Ashvini Narwade

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDITION

WRIT PETITION NO. 16066 OF 2023

M/s. Ginny Food … Petitioner

Versus

Union of India & Ors. …Respondents

Ms. Sakshi Singhal for the Petitioner.
Mr. Karan Adik a/w. Mr. Saket R. Ketkar for the Respondents.

CORAM: G. S. KULKARNI & FIRDOSH P. POONIWALLA, JJ.
DATED: 29th FEBRUARY, 2024

P.C.

1. We have heard learned Counsel for the parties. This Petition, under Article 226 of the Constitution of India, is filed praying for the following reliefs:-

> *"a) Declare that Paragraph 11(d) read with 12A(a)(ii) of the Notes and Conditions of the Notification No. 131/2016- Cus. (N.T.), dated 31.10.2016 (EXHIBIT - "C") [as amended by Notification No. 59/2017-Cus. (NT) dated 29.06.2017 (EXHIBIT - "D") and Notification No. 73/2017-Cus. (NT) dated 26.07.2017 (EXHIBIT - "E")] are (i) ultra vires Section 16 of the IGST Act, 2017 read with Section 54 of CGST Act, 2017 and Rule 96 of CGST Rules, 2017, & (ii) unconstitutional and violative of Article 14, 19 and 21 of the Constitution of India & Quash the same;*
>
> *b) Declare that Circular No. 37/2018-CUSTOMS dated 09.10.2018 (EXHIBIT - "J") is (i) ultra vires Section 16 of the IGST Act, 2017 read with Section 54 of CGST Act, 2017 and Rule 96 of CGST Rules, 2017, and (ii) unconstitutional and violative of Article 14, 19 and 21 of the Constitution of India & Quash the same;*
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> *c) Direct Respondent Authorities to grant refund of IGST paid on goods exported by the Petitioner during the Transitional Period, after deducting the differential amount of duty drawback,*

> *i.e. grant refund of Rs.30,04,591/- [Rs.36,47,039 (Rs.7,13,830 Rs.71,382)], along with appropriate interest on such refund from the date of the shipping bill till the date of actual refund;*
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> *d) Pass such other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

2. In so far as the reliefs as prayed in prayer clauses (a) and (b) are concerned, it clearly appears that they are no longer *res integra* in view of several pronouncements by different Courts and, more particularly, the view taken by this Court in **Satyen Polymers Pvt. Ltd. Vs. The Union of India and Ors.,**[1]. wherein, considering the decisions in that regard as rendered by the Gujarat High Court in the case of **M/s. Amit Cotton Industries V/s. Principal Commissioner of Customs**[2] and **Awadkrupa Plastomech Pvt. Ltd. Vs Union of India** [3]as also the decision of the Division Bench of the Delhi High Court in **Kishan Lal Kuria Mal Internation V./s. Union of India**[4]., this Court, in similar circumstances as in the present case, the Court had allowed the Petition by directing the Respondents to refund the IGST paid on the goods exported by the Petitioners therein.

3. We have perused the memo of the Petition and also the reply affidavit filed on behalf of the Respondents. We find substance in the contentions as urged on behalf of the Petitioner that the Petitioner would be entitled to the refund of IGST paid by the Petitioner during the transitional period, after

1 2023 (9) TMI 1238 Bombay High Court

2 2019 (29) GSTL. 200 (GUJ.)

3 2021 (46) G.S.T.L. 31 (Guj.),

4 (2023) 95 GST 177 (Delhi)

deducting the differential amount of duty drawback, in terms of what has been placed on record at Exhibit-G (at page 120 of the Petition).

4. We find from the Reply Affidavit that, on the factual matrix, no dispute has been raised in regard to the dis-entitlement of the Petitioner in regard to the quantum as described, in the Shipping Bills itself, which, in terms of Rule 96 of the CGST Rules would amount to applications for refund.

