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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (ST) NO. 23507 OF 2022

Oasis Realty
having its office at 3rd Floor,
Commerz – International Business Park
Oberoi Garden City, Off. Western
Express Highway, Goregaon East,
Mumbai – 400 063

.....Petitioner

Vs.

1. The Union of India, through
the Secretary, (Revenue)
Ministry of Finance,
Department of Revenue,
New Delhi – 110 001
2. The Joint Commissioner of State Tax,
(Appeal) – V, GST-APP-F-005,
Having his office at
Fifth Floor, B Building, GST Bhavan,
Maharashtra State BKC, Bandra,
Mumbai– 400 051
3. The Deputy Commissioner of State Tax,
Mumbai – LTU – 528 Mumbai South West,
LTU – III having his office at
GST Bhavan, Mazgaon, Mumbai - 400010
4. The State of Maharashtra,
Through Government Pleader
High Court, Bombay

.....Respondents

WITH

WRIT PETITION (ST) NO. 12287 OF 2022

Roma Builders Pvt Ltd. a registered
company having office at 514, 5th Floor,
Dalamal Towers, 211, FPL Marg, Nariman Point,
Mumbai – 40021.

.....Petitioner

Vs.

1. State of Maharashtra
Through the Government Pleader
High Court, Mumbai.
 2. The Union of India, through
the Revenue Secretary,
Department of Revenue,
Ministry of Finance having his
office at 128-A/North Block, New Delhi.
 3. The Joint Commissioner of State Tax (Appeals-V),
Having office at 5th Floor, B Building, GST Bhavan,
BKC, Bandra, Mumbai– 400051
 4. The Deputy Commissioner of State Tax,
E-632, Large Tax Payers Unit – 3,
having office at 3rd Floor, H Wing,
GST Bhavan, Mazgaon, Mumbai – 400010
-Respondents

WITH

WRIT PETITION (ST) NO. 12457 OF 2022

Macrotech Developers Limited,
a company, registered under the
Companies Act, 1956, having its registered
office at 412, Floor-4, 17G, Vardhaman Chamber,
Cawasji Patel Road, Horniman Circle, Fort,
Mumbai – 400001.

.....Petitioner

Vs.

1. State of Maharashtra
through the Secretary, Ministry of Finance,
Department of Revenue, Aykar Mantralaya,
Mumbai 400 021.
2. The Commissioner of State Tax,
Maharashtra State, at 8th Floor, GST Bhavan,
Mazgaon, Mumbai– 400010
3. The Deputy Commissioner of State Tax,
Mumbai (E-633), Large Tax Payer Unit – 3,

at G-7, 3rd Floor, New Building,
GST Bhavan, Mazgaon, Mumbai – 400010

4. The Joint Commissioner of State Tax, Appeals-V,
at Suburban State GST Office,
Bandra (East), Mumbai– 400051

.....Respondents

Mr. Prakash Shah a/w Mr. Jas Sanghavi, Mr. Mihir Mehta and Mr. Yash Prakash i/by PDS Legal for Petitioner in WPL No.23507 of 2022.

Mr. Rahul C. Thakar i/by Mr. C. B. Thakar for Petitioner in WPL No.12287 of 2022.

Mr. Vishal Agrawal a/w Mr. Akshit Malhotra and Ms. Hima Doshi i/by Mr. Prabhakar K Shetty for Petitioner in WPL No.12457 of 2022.

Ms. Jyoti Chavan, AGP for Respondents-State.

Mr. Jitendra B. Mishra a/w Ms. Sangeeta Yadav for Respondent No.2 in WPL 12287 of 2022.

CORAM : K. R. SHRIRAM &
A. S. DOCTOR, JJ.

DATE : 16th SEPTEMBER, 2022

ORAL JUDGMENT:- (PER K. R. SHRIRAM, J.)

1. Issue in this Petition is:

Whether, an Appellant, to comply with the requirements of Sub-section 6 of Section 107 of the Maharashtra Goods and Services Tax Act, 2017 (MGST Act) of paying a sum equal to 10% of the amount of Tax in dispute arising out of the impugned order, can pay the amount utilising the credit available in the Electronic Credit Ledger?

2. It is Petitioner's case that it can be used and it is Revenue's case that it cannot be. According to Revenue, Appellant can utilise the credit available only in the Electronic Cash Ledger. By consent Writ Petition (St)

No.23507 of 2022 is taken as the lead Petition to be disposed at the admission stage itself. Therefore, Rule. Rule made returnable forthwith.

