IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 15833 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
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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COSMO FILMS LIMITED
Versus
UNION OF INDIA & 3 other(s)

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Appearance:
MR. ABHISHEK RASTOGI WITH MR. PRATUSH SAHA WITH MR. MR NACHIKET A DAVE(5308) FOR THE PETITIONER(S) NO. 1
MR NIRZAR S DESAI(2117) for the Respondent(s) No. 1,3,4
NOTICE SERVED(4) for the Respondent(s) No. 2

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 20/10 / 2020

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. **Rule** returnable forthwith. The Learned Standing Counsel Mr. Nirzar Desai waived service of notice of rule on behalf of the respondent nos. 1, 3 and 4.

2. Having regard to the controversy raised in this petition in narrow compass, with the consent of the learned advocates for the respective parties, the same is taken up for final hearing .

3. By this petition, under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs:

> *"a) this Hon'ble Court may be pleased to issue an appropriate writ, order or direction quashing and setting aside the amendments in sub-rule (10) of Rule 96 of the CGST Rules and GGST Rules substituted vide Notification Number 54/2018-Central Tax, dated 9 October 2018 and Notification No.54/2018-State Tax, No. (GHN -99) / GSTR-2018(33)TH, dated 9 October 2018, to the extent it denies the option of rebate claim to the Petitioner for importing goods under AA License, as being ultra vires of the CGST Act, GGST Act and Rules made thereunder and the Constitution;*
>
> *b) this Hon'ble Court may be pleased to issue a writ, order or direction staying any demand against Rebate benefits availed by the Petitioner due to retrospective*

operation of the impugned Notifications on Rule 96(10) of the CGST and the GGST Rules;

c) this such further and other reliefs be granted as this Hon'ble Court may deem fit and proper."

4. The short facts of the case are as under:

4.1. The petitioner is a public limited company engaged in the business of manufacturing and sale of flexible packaging films. The petition is filed through its Director and Authorized person Mr. Anil Kumar Jain.

4.2. The petitioner is the holder of Advance Authorization Licenses (for short 'the AA License') granted in terms of the Foreign Trade Policy, issued and amended from time to time.

4.3. The petitioner has obtained AA Licenses and imports goods without payment of import duty in terms of Notification No. 79/2017-Customs, dated 13th October 2017. It is the case of the petitioner that, with effect from 1st July 2017, the Central Goods and Service Tax Act,2017 (for short 'the CGST Act') and the Gujarat Goods and Services Tax Act, 2017 (for short 'the GGST Act') are enacted for indirect tax on goods and services. The provisions with respect to export

of goods or services are contained under the Integrated Goods and Services Tax Act, 2017 (for short 'the IGST Act'). Section 16 of the IGST Act deals with export of goods and services and provides benefits against the export of goods or services which can be claimed through either, (a) supply without payment of IGST and claim refund of unutilized input tax credit at the end of the period ("Refund") and (b) Supply on payment of IGST and claim refund of such IGST paid ("Rebate").

4.4. For the purpose of procedure for granting refund of IGST on the goods and services exported out of India, Rule-96 of the Central Goods and Services Tax Rules, 2017 (for short 'the CGST Rules') provides the mechanism, as per the procedure prescribed under Section 54 of the CGST Act and GGST Act. Sub-rule (10) of Rule-96 of the CGST Rules was introduced vide para-3 of Notification No. 54/2018-Central Tax, dated 9th October 2018 issued by the respondent no.1- the Ministry of Finance w.e.f. 23rd October 2017 and corresponding provisions were also introduced in the GGST Rules by the respondent no.2- State of Gujarat.

4.5. Sub-rule (10) of Rule-96 of CGST Rules was

inserted w.e.f. 23.10.2017 vide NN 03/2018 CT dated 23.01.2018

inserted by the Central Goods and Service Tax (3rd Amendment) Rules, 2017 w.e.f. 1st July 2017. Sub-rule (10) provides for the exemption for AA license holders importing goods from levy of custom duties and IGST.

4.6. The petitioner was entitled to import raw materials without payment of IGST under AA Licenses and pay IGST on exports and claim Rebate (Refund) of the IGST so paid on exports. The petitioner has received benefits of rebate of IGST at the relevant point of time. Thereafter, sub-rule (10) of Rule-96 of the CGST Rules was amended by Notification dated 4th September, 2018 with retrospective effect from 23rd October, 2017, providing that rebate on exports cannot be availed by the petitioner, if the inputs procured by the petitioner have enjoyed AA benefits or Deemed Export Benefits under the said notification. Therefore, the petitioner was unable to utilize the benefit of duty-free imports under AA Licenses and take the benefit of rebate on exports, because of the amendments made in Rule-96(10) of CGST Rules. It appears that, thereafter, by Notification No. 53/2018-Central Tax dated 9th October 2018, sub-clause (a) and (b) of sub-rule 10 of Rule 96 of the CGST Rules were merged. Thereafter, vide Notification No.

54/2018-Central Tax dated 9th October 2018, the sub-rule 10 of Rule 96 of the CGST Rules was again de-merged and "with effect from 23rd October, 2017" thereby indicating that Notification No. 54/2018-Central Tax do not intend to apply the amendment to Rule-96(10) of the CGST Rules retrospectively. The petitioner has therefore preferred this petition challenging the aforesaid notifications and amendments made in sub-rule 10 of Rule-96 of the CGST Rules, by Notification No. 54/2018 denying the option to claim rebate to the petitioner for importing goods under AA Licenses being ultra-vires the provisions of the CGST Act and the CGST Rules made there under and Article 14 of the Constitution of India.

5. It would therefore be necessary to refer to the relevant provisions of the CGST Act , IGST Act and CGST Rules which have been amended by the impugned notifications as under:

5.1. Section 16 of the IGST Act, 2017 read as under:

"SECTION 16 : Zero rated supply

(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."

5.2. Section 54 of the IGST Act, 2017 read as under:

"CHAPTER XI

REFUNDS

Section 54 - Refund of tax

(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, 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.

(4) The application shall be accompanied

by—

(a) such documentary evidence as may be prescribed to establish that a refund is due to the applicant; and

(b) such documentary or other evidence (including the documents referred to in section 33) as the applicant may furnish to establish that the amount of tax and interest, if any, paid on such tax or any other amount paid in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such tax and interest had not been passed on to any other person:

Provided that where the amount claimed as refund is less than two lakh rupees, it shall not be necessary for the applicant to furnish any documentary and other evidences but he may file a declaration, based on the documentary or other evidences available with him, certifying that the incidence of such tax and interest had not been passed on to any other person.

(5) 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 shall be credited to the Fund referred to in section 57.

(6) Notwithstanding anything contained in sub-section (5), the proper officer may, in the case of any claim for refund

on account of zero-rated supply of goods or services or both made by registered persons, other than such category of registered persons as may be notified by the Government on the recommendations of the Council, refund on a provisional basis, ninety per cent. of the total amount so claimed, excluding the amount of input tax credit provisionally accepted, in such manner and subject to such conditions, limitations and safeguards as may be prescribed and thereafter make an order under sub-section (5) for final settlement of the refund claim after due verification of documents furnished by the applicant.

(7) The proper officer shall issue the order under sub-section (5) within sixty days from the date of receipt of application complete in all respects.

(8) Notwithstanding anything contained in sub-section (5), the refundable amount shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to—

(a) refund of tax paid on export exports of goods or services or both or on inputs or input services used in making such zero-rated supplies;

(b) refund of unutilised input tax credit under sub-section (3);

(c) refund of tax paid on a supply which is not provided, either wholly or partially, and for which invoice has not

been issued, or where a refund voucher has been issued;

(d) refund of tax in pursuance of section 77;

(e) the tax and interest, if any, or any other amount paid by the applicant, if he had not passed on the incidence of such tax and interest to any other person; or

(f) the tax or interest borne by such other class of applicants as the Government may, on the recommendations of the Council, by notification, specify.

(9) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provisions of this Act or the rules made thereunder or in any other law for the time being in force, no refund shall be made except in accordance with the provisions of sub-section (8).

