

08.7.2025
Sl. No.22
Court No.4
Ali

**CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
APPELLATE SIDE**

WPA 1171 of 2025

**Kartick Das
Vs.
Assistant Commissioner of CGST & C Ex.
Dinajpur Division & Ors.**

Mr. Budhayan Bhattacharyya,
Ms. Stuti Bansal,
Ms. Keya Kundu,
Ms. Chayna Kumary
.... for the Petitioner.

Mr. Subir Kumar Saha, Ld. AGP,
Mr. Bikash Singha
...for the State.

Mr. Dilip Kumar Agarwal,
Ms. Biswaraj Agarwal
.....for the respondent Nos. 1,2,3 &6.

1. By the instant writ petition, the petitioner lays challenge to an order dated December 5, 2023 passed by the appellate authority under Section 107(11) of Central Goods and Services Tax Act, 2017.

2. The facts of the case run by the petitioner in the writ petition are that on November 24, 2022 the petitioner had filed an application for refund of "Excess Balance in Electronic Cash Ledger" for an amount of Rs. 13,00,000/-. Such application for refund was filed in the category "Excess Balance in

Electronic Cash Ledger” as the funds had been deposited inadvertently and had remained unutilized.

3. The petitioner has asserted that he sought for refund since there was an inadvertent excess deposit of cash under the heads “Central Tax” and “State Tax”, and an unused balance amounting to Rs. 13,00,000/- remained in the Electronic Cash Ledger; the petitioner contends that he was legally entitled to claim the said sum as refund under Section 49(6) of the CGST/WBGST Act, 2017.

4. Upon due scrutiny and verification of the refund application of the application, the respondent No. 1 passed an order of refund.

5. Subsequently, the said order of refund was examined by the Principal Commissioner of CGST & CX, Siliguri Commissionerate, in exercise of his power under Section 107 (2) of the CGST Act, 2017 whereupon, the said Principal Commissioner passed an order “order in review” dated August 18, 2023, thereby holding that the said order did not appear to be proper and legal on the grounds mentioned therein. By the said order, the said authority, authorised the Deputy/Assistant Commissioner of CGST & CX, Dinajpur, Siliguri Commissionerate to file an appeal before the Additional Joint Commissioner

(Appeals) Siliguri (Appeals) against the said Refund Sanction order dated January 23, 2023.

6. Accordingly, an appeal was filed by the Assistant Commissioner of CGST & CX Dinajpur under Section 107(11) of the CGST Act, 2017.

7. The said appeal was allowed by an order dated December 5, 2023 passed by the Additional Commissioner CGST & C Ex., (Appeals) Siliguri Appeal Commissionerate Siliguri being the appellate authority thereby setting aside the refund sanctioned order dated January 23, 2023.

8. During the said appeal the petitioner was granted opportunity of personal hearing and petitioner appeared before the appellate authority on November 16, 2023. During the hearing petitioner sought for 10 days' time to submit GSTR-1, GSTR-3B, GSTR-7A, GSTR 9, and a reconciliation statement along with other documents in support of the petitioner's claim.

9. The petitioner has contended that no further notice was given to the petitioner thereby fixing a date enabling him to file the documents he sought to rely on.

10. The appellate authority ultimately allowed the appeal by an order dated December 5, 2023 thereby, according to the petitioner, depriving the petitioner of

an opportunity to file the documents the petitioner sought to rely on.

11. Being aggrieved by the said appellate order, the petitioner has approached this Court by filing the instant writ petition.

12. Mr. Bhattacharyya, learned advocate appearing for the writ petitioner at the first instance submits that the order in review could not have been passed without hearing the petitioner.

13. He further submitted that the appellate authority while passing the impugned order has acted in abject violation of principles of natural justice by not granting the petitioner an opportunity to file documents and papers which the petitioner sought to rely on upon making a prayer to submit the same within a period of ten days.

14. As regards the aspect of delayed approach, Mr. Bhattacharya relies on a judgement of the Hon'ble Supreme court in the case of Collector Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji & Ors. reported at AIR 1987 SC 135.

15. Mr. Bhattacharya therefore submits that the order impugned should be set aside and the petitioner must be afforded an opportunity to rely on the documents that he wished to rely on.

16. Mr. Agarwal, learned advocate appearing for the respondent CGST authorities submits that the petitioner's case is without any basis inasmuch as the petitioner has himself admitted in paragraph 2(iii) at page 4 of the writ petition that *"due to an inadvertent excess deposit of cash under the heads "Central Tax" and "State Tax" an unused balance amounting to Rs. 13,00,000/- INR remained in the electronic cash ledger, which your petitioner is legally entitled to claim as refund under Section 49(6) of the CGST/WBGST Act, 2017 read with Rule 89(1) of the Rules"*.

17. He hands up a copy of an "Electronic Cash Ledger" and submits that it is evident that the said amount of Rs. 13,00,000/- INR has not been deposited in cash by the petitioner and the fact that the said amount was not deposited would be evident from the "Electronic Cash Ledger".

18. It has also been submitted by Mr. Agarwal that the writ petition is grossly delayed.

19. On a query of the Court as to why has the writ petitioner approached this Court about one and a half years after passing of the order impugned, Mr. Bhattacharyya has invited the attention of the Court to the pleadings made at paragraph 4 (xix) of the writ petition and submitted that the petitioner

intended to challenge the appellate order before the CGST Tribunal but since the Tribunal had (has) not yet been set up, the petitioner had to approach this Court. It is further submitted that the matter gives rise to a continuing cause of action.

