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

\+ W.P.(C) 627/2020

M/S PITAMBRA BOOKS PVT. LTD, ... Petitioner

Through: Mr. Puneet Agrawal and Mr. Yuvraj Singh, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Satyender Kumar, CGSC for R-1. Ms. Sonu Bhatnagar and Ms. Venus Mehrotra, Advocates for R-2, 3 & 5.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 21.01.2020

W.P.(C) 627/2020

1. Issue notice. Counter-affidavit be filed within six weeks. Rejoinder, if any, be filed before the next date.

2. List the petition for hearing on 11.08.2020.

C.M. No. 1740/2020

3. The petitioner - who is engaged in the business of manufacturing and trading of books, is registered under the Goods and Service Tax Act

(hereinafter referred to as "the Act"). The business involves procuring raw materials and allied goods from the domestic market for manufacture of final product through its in-house manufacturing facility, which is then exported to markets in Sudan, Russia, Ethiopia, Guinea and other African/Asian countries etc. The export activity of the petitioner is categorised as zero-rated supplies as defined under Section 16(1)(a) of the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "the IGST Act").

4. The present petition *inter-alia* impugns Circular No.37/11/2018-GST dated 15.03. 2018 and Circular No. 125/44/19-GST dated 18.11.2019. Mr. Puneet Agrawal, learned counsel for the petitioner submits that owing to the restrictions imposed in the aforenoted circulars, Petitioner has been deprived of the benefit of availing refund claim of the unutilised input tax credit for the period from April, 2018 to June, 2018. This is causing serious financial hardship as more than Rs.30 crores of accrued and unutilised input tax credit, that is eligible for refund is now lying stuck. The implementation of the aforesaid circulars on the GSTN portal has occasioned the disablement of the option for filing the refund of tax. He submits that the problem stems from paragraph 8 of impugned circular no. 125/44/2013/GST dated 18th November, 2019, which inhibits refund claims for a period of two separate (not successive) financial years. He argues that this is in contravention of Section 44 as also Rule 89 of the IGST rules. The aforesaid paragraph reads as under**:**

"8. The applicant, at his option, may file a refund claim for a tax

period or by clubbing successive tax periods. The period for which refund claim has been filed, however, cannot spread across different financial years. Registered persons having aggregate turnover of up to Rs. 1.5 crore in the preceding financial year or the current financial year opting to file FORM GSTR-1 on quarterly basis, can only apply for refund on a quarterly basis or clubbing successive quarters as aforesaid. However, refund claims under categories listed at (a), (c) and (e) in para 3 above must be filed by the applicant chronologically. This means that an applicant, after submitting a refund application under any of these categories for a certain period, shall not be subsequently allowed to file a refund claim under the same category for any previous period. This principle / limitation, however, shall not apply in cases where a fresh application is being filed pursuant to a deficiency memo having been issued earlier."

5. Mr. Agarwal, relies upon Article 286(1) of the Constitution of India which provides that no law of state shall impose, or authorise the imposition of tax on the supply where said supply takes place in the course of export out of the territory of India. He also refers to the definition of "export of goods" as provided in Section 2(5) of the IGST which reads as under:

"(5) "export of goods" with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India;"

6. Mr.Agarwal also relies upon Section 16(1)(a) of the IGST Act which deals with zero rated supply and reads as under:

"1[(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.]"

(Emphasis Supplied)

7**.** He argues that the petitioner as exporter of goods, has a substantive right to claim refund of "unutilised input tax credit". He submits that sub clause (a) of Sub Section (3) of Section 16 provides that a registered person making zero rated supplies shall be eligible to claim refund by making supply of goods and services 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 in

accordance with Section 54 of the Central Goods and Service Tax (CGST) Act or the rules made thereunder. Section 54(1) of the CGST provides as under**:**

> *"Section 54 – Refund of Tax*
>
> ***(1) Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed:***
>
> ***Provided that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in the return furnished under section 39 in such manner as may be prescribed.***
>
> *(2) A specialised agency of the United Nations Organisation or any Multilateral Financial Institution and Organisation notified under the United Nations (Privileges and Immunities) Act, 1947 (46 of 1947), Consulate or Embassy of foreign countries or any other person or class of persons, as notified under section 55, entitled to a refund of tax paid by it on inward supplies of goods or services or both, may make an application for such refund, in such form and manner as may be prescribed, before the expiry of six months from the last day of the quarter in which such supply was received.*
>
> *(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.*

