IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 16056 of 2022

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M/S SE FORGE LIMITED
Versus
UNION OF INDIA

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Appearance:
ANANDODAYA S MISHRA(8038) for the Petitioner(s) No. 1
MR ROHIT G LALWANI(12507) for the Petitioner(s) No. 1
MS HETVI H SANCHETI(5618) for the Respondent(s) No. 1,2,3

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CORAM: **HONOURABLE MS. JUSTICE SONIA GOKANI**
and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 03/02/2023

ORAL ORDER
(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

1. The petitioner is a SEZ unit engaged in manufacturing of engineering components, tower flanges and bearing rings for wind energy sector and various flanges for other industries holding GSTIN No.24AAKCS1047G1Z. It is authorized to operate as a Special Economic Zone at Vadodara, Gujarat and is engaged in the export of goods under Letter of Undertaking (LUT) from the SEZ unit.

2. The petitioner has received supplies from non-SEZ suppliers wherein some suppliers levy the Integrated

Goods and Services Tax (`IGST' for short). Being an SEZ unit, the petitioner has not been able to utilize the credit which remains untilized in the Electronic Credit Ledger of the petitioner. The petitioner filed refund application in Form GST RFD-01 on 28.9.2020 for the period of September 2018 to December 2019 for the amount of Rs.8,88,079/- in relation to such unutilized Input Tax Credit (`ITC' for short). It was done under the category of `Export of Goods/Services without payment of tax'. The application had been moved under Section 54(3) of the Central Goods and Services Tax Act, 2017 (`CGST' Act for short) and Rule 89(4) of the Central Goods and Services Tax Rules, 2017 (`CGST Rules' for short).

3. The show cause notice was issued on 28.10.2020, reply to which had been given by the petitioner. The Assistant Commissioner, on 23.11.2020, rejected the refund claim of the petitioner vide Order in Original No.GSTD-VII/Vad-I/AC/Ref/04/SE Forge/2020-21 dated 23.11.2020.

4. Aggrieved, the petitioner preferred appeal before the Commissioner, CGST and Central Excise

(Appeals), Vadodara, which rejected the appeal on 3.2.2021 vide OIA No.VAD-CGST-001-APP-ADC-107-2020-21.

5. Another refund application dated 12.3.2022 in Form GST RFD-01 vide ARN AA2403220420117 for the period of January-2020 to November-2021 amounting to Rs.22,64,582/- has been made. Provisional Refund Order was issued in FORM GST RFD-04 on 27.3.2022 for refund of Rs.18,11,665/-.

6. The show cause notice was in issued FORM GST RFD-08 dated 28.4.2022 on the ground that the Provisional Refund Order was erroneously granted. The same had been responded to vide its communication dated 10.5.2022.

6.1 The grievance on the part of the petitioner is that the adjudicating authority rejected the refund claim of ITC and further directed recovery of the provisionally sanctioned refund amount issued on 27.3.2022. According to the petitioner, the appellate authority erred in holding that Section 54(3) of the CGST Act read with Rule 89(1) and Rule 89(2)(f) of the CGST Rules mandates only the

supplier to claim the refund of ITC. It is the case of the petitioner that CGST Act does not make any distinction between a SEZ unit and other registered persons so far as eligibility of ITC is concerned. SEZ is not an exclusion under the framework of GST scheme. There is no express denial of refund of output tax or ITC to a SEZ under Section 54. Therefore, the averment that since the supply to SEZ unit is a zero rated, the units situated in SEZ are not eligible for refund under Section 54 of the Act is not sustainable.

7. The petitioner, therefore, sought the following reliefs:

> *"54(A) That this Hon'ble Court may be pleased to issue an appropriate a Writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India, ordering and quashing the impugned orders passed by Commissioner (Appeals) for period of September, 2018 to December, 2019 and Learned Assistant Commissioner for period of 2020 – November, 2021 respectively and directing the Respondents themselves, their officers and subordinates to act upon or grant the petitioner refund of ITC on inward supply charged by the Supplier and lying in Electronic Credit Ledger.*

B) And pass, such further order/orders for granting relief(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case to meet the ends of justice."

8. On issuance of the notice, the respondent appeared and filed affidavit-in-reply of Principal Commissioner of Central Goods & Services Tax, Commissioner, Vadodara-I, Vadodara who has denied all the averments set out in the petition. It is emphasized that the petitioner's unit is located in SEZ and enjoy the special status under the Special Economic Zone Act, 2005, (`SEZ Act' for short) where other benefits are extended as per the provisions of law including the benefit of tax free supply from suppliers located in Domestic Tariff Area (`DTA' for short) under the CGST and IGST and Rules made thereunder.

