

A.F.R.

Court No. - 2

Case :- MISC. BENCH No. - 2581 of 2021

Petitioner :- M/S Bushrah Export House Thru Sole Prop. Asif Ali

Respondent :- U.O.I. Thru Secy. Finance Ministry Revenue Deptt. & Ors.

Counsel for Petitioner :- Vibhanshu Srivastava, Jayant Kumar

Counsel for Respondent :- A.S.G., Kuldeepak Nag
(K.D.Nag), Mahendra Kumar Mishra

Hon'ble Devendra Kumar Upadhyaya, J.

Hon'ble Manish Kumar, J.

Heard Shri Jayant Kumar and Shri Vibhanshu Srivastava, learned counsel for the petitioner and Shri K. D. Nag, learned Standing counsel appearing for the respondents.

The petitioner is a proprietorship firm and is engaged in the business of export of apparels. These proceedings by the petitioner have been instituted under Article 226 of the Constitution of India with the following prayers:

- (a) Issue a writ of mandamus or any other appropriate writ or direction to the respondent no.2 directing to disburse the provisional refund in terms of Rule 90(2) of CGST Rules, 2017 immediately.
- (b) Issue a writ of mandamus or any other appropriate writ or direction to the respondent no.2 directing to disburse the full return in terms of Rule 92(1) of CGST Rules, 2017.
- (c) Issue a writ of mandamus or any other appropriate writ or direction to the respondent no.2 directing to conclude the refund process in a time bound manner as per the provisions of CGST Rules, 2017.
- (d) Issue a writ of mandamus or any other appropriate writ or direction to the respondent no.2 directing to unblock the Electronic Credit Ledger of the petitioner.
- (e) Issue any other appropriate writ, order or direction which this Hon'ble Court may deem just and necessary in the circumstances of the case may also be passed.

The petitioner, thus, appears to be aggrieved by non-disbursement of the provisional refund, non completion of the

proceedings to disburse the full refund and also by an order whereby Electronic Credit Ledger of the petitioner has been blocked.

Learned counsel representing the respondents, Shri Nag has submitted that after giving due opportunity of hearing to the petitioner the Principal Commissioner, Central Goods and Services Tax and Central Excise has taken a decision on 13.10.2020 whereby it has been ordered that the refund to the petitioner may be withheld till completion of investigation in the case. Since it appeared to us on previous dates of hearing of this matter that no such order or decision was communicated to the petitioner, we required Shri Nag to produce the original file containing the said decision taken by the Principal Commissioner on 13.10.2020. In deference to our said order the original record has been produced by the learned Standing Counsel today which we have perused as well.

From a perusal of the file, it appears that vide letter dated 25.09.2020 the petitioner was required to participate in the hearing through Video Conference. The said letter also prescribed that the submissions which may be made by the petitioner/its representative through Video Conference will be reduced in writing and a statement of the same to be known as "record of personal hearing" shall also be prepared. It is not denied on behalf of the petitioner that pursuant to the said notice/letter dated 25.09.2020 the petitioner's representative was provided opportunity of hearing through Video Conference and submissions made during the said hearing were also reduced in writing as "record of personal hearing". The said record of personal hearing has also been annexed as annexure-5 to the writ petition. Thus, there cannot be any complaint on behalf of the petitioner that before taking the decision dated 13.10.2020 whereby the refund has been ordered to be withheld, opportunity of hearing to the petitioner was not provided. However, we now need to examine as to whether the said decision dated 13.10.2020 can be said to be in conformity with the provisions contained in section 54(11) of the Central Goods and Services Tax Act,

2017 (hereinafter referred to as “GST, Act”) and the Rules framed thereunder.

