

HIGH COURT FOR THE STATE OF TELANGANA AT HYDERABAD
(Special Original Jurisdiction)

TUESDAY, THE TWENTIETH DAY OF APRIL
TWO THOUSAND AND TWENTY ONE

PRESENT

THE HON'BLE SRI JUSTICE A. RAJASHEKER REDDY
AND
THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

WRIT PETITION NO. 21311 OF 2020

Between:

Bharti Airtel Limited, Having its office at, 1-8-437, 438, 364 & 445, Splendid Towers, Opp. Begumpet PS, Huda Road, Begumpet, Hyderabad- 500016
GSTIN: 36AAACB2894G1ZO Represented by its Authorized Signatory, Mrs. Snigdha Ghosal

...PETITIONER

AND

1. State of Telangana, Represented by its Chief Secretary, Commercial Tax and Excise, Secretariat Buildings, Hyderabad- 500063
2. Commissioner of Central Tax, Central GST, 7th Floor, GST Bhavan, LB Stadium Road, Basheerbagh, Hyderabad - 500004
3. Joint Commissioner (Appeals-II), Hyderabad 7th Floor, GST Bhavan, LB Stadium Road, Basheerbagh, Hyderabad- 500004
4. Assistant Commissioner of Central Tax, Central GST- Begumpet Division, Hyderabad 3rd Floor, 3A-3B, Plot No. 1-8-382, Queen's Plaza, SP Road, Secunderabad- 500003
5. Union of India, Represented by its Secretary, Ministry of Finance, E Block, Central Secretariat, New Delhi - 110011
6. Goods and Service Tax Council, Represented by its Special Secretary, GST Council Secretariat, 5th Floor, Tower II, Jeevan Bharti Building, Janpath Road, New Delhi - 110001
7. Central Board for Indirect Taxes and Customs, North Block, Central Secretariat, New Delhi-110001

...RESPONDENTS

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith, the High Court may be pleased to: i. Issue a writ, order or a direction, particularly one in the nature of a writ of Certiorari calling for records in Appeal No. 01/2020 (SC) GST on the file of the 3rd Respondent and consequently allow the appeal filed by the Petitioner by quashing the Impugned Order dated 10.08.2020 in Appeal No. 01/2020 (SC) GST on the file of the 3rd Respondent. ii. Issue a writ, order or a direction, particularly one in the nature of a writ of Mandamus directing the Respondents No. 1-5 to refund an amount of Rs. 1,80,00,000/- (Rupees One Crore Eighty Lakhs) paid by the Petitioner towards interest for the FY 2017-18, 2018-19 & 2019-20 for delayed payment of SGST.

IA NO: 1 OF 2020

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to direct

the Respondents No. 1-5, to refund the amount of Rs. 1.80,00,000/- (Rupees One Crore Eighty Lakhs) paid by the Petitioner towards interest for the FY 2017-18, 2018-19 & 2019-20 for delayed payment of SGST on the condition of blocking of an equivalent amount of Input Tax Credit from the credit available in the Petitioner's electronic credit ledger.

Counsel for the Petitioner: SRI AVINASH DESAI

Counsel for the Respondent No.1: GP FOR COMMERCIAL TAXES

**Counsel for the Respondent Nos.2 to 4, and 6, 7: SRI B. NARAYANA REDDY,
STANDING COUNSEL FOR CENTRAL EXCISE,
CUSTOMS AND SERVICE TAX (CENTRAL TAXES)**

**Counsel for the Respondent No.5: SRI NAMAVARAPU RAJESHWAR RAO,
ASSISTANT SOLICITOR GENERAL**

The Court made the following: ORDER

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY
AND
THE HON'BLE DR. JUSTICE SHAMEEM AKTHER
W.P.NO.21311 OF 2020

ORDER (Per the Hon'ble Sri Justice A.Rajasheker Reddy)

Petitioner is M/s Bharati Airtel Limited, and as per the averments made in the affidavit filed in support of the writ petition, it is engaged in providing telecom services throughout India, including the State of Telangana. The petitioner – company is registered under Central Goods and Services Tax Act, 2017 (for short 'the Act').

2. The Deputy Commissioner – EIU, State Tax, vide notice bearing No.DC-2/EIU/AIRTEL/01/2019 dated 18.03.2019 informed the petitioner – company that it committed some errors in depositing State Goods and Service Tax (SGST) in the State of Telangana for the financial years 2017-18, 2018-19 and 2019-20.

3. The case of the petitioner is that they have entered incorrect State Code in some of the invoices, due to which excess SGST has been paid in the State of Andhra Pradesh. However, on receipt of the notice dated 18.03.2019, the petitioner paid the tax.

4. Thereafter, the petitioner was directed to pay an amount of Rs.1,80,00,000/- (Rupees one crore, eighty lakhs only) towards interest for the late payment of the SGST to the State Government. Petitioner – company paid the said amount of Rs.1,80,00,000/-

(Rupees one crore, eighty lakhs only) under protest through Form GST PMT -06 bearing CPIN No.19063600157378 dated 25.06.2019. The said payment of penal interest was intimated to the Deputy Commissioner – EIU vide letter dated 25.06.2019 .

5. The case of the petitioner – company is that the above said amount of Rs.1,80,00,000/-, has not been passed over to any other person.

6. Petitioner filed an application dated 12.08.2019 for the period June 2019-20 under ARN No.AA3608190092823, seeking refund of Rs.1,80,00,000/- (Rupees one crore, eighty lakhs only) under Rule 89 of Central Goods and Services Tax Rules, Rules, 2017 (for short 'the Rules') read with Section 54 of the Act.

