

Item No.11.

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

HEARD ON: 20.01.2023

DELIVERED ON: 20.01.2023

CORAM:

**THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**M.A.T. No.9 of 2023
with
I.A. No.CAN 1 of 2023**

**M/s. Radiant Enterprises Private Limited and Anr.
Vs.
Joint Commissioner, CGST &
CX (Appeal I) & Ors.**

Appearance:-

**Mr. Vinay Kr. Shraff,
Ms. Priya Sarah Paul,
Ms. Priyanka Sharma**

...

for the appellants.

**Mr. K. K. Maity,
Ms. Ekta Sinha**

...

for the CGST authority.

JUDGMENT

(Judgment of the Court was delivered by T.S. SIVAGNANAM, J.)

1. This intra-Court appeal filed by the writ petitioners is directed against the order dated 20th December, 2022 passed by the learned Single Bench in W.P.A. No.1366 of 2022 by which the writ petition filed challenging an order passed by the appellate authority under the provisions of the CGST Act, dated 31st March, 2021 was dismissed.

2. On perusal of the order passed by the learned Single Bench, we find that the learned Single Bench has quoted paragraph 7 of the order passed by the appellate authority and has held that it is not inclined to interfere with the order considering the reasons recorded. We find that there is no independent finding recorded by the learned writ Court as to how the Hon'ble Court was convinced that the reasons recorded by the appellate authority was just and proper. This issue is very crucial in the instant case since the appellants had filed the writ petition challenging that portion of the order passed by the appellate authority, which was never the case before the original authority and was suo motu raised by the appellate authority and a decision has been rendered against the appellants.

3. The issue arose out of an application for refund filed under section 54 of the CGST Act, 2017. The original authority

by order dated 13th November, 2019 rejected the claim by assigning the following reasons.

"The Refund Claim is rejected in terms of Section 54(1) of CGST Act 2017 wherein it is clearly stated that 'Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application.....'. In the instant case, tax is paid/deposited into govt. exchequer by M/s. Eveready and not the claimant."

4. Thus it is seen that the original authority rejected the refund claim only for the reason that the tax has been paid/deposited into the Government exchequer by M/s. Eveready and not the appellants and therefore, they are not entitled to maintain an application for grant of relief.

5. Aggrieved by the same, the appellants filed a statutory appeal before the appellate authority. The grounds of appeal annexed in the stay petition from which the appellants have contended as to how as a service recipient, they are entitled to maintain an application for refund. In support of their contention, several decisions have been relied upon passed by the tribunals as well as by the various High Courts in this country. Thus, the appellants contended that the person, who has borne the incidence of tax can file a refund claimed in

accordance with the provisions of section 54 of the CGST Act and in the case on hand, the appellants are the persons, who had ultimately borne the incidence of tax and therefore, eligible to claim the refund under section 54 of the CGST Act.

6. The appellate authority took up the case for consideration. From paragraph 5 of the order passed by the appellate authority, the discussions and findings commenced. In paragraph 5 the appellate authority states that there are two issues involved, the first of which is whether the recipient of services or goods can apply for refund claim for excess payment of tax or not. The appellate authority also framed another issue as to whether the building purchased by the appellants from their purchaser M/s. Eveready Industries Limited is taxable under the GST or not.

7. The first issue has been held in favour of the appellants in unequivocal terms. The appellate authority has stated that the appellants are entitled to maintain the claim for refund. However, the second issue, which was suo motu framed by the appellate authority has been decided against the appellants. Firstly, the appellate authority has ignored the fundamental legal principles while deciding the appellants' appeal. The appeal is against an order of rejection for the refund claim only on the ground that the appellants are not the persons, who

had remitted the tax. In the said appeal, the appellants cannot be put in a disadvantageous position and cannot be worst off in their own appeal. Thus the second issue suo motu framed by the appellate authority could not have been framed and there is no jurisdiction for the appellate authority to frame such an issue. Assuming the statute provides for a cross appeal to be filed and the State had filed a cross appeal, then the position would have been different. However, CGST Act does not provide for any such provision for filing a cross appeal by the revenue in a statutory appeal filed before the appellate authority under section 107 of the CGST Act. Thus, the second issue has to be necessarily set aside.

8. For the above reasons, the appeal is allowed. The order passed in the writ petition is set aside and the writ petition is allowed and that portion of the order passed by the appellate authority on the second issue is quashed.

9. Mr. K.K. Maity, learned senior standing counsel appearing for the respondents submitted that the appellate authority is entitled to go into the other issues in terms of section 107(2) of the CGST Act.

10. If the power under the said provision had to be invoked, then the appellants should have been put on notice. It is not

the case of respondents/revenue that the appellate authority thought fit to take up the other issues, that too in an appeal filed by the appellants against an order of rejection of the refund claim. That apart, there is no direction issued to any authority to file an application for considering the other issues. Therefore, assuming appellate authority has exercised its power under section 107(2) of the CGST Act, such exercise is not in accordance with the said statutory provision and being in violation of the said provision as well as violation of the principles of natural justice. The appellate authority could not have taken a decision on the second issue, which did not emanate from the order passed by the original authority.

11. The order passed by the appellate authority on the second issue is set aside and there will be a direction that the application filed by the appellants for refund shall be entertained by the original authority and appropriate order be passed on the same. Refund application shall be processed within a period of four weeks from the date of receipt of the server copy of this judgment and order.

12. There shall be no order as to costs.

13. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J)

I agree,

(HIRANMAY BHATTACHARYYA, J.)

NAREN/PALLAB (AR.C)