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

% ***Judgment delivered on: 16.12.2024***

+ W.P.(C) 13149/2024

M/S G.S INDUSTRIES

.....Petitioner

Through: Mr. Siddharth Malhotra & Ms.
Ritika Goel, Advs.

versus

COMMISSIONER OF CENTRAL TAX AND GST, DELHI
(WEST)

.....Respondent

Through: Mr. Aditya Singla, SSC along
with Mr. Umagn Misra, Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. The order sheet would reflect that despite time having been granted on 19 September 2024 and 16 October 2024, the respondents have failed to file a reply. Although Mr. Singla, learned counsel representing them has vehemently requested for further time being granted to file an additional affidavit, we find no justification to defer disposal of this writ petition, in light of the following facts which obtain.

2. The petitioner impugns an Order-in-Appeal dated 24 May 2024 passed by the appellate authority allowing an appeal preferred by the Department and consequently setting aside an order dated 09 June



2023 and which had sanctioned a refund to the writ petitioner.

3. For the purposes of disposal of the present writ petition, we take note of the following salient facts.

4. The petitioner is stated to have applied for refund for the period April 2018 to March 2019 in terms of two applications dated 04 July 2019 and 09 July 2019. Two deficiency memos came to be issued by the respondents while considering the aforesaid applications. It is the case of the writ petitioner that the aforesaid deficiency memos were duly attended to and all material duly supplied. Since the refund was not released even thereafter, the petitioner is stated to have approached the respondents by way of representations dated 13 February 2020 and 27 February 2020.

5. In light of the continued inaction of the respondents, the petitioner had approached this Court in **G.S. Industries v. Principal Commissioner of Central Goods & Services Tax & Ors.**¹ and which came to be disposed of on 24 November 2020, with the direction that the claim of the petitioner be duly processed and a decision taken thereon within a period of three weeks.

6. The respondents, however, in terms of an order dated 14 December 2020, proceeded to reject the prayer for refund as was made. While originally, the petitioner had also approached this Court by way of a contempt action, the order of 14 December 2020 ultimately came to be assailed in terms of Section 107 of the **Central Goods and Services Tax Act, 2017**² by way of an appeal and which

¹ W.P.(C) 9321/2020

² Act



2024:DHC:9822-DB



appeals came to be allowed on 03 January 2022.

7. It becomes pertinent to note that the appellate authority, while allowing the appeal, had held as follows:-

“Discussion and findings: I have carefully gone through the facts of the case and submissions and additional submissions and oral arguments made by the Appellant during the course of personal hearing. I find that Appellants refund claims, on account of ITC accumulated due to inverted duty structure, have been rejected mainly on the grounds that:-

A the appellant was not in existence at the registered address during the course of physical verification.

B The appellant was alleged to have claimed excessive consumption of brass in its production process in manufacturing of its product. Now I take up the issues point wise to decide the matter-

a) The appellant has placed on record

i) electricity bill issued by BSES in name of Harjinder Singh, Proprietor having the same address mentioned in GSTIN

ii) Copy of VAT assessment order dated 02.01.2012 & 06.11.2019 bearing the same address

iii) Copies of three refund orders bearing nos.662027, 662023 & 662028 issued by VAT department , Delhi

iv) Income Tax Return for the assessment year 2019-20 alongwith the copy of balance sheet.

These above mentioned evidence prove the existence of the appellant at the registered address.

B--Adjudicating Authority has not provided the sources from which it was observed that the product which are claimed to be manufactured by the appellant requires very less to no brass as any of such source was not provided for cross verification in the SCN or at the time of adjudication. The appellant was engaged in the business of manufacturing of gunmetal component which are further used in manufacturing of Handpump parts. I observe that Appellant in course of carrying out manufacturing purchase raw materials like Zinc, Lead, Tin, Copper, Brass etc. Gun metal, also known as red brass in the United States, is a type of bronze; an alloy of copper, tin and zinc proportions of which may vary but 88% copper, 8-10% tin, and 2-4% zinc is an approximation as per documents submitted by the appellant. Brass is an alloy of



copper, zinc and tin and the most important component used in manufacturing of gun metal. I find force in appellant's contention as Gun metal, also known as red brass in the United States is the most durable of all metals for the plumbing industry and water pipe applications. Further, I find that it is a well settled law that the SCN must clearly bring out the allegations and contraventions and it must also be supported with relied upon evidences or facts. As such the impugned orders based on conjectures and surmises and do not stand scrutiny of law. There are plethora of judgments wherein it has been pronounced that substantive benefit cannot be denied on ground of technical /procedural lapse. Thus, rejection of subject refund claims by the adjudicating authority in the impugned orders without appreciating the facts of the matter and are not maintainable in law and liable to be set aside.

