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

% *Date of Decision: 09.08.2023*

+ **W.P.(C) 871/2022 and CM NO. 2492/2022**

NATIONAL INTERNET EXCHANGE
OF INDIA

..... Petitioner

Through: Ms. Charanya Lakshmi
Kumaran, Mr. Karan Sachdev,
Mr. Kunal Kapoor and Mr.
Agrim Arora, Advs.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. R. Ramachandran, Senior
Standing Counsel for R-1 and
5.
Mr. Rajeev Aggarwal, ASC and
Mr. Rishikesh Kumar, ASC for
R-2, 3 & 4.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The National Internet Exchange of India (hereafter '**the petitioner**') has filed the present writ petition impugning an order dated 13.04.2021 (hereafter '**the impugned order**'), passed by respondent no.3 (Assistant Commissioner, Department of Trade and Taxes) whereby the petitioner's claim for refund of Integrated Goods and Services Tax (hereafter '**IGST**') in respect of zero rated supplies,

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By: DUSHYANT
RAWAL
Signing Date: 24.08.2023

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was rejected on the ground that the petitioner's application was filed beyond the period stipulated under Section 54(1) of the Central Goods and Services Tax Act, 2017 (hereafter '**the CGST Act**'). The petitioner assails rejection of its claim on the ground that its first application seeking refund was filed within the prescribed period. Its subsequent applications were filed online to clarify the deficiencies and queries raised by the concerned officer; therefore, it cannot be considered as a fresh application for the purposes of determining whether the claim was filed within the period of limitation.

2. In terms of Paragraph 10 of Circular No. 125/44/2019-GST dated 18.11.2019 (hereafter '**the impugned Circular**') once a deficiency memo is issued, the application for refund would not be processed and the taxpayer is required to file a fresh application. Further in terms of paragraph 12 of the impugned Circular, the fresh application is also required to be filed within the stipulated period of two years from the relevant date. Thus, notwithstanding that the taxpayer's first application was within the period of limitation, in terms of the impugned Circular, the taxpayer's claim for refund is liable to be rejected as barred by limitation, if the fresh application, pursuant to a deficiency memo, is filed after the period of limitation as specified under Section 54 of the CGST Act.

3. The petitioner assails the impugned Circular as well as Rule 90(3) of the Central Goods and Services Tax Rules, 2017 (hereafter '**the CGST Rules**') as unconstitutional and *ultra vires* the CGST Act.



Factual Context

4. The petitioner is a non-profit company registered in the State of Delhi for the purposes of Goods and Services Tax and has been assigned, GSTIN 07AABCN9308A1ZT. The petitioner is, *inter alia*, engaged in the export of internet services, peering of internet service providers and routing of domestic internet traffic in India. The petitioner additionally manages the .IN registry which offers the .IN domain name.

5. On 17.10.2019, the petitioner filed a claim for refund of ₹51,28,263/- being the IGST paid on zero rated supplies for the month of October 2017. The said claim for refund was made in terms of Section 54 of the CGST Act read with Rule 89 of the CGST Rules.

6. In terms of Section 16(3)(b) of the Integrated Goods and Services Act, 2017 (hereafter '**IGST Act**') as in force prior to the enactment of the Finance Act 2021, the petitioner was eligible to claim refund of the tax paid on the export of its services. In terms of Section 54 of the CGST Act, the petitioner was required to file its refund application within two years from the date of the invoice, which in the present case is 31.10.2017.

7. The petitioner was issued a deficiency memo (No. ZA071019001884M) dated 21.10.2019 (hereafter '**deficiency memo no.1**') by respondent no.4 (Sales Tax Officer Class II/AVATO) in respect of its refund claim, pointing out certain defects. The petitioner was advised to file a fresh refund application after the rectification of



the said defects.

8. Thereafter, the petitioner re-filed the refund application as a fresh refund application on 31.10.2019. The petitioner subsequently received another deficiency memo (No. ZA071119001459L) dated 11.11.2019 (hereafter '**deficiency memo no.2**') issued by respondent no.3 pointing out certain mismatch in documents and seeking further information regarding the petitioner's claim for refund. The petitioner was once again advised to file a fresh refund application after the rectification of defects.

