

A2Z Taxcorp LLP

Mere availment of ineligible self-assessed ITC or non-reply to audit report is not suppression to invoke Section 74 of the CGST Act

The GSTAT, Thiruvananthapuram Bench in *M/s. Santhome Latex Enterprises v. The Commissioner of CGST, Thiruvananthapuram* [Appeal No. APL/21/TVP/2026, Final Order No. 04/TVP/KERALA/2026 dated August 21, 2026] set aside the Order-in-Appeal which had reversed the adjudication order dropping the demand of ineligible Input Tax Credit (“ITC”) raised under Section 74 of the Central Goods and Services Tax Act, 2017 (“the CGST Act”), and held that the mere act of taking ineligible self-assessed ITC in the Electronic Credit Ledger, or the mere failure to reply to an audit enquiry or final audit report, does not amount to “suppression of facts” so as to invoke Section 74 of the CGST Act, unless the Department establishes by evidence that the taxpayer knew that the credit was ineligible and, in a contumacious act, still went ahead and took it. The GSTAT further held that an Appellate Authority cannot sustain a Section 74 demand on a ground that is not found in the Show Cause Notice.

Facts:

- M/s. Santhome Latex Enterprises (“the Appellant”) is engaged in the manufacture and supply of Centrifugal Rubber Latex used in medical, pharmaceutical and other commercial applications.
- Pursuant to an audit of the Appellant’s records under Section 65 of the CGST Act for the period July 2017 to March 2022, the Department issued a Show Cause Notice dated January 20, 2024 (“the SCN”) under Section 74(1) of the CGST Act read with the corresponding provisions of the Kerala GST Act, 2017 and Section 20 of the IGST Act, 2017, proposing recovery of alleged excess/ineligible ITC of Rs. 8,56,877/- for FY 2017-18 to FY 2021-22, along with interest under Section 50 and penalty under Section 74(9) read with Section 122(2)(b) of the CGST Act.

A2Z Taxcorp LLP

- The SCN alleged that the Appellant had taken self-assessed ITC in its Electronic Credit Ledger “without actually verifying the eligibility thereon”, in contravention of Sections 16(2) and 42(1) of the CGST Act, that “avilment of ineligible/excess credit would amount to suppression of facts”, and that the ineligible ITC was availed “with a malafide intention to evade payment of tax”. No search, seizure, parallel records, fake invoices or concealed purchases were involved; the proceedings arose only from statutory return data, i.e., GSTR-2A/Table 8 figures, GSTR-3B and GSTR-9C reconciliation records.
- The Superintendent, Central GST, Pattom Range, Thiruvananthapuram, vide Order-in-Original No. 137/GST/PATTOM/SUPDT/2024-25 dated January 24, 2025 (“**the OIO**”) dropped the demand, holding that (i) the Appellant had availed ITC on the basis of supplier invoices and had, at the end of each year, filed a self-certified reconciliation statement in Form GSTR-9C along with the required documents on the GST portal; (ii) the returns showed that the ineligible/blocked credit had been reversed on self-assessment; (iii) mere contravention of Sections 16(2) and 42(1) cannot be the reason for fraud, wilful misstatement or suppression of facts; (iv) “non-declaration of facts or information” as contemplated in Explanation 2 to Section 74 was not established in the SCN; and (v) the SCN did not leave any option to confirm the demand under Section 73.
- The Revenue filed an appeal against the OIO before the Joint Commissioner (Appeals), Kochi, on the ground that the Appellant had not replied to the audit enquiry/final audit report and had not furnished the information called for during audit, that the facts came to the notice of the Department only through audit, and that such failure constitutes “suppression” under Explanation 2 to Section 74 of the CGST Act.
- The Joint Commissioner (Appeals), Central Tax, Central Excise and Customs, Kochi, vide Order-in-Appeal No. TVM-GST-000-APP-233-2025-26-JC dated December 02, 2025 (“**the Impugned Order**”) allowed the Revenue’s appeal and reversed the OIO, holding

A2Z Taxcorp LLP

that “failure to furnish the information to proper officer when called for, tantamount to suppression, as per the Explanation to Section 74”.

