

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 16258 OF 2023

Tikona Infinet Private Limited]
a company incorporated under the]
Companies Act, 1956 and having its]
Registered Office at 3rd Floor, 3A]
Corpora, LBS Marg, Bhandup,]
Mumbai City – 400078, Maharashtra] ...Petitioner

Versus

1] Union of India]
Through the Secretary,]
Ministry of Finance]
Udyog Bhawan, New Delhi]
2] Commissioner (In situ), CGST &]
Central Excise, Audit Raigad]
Commissionerate, 4th floor,]
MTNL Bldg, Administrative]
Wing Sector 16-A, Vashi]
Navi Mumbai – 400 021.]...Respondents

Mr Prasad Paranjape, a/w Advocate Bhavya Varma i/by
Lumiere Law Parters for the Petitioner.

Mr J B Mishra, a/w Mr. Ram Ochani for the Respondents.

CORAM **M.S. Sonak &
Jitendra Jain, JJ.**
DATED: **08 October 2024**

JUDGMENT : (Per M. S. Sonak, J.)

1. Heard learned counsel for the parties.
2. Rule. The rule is made returnable immediately at the request of and with the consent of the learned counsel for the parties.
3. The Petitioner challenges the show cause notice dated 17.08.2023 as a prelude to recovering or reversing the Input Tax Credit (ITC) of Rs. 18,30,58,995/- on the sole ground that the necessary GST IT 02 form was not filed by its transferor electronically but only manually thereby allegedly breaching the provisions of Section 18(3) of the CGST Act read with Rule 41 of the CGST Rules. The petitioner contends that such notice is wholly without jurisdiction, arbitrary and void, given the admitted impossibility of filing such form electronically due to serious functionality issues plaguing the department's portal.
4. Mr. Paranjape, the learned counsel for the Petitioner, submits that the Petitioner, for the period between September 2017 and November 2017, had correctly availed input tax credit ("**ITC**") of Rs.18,30,58,995/-. However, during the said period, the Respondents did not make the facility of filing Form GST ITC – 02 electronically available. Therefore, the Petitioner wrote to the Respondents seeking a leave to file the said Form manually. The Petitioner filed the form manually.
5. Mr. Paranjape submits that after almost six years, the Petitioner was served with the impugned show cause notice dated 17 August 2023 alleging that the Petitioner had wrongly availed and utilised the input tax credit of Rs.18,30,58,995/— on the sole ground that the transfer of the said ITC had been

availed by the Petitioner by filing the Form GST ITC-02 manually instead of electronically.

6. Mr Paranjape submits that there is no dispute about the department's portal not being functional enough to accept the filing of Form GST ITC-02 electronically during the relevant period. Therefore, he submits that denying ITC, even though the necessary form had been filed manually, amounts to arbitrariness. He submitted that the Petitioner could not be so severely prejudiced for no fault or because the department made no facilities for filing Form GST ITC-02 electronically.

7. Mr Paranjape submitted that there was no allegation in the impugned show cause notice about the Petitioner not being entitled to the ITC or that the Petitioner had not filed the prescribed form manually. He submitted that the only allegation in the impugned show cause notice was that the prescribed form had not been filed electronically. Therefore, the Petitioner had wrongly availed and utilised the ITC for the relevant period. He submitted that the very basis of the impugned show cause notice was arbitrary, and therefore, a case was made out to quash and set aside the impugned show cause notice dated 17 August 2023.

8. Mr. Paranjape submitted that similar issues concerning the Petitioner had arisen in Uttar Pradesh, Gujarat, and Delhi, forcing the Petitioner to institute proceedings before the respective High Courts. He relied upon the decisions of the Allahabad, Gujarat, and Delhi High Courts and urged that similar relief be granted to the Petitioner in the present Petition.

