GOODS AND SERVICES TAX APPELLATE TRIBUNAL
THIRUVANANTHAPURAM BENCH
Division Bench :: Court No. I
(e-hearing)

APPEAL NO: APL/21/TVP/2026

M/s. Santhome Latex Enterprises ....Appellant

Versus

The Commissioner of CGST Thiruvananthapuram ....Respondent

Counsel for Appellant
Unnikrishnan M, CA

Counsel for Respondent
Suresh S, AR

CORAM:

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

....

FINAL ORDER NO: 04/TVP/KERALA/2026

Date of Hearing: 7-8-2026
Date of Order: 21-8-2026

Per: Ramamoorthi Sriram, Member (Technical)

1.0 The present appeals are filed against the Order in Appeal Number: TVM-GST-000-APP-233-2025-26-JC dated 02.12.2025 of Joint Commissioner (Appeals), Central Tax, Central Excise and Customs, Kochi.

Issue to be decided:

(i) Whether in the facts and circumstances of the case the mere act of the tax payer in taking ineligible self-assessed ITC in their Electronic Credit Ledger in terms of section 42(1) of the CGST Act would amount to suppression of facts before the department, which would fall within the scope of section 74 of the Central Goods and Services Act, 2017.

(ii) Whether the failure to reply to the audit enquiry / final audit report by the tax payer would amount to suppression of facts in terms of section 74 of the CGST Act , 2017.

Brief Facts of the Case :

2.0 The appellant, M/s. Santhome Latex Enterprises, is engaged in the manufacture and supply of Centrifugal Rubber Latex, which is used in medical, pharmaceutical and other commercial applications.

3.0 The present proceedings arise from audit of the appellant's records for the period from July 2017 to March 2022. Consequent to the above, a Show Cause Notice was issued to the appellant under Section 74(1) of the CGST Act, 2017, read with the corresponding provisions of the KGST Act, 2017 and Section 20 of the IGST Act, 2017. The notice proposed recovery of alleged excess availment of input tax credit for the period from 2017-18 to 2021-22, together with interest under Section 50 and penalty under Section 74(9) read with Section 122(2)(b).

4.0 The show cause notice was adjudicated by Order-in-Original No. 137/GST/PATTOM/SUPDT/2024-25 dated 24.01.2025, passed by the Superintendent, Central GST and Central Excise, Pattom Range, Thiruvananthapuram. In the said order, the adjudicating authority found that the statutory ingredients for invoking Section 74 were not established. The adjudicating

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authority held that the allegation of “non-declaration of facts or information” as contemplated in Explanation 2 to Section 74 was not established in the show cause notice. The adjudicating authority further held that since the notice had been issued under Section 74 and did not provide an option to confirm demand under Section 73, the demand proposed under Section 74 could not be sustained. Accordingly, the demand under Section 74, together with consequential interest and penalty, was dropped.

5.0 Aggrieved by the said Order-in-Original, the Respondent / Revenue filed an appeal before the Joint Commissioner (Appeals), Kochi. The Department’s appeal challenged the dropping of the demand under Section 74. The substance of the Department’s grievance was that the adjudicating authority ought to have sustained the proceedings under Section 74 on the ground that the appellant had not furnished information called for during audit and that the facts came to the notice of the Department only through audit.

6.0 The Joint Commissioner (Appeals), Central Tax, Central Excise and Customs, Kochi, thereafter passed Order-in-Appeal No. TVM-GST-000-APP-233-2025- 26-JC dated 02.12.2025. By the impugned Order-in-Appeal, the appellate authority allowed the Department’s appeal and reversed the Order-in Original.

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7.0 Aggrieved by the said Order-in-Appeal, the appellant has filed the present appeal before the Tribunal.

Grounds of Appeal / Submissions of the Appellant:

8.0 The Appellant / Assessee has filed the present appeals on the following grounds:

(i) The present proceedings arise only from statutory return data, GSTR-2A / Table 8 figures, GSTR-3B and GSTR-9C reconciliation records, and not from search, seizure, parallel records, fake invoices or concealed purchases

(ii) The invoice-wise reconciliation explaining the alleged ITC difference had already been uploaded as part of the appellant's GSTR-9C / annual return filings and was available on the common GST portal.

