

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Raja Basu Chowdhury

WPA 18241 of 2022

Utpal Das

Versus

The State of West Bengal & Ors.

For the petitioner : Mr. Avra Mazumder
Ms. Pampa Sen
Mr. Soumen Bhowmik
Ms. Alisha Dey
Ms. Elina Dey

For the State : Mr. Anirban Ray, Ld. GP,
Md. T. M. Siddiqui
Mr. Tanoy Chakraborty
Mr. Saptak Sanyal
Mr. Debraj Sahu

Heard on : 18th July, 2024

Judgment on : **18th July, 2024**

Raja Basu Chowdhury, J:

1. Although, the affidavit in opposition has been filed belatedly at the time of hearing, however, for ends of justice the same is taken on record.
2. The present writ petition has been filed, *inter alia*, challenging the order dated 8th April, 2021, passed under Section 73 of the

Central/West Bengal Goods and Services Tax Act, 2017 (hereinafter referred to as the “said Act”), as well as the order dated 13th May, 2022, passed by the appellate authority under Section 107 of the said Act.

3. Shorn of unnecessary details, the facts are that the petitioner is a registered tax payer under the provisions of the said Act. The petitioner was served with a notice dated 22nd February, 2021, in Form GST DRC-01A, identifying the liability inclusive of interest payable by the petitioner for the tax period April, 2018 to March, 2019, the relevant penalty which may be applied in the case of the petitioner was also included in the said Form GST DRC-01A.

4. Upon receipt of such notice, the petitioner had by a response in writing which is appearing at page 37 of the writ petition admitted that by reasons of a clerical mistake in filing GSTR-09 the petitioner had availed excess Input Tax Credit (ITC). Since, according to the petitioner, the ITC was not utilized, by filing a Form GSTDRC-03 on 20th March, 2021 the petitioner had reversed such entry by debiting its electronic credit ledger.

5. Notwithstanding the aforesaid a show cause notice was issued under Section 73 read with Section 50(1) of the said Act on 23rd March, 2021, identifying therein the interest and the penalty leviable on the petitioner in respect of the tax period April, 2018 to March, 2019. The aforesaid ultimately culminated in the order dated 8th April, 2021 passed under Section 73 of the said Act whereby the

petitioner was saddled with interest and penalty as appearing in the said order. Being aggrieved, the petitioner had preferred an appeal under Section 107 of the said Act. The appellate authority by its order dated 13th May, 2022 having found that the proper officer acted as per the provisions of law in imposing interest and penalty did not interfere with the order passed by the proper officer.

6. Mr. Mazumder, learned advocate appearing on behalf of the petitioner at the very outset submits that immediately upon receipt of the notice in Form GST DRC-01A, the petitioner had acted on the basis thereof and had voluntarily debited its electronic credit ledger by filing Form GST DRC-03. According to the petitioner there had been mistake in filling up of GSTR-09, which resulted in wrongful availment of ITC. The aforesaid debit of its electronic credit ledger by filing Form GST DRC-03 was in addition to the tax paid by the petitioner in terms of Section 39 of the said Act, while filing the regular returns which according to the petitioner had been filed in October, 2019 itself.

7. It is submitted that once, the petitioner's electronic credit ledger was debited by filing Form GST DRC-03, the matter ought to have rested. Unfortunately, the respondents had proceeded further by issuing a show cause notice. Although, the petitioner duly responded to the same, the order impugned under Section 73 of the said Act dated 8th April, 2021 had been passed.

8. By drawing attention of this Court to the electronic credit ledger of the petitioner for the period 1st April, 2018 to 31st March, 2019 which forms part of the writ petition, it is submitted that at no point of time the petitioner's credit balance in the said credit ledger had gone below the amount of Rs.5 lakhs which was claimed by the respondents on account of reversal of ITC on which interest was claimed.

9. By placing reliance on Section 50(3) of the said Act, it is submitted that unless the registered tax payer had both availed and utilized the ITC, the interest could not have been levied upon the petitioner. Admittedly, in this case, the petitioner had enough electronic credit available, as such, there is no question of the petitioner being saddled with interest.

