IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 14974 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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REAL PRINCE SPINTEX PVT. LTD.
Versus
UNION OF INDIA

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Appearance:
UCHIT N SHETH(7336) for the Petitioner(s) No. 1,2
MR NIRZAR S DESAI(2117) for the Respondent(s) No. 1,2
NOTICE SERVED BY DS(5) for the Respondent(s) No. 3

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 04/03/2020

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. **Rule,** returnable forthwith. Mr.Nirzar S. Desai, the learned standing counsel waives service of notice

of rule for and on behalf of the respondents.

2. By this Writ Application under Article 226 of the Constitution of India, the writ-applicants have prayed for the following reliefs:

> *"A. This Hon'ble Court may be pleased to issue a writ of mandamus or a writ in nature of mandamus or any other appropriate writ or order directing the learned Respondents to forthwith grant refund of IGST paid on exports by the Petitioner after deducting the differential amount of duty drawback for the period from July to September 2017 along with appropriate interest on such refund amount;*
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> *B. Pending notice, admission and final hearing of this petition, this Hon'ble Court may be pleased to direct the learned Respondents to forthwith grand refund of IGST paid on exports by the Petitioners after deducting the differential amount of duty drawback for the period from July to September 2017 along with appropriate interest on such refund amount;*
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> *C. Ex parte ad interim relief in terms of prayer B may kindly be granted;*
>
> *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. "*

3. The facts giving rise to this litigation may be summarized as under:

3.1. The Writ-Applicant No.1 is a Private Limited Company. The Writ-Applicant No.2 is one of the Directors and Authorized Signatory of the company.

The writ-applicants are engaged in the business of trading of cotton yarn and cotton waste. The writ-applicants are registered under the Central/Gujarat/Integrated Goods and Services Tax Act, 2017 (for short 'the GST Act').

3.2. The writ-applicants claim to be the exporters of the cotton yarn and waste. With the introduction of the GST regime in the country, from 01.07.2017, the exports were declared as the "zero rated supplies" under the provisions of the Act. In other words, all the export transactions were exempted from any tax liability under the GST Act.

3.3. According to the writ-applicants, Section 16 of the IGST Act gives two options to the exporters for claiming refund of the tax. Section 16(3) of the IGST Act reads thus:

> *"(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:––*
>
> *(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or*
>
> *(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder."*

3.4. The plain reading of the aforesaid provision makes it clear that the first option available to the exporter is to make the export without payment of tax against the bond or letter of undertaking in which case it could claim refund of the unutilized input tax credit. The second option is to supply goods or services on payment of the integrated tax and claim refund of such tax paid.

3.5. According to the writ-applicants, they obtained the letter of undertaking from the department for availing the option of making exports without payment of tax. The letter of undertaking dated 27.11.2017 is at **Annexure-A** (page No.14 of the paper-book).

3.6. It is the case of the writ-applicants that from July, 2017 onwards till the letter of undertaking was obtained, they had exported goods on payment of the IGST. According to the writ-applicants, under a misconception of law, they selected the option of export without payment of tax while filing the shipping bills though the writ-applicants, at the relevant point of time, had no letter of undertaking, and simultaneously, also claimed higher rate of duty drawback under the Customs Act, 1962.

3.7. However, according to the writ-applicants, the IGST was paid on the exports along with the returns

filed in the Form GSTR-3B.

3.8. It is the case of the writ-applicants that since the clearing and forwarding agent had erroneously selected the option of export without payment of tax while filing the shipping bill, the amount of the IGST paid was shown as 'Nil' in the shipping bill. In such circumstances, the customs authorities denied to grant refund of the IGST paid on exports by the writ-applicants.

3.9. In the aforesaid context, number of representations were filed before the Customs Authorities.

3.10. According to the writ-applicants, the respondents have not responded to the representations so far. In spite of the repeated requests, the refund of the IGST paid on the exports, during the period between July and September, 2017 has not been granted.

