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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Decision delivered on: 23.05.2022+ **W.P.(C) 9628/2021**M/S DELHI AND DISTRICT
CRICKET ASSOCIATION

..... Petitioner

Through: Mr Puneet Agarwal, Mr Prem
Kundpal, Ms Hemlata Rawat, Mr
Chetan Kumar Shukla and Mr
Ayushman Vatsyayana, Advs.

versus

ASSISTANT COMMISSIONER OF
CENTRAL TAX, DELHI NORTH

..... Respondent

Through: Mr Akshay Amritanshu, Mr Kartikey
Singh and Mr Ashutosh Jain, Advs.**CORAM:****HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MS. JUSTICE TARA VITASTA GANJU****[Physical court hearing/ hybrid hearing (as per request)]****RAJIV SHAKDHER, J. (ORAL):**

1. The matter was listed, in the first instance, on 13.09.2021, when we had recorded the following after Mr Puneet Agarwal, learned counsel for the petitioner, was heard in support of the instant action:

“W.P.(C) 9628/2021 & CM No.29755/2021 [Application filed on behalf of the petitioner seeking stay on the operation of the impugned order]

2. *The instant writ petition is directed against the Order-in-Original no.01/2020-21 dated 30.06.2020, passed by the Assistant Commissioner, Goods and Service Tax (GST), and the show cause notice, dated 20.02.2020.*



3. Mr. Puneet Agarwal, who appears on behalf of the petitioner, says that, the impugned order and show cause notice are flawed, broadly, for the following reasons:

(i) The impugned order, dated 30.06.2020, was passed by an officer who had no jurisdiction to pass the said order. According to Mr. Agarwal, demand for service tax in excess of Rs.50,00,000/- could have been adjudicated upon only by Additional/Joint Commissioner or a Commissioner [if the demand exceeds Rs.2,00,00,000/-].

(ii) In this behalf, Mr. Agarwal has relied upon paragraph 11.1 of the Central Board of Excise and Customs (CBEC) circular bearing no. 1053/02/2017-CX, dated 10.03.2017.

(iii) No pre-show cause notice consultation was carried out, although, the demand was over Rs.50,00,000/-, which was a requirement of paragraph 5 of the aforementioned circular dated 10.03.2017

(iv) No hearing was given to the petitioner prior to passing of the impugned order.

(v) The impugned order has gone beyond the order of remand, passed by the Commissioner, Appeals-I, GST, Delhi [hereafter referred as 'Commissioner (Appeals-I)'], dated 30.05.2019.

(vi) According to Mr. Agarwal, the remand order was restricted to the issue, concerning the purported failure, in not granting to the petitioner, the claim for refund of cess quantified at Rs.36,94,642/-. For this purpose, our attention has been drawn to the Order-in-Original, passed in the first round, dated 03.01.2019 and the remand order passed by the Commissioner (Appeals-I), dated 30.05.2019. [See Annexure 'P-14' and 'P-17'.]

(vii) Lastly, it is stated that, the impugned show cause notice is based on inaccurate facts. For this purpose, our attention has been drawn to paragraph 8 at page 75 of the case file, wherein it is stated that, on account of 'Business Auxiliary Services', the petitioner had failed to pay service tax amounting to Rs.2,40,03,002/-. Mr. Aggarwal has pointed out that this amount has been paid. In this behalf, our attention has been drawn to page 178 and 232 of the case file.

4. We may note that, the record, at present, shows that the case set up by the petitioner was that, it had deposited excess



amount towards service tax and cess, and since certain amounts remained unutilized, it wanted refund of the excess amount.

4.1. In the first round, the Order-in-Original dated 03.01.2019 had pegged the refund amount, at Rs.2,32,09,285/-. In doing so, it denied refund attributable to cess amounting to Rs.36,94,642/-.

4.2. It is because of this grievance that the petitioner had carried the matter in appeal to the Commissioner (Appeals-I), who, via order dated 30.05.2019, had remanded the matter to the adjudicating authority.

