

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/SPECIAL CIVIL APPLICATION NO. 10110 of 2020**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MS. JUSTICE SONIA GOKANI**

**and**

**HONOURABLE MRS. JUSTICE MAUNA M. BHATT**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
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

**MOBILE SHOPPE  
Versus  
UNION OF INDIA**

**Appearance:**

**UCHIT N SHETH(7336) for the Petitioner(s) No. 1**

**MR UTKARSH R SHARMA(6157) for the Respondent(s) No. 1,2**

**PRIYANK P LODHA(7852) for the Respondent(s) No. 3**

**CORAM: HONOURABLE MS. JUSTICE SONIA GOKANI**

**and**

**HONOURABLE MRS. JUSTICE MAUNA M. BHATT**

**Date : 20/01/2023**

**ORAL JUDGMENT**

**(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)**

1. The petitioner is engaged in export of Mobile Phones. It received purchase orders for mobile phones from foreign buyers. The petitioner buys the mobile phones through its sister concerned M/s.Anjali Enterprise, which instructs the vendor to deliver the mobile phones directly to the airports for the purpose of export by M/s.Mobile Shop i.e. the present petitioner.

1.1 The vendor raises the invoice in the name of M/s.Anjali Enterprise in accordance with the instructions, but generates e-way bill with delivery address mentioned as the airport. Both such invoice and e-way bill accompany movement of the right up to the airport. M/s.Anjali Enterprises raises

invoices on the petitioner for sale of mobile phones and the petitioner thereafter, files the shipping bills and export the goods after due clearance by the customs authorities.

1.2 The IGST is always paid on the goods under the Integrated Goods and Services Tax Act, 2017. Exports being zero rated supplies under Section 16 of the IGST Act, the shipping bills filed by the petitioner are treated as refund applications under Rule 96 of the Central Goods and Services Tax Rules, 2017 ('the CGST Rules' hereinafter).

1.3 The refund is, therefore, processed by the Customs Authorities in accordance with Rule 96 of the CGST Rules. The petitioner

points out with emphasis that the proper officer for determining and adjudicating refund of IGST paid on export is the Customs Authority. It receives consideration for export in foreign exchange.

1.4 On 31.07.2020, as per the case of the petitioner, the search proceedings were conducted by the respondent authorities under the CGST Act at the premise of the petitioner. The petitioner explained the modus operandi of its business in detail and the employees of the petitioner cooperated with the respondent. At the time of search, the query was raised regarding refund claimed by the petitioner on export. The respondent also demanded the e-way bills in respect of purchases.

1.5 The entire modus of the petitioner was explained of having made the purchases through its sister concern M/s.Anjali Enterprise which in turn instructed the vendor to deliver the goods directly to the airport for the purpose of fulfilling the order of the petitioner. This being a single movement of the goods from the premise of vendor of M/s.Anjali Enterprise to the airport, only one e-way bill was generated by such vendor wherein the delivery address was mentioned as the airport.

1.6 The second e-way bill was insisted by the respondent in respect of purchases made by the petitioner from M/s.Anjali Enterprise and in absence thereof, it was

construed as the deficiency of documents and the refund of IGST was said to be erroneous on the ground of deficiency of documents. The coercive actions had been threatened by the respondent for this purpose.

1.7 On the very day the respondent submitted a request to the Customs Authorities to detain the cargo of the petitioner which was pending clearance for export at the airport. The Customs Authorities detained the consignment of the petitioner eventually.

1.8 On 02.08.2020, after leaving the premises of the petitioner, the respondent issued a summon to the petitioner for appearing the next day. The respondent



further called upon the petitioner to produce the e-way bills in respect of its purchases as well as export documents even though the export file had been seized by the respondent at the time of search proceedings.

1.9 The petitioner requested for adjournment on personal ground on 03.08.2020 and on 04.08.2020 the petitioner submitted a letter to the Customs Authorities requesting to release the goods since the foreign buyer was threatening to cancel further orders. The petitioner had also shown its preparedness to submit the documents, which were necessary.

