

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.09.2020

CORAM

THE HON'BLE DR. JUSTICE ANITA SUMANTH

W.P.Nos.28437, 29998 & 31081 of 2019, and 4468, 5918, 6223, 3331, 3660, 3858, 3899, 3902, 4633, 4745, 4885, 4890, 4892, 4904, 4912, 5045, 5048, 5051, 5088, 5105, 5111, 5167, 5169, 5173, 5190, 5193, 5197, 5207, 5290, 5292, 5717, 6066, 6362, 6471, 6478, 6529, 6535, 6621, 6693, 6750, 6884, 8197, 8811, 9227, 11702, 4471, 4777, 4783, 4785, 6230, 6296, 6583, 6615, 6996, 5012, 5019, 5021, 5286, 5800, 4919, 5000, 5107, 5108, 5532, 5537, 5554, 5569, 5618, 5676, 5853, 5855, 5972, 5974, 6006, 6142, 6164, 6234, 6244, 6276, 6481, 6483, 7042, 7128, 7130, 7190, 7386, 550, 2717, 2729, 2748, 4883, 5002, 5694, 5698, 5702, 5705, 5005, 5951, 5008, 6863, 4790, 4794, 4798, 4803, 4806, 4875, 4879, 7206, 5803, 5916, 6185, 6188, 6886, 12478, 3472, 12492, 12588, 12592, 1227, 12639, 7065, 12656, 12660, 3799, 5914, 6562, 12648, 12653, 12667, 12673, 12686, 12727, 12625, 12627, 12648, 12492, 12653, 12656, 12660, 12661, 12667, 12673, 12686, 3472, 3799, 6875, 6879, 7065, 12629, 12639, 12710 & 12837 of 2020

and

WMP Nos.29900, 28132, 29899 and 31205 of 2019, 5916, 5920, 7014, 7847, 8025, 5662, 5665, 5666, 5668, 5670, 3864, 4625, 5101, 5102, 5242, 5293, 5294, 5681, 5690, 5692, 5777, 5779, 5782, 5786, 5812, 5907, 5908, 5911, 5912, 5926, 5930, 5931, 5934, 6008, 6021, 6022, 6101, 6103, 6110, 6130, 6136, 6232, 6471, 6474, 6476, 6477, 6478, 6527, 6528, 6575, 6634, 6635, 6638, 6653, 6675, 6792, 6859, 6861, 6865, 6868, 7039, 7040, 7041, 7235, 7392, 7406, 7664, 7806, 8176, 8178, 8180, 8612, 8835, 8836, 9768, 9770, 10695, 10696, 11309, 11465, 11527, 14377, 3152, 3178, 3197, 4313, 4315, 4575, 4622, 5287, 5680, 5771, 6508, 6510, 6576, 6577, 6915, 6917, 6919, 6934, 6937, 6974, 7013, 5775, 5787, 6229, 5295, 5490, 5605, 5607, 5609, 5644, 5649, 5652, 5654, 5657, 5755, 5756, 5762, 5763, 5770, 5813, 5823, 5827, 5960, 5962, 5964, 5967, 6007, 6023, 6024, 6138, 6139, 6149, 6236, 6237, 6239, 6241, 6639, 7118, 7270, 7272, 7318, 7321, 7331, 7338, 7356, 7408, 7504, 7505, 7654, 7670, 7671, 7674, 7675, 7753, 7758, 7759, 7802,

7804, 7838, 7840, 7841, 7848, 7944, 647, 5935, 5958, 6862, 6615, 6645, 6646, 6652, 6781, 7017, 7018, 7020, 5802, 5803, 5810, 5915, 5922, 5923, 6028, 6029, 6031, 6783, 6784, 6790, 6791, 7210, 7233, 7661, 7662, 7945, 8208, 8210, 8212, 8213, 8342, 8397, 8399, 8496, 8499, 8588, 7782, 7783, 8420, 8421, 8424, 15527, 15528, 6933, 15405, 15591, 15622, 15629, 15639, 15721, 4047, 4049, 4489, 4491, 6932, 7781, 15393, 15394, 15612, 15616, 15617, 15618, 8610, 15648, 15652, 15669, 15589, 15591, 15596, 15597, 15612, 15618, 15622, 8420, 8421, 8424, 4047, 6932, 6933, 7781, 7782, 7783, 8195, 15394, 15405, 15527, 15528, 15629, 15639, 15640, 15641, 15648, 15652, 15669, 15705 & 15848 of 2020 and 18404 of 2019

WP.No.4468 of 2020

M/s. Maansarovar Motors Private Limited,
Represented by its Director,
No.292/294, S.F.No.290/2, 291,
Mount Poonamallee High Road,
Ayyappanthangal, Chennai-600056.

