

(2023) 08 BOM CK 0002
In the Bombay High Court
Case No : Writ Petition (L) No.25142 Of 2022

JEM Exporter

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 02-08-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Central Goods And Services Tax Rules, 2017 — Rule 21A, 22, 23, 26, 26(a), 26(2)(a), 89A, 90A, 91A, 92A, 93A, 94A, 95A, 96A, 97A
Central Goods And Services Tax Act, 2017 — Section 16(2), 29, 29(2), 29(2)(e), 50, 54, 70, 74, 107(6), 122(1), 125
Maharashtra Goods And Services Tax Act, 2017 — Section 74
Integrated Goods And Services Tax Act, 2017 — Section 20

Citation : (2023) 08 BOM CK 0002

Hon'ble Judges : G. S. Kulkarni, J; Jitendra Jain, J

Bench : Division Bench

Advocate : Bharat Raichandani, Prathamesh Gorgate, Jitendra B. Mishra, Dhananjay B. Deshmukh, Ashutosh Mishra

Final Decision : Disposed Of

Judgement

Jitendra Jain, J

1. Rule. Rule made returnable forthwith. Heard finally by consent of the parties.
2. By this petition under Article 226 of the Constitution of India, the Petitioner has challenged the Order In Appeal (O-I-A) passed by the Commissioner of Goods and Service Tax and C Ex. [Commissioner (Appeal)], dated 17th June 2022, whereby, the Appellate Authority has upheld the order of rejection of application for revocation of cancellation of registration of the Petitioner and also has upheld Order-In-Original (O-I-O) raising a demand of Rs.1,01,02,741/- for contravention of provisions of Section 16(2) of the CGST Act and further levy of interest under section 50 of the Act and imposition of penalty under Section 122(1) read with section 74 of the CGST Act, 2017 and section 125 of the CGST Act, 2017.

3. Narrative of the relevant events :-

(i) The Petitioner is engaged in the business of exporting mobile handsets. The Petitioner is registered under the CGST Act, 2017 as a sole proprietor.

(ii) On 10th April 2020 and 24th February 2020, the Petitioner made an application for refund of Input Tax Credit (for short "ITC") on export of goods and services for the period February 2020 and January 2020 claiming refund of Rs.1,01,72,874/- and Rs.16,51,370/- respectively.

(iii) On 7th August 2020, summons under section 70 of the CGST Act was served on the Petitioner to conduct inquiry about contravention of provisions of the CGST Act and the Rules. Pursuant to the said summons, the Petitioner attended and a statement of the Petitioner was recorded.

(iv) On 25th March 2021, common notice was issued under section 74 of the CGST Act, section 74 of the Maharashtra GST Act, 2017 and section 20 of the IGST Act, 2017 to the Petitioner and IJM Exporters, a proprietorship firm of one Mr. Imran Jamal Merchant, both having same registered office address. The said show cause notice refers to the refund application made by the Petitioner. In the said show cause notice, it is alleged that IJM Exporters has availed ITC on goods purchased from non-existing entities and passed on said ITC to the Petitioner since IJM Exporters have sold the goods to the Petitioner, who has made a claim for refund of ITC on export of the goods purchased from the IJM Exporters. The Petitioner and IJM Exporters have wrongly availed the ITC and, therefore, a show-cause was issued. In the said show cause notice, the Petitioner was required to show cause why the GST registration should not be cancelled under section 29(2) of the CGST Act, 2017 and ITC amounting to Rs.1,01,72,874/- should not be demanded along with interest and penalty.

(v) On 24th April 2021, the Petitioner replied to the aforesaid show cause notice and gave its submissions for dropping the said show cause notice on the grounds more particularly set out therein. The Petitioner stated that they have purchased the goods from IJM, who is registered with the GST Department. The goods have been purchased in accordance with invoices issued as per CGST Act and payments have been made through banking channel. Therefore, it was contended that the Petitioner is justified in claiming the refund arising from export of the goods. The Petitioner prayed that the show cause notice be dropped in the light of the submissions made therein.

