**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/SPECIAL CIVIL APPLICATION NO. 15473 of 2019**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR. JUSTICE J.B.PARDIWALA**

**and**
**HONOURABLE MR. JUSTICE BHARGAV D. KARIA**

==========

| | | |
|---|---|---|
| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | |
| 2 | To be referred to the Reporter or not ? | |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | |

==========

M/S BRITANNIA INDUSTRIES LIMITED
Versus
UNION OF INDIA

==========

Appearance:
ANANDODAYA S MISHRA(8038) for the Petitioner(s) No. 1
MR ANKIT SHAH(6371) for the Respondent(s) No. 1,2,3

==========

CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
**HONOURABLE MR. JUSTICE BHARGAV D. KARIA**

**Date : 11/03/2020**

**ORAL JUDGMENT**
**(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)**

1. Rule returnable forthwith. Learned Standing Counsel Shri Ankit Shah waives service of rule on behalf of the respondents.

2. By this petition under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs :

A) That this Hon'ble court may be pleased to issue an appropriate a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing the respondents themselves, their officers and subordinates to act upon or grant the petitioner refund of unutilized IGST credit lying in Electronic Credit Ledger.

A1. That this Hon'ble Court may be pleased to issue an appropriate a Writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India to set aside the order of rejection of refund dated 01.08.2019 passed by the Deputy Commissioner, CGST, Mundra Division.



B. That this Hon'ble Court may be pleased to issue an appropriate a Writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India, ordering and directing the respondents that in case there is no rule for SEZ refund then rule(s) for granting refund of unutilized IGST credit lying in

Electronic Credit Ledger be framed to bring parity in refund under section 54 for all inverted tax structure suppliers and to remove financial hardship faced by genuine exporters like the petitioner.

C. And pass such further order/orders for granting relief(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case to meet the ends of justice."

3. The petitioner a limited company has filed this petition through its director. The petitioner which is situated in Special Economic Zone (for short "SEZ") filed an application for refund in Form GST RFD-01A with regard to the credit of Integrated Goods and Services Tax (for short "IGST") distributed by Input Service Distributor (for short "ISD") for the services pertaining to the SEZ unit for an amount of Rs.99,05,156/- for the year 2018-2019.

4. It is the case of the petitioner that being a SEZ unit making zero rated supplies under the GST, the petitioner was not able to utilize the credit of the Input Tax Credit of IGST from its ISD and it was lying unutilized in the Electronic Credit Ledger of the petitioner.

5. The petitioner therefore, made an application to claim such refund. It appears that show cause notice dated 2nd July, 2019 was issued by respondent no.3 - Deputy Commissioner, Central GST Mundra Division, Gandhindham with a proposal of rejection of the claim of refund of the unutilized ITC on the following grounds :

"a. The Petitioner is situated in Adani Port & SEZ and as per the CGST the supply of Goods and/or Services to SEZ unit is Zero rated hence are not eligible for refund under Section 54 of the Central Goods and Services Act, 2017 (hereinafter referred to as CGST}.

b. The refund filed by the Petitioner cannot be processed under any category of refund specified under manual refund processing Circular No. 17/17/2017-GST) dated 15.11.2017 and Circular No. 24/24/2017-GST dated 21.12.2017.

c. For the supply received from outside SEZ, SEZ unit is not supposed to pay any tax whether under forward charge or reverse charge mechanism and for the supply received from another unit within SEZ, any and all such supplies have no tax treatment and therefore there is no question of forwarded charge or reverse charge tax payment. SEZ unit is not supposed to pay any tax and thus there would be no question of ITC.

d. That till date no circular, notification/ relevant guidelines have been issued by the board providing guideline to process GST refund claim application of units situated in Special Economic Zones in respect of tax paid an inward supplies. Therefore in absence of any circular/ notification/ relevant guidelines to process GST refund claim application of units situated in

SEZ, this office is unable to process the refund application."

6. The petitioner thereafter, during the course of personal hearing held on 23rd July, 2019 submitted written submissions in Form-GST-RFD-09. Respondent no.3-Deputy Commissioner, Central GST Mundra Division however, passed an order dated 1st August, 2019 rejecting the refund claim of Rs.99,05,156/- in GST-FORM-RFD-06 on the grounds mentioned in the show cause notice rejecting the written submissions filed by the petitioner.

7. The petitioner therefore, being aggrieved has filed this petition with the aforesaid prayers.

8. Learned advocate Mr. Anandodaya S. Mishra for the petitioner submitted that the petitioner is entitled to refund of the unutilized ITC distributed by ISD as section 16 of the CGST Act provides for input tax credit charged on any supply of goods or services or both by the supplier which are used or intended to be used in the course or furtherance of the business of the petitioner.

