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GUJARAT HC DENIES INTEGRATED GST REBATE TO ADVANCE AUTHORISATION LICENSE HOLDERS

IS IT FAIR ?

What is this all about ?

- The exporters were entitled to import raw materials without payment of IGST under the AA License and pay IGST on exports and claim Rebate (Refund) of the IGST so paid on exports. The exporter received benefits of rebate of IGST at the relevant point of time and then, Subrule (10) of Rule 96 of the CGST Rules was amended by Notification No. 39/2018- Central Tax dated September 4, 2018 with retrospective effect from October 23, 2017, providing that rebate on exports cannot be availed by the Petitioner, if the inputs procured by the Petitioner have enjoyed AA benefits or Deemed Export Benefits under the said notification. Therefore, the Petitioner was unable to utilize the benefit of dutyfree imports under AA Licenses and take the benefit of rebate on exports.
- Thereafter, by Notification No. 53/2018-Central Tax dated October 9, 2018, subclause (a) and (b) of subrule 10 of Rule 96 of the CGST Rules were merged. Thereafter, vide Notification No. 54/2018-Central Tax dated October 9, 2018, the subrule 10 of Rule 96 of the CGST Rules was again demerged and “with effect from October 23, 2017”.
- The Hon’ble HC, Gujarat in *Cosmo Films India v. Union of India & Ors.* [R/SLP No. 15833/2018 dated October 20, 2020] upheld the validity of rule 96(10) of the Central Goods and Services Tax Rules, 2017 (“CGST Rules”) and rules that notification is required to be made applicable prospectively only w.e.f. October 23, 2017 and not prior thereto from the inception of Rule 96(10) of the CGST Rules w.e.f. July 1, 2017.

What is the issue?

- ✓ If the assessee has obtained Advance Authorization¹ Licenses and then it can import goods without payment of import duty in terms of **Notification No. 79/2017-Customs, dated 13th October 2017.**
- ✓ The provisions concerning the export of goods or services are contained under the Integrated Goods and Services Tax Act, 2017.
- ✓ Section 16 of the IGST Act deals with the export of goods and services and provides benefits against the export of goods or services which can be claimed through either,
 - a. supply without payment of IGST and claim a refund of the unutilized input tax credit at the end of the period ("Refund") and
 - b. Supply on payment of IGST and claim refund of such IGST paid ("Rebate").
- ✓ For the procedure for granting refund of IGST on the goods and services exported out of India, Rule-96 of the Central Goods and Services Tax Rules, 2017 provides the mechanism, as per the procedure prescribed under section 54 of the CGST Act and GGST Act.
- ✓ **Sub-rule (10) of Rule-96** of the CGST Rules was introduced vide **para-3 of Notification No. 54/2018-Central Tax, dated 9th October 2018** issued by the CBIC.
- ✓ **Sub-rule (10) of Rule-96** of CGST Rules was inserted by the Central Goods and Service Tax (3rd Amendment) Rules, 2017 w.e.f. 1st July 2017.
- ✓ **Sub-rule (10) provides for the exemption for AA license holders importing goods from levy of customs duties and IGST.**
- ✓ The assessee was earlier entitled to import raw materials without payment of IGST under AA Licenses and pay IGST on exports and claim Rebate (Refund) of the IGST so paid on exports.
- ✓ The petitioner has received benefits of rebate of IGST at the relevant point of time.
- ✓ Thereafter, sub-rule (10) of Rule-96 of the CGST Rules was amended by Notification dated 4th September 2018 with retrospective effect from 23rd October 2017, providing that rebate on exports cannot be availed by the petitioner if the inputs procured by the petitioner have enjoyed AA benefits or Deemed Export Benefits under the said notification.
- ✓ Therefore, the assessee was unable to utilize the benefit of duty-free imports under AA Licenses and take the benefit of rebate on exports, because of the amendments made in Rule-96(10) of CGST Rules.
- ✓ It appears that, thereafter, by **Notification No. 53/2018-Central Tax dated 9th October 2018**, sub-clause (a) and (b) of sub-rule 10 of Rule 96 of the CGST Rules were merged.
- ✓ Thereafter, vide **Notification No. 54/2018-Central Tax dated 9th October 2018**, the sub-rule 10 of Rule 96 of the CGST Rules was again de-merged and "with effect from 23rd October 2017" thereby indicating that Notification No. 54/2018-Central Tax do not intend to apply the amendment to Rule-96(10) of the CGST Rules retrospectively.
- ✓ The Cosmo Films Ltd. (Petitioner) has therefore preferred this petition before Gujarat High Court challenging the aforesaid notifications and amendments made in sub-rule 10 of Rule-96 of the CGST Rules, by Notification No. 54/2018 denying the option to claim rebate to the petitioner for importing

