IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 11254 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE N.V.ANJARIA

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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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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BALKRISHNA INDUSTRIES LIMITED
Versus
THE UNION OF INDIA

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Appearance:
MR DHAVAL SHAH(2354) for the Petitioner(s) No. 1
MR ANKIT SHAH(6371) for the Respondent(s) No. 1,5
MR DHAVAL D VYAS(3225) for the Respondent(s) No. 4
NOTICE SERVED for the Respondent(s) No. 2,3

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CORAM:**HONOURABLE MR. JUSTICE N.V.ANJARIA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 04/08/2022

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE N.V.ANJARIA)

Heard learned advocate Mr. Mihir Joshi with learned advocate Mr. Dhaval Shah for the petitioner, learned advocate Mr. Ankit Shah for respondents no. 1, 2 and 5 and learned advocate Mr. Dhaval Vyas for respondent no.4. Though served with notice of this court, none appeared on behalf of respondents no.3 and 5.

1.1 Rule returnable forthwith. Learned advocate Mr. Ankit Shah and learned advocate Mr. Dhaval Vyas waives service of Rule for the respective respondents.

2. By filing the present Special Civil Application under Article 226 of the Constitution of India, the petitioner has prayed to set aside order dated 30.06.2020 passed by the respondent no.3 appellate authority insofar as the said order allowed refund to the petitioner after debiting the Integrated Goods and Services Tax standing in the credit ledger account of the petitioner.

2.1 Also prayed is to set aside the communication dated 14.07.2020 issued by respondent no.3 in that regard. Order in original dated 14.07.2020 which was carried in appeal and to the extent it is adverse to the petitioner is also sought to be set aside.

2.2 The petitioner further wants to set aside paragraph 3.2 of the Circular dated 04.09.2018.

2.3 The petitioner has prayed for direction to refund of Rs. 21,71,74,611/-, which is unutilised input tax credit to be refunded without any Integrated Goods and Services Tax (IGST) debit with interest.

2.4 The petitioner has claimed interest on the amount of Rs. 14,94,881/- in respect of the period beyond 60 days from 17.04.2019, which was the date of filing of refund application, till actual payment.

3. The petitioner is engaged in the manufacture of tyres and has factory at Bhuj. The petitioner is also registered with the Goods & Services Tax Authorities. The petitioner applied on 17.04.2019 seeking refund of unutilised credit of Rs. 31,58,80,475/-, comprising of the amounts towards CGST, SGST and the cess under Section 54(3) (i) of the Act read with Rule 89(4) of the CGST Rules on the ground that the petitioner had made zero rated supplies.

3.1 Section 16 of the Act allows registered person to take credit on input tax on the goods and services tax paid by such person. It is the case of the petitioner that in compliance of the relevant rules, the petitioner debited the amount equal to the refund claim in the electronic credit ledger from the balance available in GST and SGST on the date of the application.

3.2 The petitioner debited the amounts, the break-up of which was as under,

1.	IGST Balance	-	Nil
2.	CGST Balance	-	Rs. 8,00,00,000/-
3.	SGST Balance	-	Rs.23,29,91,500/-
4.	Cess	-	Rs. 28,88,975/-
	Total	-	Rs.31,58,80,475/-

3.3 At the relevant time, the petitioner had following balances in the credit ledger, that is, on the date when the refund claim was filed.

1.	IGST Balance	-	Rs.21,71,74,611/-
2.	CGST Balance	-	Rs.10,22,10,469/-
3.	SGST Balance	-	Rs.27,38,45,864/-
4.	Cess	-	Rs. 1,32,36,093/-
	Total	-	Rs.60,64,67,037/-

3.4 Respondent no.4, Assistant Commissioner of Goods and Services Tax acknowledged the application of the petitioner. However, on 10.05.2019, he issued show-cause notice proposing to reject the refund claim on two grounds, namely, that the turnover of the zero rated supplies required to be taken was of particular amount, instead of the amount that was stated by the petitioner. Secondly, it was stated that the petitioner did not follow the procedure mentioned in para 3.2 of the Circular dated 04.09.2018 by not debiting the amount of IGST of Rs.21,71,74,611/-, which was available in the balance.