... Petitioner

/Vs/

1.The Assistant Commissioner,
Poonamallee Division,
Chennai Outer Commissionerate,
C-48, TNHB Building, Anna Nagar,
Chennai-600 040.

2.The Superintendent of GST & Central Excise,
Poonamallee-II Range,
42, Trunk Road, Poonamallee,
Chennai-600 056.

3.The Branch Manager,
HDFC Bank Limited,
98/99, Dual Gardens, Mount Poonamallee Road,
Porur, Chennai-600 116.

... Respondents

PRAYER in W.P.No.4468 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of writ of Certiorari to call for the records of the Second Respondent in the Impugned Demand in O.C.No.342/2019 dated 09.09.2019 and impugned notice to a third person by First Respondent in C.No.IV/16/13/2020-Tech, Form GST DRC-13 dated 12.02.2020, quash the same.

For Petitioner in W.P.No.4468 of 2020 : Mr.K.Vaitheeswaran

For Respondents in W.P.No.4468 of 2020: Mr.A.P.Srinivas,
Senior Standing Counsel
Mr.Mohammed Shafiq,
Special Government Pleader

COMMON ORDER

This batch of writ petitions revolves around the interpretation of Section 50 of the Central Goods and Services Tax Act, 2017 (in short 'Act'), particularly the effective date of application of the proviso inserted vide Section 100 of Finance (No.2) Act of 2019.

2. Section 50 of the Act states that every person who is liable to pay tax in terms of the Act shall remit the tax either in cash or by way of adjustment of credit available in the Input Tax Credit (ITC) register. In cases of delay in such remittance, interest is liable to be paid for the period of delay. While the levy of interest on remittances of tax in cash is not in question, the authorities have proceeded to levy interest on remittances of

tax by adjustment of available ITC and this is the subject matter of challenge before me.

3. The petitioner's argue that (i) the credit was available even prior to the arising of the output tax liability and hence the question of delay does not arise(ii) no opportunity was granted prior to raising of the impugned demand and consequential proceedings (iii) interest is a measure of compensation and since ITC is already available in the electronic ledger, there is no question of the same being due to the revenue (iv) the proviso to Section 50 of the Act which states that interest shall be levied only on that part of that paid in cash has been inserted to set right an anomaly and is therefore retrospective in operation. Reliance is placed on (i)*Eicher Motors Ltd. Vs. Union of India* [(1999) 106 ELT 3] (ii) *Pratibha Processors vs. Union of India* [(1996) 88 ELT 12] (iii) *Refix Industry Vs. Assistant Commissioner of CGST order dated 06.01.2020* in W.P.No.23360 & 23361 of 2019.

4.Per contra, the revenue argues that Section 16(2) entitles a person to take credit of input tax and Section 41(1) provides for a credit entry in the electronic credit ledger, which is provisional in nature. Since Section 41 provides that the entitlement to credit is only with the filing of return on self-assessment basis, this entitlement cannot be availed of till such time a return is filed by an assessee. After a return is filed and the credit is availed

by entry in the register, the assessee can proceed to utilize the same against output tax liability. Reference is made to Section 49, which deals with payment of tax, interest, penalty and other amounts to support the aforesaid argument emphasizing that it is only when a credit entry is made in the electronic credit ledger that the entitlement to avail the same arises. This argument does not advance the case of the revenue as all the petitioners before me have filed their returns under the Act. In fact, the question of payment of interest arises only in the satisfaction of the tax computed under that return, belatedly and either by cash or by reversal of ITC.

5. Reliance is placed on a decision of the Telangana High Court in *Megha Engineering and Infrastructure Ltd. Vs. Commissioner of Central Taxes, Hyderabad* in W.P.No.44517 of 2018. Since the effective date of Section 100 was not notified when the decision in *Refix Industries* (supra) was rendered and has been notified now vide Notification No. 63 of 2020 dated 25.08.2020, as being 01.09.2020, the decision in *Refix Industries* (supra) is said to be of no benefit to the petitioners. Reliance is also placed on a Clarification issued by the Central Board of Excise and Customs bearing No.20/16/07/2020-GST dated 10.02.2020 to the effect that liability to interest would arise on total amount of tax liability as revealed in the GST return.

6. Learned Senior standing counsel for the revenue would, however, acknowledge that the clarificatory Press Release of the CBIC dated 26.08.2020 has protected the interest of the assesseees by stating that no recovery of interest shall be made even for the earlier periods. He would also state that though Circular F.No.CEBC/20/1/8/2019-GST dated 18.09.2020 has more or less settled the issue as regards the recovery to be made for the past periods, some shadows still remain on the legal issues concerning the determination of effective date of the proviso.

