AFR

ORISSA HIGH COURT : CUTTACK

W.P.(C) No.12682 of 2025
&
W.P.(C) No.12686 of 2025

In the matter of an Application under Articles 226 and 227 of the Constitution of India, 1950

* * *

W.P.(C) No.12682 of 2025:

M/s. Manoja Kumar Nayak
Having its Office At/P.O.: Nalco Nagar
District: Angul – 759 145
Represented by
Proprietor Shri Manoja Kumar Nayak
Aged about 55 years
Son of Sri Babaji Nayak. ... Petitioner

-VERSUS-

1. Commissioner
Goods and Services Tax and Central Excise
Rourkela, At: KK-42, Civil Township
Rourkela – 769 004.

2. Additional Commissioner
Goods and Services Tax and Central Excise
Rourkela Commissionerate
At: KK-42, Civil Township
Rourkela – 769 004.

3. Superintendent, Anti-Evasion
Goods and Services Tax and Central Excise

Rourkela Commissionerate
At: KK-42, Civil Township
Rourkela – 769 004.

4. Assistant Commissioner,
Goods and Services Tax and Central Excise
Angul Division
At: Similipada, 1st Lane
District: Angul – 759 122.

5. Superintendent
Goods and Services Tax and Central Excise
Angul-1 Range
At: Similipada, 1st Lane
District: Angul – 759 122. ... Opposite parties.

W.P.(C) No.12686 of 2025:

M/s. Babamani Roadways & Borewells
A partnership firm having its Office
At: Anand Nagar, P.O.: Hakimpada
District: Angul – 759 143,
Represented by its Partner
Shri Pramod Kumar Nayak
Aged about 55 years
Son of Late Janmejay Nayak. ... Petitioner

-VERSUS-

1. Commissioner
Goods and Services Tax and Central Excise
Rourkela, At: KK-42, Civil Township
Rourkela – 769 004.

2. Additional Commissioner
Goods and Services Tax and Central Excise
Rourkela Commissionerate

At: KK-42, Civil Township
Rourkela – 769 004.

3. Superintendent, Anti-Evasion
Goods and Services Tax and Central Excise
Rourkela Commissionerate
At: KK-42, Civil Township
Rourkela – 769 004.

4. Assistant Commissioner,
Goods and Services Tax and Central Excise
Angul Division
At: Similipada, 1st Lane
District: Angul – 759 122.

5. Superintendent
Goods and Services Tax and Central Excise
Angul-1 Range
At: Similipada, 1st Lane
District: Angul – 759 122. ... Opposite parties..

Counsel appeared for the parties:

For the Petitioner (in both the cases)	:	Mr. Rudra Prasad Kar, Senior Advocate Assisted by M/s. Aditya Narayan Ray, Asit Kumar Dash and Abhishek Dash, Advocates
For the Opposite parties (in both the cases)	:	Mr. Sujan Kumar Roy Choudhury, Senior Standing Counsel, Mr. Mukesh Agarwal, Senior Standing Counsel, Goods and Services Tax, Central Excise and Customs

P R E S E N T:

HONOURABLE CHIEF JUSTICE
MR. HARISH TANDON

AND

HONOURABLE JUSTICE
MR. MURAHARI SRI RAMAN

Date of Hearing : 12.02.2026 :: Date of Judgment : 08.04.2026

JUDGMENT

MURAHARI SRI RAMAN, J.—

Assailing the Order-in-Original dated 03.02.2025 and Order dated 04.02.2025 under Section 74 read with Summary of the Order dated 04.02.2025 in Form DRC-07, passed by the GST and Central Excise, Angul-I Range (Annexures-5 and 6) for the Financial Year 2017-18 covering tax periods July, 2017 to March, 2018, whereby and whereunder not only tax equivalent to input tax credit, which had already been reversed in the subsequent returns, but also interest thereon under Section 50 is levied and penalty imposed by way of initiating proceeding under Section 74 of the Central Goods and Services Tax Act, 2017 read with Section 20 of the Integrated Goods and Services Tax Act, 2017, in connection with Summary Show Cause Notice and Demand Show Cause Notice, both dated 26.07.2024 (Annexure-3), by way of filing petition being W.P.(C) No.12682 of 2025, the petitioner craves indulgence of this Court by exercising power under Articles 226 and 227 of the Constitution of India.

1.1. Assailing the Order-in-Original dated 04.02.2025 passed under Section 74 read with Summary of the Order dated 05.02.2025 in Form DRC-07, passed by the GST and Central Excise, Angul-I Range (Annexures-6 and 7) for the Financial Year 2017-18 covering tax periods July, 2017 to March, 2018, whereby and whereunder not only tax equivalent to input tax credit, which had already been reversed in the subsequent returns, but also interest thereon under Section 50 is levied and penalty imposed by way of initiating proceeding under Section 74 of the Central Goods and Services Tax Act, 2017 read with Section 20 of the Integrated Goods and Services Tax Act, 2017, in connection with Summary Show Cause Notice and Demand Show Cause Notice, both dated 26.07.2024 (Annexure-3), by way of filing petition being W.P.(C) No.12686 of 2025, the petitioner craves indulgence of this Court by exercising power under Articles 226 and 227 of the Constitution of India.

Case of the petitioner:

2. At the outset, since it is submitted at the Bar that both the cases are identical and arises out of similar orders passed by the same authority by taking cognizance of allegation contained in Alert Notice of the DGGI, Kolkata Zonal Unit relating to self-same alleged non-existent supplier *vis-a-vis* input tax credit availed by both the petitioners, which was voluntarily reversed, the factual

narration contained in W.P.(C) No.12682 of 2025 is taken as the lead case for convenience of adjudication of issues flagged in the cases.

3. The petitioner, registered under the provisions of the Central Goods and Services Tax Act, 2017/the Odisha Goods and Services Tax Act, 2017 (collectively be called "GST Act") and assigned GSTIN: 21AANPN1032G2Z6, is engaged in the business of transportation and execution of works contract.

3.1. The Superintendent (Anti-Evasion), CGST and Central Excise, Rourkela Commissionerate issued a Letter dated 12.07.2024 requesting the petitioner-recipient to reverse input tax credit to the tune of Rs.4,39,970/- along with applicable interest and penalty, as M/s. Auxesia Traders, Kolkata (GSTIN: 19APGPB1744M1ZS), the supplier, was alleged to be non-existent entity which issued fake/bogus invoices. The input tax credit so availed by the petitioner was in contravention of Section 16(2) of the GST Act. Responding to said letter, the petitioner submitted a reply dated 17.07.2024 that he voluntarily reversed the input tax credit of Integrated Goods and Services Tax to the tune of Rs.4,39,470/- in the returns *vide* Form GSTR-3B for the month of April, 2023 for an amount of Rs.2,64,342/- and Form GSTR-3B for the month of June, 2024 for an amount of Rs.1,75,128/. Hence, the petitioner was not beneficiary

of the impugned transactions. It was also objected to therein that since the Electronic Credit Ledger had more credit balance than the alleged amount of input tax credit availed or utilised, payment of interest under Section 50 of the GST Act does not arise. In view of the retrospective amendment made in Section 50 of the GST Act with effect from 01.07.2017, interest is chargeable only on ITC wrongly availed and utilised, not just on wrongly availed.

