IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.07.2022

CORAM

THE HONOURABLE **DR.JUSTICE ANITA SUMANTH**

W.P.No.6979 of 2019

M/s.Grand Technologies
Represented by its Partner S.Chitra Devi,
No.B 183, 186 & 187, 26th Cross Road,
PIPDIC Industrial Estate, Mettupalayam,
Puducherry – 605 009. ... Petitioner

Vs

The Assistant Commissioner of GST & CE,
Puducherry Division III,
No.14, Municipal Street,
Azeez Nagar, Reddiarpalayam,
Puducherry – 605 010. ... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the respondent pertaining to his order issued from C.No.V/ST/15/94/2018 (RF) dated 28.01.2019 vide order in original No.04/2019 (Refund) dated 28.01.2019 and quash the same, consequently direct the respondent to consider the refund claim filed by the petitioner, by treating the date on which the petitioner filed refund application to PIPDIC as the date of filing of refund claim.

For Petitioner : Mr.G.Natarajan

For Respondent : Mrs.Hema Muralikrishnan,
Senior Standing Counsel

ORDER

The petitioner challenges an order that has been passed rejecting a claim of refund. The petitioner manufactures parts of mosquito machines and was registered under the erstwhile service tax as well as Central Excise Laws.

2. The unit had been established on land that had been allotted by the Pondicherry Industrial Promotion Development and Investment Corporation (PIPDIC), which is a Government of Puducherry Undertaking. The land had been leased out to the petitioner for a period of 76 years. The petitioner had remitted premium of a sum of Rs.31,10,400/-, that included service tax of an amount of Rs.3,17,288/- at 12.36% as applicable.

3. Service tax had been paid under monthly returns that had been filed in time, in the capacity of a service recipient to PIPDIC that had duly deposited the same with the Central Government and no dispute is raised in this regard by the respondents. While this is so, a benefit had been granted by the Government by way of a refund of the tax paid, as a one-time premium. The exact language in terms of which the benefit was couched is as follows:

> *Refund shall be made of all such service tax which has been collected, but which would not have been so collected, had sub-section (1) been in force at all times.*

4. Thus, the amount paid as premium for the grant of long term lease of industrial plots for a period in excess of 30 years, was exempted from payment of service tax. Initially, the benefit under Notification No.41/2016-ST dated 22.09.2016 (Notification/Notification in question) was made effective from date of Notification.It was given statutory effect by insertion of Section 104 in Finance Act, 1994 in the year 2017 and the benefit was conditional made upon the service recipient having, i) in fact, received the service ii) paid the service tax during the period 01.06.2007 to 21.09.2016 and iii) filled an application seeking refund within a period of six (6) months from the date on which the Finance Bill received the assent of the President. The Finance Bill had been assented to on 31.03.2017 and thus the six month period ended on 30.09.2017.

5. Section 104, for purposes of clarity and completion, is extracted below:

> *SECTION 104 .(1) Notwithstanding anything contained in section 66, as it stood prior to the 1st day of July,2012, or in section 66B, no service tax, leviable on one time upfront amount(premium, salami, cost, price, development charge or by whatever name called) in respect of taxable services provided or agreed to be provided by a State Government industrial development corporation or undertaking to industrial units by way of grant of long term lease of thirty years or more for industrial plots, shall be levied and collected during the period commencing from the 1st day of June,2007 and ending with 21st day of September,2016 (both days inclusive).*
>
> *(2) Refund shall be made of all such service tax which has been collected, but which would not have been so collected, had sub-section(1) been in force at all times.*

(3) Notwithstanding anything contained in this Chapter, an application for claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill,2017 receives the assent of the President.

6. The petitioner, going by the effective date set out in the Notification, had promptly, and perhaps, even prematurely, made an application on 06.03.2017 to PIPDIC, immediately upon announcement of the scheme by the Hon'ble Finance Minister in the Budget Speech on the floor of the House. However, while the petitioner had, admittedly, complied with conditions (i) and (ii), the question that arises in this Writ Petition is as to whether there is proper compliance of condition (iii) as set out in paragraph 4 of this order supra.

