

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 22979 of 2022**

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M/S SHIV CRACKERS

Versus

CHIEF COMMISSIONER OF CGST AND C.E. & ANR.
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Appearance:

MR.AVINASH PODDAR(9761) for the Petitioner(s) No. 1

for the Respondent(s) No. 1

MR UTKARSH R SHARMA(6157) for the Respondent(s) No. 1,2
=====**CORAM: HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA**Date : 30/11/2023****ORAL ORDER****(PER : HONOURABLE MR. JUSTICE NIRAL R. MEHTA)**

[1] By way of this petition under Article 226 of the Constitution of India, the writ applicant has approached this Court with the following reliefs:

“3.3 This Hon’ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, direction or order and be please to:

(a) Quash and set aside the impugned order in appeal dated 25.07.2022 with a direction to accept the pre-deposit paid by

Electronic Credit Ledger and to admit the appeal and dispose the same on merits.

(b) Stay the implementation and operation of the impugned order in appeal dated 25.07.2022, as an ad-interim relief, and direct respondents not to take any coercive action against the petitioner.

(c) Any other and further relief deemed just and proper by granted in the interest of justice.”

[2] The brief facts leading to filing of the present petition can be stated as under:

[2.1] The petitioner is a partnership firm concern having its registered office and principal place of business at 2/3710, Navsari Bazar, Main Road, Sagrampura, Surat-395002, Gujarat.

[2.2] The petitioner engaged in the business of supply of “Fireworks, Signaling flares, rain rockets, fog signals and other pyrotechnic articles” falling under HSN: 3604 and is duly migrated under CGST / GGST Act vide GSTN as 24AAVFS3958EIZQ.

[2.3] On 31st October 2018 and 1st November 2018, a search proceeding under Section 67(2) of the CGST / GGST Act has been

conducted by the officers of the CGST Department at 8 business premises of the petitioner situated at Surat. The CGST has issued the prohibition order with respect to the stock kept at premises registered as additional place of business.

[2.4] The petitioner was also carrying its business from the premise situated at 2/3711 and 2/3713, Navsari Bazar, Main Road, Sagrampura, Surat – 395002. The petitioner uses premise at 2/3710-11 as a shop selling the products and premise at 2/3713 as shop cum godown. According to the petitioner, these premises are attached with each other and has been altered in such a way that there is only one entry point and only one exist point for these premises. The petitioner, however, has mentioned 2/2710 and not 2/3710-13 in its GST registration and thereby, CGST officer has treated these premises i.e. 2/3711 and 3713 as an unregistered premises and thereby, issued order for seizure with respect to the goods kept in those premises.

[2.5] The statements of the petitioner came to be recorded on 30th January 2019 and 26th April 2019. On 29th April 2019, the learned Principal Commissioner GST and Central Excise, Surat has issued

the order under Section 67(7) of the CGST Act and extended operation of the order for seizure and prohibition order by further six months.

[2.6] The show cause notice under Section 74 of the CGST Act dated 25th October 2019 came to be issued. In the said show cause notice,, Mr. Hemanshu Kanaiyalal Sopariwala, partner of the petitioner, was asked to show cause why penalty should not be imposed upon him under Section 122(3) of the CGST Act for contravention of provisions of the Act.

[2.7] In the said show cause notice dated 25th October 2019, the learned Assistant Commissioner, GST and Central Excise, Division-I, Surat has directed the petitioner to show cause why:

(i) Goods confiscated valued at Rs.60,31,867/- should not be confiscated under the provisions of Section 130(1) of the CGST Act;

(ii) Penalty under Section 122 of the CGST Act should not be imposed upon the petitioner with respect to para (i) above;

(iii) Tax amounting to Rs.8,83,392/- should not be demanded and

recovered from the petitioner under Section 74(1) of the CGST Act read with Section 35(6) of the CGST Act;

(iv) Interest at an appropriate rate should not be recovered from the petitioner under Section 50 of the CGST Act with respect to para (iii) above;

(v) Penalty should not be imposed upon the petitioner under Section 122(1) of the CGST Act with respect to para (iii) above.