9. Learned advocate Mr. Mishra relied upon the provisions of section 2(61) of the Central

Goods And Service Tax Act,2017 (for short 'CGST Act') which defines "input service distributor" which means that an office of the supplier of goods or services or both which receives tax invoices issued under section 31 towards the receipt of input services and issues a prescribed document for the purpose of distributing the credit of the tax paid on the said services to a supplier of taxable goods or services. It was therefore submitted that as the petitioner has received input tax credit (for short 'ITC') from ISD, the petitioner is entitled to the refund being an SEZ unit.

10. Learned advocate for the petitioner also referred to the notification no.28/2012 dated 20th June, 2012 clarifying the procedure for distribution of ITC by ISD and submitted that if the credit of service tax is distributed to all the units in the manner prescribed in the said notification by an ISD, then the refund of IGST credit distributed should also be refunded to the SEZ units as SEZ unit is not an excluded.



11. Learned advocate for the petitioner thereafter, referred to the grounds for rejection of the refund claim of the

petitioner and submitted that the petitioner being an SEZ unit having a zero rated supply cannot be denied the refund under section 54 of the CGST Act because there is no express provision for rejecting the refund under the CGST Act. It was submitted that the sole intention of section 16 of the IGST Act which provides for zero rated supply is to avoid the cascading effect of taxation including the zero tax liability for exports and hence, the supplies made to a SEZ have been made as zero rated supplies. It was therefore, submitted that the entire scheme of the GST does not restrict any distribution of common credit by an ISD to an SEZ unit and on a conjoint reading of section 16 of the IGST Act and section 54 of the CGST Act, the petitioner is entitled to get the refund of unutilized ITC lying in the Electronic Credit Ledger.



12. Learned advocate for the petitioner thereafter relied upon circular no. 17 dated 15th November, 2017 issued by GST policy wing of Central Board of Excise and Customs to submit that unutilized ITC of IGST paid and distributed by ISD is required to be refunded after the application is filed by the petitioner in FORM-GST-RFD-01A after 14th

May, 2019 as per the said circular.

13. It was submitted that refund being inclusive in nature, the same is also required to be granted with regard to unutilized input tax credit under section 54 of the CGST Act. Reliance was also placed on the decision of this Court in case of **M/s. Amit Cotton Industries Through partner Veljibhai Virjibhai Ranipa v. Principal Commissioner of Customs** rendered in Special Civil Application No.20126/2018 on 27th June, 2019, wherein in similar facts, this Court allowed the claim made by the petitioner for refund of the IGST in case of an export unit.

14. It was therefore, submitted that in view of the aforesaid decision, the petition is required to be allowed by directing the respondents to grant refund of ITC of Rs.99,05,156/- lying in Electronic Credit Ledger of the petitioner.



15. On the other hand, learned Standing Counsel Mr. Ankit Shah for the respondents vehemently opposed the petition. Mr. Shah relying upon the averments made in affidavit in reply submitted that the petitioner is not entitled to claim refund of the IGST which was

distributed by ISD.

16. Learned advocate Mr. Shah also raised a preliminary objection that the petition is not maintainable as alternative remedy of filing an appeal before the appellate authority is available to the petitioner under the provisions of section 107 of the CGST Act. It was submitted that the petitioner could not have by-passed the appellate authority without any justifiable grounds and therefore, the petition is required to be rejected on this ground alone.

17. With regard to the submissions made by the petitioner on the merits of the case as to the entitlement of the refund of the input tax credit distributed by the ISD, learned advocate for the respondents referred to the following averments made in the affidavit in reply :



**"7.** It is submitted before the Hon'bte Court that Section 2 (19) of lntegrated Goods and Services Tax Act, 2017 states that "Special Economic Zone" shall have the same meaning as assigned to it in clause (za) of section 2 of the Specific Economic Zones Act, 2005. Further, as per Section 2 (za) of the Special Economic Zones Act, 2005. "Special Economic Zone" means each Special Economic Zone notified under the proviso to sub-section (4) of section 3 and sub-section (1) of section 4 (including Free Trade and Warehousing Zone) and

includes an existing Special Economic Zone. Further, the government has offered various incentives and facilities to the units in SEZs for attracting investments into the SEZs, including foreign investment. The incentives includes duty free import/domestic procurement of goods for development, operation and maintenance of SEZ units, exemption from Central Sales Tax, exemption from Service Tax and from State sales tax which have now been subsumed into GST and supplies to SEZs are zero rated under IGST Act, 2017.

