RRR,J & HN,J
W.P.No.25826/2023

IN THE HIGH COURT OF ANDHRA PRADESH

***

+W.P.No.25826 of 2023

Between:

M/s. Sriba Nirman Company,
Rep. by Shri Chaparala Venkata Naga Murali Krishna,
Its Managing Partner, D.No.78-14-20,
Syamalanagar, Rajahmundry,
Andhra Pradesh – 533 103

… Petitioner

AND

$ 1. The Commissioner (Appeals), Guntur, Central Tax & Customs, Sub-office @ Visakhapatnam, 4th Floor, Customs House, Prt Area, Visakhapatnam.
2. The Joint Commissioner of Cntral Tax, Visakhapatnam Central GST Commissionerate, GST Bhavan, Port Area, Visakhapatnam.
3. The Joint Cirector, Directorate General of GST Intelligence, Visakhapatnam Zonal Unit, Door NO.28-14-17, Suryabagh, Beside Melody Theatre, Visakhapatnam.
4. The Assistant Commissioner (ST), Aryapuram Circle, Rajahmahendravaram.

... Respondents

Date of Judgment pronounced on : 29-01-2025

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

And

HON'BLE SRI JUSTICE HARINATH. N

1. Whether Reporters of Local newspapers May be allowed to see the judgments? : Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals: : Yes/No

3. Whether The Lordship wishes to see the fair copy Of the Judgment? : Yes/No

***IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI**

*** HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO**

And

HON'BLE SRI JUSTICE HARINATH. N

+ W.P.No.25826 of 2023

% Dated:29-01-2025

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M/s. Sriba Nirman Company,
Rep. by Shri Chaparala Venkata Naga Murali Krishna,
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4. The Assistant Commissioner (ST), Aryapuram Circle, Rajahmahendravaram.

... Respondents

! Counsel for Petitioner : Sri V. Raghu Ram, Sr. Counsel
For Sri Anil Kumar Bezawada

^Counsel for Respondents 1 to 3 : Smt. Santi Chandra S.C.

^Counsel for Respondent No.4 : G.P. for Commercial Tax

<GIST :

>HEAD NOTE:

? Cases referred:

1. 2012 (26) STR 3 (Kar)
2. 2017 (7) GSTL 142 (AP)
3. 2013 (288) E.L.T. 161 (SC)

APHC010498482023

IN THE HIGH COURT OF ANDHRA PRADESH
AT AMARAVATI **[3488]**
(Special Original Jurisdiction)

WEDNESDAY, THE TWENTY NINTH DAY OF JANUARY
TWO THOUSAND AND TWENTY FIVE

PRESENT

THE HONOURABLE SRI JUSTICE R RAGHUNANDAN RAO

THE HONOURABLE SRI JUSTICE HARINATH.N

WRIT PETITION NO: 25826/2023

Between:

Sriba Nirman Company **...PETITIONER**

AND

The Commissioner Appeals and Others **...RESPONDENT(S)**

Counsel for the Petitioner:

1. ANIL KUMAR BEZAWADA

Counsel for the Respondent(S):

1. SANTHI CHANDRA (Jr. Standing Counsel for CBIC)
2. GP FOR COMMERCIAL TAX
3.

The Court made the following Order:

(per Hon'ble Sri Justice R. Raghunandan Rao)

Heard Sri V. Raghu Ram, learned Senior Counsel representing Sri Anil Bezawada, learned counsel appearing for the petitioner, Smt. Santi Chandra, learned Standing Counsel appearing for respondents 1 to 3 and learned Government Pleader for Commercial Tax appearing for the 4th respondent.