3.5 The petitioner filed reply on 10.06.2019 contending that it was entitled to refund of unutilised credit under section 54(3)(i) read with Rule 89(4) of the Rules for the zero rated supplies it effected under section 16 of the Act. Out of the total refund claim of Rs. 31,58,80,475/-, respondent no.4 passed order dated 20.06.2019 and sanctioned only Rs. 9,72,10,984/-. Balance of Rs. 21,86,69,491/- was rejected on the aforesaid grounds, mainly for the contravention of the procedure mentioned in the said Circular dated 04.09.2018.

3.6 The petitioner preferred appeal against the aforesaid order dated 20.06.2019. The respondent no.3, appellate authority by order dated 30.06.2020 held that the petitioner was eligible for refund of Rs. 21,71,74,611/-, but at the same time, allowed the petitioner to file a fresh claim after deducting IGST by following the procedure provided in the aforementioned Circular. The petitioner requested the appellant authority in vein to delete the words "after deducting IGST of Rs. 21,71,74,611/- from the electronic credit ledger".

3.7 When the petitioner filed fresh application dated 14.07.2020 seeking refund, it was reponded by the authority with another show-cause notice dated 20.07.2020 proposing to reject the claim of refund. It was for the reason that the petitioner had not reversed the credit of IGST of Rs. 21,71,74,611/-.

3.8 The stand of respondent no.3 is thus that the petitioner was first required to debit IGST of Rs.21,71,74,611/- in terms of procedure contemplated in paragraph 3.2 of the Circular dated 04.09.2018 in order to be eligible to get refund. When the said procedure was not observed, it was viewed that the refund claim was liable to be rejected.

4. Learned senior advocate for the petitioner raised following main submissions, (i) the entitlement of refund to the petitioner was not disputed as the appellate authority held in favour of the petitioner. (ii) the petitioner had debited equal to amount of refund of unutilized credit in compliance of Rule 89(3) of the Rules. (iii) it was submitted that the respondents could not have rejected the refund on the sole ground that the petitioner did not debit the amount in its credit ledger in the sequence mentioned in paragraph 3.2 of the Circular. (iv) that when the application was filed in prescribed manner under the provisions and the rules and when the petitioner was already held entitled to refund, there was no good reason to deny the claim. (v) Had the deficiency memo issued, the petitioner could have earned opportunity to correct the sequence of the debit in its credit ledger as per the circular. (vi) No deficiency memo was issued, it was submitted (vii) In any case, the circular could not have overriding effect over the provisions of law and Rules which were complied with.

4.1 Learned senior advocate for the petitioner relied on the decision in **J.K. Lakshmi Cement Ltd. Vs. Commercial Tax Officer, Pali [2018(14) GSTL 497 (SC)]** to submit the proposition that circulars and instructions issued by the Board are binding on the authorities under respective statute, but when the Supreme Court or High Court lays down principle, it would be appropriate for the Court to direct that the circular should not be given effect to as they are not binding on the Courts. Further, the decision of Supreme Court in **Commissioner of Central Excise, Bolpur vs. Ratan Melting and Wire Industries [(2008) 13 SCC 1]** to assert that circular contrary to statutory provisions has no existence of law. The decision of the Division Bench in **Amit Cotton Industries vs. Principal Commissioner of Customs [2019(29) GSTL 200 (Guj)]**, observed that circulars are instructions or guidance to the departmental officers.

4.2 On the other hand, on the basis of the contents and contentions therein, learned advocate for the respondent submitted that the refund of unutilised input credit on account of zero rated supplies made without payment of tax is governed under sub-section (3) of section 54 of the Act. It was submitted that sub-section (1) of section 54 provides that an application for such refund has to be preferred in such manner as may be prescribed. It was submitted that on the manner prescribed in Rule 89(4) of the

Rules and it was further prescribed in circular dated 04.09.2018. The Circular was issued, it was submitted, under section 168(1) of the Central Goods and Services Tax Act, 2017, which could not be said to be in contravention with the provisions of section and rule concerned and when the petitioner had not complied with the provisions of the Circular, the refund claim was rightly rejected.

5. The petitioner claimed refund of untilised input tax credit on the ground that it had made zero rated supplies. Section 16 of the Act permits registered person to take credit of input tax credit of GST paid on capital goods and input services subject to such conditions and restrictions and in the manner as prescribed in Section 49 of the Act.