7. Section 50 is extracted below:

Interest on delayed payment of tax-

1) Every 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 tax 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 may be notified by the Government on the recommendations of the Council.

“ 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 in 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 levied on that portion of the tax that is paid by debiting the electronic cash ledger.”

(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

(3) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not

exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council.

8. The issue before me has seen a checkered history. Section 50 was part of the original enactment, w.e.f. 01.07.2017, sans, of course, the proviso thereto that stood inserted vide Section 100 of the Finance (No. 2) Act, 2019.

9. I would first refer to the 31st Goods and Services Tax Council Meeting (GST Council)/Council held on 22.12.2018 that discussed the proposal for amendment of Section 50 so as to provide for payment of interest on net cash liability alone, that interest be charged only on net tax liability of the tax payer after taking into account admissible credit i.e., amount payable through electronic cash ledger. The Amendment Act, specifically Section 100 thereof, inserted a proviso to Section 50 that reiterated the above position. However, the date of notification of Section 50 was not specified and left to be indicated at a future date.

10. I may at this juncture note that the GST Council is chaired by the Hon'ble Union Finance Minister and comprises representatives of the Centre, the States, the Council Secretariat, officials of the Goods and Services Tax Network and Members of the Central Board of Indirect Taxes (CBIC)/Board. Thus, the Centre, State and the Board have come to a

common and unanimous conclusion which is reflected in the minutes of the meeting.

11. The 39th GST Council meeting held on 21.06.2019 made recommendations to amend Section 50 vide Section 100 of Finance (No.2) Act, 2019 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.

12. On the heels of the aforesaid recommendation came Notification No.63 of 2020-Central Tax dated 25.08.2020, 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 give full effect. The press release is extracted below:

Press Release

CBIC

26.08.2020

Interest on delayed payment of GST:CBIC

New Delhi: *The Central Board of Indirect Tax & Customs (CBIC) today clarified that the Notification No. 63/2020-Central Tax dated 25th August 2020 relating to interest on delayed payment of GST has been issued that prospectively due to certain technical limitations. However, it has assured that no recoveries shall be made for the past period as well as by the Central and State tax administration in accordance with the decision taken in the 39th Meeting of GST Council. This will ensure full relief to the taxpayers as decided by the GST Council.*

CBIC explanation came in response to an assortment of comments in the social media with respect to Notification dated 25th August 2020 regarding charging of interest on delayed payment of GST on net liability (the tax liability discharge in cash) w.e.f. 1st September 2020.

13. Barring one matter in this batch, all writ petitions challenge action taken by the Central GST Authorities levying interest on tax paid by reversal of ITC. In one matter alone, the challenge is to recovery taken under the Tamil Nadu Goods and Services Tax Act, 2017 (TNGST Act). Learned Special Government Pleader would adopt the submissions of the Central authorities and state that the position of the State Government is in line with the view expressed by the Centre in press release dated 26.08.2020.

14. It is thus clear that there is a meeting of minds of the Centre, the State of Tamil Nadu and the Board to the effect that the proviso to Section 50 is operative effective 01.07.2017, and no interest is liable to be levied on tax remitted by reversal of available ITC.

15. While this is so, the GST authorities have adopted a contradictory stand by issuing orders, styled as notices, levying interest for allegedly belated remittance of tax by reversal of ITC. No opportunity appears to have been granted in most of the matters calling for explanation from the assesseees prior to raising of the impugned demands of interest and coercive recovery action by attachment of bank accounts have been resorted to by the respective Assessing Officers.

16. Though cumbersome and adding to the volume of this already long order, I extract my order in the case of *Refix Industry Vs. Assistant Commissioner of CGST* in full (order dated 06.01.2020 in W.P.No.23360 & 23361 of 2019), wherein I had had occasion to deal with this very issue for the sake of completion:

The petitioners are registered as assesseees under the provisions of the Central Goods and Service Tax Act, 2017 (in short 'CGST Act'). The petitioners have admittedly filed Returns of income belatedly for the period 2017-18. Communications dated 07.05.2019 (in W.P.No.23360 of 2019) and 15.05.2019 (in W.P.No.23361 of 2019) computing the delay in filing of Returns and consequently the interest to be remitted on the tax accompanying the Returns were issued by the 2nd respondent in the following terms:

W.P.No.23360 of 2019:

Sl.No	Month	Delay (No. Duty paid)	Duty paid (in Rs.)	Interest to be paid @ 18%
1.	August-17	140	5016431	346340
2	September-17	110	817158	32642
3	October – 17	81	817158	32642
4	November-17	51	817158	20552
5	December -17	18	629658	5589
6	January – 18	91	5312557	238410
7	February – 18	63	1566965	48683
8	March – 18	32	22789660	359640
			Total	1165982

W.P.No.23361 of 2019:

Sl.No	Month	Delay No. Duty paid (Duty paid (in Rs.)	Interest to be paid @ 18%
1	July-17	31	27000	413
2	August-17	258	900000	114510
3	October – 17	197	534714	52045
4	November-17	167	534714	44119
5	December -17	134	268898	17769
6	January – 18	181	1353568	1208199
7	February – 18	155	12103153	925145
8	March – 18	143	7750	547
			Total	2362746

2. Demand notices were issued to the Banks (R3) seeking to recover the arrears of interest from the balances in the accounts of the petitioners.

3. The petitioners objected stating that they had sufficient Input Tax Credit (ITC) available with the Department and thus interest could be demanded, if at all, only on the cash component of the tax remitted belatedly. This amounted to a sum of Rs.1,21,701/- (in W.P.No.23360 of 2019) and Rs.1,25,751/- (in W.P.No.23361 of 2019) and the amounts have been remitted on 14.06.2019. According to the petitioners, the total tax payable, being Rs.3,94,49,225/- in W.P.No.23360 of 2019 and Rs.2,74,71,771/- in W.P.No.23361 of 2019, was remitted by way of cash to an extent of Rs.19,55,634/- (in W.P.No.23360 of 2019) and Rs.12,19,151/- (in W.P.No.23361 of 2019) and Rs.3,74,93,591/- (in W.P.No.23360 of 2019) and Rs.2,62,52,620/- (in W.P.No.23361 of 2019) from out of the available ITC. The proceedings for coercive recovery of the interest are impugned in the present Writ Petitions.

4. Though the petitioners have raised other grounds as well, including one of the violation of principles of natural justice, the only issue agitated is the legal issue as to whether interest would at all be payable on the component of ITC that was, admittedly, available with the Department throughout and that has been adjusted towards the tax demands for the period August, 2017 to March, 2018.

5. There is some history to this matter as this very issue appears to have been raised earlier by a petitioner in W.P.No.15978 of 2019. A learned single Judge, by order dated 13.06.2019, directed the petitioner therein to remit the admitted tax, being tax on the cash component of the demand belatedly paid and the Department to dispose the representation of the petitioner in that case to the effect that there would be no liability to interest in regard to the ITC available with the Department.

6. As against the aforesaid order, Writ Appeals were filed before the Division Bench and by order dated 23.07.2019, the two Hon'ble Judges expressed divergent views. One Judge dismissed the Writ Appeals, whereas the second Judge was of the view that the legal issue on the levability of interest called for a deeper consideration than had been extended by the learned single Judge at the stage of admission and such summary dismissal required revisiting.

7. The matter was thus referred to a Third Judge, who by his order delivered on 19.12.2019, held that Writ Appeals of the Revenue were not warranted, since the learned single Judge had not in the original instance determined the legal issue in a manner detrimental to the Revenue, but only remitted the matter back to the

Assessing Officer to determine the quantum of liability. The aforesaid orders are circulated for my benefit by learned counsel.

8. *The question crystallised by the Third Judge for consideration is as to whether interest on belated payment of tax as contemplated under Section 50 of the CGST Act is automatic or whether the same would have to be determined after considering the explanation offered by the assessee. At paragraph 29, the Hon'ble Judge holds that the liability to pay interest under Section 50 is automatic. However, since the petitioner in that case had raised disputes with regard to the period for which the tax had allegedly not been paid, as well as the quantum of tax remaining unpaid in excess of ITC, all being questions of fact, he was of the view that such matters would have to be resolved after hearing the assessee. He categorically states 'therefore in my considered view though the liability fastened on the assessee to pay interest is an automatic liability, quantification of such liability certainly needs an arithmetical exercise after considering the objections if any, raised by the assessee.' The objections raised in that case are thus factual and relate to disputed questions of fact as noted by me in the earlier portion of this paragraph.*

9. *However, the objection raised by the petitioners before me is not one of fact but one of law. According to the petitioners, Section 50 that provides for levy of interest on belated payments would apply only to payments of tax by cash, belatedly, and would not stand triggered in the case of available ITC, since such ITC represents credit due to an assessee by the Department held as such.*

10. *In order to decide the purely legal issue raised by the petitioners, it is necessary to extract Section 50 itself, which I do below:*

'Interest on delayed payment of tax: "

(1) Every 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 tax 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 may be notified by the Government on the recommendations of the Council.