1.10 It is averred by the petitioner that the Custom Authorities had been

satisfied with the documents presented by the petitioner for export and on 07.08.2020 the goods were released from detention and were allowed to be exported by the Custom Authorities.

1.11 The petitioner received fresh summons dated 07.08.2020 on 08.08.2020 after acquiring e-way bills in respect of its purchases. The petitioner showed its inability as the e-way bills right upto the airport were already seized by the respondent at the time of search proceedings. The respondent also required the export documents for adjudication and scrutiny of refund granted to the petitioner.

1.12 On 13.08.2020, the petitioner



addressed a communication to the respondent through e-mail informing the authorities that the official press release of 23.04.2018 issued by the Central Board of Indirect Taxes and Customs ('the CBIT' hereinafter) clarified that only one e-way bill was required for transactions on "bill to ship to" basis. This circular was binding on the respondent and it was pointed out that refund of IGST paid on export was granted by the Custom Authorities. Therefore, the respondent did not have the jurisdiction to re-adjudicate or scrutinize such refund.

1.13 The respondents since were not willing to drop the proceedings and insisted on initiating the inquiry and

production of documents in the summons issued on 07.08.2020 and also further threatened to take coercive actions including the arrest and further detention though there is no *prima facie* adjudication of any liability against the petitioner.

1.14 The principal grievance on the part of the petitioner is that the proceedings for scrutiny of refund of IGST for the export already made by the petitioner is initiated by the CGST Department even though the proper officer for grant of refund of IGST is the Custom Authorities and therefore, initiation of the actions on the part of the respondent is bad in law. Rule 96 since provides for the shipping bill of the export to be treated as the

refund application and the custom authorities treated the process of refund claim of the exporter. The petitioner has been paying the IGST on export and the Custom Authorities had been processing the refund of such IGST after clearance of the goods for export, it is urged that this continuous scrutiny on the part of the respondent is wholly without jurisdiction and not sustainable under the law.

1.15 The principal objection on the part of the respondent is the documentation of the petitioner at the time of the search proceedings that it does not have e-way bill in respect of the purchase from M/s.Anjali Enterprise when it was already clarified at the time of search that

M/s.Anjali Enterprise is the sister concerned of the petitioner and it places the purchase orders on different vendors to directly delivered the goods for export on bill to ship to basis. It is also the say of the petitioner that duty is of the person moving the goods to generate valid e-way bill and if at all there is deficiency in e-way bill it is the vendor who is responsible for such default. The petitioner being a buyer cannot be made liable for any default on the part of the vendor or its sister concerned. Because, the petitioner is an exporter, the exports are zero rated supplies under the GST Act, the petitioner as such does not have effective tax liability under the GST Act.

1.16 Rule 138 of the GST Rule is depended upon to urge that it requires e-way bill along with the movement of goods for the purpose of verification if the goods are intercepted. It was clear from Rule 138A of the GST Rules which required carrying of invoice and e-way bill along with the goods. The purpose of e-way bill was to ensure that there is no unaccounted movement of goods. It is the intercepting authority, which has a right to ask for the e-way bill and initiate the inquiry/proceedings in case of the deficiency. However, this *post facto* verification of e-way bill much after the movement the goods is over and that to in respect of transactions which were admittedly accounted by the petitioner is

according to the petitioner without jurisdiction and contrary to the object and purpose of e-way bill provisions.

2. Resultantly, the prayers sought for in the present petition are as follow:

“34...