(vi) On 13th August 2021, common order came to be passed against the Petitioner and the IGM Exporters confirming the demand of Rs.1,01,02,741/- and levying interest and penalty. By the said order, the GST registration of the Petitioner was also cancelled under section 29(2)(e) of the CGST Act, 2017. Similar order was passed in the case of IJM Exporters.

(vii) Against the above order, the Petitioner filed an appeal with the Commissioner (Appeals), challenging the same on various grounds stated in the Appeal Memo.

(viii) On 17th June 2022, the office of the Commissioner (Appeals) passed a common order in the case of the Petitioner and IJM Exporters and confirmed the O-I-O by upholding the cancellation of registration of the Petitioner and also confirming the demand of duty, penalty and interest. The Appellate Authority stated that the pre-deposit for filing the appeal has not been made by the Petitioner and furthermore, the appeal is not signed as per Rule 26 and, therefore, the Appeals are liable to be rejected. The Commissioner (Appeal) observed that as per the investigation report, the persons from whom IJM Exporters had purchased the goods were non-existent and, therefore, the IJM Exporters had claimed fake ITC and since purchases of the Petitioner are from IJM Exporters, consequently the Petitioner has also wrongly availed the ITC and made a claim for refund.

4. Being aggrieved by the aforesaid order, the Petitioner has filed the present petition since so far the GST Tribunal has not been constituted and the cancellation of the registration is affecting the business of the Petitioner. It is on this backdrop that this Court has entertained the present petition.

5. Heard learned counsel for the Petitioner and learned counsel for the Respondents.

6. SUBMISSIONS OF THE PETITIONER :- The Petitioner has contended that the O-I-O has been passed pursuant to a show cause notice under section 74 of the CGST Act. The Petitioner submits that she had made an application for refund of ITC on exports of goods and services under section 54 of the CGST Act. The procedure for processing the refund application is provided under rules 89 to 97A of the CGST Rules, 2017. The Petitioner submitted that the procedure prescribed under the rules has not been followed, but on the contrary, a demand of Rs.1,01,02,741/- has been raised in addition to interest and penalty. The Petitioner submits that show cause notice under section 74 could not have been issued for processing the refund application. Similarly, section 29 of the CGST Act, 2017 provides for cancellation or suspension of registration and Rules 21A, 22 and 23 of the CGST Rules prescribe the procedure to be followed for cancellation/suspension of the Registration. The Petitioner submits that the said procedure has also not been followed and the registration cannot be cancelled by issuing a notice under section 74 of the CGST Act. The Petitioner has stated that no demand could have been raised while processing the refund application, but at the most an order could have been passed rejecting the refund application. The Petitioner has relied on the decision of the coordinate bench of this Court in the case of Knowledge Capital Services Ltd. Vs. Union of India & Ors. 2023-TIOL-476-HC-MUM-GST, in support of the contention that procedure prescribed by CGST Rules for processing refund application has to be followed. The Petitioner, therefore, submitted that the impugned order in appeal confirming the O-I-O is required to be set aside.

7. SUBMISSIONS OF THE RESPONDENTS:- Per contra, the Respondents supported the orders passed by the lower authority. The Respondents contended

that the Petitioner has failed to comply with mandatory pre-deposit of 10% for entertaining the appeal under section 107(6) of the CGST Act, 2017. The Respondents further contended that the appeal memo was not signed by the proprietor of the Petitioner and, therefore, the Appellate Authority was justified in rejecting the appeal on merits. The Respondents submitted that the Petitioner has purchased goods from IJM and the suppliers of IJM have been found to be non-existent, therefore, the ITC claimed by the Petitioner is not genuine and consequently, the Petitioner is not entitled to the refund. The Respondents also justified the cancellation of registration on the ground that the Petitioner has furnished false information with regard to filing of GSTR-1 and GSTR-3. The Respondents further contended that the plea taken by the Petitioner that proper procedure for cancellation of registration and processing of refund application having not been followed, was not taken before the lower authorities. The Petitioner was put to the notice to show cause why the registration should not be cancelled and also for processing the refund application as evident from the show cause notice dated 25th March 2021. The Petitioner replied to the same without objecting to the procedure and, therefore, the contention raised by the Petitioner on this count is to be rejected since the Petitioner had participated in the proceedings without objecting to the same.

