



IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 14158 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

M/S. AYANA PHARMA LIMITED THROUGH ITS AUTHO. REPS. MULRAJ K.
 CHHEDA
 Versus
 UNION OF INDIA

Appearance:
 MR BHARAT RAICHANDANI FOR MR ADITYA R PARIKH(8769) for the
 Petitioner(s) No. 1
 for the Respondent(s) No. 2,3,4
 PRIYANK P LODHA(7852) for the Respondent(s) No. 1

CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 13/01/2022

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. By this writ application under Article 226 of the Constitution of India, the writ applicant a Company situated at Jerusalem through its Authorized Representative in India, has prayed for the



following reliefs:

“12.

- (a) *that this Hon'ble Court be pleased to issue a Writ of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioner's case and after going into the validity and legality of the provisions set aside and quash Order No.NRV/KAMI/ Circle – 2/ GST REFUND / 2020-21 dated 02.12.2000 (Exhibit "A");*
- (b) *that this Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction, directing the Respondents to sanction entire refund claim with interest to the Petitioner because the Petitioner is eligible for refund under the provisions of Section 54 of the CGST Act, 2017 read with Rule 89 of the CGST Rules, 2017;*
- (c) *that this Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction ordering and directing the Respondent to give the petitioner an opportunity to present their case and to put forth their case / submissions and thereafter, pass a reasoned order;*
- (d) *for interim and ad-interim reliefs in terms of prayer (a), (b), (c) or (d) above;*
- (e) *for costs of this petition;*
- (f) *for such and other reliefs as the nature and circumstances of the case may require”.*

2. The facts giving rise to this litigation may be summarized as under:

2.1 The writ applicant is engaged in the business of manufacture / buying and selling of pharmaceutical products. It is not in dispute that the writ applicant is a Company situated outside India.



2.2 It appears from the materials on record that the writ applicant is involved in the development of Liposomal Therapeutics for the treatment of cancer. In order to undertake clinical research / studies, the writ applicant would outsource the same to the third party i.e. Clinical Research Organizations (for short “the CRO”).

2.3 In the case on hand, the writ applicant entered into an agreement between the Indian CRO known and recognized as Lambda Therapeutic Research Limited (for short “the LTRL”) to undertake clinical research in relation to the drugs namely Doxorubicin Hydrochloride Liposome Injection (for short “DHIL”) manufactured by the writ applicant. The DHIL drug is used for treatment of ovarian cancer. It is not in dispute that LTRL has provided the services of clinical research or testing services to the writ applicant. Accordingly, the LTRL has charged the GST @ 18% on the invoice value.

2.4 It is a case of the writ applicant that the services provided by the LTRL to it qualifies as “Export of Services” the terms of the provisions of Section 2(6) of the Integrated Goods and Services Tax Act, 2017 (for short “The IGST Act, 2017”). In such circumstances, the LTRL wrongly levied and collected the IGST on the above said supply of services.

2.5 On enquiry with the LTRL, the writ applicant was informed that the IGST levied and collected has been deposited with the Government Treasury / Exchequer. The LTRL further confirmed that neither they have claimed / filed any refund application nor received the refund from the Government of the disputed amount. It is in the aforesaid set of circumstances, that the writ applicant



has filed a claim for refund of Rs.1,36,04,449/- (USD 1,94,103) manually on 01.08.2020 in accordance with the provisions of Section 54 of the CGST Act, 2017.

2.6 It appears that such claim came to be rejected by the Deputy State Tax Commissioner vide communication dated 02.12.2020 in absolute ignorance of the provisions of the Act, 2017. The claim of the writ applicant for refund came to be rejected on the ground that the writ applicant could not have filed the application manually. The claim for the refund can be entertained and looked into only if the same is tendered "online".

2.7 In such circumstances referred to above, the writ applicant is here before this Court with the present writ application.

3. Mr. Bharat Raichandani, the learned counsel appearing with Mr. Aditya Parikh, learned counsel appearing for the writ applicant vehemently submitted that the Authority concerned committed a serious error in turning down the claim for refund on the highly technical ground as stated in impugned communication dated 02.12.2020, Annexure A, page 22. Same reads thus:

"02.02.2020

To,
M/s. Ayana Pharma Ltd.
Office No.321-B. Bhaveshwar Arcade,
LBH Marg, Ghatkoper,
Mumbai 400 086.