10. In support of his contention that unless, the registered tax payer avails and utilizes ITC, interest cannot be leviable, reliance is placed on a judgment delivered by a coordinate Bench of this Court in the case of ***Ranjan Sarkar v. Assistant Commissioner of State Tax*** reported in **(2014) 163 taxmann.com 414 (Calcutta)** and two other judgments; one delivered by the Hon'ble Madras High Court in the case of ***Grundfos Pumps India Pvt. Ltd. v. Joint Commissioner of GST & Central Excise*** reported in **(2023) 150 taxmann.com 176 (Madras)** and the other judgment delivered by the Hon'ble Punjab & Haryana High Court in the case of ***Deepak***

Sales Corporation., v. Union of India reported in **(2023) 156 taxmann.com 325 (Punjab & Haryana)**.

11. Independent of the above, it is submitted that although, Section 50 of the said Act provided for liability to pay tax and interest in accordance thereof, an exception has been carved out, which, *inter alia*, provides the interest on tax payable in respect of supplies made during the tax period and declared in the return for such period furnished after due date in accordance with the provisions of Section 39 of the said Act, except where such return is furnished after commencement of proceedings under Section 73 or Section 74 in respect of the said period, shall be payable on the portion of the tax which is paid by debiting the electronic cash ledger. In other words, in all cases in which proceeding has not commenced, only ITC shall be reversed by debiting the credit ledger, if credit is available. Admittedly, in this case before initiation of proceeding under Section 73 of the said Act, on the receipt of notice in GST DRC-01A the petitioner had debited its credit ledger consequently interest could not have been levied on the petitioner nor could have the respondents called upon the petitioner to make payment of interest by debiting its cash ledger.

12. *Per contra*, Mr. Chakraborty, learned advocate representing the State respondents has taken me to the notice issued in Form GSTDRC-01A. By referring to the said notice, it is submitted that not only the tax but the component of interest and penalty are also

identified. The petitioner, however, chose not to debit its electronic cash ledger to make payment of interest and penalty. Only the tax component was paid by debiting its credit ledger. It is submitted that since, the petitioner choose not to pay interest and penalty by debiting its cash ledger, the notice was issued under Section 73 of the said Act. There is no irregularity in issuing the same. Even before the adjudicating authority the petitioner's advocate had appeared and expressed the intent to make payment of interest, though subsequently having not been paid, the adjudication order was passed. In the given facts, this Court ought not to interfere.

13. By referring to the provisions of Rule 142(1)(a) of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the "said Rules") it is submitted that the said Rules, *inter alia*, provide the manner in which GST DRC-01A shall be issued. Once, a notice is issued under GSTDRC-01A, a proceeding under Section 73 or Section 74 of the said Act, as the case may be is deemed to commence. In support of his aforesaid contention, he also draws attention of this Court to Section 73(7) of the said Act. According to Mr. Chakraborty, once a notice is issued in GST DRC-01A there is no option for the registered tax payer but to pay interest and penalty by debiting the electronic cash ledger. By referring to the judgment relied on by the petitioner, it is submitted that the judgment is an authority for what it decides and not what can be logically deduced there from. It is submitted that in the facts of the case, the show

cause notice was issued. The judgments relied on behalf of the petitioner is distinguishable on facts and no reliance ought to be placed. In the facts as stated hereinabove, there is no irregularity in the order passed either by the adjudicating authority or by the appellate authority.

14. Heard the learned advocates appearing for the respective parties and considered the materials on record. The short point that falls for consideration in the instant writ petition is whether the petitioner can be called upon to make payment of interest upon the petitioner not complying with the notice issued in Form DRC-01A as regards payment of interest, prior to issuance of the show cause under Section 73 of the said Act. Admittedly, in this case on the issuance of a notice in Form DRC -01A the petitioner had debited its credit ledger by indicating that by reasons of error committed during filling of GSTR – 09 the petitioner had wrongly availed the ITC. It is the petitioner's case that the ITC, though wrongfully availed, was not utilized by him. According to the petitioner unless, the ITC is wrongfully availed and utilized, in terms of Section 50(3) of the said Act interest is not leviable. I find that the said section had been amended by Finance Act of 2022 with retrospective effect from 1st July 2017. Having regard to the aforesaid, I find that the aforesaid Section is applicable to the facts of this case.

