IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 20126 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA **Sd/-**
and
HONOURABLE MR.JUSTICE A.C.RAO **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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M/S AMIT COTTON INDUSTRIES THROUGH PARTNER, VELJIBHAI VIRJIBHAI RANIPA
Versus
PRINCIPAL COMMISSIONER OF CUSTOMS

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Appearance:
MR D K TRIVEDI for the Petitioner(s) No. 1
MR PARTH H BHATT for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR.JUSTICE A.C. RAO

Date: 27/06/2019
ORAL JUDGMENT
(PER: HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. RULE returnable forthwith. Mr.Parth Bhatt, the learned counsel waives service of notice of rule for and on behalf of the respondents.

2. By this writ-application under Article 226 of the Constitution of India, the writ-applicant has prayed for the following reliefs :

"A. Your Lordships may be pleased to admit this petition;

B. Your Lordships may be pleased to allow this petition;

C. Your Lordships may be pleased to issue writ of mandamus or any other appropriate writ directing the respondent authorities to immediately sanction the refund of IGST paid in regard to the goods exported i.e. 'Zero Rated Supplies' made vide shipping bills mentioned hereinabove;

D. Your Lordships may be pleased to direct the respondent authorities to pay interest @ 9% to the petitioner herein on the amount of refund of IGST mentioned hereinabove from the date of shipping bills uptill the date on which the amount of refund is paid to the petitioner herein, as the same is arbitrarily and illegally withheld by the respondent authorities;

E. Your Lordships may be pleased to grant an ex-parte, ad interim order in favour of the petitioner herein in terms of prayer clause 'C' and 'D' hereinabove;

F. Since the petitioner are constrained to approach Your Lordships by way of this petition only because of illegal act of respondent authorities, Your Lordships may be pleased to direct the respondent authorities to pay a cost of this litigation to the petitioner herein;

G. Your Lordships may be pleased to grant such other and further relief/(s) that may be deemed fit and proper in the interest of justice in favour of the petitioner."

3. The case of the writ-applicant in its own words as pleaded in the writ-application is as under :

"5.1. The petitioner herein is a Cotton Ginning Mill. They are engaged in a business of procuring raw cotton from farmers, ginning the same, pressing the same, carrying out necessary process, converting it into bales and then exporting these cotton bales out of India.

5.2. As required under the statute, they are registered with the Goods and Service Tax (hereinafter referred to as 'GST') Authorities. The hold GST Registration certificate bearing No. 24AAEFA672D1Z1.

5.3. Any supplies made from registered premises i.e. factory of the petitioner herein would attract GST. Therefore, GST is paid by the petitioner in accordance with law. However, since the goods are exported out of India, the same are to be termed as 'Zero Rate Supply' in accordance with Section 16 of the IGST Act.

5.4. According to the said provision, a registered person making 'Zero Rated Supply' has an option to claim refund in accordance with Section 16(3)(b) in a manner as to, he may supply goods or services or both, 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 CGST Act.

5.5. As provided in Rule 96 of the CGST Rules, 2017, the shipping bill filed by an exported of goods shall be deemed to be an application for refund of Integrated Tax paid on the goods exported out of India and such application shall deemed to have been filed only when the person in charge of conveyance carrying the export goods duly files an export manifest or an export report covering the number and the date of shipping bills or bills of export and the applicant has furnished a valid return in Form – GSTR-3 or Form GSTR-3B.

5.6. Accordingly, the petitioner had for the purpose of exporting goods out of India issued Commercial Invoice, Export Invoice, Shipping Bills. Export General Manifest and Bill of Lading were also generated by the Shipping Line.

Sr. No.	*Commercial Invoice No. & Date*	*Export Invoice No. & Date*	*Shipping Bill No. & Date*	*Export General Manifest No. & Date*	*Bill of Lading No. & Date*
1	*AC/EXP/ 17-18/09 17/07/2017*	*AC/EXP/ 17-18/09 17/07/2017*	*7437636 18/07/2017*	*131676 01/01/2018*	*MSCUUD505 394 20/07/2017*
2	*AC/EXP/ 17-18/10 20/07/2017*	*AC/EXP/ 17-18/10 20/07/2017*	*7512885 21/07/2017*	*131913 01/08/2017*	*EID0191773 26/07/2017*
3	*AC/EXP/ 17-18/11 27/07/2017*	*AC/EXP/ 17-18/11 27/07/2017*	*7662194 28/07/2017*	*132230 08/08/2017*	*EID0192292 03/08/2017*

On perusing the same, it may be observed that goods are exported top Bangladesh under the aforesaid documents. It may also be found that following IGST is paid in regard to the aforesaid goods :

Sr. No.	*Shipping Bill No & Date*	*Amount of IGST Paid (Rs)*
1	*7437636 - 19/07/2017*	*6,98,628/-*
2	*7512885 - 21/07/2017*	*6,88,986/-,*
3	*7662194 - 28/07/2017*	*5,17,506/-*
	TOTAL	*19,05,120/-*

5.7. As provided in Section 54 of CGST Act, 2017, read with Section 16 of IGST Act, 2017, immediately after the goods are exported, considering the shipping bills as application for refund of IGST paid in regard to the export goods, the respondent authorities are supposed to immediately refund the said amount of IGST to the petitioner.

