DELHI SALES TAX CASES

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HIGHLIGHTS

"The constitutional courts while exercising their powers of judicial review would not assume the role of an appellate authority. Their jurisdiction is circumscribed by limits of correcting errors of law, procedural errors leading to manifest injustice or violation of principles of natural justice. Put differently, judicial review is not analogous to venturing into the merits of a case like an appellate authority."

- Surya Kant, J. in Pravin Kumar v. Union of India

Sales Tax Bar Association (Regd.)
Knowledge, Diffusion & Promotion Section
Trade & Taxes Department, 2nd Floor, Bikrikar Bhawan, New Delhi-110002

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NEWS AND UPDATES

1. Appellate authorities must not keep cases pending indefinitely as such inaction may affect the fundamental rights of the parties involved, the Bombay High Court recently observed Apna Chemist v. Assistant Commissioner (Zone-3) & Anr.

   A division bench of Justices GS Kulkarni and Firdosh Pooniwalla added that there should not be a scope for appeals to become a case of "operation being successful, but patient dead."

   "There cannot be a scope for a theory of 'operation being successful however the patient dead'. The petitioners would certainly have a legal right to know, the status of their challenge insofar as the interim reliefs or the final reliefs they seek in their appeals, before they are made to suffer the suspension order," the Court said.

   The Court was dealing with petitions by some chemist shop owners (petitioners) who complained that appeals filed by them against the suspension of their licenses were not being listed before the appellate authority.

   It was also submitted that no interim order was passed yet on their stay applications.

   The lead petitioner (Apna Chemist) in the case had its license suspended on October 3 last year. The suspension was for a period from 8 January, 2024 to 17 January, 2024. An appeal challenging this order was filed on October 31, 2023.

   They argued that the remedy of appeal would be rendered otiose if the appeal is decided after the suspension period is over.

   "The non-passing of an appropriate order (interim or final), would also have a direct bearing on the rights of the petitioner to carry on trade, occupation/ business. Such inaction on the part of the appellate authority is likely to affect the rights guaranteed to such persons under Article 19(1)(g) of the Constitution read with Articles 14, 21 and 300A of the Constitution," the Court held.

   It also said that the appellate authority was expected to provide effective remedies in line with its statutory powers.

   "The appellate authority is expected not to overlook the significant obligation with the powers the appellate authority wields, in adjudication of the statutory appeals. Once the remedy is provided by law, it is required to be an 'effective remedy' in letter and spirit. The appellate authority hearing the statutory appeals would be required to be alive to the consequences," the bench observed.

   With these observations, the High Court disposed of the matter by directing the appellate authority to expeditiously decide on the appeals.

"Till the appeals/stay applications are decided, the orders suspending petitioner's licences, subject matter of challenge in the appeals, shall remain stayed," the Court added.

2. Sales Tax Bar Association (REGD) Vs Union of India & Ors. (Delhi High Court) Introduction: The Delhi High Court recently expressed its dissatisfaction over the prolonged inaction by the government regarding the construction of chambers for members of the Sales Tax Bar Association. This discontent arises from the government's failure to implement the court's orders issued in W.P.(C) 14052/2006 on January 12, 2011. Despite providing a detailed roadmap for construction, the court observed a lack of progress after twelve years, prompting the petitioner to file a writ petition. The court's frustration is evident in its repeated concerns about non-compliance, leading to a renewed directive for immediate action.

3. Bogus Firms Exposed, Evading Rs. 44,015 Cr; 121 Arrests Made Goods and Services Tax in an intensified effort against tax evasion, the Goods and Services Tax (GST) formations, led by the Central Board of Indirect Taxes and Customs (CBIC) and State/UT Governments, have unearthed 29,273 sham firms involved in suspected Input Tax Credit (ITC) evasion amounting to Rs. 44,015 crore since May 2023. This crackdown, aimed at non-existent taxpayers, has resulted in 121 arrests, marking a significant stride in curbing GST fraud.

4. SC explains Article 22(5): Detaining Authority's Duty & Detenue's Rights. It is a matter of huge significance that the Supreme Court in a most learned, laudable, landmark, logical and latest judgment titled Sarfaraz Alam vs Union of India & Ors in Criminal Appeal No ……. of 2024 and pronounced as recently as on January 4, 2024 in the exercise of its criminal appellate jurisdiction has explained the scope of Article 22(5) of the Constitution that pertains with the duty of the authorities in serving the grounds of detention to detenue and detenue's right to make a representation. The Apex Court dismissed an appeal challenging the detention order of an individual apprehended for attempting to smuggle gold and foreign currencies without customs detection." By the way, the Court noted that there was no procedural error by the authorities as they had made efforts to translate documents into Bengali and the detenue was well aware of his right to make a representation. It was pointed out by the Court that the detenue was not entitled to any relief due to his deliberate suppression of facts. It must be also noted that the detenue had refused to receive the ground of detention, despite being proficient in English and had approached the Court with unclean hands. So no wonder that the Apex Court dismissed the appeal.

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS
[Pamidighantam Sri Narasimha and Aravind Kumar, JJ]

SPECIAL LEAVE PETITION (CIVIL) Diary No(s). 1887/2024

(Arising out of impugned final judgment and order dated 26-09-2023 in WP(C) No. 5820/2022 passed by the High Court Of Delhi At New Delhi)

Commissioner of Delhi Goods and Service Tax ... Petitioner(s)

Versus

ITD ITD CEM JV ... Respondent(S)

(IA No.14675/2024-CONDONATION OF DELAY IN FILING and IA No.14673/2024-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

Date of Order : 09-02-2024

This petition was called on for hearing today.

WHETHER LIMITATION OF 15 DAYS WOULD START FROM THE NOTICE ISSUED U/S 74(8) PERSONALLY TO THE COMMISSIONER OR SUBMITTED AT THE COUNTER AUTHORISED TO RECEIVE THE SAME? IT WAS HELD THAT THE NOTICE REGARDING COMPLETION OF PROCEEDINGS WITHIN 15 DAYS WILL BEGIN FROM THE DATE OF THE NOTICE SUBMITTED AT THE DAK.

For Petitioner(s) : Mr. N Venkataraman, A.S.G.
Ms. Nisha Bagchi, Sr. Adv.
Mr. Mukesh Kumar Maroria, AOR
Ms. Saumya Tandon, Adv.
Mr. Prasenjeet Mohapatra, Adv.
Mr. Siddharth Sinha, Adv.

For Respondent(s) : Mr. Rajesh Jain, Adv., Mr. Virag Tiwari, Adv.
Mr. K.J. Bhat, Adv., Mr. Ramashish, Adv.
Ms. Tanya, Adv.
Mr. Avadh Bihari Kaushik, AOR

UPON hearing the counsel the Court made the following

O R D E R

Delay condoned.

Having heard Ms. Nisha Bagchi, learned senior counsel appearing for the petitioner, in the facts and circumstances of the case, we are not

inclined to interfere with the impugned judgment and order passed by the High Court.

Accordingly, the Special Leave Petition is dismissed. Pending application(s), if any, shall stand disposed of.

(KAPIL TANDON)
COURT MASTER (SH)

(NIDHI WASON)
COURT MASTER (NSH)

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

[Mohammed Shaffiq, J.]

W.P. (MD) NO. 22642 OF 2022
W.M.P. (MD) NOS.16803 and 16804 of 2022

M/s.Vadivel Pyrotech Private Limited ... Petitioner

Versus

Assistant Commissioner (ST) ... Respondent

Date of Order: 27.09.2022

WHETHER NOTICES ISSUED IN ASMT-10 AND DRC-01 ON DIFFERENT DISCREPANCIES CAN BE SAID TO BE VALID U/S 61 OF THE ACT OR WILL THE PROCEEDINGS BE VITIATED?

HELD – THE ENTIRE PROCEEDINGS WILL BE VITIATED AND HELD TO BE AGAINST PRINCIPLES OF NATURAL JUSTICE.

For Petitioner : Mr. N.Viswanathan

For Respondent : Mr. M. Prakash,
Additional Government Pleader

PRAYER : Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, to call for the records connected with order Ref.No:33AADCV5898H1ZV dated 09.05.2022 passed by the respondent herein and quash the same for having been passed in gross violation to the principles of natural justice besides being excessive and without the authority of law.

ORDER

This Writ Petition is filed challenging the impugned order in Ref. No:33AADCV5898H1ZV dated 09.05.2022 passed by the Respondent herein as having been made in gross violation of principles of natural justice

and the procedure provided/prescribed under the Tamil Nadu Goods and Service Tax Act, 2017.

2. The impugned order is apparently made pursuant to the Scrutiny of the GST returns filed by the petitioner under Section 61 of the Tamil Nadu Goods and Service Tax Act, 2017 (herein after referred to as TNGST Act) for the period 2018-2019 as would be evident from the Preamble to the Show Cause Notice in GST DRC-01 and the impugned Order in GST DRC-07, which reads as under:

> **"Summary of Show Cause Notice:**
>
> M/s. VADIVEL PYROTECHS PRIVATE LIMITED, Door No. 217/G, Setur Road Sivakasi, 626123 are dealing in Fireworks registered under the TNGST Act, 2017. This is to inform that during the scrutiny of the return under section 61 of Tamilnadu Goods and Service Tax Act, 2017 (hereinafter referred as TNGST Act, 2017) for the year 2018-2019, the following differences were noticed.
>
> **Summary of the Order:**
>
> M/s. VADIVEL PYROTECHS PRIVATE LIMITED, Door No. 217/G, Setur Road Sivakasi, 626123 are dealing in Fireworks registered under the TNGST Act, 2017. This is to inform that during the scrutiny of the return under section 61 of Tamilnadu Goods and Service Tax Act, 2017 (hereinafter referred as TNGST Act, 2017) for the year 2018-2019, the following differences were noticed."

3. Though a number of grounds have been raised challenging the impugned order, the learned counsel for the Petitioner would confine his challenge to the impugned proceedings on the ground that the same stands vitiated, inasmuch as rule 99 of the Tamil Nadu Goods Service Tax Rules, has not been complied with, which would prove fatal to the validity of the impugned order dated 9-5-2022.

4. The brief facts of the case are as follows:

(i) The petitioner is engaged in the business of manufacture and supply of pyrotechnic products (fireworks) and is registered under the TNGST Act. The petitioner had filed the GST returns under the TNGST Act periodically discharging appropriate taxes, while availing the Input Tax Credit in terms of section 16 of the TNGST Act. The Respondent had

undertaken Scrutiny of the GST returns in terms of section 61 of the TNGST Act and a notice in Form ASMT 10 dated 22-12-2021 was issued pointing out certain discrepancies between GSTR3B, GSTR 1 and GSTR 2A returns filed by the petitioner for the year 2018-19 calling upon the petitioner to pay taxes to the extent of Rs. 13,54,250/- along with interest. The petitioner in response paid the interest and furnished GST-DRC 03 dated 27-12-2021, while submitting his explanation in Form ASMT 11 on 18-1-2022 by furnishing the relevant details.

(ii) While so, after more than six months, the petitioner was enquired over telephone by the office of the Respondent as to whether the petitioner had paid taxes, interest and penalty demanded *vide* order dated 9-5-2022. It is stated that the petitioner was until then unaware of any proceedings other than the Scrutiny under section 61 of the Act resulting in the issuance of Form ASMT 10 dated 22-12-2021, which was responded to by the petitioner in Form ASMT 11 dated 18-1-2022. Thereafter, on enquiry with the office of the Respondent on 12-8-2022, the petitioner was informed that an order dated 9-5- 2022 was passed by the Respondent and a Summary of the Notice in GST DRC-01 and Order in GST DRC-07 had also been uploaded in the GST portal. On being so informed, the petitioner logged in to the GST portal and found that the Notice and Order had in fact been uploaded. Thereafter, the petitioner downloaded GST DRC-01 and GST DRC- 07.

(iii) On perusal of the downloaded summary of Show Cause Notice in GST DRC-01 and Order in GST DRC-07, the petitioner found that pursuant to alleged Scrutiny of the returns, six defects were noticed, *viz.*,

[1] Difference of turnover reported in the audited financial statement and in the GSTR 9 C involving tax amounting to Rs. 35,33,657/-;

[2] Availment of input tax credit of Rs. 4,22,08,872/-based on the invoices of their sister concerns without issue of e-way bills thereby assuming non-receipt of goods violating Sec. 16 of the TNGST Act, involving tax of Rs. 4,22,08,872/-;

[3] Difference of input tax credit between the input tax credit available as per GSTR2A and the input tax credit availed as GSTR3B involving credit amount of Rs. 13,54,250/-;

[4] Denial of ITC of Rs. 6,34,252/-(CGST of Rs. 3,17,126/- and SGST of Rs. 3,17,126/-) on the alleged 'Non accounting of purchases as per 2A Statement' for the reason that they have not availed IGST input tax credit of Rs. 5,25,260/-which was otherwise available to the petitioner as per GSTR-2A, on the value of Rs. 35,23,620/-;

[5] Availment of 'ineligible' 'Blocked Credit' Rs. 1,91,520/and

[6] Demand of Rs. 15,70,148/- under reverse charge presuming the value accounted as towards freight calculating the same @ 5% of the inward supplies received.

The aforesaid defects are different from the defects/discrepancy which were pointed out in the Form ASMT 10 issued on 22-12-2021. The petitioner submits that the entire proceedings has been made behind their back and they were completely unaware of either the summary of the Notice in GST DRC-01 or the Order in GST DRC-07 until being informed by the Respondent. It was submitted that the entire proceedings stands vitiated for violation of principles of natural justice inasmuch as neither the show cause notice nor the orders under GST DRC-07 passed under section 74 of the Act was served on the petitioner. In this regard, reliance was sought to be placed on the decision of this Court in W.P.No.27651 of 2021 to submit that it has been suggested by this Court that though section 169 prescribes different modes for service of orders, summons, notice etc., in view of the technical difficulties in implementing GST, unless the technical issues are resolved, a physical copy through registered post or speed post or courier with acknowledgement may be followed for service of orders, summons, notices etc. The relevant portion of the order reads as follows:

> "11. Though section 169 of the respective enactments allows the authorities to communicate any decision, order, summons, notice or other communication under this Act by any one of the methods specified, unless the proper conformation that notices and impugned orders which were uploaded in the web portal of the State Government in tngst.cid.tn.gov.in are auto populated, it cannot be said that there is a sufficient compliances of the aforesaid Section.
>
> 12. GST Act was implemented in the year 2017 with effect from 1-7-2017. The web portal maintained by GST has

faced problems on several occasions and steps were taken for correcting the technical glitches. Even as on date, there are problems arising out of intercommunication between the State GST and Central GST and the web portal which has to be resolved.

13. The respondents can therefore continue the service of notice through registered post or speed post or courier with acknowledgment to the petitioners at their last known place of business or residence and upload the same in the web portal. Till all problems are resolved on the technical side, the authority may simultaneously serve the notice of assessment and communications under the Act and Rules both through registered post or speed post or courier with acknowledgment as is contemplated section 169(1)(b) of the Act and through web portal.

14. Once all technical problems are resolved, the practice of sending physical copy through registered post or speed post or courier with acknowledgment may be dispensed with.

15. Considering the same, I am inclined to set aside the impugned assessment orders and remit the cases back to the respondents to pass speaking on merits and in accordance with law.

16. The petitioners are directed to file a reply to the respective Show Cause Notices which have been served on the learned counsel for the petitioners. The impugned orders which stand quashed by this order shall be treated as supplementary Show Cause Notices."

5. It is submitted by the learned counsel for the petitioner that the impugned proceedings is in gross violation of the procedure contemplated under Rule 99 of the Tamil Nadu Goods and Service Tax Rules, which prescribes the method and the manner for verification of the correctness of the returns and to correct any discrepancy that may be noticed or to initiate appropriate proceedings under section 65, 66, 67, 73 or 74 of the GST Act pursuant to a Scrutiny under section 61 of the Act. To appreciate the above contention, it may be relevant to extract section 61, 74 and rule 100(2) of the Tamil Nadu Goods and Service Tax Act and Rules which reads as under:

"Section 61. Scrutiny of returns: "(1) The proper officer may scrutinize the return and related particulars furnished by the

registered person to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed and seek his explanation thereto.

(2) In case the explanation is found acceptable, the registered person shall be informed accordingly and no further action shall be taken in this regard.

(3) In case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him or where the registered person, after accepting the discrepancies, fails to take the corrective measure in his return for the month in which the discrepancy is accepted, the proper officer may initiate appropriate action including those under section 65 or section 66 or section 67, or proceed to determine the tax and other dues under section 73 or section 74.

Section 74:

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 short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by reason of fraud, or any willful 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.

(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 utilised 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 willful 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 per cent. 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 utilised 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 with in 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 notice" 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 1[sections 122 and 125] 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.

Rule 100(2):

(2) The proper officer shall issue a notice to a taxable person in accordance with the provisions of section 63 in FORM GST ASMT-14 containing the grounds on which the assessment is proposed to be made on best judgment basis and shall also serve a summary thereof electronically in **FORM GST DRC-01**, and after allowing a time of fifteen days to such person to furnish his reply, if any, pass an order in **FORM GST ASMT-15** and summary thereof shall be uploaded electronically in **FORM GST DRC-07**."

On a cumulative reading of the above provisions and the corresponding Rules, the following position appears to emerge:

(a) The proper officer may scrutinize returns and related particulars and in case any discrepancies are noticed, the same shall be informed in ASMT 10 seeking explanation from the taxable person (As a matter of fact in the instant case ASMT 10 was issued on 22-12-2021 pointing out certain discrepancies).

(b) If the explanation offered by the petitioner in ASMT 11 is acceptable, no further action shall be taken (As a matter of fact ASMT 11 was submitted by the petitioner in response to the ASMT 10 dated 22-12-2021).

(c) In case the explanation is not satisfactory or no explanation is offered or the taxable person fails to take corrective measures in the return for the month in which the discrepancies were noticed and accepted, the proper officer may proceed to initiate appropriate action under section 65, 66, 67, 73 or 74 of the Act.

(d) Thereafter, the proper officer shall proceed to pass order in GST DRC-07 under section 73 and 74 after issuing GST DRC-01A in terms of rule 142 (1A) and GST DRC-01.

(e) It is thus clear that any proceeding in GST DRC-01A/1 culminating in an Order in GST DRC-07, if pursuant to Scrutiny under section 61 of the TNGST Act ought to be preceded by issuance of Form ASMT 10. In the present case, though ASMT 10 was issued on 22-12-2021 pointing out certain discrepancies, the GST DRC-01 dated 15-2-2022 and the impugned order in GST DRC-07 dated 9-5-2022 are made on the basis of issues that are completely different from what was set out in Form ASMT 10 dated 22-12-2021. As this Court is of the view that ASMT 10 is mandatory before proceeding to issue GST DRC-01, failure to issue the same in respect of the discrepancies forming the subject matter in GST DRC-01 dated 15- 2-2022 culminating in GST DRC-07 dated 9-5-2022 would vitiate the entire proceedings. It is trite law that when the Act prescribes the method and manner for performing an act, such act shall be performed in compliance with the said method and manner and no other manner.

6. To a pointed question as to whether Form ASMT 10 which ought to have been issued in respect of aspects forming the subject matter of the proceedings in GST DRC-01 culminating in GST DRC-07 in view of the fact that the proceedings are pursuant to scrutiny of

assessments, the learned Additional Government Pleader submitted that Form ASMT 10 was not issued other than the one issued on 22-12-2021, which does not cover the issues raised in the impugned proceeding. The learned Additional Government Pleader sought leave to issue notice in Form ASMT 10 in respect of the aspects forming the subject matter of the impugned proceedings and thereafter to assess in compliance with the procedure contemplated under the Act including section 61.

7. Recording the same, the impugned order dated 9-5-2022 is set aside and the matter is remitted back to the Assessing Officer for redoing the assessment. It is open to the Respondent to issue appropriate Form (Form ASMT 10) and after affording a reasonable opportunity to the petitioner in the manner contemplated under the Act proceed further in accordance with law. The petitioner shall also co-operate in the proceedings.

8. With the above observations, this Writ Petition is disposed of. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
[Sonia Gokani (Designated) & Sandeep N. Bhatt, CJ.J.]

R/Special Civil Application No. 2288 of 2023

Devi Products ... Petitioner

versus

State of Gujarat ... Respondent

Date of Order: 15.02.2023

WHETHER A SHOW CAUSE NOTICE FOR CANCELLATION OF REGISTRATION, WITHOUT GIVING PROPER REASONS AS TO WHY IT IS BEING CANCELLED – CAN BE UPHELD IN LAW UNDER GST ACT?

HELD – NO.

Present for Petitioner(s) No. 1 : Mr Kuntal A Parikh (7757)

Present for Respondent(s) No. 2 : Ms Shrunjal Shah, Mr Utkarsh Sharma and Mr Kathiria, AGPS

ORDER

Ms. Sonia Gokani, (Designated) CJ.

1. By way of the present petition under Article 226 of the Constitution, the petitioner seeks to challenge the legality and validity of the order dated

24.03.2021 passed by the respondent No.2 whereby the registration certificate granted to the petitioner under the Central Goods and Service Tax Act, 2017 and Gujarat Goods and Services Tax, 2017 ("GST Acts" for short) has been cancelled with effect from 01.07.2017. It is averred that the same has been done in violation of principles of natural justice.

2. Petitioner has challenged the show cause notice dated 15.03.2021 issued under Rule 21 of the CGST Rules and GST Rules whereby respondent No.2 suspended the registration certificate with immediate effect from 15.03.2021 itself.

3. Petitioner is sole proprietor engaged in the business of trading of article brass and was registered with the Gujarat Value Added Tax under the Gujarat Value Added Tax, 2003 and Central Sales Tax Act, 1956. He got his registration with effect from 01.07.2017 by virtue of Section 139 of the GST Act and he has granted final certificate of registration under the very provision. According to petitioner, till June, 2020, he had filed his return of income under the GST Act, however, because of the prevalent circumstances he had no business subsequent to June, 2020, and therefore he was of bonafide belief that there was no requirement to file return under the GST ACT.

4. A show cause notice was issued on 15.03.2021 under Rule 22(1) of the GST Rules read with Section 29 of the GST Act whereby the petitioner was informed that his registration was liable to be cancelled because he had not filed the return for a continuous period of six months and he was called upon to file his reply to the notice. It is also the grievance of the petitioner that his registration has been suspended with immediate effect on 15.03.2021 itself under Rule 21A of the GST Rules and this had been done without recording any reasons. Thereafter, the registration of his was cancelled by respondent No.2 with effect from 01.07.2017 without recording any particulars or the reasons or the grounds for cancellation. This orders since was cryptic and there is no tax demand determined, he is before this Court.

5. It is his say that due to Covid-19 pandemic his business was badly affect and in fact, there had been no business post June, 2020 period. The financial hardship that he suffered from July, 2020 had led him to believe that there was no requirement for GST return to file. His registration has been cancelled with effect 01.07.2017 for not filing return after June, 2020. Therefore, he has approached this Court with the following prayers :

(a) That this Honorable Court be pleased to issue a writ of mandamus or any other appropriate writ, direction or order quashing and setting aside the impugned order dated 24.03.2021 (Annexure - A)

cancelling the registration certificate of the Petitioner passed by the Respondent No. 2 as well as show cause notice dated 15.03.2021 (Annexure - B); and

(b) That this Honorable Court be pleased to issue a writ of mandamus or any other appropriate writ, direction or order directing the Respondents to forthwith restore the registration certificate (Annexure - C) of the Petitioner with effect from 01.07.2017; and

(c) Pending notice, admission and final disposal of this Petition, this Hon'ble Court by way of interim relief be pleased direct the respondent authorities to restore the registration of the Petitioner with effect from 01.07.2017; and

(d) Ex-parte ad-interim relief in term of Prayer 9(c) be granted; and

(e) For Costs; and

(f) That this Honorable Court be pleased to grant such other and further relief/s as are deemed just and proper in the facts and circumstances of this case."

6. We have heard Mr.Kuntal Parikh, learned advocate appearing for the petitioner who has drawn our attention to the decision of this Court in case of **Aggarwal Dyeing and Printing Works vs. State of Gujarat and others** rendered in Special Civil Application No. 18860 of 2021 and allied matter. He has urged that his case is squarely covered by the decision of this Court. In the case of **Aggarwal Dyeing**, the writ applicant had approached the Court by urging that the show cause notice issued to him was cryptic and the order passed was also not in accordance with law. The appeal was preferred after delay of more than 2 years before the appellate authority in that case under Section 107 read with Rule 108 of the Rules. The case there was also that the turn over was nil and under the bonafide belief that no return was required to be tendered, the same was not submitted. In that group of matters, this Court had noticed that the notice impugned was devoid of any specific details and particulars. The order of cancellations also were more glaring. He therefore has urged that this would squarely cover the issue and hence, the order needs to be quashed along with the notice.

7. Ms.Shrunjal Shah, learned Assistant Government Pleader appearing on an advance copy argued fervently and Mr.Utkarsh Sharma, learned Assistant Government Pleader has also has drawn the attention of this

Court to the scheme of the Act which has brought into force on 01.07.2017 particularly the provision of Section 29 to urge this Court that the filing of return is must and Section 29 confers power on proper Officer to cancel the registration. It is also further argued before this Court that for period of six months, no return is filed, no further dilation in the notice is required. According to learned Assistant Government Pleader, the decision covers the issue of the cryptic notice and in the instant case such cancellation is on account of non-filing of return and that factor needs to be considered by the Court. It is not in dispute that this decision has not been challenged and in fact has been followed in various decisions delivered thereafter. In short, the attempt has been made to defend the action of the concerned officer since this was in relation to non-filing of the return for a period of six months.

8. Having heard both the sides at the stage of admission, we deem it appropriate to entertain this petition essentially following the decision in the case of **Aggarwal Dyeing**. The controversy there in the writ application was whether the show cause notice seeking cancellation of registration and the consequential order cancelling the registration under the GST Act was valid and sustainable in the eyes of law. The Court not only had examined the scheme of the Act but had also following various decisions of the Apex Court particularly on the necessity of giving reasons by a body or authority in support of the decision held that the absence of reasons renders an order indefensible and unsustainable particularly when it is subject to the appeal or revision. It also has amplified the decision of the **Krani Associates vs. Masood Ahmed** reported in **(2010) 9 SCC 496** where the Court has held that insistence on recording of reasons is meant to serve the vital principles of justice that justice must not only be done but it must also appear to be done as well. It would also operate as valid restraint on any possible arbitrary exercise of judicial and quasi judicial or even administrative power. It also reassures that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations. The reasons have virtually become indispensable component of a decision making process Observing the principles of natural justice vide judicial, quasi judicial or even the administrative bodies. They would also facilitate the process of judicial review by the superior Court. Therefore, it has been held that the assignment of the reason is imperative in nature and speaking order doctrine mandates assigning the reasons which is heart and sole of the decisions and that must be the result of independent re-appreciation of evidence adduced and documents produced in the case. Applying these principles, the Court held that the State and its officers ought to have at least incorporate the specific details of the contents of the show cause notice which any prudent person can respond to as otherwise

it would to fail to respond to such show cause notice which is bereft of details thereby making the mechanism of issuing show cause notice only a formality. Some of the findings and observations would be of profitable to reproduced at this stage :

> 12. At this stage it would be germane to refer to observations made by the Andhra Pradesh High Court in the case of MRF Mazdoor Sangh v. The Commissioner of Labour & Others, reported in 2014 (3) ALT 265, MANU/AP/1685/2013, wherein the matter of cancellation of registration of trade union, it was held that :
>
> "The show cause notice should reflect the jurisdictional facts based on which the final order is proposed to be passed. The person proceeded against would then have an opportunity to show cause that the authority had erroneously assumed existence of a jurisdictional fact and, since the essential jurisdictional facts do not exist, the authority does not have jurisdiction to decide the other issues."
>
> 12.1 We find that the aforesaid observation would squarely apply to the present facts of the case on hand. Thus, the sum and substance of various judgments on the principles of natural justice is to the effect that wherever an order is likely to result in civil consequences, though the statute or provision of law, by itself, does not provide for an opportunity of hearing, the requirement of opportunity of hearing has to be read into the provision.
>
> 13. It cannot be disputed that the writ applicant is liable to both civil and penal consequences pursuant to the impugned order of cancellation of certificate of registration. In all the writ applications we could note from the tabular details that the show cause notice though issued in the prescribed form does not elaborate the reasons and the one line reason mentioned is nothing but the reproduction of either of the reasons provide under rules regarding cancellation of registration. It appears from the materials on record that the respondent no. 2 issued a show-cause notice dated 18th September, 2018 in the Form GST REG-17, calling upon the writ-applicant to show-cause as to why the registration under the GST should not be cancelled. Such notice issued by the respondent no. 2 is under Rule 22(1) of the Central Goods and Services Tax Rules, 2017. The notice dated 18th September, 2018 referred to above reads as under :

"Form GST REG-17
[See Rule 22(1)]

Reference Number : ZA240918027128D Date : 18/09/2018

To Registration no. (GSTIN/Unique ID) :
24AEXPA3306
SANJEEV PREM AGGARWAL
SURVEY NO.230, OPP. MARIYA BANK, B/H RANIPUR VILLAGE,
NAROL, Ahmedabad, Gujarat 382405.

Show Cause Notice for Cancellation of Registration

Whereas on the basis of information which has come to my notice, it appears that your registration is liable to be cancelled for the following reasons :

1. Any Tax payer other than composite taxpayer has not filed returns for a continuous period of six months. You are hereby directed to furnish a reply to the notice within seven working days from the date of service of this notice. You are hereby directed to appear before the undersigned on 27/09/2018 at 12:42.

If you fail to furnish a reply within the stipulated date or fail to appear for personal hearing on the appointed date and time, the case will be decided ex parte on the basis of available records and on merits.

Place : Gujarat Signature valid digitally signed by
OS Goods and Service Tax Network

Date: 2018.09.18 13.00.44"

13.1 To say the least, the respondent authority i.e. the Assistant/Deputy Commissioner, State tax Officer ought to have atleast incorporated Specific details to the contents of the show cause. Any prudent person would fail to respond to such show cause notice bereft of details thereby making the mechanism of issuing show cause notice a mere formality and an eye wash.

14. We further notice that the respondent authority has failed to extend sufficient opportunity of hearing before passing impugned order, inspite of specific request for adjournment sought for. Even the impugned order is not only non speaking, but cryptic in nature and the reason of cancellation not decipherable therefrom. Thus, on all counts the respondent authority has failed to adhered to the aforesaid legal position. We therefore, have no hesitation in holding that the basic Principles of natural justice stand violated and the order needs to be quashed as it entails penal and pecuniary consequences.

15. We would be failing in our duty if we do not draw the attention of the Appellate Authority who has mechanically disposed off the appeals on the ground of delay. Apt would be to revisit the observations of the Supreme Court with regard to reasonable opportunity in the case of Union of India v. Jesus Sales Corporation, reported in 1996 (4)SCC 69, wherein it is observed that a practice has developed holding that even in the absence of a provision providing for an opportunity of hearing, such a provision is required to be read into the Rules governing the case, particularly, when an order being made is likely to have civil consequences. The Hon'ble Supreme Court has emphasize up on the appellate court to have the approach tilting in favour of providing fair and reasonable opportunity of hearing while dealing with condonation of delay application in filing appeal. The relevant observation made by the Hon'ble Supreme Court in the case of Jesus Sales Corporation (supra) in para 2, are as under :

"The Appellate authority may dispense with such deposit in its discretion. The proviso relating to the condonation for delay in filing the appeal is more or less on the pattern of section 5 of the Limitation Act. Some how, a practice has grown throughout the country that before rejecting the prayer for condonation of delay in filing the appeal or application, opportunities are given to the appellants or petitioners, as the case may be, to be heard on the question whether such delay be condoned. Opportunities to be heard are also the contesting respondents in such appeals. In different statutes given to where power has been vested in the Appellate authority to condone the delay in filing such appeals or applications, there are no specific provisions in those statutes saying that before such delays are condoned the appellants or the applicants shall be heard, but on basis of practice which has grown during the years the courts and quasijudicial authorities have been hearing the appellants and applicants before dismissing such appeals or applications as barred by limitations. It can be said that courts have read the requirements of hearing the appellants or the applicants before dismissing their appeals or applications filed beyond time on principle of natural justice, although the concerned statute does not prescribe such requirement specifically."

