

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.01.2020

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

Writ Petition Nos.23360 and 23361 of 2019
& WMP Nos.23106 and 23108 of 2019

M/s.Reflex Industries Limited
represented by its Senior Executive
Authorized Signatory Mr.Vijayakumar
No.1/171, Old Mamallapuram Road,
Tiruporur - 603 110,
Kanchipuram District. Petitioner in W.P.No.23360 of 2019

M/s.Sherisha Technologies Pvt. Ltd.,
represented by its Assistant Manager - Accounts
Authorized Signatory Mr.Hari,
1/171, Old Mamallapuram Road,
Tiruporur - 603 110,
Kanchipuram District. Petitioner in W.P.No.23361 of 2019

Vs

1. The Assistant Commissioner of CGST & Central Excise,
Maraimalai Nagar Division,
Plot No.40 Ranga Colony,
Rajakilpakkam, Chennai - 600 073.
2. The Superintendent of Central Tax,
Thiruporur Range, M.M.Nagar Division,
Plot No.40, Ranga Colony,
Rajakilpakkam, Chennai - 600 073.
..... Respondents in both W.Ps
3. Bank Managar,
Indian Overseas Bank,
68-A, Euros Corporate Centre,
Dr.Radhakrishnan Salai,
Mylapore, Chennai - 600 004.
..... Respondent in W.P.No.23360 of 2019
3. Bank Managar,
ICICI Bank,
7, Bazullah Road, T.Nagar,
Chennai - 600 017.
..... Respondent in W.P.No.23361 of 2019

PETITIONs filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari calling for the records of the impugned notice to a third person in Form GST DRC - 13 dated 21.05.2019 bearing reference C.No:IV/16/30/2019-Tech-III issued by the 1st respondent and quash the same.

For Petitioner in both W.Ps : Mr.R.Anish Kumar

For Respondents in both W.Ps : Mr.Thirumalaisamy

C O M M O N O R D E R

The petitioners are registered as assesseees under the provisions of the Central Goods and Service Tax Act, 2017 (in short 'CGST Act'). The petitioners have admittedly filed Returns of income belatedly for the period 2017-18. Communications dated 07.05.2019 (in W.P.No.23360 of 2019) and 15.05.2019 (in W.P.No.23361 of 2019) computing the delay in filing of Returns and consequently the interest to be remitted on the tax accompanying the Returns were issued by the 2nd respondent in the following terms:

W.P.No.23360 of 2019:

Sl.No.	Month	Delay (No. of days)	Duty paid (in Rs.)	Interest to be paid @ 18%
1.	August - 17	140	5016431	346340
2.	September- 17	110	2103842	114126
3.	October - 17	81	817158	32642
4.	November-17	51	817158	20552
5.	December -17	18	629658	5589
6.	January - 18	91	5312557	238410
7.	February - 18	63	1566965	48683
8.	March - 18	32	22789660	359640
			Total	1165982

W.P.No.23361 of 2019:

Sl.No.	Month	Delay (No. of days)	Duty paid (in Rs.)	Interest to be paid @ 18%
1.	July - 17	31	27000	413
2.	August - 17	258	900000	114510
3.	October - 17	197	534714	52045
4.	November-17	167	534714	44119
5.	December -17	134	268898	17769
6.	January - 18	181	13535680	1208199
7.	February - 18	155	12103153	925145
8.	March - 18	143	7750	547
			Total	2362746

2. Demand notices were issued to the Banks (R3) seeking to recover the arrears of interest from the balances in the accounts of the petitioners.

3. The petitioners objected stating that they had sufficient Input Tax Credit (ITC) available with the Department and thus interest could be demanded, if at all, only on the cash component of the tax remitted belatedly. This amounted to a sum of Rs.1,21,701/- (in W.P.No.23360 of 2019) and Rs.1,25,751/- (in W.P.No.23361 of 2019) and the amounts have been remitted on 14.06.2019. According to the petitioners, the total tax payable, being Rs.3,94,49,225/- in W.P.No.23360 of 2019 and Rs.2,74,71,771/- in W.P.No.23361 of 2019, was remitted by way of cash to an extent of Rs.19,55,634/- (in W.P.No.23360 of 2019) and Rs.12,19,151/- (in W.P.No.23361 of 2019) and Rs.3,74,93,591/- (in W.P.No.23360 of 2019) and Rs.2,62,52,620/- (in W.P.No.23361 of 2019) from out of the available ITC. The proceedings for coercive recovery of the interest are impugned in the present Writ Petitions.

4. Though the petitioners have raised other grounds as well, including one of the violation of principles of natural justice, the only issue agitated is the legal issue as to whether interest would at all be payable on the component of ITC that was, admittedly, available with the Department throughout and that has been adjusted towards the tax demands for the period August, 2017 to March, 2018.

5. There is some history to this matter as this very issue appears to have been raised earlier by a petitioner in W.P.No.15978 of 2019. A learned single Judge, by order dated

13.06.2019, directed the petitioner therein to remit the admitted tax, being tax on the cash component of the demand belatedly paid and the Department to dispose the representation of the petitioner in that case to the effect that there would be no liability to interest in regard to the ITC available with the Department.

6. As against the aforesaid order, Writ Appeals were filed before the Division Bench and by order dated 23.07.2019, the two Hon'ble Judges expressed divergent views. One Judge dismissed the Writ Appeals, whereas the second Judge was of the view that the legal issue on the leviability of interest called for a deeper consideration than had been extended by the learned single Judge at the stage of admission and such summary dismissal required revisiting.

