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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 14120/2024

M/S NETGEAR TECHNOLOGIES INDIA PVT LTD .....Petitioner

Through: Mr. Ashwini Chandrasekaran, Ms. Priyanka Rathi and Ms. Shubhangi Gupta, Advs.

versus

THE COMMISSIONER CGST KAROL BAGH DIVISION GST DELHI NORTH & ANR. .....Respondents

Through: Mr. Anurag Ojha, SSC with Mr. Subham Kumar and Mr. Dipak Raj, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

O R D E R

% 17.03.2025

1. This writ petition has been preferred seeking the following reliefs:

> "(i) Issue a writ of Certiorari or any other appropriate writ, order, or direction, to quash the Impugned Demand-cum-Show Cause Notice No. 13/2023-24 dated August 03, 2024, issued by the Ld. Assistant Commissioner, CGST, Karol Bagh Division, New Delhi, i.e. Respondent No. 2, for the period October 2017 to March 2018;
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> (ii) Issue a writ of Mandamus or any other appropriate writ, order, or direction, directing the Respondents to follow and abide by the OIA and decision of this Hon'ble Court dated May 18, 2023;
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> (iii) Direct the Respondents to refrain from initiating any further action/recovery proceedings against the Petitioner in respect of the refund granted for the relevant period;
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> (iv) In the interim, to keep the proceedings initiated vide the Impugned Demand-cum-Show Cause Notice No. 13/2023-24 dated

August 03, 2024, in abeyance till the disposal of the present petition;

(v) To issue order(s), direction(s), writ(s) or any other relief(s) as this Hon'ble Court deems fit and proper in the facts and circumstances of the case and in the interest of justice;

(vi) To award costs of and incidental to this application be paid by the Respondent;

(vii) Pass any other order(s) as this Hon'ble Court may deem fit and more appropriate in order to grant relief to the Petitioner."

2. We had, in our order dated 07 October 2024, flagged the principal issue which arises in the following words:

> "1. Prima facie and on hearing learned counsels for parties, we find ourselves unable to sustain the impugned Show Cause Notice ["SCN"] bearing in mind the Order-in-Appeal dated 09 March 2021 and which has at least, subject to whatever orders that may be passed by the Goods & Service Tax Appellate Tribunal, upheld the stand of the writ petitioners that the services rendered amounted to an export of service and that it was not an intermediary."

3. It becomes relevant to note that the Court in **M/s Netgear Technologies India Private Limited v. The Assistant Commissioner GST Delhi East Commissionerate**[1], while disposing of an earlier writ petition filed by the petitioner had held that since the respondent-Department had not taken any steps to obtain a stay against the Order-in-Appeal dated 09 March 2021, the petitioner would be entitled to a refund in terms of the said appellate order. It held that the respondent cannot simply ignore an appellate order and refuse benefits merely because it intends to challenge it in the future. Further observing that the petitioner had already been deprived of the benefits under this order for more than two years, the Court held as follows:

> "6. Mr. Harpreet Singh, learned Counsel for the respondent, submits that the same is for the reason that the Appellate Tribunal has not

[1] W.P.(C) 10461/2022 dated 18 May 2023

been constituted. Thus, although the Revenue intends to file an appeal under Section 112 of the Central Goods and Services Tax Act, 2017, it has been unable to do so.

7. Concededly, the respondent has taken no steps to secure any order with regard to the stay of the Order-in-Appeal pursuant to which the petitioner is now entitled to the claim of refund. We are unable to accept that the Revenue can ignore the Order-in-Appeal and deny the benefits of the same on the ground that it seeks to appeal the said order. In the present case, the petitioner has been denied the benefit of the order in its favour for over two years. Clearly, the same cannot be countenanced.

8. The said issue is also covered by an earlier decisions of this Court in Zones Corporate Solutions Pvt. Ltd. v. Commissioner of Central Goods & Services Tax Delhi East & Anr.: 2020-VIL-302-DEL:W.P.(C) 3620/2020 and Alex Tour and Travel Private Limited v. Assistant Commissioner, CGST, Division-Janakpuri: 2023-VIL-284-DEL: W.P.(C) 5722/2023.