15.1 The Appellate authority ought to have appreciated that the writ applicants at relevant point of time i.e. in year 2017, applied for registration which request was favourably considered by the authorities under the Act with a specific registration number allotted to the writ applicant. It was a transitional phase, whereby the old CST Act was repealed and the new regime of CGST/GGST has come into force. With the different forms and procedure envisaged there under, any layman is bound to take time to adhered to the norms. The Record reveals that subsequently the writ applicants have claim to have filed their returns and have even deposited all dues. We further notice that such exercise has been undertaken through the writ applicant's Tax Consultant who were professionally engaged to undertake such task. Unfortunately, information

of the returns for certain period not being uploaded, surfaced in the year 2019 and the cause explained suggest that circumstances were beyond the writ applicant's reach. In such peculiar circumstances, it was least expected of the Appellate authority to condone the delay for filing appeal, more so, with the Onset of Pandemic Covid-19, preventing further follow up action. In the peculiar facts and circumstances, the authority ought to have condoned the delay which unfortunately was not done, despite the writ applicant having made a fervent request for condonation of delay in filing appeal seeking revocation of cancellation of registration.

16. When we inquired with the learned AGP appearing for the respondents as to why such vague show cause notices and vague final orders, bereft of any material particulars therein are being passed, the reply on behalf of the respondents was quite baffling. The learned AGP submitted that on account of technical glitches in the portal, the department is finding it very difficult to upload the show cause notice as well as the final order of cancellation of registration containing all the necessary details and information therein. According to the learned AGP, it is in such circumstances that the show cause notices and impugned orders without any details are being forwarded to the dealers. This hardly can be a valid explanation for the purpose of issuing such vague show cause notices and vague final orders cancelling the registration.

17. We direct that till the technical glitches are not cured, the department will henceforth issue show cause notice in a physical form containing all the material particulars and information therein to enable the dealer to effectively respond to the same. Such show cause notice in physical form shall be dispatched to the dealer by the RPAD. In the same manner, the final order shall also be passed in physical form containing all necessary reasons and the same shall be forwarded/communicated to the dealer by way of RPAD. Any lapse in this regard, henceforth shall be viewed very strictly. We are saying so because this Court has been fedded up with unnecessary litigation in this regard.

18. Our final conclusion are as under:

18.1. Until the Department is able to develop and upload an appropriate software in the portal which would enable the Department to feed all the necessary information and material particulars in the show cause notice as well as in the final order of cancellation of registration that may be passed, the authority concerned shall issue an appropriate show cause notice containing all the necessary details and information in a physical form and forward the same to the dealer by RPAD. In the same manner, when it comes to passing the final order, the same shall also be passed in a physical form containing all the necessary information and particulars and shall be forwarded to the dealer by RPAD.

18.2. Over a period of time, we have noticed in many matters that the impugned order cancelling the registration of a dealer travels beyond the scope of the show cause notice. Many times, the dealer is taken by surprise when he gets to read in the order that the authority has relied upon some inspection report or spot visit report etc. If the authority wants to rely upon any particular piece of evidence then it owes a duty to first bring it to the notice of the dealer so that if the dealer has anything to say in that regard, he may do so. Even if the authority wants to rely on any documentary evidence, the dealer should be first put to the notice of such documentary evidence and only thereafter, it may be looked into.

18.3. The aforesaid may appear to be very trivial issues but, it assumes importance in reducing the unnecessary litigation. Our concern is that on account of procedural lapses, the High Court should not be flooded with writ applications. The procedural aspects should be looked into by the authority concerned very scrupulously and deligently. Why unnecessarily give any dealer a chance to make a complaint before this Court when it could have been easily avoided by the department."

9. In the instant case, what one finds is that it was a case of non-filing of return for six months. Assuming that requirement of filing of the return and the consequences for non-filing of return for six months is apparent in statutory provision, the very nature of notice has been held by this Court in the decision of Aggrawal Dyeing and Printing Works (supra) as cryptic and unsustainable under law.

10. Moreover, what is far more vital to be considered is the order which has been passed and that raises a serious concern of ours as the consequential order also is cryptic. While cancelling the registration, the authority concerned has not even determined the amount payable pursuant to such cancellation. It would be apt to reproduce the entire order of cancellation of registration :

"This has reference to your reply: dated 24/03/2021 in response to the notice to show cause dated 15/03/2021: Whereas no reply to notice to show cause has been submitted;

To

The effective date of cancellation of your registration is 01/07/2017 Determination of amount payable pursuant to cancellation:

Accordingly, the amount payable by you and the computation and basis thereof is as follows:

The amounts determined as being payable above are without

prejudice to any amount that may be found to be payable you on submission of final return furnished by you.

You are required to pay the following amounts on or before 03/04/2021 failing which the amount will be recovered in accordance with the provisions of the Act and rules made thereunder.

Head	Central Tax	State Tax/UT Tax	Integrated Tax	Cess
Tax	0	0	0	0
Interest	0	0	0	0
Penalty	0	0	0	0
Others	0	0	0	0
Total	0	0	0	0

11. Assuming that the notice which merely speaks of "any tax payer other than composition tax payer has not filed returns for a continuous period of six months" would be comprehensible for the assessee to respond to the same as he was also given an opportunity to appear on 23-3-2021, this non-appearance on the part of the respondent when has resulted into cancellation of registration that too from the first date i.e. 1-7-2017 much prior to 2020 when he had defaulted in filing the returns, what is completely incomprehensible is that cancellation of registration without any determination of the amount which is to be paid by the petitioner which is hardly sustainable and such action can hardly be ratified in any manner.

12. We notice that this Court having noticed the repeated actions on the part of the officers of issuance of notice had also seriously frowned upon the non following of the decision. However, it has been brought to our notice that this is prior to delivery of the judgment in the month of February, 2022, therefore nothing further is to be stated as learned Assistant Government Pleader Mr.Kathiria had also drawn the attention of this Court of senior officers having taken note of the said decision and having circulated the same amongst them.

13. The writ application is allowed quashing the show cause notice and the consequential order cancelling registration with liberty to the respondent to issue fresh notice with particular reasons incorporating the details and a reasonable opportunity of hearing to writ applicant and to pass appropriate speaking order. The writ applicant is also permitted to respond to the same by filing an objection and reply with necessary documents.

HIGH COURT OF KARNATAKA
[S.R. Krishna Kumar, J.]

Writ Petition No. 13185 of 2020 (T-Res)

Tonbo Imaging India (P.) Ltd. ... Petitioner

Versus

Union of India & Ors. ... Respondents

Date of Order: 16.02. 2023

WHETHER AMENDMENT TO RULE 89(4C) AS AMENDED BY NOTIFICATION NO. 16/2020 – CENTRAL TAX DATED 23.03.2020 REQUIRING PROOF OF EXPORT TURNOVER BEING 1.5 TIMES VALUE OF LIKE GOODS DOMESTICALLY SUPPLIED, BE DECLARED AS ULTRA VIRES?

HELD – YES.

Present for Petitioner : V. Raghuraman, Sr. Counsel & C.R. Raghavendra, Adv.

Present for the Respondents : Smt. Vanitha. K.R., Adv.

ORDER

1. In this petition, petitioner has sought for the following reliefs:—

"a. Issue a writ of declaration or any other appropriate writ or direction declaring the provision of Rule 89(4)(C) of the CGST Rules, as amended *vide* Para 8 of Notification 16/2020-CT dated 23-3-2020, enclosed a Annexure A as unconstitutional for the reasons stated in the grounds;

b. Issue a writ of declaration or any other appropriate writ or direction declaring the provisions of *Explanation* to Rule 93 of the CGST Rule, enclosed as Annexure B as unconstitutional for the reasons stated in the grounds;

c. Issue a writ of certiorari or any other appropriate writ to quash impugned order passed by Respondent No. 3 in Form GST-RFD-06 dated 30-6-2020, enclosed as Annexure C for the reasons stated in the grounds;

d. Issue a writ of mandamus or any other appropriate writ directing the Respondent No. 3 to accept the six refund applications in Form

GST-RFD-01 on 25-5-2020, 27-5-2020 and on 28-5-2020 for the tax periods May 2018, July 2018, August 2018, November 2018, December 2018 and March 2019 (enclosed in Annexures D1, D2, D3, D4, D5 and D6) and grant refund of taxes in accordance with law along with interest;

And

e. Grant such other consequential relief a this Hon'ble High Court may think fit including refund of amounts paid, if any and the cost of this writ petition.

2. Apart from other issues, the validity of rule 89(4C) of the Central Goods and Services Tax Rules, 2017 (for short 'the CGST Rules') as amended vide Para 8 of the Notification No. 16/2020- CT dated 23-3-2020 is the subject matter of the present petition.

Prior to the aforesaid amendment, rule 89(4C) of the CGST Rules, read as under:—

"Turnover of zero-rated supply of goods means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking as declared by the supplier, whichever is less, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both."

After amendment w.e.f 23-3-2020, rule 89(4C) reads as under:—

"Turnover of zero-rated supply of goods means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking or the value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier, as declared by the supplier, whichever is less, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both."

Factual Matrix of the case:

3. The petitioner - M/s Tonbo Imaging India Pvt Ltd, is engaged in designing, developing, building and deploying various types of advanced imaging and sensor systems to sense, understand and control complex environments. The petitioner is engaged in developing innovative designs in micro-optics, lower power electronics and real-time vision processing to design imaging systems for real world applications in fields of military

applications, critical infrastructures for modern day battlefields, unmanned reconnaissance, transport vehicles driving in the dark etc., wherein the customized products provide effective visualization in different and challenging environments.

3.1 The petitioner exported various aforementioned customized/ unique products during the period from May 2018 to March 2019. Since exports made by the petitioner are "zero rated" under section 16 of the Integrated Goods and Services Act, 2017 (for short, 'the IGST Act'), the petitioner filed refund applications with the respondents on 25-5-2020, 27-5-2020 and 28-5-2020 and claimed refund of unutilized input tax credit under section 54(3)(i) of the Central Goods and Services Act, 2017 (for short 'the CGST Act') read with rule 89 of the CGST Rules.

3.2 Meanwhile, rule 89(4)(C) of the CGST Rules having been amended w.e.f 23-3-2020, Show Cause Notices dated 27-5-2020, 3-6-2020 and 4-6-2020 were issued by the respondents on the ground that the petitioner had not given proof, which was required to be given in terms of the amended rule 89(4)(C) of the CGST Rules and that therefore, the refund claims could not be considered.

3.3 The petitioner submitted replies dated 4-6-2020, 8-6-2020 and 9-6-2020 to the show cause notices inter-alia stating that the amended rule 89(4)(C) of the CGST Rules would not be applicable in the instant case, as the period for which refund was being claimed (i.e., May 2018 to March 2019) was much prior to the amendment of rule 89(4)(C) (i.e., on 23-3-2020) and that therefore, the petitioner would be governed by the old/un-amended rule 89(4)(C) and not the amended rule 89(4)(C).

3.4 In pursuance of the same, the respondents proceeded to pass the impugned order dated 30- 6-2020 rejecting the refund claim of the petitioner, who is before this Court by way of the present petition not only assailing the impugned order but also the validity of rule 89(4)(C) of the CGST rules as well as the Explanation to rule 93 of the CGST rules.

4. Heard Sri.V. Raghuraman, learned Senior Counsel along with Sri. J.S. Bhanumurthy for the petitioner and Smt. K.R. Vanitha, learned counsel for the respondents-revenue and perused the material on record.

Petitioner's Contentions:

5. In addition to reiterating the various contentions urged in the petition and referring to the material on record, learned Senior counsel for the petitioner submitted that at the outset, the challenge in the present petition to the validity of the explanation to rule 93 of the CGST Rules(Relief

'B') was not being pressed into service by the petitioner, who would be restricting its claim to the remaining reliefs sought for in the petition.

5.1 It was submitted that rule 89(4)(C) of the CGST Rules, as amended on 23-3-2020 is ultra vires and invalid and deserves to be declared unconstitutional and struck down. It was further submitted that the impugned order is illegal, arbitrary and without jurisdiction or authority of law and deserves to be quashed and the respondents be directed to accept/allow the subject refund claims of the petitioner and grant refund of taxes along with interest in favour of the petitioner.

Learned Senior counsel elaborated his submissions as under:—

5.2 Rule 89(4)(C) of the CGST Rules is ultra vires section 54 of the CGST Act read with section 16 of the IGST Act; the very intention of the zero-rating it to make entire supply chain of "exports" tax free, i.e., to fully 'zero-rate' the exports by exempting them from both input tax and output tax; accordingly, section 16(3) of the IGST Act allows refund of input taxes paid in the course ofmaking a zero-rated supply, i.e., supplies which covers exports as well as supplies to SEZs. The rule in whittling down such refund is ultra vires in view of the well settled principle of law that Rules cannot over-ride the parent legislation.

5.3 Rule 89(4)(C) of the CGST Rules is ultra vires article 269A read with Article 246A of the Constitution of India as the Parliament has no legislative competence to levy GST on export of goods; neither in Article 246A nor in Article 269A is there a reference to treatment of export of goods or services, while in Article 269A reference is made to import of goods or services or both, particularly when reference to export of goods or services in Article 286 is only for the purpose of placing restrictions on the powers of the State Legislature.

5.4 Rule 89(4)(C) of the CGST Rules is violative of article 14 and 19(1)(g) of the Constitution of India; it was submitted that the quantum of refund of unutilized input tax credit is restricted only in cases falling under section 16(3)(a) of the IGST Act, i.e., in cases where export of goods is made without payment of duty under a Bond/Letter of Undertaking(LUT); however, no such restriction is imposed on cases falling under section 16(3)(b) of the IGST Act, i.e., in cases where export of goods is made after payment of duty; by virtue of the above, there is a hostile discrimination between two class of persons, viz.:

(i) the class of exporters, who opt to obtain refund of unutilized input tax credit where export of goods are made without payment of duty under a bond/LUT in terms of section 16(3)(a) of the IGST Act read with rule 89(4) of the CGST Rules and,

(ii) the class of exporters who opt to obtain refund of tax after payment of duty in terms of section 16(3)(b) of the IGST Act read with Rule 96A of the rules; the guarantee of equal protection of the laws must extend even to taxing statutes; if person or property of the same character has to be taxed, the taxation must be by the same standard, so that the burden of taxation may fall equally on all persons holding that kind and extent of property; if the same class of property or persons similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property or persons.

5.5 It was submitted that article 14 of the Constitution forbids class legislation; however, article 14 does not prohibit reasonable classification for the purpose of legislation provided it passes two tests, viz., that the classification must be founded on an intelligible differentia, which distinguishes persons or things that are grouped together from others left out of the group; and that the differentia must have a rational relation with the object sought to be achieved by the statute; it was submitted that the impugned rule 89(4)(C) of the CGST Rules is arbitrary and unreasonable, in as much as it bears no rational nexus with the objective sought to be achieved by Section 16 of the IGST Act, in that while section 16 of the IGST Act seeks to make exports tax- free by "zero-rating" them, the impugned rule 89(4)(C) of the CGST Rules aims to do just exactly the opposite by restricting the quantum of refund of tax available to the expended in making such exports; it was therefore submitted that including domestic turnover in the definition of zero rated supply which is meant to cover only exports is clearly arbitrary and unreasonable.

5.6 Insofar as violation of article 19(1)(g) of the Constitution of India is concerned, it was submitted that in exports, availability of the rotation of funds is essential for the business to thrive; the entire concept of refund of unutilized input tax credit relating to zero-rated supply would be obliterated, in case the respondents are permitted to put any limitation and condition that takes away petitioner's right to claim refund of all the taxes paid on the domestic purchases used for the purpose of zero-rated supplies; the incentive given to the exporters would lose its meaning and this would cause grave hardship to the exporters who are earning valuable foreign exchange for the country; it was therefore submitted that exporters would have factored in such incentives in the pricing mechanism when they quote and consequently, the restriction of the same by the impugned amended rule 89(4)(C) would be highly unreasonable.

5.7 Rule 89(4)(C) of the CGST Rules also suffers from the vice of vagueness for the reason that the words “like goods” and “similarly placed supplier” in the impugned rule 89(4)(C) are completely open-ended and are not defined anywhere in the CGST Act/Rules or the IGST Act/Rules; in this context, it was submitted that considering the business of the petitioner, it is not possible to have any “like goods” and “same or similar placed supplier” for the unique and customized products being manufactured by the petitioner and the preciseness of definitions as found in the customs legislation is missing herein.

5.8 In this context, it was submitted that the impugned Rule fails to clarify, as to what would be the consequence if there are no goods supplied in the domestic market and value of like goods provided by other suppliers is not available or as to what would be the consequences in respect of a supplier who may have different pricing policy for different local customers nor what would be the consequences in respect of a supplier who would be pricing the local goods differently in different states for the same products being exported. It was therefore submitted that when it is impossible for any exporter to show proof of value of “like goods” domestically supplied by the “same or, similarly placed, supplier”, the refund itself cannot be denied to such exporter and consequently, rule 89(4)(C) of the CGST Rules merely being a machinery provision cannot impose a rigorous condition to take away right to obtain refund, which the petitioner is otherwise entitled to in terms of section 54 of CGST Act read with section 16 of the IGST Act.

5.9 The impugned rule 89(4)(C) of the CGST Rules, as amended on 23-3-2020 is arbitrary and unreasonable, in as much as the possibility of taking undue benefit by inflating the value of the zero-rated supply of goods, cannot be a ground to amend the Rule, which deserves to be declared invalid on this ground also.

5.10 The impugned refund rejection order has been mechanically passed without any application of mind also violative of principles of natural justice; further, the refund claims of the petitioner pertain to periods prior to 23-3-2020, when rule 89(4)(C) of the CGST Rules came into force and since the same cannot be given retrospective or retroactive effect, the impugned order deserves to be quashed.

In support of his contentions, learned Senior counsel placed reliance upon the following judgments:—

(i) CIT v. Taj Mahal Hotel [1971] 3 SCC 550;

(ii) Bimal Chandra Banerjee v. State of Madhya Pradesh 1970 taxmann.com 98/2 SCC 467;

(iii) Sangram Singh v. Election Tribunal AIR 1955 SC 425;(iv) All India Federation of Tax Practitioners v. Union of India 2008 taxmann.com 1072/[2007] 7 SCC 527;

(v) Shayara Bano v. Union of India [2017] 9 SCC 1;

(vi) Pitambra Books (P.) Ltd. v. Union of India [2020] 114 taxmann.com 122/34 GSTL 196 (Delhi);

(vii) Shreya Singhal v. Union of India [2015] 55 taxmann.com 387/5 SCC 1;

(viii) Universal Drinks (P.) Ltd. v. Union of India 1984 (18) ELT 207 (Bom.);

(ix) Dipak Vegetable Oil Industries Ltd. v. Union of India 1990 taxmann.com 673/[1991] 52 ELT 222 (Guj.);

(x) Hajee K. Assainar v. CIT [1971] 81 ITR 423 (Ker.);

(xi) CIT v. Vatika Township (P.) Ltd. [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 (SC);

(xii) Verghese v. Dy. CIT [1994] 76 Taxman 12/210 ITR 511 (Kar.);

(xiii) Asstt. Commissioner, Commercial Tax Department v. Shukla & Bros. 2010 (254) ELT 6 (SC);

(xiv) Kunnathai Thathunni Moopil Nair v. State of Kerala AIR 1961 (SC) 552;

(xv) Dy. CIT v. Pepsi Foods Ltd. [2021] 126 taxmann.com 69/282 Taxman 10/7 SCC 413;

(xvi) Reckitt Banckiser v. Union of India [2011] 269 ELT 194 (J&K);

(xvii) U.P. Power Corpn. Ltd. v. Sant Steels & Alloys (P.) Ltd. [2008] 2 SCC 777;

Respondents' Contentions:

6. Per contra, learned counsel for the respondents-revenue, in addition to reiterating the various contentions urged in the statement of objections submitted that the petition was not maintainable and was liable to be dismissed. It was submitted that the petitioner has not submitted the proof that the export turnover mentioned in the instant claim is 1.5 times the value of like goods domestically supplied by the same or similarly placed supplier and hence, zero-rated turnover declared by the petitioner cannot be accepted for the purpose of calculation of eligible refund amount. Thus repudiating the various contentions of the petitioner, it was submitted that there was no merit in the petition and the same was liable to be dismissed.

Analysis and Findings:

7. Before adverting to the rival contentions and the relevant statutory provisions, a brief overview of the GST scheme is required; in this context, it is relevant to state that the entire scheme of indirect taxes in India has undergone transformation upon introduction of GST with effect from 1-7-2017. This tax is being levied with concurrent jurisdiction of the Centre and the States on the supply of goods or services. For this purpose, the Constitution of India has been amended vide Constitution (101st Amendment) Act, 2016 with effect from 16th September 2016.The Constitutional Amendment Bill specifically mentions that the objective of introducing GST is to avoid cascading effect of taxes.

8. Central Government enacted the CGST Act to provide for levy and collection of tax on supply of goods or service or both where the supply is intra-state supply; so also, the CGST Rules were also framed including the impugned rule 89(4)(C);

9. Central Government enacted the IGST Act for the purpose of levy and collection of GST on the supply of goods or services or both where the supply is inter-state supply;

10. The State of Karnataka enacted the KGST Act to levy and collect tax on intra-state supply of goods or services or both within the state of Karnataka.

11. GST is a multi-stage tax, as each point in a supply chain is taxed (unless specifically exempted by law) till the goods and services reach the final consumer. This can be demonstrated by the following:

- A manufacturer procures “input goods” and “input services” to manufacturer his goods and would make “outward supply” to a wholesale supplier. Here, the levy of GST would be on the manufacturer/seller. However, the incidence of GST would be on the wholesale supplier.

- For the wholesale supplier, the goods procured from the manufacturer/seller becomes “input goods”. The wholesale supplier would make value additions thereon and make an “outward supply” of the same to the retailer. In doing so, GST is levied on the wholesale supplier, but the incidence of GST, which was earlier on the wholesale supplier, is further passed on to the retailer.

- The goods procured from the wholesale supplier becomes “input goods” for the retail seller. The retail seller would make value

additions thereon and make an "outward supply" of the same to the final consumer. In doing the same, GST is levied on the retail seller, but the incidence of GST, which was earlier on the retail seller, is further passed on to the final consumer.

- The supply chain having been terminated, the final consumer will not be able to pass the incidence of tax any further and thus bears the final burden of tax.

- GST is therefore a destination-based tax on consumption of goods and services. It is levied at all stages right from manufacture up to final consumption with 'credit' of taxes paid at previous stages of supply chain available as setoff. In a nutshell, only value addition will be taxed, and burden of tax is to be borne by the final consumer.

12. In the case of **All India Federation of Tax Practitioners Vs Union of India - (2007) 7 SCC 527**, the Apex Court held as under:

"6. At this stage, we may refer to the concept of "Value Added Tax" (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer.

7. In the light of what is stated above, it is clear that service tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is nota charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax."

13. In the case of **Union of India v. VKC Footsteps (India) (P) Ltd. (2022) 2 SCC 603**, the Apex Court held as under:—

"44. The idea which permeates GST legislation globally is to impose a multi-stage tax under which each point in a supply chain is potentially taxed. Suppliers are entitled to avail credit of tax paid at an anterior stage. As a result, GST fulfils the description of a tax which is based on value addition. Value addition is intended to achieve fiscal neutrality and to obviate a cascading effect of taxation which traditional tax regimes were liable to perpetuate. In a sense therefore, the purpose of a tax on value addition is not dependent on the distribution or manufacturing model. The tax which is paid at an anterior stage of the supply chain is adjusted. The fundamental

object is to achieve both neutrality and equivalence by the grant of seamless credit of the duties paid at an anterior stage of the supply chain."

Section 16 of the IGST Act, 2017 reads as under:

Zero rated supply.

(1) "zero rated supply" means any of the following supplies of goods or services or both, namely:—

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:--

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made there under.

Section 54(3) of the CGST Act, 2017 reads as under:

Refund of tax.

54. (1) Any person claiming refund of any tax . . . . . .

(2) ** ** **

(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:

Provided that no refund of unutilised input tax credit shall be allowed in cases other than

(i) zero rated supplies made without payment of tax;

(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:

Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.

(4) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

****Rule 89(4) of the CGST Rules, 2017 reads as under:**

"89. Application for refund of tax, interest, penalty, fees or any other amount.-(1) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

(4) In the case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), refund of input tax credit shall be granted as per the following formula - Refund Amount = (Turnover of zero- rated supply of goods + Turnover of zero-rated supply of services) x Net ITC ÷Adjusted Total Turnover Where, —

(A) "Refund amount" means the maximum refund that is admissible;

(B) "Net ITC" means input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both;

(C) "Turnover of zero-rated supply of goods means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking or the value

which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier, as declared by the supplier, whichever is less, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both"

(D) "Turnover of zero-rated supply of services" means the value of zero-rated supply of services made without payment of tax under bond or letter of undertaking, calculated in the following manner, namely:—Zero-rated supply of services is the aggregate of the payments received during the relevant period for zero-rated supply of services and zero-rated supply of services where supply has been completed for which payment had been received in advance in any period prior to the relevant period reduced by advances received for zero-rated supply of services for which the supply of services has not been completed during the relevant period;"

14. There is no gainsaying the fact that one of the fundamental principles to make exports competitive in the international market is that taxes are not added to the cost of exports. This intention cannot be carried out by merely exempting the output goods or services for the following reasons:-

- The inputs and input services which go into the making of the output goods or services would have already suffered tax and only the final output product would be exempted.
- When the output is exempted, tax laws do not allow availment/ utilization of credit on the inputs and input services used for supply of the exempted output. Thus, in a true sense, the entire supply is not zero-rated.
- To overcome the above anomalies, export of goods and services to destinations outside India have been "zero-rated" in the GST regime. The effect of "zero-rating" is that the entire supply chain of a particular zero-rated supply (i.e., export) is tax free i.e., there is no burden of tax either on the input side or output side.
- The detailed write-up on 'zero rating of supplies' issued by the Director General of Taxpayer Services, CBIC(Annexure-K to the writ petition) clarifies the position as under:

What is the need for Zero Rating?

As per section 2(47) of the CGST Act, 2017, a supply is said to be exempt, when it attracts nil rate of duty or is specifically exempted buy

a notification or kept out of the purview of tax (i.e. a non-GST) supply). But if a good or service is exempted from payment of tax, it cannot be said that it is a zero rated. The reason is not har5d to find. The inputs and input services which go into the making of the good or provision of service has already suffered tax and only the final product is exempted. Moreover, when the output is exempted, tax laws do not allow availment/utilisation of credit on the inputs and input services used for supply of the exempted output. Thus, in a true sense the entire supply is not zero rated. Though the output suffers no tax, the inputs and input services have suffered tax and since availment of tax on input side is not permitted, that becomes a cost for the supplier. The concept of zero rating of supplies aims to correct this anomaly.

– What is Zero Rating?

– By zero rating it is meant that the entire value chain of the supply is exempt from tax. This means that in case of zero rating, not only is the output exempt from payment of tax, there is no bar on taking/ availing credit of taxes paid on the input side for making/providing the output supply. Such an approach would in true sense make the goods or services zero rated.

– All supplies need not be zero-rated. As per the GST Law exports are meant to be zero rated the zero rating principle is applied in letter and spirit or exports and supplies to SEZ. The relevant provisions are contained in section 16(1) of the IGST Act, 2017, which states that “zero rated supply” means any of the following supplies of goods or services or both, namely:--

– (a) export of goods or services or both; or

– (b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

– As already seen, the concept of zero rating of supplies requires the supplies as well as the inputs or input services used in supplying the supplies to be free of GST. This is done by employing the following means:

– (a) The taxes paid on the supplies which are zero rated are refunded;

– (b) The credit of inputs/input services is allowed;

– (c) Wherever the supplies are exempted, or the supplies are made without payment of tax, the taxes paid on the inputs or input services i.e. the unutilised input tax credit is refunded.

– The provisions for the refund of unutilised input credit are contained in the explanation to section 54 of the CGST Act, 2017, which defines refund as below:

– "refund" includes refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, or refund of tax on supply of goods regarded as deemed exports, or refund of unutilised input tax credit as provided under sub-section (3).

– Thus, even if a supply is exempted, the credit of input tax may be availed for making zero-rated supplies. A registered person making zero rated supply can claim refund under either of the following options, namely:--

– a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedures as may be prescribed, without payment of integrated tax and claim refund or unutilised input tax credit; or

– (b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54 of the CGST Act, 2017 or the rules made there under.

– As per section 54(3) of the CGST Act, 2017, any unutilised input tax credit in zero rated supplies can be refunded, wherever such supplies are made by using the option of Bo0nd/LUT. The difference between zero rated supplies and exempted supplies is tabulated as below:

Exempted supplies	Zero rated supplies
"exempt supply" means supply of any goods or services or both which attracts nil rate of tax which may be wholly exempt from tax under section 11 of CGST Act or under section 6 of the IGST Act, and includes not-taxable supply	"zero rated supply" shall have the meaning assigned to it in section 16
No tax on the outward exempted supplies, however, the input supplies used for making exempt supplies to be taxed	No tax on the outward supplies; Input supplies also to be tax free
Credit of input tax needs to be reversed, it taken; no ITC on the exempted supplies	Credit of input tax may be availed for making zero- rated supplies, even if such supply is an exempt supply IIC allowed on zero-rated supplies

Value of exempt supplies, for apportionment of ITC, shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.	Value of zero rated supplies shall be added along with the taxable supplies for apportionment of ITC
Any person engaged exclusively in the business of supplying goods or services or both that are not liable to tax or wholly exempt from tax under the CGST or IGST Act shall not be liable to registration	A person exclusively6 making zero rated supplies may have to register as refunds of unutilised ITC or integrated tax paid shall have to be claimed
A registered person supplying exempted goods or services or both shall issue, instead of a tax invoice, a bill of supply	Normal tax invoice shall be issued

– Provisional refund:

– As per section 54(6) of the CGST Act, 2017, ninety percent of the total amount of refund claimed, on account of zero-rated supply of goods or services or both made by registered persons, may be sanctioned on a provisional basis. The remaining ten percent can be refunded later after due verification of document furnished by the applicant.

– Non-applicability of Principle of Unjust Enrichment:

– The principle of unjust enrichment shall not be applicable in case of refund of taxes paid wherever such refund is on accounts of zero rated supplies. As per section 54(8) of the CGST Act, 2017, the refundable amount, if such amount is relatable to refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, shall instead of being credited to the Fund, be paid to the applicant."

15. The detailed write-up on 'refund of integrated tax paid on account of zero rated supplies' issued by the Director General of Taxpayer Services, CBIC, (Annexure-L to the writ petition) clarifies the position as under:

• Under GST, Exports and supplies to SEZ are zero rated as per section 16 of the IGST Act, 2017. By zero rating it is meant that the entire supply chain of a particular zero rated supply is tax free i.e. there is no burden of tax either on the input side or output side. This is in contrast with exempted supplies, where only output is exempted from tax but tax is suffered on the input side. The essence of zero rating is to make Indian goods and services

competitive in the international market by ensuring that taxes do not get added to the cost of exports.

