GOODS AND SERVICES TAX APPELLATE TRIBUNAL
ERNAKULAM BENCH
Division Bench : Court No I

APPEAL NO : APL/40/ERN/2026
[arising out of OIA No.CLT-GST-000-APP-108-2025-26-JC dated 19/08/202 passed by Joint Commissioner (Appeals) Central Tax, Central Excise & Customs, Kochi]
(hearing in hybrid mode)

MPS STEELS, PALAKKAD ……Appellant

VERSUS

THE COMMISSIONER OF CGST & CE,
KOCHI ……...Respondent

for Appellant
KV Padmanathan, Advocate

for Respondent
Baiju Daniel, AR

CORAM : Hon'ble Shri Subramanya Rayaprol, Vice-President
Hon'ble Shri Ramamoorthi Sriram, Member (Technical)

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FINAL ORDER NO : 24/TVP/KERALAM/2026

Date of Hearing: 27/10/2026
Date of Order: 03/11/2026

Order Per: Ramamoorthi Sriram, Member (Technical)

1.0 The Appellant, MPS Steels Private Limited (GSTIN No. 32AAICM2195D1ZP) is a company engaged in the supply of goods falling under HSN codes 72061090, 72071920, 72042190 and 72044900.

2.0 The appellant was issued a Show Cause Notice No. 13/2023/GSTPNR dated 20.11.2023.

3.0 ORDER-IN-ORIGINAL No. 15/2024-25/GST-PSR dated 03/04/2024 was passed by the Supdt of Central Tax & Central Excise, Palakkad South Range confirming levy of duty , interest, late fees and penalty.

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4.0 The appellant filed an appeal before the Joint Commissioner (Appeals) Central Tax, Central Excise & Customs, Kochi [Appellate Authority] who vide the impugned OIA allowed partial relief and confirmed the balance demand of duty, interest, late fees and penalty.

5.0 Aggrieved by the above order, the appellant has filed this appeal before the Tribunal.

6.0 Grounds of Appeal / Submissions of the Appellant:

a. Appellate Authority has erred in upholding the confirmation of the ITC demand of Rs. 3,06,504/- on the ground of violation of Section 16(2)(c) of the CGST Act, 2017, when the Show Cause Notice was issued on violation of Section 16(2)(aa) of the Act alone.

b. The show cause notice itself is without jurisdiction since section 16(2)(aa) was inserted in to the CGST Act only with effect from 01- 01-2022 whereas the disputed demand pertains to financial year 2018-19. The demand proposed for the violation of a statutory condition, which was not in force during the relevant period, is without authority of law, and requires to be set aside in entirety.

c. Without prejudice, the learned First Appellate Authority ought to have appreciated that section 75(7) of the Act expressly provides that no demand of tax, interest or penalty shall be confirmed on any ground other than the grounds specified in the notice.

d. Appellate Authority has erred in relying upon the judgment of the Hon'ble High Court of Delhi in Commissioner of Service Tax vs. ITC Ltd. [2014 (36) S.T.R. 481 (Del.)] to confirm the demand. The said judgment holds that failure to

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mention the relevant subclause of a statutory provision does not invalidate a show cause notice, if no prejudice has been caused resulting in an arbitrary and unjust decision. However, the facts of the present case are substantially different. In this case, the demand was confirmed under Section 16(2)(c), which is substantively different from the allegation under Section 16(2)(aa) and operates on an entirely different premise. The Appellant was never called upon to demonstrate that the underlying tax had been paid to the Government by the supplier, and was therefore completely prejudiced in its defense.

e. The appellant places reliance on judgment of Hon'ble Supreme Court in CCE v. Champdany Industries Ltd. [2010] 3 taxmann.com 321/, wherein it was held that unless the foundation of the case is made out in the show cause notice itself the revenue cannot argue a case not made out in the show cause notice. Similar view was also expressed in CCE v. Ballarpur Industries Ltd. 2007 (215) E.L.T 489 (SC). In CCE v. Shital International [2010] 1 taxmann.com 413 the Supreme Court decided that the show cause notice should serve as the cases foundation and the Revenue is not allowed to build up a new case against the assessee until the basis for the case is established in the show-cause notice.

f. Even assuming that the appellant was required to furnish the certificate specified under Circular No. 183/2022-GST to establish eligibility for ITC under Section 16(2)(c), the learned First Appellate Authority ought to have issued a notice in this regard and granted sufficient opportunity to the appellant to submit the same.

g. Without prejudice, the learned First Appellate Authority has erred in denying input tax credit on the ground the supplier has not paid the taxes to the Government, without initiating any actions against the supplier.