3.2. The Superintendent (Anti-Evasion), GST and Central Excise of Rourkela Commissionerate ("Adjudicating Authority", for short) issued Summary of Show Cause Notice dated 26.07.2024 in Form GST DRC-01 enclosing therewith Demand-*cum*-Show Cause Notice dated 26.07.2024 (for convenience be referred to as "SCN") indicating exercise of power under Section 74, Section 50 of the GST Act read with Section 20 of the Integrated Goods and Services Tax Act, 2017. Raising objection that no Show Cause Notice in Form GST DRC-01A (pre-Show Cause Notice) required under Rule 142(1A) of the Central Goods and Services Tax Rules, 2017 being issued, interest under Section 50 would not be attracted in the present case, the petitioner requested the Adjudicating Authority to drop the proceeding by furnishing written submission on 30.01.2025 in response to said SCN. There was blatant omission of

adherence to the principles of natural justice in absence of issue of Form GST DRC-01A, rendering the Order-in-Original dated 03.02.2025 passed under Section 74 pertaining to the tax periods covering July, 2017 to March, 2018 vitiated. Thereby, all other consequential actions are liable to be nullified.

3.3. Aggrieved by non-consideration of reply and written notes submitted to the Adjudicating Authority and the Order-in-Original being passed upon initiation of proceeding under Section 74 of the GST Act by issue of SCN in contradiction to guidelines contained in F.No.CBIC-20004/3/2023-GST, dated 13.12.2023 issued by the Central Board of Indirect Taxes and Customs (GST Policy Wing), the petitioner has approached this Court by way of filing the instant writ petition.

Hearing:

4. As the initiation of proceeding under Section 74 of the GST Act has been questioned and a question is flagged by the petitioner as to whether interest under Section 50 and penalty under Section 74 would be attracted when the input tax credit availed has been reversed voluntarily by utilising Electronic Credit Ledger leaving excess balance after such adjustment by reversing such input

tax credit, both the matters are taken up for final hearing at the stage of "Fresh Admission".

4.1. Record reveals that the writ petition [W.P.(C) No.12682 of 2025] being filed on 03.05.2025, it got registered on 06.05.2025, and copy thereof was served on Senior Standing Counsel (CGST) on 03.05.2025. Till the date of hearing of this matter, *i.e.,* 12.02.2025, no counter affidavit has been filed on behalf of the opposite parties. Yet, it is stated at the Bar that the authority concerned has been persisting the petitioner to pay off the demand comprising tax, interest as also the penalty. Since the matter involves question of law emerging from undisputed facts as referred to above, this Court heard arguments advanced by the counsel for the respective parties.

4.2. Heard Sri Rudra Prasad Kar, learned Senior Advocate assisted by Sri Asit Kumar Dash, learned Advocate for the petitioner and Sri Sujan Kumar Roy Choudhury, learned Senior Standing Counsel and Sri Mukesh Agarwal, learned Senior Standing Counsel for the opposite parties.

4.3. Hearing being concluded, the matter stood reserved for preparation and pronouncement of Judgment/Order.

Arguments and submissions:

5. Sri Rudra Prasad Kar, learned Senior Advocate appearing along with Sri Asit Kumar Dash, learned Advocate submitted that the Adjudicating Authority exceeded jurisdiction in invoking provisions of Section 74 for levying tax equivalent to input tax credit stated to have been voluntarily reversed in the subsequent returns in Form GSTR-3B and interest under Section 50 and imposing penalty under Section 74. The provisions of Section 74 for levying interest under Section 50 and penalty under Section 74 cannot be invoked even for the purpose of non-payment of Goods and Services Tax, in absence of any material on record with respect to specific element of fraud or wilful misstatement or suppression of facts in order to evade tax. It is emphatically submitted that only in the cases where the investigation indicates that there is material evidence of fraud or wilful misstatement or suppression of fact to evade tax on the part of the taxpayer provisions of Section 74 of GST Act could be invoked for issuance of SCN, and such evidence should also be made a part of the SCN. The Adjudicating Authority without independent application of mind merely based on Alert Notice dated 19.03.2024 received from the DGGI, Kolkata Zonal Unit traversed his authority under Section 74 of the GST Act.

5.1. Advancing his argument further it is canvassed by the learned Senior Counsel that as per Section 74(5) of the GST Act, a person chargeable with tax may, before service of notice under sub-section (1) *i.e.* SCN, pay the amount of tax along with interest payable under Section 50 and a penalty equivalent to fifteen per cent of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the Proper Officer and inform the Proper Officer in writing of such payment. In the instant case, the alleged tax has been paid by the petitioner voluntarily prior to issuance of the SCN. Therefore, there being no occasion or scope available for the Adjudicating Authority to invoke provisions of Section 74 and proceed to demand interest and penalty without verifying the records/returns available with him and mechanically issue SCN and confirm the proposed demand therein ignoring to take into consideration the explanation proffered in response to such SCN. He, thus, emphasised that not only the SCN (Annexure-3), but also the Order-in-Original coupled with Summary Order (Annexures-5 and 6 respectively) is vitiated.

5.2. Forcefully arguing that in view of amendment carried in Section 50 of the GST Act giving retrospective effect from 01.07.2017, interest stands chargeable only on input tax credit “wrongly availed and utilised”, but not on its being “wrongly availed”, Sri Rudra Prasad Kar, learned Senior

Advocate has taken this Court to the uncontroverted fact that the Electronic Credit Ledger had more credit balance than the alleged input tax credit requested for reversal *vide* Letter dated 12.07.2024 (Annexure-1). The petitioner had already reversed such input tax credit to the tune of Rs.4,39,970/- while filing returns in Form GSTR-3B for the months of April, 2023 and June, 2024, prior to issue of SCN. Such fact was also intimated to the Proper Officer on 17.07.2024. The learned Senior Counsel made suave submission that the availed input tax credit being reversed *suo motu* leaving excess balance in the Electronic Credit Ledger, the liability to pay interest under Section 50 of the GST Act would not arise on the facts and in the circumstances of the case. Therefore, the ingredients for exercise of power to initiate proceeding under Section 74 being absent, the imposition of penalty therefor also would be uncalled for.

6. The learned Senior Standing Counsel(s) being present did not dispute the facts as unfurled in the writ petition that the petitioner had reversed the input tax credit to the tune of Rs.4,39,970/- as requested in Letter dated 12.07.2024 of the Superintendent (Anti-Evasion), CGST and Central Excise, Rourkela Commissionerate, but vociferously submitted that the petitioner cannot be allowed to circumvent efficacious remedy available under GST Act and having approached this Court directly

beseeching to invoke extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, the writ petition deserves to be dismissed.

6.1. The learned Senior Standing Counsel emphasised on the point that it is unknown whether the input tax credit stated to have been reversed voluntarily is relatable to the allegation made in Summary of Show Cause Notice read with Demand Show Cause Notice dated 26.07.2024 (Annexure-3). Therefore, it is arduously contended by the Revenue that such factual aspect is required to be considered by the fact-finding authorities empowered to do so under the GST Act.

Consideration of arguments and submissions:

7. No answer is available with the Senior Standing Counsel(s) as to why no counter affidavit has been filed nor was there any instruction received from the opposite parties even though the copy of the writ petition was served on them way back on 03.05.2025. Considering the submission of the counsel for the petitioner that the authorities concerned have been pursuing with recovery of the demand, this Court has proceeded to hear the matter.

