GAUHATI HIGH COURT

No.-WP(C)/3878/2021, WP(C)/3675/2021,WP(C)/3880/2021, WP(C)/4120/2021

BMG Informatics Pvt. Ltd.-Appellant

Versus

The Union of India and 3 ors., The Commissioner Central Goods and Service Tax Guwahati, The Joint Commissioner (Appeals) CGST Central Excise and Customs Guwahati, The Assistant Commissioner CGST and Central Excise Division II-Respondent

Hon'ble Achintya Malla Bujor Barua, J.

Date of order: 02/09/2021

Appearance:

Mr. P. Baruah for the Petitioner.

SC, GST for the Respondent.

Decision-In Favour of assessee

Issue Involved: The assessee submitted a claim for a refund under FORM-GST-RFD-02. In response thereof, the department had issued a show-cause notice dated 10.04.2020 that the assessee had misdeclared the amount of total turnover in Annexure-1 to the RFD-01 for the period October – December 2018 and, therefore, the refund claimed is liable to be rejected.The assessee submitted a reply dated 25.04.2020 showing their reasons as to why there was no mis-declaration. The Assistant Commissioner CGST, Central Excise and Customs, Guwahati in consideration of the claim of the assessee for the refund had passed the order dated 22.05.2020, whereby the claim for refund for an amount of Rs. 3,92,594/- for the period from 01.10.2018 to 31.12.2018 stood rejected.

Held that: The Court as held that the refund of accumulated ITC under clause (ii) of sub section (3) of section 54 of the CGST Act would not be applicable in cases where input and output supplies are same was in clear conflict with the provisions of section 54 of the Act and thereby same has to be ignored. Court has held that the refund of inverted duty shall be available when the duty on inward supply is higher than on outward supply and while determining the rate of duty on outward supply the partial exemption granted under section 11 of the Act has to be taken into consideration.

JUDGMENT

JUDGMENT & ORDER (ORAL)

Heard Dr. A Saraf, learned senior counsel for the petitioner in WP(C)No.3878/2021 & WP(C)No.3880/2021. Also heard Mr. SC Keyal, learned counsel for the petitioners in WP(C)No.3675/2021 and WP(C)4120/2021.

2. It is taken note of that the petitioners in WP(C)No.3675/2021 and WP(C)No.4120/2021 i.e., the authorities under the GST Department are the respondents in WP(C)No.3878/2021 and WP(C)No.3880/2021, whereas the assessee BMG Informatics Pvt. Ltd., is the respondent in WP(C)No.3675/2021 and WP(C)No.4120/2021 and accordingly, the learned counsel representing the respective writ petitioners also represents the respondents in the corresponding writ petitions filed by the other.

3. For the sake of convenience, we refer the petitioner in WP(C)No.3878/2021 and WP(C)No.3880/2021 to be the assessee and the petitioners in WP(C)No.3675/2021 and WP(C)No.4120/2021 to be the department.

4. The assessee BMG Informatics Pvt. Ltd is a company dealing with IT system integrator and is a service provider primarily engaged in sales and service of information and technology products to Government Departments, PSU and to other Research and Educational Institutes located in the North Eastern region. The assessee is a registered dealer under the Central Goods and Service Tax Act 2017 (for short, the CGST Act of 2017) bearing registration No. GSTIN 18AADCB2203Q3ZL.

5. The assessee submitted a claim for a refund under FORM-GST-RFD-02. The said application was acknowledged vide Acknowledgement Number ZQ1802200360224 dated 28.02.2020. In response thereof, the department had issued a show-cause notice dated 10.04.2020 that the assessee had misdeclared the amount of total turnover in Annexure-1 to the RFD-01 for the period October – December 2018 and, therefore, the refund claimed is liable to be rejected.