5.1 Rule 89 of the CGST Rules, 2017, deals with application for refund of tax, interest, penalty, fees or any other amount. Sub-Rule (3) of Rule 89 says that "where the application relates to refund of input tax credit, electronic credit ledger shall be debited by the applicant by an amount equal to refund so claimed." It is the uncontroverted fact that petitioner debited the amount equal to the refund claim out of credit of the tax amount lying in its electronic ledger.

5.2 The circular dated 04.09.2018 of which the breach is complained of and made basis to deny the

refund claim of the petitioner is issued under Section 168 of the Act. Paragraph 3.2 of the said Circular dated 04.09.2018, which is made the basis for rejection of refund claim of the petitioner reads as under,

> "3.2 After calculating the least of the three amounts, as detailed above, the equivalent amount is to be debited from the electronic credit ledger of the claimant in the following order:
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> 1) Integrated tax, to the extent of balance available.
> 2) Central tax and State tax/Union Territory tax, equally to the extent of balance available and in the event of a shortfall in the balance available in a particular electronic credit ledger (say, Central tax), the differential amount is to be debited from the other electronic credit ledger(i.e, State tax/Union Territory tax, in this case).

5.2 The stance adopted by the authorities is that the petitioner ought to have debited the amount in the sequence and the order mentioned in the Circular, that is, (i) Integrated tax to the extent of balance available. (ii) Central Tax and State Tax/Union Territory tax equal to the extent of balance available and in the event of shortfall in the balance in the particular head, the differential amount is to be debited from the other head (for instance if the central tax amount has no balance then the amount may be debited from State Tax). Even though the petitioner had debited the total amount

equal to the refund claim, as required, the debit should have been in the said order, it was so stated.

5.3 It is not in dispute that the refund claim application was in accordance with section 54 of the Act and the amount equal to the refund claim was debited from the electronic credit ledger in compliance of Rule 89(4) of the CGST Rules. Therefore, the provisions of law and Rules were complied with by the petitioner. Admittedly, the respondent did not issue any deficiency memo within 15 days as provided in Rule 89(4) of the Rules. Furthermore, the appellate authority had accepted the refund claim of the petitioner on merits and the petitioner's entitlement to refund was not in dispute.

5.4 While section 54 of the CGST Act provides that an application shall be made in such form and in the manner as prescribed, Rule 89(4) says that the application should be filed in the prescribed form and in the manner prescribed. Section 2(89) of the Act defines the expression "prescribed" to mean "prescribed by the Rules made under CGST Act on the recommendation of the Council". Therefore, the manner prescribed was to be one prescribed under Rule 89(3) of the Rules.

5.5 The Circular dated 04.09.2018 was the product of exercise of the powers under section 168(1) of the Act. It was an administrative instruction issued by

the authority. The Circular of such nature could not substitute, amend or curtail the ambit or operation of the CGST Rules, in particular Rule 89(3), which was duly observed by the petitioner in respect of its refund claim. There was no breach of the 'manner prescribed' in the Rules in relation to lodging of the refund claim.

5.6 As the petitioner had debited the total amount of refund claim prescribed in the Rule in its electronic credit ledger, the requirement was met with. Merely because the debit was not made in the sequence mentioned in the Circular, the refund claim could not have been rejected. Even otherwise, no undue benefit was taken by the petitioner by not adhering to the order of refund.

6. When the entitlement of the petitioner for refund is not in dispute and the appellate authority has confirmed the claim of the petitioner and the conditions of section 54(3) of the Act and Rule 89(4) of the Rules are complied with, in such facts and circumstances, even if the procedure laid down in the circular for getting refund stands at variance or if it was not observed by the petitioner for non-culpable reasons, the providence and procedure in the circular would not prevail over the statutory prescription under which the right of the petitioner to get refund is established.

6.1 In **Babaji Kondaji Garad & Ors. vs. Nasik Merchants Coop. Bank Ltd.[AIR 1984 SC 192],** the Supreme Court had an occasion to consider Section 73-B of the Maharastra Cooperative Societies Act and Rule 61 of Cooperative Societies Rules. Section 73-B mandated to earmark the cities for reserved category and Board of Directors of the specified. The Supreme Court observed that what is contemplated in Rule 61 which was a bylaw, could not displace the legislative mandate of statutory provision.