5.8. In this case, exports were made in July 2017 but till date, IGST is not refunded. It is pertinent to note that no reason for withholding the amount of refund is assigned by the respondent authorities so far.

5.9. Time and again, the petition herein had approached respondent No.02 herein and requested him to kindly sanction refund of IGST. It was requested that the same may be credited in the concerned bank account of the petitioner in accordance with law. The respondent No.02

had verbally informed the petitioner that only because the petitioner had claimed drawback @ 1% in regard to the exported goods, therefore, refund of IGST would not be sanctioned. It is also informed that if the petitioner would have claimed drawback @ 0.15% instead of 1%, their refund would have been sanctioned.

5.10. Although there is no provision of law under which refund of IGST could be withheld because of aforesaid reasons, since the petitioner was suffering from cash crunch and was in dire need of the refund amount, they have given away the balance drawback i.e. 0.85% (1% - 0.15%) along with interest. Subsequently, on 16/10/2018, petitioner had also written a letter to the Deputy Commissioner of Customs, Drawback Section (Export), Mundra, and informed him regarding return of excess drawback claim under the aforesaid shipping bills. Copy of letter dtd. 16/10/2018 along with relevant challans and copies of demand drafts under which the so-called excess drawback is paid back along with interest are collectively annexed herewith and marked as ANNEXURE-C Colly.

5.11. Since the respondent authorities had not credited the refund of IGST in the concerned bank account of the petitioner so far, vide letter dtd. 05/11/2018; copy whereof is annexed herewith and marked as ANNEXURE-D, the petitioner herein had informed the respondent No.1 about reversal of so-called excess drawback along with interest. It was once again requested that at least in light of

the fact that the aforesaid amount of drawback was given away along with interest, the legally payable refund of IGST amount may kindly be credited to the concerned bank account of the petitioner in accordance with law.

5.12. Despite repeated follow ups with the respondent No.01 herein, before and after the date on which aforesaid letter dtd. 05/11/2018 was submitted, till date, the refund of IGST amount is not credited to the concerned bank account of the petitioner herein.

5.13. In response to aforesaid letter dated 5/11/2018 of the petitioner being addressed to the respondent No.2, the petitioner is in receipt of email dated 28.11.2018 from the email i.d. mundraigst2018@gmail.com. The same confirms that only reason for withholding refund is that the petitioner had first claimed more rate of draw-back. However, very conveniently, it failed to deal with the fact that the said higher rate is given away/paid back by the petitioner. A copy of the said email is annexed herewith and marked as Annexure-G. On perusing the said email, it may be found that the same further talks about circular No.37/2018-Customs, dated 9.10.2018. However, the said circular is not relevant in this case because the circular restricts Drawback if refund is availed and not the other way around. In any case, since the higher rate of draw-back is now given away/paid-back, even otherwise the question of with-holding refund would not arise."

4. Thus, it appears from the pleadings as aforesaid that the writ-applicant had exported goods in July 2017. It is the case of the writ-applicant that it is eligible to seek refund of the IGST in accordance with the provisions of the IGST Act, 2017. However, according to the writ-applicant, without any valid reason the refund to the tune of Rs.19,05,121=00 has been withheld. According to the writ-applicant, the respondent no.1 is the Jurisdictional Head of the Mundra Customs House.. Since the goods were exported from the Mundra Port, it is the respondent no.1 who is responsible for the refund in question. According to the writ-applicant, despite many representations addressed to the respondent no.2, i.e. the Deputy Commissioner of Customs, no cognizance has been taken so far as regards the claim for the lawful refund of the requisite amount.

5. Mr.D.K.Trivedi, the learned counsel appearing for the writ-applicant, vehemently submitted that there is no legal embargo on availing the drawback at the rate of 1% higher rate on one hand and availing refund of the IGST paid in regard to the 'Zero Rated Supply', i.e. the goods exported out of India, on the other.

6. It is submitted that the refund ought to have been sanctioned immediately irrespective of the fact, whether the drawback was claimed at the rate of 1% (higher rate) or at the rate of 0.15% (lower rate).

7. Mr.Trivedi would submit that the stance of the respondents that the writ-applicant is not entitled to claim refund as the writ-applicant had availed drawback at the higher rate in regard to the finished goods exported out of India, is not sustainable in law.

