

ORDER-IN-APPEAL

BRIEF FACTS OF THE CASE :

M/s Nandini Herbal Care Pvt. Ltd., S/201, Signature Complex, Nr. Sela Over Bridge, Opp. Suvarna Bulngalows, Thaltej, Ahmedabad -380054 (GSTIN 24AABCN1992Q1ZY) (hereinafter referred to as "Appellant") has filed appeal against Order-In-Original GST-06/ D-VI/ O&A/ 747 /NANDINI / A.M/ 2022-23 dated 22-03-2023 (hereinafter referred to as the "impugned order") passed by the Assistant Commissioner, CGST & C.Ex., Division-VI, Ahmedabad-North Commissionerate (hereinafter referred to as the "adjudicating authority").

2. The facts of this case are that the Appellant are engaged in the business of supply of Herbal Cosmetic Products and were holding VAT Registration No. 24073801404. Subsequently on implementation of Goods & Service Tax, the appellant migrated into GST and is holding GSTIN 24AABCN1992Q1ZY. It was observed by the investigating team of Ahmedabad North Commissionerate that the appellant have not filed GSTR-1 and GSTR-3B returns and not paid GST amounting to Rs.1,29,82,425/- to the govt. exchequer for the period from September-2018 to February-2019. Thus by not discharging their tax liability and non-filing of the GSTR1-M and GSTR-3B returns, the appellant for the said period, have failed to comply with the provisions of Section 37 of the CGST/GGST, Act, 2017 read with Rule 59 of the CGST /GGST Rules, 2017 along with Section 39 of the CGST/GGST Act, 2017 read with Rule 61 or the CGST /GGST Rules, 2017 and Section 20 of the IGST Act, 2017.



3. Therefore the appellant was issued show-cause-notice dated 31-03-2022 as to why:

- (1) "The GST amount of Rs.1,29,82,425/- (IGST Rs.1,15,43,355/- + CGST Rs.7,19,535/- + SGST Rs.7,19,535/-) should not be demanded and recovered from them under Section 74(1) of the CGST Act, 2017 read with the Section 74(1) of the Gujarat GST Act, 2017 read with. Section 20 of IGST Act, 2017;
- (2) The GST amount of Rs.1,29,82,425/- (IGST Rs.1,15,43,355/- + CGST Rs.7,19,535/- + SGST Rs.7,19,535/-) paid through ITC/cash, should not be appropriated against their outstanding GST tax liability as per para (1) above.
- (3) Interest on applicable rates should not be demanded and recovered from them under provisions of Section 50 (1) of the CGST Act, 2017 read with Section 50 (1) of the Gujarat GST Act, 2017 and Section 20 of the IGST Act, 2017 on the total GST liability of Rs.1,29,82,425/- paid by them as per para (2) above.
- (4) Interest of Rs.1,57,630/- paid through cash, should not be appropriated against their outstanding interest liability as per para (3) above.
- (5) Penalty should not be imposed upon them under Section 74(1) of the CGST Act, 2017 read with Section 74(1) of the Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 on the GST liability of Rs.1,29,82,425/- mentioned at Sr. No. (1) above.
- (6) Penalty should not be imposed upon them under Section 122(2) (b) and read with Section 122(1)(iii) of the CGST Act, 2017, read with Section 122 (2)(b) and read with Section 122(1)(iii) of the Gujarat GST Act, 2017, read with Section 20 of IGST

Act, 2017 for reason of fraud or wilful misstatement or suppression of facts to evade tax.”