9. The petitioner re-filed a its refund application as a fresh refund application on 20.02.2020. However, respondent no.3 once again issued another deficiency memo (No. ZD070920006606J) dated 14.09.2020 (hereafter '**deficiency memo no.3**') raising a fresh set of queries and requiring documents to be uploaded. These were termed as deficiencies. Pursuant to the said deficiency memo no.3, the petitioner re-filed its refund application for a fourth time on 02.11.2020.

10. Respondent no.2 (Additional Commissioner) thereafter issued a show cause notice dated 02.03.2021 (hereafter '**the impugned SCN**') calling upon the petitioner to show cause as to why its refund application should not be rejected on the ground that it was filed after the prescribed period of two years. The petitioner filed a reply dated 12.03.2021 to the said impugned SCN stating that as per the statutory provisions its claim for refund was filed within the two-year period as



prescribed, and thus was liable to be processed. Respondent no.2 thereafter passed the impugned order, relying upon paragraph 12 of the impugned Circular.

Reasons and conclusion

11. The provisions for refund are contained in Chapter 11 of the CGST Act. Sub-section (1) of Section 54 of the CGST Act provides that an application for refund shall be made before the expiry of two years from the relevant date. Sub-section (4) to Section 54 of the CGST Act provides that an application shall be accompanied by such documentary evidence as may be prescribed.

The relevant extract of Section 54 of the CGST Act – Sub-sections (1), (4), (7) and (8) – are set out below:

“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 the return furnished under section 39 in such manner as may be prescribed.

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(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.

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(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) Notwithstanding anything contained in sub-section (5), the refundable amount shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to—

(a) refund of tax paid on export of goods or services or both or on inputs or input services used in making such exports;

(b) refund of unutilised input tax credit under sub-section (3);

(c) refund of tax paid on a supply which is not provided, either wholly or partially, and for which invoice has not been issued, or where a refund voucher has been issued;

(d) refund of tax in pursuance of section 77;



(e) the tax and interest, if any, or any other amount paid by the applicant, if he had not passed on the incidence of such tax and interest to any other person; or

(f) the tax or interest borne by such other class of applicants as the Government may, on the recommendations of the Council, by notification, specify.

(8A) The Government may disburse the refund of the State tax in such manner as may be prescribed.”

12. The period of limitation for making an application is prescribed under Section 54(1) of the CGST Act. In terms of Sub-section (8) read with Sub-section (7) of Section 54 of the CGST Act, if the proper officer is satisfied that the amount claimed is refundable, he is required to deposit the same in a fund referred to in Section 57 of the CGST Act or be paid to the applicant, if the condition of Sub-section (8) of Section 54 of the CGST Act are satisfied.

13. In terms of Section 54(1) of the CGST Act, an application for refund is required to be made within a period of two years from the relevant date, which is defined in Explanation (2) to Section 54 of the CGST Act.

14. The application is required to be made in such form and manner as may be prescribed. In terms of Clause (a) of Sub-section (4) of Section 54 of the CGST Act, the application is also required to be accompanied by such documentary evidence as may be prescribed.

15. The form and manner of making an application for refund is



prescribed under the CGST Rules. Rule 89 of the CGST Rules provides that an application for refund shall be made electronically in form GST RFD-01 through the common portal either directly or through a Facilitation Centre notified by the Commissioner. In accordance with the provisions of Section 49(6) of the CGST Act, an application for refund relating to the balance in the electronic cash register may be made through a return furnished for the relevant tax period in Form GSTR-3 or Form GSTR-4 or Form GSTR-7 as applicable.

16. Sub-rule (2) of Rule 89 of the CGST Rules expressly prescribes the documentary evidence as applicable, which is required to accompany the application of refund, to establish that refund as claimed is refundable. Sub-rule (2) of Rule 89 of the CGST Rules is set out below:

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

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(2) The application under sub-rule (1) shall be accompanied by any of the following documentary evidences in Annexure 1 in **Form GST RFD-01**, as applicable, to establish that a refund is due to the applicant, namely:-

(a) the reference number of the order and a copy of the order passed by the proper officer or an appellate authority or Appellate Tribunal or court resulting in such refund or reference number of the payment of the amount specified in subsection (6) of section 107 and sub-section (8) of section 112



claimed as refund;

(b) a statement containing the number and date of shipping bills or bills of export and the number and the date of the relevant export invoices, in a case where the refund is on account of export of goods;

