BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.06.2024

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.(MD)No.26254 of 2022
and
W.M.P.(MD)Nos.20437and 20438 of 2022

M/s.Greenstar Fertilizers Limited,
Rep. by its Chief Operating Officer,
E.Balu,
No.35, SPIC Nagar,
Muthaiahpuram Post,
Tuticorin- 628 005. ... Petitioner

Vs.

1.The Joint Commissioner (Appeals),
Office of the Commissioner of GST and
Central Excise (Appeal),
Coimbatore Circuit Office,
Madurai,
No.4, Lal Bahadur Shashtri Marg,
C.R.Buildings, Madurai – 2.

2.The Assistant Commissioner of GST and Central Excise,
Tuticorin Division,
C-50, SIPCOT Industrial Complex,
Tuticorin - 628 008. ... Respondents

Prayer: Writ Petition filed under Article 226 of Constitution of India for issuance of a Writ of Certiorari, to call for the records pertaining to the Order-in-Original No.02/2021-GST in GEXCOM/ADJN/GST/374/2021-O-CGST-DVN-TTN dated 31.12.2021 DIN No. 20211259XO000000D6BD, passed by the second respondent and

consequently, the Order-in-Appeal No.A.Nos.21/2022-GST DIN No. 20220859KV0000717702 dated 17.08.2022, passed by the first respondent and quash the same insofar as it relates to levy of penalty.

For Petitioner : Mr.S.Ganesh

For Respondents : Mr.N.Dilipkumar
Standing Counsel

O R D E R

The petitioner has challenged the impugned order passed by the first respondent in A.No.21/2022-GST, dated 17.08.2022.

2. By the impugned order, the appeal filed by the petitioner against the order of the second respondent in Order-in-Original No.OIO.No. 02/2021-GST in GEXCOM/ADJN/GST/374/2021 O-CGST-DVN-TTN dated 31.12.2021 (Corrigendum dated 24.03.2022 in GEXCOM/ADJN/GST/374/2021 O-GST-DVN-TTN) has been rejected.

3. By the aforesaid Order-in-Original No.OIO.No.02/2021-GST in GEXCOM/ADJN/GST/374/2021 O-CGST-DVN-TTN dated 31.12.2021, the proposals contained in the show cause notice No.11/2021(AC), dated 26.07.2021, were confirmed. The petitioner appears to be a Central Excise

Assessee under the provisions of the Central Excise Act, 1944 r/w. Central Excise Rules, 2002. With the implementation of GST with effect from 01.07.2017, the petitioner transitioned various amounts as input tax credit under Section 142 of the CGST Act, 2017, as detailed below.

S.No.	Particulars of wrong availment of Transitional Credit	Amount availed (Rs.)	Amount Reversed (Rs.)	Date of reversal
1	Wrong availment of transitional credit on input held in stock on the premises located in Andhra Pradesh	9,46,567	9,46,567	08.12.2021 i.e., after issuance of SCN
2	Wrong availment of transitional credit in Trans-1 return without support of prescribed documents	6,67,649	2, 87, 630 1,20,670	08.12.2021 i.e., after issuance of SCN 09.12.2021 i.e., after issuance of SCN
3	Wrong availment of excess transitional credit than that available as per prescribed documents	2,91,467	2,91,467	08.12.2021 i.e., after issuance of SCN
4	Wrong availment of ineligible transitional credit on excise duty paid on capital goods by wrongly classifying them as inputs	11,27,932	11,27,932	16.12.2020 before issuance of SCN
	Total	30,33,615	27,74,266	

4. The petitioner has reversed a sum of Rs.11,27,932/- before the issuance of the above mentioned show cause notice dated 26.07.2021. Under these circumstances, the second respondent had earlier confirmed the penalty and interest on the petitioner as under:-

> *"i) I demand an amount of Rs.9,46,567/- (Rupees nine lakh forty six thousand five hundred and sixty seven only) from M / s Greenstar Fertilizers Ltd, Tuticorin, mentioned in Para 9 above, being the amount of ineligible transitional credit availed and carried forward in 7A of Table 7(a) in Tran-? Return on inputs not held in stock in their registered place of business on the appointed day, under Section 74(1) of the CGST Act, 2017 read with Rule 121 of the CGST Rules, 2017;*
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> *ii) I demand an amount of Rs.4.08,300/- (Rupees four lakh eight thousand and three hundred only) from M/s Greenstar Fertilizers Ltd, Tuticorin, mentioned in Para 10 above, being the amount of ineligible transitional credit availed and carried forward in 7A of Table 7(a) in Tran-1 Return without the support of invoices or other prescribed documents evidencing the payment of duty, under Section 74(1) of the CGST Act, 2017 read with Rule 121 of the CGST Rules, 2017,*
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> *iii) I drop the demand for an amount of Rs.2,59.349/- (Rupees two lakh fifty nine thousand three hundred and forty nine only) from M/s Greenstar Fertilizers Ltd, Tuticorin in view of the Invoices submitted by them to substantiate their eligibility for availing transitional credit as explained in Para 10 above.*
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> *iv) I demand an amount of Rs.2,91,467/- (Rupees two lakh ninety one thousand four hundred and sixty seven only) from M/s Greenstar Fertilizers Ltd, Tuticorin, mentioned in Para 11 above, being the amount of ineligible transitional credit availed and carried forward in 7A of Table 7(a) in Tran-1 Return in excess of credit available as per the prescribed documents, under Section 74(1) of the CGST Act,*

