

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.157 OF 2019

M/s. Sanathan Textile Pvt. Ltd.

... Petitioner

Vs.

Union of India, Through The Secretary,
Ministry of Finance, Department of Revenue
& Anr.

... Respondents

Mr. V. Raghuraman, Senior Counsel, Mr. Raghavendra, Mr. Shailesh Sheth
and Mr. Prabhakar K. Shetty for Petitioner.

Mr. J. B. Mishra along with Mr. Anjani Kumar Singh for Respondent Nos.1
and 2.

Mr. Ram Ochani for Respondent No.5.

CORAM : K.R. SHRIRAM &
ARIF S. DOCTOR, JJ.

DATED : 14th NOVEMBER 2022

PC. :

1. The substantial prayers in the Petition are as under :-

- a) *That this Hon'ble High Court may issue a writ of declaration or any other writ or direction declaring the provisions of Section 3(7) of the Customs Tariff Act, 1975, Section 5 and Section 7(2) of the Integrated Goods and Services Tax Act, 2017 as unconstitutional being violative of Article 246/246A/269A of the Constitution of India;*
- b) *that this Hon'ble Court may issue a writ of certiorari or any other appropriate writ or order to quash the assessment of duties and IGST made under impugned Bills of Entry by the Respondent No.2 enclosed in Exhibit A as violative of Articles 14, 19, 265 and 300A being unreasonable, discriminatory, arbitrary, oppressive, excessive, premeditated and without the authority of law.*

- c) *This Hon'ble Court may issue an appropriate writ or Order in the nature of Mandamus or otherwise to the respondents to re-assess the impugned Bills of Entry issued by the Respondent No.2 enclosed in Exhibit A by considering the exemption to IGST inserted vide Notification No.79/2017-Cus dated 13.10.2017 to have retrospective effect and grant the refund of duties/taxes paid by the petitioner."*

2. On 10th October 2022 an order came to be passed by this Court, in which Paragraphs 1 to 5 read as under :-

- "1. Heard Mr. Raghuraman and Mr. Mishra and as we understand the facts of this case, import of capital goods under the valid authorisation under the Export Promotion Capital Goods Scheme (EPCG Scheme) was wholly exempted from payment of any additional duty under Section 3 of the Customs Tariff Act. Petitioner has availed of this EPCG Scheme.*
- 2. The intention of the Central Government while framing EPCG Scheme was to permit import at zero customs duty. Accordingly, by Notification No. 16/2015-Cus dated 1st April 2015 goods covered by valid authorisation issued under the EPCG Scheme in terms of Chapter 5 of the Foreign Trade Policy were exempted from the whole of the additional duty leviable under Section 3 of the Customs Tariff Act. When the GST regime came into force, Section 3 of the Customs Tariff Act came to be amended by insertion of Sub Section (7) and Sub Section (9) that provided for levy of Integrated Tax and Goods and Services Compensation Cess. Corresponding amendment was made in Notification No. 16/2015-Cus vide Notification No. 26/2017-Cus dated 29th June 2017. In the Notification No.26/2017, the import under the EPCG Scheme which was exempted from additional duty under Sub Section (7) and Sub Section (9) of Section 3 of the*

Customs Tariff Act was not included. However, within a short time thereafter in Notification dated 13th October 2017 being amended Notification No.16/2015-Cus came to be issued and the imports under the EPCG Scheme were exempted from additional duty under Sub Section (7) and Sub Section (9) of the Customs Tariff Act. It is petitioner's case that during this period, i.e., from 1st July 2017 when Notification No. 16/2015-Cus came into effect and the fresh amendment dated 13th October 2017 came into effect, petitioner paid Integrated Goods and Service Tax (IGST) amounting to Rs.24,94,53,580/- on the capital goods imported by petitioner. The details of the bills of entries are provided in the petition.

3. *Mr. Raghuraman submitted that the fact that within a short time the original Notification No.16/2015 came to be further amended itself makes it apparent that it was on account of inadvertence or oversight while amending Notification No.16/2015-Cus by Notification No. 26/2017-Cus dated 29th June 2017. The words "figures and brackets Sub Section (7) and Sub Section (9)" were not inserted and it was always the intention of the Central Government to exempt imports of capital goods under the EPCG Scheme from payment of additional duty under Section 3 of the Customs Tariff Act.*
4. *Mr. Raghuraman added that it is more so because customs duty was always exempted and therefore Notification No. 79/2017-Cus dated 13th October 2017 has to be read as clarificatory or curative in nature, in as much as, otherwise it would leave whole class of importers who had imported capital goods uncovered from period 1st July 2017 to 13th October 2017. Mr. Raghuraman placed reliance on a judgment of the Gujarat High Court in Prince Spintex Pvt. Ltd. vs. Union of India.*
5. *In our view, it would also assist the court if respondents place on record the Minutes of Meeting recorded alongwith discussion notes, file notings, representations received and the agenda placed before the Central Board of Indirect Taxes and Customs (CBI & C) that resulted in*

issuance of Notification No.79/2017 dated 13th October 2017. Ordered accordingly.”

