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

% *Date of Decision: 26.07.2024*

\+ **W.P.(C) 9381/2023**

RAJIV SHARMA HUF PROPRIETOR OF M/S SAGAR SCOOTER SYNDICATE THROUGH ITS KARTA RAJIV SHARMA .....Petitioner

Through: Mr Vineet Bhatia, Mr Keshav Garg and Mr Aamnaya Jagannath Mishra, Advocates.

Versus

UNION OF INDIA AND ORS. .....Respondents

Through: Mr Syed Abdul Haseeb, CGSC for R1.
Mr Atul Tripathi, SSC for CBIC with Mr V.K. Attri, Mr Amresh Jha and Ms Priya Kumari, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE SACHIN DATTA

VIBHU BAKHRU, J. (Oral)

1. The petitioner, a Hindu Undivided Family, is engaged in the business of trading and export of automotive spare parts, automobile components and other allied products in the name and style of its proprietorship concern, ‘M/s Sagar Scooter Syndicate’. The petitioner is registered under the Central Goods and Services Tax Act, 2017 (hereafter *the CGST Act*) and has been assigned the Goods and Services Tax Identification No. (GSTIN) :07AAPHR6437P1Z6.

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2. The petitioner has filed the present petition impugning an Order-in-Appeal dated 24.04.2023 (hereafter *the impugned order*), whereby the petitioner's appeal under Section 107 of the CGST Act against an Order-in-Original dated 01.11.2022 (hereafter '*the impugned refund rejection order'*), was dismissed.

3. Although, the petitioner has the remedy of an appeal before the Appellate Tribunal in terms of Section 112 of the CGST Act but the petitioner cannot avail of the said remedy as the Appellate Tribunal has not been constituted. In the given circumstances we consider it apposite to entertain the present petition.

4. The petitioner made an application dated 23.08.2022, in the proper format (Form GST RFD-01), seeking refund of the accumulated Input Tax Credit (hereafter *ITC*) for the period of November, 2021 for an amount of ₹12,82,643/-. The petitioner claimed that it had exported the goods without payment of tax and was entitled to refund of the accumulated ITC in respect of the zero-rated supply under Section 16 of the Integrated Goods and Services Tax Act, 2017 (hereafter *the IGST Act*).

5. The Adjudicating Authority issued a Show Cause Notice (hereafter *SCN*) dated 10.10.2022 in FORM GST RFD-08 proposing to reject the petitioner's application for refund. The reasons for the same are mentioned in a tabular statement set out in the SCN. The same is reproduced below:

"Sr. No.	Description (Select the reasons of inadmissibility of refund from the drop down)	Amount Inadmissible
1	Invoices mentioned at Sr. No.2,37,38 & 39 in Anx B are not reflecting in GSTR-	

	2A of the month Nov-2021.	Rs.12,82,643/- (CGST-6,41,321/- SGST-6,41,322/-)"
2	Kindly Provide E-Way bills of Inward & Outward Supplies.	
3	Kindly Provide BRCs for the relevant period.	
4	Kindly provide Bank Statement and Ledger Account of suppliers for further verification.	

6. The petitioner responded to the SCN by filing a reply dated 21.10.2022 in FORM RFD-09.

7. The Adjudicating Authority accepted the petitioner's explanation regarding the four specified invoices, which were allegedly not reflected in the return – GSTR-2A of the month of November, 2021, and the E-Way bills for supplies. However, it rejected the petitioner's application for refund on the ground that the petitioner had failed to provide Bank Realization Certificates (hereafter *BRCs*), and the bank statements and the ledger accounts of the suppliers were found to be incomplete.

8. The petitioner appealed the impugned refund rejection order before the appellate authority under Section 107 of the CGST Act. The petitioner contended that it was not required to furnish BRCs for claiming refund in case of export of goods. Notwithstanding the same, the petitioner also submitted details of all BRCs. The appellate authority rejected the contention that furnishing of BRC's was not necessary to claim a refund of accumulated ITC. Further, the appellate authority also did not accept that the petitioner was entitled to any relief on account of producing the BRCs in the appellate proceedings. The appellate authority proceeded on the basis that in terms of Rule 96B of the Central Goods and Services Tax Rules, 2017 (hereafter *the CGST Rules*) a taxpayer was required to deposit the amount

refunded in case the export proceeds were not realized within the period allowed under the Foreign Exchange Management Act, 1999 (hereafter *FEMA*). The appellate authority held that since in the present case the refund had not been granted, sanctioning the refund would be an empty formality as the petitioner would be required to re-deposit the same on account of non-receipt of sale proceeds within the period of nine months.