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h. Without prejudice, the appellant is now entitled to ITC on production of valid certificates from its suppliers in accordance with Circular No. 183/2022-GST.

Shri Padmanathan K.V., learned Advocate forcefully reiterated the above submissions on behalf of the appellant,

7.0 Submissions of the Respondent /AR:

Shri Baiju Daniel , learned AR for the revenue submits as follows:

a. The findings of the order of the JC (Appeals) are reiterated.

b. In respect of the demand of Rs. 306504/- it is seen that the SCN is issued under section 16(2) (aa) and the Order confirms the demand under Section 16(2) (c).

c. In respect of the other demands and penalties imposed, the appellant has not produced any evidence showing their eligibility for the ITC claimed.

Discussions and Findings

8.0 At the outset we find that the challenge to the order in appeal is only in respect of confirmation of the ITC demand of Rs. 3,06,504/. We observe that on the issue of variance between the statutory provisions invoked in the SCN [section 16(2)(aa)] and the statutory provisions under which the demand has been confirmed in the OIO [section 16(2)(c)] the findings in the OIA are as follows:

. . . I have earnestly perused the SCN and the impugned Order. I found that in the SCN SI.No.13/2023/GST-PSR dated 20.11.2023, the Respondent has described the issue in detail as "Ineligible ITC availed in respect of invoices issued by the suppliers who have not filed their GSTR-3B returns for the relevant tax period". The same issue was also reiterated in detail in the impugned Order. The only averment made by the Appellant in this regard is that the Respondent-the Adjudicating Authority has not mentioned provisions of the Act correctly in the SCN. In this connection, I rely on judgement of Hon'ble High Court of Delhi in the case of Commissioner of Service Tax Vs ITC Ltd. [2014 (36) S.T.R. 481 (Del.)]. In the said case, the Hon'ble High Court had observed that the Tribunal should not have

quashed show cause notices itself on ground of violation of principles of natural justice for show cause notice not specifying sub-clause of Section 65(19) of Finance Act, 2005.

. . .

The discussion rendered by me above, relying upon the judgment of Hon'ble High Court of Delhi as well as the facts of the case unequivocally establishes that mere wrong referral of statutory provision, by itself would not render the demand invalid. Here, the Appellant has failed to prove their claim as regards the ITC demanded in the Notice. The fact that the invoice involved in the disputed ITC has not been declared by the supplier is not controverted by the Appellant. Their only contention is that the statutory provision referred to in the SCN is Section 16(2)(aa) which has been introduced only w.e.f. 01.01.2022. But the fact remains that the ITC availed is in violation of the extant provisions of Section 16(2)(c), as the underlying tax has not been paid by the supplier to the government account. Here, though there is a patent error in the statutory provision invoked in the SCN, the Appellant has not been able to fulfil their responsibility under section 155 of the Act to prove eligibility of the claim of ITC in as much as they have neither produced any certificate, as specified under Circular No. 183/2022, nor have they proved that the ITC in question has since been auto populated in their GSTR 2A. So much so, the allegation in the Notice that the Appellant has availed ITC to the tune of Rs.3,06,504/-(CGST-Rs.1,53,252/- and SGSTRs.1,53,252/-), which is ineligible, is proved without any doubt. As such, I hold that the Appellant is not eligible for availing the said amount as ITC and hence the same is liable for recovery.

8.1 On perusal of the impugned SCN, it is seen that the relevant portion reads as follows:

Issue 1: Ineligible ITC availed in respect of invoices issued by the suppliers who have not filed their GSTR-3B returns for the relevant tax period.

As per sect 16(2)(aa) of the CGST Act 2017 the input tax credit on the basis of invoices issued by suppliers who have not filed their GSTR3B returns for the relevant tax period cannot be availed is tabulated below……

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There is no reference to any other charge against the appellant.

