THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO
AND
THE HON'BLE SRI JUSTICE K.SURESH REDDY

W.P.No.45971 of 2018

ORDER: (*Per Hon'ble Sri Justice U.Durga Prasad Rao*)

The petitioner prays for a writ of *mandamus* declaring that the Assessment Order vide Ref.No.CGST/2017-18/05 dated 29.10.2018 for the tax period July, 2017 to February, 2018 passed by the respondent No.1 levying GST on the value of broken rice, bran and husk obtained by the petitioner on milling of the paddy of the respondent No.4 which were allowed to be retained by the petitioner in addition to the milling charges as compensation/exchange for the own rice supplied by the petitioner to the respondent No.4 to make up the shortfall in the yield, as contrary to the law and consequently set aside the same or in the alternative direct the respondent No.4 to pay the GST liability of the petitioner and pass such other order deemed fit.

2. The petitioner's case is thus:

(a) The petitioner is a Rice Miller and registered dealer under APGST Act, 2017 (for short, **"GST Act"**) on the rolls of respondent No.2. The State Government through the Andhra Pradesh Civil Supplies Corporation i.e., the respondent No.4 herein procures paddy from the ryots and gives to the rice mills for milling and handing over to respondent No.4 for public distribution. As a consideration for milling, the respondent No.4 pays charges at the rate of 15% per one

quintal of paddy milled. As per the terms of the agreement, the Rice Millers have to supply rice equivalent to 67% of the paddy given for milling irrespective of the yield. In fact, the actual yield will be around 61% to 62% only. The balance of 5% to 6% has to be provided by the petitioner to the respondent No.4 out of his own stock. Therefore, as a compensation/exchange for the same, the respondent No.4 allows the petitioner to retain the broken rice, bran and husk obtained in the course of milling of the paddy. The petitioner sells the said broken rice, bran and husk. The broken rice and husk are exempted from tax and hence, no GST need to be paid on the same. But, the petitioner pays tax on the bran at the rate of 5%.

(b) The 1st respondent conducted the inspection of the premises of the petitioner and issued a show cause notice dated 22.05.2018, for which the petitioner submitted his objections/reply. Whereupon, the 1st respondent passed the impugned assessment order vide Ref.No.CGST/2017-18/05 dated 29.10.2018 imposing the GST not only on milling charges of Rs.15/- per quintal, but also on the value of by-products which were allowed to be retained by the petitioner treating the by-products as part of consideration.

(c) The further case of the petitioner is that neither the petitioner nor 4th respondent had anticipated that the GST would be attracted and therefore, no GST was added to the consideration/charges paid to the petitioner for milling of the paddy. Further it was assumed that as the

4th respondent is a unit of the State Government, the petitioner was under the impression that even if any tax law was attracted, the same would be paid by the 4th respondent directly to the GST authorities as is being done in the case of Rural Development cess which is being paid directly by the Food Corporation of India to the Department. Hence, the petitioner did not collect any GST from the 4th respondent. Hence, the 1st respondent cannot subject to tax any amount in excess of Rs.15/- per quintal. In fact, the broken rice, bran and husk were given to the petitioner by the 4th respondent not as consideration, but in exchange for the own rice given by the petitioner to make up the shortfall of the rice after milling. The petitioner has paid tax on the bran whereas the broken rice and husk are exempted from the tax under the GST Act. Therefore, levying tax on the value of the by-products is legally unsustainable. At any rate even if the GST liability is attracted, the same has to be tacked to the 4th respondent who is the recipient of the services.

Hence, the writ petition.

3. The 1st respondent has filed counter *inter alia* contending thus:

(a) It is contended that as per the terms of the agreement between the petitioner and 4th respondent, the petitioner would retain bye products. The bye products which are retained can only be treated as part of consideration for the work agreed to be done i.e., custom milling. Both the parties arrived @ Rs.15/- per quintal only after

considering the fact that the petitioner herein would retain the bye products. Further, as per the terms of the agreement, the taxes payable for the bye products are to be borne by the petitioner herein.

