

IN THE HIGH COURT AT CALCUTTA
Circuit Bench At Jalpaiguri
(Via Video Conference)

WPA/1905/2023

Suraj Mangar

vs.

The Assistant Commissioner of West Bengal
State Tax, Cooch Behar Charge and Ors.

BEFORE:

The Hon'ble JUSTICE RAVI KRISHAN KAPUR

Date : 2nd August, 2024.

Mr. Ankit Kanodia
Ms. Megha Agarwal
Mr. Abhilash Mittal

...for the Petitioner

Mr. B. Ghosh,
Mr. Suir Kr. Saha
Mr. Hirak Barman

...for the State

Ravi Krishan Kapur, J.:

1. The petitioner assails the orders dated 24 February 2022 and 5 July 2023 respectively passed by the Assistant Commissioner of West Bengal State Tax, Cooch Behar and Senior Joint Commissioner (Appeal) of Revenue, Commercial Taxes, Jalpaiguri Circle being the Appellate Authority rejecting the claim of the petitioner for refund of unutilized Input Tax Credit (ITC) aggregating to Rs.78,45,666/-.
2. Briefly, the petitioner applied for refund under section 54(3)(i) of the CGST/WBGST Act 2017 (the Act) read with Section 16(3) of the IGST Act, 2017 for unutilized ITC on account of exports made to Bhutan between the period February 2021 to August 2021 valued at Rs.89,11,981/-. It is alleged that the above application was acknowledged on 10 January 2022 after a delay of two days from the expiry of the statutory period of 15 days. Upon scrutiny, the claim of

the petitioner was found to be inadmissible and a show cause notice was issued by the respondent no 1 on 8 February 2022 in Form RFD 08 mentioning the grounds for inadmissibility. The petitioner failed to reply to the show cause notice and prayed for extension of time. The prayer for extension was rejected and ultimately an order in Form RFD 06 dated 24 February 2022 was issued by the respondent no 1 on 24 February 2022.

3. Being aggrieved by the order of rejection, the petitioner filed an appeal before the Appellate Authority which was initially rejected on the ground of delay. By an order dated 8 January 2023 passed an earlier writ petition being WPA 2809 of 2022, a Co-ordinate Bench had remanded the matter to the Appellate Authority with a direction to dispose of the same on merits.
4. Pursuant to the above order, the respondent no 2 considered and rejected the appeal filed by the petitioner and passed an order dated 5 July 2023 on the grounds that on physical verification of the business premises of your petitioner, the premises were found unfit to conduct such business. Moreover, no E-way bill for inward supplies from Ronak Enterprises (GSTIN 19BEWPC3060B1ZN) had been generated. Subsequently, it transpired that in most of the cases the goods transported were not pan masala and where the goods were pan masala there was a mismatch in the values from that disclosed by the petitioner.
5. The principal ground of challenge raised by the petitioner is that the respondents failed to consider the claim for refund within the stipulated mandatory time limit of 60 days under section 54(7) of the

Act. It is alleged that section 54(7) of the Act provides for a mandatory period of 60 days to pass any order from the date of filing of the refund application in FORM RFD- 06. The word *shall* in the section is to be read as mandatory even when the authority passes an order rejecting the claim for refund. It is further contented by the petitioner that the withholding of refund on the ground of cross verification cannot be a valid ground for rejecting the refund beyond the prescribed time limit. In support of such contention, the petitioner relies on the decisions in *The Mayor Municipal Corporation vs. Govind Bajirao Navpute* (AIR 2020 SC 2019), *Commissioner of Income Tax- III vs. Panorama Builders Pvt. Ltd.* (2012 TAX.L.R.945), *Auto Creators vs. Union of India* (AIR ONLINE 2012 DEL 19) and *Deepak Krishna & Anr. vs. District Registrar, Ernakulam & Ors.* (AIR 2007 KERALA 257).

