BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 14.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P.(MD)No.11113 of 2020
and
W.M.P(MD).No.9729 of 2020

Tvl. Kumaran Filaments (P) Ltd.,
Represented by its Managing Director,
K.Ganesan ... Petitioner

-Vs-

1.Commissioner of Central GST and Central Excise,
Central Revenue Buildings,
No.5, V.P. Rathnasamy Nadar Road,
Bibikulam,
Maduarai – 625 002.

2.The Assistant Commissioner (AUDIT)
CGST and Central Excise,
O/o. The Assistant Commissioner of GST and Central Excise,
Tractor Road,
NGO 'A' Colony,
Tirunelveli - 627 007.

3.The Assistant Commissioner,
CGST And Central Excise,
Tirunelveli Division,
O/o The Assistant Commissioner of CGST and Central Excise,
Tractor Road,
NGO 'A' Colony,
Tirunelveli – 627 007. ... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari, to call for the records pertaining to the impugned order in original No.GST/01/2020 passed by the third respondent in C.No:V/GST/15/31/2019-Adjn dated 04.05.2020 and quash the same.

For Petitioner : Mr.B.Rooban

For Respondents : Mrs.S.Ragaventhre
Standing Counsel

ORDER

The prayer sought for herein is for a Writ of Certiorari, to call for the records pertaining to the impugned order in original No.GST/01/2020 passed by the third respondent in C.No: V/GST/15/31/2019-Adjn, dated 04.05.2020 and quash the same.

2.The petitioner concern is registered on the files of the third respondent holding GST No.33AADCK6351N1ZB. The petitioner claimed that it had regularly filed the monthly returns under the Goods and Services Tax Act, [in short 'GST Act'].

3.Since the GST regime got implemented from 01.07.2017, the petitioner got unavailed CENVAT credit of Rs.50,21080/- paid during the earlier regime through return in ER-1 for the first quarter of 2017, that is, for the months of April' 2017, May' 2017 and June' 2017. After the implementation of GST regime, the petitioner claimed the said unavailed CENVAT credit through TRAN-1, and the same has been carry forwarded to a new regime as Input Tax Credit.

4.While so, during the month of May' 2019, the second respondent has informed the petitioner that the return in ER-1, for the first quarter of 2017, that is, for the months of April' 2017, May' 2017 and June' 2017, has not been filed by the petitioner, and therefore,

insisted the petitioner to immediately reverse the CENVAT credit of Rs. 50,21,080/-. Subsequently, or immediately, the petitioner submitted the said ER-1 for the months of April, May and June, 2017, and uploaded through online on ACES portal, for which acknowledgement with a caption 'successful upload' message was also received by the petitioner. However, the said uploaded returns were rejected by portal due to the technical glitches and even after repeated attempts with the helpdesk, the same could not be filed, therefore, the petitioner is eligible to carry forward the closing balance of CENVAT credit in TRAN-1 under Section 140 of the GST Act.

5.However, while doing the audit by the second respondent, it seems to have been objected that the successfully uploaded ER-1 returns for the months of April, May and June, 2017, could not be treated as filed and hence, insisted the petitioner to reverse carried forward CENVAT credit of Rs.50,21,080/- and accordingly, the petitioner, having no other option, left with, to reverse the said CENVAT credit of Rs.50,21,080/- in

GSTR-3B filed for the month of May' 2019. The said transitional credit of Rs.50,21,080/- was neither utilised nor refunded, but remained as excess credit till the date of reversal. In other words, the petitioner has never utilised the said CENVAT credit for discharging their output tax liability, but it simply remains as balance in the electronic credit ledger only.

6.While that being so, a show cause notice was issued by the respondent on 10.12.2019 to show cause, as to why the said transitional credit of Rs.50,21,080/- should not be disallowed and adjusted towards the alleged demand, and why not interest under Section 50(3) shall be levied, and as to why not a penalty under Section 122(2)(a) of the CGST Act shall be levied.

7.The said show cause notice was issued under Section 73(1) of the CGST Act. Insofar as the said show cause notice, the petitioner has given his reply and objections on 04.02.2020. However, without

considering or accepting the said reply given by the petitioner, the respondent proceeded to pass assessment order, dated 04.05.2020 whereby, the respondent has, in fact, disallowed the credit of Rs.50,21,080/- carried forward through form GST TRAN-1 by the petitioner, and demanded the same from them in terms of Section 73(1) of the Act r/w relevant Rules.

