



आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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DIN- 20230364SW/0000217104

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : GAPPL/ADC/GSTP/2705/2022 -APPEAL

19746-52

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-002-APP-ADC-170/2022-23**
दिनांक Date : **22-03-2023** जारी करने की तारीख Date of Issue : **22-03-2023**

श्री मिहिर रायका_अपर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Mihir Rayka, Additional Commissioner (Appeals)

ग Arising out of Order-in-Original No. **GST/03/Dem/AC/2022-23/HNM DT. 13.06.2022**
issued by The Assistant Commissioner, CGST & CX, Division-II, Ahmedabad North

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
**M/s. Gopi Textiles, 672/5, Bombay Market Cross Lane,
Railwayपुरा, Ahmedabad-380001**

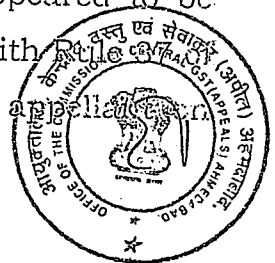
(A)	इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है। Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.
(i)	National Bench or Regional Bench of Appellate Tribunal framed under GST Act/CGST Act in the cases where one of the issues involved relates to place of supply as per Section 109(5) of CGST Act, 2017.
(ii)	State Bench or Area Bench of Appellate Tribunal framed under GST Act/CGST Act other than as mentioned in para- (A)(i) above in terms of Section 109(7) of CGST Act, 2017
(iii)	Appeal to the Appellate Tribunal shall be filed as prescribed under Rule 110 of CGST Rules, 2017 and shall be accompanied with a fee of Rs. One Thousand for every Rs. One Lakh of Tax or Input Tax Credit involved or the difference in Tax or Input Tax Credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to a maximum of Rs. Twenty-Five Thousand.
(B)	Appeal under Section 112(1) of CGST Act, 2017 to Appellate Tribunal shall be filed along with relevant documents either electronically or as may be notified by the Registrar, Appellate Tribunal in FORM GST APL-05, on common portal as prescribed under Rule 110 of CGST Rules, 2017, and shall be accompanied by a copy of the order appealed against within seven days of filing FORM GST APL-05 online.
(i)	Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying - (i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant, and (ii) A sum equal to twenty five per cent of the remaining amount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order, in relation to which the appeal has been filed.
(ii)	The Central Goods & Service Tax (Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 has provided that the appeal to tribunal can be made within three months from the date of communication of Order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later.
(C)	उच्च अपीलीय प्राधिकारी को अपील दाखिल करने संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbic.gov.in को देख सकते हैं। For elaborate, detailed and latest provisions relating to filing of appeal to the appellate authority, the appellant may refer to the website www.cbic.gov.in .

ORDER-IN-APPEAL

BRIEF FACTS OF THE CASE :

M/s. Gopi Textiles, 672/5, Bombay Market Cross Lane, Railwaypura, Ahmedabad : 380 001 (hereinafter referred to as "*the appellant*"), holding GSTIN 24ACVPG8592J1ZU has filed appeal against Order-In-Original No. GST/03/Dem/AC/2022-23/HNM, dated 13.06.2022 (hereinafter referred to as the "*impugned order*") passed by the Assistant Commissioner, CGST, Division-II [Naroda Road], Ahmedabad-North Commissionerate (hereinafter referred to as the "*adjudicating authority*").

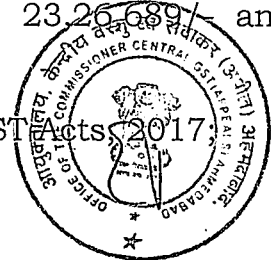
2. The facts leading to this case are that the officers from the Directorate General of Goods and Services Tax Intelligence, Ahmedabad Zonal Unit [AZU], Ahmedabad (hereinafter referred to as '*DGGI*') visited the business premises of *the appellant* on 05.02.2018. During the visit of officers of *DGGI*, it was noticed that the appellant had collected GST from their customers / buyers, however, *the appellant* has not filed the prescribed returns i.e GSTR-1 and GSTR-3B for the period from July-2017 to December-2017 and also failed to deposit such tax collected to the Govt. exchequer for the period from July-2017 to December- 2017, therefore, *DGGI* initiated proceeding by issuing a Show Cause Notice F. No. DGGI / AZU/ Gr. A/ 36-11/ 2020-21, dated 08.06.2020 demanding GST amount of Rs. 21,42,055/- (CGST Rs. 10,71,032/- and SGST Rs. 10,71,032/-) under Section 16(2) of the Central Goods and Services Tax Act, 2017 and Gujarat Goods and Services Tax Act, 2017 (herein after referred to as the '*CGST Act, 2017/GGST Act, 2017*' and collectively as the '*GST Acts, 2017*'). The appellant had discharged their GST liability through Input Tax Credit (ITC) and paid Rs.21,42,064/- and filed GST returns viz. GSTR-1 and GSTR-3B for the period July, 2017 to December-2017 on 03.03.2018. However, the appellant failed to produce the requisite evidences for payments made to the suppliers and in absence of such proof of payments, the amount towards receipt of inward taxable supplies by the appellant appeared to be unpaid. Hence, as per proviso to Section 16(2) of the Acts read with the CGST Rules & GGST Rules 2017, the ITC availed by the appellant



