



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CMPMO No. 447 of 2023
Date of Decision: 18.8.2023

M/s Vardhman Ispat Udyog

.....Petitioner

Versus

State of Himachal Pradesh and Ors.

.....Respondents

Coram

Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting? Yes.

For the Petitioner: Mr. Shrawan Dogra, Senior Advocate with Mr. Manik Sethi, Advocate.

For the Respondents: Mr. Rajan Kahol, Mr. Vishal Panwar and Mr. B.C. Verma, Additional Advocates General with Mr. Rahul Thakur and Mr. Ravi Chauhan, Deputy Advocates General.

Sandeep Sharma, J. (Oral)

Since there is no appellate Tribunal, which is otherwise required to be constituted in terms of provisions contained under Section 109 of the Himachal Pradesh Goods and Services Tax Act, 2017 (in short "the Act") petitioner is compelled to approach this Court in the instant proceedings filed under Article 227 of the Constitution of India, praying therein to issue direction to respondent No.1 to not to act in furtherance of order dated 19.5.2023, passed by the Commissioner (Appeals) HP Goods and Service Tax-cum-Divisional Commissioner, Shimla Division, whereby

appeal having been filed by the petitioner under Section 107(1) of the Act, laying therein challenge to order dated 30.8.2022, passed by the Joint Commissioner of State Taxes and Excise, Central Enforcement Zone, Una, came to be dismissed.

2. Mr. Rajan Kahol, learned Additional Advocate General, appears and waives service of notice on behalf of respondents No. 1 and 2.

3. Having regard to the nature of prayer made in the instant proceedings as well as order proposed to be passed by this Court, this Court sees no necessity to call for the reply of the aforesaid respondents.

4. For having bird's eye view, facts which may be relevant for adjudication of the case at hand are that on 9.8.2021, respondent No.1 issued a show cause notice titled " intimation of tax as being payable under Section 73 (5)/74(5)" thereby intimating the petitioner with regard to its liability to pay the tax (Annexure P-1). After receipt of the aforesaid show cause notice, petitioner filed representation but vide order dated 30.8.2022, respondent No.1 directed the petitioner to deposit the due amount of tax, interest and penalty within three weeks of passing of the order (Annexure P-2). Against the aforesaid order dated 30.8.2022, petitioner filed an appeal under Section 107 (1) of the Act before the appellate authority i.e.

respondent No.2, but same came to be dismissed vide order dated 19.5.2023 (Annexure P-3).

5. Though provisions contained under Section 112 (1) of the Act give right of further appeal to the petitioner to approach the appellate Tribunal, otherwise required to be constituted under Section 109 of the Act, but since same is yet to be constituted or formed, petitioner is compelled to approach this Court in the instant proceedings filed under Section 227 of the Constitution of India, praying therein to exercise supervisory powers, thereby directing respondent No.1 not to give effect to order dated 19.5.2023, passed by the appellate authority (Annexure P-3), till the time appeal proposed to be filed by the petitioner, laying therein challenge to order dated 19.5.2023, passed by the appellate authority is decided by the appellate Tribunal under Section 112 (1) of the Act.

6. Mr. Vishal Panwar, learned Additional Advocate General while opposing prayer made in the instant petition vehemently argued that petition under Article 227 of the Constitution of India is not maintainable especially when there is specific remedy provided under the Act itself.

7. Mr. Sharwan Dogra, learned Senior Advocate, duly assisted by Mr. Manik Sethi, Advocate, vehemently argued that once there is a specific provision for filing appeal against the order passed by the appellate

authority in the appellate Tribunal and such appellate Tribunal is yet to be constituted under Section 109 of the Act, there is no alternative efficacious remedy available to the petitioner save and except present petition under Article 227 of the Constitution of India, which otherwise enables this Court to exercise supervisory jurisdiction over all the courts subordinate to it including the courts exercising quasi judicial powers. In support of his aforesaid contentions, learned Senior Counsel also invited attention of this court to the judgment dated 8.2.2023, passed by the High Court of Bombay in **Writ Petition No. 10883 of 2019, Rochem India Pvt. Ltd. v. The Union of India and Ors.** (alongwith connected matters), wherein in similar circumstances, High Court of Bombay having taken note of the fact that there is no appellate Tribunal, which was otherwise required to be constituted in terms of Section 109 of the Central Goods and Services Tax 2017 not only entertained the petition under Articles 226 and 227 of the Constitution of India, but also ordered that impugned order shall not be given effect until two weeks after the period prescribed for filing an appeal to the appellate authority under Clause-4.2 of the circular dated 18.5.2020, issued by the Central Board of Direct taxes is over.