6. On behalf of the respondent authorities it is submitted that the prescribed time limit under section 54(7) of the Act is not mandatory but merely directory on a plain and meaningful reading. Section 54(7) of the Act is procedural in nature and the time limit of 60 days ought to be treated as merely directory. Rule 92 of the CGST Rules 2017 does not indicate any stipulated time period for rejection of a claim for refund. The only condition provided in the said Rule is that no rejection shall be made without granting an opportunity to the applicant of being heard. In support of such contention, the respondent relies on the decision in *Garbari Union Co-operative Agricultural Credit Society Limited & Anr. vs. Swapan Kumar Jana & Ors.* (1997) 1 CHN 189.

7. For convenience, the relevant provisions of the Act and Rules are set out below:

Section 54. Refund of tax.

(1) Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed:

Provided that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in 1 [such from and] manner as may be prescribed.

*(2) ****

(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:

Provided that no refund of unutilised input tax credit shall be allowed in cases other than--

(i) zero rated supplies made without payment of tax;

(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:

Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.

(4) The application shall be accompanied by--

(a) such documentary evidence as may be prescribed to establish that a refund is due to the applicant; and

(b) such documentary or other evidence (including the documents referred to in section 33) as the applicant may furnish to establish that the amount of tax and interest, if any, paid on such tax or any other amount paid in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such tax and interest had not been passed on to any other person: Provided that where the amount claimed as refund is less than two lakh rupees, it shall not be necessary for the applicant to furnish any documentary and other evidences but he may file a declaration, based on the documentary or other evidences available with him, certifying that the incidence of such tax and interest had not been passed on to any other person.

(5) If, on receipt of any such application, the proper officer is satisfied that the whole or part of the amount claimed as refund is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund referred to in section 57.

*(6) ****

(7) The proper officer shall issue the order under sub-section (5) within sixty days from the date of receipt of application complete in all respects.

*(8) ****

*(9) ****

*(10) ****

*(11) ****

(12) ***

(13) ***

(14) ***

Section 55. Refund in certain cases

The Government may, on the recommendations of the Council, by notification, specify any specialised agency of the United Nations Organisation or any Multilateral Financial Institution and Organisation notified under the United Nations (Privileges and Immunities) Act, 1947 (46 of 1947), Consulate or Embassy of foreign countries and any other person or class of persons as may be specified in this behalf, who shall, subject to such conditions and restrictions as may be prescribed, be entitled to claim a refund of taxes paid on the notified supplies of goods or services or both received by them.

Section 56. Interest on delayed refunds.

If any tax ordered to be refunded under sub-section (5) of section 54 to any applicant is not refunded within sixty days from the date of receipt of application under sub-section (1) of that section, interest at such rate not exceeding six per cent. as may be specified in the notification issued by the Government on the recommendations of the Council shall be payable in respect of such refund from the date immediately after the expiry of sixty days from the date of receipt of application under the said subsection till the date of refund of such tax:

Provided that where any claim of refund arises from an order passed by an adjudicating authority or Appellate Authority or Appellate Tribunal or court which has attained finality and the same is not refunded within sixty days from the date of receipt of application filed consequent to such order, interest at such rate not exceeding nine per cent. as may be notified by the Government on the recommendations of the Council shall be payable in respect of such refund from the date immediately after the expiry of sixty days from the date of receipt of application till the date of refund.

Explanation.--For the purposes of this section, where any order of refund is made by an Appellate Authority, Appellate Tribunal or any court against an order of the proper officer under sub-section (5) of section 54, the order passed by the Appellate Authority, Appellate Tribunal or by the court shall be deemed to be an order passed under the said sub-section (5).

Rule 89. Application for refund of tax, interest, penalty, fees or any other amount.

(1) Any person, except the persons covered under notification issued under section 55, claiming refund of 13[any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49 or] any tax, interest, penalty, fees or any other amount paid by him, other than refund of integrated tax paid on goods exported out of India, may file electronic cash ledger in accordance with the provisions of sub-section (6) of section 49 or 10[subject to the provisions of rule 10B,] an application electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

[**]**

[Provided that] *in respect of supplies to a Special Economic Zone unit or a Special Economic Zone developer, the application for refund shall be filed by the –*

(a) supplier of goods after such goods have been admitted in full in the Special Economic Zone for authorised operations, as endorsed by the specified officer of the Zone;

(b) supplier of services along with such evidence regarding receipt of services for authorised operations as endorsed by the specified officer of the Zone:

[Provided further that] in respect of supplies regarded as deemed exports, the application may be filed by, –

(a) the recipient of deemed export supplies; or

(b) the supplier of deemed export supplies in cases where the recipient does not avail of input tax credit on such supplies and furnishes an undertaking to the effect that the supplier may claim the refund]

Provided also that refund of any amount, after adjusting the tax payable by the applicant out of the advance tax deposited by him under section 27 at the time of registration, shall be claimed only after the last return required to be furnished by him has been so furnished.