A. *This Hon’ble Court may be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ, order or direction quashing and setting aside summons dated 7.8.2020(annexed at Annexure A) requiring presence of the Petitioner as well as production of documents as mentioned therein;*

B.*It may please be held that the Respondents have no jurisdiction to initiate adjudication/scrutiny of refund of IGST paid on exports which was processed by the Customs authorities;*

C. *Without prejudice to the above and in the alternative it may please be held that the Respondents have no jurisdiction to call for production of second e-way bill in respect of "bill to ship to" transactions which is contrary to official press release of CBIC dated 23.4.2018;*

D. *Without prejudice to the above and in the alternative it*



*may please be held that Respondents have no jurisdiction to call for and verify e-way bills after end of movement of goods and in respect of admittedly accounted transactions;*

*E. Without prejudice to the above and in the alternative it may please be held that the buyer cannot be penalized for minor deficiencies, if any, in e-way bills generated by the vendor;*

*F. Without prejudice to the above and in the alternative it may please be held that in any case threat of coercive action against the Petitioner including detention of goods meant for export and arrest even without prima facie adjudication of any liability against the Petitioner is wholly without jurisdiction and illegal;*

*G. Pending notice, admission and final hearing of this petition, this Hon'ble Court may be pleased to restrain the Respondents from requiring the Petitioner to remain present and produce documents as mentioned in the impugned summons dated 7.8.2020 (annexed at Annexure A) and in any case this Hon'ble Court may be pleased to restrain the Respondents from taking any coercive action including detention of goods or arrest without there being any adjudication of liability against the petitioner;*

*H. Ex-parte ad interim relief in terms of prayer G may kindly be granted;*

*H1: This Hon'ble Court may be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ or order directing the respondents to withdraw the instructions given to the customs authorities to withhold the refund of IGST paid by the petitioner on export.*

*I. 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 petitioner shall forever pray.”*

3. This Court [Coram: Justice J.B. Pardiwala (as His Lordship then was) and Justice Ilesh J. Vora) issued the notice by allowing the draft amendment by the following order:

*“1. Draft amendment is allowed. Necessary incorporation shall be carried out at the earliest.*

*2. We have heard this matter for some time. We failed to understand what jurisdiction the respondent No.2 has to inquire with the writ applicant as regards the export of the goods under the provisions of the Customs Act. There has been no satisfactory reply to the question put by us to the learned Standing Counsel appearing for the respondents. It*

*appears that the respondent No.2 has now gone to the extent of informing the Customs Authority that the refund of the IGST paid on the export should not be processed. We once again questioned the respondent No.2 under which authority, he could have asked the customs people to do so.*

*3. Learned Standing Counsel appearing for the respondents would submit that, there is some doubt as regards the Eway bill. The respondent No.2 would like to interrogate the writ applicant in this regard.*

*4. Prima facie, Mr. Uchit Sheth, the learned counsel appearing for the writ applicant is right in his submission that once the Eway bill is generated, the export cannot be disputed. If there is any doubt as regards the export of the goods, it is for the customs authority to take up the issue. Why should the respondent No.2 meddle into the affairs and jurisdiction of the Customs Authority. It has also been brought to our notice that the goods to be exported were detained by the Customs Authority at the instance of the respondent No.2, but later, such goods were permitted to be cleared and those were actually exported.*

*5. We would like to hear the Customs Authority also in this regard. We ask Mr. Sheth, the learned counsel appearing for the writ applicant to implead “The*

*Deputy Commissioner of Customs, Air Cargo Complex, Old Airport, Ahmedabad” as the respondent No.3. The cause title be amended accordingly.*

*6. Notice to the newly added party respondent No.3, returnable on 23.02.2021. The matter shall be heard finally on 23.02.2021. Notify the matter on top of the Board on the next date of hearing. We clarify that there shall not be any undue harassment to the writ applicant. Till we hear the matter, the writ applicant shall not be summoned by the respondent No.2 in any manner.”*

3.1 The Court thus permitted the adding of Deputy Commissioner, Customs, Air Cargo Complex, Old Airport, Ahmedabad as the party respondent No.3 and the respondents were represented by the senior standing counsel filed affidavit-in-reply on behalf of the respondent No.3, who did admit any of the statements or averments.

