

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 14119 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 H K ENTERPRISE
Versus
UNION OF INDIA & ORS.

Appearance:

MR. SANKET GUPTA, ADVOCATE FOR MR ANAND NAINAWATI(5970) for the Petitioner(s) No. 1

MR. HIRAK SHAH, ADVOCATE FOR MR NIKUNT K RAVAL(5558) for the Respondent(s) No. 2,3

PARAM V SHAH(9473) for the Respondent(s) No. 1

CORAM: HONOURABLE MR. JUSTICE BHARGAV D. KARIA
and
HONOURABLE MR.JUSTICE D.N.RAY

Date : 20/11/2024

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; learned advocate Mr.Param V.Shah for the respondent No.1 and learned advocate Mr.Hirak Shah appearing for learned advocate Mr.Nikunt Raval for the respondent Nos.2 and 3.

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.Param V.Shah waives service of notice of rule on behalf of the respondent No.1 and learned advocate Mr.Hirak Shah waives service of notice of rule on behalf of the respondent Nos. 2 and 3.

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(ii) 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 0/0 dated 15.7.2023 by Respondent No.2. and impugned Order-in-Appeal No. KCH-EXCUS-000-APP-070-2023-GST-JC dated 21.11.2023 issued on 28.11.2023 by Respondent No.3.

(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.20,44,913/- paid by the petitioner as IGST on ocean freight of goods imported during June 2018 along with the 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 short question that arises for adjudication of this Court is whether the petitioner is eligible for refund of IGST on ocean freight paid by the petitioner in pursuance of Notification No.8/2017 and Notification No.10/2017 dated 28.06.2017, during June 2018, when such Notifications have been struck down by this Court in case of **M/s. Mohit Minerals Pvt. Ltd. Vs. Union of India & Ors** reported in **2020 (1) TMI 974**, and the

Hon'ble Apex Court has confirmed the same by judgement/order dated 19.5.2022 in case of **Union of India and others Vs. Ms. Mohit Minerals Pvt. Ltd.** reported in 2022 (5) TMI 968.

6. Pursuant to the aforesaid judgements, the petitioner filed a refund claim for the period June, 2018 on 29.03.2023 for the IGST paid on ocean freight for the month of June, 2018 by submitting FORM GST RFD-01. The said refund claim was specifically stated to have been made on account of unutilized amount of GST paid on Ocean Freight under Reverse Charge Mechanism on import of goods in India. However, on 15.06.2023, the petitioner was issued with the Notice for rejection of refund application vide FORM GST RFD-08 asking to show cause as to why the refund application should not be rejected on the ground of delay.

The petitioner filed detailed reply to the said FORM GST RFD-08 by filing FORM GST-RFD-09 dated 10.07.2023 stating categorically that since the refund is being sought pursuant to the judgement of the Hon'ble Apex Court which was dated 19.05.2022, the consequent application seeking refund could not be rejected on the ground of delay.

7. However, the respondent No.2 vide FORM GST RFD-06 dated 15.07.2023 rejected the refund claim of the petitioner on the ground that the petitioner's refund claim is beyond the statutory period of two years from the relevant date and hence, barred by time. Thereafter, the petitioner filed an appeal before the Appellate Authority which too came to be dismissed on the very same ground. Aggrieved by the aforesaid rejection, the

petitioner has filed the present petition.

8.1. FINDINGS :-

The issue of levy of IGST on ocean freight 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.

8.2 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.

9. It is but implicit that to obviate the impossible, it must be held that the petitioner could have filed the application for refund only after the Notification in

question has finally struck down and appeal of the Union of India dismissed in the year 2022. Therefore, this Court holds that the application for refund having been filed within a reasonable time thereafter, cannot be held to be time barred.

10. 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