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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 22.03.2023

+ W.P.(C) 10301/2022

DL SUPPORT SERVICES INDIA PRIVATE
LIMITED

..... Petitioner

Through: Mr Sujit Ghosh, Mr Mannat
Waraich and Ms Anshika
Agarwal, Advocates.

Versus

ADDITIONAL COMMISSIONER CGST
APPEALS II DELHI& ANR.

..... Respondents

Through: Mr Akshay Amritanshu, Senior
Standing Counsel for CBIC
with Mr Ashutosh Jain, Mr
Divyansh Singh and Mr
Samyak Jain, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The petitioner has filed the present petition impugning an order dated 19.04.2022 (Order-in-Appeal No.15/2022-23).
2. At the outset it is relevant to state that this Court has entertained

the present petition solely for the reason that the petitioner does not have an equally efficacious remedy of an appeal before the Goods and Services Tax Tribunal because the same has not been constituted as yet.

3. It is the petitioner's case that the said order is, *ex facie*, beyond jurisdiction inasmuch as it seeks to deny the petitioner refund of integrated tax paid in respect of services provided to an entity located overseas, on the ground that the petitioner is an 'intermediary'; therefore, the place of services performed by the petitioner is necessarily to be considered as located in India. The petitioner submits that denial of refund on this ground was not available to the Appellate Authority as this did not form a part of the show cause notice issued by the Adjudicating Authority.

4. The petitioner claims that it is involved in the export of services and had sought a refund of ₹13,10,508/- paid on the export of services for the period of April 2020. The petitioner's application dated 31.05.2021 was accepted on 01.06.2021 without issuing the deficiency memo. Thereafter, the Adjudicating Authority issued a show cause notice dated 20.07.2021 proposing to deny refund of Integrated Tax to the petitioner on the ground that the petitioner and the service recipient(s) were not distinct persons.

5. The petitioner responded to the said show cause notice disputing the assumption that the petitioner and the overseas service recipient were not separate tax entities. However, the petitioner's

contention was not accepted by the Adjudicating Authority and its application for refund of Integrated Tax was rejected by an order dated 30.07.2021.

6. The petitioner appealed the said order dated 30.07.2021 before the Appellate Authority.

7. The Appellate Authority referred to the Circular dated 20.09.2021 (Circular No.161/17/2021-GST) issued by the Government of India, whereby it was clarified that the company incorporated in India and a body incorporated by or under the laws of a country outside India are separate persons under the Central Goods and Services Tax Act, 2017 (CGST Act); accordingly, the said entities are not considered as “*merely establishment of a distinct person in accordance of Explanation 1 in Section 8*” of the GST Act. In view of the above, the Appellate Authority accepted that the petitioner and its foreign clients were not establishments of a distinct person but were separate tax entities; therefore, condition (v) of Section 2(6) of the CGST Act was satisfied. Notwithstanding that the ground on which the Adjudicating Authority had rejected the petitioner’s claim for refund was found to be untenable, the Appellate Authority proceeded to deny the refund on an absolutely new ground that the petitioner was an intermediary under Section 2(13) of the Integrated Goods and Services Tax Act, 2017 (IGST Act). Therefore, the services rendered by the petitioner did not qualify to be considered as export of services.

8. Undisputedly, this was a completely different ground, which

was not under contemplation of the Adjudicating Authority or the petitioner. It is the petitioner's case that it was not open for the Appellate Authority to *suo moto* set up a new case on behalf of the Revenue and proceed to adjudicate the same. The petitioner contends that the powers of the Appellate Authority under Section 107 of the CGST Act does not extend to the said extent. In terms of Section 107(11) of the CGST Act, the Appellate Authority has the power to make such an inquiry as it considers necessary and pass such orders as it thinks just and proper including confirming, modifying or annulling the decision appealed against; however the power of modifying the order appealed against does not extend to setting up a new case altogether. The petitioner also contends that in terms of the second proviso to Section 107(11) of the CGST Act, the Appellate Authority has the power to direct the assessee to pay tax, if it finds that the same is not paid, short paid, erroneously refunded or that the input tax has been wrongly availed, as the case may be. However, no such orders can be passed unless the appellant is given a show cause notice putting it to notice regarding the proposed order. And, the order is passed within the time limit specified under Section 73 or Section 74 of the CGST Act.

9. Mr Ghosh contends that it is only in cases where the refund has been erroneously granted that the Appellate Authority can assume the power to pass any orders in terms of the second proviso to Section 107(11) of the CGST Act for denying the entitlement of refund and directing recovery of the same. He earnestly contended that in the

present case, the refund has not been granted and therefore, the Appellate Authority did not have any authority to pass any orders in terms of the second proviso to Section 107(11) of the CGST Act.

10. Mr Amritanshu, learned counsel appearing for the respondents countered the aforesaid contentions. He submitted that the powers available to the Appellate Authority to modify the order appealed against would include a power to adjudicate afresh any issues that have any bearing on the question of payment of tax, short payment of tax, erroneous refund, wrongful availment of input tax credit, or any other matter.

11. It is the petitioner's case that it is not an intermediary. However, Mr Ghosh submitted that since the said case was never projected by the Revenue, the petitioner had no opportunity to address the same at any stage. The ground on which the Appellate Authority had denied the refund – that is, the petitioner is an intermediary – was neither a part of the show cause notice nor projected as a subject matter before the Appellate Authority at any stage.

12. We have heard the learned counsel for the parties.

13. There is no cavil with the finding of the Appellate Authority that Condition (v) of Section 2(6) of the CGST Act is satisfied. The respondents have not preferred any appeal against the order of the Appellate Authority. Further, the learned counsel for the respondents has also not advanced any submissions to contest the said finding. Clearly, the said finding is now final *inter se* between the parties.

14. In so far as the jurisdiction to decide an appeal on a completely new basis is concerned, it does not appear from the impugned order that the Appellate Authority had examined the question.

15. We have heard some arguments on the issue of power of the Appellate Authority to modify the order appealed against under Section 107(11) of the CGST Act. However, it would be apposite that in the first instance, the Appellate Authority considers the question whether it has the authority to expand the scope of controversy by introducing a fresh ground for denial of refund. We also do not consider it apposite that the matter be decided in a piecemeal fashion.

16. It is not disputed that the petitioner was not given an opportunity to meet the case that it was not entitled to refund as the services provided by it was as an intermediary. It is, thus, clear that the impugned order has been passed in violation of the principles of natural justice.

17. In view of the above, we consider it apposite to set aside the impugned order and remand the matter to the Appellate Authority to decide the petitioner's appeal afresh, including the question as to whether the Appellate Authority has the jurisdiction to set up a new case against the assessee, which was not a subject matter of either the show cause notice or the enquiry before the Adjudicating Authority.

18. The appeal filed by the petitioner is restored before the Appellate Authority. The Appellate Authority is directed to decide the petitioner's appeal afresh in accordance with law after affording the

petitioner an opportunity to be heard. The Appellate Authority is also requested to dispose of the appeal as expeditiously as possible and preferably within a period of eight weeks from today.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

MARCH 22, 2023
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