HIGH COURT FOR THE STATE OF TELANGANA
AT HYDERABAD
(Special Original Jurisdiction)

MONDAY, THE FIFTH DAY OF SEPTEMBER
TWO THOUSAND AND TWENTY TWO

PRESENT

THE HONOURABLE THE CHIEF JUSTICE UJJAL BHUYAN
AND
THE HONOURABLE SRI JUSTICE C.V. BHASKAR REDDY

WRIT PETITION NO: 37465 OF 2021

Between:

Micro Systems and Services (Sole Proprietorship), Represented by its Sole Proprietor, Smt. Yeshala Prasuna Giri Having its office at, 12-5-35/A9/S1, Ballad Estate, Tarnaka, Secunderabad, TS - 500017. ...PETITIONER

AND

1. The Union of India, Ministry of Finance, Represented by its Secretary, Department of Revenue GOI, North Block, New Delhi - 110 001.
2. The Chairman, Central Board of Indirect Taxes and Customs, Office at, Department of Revenue GOI, North Block, New Delhi - 110 001.
3. The State of Telangana, Represented by the Principal Secretary Finance Department, Government of Telangana.
4. The Chief Commissioner of GST and Customs, Hyderabad Zone, Office at, GST Bhavan, L B Stadium Road, Basheerbagh, TS - 500004.
5. The Joint Commissioner (Appeals - II), Hyderabad, Office at, Office of Commissioner (Appeals - II) GST and Central Tax, GST Bhavan, LB Stadium Road, Basheerbag, TS - 500004.
6. The Assistant Commissioner of Central Tax, Central Excise and Service Tax, Tarnaka Division, Hyderabad, Office at Assistant Commissioner, Central Taxes, Tarnaka Division, Elegant Edifice, 3-4418/2 NR, Ramanthapur, Hyderabad - 500013.

...RESPONDENTS

Petition Under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith, the High Court may be pleased to issue a writ of certiorari or any other appropriate writ, order or direction setting aside the Impugned Order in Appeal No.HYD-GST-SC-AP2-002-21-22 dated 09/04/2021 (received on 21.04.2021) passed by the Respondent No.5 in confirming the Speaking Order No.19/ 2020-Refund dated 04.01.2021 passed by the Respondent No.6 for rejecting the claim for Refund of Rs.77,91,857/- liable to the Petitioner for the year April, 2019 to March, 2020. and b) This Honourable Court be pleased to issue a Writ or order declaring the Board Circular No.135/05/2020 - GST dated 31/03/2020 issued by the Respondent No.2 as ultra vires of Section 54(3)(ii) of the CGST Act, 2017 to the extent that it seeks to reject the refund of accumulated unutilized tax credit in cases where the input and output supplies are the same. and c) Consequently, Direct the Respondents and more particularly Respondent No.5 and 6 to refund the amount of Rs.77,91,857/- under inverted tax structure in terms of Section 54 of CGST Act, 2017 read with appropriate CGST Rules, 2017 to the Petitioner.

I.A.NO:1 OF 2021

Petition Under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to stay the operation and execution of the Impugned Order in Appeal No.HYD-GST-SC-AP2-002-21- 22 dated 09/04/2021 (received on 21/04/2021) passed by the Respondent No.5 in confirming the Speaking Order No.19/ 2020-Refund dated 04/01/2021 passed by the Respondent No.6 against the Petitioner firm herein, pending disposal of the writ petition.

I.A.NO:1 OF 2022

Between:

1. The Union of India, Ministry of Finance, Represented by its Secretary, Department of Revenue GOI, North Block, New Delhi - 110 001.
2. The Chairman, Central Board of Indirect Taxes and Customs, Office at, Department of Revenue GOI, North Block, New Delhi - 110 001.
3. The State of Telangana, Represented by the Principal Secretary Finance Department, Government of Telangana.
4. The Chief Commissioner of GST and Customs, Hyderabad Zone, Office at, GST Bhavan, L B Stadium Road, Basheerbagh, TS - 500004.
5. The Joint Commissioner (Appeals - II), Hyderabad, Office at, Office of Commissioner (Appeals - II) GST and Central Tax, GST Bhavan, LB Stadium Road, Basheerbag, TS - 500004.
6. The Assistant Commissioner of Central Tax, Central Excise and Service Tax, Tarnaka Division, Hyderabad, Office at Assistant Commissioner, Central Taxes, Tarnaka Division, Elegant Edifice, 3-4418/2 NR, Ramanthapur, Hyderabad - 500013.