supplies in respect of which payments to the respective suppliers were outstanding, and therefore required to be reversed and the same was thereby required to be added to their output GST liability. The notice further proposed to add Input Tax Credit amounting to Rs. 23,36,689/- (CGST Rs. 11,68,345/- + SGST Rs.11,68,345/-) being disallowed and added to their output tax liability under Section 16(2) read with Rule 37 of CGST/GGST Rules, 2017 (the Rules) and Section 74(1) and 76(2) of the GST Acts, 2017. The notice further proposes to demand interest on the CGST; SGST; ITC alleged to have wrongly availed under Section 50 of the CGST/GGST Acts, 2017; and also to impose penalty under Section 74, 76, 122(1)(iii), 122(1)(xvii) & 122(2)(b) of the GST Acts, 2017.

3. *The Adjudicating Authority* vide Order-in-Original No. GST/ 03/ Dem/ AC/ 2022-23/HNM, dated 13.06.2022 has :

- (a) confirmed the demand of ITC of Rs.21,42,064/- (CGST Rs.10,71,032/- + Gujarat GST Rs.10,71,032/-) for the period from July, 2017 to December, 2017 under Section 16(2) of the GST Acts, 2017 and read with Rule 37 of GST Rules, 2017 utilized for discharging the GST liability disallowed and be held unutilizable for discharging their GST liability;
- (b) confirmed the demand of ITC of Rs.23,36,689/- (CGST Rs.11,68,345/- & Gujarat GST Rs. 11,68,345/-) under Section 16(2) read with Section 74(1) of the CGST / Gujarat GST Acts, 2017 disallowed and added to their output tax liability;
- (c) confirmed the demand of GST of Rs.21,42,055/- (CGST Rs.10,71,028/- & Gujarat GST Rs.10,71,028/-), not paid on taxable supplies under Section 74(1) read with Section 76(2) of the CGST / Gujarat GST Acts.
- (d) confirmed the demand of applicable interest on the GST liability on Rs. 23,26,689/- and Rs. 21,42,055/- under Section 50 of the CGST / Gujarat GST Acts.
- (e) Imposed a penalty of Rs. 23,36,689/- under Section 74 the GST Acts, 2017 for non payments of GST amounts Rs. 23,26,689/- and Rs. 21,42,055/-.
- (f) Not proposed penalty under Section 76 of the GST Acts



- (g) Not proposed penalty under Section 122(1)(iii), 122(1) (xvii) & 122(2)(b) of the GST Acts, 2017

4. Being aggrieved, the appellant filed the present appeal on 14.09.2022 on the following grounds that:-

- (a) It has been alleged that appellant failed to produce the documents evidencing the payment made to suppliers and due to non-availability of said documents, ITC was found to be ineligible and unutilizable for discharging Output Tax liability and needs to be reversed. The appellant had made the payment to all suppliers from whom inward supply has been made and ITC has been availed during July'17 to Dec'17. Appellant has made submission to the department related to payment made to suppliers like ledgers of Purchase, Purchase return sales, Sales retrun, Bank Statement etc through email dated 1.11.2018, 6.11.2019 and 17.6.2020 & 18.6.2020. It is further submitted that the appellant has made full payment to all suppliers from which inward supply has been taken and submitting all the proof of documents for payment made to suppliers, which is as per section 16(2) of CGST Act, 2017 read with Rule 37 of CGST Rules, therefore, the appellant is eligible to avail and utilized the Input Tax Credit for discharging their GST liabilities. Interest liability on late payment to suppliers amounting to Rs. 9580/- has been paid vide DRC-03 dated 13.09.2022.
- (b) Section 74 of the CGST Act, 2017 will not be applicable in the present case to demand tax as there is no suppression on their part, as the appellant filed GST Returns based on the transactions declared in books of accounts by utilizing full ITC credit for which payment has been made to suppliers. Mere non-filing of GST returns does not amount to wilful suppression or misstatement of facts for evading tax. The appellant had not suppressed the tax liability as they had recorded the tax liability in their books of accounts before DGGI initiated search proceedings. The appellant had accounted value of taxable supply in their books of accounts for which sufficient Input Tax Credit was available, but appellant has filed GSTR-1 and GSTR-3B returns lately in March 2018 i.e on 3.3.2018 by utilizing the ITC. The appellant has sufficient ITC for availment and discharging their GST liability, which proves the bonafide



belief of appellant for late filing of GST returns, and has no intention to evade tax or suppress the facts and there is no loss of revenue to the government exchequer in this case of late filing of return by utilizing the ITC. For this, the made reliance upon the judgment in the case of