9. According to the respondent, the petitioner has received the supplies from DTA unit on which DTA unit charges GST. The petitioner filed refund claim dated 28.9.2020 under the category of `Export of goods/service without payment of tax of unutilized Input Tax Credit for the period from September, 2018 to December, 2019

amounting to Rs.8,88,079/- before the respondent no.3. The rejection of the refund claim on 23.11.2020 is after following principle of natural justice. The appeal has been filed against the order dated 23.11.2020 before the respondent, which after following due process, is rejected. The appellate authority upheld the order issued by respondent no.1.

10. It is further contended that the petitioner filed refund claim amounting to Rs.22,64,582/- for same purpose for the period from January, 2020 to November, 2021, which is rejected vide order dated 11.5.2022.

11. It is the case of the respondent that Section 2(19) of the IGST Act provides that SEZ shall have the same meaning as assigned to it in clause (za) of section 2 of the Special Economic Zones Act, 2005. It is the say of the respondent that on collective reading of the provisions of Section 54(3) of the CGST Act, Section 16 of the IGST Rules together with Rule 89(1) of the CGST Rules, it is clear that when a supply is made to the SEZ unit or SEZ developer, it is the supplier and not the receiver who shall file the refund application. The

online portals and forms have been developed for smooth processing of the refunds according to the aforesaid rules. It is also prescribed in the reply the detailed procedure to be followed by saying that Section 16(a) of the IGST Act the supplier making supplies to SEZ unit, without payment of tax, shall need to fill up GSTR-I return to show the outward supply made to SEZ specifically pertaining to zero-rated supplies made to SEZ unit or SEZ Developers, whereas in case of second option under Section 16(b) of IGST Act, when the supplier has made the supply with payment of tax, in such case, supplier is required to fill up Form GSTR-I and this form reflects the tax amount paid on such supply. According to the respondent, the mechanism is so evolved in a manner that once the supplier files this Form GSTR-I, the corresponding entry also reflects automatically in Form No.GSTR-2A. The system automatically `autopopulates' i.e. automatically shows credit in ITC Ledger of Credit in the SEZ unit which means that the credit may reflect in the ITC ledge of SEZ recipient but the SEZ unit has not paid necessarily the amount of taxes to the supplier so as to avail the refund.

12. According to the respondent, the claim refund under Rule 89 by way of filling up Form RFD-01, is also available to the supplier, under option 7(F) under the category `Supply made to the SEZ with Payment of Tax' along with a declaration under Rule 89 2(f). In a given case, the SEZ unit may have to reverse the credit available under the option in Form GSTR 3B. It is also the stand of the respondent that "the petitioner is situated in Special Economic Zone (SEZ) filed an application for refund in FORM GST RFD-01A with regard to the credit of **Integrated Goods and Services Tax (IGST) distributed by Input Service Distributor (ISD)** for the services pertaining to the SEZ units as it is not possible for a supplier of services to file a refund application to claim the refund of the Input Tax Credit (ITC) distributed by the ISD. As per Section 2(61) of CGST Act, 2017, Input Service Distributor means : (a) It is the office of supplier of goods and/or services (b) The said office receives tax invoices towards receipt of input services (c) The said office distributes credit of CGST/SGST/IGST/UTGST to a supplier of goods/services having same PAN (d) The said office issues tax invoice or other prescribed documents for distribution of credit.

A supplier of goods/services may have various offices such as head office, registered office, regional office, marketing office, branch, godown, sales depot etc., which avail various input services such as security services, communication charges, courier expenses, housekeeping expenses to name a few, and pay service tax. Such units and premises may obtain registration as an Input Service Distributor for availment of credit on such input services and distribution of credit to other units to resolve the challenge of efficient utilization of accumulated credit. **A sole SEZ unit cannot sit at par with credit distributed by Input Service Distributor."**

13. The essential anxiety on the part of the respondent is that if the payment of amount of tax is already made to the supplier by the SEZ, the SEZ has to directly file appropriate civil case against the supplier for recovery of amount of the amount since it was not required to pay any amount and the burden to verify whether the supplier claimed the refund and whether the SEZ unit has actually paid up the tax cannot be shifted to the department. This is inadvertence of the SEZ unit and not of the department. In GST regime SEZ units

are not required to pay any tax on supplies made to them by DTA, rather it is the supplier who is required to pay taxes.

