

GAHC010183742024



2025:GAU-AS:1972-DB

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4787/2024

M/S HIGH TECH ECOGREEN CONTRACTORS LLP
(FORMERLY M/S HITECH CONSTRUCTION), A LIMITED LIABILITY
PARTNERSHIP FIRM, HAVING ITS PRINCIPAL PLACE OF BUSINESS AT J.P.
AGARWALA ROAD, GAURIPUR, DHUBRI-783331 AND IN THE PRESENT
PROCEEDINGS IS BEING REPRESENTED BY ITS PARTNER MR. SUBHASH
KUMAR JAIN.

.....Petitioner

-VERSUS-

1.THE JOINT DIRECTOR, DIRECTORATE GENERAL OF GOODS AND
SERVICES TAX INTELGENCE (DGGI), GUWAHATI ZONAL UNIT,
H/NO. 4, RAJGARH BYE LANE NO. 2, CHANDMARI,
P.O. SILPUKHURI, GUWAHATI, ASSAM, PIN- 781003.

2:THE ADDITIONAL COMMISSIONER,
CGST AND CENTRAL EXCISE, GUWAHATI,
GST BHAWAN, KEDAR ROAD, MACHKHOWA, GUWAHATI-781001.

3:THE COMMISSIONER (APPEALS),
CGST AND CENTRAL EXCISE AND CUSTOMS, GUWAHATI,
3RD FLOOR, GST BHAWAN, KEDAR ROAD,
MACHKHOWA, GUWAHATI-781001.

.....Respondents

- BEFORE -

HON'BLE THE CHIEF JUSTICE MR. VIJAY BISHNOI
HON'BLE MR. JUSTICE N. UNNI KRISHNAN NAIR

For the Petitioner : Mr. V. Shraff, Advocate.
Ms. B. Podder, Advocate.

For the Respondent(s) : Mr. S.C. Keyal, Standing Counsel, CGST.
Ms. N. Kakati, Advocate.

Date of Hearing : 13.02.2025.

Date of judgment : 25.02.2025.

JUDGMENT & ORDER (CAV)

(Vijay Bishnoi, CJ)

Heard Mr. V.K. Shraff, learned counsel appearing for the petitioner. Also heard Mr. S.C. Keyal, learned Standing Counsel, CGST appearing for the respondents.

2. This writ petition is filed on behalf of the petitioner, M/s High Tech Ecogreen Contractors LLP, for quashing and setting aside of the order dated 31.03.2023 passed by the respondent No.2, i.e. Additional Commissioner, CGST & Central Excise, Guwahati (hereinafter to be referred as the "Additional Commissioner") in Order-in-Original No.09/Addl. Commr./GST/GHY/2022-2023, whereby the Additional Commissioner confirmed and ordered payment of interest of Rs.1,11,74,767/- for delayed payment of GST for the period from July, 2017 to March, 2021; confirmed demand of ITC amounting to Rs.1,38,39,950/- in respect of ineligible Input Tax Credit (ITC) availed in terms of Section 74(9) of the CGST Act, 2017 and the corresponding Section of Assam GST Act, 2017 and confirmed realisation of interest on the confirmed amount of Rs.1,38,39,950/- at the rates applicable in terms of Section 50 of the CGST Act, 2017 and the corresponding Section of Assam GST Act, 2017 and imposed a penalty of Rs.1,38,39,950/- in terms of Section 74(9) of the CGST Act, 2017 and the corresponding Section of Assam GST Act, 2017 for wrong availment of ITC.

Vide order dated 31.03.2023, the respondent No.2, Additional Commissioner ordered as follows:

(i) Confirmed demand of GST amounting to Rs.39,47,122/- in respect of supply of goods and services for the month of May, 2020 in terms of Section 74(9) of the CGST Act, 2017 and the corresponding Section of Assam GST Act, 2017;

(ii) Confirmed and ordered payment of interest of Rs.99,273/- for delayed payment of GST for the month of May, 2020;

(iii) Ordered appropriation of the amount of Rs.39,47,122/- already paid by way of belated filing of GSTR-3B for the month of May, 2020 during the time of investigation;

(iv) Imposed a penalty of Rs.39,47,122/- in terms of Section 74(9) of the CGST Act, 2017 and the corresponding Section of Assam GST Act, 2017 for non-payment of GST for the month of May 2020;

(v) Confirmed and ordered payment of interest of Rs.1,11,74,767/- for delayed payment of GST for the period from July, 2017 to March, 2021;

(vi) Confirmed demand of GST amounting to Rs.70,12,366/- payable under RCM in terms of Section 74(9) of the CGST Act, 2017 and corresponding Section of Assam GST Act, 2017;

