

[2022] 142 taxmann.com 338 (Andhra Pradesh)/[2022] 94 GST 731 (Andhra Pradesh)[05-08-2022]

GST : In view of Covid-19 pandemic, refund of GST paid on inputs and input services used while supplying to SEZ units cannot be denied on ground that endorsement certificate was not filed along with application or that certificate was produced later

GST : Appellate authority is empowered to accept additional evidence if appellant is prevented by sufficient cause from producing material before lower authority

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[2022] 142 taxmann.com 338 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

Fedex Express Transportation and Supply Chain Services (India)

v.

Additional Commissioner*

C. PRAVEEN KUMAR AND TARLADA RAJASEKHAR RAO, JJ.

WRIT PETITION NOS. 2478 & 2498 OF 2022

AUGUST 5, 2022

Refund - Supply to SEZ units - Claim for refund of input tax credit on supplies made to SEZ units was filed along with necessary documents except endorsement certificate which could not be obtained due to restrictions imposed in view of Covid-19 - HELD : Petitioner-assessee could not have anticipated outbreak of Covid-19 and when application for refund was planned to be filed, country was engulfed with pandemic as a result of which endorsement certificate could not be obtained - Endorsement certificate produced belatedly from one of recipients required acceptance [Section [54](#) of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017 - Rule [89](#) of Central Goods and Services Tax Rules, 2017/Andhra Pradesh Goods and Services Tax Rules, 2017] [Para 10] [In favour of assessee/Matter remanded]

Appeal to Appellate Authority - Additional evidence - Power of appellate authority - Appellate authority is empowered to direct production of any document, or examination of any witness to dispose of appeal and can make any further query as he thinks fit - Appellate authority is empowered to accept additional evidence in a given set of circumstances - Claim for refund of input tax credit on supplies made to SEZ units was filed along with necessary documents except endorsement certificate which could not be obtained due to restrictions imposed in view of Covid-19 - Circumstances on which discretion could be exercised for entertaining additional evidence at belated stage squarely fitted in instant case - Request to accept endorsement certificate should be allowed [Section [107](#) of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017 - Rule [112](#) of Central Goods and Services Tax Rules, 2017/Andhra Pradesh Goods and Services Tax Rules, 2017] [Paras 13, 16 and 17] [In favour of assessee/Matter remanded]

CASES REFERRED TO

Madanlal v. Shyamlal [2002] 1 SCC 535 (para 6) and *Avichal Press (P.) Ltd. v. Asstt. CIT* 2012 SCC Online Guj. 6179 (para 12).

ORDER

C. Praveen Kumar, J. - Since the issue involved in both the Writ Petitions being one and the same, they are heard together and disposed of by this Common Order. W.P. No. 2498 of 2018 is taken as a lead petition in deciding the issue involved.

2. The present Writ Petitions came to be filed to declare the Order in Appeal No. VIZ-GST-000-APP-021-21-22, dated 30-7-2021, passed by Respondent No. 1 herein rejecting the appeal filed by the Petitioner without considering the endorsement certificates filed by the Petitioner in the Appeal as illegal, improper and incorrect and violative of articles 14 and 19(1)(g) of the Constitution of India and consequently to direct Respondent No. 2 to grant refund to the Petitioner.