8. Mr.Trivedi submitted that it is not in dispute that his client paid back to the department the differential drawback amount, i.e. 0.85%, along with interest.

9. In the aforesaid context, Mr.Trivedi invited the attention of this Court to page-44 of the paper-book (Annexure-C collectively). Annexure-C is a letter dated 16th October 2018 addressed by the writ-applicant to the Deputy Commissioner of Customs, Mundra, with respect to the return of the excess drawback. The letter reads thus :

> *"Dt. 16.10.2018*
>
> *To,*
>
> *The Deputy Commissioner of Customs,*
> *Drawback Section (Export)*
> *Mundra.*
>
> *Ref : Return of Excess Drawback Claimed against SB Nos.7512885 dtd. 21.07.2017, 7437636 dtd. 18.07.2017 & 7662194 dtd. 28.07.2017*
>
> *Dear Sir,*
>
> *In continuation to the subject reference we would like to return the extra drawback claimed due to mistake against SB Nos.7512885 dtd. 21.07.2017, 7437636 dtd. 18.07.2017 & 7662194 dtd. 28.07.2017.*
>
> *Pls find below details attached Challans which are submitted back to the customs.*

SR. NO.	*SHIPPING BILL NO. & DT.*	*DD NO.*	*CHALLAN NO.*	*AMOUNT (INR) WITH INT.*
1	*7512885 DTD. 21.07.2017*	*500787/ 500783*	*1445 DTD. 04.10.2018*	*137850/-*
2	*7437636 DTD. 18.07.2017*	*500789/ 500782*	*1443 DTD. 04.10.2018*	*132180/-*
3	*7662194 DTD. 28.07.2018*	*500788/ 500784*	*1444 DTD. 04.10.2018*	*103480/-*

Thanking you

Yours faithfully

Sd/-
Amit Cotton Industries"

10. Mr.Trivedi invited the attention of this Court to Section 16 of the IGST Act, 2017, which is with respect to the 'zero rated supply'. Our attention was thereafter invited to Section 54 of the CGST Act, 2017, which is with respect to refund of tax. In the last, Mr.Trivedi invited the attention of this Court to Rule 96 of the CGST Rule, 2017, which is in respect of the refund of the integrated tax paid on goods or services exported out of India. Referring to and relying upon the aforesaid provisions of law, more particularly, Rule 96, it is submitted that the claim for refund can be withheld only on two grounds as enumerated in the sub-clauses (a) and (b) of clause (4) of Rule 96 of the Rules.

11. Mr.Trivedi submitted that it is not in dispute that the goods were exported to Bangladesh. He pointed out that the Export Invoices, Shipping Bills, Export General Manifest and Bill of Lading were generated as regards the export. He would submit that in such circumstances the said export supplies are 'zero

rated supplies' in accordance with Section 16 of the IGST Act. He submitted that as provided in Section 16(3)(b) of the IGST Act, 2017, the writ-applicant had the option to first pay the integrated tax in regard to the said supplies and then claim the refund of such tax in accordance with the provisions of Section 54 of the CGST Act, 2017.

12. Mr.Trivedi submitted that as the export supplies were 'zero rated supplies', his client is entitled to refund as provided in Section 54 of the CGST Act, 2017. Mr.Trivedi invited our attention to grounds nos.(E), (F), (G), (H), (I), (J) and (K) as raised in the writ-application. The aforesaid grounds read thus :

> *"E. It is pertinent to note that under normal circumstances, i.e. in case of refund of tax, the proper officer shall issue order for refund within six months from the date of receipt of application and the said refund amount must be credited to the fund referred to in Section 57 of CGST Act, 2017. Same is in accordance with Section 54(5) read with Section 54(7) of CGST Act, 2017. However, as provided in Section 54(8) of CGST Act, 2017, instead of crediting the refund amount to the fund, same shall be refunded to the petitioner at the earliest because it is a case of refund of tax paid on 'Zero Rated Supplies'. Since the same is not done, Your Lordships may direct the respondent authorities to kindly sanction the refund at the earliest.*
>
> *F. As provided in Rule 96 of CGST Rules, 2017, the shipping bill filed by an exporter of goods shall be deemed to be an application for refund of Integrated Tax paid on the goods exported out of India and such application shall be*

deemed to have been filed only when the person in charge of the conveyance carrying the export goods duly files an export manifest or an export report covering the number and the date of shipping bills or bills of export and the applicant has furnished a valid return in Form GSTR-3 or Form GSTR-3B. In this case, as could be observed from the documents mentioned hereinabove, shipping bills were generated and Export General Manifest were also generated. The petitioner has also furnished valid Return in GSTR-3B. Therefore, all the necessary requirements under Rule 96(1) is complied with. As such, no formal refund application is required to be filed. The respondent authorities is required to sanction refund amount considering the shipping bills as refund application. However, the same is not done so far, therefore Your Lordships may direct the respondent authorities to kindly sanction the refund at the earliest.

