IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO.3264 OF 2020

BA Continuum India Pvt. Ltd. … Petitioner
Vs.
Union of India and others … Respondents

Mr. Prakash Shah a/w. Mr. Jas Sanghavi, Mr. Prasad Paranjpe i/b. Mr. Anil Balani for Petitioner.
Ms. Jyoti Chavan, AGP for Respondents-State.

CORAM : UJJAL BHUYAN &
ABHAY AHUJA, JJ.

Reserved on : NOVEMBER 24, 2020
Pronounced on: MARCH 08 , 2021

Judgment and Order : (*Per Ujjal Bhuyan, J.*)

Heard Mr. Prakash Shah, learned counsel for the petitioner and Ms. Jyoti Chavan, learned AGP for the respondents-State.

2. In this petition filed under Articles 226 / 227 of the Constitution of India, petitioner has assailed legality and correctness of five identical orders all dated 26.06.2020 passed by respondent No.4 for five quarters covering the period from April, 2018 to June, 2019 rejecting the refund claims made by the petitioner in respect of unutilized input tax credit.

3. Petitioner is a company incorporated under the Companies Act, 1956. It is engaged in the business of providing information technology and information technology enabled services to customers located outside India. It has its registered office at Andheri (East), Mumbai.

4. Under the erstwhile service tax regime, petitioner was registered with the service tax department. With effect from 01.07.2017, goods and services tax (GST) regime came into effect with the introduction of

Central Goods and Services Tax Act, 2017 and the corresponding Maharashtra Goods and Services Tax Act, 2017 in so far State of Maharashtra is concerned. The erstwhile Central Excise Act, 1944 and Chapter V of the Finance Act, 1994 dealing with service tax stood subsumed in the Central Goods and Services Tax Act, 2017. All the assessees under the erstwhile two enactments dealing with central excise and service tax were required to migrate to the GST regime in terms of section 139(1) of the Central Goods and Services Tax Act, 2017 (briefly 'the CGST Act' hereinafter).

5. In compliance thereto petitioner migrated from service tax registration to GST registration and was allotted GST identification number in the State of Maharashtra.

6. It is stated that petitioner had entered into a master agreement dated 03.05.2004 with Bank of America National Association (for short 'BANA' hereinafter), a national banking association incorporated under the laws of United States of America. The agreement was entered into to provide for information technology and information technology enabled services by the petitioner to BANA. Details of the support services provided by the petitioner to BANA have been mentioned in the writ petition.

7. In order to provide the mentioned output services, petitioner received various input services and availed the credit of tax paid thereon. According to the petitioner, the services provided by it to BANA qualifies as "export of service" as well as "zero-rated supply" in terms of sections 2(6) and 16 of the Integrated Goods and Services Tax Act, 2017 ('IGST Act' for short).

8. Petitioner exported the said services without payment of tax and filed related applications in the prescribed format on various dates claiming refund of unutilized input tax credit under section 16(3) of the

IGST Act read with section 54 of the CGST Act and Rule 89 of the Central Goods and Services Tax Rules, 2017 (briefly 'CGST Rules' hereinafter). Petitioner filed five refund applications covering five different periods claiming total refund of Rs.9,58,13,338.00. Details of the refund applications have been provided in the writ petition which are extracted hereunder:-

Sr. No.	Period	Application Reference No. & Date	Amount
1.	April 2018 to June 2018	AA271219120611I 27.12.2019	12,19,054
2.	July 2018 to September 2018	AA270120087932A 21.01.2020	8,94,21,238
3.	October 2018 to December 2018	AA270120116912Q 27.01.2020	18,99,834
4.	January 2019 to March 2019	AA270220067090S 17.02.2020	22,58,739
5.	April 2019 to June 2019	AA270220076623G 19.02.2020	10,14,473
Total			**9,58,13,338**

9. As a sequel to the aforesaid refund applications, five identical show cause notices were issued to the petitioner by respondent No.4; three show cause notices were dated 26.02.2020 and two dated 09.03.2020. It was alleged in the show cause notices that the tax payer i.e., the petitioner was facilitating supply of services between two persons on account of Bank of America. Thus, the tax payer was an intermediary under section 2(13) of the IGST Act. The place of supply in case of intermediary services shall be location of the supplier of services i.e., India. As the place of said supply is India then the said supply of services would not be eligible to be treated as export of services as per section 2(6) of the IGST Act. Hence, the claim of refund of input tax credit on export of services without payment of integrated tax was not liable to be allowed. Petitioner was directed to file reply before the respective due dates.

