

\$~1

\*

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

%

*Date of Decision: April 6, 2023*

+

**W.P.(C) 3550/2023**

**BHARAT SANCHAR NIGAM LIMITED ..... Petitioner**

Through: Mr. Kamal Sawhney, Adv. with  
Mr. Krishna Rao, Ms. Aakansha  
Wadhwani, Mr. Deepak  
Thackur and Ms. Anishka  
Gupta, Advs.

versus

**UNION OF INDIA & ORS.**

**..... Respondents**

Through: Mr. Bhagwan Swarup Shukla,  
CGSC with Mr. Sarvan Kumar  
and Mr. Vikrant, Advs. for  
UOI.  
Mr. R. Ramachandran, Senior  
Standing Counsel for R-2 and  
3.

**CORAM:**

**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**HON'BLE MR. JUSTICE AMIT MAHAJAN**

**VIBHU BAKHRU, J. (Oral)**

1. The petitioner has filed the present petition impugning an order dated 25.11.2021 passed by the Additional Commissioner CGST Appeals-II (**the Appellate Authority**), whereby the petitioner's appeal against an order dated 29.04.2020 passed by the Adjudicating Authority was rejected.

2. In addition, the petitioner impugns the validity of Rule 90(3) of the Central Goods and Services Tax Rules, 2017 (hereafter '**the**

**Rules’)**. The petitioner also assails Paragraph 12 of Circular No. 125/44/2019 dated 18.11.2019 as being *ultra vires* Section 54 of the Central Goods and Services Tax Act, 2017 (hereafter ‘**the CGST Act’**).

3. The petitioner is essentially aggrieved by the denial of his request for refund of GST amounting to ₹2,63,98,462/-.

4. The petitioner claims that excess tax to the aforesaid extent was paid for the month of December, 2017 and the petitioner is entitled to refund of the said amount.

5. The petitioner has explained that there was an error on its part in reporting the sales for the aforesaid month. The petitioner states that it had raised an invoice for carrying out the work of the NFS Project, which involved laying of an alternate communication network for Defence Services. The petitioner had also deposited the Goods and Services Tax amounting to ₹ 18,60,35,829/- and had reported the same in its returns (GSTR-1 and GSTR- 3B) filed for the month of December, 2017.

6. Thereafter, the petitioner received a letter dated 22.02.2018 from the Department of Telecommunications (DOT) clarifying that the amount of ₹ 104,65,11,628/- paid to the petitioner was inclusive of taxes. It is the petitioner’s case that on receipt of the said letter, it realised that the calculation of GST was erroneous in as much as the petitioner had assumed that amount received was exclusive of GST, which would be paid over and above the specified amount.

7. In view of the clarification from DOT that the amount received by the petitioner was inclusive of taxes, the petitioner reworked his tax liability and found that it was required to pay a sum of ₹15,96,37,367/- as GST and it had erroneously paid a sum of

₹2,63,98,462/- in excess of its liability.

8. In view of the above, the petitioner filed an application (in Form GST RFD 01) on 17.01.2020 seeking refund of the excess payment of tax amounting to ₹2,63,98,462/-.

9. The Adjudicating Officer issued a Deficiency Memo dated 31.01.2020 (in Form GST RFD 03) seeking certain other documents.

10. The said Deficiency Memo is set out below:

**FORM-GST-RFD-03**  
[See Rule 90(3)]  
**Deficiency Memo**

सेवा में,

**07AABCB5576G1ZN** (GSTIN/UIN/Temporary ID),  
M/s BHARAT SANCHAR NIGAM LIMITED,  
H C MATHUR LANE,  
JANPATH, NEW DELHI – 110001.

महोदय,

**विषय: Refund Application Reference No. (ARN) AA070120034449K dated 17-01-2020 – reg.**

This has reference to your above mentioned application electronically filed vide above mentioned ARN under Section 54 of the CGST Act, 2017 read with Rule 89 of CGST Rules. Upon scrutiny of your application, certain deficiencies have been noticed below:

Sr. No.	Description
1.	Reconciliation with outward supply in t/o GSTR-3B Vs GSTR-1 for relevant period.
2.	Refund filed on the ground of excess payment of tax; kindly provide the reason for excess payment of tax along with supporting documents.
3.	Copy of cash & credit ledger along with relevant copies of challan for the relevant period.

You are advised to file a fresh refund application after rectification of above deficiencies.

Date: 31-01-2020  
Place: Delhi

Signature (DSC): -sd-  
Name of Proper Officer: Rahul Kumar  
Designation: Assistant Commissioner,  
Div-Connaught Place.

11. The petitioner claims that it responded to the said Deficiency Memo by submitting the clarifications online.

12. There is some controversy in respect of the response to the said Deficiency Memo. The acknowledgment on record indicates that it

was acknowledged as a fresh application (in Form GST RFD 01).

13. It appears from the above that the petitioner had uploaded the documents online in the said format and therefore, the same was construed as an application for refund.

14. Thereafter, by an order dated 29.04.2020, the petitioner's application was rejected on the ground that the same was beyond the period of limitation.

15. A plain reading of the said order indicated that the clarifications submitted by the petitioner on 10.02.2020 (in Form GST RFD 01) was treated as the application for refund. Since the same was beyond the period of two years from the date of filing the return (which was filed on 22.01.2018), the petitioner was denied its claim for refund of excess tax.

16. The petitioner appealed the said order before the Appellate Authority, which was rejected by the impugned order 25.11.2021. The Appellate Authority upheld the order passed by the Adjudicating Authority.

17. The reasons stated by the Appellate Authority in the impugned order indicates that the Appellate Authority had proceeded on the basis that the petitioner had filed the first online refund claim along with documents on 10.02.2020.