[Emphasis Supplied]

8. Section 54(3) of the said Act provides that a registered person claiming refund of any "unutilised input tax credit" at the end of any tax period, *may make an application before the expiry of two years from the relevant date as enabled by Section 54(1)*. Further, Rule 89(4)(F) of CGST rules define the term "relevant period" as the period for which the claim has been filed. He submits that on a harmonious reading of the aforesaid provisions, it emerges that a person making zero rated supplies can claim refund of unutilised input tax credit at the end of any tax period by making refund application before the expiry of two years from the relevant date in such form and manner as may be prescribed. He further submits that Circular No. 17/17/2017 earlier provided that the refund period could not spread across different months. However, on receiving representations from traders and the stakeholders, the

Government became cognizant of the difficulties faced by the exporters while claiming refund, and the CBIC issued the impugned Circular No. 37/11/2018, recognising the difficulties faced by exporters, which is evident from the following clauses of the said circular:

> *"11.1 In many scenarios, exports may not have been made in that period in which the inputs or input services were received and input tax credit has been availed. Similarly, there may be cases where exports may have been made in a period but no input tax credit has been availed in the said period. The above referred rule, taking into account such scenarios, defines relevant period in the context of the refund claim and does not link it to a tax period.*
>
> *11.2 In this regard, it is hereby clarified that the exporter, at his option, may file refund claim for one calendar month/quarter or by clubbing successive calendar months/quarters. the calendar month(s)/ quarter(s) for which refund claim has been filed, however, <u>cannot spread across different financial years.</u>"*

9. Mr. Agarwal argues that the language of clause 11.1 indicates that respondents have acknowledged that in a situation where exports have been made in the period where no input tax credit has been availed, the relevant period in the context of refund claim cannot be linked to a tax period. He submits that despite recognising the difficulties faced by the exporters, the respondents have failed to address the scenario in which the petitioner is placed, wherein the refund claim pertains to a different financial year. Under Clause 11.2, the exporter has been given an option to file a refund claim for one calendar month/quarter or by clubbing successive calendar months/quarters, however, the said clause restricts the claim of refund in case it is spread across different financial years. The aforesaid restriction is

ultra vires the Act and the provisions contained there under. He further argues that the petitioner was availing the Input Tax Credit (ITC) pertaining to zero rated exports and taxable supplies. GST paid on raw materials which were used solely for making exempted supplies were separately identified and were reversed in accordance with the provisions of Rule 42 of the CGST Rules. The ITC relatable to zero rated and taxable supplies so availed was utilised for meeting the output tax for domestic supplies. The ITC balance after utilising the same against output tax liability is eligible for refund subject to the computation of maximum eligible amount i.e. the amount computed as per Rule 89(4), which provides as under:

> *"[(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, 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; [(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.']132 (F) —Relevant period‖ means the period for which the claim has been filed"***

10. For the period from November, 2017 to June, 2018 i.e. for eight months, Petitioner claims that the eligible refund in terms of the above extracted Rule 89(4) would be Rs. 2.80 crores in accordance with the figures available in the GSTR 3B return. For the period from July, 2018 to March, 2019, the amount of eligible refund is Rs.14.32 crores. At the end of June, 2018, the balance ITC was Rs.6.49 cores and likewise, the balance at the end of March, 2018 is Rs.20.68 crores which includes the ITC claimed and allowed till October, 2017. The petitioner exported finished products worth Rs.2,31,934,457 out of the raw-material received in the month of June, 2018. Upon export, the petitioner became eligible for claiming refund of unutilised ITC amounting to a total of Rs.2.80 crores. Petitioner procured raw material after paying GST from domestic market and manufactured the final product in the months from November, 2017 to June, 2018. However,

the production done in the above months was exported only in June, 2018. Therefore, the ITC earned by the petitioner is spread over two financial years i.e. 2017-18 and 2018-19 and whereas the export against the said purchases was made only in the financial year 2018-19. Mr. Agrawal submits that in terms of Section 16(1) and 16(3) of IGST r/w 54(3) of CGST Act, the petitioner is eligible for the refund of accumulated unutilised ITC of Rs. 2.80 crores on account of export of goods. The current position is that by virtue of the circulars, the petitioner is not able to claim the refund as the option of selecting the tax period which lies with the petitioner in terms of the aforesaid provisions, has been denied. Petitioner has been trying to file the refund application for the unutilised input tax credit claimed in the respective months of production; however the impugned circulars have denied the petitioner the statutory rights. Rule 89(4) of the CGST Rules which provides the formula for calculating input tax for refund is in contravention of Section 16 of the IGST Act r/w Section 54 of CGST Act as the said Rule restricts the computation of the refund taking the basis of ITC *"availed during the relevant period"*. The "relevant period" has been defined in Rule 89(4)(F) as the period for which the claim has been filed and said provision is also impugned in the petition. Mr. Agarwal argues that the impugned circulars, in so far as they restrict the refund claims only on monthly basis, are contrary to the rights conferred by the Act.

