IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:05.12.2023

\+ **W.P.(C)No.2918/2021**

GRAPES DIGITAL PVT. LTD. ..... Petitioner

versus

PRINCIPAL COMMISSIONER & ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Tarun Gulati, Sr. Adv. with Mr. Deepak Joshi, Mr. Ankur Jain, Mr. Kumar Sambhav & Ms. Shruti, Advs.

For the Respondent : Ms. Samiksha Godiyal, Ms. Diksha Tiwari & Ms. Apurva Singh, Advs.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition impugning several orders. The petitioner impugns the Orders-in-Original dated 24.10.2018 and 08.08.2019, passed by the Adjudicating Authority in respect of the application filed by the petitioner for refund of Integrated Goods and Services Tax (hereafter '**IGST**') in respect of 'zero rated supply' being the export of services. In terms of the impugned Order-in-Original dated 24.10.2018, the Adjudicating Authority had allowed the petitioner's claim for the refund of IGST of ₹24,33,20,306/- but, had adjusted an

amount of ₹5,08,03,767/- on account of interest liability. The interest liability comprised of an amount of ₹2,26,71,171/-, on account of interest on delayed payment of tax on input supplies on Reverse Charge Method (hereafter '**RCM**') and ₹2,81,32,596/- as interest on delayed payment of IGST on zero rated supplies. The Adjudicating Authority had passed the impugned Order-in-Original dated 08.08.2019 pursuant to a remand by the learned Appellate Authority holding that the adjustment on account of interest was permissible under Section 75 (12) of the Central Goods & Services Tax Act, 2017 (hereafter '**the CGST Act**') and Section 79(1)(a) of the CGST Act.

2. In addition, the petitioner impugns the Review Order dated 16.10.2019 passed by respondent no.1 [Principal Commissioner, Central Goods & Service Tax, Delhi, South Commissionerate] directing that an appeal be filed for setting aside the impugned Orders-in-Original dated 24.10.2018 and 08.08.2019 to the extent that the said orders accepted the petitioner's claim for a refund of IGST in the sum of ₹24,33,20,306/-.

3. The petitioner also impugns an Order-in-Appeal dated 30.04.2019 passed by the Appellate Authority [Commissioner of Central Tax, Appeals-II, Delhi] rejecting the petitioner's appeal against the impugned Order-in-Original dated 24.10.2018 and remanding the matter for rectification of the said order. The petitioner is aggrieved to the extent that the levy of interest and its adjustment was upheld. Finally, the petitioner also impugns an Order-in-Appeal dated 14.10.2020 passed by the Appellate Authority allowing the Revenue's

appeal against the Orders-in-Original dated 24.10.2018 and 08.08.2019 and dismissing the petitioner's appeal against the impugned Order-in-Original dated 08.08.2019.

4. The petitioner claims that it is entitled to a refund of the sum of ₹24,33,30,306/- being the IGST paid in respect of zero rated supplies made during the period of July, 2017 till March, 2018. The petitioner claims that its activity of import and export of services is tax neutral and it has no real liability to pay any tax. Although, the petitioner is liable to pay tax on import of services on RCM, it is entitled to claim refund of the same, either directly, or by availing the Input Tax Credit (**ITC**) to pay IGST on its output supplies and claim refund of the IGST. In either of the two options, its net liability to pay goods and services tax is nil. In the aforesaid basis, the petitioner submits that the adjustment of interest on its tax liability against its claim for refund, is erroneous.

5. It is also the petitioner's case that the controversy is restricted to the question whether the Adjudicating Authority was correct in adjusting the interest liability. The question whether the petitioner was entitled to a refund, as claimed, was settled in its favour. It is contended that the said question could not be reopened by the Revenue by reviewing the Order-in-Original dated 24.10.2018 and filing an appeal after a period of six months, for preferring an appeal as stipulated under Section 107(2) of the CGST Act, had expired and after the Order-in-Original dated 24.10.2018 had merged with the Order-in-Appeal dated 30.04.2019.

6. The Revenue has countered the aforesaid submissions. According to the Revenue, its appeal against the Order-in-Original dated 24.10.2018 filed pursuant to the Review Order dated 16.10.2019, was within the period of six months as stipulated under Section 107(2) of the CGST Act. The Revenue contends that in any event the appeal was filed within the prescribed period, from the date of the impugned Order-in-Original dated 08.08.2019. Since, the said order dealt with the question of refund, the Revenue's right to review the same was wide enough to cover all aspects of refund, including the petitioner's claim for the refund of ₹24,33,20,306/- which was accepted by the Adjudicating Authority.

7. It is the Revenue's case – which was accepted by the Appellate Authority in its impugned Order-in-Appeal dated 14.10.2020 – that the petitioner having chosen to export the goods under a Letter of Undertaking (**LOU**) without payment of Central Goods and Service Tax (hereafter **'CGST'**) was precluded from changing its option to pay IGST and claim refund on export of services (zero rated supply). It is submitted that the only recourse available to the petitioner was to seek refund of ITC on account of tax paid on RCM in respect of import of input supplies. Since the petitioner had not filed any application seeking refund of the said ITC and had confined its application to the refund of IGST, its claim for refund was unsustainable.

8. The controversy in the present case arises in the following factual context.

8.1 The petitioner is engaged in the business of providing services of digital media management, online advertisement, management of advertisement project, sale and procurement of space and slots for advertisement on social media, planning and management of advertisement campaign and other business support services. The petitioner provides its services to clients located in India as well as abroad. The petitioner claims that it is required to import such services from entities located overseas. In terms of Section 7(4) of the Integrated Goods & Services Tax Act, 2017 (hereafter **'the IGST Act'**), the supply of services imported into the territory of India is required to be treated as supply of services in the course of inter-state trade or commerce and thus, the same is chargeable to IGST under the IGST Act. However, IGST is required to be paid by the importer of such services under RCM. In terms of Section 20(iv) of the IGST Act, the provisions of the CGST Act relating to ITC apply *mutatis mutandis* in relation to IGST as they apply to CGST as if they are enacted under the IGST Act. Section 16 of the IGST Act defines 'zero rated supplies' to include export of goods and services. Thus, the services exported by the petitioner qualify as zero rated supply.