4.3. The grievance of the petitioner is that, the adjudicating authority, instead of confining itself to this aspect of the matter, broadened the scope of the adjudication by issuance of the impugned show cause notice dated 20.02.2020, and thereafter, went on to adjudicate the matter, vide order dated 30.06.2020, contrary to the scope of the order of remand.

4.4. The petitioner claims that the injury inflicted was further compounded by not according personal hearing to the petitioner. It is in this context that, various flaws [as noted above by us], in the impugned order, have been pointed out by the petitioner.

5. Issue notice to the respondent/revenue, via all permissible modes including e-mail.

5.1. Counter-affidavit will be filed by the respondent/revenue, within four weeks from the date of receipt of notice.

5.2. The respondent/revenue, in their counter-affidavit, apart from anything else, will also indicate the amount that has already been paid by the petitioner towards service tax and cess, during the relevant period(s) i.e., October 2016 to March 2017 and April 2017 to June 2017.

5.3. The counter-affidavit will also indicate the liability towards service tax and cess, which the petitioner, according to the respondent/revenue, is mulcted with, as per the ST-3 return.

6. In the meanwhile, there shall be a stay on the operation of the impugned order, dated 30.06.2020.

7. List the matter on 03.12.2021.”

2. The respondent/revenue entered appearance in the matter on 03.12.2021, when opportunity was granted to the petitioner to file a



rejoinder to the counter-affidavit filed by the respondent/revenue.

2.1. Thereafter, the matter was taken up on 08.04.2022. On that date, after hearing the learned counsel for the parties, a brief order was passed, wherein, *inter alia*, it was recorded that the period in issue, in respect of which refund is sought, along with interest, by the petitioner, concerns October 2016 to March 2017 and April 2017 to June 2017.

2.2. Furthermore, a reference was also made to the counter-affidavit filed on behalf of the respondent/revenue. In particular, the table which is set forth in Annexure 'R/1' appended to the counter-affidavit, was adverted to in the said order. For the sake of convenience, the said table is set forth hereafter :

Total Payment	
Cash	5,85,84,462/-
CENVAT	31,14,179/-
Total (A)	6,16,98,641/-
Total liability	
October 2016 to March 2017	2,45,56,461/-
April 2017 to June 2017	1,03,05,282/-
Total (B)	3,48,61,743/-
(A)-(B) (Excess paid)	2,68,36,898/-
Less (Refund already granted)	2,32,09,285/-
Tax Excess paid (Refundable)	36,27,613/-

2.3. The matter was, thereafter, posted on 02.05.2022, on which date, at the request of the learned counsel for the respondent, the matter was



adjourned for today i.e., 23.05.2022.

3. A perusal of the record and orders culled out above would show that, in the first instance, the Order-in-Original was passed on 03.01.2019, which was carried in appeal by the petitioner. In appeal, the Commissioner (Appeals-I) via order dated 30.05.2019, *inter alia*, made the following observations:

“DISCUSSION & FINDINGS:

6. *I have carefully gone through the facts of the case and the submissions made by the appellants. The basic issue before me to decide is whether Swachh Bharat Cess and Krishi Kalyan Cess paid in excess alongwith excess Service Tax paid, is refundable to the appellants or not and whether interest on refund is payable or not.*

7. *The appellants had filed refund claim of Rs.2,69,03,927/- of service tax including cess as part of amount paid in cash vide challan but not utilized before the advent of GST. This amount had remained unutilized on 30.06.2017 out of Rs.5,54,24,028/- deposited on 29.03.2017. The Adjudicating Authority sanctioned the refund of Rs.2,32,09,285/- as Service Tax but rejected refund of Rs.36,94,642/- representing the cess amount. The appellants have submitted that during the period March 2017 - June 2017, they had utilized Rs. 1,70,80,729 + Rs.96,18,260/- = Rs.2,66,98,989/- towards Service Tax and Rs.18,21,112/- towards cess. Thus, they had utilized Rs.2,85,20,101/- in total and had claimed refund of Rs.2,69,03,927/- of which the service tax element was Rs.2,50,30,397/- and cess element was Rs.18,73,530/-. The appellants have mainly contended that they should have been refunded the amount deducting the utilized amount of CESS which they had utilized towards payment of tax liability, details of which are as under:*

TABLE-II (Amount in Rs.)