8. Perusal of material on record reveals that against Serial No.4 seeking to disclose "Eligible ITC" in the return for the month of April, 2023 in Form GSTR-3B prescribed

under Rule 61(5) (filed on 19.05.2023), an amount of Rs.2,64,342/- is shown to have been placed under the heading "ITC reversed". Similarly, an amount of Rs.1,75,128/- was reversed against the said heading "Eligible ITC" and "ITC reversed" in the return for the month of June, 2024 in Form GSTR-3B (filed on 13.07.2023). Such fact of self-assessment is also intimated to the Superintendent (Anti-Evasion) by a reply dated 17.07.2024 (Annexure-2) in response to a Letter of request issued by said authority on 12.07.2024.

8.1. It is emanated from a conjoint reading of Letter dated 12.07.2024 and SCN dated 26.07.2024 that M/s. Auxesia Traders (GSTIN: 19APGPB1744M1ZS), the supplier, generating fake invoices in its name issued to different business entities including the present petitioner "in order to pass on fake input tax credit without supply of underlying goods and/or services". The allegation against the petitioner is transpired from the Demand Show Cause Notice dated 26.07.2024 which is as follows:

"Whereas it appears that the noticee have contravened the provisions of Section 16 of the CGST Act, 2017 (hereinafter referred to as the Act) read with Rule 36 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred as the Rules), inasmuch as the noticee has fraudulently availed input tax credit (ITC) to the tune of Rs.4,39,970/- (IGST: Rs.4,39,970/-) [Rupees

four lakh thirty nine thousand nine hundred seventy only] on the strength of fake/bogus invoices issued by M/s. Auxesia Traders (herein referred to as M/s. AT (having GSTIN: 19APGB1744M1ZS, who has been, upon verification found to be non-existent and fictitious firm. Therefore, it appears, that the noticee is required to pay/ reverse input tax credit equivalent to Rs.4,39,970/- (IGST: Rs.4,39,970/-) availed and utilised on the strength of paper tax invoices issued by the aforesaid non-existent for the tax periods August, 2017 to December, 2017, in terms of provision of Section 74(1) of CGST Act along with interest payable thereon under Section 50 of CGST Act and OGST Act and the said taxpayer is also liable for penal action under Section 74 of the said Act read with Section 20 of the Integrated Goods and Services Tax Act."

8.2. In Demand Show Cause Notice dated 26.07.2024, following discussions find place:

"5.0 Discussions, findings and outcome of the investigation:

5.1 From the facts, as mentioned at Para-2 supra, it appears that ***M/s. AT is a fake/bogus firm, which was registered under GST for the purpose of availing and passing on fake/ineligible ITC without any underlying supply of goods or services or both. It also appears that a non-existent firm cannot supply any goods/services to any taxpayer as it is a fictitious entity created for the sole purpose of passing on fake ITC.*** *Moreover, the noticee have claimed to have reversed the demanded ITC, however the noticee have not submitted any document that ascertains*

that the ITC reversed by GSTR-3B, is the same as availed by them from M/s AT.

5.2. In view of above discussion, it is appear that there is no supply of goods or services or both were made by M/s. AT to the Noticee against tax invoices issued for the period from August-2017 to December-2017. ***Therefore, the ITC amounting to Rs. 4,39,970/- (IGST- Rs. 4,39,970/-) [Rupees four lakh thirty nine thousand nine hundred seventy only] availed by the Noticee on the strength of invoices issued by M/s AT for the period August-2017 to December-2017, is not admissible to them.*** *It also appears that this is a case of purely paper transaction without supply of any goods or services, thus ITC availed or utilized in respect of such fictitious transactions, is illegal, irregular and contravention of provision of Section 16 of the Act and Rule 36 of the Rules and not admissible to the Noticee.*

***

8.0 Now, therefore, M/s. Manoja Kumar Nayak having GSTIN: 21AANPN1032G2Z6 and principal place of business At:- Nalco Nagar, Nalco, Angul, Odisha, 759145, are hereby called upon to show cause to the Superintendent, CGST & Central Excise, Angul-l Range of Angul Division, within 30 (thirty) days of the receipt of this Show Cause Notice as to why:

(i) an amount of Rs.4,39,970/- (IGST- Rs. 4,39,970/-) [Rupees four lakh thirty nine thousand nine hundred seventy only] should not be demanded and recovered from them in terms of the provision of Section 74(1) of the CGST Act, 2017 read with

Section 20 of the IGST Act, 2017 for availment and utilization of inadmissible/illegal ITC;

(ii) Interest as applicable under the provisions of Section 50 of the CGST Act, 2017 read with section 20 of the IGST Act, 2017 should not be demanded and recovered from them on the amounts of tax demanded at (i) above;

(iii) Penalty equivalent to the tax liability as demanded at (i) should not be imposed on them under Section 74(1) of the CGST Act, 2017 read with section 20 of the IGST Act, 2017 for availing inadmissible ITC and defrauding the Government Exchequer.

9. The Noticee, i.e., M/s. Manoja Kumar Nayak, (GSTIN: 21AANPN1032G2Z6), are also informed that in terms of Section 74(8) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017, where tax and interest is paid within a period of thirty days of the date of service of notice under sub-section (1) of Section 74, the penalty payable shall be twenty five percent (25%) of such tax and proceedings in respect of such GST, interest and penalty shall be deemed to be concluded provided the said reduced penalty is also paid within the said thirty (30) days.

***"

8.3. As against such notice as aforesaid, by furnishing a written reply dated 30.01.2025 (Annexure-4) the petitioner intimated as follows:

"In the notice, your goodself has requested to reverse the ITC of Rs.4,39,970/- availed from M/s. Auxesia Traders, GSTIN: 19APGPB1744M1ZS.

Important to mention here that, in order to avoid litigation and buy peace of mind, ***the noticee has suo motu reversed the entire input tax credit of (IGST) Rs.4,39,970/- (GSTR-3B for the month of April 2024 of Rs.2,64,342/-, GSTR-3B for the month of June 2024 of Rs.1,75,128/).*** *Hence the noticee is not beneficiary of the impugned transaction.* ***Copy of the GSTR 3B are attached.***

Further, upon perusal of the Electronic Credit Ledger, your honour may observe that the noticee has more credit balance than the impugned ITC in the electronic credit ledger. ***Hence, the liability of interest under Section 50 of the CGST Act may not arise.*** *In view of the retrospective amendment made in Section 50 of the CGST Act from 01.07.2017, interest is chargeable only on ITC wrongly availed and utilised, not just on wrongly availed."*

8.4. Despite the reply to Show Cause Notice is candid to be noticed that the noticee had already made deposits as pointed out by the Superintendent (Anti-Evasion) *vide* Letter dated 12.07.2024 even before issue of Summary Show Cause Notice dated 26.07.2024. The Letter dated 17.07.2024 before issue of Show Cause Notice dated 26.07.2024 (Annexure-2 series) and Reply dated 30.01.2025 (Annexure-4) both addressed to the Superintendent (Anti-Evasion) unambiguously depicts that the petitioner has shown the reversal of input tax credit for an amount of Rs.4,39,970/- while filing returns for the month of April, 2024 and June, 2024 *vide* Form GSTR-3B. The said letter as well as the reply

indicates that evidence showing such fact and figure has been enclosed. For the sake of consideration of argument, even in its absence, since the fact of such reversal was also uploaded in the web-portal of the Goods and Services Tax Organisation, which is accessible by the authority concerned, the Superintendent (Anti-Evasion) appears to have acted over-zealously, which is reflected in the following sentences culled out from the Order-in-Original No.24/SUPDT/ GST/AGL-I/2025, dated 03.02.2025:

"3.0. Reply of the Noticee:

3.1 ***In response to the Demand-cum-SCN, the Noticee submit a reply on 30.01.2025 in which he stated that in order to avoid litigation and buy peace of mind, the Noticee has suo motu reversed the entire input tax credit of (IGST) Rs. 4,39,970/- (GSTR-3B for the months of April 2024 of Rs.2,64,342/- and June 2024 of Rs.1,75,128/- respectively).*** *Hence the Noticee is not beneficiary of the impugned transaction. Further, the Noticee added that upon in electronic credit ledger the Noticee has more credit balance than the impugned ITC so Liability of interest under Section 50 of the CGST Act may not arise and further he requested to drop the case.*

***

6.0 Discussions and findings:

6.1 I have carefully gone through the case records, including the allegations contained in the impugned

SCN and the reply furnished by the Noticee. I find that in the instant case, the reply to the SCN submitted by the Noticee is not satisfactory as the Noticee mentioned that he has Suo-motto reversed the ITC of Rs. 4,39,970/- (GSTR-3B for the months of April 2024 of Rs.2,64,342/- and June 2024 of Rs.1,75,128/- respectively). ***First of all, the Noticee did not submit any document that ascertains that the ITC reversed by GSTR-3B is the same as demanded from them. Further, on verifying the GSTR-3B return for the month of April-2024 it was found that no ITC was reversed through that return hence the reply submitted by the Noticee is not accepted.*** *Moreover, as per Rule 142 of the CGST Act 2017, the taxpayers shall make payments tow£irds tax, interest, penalty, and other amounts before or after the issuance of a show-cause notice by Form GST DRC-03. Hence the ITC reversed in GSTR-3B would not be taken into consideration.*

6.2 The allegation in the impugned SCN is that the Noticee has contravened the provisions of Section 16 of the CGST, 2017 (hereinafter referred to as the Act) read with Rule 36 of Central Goods and Services Tax Rules, 2017 by fraudulently availing ITC of Rs.4,39,970/- on the strength of fake/bogus invoices issued by M/s. AT having GSTIN: 19APGPB1744M1ZS, who has been, upon verification found to be non-existent and fictitious firm, which is recoverable from them under the provisions of Section 74 of the Acts along with interest under Section 50(1) and applicable penalty under Section 74 of the Acts.

6.8 The Noticee being registered taxpayer under the CGST and OGST Act, 2017, it is expected to be well versed with the GST laws and provisions of taxation. They should have taken reasonable steps to ensure genuineness of ITC being availed of by them. As stated above, the burden lies on the Noticee to demonstrate that he had taken such care. However, it appears that the Noticee have availed of the ITC of Rs. 4,39,970/- (IGST= Rs.4,39,970/-) [Rupees four lakh thirty nine thousand nine hundred seventy only] on the basis of bogus/fake invoices, knowing well that such invoices were issued by non-existent firm and therefore have no legal sanctity and no tax was actually paid to the Government on such supply and therefore they were not eligible to avail ITC on such invoices, as per the provisions of Section 16 of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017. But the Noticee deliberately availed of such inadmissible ITC with sole intention to defraud the Government Exchequer. Had the departmental officers not initiated the enquiry, such wrong availment of ITC would have remained unnoticed and the Noticee continued to have enjoyed this unlawful benefit. Therefore, the extended period of limitation as envisaged in the proviso to Section 74 of the Acts appears to be invocable in the instant case for recovery of tax, interest, and imposition of penalty.

7.0 As per my discussion above, I find that the Noticee has fraudulently availed the ITC (IGST) amounting to Rs.4,39,970/- (Rupees Four Lakh Thirty-Nine Thousand Nine Hundred and Seventy Only) in contravention of the provisions as laid down in Section 16 of the CGST Act, 2017 read with section

20 of the IGST Act, 2017 during the FY 2017-18 and the same is recoverable from him under Section 74(1) of the Acts.

7.1 Since the Noticee has availed the ITC fraudulently and thereby violated the provisions of Section 16 of the CGST Act, 2017 read with section 20 of the IGST Act, 2017. Therefore, the Noticee is liable to pay interest in compliance with Section 50 of CGST Act, 2017 read with section 20 of the IGST Act, 2017."

8.5. It is transparent from a close scrutiny of returns in Form GSTR-3B as enclosed with the writ petition at Annexure-2 series as broad daylight that the finding of fact of the Superintendent (Anti-Evasion) is fallacious and cannot be countenanced. The return in Form GSTR-3B for the month of April in the year 2023-24 reveals as follows:

"Year 2023-24
Period April

***

4. Eligible ITC

Details		*Integrated tax*	*Central tax*	*State/ UT tax*	*Cess*
*		*	*	*	*
B.	*ITC Reversed*				
(1)	*As per Rules 38, 42 and 43 of CGST Rules and Section 17(5)*	*264342.00*	*0.00*	*0.00*	*0.00*
(2)	*Others*	*0.00*	*0.00*	*0.00*	*0.00*
C.	*Net ITC available (A-B)*	*-264342.00*	*192583.88*	*19258 3.88*	*0.00*

The return in Form GSTR-3B for the month of June in the year 2024-25 reveals as follows:

"Year 2024-25
Period June

***

4. Eligible ITC

Details		*Integrated tax*	*Central tax*	*State/ UT tax*	*Cess*
*		*	*	*	*
B.	*ITC Reversed*				
(3)	*As per Rules 38, 42 and 43 of CGST Rules and Section 17(5)*	*175128.00*	*0.00*	*0.00*	*0.00*
(4)	*Others*	*0.00*	*0.00*	*0.00*	*0.00*
C.	*Net ITC available (A-B)*	*-175128.00*	*322425.99*	*32242 5.99*	*0.00*

8.6. Learned Senior Advocate drew attention of this Court to the copy of the Electronic Credit Ledger to demonstrate that corresponding effect is also given by the petitioner while maintaining such Ledger. It is not forthcoming from record that the Superintendent (Anti-Evasion) having scope to access to these documents, which were available to him in response to the Show Cause Notice, has called for any other document(s) for production by the petitioner. Perusal of impugned Order-in-Original also indicates no material is put forth by the Adjudicating Authority or was confronted to the

petitioner even remotely to show that the petitioner has any complicity with the supplier's non-performance.

8.7. Bare reading of Summary Show Cause Notice would reveal that the foundation of allegation of claim of input tax credit by the petitioner against fake/bogus invoices is this:

"Also, Shri Tamoji Bose (Proprietor of M/s. AT) in his statements dated 07.03.2019 and 08.09.2019 stated that there is actually no real business activity in the name of M/s. Auxesia Traders, only fake GST invoice are issued in the name of M/s. Auxesia Traders to different business entities in order to pass on fake input tax credit without supply of underlying goods and/or services. He also admitted that he did not have any idea about sales and purchase of the company."

8.8. From the above statement fact it is demonstrably clear that based on third party statement the proceeding under Section 74 on the presumption that input tax credit has been "wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax". It may be highlighted that input tax credit could be availed erroneously or on a mistaken interpretation of law. Therefore, it would not be apposite to form an opinion that in each and every case where the supplier admits or defaults, it would lead to infer that the recipient fraudulently in order to evade tax has availed the input tax credit against fake/bogus invoices.