The objective of zero rating of exports and supplies to SEZ is sought to be achieved through the provision contained in section 16(3) of the IGST Act, 2017, which mandates that a registered person making a zero rated supply is eligible to claim refund in accordance with the provisions of section 54 of the CGST Act, 2017, under either of the following options, namely:—

- He may supply goods or service or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit of CGST, SGST/UTGST and IGST; or

- He may be supply good or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied.

The second category pertain to refund of integrated tax paid for the zero-rated supplies made by suppliers who opt for the route of export on payment of integrated tax and claim refund of such tax paid. There can be two sub-categories of such suppliers namely:

1. Exporter of goods

2. Service of exporters and persons making supplies to SEZ.

Export of Goods

The normal refund application in GST RFD-01 is not applicable in this case. There is no need for filing a separate refund claim as the shipping bill filed by the exporter is itself treated as a refund claim. As per rule 96 of the CGST Rules, 2017 the shipping bill filed by an exporter shall be deemed to be an application for refund of integrated tax paid on the goods exported out of India and such application shall be deemed to have been filed only when:- (a) the person in charge of the conveyance carrying the export goods duly files an export manifest or an export report covering the number and the date of shipping bill or bills of export; and (b) the applicant has furnished a valid return in FORM GSTR-3 or FORM GSTR3B, as the case may be.

Thus, once the shipping bill and export general manifest (EGM) is filed and a valid return is filed, the application for refund shall be considered to have been filed and refund shall be processed by the department.

Service Exporters and Persons making supplies to SEZ

Under this category also, the supplier may choose to first pay IGST and then claim refund of the IGST so paid. In these cases, the suppliers will have to file refund claim in FORM GST RFD- 01 on the common portal, a per rule 89 of the CGST Rules, 2017. Service Exporter need to file a statement containing the number and date of invoices and the relevant Bank Realisation Certificate, a the case may be, along with the refund claim.

Insofar as refund is on account of supplies made to SEZ, the DTA supplier will have to file the refund claim in such cases. The second proviso to Rule 89 stipulates that in respect of supplies to a Special Economic Zone unit or a Special Economic Zone developer, the application for refund shall be filed by the—

(a) Supplier of goods after such goods have been admitted in full in the Special Economic Zone for authorised operations, as endorsed by the specified officer of the Zone;

(b) Supplier of services along with such evidence regarding receipt of services for authorised operations as endorsed by the specified officer of the Zone.

Thus, proof of receipt of goods or service as evidenced by the specified officer of the zone is a pre-requisite for filing of refund claim by the DTA supplier.

The claim for refund when made for supplies made to SEZ unit/ Developer has to be filed along with the following documents:

1. A statement containing the number and date of invoices as provided in rule 46 along with the evidence regarding the endorsement specified in the second proviso to sub- rule (1) in the case of the supply of goods made to a Special Economic Zone unit or a Special Economic Zone developer;

2. A statement containing the number and date of invoices, the evidence regarding the endorsement specified in the second proviso to sub-rule(1) and the details of payment, along with the proof thereof, made by the recipient to the supplier for authorised

operations a defined under the Special Economic Zone Act, 2005, in a case where the refund is on account of supply of services made to a Special Economic Zone unit or a Special Economic Zone developer;

3. A declaration to the effect that the Special Economic Zone unit or the Special Economic Zone developer has not availed the input tax credit of the tax paid by the supplier of goods or services or both, in a case where the refund I on account of supply of goods or services made to a Special Economic Zone unit or a Special Economic Zone developer.

Grant of Provisional Refund

The above category of persons making zero rated supplies will be entitled to provisional refund of 90% of the claim in terms of Section 54(6) of CGST Act, 2017.

Rule 91 of CGST Rules, 2017 provide that the provisional refund is to be granted within 7 day from the date of acknowledgement of the refund claim. An order for provisional refund is to be issued in Form GST RFD 04 along with payment advice in the name of the claimant in Form GT RFD 05. The amount will be electronically credited to the claimant's bank account.16. Rule 91 also prescribe that the provisional refund will not be granted if the person claiming refund has, during any period of five year immediately preceding the tax period to which the claim for refund relate, been prosecuted for any offence under the Act or under an earlier law where the amount of tax evaded exceeds two hundred and fifty lakh rupees.

16. The principles emerging from the aforesaid discussion can be summarized as under:-

- The entire supply chain in an export transaction would be tax free and exempt from GST, i.e., GST would be exempt both at input stage as well as output stage.

- There is no bar on availing/utilizing credit of input taxes paid for making/providing the output supply in an export transaction.

- It is seen that the above intention is effectuated vide Section 16 of the IGST Act. Section 16(1)(a) of the IGST Act says that "zero-rated supply" means export of goods and services. Further, Section 16(2) of the IGST Act says that "credit of input tax" may be availed

for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

- Since GST would have been suffered at the input stage, either by actual payment thereof or through utilization of credit of input tax, Section 16(3) of the IGST Act says that a registered person making zero rated supply shall be eligible to claim refund such taxes paid in accordance with Section 54 of the CGST Act by exercising either of the following options, but subject to such conditions, safeguards and procedure as may be prescribed.

- He may supply goods or services or both under bond or LUT without payment of IGST and claim refund of unutilized input tax credit; or

- He may supply goods or services or both on payment of IGST and claim refund of such tax paid on goods or services or both so supplied.

- Section 54 of the CGST Act deals with refund of tax; section 54(3) provides that a registered person may claim refund of any unutilized input tax credit at the end of any tax period. Corresponding to Section 16(3) of the IGST Act (supra), clause (i) of first Proviso to section 54(3) provides that refund of the said unutilized input tax credit would be available on making zero-rated supplies.

- Section 16 of the IGST Act contemplates that exports are “zero rated” (in other words, exports are tax free) and that therefore, refund can be claimed of input tax credit lying unutilized on account of such zero-rated supplies (i.e., exports) as also on the output tax.

- Section 54 of the CGST Act provides for refund of GST; section 54(3) provides that a registered person may claim refund of any unutilized input tax credit at the end of any tax period.

- Rule 89 of the CGST Rules contains the machinery provisions to operationalize section 54 of the CGST Act where exports are done without payment of output tax under bond• or LUT.

- The method of calculation of refund under rule 89 of the CGST Rules prior to its amendment dated 23-3-2020 provided that the refund of unutilized input tax credit is computed by identifying the proportionate input tax credit utilized for export of goods to total

supplies, viz., refund value = (turnover of zero-rated supply of goods and/or services ÷ adjusted total turnover) X Net input tax credit for the period; in other words, refund will be in proportion of export turnover to the total turnover during the relevant period.

- By the impugned amendment to rule 89(4)(C), the phrase "turnover of zero-rated supply of goods" came to be defined; accordingly, refund will be the lesser of: (a) value of zero-rated supply of goods; or (b) value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed, supplier, as declared by the supplier.

- In effect, refund of unutilized input tax credit on account of making zero rated supply of goods would now be restricted to a maximum of 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier.

- The effect of the impugned amendment to rule 89(4)(C) is demonstrated by the petitioner vide the Illustration in the table at Annexure-N as under:—

Sl. No.	Export/ Domestic	No. of goods	Value per Goods	Turnover	Turnover of zero-rated supply of goods as per Rule 89(4): Before amendment	Turnover of zero-rated supply of goods as per Rule 89(4): After amendment
1.	Export goods	10	100	1000	1000	**450** i.e., 1.5*30*10 = 450 or 1000 whichever is less. Refund is 450 and balance 550 is lost:
	Like goods domestically sold	10	30	300		
2.	Export goods	10	100	1000	1000	**0** i.e., 1.5*0*10 = 0 or 1000 whichever is less.
	Like goods domestically sold	0	0	0		

In my considered opinion, the impugned amendment to rule 89(4)(C) of the CGST Rules is illegal, arbitrary, unreasonable, irrational, unfair, unjust and ultra vires section 16 of the IGST Act and section 54 of the CGST Act for the following reasons:—

(a) Rule 89(4)(C) of the CGST Rules is ultra vires section 54 of the CGST Act read with section 16 of the IGST Act; the very intention of the zero-rating it to make entire supply chain of "exports" tax free, i.e., to fully 'zero-rate' the exports by exempting them from both input tax and output tax; accordingly, section 16(3) of the

IGST Act allows refund of input taxes paid in the course of making a zero-rated supply, i.e., supplies which coversexports as well as supplies to SEZs. The rule in whittling down such refund is ultra vires in view of the well settled principle of law that Rules cannot override the parent legislation.

(b) Rule 89(4)(C) of the CGST Rules is violative of articles 14 and 19(1)(g) of the Constitution of India; the quantum of refund of unutilized input tax credit is restricted only in cases falling under section 16(3)(a) of the IGST Act, i.e., in cases where export of goods is made without payment of duty under a Bond/Letter of Undertaking(LUT); however, no such restriction is imposed on cases falling under section 16(3)(b) of the IGST Act, i.e., in cases where export of goods is made after payment of duty; by virtue of the above, there is a hostile discrimination between two class of persons, viz., (i) the class of exporters who opt to obtain refund of unutilized input tax credit where export of goods are made without payment of duty under a bond/LUT in terms of section 16(3)(a) of the IGST Act read with rule 89(4) of the CGST Rules and (ii) the class of exporters who opt to obtain refund of tax after payment of duty in terms of section 16(3)(b) of the IGST Act read with rule 96A of the rules; the guarantee of equal protection of the laws must extend even to taxing statutes; if person or property of the same character has to be taxed, the taxation must be by the same standard, so that the burden of taxation may fall equally on all persons holding that kind and extent of property; if the same class of property or persons similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property or persons.

(c) It is trite law that article 14 of the Constitution forbids class legislation; however, article 14 does not prohibit reasonable classification for the purpose of legislation provided it passes two tests, viz., that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and that the differentia must have a rational relation with the object sought to be achieved by the statute; the impugned rule 89(4)(C) of the CGST Rules is arbitrary and unreasonable in as much as it bears no rational nexus with the objective sought to be achieved by section 16 of the IGST Act in that while section 16 of the IGST Act seeks to make exports tax-free by “zero-rating” them, the impugned rule 89(4)(C) of the CGST Rules aims to do just exactly the opposite by restricting the

quantum of refund of tax available to the expended in making such exports; consequently, including domestic turnover in the definition of zero rated supply which is meant to cover only exports is clearly arbitrary and unreasonable.

(d) It is significant to note that in exports, availability of the rotation of funds is essential for the business to thrive; the entire concept of refund of unutilized input tax credit relating to zero-rated supply would be obliterated in case the respondents are permitted to put any limitation and condition that takes away petitioner's right to claim refund of all the taxes paid on the domestic purchases used for the purpose of zero- rated supplies; the incentive given to the exporters would lose its meaning and this would cause grave hardship to the exporters who are earning valuable foreign exchange for the country; it follows there from that exporters would have factored insuch incentives in the pricing mechanism when they quote and consequently, the restriction of the same by the impugned amended rule 89(4)(C) would be highly unreasonable.

(e) Rule 89(4)(C) of the CGST Rules also suffers from the vice of vagueness for the reason that the words "like goods" and "similarly placed supplier" in the impugned rule 89(4)(C) are completely open-ended and are not defined anywhere in the CGST Act/Rules or the IGST Act/Rules; in this context, it is relevant to state that considering the business of the petitioner, it is not possible to have any "like goods" and "same or similar placed supplier" for the unique and customized products being manufactured by the petitioner and the preciseness of definitions as found in the customs legislation is missing herein.

(f) The impugned Rule also fails to clarify, as to what would be the consequence if there are no goods supplied in the domestic market and value of like goods provided by other suppliers is not available or as to what would be the consequences in respect of a supplier who may have different pricing policy for different local customers nor what would be the consequences in respect of a supplier who would be pricing the local goods differently in different states for the same products being exported; when it is impossible for any exporter to show proof of value of "like goods" domestically supplied by the "same or, similarly placed, supplier", the refund itself cannot be denied to such exporter and consequently, rule 89(4)(C) of the CGST Rules merely being a machinery provision cannot impose a rigorous condition to take away right to obtain refund which the

petitioner is otherwise entitled to in terms of rection 54 of CGST Act read with Section 16 of the IGST Act.

(g) The amendment to the said rule does have the effect of restricting refunds in actuality as shown in the table at Annexure-N without any adequate defining reason for so doing; in a case where the domestic turnover is nil for the particular period or very less, the quantum of refund becomes nil or negligible thereby clearly whittling down the principle of zero rating as is specified in Section 16 of the IGST Act, 2017 which would mean that the taxes on exports do not get refunded adequately; these aspects are contained in the clarifications issued by the respondents at Annexure K and L referred to supra.

(h) The object of zero rating would be lost if exports are made to suffer GST as the exporter would either pass it on to the foreign supplier or would absorb it himself; firstly it would mean that taxes are exported which is against the policy of zero rating supra and secondly, it would make exports uncompetitive being against the stated policy of the Government. The amending words therefore, do not sub serve the objectives set out in section 16 of the IGST Act, 2017 nor section 54 of the CGST Act, 2017 and are contrary to the clarifications given above.

(i) The impugned amendment is also unreasonable and arbitrary as adequate reasoning is not present; this would make such amendment unreasonable for the reason that it bears no rational nexus with the objective sought to be achieved by section 16 of theIGST Act (supra). While section 16 of the IGST Act seeks to make exports tax-free by “zero-rating” them, the impugned rule 89(4)(C) of the CGST Rules, as amended on 23-3- 2020 aims to do just the opposite by restricting the quantum of refund of tax available in making such exports. Further, what is seen is that including domestic turnover in definition of zero rated supply which is meant to cover only exports is clearly arbitrary and unreasonable as that would defeat the provisions of law to grant refund on zero rated goods.

18. Therefore, I am also of the view that terminology used in the impugned Rule viz., ‘like goods and same or similarly placed supplier’ does not have any precise meaning in the said Rules and no guideline is present in that respect.

19. In **Shayara Bano’s case** (supra), the Apex Court held as under:

"101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under article 14."

20. In **Shreya Singhal's case** (supra), the Apex Court held as under:—

"68. Similarly, in Kartar Singh v. State of Punjab (1994) 3 SCC 569 at para 130-131, it was held:

'130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'

69. Judged by the standards laid down in the aforesaid judgments, it is quite clear that the expressions used in 66A are completely open-ended and undefined.

76. Quite apart from this, as has been pointed out above, every expression used is nebulous in meaning. What may be offensive

> to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another.Even the expression "persistently" is completely imprecise - suppose a message is sent thrice, can it be said that it was sent "persistently"? Does a message have to be sent (say) at least eight times, before it can be said that such message is "persistently" sent? There is no demarcating line conveyed by any of these expressions - and that is what renders the Section unconstitutionally vague."

21. As rightly contended by the petitioner, in exports, availability of the rotation of funds is essential for the business to thrive. The entire concept of refund of unutilized input tax credit relating to zero-rated supply would be obliterated in case the respondents are permitted to put any limitation and condition that takes away petitioner's right to claim refund of all the taxes paid on the domestic purchases used for the purpose of zero-rated supplies. The incentive given to the exporters would lose its meaning and this would cause grave hardship to the exporters, who are earning valuable foreign exchange for the country. It should be noted that exporters would have factored in such incentives in the pricing mechanism when they quote and therefore, the restriction of the same would be highly unreasonable, given the objective of the Government that exports should be zero rated and taxes should not be exported.

22. The respondents-revenue contend that the impugned amendment was based on the minutes of the GST Council's 39th meeting held on 14-3-2020, which discloses that the above the only ground for amendment seems to be a possible misuse without any factual data supporting the same; the reasons for such amendments based on possible misuse without adequate defining data cannot be countenanced as having a reasonable basis in law. Issue of misuse cannot be generalized. Every such misuse is required to be ascertained and verified before asserting that there has been misuse. It is also well settled that if the government perceives that there could be a possibility of abuse of a provision, it should adopt measures to keep a check on the same; however, the law cannot be amended on the premise of distrust.

23. In **Reckitt Benckiser's case** (supra), the High Court of Jammu and Kashmir held as under:—

> "29. The issue of misuse cannot be generalized. It has to be case specific covering an individual or group of individuals. Every such misuse is required to be ascertained and verified before asserting

that there has been misuse of exemption. By a general survey conducted, it cannot be said that exemption benefit is being misused by the present petitioners. Taking recourse to the fact that exemption granted is being misused without identifying the individual cases would be an exercise which can be termed to have been made by the respondents only to deny the exemption granted to petitioners by way of original notification in pursuance to which they have altered their position. This action on the part of respondents can be termed to be arbitrary in nature."

24. In **Sant Steel's case** (supra), the Apex Court held as under:—

"30. It is highly against the public morality that the incumbent who have felt persuaded on account of the representation made by the State Government that they will be given certain benefits and they acted on that representation, it does not behove on the part of the appellant Corporation to withdraw the said benefit before expiry of the stipulated period by issuing the notification revoking the same which the respondents were legitimately entitled to avail. We fail to understand why the appellant Corporation which made a representation and allowed the other party to act upon such representation could resile and leave the citizens in a lurch. In such a situation, the principle of promissory estoppel which has been evolved by the courts which is based on public morality cannot permit the State to act in such an arbitrary fashion.

31. Other grounds for the purpose of public interest which have been pleaded, namely, that there are two methods of tariff provided by the amendment and the actual consumption has (energy consumption charges have) been reduced based on the calculation of energy charges per KV from 308 paise to 100 paise and there was large scale theft or that units were closing down and there was no mala fide intention in the matter of revocation of the notification and the cost of production of power has gone up to Rs. 2.50 per unit, are considerations which hardly involve any public interest. They were more of a nature of losses which have been suffered by the Corporation and these methods were evolved to reduce and to make good the losses. Restructuring benefit to 17% of Tariff 4(A) (demand charges) are the factors which are aimed to make the losses good for the Corporation. This is not case in which serious public repercussion was involved. These are not the factors which put together can constitute a public interest. Theft of the energy if it was proved by cogent data that as a result of giving this benefit

to the entrepreneurs in the hill areas, they were misusing it or there was theft of the energy at a large scale by these persons to whom the concession had been given then of course such factors, if all the datas were brought on record of course could have persuaded the Court to take a different view of the matter. But simply because there was theft of energy the State cannot persuade us to hold that the revocation of such concession can be said to be in public interest. Since the benefit was given to these units in the hill areas, there should have been overwhelming evidence to show some mala fide on the part of these consumers which have persuaded the Corporation to revoke it. If there was no misuse of the energy by these units in the hill areas to whom the concession had been granted then in that case it cannot be taken that there was really public interest involved which persuaded the Corporation to revoke the same.

58. In the present case, the plea of respondents that some unscrupulous manufacturers were involved in bogus production for the purpose of claiming maximum exemption from the payment of excise duty, cannot be generalized but has to be case specific. The same, therefore, cannot be treated to be in the public interest as projected by the respondents. This is because there has been no individual identification of such bogus manufacturers and the action of respondents vide impugned notifications would prejudice the rights of those genuine manufacturers who on the promise of the State, have altered their position and are involved in fair industrial activities. In view of the above discussion, I am of the opinion that there is no supervening public interest in withdrawing the exemption by way of impugned notifications."

25. It is also relevant to note that in the aforesaid GST Council Meeting, it was stated that the FOB value of exports will not be changed, which would mean that there is no doubt about the valuation of the goods; therefore, if there is no doubt about the value of the goods, the artificial restriction of refunds by taking the value of domestic supplies seems irrational. Further, the policy of the Government itself will have to satisfy the test of rationality and must be free from arbitrariness and discrimination. In Pepsi Foods Ltd.'s case (supra), the Apex Court held as under:—

"27. We have already seen how unequals have been treated equally so far as assessees who are responsible for delaying appellate proceedings and those who are not so responsible, resulting in a violation of article 14 of the Constitution of India. Also, the

expression “permissible” policy of taxation would refer to a policy that is constitutionally permissible. If the policy is itself arbitrary and discriminatory, such policy will have to be struck down, as has been found in para 20 above.”

26. As rightly contended by the learned Senior counsel for the petitioner, the impugned rule 89(4)(C) is arbitrary and unreasonable, in as much as the possibility of taking undue benefit by inflating the value of the zero-rated supply of goods, cannot be a ground to amend the Rule, which deserves to be declared invalid on this ground also.

27. Insofar as the other contentions urged by the respondents - revenue in their statement of objections and before this Court, the same are neither relevant nor germane for adjudication of this petition and consequently, the same have not been referred to in detail in this order.

28. For the foregoing reasons, I am of the considered opinion that the impugned rule 89(4)(C) of the CGST Rules, 2017 as amended vide Para 8 of the Notification No. 16/2020-Central Tax dated 23-3-2020 deserves to be declared ultra vires and invalid and consequently deserves to be quashed. So also, the impugned order dated 30-6-2020 which is based on the impugned amended Rule also deserves to be quashed and consequently, respondents are to be directed to accept the refund applications of the petitioner and grant refund in favour of the petitioner together with applicable interest within a stipulated time frame.

29. The issue regarding validity of the Explanation to rule 93 of the CGST Rules is however kept open to be dealt with in an appropriate case.

30. In the result, I pass the following:-

ORDER

(i) The writ petition is hereby allowed;

(ii) The impugned offending words, “or the value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier” appearing in rule 89(4C) of the Central Goods and Services Tax Rules, 2017 as amended vide Para 8 of the Notification No. 16/2020-Central Tax(F.No.CBEC-20/06/04/2020-GST) dated 23-3-2020 is declared ultra vires the provisions of the Central Goods and Services Tax Act, 2017 and the Integrated Goods and Services Tax Act, 2017 as also

violative of articles 14 and 19 of the Constitution of India and resultantly, the same are hereby quashed;

(iii) The impugned order at Annexure-C dated 30-6-2020 passed by the 3rd respondent is hereby quashed;

(iv) The respondents-revenue are directed to accept the refund claims/applications of the petitioner at Annexures D-1 to D-6 and grant refund together with applicable interest infavour of the petitioner within a period of three (3) months from the date of receipt of a copy of this order.

IN THE HIGH COURT OF DELHI AT NEW DELHI
[Vibhu Bakhru and Amit Mahajan, JJ.]

W.P.(C) NOS. 10407 & 10423 OF 2022

Balaji Exim ... Petitioner

Versus

Commissioner, CGST and Ors. ... Respondents

Date of Judgment : 10.03.2023

WHETHER ITC (REFUND) BE DENIED EVEN IF ALL DOCUMENTS FILED AND GOODS EXPORTED – ONLY ON THE GROUND THAT FAKE INVOICE WERE ISSUED?

HELD – NO

For the Petitioner	:	Abhas Mishra, Ms. Aakriti P. Mishra and Shyam Bhageria, Advs.
For the Respondent.	:	Aditya Singla, Sr. Standing Counsel, Ms.A. Sahitya Veena, Adv. for R-1 and R-2. Ms. Nidhi Banga, Sr. Panel Counsel and Nishant Kumar, Adv. for R-3.

JUDGMENT

Vibhu Bakhru, J.

1. The petitioner has filed the present petitions impugning the common Order-In-Appeal dated 31.03.2022 (Order-In-Appeal No.347-348/2021-22 – hereafter 'the impugned order'), whereby two separate appeals preferred by the petitioner against the Order-In-Original Nos. ZU0707210034420 dated 03.07.2021 and ZT0707210034442 dated 02.07.2021, respectively were dismissed.

2. Although the petitioner has a statutory right to appeal the impugned order, it is not possible for the petitioner to avail the said remedy as the Tribunal has not been constituted.

3. The petitioner had filed its refund application dated 11.09.2020 (in Form – GST-RFD – 01) seeking refund of the unutilized Input Tax Credit (hereafter 'ITC') amounting to ₹72,03,961/-, which comprised of Integrated Goods and Service Tax (hereafter 'IGST') amounting to ₹19,53,062/- and Cess of ₹52,50,899/-. The petitioner also filed another refund application dated 12.09.2020 (in Form GST-RFD – 01) claiming refund of ITC of ₹12,40,270/- comprising of IGST of ₹3,37,174/- and Cess amounting to ₹9,03,096/-. The refund sought was in respect of goods exported by the petitioner.

4. Respondent no.2 issued an acknowledgment (in Form GST-RFD-02) dated 27.09.2020, in respect of the petitioner's refund application for the amount of ₹12,40,270/-. In respect of the first application dated 11.09.2020, respondent no.2 issued a deficiency memo dated 21.09.2020, inter alia, stating that the supporting documents were not uploaded on the GST portal. Accordingly, the petitioner filed another application dated 23.09.2020 along with all documents in support of its refund application. The same was acknowledged by the respondent on 01.10.2020.

5. The petitioner's applications were not processed as the supplier from whom the petitioner had purchased the goods had allegedly received fake invoices from its suppliers.

6. A search was conducted by the officers of Central GST, Anti Evasion Branch, Delhi West Commissionerate in the premises of the petitioner on 21.10.2020. Thereafter, the petitioner (its proprietor) was summoned to the office of respondent no.1 on 23.10.2020 to tender certain documents.

7. Admittedly, the petitioner (proprietor) appeared before the Superintendent, Anti Evasion Branch on 23.10.2020 and furnished documents as sought for. Notwithstanding the same, the petitioner was issued another summons dated 28.12.2020 for furnishing the documents, which, according to the petitioner, had already been submitted.

8. The petitioner wrote several letters to respondent no.2 requesting for an early disposal of his refund applications. However, his requests were not acceded to.

9. In the meantime, the petitioner became aware of the allegations that its supplier, M/s Shruti Exports, had issued fake invoices and its ITC was blocked. The said supplier had moved the High Court of Calcutta by filing

a writ petition seeking unblocking of its Electronic Credit Ledger (hereafter '**ECL**').

10. Show cause notice dated 04.06.2021 was issued by respondent no.2 to the petitioner proposing to reject the petitioner's refund applications. This show cause notice indicated that respondent no.2 had sought a report regarding legitimacy and genuineness of the export of goods from the Customs Station, Kolkata, which were purchased by the petitioner from M/s Shruti Exports (proprietor Sh. Vijander Kumar Goel). In response to the said query, respondent no.2 had received information that the said supplier – M/s Shruti Exports was being investigated by DGGI in connection with fake invoices allegedly issued by it. It was further alleged that M/s Shruti Exports had availed CGST and SGST amounting to ₹1,35,21,489/- and Cess of ₹21,76,132/- on the strength of fake invoices issued by certain persons.

11. The petitioner responded to the said show cause notice on 12.06.2021. The petitioner was also afforded a personal hearing by respondent no.2 on 01.07.2021. During the course of the said proceedings, the petitioner also submitted additional documents in support of its refund claim.

12. The petitioner submitted that he was not concerned with any allegation against its supplier M/s Shruti Exports (proprietor Vijander Kumar Goel) as the purchases made by it were genuine and against genuine invoices. He also pointed out that in WPA No.4006/2020 captioned *Vijander Kumar Goel v. Assistant Commissioner, CGST Central Tax & Anr.,* the Calcutta High Court had passed an order directing unblocking of the ITC of the petitioner therein (Vijander Kumar Goel) and the same was subsequently unblocked.

13. Respondent no.2 rejected the refund applications by an order dated 02.07.2021, essentially, on the same grounds as stated in the show cause notice. Respondent no.2 reiterated that an investigation had been initiated against the supplier (M/s Shruti Exports) from where the petitioner had allegedly procured the goods. The said order indicated that respondent no.2 had received information that M/s Shruti Exports (GST No. 19AFRPG5814N1ZS) had issued the following two invoices to the petitioner in the month of August, 2020:

(i) Invoice No. SE/32/20.21 dated 29.08.2020; and

(ii) Invoice No. SE/33/20.21 dated 29.08.2020

14. Although it was confirmed that the said invoices were reflected on the 'AIO' System, the refund applications were rejected for the reason that *"it appeared that they are to be part of a supply chain involving fake Input Tax Credit".*

15. The petitioner appealed the said orders rejecting its refund applications, which was dismissed by the impugned order.

16. The Appellate Authority held that although the petitioner was in possession of the tax invoices, it could not be said that the petitioner had received the goods. Therefore, one of the conditions as stipulated in Section 16(2) of the Central Goods & Services Tax, 2017 – the taxpayer has received the goods or services or both – was not satisfied. The Appellate Authority concluded that the present case was one of *"goodless supply on the strength of fake invoices".*

17. It is clear from the above that the petitioner's refund applications were rejected on a mere apprehension that its supplier had issued fake invoices. There is no conclusive finding on the basis of any cogent material that the invoices issued by M/s Shruti Exports to the petitioner are fake invoices.

18. Admittedly, the invoices issued by M/s Shruti Exports are reflected in the AIO System and there is no dispute that M/s Shruti Exports had issued the said invoices. It is also clear that M/s Shruti Exports is a dealer registered with the Goods & Services Tax Department. There is no allegation that the invoices (which include IGST as well as Cess) were not paid by the petitioner. It is also important to note that there is no allegation that the goods in question were not exported overseas. Thus, the petitioner has established not only the fact that the goods have been exported but that it had paid for the same including the IGST and Cess.

19. The respondents filed a counter affidavit enclosing therewith a letter dated 16.04.2021 issued by the CGST Authorities, Kolkata in response to the request of respondent no.2 verifying the existence and genuineness of suppliers. The said letter indicates that M/s Shruti Exports was found to be an existing dealer and its sole proprietor was also a Director of M/s BVN Alloys Pvt. Ltd. Both the dealers were found existing at Room No.464, 4th Floor, 138 Biplabi Rashbehari Basu Road, Kolkata-700001. It was found that M/s Shruti Exports had availed of CGST and SGST totaling ₹1,35,21,489/- and Cess amounting to ₹21,76,132/- from the taxpayers against whom cases were booked for issuing fake invoices. The said letter set out a tabular statement mentioning the names of six dealers who had allegedly issued fake invoices to M/s Shruti Exports. It was pointed out

by the learned counsel appearing for the petitioner that none of the said suppliers, except one, PSSM Commercial Pvt. Ltd., had made any supplies chargeable to Cess. He submitted that, thus, the only invoice in respect of which supplies received by M/s Shruti Exports, which could be assumed to be further supplied to the petitioner, was from PSSM Commercial Pvt. Ltd. However, CGST and SGST paid by PSSM Commercial Pvt. Ltd. was only ₹9,52,220/-.

20. It is also important to note that the supplies, as mentioned in the said letter, were for a period prior to August, 2020.

21. Mr. Singla, learned counsel appearing for the petitioner, handed over a copy of the show cause-cum-demand notice dated 30.11.2022 issued to M/s Shruti Exports and one, Sanjay Kumar Bhuwalka. However, the said show cause notice indicates that it relates to the period from July, 2017 to Financial Year 2019-20. Thus, it could not possibly cover the supplies made to the petitioner.

22. It is apparent that the petitioner's refund applications have been rejected merely because of suspicion without any cogent material. There is no dispute that goods have been exported; the invoices in respect of which the petitioner claims the ITC were raised by a registered dealer; and, there is no allegation that the petitioner has not paid the invoices, which include taxes. Thus, the applications for refund cannot be denied.

23. There is merit in the petitioner's contention that it is not required to examine the affairs of its supplying dealers. The allegations of any fake credit availed by M/s Shruti Exports cannot be a ground for rejecting the petitioner's refund applications unless it is established that the petitioner has not received the goods or paid for them. In the present case, there is little material to support any such allegations.

24. In *On Quest Merchandising India Pvt. Ltd. v. Government of NCT of Delhi & Ors.: 2017 SCC OnLine Del 11286*, a Coordinate Bench of this Court had referred to various authorities and observed as under:

> "39. Applying the law explained in the above decisions, it can be safely concluded in the present case that there is a singular failure by the legislature to make a distinction between purchasing dealers who have bona fide transacted with the selling dealer by taking all precautions as required by the DVAT Act and those that have not. Therefore, there was need to restrict the denial of ITC only to the selling dealers who had failed to deposit the tax collected by them and not punish bona fide purchasing dealers. The latter cannot be expected to do the impossible. It is trite that a law that is not capable

of honest compliance will fail in achieving its objective. If it seeks to visit disobedience with disproportionate consequences to a bona fide purchasing dealer, it will become vulnerable to invalidation on the touchstone of Article 14 of the Constitution.

