IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 11846 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

and

HONOURABLE MR.JUSTICE A.G.URAIZEE

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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 ?	

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THERMAX LIMITED
Versus
UNION OF INDIA

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Appearance:
MR ANAND NAINAWATI(5970) for the PETITIONER(s) No. 1
MR ANKIT SHAH(6371) for the RESPONDENT(s) No. 3
NOTICE SERVED(4) for the RESPONDENT(s) No. 1
UNSERVED WANT OF TIM(31) for the RESPONDENT(s) No. 2

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CORAM: **HONOURABLE MR.JUSTICE S.R.BRAHMBHATT**
and
HONOURABLE MR.JUSTICE A.G.URAIZEE

Date : 11/02/2019

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE A.G.URAIZEE)

1. Rule. Learned advocate Mr. Ankit Shah waives service of Rule on behalf on behalf of the respondent No.3. Though served, none appears on behalf of the respondent Nos.1 and 2.

2. With the consent of the learned advocates for the parties, the mater is taken up for final disposal.

3. The petitioner has preferred present petition under Article 226 of the Constitution of India for the following reliefs:

> "(a) that this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of mandamus or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the petitioner case and after going into the validity and legality thereof to quash and set aside the impugned Order No.24/2017-CX(WZ)/ASRA/Mumbai dated 27.12.2017 passed by the Respondent No.2;
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> (b) that pending the hearing and final disposal of this petition, the Respondents by themselves, their officers, subordinates, servants and agents be directed by an interim order and injunction of this Hon'ble Court to forthwith deposit amount of Rs.30,00,355/- with interest thereon at the rate applicable under Section 11AB of the Act in this Hon'ble Court and the petitioner be permitted to withdraw the same on such terms and conditions as the Hon'ble Court may deem fit;"

4. Short facts of the present petition are as follows:

4.1 The petitioner Company engaged in the manufacture of Boilers, Heaters, Heat Pumps and Pollution control equipment for industrial use and all these equipments are capital goods falling under Chapter 84 of the Central Excise Tariff Act, 1985. The petitioner Company have major manufacturing set up at Pune, Maharashtra and Baroda in Gujarat.

4.2 The petitioner availed credit on the inputs, capital goods and input services used in the manufacturing of finished goods which are chargeable to excise duty. It is the case of the petitioner that one of the customers M/s. Ansaldo Caldale SpA (Siemens Projects) had placed order on the petitioner for supply of Boiler at Jeddah, Saudi Arabia. Therefore, with a view to carry out complete assemble, the petitioner signed a lease agreement with Special Economic Zone on 03.11.2007 and the petitioner therefore temporarily given Survey No.169 at village: Dhrub for assembling the boilers. The petitioner exported the boilers on payment of applicable excise duty.

4.3 The petitioner filed a rebate claim under Rule 18 of the Central Excise Rules, 2002 on 16.06.2008. Thereafter, after a period of three months i.e. on 12.09.2008, show cause notice was issued proposing to deny rebate claimed by the petitioner. On 05.03.2009, the petitioner filed reply to the show cause notice and thereafter, the petitioner filed written submissions.

4.3 The respondent No.3 rejected the rebate claim filed by the petitioner on 20.07.2011. Therefore, the petitioner has challenged the same before the Commissioner of Central Excise (Appeals), Rajkot, who in turn rejected the appeal on 22.11.2011 by upholding the order in original dated 20.07.2011.

4.4 Being aggrieved with the said order, the petitioner filed Revision Application before the Revisionary Authority i.e. respondent No.2. On 27.12.2017, the respondent No.2 rejected the Revision Application of the petitioner.

5. We have heard Mr. Anand Nainavati, learned advocate

for the petitioners and Mr. Ankit Shah, learned advocate for the respondent No.3.

6. Mr. Anand Nainvati, learned advocate for the petitioner has drawn our attention to the order dated 03.08.2018 passed by this Court. The said order reads as under:

> *"1. The petitioner has challenged a revision order dated 27.12.2017, in which, the revisional authority has held that the petitioner had procured duty paid inputs and goods manufactured which were physically exported on payment of excise duty which was not required to be paid. The duty paid by the petitioner would be therefore without authority of law and cannot be said to be duty paid on the exported goods. On such basis, the revisional authority rejected the petitioner's case for rebate on the exported goods, however, on the ground that the Government cannot retain an amount which is not due to it. The Revisional Authority directed that the amount so collected, shall be recredited in the petitioner's CENVAT Credit Account.*
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> *2. Counsel for the petitioner submitted that the petitioner has no grievance about the logic adopted by the Revisional Authority, however, in view of the ushering effect of the GST regime with effect from 01.07.2017, the question of CENVAT Credit which becomes available after 01.07.2017 has to be deal with differently. Our attention was drawn to subsection (3) of section 142 of the Central Goods and Services Tax Act, 2017, which reads as under:*
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> > *"(3) Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of subsection (2) of section 11B of the Central Excise Act, 1944 (1 of 1944):*
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> > *Provided that where any claim for refund of CENVAT*

credit is fully or partially rejected, the amount so rejected shall lapse:

Provided further that no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act."