No inference or presumption or assumption can be deduced that mere availability of balance in the Electronic Credit Ledger would lead to suggest there was utilization.

8.9. Merely because the supplier is found to be non-existent as indicated in the Alert Notice of the DGGI, the Adjudicating Authority has jumped to the conclusion that by dint of the bogus/fake invoices the petitioner has availed the input tax credit. From the given facts it emanates that the input tax credit in question has been claimed by the petitioner on account of transactions of supply made from outside this State. Obviously such goods could not move in absence of e-waybill which is generated from the authority of the Goods and Services Tax Organisation. It is not the case of the Revenue that the e-waybills were not utilised by the petitioner for receiving the supplies from alleged supplier. No material is brought on record by the Revenue that there was absence of waybills with respect to alleged invoices. Furthermore, the Order-in-Original is silent about the period since when the supplier was found to be non-existent. The Adjudicating Authority has proceeded merely on the basis of Alert Notice of DGGI based on admission of third party-supplier. No inquiry was made by the Adjudicating Authority nor was any finding of fact returned as to the status of registration of the supplier

on the date of issue of alleged invoices. There is no finding as to whether supplier was non-existent and/or found to be unregistered during the period when the transactions were being effected. Without independent application of mind to the allegations/objections contained in the Alert Notice of the DGGI, possibly the Adjudicating Authority could not proceed to exercise power under Section 74 under supposed premise that the recipient had also defrauded the Revenue. From said Summary Show Cause Notice it could be gathered that the Alert Notice contained issue of invoices by the fake/bogus entity. Nothing is demonstrated by the Revenue to show that prior to issue of such SCN the authority concerned had examined the complicity of the petitioner in such transactions in order to evade tax. Allegation against supplier *vide* Alert Notice No.11/2023-24, dated 19.03.2024 would not *ipso facto* empower the Adjudicating Authority to initiate action against the recipient (petitioner) under Section 74. The language employed in Section 74 suggests that strong and tangible material must be available on record to suggest that the petitioner had the conscious and active involvement in such dubious transactions.

8.10. Thus, it can be seen from the approach made by the Adjudicating Authority that he blindly followed the Alert Notice of the DGGI, without undertaking any

independent inquiry to ascertain credibility of such allegation *qua* the petitioner. The Adjudicating Authority having religiously followed the Alert Notice assumed that the petitioner was the beneficiary of alleged input tax credit in order to evade tax. Hence, discrediting such inchoate material being utilised for the purpose of raising demand of tax, interest and penalty under Section 74 this Court thus finds the determination of liability null and invalid in absence of any independent inquiry being carried out to verify the allegation contained in the Alert Notice of the DGGI. The Adjudicating Authority has made no attempt whatsoever by seeking specified records to be produced. He could have examined the statement of fact made by the petitioner in the reply. Instead of conducting such inquiry the Adjudicating Authority hastily jumped to the conclusion that the petitioner has availed input tax credit wrongfully on the basis of fake/bogus invoices issued by the non-existent supplier. The Adjudicating Authority accepted the information based on admission of an outside source as reflected in the Alert Notice without subjecting it to a critical scrutiny and independent application of mind. Hence, the initiation of proceeding under Section 74 for Financial Year, 2017-18 [covering tax periods July, 2017 to December, 2017] solely based on such information does smack tinge of caprice of the Adjudicating Authority.

8.11. Section 74(1) of the GST Act is quoted hereunder:

> *"(1) Where it appears to the Proper Officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised* ***by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax****, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under Section 50 and a penalty equivalent to the tax specified in the notice."*

8.12. Sub-sections (1), (9) and (10) of Section 73 of the GST Act stand as follows:

> *"(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason,* ***other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax****, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable*

under the provisions of this Act or the rules made thereunder.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) ***within three years from the due date for furnishing of annual return*** *for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund."*

8.13. The period for which the Show Cause Notice was issued and the Order-in-Original was passed is concerning transactions effected during the period August, 2017 to December, 2017 [Financial Year 2017-18] and genesis of such allegation could be ascertained from Summary of Show Cause Notice which is to the following effect:

"On going through the list of availers of input tax credit passed on by M/s. Auxesia Traders (as provided by DGGI, Kolkata Zonal Unit, along with the aforesaid alert notice), it is observed that M/s. Auxesia Traders, which is a fake/bogus firm, have passed on bugus input tax credit of Rs.4,39,970/- to the noticee".

8.14. From the finding of fact as recorded in the Order-in-Original it is un-understandable that the conduct of

business by the petitioner with respect to the subject-transactions in question could be said to be fraudulent one having its involvement in the issue of fake/bogus invoices. Nonetheless, the petitioner has shown *bona fide* by reversing the amount of input tax credit the moment a letter from the Superintendent (Anti-Evasion) was issued bringing such conduct of the supplier to his notice.

8.15. Careful reading of the provisions of Section 73 and Section 74 of the GST Act as extracted hereinabove would lead to show that limitation has been specified for the Adjudicating Authority for proceeding under Section 73(1). From the pleadings it could be discerned that the period so stipulated therein had been elapsed. However, for invocation of power under Section 74(1), the circumstances are spelt out, which in the humble opinion of this Court are absent in the present case. It is emerged from the chronology of events obtained on record that after the period of limitation stipulated in Section 73 is lapsed, the Adjudicating Authority has sought to initiate proceeding under Section 74 by issue of Letter dated 17.07.2024 of the Superintendent (Anti-Evasion). The Show Cause Notice itself indicates that pertaining to transactions during August, 2017 to December, 2017, the proceeding under Section 74 is drawn up by issue of Summary of Show Cause Notice

and Demand Show Cause Notice, both dated 26.07.2024 conspicuously after 8 years of the alleged transactions.

8.16. Sri Rudra Prasad Kar, learned Senior Advocate stemming on Instruction No.05/2023-GST *vide* F. No. CBIC-20004/3/2023-GST, dated 13.12.2023 issued by the Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs, GST Policy Wing, submitted that there was no scope for the Revenue on the facts and in the circumstances of the case choosing not to proceed under Section 73 as the period stipulated therein is lapsed and to proceed by instituting proceeding under Section 74 of the GST Act.

8.17. In the aforesaid Circular it has been impressed upon every field formation not to invoke proceeding under Section 74 mechanically. The relevant portion of the Circular is reproduced hereunder for better comprehension:

> *"Attention is invited to the Hon'ble Supreme Court's judgment dated 19.05.2022 in the case of CC, CE & ST, Bangalore, (Adjudication) etc. Vrs. Northern Operating Systems Private Limited (NOS) in Civil Appeal No. 2289-2293 of 2021*[1] *on the issue of nature of secondment of employees by overseas entities to Indian firms and its Service Tax implications. Representations have been received in*

[1] *(2022) 18 SCR 901.*

the Board that, subsequent to the aforesaid judgment, many field formations have initiated proceedings for the alleged evasion of GST on the issue of secondment under Section 74(1) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act').

2.1 The matter has been examined by the Board. It appears that the Hon'ble Supreme Court in its judgment inter-alia took note of the various facts of the case like the agreement between NOS and overseas group companies, and held that the secondment of employees by the overseas group company to NOS was a taxable service of 'manpower supply' and Service Tax was applicable on the same. It is noted that secondment as a practice is not restricted to Service Tax and issue of taxability on secondment shall arise in GST also. A careful reading of the NOS judgment indicates that Hon'ble Supreme Court's emphasis is on a nuanced examination based on the unique characteristics of each specific arrangement, rather than relying on any singular test.

