IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) Nos.23508, 23511, 23513, 23514 and 23521 of 2021

AFR

M/s. Jyoti Construction .... ***Petitioner***

Mr. Ajit Kumar Roy, Advocate

-versus-

Deputy Commissioner of CT & GST, Barbil Circle, Jajpur and another .... ***Opposite Parties***

Mr. Sunil Mishra, Additional Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE B.P. ROUTRAY

ORDER
07.10.2021

Order No.

Dr. S. Muralidhar, CJ.

01. 1. These five matters arise out of a common set of facts and are accordingly being disposed of by this common order.

2. In all these writ petitions the challenge is to orders dated 28th April 2021 passed by the Additional Commissioner of Sales Tax (Appeal), Central Zone, Odisha (Opposite Party No.2) rejecting the appeal filed by the Petitioner under Section 107 (1) of the Odisha Goods and Services Tax Act, 2017 (OGST Act) and holding that the appeals filed are defective since the Petitioner herein had made payment of the pre-deposit being 10% of the disputed amount under the

IGST, CGST and SGST by debiting its electronic credit ledger (ECRL) and did not pay it from the electronic cash ledger (ECL) and furnished the proof of payment of the mandatory pre-deposit and that this was in contravention of Section 49(3) of the OGST Act read with Rule 85 (4) of the OGST Rules, 2017.

3. Identical orders dated 28th April 2021 were passed by Opposite Party No.2 in respect of each of the periods i.e. March, April, May, June and July, 2020 and therefore, five petitions have been filed in this Court.

4. This Court has heard the submissions of Mr. Ajit Kumar Roy, learned counsel appearing for the Petitioner and Mr. Sunil Mishra, learned Additional Standing Counsel (ASC) for the Department.

5. The Petitioner is a partnership firm engaged in the business of execution of works contract including civil, electrical and mechanical.

6. In the instant case for each of the above periods, a demand was raised by the Deputy Commissioner of CT & GST, Barbil Circle, Jajpur, Odisha (Opposite Party No.1) which

resulted in an extra demand for IGST, CGST and OGST inclusive of interest. An appeal was filed in Form-GST APL-01 before the appellate authority i.e. Opposite Party No.2 under Section 62 (1) of the OGST Act read with Rule 100 (1) of the OGST Rules. This was filed electronically.

7. In terms of Section 107 (6) of the OGST Act, the Petitioner was required to make payment equivalent to 10% of the disputed amount of tax arising from the order against which the appeal is filed. This payment was required to be made by the Petitioner by debiting its ECL as provided under Section 49(3) read with Rule 85 (4) of the OGST Rules. According to the Department, this liability of pre-deposit could be discharged only by debiting the ECL. However, it was noticed that the Petitioner sought to make payment of the pre-deposit by debiting the ECRL. Considering this to be defective and liable for rejection of the appeal, a show cause notice (SCN) was issued on 25th January 2021 and 17th February, 2021.

8. The contentions of the Petitioner before the appellate authority, which are also the contentions before this Court, as articulated by Mr. Roy, learned counsel, is that under Section 49 (4) of the OGST Act, the amount available in the ECRL

could be used for making "any payment towards output tax" under the OGST Act or the IGST Act "in such manner and subject to such conditions and within such time as may be prescribed". Under Rule 85 (4) of the OGST Rules, the amount deducted under Section 51, or collected under Section 52, or the amount payable on reverse charge basis, or; the amount payable under Section 10, or any amount payable towards interest, penalty, fee or "any other amount under the Act" shall be paid by debiting the ECL (i.e. the cash ledger) maintained under Rule 87 and the electronic ledger liability register (ELR) shall be credited accordingly.

9. It is submitted by Mr. Roy that on a collective reading of the above Rules, the pre-deposit could be made by debiting the ECRL. Mr. Roy refers to the definition of "Output Tax" under Section 2 (82) of the OGST Act which means "tax chargeable under this Act on taxable supply of goods or services or both" made by the taxable person or his agent but excludes tax payable on reverse charge basis. On this basis, it is contended that since what in effect be the Petitioner was paying was a percentage of the output tax as defined under Section 2(82) of the OGST Act, the amount could well be paid by debiting the ECRL.