I find that in accordance with the contentions made by the Appellant and the relevant statutes of the said Act, the appeal filed by the appellant holds ground and merits acceptance.

Order

In view of above discussions, analysis and statutory provisions cited above, the two appeals filed by the appellant hold merit and deserve to be allowed. No order as to interest. The two impugned orders are set aside and both the appeals are allowed and disposed off in terms of Section 107(12) of CGST Act, 2017.

**(SANJAY KUMAR SINHA)
ADDITIONAL COMMISSIONER
CGST APPEALS-II, DELHI"**

8. Despite the order passed by the appellate authority, the dispute with respect to refund appears to have continued to fester. Since the respondents were failing to give effect to the Order-in-Appeal, the petitioner was constrained to approach this Court yet again by filing **G.S. Industries v. Commissioner Central Goods And Services Tax Delhi West & Anr. & Ors³**. While ruling on that petition, we had in terms of our order of 28 March 2023 observed as follows: -

³ W.P.(C) 14719/2022



2024:DHC:9822-DB



“11. The principal question that falls for consideration by this Court is whether the benefit of Order-in-appeal dated 03.01.2022 can be denied to the petitioner and the refund amount be withheld solely on the ground that the respondent has decided to file an appeal against the said order.

12. Concededly, the respondent has not filed any appeal against the order-in-appeal dated 03.01.2022, and there is no order of any Court or Tribunal staying the said order. Indisputably, the order-in-appeal dated 03.01.2022 cannot be ignored by the respondents solely because according to the revenue, the said order is erroneous and is required to be set aside.

13. Learned counsel for the parties also pointed out that the said issue is covered by the earlier decision of this Court in **Mr. Brij Mohan Mangla Vs. Union of India & Ors.: W.P.(C) 14234/2022 dated 23.02.2023**.

14. In view of the above, the present petition is allowed. The respondents are directed to forthwith process the petitioner's claim for refund including interest.

15. It is, however, clarified that this would not preclude the respondents from availing any remedy against the Order-in-appeal dated 03.01.2022 passed by the Appellate Authority. Further, in the event, the respondents prevail in their challenge to order-in-appeal dated 03.01.2022, the respondents would also be entitled to take consequential action for recovery of any amount that has been disbursed, albeit in accordance with the law.”

9. Undisputedly, despite the observations made by us, no further appeal was taken by the Respondents in respect of the order of 03 January 2022. The refund claims ultimately came to be sanctioned on 09 June 2023.

10. It becomes pertinent to note that although the respondents finally acceded to the claim of refund, they refused to accord statutory interest, which according to the writ petitioner was payable thereon. Aggrieved by the aforesaid and to that extent, the petitioner preferred yet another appeal on 12 February 2024. That denial of interest in terms of the order of 09 June 2023 came to be upheld in the appeal



which was preferred by the writ petitioner and in terms of the aforementioned order of the appellate authority dated 12 February 2024.

11. We are, however, and in the present proceedings not concerned with the validity of that order, since the same forms subject matter of a separate writ petition.

12. The respondents, however, appear to have in the meanwhile instituted an independent appeal seeking to question the order dated 09 June 2023 and which has now come to be allowed in terms of the order impugned dated 24 May 2024.

13. While deciding that appeal, the appellate authority has essentially taken into consideration an order dated 11 December 2023 passed by the Commissioner and which has chosen to review the order sanctioning refund in favour of the writ petitioner. This becomes evident from a reading of paragraph 6 of the impugned order and which is reproduced hereinbelow: -

“6. I find that the respondent has been sanctioned refund claim, to the extent of Rs. 3754306/- wide the impugned order. The said impugned order has been reviewed by the Commissioner, CGST Delhi West Commissionerate vide Review Order No. 23/2023-24 dated 11.12.2023 under following observations:

“A (i) Para 36 of Circular No. 125/44/2019-GST dated 18.11.2019 provides that taxpayer shall upload the details of all the invoices on the basis of which input tax credit has been availed during the relevant period for which the refund is being claimed, in Annexure-B along with the application for refund claim.

A(ii) Para 6.1 and 6.2 of Circular No. 135/05/2020-GST dated 31.03.2020 provide that taxpayer shall add a column relating to HSN/SAC Code in the statement of invoices relating to inward supply as provided in Annexure-B of the Circular No. 125/44/2019-GST dated 18.11.2019 so as to



easily identify between the supplies of goods and services.

A(iii) Further para 53 of Circular No. 125/44/2019-GST dated 18.11.2019 provides that the refund of tax paid on input services and capital goods as part of refund of input tax credit accumulated on account of inverted tax structure is not allowed.