[Explanation.]—For the purposes of this sub-rule, – “specified officer” means a “specified officer” or an “authorised officer” as defined under rule 2 of the Special Economic Zone Rules, 2006.]

(1A) Any person, claiming refund under section 77 of the Act of any tax paid by him, in respect of a transaction considered by him to be an intra-State supply, which is subsequently held to be an inter-State supply, may, before the expiry of a period of two years from the date of payment of the tax on the inter-State supply, file an application electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that the said application may, as regard to any payment of tax on inter-State supply before coming into force of this sub-rule, be filed before the expiry of a period of two years from the date on which this sub-rule comes into force.]

(2) ***

(3) ***

(4) ***

(5) ***

Rule 90. Acknowledgement.

(1) Where the application relates to a claim for refund from the electronic cash ledger, an acknowledgement in FORM GST RFD-02 shall be made available to the applicant through the common portal electronically, clearly indicating the date of filing of the claim for refund and the time period specified in sub-section (7) of section 54 shall be counted from such date of filing.

(2) The application for refund, other than claim for refund from electronic cash ledger, shall be forwarded to the proper officer who shall, within a period of fifteen days of filing of the said application, scrutinize the application for its completeness and where the application is found to be complete in terms of sub-rule (2), (3) and (4) of rule 89, an acknowledgement in FORM GST RFD-02 shall be made available to the

applicant through the common portal electronically, clearly indicating the date of filing of the claim for refund and the time period specified in sub-section (7) of section 54 shall be counted from such date of filing.

(3) Where any deficiencies are noticed, the proper officer shall communicate the deficiencies to the applicant in FORM GST RFD-03 through the common portal electronically, requiring him to file a fresh refund application after rectification of such deficiencies.

“Provided that the time period, from the date of filing of the refund claim in FORM GST RFD-01 till the date of communication of the deficiencies in FORM GST RFD-03 by the proper officer, shall be excluded from the period of two years as specified under sub-section(1) of Section 54, in respect of any such fresh refund claim filed by the applicant after rectification of the deficiencies.”;

(4) Where deficiencies have been communicated in FORM GST RFD-03 under the State Goods and Service Tax Rules, 2017, the same shall also deemed to have been communicated under this rule along with the deficiencies communicated under sub-rule (3).

(5) The applicant may, at any time before issuance of provisional refund sanction order in FORM GST RFD-04 or final refund sanction order in FORM GST RFD-06 or payment order in FORM GST RFD-05 or refund withhold order in FORM GST RFD-07 or notice in FORM GST RFD-08, in respect of any refund application filed in FORM GST RFD-01, withdraw the said application for refund by filing an application in FORM GST RFD-01W.

(6) On submission of application for withdrawal of refund in FORM GST RFD-01W, any amount debited by the applicant from electronic credit ledger or electronic cash ledger, as the case may be, while filing application for refund in FORM GST RFD-01, shall be credited back to the ledger from which such debit was made.”

Rule 92. Order sanctioning refund.-

(1)Where, upon examination of the application, the proper officer is satisfied that a refund under sub-section (5) of section 54 is due and payable to the applicant, he shall make an order in FORM GST RFD-06 sanctioning the amount of refund to which the applicant is entitled, mentioning therein the amount, if any, refunded to him on a provisional basis under sub-section (6) of section 54, amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable:

[(1A)Where, upon examination of the application of refund of any amount paid as tax other than the refund of tax paid on zero-rated supplies or deemed export, the proper officer is satisfied that a refund under sub-section (5) of section 54 of the Act is due and payable to the applicant, he shall make an order in FORM RFD-06 sanctioning the amount of refund to be paid, in cash, proportionate to the amount debited in cash against the total amount paid for discharging tax liability for the relevant period, mentioning therein the amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable and for the remaining amount which has been debited from the electronic credit ledger for making payment of such tax, the proper officer shall issue FORM GST PMT-03 recrediting the said amount as Input Tax Credit in electronic credit ledger.]