3. The facts are as under:

- i. The Petitioner is a Company registered under Central Goods and Services Tax Act, 2017 ['C.G.S.T. Act'] read with Andhra Pradesh Goods and Services Tax Act, 2017 ['A.P.G.S.T. Act'] within the State of Andhra Pradesh.
- ii. The Petitioner is primarily engaged in business of providing Express Courier Services to Units situated in Special Economic Zone ['SEZ']. The period in dispute is between April, 2018 to July, 2018 and August, 2018 to March, 2019. The Petitioner made supplies to SEZ Unit, which are to be treated as zero rated supplies and, as such, the Petitioner is entitled for refund of input taxes paid, while making zero rated supply, in view of Section 16 of Integrated Goods and Service Tax, 2017, ['I.G.S.T. Act'].
- iii. An application for refund came to be made under section 54 of C.G.S.T Act read with rule 89 of Central Goods and Service Tax Rules, 2017 ['C.G.S.T. Rules']. The said application has to be made within a period of two years from the relevant time, but, due to Covid Pandemic, the time limit was extended through Notifications from time-to-time.
- iv. It is the case of the Petitioner that it has filed the refund claim in Form GST RFD-01 on 28-8-2020 [Form GST RFD-01 on 30-8-2020 in W.P. No. 2478 of 2022] in terms of Section 54 of the C.G.S.T. Act read with Notification No. 35/2020 (Central Tax), dated 3-4-2020, as amended by Notification No. 55/2020 (Central Tax), dated 27-6-2020, for supplies made to its recipients, which are in SEZ. An acknowledgment evidencing filing of refund claim was received by the Petitioner.
- v. It is said that, in order to file a refund claim, the Petitioner approached/corresponded with its recipient viz., the SEZ Units, to obtain endorsement certificates from the specified officer of their respective zone in relation to receipt of services by these SEZ Units for their authorised operation. The details of correspondence are referred to in the affidavit which is not in dispute. It is further averred in the affidavit that, the SEZ Units were unable to obtain endorsement certificate from the specified officer of SEZ due to restrictions imposed in the wake of Covid pandemic. Since, the refund claims are to be filed on or before 31-8-2020, the Petitioner filed the refund claim along with necessary supporting documents as outlined in C.G.S.T. Rules, except the endorsement certificate.
- vi. While things stood thus, the Petitioner received show cause notice in Form GST RFD-08, dated 15-9-2020, [dated 14-9-2020 in W.P. No. 2478 of 2022] issued by Respondent No. 2, wherein the claim of the Petitioner was denied on the ground that the endorsement certificates were not submitted by the Petitioner, and that the Petitioner was directed to show cause as to why the refund claim should not be rejected for non-furnishing of the certificate within 15 days from the date of receipt of notice. The Petitioner addressed a letter, dated 28-9-2020, requesting 30 days time to furnish a reply to the show cause notice. Thereafter, the Petitioner filed a reply to the show-cause notice on 30-9-2020, explaining as to why the endorsement certificates could not be enclosed along with the refund/claim, while other documents evidence zero rated supplies to SEZ Units. It is said that, without considering the representation/reply made by the Petitioner, the Authorities rejected the claim of Rs. 3,45,02,753/- [Rs.86,27,371/- in W.P. No. 2478 of 2022] on the ground of non-submission of endorsement certificate. Challenging the same, the Petitioner filed an Appeal No. 3/2021, dated 5-1-2021, [Appeal No. 04/2021, dated 29-1-2021] before Respondent No. 1 in terms of Section 107 of the C.G.S.T. Act. In the said Appeals, the Petitioner explained the difficulty faced in obtaining the endorsement certificate and requested Respondent No. 1 to set-aside the refund rejection order.

vii. Pending Appeals, the Petitioner requested the Development Commissioner of SEZ to help in obtaining endorsement certificates. Finally, the Petitioner was able to obtain endorsement certificate, dated 11-1-2021, from the specified officer of Ramky Pharmacity India Limited, for a substantial portion of the services provided to SEZ Units for authorized operations. On receipt of the said certificate, the Petitioner submitted the same to Respondent No. 1 by way of additional material on 10-2-2021. The Petitioner attended the hearing on 13-7-2021 through its consultants, wherein, the grounds mentioned earlier, were reiterated. Without taking into consideration the submissions made, the Appeals came to be rejected only on the ground that the Petitioner has not submitted endorsement certificate within the time specified and also along with refund claim. These Orders are sought to be challenged in this Writ Petitions.

4. Counters came to be filed, in both the Writ Petitions, disputing the averments made in the affidavits filed in support of the Writ Petitions. A perusal of the averments in the counter show that the Petitioner herein has not complied with the statutory requirement, namely, filing of necessary documents within the time prescribed. Insofar as the documents relating to (1) April, 2018 to July, 2018 and (2) August, 2018 to March, 2019, it is pleaded that the Petitioner could have obtained the endorsement certificate much prior and taking the plea of Covid pandemic now, is an afterthought and cannot be accepted. Referring to Rule 89 of C.G.S.T. Rules, it is said that, in the absence of endorsement certificate, it cannot be established that the impugned supplies are consumed for specified purpose, in which case, refunds cannot be considered. It is averred that, a substantial concession of refund cannot be granted on mere assumption and presumption, as the same cannot take the place of proof.

5. The short question that arises for consideration is, whether the request of the Petitioner seeking a direction to the Appellate Authority to accept the endorsement certificate filed pending appeal can be accepted?

6. (i) Sri. Karan Talwar, learned Counsel appearing for the Petitioner, mainly submits that, when the statute provides for making an application with a delay and since the endorsement certificate could not have been obtained from SEZ Units through specified officer due to Covid pandemic, the Authorities should have considered the request of the Petitioner, more so, when the Petitioner has been continuously corresponding with the Respondents expressing the difficulty in obtaining certificate. He further submits that, the finding of the Appellate Authority that the Petitioner has not shown due diligence, may not be correct as e-mail correspondence exchanged between the parties establish otherwise. He further submits that, the expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done so long as negligence, inaction or lack of *bona fides* cannot be imputed to the party concerned. He relied on the Judgment of the Hon'ble Supreme Court in *Madanlal v. Shyamlal* [2002] 1 SCC 535 in support of his plea.