7. The 4th respondent – Assistant Commissioner of Central Tax, issued a show cause notice dated 13.09.2019 asking the petitioner to explain why its refund application shall not be rejected.

8. Petitioner filed reply, contending that the return that is required to be filed under Section 39 of the Act, read with Rule 61 of the Rules, is GSTR -3, but as the same was kept under suspension, they are filing GSTR-3B, and the same cannot be taken in lieu of GSTR-3, and since the GSTR-3 is kept under suspension, the period for which interest can be levied cannot be said to have commenced in

terms of Section 50 of the CGST Act, 2017. The petitioner further submitted that even if there is a delay in payment of tax, it is liable to pay interest only on the net tax liability after adjusting the admissible input tax credit.

9. The original authority i.e., the 4th respondent - Assistant Commissioner of Central Tax, Begumpet GST Division, Secunderabad GST Commissionerate, vide Order-in-Original No.148/2019-20-GST-REFUND, dated 18.10.2019, rejected the claim of the petitioner and held that the petitioner - assessee is not eligible for a refund.

10. Assailing the order passed by the original authority, petitioner filed an appeal, and the appellate authority - 2nd respondent, vide Order-In-Appeal No.HYD-GST-SC-AP2-027-20-21 dated 10.08.2020, dismissed the appeal, confirming the order of the original authority dated 18.10.2019. Aggrieved by the same, the present writ petition has been filed by the petitioner - assessee.

11. Learned counsel for the petitioner Mr. Avinash Desai, referring to the averments made in the affidavit filed in support of the writ petition, submits that due to entering of incorrect State Code in some invoices, excess SGST was paid to the State of Andhra Pradesh instead of State of Telangana, but however, after receipt of notice dated 18.03.2019, petitioner paid the tax for the financial years 2017-18 to 2019-20, and as per the directions of respondent No.4, it paid

an amount of Rs.1,80,00,000/- (Rupees one crore, eighty lakhs only) towards interest for the delayed payment.

12. That Section 50(1) of the Act provides for payment of interest by a person who has failed to discharge his liability to pay tax within the prescribed period; that Section 50(2) of the Act provides that the period for which interest is to be paid shall commence from the day succeeding the day on which tax was due to be paid; that as per Section 39(7) of the Act, registered person has to pay the Government tax due as per Form GSTR -3, not later than the last date on which he is required to furnish the said Form; that as per Rule 61 of the Rules, the prescribed return in terms of Section 39, has to be furnished in GSTR -3, and not GSTR -3B; and that as GSTR - 3 stood suspended as a result of the orders passed by the Government, all the assesses, including the petitioner, have been filing returns in form GSTR-3B, as a temporary solution to channelize collection of taxes. Hence, GSTR - 3B cannot be considered as a return filed in lieu of GSTR - 3, and the liability to pay interest does not arise, for the reason that the period for which the interest can be levied cannot be said to have commenced, as GSTR-3 stood suspended.

13. In support of his contention that the return filed in Form GSTR - 3B is not in lieu of return to be filed in Form GSTR-3, and that the last date of filing GSTR- 3B, is not the last date for filing Input

Tax Credit, petitioner relied on the judgment of the High Court of Gujarat in the decision reported in ***AAP & COMPANY, CHARTERED ACCOUNTANTS vs. UNION OF INDIA***¹.

14. That for the financial years 2017-18 to 2019-20 petitioner was having sufficient input tax credit balance in its electronic ledger account to discharge the additional tax amount according to Section 49(5) of the Act, and there was no outstanding tax liability. That even if the petitioner is liable to pay interest for the delayed payment, it is liable only on the net tax liability after duly adjusting the input tax credit.

15. In support of the above contention, learned counsel for the petitioner placed reliance on the 31st Meeting of the GST Council dated 22.12.2018, wherein it gave in-principal approval for amendment of Section 50 of the Act, to make a provision for payment of interest only on the net tax liability, after taking into account the admissible input tax credit.

16. That the GST Council, in its 39th Meeting held on 14.03.2020, also recommended that the interest for delay in payment of GST would be charged on net tax liability with effect from 01.07.2017 and the provision in this regard was recommended to be made with retrospective operation.

¹(2019)107 taxmann.com 125 (Gujarat)

17. That the 7th respondent – Central Board for Indirect Taxes and Customs, New Delhi, issued a notification dated 25.08.2020 amending Section 50 of the CGST Act, inserting the proviso to the said provision, whereunder the interest on tax paid after the due date, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger. As per the notification, this provision will come into force with effect from 01.09.2020, i.e., the provision was given prospective operation, which is contrary to the recommendations made by the GST Council in its 39th meeting, wherein this provision was recommended to be given retrospective operation.

18. That 7th respondent issued a clarification/direction dated 26.08.2020 stating that the notification No.63/2020 dated 25.08.2020 was issued prospectively due to certain technical limitations and that it was clarified that no recoveries shall be made for the past period as well by the Central and State tax administration in accordance with the decision taken in the 39th meeting of the GST Council.

19. That, the CBEC Policy wing issued a circular with administrative instructions dated 18.09.2020 for recovery of interest on net tax liability with effect from 10.07.2017, stating that in order to implement the decision of the council in its true spirit, and at the same time working within the legal framework, it has been decided to address the issue through administrative arrangements .

20. That it is a settled proposition of law that any amendment which is given to clarify an anomaly will generally have a retrospective effect. Learned counsel submits that considering identical facts and circumstances, a learned Single Judge of High Court of Madras in the decision reported in **MAANSAROVAR MOTORS PRIVATE LIMITED vs. THE ASSISTANT COMMISSIONER, POONAMALLE DIVISION²**, held that the proviso inserted to Section 50 of the Act by way of amendment, has to be taken to be retrospective, and further directed the appropriate authority to compute the interest liability for belated remittances of cash, and refund the balance of the amount collected from the petitioner therein.