8.2 In terms of Section 16(3) of the IGST Act, as was in force at the material time, the petitioner had the option to either seek refund of IGST paid in respect of inputs for zero rated supplies made under the LOU without the payment of IGST, or to seek refund of IGST paid in respect of such zero rated supplies.

8.3 The Goods and Services Tax regime was rolled out in the month of July, 2017. The petitioner claims that there was a huge confusion with regards to the implementation of the refund mechanism and that the claims for refund were not being processed expeditiously. Thus, it was apparent that any input tax paid by the petitioner on RCM basis would get stuck with the concerned authorities and the petitioner's claim for refund of the said amount would not be processed within a short period of time. The petitioner claims that in order to avoid the blocking of its funds by payment of IGST on RCM, the petitioner refrained from depositing such tax, which it was liable to pay under the IGST Act. During the period in question, the petitioner exported its services under the LOU without payment of IGST.

8.4 Subsequently, the petitioner amended its returns by amending its invoices to reflect the same as invoices bearing IGST under the IGST Act. In the month of August, 2018, the petitioner deposited IGST for its input supplies (on RCM). It also deposited IGST on export of services by utilizing the ITC that was accumulated on account of payment of IGST on input supplies. Thereafter, on 28.08.2018, the petitioner filed an application claiming ₹24,33,20,306/- as refund of IGST paid against zero rated supplies.

8.5 The refund application was duly acknowledged by respondent no.2. The said application was disposed of by the Adjudicating Authority by the Order-in-Original dated 24.10.2018. The Adjudicating Authority accepted the petitioner's claim for refund of IGST amounting to ₹24,33,20,306/-, however, it held that the interest due on delayed

payment of IGST on RCM, on inputs as well as on the interest liability on delayed payment of IGST, was required to be adjusted under Section 73 of the CGST Act read with Rule 50 of the Central Goods & Services Tax Rules, 2017 (hereafter **'the CGST Rules'**). The aggregate of the interest was computed as ₹5,08,03,767/-. Accordingly, the net amount of ₹19,25,16,539/- was sanctioned. Tabular statements indicating the interest liability on delayed payment of IGST on inputs was computed at ₹2,26,71,171/- and the interest liability on delayed payment of IGST on exports was computed at ₹2,81,32,596/-, and the same are set out below:

"Interest liability on delayed payment of RCM:-

Month	**IGST payable under RCM**	**Due date for payment**	**Date of payment**	**no. of delayed**	**Interest @ 18%**
Sept, 17	2671165	20-Oct, 17	20-Feb, 18	124	163344
	11102519	20-Oct, 17	24-Aug, 18	309	1691841
Oct, 17	19796540	20-Nov, 17	24-Aug, 18	278	2714024
Nov, 17	41294657	20-Dec, 17	24-Aug, 18	248	5050393
Dec, 17	17880570	22-Jan, 18	24-Aug, 18	215	1895830
Jan, 18	24943195	20-Feb, 18	24-Aug, 18	186	2287940
Feb, 18	50960481	20-Mar, 18	24-Aug, 18	158	3970729
Mar, 18	78190303	20-Apr, 18	24-Aug, 18	127	4897069
Total	**246839430**				**22671171(A)**

Interest liability on delayed payment of IGST on export:-

Month	**Value of export**	**Due date for**	**Date of payment**	**IGST Amount**	**No. of days**	**Interest**

		payment			**delayed**	
July, 17	31041033	25-Aug,17	24-Aug,18	5587386	365	1005729
Aug, 17	96995399	20-Sep,17	24-Aug,18	17459172	339	2918791
Sep, 17	125185595	20-Oct,17	24-Aug,18	22533407	309	3433721
Oct, 17	280743778	20-Nov,17	24-Aug,18	50533880	278	6927987
Nov, 17	116039258	20-Dec,17	24-Aug,18	20887066	248	2554517
Dec, 17	167134900	22-Jan,18	24-Aug,18	30084282	215	3189758
Jan, 18	243051706	20-Feb,18	24-Aug,18	43749307	186	4012950
Feb, 18	291429265	20-Mar,18	24-Aug,18	52457268	157	4087355
Mar, 18	158543	20-Apr,18	24-Aug,18	28538	127	1787
Total	**1351779477**			**243320306**		**28132596(B)”**

8.6 The petitioner being aggrieved by the adjustment of interest on delayed payment of IGST on imports and exports, filed an appeal before the Appellate Authority. The petitioner claims that the Adjudicating Authority had not issued any show cause notice under Section 73 of the CGST Act, for determining the input tax liability; therefore, no such adjustment on the said account could be made. In addition, the petitioner contended that the transactions were tax neutral and that the petitioner had no real liability to pay any tax. Although, it was liable to pay IGST on import of services, it was entitled to refund of the same on export of services. It was also entitled to a refund of any IGST paid on output supplies, therefore, the delay in payment of IGST, input or on

output supplies did not prejudice the Revenue in any manner. It is also contended that the levy of interest is compensatory in nature, thus, if the petitioner is entitled to refund on payment, the Revenue cannot claim any interest on account of any delay as in any event it could not retain any amount of IGST so paid.

8.7 The Appellate Authority rejected the aforesaid contentions. It held that the petitioner was required to pay IGST and interest on its own in terms of Section 50(1) of the CGST Act without waiting for any show cause notice under Section 73 of the CGST Act. The learned Appellate Authority held that it was not permissible for the petitioner to withhold payment of IGST for periods ranging over four months to a year. Therefore, the Appellate Authority rejected the contention that the transaction was tax neutral and entitled the petitioner to resist payment of interest on delayed payment of tax.

8.8 It is relevant to note that the Appellate Authority also noted that there was no dispute as to the quantum of interest liability. However, Appellate Authority found that the Adjudicating Authority had incorrectly referred to Section 73 of the CGST Act and Rule 50 of the CGST Rules for the purpose of making the said adjustments. The Appellate Authority found that the same was an error apparent on record and remanded the matter to the Adjudicating Authority to afford the petitioner an opportunity to defend its case to resist the adjustment under the said provisions. The Appellate Authority directed that the Adjudicating Authority will also consider the adjustment of refund under Section 75(12) of the CGST Act read with Section 79(1)(a) of the

CGST Act as applicable by the virtue of Section 20(xvi) of the IGST Act.

