

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 13355 of 2024****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE BHARGAV D. KARIA
and
HONOURABLE MR.JUSTICE D.N.RAY**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

M/S A T TRADE OVERSEAS PVT. LTD.**Versus****UNION OF INDIA & ANR.****Appearance:****MR. SANKET GUPTA, ADVOCATE FOR MR ANAND NAINAWATI(5970) for the Petitioner(s) No. 1****DS AFF.NOT FILED (N) for the Respondent(s) No. 1****MR. HIRAK SHAH, ADVOCATE FOR MR NIKUNT K RAVAL(5558) for the Respondent(s) No. 2****CORAM: HONOURABLE MR. JUSTICE BHARGAV D. KARIA
and****HONOURABLE MR.JUSTICE D.N.RAY****Date : 18/10/2024****ORAL JUDGMENT****(PER : HONOURABLE MR.JUSTICE D.N.RAY)**

1. Heard learned advocate Mr.Sanket Gupta
appearing for learned advocate Mr.Anand

Nainawati for the petitioner and learned advocate Mr.Hirak Shah appearing for learned advocate Mr.Nikunt Raval for the respondents.

2. Having regard to the brief controversy involved, with the consent of learned advocates for the respective parties, the matter is taken up for final hearing.

3. Rule returnable forthwith. Learned advocate Mr. Hirak Shah waives service of notice of rule on behalf of the respondents.

4. By this petition under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs:

“(a) That this Hon'ble Court be pleased to issue a writ of mandamus or certiorari any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the petitioner' case and after going into the validity and legality thereof to declare the levy of IGST on ocean freight paid by the petitioner; in view of Sr. No. 9(i) of Notification No 8/2017-IT(Rate) dated 28.06.2017 read with Sr. No. 10 of Notification No 10/2017-IT(Rate) dated 28.06.2017 as unconstitutional and ultra vires of the IGST Act, 2017:

(b) That this Hon'ble Court be pleased to issue a writ of mandamus or certiorari any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the petitioner' case and after going into the validity and legality thereof quash and set aside the rejection order dated 26.07.2024 by Respondent No. 2. (Exhibit.1)

(c) that this Hon'ble Court be pleased to issue a writ of mandamus or certiorari any other writ, order or direction under Article 226 of the Constitution of India directing the Respondents to refund the amount of Rs.1,60,43,685/- paid by the petitioner as IGST on ocean freight of goods imported during February 2019 along with appropriate interest

for delayed refund,

(d) For any other ad interim relief as this Hon'ble Court may deem fit:

(e) For costs of the Petition:

(f) For such further and other relief as the nature and circumstances of the case may warrant.

5. The Brief facts of the case are that during the period 2018-19, the petitioner has imported Bituminous Coal from foreign suppliers after payment of customs duty and IGST on the import of such goods. The petitioner entered into either of the two forms of contract i.e. CIF (Cost Insurance and Freight) or CFR (Cost and Freight) for importing goods into India. The petitioner is also engaged in FOB contracts, however the same is not the subject matter in the present case.

5.1 The foreign shipping line prepares

the bill of lading while dispatching the goods and once the goods are received by the petitioner, the bill of entry to clear the goods for home consumption is filed.

5.2 In terms of Notification No.8/2017 read with Notification No.10/2017, the petitioner in his capacity as importers, paid IGST at 5% on reverse charge basis on the ocean freight paid for services of transportation of goods by a vessel by up to the customs clearance station in India, by a person located in a non-taxable territory to a person located in a non-taxable territory. Although, the petitioner was not the recipient of such services, due to the deeming fiction created by Sr.No.10 of Notification No. 10/2017, the liability to discharge such tax was affixed on the importer. Thus, during February 2019, the

petitioner paid IGST amounting to Rs.2,61,52,445/- on the ocean freight to the overseas supplier for transportation of goods up to the customs clearing station in India. The payment of such amount was duly reflected in the monthly GSTR-1 and GSTR-3B returns furnished by the petitioner. On 23.01.2020, this Court in the case of **M/s Mohit Minerals Pvt. Ltd. v. Union of India & Ors.**, reported at **2020 (1) TMI 974**, struck down Notification Nos.8/2017 and 10/2017 as unconstitutional. The respondents filed an appeal before the Hon'ble Supreme Court of India and on 19.05.2022, the Hon'ble Supreme Court in the case of **Union of India & Ors. V. M/s Mohit Minerals Pvt. Ltd. 2022 (5) TMI 968** affirmed the decision of this Court and dismissed the appeal filed by the respondents.