9.1. Representative of the petitioner personally met respondent No.4 and requested for personal hearing post filing of reply. Due to technical glitches on the GSTN portal, petitioner was initially not able to file its replies on the portal. The replies were filed through various emails denying the allegations and contentions advanced in the show cause notices. However, petitioner subsequently filed its respective replies to the show cause notices on the GSTN portal in the prescribed format on 18.03.2020 and 19.03.2020.

10. On 16.03.2020, representative of the petitioner called upon respondent No.4 who instructed the representative to submit certain documents and informed him that after submission of the documents, personal hearing would be granted to the petitioner.

11. Because of outbreak of *coronavirus* pandemic, it is stated that offices of the petitioner and its consultants were closed. As a result, petitioner could not collect the required documents and, therefore, it sent emails dated 17.03.2020 and 02.04.2020 seeking additional time till 07.04.2020 and 27.04.2020 respectively for submission of documents.

12. *Vide* email dated 21.04.2020, respondent No.4 instructed the petitioner to submit the documents within three days failing which it was mentioned that the matter would be decided *ex-parte*. Petitioner was further informed that the show cause notices would be adjudicated on the basis of documents available on record without conducting personal hearing. In this connection, reference was made to Trade Circular No.3T of 2020 dated 17.03.2020 whereafter it was mentioned that email reply would be treated as personal hearing.

13. Petitioner responded *vide* email dated 24.04.2020 by filing detailed submissions requesting respondent No.4 to grant personal hearing while deciding the show cause notices and further stating that Trade Circular No.3T of 2020 dated 17.03.2020 would not be applicable

to the case of the petitioner. This was followed by subsequent emails of the petitioner dated 27.04.2020, 27.05.2020 and 21.06.2020 requesting respondent No.4 to grant personal hearing before passing any order adverse to the petitioner.

14. However, notwithstanding such request, five identical orders all dated 26.06.2020 were passed by respondent No.4 rejecting the refund applications filed by the petitioner. Details of the orders dated 26.06.2020 are as under:-

a. Order No.ZD2706200120350 dated 26.06.2020 for the period January to March 2019.

b. Order No.ZD2706200120243 dated 26.06.2020 for the period April to June 2018.

c. Order No.ZD270620012038U dated 26.06.2020 for the period April to June 2019.

d. Order No.ZD270620012026Z dated 26.06.2020 for the period July to September 2018.

e. Order No.ZD2706200120326 dated 26.06.2020 for the period October to December 2018.

15. From a perusal of the above orders, it is seen that respondent No.4 on consideration of the master service agreement has held that petitioner facilitates services provided by BANA to its customers; services provided by the petitioner qualifies as ‘intermediary services’; and in case intermediary services are provided to the recipient located outside India, the inter-state provisions as contained in section 7(5)(c) of IGST Act would be applicable and hence IGST is payable on the transactions under dispute.

15.1. Petitioner does not satisfy the conditions for treating the supply of services as an export of services. Since petitioner has not paid IGST, that amount of IGST would offset the quantum of refund claimed. Therefore, for the said reason, petitioner is not eligible and entitled to refund.

16. Assailing the legality and validity of the aforesaid orders, present writ petition has been filed seeking the relief as indicated above.