9. In view of the above, the present petition is allowed. The respondent is directed to disburse the petitioner's claim for refund with applicable interest as expeditiously as possible and, in any event, within a period of four weeks from today.

10. It is clarified that this would not preclude the respondents from availing the remedies as available in law.

11. Needless to say, if the Revenue prevails in upsetting the Order-in-Appeal dated 09.03.2021, it would also be entitled to recover the amount as disbursed."

4. Bearing in mind the above, we have no doubt that the respondents were liable to disburse the refund pursuant to the Order-in-Appeal dated 09 March 2021 for the tax period of October 2017 to March 2018. Subsequently, and by virtue of an order dated 25/26 July 2023, the respondent sanctioned the refund in terms of the aforenoted orders.

5. However, by way of the impugned **Show Cause Notice**[2] dated 03 August 2024, and which takes note of the earlier proceedings that

[2] SCN

had culminated in the Order-in-Appeal dated 09 March 2021 as well as the claim for refund flowing therefrom coming to be affirmed by this Court, the respondents have once again initiated proceedings for the same tax period of October 2017 to March 2018.

6. It becomes relevant to note that the SCN issued under Section 74 of the **Central Goods and Services Tax Act, 2017**[3] fails to lay in place any clear allegations of collusion, misstatement or wilful suppression of facts. It rather rests on the allegation that the sanction of refund appears to be erroneous in light of the incorrect conclusion that the activities undertaken by the petitioner amounted to an export of services. The SCN, as would be evident from the extract which appears below, only baldly alleges that the petitioner misstated and suppressed facts leading to the passing of the order by the appellate authority:

> "**Invocation of Section 74 of the CGST Act, 2017:**
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> The taxpayer had filed refund application Vide **ARN No. AA0703180058923X dated 15.04.2019 on the ground of "Exports of Goods/Services without payment of IGST"** which was rejected by the then Asst. Commissioner, CGST Division Nehru Place, New Delhi. Further the applicant filed an appeal before the Joint Commissioner, CGST, Appeals-1, Delhi. The appeal was allowed in favor of the applicant vide OIA No. 51/JC/Central Tax/Appl-1/Delhi/2019 dated 09.03.2001 and hence the applicant filed the instant refund claim on 27.04.2021 amounting to Rs. 26,88,280/- before the Asst. Dy. Commissioner of CGST Division Nehru Place, Delhi EAST Commissionerate under the category **"on account of Assessment/ Provisional Assessment/ Appeal/ any other order"**. The aforementioned OIA was reviewed by the then Commissioner, CGST Delhi East with the direction to file appeal against this OIA before GST Tribunal after its formation to safeguard government revenue. Meanwhile the petitioner changed its PPoB to CGST South. The applicant filed a writ petition before the Hon'ble High

[3] Act

Court of Delhi praying to issue direction to department to grant refund amount alongwith the applicable interest. Hon'ble High Court allowed the petition tin WP(C) 10461/2022. The applicant again filed the refund claim vide ARN AA070230672538 dated 21.07.2003 under the category of **"On Account of Assessment/ Provisional Assessment/ Appeal/ Any other order."** The same was sanctioned under Section 54 of the CGST Act, 2017 on 26.07.2023 in pursuance of High Court decision in WP(C) 10461/2022.

As is evident from the discussion above in para 4, the supply provided by applicant is not export of services, and therefore, the refund is not eligible since place of supply is India. Since the supply provided by the applicant cannot be considered as an export of services in terms of Section 2(6) of CGST Act 2017, therefore the taxpayer was not eligible for claiming refund of accumulated ITC under Section 54.

In the regime of self-assessment and voluntary compliance, the onus is on the taxpayer to declare the nature of its supply and transactions truthfully. In the instant case, it appears that the taxpayer has misstated facts and suppressed facts from the department to claim refund of accumulated ITC by treating the supplies made as export. It appears from the discussion above that as per the service agreement, the Place of supply is in India and the nature of supply is of intermediary services and not export. However, the taxpayer declared the supply as export and filed refund under Section 54 of CGST Act. As mentioned above, the refund was initially rejected vide Order dated 22.05.2019. However, in pursuance of High Court Order following the Writ Petition filed by the taxpayer, the refund was sanctioned vide Order dated 26.07.2023.