➤ Super Industries 2017 (348) E.L.T. A127 (SC) wherein it is held that *"Details declared in the books of Accounts cannot be said to be suppressed"*

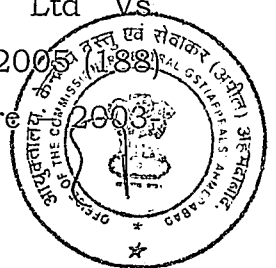
➤ Continental Foundation Jt. Venture Vs. Commr. Of C.Ex, Chandigarh-I [2007 (216) E.L.T. 177 (SC)] held that *"Suppression means failure to disclosed full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression."*

➤ Padmini Products V/s CCE 43 ELT 195 (SC) it is held that *"No suppression of facts if assessee had a bonafide belief"*.

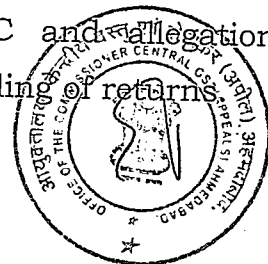
(c) GST law has provision of late fees and interest for late filing of returns means Govt. Can levy late fees and for late paying of tax, govt. can levy interest.

(d) The department claimed that if investigation was not conducted, appellant may have continued to apply the modus of collecting and not depositing GST to the Government. On presumption basis, the department has estimated that the appellant is evading tax by not filing GST returns. However, before the investigation, the appellant has disclosed all transactions in their books of accounts and disclosed it in Tax Audit Report dated 22.09.2018 proving appellant is in bonafide belief to pay tax, hence no intention to evade tax.

(e) The department relied on meaning of word "suppression" as per Explanation 2 of Section 74 of CGST Act, 2017, in this case, returns are filed, all information as disclosed in books of accounts before initiation of proceedings, this is not a case of fraud or suppression. Mere filing of returns after investigation not put the appellant in shoes of fraudster. Therefore, Section 74 of CGST Act, 2017 is not applicable in this case. They rely upon in the case of Anand Nishikawa Co. Ltd Vs Commissioner of Central Excise, Meerut [(2005) 7 SCC 749 = 2005 (188) E.L.T. 149 (SC) and Eastland Combines Vs. CCE, Coimbatore TIOL-26-SC-CX;



- (f) There is no provision under the CGST Act, 2017 to recover the amount equal to the ITC availed in terms of Section 16(2) of the CGST Act, 2017.
- (g) They are not liable to pay interest under Section 50 of the CGST Act, 2017 as appellant has been discharged GST tax liability of Rs. 21,42,056/- by utilizing ITC from Electronic Credit Ledger. Hence, demand of interest under Section 50 on the entire tax liability of Rs.21,42,056/- is liable to be dropped. For, this they made reliance on the judgment in the case of M/s. Refex Industries Limited in Madras High Court.
- (h) It further alleged that the appellant has not made payment to suppliers within the prescribed time period as per Section 16(2) of CGST Act, 2017 i.e 180 days from the date of invoice read with Rule 37 of the CGST Rule, 2017. The appellant has made full payment to all suppliers and also paid interest of Rs. 9580/- through DRC-03 dated 13.09.2022 as per Section 16(2) read with Rule 37 of CGST Rules, 2017, as there is no mechanism for implementation of Second proviso to Section 16(2) of the CGST Act, 2017. Hence, delay in payment cannot be said "Failure to pay".
- (i) They re-iterated that Section 74 of the CGST Act, 2017 will not be applicable in the present case to demand tax as there is no suppression of facts with intention to evade payment of tax and relied upon various decisions of the Apex Court in support of their contention.
- (j) The appellant is not liable to pay penalty under Section 74 of CGST Act, 2017 as the penalty is to depend on the totality of the facts and circumstances of the case. The appellant has disclosed tax payable mentioned in the SCN in the books of accounts prior to initiation of proceedings by the department and filed tax audit report, income tax returns etc., showing all such taxable services. Hence, the appellant is in bonafide belief to pay tax but due to complexity of computation of liability, it had delayed in filing of GST returns and paid the tax liability correctly. Penalty is not applicable in this case as appellant has discharged GST liability by full utilizing of ITC and allegation of suppression or fraud does not relevant for the late filing of returns.