Subject: Manual GST Refund Application
Ref.: Your application dated 01.09.2020.

In reference to above subject as well as reference, it is



hereby informed that M/s. Ayana Pharma Ltd. has preferred application for GST refund of an amount of Rs.1,36,04,441/- for the period July, 2018 to June, 2019. All process of GST refund is online and you are required to file refund application online. The refund application submitted by you is manual. Therefore, your Original Application is returned so as to file online refund application.

*(C.L. Patel
Deputy State Tax Commissioner,
Circle -2, Ahmedabad.”*

4. Mr. Raichandani, learned counsel first invited our attention to the definition of the term “person” as defined under Section 2(84) of the Act. Learned counsel would submit that the term “person” would include any body corporate incorporated by or under law of country outside India. Our attention was thereafter, invited to Rule 89 of the Rules. Rule 89 is in Chapter X of the Rules, it is with respect to refund. Thereafter, our attention was drawn to Rule 97A of the Rules which provides for manual filing and process. The argument of the learned counsel is that Rule 97A, starts with the non-obstante clause and the said Rules clarifies that any reference to electronic filing of an application would include manual filing also of the said application. Mr. Raichandani, the learned counsel in support of his aforesaid submissions, placed reliance on decision of the High Court of Bombay clarifying the position of law as regards the manual filing of the claim for refund. The order has been passed by the High Court of Bombay in the case of **Laxmi Organic Industries Ltd. Vs. Union of India & Ors.**, Writ Petition No.7861 of 2021 decided on 30.11.2021. In such circumstances referred to above, Mr. Raichandani, the learned counsel prays it has merits in the writ application and the same may be allowed and the respondents be directed to process the manual application for the refund.



5. On the other hand, this application has been vehemently opposed by Mr. Utkarsh Sharma, the learned AGP appearing for the State respondent and Mr. Priyank Lodha, the learned senior standing counsel appearing for the respondent No.1 – Union of India. Mr. Sharma, the learned AGP first invited our attention to Section 54 of the Act, 2017. Section 54 is in Chapter xi. Chapter xi is with respect to the refund. Mr. Sharma, learned AGP would submit that in the first instance, the writ applicant being a Company situated outside India could not have filed application in the manual form seeking refund.

6. At the out set, Mr. Priyank Lodha, the learned senior standing counsel appearing for the Union of India would submit that bare reading of the provisions of Section 54 of the Act would indicate that it is only “the person” who has actually paid such tax, who can make an application for the refund of the same. According to Mr. Lodha, the learned senior standing counsel, in the case on hand, the tax has not been paid by the writ applicant, the tax has been paid by the LTRL.

Mr. Lodha, learned Counsel appearing for the respondent principal Commissioner, Central GST, Ahmedabad further relied upon the affidavit in reply filed by the Principal Commissioner and has principally raised three fold contentions. First, that the writ applicant is not registered person under GST act, 2017 and therefore cannot claim refund electronically. He placed reliance upon sub-section 3 of section 16 of the IGST Act, 2017 as well as section 25 of the CGST Act, 2017 read with Rule 8 of the CGST Rules, 2017. He further submitted that the writ applicant being foreign based company has no PAN no. under the Income Tax Act



which is required seeking registration under CGST Act and only a registered person can apply for electronic refund by following procedure provided under Rule 89(1) of the CGST Rules, 2017. Mr, Lodha further submitted that secondly, the supplier of services is entitled to file application for refund, as he is the registered person who has discharged tax. The Third limb of argument canvassed by the Union is that the services availed by the writ applicant cannot be termed as “ export of services ” , more particularly when the writ applicant has received services within the territorial limits of India and has therefore failed to comply with the requirement as provided under clause (iii) of subsection 6 of section 2 which deals definition of term “ export of services ”.

7. In such circumstances referred to above, according to both Mr. Sharma, the learned AGP and Mr. Lodha, the learned senior standing counsel, writ application deserves to be rejected.

8. Having heard the learned counsels appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the respondent No.4 is justified in rejecting the claim for the refund of tax on the ground that such claim has been put forward manually and not by way of online.