[2.8] The learned Assistant Commissioner, CGST and Central Excise, Division – I, Surat has issued corrigendum dated 2nd March 2020 raising the valuation of the goods held at premise 2/3713, Navsari Bazar to Rs.50,38,400/- from Rs.49,07,735/- and thereby, raised evasion of tax to Rs.9,06,912/- from Rs.8,83,392/-.

[2.9] A notice for personal hearing was received by the petitioner on 9th June 2020 directing, *inter alia*, to remain present on 19th June 2020.

[2.10] The petitioner, vide its letter dated 19th June 2020, requested the learned Assistant Commissioner to postpone the hearing till 30th June 2020 in view of the pandemic situation due to

COVID-19 and also requested the learned Assistant Commissioner to revalue the seized goods.

[2.11] That again on 29th June 2020, the petitioner received notice from the department directing, *inter alia*, to remain present on 7th July 2020. Pursuant to the said notice, the petitioner submitted a detailed reply 6th July 2020.

[2.12] Again, on 20th August 2020, the petitioner was in receipt of the notice dated 5th August 2020, wherein the petitioner was asked to remain present on 11th August 2020. Thus, the said notice was received by the petitioner after the date of personal hearing and thereby, the petitioner could not remain present before the learned Assistant Commissioner.

[2.13] Again, on 27th March 2021, the petitioner has received notice for personal hearing dated 22nd March 2021, whereby, the petitioner was asked to remain present on 7th April 2021. On 7th April 2021, the authorized representative of the petitioner was appeared before the learned Assistant Commissioner and prayed as under:

(i) Transfer the entire proceeding to the SGST department as officers of the SGST department has initiated the proceeding first.

(ii) Release all the seized goods as the period for which the officers of the CGST department initiated the proceeding has already been covered by the officers of the SGST.

(iii) Further, prayed to revalue the seized goods as the valuation shown in the show cause notice is baseless and in support of its claim, he has already submitted its evidences and working through his letter dated 6th July 2020.

[2.14] The learned Assistant Commissioner has issued the order in original dated 29th April 2021 as under:

(i) Confiscation of the goods valued at Rs.61,62,532/- seized at the premise of the petitioner under Section 130(1) of the CGST Act;

(ii) Imposed penalty equivalent to tax amount i.e. Rs.11,09,256/- under Section 122 of the CGST Act upon the petitioner;

(iii) Confirmed the demand of GST amounting to Rs.9,06,912/-

payable on unaccounted goods valued at Rs.50,38,400/- under Section 74(1) of the CGST Act read with Section 35(6) of the CGST Act;

(iv) Imposed interest at an appropriate rate on the demand confirmed on (iii) above;

(v) Imposed penalty of Rs.9,06,912/- upon the petitioner under Section 122(1) of the CGST Act in respect to demand at (iii) above;

(vi) Imposed penalty of Rs.25,000/- upon Mr. Hemanshu Kanaiyalal Sopariwala, the partner of the petitioner under Section 122(3) of the CGST Act for his involvement in the evasion of tax.

[3] Being aggrieved and dissatisfied by the aforesaid, the petitioner has preferred appeal before the respondent under Section 107 of the CGST Act in Form GST APL-01 on 13th July 2021.

[4] The aforesaid appeal came to be disposed of vide order dated 25th July 2022 by the learned Additional Commissioner relying upon the judgement of the Hon'ble High Court of Orissa in the

matter of **M/s. Jyoti Construction vs. Deputy Commissioner of CT and GST, Jaipur** reported in [2021 (10) TMI 524]. In the said decision, the Hon'ble High Court of Orissa held that the Electronic Credit Ledger cannot be used to give the pre-deposit for the purpose of filing an appeal under the GST and the payment for the pre-deposit must be done through Electronic Credit Ledger only.

[5] Being aggrieved and dissatisfied by the aforesaid, the petitioner has approached this Court under Article 226 of the Constitution of India with the aforesaid reliefs.

[6] We have heard the learned advocate Mr. Avinash Poddar for the petitioner and learned advocate Mr. Utkarsh Sharma for the respondent.