2. The facts in the present case, as stated by the petitioner, are as follows:

a) The petitioner is a partnership firm, established in January 2017 and carrying on the business of a works contractor, which is executing infrastructure based Engineering Procurement Construction contracts. The petitioner registered itself under the GST Act. The primary and main business of the petitioner, for the relevant period from July, 2017 to March 2018, was the execution of works, as a sub-contractor, for one M/s. Vijay Nirman Company Ltd.

b) The petitioner raised nine invoices with an aggregate value of Rs.20,92,02,422/-. These invoices, were inclusive of GST of Rs.3,19,12,234/-. The said invoices were raised in the month of March, 2018.

c) The petitioner, though paid certain amounts, by M/s. Vijay Nirman Company Ltd., was unable to pay GST as the payments received from M/s. Vijay Nirman Company Ltd., were not sufficient even for executing the works awarded by it. As the GST portal, does not accept filing of returns, unless

accompanied by payment of tax, the petitioner was unable to file the GSTR-3B returns within the statutory time limit.

d) On 31.07.2018, the principal place of business of the petitioner was inspected, by the DGGI officers, on the authorization given by the Joint Director, DGGI, Visakhapatnam Zonal Unit, Visakhapatnam. In the course of the said inspection, the officers had seized certain documents and records and had also recorded the statement of the Managing Partner of the petitioner. At that stage, the petitioner, having realized its mistake of non-filing of GST returns and non-payment of GST, had taken steps to deposit necessary tax. The petitioner, in four installments, between 31.07.2018 to 29.09.2018, had deposited a sum of Rs.3,36,51,468/- and also filed all the pending GSTR-3B's for the financial year 2017-2018 by 29.09.2018.

e) After these payments had been made and after the returns had been filed, the 3rd respondent issued a show cause notice, dated 21.08.2020, calling upon the petitioner to pay tax liability, (which had already been paid, as shown above) interest and penalty. Thereafter, the 3rd respondent again issued a show cause notice, dated 03.09.2020, to show cause as to why a tax amount of Rs.3,19,12,233/- payable under the CGST, SGST and IGST Acts, should not be demanded; the payments made by the petitioner to the tune of Rs.3,19,12,233/- earlier, should not be adjusted against such a demand; interest at the applicable rates, under Section 50 of the CGST and corresponding Sections of CGST, SGST and IGST Acts, should not be

demanded; penalty equivalent to the output tax mentioned above, should not be imposed under Section 122(1) read with Section 74(1) of the CGST Act, 2017 for contravention of CGST, SGST and IGST Acts. Penalty under Section 122 (2) and (b) of the CGST Act, 2017 and corresponding Sections of CGST, SGST and IGST Acts; penalty under Section 122(3) (d) of the CGST Act and corresponding Sections of CGST, SGST and IGST Acts; penalty under Section 125 of the CGST Act, 2017 and corresponding Sections of CGST, SGST and IGST Acts; and late fee under Section 47 of the CGST Act, 2017 and corresponding Sections of CGST, SGST and IGST Acts.

f) The petitioner filed a detailed reply on 23.09.2021 to these show cause notices and also availed a personal hearing, on 23.09.2021 itself. The 2nd respondent confirmed the demand, raised in the show cause notice, by way of an order, dated 24.12.2021. Aggrieved by the same, the petitioner had approached the 1st respondent, by way of an appeal, on 05.05.2022. The 1st respondent, after considering the submissions made by the petitioner, upheld the penalty imposed under the original order. Thereafter, the 4th respondent issued a notice dated 19.08.2023, demanding payment of Rs.3,20,72,233/- failing which recovery action would be initiated under Section 79 of the CGST Act, 2017.

3. The petitioner being aggrieved by these proceedings, has approached this Court challenging the appellate order of the 1st respondent, dated 26.07.2022, upholding penalty under Section 74 of the GST Act, along

with other penalties imposed in the original order of the 2nd respondent dated 24.12.2021.

4. Sri V. Raghuram, learned Senior Counsel representing Sri Anil Bezawada, learned counsel appearing for the petitioner, assails the impugned orders, essentially on three grounds:

a) The provisions of Section 74 (5) of the GST Act, 2017 could not have been invoked merely on the ground that the petitioner had not paid pending GST taxes till the visit of the tax authorities on 31.07.2018. Such non-payment cannot be treated to have been done by way of fraud or that there was wilful misstatement or suppression of facts to evade tax.

b) Section 74 of the GST Act can be invoked only where payment of tax had not been made before issuance of show cause notice under Section 74. In the present case, payments of all taxes had been completed by September 2018 itself whereas the show cause notice was issued on 03.09.2020, which is almost two years after the payment of the tax. As such, the necessary jurisdictional facts, to invoke Section 74 are not available.

c) The last date for filing of annual returns and payment of any tax dues would actually be 07.02.2022, by virtue of Section 44 of the CGST Act, and the relevant circulars and proceedings. The question of non-payment of taxes would arise only after that date.