(b) In the present transaction, the rice miller is running the service of converting the paddy into the rice which is "service". Thus, the rice miller is the supplier of the service and Government or the Civil Supplies Corporation is the recipient of the service. There is no specific exemption provided to the above said service. Hence, the same is taxable. As per the tariff under GST, the prescribed rate for the above referred service is 5% (clarification issued vide Circular No.19/19/17 dated 20.11.2017). Under the GST Act, the GST is leviable on the consideration for supply. As per the definition of the term "consideration" given under Section 2(31) of the APGST Act, consideration can be in the form of money or otherwise. In the present case, the consideration is not just Rs.15/- per quintal but also includes bye products viz., broken rice, bran and husk. Unlike the previous enactments, under the GST Act 2017, consideration need not be in the form of money but anything equivalent to money. Thus, even the monetary value of the goods and services also will form part of consideration. In case of "Custom Milling of Rice" (for short, **"CMR"**), price is not the sole consideration as the consideration involves something in the form other than the cash. Hence, Section 15 cannot be applied to the above case.

(c) As per Rule 27 of the CGST/SGST Rules, where the supply or goods or services is for a consideration not wholly in money, the value of the supply shall be the open market value of such supply. It is further contended that the normative milling charges are fixed by the Tariff Commission of India duly considering the cost of milling and the value of the bye products, so that the Government will not be at loss. In the instant case, the Comptroller and Audit General has pointed out that the increase in cost of the bye products was not taken into consideration for fixing the revised normative value of custom milling per quintal of paddy; thereby causing huge loss to the State exchequer. The same was acknowledged by the Ministry of Consumer Affairs, Food and Public Distribution, Government of India in the press note dated 08.12.2015. However, till date the Tariff Commission of India has not revised the normative value. From all these, it is clear that the milling charges are always fixed taking into consideration the value of bye products also. Since the normative value was fixed way back in the year 2005, the assessment considering the value of bye products at the present values is justified.

(d) The bye products may include some exempted products like husk. However, for the purpose of calculation of consideration their value shall be taken. Hence, the petitioner's contention that the exempted goods are being taxed is not correct. It is true that as per the tariff under the GST, the commodities like rice, broken rice and husk

are exempted and bran is taxable one. However, the issue for consideration is whether the broken rice and husk which are the exempted commodities will form part of the valuation. In this regard, it is pertinent to distinguish between the supply and consideration. Supply is what is provided by the supplier and consideration is what he get in return. In case of the cash transactions, usually the supply will be either goods or services whereas consideration will be in the form of cash. However, in case of non-cash transactions, both the supply and consideration could be goods or services, which transaction can be termed as "exchange" or "barter". It is further contended that since the milling is done by the petitioner, the primary responsibility and liability for payment of the GST is with the petitioner, but not with 4th respondent. The analogy of Rural Development Cess cannot be adopted in the instance case as it was an accommodation made by the Government to pay cess directly to the Department instead of millers.

(e) It is submitted that though the petitioner has filed returns duly disclosing the turnover, however, failed to pay the tax thereon and hence, the assessment was taken up quantifying the tax liability. Section 74 of the APGST Act, 2017 will be applicable where the evasion is wilful and Section 73 will be applicable where it is non-wilful. In the instant case, since the petitioner has already disclosed the turnover, but disputed the levy of tax, it is a *bonafide* mistake on his part and accordingly, the provisions of Section 73 were

invoked. The prices arrived at are existing market prices only and are not imaginary. The information was obtained from the Civil Supplies Department relates to the milling year 2017-18. Accordingly, the amounts received were taxed under the provisions of the GST Act only. The writ petition is not maintainable as the petitioner has got an effective and alternative remedy. Therefore, the writ petition may be dismissed.

4. Respondent No.4 filed counter opposing the writ petition and contending thus:

(a) It is submitted that the 4th respondent has been procuring the Custom Mill Rice (CMR) under Minimum Support Price (MSP) operations and acts as a nodal agency to procure paddy through various agencies like PACS/Velugu/DCMS/GCC etc. and in turn the designated rice mills get the paddy and the respective miller has to deliver resultant rice @ 67% for raw rice and 68% for boiled rice to APSCSCL/FCI at their designated godowns simultaneously.