17. On 22.09.2020, this Court had passed the following order:-

> "3. Mr. Shah submits that this is a case where petitioner's claim to refund has been rejected without giving any opportunity of hearing to the petitioner. In this connection he has referred to Rule 92(3) more particularly to the proviso thereto of the Central Goods and Services Tax Act, 2017 which clearly provides that no application for refund shall be rejected without giving the applicant an opportunity of being heard. He has also taken us to the impugned order of the Assessing Officer at Page-292 of the paper-book and submits that Assessing Officer had wrongly relied upon Circular dated 17th March 2020 issued by the Commissioner of State Tax under Maharashtra Value Added Tax Act, 2002 which deals with time barring assessments; on the face of it, the said Circular is not applicable to a claim for refund. He has also referred to the judgment of this Court in *Yeshwant Gajanan Joshi & others Vs. Hindustan Petroleum Corporation Limited*, *AIR 1988 Bombay 408* to contend that in such a case the remedy of appeal is not at all efficacious.
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> 4. Ms. Chavan, learned AGP appearing for the State submits that she may be given an opportunity to put her objections on record by way of affidavit as there could be communication between the parties which according to her may satisfy the requirement of hearing.
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> 5. Let her file the affidavit within two weeks."

18. Thereafter respondents have filed the reply affidavit whereafter petitioner has filed rejoinder affidavit.

19. Respondent Nos.2 to 4 in their common affidavit filed through Shri. G. R. Popalghat, Joint Commissioner of State Tax have taken a preliminary objection as to the maintainability of the writ petition by contending that the impugned orders are appealable under section 107 of the Maharashtra Goods and Services Tax Act, 2017 (briefly 'the MGST Act' hereinafter). Reference has been made to the said provision to support the above contention.

19.1. Justifying the impugned orders, it is stated that those have been passed within the framework of the GST statute by following the principles of natural justice. Impugned orders are reasoned ones and do not suffer from the vice of arbitrariness. Show cause notices were issued to the petitioner framing proper charges; opportunity of being heard was granted to the petitioner at various stages in response to which petitioner through its representative had made submissions in response to the show cause notices. Impugned orders are speaking orders whereby and whereunder specific reasons have been given while disallowing the claim of the petitioner. Petitioner had forwarded written submissions *via* email which were duly taken into consideration. Petitioner also made submissions before the adjudicating officer on telephone. Therefore, allegation of the petitioner that personal hearing was not granted has been denied. It is stated that petitioner was granted effective hearing whereafter reasoned orders have been passed on merit. If petitioner is aggrieved by the impugned orders, proper remedy would be to prefer appeal under section 107 of the MGST Act.

19.2. Touching upon merit, it is contended that refund applications for five quarters were filed by the petitioner seeking refund of input tax credit on export of services without payment of IGST. After perusal of the service agreement and other relevant documents on record, it is observed that nature of services provided by the petitioner to BANA falls within the definition of ‘intermediary services’ under section 2(13) of the IGST Act, 2017. Therefore, petitioner is not qualified for export of services, place of supply being in India. Thus, the petitioner is required to pay IGST on such transactions. In the instant case, respondent Nos.2 to 4 have not raised the demand but have only rejected the claim for refund in respect of unutilized input tax credit by holding that IGST is payable on such transactions. However, no demand has been raised as of date upon the petitioner. In this connection, reference has been made to the master agreement dated 03.05.2004.

19.3. Following the show cause notices date of hearing was given to the petitioner. Petitioner was required to submit reply online. Thus, opportunity of being heard was granted to the petitioner. Request for further time sought for by the petitioner was dilatory and, therefore, was not justified.

19.4. Petitioner had attended office of the respondents on 04.03.2020 and 16.03.2020 and thereafter filed detailed reply *vide* email dated 23.04.2020.

19.5. In the affidavit, reference has been made to different telephone calls to and from the petitioner, details of which have been furnished. It is stated that telephonic calls were made on 2nd, 10th, 13th, 16th, 17th, 22nd, 23rd and 24th January, 2020 and on 14th, 17th, 18th, 20th, 21st, 24th and 26th February, 2020. Supporting documents were received on 26.12.2019, 14.01.2020, 22.01.2020, 28.01.2020 and 31.01.2020. Emails with attached documents were received on 07.02.2020 and 21.02.2020.

