

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.08.2021

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.13284, 13286, 13287, 13289, 13291 & 13292 of 2020

WMP.No.16417, 16423, 16426, 16419 & 16421 of 2020

W.P.No.13284 of 2020

Platinum Holdings Private Limited
Represented by its Authorised Signatory
M.Sreehari

...Petitioner

Vs.

1. Additional Commissioner of GST & Central Excise (Appeals-II)
Newry Towers, 2nd Floor, Plot No.2054, I Block,
II Avenue, Anna Nagar,
Chennai-600040.
2. Assistant Commissioner of GST & Central Excise
Tambaram Division, Chennai Outer Commissionerate,
Chennai-600073.

...Respondents

Prayer in W.P.No.13284 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of certiorarified mandamus calling for the records pertaining to impugned Common Order-in-Appeal on the file of the 1st respondent herein in Order-in-Appeal Sl.No.66/2020 dated 07.08.2020 and quash the same and consequently directing the respondents to grant to the petitioner the

refund of the Central Goods and Services Tax, State Goods and Services Tax and Integrated Goods and Services Tax paid by the petitioner on supply of goods and services for the past period of November, 2017.

(In all WPs)

For Petitioner : Mr.P.B.Harish

For Respondents : Mrs.R.Hemalatha

Senior Standing Counsel

COMMON ORDER

The petitioner is a Special Economic Zone (SEZ) and has effected purchases from several suppliers/vendors for the development of the SEZ. I am concerned in these writ petitions with the rejection of the request of the SEZ/petitioner for refund of taxes paid under the Central Goods and Services Tax Act, 2017 (in short 'CGST Act'), State Goods and Services Tax Act, 2017 (in short 'SGST Act') and Integrated Goods and Services Tax Act, 2017 (in short 'IGST Act').

2. The admitted facts are as follows:

(i) Supplies were effected to the petitioner, under invoices that included components of SGST, CGST and IGST.

(ii) The supplies are zero-rated insofar as the recipient is a SEZ, an entity not liable to tax in regard to the supplies made to it for development or export.

(iii) Thus admittedly, the only component of tax that ought to have been levied in this case was IGST, despite which, the suppliers had mulcted the supplies with SGST and CGST also.

(iv) Despite the petitioner not being liable to the payment of taxes, the invoices have been settled in full and tax has been paid on all the zero rated supplies.

3. On the basis of the aforesaid admitted facts, the petitioner filed applications for refund of the taxes erroneously remitted on various dates. The applications were deficient in some respects and deficiency memos were issued. Pursuant to correction of the deficiencies, the applications were taken on file on 11.10.2019.

4. A show cause notice was issued on 31.10.2019, where the locus of the petitioner to claim the refund was questioned, the respondent being of the view that the petitioner was not entitled to the refund on various grounds, including that, as per Section 54 of the CGST Rules, only a supplier of services would be entitled to claim refund and not the SEZ itself.

5. A reply dated 22.11.2019 was filed to the show cause notice which this Court does not have the benefit of since it has not been enclosed in the compilation. Be that as it may, the impugned orders-in-original have come to be passed by the 1st respondent as against which the petitioner filed appeals before the 1st respondent, that have also come to be rejected. Appellate orders dated 07.08.2020 are the subject matter of the present writ petitions.

6. The issue for resolution has been crystallized at para 5 of the impugned order as to '*whether a SEZ unit is eligible to claim refund of unutilized Input Tax Credit (ITC)*'. The authority refers to the provisions of Section 54 of the CGST Act dealing with applications for refund and Rule 89 (1) of the Central Goods and Services Tax Rules, 2017 (CGST Rules) under Chapter X thereof, which deal with the procedure for disposal of applications seeking refund of tax, interest, penalty fees or other amounts.

7. The conclusion at para 7.1 is based upon a reading of the provisions of the Provisions/Rules aforesaid, to the effect that an application for refund would be maintainable only if filed by the supplier of goods or services and not by any other entity including the recipients of the services, such as the petitioner SEZ before me.

8. According to the learned counsel for the petitioner, there is no restriction placed on who might claim refund of tax. Admittedly, the supplies at issue in the present writ petitions are zero rated and hence in view of the admitted position that the petitioner has, in fact, remitted taxes thereupon, there is no embargo on the refund sought. The reference in Section 54 is to '*any person*' and would, according to the petitioner, include the SEZ as well. In support of this argument, reference is made to Clause (g) of the Explanation at the foot of Section 54, which provides clarity on what the relevant date for filing of an application for refund would be, in cases of such applications being filed by an entity other than the supplier. Had the position been that only a supplier could seek refund, there would have been no necessity for such an Explanation in the first place.

9. Per contra, the revenue would refer to Rule 89, particularly the second proviso thereof, stating that it is only the supplier that is intended to claim refund. Logistically, it would be very difficult for the revenue to examine and determine the eligibility of any other entity to such refund. It is for this reason that the provisions of Section 54 (4) casts an onerous burden upon the applicant to provide all documentary evidence along with the application seeking refund. In the present case there is no allegation or material placed on record by the revenue to the effect

that the supplier has also made a claim for refund of the tax paid. There is, thus, no double claim that has been made in the instant case.