[7] At the outset, learned advocate Mr. Poddar for the petitioner pointed out that vide circular dated 6th July 2022 issued by the GST Policy Wing, Central Board of Indirect Taxes and Customs, Ministry of Finance, Government of India, it has been clarified that payment of pre-deposit can be made by utilizing the Electronic Credit Ledger (ECL). Learned advocate Mr. Poddar further relied upon the

judgement passed by the Hon'ble Bombay High Court in the case of **Oasis Realty vs. The Union of India and others (Writ Petition No.23507 of 2022 decided on 16th September 2022)**, wherein the Hon'ble Bombay High Court, having considered the provisions of the Act, held that the amount of ITC available in the Electronic Credit Ledger can be used towards payment of Integrated Tax or Central Tax or the State Tax or Union Territory Tax.

[8] *Per contra*, learned advocate Mr. Utkarsh Sharma for the respondent vehemently opposed the present petition, however, could not dispute the ratio laid down by the Hon'ble Bombay High Court in the case of **Oasis Realty (supra)**.

[9] We have heard learned advocates appearing for the respective parties and have gone through the material produced on record. No other and further submissions have been canvassed by the learned advocates for the respective parties, except what are stated hereinabove.

[10] Having heard the learned advocates appearing for the respective parties and having gone through the material produced

on record, the only question that falls for the consideration of this Court is whether the appellant, to comply with the requirement of sub-section (6) of Section 107 of the CGST Act of paying a sum equal to 10% of the amount of tax in dispute arising out of the impugned order, can pay the amount utilizing the credit available in the Electronic Credit Ledger?

[11] In our considered opinion, the aforesaid question is no more *res integra*. The Hon'ble Bombay High Court in the case of **Oasis Realty (supra)**, having considered the relevant provisions, held as under:

“9. We are not in agreement with the submission made on behalf of the State. This is because clause (b) of Sub-section (6) of Section 107 provides a precondition, “unless the appellant has paid” (not deposited) a sum equal to 10% of remaining amount of Tax in dispute. It says 10% of Tax has to be paid as a precondition. That Tax can be Integrated Tax or Central Tax or the State Tax as in the case at hand, or Union Territory Tax. The amount of ITC available in the Electronic Credit Ledger can be utilised towards payment of Integrated Tax or Central Tax or State Tax or Union Territory Tax.

Therefore, in our view, Petitioner having to pay 10% of the Tax in dispute under clause (b) of Sub-section (6) of Section 107,

can certainly utilise the amount of ITC available in the Electronic Credit Ledger. We hasten to add that in view of provisions of Sub-section (3) of Section 49, the party may also pay this 10% of the Tax in dispute by utilising the amount available in the cash ledger.

10. Moreover, Sub-section (4) of Section 49 provides the amount available in the Electronic Credit Ledger may be used for making any payment towards output tax under the MGST Act or IGST Act subject to certain restrictions or conditions that may be prescribed. Sub-rule (2) of Rule 86 of MGST Rules provides for debiting of the Electronic Credit Ledger to the extent of discharge of any liability in accordance with the provisions of Section 49 of the MGST Act. Further, output tax in relation to a taxable person is defined in Clause (82) of Section 2 of MGST Act as the tax chargeable on taxable supply of goods or services or both but excludes tax payable on reverse charge mechanism. Therefore, any payment towards output tax, whether self-assessed in the return or payable as a consequence of any proceeding instituted under the MGST Act can be made by utilisation of the amount available in the Electronic Credit Ledger. Hence, a party can pay 10% of the disputed Tax either using the amount available in the Electronic Cash Ledger or the amount available in the Electronic Credit Ledger.

*11. Ms. Chavan relied upon an order of the High Court of Orissa at Cuttack in **M/s Jyoti Construction Vs. Deputy Commissioner of CT & GST 2021(10) TMI 524** to submit that the amount in the credit ledger cannot be used to pay the 10% required to be paid under Sub-section (6) of Section 107 of the MGST Act. In our*

view it will not be necessary to discuss the said order because subsequent to the said order the Central Board of Indirect Taxes and Customs, GST Policy Wing, Department of Revenue, Ministry of Finance, Government of India (CBIT&C) has, in exercise of its powers conferred by Section 168(1) of the Central Goods and Services Tax Act, 2017, issued clarification in the form of a circular. This clarification came to be issued in view of various representations that CBIT&C received on utilisation of the amounts available in the Electronic Credit Ledger and the Electronic Cash Ledger for payment of tax and other liabilities. The CBIT&C, in its circular F. No.CBIC-20001/2/2022-GST dated 6th July 2022 has clarified as under:-