19.6. Show cause notices were issued on 26.02.2020 and 09.03.2020. For the first set of show cause notices, personal hearing was fixed on 04.03.2020 and for the second set of show cause notices, personal hearing was fixed on 20.03.2020. Petitioner was directed to furnish reply to the show cause notices on or before 12.03.2020 and 24.03.2020 respectively. As per Rule 92(3) of the Maharashtra Goods and Services Tax Rules, 2017, petitioner ought to have filed its reply on the GST portal within 15 days of issuance of show cause notice and thereafter ought to have attended the hearing. Petitioner failed to do so. Though he attended office on 04.03.2020, he was without the supporting documents. Reply of the petitioner on the portal was not visible. After considering the written submissions and materials on record and hearing petitioner's representative over phone calls, refund applications have been rejected.

19.7. In the above circumstances, respondents seek dismissal of the writ petition.

20. In its rejoinder affidavit, petitioner has stated that personal visits of the tax consultants of the petitioner to the office of respondent No.4 were for various issues including submission of documents; no discussions were held on merit i.e., eligibility of the refund claim. Telephonic conversations were between the tax consultants of the petitioner and Mr. Satish Jadhav, Inspector of State Tax and not with respondent No.4, again relating to documents. Such discussions cannot be construed to be grant of personal hearing. Duration of such telephonic conversations lasted from a few seconds to about 10 minutes. Besides emails exchanged were regarding submission of documents and not on merit of the claim.

20.1. Regarding availability of alternative remedy of appeal, it is contended that there is clear violation of the principles of natural justice which has rendered the impugned orders void. Since infringement of the rules of natural justice strikes at the root, it is a good ground for invoking the power of judicial review. That apart, the reply affidavit has been filed by an officer of the rank of Joint Commissioner which is also the rank and designation of the appellate authority. Claim of the petitioner to refund has been contested and denied on merit by the affiant. Therefore, filing of appeal would be a futile exercise.

20.2. That apart, petitioners have reiterated the contentions advanced in the writ petition while denying the stand taken by the respondents in the reply affidavit.

21. Mr. Prakash Shah, learned counsel for the petitioner has at the outset referred to rule 92 of the CGST Rules. He submits that under rule 92(3) of the CGST Rules where the proper officer is satisfied for reasons to be recorded in writing that the whole or any part of the amount

claimed as refund is not admissible or is not payable to the applicant, he shall issue a notice to the applicant in the prescribed form requiring the applicant to furnish a reply also in the prescribed form within 15 days and after considering the reply, make an order either sanctioning the amount of refund in whole or part or rejecting the said refund claim which order shall be made available to the applicant electronically. Laying great emphasis on the *proviso* thereto he submits that it makes it abundantly clear that no application for refund shall be rejected without giving the applicant an opportunity of being heard. Submission of Mr. Shah is that no opportunity of hearing was given to the petitioner before rejecting the refund claim.

21.1. Referring to exhibit-1 to the reply affidavit of respondent Nos.2 to 4, he submits that whatever documents were sought for by the respondents were submitted before respondent No.4 on 16.03.2020. However, petitioner was asked to produce further documents on 20.03.2020 whereafter offices in the state stopped functioning because of the pandemic.

21.2. Insofar telephone calls and telephonic conversations are concerned, he submits that those were with the Inspector of State Tax and not with the authority who has passed the impugned order i.e., respondent No.4. Even otherwise the telephone calls were only for duration of one minute or of similar duration. Telephonic conversations cannot be construed to be hearing within the meaning of the *proviso* to rule 92(3).

21.3. On the point of alternative remedy, he submits that when there is violation of the principles of natural justice, availability of alternative remedy would be no bar to invoke the writ jurisdiction of the High Court under Article 226 of the Constitution of India. On this point, he further submits that while the impugned order has been passed by respondent No.4, the common affidavit has been filed on behalf of respondent Nos.2

to 4 by Shri. G. R. Popalghat, Joint Commissioner of State Tax. Joint Commissioner is the appellate authority in respect of orders passed by the Deputy Commissioner. When an officer of the rank of appellate authority has sworn the reply affidavit, approaching the said authority in appeal would be a futile exercise. That apart, the Joint Commissioner in the affidavit in reply while controverting the averments made in the writ petition has touched upon the merit of the claim made by the petitioner and has refuted the same on merit.