(iii) The adjudicating authority accepted that the relevant reconciliation had been disclosed through statutory filings on the portal and, on that basis, held that "non-declaration of facts or information" under Explanation 2 to Section 74 was not established,

(iv) The impugned Order-in-Appeal reverses the Order-in-Original without dislodging the above factual finding that the reconciliation had already been disclosed through GSTR-9C / annual return filings

(v) The impugned Order-in-Appeal also travels beyond the show cause notice by sustaining Section 74 on the materially different basis of alleged nonresponse to audit observation / audit report.

(vi) Non-response to an audit observation or Final Audit Report cannot amount to suppression when the underlying data was already available on the portal and Section 65 does not contemplate a statutory reply to the Final Audit Report.

(vii) A difference between GSTR-2A / Table 8 figures and ITC availed in GSTR-3B cannot, by itself, establish violation of Section 16(2)

(viii) Without prejudice, once Section 74 fails, the demand relatable to FY 2017-18 and FY 2018-19 would be barred by limitation if tested under Section 73, and the demand for FY 2019-20 is similarly arguable on limitation.

(ix) Penalty under Section 74(9) read with Section 122(2)(a) cannot survive in the absence of fraud, willful misstatement or suppression.

(x) Interest is unsustainable both as consequential to an invalid Section 74 demand and, independently, for want of proper utilization -based quantification under Rule 88B(3) read with Section 50(3).

9.0 C.A Unnikrishnan M, appeared for the appellant and argued vehemently reiterating the above grounds of appeal and made a forceful argument to the effect that the impugned Order-in-Appeal deserves to be set aside and the Order-in-Original dropping the demand under Section 74 ought to be restored.

Submissions of the Respondent / Revenue

10.0 Shri Suresh S , learned Joint Commissioner / Authorized Representative appeared for Respondent / Revenue and made the following submissions in defense of the order in appeal:

“Failure to furnish the information to proper officer when called for, tantamount to suppression, as per the Explanation to Section 74 of the CGST Act, 2017.

In the instant case it is evident that the tax payer has availed ITC in contravention of section 16(2) and section 42 (1) of CGST Act 2017. The taxpayer has also failed to reverse the ineligible blocked credit under section 17(1) of the CGST Act. It is the bounden duty of the taxpayer to comply with the statutory provisions on self-assessment basis and disclose the correct information in the statutory return filed by them. By these failures, the tax payer has failed to comply with the statutory obligations cast on him under section 16(2) and section 42(1) of the CGST Act read with the Rules made thereunder. The tax payer has not replied to the audit enquiry as well as the audit report. In view of the above it appears that the taxpayer has availed ineligible ITC and has not provided the correct information in the statutory returns which they were legally mandated to provide in terms of the provisions of the CGST Act and Rules made thereunder and has not furnished the reply to the department when called for and thus suppressed the facts from the department. There was failure on the part of the appellant to avail only the eligible ITC and to reverse the ineligible / blocked credit under section 17 of the CGST Act and to provide the correct information that they were legally mandated to provide in terms of CGST Act and Rules made thereunder and the appellant has also not furnished the reply to the department when called for. The above act of the appellant constitute ‘suppression’ as elucidated under Explanation 2 to section 74 of the CGST Act 2017. Hence the order in appeal is sustainable.

11.0 Written submissions reiterating the above were also filed on 13/8/2026 by Shri Sreekumar B, Assistant Commissioner AR for the Revenue.

Discussions and findings

12.0 We have carefully considered the submissions made by both sides and also perused the records of the case.

13.0 On a careful perusal of the show cause notice dated 20/1/2024 which is the foundational document of the current proceedings, we find that, in page 7 of the SCN an allegation is made to the effect that:

The tax payer has taken the self-assessed ITC in their Electronic Credit Ledger without actually verifying the eligibility thereon. Therefore, it appears that the taxpayer has suppressed the facts to the department, in as much as he has taken ineligible self-assessed ITC in terms Section 42(1) of the Act. Therefore, it appears that the GST amounting to Rs.8,56,877/- being the ineligible credit as detailed above is liable to be disallowed/recovered from them under Section 74(1) of CGST Act, 2017 along with interest in terms of Section 50(3) of the Act. Further, by their act of contravention of the provisions of Section 16 of CGST Act 2017, for suppression of facts, with intent to evade payment of tax, the taxpayer has rendered themselves liable for penalty under Section 74 of the CGST Act, 2017.

