2022 (4) TMI 118 - CALCUTTA HIGH COURT

Other Citation: 2022 (59) G. S. T. L. 389 (Cal.)

M/S. SHIVACO ASSOCIATES & ANR. VERSUS JOINT COMMISSIONER OF STATE TAX, DIRECTORATE OF COMMERCIAL TAXES & ORS.

WPA No. 54 of 2022

Dated: - 11-3-2022

Refund of the unutilized ITC accumulated on account of inverted tax structure - refund claimed on account of rate of tax on inputs being higher than the rate of tax on output supplies - rejection of refund relying on a circular issued by the Central Board of Indirect Taxes and Customs being Circular No. 135/2020-GST dated 31.03.2020 wherein it has been mentioned that the tax-payers cannot claim refund in terms of clause (ii) of Section 54(3) of the CGST Act, 2017 in cases where the input and output supplies remain the same.

Whether the benefit which is available under the Act can be taken away and/or restricted by the circular? - HELD THAT:- Any circular issued under Section 168(1) of the Act is only for the purpose of bringing uniformity in the implementation of the Act. The intention of the legislature as expressed in Section 54(3) of the Act is clear and unambiguous. The Section, in absolute uncertain terms, mentions that refund of any unutilized input tax credit may be claimed where credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. The Act does not restrict refund only in respect of supplies which are different at the input and output stage. The Board thought it fit to reduce the tax in respect of domestic consumers with effect from 25.01.2018 and there is no reason as to why the benefit of accumulated input tax credit will not be passed on to the petitioners - The circular dated 31.03.2020 is imposing a restriction to release certain benefits which are provided under the Act.

By way of the circular, the Board is curtailing the said benefit and making refund permissible only if the input and output supplies are different. The same amounts to overreaching the provisions as laid down in the Act - It cannot be said that the legislature was unmindful of the fact that there may be instances where the input and output supplies are the same. On the contrary, it can be said that the legislature consciously did not create any distinction for allowing refund in all cases where the input tax is more than the output tax. The said benefit is applicable to all similar cases.

The respondent authority ought not to reject the claim of the petitioners relying on the circular as the prayer made by the petitioners is permissible under the Act - it is held that the petitioners will be entitled to the refund as claimed - Petition disposed off.

Judgment / Order

HON'BLE JUSTICE AMRITA SINHA

For the writ petitioners :- Mr. Jagriti Mishra, Adv. Mr. U. Ali, Adv. Mr. Subrata Pal, Adv.

For the respondents :- Mr. Subir Kumar Saha, Adv. Mr. Bikramaditya Ghosh, Adv.

Judgment

Amrita Sinha, J.:-

The petitioners have filed the instant writ application inter alia praying for setting aside the impugned order passed by the adjudicating officer that is the Assistant Commissioner, Siliguri dated 26.11.2020 and the impugned order passed by the appellate authority being the Joint Commissioner, State Tax Siliguri dated 10.12.2021 rejecting the refund claim of the petitioners. The claim pertains to the period 01.10.2018 to 31.12.2018.

The said refund was sought under Section 54(3) of the Central Goods and Services Tax Act, 2017.

The petitioners are engaged in the business of purchasing LPG gas in bulk through tanker and thereafter bottling the same in bottles / cylinders of 4kgs, 6kgs, 14kgs, 17kgs and 21kgs and sell the same to commercial customers on GST applicable at the rate of 18% and to the domestic customers at the rate of 5%.

Prior to 25.01.2018 the input and output tax on liquefied petroleum gases to commercial as well as domestic consumers was 18%. By a notification dated 28.06.2018 published in the Gazette of India, Extraordinary, the rate of output tax on domestic LPG has been reduced to 5%. The petitioners claim refund of the unutilized ITC accumulated on account of inverted tax structure as the rate of tax on inputs is higher than the rate of tax on output supply.

The prayer of the petitioners for refund stood rejected by the adjudicating authority relying on a circular issued by the Central Board of Indirect Taxes and Customs being Circular No. 135/2020-GST dated 31.03.2020 wherein it has been mentioned that the tax-payers cannot claim refund in terms of clause (ii) of Section 54(3) of the CGST Act, 2017 in cases where the input and output supplies remain the same.

Being aggrieved by the order of the adjudicating authority the petitioners preferred appeal which stood rejected by order dated 10.12.2021.

The petitioners have challenged both the orders of rejection in the present writ petition.

According to the respondents, as the input and output supply i.e, liquefied petroleum gas remains the same, accordingly, in view of the circular dated 31.03.2020 the prayer for refund of the accumulated tax cannot be granted.

The petitioners submit that the respondents cannot take advantage of the said circular as the Act permits such refund. The circular which has been issued as clarification cannot take away the right granted in their favour by the Act itself.

According to the petitioners, the gas which is purchased in bulk is not supplied to the consumers in the same manner and quantity, but bulk gas is refilled in small containers and thereafter sold out to both commercial as well as domestic consumers. Hence, it cannot be said that the input and output supplies

remain the same.

In support of their stand the petitioners rely upon an advance ruling by the ***Gujarat Authority for Advance Ruling in Advance Ruling No. GUJ/GAAR/R/2020/15 dated 19.05.2020 in re- M/s. Navbharat LPG Bottling Company*** wherein the Authority was of the opinion that the applicant would be liable to pay five percent tax on the LPG sold to domestic customers with effect from 25.01.2018 and would get the benefit of the input tax credit.