3. The provisions relevant to the issue at hand are Sub-sections (1), (6) and (7) of Section 107, Sub-sections (1), (2), (3), (4), (5) and (6) of Section 49 and Sub-section (82) of Section 2 of the MGST Act. These provisions read as under:-

107. Appeals to Appellate Authority -

(1) Any person aggrieved by any decision or order passed under this Act or the Central Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

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(6) No appeal shall be filed under sub-section (1), unless the appellant has paid-

(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and

(b) a sum equal to ten per cent of the remaining amount of tax in dispute arising from the said order, in relation to which the appeal has been filed.

(7) Where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed.

49. Payment of tax, interest, penalty and other amounts -

(1) Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.

(2) The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger,

in accordance with section 41, to be maintained in such manner as may be prescribed.

(3) The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.

(4) The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and within such time as may be prescribed.

(5) The amount of input tax credit available in the electronic credit ledger of the registered person on account of -

(a) integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards the payment of central tax and State tax, or as the case may be, Union territory tax, in that order;

(b) the central tax shall first be utilised towards payment of central tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;

(c) the State tax shall first be utilised towards payment of State tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;

(d) the Union territory tax shall first be utilised towards payment of Union territory tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;

(e) the central tax shall not be utilised towards payment of State tax or Union territory tax; and

(f) the State tax or Union territory tax shall not be utilised towards payment of central tax.

(6) The balance in the electronic cash ledger or electronic credit ledger after payment of tax, interest, penalty, fee or any other amount payable under this Act or the rules made thereunder may be refunded in accordance with the provisions of section 54.

2(82) “output tax” *in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis;*

4. Before a party files an Appeal, Sub-section (6) of Section 107 mandates the party to pay in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order as is admitted by him. Therefore, if the impugned order provides for the amount of 'tax, interest, fine, fee and penalty' to be paid and the Appellant admits those amounts, such amounts shall be paid by him before filing the Appeal. This would arise only in a situation where part of the order is accepted and part of it is not accepted. It will not arise in a situation where the entire order is admitted because the party may then not want to file an Appeal.

5. Clause (b) of Sub-section (6) of Section 107 provides that for such part of the impugned order that is not admitted by the Appellant, the Appellant shall pay a sum equal to 10% of the remaining amount of 'tax' in dispute arising from the said order in relation to which the Appeal has been filed. It is important to note, it does not say anything about 'interest, fine, fee or penalty'. Therefore, when we compare clauses (a) and (b) of Sub-section (6) of Section 107, where there is an admission of part of the order and the admission is in relation to tax, interest, fine, fee and penalty, all those amounts will have to be deposited first and, to the part which is not admitted only 10% of the tax in dispute has to be deposited. The deposit will not include the interest, fine, fee and penalty mentioned in the impugned order. By way of illustration, if an impugned order provides:-

Tax – Rs. 1 Crore, Interest – 10%, fine – Rs. 2 Lakhs, fee – Rs. 50 Thousand, penalty – Rs. 5 Lakhs and Appellant is admitting 25% of the amount of tax, then the 25% of Rs.1 Crore, i.e., Rs.25 Lakhs will have to be paid in full before filing the Appeal. On the remaining Rs.75 Lakhs of tax only 10% has to be paid, i.e., Rs.7.5 Lakhs. So before filing the Appeal, Appellant has to pay (a) Rs.32.5 Lakhs and no part of the balance amount of tax and (b) NIL against interest, fine, fee and penalty.

6. We must also note that the expression used in Sub-section (6) of Section 107 is, “unless the Appellant has paid”. It is a precondition to filing an Appeal. The expression used is “paid” and not “deposited”. This would be material while considering the provisions of Sub-section (3), Sub-section (4) and Sub-section (5) of Section 49.

7. Sub-section (1) of Section 49 provides for a party to deposit its tax, interest, penalty, fee or any other amount and how such deposit has to be made. It says it can be made by internet banking or by using credit or debit cards or NEFT or RTGS or by such other mode and subject to such conditions and restrictions as may be prescribed. It also says that if such a deposit is made it shall be credited to the Electronic Cash Ledger of the said party.