8.That apart, the respondents also, in the said order, appropriated the credit of Rs.50,21,080/- and the same was reversed on 20.06.2019 for the demand. The respondent also demanded interest at appropriate rate for taking ineligible transitional credit in terms of Section 73(1) of the Act, determined under Section 50(3) of the CGST Act, 2017 and also imposed a penalty of Rs.5,02,108/- being the 10% of the demand on them under Section 122 (2)(a) of the CGST Act, for wrong availment of Input Tax Credit for any reason other than fraud or any wilful mis-statement, etc.,

9.Felt aggrieved over the said order, the petitioner has moved this writ petition with the aforesaid prayer.

10. At the first instance, when this Court posed a question to the learned counsel for the petitioner, that as against the impugned order, why appeal has not been filed, and why the petitioner has chosen to approach this Court by invoking the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India, the reply was that insofar as the dis-allowance of the credit and demand of the tax is concerned, the petitioner has not agitated the issue, because the entire tax demand has been appropriated from the credit of the petitioner from the electronic ledger, however, he would submit that, when the entire demand of tax has been appropriated from the credit of the petitioner, the question of demanding any interest on the said payment of tax, and also imposing a penalty, as if that, the petitioner has wrongly availed the ITC, does not arise, therefore, such a mechanical order, since has been passed, according to the learned counsel for the petitioner, by the revenue, it

triggered the petitioner to invoke the extra-ordinary jurisdiction of this Court by filing the present writ petition, he contended.

11. On the merits of the case, learned counsel for the petitioner would contend that, insofar as the dis-allowing of the credit to the extend of Rs.50,21,080/- is concerned, and a consequential appropriation of the said credit towards the demand made in this regard, is concerned, the petitioner has given up his challenge, therefore, those aspects need not be gone into.

12. However, insofar as the demand of interest is concerned, learned counsel would submit that, the demand of interest, on the alleged tax due is concerned, need not arise in this case, because, the entire tax due or demand, had been appropriated from the credit of the petitioner from the electronic ledger to the extend of Rs.50,21,080/- as that amount have been made available in the credit of the petitioner for the whole period, that is, from first quarter of 2017, that is, well before the GST regime come into effect.

13. When that being so, whether the respondents' demand interest is concerned, the learned counsel would contend that, this issue has been considered by this Court in a batch of writ petitions, and accordingly, it has been decided in favour of the tax payer.

14. In this context, the learned counsel for the petitioner relied upon a decision of the writ Court in ***M/s.Maansarovar Motors Pvt. Ltd. vs. the Assistant Commissioner, Poonamalle Division, Chennai and others,*** made in W.P.Nos.28437 of 2019, etc., batch. In the said judgment, the learned counsel for the petitioner has relied upon the following, which was held by the writ Court with regard to the demand of interest.

> *"23.Moreover, interest, as held by the Supreme Court in the case of Commissioner of Income Tax Vs. Anjum H Ghaswada, (252 ITR 1), is indented to compensate the revenue for loss of capital. In the present case, there is no loss insofar as the revenue is in possession of the credit 'which is good as cash' as held by the Supreme Court in the case of Eicher Motors (supra) and cannot thus*

be said to be prejudiced in any way.

24. Useful reference may also be made to a decision of a Division Bench of this Court in Commissioner of Central Excise, Puducherry-I Vs. W.P.Nos.28437 of 2020 etc. batch CESTAT, Chennai 2017 (346 E.L.T. 80). The Bench was answering a substantial question of law on the issue of whether interest may be demanded for differential duty not paid in time, since the assessee had sufficient credit in its current account during the relevant period. One of the reasons on which the revenues' appeal was dismissed and the assessee's contention that no demand for interest would arise in a case where sufficient credit is available to the assessee, is set out in para 6 of the short decision.

The Bench notes that there was sufficient credit available with the Department as on 30.06.2006 and the principal demand raised arose only from the adjustment of such credit. This adjustment could well have been automatic and the Bench thus says that no interest would lie on such adjustment which could have been made at any time, since the

amount was available with the Department. In this context, the Bench quips that 'when credit was available to the account of the assessee, the Department cannot act like Shylock demanding a pound of flesh'. Equally so in the present case.