(c) a statement containing the number and date of invoices and the relevant Bank Realisation Certificates or Foreign Inward Remittance Certificates, as the case may be, in a case where the refund is on account of the export of services;

(d) a statement containing the number and date of invoices as provided in rule 46 along with the evidence regarding the endorsement specified in the second proviso to sub-rule (1) in the case of the supply of goods made to a Special Economic Zone unit or a Special Economic Zone developer;

(e) a statement containing the number and date of invoices, the evidence regarding the endorsement specified in the second proviso to sub-rule (1) and the details of payment, along with the proof thereof, made by the recipient to the supplier for authorised operations as defined under the Special Economic Zone Act, 2005, in a case where the refund is on account of supply of services made to a Special Economic Zone unit or a Special Economic Zone developer;

(f) a declaration to the effect that the Special Economic Zone unit or the Special Economic Zone developer has not availed the input tax credit of the tax paid by the supplier of goods or services or both, in a case where the refund is on account of supply of goods or services made to a Special Economic Zone unit or a Special Economic Zone developer;



(g) a statement containing the number and date of invoices along with such other evidence as may be notified in this behalf, in a case where the refund is on account of deemed exports;

(h) a statement containing the number and the date of the invoices received and issued during a tax period in a case where the claim pertains to refund of any unutilised input tax credit under sub-section (3) of section 54 where the credit has accumulated on account of the rate of tax on the inputs being higher than the rate of tax on output supplies, other than nil-rated or fully exempt supplies;

(i) the reference number of the final assessment order and a copy of the said order in a case where the refund arises on account of the finalisation of provisional assessment;

(j) a statement showing the details of transactions considered as intra-State supply but which is subsequently held to be inter-State supply;

(k) a statement showing the details of the amount of claim on account of excess payment of tax;

(l) a declaration to the effect that the incidence of tax, interest or any other amount claimed as refund has not been passed on to any other person, in a case where the amount of refund claimed does not exceed two lakh rupees:

Provided that a declaration is not required to be furnished in respect of the cases covered under clause (a) or clause (b) or clause (c) or clause (d) or clause (f) of sub-section (8) of section 54;

(m) a Certificate in Annexure 2 of FORM GST RFD-01 issued by a chartered accountant or a cost accountant to the effect that the incidence of tax,



interest or any other amount claimed as refund has not been passed on to any other person, in a case where the amount of refund claimed exceeds two lakh rupees:

Provided that a certificate is not required to be furnished in respect of cases covered under clause (a) or clause (b) or clause (c) or clause (d) or clause (f) of subsection (8) of section 54;

Explanation.– For the purposes of this rule-

- (i) in case of refunds referred to in clause (c) of sub-section (8) of section 54, the expression “invoice” means invoice conforming to the provisions contained in section 31;
- (ii) where the amount of tax has been recovered from the recipient, it shall be deemed that the incidence of tax has been passed on to the ultimate consumer.”

17. Rule 90 of the CGST Rules provides that the acknowledgement of an application under Rule 90 shall be in Form GST RFD-02. If the application for refund is complete in terms of Sub-rule (2), (3) and (4) of Rule 89 of the CGST Rules, the acknowledgement is required to be issued in Form GST RFD-02 and the period for limitation is required to be counted from such date of filing. Sub-rule (3) of Rule 90 of the CGST Rules provides that where deficiencies are noted, the same are required to be communicated to the applicant in Form GST RFD-03 through common portal. In such cases, the applicant would be required to file a fresh application after rectification of deficiencies. Sub-rules (1), (2) and (3) of Rule 90 of the CGST Rules are set out below:



“**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.”

18. It is apparent from the above that once an application is complete in terms of Sub-rule (2), (3) and (4) of Rule 89 of the CGST Rules, the same is necessarily required to be accepted.

19. An application can be rejected as deficient only where any deficiencies are noted. The contextual reading of Sub-rule (3) with Sub-rule (2) of Rule 90 of the CGST Rules, indicates that the deficiencies referred to in Sub-rule (2) of Rule 90 of the CGST Rules



are those that render an application incomplete in terms of Sub-rules (2), (3) and (4) of Rule 89 as stipulated in Sub-rule (2) of Rule 90. Thus, if an application is complete in terms of Sub-rule (2), (3) and (4) of Rule 89 of the CGST Rules, the same cannot be rejected, relegating the taxpayer to file afresh. In any view of the matter, the period of processing the said application under Sub-section (7) of Section 54 of the CGST Act, is required to be counted from the said date.