¹ An Advance Authorisation is issued to allow duty free import of inputs, which are physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, energy, catalysts

which are consumed/ utilised to obtain export product, may also be allowed. DGFT, by means of Public Notice, may exclude any product(s) from purview of Advance Authorisation.

goods under AA Licenses being ultra-vires the provisions of the CGST Act and the CGST Rules made thereunder and Article 14 of the Constitution of India.

Contentions of the Petitioner

- ✓ Due to amended Sub Rule (10), the petitioner is not entitled to get rebate benefits under section 16(3)(b) of the IGST Act because of the amendment w.e.f. 23rd October 2017 where the petitioner has availed the benefit of upfront IGST exemption on imports against AA Licenses, as conferred upon the petitioner through Notification No. 79/2017-Customs dated 13th October 2017.
- ✓ The Domestic Tariff Area suppliers of the petitioner may avail Deemed Export Benefits and claim a refund of input taxes if they supply goods to the petitioner who holds AA License under **Notification No. 48 of 2017 dated 18th October 2017**, but the petitioner is denied the benefits under rebate mode under Rule 96 (10) as amended by the impugned Notification No. 54 of 2018 w.e.f. 23rd October 2017, if the suppliers of the petitioner avail Deemed Export benefits while supplying materials to the petitioner from DTA.
- ✓ The petitioner was eligible to opt for the rebate of IGST paid on exports without any restriction, however, w.e.f. 23rd October 2017, on account of the amendment in Rule 96(10), the petitioner is not able to avail export benefits under the rebate, if the petitioner imported goods under AA Licenses issued before 23rd October 2017.
- ✓ The action of the government suffers from the vices of excessive delegation by the impugned notifications denying the benefit of 'Zero-rated' exports conferred upon the petitioner through Section 16(3)(b) of the CGST Act by imposing arbitrary restrictions upon the petitioner, so that they are unable to claim rebate benefits from the Government.
- ✓ **The petitioner is entitled to a rebate of IGST on exports under section 16 of the IGST Act r/w. Section 54 of the CGST Act**, as the benefits against the export of goods, can be claimed after payment of IGST on exports and claim a refund of such IGST paid under the rebate mode, as provided under section 54 of the CGST Act and the CGST Rules. It was submitted that neither Section 16 of the IGST Act nor Section 54 of the CGST Act prescribes any power to issue impugned notifications, to deny the impact of zero-rating exports for granting benefits of rebate under section 16 of the IGST Act, to nullify the benefits under the Advance Authorization Scheme availed by the exporters.
- ✓ Due to the impugned notifications, the exporters were put at a disadvantageous position against regular exporters who are exporting goods without payment of IGST on the output side and at the same time, claiming refund of input taxes on the input side thereby effectively incurring no tax cost either on the input side i.e. on procurements or the output side i.e. on exports in terms of Section 16 of the IGST Act, whereas, only because the petitioner has availed the benefit under Advance Authorization Scheme, because of amended Rule -96(10) of the CGST Rules, the petitioner is denied the benefit of IGST refund/rebate on the output side i.e. export.
- ✓ The exporter is discriminated qua others who have not availed the benefits of the Advance Authorization Scheme, which would result in the violation of Article 14 of the Constitution of India, as the regular exporters can avail the option of rebate and recover rebate for accumulated input tax credit balance.
- ✓ Advance Authorization License holders or regular exporters earn foreign exchange for the country and boost the economy of the nation and therefore, there should not be any reasonable classification by subjecting the petitioner to different tax treatments.

