IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.08.2021

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P.No.9462 of 2021
and WMP No.10047 of 2021

M/s.Rocky Marketing Pvt. Ltd.,
(represented by its Director, Shri.S.Suryanarayanan)
No.3/8 Mayor Samhandam Street,
Rangarajapuram,
Chennai – 600 024. ...Petitioner

Vs

Joint Commissioner of GST & CE (In situ)
Thyagaraya Nagar Division
MHU Complex,
No.692 Anna Salai,
Nandanam,
Chennai – 600 035.

... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus and quash the impugned show cause notice bearing No.1/2021 ® dt.26.02.2021 issued by the respondent, as the same being an abuse of the process of law, lacks judicial propriety, illegal, contrary to Rule 6 of the Cenvat Credit Rules, 2004 and ultra vires Articles 19(1)(g) and Article 265 of the Constitution of India and directing

the respondent to sanction the refund, as per the orders of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT).

For Petitioner : Mr. G.Natarajan

For Respondent : Ms.Anu Ganesan

Junior Panel Counsel

O R D E R

The petitioner challenges show cause notice dated 26.02.2021 issued by the sole respondent/Joint Commissioner of Goods and Services Tax (Central Excise).

2. The petitioner had entered into a Business Solutions Agreement with Amazon Seller Services Private Ltd., (Amazon). The agreement enabled the petitioner to list its catalogue of products for sale in the Amazon shopping portal. Amazon provides various services, such as the facility of storage, shipping, processing of sales returns, if any, processing of payments and more, which are overall referred to as 'fulfillment and associated services'. The petitioner compensates Amazon for such services and Amazon pays service tax in this regard. In all, the nature of the transaction between the petitioner and Amazon is the trading of goods through Amazon for which Amazon provides various services to the petitioner.

3. Separately the petitioner participates in a programme called the Amazon Marketing Programme, as per which, Amazon offers promotional incentives to those who access its websites. Thus, and as part of the programme, discounts are offered by the petitioner through Amazon which are operative through specific promotion codes. For its participation in the programme, the petitioner receives compensation from Amazon. The aforesaid activity constitutes a declared service as defined in Section 66 E of Finance Act, 1994 (Act), taxable in terms of Section 65B (44) of the Act. Service tax is being remitted by the petitioner on the component of compensation. Amazon continues to extend the fulfillment and associated services in connection with the Amazon Marketing Programme as well, for which it is duly compensated by the petitioner. Thus the fulfillment services rendered by Amazon are utilized by the petitioner, both for the sale of its goods through the portal (hereinafter referred to as 'Direct Trading') as well as the sale of goods through promotion codes (hereinafter referred to as 'Incentive Trading').

4. The activity of trading of goods falls under Section 66D(e) of the Act, being the negative list, and receipts therefrom are exempt from the levy of tax as per Rule 2(e) of the Cenvat Credit Rules, 2004 (Rules). As a result, no tax is

payable on the receipt of consideration from the activity of Direct Trading, which is an exempt service.

5. The period with which we are concerned in this Writ Petition is April, 2014 to October, 2015. The petitioner had availed cenvat credit of an amount of Rs.86,10,981/- in respect of the compensation paid to Amazon for fulfillment services. Initially the aforesaid credit was used by the petitioner and set off against its output tax liability. Since it was advised that it would not be entitled to credit in respect of the exempt services, the petitioner made good the liability in that regard.

6. Later, the petitioner upon receipt of legal advice, took the stand that the fulfillment services constituted 'input service' in terms of Rule 2(l) of the Rules. The aforesaid services were used in common, both for trading as well as the exempt services, thus bringing into play the provisions of Rule 6 of the Cenvat Credit Rules. Rule 6 provides for the methodology to be adopted to compute proportionate credit in case where common input services are utilized both for taxable as well as exempt activities.

