

W.P.(MD) No.15302 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on	15.04.2024
Delivered on	30.04.2024

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.(MD) No.15302 of 2022

and

W.M.P.(MD) Nos.10956 & 10957 of 2022

M/s.Razack Trading Company
Represented by its Managing Partner,
Mr.AR.Akbar Sharieef,
6, RTC, Thandavarayan Street,
Ariyallur – 621 704.

... Petitioner

Vs.

1.The Assistant Commissioner (ST) (FAC),
Ariyalur Assessment Circle,
Ariyalur.

2.The Appellate Deputy Commissioner (ST),
Goods and Service Tax,
Trichy & Vellore Division,
2nd Main Road, Ponnagar,
Trichy – 620 001.

... Respondents

Prayer: Writ Petition filed under Article 226 of Constitution of India for issuance of a Writ of Certiorari calling for the records of the second respondent culminating in the order dated 22.11.2021 issued from file in



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AP/GST/138/2020 and quashing it to the extent it upholds the demand for payment of interest.

For Petitioner : Mr.S.Murugappan

For Respondents : Mr.J.K.Jeyaselan
Government Advocate (Civil Side)

ORDER

The petitioner is aggrieved by the impugned order dated 22.11.2021 passed by the second respondent Appellate Deputy Commissioner (ST) (FAC) in AP/GST/138/2020.

2. By the impugned order dated 22.11.2021, the second respondent Appellate Deputy Commissioner (ST) (FAC) has partly allowed the appeal filed by the petitioner in AP/GST/138/2020. Relevant portion of the impugned order dated 22.11.2021 reads as under:-

A careful reading of the above will reveal that the above section comes in to play only when the assessee has short paid or the refund was granted erroneously or input credit was wrongly availed by reason of fraud, willful misstatement or suppression.

None of the above ingredients are present in this case so as to invoke section 74 of the CGST Act, 2017.

The Appellant has not suppressed any fact from the department. He has filed Tran-1 fully disclosing the



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import duty carried over as transitional credit. The department after considering all the facts on record has granted the refund. It is clear that there was no misstatement or fraud on the part of the Appellant. Hence, I am of the view that the Issue of SCN under Section 74 of the CGST Act, 2017 is not legal and proper.

Now we address the issue whether penalty is imposable under Section 74 of the CGST Act 2017. As invocation of demand under Section 74 itself is not legal the demand for penalty is not sustainable. Hence, I set aside the Penalty of Rs.21,44,097/- imposed in the order.

The summary of Order in Form GST DRC-07 does not demand interest but the manual order dated 19.03.2020 has demanded interest under section 50 @18%. Section 50(1) reads as below:

Section 50- Interest on delayed payment of tax (GST)

(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made there under, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall, for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent, as may be notified by the Government, on the recommendation of the Council.

As the Appellant has accepted and paid the tax dues of Rs.42,88,194 through two DRC-03 challans stated above, the erroneous refund relates to the tax due payable to the government by the Appellant and hence they are liable to pay interest at 18% u/s 50(1)



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as demanded in the Order. Further demand of interest is Automatic when the tax due is confirmed. Hence, I upheld the demand for interest @18% mentioned in the Order.

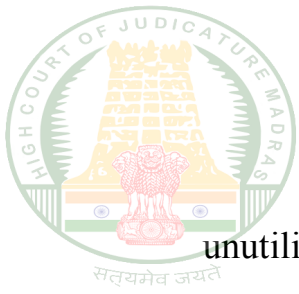
For all the aforesaid reasons. the Assistant Commissioner (ST) cannot impose penalty of Rs. 21,44,097/- on the Appellant and can only demand interest u/s 50 at 18%.

Hence, I set aside imposition of penalty in the Order the passed by the Assistant Commissioner (ST), Ariyalur in Order Ref No: ZA330320001635A, Dated: 19.03.2020 and upheld the demand of interest at 18% U/s.50 on the erroneous refund which was accepted and paid by the Appellant.

Thus, the appeal stands Partly Allowed on the terms aforesaid.

3. The brief facts of the case are that the petitioner had imported a consignment of split coriander seed and had paid basic customs duty. The petitioner availed Input Tax Credit (ITC) for a sum of Rs.42,88,194/- on the basic customs duty paid by the petitioner under the provisions of CENVAT Credit Rules, 2004 presumably on the ground that the petitioner was a registered dealer.

4. This amount was transited by the petitioner by filing TRAN-1 under Section 142 of the CGST Act. Since the amount was lying



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unutilised, the petitioner claimed for refund of the aforesaid amount

which was sanctioned on 17.07.2018 in Form RFD-06.

