R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF FEBRUARY, 2023

BEFORE

THE HON'BLE MR JUSTICE S.R.KRISHNA KUMAR

WRIT PETITION NO. 13185 OF 2020 (T-RES)

BETWEEN:

M/S TONBO IMAGING INDIA PVT LTD
NO.3, CHIKKAYELLAPPA TOWER-II,
SARJAPURA MAIN ROAD,
1ST C MAIN, JAKKASANDRA EXTENSION,
CHIKKAYELLAPPA INDUSTRIAL LAYOUT,
BENGALURU-560 034.
(REPRESENTED BY MS CECILIA D SOUZA,
DIRECTOR AND THE CHIEF FINANCIAL OFFICER,
AGED ABOUT 46 YEARS,
D/O MR MARCEL D SOUZA

...PETITIONER

(BY SRI. V. RAGHURAMAN, SENIOR COUNSEL FOR
SRI. C.R. RAGHAVENDRA , ADVOCATE)

AND:

1. UNION OF INDIA
MINISTRY OF FINANCE,
REPRESENTED BY SECRETARY,
NORTH BLOCK,
NEW DELHI-110001

2. CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS
NORTH BLOCK,NEW DELHI-110001
REPRESENTED BY ITS CHAIRMAN.

3. DEPUTY COMMISSIONER OF CENTRAL TAX.
SOUTH DIVISION 5, A WING 6TH FLOOR,
KENDRIYA SADAN, KORAMANGALA,
BENGALURU-560 034.

4. COMMISSIONER OF CENTRAL TAX
SOUTH DIVISION COMMISSIONERATE,
C R BUILDING, QUEENS ROAD,
BENGALURU-560 034.

...RESPONDENTS

(BY SMT. VANITHA.K.R.,ADVOCATE)

THIS W.P. IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE THE PROVISIONS OF RULE 89(4)(C) OF THE CGST RULES, AS AMENDED VIDE PARA 8 OF NOTIFICATION 16/2020-CT DATED 23.03.2020, ENCLOSED AS ANNEXURE-A AS UNCONSTITUTIONAL FOR THE REASONS STATED IN THE GROUNDS & ETC.,

THIS W.P. IS BEING HEARD AND RESERVED ON 25.11.2022, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

In this petition, petitioner has sought for the following reliefs:-

a. Issue a writ of declaration or any other appropriate writ or direction declaring the provision of Rule 89(4) (C) of the CGST Rules, as amended vide Para 8 of Notification 16/2020-CT dated 23.03.2020, enclosed a ***Annexure A*** *as unconstitutional for the reasons stated in the grounds;*

b. Issue a writ of declaration or any other appropriate writ or direction declaring the provisions of Explanation to Rule 93 of the CGST Rule, enclosed as Annexure B as unconstitutional for the reasons stated in the grounds;

c. Issue a writ of certiorari or any other appropriate writ to quash impugned order passed by

Respondent No. 3 in Form GST-RFD-06 dated 30.06.2020, enclosed as ***Annexure C*** *for the reasons stated in the grounds;*

d. Issue a writ of mandamus or any other appropriate writ directing the Respondent No. 3 to accept the six refund applications in Form GST-RFD-01 on 25.05.2020, 27.05.2020 and on 28.05.2020 for the tax periods May 2018, July 2018, August 2018, November 2018, December 2018 and March 2019 (enclosed in ***Annexures D1, D2, D3, D4, D5 and D6****) and grant refund of taxes in accordance with law along with interest;*

And

e. Grant such other consequential relief a this Hon'ble High Court may think fit including refund of amounts paid, if any and the cost of this writ petition.

2. Apart from other issues, the validity of Rule 89(4C) of the Central Goods and Services Tax Rules, 2017 (for short 'the CGST Rules') as amended vide Para 8 of the Notification No.16/2020-CT dated 23.03.2020 is the subject matter of the present petition.

Prior to the aforesaid amendment, Rule 89(4C) of the CGST Rules, read as under:-

"Turnover of zero-rated supply of goods means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking as declared by the supplier, whichever is

less, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both".

After amendment w.e.f 23.03.2020, Rule 89(4C) reads as under:-

> *"Turnover of zero-rated supply of goods means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking* ***or the value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier,*** *as declared by the supplier, whichever is less, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both"*

Factual Matrix of the case:

3. The petitioner - M/s Tonbo Imaging India Pvt Ltd, is engaged in designing, developing, building and deploying various types of advanced imaging and sensor systems to sense, understand and control complex environments. The petitioner is engaged in developing innovative designs in micro-optics, lower power electronics and real-time vision processing to design imaging systems for real world applications in fields of military applications, critical infrastructures for modern day battlefields, unmanned reconnaissance, transport vehicles driving in the dark

etc., wherein the customized products provide effective visualization in different and challenging environments.

3.1 The petitioner exported various aforementioned customized / unique products during the period from May 2018 to March 2019. Since exports made by the petitioner are “zero rated” under Section 16 of the Integrated Goods and Services Act, 2017 (for short, ‘the IGST Act’), the petitioner filed refund applications with the respondents on 25.05.2020, 27.05.2020 and 28.05.2020 and claimed refund of unutilized input tax credit under Section 54(3)(i) of the Central Goods and Services Act, 2017 (for short ‘the CGST Act’) read with Rule 89 of the CGST Rules.

3.2 Meanwhile, Rule 89(4)(C) of the CGST Rules having been amended w.e.f 23.03.2020, Show Cause Notices dated 27.05.2020, 03.06.2020 and 04.06.2020 were issued by the respondents on the ground that the petitioner had not given proof, which was required to be given in terms of the amended Rule 89(4)(C) of the CGST Rules and that therefore, the refund claims could not be considered.

3.3 The petitioner submitted replies dated 04.06.2020, 08.06.2020 and 09.06.2020 to the show cause notices *inter-alia* stating that the amended Rule 89(4)(C) of the CGST Rules would

not be applicable in the instant case, as the period for which refund was being claimed (i.e., May 2018 to March 2019) was much prior to the amendment of Rule 89(4)(C) (i.e., on 23.03.2020) and that therefore, the petitioner would be governed by the old/un-amended Rule 89(4)(C) and not the amended Rule 89(4)(C).