4. The adjudicating authority, vide the impugned order dated 22-03-2023, passed the following order:

- (i) “I confirm and order to recover the GST amount of Rs.1,29,82,425/- (IGST Rs.1,15,43,355/- + CGST of Rs.7,19,535/- + SGST Rs.7,19,535/-) under Section 74 of the CGST Act, 2017 read with SGST Act, 2017 and IGST Act, 2017 as applicable and since the said amount has already been paid by the Noticee, I appropriate the same against the liability.
- (ii) I confirm and order to recover interest of Rs.5,00,530/- under Section 50 of the CGST Act, 2017, read with SGST Act, 2017 and IGST Act, 2017. Since the interest amount of Rs.1,57,630/- is already paid, I appropriate the same against the liability.
- (iii) I impose penalty of Rs.1,29,82,425/- (IGST Rs.1,15,43,355/- + CGST of Rs.7,19,535/- + SGST Rs.7,19,535/- under Section 74(1) read with Section 122 (2) (b) and Section 122(1)(iii) of the CGST Act, 2017 and SGST and IGST Act, 2017 as applicable.”

5. Being aggrieved with the impugned order, the appellant filed present appeal on the following grounds:

“1.1 The impugned order dated 22.03.2023 has been passed based on the SCN which was issued in violation of the Principles of Natural Justice.

1.2 The appellant submit that Natural Justice is the essence of fair adjudication and it is fundamental to the administration of justice. Purpose of following the Principles of Natural Justice is to prevent miscarriage of justice. It is submitted that SCN needs to be based on the Principles of Natural Justice. No further investigation has been done by the Learned Adjudicating Authority and no opportunity has been provided to the appellant before issuance of the SCN as the Learned Adjudicating Authority issued SCN within 9 days of issuing DRC- 01A. It is now well settled that Principles of Natural Justice and *audi alteram partem* which means no one should be condemned unheard are part of Article 14 of the Constitution of India and that Principles of Natural Justice applies even to the administrative orders affecting the rights of citizens.

1.3 The Hon'ble Supreme Court in the case of *Uma Nath Pandey Vs State of UP* reported at 2009 (237) ELT 241(S.C) explained meaning of natural justice and held that First rule is 'nemo judex in causa sua' meaning 'no man shall be a judge in his own cause' and Second rule of natural justice is 'audi alteram partem' meaning no one should be condemned unheard. It was thus held that, hearing should be given to each Assessee

1.4 In *UOI Vs. Hani/ Era Textiles Ltd.* reported at 2017 (349) ELT 384 (S.C) it was held that *Audi Alteram Partem* is basic principle of natural justice which ensures opportunity of fair hearing to parties.

1.5 Hence the impugned order has been passed by the Learned Adjudicating Authority without providing any opportunity of being heard.

2. Neither DRC 01A, DRC 01 nor DRC 07 have been issued as prescribed in law:

2.1 The impugned order has not been issued as per the Rule 142 of the CGST Rule, 2017 reproduced here below as:

Rule 142. Notice and order for demand of amounts payable under the Act. -

(1) The proper officer shall serve, along with the

(a) Notice issued under section 52 or section 73 or section 74 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130, a summary thereof electronically in FORM GST DRC-01,

(b) statement under sub-section (3) of section 73 or sub-section (3) of section 74, a summary thereof electronically in FORM GST DRC-02, specifying therein the details of the amount payable.

(1A) The [proper officer may], before service of Notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, 4[communicate] the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A.};

(2) Where, before the service of Notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-section (5) of section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of subsection (5) of section 74, or where any person makes payment of tax, interest, penalty or any other amount due in accordance with the provisions of the Act [whether on his own ascertainment or, as communicated by the proper officer under sub-rule (1A),] he shall inform the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in FORM GST DRC-04 .

[(2A) Where the person referred to in sub-rule (1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he may make such submission in Part B of FORM GST DRC-01A.]

(3) Where the person chargeable with tax makes payment of tax and interest under sub-section (8) of section 73 or, as the case may be, tax, interest and penalty under sub-section (8) of section 74 within thirty days of the service of a Notice under sub-rule (1), or where the person concerned makes payment of the amount referred to in sub-section (1) of section 129 within [seven days of the notice issued under sub-section (3) of Section 129 but before the issuance of order under the said sub-section (3)], he shall intimate the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an order in FORM GST DRC-05 concluding the proceedings in respect of the said Notice.