9. The appellate authority also upheld the findings of the adjudicating authority that the ledger account of the suppliers submitted by the petitioner was incomplete and thus, the petitioner had failed to establish that it was not disentitled to avail the benefit of ITC in terms of Section 16(2)(c) of the CGST Act.

10. The petitioner has also impugned the provision of Rule 96B of the CGST Rules on the ground that it is *ultra vires* the provisions of the CGST Act and the IGST Act.

11. According to the petitioner, there is no requirement for a taxpayer to receive the sale proceeds of export of goods within the period stipulated under FEMA for the taxpayer to claim refund of tax under Section 16 of the IGST Act. However, the learned counsel for the petitioner does not press the challenge to the vires of Rule 96B of the CGST Rules and has confined the present petition to assailing the impugned order on merits.

REASONS & CONCLUSION

12. As is apparent from the above, the petitioner's application for refund was proposed to be rejected on four grounds. First, that there was a discrepancy in respect of certain invoices as they were not reflected in the

return (GSTR-2A) for the month of November, 2021. Second, that the petitioner was required to provide E-Way bills of inward and outward supplies. Third, that the petitioner was required to provide BRCs for the relevant period. And fourth, that the petitioner was called upon to provide bank statement and ledger account of suppliers for further verification.

13. As noted above, the petitioner had submitted its response to the notice for rejection of the application for refund (FORM-GST-RFD-08) and the adjudicating authority was satisfied in respect of the first two reasons, that are, certain invoices not being reflected in GSTR-2A and the supply of E-Way bills. The petitioner's application for refund was rejected for the remaining two reasons – that the petitioner had not provided BRCs for the relevant period, and the bank statements and ledger accounts of the suppliers were found to be incomplete.

14. At the threshold, it is relevant to note that in terms of the procedural scheme for processing an application for refund under the CGST Rules, a notice for rejection of an application for refund in FORM GST-RFD-08 is required to be issued only in case the proper officer is satisfied that the whole or part of the amount claimed as refund is not admissible or is not payable to the applicant.

15. It is relevant to refer to Rule 92(3) of the CGST Rules, which contemplates issuance of a notice in FORM GST-RFD-08. The same is set out below:

> "**92. Order sanctioning refund.-**
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> *** *** ***

> (3) Where the proper officer is satisfied, for reasons to be recorded in writing, that the whole or any part of the amount claimed as refund is not admissible or is not payable to the applicant, he shall issue a notice in FORM GST RFD-08 to the applicant, requiring him to furnish a reply in FORM GST RFD-09 within a period of fifteen days of the receipt of such notice and after considering the reply, make an order in FORM GST RFD-06**,** sanctioning the amount of refund in whole or part, or rejecting the said refund claim and the said order shall be made available to the applicant electronically and the provisions of sub-rule (1) shall, *mutatis mutandis*, apply to the extent refund is allowed:
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> Provided that no application for refund shall be rejected without giving the applicant an opportunity of being heard."

16. A plain reading of the said Rule indicates that a notice for rejection of an application for refund can be made only if the proper officer has satisfied himself that the claim for refund is not admissible. Rule 92(3) of the CGST Rules does not contemplate a general enquiry for eliciting documents or examining the returns. The necessary condition for issuance of a notice in a FORM GST RFD-08 is the satisfaction of the proper officer that the refund is inadmissible.

17. Rule 89(1) of the CGST Rules contains provisions for making an application for refund of tax, interest, penalty, fees or any other amount. Rule 89(2) of the CGST Rules sets out the documents that are required to be furnished along with the application (which is required to be submitted in FORM GST RFD-01). The proper officer is required to examine the said application and issue an acknowledgement under Rule 90 of the CGST Rules. If certain deficiencies are noticed in the application, the same are required to be communicated to the applicant in FORM GST RFD-03 as provided under Rule 90(3) of the CGST Rules.

18. In the present case, the Proper Officer has not issued any deficiency memo and thus, it must be assumed that all documents necessary for processing the refund claim, as required under Rule 89(2) of the CGST Rules, were filed along with the refund application. In the aforesaid view, the proper officer's demand to provide BRCs, bank statements and ledger accounts of the suppliers for further evaluation was not s*ensu stricto* in conformity with Rule 92(3) of the CGST Rules inasmuch as there is no ground for the proper officer to be satisfied that the petitioner's application for refund was required to be rejected on those grounds.

