IN THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extra-ordinary Jurisdiction)

W.P.(C) No. 09 of 2020

Sun Pharma Laboratories Limited
Plot No. 107-108, Namli Block,
P.O. Ranipool, East Sikkim,
Sikkim-737135

… Petitioner

Versus

1. Union of India
   Through the Secretary,
   Department of Revenue,
   Ministry of Finance,
   North Block, New Delhhi-110001

2. The Assistant Commissioner, Gangtok Division,
   Siliguri CGST and CX Commissionerate
   Indira By-Pass Road, Near District Court,
   Sichey, East Sikkim,
   Gangtok-737 101

3. The Joint Commissioner of CGST and Central Excise
   Siliguri CGST and Central Excise (Appeal) Commissionerate,
   Central Revenue Building, 4th Floor,
   Haren Mukherjee Road, Hakimpara,
   Siliguri-734001

4. The Commissioner,
   CGST and Central Excise,
   Siliguri Commissionerate
   Central Revenue Building, 4th Floor,
   Haren Mukherjee Road, Hakimpara,
   Siliguri-734001

… Respondents

BEFORE

HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.
HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, J.

For the petitioner : Mr. Rahul Tangri, Ms. Gita Bista and Mr. Vivek Jain, Advocates.

For the respondents : Mr. B.K. Gupta, Advocate.

Date of hearing : 19.11.2020

Date of judgment : 19.11.2020

JUDGMENT (ORAL)

(*Arup Kumar Goswami, CJ*)

Heard Mr. Rahul Tangri, learned Counsel for the petitioner. Also heard Mr. B.K. Gupta, learned Counsel appearing for the respondents.

2. The petitioner is a Private Limited Company engaged in the supply of patented and propriety medicines falling under Chapter 29 and 30 of the Customs Tariff Act, 1975, made applicable to the supplies made under the Central Goods and Services Act, 2017 (for short, the CGST Act). It has two Units in the State of Sikkim, one of which is located at Nandok Block and the other at Namli Block, which will, hereinafter be referred to as Unit-I and Unit-II, respectively. Both the Units are registered under General Sales Tax Index (GSTI) vide GSTI number.

3. It is the case of the petitioner that during the month of August, 2017 two consignments of pine bark extract and Crospovidone NF were transferred by the petitioner from Unit-II to Unit-I. As the transfer did not qualify as supply in terms of Section 7 of the CGST Act, such transfer ought to have been effected under the cover of a delivery challan but, inadvertently two invoices bearing No. S 11725000335 dated 14.08.2017 and S 11725000354 dated 17.08.2017 came to be issued. Having realized the mistake, the transfers were not declared as "outward supply" in the Form GSTR-01 for the month of August, 2017. However, at the time of filing of the GSTR-3B return for the month in question, the petitioner inadvertently took these two invoices into consideration and discharged GST amounting to Rs.15,82,938.72 and Rs.1,659.42, respectively, totalling Rs.15,84,598/-. Subsequently, the petitioner filed an online application dated 01.12.2018 in Form GST RFD-01A under Section 54 of the CGST Act seeking refund of such amount. The acknowledgment copy along with all

annexures including a copy of the certificate of Chartered Accountant certifying that the petitioner had not passed incidence of tax to any other person was physically delivered before respondent no.2 on 04.12.2018. Respondent no.2, thereafter issued a Show Cause Notice (for short, SCN) dated 08.03.2019 for rejection of application for refund in Form GSTRFD-08 with reference to Rule 92(3) of the Central Goods and Services Tax Rules, 2017 (for short, the CGST Rules), asking the petitioner to show cause within 15 days from the date of receipt of notice with further direction to appear before the Assistant Commissioner of Gangtok Division, Siliguri GST Commissionerate on 27.03.2019, indicating therein that in case the petitioner failed to furnish the reply or failed to appear as stipulated, the case would be decided ex-parte on the basis of available records on merit.