(10) Where any refund is due under sub-section (3) to a registered person who has defaulted in furnishing any return or who is required to pay any tax, interest or penalty, which has not been stayed by any court, Tribunal or Appellate Authority by the specified date, the proper officer may—

(a) withhold payment of refund due until the said person has furnished the return or paid the tax, interest or penalty, as the case may be;

(b) deduct from the refund due, any tax, interest, penalty, fee or any other amount which the taxable person is liable to pay but which remains unpaid under this Act or under the existing law. Explanation.––For the purposes of this sub-section, the expression "specified date" shall mean the last date for filing an appeal under this Act.

(11) Where an order giving rise to a refund is the subject matter of an appeal or further proceedings or where any other proceedings under this Act is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue in the said appeal or other proceedings on account of malfeasance or fraud committed, he may, after giving the taxable person an opportunity of being heard, withhold the refund till such time as he may determine.

(12) Where a refund is withheld under sub-section (11), the taxable person shall, notwithstanding anything contained in section 56, be entitled to interest at such rate not exceeding six per cent. as may be notified on the recommendations of the Council, if as a result of the appeal or further proceedings he becomes entitled to refund.

(13) Notwithstanding anything to the contrary contained in this section, the amount of advance tax deposited by a casual taxable person or a non-resident taxable person under sub-section (2) of section 27, shall not be refunded unless such person has, in respect of the entire period for which the certificate of registration granted to him had remained in force, furnished all the returns required under section 39.

(14) Notwithstanding anything contained in this section, no refund under sub-section (5) or sub-section (6) shall be paid to an applicant, if the amount is less than one thousand rupees.

Explanation.—For the purposes of this section,——

(1) "refund" includes refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, or refund of tax on the supply of goods regarded as deemed exports, or refund of unutilised input tax credit as provided under sub-section (3).

(2) "relevant date" means—

(a) in the case of goods exported out of India where a refund of tax paid is available in respect of goods themselves or, as the case may be, the inputs or input services used in such goods,——

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India; or

(ii) if the goods are exported by land, the date on which such goods pass the frontier; or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of supply of goods regarded as deemed exports where a refund of tax paid is available in respect of the goods, the date on which the return relating to such deemed exports is furnished;

(c) in the case of services exported out of India where a refund of tax paid is available in respect of services themselves or, as the case may be, the inputs or input services used in such services, the date of——

(i) receipt of payment in convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India, where the supply of services had been completed prior to the receipt of such payment; or

(ii) issue of invoice, where payment for the services had been received in advance prior to the date of issue of

the invoice;

(d) in case where the tax becomes refundable as a consequence of judgment, decree, order or direction of the Appellate Authority, Appellate Tribunal or any court, the date of communication of such judgment, decree, order or direction;

(e) in the case of refund of unutilised input tax credit under clause (ii) of the first proviso to sub-section (3), the due date for furnishing of return under section 39 for the period in which such claim for refund arises;

(f) in the case where tax is paid provisionally under this Act or the rules made thereunder, the date of adjustment of tax after the final assessment thereof;

(g) in the case of a person, other than the supplier, the date of receipt of goods or services or both by such person; and

(h) in any other case, the date of payment of tax. Refund in certain cases."

5.3. Rule-96 of the CGST Rules read as under:

*"**Rule -96**, Refund of integrated tax paid on goods [or services] exported out of India 96.(1) The shipping bill filed by [an exporter of goods] shall be deemed to be*

an application for refund of integrated tax paid on the goods exported out of India and such application shall be deemed to have been filed only when:-

(a) the person in charge of the conveyance carrying the export goods duly files [a departure manifest or] an export manifest or an export report covering the number and the date of shipping bills or bills of export; and

(b) the applicant has furnished a valid return in FORM GSTR-3 [or FORM GSTR-3B, as the case may be].

(2) The details of the [relevant export invoices in respect of export of goods] contained in FORM GSTR-1 shall be transmitted electronically by the common portal to the system designated by the Customs and the said system shall electronically transmit to the common portal, a confirmation that the goods covered by the said invoices have been exported out of India:

[Provided that where the date for furnishing the details of outward supplies in FORM GSTR-1 for a tax period has been extended in exercise of the powers conferred under section 37 of the Act, the supplier shall furnish the information relating to exports as specified in Table 6A of FORM GSTR-1 after the return in FORM GSTR-3B has been furnished and the same shall be transmitted electronically by the common portal to the system designated by the Customs:

Provided further that the information in Table 6A furnished under the first proviso shall be auto-drafted in FORM GSTR-1 for the said tax period.]

(3) Upon the receipt of the information regarding the furnishing of a valid return in FORM GSTR-3 [or FORM GSTR-3B,

as the case may be] from the common portal, [the system designated by the Customs or the proper officer of Customs, as the case may be, shall process the claim of refund in respect of export of goods] and an amount equal to the integrated tax paid in respect of each shipping bill or bill of export shall be electronically credited to the bank account of the applicant mentioned in his registration particulars and as intimated to the Customs authorities.

(4) The claim for refund shall be withheld where,-

(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 sub-section (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.

(5) Where refund is withheld in accordance with the provisions of clause (a) of sub-rule (4), the proper officer of integrated tax at the Customs station shall intimate the applicant and the jurisdictional Commissioner of central tax, State tax or Union territory tax, as the case may be, and a copy of such intimation shall be transmitted to the common portal.

(6) Upon transmission of the intimation under sub-rule (5), the proper officer of central tax or State tax or Union territory tax, as the case may be, shall pass an order in Part B of FORM GST RFD-07.

(7) Where the applicant becomes entitled to refund of the amount withheld under

clause (a) of sub-rule (4), the concerned jurisdictional officer of central tax, State tax or Union territory tax, as the case may be, shall proceed to refund the amount after passing an order in FORM GST RFD-06.

(8) The Central Government may pay refund of the integrated tax to the Government of Bhutan on the exports to Bhutan for such class of goods as may be notified in this behalf and where such refund is paid to the Government of Bhutan, the exporter shall not be paid any refund of the integrated tax.

[(9) The application for refund of integrated tax paid on the services exported out of India shall be filed in FORM GST RFD-01 and shall be dealt with in accordance with the provisions of rule 89.

[(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have -

(a) received supplies on which 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 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme or 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 has been availed; or

(b) availed the benefit under notification No. 78/2017-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. 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 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme.]"

5.4. Notification No. 40 of 2017-C.T. (Rate) dated 23-Oct-2017 read as under:

Merchant exporter

"Reduced CGST Rates prescribed for supply of taxable goods by a registered supplier to a registered recipient for export subject to specified conditions.

In exercise of the powers conferred by sub-section (1) of section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereafter in this notification referred to as "the said Act"), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby exempts the intra-State supply of taxable goods (hereafter in this notification referred to as "the said goods") by a registered supplier to a

registered recipient for export, from so much of the central tax leviable thereon under section 9 of the said Act, as is in excess of the amount calculated at the rate of 0.05 per cent., subject to fulfillment of the following conditions, namely :-

(i) the registered supplier shall supply the goods to the registered recipient on a tax invoice;

(ii) the registered recipient shall export the said goods within a period of ninety days from the date of issue of a tax invoice by the registered supplier;

(iii) the registered recipient shall indicate the Goods and Services Tax Identification Number of the registered supplier and the tax invoice number issued by the registered supplier in respect of the said goods in the shipping bill or bill of export, as the case may be;

(iv) the registered recipient shall be registered with an Export Promotion Council or a Commodity Board recognized by the Department of Commerce;

(v) The registered recipient shall place an order on registered supplier for procuring goods at concessional rate and a copy of the same shall also be provided to the jurisdictional tax officer of the registered supplier;

(vi) the registered recipient shall move the said goods from place of registered supplier –

(a) directly to the Port, Inland Container Deport, Airport or Land

Customs Station from where the said goods are to be exported; or

(b) directly to a registered warehouse from where the said goods shall be move to the Port, Inland Container Depot, Airport or Land Customs Station from where the said goods are to be exported;

(vii) if the registered recipient intends to aggregate supplies from multiple registered suppliers and then export, the goods from each registered supplier shall move to a registered warehouse and after aggregation, the registered recipient shall move goods to the Port, Inland Container Deport, Airport or Land Customs Station from where they shall be exported;

(viii) in case of situation referred to in condition (vii), the registered recipient shall endorse receipt of goods on the tax invoice and also obtain acknowledgement of receipt of goods in the registered warehouse from the warehouse operator and the endorsed tax invoice and the acknowledgment of the warehouse operator shall be provided to the registered supplier as well as to the jurisdictional tax officer of such supplier; and

(ix) when goods have been exported, the registered recipient shall provide copy of shipping bill or bill of export containing details of Goods and Services Tax Identification Number (GSTIN) and tax invoice of the registered supplier along with proof of export general manifest or export report having been filed to the registered supplier as well as jurisdictional tax officer of such supplier.