In view of the above submissions the appellant prayed to drop proceedings sought to be initiated under the impugned order.

PERSONAL HEARING:

5. Personal hearing in this case was held on 8.12.2022, Shri Jitendra Chopra and Nancy Shah, both Chartered Accountants, appeared in person, on behalf of the appellant as authorised representative. They reiterated that they nothing more to add to their written submission till date.

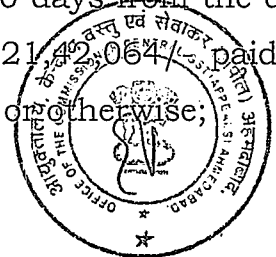
DISCUSSION AND FINDINGS:-

6. I have carefully gone through the facts of the case and the submissions made by the appellant in their grounds of appeal as well as at the time of personal hearing and find that appellant is mainly contesting the demand, interest and imposition of penalty under Section 16(2) read with Rule 37 of GST Rules, Section 50 and Section 74 and of the GST Acts, 2017. According to the appellant, it is a mere late payment to the suppliers, late payment of tax and late filing of returns and hence the provisions of Section 74 and Section 16(2) of the GST Acts, 2017 are not attracted. So the questions to be answered in the present appeal are

(i) whether the demand of tax paid by utilizing ITC Rs. 21,42,064/- and imposition of interest and penalty under Section 74 of the GST Acts, 2017 is proper or otherwise;

(iii) whether demand of ITC Rs. 23,36,689/- availed and added to output tax liability due to non payment to the suppliers within 180 days from the date of issue of invoices under Section 16(2) read with Rule 37 and penalty thereof under of Section 74 of the CGST Act, 2017 is proper or otherwise;

(ii) whether interest under Section 50 of the CGST Act, 2017 is applicable on the amount of ITC of Rs. 23,36,689/- not paid within 180 days from the date of invoices to the suppliers and GST tax liability of Rs. 21,42,064/- paid by debiting through Electronic Credit Ledger utilizing full ITC or otherwise;

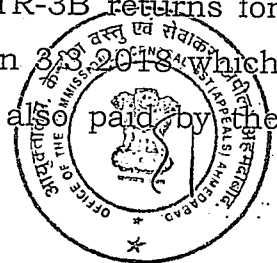


7. At the foremost, I observed that in the instant case the "impugned order" is of dated 13.06.2022 and the same has been communicated to the appellant on 20.06.2022 and the present appeal is filed on 14.09.2022. As per Section 107(1) of the CGST Act, 2017, the appeal is considered to be filed in time.

8. I find that the show cause notice proposed to recover the GST tax liability not paid by the appellant for the period from July-2017 to December-2017. I find that the appellant consequent to visit of DGGI officers on dated 05.02.2018 had filed all the pending GSTR returns for the period from July-2017 to December-2017 on 03.03.2018 and accounted for the details of taxable supply made for the period from July-2017 to December-2017 in their books of account. DGGI have determined the tax liability only from the books of accounts maintained by the appellant. Thus, the instant matter is just a case of delayed payment of tax liability on the part of appellant as no undeclared income or transaction was detected during the DGGI's investigation. I find that the show cause notice has taken reliance in the Explanation-2 given under Section 74 of the CGST Act, 2017 which explained the expression 'suppression' to allege that the appellant suppressed facts. Explanation-2 to Section 74 of the CGST Act 2017 reads as under:

"Explanation-2. — For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."

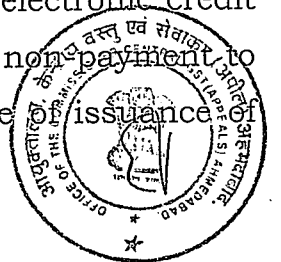
From the plain reading of the above explanation it is evident that suppression is (i) non-declaration of fact or information in the return, statement, report or any other document furnished or (ii) failure to furnish any information on being asked for. In the present case, the appellant had booked their transaction in their books of accounts and not filed GSTR-1 & GSTR-3B returns before the investigation took place. The amount of GST was determined on the basis of the transaction declared in their books of account. It is also observed that subsequently the appellant has filed their GSTR-1 and GSTR-3B returns for the disputed period i.e from July-2017 to December-2017 on 3.3.2018 which was admitted in the notice itself. All the tax dues were also paid by the