8.9 Pursuant to the order dated 30.04.2019 passed by the Appellate Authority, the Adjudicating Authority once again examined the question regarding adjustment of the petitioner's interest liability quantified at ₹5,08,03,767/-. The Adjudicating Authority held that the refund of IGST of ₹19,25,16,539/- had been sanctioned correctly after making adjustment of the amount of ₹5,08,03,767/-. The Adjudicating Authority held that the said adjustment was permissible under Section 75(12) of the CGST Act read with Section 79(1)(a) of the CGST Act.

8.10 Aggrieved by the Order-in-Original dated 08.08.2019, the petitioner filed an appeal before the Appellate Authority. The petitioner reiterated its contentions that there was no provision for deduction and adjustment of any unconfirmed demand of interest. Further, it reiterated its contention that the entire transaction was revenue neutral and therefore, there was no liability to pay any interest.

8.11 In the meanwhile, respondent no.1 passed an order reviewing both, the Orders-in-Original – the Order-in-Original dated 24.10.2018 as well as the Order-in-Original dated 08.08.2019 – passed by the Adjudicating Authority. According to the Reviewing Authority, the Adjudicating Authority had erred in accepting that IGST was refundable to the petitioner. The Reviewing Authority noted that the petitioner had exported the services under LOU without payment of IGST and therefore, could not seek refund of IGST. According to

respondent no.1, it was not open for the petitioner to amend its returns and change its option of exporting the services on payment of IGST after the services in question are exported. The said Authority accordingly directed filing of an appeal against both the impugned Orders-in-Original (Order-in-Original dated 24.10.2018 and the Order-in-Original dated 08.08.2019). In terms of the said Review Order dated 16.10.2019, the Revenue filed appeals before the Appellate Authority. Both the appeals (appeal preferred by the Revenue as well as the appeal preferred by the petitioner) were disposed of by a common order dated 14.10.2020. The Appellate Authority allowed the appeal filed by the Revenue and rejected the petitioner's appeal. The Appellate Authority accepted the contention that it was not permissible for the petitioner to amend its return and therefore, the refund of IGST was neither just nor proper. The Appellate Authority did not accept that the appeal filed by the Revenue against the Order-in-Original dated 24.10.2018 was barred by limitation. It also did not accept the contention that the transaction was revenue neutral as claimed by the petitioner.

8.12 As stated above, the petitioner has filed the present petition assailing the impugned Order-in-Appeal dated 14.10.2020 passed by the Appellate Authority as it cannot avail the statutory right of appeal before the Goods and Services Tribunal because the same has not been constituted.

WHETHER THE REVENUE'S APPEAL AGAINST THE ORDER DATED 24.10.2018 WAS BARRED BY LIMITATION.

9. Section 107 of the CGST Act contains provisions for appeals to the Appellate Authority. In terms of Sub-section (2) of Section 107 of the CGST Act, the Commissioner is empowered to call for records of any proceedings in which the Adjudicating Authority has passed any order under the CGST Act or SGST Act or the UGST Act for the purpose of satisfying himself as to the legality or propriety of the said decision. He is also empowered to direct a subordinate officer to apply to the Appellate Authority for determination of such points as arising from the decision or order as may be specified by him. The said application is required to be dealt with by the Appellate Authority as an appeal against the decision or order of the Adjudicating Authority. Sub-sections (2) and (3) of Section 107 of the CGST Act are relevant and are set out below:

> "(2) The Commissioner may, on his own motion, or upon request from the Commissioner of State tax or the Commissioner of Union territory tax, call for and examine the record of any proceedings in which an adjudicating authority has passed any decision or order under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, for the purpose of satisfying himself as to the legality or propriety of the said decision or order and may, by order, direct any officer subordinate to him to apply to the Appellate Authority within six months from the date of communication of the said decision or order for the determination of such points arising out of the said decision or order as may be specified by the Commissioner in his order.
>
> (3) Where, in pursuance of an order under sub-section (2), the authorised officer makes an

> application to the Appellate Authority, such application shall be dealt with by the Appellate Authority as if it were an appeal made against the decision or order of the adjudicating authority and such authorised officer were an appellant and the provisions of this Act relating to appeals shall apply to such application."

10. It is apparent from the plain reading of Sub-section (2) of Section 107 of the CGST Act that any application to the Appellate Authority at the instance of the Commissioner can be made only within six months of the communication of the decision or order passed by the Adjudicating Authority.

11. In the present case, the Review Order was passed by the Commissioner on 16.10.2019, that is, almost one year after the impugned Order-in-Original dated 24.10.2018. Subsequent thereto, the Revenue, filed an appeal on 17.10.2019. Notwithstanding the same, it was contended on behalf of the Revenue that its appeal against the Order-in-Original dated 24.10.2018 was within time as that order was received by the Revenue Branch (Commissioner) on 24.09.2019. The petitioner disputes that the information regarding the Order-in-Original was received on 24.09.2019 as claimed by the Revenue. The petitioner also contends that in any event the Revenue cannot draw any advantage on account of any delay in intra-departmental communications, as accepting the same would negate the legislative intent of ensuring that the appeals are filed within the specified time period and not thereafter.

12. In view of the aforesaid, this Court had by an order dated 13.02.2023 directed the Revenue to file, *inter alia*, an affidavit

disclosing the procedure adopted by it for communication of the Orders-in-Original. And, if such a procedure was established, the reasons for not following the same in the present case. In compliance with the said order, the Revenue filed an affidavit stating that there was no specific procedure or timeline adopted for communication of the Order-in-Original till 14.06.2022. It is affirmed that different practices were being followed by different field formations and it was a general practice that copies of the Orders-in-Original were communicated to the Review Branch of the Commissionerate by endorsement on the Orders-in-Original. The date of receipt of the Order-in-Original was considered as the relevant date for the purpose of computing limitation under Section 107(2) of the CGST Act. According to the Revenue, the Order-in-Original dated 24.10.2018 was not dispatched to the Review Branch but was endorsed to the Pay & Accounts Office for disbursement of the refund amount. It is stated that this was an inadvertent error and the delay in filing the appeal was *bona fide.*

13. The explanation as to how the Order-in-Original dated 24.10.2018 was finally received by the Commissioner makes interesting reading. It is the Revenue's case that steps for examining the matter were triggered with the concerned officer becoming aware of the second Order-in-Original dated 08.08.2019. However, as to how the Review Branch became aware of the said order has not been explained. It is also stated that the Order-in-Original dated 08.08.2019 was endorsed to the Review Branch on 09.08.2019 (the Dispatch Register also evidences that the said order was dispatched to the petitioner as well as to the

Review Branch on 09.08.2019). However, according to Revenue the said order was not received by the Review branch, despite that the same was dispatched to it. There is no explanation as to why this order did not reach the Review Branch.

