2024:DHC:8662-DB

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

% ***Judgment delivered on: 05.11.2024***

\+ W.P.(C) 10940/2023

M/S HCC VCCL JOINT VENTURE .....Petitioner

Through: Mr. Bharat Raichandani, Mr. Deepak Kumar Khokhar & Ms. Anweshaa Laskar, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Ravi Prakash, CGSC for Resp./ UOI.
Mr. Aditya Singla, SSC with Mr. Ritwik Saha & Ms. Medha Navami, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. The writ petitioner assails the validity of the order dated 05 July 2023 made in purported exercise of powers conferred by Section 108 of the **Central Goods & Services Tax Act, 2017**[1] and which has principally placed in abeyance an order of refund dated 09 December 2022. That order had sanctioned the refund of a sum of INR 5,50,00,000/- in favour of the writ petitioner.

2. While considering the petition on 21 October 2024 we had, upon hearing learned counsels for respective sides, passed the following order

[1] CGST Act

> "1. Having heard learned counsels for respective sides at some length, we take note of the following facts which emerge.
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> 2. The petitioner is principally aggrieved by the order dated 05 July 2023 and which has essentially placed in abeyance the Refund Sanction Order dated 09 December 2022. The Refund Sanction Order undisputedly pertained to the amounts standing to the credit of the Electronic Cash Ledger of the writ petitioner.
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> 3. Undoubtedly, the said ledger would embody amounts which have been deducted under Section 51 of the **Central Goods and Services Tax Act, 2017** by a department or establishment of the government, a local authority, or other governmental agencies. In this case, these were amounts which were deducted by the **Delhi Metro Rail Corporation** and credited to the Electronic Cash Ledger of the deductee, namely, the petitioner herein.
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> 4. We also take note of the provisions contained in Section 49(5) of the Act and which prescribe the manner in which the **Input Tax Credit** available in the Electronic Credit Ledger of a registered person could be utilized. Of equal significance is sub-section (6) of Section 49 which provides that the balance in the Electronic Cash or Credit Ledger may be refunded in accordance with Section 54 after payment of tax, interest, penalty, fee or any other amount payable under the Act.
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> 5. As per the facts which emerge from the record, presently there does not appear to be any quantified demand or liability that stands created against the writ petitioner. As we peruse the impugned order, we find that the principal allegation against the petitioner is of an incorrect utilization of ITC alone.
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> 6. We further take note of the provisions made in Section 54 and which while addressing various contingencies in which a refund of unutilized ITC may be stalled or paused, incorporates no corresponding prohibitions with respect to amounts standing to the credit of the Electronic Cash Ledger.
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> 7. In order to enable Mr. Singla, learned counsel appearing for the respondents to address submissions in the aforesaid light, let the matter be called again on 05.11.2024."

3. The submission which was essentially addressed before us on that date was that no restraint on withdrawal of sums standing to the credit of the Electronic Cash Ledger could be placed under the provisions of the CGST Act. Learned counsel for the petitioner had on that occasion contended that the restrictions with respect to utilization of funds that may stand to the credit of a ledger as contemplated under

the CGST Act would be confined to the Electronic Credit Ledger alone. It was in the aforesaid context that we had granted time to Mr. Singla, learned counsel appearing for the respondents, to address further submissions.

4. For completeness, we also bear in consideration that while the original order of stay under Section 108 was ordained to operate for a period of six months, the same came to be amended by way of a Corrigendum issued thereafter. That Corrigendum dated 04 December 2023 reads thus: -

> "Attention is invited to Revision/Stay order dated 05.07.2023 under Section 108 of CGST Act 2017 for Refund applied under ARN AA0710220365371 dated 14.10.2022 issued from CGST/DW/HQ/Review/RFD-06/HCC-VCCL/379/2022/Pt-1/19849 by the undersigned in respect of M/s HCC-VCCL Joint Venture (GSTIN-07AACAH8776P12T), DC-06, PROJECT ROAD NO 235 KESHOPUR, KESHOPURI, MAJOR BHUPINDER SINGH NAGAR KRISHNA PARK, Vikaspuri, New Delhi, West Delhi, Delhi, 110018.
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> In the said Revision/Stay order dated 05.07.2023, "SIX MONTHS" may be read as "TWO YEARS" The above Revision/Stay order dated 05.07.2023 stands corrected to that extent."

