



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- 20231264SW0000777F03

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या File No : GAPPL/ADC/GSTP/2966/2023 -APPEAL 19/12/23 - 56

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-CGST-001-APP-JC- 177/2023-24

दिनांक Date : 30.11.2023 जारी करने की तारीख Date of Issue : 08.12.2023

श्री आदेश कुमार जैन संयुक्त आयुक्त (अपील) द्वारा पारित

Passed by Shri Adesh Kumar Jain, Joint Commissioner (Appeals)

ग Arising out of Order-in-Original No. 287 /AC/C Doctor India / DIV-III/A'BAD-SOUTH/JDM/2022-23 dated 28.04.2023 issued by The Assistant Commissioner, CGST & CX, Division II, Ahmedabad South.

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Appellant	Respondents
M/s C. Doctor India Pvt Ltd., Plot No 3607-3608 GIDC Estate, Phase IV Vatva GIDC, Ahmedabad, Gujarat - 382445	The Assistant Commissioner, CGST & CX, Division II, Ahmedabad South

- (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 से 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/अपीलिय आदेश

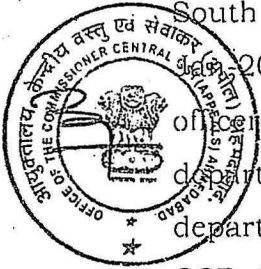
This order arises out of an appeal filed by M/s. CDoctor India Pvt Ltd., Plot No 3607-3608 GIDC Estate, Phase IV, GIDC-Vatva, Ahmedabad - 382445, Gujarat, (GSTIN: 24AAACI3673A1Z3),(hereinafter referred to as the 'Appellant') against Order in Original No. 287/AC/C Doctor India/DIV-II/A'BAD-SOUTH/JDM/2022-23 dated 28.04.2023 (hereinafter referred to as the 'impugned order') passed by the Assistant Commissioner, CGST &, C. Ex., Division-II, Ahmedabad South Commissionerate (hereinafter referred to as the 'adjudicating authority').

2. Briefly stated the facts of the case are that the 'Appellant' were holding GST Registration No. 24AAACI3673A1Z3 and are engaged in manufacturing and supply of heat Exchanger & Pressure Vessel and industrial vacuum etc. and also availing input tax credit on purchase of inputs, inputservices and capital goods, as may be eligible to them under the Provisions of Central Goods and Services Tax Act, 2017.

2.1 Based on an Intelligence by the Preventive section of CGST Ahmedabad South Commissionerate that the appellant has not filed GSTR-3B returns from 2018 onwards and not fulfilled their GST liability. The investigating officers observed that the appellant was registered with erstwhile Service Tax department under registration no. AMCI3673AST002, erstwhile Central Excise department under registration no. AAACI3673AXMOO2 and presently with the GST department having GSTIN 24AAACI3673A13. It was also observed that they had not filed their mandatory Service Tax returns (ST-3) from April-2016 to June-2017 and they have not filed their GSTR-3B Returns from Jan-2018 onwards which was ultimately accepted by Shri Bharatkumar Jain, General Manager, in his statement recorded on 14.08.2018.

2.2 On the basis of documents submitted by the appellant, it was observed that during the period April-2016 to June-2017 the appellant had provided taxable service under the erstwhile service tax regime, but have failed to fulfill their Service Tax liability as per books of accounts. On being pointed out, the appellant readily discharged the entire service tax liability of Rs. 29,98,866/- along with interest amounting to Rs. 13,41,709/- and penalty amounting to Rs. 4,49,830/- Rs. 20,000/- was also paid by them towards late fees. Accordingly, the Inquiry in respect of non-payment of Service tax for the period April-2016 to June2017 was concluded by the Competent Authority.