19. As noted above, the proper officer had set out four reasons in the SCN for rejection of the petitioner's application for refund. Insofar as the first two reasons are concerned, the proper officer was satisfied with the petitioner's explanation and it is not necessary to consider the same. The petitioner's application for refund was rejected on the ground that it had not provided BRCs and had provided incomplete bank statements and ledger accounts of suppliers for verification. Thus, these are the only two issues that require further examination.

20. Insofar as failure to furnish BRCs before the proper officer is concerned, it is relevant to note that the petitioner's claim for refund was on account of export of goods. Section 16(1) of the IGST Act provides that the expression "zero rated supplies" includes export of goods or services or both. Section 16(3) of the IGST Act provides that a registered person who makes zero rated supplies shall be eligible to claim refund of unutilized ITC on supply of goods or services or both without payment of integrated tax under a bond or a Letter of Undertaking, in accordance with the provisions

of Section 54 of the CGST Act. Thus, in terms of Section 16(3) of the IGST Act, the petitioner is entitled to refund of unutilized ITC on export of goods.

21. The expressions 'export of goods' and 'export of services' are defined under Sections 2(5) and 2(6) of the IGST Act respectively. The same are set out below:

> "2. **Definitions** – In this Act, unless the context otherwise requires,—
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> *** *** ***
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> (5) "export of goods" with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India;
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> (6) "export of services" means the supply of any service when,—
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> (i) the supplier of service is located in India;
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> (ii) the recipient of service is located outside India;
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> (iii) the place of supply of service is outside India;
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> (iv) the payment for such service has been received by the supplier of service in convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India; and
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> (v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with *Explanation* 1 in section 8;"

22. It is material to note that whereas the expression, 'export of services' is defined to mean supplies of services where the payment of the services has been received by the supplier of services in convertible foreign exchange or in Indian rupees as permitted by the Reserve Bank of India, no such condition is in the definition of the expression, 'export of goods', under Section 2(5) of the IGST Act.

23. There is merit in the petitioner's case that its claim for refund could not be rejected on account of non-furnishing of BRCs.

24. It is also necessary to refer to Circular No. 125/44/2019 - GST dated 18.11.2019 issued by the Central Board of Indirect Taxes and Customs. The said Circular also expressly provides that furnishing of BRCs is not a necessary condition for claiming refund in case of export of goods. Paragraph 48 of the said Circular is relevant and is set out below:

> "48. It is clarified that the realization of consideration in convertible foreign exchange, or in Indian rupees wherever permitted by Reserve Bank of India, is one of the conditions for export of services. In case of export of goods, realization of consideration is not a pre-condition. In rule 89 (2) of the CGST Rules, a statement containing the number and date of invoices and the relevant Bank Realization Certificates (BRC) or Foreign Inward Remittance Certificates (FIRC) is required in case of export of services whereas, in case of export of goods, a statement containing the number and date of shipping bills or bills of export and the number and the date of the relevant export invoices is required to be submitted along with the claim for refund. It is therefore clarified that insistence on proof of realization of export proceeds for processing of refund claims related to export of goods has not been envisaged in the law and should not be insisted upon."

25. Thus, in view of the aforementioned Circular, the petitioner's claim for refund of ITC could not be rejected by the proper officer on the ground of non-furnishing of BRCs.

26. However, the said issue is also rendered academic as, in fact, the petitioner did furnish the BRCs evidencing the realization of sale proceeds of export of goods. This is noted by the appellate authority in the impugned order. Notwithstanding the same, the appellate authority did not accept the BRCs by referring to Rule 96B of the CGST Rules. Rule 96B(1) of the CGST Rules provides that where refund of unutilized ITC on account of export of goods has been paid to an applicant but the sale proceeds have not been realized in full within such period as provided under FEMA including

any extension thereof, the persons to whom refund is made are required to deposit the same along with applicable interest within a period of thirty days of the stipulated period within which the sale proceeds were required to be realized. The appellate authority had reasoned that granting of refund would not serve any purpose because the petitioner would be required to re-deposit the same. However, this reasoning is flawed as it ignores Sub-rule (2) of Rule 96B of the CGST Rules, which provides that if the applicant produces BRCs within three months of realization of export sale proceeds; any amount recovered under Sub-rule (1) of Rule 96B of the CGST Rules would be refunded by the proper officer. Rule 96B of the CGST Rules is set out below:

