HIGH COURT OF CHHATTISGARH, BILASPUR

WPT No. 100 of 2019

Reserved on : 28.07.2022

Delivered on : 31.10.2022

Abis Export India Private Limited through its Director Dr. Anjum Alvi, S/o Late Dr. Iqbal Alvi, Aged About 55 Years, R/o Ward No. 19, Anupam Nagar, Rajnanadgaon, P.S. Basant, Post Rajnandgaon (C.G.)

---- Petitioner

Versus

1. State of Chhattisgarh, through Secretary, Department of State Tax, Mantralaya, Mahanandi Bhawan, Atal Nagar, Raipur, District- Raipur (C.G.)
2. Commissioner State Tax, North Block, Sector-19, Commercial Tax, GST Building, Raipur (C.G.)
3. Joint Commissioner Appeal, State Tax, Durg, Malviya Nagar Chowk, Durg (C.G.)
4. Proper Officer (Assistant Commissioner), State Tax, Head Office, Raipur, Near Time Square Building, Atal Nagar, Raipur, District- Raipur (C.G.)
5. Assistant Commissioner, State Tax, Rajnandgaon Circle, Station Road Rajnandgaon (C.G.)

Respondents

For Petitioner	:	Mr. Rajeev Shrivastava, Senior Advocate with Mr. Sourabh Sahu, Advocate.
For State	:	Mr. Sandeep Dubey, Dy. Advocate General.

Hon'ble Shri Justice Narendra Kumar Vyas

C.A.V. ORDER

1. The petitioner has filed this writ petition assailing the order dated 11.09.2018 (Annexure P/1) by which the appeal preferred by the petitioner under Section 50(1) of the Central Goods and Services Tax Act, 2017 (for short “the Act, 2017”) has been rejected on the count that the petitioner has not paid the amount of tax, interest, fine, fee and penalty arising from the impugned order dated 03.08.2018, which is in violation of Section 107 (6) of the Act,

2017. The petitioner has also filed this writ petition assailing the order dated 03.08.2018 (Annexure P/2) by which the petitioner has been directed to pay interest to the tune of Rs. 72,69,975.00 and demand was directed to be issued within 7 days .

2. The brief facts as reflected from record are that the petitioner is a company which involves in production of number of commodities including pet food. The pet food is a commodity which has been classified under Harmonized System Code (HSN) bearing No. 2309 after implementation of the Act, 2017. The said commodity is taxable commodity under the Act, 2017, but due to non-availability of clear instructions or notification with regard to taxation on animal and pet food, which falls in the index under Chapter 23 HSN 2309. The animal feed and pet food were sold by the petitioner's company to different distributors without charging GST and the return was filed. However, with the passage of time, when the provisions of GST emerged out of fuming condition and the fact got established that all animal feed are exempted from tax except pet food. The petitioner's company approached the authority showing the difference in its GSTR 1 & GSTR 3B and sought directions from the authorities about the mechanism to rectify its return, but on account of non-availability of the mechanism, the return could not be rectified.

3. It has been further contended that there is no tax liability with the petitioner because on pet food, the petitioner has neither availed any input credit nor charged the same with the customer to whom it was sold, however, the petitioner on his own set-off the tax liability in the return submitted in the month of March 2018 for the month of July 2017 to September 2017, yet the authority has sought interest on basis of the differences in the return for the period of July 2017 to September 2017 and demanded interest of Rs. 73,52,955/- (GST Rs. 41,490/-, SGST Rs. 41,490/- & IGST Rs. 72,69,975/-). The petitioner preferred an appeal against the same which has been dismissed on the count that the petitioner has not complied with the provision of sub-section

6 of Section 107 of the Act, 2017. Though the order impugned is liable under Section 109 of the Act, 2017, respondent No. 2 has informed the petitioner that no appellate tribunal has been constituted and as soon as it will be constituted, the same shall be informed to the petitioner. It has been further contended that on one hand, there is no authority to hear the appeal against the impugned orders and on the other hand, respondent No. 5 is issuing notice to the petitioner to deposit the amount assigned by the impugned order. In view of aforesaid facts and circumstances of the case, the petitioner has filed the present petition claiming following reliefs:-

(i) This Hon'ble Court may kindly be pleased to quash impugned order dated 03.08.2018 and the demand notice dated 16.05.2018.

(ii) This Hon'ble Court be pleased to quash the GST DRC-13 in pursuance of the order dated 03.08.2018 passed by respondent No. 4.

(iii) This Hon'ble Court may kindly be pleased to grant any other relief(s)/ order(s)/ direction (s) in favour of petitioner, which may deem fit and proper in the facts and circumstances of the case, in the interest of justice.