From the above, it appears that the refund sanctioned to the claimant is erroneous and liable to recovered by invoking Section 74.

In the present case, it therefore, appears that Refund application filed by the assessee vide ARN AA0707230672538 dated 21.07.2023 for Rs.26,88,280/- on account of *'On Account of Assessment/ provisional Assessment/ Appeal/ Any other order'* sanctioned under Section 54 of the CGST Act, 2017 alongwith interest amounting to Rs. 5,04,439/- vide Refund Order No. ZF0707230369755 dated 26.07.2023 was erroneously refunded and are liable to be recovered from the assessee along with applicable interest and penalty as per Section 50 and Section 122 of the CGST Act, 2017. "

7. As is manifest from a reading of the impugned SCN, it merely observes that the petitioner wrongfully claimed a refund by misrepresenting that the transactions in question would constitute an export of services. The Department asserts in the SCN that the services provided by the petitioner were intermediary services with the place of supply being in India and thus disentitling it from claiming a refund.

8. However, it becomes pertinent to note that the SCN carries no specific allegation of fraud, wilful misstatement or suppression against the petitioner. We are thus of the firm view that absent the same, the jurisdiction assumed by the respondent under Section 74 is clearly erroneous and untenable. A Division Bench of this Court in **Parity Infotech Solutions (P) Ltd. v. State (NCT of Delhi)**[4] had held that a SCN under Section 74 can only be issued when the proper officer has specific reasons to believe that tax had been short-paid, not paid, erroneously refunded or Input Tax Credit had been wrongly availed or utilized due to fraud, wilful misstatement or suppression of facts to evade tax.

9. It is pertinent to note that Section 74 uses the expression *"by reason of"* and thus being indicative of the power conferred by that provision being liable to be invoked only if it be found that the assessee had indulged in acts constituting fraud, wilful misstatement or suppression of facts in order to evade tax. The employment of the phrase *"by reason of"* is demonstrative of the legislative intent of the power conferred by Section 74 being available to be wielded only if the availing of benefits under the Act is seeded by or founded upon

acts amounting to fraud, wilful misstatement or suppression. It is equally important to bear in mind that an allegation of fraud, wilful misstatement or suppression of facts cannot be used as a matter of rote or rest on a mere incantation of the language employed by that section. It would ultimately have to be tested on facts which are found or discovered by the respondents and which would be demonstrative of the charge which is laid.

10. The Court in *Parity Infotech* had found that the SCN merely reproduced the statutory language of Section 74 without any tangible material or independent reasoning to support the allegation of fraud or misstatement. Consequently, the SCN was held to have been issued mechanically and thus the invocation of Section 74 being wholly unwarranted. This becomes evident from the following observations appearing therein:

> "**22.** Notwithstanding that Respondent 4 had no information as to any offending transaction, it issued the impugned show-cause notice under Section 74 of the CGST Act, asserting as under:
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> > "It has come to my notice that tax due has not been paid or short-paid or refund has been released erroneously or input tax credit has been wrongly availed or utilised by you or the amount paid by you through the above referred application for intimation of voluntary payment for the reasons and other details mentioned in annexure for the aforesaid tax period."
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> **23.** It is clear from the above that the respondents had no clue as to the transaction in respect of which the petitioner's ITC was blocked. Respondent 4 had, thus, mechanically reproduced the words of Section 74 of the CGST Act without any tangible material that could provide any reasons to believe that the petitioner had availed of the ITC fraudulently or was ineligible for availing the ITC.
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[4] 2023 SCC OnLine Del 1436

26. It is also relevant to refer to Section 74(1) of the CGST Act, which reads as under:

> "74. *Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised 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 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."

27. It is apparent from the above that a show-cause notice under Section 74(1) of the CGST Act can be issued only where it appears to the proper officer that the tax has not been paid or short paid or erroneously refunded or where the ITC has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax.

28. In the present case, the respondents had no material to form any opinion that the ITC had been availed wrongly on account of any fraud or any wilful-misstatement or suppression of facts to evade tax. Concededly, the respondents had no material to form any independent opinion whatsoever. It is apparent that the impugned show-cause notice was issued in a mechanical manner to comply with the impugned instructions.