(b) As per clause 22 of the agreement, the mill shall retain all bye products such as broken, bran, husk etc derived during the process of milling, Income generated while selling by-products is concerned, the mill shall be responsible to incur expenses and to pay taxes to the concerned departments. Thus, as per clause 22 of the agreement, the writ petitioner is liable to pay all the taxes to 1st respondent. Thus, as per clause 9 of the agreement, the writ petitioner has to deliver 67% of

raw rice and 68% of boiled rice to APSCSCL/FCI. The writ petitioner's raising objection regarding the resultant rice of CMR coming to 61-62% is not correct. On the other hand, all the rice millers in the Andhra Pradesh are supplying 67%/68% CMR to the respondent Corporation since the inception.

(c) As per clause 31 of the agreement, both the parties have agreed that in the event of any dispute with regard to the agreement, the same shall be referred to the arbitrator and the arbitrator shall be appointed by VC & Managing Director of Corporation.

(d) The appeal against the impugned order can be filed before the appellate authority. Instead of approaching the said authority the petitioner straight away filed the writ petition and hence, the writ petition is liable to be dismissed *in limine.*

(e) The 4th respondent herein need not pay any taxes payable to 1st respondent. It is the bounden duty of the writ petitioner to pay all the taxes payable to the 1st respondent as per the agreement but not the 4th respondent in view of Clause No.22 of agreement. On that ground also, the writ petition is liable to be dismissed. The writ petition does not merit consideration and hence, the same may be dismissed.

5. Heard the arguments of learned Senior Counsel, Sri S.Ravi representing Sri G.Narendra Chetty, learned counsel for petitioner, and learned Advocate General representing the respondents 1 to 3 and Sri Hemachandra, learned Standing Counsel for the 4th respondent**.**

6. Severely fulminating the impugned Assessment Order, learned Senior Counsel, Sri S. Ravi argued that the 1st respondent who is the assessing authority wholly misconceived while applying the provisions of the GST Act to the terms of the CMR agreement between the petitioner and 4th respondent and included the value of the by-products to the actual consideration of Rs.15/- per quintal paid to the petitioner towards milling charges and held that the total consideration in this case is not only Rs.15/- per quintal but also the value of the by-products and accordingly, wrongly assessed the GST on the aforesaid total value treating the same as consideration. Learned Senior Counsel strongly professed that having regard to the intention of the parties and the terms employed in the agreement, particularly Clause No.22, there can not be even a slightest demur that the by-products obtained on milling such as brokens, bran, husk etc. do not form part of the consideration for milling. Referring to Clause No.22, learned Senior Counsel vehemently argued that the 4th respondent made it abundantly clear that the petitioner shall retain all by-products derived during the process of milling. Had it been the intention of the parties that the by-products which were allowed to be retained by the petitioner should form part of

consideration, nothing prevented them to employ a suitable clause to that effect. On the other hand, it was simply mentioned that the mill (the petitioner) shall retain all by-products such as brokens, bran, husk etc., derived during the process of milling. Of course, it is mentioned that the mill shall be responsible to incur expenses and taxes on sale of by-products. This later part of the clause only implies that on sale of these by-products, the petitioner would be liable to pay GST treating the same as supply of the goods, provided these by-products are taxable commodities under GST Act. In fact, the brokens and husk are exempt commodities and hence no GST need to be paid and the petitioner on sale of bran to the third parties collects GST at 5% and issues invoice to that effect. Learned Senior Counsel would argue that there is no dispute with regard to the later part of the clause i.e., with regard to the petitioner's liability to pay GST on the sale of by-products. However, such condition will not make the by-products as part of the consideration for milling. He further argued that there was a valid purpose in 4th respondent's letting the petitioner to retain the by-products. As per terms of the agreement, irrespective of the yield on milling, the petitioner is liable to deliver 67% of Custom Milled Rice against the paddy delivered to him. However, the yield will not be more than 61% to 62%. Nevertheless, the petitioner shall replenish the shortfall of the yield of the rice and deliver 67% of rice to 4th respondent. In that process, since the petitioner incurs loss, to compensate him, the 4th respondent allowed him to retain the

