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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 15.09.2023*

\+ **W.P.(C) 9908/2021 and CM No. 34717/2021**

M/S. INDIAN HERBAL STORE PVT. LTD. ..... Petitioner

Through: Mr Bimal Jain and Mr Keshav Jatwani, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr Akshay Amritanshu and Mr Samyak Jain, Advocates.

AND

\+ **W.P.(C) 9912/2021 and CM No. 34752/2021**

INDIAN HERBAL STORE PVT. LTD. ..... Petitioner

Through: Mr Bimal Jain and Mr Keshav Jatwani, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr Akshay Amritanshu and Mr Samyak Jain, Advocates.

**CORAM:**
**HON'BLE MR. JUSTICE VIBHU BAKHRU**
**HON'BLE MR. JUSTICE AMIT MAHAJAN**

**VIBHU BAKHRU, J.**

**INTRODUCTION**

1. The petitioner has filed the present petitions, *inter alia*, praying that the respondents be directed to allow the petitioner's claim for the

refund of accumulated unutilised Input Tax Credit (hereafter '**ITC**') on export of goods.

2. The petitioner also impugns the provisions of Rule 89(4)(C) of the Central Goods and Services Tax Rules, 2017 (hereafter '**the Rules**') as *ultra vires* the provisions of Section 54 of the Central Goods and Services Tax Act, 2017 (hereafter '**the CGST Act**') as well as Section 2(5) and Section 16 of the Integrated Goods and Services Tax Act, 2017 (hereafter '**the IGST Act**'). The petitioner also claims that Rule 89(4)(C) of the Rules falls foul of Article 14 of the Constitution of India and therefore, is liable to be struck down.

3. In addition, the petitioner contends that Sub-rule (4)(C) of Rule 89 of the said Rules, which was substituted by the Central Goods and Services Tax Act (Third Amendment) Rules, 2020 with effect from 23.03.2020, has no application for refund in respect of exports made prior to the said date.

## FACTUAL CONTEXT

4. The petitioner's claim for refund relates to the period 01.10.2018 to 30.09.2019. The petitioner had filed four separate applications for four quarters comprising of the period 01.10.2018 to 30.09.2019. The said applications were rejected by four separate orders (orders dated 15.09.2020, 24.09.2020, 22.10.2020 and 05.11.2020).

5. The petitioner's claim for refund was rejected on essentially,

two grounds. First, that the petitioner had not produced the relevant Foreign Inward Remittance Certificates (FIRCs) and co-related them with the exports made. And second, that the computation of the eligible export turnover was not compliant with Rule 89(4)(C) of the Rules.

6. The petitioner appealed the said orders rejecting the refund for the four tax periods (01.10.2018 to 31.12.2018; 01.01.2019 to 31.03.2019; 01.04.2019 to 30.06.2019; and 01.07.2019 to 30.09.2019) and filed four separate appeals. The same were rejected by two orders-in-appeal: the first dated 18.06.2021 relating to the exports made during the period 01.10.2018 to 31.12.2018 and the second, also dated 18.06.2021, relating to the three quarters (that is, 01.01.2019 to 30.09.2019).

7. The petitioner succeeded in respect of the issue regarding non-submission of the FIRCs. But the Appellate Authority upheld the refund rejection orders on the ground that the export turnovers for the relevant tax period were not compliant with Rule 89(4)(C) of the Rules.

**REASONS AND CONCLUSION**

8. Aggrieved by the impugned orders, the petitioner has filed the present petitions. As noted at the outset, the petitioner also challenges the constitutional *vires* of Clause (C) of Rule 89 (4) of the Rules.