29. In view of the above, we have no hesitation in holding that the impugned show-cause notice is not in conformity with the provisions of Section 74 of the CGST Act and is, thus, without authority of law."

11. The Allahabad High Court has, in **HCL Infotech Ltd. v. CCT**[5], further clarified that in order to invoke the extended time period of five years under Section 74 of the Act, the SCN must clearly set out the specific acts of commission or omission on the basis of which an

[5] 2024 SCC OnLine All 5769

opinion may be formed that benefits had been claimed *"by reason of"* fraud, misstatement or suppression of facts. We deem it appropriate to extract the following passages from that decision:

> "**22.** We find that proceedings initiated against the petitioner for availing or utilizing the excessive ITC have already been finalized by the Respondent No. 2 and the proceedings were dropped vide order dated 30.12.2023 therefore, the said proceedings could have been reopened under Section 74 of the CGST Act only if the adjudicating authority was prima facie satisfied that the petitioner has availed or utilized Input Tax Credit due to any fraud or any wilful mis-statement or suppression of facts to evade tax. The field of operation of Section 73 and 74 of the CGST Act is altogether different i.e. Section 73 operates in all other cases of wrongly availed or utilized Input Tax Credit for any reason other than fraud or wilful mis-statement or suppression of facts and Section 74 comes into play when the excessive Input Tax Credit has been availed due to some fraud or wilful mis-statement or suppression of facts. Thus it is patently manifest that for deriving the jurisdiction to initiate proceedings under Section 74 of the CGST Act, the adjudicating authority must expressly mention in the Show Cause Notice that he is prima-facie satisfied that the person has wrongly availed or utilized Input Tax Credit due to some fraud or a wilful mis-statement or suppression of facts to evade tax and that must be specifically spelled out in the Show Cause Notice. Once the aforesaid basic ingredient of the Show Cause Notice under Section 74 of the CGST Act is missing, the proceedings becomes without jurisdiction as the adjudicating authority derives jurisdiction to proceed under Section 74 of the CGST Act only when the basic ingredients to proceed under Section 74 are present.
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> **23.** The Hon'ble Supreme Court in the case of *Raj Bahadur Narain Singh Sugar Mills Ltd.* v. *Union of India*, (1996) 88 ELT 24 (S.C.) has held as follows:—
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> > "9. We have set out the relevant parts of the show cause notice. It speaks of an erroneously granted rebate. There is no mention in it of any collusion, wilful mis-statement or suppression of fact by the appellants for the purposes of availing of the larger period of five years for the issuance of a notice under Rule 10. The party to whom a show cause notice under Rule 10 is issued must be made aware that the allegation against him is of collusion or wilful misstatement or suppression of fact. This is a requirement of natural justice. It is also the law, laid down by this Court in *Collector of Central Excise* v. *H.M.M. Limited*, (1995) 76

ELT 497. It has been said there with reference to Section 11A of the Central Excises and Salt Act, 1944, which replaced Rule 10, that if the authorities propose to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions and omissions stated in the proviso is committed to extend the period from six months to five years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the authorities. The defaults enumerated in the proviso were more than one and if the authorities placed reliance on the proviso, it had to be specifically stated in the show cause notice which was the allegation against the assessee falling within the four corners of the said proviso."

24. The Hon'ble Supreme Court in the case of *CCE* v. *H.M.M. Limited*, (1995) 76 ELT 497 (S.C.) has held as follows:—

"2. The assessee contended before the Additional Collector of Central Excise that the show cause notice was time barred under the main part of Section 11A since it was issued after the expiry of the period of six months stipulated therein but the Additional Collector sustained the notice on the ground that it was within five years impliedly holding that the purported action was under the proviso to Section 11A of the Act. There is no dispute that the show cause notice cannot be sustained under sub-section (1) of Section 11A unless the proviso is attracted. Admittedly, it is beyond the period of limitation of six months prescribed under Section 11A(1) but it is within the extended period of 5 years under the proviso to that sub-section. Now in order to attract the proviso it must be shown that the excise duty escaped payment by reason of fraud, collusion or wilful misstatement or suppression of fact or contravention of any provision of the Act or of the Rules made thereunder with intent to evade payment of duty. In that case the period of six months would stand extended to 5 years are provided by the said proviso. Therefore, in order to attract the proviso to Section 11A(1) it must be alleged in the show cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or wilful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been noticed or that the assessee was a guilty

