

[2022] 144 taxmann.com 94 (Andhra Pradesh)/[2023] 68 GSTL 52 (Andhra Pradesh)/[2023] 95 GST 140 (Andhra Pradesh)[26-08-2022]

GST : Where finding of Assessing Authority in impugned order was on non-declaration of correct liability in GSTR-3B and withholding of payment of tax by due date, petitioner should avail remedy of appeal where all issues could be agitated; writ petition was not maintainable

■ ■ ■

[2022] 144 taxmann.com 94 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

Balaji Enamil Industry

v.

Assistant Commissioner (ST)*

C. PRAVEEN KUMAR AND TARLADA RAJASEKHAR RAO, JJ.

WRIT PETITION NO. 6934 OF 2022

AUGUST 26, 2022

Interest - Input tax credit reversal - Writ petition - Assessee reversed input tax credit when department alleged availment of ineligible ITC - Order was passed imposing interest and penalty despite reversing ITC that was only availed and not utilized - Whether interest and penalty were payable when net cash liability was zero and ITC availed was reversed - HELD: Prima facie section 50 of CGST Act was amended for payment of interest on net cash liability in case of delay in payment of tax - Finding of Assessing Authority in impugned order was on non-declaration of correct liability in GSTR-3B and withholding of payment of tax by due date - Petitioner should avail remedy of appeal where all issues could be agitated - Writ petition was not maintainable [Section [50](#) read with section [107](#), of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017] [Paras 10 and 11] [In favour of revenue]

CASE REVIEW

Asstt. Commissioner (CT) LTU v. Glaxo Smith Kline Consumer Health Care Ltd. [2020] 116 taxmann.com 417/36 GSTL 305 (SC)/[2020] 19 SCC 681 (para 8) and *Asstt. CST v. Commercial Steel Ltd.* [\[2021\] 130 taxmann.com 180/52 GSTL 385/88 GST 799 \(SC\)](#) (para 9) followed.

CASES REFERRED TO

Asstt. Commissioner (CT) LTU v. Glaxo Smith Kline Consumer Health Care Ltd. [2020] 116 taxmann.com 417/36 GSTL 305 (SC)/[2020] 19 SCC 681 (para 4) and *Asstt. CST v. Commercial Steel Ltd.* [\[2021\] 130 taxmann.com 180/52 GSTL 385/88 GST 799 \(SC\)](#) (para 9).

G. Narendra Chetty for the Petitioner.

ORDER

C. Praveen Kumar J. - The present writ petition came to be filed, seeking the following relief:—

"to declare the impugned interest and penalty order passed by the first respondent in Form DRC-07, dated 18-12-2021, imposing interest under section 50 along with penalty under section 122(2) of the

Central Goods and Service Tax Act, 2017 [for short, "CGST Act"], for the tax period 2017-18 to 2019-20, as illegal, improper and incorrect."

2. The averments made in the affidavit filed in support of the writ petition, are as under:-

- (a) The petitioner is a registered dealer, intended with GST and is on the rolls of first respondent doing business in MDF Boards and Writing Slates. The first respondent conducted inspection on the business premises of the petitioner on 4-11-2020 and thereafter issued Show Cause notice dated 6-8-2021, proposing to restrict ITC for the tax period 2019-20 at Rs. 9,41,624/- [as against Rs. 18,82,220/-]. On receipt of Show Cause notice, the petitioner paid the amount as demanded in Show Cause notice of Rs.10,78,074/- by reversing the ITC claim as it has not utilized the ITC and the same is lying to its credit in the Electronic Credit Ledger.
- (b) It is the case of the petitioner that as Input Tax Credit claim was not utilized and was lying in the Electronic Ledger, it has reversed the same and there was no 'net cash liability' on the petitioner. Hence, all proceedings pursuant to the Show Cause notice shall be deemed to have been closed.
- (c) However, the first respondent issued Show Cause notice dated 6-10-2021, stating that the petitioner has paid only the Tax and not interest under section 50 of the GST Act, and as such, the petitioner has to pay interest, and penalty under section 122(2) of GST Act. Objections to the said Show Cause notice came to be submitted *vide* letter dated 29-11-2021, stating that as per the instructions of the Audit Officer, the petitioner has reversed the ITC and discharged liability through DRC-03. According to him, payment of interest would arise if it has utilized the credit and as long as the credit is not utilized, payment of interest does not arise. The impugned order came to be passed rejecting the objections of the petitioner, which lead to filing of the present writ petition.

3. Sri G. Narendra Chetty, learned counsel for the petitioner mainly submits that section 50 of the CGST Act, 2017, which was amended with retrospective effect, came into effect from 1-7-2017. Therefore, the interest on the same is chargeable only on 'net tax liability' *i.e.* if any tax is payable/paid after adjusting the Input Tax Credit available to the dealer. He relied upon various judgments of different High Courts in support of his case. He also relies to a Common Order passed by this Court on 2-3-2022 in W.P.Nos.8734 and 8768 of 2020, wherein it was held that in view of the amended section 50 of CGST Act, 2017 with retrospective effect, interest is liable only on 'net tax liability' and not on the 'gross tax liability'. He further submits that the ITC claim was lying in Electronic Credit Ledger of the petitioner and since it was not utilized, he got it reversed pursuant to the same being pointed out by the first respondent in the Audit. Hence, pleads that the order passed under challenge requires interference.