20. However, notwithstanding the fact that the application for refund is complete inasmuch as it is accompanied by the documents as specified in Sub-rule (2) of Rule 89 of the CGST Rules, the proper officer may withhold the processing of refund, if he is not completely satisfied that the same is refundable to the taxpayer. In such circumstances, where the proper officer requires to further verify the claim or is unable to process it on account of discrepancies noticed by him, he is required to issue notice in Form GST RFD-08 in terms of Sub-rule (5) of Rule 90 of the CGST Rules.

21. In this case, there is no dispute that the petitioner's application for refund dated 30.01.2019 was accompanied by the documents as prescribed under Rule 89(2) of the CGST Rules. However, the petitioner's application was not processed as the proper officer had noticed certain discrepancies and required certain clarifications. Deficiency memo no.2 dated 11.11.2019 setting out the description of the deficiencies is relevant and is reproduced below:



“S. No.	Description
1.	It has been noticed that in most of the cases value/amount as indicated in the FIRC's against the corresponding export invoices as reflected in statement 2 (as uploaded at the module along with refund application) does not tally. Therefore, tax period is required to reconcile the differences noticed, export invoices wise vis – a- vis FIRC'S.
2.	The copies of export invoices not uploaded in order to ascertain and co relate the correct particulars viz nature of services supplied and value thereof.
3.	The taxpayer has not uploaded the GST-RFD-01A for the tax period of October 2017-18 (tax period) for which refund is being claimed, in the absence of same calculation of refund amount claimed could not be verified.
4.	The tax period has indicated 54 nos. of record of export invoices in the GSTR-01 whereas in the statement 2 particulars of all the 54 export invoices have not been mentioned.
5.	In GSTR-3B for the tax period/ month of October-2017-18, in table 3.1(B) total turnover of outward taxable supplies (zero rated) shown to be of nil value whereas in the table 6A GSTR-01 total taxable value of export invoices is of Rs. 28906700/-. The taxpayer is required to clarify the above mentioned discrepancy.
6.	In the table 6 of GSTR-3B, computation of tax is against the total taxable value of Rs. 51267994/- only which happens to be the declared outward taxable supplies (other than zero rated) as per GSTR-3B. The aforesaid amount does not includes the turnover of zero rated supplies. The taxpayer is required to



	furnish a clarification in this regard.
7.	On perusal of copies of FIRC's uploaded it has been noticed that some of them has been issued for the purpose of domain registration fees, the taxpayer needs to clarify that how such FIRC's are related to receipt of foreign exchange.
8.	On perusal of particulars of FIRC's as mentioned in STATEMENT 2, it has been noticed that in some cases date of FIRC's is prior to the month of October-2017, i.e. period for which refund has been claimed.
9.	The taxpayer has claimed eligible ITC in the GSTR 3B for the month of October-2017 under the head of IGST, CGST and SGST for an amount of Rs.19,29,550/- Rs.4,88,903/- and Rs.4,88,903/- respectively whereas as per the auto populated GSTR 2A, the ITC under the head of IGST, CGST and SGST is Rs.1,17,472/-, Rs.2,94,797/-, Rs.2,94,797/- respectively. The taxpayer is required to clarify the discrepancies/ mismatch noticed in this regard.
10.	The taxpayer is required to maintain records as prescribed under section 35 of the GST Act 2017, the following records including copy of bank statement indicating payments made on account of purchases and payment received on account of out ward supplies made, books of accounts in respect of inward and outward supply of goods/ Services, stock of goods, delivery challan, receipt vouchers, payment vouchers, advances received, advances paid, purchase ledger sales ledger, credit note and debit note are required for the period under consideration in order to verify the particulars as indicated in GSTR-3B, GSTR-01 and GST-RFD-01A and other documents/ declarations filed by the applicant, in order to clarify the