G. As provided in Rule 96(2) and 96(3), the details of export invoices in respect of export of goods contained in Form GSTR-1 shall be transmitted electronically by the common portal to the system designated by the Customs and the said system shall electronically transmit to the common portal, a confirmation that goods covered by the said invoice have been exported out of India. The refund amount shall be automatically credited to the concerned bank account of the petitioner herein. Needless to mention that since in the case of the petitioner, they had filed their GSTR-1 return for the month of July 2017 automatically the system must have acted in accordance with the said provisions and the refund ought to have been credited to the concerned bank account of the petitioner. However, the

same is not done, therefore Your Lordships may direct the respondent authorities to kindly sanction the refund at the earliest.

H. Refund could only be withheld if the circumstances mentioned in Rule 96(4) arises. However, in this case, no such circumstances arise. Further, if it would have arose, the petitioner were required to be intimated about the same in accordance with Rule 96(5) and subsequently, an order in Part-B of Form GST RFD-07 ought to have been passed and then the procedures required under Rule 96(7) should have been followed. However, in this case neither is the refund withheld because of the circumstances mentioned in Rule 96(4) nor are they intimated, nor is any order passed or nor is any procedure in accordance with the aforesaid provision is followed. Therefore, the manner in which the refund is withheld is completely erroneous, illegal, arbitrary and therefore Your Lordships may direct the respondent authorities to kindly sanction the refund at the earliest.

I. On perusing email dated 28.11.2018 being sent to the petitioner in response to their letter dated 5.11.2018, it may be observed that the same talks about circular no.37/2018-Customs, dated 9.10.2018. On perusing the same it may be observed that although it is issued with a purpose to clarify situations where IGST refunds have not been granted due to claiming higher rate of drawback or where higher rate and lower rate are identical, in order to clarify the same, relevant Notifications and conditions pertaining to the drawback are discussed. A reading of these Notifications and Rules would suggest that in all cases where IGST refund is availed, the

authorities concerned may not allow higher rate of drawback. However, there is no provision in the Central Goods and Service Tax Act, 2017 or the Integrated Goods and Service Tax, 2017 or that there is no such circular or instructions even, under the GST law which would provide for restriction of IGST refund for the reason that higher rate of drawback is claimed. In short, the provisions discussed in the circular relied upon in the email pertains to reverse situation than the present one. Therefore, the circular is not correct.

J. Without prejudice to the above, it is further submitted that in any case, the circulars are not law. They are not binding precedents. They are only binding on the department and not the assessee. Even in that view of the matter, reliance placed on the said circular is not sustainable for the purpose of withholding refund.

K. In any view of the matter, as far as the petitioner is concerned, since they have already reversed/paid back the difference amount of the higher rate and lower rate in order to restrict the drawback claim to lower rate, even the said circular may not prevent the refund of IGST."

13. In such circumstances referred to above, Mr.Trivedi prays that there being merit in this writ-application, the same be allowed and a writ of mandamus be issued directing the authorities to immediately sanction the refund of the IGST paid in regard to the goods exported, i.e. 'zero rated supplies', within the shipping bills referred to above.

14. On the other hand, this writ-application has been vehemently opposed by Mr.Parth Bhatt, the learned standing counsel appearing for the respondents. Mr.Bhatt submitted that the writ-applicant is not entitled to claim the refund of the IGST paid as the writ-applicant had availed higher duty drawback. Mr.Bhatt pointed out that in the case on hand, the writ-applicant having availed the higher drawback the provisions of Section 16 of the IGST Act, 2017, as well as the provisions of Section 54 of the CGST Act, 2017, will have no application. Mr.Bhatt submitted that the contention canvassed on behalf of the writ-applicant that as the differential drawback (higher drawback) amount came to be refunded to the department, he is entitled to seek sanction of the refund of the IGST paid, is without any merit. The argument of Mr.Bhatt is that the writ-applicant might have returned the differential drawback amount, but that was a unilateral act on the part of the writ-applicant not recognized in law. According to Mr.Bhatt, the IGST refund mechanism is system based and processed electronically in accordance with the declaration which the exporter may give in the shipping bill and the GST return. According to Mr.Bhatt, as the writ-applicant had availed the higher drawback, the system declined the IGST refund.

15. Mr.Bhatt placed reliance on the following averments made in the affidavit-in-reply filed on behalf of the respondents duly affirmed by one Shri B.Jeyanth Malaiyandi, Deputy Commissioner of Customs :

> *"10. I say and submit that the legal positions related to Drawback claims are as under, Notification 131/2016 – Cus (N.T.) dated 31.10.2016 specified the rate of drawback*

subject to the notes and conditions mentioned in the notification.