2.3 Further, it was found in the investigation conducted that they were not filing the GST Returns, viz. GSTR-1M for the month of June 2018 and GSTR-3B for the period from January-2018 to June-2018 and also not discharged



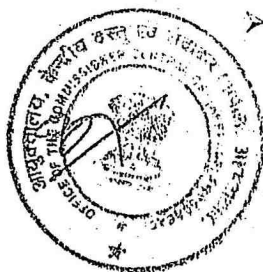
their GST liability for the said period. Further, the appellant filed GSTR-1 for the month from January, 2018 to May, 2018, and have declared their GST liabilities for the said period by filing their GSTR-1 Returns under Section 37 of the CGST Act. However, the corresponding GST liability was neither paid nor the GSTR-3B Returns were filed within the due dates. GSTR-1 Returns are being filed in accordance with Rule 59(1) of GST Rules and GSTR-3B Returns are being filed in accordance with Rule 61 sub-rule 3 of the GST Rules, 2017.

2.4 A Show cause notice no. 09/2022-23 dated 17.05.2022(SCN for short) was issued to the appellant by the Deputy Commissioner, CGST Ahmedabad (South) wherein it was proposed :

- to demand and recover GST amounting to Rs.1,26,18,657/- in terms of Section 74 (1) of the CGST Act, 2017 read with corresponding Section 74 (1) of the Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017;
- to appropriate the amount of Rs.1,26,18,657/- paid by the appellant against their GST liability demanded above;
- to demand and recover interest amounting to Rs. 8,01,314/- in terms of Section 50 of the CGST Act, 2017 read with Section 50 of the SGST Act, 2017 read with Section 20 of the IGST Act, 2017.
- to appropriate the amount of Rs.3,56,631/- paid the appellant against their interest liability demanded above;
- to demand and recover wrongly availed ITC amounting to Rs.3,62,312/- in terms of Section 74 (1) of the CGST Act, 2017 read with Section 74 (1) of the Gujarat GST Act, 2017 along with applicable interest in terms of Section 50 of the CGST Act, 2017 read with Section 50 of the SGST Act, 2017 read with Section 20 of the IGST Act, 2017 ;
- Penalties were proposed under Section 74, Section 122 (1) (iii), and Section 122 (2)(b) of the CGST Act, 2017 read with Section 74, Section 122 (1) (iii), and Section 122 (2)(b) of the Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017.

3. The SCN was adjudicated by the adjudicating authority vide the impugned order wherein it was ordered that :

- Demand of GST amounting to Rs. 1,26,18,657/- was confirmed and it was ordered to appropriate the GST liability against the payment Rs. 1,26,18,657/- made by the appellant during investigation and reflected in their GSTR 3B return.
- Confirm the demand of interest and recovery from the appellant.



- o ITC amount of Rs. 3,62,312/- was disallowed being wrongly availed and was ordered to recover the same from them under Section 74(1) of the CGST Act, 2017 read with Section 74(1) of the Gujarat GST Act, 2017.

4. Being aggrieved with the impugned order the appellant has filed the present appeal on the following grounds:

4.1 The impugned order is a non-speaking order. The adjudication authority has confirmed the demand of interest on full value of demand and equivalent penalty of tax under various section without appreciating the submissions of the Appellant and without providing any reasons for not considering the said submissions. Thus, the impugned order is a non-speaking order and has been passed in gross violation of principles of equity, fair play and natural justice. The impugned order is liable to be set aside on this ground alone. The Appellant wish to place reliance on the following decisions:

- i. CyilLasardo (Dead) v. Juliana Maria Lasarado - 2004 (7) SCC 431
- ii. Asst. Commissioner, Commercial Tax Department v. Shukla & Brothers reported at 2010 (254) ELT 6 (SC)

They have paid the GST liability at the time of inquiry and investigation. Appellant submitted that the Appellant duly acknowledges that due to financial constraints they were not able to file GSTR 3B and paid the GST liability in full which shows the Appellant does not have any malafide intention. Since, the Appellant have duly paid the GST liability in full along with interest during the course of investigation and before the issuance of show cause notice. Therefore, the impugned order confirming the demand with respect to GST liability is in itself bad in law and liable to be set aside on this ground alone.

