Inadequate expounding results in 'miscarriage of law' though not of justice

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GUJARAT High Court in the case of ***Britannia Industries Ltd.*** vide its order dated 11.3.2020 - **2020-TIOL-1495-HC-AHM-GST** has held, and rightly, that SEZ units are eligible to claim refund of unutilised credit thereby ensuring carriage of justice though ***prima facie*** inadequate expounding of the relevant legal provisions before the Hon'ble Court understandably resulted in miscarriage of law relating to the issue.

2. Briefly stated, the assessee (a SEZ unit) sought refund of unutilised input tax credit (ITC) (of the amount distributed to it by the input service distributor) accumulated on account of zero-rated supplies made by it (i.e. the SEZ unit) without payment of duty and thus the case was squarely covered under section 54(3) of the CGST Act read with rule 89(4) of the CGST Rules which make no distinction between SEZ unit and non-SEZ unit with regard to such refund.

3. However, the department ***inter alia*** and essentially contended that (I) the supplies made to SEZ unit are zero-rated (as per section 16(1) of the IGST Act) and, therefore, the SEZ unit is not to pay any duty on the supplies received from DTA. Accordingly, it was not supposed to accumulate any ITC, and (II) as per proviso to rule 89(1) of the CGST Rules, refund of tax paid on the supplies to SEZ unit is to be claimed by the supplier. Both these contentions are totally untenable and reflect wrong understanding/interpretation of law as will become evident from what follows a little later.

4. On behalf of the assessee (SEZ unit), it was not effectively expounded, it seems, that (I) zero rated supplies are defined in section 16(1) of the IGST Act as supplies for export or to SEZ units or developer, (II) zero rated supplies can be made without tax under LUT or on payment of tax (as is also evident from section 16(3) of the IGST Act), (III) thus 'zero rated supply' is a legally defined term which does not imply that 'zero rated supply' has to be made at zero rate of tax; in other words, zero rated supply can be made on payment of tax at the normal rate.

Sub-sections (1), (2) & (3) of s. 16 of IGST Act are reproduced below for convenience -

> ***16. (1) "zero rated supply" means any of the following supplies of goods or services or both, namely:--***
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> ***(a) export of goods or services or both; or***
>
> ***(b) supply of goods or services or both to a Special Economic Zone developer***
>
> ***or a Special Economic Zone unit.***
>
> ***(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.***
>
> ***(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:--***

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied,

in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder.

(IV) if the supplier makes supplies to SEZ unit (which will be zero rated by definition) on payment of tax, SEZ unit is entitled to take ITC of the tax shown in the invoices because section 16(1) (read with section 17(2)) of the CGST Act allows ITC on supplies of inputs and input services used for making zero rated supplies without payment of tax and Section 16(2) of the IGST Act also lends irrefutable support thereto.

(V) the supplier making zero rated supplies to the SEZ unit can claim refund of the tax paid on such zero rated supplies but for that, the credit taken by the SEZ unit will have to be reversed, otherwise, the supplier will not be entitled to refund ***inter alia*** on the ground that the burden of tax has been passed on.

(VI) in this (i.e. SEZ unit's) case, the supplier did not claim any refund of tax paid on the zero rated supplies made to the SEZ unit.

(VII) since the SEZ unit accumulated ITC on account of its inability to utilize the same due to the fact that it made zero rated supplies without payment of tax, the unutilised ITC was clearly refundable to it in terms of s. 54(3) of the CGST Act read with rule 89(4) of the CGST Rules.

Section 54(3) of the CGST Act and rule 89(4) are reproduced below for ease of reference.

S***. 54(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;

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Rule 89(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 Ã·Adjusted Total Turnover

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(VIII) The assertion by the department that in respect of the supplies to SEZ unit, only the supplier can (or has to) claim the refund of unutilised ITC was a complete misinterpretation of rule 89(1) the relevant parts of which are reproduced below:

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

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Provided further 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:

5. Thus, as per rule 89(1), if the refund sought is that of the tax etc. paid on the supplies by the supplier, then supplier has to file the refund claim (which is covered under section 54(1) of the CGST Act) and the proviso to rule 89(1) merely adds additional requirement that in case such tax was paid by the supplier in respect of supplies made to SEZ unit, then the supplier has to (additionally) comply with the conditions mentioned in the said proviso before filing the refund claim. But, in this case of the SEZ unit, the refund was not sought of the tax paid by the supplier on the zero rated supplies by the supplier (a subject matter of section 54(1) read with rule 89(1) but the refund was sought of the unutilised ITC accumulated by SEZ unit on account of its (i.e. SEZ unit's) zero rated supplies made without payment of tax which is the subject matter, not of section 54(1) read with rule 89(1) but of section 54(3) read with rule 89(4)).

6. However, ***prima facie***
due to inadequate expounding of the above straight forward position of law before the Hon'ble Court, the Hon'ble Court was unwittingly led to believe that the refund application for the impugned refund had to be made by the supplier who made zero rated supplies to the said SEZ unit, in which scenario the SEZ unit would not be able to claim the impugned refund of unutilised ITC which it accumulated by legally and correctly taking ITC of the tax amount distributed to it by the input service distributor (ISD) as per law and which remained unutilised on account of the fact that it (SEZ unit) made zero rated supplies without payment of tax. The Hon'ble Court must have understandably found such a scenario (i.e. the scenario which would result in a SEZ unit being deprived of the refund of unutilised ITC) too unreasonable to be countenanced. So the Hon'ble Court chose to rely on the judgement in the case of ***Amit Cotton Industries*** - **2019-TIOL-1443-HC-AHM-GST**
which involved refund of tax paid on the zero rated supply (exports) although that refund fell under the purview of section 54(1) of the CGST Act read with Rule 96 of the CGST Rules [while the impugned refund of the SEZ unit fell under the purview of section 54(3) read with rule 89(4)]. It may be pertinent to reiterate that the case of ***Amit Cotton Industries***
(supra) did not involve the issue of refund of unutilised ITC (which is the subject matter of section 54(3) of the CGST Act read with rule 89(4) of the CGST Rules). It may also be added here that as is evident from the foregoing, section 54(3) (read with rule 89(4)) and section 54(1) (read with rule 96) operate in different non-overlapping fields. Nevertheless, the Hon'ble Court felt so strongly about doing justice to the SEZ unit that it showed willingness to overstretch the ratio of the judgement in the case of ***Amit Cotton Industries***
to allow SEZ unit refund of the unutilised credit [which, as demonstrated earlier was indeed admissible in terms of s.54(3) read with rule 89(4), any way] adding that as there is no specific supplier who can claim the refund in this case, SEZ unit is entitled to claim it.

7. Thus ***prima facie***
inadequate expounding of the correct provisions of law before the Hon'ble Court understandably resulted in the miscarriage of law but fortunately not of justice.

(The author is former Member CESTAT and Sr Partner, TLC Legal Advocates. The views expressed are strictly personal.)