8. Before ascertaining the correctness and genuineness of the rival submissions made by the learned counsel for the parties, it would be apt to take note of the following provisions of the act:

“CHAPTER-XVIII

APPEALS AND REVISION 107.

Appeals to Appellate Authority.—(1) Any person aggrieved by any decision or order passed under this Act or the Central Goods and Services Tax Act, 2017 (No.12 of 2017) by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

(2) The Commissioner may, on his own motion, or upon request from the Commissioner of central tax, call for and examine the record of any proceeding in which an adjudicating authority has passed any decision or order under this Act or the Central Goods and Services Tax Act, 2017 (No.12 of 2017) for the purpose of satisfying himself as to the legality or propriety of the said decision or order and may, by order, direct any officer subordinate to him to apply to the Appellate Authority within six months from the date of communication of the said decision or order for the determination of such points arising out of the said decision or order as may be specified by the Commissioner in his order.

(3) Where, in pursuance of an order under sub-section (2), the authorised officer makes an application to the Appellate Authority, such application shall be dealt with by the Appellate Authority as if it were an appeal made against the decision or order of the adjudicating authority and such authorised officer were an appellant and the provisions of this Act relating to appeals shall apply to such application.

(4) The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months, as the case may be, allow it to be presented within a further period of one month.

(5) Every appeal under this section shall be in such form and shall be verified in such manner as may be prescribed.

(6) No appeal shall be filed under sub-section (1), unless the appellant has paid—

(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and

(b) a sum equal to ten per cent of the remaining amount of tax in dispute arising from the said order, 1 “subject to a maximum of twenty-five crore rupees,” in relation to which the appeal has been filed.

(7) Where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed.

(8) The Appellate Authority shall give an opportunity to the appellant of being heard.

(9) The Appellate Authority may, if sufficient cause is shown at any stage of hearing of an appeal, grant time to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(10) The Appellate Authority may, at the time of hearing of an appeal, allow an appellant to add any ground of appeal not specified in the grounds of appeal, if it is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

(11) The Appellate Authority shall, after making such further inquiry as may be necessary, pass such order, as it thinks just and proper, confirming, modifying or annulling the decision or order appealed against but shall not refer the case back to the adjudicating authority that passed the said decision or order :

Provided that an order enhancing any fee or penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund or input tax credit shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:

Provided further that where the Appellate Authority is of the opinion that any tax has not been paid or short-paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised, no order requiring the appellant to pay such tax or input tax credit shall be passed unless the appellant is given notice to show cause against the proposed order and the order is passed within the time limit specified under section 73 or section 74.

(12) The order of the Appellate Authority disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for such decision.

(13) The Appellate Authority shall, where it is possible to do so, hear and decide every appeal within a period of one year from the date on which it is filed : Provided that where the issuance of order is stayed by an order of a court or Tribunal, the period of such stay shall be excluded in computing the period of one year.

(14) On disposal of the appeal, the Appellate Authority shall communicate the order passed by it to the appellant, respondent and to the adjudicating authority.

(15) A copy of the order passed by the Appellate Authority shall also be sent to the Commissioner or the authority designated by him in this behalf and the jurisdictional Commissioner of central tax or an authority designated by him in this behalf.

(16) Every order passed under this section shall, subject to the provisions of section 108 or section 113 or section 117 or section 118 be final and binding on the parties.

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109. Appellate Tribunal and Benches thereof.—

(1) Subject to the provisions of this Chapter, the Goods and Services Tax Tribunal constituted under the Central Goods and Services Tax Act, 2017 (No.12 of 2017) shall be the Appellate Tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority under this Act.

(2) The constitution and jurisdiction of the State Bench and the Area Benches located in the State shall be in accordance with the provisions of section 109 of the Central Goods and Services Tax Act, 2017 (No.12 of 2017) or the rules made there under.

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112. Appeals to Appellate Tribunal.—(1) Any person aggrieved by an order passed against him under section 107 or section 108 of this Act or the Central Goods and Services Tax Act, 2017 (No.12 of 2017) may appeal to the Appellate Tribunal against such order within three months from the date on which the order sought to be appealed against is communicated to the person preferring the appeal.

(2) The Appellate Tribunal may, in its discretion, refuse to admit any such appeal where the tax or input tax credit involved or the difference in tax or input tax credit involved or the amount of fine, fee or penalty determined by such order, does not exceed fifty thousand rupees.

