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

% *Date of Decision: 06.10.2023 +*

W.P.(C) 8164/2022

SIMRAN CHANDWANI

..... Petitioner

Through: Mr. Vineet Bhatia, Mr. Aamnaya
Jagannath Mishra, Mr. Bipin Punia
& Ms. Nidhi Aggarwal, Advs.

versus

PRINCIPAL COMMISSIONER OF CGST, DELHI NORTH AND
ORS. Respondents

Through: Mr. Vijay Joshi, SSC with Mr.
Shubham Chaturvedi, Adv.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition, *inter alia*, praying that the respondents be directed to refund an amount of ₹5,47,894/- along with interest. The petitioner is, essentially, aggrieved by the denial of refund of the unutilized Input Tax Credit (hereafter 'ITC') on account of the inverted duty structure.
2. The petitioner claims that she is engaged in the business of selling footwear which is chargeable to goods and services tax at the rate

of 5% or 12%, depending on whether the price of the footwear is below ₹1,000/- or above ₹1,000/-. One of the components used in manufacturing of footwear is PVC straps, which is chargeable to goods and services tax at the rate of 18%.

3. In view of the said inverted duty structure, the petitioner claims that she is entitled to a refund of the accumulated unutilized ITC.
4. On 05.02.2021, the petitioner filed an application for refund of ITC aggregating ₹5,47,894/- (CGST ₹1,42,414/- + SGST ₹4,05,480/-) for the period of July, 2020 to December, 2020 in the appropriate format (FORM GST RFD-01). The respondents issued an acknowledgment in FORM GST RFD-02 dated 10.02.2021 acknowledging the said application. Thereafter, the respondents issued the show cause notice dated 09.03.2021 in FORM GST RFD-08 calling upon the petitioner to show cause as to why her refund claim should not be rejected. The Proper Officer had flagged four issues in the show cause notice dated 09.03.2021. The first issue related to the mismatch of figures relating to eligible ITC in RFD-01 and GSTR-3B, Annexure B and GSTR-2A. The petitioner was called upon to furnish an explanation regarding the same. The second issue related to two invoices appearing at serial no.55 and 56 of Annexure B involving the ITC of an amount of ₹16,272.18/- which did not appear in GSTR-2A uploaded by the petitioner.
5. The third issue related to ineligible ITC under Rule 36(4) of the

Central Goods and Services Tax Rules, 2017 (hereafter ‘**the CGST Rules**’). According to the Proper Officer, the claim for the ITC could not exceed more than 20% of the eligible credit in respect of the invoices and debit notes which have not been uploaded by the supplier. It was alleged that the petitioner had violated the said condition as laid down in Rule 36(4) of the CGST Rules in respect of her claims for the month of October, 2020 and November, 2020 as she had availed excessive ITC amounting to ₹1,03,210.09/.

6. The fourth issue related to the returns filed by one of the suppliers in respect of the goods supplied to the petitioner. The said supplier had classified the goods supplied as HSN 6404, which was the code for the finished products (complete shoes). The supplier had charged GST at the rate of 18% and therefore, the concerned officer had questioned the petitioner’s claim for the inverted duty structure in respect of the said goods. He reasoned that if the input was the same product as supplied by the petitioner, the goods supplied would not be chargeable to tax at a lower rate.

7. The petitioner replied to the show cause notice on 18.03.2021.

The petitioner’s explanation in regard to issue no.1 and 2 were subsequently accepted by the Adjudicating Authority and are not relevant for the present appeal. The petitioner’s claim for refund was rejected on account of issue no.3 and 4. That are the issues relating to excess ITC in violation of Rule 36(4) of the CGST Rules and on account

of the input being the complete finished products but charged at a higher rate.