(iv) This Hon'ble Court may kindly be pleased to grant cost of the petition.

4. Learned counsel for the petitioner would submit that there was no clear understanding of law, therefore, the petitioner approached to different authorities of the State from whom he got registration under the GST Act and asked whether the entire entry under 2309 is exempted from GST or not. The Tax Officer, GST Sales Kerala informed the petitioner that the entry 2309 is exempted from payment of tax. It has been informed vide email dated 03.04.2018 (Annexure P/6) that GST rate for the HSN Code 23091000 is 0%. The confusion was going on, therefore, frequent question was asked, wherein it has been informed that except pet food all the items are exempted from payment of GST. In the meanwhile, the petitioner has already sold the pet food without charging GST and submitted its return in the form GSTR 3B. When the petitioner came to know that the pet food is

taxable, the petitioner filed GSTR 1 showing the pet food as taxable. However, since the petitioner had not availed the input credit with regard to pet food, therefore, no tax liability was outstanding towards the petitioner. It was only question to correcting the return. Thereafter, in the return for the month of March, 2018, the petitioner set off the liability by creating additional tax liability for the month of July 2017 to September 2017 and set off through available input credit, thus, the case of the petitioner was not the case of non-payment of tax. It was only setting off the tax liability and correction of return.

5. Learned Senior Advocate would further submit that the taxing authority/ the Assistant Commissioner, Chhattisgarh State Tax, Rajnandgaon Circle ignoring the fact that the products manufactured by the petitioner is non-taxable, has sought explanation from the petitioner with regard to difference in GST liability reflecting in GSTR 3B. On 09.04.2018, the petitioner submitted its explanation with regard to non-reflection of GST liability in GSTR 3B for the month of July, 2017 to September, 2017 and also stated that the petitioner has sufficient amount as input credit as on 31.12.2017 i.e. to the tune of Rs. 8,58,92,248/. The petitioner also stated that whenever the department will provide any mechanism to correct the GSTR 3B, the petitioner would correct and rectify the calculation and if no such window is made available, the same will be done in the annual return.

6. He would further submit that in spite of letter dated 09.04.2018, the respondents failed to provide any window or mechanism for correction in form GSTR 3B. However, the petitioner had already mentioned in the GST annual return for the month of July 2017 to September 2017 submitted in the return filed on March, 2018 regarding intention to correct the return. He would further submit that the annual return of the petitioner is due to be filed on 31st August, 2019 though the petitioner had corrected the return to the best of his understanding as there is no clear provision or mechanism provided by the respondents for correction of the

return, respondent No. 4 issued a notice to the petitioner in GSTASMT 10 on 30.05.2018 seeking his explanation with regard to difference in GSTR 1 and GSTR 3B for the period of July, 2017 to December, 2017. The petitioner has submitted reply to the notice in GSTASMT-11 reiterating the same stand which the petitioner has already taken mainly contending that there were some errors in filing of turnover and tax figures in GSTR 3B in the initial months as there was lack of clarity or taxability of some products of the company. However, the said error was rectified while filing GSTR-1 and the liability was created through the return. The said liability could not be created in GSTR 3B as there was no mechanism available for rectification. He would further submit that on 31.12.2017, there was a total input credit of Rs. 858.92 lac (IGST 707.35 lacs and CGST 151.57 lacs) lying in the credit ledger of the company which was sufficient to cover the tax liability. The said credit was left unutilized and there was no intention to evade any tax liability but due to lack of clarity on the mechanism to create and set off the liability the deference between the return remained unresolved. This is evident from the fact that the company has reported the correct figures in the GSTR-1 and has also left sufficient input credit to cover the additional liability so created.

7. He would further submit that in furtherance of notice dated 30.05.2018, on 20.06.018 three deferent notices were issued for SGST, CGST & IGST, wherein it has been stated that the show cause notice was issued to the tax payer on 30.05.2018 of which the tax payer has filed reply. The petitioner has already filed its reply to the show cause notice, therefore, no further reply as well as any notice was required to be issued by respondent No. 4, but ignoring the reply of the earlier show cause notice, respondent No. 4 vide its order dated 03.08.2018 has imposed the liability of interest.