14. Notwithstanding that, the Order-in-Original dated 08.08.2019 was not received, the Revenue claims that the Review Branch became aware that such an order was passed. Despite the court raising a pointed query, no specific answer was forthcoming by the Revenue as to how the Review Branch became aware of the Order-in-Original dated 08.08.2019.

15. The Revenue claims that on becoming aware of the Order-in-Original dated 08.08.2019 (although the Revenue has not explained as to how the Review Branch became aware of the same), the Review Branch sent a letter dated 19.09.2019 informing, respondent no.2 that it had not received the Order-in-Original dated 08.08.2019. On receipt of this letter, respondent no.2 once again forwarded the Order-in-Original dated 08.08.2019 to the Review Branch under cover of its letter dated 20.09.2019.

16. It is stated that on receipt of the Order-in-Original dated 08.08.2019, the Review Branch became aware of the existence of the Order-in-Original dated 24.10.2018. The Review Branch then sent a letter dated 24.09.2019 to respondent no.2 requesting for a certified copy of the Order-in-Original dated 24.10.2018, which was supplied by

respondent no.2 under cover of the letter issued on the same date, that is, on 24.09.2019.

17. The question that arises for consideration is whether, in the given facts, the stipulated time for filing the appeal is required to be reckoned from 24.09.2019.

18. In our view, the said question is required to be answered in the negative. We are unable to accept that the appeal filed by the Revenue against the Order-in-Original dated 24.10.2018 was within the period of limitation for several reasons. First, we find it difficult to accept the Revenue's explanation regarding delayed communication of the Order-in-Original dated 24.10.2018. As noted above, there is no explanation as to how the concerned officer became aware of the Order-in-Original dated 08.08.2019. It is also relevant to note that although, the Revenue had placed on record orders seeking certified copies of the Orders-in-Original dated 24.10.2018 and 08.08.2019 from respondent no.2, there is no communication, issued by the Principal Commissioner (respondent no.1), either protesting or calling for an explanation as to why the Orders-in-Original dated 24.10.2018 and 08.08.2019 were not communicated to the Commissioner by respondent no.2.

19. As noted above, the petitioner had filed an appeal against the said Order-in-Original dated 24.10.2018. The Revenue had notice of the said appeal but no one had appeared on behalf of the Revenue at the hearing held by the Appellate Authority on 29.03.2019. There is no allegation that the Order-in-Appeal dated 30.04.2019 disposing of the appeal was

passed without affording the Revenue any opportunity to contest the same. The Revenue had taken no steps to challenge the Order-in-Appeal dated 30.04.2019 passed by the Appellate Authority

20. It is clearly not open for the Revenue to now claim that it had no knowledge of the Order-in-Original dated 24.10.2018, which was the subject matter of an appeal that was heard by the Appellate Authority on 29.03.2019.

21. We are inclined to accept the contention that the intra-departmental communications seeking certified copies of the Orders-in-Original have been generated for the purpose of reflecting delay in communication of the said Orders-in-Original, for the purpose of limitation.

22. The second reason, which we find more important, rests on the interpretation of the expression '*communication of the order'* as used in Section 107 of the CGST Act. The said expression, when used to specify the period for the tax authorities to initiate any measure, is required to be interpreted in a narrow sense.

23. The scheme of Section 107 of the CGST Act clearly indicates the legislative intent to place a strict time frame within which the appeals can be preferred to the Appellate Authority. In terms of Sub-section (1) of Section 107 of the CGST Act, any person aggrieved by the said decision of the Adjudicating Authority can file an appeal to the Appellate Authority within a period of three months from the date on which the order is communicated to such person. In terms of Sub-

section (2) of Section 107 of the CGST Act, the Revenue can apply to the Appellate Authority within a period of six months of communication of the order passed by the Adjudicating Authority. In terms of Sub-section (4) of Section 107 of the CGST Act, the Appellate Authority can condone the delay for filing an appeal beyond the period of six months, subject to maximum of one year. Further, Sub-section (13) of Section 107 of the CGST Act enjoins the Appellate Authority to, where it is possible to do so, hear and decide the appeal within a period of one year from the date on which it is filed.

24. It is also important to note that there is no provision which requires the Adjudicating Authority to communicate its orders intra-departmentally. In terms of Section 54(7) of the CGST Act the Proper Officer is required to issue the order of refund under Sub-section (4) of Section 54 of the CGST Act within sixty days from the date of receipt of the application, complete in all respect. In contradistinction, any order passed by the Appellate Authority under Section 107 of the CGST Act is required to be sent to the Jurisdictional Commissioner or any authority designated by him in this behalf. In the given statutory framework, where there is no statutory provision requiring the Adjudicating Authority to communicate its orders to the concerned jurisdictional commissioner (the Reviewing Authority), computing the period of limitation for filing an appeal on the contingency of receiving the order; would be destructive of the legislative intent to put in place a strict time frame for filing of the appeal. Plainly, no allowance can be made for extending the period of limitation on account of

miscommunication of orders intra-departmentally. Thus, the expression '*communication of the decision or order*' as used in Sub-section (2) of Section 107 of the CGST Act, in the context of intra-departmental communication must be construed as the date of issue of the order.

25. In view of the above, the Revenue's appeal against the Order-in-Original dated 24.10.2018, was beyond the period of limitation as prescribed and was liable to be rejected on this ground.

