IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Mr. Justice Md. Nizamuddin

W.P.A No. 17567 of 2021

The Principle Commissioner, CGST & CX, Kolkata North Commissionerate & Anr.
Vs.
Joint Commissioner (Appeal), Central Tax, Kolkata Appeal – I & Anr.
With

WPA No. 12676 of 2021

Electrosteel Castings Limited
Vs
The Assistant Commissioner, CGST & CX, Khardah Division Kolkata North Commissionerate & Ors.

For the Petitioners (in WPA 17567/2021) & Respondent no.1 (in WPA 12676/2021)	:-	**Mr. Bhaskar Prosad Banerjee, Adv.** **Mr. Tapan Bhanja, Adv.**
For the Electrosteel (in both cases)	:-	**Mr. Abhrotosh Majumdar, Adv.** **Mr. Rahul Dhanuka, Adv.** **Mr. Harsh Choudhury, Adv.**
For the Union of India	:-	**Ms. Priti Jain, Adv.**
Judgement On	:-	**10.06.2022**

MD. NIZAMUDDIN, J.

Heard learned counsel appearing for the parties.

Both these Writ Petitions being WPA No. 17567 of 2021 filed by the CGST authorities and WPA No. 12676 of 2021 filed by the assessee company arise out of the same impugned order dated 5th February, 2021 with corrigendum orders dated 17th February, 2021 and 29th July, 2021, passed by the Appellate authority being Joint Commissioner of Income, CGST & CX, Appeal-I, Kolkata, in Appeal No. 12/CGST/Kol-North/2021 filed by the assessee company against

the order dated 10th July, 2019, passed by Assistant Commissioner of CGST & CX, Khardah Division, Kolkata-North.

Since the issues involved in both the Writ Petitions are related and relief asked for in both the Writ Petitions are inter-dependent on the final outcome of both the Writ Petitions, the same are heard and disposed of by this common judgment.

Assessee company has filed the instant Writ Petition being WPA No. 12676 of 2021, being aggrieved by inaction and refusal on the part of CGST authority concerned in disbursing the refund amount of Rs.1,71,20,724/- with applicable interest as per the aforesaid order dated 17th February, 2021, passed by the Appellate authority in spite of repeated request by it and it has made prayer for relief in the aforesaid Writ Petition by way of direction upon the CGST authorities concerned to refund the aforesaid amount of refund along with applicable interest to the assessee company as per the aforesaid order of the Appellate authority dated 17th February, 2021.

CGST authorities have filed the instant Writ Petition being WPA No. 17567 of 2021 challenging the aforesaid impugned order of the Appellate authority dated 17th February, 2021 which is further appealable before the Appellate Tribunal by making prayer for quashing of the aforesaid impugned order mainly on the ground that the same is perverse since the Appellate authority in the impugned order has not considered the definition of 'non-taxable supply' as defined in the CGST Act, 2017 and further contending that the sanctioning authority has rightly included the domestic supply in Adjusted Total Turnover and has rightly rejected a part of the refund claim of the assessee company and that the impugned order of the Appellate authority on the basis of which assessee company has claimed the aforesaid refund is not sustainable.

Assessee company has opposed the instant Writ Petition of the CGST authority by contending mainly that i) this Writ Court should not interfere with the aforesaid impugned order of the Appellate authority by exercising its

constitutional writ jurisdiction as an Appellate authority over the same, ii) there is no jurisdictional excess or error in passing the impugned order by the Appellate authority, iii) there is no error apparent on the face of record and iv) the view taken by the CGST authorities defeats the legislative intent and the formula prescribed in Rule 89 (4) of the CGST Rules.

Main issue in the instant cases which arises for consideration is whether for the purpose of computing refund of credit of compensation cess to be made under Section 54 (3) of the CGST Act read with Rule 89 (4) of the CGST Rules as applicable mutatis mutandis to the Cess Act, the domestic turnover of final products which are not taxable under the Cess Act, could be excluded to arrive at the adjusted total turnover under Rule 89(4) of the CGST Rules having regard to the definition of 'Adjusted Total Turnover" contained in Clause (E) of the said Rule.

Refund of ITC of Cess in cases of zero rated supply of goods is governed by the provisions of Section 9(2) and Section 11 of the Cess Act read with Section 54 of the CGST Act read with Rule 89 (4) of the CGST Rules. The formula prescribed under Rule 89 (4) of the CGST Rules categorically excludes value of exempt supplies other than zero rated supplies while calculation of adjusted total turnover. Since "exempt supply" has not been defined under the Cess Act, definition of exempt supply contained in Section 2 (47) of the CGST Act shall apply mutatis mutandis for computation of refund of ITC of Cess by application of provisions of Section 11, Section 9 and Section 2 (2) of the Cess Act.

Assessee company alleges that the CGST authorities concerned have ignored the expression 'mutatis mutandis" appearing in Section 2 (2) of Cess Act and have not given any justification as to why domestic supply of finished goods which are subject to nil rate of Compensation Cess cannot be construed as exempted supplies.

