

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.02.2017

Pronounced on: 01.11.2017

CORAM

THE HONOURABLE Mr.JUSTICE HULUVADI G.RAMESH

&

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. Nos.8334, 8339, 8603, 8794, 8919, 9231, 9240 and 10158 of 2013

& Connected M.P.s

Tarajyot Polymers Ltd.,
Represented by its Director
Mr. Sureshkumar ramsisaria,
37/12-1, Archana Complex, 4th Cross
Lalbagh Road, Bangalore 560 027

.. Petitioner in W.P.No.8334 of 2013

M/S.BISHAN SAROOP RAM KISHAN
AGRO (P) LTD REP. BY ITS AUTHORISED
SIGNATORY MR.PANKAJ KUMAR KHAITAN B-35
SIDCO INDUSTRIAL AREA MARAIMALAI NAGAR
KANCHEEPURAM-603 209.

.... Petitioner in W.P.No.8339 of 2013

M/S.SHYAM TEXTILES LIMITED
REP. BY ITS DIRECTOR CHANDRA PRAKASH
RAMSISARIA NO.335/1 335/2 344/B1 & 344/B2
ULUMARANAPALLI THALLY POST
DENKANIKOTTAI-635118. Petitioner in W.P.No.8603 of 2013

M/S. SAMARTH CORPORATION
REP. BY ITS DIRECTOR VIRENDRA JATHAN
ARIHANT COMPOUND BUILDING NO.3 GALA NO.2
1ST FLOOR KOPPAR BURNA VILLAGE BHIWANDI
MAHARASHTRA-421301. Petitioner in W.P.No.8794 of 2013

M/S.SYBEX CORPORATION
REPRESENTED BY ITS PROPRIETOR MISS.SUBHAGA
P.SHAH BLDG.NO.Z-1 GALA NO.6 SHREE CORETI

BUNDER ROAD KALHAR BHIWANDI

MAHARASHTRA-421 302 Petitioner in W.P.No.8919 of 2013

M/S.PRADEEP INDUSTRIAL PACKERS

P.LTD. REP. BY ITS DIRECTOR MURLI MANOHAR

SARAF A-16 2ND STAGE PEENYA INDUSTRIAL

ESTATE BANGALORE ... Petitioner in W.P.No.9231 of 2013

M/S.TAHA TRADING CORPORATION

REP. BY ITS PROPRIETOR MIKAD HUSAIN KAPADIA

119 SIYAGANJ INDORE 452 007 MADHYA

PRADESH (M.P) ... Petitioner in W.P.No.9240 of 2013

M/S.KAMADHENU POLYMERS PVT.

LTD. REP BY ITS DIRECTOR VIJAY SHANKAR

SARAF NO. 37/12-1 ARCHANA COMPLEX 4TH

CROSS LALBAGH ROAD BANGALORE 560 027

.... Petitioner in W.P.No.10158 of 2013

Vs

1.Union of India,
Ministry of Finance,
Represented by its Secretary,
Department of Revenue,
North Block, New Delhi 110 011.

2.The Commissioner of Customs (Appeals),
60, Rajaji Salai,
Custom House, Chennai-600 001. ... Respondents 1 & 2 in all W.Ps

3.The Additional Commissioner of Customs, DFIA
60, Rajaji Salai, Custom House,
Chennai - 600 001.

... 3rd Respondents in W.P. No
8334, 8339, 8603, 8794, 9231, 9240 & 10158/2013.

4.The Deputy Commissioner of Customs, DFIA
60, Rajaji Salai, Custom House,
Chennai - 600 001. ... 3rd Respondent in W.P. 8919/2013.

Prayer in all Writ Petitions: Writ Petitions are filed under Article 226 of the Constitution of India praying for issuance of writ of Declaration declaring the impugned section 93 of the Finance Act, 2009 as ultra vires the Foreign Trade (Development) Act, 1992, the Foreign Trade Police and relevant Hand Book of Procedure, the Customs Act, 1962 Notification No.40/2006 - Cus

dated 01.05.2006 as amended from time to time and Articles 14, 19(1)(g), 21 and 265 of the Constitution of India .

For Petitioners: Mr.C.Saravanan in all cases

For Respondents: Mr.V.Sundareswaran for R1 in all cases

Mr.S.Rajasekar for R2 in all cases

C O M M O N O R D E R

(DR. ANITA SUMANTH, J.)