4.3 Excess claim of ITC of Rs 3,62,312/- in July 2017 due to software error: The appellant submitted that, due to some technical glitches input tax credit on certain July 2017 invoices availed inadvertently two times. Since, there is no system of revise return under GST, only option left with the appellant is to rectify such mistake in the upcoming GSTR 3B return and on identifying the mistake, they voluntarily rectified such mistake and has reversed excess claim of input tax credit in GSTR 3B return for the month of July 2018, under the column ITC reversed others. The appellant submitted that, as they have already reversed excess claim of ITC in July 2018 GSTR 3B return and also paid interest there on, before issuance of show cause notice, order of recovering under section 74(1) does not apply. Appellant further submitted that as per sub section 6 of Section 73, they already informed the officer about reversal of ITC with interest, no notice is required to be issued and liable to be set aside on this ground alone.

4.4 No suppression since the demand is based on the GSTR - 1 return which is public document. The Appellant submitted that the impugned order alleged that the Appellant have suppressed the true taxable value with the mala fide intention to evade the payment of GST. However, it is pertinent to note that the adjudicating authority in the impugned order has erroneously arrived at the aforesaid conclusion without stating any reasons. Nowhere in the present SCN nor in the impugned order, reasons have been specified that the Appellant have suppressed the fact. Further, the demand raised in the show cause notice, which was confirmed in the impugned order, is based on the GSTR- 1 (outward supply) return which is a public document and it is trite law that if the information is available in the public document, then the allegation of suppression cannot be sustained. In this regard, the Appellant wish to place reliance on case of M/s Swarn Cars Pvt. Ltd. v. C.C.E., Kanpur 2020 (2) TMI 222:

4.5 Further, the Appellant submitted that it is well settled law that the burden of proof is on the Department to established an act of suppression or mis declaration with an intent to evade payment of tax. In this connection, the Appellant wish to place reliance on the following decisions:

- (a) Cosmic Dye Chemical vs. Collector of Central Excise, Bombay 1995 (75) E.L.T. 721 (S.C.)
- (b) Tamil Nadu Housing Board vs. Collector 1994 (74) E.L.T. 9 (S.C.)
- (c) Cadila Laboratories Pvt. Ltd. vs. CCE 2003 (152) E.L.T. 262 (S.C.)
- (d) Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay 1995 (78) E.L.T. 401 (S.C.)
- (e) MI/s. Continental Foundation Joint Venture Holding, Naphtha H.P. vs. CCE, Chandigarh-I 2007 (216) E.L.T. 177 (S.C.)
- (f) Alumecco Extrusion vs. CCE 2010 (249) ELT 577
- (g) National Rifles vs. CCE 1999 (112) E.L.T. 483
- (h) SPGC Metal Industries Pvt. Ltd. vs. CCE 1999 (111) E.L.T. 286
- (i) Gujarat State Fertilizers vs. CCE, Vadodara 1996 (84) E.L.T. 539 U ITI (TID) Ltd. vs. CCE 2007 (11) ELT 316 (Tri)
- (j) Neyveli Lignite Corporation Ltd. vs. CCE 2007 (209) ELT 310 (Tri)
- (k) Commissioner vs. Bentex Industries 2004 (173) ELT A079 (SC)
- (l) Commissioner vs. Binny Limited 2003 (156) ELT A327 (SC)
- (m) Collector vs. Ganges Soap Works (P) Ltd. 2003 (154) ELT A234 (SC)

The appellant submitted that there was no suppression of facts or any ill-intention on the appellant part for evading any tax and the tax legally due and payable for all the business transactions involved in the present case has been actually paid also, leaving no short levy or short payment of tax. Full and truthful details of the appellant business transactions have been recorded not

only in the audited books of accounts including balance sheet and ledger, but such details have also been disclosed while filing Returns in Form GSTR-1 and thus there was no suppression of facts or non-disclosure of any relevant details on the appellant part.

