CASE DETAILS

PRIMARY DETAILS			
Main Number	**WP 298/2024**	**SR Number**	**WPSR 321/2024**
CNR No.	**HBHC010004582024**		
Petitioner	**M/S.Rays Power Infra Private Limited**	**Respondent**	**Superintendent of Central Tax**
Petitioner Advocate	**M NAGA DEEPAK**	Respondent Advocate	**DOMINIC FERNANDES senior standing counsel for CBIC**
Case Category	**NON-SERVICE**	District	**HYDERABAD**
Filing Date	**03/01/2024**	Registration Date	**04/01/2024**
Listing Date	**28/02/2024**	Case Status	**DISPOSED Click here to see the Order**
Disposal Date	**28-02-2024**	**Disposal Type**	**ALLOWED NO COSTS**
Purpose	**FOR PRONOUNCEMENT OF JUDGMENT**		
Hon'ble Judges	**The Honourable Sri Justice P.SAM KOSHY,The Honourable Sri Justice N.TUKARAMJI**		

THE HONOURABLE SRI JUSTICE P.SAM KOSHY
AND
THE HONOURABLE SRI JUSTICE N. TUKARAMJI

WRIT PETITION No.298 of 2024

ORDER: *(per Hon'ble Sri Justice **P.SAM KOSHY**)*

This Writ Petition has been filed by the petitioner under Article 226 of the Constitution of India praying this Court to issue a writ, direction or order, more particularly, one in the nature of a *Writ of Mandamus* by declaring the impugned order in Original No.1/2023-24-GST (Supdt.), dated 15.11.2023, and also the consequent demand raised in Form DRC-07 bearing reference No.ZD361223018542R, dated 11.12.2023, as void, illegal, arbitrary, without jurisdiction and without authority of law and to set aside the same.

2. Heard Mr.M. Naga Deepak, learned counsel for the petitioner and Mr.Dominic Fernandes, learned Standing Counsel for Central Board of Indirect Tax (C.B.I.C.), for the respondents.

3. *Vide* the impugned order, the 1st respondent has confirmed a demand of ₹.92,160/- (CGST ₹.46,080/- + SGST ₹.46,080/-) towards irregularly availed Input Tax Credit (I.T.C.) on ineligible supplies. Further, the authorities concerned have also confirmed demand of notice towards irregularly availed I.T.C. on common services used for providing taxable services and

exempted supplies of ₹.2,34,700/-. In addition, there was also a demand for interest amount of ₹.6,642/- and ₹.39,100/- in terms of Section 50 of the Central Goods and Services Tax Act, 2017 (for short, 'the C.G.S.T. Act') r/w corresponding similar provisions of the Telangana Goods and Services Tax Act, 2017 (for short, 'the T.G.S.T. Act') and Section 20 of the Integrated Goods and Services Tax Act, 2017 (for short, 'the I.G.S.T. Act'). In addition, there was also imposition of penalty in terms of Section 74(9) r/w Section 122(2)(b) of C.G.S.T. Act and the corresponding provision under the T.G.S.T. Act and Section 20 of the I.G.S.T. Act. The period of dispute as regards tax is from July, 2017 to March, 2019.

4. The petitioner herein is a company engaged in the business of generation of electricity through solar plants and is a registered establishment under the C.G.S.T. Act and I.G.S.T. Act. The return filed by the petitioner for the period July, 2017 to March, 2019 was subjected to G.S.T. audit by the 3rd respondent. The summary of the audit findings was communicated to the petitioner on 14.10.2021. Accepting the findings of the audit, the petitioner immediately paid the entire additional tax that was required to be paid along with interest. The demand was made on 28.10.2021. Subsequent to the entire aforesaid payment being made, the final audit report was passed

on 10.11.2021. In the final audit report, the auditors have accepted the payment made by the petitioner and the same was received by the department. Despite the entire payment being made, the 1st respondent issued show-cause notice dated 20.04.2022 under Section 74(1) of the C.G.S.T Act. Thereafter, the petitioner submitted a reply to the said show-cause notice on 04.09.2023 highlighting the facts to the concerned authorities in respect of the entire tax liability having been discharged along with interest on 28.10.2021 and stating that the entire irregularly availed I.T.C. already stood reversed for dropping of the show-cause proceedings. Subsequently, the petitioner was provided with personal hearing and after hearing the petitioner, the authorities concerned have passed the impugned order confirming the demand raised which has led to filing of the present writ petition.

5. Learned counsel for the petitioner contended that initiation of the proceedings under Section 74(1) of the C.G.S.T Act by the respondents at the first instance is itself bad in law and the entire proceedings and the final order passed by the 3rd respondent is liable to be set aside / quashed.