3.4 In pursuance of the same, the respondents proceeded to pass the impugned order dated 30.06.2020 rejecting the refund claim of the petitioner, who is before this Court by way of the present petition not only assailing the impugned order but also the validity of Rule 89(4)(C) of the CGST Rules as well as the Explanation to Rule 93 of the CGST Rules.

4. Heard Sri.V.Raghuraman, learned Senior Counsel along with Sri.J.S.Bhanumurthy for the petitioner and Smt.K.R.Vanitha, learned counsel for the respondents-revenue and perused the material on record.

Petitioner's Contentions:

5. In addition to reiterating the various contentions urged in the petition and referring to the material on record, learned Senior counsel for the petitioner submitted that at the outset, the challenge in the present petition to the validity of the explanation to Rule 93 of

the CGST Rules(Relief 'B') was not being pressed into service by the petitioner, who would be restricting its claim to the remaining reliefs sought for in the petition.

5.1 It was submitted that Rule 89(4)(C) of the CGST Rules, as amended on 23.03.2020 is *ultra vires* and invalid and deserves to be declared unconstitutional and struck down. It was further submitted that the impugned order is illegal, arbitrary and without jurisdiction or authority of law and deserves to be quashed and the respondents be directed to accept/allow the subject refund claims of the petitioner and grant refund of taxes along with interest in favour of the petitioner.

Learned Senior counsel elaborated his submissions as under:-

5.2 Rule 89(4)(C) of the CGST Rules is *ultra vires* Section 54 of the CGST Act read with Section 16 of the IGST Act; the very intention of the zero-rating it to make entire supply chain of "exports" tax free, i.e., to fully 'zero-rate' the exports by exempting them from both input tax and output tax; accordingly, Section 16(3) of the IGST Act allows refund of input taxes paid in the course of making a zero-rated supply, i.e., supplies which covers exports as well as supplies to SEZs. The rule in whittling down such refund is

ultra vires in view of the well settled principle of law that Rules cannot over-ride the parent legislation.

5.3 Rule 89(4)(C) of the CGST Rules is *ultra vires* Article 269A read with Article 246A of the Constitution of India as the Parliament has no legislative competence to levy GST on export of goods; neither in Article 246A nor in Article 269A is there a reference to treatment of export of goods or services, while in Article 269A reference is made to import of goods or services or both, particularly when reference to export of goods or services in Article 286 is only for the purpose of placing restrictions on the powers of the State Legislature.

5.4 Rule 89(4)(C) of the CGST Rules is violative of Article 14 and 19(1)(g) of the Constitution of India; it was submitted that the quantum of refund of unutilized input tax credit is restricted only in cases falling under Section 16(3)(a) of the IGST Act, i.e., in cases where export of goods is made without payment of duty under a Bond/Letter of Undertaking(LUT); however, no such restriction is imposed on cases falling under Section 16(3)(b) of the IGST Act, i.e., in cases where export of goods is made after payment of duty; by virtue of the above, there is a hostile discrimination between two class of persons, viz.,

(i) the class of exporters, who opt to obtain refund of unutilized input tax credit where export of goods are made without payment of duty under a bond/LUT in terms of Section 16(3)(a) of the IGST Act read with Rule 89(4) of the CGST Rules and,

(ii) the class of exporters who opt to obtain refund of tax after payment of duty in terms of Section 16(3)(b) of the IGST Act read with Rule 96A of the rules; the guarantee of equal protection of the laws must extend even to taxing statutes; if person or property of the same character has to be taxed, the taxation must be by the same standard, so that the burden of taxation may fall equally on all persons holding that kind and extent of property; if the same class of property or persons similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property or persons.

5.5 It was submitted that Article 14 of the Constitution forbids class legislation; however, Article 14 does not prohibit reasonable classification for the purpose of legislation provided it passes two tests, viz., that the 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 that the

differentia must have a rational relation with the object sought to be achieved by the statute; it was submitted that the impugned Rule 89(4)(C) of the CGST Rules is arbitrary and unreasonable, in as much as it bears no rational nexus with the objective sought to be achieved by Section 16 of the IGST Act, in that while Section 16 of the IGST Act seeks to make exports tax-free by “zero-rating” them, the impugned Rule 89(4)(C) of the CGST Rules aims to do just exactly the opposite by restricting the quantum of refund of tax available to the expended in making such exports; it was therefore submitted that including domestic turnover in the definition of zero rated supply which is meant to cover only exports is clearly arbitrary and unreasonable.

5.6 Insofar as violation of Article 19(1)(g) of the Constitution of India is concerned, it was submitted that in exports, availability of the rotation of funds is essential for the business to thrive; the entire concept of refund of unutilized input tax credit relating to zero-rated supply would be obliterated, in case the respondents are permitted to put any limitation and condition that takes away petitioner’s right to claim refund of all the taxes paid on the domestic purchases used for the purpose of zero-rated supplies; the incentive given to the exporters would lose its meaning and this

would cause grave hardship to the exporters who are earning valuable foreign exchange for the country; it was therefore submitted that exporters would have factored in such incentives in the pricing mechanism when they quote and consequently, the restriction of the same by the impugned amended Rule 89(4)(C) would be highly unreasonable.

5.7 Rule 89(4)(C) of the CGST Rules also suffers from the vice of vagueness for the reason that the words “like goods” and “similarly placed supplier” in the impugned Rule 89(4)(C) are completely open-ended and are not defined anywhere in the CGST Act/Rules or the IGST Act/Rules; in this context, it was submitted that considering the business of the petitioner, it is not possible to have any “like goods” and “same or similar placed supplier” for the unique and customized products being manufactured by the petitioner and the preciseness of definitions as found in the customs legislation is missing herein.

5.8 In this context, it was submitted that the impugned Rule fails to clarify, as to what would be the consequence if there are no goods supplied in the domestic market and value of like goods provided by other suppliers is not available or as to what would be the consequences in respect of a supplier who may have different

pricing policy for different local customers nor what would be the consequences in respect of a supplier who would be pricing the local goods differently in different states for the same products being exported. It was therefore submitted that when it is impossible for any exporter to show proof of value of “like goods” domestically supplied by the “same or, similarly placed, supplier”, the refund itself cannot be denied to such exporter and consequently, Rule 89(4)(C) of the CGST Rules merely being a machinery provision cannot impose a rigorous condition to take away right to obtain refund, which the petitioner is otherwise entitled to in terms of Section 54 of CGST Act read with Section 16 of the IGST Act.