...PETITIONERS/RESPONDENTS 1,2,4,5&6

AND

1. Micro Systems and Services (Sole Proprietorship), Represented by its Sole Proprietor, Smt. Yeshala Prasuna Giri Having its office at, 12-5-35/A9/S1, Ballad Estate, Tarnaka, Secunderabad, TS - 500017.

...RESPONDENT/WRIT PETITIONER

2. State of Telangana, Represented by the Principal Secretary to Government, Finance Department, Government of Telangana.

.....(RESPONDENT No.3 in WP)

...RESPONDENTS

Petition Under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to vacate the Interim Order dated 31-12-2021 in W.P. 37465 of 2021 and dismiss the above referred writ petition.

Counsel for the Petitioner : SRI.MADHOOR SAICHANDRAHAAS NAIDU / SRI.SAI CHANDRA HAAS

Counsel for the Respondent No.1 : SRI.B.NARASIMHA SARMA

Counsel for the Respondent No.3 : G.P FOR FINANCE AND PLANNING

Counsel for the Respondent Nos.2 & 4 to 6 : SRI.DOMINIC FERNANDES (senior standing counsel for CBIC)

The Court made the following ORDER

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN

AND

THE HON'BLE SRI JUSTICE C.V.BHASKAR REDDY

Writ Petition No.37465 of 2021

ORDER: *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Heard Mr. Sai Chandra Haas, learned counsel for the petitioner and Mr. Dominic Fernandes, learned Senior Standing Counsel for CBIC appearing for respondent Nos.2 and 4 to 6.

2. By filing this writ petition, under Article 226 of the Constitution of India, petitioner prays for the following relief:-

> "a) That this Hon'ble Court be pleased to issue a writ of certiorari or any other appropriate writ, order or direction setting aside the Impugned Order in Appeal No.HYD-GST-SC-AP2-002-21-22 dated 09.04.2021 (received on 21.04.2021) passed by the Respondent No.5 in confirming the Speaking Order No.19/2020-Refund dated 04.01.2021 passed by the Respondent No.6 for rejecting the claim for Refund of Rs.77,91,857/- liable to the Petitioner for the year April, 2019 to March, 2020; and
>
> b) This Hon'ble Court be pleased to issue a Writ or order declaring the Board Circular No.135/05/2020-GST dated 31.03.2020 issued by the Respondent No.2 as *ultra vires* of Section 54(3)(ii) of the CGST Act, 2017 to the extent that it seeks to reject the refund of

accumulated unutilized tax credit in cases where the input & output supplies are the same; and

c) Consequently, Direct the Respondents and more particularly Respondent No.5 & 6 to refund the amount of Rs.77,91,857/- under inverted tax structure in terms of Section 54 of CGST Act, 2017 read with appropriate CGST Rules, 2017 to the Petitioner, in the interests of justice and

d) Award costs to the Petitioner; and

e) For such further and other reliefs, as this Hon'ble Court may deem fit and proper in the nature and circumstances of the case may require."

3. Petitioner is a proprietary concern established in the year 2005 engaged in the business of assembling and supply of computers and computer parts. Petitioner is a registered person as per provisions of the Central Goods and Services Tax Act, 2017 (briefly, 'the CGST Act' hereinafter). It is also a registered supplier to all the Defence, Research & Development Organisation (DRDO) Laboratories and affiliates across the country.

4. On the materials supplied by it, petitioner added 5% Goods and Services Tax (GST) as per the concessional rate fixed by the Government for supplies to DRDO. Petitioner filed application on 02.12.2020 before respondent No.6 claiming refund of Rs.77,91,857/- under inverted tax structure in terms of Section 54 of the CGST Act.

Respondent No.6 issued show cause notice dated 28.12.2020 calling upon the petitioner to show cause as to why refund application should not be rejected for contravention of Section 54(3)(ii) of the CGST Act. Thereafter petitioner submitted reply dated 01.01.2021.