7. While the petitioner had undoubtedly made an application within the time frame stipulated, in fact even prior to the date of grant of Presidential assent, the application had been filed before PIPDIC and not before the Service tax authorities in terms of Section 11B of the Central Excise Act, 1944. The request for refund had been accompanied by copies of returns as required, to establish payment of service tax for the period stipulated. While this was so and the application had been filed well in time, there was no response from PIPDIC despite reminders dated 21.08.2017, 25.09.2017, 19.01.2018 and 12.02.2018, the last of the communications being filed with PIPDIC through the Pondicherry Chamber of Industries.

8. Finally, and only in response to the letter filed through the Chamber of Commerce, did PIPDIC respond on 28.06.2018 stating that the petitioner's request was misconceived as it ought to have been made before the service tax department. PIPDIC also confirmed two other factors; the first being that the service tax paid by the petitioner has been passed on to the service tax department and that no other request for refund had been received by PIPDIC from any other assessee, similar to the petitioner.

9. The rejection by PIPDIC was dated 28.06.2018 and the petitioner thereafter wrote to the Superintendent, Service Tax Department on 18.10.2018 seeking his advice on the way forward. The response from the Department sent via e-mail dated 31.10.2019 reads as follows:

> *Please refer to your letter dated 18.10.2018 for refund of service tax paid. In this regard, please submit the ER-1 returns and Service Tax returns for the relevant period to this office immediately.*

10. The initial view of the Superintendent, as conveyed on 31.10.2018, was that the petitioner was entitled to the refund as sought. He thus sought copies of the returns to establish payment of service tax by the petitioner, that were duly furnished. However, thereafter, the Department awoke to the fact that the claim had been made beyond the period mentioned in the Notification and

thus issued a show cause notice dated 19.12.2018 calling upon the petitioner to respond as to why the refund claim not be rejected.

11. A corrigendum was issued by the authorities to correct the period within which the claim ought to have been made as per Notification. The petitioner responded vide letter dated 11.01.2019 pointing out that it had made the claim in time, only before PIPDIC, and not before the service tax authorities. After hearing the petitioner, the impugned order-in-originaldated 28.01.2019 has come to be passed rejecting the petitioner's claim.

12. The submissions of the petitioner are two-fold. Firstly, petitioner submits that the appropriate limitation for processing of the refund claim would be a period three years, since, by the very grant of refund, the levy of service tax on the lease premium is rendered unconstitutional. The alternate submission is that the time spent before a wrong forum (PIPDIC) be excluded for the purpose of computation of limitation, seeing as, admittedly, the claim had been filed before PIPDIC in time.

13.On the first argument, learned counsel relies upon the judgment of 9 Judges of the Hon'ble Supreme Court in the case of *Mafatlal Industries Ltd. Vs. Union of India* ((1997) 5 SCC 536), and with respect to the alternate issue, he relies upon the following decisions:

1. Commissioner of Central Excise Vs. AIA Engineering Ltd. [2011 (21)

STR 367 (Guj.)]

2. *J.M.Baxi& Co. Vs. Government of India* [2016 (336) ELT 285 (Mad.)]

3. *Commissioner of Central Excise, Visakhapatnam-II Vs. Cairn Energy India Pty. Ltd.* [2015 (316) E.L.T. 612 (A.P.)]

4. *Choice Laboratories Ltd. Vs. Union of India* [2015 (315) ELT 197 (Guj.)]

5. *Academy of Maritime Education & Training Trust Vs. C.S.T. (Appeals-I), Chennai* [2018 (11) G.S.T.L. 261 (Mad.)]

6. *Sun Pharmaceutical Industries Ltd. Vs. Union of India* [2020 (374) ELT 222 (Del.)]

