

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.01.2021

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THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. Nos.8451 & 8452 of 2019

Sutherland Global Services Pvt Ltd.,
Rep. by Associate Vice President Finance,
Mr.V.N.Achutarama Gupta,
45A, Velachery Main Road, Velachery,
Chennai 600 042. ...Petitioner in both WPs

Vs

Assistant Commissioner,
Office of the Assistant Commissioner of CGST
& Central Excise, Chennai South Commissionerate,
Adyar Division, No.690, EVR Periyar Building,
Anna Salai, Nandanam,
Chennai 600 035. ... Respondent in both WPs

COMMON PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, to call for the records relating to file C.No.V/18/46/2018-RF in Order in Original No.37/2018 & 38/2018 (RF/RB) Legacy dated 07.01.2019 passed by the Respondent and quash the same as arbitrary and illegal and direct the respondent to refund the amount due to the petitioner.

For Petitioner : Mr.Joseph Prabakar for both WPs
For Respondent : Mr.Rajinish Pathyil
Senior Central Government
Standing Counsel for both WPs

COMMON ORDER

The petitioner challenges two Orders-in-Original, both dated 07.01.2019, passed in terms of the provisions of the Central Excise Act, 1944 (in short 'Act'). The petitioner is in the business of providing rent-a-cab, man power supply, business auxiliary services, business support services, recovery agent service, Information Technology software service, works contract services, legal consultancy services etc. and in the export of the same. Two claims had been filed seeking refund of unutilized input service tax credit in terms of Rule 5 of the CENVAT Credit Rules, 2004 (in short 'Rules') read with Notification No. 27 of 2012 for the periods April, 2016 to June, 2016 and July, 2016 to September, 2016. The

claims are to be accompanied by various documents including bank realization certificates in respect of the services exported as well as a certificate from the Chartered Accountant duly certifying the correctness or otherwise of the refund claim in respect of the services exported.

2. In the two claims in question, the petitioner has, admittedly, not enclosed the Foreign Inward Remittance Certificates (FIRCs) that are to accompany the claim, to evidence bank realization. According to the petitioner, this was made impossible by virtue of a Notification issued by the Reserve Bank of India in Circular No.74 dated 26.05.2016 wherein at paragraph 4 under the heading 'Reporting of Advance Remittance for Exports' states as follows:

'4. Reporting of Advance Remittance for Exports.

4.1 Presently the export data in EDPMS is being captured only from the shipping bills generated. It has now been decided to capture the details of advance remittances received for exports in EDPMS. Henceforth, AD Category -I banks will have to report all the inward remittances including advance as well as old outstanding inward remittances received for export of goods/software to EDPMS. Further, AD Category -I banks need to report the electronic FIRC to EDPMS wherever such FIRCs are issued against inward remittances.'

3. An electronic FIRC (eFIRC) has been explained by the Foreign Exchange Dealers' Association of India (FEDAI), in its response to question No.5. The query and answers are extracted below:

'Q.5. What is eFIRC as mentioned in AP Dir Circular?

Ans: the term is used to facilitate the adjustment of export documents handled by the bank (A) against the IRM reported by bank (B). There is no need to issue the same in physical form. For all practical purposes, the IRM unique number is the only source to adjust export documents.'

4. Thus, it appears that from 2016, the procedure for filing of physical FIRCs has been done away with and the exporters were required to use only electronic FIRCs or the Inward Remittance Unique Number (IRM Unique number) or any other documents to the satisfaction of the Authorities to evidence remittances towards export of services. It does not appear that the question of sufficiency/adequacy of the evidence produced for remittances was a matter that was before the Assessing Officer for consideration at all.

5. In the present case, the Authorities have really had no occasion to go into this issue, as the petitioner has waived a personal hearing prior to adjudication. Had the authorities issued a show cause notice, the petitioner will have had occasion to raise the plea that though the FIRC's were not available, e-FIRC's/IRM or other contemporaneous documents were available to evidence the exports. This aspect of the matter has thus not been gone into.

6. The petitioner had, vide letter dated 17.07.2018 addressed to the Superintendent, put forth submissions in regard to the quantification of the refund by proper application of the formula prescribed in para 2(g) of Notification 27/2012 dated 18.06.2012. In support of the methodology of quantification put forth by it, the petitioner had relied upon two decisions of the Appellate Authority. On 20.06.2018, the petitioner waived issuance of show cause notice, subsequently, on 17.07.2018, inserting a condition to the waiver, requesting for a personal hearing in the event that the Authority was not convinced with the decisions of the Appellate Authority relied upon.

7. The entirety of the impugned order discusses the methodology of quantification put forth by the petitioner and the Officer also distinguishes the decisions of the Appellate Authority. Incidentally, he notices a lacunae in regard to the FIRC's that were submitted stating that some were ineligible since bank statements had been submitted in place of the FIRC's, drawing adverse inference from the same. However, this issue appears to have escaped the realm of discussion on account of the non-issuance of show cause notice.

8. The question to be decided now is as to whether the petitioner ought to have been heard in the light of conditional waiver expressed. Section 33A of the Act sets out the procedure for adjudication and Section 33 A(1) states that the Adjudicating Authority shall give an opportunity of being heard to a party in a proceeding, if the party so desires.

9. In this case, the desire of the party to be heard is clear and it is only if the authority were convinced with its written submissions and the decisions of the appellate authority that the personal hearing stood waived. Thus, in my view, it was incumbent upon the authority to have proceeded to issue show cause and personal hearing notice to the petitioner, frame the issues for resolution and thereafter pass an order-in-original. This has not been done in the present case and the impugned order dated 07.01.2019 is thus set aside. The Authority will issue a show cause notice on all aspects of the matter including on the sufficiency/adequacy or otherwise of the evidences for realization of remittances, within a period of four (4) weeks from date of uploading of this order. After hearing the

petitioner and considering all the materials that may be filed by the petitioner, an order of adjudication shall be passed within a period of four (4) weeks from date of conclusion of personal hearing.

10. These Writ Petitions are allowed in the aforesaid terms. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

Assistant Commissioner,
Office of the Assistant Commissioner of CGST
& Central Excise, Chennai South Commissionerate,
Adyar Division, No.690, EVR Periyar Building,
Anna Salai, Nandanam, Chennai 600 035.

+2cc to Mr. Joseph Prabhakar, Advocate, S.R.No. 4165

+2cc to Mr. Rajnish Pathiyil, Advocate, S.R.No. 4186 & 4187

W.P. Nos.8451 & 8452 of 2019

MGR (CO)

GN (22/02/2021)

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