21. Learned counsel submits that the appellate authority has relied on the judgment of a Division Bench of this court in the decision reported in **MEGHA ENGINEERING & INFRASTRUCTURES LTD. vs. THE COMMISSIONER OF CENTRAL TAX, HYDERABAD³** to reject the claim of the petitioner. He submits that the said judgment was passed prior to the amendment to Section 50 of the Act and hence cannot be made applicable to the facts of the present case.

22. With these submissions, learned counsel for the petitioner seeks to set aside the impugned orders and to direct respondents 1 to 5 / competent authority to refund an amount of Rs.1,80,00,000/-

² MANU/TN/5780/2020 (W.P.NO.28437 OF 2019 AND BATCH DATED 29.09.2020)

³ MANU/TL/0041/2019 (Equivalent citations: 2019(4) ALD 19, (2019) 73 GST 787)

(Rupees one crore, eighty lakhs only) paid by the petitioner towards interest for the financial years 2017-18, 2018-19 and 2019-20 for delayed payment of SGST.

23. Commissioner of Central Taxes and central Excise, Secunderabad Commissionerate R/o Hyderabad, filed a counter affidavit on behalf of respondents 2 to 7 denying averments made by the petitioner in the writ affidavit.

24. Sri B.Narayana Reddy, learned Standing Counsel for Central Excise, Customs and Service Tax (Central Taxes), appearing for respondents 2 to 7, referring to the averments made in the counter affidavit submits that for the Financial Years 2017-18, 2018-19 and 2019-20, petitioner paid the taxes belatedly after the due date of filing returns. Therefore, as per Section 50(1) of the Act, it is liable to pay interest on the total defaulted tax amount. He submits that the said provision does not provide for levying interest only on the net tax liability after adjusting the input tax credit available in the electronic cash ledger of the assessee.

25. That, as per Section 49 of the Act, the tax shall be paid by setting off the input tax credit/balance available under electronic cash or credit ledger, while filing the return under Section 39 of the Act. Government of India, in the exercise of its jurisdiction under Section 164 of the Act, amended CGST Rule 61(5) retrospective, vide

notification 49/2019-Central Tax dated 09.10.2019 with effect from 01.07.2017, clarifying that the return specified under Section 39 is GSTR 3B, and further it is also clarified that in a case where a person furnishes GSTR- 3B, he shall not be required to file GSTR -3. Therefore, the contention of the learned counsel for the petitioner that the period for payment of interest under Section 50 of Act has not yet commenced in view of the postponement of filing GSTR-3 is not correct, and the further contention of the learned counsel for the petitioner that filing of return in GSTR-3B is not in lieu of filing return in GSTR-3 is also not correct, given the above stated amendment to Rule 61(5) of the Rules.

26. That against the judgment of the High Court of Gujarat in *AAP AND CO., CHARTERED ACCOUNTS vs. UNION OF INDIA* (1 supra), which held that GSTR-3B return cannot be considered as a return in lieu of GSTR - 3, appeal was filed, and the Apex Court stayed the said judgment.

27. He submits that the assessee has to pay tax while filing the monthly return as prescribed under Section 39 of the Act, read with Rule 61(5) of the Rules, in the form GSRT 3B, and for delayed payment of such tax, he is liable to pay interest under Section 50 of the Act.

28. That the amended provision under Section 50 was brought into force with effect from 01.09.2020 vide notification No.63/2020-Central tax dated 25.08.2020, i.e., the provision is made prospective in operation. But, in the present case, the show cause notice was issued on 13.09.2019, and the primary and the appellate authorities passed orders on 18.10.2019 and 10.08.2020, respectively i.e., prior to the coming into force the amended provision on 01.09.2020. Hence, the provision as it stood prior to the amendment applies to the petitioner. He submits that when the Central Government has specifically made a provision to have a prospective operation, this court cannot make the said provision to operate retrospectively.

29. That the Administrative Instructions dated 18.09.2020 issued by the Central Board of Indirect Taxes and Customs giving amended provision retrospective operation is only to the limited extent of taking recovery action on interest on net cash tax liability only and not to take any action for recovery of interest on gross tax liability for the past period i.e., from 01.07.2017 to 31.08.2020.

30. That the taxpayers who have already discharged the interest on gross tax liability, the law of the land continues for the said period, and there are no instructions on refund of interest paid, and the statutory framework also does not allow for such refund.

31. That the issue involved in this writ petition is squarely covered by the Division Bench Judgment of this court in *Megha Engineering & Infrastructures Ltd. vs. The Commissioner of Central Tax, Hyderabad* (3 Supra), wherein this court considering that the petitioner therein filed the returns belatedly, and payment of tax liability, partly in cash and partly in form of claim for ITC was made beyond the period prescribed, held that liability to pay interest under Section 50(1) of the Act arose automatically and that the petitioner cannot escape from the liability, and that the claim made by respondents on ITC portion of tax, cannot be found fault with.

32. In view of the above circumstances, learned Standing Counsel for respondents seeks to dismiss the writ petition.

33. Heard Sri Namavarapu Rajeshwar Rao, learned Assistant Solicitor General, appearing for respondents along with the learned Standing Counsel for respondents 2 to 7.

34. Rejoinder is filed on behalf of the petitioner, disputing the averments made in the counter affidavit and reiterating the averments made in the writ affidavit.