3. Subsequent thereto, Mr. Mishra has placed on record today a compilation of documents containing discussion notes, representation received, Minutes of the Meetings where the mandates of the Committee on exports was fixed, interactions/discussions of the Committee on exports and with stakeholders, etc. A copy of the compilation was also handed over to Mr. Raghuraman.

4. The Counsel brought to our attention Agenda Item 5 in the 22nd GST Council Meeting dated 06th October 2017, which was report and recommendations of the Committee on exports. The Minutes open with the following words :-

“In the 21 st Meeting held on 09.09.2017 at Hyderabad, taking cognizance of the difficulties being faced by exporters post-GST, the Council decided to constitute a Committee on Exports to examine the issues troubling the export sector and to recommend a suitable strategy for helping this sector.” (emphasis supplied)

5. Various issues were identified by the Committee after interacting with all concerned and examining the representations received. The Committee was conscious that there were core issues which needed immediately to be addressed to encourage export in the GST

environment. One of that was ‘working capital blockage’ for manufacturer exporters including EOUs due to requirement of upfront payment of GST on inputs and capital goods. On this issue of working capital blockage, the Committee proposed two options for resolving the same. The Committee observed that holders of advance authorisations/EPCG/100% EOUs earlier procured their inputs/capital goods, etc., meant for export production duty free, but now have to pay GST thereon. It was also observed that likewise, merchant exporters procured their goods for export free of central duties, but they now have to pay GST. This gave rise to the problem of cash blockage, which has also got accentuated due to delay of refunds. Keeping this fact in mind, two options of resolution were proposed. Option one was exemption on IGST and Cess on imports plus deemed export and nominal GST for supplies to merchant exporters. In that, for procuring imported supply, it was proposed to grant exemption from payment of IGST and Cess under Section 6 of the Integrated Goods and Services Tax Act, 2017(‘IGST Act, 2017’) read with Section 25 of the Customs Act, 1962. The second option suggested was e-Wallet. This second option, we are informed, has been shelved.

6. The Minute Book indicates there was extensive deliberation among the participants. It would be useful to reproduce Paragraphs 12.8, 12.10 and 12.13 of the Minute Book.

“12.8. On the issue of working capital blockage to exporters, he suggested that presently Option-1 (allowing tax payment through Advance Authorisation/EPCG/EOU schemes) could be implemented and Option-2 (e-Wallet) could be implemented by April, 2018. The Hon’ble Minister from Jammu & Kashmir stated that Option-1 damaged the basic structure of GST of not giving exemptions which also applied for duty exemption schemes for North-Eastern States. He stated that the basic structure of GST should not be tampered with due to operational difficulties which was largely due to delay in the delivery by the IT vendor. He cautioned that if a regime of exemptions was introduced, the GST architecture might collapse. He stated that a regime of exemption would create a very high arbitrage on both sides and once people got used to it, it would be difficult to get rid of it.

12.10. The Hon’ble Deputy Chief Minister of Bihar observed that the officers from the States of Gujarat, Maharashtra, Karnataka, Uttar Pradesh, West Bengal and Tamil Nadu were members of the Export Committee and the recommendations of the Committee were unanimous. He stated that the fundamental question was how to save exports and the proposed exemption was only an interim measure until the scheme of e-Wallet was implemented. He observed that even if it involved some compromise with the GST design, the Council should support Option-1 to help exporters.

12.13.
 He suggested that they should be given the facility of exemption for short period.
 He warned that without these support measures, the exports might collapse. Shri Alok Chaturvedi, Director General of Foreign Trade (DGFT) stated that the size of the problem of funds blockage for the exporters could be gauged from the fact that the revenue foregone for one year from advance authorization, EOU and EPCG was around Rs.45,000 crore. He stated that Rs. 28,000 crore of duty foregone was due to advance authorization scheme, Rs.9,000 crore was due to EPCG and Rs. 8,000 was due to EOUs scheme. He emphasised that exporters were facing competition in the international market and they had to compete against exporters from countries like Bangladesh, Vietnam, Cambodia and Philippines. He also reminded that Indian exporters faced problems in relation to infrastructure, lack of flexible labour laws and lack of economies of scale. He stated that the exporters needed support for the next seven to eight months and the system of e-Wallet could be developed by then.”