14. We have heard the learned advocate Mr.Mishra and learned Standing Counsel Ms. Hetvi Sancheti, who have extensively argued along the line of the pleadings. The question that has continued to bother the respondent is of allowing the refund to the SEZ when it is not required to actually fulfill the supplier's obligation as has been reiteratively contended before this Court. The SEZ since is considered as zero rated supply in terms of 16 of the IGST Act, such supplier is exempted from IGST. The notification No.15 of 2017 integrated tax dated 30th June, 2017 provides that the suppliers supplying the goods at SEZ can supply under the bond or electronic undertaking without payment of IGST and claim credit of ITC or can supply on payment of IGST or claim refund of taxes paid. Yet another concern on the part of the respondent is that the SEZ is not actually required to make any payment of amount of taxes to the supplier and even if it has so done it, it is required to then recover it through the mode of civil

cases. It is an additional burden on the administration, the respondents authorities to verify whether the supplier has claimed the refund or not and whether the SEZ unit has actually paid the taxes to the supplier. A system since is not geared up for the same, the concern has multiplied. Any inadvertent payment of the amount of taxes to the supplier in wake of thousands of such transactions happening everyday in the SEZ, it is urged that no exceptions be made.

15. We noticed here that while claiming the refund both the times on the part of the petitioner, it has specified that the supplier had not claimed the refund and furthermore, if any such eventuality is noticed, it has taken the responsibility for the refund of amount. This is squarely covered by the decision of this Court in M/s. Britannia Industries versus Union of India (Coram : J.B. Pardiwala,J (as His Lordship then was) and Bhargav Karia,J), where the petitioner unlimited company had filed that petition through their Director and it was situated in SEZ. It filed an application for refund in Form GSTRF3018 with regard to the credit of integrated goods and service tax distributed by the Input Service

Distributor (`ISD' for short) for the services pertaining to the SEZ unit. It was also the case of the petitioner that since it was a SEZ unit making zero rated supplies under the GST, was not in a position to utilize the credit of ITC of IGST from its IST, which remained unutilized in electronic credit ledger and hence, the application to claim such refund was made. The same has been dealt with by the Court extensively. The Court has not upheld the stance of the department that the petitioner would not be entitled to seek the refund of the ITC paid in connection with the goods or services supplied to the SEZ unit. So, the relevant findings and the observations would require reproduction.

16. Paragraph 19 onwards are as under :

> *19. Having heard the learned advocates for the respective parties and having gone through the materials on record, in order to decide as to whether the petitioner is entitled to refund of ITC distributed by ISD, we may refer to the following provisions of law relevant for the purpose of deciding the controversy between the parties :*

Central Goods Service Tax Act,2017

2(61) *"Input Service Distributor" means an office of the supplier of goods or services or both which receives tax invoices issued under section 31 towards the receipt of input services and issues a prescribed document for the purposes of distributing the credit of central tax, State tax, integrated tax or Union territory tax paid on the said services to a supplier of taxable goods or services or both having the same Permanent Account Number as that of the said office;*

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Eligibility and condition for taking input tax credit.

16(1) *Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.*

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

(a) he is in possession of a tax invoice or debit note

issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(b) he has received the goods or services or both.

Explanation.—For the purposes of this clause, it shall be deemed that the registered person has received the goods where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or installments, the registered person shall be entitled to take credit upon receipt of the last lot or installment:

Provided further that where a recipient fails to pay to

the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961 (43 of 1961), the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for

the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

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Refund of tax.

54. (1) Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed:

Provided that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in the return furnished under section 39 in such manner as may be prescribed.

(2) A specialised agency of the United Nations Organisation or any Multilateral Financial Institution and Organisation notified under the United Nations (Privileges and Immunities) Act, 1947 (46 of 1947), Consulate or Embassy of foreign countries or any other person or class of persons, as notified under section 55, entitled to a refund of tax paid by it on inward supplies of goods or services or both, may make an

application for such refund, in such form and manner as may be prescribed, before the expiry of six months from the last day of the quarter in which such supply was received.

(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:

Provided that no refund of unutilised input tax credit shall be allowed in cases other than—

(i) zero-rated supplies made without payment of tax;

(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:

Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both

avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.