It is not in dispute that as per the requirement of law the petitioner had made an application on 26.05.2020 seeking refund and acknowledgment in respect whereof was also issued by the respondent-department in terms of the provisions contained in Rule 90 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as “the Rules”). It is not that the department had noted any deficiency in the application filed by the petitioner seeking refund; rather the application appears to be in order and therefore, acknowledgment was issued. Rule 91 of the said Rules makes a provision for grant of provisional refund according to which the proper officer, after scrutiny of the claim and the evidence and on being *prima facie* satisfied that the amount claimed is due to the applicant in accordance with section 54(6) of the Act, shall make an order sanctioning the amount of refund on a provisional basis. The time period provided for passing an order for refund on provisional basis as provided under Rule 91(2) is seven days from the date of the acknowledgment under sub-rule (1) or sub-rule (2) of the Rule, 90.

It has been submitted by the learned counsel for the petitioner that the application was made by the petitioner on 26.05.2020 and after scrutiny, acknowledgment in Form RFD-02 was issued by the department within 2-3 days from the date of submission of the application and as per the statutory requirement of sub rule 2 of rule 91 the proper officer ought to have passed an order regarding provisional refund within seven days, however, despite long period having elapsed since the acknowledgment was issued, no such order has yet been passed.

As observed above, the submission of the learned counsel for the respondents is that neither orders sanctioning the provisional refund, nor orders sanctioning final refund in this case has been passed for the reason that the **Principal Commissioner vide his decision dated**

13.10.2020 has ordered for withholding the refund amount on the ground that some investigation in the case is pending.

No doubt, section 54(11) of the Act empowers the authority concerned to withhold the refund till such time as he may be determined, however, there are certain safeguards which have been statutorily provided before passing such an order withholding the refund. In this regard, it would be relevant to extract sub section 11 of section 54 of the Act which runs as under:

"(11) Where an order giving rise to a refund is the subject-matter of an appeal or further proceedings or where any other proceedings under this Act is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue in the said appeal or other proceedings on account of malfeasance or fraud committed, he may, after giving the taxable person an opportunity of being heard, withhold the refund till such time as he may determine."

A perusal of the aforequoted provision of sub section 11 of section 54 of the Act clearly reveals that the appropriate authority of the department is vested with the power to withhold the refund, however, the refund can be withheld by the authority only once he is of the opinion that grant of such refund is likely to adversely affect the revenue in some appeal or any other proceedings because of malfeasance or fraud committed by the applicant. Thus, what we find is that for exercising the authority vested by sub section 11 of section 54 of the Act for withholding the refund, the officer concerned has to form an opinion regarding refund having the tendency of adversely affecting the revenue in some proceedings.

It is also relevant to notice that such opinion is to be formed only if the authority opines that refund will adversely affect the revenue on account of some malfeasance or fraud committed. In this view, it is not only that the opinion of the officer concerned needs to be recorded but that opinion regarding refund adversely affecting the revenue has to be based on some malfeasance or fraud.

The corresponding rule for exercise of powers under section 54(11) of the Act is Rule 92 of the Rules, 2017 which is extracted herein below:

“92. Order sanctioning refund.— (1) Where, upon examination of the application, the proper officer is satisfied that a refund under sub-section (5) of Section 54 is due and payable to the applicant, he shall make an order in Form GST RFD-06 sanctioning the amount of refund to which the applicant is entitled, mentioning therein the amount, if any, refunded to him on a provisional basis under sub-section (6) of Section 54, amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable:

Provided that in cases where the amount of refund is completely adjusted against any outstanding demand under the Act or under any existing law, an order giving details of the adjustment shall be issued in Part A of Form GST RFD-07.

[(1-A) Where, upon examination of the application of refund of any amount paid as tax other than the refund of tax paid on zero-rated supplies or deemed export, the proper officer is satisfied that a refund under sub-section (5) of Section 54 of the Act is due and payable to the applicant, he shall make an order in Form RFD-06 sanctioning the amount of refund to be paid, in cash, proportionate to the amount debited in cash against the total amount paid for discharging tax liability for the relevant period, mentioning therein the amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable and for the remaining amount which has been debited from the electronic credit ledger for making payment of such tax, the proper officer shall issue Form GST PMT-03 re-crediting the said amount as Input Tax Credit in electronic credit ledger.]

(2) Where the proper officer or the Commissioner is of the opinion that the amount of refund is liable to be withheld under the provisions of sub-section (10) or, as the case may be, sub-section (11) of Section 54, he shall pass an order in Part B of Form GST RFD-07 informing him the reasons for withholding of such refund.