8. ANALYSIS:- As per section 107(6) of the CGST Act, 2017, no appeal shall be filed unless the Appellant has paid admitted tax, interest, fine, fee and penalty in full and a sum equal to 10% of the amount of tax in dispute in relation to which the appeal has been filed. Rule 108(2) of the CGST Rules provides that the grounds of appeal and the form of verification as contained in GST APL 01 form shall be signed in the manner specified in Rule 26. Rule 26 provides for method of authentication of the documents specified therein. Rule 26(2) provides that each document furnished online shall be signed or verified through electronic verification code in the case of an individual, by the individual himself or where he is absent from India, by some other person duly authorised by him in this behalf and where the individual is mentally incapacitated from attending to his affairs by his guardian or by any other person competent to act on his behalf.

9. The Commissioner (Appeal) in his order dated 17th June 2022 in para 5.4 to 5.6 observed that the Appellant has not provided challan or proof of having made pre-deposit. The Commissioner (Appeal) further observed that filing of certified copy of the order against which the appeal is filed has not been complied with and further the appeal is not signed by the proprietor nor has the Appellant submitted any authority letter of the signatory. Therefore, the Commissioner (Appeal) held that the appeal is to be rejected on this ground itself. However, the Commissioner (Appeal) after having given a finding that the appeal is required to be rejected on these grounds recorded a finding on the merits of the case and upheld the cancellation of registration. The Commissioner (Appeal) also observed that the proprietor of IJM has created a syndicate with intent to evade payment of CGST by wrongly availing ITC in one firm and utilizing the same in another firm for availing refund claim on account of export.

10. In our view, the Commissioner (Appeal) was not justified in deciding the matter on merits after having come to a conclusion that the appeal is to be rejected on the ground of no proof of pre-deposit, failure to file certified copy of the order and the appeal not having been authenticated as per rule 26(2)(a) of the CGST Rules. If the appeal is rejected on this ground, then in our view any adjudication on merits is not permissible by the Appellate Authority and would be without jurisdiction. In this context, it is important to note the decision of Karnataka High Court in the case of Inspecting Assistant Commissioner Vs. K. B. Nagarala (1986) 162 ITR 170. Paragraph 9 of the order reads thus:-

"An Appellate Authority under the act or under any enactment can examine the merits only when it finds that the Appeals filed before it are competent and not otherwise. When once the Tribunal found that the appeals were incompetent, it should have refrained from dealing with the merits and expressing any opinion on any of the questions raised by the respondents in support of their appeals. From this, it follows that the Tribunal committed an error of law in dealing with the merits....."

11. The reasons given in paragraphs 5.4 to 5.6 of the order in appeal that is to say proof of pre-deposit having not been filed, certified copy of the order having not been filed and appeal having not been authenticated as per rule 26(a) is a procedural requirement for filing the appeal. In our view, justice cannot be denied for failure to comply with the procedure without giving an opportunity to the Appellant to rectify the procedural defects. In our view, the Commissioner (Appeal) ought to have issued a defect memo calling upon the Petitioner to produce the proof of pre-deposit of tax as per section 107(6) of the CGST Act, 2017, for filing the certified copy of the order and for authentication of the appeal memo as per rule 26(2)(a). The Commissioner (Appeal) having not given an opportunity to the Petitioner for curing the procedural defect was not justified in rejecting the appeal. This would be contrary to the principle of natural justice.

12. The Supreme Court in the case of Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava AIR 1961 SC 932, has observed in paragraphs 5 and 14, which reads as thus:-

"5. The requirement that certified copy of the decree should be filed along with the memorandum of appeal is mandatory, and in the absence of the decree the filing of the appeal would be incomplete, defective and incompetent.

