IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 16.11.2023

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

W.P.Nos.10852 & 10855 of 2021
and
W.M.P.Nos.10772 & 10773 of 2021

The Commercial Tax Officer-GD-III,
Office of the Commercial Tax Officer-GD-III,
Commercial Taxes Department,
100 Feet Road, Ellaipillaichavady,
Puducherry 605 005.

... Petitioner in both petitions

Vs.

1.M/s.Suzlon Energy Limited,
R.S.No.59, Thiruvandarkoil,
Mannadipet Commune,
Puducherry.

2.The Assistant Commissioner (Appeal),
Commercial Taxes Complex,
100 Feet Road, Ellaipillaichavady,
Puducherry 605 005.

... Respondents in both petitions

Common Prayer:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the 2nd respondent herein relating to the order dated 28.07.2022 passed in Appeal Nos.24/GST/2020-21/AC (Appeal) & 23/GST/2020-21/AC (Appeal) respectively and quash the same.

For Petitioner
in both petitions : Mr.Ramaswamy Meyyappan,
Government Advocate

For Respondent
in both petitions : Mr.Raghavan Ramabadran,
for M/s.Lakshmi Kumaran
& Sridharan Attorneys for R1

COMMON ORDER

These writ petitions have been filed challenging the impugned orders passed by the second respondent.

2. In these petitions, the said impugned orders were challenged by the petitioner on the following grounds:

2.1 According to the petitioner, the first respondent had procured the materials from the supplier, where the supplier paid IGST at the rate of 18% and made the supply. However, for the final product, the first respondent is liable to pay IGST only at the rate of 5%. Further he would contend that the supplier of the first respondent is also supposed to have paid only 5% IGST on the input product, but he had wrongly paid 18% IGST and since there is no inverted duty structure in this case, the refund application can be rejected on this ground. Hence, he would contend that since the second respondent had passed the impugned order without considering the above aspect, the said impugned order is liable to be set aside.

2.2 The another stand taken by the petitioner is that since the supplier of the first respondent had paid IGST for the input products at the rate of 18%, the first respondent also should have paid IGST for the final products at the rate of 18%. However, this aspect was also not considered by the second respondent while passing the impugned order and hence, the same is liable to be set aside.

3. On the other hand, the learned counsel appearing for the first respondent would submit that in the present case, the vendor of the first respondent had paid 18% IGST and there is no dispute on that aspect. The contention of the first respondent was that since the assessment year was already completed, the jurisdictional officer has no *locus standi* for the petitioner to take a stand that the assessment order was wrong. This aspect was well considered by the second respondent in the said impugned order. Therefore, he would submit that there is no illegality in the said impugned order.

4. Further, he would submit that prior to the rejection of refund application, the show cause notice was issued by the petitioner against the first respondent, wherein they had stated that the first respondent also should have paid 18% of duty on the final product since his vendor had paid 18% of duty on the input product. As far as this aspect is concerned, he would submit that in the rejection of refund application, the petitioner had took a stand that the first respondent is liable to pay 5% duty on the final product. However, now contrary to the same, he cannot take a

different stand and contend that the first respondent is supposed to have paid 18% duty. Further, he would contend that the petitioner is taking contrary stands from time to time to suit their convenience and accordingly, they had filed the present petitions. Hence, he would submit that since all those aspects were well considered by the second respondent in the impugned order, these writ petitions are not sustainable and prays for dismissal of the same. In support of his contentions, he would refer to the following judgements:

(i) ***Sarvesh Refractories (P) Ltd vs. Commissioner of C.EX & Customs*** reported in ***2007 (218) E.L.T. 488 (S.C.)*** rendered by Hon'ble Apex Court and

(ii) ***M/s.Modular Auto Limited vs. Commissioner of Central Excise, Chennai*** reported in ***2018 (8) TMI 1691*** rendered by the Hon'ble Division Bench of this Court.

5. I have given due consideration to the submissions made by the learned counsel for the petitioner as well as the respondent and also perused the materials available on record.

6. The issue that has to be decided in these petitions is whether the first respondent is entitled for refund or not.

7. In the present case, there is no dispute on the fact that the vendor of the first respondent had paid 18% duty on the goods supplied to the first respondent. It is also not in dispute that the output or final product of the first respondent is chargeable at 5% IGST.

8. At this juncture, it would be appropriate to extract the provisions of Section 54(3) of the Goods and Services Tax Act, 2017 (hereinafter called as GST Act), hereunder:

> ***54. Refund of tax.—***
>
> *(1) .....*
>
> *(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:"

9. A reading of the above provision of Section 54(3)(ii) of the GST Act, makes it clear that if any rate of tax of input is higher than the rate of tax of output, the refund application can be filed to refund the excess amount paid in the input tax.