14.0 We find that in page 10 of the SCN the following averments are made:

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It is evident that, the taxpayer availed excess Input Tax Credit in contravention of Section 16(2) and Section 42(1) of CGST Act, 2017. Availment of ineligible/excess credit would amount to suppression of facts. The taxpayer availed ineligible/excess ITC with a malafide intention to evade payment of tax. By these failures, the taxpayer has failed to comply with the statutory obligations cast upon him under Section 16(2) and Section 42(1) CGST Act, 2017 read with Rules made thereunder. Accordingly, invoking the provisions of Section 74(1) is justified for demanding the recovery of the ineligible ITC availed by them and for imposing penalty under Section 74(9) of the CGST Act, 2017.

15.0 Our observations after a careful perusal of the SCN are as follows:

No evidence whatsoever has been adduced in support of the contention that the tax payer had taken the ITC without verifying the eligibility thereon. Even if it were established that the tax payer had taken the ITC without verifying the eligibility thereof, in the absence of any statutory presumption to the effect, the mere act of taking of ITC without due verification will not amount to a suppression of facts. As the law stands today, onus is on the department to establish that the tax payer knew that a particular ITC was not eligible, but in a contumacious act, still went ahead and took the credit thereof. We find no such assertion / evidence in support thereof in the SCN. We find that every act of transgression of section 16(2) / 42(1) of the CGST Act cannot be termed as a violation inviting proceedings under section 74 of the CGST Act unless clear and categorical evidence has been adduced to the effect that the said transgression was the result of fraud, or willful-misstatement or suppression of facts with an intent to evade tax. We find that other than certain vague / bald assertions, there is no evidence whatsoever in the SCN warranting the invocation of the provisions of section 74 of the CGST Act against the tax payer.

16.0 We find that the entire SCN has been founded on the questionable assertion that "Availment of ineligible/excess credit would amount to suppression of facts." and the other unproven assertion that "The taxpayer availed ineligible/excess ITC with a malafide intention to evade payment of tax".

17.0 We have also perused the order in original and reproduce the relevant portions thereof:

"*20. Demand of tax for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any willful misstatement or suppression of facts is raised under section 74(1) of CGST Act, 2017. As per explanation 2 to Section 74, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made there under, or failure to furnish any information on being asked for, in writing, by the proper officer.*

21. I see that taxpayer has availed input tax credit in GSTR-3B based on inward supply invoices received from their suppliers and at the end of each financial year they have filed self-certified reconciliation statement in form GSTR-9C, through which they had reconciled the input tax credit, claimed in GST returns with that available in financial statement. They have also uploaded the required documents along with the said form, on the GST portal.

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I do not find any fraud or any willful misstatement or suppression of facts, in this action of taxpayer.

22. Justification for imposition of penalty given in the notice is that the taxpayer availed excess Input Tax Credit in contravention of Section 16(2) and Section 42(1) of CGST Act, 2017 and also the taxpayer has failed to reverse the ineligible/blocked ITC under Section 17 of CGST Act, 2017. These justifications do not appear to be true as it is evident form the returns of the taxpayer that they have reversed the ineligible/blocked credit on the basis of self-assessment. Merely the contravention of section 16(2) and section 42(1) of the Act, cannot be considered the reason for fraud or any willful misstatement or suppression of facts.

23. In view of the fact that "non-declaration of facts or information" as in explanation 2 to Section 74 is not established in the notice, though the noticee is not eligible for the input tax credit in question, I am not inclined to confirm the proposal for demanding the amount under Section 74 of the GST Act or to impose penalty under Section 74. Confirming a demand under Section 74 also invokes the harsh penalty envisaged under this Section, which will be unjust in the given situation. The notice has not left an option to confirm the demand under Section 73 of the Act. Therefore, I drop the demand in the notice."