(2) Where the proper officer or the Commissioner is of the opinion that the amount of refund is liable to be withheld under the provisions of sub-section

(10) or, as the case may be, sub-section (11) of section 54, he shall pass an order in [Part A] of FORM GST RFD-07 informing him the reasons for withholding of such refund.

[Provided that where the proper officer or the Commissioner is satisfied that the refund is no longer liable to be withheld, he may pass an order for release of withheld refund in Part B of FORM GST RFD- 07.]

(3) Where the proper officer is satisfied, for reasons to be recorded in writing, that the whole or any part of the amount claimed as refund is not admissible or is not payable to the applicant, he shall issue a notice in FORM GST RFD-08 to the applicant, requiring him to furnish a reply in FORM GST RFD-09 within a period of fifteen days of the receipt of such notice and after considering the reply, make an order in FORM GST RFD-06 sanctioning the amount of refund in whole or part, or rejecting the said refund claim and the said order shall be made available to the applicant electronically and the provisions of sub-rule (1) shall, mutatis mutandis, apply to the extent refund is allowed:

Provided that no application for refund shall be rejected without giving the applicant an opportunity of being heard.

Rule 93. Credit of the amount of rejected refund claim.

(1) Where any deficiencies have been communicated under sub-rule (3) of rule 90, the amount debited under sub-rule (3) of rule 89 shall be re-credited to the electronic credit ledger.

(2) Where any amount claimed as refund is rejected under rule 92, either fully or partly, the amount debited, to the extent of rejection, shall be re-credited to the electronic credit ledger by an order made in FORM GST PMT-03.

Explanation.— For the purposes of this rule, a refund shall be deemed to be rejected, if the appeal is finally rejected or if the claimant gives an undertaking in writing to the proper officer that he shall not file an appeal.

Rule 94. Order sanctioning interest on delayed refunds.

1) Where any interest is due and payable to the applicant under section 56, the proper officer shall make an order along with a payment order in FORM GST RFD-05, specifying therein the amount of refund which is delayed, the period of delay for which interest is payable and the amount of interest payable, and such amount of interest shall be electronically credited to any of the bank accounts of the applicant mentioned in his registration particulars and as specified in the application for refund.

(2) The following periods shall not be included in the period of delay under sub-rule (1), namely:-

(a) any period of time beyond fifteen days of receipt of notice in FORM GST RFD-08 under sub-rule (3) of rule 92, that the applicant takes to-

- (i) furnish a reply in FORM GST RFD-09, or
- (ii) submit additional documents or reply; and

(b) any period of time taken either by the applicant for furnishing the correct details of the bank account to which the refund is to be credited or for validating the details of the bank account so furnished, where the amount of refund sanctioned could not be credited to the bank account furnished by the applicant.”

8. It is always a question of interpretation whether a provision in a statute is mandatory or directory. This depends upon the intent of the legislature. The intention of legislature is to be ascertained not only by the phraseology of the relevant provision, but also by the context, the subject matter and object of the relevant provision. "In ascertaining the real intention of the Legislature, the Court considers inter alia, the nature and the design of the statute and the consequences which follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of non-compliance with the provisions, the fact that non-compliance with the provisions is or is not visited by some penalty, the serious or the trivial consequences, that flow therefrom, and, above all, whether the object of the legislation would be defeated or furthered" (*State of U.P. vs. Babu Ram Upadhyay* AIR 1961 SC 751).
9. Ordinarily, the use of the term "shall" is intended to be mandatory but phraseology *per se* is not the sole determining factor. There are numerous cases where the word "shall" has been construed as merely directory. Of course, the term raises a presumption that a particular provision is imperative, but such *prima facie* inference is rebuttable by other considerations such as the object, scope and consequences of such enactment. In *C Bright vs District Collector and Ors.* (2021) 2 SCC 392 it has been held as follows:

8. *A well-settled rule of interpretation of the statutes is that the use of the word "shall" in a statute, does not necessarily mean*

that in every case it is mandatory that unless the words of the statute are literally followed, the proceeding or the outcome of the proceeding, would be invalid. It is not always correct to say that if the word “may” has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid [State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912] and that when a statute uses the word “shall”, prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute [State of U.P. v. Babu Ram Upadhyaya, AIR 1961 SC 751]. The principle of literal construction of the statute alone in all circumstances without examining the context and scheme of the statute may not serve the purpose of the statute [RBI v. Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424].

