



W.P.No. 31810 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.10.2022

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THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

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BMW India Pvt. Ltd.
1st Cross Road, 1st Main Road
Off 2nd Avenue, Mahindra World City
Chengleput - 603002
Rep. by its Authorized Signatory:
Mr. Venkataraman Chandrasekar Babu

...Petitioner

Vs

1.Assistant Commissioner, CGST
Maraimalai Nagar Division
Plot No. 40, Ranga Colony,
Rajakipakkam, Chennai 600073

2.Union of India
through Secretary (Revenue)
Department of Revenue
Ministry of Finance
North Block, New Delhi – 110001

3.Central Board of Indirect Taxes
and Customs
Department of Revenue
Ministry of Finance, North Block
New Delhi -110001

4.Commissioner Goods and Services Tax,
Department of Revenue



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Ministry of Finance, North Block
New Delhi – 110001

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5. Goods and Services Tax Network
CEO
Worldmark 1, 4th Floor, Tower - B
Aerocity Indira Gandhi International
Airport, New Delhi – 110037

...Respondents

Prayer: Writ Petitions filed under Article 226 of the Constitution of India, to issue a Writ of certiorarified mandamus call for the records of the Order - In - Original No. 137/ 19-RF dated 29.08.2019 passed by the Respondent No. 1 and quash the same and direct the Respondent No. 1 to consequentially grant refund of admissible CENVAT Credit of CVD and SAD amounting INR 36,93,10, 841/- in cash to the Petitioner or allow the Petitioner to claim and utilize input tax credit of aforementioned CVD and SAD for setting off against subsequent period GST liability.

For Petitioner : Mr.Tarun Gulati
Senior Counsel for
: Mr.Karthik Sundaram

For Respondents : Mr.T.L.Thirumalaiswamy
Standing Counsel for [R1, R3 to R5]

: Mr.S.Rajesh Vivekanantham
Senior Panel Counsel for [R2]

ORDER

The petitioner has challenged order-in-original dated 29.08.2019 rejecting its request for refund of a sum of Rs.36.93 crores (approx). The



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petitioner is engaged in the assembly and manufacturing, as well as import of motor vehicles and subsequent sales in India. During the period 01.03.2011 to 11.04.2013 it had imported motor cars in completely knocked down (CKD) condition.

2. Proceedings under a show cause notice had been initiated on 26.08.2013 touching upon the concessional rate of duty that had been claimed by the petitioner. The proceedings had culminated in an order-in-original dated 13.02.2015 confirming the demand of differential customs duty along with penalty, interest and redemption fine.

3. Aggrieved by this order, the petitioner has preferred an appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT) after effecting mandatory pre-deposit. Its contention had been accepted in part and a final order dated 17.09.2018 had come to be passed whereunder the CESTAT has upheld the demand of differential customs duty restricting the same to the regular period of limitation along with applicable interest, penalty and redemption fine.

4. Since the CESTAT was of the view that the petitioner has not concealed any particulars, the remaining portion of the demand relating to the period beyond five years was set aside. The entirety of the consequential



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demand of a sum of Rs.154.16 crores (approx) has been remitted by the petitioner simultaneous with a challenge to the order of the CESTAT before the Hon'ble Supreme Court. This appeal is pending disposal.

5. The amount remitted by the petitioner included, apart from the duty, penalty, interest and fine, countervailing duty (CVD) of an amount of Rs.30.95 crores (approx) and Special Additional Duty (SAD) of a sum of Rs.5.97crores (approx) amounting to a total of Rs.36.93 crores (approx).

6. Pursuant to the remittance of the amount, the petitioner filed an application seeking refund of the amount of Rs.36.93 crores (approx). The refund application proceeds on the eligibility of the petitioner to the CENVAT credit of CVD and SAD in terms of Rule 3 of the CENVAT Credit Rules, 2004 (CC Rules).

7. Inter alia, the petitioner specifically makes reference to the provisions of Section 142(7)(b) of the Central Goods and Service Tax Act, 2017 (CGST Act) that states that any amount found to be admissible in any proceedings of appeal relating to output duty or tax liability initiated before, on or after the appointed date under the erstwhile law, shall be refunded to the petitioner in cash. The refund application has come to be rejected by way of the impugned order. Hence, this writ petition.



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8. Detailed submissions of Mr. Tarun Gulati, learned Senior Counsel for Mr. Karthik Sundaram, learned counsel on record for the petitioner and, Mr. T.L. Thirumalaiswamy, learned Standing Counsel for R1, R3 to R5 and Mr. S. Rajesh Vivekananthan, learned Senior Panel Counsel for R2 have been heard.