10. The contention of the petitioner was that if the tariff is higher rate for input and lower rate for the the final product, the first respondent is certainly entitled for refund in terms of Section 54(3) of GST Act. In the present case, the input product is chargeable only at the rate of 5%, however, it has been wrongly made at the rate of 18% by the vendor of the first respondent. Therefore, the first respondent cannot invoke Section 54(3) of GST Act. Further, it appears that a notice was issued by the petitioner stating that while selling the final product, the first

respondent should have collected the IGST at the rate of 18% at par with the rate of tax paid by the supplier for the input product i.e., at the rate of 18%.

11. The fact remains that the input is chargeable to duty at the rate of 5% and the same was admitted by the petitioner as well as the first respondent and it was also stated in the impugned order by the second respondent. In terms of Section 54(3)(ii) of the GST Act, if the rate of tax on input is higher than the rate of tax on output, certainly, the person can claim the refund. Accordingly, in the present case, the duty paid on input is 18% though it is chargeable at 5%. Therefore, this Court is of the considered view that the petitioner is entitled for refund in terms of the provision of the Section 54(3)(ii) of the GST Act and the said view was also held by the second respondent in the impugned order. Hence, this Court does not find any error or illegality in the order passed by the second respondent on this aspect.

12. As far as the contention of the petitioner, that since the supplier of the first respondent had wrongly paid 18% IGST on the input, the first respondent should have paid 18% duty on output, is concerned, this Court is not inclined to accept the same since this Court does not find any substance in the said submission made by the learned counsel for the petitioner for the reason that at any cost, the petitioner cannot insist or advise the Assessee (first respondent) to pay excess rate of duty than the duty prescribed in the law.

13. In the judgement of the Hon'ble Apex Court in ***Sarvesh Refractories (P) Ltd vs. Commissioner of C.EX & Customs*** (mentioned supra), it has been held as follows:

> *"6. The finding recorded by the Tribunal is unexceptionable. We agree with the view taken by the Tribunal that the appellant could not get the classification of 'Loadall' changed to Heading 84.27 from 84.29, as declared by the manufacturer. Insofar as the penalty imposed by the Authority in original is concerned, we are of the view that a case for imposition of penalty is not made out and accordingly, the same is set aside and deleted. Rest of the order of the Tribunal restoring the order of the Authority-in-original is confirmed."*

14. Further, in the judgement of the Hon'ble Division Bench of this Court in ***M/s.Modular Auto Limited vs. Commissioner of Central Excise, Chennai*** (mentioned supra), it has been held as follows:

> *"16. In the instant cases, it is not in dispute that whatever the portion of Service Tax component which was collected from the assessees by BIL was only the amount on which the CENVAT credit has been claimed by the assessees. Therefore, unless and until the assessment made on BIL was revised, which obviously could have been done, at this juncture, on account of the expiry of the period of limitation, the interpretation given by the Commissioner (Appeals) as well as the Tribunal with regard to the nature of invoice raised on the assesses is unsustainable. Furthermore, we find that the reason assigned by the Tribunal in paragraph 6.2 stating that the activity performed by the BIL for monitoring of production activities of the assesses cannot by any stretch of imagination be considered as an input service or in relation to the manufacture of final products of the assesses, is a statement, which is unsubstantiated by any record. At best, it can be taken as a personal opinion of the Tribunal, which could not have been a reason to reverse the credit availed by the assesses.*
>
> *17. What is important to note that the assessees' specific case is that there has been a service by BIL to the assessees in the matter of retrieval of data and service tax has been collected and paid by BIL and the correctness, legality or otherwise of the tax paid by the subject providers cannot be called in question by the Central Excise Officer having the jurisdiction over the*

assesses availing the credit. This question has not been considered. If the impugned orders are allowed to stand, then it would in effect mean that the jurisdictional assessment officers of the assesses are sitting in the judgment over the assessment made on BIL, over which, they have no jurisdiction."

15. The law laid down by the Hon'ble Apex Court and the Hon'ble Division Bench of this Court in the above said cases would apply to the present case.

16. Considering the above discussions and aforesaid judgements, I am not inclined to entertain these petitions since I do not find any merits in these petitions.

17. Therefore, this Court is of the view that the first respondent is entitled for refund as per the order passed by the second respondent and the first respondent is also entitled for interest at the rate of 9% per annum of the refund amount for the delay period in terms of Section 56 of the GST Act.

18. Accordingly, these writ petitions are dismissed. While dismissing the writ petitions, the petitioner is directed to pass the refund order and deposit the refund amount along with the interest to the account of the first respondent within a period of 30 days from the date of receipt of copy of this order.

19. In the result, these writ petitions are dismissed. No costs. Consequently the connected miscellaneous petitions are also closed

16.11.2023

Speaking/Non-speaking order
Index : Yes / No
Neutral Citation : Yes / No
nsa

To

The Assistant Commissioner (Appeal),
Commercial Taxes Complex,
100 Feet Road, Ellaipillaichavady,
Puducherry 605 005.

KRISHNAN RAMASAMY.J.,

nsa

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