Sub-section (2) of Section 49 provides that the input tax credit (ITC) as self-assessed in the return of a registered person shall be credited to his Electronic Credit Ledger. This means, where a supplier has been paid in respect of supply of goods or services or both, the tax portion paid to the supplier by the registered person shall be credited to the Electronic Credit Ledger of the registered person.

Sub-section (3) and Sub-section (4) of Section 49 provide how to use the amounts lying in the Electronic Cash Ledger and Electronic Credit Ledger, respectively. Sub-section (3) provides that the amount available in the Electronic Cash Ledger may be used for making any payment towards tax, interest, penalty, fee or any other amount payable under the provisions of this Act or rules made thereunder. Sub-section (4) provides that the amount available in the Electronic Credit Ledger may be used for making any payment towards output tax under MGST (this) Act or under Integrated Goods and Services Tax (IGST) Act in such manner and subject to such conditions as may be prescribed from time to time.

Sub-section (5) of Section 49 provides for, how the amount of ITC available in the Electronic Credit Ledger shall be utilised. It says any amount of ITC available on account of integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards payment of central tax or State tax or as the case may be, even Union territory tax in that order. Clause (b) of Sub-section (5)

says the amount of ITC available in the Electronic Credit Ledger on account of the central tax shall first be utilised towards payment of central tax and the amount remaining may be utilised for payment of integrated tax. Clause (c) of Sub-section (5) provides that the amount of ITC available in the Electronic Credit Ledger on account of the State tax shall first be utilised towards payment of State tax and the amount remaining, if any, shall be utilised towards payment of integrated tax. Similarly, clause (d) provides for the utilisation for the Union Territory tax.

8. It is Respondents case that Sub-section (4) of Section 49 restricts the usage of the amount available in the Electronic Credit Ledger only for payment of output tax or under MGST or under IGST and the amount available cannot be utilised for payment of tax under clause (b) of Sub-section (6) of Section 107.

9. We are not in agreement with the submission made on behalf of the State. This is because clause (b) of Sub-section (6) of Section 107 provides a precondition, “unless the appellant has paid” (not deposited) a sum equal to 10% of remaining amount of Tax in dispute. It says 10% of Tax has to be paid as a precondition. That Tax can be Integrated Tax or Central Tax or the State Tax as in the case at hand, or Union Territory Tax. The amount of ITC available in the Electronic Credit Ledger can be utilised towards payment of Integrated Tax or Central Tax or State Tax or Union Territory Tax.

Therefore, in our view, Petitioner having to pay 10% of the Tax in dispute under clause (b) of Sub-section (6) of Section 107, can certainly utilise the amount of ITC available in the Electronic Credit Ledger. We hasten to add that in view of provisions of Sub-section (3) of Section 49, the party may also pay this 10% of the Tax in dispute by utilising the amount available in the cash ledger.

10. Moreover, Sub-section (4) of Section 49 provides the amount available in the Electronic Credit Ledger may be used for making any payment towards output tax under the MGST Act or IGST Act subject to certain restrictions or conditions that may be prescribed. Sub-rule (2) of Rule 86 of MGST Rules provides for debiting of the Electronic Credit Ledger to the extent of discharge of any liability in accordance with the provisions of Section 49 of the MGST Act. Further, output tax in relation to a taxable person is defined in Clause (82) of Section 2 of MGST Act as the tax chargeable on taxable supply of goods or services or both but excludes tax payable on reverse charge mechanism. Therefore, any payment towards output tax, whether self-assessed in the return or payable as a consequence of any proceeding instituted under the MGST Act can be made by utilisation of the amount available in the Electronic Credit Ledger. Hence, a party can pay 10% of the disputed Tax either using the amount available in the Electronic Cash Ledger or the amount available in the Electronic Credit Ledger.

11. Ms. Chavan relied upon an order of the High Court of Orissa at Cuttack in *M/s Jyoti Construction Vs. Deputy Commissioner of CT & GST*¹ to submit that the amount in the credit ledger cannot be used to pay the 10% required to be paid under Sub-section (6) of Section 107 of the MGST Act.