- ✓ There is no case of reasonable classification for the exporters who have availed the benefit of AA License because there is no nexus which is sought to be achieved, as the rationale behind the introduction of sub-rule (10) of Rule-96 is that benefit should not be claimed by both the suppliers of AA License holders and the AA License holders themselves.
- ✓ In the case of the suppliers of AA License holders, a refund is claimed against deemed exports under Rule-89 of the CGST Rules, wherein, it is specifically provided that the AA License holder should not claim the input tax credit.
- ✓ The rationale given in the aforesaid notification is illogical, arbitrary, and unreasonable, as a benefit under rebate claim cannot exceed the amount of input tax credit taken which is allowed to be taken by AA license holders is restricted in case of Deemed Export benefits or Merchant Export Benefits.

Invoking Section 164, Justifiable?

- ✓ The impugned notifications, while exercising powers under section 164 of the CGST Act, but the provision of Section 164 of the CGST Act can be invoked only where a provision is specifically required to be prescribed by the respondents. Sub-section (2) of Section 164 specifically states that the power to make rules is only to the extent required by the CGST Act and accordingly, such powers can be exercised only subject to and subservient to the respective provisions of the GST law. Rebate mode or refund mode prescribed under the Rules should be following Section 16 of the IGST Act or Section 54 of the CGST Act.
- ✓ Amended sub-rule 10 of Rule-96 restricts rebate claims in case of AA License holders without any reasonable basis to justify the imposition of absolute restriction for not claiming and not the form and manner for claiming the refund.

- ✓ The power to prescribe safeguards and conditions for refund of tax, submitted that sufficient safeguards already exist to prevent undue benefits being claimed, as Rule-89 of the CGST Rules prohibits availment of the input tax credit in case of Deemed Export Benefits are claimed and in case of Merchant Export Benefits and AA benefits, the quantum of the rebate can in no case exceed the input tax credit balance i.e. the input tax credit earlier availed. The amendment of sub-rule (10) of Rule-96 is unreasonable and liable to be struck down.

Retrospective nature of Amendment, Justifiable?

- ✓ Concerning the retrospective amendment made in sub-rule (10) of Rule-96 of the CGST Rules w.e.f. 23rd October 2017, Though the notification has been issued on 4th September 2018, such retrospective operation cannot be arbitrary and burdensome. Reliance was placed on the decision of the Apex Court in the case of **Tata Motors Ltd. v. State of Maharashtra & Ors. AIR 2004 SC 3618**.
- ✓ In the retrospective introduction in sub-rule (10) of Rule-96 of CGST Rules, the petitioner is unfairly penalized as a consequence of claiming benefits during the interim period from 23rd October 2017 till 4th September 2018.

The intention behind such disadvantageous notification?

- ✓ AA License scheme has been introduced by the government to boost exports, enhancing foreign exchange earnings, and attracting more investment in the country, and therefore, AA License holders are granted additional fiscal benefits and incentives vis-a-vis regular exporters.

To deny the benefits which are available to regular exports that are not holding the AA Licensee to the AA License holders goes against the policy of granting of AA License

and denial of such benefits defeats the whole purpose of the AA License scheme

Taxes cannot be exported!!

- ✓ It is a settled legal position that taxes cannot be exported, as per the norms prescribed by the World Trade Organization which specifically permits remission of duties and taxes on exported products.
- ✓ The reliance should be placed on **Article-XVI of the General Agreement on Tariffs and Trade, 1994 (Note to Article XVI) and the provisions of Annexures-I to III of the Agreement on Subsidies and Countervailing Measures**, the exemption or remission of duties and taxes on exported products, so as not to bring such measures to be subsidy and hence, is permitted.
- ✓ It is a settled international practice to export only the goods and services and not the taxes suffered thereon.
- ✓ The exporter is unable to get back the transitional credit either through the refund mode or the rebate mode, the petitioner would be constrained to write-off this amount and pass on the burden of such amount to its foreign customers, which would lead to a situation of export of taxes, which is against the policy of the government.
- ✓ Lastly, reliance was placed on the statement of objects and reasons to the Constitution Amendment Bill introducing the GST regime in India, wherein, it is specified that removal of the cascading effect of taxes is one of the objectives of GST and hence, smooth pass-through of credits is the stated objective of the GST regime and denial of benefit on transitional credit to the petitioner leading to blockage of credits is against the spirit and objective of the GST regime.