5. Notwithstanding the reply submitted by the petitioner, respondent No.6 rejected the refund application dated 02.12.2020 by a speaking order dated 04.01.2021. While rejecting the refund application of the petitioner, respondent No.6 relied upon a Circular of the Central Board of Indirect Taxes and Customs (briefly, 'the Board' hereinafter) dated 31.03.2020.

6. Aggrieved by such rejection, petitioner filed appeal under Section 107 of the CGST Act before respondent No.5 on 04.02.2021. However, respondent No.5 by order dated 09.04.2021 confirmed the rejection order dated 04.01.2021 and dismissed the appeal.

7. Aggrieved thereby, the present writ petition came to be filed.

8. Learned counsel for the petitioner submits that the Board has issued a clarificatory Circular dated 06.07.2022 clarifying paragraph 3.2 of the Circular dated 31.03.2020

relied upon by respondent Nos.6 and 5 while rejecting the refund application of the petitioner. Therefore, in view of the changed circumstances, respondents may be directed to allow the refund application.

8.1. Learned counsel appearing for respondent Nos.2 and 4 to 6 however submits that respondent Nos.5 and 6 had taken the decision on the basis of the existing Circular of the Board. Therefore, such decision of the Board cannot be faulted. However, as to applicability of the Circular dated 06.07.2022, he submits that this Circular cannot be applied retrospectively.

9. Submissions made by learned counsel for the parties have received the due consideration of the Court.

10. From a perusal of the order dated 04.01.2021, passed by respondent No.6, it is seen that petitioner had filed refund claim for Rs.77,91,857/- on 02.12.2020 for the period from April, 2019 to March, 2020. Contention of the petitioner was that it had sold goods under concessional/inverted tax rate to DRDO which had issued the requisite certificates. Petitioner is eligible for refund of the aforesaid amount of credit paid by it towards procuring raw materials at full rate of tax. Therefore, the request for

refund under the inverted tax structure in terms of Section 54 of the CGST Act read with Rules 89(4) and 89(5) of the Central Goods and Services Tax Rules, 2017 (briefly, 'the CGST Rules' hereinafter) was made. Respondent No.6 adverted to the Board Circular dated 31.03.2020 more particularly to para 3.2 thereof as per which it was clarified that refund of accumulated Input Tax Credit (ITC) under clause (ii) of sub-section (3) of Section 54 of the CGST Act would not be applicable in cases where the input and the output supplies are the same. The main thrust of the above Board's Circular was that the input and the output supplies should be invariably different. On the above basis, the refund claim of the petitioner was rejected. This order of respondent No.6 was affirmed in appeal by respondent No.5 vide the order dated 09.04.2021.

11. At this stage, we may advert to para 3.2 of the Board's Circular dated 31.03.2020 which reads as under:-

> "Refund of accumulated ITC in terms of clause (ii) of sub-section (3) of section 54 of the CGST Act is available where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. It is noteworthy that, the input and output being the same in such cases, though attracting different tax rates at different

> points in time, do not get covered under the provisions of clause (ii) of sub-section (3) of section 54 of the CGST Act. **It is hereby clarified that refund of accumulated ITC under clause (ii) of sub-section (3) of section 54 of the CGST Act would not be applicable in cases where the input and the output supplies are the same.**"

12. From the above, it is seen that according to the Board, refund of accumulated ITC in terms of Section 54(3)(ii) of the CGST Act was available where the credit accumulated on account of rate of tax on inputs was higher than the rate of tax on output supplies. Clarifying further, it was held that refund of accumulated ITC under Section 54(3)(ii) of the CGST Act would not be applicable in cases where input and output supplies are the same.