2017 read with Rule 121 of the CGST Rules, 2017;

v) I demand an amount of Rs.11,27,932/- (Rupees eleven lakh twenty seven thousand nine hundred and thirty two only) from M/s Greenstar Fertilizers Ltd, Tuticorin, mentioned in Para 12 above, being the amount of ineligible transitional credit availed and carried forward in 7A of Table 7(a) in Tran-1 Return by willful misstatement showing capital goods as inputs, under Section 74(1) of the CGST Act, 2017 read with Rule 121 of the CGST Rules, 2017;

vi) I appropriate the amounts of Rs.9,46,567, Rs. 4,08,300, Rs.2,91,467 and Rs.11,27,932 mentioned at i), ii), iv) and v) above being the ineligible transitional credit reversed by the taxpayer vide DRC03.

vii) I also demand interest at appropriate rate under Section 50 of the CGST Act 2017 from M/s Greenstar Fertilizers Ltd, Tuticorin on the amounts of ineligible transitional credit availed and subsequently reversed on different dates as detailed above.

viii) I impose a sum of Rs.16,46,334/- (Rupees sixteen lakh forty six thousand three hundred and thirty four only) in connection with the demands at i), ii) and iv) above as penalty on M/s Greenstar Fertilizers Ltd, Tuticorin under Section 74(1) of the CGST, Act, 2017.

ix) I also impose a sum of Rs..1,69,190/- (Rupees one lakh sixty nine thousand one hundred and ninety only) in connection with the demand at v) above as penalty on M/s Greenstar Fertilizers Ltd. Tuticorin under Section 74(5) of the CGST. Act, 2017."

5. Aggrieved by the aforesaid order, the petitioner has filed an appeal in A.No.21/2022-GST before the first respondent, which has culminated in the impugned order, thereby the Order-in-Original No. 02/2021-GST in GEXCOM/ADJN/GST/374/2021 O-CGST-DVN-TTN

dated 31.12.2021, passed by the second respondent was modified as under:-

> *"06.I modified the appeal in A.No:21/2022-GST filed by the M/s.Green Star Fertilisers Limited, Thoothukudi by setting aside the Order in Original No: OIO No:02/2021-GST in GEXCOM/ADJN/GST/374/2021 O-CGST-DVN-TTN dated 31.12.2021 (Corrigendum dated:24.03.2022 in GEXCOM/ADJN/GST/374/20210-GST-DVN-TTN] passed by the Assistant Commissioner of CGST & CE on the issue of levy of interest alone and upheld the imposition of penalty. The appeal is disposed off accordingly."*

6. Since the Tribunal that is contemplated under the provisions of CGST Act, 2017, has not been constituted so far, the petitioner has filed this Writ Petition to review the order passed by the first respondent partly insofar as it upholds the order passed by the second respondent in Order-in-Original No.02/2021-GST in GEXCOM/ADJN/GST/374/2021 O-CGST-DVN-TTN dated 31.12.2021.

7. The petitioner has challenged the impugned order on the following grounds:-

> *"i) The order passed by the 2nd respondent imposing penalty under Section 74(1), 74(5) of the Central Goods and Services Tax Act, 2017 and under Rule 121 of the Central Goods and Services Tax Rules, and sustained by the 1st Respondent suffers from patent error.*

ii) The Respondents have failed to consider that, the Petitioner has reversed the input tax credit shown in the Electronic Credit Ledger, and in such circumstances, the levy of penalty is unwarranted.

iii) The Respondents ought not to have levied penalty, as from the date of Claim of Input Tax Credit through TRANS-1, till the date of reversal, the balance of Electronic Credit Ledger stayed above the disputed amount.

iv) The Respondents ought not to have imposed penalty as there is no actual loss to the Revenue.

v) Where input tax credit was reversed from Electronic Credit Ledger and the balance remained unutilised, since the date of claim of Input Tax Credit in Electronic Credit Ledger, and at no point of time, the Input Tax Credit was either availed or utilized and therefore ,penalty can be imposed.

