Neutral Citation No.2023:PHHC:131711-DB

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.283 of 2023
Date of Decision: 21.09.2023

Deepak Sales Corporation ... Petitioner

Versus

Union of India and others ... Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. Amrinder Singh, Advocate,
for the petitioner.

Mr. Rishabh Kapoor, Senior Standing Counsel,
for the respondents.

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RITU BAHRI, J.

1. The instant petition invoking the writ jurisdiction of this Court has been filed by the petitioner under Article 226 of the Constitution thereby challenging the order dated 29.04.2022 passed by the Commissioner (Appeals) i.e. respondent No.4 whereby the appeal filed by the petitioner challenging the order passed by respondent No.3 had been dismissed and it was held that the petitioner had utilized the amount of Rs.21,13,354/- from the excess Input Tax Credit (ITC) taken by it and was liable for imposition of equal penalty and to pay interest.

2. The factual matrix of the case in brief is that the petitioner which is a proprietorship trading concern operating since the year 2010, was previously registered under the erstwhile Haryana Value Added Tax

Act, 2003 (For short "VAT Act"). After introduction of Central Goods and Service Tax Act, 2017 (For short "CGST Act") w.e.f. 01.07.2017, it had migrated into GST regime and got itself registered under the CGST Act. It was submitted that in the month of July 2017, the petitioner had available with it a sum of Rs.2,41,50,783/- as ITC for discharging its output central tax liability for that month. The said ITC was on account of credit availed on inputs during the month of July 2017 and cenvat credit transaction from the erstwhile VAT regime. The petitioner debited its electronic credit ledger with an amount of Rs.1,59,55,219/- towards its central tax liability for that month and thereafter was left with balance of Rs.81,95,564/- as ITC. During the month of August 2017, the petitioner was entitled to avail ITC to the extent of Rs.1,40,57,836/-. However, while making entry in the electronic credit ledger and filing return for the month of August 2017, inadvertently the petitioner typed the amount of ITC as Rs.14,05,78,663/- instead of Rs.1,40,57,836/- thereby claiming excess ITC to the tune of Rs.12,65,20,827/-. For that particular month, the central tax liability of the petitioner was to the tune of Rs.1,61,71,190/- and after discharging it by using its ITC, the balance in the electronic credit ledger account of the petitioner was left as Rs.13,26,03,037/-. The petitioner came to know about the error made in entering the amount of ITC only while filing return on 28.12.2017. The petitioner thereafter kept on requesting the respondents by sending E-mail to guide in the matter as being a new entrant in GST regime, it was not aware about the procedure for reversing the ITC. Since, no response was received from the respondents, therefore, ultimately, the petitioner could reverse the excess ITC while submitting its return for the

month of July 2018.

3. It was further submitted by the petitioner that an audit of its record was conducted by GST Department during 27.07.2020 to 29.07.2020. The petitioner was questioned with regard to reversal of excess ITC and thereafter a show cause notice dated 27.10.2020 was issued upon it by respondent No.5 demanding interest of approximately of Rs.1,46,62,551/- @ 18% on entire amount of excess ITC, for a period of 235 days. Penalty was also proposed to be imposed upon the petitioner. The petitioner submitted reply to the notice. The respondent No.3 vide order dated 31.03.2021 confirmed the demand of interest at the same rate but the proposal for imposing penalty had been dropped.

4. The petitioner challenged the order dated 31.03.2021 by filing an appeal before the respondent No.4 who partly allowed the appeal vide order dated 29.04.2022 thereby holding that interest was payable on the amount of Rs.21,13,354/- which was alleged to be wrongly utilized by the petitioner and also imposed penalty on the same.

5. Feeling aggrieved, the petitioner has challenged the show cause notice and orders passed by respondents No.4 and 3 respectively on the grounds that the notice was issued without jurisdiction as the respondent No.5 was not a proper officer. It was also alleged that the petitioner had not utilized the amount of excess ITC at all and it was due to not giving any response on the part of the respondents that it could not reverse the ITC till July 2018. While further submitting that no amount of interest or penalty was payable by the petitioner, prayer had been made for issuing writ of certiorari for quashing the show cause notice and the impugned orders.