2. The registered supplier shall not be eligible for the above mentioned exemption if the registered recipient fails to export the said goods within a period of ninety days from the date of issue of tax invoice."

5.5. Notification No. 41/2017-INTEGRATED TAX (RATE) reads as under:

"INTEGRATED TAX (RATE)

SECTION 6 OF THE INTEGRATED GOODS AND SERVICES TAX ACT, 2017 — POWER TO GRANT EXEMPTION — EXEMPTION TO INTER-STATE SUPPLY OF TAXABLE GOODS BY A REGISTERED SUPPLIER TO A REGISTERED RECEIPT FOR EXPORT, FROM SO MUCH OF INTEGRATED TAX LEVIABLE THEREON UNDER SECTION 5, AS IS IN EXCESS OF AMOUNT CALCULATED AT RATE OF 0.1 PER CENT

NOTIFICATION NO.41/2017-INTEGRATED TAX (RATE), DATED 23-10-2017

In exercise of the powers conferred by sub-section (1) of section 6 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), (hereafter in this notification referred to as "the said Act"), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby exempts the inter-State supply of taxable goods (hereafter in this notification referred to as "the said goods") by a registered supplier to a registered recipient for export, from so much of the integrated tax leviable thereon under

section 5 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), as is in excess of the amount calculated at the rate of 0.1 per cent, subject to fulfilment of the following conditions, namely:-

(i) the registered supplier shall supply the goods to the registered recipient on a tax invoice;
(ii) the registered recipient shall export the said goods within a period of ninety days from the date of issue of a tax invoice by the registered supplier;
(iii) the registered recipient shall indicate the Goods and Services Tax Identification Number of the registered supplier and the tax invoice number issued by the registered supplier in respect of the said goods in the shipping bill or bill of export, as the case may be;
(iv) the registered recipient shall be registered with an Export Promotion Council or a Commodity Board recognised by the Department of Commerce;
(v) the registered recipient shall place an order on registered supplier for procuring goods at concessional rate and a copy of the same shall also be provided to the jurisdictional tax officer of the registered supplier;
(vi) the registered recipient shall move the said goods from place of registered supplier-

(a) directly to the Port, Inland Container Deport, Airport or Land Customs Station from where the said goods are to be exported; or

(b) directly to a registered warehouse from where the said goods shall be move to the Port, Inland Container

Deport, Airport or Land Customs Station from where the said goods are to be exported;

(vii) if the registered recipient intends to aggregate supplies from multiple registered suppliers and then export, the goods from each registered supplier shall move to a registered warehouse and after aggregation, the registered recipient shall move goods to the Port, Inland Container Deport, Airport or Land Customs Station from where they shall be exported;

(viii) in case of situation referred to in condition (vii), the registered recipient shall endorse receipt of goods on the tax invoice and also obtain acknowledgement of receipt of goods in the registered warehouse from the warehouse operator and the endorsed tax invoice and the acknowledgement of the warehouse operator shall be provided to the registered supplier as well as to the jurisdictional tax officer of such supplier; and

(ix) when goods have been exported, the registered recipient shall provide copy of shipping bill or bill of export containing details of Goods and Services Tax Identification Number (GSTIN) and tax invoice of the registered supplier along with proof of export general manifest or export report having been filed to the registered supplier as well as jurisdictional tax officer of such supplier.

2. The registered supplier shall not be eligible for the above mentioned exemption if the registered recipient fails to export the said goods within a period of ninety days from the date of

issue of tax invoice."

5.6. Notification No. 48/2017-C.T. dated 18-Oct-2017 reads as under:

"Deemed Exports – Supply of goods against advance authorization, EPCG or supply to EOU or by Banks/PSUs against advance authorization notified as deemed exports.

In exercise of the powers conferred by section 147 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, hereby notifies the supplies of goods listed in column (2) of the Table below as deemed exports, namely :-

TABLE

Sr. No.	**Description of supply**
(1)	(2)
1	Supply of goods by a registered person against Advance Authorisation
2	Supply of capital goods by a registered person against Export Promotion Capital Goods Authorisation
3	Supply of goods by a registered person to Export Oriented Unit
4	Supply of gold by a bank or Public Sector Undertaking specified in the notification No. 50/2017-Customs, dated the 30thJune, 2017 (as amended) against Advance Authorisation.

Explanation -

For the purposes of this notification, -

1. *"Advance Authorisation" means an authorisation issued by the Director General of Foreign Trade under Chapter 4 of the Foreign Trade Policy 2015-20 for import or domestic procurement of inputs on pre-import basis for physical exports.*
2. *Export Promotion Capital Goods Authorisation means an authorisation issued by the Director General of Foreign Trade under Chapter 5 of the Foreign Trade Policy 2015-20 for import of capital goods for physical exports.*
3. *"Export Oriented Unit" means an Export Oriented Unit or Electronic Hardware Technology Park Unit or Software Technology Park Unit or Bio-Technology Park Unit approved in accordance with the provisions of Chapter 6 of the Foreign Trade Policy, 2015-20."*

5.7. Notification No. 3/2018-C.T. dated 23-Jan-2018 read as under:

"….

(x) with effect from 23rd October, 2017, in rule 96,

(a) in sub-rule (1), for the words "an exporter", the words "an exporter of goods" shall be substituted;

(b) in sub-rule (2), for the words "relevant export invoices", the words "relevant export invoices in respect of

export of goods" shall be substituted;

(c) in sub-rule (3), for the words "the system designated by the Customs shall process the claim for refund", the words "the system designated by the Customs or the proper officer of Customs, as the case may be, shall process the claim of refund in respect of export of goods" shall be substituted;

(d) for sub-rule (9), the following sub-rules shall be substituted, namely :-

"(9) The application for refund of integrated tax paid on the services exported out of India shall be filed in ***FORM GST RFD-01*** *and shall be dealt with in accordance with the provisions of rule 89".*

(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have received supplies 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 or notification No.40/2017-Central Tax (Rate), 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 notification No.78/2017-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. 1272(E), dated the 13th October, 2017 or notification No.79/2017-Customs Tax, 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."

5.8. Notification No. 39/2018-C.T. dated 04-Sep-2018 reads as under:

"….
6. In the said rules, with effect from the 23rd October, 2017, in rule 96, for sub-rule (10), the following sub-rule shall be substituted, namely :-

"(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have -

(a) received supplies on which 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 or 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 has been availed; or

(b) availed the benefit under notification No.78/2017-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. 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."

5.9. Notification No.53/2018-C.T. dated 09-Oct-2018 reads as under:

"Central Goods and Services Tax Rules, 2018 – Eleventh Amendment of 2018

In exercise of the powers conferred by section 164 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government hereby makes the following rules further to amend the Central Goods and Services Tax Rules, 2017, namely :-

1. (1) These rules may be called the Central Goods and Services Tax (Eleventh Amendment) Rules, 2018.

(2) They shall be deemed to have come into force with effect from the 23rd October, 2017.

2. In the Central Goods and Services Tax Rules, 2017, in rule 96, for sub-rule (10), the following sub-rule shall be substituted and shall be deemed to have been substituted with effect from the 23rd October, 2017, namely :-

> *"(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have received supplies 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 or 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 notification No. 78/2017-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. 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."

5.10. Notification No.54/2018-C.T.-dated 09-Oct-2018 reads as under:

"Central Goods and Service Tax Rules, 2017-Twelfth Amendment of 2018.

In exercise of the powers conferred by Section 164 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government thereby makes the following rules further to amend the Central Goods and Services Tax Rules, 2017, namely:

1. (1) These rules may be called the Central Goods and Services Tax (Twelfth Amendment) Rules, 2018.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the said rules), in rule 89, for sub-rule (4B), the following sub-rule shall be substituted, namely:-

"(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, Sub-section (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.".