40.** ** **

41. The Court respectfully concurs with the above analysis and holds that in the present case, the purchasing dealer is being asked to do the impossible, i.e. to anticipate the selling dealer who will not deposit with the Government the tax collected by him from those purchasing dealer and therefore avoid transacting with such selling dealers. Alternatively, what Section 9(2)(g) of the DVAT Act requires the purchasing dealer to do is that after transacting with the selling dealer, somehow ensure that the selling dealer does in fact deposit the tax collected from the purchasing dealer and if the selling dealer fails to do so, undergo the risk of being denied the ITC. Indeed Section 9(2)(g) of the DVAT Act places an onerous burden on a bonafide purchasing dealer."

25. In view of the above, the petitioner would be entitled to the refund of the ITC on goods that have been exported by it. The present petitions are, accordingly, allowed and the respondents are directed to forthwith process the petitioner's applications for refund of the ITC including Cess.

26. It is clarified that in the event the respondents are able to find material to establish the allegations regarding non-supply of any goods by M/s Shruti Exports to the petitioner, it would be open for the respondents to initiate such action as may be warranted in accordance with law.

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Vibhu Bakhru and Amit Mahajan, JJ.]

W.P.(C) 14719/2022

G. S. Industries ... Petitioner

Versus

Commissioner Central Goods and Services Tax Delhi West & Anr. & Ors. ... Respondents

Date of Order : 28.03.2023

WHETHER REFUND CAN BE WITHHELD ONLY ON THE GROUND THAT THE COMMISSIONER HAD DECIDED TO FILE AN APPEAL?

HELD – NO.

Present for Petitioner : Mr. Vineet Bhatia &
Mr. Siddarth Malhotra, Advs.

Present for Respondent : Ms. Anushree Narain, Standing Counsel

ORDER

Vibhu Bakhru, J.

1. The petitioner has filed the present petition, inter-alia, praying that the directions be issued to the respondent to refund the tax amounting to ₹23,10,333/- claimed by the petitioner for the period September, 2017 to March, 2018. The petitioner also seeks directions that the respondent be directed to pay an amount of ₹14,46,417/- being the refund amount claimed for the period April, 2018 to March, 2019. Additionally, the petitioner also claims interest on the said amount of refund, which have been withheld by the respondent.

2. The petitioner carries on the business as G.S. Industries and is engaged in manufacturing Handpump parts falling under HSN 8413/9140, which is chargeable to Goods and Services Tax @ 5%.

3. The petitioner claims that it has accumulated Input Tax Credit on account of an inverted duty structure.

4. The petitioner filed an application on 04.07.2019 claiming refund of ₹23,10,333 accumulated Input Tax Credit for the period September 2017 to March, 2018. The petitioner filed another application on 09.07.2019 claiming an amount of ₹14,46,417/- as accumulated Input Tax Credit for the period April, 2018 to March, 2019. Thus, the petitioner claims an amount of ₹37,56,750/- as refund of accumulated tax.

5. The applications filed by the petitioner were acknowledged. However, thereafter two separate deficiency memos, both dated 29.11.2019, were issued. The respondent pointed out certain deficiencies and also sought certain clarifications with regard to the said applications. In addition, the respondent also called upon the petitioner to submit a Chartered Accountant's certificate confirming that the incidence of tax and interest was not passed on to any other person.

6. The petitioner responded to the said deficiency memos by a communication dated 27.01.2020. However, the respondent did not accept the petitioner's explanation and issued Show Cause Notices dated 23.11.2020 calling upon the petitioner to show cause why his applications for refund not be rejected for the following reasons:

> " 1. It has been observed that you are claiming that you are manufacturing India Mark 11 hand pump and their parts which fall under the 5% GST classification. Further, it has also been observed that the major part of the refund claim is of Brass Scrap (18%). You are requested to submit the complete details of the purchase and sale registers for the relevant period.
>
> 2. From various sources, it was also observed that the product which are claimed to be manufactured by you requires very little to no Brass. You are requested to provide the details of the stock register/item wise summary for verification of the refund claim.
>
> 3. You are also requested to submit the details of the registered place of business (both principal and additional) to this office as a PV was conducted by the AE branch on 16.09.2020 at the regd. Principal place of business under section 67(1) of the CGST Act 2017 and it was observed that some other firm is running since January 2019."

7. The petitioner responded to the said Show Cause Notices. Petitioner's explanation was not accepted and by a separate order dated 14.12.2020, the applications for refund were rejected.

8. The petitioner filed separate appeals impugning the orders-in-original dated 14.12.2020, which were disposed of by a common order dated 03.01.2022 (Order-in-appeal No.209-210/2021-2022). The Appellate Authority allowed the petitioner's appeal. It accepted that the petitioner was in existence at the material time, and the findings contrary to the same were erroneous. The Appellate Authority relied upon certain documents, including electricity bills, income tax returns etc. filed by the petitioner. The Appellate Authority also found that the Adjudicating Authority had not provided any basis for observing that the product manufactured by the petitioner required very less or no brass at all.

9. Since the petitioner succeeded in its appeal, the petitioner is entitled to the refund as claimed. However, notwithstanding the same, the refund has not been disbursed.

10. Ms. Narain, learned counsel appearing for the respondent, submits that the respondent has decided to challenge the Order-in-appeal dated 03.01.2022, and the Commissioner has passed an order dated 19.05.2022, setting out the grounds on which the appeal is required to be preferred against the Order-in-appeal.

11. The principal question that falls for consideration by this Court is whether the benefit of Order-in-appeal dated 03.01.2022 can be denied to the petitioner and the refund amount be withheld solely on the ground that the respondent has decided to file an appeal against the said order.

12. Concededly, the respondent has not filed any appeal against the order-in-appeal dated 03.01.2022, and there is no order of any Court or Tribunal staying the said order. Indisputably, the order-in-appeal dated 03.01.2022 cannot be ignored by the respondents solely because according to the revenue, the said order is erroneous and is required to be set aside.

13. Learned counsel for the parties also pointed out that the said issue is covered by the earlier decision of this Court in Mr. Brij Mohan Mangla Vs. Union of India & Ors.: W.P.(C) 14234/2022 dated 23.02.2023.

14. In view of the above, the present petition is allowed. The respondents are directed to forthwith process the petitioner's claim for refund including interest.

15. It is, however, clarified that this would not preclude the respondents from availing any remedy against the Order-in-appeal dated 03.01.2022 passed by the Appellate Authority. Further, in the event, the respondents prevail in their challenge to order-in-appeal dated 03.01.2022, the respondents would also be entitled to take consequential action for recovery of any amount that has been disbursed, albeit in accordance with the law.

HIGH COURT OF JUDICATURE AT ALLAHABAD

[Rajesh Bindal and J.J. Munir, CJ. , J.]

Writ Tax No. 1580 of 2022

M/s Margo Brush India and others ... Petitioner

Versus

State of U.P. and another ... Respondents

Date of Order : 16.01.2023

WHETHER REFUND CAN BE WITHHELD ONLY ON THE GROUND THAT THE COMMISSIONER HAD DECIDED TO FILE AN APPEAL?

HELD – NO.

For the Petitioner : Aditya Pandey and Akhil Agnihotri, Advs.

Standing Counsel for the Respondent : Ankur Agarwal

ORDER

1. The order passed on GST MOV-06 dated September 29, 2022, vide which the goods in transit were seized by the authorities concerned, has been impugned in the present writ petition. Further show cause notice on GST MOV-07 and order passed thereon on GST MOV-09 dated October 7, 2022 are under challenge in the present petition.

2. Learned counsel for the petitioners submitted that the goods were accompanied by proper documents. The owners of the goods either are the consignors or the consignees. However, still without appreciating the contentions raised by the petitioners, vide impugned order, the driver of the vehicle was deemed to be the owner and penalty of ₹4,55,548/- has been levied in exercise of power under Section 129(1)(b) of U.P. Goods and Services Tax Act, 2017 (hereinafter referred to as 'the Act').

3. The argument is that it is a case in which the goods in transit were accompanied by proper documents. When show cause notice was issued to the driver of the vehicle, the petitioners had filed their replies. In terms of the provisions of Section 129(1)(a) of the Act, in case, the owner of the goods comes forward, the penalty is to be levied upon him. The penalty can be levied under section 129(1)(b) of the Act, only if the owner of the goods does not come forward. In the case in hand, vide impugned order the penalty has been levied under Section 129(1)(b) of the Act, which is not applicable. He has also referred to Circular dated December 31, 2018 issued by the Central Board of Indirect Taxes and Customs (hereinafter referred to as 'Board'), whereby a clarification has been issued as to who is to be treated as owner of the goods for the purpose of Section 129(1) of the Act. It provides that if the goods are accompanied with invoices then consignor should be deemed to be the owner. In the case in hand, the petitioner nos. 1 and 2 are the consignors, whereas petitioner nos. 3 to 5 are consignees, hence, in their presence and accepting the ownership of the goods, the impugned order should not have been passed under Section 129(1)(b) of the Act.

4. On the other hand, learned counsel for the respondents submitted that it is a case in which the goods were not matching with the invoices as certain goods were found either to be more or less than the quantity mentioned in the invoices. Hence, penalty has been appropriately levied on the petitioners.

5. After hearing learned counsel for the parties, in our opinion, the present writ petition deserves to be allowed and the order impugned dated October 7, 2022 deserves to be set aside for the reason that the consignors

and consignees are present and accepting ownership of the seized goods. The consignors are registered dealers in the State of U.P.

6. In view of the aforesaid fact and also the clarification given by the Board vide its Circular dated 31, 2018, in our opinion, levy of penalty under Section 129(1)(b) of the Act was not called for and could not be justified as Section 129(1)(a) of the Act provides that where owner of the goods comes forward for payment of penalty, the amount has to be two hundred per cent of the tax payable, whereas, in the case in hand, the penalty has been levied to the tune of hundred per cent of the value of the goods.

7. For the reasons mentioned above, the impugned order dated October 7, 2022 passed by respondent no. 2 is set aside. The writ petition is allowed. The matter is remitted back to the competent authority for passing fresh order within a period of two weeks from the date of receipt of copy of the order.

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Vipul M. Pancholi and Devan M. Desai, JJ.]

R/Special Civil Application No. 22339 of 2022

Shree Renuka Sugars Ltd. ... Petitioner

Versus

State of Gujarat ... Respondent

July 13, 2023

"WHETHER SUPPLEMENTARY APPLICATION FOR REFUND CAN BE REJECTED, FILED UNDER THE CLAIM OF ANY OTHER" CATEGORY WHEN SUBSTANTIALLY ALL THE CONDITIONS AS REQUIRED UNDER LAW, HAVE BEEN COMPLIED WITH CAN BE REJECTED.

HELD: NO

Present for the Petitioner : Amal Paresh Dave and Paresh M Dave

Present for the Respondent : Government Pleader

JUDGMENT

Vipul M. Pancholi, J.

Leave to amend the prayer clause by amending one of the numbers of the impugned order is allowed. Learned advocate for the petitioner to carry out the same forthwith.

1. By way of the present petition, which is filed under Article 226 of the Constitution of India, the petitioners have prayed for the following relief/s:

> "(A) That Your Lordships may be pleased to issue a Writ of Certiorari or any other appropriate writ, direction or order, quashing and setting aside the order Nos.ZD240822013296L and ZD240822001278N dated 26.08.2022, both dated 26th August, 2022 (Annexure-"J"), with all consequential reliefs and benefits to the Petitioner;
>
> (B) That Your Lordships may be pleased to issue a Writ of Mandamus, or any other appropriate writ, order or direction, directing the Respondent No.2 to consider, decide and sanction all the supplementary claims filed by the Petitioner as listed in Annexure-"F".
>
> (C) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to direct Respondent No.2 to forthwith decide the Petitioner's supplementary refund claims on merits, on the terms and conditions that may be deemed fit by this Hon'ble Court.
>
> (D) An ex-parte ad-interim relief in terms of Para 17(C) above may kindly be granted.
>
> (E) Any other and further relief that may be deemed fit in the facts and circumstances of the case may also please be granted."

2. Looking to the issue involved in the present petition, learned advocates appearing for the parties jointly requested that this petition be finally disposed of at admission stage. Hence, Rule. Learned AGP Ms. Shrunjal Shah waives service of notice of Rule qua respondents.

3. The brief facts leading to filing of the present petition are as under:

3.1. It is the case of the petitioner that petitioner No.1 is a company engaged in sugar industry. The petitioner is engaged in manufacturing, trading and supplying/selling sugar and allied products. The petitioner has been selling and supplying such goods within the country and also exporting substantial quantities of goods to foreign countries. It is stated that petitioner has been importing materials like raw sugar under Advance Authorization Scheme. Such imports are allowed to be made under exemption of integrated tax because import duties including integrated tax are exempt when such materials are imported under a valid Advance

Authorization. The petitioner would process raw sugar in their refineries and refined sugar so produced is sold in the domestic market as well as exported to foreign countries. It is stated that the supplies made in the domestic market are always on payment of GST at appropriate rate, whereas the exports are made under Bond without payment of integrated tax on exported refined sugar.

3.2. It is stated that exports made by the petitioner are in the nature of zero-rated supplies as contemplated under Section 16 of the Integrated Goods and Services Tax Act, 2017 ('IGST Act' for short). It is further stated that since such zero-rated supplies are made without payment of tax, ITC availed by the petitioner in respect of input supplies used in relation to making zero-rated supplies without tax remains unutilized and such unutilized ITC gets accumulated in the petitioner's credit ledger. It is also stated that by virtue of Section 54(3) of the Central Goods and Services Tax Act ('CGST Act' for short) and also Section 16(3) of the IGST Act, the petitioner is entitled to claim refund of such unutilized ITC. Further, under Rule 89(4) of the CGST Rules, the Central Government has provided for a formula for calculating the amount of refund of unutilized ITC availed in respect of inputs and input services used in making zero-rated supplies of goods and the petitioner has been claiming refund of such unutilized ITC in accordance with this formula on regular basis.

3.3. It is further stated that petitioner has been claiming refund of the unutilized ITC of inputs and input services used in making zero-rated supply of goods on regular basis and such refund claims are sanctioned and paid by the respondent No.2 on regular basis.

3.4. The petitioner has further stated that the present case is for the petitioner's refund claims of unutilized ITC used in making zero-rated supply of goods during the period of 11 months in Financial Year 2020-2021 and 2021-2022. It is further stated that the petitioner has been legally entitled to refund of a sum aggregating to Rs.1,10,67,67,172/- for these 11 months, however, the petitioner erroneously lodged claims for a lower amount of Rs.1,00,47,38,439/- due to inadvertent arithmetical error of their employee and therefore the respondents have sanctioned and paid refund aggregating to Rs.1,00,47,38,439/-. It is further stated that when the petitioner realized the error and lodged supplementary refund claims for the left out amount of refund being Rs.10,20,28,733/-, the respondents have refused to sanction and pay such refund on a specious basis that the category under which such supplementary claims were lodged was not applicable in the case of the petitioner. The petitioner has, therefore, filed the present petition.

4. Heard learned advocate Mr. Paresh M. Dave for the petitioner and learned AGP Ms. Shrunjal Shah for the respondents.

5. Learned advocate for the petitioner, at the outset, referred the provisions contained in Section 16 of the IGST Act and thereafter referred the provisions contained in Section 54 of the CGST Act. Thereafter, learned counsel has referred the provisions contained in Rule 89 of CGST Rules and also referred the document produced at page 48 of the compilation i.e. Form GST RFD – 01, i.e., the Application for Refund. At this stage, learned advocate has also referred the statement produced at page 57 of the compilation. Learned advocate Mr. Dave submitted that the total refund that the petitioner had been entitled to for these 11 months in respect of export of goods without payment of tax (accumulated ITC) in accordance with the formula of Rule 89(4) of the Rules is Rs.1,10,67,67,172/-, however, there was an error in showing the refund amount which resulted in total refund amount being shown as Rs.1,00,47,38,439/-, and therefore, a sum of Rs.10,20,28,733/- remained to be shown in the applications as refund amount. Learned advocate referred the statement produced at page 57 of the compilation in support of the said contention.

5.1. Learned advocate for the petitioner, therefore, submitted that the amount of refund claimed by the petitioner was lower than what was actually admissible to the petitioner because of accumulated ITC involving zero rated supplies. It is submitted that all the 11 refund applications have been sanctioned and paid by the respondent No.2 after verifying and scrutinizing the applications. Thus, the petitioner got refund claims aggregating to Rs.1,00,47,38,439/-.

5.2. Learned counsel further submits that when the petitioner realized the arithmetical error committed while submitting the applications for refund for particular months, the refund applications have been made within statutory period laid down under Section 54(1) of the CGST Act. However, while showing the category of refund application, the petitioner has shown “any other” as the category because refund applications for these 11 months had already been made under Clause 7(c) i.e. accumulated ITC category for export of goods without payment of tax and the same had been sanctioned and paid by CGST officers. It is clarified that these supplementary refund applications are only for correcting clerical and arithmetical error which crept in while making refund applications in past.

5.3. Learned advocate for the petitioner thereafter submitted that respondent No.2 issued two notices for rejecting the supplementary refund applications for July, 2020 and September, 2020 on the ground that

"any other" category facilitated the tax payer to file a refund claim of a category other than listed in portal and the refund application made by the petitioner was not valid under "any other" category. It is submitted that petitioner filed reply on 10.08.2022 and explained the background in which the supplementary applications for refund had to be filed. The petitioners have also explained why "any other" category was mentioned in the refund application, and that the refund claim only of that amount which was left out while making the application with incorrect calculations. Two separate replies were also filed. At this stage, it is submitted that the respondent No.2 passed orders and uploaded the same on common portal on 26.08.2022 without giving opportunity of hearing to the petitioner.

5.4. Learned advocate referred the said orders and submitted that from the orders passed by the respondents, it is clear that the respondent has reproduced the notices but the submissions made by the petitioner in the replies are not referred at all in the said orders. It is submitted that there was no bar under the law for supplementary refund claim for the same period for differential amount.

5.5. Learned advocate Mr. Dave would further submit that in the CGST Act, a refund application has to be filed on the common portal and in the format prescribed by the Government. In such prescribed form of application, the assessee is required to disclose grounds of refund claim with the category under which refund was claimed and the assessee is obliged to fill in such details against serial No.7 of the refund application. In the present case, the petitioner claimed refund of accumulated ITC in respect of export of goods without payment of tax, and therefore, such category was declared while lodging the refund application initially. The said refund application has been sanctioned and paid also by the respondent No.2. However, another application for remaining amount of refund or for supplementary claim for the same category of accumulated ITC is not possible to be uploaded on the common portal because another application for the same month under the same category of accumulated ITC for export of goods without payment of tax is not accepted on the common portal, and therefore, the petitioner had no option but to upload the supplementary application under "any other" category. It is also submitted that there is no bar or prohibition under the law as regards submission of a supplementary refund claim, if an assessee had committed an error of claiming refund of a reduced amount while making refund application on the common portal. Learned counsel, therefore, urged that this petition be allowed and appropriate directions be issued to the respondents by quashing and setting aside the order impugned in the present petition.

5.6. Learned counsel has placed reliance upon the following decisions/ orders in support of his submissions:

1. In **Bombardier Transporation India Pvt. Ltd. v. Directorate General of Foreign Trade**, reported in 2021 (377) ELT 489 (Guj.);

2. In **P.A.Footwear Pvt. Ltd. v. Director General of Foreign Trade, New Delhi, reported in 2020(372) ELT 660 (Mad.)**;

3. Order dated 11.02.2022 passed by this Court in Special Civil Application No.9151 of 2021 in the case of **M/s. Bodal Chemicals Ltd. v. Union of India;**

4. In **Vishnu Aroma Pouching Pvt. Ltd. v. Union of India**, reported in 2020(38) GSTL 289 (Guj.);

5. Order dated 21.07.2022 passed by this Court in Special Civil Application No.17424 of 2021 in the case of **M/s. Stitchwell Garments v. Union of India**.

6. On the other hand, learned AGP Ms. Shrunjal Shah has opposed this petition. Learned AGP has referred the averments made in the affidavit-in-reply filed on behalf of respondent No.2. It is submitted that the common portal calculates the refundable amount as per the formula and under Rule 89(4) of the CGST Rules. Learned AGP referred para 10 of the reply and submitted that as per the refund application submitted by the petitioner for July, 2020, the maximum refund amount that could be claimed by the petitioner as per statement 3A of RFD-01 was Rs.5,57,57,863/- and the amount eligible for refund was Rs.2,91,60,705/-. It is submitted that the petitioner could claim a higher amount of refund up to a maximum of Rs.5,57,57,863/-. However, the petitioner only claimed Rs.2,91,60,705/- as refund by its own, and therefore, the petitioner is responsible for the less amount of refund claimed. Similarly, it is pointed out that for the month of September, 2020, the petitioner could claim an amount of Rs.15,85,34,281/-, however, the petitioner claimed only Rs.13,71,59,537/- for which the petitioner is responsible.

6.1. At this stage, it is further submitted that vide Circular dated 3rd October, 2019, the Government of India provided certain clarifications on the eligibility to file a refund application in form GST RFD-O1 for a period and category under which NIL Refund Application has already been filed. Learned AGP has referred Clause 3 of the said Circular and submitted that as per the said Clause no refund claims in Form GST RFD-01A/RFD-01

must have been filed by the registered person under the same category for any subsequent period.

6.2. It is submitted that in the case of the petitioner, after claiming the ITC refund once for each of the specified period, the petitioner submitted supplementary refund application in “any other” category. It is submitted that for the said period, the petitioner had already claimed ITC refund and therefore the claim of the petitioner is rightly rejected by the respondent and thereby the respondent has not committed any error. Learned AGP, therefore, urged that this petition be dismissed.

6.3. Learned AGP has placed reliance upon the decision rendered by the Hon’ble Supreme Court in the case of **Union of India & Others v. VKC Footsteps India Private Ltd.,** reported in **(2022) 2 SCC 603**.

7. Having heard the learned advocates appearing for the parties and having gone through the material placed on record, it reveals that the petitioner is a company engaged in the business of manufacturing, trading and supplying/selling sugar and allied products. The petitioner has been selling and supplying such goods within the country and also exporting substantial quantities of goods to foreign countries. The petitioner states that the exports made by the petitioner are in the nature of zerorated supplies as contemplated under Section 16 of the IGST Act. The petitioner further states that since such zero-rated supplies are made without payment of tax, ITC availed by the petitioner in respect of input supplies used in relation to making zero-rated supplies without tax remains unutilized and such unutilized ITC gets accumulated in the petitioner’s credit ledger. It is also the case of the petitioner that by virtue of Section 54(3) of the CGST Act and also Section 16(3) of the IGST Act, the petitioner is entitled to claim refund of such unutilized ITC. Further, under Rule 89(4) of the CGST Rules, the Central Government has provided for a formula for calculating the amount of refund of unutilized ITC availed in respect of inputs and input services used in making zero-rated supplies of goods and the petitioner has been claiming refund of such unutilized ITC in accordance with this formula on regular basis.

8. The present is a case for the petitioner’s refund claims of unutilized ITC used in making zerorated supply of goods during the period of 11 months in Financial Year 2020-2021 and 2021-2022. Learned advocate for the petitioner submitted that petitioner has been legally entitled to refund of a sum aggregating to Rs.1,10,67,67,172/- for these 11 months, however, the petitioner erroneously lodged claims for a lower amount of Rs.1,00,47,38,439/- due to inadvertent arithmetical error of the employee

of the petitioner. It is submitted that the respondents have sanctioned and paid refund aggregating to Rs.1,00,47,38,439/-. It is the case of the petitioner that when the petitioners realized the error, they have lodged supplementary refund claims for the left out amount of refund being Rs.10,20,28,733/-, however, the respondents have refused to sanction and pay such refund on a ground that the category under which such supplementary claims were lodged was not applicable in the case of the petitioner.

9. At this stage, we would like to refer to the relevant provisions of law. Sub-Sections (3) and (14) of Section 54 of the CGST Act provides as under:

"54. Refund of tax.

(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:

Provided that no refund of unutilised input tax credit shall be allowed in cases other than-

(i) zero rated supplies made without payment of tax;

(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:

Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.

* * * * * *

(14) Notwithstanding anything contained in this section, no refund under sub-section (5) or sub-section (6) shall be paid to an applicant, if the amount is less than one thousand rupees.

Explanation.—For the purposes of this section,--

(1) "refund" includes refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, or refund of tax on the supply of goods regarded as deemed exports, or refund of unutilised input tax credit as provided under subsection (3).

(2) "relevant date" means--

(a) in the case of goods exported out of India where a refund of tax paid is available in respect of goods themselves or, as the case may be, the inputs or input services used in such goods,--

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India; or

(ii) if the goods are exported by land, the date on which such goods pass the frontier; or

(iii) if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India;

(b) in the case of supply of goods regarded as deemed exports where a refund of tax paid is available in respect of the goods, the date on which the return relating to such deemed exports is furnished;

6[(ba) in case of zero-rated supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit where a refund of tax paid is available in respect of such supplies themselves, or as the case may be, the inputs or input services used in such supplies, the due date for furnishing of return under section 39 in respect of such supplies;]

(c) in the case of services exported out of India where a refund of tax paid is available in respect of services themselves or, as the case may be, the inputs or input services used in such services, the date of--

(i) receipt of payment in convertible foreign exchange, 7[or in Indian rupees wherever permitted by the Reserve Bank of India] where the supply of services had been completed prior to the receipt of such payment; or

(ii) issue of invoice, where payment for the services had been received in advance prior to the date of issue of the invoice;

(d) in case where the tax becomes refundable as a consequence of judgment, decree, order or direction of the Appellate Authority, Appellate Tribunal or any court, the date of communication of such judgment, decree, order or direction;

8[(e) in the case of refund of unutilised input tax credit under clause (ii) of the first proviso to sub-section (3), the due date for furnishing of return under section 39 for the period in which such claim for refund arises;]

(f) in the case where tax is paid provisionally under this Act or the rules made thereunder, the date of adjustment of tax after the final assessment thereof;

(g) in the case of a person, other than the supplier, the date of receipt of goods or services or both by such person; and

(h) in any other case, the date of payment of tax."

9.1. Section 16 of the IGST Act reads as under:

"16. (1) "zero rated supply" means any of the following supplies of goods or services or both, namely:--

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

[(3) A registered person making zero rated supply shall be eligible to claim refund of unutilised input tax credit on supply of goods or services or both, without payment of integrated tax, under bond or Letter of Undertaking. in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder, subject to such conditions, safeguards and procedure as may be prescribed:

Provided that the registered person making zero rated supply of goods shall, in case of non-realisation of sale proceeds, be liable to deposit the refund so received under this sub- section along with the applicable interest under section 50 of the Central Goods and Services Tax Act within thirty days after the expiry of the time limit prescribed under the Foreign Exchange Management Act, 1999 (42 of 1999) for receipt of foreign exchange remittances, in such manner as may be prescribed.

(4) The Government may, on the recommendation of the Council, and subject to such conditions, safeguards and procedures, by notification, specify-

(i) a class of persons who may make zero rated supply on payment of integrated tax and claim refund of the tax so paid;

(ii) a class of goods or services which may be exported on payment of integrated tax and the supplier of such goods or services may claim the refund of tax so paid.]

9.2. Now, we would like to refer to Sub-Rule (4) of Rule 89 of the CGST Rules, which reads as under:

"89: Application for Refund of Tax, Interest, Penalty, Fees or any Other Amount.

* * * * * *

(4) In the case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), refund of input tax credit shall be granted as per the following formula,-

Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero rated supply of services) x Net ITC ÷ Adjusted Total Turnover

Where,-

(A) "Refund amount" means the maximum refund that is admissible;

(B) "Net ITC" means input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both;

(C) "Turnover of zero-rated supply of goods" means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking or the value which is 1.5 times the value of like goods domestically supplied by the same or, similar placed, supplier, as declared by the supplier, whichever is less, other than the turnover of supplies in respect of which refund is claimed under sub- rule (4A) or (4B) or both;

(D) "Turnover of zero-rated supply of services" means the value of zero-rated supply of services made without payment of tax under bond or letter of undertaking, calculated in the following manner, namely:-

Zero-rated supply of services is the aggregate of the payments received during the relevant period for zero-rated supply of services and zero-rated supply of services where supply has been completed for which payment had been received in advance in any period prior to the relevant period reduced by advances received for zero-rated supply of services for which the supply of services has not been completed during the relevant period;

(E) "Adjusted Total Turnover" means the sum total of the value of-

(a) the turnover in a State or a Union territory, as defined under clause (112) of section 2, excluding the turnover of services; and

(b) the turnover of zero-rated supply of services determined in terms of clause (D) above and non-zero-rated supply of services, excluding-

(i) the value of exempt supplies other than zero-rated supplies; and

(ii) the turnover of supplies in respect of which refund is claimed under sub- rule (4A) or sub-rule (4B) or both, if any,during the relevant period.

(F) "Relevant period" means the period for which the claim has been filed.»

10. Thus, from the aforesaid provisions, it is clear that the "refund amount" means the maximum refund that is admissible. In the present

case, the respondents have not disputed that the maximum refund that is admissible is Rs.1,00,47,38,439 and not the amount of Rs.1,10,67,67,172/- . However, the stand of the respondent is that the petitioner is responsible for the error committed by the employee of the petitioner in claiming the refund of lower amount than the maximum admissible amount.

11. From the record, it appears that out of Rs.1,10,67,67,172/-, the respondent has already granted refund for an amount of Rs.1,00,47,38,439/- , and therefore, the dispute is with regard to refund of an amount of Rs.10,20,28,733/-. When the petitioner realized the arithmetical error committed while submitting the applications for refund for particular months, supplementary applications have been made for getting the refund of aforesaid amount of Rs.10,20,28,733/- within statutory period laid down under Section 54(1) of the CGST Act. It is the case of the petitioner that while showing the category of refund application, the petitioner has shown "any other" as the category because refund applications for these 11 months had already been made under Clause 7(c) i.e. accumulated ITC category for export of goods without payment of tax and the same had been sanctioned and paid by CGST officers. It is also relevant to note that as the petitioner already filed refund application under Clause 7(c) i.e. accumulated ITC category at first point of time, for the same month and same period, another/supplementary application for the refund of the differential amount of refund (not claimed by the petitioner on account of arithmetical error on the part of the petitioner) cannot be filed on the portal and therefore there was no option for the petitioner to submit the application under the category "any other". Thus, we are of the view that this is nothing but technical error and for such technical error, the claim of the petitioner cannot be rejected without examining the same by the respondent authority on its own merits and in accordance with law.