8.2 The appellant has contended that:

a. They had answered the charge actually made in the notice and pointed out that section 16(2)(aa) took effect only on 1st January, 2022 and could not govern supplies in September 2018 or March 2019.

b. They had also tendered invoices, ledger accounts, bank records and stock-record explanation.

c. After the reply, the respondents neither amended the show cause notice nor issued a supplementary notice setting out that the relevant facts alleging non-payment of tax by the suppliers to the Government.

8.3 We find that the showcase notice was issued only on grounds of non-compliance with section 16(2) (aa). Once the appellant has pointed out that the said section took effect only on 1/1/22 and could not have been invoked for the past period (2018-19), one would have imagined that the entire issue had attained a quietus as nothing else survived in this case.

8.4 However we observe that our fond hopes as above were belied by the tenacity and ingenuity of the revenue. We find that in the adjudication order, the charge in the show cause notice that

"*ITC availed in respect of invoices issued by the suppliers who have not filed their GSTR-3B returns for the relevant tax period*" [violation of 16(2)(aa)]

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has metamorphosed into the charge that a*vailing of input tax credit (ITC) by the taxpayer in respect of above said invoices contravenes the provisions of Section 16(2) (c) of CGST Act, 2017, …….*

8.5 We find that on the issue that the SCN was issued only under section 16(2)(aa) which has been inserted vide Finance Act, 2021, only with effect from 01-01- 2022 and the said provision was not effective during the financial year 2018-19, (an issue which was forcefully argued by the appellant as recorded in the OIO), the order is sub-silentio.

8.6 The OIO after having artfully dodged / side stepped the above vital question of law raised by the appellant has proceeded to confirm the demand under section 16(2)(c) of the CGST Act

8.7 On perusal of the SCN we find that nowhere has the tax payer been put to notice regarding any such infraction of the said section 16(2)(c). As such we find that this a last-ditch attempt by the department to confirm the demand in question (which was raised on inapplicable sections of the law) through an insinuation / improvisation which was never part of the original show cause notice.

8.8 It was the bounden duty of the appellate authority to see through this smoke screen and hold that the demand which has been raised on anachronous statutory grounds has no leg to stand on.

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8.9 However, we regret to note that the appellate authority has tried to justify the adjudication order relying upon the order of the Hon'ble High Court of Delhi in the case of Commissioner of Service Tax Vs ITC Ltd. [2014 (36) S.T.R. 481 (Del.)].

8.10 In response the above, the appellant has contended that:

a. That decision asks whether the notice, read as a whole, actually conveyed the charge and whether prejudice resulted; a missing sub-clause alone need not invalidate a clear allegation.

b. In contrast, the impugned show cause notice made non-filing of GSTR-3B the charge and pointed to section 16(2) (aa).

c. A factual finding of actual non-payment under section 16(2)(c) required detailed verification of supplier's records.

d. These facts were never put to the appellant before passing the Order in-Original.

8.11 We find considerable merit in the above said contentions of the appellant regarding the non-applicability of the decision in the case of Commissioner of Service Tax Vs ITC Ltd (supra) to the case before us.

8.12 We are not impressed by the ratio / logic adopted in the order in appeal for relying on the above said decision. Our reasons for the same are stated below:

a. We find that in para 9 of the OIA the Appellate Authority has observed that :

"The discussion rendered by me above, relying upon the judgment of Hon'ble High Court of Delhi as well as the facts of the case unequivocally establishes that mere wrong referral of statutory provision, by itself would not render the demand invalid."

b. We observe that contrary to the assertion above, the OIA other than reproducing para 17 of the said judgement, has not made any analysis as to how the ratio of that case is applicable to the present case. The Appellate Authority has also not appreciated the fundamental fact that the above said judgement is not with respect to wrong referral of statutory provisions but with respect to non-referral of statutory provisions. This much is clear from a sentence extracted from para 8 of the OIA itself which reads as follows:

In the said case, the Hon'ble High Court had observed that the Tribunal should not have quashed show cause notices itself on ground of violation of principles of natural justice for show cause notice not specifying sub-clause of Section 65(19) of Finance Act, 2005

c. We find that with respect to the specific facts of that particular case, the High Court held that mere non-referral of the specific sub clause of the statute cannot be said to have resulted in violation of the principles of natural justice as it was not a case wherein the respondent / assessee was taken by surprise as relevant facts on which the Commissioner relied on and provisions of the statute invoked were set out and mentioned in the show cause itself. Further personal hearing was given in which the question whether the services covered were and could be treated as Business Auxiliary service was discussed.