(3) Where the proper officer is satisfied, for reasons to be recorded in writing, that the whole or any part of the amount claimed as refund is not admissible or is not payable to the applicant, he shall issue a notice in Form GST RFD-08 to the applicant, requiring him to furnish a reply in Form GST RFD-09 within a period of fifteen days of the receipt of such notice and after considering the reply, make an order in Form GST RFD-06 sanctioning the

amount of refund in whole or part, or rejecting the said refund claim and the said order shall be made available to the applicant electronically and the provisions of sub-rule (1) shall, mutatis mutandis, apply to the extent refund is allowed:

Provided that no application for refund shall be rejected without giving the applicant an opportunity of being heard.

(4) Where the proper officer is satisfied that the amount refundable under sub-rule (1) [or sub-section (1-A)] or sub-rule (2) is payable to the applicant under sub-section (8) of Section 54, he shall make an order in Form GST RFD-06 and issue a [payment order] in Form GST RFD-05 for the amount of refund and the same shall be electronically credited to any of the bank accounts of the applicant mentioned in his registration particulars and as specified in the application for refund [on the basis of a consolidated payment advice]:

[Provided that the order issued in FORM GST RFD-06 shall not be required to be revalidated by the proper officer:

Provided further that the [payment order] in FORM GST RFD-05 shall be required to be revalidated where the refund has not been disbursed within the same financial year in which the said [payment order] was issued.]

[(4-A) The Central Government shall disburse the refund based on the consolidated payment advice issued under sub-rule (4).]

(5) Where the proper officer is satisfied that the amount refundable under sub-rule (1) [or sub-rule (1-A)] or sub-rule (2) is not payable to the applicant under sub-section (8) of Section 54, he shall make an order in Form GST RFD-06 and issue [a payment order] in Form GST RFD-05, for the amount of refund to be credited to the Consumer Welfare Fund.”

Sub rule 2 of rule 92 as quoted above, requires the proper officer or the Commissioner to pass an order in **Part B of FORM GST RFD-07**, if he is of the opinion that the amount of refund is liable to be withheld under sub section 10 or sub section 11 of section 54, as the case may be. **Since GST RFD-07 is appended with the rules and as such the said form also has a statutory force. Part B of FORM GST RFD-07 is also extracted herein below:**

**“PART-B****ORDER FOR WITHHOLDING THE REFUND**

This has reference to your refund application referred to above and information/documents furnished in the matter. The amount of refund sanctioned to you has been withheld due to the following reasons:

<i>Refund Order No.:</i>					
<i>Date of issuance of Order:</i>					
<i>Sr. No.</i>	<i>Refund Calculation</i>	<i>Integrated Tax</i>	<i>Central Tax</i>	<i>State/ UT Tax</i>	<i>Cess</i>
<i>i.</i>	<i>Amount of Refund Sanctioned</i>				
<i>ii.</i>	<i>Amount of Refund Withheld</i>				
<i>iii.</i>	<i>Amount of Refund Allowed</i>				

Reasons for withholding of the refund:

<<Text>>

I hereby, order that the amount of claimed/admissible refund as shown above is withheld for the above mention reasons. This order is issued as per provisions under sub-section (...) of Section (...) of the Act.

Date:***Signature (DSC):******Place:******Name:******Designation******Office Address:”***

From a perusal of Part B of FORM GST RFD-07 it is clear that the proper officer or Commissioner has to assign the reasons for withholding the refund. Passing of an order in Part B of FORM GST RFD-07 is a statutory mandate which is binding on the department for the reason that different forms appended with the Rules, 2017 are part of the Rules which are statutory in nature having been framed under section 164 of the Act, 2017.

What we may observe, at this juncture, is that recording of reasons while passing of the order for withholding the refund is not only statutorily requirement as per the provisions contained in Rule 92(2) of the Rules read with Part B of Form GST RFD-07 and section 54(11) of the Act but it is also required so as to make the person,

aggrieved by such an order, realize his right of appeal as available under section 107 of the Act.