9. To a pointed query by the Court as to the appropriateness of deciding the refund claim even pending the substantive appeal of the petitioner before the Hon'ble Supreme Court, learned Senior Counsel reiterates the eligibility of the petitioner to refund, irrespective of the fate of the appeal.

10. It is his categorical submission that even if the petitioner were to fail in the appeal before the Hon'ble Supreme Court, it is entitled to the refund of CVD and SAD in terms of the eligibility earned from application of Rule 3 of CC Rules r.w. Section 142 (7)(b) of the CGST Act.

11. As far as question of eligibility is concerned, he would draw attention to the fact that the respondent, both in the impugned order as well as in the counter, has acceded to the eligibility of the petitioner to CENVAT credit in terms of Rule 3 of the CC Rules. What remains is merely application of the provisions of Section 142 of the CGST Act to grant the



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refund sought.

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12. He draws attention to the scheme of refund under the GST regime pointing out that Section 140 and 142 operate in different spheres. While Section 140 is a provision that provides for transitional arrangements for the conveyance of credit available in the erstwhile regime to the new regime, Section 142 is a residuary provision that deals with several miscellaneous situations not dealt with under Section 140.

13. He would emphasize that the claim of the petitioner does not touch upon input tax credit and the claim is for cash refund of the eligible CENVAT credit. Thus, the applicable provision is Section 142 (7)(b) read with Section 142(3) that enables a claim for refund of any amount of CENVAT credit, duty, tax, interest or other amount, paid under the existing law, to be disposed in accordance with the provisions of the existing law and in cash.

14. The reference to payment '*under the existing law*', is not a connotation of time but the statute under which the payment was made, in this case, is CENVAT credit Rules. According to the petitioner, the right of refund stood crystallized under the erstwhile law and such right is not effaced, but, in fact, protected by virtue of Section 174 of the CGST Act,



that deals with repeal and saving.

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15. In specific, Section 174(2)(d), specifically protects rights, privileges, obligations or liability acquired or accrued under the amended Act or repeal acts/orders and Section 174(3), refers to the general application of Section 6 of the General Clauses Act, 1897. Instead, the Authority has proceeded to extract in the order, and apply the provisions of Section 142(7)(a), that are according to the petitioner, wholly inapplicable to the facts and circumstances of this case.

16. Per contra, Mr.Rajesh Vivekanantham, learned Senior Panel Counsel appearing for R3, contests the eligibility of the petitioner to CENVAT credit. He would point out that the observations made out by the Officer at para 3 and 4 as well as the conclusions in the impugned order merely reiterate the submissions of the refund claim and should not be taken to be an admission of eligibility.

17. Then again, the observation towards the latter half of para 6 of the counter to the effect that '*This amount paid as CVD and SAD on imports is available to the Petitioner for availing as CENVAT Credit only.*' is also, according to him, only a passing remark and cannot be taken to be admission of eligibility. According to him, the applicable provision is Section



172(7)(a) and not 7(b) as urged by the petitioner, as the payments have been made only as a measure of recovery after the order of the CESTAT was passed.

18. Having heard the rival contentions, I am of the considered view that the petitioner's claim has not been dealt with in a proper manner. The detailed contentions raised by the petitioner in the refund claim have not been specifically adverted to or discussed in light of either the CC Rules or Section 172(7)(b), specifically referred to in the refund application.

19. Moreover, the petitioner ought to have heard in person prior to the impugned order having been passed, which has not been done despite the petitioner having, at para 13 of the refund claim, specifically sought an opportunity of personal hearing prior to disposal of the application. The impugned order is thus set aside and remanded for de novo hearing and disposal, in accordance with law.

20. The officer in the remand proceedings shall test the eligibility of the petitioner to the credit at the outset and render a categorical finding in this regard. The provisions of Section 142 shall thereafter be applied to determine the refund sought. Such exercise shall be completed within a period of eight weeks from date of receipt of this order.



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21. At this juncture, the petitioner raises a new claim in regard to a transition of credit, that does not figure in the refund claim, taking a cue from the judgment of the Hon'ble Supreme Court in the case of *Union of India V. Filco Trade Centre Pvt. Ltd.* (SLP (C) Nos.32709 – 32710 of 2018) dated 02.09.2022. The petitioner is at liberty, if it believes that it is so entitled, to make a claim of transition before the Officer and such claim shall be disposed by the officer, in accordance with law. In light of the order now passed, the judgements cited by the petitioner are not discussed, and shall be considered in the course of the remand proceedings.

22. This writ petition is disposed as above. No costs.

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Index : Yes

Speaking Order

To

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Maraimalai Nagar Division
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