18. The petitioner's application filed on 17.01.2020 was ignored. Although it has not been expressly stated, it appears that the Appellate Authority had proceeded on the basis that it was appellant's case that it had filed the Form GST RFD 01 physically on 17.01.2020. The Appellate Authority reasoned that an application could only be filed online and this same appears to be the sole reason why the petitioner's appeal was rejected.

19. Concededly, the petitioner had filed its online application for refund on 17.01.2020. It is also not disputed that the said application was within the period of limitation as stipulated under Section 54 of the CGST Act. Thus, the impugned order is founder on a palpably erroneous premise.

20. It is stated in the counter affidavit by the respondent that the petitioner's first application for refund dated 17.01.2020 was incomplete and therefore, could not be processed. However, the said contention is also unmerited.

21. Rule 89(2) of the Rules prescribes the documents that are required to be filed along with the Form GST RFD 01.

22. Given that the petitioner's claim for refund was for excess tax paid on an erroneous assumption, the documents, as mentioned in Clause (k), (l) and (m) of Rule 89(2), are relevant. The said Clauses are set out below:

***“89. Application for refund of tax, interest, penalty, fees or any other amount***

xxxx

xxxx

xxxx

(2) The application under sub-rule (1) shall be accompanied by any of the following documentary evidences in Annexure 1 in **FORM GST RFD-01**, as applicable, to establish that a refund is due to the applicant, namely:-

xxxx

xxxx

xxxx

(k) a statement showing the details of the amount of claim on account of excess payment of tax;

(l) a declaration to the effect that the incidence of tax, interest or any other amount claimed as refund has not been passed on to any other person, in a case where the amount of refund claimed does not exceed two lakh rupees:

*PROVIDED* that a declaration is not required to be furnished in respect of the cases covered under clause (a) or clause (b) or clause (c) or clause (d) or clause (f) of sub-section (8) of section 54;

(m) a Certificate in Annexure 2 of **FORM GST RFD-01** issued by a chartered accountant or a cost accountant to the effect that the incidence of tax, interest or any other amount claimed as refund has not been passed on to any other



*person, in a case where the amount of refund claimed exceeds two lakh rupees:*

*PROVIDED that a certificate is not required to be furnished in respect of cases covered under clause (a) or clause (b) or clause (c) or clause (d) or clause (f) of sub-section (8) of section 54;*

*Explanation : For the purposes of this rule-*

- (i) in case of refunds referred to in clause (c) of sub-section (8) of section 54, the expression "invoice" means invoice conforming to the provisions contained in section 31;*
- (ii) where the amount of tax has been recovered from the recipient, it shall be deemed that the incidence of tax has been passed on to the ultimate consumer.*

xxxx

xxxx

xxxx"

23. It is the respondent's case – although not borne out from the order passed by the Adjudicating Authority denying refund or the Appellate Authority – that the application filed by the petitioner was not accompanied by a statement showing the details of the amount of claim on account of excess payment of tax as required under Rule 89(2)(k) of the Rules.

24. The said contention is ex facie erroneous as the Form specifically requires the applicant to disclose the statement of excess tax.

25. Mr. Kamal Sawhney, learned counsel appearing for the petitioner, had earnestly contended that it was open for the respondents to seek any documents required for clarification relating to the refund claim made by a taxpayer, however, the taxpayer's application cannot be considered as deficient if it was duly accompanied by the documents prescribed under Rule 89(2).

26. The said contention is merited. However, the said contention does not arise in the facts of the present case as the Appellate Authority has not rejected the petitioner's appeal on the ground that its application filed on 17.01.2020 was deficient; it has done so on an

erroneous assumption that it was filed physically and not online.

27. It is pointed out that the Adjudicating Authority had proceeded on the basis that it had communicated the deficiencies in Form GST RFD 03 on 31.01.2020 electronically and the said deficiency was resolved after the expiry of two years as stipulated in Section 54 of the CGST Act. The Adjudicating Authority had referred to Rule 90(3) of the Rules and had proceeded on the basis that the said Rule provides for filing of a fresh refund application after rectification of deficiencies. And, the date for filing the fresh application was required to be considered for the purpose of limitation.

28. We are of the view that Rule 90(3) cannot be applied in the manner as sought to be done by the Adjudicating Authority. Merely because certain other documents or clarifications are sought by way of issuing a Deficiency Memo, the same will not render the application filed by a taxpayer as *non est*.

29. If the application filed is not deficient in material particulars, it cannot be treated as *non est*. If it is accompanied by the “*documentary evidences*” as mentioned in Rule 89(2) of the Rules, it cannot be ignored for the purposes of limitation. The limitation would necessarily stop on filing the said application. This is not to say that the information disclosed may not warrant further clarification, however, that by itself cannot lead to the conclusion that the application is required to be treated as *non est* for the purposes of Section 54 of the CGST Act. It is erroneous to assume that the application, which is accompanied by the documents as specified under Rule 89(2) of the Rules, is required to be treated as complete only after the taxpayer furnishes the clarification of further documents as may be required by the proper officer and that too from the date

such clarification is issued.

30. In view of the above, learned counsel for the petitioner does not seek to press and challenge the validity of Rule 89(2) and Rule 90(3) of the Rules.

31. The impugned order passed by the Appellate Authority as well as the order passed by the Adjudicating Authority, is set aside, and the matter is remanded to the Adjudicating Authority to consider afresh in the light of the observations made by this Court.

**VIBHU BAKHRU, J**

**AMIT MAHAJAN, J**

**APRIL 6, 2023**

*'KDK'*



न्यायमेव जयते