

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.03.2021

CORAM:

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P. Nos. 34638 & 34641 of 2018

and

W.M.P. Nos. 40159 & 40160 of 2018

BNP Paribas Global Securities Operations

Private Limited,

Represented by V.Siva Prasad,

Chief Administrative Officer,

No.8, Ekkaduthangal Road, Guindy,

Chennai - 600 032.

...Petitioner in both W.Ps

Vs

The Assistant Commissioner of GST &

Central Excise,

Office of the Deputy Commissioner of GST &

Central Excise,

Guindy Division,

Chennai South Commissionerate,

EVR Periyar Building, III Floor,

690, Anna Salai, Nandanam,

Chennai - 600 035.

...Respondent in both W.Ps

Prayer in W.P.No.34638 of 2018: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records on the file of the Respondent in proceedings Order in Original No.80/2018 dated 25.10.2018 and to quash the same and direct the Respondent to grant refund to the Petitioner.

Prayer in W.P.No.34641 of 2018: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records on the file of the Respondent in proceedings Order in Original No.79/2018 dated 25.10.2018 and to quash the same and direct the Respondent to grant refund to the Petitioner.

For Petitioner
(In both W.Ps)

: Mr.Joseph Prabakar

For Respondent
(In both W.Ps)

: Mr.V.Sundareswaran

Senior Standing Counsel

COMMON ORDER

The petitioner has challenged the impugned Order-in-Original Nos.79 and 80 of 2018 dated 25.10.2018 to quash the

same and direct the respondent to grant refund claim to the petitioner.

2. The petitioner had filed the three refund claims on 07.09.2017, 21.09.2017 and 30.10.2017 for the the following period. (Commencing from October 2016 to December 2016, January 2017 to March 2017 and April 2017 to June 2017).

S.No	Date	Amount	Period
1	07/09/17	Rs.1,52,95,703/-	October 2016 to December 2016
2	21.09.2017	Rs.3,43,88,456/-	January 2017 to March 2017
3	30.10.2017	Rs.1,65,14,132/-	April 2017 to June 2017

The three refund claims were considered by the respondent vide three separate Order-in-Original Nos.79 to 81 of 2018. The 3rd refund claim filed on 30.10.2017 for the exports made during April 2017 to June 2017, the respondent has allowed the claim vide Order-in-Original No.81 of 2018.

3. However, the corresponding refund claims filed on 07.09.2017 and 21.09.2017, the respondent has rejected the claims vide order in Original Nos.79 of 2018 and 80 of 2018. The said refund claims have been rejected with the following observations:-

23. I find that there are no recoverable arrears free from restraints pending against the claimant for realization:-

24. Having verified the parameters stipulated under Rule 5 of CENVAT Credit Rules, 2004 and notification issued therein, I now proceed to discuss the verification made with regard to the condition stipulated under Rule 2(h) of Notification No.27/2012-CE(NT) dated 18/06/2012 as amended. The said condition is reproduced below:

(h) the amount that is claimed as refund under rule 5 of the said Rules shall be debited by the claimant from his CENVAT credit account at the time of making the claim.

In the instant refund claim, the claimant has not debited the amount that is claimed as refund before or at the time of making the claim. In

fact, they have not debited the refund claimed amount at all. The claimant vide their letter dated 09/10/2018 have stated that they have reversed the amount claimed as refund in their books of accounts. However, I find that such reversal made in their internal accounting document cannot be treated as a valid documentary evidence for processing the refund claim inasmuch as the same is not a statutory document under Service Tax Act & Rules to link up with the refund claim on hand. I also observe that the claimant is defending their lapse of non debit discussed above claiming inter alia, that (a) in the ST-3 return for the period April 2017 to June 17, the transactions pertaining to the said period only will be disclosed; (b) the opportunity of disclosing reversal in the column for the month of September was absent in the ST-3 return and in the Excel template for the ST-3, the columns for the months of July, August & September were freezed and c) As per CBEC Circular 207/5/2017-ST, it can be inferred that revision of service tax return can be done only for reverse charge inclusion and for other events happening after June, for instance, refund claim reversals, the same should not be disclosed in the last ST-3 return.

However, I find that the arguments mentioned above putforth by the claimants are not reasonable and not based on valid law. On going through the details available in ST-3 return, it can be very well seen that the return captures all the data including arrear payments for the earlier period, interest, penalty payments etc, and reversal of CENVAT credit made due to various reasons and relevant columns are available to furnish the same. Therefore, the argument that in the ST-3 return for the period April 17 to June 17, the transactions pertaining to the said period only will be disclosed is incorrect. Similarly, the inference made by the claimant that revision of service tax return can be done only for reverse charge inclusion as per CBEC Circular 207/5/2017-ST is totally misplaced as the said Circular has not spelt so. Also, freezing of columns for the months of July, August and September in the ST-3 return for April-June 17 was only for furnishing the taxable value etc, and the CENVAT credit taken, utilized columns etc, were open to feed any data and the CENVAT credit payers have furnished

such data in the ST-3 return filed for April 17 to June 17. Many a times, the details are furnished in the remarks column by the tax payers, which the claimants have not resorted to. All the more, the claimant has raised this issue only as a defence and appears that they have not raised the same at the time of filing of return or thereafter. Further, had there been such issues in the ST-3 return for April- June 2017, definitely the trade and industry would have raised the same before the appropriate authorities and in the absence of any clarifications, circulars, instructions etc, in this regard, i observe that the claimant's contention in this regard is not acceptable.