9. Per Contra, Learned counsel Mr Mishra, who appears along with learned counsel Mr Ram Ochani for the Respondents, did not dispute that during the relevant period, the department's portal did not have the facility of filing Form GST ITC-02 electronically. However, he referred to Rule 41 of the Central Goods and Services Tax Rules, 2017 (“**CGST Rules**”) to submit that a registered person shall, in the event of inter alia transfer or change in ownership of business for any reason, furnish the details in Form GST ITC-02 electronically on a common portal along with - request for transfer of unutilised input tax credit lying in his electronic credit ledger to the transferee.

10. Mr Mishra submitted that in this case, since the prescribed form was not filed electronically, the impugned show cause notice was issued to the Petitioner requiring it to show cause as to why the credit of Rs.18.30 crores (approximately) should not be recovered from the Petitioner. He submitted that in addition to this aspect, the Petitioner was called upon to show cause regarding other matters detailed in the impugned show cause notice.

11. Mr Mishra submitted that the impugned show cause notice was *intra vires*; therefore, no case was made to interfere with the same. He submitted that it was open to the Petitioner to raise all permissible defences in response to the impugned show cause notice. Still, there was no case for quashing the impugned show cause notice because the same was *intra vires* and following the requirements of Rule 41 of the CGST Rules.

12. Mr. Mishra submitted that this Petition may be dismissed for the above reasons.

13. Rival contentions now fall for our determination.

14. The Petitioner, a Company registered under the provisions of the Companies Act, 1956, is registered under the Central Goods and Services Tax Act, 2017 (**CGST Act**) with GSTIN 27AAACM6427C1ZR. The Petitioner is engaged, *inter alia*, in providing internet services across India from various States, including the State of Maharashtra.

15. On 17 August 2017, the Petitioner entered into a Business Transfer Agreement (**"BTA"**) with Tikona Digital Networks (**"TDN"**), in which the TDN business was transferred to the Petitioner as a going concern. On 22 September 2017, TDN filed a letter dated 13 September 2017 with the jurisdictional Assessing Authority, Navi Mumbai, informing them about the non-availability of Form ITC-02 functionality on the department's common portal. This communication is at Exhibit D (pages 72-73 of the paper book in this Petition).

16. By letter/communication dated 22 September 2017, the TDN disclosed details about the Business Transfer Agreement (BTA) with the Petitioner herein. A copy of the BTA was even manually provided to the jurisdictional Assessing Authority. The Petitioner invited the attention of the Jurisdictional Assessing Authority to the provisions of Section 18(3) of the CGST Act, which provides that a registered person transferring its business was allowed to transfer the input tax credit lying unutilised in its electronic credit ledger to the transferee. TDN also referred to Rule 41(1) of the CGST Rules, which provides that a registered person intending to

transfer the credit is required to file Form GST ITC-02 on the common portal for transferring the said input tax credit to the transferee.

17. The letter/communication dated 13 September 2017 clearly and unambiguously states that TDN intends to transfer unutilised credit in the electronic credit ledger of TDN on the date of slump sale to the Petitioner. However, since Form ITC-02 was not yet available on the GSTIN portal for filing, TDN could not comply with the electronic filing requirement of the said form. In conclusion, TDN requested the jurisdictional Assessing Authority to guide it on transferring credit from TDN to the Petitioner.

18. The Petitioner has pleaded that there was neither any response nor any guidance from the jurisdictional Assessing Authority despite such authority admittedly receiving the communication/letter dated 13 September 2017 containing full details of the transfer. Therefore, the Chartered Accountant Certificate dated 09 February 2018 was submitted to certify that the transfer of business from TDN to the Petitioner was effected with specific provisions for the transfer of liabilities. On 14 February 2018, the Petitioner submitted a letter dated 12 February 2018 informing the Respondents about the transfer of ITC from TDN to the Petitioner through Form GSTR-3B. This letter/communication is at Exhibit-I (pages 88-90 of the paper book of this Petition)

19. After about 5 to 6 years, the second Respondent issued an Audit Notice dated 28 April 2023 to the Petitioner proposing to recover and demand the ITC of Rs.18,30,58,995/—with interest and penalty on the alleged

ground of wrongful availment of ITC. The Petitioner submitted replies dated 17 May 2023 and 18 May 2023 to the Audit Notice dated 28 April 2023 manually and electronically. The Petitioner, *inter alia*, explained that during the relevant period, Form ITC-02 was not functional or available on the department's portal. Therefore, TDN and the Petitioner had manually submitted the same. Full particulars were provided along with the replies dated 17 May 2023 and 18 May 2023. Additional written submissions were submitted in response to the Audit Note dated 28 April 2023.