5. The learned Government Pleader for Commercial Tax contends that none of the aforesaid contentions can be raised, in as much as, the factual matrix, necessary for raising such contentions, is absent in the present case. The learned Government Pleader for Commercial Tax would contend that Sections 37 to 39 of the CGST Act, read with necessary Rules, requires the registered dealers under the GST regime, to submit returns on a monthly basis, which is on or before the 20th day of the month succeeding the said tax period. The contention of the petitioner that non-filing of monthly returns cannot be treated as suppression of facts, till the due date of the filing of the annual returns, is not acceptable, in as much as, the non-filing of monthly returns and non-payment of tax along with such monthly returns would amount to contravention of the provisions of Section 37 of the CGST Act and consequently, would also amount to suppression of fact and evasion of tax.

Consideration of the Court:

6. Section 37 of the CGST Act, which is *in pari materia* with the corresponding provision under the APGST and IGST Act, read with Sections 38 and 39, stipulates that every registered person, is required to furnish a return electronically of inward and outward supplies of goods and services or both, input tax credit available, tax payable, tax paid, and such other particulars, in the prescribed format, for every calendar month or part thereof, within 10 days of the expiry of the said month. Section 44 also requires an annual return to be filed by every registered person, within such time and

format as may be prescribed. The prescribed time, for the purpose of this case, would be till 07.02.2020.

7. In the event of non-filing of returns and non-payment of tax, the CGST Act provides for certain penalties. These penalties are under Section 73, 74, 122 of the Act. Apart from this, interest can be levied for delayed payment, under Section 50 of the CGST Act.

8. Sri V. Raghuram, learned Senior Counsel, contends that the annual returns had been filed, by the petitioner, for the relevant period, within the time stipulated under Section 44 of the CGST Act, and that the necessary tax had also been paid by the said date. He would contend that such filing of return and payment of tax is sufficient compliance of the requirement of CGST Act and as such the question of invoking the penal provisions of either Section 73 or Section 74 or Section 122 of the CGST Act would not arise. He would further submit that as far as the interest payable under Section 50 of the CGST Act is concerned, necessary interest of Rs.25,49,481/- was paid, on 20.07.2022, by way of debiting the same in the electronic cash ledger of the petitioner.

9. There is no dispute between the petitioner and the tax authorities that a sum of Rs.3,19,12,233/- is the tax liability of the petitioner under the CGST, SGST and IGST Acts. There is also no dispute that this amount had been paid. The petitioner also does not appear to dispute the fact that a sum

of Rs.25,49,481/- is payable in terms of interest payable under Section 50 of the Act and that the same has been paid.

10. The primary dispute is on the question of whether penalty under Section 74(1) of the CGST Act can be levied, along with the other penalties, on the petitioner.

11. Section 74 of the CGST Act, reads as follows:

> **74. 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 wilful-misstatement or suppression of facts.—** (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, 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 utilized 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.
>
> (2) The proper officer shall issue the notice under sub-section (*1*) at least six months prior to the time limit specified in sub-section (*10*) for issuance of order.
>
> (3) Where a notice has been issued for any period under sub-section (*1*), the proper officer may serve a statement, containing the details of tax not paid or short paid or

erroneously refunded or input tax credit wrongly availed or utilized for such periods other than those covered under sub-section (*1*), on the person chargeable with tax.