5.9 The impugned Rule 89(4)(C) of the CGST Rules, as amended on 23.03.2020 is arbitrary and unreasonable, in as much as the possibility of taking undue benefit by inflating the value of the zero-rated supply of goods, cannot be a ground to amend the Rule, which deserves to be declared invalid on this ground also.

5.10 The impugned refund rejection order has been mechanically passed without any application of mind also violative of principles of natural justice; further, the refund claims of the petitioner pertain to periods prior to 23.03.2020, when Rule

89(4)(C) of the CGST Rules came into force and since the same cannot be given retrospective or retroactive effect, the impugned order deserves to be quashed.

In support of his contentions, learned Senior counsel placed reliance upon the following judgments:-

(i) CIT vs. Taj Mahal Hotel – (1971) 3 SCC 550;
(ii) Bimal Chandra Banerjee vs. State of Madhya Pradesh – 1970) 2 SCC 467;
(iii) Sangram Singh vs. Election Tribunal – AIR 1955 SC 425;
(iv) All India Federation of Tax Practioners vs. Union of India – 2007) 7 SCC 527;
(v) Shayarabano vs. Union of India – (2017) 9 SCC 1;
(vi) Pitambra Books Pvt. Ltd., vs. Union of India (34) – GSTL 196 (DEL);
(vii) Shreya Singal vs. Union of India – (2015) 5 SCC 1;
(viii) Universal Drinks Pvt. Ltd., vs. Union of India – 1984 (18) ELT 207(BOM);
(ix) Deepak Vegetable Oil Industries vs. Union of India – 1991(52) ELT 222 (GUJ);
(x) Hajee K Assiannar vs. CIT – (1971) 81 ITR 423 (KER);
(xi) CIT vs. Vatika Township Pvt. Ltd., - (2014) 367 ITR 466 (SC);
(xii) Verghese vs. DCIT – (1994) 210 ITR 511 (KAR);
(xiii) ACCT vs. Shukla & Brothers – 2010 (254) ELT 6 (SC);
(xiv) Moopil Nair vs. State of Kerala – AIR 1961 SC 552;
(xv) Deputy Commissioner of Income Tax vs. Pepsi Foods Ltd., - (2021) 7 SCC 413;
(xvi) Reckitt Benckiser vs. Union of India – 2011 (269) ELT 194 (J & K);

(xvii) U.P. Power Corporation vs. Sant Steels & Alloys Pvt. Ltd., - (2008) 2 SCC 777;

Respondents' Contentions:

6. Per contra, learned counsel for the respondents-revenue, in addition to reiterating the various contentions urged in the statement of objections submitted that the petition was not maintainable and was liable to be dismissed. It was submitted that the petitioner has not submitted the proof that the export turnover mentioned in the instant claim is 1.5 times the value of like goods domestically supplied by the same or similarly placed supplier and hence, zero-rated turnover declared by the petitioner cannot be accepted for the purpose of calculation of eligible refund amount. Thus repudiating the various contentions of the petitioner, it was submitted that there was no merit in the petition and the same was liable to be dismissed.

Analysis and Findings:

7. Before adverting to the rival contentions and the relevant statutory provisions, a brief overview of the GST scheme is required; in this context, it is relevant to state that the entire scheme of indirect taxes in India has undergone transformation

upon introduction of GST with effect from 01.07.2017. This tax is being levied with concurrent jurisdiction of the Centre and the States on the supply of goods or services. For this purpose, the Constitution of India has been amended vide Constitution (101st Amendment) Act, 2016 with effect from 16th September 2016. The Constitutional Amendment Bill specifically mentions that the objective of introducing GST is to avoid cascading effect of taxes.

8. Central Government enacted the CGST Act to provide for levy and collection of tax on supply of goods or service or both where the supply is intra-state supply; so also, the CGST Rules were also framed including the impugned Rule 89(4)(C);

9. Central Government enacted the IGST Act for the purpose of levy and collection of GST on the supply of goods or services or both where the supply is inter-state supply;

10. The State of Karnataka enacted the KGST Act to levy and collect tax on intra-state supply of goods or services or both within the state of Karnataka.

11. GST is a multi-stage tax, as each point in a supply chain is taxed (unless specifically exempted by law) till the goods and

services reach the final consumer. This can be demonstrated by the following:

- A manufacturer procures “input goods” and “input services” to manufacturer his goods and would make “outward supply” to a wholesale supplier. Here, the levy of GST would be on the manufacturer/seller. However, the incidence of GST would be on the wholesale supplier.
- For the wholesale supplier, the goods procured from the manufacturer/seller becomes “input goods”. The wholesale supplier would make value additions thereon and make an “outward supply” of the same to the retailer. In doing so, GST is levied on the wholesale supplier, but the incidence of GST, which was earlier on the wholesale supplier, is further passed on to the retailer.
- The goods procured from the wholesale supplier becomes “input goods” for the retail seller. The retail seller would make value additions thereon and make an “outward supply” of the same to the final consumer. In doing the same, GST is levied on the retail seller, but the incidence of GST, which was earlier on the retail seller, is further passed on to the final consumer.

- The supply chain having been terminated, the final consumer will not be able to pass the incidence of tax any further and thus bears the final burden of tax.
- GST is therefore a destination-based tax on consumption of goods and services. It is levied at all stages right from manufacture up to final consumption with 'credit' of taxes paid at previous stages of supply chain available as setoff. In a nutshell, only value addition will be taxed, and burden of tax is to be borne by the final consumer.

12. In the case of ***All India Federation of Tax Practitioners Vs Union of India - (2007) 7 SCC 527***, the Apex Court held as under:

> *"6. At this stage, we may refer to the concept of "Value Added Tax" (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer.*
>
> *7. In the light of what is stated above, it is clear that service tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on*

services provided within the country. Service tax is a value added tax."

