
[2021] 132 taxmann.com 22 (TELANGANA)/[2022] 89 GST 154 (TELANGANA)[28-09-2021]

GST : Refund of excess balance in electronic cash ledger which was collected by supplier engaged in selling goods through e-commerce platform as Tax Collected at Source (TCS) was admissible

GST : Mere existence of alternate appellate remedy is no bar for invoking writ jurisdiction of High Court when GST Appellate Tribunal has not been constituted and right to carry on business was impeded resulting in violation of fundamental right

GST : Circulars, instructions and clarifications issued by Central Board of Indirect Taxes & Customs (CBIC) are binding on all authorities under GST law

■ ■ ■

[2021] 132 taxmann.com 22 (TELANGANA)

HIGH COURT OF TELANGANA

Appario Retail (P.) Ltd.

v.

Union of India*

M.S.RAMACHANDRA RAO, ACTG. CJ.

AND T. VINOD KUMAR, J.

WRIT PETITION NO. 12183 OF 2021

SEPTEMBER 28, 2021

Refund - Excess balance in electronic cash ledger - Petitioner was engaged in business of trading of electronic goods over e-commerce platform and such platform was covered under Tax Collected at Source (TCS) provision - Petition was filed to quash impugned Order-in-Appeal whereby refund of balance lying in electronic cash ledger has been rejected - HELD : Contention of department that amount collected by e-commerce operator is not tax, was not acceptable as TCS provisions under section 52 are contained in chapter X dealing with 'payment' of tax and heading of section 52 also deals with 'Tax collected at source' - Refund provisions will be applicable once amount collected was held as tax and supplier was entitled to take credit in electronic cash ledger - Argument of department that amount collected as TCS was not paid by petitioner and therefore, not entitled to claim refund, was misplaced - Such refund was permitted as clarified by CBIC in FAQs on TCS under GST - Refund of balance in electronic cash ledger admissible - Impugned order set aside - Petition allowed [Section [52](#), read with section [54](#), of Central Good and Services Tax Act, 2017/Telangana Goods and Services Tax Act, 2017 [Paras 33, 34, 35, 41, 42, 43, 44 and 53][In favour of assessee]

Writ petition - Alternative remedy - Whether petition can be filed before High Court when an effective statutory remedy of appeal to Appellate Tribunal is available - HELD : GST Appellate Tribunal is only on paper and not yet constituted despite lapse of 3 years, since CGST Act was introduced - Petitioner could not be compelled to wait for eternity to agitate its claim seeking refund - Mere existence of alternate remedy is no bar for invoking jurisdiction of High Court when right to carry on business was impeded resulting in violation of fundamental right [Articles [19\(1\)\(g\)](#) and [226](#) of the Constitution of India, read with section [109](#) of the Central Good and Services Tax Act, 2017/Telangana Goods and Services Tax Act, 2017] [Para 51][In favour of assessee]

CBIC clarification - Binding nature - Department's contention that CBIC's FAQ on TCS under GST not binding on appellate authority - Held : Circulars, instructions and clarifications issued by Central Board of Indirect Taxes & Customs (CBIC) binding on all authorities under GST law [Section [168](#) of the Central Goods and Services Tax Act, 2017/Telangana Goods and Services Tax Act, 2017] [Paras 47, 48 and 49][In favour of assessee]

Circulars and Notifications : [CBIC FAQs on TCS under GST, dated 28-9-2018](#)

HELD

- The balance amount in the electronic cash ledger till it is appropriated by making payment towards discharge of liability of tax, interest or any other amount to the Government, would be the amount available to the 'registered person' in whose name the said electronic cash ledger is maintained. Therefore, the stand of the respondents that since the amount collected by ECO under section 52 of the CGST Act is not paid by the petitioner by himself and therefore, it is not entitled to claim refund of the same, is totally misplaced. As the petitioner is claiming refund balance in electronic cash ledger, it is covered by the proviso to sub-section (1) of section 54 and would not fall under sub-section (1) of section 54. [Para 43]
- The petitioner is entitled to claim refund of the excess balance in its electronic cash ledger, which includes the amount that has been collected by the Electronic Commerce Operator (ECO) under section 52 from the net value of consideration payable to the petitioner in respect of sales/supplies effected through it, as such amount paid to the Government is allowed as a credit in the electronic cash ledger of the petitioner under section 49(1) and such balance being eligible for refund under section 49(6) and therefore, the petitioner is entitled to claim refund of the balance in electronic cash ledger under proviso to sub-section (1) of section 54. [Para 45]