9. Sub-rule (4) of Rule 89 of the Rules contains a formula for

computing the maximum amount of refund admissible in respect of goods or services or both exported without payment of tax under a bond or a letter of undertaking in accordance with Section 16(3) of the IGST Act. Sub-rule (4) of Rule 89 of the Rules is set out below:

> "(4) In the case of zero rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), refund of input tax credit shall be granted as per the following formula –
>
> Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero-rated supply of services) x Net ITC ÷Adjusted Total Turnover
>
> Where, –
>
> (A) "Refund amount" means the maximum refund that is admissible;
>
> (B) "Net ITC" means input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both;
>
> (C) "Turnover of zero-rated supply of goods" means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking or the value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed, supplier, as declared by the supplier, whichever is less, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both;
>
> (D) "Turnover of zero-rated supply of services" means the value of zero-rated supply of

services made without payment of tax under bond or letter of undertaking, calculated in the following manner, namely:-

Zero-rated supply of services is the aggregate of the payments received during the relevant period for zero-rated supply of services and zero-rated supply of services where supply has been completed for which payment had been received in advance in any period prior to the relevant period reduced by advances received for zero-rated supply of services for which the supply of services has not been completed during the relevant period;

(E) "Adjusted Total Turnover" means the sum total of the value of-

(a) the turnover in a State or a Union territory, as defined under clause (112) of section 2, excluding the turnover of services; and

(b) the turnover of zero-rated supply of services determined in terms of clause (D) above and non-zero-rated supply of services, excluding–

(i) the value of exempt supplies other than zero-rated supplies; and

(ii) the turnover of supplies in respect of which refund is claimed under sub-rule (4A) or sub-rule (4B) or both, if any, during the relevant period.'

(F) "Relevant period" means the period for which the claim has been filed.

10. As is apparent from the above, the maximum amount of refund of ITC admissible is the fraction of the amount of ITC (as adjusted by ITC refundable under Sub-rules (4A) and (4B) of Rule 89 of the

Rules) in proportion of the export turnover to the total turnover, as adjusted by excluding exempt supplies and supplies in respect of which the refund is claimed under Sub-rules (4A) and (4B) of Rule 89 of the Rules.

11. Clause (C) of Sub-rule (4) of Rule 89 of the Rules, defines the expression "turnover of zero rated supply of goods".

12. By virtue of the amendment of Rule 89(4)(C) of the Rules, the definition of the expression "*turnover of zero-rated supply of goods*" was substituted. Clause (C) of Rule 89(4) of the Rules as existing prior to its amendment and post its amendment are set out below:

| | |
|---|---|
| "Turnover of zero-rated supply of goods means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking as declared by the supplier, whichever is less, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both." | "Turnover of zero-rated supply of goods means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking or the value <u>which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier</u>, as declared by the supplier, whichever is less, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both".<br>[ emphasis added] |

13. The condition that the export turnover would mean the value, *which is 1.5 times the value of the similar goods domestically supplied by the same, or similarly placed supplier*, was added as a condition for

computing the turnover of zero-rated supplies. Post the amendment of Clause (C) of Rule 89(4) of the Rules, the turnover of the zero-rated supplies would mean the value of the zero-rated supplies actually made during the relevant period without payment of tax under bond or undertaking, or the value which is 1.5 times of similarly placed goods domestically supplied by the supplier or a similarly placed supplier, whichever is less. Thus, if the value of the zero-rated supplies exceeded 1.5 times the value of similar goods domestically supplied, the export turnover would necessarily be kept at that value.

14. The effect of the added condition is that the refund of ITC is restricted by capping the value of the export turnover to 1.5 times the value of similarly placed domestic supplies. Thus notwithstanding the value of the goods exported and the export proceeds realised by an exporter, the value of exports would be considered as 1.5 times the value of such goods, as domestically supplied if the said value was less than the actual value of exports.

15. According to the respondents, Clause (C) of Sub-rule (4) of Rule 89 of the Rules is a procedural provision for the purpose of calculation of the admissible refund of ITC. Thus, the amended clause is applicable retrospectively.

16. There is no dispute that the amended Sub-rule (4) of Rule 89 of the Rules applies prospectively; that is, with effect from 23.03.2020, being the date when the Central Goods and Services Tax Act (Third Amendment) Rules, 2020 came into force. However, according to the

Revenue, it has a retroactive operation for computing the refund of ITC in respect of exports made prior to the date of the amendment (23.03.2020) but applied for after the amendment. And, the applications filed after 23.03.2020 are required to be processed in accordance of the amended rules. It was contended on behalf of the Revenue that the amendment to Rule 89 of the Rules is merely a procedural amendment and therefore, the procedure as applied after the Central Goods and Services Tax Act (Third Amendment) Rules, 2020 came into effect would be fully operational notwithstanding that the application for the refund is in respect of exports for a period prior to 23.03.2020 (the date on which the amended rules were notified).