13. In the case of ***Union of India v. VKC Footsteps (India) (P) Ltd.*, - (2022) 2 SCC 603**, the Apex Court held as under:-

"44. The idea which permeates GST legislation globally is to impose a multi-stage tax under which each point in a supply chain is potentially taxed. Suppliers are entitled to avail credit of tax paid at an anterior stage. As a result, GST fulfils the description of a tax which is based on value addition. Value addition is intended to achieve fiscal neutrality and to obviate a cascading effect of taxation which traditional tax regimes were liable to perpetuate. In a sense therefore, the purpose of a tax on value addition is not dependent on the distribution or manufacturing model. The tax which is paid at an anterior stage of the supply chain is adjusted. The fundamental object is to achieve both neutrality and equivalence by the grant of seamless credit of the duties paid at an anterior stage of the supply chain."

Section 16 of the IGST Act, 2017 reads as under:

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 there under.

Section 54(3) of the CGST Act, 2017 reads as under:

Refund of tax.

54. (1) Any person claiming refund of any tax……

(2)xxxxxxxxxxxxxxxxxxxxxxxx

(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) xxxxxxxxxxxxxxxxxxxxxxxxxxx

Rule 89(4) of the CGST Rules, 2017 reads as under:

"89. Application for refund of tax, interest, penalty, fees or any other amount.-*(1)xxxxxxxxxxxxxxxx*

(4) In the case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), refund of input tax credit shall be granted as per the following formula – Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero-rated supply of services) x Net ITC ÷Adjusted Total Turnover Where, -

(A) "Refund amount" means the maximum refund that is admissible;

(B) "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;

(C) "Turnover of zero-rated supply of goods means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking ***or the value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier, as declared by the supplier, whichever is less,*** *other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both"*

(D) "Turnover of zero-rated supply of services" means the value of zero-rated supply of services made without payment of tax under bond or letter of undertaking, calculated in the following manner, namely:-

Zero-rated supply of services is the aggregate of the payments received during the relevant period for zero-rated supply of services and zero-rated supply of services where supply has been completed for which payment had been received in advance in any period prior to the relevant period reduced by advances received for zero-rated supply of services for which the supply of services has not been completed during the relevant period;"

14. There is no gainsaying the fact that one of the fundamental principles to make exports competitive in the international market is that taxes are not added to the cost of exports. This intention cannot be carried out by merely exempting the output goods or services for the following reasons:-

- The inputs and input services which go into the making of the output goods or services would have already suffered tax and only the final output product would be exempted.
- When the output is exempted, tax laws do not allow availment/utilization of credit on the inputs and input services used for supply of the exempted output. Thus, in a true sense, the entire supply is not zero-rated.
- To overcome the above anomalies, export of goods and services to destinations outside India have been “zero-rated” in the GST regime. The effect of “zero-rating” is that the entire supply chain of a particular zero-rated supply (i.e., export) is tax free i.e., there is no burden of tax either on the input side or output side.

- The detailed write-up on 'zero rating of supplies' issued by the Director General of Taxpayer Services, CBIC(Annexure-K to the writ petition) clarifies the position as under:

What is the need for Zero Rating?

As per section 2(47) of the CGST Act, 2017, a supply is said to be exempt, when it attracts nil rate of duty or is specifically exempted buy a notification or kept out of the purview of tax (i.e. a non-GST) supply). But if a good or service is exempted from payment of tax, it cannot be said that it is a zero rated. The reason is not har5d to find. The inputs and input services which go into the making of the good or provision of service has already suffered tax and only the final product is exempted. Moreover, when the output is exempted, tax laws do not allow availment /utilisation of credit on the inputs and input services used for supply of the exempted output. Thus, in a true sense the entire supply is not zero rated. Though the output suffers no tax, the inputs and input services have suffered tax and since availment of tax on input side is not permitted, that becomes a cost for the supplier. The concept of zero rating of supplies aims to correct this anomaly.

- *What is Zero Rating?*
- *By zero rating it is meant that the entire value chain of the supply is exempt from tax. This means that in case of zero rating, not only is the output exempt from payment of tax, there is no bar on taking/availing credit of taxes paid on the input side for making/providing the output supply. Such an approach would in true sense make the goods or services zero rated.*
- *All supplies need not be zero-rated. As per the GST Law exports are meant to be zero rated the zero rating principle is applied in letter and spirit or exports and supplies to SEZ. The relevant*

provisions are contained in Section 16(1) of the IGST Act, 2017, which states that "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.*
- *As already seen, the concept of zero rating of supplies requires the supplies as well as the inputs or input services used in supplying the supplies to be free of GST. This is done by employing the following means:*
- *a) The taxes paid on the supplies which are zero rated are refunded;*
- *b) The credit of inputs/input services is allowed;*
- *c) Wherever the supplies are exempted, or the supplies are made without payment of tax, the taxes paid on the inputs or input services i.e. the unutilised input tax credit is refunded.*
- *The provisions for the refund of unutilised input credit are contained in the explanation to section 54 of the CGST Act, 2017, which defines refund as below:*
- *"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 supply of goods regarded as deemed exports, or refund of unutilised input tax credit as provided under sub-section (3).*
- *Thus, even if a supply is exempted, the credit of input tax may be availed for making zero-rated supplies. A registered person making zero rated supply can 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 procedures as may be prescribed, without payment of integrated tax and claim refund or 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 CGST Act, 2017 or the rules made there under.*
- *As per Section 54(3) of the CGST Act, 2017, any unutilised input tax credit in zero rated supplies can be refunded, wherever such supplies are made by using the option of Bo0nd/LUT. The difference between zero rated supplies and exempted supplies is tabulated as below:*

Exempted supplies	*Zero rated supplies*
"exempt supply" means supply of any goods or services or both which attracts nil rate of tax which may be wholly exempt from tax under section 11 of CGST Act or under section 6 of the IGST Act, and includes not-taxable supply	*"zero rated supply" shall have the meaning assigned to it in section 16*
No tax on the outward exempted supplies, however, the input supplies used for making exempt supplies to be taxed	*No tax on the outward supplies; Input supplies also to be tax free*
Credit of input tax needs to be reversed, it taken; no ITC on the exempted supplies	*Credit of input tax may be availed for making zero-rated supplies, even if such supply is an exempt supply IIC allowed on zero-rated supplies*