6. The assessee submitted a reply dated 25.04.2020 showing their reasons as to why there was no mis-declaration. The Assistant Commissioner CGST, Central Excise and Customs, Guwahati (to be referred to as the Assistant Commissioner) in consideration of the claim of the assessee for the refund had passed the order dated 22.05.2020, whereby the claim for refund for an amount of Rs. 3,92,594/- for the period from 01.10.2018 to 31.12.2018 stood rejected. The Assistant Commissioner while rejecting the claim of the assessee for the refund made under Section 54(3)(ii) of the CGST Act of 2017 had arrived at the reasons for such rejection as stated in paragraph 6 thereof which is extracted as below:

"6. Section 54(3)(ii) of CGST Act, 2017 allows refund of accumulated ITC where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. However, the input and output being the same in the instant case though attracting different tax rates depending upon the class of buyer, does not get covered under the provisions of clause (ii) of sub-section (3) of Section 54 of the act supra. This view is also supported by the clarificatory Circular No.135/05/2020-GST dated 31 st March 2020 (para 3.2). Thus, the instant claim is liable for rejection on this score alone, as the amount of ITC claimed for refund was accumulated out of the trading activity where the input and output were the same."

7. A reading of paragraph 6 of the order dated 22.05.2020 would go to show that the Assistant Commissioner had arrived at the conclusion that the input and output supplies in the instant case being the same, though it may attract a different tax rate depending upon the class of buyer would not be covered under the provisions of Section 54(3)(ii) of the CGST Act, 2017. In order to arrive at such conclusion, the Assistant Commissioner refers to paragraph 3.2 of the clarificatory circular No.135/05/2020-GST dated 31.03.2020.

8. In paragraph 5 of the order dated 22.05.2020, the Assistant Commissioner had taken note that the assessee BMG Informatics Pvt. Ltd is primarily engaged in sales and service of information and technology products to Government Departments, PSU and to other Research and Educational Institutes in the North Eastern region. In course of their business, the assessee upon receipt of supply orders from the purchasers, procure materials from the distributors and/or original equipment manufacturers and supply such material to the customers of above

description i.e. Government Departments, PSU and other Research and Educational Institutes located in the North Eastern region. Accordingly, it was concluded by the Assistant Commissioner that the assessee BMG Informatics Pvt. Ltd is engaged in trading of technology related products and they are not manufacturers of the product concerned.

9. On an appeal being preferred by the assessee, the order dated 06.11.2020 was passed by the Joint Commissioner (Appeals) CGST, Central Excise & Custom, Guwahati {to be referred to as the Joint Commissioner (Appeals)}. The Joint Commissioner (Appeals) by his order dated 29.10.2020 had arrived at a conclusion in paragraph 6.11 thereof which is extracted as below:

"6.11. On going through the above observation of the lower authority, I find that no such allegation or ground was proposed in the impinged SCN to reject the refund claim of the appellant. The lower authority rejected the refund claim on the basis of a ground which was not proposed in the impugned SCN in violation of principle of natural justice. Nowhere, it was mentioned in the impugned show cause notice dated 10.04.2020 issued to the appellant that sub-section(3) of Section 54 of CGST Act, 2017 is not applicable in their case and the refund claim is liable to be rejected as the input and output supplies are the same. Despite this fact, the lower authority has travelled beyond the scope of the SCN and has given a reasoning in para-6 of the impugned order that the input and output being the same in the instant case, though attracting different tax rates depending upon the class of buyer, does not get covered under the provisions of clause (ii) of sub section (3) of the Section 54 of CGST Act, 2017. Therefore, I am of the view that the Assistant Commissioner arbitrarily disallow the refund claim of the appellant by travelling beyond the scope of SCN which is not maintainable and liable to be rejected.