7.1 As per Notification No 15/2017- Integrated Tax (Rate) dated 30-06-2017, in exercise of the powers conferred by subsection (1) of section 6 of the Integrated Goods and Service Tax Act, 2017, the Central Government have exempted all goods or services or both imported by a unit or a developer in the Special Economic Zone, from the whole of the integrated tax leviable thereon under sub-section (7) of section 3 of the Customs Tariff Act, 1975 (51 of 1975) for authorized operations and as per Notification No. 18/2017 Integrated Tax (Rate) exempted services imported by a unit or a developer in the Special Economic Zone for authorized operations, from the whole of the integrated tax leviable thereon under section 5 of the Integrated Goods and Services Tax Act, 2017. Thus, above notifications exempts all goods or services or both imported by a unit or a developer in the SEZ from the whole of the integrated tax for authorized operations.



7.2 Further, as per Section 16 (1) (b) of Integrated Goods and Services Tax Act, 2017 supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit is considered as “Zero rated Supply". The relevant Section states as under:

16(1) ”zero rated supply” means any of the following supplies of goods or services or both, namely:

(a) -------

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

Thus, as per Section 16(1) of the Integrated Goods & Services Tax Act, 2017 the supply of goods and / or Service to a SEZ unit i.e. petitioner in this case, is ZERO RATED. Thus, the petitioner being a SEZ unit was not eligible for
Refund under Section 54 of the CGST Act, 2017.

7.3 Further, Section 16(3) of Integrated Goods and Services Tax Act, 2017 prescribed the options under which a registered person becomes eligible for claim of refund. The relevant Section states as under :

16(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:

(a) he may supply goods or services or both under
bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilized input tax credit; or



(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied,
in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder.

From the above, it is clear that under Option 1

which is available under section 16 (3) (a) of IGST Act, a registered person may supply such goods or services or both under bond or Letter of undertaking to SEZ Developer or SEZ Co-Developer or SEZ Units without payment of integrated tax and also claim refund of unutilized input tax credit. Further, under Option 2 under section 16 (3) (b) of IGST Act a registered person may supply such goods or services or both to SEZ Developer or SEZ Co-Developer or SEZ Units on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied in accordance with Section 54 of Central Goods and Service Tax Act or rules made thereunder. Thus, it is clear that as per the provisions of Section 16 (3) of Integrated Goods and Services Tax Act, 2017 only the supplies of goods or services or both to SEZ Developer or SEZ Co-Developer or SEZ Units is eligible for claim of refund and there is no provision for granting of refund to the SEZ unit in the IGST Act, 2017. Therefore, claim of the petitioner holds no merits.

7.4 Section 54 of the Central Goods and Services Tax Act, 2017 deals with provisions relating to granting of refund. As per sub section 3 of Section 54 of the CGST Act, 2017, a registered person may claim Refund of any unutilized input tax credit at the end of any tax period, provided that no Refund of unutilized input tax credit shall be allowed in cases other than zero-rated supplies made without payment of tax and 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.

7.5 Further. Rule 89 of the Central Goods and Services Tax Rules, 2017 deals with granting of the refund to the assessees. Sub-rule 1 of Rule 89 is reproduced as under:

89. Application for refund of tax, Interest, penalty, fees or any other amount.

(1) Any person, except the persons covered under notification issued under section 55, claiming refund of any tax, interest, penalty, fees or any other amount paid by him, other than refund of integrated tax paid or} goods exported out of India, may file an application electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner :

Provided that any claim for refund relating to balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49 may be made through the return furnished for the relevant tax period in FORM GSTR-3 or FORM GSTR-4 or FORM GSTR-7, as the case may be:

Provided further that in respect of supplies to a Special Economic Zone unit or a Special Economic Zone developer, the application for refund shall be filed by the

(a) supplier of goods after such goods have been admitted in full in the Special Economic Zone for authorised operations, as endorsed by the specified officer of the Zone;

(b) supplier of services along with such evidence regarding receipt of services for authorised operations as endorsed by the specified officer of the Zone:
[Provided also that in respect of supplies regarded as deemed exports, the application may be filed by,

(a) the recipient of deemed export supplies; or

(b) the supplier of deemed export supplies in cases where the recipient does not avail of input tax credit on such supplies and furnishes an undertaking to the effect that the supplier may claim the refund

Provided also that refund of any amount, after adjusting the tax payable by the applicant out of the advance tax deposited by him under section 27 at the time of registration, shall be claimed in the last return required to be furnished by him.

From the above stated provisions, it is clear that as per Rule 89(1) of the CGST Rules, 2017 in case of supplies to a Special Economic Zone unit or a Special Economic Zone developer, the application for refund shall be filed by the supplier of the goods or services and not by the recipient/receiver of the goods or services. Thus, the petitioner being the receiver is not eligible for refund of ITC and Deputy Commissioner has rightly rejected the refund claim of the petitioner.