Value of exempt supplies, for apportionment of ITC, shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.	*Value of zero rated supplies shall be added along with the taxable supplies for apportionment of ITC*
Any person engaged exclusively in the business of supplying goods or services or both that are not liable to tax or wholly exempt from tax under the CGST or IGST Act shall not be liable to registration	*A person exclusively6 making zero rated supplies may have to register as refunds of unutilised ITC or integrated tax paid shall have to be claimed*
A registered person supplying exempted goods or services or both shall issue, instead of a tax invoice, a bill of supply	*Normal tax invoice shall be issued*

- *Provisional refund:*

- *As per section 54(6) of the CGST Act, 2017, ninety percent of the total amount of refund claimed, on account of zero-rated supply of goods or services or both made by registered persons, may be sanctioned on a provisional basis. The remaining ten percent can be refunded later after due verification of document furnished by the applicant.*

- *Non-applicability of Principle of Unjust Enrichment:*

- *The principle of unjust enrichment shall not be applicable in case of refund of taxes paid wherever such refund is on accounts of zero rated supplies. As per section 54(8) of the CGST Act, 2017, the refundable amount, if such amount is relatable to 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, shall instead of being credited to the Fund, be paid to the applicant.

15. The detailed write-up on 'refund of integrated tax paid on account of zero rated supplies' issued by the Director General of Taxpayer Services, CBIC, ***(Annexure-L to the writ petition)*** clarifies the position as under:-

Under GST, Exports and supplies to SEZ are zero rated as per section 16 of the IGST Act, 2017. By zero rating it is meant that the entire supply chain of a particular zero rated supply is tax free i.e. there is no burden of tax either on the input side or output side. This is in contrast with exempted supplies, where only output is exempted from tax but tax is suffered on the input side. The essence of zero rating is to make Indian goods and services competitive in the international market by ensuring that taxes do not get added to the cost of exports.

The objective of zero rating of exports and supplies to SEZ is sought to be achieved through the provision contained in Section 16(3) of the IGST Act, 2017, which mandates that a registered person making a zero rated supply is eligible to claim refund in accordance with the provisions of Section 54 of the CGST Act, 2017, under either of the following options, namely:--

- *He may supply goods or service 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 of CGST, SGST/UTGST and IGST; or*
- *He may be supply good 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.

The second category pertain to refund of integrated tax paid for the zero-rated supplies made by suppliers who opt for the route of export on payment of integrated tax and claim refund of such tax paid. There can be two sub-categories of such suppliers namely:

1. *Exporter of goods*

2. *Service of exporters and persons making supplies to SEZ.*

Export of Goods

The normal refund application in GST RFD-01 is not applicable in this case. There is no need for filing a separate refund claim as the shipping bill filed by the exporter is itself treated as a refund claim. As per rule 96 of the CGST Rules, 2017 the shipping bill filed by an exporter 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 an export manifest or an export report covering the number and the date of shipping bill or bills of export; and (b) the applicant has furnished a valid return in FORM GSTR-3 or FORM GSTR3B, as the case may be.

Thus, once the shipping bill and export general manifest (EGM) is filed and a valid return is filed, the application for refund shall be considered to have been filed and refund shall be processed by the department.

Service Exporters and Persons making supplies to SEZ

Under this category also, the supplier may choose to first pay IGST and then claim refund of the IGST so paid. In these cases,

the suppliers will have to file refund claim in FORM GST RFD-01 on the common portal, a per Rule 89 of the CGST Rules, 2017. Service Exporter need to file a statement containing the number and date of invoices and the relevant Bank Realisation Certificate, a the case may be, along with the refund claim.

In so far as refund is on account of supplies made to SEZ, the DTA supplier will have to file the refund claim in such cases. The second proviso to Rule 89 stipulates that in respect of supplies to a Special Economic Zone unit or a Special Economic Zone developer, the application for refund shall be filed by the-

(a) Supplier of goods after such goods have been admitted in full in the Special Economic Zone for authorised operations, as endorsed by the specified officer of the Zone;

(b) Supplier of services along with such evidence regarding receipt of services for authorised operations as endorsed by the specified officer of the Zone.

Thus, proof of receipt of goods or service as evidenced by the specified officer of the zone is a pre-requisite for filing of refund claim by the DTA supplier.

The claim for refund when made for supplies made to SEZ unit/Developer has to be filed along with the following documents:

1. A statement containing the number and date of invoices as provided in rule 46 along with the evidence regarding the endorsement specified in the second proviso to sub-rule (1) in the case of the supply of goods made to a Special Economic Zone unit or a Special Economic Zone developer;

2. A statement containing the number and date of invoices, the evidence regarding the endorsement specified in the second proviso to sub-rule(1) and the details of payment, along with the

proof thereof, made by the recipient to the supplier for authorised operations a defined under the Special Economic Zone Act, 2005, in a case where the refund is on account of supply of services made to a Special Economic Zone unit or a Special Economic Zone developer;

3. A declaration to the effect that the Special Economic Zone unit or the Special Economic Zone developer has not availed the input tax credit of the tax paid by the supplier of goods or services or both, in a case where the refund I on account of supply of goods or services made to a Special Economic Zone unit or a Special Economic Zone developer.

Grant of Provisional Refund

The above category of persons making zero rated supplies will be entitled to provisional refund of 90% of the claim in terms of Section 54(6) of CGST Act, 2017.

Rule 91 of CGST Rules, 2017 provide that the provisional refund is to be granted within 7 day from the date of acknowledgement of the refund claim. An order for provisional refund is to be issued in Form GST RFD 04 along with payment advice in the name of the claimant in Form GT RFD 05. The amount will be electronically credited to the claimant's bank account. Rule 91 also prescribe that the provisional refund will not be granted if the person claiming refund has, during any period of five year immediately preceding the tax period to which the claim for refund relate, been prosecuted for any offence under the Act or under an earlier law where the amount of tax evaded exceeds two hundred and fifty lakh rupees.