- Aggrieved, the Appellant filed the present appeal before the GSTAT contending, *inter alia*, that the invoice-wise reconciliation explaining the alleged ITC difference had already been uploaded with the GSTR-9C/annual return and was available on the common portal; that the Impugned Order reversed the OIO without dislodging this factual finding; that the Impugned Order travelled beyond the SCN by sustaining Section 74 on the materially different ground of non-response to audit; that Section 65 does not contemplate a statutory reply to the Final Audit Report; that a difference between GSTR-2A/Table 8 figures and ITC availed in GSTR-3B cannot by itself establish a violation of Section 16(2); and that, once Section 74 fails, the demand for FY 2017-18 and FY 2018-19 would be barred by limitation under Section 73, penalty under Section 74(9) cannot survive, and interest is unsustainable for want of utilisation-based quantification under Rule 88B(3) of the CGST Rules, 2017 read with Section 50(3).
- The Revenue contended that the Appellant had availed ITC in contravention of Sections 16(2) and 42(1), had failed to reverse ineligible/blocked credit under Section 17, had not replied to the audit enquiry and the audit report, and that failure to furnish information to the proper officer when called for is itself “suppression” as elucidated in Explanation 2 to Section 74 of the CGST Act.

Issues:

- Whether the mere act of the taxpayer in taking ineligible self-assessed ITC in its Electronic Credit Ledger in terms of Section 42(1) of the CGST Act would amount to suppression of facts before the Department so as to fall within the scope of Section 74 of the CGST Act?

A2Z Taxcorp LLP

- Whether the failure of the taxpayer to reply to the audit enquiry/final audit report would amount to suppression of facts in terms of Section 74 of the CGST Act?
- Whether the Appellate Authority could sustain the demand under Section 74 of the CGST Act on a ground which was not found in the SCN?

Held:

The GSTAT, Thiruvananthapuram Bench in ***Appeal No. APL/21/TVP/2026*** held as under:

- **Observed that**, the SCN, being the foundational document of the proceedings, merely alleged that the Appellant had taken self-assessed ITC without verifying its eligibility and that avilment of ineligible/excess credit “would amount to suppression of facts”; no evidence whatsoever was adduced in support of the contention that the ITC was taken without verification.
- **Observed that**, even if it were established that the taxpayer had taken ITC without verifying its eligibility, in the absence of any statutory presumption to that effect, the mere act of taking ITC without due verification will not amount to suppression of facts; as the law stands today, the onus is on the Department to establish that the taxpayer knew that a particular ITC was not eligible but, in a contumacious act, still went ahead and took the credit, and no such assertion or evidence was found in the SCN.
- **Noted that**, every act of transgression of Sections 16(2)/42(1) of the CGST Act cannot be termed as a violation inviting proceedings under Section 74 unless clear and categorical evidence is adduced that the transgression was the result of fraud, wilful misstatement or suppression of facts with an intent to evade tax; the entire SCN was founded on the questionable assertion that “avilment of ineligible/excess credit would amount to suppression of facts” and the unproven assertion of malafide

A2Z Taxcorp LLP

intention, and other than vague/bald assertions there was no evidence warranting invocation of Section 74.