(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

(3) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent, as may be notified by the Government on the recommendations of the Council."

11. The Section provides for interest on belated payment of tax and as held by the third Judge, such levy is 'automatic', and is intended to compensate the revenue for the remittance of tax belatedly and beyond the time frames permitted under law. Though in the context of the Income Tax Act, 1961, the question of whether remittance of interest under Sections 234 A, 234B and 234C of the Income Tax Act, 1961 for belated filing of return, belated remittances of advance tax and deferment of advance tax are mandatory came to be considered by the Supreme Court in the case of Commissioner Of Income Tax, Mumbai vs Anjum M.H.Ghaswala & Ors (252 ITR 1), and held to be compensatory and hence mandatory. The principle of the said judgment applies on all fours to the present case.

12. The specific question for resolution before me is as to whether in a case such as the present, where credit is due to an assessee, payment by way of adjustment can still be termed 'belated' or 'delayed'. The use of the word 'delayed' connotes a situation of deprivation, where the State has been deprived of the funds representing tax component till such time the Return is filed accompanied by the remittance of tax. The availability of ITC runs counter to this, as it connotes the enrichment of the State, to this extent. Thus, Section 50 which is specifically intended to apply to a state of deprivation cannot apply in a situation where the State is possessed of sufficient funds to the credit of the assessee. In my considered view, the proper application of Section 50 is one where interest is levied on a belated cash payment but not on ITC available all the while with the Department to the credit of the assessee. The latter being available with the Department is, in my view, neither belated nor delayed.

13. The argument that ITC is liable to be reversed if it is found to have been erroneously claimed, and that it may be invalidated in some situations, does not militate with my conclusion as aforesaid. The availment and utilization of ITC are two separate events. Both are subject to the satisfaction of statutory conditions and it is always possible for an Officer to reverse the claim (of availment or utilization) if they are found untenable or not in line with the statutory prescription. Credit will be valid till such time it is invalidated by recourse to the mechanisms provided under the Statute and Rules.

14. I am supported in my view by a recently inserted proviso to Section 50(1) reading as below: 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 in 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 levied on that portion of the tax that is paid by debiting the electronic cash ledger.

15. The above proviso, as per which interest shall be levied only on that part of the tax which is paid in cash, has been inserted with effect from 01.08.2019, but clearly seeks to correct an anomaly in the provision as it existed prior to such insertion. It should thus, in my view, be read as clarificatory and operative retrospectively.

16. Learned counsel for the petitioners also draw my attention to the decision of the Telengana High Court in the case of Megha Engineering and Infrastructures Ltd. V. The Commissioner of Central Tax and others (2019-TIOL 893), where the Division Bench interprets Section 50 as canvassed by the Revenue. The amendment brought to Section 50(1), was only at the stage of press release by the Ministry of Finance at the time when the Division Bench passed its order and the Division Bench thus states that 'unfortunately, the recommendations of the GST Council are still on paper. Therefore, we cannot interpret Section 50 in the light of the proposed amendment'. Today, however, the amendment stands incorporated into the Statute and comes to the aid of the assessee.

17. In the light of the above discussion, these Writ Petitions are allowed and the impugned notices are set aside. No costs. Connected Miscellaneous Petitions are closed.

17.The Supreme Court in *Eicher Motors*(supra), considered the validity and application of the scheme of Rule 57F of the Central Excise Rule, 1944 in terms of which, credit lying utilized as on a particular date with the manufacturer lapsed, the Bench categorically holding that available credit is as good as tax paid. By ignoring the available credit and providing to levy interest upon that component of tax which the assessee seeks to remit by adjustment of credit, the Department is enriching itself doubly – on the one hand, holding in its coffers the available credit and on the other, seeking the payment of interest upon the same sum.

18. The Supreme Court in the context of Section 43B of the Income Tax Act, 1961 (IT Act) held in the case of *Allied Motors (P) Ltd. Vs. Commissioner of Income Tax* (1997 (3) SCC 472) that the nature and object of a proviso should be taken into account while deciding the question of whether the proviso was prospective or retrospective. Where a proviso was designed to eliminate unintended and prejudicial consequences which would cause hardship to a party, such a proviso should be seen to be remedial and one that mitigated the prejudice caused from inception.

19. This was reiterated in the case of *Commissioner of Income Tax Vs. Alom Extrusions Ltd.*(319 ITR 306) in the context of the second proviso to Section 43B of the IT Act. The Supreme Court in this case was dealing with the effective date of operation of the omission of the second proviso to

Section 43B of the Income Tax Act, 1961 (in short 'IT Act'). Section 43B deals with the grant of deduction of statutory payments to an assessee conditional upon actual remittance of the aforesaid amounts.