16. The principles emerging from the aforesaid discussion can be summarized as under:-

- The entire supply chain in an export transaction would be tax free and exempt from GST, i.e., GST would be exempt both at input stage as well as output stage.
- There is no bar on availing/utilizing credit of input taxes paid for making/providing the output supply in an export transaction.
- It is seen that the above intention is effectuated vide Section 16 of the IGST Act. Section 16(1)(a) of the IGST Act says that "zero-rated supply" means export of goods and services. Further, Section 16(2) of the IGST Act says that “credit of input tax” may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.
- Since GST would have been suffered at the input stage, either by actual payment thereof or through utilization of credit of input tax, Section 16(3) of the IGST Act says that a registered person making zero rated supply shall be eligible to claim refund such taxes paid in accordance with Section 54 of the CGST Act by exercising either of the following options, but subject to such conditions, safeguards and procedure as may be prescribed.

- He may supply goods or services or both under bond or LUT without payment of IGST and claim refund of unutilized input tax credit; or
- He may supply goods or services or both on payment of IGST and claim refund of such tax paid on goods or services or both so supplied.
- Section 54 of the CGST Act deals with refund of tax; Section 54(3) provides that a registered person may claim refund of any unutilized input tax credit at the end of any tax period. Corresponding to Section 16(3) of the IGST Act (supra), Clause (i) of first Proviso to Section 54(3) provides that refund of the said unutilized input tax credit would be available on making zero-rated supplies.
- Section 16 of the IGST Act contemplates that exports are “zero rated” (in other words, exports are tax free) and that therefore, refund can be claimed of input tax credit lying unutilized on account of such zero-rated supplies (i.e., exports) as also on the output tax.
- Section 54 of the CGST Act provides for refund of GST; Section 54(3) provides that a registered person may claim

refund of any unutilized input tax credit at the end of any tax period.

- Rule 89 of the CGST Rules contains the machinery provisions to operationalize Section 54 of the CGST Act where exports are done without payment of output tax under bond or LUT.
- The method of calculation of refund under Rule 89 of the CGST Rules prior to its amendment dated 23.03.2020 provided that the refund of unutilized input tax credit is computed by identifying the proportionate input tax credit utilized for export of goods to total supplies, viz., refund value = (turnover of zero-rated supply of goods and/or services ÷ adjusted total turnover) X Net input tax credit for the period; in other words, refund will be in proportion of export turnover to the total turnover during the relevant period.
- By the impugned amendment to Rule 89(4)(C), the phrase "turnover of zero-rated supply of goods" came to be defined; accordingly, refund will be the lesser of: (a) value of zero-rated supply of goods; or (b) value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed, supplier, as declared by the supplier.

- In effect, refund of unutilized input tax credit on account of making zero rated supply of goods would now be restricted to a maximum of 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier.
- The effect of the impugned amendment to Rule 89(4)(C) is demonstrated by the petitioner vide the Illustration in the table at Annexure-N as under:-

Sl. No.	**Export / Domestic**	**No.of goods**	**Value per Goods**	**Turnover**	**Turnover of zero-rated supply of goods as per Rule 89(4):** **Before amendment**	**Turnover of zero-rated supply of goods as per Rule 89(4):** **After amendment**
1.	**Export goods**	10	100	1000	1000	**450**
	Like goods domestically sold	10	30	300		i.e., 1.5*30*10 = 450 or 1000 whichever is less. Refund is 450 and balance 550 is lost:
2.	**Export goods**	10	100	1000	1000	**0**
	Like goods domestically sold	0	0	0		i.e., 1.5*0*10 = 0 or 1000 whichever is less.

17. In my considered opinion, the impugned amendment to Rule 89(4)(C) of the CGST Rules is illegal, arbitrary, unreasonable, irrational, unfair, unjust and *ultra vires* Section 16 of the IGST Act and Section 54 of the CGST Act for the following reasons:-

(a) Rule 89(4)(C) of the CGST Rules is *ultra vires* Section 54 of the CGST Act read with Section 16 of the IGST Act; the very intention of the zero-rating it to make entire supply chain of "exports" tax free, i.e., to fully 'zero-rate' the exports by exempting them from both input tax and output tax; accordingly, Section 16(3) of the IGST Act allows refund of input taxes paid in the course of making a zero-rated supply, i.e., supplies which covers exports as well as supplies to SEZs. The rule in whittling down such refund is ultra vires in view of the well settled principle of law that Rules cannot override the parent legislation.

(b) Rule 89(4)(C) of the CGST Rules is violative of Article 14 and 19(1)(g) of the Constitution of India; the quantum of refund of unutilized input tax credit is restricted only in cases falling under Section 16(3)(a) of the IGST Act, i.e., in cases where export of goods is made without payment of duty under a Bond/Letter of Undertaking(LUT); however, no such restriction is imposed on cases falling under Section 16(3)(b) of the IGST Act, i.e., in cases

where export of goods is made after payment of duty; by virtue of the above, there is a hostile discrimination between two class of persons, viz., (i) the class of exporters who opt to obtain refund of unutilized input tax credit where export of goods are made without payment of duty under a bond/LUT in terms of Section 16(3)(a) of the IGST Act read with Rule 89(4) of the CGST Rules and (ii) the class of exporters who opt to obtain refund of tax after payment of duty in terms of Section 16(3)(b) of the IGST Act read with Rule 96A of the rules; the guarantee of equal protection of the laws must extend even to taxing statutes; if person or property of the same character has to be taxed, the taxation must be by the same standard, so that the burden of taxation may fall equally on all persons holding that kind and extent of property; if the same class of property or persons similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property or persons.

(c) It is trite law that Article 14 of the Constitution forbids class legislation; however, Article 14 does not prohibit reasonable classification for the purpose of legislation provided it passes two tests, viz., that the 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 that the differentia must have a rational relation with the object sought to be achieved by the statute; the impugned Rule 89(4)(C) of the CGST Rules is arbitrary and unreasonable in as much as it bears no rational nexus with the objective sought to be achieved by Section 16 of the IGST Act in that while Section 16 of the IGST Act seeks to make exports tax-free by "zero-rating" them, the impugned Rule 89(4)(C) of the CGST Rules aims to do just exactly the opposite by restricting the quantum of refund of tax available to the expended in making such exports; consequently, including domestic turnover in the definition of zero rated supply which is meant to cover only exports is clearly arbitrary and unreasonable.