5. Mr. Singla at the outset contended that Section 108 confers a power on the revisional authority to stay the operation of a decision or order made under the CGST Act in the interregnum and till it concludes an inquiry with respect to the validity of the said decision or order. In view of the aforesaid, it was contended that there exists no justification for the Court to interdict those proceedings initiated by the revisional authority at this stage and where only an interim stay had been granted and all rights and contentions of the writ petitioner stand preserved.

6. Taking us through the provisions enshrined in Sections 49, 51 and 54 of the CGST Act, Mr. Singla submitted that the power to

restrain implementation of an order of refund would apply equally to sums standing to the credit of either the Electronic Credit or the Electronic Cash Ledger. Mr. Singla laid emphasis on Section 49(3) in terms of which the statute provides that the amount available in the Electronic Cash Ledger may be used for making payments towards tax, interest, penalty, fee or any other amount payable under the CGST Act, and thus, standing on an equal pedestal with amounts which may stand in the balance of an Electronic Credit Ledger. This, according to Mr. Singla, would be the position which would indisputably emerge when one reads sub-sections (2) and (3) of Section 49.

7. The fact that the CGST Act places sums standing to the credit of those ledgers on an equal pedestal, according to Mr. Singla, is further fortified from a reading of Section 49(6) and which prescribes that the balance in both those ledgers may be refunded in accordance with the provisions of Section 54.

8. For the purposes of evaluating the submissions which were addressed, we deem it apposite to extract Sections 49, 51 and 54 hereunder:

> "**49. Payment of tax, interest, penalty and other amounts**.—(1) Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.
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> (2) The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with [Section 41 [* * *]], to be maintained in such manner as may be prescribed.
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> (3) The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any

other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.

(4) The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions [and restrictions] and within such time as may be prescribed.

(5) The amount of input tax credit available in the electronic credit ledger of the registered person on account of—

(*a*) integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards the payment of central tax and State tax, or as the case may be, Union territory tax, in that order;

(*b*) the central tax shall first be utilised towards payment of central tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;

(*c*) the State tax shall first be utilised towards payment of State tax and the amount remaining, if any, may be utilised towards payment of integrated tax:

[Provided that the input tax credit on account of State tax shall be utilised towards payment of integrated tax only where the balance of the input tax credit on account of central tax is not available for payment of integrated tax;]

(*d*) the Union territory tax shall first be utilised towards payment of Union territory tax and the amount remaining, if any, may be utilised towards payment of integrated tax:

[Provided that the input tax credit on account of Union territory tax shall be utilised towards payment of integrated tax only where the balance of the input tax credit on account of central tax is not available for payment of integrated tax;]

(*e*) the central tax shall not be utilised towards payment of State tax or Union territory tax; and

(*f*) the State tax or Union territory tax shall not be utilised towards payment of central tax.

(6) The balance in the electronic cash ledger or electronic credit ledger after payment of tax, interest, penalty, fee or any other amount payable under this Act or the rules made thereunder may be refunded in accordance with the provisions of Section 54.

(7) All liabilities of a taxable person under this Act shall be recorded and maintained in an electronic liability register in such manner as may be prescribed.

(8) Every taxable person shall discharge his tax and other dues

under this Act or the rules made thereunder in the following order, namely:—

(*a*) self-assessed tax, and other dues related to returns of previous tax periods;

(*b*) self-assessed tax, and other dues related to the return of the current tax period;

(*c*) any other amount payable under this Act or the rules made thereunder including the demand determined under Section 73 or Section 74 [or Section 74-A].

(9) Every person who has paid the tax on goods or services or both under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such tax to the recipient of such goods or services or both.

Explanation.—For the purposes of this section,—

(*a*) the date of credit to the account of the Government in the authorised bank shall be deemed to be the date of deposit in the electronic cash ledger;

(*b*) the expression,—

(*i*) "tax dues" means the tax payable under this Act and does not include interest, fee and penalty; and

(*ii*) "other dues" means interest, penalty, fee or any other amount payable under this Act or the rules made thereunder.