I say and submit that condition 7 of the notification dated 31.10.2016 mentions that if any exporter claims drawback under Column (4) and (5), it means that drawback includes Customs, Central excise and Service Tax component and it's called Higher drawback. Similarly, if any exporter claims drawback under Column (6) and (7), it means the drawback included Customs only and it's called Lower drawback.

11. I say and submit that after the introduction of IGST, the condition 11 of Notification 131/2016 – Cust (N.T) dated 31.10.2016 has been amended by Notification 59/2017 dated 29.06.2017.

I submit that the condition no. 11(d) mentions that drawback under Column (4) and (5) i.e. Higher Drawback is not applicable to the goods if good is exported by claiming refund of integrated goods and services tax paid on such exports.

I submit that in the present case, the Petitioner has exported goods and claimed Higher drawback. The drawback details as claimed by the petitioner obtained from Customs system have been given in Annex A. The claiming of higher drawback can be ascertained from the facts that the drawback serial number has been affixed with 'A' which denotes higher drawback.

I submit that in spite of exporting goods under payment of IGST, the exporter has claimed Higher Drawback and violated condition 11(d) of the Notification 131/2016 – Cus (N.T.) dated 31.10.2016 as amended by notification 59/2017 dated 29.06.2017 to gain unlawful benefits.

12. I say and submit that a new condition, condition no.12A has been introduced after GST in the Notification 131/2016 – Cus (N.T.) dated 31.10.2016 vide Notification 59/2017 dated 29.06.2017 for the purpose of claiming Higher drawback.

I submit that as per the condition no.12A, it is made clear that the exporter who avails drawback under Column (4) and (5) i.e. Higher drawback has to satisfy the condition that no refund of IGST paid on export product shall be claimed. In this case, the petitioner has availed Higher drawback after giving declaration that no refund of IGST shall be claimed. In this case, after availing the higher drawback, now the petitioner is claiming for IGST refund which is undue as per the declaration made by the petitioner.

13. In response to para 5.8 of the petition, I say and submit that when the IGST refund is undue as detailed in the above paras, the question of withholding the refund doesn't arise.

14. In response to para 5.10 of the petition, I say and submit that the petitioner has paid back the differential

drawback (Between Higher drawback and Lower drawback) along with interest to claim IGST refund. It's to be highlighted here that the petitioner on their own paid the differential amount. However, there is no procedure prescribed under any law/notification that if differential amount of drawback has been paid, the exporter would be eligible for IGST refund. I further say and submit that when a procedure is non-existent, expecting IGST refund is not proper.

15. In response to para 5A of the petition, I say and submit that the Petitioner has alleged that there Is no embargo for simultaneously availed both Higher drawback and refund of IGST paid in regard to the Zero Rated Supply. I say and submit that the same is not proper. I submit that it is clearly provided in the respective provisions of IGST refund and Drawback that either higher drawback or IGST refund only can be availed but not both.

I say and submit that Section 16 of the IGST Act of 2016 mentions that the IGST refund shall be claimed in accordance with the provisions of Section 54 of the CGS'I' act, 2017. The bare provision of Section 16 relevant to the issue is reproduced hereunder:

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

(a) ....

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, art 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.

I submit that the provision of Section 54 of the CGST Act of 2017 (as Annexure: D) is made applicable to the refund of IGST as per Section 16 of the IGST Act, 2017. I submit that the provisions of the Acts as stated clearly spell it out that the refund of IGST shall not be allowed if the supplier of goods or services i.e. exporter avails drawback in respect of Central tax or claims refund of the integrated tax paid which is Higher drawback. I say and submit that as per the referred provisions, they clearly debar any exporter from availing IGST refund if the exporter has already availed Higher drawback. In this case also, the Petitioner has availed Higher drawback and therefore the IGST refund has been legally denied as per Section 16 of the IGST Act, 2017 read with provisions of Section 54 of the CGST Act, 2017.

16. In response to para 5.B of the Petition, I say and submit that the Petitioner alleged that the in spite of returning the differential drawback (Higher drawback - Lower drawback) amount, the Respondent authorities have not sanctioned the IGST refund amount.

I submit that entire IGST refund mechanism is system based and processed electronically. I submit that there is no manual intervention in the mechanism unless there is any error committed by the exporter while filing GST returns or shipping bill. I say and submit that presently, there is no option available in the system to consider the claim of the petitioner. I further say and submit that this payment of differential drawback amount to claim IGST refund is nowhere prescribed in the law. I submit that the Petitioner herein has invented a new procedure in order to try to obtain the benefit which has already been forgone while claiming the higher drawback. I submit that for claiming the higher drawback, the Petitioner has given declaration that the IGST refund will not be claimed as per condition 12 of Notification 131/2016 to avail higher drawback. I submit that the system has processed the IGST refund of the Petitioner based on the declaration given by them at the time of filing Shipping bill. I say and submit that there is no role by either the Respondent no. 1 or the Respondent no. 2 in non-sanctioning the refund and it is based on the declaration by the Petitioner at the time of export.

