IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.36433 of 2021

M/s. SM Niryat Pvt. Ltd. .... ***Petitioner***
Mr. R.P. Kar, Advocate

-versus-

The Union of India and others .... ***Opposite Parties***
Mr. P.K. Parhi, ASG for Union of India
Mr. Ch. S. Mishra, Senior Standing Counsel for CGST
Mr. Sunil Mishra, Addl. Standing Counsel for SGST

CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. SAHOO

Order No. **ORDER**
27.01.2022

01. 1. It is stated by Mr. R.P. Kar, learned counsel appearing for the Petitioner that the present petition may be disposed of in terms of paragraphs-5, 8 and 9 of the order dated 25th November 2021 passed by this Court in W.P.(C) No.34402 of 2021 (***M/s B.S. Minerals v. State of Odisha and others)*** which read as under:

> " 5. A development that has taken place subsequent to the above order passed by this Court is that the GST Council at its 45th Meeting on 17th September 2021 decided *inter alia* to issue a clarification in respect of goods for which the export duty is in fact not paid. It was 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) of the CGST Act, 2017 from availment of refund of accumulated ITC." 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 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, 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."

8. It is seen that since the instruction dated 25th June 2021 stands withdrawn, clearly the earlier instruction dated 8th June 2021 which is in the same vein also does not survive. Therefore, one of the prayers of the previous petition as well as the present petition challenging the aforementioned circulars does not survive.

> 9. Since the impugned SCN and the consequential order has been issued only as result of the above circulars, it also does not survive and is accordingly set aside."

2. In terms of paragraphs-5, 8 and 9 of the order dated 25th November 2021 passed by this Court in W.P.(C) No.34402 of 2021 (***M/s B.S. Minerals v. State of Odisha and others)***, the impugned order issued by Opposite Party No.6 under Section 73 of the CGST/OGST Act is quashed.

3. The writ petition is accordingly disposed of.

4. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March 2020, modified by Notice No.4798, dated 15th April, 2021 and Court's Office order circulated vide Memo Nos.514 and 515 dated 7th January, 2022.

(Dr. S. Muralidhar)
Chief Justice

(M.S. Sahoo)
Judge

S.K. Jena/PA