8. In respect of issue no.3 – the issue relating to availing ITC exceeding 20% of the ITC as reflected by the supplier, the Adjudicating Authority found that the petitioner had availed excess ITC of ₹1,03,210.09/- for the month of October, 2020 to November, 2020. A tabular statement indicating the said finding is set out below:

| “Month | Type of Return | Total ITC | 110% OF ITC Appearing In GSTR2A | Maximum ITC eligible during the month | Excess ITC availed (3B-2A) |
|-------------------------|----------------|-----------|---------------------------------|---------------------------------------|----------------------------|
| Oct., 2020 | GSTR-2A | 101176.50 | 111294.15 | 111294.15 | 54919.85 |
| | GSTR-3B | 166214.00 | | | |
| Nov., 2020 | GSTR-2A | 59021.60 | 64923.76 | 64923.76 | 48290.24 |
| | GSTR-3B | 113214.00 | | | |
| TOTAL EXCESS ITC | | | | | 1,03,210.09” |

9. It is the petitioner’s case that although, it had availed the excess ITC in the month of October, 2020 and November, 2020, the same was on account of input suppliers not furnishing monthly returns but furnishing quarterly returns. It was explained that because of the mismatch in the period, there was excess ITC available in the returns filed by the input suppliers in the last months of the quarter – September, 2020 and December, 2020. It is the petitioner’s case that if the ‘relevant period’ is viewed, it would be evident that the petitioner had accounted for the ITC in the month of October, 2020 and November, 2020 and that the said ITC was not reflected in

GSTR-2A (data populated on the basis of the returns filed by the supplier). Thus, there was mismatch in the ITC as reflected in GSTR-2A (populated on the basis of returns filed by the suppliers). Whereas, in the month of July, 2020 and August, 2020, the input tax reflected in GSTR was less than the ITC claimed by the petitioner, it was significantly higher in the month of September, 2020. Similarly, in the month of October, 2020 and November, 2020, the ITC reflected in GSTR-2A was significantly less than the ITC as claimed by the petitioner, but in the month of December, 2020, it was significantly higher. According to the petitioner, this anomaly was on account of the mismatch in the tax periods for which the petitioner and the input suppliers filed their respective returns. A tabular statement setting out the difference between the ITC as reflected in GSTR-2A and in GSTR3B for the refund claim period from 01.07.2020 to 31.12.2020 is set out below:-

| SIMRAN CHANDWANI | | | | | | | |
|--|--------------|----------------------|--------------------|--------------------|--------------------|---------------------|-----------------|
| BHAGWATI PLASTIC | | | | | | | |
| 07AZGPC3374C1ZR | | | | | | | |
| Refund Claim Period from 01.07.2020 to 31.12.2020 | | | | | | | |
| S. No | . Month | ITC Claim in GSTR-3B | | INPUT IN GSTR-2A | | DIFFERENCE 3B VC 2A | |
| | | CGST | SGST | CGST | SGST | CGST | SGST |
| 1 | Jul-20 | 91,395.00 | 91,395.00 | 80,086.22 | 80,086.22 | 11,308.78 | 11,308.78 |
| 2 | Aug-20 | 76,655.00 | 76,655.00 | 60,706.40 | 60,706.40 | 15,948.60 | 15,948.60 |
| 3 | Sep-20 | 78,299.00 | 78,299.00 | 1,03,094.72 | 1,03,094.72 | (24,795.72) | (24,795.72) |
| 4 | Oct-20 | 83,107.00 | 83,107.00 | 50,588.25 | 50,588.25 | 32,518.75 | 32,518.75 |
| 5 | Nov-20 | 56,607.00 | 56,607.00 | 29,510.80 | 29,510.80 | 27,096.20 | 27,096.20 |
| 6 | Dec-20 | 52,021.00 | 52,021.00 | 1,11,810.65 | 1,11,810.65 | (59,789.65) | (59,789.65) |
| | Total | 4,38,084.00 | 4,38,084.00 | 4,35,797.04 | 4,35,797.04 | 2,286.96 | 2,286.96 |
| Refund Claim Amount is Rs.5,47,894/- {CGST Rs. 1,42,414/- + SGST Rs.4,05,480/-} | | | | | | | |