7. Rule 6(3) deals with a situation where a manufacturer of final products/ provider of output services is engaged in both taxable as well as exempt activity, and reads as follows:

6. Obligation of a manufacturer or producer of final products and a provider of output service.

……

(3)(a) Amanufacturer who manufactures two classes of goods, namely:-

(i) non-exempted goods removed;

(ii) exempted goods removed; or

(b) a provider of output service who provides two classes of services, namely:-

(i) non-exempted services;

(ii) exempted services,

Shall follow any one of the following options applicable to him, namely:-

(i) pay an amount equal to six percent of value of the exempted goods and seven percent of value of exempted services subject to a maximum of the sum total of opening balance of the credit of input and input services available at the beginning of the period to which the payment relates and the credit of input and input services taken during that period; or

(ii) pay an amount as determined under sub-rule (3A):

PROVIDED that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i):

……..

8. The petitioner, upon application of Rule 6(3) found that it had over-paid the quantum of taxes and thus claimed a refund of an amount of Rs.47,38,050/- representing credit re-paid in excess, along with interest.

9. The petitioner's refund application was rejected and an order-in-original passed on 29.06.2016. The Assessing Authority rejected the claim primarily on the ground that there was no identity of input services as far as direct trading and incentive trading were concerned. Though certain other disqualifications are set out, only the disqualification at paragraph 19(v) is relevant to decide this Writ Petition and I hence extract the same below:

'19. Non-eligibility of Cenvat Credit taken by the claimant:

……..

(v) On perusal of the issue and the details given by the assessee it is seen that M/s.Rocky Marketing (Chennai) Pvt. Ltd. are doing trading by selling various products on the basis of prices fixed by them and on the basis of prices fixed by M/s.Amazon. For both the cases M/s.Amazon is providing service of storing goods, preparing invoice and dispatch of goods and collecting service charges for the same services from M/s.Rocky Marketing (Chennai) Pvt. Ltd. M/s.Rocky Marketing (Chennai) Pvt. Ltd. availed credit of service tax involved on these services. This availment of CENVAT credit is not proper for the reason that these services are used by M/s.Rocky Marketing (Chennai) Pvt. Ltd. for selling of their goods which is trading and the same falls under negative list of services under Section 66 D (e) of the Finance Act, 1994 and hence they are not eligible to take credit in terms of Rule 2(1) of Cenvat Credit Rules, 2004. The input services received by the assessee namely service of storing goods, preparing invoice for sale of goods and dispatch of goods are used for sale of goods which is trading and such services are not required/related to the service of "agreeing to the obligations to refrain from an act, or to tolerate an act or a situation, or to do an act", which is explained by them that the price of the goods will be fixed by M/s.Amazon and the loss incurred due to the fixation of the price by Amazon is compensated by M/s.Amazon to the M/s.Rocky Marketing (Chennai) Pvt. Ltd. On the amount received by the M/s.Rocky Marketing (Chennai) Pvt. Ltd. service tax is paid. For the service, the above input services are not related/used.'

10. An appeal came to be filed before the first appellate authority which came to be partly allowed by order dated 28.11.2016. There are three material observations/conclusions in the order passed in first appeal. The first is as regards the identity or otherwise of the input services. The Appellate Commissioner states at paragraph 6 of the order that *'there is convergence on the stance of the Department and the appellant on the facts that (a) the appellant provided both taxable service and exempt service (trading, which*

falls under negative list), (b) the appellant have availed cenvat credit on common input services used for providing both taxable service and exempt service and (c) the appellant have not maintained separate accounts/records for receipt and use of common input services.'

11. The second is the rejection of the refund claim for non-adherence to the procedure laid down under the Rules for payment/reversal as a result of which the Commissioner directed the petitioner to remit 7% of the value of exempt services vide Rule 6(3)(i) read with Rule 6(3D)(c) of the Rules. Thirdly, following the methodology set out earlier, he computed the excess paid at a sum of Rss.4,31,586/- along with interest thereon and directed refund of the same subject to the test of unjust enrichment.

12. As against the aforesaid order, the petitioner filed an appeal before the Customs, Central Excise and Appellate Tribunal (CESTAT). The appeal proceeds on the premise that the only dispute arising from the order of the first Appellate Commissioner, is as to whether Rule 6(3)(i) would apply to the facts of the petitioner's case or Rule 6(3)(ii). As far as commonality of input services is concerned, the observation of the Commissioner in this regard was not disturbed, as no appeal or cross objection was filed by the revenue challenging the same.

