IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 11905 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA **Sd/-**
and
HONOURABLE MR. JUSTICE ILESH J. VORA **Sd/-**

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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

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M/S COMSOL ENERGYPRIVATE LIMITED
Versus
STATE OF GUJARAT

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Appearance:
MR HARDIK P MODH, ADVOCATE for the Petitioner(s) No. 1
for the Respondent(s) No. 2,3
ADVANCE COPY SERVED TO GOVERNMENT PLEADER/PP(99) for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE ILESH J. VORA

Date : 21/12/2020
ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. By this writ-application under Article 226 of the Constitution of India, the writ-applicant has prayed for the following reliefs :

"A) that this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari, or any other appropriate writ, order or direction calling upon the required proceedings in relation to the impugned "Deficiency Memo" in prescribed FORM RFD-03 vide Nos.ZD240720008807J and ZD240720008830U both dated 17.07.2020 (Annexure-F) and after going the legality and propriety thereof, to quash both the impugned deficiency memo dated 17.07.2020 issued by the Respondent No.3;

B) that this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus, or any other appropriate writ, order or direction directing the Respondent to entertain the refund filed in prescribed FORM RFD-01 online portal for the month of February 2018 and March 2018 for an amount of Rs.93.54 lacs along with interest at appropriate rate as deemed fit by this Hon'ble Court;

C) that this Hon'ble Court be pleased to direct the Respondents, by themselves, their servants and agents, pending the hearing and final disposal of the Petition to sanction the refund claim filed in prescribed FORM RFD-01 online portal for the month of February 2018 and March 2018 for an amount of Rs.93.54 lacs along with interest for the period February and March 2018 with such terms and conditions as deemed fit by this Hon'ble Court;

D) grant ad-interim relief in terms of the prayers above;

E) grant costs of the Petition and orders thereon; and

F) grant such further and other reliefs, as this Hon'ble Court may deem fit and proper in the nature and circumstances of the case."

2. The writ-applicant herein filed the refund claims of the Integrated Goods and Services Tax (for short, the 'IGST') paid on the Ocean Freight under the reverse charge mechanism after the decision of this Court in the writ-applicant's own case which was connected with the main petition of Mohit Minerals (Pvt) Ltd. vs. Union of India and others (Special Civil Application No.726 of 2018). This Court, vide Order and Judgment dated 23.01.2019, held that the Notification No.8/2017 – Integrated Tax (Rate) dated 28.06.2017 and the Entry No.10 of the Notification No.10/2017 under the Integrated Tax (Rate) dated 28.06.2017 lack legislative competency and the same were accordingly declared as unconstitutional.

3. Upon filing of the refund claims, the respondent no.3 issued the Deficiency Memo in both the claims separately on an erroneous premise that the refund claims were not filed within the statutory time limit as provided under Section 54 of the CGST Act in as much as Section 54 does not provide separate category for claiming refund of such amount.

4. The writ-applicant has preferred the captioned writ-application on the following grounds :

5. This Court in the writ-applicant's own case vide order dated 23.01.2020 declared the Notification No.8/2017 – Integrated Tax (Rate) dated 28.06.2017 and the Entry No.10 of the Notification No.10/2017 – Integrated Tax (Rate) dated 28.06.2017 ultra vires as they lacked the legislative competency. This Court held that the levy of the IGST under the RCM on the Ocean Freight for the service provided by a person located in a non-taxable territory by way of transportation of goods through vessel from a place outside India to customs frontier of India is unconstitutional.

6. Article 265 of the Constitution of India provides that no tax shall be levied or collected except by authority of law. Since the amount of IGST collected by the Central Government is without authority of law, the Revenue is obliged to refund the amount erroneously collected. In the case of State of Madhya Pradesh and another vs. Bhailal Bhai and others, AIR 1964 SC 1006, a Constitution Bench of the Supreme Court held that, where sales tax, assessed and paid by the dealer, is declared by the competent court to be invalid in law, the payment of tax already made is one under a mistake of law within the meaning of Section 72 of the Contract Act and, therefore, the Government to whom the payment was made by mistake must be repaid. The Supreme Court further held that in that respect the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, has power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realized by the Government without the authority of law.