(4) The service of statement under sub-section (*3*) shall be deemed to be service of notice under sub-section (*1*) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (*1*) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (*1*), 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.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (*1*), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (*5*) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (*1*) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (*1*) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five percent of such tax within thirty days of issue of the notice,

all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (*9*) within a period of five 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 utilized relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (*9*) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation 1.—For the purposes of section 73 and this section,—

(i) the expression —all proceedings in respect of the said noticeǁ shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.

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.

12. The provisions of Section 73 (2) to (11) may not be relevant for the purposes of this case. However, Section 73(1) has to be considered.

73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any wilful-misstatement or suppression of facts.—
(*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 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 utilized 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.

13. Under Section 74 (1) of the Act, a penalty, equivalent to the tax, is leviable, where a tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilized (for purposes of

brevity the said scenario is being referred to as the " non payment of tax"). Similarly, under Section 73 (1) read with Section 73 (9) a penalty, equivalent to 10% of the tax not paid or Rs.10,000/-, whichever is higher, can be levied.

14. The differentiation, between invocation of Section 73 and the invocation of section 74, is on the basis of the circumstances in which such tax has not been paid. Section 74 is to be invoked where non-payment of tax occurs on account of fraud, wilful misstatement or suppression of facts for the purpose of evading tax. Where non-payment or short payment is for reasons other than the aforesaid reasons set out under Section 74, the provisions of Section 73 of the GST Act would be applicable.

15. The learned Senior Counsel relied upon the judgments in **CCE vs. Adecco Flexione Workforce Solutions Ltd.,[1]; Commissioner of Central Excise, Viskahaptanam vs. Tirupathi Fuels Pvt. Ltd.,[2]; Uniworth Textiles Ltd., vs. CCE [3];** and **CBIC Instruction 05/2023, dated 13.12.2023**, to explain the scope of Section 74 of the Act.

16. The learned Senior Counsel relied upon paragraph-3 of **CCE vs. Adecco Flexione Workforce Solutions Ltd.,** which reads as follows:

> 3. Unfortunately, the assessing authority as well as the appellate authority, seem to think, if an assessee does not pay the tax within the stipulated time and regularly pays tax after the due date with interest. It is something which is

[1] 2012 (26) S.T.R. 3 (Kar)
[2] 2017 (7) GSTL 142 (AP)
[3] 2013 (288) E.L.T. 161 (S.C)

> not pardonable in law. Though the law does not say so, authorities working under the law seem to think otherwise and thus they are wasting that valuable time in proceeding against persons who are paying service tax with interest promptly. They are paid salary to act in accordance with law and to initiate proceedings against defaulters who have not paid service tax and interest in spite of service of notice calling upon them to make payment and certainly not to harass and initiate proceedings against persons who are paying tax with interest for delayed payment. It is high time, the authorities will change their attitude towards these tax payers, understanding the object with which this enactment is passed and also keep in mind the express provision as contained in sub-sec. (3) of Sec. 73. The Parliament has expressly stated that against persons who have paid tax with interest, no notice shall be served. If notices are issued contrary to the said Section, the person to be punished is the person who has issued notice and not the person to whom it is issued. We take that, in ignorance of law, the authorities are indulging in the extravaganza and wasting their precious time and also the time of the Tribunal and this Court. It is high time that the authorities shall issue appropriate directions to see that such tax payers are not harassed. If such instances are noticed by this Court hereafter, certainly it will be a case for taking proper action against those law breakers."

17. However, this is a case where the assessee had paid both service tax and interest for delayed payments before the issue of a show cause notice under the Act. The Court relying upon the provisions of sub-section (3) of Section 73 of the Finance Act, 1994, which stipulates that no

notice can be issued after the payment of service tax and interest, had made the afore said observations.