[(10) A registered person may, on the common portal, transfer any amount of tax, interest, penalty, fee or any other amount available in the electronic cash ledger under this Act, to the electronic cash ledger for,—

(*a*) integrated tax, central tax, State tax, Union territory tax or cess; or

(*b*) integrated tax or central tax of a distinct person as specified in sub-section (4) or, as the case may be, sub-section (5) of Section 25, in such form and manner and subject to such conditions and restrictions as may be prescribed and such transfer shall be deemed to be a refund from the electronic cash ledger under this Act:

Provided that no such transfer under clause (*b*) shall be allowed if the said registered person has any unpaid liability in his electronic liability register.]

[(11) Where any amount has been transferred to the electronic cash ledger under this Act, the same shall be deemed to be deposited in the said ledger as provided in sub-section (1).]

[(12) Notwithstanding anything contained in this Act, the Government may, on the recommendations of the Council, subject

to such conditions and restrictions, specify such maximum proportion of output tax liability under this Act or under the Integrated Goods and Services Tax Act, 2017 (13 of 2017) which may be discharged through the electronic credit ledger by a registered person or a class of registered persons, as may be prescribed.]

xxxx **xxxx** **xxxx**

51. Tax deduction at source.—(1) Notwithstanding anything to the contrary contained in this Act, the Government may mandate,—

(*a*) a department or establishment of the Central Government or State Government; or

(*b*) local authority; or

(*c*) Governmental agencies; or

(*d*) such persons or category of persons as may be notified by the Government on the recommendations of the Council, (hereafter in this section referred to as "the deductor"), to deduct tax at the rate of one per cent. from the payment made or credited to the supplier (hereafter in this section referred to as "the deductee") of taxable goods or services or both, where the total value of such supply, under a contract, exceeds two lakh and fifty thousand rupees:

Provided that no deduction shall be made if the location of the supplier and the place of supply is in a State or Union territory which is different from the State or as the case may be, Union territory of registration of the recipient.

Explanation.—For the purpose of deduction of tax specified above, the value of supply shall be taken as the amount excluding the central tax, State tax, Union territory tax, integrated tax and cess indicated in the invoice.

(2) The amount deducted as tax under this section shall be paid to the Government by the deductor within ten days after the end of the month in which such deduction is made, in such manner as may be prescribed.

[(3) A certificate of tax deduction at source shall be issued in such form and in such manner as may be prescribed.]

(4) [* * *]

(5) The deductee shall claim credit, in his electronic cash ledger, of the tax deducted and reflected in the return of the deductor furnished under sub-section (3) of Section 39, in such manner as may be prescribed.

(6) If any deductor fails to pay to the Government the amount deducted as tax under sub-section (1), he shall pay interest in accordance with the provisions of sub-section (1) of Section 50, in

addition to the amount of tax deducted.

(7) The determination of the amount in default under this section shall be made in the manner specified in Section 73 or Section 74 [or Section 74-A].

(8) The refund to the deductor or the deductee arising on account of excess or erroneous deduction shall be dealt with in accordance with the provisions of Section 54:

Provided that no refund to the deductor shall be granted, if the amount deducted has been credited to the electronic cash ledger of the deductee.

xxxx **xxxx** **xxxx**

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 [such form and] 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 (46 of 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 [167][two years] 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 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.

(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.

(5) If, on receipt of any such application, the proper officer is satisfied that the whole or part of the amount claimed as refund is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund referred to in Section 57.

(6) Notwithstanding anything contained in sub-section (5), the proper officer may, in the case of any claim for refund on account of zero-rated supply of goods or services or both made by registered persons, other than such category of registered persons as may be notified by the Government on the recommendations of the Council, refund on a provisional basis, ninety per cent. of the total amount so claimed, [* * *] in such manner and subject to such conditions, limitations and safeguards as may be prescribed and thereafter make an order under sub-section (5) for final settlement of the refund claim after due verification of documents furnished by the applicant.

(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" and "exports"] of goods or services or both or on inputs or input services used in making such zero-rated supplies;

(*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.

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

(9) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provisions of this Act or the rules made thereunder or in any other law for the time being in force, no refund shall be made except in accordance with the provisions of sub-section (8).