7. Section 54 of the CGST Act is applicable only for claiming refund of any tax paid under the provisions of the CGST Act and/or the GGST Act. The amount collected by the Revenue without the authority of law is not considered as tax collected by them and, therefore, Section 54 is not applicable. In such circumstances, Section 17 of the Limitation Act is the appropriate provision for claiming the refund of the amount paid to the Revenue under mistake of law, which is as under :

> *"Section 17(1) of the Limitation Act, 1963*
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> *(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,—*
>
> *(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or*
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> *(b) ****
>
> *(c) the suit or application is for relief from the consequences of a mistake; or*
>
> *(d) ***"*

8. This Court, in the case of Binani Cement Ltd. vs. Union of India, reported in 2013 (288) ELT 193 (Guj), held that where the duty is collected without any authority of law, such collection of duty is considered as collected without authority of law and,

therefore, is opposed to Article 265 of the Constitution of India and, thus, unconstitutional. It is held that the assessee is not bound by the limitation prescribed under the special law for claiming the refund of the excess duty or duty collected illegally. The period of limitation prescribed under the Limitation Act would apply. The relevant abstract of the decision at paragraphs nos.23 and 25 are as under :

> *"23) Despite this prima-facie conclusion we have reached, there is a reason why we are inclined to hold that what is collected by the respondents from the petitioners can never be described as a customs duty. We say so because the very levy has been declared to be unauthorized by the Supreme Court in the case of Commissioner of Central Excise & Customs, BhubaneswarI vs. Tata Iron & Steel Co. Ltd. (Supra). The Apex Court held that in absence of any notification under section 7 of the Coal Mines Act, the customs department could not levy any duty from the importers relying solely on the notification issued under section 6 of the Coal Mines Act. Such notification could authorize only collection of additional duty of excise. That being so, the collection of the amount from the petitioners could not take the colour of additional duty of customs either mistakenly or illegally collected. It is a case where the duty was collected without any authority of law. Such collection of duty is not illegal or unlawful or irregularly collected customs duty under the Customs Act, but a duty collected without authority of law and therefore opposed to Article 265 of the Constitution of India and is thus unconstitutional. In that view of the matter, the petitioners cannot be bound*

by the limitation prescribed in the Customs Act, 1962 for claiming refund of excess duty or duty collected illegally. The period of limitation prescribed under the Limitation Act would apply.

25) In the result, the petition is allowed in part. The collection of the duty described as additional duty of customs in purported exercise of powers under section 7 of the Coal Mines Act, is held unlawful. The petitioners shall be entitled to refund of such duty paid only within three years immediately preceding the date of filing of the petition, which happens to be 18.8.2006. Such refund shall be granted to the petitioners with simple interest at the rate of 9% per annum from the date of payment till actual refund, however, only after ascertaining that the burden of such duty was not passed on to consumer or any other person."

9. Similar situation arose in the case of Joshi Technology International vs. Union of India, reported in 2016 (339) ELT 21 (Guj), wherein this Court held that the statutory time limit provided under Section 11B of the Central Excise Act is not applicable to the claim of refund of duty paid under mistake as the same was paid under mistake of law and, therefore, such claim is considered as outside purview of enactment. It was held that general provisions provided under the Limitation Act is applicable to claim refund of such duty. The relevant paragraphs of the decision are given as under :

"14.4 Thus, in view of the principles enunciated by the Supreme Court in Salonah Tea Co. Ltd. v. Superintendent of