Court Verdict

- ❖ **Rule 96 (10) as it originally existed, when the Rules came into force provided that the persons claiming refund of Integrated Tax (IGST) paid on export of goods or services should not have received supplies on which the supplier has availed the benefit from Government of India, Ministry of Finance.**
- ❖ **On conjoint readings of the provision of Section 16 of the Integrated Goods and Services Tax Act, 2017 (“IGST Act”), Section 54 of Central Goods and Services Tax Act, 2017 (“CGST Act”), and Rule 96(10) of CGST Rules, which is substituted by Impugned Notification, it is apparent that the person who has availed the benefits of Notification No. 48/2017- Central Tax dated October 18, 2017, and other Notifications as stated in subrule 10 of Section 96 ibid shall not have the benefit of claiming refund of integrated tax paid on exports of goods or services.**
- ❖ **The Petitioner has availed benefits under the Advance Authorization License scheme as per the Notification No. 18/2015- Customs dated April 1, 2015, which was amended by Notification No. 79/2017- Customs dated October 13, 2017, and paid integrated tax on the goods procured by the Petitioners for the export purpose.**
- ❖ **Considering the effect of the Impugned Notification, the contentions raised on behalf of the department that there is no discrimination qua the petitioner is tenable in law, as by the amendment made by Impugned Notification it denied the benefit which is granted to the Petitioner by the Notification No. 39/2018- Central Tax dated September 4, 2018, was withdrawn as the same was not made applicable from October 23, 2017.**
- ❖ **Recently, vide Notification No. 16/2020- Central Tax dated March 23 2020 an amendment has been made by inserting an**

explanation to Rule 96(10) of CGST Rules, 2017 as amended (with retrospective effect from October 23, 2017).

- ❖ Under which the option of claiming a refund is not restricted to the exporters who only avails BCD exemption and pays IGST on the raw materials thereby exporters who want to claim a refund under the second option can switch over now.
- ❖ The above amendment was made retrospectively thereby avoiding the anomaly during the intervention period and exporters who already claimed a refund under the second option need to payback IGST along with interest and avail ITC, because of which, the grievance of the Petitioner was therefore taken care of.
- ❖ However, it is also made clear that Impugned Notification is required to be made applicable w.e.f. October 23, 2017, and not prior thereto from the inception of Rule 96(10) of the CGST Act. Therefore, in effect Notification No. 39/2018- Central Tax dated September 4, 2018, shall remain in force as amended by the Impugned Notification by substituting subrule (10) of Rule 96 of CGST Rules, in consonance with sub-section (3) of Section 54 of the CGST Act and Section 16 of the IGST Act.
- ❖ The Impugned Notification is therefore held to be effective w.e.f. October 23,

Our View

The validity of Rule 96(10) will likely be challenged before other High Courts on the same/ other various substantive grounds.

Notification No. 03/2018 dated 23.01.2018, which has put a

restriction on Refund of IGST paid on export of goods:-

If the supplier has claimed the benefit of certain Notifications as mentioned therein, in other words, the conditions are applicable vis-à-vis the Supplier of goods to the exporter and not to the exporter of goods directly.

In our view, the restrictions have been put on the exporters of goods/services only vide Notification No. 54/2018-CT dated 09.10.2018. (*w.e.f. from the 09.10.2018 only*)

Accordingly, IGST paid refunds availed by exporters from 1.07.2017 to 8.10.2018 are good in law.

Worthwhile to mention that, Advance Authorisation holders availing IGST refund are here for long battle now.

QUESTIONS ?

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