12. At this stage, we would like to refer to the decision rendered by the Hon'ble Supreme Court in the case of **VKC Foodsteps India Private Limited (supra)**, wherein the Hon'ble Supreme Court observed in para 88, 99 and 142 as under:

> "88. The jurisprudential basis furnishes a depiction of an ideal state of existence of GST legislation within the purview of a modern economy, as a destination-based tax. But there can be no gain saying the fact that fiscal legislation around the world, India being no exception, makes complex balances founded upon socio-economic complexities and diversities which permeate each society. The form which a GST legislation in a unitary State may take will vary considerably from its avatar in a nation such as India

where a dual system of GST law operates within the context of a federal structure. The ideal of a GST framework which Article 279A(6) embodies has to be progressively realized. The doctrines which have been emphasized by Counsel during the course of the arguments furnish the underlying rationale for the enactment of the law but cannot furnish either a valid basis for judicial review of the legislation or make out a ground for invalidating a validly enacted law unless it infringes constitutional parameters. While adopting the constitutional framework of a GST regime, Parliament in the exercise of its constituent power has had to make and draw balances to accommodate the interests of the States. Taxes on alcohol for human consumption and stamp duties provide a significant part of the revenues of the States. Complex balances have had to be drawn so as to accommodate the concerns of the states before bringing them within the umbrella of GST. These aspects must be borne in mind while assessing the jurisprudential vision and the economic rationale for GST legislation. But abstract doctrine cannot be a ground for the Court to undertake the task of redrawing the text or context of a statutory provision. This is clearly an area of law where judicial interpretation cannot be ahead of policy making. Fiscal policy ought not be dictated through the judgments of the PART F High Courts or this Court. For it is not the function of the Court in the fiscal arena to compel Parliament to go further and to do more by, for instance, expanding the coverage of the legislation (to liquor, stamp duty and petroleum) or to bring in uniformity of rates. This would constitute an impermissible judicial encroachment on legislative power. Likewise, when the first proviso to Section 54(3) has provided for a restriction on the entitlement to refund it would be impermissible for the Court to redraw the boundaries or to expand the provision for refund beyond what the legislature has provided. If the legislature has intended that the equivalence between goods and services should be progressively realized and that for the purpose of determining whether refund should be provided, a restriction of the kind which has been imposed in clause (ii) of the proviso should be enacted, it lies within the realm of policy.

* * * * * *

99. We must be cognizant of the fact that no constitutional right is being asserted to claim a refund, as there cannot be. Refund is a matter of a statutory prescription. Parliament was within its legislative authority in determining whether refunds should be allowed of unutilised ITC tracing its origin both to input goods and

input services or, as it has legislated, input goods alone. By its clear stipulation that a refund would be admissible only where the unutilised ITC has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies, Parliament has confined the refund in the manner which we have described above. While recognising an entitlement to refund, it is open to the legislature to define the circumstances in which a refund can be claimed. The proviso to Section 54(3) is not a condition of eligibility (as the assessees' Counsel submitted) but a restriction which must govern the grant of refund under Section 54(3). We therefore, accept the submission which has been urged by Mr N Venkataraman, learned ASG.

142. The above judicial precedents indicate that in the field of taxation, this Court has only intervened to read down or interpret a formula if the formula leads to absurd results or is unworkable. In the present case however, the formula is not ambiguous in nature or unworkable, nor is it opposed to the intent of the legislature in granting limited refund on accumulation of unutilised ITC. It is merely the case that the practical effect of the formula might result in certain inequities. The reading down of the formula as proposed by Mr Natarjan and Mr Sridharan by prescribing an order of utilisation would take this Court down the path of recrafting the formula and walk into the shoes of the executive or the legislature, which is impermissible. Accordingly, we shall refrain from replacing the wisdom of the legislature or its delegate with our own in such a case. However, given the anomalies pointed out by the assessees, we strongly urge the GST Council to reconsider the formula and take a policy decision regarding the same."

12.1.In the aforesaid decision, the Hon'ble Supreme Court has an occasion to deal with the issue where the High Court has expanded the provision for refund beyond what the legislature has provided, and therefore, the aforesaid decision would not render any assistance to learned AGP in the facts of the present case.

13. Now, we would like to refer to the decisions relied on by the learned advocate appearing for the petitioner. In the case of **Bombardier Transportation India Pvt. Ltd. (supra)**, the Division Bench of this Court observed in para 23 and 25 as under:

"23. The writapplicant submits that as per its understanding, the EDI system, which is an electronic system developed and

managed by the respondent no.3 with an objective to digitalize transmission of shipping bills between Respondents, suffers from lacunae that it does not permit amendment, which is specifically permitted in terms of Section 149 of the Customs Act, 1961, to be carried electronically through EDI system. It is a settled law that the benefit which otherwise a person is entitled to once the substantive conditions are satisfied cannot be denied due to a technical error or lacunae in the electronic system.

* * * * * *

25. In view of the above, the present writapplication succeeds and is hereby allowed. The respondents nos.1 and 2 are directed to grant the benefits of the MEIS to the writapplicant within a period of four weeks from the date of the receipt of this order."

13.1. In the case of **M/s Bodal Chemicals Ltd. (supra)**, the Division Bench of this Court observed in para 9 and 11 as under:

"9. We are of the view that the respondents cannot raise their hands in despair saying that it is not possible to correct or take care of the technical glitches. The writ applicant herein has been running from pillar to post requesting the respondents to provide a solution and take care of the technical error and glitch that occurred as regards furnishing the GSTR – 6 return for recording and distributing the ISD credit of Rs.20,52,989/-. As usual, there is no response at the end of the GSTN. The writ applicant is not allowed to distribute the ISD credit of Rs.20,52,989/- as the same has not been recorded, reported and declared in the GSTR – 6 return.

* * * * * *

11. For all the aforegoing reasons, this petition succeeds and is hereby allowed. The respondents are directed to allow the writ applicant to furnish manually the GSTR – 6 return with details of the ISD credit of Rs.20,52,989/- and also permit distribution of such credit to the constituents of the writ applicant. Let this entire exercise be undertaken within a period of six weeks from the date of the receipt of writ of this order."

13.2.In the case of **M/s. Stitchwell Garments (supra)**, the Division Bench of this Court observed and held in para 5.2 to 5.4 and 6 as under:

"5.2 The entitlement of the petitioner for availment under export scheme is not in dispute. Entering a particular code to receive

the benefit was only part of procedure. It could not overreach or obliterate the substantive right claimable by the petitioner once the petitioner was eligible under the scheme to get the benefit. The decisions relied on by the learned advocate for the petitioner lay down that technical glitch ought not to have been permitted to take toll of the petitioner's rights under the scheme to avail the benefits.

5.3 Supreme Court in Saiyad Mohammad Bakar El- Edroos (Dead) By Lrs. Vs. Abdulhabib Hasan Arab & Ors. [(1998) 4 SCC 343], held that procedure cannot operate to defeat the ends of justice, it must stand to the aid of justice,

> "8. A procedural law is always in aid of justice, not in contradiction or to defeat the very object which is sought to be achieved. A procedural law is always subservient to the substantive law. Nothing can be given by a procedural law what is not sought to be given by a substantive law and nothing can be taken away be the procedural law what is given by the substantive law."

5.4 Even if the petitioner had entered wrong scheme code, it was only an irregularity and not illegality. In Solanki Parvatikumari Rameshbhai Vs. State of Gujarat being Special Civil Application No. 22981 of 2017, Single Judge of this Court explained the differentiation between illegality and irregularity,

> "5.2 Law conceives a clear differentiation between illegality and irregularity. This nice distinction brings home the case of the petitioner. An illegality is something which amounts to substantial failure in compliance of requirement. It denotes such breach of rule or requirement which alters the position of a party in terms of his right or obligation. Illegality denotes a complete defect in the jurisdiction or proceedings. Illegality is properly predictable in its radical defects. It is a situation contrary to the principle of law. As against this, an irregularity as defined lexicographically, is want of adherence to some prescribed rule or mode of proceedings. It consist in omitting the rule something that is necessary for due and orderly conducting of a suit or doing it in an unreasonable time or improper manner. In Law Lexicon by R. Ramanatha Aiyar, 1997 Edition, irregularity is defined as "a neglect of order or method; not according to regulations; the doing of an act at an unreasonable time, or in an improper manner; the technical term for every defect in practical proceedings or the mode of conducting an action or defence, as distinguished from defects

> in pleading. Irregularity is failure to observe that particular course of proceedings which, conformable with the practice of the court, ought to have been observed".

> 6. In the aforesaid view, the petition deserves to be allowed. Resultantly, the decision of Respondent Director General of Foreign Trade reflected in email communication dated 10.06.2021 refusing to change the Scheme Code from 19 to 60 in EDI shipping bills is hereby set aside. Respondents no.1 and 2 herein are directed to accept the application of the petitioner for export benefits under the Scheme of Rebate of State and Central taxes and Levies (RoSCTL) in respect of 70 shipping bills referred to in order dated 04.01.2021, the Principal Commissioner of Customs, Customs House, Mundra. The acceptance of the petitioner's application may be by manual mode if the system does not permit the correction. The application of the petitioner for the above purpose shall be deemed to have been filed with Code 60."

14. Keeping in view the aforesaid decisions, it is settled law that the benefit which otherwise a person is entitled to once the substantive conditions are satisfied cannot be denied due to a technical error or lacunae in the electronic system. As discussed hereinabove, the petitioner has no option but to upload the supplementary application under "any other" category for the refund of the left out amount, which was due to an arithmetical error committed by the employee of the petitioner. We are of the view that the said claim of the petitioner for refund of the left out amount of Rs.10,20,28,733/- cannot be rejected outright merely on technicality and that too when the substantive conditions are satisfied without scrutiny by the respondent in accordance with law. Thus, the petition deserves to be allowed.

15. The petition is allowed. The impugned order Nos. ZD240822013296L and ZD240822013287K dated 26.08.2022 are hereby quashed and set aside. The respondents are directed to allow the petitioner to furnish manually the refund applications for refund of the left out amount of Rs.10,20,28,733/-. However, it is open for the respondents authority to scrutiny the claim of the petitioner for refund of the aforesaid amount in accordance with law and to take appropriate decision on the applications which may be made by the petitioner. Let this exercise be undertaken by the respondents within a period of six weeks from the date of receipt of the applications from the petitioner. Rule is made absolute.

IN THE HIGH COURT OF DELHI AT NEW DELHI
[Vibhu Bakhru and Amit Mahajan, JJ.]

W.P.(C) 9742/2023 & CM APPL. 37331/2023

Shivbhola Filaments (P.) Ltd. ... Petitioner

Versus

Assistant Commissioner CGST ... Respondent

Date of Order : 25.07.2023

WHETHER APPLICATION FOR REFUND CAN BE REJECTED SIMPLY ON THE GROUND OF ANY MISMATCH, WITHOUT ALLOWING THE APPLICANT TO RECONCILE THE STATEMENT OF REFUND AS QUANTIFIED EARLIER.

HELD: NO

For the Petitioner : Yuvraj Singh, Ms. Hemlata Rawat and Chetan Kumar Shukla, Advs.

For the Respondent. : Atul Tripathi and V.K. Attri, Advs.

ORDER

Vibhu Bakhru, J.

1. Issue notice.

2. The learned counsel for the respondents accepts notice.

3. The petitioner has filed the present petition, *inter alia*, impugning an Order-in-Appeal dated 18.11.2021 whereby, the appeals preferred by the petitioner (eight in number) against the eight separate orders, all dated 31.12.2020, passed by the Adjudicating Authority, were rejected.

4. The petitioner is engaged in the manufacturing of Polypropylene Yarn and Polypropylene narrow woven fabric, which is chargeable to Goods and Services Tax (GST) at the rate of 12% and 5% respectively.

5. The petitioner claims that raw materials used for manufacturing of the product (Granules, Master Batch, Spin Finish Oil) are chargeable to GST at the rate of 18%. The petitioner, thus, claims that due to the inverted tax structure, it is unable to avail the entire credit of input tax paid by it on inputs in discharge of its tax liability on output.

6. In the aforesaid circumstances, the petitioner had filed refund applications dated 23.10.2020 for various tax periods from August, 2018 to March, 2019. The petitioner received "Notice of Rejection of Application for Refund" dated 18.12.2020 (hereafter 'Show Cause Notice') in respect of each of its refund applications. The petitioner was also called upon to show cause as to why its refund applications should not be rejected.

7. The aforementioned notices indicated that the petitioner's applications for refund were proposed to be rejected for the reason that there was mismatch with the returns filed by the petitioner in form GSTR 2A. The petitioner responded to the said show cause notices and furnished a reconciliation statement for each tax period. However, the petitioner's applications (except for application relating to the tax period between August 2018 to September, 2018, which was rejected on the ground of limitation) were rejected for the same reason as stated in the show cause notices – mismatch with the returns filed by the petitioner).

8. Aggrieved by the said rejection orders dated 31.12.2020, the petitioner preferred appeals before the Appellate Authority under Section 107 of the Central Goods and Service Tax Act, 2017 (hereafter 'the CGST Act'). The said appeals have been rejected by a common Order-in-Appeal dated 18.11.2021, which is impugned in the present petition.

9. The petitioner challenges the impugned Order-in-Appeal dated 18.11.2021 essentially on two grounds. First, that the petitioner was not afforded an opportunity to be heard by the Adjudicating Authority and thus, the refund rejection orders were required to be set aside. Second that the petitioner had furnished the reconciliation statement scaling down its claims for refund, yet the same were rejected on the ground that there was a mismatch in the returns filed.

10. A plain reading of the impugned Order-in-Appeal dated 18.11.2021 indicates that the petitioner's applications for refund were rejected on the ground that the petitioner had changed the value of the inverted rated supply of goods substantially. The relevant extract of the impugned Order in Appeal dated 18.11.2021 reads as under: -

> "5.8 From, the above, it can be seen that the appellant is changing the value of inverted rated supply of goods very frequently and drastically. I also noticed that in the reconciliation statement, the appellant has included the value of waste of HSN 55051090 attracting GST @ 18%, goods of HSN code 5402 of traded goods which do not fall under the category of inverted rated goods. Furthermore, the item of HSN 5402 which is inward supply of

goods of the appellant found appearing in trading turnover as well as inverted turnover. Like-wise there was mis-match in the amount of tax payable on such inverted rated supply goods. I also noticed variation in amount of 'Total Adjusted Turnover' mentioned by the appellant at each stage of period. In appeal No.95/2021, the amount of Adjusted Total Turnover in Form GSTRFD- 01 has been shown as Rs.5,10,01,517/- as against Rs.3,12,40,839.32 in Reconciliation statement and Rs.6,92,25,015/- in GSTR-3B. Thus, I am of the considered view that the AA has correctly pointed out that there was mis-match in inverted rated supply of goods, Adjusted total turnover and the amount of tax payable on such inverted rated supplies."

5.9 I also noticed that in SCNs it has been mentioned that some invoices included for the purpose of arriving at the amount of 'Net ITC' not found in GSTR-2A returns for the relevant period. In this regard, I want to refer Circular No.135/05/2020-GST dated 31.03.2020 wherein it has been clarified that the refund of accumulated ITC shall be restricted to the ITC as per those invoices, the details of which are uploaded by the supplier in FORM GSTR-1 and are reflected in the FORM GSTR-2A of the applicant. Hence, I am of the view that the refund of accumulated ITC shall not be available to the appellant of those invoices the details of which are not reflected in GSTR-2A of the applicant at the time of filing of refund. In view of the above discussions, mis-match in Net ITC, Inverted rated supply of goods and tax payable on such supplies and adjusted total turnover clearly established and the appellant failed to reconcile the mis-match documentary or otherwise."

11. It is apparent from the above that although the Appellate Authority had flagged issues on the basis of which certain amount of refund as claimed by the petitioner was required to be rejected, however, no exercise was conducted to determine the extent of the refund claimed, which was untenable. The petitioner had submitted reconciliation statements, and had reduced its claims for refund substantially to restrict the same to the quantum of refund, that according to the petitioner, was due.

12. Plainly, it is not apposite for the concerned authorities to simply reject an application for refund on the ground of any mismatch without permitting the tax payer to reconcile the same and provide the necessary explanations.

13. In the present case, the petitioner was not heard by the Adjudicating Authority and no such exercise for determining the amount of refund admissible was undertaken.

14. In view of the above, we consider it apposite to set aside the impugned Order-in-Appeal dated 18.11.2021 as well as the orders dated 31.12.2020 passed by the Adjudicating Authority (annexed with the petition as Annexure P/4) and restore the petitioner's applications for refund before the Adjudicating Authority for determining the amount of refund payable to the petitioner after affording the petitioner an opportunity to be heard. The petitioner is also at liberty to file a written explanation along with a statement reconciling the quantum of refund claimed with the amounts as disclosed in the returns, within a period of two weeks from today. In the event, the petitioner files any such detailed explanation and reconciliation statements, the Adjudicating Authority shall consider the same and pass a speaking order.

15. The petition is disposed of in the aforesaid terms. All pending applications are also disposed of.

IN HIGH COURT OF ANDHRA PRADESH

[U. Durga Prasad Rao and Venkata Jyothirmai Pratapa, JJ.]

Writ Petition Nos. 15481 of 2023

Arhaan Ferrous and Non-Ferrous Solutions (P.) Ltd. ... Petitioner

Versus

Deputy Assistant Commissioner-1(ST) ... Respondent

Date of Order : 03.08.2023

WHETHER GOODS CAN BE CONFISCATED UNDER RULE 138A BY REVENUE MERELY ON THE GROUND THAT THE PURCHASER HAD PURCHASED GOODS FROM A VENDOR WHO WAS NOT HAVING ANY BUSINESS PREMISES AND WAS NOT AVAILABLE AT THE SAID ADDRESS, THOUGH HE WAS HAVING A VALID GST NUMBER AND PURCHASED THE GOODS FOR A VALUABLE CONSIDERATION AFTER VERIFYING HIS GST REGISTRATION FROM THE WEB PORTAL?

HELD: NO

For the Petitioner : V Siddharth Reddy

For the Respondent. : GP for Commercial Tax

ORDER

U. Durga Prasad Rao, J.

The 1st petitioner is the owner of the goods and 2nd petitioner is the owner of the vehicle in the above writ petitions and they seek writ of

mandamus declaring the action of 1st respondent in detaining their goods and vehicles while in transit with valid invoices as illegal and consequently to set aside the Form GST MOV -01, dated 12-6-2023 and confiscation notices in Form GST MOV -10, dated 14-6-2023 proposing to confiscate the goods and vehicles and pass such other orders deemed fit.

2. Petitioners' case succinctly is thus:

(a) 1st petitioner who is common in the above batch of writ petitions is a trader in iron scrap under a valid registered GST No. 37AATCA9148B1ZD. He purchased the iron scrap from the 4th respondent under invoice, dated 12-6-2023 and in turn sold the same in favour of M/s Radha Smelters Private Limited, Sankarampet, Medak District, Telangana State under valid invoice number. The 1st petitioner engaged the vehicles of the 2nd petitioner for transporting goods from Vijayawada to Sankarampet and consignment was sent along with valid documents such as invoice, way bill, weighment slip etc., While goods were in transit the 1st respondent detained the vehicles along with the goods on 12-6-2023 on the alleged ground that the vendor of the 1st petitioner i.e., the 4th respondent has no place of business at Vijayawada and accordingly issued impugned proceedings in the name of 4th respondent by deliberately ignoring the documents produced by the drivers at the time of check.

(b) It is further case of the petitioners that the 4th respondent having sold the scrap has no interest and in case of default on his part, the 1st respondent may initiate action against the 4th respondent. However, under the guise of initiating proceedings against the 4th respondent, the 1st respondent cannot put the petitioners in trouble as long as the transaction is covered by all relevant and applicable documents.

(c) It is further case of the petitioners that the 1st respondent did not follow the procedure contemplated under APGST/CGST Act, 2017 and in straight away issued proceedings proposing to confiscate the goods under transit without issuing notices in GST MOV-02, 03, 04, 05, 06 07, 08 or GST MOV -09 before issuing notice of confiscation in Form GST MOV -10. It is also contended that the documents served on the 2nd petitioner do not contain DIN Number. The 1st respondent has no right or jurisdiction to detain the goods and vehicle of the petitioners.

Hence, the writ petition.

3. The 1st respondent filed counter mainly contending thus:

(a) On 12-6-2023 the 1st respondent while conducting check of vehicles at Mahanadu Road, Auto Nagar, Vijayawada found the lorries of the petitioners transporting iron scrap covered by Bill and E-way Bill, which on verification revealed that 4th respondent was transporting iron scrap from Vijayawada destined to be delivered to M/s Radha Smelters Pvt Ltd., Sankarampet, Medak District, Telangana State. It is noticed that 4th respondent without having any place of business in Vijayawada dispatched goods therefrom. The consignment was not accompanied by the purchase voucher/ invoice and payment of consideration. Hence the proper officer recorded statement of the drivers in Form GST 01. The Joint Commissioner (ST), Kurnool was requested to verify the genesis of the goods and bonafides of the seller dealer. Basing on the report of the Joint Commissioner (ST) Ku;rnool the registering authority suspended the registration of 4th respondent on 13-6-2023. Since the goods are moved in violation of section 113 of APGST Act, notice of confiscation in Form GST MOV-10 was issued proposing to confiscate the goods and conveyance. Subsequently two reminders were issued to 4th respondent on 23-6-2023 and 3-7-2023. However, the seller remained silent. The transport is covered by bill and way bill issued by the 4th respondent and verification of the same shows that the 4th respondent sold iron scrap against bill and way bill without any purchase details. In the circumstances the vehicle and goods were detained by following due process of law. Further, the Joint Commissioner (ST), Kurnool informed that the seller is a fake dealer who obtained registration by showing fictitious document and hence the same was suspended. The Assistant Commissioner (ST), Kurnool-I, inspected the business premises of the seller in Kurnool and recorded panchanama through mediators which shows that the seller is a non-existing entity. In such a scenario, it is questionable as to how the buyer has purchased the goods from a bogus and non-existing seller.

(b) It is contended that the tax invoice and e-Way bill were raised by the 4th respondent implying that he is the owner of the goods. The 1st petitioner failed to establish the ownership of goods under dispute but submitted a letter dated 26-6-2023 without signature claiming ownership of the goods. As the letter is without signature, the 1st respondent issued an endorsement dated 30-6-2023 to the address of the registered person which was returned with the

endorsement as address is incomplete. This creates a doubt about the existence of the 1st petitioner also. Since the notices in this case were issued through the GST portal by generating reference number and date, DIN need not be generated for them.

(c) It is also contended that since the petitioners failed to establish the ownership of goods and genuineness of the purchases allegedly made from the non-existing dealer, it is not obligatory on the part of proper officer to issue notice to the petitioners. The writ petition is premature as the proceedings are pending and not attained finality. The respondent thus prayed to dismiss the writ petition.

4. The petitioners filed reply affidavit in W.P.No.15481/2023 and opposed the counter averments. It is contended that the suspension of registration of 4th respondent on 13-6-2023 pending enquiry relating to its genuineness, basing on the report of the Joint Commissioner (ST), Kurnool, is incorrect because the inspection of the premises of the 4th respondent according to Joint Commissioner's report was held only on 01-7-2023 and that being so, the suspension of registration cannot precede to 13-6-2023. It is further contended that at the time of interception of vehicle for check up, the 1st petitioner is the owner of the goods-cum-seller and M/s. Radha Smelters Private Limited is the buyer and the transaction is covered by valid invoice and waybill and those documents were accompanying the goods and therefore, if at all the 1st respondent suspected the genuineness of the documents, he ought to have initiated proceedings against the 1st petitioner. The 1st respondent deliberately ignored the documents produced at the time of check which shows the source of goods and issued proceedings in the name of 4th respondent. As per section 129 of the CGST/APGST Act, 2017, action if any can be initiated against the person who is transporting goods in contravention of the provisions of the Act. In the instant case, the 1st petitioner is transporting goods with valid documents. Instead of issuing proceedings in the name of petitioner, the 1st respondent issued notices against 4th respondent who has no interest in the matter after selling the consignment for valuable consideration to the petitioner. Under law there is no requirement that the petitioner shall verify whether 4th respondent has any registered place of business at Vijayawada. Having verified the credentials of GST registration number of the 4th respondent on the Department web portal, the petitioner purchased the goods and paid the consideration through the bank transaction. However, the subsequent suspicion against the genuineness of a registration of 4th respondent entertained by the Department has no bearing with the transaction entered into by the petitioner with 4th respondent. It is further contended that in

view of deletion of non-obstante clause in section 130 of the CGST Act, 2017, by virtue of the Finance Act, 2021, section 129 of the GST Act will have overriding effect on section 130 of the said Act and thereby, in respect of goods in transit, the procedure prescribed under section 129 of the CGST Act has to be followed. At any rate, since no notice was issued in the name of the petitioners, the confiscation proposals against 4th respondent cannot be made applicable against the petitioners.

5. Heard Sri V. Siddharth Reddy, learned counsel for petitioners, and learned Government Pleader for Commercial Taxes-1 representing the respondents. Both the learned counsel reiterated their pleadings in the respective arguments.

6. Severely fulminating the action of the 1st respondent in issuing notice dated 12-6-2023 in Form GST MOV-01 and notice dated 14-6-2023 in Form GST MOV-10 U/s 130 of CGST/APGST Act proposing to confiscate the goods and conveyance, learned counsel for petitioners would submit that the aforesaid notices were issued to 4th respondent on the main allegations, as if, the consignor i.e., the 4th respondent has no place of business at Vijayawada but making movement of goods i.e., MS Scrap without any details of purchase and further, his registration was suspended for obtaining the registration with fabricated documents. Learned counsel strenuously argued that in fact the 1st petitioner has purchased the subject goods from the 4th respondent and sold to M/s Radha Smelters Private Limited and transporting through conveyance of the 2nd petitioner and therefore as on the date of interception i.e., 12-6-2023 the 1st petitioner was the owner of the goods but not the 4th respondent. Driver of the goods produced all relevant documents before the 1st respondent but he selectively perused only the invoice issued by the 4th respondent and came to conclusion as if the details of the Vendor of the 4th respondent and concerned bills were not produced and detained the vehicle. Learned counsel would lament that if the 1st respondent had any suspicion about the genuineness of the business of the 1st petitioner and his GST registration, he ought to have issued notice U/s 129 of CST/APGST Act and initiated proceedings. Without doing so he straight away issued notice of confiscation against the 4th respondent while detaining the goods pertaining to the 1st petitioner which is illegal and unjust. He further argued that without initiating proceedings U/s 129 against the petitioners, resorting to Section 130 of the Act against 4th respondent and on that ground proposing to confiscate the goods of the 1st petitioner is illegal. He placed reliance on the order dated 16-8-2022 in W.P.No.100849/2022 (T.Res) Rajeev Traders v. Union of India [2022] 142 taxmann.com 420 (Kar.)/2022 (66) G.S.T.L. 15 (Kar.)/[2023]

95 GST 313 (Kar.) passed by learned single Judge of the High Court of Karnataka, Dharwad Bench.

7. In oppugnation learned Government Pleader would argue, the vehicles were intercepted at Auto Nagar, Vijayawada on 12-6-2023 by the 1st respondent and having found they contained iron scrap, he enquired the drivers who produced the invoices dated 12-6-2023 which showed that the consignment was destined from Vijayawada to Sankarampet, Medak, Telangana. The invoices further showed that M/s K.S Enterprises, i.e., the 4th respondent is the owner of the consignment and the 1st petitioner is the buyer and the consignee is M./s Radha Smelters Pvt Ltd. Learned G.P would weightily point out that since the 4th respondent has no place of business at Vijayawada wherefrom the goods were sought to be transported and as the driver at that time could not show the bill of purchase, the mode of payment of purchase price by 1st petitioner to 4th respondent and mode of transportation from Kurnool to Vijayawada, the 1st respondent suspected the bonafides of 4th respondent and detained the vehicles and informed the Joint Commissioner (ST) Kurnool to examine bonafides of seller i.e., the 4th respondent. The enquiry revealed that the 4th respondent was not doing business in the given address at Kurnool and there was no such person. Therefore, the GST registration of the 4th respondent was suspended on 13-6-2023 pending further enquiry and notice of confiscation in Form GST MOV -10 was issued U/s 130 of CGST/ APGST Act, 2017 to 4th respondent.

8. Refuting the argument of the petitioners that no notice was issued and action was initiated against the petitioners but their stock and vehicle were illegally detained by initiating proceedings against the 4th respondent, learned G.P would submit that since the origin of the goods as per the invoice is relatable to 4th respondent who happens to be a fictitious person, proceedings were initiated against him by issuing notices. The 4th respondent shall appear and prove the authenticity of his business. Be that as it may, since the 1st petitioner claims to be the purchaser from the 4th respondent, though proceedings were not separately launched against him, he owes a responsibility to establish the authenticity of the transaction between him and the 4th respondent by producing invoice and purchase bill issued by the 4th respondent and also the mode of payment of consideration to him and further, produce relevant document as to the place of purchase of the goods i.e., Kurnool or Vijayawada or some other place and mode of transportation to Vijayawada if delivery was obtained at some other place. Learned G.P would thus argue that the burden of proving the genuineness of the transaction between the 1st petitioner and the 4th respondent lay on the former. He would submit that the petitioners

can attend the enquiry and establish their innocence by producing the relevant documents. Learned GP defended the action of the 1st respondent in straight away initiating proceedings U/s 130 of CGST/APGST Act on the submission that the very existence of 4th respondent and his obtaining GST registration were doubtful.

9. The point for consideration is:

(1) Whether 1st respondent is legally justified in detaining the goods and vehicles of petitioners without initiating any proceedings against them but only against the 4th respondent U/s 130 of CGST/APGST Act, 2017 ?

10. **POINT**: The authority of a proper officer to inspect the goods in movement can be traceable to Section 68 of CGST/APGST Act, 2017 which reads thus:

"68. Inspection of goods in movement:

(1) The Government may require the person in charge of a conveyance carrying any consignment of goods of value exceeding such amount as may be specified to carry with him such documents and such devices as may be prescribed.

(2) The details of documents required to be carried under sub-section (1) shall be validated in such manner as may be prescribed.

(3) Where any conveyance referred to in sub-section (1) is intercepted by the proper officer at any place, he may require the person in charge of the said conveyance to produce the documents prescribed under the said sub-section and devices for verification, and the said person shall be liable to produce the documents and devices and also allow the inspection of goods."

11. Then, the details of documents required to be carried under sub-section (1) are narrated in rule 138A of CGST/APGST Rules, 2017, as per which the following documents and devices to be carried by a person in charge of a conveyance:

i. The invoice or bill of supply or delivery challan, as the case may be; and

ii. A copy of the e-way bill in physical form or the e-way bill number in electronic form or mapped to a Radio Frequency

Identification Device embedded on to the conveyance in such manner as may be notified by the Chief Commissioner:

Provided that nothing contained in clause (b) of this sub-rule shall apply in case of movement of goods by rail or by air or vessel.

Provided further that in case of imported goods, the person in charge of a conveyance shall also carry a copy of the bill of entry filed by the importer of such goods and shall indicate the number and date of the bill of entry in Part A of FORM GST EWB-01

** ** **

12. Authorized by above provisions, in the instant case the proper officer/1st respondent intercepted the lorries at Auto Nagar, Vijayawada, on 12-6-2023 which were found carrying iron scrap covered by bill and e-way bills. They revealed that the consignor i.e., the 4th respondent without having place of business at Vijayawada, transporting the goods from Vijayawada to Sankarampet, Medak in Telangana State. According to 1st respondent, the enquiry conducted by Joint Commissioner (ST), Kurnool, revealed the 4th respondent was not doing business in the given address at Kurnool and there was no such person and therefore, his GST registration was suspended w.e.f. 13-6-2023 and enquiry was initiated against 4th respondent by issuing notice of confiscation in Form GST MOV-10 under section 130 of the CGST/APGST Act, 2017. The contention of the Revenue is that since the existence and business activities of the 4th respondent are highly doubtful, confiscation proceedings U/s 130 of the CGST/APGST Act, 2017 can be launched directly against 4th respondent without reference to the petitioners and as the 1st petitioner claims to be the purchaser from 4th respondent, he has to establish that he is a bonafide purchaser from 4th respondent for valuable consideration by paying the due tax without knowing the credentials of 4th respondent by participating in the enquiry proceedings initiated against the 4th respondent.