- **Noted that**, the Adjudicating Authority, on a meticulous analysis of the facts and the law, recorded a categorical finding on the bona fide efforts of the taxpayer in availing ITC in line with the statutory provisions (filing of self-certified GSTR-9C reconciliation with supporting documents on the portal and reversal of blocked credit on self-assessment) and arrived at the legally correct conclusion that the SCN had invoked Section 74 without any supporting evidence.
- **Observed that**, instead of accepting the OIO in review, the Revenue filed an appeal on new/extraneous grounds (non-reply to the audit enquiry and final audit report) which are not found in the SCN; raising such additional grounds at the appellate stage is against the fundamental principles of natural justice and, on this ground alone, the Appellate Authority ought to have rejected the Department's appeal, which was in any case an exercise in futility as it did not challenge any of the findings of fact or law on which the OIO was founded.
- **Observed that**, "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 under Section 74; the Impugned Order does not specify what information was sought by the proper officer, when it was called for and under which provision of the statute, and is "delightfully vague" in this respect; it has not put forth even an iota of evidence as to how and why the charge of suppression is sustained, and has reversed the OIO without discussing or dislodging its factual findings, thereby suffering from non-application of mind.
- **Noted that**, the SCN, issued after the **CBIC's Instruction No. 05/2023-GST dated December 13, 2023** (which mandates that Section 74(1) may be invoked only where the investigation indicates material evidence of fraud, wilful misstatement or suppression to evade tax, and that such evidence should be made part of the SCN), fails all the tests

A2Z Taxcorp LLP

laid down in the said binding Instruction, in as much as the SCN is not based on any investigation worth the name and no material evidence of fraud/wilful misstatement/suppression to evade tax has been indicated.

- **Held that**, relying on *Cosmic Dye Chemical v. Collector of Central Excise, Bombay* [1995 (75) E.L.T. 721 (S.C.)] and *Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd.* [2007 (215) E.L.T. 489 (S.C.)], wilful 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; mere omission to give correct information is not suppression unless the omission was wilful and with intent to evade tax, and when the facts are known to both the parties, omission by one party would not constitute suppression.
- **Held that**, answering both questions in the negative, in the absence of any other evidence to the contrary, (i) the mere act of the taxpayer in taking ineligible self-assessed ITC in its Electronic Credit Ledger in terms of Section 42(1) of the CGST Act would not amount to suppression of facts before the Department falling within the scope of Section 74(1); and (ii) mere failure to reply to the audit enquiry/final audit report would not amount to suppression of facts in terms of Section 74 of the CGST Act.
- **Directed that**, the Impugned Order is set aside and the appeals are allowed with consequential relief.

Our Comments:

Relevant provisions

Section 74(1) of the CGST Act, which governs determination of tax not paid/short paid and ITC wrongly availed or utilised for periods up to FY 2023-24, can be invoked only where such non-payment, short payment, erroneous refund or wrong availment/utilisation is “by reason of

A2Z Taxcorp LLP

fraud, or any wilful-misstatement or suppression of facts to evade tax”. The extended limitation of five years and the penalty equal to the tax under Section 74 are the price of this qualitative element; for every other case, Section 73 alone applies. Explanation 2 to Section 74 (as it stood at the time of the SCN) defined “suppression” to 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 the Act or the Rules, or failure to furnish any information on being asked for, in writing, by the proper officer. Consequent to the insertion of Section 74A by the Finance (No. 2) Act, 2024, this Explanation stood omitted from Section 74 with effect from November 01, 2024 (a fact expressly noticed by the Hon'ble Supreme Court in *Tata Steel Limited*, discussed below), and a materially identical definition is now housed in Explanation 2 to Section 74A “for the purposes of this Act”.

Section 75(7) of the CGST Act mandates that the amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice and that “no demand shall be confirmed on the grounds other than the grounds specified in the notice”. Section 75(2) provides that where any Appellate Authority, Appellate Tribunal or court concludes that a notice under Section 74(1) is not sustainable because the charge of fraud, wilful misstatement or suppression is not established, the proper officer shall determine the tax deeming the notice to have been issued under Section 73(1), and Section 75(3) allows two years from the communication of such direction for passing the consequential order.