(vii) Ordered appropriation of the GST amount of Rs.70,12,364/-, interest amounting to Rs.5,02,452/- and penalty amounting to Rs.10,51,854/- already paid by way of filing DRC-03;

(viii) Confirmed demand of ITC amounting to Rs.1,38,39,950/- in respect of ineligible Input Tax Credit (ITC) availed in terms of Section 74(9)

of the CGST Act, 2017 and the corresponding Section of Assam GST Act, 2017;

(viii) Confirmed the proposal for realization of interest on the confirmed amount of Rs.1,38,39,950/- at the rates applicable in terms of Section 50 of the CGST Act, 2017 and the corresponding Section of Assam GST Act, 2017;

(ix) Imposed a penalty of Rs.1,38,39,950/- in terms of Section 74(9) of the CGST Act, 2017 and the corresponding Section of Assam GST Act, 2017 for wrong availment of ITC.

The petitioner has also challenged the order dated 12.02.2024 passed by the respondent No.3, i.e. Commissioner (Appeals), CGST, Central Excise and Customs, Guwahati [hereinafter to be referred as the "Commissioner (Appeals)"] in Order-in-Appeal No.81/GHY(A)/COM/GSTP/GHY/2024, whereby the appeal preferred by the petitioner against the order dated 31.03.2023 has been dismissed being barred by limitation.

Simultaneously, the petitioner has also challenged the constitutional validity of Rule 36(4) of the Central Goods and Services Tax/Assam Goods and Services Tax Rules, 2017.

3. We have noticed that against the order dated 12.02.2024, the petitioner has a remedy of filing an appeal before the Appellate Tribunal under Section 112(1) of the Central Goods and Services Tax Act, 2017 (hereinafter to be referred as "the CGST Act") read with Rule 110 of the Central Goods and Services Tax Rules, 2017 (hereinafter to be referred as "the CGST Rules") and a preliminary objection to this effect has also been raised by the respondents.

4. We are of the view that since a statutory remedy is available to the

petitioner to challenge the validity of the order dated 12.02.2024 as well as the order dated 31.03.2023, passed by the Commissioner (Appeals), i.e. respondent No.3 and Additional Commissioner, i.e. respondent No.2, respectively, the challenge of the petitioner to the aforesaid orders cannot be entertained in this writ petition and we confine ourselves to examine the question regarding the validity of Rule 36(4) of the CGST Rules.

5. The brief facts of the case are that the petitioner is a registered assessee under the CGST Act and Assam Goods and Service Tax Act, 2017 (in short, "the AGST Act") engaged in the business of rendering works contract service.

A show-cause notice dated 23.12.2021 was issued to the petitioner mainly alleging wrong availment of Input Tax Credit (ITC) which is not allowable under the provision of Rule 36(4) of the CGST Rules.

6. The respondent No.2, Additional Commissioner has passed an order dated 31.03.2023 demanding GST and imposing penalty, the details of which have already been noted in the earlier part of this judgment.

7. Being aggrieved with the order dated 31.03.2023, the petitioner approached the respondent No.3, Commissioner (Appeals) by way of filing an appeal. However, the said appeal came to be dismissed being barred by limitation vide order dated 12.02.2024.

8. The only ground taken by the petitioner for assailing the validity of Rule 36(4) of the CGST Rules, is that the said Rule is enacted drawing power from Section 43A(4) of the CGST Act, which was inserted by the Central Goods and Services Act (Amendment) Act, 2018 (in short, "the CGST (Amendment) Act, 2018"). It is contended that the effective date of implementation of Section 43A

was never notified and since it was omitted with effect from 01.10.2022, vide notification dated 28.09.2022, it is clear that Rule 36(4) of the CGST Rules has no constitutional or legal validity before 01.01.2022 when Section 16(2)(aa) was inserted in the Act vide notification dated 21.12.2021 which came into effect from 01.01.2022.

The petitioner is claiming that the tax demand for the period October, 2019 to March, 2021, based on the alleged violation of Rule 36(4) of the CGST Rules, is without authority of law.

9. Learned counsel for the petitioner, reiterating the above contention has argued that when Section 43A of the CGST Act has not been enforced at any point of time, Rule 36(4) of the CGST Rules has no constitutional and legal validity till the date Section 16(2)(aa) of the CGST Act came into effect and therefore, the demands raised for the period starting from October, 2019 to March, 2021 are illegal.

10. No other ground is raised to assail the validity of Rule 36(4) of the CGST Rules.

11. Opposing the challenge to the validity of Rule 36(4) of the CGST Rules, Mr. S.C. Keyal, learned counsel for the Revenue, has submitted that the validity of Rule 36(4) of the CGST Rules has already been upheld by the Division Bench of Kerala High Court in ***Nahasshukoor Vs. Assistant Commissioner, Second Circle, State Goods & Service Tax Department, Colletorate & Ors. [WP(C) No.1853/2023, disposed of on 03.11.2023]***.