7. After discussing and considering all the pros and cons and after being conscious of the fact that the basic structure of GST was not to grant exemptions, the GST Council decided to grant exemption from IGST, Cess, etc., under Section 6 of the IGST Act, 2017 read with Section 25 of the Customs Act, 1962 to import of goods for exporters availing the scheme of advance authorisation/export promotion capital goods/100% export oriented units upto 31st March 2018 and to continue the existing monitoring scheme for exports.

8. Keeping in mind the above background and the fact that even the Government of India was conscious of the problems faced by the exporters and the fact that the exemption has continued to be extended periodically and is valid even as on date, it is apparent that it was on account of inadvertence or oversight that while amending Notification No.16/2015-Cus, dated 1st April 2015, by Notification No.26/2017-Cus, the words, figures and brackets “Sub Section (7) and Sub Section (9)” were not inserted and that it was always the intention of the Central Government to exempt imports of capital goods under the EPCG Scheme from payment of additional duty under Section 3 of the Customs Tariff Act. We must keep in mind, when the GST regime came into force, while Section 3 of the Customs Tariff Act came to be amended by inserting Sub Sections (7) and (9) providing for levy of Integrated Tax and Goods and Service Compensation Cess, in the corresponding amendment made in Notification No.16/2015-Cus. Vide Notification No.26/2017-Cus, dated 29th June 2017, Sub Sections (7) and (9) of Section 3 were left out. Within a short time thereafter, however, Notification dated 13th October 2017, Notification No.16/2015-Cus came to be further amended and imports under the EPCG Scheme were exempted from additional duty under Sub

Sections (7) and (9) of Section 3 of the Customs Tariff Act. In our view, therefore, Notification No.79/2017-Cus, dated 13th October 2017 has to be read as clarificatory or curative in nature, inasmuch as, it would, otherwise, leave a whole class of importers who had imported capital goods uncovered during the period 1st July 2017 to 13th October 2017, allowing the Department to levy additional duty under Sub Section (7) and Sub Section (9) of the Customs Tariff Act on such imports, despite the fact that the Foreign Trade Policy 2015-2020 envisaged imports under the EPCG Scheme at zero custom duty. We find support for this view in Paragraph 38 of the judgment of Hon'ble Gujarat High Court in **Prince Spintex Pvt. Ltd. Vs. Union of India**¹. Paragraph 38 reads as under :-

“38. In the facts of the present case, import of capital goods under a valid authorisation under the EPCG Scheme was wholly exempt from payment of any additional duty under Section 3 of the Customs Tariff Act. The intention of the Central Government while framing the EPCG Scheme was to permit export at zero customs duty. Accordingly, by Notification No.16/2015-Cus., dated 1st April, 2015, goods covered by a valid authorisation issued under the EPCG Scheme in terms of Chapter 5 of the Foreign Trade Policy were inter alia exempted from the whole of the additional duty leviable under Section 3 of the Customs Tariff Act. However, when the GST regime came into force, while Section 3 of the Customs Tariff Act came to be amended by inserting sub-sections (7) and (9) providing for levy of Integrated Tax and Goods and Service Compensation Cess, in the corresponding amendment made in Notification No.16/2015-Cus. vide Notification No.26/2017-Cus., dated 29th June, 2017, sub-section (7) and sub-section (9) of Section 3

¹ 2020 (35) G.S.T.L. 261 (Guj.)

were left out. However, within a short time thereafter, vide notification dated 13th October, 2017, Notification No.16/2015-Cus. came to be further amended and the imports under EPCG Scheme were exempted from additional duty under sub-section (7) and sub-section (9) of the Customs Tariff Act. It is therefore, apparent that it was on account of inadvertence or oversight that while amending Notification No.16/2015-Cus., dated 1st April, 2015 by Notification No.26/2017-Cus, the words, figures and brackets "sub-section (7) and sub-section (9)" were not inserted and that it was always the intention of the Central Government to exempt imports of capital goods under the EPCG Scheme from payment of additional duty under Section 3 of the Customs Tariff Act. Notification No.79/2017, dated 13th October, 2017, therefore, has to be read as clarificatory or curative in nature, inasmuch as, otherwise it would leave as whole class of importers who had imported capital goods, uncovered during the period 1-7-2017 to 13-10-2017, allowing the department to levy additional duty under sub-sections (7) and (9) of the Customs Tariff Act on such imports, despite the fact that the Foreign Trade Policy 2015-2020 envisages imports under the EPCG Scheme at zero customs duty. Under the circumstances, the action of the respondents in levying Integrated Tax and Compensation Cess on the import of capital goods by the petitioner under a valid authorisation under the EPCG Scheme, not being in consonance with the Foreign Trade Policy 2015-2020 cannot be sustained. For the same reasons, Trade Notice No. 11/2018 dated 30-6-2017, to the extent it is stated therein that under Chapter 5 importers would need to pay IGST, is also rendered unsustainable. Consequently, subject to fulfilment of the conditions contained in the Foreign Trade Policy, 2015-2020 and the exemption Notification No.16/2015-Cus., dated 1st April 2015 as amended from time to time, the petitioner would continue to enjoy exemption from payment of additional duty under sub-section (7) and sub-section (9) of Section 3 of the Customs Tariff Act even during the period 1-7-2017 to 13-10-2017 and is, therefore, entitled to refund of the additional duty paid by it under sub-sections (7) and (9) of Section 3 of the Customs Tariff Act."

