The matter pertained to the refund of tax in case of export of services and the lower authorities had denied the refund on only one ground that the payment had been received not in convertible foreign currency as the recipient of service had transferred funds through an agency which had remitted INR to the petitioner herein and as such clause (iv) of the definition of export of service was not fulfilled. The petitioner had relied on several judgments of service tax regime covering the issue in favour of assessee. The HC observerd that the lower authorities had failed to differentiate why such judgments would not be applicable in the present case as pari materia provisons existed in the service tax regime and thus remanded the matter to the adjudicating authority to pass fresh orders after dealing with the case laws cited by the petitioner in its favour within three months of conclusion of hearing.

06 18.08.2023
RP Ct. No. 01
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MAT 1219 of 2023
with
IA No. CAN 1 of 2023

Mr. Bimal Jhunjhunwala
Vs.
The Assistant Commissioner, CGST & CX, BBD Bag I Division, Kolkata North Commissionerate & Ors.

Mr. Ankit Kanodia
Ms. Megha Agarwal
Mr. Jitesh Sah
... For the Appellant

Mr. K.K. Maity
Mr. Tapan Bhanja
... For the CGST Authority

Mr. Siddhartha Lahiri
Ms. Sarda Sha
... For Respondent No.4

1. This intra-Court appeal filed by the petitioner is directed against an order dated 22nd June, 2023 passed in WPA 12914 of 2023. By the impugned order the learned Single Bench had declined to grant any interim order and directed the respondents to file affidavit-in-opposition. Aggrieved by the same, the appellant has preferred this appeal.

2. With the consent of the learned advocates for the parties, this appeal is taken up along with the writ petition for hearing and disposal.

3. The appellant had challenged the order dated 19.08.2022 passed by the first respondent by which the application filed by the appellant for refund was rejected. The first respondent by the said order defined "Export of Services" as defined under Section 2(6) of IGST Act, 2017.

CS KK Agrawal

From the application filed by the appellant we find that the importer had sent remittance through an agency (WISE US Inc.) located outside India, who has remitted INR to the appellant. The first respondent thereafter held that remittance was not received in foreign convertible exchange by the appellant. Therefore the authority held that in the light of the definition "Export of Service" it violated the condition (iv) of Section 2(6) of IGST Act, 2017. The first respondent while referring to those decisions, which were relied upon by the appellant, would state that those decisions are relating to erstwhile service tax regime and CBST has not amended the definition of "Export of Service" in IGST Act. Thereafter, the appellant preferred an appeal before the Appellate Authority, namely, the second respondent, who by order dated 31.03.2023 dismissed the appeal by affirming the order passed by the first respondent. Aggrieved by the said order, the appellant had filed a writ petition since no Tribunal has constituted under the provisions of IGST Act. We firstly need to point out that the manner in which the decisions, which were referred to by the appellant, were not taken note of by the first respondent is incorrect. However, the pari materia and statutes existed in the service tax regime then the authorities inclined to take note of the various decisions and make an analysis of the same and consider their applicability to the facts of the case of the appellant and then arrive at a conclusion. However, this has not been done by the first respondent.

4. The appellant contends that if the amount is received by an Indian resident in INR through an exchange house situated outside India having its account with an authorized dealer, then such remittance shall be deemed to be received in foreign currency. The appellant's case is that the exchange house, namely, WISE US Inc., through its VOSTRO account with HDFC Bank Limited, which is an authorized category-I dealer under FEMA Act, 1999 has converted the remittances received in US Dollars to India Rupees and transferred the same to the bank account of the appellant and, therefore, the appellant submits that the remittance clarifies the conditions prescribed in regulation 4(2) of Foreign Exchange Regulation 2015 and the remittance shall be deemed to have been received in foreign currency. The appellant also places reliance on Regulation 3 of Foreign Exchange Management (Manner of Receipt and Payment) Regulation 2016 issued by the Foreign Exchange Department of the Reserve Bank of India vide Notification No. FEMA 14(R)/2016-RB dated 02.05.2016 which provides for manner of receipt in foreign exchange stating that the payment in rupees from the account of a bank situated in any country (other than a member country of Asian Clearing Union or Nepal or Bhutan) is a manner of receipt of foreign exchange. The appellant has relied on the decisions of the Tribunal in the case of **WM Global Sourcing India Private Ltd. vs. Commissioner of Central Tax, Bengaluru East reported in 2022(56) GSTL (Tri-Bang)** wherein there is a reference to a decision of the Hon'ble Supreme Court in

the case of **J. B. Boda & Co. vs. Central Board of Direct Taxes reported in 2002 TIOL 2578 SC IT** wherein it was held that an exporter cannot be denied the benefit of export of service simply on the ground that the payment has been routed through a third party which is also based outside the country. Several other decisions have also relied upon by the appellant and it is submitted that those decisions have not been considered by the first and the second respondent. Further the appellant also places reliance on various judgments under the service tax regime to support his contention that clearly because payment was received in Indian rupees and it cannot be said payment against export has not been received in convertible foreign exchange as provided in the Export of Service Rules 2005. Since these issues have not been thoroughly adjudicated either by the Adjudicating Authority, namely the 1st respondent or by the Appellate Authority, we deem it appropriate that the matter should be remanded back to the first respondent to consider all the issues in a holistic manner and take note of the ratio decidendi which can be culled out in various decisions which have been relied by the appellant, more particularly the decisions which were rendered during the service tax regime.

5. For such reasons, the appeal along with the connected application and the writ petition are all stand **allowed** and the orders passed by the 1st respondent and the second respondent are set aside and matter stands

remanded back to the 1st respondent. The 1st respondent shall afford an opportunity of personal hearing to the appellant and/or through his authorized representative and after taking note of the observations made in the said order pass a fresh order on merits and in accordance with law as expeditiously as possible, preferably within a period of three months from the date of the personal hearing is concluded.

6. Needless to state that this Court has not gone into the merits of the case and the facts have been set out in the preceding paragraphs and the submissions of the appellants have been noted. It is for the first respondent to take note of the factual and legal position and arrive at a further decision.

(T. S. Sivagnanam)
Chief Justice

(Hiranmay Bhattacharyya, J.)

CS KK Agrawal