18.0 From para 21 of the OIO cited above, we find that the OIO has made a categorical finding regarding the bonafide efforts made by the taxpayer towards availing of ITC, in line with the statutory provisions, and on the basis of the above, has arrived at the well-reasoned conclusion that there has been no fraud / willful misstatement /suppression of facts on the part of the tax payer. In para 22 of the OIO, a finding has been recorded to the effect that 'Merely the contravention of section 16(2) and section 42(1) of the Act, cannot be considered the reason for fraud or any willful misstatement or suppression of facts. This is very much in alignment with the views expressed by us in para 15 above, arrived at on the basis of an independent analysis of the impugned SCN .

19.0 We find that the said OIO passed by the Superintendent has, on the basis of a meticulous analysis of the facts and the law, arrived at the legally correct decision that the SCN has invoked the provisions of section 74 without any supporting evidence thereof and is therefore liable to be dropped.

20.0 We would have been heartened if the Revenue had appreciated the efforts of the officer passing the OIO in arriving at an unbiased, legally sound order, based in the true spirit of quasi-judicial adjudication, and accepted the said order in review.

21.0 Unfortunately, what we find is that the Revenue has filed an appeal against the said order on the following new/extraneous grounds which are not found in the Show Cause Notice:

(i) The tax payer has not replied the audit enquiry as well as the final audit report. Hence it appeared that the tax payer availed and has not provided the correct information in the statutory returns which they were legally mandated to provide in terms of the provisions of the CGST Act and Rules made thereunder and has not furnished reply to the department when called fore and thus suppressed the facts from the department.

(ii) We find that raising such additional grounds at the appellate stage is against the fundamental principles of natural justice. On this ground alone the Appellate Authority ought to have rejected the department's appeal.

(iii) Notwithstanding the above, on examination of the fresh grounds sought to be raised by the Revenue at the appellate stage (which are prima facie inadmissible in as much as they do not figure in the SCN) it strains our credulity as to how a failure to reply to the audit enquiry and final audit report would amount to suppression of facts in terms of section 74 of the CGST.

(iv) We find that the appeal filed by the department before the Appellate Authority was an exercise in futility as it did not challenge any of the findings of fact / findings of law on which the adjudication order was founded.

(v) We have also perused the OIA and find that the ratio of the OIA is as follows:
"Failure to furnish the information to proper officer when called for, tantamount to suppression, as per the Explanation to Section 74 of the CGST Act, 2017.
Section 74 ibid, provides for the determination of tax not paid or short paid by reason of fraud or any willful misstatement or suppression of facts.
As per Explanation-2 of Section 74 of the Act: "Explanation 2.-For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."

Based on the above discussions, I find that the grounds of appeal raised by the appellant have merit."

22.0 If the department's appeals left us flummoxed, we must confess that the OIA has done one better and left us totally dumbfounded. On a study of the same, we are constrained to make the following observations:

(i) Firstly, failure to provide information to the proper officer was never a ground in the show cause notice and the OIA by relying on this new ground has transgressed all fundamental principles of natural justice and deserves to be set aside for that reason alone.

(ii) The OIA also does not specify (i) what is the information sought for by the proper officer (ii) when it was called for and (iii) under what provision of the statute. We find that the OIA in this respect is delightfully vague.

(iii) We also find that except for the above vague assertions on a charge which was not part of the original show cause notice, the OIA has not put forth even an iota of evidence as to how and why the charge of suppression is found to be sustained against the appellant.

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23.0 At the cost of repetition, we observe that the OIA has not discussed / refuted the following findings of the Adjudicating Authority in the OIO:

(i) The present proceedings arise only from statutory return data, GSTR-2A / Table 8 figures, GSTR-3B and GSTR-9C reconciliation records, and not from search, seizure, parallel records, fake invoices or concealed purchases.

(ii) The invoice-wise reconciliation explaining the alleged ITC difference had already been uploaded as part of the appellant's GSTR-9C / annual return filings and was available on the common GST portal.