2.2. Hon'ble Supreme Court in the case of Commissioner of Central Excise, Mumbai Vrs. M/s. Fiat India) Ltd in Civil Appeal 1648-49 of 2004[2] has grven the following observation:

*'66. *** Each case depends on its own facts and a close similarity between one case and another is not enough because either a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by*

[2] *(2012) 12 SCR 975.*

Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.'

2.3. It may be relevant to note that there may be multiple types of arrangements in relation to secondment of employees of overseas group company in the Indian entity. In each arrangement, the tax implications may be different, depending upon the specific nature of the contract and other terms and conditions attached to it. Therefore, the decision of the Hon'ble Supreme Court in the NOS judgment should not be applied mechanically in all the cases. Investigation in each case requires a careful consideration of its distinct factual matrix, including the terms of contract between overseas company and Indian entity, to determine taxability or its extent under GST and applicability of the principles laid down by the Hon'ble Supreme Court's judgment in NOS case.

3.1. It has also been represented by the industry that in many cases involving secondment, the field formations are mechanically invoking extended period of limitation under Section 74(1) of the CGST Act.

3.2. In this regard, Section 74(1) of CGST Act reads as follows:

'(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by reason

of fraud, or any wilful-misstatement or suppression of facts to evade tax.'

3.3. From the perusal of wording of section 74(1) of CGST Act, it is evident that Section 74(1) can be invoked only in cases where there is a fraud or wilful mis-statement or suppression of facts to evade tax on the part of the said taxpayer. ***Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful mis-statement or suppression of facts to evade tax. Therefore, only in the cases where the investigation indicates that there is material evidence of fraud or wilful misstatement or suppression of fact to evade tax on the part of the taxpayer, provisions of Section 74(1) of CGST Act may be invoked for issuance of show cause notice, and such evidence should also be made a part of the show cause notice.***

4. The above aspects may be kept in consideration while investigating such cases and issuing show cause notices.

5. Difficulties, if any, in implementation of these instructions may be informed to the Board (gst-cbec@gov.in).

(Sanjay Mangal)
Principal Commissioner (GST)"

8.18. In *C.C., C.E. & S.T., Bangalore (Adjudication) etc. Vrs. Northern Operating Systems Pvt. Ltd., (2022) 18 SCR 901* it has been observed that:

"Invocation of the extended period of limitation:

62. *The revenue's argument that the assessee had indulged in wilful suppression, in this court's considered view, is insubstantial. The view of a previous three judge ruling, in Cosmic Dye Chemical Vrs. Collector of Central Excise, (1995) 6 SCC 117, in the context of Section 11A of the Central Excise Act, 1944, which is in identical terms with Section 73 of the Finance Act, 1994 was that:*

'Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11-A. ***Misstatement or suppression of fact must be wilful.****'*

63. *This decision was followed in Uniworth Textiles Vrs. Commissioner of Central Excise, (2013) 9 SCC 753 where it was observed that "(t)he conclusion that mere non-payment of duties is equivalent to collusion or wilful misstatement or suppression of facts" is "untenable". This view was also followed in Escorts Vrs. Commissioner of Central Excise, (2015) 9 SCC 109, Commissioner of Customs Vrs. Magus Metals, (2017) 16 SCC 491 and other judgments.*

64. *The fact that the CESTAT in the present case, relied upon two of its previous orders, which were pressed into service, and also that in the present case itself, the revenue discharged the later two show cause notices, evidences that the view held by the assessee about its liability was neither untenable, nor mala fide. This is sufficient to turn down the revenue's contention about the existence of "wilful suppression" of facts, or deliberate misstatement. For these reasons, the revenue was not justified in invoking the extended period of limitation to fasten liability on the assessee."*

8.19. Section 155 of the GST Act lays down that "Where a person claims that he is eligible for input tax credit under the Act, the burden of proving such claim shall lie on such person". Rule 36 of the CGST Rules envisages documentary requirements and conditions for claiming input tax credit. This Court is not oblivious of guidelines enshrined in *State of Karnataka Vrs. Ecom Gill Coffee Trading Private Limited, (2023) 2 SCR 647* in order to establish genuineness of claim of input tax credit by the recipient. Mere production of tax invoices and proof of payment through banking channels is insufficient to prove a genuine transaction. To successfully rebut allegations/objections specified in the Show Cause Notice under Section 74, the recipient of goods and services is required to provide additional evidence, such as: e-way bills and vehicle tracking data; proof of physical delivery (weighbridge slips, gate passes). In the

perspective of the recipient to justify its claim for input tax credit it has been observed in said reported judgment as follows:

*"In view of the above and for the reasons stated above and in absence of any further cogent material like furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. and the actual physical movement of the goods by producing the cogent materials, the Assessing Officer was absolutely justified in denying the ITC, which was confirmed by the first Appellate Authority. ***"*

8.20. Nevertheless, such a situation does not arise in the instant case. In the case at hand, realising the difficulty on account of alleged non-existence of the supplier, the recipient appears to have chosen to abandon the claim and sought to reverse the input tax credit claimed at the relevant point of time while furnishing returns. The tenor of reply dated 17.07.2024 shows that "in order to buy peace of mind", the petitioner reversed the amount of input tax alleged to have been availed on the basis of fake/bogus invoices issued by the supplier. It is obvious that it would not be in a position to prove the genuineness of the claim as the Directorate General of Goods and Services Tax Intelligence, Kolkata Zonal Unit, has pointed out *vide* Alert No.11/2023-24, dated 19.03.2024 that the supplier is non-existent. When the

petitioner has reversed the input tax credit and placed on record material to evince such fact, the reference to Rule 36 of the CGST Rules, 2017 made by the Adjudicating Authority to indicate that documents required to be produced were not submitted by the petitioner is redundant, uncalled for and supported by germane reason. By reversing the input tax credit, the petitioner did not thereby set up claim for availing the benefit. Therefore, since there was no input tax credit claim survived due to reversal, no document was required to be produced in terms of Rule 36. Only document(s) which was required to be produced (and in fact it was produced) is the evidence showing reversal of amount of input tax credit alleged to have been claimed against the bogus/fake invoices.