6.2 The Supreme court observed that in construing the legislative measure or statutory provision, opinion of the executive is not relevant. It was observed,

> "Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the bye-law if not in conformity with the statute in order to give effect to the statutory provision the rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with."

6.3 What the Circular lays down is the procedure. The Supreme Court in **Saiyad Mohammad Bakar El-Edroos Vs. Abdulhabib Hasan Arab & Ors.[(1998) 4 SCC 343],** reiterated the principle that the procedure of law is always subservient to substantive law.

6.3.1 It was stated,

> "A procedural law is always in aid of justice, not in contradiction or to defeat the very object which is sought to be achieved. A procedural law is always subservient to the substantive law. Nothing can be given by a procedural law what is not sought to be given by a substantive law and nothing can be taken away be the procedural law what is given by the substantive law."
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> (para 8)

6.4 Even if the procedure of claiming refund, contemplated in paragraph 3.2 of the Circular could not be adhered to, but on the other hand, there was a substantive right of the petitioner created to claim the refund in law, then non-compliance of the procedure of Circular would only amount to irregularity and not illegality.

6.4.1 In **Solanki Parvatikumari Rameshbhai Vs. State of Gujarat being Special Civil Application No. 22981 of 2017,** Single Judge of this Court explained the differentiation between illegality and irregularity,

> "5.2 Law conceives a clear differentiation between illegality and irregularity. This nice distinction brings home the case of the petitioner. An illegality is something which amounts to substantial failure in compliance of requirement. It denotes such breach of rule or requirement which alters the position of a party in terms of his right or obligation. Illegality denotes a complete defect in the jurisdiction or proceedings. Illegality is properly predictable in its radical defects. It is a situation contrary to the principle of law. As against this, an irregularity as defined

lexicographically, is want of adherence to some prescribed rule or mode of proceedings.

6.4.2 It was further stated by the Court in same para,

> "It consist in omitting the rule something that is necessary for due and orderly conducting of a suit or doing it in an unreasonable time or improper manner. In Law Lexicon by R. Ramanatha Aiyar, 1997 Edition, irregularity is defined as "a neglect of order or method; not according to regulations; the doing of an act at an unreasonable time, or in an improper manner; the technical term for every defect in practical proceedings or the mode of conducting an action or defence, as distinguished from defects in pleading. Irregularity is failure to observe that particular course of proceedings which, conformable with the practice of the court, ought to have been observed".

6.4.3 It was further stated that irregular conduct or procedure could not have debilitating effect on the substantive rights of the party,

> "5.3 A thing irregularly done is not regularly done. It is not in conformity of rule or principle. The concepts "illegal", "irregular" and "procedurally irregular", are often understood in terms of their degree which they bear to be not in conformity with rule of particular course of action. The illegality is a highest kind of breach of law which will taint and vitiate the action. One who commit "illegality" has to be denied the assertion of his right and he stands disentitled to relief in law. Irregularity, as noticed, is breach of procedure of rule or some orderly conduct but

> not of such nature which could be said to be in the nature of a debilitating defect. It is pardonable in law. The concept of procedural irregularity is indicative of lapse of minor nature in procedure which could not affect adversely rights of a party, nor would exceptionally reverse the obligation of the other side."

6.5 For all the aforesaid discussion and reasons, petition deserves to be allowed. Rule is made absolute. (a) Order in Appeal dated 30.06.2020 passed by respondent no.3 to the extent it allowed only after debiting in the credit ledger account of the petitioner is quashed and set aside. (b) Communication dated 14.07.2020 from respondent no.3 in above regard is also set aside. (c) Order in original dated 14.07.2020 stands set aside. (d) It is declared that non-compliance of the procedure in paragraph 3.2 of the circular dated 04.09.2018 will not dis-entitle the petitioner from claiming the refund amount. The respondent shall make the payment of refund to the petitioner to the tune of Rs.21,71,74,611/- with statutory interest within eight weeks from the date of receipt of this order.

7. The petition stands allowed. Rule is made absolute accordingly.

(N.V.ANJARIA, J)

(BHARGAV D. KARIA, J)

BIJOY B. PILLAI