12. It is contended that since the validity of Rule 36(4) of the CGST Rules has already been upheld by the Division of Kerala High Court and the said judgment passed by the Kerala High Court is having persuasive value, the

challenge to the validity of Rule 36(4) of the said Rules is liable to be dismissed. It is further contended by Mr. Keyal that Section 43A of the CGST Act was inserted by Act No.31/2018, dated 29.08.2018 and the same is effective from the said date.

13. In the affidavit-in-opposition, a categorical statement is made on behalf of the Revenue that Rule 36(4) of the CGST Rules, 2017 was issued by drawing powers from Section 43A of the CGST Act, 2017.

14. Learned counsel for the Revenue has urged the Court that Rule 36(4) of the CGST Rules is otherwise valid and therefore, the validity of the same is liable to be upheld.

15. In rejoinder, learned counsel for the petitioner has argued that the judgment rendered by the Kerala High Court in **Nahasshukoor** (supra) is not going to effect the challenge of the petitioner to the validity of Rule 36(4) of the CGST Rules because in the above referred judgment, the Division Bench of Kerala High Court has judged the validity of Rule 36(4) of the CGST Rules vis-à-vis Article 14 of the Constitution of India and held that it is not violative of Article 14 of the Constitution of India, whereas in the present petition, the petitioner is not challenging the validity of Rule 36(4) as being violative of Article 14 of the Constitution of India but only on the ground that the same draws its power from Section 43 of the CGST Act, in particular sub-section (4) of Section 43A but as Section 43A has never come into force, Rule 36(4) of the CGST Rules cannot be termed as constitutionally valid one till Section 16(2)(aa) of CGST Act came into force with effect from 01.01.2022.

16. Heard the learned counsel for the parties and perused the material available on record.

17. First of all, we examine whether Section 43A of the CGST Act has been enforced before enactment of the Finance Act, 2022 with effect from 01.10.2022 whereby Section 43A is omitted.

18. It is the contention of the petitioner that Section 43A has never been enforced because the Central Government has never notified the date of enforcement of Section 43A. However, the counsel for the Revenue has urged that it is effective from the date when the CGST (Amendment) Act, 2018 was notified.

19. Learned counsel for the petitioner has invited our attention towards various Notifications to buttress his contention that Section 43A of CGST Act has never been notified till it was omitted from the statute book vide Finance Act, 2022 which came into effect on 01.01.2022.

20. It is to be noticed that in sub-section (2) of Section 1 in the CGST (Amendment) Act, 2018, whereby Section 43A is enacted, it is provided that the provisions of the Amendment Act of 2018 shall come into force on such date the Central Government may, by Notification, in the Official Gazette, appoint. The proviso to sub-section (2) of Section 1 says that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as reference to the coming into force of that provision.

Section 1 of the CGST (Amendment) Act, 2018 is reproduced hereunder:

“1. (1) This Act may be called the Central Goods and Services Tax (Amendment) Act, 2018.

(2) Save as otherwise provided, the provisions of this Act shall come into force on such date as the Central Government, by notification in the Official Gazette, appoint :

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.”

21. From the above, it is clear that the Central Government in its discretion can appoint different dates for different provisions of the CGST (Amendment) Act, 2018 for their enforcement by issuing Notification in Official Gazette.

22. Learned counsel for the Revenue has failed to satisfy this Court that the Central Government, by Notification in the Official Gazette, has appointed a date from which Section 43A has been enforced till the date it was omitted by the Finance Act, 2022, i.e. from 01.10.2022.

23. In such circumstances, it can be concluded that Section 43A has never come into operation because the Central Government has never notified any date for its enforcement till it was omitted.

24. Now question which arises before this Court whether Rule 36(4) of the CGST Rules draws its power only from Section 43A or in particular sub-section (4) of Section 43A.

25. To find out the source of power of Rule 36, in particular, sub-rule (4) thereof, we take a look into the relevant provisions of the CGST Act well as the CGST Rules.

26. The Central Government is empowered to make rules to carry out the provisions of CGST Act by virtue of Section 164 of the said Act.

Section 164 reads as under :

“164. Power of Government to make rules :-

(1) The Government may, on the recommendations of the Council, by notification, make rules for carrying out the provisions of this Act.

(2) Without prejudice to the generality of the provisions of sub-section (1), the

Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules.

(3) The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act come into force.

(4) Any rules made under sub-section (1) or sub-section (2) may provide that a contravention thereof shall be liable to a penalty not exceeding ten thousand rupees.”