20. Under the second proviso to Section 43B, assesseees were entitled to deduction only if the contribution to provident fund (PF) stood credited on or before the due date as set out under the Provident Funds Act (PF Act). This presented a difficulty since the financial year for companies ended on the 31st of March of the particular financial year whereas, the accounting period of the Provident Fund Commissioner ended after the due date for filing of income tax returns. Thus, an assessee, who had made the statutory deposit within the due date under the PF Act, would not be in a position to claim the deduction when the return of income for income tax was filed. The second proviso thus stood deleted by Finance Act, 2003, with effect from 01.04.2004. However, while considering the effective date of deletion, the Bench noted the reason for such deletion as being curative and intended to remove existing anomalies. The Bench held that an amendment, be it by way of insertion, substitution or deletion, made specifically to remove an anomaly, should normally be effective retrospectively, back to the date when the anomaly first arose.

21. The Bench cites an oft-quoted observation of the three Judge Bench in the case of *Commissioner of Income Tax, Bangalore vs. J.H. Gotla*, [1985] 156 I.T.R. 323 to the following effect:

"...We should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result, i.e., a result not intended to be subserved by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction."

22. Thus, notwithstanding that the Amendment Act provided for the deletion to come into effect from 01.04.1988, the Hon'ble Supreme Court held that the deletion would operate with effect from 01.04.1984 itself. The ration of this decision is clearly applicable to the case on hand.

23. Moreover, interest, as held by the Supreme Court in the case of *Commissioner of Income Tax Vs. Anjum H Ghaswada*, (252 ITR 1), is indented to compensate the revenue for loss of capital. In the present case, there is no loss insofar as the revenue is in possession of the credit '*which is good as cash*' as held by the Supreme Court in the case of *Eicher Motors* (supra) and cannot thus be said to be prejudiced in any way.

24. Useful reference may also be made to a decision of a Division Bench of this Court in *Commissioner of Central Excise, Puducherry-I Vs.*

CESTAT, Chennai 2017 (346 E.L.T. 80). The Bench was answering a substantial question of law on the issue of whether interest may be demanded for differential duty not paid in time, since the assessee had sufficient credit in its current account during the relevant period. One of the reasons on which the revenues' appeal was dismissed and the assessee's contention that no demand for interest would arise in a case where sufficient credit is available to the assessee, is set out in para 6 of the short decision. The Bench notes that there was sufficient credit available with the Department as on 30.06.2006 and the principal demand raised arose only from the adjustment of such credit. This adjustment could well have been automatic and the Bench thus says that no interest would lie on such adjustment which could have been made at any time, since the amount was available with the Department. In this context, the Bench quips that '*when credit was available to the account of the assessee, the Department cannot act like Shylock demanding a pound of flesh*'. Equally so in the present case.

25. The revenue places reliance on a decision of the Telangana High Court in *Megha Engineering and Infrastructure Ltd. Vs. Commissioner of Central Taxes, Hyderabad*. In W.P.No.44517 of 2018 dated 18.04.2019. The aforesaid decision is dated 18.04.2019 long prior to the clarifications issued by the GST Council. I have also in my decision in the case of *Refix Industry* (supra) noted this position at para 16 thereof.

26. In any event, this entire controversy has been now settled by the Board vide its Circular in F.No.CBEC.20/01/08/2019 GST dated 18.09.2020 to the following effect:

*F. No. CBEC- 20/01/08/2019-GST
Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes and Customs
GST Policy Wing*

*Room No. 159A,
North Block, New Delhi,
Dated: 18th September, 2020*

To,

*The Principal Chief Commissioners/ Chief Commissioners/
Principal Commissioners/ Commissioners of Central Tax (All)
The Principal Director Generals/Director Generals (All)*

Madam / Sir,

Subject: Administrative instructions for recovery of interest on net cash tax liability w.e.f. 01.07.2017 -reg.

*Based on the recommendations of the 35th meeting of the GST Council held on 21st June, 2019, the provision of section 50 was amended vide section 100 of the [Finance \(No. 2\) Act, 2019](#) to provide for **charging interest on the net cash tax** liability. The said amendment was to be made effective from a date to be notified by the Government. Accordingly, the said provision was made effective vide [notification No. 63/2020 — Central Tax dated the 25th August, 2020](#), w.e.f. 01.09.2020.*

2. The GST Council, in its 39th meeting, held on 14th March, 2020 recommended interest to be charged on the net cash tax liability w.e.f. 01.07.2017 and accordingly, recommended the amendment of section 50 of the CGST Act retrospectively w.e.f. 01.07.2017. The retrospective amendment in the GST laws would be carried out in due course through suitable legislation.