7.6 Thus, on collective reading of provisions of Section 54(3) of the Central Goods and Services Tax Act, 2017, Section 16 of the Integrated Goods and Services Tax Rules, 2017 together with Rule 89 (1) of the Central Goods and Services Tax Rules, 2017, it is clear that when a supply is made to the SEZ unit or SEZ Developer it is the supplier and not the receiver who shall file the Refund application. The reason for the same is that in case of supply to a SEZ unit (which is considered as Interstate Supply) the liability to pay tax on such supplies is on the supplier. The receiver i.e. SEZ unit is not at all liable to pay any kind of tax on such supplies received by them. Thus, the petitioner was not at all liable to pay any tax on the supplies received by them and therefore is not liable to claim refund as per the prevalent provisions as discussed herein above.

7.7 The Central Board of Indirect Taxes and Customs (CBIC) looking to the difficulties being faced by the exporters in getting their genuine refunds after implementation of GST from 1st July, 2017 has issued Circular No: 17/17/2017-GST dated 15.11.2017 for manual filing and processing of refund claims in respect of zero-

rated supplies and Circular No.: 24/24/2017-GST dated 21.12.2017 for manual filing and processing of refund claims on account of inverted duty structure, deemed exports and excess balance in electronic cash ledger. However, the Refund claimed by the petitioner cannot be processed under any of the category of eligible Refunds Specified under Manual Refund Processing Circular No.: 17/17/2017-GST dated 15.11.2017 and Circular No.: 24/24/2017-GST dated 21.12.2017 and accordingly, the refund claim is rightly rejected vide the impugned order.

7.8 Further, it is to submit that neither any Notification nor any circular or guidelines have been issued by the Government/Central Board of Indirect Taxes and Customs providing guidelines for processing of Input Tax Credit Refund claims filed by the units located in the Special Economic Zones, in respect of Tax Paid on inward supplies. Therefore, in absence of any circular/ Notification /relevant guidelines to process Input Tax Credit Refund claims of units located in the Special Economic Zones, the petitioner could not be granted refund and hence the petitioners claim was rightly rejected by the Deputy Commissioner.

7.9 Further, it is submitted before the Hon'ble Court that in GST regime SEZ units are not required to pay any tax on supplies made to them by Domestic Tariff Area units, rather it is the supplier who is required to pay taxes if that supplier is not selling the goods under LUT and that the supplier is only eligible to claim the Refund. Therefore, Order in Original No.: 28 / Mundra / CGST / Refund / 2019-20 dated 01.08.2019 passed by Deputy Commissioner, CGST, Mundra Division, Gandhidham rejecting refund claim of Rs. 99,05,156/- of the petitioner, in terms of provisions of Section 54 of Central Goods and Services Tax Act, 2017 read with provisions of Rule 89 of the Central Goods and Services Tax Rules, 2017, Notification No.: 55/2017-Central Tax dated -GST dated 15.11.2017 and Procedure Circulars; Nos.: 17/17/2017-GST

and 24/24/2017-GST dated 21/12/2017 in respect of the petitioner is just fair, proper and legal. The claim of the petitioner in the present petition is devoid of merits and is liable to be rejected.

8. Further, it is to submit before the Hon'ble High Court that High Court of Madras in the case of M/s Stromtek Automation P. Ltd. v/s. Addi. Commr. of GST & C. Ex. Chennai reported as 2019 (28) G.S.T.L. 436 (Mad.) has observed that this is a fit case to relegate the writ petitioner to alternate remedy of filing an appeal to Commissioner (Appeals)-II. The relevant paras of the subject judgment are reproduced as under:

"20. This takes us to the alternative remedy aspect. There is no dispute or disagreement between the two Learned Counsel before this Court that there is an alternate remedy to the writ petitioner by way of statutory appeal to the Commissioner (Appeals)-II, Newry Towers No.: 2054-1, II Avenue, Anna Nagar, Chennai 600 040.

21. The exercise of writ jurisdiction when alternate remedy is available, is an issue, which has been dealt with in a long line of authorities by the Hon'ble Supreme Court. Suffice to refer to KC. Mathew case Authorized Officer, State Bank of Travancore v. Mathew K.C. reported in (2018) 3 SCC 85 and Satyawati Tondon case [United Bank of India v. Satyawati Tondon and Others reported in (2010) 8 SCC 110.



22. To be noted, in Satyawati Tondon case, Hon'ble Supreme Court has held that with regard to alternative remedy the same has to be construed strictly when it comes to cases pertaining to taxes, CESS etc. To put it otherwise,
fiscal laws in general."