5. On realizing the mistake, the Department issued notice dated 01.02.2020. In the notice dated 01.02.2020, the petitioner was directed to pay the aforesaid refund amount along with interest under Section 50 of the CGST Act, 2017, failing which, the action initiated will be taken under Section 74 of the TNGST Act, 2017. The relevant portion of the notice dated 01.02.2020 reads as under:-

On perusal of the documents during Tran-1 Verification and upon verification of bill of entry submitted by you and duty paid challan to the central tax authority, the availed credit of import duty on the import of split Coriander for industrial processing and the total value was shown as Rs.1,34,600/- instead of US Dollars and the credit availed in Tran-1 filed on 27.12.2017 to the tune of Rs.42,88,194/-. It was also noticed that you have paid only the basic customs duty and cess on customs duty but there was no CVD

As per Rule 3(1) of the Cenvat credit rules, 2004, listing the eligible duties which are allowed to take credit wherein the basic customs duty does not fall under category of eligible credit, you have been informed already by the Perambalur range officer vide the letter dated:28 10.2019



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Since as much as the ineligible amount of Rs. 42,88,194/- was refunded, you are hereby given an opportunity to pay the erroneous refund amount along with interest u/s.50. failing which action initiated will be taken under sec. 74 of TNGST Act-2017.

6. The petitioner suffered an adverse order in the hands of the first respondent on 19.03.2020 in his proceedings bearing reference No.GSTN: 33AAAFR5307B1ZW/2017-18. Operative portion of the order dated 19.03.2020 in his proceedings bearing reference No.GSTN: 33AAAFR5307B1ZW/2017-18 reads as under:-

The dealers has availed wrong Claim of ITC not paid within the notice time. Hence, is ordered to pay a Penalty at 50% of the tax dues under section 74(11) of the TNGST Act, 2017 is also levied.

<i>Total Tran 1 credit claimed</i>	<i>:Rs. 42,88,194/-</i>
<i>Eligible Tran1 credit</i>	<i>:Rs. ---</i>
<i>Wrong Claim of ITC or erroneous refund sanctioned</i>	<i>:Rs. 42,88,194/-</i>
<i>Penalty levied U/s 74(11)</i>	<i>:Rs. 21,44,097/-</i>
<i>Total</i>	<i>:Rs. 64,32,291/-</i>

It is further ordered that the above mentioned tax dues shall be paid along with interest at 18% per



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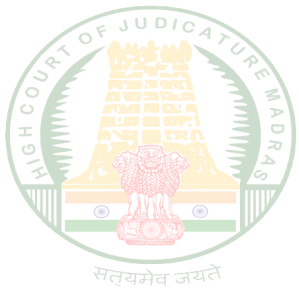
annum, and the interest will be payable up to the date of payment of tax made.

7. In the light of aforesaid order passed by the first respondent on 19.03.2020, the petitioner repaid the amount which was refunded to the petitioner on 17.07.2018 on the following dates:-

Sl.No.	Date	Amount
1	23.07.2020	Rs.31,54,393/-
2	17.11.2020	Rs.11,33,801/-
Total		Rs.42,88,194/-

8. Meanwhile, the petitioner also preferred an appeal before the first respondent which has culminated in the impugned order. By the impugned order, the second respondent has dropped the penalty imposed on the petitioner under Section 74 of the CGST Act, 2017 but has uphold the levy of interest under Section 50 of the CGST Act, 2017.

9. This Writ Petition has been filed to review the aforesaid order as the appellate remedy before the Appellate Tribunal that is contemplated under Section 109 of the respective GST enactments and not yet to be constituted.



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10. The learned counsel for the petitioner would submit that interest under Section 50 of the CGST Act, 2017 cannot be imposed on the petitioner in view of the specific language in Section 50(1) & (3) of the CGST Act, 2017.

11. Explaining further, the learned counsel for the petitioner would further submit that Section 50(1) of CGST Act, 2017 will apply to a case where a person who is liable to pay tax in accordance with the provisions of this Act or the Rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, for the period for which the tax or any part thereof remains unpaid. It is submitted that only such a person shall pay, on his own, interest at such rate, not exceeding 18%, as may be notified by the Government on the recommendations of the Council.

12. It is submitted that in the case, the petitioner was not liable to pay the tax or therefore was no fault on the part of the petitioner to pay tax and therefore, the question of levying interest under Section 50 of the CGST Act, 2017 does not arise. It is further submitted that the question of invoking Section 50(3) of the CGST Act, 2017 also will not arise since



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the petitioner has although wrongly availed the input tax credit, he has not utilised the same.