vi) The Plain reading of Section 74 makes it clear that there must be a revenue loss to the Government on account of the Act of the Assessee. The Term 'Input Tax Credit' availed or utilised implies that input tax credit kept in Electronic Credit Ledger must be availed or utilised for payment of reduction in tax liability of the Assessee. In the present case the Petitioner has neither availed or utilised Input Tax Credit, for any reduction in tax liability as the same is reversed immediately after issuance of the Show Cause Notice.

vii) All the issues are related to procedural errors which were unintentional and misunderstanding of the newly introduced Central Goods and Services Tax Act 2017, Act, during the initial period of its introduction.

viii) The 1st Respondent while allowing the Appeal has partly set-aside the imposition of interest demanded under section 50 of the Central Goods and Services Tax Act 2017, however sustained the order of imposing penalty which is irrational, arbitrary and unreasonable. The 1st Respondent ought to have set-aside the imposition of penalty demanded, under Section 74 of the Central Goods and Services Tax Act 2017, applying the principles for setting aside the demand of interest under Section 50 of the Central Goods and Services Tax Act 2017.

ix) Even the show cause notice dated 26-07-2021 issued by the 2nd Respondent is vague, and does not disclose the foundational allegation of fraud or any wilful misstatement or suppression of facts to evade tax, which are the essential ingredients to impose penalty under Section 74 of Central Goods and Services Tax Act 2017. Therefore, imposing penalty under section 74 of the Central Goods and Services Tax Act 2017, is inapplicable to the facts and circumstances of the case."

8. The writ petition is opposed by the learned Senior Counsel for the respondents on the ground that the impugned order of the first respondent in A.No.21/2022-GST, dated 17.08.2022, does not warrant any interference, as it is in accordance with the provisions of the CGST Act, 2017.

9. It is submitted that the petitioner has admitted that he had wrongly transitioned the credit under Section 142 of the CGST Act, 2017 and therefore, the proceedings were initiated against the petitioner, vide the above mentioned show cause notice dated 26.07.2021 under Section 74 of the CGST Act, 2017. It is only after the issuance of the show cause notice on 08.12.2021, the petitioner has reversed the amount mentioned at Serial Nos.1 to 3 in the above mentioned Table, on the dates mentioned therein.

10. Defending the impugned order, the learned Senior Standing Counsel for the respondents would further submit that the impugned order of the first respondent upholding the levy of penalty under Section 74(1) and 74(5) of the CGST Act is well reasoned and do not require any interference.

11. The learned Senior Standing Counsel for the respondents would further submit that irrespective of the fact whether the credit was used/utilized or merely availed, the language in Section 74(1) and 74(5) of the CGST Act make it clear that the penalty has to be levied at the rate prescribed under these provisions.

12. Specifically, the learned Senior Standing Counsel for the respondents would submit that under Section 74(1) of the CGST Act, it has been clearly stated that the word used is credit has been wrongly availed or utilized by reason of fraud or any wilful misstatement or suppression of facts with an intention to evade tax. Therefore, irrespective of the fact whether the credit was utilized or not, the petitioner is liable to penalty under Section 74(1) and 74 (5) of the

respective GST Act. It is therefore, submitted that the Writ Petition is liable to be dismissed.

13. In support of his submissions, the learned Senior Standing Counsel for the respondents has relied on the following decisions of the Hon'ble Supreme Court:-

(i) **M/s.Gujarat Travancore Agency, Cochin** vs. **Commissioner of Income Tax, Kerala, Ernakulam** [1989 (3) SCC 52]

(ii) **Punjab Tractors Ltd.** vs. **Commissioner of Central Excise, Chandigarh** [2005 (11) SCC 210]

14. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondents.

15. In my view, the impugned order sustaining the penalty under Section 74(1) and 74(5) of the CGST Act is unsustainable. Incidentally, I have dealt with almost an identical issue in **Aathi Hotel, Rep. by its Proprietor S.Vaithiyanathan** vs. **Assistant Commissioner (ST) (FAC)**, 2021 SCC OnLine Mad 16170, wherein at Paragraph Nos.18 and 19, it

has been held as under:-

> *"18. The Hon'ble Supreme Court in Union of India v. Ind-Swift Laboratories Limited, (2011) 4 SCC 635 while construing the provisions of erstwhile Cenvat Credit Rules 2002, held that wrong filing of credit rule attracts interest under the Provisions of the Cenvat Credit Rules 2002 read with Central Excise Act, 1944. There the credit was availed and the benefit of refund was claimed. The case was attempted to be settled after payment of the amount ITC availed utilized before the settlement commission which circled interest at 10% per annum from the due dte as per Section 11 AB of the Central Excise Act, 1944. In paragraph 17 the Court held as under:-*
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> > *"17. We have very carefully read the impugned judgment and order of the High Court. The High Court proceeded by reading it down to mean that where CENVAT credit has been taken and utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly for according to the High Court interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. Therefore, High Court on a conjoint reading of Section 11AB of the Act and Rules 3 & 4 of the Credit Rules proceeded to hold that interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is wrongly utilized. In our considered opinion, the High Court misread and misinterpreted the aforesaid Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. A statutory provision is generally read down in order to save the said*

provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service. The issue is as to whether the aforesaid word "Or" appearing in Rule 14, twice, could be read as "AND" by way of reading it down as has been done by the High Court. If the aforesaid provision is read as a whole we find no reason to read the word "OR" in between the expressions 'taken' or 'utilized wrongly' or 'has been erroneously refunded' as the word "AND". On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest"