4. The petitioner submitted reply dated 27.03.2019 to the SCN for rejection of application for refund and had requested for processing the refund claim on the basis of clarification and reply furnished by sanctioning the amount in cash or by sanctioning direct credit in the Input Tax Credit (for short, ITC) credit ledger on portal of the amounts in question in their respective heads of GST Taxes. Representative of the petitioner also appeared for personal hearing in terms of SCN and thereafter, respondent no.2 passed an order dated 01.04.2019/02.04.2019 in Form – GST-RFD-06 under Rule 92(1) of the CGST Rules, 2017 read with Section 54 and Section 56 of the CGST Act rejecting the prayer holding that there was no provision under GST Act and GST Rules for refund of excess payment of tax, if payment was made through ITC.

5. An appeal was preferred by the petitioner before the Commissioner (Appeals), CGST and Central Excise, Siliguri on 01.07.2019, who passed an order dated 11.09.2019 holding that the ground of rejection of the refund claim in the impugned order was erroneous. However, after an examination

as to whether or not any excess payment of tax had actually occurred in the case, rejected the appeal by holding that there is no requirement of refund.

6. Therefore, recourse is taken to redress the grievance of the petitioner by filing this writ petition before this Court, as no Goods and Services Tax Appellate Tribunal had been constituted to entertain an appeal under Section 112 of the CGST Act.

7. Mr. Rahul Tangri, learned Counsel for the petitioner submits that the impugned order dated 11.09.2019 that travelled beyond the grounds cited in the SCN dated 08.03.2019, and therefore, the impugned order is violative of principles of natural justice. It is submitted by him that once the reason for rejection of the prayer for refund was found to be erroneous, the appeal of the petitioner ought to have been allowed. It is submitted that the findings recorded by the Appellate Authority that the petitioner had rectified the error committed in payment of tax in GSTR-3B for the month of August, 2017 in the GSTR-1 of the respective month and that the petitioner had carried forward the excess amount of tax to the next month's return to be offset against the output tax liability of that month are perverse. It is submitted that an analysis and scrutiny of GSTR-1, GSTR-2A and GSTR-3B of the petitioner for the month of September, 2017 would demonstrate that there was no adjustment of tax paid in excess in the month of August, 2017 against GST liability for the month of September, 2017, in any form. Mr. Tangri submits that though in the normal course, GSTR-1 was required to be filed before GSTR-3B, filing of GSTR-1 was deferred by the authorities and the petitioner and all others falling under GST Act was required to submit GSTR-3B before filing GSTR-1. He has submitted that reliance placed on the Circular No. 7/7/2017-GST dated 01.09.2017 issued by the Central Board of Excise and Customs (presently

known as Central Board of Indirect Taxes and Customs), which was issued to address the difficulties faced by the assesses regarding the system based reconciliation of forms GSTR-1, GSTR-2 and GSTR-3B, was suspended by Circular No. 26/26/2017-GST dated 29.12.2017 indicating therein that system based Circular dated 01.09.2017 can be operationalized only after the relevant notification is issued, which, however, has not been issued till date. He submits that it was also laid down in the said Circular dated 29.12.2017 that excess amount of tax paid in a month by mistake may be adjusted in returns in Form GSTR-3B of subsequent months and in cases where such adjustment is not feasible, refund can be claimed. He has submitted that the Circulars issued by the Board are binding on the Department and that the petitioner had fulfilled all the conditions precedent in terms of Section 54 of CGST Act and CGST Rules to obtain refund or tax paid in excess. Learned counsel submits that in the circumstances of the case, tax paid inadvertently by the petitioner has been appropriated and retained by the department without any authority of law.

8. Mr. Tangri has strenuously urged that the petitioner had not adjusted the excess tax amount paid and therefore, this Court may pass appropriate orders directing the respondents to refund the tax along with interest as envisaged under Section 56 of the CGST Act.

9. Mr. B.K. Gupta, learned counsel for the respondents, abiding by the stand taken in the affidavit filed on behalf of respondent nos. 1 to 4, supports the impugned order dated 11.09.2019 and contends that order dated 11.09.2019 is not beyond the scope of SCN dated 08.03.2019 as it was noted therein that there is no evidence of payment of tax. He has submitted that Section 107(11) of the CGST Act empowers the Appellate Authority to pass order, confirming, modifying or annulling the decision or

order of the Adjudicating Authority after making such further inquiry as may be considered necessary. The two invoices in respect of which refund had been claimed having been issued in the month of August, 2017, there is no illegality in placing reliance on the said Circular dated 01.09.2017 as the same was very much in force at that point of time. It is submitted by him that the petitioner was required to adjust the error following the steps outlined in the Circular dated 29.12.2017. He has also reiterated the finding recorded by the Appellate Authority that the excess payment of tax in GSTR-3B is not actually an excess payment of tax as it can be auto adjusted in the subsequent months. However, the appellant did not adjust its excess payment of tax in subsequent months.