8. He would further submit that though in the notice dated 20.06.2018, respondent No. 4 himself has stated that the reply

has been filed by the tax payer, in the order dated 03.08.2018, respondent No. 4 stated that the petitioner has not filed any reply in reply to the notice DRC01 and without considering the reply and without giving any opportunity of hearing to the petitioner, has imposed the liability vide order dated 03.08.2018. Being aggrieved with the order dated 03.08.2018, the petitioner preferred an appeal before respondent No. 3 stating that the GST rate schedule for goods was issued by the council to list down the approved rate of the GST to be levied on certain goods. The relevant extract of the said schedule as referred to above issued by the council, the said schedule has also prescribed the rate on the goods covered under Chapter 23 and would pray for quashing of the impugned orders Annexure P/1 & P/2.

9. Learned Senior Advocate has also filed the written submission and referred to the judgment rendered by Hon'ble the Supreme Court in case of **Hansraj & Son Vs. State of Jammu & Kashmir & others**[1] & **Commissioner of Central Excise, Meerut Vs. Kisan Sahkari Chinni Mills Ltd.**[2].

10. The State has filed its return contending that there is certain specific provision which has been provided for furnishing information by the tax payers. Section 39 of the Act, 2017 provides for furnishing of returns wherein the liability was fixed on the registered dealer to furnish in such form and in the manner as may be prescribed a return electronically of inward and outward supplies of goods or services or both i.e. the details of input tax credit availed, tax payable, tax paid and such other particulars as may be prescribed on or before 20th day of the month succeeding such calendar month or part thereof.

11. It has been further contended that the provisions prescribed under the Goods and Services Tax Act provide for three kinds of return i.e. GSTR 1 is to be filed stating there the details of outward supplies in compliance of Section 37, thereafter, GSTR-

2 is to be filed stating therein the details of inward supplies in compliance of Section 38 and return in the prescribed form of GSTR-3 is to be filed in compliance of Section 39. It has been further contended that since to simplify this process, the Government of India vide notification dated 28.06.2017 has introduced Form- GSTR3B for payment of liability of tax wherein the details of total supply made as well as the total purchases made and input tax credit availed and or utilized all are shown on one place so that if there is any liability after utilizing the input tax credit, the registered dealer can pay the same.

12. It has been further contended that for the month of August, 2017 to December, 2017, the petitioner has submitted Form GSTR 3B concealing the amount received on pet food sold thereby has not provided the correct information whereas it is the duty of the registered dealer to provide the correct information of tax paid as well as tax payable. If at all the petitioner was under impression whether the tax will be levied or not, he ought to have shown the amount as tax payable in form GSTR 3B, but in spite of this clear provisions, the petitioner chooses not to file correct return and states the correct details, but to file the incorrect details. It has been further contended that Section 50 of the Act, 2017 empowers the authority for levying the interest on delayed payment of tax and in the present case, since the petitioner has paid belatedly the amount of tax due for the month of August, 2017, September, 2017, October, 2017 as well as December, 2017 on 21.05.2018, therefore, due to this delay, the interest was levied for the non-payment of tax amounting to Rs. 73,52,955/-. This levy cannot be said as arbitrary, illegal and irrational. Hence, it is not the case of incorrect filing of return, but delay payment of tax. He would further submit that since it is a clear breach of provision under Section 50 of the Act, 2017 which provides penalty in case of failure to pay the tax, the taxing authority can impose the same for the period for which the tax or any part thereof remains unpaid, levy the interest at

such rate not exceeding 18%. In the present case, the interest at the rate of 18% was levied.

13. It has been further contended that the mechanism of utilization of input tax credit is governed by Section 41 of the GST Act, wherein it was stated that every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to take credit of eligibly input tax, as self assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger. In view of the submissions made hereinabove, it is submitted that the impugned demand notices are just, proper and legal and do not suffer from any illegality or infirmity. Hence, it is prayed that the present petition being devoid of merit and substances and accordingly, the same deserves to be dismissed.

14. I have heard learned counsel for the parties and perused the documents appended there to with utmost satisfaction.

15. During pendency of the writ petition, the Government of India vide its Gazette notification dated 28.03.2021 has amended Section 50 of the Central Goods and Service Tax Act, 2017 and proviso has been inserted which has been made effective w.e.f. July, 2017. The inserted proviso reads as under:-

> "20. In Section 50 of the Income-tax Act, in clause (2), the following proviso shall be inserted, namely:-
>
> "Provided that in a case where goodwill of a business or profession forms part of a block of asset for the assessment year beginning on the 1st day of April, 2020 and depreciation thereon has been obtained by the assessee under the Act, the written down value of that block of asset and short term capital gain, if any, shall be determined in such manner as may be prescribed."