	discrepancies noticed and as discussed above.
11.	The taxpayer has not filed the declaration regarding that refund of ITC claimed in the application does not include ITC availed on goods or services used for making nil rated or fully exempt supplies.
12.	The taxpayer has not filed an undertaking to the effect that amount of refund claimed is same in both RFD 01 A and acknowledgement in the same and has been debited in electronic credit ledger on the date of claim.
13.	The taxpayer has not filed information about any demand which had not been stayed and is pending.
14.	The taxpayer has not filed an undertaking to the effect that the required information in GSTR-3B, GSTR-1, GSTR RFD-01A has been furnished correctly.
15.	The taxpayer has not filed trading account for the relevant period i.e. for the month of Oct-2017.
16.	The taxpayer has not filed proof of receipt and delivery of goods/ services.
17.	The taxpayer has not filed any other document that verify transition or entry in any books of account.
18.	The taxpayer has not filed Copy of purchase orders issued by the foreign buyers.
19.	The taxpayer has not filed marked copy of bank statement to indicate making of payment against purchases/ supplies received and receipt of payment against exports.
20.	The taxpayer has not filed a declaration that no refund has already been claimed against relevant invoices.
21.	The taxpayer has not filed declaration regarding not availing of duty draw back in respect of goods/ services exported.



22.	The taxpayer has not filed declaration regarding 91(1) of CGST Rules, 2017.”
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22. It is clear from the deficiencies as mentioned that the proper officer had noticed certain discrepancies in the documents. In addition, he also required the petitioner to provide certain documents in order to verify its claims for refund. It is also apparent that some of the documents demanded were not relevant as the petitioner’s claim was for refund of IGST and not unutilised ITC.

23. The nature of the deficiencies as set out in deficiency memo no.2 clearly indicate that the application filed by the petitioner was not incomplete in terms of Rule 89(2) of the CGST Rules. Sub-rules (3) and (4) of Rule 89 of the CGST Rules are not applicable in the facts of the present case. The petitioner had, in terms of Clause (c) of Sub-rule (2) of Rule 89 of the CGST Rules, submitted a statement containing the number and date of invoices and the relevant Bank Realisation Certificates/Foreign Inward Remittance Certificates. It was also accompanied by the necessary declaration as specified.

24. In view of the above, the application for refund filed by the petitioner on 31.10.2019 could not be ignored or disregarded.

25. As noted above, in terms of Section 54(1) of the CGST Act, an application is required to be made in the prescribed form and manner before two years from the relevant date. It is clear that the petitioner had complied with the said requirement inasmuch as it had filed an application for refund on 31.10.2019 in the “form and manner” as



prescribed in the CGST Act and the CGST Rules. Thus, in terms of Section 54(1) of the CGST Act, the period of limitation would stop running notwithstanding that the proper officer required further documents or material to satisfy himself that the refund claimed was due to the petitioner.

26. This Court in an earlier decision in *Bharat Sanchar Nigam Limited v. Union of India & Ors.*: 2023:DHC:2482-DB and in similar circumstances held as under:

“28. We are of the view that Rule 90(3) cannot be applied in the manner as sought to be done by the Adjudicating Authority. Merely because certain other documents or clarifications are sought by way of issuing a Deficiency Memo, the same will not render the application filed by a taxpayer as *non est*.

29. If the application filed is not deficient in material particulars, it cannot be treated as *non est*. If it is accompanied by the “*documentary evidences*” as mentioned in Rule 89(2) of the Rules, it cannot be ignored for the purposes of limitation. The limitation would necessarily stop on filing the said application. This is not to say that the information disclosed may not warrant further clarification, however, that by itself cannot lead to the conclusion that the application is required to be treated as *non est* for the purposes of Section 54 of the CGST Act. It is erroneous to assume that the application, which is accompanied by the documents as specified under Rule 89(2) of the Rules, is required to be treated as complete only after the taxpayer furnishes the clarification of further documents as may be required by the proper officer and that too from the date such clarification is issued.”



27. Mr Ramachandran, learned counsel appearing for the Revenue rightly submits that the present case is covered by the decision in the case of *Bharat Sanchar Nigam Limited v. Union of India & Ors. (supra)* and thus, it is not necessary to examine the broader challenge to the *vires* of Rule 90(3) of the CGST Rules or paragraph 12 of the impugned Circular.

28. The learned counsel appearing for the petitioner also submits that he does not wish to press the aforesaid challenge in the present case.

29. In view of the above, the present petition is allowed and the impugned order dated 13.04.2022 rejecting the petitioner's application for refund on the ground of limitation is rejected. The petition and the application for refund is restored for the consideration of the proper officer, afresh on merits.

30. The petition is allowed in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

AUGUST 9, 2023
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