appellant while filing these GSTR-1 and GSTR-3B returns by utilizing full ITC from their Electronic Credit Ledger. In the circumstances, I find that present matter is not a case where suppression of facts or non-declaration on the part of the appellant is proved. Further the term 'suppression' as provided in the said explanation is failure to furnish information on being asked for. Since, before issuance of the show cause notice, I find that the appellant has submitted all the relevant documents and information to the department at the time of proceedings by DGGI and the show cause notice has been issued on the basis of information taken from the books of account of the appellant; it cannot be the case of failure to furnish information either. Therefore, I find that it is not a case for invoking the provisions of Section 74 of the CGST/IGST Act, 2017 for demanding the GST but it is a case of delayed payment of GST for which the GST Acts has provided the provision for payment of interest under Section 50 ibid and the demand was required to be confirmed under Section 73 of the CGST Act, 2017 and Gujarat GST Act, 2017 (the Acts).

8.1 I find that in the instant case, the appellant is registered with the department. They were making taxable supplies and in terms of Section 9, though they were levying and collecting GST, but were not discharging their tax liability as stipulated under Section 12 of the Act. They, however, subsequently filed their GSTR-1 for July-2017 to December-2017 and discharged their tax liability by filing GSTR-3B for the period July-2017 to December-2017, both returns on 03.03.2018 by utilizing the full ITC debiting through their Electronic Credit Ledger (ECL). Thus, the tax payments for these period as well as the statutory returns were filed subsequent to initiation of investigation but before issuance of Show Cause Notice. I also find that the appellant submitted the documents relating to payments to their suppliers as prescribed under Section 16(2) of the CGST Act, 2017.

8.2 I find that in the instant case, the GST liability of Rs. 21,42,064/- has been paid on 3.3.2018 by the appellant debiting through their Electronic Credit Ledger by availing and utilizing the full ITC available in their electronic credit ledger, which have been disallowed by the department due to non-payment to the suppliers by the appellant within 180 days from the date of issuance of



invoices under Section 16(2) of the CGST Act, 2017 read with Rule 37 of the CGST Rules, 2017. Relevant provisions of Section 16(2) and Rule 37 are reproduced below:

"SECTION 16. Eligibility and conditions for taking input tax credit.-

(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course of furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

(2) Notwithstanding anything contained in this section, no registered persons shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless-

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(aa) the details of invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner prescribed under section 37;

(b) he has received the goods or services or both.

Explanation: For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services-

(i) where the goods are delivered by the supplier to a recipient or any other person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise,

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person.

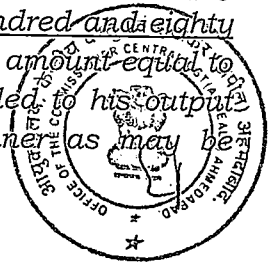
(ba) the details of input tax credit in respect of the said supply communicated to such registered person under section 38 has not been restricted;

(c) subject to provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39;

PROVIDED that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment;

PROVIDED FURTHER that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply alongwith tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be



prescribed:

PROVIDED ALSO that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) & (4)

"Rule 37: Reversal of input tax credit in the case of non-payment of consideration:-

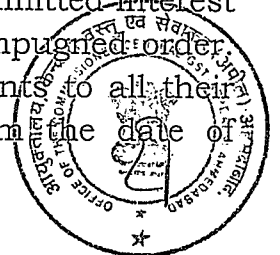
(1) A registered person,, who has availed of input tax credit on any inward supply of goods or services or both, but fails to pay to the supplier thereof, the value of such supply along with the tax payable thereon, within the time limit specified in the second proviso to sub-section (2) of section 16, shall furnish the details of such supply, the amount of value not paid and the amount of input tax credit availed of proportionate to such amount not paid to the supplier in FORM GSTR-2 for the month immediately following the period of one hundred and eighty days from the date of the issue of the invoice:

PROVIDED that the value of supplies made without consideration as specified in Schedule-I of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16:

PROVIDED FURTHER that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section(2) of section 15 shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of Section 16;

- (2) The amount of input tax credit referred to in sub-rule (1) shall be added to the output tax liability of the registered person for the month in which the details are furnished.
- (3) The registered person shall be liable to pay interest at the rate notified under sub-section(1) of section 50 for the period starting from the date of availing credit on such supplies till the date when the amount added to the output tax liability, as mentioned in sub-rule(2), is paid.
- (4) The time limit specified in sub-section (4) of Section 16 shall not apply to a claim for re-availing of any credit, in accordance with the provisions of the Act or the provisions of this Chapter, that had been reversed earlier."