19. The ratio in the above case is to be distinguished on facts as in the present case although credit was wrongly attempted to be transitioned, it was never utilized. Further before levying penalty or interest, a proper excise was required to be made by a proper officer under Section 74(10) after ascertaining whether the credit was wrongly availed and wrongly utilised. Though under Sections 73(1) and 74(1) of the Act, proceedings can be initiated for mere wrong availing of Input Tax Credit followed by imposition of interest penalty either under Section 73 or under Section 74 they stand attracted only where such credit was not only availed but also utilised for discharging the tax liability. The proper method would have been to levy penalty under Section 122 of TNGST Act, 2017."

16. Similar view was also taken by the Principal Bench of this Court in **Kumaran Filaments (P) Ltd.** vs. **Commissioner of Central GST and Central Excise, Madurai and others**, 2021 SCC OnLine Mad 12062, wherein at Paragraph No.29, it has been held as under:-

> *"29. However, the fact remains that, the petitioner has never utilised or availed the ITC wrongly. The entire amount has been in the credit till the impugned order is passed, that is the reason, why, the respondent-revenue was able to appropriate the amount from the credit, that is, the electronic credit ledger of the petitioner. Therefore, since at no point of time, the ITC was either availed or utilised by the petitioner, that is, one of the pre-requisite under which only penalty can be imposed under section 122(2)(a), such situation, since is not available in the present case, I am of the considered view that, such kind of penalty cannot be imposed against the petitioner."*

17. Similar views were also taken by the Division Bench of the Patna High Court in **Commercial Steel Engineering Corporation** vs. **State of Bihar and others**, (2020) 74 GSTR 51 : 2019 SCC OnLine Pat 3363. In this connection, a reference was made to Paragraph Nos.32 to 34 of the said decision, which read as under:-

> *"32. Had it been a case where the credit shown in electronic ledger, was availed or utilized for meeting any tax liability for any year, there would be no error found in the action complained but it would*

be stretching the term "availment" beyond prudence to treat the mere reflection of the transitional credit in the electronic credit ledger as an act of availment, for drawing a proceeding under section 73(1) of "the BGST Act". The provisions underlying section 73 is self eloquent and it is only if such availment is for reducing a tax liability that it vests jurisdiction in the assessing authority to recover such tax together with levy of interest and penalty under section 50 but until such time that the statutory authority is able to demonstrate that any tax was recoverable from the petitioner, a reflection in the electronic credit ledger cannot be treated as an "availment".

33. The judgment of the Supreme Court rendered in the case of Ind-swift Laboratories Ltd. [2011] 40 VST 1 (SC) ; [2011] 7 GSTR 348 (SC) ; (2011) 4 SCC 635 is an expression on situation where such credit has been utilized by a dealer and it is in such circumstances that the Supreme Court bearing note on the adjudication done by Settlement Commission, has recorded its opinion.

34. In so far as the present case is concerned, annexure 2 series confirms that the petitioner has an input-tax credit in his favour under the Value Added tax Act and the Entry tax Act. Now whether he is entitled for refund of this credit or entitled to carry it forward in the transitional credit, may be a subject-matter of proceeding pending before the statutory authority but nonetheless, it is definitely a confirmation of the fact that there is no tax outstanding against the petitioner which is recoverable."

18. Under these circumstances, I am of the view that imposition of penalty under the peculiar facts and circumstances of the case is

unjustified. However, considering the fact that the petitioner has availed input tax credit, which was not eligible to be availed, but could have resulted in wrong utilization of input tax credit, a token penalty of Rs.10,000/- is imposed on the petitioner. The observation of the first respondent by placing reliance on the decisions of the Hon'ble Supreme Court referred to supra, is also not relevant as Section 74 of the CGST Act deals with a situation where the credit is availed or utilized by reason of fraud or any wilful misstatement or suppression of facts.

19. This Writ Petition stands allowed with the above observation. No costs. Consequently, connected Miscellaneous Petitions are closed.

Index : Yes/ No **11.06.2024**
Neutral Citation: Yes / No
Speaking Order / Non-Speaking Order
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To
1.The Joint Commissioner (Appeals),
Office of the Commissioner of GST and
Central Excise (Appeal),
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C.SARAVANAN, J.

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W.P.(MD) No.26254 of 2022

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