

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.03.2021

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. Nos.10969, 10972 and 10978 of 2020

and

WMP. Nos.13335, 13339 and 13343 of 2020

M/s.Chaizup Beverages LLP,
Represented by its Authorized Representative,
Mr.Shiv Kumar Agarwal,
No.2/280, Pannimadai Thudiyalur,
Coimbatore – 641 017.

...Petitioner in the above W.Ps

Vs

1.The Assistant Commissioner,
Coimbatore I Division,
O/o.The Assistant Commissioner of GST &
Central Excise, 1441, Elgi Equipments
building, Ground Floor, Trichy Road,
Coimbatore 641 018.

2. Additional Commissioner of GST
& Central Excise Appeals,
No.6/7, A.T.D. Street, Race Course
Road, Coimbatore – 641 018.

...Respondents in the above W.Ps

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to
Writ of **Certiorari** to call for the records pertaining to impugned order-in-appeal

Nos.05/2020, 06/2020 and 07/2020 dated 12.05.2020 passed by the 2nd respondent and quash the same.

For Petitioner : Mr.Hari Radhakrishnan
For Respondents : Mr.M.Santhanaraman,
Senior Standing Counsel

ORDER

These Writ Petitions challenge appellate orders dated 12.05.2020 passed by R2 confirming the rejection of the refunds claimed by the petitioner. The rejection is confirmed taking note of paragraph 2.5 of Board's Circular No.37/18-Customs dated 09.10.2018, on the ground that there has been an excess claim of duty draw back by the petitioner, as per which, they have renounced their claim for Input Tax Credit (ITC).

2. Though the Writ Petitions challenge orders for the months of July, August and September, 2017, the petitioner does not pursue its claim for the month of July, 2017 and files a memo dated 26.03.2021 requesting that the Writ Petition be closed as withdrawn. Accordingly, W.P.No.10969 of 2020 pertaining to appellate order

dated 12.05.2020 in Appeal No.05/2020 for the month of July, 2017 is dismissed as withdrawn.

3. As regards the Writ Petitions for the months of August and September, 2017, the petitioner had admittedly claimed excess draw back. The petitioner is an exporter of tea and had engaged in export transactions without payment of Integrated Goods and Service Tax (IGST). According to the petitioner, export of goods and services are to be treated as zero rated supplies in terms of Section 16 of the Goods and Service Tax Act, 2017 (in short 'Act'). A claim for draw back in terms of the provisions of the Customs Act, 1962 had been made. The claim was sanctioned and the petitioner has received the draw back.

4. Despite the transactions being categorised as zero rated supplies, the petitioner remitted IGST, Central Goods and Service Tax (CGST) and State Goods and Service Tax (SGST) on the purchase of tea and such tax was credited in its electronic credit ledger. The petitioner thereafter filed an application for refund of the amounts taking advantage of Section 54 of the Act.

5. 90% of the claim was sanctioned on a provisional basis, but was followed by a show cause notice dated 02.04.2018, since R1, the Assessing Authority, was of

the view that the refund was liable to be rejected in entirety invoking the third proviso to Section 54(3) of the Act and on the basis that the petitioner had availed draw back at a higher rate than applicable. Thus the claim was proposed to be rejected in full and the amount provisionally sanctioned was proposed to be recovered as well.

6. Despite replies of the petitioner contending otherwise, orders of rejection came to be passed, that have been confirmed vide the impugned appellate orders. In the course of the appeal hearing, the petitioner took an alternate plea before R2 for sanction of refund after setting off of the draw back already claimed. This was also rejected. Though second appeal is provided before the Goods and Services Tax Appellate Tribunal, these Writ Petitions are maintainable for the reason that the Tribunal is yet to be constituted.

7. Heard Mr.Hari Radhakrishnan, learned counsel for the petitioner and Mr.Santhanaraman, learned counsel for the respondent.

8. The respondent places reliance on Circular No.37/18-Customs dated 09.10.2018, particularly paragraph 2.5 thereof, which reads as follows:

2.5 By declaring drawback serial number suffixed with A or C and by making above stated declarations, the exporters consciously relinquished their IGST/ITC claims.'

9. According to R2, since the claim of draw back was inflated, the petitioner automatically renounced any claim towards refund of ITC. A Division Bench of the Gujarat High Court in *Real Prince Spintex Pvt. Ltd. V. Union of India* (2020 (35) GSTL 369) and a learned single Judge of this Court in *Precot Meridian Ltd. V. Commissioner of Customs, Tuticorin* (2020 (34) GSTL 34) have held otherwise.

10. The provisions of Section 54 of the Act read as follows:

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.

(2) A specialised agency of the United Nations Organisation or any Multilateral Financial Institution and Organisation notified under the United Nations (Privileges and Immunities) Act, 1947, Consulate or Embassy of foreign countries or any other person or class of persons, as notified under section 55, entitled to a refund of tax paid by it on inward supplies of goods or services or both, may make an application for such refund, in such form and manner as may be prescribed, before the expiry of six months from the last day of the quarter in which such supply was received.

(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.

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11. It is clear from a reading of Section 54(3) that the petitioner is entitled to one or the other of two benefits, i) duty draw back or ii) Input Tax Credit. Thus, an option has been extended to an assessee engaged in zero rated sale to either claim the benefit of duty drawback or the benefit of refund of ITC. That is why, in the present case, the petitioner, for the month of July, 2017 has opted to stick with the claim of duty draw back seeing as the amount of drawback is higher than the ITC for the months of August and September, 2017.