4.6 The appellant submitted in order to allege suppression, there must be a positive act on the part of the Appellant to withhold or hide the facts from the Department with a view to evade payment of tax. Mere non-payment of tax is not enough to allege that the Appellant are guilty of suppression. In this regard, the Appellant wish to place reliance on the following decisions:

- (i) Padmini Products v. CCE 1989 (43) ELT 195 (SC)
- (ii) CCE v. Chemphar Drugs & Liniments 1989 (40) ELT 276 (SC)
- (iii) GopalZardaUdyog v. CCE 2005 (188) ELT 251 (SC)

4.7 The Appellant submitted that despite non-filing of GSTR-3B due to financial constraints, they informed about tax liability for January to June 2018 through GSTR-1, eliminating any suppression of facts. They further submitted that Section 74 of the CGST Act applies only in cases of non-payment due to fraud or suppression, which is not applicable here. The Appellant paid the tax before the show cause notice, and the absence of suppression, evident in GSTR-1 filing, renders the demand of Rs. 29,80,969/- under Section 74 unjustifiable.

4.8 The Appellant submitted that government notifications waiving late fees for delayed GSTR-3B filings due to technical issues after the GST introduction. This demonstrates that non-filing on time isn't indicative of suppression, as acknowledged by the government's recognition of portal challenges. Therefore, the demand in the impugned order should be set aside on this basis.

4.9 The Appellant submitted that the impugned order incorrectly asserts the failure to furnish GSTR-3B as a violation of Section 39 of the CGST Act, 2017. They argue that GSTR-3B is not a standalone return but a provisional form, part of Form GSTR-3, as outlined in Rule 61. The rule specifies that GSTR-3B is electronically generated based on GSTR-1 information, emphasizing its provisional nature. The rule further mandates the finalization through Form GSTR-3 to rectify discrepancies. Notably, Rule 61(c) indicates that GSTR-3 governs Input Tax Credit (ITC) eligibility, discrediting the notion that GSTR-3B is the final statement for ITC claims. The Appellant submitted that the impugned order is baseless and should be set aside due to a misinterpretation of the legal framework surrounding GSTR-3B.

4.10 The Appellant submitted that Section 74 of the CGST Act, 2017 shall be applicable only when the tax was short paid or not paid by the register person



with a reason of fraud or any willful misstatement or suppression of facts. However, the said provision shall not be invoked for levy of penalty. Therefore, the impugned order imposing penalty of Rs. 1,29,80,969/- under Section 74 of the CGST Act, 2017 is not maintainable and liable to be set aside on this ground alone.

4.11 The Appellant submitted that none of the ingredients specified under Section 122 of the CGST Act, 2017 fulfils in the present case. Therefore, the Appellant is not liable to pay any penalty under the CGST/SGST Act, 2017. The Appellant submitted that the Section 122 (1) (iii) states that the taxable person is liable to pay penalty if he collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due. However, it is pertinent to note that the Appellant is liable to pay tax under GSTR- 3 returns. Since, till date no time limit was prescribed for filing the GSTR- 3 returns. Hence, the present show cause notice with respect to Section 122 (1) (iii) is not applicable in the present case. As appellant had filed GSTR 1 and disclosed its liability and also paid tax with applicable interest before issuance of show cause notice, there is no case of fraud or any wilful misstatement or suppression of facts to evade tax, and therefore this section will not be applicable. Hence, the penalty levied and demand raised u/s Section 122 (2) (b) is incorrect, unlawful and not enforceable. Therefore, the demand being wrongly raised is liable to be squashed and dropped.

4.12 The Appellant asserted that Section 126 of the CGST Act applies to their case, they further submitted that penalties under Sections 74, 122(1)(iii), and 122(2)(b) should not be imposed for minor breaches that are easily rectifiable. They contend that the failure to furnish GSTR-3B has been rectified by filing the returns and settling the tax liability, thus rendering the penalties unjustifiable. The Appellant urges the setting aside of the impugned order on this basis.

4.13 The Appellant submitted that if the taxable person commits any offence specified under Section 122 of the CGST Act, 2017 then he shall be held liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded by him. Since, the Appellant had not evaded any tax therefore, the maximum penalty which shall be leviable to the Appellant shall be Rs. 10,000/-. Therefore, the impugned order shall be liable to be set aside on this ground alone.