(4) The representation referred to in sub-section (9) of section 73 or sub-section (9) of section 74 or sub-section (3) of section 76 or the reply to any Notice issued under any section whose summary has been uploaded electronically in FORM GST DRC-01 under sub-rule (1) shall be furnished in FORM GST DRC-06.

(5) A summary of the order issued under section 52 or section 62 or section 63 or section 64 or section 73 or section 74 or section 75 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130 shall be uploaded electronically in FORM GST DRC-07, specifying therein the amount of [tax, interest and penalty, as the case may be, payable by the person concerned].

(6) The order referred to in sub-rule (5) shall be treated as the Notice for recovery.

(7) Where a rectification of the order has been passed in accordance with the provisions of section 161 or where an order uploaded on the system has been withdrawn, a summary of the rectification order or of the withdrawal order shall be uploaded electronically by the proper officer in FORM GST DRC-08.

2.2 We have neither received DRC 01A, DRC 01 nor DRC 07 in electronic form as prescribed by Rule 142 of the CGST Rule, 2017. Henceforth the Order (DRC 07), SCN (DRC 01) and Pre SCN (DRC 01A) issued are in violation to rule 142.

3. SCN issued is bad under the law

3.1 The SCN and even the DRC-01A has not considered that we had discharged our Tax Liability amounting Rs.1,29,82,425/- along with Interest applicable in the month of March'19. Whereas the DRC-01A was issued lately on 21.03.2022 which indicates that we have already discharged our liability well before 36 months of issuance of DRC-01A & SCN.

3.2 The SCN had been issued on 31.03.2022 demanding Interest on Gross Liability and Penalty u/s 74 of the CSGT Act 2017 within 9 days of issuing DRC-01A. wherein they had earlier demanded Interest of Rs.1,57,630/- calculated on Net Tax Liability in DRC-01A.

3.3 Therefore, the SCN itself contradict the DRC-01A issued by Deputy Commissioner, CGST, Ahmedabad-North. This creates ambiguity in relation to how the Learned Adjudicating Authority in OIO changes amount of the Interest levied from Rs.1,57,630/- to Rs.5,00,530/-.

4. We had no Intention to evade Tax as the Tax Amount was clearly shown as GST Payable in our Tally record during the said period.

4.1 It is very interesting to note that SCN had been issued to us on 31.03.2022 u/s 74 of the CGST Act 2017 for suppressing facts to the departments but following two facts was already available to the Learned Adjudicating Authority at the time of issuance of SCN which can prove that there was no suppression of facts from the department.

a) We had discharged our GST liability along with Interest and submitted all the GSTR 1 and GSTR 3B returns with late filing fees. Copies of the GSTR 3B Returns are attached as Annexure-E, which shows that we have intimated to the department that we have paid the GST along with interest.

b) A statement of our director Shri Suryakant Karsanbhai Patel was recorded under Section 70 of the CGST Act, 2017 before the Superintendent of the CSGT, Preventive (P.O.) Ahmedabad on 15.03.2019 wherein we had made available Tally records indicating GST Payable. Provided along with SCN The reasons we had not discharged the same was due financial Crisis and sudden demise of director's son (Aarsh Suryakant Patel) who was suffering Cerebral Palsy for the last 14 years. However, if the Learned Adjudicating Authority demands we can provide bank statement to substantiate that the appellant was facing acute shortage of funds during the said period.

5. Medical Emergency in family shall constitute as sufficient cause for delay.

5.1 Our Director (Suryakant Karsanbhai Patel) is the main authority supervising accounting as well as all other matter for the company. During Sept'18 to Feb'19 he had faced a lot of difficulties due to ill health of his son (Aarsh Suryakant Patel) who was suffering from Cerebral Palsy for the last 14 years and had sadly died on 15.02.2019.

5.2 As per the Information available from the website of National Institute of Neurological Disorder and Stroke, Cerebral Palsy refers to a group of neurological disorders that appear in infancy or early childhood and permanently affect body movement and muscle coordination. CP is caused by damage to or abnormalities inside the developing brain that disrupt the brain's ability to control movement and maintain posture and balance. The term cerebral refers to the brain; palsy refers to the loss or impairment of motor function.