CASE REVIEW

Commissioner of Customs v. Indian Oil Corporation Ltd. [2004 taxmann.com 1061 \(SC\)](#) (para 49) followed.

CASES REFERRED TO

Appario Retail (P.) Ltd. v. Union of India [Appeal No. HYD - GST - RRC - APP - 091-20-21 (App I), dated 29-12-2020] (para 1), *Cognizance for Extension of Limitation*, In re [\[2020\] 117 taxmann.com 66 \(SC\)](#) (para 19), *Commissioner of Customs v. Indian Oil Corpn. Ltd.* [2004 taxmann.com 1061 \(SC\)](#) (para 49) and *Royal Edible Company v. Union of India* [WP (C) No. 22593 of 2020, dated 18-12-2020] (para 50).

G. Shiv Das, Sr. Counsel and **G. Prahlad** for the Petitioner. **Namavarapu Rajeshwar Rao**, ASSGI, **B. Narayana Reddy** and **B. Narasimha Sarma** for the Respondent.

ORDER

T. Vinod Kumar, J. - This Writ Petition is filed primarily assailing the Order-in- *Appario Retail (P.) Ltd. v. Union of India* [Appeal No. HYD-GST-RRC-APP-091-20-21 (APP I), dt.29-12-2020], passed by the 4th respondent, whereby the said respondent had *set aside* the order passed by the 5th respondent in Appeal No. 03/2020-RR(GST)JC-D-D, dt.24-6-2020, denying the refund of excess amount lying to the credit of electronic cash ledger of the petitioner maintained under the Central Goods and Services Tax Act, 2017 (for short, 'the CGST Act').

2. The petitioner contends that it is engaged in the business of trading of electronic goods over e-commerce platform by obtaining registration under the provisions of Goods and Service Tax Laws; that the petitioner procures electronic goods from various vendors based on forecasted demand of business and maintains huge inventory for the purpose of ensuring timely deliveries; that as a result of purchases effected by it, a very high balance of input tax credit of GST paid on its purchases is available in the electronic credit ledger; that on receiving orders through Electronic Commerce Operator (for short, 'ECO'), the sale is effected through ECO and goods are dispatched to customers; and that the tax liability is discharged by the petitioner by debiting the Electronic Credit ledger.

3. The petitioner would further contend that upon effecting the sale through the e-platform of ECO, the consideration is received by the ECO from the customers and is remitted to the petitioner thereafter.