25. The revenue places reliance on a decision of the Telangana High Court in Megha Engineering and Infrastruacture Ltd. Vs. Commissioner of Central Taxes, Hyderabad. In W.P.No.44517 of 2018 dated 18.04.2019. The aforesaid decision is dated 18.04.2019 long prior to the clarifications issued by the GST Council. I have also in my decision in the case of Refix Industry (supra) noted this position at para 16 thereof."

15.Therefore, the learned counsel would contend that the issue has been concluded, that no such demand of interest could be made in the present case, in view of the factual position, where, the entire tax demand has been appropriated from the credit of the petitioner.

16. Insofar as the imposing of penalty under Section 122 (2) (a)

of the CGST Act, is concerned, learned counsel, by relying upon the said Section, has vehemently contended that, if at all, the petitioner has wrongly availed or utilised any ITC, then only, the petitioner is liable to be penalised by imposing a penalty under Section 122(2), here, in the case on hand, the petitioner has never availed or utilised the ITC, therefore, as per the language used under Section 122(2), such kind of penalty also cannot be imposed against the petitioner, therefore, that portion of the impugned order is also vitiated, hence, the learned counsel submits that, insofar as the demand of interest as well as the imposing of the penalty are concerned, the impugned order is liable to be interfered with, he contended.

17. Per contra, Mrs.S.Ragaventhre, learned Standing Counsel appearing for the respondents, relying upon the averments made in the counter affidavit, would contend that, insofar as the demand of tax is concerned, since the challenge made against in the impugned order, has been given up by the petitioner, as per the submissions made by the

learned counsel for the petitioner, though the revenue has got a presentable case to sustain such demand, the respondent counsel does not want to traverse the said issue.

18. However, insofar as the demand of interest is concerned, the learned Standing Counsel would contend that, such a demand is possible and infact inevitable, in view of Section 50(3) of the CGST Act, 2017, r/w 143 of CGST Rules, 2017 as well as Section 174 of the CGST Act, 2017.

19. By further elaborating her submission, learned Standing Counsel for the respondents would also submit that, since the petitioner has intended to wrongly avail or utilise the ITC, and in this regard, the demandable tax, which was due long back since has not been paid, and it had been paid only by way of appropriation from the credit only through the impugned order, till such time since the tax has not been paid to the credit of the petitioner in the respondents' account, certainly, that tax due

shall carry the interest.

20.The learned Standing counsel would also submit that, insofar as the penalty is concerned, under Section 122(2), one of the circumstances mentioned therein is that, if any registered person, who supplies any goods or services or both, on which, any tax has not been paid, or where the Input Tax Credit has been wrongly availed or utilised, then for the said purpose, penalty is imposable to the extend of either 10,000/- rupees or 10% of the tax due, whichever is higher, therefore, in this context, the ITC since was wrongly availed or utilised or intended to be utilised or availed, certainly, the petitioner is liable to pay the penalty, and accordingly, the slapping of the penalty on the petitioner through the impugned order is also sustainable, she contended.

21.I have considered the said rival submissions made by the learned counsel appearing for the parties and have perused the materials

placed before this Court.

22. In the operative portion of the impugned order, the following has been stated by the respondents.

"(i)I disallow the credit of Rs.50,21,080/- (Rupees Fifty Lakh Twenty One Thousand and Eighty Only) carried forward through form GST Tran-1 by M/s Kumaran Filaments (P) Ltd., and demand the same from them in terms of Section 73(1) of CGST Act, 2017 read with Rules 121 and 142 (1)(a) of CGST Rules, 2017 and Section 174 of the CGST Act, 2017.

(ii)I appropriate the Credit of Rs.50,21,080/- (Rupees Fifty Lakh Twenty One Thousand and Eighty Only) reversed on 20.06.2019 for the demand under (I).

(iii)I demand Interest at the appropriate rate as applicable from them for taking ineligible Transitional credit in terms of Section 73(1) as

determined under Section 50(3) of the CGST Act, 2017 read with Rule 142 of CGST Rules, 2017 and Section 174 of the CGST Act, 2017.

(iv)I impose a Penalty of Rs.5,02,108/- (Rupees Five Lakhs Two Thousand and One Hundred and Eight Only) on them under Section 122(2)(a) of the CGST Act, 2017 for wrong availment of input tax credit for any reason other than fraud or any willful misstatement or suppression of facts to evade payment of Tax."