5.3 Cerebral Palsy is the leading cause of childhood disabilities, while a person with severe CP might need special equipment or lifelong care.

• Diagnosing Cerebral Palsy

Most children with cerebral palsy are diagnosed during the first two years of life. But if a child's symptoms are mild, it can be difficult for a doctor to make a reliable diagnosis before the age of 4 or 5. Doctors will order a series of tests to evaluate the child's motor

skills. During regular visits, the doctor will monitor the child's development, growth, muscle tone, age-appropriate motor control, hearing and vision, posture, and coordination, in order to rule out other disorders that could cause similar symptoms.

• *Treating Cerebral Palsy*

Cerebral palsy can't be cured, but treatment will often improve a child's capabilities. Many children are able to manage their disabilities; the earlier treatment begins; the better chance children have of overcoming developmental disabilities. There is no standard therapy that works for every person with CP. Referrals to specialists such as a child neurologist, developmental paediatrician, ophthalmologist, or otologist aid in a more accurate diagnosis and help doctors develop a specific treatment plan.

5.4 *We hereby provide list of Medical records and documents available which clearly identify the disorder and condition of his son. -----*

5.5 *From the above records and information available from National Institute of Neurological and Disorder Stroke it is clear that children diagnosed with such disease requires much attention and care on continuous basis.*

5.6 *Our director (Suryakant Karsanbhai Patel) had to continuous travel to different places for treatment of his son during last 14 years but especially last 6 months as the health of son deteriorated. Due to aforesaid reasons he was unable to devote appropriate time and attention to the affairs of the company. Therefore, the Learned Adjudicating Authority should consider the psychological condition as well as the trauma faced by him during the said period.*

A similar issue has been addressed by CESTAT -DELHI in the case of SMT. MANJEET KAUR BANSAL, DIRECTOR VERSUS COMMISSIONER OF SERVICE TAX/GST, DELHI (RAJASTHAN) - Order No. - FINAL ORDER No. 51845/2021 Dated: - 21-9-2021. Relevant Para of judgement is reproduced here below:

9. *The authority has miserably failed to distinguish the non-payment of tax for the reasons beyond the control of the assessee from the situation where the assessee has failed to deposit tax with the sole intention to not to deposit the same. Section 78 / 78A can be attracted only in the later situation. I observe that there are ample medial documents on the record of this appeal. Perusal whereof reveals that the spouse of the appellant was diagnosed a brain lesion way back in the year 2005 when he was for the first time operated. The surgical interventions were repeated as it was again in 2008, 2014 and lately in 2017 thereafter he even went into Coma and finally passed away. This situation definitely was one of the gravest situations for the present appellant to actually to not be fully aware about the day-to-day affairs of the Company. There is sufficient admission of Amar Sigh Gautam that he was looking after the financial affairs of the Company. The financial statements in the form of balance-sheets, tax returns etc. as placed on record bear his signature aster person authorized for the Company. None of those documents bear the signature of the appellant. Department has not produced any such documents for a subsequent period where the appellant would have been a signatory to such returns. Mere oral submission of Mr. Amar Singh Gautam that he was acting under the guidance of the appellant cannot be fully sufficient for holding at least that the appellant had the knowledge and the intent to not to make the impugned payment.*

(Emphasis Supplied)

• *In the above case attached hereby as Annexure-G, the authority had considered the hardship faced by the appellant due to medical emergency aroused in the family as sufficient cause for being unaware of going business activity.*

6. *Interest imposed u/s 50 (1) of the CGST Act 2017 as calculated by the Authority in the OIO is not appropriate.*

6.1 The Learned Adjudicating Authority has calculated the Interest payable for the period September 18 to February 2019 on the Gross Tax liability and not on the Net Tax Liability i.e. Tax paid through Cash portion.