5. We may refer to the observations of this Court in similar circumstances in the case of **Satyen Polymers Pvt. Ltd.** (supra), which read thus:-

> *"15. The Circular on which reliance is placed by the Respondents is dated 9th October, 2018, whereas the export was made on 25th July, 2017 and 5th September, 2017, which is much before the date of Circular. It is a settled position that the circular cannot be made applicable retrospectively. Even otherwise, the circular proceeds on a footing of claim of higher duty drawback and not where the rate of drawback is same and further more the circular also dose not deal with the rectification of mistake if suffix (A) is mentioned instead of suffix (B), while mentioning the HSN Code, which the facts in the instant case.*
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> *16. This Court in an identical facts/situation in the case of Sunlight Cable Industries (supra), faced with a similar situation allowed the claim of refund by observing as under :*
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> > *"9. We have heard learned Counsel for the parties. We have also perused the record. Section 54 of the CGST Act provides for refund of tax, which would entitle the Assessee to claim any refund of tax and interest or any other amount paid by him by making an application before the expiry of two years from the relevant date in such form and manner as may be prescribed. Explanation below Section 54 provides for refund, which includes refund of tax paid on zero rated supplies of goods or services or both or on inputs services, etc. In the present case, it is not in dispute that the case of the Petitioner is a case of zero rated supply under Section 16(3) of the IGST Act. In these circumstances, Rule 96 of the CGST Rules, which provides for refund of integrated tax paid on goods or services exported out of India had become applicable.*

On this, there is no dispute.

10. In such circumstances, the only question, which is required to be determined is as to whether the Respondents are correct in their assertion that in making the refund as claimed by the Petitioner the Petitioner had claimed duty drawback at the higher rate of the IGST refund as seen from the reply received by the Petitioner from the CPRAMS. It appears that there is no factual foundation for the Respondents to come to such conclusion and, in fact, such a conclusion is contrary to the record, subject matter of consideration by the authorities. This is also clear from the notification dated 31st October 2016 prescribing common duty at 2% in respect of the goods in question.

11. This apart, in a similar situation where the claim of the assessee was not a claim to take a drawback at higher rate, the Gujarat High Court in Awadkrupa Plastomech (supra) in considering a prior decision in Amit Cotton Industries vs. Principal Commissioner of Customs, observed that is a situation when the claim made by the Petitioner was not to avail double benefit, that is of the IGST refund and the drawback, the Petitioner therein had become entitled to the IGST Refund. Relevant observations as made by the Division Bench are required to be noted, which read thus:

> *"8. We are not impressed by such submission because the rates of higher and lower duty drawback remains the same i.e. two percent and no occasion would arise to refund the differential amount as argued by the learned counsel appearing for the revenue. The Circular No.37/2018-Customs, dated 09/10/2018 referred to above by the Competent Authority would apply only to the cases, where the exporters have availed the option to take drawback at the higher rate in place of the IGST refund out of their own volition. In the instant case, the assessee had never availed the option to take drawback at higher rate in place of the IGST refund. In such circumstances, the Circular is not applicable to the facts of the present case.*
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> *9. Even as per the Condition No.7 of the Notification 131/2016-Cus. (N.T.) dated 31/10/2016, if the rate indicated in the columns (4) i.e. higher duty drawback and (6) i.e. lower duty drawback are the same, then it shall necessarily imply that the same pertains only to the Customs component and is available irrespective of whether the exporter*

> *has availed of the CENVET facility or not.*
>
> *10. The petitioner had exported Rope Making Machine HSN Code 84794000 which attracts the same rate under both the columns (4) & (6) respectively i.e. 2 per cent. Thus it is evident that the petitioner has claimed drawback of the customs component only for their exports and there arises no question of denying the refund of IGST. The rationale for not allowing the refund of IGST for those exporters, who claim higher duty drawback is that the higher duty drawback reflects the elements of Customs, Central Excise and Service Tax taken together and since higher duty drawback is already being availed than granting the IGST refund C/SCA/1014/2020 ORDER would amount to double benefit as the Central Excise and Service Tax has been subsumed in the GST. In the case of the writ-applicant, the drawback rates being the same, it represents only the Customs elements, which did not get subsumed in the GST and thus, the writ-applicant cannot be said to have availed double benefit i.e. of the IGST refund and higher duty drawback.*
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> *11. In the result, this petition succeeds and is hereby allowed. The respondents are directed to immediately sanction the refund towards the IGST paid in respect to the goods exported i.e.'Zero Rated Supplies' made vide the shipping bills. It appears that the writ-applicant has also prayed to pay interest at the rate of 9% on the amount of refund from the date of shipping bill till the date on which the amount is actually paid."*