Taxes, Nowgong (supra), in case where money is paid by mistake, the period of limitation prescribed is three years from the date when the mistake was known. Besides, section 17 of the Limitation Act inter alia provides that when a suit or application is for relief from the consequences of a mistake, the period of limitation would not begin to run until the plaintiff or applicant has discovered the mistake, or could, with reasonable diligence, have discovered it. Therefore, in case where money is paid under a mistake, the limitation would begin to run only when the applicant comes to know of such mistake or with reasonable diligence could have discovered such mistake. Adverting to the case at hand, the mistake is in the nature of a mistake of law. It appears that the legal position was not clear and hence, pursuant to representations made by the trade and field formations, the CBEC was required to issue the circular dated 07.01.2014 clarifying the issue. As noticed earlier, the petitioner had all along, right from July 2004 been paying Education Cess and subsequently, from the year 2007 was paying Secondary and Higher Secondary Education Cess, till April 2014. It was only when the Circular dated 07.01.2014 came to be issued by the CBEC, clarifying the issue, that the petitioner came to know about its mistake. Considering the nature of the mistake and the fact that the issue was not free from doubt till the above circular came to be issued by the CBEC, it also cannot be said that the petitioner could with reasonable diligence have discovered the mistake. It appears that it is only sometime after the Education Cess and Secondary and Higher Secondary Education Cess came to be paid for the month of April 2014

that the petitioner came to know about its mistake and in July 2014, it filed the application for refund before the second respondent. Since the period of limitation begins to run only from the time when the applicant comes to know of the mistake, the application made by the petitioner was well within the prescribed period of limitation. Moreover, as discussed hereinabove, the retention of the Education Cess and Secondary and Higher Secondary Education Cess by the respondents is without authority of law and hence, in the light of the decision of this court in Swastik Sanitarywares Ltd. v. Union of India (supra), the question of applying the limitation prescribed under section 11B of the CE Act would not arise.

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TO SUMMARISE:-

- Merely because the provisions of the Central Excise Act, 1944 and the rules framed thereunder for collection and refund viz., the machinery provisions have been incorporated in the OID Act for collection and refund of the cess levied thereunder, it cannot be inferred that the Oil Cess imposed under the provisions of the OID Act assumes the character of central excise duty. The finding recorded by the adjudicating authority that the Oil Cess is in the nature of excise duty, is erroneous and contrary to the law laid down by this court in Commissioner v. Sahakari Khand Udyog Mandli Ltd. (supra).

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- *In the facts of the present case, the refund is claimed on the ground that the amount was paid under a mistake of law and such claim being outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. The petitioner was, therefore, justified in filing the present petition before this court against the order passed by the adjudicating authority rejecting its claim for refund of the amount paid under a mistake.*

- *Since Oil Cess is not a duty of excise, the amount paid by the petitioner by way of Education Cess and Secondary and Higher Secondary Education Cess, cannot in any manner be said to be a duty of excise inasmuch as what was paid by the petitioner was not a duty of excise calculated on the aggregate of all the duties of excise as envisaged under the provisions of section 93 of the Finance Act, 2004 and section 138 of the Finance Act, 2007. Thus, the amount paid by the petitioner would not take the character of Education Cess and Secondary and Higher Secondary Education Cess but is simply an amount paid under a mistake of law. The provisions of section 11B of the Central Excise Act, 1944 would, therefore, not be applicable to an application seeking refund thereof. The petitioner was therefore, wholly justified in making the application for refund under a mistake of law and not under section 11B of the Central Excise Act, 1944.*

- *Since the provisions of section 11B of the Act are not applicable to the claim of refund made by the petitioner, the limitation prescribed under the said provision would also not be applicable and the general provisions under the Limitation Act, 1963 would be applicable. Section 17 of the Limitation Act inter alia provides that when a suit or application is for relief from the consequences of a mistake, the period of limitation would not begin to run until the plaintiff or applicant has discovered the mistake, or could, with reasonable diligence, have discovered it. Since the period of limitation begins to run only from the time when the applicant comes to know of the mistake, the application made by the petitioner was well within the prescribed period of limitation. Moreover, since the very retention of the Education Cess and Secondary and Higher Secondary Education Cess by the respondents is without authority of law, in the light of the decision of this court in Swastik Sanitarywares Ltd. v. Union of India (supra), the question of applying the limitation prescribed under section 11B of the CE Act would not arise.*

- *Even in case where any amount is paid by way of self assessment, in the event any amount has been paid by mistake or through ignorance, it is always open to the assessee to bring it to the notice of the authority concerned and claim refund of the amount wrongly paid. The authority concerned is also duty bound to refund such amount as retention of such amount would be hit by Article 265 of the Constitution of India which mandates that no tax shall be*

levied or collected except by authority of law. Since the Education Cess and Secondary and Higher Secondary Education Cess collected from the petitioner is not backed by any authority of law, in view of the provisions of Article 265 of the Constitution, the respondents have no authority to retain the same."