6. Referring to the provision of Section 73 of the C.G.S.T Act, particularly relying upon Sub-Section (5) of Section 73 of the

C.G.S.T Act, the learned counsel for the petitioner contended that the case of petitioner squarely falls within the purview of Section 73(5) and for this reason itself, the entire show-cause proceedings and the final order under challenge in this writ petition deserves to be set aside / quashed. He further contended that when the petitioner, at the first instance, was given the findings of the audit before the final audit report was submitted on 14.10.2021 and after scrutinizing the same, immediately the petitioner cleared the entire tax payable by him in respect of the I.T.C. that was availed by the petitioner wrongly. The petitioner also paid the entire interest amount on 28.10.2021 itself. According to learned counsel for the petitioner, the show-cause notice in the instant case was issued only on 20.04.2022. Therefore, the proceedings drawn by the respondents would get hit by proviso to Section 73(5) and the writ petition to the aforesaid extent deserves to be allowed. He further submitted that the authorities concerned have wrongly initiated proceedings under Section 74 which otherwise would not be sustainable particularly when the petitioner falls within the purview of proviso to Section 73(1) and 73(5) of the C.G.S.T Act.

7. *Per contra*, Mr.Dominic Fernandes, learned Standing Counsel for Central Board of Indirect Tax, appearing on behalf of

the respondents, vehemently contended that the case of petitioner being not a simple wrongful availment of I.T.C., but a deliberate, willful act on the part of petitioner with an intention of evading tax, and therefore, it is a case which would fall squarely within the purview of Section 74(1) where there is an element of misstatement made by the petitioner, and also an element of suppression of fact, till it was noticed in the course of audit, which on the part of petitioner amounts to a fraudulent act. According to him, it is not an inadvertence on the part of petitioner insofar as having wrongly availed the I.T.C, and that it was also not a case where the petitioner was ignorant of the fact that the I.T.C. that has been availed by the petitioner was in respect of certain ineligible supplies and also in respect of taxable supplies and supplies which are otherwise exempted from G.S.T.; and it was in this context that proviso to Section 74(1) was invoked and the impugned proceedings had been drawn; and therefore, contended that the impugned order does not warrant any interference.

8. Learned Standing Counsel for the respondents further contended that under challenge herein is an order which is otherwise appealable under the statute by preferring an appeal under Section 107 of the Act; and therefore, the writ petition deserves to be dismissed on the ground of there being a

statutory, alternative remedy available to the petitioner and the grounds raised by the petitioner could also be agitated before the appellate authority.

9. The point of issue for consideration in the present writ petition is as to whether the petitioner having been discharged his entire tax liability along with the accrued interest immediately upon the finding of the audit team having been made available to the petitioner. Could the respondent authorities have subsequently initiated a proceeding under Section 74 of the C.G.S.T Act.

10. The fact which needs to be considered is that admittedly there was some wrongly availment of I.T.C. by the petitioner in respect of certain exempted tax. This fact was highlighted in the provisional audit report which has been made available to the petitioner by the audit team. The said provisional report was served upon the petitioner on 14.10.2021. The petitioner accepting the said finding immediately discharged the tax liability along with the accrued interest on 28.10.2021, i.e., within a span of around two weeks time, which was much thereafter that the petitioner's audit report was published on 10.11.2021 and where in the audit report itself it has been highlighted that the petitioner has since cleared off all the tax

liability and has also paid the relevant interest also up to date. Admittedly, the show cause notice was thereafter has been issued much thereafter on 20.04.2022.

11. At this juncture, it would be relevant to take note of the contents of Section 73 of the C.G.S.T Act. The relevant portion for adjudication of the present writ petition is being reproduced hereunder:

> "**73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any willful misstatement or suppression of facts**
>
> (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilized for any reason, other than the reason of fraud or any wilful mis statement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilized input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.
>
> (5) The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.
>
> (6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.
>
> (7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the

> amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.
>
> (8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded."

12. A bare perusal of Section 73(5) of the C.G.S.T Act gives a clear indication that the framers of the law were very clear in mind that in the event if the assessee the tax payer clears all the tax liability along with interest at any day, prior to the issuance of show cause notice, they would not liable for any further additional taxes by way of penalty or interest. For this purpose, the provisions of Section 73(1) and Section 73(5) both have to be read together. The reading of the aforesaid two provisions would give a clear indication that Sub-Section (5) refers to even those payments which have been cleared by the taxpayers which were otherwise termed as wrongfully availed I.T.C.