Section 65 of the CGST Act (audit by tax authorities) obliges the registered person to afford the necessary facility and furnish such information as may be required for the audit [Section 65(5)], and obliges the proper officer to inform the registered person of the findings, his rights and obligations and the reasons for the findings within thirty days of conclusion of the audit [Section 65(6)]. Where the audit results in detection of tax not paid or ITC wrongly availed, the proper officer “may initiate action under Section 73 or Section 74” [Section 65(7)]. Rule 101(4) of the CGST Rules, 2017 provides that the proper officer may inform the registered person of the discrepancies noticed and the said person “may” file his reply. Nowhere does the statute

A2Z Taxcorp LLP

make a reply to the audit observations or to the Final Audit Report in Form GST ADT-02 mandatory, nor does it attach the consequence of “suppression” to a non-reply.

Analysis

- **Ineligibility is not suppression.** The GSTAT has rightly preserved the qualitative distinction between Sections 73 and 74. Every wrong claim of ITC is, by definition, a “contravention” of Section 16; if that alone were suppression, Section 73 would be rendered otiose and the five-year period would become the norm. The Tribunal’s formulation that the Department must show that the taxpayer “knew” that the credit was ineligible and yet “contumaciously” availed it mirrors the settled jurisprudence under Section 11A of the Central Excise Act, 1944 in *Pushpam Pharmaceuticals Co. v. Collector of Central Excise, Bombay* [1995 (78) E.L.T. 401 (S.C.)], *Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut* [2005 (188) E.L.T. 149 (S.C.)], *Continental Foundation Joint Venture v. Commissioner of Central Excise, Chandigarh* [2007 (216) E.L.T. 177 (S.C.)] and *Uniworth Textiles Ltd. v. Commissioner of Central Excise, Raipur* [2013 (288) E.L.T. 161 (S.C.)], all of which read “suppression” in the company of “fraud” and “collusion” and require a deliberate act with intent to evade. Although Explanation 2 is couched in terms of “non-declaration”, Section 74(1) itself qualifies suppression with the words “to evade tax”; the *mens rea* is built into the charging provision and cannot be read out through the definition clause.
- **Data on the common portal cannot be “suppressed”.** Where the entire case is constructed from GSTR-2A/Table 8, GSTR-3B and the GSTR-9C reconciliation which the taxpayer itself filed, the facts are, in the words of *Ballarpur Industries*, “known to both the parties”. A mismatch which the Department detects from the very portal on which the taxpayer disclosed it is the antithesis of concealment. The OIO’s finding on this point was never dislodged, and the Tribunal correctly treated the Impugned Order’s silence on it as non-application of mind.

A2Z Taxcorp LLP

- **Sanctity of the Show Cause Notice.** The Tribunal's sharpest criticism is reserved for the departmental appeal and the Impugned Order for sustaining Section 74 on a ground (non-reply to audit) which was absent from the SCN. The SCN is the foundation of the proceedings – *Commissioner of Central Excise v. Brindavan Beverages (P) Ltd.* [2007 (213) E.L.T. 487 (S.C.)] and *Commissioner of Customs, Mumbai v. Toyo Engineering India Ltd.* [2006 (201) E.L.T. 513 (S.C.)] – and Section 75(7) statutorily forbids confirmation of a demand on unnotified grounds. A reviewing Commissioner under Section 107(2) and the Appellate Authority under Section 107(11) can examine the legality or propriety of the OIO only within the four corners of the SCN; they cannot improve upon the charge. The Hon'ble Supreme Court in *G.R. Infra Projects Limited* (discussed below) has, in the same spirit, refused to permit the State to supplement a defective notice through a counter-affidavit.
- **Audit non-response.** The second limb of Explanation 2 (failure to furnish information on being asked for, in writing, by the proper officer) requires the Department to identify what information was sought, when, by whom and under which provision, and then to demonstrate that the failure was to evade tax. The Impugned Order did none of this and was rightly termed “delightfully vague”. Non-cooperation during audit may carry its own consequences under the Act, but it cannot retrospectively convert a Section 73 case into a Section 74 case, particularly where the material on which the audit itself proceeded was the taxpayer's own returns on the portal.
- **A drafting note on Section 42(1).** The SCN, the Impugned Order and consequently the first issue framed refer to “self-assessed ITC ... in terms of Section 42(1)”. Section 42 (matching, reversal and reclaim of reduction in ITC) was never operationalised, Form GSTR-2 having remained in abeyance, and stood omitted with effect from October 01, 2022 by the Finance Act, 2022. The expression “as self-assessed” occurs in Section 41(1) of the CGST Act. The casual invocation of a non-operational provision is symptomatic of

A2Z Taxcorp LLP

the very mechanical approach which the Tribunal, the CBIC Instruction and now the Hon'ble Supreme Court have deprecated.