13. We find that representations were received seeking clarification of paragraph 3.2 of the Board Circular dated 31.03.2020. The clarification was sought for in cases where the supplier is required to supply goods at lower rate under concessional notification issued by the Government. In order to clarify the issue and to ensure uniformity, Board exercised power under Section 168(1) of the CGST Act and issued Circular No.173/05/2022-GST dated 06.07.2022. Board has clarified that it was not the intent

of paragraph 3.2 of Circular dated 31.03.2020 to cover the cases where the supplier is making supply of goods under a concessional notification and the rate of tax on output supply is less than the rate of tax on input supply (of the same goods) at the same point of time due to supply of goods by the supplier under a concessional notification. Therefore, it has been clarified that in such cases, refund of accumulated input tax credit on account of inverted structure would be allowed in cases where accumulation of input tax credit is on account of rate of tax on output supply being less than the rate of tax on inputs (same goods) at the same point of time as per some concessional notification issued by the Government providing for lower rate of tax for some specified supplies subject to fulfilment of other conditions. Consequently, paragraph 3.2 of the Circular dated 31.03.2020 has now been substituted by the Circular dated 06.07.2022 as under:-

> "3.2 It may be noted that refund of accumulated ITC in terms of clause (ii) of first proviso to sub-section (3) of section 5.4 of the CGST Act is available where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. It is noteworthy that, the input and output being the same in such cases, though

attracting different tax rates at different points in time, do not get covered under the provisions of clause (ii) of the first proviso to sub-section (3) of section 54 of the CGST Act.

3.3 There may however, be cases where though inputs and output goods are same but the output supplies are made under a concessional notification due to which the rate of tax on output supplies is less than the rate of tax on inputs. In such cases, as the rate of tax of output supply is less than the rate of tax on inputs at the same point of time due to supply of goods by the supplier under such concessional notification, the credit accumulated on account of the same is admissible for refund under the provisions of clause (ii) of the first proviso to sub-section (3) of section 54 of the CGST Act, other than the cases where output supply is either Nil rated or fully exempted, and also provided that supply of such goods or services are not notified by the Government for their exclusion from refund of accumulated ITC under the said clause."

14. The above Circular dated 06.07.2022 is clarificatory in nature whereby paragraph 3.2 of the Circular dated 31.03.2020 has been substituted as supra. Being clarificatory, Circular dated 06.07.2022 inserting the above clarification would have the effect from the date when Circular dated 31.03.2020 came into effect.

15. If this be the position, then the claim of the petitioner is liable to be re-considered on the basis of the Circular dated 31.03.2020 as clarified by the Circular dated 06.07.2022.

16. Consequently, we set aside the orders dated 04.01.2021 of respondent No.6 and dated 09.04.2021 of respondent No.5. The matter is remanded back to respondent No.6 for re-consideration in terms of the Circular dated 06.07.2022 as extracted above. Let the above exercise on remand be carried out by respondent No.6 within a period of eight weeks from the date of receipt of a copy of this order.

17. Writ petition is accordingly allowed.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

SD/-K.ONESIM
DEPUTY REGISTRAR

//TRUE COPY//

SECTION OFFICER

To

1. The Secretary, Union of India, Ministry of Finance, Department of Revenue GOI, North Block, New Delhi - 110 001.
2. The Chairman, Central Board of Indirect Taxes and Customs, Office at, Department of Revenue GOI, North Block, New Delhi - 110 001.
3. The Principal Secretary, Finance Department, Government of Telangana, State of Telangana at Hyderabad.
4. The Chief Commissioner of GST and Customs, Hyderabad Zone, Office at, GST Bhavan, L B Stadium Road, Basheerbagh, TS - 500004.
5. The Joint Commissioner (Appeals - II), Hyderabad, Office at, Office of Commissioner (Appeals - II) GST and Central Tax, GST Bhavan, LB Stadium Road, Basheerbag, TS - 500004.

6. The Assistant Commissioner of Central Tax, Central Excise and Service Tax, Tarnaka Division, Hyderabad, Office at Assistant Commissioner, Central Taxes, Tarnaka Division, Elegant Edifice, 3-4418/2 NR, Ramanthapur, Hyderabad - 500013.
7. Two CC to G.P FOR FINANCE AND PLANNING, High Court for the State of Telangana at Hyderabad. (OUT)
8. One CC to SRI.SAI CHANDRA HAAS, Advocate [OPUC]
9. One CC to SRI.B.NARASIMHA SARMA, Advocate (OPUC)
10. One CC to SRI.DOMINIC FERNANDES (senior standing counsel for CBIC) Advocate [OPUC]
11. Two CD Copies
12. One spare copy

S.A

HIGH COURT

DATED:05/09/2022

ORDER

WP.No.37465 of 2021

ALLOWING THE W.P

WITHOUT COSTS.