4.14 The Appellant submitted that interest under Section 50(1) of the CGST Act should be levied only on the net tax liability, considering total tax payable minus eligible input tax credit. The proviso emphasizes interest on the "actual



amount of tax withheld" due to delayed return filing. The Appellant further submitted that, as input tax credit is equivalent to tax paid and utilized, interest should be imposed only on the cash ledger's outstanding tax amount. They submitted that the lack of an option to file returns with outstanding amounts after utilizing input tax credit, attributing filing delays to GSTN portal issues. Additionally, the Appellant notes that Section 50(2) lacks prescribed rules for calculating interest, and the retrospective amendment from September 1, 2020, clarifies interest liability on the net tax payable. Thus, they asserted that the impugned order, confirming interest on the gross amount, should be set aside. In this regard, the Appellant wish to place reliance on the following decisions:

- i. Eicher Motors Ltd. v. Union of India 1999 (106) E.L.T. 3 (S.C.)
- ii. Collector of Excise v. Dai Ichi Karkaria Ltd. 1999 (112) E.L.T. 353 (S.C.)
- iii. Pratibha Processors v. Union of India 1996(88) E.L.T. 12 (S.C.)
- iv. Vision Distribution Pvt. Ltd. v. Commissioner W.P.(C) 8317/2019 (Del.)
- v. M/s Landmark Lifestyle Vs. Union of India and Ors. (Case No. 6055/2019) (Del.)
- vi. Bharatbhai Manilal Patel Vs. State of Gujarat (Case No. 17642 Of 2019) (Guj.)



15 The Appellant submitted that in the present case. Section 137 of the Act has absolutely no application. Section 137 is a provision which fixes the vicarious liability of the person in the event any offence is committed by a company. In this case Shri Bharatkumar Jain, General Manager of the appellant has not committed any offence for which he is guilty of the offence. Non filing of GSTR 3B return before due date, due to bad financial position of the company is a procedural delay or fault and does not tantamount of any offence for which penalty is require to be imposed. The appellant, stated that, as all GSTR 3B returns are filed with interest and that before issuance of show cause notice, question of levy of penalty under section 137 does not arise, and liable to be set aside on this ground alone.

5. Personal hearing in the matter was held on 26.10.2023. Shri Priyam Shah, Chartered Accountant, appeared on behalf of the appellant as Authorised Representative. He submitted that this is a case of non-filing of GSTR-3B. GSTR-1 has been filed on due dates. Due to some financial crisis, there was some delay in filing GSTR-3B. All dues along with due interests has been paid before initiation of proceedings i.e. issue of SCN under Section 73/74. He reiterated the submissions made in appeal memorandum and requested to allow the appeal. He further relied upon the order passed by Commissioner (A), Ahmedabad in case of M/s Nami Steel vide OIA No. AHM-EXCUS-002-APP-135/2022-23 dated 31.01.2023.

DISCUSSION AND FINDINGS

6. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum as well as the submissions made at the time of personal hearing. The issue to be decided in the present appeal is as to whether the demand of GST amounting to Rs.1,26,18,657/- confirmed alongwith interest and penalties as well as ITC amount of Rs. 3,62,312/- disallowed vide the impugned order passed by the adjudicating authority, in the facts and circumstances of the case, is legal and proper or otherwise. The demand pertains to the period from January, 2018 to June, 2018.

6.1 It is observed from the case records that the appellant are manufacturers and were registered under erstwhile Central Excise Act, 1944 as well as Finance Act, 1994. It is further observed that the entire demand was raised on the grounds that although the appellant had collected the GST, but failed to deposit the same to the government exchequer and tried to suppress their taxable income from the department by not filing the GSTR-1 and GSTR-3B returns within the time limit prescribed under Section 37 and Section 39 of the CGST Act, 2017, for said period. It is alleged that the evasion was detected by the Preventive Team of CGST, Ahmedabad and the entire tax liability was discharged subsequent to the investigation, which shows their intent to evade the tax liability. The adjudicating authority confirmed the demand alongwith interest and penalties holding that the appellant had admitted their tax liability as well as failure in non-payment of tax and non-filing of returns. The appellant, have submitted that the GST Law being a new levy, lot of confusion prevailed and therefore they could not file GSTR-1 and GSTR-3B within the stipulated time. However, they have paid the entire outstanding GST amount alongwith interest before the issuance of show cause notice which in a way proves their bonafide.