(ii) Sri. Karan Talwar, learned Counsel appearing for the Petitioner, further submits that the Order impugned in the Writ Petitions is in violation of principles of natural justice and violative of Article 14 of the Constitution of India. According to him, the endorsement certificate could not be filed along with the refund application, as the Petitioner could not secure the same by then and after causing due diligence, he could secure the certificate pending appeal and, as such, filed those certificate in appeal. Therefore, the reason given for not filing the endorsement certificate along with the refund application within the time prescribed cannot be brushed aside, more so, when the statute provides that the Petitioner is entitled for refund under section 24, and rule 112 prescribe filing of application even in appeal.

(iii) In view of the above and having regard to the finding given by the Appellate Authority that accepting document at a belated stage is the discretion of the authority, submits that the Order under challenge requires to be set-aside and consequently the matter be remanded back to the Appellate Authority for fresh consideration by taking into consideration the endorsement certificate of Ramky Pharmacity India Limited.

7. *Per contra*, Sri. Suresh Kumar Routhu, learned Senior Standing Counsel appearing for Respondent Nos. 1 to 3, opposed the same contending that when the Statute prescribed a thing to be done in a particular manner, the same has to be done in that manner alone. In other words, his argument appears to be that, since Section postulates filing of endorsement certificate along with refund application, seeking a direction from this Court for accepting the endorsement certificate pending appeal, may not be correct. He further submits that, the Petitioner ought to have secured the endorsement certificate while filing the refund application and when the Limitation Act is not applicable to the case on hand, accepting the documents at a belated stage, in the absence of any reasonable explanation, cannot be permitted. In view of the above, he would submit that the Order under challenge warrants no interference and the Writ Petitions are liable to be dismissed.

8. The fact that, the Petitioner has not filed the endorsement certificate along with the refund application is not in dispute. It is also not in dispute that, against the Order of refusing to grant refund, the Petitioner has preferred an appeal before the Respondent No. 1. It is also not in dispute that the Petitioner has not filed endorsement certificate issued by the specified officer of the SEZ Unit along with the appeal also. Pending appeal, the Petitioner herein is said to have filed an application requesting the Appellate Authority to accept the endorsement certificate issued by the specified officer in respect of its recipient SEZ Units.

9. Coming to due diligence, it is to be noted that the Petitioner herein placed on record the correspondence, evidencing the efforts made to obtain endorsement certificates. Annexure-P6 filed along with the Writ Petition show that right from 12-6-2020 till 8-1-2021 the Petitioner has been in continuous touch with its recipients SEZ Units viz., Pfizer, Hobel Bellows, Astrotech Steels, MSR Garments and Ramky Pharmacity India Limited, but, ultimately the Petitioner could secure endorsement certificates from Ramky Pharmacity India Limited. Therefore, it cannot be said that the Petitioner kept quiet without pursuing its remedies.

10. Insofar as the plea of the Respondents that the Petitioner ought to have obtained endorsement certificate much prior to arrival of Covid in India, it is to be noted here that the Petitioner herein has two years time to claim refund and the Petitioner could not have anticipated that the pandemic will sweep the entire country during that period. Therefore, non obtaining endorsement certificate prior to Covid pandemic cannot be a ground to reject the claim. As stated earlier, the Petitioner could not have anticipated the situation and when it thought of making an application within the time prescribed, the entire country was engulfed with pandemic. Therefore, as contended by the Petitioner, its efforts to obtain endorsement certificate within the time prescribed, proved futile, cannot be brushed aside.

11. Coming to acceptance of additional evidence pending appeal, it would be just and proper to extract rule 112 of the C.G.S.T. Rules, which reads as under:

"112. *Production of Additional Evidence before the Appellate Authority or the Appellate Tribunal -*

(1) The appellant shall not be allowed to produce before the Appellate Authority or the Appellate Tribunal any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority or, as the case may be, the Appellate Authority except in the following circumstances, namely:-

(a) where the adjudicating authority or, as the case may be, the Appellate Authority has refused to admit evidence which ought to have been admitted; or

(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the adjudicating authority or, as the case may be, the Appellate Authority; or

(c) where the appellant was prevented by sufficient cause from producing before the adjudicating authority or, as the case may be, the Appellate Authority any evidence which is relevant to any ground of appeal; or

(d)** ** *

(2) & (3) ** ** *

(a) to (c)** ** *

(4)** ** **"

12. A plain reading of the above, *inter alia* makes it clear that the Appellate Authority has got all the power to accept additional evidence adduced by the appellant, when he is prevented by "sufficient cause" from producing the material before the assessing officer. The issue came up for consideration before the High Court of the State of Gujarat in *Avichal Press (P.) Ltd. v. Asstt. CIT* 2012 SCC Online Guj. 6179. Dealing with the same, the High Court observed as under:

"15. Rule 46A permitting additional evidence at the appellate stage before the Commissioner is essentially a rule of procedure. The grant of permission to produce the additional evidence thereunder is on the conditions mentioned therein. The rule should receive a liberal interpretation with an object that

the assessee is not deprived of opportunity to produce evidence in support of his case which he wanted to produce at the initial stage, but was prevented for good reason.