10. Heard both learned counsel. Rule 89 of the CGST Rules coming under Chapter X thereof provides for application to be filed seeking refunds of tax penalty, interest, fee or any other amount. Rule 89 (6) states that the credit available in the electronic cash or credit ledger shall be utilized towards payment of tax and the balance shall be refunded in accordance with the provisions of Section 54. Rule 89 of the CGST Rules reads thus:

REFUND

89. Application for refund of tax, interest, penalty, fees or any other amount.-(1)Any person, except the persons covered under notification issued under section 55,claiming refund of any tax, interest, penalty, fees or any other amount paid by him, other than refund of integrated tax paid on goods exported out of India, may file an application electronically in FORM GST RFD-01through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that any claim for refund relating to balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49 may be made through the return furnished for the relevant tax period in FORM GSTR-3 or FORM GSTR-4 or FORM GSTR-7,as the case may be:

Provided further that in respect of supplies to a Special Economic Zone unit or a Special Economic Zone developer, the application for refund shall be filed by the –

(a) supplier of goods after such goods have been admitted in full in the Special Economic Zone for authorized operations, as endorsed by the specified officer of the Zone;

(b) supplier of services along with such evidence regarding receipt of services for authorized operations as endorsed by the specified officer of the Zone:

.....

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

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

[(f) a declaration to the effect that tax has not been collected from the Special Economic Zone unit or the Special Economic Zone developer, in a case where the refund is on account of supply of goods or services or both made to a Special Economic Zone unit or a Special Economic Zone developer;

11. The provisions of Section 54, providing for refunds reads as follows:

REFUNDS

54. (1) 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 before the expiry of two years from the relevant date in such form and manner as may be prescribed:

.....
(4) The application shall be accompanied by—
(a) such documentary evidence as may be prescribed to establish that a refund is due to the applicant; and
(b) such documentary or other evidence (including the documents referred to in section 33) as the applicant may furnish to establish that the amount of tax and interest, if any, paid on such tax or any other amount paid in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such tax and interest had not been passed on to any other person:

.....
Explanation.—For the purposes of this section,—
(1) “refund” includes refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, or refund of tax on the supply of goods regarded as deemed exports, or refund of unutilized input tax credit as provided under sub-section (3).

(2) “relevant date” means—

(a) in the case of goods exported out of India where a refund of tax paid is available in respect of goods themselves or, as the case may be, the inputs or input services used in such goods,—

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India; or

(ii) if the goods are exported by land, the date on which such goods pass the frontier; or

(iii) if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India;

(b) in the case of supply of goods regarded as deemed exports where a refund of tax paid is available in respect of the goods, the date on which the return relating to such deemed exports is furnished;

(c) in the case of services exported out of India where a refund of tax paid is available in respect of services themselves or, as the case may be, the inputs or input services used in such services, the date of—

(i) receipt of payment in convertible foreign exchange, where the supply of services had been completed prior to the receipt of such payment; or

(ii) issue of invoice, where payment for the services had been received in advance prior to the date of issue of the invoice;

(d) in case where the tax becomes refundable as a consequence of judgment, decree, order or direction of the Appellate Authority, Appellate Tribunal or any court, the date of communication of such judgment, decree, order or direction;

(e) in the case of refund of unutilized input tax credit under sub-section (3), the end of the financial year in which such claim for refund arises;

(f) in the case where tax is paid provisionally under this Act or the rules made thereunder, the date of adjustment of tax after the final assessment thereof;

(g) in the case of a person, other than the supplier, the date of receipt of goods or services or both by such person; and

(h) in any other case, the date of payment of tax.

12. Section 16 of the IGST Act defines zero rated supply and though, in this case there is no dispute on the position that the supplies effected to the petitioner

SEZ, are indeed zero rated, I extract the same for completion of narration:-

ZERO RATED SUPPLY

16. (1) “zero rated supply” means any of the following supplies of goods or services or both, namely:—

*(a) export of goods or services or both; or
(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.*

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:—

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder.

13. The statutory scheme for refund under the CGST and SGST Acts, permits **any entity** to seek a refund of taxes or other amounts paid under the provisions of the Act, subject to satisfaction that it is so entitled, and that there is no double claim as against the same amount. Ordinarily, though zero rated supplies are not subject to the levy of taxes, the petitioner, in this case has remitted the same as raised in the invoice, albeit erroneously.

14. The provisions of Section 54 of the CGST Act, providing for a refund, apply to any person who claims such refund and who makes an application for the grant of the same. The language of the provision is clear and does not contain, or admit of any restriction in its operation.

15. Clause (h) of the explanation stipulates what the 'relevant date' for purposes of making the application is, in the case of a person other than a supplier of goods and services. Clause (h) is a residuary Clause which states that the date of payment of tax is the relevant date in the case of any goods not covered by Clauses (a) to (g) of Clause (2) of the explanation. Thus, the statutory scheme for refund admits of applications to be filed by any entity that believes that it is so entitled, including the petitioner SEZ. The language of Rule 89, echoes that of Section 54, and both the aforesaid provision and Rule commence with the phrase '*any person*'. The only exclusion is of the person covered under a notification issued under Section 55, admittedly inapplicable to the petitioner.