6.2 From the facts of the case, it is observed that the CGST Act, 2017 was implemented with effect from 1st July, 2017. The appellant had filed their GSTR-1 Return for the period January-2018 to May-2018, however they failed to file GSTR-1 Return for the month of June-2018 and the GSTR-3B Returns for the period January-2018 to June-2018. Due to financial constraints they were unable to discharge their GST liability and to file their GSTR-3B return. On being pointed out by the department, they paid up the entire amount alongwith interest by 01.10.2018, i.e before issuance of the SCN. It is also observed that the amount of demand raised vide the SCN i.e Rs.1,26,18,657/- stands paid as on date of SCN and the department have failed to investigate



any other short levy on part of the appellant apart from the above amount which was already declared by them in their statutory Returns.

7. Regarding the contention of the appellant that the impugned order is a non-speaking order do not fetch merit as the responsible person of the appellant in his voluntary statement dated 14.08.2018 have accepted their GST liability and have also admitted that they have failed to discharge their liability even after filing the GSTR-1 Returns. They have also admitted that they have failed to file their GSTR-3B Returns in time. Hence these contentions are devoid of merit.

8. The appellant have also contended that the Return GSTR-3B is not to be considered a Return in terms of Section 39 of the CGST Act, 2017. In this regard I find that this issue has been decided by the Hon'ble Apex Court in the Civil Appeal No. 5978 of 2021, filed by UOI Vs AAP and Co, as reported in 2021 (55) G.S.T.L. 513 (S.C.). The Hon'ble Apex Court held that the judgment of Hon'ble Gujarat High Court passed in the case of AAP and Co.- 2019 (26) G.S.T.L. 481 (Guj.)has been expressly overruled by a three-Judge Bench decision of this Court in Civil Appeal No. 6520 of 2021 titled *Union of India v. Bharti Airtel Ltd. & Ors.*, reported in 2021 (54) G.S.T.L. 257 (S.C.).The relevant part of the decision passed in Bharti Airtel is reproduced below :

40.No doubt, in the initial stages, it was notified that Form GSTR-3B will be in lieu of Form GSTR-3 but that was soon corrected by deletion of that expression. At the same time, as the mechanism for furnishing return in terms of Sections 37 and 38 was not operationalized during the relevant period (July to September, 2017) and became operational only later, the efficacy of Form GSTR-3B being a stop gap arrangement for furnishing of return, as was required under Section 39 read with Rule 61, would not stand whittled down in any manner. It would still be considered as a return for all purposes though filled manually electronically.

Thus, applying the ratio of Hon'ble Apex Court's decision, I do not find merit in the argument of the appellant that Form-GSTR3B is not a prescribed return, hence, was not required to be filed.

9. I find that in the instant case the GST liability was raised and the demand was confirmed under Section 74(1) of the CGST Act, 2017 alleging suppression. They have also cited the decision of the Commissioner (Appeals), CGST, Ahmedabad vide OIA No. AHM-EXCUS-002-APP-135/2022-23 dated 31.01.2023. Upon going through the said OIA it is observed that facts of the said case is identical to the instant case and I do not find any reason to differ from the decision of Commissioner (Appeals) vide the said OIA.In order to understand the provisions of the said Section the relevant portions of Section 74(1) of the CGST Act, 2017 is reproduced 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 wilful misstatement or suppression of facts. —

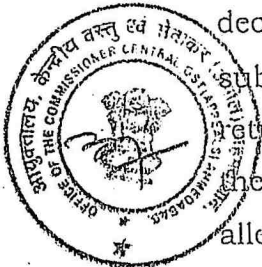
(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable 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 officers shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section 10 of 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.