17. We are unable to accept the aforesaid contention. The right for refund of the accumulated ITC stands crystalised on the date when the subject goods are exported. This is also reflected in Section 54 of the CGST Act. In terms of Section 54(1) of the CGST Act, the application for refund is required to be made "*before the expiry of two years from the relevant date in such form and manner as may be prescribed*". The term "relevant date" is defined under Clause (2) of the Explanation to Section 54 of the CGST Act. Sub-clause (a) of Clause (2) of the Explanation to Section 54 of the CGST Act is relevant and is set out below:

> "(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;"

18. It is important to note that in terms of Sub-clause (a) of Clause (2) of the Explanation to Section 54 (1) of the CGST Act, the limitation for applying for refund in respect of the export of goods and/or services is reckoned from the date when the goods and/services are exported.

19. The expression 'turnover' as used in the context of exports of goods, in its ordinary sense means the gross value of exports on a historical basis. In ***Secy., Ministry of Chemicals & Fertilizers, Govt. of India v. Cipla Ltd.*, (2003) 7 SCC,** the Supreme Court had observed as under:

> **"5.7.** "Turnover" in its ordinary sense connotes *amount of business usually expressed in terms of gross revenue transacted during a specified period* (vide *Collins Dictionary*). Broadly speaking, it represents the value of the goods or services sold or supplied during a period of time. The amount of money turned over or drawn in a business during a certain period, is another shade of meaning."

20. It is obvious that the expression 'turnover' has to be read in

reference to the period to which it relates. It must necessarily read to mean the period during which the turnover is effected, that is, the date when the supplies are made. It would thus follow that the ITC relatable to the turnover of a period must – unless it is indicated otherwise either expressly or by necessary implication – be ascertained in terms of the rules as in force during the said period.

21. In this view, we find that the appellate authority erred in applying Rule 89(4)(C) of the Rules as amended with effect from 23.03.2020 for computing the export turnover for the purposes of determining the refund as claimed by the petitioner

22. In view of the above, the petitioner's claim for refund of the accumulated ITC in respect of its exports for the period of 01.10.2018 to 30.09.2019 is liable to succeed.

23. Having observed the above, it is also necessary to note that the amendment of Rule 89(4)(C) of the Rules has been struck down by the Karnataka High Court in W.P.(C) No.13185/2020 captioned ***M/s Tonbo Imaging India Pvt. Ltd. v. Union of India and Ors.***, decided on 16.02.2023. Thus, as on date, the amended provisions are non-existent. It is well settled that if a statute or a statutory position is struck down as *ultra vires* the Constitution of India, it relates back to the date on which it was promulgated as is reiterated by the Supreme Court in the recent decision in ***Central Bureau of Investigation v. R.R Kishore : (2016) 13 SCC 240*** .

24. Although the petitioner has challenged the amendment of Rule

89(4)(C) of the Rules as *ultra vires* of the Constitution of India and has prayed that the same be struck down. We do not consider it necessary to examine the challenge in view of the decision of the Hon'ble Karnataka High Court in ***M/s Tonbo Imaging India Pvt. Ltd. v. Union of India and Ors.*** (*supra*).

25. The impugned refund rejection orders (dated 15.09.2020, 24.09.2020, 22.10.2020 and 05.11.2020) and the orders in appeal (Order-in-Appeal No. 106-108 dated 18.06.2021) are, accordingly, set aside.

26. The concerned officer shall forthwith process the petitioner's claim for refund of the accumulated ITC along with applicable interest, in respect of the exports, for the period of 01.10.2018 to 30.09.2019 pursuant to the refund applications filed by the petitioner.

27. The petitions are disposed of in the aforesaid terms. All pending applications are also disposed of.

**VIBHU BAKHRU, J**

**AMIT MAHAJAN, J**

**SEPTEMBER 15, 2023**
**RK**