4. The ECO, before remitting the amount for the supply of goods effected through it to customers, retains a percentage of amount from and out of such consideration received and deposits such amount retained by the ECO with the Government in terms of section 52 of the CGST Act as 'Collection of tax at source'; and that the such deposit of amount made by the ECO with the Government is allowed to be claimed as credit by the petitioner in the electronic cash ledger of the petitioner, on the basis of the statement filed by ECO in Form GSTR-8 in terms of rule 67 of the Central Goods and Services Tax Rules, 2017 (for short, 'the CGST Rules').
5. The petitioner also contends that due to maintenance of huge inventory on account of purchases affected to meet the forecasted demand, the petitioner invariably has excess balance of ITC in its electronic credit ledger, which is utilized for discharge of GST liability, as and when sale of goods is effected through ECO, and therefore, the amount retained by the ECO and deposited with the Government under section 52 of the CGST Act, as tax collected at source and reflected in petitioner's electronic cash ledger remains unutilized; that the said unutilized balance in the petitioner's electronic cash ledger can be claimed as refund in terms of section 49(6) read with section 54 of the CGST Act; and that the said balance amount in the electronic cash ledger is being refunded to the petitioner throughout India where it has operations, including in the State of Telangana.
6. It is further contended that the electronic cash ledger of the petitioner maintained on the GST portal is akin to e-wallet, where the e-wallet holder keeps its money to be appropriated against a specific liability to be discharged and if the remains unutilized, it can claim credit back of the same to its account.
7. The petitioner contends that as the balance in electronic cash ledger was being refunded to it previously, even in respect of period October, 2018, the petitioner filed refund claim in Form CGST RFD-01A on 20-5-2019 for the period October, 2018, of the excess balance accumulated in electronic cash ledger of Rs. 1,17,29,989/- (IGST of Rs. 73,08,531/-, CGST of Rs. 22,10,729/- and SGST of Rs. 22,10,729/-) in terms of section 54 of the CGST Act read with rule 89 of the CGST Rules; that the said refund application was adjudicated by the 5th respondent and a refund sanction order was passed granting refund of entire amount claimed as per refund application *vide* order No. RFD CGST 28/2019 dt.18-9-2019.
8. The petitioner contends that, upon the 5th respondent sanctioning the refund of excess amount available in the electronic cash ledger, the 3rd respondent examined the said refund sanction order dt.18-9-2019 and passed review order dt.09-6-2020 observing that the refund was sanctioned without examining whether the principle of "unjust enrichment" has been complied with as required under section 54(5) read with section 54(8) of the CGST Act, and the impugned refund sanction order is legally improper, and authorized the adjudicating authority for filing an appeal before the Commissioner as provided under the CGST Act.
9. It is contended that based on the said authorization granted by the 3rd respondent, the 5th respondent, who initially passed the refund sanction order, filed an appeal before the 4th respondent on 24-6-2020; that upon filing of the said appeal by the 5th respondent, the petitioner filed Memorandum of Cross Objections on 19-10-2020 contending that the TCS amount collected by the ECO and deposited with the Government represents the portion of the consideration receivable by the petitioner for supplies made through ECO; that the balance in electronic cash ledger is the amount of the consideration receivable by the petitioner and it is entitled to claim refund of the same under the category of 'refund of excess balance of electronic cash ledger'.
10. The petitioner also contends that the CBIC, *vide* Circular No. 125/44/2019/GST, dt.18-11-2019, has clarified that refund of excess balance in electronic cash ledger arising on account of TCS can be claimed under the category of 'refund of excess balance in electronic cash ledger' and that a CA certificate was also furnished in terms of rule 89(2)(n) of the CGST Rules, in support of the fact that incidence of amount paid and claimed as refund, *i.e.* TCS, credited to electronic cash ledger, has not been passed to any other person.
11. The petitioner further contends that the 4th respondent, after granting personal hearing on 23-10-2020 passed the impugned Order-in-Appeal setting aside the refund sanction order dt.18-9-2019 and rejected the refund claim.
12. The 4th respondent, by the impugned Order-in-Appeal, has held that there is no provision under section 54(1) for refund of TCS under deposited section 52 of the CGST Act; that the Circular dt.18-11-2019 allows refund of TCS - TDS, only when the same has been erroneously deposited in excess, under wrong head; that as the case of the petitioner is not an erroneous deposit in excess under wrong head, refund would not be admissible, that the Frequently Asked Questions (FAQs) issued by the CBIC are not binding on the Appellate Authority, and that there is a remedy of further appeal before the 2nd respondent.

13. The petitioner contends that, though the impugned Order-in-Appeal can be appealed before the Hon'ble Goods and Service Tax Appellate Tribunal, the said Appellate authority has not been constituted in the State of Telangana, as on date, even though more than three years have passed by after the introduction of GST with effect from 1-7-2017. Thus, it is claimed that the petitioner is invoking the extraordinary jurisdiction of this Court under article 226 of the Constitution of India, assailing the correctness of the impugned order-in-appeal passed by the 4th respondent.