CESS	AMOUNT OF CESS ACTUALLY PAID	AMOUNT UTILIZED	UNUTILIZED AMOUNT



KRISHI KALYAN CESS	1807727	862480	945247
SWACHH BHARAT CESS	1886915	958632	928283
TOTAL	3694642	1821112	1873530

8. The Appellants have thus claimed that unutilized cess amount was only Rs.18,73,530/- and not Rs.36,94,642/- , as held by the Adjudicating Authority. Thus, the refund of Rs. 18,21,112/- more was required to be sanctioned by AA even if cess was not refunded. Further, the appellants have claimed that refund of cess could not be rejected since Section 119 & 161 of Finance Act, 2015 and Finance Act 2016 respectively provide that provisions of Chapter V of the Finance Act, 1994 (relating to Service Tax) including those relating to refunds apply to Swachh Bharat Cess and Krishi Kalyan Cess respectively.

9. On perusal of para 8 (2) of the impugned O-I-O it is seen that, the AA has rejected the cess amount of Rs.36,94,642/- stating "I find that, the admissible refund claim comes to Rs. 2,32,09,285/- out of Rs.2,69,03,927/- after deduction of cess amount of Rs. 36,94,642/". The AA has not cited any reason what so ever for rejecting the cess amount as to under which provisions the cess amount was rejected. The amount deposited was in cash in Govt. exchequer, as claimed and was left unutilized. Therefore, the appellants wanted this amount to be refunded to them.

10. Further, the AA has not commented anything on the admissibility of interest as per section 11 BB of the Central Excise Act, 1944 which the appellants had claimed.

11. Thus, the Adjudicating Authority needs to examine the records and arrive at correct figures of actual amount of cess lying unutilized as well as provide the exact reason for rejecting the refund claim of cess paid in advance and take a decision on interest issue. It would be appropriate that the Adjudicating Authority examine these point and claim of interest by Appellants for which the matter needs to be recorded to Adjudicating Authority by speaking order on the same issue and therefore, matter needs to be remanded to Adjudicating Authority. “



3.1. Based on the aforesaid, the Commissioner (Appeals-I) remanded the matter to the adjudicating authority.

4. The adjudicating authority, instead of confining itself to the remand directions issued by the Commissioner (Appeals-I), appears to have widened the scope of the proceedings.

4.1. Post the remand order of Commissioner (Appeals-I), a show-cause notice dated 20.02.2020 was issued to the petitioner. In paragraph 9 of the show-cause notice, the following was proposed :

“9. Whereas, the party is required to Show Cause to the Assistant Commissioner, Division Daryaganj, 17-B, IAEA Building, New Delhi within 30 days of the receipt of this notice as to why refund claim amounting to Rs.18,21,113/- (Service Tax) and Rs.18,73,530/- (SBC & KKC) should not be rejected and penalty of Rs.9,100/- should not be recovered from them as discussed above.”

5. The record shows that the petitioner filed a reply dated 02.04.2021 to the aforementioned show-cause notice, *albeit*, on 25.06.2021. Clearly, by the time the reply was submitted, the adjudicating authority had already passed its Order-in-Original dated 30.06.2020. Before us, it is this order that has been assailed by the petitioner.

5.1. Via the order dated 30.06.2020, the adjudicating authority has, *inter alia*, concluded that the petitioner had short paid towards tax, an amount equivalent to Rs.2,15,39,257/- and 1,03,05,282/-. In the operative part of the said order, the adjudicating authority issued the following directions:

“(i) I hereby reject refund claim of Rs.18,21,113/- (Service Tax) and Rs.18,73,530/- (SBC & KKC) to M/s. Delhi & District Cricket Association, Ferozshah Kotla Grounds, New Delhi.