13. What further needs to be appreciated is that on plain reading of the provisions of Section 73(1) of the C.G.S.T Act, particularly Sub-Sections 5 to 8 which are already reproduced in the preceding paragraphs, the law makers were very clear in their mind so far as expecting the taxpayer to clear the unpaid tax or reversal of the wrongfully availed I.T.C. at the earliest in

order to provide stringent coercive recovery measures including imposition of penalty. A plain reading of Sub-Section (1) of Section 73 gives an inference of the liability of a taxpayer being in respect of (i) any tax that has not been paid or (ii) any tax which is short paid (iii) any erroneously refunded tax (iv) where ITC has been wrongly availed (v) the I.T.C. having utilized for any reason other than fraud or willful misstatement or suppression of facts in order to evade payment of tax. The said by itself would show how exhaustive was Sub-Section (1) of Section 73 and the intentions of the law makers incorporating all those unpaid or wrongly availed tax benefit.

14. Further reading of other Sub-Sections, i.e. Sub-Sections (5) to (8) would again force this Court to draw the only inference, that of, it is this very nature of wrongly availed tax or any other tax which has not been paid or erroneously refunded. In respect of this very category of wrongfully availed or wrongly retained tax from the taxpayer immediately upon them coming to know about it either by his own self-assessment or the tax as ascertained by the proper officer.

15. Admittedly in the instant case, the show cause notice was issued on 20.04.2022, however, during the course of the audit itself certain discrepancies were pointed out by the audit team.

Even much before of the final audit report being published, the petitioner is said to have paid the entire tax liability along with the updated interest on 28.10.2022. In the said circumstances, we are of the considered opinion that the case of the petitioner is one which that would fall strictly under Sub-Sections (5) and (6) of Section 73 where it has been emphatically laid down by the law makers that any person chargeable with tax, if he pays the amount of tax along with the interest payable there on, proper officer upon receipt of such information shall not initiate any further proceedings under Sub-Section (1) and all the proceedings shall have to deemed to be concluded.

16. As regards the contention of the learned Standing Counsel that the show cause notice in the instant case has been issued under Sub-Section (1) of Section 74 and not under Sub-Section (1) of Section 73 of the C.G.S.T Act, this Court is of the firm view that Section 74 would get attracted only in the event of their being strong materials available on record to show that the petitioner had played fraud or there was any misstatement made by him and there being any suppression of fact.

17. We are also of the considered opinion that applicability of Section 74 would come into play only if the conditions stipulated in Section 73 has not been met with by the taxpayer i.e. to say

in the event if the conditions stipulated in Sub-Section (5) of Section 73 is not honored by the taxpayer in spite of the tax liability being brought to his knowledge. Then in the said circumstances, Section 74 would automatically attract and in those circumstances, the contention of the learned Senior Standing Counsel would be acceptable. Further, keeping in view the provisions of Sub-Sections (5) and (6), it will go to establish that once having discharged their tax liability also by paying interest on the said tax payable, then no further proceedings could be drawn for the same tax any further. This view of the Bench stands further fortified from reading of Sub-Section (8) as well which again gives an indication that if necessary compliance in respect of tax as is stipulated under Sub-Sections (1) and (3) is paid along with interest even after issuance of show cause notice, even then the penalty cannot be levied and the notice proceedings shall be deemed to have been concluded.

18. Keeping in view the aforesaid statutory provision as it stands so far as Section 73 and the various Sub-Sections of the said Section, the element of fraud or misstatement or suppression of fact with an intention of evading tax which is halved upon by the learned Senior Standing Counsel would arose as has been stated earlier only in the event if the taxpayer fails to meet the provisions of Sub-Section (5) of Section 73. The

attempt of the learned Senior Standing Counsel trying to bring the conduct of the petitioner within the purview of fraud, misstatement and suppression of fact would not be sustainable and the said contention stands negated by the Bench simply for the reason that Sub-Section (1) of Section 73 permits a taxpayer to even clear wrongly availed I.T.C. and also wrongly utilized I.T.C. and it is this what is alleged against the petitioner of having wrongfully and irregularly availed I.T.C.

19. In view of the same, we are of the considered opinion that the action on the part of the respondents in initiating the show cause proceedings under Section 74 and passing of the impugned order dated 15.11.2023 both would be in excess of their jurisdiction and the same therefore deserves to be and are accordingly set-aside / quashed. As regards the contention of the learned Senior Standing Counsel so far as the availability of a statutory alternative remedy of appeal, we are of the firm view that since the challenge to the impugned order in original and the show cause notice at the first instance itself is not sustainable in the eye of law in terms of Sub-Sections (5) and (6) of Section 73. The petitioner cannot be forced to undergo the entire process of litigation under the statute once when the issuance of show cause notice itself was *per se* bad and since it is a case of excess of jurisdiction exercised by the respondents,

the petitioner has a right to avail a Writ remedy rather than undergoing the process of appeal, revision etc. under the statute.

20. The writ petition accordingly stands allowed. No costs.

21. Consequently, miscellaneous petitions pending if any, shall stand closed.

P.SAM KOSHY, J

N. TUKARAMJI, J

Date: 28.02.2024
Ndr/GSD