14. Counter affidavit deposed to by the 3rd respondent on behalf of the respondents 1, 3, 4 and 5 has been filed.

15. By the said counter-affidavit filed, the respondents contend that the present writ petition is not maintainable, inasmuch as there is an effective remedy of appeal before the Appellate Tribunal provided under section 109 of the CGST Act; that though the regional GST Tribunal has not been established as on date, by virtue of the order issued by CBIC, *vide* order No. 9/2019-Central Tax dt.03-12-2019, the three months period for filing of appeal has to be considered from the date of communication of the order or the date on which the President or the State President, as the case may be, of the Appellate Tribunal, after its constitution under section 109 of the CGST Act, enters office; that the CBIC by its Circular No. 132/2/2020-GST dt.18-3-2020 further clarified the issue of filing appeal before the Appellate Tribunal; that the time limit to make application to the Appellate Tribunal will be counted from the date on which the President or the State President enters the office and that the appellate authority may dispose of all the pending appeals expeditiously without waiting for the constitution of the Appellate Tribunal.

16. On the basis of the above, the respondents claim that the petitioner is expected to first exhaust the channel of appeal before the Appellate Tribunal and not by way of filing the present writ petition under article 226 of the Constitution of India.

17. The respondents also contend that the amount deducted by the ECO from the consideration payable to the supplier under section 52 of the CGST Act and deposited with the Central Government is not a 'tax' or that it is the liability of the petitioner; thus, the TCS is not an amount which is paid by the assessee and the refund thereof in terms of section 54(1) of the CGST Act or proviso thereto is not provided; and that the amount deposited by the ECO with the Government is to be utilized only for payment of tax by the supplier for his outward supplies, and section 52 of the CGST Act does not envisage refund of such amount.

18. The respondents would contend that the answer provided to Question No. 24 of FAQs also specifies that the refund is to be in accordance with the provisions of section 54(1) of the CGST Act, which applies only to the amount paid by a claimant into the electronic cash ledger, but not the amount which has been deducted and deposited by ECO, and therefore, the clarification in the form of answer to Question No. 24 of FAQs is not applicable to the petitioner.

19. The respondents also seek to rely on the extension of limitation granted by the Hon'ble Supreme Court in *Cognizance for Extension of Limitation*, In re [\[2020\] 117 taxmann.com 66](#), to contend that the appeal filed before the 4th respondent was in time and not hit by limitation.

20. We have taken note of the contentions urged by the respective parties.

21. Heard Sri G. Shiv Das, learned Senior Counsel appearing for Sri G. Prahlad, learned counsel for the petitioner; Sri B. Narasimha Sharma, learned Senior Standing Counsel appearing for respondent Nos.1, 3, 4 and 5; and Sri Namavarapu Rajeshwar Rao, learned Assistant Solicitor General, appearing for respondent No. 2.

22. Before advertng to the contentions urged before us, it is necessary to note the relevant provisions under the CGST Act.

23. Chapter I is the Preliminary chapter and under section to definitions are provided. Section 2(21) defines 'central tax'; section 2(43) defines 'electronic cash ledger'; section 2(46) defines 'electronic credit ledger'; section 2(84) defines the 'person' and includes 14 categories who are considered as 'person'; section 2(94) defines 'a registered person'; section 2(107) defines 'a taxable person'.

24. Chapter III deals with Levy and collection of Tax. Section 9 thereunder is the charging section which authorizes the levy and collection of tax called 'Central Goods and Services Tax'.

25. Chapter X deals with Payment of Tax. Section 49 deals with payment of tax, interest, penalty, fee or any other amounts; Section 51 deals with 'Tax deduction at source'; Section 52 deals with 'Collection of tax at

source'.

26. Chapter XI deals with Refunds. Section 54 thereof deals with 'refund of tax'.

27. The 'electronic cash ledger' as defined in section 2(43) of the CGST Act makes a reference to the electronic cash ledger referred to in sub-section (1) of section 49 thereof. Section 49(1) of the CGST Act reads as under:

'(1) Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using debit or credit 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.'