13. It is submitted that the amount that was wrongly availed as input tax credit by the petitioner was refunded back to the petitioner on 17.07.2018 was later repaid back by the petitioner on 23.07.2020 and 17.11.2020. Therefore, it is submitted that in absence of statutory mechanism under Section 50 read with Section 74 of the Act to recover the interest on such erroneous refund made to the petitioner, the impugned orders passed by the respondents imposing interest are liable to be interfered with. The learned counsel for the petitioner prays for quashing the impugned order.

14. Per contra, learned Government Advocate (Civil Side) for the respondents, on the other hand, would submit that the petitioner had wrongly availed input tax credit and had wrongly transitioned it under Section 142 of the CGST Act, 1942. It is submitted that even if the petitioner was registered Trader, the question of availing input tax credit under the CENVAT Credit Rules, 2004 did not arise on the basic customs duty paid by the petitioner and therefore, the petitioner as a registered



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dealer under the provisions of the Central Excise Rules, 2002 ought not to have availed the input tax credit under the provisions of CENVAT Credit Rules, 2004 on the Basic Customs Duty paid for import of split coriander seed.

15. It is submitted that since the petitioner was not entitled to avail input tax credit, the petitioner was also not entitled to transition the same under Section 142 of the CGST Act, 2017. Having enjoyed the fruits of the incorrect refund on 17.07.2018 for over a period of two years or so, the petitioner has to pay interest on the amount that was retained by the petitioner based on the erroneous order of refund dated 17.07.2018.

16. The learned Government Advocate (Civil Side) for the respondents would draw attention to Rule 121 of the TNGST Rules, 2017, as per which, the amount credited under Sub-Rule (3) to Rule 117 of the Rules may be verified and proceedings under Section 73 of the Act or, as the case may be, Section 74 of the Act shall be initiated in respect of any credit wrongly availed, whether wholly or partly. Hence, the learned Government Advocate (Civil Side) for the respondents prayed for dismissal of this Writ Petition.



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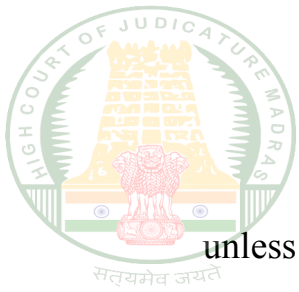
17. By way of rejoinder, the learned counsel for the petitioner would submit that both Section 74 and Section 50 of the CGST Act, 2017 apply to refund of tax. This case pertains to the erroneous refund of input tax credit as credit was availed and recognized under Section 142 of the Act.

18. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Government Advocate (Civil Side) for the respondents.

19. Admittedly, the petitioner was not entitled to avail input tax credit on the Basic Customs Duty paid under the Customs Act, 1962, under the provisions of the CENVAT Credit Rules, 2004.

20. Under Section 140 of the CGST Act, 2017, only input tax credit lying un-utilised under the CENVAT Credit Rules, 2004 and TNVAT Act, 2006 in Tamil Nadu could be transitioned.

21. Sub- Section (2) to Section 140 of the CGST Act, 2017 also makes it clear that the registered person shall not be allowed to take credit



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unless the said credit was admissible as CENVAT credit under the existing law i.e., CENVAT Credit Rules, 2004 and is also admissible as input tax credit under the CGST Act, 2017.

22. Therefore, the question of the petitioner transitioning the amount that was wrongly claimed as input tax credit under the CENVAT Credit Rules, 2004 did not arise. The Department however committed a mistake by sanctioning the refund to the petitioner on 17.07.2018 pursuant to refund claim filed by the petitioner.

23. Thereafter, releasing the mistake, the Department has issued Notice dated 01.02.2020 under Section 74 of the CGST Act, 2017. The petitioner has also not disputed that the petitioner was not entitled to avail input tax credit under the CENVAT Credit Rules, 2004.

24. The petitioner has also paid the amount to the Department *post facto* on 23.07.2020 and on 17.11.2020. There is a delay in the payment of the amount after the amount was wrongly sanctioned. A sum of Rs.31,54,393/- was paid after a delay of 730 days. There is a delay of 854 days in paying the refund the balance amount of Rs.11,33,801/-. The



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interest payable by the petitioner has been estimated by the petitioner as

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For 730 days : Rs.31,54,393/- x 18% = Rs.11,46,472/-

For 854 days : Rs.11,33,801/- x 18% = Rs. 4,77,502/-

= Rs.16,23,974/-

25. Under Section 50(3) of the CGST Act, 2017, a taxable person who makes an undue or excess claim of input tax credit under Sub-Section (10) of Section 42 of the Act or undue or excess reduction in output tax liability under Sub-Section (10) of Section 43 of the Act, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty four per cent., as may be notified by the Government on the recommendations of the Council.

26. Section 50 of the CGST Act, 2017 reads as under:-

50. Interest on delayed payment of tax.—

(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or



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any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:

Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.