10. It also requires to be examined, that where a statute imposes a public duty and lays down the manner in which and the time within which a duty shall be performed, injustice or inconvenience resulting from such rigid adherence to such interpretation must be considered to hold such provisions directory.
11. In view of the above and on a reading of section 54 of the Act, it appears that the term *shall* used in the section is directory in nature since any delay beyond the prescribed period of time in cases where a refund has been ordered is remedied by section 56 of the Act which provides for interest on delayed refunds. On the other hand, failure to pass any order within the specific period of time does not defeat, nullify nor prejudice the purpose or object behind enactment of the section. The injustice and inconvenience resulting from such rigid

adherence to the statutory prescription is also a relevant factor in holding that the above provision is merely directory. Any other construction would defeat the object of the section.

12. Significantly, the above period in consideration being the date of refund application and 24 February 2022 being the date of passing of the order for rejection was governed by the Notification dated 5 July, 2022 issued by the Department which gave an exemption to all tax payers for filing belated refund claims and excluded the period from March 1, 2020 to 28 February, 2022. An extension of time was also granted by the Goods and Service Tax Department for passing orders under section 73 and section 74 of the Act. Admittedly, the given period witnessed the peaks of the Pandemic and effects of the Omicron wave across the world. By an order dated 10 January 2022, passed in Writ Petition (C) No 3 of 2020, the Hon'ble Supreme Court had also clarified that the period from 15 March 2020 till 28 February 2022 stood excluded for the purposes of the laws of limitation as may have been prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings. In view of the above, the delay of two days caused in acknowledging the application and consequently in passing the impugned order of rejection dated 24 February 2022 stood excluded.

13. Moreover, section 54(7) read with section 56 is only applicable in cases where the proper officer is satisfied that the person applying for refund has fulfilled all prescribed conditions before making such a demand and the claim for refund is admissible. In this case, the petitioner failed to justify the objections raised in the show cause

notice and on the last day of the prescribed period, prayed for an extension of time to reply to the same. The time period could not have been extended by the authority since the given period as prescribed in the Rule 92 of the Rules is mandatory and the authority had no power to extend the same [*Odeon Builders Pvt Ltd vs NBCC (India) Limited, AIR ONLINE 2019 DEL 2036*]. Despite the petitioner being provided with ample opportunity of being heard, as has been prescribed under the Rule, the petitioner failed to comply with the mandatory time period to reply and an *ex parte* order came to be passed by the respondent no 1 rejecting the claim for refund of the petitioner.

14. The impugned orders are well reasoned and have been passed after taking into account all the relevant considerations. There is no procedural infirmity nor contravention of any law nor erroneous exercise of jurisdiction in passing either of the impugned orders. There is also nothing on merit which the petitioner has been able to demonstrate warranting any interference with the impugned orders.
15. All the decisions relied on by the petitioner are distinguishable and inapposite to the facts of this case. In *Mayor Municipal Corporation vs. Govind Bajirao Navpute (AIR 2020 SC 2019)*, the time period prescribed for preparation of a development plan was held to be mandatory in view of the express language and interpretation of section 26 of the Maharashtra Regional and Town Planning Act, 1966. Similarly, in *Commissioner of Income Tax-III vs. Panorama Builders Pvt. Ltd. 2012 Tax.L.R.945*, there was a delay of approximately 20 months from the date of expiry of the stipulated mandatory period in issuing the notice under section 143(2) of the Income Tax Act, 1961.

16. In view of the above, there are no grounds warranting any interference with either of the impugned orders.

17. WPA No. 1905 of 2023 stands dismissed. However, there shall be no order as to costs.

(RAVI KRISHAN KAPUR, J.)