28. A reading of the above provision indicates that every deposit made towards tax, interest, penalty, fee or any other amount using any of the mode of payment stands credited to the electronic cash ledger of such person to be maintained. In order to make deposit towards any of the amount specified, the section 49(1) of the CGST Act does not mandate such payment to be made only by the person in whose name such electronic ledger is maintained. On the other hand, section 49 allows a person to deposit the sums into the electronic cash ledger of another person, subject to such conditions and restrictions as may be prescribed.

29. Thus, a reading of section 49(1) of the CGST Act would indicate that it is not only the person in whose name the electronic cash ledger is maintained, but also other person can make deposits into the electronic cash ledger. This would be evident from the language used in section 49(1), as while allowing deposit, reference is made to 'by a person', and while giving credit to the electronic cash ledger, the word used is 'such person'. If the intent of the section is to allow the deposit only by the person in whose name the Electronic Cash Ledger is maintained, the same could have been mentioned by using the words like 'of the said person' or by stating 'his electronic cash ledger maintained'. Alternatively, the section would have used the terms like 'a registered person' or 'a taxable person' as defined under the CGST Act.

30. The use of the term 'by a person' for making deposit has to be given a wider meaning having regard to the definition of 'person' defined 2(84) of the CGST Act. On the other hand, the use of word 'such', which is qualified by the use of words 'shall be credited to the electronic cash ledger of such person to be maintained' connotes a different and restrictive meaning, implying the person in whose name the Electronic cash Ledger is maintained and credit is to be given. The above said position of law is also not disputed by the respondents in the counter affidavit filed.

31. Further, section 52 of CGST Act deals with 'collection of tax at source' and mandates every ECO to collect an amount calculated at such rate not exceeding one per cent, as may be notified by the Government on the recommendations of the Council, of the net value of taxable supplies made through it by other suppliers where the consideration with respect to such supplies is to be collected by the operator. Section 52(3) thereof mandates that the amount so collected by the ECO of the net value of taxable supplies made through it to be paid to the Government within ten days after the end of the month in which such collection is made. Sub-sections (4) and (5) of section 52 of the CGST Act mandates such ECO to file monthly and annual statements electronically providing the details of outward supplies effected through it and the amount collected under sub-section (1) during the month and financial year.

32. In the normal course of business, ECO would be required to remit to the supplier the consideration received by it, but for the provisions of section 52(1) of the CGST Act. Thus, it is by virtue of operation of law, the ECO is required to deduct and remit to Government, the specified percentage of amount from and out of the net value of taxable supplies effected, which otherwise is the value receivable by the supplier. It is in this context, the sub-section (7) of section 52 specifies that the supplier who had supplied the goods or services or both through ECO shall claim credit in his electronic cash ledger of the amount collected and reflected in the statement of the ECO furnished under sub-section (4) on a monthly basis.

33. In the counter affidavit filed the respondents have taken a stand that the collection of amount by the ECO from the net value of taxable supplies under section 52(1) is not a 'tax', as what is specified is the deduction of 'amount' and deposit with the government. However, we cannot lose sight of the fact that the collection so permitted under section 52 is specified in Chapter X dealing with 'Payment of Tax' and the heading of section 52 also deals with 'Collection of tax at source'. Further, it is also to be noted that section 9 of the CGST Act is the charging section providing for levy and collection of tax called as 'central goods and services tax'. If the

contention of the respondents that the said amount collected under section 52 is not a 'tax', then such collection would have to be treated as without authority of law, if the same does not partake the character of 'tax', which is only permitted to be levied and collected by the charging section *i.e.* section 9 of the CGST Act.

34. Further, it is also to be noted that the said submission of the respondents is without taking note of the Chapter and the section under which it is collected where such collection is defined as a 'tax'. Therefore, the submission of the respondents on this ground has to fail.

35. Once it is held that the amount collected by ECO and paid to the Government under section 52(3) of the CGST Act is tax to which the supplier is entitled to take credit in his electronic cash ledger under sub-section (7) of section 52, the provisions of section 54 of CGST Act would apply for claiming refund of the same.