18. Relying on the aforesaid averments, it was

submitted by Mr. Shah that the petitioner is not entitled to refund of the ITC as the petitioner is an SEZ unit and all supplies to such unit is a zero rated supply as per section 16(1) of the IGST Act and as such, only the supplies of goods or services or both to SEZ developer or SEZ co-developer or SEZ unit is eligible for claim of refund and there is no provision for granting of refund to the SEZ unit in the IGST Act, 2017 except the procedure prescribed under section 16(3) of the IGST Act. It was therefore, submitted that in view of the provision of section 54 of the CGST Act read with Rule 89 of the Central Goods and Service Tax Rules,2017 (for short 'CGST Rules') only a supplier of goods or services can file an application for refund and not recipient of the services. As in the facts of the case, the petitioner is a recipient of service; the petitioner is not entitled to get the refund under the provisions of the CGST Act read with the CGST Rules. It was further pointed out that there is no circular, notification or guidelines issued by the Government or Central Board of Indirect Taxes and Customs to process the input tax credit refund claims of the units located in the SEZ and therefore, the competent authority has rightly rejected the

claim of the refund made by the petitioner by passing the impugned order.

19. Having heard the learned advocates for the respective parties and having gone through the materials on record, in order to decide as to whether the petitioner is entitled to refund of ITC distributed by ISD, we may refer to the following provisions of law relevant for the purpose of deciding the controversy between the parties :

Central Goods Service Tax Act,2017

**2(61)** "Input Service Distributor" means an office of the supplier of goods or services or both which receives tax invoices issued under section 31 towards the receipt of input services and issues a prescribed document for the purposes of distributing the credit of central tax, State tax, integrated tax or Union territory tax paid on the said services to a supplier of taxable goods or services or both having the same Permanent Account Number as that of the said office;

xxx

Eligibility and condition for taking input tax credit.

**16(1)** Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner 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 said 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;

(b) he has received the goods or services or both.
Explanation.—For the purposes of this clause, it shall be deemed that the registered person has received the goods 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;

(c) subject to the provisions of section 41, 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:

Provided that where the goods against an invoice are received in lots or installments, the registered person shall be entitled to take credit upon receipt of the last lot or installment:



Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with

interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961 (43 of 1961), the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Xxx

**Refund of tax.**

54. (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 the return furnished under section 39 in such 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 six months 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 further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:



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.

Xxx"

Integrated Goods Service Tax Act,2017

**16. (1)** "zero rated supply" means any of the

following supplies of goods or services or both, namely:-

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:-

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder.



xxx

Central Goods Service Tax Rules,2017

**Rule 89: Application for Refund of Tax, Interest, Penalty, Fees or any Other Amount (Chapter-X: Refund)**

(1) Any person, except the persons covered under notification issued under section 55, claiming refund of any tax, interest, penalty, fees or any other amount paid by him, other than

refund of integrated tax paid on goods exported out of India, may file an application electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that any claim for refund relating to balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49 may be made through the return furnished for the relevant tax period in FORM GSTR-3 or FORM GSTR-4 or FORM GSTR-7, as the case may be:

Provided further that in respect of supplies to a Special Economic Zone unit or a Special Economic Zone developer, the application for refund shall be filed by the-

(a) supplier of goods after such goods have been admitted in full in the Special Economic Zone for authorised operations, as endorsed by the specified officer of the Zone;

(b) supplier of services along with such evidence regarding receipt of services for authorised operations as endorsed by the specified officer of the Zone:

Provided also that in respect of supplies regarded as deemed exports, the application may be filed by, -

(a) the recipient of deemed export supplies; or



(b) the supplier of deemed export supplies in cases where the recipient does not avail of input tax credit on such supplies and furnishes an undertaking to the effect that the supplier may claim the refund.

Provided also that refund of any amount, after adjusting the tax payable by the applicant out of the advance tax deposited by him under section 27 at the time of registration, shall be claimed in the last return required to be furnished by him.

Explanation.- For the purposes of this rule-

(i) in case of refunds referred to in clause (c) of sub-section (8) of section 54, the expression "invoice" means invoice conforming to the provisions contained in section 31;

(ii) where the amount of tax has been recovered from the recipient, it shall be deemed that the incidence of tax has been passed on to the ultimate consumer.

(3) Where the application relates to refund of input tax credit, the electronic credit ledger shall be debited by the applicant by an amount equal to the refund so claimed.