When it is an admitted fact that refund of unutilized credit of compensation cess would be available by applying the formula prescribed under Rule 89 of

the CGST Rules, the definition of exempted supplies under Section 2 (47) of the CGST Act has to be read harmoniously with the provisions of Compensation Act and goods subject to nil rate of compensation cess are to be construed as exempt supplies.

Assessee company submits that the Revenue Authorities cannot be allowed accepts rejects to approbate and reprobate at the same time.

The Assessee submits that the adjudicating authority had taken Net ITC amount as Rs.3,56,17,002/- for computation of refund, which is after considering reversal of a sum of Rs.7,01,82,060/- on account of supply of finished goods not subject to Cess. The reversal itself has been done by the authority on the basis that supply of finished goods not subject to Cess are exempt supplies for the purpose of Cess Act and which has not been questioned by the revenue authorities. However, while in determination of refund amount, the supply of finished goods not subject to Cess has been included in the adjusted total turnover although the formula prescribed in Rule 89(4) of the CGST Rules categorically provides for exclusion of the value of exempt supplies other than zero rated supplies while computing adjusted total turnover. This contrary stand of the Revenue authorities is wholly unsustainable.

for reversal
Supply of finished goods not subject to cess are exempt supplies and therefore more reversal

for refund
Supply of finished goods not subject to cess are taxable supplies and therefore less refund

On perusal of relevant records available, facts appear to me in brief in these two Writ Petitions are as hereunder.

M/s Electrosteel Castings Limited/the assessee company is inter alia engaged in the manufacture of ductile iron spun pipes and fittings thereof. The Assessee inter alia uses coal as an input for manufacture of its finished goods which is subject to Cess @ Rs.400 per tonne in terms of Sl No. 39 of Notification No. 1/2017-Compensation Cess (Rate) dated 28 June, 2017.

In the month of September 2018, the Assessee reversed ITC of Cess amounting to Rs.7,01,82,060/- on account of domestic supply of finished

goods not subject to Cess and Non-GST turnover during the Relevant Period by treating the same to be exempt supplies in terms of Section 11 of the Cess Act read with Section 17 (2) and 2 (47) of the CGST Act. The said reversal of ITC of Cess is not in dispute and is clearly evident from Table 4B of the GSTR 3B returns filed for the month of September, 2018.

Circular No. 45/19/2018-GST, dated 30th May, 2018, was issued by CBIC in terms which stood clarified that a registered person making zero rated supply of final products (which are not subject to Cess) under bond or LUT may claim refund of unutilized credit including that of compensation cess paid on coal. Accordingly, the Assessee filed a claim of refund of ITC of Cess amounting to Rs. 3,74,54,166/- in Form RFD-01A in the month of March, 2019 for the month of September, 2018. The said refund amount was computed in accordance with the provisions of Section 11 and Section 9 of the Cess Act and read with Section 16 of the IGST Act, Section 54 of the CGST Act and Rule 89 (4) of the CGST Rules.

The formula for refund of ITC in case of zero-rated supply of goods or services without payment of tax under LUT, as contained in Rule 89 (4) of the CGST Rules categorically provides for exclusion of value of exempt supplies other than zero rated supplies while calculating adjusted total turnover. In computing the refund amount, the Assessee excluded supply of finished goods not subject to Cess and Non-GST turnover during the relevant period, while arriving at the adjusted total turnover. Net ITC amount was taken after reversal of Rs. ITC of Cess amounting to Rs.7,01,82,060/-.

since treated as exempt supply as per Cess Act

In spite of the aforesaid factual and legal position, only refund of Rs. 2,03,33,442/- was sanctioned by the CGST authority while refund claim of Rs.1,17,20,724/- was rejected by the refund sanction order dated 10th July, 2019. The adjudicating authority computed the refund by adding the supply of finished goods not subject to Cess in the adjusted total turnover although the formula prescribed under Rule 89 (4) of the CGST Rules categorically provides

for exclusion of value of exempt supplies, in spite of the fact, that the Assessee had reversed ITC amounting to Rs.7,01,82,060/- on such supplies by treating the same as exempt supplies.

The Assessee preferred an appeal before the Appellate Authority under Section 107 (1) of the CGST Act challenging the order in question passed by the Adjudicating Authority. The Appellate Authority by its order dated 5th February, 2021, allowed the aforesaid appeal of the assessee company and consequently, allowed refund of Rs. 1,71,20,724/-. On the basis of the aforesaid order of the Appellate authority, the Assessee filed application for refund of cess in terms of Circular No. 111/30/2019-GST dated October 03, 2019 which according to the petitioner has not been considered by the CGST authority concerned till date in spite of its repeated request.

On perusal of scheme of the Cess Act which is relevant for adjudication of this case, legal position can be summarized as hereunder.