In view of the above and from the submission of the documents alongwith appeal memorandum, I find that the appellant has made submission to the department related to payment made to suppliers like ledgers of Purchase, Purchase return sales, Sales return, Bank Statement etc through email dated 1.11.2018, 6.11.2019 and 17.6.2020 & 18.6.2020. It is observed from the documents submitted such as ledger of suppliers, bank account statement etc., copies of emails made to the department for the period in dispute, the appellant has paid payments to all their suppliers within stipulated time period of 180 days from the date of invoices as prescribed under Section 16(2) of the CGST Act, 2017, however, further they produced DRC-03 dated 13.09.2022 wherein they have paid interest of Rs. 9,580/- for payment of admitted interest liability under Rule 37 of the CGST Rules, 2017 against the impugned order. Thus, I find that when the appellant has already made payments to all their suppliers before the stipulated time period of 180 days from the date of



issuance of invoices upon which they avail the ITC, the appellant is eligible and admissible to avail the input tax credit and having a sufficient balance in their credit ledger against the tax liability, they may allow to utilize the same by way of discharging their tax liability debiting through Electronic Credit Ledger (ECL) as per the law. The department has not produce any proof or evidences that prove the appellant has not made payment to their suppliers within 180 days of time period from issuance of invoices as stipulated under Section 16(2) of the CGST Act, 2017. Hence, I do not find any inference in the contention of the department to disallow such admissibility and eligibility of ITC for which they are entitled and therefore there is no question of disallowing the eligible ITC to the appellant.

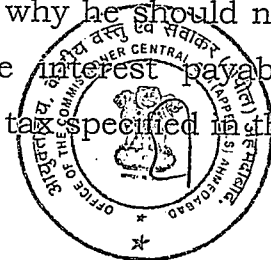
8.3 So far as the GST liability is concerned, I find the demand has been raised under Section 74(1) alleging suppression. Relevant text of Section 74 of CGST Act, 2017 is reproduced:-

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. — (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.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

Explanation 2. — For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.

8.4 On bare perusal of the legal provision under Section 74, it is apparent that in a case where it appears to a 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 utilized 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 paid or has been short paid or to whom refund has been erroneously 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 the interest payable thereupon under Section 50 and a penalty equivalent to the tax specified in the



notice. The ingredients of Section 74 of the Act require either of the following ingredients to be satisfied for proceeding thereunder i.e. that the tax in question has not been paid or short paid or erroneously refunded or the ITC has been wrongly availed or *utilized by reason of fraud or any wilful misstatement or suppression of facts to evade tax.*

8.5 In the instant case, the appellant has filed the GSTR-1 and GSTR-3B belatedly. The notice alleges that the appellant had suppressed the taxable income by not filing the GSTR-1 and GSTR-3B returns timely for the period from July-2017 to December-2017, under Section 37 & Section 39 of the CGST, Act, 2017. However, for the period from July-2017 to December-2017, the appellant did not file the GSTR-1 & GSTR-3B in time as the same were filed on 03.03.2018 i.e beyond the due date prescribed in the statute & after initiation of investigation by DGGI on 5.2.2018. So, both the returns were subsequently filed though belatedly and after initiation of investigation. I find that mere non-filing of returns and delayed payment of tax cannot be ground to invoke the provisions of fraud or wilful misstatement or suppression of fact. As to allege suppression, there should be non-declaration of facts or information in the return. The term 'suppression' in the explanation is defined as any non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer shall amount to suppression. I find that in the instant case, neither the demand notice nor the impugned order has brought out any non-declaration or any additional information on record to allege suppression of facts or established any suppression of facts to evade tax, which the appellant were required to declare in their GSTR-1 return, but failed to declare. I, therefore, find that the demand of ITC amounting to Rs. 21,42,064/- and ITC amounting to Rs. 23,36,689/- made under Section 74 (1) is not sustainable as no suppression is brought on record to invoke the provisions of extended period of limitation.

8.6 I, however, find that the demand would be sustainable under Section 73(1) of the CGST Act, 2017. I, therefore, in terms of Section 75(2) of the CGST Act, 2017, hold that the proper officer shall re-determine the tax payable by the



appellant by deeming the notice have been issued under Section 73(1) in accordance with the provisions of sub-section (2) of Section 75 of the said Act and within the time limit specified under Section 75(3). Relevant provision of Section 75(2) is reproduced below:-

SECTION 75. General provisions relating to determination of tax. —

(2) Where any Appellate Authority or Appellate Tribunal or court concludes that the notice issued under sub-section (1) of section 74 is not sustainable for the reason that the charges of fraud or any wilful misstatement or suppression of facts to evade tax has not been established against the person to whom the notice was issued, the proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of section 73.