(4) In the case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), refund of input tax credit shall be granted as per the following formula -

Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero rated supply of services) x Net ITC ÷ Adjusted Total Turnover

(A) "Refund amount" means the maximum refund that is admissible;

(B) "Net ITC" means input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both;

(C) "Turnover of zero-rated supply of goods" means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both;

(D) "Turnover of zero-rated supply of services" means the value of zero-rated supply of services

made without payment of tax under bond or letter of undertaking, calculated in the following manner, namely:-

Zero-rated supply of services is the aggregate of the payments received during the relevant period for zero-rated supply of services and zero-rated supply of services where supply has been completed for which payment had been received in advance in any period prior to the relevant period reduced by advances received for zero-rated supply of services for which the supply of services has not been completed during the relevant period;

(E) Adjusted Total Turnover‖ means the sum total of the value of-

(a) the turnover in a State or a Union territory, as defined under clause (112) of section 2, excluding the turnover of services; and

(b) the turnover of zero-rated supply of services determined in terms of clause (D) above and non-zero-rated supply of services, excluding-

(i) the value of exempt supplies other than zero-rated supplies; and

(ii) the turnover of supplies in respect of which refund is claimed under sub-rule (4A) or sub-rule (4B) or both, if any, during the relevant period.



(F) “Relevant period” means the period for which the claim has been filed.

(4A) In the case of supplies received on which the supplier has availed the benefit of the Government of India, Ministry of Finance, notification No. 48/2017-Central Tax dated the 18th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1305 (E) dated the 18th October, 2017, refund of input tax credit, availed in respect of other inputs or

input services used in making zero-rated supply of goods or services or both, shall be granted.

(4B) Where the person claiming refund of unutilised input tax credit on account of zero rated supplies without payment of tax has -

(a) received supplies on which the supplier has availed the benefit of the Government of India, Ministry of Finance, notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1320 (E), dated the 23rd October, 2017 or notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1321(E), dated the 23rd October, 2017; or

(b) availed the benefit of notification No. 78/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Subsection (i), vide number G.S.R 1272(E), dated the 13th October, 2017 or notification No. 79/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1299(E), dated the 13th October, 2017,

the refund of input tax credit, availed in respect of inputs received under the said notifications for export of goods and the input tax credit availed in respect of other inputs or input services to the extent used in making such export of goods, shall be granted.

(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.

Explanation:- For the purposes of this sub-rule, the expressions -

(a) "Net ITC" shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under subrules (4A) or (4B) or both; and

(b) "Adjusted Total turnover" and "relevant period" shall have the same meaning as assigned to them in sub-rule (4)."

20. The above provisions of CGST Act and CGST Rules, have been considered by the coordinate Bench of this Court in case of **M/s. Amit Cotton Industries**(supra), which would answer the controversy raised in this petition also. Relevant observations made in the said order are as under :

"23. Section 16 of the IGST Act, 2017, referred to above provides for zero rating of certain supplies, namely exports, and supplies made to the Special Economic Zone Unit or Special Economic Zone Developer and the manner of zero rating.

24. It is not in dispute that the goods in question are one of zero rated supplies. A registered person making zero rated supplies is eligible to claim refund under the options as provided in sub-clauses (a) and (b) to clause (3) of Section 16 referred to above.

25. Section 54 of the CGST Act, 2017, provides that any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, shall make an application before the expiry of two years from the relevant date in such form and manner as may be

prescribed. 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 will have to be credited to the Fund referred to in Section 57 of the CGST Act, 2017.

26. Rule 96 of the CGST Rules provides for a deeming fiction. The shipping bill that the exporter of goods may file is deemed to be an application for refund of the integrated tax paid on the goods exported out of India. Section 54 referred to above should be read along with Rule 96 of the Rules. Rule 96(4) makes it abundantly clear that the claim for refund can be withheld only in two circumstances as provided in sub-clauses (a) and (b) respectively of clause (4) of Rule 96 of the Rules, 2017.

27. In the aforesaid context, the respondents have fairly conceded that the case of the writ-applicant is not falling within sub-clauses (a) and (b) respectively of clause (4) of Rule 96 of the Rules, 2017. The stance of the department is that, as the writapplicant had availed higher duty drawback and as there is no provision for accepting the refund of such higher duty drawback, the writ-applicant is not entitled to seek the refund of the IGST paid in connection with the goods exported, i.e. 'zero rated supplies'.



28. If the claim of the writ-applicant is to be rejected only on the basis of the circular issued by the Government of India dated 9th October 2018 referred to above, then we are afraid the submission canvassed on behalf of the respondents should fail as the same is not sustainable in law.

29. We are not impressed by the stance of the respondents that although the writ-applicant might have returned the differential drawback amount, yet as there is no option available in the system to consider the claim, the writ-applicant is not entitled to the refund of the

IGST. First, the circular upon which reliance has been placed, in our opinion, cannot be said to have any legal force. The circular cannot run contrary to the statutory rules, more particularly, Rule 96 referred to above.

