IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.08.2022

CORAM

THE HONOURABLE **MR.JUSTICE R.MAHADEVAN**
&
THE HONOURABLE **MR.JUSTICE MOHAMMED SHAFFIQ**

W.A.No.1648 of 2022
&
CMP.No.11262 of 2022

The Assistant Commissioner of GST &
Central Excise,
Puducherry-II Division,
No.14 Municipal Street,
Azeez Nagar,
Reddiarpalayam,
Puducherry 605 010 .. Appellant

Vs.

M/s.Ganges International Private Limited,
5-A, Karasur Road, Sedarapet,
Puducherry 605 111. .. Respondent

Writ Appeal filed under Clause 15 of the Letters Patent against the order passed by the learned Single Judge in W.P.No.528 of 2019, dated 22.02.2022.

For Appellant : M/s. Hema Muralikrishnan
Standing counsel

For Respondents : M/s. Arthy
for Mr.G.Natarajan

JUDGMENT

(Judgment of the court was made by R.Mahadevan, J.)

This appeal is filed by the appellant / Revenue, assailing the order of the learned Judge dated 22.02.2022 passed in WP.No.528 of 2019.

2.Briefly stated facts are as follows:

2.1. The respondent / assessee is engaged in the manufacture of GI Tower Parts, ERW Black and GI Pipes falling under Chapter 73 of the Central Excise Tariff Act, 1985. In the course of such business, they had received technical know-how / intellectual property right from foreign persons and paid royalty to them during the period from April 2016 to June 2017. For the said services received by them, they were liable to pay service tax under reverse charge basis, which was not paid by them originally. After pointing out the same in the departmental audit, they had paid the service tax liability of Rs.24,20,684/- along with interest at Rs.3,82,139/- on 02.05.2018.

2.2. The appellant further stated that though the assessee is entitled to avail cenvat credit, as per the Cenvat Credit Rules, 2004, consequent to

the introduction of GST with effect from 01.07.2017, the relevant enactments pertaining to Central Excise and Service Tax have been repealed vide sections 173 and 174 of the CGST Act, 2017; and the Cenvat Credit Rules, 2004 has also been superseded by new Cenvat Credit Rules, 2017 vide Notification No.20/2017 CE NT dated 30.06.2017. However, various transitional provisions were enacted under the CGST Act, 2017 to avail input tax credit on transitional basis vide sections 140 to 142 of the CGST Act, 2017 and Rule 117 of the CGST Rules, 2017. For claiming transitional credit, a return in form GST-TRAN 1 has to be filed within a period of 90 days. The said provision was not applicable to the case of the assessee, as they had paid the service tax for the period from April 2016 to June 2017 only on 02.05.2018 and hence, they were unable to avail credit of the service tax already paid by them. Thus, the assessee preferred a claim before the appellant for refund of Rs.24,20,684/- in cash, relying on sections 140 and 142(9) (b) of the CGST Act, 2017.

2.3. By order-in-original No.67/2018 (Refunds) dated 29.08.2018, the aforesaid claim of refund was rejected by the appellant on the premise that the same is not relatable to section 11B of CEA, 1994 which made

applicable to service tax matters by virtue of section 83 of the Finance Act, 1994; and the assessee did not fall under any situation enumerated under section 54(8) of the CGST Act, 2017.

2.4. Challenging the aforesaid order passed by the appellant, the assessee filed WP.No.528 of 2019, which was ordered by the learned Judge on 22.02.2022, by setting aside the rejection order and remanding the matter to the respondents for fresh consideration. Therefore, this writ appeal by the appellant / Revenue.

3.The learned standing counsel appearing for the appellant submitted that the assessee had not paid the appropriate service tax within the stipulated time and paid only in May 2018 after having noticed through departmental audit, thereby lost the opportunity of taking cenvat credit of the amount to be paid under reverse charge. Elaborating further, the learned counsel submitted that as the payment had been made belatedly, the assessee could not take the cenvat credit in the ST-3 returns within the stipulated period viz., 15.08.2017 and hence, they resorted to refund of the service tax by filing refund claim under the transitional provisions under

section 142 of the CGST Act, 2017. As the claim did not fit into any of the provisions of section 142 of the CGST Act, 2017, the same was rejected by the jurisdictional Assistant Commissioner. However, the learned Judge, instead of directing the assessee to avail the alternative remedy provided in the statute, has ordered the writ petition, by remitting the matter to the respondents for fresh consideration in the light of applicability of section 142(3) of the CGST Act 2017, by the order impugned herein, which is contrary to law and opposed to the facts and circumstances of the case. The learned counsel also submitted that the doctrine of necessity cannot be invoked merely because the assessee pleaded that they had no remedy, and that, the taxing statutes are to be interpreted strictly and there is no equity in fiscal matters so as to invoke the doctrine of necessity for the purpose of providing a remedy just for asking, when the assessee has not complied with the statutory provisions. Therefore, the learned counsel sought to allow this appeal by setting aside the order of the learned judge.