by-products and make good his loss by selling the by-products to third parties. Further, the 4th respondent being the State Government Corporation, has no wherewithal to store, maintain and sell the by-products by its own. This reason also compelled the 4th respondent to permit the petitioner to retain the by-products. Therefore, the retention of by-products by the petitioner can only be termed as "compensation" but not as "consideration" within the meaning of GST Act. Learned Senior Counsel lamented that without proper appreciation of these factual intricacies, the 1st respondent casually treated the by-products as part of the consideration.

7. Finally, he reiterated that to resolve the issue whether the by-products form part of the consideration or compensation, one has to necessarily read in between the terms of the agreement but shall not go by assumptions and presumptions. To buttress his argument, learned Senior Counsel placed reliance on ***Food Corporation of India vs. State of A.P***[1]**.** He submitted that in the light of the above judgment, the assessment of the 1st respondent made on the basis of assumption is wholly without jurisdiction and authority and therefore the Writ Petition is maintainable in spite of the fact that the right of statutory appeal is available to the petitioner. He alternatively argued that in spite of his submission, if the Court comes to conclusion that the by-products shall also be treated as part of consideration and exigible to GST, the tax

[1] 1997 SCC Online AP 1143

liability may be attached to 4th respondent being the recipient of the services, either directly or by reimbursement to the petitioner.

8. In oppugnation, learned Advocate General argued that the Government of India, Ministry of Finance – Department of Revenue – Tax Research Unit in its letter F.No.354/263/2017-TRU dated 20.11.2017 addressed to the Officers of the Central Tax Departments, has given clarification on the taxability of Custom Milling of the paddy. In the said letter, it was clarified that milling of paddy is not an intermediate production process in relation to the cultivation of plants. Milling of paddy into rice is done by the Rice Millers and it changes its essential character. In that view, milling of paddy into rice is not eligible for exemption under S.No.55 of Notification 12/2017- Central Tax (Rate) dated 28.06.2017 and such custom milling which is a job work is liable to GST @ 5% on the processing charge. Therefore, the consideration received by a miller for Custom Milled Rice is exactable to GST. The learned Advocate General further argued that in the instant case the petitioner is a supplier of the service of milling to the 4th respondent and for its services, it received consideration partly in cash and partly in kind i.e., in the form of by-products. Learned Advocate General would elucidate that the definition of the term "consideration" under Section 2(31) of GST Act encompasses both cash and kind. Therefore, the 1st respondent has rightly treated the value of by-products as part of the consideration and assessed to GST. Since

clause No.22 of the agreement clearly lays down that the petitioner is responsible to pay the tax on the by-products, the petitioner has to pay tax thereon as assessed.

9. Distinguishing the Judgment in Food Corporation of India's case cited by the learned counsel for the petitioner, learned Advocate General argued that in that case, in the agreement between the Food Corporation of India and concerned Miller, it was clearly mentioned that the by-products shall be the property of the agent (Miller). In that context, it was held that FCI did not bother itself regarding the by-products and just transferred the property to the agent and the agreement was silent as to whether the sale has taken place for cash or deferred payment or for other valuable consideration and hence the value of the by-products cannot be added to the turnover of the FCI. Learned Advocate General vehemently argued that in the instant case at Clause No.22 except mentioning that the Mill (petitioner) shall retain all by-products, there is no mentioning, as we find in FCI's case, that the by-products shall be the property of the petitioner. He thus narrated that when by-products were not intended to be treated as the property of the petitioner free of cost, the obvious conclusion was that the petitioner shall retain them as part of the consideration.