WHETHER THE ORDER-IN-ORIGINAL DATED 24.10.2018 MERGES WITH THE APPELLATE ORDER.

26. As stated above, the Adjudicating Authority accepted that the petitioner was entitled to a refund of IGST to the extent of ₹24,33,20,306/- that it had paid in respect of services exported by it. The controversy was confined to the adjustment of ₹5,08,03,767/- from the aforesaid amount on account of the petitioner's interest liability on delayed payment of taxes on inputs on RCM and on account of the delayed payment of IGST. The petitioner had preferred the appeal limited to the question of adjustment of its interest liability. The Order-in-Appeal dated 30.04.2019 passed by the Appellate Authority had noted the fact that the petitioner was registered under the CGST Act and was engaged in export of taxable services out of India. It had during the period of July, 2017 to March, 2018 made zero rated supply, export of services against payment of IGST of ₹24,33,20,306/- and the same has been sanctioned in full. The Appellate Authority noted that *"thus, there is no dispute with regard to the admissibility of refund claim. The lis has arisen out of adjustment of ₹5,08,03,767/- out of the sanctioned*

refund claim". It is material to note that the Revenue was a party to the proceedings before the Appellate Authority. The Appellate Authority had also noted certain admitted facts as is apparent from the following extract from the Orders-in-Appeal dated 30.04.2019:

> "4(ii) First of all, I note that the appellant have disputed neither interest liability nor the quantum thereof. For such conclusion, I refer to para 5 & 6 of statement of facts and para no.6.2 to 6.4 of grounds of appeal. Admitted facts are:-
>
> a. The IGST of more than Rs.24.68 Crores on account of import of service was payable for the period from September 2017 to March 2018 but the same has been paid with delay ranging from 124 days to 309 days.
>
> b. The IGST of more than 24.33 Crores on account of payment of tax on zero rated supply of service was payable for July 2017 to March 2018 but the same has been paid with the delay ranging from 127 days to 365 days.
>
> c. That the appellant are liable to pay the interest of Rs.5,08,03,767/- for such offence.
>
> Also, the appellant have themselves quantified the interest liability in Annexure-II and III of appeal memo which is reproduced hereunder:-
>
> *** *** ***
>
> Thus, the interest liability as quantified by the Adjudicating Authority is also admitted by the appellant and that being the position, I need not discuss as to whether the interest is to be paid by the appellant or not. Thus, the lis involved is to be decided taking into account the fact that at the time of generation of ARN dated 28.08.2018, interest liability of Rs.5,08,03,767/- was pending against the appellant as per their own assessment of tax."

27. The Appellate Authority had remanded the matter to the Adjudicating Authority, in terms of the Order-in-Appeal dated 30.04.2019, only for the reason that it had found that the provisions of law that were pressed in service by the Original Authority for effecting the adjustments of ₹5,08,03,767/- were not applicable. There is a serious question whether the Appellate Authority could have remanded the matter to the Adjudicating Authority as Sub-section (11) of Section107 of the CGST Act expressly proscribes referring the case back to the Adjudicating Authority. Sub-section (11) of Section 107 of the CGST Act is set out below:

> "(11) The Appellate Authority shall, after making such further inquiry as may be necessary, pass such order, as it thinks just and proper, confirming, modifying or annulling the decision or order appealed against but shall not refer the case back to the adjudicating authority that passed the said decision or order:
>
> Provided that an order enhancing any fee or penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund or input tax credit shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:
>
> Provided further that where the Appellate Authority is of the opinion that any tax has not been paid or short-paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised, no order requiring the appellant to pay such tax or input tax credit shall be passed unless the appellant is given notice to show cause against the proposed order and the order is passed within the time limit specified under section 73 or section 74."

28. It is apparent that the Appellate Authority had upheld the admissibility of the petitioner's claim for refund of IGST as well as the order adjusting the interest on delayed payment of IGST on inputs and IGST on exports. The matter ought to have concluded at that. However, the matter was remanded to the Adjudicating Authority. The Appellate Authority has found no fault with the admissibility of the petitioner's claim for refund, the matter was remanded to the Adjudicating Authority for a limited purpose and the proceedings before the Adjudicating Authority on remand were confined to the examination of the provisions of law under which any adjustment on account of any unadjudicated interest liability was permissible.

29. In view of the above, there is no doubt that the Order-in-Original dated 24.10.2018 stood merged with the Order-in-Appeal dated 30.04.2019. The Revenue's contention that the matter was set at large in view of the remand order is unmerited. Consequently, the Revenue appeal in respect of matter determined in the Order-in-Appeal dated 30.04.2019 was not maintainable.

WHETHER ADJUSTMENT OF INTEREST LIABILITY IS PERMISSIBLE.

30. The next question to be considered is whether the Adjudicating Authority was entitled to adjust the interest due from the petitioner from the refund of the amount that is found admissible.

31. It is the petitioner's case that the Adjudicating Authority had accepted its claim for refund in full – that is, for an amount of ₹24,33,20,306 – but had recovered an amount of ₹5,08,03,767/- on

account of liability, which was not the subject matter of any determination under Section 73 of the CGST Act. It is contended that no liability on account of interest could be determined without following the due process in Section 73 of the CGST Act.

32. The said contention is not persuasive. A plain reading of Section 73 of the CGST Act indicates that a notice under the said section is contemplated if it appears to the Proper Officer that tax is not paid or short paid or erroneously refunded or in case where ITC has been wrongly availed or utilized. In such circumstances, the Proper Officer is required to issue a show cause notice as to why the amount specified in the notice not be paid, along with interest.

33. In cases where there is no dispute as to the payment of tax, the interest thereon is payable as a matter of course and is liable to be recovered under provisions of Section 79 of the CGST Act.

34. Sub-section (12) of Section 75 of the CGST Act expressly provides that where any self-assessed tax in accordance with a return furnished under Section 39 of the CGST Act remains unpaid or any amount of interest payable on such tax remains unpaid, the same is recoverable under Section 79 of the CGST Act notwithstanding the provisions of Sections 73 of the CGST Act or 74 of the CGST Act. Thus, no notice under Section 73 of the CGST Act is required for recovery of interest on the self-assessed tax.

