**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO.1143 OF 2021**

Jar Productions Private Limited ] .. Petitioner

vs.

The Union of India & Ors. ] .. Respondents

Mr.Prasad Paranjape a/w Mohit Raval i/b Lumiere Law Partners for the Petitioner.

Mr.Pradeep Jetly, Senior Advcate, for Respondents.

**CORAM : S.V. GANGAPURWALA & M.G.SEWLIKAR, JJ.**

**RESERVED ON : 25.04.2022**
**PRONOUNCED ON : 09.06.2022**

**JUDGMENT : (PER : M.G.SEWLIKAR, J)**

1] Rule. Rule made returnable forthwith. With the consent of parties taken up for final hearing at the stage of admission.

2] This writ petition is preferred against the order of the learned Additional Commissioner dated 19th February 2021 and against the order dated 23rd February 2021 passed by the learned Additional Commissioner

whereby the claims of the GST preferred by the petitioner have been rejected .

3] Facts leading to this application can be stated in short as under:-

The petitioner is a Company incorporated under the Company's Act, 2013. The petitioner is engaged in providing production services to 'A Suitable Company Ltd ' located in London United Kingdom (U.K.) (ASCL for short). For the purpose for providing the said services, the petitioner has entered into an agreement dated 12th September, 2019 with ASCL effective from 28th March, 2018. It is further alleged that Clause 4.10 of the agreement provides that if any refund of tax component is received by the petitioner, such amount shall be reduced from the production expenses i.e. while computing the consideration towards production services, the said amount of tax component received as refund will be deducted from the production expenses.

4] For providing the production services to ASCL, the petitioner received and utilised various inputs/ input services on which appropriate CGST/MGST/IGST services were paid as charged by the vendors. In cases, where the services were received from service provider/ vendor located

outside India, CGST+MGST or IGST on such supplies was paid by the petitioner.

5] The petitioner filed its first refund application for the period from April to July, 2019 on 31st March, 2020. The said claim was allowed by the respondent no 4 The Assistant Commissioner.

6] The Petitioner filed another refund claim of Rs. 1,43,56,999/-for the subsequent period of August 2019 to October, 2019. Thereafter, the Petitioner received a show cause notice (SCN for short). The petitioner replied to the said notice. After hearing the petitioner, the respondent no 4 rejected the claim of the petitioner on the ground that the incidence of tax has been passed on to the client i.e. ASCL resulting into unjust enrichment of the petitioner. Having held so, respondent no 4 rejected the claim of the refund of the GST. This order was passed on 27th July 2020.

7] Being aggrieved by this order, the petitioner preferred an Appeal to Respondent No 3. After hearing the Petitioner, Respondent No.3 dismissed the Appeal of the Petitioner vide Order-in-Appeal no APK/GST/A-III/ADC/MUM/54/2021 dated 19/02/2021 holding that the incidence of tax

has passed on to the client i.e. ASCL and that it amounted to unjust enrichment. The Appellate Authority held that the burden of the GST has been shifted to the service recipient, the petitioner cannot be a beneficiary, as any refund to the petitioner would amount to unjust enrichment. The Appellate Authority placed reliance on the Constitution Bench judgment of the Supreme Court in the case of **Mafatlal Industries vs Union of India (1997) 5 SCC 536.**

8] It is further alleged that the petitioner filed GST claim of Rs. 5,79,25,012/- for the period from November, 2019 to July 2020 on 1st September 2020. On 21st September, 2020, respondent no 4 issued SCN to the petitioner. Identical objections as raised in SCN dated 27th July, 2020, were also raised in the SCN dated 21st September, 2020. The Petitioner replied to this notice . After hearing the Petitioner, Respondent No. 4 rejected the claim of refund of the GST on the same ground that the incidence of tax had been passed on to the recipient of the services and if refund was allowed, it would amount to unjust enrichment. This order was passed by respondent no 4 on 16th October 2020.

9] Being aggrieved by the order of Respondent No. 4, the Petitioner preferred Appeal to Respondent No.3. Respondent No. 3 gave

personal hearing to the Petitioner and confirmed the order of Respondent No. 4. Respondent No. 3 also held that if refund is granted, it would amount to unjust enrichment. Both these orders are being challenged by the petitioner in this writ petition.