Per contra, the contention of 1st petitioner is that he is the bonafide purchaser from 4th respondent for valuable consideration on verifying GST registration of the 4th respondent on the web portal and sold the goods to M/s. Radha Smelters Private Limited, Medak in Telangana and was transporting the goods from Vijayawada to the consignee through the conveyance of 2nd respondent backed by invoice and e-way bill etc. and in spite of producing the relevant records by the driver, the 1st respondent

did not consider them and issued confiscation proceedings against 4th respondent, the original seller. Their prime contention is that since the interception was made while the goods were in transit, if at all any doubt is entertained against the bonafides of the petitioners, the 1st respondent shall issue notice u/s 129 of the CGST/APGST Act against the petitioners and proceed accordingly, but the Revenue cannot impose the proceedings initiated against 4th respondent on the petitioners.

13. In the light of the above respective contentions, the bone of contention in this case is whether the Revenue can confiscate the goods of the petitioners basing on the proceedings initiated against the 4th respondent.

14. In **Rajeev Traders' case (supra)** High Court of Karnataka, (Dharwad Bench) a learned single Judge has drawn the distinction between section 129 and 130 of CGST Act as follows:

> "103. It is to be stated that the power to detain under section 129 cannot be converted to a proceeding under section 130 of the Act since both these provisions operate independently of each other and in completely different contexts. The power to detain is only to stop the transit of the goods and thereby prevent its movement till the tax and penalty is paid. However, the power to confiscate is the process of divesting the owner of the goods of all title to the goods for a contravention of the provisions of the Act and Rules. The intent behind conferring power to detain the goods under section 129 is fundamentally to ensure that the applicable tax and penalty is recovered whereas the intent behind confiscation under Section 130 is to divest the owner of the goods itself and also impose liability of payment of the applicable tax and penalty."

15. In **Synergy Fertichem Pvt Ltd. v. State of Gujarat** 2020(33) G.S.T.L 513 (Guj.) = MANU/GJ/3200/2019/[2019] 112 taxmann.com 370 (Guj.) a division bench of Gujarath High Court also explained the distinction between section 129 and 130 CGST Act as follows:

> "(i) Section 129 of the Act talks about detention, seizure and release of goods and conveyances in transit. On the other hand, section 130 talks about confiscation of goods or conveyance and levy of tax, penalty and fine thereof. Although, both the sections start with a non-obstante clause, yet, the harmonious reading of the two sections, keeping in mind the object and purpose behind the enactment thereof, would indicate that they are independent of each other. Section 130 of the Act, which provides for confiscation of the goods or conveyance is not, in any manner, dependent or

subject to section 129 of the Act. Both the sections are mutually exclusive."

16. Thus as can be seen from the two provisions and their narration given in the above two decisions, it is clear that the proceedings for detention of goods can be initiated while the goods are in transit in contravention of provisions of the CGST/APGST Act. In the instant case also the 1st respondent has detained the goods of the 1st petitioner while they were in transit from Vijayawada to Sankarampet, Medak, Telangana State. That being the factual scenario, the question is whether 1st respondent can confiscate the goods of the 1st petitioner without initiating any proceedings against him u/s 129 but initiating proceedings u/s 130 of CGST/APGST Act against the 4th respondent on the ground of dubious credentials of the 4th respondent. In our considered view though the 1st respondent may initiate proceedings against the 4th respondent u/s 130 of the Act in view of his absence in the given address and not holding any business premises at Vijayawada, however, he cannot confiscate the goods of the 1st petitioner merely on the ground that the 1st petitioner happen to purchase goods from the 4th respondent. Even assuming that the petitioners, particularly the 1st petitioner partakes in the enquiry proceedings against the 4th respondent, his responsibility will be limited to the extent of establishing that he bonafidely purchased goods from the 4th respondent for valuable consideration by verifying the GST registration of the 4th respondent available on the official web portal and he was not aware of the credentials of the 4th respondent. Further, he has to establish the mode of payment of consideration and the mode of receiving of goods from the 4th respondent through authenticated documents. Except that he cannot be expected to speak about the business activities of the 4th respondent and also whether he obtained GST registration by producing fake documents. In essence, the petitioners have to establish their own credentials but not the 4th respondent. In that view, the 1st respondent is not correct in roping the petitioners in the proceedings initiated against the 4th respondent without initiating independent proceedings u/s 129 of CGST/APGST Act against the petitioners. As the 1st petitioner claims to have purchased goods from the 4th respondent whose physical existence in the given address is highly doubtful as per the enquiry conducted by the Joint Commissioner (ST), Kurnool, the 1st petitioner as observed supra, owes a responsibility to prove the genuineness of the transactions between him and the 4th respondent. Therefore, the 1st respondent can initiate proceedings u/s 129 of CGST/APGST Act against the petitioners and conduct enquiry by giving opportunity to the petitioners to establish their case.

17. These writ petitions are accordingly disposed of giving liberty to the 1st respondent to initiate proceedings against the petitioners u/s 129 of

CGST/APGST Act, 2017 within two weeks from the date of receipt of a copy of this order and conduct enquiry by giving an opportunity of hearing to the petitioners and pass appropriate orders in accordance with governing law and rules. In the meanwhile, the 1st respondent shall release the detained goods in favour of 1st petitioner on his deposit of 25% of their value and executing personal bond for the balance and he shall also release the vehicles in favour of the 2nd petitioner in the respective writ petitions on their executing personal security bonds for the value of the vehicles as determined by concerned Road Transport Authority. No costs.

As a sequel, interlocutory applications pending, if any, shall stand closed.

IN THE HIGH COURT OF DELHI AT NEW DELHI
[Vibhu Bakhru and Amit Mahajan, JJ.]

W.P.(C) Nos. 14427 & 14461 of 2022 and 6014 of 2023

M/S Cube Highways and Transportation Assets Advisor Private Limited ... Petitioner

Versus

Assistant Commissioner CGST Division & Ors. ... Respondents

Date of Judgment : 17.08.2023

WHETHER PETITIONER HAVING RENDERED ADVISORY SERVICES TO FOREIGN PARTIES FOR MAKING INVESTMENT IN INDIA AND INVESTMENTS HAVING BEEN MADE, CAN LEAD TO THE CONCLUSION THAT THE SAID PETITIONER IS AN "INTERMEDIARY" HENCE CLAIM OF REFUND WAS NOT ALLOWED?

HELD: NO

For the Petitioner : Mr. Tarun Gulati, Sr. Adv. with Mr. Kishore Kunal, Mr. Parth, Mr. Shakaib Khan & Mr. Shubham Bajaj, Advs.

For the Respondents : Mr. R. Ramachandran, Sr. SC.

JUDGMENT

Vibhu Bakhru, J.

1. The petitioner has filed the present petitions impugning the orders passed by the Appellate Authority (respondent no.2) rejecting the appeals

preferred by the petitioner against the orders passed by the Adjudicating Authority (respondent no.1).

2. The principal issue involved in these petitions are common. The controversy, essentially, relates to whether the services rendered by the petitioner to I Squared Asia Advisors Pte. Ltd., a company having its principal place of the business in Singapore (hereafter referred to as 'I Squared') in terms of the Amended Support Service Agreement dated 06.06.2015 (hereafter 'the Agreement') constitutes export of services. The petitioner claims that the services rendered by it are export of services because I Squared, the service recipient, is located overseas. However, the respondent authorities have held, on varying grounds, that services provided by the petitioner do not qualify as 'export of services' as the place of supply of services is in India.

Factual Context

3. The petitioner is a company incorporated under the Companies Act, 2013. It is engaged in the business of rendering investment advisory services related to the investment by non-resident group companies in the target companies in India, which are engaged in the transportation sector. The petitioner and I Squared belong to the same group of companies. The petitioner had entered into a Support Service Agreement on 30.05.2015 with I Squared. The scope of services to be provided under the said agreement were subsequently altered, therefore, the said agreement was terminated and the parties (the petitioner and I Squared) entered into the Amended Support Service Agreement on 06.06.2015 (the Agreement). In terms of the Agreement, the petitioner agreed to provide Advisory Support Services as mentioned in the Agreement, the parties agreed that the petitioner would be remunerated at an arm's length price to be determined on cost-plus markup basis.

4. The services rendered by the petitioner were accepted as 'export of services' by the Revenue under the Finance Act, 1994 (Pre-GST Regime) and the Input Tax Credit (hereafter 'ITC') was refunded to the petitioner as claimed.

5. The petitioner filed its applications for refund of unutilized ITC for the financial years 2018-19 to 2020-21, which were rejected. The claims are subject matter of the present petitions.

Proceedings for the Financial Year 2018-19, subject matter of the W.P.(C) 14461/2022

6. The petitioner filed an application on 13.07.2020 seeking refund of unutilized ITC on export of services amounting to ₹26,52,799/- relating to the tax period April 2018 to March 2019 under Section 54 of the Central Goods and Services Tax Act, 2017 (hereafter 'the CGST Act').

7. The Adjudicating Authority issued a show cause notice dated 18.07.2020 proposing to reject the petitioner's claim for refund for the following reasons:

"i. Place of provision appear to be in India;

ii. Refund claims in respect of remittances received on or before 13-7-2018 is time barred;

iii. difference in the value of supply as reflected in GSTR-1, GSTR-3B vis a vis RFD-01 and remittances received during 2018-19; and

iv. refund claimed in respect of capital goods and construction activities, repair and maintenance, rent-a-cab etc. not admissible under section 17(5) of the CGST Act."

8. The petitioner responded to the said show cause notice contesting the reasons for proposing rejection of its claim. Insofar as the place of supply of services is concerned, the petitioner responded as under :

> "In this respect, we would like to reiterate that the Company is engaged in the provision of Management Consultancy services in the nature of Investment Advisory and Marketing Survey and Advisory services to entities located outside India. The Company provides update on market information, market trends and businesses, legal and regulation information/environment in India to entities outside India. Its services inter-alia includes identifying potential opportunities for investments in India, analysing investment returns and related risks, preparing report etc. basis which the overseas entity make a decision whether to make a particular investment or not."

9. The petitioner claimed that although it had provided the services from its registered place of business in Delhi, the place of supply of services was required to be considered to be overseas by virtue of sub-section (2) of section 13 of the Integrated Goods and Services Tax Act, 2017 (hereafter '**the IGST Act**') as the location of the recipient of the service was overseas.

10. Insofar as the other grounds for proposing rejection of the petitioner's claim is concerned, the Adjudicating Authority was satisfied with the petitioner's response. The same are not subject matter of controversy in the present petitions. The petitioner's claim for refund was rejected by the Adjudicating Authority by an order dated 15-8-2020 on the sole ground that the place of supply of services was in India and therefore, the services rendered could not be considered as export of services. The relevant extract of the impugned order denying the said refund is set out below :

> "I find that the taxpayer fails to provide the documentary evidence as to what type of Investment Advisory/Market Survey and Advisory Services were provided to their foreign counterpart. The service recipient has made the expenditure at large volume but, on the basis of advisory provided by the taxpayer, where the service recipient has invested the amount for their trade promotion. Thus, it is nothing but the services provided by the taxpayer to the customers of service recipient and, thus, squarely covers under the ambit of "Intermediary services'. Therefore, the place of provision will be in taxable territory.
>
> Thus, I observe that the taxpayer is providing bundle of services of which primary and main element is business support services and the said supply of service fall under sub-section (3) to (13) of section 13 of the IGST Act. Hence, place of supply of such services will be within India in view of section 13(8) of the IGST Act. My views are also supported with the order dated 26-7-2018 pronounced by the Maharashtra Authority of Advance Ruling in the case of Sabre Travel Network India Pvt. Ltd.
>
> Hence, I find that (i) the supplier of service is located in India, (ii) the recipient of service is located outside India, (iii) the place of supply of service is within India, (iv) the payment for such service has been received by the supplier of service in convertible foreign exchange and (v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with explanation I in section 8 of IGST Act. Hence, as per section 2(6) of the IGST Act, the supply of service will not be treated as "export of service"."

11. Aggrieved by the said order, the petitioner filed an appeal under section 107 of the CGST Act before the Appellate Authority which was rejected by an order dated 29-3-2022. The Appellate Authority noted the scope of services as specified under article 3 of the Agreement and

observed that the petitioner was engaged in providing support services on behalf of I Squared regarding information of the Indian market for identifying potential opportunities/customers. The Appellate Authority held that the petitioner was engaged in rendering services for furtherance of the business for the foreign entity, which was investing in "large volume" through the petitioner. The Appellate Authority also observed that the petitioner was providing services to customers of the service recipient and held that the petitioner was an 'Intermediary' under sub-section (13) of section 2 of the IGST Act. Thus, the services rendered were considered to be 'Intermediary Services'. Paragraph 5.5 and paragraph 5.6 of the findings of the learned Appellate Authority are relevant and are set out below :

> "5.5 I also observe from the agreement that the appellant, as an agent, identifies potential opportunities, provides analytical, operational support and market information in India for his principal's output. The appellant, in his submissions to the appeal document, stated that the services, being provided to the entities outside India, inter-alia includes **identifying potential opportunities for investments in India, analyzing investment returns and related risks, preparing report etc.**
>
> 5.6 Therefore, in view of the above, I find that the appellant is performing these activities in India in his liaison capacity and the person, acting in liaison capacity, has to act as go- between his principal and his principal's customers which are opportunities for investments' in the instant case. Thus, these activities of the appellant are clearly in the nature of arranging or facilitating supply by the foreign entity in the taxable territory i.e. India and these activities are to be considered as intermediary services as defined in section 2(13) of IGST Act, 2017 as under :
>
> "(13). 'intermediary' means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account.""

12. Aggrieved by the said order, the petitioner has filed the present petition [W.P.(C) 14461/2022].

Proceedings for the Financial Year 2019-20, subject matter of the W.P.(C) 14427/2022

13. The petitioner had filed an application dated 22-7-2021 seeking refund of ITC amounting to Rs. 60,64,843/- in respect of the financial year 2019-20 under section 54 of the CGST Act. The petitioner received a show cause notice dated 18-8-2021 proposing to reject the petitioner's claim for refund inter alia on the ground that the place of supply of services was in India. The Adjudicating Authority referred to the invoices raised by the petitioner that reflected the place of supply as Delhi and drew support from the same. In addition, the show cause notice also mentioned that on scrutiny of documents, it appeared that the petitioner was acting as an 'Intermediary' in terms of sub-section (13) of section 2 of the IGST Act.

14. The petitioner replied to the show cause notice on 2-9-2021 reiterating its stand as in the previous year.

15. The Adjudicating Authority rejected the petitioner's claim for refund by an order dated 21-9- 2021, *inter alia*, on the ground that the services rendered were covered in sub-section (3)(b) and sub-section (4) of section 13 of the IGST Act. According to the Adjudicating Authority, the place of supply of service was the location where services were actually performed as services supplied to an individual, which required physical presence of the recipient or a person acting on his behalf for supply of service in India. The Adjudicating Authority also reasoned that the petitioner was *"rendering services in relation to immovable property viz. roads, tolls, etc."*, which were covered by under sub-section (4) of section 13 of the IGST Act. In addition, the Adjudicating Authority also observed that the petitioner was rendering services only to I Squared and was not providing services to any other company. It also observed that *"The service agreement has substantively every term and condition to make the taxpayer act as a facilitator of their services and products for their customers."* Accordingly, the Adjudicating Authority held that the petitioner was an 'Intermediary' and the place of supply of services provided by it were in India.

16. The petitioner appealed against the said decision. The Appellate Authority upheld the decision of the Adjudicating Authority and rejected the petitioner's appeal. The Adjudicating Authority also observed that Cube Highways Group of Companies was engaged in construction of highways, toll operations etc. in India. And the services provided by the petitioner were in relation to immovable property in India being the roads, tolls etc. The Appellate Authority further held that such activities required the physical presence of the recipient, and the recipient was represented by the petitioner. The Appellate Authority also held that in terms of sub-section (3)(b) and sub-section (4) of section 13 of the IGST Act, the place of supply of services by the petitioner were in India.

Proceedings for the Financial Year 2020-21, subject matter of the W.P.(C) 6014/2023

17. The petitioner filed an application dated 12-4-2022 seeking refund of ITC amounting to Rs. 36,70,056/- for financial year 2020-21 under section 54 of the CGST Act. A show cause notice dated 6-5-2022 was issued by the Adjudicating Authority, proposing to reject the petitioner's claim for refund inter alia on the ground that the place of supply of services was in India. The Adjudicating Authority stated that certain invoices on which ITC was claimed were not reflected in the returns filed in form GSTR-2A of the petitioner. In addition, the Adjudicating Authority also observed that the petitioner rendered services in relation to immovable property in India, therefore its activities were not covered under sub-section (6) of section 2 of the IGST Act. The petitioner responded to the show cause notice on 30-5-2022 and its response was the same as in previous years.

18. The petitioner's claim for refund was rejected by the Adjudicating Authority by an order dated 3-6-2022, inter alia, on the ground that the services rendered by the petitioner were covered under sub-section (3)(b) and sub-section (4) of section 13 of the IGST Act. According to the Adjudicating Authority, in case of services supplied to an individual, which require physical presence of the recipient or a person acting on his behalf for supply of service, the place of supply of service would be the location where services were actually performed. The Adjudicating Authority observed that the petitioner was *"rendering services in relation to immovable property viz. roads, tolls, etc."*, which were covered under sub-section (4) of section 13 of the IGST Act. The Adjudicating Authority also reasoned that since the immovable property was situated in India, the services rendered in relation to those properties also required physical presence of the recipient. This was also corroborated by the invoices disclosing the place of services as 'New Delhi'. Accordingly, the Adjudicating Authority held that the place of services rendered by the petitioner were in India and did not qualify as export of services under sub- section (6) of section 2 of the IGST Act.

19. The petitioner filed an appeal before the Appellate Authority against the said order. By an order dated 24-2-2023, the Appellate Authority upheld the decision of the Adjudicating Authority. The Appellate Authority referred to clause 3 of the Agreement and observed as under :

> "6.2 From the above, I find that the appellant is engaged in providing marketing support services, regarding information of Indian market to identify potential opportunities in India, for and on behalf of I

Squared Asia Advisors Pte. Ltd. As such, the appellant is engaged in rendering services which are for furtherance of business of the foreign entity as is evident from clause 3.7 of the agreement. As per para 3 read with clause 1.3 of the agreement, these services have been rendered by the appellant in the taxable territory i.e. India. I also find that the appellant is acting as a communication channel for I Squared Asia which is definitely with the prospective customers in India."

20. In addition, the Appellate Authority held that the petitioner was providing services on behalf of a foreign entity yet the place of supply of services was in the taxable territory, that is, India.

21. The Appellate Authority referred to the submissions filed by the petitioner and noted that the said services were in relation to construction, operation and maintenance of roads and tolls and concluded as under :

"6.4 From the conjoint reading of the nature of services, as given in the service agreement, and the submissions made by the appellant, I find that the appellant has provided their services to M/s I Squared Asia Pte. Ltd. directly in relation to immovable property. M/s I. Squared Asia Pte. Ltd. has appointed the appellant to provide the services for better understanding and upkeep the construction and operation of roads and tolls in India. Therefore, the place of supply of these services is clearly to be decided by invoking the provisions of section 13(4) of IGST Act, 2017 where the place of supply of these services shall be the place where the immovable property is located or intended to be located which is, in the appellant's case, in the taxable territory i.e. India. It is relevant to mention here that section 13(1) of the IGST Act, 2017 specifically states that the provisions of this section (i.e. section 13) shall apply **to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.** As such the appellant's submissions, that the place of supply of their services supplied to | Squared Asia cannot be determined under section 13(4) of IGST Act, hold no ground."

22. The Appellate Authority also found that the place of supply was in India in terms of section 13(3)(b) of the IGST Act. The Appellate Authority referred to the said provision and concluded as under :

"7.2 I find that the appellant has provided marketing support services in India specifically for and on behalf of M/s I Squared Asia Pte. Ltd.

for furtherance of their business of M/s I Squared Asia Pte. Ltd. in India. I find that for a service for which the place of supply has to be interpreted under section 13(3)(b) of the IGST Act, 2017, it should first be supplied to an individual. I find that the term 'individual' has the meaning of the 'person' which is defined in section 2(84) of the CGST Act, 2017 and also includes a Hindu Undivided Family, a Company, a Firm, a Limited Liability Partnership, an Association of Persons or Body of Individuals, any Body Corporate incorporated by or under the laws of a country outside India, etc.

7.3 I find that the appellant has provided services to M/s I Squared Asia Pte. Ltd., Singapore by representing themselves physically or otherwise or by acting on behalf of M/s I Squared Asia Pte. Ltd. in India. Therefore, I find that the contentions of the appellant that the services are provided by way of reports/deliverables which are directly sent to I Squared Asia which do not require physical presence of any individual hold no ground as the term 'individual' has the same meaning as of 'the Company' or 'a Body Corporate incorporated under the laws of a country outside India. As such, I conclude that the provisions of section 13(3)(b) of the IGST Act, 2017 shall also apply in the appellant's case to determine the place of supply."

23. Thus, according to Appellate Authority, sub-section (3)(b) and sub-section (4) of section 13 of the IGST Act would be applicable to the petitioner's case and the place of supply of services by the petitioner is in India.

Reasons & Conclusion

24. As is apparent from the above, the petitioner was denied refund of ITC on, essentially, three grounds. First, that the petitioner is an 'Intermediary' in respect of the services provided by it to I Squared, in terms of sub-section (13) of section 2 of the IGST Act; therefore, in terms of sub- section (8)(b) of section 13 of the IGST Act, the place of supply of service is in India, as the petitioner is located in India. Consequently, the services rendered by the petitioner did not qualify as export of services under sub-section (6) of section 2 of the IGST Act. Second, that the place of supply of services provided by the petitioner was in India by virtue of sub-section (3)(b) of section 13 of the IGST Act. And third, that the place of supply of services provided by the petitioner was in India by virtue of sub-section (4) of section 13 of the IGST Act.

25. The provisions of section 13 of the IGST Act, which provide for the place of supply of services, as are relevant to the present petitions, are set

out below :

> "13. (1) The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.
>
> (2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:
>
> Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.
>
> (3) The place of supply of the following services shall be the location where the services are actually performed, namely :—
>
> * * * * * *
>
> (b) services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.
>
> * * * * * *
>
> (4) The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including that of architects or interior decorators, shall be the place where the immovable property is located or intended to be located.
>
> ** ** **
>
> (8) The place of supply of the following services shall be the location of the supplier of services, namely :--
>
> ** ** **
>
> (b) intermediary services;"

26. Sub-section (6) of section 2 of the IGST Act, which defines the expression "export of services" is set out below :

"2. In this Act, unless the context otherwise requires, --

** ** **

(6) "export of services" means the supply of any service when, --

(i) the supplier of service is located in India;

(ii) the recipient of service is located outside India;

(iii) the place of supply of service is outside India;

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India; and

(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;"

27. Sub-section (13) of section 2 of the IGST Act defines the term "Intermediary" and is reproduced below for ready reference :

"2. In this Act, unless the context otherwise requires, --

* * * * * *

(13) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account;"

28. The principal questions to be addressed are whether in the context of services rendered by the petitioner to I Squared under the Agreement, the petitioner is an 'Intermediary' and its services are covered under sub-section (8)(b) of section 13 and/or under sub-section (4) of section 13 and/or under sub-section (3)(b) of section 13 of the IGST Act.

29. In addition, it is also the petitioner's case that the orders passed by the Adjudicating Authority and the Appellate Authority have travelled beyond the show cause notices and therefore, are liable to be set aside.

30. Mr. Ramachandran, learned counsel for the respondents submitted that the petitioner and I Squared are group companies of I Squared Capital,

which is a subsidiary of Abu Dhabi Investment Authority, International Finance Corporation and a consortium of Japanese investors. The said group has nineteen projects in India with a long-term concession to build toll highways on BOT (Build, Operate and Transfer) basis. The said concessions span over twenty to thirty years. He also submitted that the petitioner had agreed to supply services in India and it was not clear from the invoices as to the nature of services provided. He stated that the Adjudicating Authority was required to call for more information and documents to ascertain the true nature of services before arriving at any conclusion and therefore, the matters ought to be remanded back to the Adjudicating Authority to consider afresh. He stated that orders have been passed in other cases remanding the matters for re-adjudication in the light of the earlier decision rendered by this Court in *M/s Ernst & Young Ltd. v. Additional Commissioner, CGST Appeals-II, Delhi & Anr.:2023:DHC:2116-DB. He also referred to such orders passed in Bharat Sanchar Nigam Ltd. v. Union of India & Ors.:2023:DHC:2482-DB and in M/s GAP International Sourcing (India) Pvt. Ltd. v. Additional Commissioner CGST Appeals-II & Ors.:W.P.(C) No.11399/2022* dated 01.05.2023.

31. Mr. Gulati, learned senior counsel appearing for the petitioner contested the aforesaid submissions. He contended that there was no dispute as to the nature of services rendered by the petitioner. He submitted that petitioner had filed responses to the show cause notices setting out the nature of services and also provided a copy of the Agreement with I Squared in terms of which services were rendered. He pointed out that the Appellate Authority had also alluded to the nature of services in the impugned orders. Thus, there was no requirement for remanding the matters for re-adjudication as the controversy involved was squarely covered by the decisions of this Court in *M/s Ernst & Young Ltd. v. Additional Commissioner, CGST Appeals-II, Delhi & Anr. (supra) and M/s Ohmi Industries Asia Pvt. Ltd. v. Assistant Commissioner, CGST:2023:DHC:2440-DB.*

32. Before proceeding further, it would be relevant to note that there is no real dispute that the services rendered by the petitioner are covered under the Agreement. It was contended on behalf of the Revenue that petitioner is a part of a group of companies, and some of those companies have projects in India; however, there is no material on record, which even remotely suggests that petitioner had rendered any services other than advisory services. The petitioner had claimed refund of accumulated ITC in respect of export of services to I Squared under the Agreement and there is no material indicating that those services were other than advisory services.

33. At this stage, it would be relevant to refer to Clauses 2 and 3 of the Agreement relating to appointment of service provider and the scope of services. The same are set out below:

"2. Appointment of Service Provider

I Squared Asia hereby engages Cube Highways India to render Advisory Support Services to I Squared Asia (collectively, the "Services") subject to the terms and conditions of this Agreement and scope of services as specified in section 3 of this Agreement.

The Parties agreed that Cube Highways India is and at all times shall be an independent service provider, contracting with I Squared Asia on principal-to-principal basis and is not intended to be an agent or partner of the I Squared Asia.

3. Scope of Services

Cube Highways India shall provide services to I Squared Asia related to transportation sector in India. The scope of services would be as follows :

3.1 Providing update on market information, market trends & business and legal regulations.

3.2 Providing assistance in identifying potential opportunities in India consistent with the parameters and guidance provided by I Squared Asia from time to time and under communication of the same to I Squared Asia.

3.3 Providing I Squared Asia with advices and suggestions with respect to the financial feasibility and viability of any proposed project.

3.4 Providing analytical support and support for completing due diligence.

3.5 Acting as a communication channel for I Squared Asia as may be requested by I Squared Asia on a time to time basis.

3.6 Providing management advisory, management consulting and operational support services.

3.7 Providing such other services in furtherance of the foregoing, as I Squared Asia may reasonably request.

The Parties agree and acknowledge that at all times during the Term of this Agreement, Cube Highways India staff shall remain

employees of Cube Highways India, both legally and economically. The employees of Cube Highways India shall never be considered as employees of I Squared Asia.

As stated above in the scope of services, the role of Cube Highways India shall always remain that of service provider and I Squared Asia shall solely take its decisions. At its own discretion, I Squared Asia may communicate the same to Cube Highways India for further communication.

I Squared Asia shall have sole and exclusive right to either accept or reject any proposal or any request and Cube Highways India shall have no say in exercise of such decision.

Cube Highways India at no point in time can represent or reflect to anyone that it has the authority to negotiate and conclude any terms on behalf of I Squared Asia or its affiliates in this regard or that it can decide on acceptation/rejection of a project/contract on behalf of I Squared Asia or its affiliates"

34. It is apparent from Clause 2, stated hereinabove, that petitioner at all time was required to act as an independent service provider and the Agreement with I Squared was on principal to principal basis. It was expressly specified in the said Clause that the petitioner is not intended to be an agent or partner of I Squared. Similarly, the last paragraph of Clause 3 of the Agreement clearly states that the petitioner could at "no point in time can represent or reflect to anyone that it has the authority to negotiate and conclude the terms on behalf of I Squared or its affiliates".

35. The first show cause notice – relating to Financial Year 2018-19 neither contained any allegation that the petitioner was an 'Intermediary' nor raised any question regarding the nature of services rendered by the petitioner. No doubt was raised that the services rendered by the petitioner were not those as claimed by the petitioner. However, the Adjudicating Authority had rejected the petitioner's claim for refund on the ground that it was rendering 'Intermediary Services'. The Adjudicating Authority had referred to Clause 3 of the Agreement and also noted the petitioner's submission that it was engaged in providing Management Consultancy Services in the nature of Investment Advisor, Market Survey and Advisory Services to entities located outside India. It was explained that the petitioner provides updates on market information, market trends and businesses, legal and regulatory information / environment in India.

36. The Adjudicating Authority concluded that the petitioner was rendering 'Intermediary Services'. It reasoned that *".....The service*

recipient has made the expenditure at large volume but, on the basis of advisory provided by the taxpayer, where the service recipient has invested the amount for their trade promotion. Thus, it is nothing but the services provided by the taxpayer to the customers of service recipient and, thus, squarely covers under the ambit of 'Intermediary services'……..".

37. It is not easy to discern the import of the aforesaid reasoning of the Adjudicating Authority. However, it does appear that the Adjudicating Authority had proceeded on the basis that since the service recipient had invested amounts on the basis of advisory services rendered by the petitioner, the services provided by the petitioner were to customers of I Squared and therefore the petitioner was an 'Intermediary'. Plainly, the said reasoning is fundamentally flawed. Merely because I Squared may have, on the basis of advisory services given by the petitioner, made the investments in entities in India, cannot be construed to mean that the petitioner had rendered the advisory services as an 'Intermediary'.

38. As noted above, the Appellate Authority had accepted that the services provided by the petitioner included identifying potential opportunities for investments in India, analyzing investment returns and related risks, preparing reports etc. However, the Adjudicating Authority concluded that the petitioner was *"…performing these activities in India in his liaison capacity and the person acting in liaison capacity, has to act as a go-between his principal and his principal's customers which are opportunities for investments' in the instant case".*

39. Concededly, the said view is unsustainable.

40. The petitioner is the service provider. It is rendering the advisory services directly to I Squared and is not acting as a facilitator for providing such services.

41. 'Intermediary' as defined under Sub-section (13) of Section 2 of the IGST Act is a person who facilitates supply of services – he does not supply services himself but merely arranges the same. The Central Board of Indirect Taxes and Customs had issued a Circular dated 20.09.2021 which clearly defines the scope of 'Intermediary Services'. The relevant extracts of the said Circular are set out below:

"2. Scope of Intermediary services

2.1 'Intermediary' has been defined in the sub-section (13) of section 2 of the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "IGST" Act) as under -

> 'Intermediary means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account."

2.2 The concept of 'intermediary' was borrowed in GST from the Service Tax Regime. The definition of 'intermediary' in the Service Tax law as given in Rule 2(f) of Place of Provision of Service Rules, 2012 issued vide Notification No. 28/2012-S.T., dated 20-06-2012 was as follows:

> "intermediary means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his own account."

3. Primary Requirements for Intermediary services

The concept of intermediary services, as defined above, requires some basic prerequisites, which are discussed below :

3.1 Minimum of Three Parties.—By definition, an intermediary is someone who arranges or facilitates the supplies of goods or services or securities between two or more persons. It is thus a natural corollary that the arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (the main supply) and one arranging or facilitating (the ancillary supply) the said main supply. An activity between only two parties can, therefore, NOT be considered as an intermediary service. An intermediary essentially "arranges or facilitates" another supply (the "main supply") between two or more other persons and, does not himself provide the main supply.

