

OD-18

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)

ORIGINAL SIDE

CEXA/13/2025
IA No. GA/1/2025

IPSEN TECHNOLOGIES PRIVATE LIMITED

VS

COMMISSIONER OF CGST AND CX KOLKATA SOUTH COMMISSIONERATE

BEFORE :

THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM

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HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)

DATE : 21st May, 2025.

Appearance:

Mr. Dipankar Majumdar, Adv.

Mr. Sarangam Chakraborty, Adv.

Ms. Deblina Chattaraj, Adv.

Ms. Aishi Pal, Adv.

...for the appellant.

Mr. Bhaskar Prosad Banerjee, Adv.

Mr. Kaustav Kanti Maity, Adv.

... for the respondent.

The Court : This appeal has been filed by the assessee under Section 35G of the Central Excise Act, 1944 (the Act) challenging the order passed by the learned Customs, Excise & Service Tax Appellate Tribunal (Tribunal), Eastern Zonal Bench, Kolkata in Service Tax Appeal No. 75798 of 2024 dated 04.09.2024 and the rectification order in Service Tax (ROM) Application No.75650 of 2024 dated 11.02.2025.

The assessee has raised the following substantial questions of law for consideration:

- I) *Whether the Learned Tribunal erred in law as well as in fact in not appreciating that in cases where refund of tax is sought for tax paid under Reverse Charge Mechanism the question of unjust enrichment does not arise ?*
- II) *Whether the Learned Tribunal erred in law as well as facts by expanding the scope of dispute before itself in respect of issues, which were never raised in the underlying show cause notice ?*
- III) *Whether the Learned Tribunal erred in law as well as fact by reminding the case of the appellant to the adjudicating Authority for determination of the issued of is enrichment, even though the refund prayed by the appellant was allowed ?*
- IV) *Whether the Learned Tribunal erred in law as well as fact while passing the rectification order by disallowing the prayer of the appellant for modification of the operative portion of the order, despite recording of existence of factual errors at the time of passing the final order ?*

We have heard Mr. Dipankar Majumdar, learned Counsel appearing for the appellant/assessee and Mr. Bhaskar Prosad Banerjee, learned standing Counsel assisted by Mr. Kaustav Kanti Maity, learned Advocate for the respondent/revenue.

The assessee preferred the appeal before the Tribunal challenging the order passed by the Commissioner of CGST & CX, Kolkata, Appeal-I dated 06.12.2023 by which the Commissioner of Appeals affirmed the Order-in-original dated 28.02.2019.

By the said Order-in-original, the Adjudicating authority rejected the appellant's claim for refund for violation and mis-interpretation of Circular No. 207/5/2017- Service Tax dated 28th September, 2017 read with Section 142(9)(b) of CGST Act, 2017, Rule 7 of the Point of Taxation Rules, 2011 and

Rule 7B of the Service Tax Rules, 1994. The provision envisaged under Section 174 of the CGST Act, 2017 was also made applicable to the said order. The Appellate authority concurred with the view taken by the Adjudicating authority and rejected the appeal. The correctness of these orders was questioned before the learned Tribunal.

The assessee relied upon Circular No.341/34/2010-TRU dated 31st March, 2011 where the applicable point of taxation has been illustrated by way of an example in respect of cases where part payments were made for receipt of services. The assessee also contended that the Circular dated 28th September, 2017 was issued to clarify the position as to the details of credit arising out of service tax paid under reverse charge mechanism after 30th June, 2017 would be reflected in the service tax return in the transitional forms under GST. Further, the assessee contended that the service tax paid under reverse charge mechanism was eligible credit and the same was indefeasible in nature and in this regard placed reliance on the decision of the Hon'ble Supreme Court in the case of Collector of Central Excise, Pune vs. Dai Ichi Karkaria Ltd., 1999 (112) ELT 353 (SC). Further, the assessee contended that they are eligible for refund of CENVAT Credit as claimed in its refund application in terms of Section 142(9)(b) of the CGST Act, which makes it apparent that upon fulfilling the conditions listed hereunder the amount which is in the nature of admissible CENVAT Credit or which is refundable, the same becomes refundable in cash under the existing law notwithstanding anything to the contrary contained in the said law other than the provisions of sub-Section 2 of Section 1B of the Central Excise Act, 1944. An alternate submission was also made that their refund claim is also