10] Heard Shri Prasad Paranjape learned counsel for the Petitioner and Shri Pradeep Jetly, learned senior counsel for Respondents. Shri Prasad Paranjape submitted that the principle of unjust enrichment does not apply to export services. Being a zero rated supply, the principle of unjust enrichment does not apply to the services rendered by the petitioner. Clause 4.10 of the agreement clearly stipulates that if refund is received, it shall be deducted from the expenses of production. He further submitted that there are judgments of this court indicating that the principle of unjust enrichment does not apply to export services.

11] Shri Jetly learned senior counsel for the Respondents submitted that the Petitioner has admitted that even in case of alleged unjust enrichment by the petitioner, the credit notes will nullify the effect of the same. GST law does not contemplate any mechanism for paying back the GST by way of issuance of credit note. He further submitted that the petitioner has admitted that when the refund is obtained, the GST collected from the recipient would be paid back. This itself shows that the incident of

tax has been passed on to the recipient. He, therefore, submitted that the Adjudicating Authority and the Appellate Authority have rightly held that the petitioner is not entitled to the refund of GST as the incidence of tax has passed on to the recipient and there is unjust enrichment.

12] We have given thoughtful consideration to the submissions of both the learned counsels.

13] From the submissions made it is axiomatic that the respondents don't dispute that the Petitioner is entitled to the refund of GST, but their only contention is that the Petitioner has passed on the incidence of tax to the recipient company and on account of that the Petitioner is not entitled to claim refund. It is not in dispute that the Petitioner provides production services to the ASCL. Therefore, this clearly demonstrates that the Petitioner is exporting the services to the ASCL. Section 2(6) of Integrated Goods And Services Tax Act defines export services thus:-

> Export of services means the supply of any service when-
>
> (i) the supplier of service is located in India
> (ii) the recipient of service is located outside of India
> (iii) the place of supply of service is outside of India
> (iv) the payment of such service has been received by the supplier of service in convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India and

> (v) the supplier of service and the recipient of the service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8.

14] The Petitioner has placed on record a copy of the agreement. It shows that the ASCL is located outside of India and the petitioner company is located in India. And the production services are rendered by the petitioner in the U.K. It is, thus, clear that the services rendered by the petitioner fall within the expression ‘export of services’.

15] Section 54 of the Central Goods and Services Tax Act (CGST Act)deals with the refund of tax. Sub section (1) states that refund of tax can be claimed within 2 years from the relevant date. Section 54(3) deals with the cases in which refund can be claimed. Section 54(3) of CGST Act reads thus:-

> (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 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

16] Thus, refund of unutilised tax credit shall be allowed in

cases of zero rated supply. Zero rated supply has been defined in Section 16 of the Integrated Goods and Services Tax Act, 2017 thus:-

> 16 (1) zero rated supply means any of the following supplies of goods or services or both, namely:-
> (a) export of goods or services or both or
> (b) supply of goods or services or both to a Special Economic Zone developer or Special Economic Zone unit

17] Section 54(8)(e) of the CGST Act states refund cannot be claimed when incidence of tax has been passed on to the recipient or any other person. **Section 54(8)(e) of the CGST Act states thus**:-

> 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 -
> (e) if 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

18] Thus, the applicant is entitled to the refund of the amount if the incidence of tax has not been passed on to the recipient of the services. If the incidence of tax has been passed on , petitioner is not entitled to the refund.

19] Agreement executed between the petitioner and the ASCL shows that the approved production budget includes all costs in connection with the production services including the amount of Indian Goods and

Services Tax Act. This shows that GST is included in all costs in connection with production services. Petitioner is a service provider and ASCL is the service recipient.

20] Clause 4.10 of the agreement shows that if the amount of GST is refunded , then the same will be deducted from the total cost in connection with the production services. This clearly shows that the incidence of tax has not been passed to the recipient ASCL. Respondent No. 3 has treated alternative argument of the petitioner as admission. It was contended by the petitioner before Respondent no 3 that without admitting that the incidence of tax has passed on, credit notes were issued for the value of GST , the incidence of tax cannot be transferred. This alternative argument cannot be treated as an admission.