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Integrated Goods Service Tax Act,2017

16. (1) *"zero rated supply" means any of the following supplies of goods or services or both, namely:–*

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(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.

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Central Goods Service Tax Rules,2017

Rule 89: Application for Refund of Tax, Interest, Penalty, Fees or any Other Amount (Chapter-X: Refund)

(1) Any person, except the persons covered under notification issued under section 55, claiming refund of any tax, interest, penalty, fees or any other amount paid by him, other than refund of integrated tax paid on goods exported out of India, may file an application

electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that any claim for refund relating to balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49 may be made through the return furnished for the relevant tax period in FORM GSTR-3 or FORM GSTR-4 or FORM GSTR-7, as the case may be:

Provided further that in respect of supplies to a Special Economic Zone unit or a Special Economic Zone developer, the application for refund shall be filed by the–

(a) supplier of goods after such goods have been admitted in full in the Special Economic Zone for authorised operations, as endorsed by the specified officer of the Zone;

(b) supplier of services along with such evidence regarding receipt of services for authorised operations as endorsed by the specified officer of the Zone:

Provided also that in respect of supplies regarded as deemed exports, the application may be filed by, –

(a) the recipient of deemed export supplies; or

(b) the supplier of deemed export supplies in cases where the recipient does not avail of input tax credit on such supplies and furnishes an undertaking to the effect that the supplier may claim the refund.

Provided also that refund of any amount, after adjusting the tax payable by the applicant out of the advance tax deposited by him under section 27 at the time of registration, shall be claimed in the last return required to be furnished by him.

Explanation.– For the purposes of this rule-

(i) in case of refunds referred to in clause (c) of sub-section (8) of section 54, the expression "invoice" means invoice conforming to the provisions contained in section 31;

(ii) where the amount of tax has been recovered from the recipient, it shall be deemed that the incidence of tax has been passed on to the ultimate consumer.

(3) Where the application relates to refund of input tax credit, the electronic credit ledger shall be debited by the applicant by an amount equal to the refund so claimed.

(4) In the case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions

of sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), refund of input tax credit shall be granted as per the following formula –

Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero rated supply of services) x Net ITC ÷ Adjusted Total Turnover

(A) "Refund amount" means the maximum refund that is admissible;

(B) "Net ITC" means input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both;

(C) "Turnover of zero-rated supply of goods" means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both;

(D) "Turnover of zero-rated supply of services" means the value of zero-rated supply of services made without payment of tax under bond or letter of undertaking, calculated in the following manner, namely:-

Zero-rated supply of services is the aggregate of the payments received during the relevant period for zero-rated supply of services and zero-rated supply of services where supply has been completed for which payment had been received in advance in any period prior to the relevant period reduced by advances received for zero-rated supply of services for which the supply of services has not been completed during the relevant period;

(E) Adjusted Total Turnover‖ means the sum total of the value of-

(a) the turnover in a State or a Union territory, as defined under clause (112) of section 2, excluding the turnover of services; and

(b) the turnover of zero-rated supply of services determined in terms of clause (D) above and non-zero-rated supply of services, excluding-

(i) the value of exempt supplies other than zero-rated supplies; and

(ii) the turnover of supplies in respect of which refund is claimed under sub-rule (4A) or sub-rule (4B) or both, if any, during the relevant period.

(F) "Relevant period" means the period for which the claim has been filed.

(4A) In the case of supplies received on which the supplier has availed the benefit of the Government of India, Ministry of Finance, notification No. 48/2017-Central Tax dated the 18th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1305 (E) dated the 18th October, 2017, refund of input tax credit, availed in respect of other inputs or input services used in making zero-rated supply of goods or services or both, shall be granted.

(4B) Where the person claiming refund of unutilised input tax credit on account of zero rated supplies without payment of tax has –

(a) received supplies on which the supplier has availed the benefit of the Government of India, Ministry of Finance, notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1320 (E), dated the 23rd October, 2017 or notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1321(E), dated the 23rd October, 2017; or

(b) availed the benefit of notification No. 78/2017-Customs, dated the 13th October, 2017, published in

the Gazette of India, Extraordinary, Part II, Section 3, Subsection (i), vide number G.S.R 1272(E), dated the 13th October, 2017 or notification No. 79/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1299(E), dated the 13th October, 2017,

the refund of input tax credit, availed in respect of inputs received under the said notifications for export of goods and the input tax credit availed in respect of other inputs or input services to the extent used in making such export of goods, shall be granted.