16. Learned Senior Standing Counsel has taken me through Rule 89, particularly, the second proviso thereto, as well as Clause (f) of sub-Rule 2, which refer to an application filed by a supplier to a SEZ. This, according to her, would indicate that an application for refund should only be filed by a supplier. I do not agree for the reason that Rule 89(1) does not envisage any such restriction and, in my view, applies to any entity. No doubt, the second proviso refers to a supplier of an SEZ, which is only one kind of entity that may make an application under Rule

89. This is not to say that the reference to a supplier, will exclude, by virtue of such reference, other applicants.

17. Thus, on a combined reading of Section 54 and Rule 89, the restriction which has been read into the provision by the Revenue is, in my view, misplaced. In fact, the Officer in the impugned order proceeds on the basis that the second proviso to Rule 89 deploys the word 'only', which I do not find in the second proviso. It is a settled position that there can be no insertion of a word or phrase in a statutory provision or in a Rule which must be read and applied, as framed. No restrictions or amplifications of the Rule are permissible by interpretation. On the legal issue of entitlement to refund, I hold in favor of the petitioner.

18. On the question of quantification of the refund, the revenue has raised a legitimate apprehension; firstly, that such refund would be issued to the petitioner only if it is established that no such claim has been made by the supplier, and secondly, that the tax paid by the supplier to the SEZ has, in fact, been remitted to the treasury under the statutory returns filed by the SEZ. This is a matter of fact which the petitioner will have to establish before the respondent. This aspect of the matter finds reference in Section 54(4), extracted earlier in this order, which

provides for the refund application to be comprehensive and accompanied by all relevant documentary evidence in support of the claim.

19. For the above purpose, the petitioner will appear before the 2nd respondent on a date to be fixed by the authority and provide all material available with it in support of its claim. Full liberty is granted to R2 to seek and obtain all information as he may deem necessary to clear apprehensions in his mind, including that the claims amount to a double deduction or that the taxes have not been remitted to the treasury by the SEZ.

20. These writ petitions are disposed as above. Connected miscellaneous petitions are closed. No costs.

11.08.2021

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Index: Yes/No

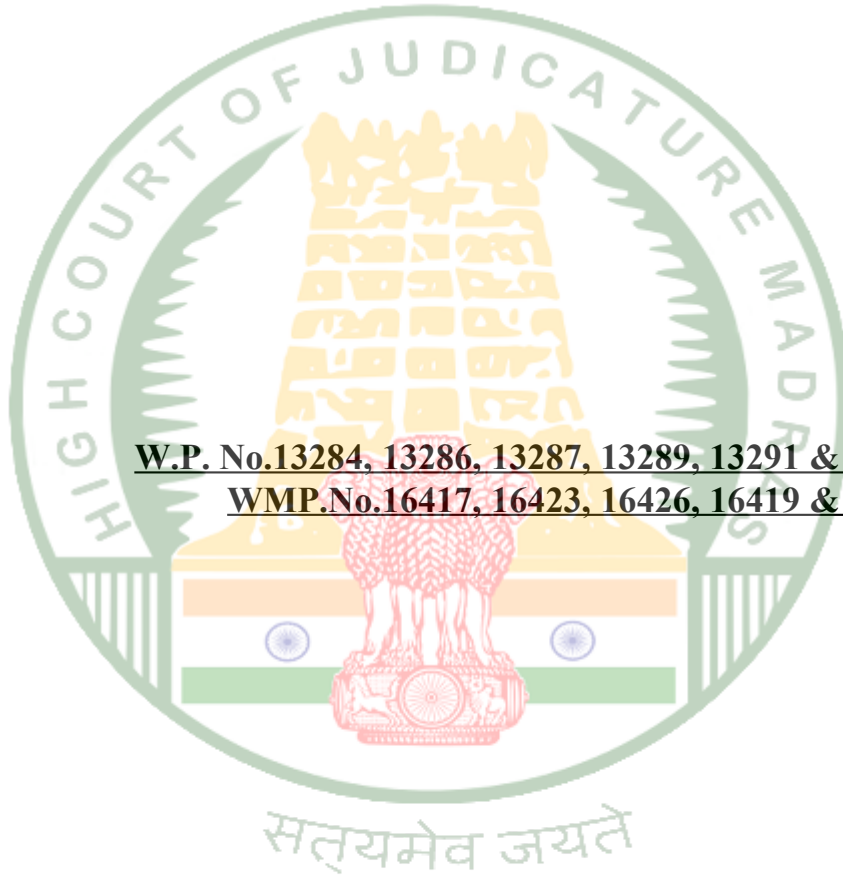
Speaking order/Non-speaking order

To

1. Additional Commissioner of GST & Central Excise (Appeals-II)
Newry Towers, 2nd Floor, Plot No.2054, I Block,
II Avenue, Anna Nagar,
Chennai-600040
2. Assistant Commissioner of GST & Central Excise
Tambaram Division, Chennai Outer Commissionerate,
Chennai-600073

DR.ANITA SUMANTH, J.

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