35. In view of the facts and circumstances of the case, and the rival contentions of both the counsels, the issue that arises for our consideration is, - Whether the liability to pay interest under

Section 50 of the Act, for the delayed payment of GST, in the light of the Administrative Instructions for recovery of interest on net cash tax liability with effect from 01.07.2017, issued by the Government of India, Ministry of Finance Department of Revenue, Central Board of Indirect Taxes and Customs GST Policy Wing, dated 18-09-2020, is to be confined only to the net tax liability by giving set-off to the input tax credit?, And if so, whether the claim of the petitioner seeking a refund of the interest paid for the Financial Years, 2017-18, 2018-19 and 2019-20 for the delayed payment of GST on the net tax liability is justified?

36. The admitted facts on record are that for the Financial Years, 2017-18 to 2019-20, petitioner made late payment of SGST, and therefore, it was directed to pay interest on the total defaulted service tax, and accordingly, it deposited the interest, which is Rs.1,80,00,000/-. The claim of the petitioner is that they had sufficient input tax credit balance in their electronic credit ledger during the disputed period, and that interest for delayed payment of GST, has to be charged only on the net cash tax liability, giving set off to the input tax credit.

37. The GST Council, in its 39th meeting held on 14.03.2020, made a recommendation that interest for delay in payment of GST be

charged on the net cash tax liability with effect from 01.07.2017 i.e., the recommendations were made to amend the law retrospectively.

38. Section 50(1) of the Act is the enabling provision under which the assessee is liable to pay interest on delayed payment of tax. By virtue of Notification No.63/2020-Central Tax dated 25.08.2020, the amendment was made to Section 50(1) of the Act by inserting a proviso, and as per the said notification, the amended provision came into force with effect from 01.09.2020. The proviso to Section 50(1) of the Act, which has been amended, is extracted as under for ready reference:

"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.

39. From the above provision, it is clear that the interest on delayed payment of tax shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger. In other words, the interest shall be charged on the net cash tax liability by giving set off to the input tax credit.

40. Though the GST Council in its 39th meeting recommended giving the above amendment retrospective operation, the Government

has given the above amendment prospective operation with effect from 01.09.2020.

41. In the present case, the delayed payment of tax was made during the year 2017-18 to 2019-2020, and the show-cause notice was issued on 13.09.2019, and the primary authority passed the order on 18.10.2019, and the appellate authority also passed the order on 10.08.2020 i.e., prior to the amendment, which came into force with effect from 01.09.2020.

42. But, subsequent to the said amendment to Section 50(1) of the Act, Principal Commissioner, Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs, GST Policy Wing, vide F.No.CBEC - 20/01/08/2019-GST dated 18.09.2020, addressed a letter to the Principal Chief Commissioners / Chief Commissioners / Principal Commissioners / Commissioners of Central Taxes (All), the Principal Director Generals (All), with regard to administrative instructions, for recovery of interest on net cash tax liability with effect from 01.07.2017. The relevant portion of the said administrative instructions, for ready reference, are extracted as under:

"Based on the recommendations of the 35th meeting of the GST Council held on 21st June, 2019, the provision of Section 50 was amended vide Section 100 of the Finance (No.2) Act, 2019 to provide for charging interest on the net cash tax liability. The said amendment was to be made effective from a date to be notified by the Government. Accordingly, the said provision was made effective vide notification No.63/2020 - Central Tax dated the 25th August, 2020 w.e.f. 01.09.2020.

2. The GST Council, in its 39th meeting, held on 14th March, 2020 recommended interest to be charged on the net cash tax liability w.e.f. 01.07.2017 and accordingly, recommended the amendment of Section 50 of the CGST Act retrospectively w.e.f. 01.07.2017. The retrospective amendment in the GST laws would be carried out in due course through suitable legislation.

3. Post issuance of notification 63/2020 - Central Tax dated the 25th August, 2020, there were apprehensions raised by taxpayers that the said notification is issued contrary to the Council's recommendation to charge interest on net cash liability w.e.f. 01.07.2017. Consequently, a press release, dated 26.08.2020 was issued to clarify the position. Further, in order to implement the decision of the Council in its true spirit, and at the same time working within the present legal framework, it has been decided to address the issue through administrative arrangements as under:

- (a) For the period 01.07.2017 to 31.08.2020, field formations in your jurisdiction may be instructed to recover interest 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); and
- (b) wherever SCNs have been issued on gross tax payable, the same may be kept in Call Book till the retrospective amendment in Section 50 of the CGST Act is carried out.

43. Thus, from the above communication, it is clear that though the amendment was given prospective operation, and as the same was contrary to the recommendations made by the Council to charge interest on net cash liability with effect from 01.07.2017, the Central Board of Indirect Taxes and Customs, GST Policy Wing, represented by its Principal Commissioner, made administrative arrangements for recovery of interest only on the net cash tax liability for the period from 01.07.2017 to 31.08.2020, and further the show cause notices issued on gross tax payable, were relegated to call book till the retrospective amendment to Section 50 of the Act is carried out.

44. Though the learned Standing Counsel for respondents 2 to 7 contends that the said administrative instructions are limited for the purpose of initiating recovery proceedings and that they cannot be

made applicable to the assesseees who have already paid the interest on the gross tax element; this court is not inclined to accept the said contention. In principle, the authorities have concluded that until the amended provision is given retrospective operation by suitable legislation, they want to implement the decision of the Council in its true spirit, and accordingly gave administrative instructions. Such administrative instructions/ circulars are clearly applicable to the petitioner's case, and binding on the Revenue.