3. On the basis of such provision, counsel contended that the CENVAT Credit should have been paid in cash since the revision order was passed after 01.07.2017.

4. NOTICE, returnable on 31.08.20181."

7. Learned advocate has relied upon the decision dated 26.03.2018 passed by Commissioner (Appeals) in the case of M/s. Lanxess India Pvt. Ltd. in Order-in-Appeal No.IND-EXCUS-000-APP-776 to 792-17-18, wherein the refund is directed to be paid in cash. He, therefore, submitted that the present petition may be allowed and the Authority may be directed to pay the refund in cash instead of crediting the same in CENVAT Account, which has become redundant after advent of GST Regime.

8. Learned advocate for the respondent submitted that appropriate order may be passed in view of the provisions of Sub-Section(3) of Section 142 of the Central Goods and Services Tax Act, 2017 (for short "GST Act")

9. The respondent No.2 has in paras 15 and 16 of the impugned order has observed as under:

"15. Government, however, also observes that the applicants had procured the duty paid inputs and the goods manufactured were physically exported on payment of excise duty which was not required to be paid by them. The duty paid without authority of law cannot be treated as duty paid on the exported goods. As such

rebate claim is not admissible in terms of Rule 18 of Central Excise Rules, 2002, read with Notification No.19/2004-C.E. (N.T.), dated 6.9.2004. However, as held in many Government of India Revision Orders, Government is of opinion that the duty paid in this instant case is to be treated as voluntary deposit made by the applicants at their own volition which is required to be returned to them in the manner it was initially paid, because the Government cannot retain the same without any authority of law. The Government places its reliance on the following GOI Revisions Orders:

2012(281) ELT 0156 – Johari Digital Health Care Limited
2012(284) ELT 737 GOI-GTN Engineering (India)
2012(278) E.L.T. 559 (G.O.I.) - Indira Gandhi Mahila Sahakari Soot Girni Ltd.
2012(278) E.L.T. 421 (G.O.I.) - Praj Industries Ltd.
2012(278) E.L.T.401 (G.O.I.) - Honeywell Automation (India) Ltd.
2012 (283) ELT 0466 GOI – Flamingo Pharmaceuticals Ltd.
2014(313) ELT 0913 GOI – Ginni International Limited
2014(313) ELT 0876 GOI – Watson Pharmaceuticals
2014(312) ELT 0929 GOI – Monomer Chemical Industries Ltd.

16. Since, Government cannot retain any amount which is not due to it, as has been held in aforesaid orders, the amount so collected is allowed to be re-credited in Cenvat Account. Government allows the applicant to take re-credit of said amount in their Cenvat Credit Account. The impugned order-in- appeal is modified to this extent."

10. It is thus eminently clear from the aforesaid observations made in the impugned order that the duty, which was paid by the petitioner, which was otherwise not payable on the exported goods and therefore, rebate of such duty was not admissible in terms of Rule 18 of the Central Excise Rules. However, the duty, which was paid by the petitioner is held to

be treated as voluntary deposit. As per Section 142(3) of the GST Act, every claim for the refund filed by any person before, on or after the appointed day i.e. 01.07.2017 for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, should be disposed of in accordance with the provisions of existing law and any amount eventually accruing to such person should be paid in cash. We are of the considered opinion that in view of this clear provision, the respondent No.2 ought to have directed the sanctioning Authority to refund the amount of the duty refundable to the petitioner in cash instead of credit in CENVAT Account.

11. In case of M/s. Lanxess India Pvt. Ltd. (Supra), the Commissioner (Appeals) has directed the sanctioning Authority to refund in cash. As per the GST transition provisions, the balance of credit lying un-utilized in account as on 30.06.2017 only gets carried forward. Hence, in the present case also, what was lying in CENVAT account of the petitioner before 10.07.2017 was to be carried forward in fresh account of CENVAT account after appointed day i.e. 01.07.2017.

12. We are therefore, of the considered view that the respondent No.2 ought to have directed the sanctioning Authority to refund the duty of the amount in cash instead of credit in the CANVAT account.

13. For the foregoing reasons, the petition succeeds and is hereby allowed. The impugned order passed by the respondent No.2 in No.24/2017-CX(WZ)/ASRA/Mumbai dated 27.12.2017 is partly modified to the extent that instead of crediting the duty

in the CENVAT account of the petitioner, the sanctioning Authority is directed to refund the amount in cash to the petitioner.

Rule is made absolute.

(S.R.BRAHMBHATT, J)

(A.G.URAIZEE, J)

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