

### **If tax liability including interest has been paid subsequently SCN cannot be issued**

The Hon'ble Telangana High Court in the case of ***Rays Power Infra Pvt. Ltd. v. Superintendent of Central Tax [Writ Petition 298 of 2024 dated February 28, 2024]***, held that if the taxpayer clears all the tax liability along with interest at any day, prior to the issuance of show cause notice, they would not be liable for any further additional taxes by way of penalty or interest and the proceedings will be considered concluded.

#### **Facts:**

M/s Rays Power Infra Pvt. Ltd. ("**the Petitioner**") was engaged in the generation of electricity through solar plants. The GST Audit was conducted for FY 2017-18 (from July, 2017) and FY 2018-19. The summary of audit findings was communicated to the Petitioner on October 14, 2021. The Petitioner accepted the amount and immediately paid the entire additional tax that was required to be paid along with interest.

Thereafter, the demand was made on October 28, 2021, followed by the final audit report dated November 10, 2021. As per the final audit report, the auditors had accepted the payment made by the Petitioner. Despite the payment of the entire amount being accepted, a show cause notice dated April 20, 2022 ("**the Impugned Notice**") was issued under Section 74(1) of the Central Goods and Services Tax Act, 2017 ("**the CGST Act**"). The reply to the Impugned Notice was submitted on September 04, 2023 and stated that the entire demand was already paid with interest on October 28, 2021. The entire irregularly availed Input Tax Credit ("**ITC**") already stood reversed for dropping of the Impugned Notice.

Further, the Petitioner was provided with a personal hearing and after hearing the Petitioner, the authorities concerned have passed an Order dated November 15, 2023 ("**the Impugned Order**") confirming the demand raised in FORM DRC-07 dated December 11, 2023 which led to the filing of the present writ.

Hence, the Writ of Mandamus was filed by the Petitioner in order to declare the Impugned Order and the demand raised in FORM DRC-07 to be void, illegal and arbitrary, without jurisdiction and without authority of law and to set aside the same.

**Issue:**

Whether the GST Authorities can initiate proceedings under Section 74 of the CGST Act, if an entire tax liability along with the interest has been paid before issuance of show cause notice?

**Held:**

The Hon'ble Telangana High Court in ***Writ Petition No. 298 of 2024*** held as under:

- Observed that, the audit report itself highlighted that the Petitioner had since cleared off all the tax liability and had also paid the relevant interest also up to date. Admittedly, the Impugned Notice was issued thereafter on April 20, 2022.
- Noted that, Section 73(5) of the CGST Act gives a clear indication that the framers of the law were very clear in mind that in the event if the taxpayer clears all the tax liability along with interest at any day, prior to the issuance of show cause notice, they would not be liable for any further additional taxes by way of penalty or interest. For this purpose, the provisions of Section 73(1) of the CGST Act and Section 73(5) of the CGST Act, both have to be read together which gives a clear indication that Sub-Section (5) of Section 73 of the CGST Act refers to even those payments which have been cleared by the taxpayers which were otherwise termed as wrongfully availed ITC.
- Opined that, sub-section 5 to 8 of Section 73 of the CGST Act, particularly states that the taxpayer must clear the unpaid tax or reverse of the wrongfully availed ITC at the earliest in order to provide stringent coercive recovery measures including imposition of penalty. The Sub-Section (1) of Section 73 of the CGST Act 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 ITC have been 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 of the CGST Act and the intentions of the law makers incorporating all those unpaid or wrongly availed tax benefit. Lastly, the 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.
- Observed that, the Impugned Notice was issued under Sub-Section (1) of Section 74 and not under Sub-Section (1) of Section 73 of the CGST Act, the Court was of the firm view that Section 74 of the CGST Act 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. The applicability of Section 74 of the CGST Act would come into play only if the conditions stipulated in Section 73 of the CGST Act have not been met with by the taxpayer in spite of the tax liability being brought to his knowledge. Then in the said circumstances, Section 74 of the CGST Act would automatically get attracted. 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, if tax 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.
  - Noted that, the Petitioner does not fall under Section 73 of the CGST Act, that talks about within the purview of fraud, misstatement and suppression of fact. Therefore, they would not be sustainable and simply for the reason that Sub-Section (1) of Section 73 of the CGST Act permits a taxpayer to even clear wrongly availed ITC and also wrongly utilized ITC and it is this what is alleged against the Petitioner of having wrongfully and irregularly availed ITC

- Held that, the passing of the Impugned Order and the Impugned Notice both are in excess of their jurisdiction, the same therefore deserves to be set-aside and are not sustainable in the eye of law in terms of Sub-Sections (5) and (6) of Section 73 of the CGST Act. 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. Hence, the writ petition accordingly stands allowed.

### **Our Comments:**

Section 73 of the CGST Act talks about “*Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful misstatement or suppression of facts*”. According to Section 73(6) of the CGST Act when the proper officer, on receipt of such liability, 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.

In the case in hand, the Impugned Notice was issued after the proper officer was in receipt of the tax liability paid by the Petitioner including interest thereon.

In Pari Materia case of ***Calderys India Refractories Ltd. v. Commissioner of Central Excise, Aurangabad [APPEAL NO. ST/702/2012 MUM. DATED FEBRUARY 25, 2013]***, the case before the Ld. CESTAT, Mumbai Bench where the assessee received services from its group companies abroad but did not discharge service tax liability on a reverse charge basis but discharged service tax liability along with interest thereon as soon as short payment was pointed out by audit party and intimated department, much before issue of show cause notice, imposition of penalty under sections 76, 77 and 78 was not sustainable.

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