

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 24640 of 2023

**Santu Das
Versus
Assistant Commissioner of CGST & C. EX, Chandannagore Division
& Ors.**

For the petitioner : Ms. Sutapa Roy Choudhury, Sr. Adv.
Mr. Abhijat Das, Adv.
Ms. Aratrika Roy, Adv.
Mr. Anirban Chatterjee, Adv.

For the State : Ms. Manju Agarwal, Sr. Adv.
Mr. Ram Chandra Agarwal, Adv.

For the CGST : Mr. Kaushik Dey, Adv.
Mr. Tapan Bhanja, Adv.

Heard on : 01.07.2026.

Judgment on : **01.07.2026.**

Raja Basu Chowdhury, J (Oral):

1. Though the matter had come up under the heading "Extension of Interim Order" since the writ petition has been pending since 2023, this Court by consent of the parties, has taken up for hearing of the writ petition itself.
2. The writ petitioner by the instant writ petition seeks to challenge not only the adjudication order passed under Section 73(9) of the WBGST/CGST Act, 2017 (hereinafter referred to as the said Act) for

the tax period of 2017-18 and 2018-19 but also two separate appellate order passed under Section 107 of the said Act both dated 23rd March, 2023 whereby not only the demand raised by the respondents in form GST DRC 07 had been confirmed but at the instance of the department, in a separate appeal the appellate authority had enhanced the penalty from Rs. 1,00,000/- to Rs. 3,80,597/-.

3. To appreciate the contention of the parties, it is relevant to note down the facts leading to filing of the writ petition.
4. It is not in dispute that a show cause had been issued on the petitioner under Section 73(1) of the said Act, dated 6th July, 2021. As would appear from the show cause, the same pertains to irregular availment of input tax credit (ITC) for the tax period of 2018-19 and wrongful utilization thereof on the ground that the returns filed by the petitioner under Section 39 of the said Act was beyond the prescribed period. The second issue canvassed in the show-cause was with regard to excess availment of ITC to the tune of Rs. 4,04,174/- for the tax period of 2017-18 and utilization in respect whereof having regard to mismatch in GSTR 9 submitted by the petitioner as on verification of the annual return submitted by the petitioner for the tax period of 2017-18, it was noticed that in table No. 8 they have shown excess availment of input tax credit to the tune of Rs. 40,414/-, and the input tax credit disclosed in form GSTR 3B table 4A could not be reconciled with the details of tax,

auto populated at the instance of the petitioner's service provider in form GSTR 2A. The third issue involved in the show cause was with regard to short payment of input tax credit to the extent of Rs. 52,208/-.

5. The petitioner had duly responded to the show cause. Subsequently the proper officer had adjudicated upon the same and had found that the petitioner had defaulted on all the 3 issues and had accordingly raised a demand of Rs. 19,02,986/- by passing an order under Section 73(9) of the said Act. The demand was raised in form GST DRC 07 on 25th October, 2021. In addition thereto, the proper officer had also imposed a penalty of Rs. 1,00,000/- in terms of Section 73(1) read with Section 73(9) of the said Act. Not only the petitioner being aggrieved with the aforesaid preferred appeal but records would reveal that the department also chose to prefer appeal under Section 107 of the said Act, insofar as the imposition of penalty was concerned. The department insisted that higher amount of penalty should be imposed.
6. By an order dated 22nd March, 2023, the petitioner's appeal was rejected. Insofar as the appeal filed by the department was concerned, the appellate authority has been pleased to enhance the quantum of the penalty by observing that the adjudicating authority had completely ignored the provisions of Section 73(9) of the said Act which stipulate that mandatory penalty should be 10% of the

tax or Rs.10,000/- whichever is higher. Following which the demand in form GST ALP 04 was raised.

7. Ms. Roy Chowdhury, learned senior advocate representing the petitioner has drawn the attention of this Court to the provisions of Section 16(5) of the said Act and would submit that subsequent to the insertion of the aforesaid Section by way of Finance Act (No.2) Act, 2024, (15) of 2024 dated 16th August, 2024 with effect from 27th September, 2024 vide SO 4253 (E) with effect from 1st July, 2017, the very basis of the demand raised by the respondents in terms of the first issue forming part of the show-cause dated 6th July, 2021 no longer survives. Insofar as the second issue is concerned, she would submit that though the petitioner had purchased services from Aircel and due payments were made in respect thereof, unfortunately, Aircel having being involved in insolvency proceedings before the National Company Law Board, Aircel may not have uploaded the returns. The failure on the part of the Aircel to upload the returns cannot be attributable to the petitioner, especially when the petitioner had made the entire payment of tax liability. Insofar as the third issue with regard to short payment of ITC is concerned, she would submit, by relying on annexure P1 to the writ petition which is a voluntary payment receipt of ITC made in form GST DRC 03 dated 31st January, 2020 that entire amount of tax which is claimed to be short paid has already been paid by the petitioner. She would submit that since

the very demand raised by the respondents no longer survives especially, having regard to Section 16(5) of the said Act, the penalty imposed by the respondents needs to be revisited and reconsidered. Accordingly, the matter may be remanded back on the aforesaid score.