I submit that payment of differential drawback amount and claiming IGST refund at this juncture by the Petitioner is an afterthought and not prescribed in the law. As the entire IGST refund mechanism is system based and the Petitioner's claim is not as per prescribed procedure, the petitioner's claim has not been considered.

17. In response to para 5.C of the Petition, I say and submit that the Petitioner has alleged that the amount has

been unlawfully withheld without any legal basis by the respondent authorities. I reiterate that it is not a proper claim on part of the Petitioner. I submit that the IGST refund mechanism is system based and processed electronically as per the declaration given by the exporter in the shipping bill and the GST return. I submit that in the present case, the Petitioner has availed higher drawback as evident from their shipping bills and because of this the system has denied them the IGST refund. I submit that as the Petitioner is ineligible for the IGST refund, it is not proper to accuse the Respondent no.1 and Respondent no. 2 for the non-sanction of IGST refund.

18. In response to para 5.D of the Petition, I say and submit that the Petitioner has quoted the provisions of Section 16(3) of IGST Act, 2017 and Section 54 of the CGST Act, 2017 to say that IGST refund has to be sanctioned. I say and submit that as per the above paras, the refund of IGST and Higher drawback cannot be simultaneously availed as per the quoted legal provisions.

19. In response to paras 5.E, 5.F, 5.G and 5.H of the Petition, I say and submit that the above paras explain the process of sanctioning of the IGST refund, the same further clarify the reasoning as to why the Petitioner is ineligible for the IGST refund when they have already availed the Higher drawback. In respect of this, the Central Board of Indirect Taxes and Customs (CBIC) has examined the issue and issued circular 37/2018-Cus dated 9.10.2018. A copy of the circular dated 09.10.2018 is annexed hereto and marked as Annexure: E.

I submit that from the above circular, it is made clear that the simultaneous availing of higher drawback and IGST refund is not permissible in the eyes of law. I submit that in the present case, the Petitioner has demanded the IGST refund after payment of the differential drawback amount. I submit that the same is not a legal procedure which can be accepted and it is not possible to be considered as the entire IGST refund mechanism is system based. I further say and submit that the Petitioner has consciously relinquished the IGST refund claim for claiming the Higher drawback. I submit that the law is very specific and there are conditions to be followed to avail any benefits either IGST refund or Drawback. I submit that in the instant case, the declaration has been given electronically by the petitioner on their own volition at the time of filing shipping bills to avail the Higher drawback benefit."

16. Mr.Bhatt invited the attention of this Court to the Circular No.37/2018-Customs dated 9th October 2018 issued by the Government of India, Ministry of Finance, Department of Revenue, as regards the IGST refunds. The Circular relied upon by the respondents reads thus :

"Circular No.37/2018-Customs

F.No.450/119/2017-Cus IV
Government of India
Ministry of Finance
Department of Revenue
(Central Board of Indirect Taxes & Customs)

****

Room No.229A, North Block
New Delhi, dated the 9th October, 2018

To,

All Principal Chief Commissioner/Chief Commissioner of Customs/ Customs & Central Tax/ Customs (Preventive)

All Principal Commissioner/Commissioner of Customs/ Customs & Central Tax/ Customs (Preventive)

All Director Generals under CBIC.

Sub : Cases where IGST refunds have not been granted due to claiming higher rate of drawback OR where higher rate and lower rate were identical – reg

Sir/Madam,

Numerous representations have been received from exporters/export associations, regarding cases where IGST refunds have not been granted because higher rate of drawback has been claimed or where higher rate and lower rate were identical.

2.0 The issue has been examined extensively in this Ministry. The legal provisions related to Drawback claims are as under :

2.1 Notes and condition (11) of Notification No.131/2016-Cus(NT) dated 31.10.2016 (as amended by Notification No.59/2017-Cus(NT) dated 29.6.2017 and 73/2017-Cus(NT) dated 26.7.2017), prescribed that 'The rates and caps of drawback specified in columns (4) and (5) of the said Schedule shall not be applicable to export of a commodity or

product if such commodity or product is –

....

(d) *exported claiming refund of the integrated goods and services tax paid on such exports'.*

2.2 Notes and Condition (12A) of Notification No.131/2016-Cus(NT) dated 31.10.2016 (as amended by Notification No.59/2017-Cus(NT) dated 29.6.2017 and 73/2017-Cus(NT) dated 26.7.2017) prescribed that 'The rates and caps of drawback specified in columns (4) and (5) of the said Schedule shall be applicable to export of a commodity or product if the exporter satisfies the following conditions, namely:-

... ...