10. Similarly, in the case of 3E Infotech Ltd. vs. CESTAT, reported in 2018(18) GSTL 410 (Mad.), the Madras High Court held that the service tax paid under mistake of law is to be returned to the assessee irrespective of the period covered under the refund application. It was held that refusing to return the amount would go against the mandate of Article 265 of the Constitution of India. The relevant paragraphs of the decision are as under :

"12. Further, the claim of the respondent in refusing to return the amount would go against the mandate of Article 265 of the Constitution of India, which provides that no tax shall be levied or collected except by authority of law.

13. On an analysis of the precedents cited above, we are of the opinion, that when service tax is paid by mistake a claim for refund cannot be barred by limitation, merely because the period of limitation under Section 11B had expired. Such a position would be contrary to the law laid down by the Hon'ble Apex Court, and therefore we have no hesitation in holding that the claim of the Assessee for a sum of Rs.4,39,683/- cannot be barred by limitation, and ought to be refunded.

14. There is no doubt in our minds, that if the Revenue is allowed to keep the excess service tax paid, it would not be proper, and against the tenets of Article 265 of the Constitution of India. On the facts and circumstances of this case, we deem it appropriate to pass the following directions:-

a) The Application under Section 11B cannot be rejected on the ground that is bared by limitation, provided for under Section.

b) The claim for return of money must be considered by the authorities."

11. The issue is squarely covered by the decision of this Court in the case of Gokul Agro Resources Ltd. vs. Union of India (Special Civil Application No.1758 of 2020, decided on 26.02.2020), wherein this Court directed the respondent to pass an appropriate order in the refund application preferred by the assessee without raising any technical issue, within a period of four weeks. The relevant paragraph of the finding of this Hon'ble Court is as under :

"6 We may only say that since the Notification has been struck down as ultra vires, as a consequence of the same, the writ applicant seeks refund of the amount paid towards the IGST. However, for this purpose, the writ applicant will have to prefer an appropriate application addressed to the competent authority. If any such application is preferred for

the refund of the amount, the authority concerned shall immediately look into the same and pass an appropriate order in accordance with law keeping in mind the decision of this Court rendered in the case of Mohit Minerals (supra). The competent authority shall not raise any technical issue with regard to the claim for refund of the IGST amount. Let this exercise be undertaken within a period of four weeks from the date of receipt of the writ of this order."

12. Similarly, this Court, in the case of Bharat Oman Refineries Ltd. vs. Union of India (Special Civil Application No.8881 of 2020, decided on 18.8.2020) directed the respondent to sanction the refund of the IGST paid by the assessee pursuant to the Entry No.10 of the Notification No.10/2017-IGST dated 28.06.2017 declared to be ultra vires in the case of Mohit Minerals Pvt. Ltd. (supra).

13. In view of the aforesaid, this writ-application succeeds and is hereby allowed. The deficiency memo issued in the prescribed form RFD-03 vide Nos.ZD240720008807J and ZD240720008830U both dated 17.07.2020 are hereby quashed and set-aside.

14. The respondent is directed to process the refund claim filed in the prescribed form RFD-01 online portal for the month of February 2018 and March 2018 for an amount of Rs.93.54 lakh along with simple interest at the rate of 6% per annum.

15. Let this exercise be undertaken at the earliest and completed by 17th August 2021.

16. The writ-application stands disposed of.

(J. B. PARDIWALA, J.)

(ILESH J. VORA, J.)

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