8.6 This provision was further clarified by the CBIC vide Circular No.185/17/2022-GST dated 27.12.2022, wherein it was stated that where the show cause notice has been issued by the proper officer to a noticee under sub-section (1) of section 74 of CGST Act for demand of tax not paid/ short paid or erroneous refund or input tax credit wrongly availed or utilized, the appellate authority or appellate tribunal or the court concludes that the said notice is not sustainable under sub-section (1) of section 74 of CGST Act, for the reason that the charges of fraud or any wilful-misstatement or suppression of facts to evade tax have not been established against the noticee and directs the proper officer to re-determine the amount of tax payable by the noticee, deeming the notice to have been issued under sub-section (1) of section 73 of CGST Act, in accordance with the provisions of sub-section (2) of section 75 of CGST Act.

8.7 Thus, in terms of Section 75(2) of the CGST Act, 2017 and CBIC's clarification vide Circular No.185/17/2022-GST dated 27.12.2022, the impugned order confirming the tax payable by the appellant under Section 74(1), needs to be re-determined by the proper officer by deeming, as if the SCN has been issued under Section 73(1) of the Act.

9. I further find that the payment of GST liability and filing of GST returns were made much prior (i.e on 3.3.2018) to issue of the subject show cause notice dated 08.06.2020. Further, I find that the computation of GST liability



was made only on the basis of the records maintained by the tax payer. When the tax along with interest was paid before the issuing the notice, according to sub-section 5 of Section 73 of CGST/SGST Act 2017, no penalty was required to be imposed. Section 73 of the CGST/SGST Act 2017 which read as under:

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. —

(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 utilized 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.

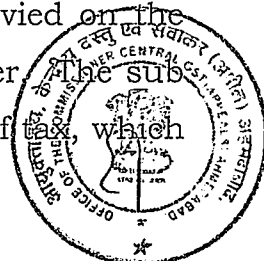
(2) to (4) ...

(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....

(8) to (11)"

9.1 I find that the adjudicating authority has held that the appellant is also liable to pay interest. In this regard, I find that the appellant submitted particulars of tax paid through Electronic Credit Ledger and contended that they are entitled to the benefit of the proviso to sub- section (1) of Section 50 of the CGST Act, 2017. The said proviso is for charging of interest only on that part of tax, which is paid through electronic cash ledger.

9.2 I find that, in the impugned order, the interest has been calculated on the entire amount of GST payable and ITC availed & utilized for duty payment. As per Section 50 of the CGST Act 2017, the interest shall be levied on the portion of the tax that is paid by debiting the electronic cash ledger. The sub-section (1) of Section 50 provides for interest on delayed payment of tax, which is reproduced below:

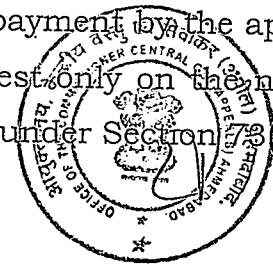


“SECTION 50. Interest on delayed payment of tax. — (1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax 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”.

[As per Section 112 of the Finance Act, 2021 this amendment has been with effect from 1st June, 2021 retrospectively from 1.7.2017, which has been notified vide Notification No. 16/2021-Central Tax, dated 01.06.2021.]

From the above discussions and plain reading of the substituted Section 50, it is clear that the interest under Section 50 of the CGST Act, 2017 can only be levied on the net tax liability and not on the gross tax liability where the supplies made during the tax period are declared in the return after the due date. However, where such returns are furnished after commencement of any proceedings under Section 73 or Section 74 in respect of said period, then interest shall be payable on the entire amount. In the instant case, I find that for the period July 2017 to December 2017, the returns were filed by the appellant before commencement of proceedings under Section 74. Therefore, in terms of amended Section 50, which was given retrospective effect vide Notification No. 9/2022-Central Tax dated 05-07-2022, the interest shall be payable only on the net cash tax liability (i.e. that portion of the tax that has been paid by debiting the electronic cash ledger or is payable through cash ledger). I, therefore, find that to that extent the demand of interest on the gross tax payable and ITC availed & utilized for duty payment by the appellant are not legally sustainable and order to recover interest only on the net cash tax liability subject to the re-determination of demand under Section 73 (1).



9.3 In this case, I find that, the interest has been demanded on the entire amount of GST including that paid by debiting from electronic credit ledger. I find that the appellant had discharged the entire tax liability of Rs.21,42,,064/- (CGST Rs.10,71,032/- + SGST Rs. 10,71,032/-) while filing GSTR-3B returns debiting through electronic credit ledger, which has also been mentioned in the impugned order. The appellant has discharged the tax liability through electronic credit ledger before issue of show cause notice. Therefore, I hold that there is no interest is payable in the present case on the above demands as discussed in para 8.2 above. Thus, it is a case of mere late payment of tax and since the tax is paid, however, interest is not payable on the liability discharged through Electronic Credit Ledger, no penalty is attracted and the proceedings are to be closed in accordance with sub-section (5) of Section 73 ibid which read as under:

"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."