18. The learned Senior Counsel relied upon **Commissioner of Central Excise, Visakhapatnam vs. Tirupathi Fuels Pvt. Ltd.** In this case, the assessee, after the authorities had found that the assessee had not filed the returns or paid the tax, had sought to levy penalty on the assessee. However, the assessee paid the service tax and interest before any show cause notice could be issued. The argument before the Hon'ble High Court was that the penalty could not have been levied, in view of the fact that Section 78 prohibits initiation of any penalty proceedings, if tax and interest had already been paid. The Hon'ble High Court, in terms of the specific language of Section 73(3) of the Finance Act, 2015, had held in favour of the assessee. However, the language of Section 73(3) stipulated that no penalty could be levied if the service tax payable, had been paid by the assessee on his own verification or on the basis of tax ascertained by a Central Excise Officer. In this case, the statute itself stipulated that the assessee can escape payment of penalty, if he pays the unpaid tax, even after the authorities find out about the non-payment of tax, if such payment is made before the notice is issued. The language in Section 73 and 74 of the GST Act does not provide for any such situation.

19. The learned senior counsel relies upon **Uniworth Textiles Ltd., vs. CCE**. More specifically, paragraph-12 of the said judgment, which reads as follows:

> **12.** We have heard both sides, Mr. R.P. Bhatt, learned Senior Counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned Senior Counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. The conclusion that mere non-payment of duties is equivalent to collusion or wilful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which a limitation period of six months may apply. In our opinion, the main body of the section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso.

20. In this case, the assessee, had procured furnace oil for running the captive power plant of a sister unit, which was supplying electric energy to the assessee. The purchase of furnace oil was exempted from payment of customs duty on the basis of a notification which stated that customs duty was exempted on goods, which are used for manufacture etc., of goods, which are exported. At one stage, on account of certain difficulties, the sister concern was unable to supply electric power and the assessee obtained such power from another unit by supplying furnace oil to the said unit. The revenue took

the view that the claim of exemption from customs duty of such furnace oil was not permissible and sought to penalize the assessee for such purpose. In that situation, the Hon'ble Supreme Court made the aforesaid observations.

21. Apart from the judgments, cited by the learned Senior Counsel, it may be appropriate to consider the scope of section 74, on the plain language of the provision. At the cost of repetition, the relevant part of section 74(1) reads as follows:

> 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,

22. Non-payment of tax, would attract penalties, under Section 74 (1), in three circumstances. The first two circumstances are fraud and wilful mis-statement. Both these require an intention to evade tax by unfair or illegal means. The third circumstance is suppression of fact, which is also defined, in Explanation-2, as non-declaration of relevant information. In view of the collocation of the terms, before this term, and in view of the requirement, under the two earlier terms of *mens rea*, the term "suppression of facts" would have to be read as wilful or deliberate suppression of fact, for evading tax. The term "evade" puts this issue beyond controversy, as this term means that the suppression must be for the purpose of evasion, which clearly requires intention and *mens rea*.

23. The learned Senior Counsel relied upon the instructions of CBIC, which came to be issued on the basis of the directions of the Hon'ble Supreme Court in the case of Northern Operating Systems Private Limited (Nos) **Instruction No.5/2023-GST (F.No.CBIC-20004/3/2023-GST), Dated 13.12.2023**, while considering Section 74(1) of the CGST Act, stated as follows:

> **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 misstatement 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 misstatement 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."

24. There can be no quarrel with this view relating to Section 74(1) of CGST Act. Every non-payment of tax cannot be treated as evasion of tax by way of fraud, wilful misstatement or suppression of facts. Every case needs to be looked into for ascertaining whether necessary evidence of fraud, wilful misstatement or suppression of fact, for the purpose of evading tax, is

available in the record and whether such material has been demonstrated before the authority.

25. Though Section 74 provides for a penalty of 100% of the tax not paid, the said provision itself provides for reduction of such liability. This liability can be reduced, by the tax payer, if he accepts that there was non-payment of tax, on account of any of the three circumstances set out In section 74 (1), and voluntarily pays tax, interest and penalty, as per the provisions of Section 74. The following table sets out the payments that need to be made:

Section	**Point of time of payment**	**Tax and penalty**
Section 74(5)	Before service of notice	Tax along with interest under Section 50 and penalty equivalent to 15% of such tax.
Section 74(8)	Within 30 days of issue of notice	Tax along with interest under Section 50 and penalty equivalent to 25% of such tax
Section 74(11)	Within 30 days of communication of the order under Section 74(9)	Tax along with interest under Section 50 and penalty equivalent to 50% of such tax