(10) Where any refund is due [* * *] to a registered person who has defaulted in furnishing any return or who is required to pay any tax, interest or penalty, which has not been stayed by any court, Tribunal or Appellate Authority by the specified date, the proper officer may—

(*a*) withhold payment of refund due until the said person has furnished the return or paid the tax, interest or penalty, as the case may be;

(*b*) deduct from the refund due, any tax, interest, penalty, fee or any other amount which the taxable person is liable to pay but which remains unpaid under this Act or under the existing law.

Explanation.—For the purposes of this sub-section, the expression "specified date" shall mean the last date for filing an appeal under this Act.

(11) Where an order giving rise to a refund is the subject matter of an appeal or further proceedings or where any other proceedings under this Act is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue in the said appeal or other proceedings on account of malfeasance or fraud committed, he may, after giving the taxable person an opportunity of being heard, withhold the refund till such time as he may determine.

(12) Where a refund is withheld under sub-section (11), the taxable person shall, notwithstanding anything contained in Section 56, be entitled to interest at such rate not exceeding six per cent. as may be

notified on the recommendations of the Council, if as a result of the appeal or further proceedings he becomes entitled to refund.

(13) Notwithstanding anything to the contrary contained in this section, the amount of advance tax deposited by a casual taxable person or a non-resident taxable person under sub-section (2) of Section 27, shall not be refunded unless such person has, in respect of the entire period for which the certificate of registration granted to him had remained in force, furnished all the returns required under Section 39.

(14) Notwithstanding anything contained in this section, no refund under sub-section (5) or sub-section (6) shall be paid to an applicant, if the amount is less than one thousand rupees.

[(15) Notwithstanding anything contained in this section, no refund of unutilised input tax credit on account of zero rated supply of goods or of integrated tax paid on account of zero rated supply of goods shall be allowed where such zero rated supply of goods is subjected to export duty.]

Explanation.—For the purposes of this section,—

(1) "refund" includes refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, or refund of tax on the supply of goods regarded as deemed exports, or refund of unutilised input tax credit as provided under sub-section (3).

(2) "relevant date" means—

(*a*) in the case of goods exported out of India where a refund of tax paid is available in respect of goods themselves or, as the case may be, the inputs or input services used in such goods,—

(*i*) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India; or

(*ii*) if the goods are exported by land, the date on which such goods pass the frontier; or

(*iii*) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(*b*) in the case of supply of goods regarded as deemed exports where a refund of tax paid is available in respect of the goods, the date on which the return relating to such deemed exports is furnished;

[(*ba*) in case of zero-rated supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit where a refund of tax paid is available in respect of such supplies themselves, or as the case may be, the inputs or input services used in such supplies, the due date for furnishing of return under section 39 in respect of such supplies;]

(*c*) in the case of services exported out of India where a refund of tax paid is available in respect of services themselves or, as the case may be, the inputs or input services used in such services, the date of—

(*i*) receipt of payment in convertible foreign exchange [or in Indian rupees wherever permitted by the Reserve Bank of India], where the supply of services had been completed prior to the receipt of such payment; or

(*ii*) issue of invoice, where payment for the services had been received in advance prior to the date of issue of the invoice;

(*d*) in case where the tax becomes refundable as a consequence of judgment, decree, order or direction of the Appellate Authority, Appellate Tribunal or any court, the date of communication of such judgment, decree, order or direction;

[(*e*) in the case of refund of unutilised input tax credit under clause (ii) of the first proviso to sub-section (3), the due date for furnishing of return under Section 39 for the period in which such claim for refund arises;]

(*f*) in the case where tax is paid provisionally under this Act or the rules made thereunder, the date of adjustment of tax after the final assessment thereof;

(*g*) in the case of a person, other than the supplier, the date of receipt of goods or services or both by such person; and

(*h*) in any other case, the date of payment of tax."

9. The sums which come to be deposited in the Electronic Credit Ledger comprise of the **Input Tax Credit**[2] as self-assessed by a registered person. That amount is available to be utilised in accordance with the priorities as fixed in Section 49(5). The sums which come to be credited to the Electronic Cash Ledger represent the tax deducted by the authorities specified in Section 51 from the payment made or credited to a supplier of taxable goods or services or both. Thus, both sums standing either in the Electronic Credit or Electronic Cash Ledgers constitute tax.