10. A reading of paragraph 6.11 of the appellate order dated 29.10.2020 would go to show that the Joint Commissioner (Appeals) had arrived at a conclusion that the Assistant Commissioner in the order dated 22.05.2020 had rejected the claim of refund of the assessee on a ground which was not incorporated in the show cause notice that was issued to the assessee, and, therefore, there was a violation of the principles of natural justice. The Joint Commissioner (Appeals) was of the view that in the show cause notice dated 10.04.2020 issued to the assessee, it was not stated anywhere that Section 54(3)(ii) of the CGST Act of 2017 is not applicable in their case and therefore, the refund claimed is liable to be rejected as the input and output supplies are same. Accordingly, the Joint Commissioner (Appeals) was of the view that the Assistant Commissioner has travelled beyond the scope of the show cause notice in arriving at his conclusion that although the input and output supplies may be same in the instant case but it may be attracting different tax rates depending upon the class of buyer and therefore it does not get covered under the provisions of Section 54(3)(ii) of the CGST Act of 2017. Accordingly, it was the conclusion of the Joint Commissioner (Appeals) that the Assistant Commissioner had arbitrarily disallowed the claim of the assessee for refund by travelling beyond the scope of the show cause notice dated 10.04.2020. In paragraph 6.12 of the order dated 29.10.2020, the Joint Commissioner (Appeals) referred to certain decisions of some authority and, thereafter in paragraph 6.13 arrived at his conclusion that in view of the ratio laid down in the decisions referred, the order of the Assistant Commissioner rejecting the claim of refund was not justified and accordingly it was set aside. Having set aside the order rejecting the claim of refund, the Joint Commissioner (Appeals) held that the assessee is entitled to the benefit of refund of duty under Section 54(3)(ii) of the CGST Act of 2017.

11. We have read both the orders i.e. the order dated 22.05.2020 of the Assistant Commissioner as well as the appellate order of the Joint Commissioner (Appeals) dated 29.10.2020. The Assistant Commissioner arrived at his conclusion to reject the claim of refund of the assessee on the ground that as the input and output supplies made by the assessee were of the same material and goods, therefore, although the rate of tax on the input supply may be higher than the rate of tax in the output supply, but by referring to the provisions of paragraph 3.2 of the clarificatory circular No.135/05/2020-GST dated 31.03.2020 it was held that the assessee in not entitled to the refund. Paragraph 3.2 of the clarificatory circular No.135/05/2020-GST dated 31.03.2020 is extracted as below:

"3.2. It may be noted that refund of accumulated ITC in terms clause (ii) of sub-section (3) of Section 54 of the CGST Act is available where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. It is noteworthy that the input and output being the same in such cases, though attracting different tax rates at different points in time do not get covered under the provisions of clause (ii) of sub-section (3) of section 54 of the CGST Act, it is hereby clarified that refund of accumulated ITC under clause

(ii) of sub-section (3) of Section 54 of the CGST Act would not be applicable in cases where the input and the output supplies are the same."

12. The circular No.135/05/2020-GST dated 31.03.2020 was issued by the Central Board of Indirect Tax and Customs of the Government of India in the Ministry of Finance, Department of Revenue in the form of a clarification, as regards, amongst others, on the provisions of Section 54(3)(ii) of the CGST Act of 2017. A reading of the 1st paragraph of the circular No.135/05/2020-GST dated 31.03.2020 would go to show that the Central Board of Indirect Tax and Customs had received various representations seeking clarification on some of the issues relating to GST refunds. Accordingly, in exercise of its powers conferred under Section 168(1) of the CGST Act of 2017, the Central Board of Indirect Tax and Customs in order to ensure uniformity in the implementation of the provisions of law, thought it appropriate to clarify the issues raised. In other words, we have to understand that the clarifications incorporated by the circular No.135/05/2020-GST dated 31.03.2020 was made in exercise of the powers under Section 168(1) of the CGST Act of 2017.

13. Section 168(1) of the CGST Act of 2017 is extracted as below:

"168(1) The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this 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 this Act shall observe and follow such orders, instructions or directions".