20. On 17 August 2023, the second Respondent issued the impugned show cause notice proposing that the ITC of Rs.18,30,58,995/- be recovered from the Petitioner with interest and penalty. Hence the present Petition.

21. Section 18(3) of the CGST Act provides that where there is a change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provisions for transfer of liabilities, the said registered person shall be allowed to transfer the input tax credit which remains unutilised in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed.

22. Rule 41 of the CGST Rules is concerned with the transfer of credit on the sale, merger, amalgamation, lease or transfer of a business. The same reads as follows:-

“41. Transfer of credit on sale, merger, amalgamation, lease or transfer of a business

(1) A registered person shall, in the event of sale, merger, de-merger, amalgamation, lease or transfer or

change in the ownership of business for any reason, furnish the details of sale, merger, de-merger, amalgamation, lease or transfer of business, in FORM GST ITC-02, electronically on the common portal along with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee:

PROVIDED that in the case of demerger, the input tax credit shall be apportioned in the ratio of the value of assets of the new units as specified in the demerger scheme.

[Explanation: For the purpose of this sub-rule, it is hereby clarified that the "value of assets" means the value of the entire assets of the business, whether or not input tax credit has been availed thereon.]

(2) The transferor shall also submit a copy of a certificate issued by a practicing chartered accountant or cost accountant certifying that the sale, merger, demerger, amalgamation, lease or transfer of business has been done with a specific provision for the transfer of liabilities.

(3) The transferee shall, on the common portal, accept the details so furnished by the transferor and, upon such acceptance, the un-utilized credit specified in FORM GST ITC-02 shall be credited to his electronic credit ledger.

(4) The inputs and capital goods so transferred shall be duly accounted for by the transferee in his books of account.”

23. The impugned show cause notice, after referring to Section 18(3) of the CGST Act and Rule 41(1) of the CGST Rules, alleges that the Petitioner has contravened the said two provisions since it has availed and utilised credit of Rs.18,30,58,995/- (including Rs.74,06,395/- as IGST, Rs.15,74,90,681/- as CGST and Rs.1,81,61,919/- as SGST) for payment of tax liability. Pertinently, the only allegation in the impugned show cause notice is that the Petitioner, before availing of and utilising the credit of Rs.18,30,58,995/- did not ensure that the prescribed Form GST ITC-02 was filed “electronically on the common portal” along with a request for

transfer of unutilised input tax credit lying its electronic credit ledger to the transferee. Thus, the only allegation in the impugned show cause notice is about non-filing Form GST ITC-02 electronically on the department's common portal.

24. The allegation in the impugned show cause notice might have had some substance if it had been the Respondents' case that its common portal was fully functional and TDN or the Petitioners could file Form GST ITC-02 electronically on the common portal. However, it was conceded that the GST portal was nascent during the relevant time, and GST ITC-02 was not available for filing electronically. Thus, neither the Petitioner nor TDN could be faulted for not filing Form GST ITC-02 electronically on the department's common portal. The record establishes, and in any event, it was not disputed, that TDN or the Petitioner couldn't file Form GST ITC-02 on the department's common portal during the relevant period because of the functionality issues relating to such a common portal.