8. Mr. Dey, learned advocate appears for the CGST authorities. He would submit that having regard to the insertion of Section 16(5), the petitioner may be entitled to the benefit thereof. Insofar as the payment made by the petitioner to the Aircel is concerned, he would submit that unless the petitioner's service provider files the returns and makes payment of the input tax credit, the petitioners liability cannot vanish. He would submit that in the event, the petitioner's service provider had made payment of the input tax credit, the same would have been auto populated in GSTR 2A and as such there is no irregularity in such decision. On the issue of payment of short deposit, he would submit that these are factual issues and this Court ought not to enter into the same.
9. Having heard the learned advocates appearing for the respective parties and having considered the materials on record, I find that in the instant case, a show cause was issued. To morefully appreciate the same, the relevant portion of the show-cause which deals with the issues raised therein are extracted hereinbelow:

"The said taxpayer had irregularly availed input tax credit (ITC) to the extent of Rs. 33.49.590/- Rs. 16,74,795/- (CGST) Rs 16,74,795/- (SGST) [for the tax period between November, 2018 to March, 2019 beyond the due date of availing ITC for the financial year 2018-19 and utilized the

said irregularly availed credit for payment of taxes on outward supply [as detailed in 'Annexure- A' to this notice]

ii) the said taxpayer has availed excess credit to the tune of Rs 4,04,1/4 [Rs.2,02,087/-(CGST) + Rs.2,02,087/-(SGST)] as is reflected in tablet of then Annual return (GSTR 9) submitted for the period 2017-18 and utilized the said irregularly availed credit for payment of taxes on outward supply as detailed in 'Annexure B' to this notice;

iii) The said taxpayer have short paid GST to the extent of Rs. 52 208/- (CGST Rs.26,104/+ SGST Rs.26,104/-) as they have shown excess clearance to the tune of Rs 2,90,042/- in their GSTR 1 for the month of August 2017 in comparison to GSTR 3B for the same period as detailed in 'Annexure - C' to this notice."

10. As would appear from the first issue in the show-cause, the same primarily relates to delayed filing of returns which having regard to the provisions of Section 16(4) of the said Act created an impediment on the registered tax payer to avail the benefit thereof. However, such situation has since changed with the insertion of Section 16(5) in the said Act. Since, going by the materials on record, it would transpire that the returns filed by the petitioner for the tax period of 2018-19 was before 30th November, 2021, I am of the view, the petitioner is entitled to the benefit of such provision and demand raised by the respondents on the petitioner for availing input tax credit to the extent of Rs. 33,49,590/-, cannot sustained and the same is accordingly quashed. Insofar as the short payment of ITC is concerned, I find that the petitioner wishes to rely on voluntary payment of input tax credit in form GSTR 03 dated 31st January, 2020. Although, the facts and figures match, however, considering the fact that aforesaid is a factual issue, I am of the view that in the fitness of things, it would only be prudent to remand the aforesaid issue to

the adjudicating authority for reconsideration thereof. The only other issue which survives for consideration is with regard to mismatch of input tax credit. In the given facts, since it is argued that the matter relating to insolvency of Aircel is now pending before the Hon'ble Supreme Court as submitted by the parties, and since, there does not appear to be much discussion on the above subject, I am of the view, the aforesaid issue should also be reconsidered by the proper officer. Since, the demand raised by the respondents insofar as the first issue is concerned, has been set aside and since the question of quantum of penalty is dependent upon the demand raised, I am of the view that the imposition of penalty which has since been enhanced by the appellate authority, in the given facts cannot be sustained. The same is set aside and the issue of imposition of penalty is accordingly remanded back to the proper officer for re-adjudication. As a sequel thereto, the orders passed both by the adjudicating authority as also the appellate authority are set aside. Since no other issue survives for adjudication, the writ petition is disposed of.

11. Urgent Photostat certified copy of this order, if applied for, be made available to the parties upon compliance of all requisite formalities.

(Raja Basu Chowdhury, J.)