3.2 Two distinct supplies: As discussed above, there are two distinct supplies in case of provision of intermediary services:

(1) Main supply, between the two principals, which can be a supply of services or securities:

(2) Ancillary supply, which is the service of facilitating or arranging the main supply between the two principals. This ancillary supply

is supply of intermediary service and is clearly identifiable and distinguished from the main supply. A person involved in supply of main supply on principal to principal basis to another person cannot be considered as supplier of intermediary service.

3.3 **Intermediary service provider to have the character of an agent, broker or any other similar person:** The definition of "intermediary" itself provides that intermediary service providers-means a broker, an agent or any other person, by whatever name called… "This part of the definition is not inclusive but uses the expression "means" and does not expand the definition by any known expression of expansion such as "and includes". The use of the expression "arranges or facilitates" in the definition of "intermediary" suggests a subsidiary role for the intermediary. It must arrange or facilitate some other supply, which is the main supply, and does not himself provides the main supply. Thus, the role of intermediary is only supportive.

3.4 **Does not include a person who supplies such goods or services or both or securities on his own account:** The definition of intermediary services specifically mentions that intermediary "does not include a person who supplies such goods or services or both or securities on his own account". Use of word "such" in the definition with reference to supply of goods or services refers to the main supply of goods or services or both, or securities, between two or more persons, which are arranged or facilitated by the intermediary. It implies that in cases wherein the person supplies the main supply, either fully or partly, on principal to principal basis, the said supply cannot be covered under the scope of intermediary".

* * * * * *

42. It is, thus implicit in the concept of an 'Intermediary' that there are three parties, *namely*, the supplier of principal service; the recipient of the principal service and an intermediary facilitating or arranging the said supply. Where a party renders advisory or consultancy services on its own account and does not merely arrange it from another supplier or facilitate such supply, there are only two entities, *namely*, service provider and the service recipient. In such a case, rendering of consultancy services cannot be considered as 'Intermediary Services' or services as an 'Intermediary'.

43. It is also relevant to note that rule 2(f) of the Place of Provision of Services Rules, 2012 also defined 'Intermediary' in similar terms as sub-

section (13) of section 2 of the IGST Act. The said sub-section is set out below :

> "(f) intermediary means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account;"

44. Undisputedly, this question is also squarely covered by an earlier decisions of this Court in *M/s Ernst & Young Ltd. v. Additional Commissioner, CGST Appeals-II, Delhi & Anr (supra)* and in *Ohmi Industries Asia Pvt. Ltd. v. Assistant Commissioner, CGST (supra)*.

45. It is also relevant to refer an Order-in-Original dated 26.07.2018 passed by the Adjudicating Authority (Order-in-Original No.15-17/MN-DIV/2018-19/R). In that case, the Adjudicating Authority had observed that the basic nature of services provided by the petitioner to I Squared is "Management and Business Consultant Services". The Adjudicating Authority had, thus, accepted that the input services as claimed by the petitioner such as business auxiliary services, consulting engineers, courier expenses, management consultant, online information and database access services etc. qualified as input services and the petitioner was, thus, entitled to refund of accumulated service tax in respect of those input services. The Adjudicating Authority had thus sanctioned refund of ₹17,75,393/- for tax period prior to July, 2017.

46. As noticed above, the definition of 'Intermediary' under Rule 2(f) of the Place of Provision of Service Rules, 2012 is similar to the definition of 'Intermediary' under Sub-section (13) of Section 2 of the IGST Act. It is not disputed that the services rendered by the petitioner were considered as export of services for the purpose of levy of service tax under the Finance Act, 1994. Concededly, the petitioner was not held to be an 'Intermediary' under Rule 2(f) of the Place of Provision of Services Rules, 2012, in respect of services rendered under the Agreement, prior to the rollout of GST with effect from 01.07.2017.

47. The petitioner's claim for refund in respect of the next two financial years, that is, Financial Years 2019-20 and 2020-21 was rejected on two other additional grounds. The Adjudicating Authority held that the place of supply of services rendered by the petitioner was its location in terms of Sub-section (3)(b) and Sub-section (4) of Section 13 of the IGST Act.

48. The impugned order dated 21.09.2021 passed by the Adjudicating Authority rejecting the petitioner's claim in respect of the Financial Year

2019-20 on the aforesaid grounds cannot be sustained as no such allegations are made in the show cause notice dated 18.08.2021 that preceded the said impugned order. In the said show cause notice, it was alleged that the petitioner was an 'Intermediary' but it was not alleged that the place of service was in India as it was covered under Sub-section (3)(b) or Sub-section (4) of Section 13 of the IGST Act. However, we also consider it apposite to examine whether the place of supply of services rendered by the petitioner is India by virtue of Sub-section (3)(b) and Sub-section (4) of Section 13 of the IGST Act.

49. The reasons recorded in the impugned order dated 21.09.2021 rejecting the petitioner's claim for refund for the Financial Year 2019-20 are cryptic. The Adjudicating Authority had noted the scope of services as specified under Clause 3 of the Agreement. The order also indicates that the Adjudicating Authority had made further enquiries by visiting the website, www.cubehighways.com. The Adjudicating Authority observed that the group of companies, which included the petitioner, was engaged in construction of highways, toll operations etc. in India and held that the petitioner renders services in relation to those projects in India. The Adjudicating Authority, thus, concluded that Sub-section (3)(b), Sub-section (4) and Sub-section (7)(b) of Section 13 of the IGST Act were attracted.

50. Sub-section (7)(b) of Section 13 of the IGST Act has no application whatsoever. Sub-section (7) of Section 13 of the IGST Act reads as under:

> "(7) Where the services referred to in sub-section (3) or sub-section (4) or sub-section (5) are supplied in more than one State or Union territory, the place of supply of such services shall be taken as being in each of the respective States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed."

51. Concededly, the petitioner has not rendered any services in more than one state or union territory as envisaged in Sub-section (7) of Section 13 of the IGST Act. Mr. Ramachandran has also made no attempt to support this conclusion.

52. Sub-section (3)(b) of Section 13 of the IGST Act is equally inapplicable. First of all, it relates to services which are supplied to an individual and which require physical presence of the recipient (or a person acting on his behalf) with the supplier of the services. There is no allegation

that the petitioner has rendered any service to an individual. Plainly, the Adjudicating Authority has misunderstood the nature of services covered under Sub-section (3)(b) of Section 13 of the IGST Act. These are essentially in the nature of personal services which require the physical presence of the service recipient. A publication issued by the Central Board of Excise & Customs captioned "Taxation of Services: An Education Guide" explains the significance of the words 'physical presence of an individual', whether represented either as the service receiver or a person acting on behalf of the receiver, as under:

> "This implies that while a service in this category is capable of being rendered only in the presence of an individual, it will not matter if, in terms of the contractual arrangement between the provider and the receiver (formal or informal, written or oral), the service is actually rendered by the provider to a person other than the receiver, who is acting on behalf of the receiver.
>
> **Illustration**
>
> A modeling agency contracts with a beauty parlour for beauty treatment of say, 20 models. Here again is a situation where the modeling agency is the receiver of the service, but the service is rendered to the models, who are receiving the beauty treatment service on behalf of the modeling agency. Hence, notwithstanding that the modeling agency does not qualify as the individual receiver in whose presence the service is rendered, the nature of the service is such as can be rendered only to an individual, thereby qualifying to be covered under this rule."

53. We are, also, unable to accept that the services rendered by the petitioner can be covered under Sub-section (4) of Section 13 of the IGST Act. As is apparent from the plain language of Sub-section (4) of Section 13 of the IGST Act, the supply of services contemplated under the said Clause are those that are supplied directly in relation to an immovable property. Such services include services supplied by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite. It includes grant of rights to use immovable property, carrying out construction work and further include services as that of architects or interior decorators. In the present case, the petitioner is rendering advisory services to I Squared. The petitioner had repeatedly filed submissions before the concerned authorities (Adjudicating Authority as well as Appellate Authority) explaining that it is rendering "advisory services to overseas group companies with respect to investment avenues in transportation sector after performing its own analysis and due diligence". It had also

explained that its overseas group company [I Squared] is not bound by its advices and takes its own decision at its discretion as expressly stated in the Agreement.

54. The petitioner had also provided invoices which indicated that it was charging "market services and advisory fee".

55. In view of the above, the orders impugned in the present petitions are liable to be set aside.

56. Mr. Ramachandran had filed written submissions, inter alia, praying that the matter be remanded for re-adjudication in the light of the decision in *M/s Ernst & Young Ltd. v. Additional Commissioner, CGST Appeals-II, Delhi & Anr (supra)* by, *inter alia*, praying as under:

> "In view of the foregoing facts and circumstances, it is respectfully prayed that this Hon'ble Court be pleased to remand the matter for re-adjudication in the light of the decision of this Hon'ble Court in the case of *M/s Ernst & Young Ltd. v. Additional Commissioner, CGST Appeals-II, Delhi & Anr in W.P.(C) 8600/2022* by calling for additional documents / information if any, required."

57. However, we are unable to accept that the present petitions are required to be remanded to the Adjudicating Authority for consideration afresh. There is no material which would even remotely suggest that the services rendered by the petitioner are not as claimed, that is, advisory services relating to investments in India. As noticed above, the concerned authorities had also accepted the same as is apparent from some of the observations made in the impugned order. Neither the Adjudicating Authority nor the Appellate Authority had any material to doubt the petitioner's claim that it had rendered advisory services for making investments in India. We do not consider it apposite to remand the present petitions for fresh adjudication. The decisions in *Bharat Sanchar Nigam Ltd. v. Union of India & Ors. (supra)* and in M/s GAP International Sourcing (India) Pvt. Ltd. v. Additional Commissioner CGST Appeals-II & Ors. (supra) relied upon by the Revenue in support of the aforesaid prayer are inapplicable in the facts of the present case. In *Bharat Sanchar Nigam Ltd. v. Union of India & Ors. (supra)*, the petitioner's claim for refund was rejected on the ground of limitation and not on merits. Thus, it was essential that the Adjudicating Authority consider the merits of the claim in the first instance. In *M/s GAP International Sourcing (India) Pvt. Ltd. v. Additional Commissioner CGST Appeals-II & Ors. (supra)*, this Court had noted that there was a serious controversy as to the exact nature of the services rendered by the petitioner. Thus, it was apposite to remand the matter for re-adjudication.

58. In view of the above, the present petitions are allowed. The impugned orders are set aside. The Adjudicating Authority is directed to process the petitioner's claim for refund as expeditiously as possible and preferably with in a period of eight weeks from today.

IN THE HIGH COURT OF JHARKHAND AT RANCHI
[Aparesh Kumar Singh and Deepak Roshan, JJ.]

W.P (T) No. 1237 and 1244 of 2022

Vikash Kumar Singh ... Petitioner

Versus

Commissioner of State tax ... Respondents

Date of Order : 23.03.2023

WHETHER SUMMARY OF SHOW CAUSE NOTICE AND SUMMONING OF ORDER ISSUED UNDER SECTION 73 ISSUED IN NEGATION OF RULE OF NATURAL JUSTICE AND PROCEDURE PRESCRIBED U/S 73 WAS JUSTIFIED?

HELD – NO.

For the Petitioner : Deepak Kr. Sinha, Adv.

For the Respondent. : Deepak Kr. Dubey, A.C. to A.A.G.-II

ORDER

1. Both the writ petitions though relate to different petitioners, but common issues are involved. Therefore, they are being heard and decided by this common judgment.

2. In W.P (T) No. 1237/2022 relating to the tax period April 2018 to March 2019, petitioner has sought quashing of the show cause notice dated 07.10.2020 (Annexure 2) issued under section 73 of JGST Act, 2017 (herei nafter to be referred as the 'Act of 2017'). Petitioner has also laid challenge to the Summary of show cause notice of the same date issued in Form GST DRC 01 (Annexure 3). Petitioner has also challenged the Summary of the Order dated 12.12.2020 (Annexure 4) issued in Form GST DRC 07. All such notices and order have been issued by the Deputy Commissioner of State Tax, Jharkhand Goods and Service Tax, Godda (Respondent No. 2).

3. In W.P (T) No. 12 44 /2022 relating to the same tax period April 2018 to Mar ch 2019, petitioner has laid challenge to the show cause notice

dated 2 0 1 0.2020 (Annexure 2) issued under section 73 of JGST Act, 2017. Petitioner has also sought quashing of the Summary of show cause notice of the same date issued in Form GST DRC 01 (Ann exure 3) as also Summary of the Order dated 14.12.2020 (Annexure 4) issued in Form GST DRC 7. All such notices have been issued by the Respondent No. 2.

4 . Petitioner in W.P (T) No. 123 7 /2022 is engaged in civil construction, etc. while pe titioner in W.P (T) No. 12 44 /2022 is the proprietor of M/s Maa Parwati Medical Stores and engaged in selling of medicine . Petitioners are duly registered under the provisions of JGST Act, 2017.

5 . Common ground taken in all these writ petition is that the show cause notices at Annexure 2 in the respective writ petitions is in teeth of the provisions of Section 73(1) the Act of 2017 and the judgment rendered by this Court in the case of *M/s NKAS SERVICES PRIVATE LIMITED Versus State of Jharkhand & others in W.P (T) No. 2659/2021 dated 09.02.2022.* Summary of Show Cause Notice cannot be a substitute of a proper show cause notice as has been held by this Court in *M/s NKAS SERVICES PRIVATE LIMITED (Supra)*. The show cause notice does not strike out the relevant particulars and does not even enumerate the contravention which the petitioners have been called upon to reply. These proceedings were initiated allegedly on account of a mismatch in GSTR 3B and GSTR 2A for the period in question and that the petitioner s have taken undue ITC to which they were not entitled. Petitioners have also taken a plea that Summary of the Order contained in Form GST DRC 07 imposes 100% penalty which is impermissible under the provisions of Section 73(9) of the Act of 2017. 100% pen alty can only be levied in a proceeding under section 74 (9) of the Act of 2017. No adjudication order has been uploaded. It is further submitted that proceedings suffer from serious violation of principles of natural justices and the procedure prescribed in law. On the same plea three other writ petitions being W.P.(T) Nos.1239, 1261 and 1263 of 2022 have been allowed by this Court vide order dated 11 th July 2022. Therefore, the impugned show cause notices and the Summary of the Orders be quashed and the m atters be remanded.

6 . In these writ petitions, counter affidavit has been filed by the Respondent State. Plea of alternative remedy of appeal under section 107 of the Act of 2017 has been taken. Otherwise, common flank in both these counter affidavi ts is that GSTN provides for standard format in which only notices can be issued upon the assesse. The Deputy Commissioner of State Tax, Godda Circle, Godda has therefore followed the procedure by mentioning the violations and charges on the petitioner i.e . difference between GSTR 3B and 2A. The show cause notices and Summary of the show cause notices in Form GST DRC 01 clearly mentions the charge

i.e. difference between GSTR 3B and 2A. A plea has also been taken that entries in GSTR 2A, which are auto populated figure of inward supply for the taxpayer in the online GSTN portal, is dynamic in nature and changes upon filing of GSTR 1 by the suppliers / taxpayer. Thus, after filing of GSTR 1 by the suppliers, any changes made in the figures in GSTR 2 A by the taxpayers was never brought to the notice of the Department either during adjudication stage or until filing of these writ petitions. Therefore, because of late filing of GSTR 1 by the suppliers, interest under section 50 of the Act of 2017 are re quired to be levied to prevent loss of revenue to the State Exchequer.

It appears that there is no specific denial of the plea taken by the petitioners that no penalty of 100% of the tax dues can be levied in a proceeding under section 73(1) in terms of section 73(9) of the Act, 2017.

7 . Learned counsel for the State have however, submitted that in case impugned show cause notices and Summary of the Orders are quashed, liberty may be granted to the Revenue to initiate proceeding after proper service of show cause notice upon the petitioners. In view of Section 73 (10) of the JGST Act 2017, limitation for initiating fresh proceeding and passing orders would expire by 30 th December 2023

8 . We have considered the submissions of learned counsel f or the parties and taken note of the materials on record. We may straightaway point out that notices under section 73(1) of the Act of 2017 at Annexure 2 in the respective writ petitions are in the standard format and neither any particulars have been struck off, nor specific contravention have been indicated to enable the petitioners to furnish a proper reply to defend themselves. The show cause notices can therefore, be termed as vague. This Court has, in the case of *M/s NKAS SERVICES PRIVATE LIMITED (Supra)* categorically held that summary of show cause notice in Form GST DRC 01 cannot substitute the requirement of a proper show cause notice under section 73(1) of the Act of 2017. It seems that the authorities have, after issuance of show cause notices dat ed 07 1 0 .2020 and 2 0 1 0.2020 (Annexure 2 in the respective writ petitions) and Summary of show cause notices contained in GST DRC 01 (Annexure 3 in the respective writ petitions) of the same date, proceeded to issue Summary of the Order dated 12.12.2020 an d 14.12.2020 (Annexure 4 in the respective writ petitions). Respondents have also not brought on record any adjudication order. In this regard, the opinion of this Court rendered in the case of *M/s NKAS SERVICES PRIVATE LIMITED Versus State of Jharkhand and others* in W.P (T) 2659/2021 at paragraph 14 to 16 are profitably quoted hereunder:

> “14. We find that the show cause notice is completely silent on the violation or contravention alleged to have been done by the

petitioner regarding which he has to defend himself. The summary of show cause notice at annexure-2 though cannot be a substitute to a show cause notice, also fails to describe the necessary facts which could give an inkling as to the contravention done by the petitioner. As noted herein above, the brief facts of the case do not disclose as to which work contract, services were completed or partly completed by the petitioner regarding which he had not reflected his liability in the filed return as per GSTR-3B for the period in question. It needs no reiteration that a summary of show cause notice in Form DRC-01 could not substitute the requirement of a proper show cause notice. At the same time, if a show cause notice does not specify the grounds for proceeding against a person no amount of tax, interest or penalty can be imposed in excess of the amount specified in the notice or on grounds other than the grounds specified in the notice as per section 75(7) of the JGST Act.

15. Learned counsel for the petitioner has relying upon the case of Bharti Airtel Ltd. (supra) and contended that the Apex Court has observed that the common portal of GSTN is only a facilitator. The format GST DRC-01 or 01A are prescribed format on the online portal to follow up the proceedings being undertaken against an assessee. They themselves cannot substitute the ingredient of a proper show cause notice. If the show cause notice does not specify a ground, the Revenue cannot be allowed to raise a fresh plea at the time of adjudication, as has been held by the Apex Court in a matter arising under Central Excise Act in the case of Shital International (supra) at para 19, extracted herein below:

> "19. As regards the process of electrifying polish, now pressed into service by the Revenue, it is trite law that unless the foundation of the case is laid in the show-cause notice, the Revenue cannot be permitted to build up a new case against the assessee. (See Commr. of Customs v. Toyo Engg. India Ltd., CCE v. Ballarpur Industries Ltd. and CCE v. Champdany Industries Ltd.) Admittedly, in the instant case, no such objection was raised by the adjudicating authority in the show cause notice dated 22-6-2001 relating to Assessment Years 1988-1989 to 2000-2001. However, in the show-cause notice dated 12-12-2000, the process of electrifying polish finds a brief mention. Therefore, in the light of the settled legal position, the plea of the learned counsel for the Revenue in that behalf cannot be entertained as the Revenue cannot be allowed to raise a fresh plea, which has not been raised in the

show- cause notice nor can it be allowed to take contradictory stands in relation to the same assessee."

In a notice under section 74 of the JGST Act, the necessary ingredients relating to fraud or willful misstatement of suppression of fact to evade tax have to be impleaded whereas in a notice under Section 73 of the same act the Revenue has to specifically allege the violations or contraventions, which has led to tax not being paid or short paid or erroneously refunded or Input Tax Credit wrongly availed or utilized. It is trite law that unless the foundation of a case is laid down in a show cause notice, the assessee would be precluded from defending the charges in a vague show cause notice. That would entail violation of principles of natural justice. He can only do so, if he is told as to what the charges levelled against him are and the allegations on which such charges are based. Reliance is placed on the opinion of the Constitution Bench of the Apex Court in the case of Khem Chand v. Union of India [AIR 1958 SC 300], which has also been relied upon in the case of Oryx Fisheries P. Ltd. v. Union of India reported in (2010) 13 SCC 427 and profitably quoted in our decision rendered in the case of the same petitioner in W.P (T) No. 2444 of 2021.

16. We are thus of the considered view that the impugned show cause notice as contained in Annexure-1 does not fulfill the ingredients of a proper show cause notice and amounts to violation of principles of natural justice. The challenge is entertainable in exercise of writ jurisdiction of this Court on the specified grounds as clearly held by the decision of the Apex Court in the case of Magadh Sugar & Energy Ltd. v.. State of Bihar & others reported in 2021 SCC Online SC 801, para 24 and 25. Accordingly, the impugned notice at annexure-1 and the summary of show cause notice at annexure-2 in Form GST DRC-01 is quashed. This Court, however is not inclined to be drawn into the issue whether the requirement of issuance of Form GST ASMT-10 is a condition precedent for invocation of Section 73 or 74 of the JGST Act for the purposes of deciding the instant case. Since the Court has not gone into the merits of the challenge, respondents are at liberty to initiate fresh proceedings from the same stage in accordance with law within a period of four weeks from today"

9. Levy of penalty of 100% of tax dues reflected in the Summary of the Order contained in Form GST DRC-07 vide Annexure-4 in the respective writ petitions are also in the teeth of the provisions of Section 73(9) of the Act of 2017, wherein while passing an adjudication order, the

Proper Officer can levy penalty up to 10% of tax dues only. The above infirmity clearly shows non-application of mind on the part of the Deputy Commissioner, State Tax, Godda Circle, Godda. Proceedings also suffer from violation of principles of natural justice and the procedure prescribed under section 73 of the Act and are in teeth of the judgment rendered by this Court in the case *M/s Nkas Services Private Limited (supra)*.

10. Taking into account all these facts and circumstances and for the reasons recorded hereinabove, the impugned show-cause notices and Summary of the Show Cause Notices dated 7-10-2020 and 20-10-2020 (Annexure-2 in the respective writ petitions) and Summary of Orders contained in Form GST DRC-07 dated 12-12-2020 and 14-12-2020 (Annexure-4 in the respective writ petitions) are quashed. However, Respondent No. 2-Deputy Commissioner of State Tax, Godda is at liberty to initiate fresh proceeding for the alleged contravention for the said tax period after issuance of proper show-cause notice in accordance with law. Writ petitions are allowed in the manner and to the extent indicated herein above.

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Vibhu Bakhru and Amit Mahajan, JJ]

W.P.(C) 17171/2022

Santosh Kumar Gupta Prop. Mahan Polymers ... Petitioner

Versus

Commissioner, Delhi Goods and Services Tax Act & Ors. ... Respondents

Date of Judgment : 05.12.2023

WHETHER REVERSAL OF ITC THROUGH DRC-03 BY PETITIONER DURING THE LATE HOURS OF SEARCH BY THE DEPARTMENT CAN BE HELD TO BE AS VOLUNTARY PAYMENT MADE BY HIM?

HELD – NO

THE HON'BLE COURT DOES NOT FIND IT DIFFICULT TO ACCEPT THAT THE PETITIONER MAY HAVE FOUND THE CIRCUMSTANCES INTIMIDATING AND HAD, ACCORDINGLY, AGREED TO REVERSE THE ITC. WE ARE UNABLE TO ACCEPT THAT THE REVERSAL OF ITC WAS MADE VOLUNTARILY WITHOUT ANY SUGGESTION OR ENCOURAGEMENT BY THE OFFICERS.

IN THE CIRCUMSTANCES, THE HON'BLE COURT DIRECT THE RESPONDENTS TO REVERSE THE ITC AMOUNTING TO ₹22,14,226/- IN THE PETITIONER'S ECL.

For the Petitioner : Mr. A. K. Babbar &
Mr. Surender Kumar, Advs.

For the Respondents : Mr. Rajeev Aggarwal, SC with
Ms. Shilpa Singh, Adv.

JUDGMENT

Vibhu Bakhru, J

1. The petitioner has filed the present petition principally challenging the search / inspection conducted at his business premises situated at 3460/1, Jai Mata Market, Tri Nagar, Delhi- 110039 and Godown at E-285, Sector-4, Bawana, Delhi-110039 on 18.10.2022 under Section 67(1) of the Delhi Goods and Services Tax Act, 2017 (hereafter '**the DGST Act**'). The petitioner claims that during the course of the search/inspection, he was compelled to reverse the Input Tax Credit (hereafter '**ITC**') amounting to ₹22,14,226/- on account of inadmissible ITC and shortage of cash.

2. The petitioner claims that his statement was recorded at about 11:30 pm on 18.10.2022 and he was compelled to agree to reverse the ITC in respect of certain suppliers whose registration were stated to be cancelled. The petitioner claims that the petitioner's statement as well as the reversal of ITC, was done under duress and while the petitioner was effectively under the control and supervision of officers of the visiting team. The petitioner also claims that the petitioner was under the stress of interrogation as the inspection was continuing from 4:00 pm, earlier that day. The petitioner also claims that although the petitioner had filed FORM GST DRC-03, there was no acknowledgement of receipt by the Department by issuing FORM GST DRC-04.

3. The petitioner also claims that the inspection conducted on 18.10.2022 was illegal as the authorization for the same [(FORM GST INS-01 dated 18.10.2022)] was issued without mentioning any specific reason for the same.

4. The first and foremost question to be examined is whether the inspection conducted by the Delhi GST Authorities was illegal for want of proper authorization.

5. According to the petitioner, the inspection / search conducted on 18.10.2022 under Section 67 of the DGST Act was illegal as the authorization for conducting the search (in FORM GST INS-01) mentioned all the reasons as stated in Section 67(1)(a) of the DGST Act. The petitioner contends that the said authorization is issued mechanically and without application of mind.

6. Rule 139(1) of the Central Goods and Services Tax Rules, 2017 (hereafter 'the CGST Rules') expressly requires that the authorization for conducting a search be issued in FORM GST INS-01. The said form is set out below:

"FORM GST INS-1
AUTHORISATION FOR INSPECTION OR SEARCH
[See rule 139(1)]

To

……..

……..

(Name and Designation of officer)

Whereas information has been presented before me and I have reasons to believe that—

A. M/s._____

☐ has suppressed transactions relating to supply of goods and/or services
☐ has suppressed transactions relating to the stock of goods in hand,
☐ has claimed ITC in excess of his entitlement under the Act
☐ has claimed refund in excess of his entitlement under the Act
☐ has indulged in contravention of the provisions of this Act or rules made the

OR

B. M/s._____

☐ is engaged in the business of transporting goods that have escaped payment of tax
☐ is an owner or operator of a warehouse or a godown or a place where goods that have escaped payment of tax have been stored
☐ has kept accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act.

OR

C.

☐ goods liable to confiscation / documents relevant to the proceedings under the Act are secreted in the business/residential premises detailed herein below

<<Details of the Premises>>

Therefore,—

☐ in exercise of the powers conferred upon me under sub-section (1) of section 67 of the Act, I authorize and require you to inspect the premises belonging to the above mentioned person with such assistance as may be necessary for inspection of goods or documents and/or any other things relevant to the proceedings under the said Act and rules made thereunder.

OR

☐ in exercise of the powers conferred upon me under sub-section (2) of section 67 of the Act, I authorize and require you to search the above premises with such assistance as may be necessary, and if any goods or documents and/or other things relevant to the proceedings under the Act are found, to seize and produce the same forthwith before me for further action under the Act and rules made thereunder.

Any attempt on the part of the person to mislead, tamper with the evidence, refusal to answer the questions relevant to inspection / search operations, making of false statement or providing false evidence is punishable with imprisonment and /or fine under the Act read with section 179, 181, 191 and 418 of the Indian Penal Code.

Given under my hand & seal this …… day of …… (month) 20…. (year). Valid for …… day(s).

Seal
Place

Signature, Name and designation of the issuing authority

Name, Designation & Signature of the Inspection Officer/s

(i)

(ii)"

7. In the present case, respondent no.3 had issued the authorization dated 18.10.2022 by selecting all reasons (except that the taxpayer had availed of a refund) as set out in Clause 'A' of the said form. The reasons, as stated, also exhaustively comprise of reasons for issuing such authorization as set out in Section 67(1)(a) of the DGST Act. Therefore, it does not appear that the authorization was issued without specifically noting the relevant reason for such search. However, it is averred by the respondents – and not seriously contested by the petitioner – that the reasons for conducting search / inspection on 18.10.2022 are recorded in the relevant files.

8. The authorization in FORM GST INS-01 does not require the concerned officer to give any reasons in detail. It merely requires that the reason for which the search / inspection is to be conducted under the statute, be mentioned. The detailed reasons are not required to be shared with the taxpayer prior to the search / inspection. However, the taxpayer is at liberty to apply for the same and absent any reason to deny the request, the same ought to be provided to the taxpayer.

9. It is contended on behalf of the respondents that the inspection / search was conducted on account of the petitioner having availed of the ITC from suppliers whose registrations were cancelled. It is also affirmed in the counter affidavit that during the course of the search, it was noticed that the petitioner had availed of ITC amounting to ₹2,39,40,871/- on account of purchases made from suppliers whose registrations were cancelled. In view of the above, we find no merit in the contention that the search conducted was illegal and was without any reasons to believe that the conditions under Section 67(1)(a) of the DGST Act were satisfied.

10. The second question to be examined is, whether the petitioner is entitled to the refund of ITC deposited during the course of the search

conducted on 18.10.2022. According to the petitioner, he was compelled to deposit a sum of ₹22,14,226/- by reversing the ITC available in his Electronic Credit Ledger (hereafter '**the ECL**'). The petitioner also claims that the statement to that effect as recorded on 18.10.2022, was also recorded under duress and coercion.

11. Mr. Rajiv Aggarwal, learned counsel appearing for the respondents countered the aforesaid submission on, essentially, two grounds. First, he submitted that the petitioner had not retracted the statement recorded on 18.10.2022, immediately after the search and therefore, he is precluded from disputing that he had voluntarily reversed the ITC amounting to ₹22,14,226/-. Mr. Aggarwal referred to the decision of the Coordinate Bench of this Court in *RCI Industries and Technologies Ltd. though its Director Rajiv Gupta v. Commissioner, DGST Delhi & Ors.: 2021 SCC OnLine Del 3450*.

12. Second, Mr. Aggarwal contended that on the date of the search, there was a balance of ₹84,19,466/- in the ECL of the petitioner. According to the respondents, the petitioner had availed of the inadmissible ITC to the extent of ₹2,39,40,871/-. Thus, if the petitioner was under any coercion, he would have been compelled to deposit the entire amount lying in his ECL.

13. It is relevant to refer to the statement of the petitioner recorded on 18.10.2022. The relevant extract which is relied upon by the respondent is set out below:

> "13. That the visiting team has informed that the following inward supply dealers have been cancelled suomoto from the date of registration: -
>
> 1. M/s. S. R. Enterprises, GSTN: 07AAFHS2748C1Z8 (1,67,310)
> 2. M/s N N Polymers, GSTN:07AMPS2298F1ZV (5,85,900/-)
> 3. M/s J P Polymers, GSTN:07ADGPJ9077M1ZW (4,64,130/-)
> 4. M/s Dream world global Asia, GSTN:07BEPPG0134K1ZJ (5,19,300/-)
> 5. M/s Kanav International Pvt. Ltd., GSTN:07AAFCK8521N1Z4 (3,94,785/-)
>
> In this regard, I agreed to reverse the ITC above mentioned firms as per DGST Act, 20 17, the question of payment of interest on ITC reversal does not arises as the firm always having ITC in Credit ledger to meet out any liability of tax."

14. It does appear from the above that the petitioner had agreed to reverse the ITC in respect of purchases from five firms aggregating ₹22,14,226/-. The petitioner now claims that the said statement was not voluntary and that he was compelled to reverse the ITC. It is not disputed that the said deposit was made at about 11:30 pm during the course of the search proceedings.