14. A reading of Section 168(1) of the CGST Act of 2017 would go to show that it is a power conferred on the Central Board of Indirect Tax and Customs to issue such orders, instructions or directions to the Central Tax Officers, as it may deemed fit, if it considers it necessary or expedient to do so for the purpose of uniformity in the implementation of the CGST Act of 2017. The said power would have to be read to be a power to the Central Board of Indirect Tax and Customs to issue such orders or instructions, directions to the Central Tax Officers as to what procedure is to be followed in order to bring in an uniformity in the implementation of the CGST Act of 2017. The said power necessarily confines to providing for a given procedure to bring in an uniformity in the implementation of the Act and such power definitely cannot be construed to be a power bestowed upon the Central Board of Indirect Tax and Customs to read and give a meaning to the provisions of the CGST Act of 2017 in a manner which would be contrary and in conflict to the provisions of the Act itself. Issuing orders, instructions or directions to bring in uniformity in the implementation of the Act and altering the particular provision of the Act itself would be two different acts and for the later the Central Board of Indirect Tax and Customs had not been empowered under the provisions of Section 168(1) of the CGST Act of 2017.

15. In view of such understanding of the provisions of Section 168(1) of the CGST Act of 2017, when we examine the provisions of paragraph 3.2 of the circular No.135/05/2020-GST dated 31.03.2020, we find that the paragraph provides that although the input supplies and the output supplies may attract different tax rates at different point of time, such differences in the tax rates are not covered under Section 54(3)(ii) of the CGST Act of 2017. Having so provided, the Central Board of Indirect Tax and Customs in paragraph 3.2 of the said circular clarifies that the refund of accumulated input tax credit (ITC for short) on account of reduction in GST rate under Section 54(3)(ii) of the CGST Act 2017 would not be applicable in cases where the input and output supplies are same.

16. In other words, by virtue of paragraph 3.2 of the circular No.135/05/2020- GST dated 31.03.2020, Central Board of Indirect Tax and Customs had made a declaration that even though there may be different tax rates at different point of time i.e. it has to be understood that even for different tax rates for the input supplies and the output supplies, the refund provided under Section 54(3)(ii) would be inapplicable in cases where the input and output supplies are the same.

17. When we read the aforesaid declaration/provision/clarification of the Central Board of Indirect Tax and Customs in the circular No.135/05/2020-GST dated 31.03.2020 in paragraph 3.2 thereof conjointly with the provisions of Section 54(3)(ii) of the CGST Act of 2017, we notice that on one hand Section 54(3)(ii) of the CGST Act of 2017 provides that no refund of unutilized input tax credit shall be allowed in cases other than where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output

supplies and on the other hand, the Central Board of Indirect Tax and Customs in their circular No.135/05/2020-GST dated 31.03.2020 provides that such refunds will not be available in the event the input supplies and the output supplies are the same, even though there may be a difference in the tax rates on the input supplies and the output supplies.

18. Such declaration/provision/clarification by the Central Board of Indirect Tax and Customs in paragraph 3.2 of their circular No.135/05/2020-GST dated 31.03.2020 appears to be in conflict and provides for the contrary to the provisions of Section 54(3)(ii) of the CGST Act of 2017. Section 54(3)(ii) of the CGST Act of 2017 is extracted as below:

Section 54(3)(ii): where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies(other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

19. A plain reading of the provisions of Section 54(3)(ii) would go to show that refund of unutilized input tax credit shall not be allowed other than in a case where the credit has accumulated on account of rate of tax in inputs being higher than the output supplies. The provisions of Section 54(3)(ii) of the CGST Act of 2017 makes it explicitly clear that if the input tax credit has accumulated as because the rate of tax on input supply is higher than the rate of tax on output supply, in such event, the assessee would be entitled to a refund of the unutilized input tax credit. Ofcourse, there is a further exception that in the event the output supplies are subjected to a nil rate or are fully exempted supplies, in such event, the refund of the unutilized input tax credit will not be available under Section 54(3)(ii) of the CGST Act 2017.