4. In such circumstances, the writ-applicants are here before this Court with the present Writ Application.

5. Mr.Uchit N. Sheth, the learned counsel appearing for the writ-applicants, submitted that the issue raised in this Writ Application is no longer *res-*

integra in view of the decision of this Court in the case of ***M/s.Amit Cotton Industries v/s Principal Commissioner of Customs*** [Special Civil Application No.20126 of 2018, decided on 27th June, 2019].

6. According to Mr.Sheth, this Court, in the case of ***M/s.Amit Cotton Industries*** (Supra), has taken the view that the refund of the IGST paid on the exports cannot be denied on the ground that the higher rate of duty drawback is claimed.

7. Mr.Nirzar Desai, the learned standing counsel appearing for the respondents, submitted that the Union has looked into the judgment delivered by this Court in the case of ***M/s.Amit Cotton Industries*** (Supra). According to Mr.Desai, the issue is squarely covered by the dictum as laid in the said judgment.

8. In the case of ***M/s.Amit Cotton Industries (supra),*** this Court held as under:

> *"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.

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.

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 writapplicant 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 afraid 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.*

31.Mr.Trivedi invited our attention to two decisions of the Supreme Court as regards the binding nature of the circulars and instructions issued by the Central Government.

32.In the case of Commissioner of Central Excise, Bolpur v. Ratan Melting and Wire Industries, reported in 2008(12) S.T.R. 416 (S.C.), the Supreme Court observed as under :

> *"4. Learned counsel for the Union of India submitted that the law declared by this Court is supreme law of the land under Article 141 of the Constitution of India, 1950 (in short the 'Constitution'). The Circulars*

cannot be given primacy over the decisions.

5. Learned counsel for the assessee on the other hand submitted that once the circular has been issued it is binding on the revenue authorities and even if it runs counter to the decision of this Court, the revenue authorities cannot say that they are not bound by it. The circulars issued by the Board are not binding on the assessee but are binding on revenue authorities. It was submitted that once the Board issues a circular, the revenue authorities cannot take advantage of a decision of the Supreme Court. The consequences of issuing a circular are that the authorities cannot act contrary to the circular. Once the circular is brought to the notice of the Court, the challenge by the revenue should be turned out and the revenue cannot lodge an appeal taking the ground which is contrary to the circular.

6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.

7. As noted in the order of reference the correct position vis-a-vis the observations in para 11 of Dhiren Chemical's case (supra) has

been stated in Kalyani's case (supra). If the submissions of learned counsel for the assessee are accepted, it would mean that there is no scope for filing an appeal. In that case, there is no question of a decision of this Court on the point being rendered. Obviously, the assessee will not file an appeal questioning the view expressed vis-avis the circular. It has to be the revenue authority who has to question that. To lay content with the circular would mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme Court. That would be against very concept of majesty of law declared by this Court and the binding effect in terms of Article 141 of the Constitution. "

33.In the case of J.K.Lakshmi Cement Limited v. Commercial Tax Officer, Pali, reported in 2018(14) G.S.T.L. 497 (S.C.), the Supreme Court observed as under :

"25. The understanding by the assessee and the Revenue, in the obtaining factual matrix, has its own limitation. It is because the principle of res judicata would have no application in spite of the understanding by the assessee and the Revenue, for the circular dated 15.04.1994, is not to the specific effect as suggested and, further notification dated 07.03.1994 was valid between 1st April, 1994 up to 31st March, 1997 (upto 31st March, 1997 vide notification dated 12.03.1997) and not thereafter. The Commercial Tax Department, by a circular, could have extended the benefit under a notification and, therefore, principle of estoppel would apply, though there are authorities which opine that a circular could not have altered and restricted the notification to the determent of the assessee. Circulars issued under tax enactments can tone down the rigour of law, for an authority which wields power for its own advantage is given right to forego advantage when required and considered necessary. This power to issue

circulars is for just, proper and efficient management of the work and in public interest. It is a beneficial power for proper administration of fiscal law, so that undue hardship may not be caused. Circulars are binding on the authorities administering the enactment but cannot alter the provision of the enactment, etc. to the detriment of the assessee. Needless to emphasise that a circular should not be adverse and cause prejudice to the assessee. (See : UCO Bank, Calcutta v. Commissioner of Income Tax, West Bengal – (1999)4 SCC 599.