8.21. Hence, unless the recipient files return and debits the respective registers, the statutory authority is not supposed to assume that the output tax liability was adjusted against available credits. In *Union of India Vrs. Bharti Airtel Ltd., (2021) 10 SCR 825,* it has been observed as follows:

> *"37. The question of reading down paragraph 4 of the said Circular[3] would have arisen only if the same was to be in conflict with the express provision in the 2017 Act and the Rules framed thereunder.* ***The***

[3] Circular No.26/26/2017-GST, dated 29.12.2017 issued by the Commissioner (GST), Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs, GST Policy Wing.

express provision in the form of Section 39(9) clearly posits that omission or incorrect particulars furnished in the return in Form GSTR-3B can be corrected in the return to be furnished in the month or quarter during which such omission or incorrect particulars are noticed. *This very position has been restated in the impugned Circular. It is, therefore, not contrary to the statutory dispensation specified in Section 39(9) of the Act. The High Court, however, erroneously noted that there is no provision in the Act, which restricts such rectification of the return in the period in which the error is noticed. It is then noted by the High Court that as there is no possibility of getting refund of surplus or excess ITC shown in the electronic credit ledger, therefore, the only remedy that can enable the writ petitioner to enjoy the benefit of the seamless utilization of the ITC is by way of rectification in its annual tax return (Form GSTR-3B) for the relevant period. Further, the High Court in paragraph 23 of the impugned judgment, noted that the relief sought in the case before it, was indispensable. This logic does not commend to us. For, if there is no provision regarding refund of surplus or excess ITC in the electronic credit ledger, it does not follow that the assessee concerned who has discharged Outward Tax Liability by paying cash (which he is free to pay in cash in spite of the surplus or excess electronic credit ledger account), can later on ask for swapping of the entries, so as to show the corresponding Outward Tax Liability amount in the electronic cash ledger from where he can take refund. Payment for discharge of Outward Tax Liability by cash or by way of availing of ITC, is a matter of option, which*

having been exercised by the assessee, cannot be reversed unless the Act and the Rules permit such reversal or swapping of the entries. ***As a matter of fact, Section 39(9) provides for an express mechanism to correct the error in returns for the month or quarter during which such omission or incorrect particulars have been noticed.****"*

8.22. Examining the contention of the petitioner confronted with the arguments advanced by the Senior Standing Counsel(s) and perusal of documents available on record it emerges that undeniably on detection of error in claim of input tax credit against the allegation of fake/bogus invoices issued by Auxesia Traders (supplier-third party) pursuant to Letter dated 12.07.2024 of Superintendent (Anti-Evasion), the petitioner reversed the alleged amount of input tax credit even before the Show Cause Notice contemplating initiation of proceeding under Section 74 of the GST Act.

8.23. In this connection regard may be had to the following observation of the Hon'ble Supreme Court of India rendered in the case of *Lipi Boilers Ltd. Vrs. Commissioner of Central Excise, (2025) 11 SCR 578:*

"Therefore, in the absence of any deliberate act on the part of the assessee with an intention to evade being established by the revenue, the essential precondition of wilful suppression with intent to evade duty is not satisfied. Consequently, the invocation of the extended

period of limitation under the proviso to Section 11A(1) is held to be not tenable in law."

8.24. Therefore, in view of *Northern Operating Systems Pvt. Ltd. (supra), Lipi Boilers Ltd. (supra)* and *Bharti Airtel Ltd. (supra)* the Revenue having failed to bring in wilful intention to evade tax it is safe to say that the petitioner could not be held to have availed input tax credit "wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax".

9. Another facet which deserves to be taken note of is with respect to absence of circumstances to exercise power under Section 74 of the GST Act. It has already been discussed in the foregoing paragraphs that after period of limitation stipulated in Section 73, the Adjudicating Authority alleging availing input tax credit wrongfully on assumed intent to evade payment of tax so as to bring the petitioner into the net of investigation/process of adjudication mechanically could not invoke provisions of Section 74.

9.1. Fact borne on record in abundance suggests that the petitioner had the excess balance left in the Electronic Credit Ledger. It is also not gainsaid by the Senior Standing Counsel(s) representing the opposite parties that the petitioner had surplus left in the Electronic Credit Ledger than the input tax credit so adjusted.

9.2. Section 50 of the GST Act dealing with "Interest on delayed payment of tax" reads thus:

> *"(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.*
>
> *[4][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 [5][or Section 74A] in respect of the said period, shall be payable on that portion of the tax which 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,*

---

4 Substituted by the Finance Act No.13 of 2021; Section 112 of said Finance Act, 2021 is extracted hereunder:
"In Section 50 of the Central Goods and Services 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 the 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 payable on that portion of the tax which is paid by debiting the electronic cash ledger.'"

5 Inserted by the Finance Act (No. 2) Act, 2024 [15 of 2024], with effect from 01.11.2024.

from the day succeeding the day on which such tax was due to be paid.

[6]*[(3) Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed.]"*

9.3. Relevant Rule 88B of the Central Goods and Services Tax Rules, 2017, dealing with "Manner of calculating interest on delayed payment of tax", as inserted *vide* Notification No.14/2022-CT dated 05.07.2022, with effect from 01.07.2017, stands as follows:

"(1) In case, where the supplies made during a tax period are declared by the registered person in the return for the said period and the said return is furnished after the due date in accordance with 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, the interest on tax payable in respect of such supplies shall be calculated on the portion of tax which is paid by debiting the electronic cash ledger, for the period of delay in filing the said return beyond the due date, at such rate as may be notified under sub-section (1) of Section 50.

---

6 Sub-section (3) of Section 50 has been substituted and is deemed to have been substituted with effect from the ***1st day of July, 2017*** by virtue of Section 111 of the Finance Act No.6 of 2022.

(2) *In all other cases, where interest is payable in accordance with sub section (1) of Section 50 , the interest shall be calculated on the amount of tax which remains unpaid, for the period starting from the date on which such tax was due to be paid till the date such tax is paid, at such rate as may be notified under sub-section (1) of Section 50.*

(3) *In case, where interest is payable on the amount of input tax credit wrongly availed and utilised in accordance with sub-section (3) of Section 50 , the interest shall be calculated on the amount of input tax credit wrongly availed and utilised, for the period starting from the date of utilisation of such wrongly availed input tax credit till the date of reversal of such credit or payment of tax in respect of such amount, at such rate as may be notified under said sub-section (3) of Section 50.*

Explanation.—

For the purposes of this sub-rule,—

(1) *input tax credit wrongly availed shall be construed to have been utilised, when the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, and the extent of such utilisation of input tax credit shall be the amount by which the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed.*

(2) *the date of utilisation of such input tax credit shall be taken to be,—*

(a) *the date, on which the return is due to be furnished under Section 39 or the actual date of filing of the said return, whichever is earlier, if the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, on account of payment of tax through the said return; or*

(b) *the date of debit in the Electronic Credit Ledger when the balance in the Electronic Credit Ledger falls below the amount of input tax credit wrongly availed, in all other cases."*

9.4. *Qua* the above amendment so made, a Circular No.192/04/2023-GST [File No. CBIC-20001/5/2023-GST], dated 17.07.2023 was issued by the Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes & Customs, GST Policy Wing, clarifying whether interest would be leviable in the event the Electronic Credit Ledger has the balance more than the input tax credit sought to be reversed. The said Circular is reproduced hereunder:

"Subject: Clarification on charging of interest under Section 50(3) of the CGST Act, 2017, in cases of wrong availment of IGST credit and reversal thereof. References have been received from trade requesting for clarification regarding charging of interest under sub-section (3) of Section 50 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act") in the cases where IGST credit

has been wrongly availed by a registered person. Clarification is being sought as to whether such wrongly availed IGST credit would be considered to have been utilized for the purpose of charging of interest under sub-section (3) of Section 50 of CGST Act, read with Rule 88B of Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the "CGST Rules"), in cases where though the available balance of IGST credit in the electronic credit ledger of the said registered person falls below the amount of such wrongly availed IGST credit, the total balance of input tax credit in the electronic credit ledger of the registered person under the heads of IGST, CGST and SGST taken together remains more than such wrongly availed IGST credit, at all times, till the time of reversal of the said wrongly availed IGST credit.