6.2 In Para 19 of the OIO the Learned Adjudicating Authority refers to Section 100 of the Finance (No.2) Act 2019 wherein Amendment was made to Section 50 of the CGST Act 2017 produced as below:

100. In section 50 of the Central Goods and Services Tax Act, in sub-section (1), the following proviso shall be inserted, namely: --

"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."

• The said Amendment came into force on 1st day of September, 2020 through NOTIFICATION NO. 63/2020-Central Tax dated 25.08.2020.

6.3 However, the Learned Adjudicating Authority ignores Section 112 of The Finance Act, 2021 wherein Amendment was made to Section 50 of the CGST Act 2017 produced below:

112. In section 50 of the Central Goods and Services Tax Act, in sub-section (1), for the proviso, the following proviso shall be substituted and shall be deemed to have been substituted with effect from the 1st day of July, 2017, namely: --

"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 payable on that portion of the tax which is paid by debiting the electronic cash ledger."

• The said Amendment came into force on 1st day of June, 2021 through NOTIFICATION NO. 16/2021 - Central Tax dated 01.06.2021.

6.4 Seeing to the facts and circumstances, the Learned Adjudicating Authority clearly misses the Amendment made to Section 50 of the CGST Act 2017 made applicable through Section 112 of The Finance Act 2021.

6.5 A Similar issue has been addressed by the Gujarat High court in case of SUMILON POLYSTER LTD. Versus UNION OF INDIA - 2023 (68) G.S.T.L.116 (Guj.)/(2022) 1 Centax 285 (Guj.) [27-07-2022]. Relevant para of the Judgment is reproduced here below:

8. In view of the above submissions, these petitions are disposed of as having become infructuous in view of the amendment of Section 50 (1) of the CGST Ad by substituting the proviso w.e.f. 1st day of July, 2017 as per Section 112 of the Finance Act, 2021 which has been made effective vide Notification No. 16 of 2021 dated 1-6- 2021. Respondents are directed to give effect to the aforesaid amendment within a period of twelve weeks from the date of receipt of this order. Interim relief granted earlier stands vacated. Notice is discharged.

• From the above judgement it is clearly evident that Interest u/s 50 of the CGST 2017 shall be paid on Net Tax Liability i.e. Tax paid through Cash Portion only considering Amendment made in Section 50 of the CGST Act 2017 made applicable through Section 112 of The Finance Act 2021. The above case is hereby attached as Annexure-H.

6.6 Therefore, Interest calculated by the Learned Adjudicating Authority on the Gross Tax Liability is not appropriate and should be set aside as we have already paid the applicable interest on the Net Tax Liability while filing the return for the period of dispute which is been considered by the Learned Adjudicating Authority in the Order in Original against the said liability.

7. Penalty u/s 74 (1) read with Section 122 (2) (b) and Section 122 (1) (iii) is not applicable.

7.1 The Learned Adjudicating Authority imposing the penalty u/s 74 of the CGST Act 2017 read with Section 122 (2) (b) and Section 122 (1) (iii) without proving the intention to evade tax on account of fraud or wilful suppression enacted by the appellant is illegal and unlawful.

7.2 Section 74 of the CGST Act 2017 is produced as below:

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 willful- 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.

Thus, the phrase "to evade tax, either by way of fraud or through wilful misstatement or through suppression of facts" in Section 74 of the Act assumes abundant importance. The word "evade" in the context means defeating the provisions of law of paying tax. It is made more stringent by use of the word "intent". The taxpayer must deliberately avoid the payment of tax which is payable in accordance with law. For the purpose of issuing a proposal under Section 74 of the Act, the case has to be of such a nature that on the face of the records, the authority concerned should be convinced that the contravention is with a definite intent to evade payment of tax. In other words, the authorities need to make out a very strong case. A fundamental postulate of jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being penalised despite being innocent.

7.3 The Appellant was unable to file the return due on account of financial crunches and sudden death of director's only son who was suffering from cerebral palsy for the last 14 years. This reflects the situation of the appellant where it was difficult to file the return on time due to genuine hardship faced during the period.