3.2 The respondent No.3 was impleaded as

party pursuant to the order of the Court and the role of the respondent No.3 had started pursuant to the letter issued by the Commissioner of Central Goods and Service Tax, Bhavnagar by Joint commissioner (AE), under jurisdiction of which the petitioner M/s.Mobile Shoppe is failing in respect of IGST,CGST and GST. This was received on 31.07.2020 and it was informed that the office was conducting inquiry in respect of Export Consignment of the petitioner and hence, it was respected to hold export of cargo in order to conduct verification of export consignment and not to conduct examination or to grant LEO to the concerned consignment for export.

### 3.3 Section 99B sub-section (1) of Customs



Act, 1962 inserted vide clause 70 of the Finance (No.2) Act, 2019, empowers the Custom Authorities for the purpose of ascertaining compliance of the provision of the Customs Act or any other law for the time being in force, requiring a person to undergo authentication in such a manner and within such time as may be prescribed. It also empowers the Custom Authorities to suspend the clearance of import and export of the goods in the event if any person has failed to comply with the requirements of sub-section (1) or has submitted incorrect documents or information. Thus, on receipt of the letter dated 31.07.2020 from the office of Commissioner of Central Goods and Service Tax, Bhavnagar the respondent No.3 had issued the detention memo dated



31.07.2020.

3.4 The letter dated 04.08.2020 from the office of the Commissioner of Central Goods and Service Tax, Bhavnagar issued the Joint Commissioner (AE) was informed to the petitioner calling for the details as the export documents had declared wrong address which did not match the address of their CGST Registration had reflected and that was apprised to the respondent No.3 for verifying the following three details:

*"(i) Whether the declaration of address in Export documents and shipping bills are correct or otherwise?"*

*(ii) Whether mobile phones already exported by the exporter were opened and processed and exported second hand mobile phones in the guise of new mobile phone as declared in the respective shipping bills and availed export benefits i.e. drawback/MEIS/refund of IGST on the declared export price of new mobile?"*

*(iii) Whether the petitioner has availed refund fraudulently or otherwise?*

3.5 In furtherance to the letter dated 04.08.2020, the petitioner's goods had been released from detention on 07.08.2020 and were allowed to be exported vide release order (LEO) dated 07.08.2020. Hence, there was a limited role of the respondent No.3 as mentioned. Substantiating documents also had been brought on the record.

4. According to the affidavit-in-reply on behalf of the respondent No.2, the petitioner is a merchant exporter of Mobile Phones after paying the applicable IGST. The said IGST is being paid by the petitioner mostly through Input Tax Credit, which is availed by them on the basis of

the purchase of Mobile Phones. The petitioner had purchased the Mobile Phones from their sister concerns as well as other local vendors. The petitioner claims the IGST refund before the Custom Authority which is a proper officer for sanctioning the refund as per the Rule 96 of the CGST Rules, 2017.

4.1 The search was conducted by the team of respondent No.2 as contended in this affidavit on 31.07.2020 and 01.08.2020 on the business premises of the petitioner as declared during the GST Registration, Shop No.10, Heera Panna Complex, Hospital Road, Porbandar under the provisions of Section 67 of the Central Goods and Services Tax Act, 2017. During the course of the search

proceedings, it had transpired that it had not declared the correct address registered under the GST i.e. Shop No.10, Heera Panna Complex, Hospital Road, Porbandar and declared wrong address of the business premise as Sheetal Complex, Porbandar in many documents including the export documents, which was not registered under the GST. No business activity has been carried out at the address given in the document i.e. Sheetal Complex, Porbandar.

4.2 In all other documents, the petitioner had declared the wrong address Sheetal Complex, Porbandar, however, there was a mandatory requirement for the e-way bill for movement of goods and petitioner had not prepared any e-way bill for the

business place of Sheetal Complex, Porbandar. Even if, in most of the cases, the petitioner had never received the goods i.e. Mobile Phones at the registered premise under the GST at Shop No.10, Heera Panna Complex. Despite the fact that the petitioner had not received the goods at Porbandar, the petitioner had prepared, according to the respondent, false e-way bills stating that they have received the goods at shop No.10, Heera Panna Complex, Hospital Road, Porbandar.