10. Nextly, learned Advocate General argued that as against the Assessment Order of the 1st respondent, a statutory appeal is provided under Section 107 of GST Act. Without availing the said efficacious

alternative remedy, the petitioner invoked the jurisdiction of this Court under Article 226 of Constitution of India. Therefore, the Writ Petition is liable to be dismissed *in limine.* To buttress his stand point of view, he placed reliance on_

> ***Assistant Commissioner (CT) LTU vs. Glaxo Smith Kline Consumer Health Care Limited***[2]
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> ***Commissioner of Income Tax and others vs. Chhabil Dass Agarwal***[3]
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> ***Order dated 21.07.2020 in W.P.No.11819 of 2020 of High Court of Andhra Pradesh.***
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> He thus, prayed to dismiss the writ petition.

11. Learned Standing Counsel for 4th respondent while toeing the line of learned Advocate General, additionally argued that since an arbitration clause is made available in the agreement, the petitioner is not entitled to file writ petition.

12. The point for consideration is:

> Whether the impugned assessment order levying GST on the estimated by-products value, treating such by-products as part of the consideration for milling, is legally sustainable under the provisions of CGST/APGST Act, 2017 or not?

13. **POINT:** As can be seen, Custom Milling Rice is an arrangement where the Government through the Civil Supplies Corporation gets the paddy milled into rice through the millers. For this purpose, the 4th respondent enters into an agreement with the millers incorporating therein the method and manner of milling the paddy.

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[2] 2020 SCC Online SC 440
[3] (2014) 1 SCC 603 = MANU/SC/0802/2013

In the above process, in the context of GST Act, the petitioner shall be regarded as "supplier". Under Section 2(105) of GST Act, supplier in relation to any goods or services or both, shall mean the person supplying the said goods or services or both and shall include an agent as such on behalf of such supplier.

The petitioner, in view of undertaking the exercise of milling the paddy, offers "services" to 4th respondent within the meaning of Section 2(102) of the GST Act. Similarly, the 4th respondent Corporation is called as "recipient" of services within the meaning of Section 2(93) of GST Act.

What the petitioner undertakes is "job work" as per Section 2(68). The term "job work" means any treatment or process undertaken by a person on goods belonging to another registered person and the expression job work shall be construed accordingly.

The returns, which the petitioner gets out of milling is known as "consideration" within the meaning of Section 2(31) of GST Act. As per this provision, the consideration may be either in the form of money or otherwise.

14. Be that it may, a doubt seems to have arisen as to whether custom milling of paddy by the rice millers for Civil Supplies Corporation is liable to GST or whether it is exempted under S.No.55 of Notification 12/2017-Central Tax (Rate) dated 28.06.2017. In this regard,

clarification was issued in F.No.354/263/2017-TRU by the Government of India, Ministry of Finance, in its letter dated 20.11.2017 to the Commercial Tax Department, a copy of which is placed on record by learned Advocate General and it reads thus:

> ***3.*** *Milling of paddy is not an intermediate production process in relation to cultivation of plants. It is a process carried out after the process of cultivation is over and paddy has been harvested. Further, processing of paddy into rice is not usually carried out by cultivators but by rice millers. Milling of paddy into rice also changes its essential characteristics. Therefore, milling of paddy into rice cannot be considered as an intermediate production process in relation to cultivation of plants for food, fibre or other similar products or agricultural produce.*
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> ***4.*** *In view of the above, it is clarified that milling of paddy into rice is not eligible for exemption under S.No.55 of Notification 12/2017-Central Tax (Rate) dated 28th June 2017 and corresponding notifications issued under IGST and UTGST Acts.*
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> ***5.*** *GST rate on services by way of job work in relation to all food and food products falling under Chapters 1 to 22 has been reduced from 18% to 5% vide notification No.31/2017-CT(R) [notification No.11/2017-CT (Rate) dated 28.06.17. S.No.26 refers]. Therefore, it is hereby clarified that milling of paddy into rice on job work basis, is liable to GST at the rate of 5% on the processing charges (and not on the entire value of rice).*

15. From the above clarification, it is clear that custom milling of paddy is not exempted and on the other hand, it is a taxable service and liable to GST @ 5% on the processing charges and not on the entire value of rice.