4. On the other hand, Sri Y.N. Vivekananda, learned Government Pleader for respondent nos.1 and 2, would submit that since the order is appealable under section 107 of CGST Act, 2017, entertaining a writ petition by the High Court may not be proper. In other words, he would submit that the petitioner ought to have availed the efficacious, alternative remedy, available under the Act. He relies upon the judgment of *Asstt. Commissioner (CT) LTU v. Glaxo Smith Kline Consumer Health Care Ltd.* [2020] 116 taxmann.com 417/36 GSTL 305 (SC)/[2020] 19 SCC 681 in support of the same.

5. A perusal of section 50 of CGST Act, 2017 shows that there was an amendment to section 50 of the CGST Act, which came into effect from 1-6-2021. A reading of section 50 of CGST Act coupled with the amendment would show that 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 percent, as recommended by the Government.

6. Proviso to Sub-section (1) of section 50 of CGST Act, 2017 states as under:-

"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".

7. *Prima facie*, it appears that proviso to section 50 of CGST Act was amended for payment of interest on 'net tax liability' in case of delay in payment of tax declaring monthly returns. As held by the Authority in the order impugned, interest will be levied on cash payments made for the return of taxes. The tax determined

after initiation of proceedings under section 73 of CGST Act, for determination of tax in pursuance of Audit conducted under section 71 of the CGST Act, the benefit of payment of interest only on cash payment is not available, and interest is payable even if assessed tax is paid out of credit available to the petitioner.

8. The arguments advanced in so far as the payment of interest is concerned, in our view, can be adjudicated on a perusal of credit and cash ledgers, more so, when a finding is given by the authority that the assessee did not declare the correct output tax liability in their GSTR-3B returns. At this stage, it is also to be noticed against the order impugned an appeal lies under section 107 of CGST Act. The Hon'ble Supreme Court in *Glaxo Smith Kline Consumer Health Care Ltd.* [supra 1 cited] has categorically held as under:-

'21. Reliance was then placed on a three-Judge Bench decision of this Court in *ITC Ltd. v. Union of India* [*ITC Ltd. v. Union of India*, (1998) 8 SCC 610] . In that case, the High Court had dismissed the writ petition on the ground that the petitioner therein had an adequate alternative remedy by way of an appeal under section 35 of the Central Excise Act. Concededly, this Court was pleased to uphold that opinion of the High Court. However, whilst considering the difficulty expressed by the petitioner therein that the statutory remedy of appeal had now become time-barred during the pendency of the proceedings before the High Court and before this Court, the Court permitted the petitioner therein to resort to remedy of statutory appeal and directed the appellate authority to decide the appeal on merits. This obviously was done on the basis of concession given by the counsel appearing for the Revenue as noted in para 2(1) of the order, which reads thus : (SCC pp. 610-11)

"2. The High Court has dismissed the writ petition filed by the petitioner on the ground that there is an adequate alternative remedy by way of an appeal under section 35 of the Central Excise Act. The learned counsel for the petitioner submits that the petitioner will face certain difficulties in pursuing this remedy:

(1) This remedy may not be any longer available to it because the appeal has to be filed within a period of three months from the date of the assessment order and delay can be condoned only to the extent of three more months by the Collector under section 35 of the Act. It is pointed out that the petitioner did not file an appeal because the Collector (Appeal) at Madras had taken a view in a similar matter that an appeal was not maintainable. That apart, the petitioner in view of the huge demand involved filed a writ petition and so did not file an appeal. In the circumstances of the case, we are of the opinion that the ends of justice will be met if we permit the petitioner to file a belated appeal within one month from today with an application for condonation of delay, whereon the appeal may be entertained. The learned counsel for the Revenue has stated before us that the Revenue will not object to the entertainment of the appeal on the ground that it is barred by time. In view of this direction and concession, the petitioner will have an effective alternative remedy by way of an appeal."

(Emphasis Supplied)

In that case, it appears that the writ petition was filed within statutory period and legal remedy was being pursued in good faith by the assessee (appellant).'

9. Further, in *Asstt. CST v. Commercial Steel Ltd.* [[2021](#)] [130 taxmann.com 180/52 GSTL 385/88 GST 799](#), the Hon'ble Supreme Court held that the Court can entertain a writ petition under article 226 of Constitution of India in exceptional circumstances where there is:

- (i) a breach of fundamental rights;
- (ii) a violation of the principles of natural justice;
- (iii) an excess of jurisdiction; or
- (iv) a challenge to the vires of the statute or delegated legislation.

10. In the present case, none of the above exceptions are established. The only question is as to whether the authorities were right in directing the petitioner for payment of interest on the disputed tax and the penalty thereof. As seen from the order impugned, original tax to an extent of Rs. 36,72,034/- was assessed, but however, the petitioner is said to have paid Rs. 25,93,960/- in DRC-03 pursuant to Show Cause notice issued on 6-8-2021. The petitioner is said to have paid the said amount on 6-9-2021. The question now is whether the petitioner is liable to pay interest on the tax amount of Rs. 25,93,960/- paid before issuance of Show Cause notice and on Rs. 10,78,074/- paid after the issuance of Show Cause notice. Since an appeal provision is available, and taking into consideration the findings given by the Assessing Authority, more so, when the

finding by the Assessing Authority is to the effect that the assessee is under an obligation to restrict input tax credit to the extent of exempt supplies every month and reverse the same in their GSTR-3B returns, but failed to do so and utilized such ineligible credit to discharge output tax liability, withholding the payment of tax by the due date, coupled with the finding given with regard to payment of interest, we feel that in the fitness, it would be just and proper, the petitioner avails the remedy of appeal where all the issues can be agitated.

11. In view of the foregoing reasons, the writ petition is disposed of. However, the petitioner can take advantage of the orders of the Hon'ble Supreme Court in calculating the limitation and the pendency of Writ Petition before this Court while filing the appeal. There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

SB

*In favour of revenue.