This batch of eight Writ Petitions have been filed at the instance of Transferees of Duty Free Import Authorization (in short, 'DFIA') praying for the issue of a Writ of declaration declaring section 93 of Finance Act 2009 ultra vires the Foreign Trade (Development) Act, 1992, the Foreign Trade Policy and relevant Hand Book of Procedure, the Customs Act, 1962, Notification No.40/2006 - CUS dated 01.05.2006 and Articles 14, 19(1)(g), 21 and 265 of the Constitution of India.

2. The facts as relating to W.P.No.8334 of 2013, Tarajyot Polymers Limited are taken to be representative of all matters in the batch. The petitioner is a trader in plastic granules and imports the same under the Duty Free Import Authorisation Scheme (DFIA) under para 4.4.1 and 4.4.2 of the Foreign Trade Policy read with Notification No.40 of 2006 - Cus dated 1.5.2016. The Petitioner, a transferee of DFIA, purchased the scrips and utilised the same for discharging duty liability against various Bills of Entry under Notification No.40 of 2006 and 17 of 2009 dated 19.2.2009. Show cause notices were issued by the Additional Commissioner Of Customs dated 11.1.2011 calling upon the petitioner to show cause why additional duty along with interest from the date of clearance not be recovered from it on the materials imported under various bills of entry as per Notification 40 of 2006 as amended by condition (iiia) of Notification No.17 of 2009 - Customs along with penalty under section 114-A of the Customs Act 1962.

3. The basis of the show cause notice was that the petitioner had not declared at the time of clearance of the goods, the fact that CENVAT credit had been availed of by the original licence holders, Virgo Polymers (I) Pvt. Ltd, Big Bags India Pvt. Ltd., (BBI) Bangalore and others. Since there had been no declaration as called for in terms of clause (iii) of Notification 17 of 2009, additional Duty had not been levied. Upon notice, BBI had confirmed the position that CENVAT credit had indeed been availed of by them in respect of inputs procured

indigenously and used for the manufacture of the goods exported. The show cause notice alleged that this fact was within the knowledge of the assessee since additional duty had been remitted in respect of earlier clearances under the DFIA scheme.

4. Despite objections to the show cause notice, orders-in-original were passed on 25.4.2011, 20.4.2011 and 25.4.2011 confirming the demand of additional duty along with interest alleging mis-declaration and suppression of the availment of CENVAT credit. Penalty was also imposed. Appeals were filed before the first appellate authority, the Commissioner of Customs (Appeals) who, vide his order dated 14.3.2013, dismissed the same for non compliance since the conditional interim order passed on 14.2.2013 directing pre-deposit of the duties within 10 days of receipt of the order had not been complied with. The petitioner would state that appeals have been filed against the order dated 14.2.2013 before the Customs, Central Excise and Service Tax Appellate Tribunal (CESTAT) at Chennai. Along with the appeal, an application has been filed praying for waiver of pre-deposit. As against the order of the Commissioner (Appeals) dated 14.2.2013, Writ Petitions in W.P.No. 8602, 8792 and 8793 of 2013 appear to have been filed seeking an identical prayer as that sought for in the affidavit filed in support of the present writ petitions that were dismissed on 9.4.2013 on the ground that the prayer was infructuous since the matter has travelled in appeal to the CESTAT where it is pending.

5. Various grounds have been raised by the petitioner before the CESTAT challenging the order of the Commissioner (Appeals), the second respondent herein, dated 14.3.2013. During the pendency of the appeals, the petitioner has filed the present Writ Petitions. Though the petitioner has sought the issuance of a writ of declaration declaring the impugned section 93 of the Finance Act, 2009 as ultra vires the Foreign Trade (Development) Act, 1992, the Foreign Trade Police and relevant Hand Book of Procedure, the Customs Act, 1962 Notification No.40/2006 - Cus dated 01.05.2006 as amended from time to time and Articles 14, 19(1)(g), 21 and 265 of the Constitution of India, learned counsel for the petitioner would, at the start of the hearing, restrict the challenge solely to the retrospective operation of Notification 17 of 2009 advancing arguments only on this aspect of the matter. This order thus, considers and disposes the said arguments in deciding the question of retrospectivity of Notification 17 of 2009 dated 19.02.2009.