3. In the said rules, in rule 96, for sub-rule (10), the following sub-rule shall be substituted, namely:-

"(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have -

(a) received supplies on which 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 except so far it

relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme or 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 has been availed; or

(b) availed the benefit under notification No. 78/2017-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 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 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme."

6.1. The learned advocate Mr. Abhishek Rastogi appearing with the learned advocate Mr. Nachiket Dave for the petitioner submitted that

as per the amended Rule-96 (10) of the CGST Rules, the petitioner is not entitled to get rebate benefits under Section 16(3)(b) of the IGST Act in view of the amendment w.e.f. 23rd October 2017 where the petitioner has availed the benefit of upfront IGST exemption on imports against AA Licenses, as conferred upon the petitioner through Notification No. 79/2017-Customs dated 13th October, 2017.

6.2. It was submitted that the Domestic Tariff Area (for short 'DTA') suppliers of the petitioner may avail Deemed Export Benefits and claim refund of input taxes, if they supply goods to the petitioner who holds AA License under Notification No. 48 of 2017 dated 18th October, 2017, but the petitioner is denied the benefits under rebate mode under Rule 96 (10) as amended by the impugned Notification No. 54 of 2018 w.e.f. 23rd October 2017, if the suppliers of the petitioner avails Deemed Export benefits while supplying materials to the petitioner from DTA.

6.3. Mr. Rastogi further submitted that, till 23rd October 2017, the petitioner was eligible to opt for the rebate of IGST paid on exports without any restriction, however, w.e.f. 23rd October 2017, on account of the amendment in Rule

96(10) , the petitioner is not able to avail export benefits under the rebate, if the petitioner imported goods under AA Licenses issued prior to 23rd October 2017.

6.4. The learned advocate Mr. Rastogi therefore submitted that the action of the respondents suffers from the vices of excessive delegation by the impugned notifications denying the benefit of 'Zero-rated' exports conferred upon the petitioner through Section 16(3)(b) of the CGST Act by imposing arbitrary restrictions upon the petitioner, so that they are unable to claim rebate benefits from the Government.

6.5. It was submitted that the petitioner is entitled to rebate of IGST on exports under Section 16 of the IGST Act r/w. Section 54 of the CGST Act, as the benefits against the export of goods can be claimed after payment of IGST on exports and claim refund of such IGST paid under the rebate mode, as provided under Section 54 of the CGST Act and the CGST Rules. It was submitted that neither Section 16 of the IGST Act nor Section 54 of the CGST Act prescribes any power to issue impugned notifications, so as to deny the impact of zero-rating exports for granting benefits of rebate under Section 16 of the IGST

Act, so as to nullify the benefits under the Advance Authorization Scheme availed by the exporters, like the petitioner.

6.6. It was submitted that in view of the impugned notifications, the petitioner is put at a disadvantageous position against regular exporters who are exporting goods without payment of IGST on the output side and at the same time, claiming refund of input taxes on the input side thereby effectively incurring no tax cost either on the input side i.e. on procurements or on the output side i.e. on exports in terms of Section 16 of the IGST Act, whereas, only because the petitioner has availed the benefit under Advance Authorization Scheme, in view of amended Rule -96(10) of the CGST Rules, the petitioner is denied the benefit of IGST refund /rebate on the output side i.e. export.

ARTICLE 14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

6.7. Mr. Rastogi submitted that the petitioner is discriminated qua others who have not availed the benefits of the Advance Authorization Scheme, which would result in violation of Article 14 of the Constitution of India, as the regular exporters are able to avail the option of rebate and recover rebate for accumulated input tax credit balance. It was

submitted that, AA License holders or regular exporters earn foreign exchange for the country and boost the economy of the nation and therefore, there should not be any reasonable classification by subjecting the petitioner to different tax treatments.

6.8. It was submitted that, there is no case of reasonable classification for the exporters who have availed the benefit of AA License because there is no nexus which is sought to be achieved, as the rational behind introduction of sub-rule (10) of Rule-96 is that benefit should not be claimed by both the suppliers of AA License holders and the AA License holders themselves.

6.9. It was submitted that in case of the suppliers of AA License holders, refund is claimed against deemed exports under Rule-89 of the CGST Rules, wherein, it is specifically provided that the AA License holder should not claim input tax credit. The reliance was placed to third proviso of Rule-89(1) which reads as under:

"Third proviso to Rule 89(1)

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.***"

Thereafter, reliance was placed on the definition of Net ITC. Rule-89(4A) of the CGST Rules, which reads as under:

"Definition of Net ITC and Rule 89(4A)

"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;***

(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."*

6.10. Relying upon the above provisions that AA License holders cannot claim input tax

credit in case the vendor / supplier is availing Deemed Export Benefits and the AA License holder is also required to furnish an undertaking stating that no input tax credit is claimed. The reliance was also placed on Circular No. 14/14-2017-GST, dated 6th November 2017, wherein, procedural safeguards in case of Deemed Export Benefits are provided stipulating requirements of furnishing intimation with the jurisdictional GST authorities, maintaining records, submitting copies of invoices, etc. It was submitted that, there are sufficient safeguards to ensure that both the suppliers of AA License holders and AA License holders themselves do not claim benefits under the GST regime simultaneously.

6.11. It was pointed out by Mr. Rastogi that, in case of AA License holders benefits are availed only to input tax credit to the extent of tax paid on the inward supply and such benefit under the rebate mode cannot exceed, the input tax credit balance available with the AA License holder, i.e. the amount of input tax credit actually availed in the past and therefore, there is no question of additional benefit being availed in absence of sub-rule (10) of Rule-96 of the CGST Rules.

6.12. Reliance was placed on the Circular No. 45/19/2018-GST dated 30th May 2018 and more particularly para-7.1 thereof, emphasizes the objective of introduction of sub-rule (10) of Rule-96 which reads as under:

> *"Sub-rule (10) of rule 96 of the CGST Rules seeks to prevent an exporter, who is receiving goods from suppliers availing the benefit of certain specified notifications under which they supply goods without payment of tax or at reduced rate of tax, from exporting goods under payment of integrated tax. This is to ensure that the exporter does not utilise the input tax credit availed on other domestic supplies received for making the payment of integrated tax on export of goods."*

Domestic Supply: 100
Export Supply: 80
ITC: 200
ITC utilised: 180

Max refund which can be claimed: 80

6.13. It was submitted that, the rationale given in the aforesaid notification is illogical, arbitrary and unreasonable, as benefit under rebate claim cannot exceed the amount of input tax credit taken which is allowed to be taken by AA license holders is restricted in case of Deemed Export benefits or Merchant Export Benefits.

6.14. It was submitted by the learned Advocate Mr. Rastogi that the respondents have issued the impugned notifications, while exercising powers under Section 164 of the CGST Act, but the provision of Section 164 of the CGST

Act can be invoked only where a provision is specifically required to be prescribed by the respondents. It was submitted that, sub-section (2) of Section 164 specifically states that the power to make rules is only to the extent required by the CGST Act and accordingly, such powers can be exercised only subject to and subservient to the respective provisions of the GST law. It was therefore submitted that rebate mode or refund mode prescribed under the Rules should be in accordance with Section 16 of the IGST Act or Section 54 of the CGST Act.

164(2) Without prejudice to the generality of the provisions of sub-section (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules.

6.15. Mr. Rastogi therefore submitted that amended sub-rule 10 of Rule-96 restricts rebate claims in case of AA License holders without any reasonable basis to justify imposition of absolute restriction for not claiming and not the form and manner for claiming refund.

6.16. Mr. Rastogi without admitting that the respondents have the power to prescribe safeguards and conditions for refund of tax, submitted that sufficient safeguards already exist to prevent undue benefits being claimed, as Rule-89 of the CGST Rules prohibits availment of input tax credit in case of Deemed Export Benefits are claimed and in case of Merchant

Export Benefits and AA benefits, the quantum of rebate can in no case exceed the input tax credit balance i.e. the input tax credit earlier availed. It was therefore submitted that, the amendment of sub-rule (10) of Rule-96 are unreasonable and liable to be stuck down.

6.17. With regard to the retrospective amendment made in sub-rule (10) of Rule-96 of the CGST Rules w.e.f. 23rd October 2017, it was submitted by Mr. Rastogi that, though the notification has been issued on 4th September 2018, such retrospective operation cannot be arbitrary and burdensome. Reliance was placed on the decision of the Apex Court in the case of ***Tata Motors Ltd. v. State of Maharashtra & Ors.*** reported in ***AIR 2004 SC 3618***, in support of such submission.