3. Post issuance of [notification 63/2020 — Central Tax dated the 25th August, 2020](#), there were apprehensions raised by taxpayers that the said notification is issued contrary to the Council's recommendation to charge interest on net cash liability

w.e.f. 01.07.2017. Consequently, a press release, dated 26.08.2020 was issued to clarify the position. Further, in order to implement the decision of the Council in its true spirit, and at the same time working within the present legal framework, it has been decided to address the issue through administrative arrangements, as under:

a. For the period 01.07.2017 to 31.08.2020, field formations in your jurisdiction may be instructed to recover interest only on the net cash tax liability (i.e. that portion of the tax that has been paid by debiting the electronic cash ledger or is payable through cash ledger); and

b. wherever SCNs have been issued on gross tax payable, the same may be kept in Call Book till the retrospective amendment in section 50 of the CGST Act is carried out.

4. Difficulty, if any, in the implementation of these instructions may please be brought to the notice of the Board.

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.

28. 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

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.

29. 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

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.

30. In W.P.No.12492 of 2020, learned counsel for the petitioner states that the interest liability relating to belated payment of tax both by cash and reversal of ITC has been coercively recovered. In light of my decision as aforesaid, a direction is issued to the appropriate authority to compute the interest liability for belated remittances of cash and refund the balance of the amount collected from the petitioner within a period of four weeks from date of uploading of this order.

31. With the insertion of the proviso to be taken to be retrospective for the detailed reasons set out above, these writ petitions are allowed. Consequently, the attachments will also stand lifted forthwith. The Assessing Officers are at liberty to raise fresh demands relating to interest on delayed remittances of tax by cash, in accordance with law. Connected miscellaneous petitions are closed. No costs.

Index : Yes
Internet : Yes
speaking order

ska

To

- 1.The Assistant Commissioner,
Poonamallee Division,
Chennai Outer Commissionerate,
C-48, TNHB Building, Anna Nagar,
Chennai-600 040.
- 2.The Superintendent of GST & Central Excise,
Poonamallee-II Range,
42, Trunk Road, Poonamallee,
Chennai-600 056.
- 3.The Branch Manager,
HDFC Bank Limited,
98/99, Dual Gardens, Mount Poonamallee Road,
Porur, Chennai-600 116.

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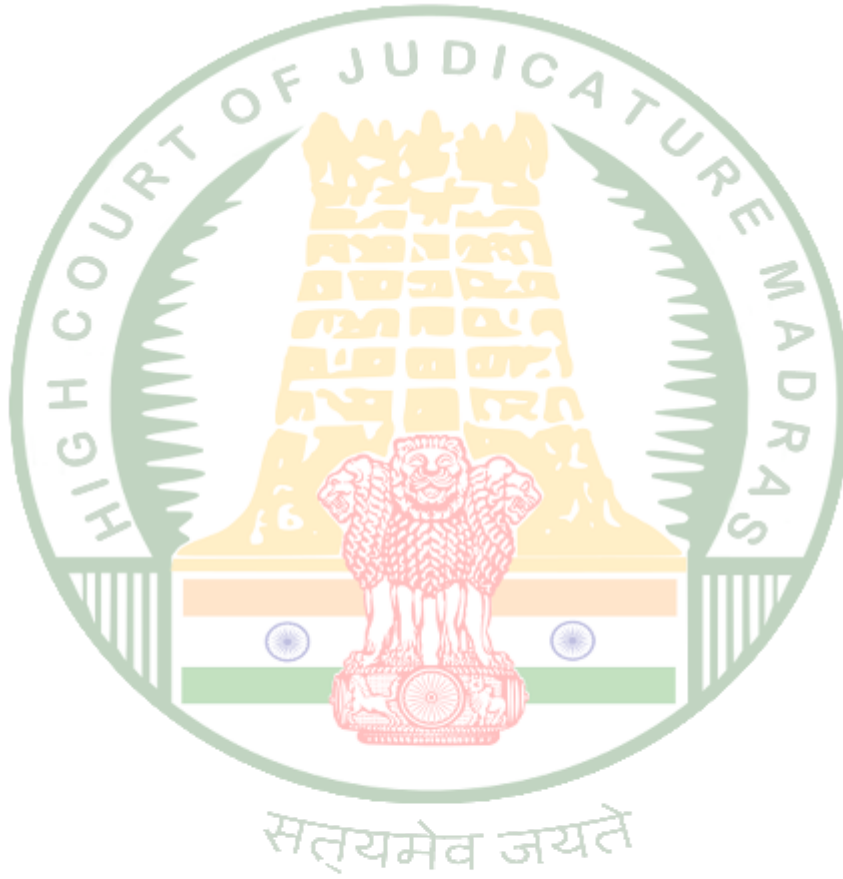
DR.ANITA SUMANTH, J.