7.4 As a matter of fact, the appellant has filed the Returns due immediately after Panchnama was being issued on 15.03.2019 along with applicable Interest and late fees before issuance of any further notice to him. This shows the appellant had no intention to evade tax and henceforth no penalty shall be imposed on account of genuine hardship faced by the appellant.

7.5 A similar issued has been addressed under CESTAT, PRINCIPAL BENCH, NEW DELHI in the case of COMMISSIONER OF CENTRAL EXCISE, INDORE (M.P.) Versus MUKESH JAIN - 2012 (28) S.T.R. 277 (Tri. - Del.)

7. In this case, the sub-broker had taken service tax registration in 20-1-2005. Initially, service tax was paid and returns were filed. It appears that from April, 2006 onward when in spite of reminders, returns were not being filed and inquiry in this

case was conducted by the department in 2008, it was learnt that the respondent in spite of service tax registration were not paying service tax since April, 2006 due to financial difficulties though the tax till March, 2006 had been paid. It is not disputed that immediately after non-payment of service tax was pointed out, the same was paid along with interest. The lower authorities have treated this as a case covered under Section 73(3) of the Finance Act, 1994 under which where any service tax has not been levied or has been short-levied or short paid or erroneously refunded, the persons chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid. Since in this case, the department does not dispute that the non-payment of tax during the period was on account of financial difficulties having been suffered by the respondent and since immediately after on being pointed out, the respondent paid the entire amount along with interest, I am of the view that this case is covered by the provisions of Section 73(3) and hence, penalty under Sections 76 and 78 was not called for. In view of this, I do not find any infirmity in the impugned order. The Revenue's appeal is dismissed. Cross objection filed by the respondent also stands disposed of.

(Emphasis Supplied)

In the above case the Learned Adjudicating Authority states that when the tax and interest is paid along with the returns furnished which is not being disputed by the department then no penalty shall be imposed for the said period on account of genuine hardship faced by the appellant. Henceforth no penalty shall also be imposed on us. The above case is attached hereby as Annexure-I.

7.6 Reliance in this regard can be placed on the case of Anand Nishikawa Co. Ltd. v. Commission of Central Excise, Meerut (Supra) wherein it was held as follows:

Reliance on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to Section 11A of the Act ... "

(Emphasis Supplied)

Further, the appellant has requested to set aside the impugned order and grant the relief.

PERSONAL HEARING:

6. Personal hearing in this case was held on 28.07.2023. Shri Nitesh Jain, Chartered Accountant appeared in person, on behalf of the appellant as authorised representative. He reiterated the written submissions and submitted that it is not a case of evasion of taxes but only delayed filing of return. He further submitted that delay in filing was occurred due to ill health

of only son of the Director of the Company (appellant) and eventual death on 15.02.2019. They have paid all the dues of Taxes along with interest within 11 days of inspection conducted by the preventive team i.e. between 15-03-2019 to 26-03-2019 much before the issuance of SCN i.e. on 31-03-2022 and requested to allow the appeal.

Discussion & findings:

7.1 I have carefully gone through the facts of the case and the submissions made by the appellant in their grounds of appeal and find that the appellant is mainly contesting the interest and penalty on the delayed filing of returns and delayed payment of GST for the period September-2018 to February-2019.

7.2 So the question to be answered in the present appeal is:

(a) Whether the interest of Rs.5,00,530/- charged to be recovered on total GST liability of Rs.1,29,82,425/- (IGST Rs.1,15,43,355/-,CGST Rs.7,19,535/- and SGST Rs.7,19,535/-) for the period September-2018 to February 2019 under section 50 of the CGST/GGST Act, 2017 read with Section 20 of the IGST Act, 2017 is proper or otherwise

(b) Whether the Penalty of Rs.1,29,82,425/- imposed under Section 74(1) read with Section 122(2)(b) and Section 122(1)(iii) of the CGST/GGST Act, 2017 read with Section 20 of the IGST Act, 2017 is proper or otherwise?