- **Binding nature of the CBIC Instruction.** The Tribunal has treated Instruction No. 05/2023-GST dated December 13, 2023 as binding on the field formations and has tested the SCN against it. This is consistent with the settled position that circulars and instructions of the Board issued under Section 168 bind the Department, though not the assessee or the courts. Notices issued after December 13, 2023 which do not carry the “material evidence” of fraud/wilful misstatement/suppression on their face are vulnerable on this ground alone.

Pari materia judgments

- The Hon'ble Supreme Court in ***M/s G.R. Infra Projects Limited, Ratlam v. State of Madhya Pradesh & Ors. [Civil Appeal No. 11277 of 2026 dated August 19, 2026]*** set aside a Section 74 SCN for FY 2018-19 holding that, but for a “bland statement” of “fraud or concealment of facts”, nothing was stated as to how fraud was inferred or concealment detected; the allegations which lead to the inference of fraud or suppression “should emanate from the notice itself” and there cannot be “a mechanical use of the words ‘fraud, wilful misstatement or suppression of facts’ without listing out the aspects” which persuaded the officer. The Court refused to look at the counter-affidavit to sustain the notice.
- The Hon'ble Supreme Court in ***M/s Tata Steel Limited v. Union of India & Ors. [2026 INSC 920, Civil Appeal arising out of SLP (C) No. 16859 of 2026, dated August 25, 2026]*** quashed a Section 74 SCN founded on a C&AG audit objection regarding ITC mismatch for FY 2018-19 to FY 2020-21, holding that proceedings under Sections 73/74 can be initiated only on the satisfaction of the proper officer; even where observations or objections are made on audit, the officer must enter his own satisfaction that fraud, wilful misstatement or suppression led to the mismatch; and that the foundational

A2Z Taxcorp LLP

facts must be evident from the notice itself since “the words are not to be mechanically recited in the notice to enable recovery outside the normal limitation”. This decision, rendered four days after the GSTAT order, is of direct relevance to audit-driven Section 74 notices of the kind before the Tribunal.

- The Hon’ble Allahabad High Court in ***HCL Infotech Ltd. v. Commissioner, Commercial Tax & Anr. [Writ Tax No. 1396 of 2024 dated September 27, 2024]*** held that a notice under Section 74 which merely alleges excess availment of ITC, without the ingredients of fraud, wilful misstatement or suppression, is without jurisdiction, and that proceedings concluded under Section 73 cannot be reopened under Section 74 in the absence of such ingredients.
- The Hon’ble Madras High Court in ***Neeyamo Enterprise Solutions Pvt. Ltd. v. Commercial Tax Officer [W.P.(MD) Nos. 30453 to 30458 of 2024 dated November 11, 2025]*** held that fraud, wilful misstatement or suppression to evade tax is a “jurisdictional fact” for Section 74 which must be articulated in the SCN and supported by material; the taxpayer’s failure to respond to the notices cannot substitute for the missing allegation, and the Board’s Instruction is binding on the authorities.
- The Hon’ble Allahabad High Court in ***M/s Vrinda Automation v. State of U.P. & Anr. [Writ Tax No. 2006 of 2025 dated May 14, 2025]*** held that Section 75(7) is a mandatory bar which safeguards the taxpayer from surprise demands, and an order confirming a demand beyond the amount or grounds proposed in the SCN is liable to be set aside.