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W.P.Nos.28437, 29998 & 31081 of 2019, and 4468, 5918, 6223, 3331, 3660, 3858, 3899, 3902, 4633, 4745, 4885, 4890, 4892, 4904, 4912, 5045, 5048, 5051, 5088, 5105, 5111, 5167, 5169, 5173, 5190, 5193, 5197, 5207, 5290, 5292, 5717, 6066, 6362, 6471, 6478, 6529, 6535, 6621, 6693, 6750, 6884, 8197, 8811, 9227, 11702, 4471, 4777, 4783, 4785, 6230, 6296, 6583, 6615, 6996, 5012, 5019, 5021, 5286, 5800, 4919, 5000, 5107, 5108, 5532, 5537, 5554, 5569, 5618, 5676, 5853, 5855, 5972, 5974, 6006, 6142, 6164, 6234, 6244, 6276, 6481, 6483, 7042, 7128, 7130, 7190, 7386, 550, 2717, 2729, 2748, 4883, 5002, 5694, 5698, 5702, 5705, 5005, 5951, 5008, 6863, 4790, 4794, 4798, 4803, 4806, 4875, 4879, 7206, 5803, 5916, 6185, 6188, 6886, 12478, 3472, 12492, 12588, 12592, 1227, 12639, 7065, 12656, 12660, 3799, 5914, 6562, 12648, 12653, 12667, 12673, 12686, 12727, 12625, 12627, 12648, 12492, 12653, 12656, 12660, 12661, 12667, 12673, 12686, 3472, 3799, 6875, 6879, 7065, 12629, 12639, 12710 & 12837 of 2020 and
WMP Nos.29900, 28132, 29899 and 31205 of 2019, 5916, 5920, 7014, 7847, 8025, 5662, 5665, 5666, 5668, 5670, 3864, 4625, 5101, 5102, 5242, 5293, 5294, 5681, 5690, 5692, 5777, 5779, 5782, 5786, 5812, 5907, 5908, 5911, 5912, 5926, 5930, 5931, 5934, 6008, 6021, 6022, 6101, 6103, 6110, 6130, 6136, 6232, 6471, 6474, 6476, 6477, 6478, 6527, 6528, 6575, 6634, 6635, 6638, 6653, 6675, 6792, 6859, 6861, 6865, 6868, 7039, 7040, 7041, 7235, 7392, 7406, 7664, 7806, 8176, 8178, 8180, 8612, 8835, 8836, 9768, 9770, 10695, 10696, 11309, 11465, 11527, 14377, 3152, 3178, 3197, 4313, 4315, 4575, 4622, 5287, 5680, 5771, 6508, 6510, 6576, 6577, 6915, 6917, 6919, 6934, 6937, 6974, 7013, 5775, 5787, 6229, 5295, 5490, 5605, 5607, 5609, 5644, 5649, 5652, 5654, 5657, 5755, 5756, 5762, 5763, 5770, 5813, 5823, 5827, 5960, 5962, 5964, 5967, 6007, 6023, 6024, 6138, 6139, 6149, 6236, 6237, 6239, 6241, 6639, 7118, 7270, 7272, 7318, 7321, 7331, 7338, 7356, 7408, 7504, 7505, 7654, 7670, 7671, 7674, 7675, 7753, 7758, 7759, 7802, 7804, 7838, 7840, 7841, 7848, 7944, 647, 5935, 5958, 6862, 6615, 6645, 6646, 6652, 6781, 7017, 7018, 7020, 5802, 5803, 5810, 5915, 5922, 5923, 6028, 6029, 6031, 6783, 6784, 6790, 6791, 7210, 7233, 7661, 7662, 7945, 8208, 8210, 8212, 8213, 8342, 8397, 8399, 8496, 8499, 8588, 7782, 7783, 8420, 8421, 8424, 15527, 15528, 6933, 15405, 15591, 15622, 15629, 15639, 15721, 4047, 4049, 4489, 4491, 6932, 7781, 15393, 15394, 15612, 15616, 15617, 15618, 8610, 15648, 15652, 15669, 15589, 15591, 15596, 15597, 15612, 15618, 15622, 8420, 8421, 8424, 4047, 6932, 6933, 7781, 7782, 7783, 8195, 15394, 15405, 15527, 15528, 15629, 15639,

15640, 15641, 15648, 15652, 15669, 15705 & 15848 of 2020 and 18404 of
2019

29.09.2020



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