16. In the facts of the present case, the approach of CIT(A) as well as of the Tribunal with regard to applying rule 46A was wooden. As noted above, the factum of confirmations was already there before the Assessing Officer, but the same was not accepted on the ground that the letters were signed by the Managing Director of the Assessee-Company. Therefore, when in the proceedings of appeal, the confirmation letters of the parties were produced with explanation for not producing the same, there was no reason for the assessing officer to reject the same.

17. Fresh confirmation letters were only in continuation of previous ones already produced. They were produced only in compliance of requirement on which the Assessing Officer based his rejection. They were, as such, not new evidence. The refusal to permit them was mechanical and suffered from non application of mind. The assessee's case for permission to produce such additional evidence clearly fell under clause (b) of sub rule (1) of 46A that he was prevented by sufficient cause from producing the confirmation letters, which he was called upon to produce by the Assessing Officer. Those confirmation letters were in support of the ground of assessee's appeal, therefore, it was covered under sub-clause (c) also."

13. Further, Rule 112(4) of C.G.S.T. Rules postulate that, nothing contained in the said Rule shall affect the power of the Appellate Authority or the Appellate Tribunal to direct production of any document, or examination of any witness, to enable it to dispose of the appeal. In fact, section 107(11) of C.G.S.T. Act contemplate that, before disposing of any appeal, the Appellate Authority may make any further inquiry as he thinks fit. The said provision is akin to section 250 of the Income-tax Act, which is similar to section 107 of C.G.S.T. Act, which deals with the procedure in appeal before the Appellate Authority. Ergo, having regard to the judgments, referred to above and the provisions of law, it is very much clear that the Appellate Authority has got power in a given set of circumstances, to accept the request of taking additional evidence on record. In fact, the Appellate Authority in paragraph No. 11 of the Order categorically states that, "as a rule, additional evidence is not permitted to be produced, for the first time, in appeal proceedings. However, additional evidence at the appellate stage can be entertained, at the discretion of the appellate authority, in cases where it can be proved that the party did not get the opportunity to file the documents at the lower stage or the original authority refused to admit the evidence or the appellant establishes that it had exercised due diligence, but was still unable to produce such evidence during the original proceedings. Therefore, the circumstances on which the discretion can be exercised for entertaining additional evidence at the belated stage squarely fits in the instant case, more so in view of the findings of the Appellate Authority. Therefore, on this score as well the Appellate Authority ought to have accepted the request of the Petitioner.

14. Coming to the last issue, namely, no opportunity was given to the Petitioner to explain the rejection of its claim, it would be appropriate to refer to few sentences in paragraph No. 12 of the Order, which is as under:

"A cursory scrutiny of the said certificates, it is observed that the said certificates were issued in respect of certain supplies received by M/s. Pfizer Healthcare India Pvt. Ltd, from the appellant during the period from October, 2017 to the second week of July, 2018. Thus, it is observed that the supplies relating to the claim of Rs. 86,27,371/- filed for the period from August 2018 to March, 2019 are not covered in the said certificates. Further, the supplies covered from October, 2017 to March, 2018 in the said certificates are not relevant for both the impugned refund claims, as the other claim was filed for the supplies made during the period from April, 2018 to July, 2018. That being so, the certificates related to supplies made to other supplies, such as Pokarna Engineered Stone etc., could not be produced by the appellant even now. Thus, the certificates are found to be deficient in that they do not cover the entire period involved in the claims nor did they cover all the supplies made during the material period to all the recipients."

15. Insofar as these findings are concerned, the learned Counsel for the Petitioner submits that, no opportunity was given to explain the reasons given for rejecting the claim for the period April, 2018 to July, 2018 and August, 2018 to March, 2019. In fact, he would submit that, had an opportunity been given or a notice was given asking the Petitioner to explain, it would have explained to the Appellate Authority that the claim made was relevant. The said argument of the learned counsel cannot be brushed aside.

16. For the above reasons, the request of the Petitioner to accept the endorsement certificate, dated 11-1-2021, of the specified officer of Ramky Pharmacy India Limited, is allowed.

17. Accordingly, the Writ Petitions are allowed setting aside the impugned Order, dated 30-7-2021, and the matters are remanded back to the Appellate Authority to deal with the same afresh after accepting the application filed by the Petitioner for additional evidence, in accordance with law. No Order as to Costs.

18. As a sequel, interlocutory applications, if any, pending shall stand closed.

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*Partly in favour of assessee