12. A Division Bench of this Court in Gujarat Nippon International (supra), considering the prior decision in Awadkrupa Plastomech (supra), granted a similar reliefs in the said case inter alia making the following observations:

> *"6. From the facts on record, it is evident that the petitioner is claiming drawback of the custom component only for the goods exported by the petitioner at the rates specified therein. The rates of drawback under column 'A' and 'B' for the product exported by the petitioner is the same. The said fact is not disputed by the respondents. It is only on technical ground that affixing suffix 'A' claim of the petitioner is denied. The case of the petitioner is similar to the one decided by Gujarat High Court in the case of Awadkrupa Plastomech Pvt. Ltd. (supra) and confirmed*

> *by the Apex Court.*
>
> *7. In view of the above, the petitioner succeeds. Respondents shall sanction the refund towards IGST paid in respect of the goods exported i.e. supply made by shipping. Of course, in case, if there is no other impediment, statutory interest shall follow."*

13. Also in Kishan Lal Kuria Mal International vs. Union of India, the Division Bench of the Delhi High Court, following the decision of the Gujarat High Court in Amit Cotton Industries (supra) allowed the prayer for refund of the IGST. The following are the observations of the Court:-

> *"8. Since the facts in the present cases are pari materia to the case in M/s. Amit Cotton Industries (supra), the present writ petitions are allowed directing the Respondent authorities to grant refund of IGST paid on the goods exported by the Petitioners during the transitional period, after deducting the differential amount of duty drawback, if the said differential amount has not already been returned by the petitioner, within twelve weeks along with appropriate interest at the rate of 7% p.a. on such refund from the date of the shipping bill till the date of actual refund".*

14. In the aforesaid circumstances, in the present case, the Petitioner is entitled to a refund of the IGST paid on the exports in question, as it is certain that this is not a case where the Petitioner is availing any double benefit that is of the IGST refund and a higher duty drawback."

17. The above decision of this Court is squarely applicable in the facts of the present case. In the light of the above discussion, we allow the petition by following order:

ORDER

i) The Petition is allowed in terms of prayer clause (c).

ii) The Respondents are directed to refund of Rs.17,04,127/- to the Petitioner the IGST paid in respect of the zero rated supply under shipping bills in question alongwith interest as per the IGST Act.

iii) Amount be released within a period of two weeks of the receipt of the authenticated copy of the present order by the concerned officers.

iv) The Petition is allowed in the aforesaid terms. No costs."

6. In the aforesaid circumstances, we are inclined to allow this Petition. The Petition is allowed in terms of prayer clause (c) which reads thus:-

> *c) Direct Respondent Authorities to grant refund of IGST paid on goods exported by the Petitioner during the Transitional Period, after deducting the differential amount of duty drawback, i.e. grant refund of Rs.30,04,591/- [Rs.36,47,039 (Rs.7,13,830 Rs.71,382)], along with appropriate interest on such refund from the date of the shipping bill till the date of actual refund;*

7. The amount be released with simple interest, at the rate of 7%, to the Petitioner within three weeks from the date an authenticated copy of this order is presented before the concerned officer.

8. Needless to observe, that the refund as directed by us will be required to be processed by the respective authorities where the Shipping Bills have been filed.

9. Disposed of in the above terms. No costs.

(FIRDOSH P. POONIWALLA, J.) **(G. S. KULKARNI, J.)**