IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1931 OF 2021

Tushar Kumar Chhaganlal Kothiya Proprietor Of M/s. Tulip Turnomatic … Petitioner

Versus

Union Of India & Anr. …Respondents

Mr. Hiren Trivedi a/w Ms. Deepali Kamble, for Petitioner.
Mr. Jitendra Mishra a/w Mr. Satyaprakash Sharma & Mr. Rupesh Dubey, for Respondents.

CORAM: G. S. KULKARNI & FIRDOSH P. POONIWALLA, JJ.
DATED: 15 January, 2024

P.C.

1. By this petition filed under Article 226 of the Constitution of India, the petitioner seeks a writ and direction to the respondents to sanction refund of the Integrated Goods and Service Tax (for short "**IGST**") in regard to the Goods exported by the petitioner which are stated to be zero rated supply in respect of four Shipping Bills which are of the period between 31 July 2017 to 16 August 2017.

2. The case of the petitioner is that the petitioner is engaged in the business of Manufacture and Export of Wide Range of Brass Parts and Ferrous and Non-Ferrous components and is duly registered under the GST Act as also having IEC code number. The petitioner has undertaken the export in question, the details in regard to such exports namely the invoices are placed on record. The petitioner having claimed duty drawback at a higher rate on all these exports appears to be an admitted position. The petitioner filed GST returns for the said period in form GSTR01 for July/August as also in form GSTR-3B for July 2017 and August 2017 which are annexed at Exhibit "E to E3" in the petition. The petitioner contends that the Central Board of Excise and Customs (for short **"CBIC"**) had issued circular No.05/2018 dated 23 February 2018 providing an alternative mechanism to give exporters an opportunity to rectify errors committed in the initial stages. Similar circular was issued on 29 May 2018.

3. The petitioner has contended that by its letter dated 27 August 2018 and 11 July 2019 addressed to the Deputy Commissioner (IGST Jawaharlal Nehru Custom House) a request was made for amendment in the shipping bills. On 14 September 2019, such application was rejected for each of the shipping bills. Thereafter, by an E-mail dated 10 February 2020, the respondent authority informed the petitioner that the petitioner had availed high duty drawback and therefore the refund cannot be sanctioned. It is on such backdrop, the present petition has been filed praying for the following reliefs:-

> "(A) This Hon'ble Court may be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other writ, orders or directions to 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 bill no. 7718964 dated 31.07.2017, shipping bill no. 7715802 dated 31.07.2017, shipping bill no. 7945347 dated 10.08.2017 and shipping bill no. 8026031 dated 16.08.2017;

(A1) This Hon'ble Court may be please to issue a writ of mandamus or writ in the nature of mandamus or any other writ, orders or directions to quash 'and set aside communication dated 10.02.2021 (at Annexure-K) send through mail stating that if higher duty drawback is claimed then IGST refund couldn't be sanctioned.

(B) This Hon'ble Court may be pleased to direct the respondent authorities to pay interest @ 9% to the petitioner herein on the amount of refund from the date of shipping bill till 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;

(C) This Hon'ble Court may be pleased to grant an ex-parte, ad interim order in favour of the petitioner herein in terms of prayer clause 'A' and 'B' hereinabove;

(D) Such further relief(s) as deemed fit in the facts and circumstances of the case may kindly be granted in the interest of justice for which act of kindness your Petitioners shall forever pray."

4. On behalf of the respondents, a reply affidavit has been filed opposing the petition, inter alia contending that the petitioner would not be entitled to make such application for refund of the IGST paid in regard to the exports of the shipping bills in question, much less with interest as claimed. It is contended that it is not correct for the petitioner to contend that the respondents have withheld the refund arbitrarily and without the authority of law and without jurisdiction. It is contended that it is a matter of fact, that the Customs, Central Excise Duties and Service Tax Drawback Rules 1995 were amended vide notification no. 58/2017 dated 29 June 2017 to allow drawback subject to the provisions inter alia of which CGST Act 2017 as also the