4.3 No sales/purchase documents and books of accounts had been maintained at the GST registered business premises i.e. Shop No.10, Heera Panna Complex, Hospital Road, Porbandar. The petitioner had not received

the goods and he had in fact availed and utilized the Input Tax Credit for paying the IGST against their export.

4.4 During the search proceedings, no responsible persons were available at Porbandar based firm and therefore, the respondent had issued the summons dated 02.08.2020 to the petitioner for being present on 03.08.2020 and to produce all document corroborating the evidences.

4.5 The request was made on the part of the petitioner for 15 days vide its communication dated 03.08.2020, which was accepted by the respondent as the part of the principal of natural justice and a fresh summons on 07.08.2020 was issued.



4.6 The further investigation could not be proceeded by the respondent in absence of any inquiry of the petitioner under Section 70 of the CGST Act, 2017. The respondent, therefore, initiate the inquiry to establish the chain of movement of goods exported and Input Tax Credit availed and utilized by the petitioner as from the documentary evidences, it was realized that the petitioner had not received the physical Mobile Phones at the declared premise premise.

4.7 M/s.Anjali Enterprise is a sister concern of the petitioner, it had produced the Mobile Phones from its sister concern. M/s.Anjali Enterprise had procured the Mobile Phones from other vendors, who had

generated e-way bills in the name of M/s.Anjali Enterprise. Some of the e-way bills had been generated in "Bill-To-Ship-To" mode where delivery of Mobile Phones is shown at Air Cargo Complex, Ahmedabad. It is further contended that the Mobile Phones procured by M/s.Anjali Enterprise have been sold and transferred to the petitioner without generating any e-way bills. The petitioner produced the Tax Invoice bearing No.10 dated 30.07.2020 under which the Mobile Phones have been sold by M/s.Anjali Enterprise to the petitioner. The address given on the invoices i.e. Sheetal Complex, Hospital Road, Porbandar and during the search on 31.07.2020 and 01.08.2020 by the respondent and their team had been established that no business activity is

carried out by the petitioner at Sheetal Complex.

4.8 As per the Notification No.02/2020-Central Tax dated 01.01.2020, the tax invoices must contain the details of Delivery Information and details of "Dispatched From". This being a mandatory details not mentioned in the tax invoice No.10 dated 30.07.2020 issued by M/s.Anjali Enterprise. There was a reason for the petitioner to question this entire modus. In such scenario, the Mobile Phones have been presumed to be supplied to the petitioner at Porbandar and not to Air Cargo, Ahmedabad as declared by M/s.Anjali Enterprise in the Tax Invoice. The petitioner, according to the respondent's

contention, is exporting the Mobile Phones from Air Cargo, Ahmedabad. It does not come out as to how the petitioner has transported the Mobile Phones from Porbandar to Ahmedabad and in turn exported the same. In absence of valid Tax Invoice, the respondent had insisted the petitioner for producing valid e-way bill along with the Tax Invoices, Export Invoices and other relevant documents, which is a valid inquiry.

4.9 The respondent initiated the inquiry to establish the chain of Input Tax Credit to avail and utilized by the petitioner as neither sale/purchase documents nor physical Mobile Phones were present at the declared premise of the petitioner. The

petitioner is the buyer of Mobile Phones from M/s.Anjali Enterprise which has in turn neither issued Tax Invoice/Export Invoice of export invoice in accordance with the provisions laid under Notification No.02 of 2020-Central Tax dated 01.01.2020 nor generated valid e-way bills. The petitioner has availed the Input Tax Credit on all such purchases and also utilized the same in paying the applicable IGST.