16. To the above extent, there is no controversy. However, the bone of contention in this case is what constitutes the ‘consideration’ for levy of GST. According to Revenue, not only the milling charges @ Rs.15/- per quintal but also the by-products received by the petitioner constitute

the consideration, whereas, the contention of the petitioner is that by-products were just left by 4th respondent with the petitioner as they were not useful to it, for, their disposal was not economically viable. Further, the by-products were left to the petitioner as compensation to replenish the shortfall of the rice to make 67% of yield on milling.

17. In order to appreciate the above respective contentions and to know the nature and character of by-products, we should necessarily refer to the terms of the agreement. It is pertinent to mention here that in similar circumstances, in the case of **Food Corporation of India vs. State of A.P.** (*1 supra*), a Division Bench of the High Court of Andhra Pradesh held that when the terms between the parties are under an agreement, those terms are sacrosanct and cannot be explained otherwise by adducing oral evidence. The facts in that case briefly are that the FCI entered into agreements with different millers to whom it supplied paddy for the purpose of milling and paid hire charges and milling charges. As per the milling agreement, the FCI agreed to give the by-products such as broken rice, husk and bran to the millers. The Assessing Authority added the value of the by-products to the turnover of the FCI for the purpose of computation of Sales Tax, treating such by-products to have been sold by the FCI to the millers. The contention of the FCI was that it just allowed the millers to treat the by-products as their property but there was no sale between them and it did not receive any remuneration in that regard and therefore same cannot be added to

its turnover. In that context, the Division Bench perused the relevant term relating to by-products embodied in clause E(v) which is as follows:

> "The by-products, viz., broken rice, rice fragments, rice bran and husk, etc., obtained in the shelling of paddy shall be the property of the agent and these products shall not be the responsibility of the FCI. However, sales tax, if any on the value of such by-products will be recovered from the miller at the rate fixed by the appropriate Government and in force from time to time."

Analysing the above stipulation, the Division Bench observed thus:

> **5.** Since in the agreement the service charge is indicated as only Rs.5 per quintal of paddy and nothing else is indicated towards remuneration, there is no warrant to stipulate a further condition regarding remuneration, as has been done by the authorities under the Andhra Pradesh General Sales Tax Act. It is well-known that when the terms between the parties are under an agreement, the terms are sacrosanct between them and that it can neither be varied or altered or explained otherwise by adducing of oral evidence. (Emphasis supplied).

> Clause E(v) does not speak of the by-products having been allowed as remuneration for milling. All that it says is that the by-products are not the responsibility of the petitioner and concedes that these by-products are the property of the agent. There is nothing to show that the transfer of property in the goods or the by-products to be by way of sale, but only indicates that the FCI does not concern or bother itself for the broken rice, etc., for which it has no use and does not want to be burdened with the clause would not lead to the proof of there having been a sale. The transfer of property in the goods might take place even when there is no sale, say where there is a voluntary transfer or gifting away of the goods in question.

18. From the above, it percolates:

(i) When the terms are entered in the form of a written agreement, the same are sacrosanct and shall be looked into know the

purpose for which by-products were given to the miller and not by adducing oral evidence.

(ii) When the terms only specify a certain amount as remuneration and nothing else is indicated towards remuneration, no further condition can be regarded as remuneration.

(iii) When the terms say that the by-products shall be the property of the agent (miller), such transfer of property in the goods cannot be treated as sale.

In the light of above jurisprudence, we have to meticulously analyse the terms of the agreement to know whether in the instant case, the by-products assumed the character of 'consideration'.