10. Section 54 prescribes the manner in which a person claiming

[2] ITC

refund may apply for disbursal of those amounts. Hereto, the Proviso to Section 54(1) stipulates that a registered person claiming refund of sums standing in balance in the Electronic Cash Ledger would have to follow the procedure as prescribed. Of crucial significance is the usage of the phrase "*in accordance with the provisions of sub-section (6) of Section 49*" as they appear in Section 54(1). Thus refund, be it from the Electronic Cash or the Electronic Credit Ledger, are essentially treated at par. By virtue of Section 54(11), the Commissioner stands independently empowered to withhold a refund if it be of the opinion that the grant thereof would adversely affect the Revenue either in an appeal which may be pending or in any other proceedings on account of malfeasance of fraud that may have been committed.

11. Undisputedly, there is no outstanding demand against the petitioner and which may have perhaps legitimately constituted one of the possible reasons to withhold the refund. While it is true that Section 54 while making specific provisions with respect to refund of unutilized ITC in terms of sub-sections (5) and (8) thereof, stops short of incorporating similar restrictions on utilization of the balance standing in the Electronic Cash Ledger in terms which may be described as explicit, the position, in our considered opinion, would be no different.

12. This we note since Section 108 empowers the revisional authority to place in abeyance "any order" made under the CGST Act and which in its opinion could be said to be illegal, improper or prejudicial to the interest of the Revenue.

13. We, therefore, find ourselves unable to sustain the contention of the petitioner who had sought to canvass a position of distinction

which we should recognise to exist and governing sums which stand in balance in the Electronic Cash and Electronic Credit Ledgers.

14. However, and notwithstanding the above, we find merit and force in the second submission which was addressed in challenge to the impugned order and which proceeded on the following lines. Taking us through the order impugned, learned counsel for the writ petitioner, laid emphasis on a complete absence of any finding which may have been indicative of the revisional authority having come to even a prima facie conclusion that the order dated 09 December 2022 was either illegal, improper or prejudicial to the interest of the Revenue. According to learned counsel, absent any such conclusion, the power as conferred by Section 108 could not have possibly been invoked.

15. We take note of Section 108 of the Act and which reads thus:-

> "**108. Powers of Revisional Authority**.—(1) Subject to the provisions of Section 121 and any rules made thereunder, the Revisional Authority may, on his own motion, or upon information received by him or on request from the Commissioner of State tax, or the Commissioner of Union territory tax, call for and examine the record of any proceedings, and if he considers that any decision or order passed under this Act or under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act by any officer subordinate to him is erroneous in so far as it is prejudicial to the interest of revenue and is illegal or improper or has not taken into account certain material facts, whether available at the time of issuance of the said order or not or in consequence of an observation by the Comptroller and Auditor General of India, he may, if necessary, stay the operation of such decision or order for such period as he deems fit and after giving the person concerned an opportunity of being heard and after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, including enhancing or modifying or annulling the said decision or order.
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> (2) The Revisional Authority shall not exercise any power under sub-section (1), if—

(*a*) the order has been subject to an appeal under Section 107 or Section 112 or Section 117 or Section 118; or

(*b*) the period specified under sub-section (2) of Section 107 has not yet expired or more than three years have expired after the passing of the decision or order sought to be revised; or

(*c*) the order has already been taken for revision under this section at an earlier stage; or

(*d*) the order has been passed in exercise of the powers under sub-section (1):

Provided that the Revisional Authority may pass an order under sub-section (1) on any point which has not been raised and decided in an appeal referred to in clause (*a*) of sub-section (2), before the expiry of a period of one year from the date of the order in such appeal or before the expiry of a period of three years referred to in clause (*b*) of that sub-section, whichever is later.

(3) Every order passed in revision under sub-section (1) shall, subject to the provisions of Section 113 or Section 117 or Section 118, be final and binding on the parties.