10. On the other hand, Mr. Mishra, learned ASC for the Department refers to Section 49 (3) of the OGST Act which requires payment to be made from the ECL and Section 49 (4) which refers to the ECRL. It is submitted that the pre-deposit cannot be equated to the output tax. The proviso to Section 41 (2) of the OGST Act sets out the purposes for which the inout tax credit (ITC) can be utilized. It can be utilized for payment of "self assessed output tax as per the return". It is pointed out that self-assessment is defined under Section 59 of the OGST Act i.e. when the tax payer files a return under Section 39 of the OGST Act and the Form GSTR-3B, the taxpayer is deemed to be self-assessed. In no other cases, can ITC be utilized to discharge any liability. He also refers to Rule 85 (3) of the OGST Rules which states that "subject to the provision of Section 49 payment of every liability by a registered person as per his return shall be made by debiting the electronic credit ledger maintained as per Rule 86".

11. The appellate authority has, in the impugned order, referred to the decision in ***Shukhdev Singh v. Bhagatram Sardar Singh AIR 1975 SC 1331,*** which mandates that "If Statute provides a thing to be done in a particular manner, then it has to be done only in that manner." Mr. Mishra,

learned ASC in addition refers to the decision of the Supreme Court of India in ***M/s. Jayam & Co. v. State of Tamil Nadu (2016) 15 SCC 125*** which held that the ITC itself is a concession and has to be utilized as per the provisions in the GST statute and not otherwise.

12. Mr. Roy, learned counsel for the Petitioner, on the other hand refers to the decision of Supreme Court of India in ***J.K. Synthetics Ltd. v. Commercial Taxes Officer 94 (1994) STC 422*** where certain observations were made in the context of payment of interest. It was held that the provisions that permit the levy and collection of interest, even if construed as forming part of the machinery provision, "is substantive law for the simple reason that in the absence of contract or usage, interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount."

13. On the strength of the above observations, it is contended by Mr. Roy that Section 107 (6) of the OGST Act was merely a machinery provision and that it must be interpreted purposively to subserve the purpose of collecting the pre-deposit amount which could be done even by debiting the ECRL. He refers to the dissenting view of Justice P.N.

Bhagwati (as the learned Chief Justice of India then was) in ***Associated Cement Company Limited v. Commercial Tax Officer, Kota (1981) 4 SCC 578*** that a provision made in a statute for charging interest on delayed payment of tax must be construed as a substantive law and not a procedural provision.

14. The Court does not find the above decision to be helpful to the Petitioner. It is not possible to accept the plea of the Petitioner that "Output Tax", as defined under Section 2(82) of the OGST Act could be equated to the pre-deposit required to be made in terms of Section 107 (6) of the OGST Act. Further, as rightly pointed out by Mr. Mishra, learned ASC, the proviso to Section 41 (2) of the OGST Act limits the usage to which the ECRL could be utilised. It cannot be debited for making payment of pre-deposit at the time of filing of the appeal in terms of Section 107 (6) of the OGST Act. It is not therefore possible to accept the pleaa Section 107 (6) of the OGST Act is merely a "machinery provision".

15. The reliance by Mr. Roy, learned counsel for the Petitioner on the judgment of the Gujarat High Court in ***Vinayak Trexim v. State of Gujarat [2020] 79 GSTR 118 (Guj)*** is also not helpful to him. There a sum of

Rs.20,00,000/- was to be refunded to the Assessee and it was directed by the High Court that this amount could be used for the purposes of pre-deposit. It is not possible in the present case to equate the output tax payable to the amount of pre-deposit required to be made. There is world of difference between an amount which is refundable and an amount which is liable to be paid as output tax. Here there is no amount refundable to the Petitioner which could be utilized for making of payment of the pre-deposit.

16. The Court is unable to find any error having been committed by the appellate authority in rejecting the Petitioner's contention that the ECRL could be debited for the purposes of making the payment of pre-deposit.

17. It is then contended by Mr. Roy, learned counsel for the Petitioner that the Petitioner should be permitted to reverse the debit of the ECRL for paying the pre-deposit and thereafter the Petitioner will make payment by debiting the ECL.

18. As far as the above contention is concerned, the Court is of the view that the prayer of the Petitioner that the debiting of the ECRL made by it should be reversed is a separate

cause of action for which the Petitioner should independently seek appropriate remedies in accordance with law. The making of the pre-deposit by the Petitioner is not contingent upon the above reversal of the debit entry in the ECRL.

19. For the aforementioned reasons, the Court finds no merit in these writ petitions and accordingly, the writ petitions are dismissed. But in the circumstances, there shall be no order as to costs.

20. An urgent certified copy of this order be granted as per rules.

(Dr. S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge

S.K. Guin