10. In respect of the issue with regards to the supplies classified under HSN 6404, the petitioner explained that the said issue arose in respect of supplies made by one supplier namely M/s V. K. Polymers (GSTIN 07AAKPG9643F1ZK). It was explained that the said supplier had supplied the PVC straps, which were chargeable to GST at the rate of 18%. Although, the said supplier had charged GST at the correct rate, it had erroneously classified the supplies as HSN 6404 in its invoices instead of HSN 6406. According to the petitioner, the PVC straps supplied by the said supplier were used in the manufacturing of complete footwear. The petitioner also produced a certificate from the said supplier (M/s V. K. Polymers) certifying that there was an error in the classification of the goods in the invoices.

11. Notwithstanding the aforesaid explanation, the Adjudicating Authority rejected the petitioner's claim for refund on both the issues, as mentioned above. The petitioner's contention that the mismatch in the ITC appearing in GSTR-2A and her returns, was on account of the suppliers filing returns on a quarterly basis, was not accepted on the ground that the petitioner had not provided the relevant supporting documents along with her reply.

12. The petitioner's explanation regarding one of the suppliers (M/s V. K. Polymers) erroneously classifying the supplies under HSN 6404 was also not accepted. The controversy is involved in the six invoices issued by M/s V. K. Polymers and that the Adjudicating Authority

noted that the goods supplied had been classified under HSN 6404 (which covered complete footwear) in those invoices. The Adjudicating Authority reasoned that the classification of goods was a vital ingredient in GST and played a very important role in collecting the tax from the tax payer. It did not accept the petitioner's contention while observing that the petitioner had obtained the declaration from the suppliers "just to shelter their vicious thinking to gain cash refund".

13. In view of the above, the petitioner's claim for refund was rejected by an order dated 05.04.2021.

14. The petitioner filed an appeal, which was rejected by an order dated 18.02.2022. The Appellate Authority concurred with the

Adjudicating Authority that the ITC amounting to ₹1,03,210.09/- for the month of October, 2020 and November, 2020 was claimed in contravention of Rule 36(4) of the CGST Rules. It is also noticed that the petitioner had admitted that she had claimed excess ITC in those months and had deposited the interest. The Appellate Authority reasoned that in view of the above, the petitioner was not entitled to a refund of the ITC as claimed.

15. The petitioner's contention that the six invoices issued by one of the suppliers which incorrectly classified the goods as supplied was also rejected. The petitioner had also raised a grievance before the Appellate Authority that the tax involved in the six invoices in question amounted to ₹47,698/- but the Adjudicating Authority had

rejected the entire claim. However, this contention was not accepted as the Appellate Authority held that the petitioner had not provided segregated details and the eligible 'Net ITC'. The Appellate Authority was not persuaded by the petitioner's contention that it was not engaged in the purchase of the finished goods but was a manufacturer of footwear. The Appellate Authority held that there was no bar or restriction for the petitioner to trade the items manufactured by it and proceeded on the basis that the petitioner had in fact purchased the complete product from a certain supplier.

16. Although the petitioner has the remedy of an appeal before the Appellate Tribunal, the said remedy is illusory as the Appellate Tribunal has not yet been constituted. In the aforesaid circumstances, the petitioner has filed the present petition. In view of the above, this Court considers it apposite to entertain the present petition.