(ii) *If the goods are exported on payment of integrated goods and services tax, the exporter shall declare that no refund of integrated goods and services tax paid on export product shall be claimed;.....'*

2.3 In terms of Rules 12 and 13 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, the shipping bill itself is treated as claim for drawback in terms of the declarations made on the shipping bill.

2.4 The declarations required in terms of above Notes and Conditions and provisions of the Drawback Rules are made electronically in the EDI System. When composite drawback rate was claimed (by declaring suffix A or C with Drawback serial number), exporter was required to tick DBK002 and

DBK003 declarations in the shipping bills. In fact, for period 1.7.2017 to 26.7.2017, a manual declaration was also required to be given as the changes made on 26.7.2017 were made applicable for exports made from 1.7.2017 onwards.

2.5 By declaring drawback serial number suffixed with A or C and by making above stated declarations, the exporters consciously relinquished their IGST/ITC claims.

3. It has been noted that exporters had availed the option to take drawback at higher rate in place of IGST refund out of their own volition. Considering the fact that exporters have made aforesaid declaration while claiming the higher rate of drawback, it has been decided that it would not be justified allowing exporters to avail IGST refund after initially claiming the benefit of higher drawback. There is no justification for re-opening the issue at this stage.

4. Field formations may, therefore, take necessary steps to bring these changes to the knowledge of exporters.

5. Difficulties, if any, may be brought to the notice of the Board. Hindi version will follow.

Yours faithfully,
Sd/-
(Maninder Kumar)
O.S.D. (Cus-IV)"

17. In such circumstances referred to above, Mr.Bhatt, the learned standing counsel appearing for the respondents, prays

that there being no merit in this writ-application, the same be rejected.

18. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is, whether the respondents are justified in withholding the refund of the IGST paid by the writ-applicant in connection with the goods exported, i.e. 'zero rated supplies'.

19. On 20th December 2018, this Court passed the following order :

> *"1. The learned advocate for the petitioner has tendered a draft amendment. The amendment is allowed in terms of the draft. The same shall be carried out forthwith.*
>
> *2. The learned advocate for the petitioner invited the attention of the court to the provisions of section 16 of the Integrated Goods and Services Tax Act, 2017 which makes a provision for "Zero rated supply". It was submitted that under sub-section (3) thereof, a registered person making zero rated supply is eligible to claim refund as provided therein. It was submitted that the provision for refund of integrated tax paid on goods exported out of India is made under rule 96 of the Central Goods and services Tax Rules, 2017 (hereinafter referred to as "the rules"). It was submitted that all the requirements for claiming refund under the said rule have been fulfilled by the petitioner. Referring to sub-rule (4) of rule 96 of the rules, it was submitted that the claim for refund can be withheld only in*

the two eventualities mentioned therein, none of which are attracted in the present case. Reference was made to the e-mail dated 28.11.2018 issued by the IGST Section, Customs House, Mundra drawing the attention of the petitioner to the Board Circular No.37/2018-Customs dated 9.8.2018 wherein it is clearly mentioned that by declaring drawback claim serial number suffixed with A or C, the exporters consciously relinquished their IGST/ITC claim. Reference was made to Circular No.37/2018-Customs dated 9.10.2018 to submit that the same does not relate to IGST and would have no applicability to the facts of the present case. It was submitted that in any case, the petitioner has already returned back the differential drawback amount, and hence, there is no impediment in the way of the respondents in granting the refund to the petitioner.

2. Having regard to the submissions advanced by the learned advocate for the petitioner, Issue Notice returnable on 24th January, 2019. "

20. Before adverting to the rival submissions canvassed on either side, we may refer to the three provisions of law relevant for the purpose of deciding the controversy between the parties.

Section 16 of the IGST Act, 2017, reads thus :

"16. Zero rated supply.-- (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."

21. Section 54 of the CGST Act, 2017, reads thus :

"54. Refund of tax.-- (1) Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed:

Provided that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in 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, 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.

(4) The application shall be accompanied by—

(a) such documentary evidence as may be prescribed to establish that a refund is due to the applicant; and

(b) such documentary or other evidence (including the documents referred to in section 33) as the applicant may furnish to establish that the amount of tax and interest, if any, paid on such tax or any other amount paid in relation to which such refund is claimed was

collected from, or paid by, him and the incidence of such tax and interest had not been passed on to any other person:

Provided that where the amount claimed as refund is less than two lakh rupees, it shall not be necessary for the applicant to furnish any documentary and other evidences but he may file a declaration, based on the documentary or other evidences available with him, certifying that the incidence of such tax and interest had not been passed on to any other person.

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

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

documents furnished by the applicant.

(7) The proper officer shall issue the order under sub-section (5) within sixty days from the date of receipt of application complete in all respects.