21.4. Therefore, he submits that the impugned orders being *ex-facie* illegal being violative of the principles of natural justice are liable to be set aside and quashed. Claim of the petitioner to refund is liable to be heard afresh.

22. Ms. Jyoti Chavan, learned AGP appearing for the respondents has referred to various provisions of the CGST Act and the MGST Act. Referring to section 107 of the MGST Act, she submits that the impugned orders rejecting the claim of the petitioner to refund are appealable orders under sub-section (1) of section 107. Therefore, petitioner has got statutory alternative remedy which is also efficacious. When the petitioner has got adequate and efficacious statutory alternative remedy, this Court may not invoke its extra-ordinary jurisdiction under Article 226 of the Constitution of India to entertain the writ petition.

22.1. That apart, learned AGP submits that the dispute involved is claim to refund which according to the respondents petitioner is not entitled to. Therefore, the dispute centers around factual aspects for which appeal would be the appropriate remedy and not a writ petition.

22.2. Adverting to the impugned orders, she submits that respondent No.4 had considered all relevant aspects and thereafter had passed reasoned orders rejecting the refund applications of the petitioner.

Before passing such orders, respondent No.4 had given due opportunity of hearing to the petitioner which would be evident from the exchange of e-mails between the parties annexed to the reply affidavit at pages 478, 480, 482 and 483 of the paper book.

22.3. She, therefore, submits that petitioner has failed to make out any case for invoking the extra-ordinary jurisdiction of this Court. There is no infirmity in the impugned orders. Therefore, the writ petition is liable to be dismissed.

23. In his reply submissions, Mr. Shah has referred to e-mail dated 21.04.2020 sent by respondent No.4 to the petitioner wherein she had stated that due to the lock-down conditions and restrictions across the country, it was not possible to give an opportunity of personal hearing while calling upon the petitioner to submit all details *via* e-mail which would be treated as an opportunity of hearing as per Trade Circular dated 17.03.2020. Referring to the said trade circular, Mr. Shah submits that the said circular issued by the Commissioner of State Tax, Maharashtra pertained to assessment proceedings under section 23(2) of the Maharashtra Value Added Tax Act, 2002 for the financial year 2015-16 and assessment proceedings under section 23(5) for the financial year 2013-14 which were getting barred by limitation on 31.03.2020. By the said circular, it was directed that all the documents required for completion of time barring assessments should be sought for by the assessing authorities through e-mail. Such submission of documents would be considered as an opportunity of hearing granted to the dealer. Petitioner's case is claim for refund whereas the circular dealt with time barring assessments under the Maharashtra Value Added Tax Act, 2002. Therefore, the said circular cannot be brought in aid of or pressed into service by the respondents. Referring to the various e-mails, petitioner's reply dated 22.04.2020 to the show cause notice issued and to the various e-mails exchanged thereafter, he submits that petitioner had made a specific prayer to respondent No.4 not to pass any *ex-parte* order

without granting personal hearing to the petitioner. Notwithstanding the same the *ex-parte* orders were passed. Therefore, this is a fit case for intervention by the Court.

24. Submissions made by learned counsel for the parties have received the due consideration of the Court. Also perused the materials on record.

25. At the outset we may mention that this Court under Article 226 of the Constitution of India is confining its scrutiny to the decision making process culminating in passing of the impugned orders dated 26.06.2020. In exercise of the power of judicial review, merit of the decision *per se* is not being examined. It is the decision making process with which judicial review is concerned. Therefore, we are consciously not entering into the arena of merit of the petitioner's claim to refund at this stage.

26. We have already noticed that petitioner had filed five applications for refund covering five periods from April, 2018 to June, 2019 in the prescribed format on 27.12.2019, 21.01.2020, 27.01.2020, 17.02.2020 and 19.02.2020. Respondent No.4 issued show cause notices thereafter to the petitioner on 26.02.2020 in respect of three claims and on 09.03.2020 in respect of the remaining two claims. Those were in fact notices for rejection of application for refund. We may take one such show cause notice which is dated 09.03.2020 for the period from January, 2019 to March, 2019. While giving reasons as to why petitioner is not eligible to get the refund, petitioner was granted 15 days time to file reply and was also directed to appear before respondent No.4.