12.1 In the instant case, it has been noticed that taxpayer has neither uploaded Annexure-B nor submitted it to the concerned division and the refund claim has been sanctioned without considering the mandatory document i.e. Annexure-B as mentioned in Circular No. 125/44/2019-GST dated 18.11.2019 & Circular No. 135/05/2020-GST dated 31.03.2020. Whereas without Annexure-B, ITC of capital goods and/or input services can't be distinguished from total ITC for a relevant tax period as ITC on capital goods and input services is not permissible in terms of para 53 of Circular No. 125/44/2019-GST.

12.2 Therefore, the refund sanctioned without receipt of Annexure-B is contrary to the provision contained in rule 90(3) of CGST Rules, 2017 which states that in deficiency of any requisite documents, the proper officer shall communicate the deficiencies to the applicant in Form GST RFD-03 through common portal electronically requiring him to file a fresh refund application after rectification of such deficiencies. In the instant case, the proper officer did not issue any deficiency memo (Form GST RFD-03) and refund order was sanctioned.

13. The refund sanctioning authority failed to obtain and examine the Annexure-B while passing the refund order. The refund sanctioning authority, by not raising the above-mentioned requirement has erred in sanctioning the said refund order in the absence of the said Annexure-B.

14. Therefore, it appears that RFD-06 issued vide Order No. CGST/ DW/ Rajouri/ R-123/ Refund/ G.S.Industries/05/2022/86 dated 09.06.2023 passed by the adjudicating authority does not appear to be legal and proper and deserves to be set aside."

14. Basis the above, the appeal of the Department came to be allowed with the appellate authority holding as under:-

“7. I find that the respondent stated that as their refund claim pertain to the period of 2017-18 & 2018-19, they were not required to



2024:DHC:9822-DB



submit Annexure-B. In this context, I find that the Circular No. 125/44/2019-GST dated 18.11.2019 was effective from 26.09.2019 and after the said date, all refund applications filed on common portal are bound by the said Circular. Therefore, the contention of the respondent that they were not required to submit Annexure-B hold no ground as they filed the said refund application on common portal on 04.02.2022 i.e. after issuance of the said Circular. As such, I find force in the department's appeal alleging that the adjudicating authority failed to ask for Annexure-B from the respondent and sanctioned the refund without examining the same. Hence, I hold that the impugned order passed by the adjudicating authority is neither legal nor maintainable in law and therefore the same is liable to be set aside and the departmental appeal is liable to be allowed. Accordingly, I pass the following order.

ORDER

8. The appeal filed by the Dy./Assistant Commissioner, CGST Rajouri Garden Division, CGST Delhi West, 4th Floor, EIL Annexe Building, Bhikaji Cama Place, New Delhi 110066 against Order-In-Original No. CGST/DW/Rajouri/R-123/Refund/ G.S.Industries/ 05/2022/86 dated 09.06.2023 is hereby allowed. The impugned order dated 09.06.2023 is set aside for the reasons as discussed supra. The instant appeal is disposed of in terms of Section 107(12) of CGST Act, 2017.”

15. We find ourselves unable to sustain the order dated 24 May 2024 for reasons which follow. Undisputedly, we had in terms of our order passed on 28 March 2023 in the earlier round of litigation in unequivocal terms held that since concededly the respondents had failed to assail the Order-in- Appeal dated 03 January 2022, the claim for refund could not have been denied. That is the position which remains unchanged even till date.

16. That leaves us only to consider whether it would have been permissible at all for the Commissioner to question the validity of the order dated 09 June 2023 in purported exercise of powers conferred under Section 107(2) of the Act. Undisputedly the order of 09 June 2023 had come to be framed in order to give effect to the Order-in-



Appeal dated 03 January 2022.

17. The Commissioner, while seeking to review an order passed under the Act and in purported exercise of powers vested by Section 107(2), cannot possibly sit over and above an order passed by the appellate authority. Regard must be had to the fact that the power enshrined in Section 107(2) is concerned with the examination of the record of proceedings which may have been undertaken by an adjudicating authority. It clearly does not contemplate the Commissioner seeking to even attempt to review an order passed by the appellate authority. The power so wielded by the Commissioner with reference to Section 107(2) is rendered further unsustainable when viewed in light of the observations which appear in our earlier order of 28 March 2024. We are thus of the firm opinion that the impugned order cannot possibly sustain.

18. We, consequently, allow the instant writ petition and quash the order of 24 May 2024. The grievance of the petitioner with respect to denial of interest as per the order of 09 June 2023 and which was affirmed in appeal and presently forms subject matter of *G.S. Industries v. Commissioner Central Goods And Services Tax Delhi West & Anr. & Ors*, as noted above, is left open to be examined in those proceedings.

YASHWANT VARMA, J.



DHARMESH SHARMA, J.

DECEMBER 16, 2024/RW