16. Learned counsel for the petitioner has filed I.A. No. 02/2021, which is an application for disposal of the writ petition in view of the Gazette Notification dated 28.03.2021 mainly contending that the Government of India vide its notification dated 28.03.2021 has provided a mechanism that the tax payable in

respect of supply made and declared in the return for the said period furnished after the due date in accordance of Section 39 of the Act, 2017, except where such return is furnished after commencement of any proceeding under Section 73 & 74 of the Act, 2017 shall be payable on that portion of tax which is debiting the electronic cash ledger and would submit that the petition may be disposed of in view of the amendment made by the Central Government and liberty was sought to approach the authority for deciding the appeal afresh after taking advantage of the amendment made by the Central Government which has been made effective w.e.f. 1st July, 2017.

17. The State has filed reply denying the contention raised by the petitioner and would submit that the petitioner is not entitled to get any advantage of this amended provision.

18. Before adverting to the facts of the case, it is expedient for this Court to extract Section 50 of the Act, 2017 prior to the amendment, which reads as under:-

> "112. In Section 50 of the Central Goods and Services Tax Act, in sub-section (1), for the proviso, the following proviso shall be substituted and shall be deemed to have been substituted with effect from the 1st day of July, 2017, namely:-
>
> "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 of 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 payable on that portion of the tax which is paid by debiting the electronic cash ledger."

19. This Court has to see whether the amendment has retrospectively application or not?

20. Before deciding the issue posed by this Court, it is expedient for this Court to examine to understand the events took place before amendment was made by the Central Government. This amendment was made in pursuance of 39th GST Council meeting held on 21.06.2019 which has recommended to amend

Section 50 vide Section 100 of Finance (No. 2) Act, 2019 and to provide for charging interest on net cash liability and the Council in its meeting on 14.03.2020 recommended charging of interest on net cash tax liability with effect from 01.07.2017 with a retrospective amendment of the Act from the aforesaid date. On 14.03.2020, the Council issued a press release wherein, under the head 'Measures for trade facilitation', it was stipulated categorically that interest for delay in payment of GST would be charged only on net cash tax liability with effect from 01.07.2017 and that the proviso to Section 50 would be retrospective, with effect from 01.07.2017.

21. On the heels of the aforesaid recommendation notification No. 63 of 2020- Central Tax dated 25.08.2020 came which stated that the proviso would operate with effect from 01.09.2020. Naturally, this resulted in a barrage of apprehension and doubts from taxpayers. The CBIC reacted promptly and vide press release dated 26.08.2020, issued on the very next day after the aforesaid notification, clarified that the notification had been issued only on account of and to get over certain 'technical limitations' and the decision of the GST Council in the 39th meeting would be given full effect. Thereafter, vide notification dated 28.03.2021, it has made effective the amendment in Section 50 and giving its retrospective effect.

22. The said amendment has come up for consideration before the Hon'ble High Court of Madras in **M/s. Maansarovar Motors Private Limited Vs. The Assistant Commissioner & others**[3] wherein Hon'ble High Court of Madras has examined whether amendment of Section 50 should be given retrospective effect or not and has held that the same should be given retrospective effect and has held at paragraph 27 to 29 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.

(i) Thus, notwithstanding that the proviso has been stated to be effective only from 01.09.2020 by Notification No.63 of 2020 dated 25.08.2020, I cannot but take note of (i) the resolution of the GST Council W.P.Nos.28437 of 2020 etc. batch dated 22.12.2018 introducing the proposal for amendment of Section 50 to allow payment of interest on net cash liability, taking into account admissible credit that amount payable through electronic cash ledger (ii) the GST Council meeting dated 21.06.2019 wherein the recommendation was made to amend Section 50 vide Section 100 of Finance (No.2) Act, 2019 to provide for charging interest on net cash liability (iii) the Council in its meeting on 14.03.2020 recommending charging of interest on net cash tax liability with effect from 01.07.2017 and accordingly, retrospective amendment of the Act from the aforesaid date (iv) the press release of the Council post the 39th meeting also dated 14.03.2020 allaying apprehensions of the tax payers that the amendment of Section 50 would be prospective, setting out clearly as a trade facilitation measure, the assurance that the insertion of the proviso would be retrospective, applicable with effect from 01.07.2017 (v) the fact that close on the heels of Notification No.63 of 2020 dated 25.08.2020 stipulating the effective date as 01.09.2020, the CBIC issued a press release assuaging apprehensions by stating that the prospective notification was only on account of technical limitations.

(ii) The Board has, in my view, extended a waiver of recovery for the past period in line with the decisions of the Council (vi) Notification dated 18.09.2020, that cemented the long line of assurances of the GST Council and the Board in letter and spirit. While promising that the amendment in W.P.Nos.28437 of 2020 etc. batch question will be clarified to be retrospective, the Board has indicated certain difficulties in carrying out the stated amendment at this juncture. I would be loath to speculate on the nature of the

> difficulties expressed and restrict myself to concluding that the sequence of events that I have set out above make it more than amply clear to me that the present writ petitions are liable to be allowed."