27. From exhibit-1 to the reply affidavit of the respondents, we find that on 16.03.2020, the Chartered Accountant of the petitioner had attended the office of respondent No.4 and had submitted documents sought for. He was again asked to appear on 20.03.2020 for production

of further documents mentioned in the order-sheet of 16.03.2020. However, no further physical proceedings took place thereafter.

28. We also find that a large number of e-mails exchanged between the parties have been placed on record. In one of the e-mails dated 21.04.2020, respondent No.4 had informed the petitioner that she was unable to see the reply of the petitioner in the electronic format till 18.04.2020 due to log in error. Referring to request of the petitioner for an opportunity to be heard, it was mentioned that due to lock-down conditions and restrictions, it would not be possible to give an opportunity for personal hearing. Petitioner was called upon to submit details *via* e-mail which would be treated as an opportunity of hearing. In this connection, reliance was placed on the Trade Circular dated 17.03.2020.

29. At this stage, we may advert to the said trade circular. Commissioner of State Tax, Maharashtra issued a trade circular on 17.03.2020 laying down guidelines in view of outbreak of *coronavirus*. Because of the pandemic and the resultant lock-down, departmental authorities were advised to take up on priority basis assessment proceedings under the Maharashtra Value Added Tax Act, 2002, which were getting barred by limitation on 31.03.2020. Departmental authorities were advised to carry out proceedings through e-mail to avoid physical interaction with assessees or their authorized representatives. Thus, from the above it is evident that the Trade Circular dated 17.03.2020 dealt with time barring assessments under the Maharashtra Value Added Tax Act, 2002 and cannot be relied upon to dispense with physical hearing while rejecting refund applications.

30. Petitioner in its detailed reply dated 22.04.2020 had specifically requested respondent No.4 to withdraw the proposal to pass *ex-parte* orders in its case without granting personal hearing based on detailed legal and factual submissions. This was followed by a number of e-mails

requesting respondent No.4 for granting opportunity of being heard in person.

31. It may be mentioned that there were some telephonic conversations between officials working under respondent No.4 and the tax consultants of the petitioner. While respondents would like to contend that such telephonic conversations can be construed to be an extension of hearing, the same has been disputed by the petitioner by contending that those conversations were for very brief periods lasting for about a minute or so in which subordinate officials working under respondent No.4 sought for documents etc. In any event, no record of such telephonic conversations have been maintained. What transpired in such conversations is also not known. Therefore, such telephonic conversations cannot be a substitute for a hearing in person or cannot be construed to be a hearing.

32. Be that as it may, respondent No.4 has passed five different but identical orders on 26.06.2020 rejecting the claim of refund made by the petitioner on merit.

33. Section 54 of the CGST Act deals with refund of tax. Sub-section (1) says that any person claiming refund of any tax and interest may make an application before the expiry of two years from the relevant date in the prescribed form and manner. As per sub-section (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. In terms of sub-section (7), the proper officer shall issue the order under sub-section (5) within 60 days from the date of receipt of the application, complete in all respects.

34. Chapter X of the CGST Rules deals with refund. Rule 89 forming part of chapter X provides for filing of application for refund of tax, interest etc. in the prescribed electronic form. Rule 92 which is also part

of chapter X deals with an order sanctioning refund. Sub-rule (3) is relevant and the same is extracted hereunder:

> "Rule 92- Order sanctioning refund.-
>
> (1) * * * * * * * * *
>
> (2) * * * * * * * * *
>
> (3) Where the proper officer is satisfied, for reasons to be recorded in writing, that the whole or any part of the amount claimed as refund is not admissible or is not payable to the applicant, he shall issue a notice in Form GST RFD-08 to the applicant, requiring him to furnish a reply in FORM GST RFD-09 within a period of fifteen days of the receipt of such notice and after considering the reply, make an order in FORM GST RFD-06 sanctioning the amount of refund in whole or part, or rejecting the said refund claim and the said order shall be made available to the applicant electronically and the provisions of sub-rule (1) shall, *mutatis mutandis*, apply to the extent refund is allowed:
>
> Provided that no application for refund shall be rejected without giving the applicant an opportunity of being heard."