The petitioners rely upon the judgment and order passed by the ***Guwahati High Court on 02.09.2021 in case No. WP(C)/3878/2021*** in the matter of ***B.M.G Informatics Pvt. Ltd. V. Union of India and Ors***. wherein the Court was of the view that the provisions of the circular dated 31.03.2020 providing that even though different tax rates may be attracted at different points of time but the refund of accumulated unutilized tax credit will not be available under Section 54(3)(ii) of the CGST Act, 2017 where the input and output supplies are same, would have to be ignored.

The petitioners also rely upon the judgment delivered by the ***Delhi High Court on 31.05.2011 in WP(C)4452/2008 in M/s. Jindal Stainless Ltd. & Anr. V. Union of India and Ors.*** wherein the Court was pleased to set aside the impugned circular which ought to impose condition which was not in the Act.

The respondents in support of their stand rely upon the judgment delivered by the Madhya Pradesh High Court in the matter of ***Eastern Air Products Pvt. Ltd. V. Commissioner of Sales Tax, Indore reported in 1994 SCC Online MP 89*** wherein the Court was of the opinion that all goods which are originally mentioned maybe the same goods though in different forms. According to the respondents, the gas purchased by the petitioners in bulk and sold to the consumers in smaller quantities in different containers, remains the same and hence, the petitioners are liable to pay 18% tax in both input and output supplies. They are not entitled to any refund on account of the inverted tax structure.

I have heard the submissions made on behalf of both the parties.

The petitioners claim refund in accordance with Section 54(3) of the CGST Act, 2017 on the ground that credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. Admittedly, the rate of tax on the input supply (LPG in bulk) is 18% and the rate of tax on output supply (LPG in small Containers for domestic consumers) is 5%.

The claim of the petitioners for refund stood rejected on the ground that the input and output supplies are the same. The said restriction on claiming refund has been imposed by the circular dated 31.03.2020. The said circular was issued in exercise of the powers conferred under Section 168(1) of the CGST Act, 2017.

According to Section 168(1) of the Act the Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the implementation of the Act, issue such orders, instructions or directions to the central tax officers as it may deem fit, and thereupon all such officers and all other persons employed in the implementation of the Act shall observe and follow such orders, instructions or directions.

The respondents, relying upon the aforesaid circular, are restricting the claim of the petitioners which is otherwise admissible under the Act. Had the circular not been there, then the petitioners' claim would

have been allowed.

The issue at present is whether the benefit which is available under the Act can be taken away and/or restricted by the circular.

Any circular issued under Section 168(1) of the Act is only for the purpose of bringing uniformity in the implementation of the Act. The intention of the legislature as expressed in Section 54(3) of the Act is clear and unambiguous. The Section, in absolute uncertain terms, mentions that refund of any unutilized input tax credit may be claimed where credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. The Act does not restrict refund only in respect of supplies which are different at the input and output stage. The Board thought it fit to reduce the tax in respect of domestic consumers with effect from 25.01.2018 and there is no reason as to why the benefit of accumulated input tax credit will not be passed on to the petitioners.

Section 168(1) strives to lay down that for the purpose of uniformity in the implementation of the Act, orders, instructions or directions may be issued. 'Uniformity in implementation' does not mean curbing benefits available in the Act by introducing new provisions. A circular cannot supplant or implant any provision which is not available in the Act.

The circular dated 31.03.2020 is imposing a restriction to release certain benefits which are provided under the Act.

In M/s. Jindal Stainless Ltd. (supra) the Hon'ble Court took into consideration various other judgments to arrive at a decision. The Court took note of the judgment in the matter of ***Dilip Kr. Ghosh Vs. Chairman; AIR 2005 SC 3485*** wherein it was held that circular cannot override the Rules occupying the field and if there is a clash between the Rule and the Circular, the Circular has to be treated as non est.

In Additional District Magistrate (Rev.) Delhi Administration V. Shri Ram; AIR 2000 SC 2143, the Court held that conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

In the present case, the Act does not mention about non-granting of the benefit of accumulated input tax credit where the input and output supplies are the same. The circular is trying to restrict the refund to a particular set of supplies. The circular is trying to create a class inside the class, which is impermissible. According to the Act, refund is permissible in respect of all classes where the input tax is higher than the output tax. By way of the circular, the Board is curtailing the said benefit and making refund permissible only if the input and output supplies are different. The same amounts to overreaching the provisions as laid down in the Act.

It cannot be said that the legislature was unmindful of the fact that there may be instances where the input and output supplies are the same. On the contrary, it can be said that the legislature consciously did not create any distinction for allowing refund in all cases where the input tax is more than the output tax. The said benefit is applicable to all similar cases.

The respondent authority ought not to reject the claim of the petitioners relying on the circular as the prayer made by the petitioners is permissible under the Act.

In view of the discussions made hereinabove, the impugned orders passed by the adjudicating authority and the appellate authority are liable to be set aside and quashed. The same are accordingly set aside and quashed.

In the facts and circumstances of the instant case, it is held that the petitioners will be entitled to the refund as claimed.

The writ petition stands disposed of.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties expeditiously on compliance of usual legal formalities.

Citations: in 2022 (4) TMI 118 - CALCUTTA HIGH COURT

1. 2005 (9) TMI 656 - Supreme Court
2. 2000 (5) TMI 1069 - Supreme Court
3. 2021 (9) TMI 472 - GAUHATI HIGH COURT
4. 2011 (5) TMI 1034 - DELHI HIGH COURT
5. 1997 (4) TMI 466 - MADHYA PRADESH HIGH COURT
6. 2020 (6) TMI 541 - AUTHORITY FOR ADVANCE RULING, GUJARAT