35. Ms. Samiksha Godiyal, learned counsel appearing for the Revenue has also referred to Section 50 of the CGST Act and has rightly

pointed out that in terms of Sub-section (1) of Section 50 of the CGST Act every person who is liable to pay tax in accordance with the provisions of the CGST Act and the CGST Rules made thereunder, but fails to pay the same within the prescribed period, is required to pay interest on his own at such rate, not exceeding 18% per annum, as may be notified by the government on the recommendations of the GST Council. Thus, in cases where interest is payable on the basis of tax as disclosed by an assessee in his return, the same is required to be paid and if not paid can be recovered under Section 79 of the CGST Act.

36. In ***Union of India v. L.C. Infra Projects Pvt. Ltd.***[1], the Karnataka High court considered the question whether a notice under Section 73(1) of the CGST Act was applicable in respect of interest payable under Section 50 of the CGST Act. In the aforesaid context, the Karnataka High Court observed as under:

> "11. On plain reading of sub-section (1) of section 73 of the GST Act it is applicable when any tax has not been paid or short-paid. It contemplates that a show-cause notice is to be issued to the assessee calling upon him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 of the GST Act.
>
> 12. Assuming that sub-section (1) of section 73 is not applicable, in our view, before penalizing the assessee by making him pay interest the principles of natural justice ought to be complied with before making a demand for interest under sub-section (1) of section 50 of the GST Act Consequence of demanding interest and non-payment thereof is very drastic.

[1] 2020 SCC OnLine Kar 5093

> 13. Therefore, the learned single judge (*LC Infra Projects Pvt. Ltd*. v. *Union of India* (2020) 73 GSTR 248 (Karn))) rightly held in paragraph 6 of the impugned judgment that issuance of show-cause notice is sine qua non to proceed with the recovery of interest payable in accordance with sub-section (1) of section 50 of the GST Act."

37. There is no dispute that a taxpayer from whom interest is proposed to be recovered is required to be put to notice of the same. The principles of natural justice demand that he be given full opportunity to raise any objection regarding the same, which are required to be considered.

38. In view of the above, the Karnataka High Court had set aside the demand for interest on the ground of breach of principles of natural justice. However, it is erroneous to suggest that a specific notice under Section 73 of the CGST Act be issued before raising any demand of interest. The principles of natural justice mainly require the taxpayer to be put to notice regarding raising of a demand of interest and he be provided full opportunity to contest the same. In the present case, there is no dispute that the petitioner was afforded full opportunity to contest the claim of interest on GST paid by RCM and IGST.

39. In ***Godavari Commodities Ltd. v. Union of India through the Commissioner, Central Goods & Services Tax & Ors.***[2], the Division Bench of the Hon'ble High Court of Jharkhand had directed that a letter issued to the taxpayer demanding interest be treated as a notice under

[2] 2019 SCC OnLine Jhar 1839

Section 73(1) of the CGST Act. The rationale was to provide the taxpayer an opportunity of being heard by the Adjudicating Authority.

40. Section 73 of the CGST Act does not expressly refer to a notice to determine the liability of interest. Sub-section (1) of Section 73 requires a Proper Officer to issue a notice to the person chargeable to tax, if it appears that any tax has not been paid or short paid or erroneously refunded, or where it appears that ITC has been wrongly availed or utilized for any reason other than fraud or wilful mis-statement or suppression of facts, to evade tax. Liability to pay interest follows the determination of tax; it is a consequence of failure to pay tax within the prescribed period. In cases where there is no dispute as to the tax, the dates on which such tax was payable, and the date on which it is paid, the amount of interest would be a matter of calculation.

41. Having stated the above, in case there are contentious issues, which require to be adjudicated, a proper notice is required to be issued to the taxpayer and the quantum of interest payable is required to be adjudicated. In the present case, the adjudicating officer has adjudicated the interest payable and there is no dispute as to the material facts on the basis of which said interest is calculated. In these circumstances, the principles of natural justice are satisfied and there was no requirement for the Adjudicating Authority to issue any further notice. The petitioner has also availed of remedy of an appeal under Section 107 of the CGST Act.

42. In view of the above, we find no infirmity with the process of adjusting interest as payable on the admitted tax against the amount refundable to a tax payer.

WHETHER THE PETITIONER IS LIABLE TO PAY INTEREST AS DETERMINED BY THE ADJUDICATING AUTHORITY.

43. As noted hereinbefore, the Adjudicating Authority had recovered an amount of ₹5,08,03,767/- on account of interest payable on delayed payment of tax. The said amount comprised of two components namely, interest on delayed payment of GST on RCM on input supplies and interest on the delayed payment of IGST on exports.

44. The tabular statement set out in the Order-in-Original dated 24.10.2018 indicates that the petitioner had delayed depositing IGST of ₹24,68,39,430/- on input services on RCM. Interest on such delayed payment of IGST on inputs was computed at ₹2,26,71,171/-.

45. According to the petitioner, its profit margins are relatively low and the petitioner could not afford to block any amount in payment of GST. It is contended that at the material time, there was confusion as to the process for recovering the refund of GST and therefore, the petitioner had deferred the payment of such tax till a proper mechanism was introduced for expeditious disposal of refund application. The petitioner claims that since its transactions were revenue neutral, it was not obliged to pay any interest on the delayed payment of IGST on inputs under RCM as in any event, the petitioner would be entitled to refund of the same as the output supplies was for zero rated supplies.