6.18. It was submitted that, the retrospective introduction in sub-rule (10) of Rule-96 of CGST Rules, the petitioner is unfairly penalized as a consequence of claiming benefits during the interim period from 23rd October 2017 till 4th September 2018.

6.19. It was further submitted that the AA License scheme has been introduced by the

respondent no.1 with the objective of boosting exports, enhancing foreign exchange earnings and attracting more investment in the country, and therefore, AA License holders are granted with additional fiscal benefits and incentives vis-a-vis regular exporters. It was therefore submitted that to deny the benefits which are available to regular exports that are not holding the AA Licensee to the AA License holders, it goes against the policy of granting of AA License and denial of such benefits defeats the whole purpose of the AA License scheme.

6.20. Mr. Rastogi thereafter submitted that it is a settled legal position that taxes cannot be exported, as per the norms prescribed by the World Trade Organization (for short 'WTO') which specifically permits remission of duties and taxes on exported products. The reliance was placed on Article-XVI of the General Agreement on Tariffs and Trade, 1994 (Note to Article XVI) and the provisions of Annexures-I to III of the Agreement on Subsidies and Countervailing Measures, the exemption or remission of duties and taxes on exported products, so as not to bring such measures to be subsidy and hence, is permitted. It is a settled international practice to export only the goods and services and not the

taxes suffered thereon. It was further submitted that, the petitioner is unable to get back the transitional credit either through the refund mode or the rebate mode, the petitioner would be constrained to write-off this amount and pass on the burden of such amount to its foreign customers, which would lead to a situation of export of taxes, which is against the policy of the respondent no.1.

6.21. Lastly, reliance was placed on the statement of objects and reasons to the Constitution Amendment Bill introducing the GST regime in India, wherein, it is specified that removal of the cascading effect of taxes is one of the objectives of GST and hence, smooth pass through of credits is the stated objective of the GST regime and denial of benefit on transitional credit to the petitioner leading to blockage of credits is against the spirit and objective of the GST regime.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

7.1. Learned Standing Counsel Mr. Nirzar Desai appearing for the respondent nos. 1, 3 and 4 submitted that, sub-rule (10) of Rule-96 of CGST Rules only provides that registered persons,

including importers, who are directly purchasing / importing supplies on which the benefit of reduced tax incidence or no tax incidence under certain specified notifications has been availed, would not be eligible for refund of integrated tax paid on export of goods or services. It was submitted that, the intention of sub-rule (10) of Rule-96 is to ensure that an exporter is not able to utilize the input tax credit availed on inward supplies which are used in making domestic output supplies for payment of IGST on exports and thereby encash the same. It was submitted that, such exports are free to export under LUT/ Bond and claim refund of any unutilized input tax credit.

7.2. Mr. Desai thereafter relied upon the following averments made in the affidavit-in-reply filed on behalf of the respondent nos. 1, 3 and 4:

> *"9. I say that the petitioner challenges that sub-rule (10) of Rule 96 is beyond the competence of the respondents and is consequently invalid. The said contention of the petitioner is not correct. In terms of Section 164 of the CGST Act, the Government, may on the recommendation of the Council, by notification make rules for carrying out the provisions of the Act. The approval*

of the GST Council, which is a Constitutional body constituted under Article 279A of the Constitution of India and mandated with making all GST related decisions, has been obtained for all the above measures. The above notifications were issued on the recommendation of GST Council on the basis of decision taken in its 25th Meeting, held on 15.01.2018. The subject matter was presented at Serial No.9 of Agenda item no. 7(i) before GST Council. The decision taken, as recorded in minutes of meeting, was as under:

"17.For Agenda item 7, the Council approved the proposed changes in CGST Rules and Forms, as contained in Agenda item 7, except for Serial No.5 of Agenda item 7(i)(v) relating to purchase value of goods repossessed from a defaulting borrower".
Accordingly, insertion of sub-rule (10) has been made in terms of law.
10. I say that the retrospectivity of the amendments made to sub-rule (10) of rule 96 of the CGST rules was nullified vide issuance of notification No.53/2018-Central Tax dated 09.10.2018, which restored the position of rule 96(10), with retrospective effect (i.e. w.e.f. 23.10.2017) as it existed before the issuance of Notification No.39/2018-Central Tax dated 04.09.2018. Further, vide notification No. 54/2018-Central Tax dated 09.10.2018, an exception was carved from the restriction imposed by sub-rule (10) of rule 96 for those exporters who are importing capital goods under the EPCG scheme.

11. I say that the petitioner further

challenges that Rule 96(10) of CGST/GGST Rules, 2017 inserted vide Para 6 of Notification No.39/2018-Central Tax/State Tax, dated 04.09.2018 violates the Article 14 of Constitution of India. In this regard, I say that it is well-established that Article 14 forbids class legislation but does not forbid classification. Permissible classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and the differentia must have a rational relation to the object sought to be achieved by the statute in question.

I further say that what is disallowed to the petitioner and allowed to others of the same class should be demonstrated by the petitioner. That is the test for arbitrariness. The petitioners had no occasion to demonstrate their case in the test of arbitrariness. Needless to mention, GST laws are a self-contained legislations. The laws were promulgated after necessary constitutional amendments. It cannot, therefore, be said that equals have been treated unequally or unequals have been treated equally while providing benefit of Notification No. 39/2018- Central Tax/State Tax, dated 04.09.2018. Only such provisions of a taxing statute can be struck down on the ground of discrimination which operate differently on the members of the same class and in similar situation. If members of the same class are affected equally and uniformly, the provision cannot be said to suffer from the vice of discrimination and, therefore, cannot be struck down as violation of Article 14

of the Constitution. In this connection reliance is place on judgment of hon'ble Supreme Court in case of Amalgamated Tea Estate Co. Vs. State of Kerala, (1974) CTR (S.C.) 192, wherein it was said that -

"as revenue is the first necessity of the State and as taxes are raised for various purposes and by an adjustment of diverse elements, the court grants to the State greater choice of classification in the field of taxation than in other spheres."

and that -

"On a challenge to a statute on the ground of Article 14, the court would generally raise a presumption in favour of its constitutionality. Consequently, one who challenges the statute bears the burden of establishing that the statute is clearly violative of Article 14."

In N. V. Somaraju Vs. Govt. of India 1973 Tax LR 1084 (Andh.Pra.), it was held that-

"While considering the provisions of Article 14 of the Constitution, no precise or mathematical accuracy is contemplated and what is to be seen is overall equality given to the same class." and "in the matter of taxation the legislature has greater freedom not only to classify the different persons or subjects in regard to whom or which tax is to be levied but different modes of taxation can also be adopted."

In view of the above, I say that Rule 96(10) of CGST/GGST Rules, 2017 inserted

vide Para 6 of Notification No.39/2018-Central Tax/State Tax, dated 04.09.2018 does not violate Article 14 of the Constitution of India.

12. I say that the petitioner further challenges that Rule 96(10) of CGST/GGST Rules, 2017 inserted vide Para 6 of Notification No.39/2018-Central Tax/State Tax, dated 04.09.2018 violates the Article 19(1)(g) of Constitution of India. In this regard, I say that Article 19(1)(g) of the Constitution guarantees the citizens of India a right to carry on any occupation, trade or business. The petitioners had no carry on any occupation, trade or business. The petitioners had no occasion to demonstrate their case in the test of arbitrariness. The petitioner is still entitled to the full enjoyment of this freedom even after implementation of the notification, ibid, and the legislature has not infringed his right to trade under Article 19(1)(g) of the Constitution.

13. In view of whatever is stated hereinabove it is stated that the Petitioners have no case on merits or otherwise and hence, the present Petition deserves to be dismissed."