or wilful misstatement or suppression of fact. In the absence of such averments in the show cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11A(1) of the Act. The Additional Collector while conceding that the notice had been issued after the period of six months prescribed in Section 11A(1) of the Act had proceeded to observe that there was wilful action of withholding of vital information apparently for evasion of excise duty due on this waste/by-product but counsel for the assessee contended that in the absence of any such allegation in the show cause notice the assessee was not put to notice regarding the specific allegation under the proviso to that subsection. The mere non-declaration of the waste/by-product in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of excise duty due on the said product. There could be, counsel contended, bona fide belief on the part of the assessee that the said waste or by-product did not attract excise duty and hence it may not have been included in their classification list. But that per se cannot go to prove that there was the intention to evade payment of duty or that the assessee was guilty of fraud, collusion, misconduct or suppression to attract the proviso to Section 11A(1) of the Act. There is considerable force in this contention. If the Department proposes to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The de-faults enumerated in the proviso to the said sub-section are more than one and if theexcise department places reliance on the proviso it must be specifically stated in the show cause notice which is the allegation against the assessee falling within the four comers of the said proviso. In the instant case that having not been specifically stated the Additional Collector was not justified in inferring (merely because the assessee had failed to make a declaration in regard to waste or by-product) an intention to evade the payment of duty. The Additional Collector did not specifically deal with this contention of the assessee but merely drew the inference that since the classification list did not make any mention in regard to this waste product it could be inferred that the assessee had apparently tried to evade the payment of excise duty."

25. We find that the impugned Show Cause Notice does not make even a whisper of the fact that petitioner has wrongly availed or

> utilized Input Tax Credit due to any fraud, or wilful mis-statement or suppression of facts to evade tax therefore, the proceedings initiated against the petitioner under Section 74 of the CGST Act are without jurisdiction for the lack of basic ingredients required under the said clause. So far as the argument advanced by the learned counsel appearing for the respondents that the writ petition against the Show Cause Notice is not maintainable, is concerned, we find that it is consistent view of the Hon'ble Supreme Court that if the Show Cause Notice is without jurisdiction then the same can be challenged by filing writ petition before the High Court under Artilce 226 of the Constitution of India.
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> **26.** In the present case, we do not find that the basic ingredients required for initiating proceedings under Section 74 of the CGST Act are present in the impugned Show Cause Notice dated 30.12.2023. Therefore the entire exercise including the Show Cause Notice is without jurisdiction and thus this writ petition under Article 226 of the Constitution of India is maintainable.
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> **27.** In view of the aforesaid reasons, we are of the categorical view that the impugned Show Cause Notice dated 03.08.2024 in its present form lacks basic ingredients to proceed in the matter under Section 74 of the CGST Act. Therefore, the impugned Show Cause Notice dated 03.08.2024 and the entire exercise initiated pursuant thereto is absolutely without jurisdiction and is liable to be quashed."

12. In view of the aforesaid and bearing in mind the absence of clear and specific reasoning in the impugned SCN and which could be read as justifying the invocation of Section 74, we find ourselves unable to sustain the impugned SCN for a tax period that had already been assessed by the GST authorities or to countenance the SCN as operating as a fetter on the grant of refund which was affirmed and recognised by the Court in *Netgear Technologies India*.

13. In fact, we are constrained to observe that the SCN appears to have been issued solely to avoid the inevitable consequences which flow from our decision rendered *inter partes* in the earlier round of litigation. We are of the firm opinion that a claim for refund cannot be legally or justifiably stalled by the adoption of circuitous means as the present.

14. The writ petition is, consequently, allowed. The impugned SCN dated 03 August 2024 is hereby quashed and set aside. The refund claim of the petitioner shall be attended to and disposed of forthwith. The disbursal of refund shall be subject to any orders that may be passed on any appeal that the respondents may institute against the Order-in-Appeal.

15. The writ petition stands disposed of on the aforesaid terms.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

MARCH 17, 2025/ AK