13. The Tribunal allowed the appeal filed by the petitioner vide order dated 03.11.2020 holding at paragraph 5, that the conclusion of the first Appellate Commissioner that the reversal of credit as per Rule should be as per Rule 6(3)(i), is against the provisions of law. The Tribunal upheld the entitlement of the petitioner for reversal after computing proportionate credit by applying Rule 6(3)(ii). Paragraph 5 contains two instances of a typographical error where instead of Rule 6(3)***(ii)***, the Tribunal has stated Rule 6(3*)(i)* and learned Panel Counsel, on instructions, would confirm that the references to 'Rule 6(3)(i)' in paragraph 5 should be read as Rule '6(3)(ii)'. The Tribunal notes that the petitioner has furnished the details of the credit and directs the authority to quantify the amount for which purpose they remanded the matter to the adjudicating authority.

14. Paragraph 5 is extracted below for the purpose of clarity:

> *'5. From the above, we have no hesitation to hold that the view taken by the Commissioner (Appeals) that the appellant has to reverse credit as per Rule 6 (3) (i) is against the provisions of law. The appellant would be eligible for refund after reversal/paying of proportionate credit on exempted services by applying Rule 6 (3) (i). This amount however has to be verified. Appellant has furnished details of the credit availed and the amount reversed by them along with the letters issued to department. The indirect tax regime has been shifted from Service Tax to GST, appellant would be eligible for cash refund of such amount. However, we direct the lower authority to quantify the amount for refund after complying with Rule 6 (3) (i) being the proportionate credit availed on exempted services. We find the issue under consideration in the appeal in favour of the assessee and against the Revenue. For the limited purpose of quantification of the amount eligible for refund, we remand the*

matter to the adjudicating authority. Needless to say that refund being of input service credit, the question of unjust enrichment does not arise. The appeal is allowed in the above terms.'

On 09.11.2020, the petitioner gives its computation of the refund pursuant to which the impugned show cause notice is issued.

15. The main ground agitated is that inspite of the CESTAT having allowed its appeal, such order having attained finality, the show cause notice once again proposes to test the entitlement of the petitioner for refund. As far as the claim of the petitioner, both in terms of its own computation as well as the amount quantified by the Commissioner under his order dated 28.11.2016 is concerned, the authority rejects the double claim, and rightly so. Moreover, the authority also refers to direct trading of certain products that do not form part of the original proceedings, such as Everest Masalas.

16. I had, in order to obtain clarity on the interpretation of the parties to the order of the first Appellate Commissioner, directed the petitioner to circulate copies of the statement of facts and grounds of appeal filed before the first and second Appellate Authorities and both are available on record.

17. Since the impugned communication is a show cause notice, the burden lies heavy upon the petitioner to establish that the same is bereft of

jurisdiction, as the scope of interference under Article 226 in such case is limited. I would thus restrict the scope of examination to the question as to whether the impugned show cause notice stretches beyond the scope of remand by the CESTAT.

18. Two issues arise in the matter, viz., i) the entitlement to credit and ii) the quantification thereof. As far as entitlement is concerned, I am of the view that the issue stands decided at the level of the first Appellate Authority and hence the show cause notice purporting to re-open the question of entitlement to credit, is bad in law. It is only on the aspect of quantification that the matter has been remanded by the Tribunal and the respondent ought to have restricted himself to a verification of this aspect alone.

19. Per contra, learned counsel for the respondent would state that the litigation in this case involves one comprehensive issue, i.e., being the entitlement of the petitioner for credit. Though the main issue may involve the adjudication of several aspects of the matter, the overarching lis concerns the entitlement of the petitioner to credit. The observation of the Commissioner to the effect that there is convergence on the aspect of commonality of services is, according to her, an incorrect and erroneous observation and should not stand in the way of a proper decision to be taken, substantially.

20. She would point out that there has never been convergence by the Department and the assessee on the issue of input services and thus, for the Commissioner to have stated so, is patently incorrect. However, she would accept the position that observation has been allowed to attain finality and no appeal/cross objection has been filed at the instance of the revenue challenging the same.