20. Accordingly, we are required to look into the aspect as to whether the tax rate applicable to the present assessee in respect of the output supplies were subjected to a tax of nil rate or were fully exempted. In the instant case, the assessee obtains its input supplies either from the manufacturer, or from some other authorized dealer and makes the output supplies to a Government Department or PSU or a Research and Educational Institute within the NE Region. It is stated that the tax rate applicable in respect of a supply made to a Government Department, PSU or a Research and Educational Institutes within the NE Region is subjected to a partial exemption of the GST under Notification 45/2017-GST (Rate) dated 14.11.2017 of the Government of India in the Ministry of Finance, Department of Revenue. The Notification 45/2017-Central Tax (Rate) dated 14.11.2017 is issued under Section 11(1) of the CGST Act of 2017 and provides that on the recommendation of the GST Council, the goods specified in column(3) of the table therein are exempted from the so much of the central tax leviable thereon under Section 9 of the Act as in excess of the amount calculated at the rate of 2.5% in respect of supplies to the institutions specified in the corresponding entry in column(2) of the said table.

21. Section 11(1) of the CGST Act of 2017 provides that where the Government is satisfied that it is necessary in the public interest so to do, it may, on the recommendation of the Council, by notification, exempt generally, either absolutely or subject to such conditions as may be specified therein, goods or services or both of any specified description from the whole or any part of the tax leviable thereon.

22. A reading of the Notification No. 45/2017-GST (Rate) dated 14.11.2017 goes to show that in respect of the description of the goods specified therein there would be an exemption of the tax leviable under Section 9 of the Act in respect of excess of the amount calculated @ 2.5%. In other words, whatever is the rate of tax against the specified goods as provided under Section 9 for the output supplies be made to Government Department, PSUs or the Research and Educational Institutes of the North Eastern region, the tax rate would be @2.5% and any tax in excess thereof, as may be provided under Section 9, stands exempted.

23. A reading of the Notification No. 45/2017-GST (Rate) dated 14.11.2017 goes to show that in respect of the goods specified therein there is a partial exemption and it is neither a case of nil rate nor it is a case of full exemption.

24. Accordingly, we are to conclude that in the instant case the input supplies and the output supplies made by the petitioner assessee are not governed either by a nil rate of tax nor it is governed by fully exempted rate of tax and, therefore, the refund provided under Section 54(3)(ii) would be applicable in respect of the difference

between the rate of tax of input supplies and the rate of tax on output supplies. In other words, the provisions for refund of the unutilized input tax credit under Section 54(3)(ii) of the CGST Act of 2017 would be applicable in case of the petitioner assessee.

25. It being so, on a claim for refund being made by the petitioner assessee, it is incumbent upon the Assessing Authority i.e. the Assistant commissioner in the instant case to arrive at a factual satisfaction as to what was the rate of tax on the input supplies of the petitioner assessee and what was the rate of tax after applying the partial exemption under the Notification 45/2017-GST (Rate) dated 14.11.2017 in respect of the output supplies. In the event, a factual satisfaction is arrived that the rate of tax on the input supplies is higher than the rate of tax on the output supplies, the provisions of Section 54(3)(ii) would be applicable and the assessee would be entitled to the refund as provided therein.

26. When we read the provisions of paragraph 3.2 of the circular No.135/05/2020-GST dated 31.03.2020 vis a vis, the provisions of Section 54(3) (ii) of the CGST Act of 2017 as indicated herein above, we find that there is a conflict between the provisions of paragraph 3.2 of the circular No.135/05/2020- GST dated 31.03.2020 with the provisions of Section 54(3)(ii) of the CGST Act of 2017.

27. The law in this respect is settled to the extent that whenever there is a conflict between the provisions of a statutory Act and that of a notification or circular issued by an administrative authority, the provisions of the statutory Act would prevail over such conflicting provisions of a notification or a circular of an administrative authority. The said principle of law is so well entrenched that we are not required to refer to any specific judgment on the said point of law and it is a well accepted principle of law. The further implication of such conflict between the provisions of a statutory Act and that of a notification or circular by an administrative authority has been interpreted by the Supreme Court in a plethora of decisions that the provisions of such notification or circular, which would be in conflict with the provisions of a statutory Act, would have to be ignored and not taken into consideration for the purpose of arriving at any such decision.