27. Section 16 of the CGST Act enables a registered person, which is defined in Section 2(94) of the said Act, to take credit of input tax charged on any supply of goods or services or both which are used or intended to be used in the course or furtherance of his business. The eligibility and conditions for taking input tax credit by a registered person are enumerated in Section 16. Section 16 falls under Chapter V of the said Act under the heading “**INPUT TAX CREDIT**”.

On the other hand, Section 43A, which was inserted by Act No.31 of 2018 vide Section 18 and later on omitted by Finance Act, 2022, i.e. from 01.10.2022, speaks about the procedure for furnishing return and availing input tax credit for the registered person. Section 43A falls under Chapter IX of the CGST Act under the heading “**RETURNS**”.

Rule 36 of the CGST Rules speaks about documentary requirements and conditions for claiming input tax credit. It falls under Chapter V of the said Rules under the heading “**INPUT TAX CREDIT**”.

In our view Section 16 of the CGST Act and Rule 36 of CGST Rules are in relation to eligibility of a registered person who can avail input tax credit by furnishing required documents, whereas Section 43A of the CGST Act is defining procedure for furnishing returns for availing input tax credit.

Needless to say that the eligibility conditions and requirement of documents for availing input tax credit is distinct from the procedure of furnishing return for availing said benefit.

From the above analysis, we have no doubt in our mind that Rule 36 of CGST Rules is relatable to Section 16 of the CGST Act and as such, sub-rule (4) of Rule 36 of the said Rules is also relatable to Section 16 of the CGST Act only.

28. We have taken note of the argument of the counsel for the petitioner that sub-rule (4) of Rule 36 of the CGST Rules became constitutionally valid with the enforcement of Section 16(2)(aa) of the CGST Act, i.e. from 01.01.2022 but cannot be termed as valid for the period prior to that, but for rejection only.

Sub-section (1) of Section 164 of the CGST Act enables the Government to make rules for carrying out the provisions of the said Act. Sub-section (2) of Section 164 clarifies that the Central Government may make rules for all or any of the matters which by CGST Act are required to be or may be prescribed without prejudice to the generality of the provisions of sub-section (1) of Section 164. It means that provisions of sub-section (2) of Section 164 are not restrictive of sub-Section (1) and after careful scrutiny of the CGST Act, we have no doubt in our mind that Rule 36 or in particular sub-rule (4) of Rule 36 is framed as per the objects of the CGST Act and falls within the scope of general power conferred by sub-section (2) of Section 164 of the said Act.

29. It is also to be noticed that the petitioner, in its reply filed before the Additional Commissioner, pursuant to the show-cause notice, took a specific plea that it availed the input tax credit as per sub-rule (4) of Rule 36 which demonstrates that, on the one hand, the petitioner is relying on a provision of a Rule to justify its action of availing input tax credit, on the other hand, is challenging the validity of the said provision of the Rule which, in our view,

cannot be permitted.

30. In view of above discussion, we conclude that Rule 36 of CGST Rules and in particular sub-Rule (4) of Rule 36 derives power from Section 16 of the CGST Act as well as from the general powers conferred by the CGST Act.

31. Another simple reason for not accepting the contention of the learned counsel for the petitioner that sub-rule (4) of Rule 36 derives power from sub-section (4) of Section 43A is that since Section 43A has not been enforced at any point of time till its omission vide Finance Act, 2022, with effect from 01.10.2022, it is impossible to conclude that a rule or sub-rule derives power from a provision which has never been enforced.

In other words, when a provision of an Act never comes into operation, it cannot be treated as a source of power of a provision of a rule.

32. In view of above discussions, we do not find any merit in the challenge of the petitioner to the validity of sub-rule (4) of Rule 36 of CGST Rules. Hence, the writ petition is dismissed, being devoid of any merit.

33. Before parting, we are compelled to observe that the petitioner has laid challenge to sub-rule (4) of Rule 36 of CGST Rules only with the intention to bypass statutory remedy of appeal which the petitioner can prefer under Section 112(1) of the CGST Act read with Rule 110 of CGST Rules because if the petitioner was aggrieved by sub-rule (4) of Rule 36, he could have challenged the validity of the same immediately after passing of the order dated 31.03.2023 by the Additional Commissioner instead of filing an appeal before the Commissioner (Appeals). Such course cannot be appreciated.

34. Be that is it may, we make it clear that this order will not come in the way of the petitioner to avail statutory alternative remedy available to it for

challenging the orders dated 31.03.2023 and 12.02.2024 passed by the respondent Nos.2 and 3, i.e. Additional Commissioner and Commissioner (Appeals), respectively, in accordance with law.

JUDGE

CHIEF JUSTICE

Comparing Assistant