23. Insofar as the first part of the order, which is disallowing the credit of Rs.50,21,080/- carried forward through the Form GST TRAN-1 is concerned that has been disallowed and correspondingly, in the second portion, the entire amount has been appropriated from the credit of the petitioner, which was reversed on 20.06.2019.

24. Insofar as these two portions of the impugned order is concerned, since the petitioner has given up his challenge, we need not

traverse on these issues. However, insofar as the third and fourth clause of the interim order, where, interest was demanded or penalty was imposed are concerned, since there has been a case and counter case projected by the learned counsel for the parties, those issues alone are dealt with.

25. Insofar as the due of interest is concerned, the factual matrix is that, the entire amount of Rs.50,21,080/- was very much available in the credit of the petitioner for the whole period, therefore, if at all, the same is disallowed, and accordingly, it is appropriated through the impugned order, even before appropriation, since the amount has been in the credit of the petitioner, that is, in the electronic ledger from which, the amount now has been appropriated, it can be safely stated that the said amount, since have been in the credit of the petitioner for the entire period, it may not require any interest to be paid.

26. In order to fortify the said view, this Court wants to press

into service the decision made by a learned Judge of this Court in Maansarovar Motors Pvt. Ltd., case cited supra, dated 29.09.2020. The relevant portion of the order has already been quoted hereinabove, where, the learned Judge, after taking aid from the Judgment of the Hon'ble Supreme Court in ***Commissioner of Income Tax v. Anjum H Ghaswada (252 ITR 1)*** and also a Division Bench of this Court in ***Commissioner of Central Excise, Puducherry-I, v. CESTAT, Chennai , 2017 (346 ELT 80)*** and also some other decisions, have held that, insofar as the appropriation of the tax demand from the credit is concerned, it cannot carry any interest, therefore, demanding any interest, in the words of the Division Bench is nothing but the Department act like shylock demanding a pound of flesh.

27. If we apply the said principle made in those cases, as has been quoted hereinabove, which is part of Maansarovar Motors Pvt., Ltd., case certainly, that would carry forward the plea of the petitioner as against the demand of interest in the impugned order. Insofar as the

imposition of penalty is concerned, the relevant Section is 122(2). The language used in 122(2) reads as follows:

> "*(2)Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,-*
>
> *(a)for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent, of the tax due from such person, whichever is higher."*

28.In the present case, the reason for imposing penalty is that the petitioner has wrongly availed or utilised the Input Tax Credit.

29.However, the fact remains that, the petitioner has never utilised or availed the ITC wrongly. The entire amount has been in the credit till the impugned order is passed, that is the reason, why, the

respondent revenue was able to appropriate the amount from the credit, that is, the electronic credit ledger of the petitioner. Therefore, since at no point of time, the ITC was either availed or utilised by the petitioner, that is, one of the pre-requisite under which only penalty can be imposed under Section 122(2)(a), such situation, since is not available in the present case, I am of the considered view that, such kind of penalty cannot be imposed against the petitioner.

30.Therefore, insofar as the demand of interest as well as the imposition of penalty is concerned, which is form part of the impugned order under Clause 3 and 4 of the operative portion, those demand made by the respondents or imposing penalty against the petitioner are untenable and therefore, that are liable to be interfered with.

31. In that view of the matter, this Court is inclined to dispose of this writ petition with the following order:

"that insofar as the impugned order is

concerned, Clause 1 and 2 of the operative portion of the impugned order, with regard to the appropriation of the demanded tax to the extend of Rs.50,21,080/- from the credit of the petitioner is concerned, it is to be sustained, therefore, it is upheld.

However, insofar as the third and fourth part of the operative portion of the impugned order, under which demand of interest, and imposition of penalty was made against the petitioner are concerned, those demand of interest as well as imposition of penalty are unjustifiable and unlawful, therefore, such part of the order impugned are hereby set aside."

32. In the result, this writ petition is partly allowed as indicated above. However, there shall be no order as to costs. Consequently,

connected miscellaneous petition is closed.

14.09.2021

Index : Yes/No
Internet : Yes

PJL

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate/litigant concerned.

To

1.Commissioner of Central GST and Central Excise,
Central Revenue Buildings,
No.5, V.P. Rathnasamy Nadar Road,
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R.SURESH KUMAR, J.

PJL

W.P.(MD)No.11113 of 2020

14.09.2021