The parliament enacted the Cess Act to provide for compensation to the States for the loss of revenue arising on account of implementation of the Goods and Services Tax in pursuance of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016.

Section 2 (1)(c) of the Cess Act defines “Cess” to mean the goods and services tax compensation cess levied under Section 8 of the Cess Act.

Section 2 (1)(d) of the Cess Act defines “compensation” to mean an amount, in the form of goods and services tax compensation, as determined under Section 7 of the Cess Act.

Section 4 of the Cess Act provides that for the purpose of calculating the compensation amount payable in any financial year during the transition period, the financial year ending 31st March, 2016, would be taken as the base year.

Taxes, duties and levies like VAT, Purchase Tax, CST, Luxury Tax, Entertainment Tax, Cess imposed by the State Government on the sale and purchase of MS, HSD, Natural Gas, ATF etc. and other levies under Entries 54, 55, 62 and 66 of List II of Schedule VII to the Constitution were subsumed in GST (Section 5 – Base year revenue).

Section 7 of the Cess Act Provides for levy and collection of Cess. The Council constituted under Article 279-A of the Constitution has been vested with the authority to make recommendations for levy and collection of cess.

From legislative scheme of the Cess Act it appears that the cess is an impost to counterbalance the loss of revenue of the States on account of subsumption of various taxes commencement of the GST regime. Hence, cess is a levy which partakes the character of all the levies, which now are subsumed in GST.

Cess is akin to the components of GST, which is a constitutionally approved amalgam of State taxes, which existed prior to the commencement of the GST regime. The goods and services Tax Compensation Cess Rules, 2017 were also framed and made effective from 1st July, 2017 wherein the Central Goods and Services Tax Rules, 2017 were adapted. Having regard to the conscious use of the expression "mutatis mutandis" in Section 11 of the Cess Act all the provisions of CGST and IGST Acts would be squarely applicable to the levy, collection and refund of the Cess Act. The words tax and cess for the purpose of the Act would have to be used interchangeably.

Domestic supply of finished goods which are not liable to Compensation Cess are to be reckoned as exempted supplies for the purpose of calculation of refund in terms of Rule 89 (4) of the CGST Rules.

Section 2 (47) of the CGST Act defines "exempt supply" as supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under Section 11, or under Section 6 of the Integrated Goods and Services Tax Act, 2017 and includes non-taxable supply. Thus, finished

goods supplied by the Assessee domestically which attract nil rate of Cess in term of Sl. No. 56 of the said Notification should be construed as exempt supplies and is therefore required to be excluded from adjusted total turnover for the purpose of computation of refund of ITC of Cess in terms of Rule 89 (4) of the CGST Rules.

The term "mutatis mutandis" has been discussed by the Hon'ble Supreme Court in several cases as under:

a) Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond & Gem Development Corporation Ltd. & Another [(2013) 5 SCC 470] wherein it has been held at Para 18 that the phrase mutatis mutandis implies that provision contained in other part of the statute or other statute would have application as it is with certain changes in points of details.

b) Paresh Chandra Chatterjee Vs. State of Assam & Ors. [AIR 1962 SC 167] wherein it has been observed that the expression mutatis mutandis means 'with due alteration of details'.

Applying the ratio of the aforesaid judgments, it would be clear that goods which are subject to nil rate of cess would be construed as exempt supplies for purposes of the formula prescribed Rule 89 (4) of the CGST Rules and therefore, deserves to be excluded from the calculation of adjusted total turnover.

Considering the facts and circumstances of the case as appears from record and impugned elaborate order of the Appellate authority, submission of the parties, relevant provisions of law and the discussion made above I am not inclined to interfere with the impugned order dated 5th February, 2021, for the reason that in my considered view Appellate authority while passing the impugned order has neither committed any procedural irregularity nor any jurisdictional error nor any violation of principles of natural justice and the

impugned order is based on cogent reasons and is speaking one and so far as findings of fact is concerned, in exercise of constitutional writ jurisdiction under Article 226 of the Constitution, this Writ Court is not inclined to act as an Appellate authority and differ with the same and substitute the said findings of the Appellate authority. Accordingly the writ petition being WPA No. 17567 of 2021 filed by the CGST authority against impugned order of the Appellate authority dated 5th February, 2021 is dismissed and consequently Writ Petition being WPA No. 12676 of 2021 filed by the assessee company is disposed of by allowing the same in view of the reasons and discussions made above. In my considered view action of withholding of the petitioner/assessee's claim of refund in question by the respondent CGST authority and not refunding the same to the petitioner in spite of the order of the Appellate authority dated 5th February, 2021, holding such claim in favour of the assessee company/petitioner, is arbitrary and unjustified and accordingly respondent CGST authorities concerned are directed to refund the amount as per the aforesaid order of the Appellate authority dated 5th February, 2021, along with applicable interest till the date of such payment, within eight weeks from the date of communication of this order. No order as to costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(MD. NIZAMUDDIN, J.)