(4) If the said decision or order involves an issue on which the Appellate Tribunal or the High Court has given its decision in some other proceedings and an appeal to the High Court or the Supreme Court against such decision of the Appellate Tribunal or the High Court is pending, the period spent between the date of the decision of the Appellate Tribunal and the date of the decision of the High Court or the date of the decision of the High Court and the date of the decision of the Supreme Court shall be excluded in computing the period of limitation referred to in clause (*b*) of sub-section (2) where proceedings for revision have been initiated by way of issue of a notice under this section.

(5) Where the issuance of an order under sub-section (1) is stayed by the order of a court or Appellate Tribunal, the period of such stay shall be excluded in computing the period of limitation referred to in clause (*b*) of sub-section (2).

(6) For the purposes of this section, the term,—

(*i*) "record" shall include all records relating to any proceedings under this Act available at the time of examination by the Revisional Authority;

(*ii*) "decision" shall include intimation given by any officer lower in rank than the Revisional Authority."

16. In order to evaluate the correctness of that submission we deem it apposite to extract the following paragraphs from the order impugned:

> "**3.** After examining the electronic cash ledger of the tax payer, it appeared to the adjudicating authority that TDS has been credited in the cash ledger as detailed in para 2 above and the same has been debited in the electronic cash ledger while claiming the refund claim. Therefore the adjudicating authority sanctioned an amount of Rs5,50,00,000/- (CGST- 2,75,00,000/- & SGST 2,75,00,000) as electronic cash refund the tax payer i.e. M/s HCC-VCCL Joint Venture under rule 92 of CGST Rules, 2017 read with section 54 of the CGST Act, 2017.
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> **4.** After issuance of impugned RFD-06 a copy of the same was endorsed to the undersigned for information. On specific intelligence inputs and further data analysis thereon, it came to the notice that the impugned order is erroneous insofar as it is prejudicial to the interest of revenue and is improper and has not taken into account certain material facts which were not available at the time of issuance of the said order as detailed herein below:
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> (i) As per the data available, the taxable value of Inward Supplies is Rs 348 crores from the date of registration in Feb 2020 to September 2022, which is not supported by the bank statements of the taxpayer.
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> (ii) Balance Sheet for the F.Y. 2020-21 shows that the taxpayer had capitalized a vehicle amounting to Rs. 16 crores which leads to infer that ITC has been availed on this item. Since the party was engaged in construction activity, as per section 17 of the CGST Act, the ITC is inadmissible on vehicles.
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> (iii) Further, from the scrutiny of GSTR-2A and the Bank Statement, it is seen that 75% of the supplies were made by the following three suppliers (a) M/s VCCL, (b) M/s Terratec India Pvt. Ltd. and (c) LR Sharma. Further, it has come to the notice that till July 2022, only the aforementioned three major parties have issued invoices amounting to Rs. 132 Crore to HCC-VCCL(JV), whereas the bank statement shows that the payment against these invoices have been made to the extent of Rs. 16.25 crores only within the stipulated time of 180 days u/s Section 16(2) of the CGST Act, 2017 read with Rule 37 of CGST Rules, 2017.
>
> **xxxx xxxx xxxx**
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> **13.** I have carefully gone through all the material facts provided by the taxpayer and the contentions of the taxpayer is summarized below:-

(i) The payment of invoices issued by VCCL, Terratec India Pvt. Ltd. and LR Sharma & Co. has been partially paid by the Joint Venture. The taxpayer has provided partial bank statements and ledgers for the same.

(ii) Any inquiry or investigation can continue and may take it own course, but these proceedings cannot have any bearing on this ECL refund. In other words, no provision under GST restricts the refund of ECL unless there is an outstanding demand of tax.

(iii) In F.Y. 2020-21 the Tunnel Boring Machine (TBM) amounting to Rs. 16.56 crores approximately have been mentioned as vehicle instead of 'Plant & Machinery'. Such a mistake of presentation in the Financials is an error only in FY 2020-21 due to change in the Statutory Auditor. This mistake was rectified by the same Auditor in the Financials of the subsequent year i.e. FY 2021-22. But this error may not change the nature and purpose of TBM.