d. We find that in contrast, the present case is not one of non-referral but of wrong referral. It is one thing to say that a show cause which contains all the narrations of facts and law but only omits to mention the exact sub clause of the statute does not violate the principles of natural justice and it is entirely a different matter to contend that a show cause notice which extracts verbatim the provisions of the law without showing whether / how a particular provision of the statute was contravened can be

the basis of an adjudication order that enters a finding of contravention of the said section. In the present case the assessee who were asked to show cause as to why ITC availed by them should not be disallowed under section 16(2) (aa) of the CGST Act (which they very ably countered by pointing to its coming into effect at a much later date) were suddenly visited upon with an adjudication order which found that they had breached section 16(2)(c) by availing ITC credit on invoices in respect of which tax had not been paid by their supplier. On perusal of the OIO, we observe that there is absolutely no indication that this new charge of violation of section 16(2)(c) (which was not part of the original SCN) was even broached at the time of the personal hearing. Therefore, we have very reason to believe that in the present case, the assessee was caught totally unawares and was suddenly blindsided on a finding of violating section 16(2)(c), a charge which was not put to them at any stage.

e. We therefore find that the facts and circumstances of the present case are not pari materia with that in the case of CST vs ITC (supra) and the decision of that case is clearly distinguishable and has absolutely no application to the case before us.

f. We find that in the in instant case, the grounds of the show cause notice [contravention of section 16(2)(aa)] and grounds on which the demand is confirmed in the OIO[contravention of section 16 (2)(c)] are far different from one another and therefore the entire proceedings are vitiated by a brazen disregard and breach of section 75(7) of the CGST Act and therefore the entire proceedings are liable to be set side on this ground alone.

g. We find that the correct position of law is to be found in the latest decision of the honorable Supreme Court on the subject in the case of M/s Armour Security (India) Ltd v Commissioner, CGST, Delhi East Commissionerate, [2025] 177 taxmann.com 478 (SC), with specific reference to section 75(7) of the CGST Act wherein the

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honorable clearly upheld the following principles as laid out in other decisions of the Supreme Court:

a. *It is well settled that unless the foundation of the case is made out in the show- cause notice, Revenue cannot in Court argue a case not made out in its show-cause notice……* [(C.C.E., Bhubaneswar-1 vs M/S. Champdany Industries Ltd – para 50)]

b. *if there is no invocation of the concerned rules in the show-cause notice, it would not be open to the Commissioner to invoke the said Rule."* [Commissioner of Central Excise, Nagpur v.Ballarpur Industries Ltd. MANU/SC/3595/2007 :]

h. The Court went on to state that :

From the above exposition of law, we can safely conclude that a show cause notice delineates the scope of the proceedings in the expression of subject matter with which the authority would be dealing. It would be impermissible for an authority to invoke such rules, claims or grounds at a later stage which do not figure in the show cause notice. That is to say, any ground, reasoning or claim which does not figure out in the show cause notice cannot be permitted to adversely affect the noticee. Such recognition has even been made statutorily, as per sub-section (7) of Section 75 of the Act, which reads as thus:

"75. General provisions relating to determination of tax.—...

xxx (7) The amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice and no demand shall be confirmed on the grounds other than the grounds specified in the notice."

i. We observe that our findings are therefore reinforced not only by section 75(7) of the CGST Act but also the legal imprimatur of the principles thereof in the case of M.s Armour Security (supra).

j. We also find that once the demand of duty itself is held to be not sustainable, the natural corollary is that demand of interest and penalty associated with the said

demand of duty are also not sustainable.

9. We therefore find that in view of the above discussions above, the order portion of the order in appeal pertaining to the demand of duty (para 1) , interest (para 4) and penalty (para 6) in respect of the alleged ineligible availment of ITC in contravention to Section 16(2)(c) of the CGST Act, 2017**,** is liable to be set aside.

10.0 In view of the findings above, the following order is passed:

ORDER

The appeal is allowed and paragraphs 1, 4 and 6 of the order portion in the order in appeal are set aside with consequential relief.

(Order pronounced in open court)

Subramanya Rayaprol
Vice-President

Ramamoorthi Sriram
Member (Technical)

Date: 3-11-2026

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