4.10 Rule 138A of the CGST Rules prescribes that the person in charge of the conveyance shall carry the invoice or bill of supply or delivery challans and in case of transportation of goods by road, he shall also carry a copy of the e-way bill physical form or the e-way bill number in

electronic mode. Rule 138 E-way Rules of Central Goods and Service Tax Rules, 2017 have been notified by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes and Customs vide Notification No.12/2018-Central Tax dated 07.03.2018. The said Notification has come into force on 01.04.2018 as notified by the Notification No.15/2018-Central Tax dated 23.03.2018. The petitioner has procured the Mobile Phones from M/s.Anjali Enterprise under the incorrect Tax Invoices as per the Notification No.02/2020-Central Tax dated 01.01.2020. E-way bills are the documents which are to be enclosed with all the tax invoices having value more than Rs.50,000/- under which the goods have been



sold/procure and movements of the goods have been effected. As the respondent initiated the inquiry to establish the chain of the Input Tax Credit availed and utilized by the petitioner, the purchase documents are required for corroborating evidences. The petitioner falls under the jurisdiction of the Central Goods and Services Tax, Bhavnagar and accordingly, the respondent issued the summons for producing the e-way bills, tax invoices, export invoices, etc. for corroboration.

4.11 The search conducted under Section 67 of the Central Goods and Services Tax Act, 2017, by the team of respondent No.2 was the reason for questioning various aspects. Thus, it appears that the address

given of the business premises Sheetal Complex, Porbandar for the purpose of export of Mobile Phones on their Tax Invoices and when no such business activity had been carried out at such address and when it was further realized that neither sale nor any purchase documents nor any Mobile Phones available at the business premise of the petitioner, the petitioner had been questioned as he falls under the jurisdiction of the CGST, Bhavnagar. According to the respondent, there are number of evidences against the petitioner which have given reason to believe for questioning this conduct and hence, the summons on 02.08.2020 and 07.08.2020 had been issued under Section 70 of the CGST Act, 2017 to safeguard the Government

Revenue. There is no coercive action initiated by the respondent and hence, the petitioner has no case on merits.

5. Affidavit-in-rejoinder is filed by the petitioner denying all contentions and explaining that the issue with related to the address is concerned, the IEC certificate for Custom purposes carries the old address of the petitioner located at Sheetal Complex, Porbandar, which was the correct address at the time of issuance of such certificate, whereas the GST registration contains the current address of Heera Panna Complex. This was explained to the respondent at the time of search, undue impetus is given to the mismatch of the address by the respondent No.2 although

it has been explained by the petitioner. The copy of IEC registration certificate is also forming the part of the record.

5.1 The petitioner repeatedly averred that it being an exporter receives goods directly at the airport for the purpose of export. The transactions are on bill to ship to basis, thus there is no question of non-receipt of goods or generating false e-way bills with an intention to evade the payment of tax.

5.2 The allegation of the respondent that the petitioner did not maintain the books of accounts is also contrary to the facts, according to the petitioner. The respondents themselves have seized the accounting records of the petitioner at the

time of the search.

5.3 The petitioner also has expressed the surprises as to how the petitioner would export the goods without the receipt of the goods. The petitioner never denied the cooperation to the authority. The petitioner objected to the very jurisdiction of the authorities to verify the export transactions and the refund of the IGST granted by the Custom Authorities. Since the respondent did not accede to such a request, this petition has been preferred.

5.4 It is already given in explanation regarding the old address at Sheetal Complex and alleged discrepancy in invoice is concerned, the same being merely

technical. The presumptions sought to be drawn by the respondent No.2 authority that the goods are supplied in Porbandar and not exported beyond its jurisdiction since the Custom Authorities have already verified time to time the goods which has been exported.

5.5 The emphasis that M/s.Anjali Enterprise has indeed issued tax invoices to the petitioner is reiterated. It is further averred that in so far as non-integration of e-way bills is concerned, it has relied on the CBIC press release that bill to ship to transactions require only one e-way bill and second e-way bill is not required to be generated. The respondent authority has no jurisdiction to examine the validity. The



request is made to the respondent No.2 not to take coercive action against the petitioner. However, when the respondent had requested the Custom Authority not to allow the export of goods by the petitioner, it was only after the petitioner was able to convince the Custom Authority that there was absolutely no discrepancy in the export consignment that the goods were permitted to be exported. There was threatening coercive measures such as arrest and now the IGST refund on export to be granted by the Customs Authorities remains blocked because of the letter of the respondent No.2. Although, nothing has been in fact found.