In our view it will not be necessary to discuss the said order because subsequent to the said order the Central Board of Indirect Taxes and Customs, GST Policy Wing, Department of Revenue, Ministry of Finance, Government of India (CBIT&C) has, in exercise of its powers conferred by Section 168(1) of the Central Goods and Services Tax Act, 2017, issued clarification in the form of a circular. This clarification came to be issued in view of various representations that CBIT&C received on utilisation of the amounts available in the Electronic Credit Ledger and the Electronic Cash Ledger for payment of tax and other liabilities. The CBIT&C, in its circular F. No.CBIC-20001/2/2022-GST dated 6th July 2022 has clarified as under:-

Utilisation of the amounts available in the electronic credit ledger and the electronic cash ledger for payment of tax and other liabilities

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| <p>6. Whether the amount available in the electronic credit ledger can be used for making payment of any tax under the GST Laws?</p> | <p>1. In terms of sub-section (4) of section 49 of CGST Act, the amount available in the electronic credit ledger may be used for making any payment towards output tax under the CGST Act or the Integrated Goods and Services Tax Act,</p> |
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¹ 2021 (10) TMI 524

2017 (hereinafter referred to as “IGST Act”), subject to the provisions relating to the order of utilisation of input tax credit as laid down in section 49B of the CGST Act read with rule 88A of the CGST Rules.

2. Sub-rule (2) of rule 86 of the CGST Rules provides for debiting of the electronic credit ledger to the extent of discharge of any liability in accordance with the provisions of section 49 or section 49A or section 49B of the CGST Act.
3. Further, output tax in relation to a taxable person (i.e. a person who is registered or liable to be registered under section 22 or section 24 of the CGST Act) is defined in clause (82) of section 2 of the CGST Act as the tax chargeable on taxable supply of goods or services or both but excludes tax payable on reverse charge mechanism.
4. **Accordingly, it is clarified that any payment towards output tax, whether self-assessed in the return or payable as a consequence of any proceeding instituted under the provisions of GST Laws, can be made by utilization of the amount available in the electronic credit ledger of a registered person.**
5. **It is further reiterated that as output tax does not include tax payable under reverse charge mechanism, implying thereby that the electronic credit ledger cannot be used for making payment of any tax which is payable under reverse charge mechanism.**
7. Whether the amount available in the electronic credit ledger can be used for making payment of any liability other than tax under GST Laws?

As per sub-section (4) of section 49, the electronic credit ledger can be used for making payment of output tax only under the CGST Act or the IGST Act. It cannot be used for making payment of any interest, penalty, fees or any other amount payable under the said

acts. Similarly, electronic credit ledger cannot be used for payment of erroneous refund sanctioned to the taxpayer, where such refund was sanctioned in cash.

8. Whether the amount available in the electronic cash ledger can be used for making payment of any liability under the GST Laws?

As per sub-section (3) of Section 49 of the CGST Act, the amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of the GST Laws.

(emphasis supplied)

Therefore, CBIT&C has itself clarified that any amount towards output tax payable, as a consequence of any proceeding instituted under the provisions of GST Laws, can be paid by utilisation of the amount available in the Electronic Credit Ledger of a registered person. The CBIT&C has also requested that suitable trade notices be issued to publicize the contents of the circular.

12. Ms. Chavan, the learned AGP submitted that this clarification will not apply to tax payable on reverse charge mechanism.

Mr. Prakash Shah stated that sub-paragraph (5) of paragraph 6 of the circular reproduced in paragraph (11) above makes it clear that Electronic Credit Ledger cannot be used for making payment of any tax which is payable under reverse charge mechanism.

13. Since in the Petitions before us the amounts payable are towards output tax, we hold that Petitioners may utilise the amount

available in the Electronic Credit Ledger to pay the 10% of Tax in dispute as prescribed under Sub-section (6) of Section 107 of MGST Act.

14. Accordingly the impugned Order-in-Appeal No.JC/APP-V/GST-Defective/A.FY/2021-22/A.O.Y..2022-23/-B-1 dated 6th April, 2022 and FORM GST APL-02 passed by Respondent No.2 is quashed and set aside. The Appeal is restored to file on the undertaking of Petitioner that it shall debit the Electronic Credit Ledger within one week of this order getting uploaded towards this 10% payable under Section 107(6)(b), if not already debited, is accepted.

15. In view of the above order passed in Writ Petition (ST) 23507 of 2022, the orders dated 21st March, 2022 impugned in Writ Petition (ST) No.12287 of 2022 and Writ Petition (ST) No.12457 of 2022 are also quashed and set aside with the same direction mentioned above.

16. All Petitions disposed. No order as to costs.

(A. S. DOCTOR, J.)

(K. R. SHRIRAM, J.)