IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE AMIT RAWAL

FRIDAY, THE 18TH DAY OF DECEMBER 2020 / 27TH AGRAHAYANA, 1942

WP(C).No.4524 OF 2020(M)

PETITIONER/S:

FIBRE WORLD
REGISTERED OFFICE NO.XVIII/1269, P.B.NO.4643, CULLEN ROAD, ALAPPUZHA-688012, REPRESENTED BY ITS MANAGING PARTNER- MR.ROBY FRANCIS.

BY ADVS.
SRI.M.GOPIKRISHNAN NAMBIAR
SRI.K.JOHN MATHAI
SRI.JOSON MANAVALAN
SRI.KURYAN THOMAS
SRI.PAULOSE C. ABRAHAM

RESPONDENT/S:

1. **THE UNION OF INDIA**
   REPRESENTED BY THE SECRETARY, MINISTRY OF FINANCE (DEPARTMENT OF REVENUE), NORTH BLOCK, NEW DELHI-110001.

2. **THE STATE TAX OFFICER,**
   SECOND CIRCLE, SGST DEPARTMENT, CIVIL STATION, ALAPPUZHA-688001.

3. **THE DEPUTY COMMISSIONER OF CUSTOMS,**
   (IN CHARGE OF DRAW BACK AND REFUNDS), OFFICE OF THE COMMISSIONER OF CUSTOMS, CUSTOM HOUSE, WILLINGDON ISLAND, COCHIN-682009.

4. **THE ASSISTANT COMMISSIONER OF CUSTOMS (DRAW BACK), OFFICE OF THE COMMISSIONER OF CUSTOMS, CUSTOM HOUSE, WILLINGDON ISLAND, COCHIN-682009.**

5. **ADDL. THE DEPUTY COMMISSIONER**
   SOUGHT TO BE IMPLEADED

R1 BY ADV. MR.P.R.AJITH KUMAR, CGC
R3-4 BY SRI.P.R.SREEJITH, SC, CENTRAL BOARD OF EXCISE AND CUSTOMS

OTHER PRESENT:

SR GP SRI C K GOVIND

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 11-12-2020, THE COURT ON 18-12-2020 DELIVERED THE FOLLOWING:

JUDGMENT

[WP(C).4524/2020

Dated this the 18th day of December 2020

The question of law raised in this writ petition is whether the assessee registered under GST Act is entitled to Input Tax Credit (ITC) or not in case of availment of facility of duty draw back. The ratio decidendi culled out in ***Amit Cotton Industries Vs. Principal Commissioner of Customs in 2019 75 GST 33 (Gujarat)*** has also been followed by a Single Judge of this Court in W.P.(C)No.2981/2019 holding in favour of the assessee by taking the aid of Rule 96 of Central Sales Tax Rules, 2017. The facts for the adjudication of this writ petition are as follows.

2. The petitioner is an exporter of door mats made of coir, rubber, Poly-propylene etc. since 1988. Petitioner is a registered dealer under the provisions of the Central General Sales Tax Act/State General Sales Tax Act/Integrated Sales Tax Act. Petitioner in the month of July 2017 effected zero rated supplies under a Letter of Undertaking, which was made though Custom Broker. Since the petitioner had the option to avail drawback as per provisions of the Customs Act, 1962, owing to the confusions and lack of clarity during the nascent stages of implementation of GST, petitioner submitted on-line application for refund in respect of unutilized tax credit, as

appearing in GSTR -1 and GSTR 3B amounting to Rs.5,82,35,435/- as outwards supplies. In the aforementioned returns, there was no element of remittance of IGST. The claim of the petitioner in view of the provisions of Section 54 of the GST 2017, for ITC, was Rs.68,09,713/- (SGST Rs.29,29,514, CGST Rs.29,29,514/- and IGST Rs.9,50,685/-). In order to claim ITC, petitioner submitted an on-line application for refund of untilized tax credit, evident from Ext.P2 receipt. Vide communication Exts.P3 and P3 (a) was intimated to be eligible for refund of 90% of the unutilized ITC in respect of zero rated supply, which was provisionally sanctioned and to be disbursed by the Central GST authorities as per Circular No.2/2018 dated 10.01.2018.