7. *Lipi Data Systems Ltd. Vs. Commissioner of Customs (ACC & Import), Mumbai* [2019 (370) ELT 444 Tri-Mum]

8. *Commissioner of Excise, Vadodara Vs. Shankar Packaging Ltd.* [2013 (291) ELT 475 (Tri. – Ahmd.)]

9. *M.R.International Vs. Commissioner of Customs (Import), Mumbai* [2014 (34) STR 303 (Tri.-Mumbai)

10. *Anurag Enterprises Vs. Commissioner of CGST, Ghaziabad* [2019 (369) ELT 1617 (Tri. – All.)]

11. *Teknomec Vs. Commissioner of GST & Central Excise, Chennai* [2020 (35) GSTL 135 (Tri. – Chennai)]

12. *Dynamic Techno Medicals Pvt. Ltd. Vs. Commissioner of CGST & Central Excise* [2021 (52) GSTL 309 (Tri. – Chennai)]

13. *Commissioner of Central Excise V. AIA Engineering Ltd.* (2011(2)STR 367 (Guj.))

14. The submissions advanced on behalf of the Department are that the levy in this case has not been held to be unconstitutional, but the refund has been directed to be given only by way of a benefit to the assesses. Thus, in such

a case, the petitioner cannot seek a benefit of general limitation of three years and is strictly bound by the period set out under the Notification.

15. With regard to the alternate argument, learned Standing Counsel would point out that the claim in this case has been made before PIPDIC, which is a Government Undertaking. In all cases, relied upon by the learned counsel for the petitioner, the claims had been filed before officers of the service tax department itself who were not the proper/appropriate officers, to consider such request. It was in such circumstances, that the Courts had held that since the claims had been made before the service tax department, though before the erroneous officers, a hyper-technical view should not be taken and the assessees' claims in those cases should be considered.

16. She relies upon the following decisions in support of her submissions:

(i) *Assistant Collector of Customs and Others Vs. Anam Electrical Manufacturing Co. and Others* [(1997) 5 SCC 744]

(ii)*Mafatlal Industries Ltd. Vs. Union of India* [(1997) 5 SCC 536]

(iii) *Union of India and Others Vs. Barmalt (India) Ltd. Gurgaon and Others* [(1997) 5 SCC 748]

17. Heard Mr.G.Natarajan, learned counsel for the petitioner and MsMrs.HemaMuralikrishnan, learned Senior Standing Counsel for the respondents.

18. The first argument advanced is that the provisions relating to levy of service tax on lease premium are rendered unconstitutional or erroneous by virtue of insertion of Section 104 in 2017, and this would entitle an assessee to the benefit of the larger limitation under general law. However, in my considered view, this is not a case where, by virtue of an amendment, by way of insertion of a provision, the charging provision is rendered unconstitutional.

19. Section 104, no doubt, states that no tax shall be levied or collected as a one-time measure, in regard to the taxable services provided or agreed to be provided, by a State Government, Industrial Development Corporation or Undertaking to industrial units by grant of long term lease in excess of 30 years. It further provides that there shall be a grant of refund of any service tax collected on the aforesaid account.

20. However, the exemption/refund is by way of benefit or concession granted to an assessee. The provisions of Section 66/66B, insofar as applicable to this issue, have not been struck down as unconstitutional or ultravires but are merely rendered inoperative by virtue of the munificence provided by Section 104. Thus, this is not a case where the assessee becomes entitled to a refund on account of any deficiency or lacunae in the statutory provision itself, but on account of a beneficial policy extended to the assessee. The notification granting such benefit would thus have to be construed strictly and it is solely upon

compliance with the conditions set out therein, that the assessee would become entitled to the benefit of refund. This argument is rejected.

21. The alternate submission is that the refund claim was indeed filed in time, albeit, before PIPDIC and this constitutes only a minor, condonable error. As stated earlier, it is imperative on the part of the assessee to have complied with the conditions set out under Section 104 and in this view of the matter, the order passed by the authority, impugned in this writ petition, contains no flaw.