23. Now coming to the facts of the case, the petitioner was held liable for payment of interest of Rs. 72,69,975 after examining the GSTR 3B which is return as provided under Section 39 of the GST Act. Section 107 (6) of the Act, 2017 provides that no appeal shall be filed under sub-section (1) unless the appellant has paid the tax as provided in Section (a) & (b) of the said section. For better understanding Sections 39 & 107(6) of the Act, 2017 read as under:-

> "**Section 39 - Furnishing 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 as may be prescribed
>
> [Provided that the Government may, on the recommendation of the Council, notify certain classes of registered persons who shall furnish return for every quarter or part thereof, subject to such conditions and safeguards as may be specified therein.]
>
> (2) A registered person paying tax under the provisions of section 10 shall, for each quarter or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of turnover in the State or Union territory, inward supplies of goods or services or both, tax payable and tax paid within eighteen days after the end of such quarter.
>
> (3) Every registered person required to deduct tax at source under the provisions of section 51 shall furnish, in such form and manner as may be prescribed, a return, electronically, for the month in which such deductions have been made within ten days after the end of such month.
>
> (4) Every taxable person registered as an Input Service Distributor shall, for every calendar month

or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, within thirteen days after the end of such month.

(5) Every registered non-resident taxable person shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, within twenty days after the end of a calendar month or within seven days after the last day of the period of registration specified under sub-section (1) of section 27, whichever is earlier.

(6) The Commissioner may, for reasons to be recorded in writing, by notification, extend the time limit for furnishing the returns under this section for such class of registered persons as may be specified therein:

Provided that any extension of time limit notified by the Commissioner of State tax or Union territory tax shall be deemed to be notified by the Commissioner.

(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 due as per such return not later than the last date on which he is required to furnish such return.

[Provided that the Government may, on the recommendations of the Council, notify certain cases of registered persons who shall pay to the Government the tax due or part thereof as per the return on or before the last date on which he is required to furnish such return, subject to such conditions and safeguards as may be specified therein.]

(8) Every registered person who is required to furnish a return under sub-section (1) or sub-section (2) shall furnish a return for every tax period whether or not any supplies of goods or services or both have been made during such tax period.

(9) Subject to the provisions of sections 37 and 38, if any registered person after furnishing a return under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (4) or sub-section (5) discovers any omission or incorrect particulars therein, other than as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities, he shall rectify such omission or incorrect particulars in the return to be furnished for the month or quarter during which such

> omission or incorrect particulars are noticed, subject to payment of interest under this Act:
>
> [Provided that no such rectification of any omission or incorrect particulars shall be allowed after the due date for furnishing of return for the month of September or second quarter following the end of the financial year, or the actual date of furnishing of relevant annual return, whichever is earlier.
>
> (10) A registered person shall not be allowed to furnish a return for a tax period if the return for any of the previous tax periods has not been furnished by him."
>
> **107. Appeals to Appellate Authority**- (7) Where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed."

24. The amendment which has been made effective from 01.07.2017 clearly provides that the interest on tax payable in respect of supplies made during the tax paid and declared in the return for the said period furnished after the due date in accordance with the provisions of Section 39 of the Act, 2017 except where such return is furnished after commencement of any proceedings under Section 73 or 74 of the Act, 2017 shall be levied on that portion of tax i.e. paid by debiting the electronic cash ledger, as such, the amendments are having retrospectively applicability effect, as such, in view of the amendment made by the Central Government, the writ petition is disposed of with a direction to the appellate authority to examine whether in the given facts and circumstances of the case, the petitioner can be extended benefits of amendment made in Section 50 of the Income Tax Act or not. It is made clear that this Court has only examined the retrospectively applicability of amendment in Section 50 of the Act, 2017 and whether the petitioner can take its advantage or not to over come the rider of Section 107(6) which is a condition precedent for maintaining the Appeal under GST Act 2017 , it will be decided by the appellate authority in accordance with law after giving opportunity of hearing to the petitioner. The impugned order dated 11.09.2018 (Annexure P/1) is set aside and the matter is remitted back to the appellate authority to

decide the appeal of the petitioner afresh after examining the effect of the amendment in Section 50 of the Act, 2017 within four months from the date of receipt of copy of order passed by this Court.

25. In view of the above, the instant writ petition is partly allowed.

Sd/-
(Narendra Kumar Vyas)
Judge

Arun