2. *Issue has been examined and to ensure uniformity in the implementation of the provisions of law across the field formations, the Board, in exercise of its powers conferred by Section 168(1) of the CGST Act, hereby clarifies the issues as under:*

S. No.	*Issue*	*Clarification*
1.	*In the cases of wrong availment of IGST credit by a registered person and reversal thereof, for the calculation of interest under Rule 88B of CGST Rules, whether the balance of input tax credit available in electronic credit ledger under the head of IGST only needs to be considered or total input tax credit*	*Since the amount of input tax credit available in electronic credit ledger, under any of the heads of IGST, CGST or SGST, can be utilized for payment of liability of IGST, it is the total input tax credit available in Electronic Credit Ledger, under the heads of IGST, CGST and SGST taken together, that has to be considered for calculation of interest under Rule 88B of CGST Rules and for determining as to whether the balance in the electronic credit ledger has fallen below the amount of wrongly availed input tax credit of IGST, and to what extent the balance in electronic credit ledger has fallen below the said amount of wrongly availed credit.*

	available in electronic credit ledger, under the heads of IGST, CGST and SGST taken together, has to be considered.	***Thus, in the cases where IGST credit has been wrongly availed and subsequently reversed on a certain date, there will not be any interest liability under sub-section (3) of Section 50 of CGST Act if, during the time period starting from such availment and up to such reversal, the balance of input tax credit (ITC) in the Electronic Credit Ledger, under the heads of IGST, CGST and SGST taken together, has never fallen below the amount of such wrongly availed ITC, even if available balance of IGST credit in electronic credit ledger individually falls below the amount of such wrongly availed IGST credit.*** *However, when the balance of ITC, under the heads of IGST, CGST and SGST of Electronic Credit Ledger taken together, falls below such wrongly availed amount of IGST credit, then it will amount to the utilization of such wrongly availed IGST credit and the extent of utilization will be the extent to which the total balance in Electronic Credit Ledger under heads of IGST, CGST and SGST taken together falls below such amount of wrongly availed IGST credit, and will attract interest as per sub-section (3) of Section 50 of CGST Act, read with Section 20 of Integrated Goods and Services Tax Act, 2017 and sub-rule (3) of Rule 88B of CGST Rules.*
2.	*Whether the credit of compensation cess available in electronic credit ledger shall be taken into account while considering the balance of electronic credit ledger for the purpose of calculation of interest under sub-rule (3) of Rule 88B of CGST Rules in respect of wrongly availed and utilized IGST, CGST or SGST credit.*	*As per proviso to Section 11 of Goods and Services Tax (Compensation to States) Act, 2017, input tax credit in respect of compensation cess on supply of goods and services leviable under Section 8 of the said Act can be utilised only towards payment of compensation cess leviable on supply of goods and services. Thus, credit of compensation cess cannot be utilized for payment of any tax under CGST or SGST or IGST heads and/ or reversals of credit under the said heads. Accordingly, credit of compensation cess available in electronic credit ledger cannot be taken into account while considering the balance of electronic credit ledger for the purpose of calculation of interest under subrule (3) of rule 88B of CGST Rules in respect of wrongly availed and utilized IGST,*

		CGST or SGST credit.

3. It is requested that suitable trade notices may be issued to publicize the contents of this Circular.

4. Difficulty, if any, in implementation of this Circular may please be brought to the notice of the Board. Hindi version would follow.

(Sanjay Mangal)
Principal Commissioner (GST)"

9.5. The Clarification dated 17.07.2023 read juxtaposed with provisions of Rule 88B there is no ambiguity that when the Electronic Credit Ledger has sufficient balance left for adjustment of reversal of input tax credit no interest is chargeable or payable under Section 50.

10. So far as penalty as imposed under Section 74 in the Order-in-Original is concerned, suffice it to say that since there is no tax implication in the instant case, as the matter related to wrong availment of input tax credit on account of fake/bogus invoices issued by the supplier and the petitioner has reversed the alleged amount of input tax credit prior to initiation of proceeding under Section 74, the imposition of penalty cannot be a mechanical exercise of power and, thus such order is unsustainable.

10.1. In the Order-in-Original an amount of Rs.4,39,970/- is stated to have been demanded towards input tax credit (IGST) for the Financial Year 2017-18 (July, 2017 to March, 2018). Notwithstanding the fact that prior to

issue of Summary Show Cause Notice and Demand Show Cause Notice, both dated 26.07.2024 the petitioner had reversed the amount of input tax credit to the tune of Rs.4,39,970/-, the demand of equal amount is shown in the Order-in-Original. This would tantamount to double taxation which is prohibited under law. As is patent from the said Order, the same amount of Rs.4,39,970/- has been demanded in order to impose penalty of equal amount, *i.e.* Rs.4,39,970/-. On the conspectus of factual position it is ascertainable that the petitioner has voluntarily reversed input tax credit of Rs.4,39,970/-; and the Adjudicating Authority in the Order-in-Original demanded input tax credit (IGST) of Rs.4,39,970/-. This apart, he imposed penalty of Rs.4,39,970/-. In such event the petitioner is subjected to penalty twice for the self-same transaction. Once it is conceded by the Revenue that the amount of input tax credit for a sum of Rs.4,39,970/- has been reversed, raising demand to the same without giving due credit to such reversal is unethical and without authority of law. In such an event, since net tax effect would be "zero", thereby no penalty would be imposable. This Court, therefore, would show indulgence in the matter as the Adjudicating Authority has traversed his jurisdiction by acting at his whims and fancies.

Conclusion:

11. Given the factual scenario and on the afore-discussed legal perspective, this Court finds arbitrariness in raising demand of tax equivalent to the amount of input tax credit (*i.e.,* Rs.4,39,970/-, which was already reversed by the petitioner voluntarily prior to initiation of proceeding under Section 74). Furthermore, since there was availability of surplus/excess balance left in the Electronic Credit Ledger after adjustment of input tax credit so voluntarily reversed, no interest is exigible in view of Section 50(3) read with Rule 88B coupled with clarification contained in Circular dated 17.07.2023. Over and above, the imposition of penalty under Section 74 is unwholesome and unsustainable inasmuch as raising demand of "tax" equivalent to the amount of "input tax credit" already reversed would tantamount to subjecting a person to double taxation and is, therefore, liable to be nullified.

12. Having diligently considered the arguments of the Senior Counsel for the petitioner and learned Senior Standing Counsel(s), this Court comes to hold that the Order-in-Original dated 03.02.2025 passed under Section 74 by the Superintendent (Anti-Evasion), GST & Central Excise, Angul-I Range for the Financial Year 2017-18 (July, 2017 to March, 2018) [Annexure-5] in connection with Summary Show Cause Notice dated 26.07.2024 and Demand Show Cause Notice dated 26.07.2024

[Annexure-3] cannot be held to be tenable in the eye of law. Hence, with the discussions made *supra,* the said Order-in-Original is quashed for the reason assigned hitherto.

13. As it is conceded by the counsel(s) appearing for both sides that the case of the petitioner in W.P.(C) No.12686 of 2025 being identical to the fact-situation of the case in W.P.(C) No.12682 of 2025, the former writ petition at the behest of the partnership firm is also disposed in the above terms.

14. *Ergo*, the writ petitions, being W.P.(C) No.12682 of 2025 and W.P.(C) No.12686 of 2025, stand allowed and pending Interlocutory Application(s), if any, is also disposed of, but in the circumstances there shall be no order as to costs.

I agree.

(HARISH TANDON)
CHIEF JUSTICE

(MURAHARI SRI RAMAN)
JUDGE