Recording of reason in this case has to be mandatory for the reasons *inter alia*, (i) there is such a statutory requirement flowing from section 54(11) of the Act and Rule 92(2) of the Rules and (ii) if any person aggrieved by such an order intends to file an appeal then to facilitate the appellate authority to arrive at a correct decision, reasons are required to be indicated by the subordinate authority.

We have already observed above that the entire original record has been perused by the Court. Office file contains the decision dated 13.10.2020 passed by the Principal Commissioner, however, it only says "in the facts and circumstances of the case, we may withhold refund till completion of the investigation in the case". The said decision does not assign any other reason regarding on which basis the Principal Commissioner has arrived at his opinion that the refund claimed by the petitioner is likely to adversely affect the revenue in the investigation (which is said to be pending) and such opinion is based on some material indicating some malfeasance or fraud said to have been committed by the petitioner. Moreover, the order as mandated by sub rule 2 of rule 92 has not been passed in Part B of Form GST RFD-07 which as observed above, also has a column where the officer concerned has to indicate "reasons for withholding the refund". We also notice that the decision dated 13.10.2020 was not communicated to the petitioner.

At this juncture, Shri Nag, learned counsel representing the respondents has stated that the authorities will communicate the decision in Part B of Form GST RFD-07.

We are unable to agree with the said offer given by Shri Nag for the reason that Part B of Form GST RFD07 is not a form for the purposes of communicating the decision; rather it is a form in which an order has to be passed keeping in view the requirement of section 54(11) of the Act read with Rule 92(2) of the Rules. The said form

contains a separate specific column where requirement is to record reasons for withholding the refund and those reasons are to be in conformity with the requirement of section 54(11) of the Act and Rules 92(2) of the Rules. The order withholding the refund can be passed only if the prerequisites of recording of the opinion in terms of the aforesaid provision is found present in a particular case.

Learned counsel representing the petitioner has also stated that apart from the application which has been submitted by the petitioner on 26.05.2020 the petitioner had furnished three other applications as well. However, in respect of these three applications, the department has issued a deficiency memo in Form GST RFD-03, but the petitioner is unable to make good the deficiency for the reason that on 03.12.2020 the department has blocked the Electronic Credit Ledger of the petitioner which has rendered the petitioner unable to remove the deficiency pointed out in the said application by the department. Learned counsel for the petitioner has also stated that the matter is pending consideration before the department for the last about eight months and because of non-finalization of the proceedings for refund, the petitioner-firm is suffering in its business.

Having regard to the aforementioned facts and circumstances as also the legal position discussed above, this petition is finally **disposed of** with the following directions:

(i) The decision by the Principal Commissioner, dated 13.10.2020 as is available in the record produced by the learned counsel representing the respondents is hereby quashed. The Principal Commissioner or any other competent authority will take a decision in respect of withholding of the refund amount afresh within 15 days from the date a certified copy of this order is produced before him.

(ii) We also provide that the fresh decision under this order shall be taken by the competent authority of the department on the basis of record already available before it as the opportunity to the petitioner

had already been provided and the submissions of the petitioner have also been reduced in writing as "record of personal hearing".

(iii) Once any order under section 54(11) of the Act is passed, keeping in view the observations made herein above, the same shall be communicated to the petitioner forthwith and shall be served upon the petitioner through appropriate mode of service.

(iv) The investigation said to be pending against the petitioner shall be expedited and completed as far as possible within a period of four months from today. Once the investigation is completed, the requisite orders for final refund shall also be passed by the competent authority.

(v) While deciding the matter afresh under this order, the authority concerned shall also pass an order on the prayer made by the petitioner for provisional refund.

(vi) For unblocking of the Electronic Credit Ledger, the petitioner shall make an application to the Principal Commissioner within 10 days from today. Once any such application is made, the Principal Commissioner or any other competent authority shall take appropriate decision which shall be communicated to the petitioner forthwith.

Order Date :- 17.2.2021
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[Manish Kumar, J.] [D. K. Upadhyaya, J.]