28. Consequently, in view of the clear unambiguous provisions of Section 54(3) (ii) providing that a refund of the unutilized input tax credit would be available in the event the rate of tax on the input supplies is higher than the rate of tax on output supplies, we are of the view that the provisions of paragraph 3.2 of the circular No.135/05/2020-GST dated 31.03.2020 providing that even though different tax rate may be attracted at different point of time, but the refund of the accumulated unutilized tax credit will not be available under Section 54(3)(ii) of the CGST Act of 2017 in cases where the input and output supplies are same, would have to be ignored.

29. Consequent upon the conclusion arrived at, we are of the view that the rejection of the claim for refund by the petitioner assessee in the order dated 22.05.2020 of the Assistant Commissioner by referring to the provisions of paragraph 3.2 of the circular No.135/05/2020-GST dated 31.03.2020 would be unsustainable in law.

30. But at the same time, we also observe that the reasoning given by the Joint Commissioner (Appeals) in the appellate order dated 29.10.2020 for reversing the order of rejection by the Assistant Commissioner would also be not sustainable. The only reasoning given by the Joint Commissioner (Appeals) is that the issue decided by the Assistant Commissioner was not included in the show cause notice dated 10.04.2020 and, therefore, there was a violation of the principles of natural justice. We are also unable to agree with the other aspect of the order of the Joint Commissioner (Appeals) that merely because the order of the Assistant Commissioner dated 22.05.2020 was set aside on the ground of there being a violation of the principles of natural justice in the show cause notice dated 10.04.2020, therefore, without making any further enquiry as to whether the tax rate on the input supplies was higher than the tax rate on the output supplies, the Joint Commissioner (Appeals) would direct a refund of the unutilized input tax credit under Section 54(3)(ii) of the CGST Act of 2017. From such point of view, even the order of the Joint Commissioner (Appeals) dated 29.10.2020 would be unsustainable in law.

31. Consequently, both the orders i.e., dated 22.05.2020 of the Assistant Commissioner as well as the appellate order dated 29.10.2020 of the Joint Commissioner (Appeals) are set aside.

32. The matter stands remanded back to the Assistant Commissioner, GST, Guwahati to consider the matter afresh and arrive at his own factual satisfaction as to whether the actual rate of tax on the input supplies made by the petitioner assessee is higher than the actual rate of tax on the output supplies made by them and depending upon the satisfaction that may be arrived to pass a reasoned order on the claim of the petitioner assessee for refund under Section 54(3)(ii) of the CGST Act of 2017. If the Assistant Commissioner arrives at his satisfaction that the actual rate of tax on the input supplies made by the petitioner assessee is higher than the actual rate of tax on the output supplies appropriate order for refund may be passed and on the other hand, if the Assistant Commissioner upon factual deliberation arrives at his satisfaction that the actual rate of tax on the input supplies was not higher than the actual rate of tax on the output supplies, again an appropriate order may be passed by giving reasons.

33. However, we have taken note of that the circular No.135/05/2020-GST dated 31.03.2020 was issued in exercise of the powers under Section 168(1) of the CGST Act of 2017. As already noted, Section 168(1) of the CGST Act of 2017 pertains to a situation where the Central Board of Indirect Tax and Customs considers it necessary and expedient to do so for the purpose of uniformity in implementing the CGST Act of 2017. In other words, the provisions of Section 168(1) can be invoked to bring in uniformity in the implementation of the CGST Act of 2017. In the instant case, when the provisions of Section 54(3)(ii) of the CGST Act of 2017 are unambiguous and explicitly clear in nature, there is no requirement of bringing in any uniformity in the implementation of the Act and the provisions of Section 54(3)(ii) would have to be applied in the manner it is provided in the Act itself.

34. Accordingly, the requirement of passing the reasoned order by the Assistant Commissioner on the matter being remanded back be done within a period of six weeks from the date of receipt of a certified copy of this order.

35. Needless to say that whatever reasoned order is passed within the period of six weeks, the actual effect thereof be also given thereafter without any further delay.

36. In terms of the above, the writ petitions stand disposed of.