13.1 For taxpayer contention mentioned at sub para (i) above:

The taxpayer has claimed ITC on all the purchase invoices issued by the suppliers, however, during preliminary inquiry payment for invoice word Rs. 115.75 crores (Rs. 132 Crores – 16.25 crores) have been found short paid to the surprise as per Bank Statement involving tax amount of Rs. 20.83 crores (@ 18%) which is in contravention of Section 16(2) of the CGST Act, 2017, read with Rule 37 of the CGST Rules, 2017. Further ITC utilized for which complete payment has not been made within 180 days is liable for interest as per under Section 50 of CGST Act, 2017.

The relevant provision of Section 16 (2) is reproduced below.

Section 16. Eligibility and conditions for taking input tax credit.-
(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the same amount shall be credited to the electronic credit ledger of such person.

(2) ***Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless****,-*

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying

documents as may be prescribed;

1[(aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37;]

(b) he has received the goods or services or both.

*2 [**Explanation**.- For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services-*

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered pereon;]

3 [(ba) the details of input tax credit in respect of the said supply communicated to such registered person under section 38 has not been restricted;]

(c) subject to the provisions of 4[section 41 5[***]], the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

The relevant portion of Rule 37 of CGST Rules, 2017 is reproduced below:

Rule 37. Reversal of input tax credit in the case of non-payment of consideration.-

[(1) A registered person, who has availed of input tax credit on any inward supply of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, but fails to pay to the supplier thereof, the amount towards the value of such supply [whether wholly or partly,] along with the tax payable thereon, within the time limit specified in the second proviso to sub-section (2) of section 16, shall pay [or reverse] an amount equal to the input tax credit availed in respect of such supply [proportionate to the amount not paid to the supplier,] along with interest payable thereon under section 50, while furnishing the return in FORM GSTR-3B for ***the tax period immediately following the period of one hundred and eighty days from the date of the issue of the invoice:***

Provided *that the value of supplies made without consideration as*

specified in Schedule I of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16:

***Provided** further that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section (2) of section 15 shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16.*

(2) Where the said registered person subsequently makes the payment of the amount towards the value of such supply along with tax payable thereon to the supplier thereof, he shall be entitled to re-avail the input tax credit referred to in sub-rule (1).]

(3) [****]

(4) The time limit specified in sub-section (4) of section 16 shall not apply to a claim for re-availing of any credit, in accordance with the provisions of the Act or the provisions of this Chapter, that had been reversed earlier."

17. As is manifest from the aforesaid conclusions as appearing in the order impugned, the revisional authority appears to have doubted the ITC which was claimed by the writ petitioner in the tax period in question. While that conclusion and tentative view as expressed would be open to be tested under the CGST Act, the question which merits consideration is whether that conclusion would have justified the invocation of Section 108.

18. That issue, in our opinion, must necessarily be answered in the negative. The pre-requisite condition for invocation of Section 108 is the formation of an opinion that an order made under the CGST Act is erroneous, prejudicial to the interest of the Revenue, illegal or improper. By virtue of Section 108 the Commissioner is also empowered to invoke its revisional authority in a situation where it comes to the conclusion that the order under scrutiny was made without taking into account certain material facts whether available at the time of making of that order or not as well as in consequence of an observation rendered by the Comptroller and Auditor General of

India.

19. Admittedly, the allegation of wrongful availment of ITC is based on intelligence inputs received subsequent to the passing of the order dated 09 December 2022. The allegation of improper utilization of ITC is one which is clearly distinct and unconnected with the order sanctioning refund. While that allegation, when tested and examined, may ultimately lead to the creation of prospective liabilities, it has no correlation with the question of whether the order sanctioning refund was rendered invalid or was liable to be corrected under Section 108.

20. Absent any finding or conclusion having been rendered by the Commissioner in this respect, and which may have tended to indicate that the opinion expressed in the order dated 09 December 2022 was rendered unsustainable, illegal or invalid, we find ourselves unable to sustain the order impugned.

21. We, accordingly, allow the instant writ petition and quash the order dated 05 July 2023.

22. We, however, in the facts and circumstances of the case accord liberty to the respondents to proceed afresh and in accordance with law. This order, however, shall thus be without prejudice to the rights and contentions of respective parties which would be open to be canvassed in case any further proceedings as permissible in law are initiated by the respondents.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

NOVEMBER 5, 2024/kk