30. Rule 96 is relevant for two purposes. The shipping bill that the exporter may file is deemed to be an application for refund of the integrated tax paid on the goods exported out of India and the claim for refund can be withheld only in the following contingencies :

(a) a request has been received from the jurisdictional Commissioner of central tax, State tax or Union territory tax to withhold the payment of refund due to the person claiming refund in accordance with the provisions of subsection (10) or sub-section (11) of Section 54; or

(b) the proper officer of Customs determines that the goods were exported in violation of the provisions of the Customs Act, 1962.

31. Mr.Trivedi invited our attention to two decisions of the Supreme Court as regards the binding nature of the circulars and instructions issued by the Central Government.

32. In the case of Commissioner of Central Excise, Bolpur v. Ratan Melting and Wire Industries, reported in 2008(12) S.T.R. 416 (S.C.), the Supreme Court observed as under :



“4. Learned counsel for the Union of India submitted that the law declared by this Court is supreme law of the land under Article 141 of the Constitution of India, 1950 (in short the ‘Constitution’). The Circulars cannot be given primacy over the decisions.

5. Learned counsel for the assessee on the other hand submitted that once the circular has been issued it is binding on the revenue authorities and even if it runs counter to the decision of this Court, the revenue authorities cannot say

that they are not bound by it. The circulars issued by the Board are not binding on the assessee but are binding on revenue authorities. It was submitted that once the Board issues a circular, the revenue authorities cannot take advantage of a decision of the Supreme Court. The consequences of issuing a circular are that the authorities cannot act contrary to the circular. Once the circular is brought to the notice of the Court, the challenge by the revenue should be turned out and the revenue cannot lodge an appeal taking the ground which is contrary to the circular.

6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.



7. As noted in the order of reference the correct position vis-a-vis the observations in para 11 of Dhiren Chemical's case (supra) has been stated in Kalyani's case (supra). If the submissions of learned counsel for the assessee are accepted, it would mean that there is no scope for filing an appeal. In that case, there is no question of a decision of this Court on the point being rendered. Obviously, the assessee will not file an appeal questioning the view expressed vis-avis the circular. It has to be the revenue authority who has to question that. To lay content with the circular would

mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme Court. That would be against very concept of majesty of law declared by this Court and the binding effect in terms of Article 141 of the Constitution. ”

33. In the case of J.K.Lakshmi Cement Limited v. Commercial Tax Officer, Pali, reported in 2018(14) G.S.T.L. 497 (S.C.), the Supreme Court observed as under :

“25. The understanding by the assessee and the Revenue, in the obtaining factual matrix, has its own limitation. It is because the principle of res judicata would have no application in spite of the understanding by the assessee and the Revenue, for the circular dated 15.04.1994, is not to the specific effect as suggested and, further notification dated 07.03.1994 was valid between 1st April, 1994 up to 31st March, 1997 (upto 31st March, 1997 vide notification dated 12.03.1997) and not thereafter. The Commercial Tax Department, by a circular, could have extended the benefit under a notification and, therefore, principle of estoppel would apply, though there are authorities which opine that a circular could not have altered and restricted the notification to the determent of the assessee. Circulars issued under tax enactments can tone down the rigour of law, for an authority which wields power for its own advantage is given right to forego advantage when required and considered necessary. This power to issue circulars is for just, proper and efficient management of the work and in public interest. It is a beneficial power for proper administration of fiscal law, so that undue hardship may not be caused. Circulars are binding on the authorities administering the enactment but cannot alter the provision of the enactment, etc. to the detriment of the assessee. Needless to emphasise that a circular should not be adverse and cause prejudice to the assessee. (See : UCO Bank, Calcutta v. Commissioner of Income Tax, West Bengal -

(1999)4 SCC 599.

26. In Commissioner of Central Excise, Bolpur v. Ratan Melting and Wire Industries - (2008)13 SCC 1, it has been held that circulars and instructions issued by the Board are binding on the authorities under respective statute, but when this Court or High Court lays down a principle, it would be appropriate for the Court to direct that the circular should not be given effect to, for the circulars are not binding on the Court. In the case at hand, once circular dated 15.04.1994 stands withdrawn vide circular dated 16.04.2001, the appellant-assessee cannot claim the benefit of the withdrawn circular.

27. The controversy herein centres round the period from 1st April, 2001 to 31st March, 2002. The period in question is mostly post the circular dated 16.04.2001. As we find, the appellant-assessee has pleaded to take benefit of the circular dated 15.04.1994, which stands withdrawn and was only applicable to the notification dated 07.03.1994. It was not specifically applicable to the notification dated 21.01.2000. The fact that the third paragraph of the notification dated 21.01.2000 is identically worded to the third paragraph of the notification dated 07.03.1994 but that would not by itself justify the applicability of circular dated 15.04.1994.