(ii) *I order to recover Rs.2,15,39,257/- and Rs.1,03,05,282/- short paid by the assessee during the period April 2017 to June 2017.*

(iii) *I order to recover Rs.3,38,363/- as SBC for the period April, 2017 to June, 2017 along with interest and penalty at applicable rates from the assessee.*

(iv) *I order to recover penalty of Rs.9,100/- towards late filing of Service Tax returns for the period October 2016 to March 2017 and April 2017 to June 2017 by 88 days and 43 days respectively.”*

6. Mr Puneet Agarwal, who appears on behalf of the petitioner, says that no opportunity of hearing was provided to the petitioner.

6.1. It is also reiterated [and something which we had noticed in the proceedings held on 13.09.2021] that, although, the demand was more than Rs.50,00,000/-, no consultation prior to issuance of show-cause notice took place in the instant matter, contrary to the provisions of the master circular dated 10.03.2017, issued by the Central Board of Excise and Customs.

6.2. Both these aspects have not been disputed by counsel for the respondents.

7. It is also the contention of Mr Agarwal that the refund amounting to Rs.2,32,09,285/- stood already sanctioned *via* the Order-in-Original dated 03.01.2019.

7.1. Mr Agarwal says that, as noted both by the Commissioner (Appeals-I) in the order dated 30.05.2019 and in the show-cause notice which followed i.e., the show cause notice dated 20.02.2020, this aspect i.e., the non-payment of interest on the said amount i.e., Rs.2,32,09,285/- stands noticed.

7.2. It is Mr Agarwal's submission that the petitioner had claimed the refund *via* an application dated 02.11.2017, and, therefore, as per Section



11BB of the Central Excise Act, 1944 [in short “the 1944 Act”], the petitioner should have been granted interest w.e.f. 02.02.2018 [i.e., three months from the date of the receipt of the said application] up until the date of payment of the said amount i.e., 03.01.2019.

7.3. Insofar as the adjustment of Rs.36,94,642/ was concerned (which included tax and cess), it is Mr Agarwal’s submission that there is no reason provided as to why this amount was kept back.

8. Mr Akshay Amritanshu, who appears on behalf of the respondent/revenue, draws our attention to the reply dated 27.08.2019, served on the petitioner, in response to the application for refund, to which, we have made a reference above i.e., the application dated 02.11.2017.

8.1. It is Mr Amritanshu’s contention that the petitioner was asked to submit a copy of the Personal Ledger Account (PLA) and the calculation sheet for the entire refund amount claimed i.e., Rs.2,69,03,927/- (which included the amount that was already sanctioned i.e., Rs.2,32,09,285/-).

8.2. Furthermore, Mr Amritanshu has also drawn our attention to the communication dated 07.12.2018 submitted on behalf of the petitioner to the respondent/revenue.

8.3. Mr Amritanshu says that a perusal of the said communication would show that the petitioner had unequivocally stated that it would not claim interest on refund amount claimed i.e., Rs.2,69,03,927/-.

9. Having heard the learned counsel for the parties, we are of the view that there are several infractions in terms of the procedure, as well as with regard to the merits of the matter.

9.1. There is no dispute raised before us that no consultation notice prior to the issuance of the impugned show-cause notice dated 20.02.2020 was



issued; something which is completely contrary to the provisions of the master circular dated 10.03.2017.

9.2. It is also not disputed that before passing the impugned assessment order dated 30.06.2020, no personal hearing was granted to the authorized representative of the petitioner.

10. This apart, the impugned order has clearly gone beyond the directions contained in the order of remand i.e., order dated 30.05.2019, passed by the Commissioner (Appeals-I).

10.1. The Commissioner (Appeals-I) had remanded the matter to the adjudicating authority *via* order dated 30.05.2019, on two counts. First, that no reason furnished, as to why refund of Rs.36,94,642/- was not accorded. Second, as to why interest ought not to be paid to the petitioner on the amount which had already been sanctioned towards refund i.e., Rs.2,32,09,285/-.