26.In Commissioner of Central Excise, Bolpur v. Ratan Melting and Wire Industries – (2008)13 SCC 1, it has been held that circulars and instructions issued by the Board are binding on the authorities under respective statute, but when this Court or High Court lays down a principle, it would be appropriate for the Court to direct that the circular should not be given effect to, for the circulars are not binding on the Court. In the case at hand, once circular dated 15.04.1994 stands withdrawn vide circular dated 16.04.2001, the appellant-assessee cannot claim the benefit of the withdrawn circular.

27.The controversy herein centres round the period from 1st April, 2001 to 31st March, 2002. The period in question is mostly post the circular dated 16.04.2001. As we find, the appellant-assessee has pleaded to take benefit of the circular dated 15.04.1994, which stands withdrawn and was only applicable to the notification dated 07.03.1994. It was not specifically applicable to the notification dated 21.01.2000. The fact that the third paragraph of the notification dated 21.01.2000 is identically worded to the third paragraph of the notification dated 07.03.1994 but that would not by itself justify the applicability of

circular dated 15.04.1994.

28.In this context, we may note another contention that has been advanced before us. It is based upon the doctrine of contemporanea exposition. In our considered opinion, the said doctrine would not be applicable and cannot be pressed into service. Usage or practice developed under a statute is indicative of the meaning prescribed to its words by contemporary opinion. In case of an ancient statute, doctrine of contemporanea exposition is applied as an admissible aid to its construction. The doctrine is based upon the precept that the words used in a statutory provision must be understood in the same way in which they are usually understood in ordinary common parlance by the people in the area and business. (See : G.P. Singh's Principles of Statutory Interpretation, 13th Edition-2012 at page 344). It has been held in Rohitash Kumar and others v. Om Prakash Sharma and others – (2013)11 SCC 451 that the said doctrine has to be applied with caution and the Rule must give way when the language of the statute is plain and unambiguous. On a careful scrutiny of the language employed in paragraph 3 of the notification dated 21.01.2000, it is difficult to hold that the said notification is ambiguous or susceptible to two views of interpretations. The language being plain and clear, it does not admit of two different interpretations.

29.In this regard, we may state that the circular dated 15.04.1994 was ambiguous and, therefore, as long as it was in operation and applicable possibly doctrine of contemporanea exposition could be taken aid of for its applicability. It is absolutely clear that the benefit and advantage was given under the circular and not under the notification dated 07.03.1994, which was lucid and couched in different terms. The

> *circular having been withdrawn, the contention of contemporanea exposition does not commend acceptation and has to be repelled and we do so. We hold that it would certainly not apply to the notification dated 21.01.2000."*
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> *34.We take notice of two things so far as the circular is concerned. Apart from being merely in the form of instructions or guidance to the concerned department, the circular is dated 9th October 2018, whereas the export took place on 27th July 2017. Over and above the same, the circular explains the provisions of the drawback and it has nothing to do with the IGST refund. Thus, the circular will not save the situation for the respondents. We are of the view that Rule 96 of the Rules, 2017, is very clear.*
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> *35.In view of the same, the writ-applicant is entitled to claim the refund of the IGST.*
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> *36.In the result, this writ-application succeeds and is hereby allowed. The respondents are directed to immediately sanction the refund of the IGST paid in regard to the goods exported, i.e.'zero rated supplies', with 7% simple interest from the date of the shipping bills till the date of actual refund."*

9. In view of the aforesaid, no further adjudication is necessary in the present case.

10. In the result, this Writ Application succeeds and is hereby allowed. The respondents are directed to immediately sanction the refund of the IGST paid with regard to the exported goods, i.e. "zero rated supplies", with 7% simple interest from the date of shipping bill till the date of actual refund. The refund shall be granted after deducting the differential amount of the duty drawback for the

period between July and September, 2017. Rule is made absolute. Direct service is permitted.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

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