(8) Notwithstanding anything contained in sub-section (5), the refundable amount shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to--

(a) refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies;

(b) refund of unutilised input tax credit under sub-section (3);

(c) refund of tax paid on a supply which is not provided, either wholly or partially, and for which invoice has not been issued, or where a refund voucher has been issued;

(d) refund of tax in pursuance of section 77;

(e) the tax and interest, if any, or any other amount paid by the applicant, if he had not passed on the incidence of such tax and interest to any other person; or

(f) the tax or interest borne by such other class of applicants as the Government may, on the recommendations of the Council, by notification, specify.

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

(10) Where any refund is due under sub-section (3) to a registered person who has defaulted in furnishing any return or who is required to pay any tax, interest or penalty, which has not been stayed by any court, Tribunal or Appellate Authority by the specified date, the proper officer may—

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

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

Explanation.—For the purposes of this sub-section, the

expression "specified date" shall mean the last date for filing an appeal under this Act.

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

(12) Where a refund is withheld under sub-section (11), the taxable person shall, notwithstanding anything contained in section 56, be entitled to interest at such rate not exceeding six per cent. as may be notified on the recommendations of the Council, if as a result of the appeal or further proceedings he becomes entitled to refund.

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

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

Explanation.—For the purposes of this section,—

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

(2) "relevant date" means—

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

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

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

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a

place outside India;

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

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

(i) receipt of payment in convertible foreign exchange, where the supply of services had been completed prior to the receipt of such payment; or

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

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

(e) in the case of refund of unutilised input tax credit under sub-section (3), the end of the financial year in which such claim for refund arises;

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

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

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

22. Rule 96 of the CGST Rules, 2017, reads thus :

"Rule 96: Refund of integrated tax paid on goods or services exported out of India.-- (1) The shipping bill filed by an exporter of goods shall be deemed to be an application for refund of integrated tax paid on the goods exported out of India and such application shall be deemed to have been filed only when:-

(a) the person in charge of the conveyance carrying the export goods duly files a departure manifest or an export manifest or an export report covering the number and the date of shipping bills or bills of export; and

(b) the applicant has furnished a valid return in FORM GSTR-3 or FORM GSTR-3B, as the case may be;

(2) The details of the relevant export invoices in respect of

export of goods contained in FORM GSTR-1 shall be transmitted electronically by the common portal to the system designated by the Customs and the said system shall electronically transmit to the common portal, a confirmation that the goods covered by the said invoices have been exported out of India.

Provided that where the date for furnishing the details of outward supplies in FORM GSTR-1 for a tax period has been extended in exercise of the powers conferred under section 37 of the Act, the supplier shall furnish the information relating to exports as specified in Table 6A of FORM GSTR-1 after the return in FORM GSTR-3B has been furnished and the same shall be transmitted electronically by the common portal to the system designated by the Customs:

Provided further that the information in Table 6A furnished under the first proviso shall be auto-drafted in FORM GSTR-1 for the said tax period.

(3) Upon the receipt of the information regarding the furnishing of a valid return in FORM GSTR-3 or FORM GSTR-3B, as the case may be from the common portal, the system designated by the Customs or the proper officer of Customs, as the case may be, shall process the claim of refund in respect of export of goods and an amount equal to the integrated tax paid in respect of each shipping bill or bill of export shall be electronically credited to the bank account of the applicant mentioned in his registration particulars and as intimated to the Customs authorities.

(4) The claim for refund shall be withheld where,-

(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 sub-section (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.

(5) Where refund is withheld in accordance with the provisions of clause (a) of sub-rule (4), the proper officer of integrated tax at the Customs station shall intimate the applicant and the jurisdictional Commissioner of central tax, State tax or Union territory tax, as the case may be, and a copy of such intimation shall be transmitted to the common portal.

(6) Upon transmission of the intimation under sub-rule (5), the proper officer of central tax or State tax or Union territory tax, as the case may be, shall pass an order in Part B of FORM GST RFD-07.

(7) Where the applicant becomes entitled to refund of the amount withheld under clause (a) of sub-rule (4), the

concerned jurisdictional officer of central tax, State tax or Union territory tax, as the case may be, shall proceed to refund the amount after passing an order in FORM GST RFD-06.

(8) The Central Government may pay refund of the integrated tax to the Government of Bhutan on the exports to Bhutan for such class of goods as may be notified in this behalf and where such refund is paid to the Government of Bhutan, the exporter shall not be paid any refund of the integrated tax.

(9) The application for refund of integrated tax paid on the services exported out of India shall be filed in FORM GST RFD-01 and shall be dealt with in accordance with the provisions of rule 89.

(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have received supplies on which 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 or 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 notification No. 78/2017-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 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."

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 writ-applicant 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 sub-section (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-a-vis 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.

37. Rule made absolute.

(J. B. PARDIWALA,J.)

(A. C. RAO,J.)

/MOINUDDIN