6. We have heard the learned advocate,

Mr.Uchit Sheth, who has urged that no show cause notice has been given nor any opportunity given to represent the adjudication process. Only the mismatch of address has resulted into blocking of the refund of IGST which cannot be done. There is no issue of the export valuation. There is an Input Tax Credit under the GST and hence, the statutory mechanism is not to be usurped by the respondent No.2 when in fact is has no power. There is no order withholding the refund merely because the another address is given. This exercise is undertaken.

6.1 Learned advocate, Mr.Sheth has relied on the decision of the Bombay High Court in case of ***Vodafone Idea Limited vs.Deputy Commissioner of Income-tax and others,***

reported in **(2020) 421 ITR 253** where the court was considering the scrutiny under Section 143 of the Income Tax Act to hold that this Section had two objects one, to avoid the difficulties of delay in issuance of refund in genuine cases, which are routinely selected for scrutiny assessment and they are made inapplicable to the returns furnished. Second object was to safeguard the interest of revenue where the refund of any amount is due to the assessee under Section 143(1) of the and the Assessing Officer forms an opinion that grant of refund may adversely affect the recovery of revenue. He may subject to fulfilling the conditions contained in the provisions withhold the refund till the date of scrutiny assessment. It was held by

the Bombay High Court that the powers vested with the Assessing Officer are not unguided or unlimited. The exercise of powers under Section 241A are subject to the Assessing Officer forming a *bona fide* opinion that grant of refund may adversely affect the recovery of the revenue. Further, he has to record these reasons in writing and can withhold the refund only with previous approval of the Principal Commissioner or Commissioner as the case may be. These are, thus, the safeguards against the arbitrary and unguided exercise of powers.

7. In this background, the request on the part of the petitioner is to direct the authority to release the refund. Yet another decision of this Court is of

***Ganesh Sales Corporation vs. State of Gujarat***, reported in ***(2016) 68 taxmann.com (Gujarat)***. This was the case where the refund had been withheld for the period from 01.07.2014 to 30.09.2014 under Section 39 read with Section 11 of the Gujarat Value Added Tax Act. The Court held that when there was no requirement for resorting to the powers conferred by Section 39, order lacked the jurisdiction. The Court held that upon invocation of Section 39, the condition precedents are firstly, that there should be an order giving rise to a refund secondly, such order should be subject matter of appeal, further proceeding or any other proceedings which is pending. It is only when these conditions are satisfied that resort can be

made to provision of Section 39. Thus, there should be an order giving rise to the refund was satisfied in case before this Court as the order of provisional refund does not give arise to a refund and the second condition precedent was concerned the revenue was not in a position to point out that any of the three eventualities i.e. of appeal, further proceedings or any other proceedings were satisfied.

7.1 The order of provisional refund not being a subject matter of appeal nor is there any further proceeding in connection there with nor is any other proceedings of the Act pending for invocation of Section 39, nothing was there for the Court to hold that the order impugned before that Court without the condition precedents for



exercise of such powers were satisfied and therefore, the Court held that the authority had lacked the jurisdiction. Before withholding the order, according to the Court, the Commissioner is empowered to withhold the same if he is of the opinion that such refund is likely to adversely affect the revenue. The Commissioner is required to form an opinion that grant of refund is likely to adversely affect and the fact regarding formation of such opinion needs to be reflected in the order passed under Section 39 withholding the refund. There was not a whisper as regards any opinion as envisaged and hence, the Court held that withholding of the refund was not in accordance with law.