17. The first and foremost question to be addressed is whether the petitioner can be denied the refund of the ITC on the ground that the one of the suppliers had erroneously mentioned HSN 6404 in respect of the goods supplied in its invoices notwithstanding that it had also furnished the certificate acknowledging the same. As noticed above, the Adjudicating Authority had not accepted the petitioner's contention while observing that the petitioner had obtained the declaration just to "shelter their vicious thinking to gain cash refund". We find that the aforesaid reasoning is based on mere suspicion and surmises and not on cogent material. There is no dispute that the

petitioner is engaged in the manufacturing of footwear. As noted above, the controversy relates to the six invoices issued by one of the suppliers (M/s V.K. Polymers). Undisputedly, the said supplier had charged the GST at the rate of 18% which is chargeable on PVC straps. There is no cavil that the tax chargeable on footwear (complete finished products) is 5% or 12%, depending on the value of the said product. The supplies made by M/s V. K. Polymers under the six invoices in question, were below the price of ₹1,000/-. Thus, if the said supplier had supplied a complete product, it would have charged GST at the rate of 5%. According to the petitioner, the petitioner had produced a certificate from the said supplier acknowledging that it had incorrectly classified the goods under HSN 6404 instead of HSN 6406. The fact that the GST had been charged by the said supplier at the correct rate, in our view, is a material factor to be considered by the Adjudicating Authority. We find no ground to doubt the petitioner's explanation that the six invoices incorrectly mentions the classification of the goods and therefore, the petitioner ought not to be denied the benefit of the accumulated ITC.

18. We are also unable to accept the reasoning of the Appellate Authority to deny the entire claim on the basis of the six invoices issued by one supplier. According to the learned counsel for the respondents, the petitioner's claim was denied solely for want of relevant documents. However, there is no dispute that the other suppliers had correctly classified the products supplied by them. We are unable to appreciate this approach. Whilst the concerned authorities have accepted the

classification of the product supplied by a singular supplier, M/s V. K. Polymers, under six invoices, as correct; they have not accepted the classification of goods as far as the other suppliers are concerned. This is notwithstanding that there is no dispute that all suppliers have correctly charged the GST

19. The reasoning that the petitioner has produced a declaration with the *mala fide* objective of claiming refund also does not commend to us.
20. The next question to be addressed is whether the petitioner would be entitled to the refund notwithstanding that the ITC availed for the month of October, 2020 and November, 2020 was in excess of the limit as specified in Rule 36(4) of the CGST Rules.
21. The learned counsel for the petitioner has referred to Rule 89 of



the CGST Rules and contended that the maximum refund amount was required to be considered in reference to the “relevant period” as defined under Rule 89(4)(F) of the CGST Rules. He submitted that although the ITC availed in the month of October, 2020 and November, 2020 was in excess of the ITC as reflected in GSTR-2A, the ITC reflected in GSTR-2A for the month of December, 2020 would more than cover the same. As noted above, the petitioner’s contention is that this mismatch was on account of some of the suppliers filing the returns on a quarterly basis, whereas the petitioner accounted for the ITC on a monthly basis. The petitioner contends that if there is any excess ITC availed in excess of the limits provided under Rule 36(4) of the CGST Rules, the petitioner may be liable to pay an interest, but the refund of the ITC cannot be denied if there is no excess claim for the “relevant period” as defined under Rule 89(4)(F) of the CGST Rules. The learned counsel also submitted that if Rule 36(4) of the CGST Rules is to be implemented *sensu stricto*, the petitioner’s claim for the months of December, 2020 would have been higher.

22. It is material to note that the learned counsel appearing for the respondents does not dispute that if the petitioner is correct that the mismatch is only on account of the suppliers filing the quarterly returns, the petitioner would be entitled to the refund. He, however, states that the petitioner did not submit the relevant documents to establish this claim.

23. The learned counsel appearing for the parties state that in the aforesaid circumstances, the matter be remanded to the Adjudicating



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Authority to consider the matter afresh, with liberty to the petitioner to produce all the documents as to substantiate its claims.

24. In view of the above, the impugned orders dated 05.04.2021 and 18.02.2022 are set aside. The matter is remanded to the Adjudicating

Authority to consider the petitioner's claim regarding availing ITC in excess of the limit as prescribed under Rule 36(4) of the CGST Rules, as noted above and pass a fresh order.

25. We request the adjudicating authority to pass a fresh order within a period of eight weeks from today.

26. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

OCTOBER 6, 2023 Ch



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