(3) The Commissioner may, on his own motion, or upon request from the Commissioner of central tax, call for and examine the record of any order passed by the Appellate Authority or the Revisional Authority under this Act or under the Central Goods and Services Tax Act, 2017 (No.12 of 2017) for the purpose of satisfying himself as to the legality or propriety of the said order and may, by order, direct any officer subordinate to him to apply to the Appellate Tribunal within six months from the date on which the said order has been passed for determination of such points arising out of the said order as may be specified by the Commissioner in his order.

(4) Where in pursuance of an order under sub-section (3) the authorised officer makes an application to the Appellate Tribunal, such application shall be dealt with by the Appellate Tribunal as if it were an appeal made against the order under sub-section (11) of section 107 or under sub-section (1) of section 108 and the provisions of this Act shall apply to such application, as they apply in relation to appeals filed under sub-section (1).

(5) On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding

that he may not have appealed against such order or any part thereof, file, within forty five days of the receipt of notice, a memorandum of cross-objections, verified in the prescribed manner, against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal, as if it were an appeal presented within the time specified in sub-section (1).

(6) The Appellate Tribunal may admit an appeal within three months after the expiry of the period referred to in sub-section (1), or permit the filing of a memorandum of crossobjections within forty five days after the expiry of the period referred to in sub-section (5), if it is satisfied that there was sufficient cause for not presenting it within that period.

(7) An appeal to the Appellate Tribunal shall be in such form, verified in such manner and shall be accompanied by such fee, as may be prescribed.

(8) No appeal shall be filed under sub-section (1), unless the appellant has paid—

(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him, and

(b) a sum equal to twenty per cent of the remaining amount of tax in dispute, in addition to the amount paid under sub-section (6) of the section 107, arising from the said order, 1 “subject to a maximum of fifty crore rupees,” in relation to which the appeal has been filed.

(9) Where the appellant has paid the amount as per sub-section (8), the recovery proceedings for the balance amount shall be deemed to be stayed till the disposal of the appeal.

(10) Every application made before the Appellate Tribunal,—

(a) in an appeal for rectification of error or for any other purpose; or

(b) for restoration of an appeal or an application, shall be accompanied by such fees as may be prescribed.

113. Orders of Appellate Tribunal.—(1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the Appellate Authority, or the Revisional Authority or to the original

adjudicating authority, with such directions as it may think fit, for a fresh adjudication or decision after taking additional evidence, if necessary.

(2) The Appellate Tribunal may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(3) The Appellate Tribunal may amend any order passed by it under sub-section (1) so as to rectify any error apparent on the face of the record, if such error is noticed by it on its own accord, or is brought to its notice by the Commissioner or the Commissioner of central tax or the other party to the appeal within a period of three months from the date of the order :

Provided that no amendment which has the effect of enhancing an assessment or reducing a refund or input tax credit or otherwise increasing the liability of the other party, shall be made under this sub-section, unless the party has been given an opportunity of being heard.

(4) The Appellate Tribunal shall, as far as possible, hear and decide every appeal within a period of one year from the date on which it is filed.

(5) The Appellate Tribunal shall send a copy of every order passed under this section to the Appellate Authority or the Revisional Authority, or the original adjudicating authority, as the case may be, the appellant and the Commissioner or the jurisdictional Commissioner of central tax.

(6) Save as provided in section 117 or section 118, orders passed by the Appellate Tribunal on an appeal shall be final and binding on the parties.”

9. It is quite apparent from the aforesaid provision of law provided in the Act that in terms of Section 109 of the Act, appellate Tribunal is required to be constituted, enabling the parties aggrieved of order passed in appeal by the appellate authority to file further appeal, which can be substantiated from Section 107 (16) of the Act. Section 107 (16) provides

that the impugned order passed by the appellate authority shall be subject to the order passed by the appellate Tribunal under Section 113 of the Act. Section 112 (1) of the Act provides for filing appeal to the appellate Tribunal against the order of the appellate authority. It is not in dispute that in State of Himachal Pradesh, appellate Tribunal in terms of Section 109 is yet to be constituted, however to deal with aforesaid hardship being faced by the tax payers, Ministry of Finance, Government of India, through Central Board of Indirect Taxes and Customs issued orders and circulars to deal with this situation. Copy of order dated 3.12.2019 issued by the Ministry of Finance Government of India (Annexure P-4) clearly reveals that for the purpose of filing the appeal or application or as referred to in Sub-section or Sub-Section (3) of Section 112 of the Act, appellate Tribunal and its benches have been constituted, but in many States and Union Territories, same are yet to be constituted, as a result of which, appeal laying therein challenge to order passed by the appellate authority could not be filed within the time limit specified in the aforesaid Section. To remove the aforesaid difficulty, Ministry of Finance in exercise of powers conferred under Goods and Services Tax Act, 2017 on the recommendation of the Council passed order dated 3.12.2019, wherein it came to be clarified that for the purpose of calculating the three months from the date on which