eligible to be allowed in terms of Section 142(3) of the CGST Act. The grounds canvassed by the assessee did not find favour with the Appellate Authority who rejected the appeal which was put to challenge before the learned Tribunal. The learned Tribunal accepted the case of the assessee and in doing so followed the decision of the co-ordinate Bench of the Tribunal in M/s. Circor Flow Technologies India Private Ltd. vs. The Principal Commissioner of GST & Central Excise, Coimbatore [(2022-VIL-15-CESTAT-CHE-ST)];, and OSI Systems Pvt. Ltd. vs. CCT Rangareddy [2022 (9) TMI 801-CESTAT Hyderabad]. In the order passed by the learned Tribunal dated 4.9.2024, the relevant paragraph of the above two judgments were extracted and agreed with the contentions raised by the appellant that the decision in OSI Systems Pvt. Ltd. would be applicable to the assessee's case. But however, in the penultimate paragraph of the order dated 4.9.2024, the learned Tribunal while setting aside the order and allowing the appeal, remanded the matter to the Adjudicating authority for the purpose of considering whether there is a bar of unjust enrichment. To be noted that this plea of unjust enrichment was never the case of the department as could be seen from the show cause notice as well as the order of admission and the order passed by the Appellate Authority. The mistake occurred on account of the fact that while extracting the decision in the case of OSI Systems Pvt. Ltd., the word "no" before the word "unjust enrichment" was omitted. Consequently, the Tribunal appears to have been of the view that the only point to be considered is whether the word "unjust enrichment" is applicable. Having noted the error, the assessee filed an application for rectification of the order dated 4.9.2024. The applicant pointed out two

errors which are apparent on the face of the order passed by the learned Tribunal dated 4.9.2024. The first being that the Tribunal has observed that the assessee paid the license fees on 17th March, 2017 when the erstwhile provisions of service tax was in force but reversed the credit on 26th September and October, 2017. This finding, according to the assessee, was erroneous since the service tax paid subsequently to the implementation of GST of which refund was sought for was paid by the assessee under reverse charge mechanism and therefore, what was recorded by the learned Tribunal was factually incorrect. The next error which was pointed out was the omission of the word “no” in the extracted portion of the decision in the case of OSI Systems Pvt. Ltd. The said application for rectification was considered by the Tribunal and the case of the assessee was accepted and the word “no” was inserted in paragraph 3.1 of the order passed by the learned Tribunal dated 11.2.2025. In the rectification application another prayer was made by the assessee to grant refund without subjecting the assessee for further verification by the adjudicating authority. This prayer was rejected by the learned Tribunal in paragraph 4 of the order dated 11.2.2025. Therefore, the assessee is on appeal.

The learned Tribunal having accepted the fact that there is an error apparent on the face of the order inasmuch as the word “no” was missed out while extracting the relevant portion of the decision in the case of OSI Systems Pvt. Ltd., the Tribunal ought to have noted that the consequence thereof would be to allow the appeal of the assessee and direct the Adjudicating authority to grant refund within a time-frame. In fact, the factual position in OSI Systems Pvt. Ltd., is identical to that of the case of

the assessee. Therefore, the conclusion of the learned Tribunal that the assessee sought for modification of the earlier order dated 4.9.2024 is incorrect since if the word “no” is inserted in the appropriate place then the judgment in OSI Systems Pvt. Ltd. will fully apply to the facts and circumstances of the assessee’s case and consequently, they would be entitled for refund.

In the light of the above, the appeal filed by the assessee is allowed and the order passed by the learned Tribunal is set aside and the substantial questions of law are answered in favour of the assessee and the Adjudicating authority is directed to grant refund within a period of 60(sixty) days from the date of receipt of the server copy of this order.

The stay petition (GA/1/2025) also stands allowed.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(CHAITALI CHATTERJEE (DAS), J.)