26. The scheme, under section 74, appears to be in the nature of a permanent amnesty/settlement/compunding scheme, where the tax payer, liable to pay penalty under Section 74, is given an opportunity to voluntarily accept wrong doing and reduce the penalty that would be payable. In such

circumstances, the contention of the Petitioner, that action can not be taken, under section 74, against him may have force. However, this issue is not being decided as the petitioner does not meet the requirements of section 74 (5). This provision, read with Section 74(6), as extracted above, sets out that the proper officer cannot issue a notice, under sub-section (1) of Section 74, where the person chargeable with tax, has already paid the tax and the interest payable under Section 50 and penalty equivalent to 15% of such tax even before the issuance of notice. While the petitioner had paid the tax prior to the issuance of notice under Section 74(1) of the CGST Act, the interest payable under section 50, was paid after the notice had been issued. Further penalty of 15% was not paid.

27. In that context, the contention of the learned Senior Counsel that a notice under Section 74 could not have been issued as the tax had been paid prior to the issuance of the notice would have to be rejected.

28. The next contention of the learned Senior Counsel was that, non-filing of tax returns and non-payment of tax, could not have been invoked against the petitioner, as the petitioner had time, up to 07.02.2020, to file the annual returns under Section 44. This contention, however, side steps the requirement to file monthly returns along with payment of tax under Section 37 to 39 of CGST Act. Section 39 of the Act, read with Rule 61(1) of the CGST Rules, requires registered persons, like the petitioner, to file returns, in form GST3B, for each month, on or before the twentieth day of the month

succeeding such month. Rule 61 (2) of the CGST Rules requires the person, filing GSTR-3B returns, to clear the taxes due under such returns. The affidavit filed, in support of the writ petition, by the managing partner of the petitioner, himself states that the GSTR-3B returns had not been filed, though they needed to be filed. In the light of these pleadings, the contention of the learned Senior Counsel would have to be rejected. It must be held that non-filing of monthly returns and non-payment of GST along with such monthly returns, subject to the requirement of making out a case of fraud, wilful misstatement or suppression of fact, would be sufficient for invoking Section 74 of the CGST Act.

29. In the present case, there has been a failure, on the part of the petitioner, in filing the monthly returns and making payment of tax under the said monthly returns. This may not amount to fraud or misstatement. Explanation-2 to Section 74 states that suppression, for the purpose of the Act, would mean non-declaration of facts or information which is required to be declared in the returns, statement or report or any other document which needs to be furnished under the Act. To that extent, non-filing of the monthly return would amount to suppression of fact. However, the requirement under Section 74 is not fulfilled on mere suppression of fact. The said suppression of fact would have to be wilful suppression of facts.

30. The petitioner herein has neither filed the monthly returns nor made the necessary payments of tax. The defense of the petitioner is that his

sole client, viz., M/s. Vijay Nirman Company had not paid its dues, due to which the petitioner could not remit the necessary taxes along with returns. The appellate authority held that the petitioner had been paid certain amounts by his main client M/s. Vijay Nirman Company and as such, there was no impediment for the petitioner to remit the necessary taxes. On this basis, the appellate authority held that there was wilful suppression and upheld the penalty. In such a situation it is difficult to accept the contention, of the petitioner, that there was no wilful intention to suppress facts or the turnover of the petitioner and the requirement to pay tax. The other penalties levied against the petitioner are natural corollaries of the above finding and do not require any further consideration.

31. Consequently, the writ petition fails and the same is dismissed. There shall be no order as to costs. As a sequel, pending miscellaneous petitions, if any shall stand closed.

R RAGHUNANDAN RAO, J

HARINATH.N, J

Js.

THE HON'ABLE SRI JUSTICE R RAGHUNANDAN RAO

AND

THE HON'BLE SRI JUSTICE HARINATH. N

WRIT PETITION No.25826 of 2023

(per Hon'ble Sri Justice R Raghunandan Rao)

29th January, 2025

Js