6. In response to the notice, the respondents No.3 and 4 filed a

joint written statement whereas a separate written statement had been filed by respondent No.5. It was submitted by the respondents that the show cause notice was issued by proper officer. The petitioner had availed excess ITC and reversed it after a gap of about one year and as he had wrongly utilized the ITC credit for payment of its central tax liabilities, therefore, it was liable to pay interest on availment of excess ITC as per Section 50 (3) of the CGST Act as well as the penalty and the impugned orders had been rightly passed. Therefore, dismissal of the writ petition had been prayed for.

7. We have heard learned counsel for both the parties at considerable length and have carefully gone through the record.

8. It may be mentioned at the outset that the plea taken in the writ petition that the impugned show cause notice had not been issued by a proper officer having jurisdiction, had not been pressed by learned counsel for the petitioner during the course of arguments and the arguments rendered by him were restricted to the question on validity of order dated 29.04.2022 as passed by the respondent No.4 whereby interest on amount of Rs.21,13,354/- and penalty of equal amount was imposed. The main thrust of argument as raised by learned counsel for the petitioner is that the respondent No.4 had erred in assuming that the petitioner had utilized an amount of Rs.21,13,354/- out of the amount of excess ITC wrongly taken in electronic credit ledger in August 2017. He argued that while passing the impugned order, the respondent No.4 ignored the fact that after discharging the central tax liability of the petitioner for the month of July 2017, the petitioner still had a balance of Rs.81,95,564/- as ITC and, therefore, there was no utilization of amount of Rs.21,13,354/- out of ITC. He further argued that as the excess amount of ITC had been reversed by the petitioner

in August 2018 i.e. much before the audit was conducted, therefore, there could not be stated to any mala fide on the part of the petitioner and hence, no penalty was leviable especially in the circumstance when the adjudicating authority had not imposed any such penalty. He further argued that no interest whatsoever was liable to be payable by the petitioner on the amount of Rs.21,13,354/- as no amount whatsoever had been actually utilized by the petitioner from the amount of ITC availed in excess and simply because the electronic credit ledger of the petitioner showed an amount of Rs.12,65,20,827/- as excess ITC, it did not mean utilization of the same. It was submitted that a perusal of Annexure P-7 which was a screenshot from the GST Portal showing the breakup of GSTR-3B return for the month of August 2018 proved the reversal of the excess amount. He also referred to the entries made in Annexure P-5 electronic credit ledger to fortify his contention that there was no utilization of any amount out of the excess amount of Rs.12,65,20,827/-. It was, therefore, submitted that the impugned order dated 29.04.2022 was not sustainable and was liable to be set aside. To fortify his contention, learned counsel for the petitioner has placed reliance upon authorities cited as **Commissioner of Central Excise, Ludhiana v. Jagatjit Industries Ltd.**, 2011 (22) S.T.R. 518 (P&H) & **CCE Rohtak v. Grasim Bhiwani Textile Ltd.**, 2018 (362) E.L.T. 424 (P&H).

9. Per contra, learned counsel for the revenue argued that the entry of excess amount of Rs.12,65,20,827/- in electronic credit ledger of the petitioner itself was sufficient to prove that it had availed the said amount in excess and had utilized the same in terms of provisions of Sub-Section 3 of Section 50 of the CGST Act and, therefore, the petitioner was liable to pay interest as well as penalty on the excess amount. He submitted

that the respondent No.4 was competent to modify the order of adjudicating authority under Section 107 (II) of the CGST Act and had rightly levied penalty equivalent to the demanded amount that was mandatory. With these submissions, it was argued that the impugned order did not suffer from any error or irregularity and did not warrant any interference.

10. On giving due deliberations to the contentions as raised by both the sides and on a perusal of the material placed on record, it emerges that there is no dispute between the parties about the fact that during the month of August 2017, the petitioner was entitled to take ITC of Rs.1,40,57,836/- and had claimed an amount of Rs.14,05,78,663/- instead of the abovesaid amount. Meaning thereby that it had taken excess ITC to the tune of Rs.12,65,20,827/- in its return of the said month. It is also not in dispute that the petitioner had reversed the amount so taken in excess as on 18.08.2018 and the same was duly reflected in its GSTR-3B return for that month (Annexure P-7). The respondent No.5 had conducted audit of the petitioner during the period from 27.07.2020 to 29.07.2020 and thereafter show cause notice dated 27.10.2020 (Annexure P-8) was issued upon the petitioner by respondent No.5 and the said notice was adjudicated by FORM GST DRC-7 (Annexure P-2) on 31.03.2021 thereby confirming demand of interest amounting to Rs.1,46,62,551/- and whereby no proceedings for demand of penalty were ordered to be initiated. The respondent No.4 had dismissed the appeal filed by the petitioner while observing that there was shortage of an amount of Rs.21,13,354/- in the ITC credit of the appellant and the same was utilized by it from the excess ITC credit taken by them.