9.1 Upon examining the above legal provisions with the facts and circumstances of the case I find that in the instant case the appellant has filed their GSTR-1 Returns for the period January-2018 to May-2018, however they have failed to fulfill their tax liabilities. It is also found that the appellant have not filed their GSTR-3B Return for the said period. However, on being pointed out by the department they have paid the entire amount of GST alongwith interest before issuance of the SCN. It is also factual that the investigation by the department have not detected any other demand apart from the amount declared by the appellant in their GSTR-1 Return and paid by them subsequently alongwith interest. In this regard I find that mere non-filing of returns and delayed payment of tax cannot be sufficient ground for invoking the provisions of fraud or wilfull mis-statement or suppression of facts. As to allege suppression there should be non-declaration of facts or information in the returns. I also 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 had failed to declared in their return. I am therefore of the considered view that the demand of GST amounting to Rs.1,26,18,657/- and recovery of ITC amounting to Rs.3,62,312/- raised and confirmed under Section 74(1) of the GST Act, 2017 is legally unsustainable as no suppression is brought on record to invoke the provisions of extended period of limitation.

9.2 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 to have been issued under Section 73(1) of the CGST Act, 2017 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 portion of Section 75(2) and 75(3) of the CGST Act, 2017 are 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.

(3) Where any order is required to be issued in pursuance of the direction of the Appellate Authority or Appellate Tribunal or a court, such order shall be issued within two years from the date of communication of the said direction.
...

9.3 The above provision of law and doubts raised in this regard was further clarified by the CBIC Circular No. 185/17/2022-GST dated 27.12.2022. Reiterating the provisions of Section 75(2) of the CGST Act, 2017 specific clarifications and directives were communicated vide the said circular. Therefore in terms of Section 75(2) of the CGST Act, 2017 and CBIC Circular No. 185/17/2022-GST dated 27.12.2022 the impugned order confirming the tax liability on the appellant under Section 74(1) of the CGST Act, 2017 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.

10. Regarding the liability of Interest the appellant have contended that Interest should be payable on the net tax liability only. In this regard I find that payment of interest on delayed payment of tax is governed vide Section 50 of the CGST Act, 2017. The provisions of the said section have undergone various amendments and as per Notification No. 09/2022-CT dated 05.07.2022 the amended section reads as 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.]

(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.

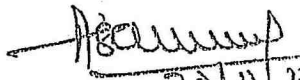
2[(3) Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the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

10.1 Examining the above provisions with the facts of the case I find that the GSTR-1 Return for the period January-2018 to May-2018 was filed by the appellant before commencement of inquiry by the department under Section 74/Section 73. Therefore the interest shall be payable on the net cash tax liability (i.e the portion of the tax that has been paid by debiting the electronic cash ledger or is payable through cash ledger). I find that the demand of interest on gross tax payable is not legally sustainable and I order to recover the same only on the net cash tax liability subject to re-determination of the demand under Section 73(1) of the CGST Act,2017.

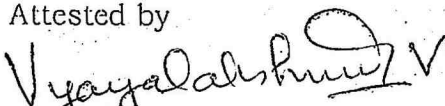
11. I further find that penalty was imposed vide the impugned order under Section 74 as well as under Section 122(1) and 122(2) of the CGST Act, 2017. Since, the impugned order confirming the tax payable by the appellant under Section 74(1), needs to be re-determined by the proper officer, by deeming that the SCN was issued under Section 73(1) of the CGST Act,2017. Therefore, the amount of penalty also needs to be re-determined in terms of Section 73nof the CGST Act, 2017.

12. In view of the above discussions the impugned order is set aside and sent back to the adjudicating authority for re-determination of the amounts of GST, interest and penalty.

13. The appeal filed by the appellant is disposed of in above terms.


(Adesh Kumar Jain)
Joint Commissioner

Attested by


(Vijayalakshmi V)

Superintendent (Appeals)
CGST, Ahmedabad

By R.P.A.D / Speed Post.

To

M/s C-Doctor India Pvt Ltd.,
Plot No.3607-3608, GIDC Estate, Phase-IV,
Vatwa, Ahmedabad 382 445.



Copy to:

1. The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner, CGST & C. Excise, Appeals, Ahmedabad
3. The Commissioner, CGST, Ahmedabad South Commissionerate
4. The Dy./Asstt. Commissioner, CGST, Division-II, Ahmedabad South Commissionerate
5. The Superintendent (Systems), CGST Appeals, Ahmedabad.
6. Guard File.
7. P.A. File