At the foremost, I observed that in the instant case the "impugned order" is of dated 22-03-2023 and the present appeal is filed on 08.05.2023. As per Section 107(1) of the CGST Act, 2017, the appeal is required to be filed within three months time limit. Therefore, I find that the present appeal is filed within normal period prescribed under Section 107(1) of the CGST Act, 2017. Accordingly, I am proceeding to decide the case.

7.4 In the instant case, I find that the appellant are engaged in the business of supply of Herbal Cosmetic Products and were holding VAT Registration No. 24073801404. Subsequently on implementation of Goods & Service Tax, the appellant migrated into GST and is holding GSTIN 24AABCN1992QIZY. They failed to file the GSTR-1 and GSTR-3B returns for the period from September'2018 to February'2019 timely and failed to pay GST to the govt. exchequer by the due dates. Therefore GST liability amounting to Rs.1,29,82,425/- was ordered to be recovered from the appellant under the provisions of Section 74(1) of the CGST/Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017 alleging the suppression of facts with intent to evade payment of Tax and as the same has been paid by the appellant after initiation of inquiry, the adjudicating authority has confirmed and appropriated the same against the GST liability raised under the provisions of Section 74(1)

of the CGST/Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017. Further Interest of Rs.5,00,530/- has been confirmed which is on total GST liability, to be recovered under section 50 of the CGST/GGST Act, 2017 read with Section 20 of the IGST Act, 2017 and since the interest of Rs.1,57,630/- has already been paid by the appellant, the same has been appropriated by the adjudicating authority. Also a Penalty of Rs.1,29,82,425/- has been imposed under Section 74(1) read with Section 122(2)(b) and Section 122(1)(iii) of the CGST/GGST Act, 2017 read with Section 20 of the IGST Act, 2017 as applicable and ordered to be recovered from the appellant.

7.5 Further, I find that the appellant did not file GSTR-1 and GSTR-3B for the period September-2018 to February-2019 and not paid GST amount of Rs.1,29,82,425/- (IGST Rs.1,15,43,355/-,CGST Rs.7,19,535/- and SGST Rs.7,19,535/-) timely due to financial crunch and sudden death of his son. The said Returns were filed subsequently between 15-03-2019 and 26-03-2019 and the GST of Rs.1,29,82,425/- (IGST Rs.1,15,43,355/-,CGST Rs.7,19,535/- and SGST Rs.7,19,535/-) was paid by the appellant. This clearly shows that the business of the appellant was going on, they have supplied goods to different recipients and collected the GST but did not deposit the same to the Government account in stipulated time period. As a result they have failed to comply with the statutory provisions of the GST Act, 2017 by not showing the outward supplies in their GSTR-1 M return and not paying the tax collected/ amount of GSTR-3B Return. I understand the difficulty faced by appellant during this hard time, but I am abide by the law and proceed further. As the said amount of GST has been ordered to be recovered under Section 74 of the CGST/GGST Act, 2017 read with Section 20 of the IGST Act alleging suppression of facts, I refer to the term 'suppression' as explained in the explanation of Section 74 of the GST Act, which is defined as under:

"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 there under, or failure to furnish any information on being asked for, in writing, by the proper officer".

7.6 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, which the appellant were required to declare in their GSTR- Return, but failed to declare. I, therefore, find that demand made in the instant case, under Section 74 (1) is not sustainable as no suppression of facts or mens-rea is brought on record to invoke the provisions of Section 74 of the CGST/GGST Act, 2017.

7.7 I, however, find that the demand should have been raised 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.”

7.8 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 willful-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 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.

7.9 Thus, in terms of Section 75(2) of the CGST Act, 2017 and CBIC's above clarification, the impugned order confirming the GST of Rs.1,29,82,425/- (IGST Rs.1,15,43,355/-,CGST Rs.7,19,535/- and SGST Rs.7,19,535/-) has been demanded to be recovered from the appellant under the provisions of Section 74(1) of the CGST Act, 2017 and appropriated the same, needs to be determined by the proper officer by deeming, as if the SCN has been issued under Section 73(1) of the Act.