25. Once the above position is accepted, we agree with Mr Paranjape that there was no justification for issuing the impugned show cause notice. The issuance of such a show cause notice once it was admitted that either TDN or the Petitioner couldn't file Form GST ITC-02 on the department's common portal because the common portal was not fully functional to generate and accept Form GST ITC-02 amounts to the issuance of a show cause notice in excess of the jurisdiction vested in the second Respondent under the CGST Act and the Rules made thereunder. The issuance of the impugned show cause notice, given the admitted facts and circumstances, is an exercise in arbitrariness, and the second

Respondent certainly lacks jurisdiction to act arbitrarily and seek to fault the Petitioner for matters entirely beyond the control of the Petitioner or reasons attributable to the Respondents themselves.

26. Several Courts, including the Hon'ble Supreme Court, have referred to the maxims “*Lex non-cogit ad impossibilia*”, “*Impotentia excusat legem*”, “*Nemo tenetur ad impossibilia*” or “*Impossibilium nulla obligatio est*”. This means that the law does not compel a person to do something she cannot possibly perform or something impossible. These maxims stem from the doctrine of necessity, explaining that when the law imposes an obligation with which a person is disabled from complying for no fault attributable to it or has no remedy over it, the law would generally excuse the performance (See *State of M.P v. Narmada Bachao Andolan 2011-7-SCC 639*).

27. Besides, in the present case, it is not as if the TDN or the Petitioner did not comply with the requirement to file the form prescribed in the rules. The form was filed, and all essential details were furnished manually because the department rendered filing the form electronically impossible. Its portal was simply not functional enough to generate and accept the prescribed form during the relevant period. Thus, the only allegation is that the procedure of filing the prescribed form “electronically” was not complied with. By invoking the principles in the above maxims, which are now accepted as a part of our legal landscape, the respondents were bound to excuse the strict compliance with the procedural requirement, the performance of which was rendered impossible by the department itself.

28. Admittedly, TDN had, by communication/letter dated 22 September 2017, informed the jurisdictional Assessing Authority about the non-availability of Form GST ITC-02 functionality on the department's common portal. Besides, full details and particulars of the BTA were furnished to the Assessing Authority. Lest there be any dispute about the BTA containing specific provisions for the transfer of liabilities, the Chartered Accountant's certificate dated 09 February 2018 was also filed certifying that the transfer of business from TDN to the Petitioner was done with the specific provision for the transfer of liabilities. Only after all these procedures were complied with did the Petitioner availed of and utilised the ITC of Rs.18,30,58,995/-.

29. In any event, if the Respondents had any issues with the manual filing of Form GST ITC-02 or GSTR-3B, the Respondents could have always processed the forms and decided on the issue of ITC that the Petitioner could have availed and utilised. The Respondents could not have avoided processing the manual return or the manual filing on the specious plea that Section 18(3) of the CGST Act and Rule 41(1) of the CGST Rules recognise only electronic filing and not manual filing. The statutory rights of at least having TDN's or Petitioner's manual filing of the prescribed forms being considered could not have been denied by the Respondents based on the premise that the prescribed forms were not filed electronically when it was an admitted position that neither TDN nor the Petitioner, who made attempts to file such forms electronically, were prevented from doing so on account of functionality issues with the department's common portal. A

case is therefore made out to quash the impugned show cause notice.

30. Incidentally, the Petitioner faced a similar problem in the State of Uttar Pradesh, forcing the Petitioner to institute Writ Tax No.859 of 2023. The Division Bench of the Allahabad High Court disposed of this, and the decision in *M/s. Tikona Infinet Private Limited vs. State of U.P. and another* is reported in 2023(8) TMI 46.

31. The Division Bench of Allahabad High Court noted that the functionality for filing Form IT-02 was not available on the department's common portal at the relevant time when BTA transferred its business with liabilities to the Petitioner. This non-availability was communicated to the jurisdictional Assessing Authority. However, no response was received. Therefore, the Petitioner manually accepted and availed the ITC of Rs.3,13,68,997/-. After a lapse of five years, the Petitioner was served with a show cause notice dated 28 February 2023 requiring the Petitioner to serve the differential ITC of Rs.2,88,35,905.60 along with interest and penalty. The Petitioner filed a detailed reply, but without considering such a reply, the jurisdictional Assessing Authority made an order dated 17 April 2023 confirming the demand in the show cause notice.