9. We are informed that an SLP against **Prince Spintex Pvt. Ltd. (supra)** has been admitted, but no stay has been granted.

10. We would also observe that in another matter **Radheshyam Spinning Pvt. Ltd. Vs. Union of India**², the Hon'ble Gujarat High Court has followed **Prince Spintex Pvt. Ltd. (supra)** and Paragraphs 2, 3 and 4 read as under :-

"2. It has been fairly conceded by the Learned Standing Counsel appearing for the Union of India as well as by the Learned Counsel appearing for the respondents Nos. 2 and 3 that the issue raised in this writ application is squarely covered by the judgment of this Court in the case of M/s. Prince Spintex Pvt. Ltd. v. Union of India; Special Civil Application No.10756 of 2018; decided on 3-2-2020 [2020(35)G.S.T.L. 261 (Guj.)]. We quote the relevant operative part of the judgment referred to above as under :

"42. In the light of the above discussion, the petition succeeds and is, accordingly, allowed. It is held that the amendment of Notification No. 16/2015 Cus. Vide Serial No. 1 of Notification No. 79/2017, dated 13th October, 2017, would also apply to imports made during the period 1-7-2017 to 13-10-2017. Trade Notice 11/2018 dated 30-6-2017 to the extent it is stated therein that under Chapter 5 importers would need to pay IGST is hereby quashed and set aside. The impugned order-in-original dated 29-9-2018 is hereby quashed and set aside and it is held that the petitioner is entitled to refund of the amount of Rs.2,38,83,203/ paid by it towards IGST with interest at the statutory rate. Rule is made absolute accordingly, with no order as to costs".

² 2022(57) G.S.T.L. 8 (Guj.)

3. *However, the controversy does not come to an end over here. After the present writ application was filed on 18th December 2020, Section 49 of the CGST came to be amended w.e.f. 1-2-2019 and new Section 49A and Section 49B were inserted in the said Act. By virtue of power under Section 49B, Rule 88A was inserted w.e.f. 29-3-2019 in the CGST Rules vide Notification No.16/2019-C.T., dated 29-3-2019. In such circumstances, w.e.f. 1-2-2019, the ITC available on account of IGST has to be first utilized for the payment of GST or CGST or SGST. This provision was amended w.e.f. 1-2-2019, but the GST portal started functioning as per the amended provisions w.e.f. 1-6-2019. Therefore, w.e.f. 1-6-2019, the accumulated ITC of IGST of Rs.3,37,79,196/- (Additional Customs duty paid by the writ applicants, EPCG holder) started getting utilized automatically during the pendency of the petition.*
4. *In view of the above, the ITC of CGST and SGST started accumulating correspondingly. In such circumstances, as on date on account of such amendment in operation, the writ applicants have Nil balance of IGST in its electronic credit ledger and the IGST balance is converted into CGST and SGST. In other words, the balance of CGST and SGST got artificially inflated as a result of the appropriation of IGST credit.”*

11. We have not elaborated on the facts of the case inasmuch as there were no disputes therein and the only issue was whether the amendment was clarificatory/curative in nature. Since we have held that the amendment to Notification No.16/2015-Cus dated 1st April 2015 was clarificatory/curative in nature, consequences have to follow inasmuch as Petitioner will be entitled to refund of the IGST paid by Petitioner. The refund shall be processed and paid together with interest, if any, within four weeks of Petitioner reversing the entries of availment of the subject credit and debiting the said amount from the credit ledger.

12. Petitioner shall together with its application file evidence that it has reversed the entry of avilment of the subject limit. The refund application to be filed physically with the concerned authorities. If, it can be filed electronically, the concerned Department shall provide the link/portal for the same.

13. Petition disposed. No order as to costs.

14. We also clarify, should any amendment to the bill of entry is required, Customs Authority shall permit such amendment.

(ARIF S. DOCTOR, J.)

(K.R. SHRIRAM, J.)