46. We find no merit in the aforesaid contention. Admittedly, the petitioner was liable to pay GST on input supplies on RCM. The liability to pay GST on inputs is not disputed. In fact, the petitioner had discharged its liability to pay GST on inputs on RCM basis and had paid a sum of ₹24,68,39,430/- in respect of input services for the period September, 2017 to March, 2018. Part of the GST payable for the month of September, 2017 was paid on 20.02.2018 which was after a delay of 124 days. The GST on inputs for part of the month of September, 2017 and October, 2017 to March, 2018 was paid on 24.08.2018. In terms of Section 50 of the CGST Act, the petitioner was liable to pay interest on such delayed payment. The contention that the petitioner would be entitled to refund of ITC paid on RCM for discharging its liability and therefore no interest is payable is, plainly, unmerited. The levy of GST is a statutory exaction and so is interest payable on such tax. If the same is not discharged within the period of time as prescribed, in terms of Section 50 of the CGST Act, an assesse is required to pay interest at the rate of not exceeding 18% as may be notified by the Central Government or recommended by the GST Council. The interest on delayed payment of tax being a statutory levy cannot be avoided on the ground that the petitioner at a subsequent stage is entitled to a refund of the ITC. The assumption that since the transaction of imports and exports is revenue neutral, the same would absolve the petitioner from payment of GST or any interest thereon is contrary to law. It is not open for the assessee to plead that since the supply imported was required to be exported, the petitioner was absolved from the statutory levy under the IGST Act. Refund of unutilized ITC or GST is available only in

terms of the relevant statutory provisions. A claim for refund of tax collected in accordance with law is a statutory right and is circumscribed by the statutory provisions. There is little scope for imputing principles of equity in matters of tax, which are covered by the statutory provisions. As observed by Subba Rao J in ***Commissioner Income Tax, Madras & Anr v. V. MR P. Firm Mua & Ors.***[3]*,"equity is out of place in tax law"*. In ***Cape Brandy Syndicate v. Inland Revenue Commissioner***, Rowlatt J[4] had observed:

> "….in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a **tax**. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

47. The aforesaid passage was referred by the Supreme Court in ***Commisioner of Income Tax, Madras v. Ajax Products Limited.***[5] and in a number of decisions delivered thereafter.

48. The reliance placed by the petitioner on the decision of the Central Excise and Service Tax Appellate Tribunal in ***Jet Airways (I) Ltd. v. Commissioner of Service Tax, Mumbai***[6] and the decision of the Bombay High Court in ***Apar Industries Ltd. v. B.S Ganu***[7] is misconceived. In those cases, there was an issue as to whether any tax was payable by the assessee. The principal dispute in ***Jet Airways (I) Ltd. v. Commissioner of Service Tax, Mumbai***[6] was whether the

[3] (1965) 1 SCR 815
[4] 1921 (1) KB 64
[5] (1965) 1 SCR 700
[6] 2016 SCC OnLine CESTAT 7389
[7] 2017 (354) E.L.T. 74 (Bom)

services availed by the assessee were covered under the category of "Online Information Database Access or Retrieval Services". It was the assessee's case that the services availed from service providers located overseas could not be classified as taxable services and therefore, the assessee had no liability to pay the same. The assessee did not prevail in its contention and therefore was held liable to pay the service tax. However, the Tribunal recognized that in such eventuality, the assessee would be entitled to utilize the service tax paid on input services for discharging its liability to pay service tax on rendering the service of transport of passengers by air and other services which the assessee had been discharging in full. Thus, the consequences of the assessee being mulcted with the liability of service tax on inputs was also that it would be entitled to utilize the same for discharge of its service tax liability on the services rendered. Thus, the Tribunal was persuaded to mould the relief by placing the assessee in the same situation had the assessee classified the input services as contended by the Revenue.

49. Similarly, in the case of ***Apar Industries Ltd. v. B.S Ganu***[7], the Bombay High Court upheld the contention that the exemption was not available and that the assessee had proceeded on an erroneous belief that it was entitled to exemption in respect of supplies made to a project. However, the supplies made were liable to be treated as deemed exports and benefit from tax was available in the circumstances. It is in these circumstances that the Court had come to the conclusion that the decision of the Settlement Commission to impose tax was not warranted.

50. The substratal principle followed by the Tribunal in ***Jet Airways (I) Ltd. v. Commissioner of Service Tax, Mumbai***[6] and the Bombay High Court in ***Apar Industries Ltd. v. B.S Ganu***[7] is that if the assessee does not prevail in its contention regarding the taxability and is held to be liable to pay tax, the assessee need not be deprived of the benefit of other provisions that may as a consequence be available to the assessee. It is necessary to bear in mind that levy of tax is not a punitive measure. Thus, if an assessee has filed its return on the belief that it is not liable to pay taxes and the said assumption is found to be erroneous, the assessee may be fastened with the liability to pay tax but ought not be deprived of the benefit of other provisions that are available in such eventuality.

51. The petitioner's contention that it is not liable to pay interest on delayed payment of GST on inputs on RCM as it may eventually be entitled to refund of the same completely disregards the statutory scheme, which we cannot accept. In view of the above, we find no merit in the contention that the petitioner is not liable to pay interest on the delayed deposit of GST on input supplies on RCM method.

52. In addition to the interest liability on delayed payments of tax on RCM, the petitioner is also mulcted with interest liability for delayed payment of IGST on exports quantified at ₹2,81,32,596/-.

53. The petitioner had exported supplies during the period July, 2017 to March, 2018 without payment of IGST under a LOU. It also filed its returns accordingly. However, in July, 2018, the petitioner filed its

return reflecting that export invoices for the period of July, 2017 to March, 2018 were amended to reflect that the exports during the said period were made after payment of IGST. The Revenue claims that this is impermissible as at the material time the petitioner had not paid IGST and therefore its exports could not be considered as made after the payment of IGST. It is material to note that the petitioner utilized its ITC available as a result of payment of IGST on RCM for payment of IGST in August, 2018, in respect of export of services.

54. Section 16(3) of the IGST Act as in force at the material time reads as under:

> "16(3) A registered person making zero rated supply shall be eligible to claim refund of unutilized input tax credit on supply of goods or services or both, without payment of integrated tax, under bond or Letter of Undertaking, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or Rules made thereunder, subject to such conditions, safeguards and procedure as may be prescribed:
>
> Provided that the registered person making zero rated supply of goods shall, in case of non-realisation of sale proceeds, be liable to deposit the refund so received under this sub-section along with the applicable interest under section 50 of the Central Goods and Services Tax Act within thirty days after the expiry of the time limit prescribed under the Foreign Exchange Management Act, 1999 (42 of 1999) for receipt of foreign exchange remittances, in such manner as may be prescribed."