10. In reply, learned counsel for the petitioner submits that while it was alleged in the SCN that there was no evidence of excess tax paid, in the impugned order dated 11.09.2019, it is held that the petitioner had rectified the error by carrying forward the excess payment of taxes to the next month’s return against the output tax liability in terms of the Circular dated 01.09.2017 which goes to show that the petitioner had, in fact, paid taxes in excess for the month of August, 2017. He has contended that the power of the Appellate Authority cannot be stretched to permit the Appellate Authority to make further inquiry in respect of a matter which is not part of SCN and any such further inquiry conducted beyond the SCN will fall foul of the principles of natural justice. It is submitted by him that even while making such inquiry no documents or explanations were sought for from the petitioner. He has contended that on surmises and conjectures and on presumption, the Appellate Authority had passed the impugned order without even verifying as to whether, in reality, the excess tax paid was adjusted in subsequent months.

11. Learned counsel submits that due to non-operationalization of adjustment feature in the GST portal and also because of lack of clarity as to how to adjust, adjustment was not carried out by the petitioner, and therefore, refund application was submitted in terms of Section 54 of the CGST Act. It is also contended that the Circulars did not provide details as to how to make adjustments. That there were deficiencies in the GST portal is fortified by the fact that time limit for filing GSTR-1 return for the month of August, 2017 was extended up to 10.01.2018 and then again up to 31.03.2018 and the petitioner had filed GSTR-1 only on 29.12.2017. He has argued that there being no doubt regarding excess payment of tax by the petitioner as also non-adjustment of the same by the petitioner in the subsequent months, refund claim made by the petitioner merits to be allowed.

12. We have considered the submissions of learned counsel for the parties and have perused the materials on record.

13. In the SCN dated 08.03.2017, it was stated that refund application is liable to be rejected on the following reasons:

> "(i) On scrutiny of cash ledger in GST portal for the relevant period of refund, it has been noticed that the said refund claim has not been debited from the cash ledger. There is also not any evidence of Excess payment of tax as declared in refund claim. As such it appears that it is contrary to the provisions of Section 16, Section 31 and Section 54 of the CGST Act, 2017 and Rules 36, 46 and 89 of the CGST Rules, 2017.
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> (ii) As per Section 34 of CGST Act, 2017 along with Circulars No. 17/17/2017-GST dated 15.11.2017, 24/24/2017-GST dated 21.12.2017 and 37/11/2018-GST dated 15.03.2018, you failed to submit the requisite documents such as - all the invoices (in original)

for the purpose of evidencing the supply of goods made and Delivery of challan (in original) for the purpose of evidencing that this was only movement of goods to one unit to another, payment particulars, statement in respect of excess payment of tax etc. as per the instruction given in Circular No. 37/11/2018-GST dated 15.03.2018 and required declarations also as stated in the said circular of refund."

14. Both the above points were required to be clarified by the petitioner. The petitioner had, accordingly, submitted its reply on 27.03.2019 and representative of the petitioner had also appeared for personal hearing before respondent no. 2. The operative portion of the order dated 01.04.2019/02.04.2019 reads as follows:

> "I, hereby reject an amount of Rs.15,84,599/- (Rupees fifteen lakhs eighty four thousand five hundred and ninety nine) only to M/s Sun Pharma Laboratories Ltd., having GSTIN 11AACCS61631Z4 under Rule 92 (1) of the CGST Rules, 2017 read with Section 54 and 56 of CGST Act, 2017, since, there is no provision under GST Act and GST Rules for refund of excess payment of tax, if payment made through Input Tax Credit".