36. By the Counter affidavit filed, the respondents contend that refund under section 54 of the CGST Act is permitted in respect of the amounts paid only by the petitioner. As the balance in Electronic Cash Ledger is on account of deposit made by the ECO, the petitioner is not entitled to claim refund of the balance since, it has not been deposited by the petitioner.

37. In order to appreciate the said contention urged, it is necessary to refer to section 54 of the CGST Act, reading as -

(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:

Provided that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in the return furnished under section 39 in such manner as may be prescribed.

38. The section 54(1) of the CGST Act, is in two parts.

39. Sub-section (1) of Section 54 deals with refund of tax and interest, if any, paid on such tax or any other amount paid by him by making an application before expiry of two years from the relevant date. The claim for refund contemplated under sub-section (1) is in respect of tax paid on outward supplies or such refund arising on account of dispute relating either rate of tax or exemption or pre-deposit. Thus, under sub-section (1) of section 54 refund can be claimed by (i) any person (ii) of any tax or interest, if any, paid on such tax or any other amount paid by him.

40. On the other hand, the proviso to sub-section (1) of section 54 of the CGST Act covers the second category of refund to be claimed by a registered person of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49. Under the proviso, there is no reference either 'tax, interest, if any, paid on such tax, or any other amount' or "paid by him". It merely refers to a registered person claiming refund of balance in Electronic Cash Ledger and nothing more. Thus, the refund under the proviso can be claimed (i) only by a 'registered person' as defined under section 2(94) of the CGST Act, (ii) of the balance in the electronic cash ledger.

41. Therefore, the section 54(1) covers two different classes of persons who can claim refund namely i) any 'person' and ii) 'registered person'. Similarly it also covers two different types of refunds namely i) tax, interest of any other amount and ii) balance in electronic cash ledger.

42. The petitioner is covered by class of person specified in (ii) and the refund claimed is also under (ii) type of refund specified above.

43. The balance amount in the electronic cash ledger till it is appropriated by making payment towards discharge of liability of tax, interest or any other amount to the Government, would be the amount available to the 'registered person' in whose name the said electronic cash ledger is maintained. Therefore, the stand of the respondents that since the amount collected by ECO under section 52 of the CGST Act is not paid by the petitioner by himself and therefore, it is not entitled to claim refund of the same, in our view, is totally misplaced. As the petitioner is claiming refund balance in electronic cash ledger, it is covered by the proviso to sub-section (1) of section 54 and would not fall under sub-section (1) of section 54.

44. Further, it is also to be seen that the CBIC in the form of FAQs on TCS under GST issued on 20-9-2018 had by way of answer to Question No. 24 also permitted the actual supplier to claim refund of excess balance

lying in his electronic cash ledger in accordance with the provisions contained under section 54(1) of the CGST Act. The clarification provided by the above FAQ reads as under:

'Q.24: How is TCS to be credited in cash ledger? Whether the refund of such TCS credit lying in the ledger would be allowed at par with refund provisions contained in section 54(1) of the CGST Act, 2017?

Answer: TCS collected is to be deposited by the e-commerce operator separately under the respective tax head (i.e., Central tax/State tax/Union territory tax/Integrated tax). Based on the statement (FORM GSTR-8) filed by the e-commerce operator, the same would be credited to the electronic cash ledger of the actual supplier in the respective tax head. If the supplier is not able to use the amount lying in the said cash ledger, the actual supplier may claim refund of the excess balance lying in his electronic cash ledger in accordance with the provisions contained in section 54(1) of the CGST Act.'

45. The above clarification provided by the CBIC in the form of question and answer, in our view, leaves no doubt as to the entitlement of the petitioner to claim refund of the excess balance in its electronic cash ledger, which includes the amount that has been collected by the ECO under section 52 of the CGST Act from the net value of consideration payable to the petitioner in respect of sales/supplies effected through it, as such amount paid to the Government is allowed as a credit in the electronic cash ledger of the petitioner under section 49(1) of the CGST Act and such balance being eligible for refund under section 49(6) of the CGST Act. Therefore, the petitioner is entitled to claim refund of the balance in electronic cash ledger under proviso to sub-section (1) of section 54 of the CGST Act.

