IN THE HIGH COURT OF ORISSA AT CUTTACK
W.P(C). No.2271 of 2022

M/s. National Ventures Private Limited .... ***Petitioner***

Mr. Chitta Ranjan Das, Advocate

-versus-

Union of India & Others .... ***Opposite Parties***

Mr. S.S. Padhi, Advocate
for CT & GST Organization

CORAM:
JUSTICE JASWANT SINGH
JUSTICE M.S. RAMAN

ORDER

Order No. **17.05.2022**

03. **1.** This matter is taken up by virtual/physical mode.

2. Challenging the order dated 13th July, 2021 passed by the Additional Commissioner of Sales Tax (Appeal), Bhubaneswar in Appeal No. AA(GST)-08/BH-III/2020-21 directed against order dated 18th March, 2020 of Deputy Commissioner of State Tax, CT & GST Circle, Bhubaneswar-III rejecting the application for refund of unutilized balance of input tax credit U/s 54 of the Odisha Goods and Services Tax Act, 2017 (in short “the OGST Act”) for the period 1st June, 2019 to 31st October, 2019, the Petitioner has knocked the doors of this Court invoking Article 226/227 of the Constitution of India with the following prayers:-

I. Issue appropriate writ, order or direction to opposite parties to pass orders by allowing refund of

Rs.41,15,556/- under Section 54(3) of the OGST/CGST Act.

II. *Issue appropriate writ, order or direction to set aside the order dated 13.07.2021 at Annexure-4 passed by the Additional Commissioner of State Tax (Appeal), Bhubaneswar and to allow the refund of Rs.41,15,556/-.*

3. It is contended by the Petitioner that the rejection of refund application issued in Form GST RFD-06 on ground that levy of Nil Rate of Tax on exported goods, *i.e.*, "Iron Ore Fines" falling within the fold of Code No.26011142 specified under Second Schedule of the Export Tariff appended to the Customs Tariff Act, 1975 does not qualify for refund of GST paid in view of Clause (i) of Proviso to sub-section (3) of Section 54 of the OGST/CGST Act is arbitrary and non-application of mind. It is further submitted that, the Adjudicating Authority while taking a decision as to whether the tax payer is entitled to claim refund against export of "Iron Ore Fines" in terms of Section 16(3)(a) of the IGST Act, 2017 read with Section 54(3) of the CGST/OGST Act has misplaced the Goa Authority for Advance Ruling *vide* order dated 21st May, 2019 bearing No.GOA/GAAR/11 of 2018-19/514 in case of M/s. Chowgule & Co Pvt. Ltd.

4. Aggrieved by the decision of Adjudicating Authority the Petitioner carried the matter in the appeal U/s 107 before the Additional Commissioner of State Tax (Appeal) who has confirmed the order of Deputy Commissioner of State Tax and thereby, sustained the order of rejection of application for refund.

5. Though, the Petitioner has right of further appeal to Appellate Tribunal U/s 112 of the OGST/CGST Act, since no

Tribunal has yet been constituted, the Petitioner has challenged the said appellate order before this Court by way of writ petition.

6. This Court *vide* order dated 4th February, 2022 has made the following observation:-

> *"**2.** Challenge is to the impugned orders, whereby refund on account of tax paid for the zero rated goods exported outside India has been denied, in view of clarificatory circular dated 20th September, 2021 (Annexure-6).*
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> ***3.** It is submitted that the matter is squarely covered by a Division Bench judgment of this Court dated 25th November, 2021 passed in W.P. (C) No. 34402 of 2021.*
>
> ***4.** Issue notice for 30th March, 2022."*

7. When the matter is taken up today for hearing, Mr. S. S. Padhi, Advocate for the CT & GST Organization has fairly and graciously admitted that the order of rejection of application for refund as claimed by the Petitioner and upheld by the Appellate Authority is erroneous in view of the order dated 25th November, 2021 passed by this Court in the case of ***M/s. B.S. Minerals Vrs. State of Odisha & Others in W.P. (C) No. 34402 of 2021.*** It is submitted that Paragraph 5 of the said order would have effect on the subject matter at issue. Thus, the export of "Iron Ore Fines" even though attracts Nil Rate of Tax, in view of Second Schedule to the Customs Tariff Act, 1975, the Petitioner would be entitled to refund on such export transactions. In view of Section 16 of the IGST Act read with Section 54(3) of the OGST/CGST Act, export of goods or services or both is levied with zero-rate. "NIL rate of Tax" falls within the ken of the term "exempt supply" defined under Section 2(47) of the OGST/CGST Act.

8. This Court in the case of *B.S. Minerals (supra)* made the following observation:

> "5. *** As a result of the above decision of the GST Council, a fresh circular dated 20th September 2021 has been issued by the Central Board of Indirect Taxes and Customs (CBITC), GST Policy Wing, Ministry of Finance, Government of India in which one of the questions addressed is, at serial No.3, "whether the first proviso to section 54(3) of the CGST/SGST Act, prohibiting refund of unutilized ITC is applicable in case of exports of goods which are having NIL rate of export duty?" The clarification issued reads as under:
>
> "1. The term 'subjected to export duty' used in first proviso to section 54(3) of the CGST Act, 2017 means where the goods are actually leviable to export duty and suffering export duty at the time of export. Therefore, goods in respect of which either NIL rate is specified in Second Schedule to the Customs Tarriff Act, 1975 or which are fully exempted from payment of export duty by virtue of any customs notification or which are not covered under Second Schedule to the Customs Tariff Act, 1975, cannot be considered to be subjected to any export duty under Customs Tarrif Act, 1975.
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> 2. Accordingly, it is clarified that only those goods which are actually subjected to export duty i.e., on which some export duty has to be paid at the time of export, will be covered under the restriction imposed under section 54 (3) from availment of refund of accumulated ITC. Goods, which are not subject to any export duty and in respect of which either NIL rate is specified in Second Schedule to the Customs Tariff Act, 1975 or which are fully exempted from payment of export duty by virtue of any customs notification or which are not covered under Second Schedule to the Customs Tariff Act, 1975, would not be covered by the restriction imposed under the first proviso to section 54 (3) of

the CGST Act for the purpose of availment of refund of accumulated ITC."

9. In view of aforesaid conceded position at the Bar, this Court deems it proper to set aside the order dated 13th July, 2021 of the Appellate Authority passed by the Additional Commissioner of State Tax (Appeal), Bhubaneswar and remand the matter to the said Appellate Authority for deciding the appeal afresh. Accordingly, the Order dated 13th July, 2021 passed by the Additional Commissioner of State Tax-the Appellate Authority is set aside and said Authority is directed to rehear the appeal affording opportunity of hearing to the appellant and dispose of the Appeal taking into consideration the view expressed *vide* order dated 25th November, 2021 in ***M/s. B.S. Minerals Vrs. State of Odisha & Others in W.P. (C) No. 34402 of 2021*** passed by this Court, as expeditiously as possible.

10. With the above observation and direction, the writ petition stands disposed of.

(Jaswant Singh)
Judge

(M.S. Raman)
Judge

Laxmikant

May 17th, 2022
Cuttack