7. The matter was thus referred to a Third Judge, who by his order delivered on 19.12.2019, held that Writ Appeals of the Revenue were not warranted, since the learned single Judge had not in the original instance determined the legal issue in a manner detrimental to the Revenue, but only remitted the matter back to the Assessing Officer to determine the quantum of liability. The aforesaid orders are circulated for my benefit by learned counsel.

8. The question crystallised by the Third Judge for consideration is as to whether interest on belated payment of tax as contemplated under Section 50 of the CGST Act is automatic or whether the same would have to be determined after considering the explanation offered by the assessee. At paragraph 29, the Hon'ble Judge holds that the liability to pay interest under Section 50 is automatic. However, since the petitioner in that case had raised disputes with regard to the period for which the tax had allegedly not been paid, as well as the quantum of tax remaining unpaid in excess of ITC, all being questions of fact, he was of the view that such matters would have to be resolved after hearing the assessee. He categorically states 'therefore in my considered view though the liability fastened on the assessee to pay interest is an automatic liability, quantification of such liability certainly needs an arithmetical exercise after considering the objections if any, raised by the assessee.' The objections raised in that case are thus factual and relate to disputed questions of fact as noted by me in the earlier portion of this paragraph.

9. However, the objection raised by the petitioners before me is not one of fact but one of law. According to the petitioners, Section 50 that provides for levy of interest on belated payments would apply only to payments of tax by cash, belatedly, and would not stand triggered in the case of available ITC, since such ITC represents credit due to an assessee by the Department held as such.

10. In order to decide the purely legal issue raised by the petitioners, it is necessary to extract Section 50 itself, which I do below:

'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.

(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

(3) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent, as may be notified by the Government on the recommendations of the Council."

11. The Section provides for interest on belated payment of tax and as held by the third Judge, such levy is 'automatic', and is intended to compensate the revenue for the remittance of tax belatedly and beyond the time frames permitted under law. Though in the context of the Income Tax Act, 1961, the question of whether remittance of interest under Sections 234 A, 234B and 234C of the Income Tax Act, 1961 for belated filing of return, belated remittances of advance tax and deferment of advance tax are mandatory came to be considered by the Supreme Court in the case of Commissioner Of Income Tax, Mumbai vs Anjum M.H.Ghaswala & Ors (252 ITR 1), and held to be compensatory and hence mandatory. The principle of the said judgment applies on all fours to the present case.

12. The specific question for resolution before me is as to whether in a case such as the present, where credit is due to an assessee, payment by way of adjustment can still be termed 'belated' or 'delayed'. The use of the word 'delayed' connotes a situation of deprivation, where the State has been deprived of the funds representing tax component till such time the Return is filed accompanied by the remittance of tax. The availability of ITC runs counter to this, as it connotes the enrichment of the State, to this extent. Thus, Section 50 which is

specifically intended to apply to a state of deprivation cannot apply in a situation where the State is possessed of sufficient funds to the credit of the assessee. In my considered view, the proper application of Section 50 is one where interest is levied on a belated cash payment but not on ITC available all the while with the Department to the credit of the assessee. The latter being available with the Department is, in my view, neither belated nor delayed.

13. The argument that ITC is liable to be reversed if it is found to have been erroneously claimed, and that it may be invalidated in some situations, does not militate with my conclusion as aforesaid. The availment and utilization of ITC are two separate events. Both are subject to the satisfaction of statutory conditions and it is always possible for an Officer to reverse the claim (of availment or utilization) if they are found untenable or not in line with the statutory prescription. Credit will be valid till such time it is invalidated by recourse to the mechanisms provided under the Statute and Rules.

14. I am supported in my view by a recently inserted proviso to Section 50(1) reading as below:

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.

15. The above proviso, as per which interest shall be levied only on that part of the tax which is paid in cash, has been inserted with effect from 01.08.2019, but clearly seeks to correct an anomaly in the provision as it existed prior to such insertion. It should thus, in my view, be read as clarificatory and operative retrospectively.

16. Learned counsel for the petitioners also draw my attention to the decision of the Telangana High Court in the case of Megha Engineering and Infrastructures Ltd. V. The Commissioner of Central Tax and others (2019-TIOL-893), where the Division Bench interprets Section 50 as canvassed by the Revenue. The amendment brought to Section 50(1), was only at the stage of press release by the Ministry of Finance at the time when the Division Bench passed its order and the Division Bench thus states that 'unfortunately, the recommendations of the GST Council are still on paper. Therefore, we cannot interpret Section 50 in the light of the proposed amendment'. Today, however, the amendment stands incorporated into the Statute and comes to the aid of the assessee.

17. In the light of the above discussion, these Writ Petitions are allowed and the impugned notices are set aside. No costs. Connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

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To

1. The Assistant Commissioner of CGST & Central Excise,
Maraimalai Nagar Division,
Plot No.40 Ranga Colony,
Rajakilpakkam, Chennai - 600 073.
2. The Superintendent of Central Tax,
Thiruporur Range, M.M.Nagar Division,
Plot No.40, Ranga Colony,
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Dr.Radhakrishnan Salai,
Mylapore, Chennai - 600 004.
4. Bank Managar,
ICICI Bank,
7, Bazullah Road, T.Nagar,
Chennai - 600 017.

+2cc to Mr.R.Anish Kumar, Advocate, S.R.No.789, 790

+2cc to Mr.T.L.Thirumalaisamy, Advocate, S.R.No. 1280 & 1281

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& WMP Nos.23106 and 23108 of 2019

(CO)

GN(17/02/2020)

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