9. In the writ application, the writ applicant has raised various grounds wherein it is categorically stated that the respondent authority has straight way rejected application on technical ground and has failed to assigned reasons. At the outset, we notice that the impugned order is a non speaking order. Further, the respondent authority without giving any opportunity of hearing has straight way passed the impugned order on highly technical



ground. We find that the respondent authority acted de hors the basic principles of natural justice. Hence, on the sole ground of violation of principles of natural justice, the writ petition is required to be allowed.

10. At this stage, we notice that by impugned order 02.12.2020, at Annexure-A, the Deputy State Tax Commissioner, Circle-2, Ahmedabad has solely rejected the application of writ applicant company on the ground that instead of online application seeking refund, the writ applicant has submitted manual / physical application. So far as rest of the contentions raised in the affidavit in reply file by the Principal Commissioner, such contentions questioning locus of the writ applicant to seek refund is first time raised before this Court. The same are not forming part of reasons assigned recorded while passing impugned order of rejection, by the Deputy State Tax Commissioner, Circle-2, Ahmedabad. We are therefore of the view that non furnishing of such reasons to writ applicant amounts to denial of right of the writ applicant to effectively deal with same. The writ applicant has deal with aforesaid contentions raised by the Union, in the present writ proceedings by filing rejoinder affidavit. However, prima facie we are of the view that the writ applicant has categorically submitted before this Court that the amount realised as tax has been actually paid by the writ applicant company as the same was handed over to the “supplier of service”, in terms of the contract. The same is borne out from the pleadings and is not specifically controverted by the respondent. For the foregoing reasons, we are of the view that the writ applicant being the real aggrieved party has locus to approach respondent authority seeking refund. So far as third limb of argument canvassed by the Union as regards “ export of service” is concerned, the same has been raised for the first time



before this Court. The writ applicant has responded by filing rejoinder affidavit.

At this stage it would be appropriate to examine the relevant provisions under the Act, 2017.

Section 2 provides for definitions of various expressions used in the IGST Act. Sub-section (6) is relevant. It defines '**export of services**'. Since this definition is relevant it is extracted as under:-

"2(6) 'export of services' means the supply of any service when,-

- (i) the supplier of service is located in India;
- (ii) the recipient of service is located outside India;
- (iii) the place of supply of service is outside India;
- (iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; and
- (v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;"

Thus from the above it is seen that 'export of services' means the supply of any service when the supplier of service is located in India; the recipient of service is located outside India; the place of supply of service is outside India; payment for such service has been received by the supplier of service in convertible foreign exchange; and the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8

'Location of the recipient of services' has been defined in sub-



section (14) of section 2. Since this definition is also relevant, the same is quoted hereunder:-

"2(14) 'location of the recipient of services' means,-

(a) where a supply is received at a place of business for which the registration has been obtained, the location of such place of business;

(b) where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;

(c) where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and

(d) in absence of such places, the location of the usual place of residence of the recipient;"

From the above what is deducible is that location of the recipient of services would mean where a supply is received at a place of business for which registration has been obtained, the location of such place of business; where a supply is received at a place other than the place of business for which registration has been obtained i.e., a fixed establishment elsewhere, the location of such fixed establishment; where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and in the absence of



such places, the location of the usual place of residence of the recipient.

Section 5 of the IGST Act is the charging section. Sub-section (1) says that subject to the provisions of sub-section (2) there shall be levied a tax called the integrated goods and services tax (IGST) on all inter-state supplies of goods or services or both except on the supply of alcoholic liquor for human consumption on the value determined under section 15 of the CGST Act and at such rate as may be notified by the central government on the recommendations of the GST Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Sub-section (2) deals with integrated tax on the supply of petroleum, crude, high speed diesel, motor spirit, natural gas and aviation turbine fuel.

That brings us to section 13 which deals with place of supply of services where location of supplier or location of recipient is outside India. Sub-section (1) gives the intent of section 13. It says that provisions of section 13 shall apply to determine the place of supply of services where the location of the recipient of services is outside India. Sub-section (2) provides that except the services specified in sub-sections (3) to (13), the place of supply of services shall be the location of the recipient of services. However as per the proviso, where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services. Thus sub-section (2) lays down the general proposition that place of supply of services shall be the location of the recipient of services barring the exceptions carved out in sub-sections (3) to (13).