> **"96B. Recovery of refund of unutilised input tax credit or integrated tax paid on export of goods where export proceeds not realised.**–(1)Where any refund of unutilised input tax credit on account of export of goods or of integrated tax paid on export of goods has been paid to an applicant but the sale proceeds in respect of such export goods have not been realised, in full or in part, in India within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), including any extension of such period, the person to whom the refund has been made shall deposit the amount so refunded, to the extent of non-realisation of sale proceeds, along with applicable interest within thirty days of the expiry of the said period or, as the case may be, the extended period, failing which the amount refunded shall be recovered in accordance with the provisions of section 73 or 74 of the Act, as the case may be, as is applicable for recovery of erroneous refund, along with interest under section 50:
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> **Provided** that where sale proceeds, or any part thereof, in respect of such export goods are not realised by the applicant within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), but the Reserve Bank of India writes off the

requirement of realisation of sale proceeds on merits, the refund paid to the applicant shall not be recovered.

(2) Where the sale proceeds are realised by the applicant, in full or part, after the amount of refund has been recovered from him under sub-rule (1) and the applicant produces evidence about such realisation within a period of three months from the date of realisation of sale proceeds, the amount so recovered shall be refunded by the proper officer, to the applicant to the extent of realisation of sale proceeds, provided the sale proceeds have been realised within such extended period as permitted by the Reserve Bank of India"

27. Since in the present case, the petitioner had produced the BRCs evidencing realization of sale proceeds – as also noted in the impugned order – the petitioner's application for refund could not be rejected for the reason that BRCs evidencing receipt of sale proceeds, were not produced within the period of nine months of export of goods and that was fatal to the petitioner's claim for refund of unutilized accumulated ITC in respect of zero-rated supply.

28. The second aspect to be examined is regarding furnishing of bank statements and ledger accounts of suppliers. By the SCN the petitioner was called upon to provide bank accounts and ledger accounts of suppliers for further verification. The petitioner provided the bank statements and had also provided the details of the suppliers as is evident from the petitioner's response in FORM GST RFD-09 furnished on 21.10.2022. However, the adjudicating authority found that the ledger accounts provided by the petitioner were incomplete and hence, the payments against the inward supplies could not be verified with the bank statements. It thus, rejected the petitioner's application for refund. The appellate authority upheld the said order. However, the reason set out in the impugned order are somewhat

different from the reason as set out in the impugned refund rejection order. The appellate authority had noted the reasons of the adjudicating authority for rejecting the petitioner's claim for refund to the effect that the petitioner had not submitted any clarification in regard to payments made to suppliers. However, in addition, the appellate authority also referred to Section 16(2) of the CGST Act and observed that the compliance of the said section also requires furnishing evidence to establish that the supplier of inward supplies had deposited tax with the Government.

29. Section 16(2)(c) of the CGST Act provides that no registered person would be entitled to credit of any ITC in respect of supply of goods or services or both unless, subject to the provisions of Section 41 of the CGST Act, the tax charged in respect of such supply has actually been paid to the government. It is material to note that there was no allegation in the SCN to the effect that the adjudicating authority was satisfied that the petitioner's application for refund was liable to be rejected on the ground that the tax had not been deposited by the suppliers from whom the petitioner received supplies. Thus, reference to Section 16(2) of the CGST Act was, plainly, outside the context of the appeal.

30. The adjudicating authority had rejected the petitioner's claim as it was not satisfied that the petitioner had made payment for the inward supplies. In this regard, the learned counsel for the petitioner submits that the petitioner had, in fact, provided details of its bank accounts as well as the ledger accounts of the suppliers maintained in its books of account. We do not propose to examine this issue in further detail. It is apparent that the adjudicating authority had some apprehension as to whether the petitioner

had made payment for the supplies in respect of which it had claimed refund of the accumulated ITC. The adjudicating authority was not satisfied that inward supplies were paid for by the petitioner. As noted above, the petitioner claims that it had paid for inward supplies in respect of which it had claimed refund of ITC.

31. In view of the aforesaid, we consider it apposite to remand the matter to the adjudicating authority for a decision afresh on the limited question whether the petitioner had made payment to the suppliers for inward supplies in respect of which it claims refund of accumulated ITC.

32. Accordingly, we set aside the impugned order as well as the impugned refund rejection order and remand the matter to the adjudicating authority to examine whether the petitioner has paid for the inward supplies in question. The petitioner would be at liberty to file the necessary documents including bank statements and ledger accounts of the suppliers maintained in its books of account, if not already filed. The adjudicating authority shall pass a reasoned order after affording the petitioner an opportunity of hearing.

33. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

SACHIN DATTA, J

JULY 26, 2024
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Click here to check corrigendum, if any