11. Ms. Bhatnagar, learned senior standing counsel for revenue on the other hand, has argued that under the scheme of the Act, the tax period is on month to month basis. She submits that though the Government has provided for clubbing of the months and the quarters, however, under no

circumstances can the refund claims spill over from one year to another. She argues that Petitioner does not have unfettered rights for claiming refund. Section 16(3) of the IGST Act, clearly stipulates that the refund is subject to conditions, and therefore, the Government is well within its jurisdiction to impose conditions by way of the impugned circular. Further, she submits that under Section 2(106) of the GST Act, the tax period has been defined to mean a period for which a return is required to be filed. The return under the Act has to be filed on a month to month basis and, therefore, the petitioner does not have any right to claim refund for one financial year, in another.

12. The matter certainly requires our consideration and we have already called upon the respondents to file a detailed counter affidavit to meet the contentions of the petitioner. However, at this stage, we are of the *prima facie* view that by way of the impugned circulars, though the respondents recognise the difficulties faced by the exporters and have permitted them to file refund claim for one calendar month/quarter or by clubbing successive calendar months/quarters, yet the restriction pertaining to the spread of refund claim across different financial years is arbitrary. There is no rationale or justification for such a constraint. In the instant case, where exports are not made in the same financial year, question arises as to whether Respondents can restrict the filing of the refund for tax periods spread across two financial years and deprive the petitioner of its valuable right accrued in his favour. In exports, availability of the rotation of funds is essential for the business to thrive. Moreover, businesses do not run according to the whims of the executive authorities. The business world cannot be told when to place orders for exports; when to manufacture the

goods for export; and; when to actually undertake the exports. Respondents' impugned circulars have thus blocked the capital of the petitioner and the unutilised ITC and it has accumulated huge amount of unutilised ITC to the tune of Rs.30 crores. Merely because the petitioner made exports in the month of June, 2018, we do not see any justification to deny the refund of the ITC which have accumulated in the previous financial years. The entire concept of refund of ITC 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. The Respondents cannot, artificially by acting contrary to the fundamental spirit and object of the law, contrive ways to deny the benefit, which the substantive provisions of the law confer on the tax payers. Thus, in our considered opinion, the petitioner has a strong *prima facie* case, and we cannot deny the petitioner of its right to claim refund which is visible from the mechanism provided under the Act. The impugned circulars take away the vested right of the taxpayer that has accrued in the relevant period. It would be profitable to refer to the judgment in this Court in ***Pioneer India Electronics (P) Ltd. vs. Union of India & Anr. ILR (2014) II DELHI 791*** wherein impugned Circular stipulating that section 27 of the Customs Act had no application was quashed, holding that Circulars can supplant but not supplement the law. Circulars might mitigate rigours of law by granting administrative relief beyond relevant provisions of the statute, however, Central Government is not empowered to withdraw benefits or

impose stricter conditions than postulated by the law**.** Further the Constitution Bench of the Supreme Court in the case of ***Commissioner of Central Excise, Bolpur vs. Ratan Melting & Wire Industries (2008) 13 SCC 1***, it was held as under:

> "**7.** *Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.*
>
> *8. ..... To lay content with the circular would mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme Court. That would be against the very concept of majesty of law declared by this Court and the binding effect in terms of Article 141 of the Constitution.*"

13. Having regard to the aforenoted circumstances, till the next date of hearing, we stay the rigour of paragraph 8 of Circular No. 125/44/2019-GST dated 18.11.2019 and also direct the Respondents to either open the online portal so as to enable the petitioner to file the tax refund electronically, or to accept the same manually within 4 weeks from today.

14. Respondents are directed to process the petitioner's claim in accordance with law once the tax refund is filed.

VIPIN SANGHI, J

SANJEEV NARULA, J

JANUARY 21, 2020
v