(d) It is significant to note that in exports, availability of the rotation of funds is essential for the business to thrive; the entire concept of refund of unutilized input tax credit relating to zero-rated supply would be obliterated in case the respondents are permitted to put any limitation and condition that takes away petitioner's right to claim refund of all the taxes paid on the domestic purchases used for the purpose of zero-rated supplies; the incentive given to the exporters would lose its meaning and this would cause grave

hardship to the exporters who are earning valuable foreign exchange for the country; it follows there from that exporters would have factored in such incentives in the pricing mechanism when they quote and consequently, the restriction of the same by the impugned amended Rule 89(4)(C) would be highly unreasonable.

(e) Rule 89(4)(C) of the CGST Rules also suffers from the vice of vagueness for the reason that the words “like goods” and “similarly placed supplier” in the impugned Rule 89(4)(C) are completely open-ended and are not defined anywhere in the CGST Act/Rules or the IGST Act/Rules; in this context, it is relevant to state that considering the business of the petitioner, it is not possible to have any “like goods” and “same or similar placed supplier” for the unique and customized products being manufactured by the petitioner and the preciseness of definitions as found in the customs legislation is missing herein.

(f) The impugned Rule also fails to clarify, as to what would be the consequence if there are no goods supplied in the domestic market and value of like goods provided by other suppliers is not available or as to what would be the consequences in respect of a supplier who may have different pricing policy for different local customers nor what would be the consequences in respect of a

supplier who would be pricing the local goods differently in different states for the same products being exported; when it is impossible for any exporter to show proof of value of “like goods” domestically supplied by the “same or, similarly placed, supplier”, the refund itself cannot be denied to such exporter and consequently, Rule 89(4)(C) of the CGST Rules merely being a machinery provision cannot impose a rigorous condition to take away right to obtain refund which the petitioner is otherwise entitled to in terms of Section 54 of CGST Act read with Section 16 of the IGST Act.

(g) The amendment to the said rule does have the effect of restricting refunds in actuality as shown in the table at Annexure-N without any adequate defining reason for so doing; in a case where the domestic turnover is nil for the particular period or very less, the quantum of refund becomes nil or negligible thereby clearly whittling down the principle of zero rating as is specified in Section 16 of the IGST Act, 2017 which would mean that the taxes on exports do not get refunded adequately; these aspects are contained in the clarifications issued by the respondents at *Annexure K and L* referred to supra.

(h) The object of zero rating would be lost if exports are made to suffer GST as the exporter would either pass it on to the

foreign supplier or would absorb it himself; firstly it would mean that taxes are exported which is against the policy of zero rating supra and secondly, it would make exports uncompetitive being against the stated policy of the Government. The amending words therefore, do not sub serve the objectives set out in Section 16 of the IGST Act, 2017 nor Section 54 of the CGST Act, 2017 and are contrary to the clarifications given above.

(i) The impugned amendment is also unreasonable and arbitrary as adequate reasoning is not present; this would make such amendment unreasonable for the reason that it bears no rational nexus with the objective sought to be achieved by Section 16 of the IGST Act (supra). While Section 16 of the IGST Act seeks to make exports tax-free by “zero-rating” them, the impugned Rule 89(4)(C) of the CGST Rules, as amended on 23.03.2020 aims to do just the opposite by restricting the quantum of refund of tax available in making such exports. Further, what is seen is that including domestic turnover in definition of zero rated supply which is meant to cover only exports is clearly arbitrary and unreasonable as that would defeat the provisions of law to grant refund on zero rated goods.

18. Therefore, I am also of the view that terminology used in the impugned Rule viz., 'like goods and same or similarly placed supplier' does not have any precise meaning in the said Rules and no guideline is present in that respect.

19. In ***Shayara Bano's case*** (supra), the Apex Court held as under:

> ***"101.*** *It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness*

as pointed out by us above would apply to negate legislation as well under Article 14."

20. In ***Shreya Singhal's case*** (supra), the Apex Court held as under:-

"68. Similarly, in Kartar Singh v. State of Punjab, (1994) 3 SCC 569 at para 130-131, it was held:

'130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'

69. Judged by the standards laid down in the aforesaid judgments, it is quite clear that the expressions used in 66A are completely open-ended and undefined.

76. Quite apart from this, as has been pointed out above, every expression used is nebulous in meaning. What may

be offensive to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another. Even the expression "persistently" is completely imprecise - suppose a message is sent thrice, can it be said that it was sent "persistently"? Does a message have to be sent (say) at least eight times, before it can be said that such message is "persistently" sent? There is no demarcating line conveyed by any of these expressions - and that is what renders the Section unconstitutionally vague."

21. As rightly contended by the petitioner, in exports, availability of the rotation of funds is essential for the business to thrive. The entire concept of refund of unutilized input tax credit relating to zero-rated supply would be obliterated in case the respondents are permitted to put any limitation and condition that takes away petitioner's right to claim refund of all the taxes paid on the domestic purchases used for the purpose of zero-rated supplies. The incentive given to the exporters would lose its meaning and this would cause grave hardship to the exporters, who are earning valuable foreign exchange for the country. It should be noted that exporters would have factored in such incentives in the pricing mechanism when they quote and therefore, the restriction of the same would be highly unreasonable,

given the objective of the Government that exports should be zero rated and taxes should not be exported.

22. The respondents-revenue contend that the impugned amendment was based on the minutes of the GST Council's 39th meeting held on 14.03.2020, which discloses that the above the only ground for amendment seems to be a possible misuse without any factual data supporting the same; the reasons for such amendments based on possible misuse without adequate defining data cannot be countenanced as having a reasonable basis in law. Issue of misuse cannot be generalized. Every such misuse is required to be ascertained and verified before asserting that there has been misuse. It is also well settled that if the government perceives that there could be a possibility of abuse of a provision, it should adopt measures to keep a check on the same; however, the law cannot be amended on the premise of distrust.