7.3. Relying on the aforesaid averments made in the affidavit-in-reply, it was submitted that, no interference is required to be made in the retrospective amendment of sub-Rule (10) of Rule 96 of the CGST Rules. Mr. Desai further relied upon the decision of the Hon'ble Apex Court in

the case of ***State of Gujarat v. Reliance Industries Limited*** reported in ***(2017) 16 SCC 28***, wherein, the Apex Court has held in context of the Gujarat Value Added Tax Act, 2003, as under:

> *"**18.** The aforesaid discussion leads us to the conclusion that it is a mega tax credit scheme which is provided under the VAT Act meant for all kinds of manufactured goods. The material in question, namely, furnace oil, natural gas and light diesel oil are admittedly subject to VAT under the VAT Act. The Legislature, however, has incorporated the provision, in the form of Section 11, to give tax credit in respect of such goods which are used as inputs/ raw material for manufacturing other goods. Rationale behind the same is simple. When the finished product, after manufacture, is sold, VAT would be again payable thereon. This VAT is payable on the price at which such goods are sold, costing whereof is done keeping in view the expenses involved in the manufacture of such goods plus the profits which the manufacturer intends to earn. Insofar as costing is concerned, element of expenses incurred on raw material would be included. In this manner, when the final product is sold and the VAT paid, component of raw material would be included again. Keeping in view this objective, the Legislature has intended to give tax credit to some extent. However, how much tax credit is to be given and under what circumstances, is the domain of the Legislature and the courts are not to tinker with the same.*
>
> ***19** This proposition is authoritatively*

determined by this Court in series of judgments. We may refer to the judgment in Godrej & Boyce Mfg. Co. Pvt. Ltd. & Ors. v. Commissioner of Sales Tax and Others, 1992 3 SCC 624 and the relevant extract which is relevant for our purposes is as follows:

"9. Sri Bobde appearing for the appellants reiterated the contentions urged before the High Court. He submitted that the deduction of one per cent, in effect, amounts to taxing the raw material purchased outside the State or to taxing the sale of finished goods effected outside the State of Maharashtra. We cannot agree. Indeed, the whole issue can be put in simpler terms. The appellant (manufacturing dealer) purchases his raw material both within the State of Maharashtra and outside the State. Insofar as the purchases made outside the State of Maharashtra are concerned, the tax thereon is paid to other States. The State of Maharashtra gets the tax only in respect of purchases made by the appellant within the State. So far as the sales tax leviable on the sale of the goods manufactured by the appellant is concerned, the State of Maharashtra can levy and collect such tax only in respect of sales effected within the State of Maharashtra. It cannot levy or collect tax in respect of goods which are despatched by the appellant to his branches and agents outside the State of Maharashtra and sold there. In law (apart from Rules 41 and 41-A) the appellant has no legal right to claim set-off of the purchase tax paid by him on his purchases within the State from out of the sales tax payable by him on the sale of the goods manufactured by him. It is only by virtue of the said Rules which, as stated above, are conceived mainly in the interest of public that he is

entitled to such set-off. It is really a concession and an indulgence. More particularly, where the manufactured goods are not sold within the State of Maharashtra but are despatched to out-State branches and agents and sold there, no sales tax can be or is levied by the State of Maharashtra. The State of Maharashtra gets nothing in respect of such sales effected outside the State. In respect of such sales, the rule-making authority could well have denied the benefit of set-off. But it chose to be generous and has extended the said benefit to such out-State sales as well, subject, however to deduction of one per cent of the sale price of such goods sent out of the State and sold there. We fail to understand how a valid grievance can be made in respect of such deduction when the very extension of the benefit of set-off is itself a boon or a concession. It was open to the rule-making authority to provide for a small abridgement or curtailment while extending a concession. Viewed from this angle, the argument that providing for such deduction amounts to levy of tax either on purchases of raw material effected outside the State or on sale of manufactured goods effected outside the State of Maharashtra appears to be beside the point and is unacceptable. So is the argument about apportioning the sale-price with reference to the proportion in which raw material was purchased within and outside the State. (emphasis added)"

To the same effect are the judgments in the case of Hotel Balaji & Ors. v. State of Andhra Pradesh & Ors., 1993 Supp 4 SCC 536 and Jayam and Company v. Assistant Commissioner and Another, 2015 15 SCC 125.

20 *The upshot of the aforesaid discussion would be to hold that reduction of 4% would be applied whenever a case gets covered by sub-clause (ii) and again when sub-clause (iii) is attracted. This, however, would be subject to one limitation. In those cases where VAT paid on such raw material is 4%, as in the case of furnace oil, reduction cannot be more than that. After all, Section 11 deals with giving credit in respect of tax that is paid. Therefore, if some reduction is to be made from the said credit, it cannot be more than the credit given. Thus, so far as furnace oil is concerned, tax credit shall be reduced by 4%. On the other hand, tax credit given in case of natural gas and light diesel oil (other fuels), it shall be reduced by 4% under sub-clause (ii) and 4% under sub-clause (iii) of clause (b) of sub-section (3) of Section 11."*

7.4. Mr. Desai also relied upon the decision of the Division Bench of this Court in case of **Willowood Chemicals Pvt. Ltd. v. Union of India** rendered on **12th / 19th September, 2018 in Special Civil Application No. 4252 of 2018,** wherein, the constitutionality of second proviso to Section 140 (1) of the CGST Act was upheld. The reliance was placed on the following observations of the said judgment which reads as under:

*"**17** Effectively and essentially, this is what the present provisos of sub section*

[1] of Section 140 of the GGST Act do. As per the main provision, credit would be available on the amount of Value Added Tax and Entry Tax carried forward in the return. As per the further proviso or the second proviso, such credit to that extent would not be transferred when necessary declarations are not furnished by the dealer. The proviso thereafter however ensures that as and when declarations are filed, the amount equivalent to credit specified in the second schedule would be refunded to the dealer. We do not find any major change in the effect of late production of the forms by a dealer in the present statutory provisions; as compared to the earlier position, nor the statutory provisions deny the benefit of such credit, even where necessary declarations are furnished. Thus, no existing or vested right can be said to have been taken away.

We do not think Section 140 [c] is a charging provision or that for want of mechanism for computing such charge, the provision itself would fail. The provision is in the nature of enabling the dealers to take credit of existing taxes paid by them but not utilized for discharging their tax liabilities. It contains conditions subject to which the benefit can be enjoyed.

***18** This brings us to the petitioners challenge to rule 117 of the CGST Rules and GGST Rules. The statutory provisions being pari materia in both the Act and the Rules, in so far as this challenge is concerned, we may refer to provisions contained in the CGST Act.*

19 *As noted, under sub section [1] of Section 140 of the CGST Act, a registered person, other than one who had opted for composition of tax would be entitled to take credit of the amount of CENVAT credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed. Under sub section [3] of Section 140, a registered person, who was not liable to be registered under the existing law and other category of persons mentioned therein, would be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi finished or finished goods held in stock on the appointed day; subject to conditions contained in clauses [i] to [v] therein. Sub section [10] of Section 140 provides that the amount of credit under sub sections [3], [4] and [6] shall be calculated in such manner as may be prescribed. Counsel for the petitioners had compared the language used by the legislature in sub sections [1] and [3] of Section 140 to argue that the expression "in such manner as may be prescribed" used in sub section [1] was missing in subsection [3].*

20 *In his contention, therefore, the rules that the subordinate legislature framed could not have prescribed a time limit for making necessary declarations; as referred to under sub section [3] of Section 140. Rule 117 of the CGST Rules pertains to taxes or duty credit carried forward under any existing law or on goods held in stock on the appointed day. Sub rule (1) of Rule 117 provides that every registered person*

entitled to take credit of the input tax under Section 140, shall within ninety days of the appointed day, submit a declaration electronically in the prescribed format, duly signed, on the common portal specifying separately the amount of input tax credit to which he is entitled under the provisions of the said section. Proviso to sub rule [1] envisages extension of period for making the said declaration on the recommendations of the Council. We have noted that such time limit was extended from time to time and finally upto 27th December 2017. A limited extension has thereafter been granted by the Government by inserting sub rule [1A] in Rule 117, authorizing the Commissioner to extend the date for submitting the declaration electronically by a further period not beyond 31st March 2019, in respect of registered persons who could not submit the said declaration by the due date on account of technical difficulties on the common portal and in respect of whom, the Council has made recommendation for such extension. Effectively thus, the last date for filing the declaration under sub rule [1] of Rule 117 in general class of persons remained 27th December 2017. For cases falling under sub rule [1A] of Rule 117, the same could be extended maximum upto 31st March 2019. As per the petitioners, this prescription of time limit per se is ultra vires the provisions of the Act and the Constitution of India.