45. The Apex Court in the decision reported in **RANADEY MICRONUTRIENTS v. C.C.E.**⁴, while considering the binding effect of the circulars issued by the Central Board of Excise and Customs on the Central Excise Officers, held that the Revenue cannot challenge them on the ground of inconsistency with any statutory provision, and that such circulars are binding on the Revenue. The relevant portion of the judgment is as under:

"16. We reject the submission to the contrary made by the learned counsel, for the Revenue and in the affidavit by M.K.Gupta, working as Director in the Department of Revenue, Ministry of Finance. One should have thought that an officer of the Ministry of Finance would have greater respect for circulars such as these issued by the Board, which also operates under the aegis of the Ministry of Finance, for it is the Board which is, by statute, entrusted with the task of classifying excisable goods uniformly. The whole objective of such circulars is to adopt a uniform practice and to inform the trade as to how a particular product will be treated for the purposes of excise duty. It does not lie in the mouth of the Revenue to repudiate a circular issued by the Board on the basis that it is inconsistent with a statutory provision. Consistency and discipline are of far greater importance than the winning or losing of court proceedings."

⁴ (1996)10 SCC 387

46. In an other judgment of the Apex Court in **CCE v. DHIREN CHEMICAL INDUSTRIES**⁵, the facts disclose that the Central Government issued a notification exempting the commodities produced from materials 'on which the appropriate amount of duty of excise has already been paid'. As the three judge Bench of the Apex Court found a conflict of opinion between the views taken in the earlier co-ordinate benches, referred the matter to the Constitution Bench, for interpreting the phrase "on which the appropriate amount of duty of excise has already been paid" occurring in the exemption notification. In the light of these facts, the Apex Court held that the exemption notification is applicable to goods made from raw material on which excise duty has, in fact, been paid at the appropriate or correct rate, and not to goods made out of raw material not liable to duty or liable to duty at "nil" rate and that in the phrase, more emphasis has to be given to the words "has already been paid", than to the words "appropriate". The Apex Court further held that CBEC circular, if any placing a different interpretation on the said phrase, would be binding on the Revenue. The relevant portion of the judgment is as under:

"11. We need to make it clear that, regardless of the interpretation that we have placed on the said phrase, if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue."

47. Thus, from the above judgments of the Apex Court, it is clear that the circulars issued by the Revenue are binding on the

⁵ (2002)2 SCC 127

authorities, even if they are inconsistent with any statutory provision. It is further held that regardless of the interpretation given by the Apex Court in relation to a phrase occurring in the notification if there are circulars, which have been issued by the Central Board of Excise and Customs, giving a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue.

48. In the present case, as already noted above though the proviso inserted to Section 50(1) of the Act by way of an amendment has been given prospective operation i.e., with effect from 1.9.2020, the Central Board of Indirect Taxes and Customs, GST Policy Wing, has issued administration instructions to recover interest on net cash tax liability with effect from 01.07.2017. These instructions have been issued to implement the decision of the Council in its 39th meeting in its true spirit. The administrative instructions, which are in the nature of circular, as per the judgments of the Apex Court referred to above (4 and 5 supra), are binding on the Revenue, and the respondents cannot plead in the counter that the amendment is prospective in nature.

49. In the present case, the petitioner paid the interest on the gross tax, under protest and as noted in the preceding paragraph, the authorities made administrative arrangements to extend the amended

provision with retrospective effect, till a suitable legislation is made in that regard.

50. It is to be noticed that on the one hand, the assesseees who have not paid the interest on the delayed payment of tax for the above said period are getting protection under the administrative instructions dated 18.09.2020, and on the other hand, the assesseees, like the petitioner, are being denied the said protection, on the ground that they have already paid, and that there are no instructions to refund and the framework of the statute also does not provide for refund. This amounts to discrimination within a class of assesseees, and the same cannot be sustained, and this court in exercise of judicial review, under Article 226 of the Constitution of India, is inclined to direct the respondents to confine charging of interest on the net cash tax liability and refund the balance amount. Moreover, the petitioner paid the amount under protest to avoid unpleasant situations, and the honest tax payers cannot be penalized by mulcting with interest. Such an interpretation of the circular, as contended by the learned Standing Counsel for the respondents, is arbitrary.

51. Considering similar facts and circumstances, and the present amendment made to Section 50(1) of the Act, and the above administrative instructions of the Central Board of Indirect Taxes and Customs GST Policy Wing, dated 18.09.2020, High Court of Madras

in the decision reported in *Maansarovar Motors Pvt. Ltd., vs. The Assistant Commissioner, Poonamallee Division and Ors.* (2 supra), held as under:

"27. Thus, the Board has yet again reiterated that the amendment by insertion of proviso of Section 50 of the CGST Act is intended to be retrospective. Perhaps the relegation of the show cause notices to the call book is to await the passing of the amendments in the Central and State statutes. To my mind, the Centre, the State and the CBIC are in agreement that the operation of the proviso of Section 50 should only be retrospective and the interpretation to the contrary by the authorities constituted under the Board, is in my view, clearly misplaced as is the consequential coercive recovery.

...

30. ... In light of my decision as aforesaid, a direction is issued to the appropriate authority to compute the interest liability for belated remittances of cash and refund the balance of the amount collected from the petitioner within a period of four weeks from date of uploading of this order."

52. Thus, the above decision of the High Court of Madras squarely applies to the facts and circumstances of the present case.

53. In an other decision of the learned single Judge of the High Court of Madras reported in ***REFEX INDUSTRIES LTD. v. THE ASSISTANT COMMISSIONER OF CGST & CENTRAL EXCISE, MARAIMALAI NAGAR DIVISION***⁶, the facts disclose that the assesses have raised an objection stating that "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". Considering this objection, and Section 50, as it stood prior to amendment, it was held as under:

⁶ MANU/TN/1448/2020 – 2020[34]G.S.T.L. 588 – {2020}74GSTR274(Mad)

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 234A, 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. (MANU/SC/0662/2001 : 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 words '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 later 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 drew my attention to the decision of the Telangana High Court in the case of Megha Engineering and Infrastructures Ltd. The Commissioner of Central Tax and others (MANU/TL/0041/2019 : 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."