23. In ***Reckitt Benckiser's case*** supra, the High Court of Jammu and Kashmir held as under:-

> *"29. The issue of misuse cannot be generalized. It has to be case specific covering an individual or group of individuals. Every such misuse is required to be ascertained and verified before asserting that there has*

been misuse of exemption. By a general survey conducted, it cannot be said that exemption benefit is being misused by the present petitioners. Taking recourse to the fact that exemption granted is being misused without identifying the individual cases would be an exercise which can be termed to have been made by the respondents only to deny the exemption granted to petitioners by way of original notification in pursuance to which they have altered their position. This action on the part of respondents can be termed to be arbitrary in nature."

24. In ***Sant Steel's case*** (supra), the Apex Court held as under:-

"30. It is highly against the public morality that the incumbent who have felt persuaded on account of the representation made by the State Government that they will be given certain benefits and they acted on that representation, it does not behove on the part of the appellant Corporation to withdraw the said benefit before expiry of the stipulated period by issuing the notification revoking the same which the respondents were legitimately entitled to avail. We fail to understand why the appellant Corporation which made a representation and allowed the other party to act upon such representation could resile and leave the citizens in a lurch. In such a situation, the principle of promissory estoppel which has been evolved by the courts which is based on public morality cannot permit the State to act in such an arbitrary fashion.

31. Other grounds for the purpose of public interest which have been pleaded, namely, that there are two methods of tariff provided by the amendment and the actual consumption has (energy consumption charges have) been reduced based on the calculation of energy charges per KV from 308 paise to 100 paise and there was large scale theft or that units were closing down and there was no mala fide intention in the matter of revocation of the notification and the cost of production of power has gone up to Rs. 2.50 per unit, are considerations which hardly involve any public interest. They were more of a nature of losses which have been suffered by the Corporation and these methods were evolved to reduce and to make good the losses. Restructuring benefit to 17% of Tariff 4(A) (demand charges) are the factors which are aimed to make the losses good for the Corporation. This is not case in which serious public repercussion was involved. These are not the factors which put together can constitute a public interest. Theft of the energy if it was proved by cogent data that as a result of giving this benefit to the entrepreneurs in the hill areas, they were misusing it or there was theft of the energy at a large scale by these persons to whom the concession had been given then of course such factors, if all the datas were brought on record of course could have persuaded the Court to take a different view of the matter. But simply because there was theft of energy the State cannot persuade us to hold that the revocation of such concession can be said to be in public interest. Since the benefit was given to these units in the hill areas, there should have been overwhelming evidence to show some mala fide on

the part of these consumers which have persuaded the Corporation to revoke it. If there was no misuse of the energy by these units in the hill areas to whom the concession had been granted then in that case it cannot be taken that there was really public interest involved which persuaded the Corporation to revoke the same.

58. In the present case, the plea of respondents that some unscrupulous manufacturers were involved in bogus production for the purpose of claiming maximum exemption from the payment of excise duty, cannot be generalized but has to be case specific. The same, therefore, cannot be treated to be in the public interest as projected by the respondents. This is because there has been no individual identification of such bogus manufacturers and the action of respondents vide impugned notifications would prejudice the rights of those genuine manufacturers who on the promise of the State, have altered their position and are involved in fair industrial activities. In view of the above discussion, I am of the opinion that there is no supervening public interest in withdrawing the exemption by way of impugned notifications."

25. It is also relevant to note that in the aforesaid GST Council Meeting, it was stated that the FOB value of exports will not be changed, which would mean that there is no doubt about the valuation of the goods; therefore, if there is no doubt about the

value of the goods, the artificial restriction of refunds by taking the value of domestic supplies seems irrational. Further, the policy of the Government itself will have to satisfy the test of rationality and must be free from arbitrariness and discrimination. In ***Pepsi Foods (case) supra,*** the Apex Court held as under:-

> *"27. We have already seen how unequals have been treated equally so far as assessees who are responsible for delaying appellate proceedings and those who are not so responsible, resulting in a violation of Article 14 of the Constitution of India. Also, the expression "permissible" policy of taxation would refer to a policy that is constitutionally permissible. If the policy is itself arbitrary and discriminatory, such policy will have to be struck down, as has been found in para 20 above."*

26. As rightly contended by the learned Senior counsel for the petitioner, the impugned Rule 89(4)(C) is arbitrary and unreasonable, in as much as the possibility of taking undue benefit by inflating the value of the zero-rated supply of goods, cannot be a ground to amend the Rule, which deserves to be declared invalid on this ground also.

27. Insofar as the other contentions urged by the respondents – revenue in their statement of objections and before

this Court, the same are neither relevant nor germane for adjudication of this petition and consequently, the same have not been referred to in detail in this order.

28. For the foregoing reasons, I am of the considered opinion that the impugned Rule 89(4)(C) of the CGST Rules, 2017 as amended vide Para 8 of the Notification No.16/2020-Central Tax dated 23.03.2020 deserves to be declared *ultra vires* and invalid and consequently deserves to be quashed. So also, the impugned order dated 30.06.2020 which is based on the impugned amended Rule also deserves to be quashed and consequently, respondents are to be directed to accept the refund applications of the petitioner and grant refund in favour of the petitioner together with applicable interest within a stipulated time frame.

29. The issue regarding validity of the Explanation to Rule 93 of the CGST Rules is however kept open to be dealt with in an appropriate case.

30. In the result, I pass the following:-

ORDER

(i) The writ petition is hereby allowed;

(ii) The impugned offending words, ***"or the value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier"*** appearing in Rule 89(4C) of the Central Goods and Services Tax Rules, 2017 as amended vide Para 8 of the Notification No.16/2020-Central Tax(F.No.CBEC-20/06/04/2020-GST) dated 23.03.2020 is declared *ultra vires* the provisions of the Central Goods and Services Tax Act, 2017 and the Integrated Goods and Services Tax Act, 2017 as also violative of Articles 14 and 19 of the Constitution of India and resultantly, the same are hereby quashed;

(iii) The impugned order at Annexure-C dated 30.6.2020 passed by the 3rd respondent is hereby quashed;

(iv) The respondents-revenue are directed to accept the refund claims/applications of the petitioner at Annexures D-1 to D-6 and grant refund together with applicable interest in favour of the petitioner within a period of three (3) months from the date of receipt of a copy of this order.

Sd/-
JUDGE

Srl.