(iii) The relevant reconciliation had been disclosed through statutory filings on the portal and, therefore, on that basis, held that "non-declaration of facts or information" under Explanation 2 to Section 74 was not established,

We find that in view of the above, the impugned Order-in-Appeal suffers from non-application of mind on the part of the Appellate Authority.

24.0 In this connection, we find that the learned Counsel for the Appellant has cited the Instruction No. 05/2023-GST dated 13/12/2023 communicated vide F. No. CBIC-20004/3/2023-GST by the Principal Commissioner, GST Policy Wing, addressed to all field formations and we reproduce the relevant portions of the said Instruction:

> *3.2 .....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 willful 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 willful 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 willful 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.

25.0 We find that the present show cause notice which was issued on 20/2/2024 (much after the issue of the Board's binding instructions as above) fails all the tests as laid down in the said Instruction of the Board, in as much as:

The SCN is not based on any investigation worth the name.

No material evidence of fraud / willful misstatement / suppression of facts to evade tax has been indicated.

26.0 We find that willful misstatement / suppression of facts is a necessary ingredient which has to be alleged and established by way of evidence in order to invoke section 74 of the CGST Act. Our finding in the above respect is based on the law as laid down by the honorable Supreme Court in the context of similar words / phrases in the of the Central Excise Act, 1944. In this context we reproduce the decisions of the honorable Supreme Court, cited by the assessee in their defense.

(i) 1995 (75) E.L.T. 721 (S.C.) [06-09-1994] - COSMIC DYE CHEMICAL Versus COLLECTOR OF CENTRAL EXCISE, BOMBAY

……..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 mis-statement or suppression of facts are concerned, they are clearly qualified by the word "willful" preceding the words "mis-statement 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 mis-statement of fact, which is not willful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be willful

(ii) 2007 (215) E.L.T. 489 (S.C.) [30-08-2007] - COMMISSIONER OF C. EX., NAGPUR Versus BALLARPUR INDUSTRIES LTD.

It was held that the word "suppression" in Section 11A of the 1944 Act is accompanied by the words "fraud" or "collusion" and, therefore, the word "suppression" should be construed strictly. That, mere omission to give correct information did not constitute suppression unless that omission was made willfully in order to evade duty. That, suppression would mean failure to disclose full and true information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party would not constitute suppression. That, an incorrect statement cannot be equated with a

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willful mis-statement. The latter implies making of an incorrect statement with the knowledge that the statement made was not correct.

27.0 To sum up our findings in the instant case:

(i) We find that the show cause notice itself did not make out any case for the invocation of section 74 of the CGST Act.

(ii) The Adjudicating Authority did a commendable job of separating the grain from the chaff and based on correct appreciation of facts and law made a clear and correct determination that section 74 of the CGST Act was not invocable in the instant case.

(iii) The review order of the Commissioner did not provide any worthwhile grounds for challenging the order in original.

(iv) The Order In Appeal vitiated the fundamental principles of natural justice by relying on a ground not found in the Show Cause Notice. The Order-in-Appeal also reversed the Order-in-Original without discussing / dislodging the factual findings in the OIO to the effect that the reconciliation had already been disclosed through GSTR-9C / annual return filings.

(v) We therefore find that for the above reasons, the Order in Appeal is not sustainable.

28.0 In view of the above findings, we answer both the questions framed for decision in para 1 above in the negative and hold that:

In the absence of any other evidence to the contrary, the mere act of the tax payer in taking ineligible self-assessed ITC in their Electronic Credit Ledger in terms of section 42(1) of the CGST Act would not amount to suppression of facts before the department, which would fall within the scope of section 74(1) of the CGST Act. In the

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absence of any other evidence to the contrary, mere failure to reply to the audit enquiry / final audit report by the tax payer would not amount to suppression of facts in terms of section 74 of the CGST Act , 2017.

29.0 In view of the above, the impugned Order in Appeal is set aside and the appeals are allowed, with consequential relief.

(Order pronounced in open court)

Subramanya V Rayaprol
Vice-President

Ramamoorthi Sriram
Member (Technical)

Dated: 21.08.2026

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