- (2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.
- (3) **A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty four per cent., as may be notified by the Government on the recommendations of the Council.**

27. Sub-Section 10 to Section 42 and Section 43 of the CGST Act,

2017 reads as under:-



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<i>Section 42(10) of the Act</i>	<i>Section 43(10) of the Act</i>
<p>Section 42 – Matching, reversal and reclaim of input tax credit</p> <p>(1)</p> <p>.....</p> <p>(10) The amount reduced from the output tax liability in contravention of the provisions of sub-section (7) shall be added to the output tax liability of the recipient in his return for the month in which such contravention takes place and such recipient shall be liable to pay interest on the amount so added at the rate specified in sub-section (3) of Section 50.</p>	<p>Section 43 – Matching, reversal and reclaim of reduction in output tax liability</p> <p>(1)</p> <p>.....</p> <p>(10) The amount reduced from output tax liability in contravention of the provisions of sub-section (7) shall be added to the output tax liability of the supplier in his return for the month in which such contravention takes place and such supplier shall be liable to pay interest on the amount so added at the rate specified in sub-section (3) of Section 50.</p>

28. As per Rule 117(3) of the CGST Rules, 2017, the amount of credit specified in the Application in FORM GST TRAN-1 shall be credited to the electronic credit ledger of the Applicant maintained in FORM GST PMT-2 on the common portal.



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WEB COPY 29. As per Rule 121 of the CGST Rules, 2017, the amount credited under Rule 117(3) of the Rules may be verified and proceedings under Section 73 or under Section 74 of the Act shall be initiated in respect of any credit wrongly availed, whether wholly or in part. Rule 121 of the CGST Rules, 2017 reads as under:-

121. Recovery of credit wrongly availed.-

The amount credited under sub-rule (3) of rule 117 may be verified and proceedings under section 73 or, as the case may be, section 74 shall be initiated in respect of any credit wrongly availed, whether wholly or partly.

30. Power to recover the amount under Section 73 or Section 74 of the respective GST Enactments implies the power to impose both penalty and interest. Therefore, it cannot be argued that interest under Section 50(3) of the CGST Act, 2017 cannot be imposed on the petitioner. In fact, both Section 73(1) and 74 of the respective GST enactments contemplates interest on account of erroneous refund of amount. Section 73(1) and Section 74(1) of the respective GST Enactments read as under:-



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<i>Section 73(1) of the Act</i>	<i>Section 74(1) of the Act</i>
<p>Section 73 - Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful-misstatement or suppression of facts.</p> <p>(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.</p>	<p>Section 74- Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts.</p> <p>(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.</p>



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WEB COPY 31. Under Section 73(5) of the respective GST Enactments, the person chargeable with tax may, before service of notice under Sub-Section (1) or, as the case may be, the statement under Sub-Section (3), pay the amount of tax along with interest payable thereon under Section 50 of the Act on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

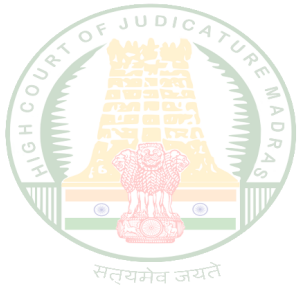
32. Under Section 74(5) of the respective GST Enactments, the person chargeable with tax may, before service of notice under Sub-Section (1), pay the amount of tax along with interest payable under Section 50 of the Act and a penalty equivalent to 15% of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

33. Only concession that is available as regards penalty under these two enactments is under Section 73(5), 73(8), 74(5) & 74(8) of the CGST Act. They read as under:-



Section 73(5) & 73(8) of the Act	Section 74(5) & 74(8) of the Act
(5) The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.	(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.
(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.	(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

34. There has to be restitution of the unjust benefit gained by a dealer/person. These provisions have been framed to ensure that there is proper restitution. Thus, no case is made out to interfere with the impugned order. Therefore, the impugned order is sustainable and this Writ Petition is liable to be dismissed.



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WEB COPY 35. Accordingly, this Writ Petition stands dismissed. No costs.

Consequently, connected Miscellaneous Petitions are closed.

30 .04.2024

Index: Yes / No

Neutral Citation: Yes / No

Speaking Order / Non-Speaking Order

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Copy To:

- 1.The Assistant Commissioner (ST) (FAC),
Ariyalur Assessment Circle,
Ariyalur.
- 2.The Appellate Deputy Commissioner (ST),
Goods and Service Tax,
Trichy & Vellore Division,
2nd Main Road, Ponnagar,
Trichy – 620 001.



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C.SARAVANAN, J.

JEN

Pre-Delivery order made in

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and

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