55. In view of Section 16(3) of the IGST Act, which was in force at the relevant time, an assessee was entitled to claim refund of unutilized ITC in respect of zero rated supply under a bond or LOU or refund of

IGST paid on the goods and service tax in respect of zero rated supplies made on payment of IGST. Since, the petitioner had exported supplies without payment of IGST at the material time, it was entitled to claim refund of unutilized ITC in respect of input supplies. However, the assessee could not claim such refund at the material time because it had not deposited IGST on RCM on inputs. Apart from a small amount of ₹26,71,165/- paid as IGST for part of services imported in the month of September 2017, which was paid on 20.02.2018, the payment of IGST on imports for the period September, 2017 to March 2108, were paid on 24.08.2018. Therefore, unutilized ITC in respect of the outwards supplies was not available to the petitioner for discharging its liability to pay IGST on exports on due dates when the said lability fell due.

56. The petitioner's grievance essentially arises because it, at a subsequent stage, had sought to amend the invoices in its return. The petitioner now reflected that the supplies were exported with payment of IGST. The petitioner's application for refund of IGST was also premised on the basis that it had discharged its liability by payment of IGST on export of services.

57. The interest liability on delayed payment of IGST is the statutory consequence of the assessee's claim that the exports made by it were on payment of IGST. There is no dispute that the IGST on the exports during the months of July, 2017 to March, 2018 was liable to be paid on various dates in August, 2017 to April, 2018 as mentioned in the tabular statement as set out by the Adjudicating Authority in the Order-in-Original dated 24.10.2018.

58. Clearly, if the petitioner's claim that it had exported goods on payment of IGST – on which its claim for refund is premised – is to be accepted, the petitioner would be liable to pay the interest on delayed payment of IGST. The petitioner's contention that it is now mulcted with the interest liability twice over once on delayed payment of tax on RCM and yet, once again on delayed payment of IGST, is correct. But that is the statutory consequence of amending invoices reflecting the exports made without payment of IGST as exports made after payment of IGST.

59. Ms. Samiksha Godiyal, learned counsel appearing for the Revenue has rightly pointed out that perhaps the correct course for the petitioner was to seek refund of unutilized ITC arising out of the payment of GST under RCM. However, since the petitioner had elected to amend the export invoices to reflect exports after payment of IGST, the logical consequence is that the petitioner would be liable to pay interest on delayed payment of IGST. Even if this Court accepts that it was open for the petitioner to amend its invoices to reflect export of supplies by payment of IGST during the period July, 2017 to March, 2018, it is not possible for this Court to accept that the petitioner had in fact discharged its liability to pay IGST on the due dates. This is because as the petitioner had neither paid IGST on due dates nor had the requisite balance of unutilized ITC for discharging the said liability on the due dates.

60. It is evident that the petitioner has been mulcted with the huge interest liability on delayed payment of IGST, which in one sense is

unwarranted, however, that is the consequence of the course adopted by the petitioner.

DENIAL OF REFUND IN ENTIRETY ON ACCOUNT OF AMENDMENT IN RETURN/INVOICES, IS IMPERMISSIBLE

61. We have not examined the question whether it is open for the petitioner to alter its option to reflect exports as IGST paid after having effected the exports under a LOU without payment of IGST. This is because the petitioner's claim for refund had been accepted by the Adjudicating Authority by Order-in-Original dated 24.10.2018. The said order was premised on the basis that the petitioner is entitled to refund of GST paid on zero rated supplies. The said finding was affirmed by the Appellate Authority in terms of an Order-in-Appeal dated 30.04.2019. The petitioner had accepted the said finding. The Revenue has sought to review the Orders-in-Original dated 24.10.2018 and 08.08.2019 after the aforesaid findings have been affirmed by the Appellate Authority.

62. As noted above, the appeal filed by the Revenue impugning the decision to admit the quantum of refund was liable to be rejected as having been preferred beyond the prescribed period. However, it is also material to note that the Revenue's appeal was premised on the basis that the petitioner could not amend or alter its return/invoices to reflect export of services on payment of IGST instead of export under LOU. According to the Revenue, it was not permissible for the petitioner to pay IGST in respect of such services by amending the returns/invoices. There is no dispute that the petitioner had paid IGST on export of

services albeit belatedly, by utilizing the accumulated ITC. Plainly, if the said payment of IGST was impermissible, there could be no impediment in the petitioner claiming the refund of the same. It is not open for the Revenue to contend that IGST was not payable and yet resist the refund of IGST paid by the petitioner.

63. As noted above, Ms Godiyal's contention that the apposite course for the petitioner was to seek refund of ITC for petitioner may be merited. This Court had pointedly asked if there was any reason why refund of ITC accumulated on account of IGST paid on import of services under RCM would be unavailable to the petitioner. In response it was submitted on behalf of the Revenue that such refund would be admissible but the petitioner's application would be barred by limitation.

64. If the Revenue's contention is accepted that the petitioner could not change its option under Section 16(3) of the IGST Act after completing the exports, the natural consequence would be that the petitioner would be entitled to refund of accumulated unutilised ITC, which it had utilized in payment of IGST. In this case, the petitioner would not liable to pay interest on delayed payment of IGST on export of services either. However, in any event, the petitioner would be entitled to refund of tax paid (IGST paid either under the RCM on inputs or the IGST on exports). The revenue's contention that any claim for refund of ITC would be barred is also not persuasive. If the refund of IGST on exports was rejected on the ground that petitioner could not amend the invoices, it would follow that its claim would be required to

be considered for the ITC utilised to pay such IGST. It is difficult to accept the Revenue's contention that the petitioner had forfeited its right to claim refund on account of an attempt to amend its option as available under Section 16(3) of the IGST Act, as in force at the material time.

65. It is not necessary for this Court to examine the aforesaid contentions in any further detail as the same relate to the appeal filed by the Revenue, which as stated above, was beyond the period of limitation.

CONCLUSION

66. In view of the above, we direct that the refund sanctioned by the Adjudicating Authority in terms of the Order-in-Original dated 08.08.2019 be disbursed to the petitioner along with applicable interest.

67. The petitioner's claim that the adjustment of interest amounting to ₹5,08,03,767/- is illegal is rejected.

68. The impugned Order-in- Appeal dated 14.10.2020, to the extent it denies the petitioner's claim for refund in entirety is set aside.

69. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

DECEMBER 05, 2023
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