6. The DFIA Scheme came into force on 1.4.2006 and Exemption Notification No.40 of 2006-cus dated 1.5.2006 was issued containing a condition that barred the benefit of the Notification to exporters who had availed CENVAT credit on inputs procured against authorisation. The bar was solely in

respect of imported goods. Thus, an exporter availing CENVAT credit on inputs procured indigenously could still avail of the benefit of the notification.

7. On 1.4.2007, an amendment was made to the Foreign Trade Policy requiring the transferees of DFIA to remit additional duty of customs and avail CENVAT credit thereupon in cases where CENVAT credit had been availed on inputs. This policy was not immediately given effect to and clearances were being effected in terms of Notification 40 of 2006 dated 1.5.2006.

8. It was only on 19.2.2009 that amending Notification No.17 of 2009 was issued inserting the offending proviso to clause iii(a) and amending the notification such that a licence holder availing CENVAT credit and importing goods after the discharge of export obligation was required to execute a bond undertaking to utilise the inputs for manufacture of dutiable goods within a period of six months. If the import was made by a transferee of the DFIA, additional duty was liable to be paid at the time of clearance unless a bond was executed at the time of clearance.

9. The thrust of the argument of Mr. Saravanan, learned counsel appearing for the petitioners is to the effect that the petitioner is not the original exporter and for this reason enforcing the condition retrospectively is unworkable in the case of the petitioner. Thus in the case of an assessee like the petitioner who is a transferee of the scrip, the onus is on the department to establish that the original exporter, i.e., the transferor of the scrip has, in fact, availed CENVAT credit. In the present case, the show cause notice alleges that the original holder of the scrip had confirmed that it had, in fact, availed CENVAT credit and claimed rebate for the indigenously procured inputs used for export.

10. Mr. Saravanan would also challenge the competence of legislature to make the said levy retrospectively relying on the following judgements:

(i) J.K.Spinning and Weaving Mills Limited & Another V. UOI and others 1987 (32) ELT 234 (SC)

(ii) MRF Limited V. Assistant Commissioner (Assessment) Sales Tax 2006 (206) ELT 6 (SC)

(iii) Jayam & Co. V. Assistant Commissioner 2016 SCC Online SC 909

(iv) Shabina Abraham V. Collector of Central Excise & Customs 2015 (322) ELT 372

11. Per contra, the respondent in its counter would mainly contend that the petitioner has suppressed the availment of CENVAT credit by BBI on the inputs used for the manufacture of the exported goods. With respect to the competence of Parliament to enact legislation with respect to fiscal obligation, the judgments of the Supreme Court in the case of Gujarat Ambuja cements Vs. Union of India (2006(3) STR 608), Kanishka Trading vs. UOI (74 ELT 782), R.C. Tobacco Pvt Ltd vs. UOI (188 ELT 129), UOI Vs. Dharmpal Sathyapal Ltd. (319 ELT 6) and of the Delhi High Court in S.M.L. Isuzu vs. UOI (340 ELT 643) were relied upon.

12. Heard Mr. Saravanan, learned counsel for the petitioner, Mr. V. Sundareswaran, learned counsel for the 1st respondent and Mr. S. Rajasekar, learned counsel for respondents 2 and 3.

13. The Foreign Trade Policy for the period 2004 - 2009 extended a duty free import authorisation allowing duty free imports of inputs used in the manufacture of products for export. The scheme came into force from 01.05.2006. Para 4.4.7 of the scheme as it originally stood stipulated that CENVAT Credit Facility was available for the inputs either imported or procured indigenously against the DFIA. While this is so, an amendment was brought in vide Finance No.2, Finance Act (2) dated 19.08.2009 as per which DFIA's issued between the period 01.05.2006 to 31.03.2007 attracted payment of additional customs duty/excise duty with effect from 01.05.2006 if the additional condition set out in the proviso (extracted below) was not complied with. The text of the Amendment Notification reads thus:

Duty Free Import Authorisation - Amendment to Notification No.40/2006-Cus.