32. In the above facts and circumstances, which are almost identical to the facts and circumstances of the present case, the Division Bench of Allahabad High Court held as follows:-

We have heard learned counsel for the petitioner and have gone through the reply dated 13.03.2023 submitted by the petitioner to the show cause as also the impugned order dated 17.04.2023 passed by the Respondent No.2. Prima-facie, we find that the

objections filed by the petitioner has not been considered by the respondent No. 2 and the order has been passed on technicalities. Shri Ankur Agarwal, learned counsel appearing for the Respondent No.2 has vehemently argued in support of the impugned order. He submits that the averment of the petitioner to the effect that the objections have not been considered is ill founded inasmuch as the impugned order records that the objections have been filed and despite opportunity having been afforded to the petitioner for personal hearing, the same was not availed by the petitioner. No irregularity or illegality can be attributable to the impugned order and the same is liable to be sustained.

Be that as it may, we find that the petitioner has been non suited on the ground that Form ITC-02 for transfer of input tax credit was not available on the GST Portal which was in nascent stage during the initial months after its implementation on 01.07.2017 and it was incumbent upon the petitioner to have raised a proper grievance on the GST portal help-desk and ought to have waited for the relevant Form to go live on the GST portal instead of making illegal adjustment by use of the Form GSTR-3B of the transferor and the transferee company and mere shortage of working capital cannot be an excuse to bypass the legal procedure laid down under the law.

We are of the view that the stand of the Respondent No.2, for rejecting the claim of the petitioner in the wake of the admitted fact that the GST common portal was not online cannot be justified. We consequently set aside the order dated 17.04.2023 with liberty to the Respondent No.2 to pass fresh order taking into consideration the objections of the petitioner and also affording it opportunity of hearing, strictly in accordance with law.

The writ petition is accordingly disposed of.

Needless to say the petitioner to cooperate in the proceedings and not take unnecessary adjournments.

33. The Petitioner faced a similar issue in Gujarat, forcing the Petitioner to institute R/Special Civil Application No.19457 of 2023 in the Gujarat High Court at Ahmedabad. This Application was disposed of by the Division Bench of the Gujarat High Court vide judgment and order dated 08 November 2023. Following the decision of the Allahabad High

Court, the Gujarat High Court issued directions to the Respondents to consider the case of the Petitioner in the light of the decision of the Allahabad High Court and pass an appropriate order following the law, especially considering the findings of the Allahabad High Court as non-availability of Form ITC-02 on online portal of GST.

34. The Petitioner faced a similar problem in Delhi, forcing the Petitioner to file W.P. (C) 14677/2023 before the Delhi High Court. This Petition was disposed of by the Division Bench of the Delhi High Court vide order dated 09 November 2023. This decision refers to the orders made by the Allahabad High Court and the Gujarat High Court. It directs the Respondents to dispose of the show cause notice by considering the directions issued by the Allahabad High Court and the Gujarat High Court in the Petitioner's case.

35. In *Pacific Industries Ltd Vs. Union of India*, D. B. Civil Writ Petition No.12190/2019) decided by the Division Bench of Rajasthan High Court at Jodhpur. The issue was about the Petitioner being deprived from submitting Form GST ITC-02A online and, consequently, deprived of the Input Tax Credit to the tune of Rs.2,58,03,590/- through Form GSTR-3B. The Petitioner contended that Form GST ITC-02A was not available on the GSTN Portal for the entire period of 30 days from the registration of its separate business verticals, and as a consequence, the Petitioner was denied the opportunity to transfer the unutilised input tax credit to its new registration which became effective on 16 April 2019. The Petitioner claimed to have uploaded a manual copy and submitted the same to the Deputy Commissioner, CTO Ward, A-Circle Udaipur, on 14 May 2019, but the same was not accepted. The

Petitioner also raised this issue with the GST Helpdesk, but there was no effective response.