15. The order seems to suggest that there was excess payment of tax. However, prayer for refund was rejected on the ground that there is no provision under GST Act and GST Rules for refund of excess payment of tax, if such payment is made through ITC. As noted earlier, the Appellate Authority in its order dated 11.09.2019 had categorically held that the ground of rejection of refund claim in the impugned order is erroneous. It would be relevant to extract paragraphs 8, 9 and 10 (recorded as paragraph 9 again) of the order of the Appellate Authority, which read as under:

"8. I have carefully gone through the records of the case including the submission made by the appellant. I fully agree with the contention of the appellant that GST laws do not distinguish between the mode of payment of excess tax for the purpose of refund. Therefore, the ground of rejection of the refund claim in the impugned order is erroneous. However, it is required to examine whether or not any excess payament of tax has actually occurred in the instant case. On comparison of the details of all invoices considered while discharging GST liability in GSTR-3B for the month of Aug. 2017 and details of invoices as uploaded in GSTR-1 for the month of Aug. 2017, it is seen that two invoices in respect of which refund has been claimed in the instant case, have been taken for tax liability in GSTR-3B, but those invoices were not uploaded in GSTR-1 of the respective month. In this respect it is pertinent to mention following two paras of C.B.E. & C. Circular No. 7/7/2017-GST. dated 1-9-2017:-

"Correction of erroneous details furnished in FORM GSTR-3B:

6. In case the registered person intends to amend any details furnished in FORM GSTR3B, it may be done in the FORM GSTR-1 or FORM GSTR-2, as the case may be. For example, while preparing and furnishing the details in FORM GSTR-1, if the outward supplies have been under reported or excess reported in FORM GSTR-3B, the same may be correctly reported in the FORM GSTR-1. Similarly, if the details of inward supplies or the eligible ITC have been reported less or more than what they should have been, the same may be reported correctly in the FORM

GSTR-2. This will get reflected in the revised output tax liability or eligible ITC, as the case may be, of the registered person. The details furnished in FORM GSTR-1 and FORM GSTR-2 will be auto-populated and reflected in the return in FORM GSTR-3 for that particular month.

Reduction in output tax liability:

10. Where the output tax liability of the registered person as per the details furnished in FORM GSTR-1 and FORM GSTR-2 is less than the output tax liability as per the details furnished in the FORM GSTR-3B and the same is not offset by a corresponding reduction in the input tax credit to which he is entitled, the excess shall be carried forward to the next month's return to be offset against the output liability of the next month by the taxpayer when he signs and submits the return in FORM GSTR-3. However, simultaneously, if there is a decrease in the eligible input tax credit, the same will be adjusted against the above mentioned reduction in output tax liability and the balance, if any, of the reduction in output tax liability shall be carried forward to the next month's return to be offset against the output liability of the next month."

9. It is evident from the above two paras that payment of tax in GSTR-3B is not final. If any error is crept in it, there is the chance of rectifying it at the time of submission of GSTR-1 and GSTR-2. In the instance case, the appellant have rectified their error in tax payment in GSTR-3B for the month of Aug. 17 in the GSTR-1 of the respective month, and the excess payment of tax has been carried forward to the next

month's return to be offset against the output tax liability of that month. Thus, any excess payment of tax in GSTR-3B is not actually an excess payment of tax as it will be auto adjusted subsequently by the system.

9. In view of the discussion as mentioned in para(s) 8 and 9 above, there is no requirement of refund in the instance case, and so I reject the instant appeal submitted by the appellant. The instant appeal is disposed off accordingly."

16. We are unable to accept the submission of learned counsel for the petitioner that once the order of the Adjudicating Authority was held to be erroneous by the Appellate Authority, the Appellate Authority ought to have allowed refund of excess tax paid by allowing the appeal of the petitioner (the appellant) without any further consideration.

17. Relevant part of section 107(11) of CGST Act,2017 reads as under:

(11) The Appellate Authority shall, after making such further inquiry as may be necessary, pass such order, as it thinks just and proper, confirming, modifying or annulling the decision or order appealed against but shall not refer the case back to the adjudicating authority that passed the said decision or order.