15. From a perusal of the materials on record it would appear that the petitioners had enough credit in its electronic credit ledger, a sum in excess of Rs.5,00,000/- which incidentally was the approximate ITC amount availed, for the relevant period. It is also noticed that in somewhat situation a Coordinate Bench of this Court in the case of ***M/s Larsen Turbo v. State of West Bengal & Ors.***, in **WPA 2654 of 2020** on 13th December 2022 had concluded that unless a registered tax payer avails and utilized ITC, interest cannot be levied. Similar views had been taken by the Hon'ble High Courts of Madras, Punjab and Haryana in the cases of ***Grundfos Pumps India (P) Ltd.*** (supra), ***Deepak Sales Corporation.***, (supra) and ***Ranjan Sarkar*** (supra), respectively.
16. However, before I proceed further I find that Mr. Chakraborty, by placing reliance on the provisions of Rule 142 of the said Rules and Section 73 of the said Act has attempted to claim that issuance of a notice in form DRC-01A, constitutes initiation of proceeding under Section 73 of the said Act and as such according to him by reasons of issuance of notice in DRC-01A the proceeding having commenced, in terms of proviso to section 50(1) of the said Act, the petitioner was obliged to make payment of interest by debiting his electronic cash ledger. Since, such payment was not made, the notice in form DRC-01 was issued. I am afraid that the aforesaid contention is misconceived. A

proceeding under Section 73 or 74 of the said Act, can initiate with issuance of a show cause notice and not prior thereto. A perusal of Rule 142(1A) of the said Rules would in no uncertain terms make the situation clear. The same provides that before service of notice to the person chargeable with tax, interest or penalty under sub-Section (1) of Section 73 or sub-Section (1) of Section 74 as the case may be, the registered tax payer must be communicated with the determination in form DRC – 01A.

17. In this case it is noticed that the petitioner had debited its electronic credit ledger to reverse the ITC availed. A perusal of Section 49(4) of the said Act would clarify that the amount available in the electronic credit ledger, may be used for making payment towards output tax under the Act. Thus, from the tenor of Sections 50(1) proviso, read with Section 49, read with Rule 86 and 87 of the said Rules, it would be apparent that payment of interest and penalty can only be made by debiting the electronic cash ledger and not from the electronic credit ledger. The payment made on 20th March 2021 in form GST DRC-03 is by debit of the electronic credit ledger. The said debit was made prior to issuance of notice in form DRC-01, as such, there is no irregularity in that regard. Further Section 50(3) specifically provides that only in cases where ITC has been wrongly availed and utilized that the registered taxpayer shall pay interest on such ITC, wrongly availed and utilized. In other words, unless the

ITC is both availed and utilized, interest cannot be levied on the registered tax payer.

18. Having regard to the aforesaid, it would be apparent that the proper officer had acted with material irregularity in saddling the petitioner with interest.
19. The only other point raised by Mr. Chakraborty is with regard to the petitioners' advocate's representation in course of hearing with regard to his intent to make payment of the interest. At the first blush, I was prompted to consider the matter from an angle that the adjudication order issued by the proper officer proceeds on the basis of an admission. However, upon perusal of the entire order it would appear that the proper officer had proceeded to adjudicate and determine the liability of the petitioner. Having regard thereto, it cannot be said that the petitioner is estopped from challenging the order passed by the proper officer or by the appellate authority. The appellate authority also did not proceed on such basis. The respondents thus, cannot be permitted to raise such a plea for the first time before this Court. As such, I do not find any irregularity in the petitioner challenging the order passed by the proper officer and the appellate authority in the writ petition. The above argument made by the respondents appear to be one, made in desperation. The order dated 8th April, 2021, passed under Section 73(9) of the said Act, in my view is contrary to the statutory provisions. The appellate authority did

not consider the aforesaid aspect at all and by a cryptic order had returned the finding that the proper officer had acted as per the provisions of law in imposition of interest and penalty and having regard to the same, did not interfere with the order.

20. In my view the order passed by the proper officer dated 8th April 2023 which has since, merged with the order passed by the appellate authority dated 13th May 2022 cannot be sustained, the same is accordingly set aside. Consequentially, the demand raised by the respondents on account of interest and penalty is also not sustainable and the same is accordingly quashed.
21. With the above observations and directions, the writ petition being **WPA 18241 of 2022** is accordingly disposed of
22. All parties shall act on the basis of the server copy of this order duly downloaded from this Court's official website.

(Raja Basu Chowdhury, J.)