In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) Number 40/2006-Customs, dated the 1st May 2006 (Vide G.S.R. 260(E), dated the 1st May, 2006) namely:-

In the said notification,-

(1) for condition number (iii) the following conditions shall be substituted, namely :-

`(iii)that in respect of imports made before the discharge of export obligation in full, the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself to pay on demand an amount equal to the duty leviable, but for the exemption contained herein, on the imported materials in respect of which the conditions specified in this notification are not complied with, together with interest at the rate of fifteen per cent per annum from the date of clearance of the said materials;

(iia)that in respect of imports made after the discharge of export obligation in full, if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or CENVAT Credit under CENVAT Credit Rules, 2004 has been availed, then the importer shall, at the time of clearance of the imported materials furnish a bond to the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself, to use the imported materials in his factory or in the factory of his supporting manufacturer for the manufacture of dutiable goods and to submit a certificate, from the jurisdictional Central Excise Officer within six months from the date of clearance of the said materials, that the imported materials have been so used:

Provided that, in case,

(a)materials are imported against an authorisation transferred by the Regional Authority, or

(b)the imported materials are transferred with the permission of Regional Authority,

then the importer shall pay an amount equal to the additional duty of customs leviable on the imported materials but for the exemption contained herein, then the imported materials may be cleared without furnishing a bond specified in this condition and the additional duty of customs so paid shall be eligible for availing CENVAT Credit under the CENVAT Credit Rules , 2004;

(iiib)that in respect of imports made after the discharge of export obligation in full, and it facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule 2 of rule 19 of the Central Excise Rules, 2002 or CENVAT credit under CENVAT Credit Rules, 2004 has not been availed and the importer furnishes proof to this effect to the satisfaction of the Deputy Commissioner of Customs or the Assistant Commissioner of Customs as the case may be, then the imported materials may be cleared without furnishing a bond specified in condition (iia);'

(2)in condition (iv), for the words, figures, letters and brackets 'Special Economic Zone as specified in the notification issued under Section 76A of the Customs Act, 1962 (52 of 1962)' the following words, figures and brackets shall be substituted, namely:-

"a Special Economic Zone notified under Section 4 of the Special Economic Zones Act, 2005 (28 of 2005)".

(3)for condition number (v), the following condition shall be substituted, namely:-

"(v)that the export obligation as specified in the said authorisation (both in value and quantity terms) is discharged within the period specified in the said authorisation or within such extended period as may be granted by the Regional Authority by exporting resultant products, manufactured in India which are specified in the said authorisation:

Provided that an Advance Intermediate authorisation holder shall discharge export obligation by supplying the resultant products to the exporter in terms of paragraph 4.1.3(ii) of the Foreign Trade Policy."

(4)In the Explanation, after clause (iv), the following clause shall be inserted, namely:-

"(v)dutiable goods" means excisable goods which are not exempt from central excise duty and which are not chargeable to 'nil rate of central excise duty."

(Notification NO.17/2009-Cus., dated 19.02.2009)

14. Notification 17/2009 thus imposed an additional condition and one that had to be satisfied retrospectively, that is from 01.05.2006 onwards and it is the retrospective application of Notification 17 of 2009 - Cus dated 19.2.2009 that is seriously objected to.

15. We now discuss the case law relied upon by both learned counsel specific to the aspect of retrospectivity. The first case cited by Mr.Saravanan is the judgement of the Full Bench of the Supreme Court in the matter of J.K.Spinning and Weaving Mills and another vs Union and India and others (32 ELT 234) relevant portions of which are extracted below:

'9. It has been already noticed that by section 51 of the Finance Act, 1982, amendments made to rules 9 and 49 have been given retrospective effect from the date on which the Rules came into force, that is to say, from February 28, 1944 '

.....

'35. We may now deal with the challenge made to the retrospective operation of amendments of Rules 9 and 49 on another ground. In order to appreciate the ground of such challenge, we may once more refer to section 51 of the Finance Act, 1982. The Explanation to section 51 provides as follows:-

"Explanation.-For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force."

Under the Explanation, although rules 9 and 49 have been given retrospective effect, an act or omission which was not punishable before the amendment of the Rules, will not be punishable after amendment. The Explanation does not however, provide for the penalties and confiscation of goods. It is the contention of the appellants that as the appellants had not complied with the requirements of the amended rules 9 and 49, they would be subjected to penalties and their goods would be confiscated under the amended rules 9 and 49 read with rule 173Q of the Rules with retrospective effect. It is, accordingly, submitted on behalf of the appellants that the amendment of these two rules with retrospective effect is arbitrary and unreasonable and should be

struck down as violative of Article 14 of the Constitution.