18. Having regard to the contour and ambit of section 107 (11) of CGST Act, in our considered opinion, the Appellate Authority cannot be faulted for undertaking an enquiry even after observing that the order of the Adjudicating Authority was erroneous because the Appellate Authority has to decide whether the petitioner has made out a case for grant of refund. The Adjudicating Authority had only scrutinized the cash ledger in GST portal for the relevant period of refund. In the reply to the SCN, the petitioner had stated that the GST liability for the month of August, 2017

had been discharged by debiting from ITC credit ledger to the extent of its availability and the balance liability was paid from cash ledger for the month and that since there is no requirement of debiting invoice-wise liability from the said ledger, the same may not be visible on the portal. The Appellate Authority concluded that the petitioner had rectified their error in tax payment in GSTR-3B for the month of August, 2017 in the GSTR-1 of the respective month, and the excess payment of tax had been carried forward to the next month's return to be offset against the output tax liability for that month. In other words, the Appellate Authority had acknowledged that there was an error in payment of tax in GSTR-3B for the month of August 2017 and that there was an excess payment of tax. Submission of Mr.Tangri that the inquiry conducted by the Appellate Authority was beyond the scope of SCN cannot be accepted. Two questions had arisen for consideration before the Appellate Authority: (i) whether there was excess payment of tax by the petitioner, and (ii) whether the petitioner is entitled for refund. Once it was held that there was excess payment of tax, obviously, the issue that would engage attention is as to whether refund ought to be granted. It is in that context the question of adjustment had come to the fore and therefore, it cannot be said that the inquiry conducted by the Appellate Authority do not have even any remote nexus with the SCN.

19. However, it does not appear from the order of the Appellate Authority that the Appellate Authority had perused and examined GSTR-1, GSTR-2 and GSTR-3B for the month of September, 2017 to actually find out whether excess payment of tax had been carried forward to be offset against the output tax liability of that month. It was presumed by the Appellate Authority that the petitioner had rectified the error in the GSTR-1 for the month of August, 2017 and that the excess payment of tax had

been carried forward in the return of September, 2017. On that presumption, it was held that excess payment of tax in GSTR-3B is not actually an excess payment of tax as it will be auto adjusted by the system and therefore, there is no requirement of refund. No finding has been recorded that, subsequently, excess payment of tax had been auto adjusted. It is to be noted that by the time Appellate Authority had passed the order, more than two years had elapsed. It is also significant to note that in the affidavit of respondent nos.1 to 4, a statement is made in paragraph 23 that the petitioner had not adjusted excess payment in corresponding months, which is contrary to the observation of the Appellate Authority.

20. It is the positive case of the petitioner that excess payment of tax had not been carried forward to the subsequent months. The Appellate Authority, in the context of a claim for refund for excess payment of tax, may be justified to look into contemporaneous materials, but in such a circumstance, it will be imperative and mandatory for the Appellate Authority to afford an opportunity to the petitioner (appellant) to furnish its comments on the aspects on which the Appellate Authority would like to examine the matter by way of further enquiry.

21. It appears from a reading of the order dated 11.09.2019 of the Appellate Authority that only argument that was advanced by the petitioner (appellant) was with regard to the finding recorded by the Adjudicating Authority and on no other point. The Appellate Authority, in the instance case, was required to grant the petitioner an opportunity to explain its stand on GSTR-1 and GSTR-3B as also the Circulars. We are of the opinion that the impugned order militates against the principles of natural justice. Accordingly, the order dated 11.09.2019 is set aside and quashed.

22. We do not consider it appropriate to embark upon an inquiry to examine the claim of the petitioner that excess payment of tax has not been carried forward or that the same has not been adjusted. These are matters to be reconsidered by the Appellate Authority. It will not be necessary for the Appellate Authority to indicate the aspects that it would like to examine, as the same are self-evident from the order dated 11.09.2019.

23. In that view of the matter, the petitioner is permitted to file a representation dealing with the aspects as reflected in paragraphs 8, 9 and 10 of the order dated 11.09.2019 and such representation would be filed within a period of eight weeks from today before the Appellate Authority. After the representation is filed, an opportunity shall be granted to the representative/counsel for the petitioner for hearing and thereafter, the Appellate Authority shall pass a fresh order with expedition and without any delay regarding the claim made by the petitioner for refund.

24. The writ petition is allowed with the above directions and observations. No cost.

(Judge) (Chief Justice)

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