order sought to be appealed is communicated to the person preferring the appeal in sub section 1 of Section 112, the start of three months period shall be considered to be the later of the following dates; i) date of communication of order; or ii) the date on which the President or the State President, as the case may be, of the Appellate Tribunal after its constitution under Section 109, enters office. It also came to be clarified vide aforesaid order that period of six months from the date of which such order has been passed in sub-section 3 of Section 112 would commence from the date of communication of order or from the date on which President or State President as the case may be, of the Appellate Tribunal after its constitution under Section 109, enters office.

10. Since in the case at hand, appellate Tribunal in terms of provisions contained under Section 109 of the Act, is yet to be constituted, there is otherwise no occasion, if any, for the petitioner to file appeal, laying therein challenge to the order passed by the appellate authority in the appellate tribunal, as a result of which, there is every likelihood of that respondent No.1 would compel the petitioner to implement/comply with the order passed by the appellate authority. Since there is specific provision of appellate Tribunal provided under the Act as detailed herein above, coupled with the settled proposition of law that no person can be rendered

remediless, this Court finds no force in the submission of learned Additional Advocate General that petition filed under Article 227 of the Constitution of India is not maintainable, rather this court is of the definite view that in given facts and circumstances of the case, petitioner had no option, but to approach this Court by way of petition filed under Article 227 of the Constitution of India, which otherwise empowers this Court to exercise supervisory powers over all the courts subordinates to it including the authorities exercising quasi judicial powers. In similar circumstances, high Court of Bombay in ***Rochem India Pvt. Ltd*** (supra), observed herein below:

“ 4. These Writ Petitions under Article 226 of the Constitution of India are filed on the ground that the Appellate Tribunal is not yet constituted. Since various such Petitions are being filed in this Court and taking note of the large pendency of such cases, we had directed the Respondents to file a reply affidavit as to the position brought about by non-constitution of the Appellate Tribunal.

5. The Chairman of the Central Board of Indirect Taxes and Customs (the “Board”) has filed an affidavit in Writ Petition no. 10883 of 2019 on 12 October 2022, wherein the Chairman has given the factual position as under:-

“ ii) Vide Notification SO 1359(E) dated 13.03.2019, the creation of the National Bench of the Goods and Services Tax Appellate Tribunal (GSTAT) at New Delhi, was notified. Vide Notification dated 21.08.2019 and 29.11.2019, the

Government, on the recommendations of the GST Council, notified the creation of various state benches of GSTAT.

iii) Subsequently, vires of section 109 & section 110 of the Central Goods & Service Tax Act, 2017, related to the constitution of GSTAT and the qualification, appointment and conditions of service of its members, were challenged in WP No. 21147 of 2018 titled as Revenue Bar Association Vs. Union of India before the Madras High Court.

ix) These Rules were challenged and subsequently were struck down by Hon'ble Supreme Court in its order dated 13.11.2019 in CA No. 8588 of 2019 in the case of Rojer Mathews vs. Union of India.

x) While doing so, the Hon'ble Apex Court laid down certain basic tenets to be followed and directed framing of fresh rules. Accordingly, Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020 were brought in place.

The said Rules 2020 were also challenged and in its order dated 27.11.2020 in WP(C) No. 804 of 2020 in the case of Madras Bar Association Vs. Union of India, Hon'ble Supreme Court of India directed certain changes to be brought in the Rules. Later, incorporating certain important aspects of the principles, Central Government promulgated the Tribunal Reforms Ordinance, 2021 which has now been replaced by the Tribunal Reforms Act 2021.

xi) In its 47th meeting held on 28-29 June 2022 in Chandigarh, the GST Council discussed the changes pertaining to the GST Appellate Tribunal in the GST Laws to bring it in conformity with judgments of the Courts in relation to various aspects concerning Tribunals. In the

aforesaid meeting, the Council has decided to constitute a Group of Ministers to look into the issues involved. Accordingly, Department of Revenue, Govt. of India, vide OM dated 06.07.2022 (Annexure I) has constituted a Group of Ministers.

xii) Group of Ministers held its first meeting on 26/7/2022 and its final meeting on 17/08/2022 in Bhubaneswar. The Group of Minister's report shall be placed in the next meeting of the GST Council and after seeking the Councils' approval, amendment to CGST/SGST Acts shall be moved in Parliament/Legislature.