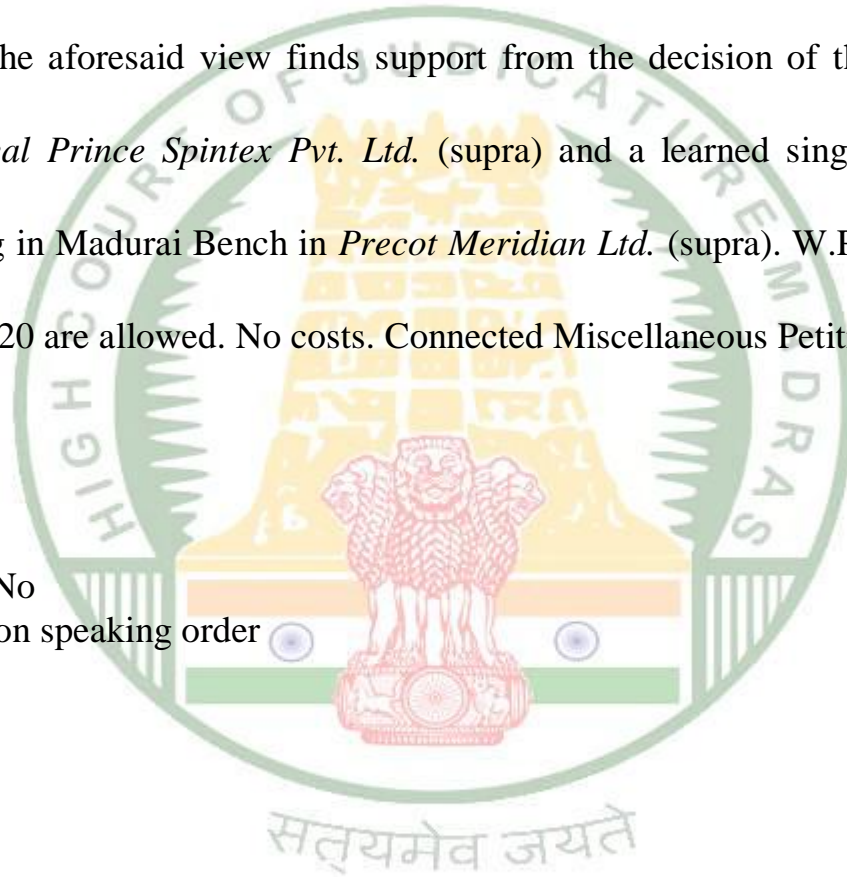
12. On a plain reading of Section 54 (3) I find the claim of refund to be in order. The orders of the appellate authority are set aside and the authority is directed to refund the sanctioned amounts within a period of six (6) weeks from today. In

doing so, the contents of paragraph 2.5 of the Circular will not stand in the way since a circular cannot stand in the way of a benefit offered under a statutory scheme. Paragraph 2.5 of the circular, insofar as it is contrary to the statutory provisions of Section 54(3) is bad in law.

13. The aforesaid view finds support from the decision of the Gujarat High Court in *Real Prince Spintex Pvt. Ltd.* (supra) and a learned single Judge of this Court sitting in Madurai Bench in *Precot Meridian Ltd.* (supra). W.P.Nos.10978 and 10972 of 2020 are allowed. No costs. Connected Miscellaneous Petitions are closed.

26.03.2021

Index: Yes/No
Speaking/Non speaking order
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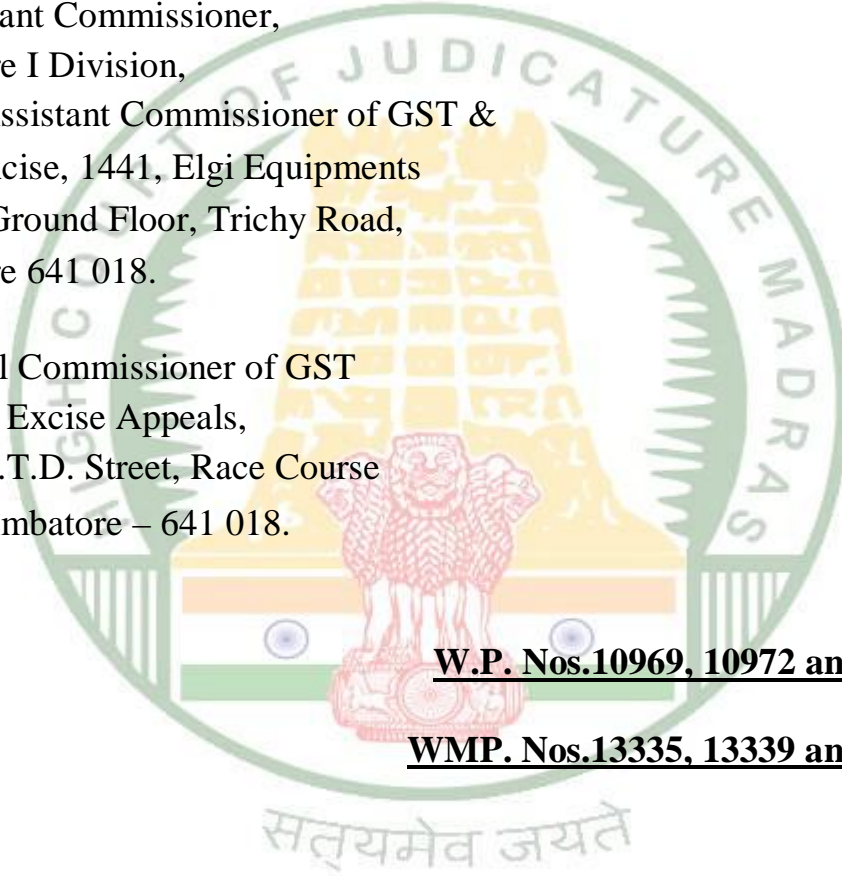
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DR. ANITA SUMANTH, J.

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To

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