19. Along with the counter, the 4th respondent filed copy of agreement dated 18.12.2017 entered into by it with the petitioner. The agreement contains 34 clauses meticulously incorporating therein, all the relevant terms relating to CMR. Clause No.22 relates to by-products. It says:

> ***22.*** *That the mill shall retain all by-products such as brokens, bran, husk etc., derived during the process of milling. The mill shall be responsible to incur expenses and taxes on sale of by-products.*

With regard to the payment of consideration i.e., milling charges, a separate clause i.e., Clause No.17 is included which says:

> ***17.*** *That the Corporation will pay milling charges as fixed by the GOI for the KMS 2017-18. The milling charges are inclusive of transportation of paddy and rice upto a distance of 8 KMs and other incidentals upto delivery of rice to the FCI/Corporation godown.*

Thus, as can be seen, the above two clauses couched in the agreement are distinct and independent to each other. Whereas, Clause No.17 says that milling charges will be paid as fixed by the GOI (admittedly @Rs.15/- per quintal), Clause No.22 states that the mill shall retain all the by-products such as brokens, bran, husk etc., derived during the process of milling. There is no slightest insinuation in either clause that the by-products shall form part of the consideration. If the parties to the agreement had such intention, nothing prevented them to do so. As we observed, all the terms of CMR, both significant and trivial, are meticulously incorporated. For instance, it was mentioned that the mill shall deliver raw rice – 67% and boiled rice – 68% as against the paddy delivered for CMR; the mill shall bear unloading charges, insurance, tarpaulin, ropes, dunnage material, prophylactic and curative treatment expenditure etc; the mill shall use SBT gunnies supplied with paddy stocks and shall return the left over gunnies to the corporation, failing which, 60% of the cost of the gunny will be collected from the mill etc. Going by the way the aforesaid terms are meticulously incorporated, one can logically conclude that, if the parties wanted to covenant that by-products shall form part of the consideration, they would have mentioned in clear terms. Therefore, we have no demur to hold that the absence of such mentioning is an indicative that the by-products which

are allowed to be retained by the petitioner are not the part of the consideration. We cannot conjunct both the above clauses to bring the by-products into the purview of consideration.

20. In the above context, the argument of learned Advocate General that since the later part of Clause No.22 ordains that the petitioner shall be responsible to pay tax on sale of by-products, the same shall be treated as part of consideration, cannot be countenanced. Treating the by-products as part of consideration and payment of tax on sale of by-products are two different aspects. The petitioner has to pay tax on sale of by-products (if they are taxable), whether he received the by-products from 4th respondent either towards part of consideration or freely. Therefore, the later part of Clause No.22 is not a determinative factor for holding that the by-products are part of the consideration. On the other hand, the submission of the petitioner that the by-products are given to the petitioner towards compensation appears to be logically correct. As per Clause No.8 the petitioner has to handover 67% of raw rice and 68% of boiled rice as against the paddy delivered to him for milling. The submission of petitioner is that the actual yield will be 61% to 62% only and he has to replenish the shortfall by incurring expenditure and therefore to compensate him, the by-products were allowed to be retained by him free of cost. On a conspectus of the terms of agreement, we hold that the by-products form part of compensation but not consideration. We are constrained to hold that in

the impugned order, the 1st respondent erroneously concluded that the miller was allowed to retain the by-products *towards consideration*, though such import is impermissible from the terms of the agreement. Therefore, the impugned order to the extent of including the value of by-products to the milling charges and assessing tax is legally unsustainable.

21. The objection of learned Advocate General regarding maintainability of Writ Petition in view of availability of alternative remedy is concerned, true that as against the impugned Assessment Order an appeal is provided under Section 107 of GST Act. It is also true that this Court will not generally entertain writ when efficacious alternative remedy is available. However, since the facts in the present case are squarely covered by the ratio laid by the Division Bench in ***Food Corporation of India vs. State of A.P.*** (*1 supra)* and the 1st respondent without considering the same committed legal error on sheer assumptions, we thought it apposite to entertain the writ petition instead of driving the petitioner to the Appellate Authority. In this regard, the decisions relied upon by learned Advocate General can be distinguished. In ***Glaxo Smith Klina Consumer Health Cares Ltd.*** case *(2 supra),* the question for consideration before Apex Court was whether the High Court in exercise of writ jurisdiction ought to entertain a challenge to the Assessment Order on the sole ground that the statutory remedy of appeal against that order was foreclosed by the