36. Attractive though the argument is, we regret we are unable to accept the same. It is true that the Explanation to section 51 has not mentioned anything about the penalties and confiscation of goods but we do not think that in view of such non-mention in the Explanation excluding imposition of penalties for acts or omissions before amendment. such penalties can be imposed or goods can be confiscated by virtue of the amended provision of Rules 9 and 49. It will be against all principles of legal jurisprudence to impose a penalty on a person or to confiscate his goods for an act or omission which was lawful at the time when such act was performed or omission made, but subsequently made unlawful by virtue of any provision of law. The contention made on behalf of the appellants is founded on the assumption that under the Explanation to section 51, the penalties can be imposed and goods can be confiscated with retrospective effect. In the circumstances, the challenge to the amendments of Rules 9 and 49, founded on the provision of the Explanation to section 51 of the Finance Act, 1982, is without any substance and is rejected.'

16. The Bench thus concludes that the levy of penalty would be unconstitutional in regard to an act or an omission that was lawful at the time of its performance or commission but rendered unlawful by virtue of a retrospective amendment. The rationale as aforesaid is applicable on all fours to the present case.

17. In a recent judgement in the case of Jayam & Co. Vs. Assistant commissioner and another (2016 SCC OnLine SC 909), a Division Bench of the Supreme Court examined the challenge to retrospective legislation quoting from its earlier pronouncements in various cases. The Bench notes that Legislature undoubtedly has the power to enact legislation retrospectively. The broad principles laid down by the Court in this regard in R.C.Tobacco Pvt Ltd vs Union of India (188 ELT 129) were extracted as below:

'15. ...

(i) A law cannot be held to be unreasonable merely because it operates retrospectively;

(ii) The unreasonability must lie in some other additional factors;

(iii) The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be unreasonable as to violate constitutional norms;

(iv) Where taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of tax or that is confiscatory, Courts will be justified in striking down the impugned statute as unconstitutional;

(v) The other factors being period of retrospectivity and degree of unforeseen or unforeseeable financial burden imposed for the past period;

(vi) Length of time is not by itself decisive to affect retrospectively."

18. Reference was also made to its earlier judgements in the cases of CIT(Central) New Delhi vs Vatika Township Private Limited (2015) 1 SCC 1 and Govind Das vs ITO (1976) 1 SCC 906 and the following observation extracted from the latter judgement:

'11. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol.36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that

'all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the

language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

19. Applied to the present case, the amendment applied retrospectively would no doubt destroy the vested right of the petitioner and substantively so.

20. After an extensive discussion, the Bench, in the judgment in the case of Jayam & Co (supra) concluded against the retrospective operation of the statute in the following terms:

'When we keep in mind the aforesaid parameters laid down by this court in testing validity of retrospective operation of fiscal laws, we find that the amendment in question fails to meet these tests. The High Court has primarily gone by the fact that there was no unforeseen or unforeseeable financial burden imposed for the past period. That is not correct. Moreover, as can be seen, sub-section (20) of section 19 is altogether new provision introduced for determining the input tax in specified situation, i.e., where goods are sold at a lesser price than the purchase price of goods. The manner of calculation of the ITC was entirely different before this amendment. In the example, which has been given by us in the earlier part of the judgment, "dealer" was entitled to ITC of Rs. 10/- on resale, which was paid by the dealer as VAT while purchasing the goods from the vendors. However, in view of section 19(20) inserted by way of amendment, he would now be entitled to ITC of Rs. 9.50. This is clearly a provision which is made for the first time to the detriment of the dealers. Such a provision, therefore, cannot have retrospective effect, more so, when vested right had accrued in favour of these dealers in respect of purchases and sales made between January 01, 2007 to August 19, 2010. Thus, while upholding the vires of sub-section (20) of section 19, we set aside and strike down Amendment Act 22 of 2010 whereby this amendment was given retrospective effect from January 01, 2007.

21. The petitioner would also rely on the observations of the Supreme Court in Shabina Abraham Vs. Collector of Central Excise and Customs (2015) 322 ELT 372:

'32. In Cape Brandy Syndicate v. IRC, (1921) 1 KB 64 at 71, Rowlatt J. laid down:

'In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

33. This Court has, in a plethora of judgments, referred to the aforesaid principles. Suffice it to quote from one of such judgments of this Court in Commissioner of Sales Tax Commissioner, Uttar Pradesh v. Modi Sugar Mills, 1961 (2) SCR 189 at 198:-

"In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency."