4.On the other hand, the learned counsel for the respondent / assessee submitted that taking note of the entitlement of the assessee with respect to

cenvat credit and there is no eligible provision available, the learned Judge rightly set aside the order passed by the appellant rejecting the claim of the assessee, and directed the authority to reconsider the matter under section 142(3) of the Act. Thus, according to the learned counsel, there is no requirement to quash the same.

5.Heard both sides and perused the materials available on record.

6.It is an admitted fact that the assessee is eligible to claim cenvat credit under the erstwhile Central Excise Act, prior to 30.06.2017, but they were unable to claim, due to transitional provision has come into effect from 01.07.2017. It is also not in dispute that they had paid the service tax for the period from April 2017 to June 2017 belatedly i.e., on 02.05.2018, after pointing out the same through departmental audit. Thereafter, the assessee filed an application for refund. The appellant rejected the claim of refund made by the assessee on the premise that there is no provision in the new regime to allow such refund as input tax credit in GST/credit in Electronic cash ledger/ payment in cash. The said order was put to challenge by the

assessee by filing WP.No.528 of 2019. After considering the case of the asseesee, the learned Judge was of the view that merely because the transitional provision has come into effect from 01.07.2017, the chance of making an application under section 140(1) to seek the refund or otherwise of the credit, which was subsequently accrued in the account of the assessee, cannot be denied. Observing so, the learned Judge ordered the said writ petition, by setting aside the order rejecting the claim of refund made by the assessee and remanding the matter to the appellant for fresh consideration. The operative portion of the said order is extracted below for ready reference:

> *"48. For all these reasons, this Court, having considered the peculiar facts and circumstances of the case, is inclined to dispose of these writ petitions with the following orders:*
>
> *"(i) That the impugned orders in these writ petitions are liable to be set aside, accordingly are set aside. As a sequel, the matters are remitted back to the respondents for reconsideration. While reconsidering the same, the authority concerned, who has to deal with the applications of the petitioners, shall consider and dispose of these applications under section 142(3) of the CGST Act, 2017.*
>
> *(ii) While reconsidering the said applications, the claim made by the petitioners need not be considered for the purpose of refund of the claim made by them. However, the said claim made by the petitioners can very well be considered for the purpose of permitting the petitioners to carry forward the accrued credit to the electronic credit ledger of the GST regime.*
>
> *(iii) After considering the said applications, as indicated above, the necessary order shall be passed by the respondents within a period of six weeks from the date of receipt of a copy of this order. It is made*

clear that, before passing the orders as indicated above, an opportunity of being heard shall be given to the petitioners, so that the petitioners can put forth their case by providing all necessary inputs to the satisfaction of the authorities to take a decision thereon."

7.It is evident from the aforesaid order that the learned Judge, considering the peculiar circumstances of the case, viz., the assessee is entitled to avail cenvat credit of the service tax already paid, which fact was also admitted by the Revenue, but they were unable to claim, due to transitional provision has come into effect from 01.07.2017, ordered the writ petition by setting aside the rejection order of the appellant and remanding back the matter to the appellant for fresh consideration, with certain directions, which are aggrieved by the appellant / Revenue.

8.This court is of the view that what was impugned herein is only the order of remand passed by the learned Judge and hence, there is no requirement to set aside the same in entirety. However, this court is inclined to modify the order of the learned Judge to some extent. Accordingly, the same is modified by directing the appellant to consider the application of the assessee under section 142(3) of the CGST Act, 2017, based on the

available materials and dispose the same, on merits and after affording an opportunity of hearing to the assessee, within a period of six weeks from the date of receipt of a copy of this judgment.

9.With the aforesaid modification, this writ appeal stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

[R.M.D.,J.] [M.S.Q.,J.]
17.08.2022

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Index: Yes/no
Internet:Yes/no

To
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