4. The case of the petitioner is that the reasons given by allowing the refund claim on 25.10.2018 for the period from April 2017 to June 2017 for a sum of Rs.1,65,14,132/- has to be adopted and therefore, the writ petitions are liable to be allowed.

5. It is submitted that the total value of Input Tax credit which was un-utilized was Rs.6,62,67,726/- which was not taken into GST Account by following the transfer application and therefore the petitioner was entitled to refund claim of the amount even though the petitioner could not debit the duty in the ST-3 return in view of the change in the law.

6. The learned counsel for the petitioner submits that Rule 2(h) of Notification No.27/2012-CE(NT) dated 18.06.2012 contemplates the amount that is claimed as refund under Rule 5 of the said Rules shall be debited from the CENVAT credit account at the time of making the refund claim. He further submits that these refund claims have been filed in time but after the GST was implemented. For the exports prior to implementation of GST, refund claims were filed within the period of one year from the date of exports in terms of Rule 5 of CENVAT Credit Rules, 2004 read with the above notification. He further submits that the petitioner has not transferred the proportionate amount to Rs.6,62,67,726/- into GST and therefore the reasonings adopted for allowing the refund claim for a sum of Rs.1,65,14,132/- vide Order-in-Original No.81 of 2018 dated 25.10.2018 has to be applied mutatis mutandis. The two refund claims were to be allowed on similar lines.

7. The respondent in its counter has stated that the petitioner had time upto 15.09.2017 to file a revised return and debited the amount which they did not and therefore the refund

claims dated 07.09.2017 and 21.09.2017 for the period commencing from October 2016 to December 2016 and January 2017 to March 2017 cannot be allowed. The refund claims cannot be allowed on the basis of the refund claim allowed for the period April 2017 to June 2017 filed on 30.10.2017, vide Order-in-Original No.81 of 2018.

8. The impugned orders seeking to deny the refund claim under Rule 5 of the CENVAT Rules, 2004 read with Notification No.27/2012-CE(NT) dated 18.06.2012, (vide condition 2(h) of the Notification) has been denied in view of the intervening events with the implementation of GST with effect from 01.07.2017. The refund of CENVAT credit under Rule 5 of the CENVAT Rules 2004 read with Notification No.27/2012-CE(NT) dated 18.06.2012 is a legitimate export incentives given to an exporter of service and goods. Therefore, such legitimate export incentives given to exporters of goods or service cannot be denied merely because of intervening changes. Considering the same, I am of the view, the writ petitions deserves to be allowed.

9. That apart, for the period covered by April 2017 to June 2017, the respondent has allowed the refund claim vide Order-in-Original No.81/2018 dated 25.10.2018 with the following observations:-

"36.2 With regard to compliance of the said two conditions, I find that due to the implementation of GST with effect from 1/7/2017, the claimants filing refund under Rule 5 of CCR, 2004 for the quarter Apr-June 2017 has been left with only two options:-

i) Debit the refund claimed in their Apr-Jun 2017 ST-3 return or

ii) Not debit the refund claimed in the said return and also not carry the balance forward in their TRAN-1 or not to file TRAN-1 at all.

If the claimant chooses option i) they will comply with the condition 2(h) of Notfn No.27/2012-CE(NT) but will be hit by condition 2(g) because the balance comes to NIL at the end of the quarter. By choosing option ii) the claimant fails to comply with condition 2(h) but will not be hit by condition 2 (g). It is seen that either way compliance of both the conditions together is not possible. Therefore, a judicious reading of the Notification makes it amply clear that the safeguards, conditions and limitations are prescribed not to deny the rightful

claims of the claimant but to ensure that no claimant unduly enriches themselves by claiming refund from the Government as well as carry their balance forward in their returns.

36.3 Against the backdrop of the extraordinary situation that has arisen with the implementation of GST, the claimants are left with no option to satisfy both the conditions viz., 2(g) and 2(h) simultaneously. In such a situation if it can be ensured that the claimant has not unduly enriched themselves by simultaneously getting the refund sanctioned and also by carrying the balance forward, the safeguards provided under the Notification would be satisfied.

36.4 In this case, I observe that:

- a. The refund claim has been filed by the claimant on 30/10/2017;
- b. The claimant has not debited the refund amount claimed has refused;
- c. The amount of CENVAT credit lying in balance as on 30/06/2017 was Rs.6,62,67,726/-;
- d. The refund amount has not been carried forward into the Electronic Credit Ledger of GST while filing from TRAN-1.

Thus, I find that by not carrying forward the balance of Rs.6,62,67,726/-, it appears that the amount claimed as refund can be construed to be debited. Also, having filed the refund claim post GST but within the relevant date for filing the claim, I find that the claimant was not in a position to satisfy both the above said conditions of the impugned notification.