3. Vide letter dated 11.7.2018, the Deputy Commissioner Duty Draw Back, Customs House, Cochin was intimated that owing to the irresponsible action of their customs agent total amount claimed was Rs.7,48,966/- and expressed their willingness to pay back the money at the rate of 15% penal interest, amounting to Rs.8,61,311/-. Vide communication dated 19/7/2013, Ext.P5, Asst. Commissioner of Customs intimated the petitioner to forward the details of shipping bills and work sheet of the actual and excess amount. In response to Ext.P5, petitioner submitted Exts.P16 and P17. Since there was no response from the Department and apprehending the issuance of a show cause notice for the non-payment of refunded amount of

untilized input tax credit, petitioner remitted an amount of Rs.10 lakhs to the 2nd respondent through FORM DRC-03 towards the re-repatriation of the refund already granted for the month of July 2017, evident from, Exts.P8 and P8(a).

4. Learned Counsel appearing on behalf of the petitioner submitted that it was not in the knowledge that the availment of drawback would stand in the way of claiming of refund on unutilised ITC, particularly when the drawback amount availed can be reversed with interest. It came to the notice of the petitioner that similar issues in India were decided in favour of the assessee. In support of the contention petitioner relied upon ***Amit Cotton Industries Vs.Principal Commissioner of Customs in 2019 75 GST 33 (Gujarat)***. Petitioner also sent a letter to the Department of customs with the details of the payment along with the demand draft for an amount of Rs.6,87,770/-, which was returned vide communication, Ext.P10 dated 1.11.2019. Chapter V of Section 16 of the CGST Act 2017 envisages eligibility and conditions for availing the input tax credit in respect of zero-rated supply. Ext.P10 communication reflecting inability to disburse ITC has been challenged in the writ petition, however, during the pendency of the writ petition order Ext.P16, 30.10.2020 was issued by the Deputy Commissioner of State goods and Services Tax Department directing the petitioner to remit back the amount of refund, provisionally

granted, with interest. After adjusting the refund amount for the months of August and September, 2017 the petitioner was directed to remit an amount of Rs.8,36,838/- towards IGST and Rs.10,89,990/- towards Central Sales Tax within 15 days and vide separate Order, Ext.P17 and after adjusting of the amount Rs.2,81,032/- demand was raised. In support of the contention, besides ***Amit Cotton Industries' case (supra)***, the judgment of this Court dated 29.8.2019 in W.P.(C)Nos.2981 & 24572019 was cited, wherein the learned Single Bench allowed the writ petitions, on consent, directing the respondents to sanction the refund of the IGST paid in regard to the goods exported i.e. 'zero rated supplies'. The said judgement was taken in writ appeal. Writ Appeals filed by the Department were disposed of, granting liberty to file Review petition before the learned Single Judge. While considering the review petition filed by the Department aspect of consent in Ext.P18 judgment was expunged but pith and substance remained intact/ unaltered, thus, it would be a farcical exercise for the petitioner to avail the remedy of appeal against Ext.P16 and Ext.P17. The action of the GST authorities declaring to refund unutilised ITC is highly illegal, arbitrary and unjustifiable.

5. As per the provisions of Section 16 (3) (a) of the IGST a person is entitled to refund the unutilised ITC. The provisions of Section 54 of the Central Goods and Service Tax Act deals with the

refund of tax on various situations. None of the notification or circular allegedly relied upon by the respondents deal with the denial of refund of ITC in respect of exports without payment of integrated tax.

6. Per contra, Sri.Sreejith, learned Counsel appearing on behalf of GST Department, submitted, that though the Department has already filed writ appeal against the order of the learned Single Judge, as the order omitted only consent part but the purport of the order allowing the refund of ITC still remains. The aforementioned writ appeal has not so far been listed. As per information, Special Leave Petition against the judgment of ***Amit Cotton Industries (supra)*** is also pending, but there is no interim order.

7. In fact the learned Single Judge did not notice third Proviso of Section 54 (3) of CGST Act, which provides that “no refund of input tax credit shall be allowed if the supplier of goods or services avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies”. Duty drawback in the instant case was in respect of goods imported for manufacturing the final product. The ratio decidendi culled out in the judgment would not have any binding effect or treated as precedent and urged this Court for dismissal of the writ petition.

8. I have heard the parties and appraised the paper books.

9. Third Proviso of Section 54(3) of the CGST Act, reads thus:

"Section 54 - Refund of tax

(1) xxxxxxx

(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:

xxxxxxxx

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."

10. On a perusal of the above provision, no doubt the exporter, who ships zero rated supplies without integrated tax is entitled to unutilised input tax credit. But the 3rd Proviso to Section 54 (3) puts an embargo regarding refund of input tax credit in case the supplier of the goods or services or both had availed a drawback in respect of Central Tax or refund of the integrated tax paid on such supplies.