21 *In essence, sub rule [1] of Rule 117 lays down a time limit for making declaration only upon making of which, a person could take benefit of tax credit in terms of Section 140 of the CGST Act. We are conscious that sub sections [1] and [3]*

of Section 140 of the CGST Act use somewhat different phraseology. Under sub section [1] the legislature has provided that the benefit of credit in the electronic credit ledger would be available to a registered person in such manner; as may be prescribed. In contrast, sub section [3] of Section 140 grants facility of credit in electronic ledger of the specified duties to the specified class of persons; subject to conditions laid down under clauses (i) to (v) of the said subsection. It is only in the proviso below clause (v) of sub section [3] that the legislature has provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall; subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed. For apparent reasons, this proviso does not apply to all cases and its effect is local, to cover cases where a person is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs.

22 *We can however not be oblivious to Section 164 of the CGST Act, which is the rule making power and reads as under :*

"164. Power of Government to make rules :

[1] The Government may, on the

recommendations of the Council, by notification, make rules for carrying out the provisions of this Act.

[2] Without prejudice to the generality of the provisions of sub section (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules.

[3] The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act comes into force.

[4] Any rules made under sub section (1) of subsection (2) may provide that a contravention thereof shall be liable to a penalty not exceeding ten thousand rupees."

***23** Under sub section [1] of Section 164 of the CGST Act, thus, the Government on recommendations of the Council, by notification, could make rules "for carrying out the provisions of the Act". This rule making power is thus couched in the widest possible manner empowering the Government to make the rules for carrying out the provisions of the Act." Sub section [2] to Section 164 is equally widely worded, when it provides that, "without prejudice to the generality of the provisions of sub section (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect*

of which provisions are to be, or may be made by the rules." Sub section [3] of Section 164, to which we are not directly concerned, nevertheless provides that the power to make rules conferred in the said section would include the power to give retrospective effect to such rules.

***24** It is in exercise of this rule making power, the Government has framed the CGST Rules, 2017 in which; as noted, sub rule (1) of Rule 117 has prescribed, besides other things, the time limit for making declaration in the prescribed form for every dealer entitled to take credit of input tax under Section 140. Sub rule [1] of Rule 117 thus applies to all cases of credits which may be claimed by a registered person under section 140 of the Act and is not confined to sub section [3]. This plenary prescription of time limit within which necessary declarations must be made is, in our opinion, neither without authority nor unreasonable.*

***25** Section 140 of the Act envisages certain benefits to be carried forward during the regime change. As is well settled, the reduced rate of duty or concession in payment of duty are in the nature of an exemption and is always open for the legislature to grant as well as to withdraw such exemption. As noted in case of Jayam & Company [Supra], the Supreme Court had observed that input tax credit is a form of concession provided by the legislature and can be made available subject to conditions. Likewise, in the case of Reliance Industries Limited [Supra], it was held and observed that how much tax credit has to be given and under what*

circumstances is a domain of the legislature. In case of Godrej & Boyce Mfg. Co. Pvt. Limited [Supra], the Supreme Court had upheld a rule which restricts availment of MODVAT credit to six months from the date of issuance of the documents specified in the proviso. The contention that such amendment would take away an existing right was rejected.

26 *While the entire tax structure within the country was thus being replaced by a new frame work, it was necessary for the legislature to make transitional provisions. Section 140 of the CGST Act, which is a transitional provision, essentially preserves all taxes paid or suffered by a dealer. Credit thereof is to be given in electronic credit register under the new statute, only subject to making necessary declarations in prescribed format within the prescribed time. As noted, sub section [1] of Section 164 of the CGST Act authorizes the Government to make rules for carrying out the provisions of the Act on recommendations of the Council. Sub section [2] of Section 164 further provides that without prejudice to the generality of the provisions of sub section [1], the Government could also make rules for all, or any of the matters, which by this Act are required to be or may be prescribed or in respect of which, provisions are to be or may be made by the rules. Combined effect of the powers conferred to subordinate legislature under sub sections [1] and [2] of Section 164 of the CGST Act would convince us that the prescription of time limit under sub rule [1] of Rule 117 of the CGST Rules is not ultra vires the Act. Likewise, such prescription of time limit cannot be stated*

to be either unreasonable or arbitrary. When the entire tax structure of the country is being shifted from earlier framework to a new one, there has to be a degree of finality on claims, credits, transfers of such credits and all issues related thereto. The petitioners cannot argue that without any reference to the time limit, such credits should be allowed to be transferred during the process of migration. Any such view would hamper the effective implementation of the new tax structure and would also lead to endless disputes and litigations. As noted in case of USA Agencies [Supra], the Supreme Court had upheld the vires of a statutory provision contained in the Tamil Nadu Value Added Tax Act which provided that the dealer would have to make a claim for input tax credit before the end of the financial year or before ninety days of purchase; whichever is later. The vires was upheld observing that the legislature consciously wanted to set up the time frame for availment of the input tax credit. Such conditions therefore must be strictly complied with. Thus, merely because the rule in question prescribes a time frame for making a declaration, such provision cannot necessarily be held to be directory in nature and must depend on the context of the statutory scheme."

7.5. Learned advocate Mr. Nirjar Desai to point out that the similar writ petition being Special Civil Application No. 10998 of 2018 was filed by the petitioner before the Delhi High Court which was disposed of by order dated 16th

January 2019 permitting the petitioner to withdraw the said writ petition and the petition may be treated as representation to the respondent, who should examine the grievance of the petitioner. It was therefore submitted that, there is suppression of fact by the petitioner by not disclosing the writ petition filed before the Delhi High Court for the same subject matter. It was further submitted that there is no demand notice issued against the petitioner and therefore, there is no cause of action to file this petition.

ANALYSIS:

8.1. Having considered the submissions made by the learned advocates for both the sides and having gone through the materials on record, the short question which arises for the consideration is whether the amendment made by the Notification No. 54/2018 dated 9th October 2018 amending sub-rule (10) of Rule 96 of the CGST Rules is valid or not.

8.2. In order to consider the issue of validity of the Notification No. 54/2018 substituting the sub-rule (10) of Rule 96 of CGST Rules, it would be necessary to refer to the

scheme of Advance Authorized Licenses. The Government of India, Ministry of Finance vide Notification No. 18/2015-Customs, dated 1st April 2015 issued in exercise of the powers conferred by Section 25 (1) of the Customs Act, 1962 (for short 'the Customs Act') exempted materials imported into India, against a valid Advance Authorization issued by the Regional Authority in terms of paragraph-4.03 of the Foreign Trade Policy, from the whole of the duty of customs leviable thereon, which is specified in the First Schedule to the Customs Tariff Act, 1975 and from the whole of the additional duty leviable thereon under sub-sections (1), (3) and (5) of Section 3 thereon, and Integrated Tax leviable thereon under sub-section (7) of section 3 of goods and service tax compensation Cess leviable thereon under sub-section (9) of Section 3, safeguard duty leviable thereon under Section 8B, countervailing duty leviable thereon under Section 9 and anti-dumping duty leviable thereon under Section 9A of the Customs Tariff Act, subject to the conditions stated in the said notification.

8.3. After coming into force of GST regime w.e.f. 01.04.2017, Notification No. 79/2017-Customs, dated 13th October 2017 was issued amending the

Notification No. 18/2015 by inserting condition (viii) as under:

Sr. No.	Notification Number and date	Amendments
2.	18/2015-Customs, dated the 1st April, 2015 [vide number G.S.R. 254(E), dated the 1st April, 2015]	In the said notification, in the opening paragraph.- (a) for the words, brackets, figures and letters "from the whole of the additional duty leviable thereon under sub-sections (1), (3) and (5) of section 3, safeguard duty leviable thereon under section 8B and anti-dumping duty leviable thereon under section 9A", the words, brackets, figures and letters "from the whole of the additional duty leviable thereon under sub-sections (1), (3) and (5) of section 3, integrated tax leviable thereon under sub-section (7) of section 3, goods and services tax compensation cess leviable thereon under sub-section (9) of section 3, safeguard duty leviable thereon

		under section 8B, countervailing duty leviable thereon under section 9 and anti-dumping duty leviable thereon under section 9A" shall be substituted; (b) in condition (viii), after the proviso, the following proviso shall be inserted, namely :- "Provided further that notwithstanding anything contained hereinabove for the said authorisations where the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section 3 of the said Customs Tariff Act, has been availed, the export obligation shall be fulfilled by physical exports only;"; (c) after condition (xi), the following conditions shall be inserted, namely :- "(xii) that the exemption from

		integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section 3 of the said Customs Tariff Act shall be subject to pre-import condition; (xiii) that the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section 3 of the said Customs Tariff Act shall be available up to the 31st March, 2018."