Integrated Goods and Service Tax (IGST-2017) and rules framed thereunder had become applicable. It is contended that in the present case the Goods were exported under the payment of IGST. It is contended that at the time of export, the petitioner claimed and availed higher rate of drawback by suffixing A to drawback serial number. It is contended that ICES system sanctioned drawback of Rs. 12,02,230/- in respect of all four Shipping Bills and automatically rejected IGST amount paid by the petitioner in terms of Notification No.131/2016 dated 31 October 2016 (as amended by Notification No.59-2017 dated 26 June 2017 and dated 26 July 2017). It is contended that in respect of Shipping Bills No.8026031 dated 16 July 2017, the ICES system sanctions IGST of Rs.24,739/- out of a total IGST of Rs.3,65,449/-paid by the petitioner. The department has next contended that in respect of some items where the petitioner had either claimed lower rate of drawback by suffixing 'B' to drawback serial numbers or the petitioner had not claimed any drawback against the goods. The department contended that now, the petitioner is claiming refund of IGST paid on export of goods in respect of all four Shipping Bills which is violation of condition 11(d) of the Notification No.131/2016. The stand taken by department is that the petitioner claiming refund of IGST paid on export goods in respect of all four Shipping Bills would be in violation of condition 11(d) of Notification No.131/2016 dated 31 October 2016, as it is clearly stated that rates and caps of drawback specified in column (4) and (5) of the drawback schedule i.e. higher rate of drawback, shall not be applicable to export of commodity or product, if it is exported claiming refund of IGST paid on such exports. In short, the case of the department is that higher rate of drawback has been availed by the petitioner. The petitioner in responding to the reply affidavit has placed on record an affidavit in rejoinder and where it has been specifically set out that without prejudice the petitioner is ready and willing to for adjustment of higher duty drawback and the balance amount being IGST minus higher rate of duty drawback already availed.

5. Learned counsel for the petitioner in support of his contention has placed reliance on the decision of the coordinate Bench of this Court in **Sunlight Cable Industries Vs. The Commissioner of Customs NS II and Ors**. which was a decision on refund of IGST paid in relation to export undertaken by the petitioner therein, on which it was claimed that the petitioner would become legitimately entitled to a refund of the IGST paid, considering that the supply itself have been zero rated supply. In such decision, the Court had taken into consideration the position in law as laid down in the decisions of the different High Courts and more particularly the decision of the Gujarat High Court in **Amit Cotton Industries Vs. Principal Commissioner of Customs**[1], as also the decision in **Kishan Lal Kuria Mal International Vs. Union of India**[2],

1 2019 (29) G.S.T.L. 200 200(Guj.)

2 (2023) 95 GST 177 (Delhi)

and considering the said position in law and the willingness on the part of the petitioner therein, the department was directed to refund to the petitioner the IGST paid by the petitioner, in respect of goods exported at a zero rated supply under shipping bills in question.

6. Having heard learned counsel for the parties and having perused the record as also the decisions as relied on behalf of the parties, the following discussion in the decision of this Court in *Sunlight Cable Industries* (supra) assist the conclusion:

> "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.
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> 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.
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> 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.

> 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."

7. Mr. Mishra, learned counsel for the respondents supporting the case of the respondents as set out in reply affidavit, would submit that it can never be a situation that the petitioner does not give up the higher duty drawback as availed and at the same time maintain an application for refund of the IGST. It is therefore submitted that in the event the petitioner is ready and willing to bring back the higher duty drawback as availed and as set out by the petitioner in the rejoinder affidavit in paragraph seven, in that event, once such amounts are brought, the amounts of the IGST refund on the basis of zero rated supply can be refunded to the petitioner. He would submit that the IGST authority as also the Customs authority are different establishment, however in such situation as in the present case, he would submit that there is certainly some bearing on the refund of the IGST claim on the higher duty drawback as availed by the petitioner. It is therefore his contention that the petitioner's case that although the amounts are with the Government of India, the Court ought not to permit adjustment of the amounts and it would be appropriate that the petitioner is called upon to deposit the higher duty drawback.

8. Having considered the rival contentions as also the record, we are of the opinion that as now the petitioner has fairly stated that the petitioner is ready and willing for adjustment of the higher duty drawback as availed by the petitioner and the balance amount being IGST minus higher duty drawback be refunded to the petitioner, it would be appropriate that the respondents consider such request of the petitioner as also fairly stated by Mr. Mishra that the IGST amounts can be refunded to the petitioner after adjustment of the higher duty drawback as availed by the petitioner. Considering the peculiar facts and circumstances of the case, we dispose of this petition by the following order.

ORDER

I. We accept the statement as made on behalf of the petitioner that the petitioner is ready and willing for adjustment of the higher duty drawback amounts to be a condition for the refund of the IGST amount paid by the petitioner on the export undertaken by the petitioner which were on the Zero rated supply in terms of Section 16 of the IGST Act.

II. The respondents shall accept such adjustment as offered by the petitioner and after adjusting the amounts of the higher duty drawback, make appropriate calculations and refund to the petitioner the IGST amounts on the zero rated supply as undertaken by the petitioner.

III. Let the entire exercise be completed within a period of six weeks from the date a copy of this order is made available to the designated officer of the department.

9. All contentions of the parties on the actual refund to be received by the petitioner is expressly kept open.

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

11. Needless to observe that on both the amounts namely the amounts on the higher duty drawback as also the amounts of the IGST refund, payment of appropriate interest as per rule be taken into consideration by the designated authority.

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