11. In ***Amit Cotton Industries' case (supra)*** petitioner, therein was aggrieved against non-granting of refund of IGST, approached the Division Bench of Gujarat High Court claiming unutilised ITC with regard to the goods exported, ie. Zero rated supply vide various shipping bills by laying reliance on provisions of Rule 96 of CGST Rules, 2017 envisaging procedure for refund of integrated tax paid on goods (all services) exported out of India. In fact provisions of Rule 96 (4) to (9) reflecting certain embargo on withholding of ITC were relied. For drawing distinction, it would be

apt to extract provisions of the rule ibid :

> "(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.
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> (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."

12. Division Bench found that none of the contingencies reflected in Rule 96 disentitled the assessee for claiming unutilised ITC. For the sake of brevity, the relevant paragraphs of judgment in **Amit's Cotton Industries** (supra) read thus:

> "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.
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> 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.
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> 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 afraind 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."

13. The shipping bills in the cited judgment were of 18.7.2017, 21.7.2017, 28.7.2017. Section 54 of CGST became enforceable with effect from 1.7.2017 vide notification 9/2017 dated 28.7.2017. The Division Bench of the Gujrat High Court before giving its opinion extracted Section 16 of the IGST Act and Section 54 of the CGST Act.

14. The Division Bench held that the circular would not have a binding force on what has been provided in the Statute or interpreted by the courts. It did not rely upon the circular dated 9.10.2018 relied upon by the Revenue whereby unutilised ITC was rejected despite the exporter availed the benefit of drawback. In other words, it did not tantamount to relinquishment of IGST and ITC claims.

15. By relying upon the aforementioned judgment, the learned Single Judge of this Court has also in ***G Next Power Corporation's case (supra)*** allowed the writ petition on behalf of the exporter.

16. It is the paramount duty of the Counsel while addressing the arguments in support of the respective contentions to refer and rely each part of the Statute and judgments either overruled or applicable. In the absence of assistance likelihood of giving a different judgment or incorrect finding or finding contrary to the Statutory provisions, cannot be ruled out.

17. Judgment of this court relied, emphatically, would not help

petitioner as it has been passed without advertence to third proviso of section 54 (3) ibid. Similar is position in respect of judgment of Gujrat high court as genesis is based upon only Circular dated 9.10.2018 only. However in the present case respondents have not taken aid of circular as was done in **Amit Cottons** case but categorically relied on third proviso of section 54 (3).

18. There is no quarrel to findings in **Amit Cotton** supra, that the circulars would not have binding effect when the provisions of Statute are very clear. But, on plain and simple reading of 3rd Proviso of 54 (3) it does not require any interpretation or can be stretched to take the aid of provisions of other Act, in forming an opinion that the person would not be barred from claiming unutilised ITC, once the exporter availed the drawback. Intention of the exporter in the instant case of refunding drawback along with the interest of 15% cannot prima facie rule out the element of mens-rea as the amount of duty draw back is meager than that of the ITC. During the pendency of this writ petition Ext.P16 and Ext.17 have been placed on record. This Court can always examine authenticity or validity even if challenge through amendment or otherwise has not been laid.

19. when Counsel for the petitioner was confronted regarding non adherance of Provisions of third Proviso to Section 54(3), it was submitted that he was of the opinion that in view of the

Division Bench Judgment of Gujarat High Court and Single Bench Judgment, sufficient grounds were available to argue instead of availing the remedy of appeal against Ext.P16. It is in such background indulgence of this Court has been insisted upon. By tracing out the difference, viz a viz, the ratio culled out by Division Bench judgment, I am of the view that the issue raised by the petitioner is not at all covered as availment of drawback Exporter would not be eligible for Input Tax Credit, thus, action of the respondents by rejecting the unutilised ITC cannot be faulted with.

The writ petition is accordingly dismissed.