14. No hard and fast rule or general applicability can be laid down for dealing with appeals defectively filed under O. 41. R. 1. Appropriate orders will have to be passed having regard to the circumstances of each case, but the most important step to take in cases of defective presentation of appeals is that they should be carefully scrutinised at the initial stage soon after they are filed and the appellant required to remedy the defects. If at the time when the appeal is preferred a decree has already been drawn up by the trial court and the appellant has not applied for it in time it would be a clear case where the appeal would be

incompetent and a penalty of dismissal would be justified. The position would, however, be substantially different if at the time when the appeal is presented before the appellate Court a decree in fact had not been drawn up by the trial court; in such a case if an application has been made by the appellant for a certified copy of the decree, then all that can be said against the appeal preferred by him is that the appeal is premature since a decree has not been drawn up, and it is the decree against which an appeal lies. In such a case, if the office of the High Court examines the appeal carefully and discovers the defect the appeal may be returned to the appellant for presentation with the certified copy of the decree after it is obtained. If the appeal has passed through the stage of admission through oversight of the office, then the only fair and rational course to adopt would be to adjourn the hearing of the appeal with a direction that the appellant should produce the certified copy of the decree as soon as it is supplied to him. In such a case it would be open to the High Court, and it would be its duty, to direct the subordinate court to draw up the decree forthwith without any delay. On the other hand, if a decree has been drawn up and an application for its certified copy has been made by the appellant after the decree was drawn up, the office of the appellate court should return the appeal to the appellant as defective, and when the decree is filed by him the question of limitation may be examined on the merits."

13. Similarly, in the case of *Bharat Industries Vs. State of Maharashtra* (1995) 98 STC 417. , a Coordinate Bench of this Court has held that an appeal cannot be dismissed in limine or similarly for failure to set out the grounds relied on for the purpose of appeal in the memorandum of appeal without giving an opportunity to the Appellant to amend the memorandum of appeal by furnishing the same or for any other defect or omission without giving a reasonable opportunity for rectification of the defects or fill up the omission.

14. The Supreme Court in the case of *United Bank of India Vs. Naresh Kumar & Ors* (1996) 6 SCC 660, has observed that substantive rights should not be allowed to be defeated on technical grounds of procedural irregularity so as to ensure that no injustice is done to any party. Similar views are expressed in the cases of *Commissioner of Income-Tax Vs. Hope Textiles Ltd.* [2006] 287 ITR 321 (MP). , *Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh & Anr.* (2006) 1 SCC 75. and *Remfry & Sons Vs. Commissioner of Income-Tax*[2005] 276 ITR 1 (Del).

15. Very recently, the Orissa High Court in the case of *Ashishkumar Kar Vs. Central Board of Excise and Customs* (2023) 152 Taxmann.com 642 (Orissa) , held that if the Appellant files an appeal in ignorance of position that he has to file certified copies of adjudication order then Appellate Authority has to intimate Appellant with regard to defect by giving him opportunity to rectify the same within the stipulated time. If the Appellant is not directed on non-supply of certified copy of adjudication order then such an order would be in violation of principal of natural justice.

16. We may also observe that the contention raised before us that the procedure

for processing the refund application and for cancellation of registration has not been followed and thereby objecting the very procedure adopted by the adjudicating authority was not canvassed before the lower authorities by the Petitioner.

17. In view of above, we pass the following order:-

(a) The Order in Appeal dated 17th June 2022 is set aside and restored to the file of the Commissioner (Appeal).

(b) Commissioner (Appeal) will issue a defect memo to the Petitioner pointing out the procedural defect in the appeal and would give adequate opportunity for rectifying the same.

(c) If the Petitioner rectifies the defect specified in the defect memo, then the Commissioner (Appeal) will pass a fresh order disposing of the appeal on merits after considering all the submissions made, including the contention of correct procedure having not followed by the adjudicating authority.

(d) Petition is disposed of in terms of the above order. No order as to costs.

(e) All contentions of the parties are kept open.