36.5 Going a step further, the claimant has also submitted an INDEMNITY BOND dated 02.04.2018 for the refund amount. The claimant in their Indemnity Bond stated as below:-

"The refund claim for the period April 2017 to June 2017 for an amount of INR 1,65,14,132/- was filed by them on 30th Oct.2017/2nd November 2017. At the time of filing of the refund claim, facility of

filing of ST-3 had been closed and hence debiting the amount claimed from ST-3 return was not possible. Therefore, the closing balance of CENVAT credit in the ST-3 return of April to June 2017 is inclusive of the refund amount claimed for the period April 2017 to June 2017. This amount has not been carried forward into the Electronic Credit Ledger of GST while filing from TRAN-1. However, the same amount has been reversed in the books of accounts to satisfy the requirement of aforesaid notification. We hereby, agree that in the event of any discovery by your office that BNP Paribas has availed dual benefit i.e., refund under erstwhile law as well as carry forward to GST through TRAN-1, we undertake to make good the loss of tax to Government, if any sustained with appropriate interest and penalty as per the provisions of Finance Act 1994 read with CENVAT Credit Rules 2004."

37. M/s VCMC & Associates, Chartered Accountants of BNP Paribas Global Securities Operations Private Limited have certified the following:-

1) They have verified returns filed by the Company under Service Tax and GST regulations for the limited purpose of issuing the certificate.

2) As on 30th June 2017, the closing balance of service tax, as per ST-3 for the period April 2017 to June 2017, is INR 66,267,726/-. The closing balance in the ST-3 represents the amount of refund to be claimed for the subsequent quarters.

3) The refund claim for April 2017 - June 2017 quarter amounting of INR 1,65,14,132/- and for the subsequent periods was not submitted as on 30th June 2017.

4) As per Notification No.27/2017 C.E. Dated 18th June 2012, at the time of filing the refund claim, the Company has rightly reversed the refund claim amount in the books of accounts of the Company on 28th September 2017.

5) They have verified that company has not carried forward this closing CENVAT credit into the Electronic Credit Ledger of GST while filing Form TRAN-1.

The Company has carried forward credit amounting to INR 1,37,220/- in table 7(b) of Form TRAN-1 vide section 140(5) of the Central Goods and Service Tax Act, 2017. This Credit availed has not been availed as CENVAT credit in ST-3 return filed for the period till June 2017.

6) They have also verified the GST returns (GSTR-3B/GSTR-1) filed by the Company for the period July 2017 onward and they did not observe the company taking the aforesaid amount of INR 66,267,726/- as input tax credit of GST.

The eligible refund as per formula is amount of Rs.2,46,88,607/- and the amount lying balance at the end of quarter is Rs.1,65,14,132/- and as on the date of filing is also considered as Rs.1,65,14,132/-, hence I find and hold that claimant is eligible for refund of Rs.1,65,14,132/- is less than the above said amounts.

38. I find that there are no recoverable arrears free from restraints pending against the claimant for realization.

39. The claimant vide their letter dated 30/10/2017 have requested to process the instant refund claim on merit basis without issue of any Show Cause Notice. Considering the same as well as my findings discussed supra, I proceed to pass the following Order.

ORDER

I, sanction a refund of Rs.1,65,14,132/- (One Crore Sixty Five Lakh Fourteen Thousand and One Hundred and Thirty Two only) towards the refund claim filed by M/s.BNP Paribas Global Securities Operations India Private Limited, having their premises at Menon Eternity, 2nd and 3rd Floor, New Door No.165 (Old No.110), St.Mary's Road, Alwarpet, Teynampet, Chennai - 600018 (Currently shifted to Plot No.8, Centre Point II, Ekkaduthangal Road, Thiru Vi. Ka Industrial Estate, Developed Plots, Guindy, Chennai - 600 032), for the quarter April 2017 to June 2017 under Rule 5 of the CENVAT credit Rules, 2004, read with notification No.27/2012 C.E. (NT) dt 18.06.2012."

10. The reasoning adopted for allowing the above refund claim has to be adopted for the other two refund claims as well. Considering the fact that the petitioner has also not been able to utilize the credit of duty under the provisions of GST which came to be effected from 01.07.2017, legitimate export incentives cannot be denied to the petitioner. I find no merits in denying the benefit of refund claim filed by the petitioner under Rule 5 of the CENVAT Rules, 2004. The respondent shall therefore refund the amount to the petitioner within a period of six weeks from the date of receipt of a copy of this order.

11. These Writ Petitions stand allowed. No costs. Consequently, connected Writ Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

The Assistant Commissioner of GST &
Central Excise,
Office of the Deputy Commissioner of GST &
Central Excise,
Guindy Division,
Chennai South Commissionerate,
EVR Periyar Building, III Floor,
690, Anna Salai, Nandanam,
Chennai - 600 035.

+1cc to Mr.V.Sundareswaran, Advocate, SR.NO. 20367

W.P. Nos. 34638 & 34641 of 2018

and

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PMK (CO)
NS(04/05/2021)