In view of aforesaid statutory provisions, in this case we are of the prima facie view that the writ applicant, being recipient of service is located outside India.

10. Now advertent back to the main contention and submissions canvassed on either side, as regards online or physical application, we must first look into few relevant provisions of the Act. Section 2(84)(h) which reads thus:

“Section 2(84)(h)

any body corporate incorporated by or under the laws of a country outside India.”

Section 54 (1) reads thus:

“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.”

Rule 89(1) of the Rules reads thus:

“Rule 89: Application for refund of tax, interest, penalty, fees or any other amount- (1) Any person, except the person covered under notification issued under Section 55, claiming refund of any tax, interest, penalty, fees or any other amount paid by him, other than refund of integrated tax paid on goods exported out of India, may file an application electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Center notified by the Commissioner.”



Rule 97A of the Rules reads thus:

“Rule 97A: Manual filing and processing: Notwithstanding anything contained in this Chapter in respect of any process or procedure prescribed herein, any reference to electronic filing of an application, intimation, reply, declaration, statement or electronic issuance of a notice, order or certificate on the common portal shall, in respect of that process or procedure, include manual filing of the said application, intimation, reply, declaration, statement or issuance of the said notice, order or certificate in such Forms as appended to these rules.”

11. The plain reading of Section 2(84) referred to above would indicate that the term “person” would include any body corporate incorporated by or under the laws of a country outside India. In such circumstances, first objection raised by Mr. Sharma, the learned AGP that the writ applicant being foreign Company could not have put forward its claim for refund of the tax, is not sustainable in law.

12. Section 54 of the Act referred to above provides that any person claiming refund of any tax and interest, if any, paid on such tax or any amount paid by him, can make an application before the expiry of two years from the relevant date in any such form and manner as may be prescribed. There is a proviso to sub-section 1 which provides 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 also claim such refund in the return furnished under Section 39 in the manner as may be prescribed.

13. We now look into Rule 89. Rule 89 lays down the procedure for filing of an application for refund of tax, interest, penalty, fees or



any other amount. Rule provides that any person except the person covered under the Notification issued under Section 55 claiming refund of tax, interest, penalty, fees or other amount paid by him other than the refund of integrated tax paid on goods exported out of India, may file an application electronically in the form GST RFD 01 through the common portal. Relying on the aforesaid Rule 89, it is submitted on behalf of the respondents that claim, if any for refund of any tax has to be by way of an application electronically in the form of GST RFD 01 through the common portal. However, it seems that the respondent No.4 has no idea about Rule 97A of the Rules which starts with the non-obstante clause. Rule 97A clarifies that notwithstanding anything contained in Chapter x of the Rules any reference to electronic filing of an application would include manual filing of the said application.

14. The Bombay High Court in the case of Laxmi Organic Industries Ltd. (Supra) has explained the true purport of Rule 97A of the Rules referred to above in following words, we quote the relevant observations in para, 6,7,8,9,10 and 11.

“6. The origin of the impugned circular can be traced to section 168 of the Central Goods and Services Tax Act, 2017 (hereafter “the CGST Act”, for short), which empowers the J.V.Salunke, PS 2-WP.7861.2021 Central Board of Indirect Taxes and Customs (hereafter “the Board”, for short) to issue such orders, instructions or directions to the central tax officers as it may deem fit and thereupon all such officers and all other persons employed in the implementation of the CGST Act shall observe and follow such orders, instructions or directions. There can hardly be any dispute that the said Superintendent was under an obligation to follow the terms of the impugned circular. However, it is axiomatic that the said Superintendent is also equally bound by the CGST Act and the CGST Rules and could not have turned a blind eye



to rule 97A of the CGST Rules. In our considered opinion, the said Superintendent failed to appreciate that the impugned circular could not have been ignored on the face of rule 97A, which is equally binding on him in the discharge of his duties. We say so for the reason that follows.

7. Chapter X of the CGST Rules is titled "Refund" and begins with rule 89. Rule 89 provides for the procedure to be observed while applying for refund of tax, interest, penalty, fees or any other amount. In terms of sub-rule (1) of rule 89, such an application could be made by the person eligible therefor electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner. We need not refer to the other sub-rules of rule 89 and the provisos appended to some of such sub-rules as well as rules 90 to 97, because the same have not been shown to us to be relevant for the purpose of a decision on this writ petition.