15. The petitioner filed the present writ petition on 23.11.2022, about a month after his statement was recorded, inter alia, seeking to retract the said statement. It is necessary to bear in mind that an opportunity to pay the tax prior to issuance of any notice under Sections 73 or 74 of the DGST Act is for the benefit of the taxpayer. Payment of tax along with interest, prior to issuance of notice, absolves the taxpayer of any liability to pay penalty or penalty in excess of 15% of the tax depending on whether Sections 73 or 74 of the DGST Act are applicable. The said tax is to be paid based on self-ascertainment basis. In the event that a taxpayer voluntary pays the tax and the applicable interest, no notice is required to be issued under Section 73(1) of the DGST Act. If it is found that the tax paid falls short of the tax payable, the proper officer is required to issue a notice for the shortfall under Section 73(7) of the DGST Act.

16. Sub-sections (5), (6) and (7) of Section 73 of the CGST Act are set out below:

> "73. Determination of tax not paid or short paid or erroneously refunded or ITC wrongly availed or utilised for any reason other than fraud or any willful-misstatement or suppression of facts.—
>
> xxx xxx xxx
>
> (5) The person chargeable with tax may, before service of notice under subsection (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 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) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the CGST 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"

17. The scheme of Sub-sections (5), (6) and (7) of Section 74 of the DGST Act are also similar except that the taxpayer is also required to pay 15% of the tax as penalty.

18. If the tax is not paid on self-ascertainment basis, the assessee cannot be extended the benefit of Section 73(6) of the DGST Act or Section 74(6) of the DGST Act. In the present case, the petitioner has stoutly disputed that the reversal of ITC was voluntary. In cases where the payment made during search is not voluntary, the taxpayer is required to be refunded the said deposit while reserving the right of the GST authorities to proceed against the said taxpayer to the full extent in accordance with law.

19. It is also material to note that the respondents have not issued an acknowledgment in FORM GST DRC-04. Thus, the procedure under Rule 142 of Delhi Goods & Services Tax Rules, 2017 (hereafter '**the DGST Rules**') has not been followed. We find that the issue is covered by the decisions of this Court in *Vallabh Textiles v. Senior Intelligence Officer &Ors.: 2022 SCC OnLine Del 4508 and in Lovelesh Singhal v. Commissioner, Delhi Goods & Service Tax &Ors.: Neutral Citation No. 2023:DHC:8631-DB.*

20. We are also unable to agree that, the petitioner's case that he had deposited the tax involuntarily, is required to be rejected on the basis of the decision in *RCI Industries and Technologies though its Director Rajiv Gupta v. Commissioner, DGST & Anr. (supra)*. In that case, the Court had noted that the petitioner had "categorically admitted his tax liability and stated that he would deposit the admitted tax / penalty amounting to ₹17,34,314". In the present case, there is no admission on the part of the petitioner of his tax liability. It is clear that the petitioner was informed by the visiting team that registration of certain dealers from whom the petitioner had reportedly received supplies was cancelled. The petitioner's statement indicates that he had agreed to reverse the ITC in respect of those suppliers. There is no acknowledgment that the invoices covering supplies from those suppliers were fake and the petitioner had not paid the consideration and the applicable GST to the said suppliers. There is no adjudication of the question whether the taxpayer was required to reverse the ITC in respect of purchases made from dealers whose registration was cancelled after the receipt of supplies, albeit retrospectively.

21. Mr. Aggarwal further submitted that there was no requirement for adjudicating the liability as the petitioner had reversed the ITC. However,

in *RCI Industries and Technologies Ltd. though its Director Rajiv Gupta v. Commissioner, DGST Delhi & Ors. (supra)*, this Court had not finally rejected the petitioner's claim that the statement was made under coercion as the Court had noted that the payment of tax would be adjudicated and that the correctness of the statement would be required to be established in the adjudication proceedings. In the present case, the tax deposited by the petitioner by reversal of ITC is not subject to any adjudication proceedings. As noted above, Mr. Aggarwal had contended that no adjudication in respect of the demand is necessary. This is also the Scheme of Sections 73(6) and 74(6) of the DGST Act. Thus, it is essential that the deposit made by an assessee on a self-ascertainment basis finally and conclusively concludes the issue regarding the tax liability to the said extent. As noted above, in the present case, the petitioner has stoutly disputed that the reversal of ITC was voluntary. Undisputedly, the same has been made while the petitioner's premises were being searched and he was being subjected to questioning / enquiries. We do not find it difficult to accept that the petitioner may have found the circumstances intimidating and had, accordingly, agreed to reverse the ITC. We are unable to accept that the reversal of ITC was made voluntarily without any suggestion or encouragement by the officers as contended by Mr. Aggarwal. But for the search continuing till late at night, there were no circumstances which would, in normal course, lead the petitioner to reverse the ITC late at night.

22. In the circumstances, we direct the respondents to reverse the ITC amounting to ₹22,14,226/- in the petitioner's ECL. We however clarify that this would not preclude the concerned authorities from safeguarding the interest of the Revenue including issuing order under Section 83 of the DGST Act or Rule 86A of the DGST Rules, if the requisite conditions are satisfied.

23. The petition is disposed of with the aforesaid terms.

IN THE HIGH COURT OF KERALA AT ERNAKULAM
[Dinesh Kumar Singh, J]

WP(C) NO. 41219 OF 2023

Chukkath Krishnan Praveen ... Petitioner/s:

Versus

State of Kerala and Ors. ... Respondent/s:

Date of Order : 08.12.2023

WHETHER AN ERROR COMMITTED IN SUBMITTING GSTR-3B, ON WHICH THE ASSESSMENT HAS BEEN COMPLETED CAN BE RECTIFIED BY FILING WRIT UNDER ARTICLE 226?

HELD – YES

THAT A DIRECTION TO RESPONDENT NO. 3 TO CONSIDER EXP-4 AND EXP-5 AS A RECTIFICATION APPLICATION AND PASS NECESSARY ORDERS IN ACCORDANCE WITH LAW.

Present for Petitioner	:	Lindons C.Davis, E.U.Dhanya, Rajith Davis, N.S.Shamila, Chinju P. Joyies, Advs.
Present for Respondent	:	Jasmne M.M. (Government Pleader)

This Writ Petition (Civil) having come up for admission on 08.12.2023, the Court on the same day delivered the Following:

J U D G M E N T

Heard Ms N S Shamila learned Counsel for the petitioner, and Ms Jasmin M M learned Government Pleader for the parties.

2. The present writ petition under Article 226 of the Constitution of India has been filed by the petitioner, a registered dealer under the provisions of the KVAT Act and now under the provisions of the CGST/ SGST Act, for the following prayers:

> "i) To issue a Writ of mandamus or any other appropriate writ or order or direction directing respondents to permit the petitioner to rectify the mistake in Form GSTR-3B by accounting input tax credit as IGST instead of SGST and CGST credit.
>
> ii) To issue a Writ of mandamus or any other appropriate writ or order or direction directing the respondents to permit the petitioner to refund IGST Input tax credit and thereafter, adjust the same towards SGST and CGST liability;
>
> iii) To issue a Writ of mandamus or any other appropriate writ or order or direction directing the respondents to reconsider Exhibit.P3 or P6 by considering evidences produced by petitioner, especially in the fact that, IGST credit and liability towards CGST and SGST are same;

iv) To issue a Writ of certiorari or any other appropriate writ or order or direction quashing Exhibts.P3 and P6 as unjust and illegal;

v) And to pass such other appropriate orders or directions as this Hon'ble Court deems fit and proper in the facts and circumstances of the case.

vi) To dispense with the production of translation of vernacular documents"

3. After some arguments, the learned Counsel for the petitioner submits that the petitioner committed some errors in submitting the returns in GSTR-3B, on the basis of which the assessment order in Ext.P3 has been passed. The petitioner has made a representation on 21.10.2023 in Ext.P4 for rectifying the mistakes/error which resulted in passing the impugned assessment order. She further submits that a direction may be given to the 3rd respondent to treat the representation as a rectification application and necessary orders be passed.

4. Ms Jasmin M M, learned Government Pleader does not have much objection to the said prayer of the petitioner.

5. In view thereof, the present writ petition is disposed of with a direction to the 3rd respondent to consider Ext.P4 and Ext.P5 as a rectification application filed by the petitioner/assessee and pass necessary orders expeditiously in accordance with the law, after giving an opportunity of hearing to the petitioner. The order should be passed on Exts.P4 and P5, preferably within a period of two months.

Sd/-
DINESH KUMAR SINGH
JUDGE

APPENDIX OF WP(C) 41219/2023

PETITIONER EXHIBITS

Exhibit P1	A TRUE COPY OF THE FORM GST ASMT-10 DATED 30.07.2020 ISSUED BY THE 3RD RESPONDENT
Exhibit P2	A COPY OF THE FORM GST ASMT-11 DATED 13.11.2020 FILED BY THE PETITIONER
Exhibit P3	A COPY OF THE ORDER DATED 21.8.2023 OF THE 4TH RESPONDENT

Exhibit P4	A COPY OF THE REPRESENTATION DATED 21.10.2023 SUBMITTED BEFORE THE 2ND RESPONDENT
Exhibit P5	A COPY OF GOODS AND SERVICE TAX - TAX LIABILITIES AND ITC COMPARISON ALONG WITH DETAILS OF BILLS AS PER GSTR 2A
Exhibit P6	A TRUE COPY OF THE LETTER NO.A4/1814 DATED 15.11.2023 ISSUED BY THE 2ND RESPONDENT
Exhibit P7	A COPY OF THE JUDGMENT IN WRIT PETITION NO.2911 OF 2022 (T-RES) DATED 16.10.2022

Extension of due date for filing of return in FORM GSTR-3B for the month of November, 2023 for the persons registered in certain districts of Tamil Nadu.

Notification No. 01/2024 – Central Tax

New Delhi, the 5th January, 2024

G.S.R…(E).— In exercise of the powers conferred by sub-section (6) of section 39 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Commissioner, on the recommendations of the Council, hereby extends the due date for furnishing the return in FORM GSTR-3B for the month of November, 2023 till the tenth day of January, 2024, for the registered persons whose principal place of business is in the districts of Tirunelveli, Tenkasi, Kanyakumari, Thoothukudi and Virudhunagar in the state of Tamil Nadu and are required to furnish return under sub- section (1) of section 39 read with clause (i) of sub-rule (1) of rule 61 of the Central Goods and Services Tax Rules, 2017.

2. This notification shall come into force with effect from 20th day of December, 2023.

[F. No. CBIC-20006/1/2024-GST]
(Raghavendra Pal Singh)
Director

Extension of due date for filing FORM GSTR-9 and FORM GSTR-9C for the Financial Year 2022-23 for the persons registered in certain districts of Tamil Nadu.

Notification No. 02/2024 – Central Tax

New Delhi, the 5th January, 2024

G.S.R…(E).- In exercise of the powers conferred by section 164 of the Central Goods and Services Tax Act,2017 (12 of 2017), the Central Government, on the recommendations of the Council, hereby makes the following rules further to amend the Central Goods and Services Tax Rules, 2017, namely: —

1. Short title and commencement. -(1) These rules may be called the Central Goods and Services Tax (Amendment) Rules, 2024.

(2) They shall come into force on the 31st day of December, 2023.

2. In the Central Goods and Services Tax Rules, 2017, in rule 80,–

(a) after sub-rule (1A), the following sub-rule shall be inserted, namely:-

"(1B) Notwithstanding anything contained in sub-rule (1), for the financial year 2022-2023, the said annual return shall be furnished on or before the tenth day of January, 2024 for the registered persons whose principal place of business is in the districts of Chennai, Tiruvallur, Chengalpattu, Kancheepuram, Tirunelveli, Tenkasi, Kanyakumari, Thoothukudi and Virudhunagar in the state of Tamil Nadu.";

(b) after sub-rule (3A), the following sub-rule shall be inserted, namely:-

"(3B) Notwithstanding anything contained in sub-rule (3), for the financial year 2022-2023, the said self-certified reconciliation statement shall be furnished along with the said annual return on or before the tenth day of January, 2024 for the registered persons whose principal place of business is in the districts of Chennai, Tiruvallur, Chengalpattu, Kancheepuram, Tirunelveli, Tenkasi, Kanyakumari, Thoothukudi and Virudhunagar in the state of Tamil Nadu.";

[F. No. CBIC-20006/1/2024-GST]
(Raghavendra Pal Singh)
Director

Note: The principal rules were published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide notification No. 3/2017-Central Tax, dated the 19th June, 2017, published vide number G.S.R. 610(E), dated the 19th June, 2017 and were last amended vide notification No. 52/2023 - Central Tax, dated the 26th October, 2023 vide number G.S.R. 798(E), dated the 26th October, 2023.

Seeks to rescind Notification No. 30/2023-CT
dated 31 st July, 2023

Notification No. 03/2024- Central Tax

New Delhi, dated the 5th January, 2024

S.O.....(E).– In exercise of the powers conferred bysection148 of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereinafter referred

to as thesaid Act),the Central Government, on the recommendations of the Council, hereby rescinds the notification of the Government of India in the Ministry of Finance, Department of Revenue, number 30/2023-CT, dated the 31st July, 2023 published vide number S.O. 3424(E), dated the 31st July, 2023, except as respects things done or omitted to be done before such rescission.

2. This notification shall come into force from 1st day of January, 2024.

[F.No.CBIC-20001/7/2023-GST]
(Raghavendra Pal Singh)
Director

Seeks to notify special procedure to be followed by a registered person engaged in manufacturing of certain goods.

Notification No. 04/2024–Central Tax

New Delhi, the 5th January,2024

S.O…(E).—In exercise of the powers conferred by section 148 of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereinafter referred to as the said Act), the Central Government, on the recommendations of the Council, hereby notifies the following special procedure to be followed by a registered person engaged in manufacturing of the goods, the description of which is specified in the corresponding entry in column (3) of the Schedule appended to this notification, and falling under the tariff item, sub-heading, heading or Chapter, as the case may be, as specified in the corresponding entry in column (2) of the said Schedule, namely:—

1. Details of Packing Machines.– (1) All the registered persons engaged in manufacturing of the goods mentioned in Schedule to this notification shall furnish the details of packing machines being used for filling and packing of packages in **FORM GST SRM-I**, electronically on the common portal,within thirty days of coming into effect of this notification.

(2) Any person intending to manufacture goods as mentioned in the Schedule to this notification, and who has been granted registration after the issuance of this notification, shall furnish the details of packing machines being used for filling and packing of packages in **FORM GST SRM-I** on the common portal, within fifteen days of grant of such registration.

(3) The details of any additional filling and packing machine being installed at the registered place of business shall be furnished, electronically on the common portal, by the said registered person within twenty four hours of such installation in PART (B) of Table 6 of **FORM GST SRM-I**.

(4) If any change is to be made in the declared capacity of the machines, the same shall be furnished, electronically on the common portal, by the said registered person within twenty four hours of such change in Table 6A of **FORM GST SRM-I**.

(5) Upon furnishing of such details in **FORM GST SRM-I**, a unique registration number shall be generated for each machine, the details of which have been furnished by the registered person, on the common portal.

(6) In case, the said registered person has submitted or declared the production capacity of his manufacturing unit or his machines, to any other government department or any other agency or organisation, the same shall be furnished by the said registered person in Table 7 of **FORM GST SRM-I** on the common portal, within fifteen days of filing such declaration or submission:

Provided that where the said registered person has submitted or declared the production capacity of his manufacturing unit or his machines, to any other government department or any other agency or organisation, before the issuance of this notification, the latest such certificate in respect of the manufacturing unit or the machines, as the case may be, shall be furnished by the said registered person in Table 7 of **FORM GST SRM-I** on the common portal, within thirty days of issuance of this notification.

(7) The details of any existing filling and packing machine disposed of from the registered place of business shall be furnished, electronically on the common portal, by the said registered person within twenty four hours of such disposal in Table 8 of **FORM GST SRM-I**.

2. **Special Monthly Statement.**– The registered person shall submit a special statement for each month in **FORM GST SRM-II**, electronically on the common portal, on or before the tenth day of the month succeeding such month.

3. **Certificate of Chartered Engineer.**– (1) The taxpayer shall upload a certificate of Chartered Engineer **FORM GST SRM-III** in respect of machines declared by him, as per para 1 of this notification, in Table 6 of **FORM GST SRM-I**.

(2) If details of any machine are amended subsequently, then fresh certificate in respect of such machine shall be uploaded.

4. This notification shall come into effect from 1st day of April, 2024.

Schedule

S. No.	Chapter /Heading /Sub-heading /Tariff item.	Description of Goods.
(1)	(2)	(3)
1.	2106 90 20	Pan-masala
2.	2401	Unmanufactured tobacco (without lime tube)– bearing a brand name
3.	2401	Unmanufactured tobacco (with lime tube)–bearing a brand name
4.	2401 30 00	Tobacco refuse, bearing a brand name
5.	2403 11 10	'Hookah' or 'gudaku' tobacco bearing a brand name
6.	2403 11 10	tobacco used for smoking 'hookah' or known as 'hookah' tobacco or 'gudaku' not bearing a brand name
7.	2403 11 90	Other water pipe smoking tobacco not bearing a brand name.
8.	2403 19 10	Smoking mixtures for pipes and cigarettes
9.	2403 19 90	Other smoking tobacco bearing a brand name
10.	2403 19 90	Other smoking tobacco not bearing a brand name
11.	2403 91 00	"Homogenised" or "reconstituted" tobacco, bearing a brand name
12.	2403 99 10	Chewing tobacco (without lime tube)
13.	2403 99 10	Chewing tobacco (with lime tube)
14.	2403 99 10	Filter khaini
15.	2403 99 20	Preparations containing chewing tobacco
16.	2403 99 30	Jarda scented tobacco
17.	2403 99 40	Snuff
18.	2403 99 50	Preparations containing snuff
19.	2403 99 60	Tobacco extracts and essence bearing a brand name
20.	2403 99 60	Tobacco extracts and essence not bearing a brand Name
21.	2403 99 70	Cut tobacco
22.	2403 99 90	Pan masala containing tobacco'Gutkha'
23.	2403 99 90	All goods, other than pan masala containing tobacco 'gutkha', bearing a brand name
24.	2403 99 90	All goods, other than pan masala containing tobacco 'gutkha', not bearing a brand name

Explanation.– (1) In this Schedule, "tariff item", "heading", "sub-heading" and "Chapter" shall mean respectively, a tariff item, heading, sub-heading and Chapter as specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).

(2) The rules for the interpretation of the First Schedule to the said Customs Tariff Act,1975, including the section and chapter notes and the General Explanatory notes of the First Schedule shall, so far as may be, apply to the interpretation of this notification.

(3) For the purposes of this notification, the phrase "brand name" means brand name ortrade name, whether registered or not, that is to say, a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person.

FORM GST SRM-I
Registration and disposal of packing machines of pan masala and tobacco products

1. GSTIN	
2. Legal name	
3. Trade name, if any	
4. ARN	
5. Date of filing	

6. Details of the machines

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11) (8x10)	(12)	(13)	(14)
Part (A) Existing													
Part (B) Newly Added													

6A. Amendment to the details of machines.

Sr. no.	Regis-tration no.of the machi-ne.	Make.	Model no.	Name of manuf-acturer.	Mac-hine no.	Date of purch-ase.	Address of place of insta-lation.	No. of trac -ks.	Weight of package -s which can be packed on the machine (in grams).	Packing capacity of each track (No. of pack-ages which can be packed for a par-ticular weight of pack-age).	Total packing capac-ity of the machine for a specific weight of package to be packed.	Electric-ity con-sumpti-on capac-ity of the machine per hour (KWH).	Working status (Y/N).	Date of change in any param ete-r listed.
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12) (9x11)	(13)	(14)	(15)

7. Details of the intimation of the machines furnished to other departments.

Sr. no.	Date of intimation.	Name of Govt. department / any other agency or organisation.	Details of declaration (to be uploaded as pdf).
(1)	(2)	(3)	(4)

8. Disposal of the packing machines.

Sr. no.	Registrat ion no. of the machine.	Make.	Mo-del no.	Name of manuf-acturer.	Machine no.	Date of purch -ase.	Address of place of installati -on.	No. of tracks.	Weight of packages which can be packed on the machine (in grams).	Packing capacity of each track (No. of packages which can be packed for a particular weight of package)	Total packi -ng capac -ity of the machi -ne for a specif -ic weigh -t of packa -ge to be packe -d.	Date of disp-osal.	Reason of disposal (Suppli-ed/ Conde-mned).
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)

9. Product details.

Sr. no.	Brand name.	Packing type.	Quantity in grams in each package.	HSN.	Description of the product.
(1)	(2)	(3)	(4)	(5)	(6)

10. Details of the Documents uploaded.

1. Certificate of chartered engineer.
2. Information given to other departments
3. Any other document to be mentioned by taxpayer.

11. Verification

I hereby solemnly affirm and declare that the information given hereinabove is true and correct to the best of my knowledge and belief and nothing has been concealed therefrom.

Place
Signatory
Date

Signature of Authorised
Name

Designation / Status

Instructions to Form GST SRM-1

1. **Terms used:**

(i) GSTIN: Goods and Services Tax Identification Number
(ii) HSN: Harmonized System of Nomenclature
(iii) MRP: Maximum Retail Price
(iv) KWH: Kilo Watt Hour
(v) Packing type: Pouch, Zipper etc.

2. **Table 6:** Details of existing machines should be provided in Part-A and details of new machines added thereafter have to be provided in Part-B. Column wise details of the information to be provided is given in the table below:

Column no.	Description
(2).	Make of the machine, if available should be provided as to whether it is semi-automatic or automatic .
(3).	Mention model number of the machine, if available.
(4).	Name of the manufacturer of the machine to be provided.
(5).	Machine number to be provided.
(6).	Date of purchase as mentioned on the invoice or any other document in lieu thereof, issued by supplier, have to be provided.
(7).	Address of the place where machine has been installed has to be selected from the drop down provided for the same based on the details of places of business provided by the manufacturer in FORM GST REG-01.

(8).	Number of tracks associated with the machine to be provided.
(9).	Weight of package which can be packed by the machine (in grams) is to be declared here. The registered person can enter multiple entries of the same for each machine.
(10).	Packing capacity of each track has to be provided in terms of number of packages which can be packed by the machine on the said track per hour for the particular weight of package declared in column 9.
(11).	Total packing capacity of the machine for a specific weight of package which can be packed would be computed by System based on information provided in column 8,9 &10.
(12).	Electricity consumption capacity of the machine to be provided in KWH.
(13).	Unique registration no. of the machine would be generated by System after filing the form. Structure of the unique no. will be GSTIN followed by three digits.
(14).	Whether the machine is working or is at standby. Accordingly, Y or N to be selected from the drop down menu.

3. **Table 6A:** Amendment to the details of the machine already provided in Table 6 or amended thereafter to be provided. After entering registration number of the machine assigned by the System in column 12 of Table 6 , other details of the machine would be auto-populated. The same can be edited wherever required. Certificate of chartered engineer shall also be uploaded for the machines whose details have been amended if the particulars given in the certificate uploaded earlier undergoes any change and the details of the documents uploaded should be given in Table 10. Any such change in any of the details of the machine including its working status which needs to be amended, has to be communicated within twenty four hours of the said change carried out by the registered person.

4. **Table 7:** Details of the intimation of the machines furnished to other department have to be provided. Documents should be uploaded in pdf format after making entries and the details of the documents uploaded should be given in Table 10.

5. **Table 8:** Details of the machines disposed of (supplied /condemned) shall be provided. After entering registration number assigned to the machine by the System, other details would be auto-populated. Date of disposal and reason for the same to be provided.

6. **Table 9**: Details of the brands, packing type, HSN and description of the products manufactured to be provided in this table. If there is any change in the information already furnished in this table, the details need to be amended accordingly.

7. **Table 10**: List of Documents uploaded:

- Single Certificate of chartered engineer to be uploaded in pdf format for all machines in the format as per FORM GST SRM-III after entering the particulars of the machines.
- Certificate of chartered engineer, in the format as per FORM GST SRM-III, shall also be uploaded for the machines whose details have been amended if the particulars given in the certificate uploaded earlier undergoes any change.
- Document in pdf format providing details of the intimation of the machines furnished to other department have to be uploaded.

FORM GST SRM-II

Monthly Statement of inputs used and the final goods produced by the manufacturer of goods specified in the Schedule

1. GSTIN	
2. Legal name	
3. Trade name, if any	
4. Financial year	
5. Tax period	
6. ARN	
7. Date of filing	

8. Details of inputs

Serial number.	HSN.	Description.	Unit. (UQC)	Opening balance.	Quantity procured.	Value of the quantity procured (Rs.).	Quantity consumed.	Closing balance.	Waste generated.
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)

9. Details of production

Brand name.	Machine registration number.	Packing type.	Quantity in grams in each package.	HSN.	Description of the product.	Number of packages packed.	MRP per package packed. (Rs.)	Total value (in MRP)of the packages packed by machine. (Rs.)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9) (7x8)
Total								

10. **Power consumption**

Sr. No.	Meter / DG set no.	Initial meter reading on first day of the month.	Final meter reading on the last day of the month.	Consumption (KWH).
(1)	(2)	(3)	(4)	(5)
(A) Electricity meter reading				
(B) DG set meter reading				
(C) Solar power having battery				
(D) Others				

11. **Details of grid integrated solar power**

Sr. No.	Initial meter reading on first day of the month.	Final meter reading on the last day of the month.	Generation/ Export / Import / Consumption (KWH).
(1)	(2)	(3)	(4)
(A) Solar meter reading (Generation)			
(B) Power meter reading (Import of electricity)			
(C) Power meter reading (Export of electricity)			
(D) Net consumption [A+B-C]			

12. **Verification**

I hereby solemnly affirm and declare that the information given hereinabove is true and correct to the best of my knowledge and belief and nothing has been concealed therefrom.

Place
Signatory
Date

Signature of Authorised
Name

Designation / Status

Instructions to Form GST SRM-II

1. **Terms used:**

(i) GSTIN: Goods and Services Tax Identification Number

(ii) HSN: Harmonized System of Nomenclature

(iii) MRP: Maximum Retail Price

(iv) KWH: Kilo Watt Hour

(v) DG set: Diesel Generator set used for power generation

(vi) Packing type: Pouch, Zipper etc.

2. **Table 8:** Details of inputs used for manufacturing the goods specified in Schedule appended with the notification, have to be provided. Column wise details of the information to be provided are given in the table below:

Column no.	Description
(1).	
(2).	HSN at minimum 4 digit level of the inputs used for manufacturing to be reported.
(3).	Description of the goods as per HSN to be provided.
(4).	Unit of measurement of the goods to be selected from the drop down.
(5).	Quantity available in the beginning of the month to be reported for the first time. From next month onwards, the information will be auto-populated from the closing balance of the previous month.
(6).	Quantity procured during the month have to be reported.
(7).	Value of the quantity procured have to be provided.
(8).	Quantity consumed have to be reported.
(9).	Closing balance should be the sum of quantity reported in col. 5 & 6 reduced by quantity reported in col. 8 (5+6-8)
(10).	Waste generated, if any to be reported.

3. **Table 9:** Details of the products manufactured to be reported brand wise, machine wise and package wise. Column wise details of the information to be provided is given in the table below:

Column no.	Description
1.	Brand reported in table 9 of Form GST SRM-I to be selected from drop down for reporting production during the tax period.
2.	Registration number of the machine assigned by System to be reported.
3.	Packing type viz. pouch, zipper etc. manufactured during the tax period to be reported.
4.	Description of the packing (Quantity in grams in each pack) to be reported.
5.	HSN, at 8 digit level, of the goods manufactured during the tax period to be reported.
6.	Description of the product manufactured during the tax period to be reported.
7.	Number of packages packed during the tax period to be reported.
8.	Maximum Retail Price (MRP) in Rs. per package packed to be reported.
9.	Total value in MRP of the packages packed during the tax period will be computed by System based on the information provided in col. 6&7.

4. **Table 10**: Power consumption during the month to be reported. Initial reading of the electricity meter in the beginning of the month to be reported for the first month. From the next month onwards, the final reading reported at the end of previous month will become initial reading of the month. Reading of DG set used, if any should also be reported separately. For reporting the reading of more than one electricity meter or DG set, separate rows to be used. Also, electricity meter reading is to be given of the main meter of the manufacturing unit in case separate meter for machines is not available. Solar power mentioned at PART C pertains to only that generated through batteries not integrated with the grid.

5. **Table 11**. Here, details of the power consumed from solar power integrated with the grid is to be reported.

FORM GST SRM-III
Certificate of Chartered Engineer

1. GSTIN -

2. Details of the machines for which certificate has been issued -

Sr. no.	Make, if avail-able.	Mod el no., if avai-lable	Name of manufact -urer.	Mac-hine no.	Registration no. assigned by System (in cases where the amendment in specification of the machines in Table 6A to be done).	Date of purc-hase, if avail -able.	No. of trac -ks.	Weight of packages which can be packed on the machine (in grams).	Packing capacity of each track (No. of packages packed for a particular weight of package).	Total packing capacity of the machine for a specific weight of package to be packed.	Electricity consumption capacity of the machine per hour (KWH).	Re-marks if any.
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11) (8x10)	(12)	(13)

This is to certify that I have examined --- (no.) machines and the above details are true and correct to the best of my knowledge and belief and nothing has been concealed therefrom.

Signature
Name –
Registration number –
Address –
Mobile no. –

Date:
Place:

[F.No.CBIC-20001/7/2023-GST]
(Raghavendra Pal Singh)
Director

Amendment in Notification No. 02/2017-CT dated 19th June, 2017.

Notification No. 05/2024 – Central Tax

New Delhi, dated the 30th January, 2024

G.S.R...(E).— In exercise of the powers under section 3 read with section 5 of the Central Goods and Services Tax Act, 2017 (12 of 2017) and section 3 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), the Central Government, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 02/2017-Central Tax, dated the 19th June, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 609(E), dated the 19th June, 2017, namely:–

In the said notification, in Table II, in serial number 83, in column (3), in clause (ii), after the figure and letter "411060,", the figure and letter "411069," shall be inserted.

[F. No. CBIC-20016/18/2023-GST]
(Raghavendra Pal Singh)
Director

Note:-The principal notification No. 02/2017-Central Tax, dated the 19th June, 2017 was published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 609(E), dated the 19th June, 2017 and was last amended by notification No. 39/2023-Central Tax, dated the 17thAugust, 2023, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 612(E), dated the 17th August, 2023.

Seeks to amend Notification No 01/2017- Central Tax (Rate) dated 28.06.2017.

Notification No. 01/2024-Central Tax (Rate)

New Delhi, the 3rd January, 2024

G.S.R. .....(E).- In exercise of the powers conferred by sub-section (1) of section 9 and sub-section (5) of section 15 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, hereby makes the following further amendments in the notification of the Government of India, Ministry of

Finance (Department of Revenue), No.1/2017-Central Tax (Rate), dated the 28thJune, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 673(E), dated the 28thJune, 2017, namely:-

In the said notification, in Schedule I – 2.5%, -

(i) against S. No. 165, in column (2), for the entry, the entry "2711 12 00, 2711 13 00, 2711 19 10" shall be substituted;

(ii) against S. No. 165A, in column (2), for the entry, the entry "2711 12 00, 2711 13 00, 2711 19 10" shall be substituted;

2. This notification shall come into force with effect from the 4th day of January, 2024.

[F. No. 190354/223/2023-TRU]
(Nitish Karnatak)
Under Secretary

Note: - The principal notification No.1/2017-Central Tax (Rate), dated the 28th June, 2017 was published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 673(E), dated the 28th June, 2017 and was last amended by notification No. 17/2023 – Central Tax (Rate), dated the 19th October, 2023, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 774(E), dated the 19th October, 2023.