law of limitation. In that case, as against the Assessment Order dated 21.06.2017, the assessee filed a belated appeal on 24.09.2018 instead of within 30 days from the date of receipt of the order copy. The same was dismissed on 25.10.2018 being barred by limitation and also as no sufficient cause was made out. Thereafter, a writ petition was filed before High Court challenging the Assessment Order dated 21.06.2017, but not the appellate order dated 25.10.2018. Ultimately, the writ petition was allowed setting aside the impugned Assessment Order dated 21.06.2017 and the assessee was relegated before the Assessing Authority for consideration of the matter afresh after hearing the assessee. The same was challenged by the Revenue before Apex Court. The Apex Court found fault with the order of the High Court mainly for the reason that as per Section 31 of A.P. Value Added Tax, 2005, an appeal could be filed within 30 days from the date of receiving the order and the Appellate Authority can condone the delay in filing appeal upto 30 days more and therefore, the Appellate Authority is not empowered to condone delay beyond the aggregate period of 60 days from the date of the order, but the High Court without considering these provisions, set aside the original Assessment Order. The Apex Court observed thus:

> **15.** *xxxx This approach is faulty. It is not a matter of taking away the jurisdiction of the High Court. In a given case, the assessee may approach the High Court before the statutory period of appeal expires to challenge the assessment order by way of writ petition on the ground that the same is without jurisdiction or passed in excess of jurisdiction – by overstepping or crossing the limits of jurisdiction including in flagrant disregard of law and*

> *rules of procedure or in violation of principles of natural justice, where no procedure is specified. The High Court may accede to such a challenge and can also non-suit the petitioner on the ground that alternative efficacious remedy is available and that be invoked by the writ petitioner. However, if the writ petitioner choses to approach the High Court after expiry of the maximum limitation period of 60 days prescribed under Section 31 of the 2005 Act, the High Court cannot disregard the statutory period for redressal of the grievance and entertain the writ petition of such a party as a matter of course. Doing so would be in the teeth of the principle underlying the dictum of a three-judge Bench of this Court in Oil and Natural Gas Corporation Limited (supra). In other words, the fact that the High Court has wide powers, does not mean that it would issue a writ which may be inconsistent with the legislative intent regarding the dispensation explicitly prescribed under Section 31 of the 2005 Act. That would render the legislative scheme and intention behind the stated provision otiose.*

In the case on hand, the Assessment Order was passed 29.10.2018 and as per Section 107 of GST Act, an appeal shall be filed within three (3) months from the date of communication of the order. The Writ petition is filed on 17.12.2018 i.e., well within the period of limitation for filing appeal. Having regard to the dictum laid in **Glaxo Smith's** case (*2 supra*), this Court can either entertain the writ petition or refer the petitioner to Appellate authority. Since the impugned order was passed having no regard to the law laid down in the case of ***Food Corporation of India vs. State of A.P*** *(1 supra),* the writ was entertained. For the same reason, the other decisions relied upon by learned Advocate General are not followed.

22. The objection raised by learned counsel for the 4th respondent that in view of the arbitration clause, the writ petition is not maintainable, has no teeth. It should be noted that there are no disputes between the petitioner and the 4th respondent with regard to the

implementation of the terms of the agreement. On the other hand, the dispute is between the Revenue and the petitioner as to whether or not the by-products form part of the consideration. Since such a dispute cannot be referred to and resolved by the Arbitrator, the Writ Petition is very much maintainable.

23. In the result, this Writ Petition is allowed and the impugned Assessment Order passed by the 1st respondent vide Ref. No.CGST/ 2017-18/05 dated 29.10.2018 in so far as it relates to the levy of GST on the value of by-products i.e., broken rice, bran and husk treating them as part of the consideration paid to the petitioner for milling of the paddy, is set aside. No costs.

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

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U. DURGA PRASAD RAO, J

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K.SURESH REDDY , J

Date: 20.11.2020
MVA / MS