54. The learned Judge of Madras High Court on thorough analysis of relevant provisions rendered the opinion and we accept the said reasoning.

55. The decision of the Division Bench of this court in *Megha Engineering & Infrastructures Ltd. vs. The Commissioner of Central Tax, Hyderabad and others* (3 supra), relied on by the appellate authority, as well as the learned Standing Counsel for the respondents 2 to 7, cannot be made applicable to the facts of the present case, for the reason that the said judgment was delivered prior to amendment to Section 50(1) of the Act, and the Division Bench had no occasion to consider the recommendations of the GST Council in its 39th meeting held on 14.03.2020 and also the communication of the Central Board of the Indirect Taxes and Customs dated 18.09.2020.

56. Further, it is also brought to the notice of this court by the learned counsel for the petitioner that Central Government by proposing the amendment in GST Law vide Finance Bill 2021 has clarified that the interest on net tax liability with retrospective effect, will get legal backing, and that Clause 103 of the bill seeks to amend Section 50 of the CGST Act to substitute proviso to sub-section (1) with retrospective effect from 01-07-2017.

57. The other contention of the learned counsel for the petitioner is that since the return that is required to be filed under Section 39 of the Act read with Rule 61, is GSTR -3, but as the same was kept under suspension, all the assesses, including the petitioner are filing returns in GSTR 3-B, and the said return cannot be taken in lieu of return under GSTR-3, and the liability to pay interest does not arise, for the reason that the period for which the interest can be levied, cannot be said to have commenced, as GSTR - 3 stood suspended.

58. In order to consider the above contention, it is necessary to note Section 39(1) and (7) of the Act, and sub rules (1) and (5) of Rule 61 of the Rules. Rule 61(5) was substituted vide notification No.17/2017-Central Tax dated 27.07.2017 and it was given retrospective effect from 1.7.2017. Subsequently, by virtue of the Notification No.82/2020-CT dated 10.11.2020, Rule 61 has been substituted with effect from 01.01.2021. But the provision existing at the relevant period has to be considered, and, therefore, provision under Rule 61, prior to amendment vide notification dated 10.11.2020, is required to be considered.

59. The above provisions are extracted as under for ready reference:

Section 39: Furnishing of returns:

(1) Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of Section 10 or Section 51 or Section 52, shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars, in such form and manner, as within such time, as may be prescribed, on or before the twentieth day of the month succeeding such calendar month or part thereof.

...

(7) Every registered person, who is required to furnish a return under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (5), shall pay to the Government the tax dues as per such return not later than the last date on which he is required to furnish such return.

Rule 61: Form and manner of submission of monthly return:

(1) Every registered person other than a person referred to in section 14 of the Integrated Goods and Services tax Act, 2017 or an Input Service Distributor or a non-resident taxable person or a person paying tax under section 10 or section 51 or, as the case may be under Section 52 shall furnish a return specified under sub-section (1) of Section 39 in **FORM GSTR-3** electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

...

(5) Where the time limit for furnishing of details in **FORM GSTR-1** under Section 37 or in **FORM GSTR -2** under Section 38 has been extended, the return specified in sub-section (1) of Section 39 shall, in such manner and subject to such conditions as the Commissioner may, by notification, specify, be furnished in **FORM GSTR-3B** electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that where a return in FORM GSTR - 3B is required to be furnished by a person referred to in sub-section (1) then such person shall not be required to furnish the return in FORM GSTR-3.

60. From a reading of sub-sections 1 and 7 of Section 39 of the Act, it is clear that every registered person, other than certain categories of persons specified under that section, shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, with the particulars mentioned in the said provision, within such time, as may be prescribed, on or before the twentieth day of the month succeeding such calendar month or part

thereof and pay to the Government the tax due as per such return not later than the last date on which he is required to furnish such return.

61. Rule 61 of the Rules provide the form and manner of submission of monthly return. Under sub-rule (1) of Rule 61, the registered person shall furnish a return specified under sub-section (1) of Section 39 in FORM GSTR -3 electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner. As per sub-rule (5) of Rule 61, where the time limit for furnishing of details in FORM GSTR -1 under Section 37 or in FORM GSTR -2 under Section 38 has been extended, the return specified in sub-section (1) of Section 39 shall be furnished in FORM GSTR - 3B. Here it is conspicuously noticed that there is no wording under sub-rule 5 of Rule 61 that return in Form GSTR-3B being in lieu of Form GSTR-3. And as per the proviso to this rule, where a return in FORM GSTR-3B is required to be furnished by a person referred to in sub-section 1, then such person shall not be required to furnish the return in FORM -3.

62. Thus, a combined reading of sub-rules 1 and 5 of Rule 61, it is clear that the return that is required to be furnished under Section 39(1), at the relevant period in question, by a taxpayer, is GSTR - 3 and not GSTR - 3B, and hence return required to be

furnished in Form GSTR – 3B is not the return in lieu of a return specified in Form GSTR - 3.