7.10 Further with regard to the applicability of interest, I refer to the relevant provision of Section 50(1) of the CGST Act, 2017, which is reproduced as under:

“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.”

Subsequently, amendments were made in Section 50 vide F.A (NO.2), 2019 and Further vide F.A. 2021 and the amended provision was given effect from 01.07.2017. The amended provisions are 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:

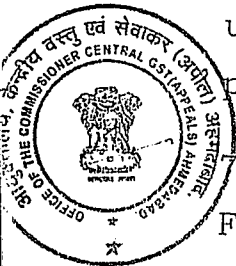
[Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section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

The above provisions were made effective with effect from 1st July, 2017 vide Finance Act, 2021".

7.11 From the plain reading of the above Section 50 (as amended), 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 of delayed debit/payment.

7.12 In the instant case, I find that for the period September-2018 to February-2019, the GSTR-1 and GSTR-3B returns were filed by the Respondent after initiation of investigation. Thus, the tax payments for these period as well as the statutory returns were filed subsequent to initiation of investigation but before issuance of SCN under Section 74 of the GST Act, 2017. Therefore, in terms of amended Section 50 of the GST Act, vide The Finance Act 2021 (No. 13 of 2021), which was given retrospective effect w.e.f. 01-07-2017 vide Notification No. 16/2021-CT, dated 01-06-2021, 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).

7.13 In view of the above, I find that the appellant has paid the interest on Cash liability, which as per my view is as per the provisions of Section 50 of the GST Act. However, as the demand needs to be determined by the proper officer by deeming, as if the SCN has been issued under Section 73(1) of the GST Act, I, therefore, find that the interest paid on Cash Portion which is proper as per the amended provisions of Section 50 of the CGST/GGST Act, 2017, also needs

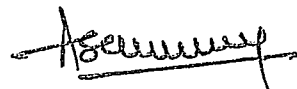


to be re-determined, on the demand raised to be re-determined in terms of Section 73 of the GST, Act, 2017.

7.14 Further, it is also observed that penalty has been imposed under Section 74 of the CGST/GGST Act, 2017; read with Section 122(2)(b) and Section 122(1)(iii) of the CGST/GGST Act read with Section 20 of the IGST Act, 2017. As the impugned order confirming the demand of GST amount Rs.1,29,82,425/- (IGST Rs.1,15,43,355/-,CGST Rs.7,19,535/- and SGST Rs.7,19,535/-) has been confirmed to be recovered from the appellant and appropriated the same, under the provisions of Section 74(1) of the CGST Act, 2017, needs to be determined by the proper officer by deeming, as if the SCN has been issued under Section 73(1) of the GST Act. I, therefore, find that the imposition of penalty also needs to be adjudged in terms of Section 73 of the GST, Act, 2017.

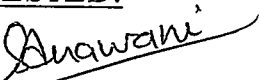
8 In view of the above discussions and findings, the impugned O-I-O is set-aside and sent back to the adjudicating authority for re-determination of tax, interest and penalty, as above.

9. 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.



(ADESH KUMAR JAIN)
JOINT COMMISSIONER (APPEALS)
CGST & C.EX., AHMEDABAD.

ATTESTED.


(SUNITA D.NAWANI)
SUPERINTENDENT
CGST & C.EX.(APPEALS),
AHMEDABAD.



By R.P.A.D.

M/s. Nandini Herbal Care Pvt. Ltd., S/201, Signature Complex, Nr. SelaI Over Bridge, Opp. Suvarna Bulngalows, Thaltej, Ahmedabad -380054.
(GSTIN 24AABCN1992Q1ZY)

Copy to:

1. The Principal Chief Commissioner of CGST & C.EX., 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 Dy/Asstt. Commissioner, CGST & C. Ex, Division-VI Ahmedabad-North.
6. The Superintendent [Systems], CGST (Appeals), Ahmedabad.
7. Guard File/ P.A. File.