36. The Division Bench of the Rajasthan High Court noted that though the learned counsel representing the Respondents – GST Department, vehemently and fervently opposed the Petitioner's contention, he was not in a position to dispute the fact that Form GST ITC-02A was not available on the GSTN Portal within the stipulated period of 30 days from the date of registration of the Petitioner's new business vertical and hence, the Petitioner was genuinely and bonafide prevented from uploading the same. No dispute was raised about the Petitioner manually submitting the form to the Deputy Commissioner within 30 days.

37. The Division Bench of the Rajasthan High Court, after taking cognisance of the above admitted factual position, firmly opined that the impugned action by which the Respondents had failed to acknowledge and transfer the input tax credit to the tune of Rs.2,58,03,590/- accruing to the Petitioner under the registration of its new business unit following Rule 41A of the GST Rules, was grossly illegal, arbitrary and unjust. A writ was accordingly issued directing the Respondents to regularise the input tax credit favouring the Petitioner as per entitlement. It was declared that the Petitioner would be allowed to avail the input tax credit of Rs. 2,58,03,590/- through the subsequent GSTR-3B return. Thus, this decision of the Division Bench of Rajasthan High Court holds that manual filing of forms under GST should be allowed if the functionality is not available on the department's electronic portal.

38. In *Savita Oil Technologies Ltd and Savita Polymers Ltd. Vs. The Union of India and ors.*¹ the Coordinate Bench of this Court of which one of us (Jitendra Jain, J) was a member, the Petitioner was prevented from filing an Appeal against intimations issued in Form DRC-05 because the electronic portal had not made a provision for filing an appeal against an intimation issued in Form DRC-05. The Coordinate Bench noted that an appeal statutorily lay against such intimations issued in Form DRC-05. Therefore, merely because the electronic portal does not make a provision for filing of an appeal against an intimation issued in Form DRC-05, the Petitioners cannot be faulted, and for such technical reason, it cannot be countenanced that a statutory right of appeal available to the Petitioners is rendered otiose.

39. Accordingly, this Court directed that until an appropriate provision is made for acceptance of such appeal electronically, filing of such appeal should be permitted manually. Again, even this decision is an authority for the proposition that the technicalities, mainly when not the party but the department creates them, should not be put forth by the department to defeat the statutory rights and entitlement of the parties.

40. Based on the facts on record and the decided cases referred to above in the case of this very Petitioner, we agree with Mr Paranjape's contention that the impugned show cause notice ought not to have been issued to the Petitioner. The Respondents were duty-bound to take cognisance of the decisions of the Allahabad, Gujarat, and Delhi High Courts in dealing with almost identical issues concerning this Petitioner.

¹

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41. For all these reasons, we quash and set aside the impugned show cause notice dated 17 August 2023 and direct the Respondents to consider, according to law, the manually filed forms by the TDN as expeditiously as possible. If, upon due consideration of the same, the Respondents still find that the ITC of Rs.18,30,58,995/- was not due or was wrongly availed of and utilised by the Petitioner, the concerned Respondent is free to make an appropriate order in that regard. However, it will not be open to the concerned Respondent to deny the benefits of accrued ITC to the Petitioner only because the prescribed forms were not filed electronically but were filed manually.

42. Suppose ultimately the concerned Respondent concludes that the ITC to the extent of Rs.18,30,58,995/- could not have been availed or utilised by the Petitioner or that the ITC to some lesser extent could have been availed or utilised by the Petitioner. In that case, the concerned Respondent will be free to take action by following the law and the principles of natural justice and fair play.

43. The Rule is made absolute in the above terms, without any cost order.

44. All concerned to act upon an authenticated copy of this judgment and order.

(Jitendra Jain, J)

(M.S. Sonak, J)