10.4 I further find that interest is not leviable on the tax liability GST of Rs.21,42,,064/- (CGST Rs.10,71,032/- + SGST Rs. 10,71,032/-) and ITC demand of Rs. 23,36,689/- (CGST Rs.11,68,345/- & SGST Rs.11,68,345/-) as the duty liability has been discharged through Electronic Credit Ledger and they have made payment to the suppliers before 180 days time period as stipulated under Section 16(2) of the Act read with Rule 37 of CGST Rules, 2017 and sufficient balance in the Electronic Credit Ledger before utilizing the full ITC to pay GST liability as per Section 50(1) of the CGST Act, 2017 as amended by the Finance Act, 2021 with effect from 1.6.2021.

11. As the tax payer had paid the tax liability before issue of the notice as discussed in the above paras, therefore, as per the provisions contained in



Section 73(5), no penalty is attracted on GST amount of Rs. 21,42,064/- and ITC demand of Rs. 23,36,689/-.

12. On carefully going through the submissions of appellant I find that the appellant have made payments to their suppliers within 180 days of time limit and as per Section 16(2) of the Act, and they are entitle to avail such ITC and thus they discharge their GST liability through debiting electronic credit ledger on 3.3.2018. I further find that the appellant has contended that interest is levied only on **"ineligible ITC availed and utilized"** and not on **"ineligible ITC availed"**. They also contended that as tax has already been paid and interest is not payable on the eligible ITC as the same was eligible ITC to them, therefore penalty on such amount i.e on Rs.23,36,689/- will also not be applicable.

13 (i) Considering the foregoing facts, I hereby referred the provisions of Section 50 (3) of the CGST Act, 2017, the same is as under:-

SECTION 50 (3):- Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent, as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed.]

[As per Section 110 of the Finance Bill, 2022 this amendment has been with effect from 1st July, 2017, which has been notified vide Notification No. 09/2022-Central Tax, dated 05.07.2022.]

In view of above, it is abundantly clear that interest is leviable only if the Input Tax Credit has been wrongly availed and utilized. In the present matter, the appellant has availed only eligible / admissible ITC in their Electronic Credit Ledger. Further, I find that the balance of ITC in Electronic Credit ledger was sufficient to discharge their GST liability for the disputed period i.e from July 2017 to December 2017. Therefore, I find that interest is not leviable on the ITC i.e for Rs. 23,36,689/-. I further find reliance on the Order-In-Appeal No. AHM-EXCUS-002-APP-135/2022-23 dated 31.01.2023 passed by the Commissioner, Appeals, Ahmedabad, wherein in the similar case of M/s. Nami Steel Pvt Ltd, the appellate authority has ordered to re-determine the tax, interest and penalty under Section 73 of the CGST Act, 2017 as Section 74 of CGST Act, 2017 is not sustainable.



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14. Further, it is also observed that penalty has been imposed under Section 74 on the appellant. As the impugned order confirming the tax payable by the appellant under Section 74(1), needs to be re-determined by the proper officer, by deeming as if the SCN has been issued under Section 73(1) of the CGST Act, 2017, I, therefore, find that the imposition of penalty also needs to be re-determined in terms of Section 73 of the CGST Act, 2017. Needless to say that the appellant shall furnish all the relevant documents relating to the return periods as requisite under the law and rules made thereunder.

15. In view of the above discussions and findings, the impugned O-I-O is set aside to the above extent and sent back to the adjudicating authority for re-determination of tax, interest and penalty.

16. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeal filed by the *appellant* stands disposed of in above terms.

(Mihir Rayka)
Additional Commissioner (Appeals)
Date: 22.03.2023

Attested

(TEJAS J MISTRY)
Superintendent (Appeals)
Central Tax, Ahmedabad.

By R.P.A.D.

To,
M/s. Gopi Textiles, 672/5,
Bombay Market Cross Lane,
Railwayपुरा, Ahmedabad : 380 001

Copy to:

1. The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner [Appeals], CGST & C. Ex., Ahmedabad.
3. The Commissioner, CGST & C. Ex., Ahmedabad-North.
4. The Additional Commissioner, CGST & C.Ex., Ahmedabad-North
5. The Deputy/ Assistant Commissioner, CGST & C. Ex, Division-II [Naroda Road], Ahmedabad-North.
6. The Superintendent [Systems], CGST (Appeals), Ahmedabad.
7. G. File