8. In the matter on hand, we notice from the discussion that on 02.8.2020 the respondent had issued a summons to the petitioner for appearing on the next day. He was called to produce the e-way bills in respect of its purchases as well as export documents. The petitioner had requested for adjournment on personal grounds and he also made a request to the Custom Authority for release of the goods, as his orders were likely to be cancelled. He was permitted the export on 07.08.2020 and the goods were released from detention. The fresh summons thereafter was received by him on 8.8.2020. On account of the seizure of e-way bills at the time of search proceedings, he had shown his inability to produce those bills. We could notice that

heavy reliance is placed on the Central Board of Indirect Taxes and Customs. A press release of 23.4.2018 in relation to the one e-way bill were required for transaction to ship to basis insisting that this is binding to the respondent.

9. The Custom Authority having permitted the goods to be exported and the petitioner having paid the IGST on the export, the process of the refund on such IGST after clearance of the goods for export is what is being provided as Rule 96 is very clear that shipping bill of the export needs to be treated as the refund application.

10. We could notice that the respondents questioning is opposing of e-way bills in support of purchase from Ms/. Anjali

Enterprise which according to the petitioner is a sister concern and the CBIC circular is favoring it. We have also noticed that no show cause notice till date is issued. The summons had been issued and thereafter the petitioner approached this Court. This Court noticed that respondent No.2 had gone to the extent of informing the Custom Authority that the refund of IGST paid on export should not be processed. The Court questioned respondent No.2 under which authority it could ask the Custom people to so do it. On the ground that there were some doubt with regard to e-way bills respondent No.2 needed to interrogate the writ applicant. Noticing the fact that the e-way bill once is generated the export cannot be disputed and

if there is any doubt as regard to the export of the goods, it is for the Custom Authority to take up the issue. The Court also noticed that at the instance of respondent No.2, the Custom Authority had detained the goods which were to be exported but later they were permitted to be cleared and those goods were actually exported. The Court also added respondent No.3 as the party and the Court directed that the petitioner shall not be unduly harassed. He was also not to be summoned by respondent No.2 in connection to this.

11. We also noticed that Joint Commissioner, CGST HQ, Bhavnagar also in its order dated 4.8.2020 had noted that the detained cargo available at the Custom Air

Cargo Complex, Ahmedabad have been examined in presence of the officer deputed by the office of Joint Commissioner and during the course of investigation it had been observed that the consignment had not been open and activated by the exporter as mobiles of MI company are not required to be activated in India.

11.1 Accordingly, there was no ambiguity in relation to the consignment except the wrong declaration of the address in the export documents i.e. Export Invoice Shipping Bill. The office of the Commissioner had proposed for lifting of detention of the cargo and it was urged that till the pendency of inquiry at the Customs, it was apprehended that the writ



applicant may fly away or abscond if the Cargo is released and there may be heavy loss of custom refund for the different price of old mobile phone vis-a-vis old mobile phones. The inquiry pertaining to ITC Chain was therefore, directed to be investigated by the office of the Joint Commissioner of CGST. This had made the petitioner to rush to this Court seeking to challenge this alleged action of respondent being high handed and not permitting the Rule 96 to come into operation.

11.2 Keeping in mind the fact that this Court on noticing the overall circumstances, since had protected the writ applicant from the investigation which had been initiated, at no stage, the authority

was precluded from initiating the proceedings of show cause notice. However, till date, it is not so done, therefore, to strike a balance this Court is of the firm opinion that when the export has been permitted by all concerned on the part of the respondents, the petitioner would become entitled to the refund and the same shall be paid with interest to the petitioner.

12. At the same time, as this Court had protected him and the investigation has not been concluded, let the same be finalized in eight weeks' period from the date of receipt of a copy of this order. If at the end of the investigation nothing is found, without any further requirement of the

petitioner moving any authority, the same shall be remitted to the petitioner in his account through RTGS with interest.

13. With the above directions, present petition is allowed.

(SONIA GOKANI, J)

(MAUNA M. BHATT,J)

M.M.MIRZA/ NAIR SMITA V.

सत्यमेव जयते

THE HIGH COURT  
OF GUJARAT

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