8.4. Thus condition no. (xii) and (xiii) were inserted, whereby it was provided that the exemption from Integrated Tax and the Goods and Services Tax compensation Cess leviable thereon under sub-section (7) and sub-section (9) of Section 3 of Customs Tariff Act shall be subject to pre-import condition and available upto 31st March 2018.

8.5. Rule 96 of the CGST Rules provides for

procedure of refund of Integrated Tax paid on goods or services exported out of India, as per Section 54 of the CGST Act. Rule 96 (10) as it originally existed, when the Rules came into force provided that the persons claiming refund of Integrated Tax paid on export of goods or services should not have received supplies on which the supplier has availed the benefit from Government of India, Ministry of Finance, under Notification No. 48/2017 dated 18th October 2017 or Notification No. 40 of 2017 dated 23rd October 2017 or Notification No. 41 of 2017- Integrated Tax (Rate), dated 23rd October 2017 or Notification No. 78 of 2017-Customs dated 30th October 2017 or the Notification No. 79 of 2017-customs dated 13th October 2017.

8.6. Thereafter, sub-rule (10) of Rule-96 of the CGST Rules was amended by the Notification No. 39/2018 dated 4th September 2018 w.e.f. 23rd October 2017 and substitute Rule-10 as under:

> "6. In the said rules, with effect from the 23rd October, 2017, in rule 96, for sub-rule (10), the following sub-rule shall be substituted, namely :-
>
> "(10) The persons claiming refund of integrated tax paid on exports of goods or

services should not have –

(a) received supplies on which 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 or 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 has been availed; or

(b) availed the benefit under notification No.78/2017-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. 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."

8.7. Thus, sub-rule (10) of Rule-96 was subdivided in two parts for the person claiming refund of integrated tax paid on exports of goods or services should not have received supplies on which the benefit of the Notification No. 48/2017

and availed benefit under Notification No. 78/2017 or 79/2017 dated 13th October 2017.

8.8. It appears that, thereafter, again both the clauses which were substituted by Notification No. 39/2018 were merged by Notification No. 53/2018 dated 9th October 2018 which reads as under:

> "Notification: 53/2018-C.T. dated 09-Oct-2018
>
> Central Goods and Services Tax Rules, 2018 – Eleventh Amendment of 2018
>
> In exercise of the powers conferred by section 164 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government hereby makes the following rules further to amend the Central Goods and Services Tax Rules, 2017, namely:-
>
> 1. (1) These rules may be called the Central Goods and Services Tax (Eleventh Amendment) Rules, 2018.
>
> (2) They shall be deemed to have come into force with effect from the 23rd October, 2017.
>
> 2. In the Central Goods and Services Tax Rules, 2017, in rule 96, for sub-rule (10), the following sub-rule shall be substituted and shall be deemed to have been substituted with effect from the

23rd October, 2017, namely :-

"(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have received supplies 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 or 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 notification No.78/2017-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. 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."

[Notification No.53/2018-C.T., dated 9-10-2018]"

8.9. Thereafter, by Notification No. 54/2018 dated 9th October 2018 again sub-rule (10) of Rule-96 was amended by substituting the same, wherein, it is provided that the persons claiming refund of integrated tax paid on exports of goods or services should not have received supplies (a) on which the benefits of Notification No. 48/2017 dated 18th October 2017, Notification No. 40/2017 dated 23rd October 2017 or Notification No. 41/2017 dated 23rd October has been availed or (b) availed the benefit under Notification No. 78/2017 or Notification No. 79/2017.

w.e.f. 09.10.2018

8.10. It is pertinent to note that the Notification No. 54/2018 is made applicable retrospectively from the date when Rule-96 (10) of the CGST Rules came into force and not with effect from 23rd October 2017, as was amended in the previous Notifications.

8.11. Section 16 of IGST Act provides for 'Zero Rated Supply' and sub-clause (b) of sub-section (3) of Section 16 provides that, a registered person making zero rated supply shall be eligible to claim refund, if he has supplied the 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.

8.12. Thus on conjoint readings of the provision of Section 16 of the IGST Act, Section 54 of CGST Act and Rule-96 (10) of CGST Rules, which is substituted by Notification No. 54/2018 dated 9th October 2018, it is apparent that the person who has availed the benefits of Notification No. 48/2017 dated 18th October 2017 and other Notifications as stated in sub-rule 10 shall not have the benefit of claiming refund of integrated tax paid on exports of goods or services. The petitioner has availed benefits under Advance Authorization License scheme as per the Notification No. 18/2015 which was amended by Notification No. 79/2017 dated 13th October 2017 and paid integrated tax on the goods procured by the petitioners for the export purpose.

8.13. Notification No. 48/2017-C.T. dated 18th October 2017 has declared the following goods and the explanation thereto states that, “Advance Authorization” means an authorization issued by the Director General of Foreign Trade under Chapter-4 of the Foreign Trade Policy 2015-20 for import or domestic procurement of inputs on pre-

import basis for physical exports. Therefore, as the petitioner has availed the benefits of AA License as per Notification No. 40/2017- CT (Rate) dated 23rd October 2017 and has enjoyed the exemption of GST on the supply of the goods from the registered supplier for the purpose of export on fulfilling the conditions prescribed therein. It appears that, thereafter, by Notification No. 39/2018-CT dated 4th September 2018 has substituted the sub-rule (10) of Rule-96 w.e.f. 23rd October 2017, however, by Notification No. 54/2018, the application of the substituted sub-rule (10) of Rule-96 is not made effective from 23rd October, 2017, but it was made applicable from the inception. Therefore, the petitioner who has availed the benefit of the Notification No. 39/2018 from 23rd October, 2017 to 4th September, 2018 would not be able to get the refund of the IGST paid or the input tax credit balance in the accounts of the petitioner, in view of the Notification No. 54/2018.

8.14. Considering the effect of the Notification No. 54/2018, the contentions raised on behalf of the respondents that there is no discrimination qua the petitioner is tenable in law, as by the amendment made by Notification No. 54/2018 it clearly denied the benefit which is

granted to the petitioner by the Notification No. 39/2018 was withdrawn as the same was not made applicable from 23rd October, 2017.

8.15 Recently, vide Notification No. 16/2020-CT dated 23.03.2020 an amendment has been made by inserting following explanation to Rule 96(10) of CGST Rules, 2017 as amended (with retrospective effect from 23.10.2017)

> *"Explanation.- For the purpose of this sub-rule, the benefit of the notifications mentioned therein shall not be considered to have been availed only where the registered person has paid Integrated Goods and Services Tax and Compensation Cess on inputs and has availed exemption of only Basic Customs Duty (BCD) under the said notifications."*

By virtue of the above amendment, the option of claiming refund under option as per clause (b) is not restricted to the Exporters who only avails BCD exemption and pays IGST on the raw materials thereby exporters who wants to claim refund under second option can switch over now. The amendment is made retrospectively thereby avoiding the anomaly during the intervention period and exporters who already claimed refund under second option need to payback IGST along with interest and avail ITC.

9. In view of above amendment , the grievance of the petitioner raised in this petition is therefore taken care of . However, it is also made clear that Notification No. 54/2018 is required to be made applicable w.e.f. 23rd October, 2017 and not prior thereto from the inception of the Rule 96(10) of the CGST Act. Therefore, in effect Notification No. 39/2018 dated 4th September, 2018 shall remain in force as amended by the Notification No.54/2018 by substituting sub-rule (10) of Rule 96 of CGST Rules, in consonance with sub-section (3) of Section 54 of the CGST Act and Section 16 of the IGST Act. The Notification No. 54/2018 is therefore held to be effective w.e.f. 23rd October 2017. Rule is made absolute to the aforesaid extent, with no order as to costs.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

Pradhyuman