22. The judgment of the Supreme Court in J.K. Cotton Spinning and Weaving Mills Ltd (supra) relied upon heavily by Mr. Saravanan were sought to be distinguished by Mr. Sundareswaran by reference to the decisions of the Supreme Court in R C Tobacco (supra) as follows:

'In J.K. Cotton Spinning & Weaving Mills Ltd. vs. Union of India (1987) Supp. SCC 350 relied upon by the petitioners, by virtue of the retrospective amendment of Rules 9 and 49 of the Central Excise Rules in 1982, commodities obtained at an intermediate stage of manufacture in a continuous process were deemed to have been 'removed' within the meaning of Rule 9(1) thereby making such intermediate products dutiable under the Act with effect from the commencement of the Act i.e. 1944. In this context the Court held that the amended Rules 9 and 49 would take effect subject to Section 11A. The decision is distinguishable. The circumstances in which the Court held that the demands for duty could only be limited to six months prior to the amendment was

unquestionably different from those present in the case before us. What we have to consider here is whether the benefit granted in 1999 could be withdrawn in 2003. Besides the Court in J.K. Cotton Spinning & Weaving Mills Ltd's case rejected the contention of the Union of India that Section 51 of 1982 Finance Act by which the amendments were made to Rules 9 and 49 overrode the provisions of Section 11A saying 'if the intention of the legislature was to nullify the effect of Section 11A,..., the legislature would have specifically provided for the same'. Similarly our decision in National Agricultural Cooperative Marketing Federation of India Ltd. vs. Union of India(2003) 5 SCC 23 which dealt with an amendment to Section 80P(2)(a)(iii) of the Income Tax Act, 1961 noted that 'the amendment does not seek to touch on the periods of limitation provided in the Act, and in the absence of such express provision or clear implication, the legislature clearly could not be taken to intend that the amending provisions authorizes the Income Tax Officer to commence proceedings which before the new Act came into force, had, by the expiry of the period provided become barred'. In the present case Section 154(4) specifically and expressly allows amounts to be recovered within a period of thirty days from the day the Finance Bill, 2003 received the assent of the President. It cannot but be held therefore that the period of six months provided under Section 11A would not apply.'

23. The Supreme Court, in RC Tobacco's case has culled out the situation where retrospective operation of an amendment would be unacceptable, in para 15 thereof, extracted supra. The conclusions support the position canvassed by the petitioner herein to the effect that an amendment that imposes an unforeseen, unworkable and confiscatory burden on the petitioner should not, normally, be retrospective.

24. Having considered the rival contentions carefully, we are of the view that the condition imposed vide the amending Notification is incapable of satisfaction retrospectively. The petitioner, by virtue of the burden imposed under the amendment is required to have furnished the details relating to availment of duty by the transferor of the scrip at the original instance. Apart from being practically unworkable, the amendment imposes a condition that nullifies a right that vested in the petitioner and creates a burden that the petitioner would be incapable of discharging. While the satisfaction of the condition post date of Notification is mandatory and, accepted to be so by the

petitioner we agree that the retrospective application of the same is liable to be interfered with. In our view, condition (iii)(a) imposed in Notification 17 of 2009 must be read to have been enacted from and with effect from 19.2.2009 only.

25. We draw support from the ratio of the judgements extracted above wherein the Supreme Court has consistently upheld the position that any amendment should seek to correct an error that was contained in the original enactment. In the circumstances of the present case, the error can be corrected only prospectively and retrospective application of the amendment would not stand the test of law.

26. The Writ Petitions are allowed to the extent indicated above. No costs. Consequently, the connected miscellaneous petitions are closed.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

msr/sl

To

- 1.The Secretary, Union of India,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi 110 011.
- 2.The Commissioner of Customs (Appeals),
60, Rajaji Salai,
Custom House, Chennai-600 001.
- 3.The Additional Commissioner of Customs, DFIA
60, Rajaji Salai, Custom House,
Chennai - 600 001.
- 4.The Deputy Commissioner of Customs, DFIA
60, Rajaji Salai, Custom House,
Chennai - 600 001.

+9 Ccs to Mr.C. Saravanan, Advocate sr 77892.

+1 cC to Mr.V. Sundareswaran, Advocate sr 78107.

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9231, 9240, and 10158 of 2013
& Connected M.P.s

GMR (CO)

SP(28/11/2017)