8. Adverting to rule 97A, which is the sheet-anchor of the J.V.Salunke,PS 2-WP.7861.2021 petitioner's claim, we find that the same was inserted in the CGST Rules by a notification dated 15th November 2017 and is the last rule in Chapter X. Obviously, such insertion was in exercise of the rule-making power conferred on the Central Government by section 164 of the CGST Act. It would be appropriate to reproduce below rule 97A in its entirety for facility of convenience: -

"97A. Manual filing and processing Notwithstanding anything contained in this Chapter, in respect of any process or procedure prescribed herein, any reference to electronic filing of an application, intimation, reply, declaration, statement or electronic issuance of a notice, order or certificate on the common portal shall, in respect of that process or procedure, include manual filing of the said application, intimation, reply, declaration, statement or issuance of the said notice, order or certificate in such Forms as appended to these rules."

9. Since rule 97A contains a non-obstante clause, it is intended to override rules 89 to 97 of the CGST Rules forming part of Chapter X. The plain and simple construction of rule 97A is that despite rule 89 providing for electronic



filing of applications for refund on the common portal, in respect of any process or procedure prescribed in Chapter X any reference to electronic filing of an application on the common portal shall, in respect of that process or procedure, include manual filing of the said application. If indeed the argument of Mr. Mishra that no application in any form other than online can be received and processed is accepted, rule 97A would be a dead letter and rendered redundant. Rule 97A cannot be construed in a manner so as to defeat the purpose of legislation. We, therefore, conclude that the impugned circular J.V.Salunke,PS 2-WP.7861.2021 would certainly be applicable to all applications filed electronically on the common portal, but the impugned circular cannot affect or control the statutory rule, i.e., rule 97A of the CGST Rules or derogate from it.

10. The proposition of law laid down in F. S. Enterprise (supra) that officers and all other persons employed in the institutions governed by the CGST Act and the CGST Rules are bound by instructions issued by the Board under section 168 of the CGST Act admits of no doubt. However, such decision did not lay down the law, as it could never have, that in a given case governed by a statutory rule the tax officers would be at liberty to elect and apply the orders, instructions or directions issued under section 168 of the CGST Act ignoring such statutory rule framed under section 164 thereof while discharging public duties entrusted to them. For the reasons we have assigned above, such decision does not advance the case of the respondents.

11. We, therefore, dispose of this writ petition with the following order: -

(i) the impugned circular is clarified and it is observed that its terms shall be applicable only to applications filed electronically on the common portal but would have no applicability to an application for refund which is filed manually;

(ii) the letter dated 27th July 2021 issued by the said Superintendent stands set aside;

(iii) the petitioner is permitted to file afresh the application for refund manually within a fortnight from date and on such receipt, the said Superintendent shall process the



same and ensure that the application is taken to its logical conclusion in accordance with law as J.V.Salunke,PS 2-WP.7861.2021 early as possible, preferably within 2 (two) months thereof; and

(iv) should the application be rejected, the order must have the support of reasons but if it succeeds no time shall be wasted to effect refund to the extent the petitioner is found eligible.”

15. In light of the aforesaid, the writ petition succeeds in part. We dispose of this writ petition with the following directions :

(1) The impugned order dated 2.12.2020 at Annexure A is hereby quashed and set aside.

(2) We further direct the Deputy State Tax Commissioner, Circle-2, Ahmedabad to treat the manual application dated 01.09.2020 as an application for refund. The respondents are further directed to permit the writ applicant to furnish it's stance to any objections, before the same is relied upon by the respondent authority, by providing sufficient opportunity to produce supporting documents and also to provide opportunity of hearing to the writ applicant. If any such documents are relied upon, it is expected of respondent to deal with such submissions and passed reasoned order.

(3) The respondent are directed to decide and process the application of refund, by keeping in mind the observations made by this Court. Any order which may be passed on the refund application may be communicated to the writ applicant.



(4) The respondent shall undertake such exercise within period of eight weeks from the date of receipt of writ of this Order.

(J. B. PARDIWALA, J)

Y.N. VYAS

(NISHA M. THAKORE,J)