63. In the judgment of the High Court of Gujarat in *AAP and Co., Chartered Accounts vs. Union of India* (1supra), a somewhat similar issue came up for consideration. The facts of the said case disclose that the Central Government issued a press release dated 18.10.2018 with regard to the last date to avail input tax credit in respect of invoice or debit notes relating to such invoices pertaining to the period from July 2017 to March 2018. Paragraph No.3 of the said press release states that *"With taxpayers self-assessing and availing ITC through return in FORM GSTR – 3B, the last date for availing ITC in relation to the said invoices issued by the corresponding supplier(s) during the period from July, 2017 to March, 2018, is the last date for the filing of such return for the month of September, 2018 i.e., 20th October, 2018."* Assailing this portion of the press release, the writ petition has been filed. Under the impugned portion of press release dated 18.10.2018, a taxpayer will not be able to claim the input tax credit for the period from July 2017 to March 2018, after filing of the return in Form GSTR – 3B for the month of September, 2018. Further, it disentitles a taxpayer to claim the input tax credit for the aforesaid period, which could not be taken on account of any error or omission. The contention of the learned counsel for the petitioner is that the impugned portion of the press release is contrary to

Section 16(4) of the CGST Act, which provides for eligibility and conditions for claiming the input tax credit. As per Section 16(4), the last date for taking the input tax credit in respect of any invoice or debit note pertaining to a financial year is the due date of furnishing of the return under Section 39 for the month of September, following the end of the financial year or furnishing of the relevant annual return, whichever is earlier. It was also contended that the last date of taking the input tax credit should be the due date of filing of return in form GSTR-3 or annual return whichever is earlier. In the light of these facts and circumstances, the issue framed for consideration was *"Therefore, the moot question is, whether the return in Form GSTR - 3B is a return required to be filed under Section 39 of the CGST Act/GGST Act."*

64. The Division Bench of Gujarat High Court held that the press release in question is valid and in consonance with Section 16(4) only if form GSTR - 3B is a return required to be filed under Section 39 of the CGST Act. The Division Bench further held that GSTR 3B is not a return in lieu of GSTR -3. The relevant portion is thus:

"29. Section 39(1) of the CGST/GGST Act provides that every taxpayer, except a few special categories of persons, shall furnish a monthly return in such form and manner as may be prescribed. Rule 61 of the CGST Rules /GGST Rules prescribes the form and manner of submission of monthly return. Sub-rule 1 of Rule 61 of the CGST Rules /GGST Rules provides that the return required to be filed in terms of Section 39(1) of the CGST/GGST Act is to be furnished in Form GSTR-3.

30. It would be apposite to state that initially it was decided to have three returns in a month, i.e., return for outward supplies i.e., GSTR -1 in terms of Section 37, return for inward supplies in terms of Section 38, i.e., GSTR-2 and a combined return in form GSTR-3. However, considering technical glitches in the GSTN portal as well as difficulty faced by the tax

payers it was decided to keep filing of GSTR -2 and GSTR-3, in abeyance. Therefore, in order to ease the burden of the taxpayer for some time, it was decided in the 18th GST Council meeting to allow filing of a shorter return in Form GSTR-3B for initial period. It was not introduced as a return in lieu of return required to be filed in Form GSTR-3. The return in Form GSTR - 3B is only a temporary stop gap arrangement till due date of filing the return in Form GSTR-3 is notified. Notifications are being issued from time to time extending the due date of filing of the return in form GSTR-3, i.e., return required to be filed under Section 39 of the CGST Act/GGST Act. It was notified vide Notification No.44/2018 Central Tax dated 10th September, 2018 that the due date of filing the return under Section 39 of the Act, for the months of July, 2017 to March 2019 shall be subsequently notified in the Official Gazette.

31. It would also be apposite to point out that the notification No.10/2017 Central tax dated 28th June, 2017 which introduced mandatory filing of the return in form GSTR-3B stated that it is a return in lieu of Form GSTR-3. However, the Government, on realising its mistake that the return in form GSTR -3B is not intended to be in lieu of Form GSTR-3, clarified its mistake retrospectively vide Notification No.17/2017 Central Tax dated 27th July, 2017 and omitted the reference to return in Form GSTR - 3B being return in lieu of Form GSTR -3.

32. Thus, in view of the above, the impugned press release dated 18th October, 2018 could be said to be illegal to the extent that its para-3 purports to clarify that the last date for availing Input tax credit relating to the invoices issued during the period from July, 2017 to March, 2018 is the last date for the filing of return in Form GSTR-3B.

33. The said clarification could be said to be contrary to Section 16(4) of the CGST Act/ GGST Act read with Section 39(1) of the CGST Act/GGST Act read with Rule 61 of the CGST Rules/GGST Rules."

65. Thus, from the above judgment of the Division Bench of the High Court of Gujarat interpreting the provisions under Section 39 (1) and (7) of the Act and sub-rules 1 and 5 of Rule 61 of the Rules, it is clear that GSTR 3B is not a return in lieu of GSTR - 3. It is not under dispute that the return in Form GSTR - 3 stood suspended since September, 2017. Therefore, in the absence of a specific return as prescribed under Section 39(1) of the Act, at the relevant period, the assessee cannot be found fault with for belated payment of tax, and as a matter of fact, no interest can be levied for the delayed payment of tax.

66. However, as per the case of the petitioner due to incorrect entry of State code in some Invoices, during the period from 2017-18, 2018-19 and 2019-20, excess SGST has been paid in the State of Andhra Pradesh, and no tax was paid in the State of Telangana for the said period and only after issuance of notice dated 18.03.2019 tax was paid, and therefore, there was delay. As per the proviso to Section 50 (1) and the administrative instructions dated 18.09.2020, it is held that the petitioner is only liable to pay interest on the net tax liability after duly adjusting the input tax credit. Therefore, though filing of Form GSTR -3B is not in lieu of Form GSTR -3, in view of the above facts and circumstances, the liability is being confined only to the net tax liability after adjusting the input tax credit. The impugned order needs to be modified accordingly.

67. Learned Standing Counsel for the respondents submitted that the above judgment of the Division Bench of the High Court of Gujarat, has been stayed by the Apex Court in Special Leave Petition (Civil) Diary No.40304/2019 dated 06.12.2019.