21. She also relies upon a judgment of three Judges of the Hon'ble Supreme Court in the case of *Gojer Bros. Pvt. Ltd., V. Ratan Lal Singh* (AIR 1974 SC 1380), applied in a judgment of the Division Bench in *Omprakash Verma and others V. State of Andhra Pradesh and others* ((2010) 13 SCC 158). The judgments discuss the principle of merger, in the context of a Civil Suit.

22. In the case of *Goger Bros.,* the Bench states that the juristic justification of the doctrine of merger may be sought on the principle that there cannot be, at one and the same time, more than one operative order governing the same subject matter. Therefore, the judgment of the inferior Court, if subjected to an examination by the superior Court will merge in the judgment of the superior court and will itself cease to have existence in the eyes of law. In

other words, the judgment of the inferior Court loses identity by reason of its merger with the judgment of the superior Court.

23. This case is distinguishable for the reason set out at paragraph 12 of the judgment, wherein the Bench restricts its applicability only to cases where the decree, in entirety was challenged in appeal. The ratio is thus inapplicable to that class of cases in which the suit covers a horizon wider than the appeal, which happens when only a part of the decree which has been passed in the suit is carried in appeal to the higher Court, as in the present case.

24. Though the larger issue agitated by the petitioner relates to its entitlement for refund on the ground that excess tax has been paid by it, there are two issues that arise for separate determination. The first relates to whether there is commonality in regard to the input services availed. This issue, in fact, stands settled at the level of first appeal, not just because of the casual observation of the Commissioner on convergence of both parties, but since the Commissioner, in conclusion, has held that the petitioner is entitled to credit of refund computed under Rule 6(3)(i). Rule 6 itself comes into operation only in a situation involving common input service and clauses (i) and (ii) only prescribe different methods for attribution of the same.

25. Thus the larger, and implicit conclusion of the Commissioner is that the input services are indeed common, and that the quantification thereof would be in terms of Rule 6(3)(i). If the revenue had desired to pursue the stand that there was no identity of input services, it was incumbent for it to have challenged this conclusion.

26. In this regard, there are two opportunities that present to the respondent. The first is the filing of an appeal in terms of Section 86(1) of the Finance Act, 1994 which provides for an appeal to be filed by a person aggrieved by an order of the first appellate authority within three months from the date of receipt of the order. The second is in terms of Section 86(4) where either the Department or an assessee who has not filed an appeal against the order of the first appellate authority may, within 45 days of receipt of notice of an appeal filed by the other party, file a memorandum of cross-objection which shall be disposed by the Appellate Tribunal as though it were an appeal presented within the time stipulated for filing of an appeal. The respondent has missed both buses.

27. A perusal of the grounds of appeal filed by the petitioner before the Tribunal reveals that, had only the revenue perused the appeal filed by the petitioner before the Tribunal, it would have noted that the premises of the

appeal was the acceptance of the position that the input services were common. Paragraph 10 of the grounds reads as follows:

> *10.0. In view of the above, the appellant wish to submit that the rejection of the refund claim of the appellant by the respondent is grossly illegal, arbitrary and is in complete violation of the principles of natural justice. Accordingly, the impugned order is patently illegal and liable to be set aside. In as much as the Commissioner (Appeals) has conceded that the appellant that the credit availed by the appellant are common in nature which are used for provision of both taxable and exempted services, the contrary observations made by the lower authority to the effect that the appellant is not at all entitled for credit, stands overruled. The applicability of Rule 6 has also been conceded by the Commissioner and the issue is boiled down as to whether the amount payable should be determined as per Rule 6 (3) (i) or 6 (3) (ii), though that was not at all an issue in the original proceedings.*

28. The identity of input services stands settled and it is only on the quantification thereof that the petitioner can be called upon to respond. Thus the respondent will issue a fresh show cause notice limiting the scope of examination to the quantification of input service alones, call upon the petitioner to file a response and conclude the matter within a period of eight (8) weeks from the date of uploading of this order.

29. This Writ Petition is disposed as above. No costs. Connected Miscellaneous Petition is closed.

19.08.2021

Index: Yes
Speaking Order
Sl

To

Joint Commissioner of GST & CE (In situ)
Thyagaraya Nagar Division
MHU Complex,
No.692 Anna Salai,
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Chennai – 600 035.

Dr.ANITA SUMANTH, J.

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