10.2. Instead of confining itself to these aspects of the matter, the adjudicating authority, inexplicably, reopened the entire assessment proceedings and concluded that there was short payment of tax. Resultantly, there are, in effect, two Orders-in-Original.

10.3. In the earlier Order-in-Original, as noted above, which is dated 03.01.2019, the adjudicating authority clearly finds that out of the refund claim made by the petitioner amounting to Rs. 2,69,03,927/-, the petitioner was entitled to Rs.2,32,09,285/-, after adjusting tax and cess amounting to Rs.36,94,642/-.

10.4. Pertinently, the Commissioner (Appeals-I) did not set aside this part of the order i.e., sanctioning refund amounting to Rs.2,32,09,285/-. Therefore, for the adjudicating authority now, to issue directions which



tantamount to not only rejecting the claim made by the petitioner towards tax and cess amount , but also have the effect of seeking to recover tax and interest, as well as penalty, is rather inexplicable.

10.5. Considering the fact that assessment had already been carried out by the adjudicating authority *via* order dated 03.01.2019 and that the remand order of the appellate authority was confined to only two aspects, which we have noticed above, there was no occasion for the adjudicating authority to pass a fresh assessment order reopening the entire assessment.

11. Ordinarily, we would have set aside the impugned Order-in-Original i.e., the order dated 30.06.2020, with a direction to the adjudicating authority to pass a fresh order.

11.1. However, in this case, since the amounts and period involved are not in dispute and because the adjudicating authority has not furnished an acceptable reason as to why the amount paid towards tax and cess i.e., Rs.36,27,615/- [Rs.36,94,642/- less Rs.67,027/] is not refunded, we are inclined to allow the writ petition insofar as the refund of the actual excess amount paid by the petitioner on account of the service tax and cess is concerned.

12. As regards the defence taken by the respondent/revenue concerning interest, we are not impressed with the objection taken before us.

12.1. The fact that the petitioner submitted a communication dated 07.12.2018 that it will not claim interest, in our opinion, will not bar the petitioner from claiming the interest, as the law otherwise allows for the same.

12.2. It is not in dispute that statutory interest gets triggered under Section 11BB of the 1944 Act, once the stipulated period for refund of the amount



gets over (in this case, the stipulated period is three months commencing from the date of receipt of application under sub-section (1) of Section 11BB of the 1944 Act).

12.3. In our opinion, there cannot be any estoppel against a statute. Once the statute provides for payment of interest and the stipulated conditions are fulfilled, the respondent/revenue would be obliged, in law, to pay the interest.

13. The argument that Mr Amritanshu has advanced on behalf the respondent/revenue, that the copy of the Personal Ledger Account (PLA) was not submitted by the petitioner, in our view, is completely untenable, as it is not in dispute that the petitioner has provided the challans against which tax and cess had been deposited by it.

13.1. Therefore, according to us, the amounts claimed were clearly verifiable by the respondent/revenue.

14. Thus, for the foregoing reasons, the writ petition is allowed with the following directions:

(i) The respondent/revenue will pay interest on Rs.2,32,09,285/- at the rate of 6% p.a. (simple), commencing from 02.02.2018 till the date of payment i.e., 03.01.2019.

(ii) The respondent/revenue will remit to the petitioner the excess amount paid towards tax and cess i.e., Rs.36,27,615/- (Rs.36,94,642 less Rs.67,027/, which, according to the petitioner was a calculation error¹).

(iia) This amount will also carry interest at the rate of 6% p.a. (simple), w.e.f. the same date i.e., 02.02.2018, till the date of payment.

(iii) The respondent/revenue will ensure that the aforementioned



directions are given effect to, at the earliest, though not later than two weeks from today.

15. The writ petition is disposed of in the aforesaid terms.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

MAY 23, 2022/ aj

Click here to check corrigendum, if any

¹ See paragraph 21 of the writ petition.