21] Moreover, in the case of **Motilal Oswal Securities Ltd vs Commissioner of Service Tax 2016 (12) TMI 1527** relied on by the petitioner similar issue was involved. This court held thus:-

> 6. We find that both the lower authorities have totally erred in rejecting the refund claim filed by the appellant. It is undisputed that the services rendered by the appellant for Institutional Investors situated abroad from whom brokerage is charged by them. In any case, the services were rendered by the appellant to the Institutional Investors who are situated abroad hence service tax law does not apply to them as also on the export

of services. Services provided by the appellant to Foreign Institutional Investors can be termed as export of services as the service tax being a destination based tax, the recipient of the services are situated abroad. We find that identical issue came up before the bench in the case of Commissioner of Service Tax, Pune II v. HSBC Software Development (I) Pvt. Ltd. 2016(42) STR 575 (Tri-Mumbai) wherein, in paragraph 7 the bench held as under :

"7. We now turn to the taxability of management, maintenance or repair service rendered by the respondent prior to the amendment of Export of Services Rules, 2005 discussed supra. That export of taxes along with commodity or invisible exports renders them unviable in the international market placed and handicaps exporters, so vital to robustness of the domestic economy, is an accepted parameter that Governments build into policy and framework of taxation. Consequently, within the rigour of tax administration, the tax collector is mandated assume the existence of such relief to the exporter, identify it and apply it to the assessment instead of relying upon the first provision or construct available to deny the relief. This is the fundamental principle evident in the various decisions of the Tribunal cited supra : that except in few commodities or services, and with deliberate intent, some instrument is promulgated by Government to ensure non-taxability of exports."

7. We also find that the Hon'ble Bombay High Court in the case of Commissioner of Service Tax, Mumbai II v. SGS India Pvt. Ltd. 2014(34) STR 554 (BOM) was considering the same issue and in paragraph 24 held as under :

"24. In the present case the tribunal has found that the assessee like the respondent render services, but they were consumed abroad. The clients of the respondents used the services of the respondent in inspection/ test analysis of the goods which the clients located abroad intended to import from India. In other words, the clients abroad were desirous of confirming the fact as to whether the goods imported complied with requisite specifications and standards. Thus, client of the respondent located abroad engaged the services of the respondent for inspection and testing the goods. The goods were tested by the respondents in India. The goods were available or their samples

> were drawn for such testing and analysis in India. However, the report of such test and analysis was sent abroad. The clients of the respondent were foreign clients, paid the respondent for such services rendered, in foreign convertible currency. It is in the sense that the Tribunal holds that the benefit of the services occurred to the foreign clients outside India. This is termed as export of service. In the circumstances, the Tribunal takes a view that if services were rendered to such foreign clients located abroad, then, the act can be termed as export of service. Such an act does not invite a Service Tax liability. The Tribunal relied upon the circulars issued and prior thereto the view taken by it in the case of KSH International Pvt. Ltd. v. Commissioner & B.A. Research India Ltd. The case of the present respondent was said to be covered by orders in these two cases. To our mind, once the Hon'ble Supreme Court has taken the view that Service Tax is a value added tax which in turn is destination based consumption tax in the sense that it taxes non commercial activities and is not a charge on the business, but on the customer, then, it is leviable only on services provided within the country. It is this finding and conclusion of the Hon'be Supreme Court which has been applied by the Tribunal in the facts and circumstances of the present case".

22] Thus, this court relying on the Apex court judgment held that when services are rendered abroad, CGST will not apply. In the case at hand also, the petitioner has rendered services to the ASCL abroad i.e. in U.K. Therefore, GST does not apply to the services rendered abroad as they amount to the export of services. In addition to that the respondent could not establish that the incident of tax has been passed on to the recipient ASCL located in London. Thus, both, the Adjudicating Authority and the Appellate Authority committed error in rejecting the refund of GST of the petitioner.

Therefore, orders of both the authorities cannot be sustained and need to be set aside.

23] In the light of the above, both the impugned orders are set aside. Writ petition is allowed in terms of prayer clause (a) & (b). Rule is made absolute on above terms.

[**M.G.SEWLIKAR, J**] [**S.V.GANGAPURWALA, J**]