68. A Three-Judge Bench of the Apex Court in ***M/s SREE CHAMUNDI MOPEDS LTD. v. CHURCH OF SIT ASSOCIATION***⁷ considered the distinction between an interim order granting a stay of operation of the order under challenge and an order quashing an order

⁷ AIR 1992 SC 1439

and held that the interim order of stay only means that the order which has been stayed would not be operative from the date of the passing of the stay order, and it does not mean that the said order has been wiped out from existence.

69. High Court of Andhra Pradesh in **GOVT. OF A.P. vs. N.RAMI REDDY**⁸ while dealing with question "*Whether having regard to the aforesaid aforementioned interim order of stay passed by the Apex Court on 27-9-2000 in SLP (C) No.15177 of 2000, the ratio of the judgment has been wiped out or not.*" held that while a court of appeal stays the operation of the judgment, it stays the further implementation, as between the parties, of the operative portion thereof, and thereby the ratio of the decision cannot be said to be wiped off and furthermore a distinction must be borne in mind that the appeal court may, in a given situation, also suspend the operation of the said decision, and that a 'suspension' of operation of a judgment and 'staying' the operation of the order, in our view, connotes two different situations.

70. A Division Bench of the High Court of Calcutta in **PIJUSH KANTI CHOWDHURY vs. STATE OF WEST BENGAL**⁹ considering the judgments of the Apex court in **NARCOTICS CONTROL BUREAU**

⁸ 2001(17)ALD 443

⁹ (2007)2 CALLT 577 HC

v. DILIP PRAHLAD NAMADE¹⁰ and SHREE CHAMUNDI MOPEDS LTD. v. CHURCH OF SOUTH INDIA TRUST ASSOCIATION, MADRAS (supra), held as under:

"13. Therefore, the effect of the order of stay in a pending appeal before the Apex Court does not amount to 'any declaration of law' but is only binding upon the parties to the said proceedings and at the same time, such interim order does not destroy the binding effect of the judgment of the High Court as a precedent because while granting the interim order, the Apex Court had no occasion to lay down any proposition of law inconsistent with the one declared by the High Court which is impugned."

71. In view of the above judgments of the Apex Court, Division Bench of the erstwhile High Court of A.P., and the Division Bench of the High Court of Calcutta, it cannot be said that the granting of a stay by the Apex Court, have the effect of wiping out the ratio of a law laid down in the decision of the High Court of Gujarat, and as it has not been set aside, the ratio can be followed

72. Thus, issues framed are answered in the affirmative in favour of the writ petitioner, as such, the impugned orders dated 18.10.2019 and 10.08.2020 passed by the 4th and the 2nd respondents, who are the original as well as the appellate authorities, respectively, holding that the petitioner - assessee is not eligible for refund, are set aside.

73. For the foregoing reasons, the respondents 2 to 7/ appropriate authority, is directed to calculate interest on the net cash

¹⁰ AIR 2004 SC 2950

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, as per the administrative instructions dated 18.09.2020, for the financial years 2017-18, 2018-19 and 2019-20, during which period there was delayed payment of GST, and refund the same collected from the petitioner, within a period of four weeks from the date of receipt of a copy of this order.

74. The writ petition is accordingly allowed to the extent indicated above.

75. Interlocutory applications pending, if any, shall stand closed. No order as to costs.

SD/-M.MANJULA
ASSISTANT REGISTRAR

//TRUE COPY//

SECTION OFFICER

One fair copy to the HON'BLE SRI JUSTICE A.RAJASHEKER REDDY
(For His Lordship's Kind Perusal)

AND

One fair copy to the HON'BLE Dr. JUSTICE SHAMEEM AKTHER
(For His Lordship's Kind Perusal)

To,

1. The Chief Secretary, Commercial Tax and Excise, State of Telangana, Secretariat Buildings, Hyderabad- 500063
2. The Commissioner of Central Tax, Central GST, 7th Floor, GST Bhavan, LB Stadium Road, Basheerbagh, Hyderabad - 500004
3. The Joint Commissioner (Appeals-II), Hyderabad 7th Floor, GST Bhavan, LB Stadium Road, Basheerbagh, Hyderabad- 500004
4. The Assistant Commissioner of Central Tax, Central GST- Begumpet Division, Hyderabad 3rd Floor, 3A-3B, Plot No. 1-8-382, Queen's Plaza, SP Road, Secunderabad- 500003
5. The Secretary, Ministry of Finance, Union of India, E Block, Central Secretariat, New Delhi - 110011
6. The Special Secretary, GST Council, Goods and Service Tax Council, Secretariat, 5th Floor, Tower II, Jeevan Bharti Building, Janpath Road, New Delhi - 110001
7. The Central Board for Indirect Taxes and Customs, North Block, Central Secretariat, New Delhi-110001
8. 11 L.R. Copies.
9. The Under Secretary, Union of India, Ministry of Law, Justice and Company Affairs, New Delhi.
10. The Secretary, Telangana Advocates Association Library, High Court Buildings, Hyderabad.

Com't

11. One CC to Sri Avinash Desai, Advocate [OPUC]
12. Two CCs to GP for Commercial Taxes, High Court for the State of Telangana.
[OUT]
13. One CC to Sri B. Narayana Reddy, Standing Counsel for Central Excise,
Customs & Service Tax (Central Taxes) (OPUC)
14. One CC to Sri Namavarapu Rajeshwar Rao, Assistant Solicitor General (OPUC)
15. Two CD Copies.
16. One Spare Copy.

MP

A handwritten signature in black ink, consisting of a stylized 'A' shape with a horizontal line extending to the right and a diagonal line crossing it.

HIGH COURT

DATED:20/04/2021

ORDER

WP.No.21311 of 2020



ALLOWING THE WRIT PETITION
WITHOUT COSTS

30
K. S. R. S.
20/07/2021