46. It is also the stand of the 4th respondent that the said clarification provided by the CBIC does not bind the said authority discharging quasi-judicial functions under the CGST Act.

47. Before accepting the said plea urged, it is to be seen that the impugned order came to be passed on an appeal filed by the 5th respondent on the basis of the authorization issued by the 3rd respondent. It is not disputed that the circular/clarification/instructions issued by the CBIC in exercise of powers under section 168 of the CGST Act, binds the 3rd respondent. Thus, if the clarification issued by CBIC binds the 3rd respondent, the same ought to have been followed while examining the correctness of the refund sanction order and before issuing authorization to file appeal thereagainst.

48. Though the 4th respondent has taken a stand that clarification issued by the CBIC does not bind the said authority, being an appellate authority, he ignored the fact that he is otherwise duty bound to examine the correctness or otherwise of the grounds in the appeal filed including the authorization issued by the 3rd respondent for filing the said appeal, contrary to the clarification issued by the CBIC.

49. The non-consideration of the said issue by the 4th respondent, in our view, is perverse, to say the least, as the basis of the 3rd respondent issuing the authorization for filing of appeal, itself is contrary to the clarification issued by the CBIC. It is settled position of law that the circulars/instructions/clarifications issued by the board binds all the authorities under the Act, as has been held by the Hon'ble Supreme Court in *Commissioner of Customs v. Indian Oil Corpn. Ltd.* [2004 taxmann.com 1061](http://2004.taxmann.com/1061).

50. Further, on the view taken by us, as to the eligibility and entitlement of the petitioner to seek refund of excess balance in electronic cash ledger, is also supported by a decision rendered by the Kerala High Court in *Royale Edible Company v. Union of India* [WP (C) No. 22593 of 2020, dated 18-12-2020], wherein the Kerala High Court also took similar view and directed the respondents therein to ascertain the excess amount lying to the credit of the petitioner in its electronic cash ledger, and after making provision for any known and determined liability of the petitioner towards tax, interest, penalty or other amounts under the Act directed the 2nd respondent to refund the said excess amount to the petitioner.

51. Now, turning to the issue of maintainability of the writ petition, though an effective remedy of appeal to the Appellate Tribunal is provided under section 109 of the CGST Act, it is an admitted fact that the said Tribunal has not yet been constituted, though more than 3 years have elapsed after the CGST Act has been introduced. Thus, the petitioner cannot be compelled to wait for eternity to agitate its claim seeking refund of the amount to which it is entitled to under the statute and also blocking its funds affecting its cash flows, merely because of existence of (non functional) alternate forum/remedy on paper, by not invoking the jurisdiction under article 226 of the Constitution of India. Further, mere existence of alternative remedy is no bar for invoking the jurisdiction under article 226 of the Constitution of India, when right to carry on business is being impeded, resulting in violation of fundamental right as guaranteed under article 19(1)(g) of the Constitution of India.

52. Thus, considered from any angle, the impugned Order-in-Appeal passed by the 4th respondent, cannot be held to be a validly passed order for it to be sustained. For the reasons indicated above, the impugned Order-in-Appeal is liable to be set aside.

53. Accordingly, the writ petition is allowed. The impugned Order-in *Appario Retail (P.) Ltd. (supra)* passed by the 4th respondent, is set aside; and it is held that the petitioner is entitled for refund of the balance in electronic cash ledger as claimed in Form CGST RFD-01A, dt.20-5-2019, for the month of October, 2018, in a sum of Rs. 1,17,29,989/-(IGST of Rs. 73,08,531/-; CGST of Rs. 22,10,729/-; and SGST of Rs. 22,10,729/-).

54. Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

RITESH

*In favour of assessee.