20. Having heard the learned advocates appearing for respective parties and having considered the material on record, this Court is of the view that the writ petition should not be entertained.

21. The writ petitioner has assailed an order passed by the appellate authority under Section 107(11) of the CGST Act, 2017 by way of a writ petition, since the relevant CGST Tribunal has not yet been constituted.

22. Viewed at from the angle that the GST Tribunal is presently not available, the writ petition is surely entertainable. However when the highly prerogative with jurisdiction under Article 226 of the Constitution, is invoked, it must be seen whether or not the approach to Court has been made within a reasonable time. The litigant's conduct should evince timeliness.

23. During the hearing on November 16, 2023 the petitioner had sought ten (10) days' time to submit certain documents. It is the petitioner's case that thereafter (i.e. after the date of hearing of the appeal

on November 16, 2023) no further notice was given to the petitioner inviting the petitioner to file the documents. In the opinion of this Court, once the petitioner had himself sought for ten days' time it was incumbent on the petitioner to submit the documents within the time requested for by the petitioner himself.

24. There is nothing on record to show that the petitioner even attempted to submit the documents sought to be relied upon within the said period of ten days sought for by him. The petitioner's expectation that the authority should have issued a further notice inviting the petitioner to file documents despite the petitioner himself having requested for ten days' time appears to be outlandish.

25. This Court has noticed that it is not the petitioner's case even in the writ petition that such request for time of 10 days was refused by the appellate authority, (even orally far less in writing). It is also noticed that the order dated December 5, 2023 impugned in the present writ petition has been passed about ten days after expiry of the period of ten days from the date of hearing during which the petitioner was supposed to file the documents.

26. There is no averment in the writ petition as to when was the impugned order served. This Court

therefore has to take it that the said order dated December 5, 2023 was served upon the petitioner around the same time that it was passed. Yet the petitioner chose not to assail the said order till May 21, 2025 when the instant writ petition was filed.

27. The writ petition does not contain any plausible explanation as to why did the petitioner make such a belated approach to Court under Article 226 of the Constitution of India. The explanation given by the petitioner that the petitioner was waiting for the CGST Tribunal to function could have been accepted if the wait had not been so unduly long as to pass one year and more. Such an explanation cannot be accepted.

28. It is settled law that writ remedy is a remedy of discretion and writ jurisdiction ought to be exercised only if the facts and circumstances of a case justify exercise thereof. The explanation given by the petitioner fails to inspire confidence of the Court.

29. As regards the submission of Mr. Bhattacharyya that the order in review dated August 18, 2023 is unsustainable because the petitioner had not been given an opportunity of hearing, this Court is of the view that the provisions of Section 107(2) of the CGST Act do not mandate or require a hearing to be taken by the authority concerned while taking a

decision as to whether the authority concerned would carry an order up in appeal or not.

The provisions of Section 107(2) can be exercised even suo motu by the commissioner. The provision of Section 107 (2) are exhausted hereinbelow:

"(2)The Commissioner may, on his own motion, or upon request from the Commissioner of State tax or the Commissioner of Union territory tax, call for and examine the record of any proceedings in which an adjudicating authority has passed any decision or order under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Service s Tax Act, 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".

30. A perusal of the said provision makes it evident that the said power is to be exercised by the Commissioner only to decide as to whether the order being examined by him requires to be appealed against or not. The order under examination as such is not interfered with at such stage. The relevant Commissioner only forms an opinion as regards the validity, propriety and legality of the order only for the purpose of deciding as to whether such order requires to be assailed by appeal or not. Importing a

requirement of hearing at such stage would make the provision unworkable.

31. Merely because the said order dated August 18, 2023 has been termed as an "order in review" therefore the petitioner would not be required to be heard. The power to take a decision as to whether an order should be carried in appeal or not has been statutorily vested with the Commissioner under Section 107 (2) of the Act. Once the source of power is there in a statute merely because the mantle for exercise thereof has been differently termed (here as "order in review") the exercise of such power cannot be faulted. Law on this score is well settled.

32. The Judgement of the Hon'ble Supreme Court in the case of Mst. Katiji (supra) is of no aid to the petitioner inasmuch as the explanation provided by the petitioner has not been found to be sufficient.

33. As regards the petitioner's contention that the matter gives rise to continuing cause of action, this Court is of the view that once the right of the petitioner to get refund has been adjudicated upon and determined by the appellate authority, though in the negative, the cause of action cannot be said to be a continuing one, in the fact and circumstances of the instant case. Damage/injury was complete on the date when the order dated December 05, 2023 was

passed. In any case, since the law of limitation is not applicable to a writ proceeding the issue as to whether or not the petitioner has a continuing cause of action need not be dilated further. The question to be answered here is whether or not the petitioner has approached the Court within a reasonable time. The answer is in the negative.

34. The petitioner's approach has not been vigilant since inception, as would be evident from the fact that the petitioner did not even attempt to submit the documents he sought to rely on before the appellate authority within the 10 days period that was requested for by the petitioner himself or even thereafter. This fact coupled with the delayed approach before this Court without any acceptable explanation, prevents this Court from exercising discretion in favour of the writ petitioner.

35. With the above observations, WPA 1171 of 2025 is stands, dismissed. There shall, however, be no order as to costs.

36. Urgent certified photocopy of this order, if applied for, be supplied as expeditiously as possible.

(Om Narayan Rai, J.)