03. I humbly say and submit that delay in the formation of GSTAT is neither intentional nor due to negligence or apathy but due to the circumstances stated above.

04. I humbly say and submit that no hardship is caused to the taxpayers/trade due to non-formation of GSTAT as period of limitation for filing appeal to the Tribunal is extended vide Central Goods & Service Tax (ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 (Annexure II), so that the appeal can be filed within three months after constitution of Tribunal." (emphasis supplied)"

6. Mr. Anil Singh, learned Additional Solicitor General has placed the Circular No. 132/2/2020-GST dated 18 March 2020 issued by the Board, giving clarification in respect of appeals in regards to non-constitution of Appellate Tribunal. After quoting the relevant Rules, the Circular states as under:-

"4.2 The appellate tribunal has not been constituted in view of the order by Madras High Court in case of Revenue Bar Assn. v. Union of India and therefore the appeal cannot be filed with three months from date on which the order sought

to be appealed against is communicated. In order to remove difficulty arising in giving effect to the above provision of the Act, the Government, on the recommendations of the Council, has issued the Central Goods and Services Tax (Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019. It has been provided through the said Order that the appeal to tribunal can be made within three months (six months in case of appeals by the Government) from the date of communication of order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later.

4.3 Hence, as of now, the prescribed time limit to make application to appellate tribunal will be counted from the date on which President or the State President enters office. The appellate authority while passing order, may mention in the preamble that an appeal may be made to the appellate tribunal whenever it is constituted within three months from the President or the State President enters office. Accordingly, it is advised that the appellate authorities may dispose all pending appeals expeditiously without waiting for the constitution of the appellate tribunal.

5. It is requested that suitable trade notices may be issued to publicize the contents of this Circular.” The State Authorities have also issued an identical Trade Circular with some modifications.

7. Therefore, what emerges from the Circular and Affidavit filed by the Chairman of the Board is that the appeal to the Appellate Tribunal can be filed within three months (six months in the case of Appeals by the Government) from the date of the communication of the order or date on which the President or State President, as the

case may be, of the Appellate Tribunal enters office, whichever is later.

8 As of date, we do not have any positive statement from the respondents to the exact time or date on which the contingency provided in Clause 4.2, that is, President or State President entering office, would occur.

9 The question is whether the Petitions need to be kept pending in this Court. In most of the Petitions filed on the ground that the Tribunal is unavailable, this Court has granted interim protection.

10 The Chairman of the Board, in the affidavit, has indicated that no hardship would be caused to the taxpayers because of the nonconstitution of the Tribunal. Reading the affidavit along with Circular, it is clear that the Government does not intend that taxpayers are prejudiced for want of the Tribunal. With that intent, the period of limitation has been extended. As a corollary of the intention expressed in the affidavit and the Circular, it follows that the appealable orders (to the Tribunal) would not be implemented till the Tribunal becomes functional. That being the position, the writ petitions do not need to remain pending in this Court. Some time after the tribunal becomes functional as above can be given.

11 It would be advisable, to avoid further complications, that the Respondent-Board issues instructions to incorporate Clause 4.2 of the Circular dated 18 March 2020 in each order which is appealable to the Appellate Tribunal constituted under Section 109 of the Act. This would guide the aggrieved parties as to the future course of conduct and reduce needless litigation in the form of filing writ petitions such as the present ones. The Learned ASG states that this option would be considered

12. Therefore, we dispose of the Petitions as follows.

- a) The period of filing the Appeal will stand extended as indicated in Clause 4.2 of the Circular dated 18 March 2020.
- b) The impugned order will not be given effect until two weeks after the period prescribed for filing an appeal as under Clause 4.2 of the Circular dated 18 March 2020 is over.”

11. Consequently, in view of the detailed discussion made herein above as well as law taken into consideration, this Court finds merit in the present petition and accordingly, same is allowed with direction to respondent No.1 to not to act in furtherance of the order dated 19.5.2023, passed by the appellate tribunal in Appeal Nos. 247 and 248 of 2022 till the time appellate tribunal in terms of Section 109 of the Act is constituted by the State of Himachal Pradesh and thereafter appeal within prescribed period of limitation as detailed in circular dated 3.12.2019 issued by the Ministry of Finance, Government of India, is filed by the petitioner in the appellate Tribunal.

August 18, 2023
(manjit)

(Sandeep Sharma),
Judge