11. The main question that arises for consideration is as to whether the petitioner was proved to have utilized an amount of Rs.21,13,354/- out

of the amount which was entered out of the excess ITC amount to the tune of Rs.12,65,20,827/- in its electronic credit ledger as observed by respondent No.4. However, before delving on that point, we consider it proper to refer to the provisions of Section 50 of the CGST Act which are relevant for the purpose. As per Sub Section 1 of Section 50, any 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 same 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 per Sub Section 3, a taxable person who makes an undue or excess claim of input tax credit shall pay interest on such undue or excess claim at a rate not exceeding twenty four per cent. From a purposeful reading of the provisions underlying Section 50 of the CGST Act, the legislation intent that stands reflected is that where an ITC/cenvat credit is wrongfully reflected in electronic ledger, the same itself is not sufficient to draw penal proceedings until the same or any part of such ITC is put to use so as to become recoverable and if such cenvat credit is reversed before utilization, then even the demand of interest and penalty cannot be said to be tenable. In this regard, we place reliance upon **Jagatjit Industries Ltd.'s** case (Supra), wherein a Bench of this Court had held that where the cenvat credit was wrongly availed and was reversed before utilizing the same, there was no justification for demand of interest and upon **Grasim Bhiwani Textile Ltd.'s** case (Supra), wherein a Coordinate Bench of this Court was dealing with a similar question in a case under Central Excise Act, 1944. The assessee had been availing credit of service

tax paid on input service. The department pointed out that the credit so availed was not admissible to the assessee and then the assessee reversed the credit amount. A show cause notice demanding interest and penalty was issued and confirmed. It was held that the cenvat credit if reversed prior to utilizing, demand of interest and penalty was untenable. Similar proposition of law was laid down by High Court of Adjudicature at Patna in **M/s Commercial Steel Engineering Corporation v. State of Bihar and others**, 2019 (28) G.S.T.L. 579.

12. On a perusal of Annexure P-5 which is extract of electronic credit ledger during the period from August 2017 till December 2018, it is revealed that an amount of Rs.14,05,78,663/- was entered as amount of ITC accrued through inputs as in August 2017. As on that date, an amount of Rs.81,95,564/- was already lying as balance ITC. It is also revealed that during the month of August 2017, the petitioner had central tax liability of Rs.1,61,71,190/- which it discharged using its ITC and thereafter a balance of Rs.13,26,03,037/- was reflected as balance ITC during the month of August 2017. Meaning thereby that the petitioner did not utilize the excess ITC of Rs.12,65,20,827/- during the month of August 2017. Similarly, till August 2018, the balance of ITC available in the electronic credit ledger of the petitioner was never below the sum of Rs.12,65,20,827/- which shows that till August 2018 when the petitioner reversed the excess ITC amount, it had never utilized the same. The respondent No.4 is, however, shown to have ignored the fact while passing the impugned order dated 29.04.2022 that by including the amount of Rs.81,95,564/- in the ITC available to the petitioner for the month of August 2017, amount more than the excess ITC amount was still there. This fact had obviously been wrongly overlooked by

respondent No.4 and once it was proved that the amount of excess ITC though entered in the ledger in excess, was never utilized by the petitioner and since it was reversed prior to utilizing, therefore, in our considered opinion, in view of the ratio of law as laid down in **Jagatjit Industries Ltd.'s** case (Supra), **Grasim Bhiwani Textile Ltd.'s** case (Supra) & **M/s Commercial Steel Engineering Corporation's** case (Supra), the demand of interest as well as penalty was not at all tenable and the petitioner could not be burdened with the same. Accordingly, the appeal is allowed. The impugned order dated 29.04.2022 is set aside and it is held that the petitioner was not liable to pay the amount of interest or penalty on the excess ITC wrongly entered by it in its electronic credit ledger for the relevant period.

(RITU BAHRI)
JUDGE

(MANISHA BATRA)
JUDGE

21.09.2023
manju

Whether speaking/reasoned Yes/No
Whether reportable Yes/No