22. To be noted however, that Section 104 does not stipulate where the claim is to be filed and to this extent, the filing of the claim before PIPDIC cannot be said to be in contravention of the provision. After all, the petitioner had been paying the amounts of service tax only to PIPDIC and hence its stand that refund must be sought from the entity to which payment had been made, can well be one legitimate, acceptable interpretation.

23. The application for refund has been filed by the petitioner before the authorities only 18.10.2018, which is, admittedly, beyond the period of six months as prescribed under Section 104 and to this extent, the impugned order cannot also be said to be erroneous. After all, one cannot expect the authorities to take an expansive view of the matter as urged by the petitioner and consider the application filed by the petitioner before PIPDIC as a refund claim under Section 11B filed before the Authorities.

24. However, the power endowed uon this Court in terms of Article 226 of the Constitution of India is substantial and wide, facilitating one to adopt a holistic perspective of all issues in arriving at a decision. Thus, in deciding whether the petitioner's claim before PIPDIC could be considered as compliance of the condition under Section 104, I take succour from the following facts:

(i) Section 104 was itself was enacted as a beneficial provision method. Legislature intended, in principle, that there shall be no levy of service tax in respect of services relating to grant of long term lease in excess of 30 years.

(ii) Admittedly, the transaction qua the petitioner and PIPDIC falls squarely within the factual and legal matrices envisaged under Section 104 and on this score, there is no dispute.

(iii) Also admittedly, the request of the petitioner for refund before PIPDIC was made 06.03.2017 even before the Presidential assent has been received, which is on 31.03.2017. Thus, the petitioner cannot be faulted for lethargy, negligence or even ignorance of the law.

(iv) It has thereafter approached PIPDIC on 21.08.2017, 25.09.2017, 19.01.2018 and thereafter, since there was no response from PIPDIC, approached the Pondicherry Chamber of Industries on 12.02.2018 urging their intervention to persuade the Managing Director of PIPDIC to grant the refund. Again, the petitioner has demonstrated diligence in the follow-up action.

(v) As per my observations in paragraph 24 above, there is no specification under Section 104 as to where such claims are to be made.

(vi) On 28.06.2018 a refund request was made to the Service Tax Department, within six months from date of receipt of rejection from PIPDIC.

(vii) Even the Service Tax Department does not reject the same outright and asks for copies of the returns to verify payment of tax. It was only in December that a show cause notice was issued proposing the rejection.

25. The sequence of events as narrated above reveals to me that the petitioner is not guilty of any violation, except perhaps, an error in its understanding of Section 104. The decisions cited on behalf of the petitioner wherein a wrong forum has been approached by those petitioners but condoned by the Court, are inapplicable in this matter, since the error is not one of approaching the wrong officer within the same Department.

26. In this case, the petitioner has filed the claim before PIPDIC which is altogether a different entity. However, the mere fact that the entity approached was PIPDIC and not an officer of the Department does not, in the light of the reasoning adduced above, persuade me to take a view adverse to the petitioner as I believe that such a conclusion would be hyper-technical.

27. Thus, while reiterating yet again that the impugned order does take one plausible view, I set it aside, invoking, and in exercise of powers vested in

this Court under Article 226 of the Constitution of India. The request of the petitioner shall be processed by the respondents and a decision taken on the merits of the claim for refund, within a period four weeks from date of uploading of this order.

28. This Writ Petition stands allowed in the above terms. No costs.

01.07.2022

Index : Yes / No
Speaking Order / Non-Speaking Order
Sl/ska

To

The Assistant Commissioner of GST & CE,
Puducherry Division III,
No.14, Municipal Street,
Azeez Nagar, Reddiarpalayam,
Puducherry – 605 010.

DR.ANITA SUMANTH, J.

Sl/ska

W.P.No.6979 of 2019

01.07.2022