Sd/

AMIT RAWAL

JUDGE

Jm/

APPENDIX OF WP(C) 4524/2020

PETITIONER'S/S EXHIBITS:

EXHIBIT P1	THE TRUE COPY OF THE GSTR-1 FILED FOR THE MONTH OF JULY (2017-18).
EXHIBIT P1(A)	THE TRUE COPY OF THE GSTR-3B FILED FOR THE MONTH OF JULY (2017-18).
EXHIBIT P2	THE TRUE COPY OF THE E-RECEIPT DATED 07.12.2017, RECEIVED FOR SUBMISSION OF REFUND APPLICATION FOR THE MONTH OF JULY, 2017.
EXHIBIT P3	THE TRUE COPY OF THE COVERING LETTER DATED 01.03.2018 ISSUED BY THE 2ND RESPONDENT.
EXHIBIT P3(A)	THE TRUE COPY OF THE REFUND ORDER (FORM-GST-RFD-04) DATED 20.2.2018 ISSUED BY THE 2ND RESPONDENT.
EXHIBIT P4	A TRUE COPY OF THE LETTER DATED 11.07.2018 SENT BY THE PETITIONER TO THE OFFICE OF THE 3RD RESPONDENT.
EXHIBIT P5	A TRUE COPY OF THE LETTER DATED 19.07.2018 ISSUED BY THE 4TH RESPONDENT TO THE PETITIONER.
EXHIBIT P6	A TRUE COPY OF THE LETTER DATED 27.07.2018 (WITHOUT ANNEXURES) SUBMITTED BY THE PETITIONER TO THE OFFICE OF THE 3RD RESPONDENT.
EXHIBIT P7	A TRUE COPY OF THE LETTER DATED 05.09.2018 SUBMITTED BY THE PETITIONER TO THE OFFICE OF THE 3RD RESPONDENT.
EXHIBIT P8	A TRUE COPY OF THE COVERING LETTER DATED 01.07.2019 (WITHOUT ANNEXURES) EVIDENCING PAYMENT OF AMOUNTS THROUGH FILING OF FORM DRC-03, SUBMITTED BEFORE THE 2ND RESPONDENT.
EXHIBIT P8(A)	A TRUE COPY OF THE COVERING LETTER DATED 23.07.2019 (WITHOUT ANNEXURES) EVIDENCING PAYMENT OF AMOUNTS THROUGH FILING OF FORM DRC-03, SUBMITTED BEFORE THE 2ND RESPONDENT.

EXHIBIT P9	A TRUE COPY OF THE LETTER (ALONG WITH ANNEXURES) DATED 29.10.2019 SUBMITTED BEFORE THE OFFICE OF THE 3RD RESPONDENT.
EXHIBIT P10	A TRUE COPY OF THE LETTER DATED 01.11.2019 ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER (WITHOUT ENCLOSURE).
EXHIBIT P11	A TRUE COPY OF NOTIFICATION NO.131/2016-CUSTOMS (N.T.) DATED 31.10.2016 ISSUED BY MINISTRY OF FINANCE (DEPARTMENT OF REVENUE), GOVERNMENT OF INDIA.
EXHIBIT P12	A TRUE COPY OF NOTIFICATION NO.73/2017 -(CUSTOMS) N.T. DATED 26.07.2017 ISSUED BY THE MINISTRY OF FINANCE (DEPARTMENT OF REVENUE), GOVERNMENT OF INDIA.
EXHIBIT P13	A TRUE COPY OF NOTIFICATION NO.50/2017-CUSTOMS DATED 30.06.2017 ISSUED BY THE MINISTRY OF FINANCE (DEPARTMENT OF REVENUE), GOVERNMENT OF INDIA.
EXHIBIT P14	A TRUE COPY OF CIRCULAR NO.37/2018-CUSTOMS DATED 09.10.2018 ISSUED BY THE DEPARTMENT OF REVENUE (CENTRAL BOARD OF INDIRECT TAXES & CUSTOMS), MINISTRY OF FINANCE, GOVERNMENT OF INDIA.
EXHIBIT P15	A TRUE COPY OF THE STATEMENT (DATED NIL) REFLECTING THE DETAILS OF EXPORT SALES FOR THE MONTH OF JULY, 2017.
EXHIBIT P16	THE TRUE COPY OF THE ORDER (DETAILED REFUND ORDER WITHOUT ANNEXURES) DATED 30.10.2020 ISSUED BY THE DEPUTY COMMISSIONER, KERALA STATE GOODS AND SERVICES TAX DEPARTMENT
EXHIBIT P17	THE TRUE COPY OF THE ORDER DATED 30.10.2020 (SUMMARY REFUND ORDER) WITHOUT ANNEXURES ISSUED BYTHE DEPUTY COMMISSIONER, KERALA STAT GOODS AND SERVICES TAX DEPARTMENT
EXHIBIT P18	THE TRUE COPY OF THE JUDGMENT DATED

29.08.2019 PASSED BY THIS HON'BLE COURT IN WPC NOS.2981 OF 2019 AND 2457 OF 2019