34.1. From the above, it is evident that in a case where the proper officer is satisfied for reasons to be recorded in writing that the whole or any part of the amount claimed as refund is not admissible or is not payable, he shall issue notice to the applicant requiring filing of reply within 15 days of receipt of notice and after considering the reply make an order sanctioning the amount of refund in whole or in part or rejecting the refund claim which order shall be made available to the applicant. As per the *proviso*, an application for refund shall not be rejected without giving the applicant an opportunity of being heard. Therefore, there is a clear legal mandate that if an application for refund is to be rejected, the same can only be done after giving the applicant an opportunity of being heard.

35. The expression 'opportunity of being heard' is not an expression of empty formality. It is a part of the well-recognized principle of *audi alteram partem* which forms the fulcrum of natural justice and is central

to fair procedure. The principle is that no one should be condemned unheard. It is not necessary to delve deep into the expression save and except to say that by way of judicial pronouncements the said expression has been made central to the decision making process, breach of which would be construed to be violation of the principles of natural justice thus adversely affecting the decision making process; a ground for invoking the power of judicial review.

36. When the law requires that no application for refund shall be rejected without giving an applicant an opportunity of being heard, the same cannot be substituted by telephonic conversations and exchange of e-mails. This is more so in the case of a claim for refund where no time-limit is fixed *vis-a-vis* rejection of claim. Under sub-section (7) of section 54, a time-limit of 60 days is prescribed for making of an order allowing claim of refund; but that period of 60 days would commence from the date of receipt of the application *complete in all respects* (emphasis is ours) without there being a corresponding provision for rejection of application not complete in all respects.

37. Admittedly in this case, no hearing was granted to the petitioner. Impugned orders, therefore, would be in violation of the *proviso* to sub-rule (3) of rule 92 of the CGST Rules and also in violation of the principles of natural justice.

38. This Court in *Yashwant Gajanan Joshi vs. Hindustan Petroelum Corporation*, **AIR 1988 Bombay 408** had repelled a contention advanced on behalf of the respondents that in view of availability of alternative remedy, relief under writ jurisdiction should be declined. It has been held that an order which is in violation of the principles of natural justice would be non est. It need not be even appealed from. If natural justice is violated at the first stage, right of appeal is not so much a true right of appeal as a corrected remedy. Observations of Megarry, J. in *Leary Vs. National Union of Vehicle Builders*, **(1911) 1 Ch.34** was

extracted. We find the observation to be so apt that we cannot resist but to re-extract the same hereunder:-

> "If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal."

39. In *DBOI Global Service Private Limited Vs. Union of India*, **2013 (29) STR 117**, a Division Bench of this Court was hearing a challenge to an order-in-original whereby refund claim for a particular period was rejected. Though it was argued on behalf of the respondents that against the order-in-original there was a statutory remedy of appeal, this Court noticed that the original authority had passed the order-in-original without considering the relevant materials and without assigning any reasons. In such circumstances, this Court set aside the order-in-original and remanded the matter back for fresh decision on merit directing the Commissioner of Service Tax, Mumbai to assign another competent officer to deal with the matter on remand.

40. That being the position, we are of the view that the matter should be remanded back to the original authority for a fresh decision in accordance with law after giving an opportunity of being heard to the petitioner. Since respondent No.4 has already taken a view on merit by disclosing her mind which is adverse to the petitioner, it would be in the interest of justice and fairness if another competent officer is assigned the task of deciding the refund applications of the petitioner *de novo* on remand.

41. In the light of what we have discussed above, we set aside the impugned orders dated 26.06.2020. Applications of the petitioner for remand shall now be considered afresh by another proper officer to be allotted by respondent No.3. Let the applications for refund be heard by the new officer within a period of three months from the date of receipt of a copy of this order by respondent No.3 after giving an opportunity of

being heard to the petitioner. All contentions are kept open.

42. Writ petition is accordingly allowed to the extent indicated above. However, there shall be no order as to cost.

(ABHAY AHUJA, J.) **(UJJAL BHUYAN, J.)**

Minal Parab