(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} – tax payable on such inverted rated supply of goods and services.

Explanation:- For the purposes of this sub-rule, the expressions –

(a) "Net ITC" shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under

subrules (4A) or (4B) or both; and

(b) "Adjusted Total turnover" and "relevant period" shall have the same meaning as assigned to them in sub-rule (4)."

20. The above provisions of CGST Act and CGST Rules, have been considered by the coordinate Bench of this Court in case of ***M/s. Amit Cotton Industries****(supra), which would answer the controversy raised in this petition also. Relevant observations made in the said order are 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."

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.

35. In view of the same, the writ-applicant is entitled to claim the refund of the IGST.

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."

21. In facts of the present case, instead of Rule 96 as was applicable in case of ***M/s. Amit Cotton Industries****(supra), Rule 89 would be applicable which is pertaining to refund of the input tax credit. Rule 89 of the CGST Rules provides for procedure for application for refund of tax, interest, penalty, fees and prescribes that in respect of supplies to a SEZ unit, the application for refund has to be filed by*

the supplier of goods or services. The contention of the respondents that as the petitioner is not the supplier of the goods and services, the petitioner would not be entitled to file application for refund is not tenable because in facts of the present case, input service distributor i.e. ISD as defined under section 2(61) of the CGST Act is an office of the supplier of goods and services which receives tax invoices issued under section 31 of the CGST Act towards the receipt of input services and issues a prescribed document for the purpose of distributing the credit of CGST, SGST Or IGST paid on such goods or services. Therefore, in facts of the case, it is not possible for a supplier of goods and services to file a refund application to claim the refund of the input tax credit distributed by ISD. Therefore, the stance of the department that the petitioner is not entitled to seek the refund of the ITC paid in connection with goods or services supplied to SEZ unit is not tenable.

22. This aspect is further fortified by notification no. 28/2012 dated 20th June, 2012 which was in connection with service tax attributable to the services used in more than one unit to be distributed pro-rata on the basis of the turnover during the relevant period of the concerned unit to the sum total of the turnover of all the units and similarly, in facts of the present case also, credit of service tax is distributed to all the units by the ISD and therefore, the claim of refund made by the SEZ unit of the petitioner is

required to be granted.

23. We are of the opinion that in view of the aforesaid decision in case of ***M/s. Amit Cotton Industries****(supra), the petitioner is entitled to claim refund of the IGST lying in the Electronic Credit Ledger as there is no specific supplier who can claim the refund under the provisions of the CGST Act and the CGST Rules as input tax credit is distributed by the input service distributor.*

24. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned order is quashed and set aside. The respondents are directed to process the claim of refund made by the petitioner for unutilized IGST credit lying in Electronic Credit Ledger under section 54 of the CGST Act, 2017. Such exercise shall be completed within three months from the date of receipt of the writ of this order."

16. An attempt is made to distinguish the matter on the facts and particularly, since the petitioner is non-SEZ by pointing out that the one which is decided in M/s Britannia Industries (supra) is in relation to the credit of IGST distributed by ISD for the services pertaining to

the SEZ unit, as it was not possible for a supplier to file refund application to claim the refund of ITC distributed by the ISD. It is also the stand of the department that the matter is pending in the form of SLP No.13431 of 2021 before the Apex Court. It is fairly admitted that no stay has been granted. We noticed that not only this decision but also M/s.IPCA Laboratories versus Commissioner in Special Civil Application No.638 of 2021 covers this issue squarely with a specific undertaking having been tendered along with the application for the refund that the supplier has not claimed any refund and any eventuality of the supplier having been given the refund, the petitioner is taking the responsibility to make good the amount which may have been given will need to be borne in mind and accordingly, this petition is allowed, quashing the order passed by the Commissioner (Appeals) for the period of September, 2018 to December, 2019 and Assistant Commissioner for the period of 2020 to November, 2021 that the respondent grant the refund of ITC to the petitioner after proper verification and by obtaining a specific undertaking / bond from the petitioner where by stating that if the supplier at any point of time has

taken refund and it comes to the notice of the department, then department will be in a position to recover it with interest. Accordingly, it is directed that department shall refund the amount to the petitioner within eight (08) weeks from the date of receipt of copy of this order.

17. This petition is disposed of in above terms.

(SONIA GOKANI, J)

(SANDEEP N. BHATT,J)

SRILATHA