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W.P.Nos.78, 83 & 87 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.01.2024

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THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

Writ Petition Nos.78, 83 & 87 of 2024
& W.M.P.Nos.76, 77, 85, 86, 89, 91 of 2024

In all WPs.

M/s.Global Calcium Private Limited,
(Represented by its Deputy General Manager,
V.Sreenivasa Reddy)
125 & 126 SIPCOT Industrial Complex,
Hosur-635 126.

... Petitioner

-VS-

Assistant Commissioner (ST),
Hosur (North)-1,
CT building, Seetharam nagar,
Bangalore Road, Near old bus stand,
Hosur-635 109.

... Respondent

Common Prayer: Writ Petitions filed under Article 226 of the Constitution of India, pleased to issue a Writ of Certiorari calling for the records relating to the impugned orders bearing GSTIN:33AAACG2998N1Z5/2017-18 dated 31.10.2023,

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GSTIN:33AAACG2998N1Z5/2018-19 dated 02.11.2023 &

WEB COPY GSTIN:33AAACG2998N1Z5/2019-20 dated 02.11.2023 passed by the
respondent and quashing the same.

In all WPs.

For Petitioner : Mr.G.Natarajan

For Respondent : Mr.C.Harsha Raj, AGP

COMMON ORDER

In these three writ petitions, three separate assessment orders relating to financial years 2017-2018, 2018-2019 and 2019-2020 are challenged.

2. The petitioner is in the business of supply of Bulk Drugs and Pharmaceutical Intermediaries. As a registered person under GST laws, the petitioner filed returns periodically. Pursuant to an audit of the petitioner's records, certain discrepancies were noticed and communicated by issuing notices. The petitioner replied to such notices, including the show cause notice under Section 73 of the TNGST Act. Eventually, the orders impugned in these writ petitions came to be issued.



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3. In the orders impugned in these writ petitions, other than

W.P.No.78 of 2024, three defects were dealt with. The first of those relates to suppression of purchases by not availing of available Input Tax Credit (ITC). The second issue, which is the principal issue, pertains to the payment of performance linked incentives to two persons who held office as whole time directors of the company. By the impugned orders, such performance linked incentive was held to be liable to GST. The third issue relates to discrepancies relating to E-way bills.

4. As regards the first defect relating to ITC, learned counsel for the petitioner submits that the purchases by the petitioner were duly reflected in the returns filed by the petitioner. To the extent indicated in the impugned orders, ITC was not claimed because the petitioner was not eligible to claim ITC in terms of Section 17(5) of the Tamil Nadu Goods and Services Tax Act, 2017. As regards the performance linked incentives to the directors, learned counsel submitted that such performance linked incentives were also paid to these whole time directors in their capacity as employees of the company. When payment is made to an employee, learned counsel



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submitted that it is part of the contract of service and such payments are not

liable to tax under the GST regime as per Circular No.140/10/2020-GST dated 10.06.2020. In spite of placing this circular before the assessing officer and pointing out that TDS was deducted under Section 192 of the Income Tax Act, 1961 (the Income Tax Act) and not under Section 194-J thereof, learned counsel submits that the assessing officer disregarded such submissions. Therefore, he contends that the impugned orders are liable to be interfered with.

5. Mr.C.Harsha Raj, learned Additional Government Pleader, made submissions in response and to the contrary. By referring to the certificate issued by the Chartered Accountant of the petitioner, learned counsel pointed out that the said certificate demarcates the amounts paid towards salary and incentives as regards the two whole time directors for each of the relevant financial years. Since such demarcation has been made in the certificate, learned counsel submits that deduction of tax at source under Section 192 of the Income Tax Act is not conclusive with regard to whether such payment was for services provided as an employee or towards any



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other services provided by the said persons. He further submits that the onus is on the petitioner to place on record all relevant documents to convince the assessing officer that the petitioner is exempt from tax either in terms of Circular No.140/10/2020-GST dated 10.06.2020 or otherwise.

6. As regards the first defect relating to ITC, the petitioner contended that ITC was not claimed on account of ineligibility. By referring to discrepancies as between the different returns, the proposed liability was partly confirmed and partly dropped.

7. With regard to the issue of directors' remuneration, the impugned order, in relevant part, records as under:

“As regards the reply in respect of defect No.2: The verification of the balance sheet with the form 16 issued by the tax payers and the form 26AS and found no details are furnished to substantiate the claim of the tax payers and the remuneration paid the directors was examined with reference to notification No.13/2017 dated 28.06.2017 and as clarified in circular No.140/2020 and it is an incentive paid to the directors and so it is taxable



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under the TNGST Act 2017 and the reply is therefore rejected as not acceptable since the tax payers have not submitted any documentary evidence to prove their claim and the proposal is therefore confirmed. ”

The above extract discloses that the assessing officer examined the balance sheet, Form-16 and Form-26AS. The expenditure incurred by the petitioner towards remuneration and performance based incentives would have been reflected in the profit and loss account of the petitioner for the relevant financial years. The petitioner asserts that TDS was deducted under Section 192 and not Section 194-J of the Income Tax Act. The deduction of tax under Section 192 is a material fact, but is not conclusive. Ultimately, the test is whether such remuneration was paid towards services provided as an employee of the company or whether services were provided under a contract for service for fees or other consideration.

8. Circular No.140 dated 10.06.2020 clarifies this position by providing as under in clauses 5.1 to 5.3. thereof:



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“5.1 Once, it has been ascertained whether a director, irrespective of name and designation, is an employee, it would be pertinent to examine whether all the activities performed by the director are in the course of employer-employee relation (i.e. a “contract of service”) or is there any element of “contract for service”. The issue has been deliberated by various courts and it has been held that a director who has also taken an employment in the company may be functioning in dual capacities, namely, one as a director of the company and the other on the basis of the contractual relationship of master and servant with the company, i.e. under a contract of service (employment) entered into with the company.

5.2 It is also pertinent to note that similar identification (to that in Para 5.1 above) and treatment of the Director's remuneration is also present in the Income Tax Act, 1961 wherein the salaries paid to directors are subject to Tax Deducted at Source ('TDS') under Section 192 of the Income Tax Act, 1961 ('IT Act'). However, in cases where the remuneration is in the nature of professional fees and not salary, the same is liable for deduction under Section 194J of the IT Act.



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5.3 Accordingly, it is clarified that the part of Director's remuneration which are declared as 'Salaries' in the books of a company and subjected to TDS under Section 192 of the IT Act, are not taxable being consideration for services by an employee to the employer in the course of or in relation to his employment in terms of Schedule II of the CGST Act, 2017."

9. The orders impugned herein were not issued after taking the above relevant aspects into consideration. It is also possible that the petitioner did not place on record all relevant documents. In these circumstances, the impugned orders are not sustainable and are hereby quashed.

10. As a consequence, these matters are remanded for reconsideration by the assessing officer. The petitioner is granted leave to place on record any additional documents with regard to all issues dealt with in the impugned orders. Such documents shall be submitted within ten days from the date of receipt of a copy of this order. Upon receipt thereof, the respondent is directed to consider all materials on record, provide a



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reasonable opportunity to the petitioner and complete the reassessment
within four weeks thereafter.

11. The writ petitions are disposed of on the above terms without any order as to costs. Consequently, connected Miscellaneous Petitions are closed.

19.01.2024

Index : Yes / No
Internet : Yes / No
Neutral Citation: Yes / No

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To

Assistant Commissioner (ST),
Hosur (North)-1,
CT building, Seetharam nagar,
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