5.3 Pursuant to the above judgment of this Court affirmed by the Hon'ble Apex Court, the petitioner filed a refund claim for the period February 2019 on 14.05.2024 for the IGST paid on ocean freight for the month of February 2019 in Form GST RFD-01. The Petitioner specifically stated the refund Claim has been made on account of unutilized amount of GST Paid on Ocean Freight under Reverse Charge Mechanism on Import of Goods in India.

5.4 In the matter of GST RFD-01 filed by the petitioner on 14.5.2024, for claiming refund of IGST paid on ocean freight for the month of February, 2019, the petitioners were issued with FORM GST RFD 02 on 26.6.2024 stating that your application for refund is hereby acknowledged against Application Reference

Number AA2405241247378. However, on the same day i.e. 26.6.2024, the petitioner was issued with the Notice for Rejection of Application for refund vide FORM GST RFD-08 stating that there is a delay in filing the refund application and hence, asking to show cause as to why the refund application is not liable to be rejected. The petitioner filed a detailed reply to the show cause notice vide FORM GST RFD 09 dated 17.7.2024 categorically stating that refund is being sought pursuant to the judgement of the Hon'ble Supreme Court of India on 19.5.2022 in the case of **Union of India & Others Vs. M/s. Mohit Minerals Pvt. Ltd.** and uploaded a copy of the judgement dated 19.5.2022 along with the subsequent judgements of this Hon'ble High Court in the case of **M/s. Comsol Energy Private Ltd.**

Vs. State of Gujarat reported in **2021 (6) TMI 827**. However, without appreciating the submissions made by the petitioner and without considering the judgements shared by the petitioner along with the reply, the respondent No.2 vide FORM GST RFD 06 dated 26.7.2024 rejected the refund claim filed by the petitioner on the ground that refund application filed by the petitioner is beyond the period of 2 years from the relevant date and hence barred by the limitation.

6. Thus, the issue that arise for determination of this Court are (i) whether the levy of IGST on transactions of CIF value can be imposed by the Department by way of Notification (ii) If answer to the first issue is in the negative, whether this Court has power to direct the refund

of the levy as prayed for by the petitioner.

7.1. FINDINGS :-

The first issue is no longer *res integra* and has decided by the Hon'ble Apex Court in case of **Union of India and another Vs. Mohit Minerals Private Limited through Director (Supra)** and the decision of various High Courts including this Court in case of **BLA Coke Pvt. Ltd Vs. Union of India & Ors.** passed in Special Civil Application No. 19481 of 2023, wherein, it has been categorically held that when the Notification itself is struck down, the respondent-authorities cannot insist for levy of IGST on the amount of ocean freight. Such being the position, the main issue falls for determination of this Court is whether the prayers for refund of the

amount of levy are maintainable and whether this Court must direct the respondents to refund the same to the petitioner. In case of **Mafatlal Industries and others Vs. Union of India and others** reported in **1997 (5) SCC 536** the Apex Court has contemplated three situations where the right to refund may arise. Firstly, where the statutory provision under which the tax is levied itself challenged by the assessee on the ground of being violative of some provisions of constitution (question of unconstitutional levy). In this class of cases, the claim for refund arises outside the provision of the Act inasmuch as, this is not situation contemplated by the Act. Secondly, where the tax is collected by the authorities under misconstruction of the statute (including rule or

notification) or by erroneous determination (case of illegal levy). In this class of cases, the claim for refund arises under the provision of the Act itself, inasmuch as, these are the situations contemplated by the Act and Rules. Thirdly where, the assessee pays a tax under mistake of law. This is not a case either of unconstitutional levy or illegal levy but, voluntary payment upon mistake of law.

7.2 In case of **Mafatlal (Supra)**, the Apex Court has gone on to hold that for the first type of cases namely unconstitutional levy, the remedy of writ jurisdiction exists, both under Articles 32 and 226 of the Constitution of India respectively.

8. Thus, the writ petition filed by the petitioner seeking refund of the IGST is

maintainable and must be allowed as the levy has been held to be unconstitutional. The petition, therefore, succeeds and is accordingly allowed. Impugned order is hereby quashed and set aside. Rule is made absolute to the aforesaid extent. No order as to costs.

(BHARGAV D. KARIA, J)

(D.N.RAY,J)

BINA SHAH