Contrary view and points of caution

- The first limb of Explanation 2 is a deeming definition which does not use the word “wilful”. The Revenue continues to argue, as it did before the GSTAT, that non-declaration of facts required to be declared in a return is *per se* suppression. While the GSTAT and the Hon’ble Supreme Court have read the intent requirement into Section

A2Z Taxcorp LLP

74(1) through the words “to evade tax”, the argument may still be pressed where the return itself is demonstrably false, for instance where ITC is availed on invoices of non-existent suppliers or through circular trading. In such cases several High Courts have declined to interfere at the SCN stage and have relegated the taxpayer to adjudication, treating the existence of suppression as a question of fact.

- Where the ingredients of Section 74 are established, penalty is mandatory and the authority has no discretion to reduce it – *Union of India v. Rajasthan Spinning & Weaving Mills* [2009 (238) E.L.T. 3 (S.C.)] (rendered in the context of Section 11AC of the Central Excise Act, 1944). The GSTAT’s ruling therefore assists only those taxpayers whose non-compliance is bona fide and stands disclosed in their statutory filings.
- Where a Section 74 charge fails, the Department may seek to re-determine the tax under Section 73 by invoking the deeming fiction in Section 75(2), within two years of the appellate direction under Section 75(3). In the present case, the OIO recorded that the SCN left no option under Section 73 and the Tribunal allowed the appeals “with consequential relief” without any such direction; the interplay between Section 75(2)/(3) and the time limits in Section 73(10) also remains a contested area. Taxpayers should nonetheless be prepared for such an attempt and preserve the limitation defence, especially for FY 2017-18 to FY 2019-20.
- For notices issued on or after November 01, 2024 under Section 74 for periods up to FY 2023-24, the Department can no longer rely on Explanation 2 to Section 74 as such, as noticed in *Tata Steel Limited*; however, the identical definition in Explanation 2 to Section 74A is expressed to be “for the purposes of this Act”, and this argument is likely to be tested further.

Takeaways

A2Z Taxcorp LLP

- Section 74 is not a fall-back for every ITC mismatch. A GSTR-2A/2B vs GSTR-3B difference, or an ineligible credit disclosed and reconciled in GSTR-9C, is at best a Section 73 case unless the Department pleads and proves, in the SCN itself, the foundational facts showing knowledge and a deliberate design to evade.
- Although a reply to Form GST ADT-01 requisitions and to Form GST ADT-02 findings is not statutorily mandatory, taxpayers are well advised to place their explanation and reconciliation on record during the audit itself, so that any subsequent allegation of “failure to furnish information on being asked for in writing” is answered by the record.
- Any new ground introduced by the Department at the review or appellate stage should be objected to at the threshold by invoking Section 75(7) and the principles of natural justice; the GSTAT has now confirmed that such an appeal deserves rejection on this ground alone.

This is one of the early final orders of the Thiruvananthapuram Bench of the GSTAT, and the candour with which the Tribunal has expressed itself (“if the department’s appeals left us flummoxed ... the OIA has done one better and left us totally dumbfounded”) sets a welcome tone for the Tribunal’s approach to mechanical invocations of Section 74. Read together with the two decisions of the Hon’ble Supreme Court in the same week, the message to the field formations is unmistakable: recite the ingredients of Section 74 only where the evidence to support them exists, and place that evidence in the notice.

[CLICK HERE FOR OFFICIAL JUDGMENT COPY](#)

(Author can be reached at info@a2ztaxcorp.com)

DISCLAIMER: The views expressed are strictly of the author and A2Z Taxcorp LLP. The contents of this article are solely for informational purpose and for the reader’s personal non-commercial use. It does not constitute professional advice or recommendation of firm.

A2Z Taxcorp LLP

Neither the author nor firm and its affiliates accepts any liabilities for any loss or damage of any kind arising out of any information in this article nor for any actions taken in reliance thereon. Further, no portion of our article or newsletter should be used for any purpose(s) unless authorized in writing and we reserve a legal right for any infringement on usage of our article or newsletter without prior permission.