<i>Utilisation of the amounts available in the electronic credit ledger and the electronic cash ledger for payment of tax and other liabilities.</i>	
XXXXXX	
6.	<p><i>Whether the amount available in the electronic credit ledger can be used for making payment of any tax under the GST Laws?</i></p> <p><i>1. In terms of sub-section (4) of section 49 of CGST Act, the amount available in the electronic credit ledger may be used for making any payment towards output tax under the CGST Act or the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "IGST Act"), subject to the provisions relating to the order of utilisation of input tax credit as laid down in section 49B of the CGST Act read with rule 88A of the CGST Rules.</i></p> <p><i>2. Sub-rule (2) of rule 86 of the CGST Rules provides for debiting of the electronic credit ledger to the extent of discharge of any liability in accordance with the provisions of section 49 or section 49A or section 49B of the CGST</i></p>

		<p>Act.</p> <p>3. Further, output tax in relation to a taxable person (i.e. a person who is registered or liable to be registered under section 22 or section 24 of the CGST Act) is defined in clause (82) of section 2 of the CGST Act as the tax chargeable on taxable supply of goods or services or both but excludes tax payable on reverse charge mechanism.</p> <p>4. Accordingly, it is clarified that any payment towards output tax, whether self-assessed in the return or payable as a consequence of any proceeding instituted under the provisions of GST Laws, can be made by utilization of the amount available in the electronic credit ledger of a registered person.</p> <p>5. It is further reiterated that as output tax does not include tax payable under reverse charge mechanism, implying thereby that the electronic credit ledger cannot be used for making payment of any tax which is payable under reverse charge mechanism.</p>
7.	Whether the amount available in the electronic credit ledger can be used for making payment of any liability other than tax under GST Laws?	As per sub-section (4) of section 49, the electronic credit ledger can be used for making payment of output tax only under the CGST Act or the IGST Act. It cannot be used for making payment of any interest, penalty, fees or any other amount payable under the said acts. Similarly, electronic credit ledger cannot be used for payment of erroneous refund sanctioned to the taxpayer, where such refund was sanctioned in cash.
8.	Whether the amount	As per sub-section (3) of Section 49 of

<p><i>available in the electronic cash ledger can be used for making payment of any liability under the GST Laws?</i></p>	<p><i>the CGST Act, the amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of the GST Laws.</i></p>
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(emphasis supplied)

Therefore, CBIT&C has itself clarified that any amount towards output tax payable, as a consequence of any proceeding instituted under the provisions of GST Laws, can be paid by utilisation of the amount available in the Electronic Credit Ledger of a registered person. The CBIT&C has also requested that suitable trade notices be issued to publicize the contents of the circular.”

[12] Keeping in mind the ratio laid down by the Hon’ble Bombay High Court in the case of **Oasis Realty (supra)** as well as the circular dated 6th July 2022 issued by the GST Policy Wing, Central Board of Indirect Taxes and Customs, Ministry of Finance, Government of India, it has been clarified that the payment of pre-deposit can be made by utilizing the Electronic Credit Ledger (ECL).

[13] In view of the aforesaid, we hold that the the petitioner may utilize the amount available in the Electronic Credit Ledger to pay the 10% of Tax in dispute as prescribed under sub-section (6) of

Section 107 of the CGST Act. Accordingly, the impugned order-in-appeal No.CR/ADC/APL/147/2022 dated 25th July 2022 passed by the respondent No.2 is hereby quashed and set aside. The appeal is restored to file on the undertaking of the petitioner that it shall debit the Electronic Credit Ledger within two weeks of this order getting uploaded towards this 10% payable under Section 107(6) (b), if not already debited, is accepted.

[14] The petition is disposed of accordingly.

(BHARGAV D. KARIA, J)

(NIRAL R. MEHTA, J)

CHANDRESH