28. In this context, we may note another contention that has been advanced before us. It is based upon the doctrine of contemporanea exposition. In our considered opinion, the said doctrine would not be applicable and cannot be pressed into service. Usage or practice developed under a statute is indicative of the meaning prescribed to its words by contemporary opinion. In case of an ancient statute, doctrine of contemporanea exposition is applied as an admissible aid to its construction. The doctrine is based upon the precept that the words used in a statutory provision must be understood in the same way in which they are usually understood in ordinary common parlance by the people in the

area and business. (See : G.P. Singh's Principles of Statutory Interpretation, 13th Edition-2012 at page 344). It has been held in Rohitash Kumar and others v. Om Prakash Sharma and others - (2013)11 SCC 451 that the said doctrine has to be applied with caution and the Rule must give way when the language of the statute is plain and unambiguous. On a careful scrutiny of the language employed in paragraph 3 of the notification dated 21.01.2000, it is difficult to hold that the said notification is ambiguous or susceptible to two views of interpretations. The language being plain and clear, it does not admit of two different interpretations.

29. In this regard, we may state that the circular dated 15.04.1994 was ambiguous and, therefore, as long as it was in operation and applicable possibly doctrine of contemporanea exposition could be taken aid of for its applicability. It is absolutely clear that the benefit and advantage was given under the circular and not under the notification dated 07.03.1994, which was lucid and couched in different terms. The circular having been withdrawn, the contention of contemporanea exposition does not commend acceptation and has to be repelled and we do so. We hold that it would certainly not apply to the notification dated 21.01.2000."

34. We take notice of two things so far as the circular is concerned. Apart from being merely in the form of instructions or guidance to the concerned department, the circular is dated 9th October 2018, whereas the export took place on 27th July 2017. Over and above the same, the circular explains the provisions of the drawback and it has nothing to do with the IGST refund. Thus, the circular will not save the situation for the respondents. We are of the view that Rule 96 of the Rules, 2017, is very clear.

35. In view of the same, the writ-applicant is entitled to claim the refund of the IGST.

36. In the result, this writ-application succeeds and is hereby allowed. The respondents are directed to immediately sanction the refund of the IGST paid in regard to the goods exported, i.e. 'zero rated supplies', with 7% simple interest from the date of the shipping bills till the date of actual refund."

21. In facts of the present case, instead of Rule 96 as was applicable in case of **M/s. Amit Cotton Industries**(supra), Rule 89 would be applicable which is pertaining to refund of the input tax credit. Rule 89 of the CGST Rules provides for procedure for application for refund of tax, interest, penalty, fees and prescribes that in respect of supplies to a SEZ unit, the application for refund has to be filed by the supplier of goods or services. The contention of the respondents that as the petitioner is not the supplier of the goods and services, the petitioner would not be entitled to file application for refund is not tenable because in facts of the present case, input service distributor i.e. ISD as defined under section 2(61) of the CGST Act is an office of the supplier of goods and services which receives tax invoices issued under section 31 of the CGST Act towards the receipt of input services and issues a prescribed document for the purpose of distributing the credit of CGST, SGST Or IGST paid on such goods or services.

Therefore, in facts of the case, it is not possible for a supplier of goods and services to file a refund application to claim the refund of the input tax credit distributed by ISD. Therefore, the stance of the department that the petitioner is not entitled to seek the refund of the ITC paid in connection with goods or services supplied to SEZ unit is not tenable.

22. This aspect is further fortified by notification no. 28/2012 dated 20th June, 2012 which was in connection with service tax attributable to the services used in more than one unit to be distributed pro-rata on the basis of the turnover during the relevant period of the concerned unit to the sum total of the turnover of all the units and similarly, in facts of the present case also, credit of service tax is distributed to all the units by the ISD and therefore, the claim of refund made by the SEZ unit of the petitioner is required to be granted.



23. We are of the opinion that in view of the aforesaid decision in case of **M/s. Amit Cotton Industries**(supra), the petitioner is entitled to claim refund of the IGST lying in the Electronic Credit Ledger as there is no

specific supplier who can claim the refund under the provisions of the CGST Act and the CGST Rules as input tax credit is distributed by the input service distributor.

24. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned order is quashed and set aside. The respondents are directed to process the claim of refund made by the petitioner for unutilized IGST credit lying in Electronic Credit Ledger under section 54 of the CGST Act, 2017. Such exercise shall be completed within three months from the date of receipt of the writ of this order.

25. Rule is made absolute to the aforesaid extent. No order as to costs.

**(J. B. PARDIWALA, J)**



**(BHARGAV D. KARIA, J)**

RAGHUNATH R NAIR