

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 22.07.2020

PRONOUNCED ON: 05.08.2020

CORAM

THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.Nos.5941 & 6018 of 2018
and
W.M.P.Nos.7315 & 7316 of 2018

Doosan Infracore India Private Limited,
Rep., by Mr.N.Krishnakumar
General Manager Finance,
Central Square II, B-19 to 21,
Thiru-Vi-Ka Industrial Estate,
Guindy,
Chennai- 600 032.

..Petitioner in both cases

-Vs-

The Assistant Commissioner,
Office of the Commissioner of GST and Central Excise,
Chennai-South Commissionerate,
692, M.H.U.Complex, Nandanam,
Chennai 600 035.

..Respondent in both cases

PRAYER in W.P.No.5941 of 2018: Writ Petition filed under Article 226 of Constitution of India, praying to issue a writ of Certiorari, to call for the records in the proceedings of the respondent in Order in Original No.115/2017 (R) dated 08.11.2017 in C.No.IV/16/130/2017/R&R/LC1, issued by the respondent and quash the same as arbitrary and illegal.

PRAYER in W.P.No.6018 of 2018: Writ Petition filed under Article 226 of Constitution of India, praying to issue a writ of Certiorari, to call for the records in the proceedings of the respondent in Order in Original No.177/2017(R) dated 19.12.2017 in C.No.IV/16/227/R&R/LC1, issued by the respondent and quash the same as arbitrary and illegal.

For Petitioner : Mr.Joseph Prabakar

For Respondent : Mr.Rajnish Pathyil

COMMON ORDER

The Writ Petitions are heard through Video Conferencing on 22.07.2020. With the consent of Mr.Joseph Prabakar, learned counsel for the petitioner and Mr.Rajnish Pathyil, learned Standing counsel appearing on behalf of the respondent, the cases are taken up for final disposal.

2. The petitioner in both these Writ Petitions, is an Export Oriented Unit, registered with the respondent for providing "Information Technology Software Service" for the period from January 2016 to March 2016 and October 2015 to December 2015. They filed refund claim for Rs.6,93,657/- and Rs.6,31,884/- on 28.03.2017 and

27.12.2016 respectively, being the Input Service Tax Credit taken, under Rule 5 of the CENVAT Credit Rules 2004 r/w Notification No.27/2012-CE (NT) dated 18.06.2012. The respondent herein through separate impugned orders dated 18.11.2017 and 19.12.2017 objected the claim contending that the refund claim is to be filed within a period of one year from the relevant date and the relevant date would be the date of receipt of payment in convertible foreign exchange with regard to the export made during the relevant period, for which the refund application is made. Aggrieved against both the rejection orders, the present Writ Petitions are filed.

3. Section 11 (B) of the Central Excise Act 1944 r/w Clause 3(b) of Notification No.27/12-CE (NT) dated 18.06.2012 enable a person for refund of any duty of excise and interest, by making an application with the authority before the expiry of one year from the relevant date. Through a Notification No.14/2016-CE (NT) dated 01.03.2016, Clause 3(b) of Notification No.27/12-CE (NT) dated 18.06.2012 came to be substituted, whereby the term 'relevant date', in the case of service provider was clarified to be after one year from the date of -

(a) Receipt of payment in convertible foreign exchange where provision of service have been completed.

(b) Issue of notice where payment for the service had been received prior to the date of issue of the invoice.

Thus, as per the substitution made to clause 3(b), the relevant date would be one year from the date of receipt of payment in convertible foreign exchange. Since the respondent has found that the date of receipt of payment in convertible foreign exchange with regard to the exports made during the period was after the one year period referred above, both the applications were held to be time barred and thus rejected.

4. It is the contention of the learned counsel for the petitioner that since the new condition of reckoning the relevant date in Para B of the Notification No.27/12 dated 18.06.2012 came into effect through Notification No.14/2016 dated 01.03.2016, the amendment would only apply to the refund claims for the subsequent quarters and not for the earlier quarters. In support of his contentions, the learned counsel for the petitioner relied upon the decision of the Hon'ble Division Bench

reported in **2018 (359) ELT 678 (Mad.)** in the case of **TARAJYOT POLYMERS LTD Vs. Union of India** and **SODEXO FOOD SOLUTIONS INDIA PRIVATE LIMITED Vs. STATE OF TAMIL NADU, rep. by the Deputy Commissioner (CT), Chennai** reported in **2019 VIL (207) MAD.**

5. The learned Standing Counsel for the respondent, on the other hand, would submit that the clarification Notification No.14/2016 dated 01.03.2016 is only a substitution of the earlier Notification No.27 of 2012 dated 18.06.2012 and therefore applied retrospectively. Hence, he would submit that the application for refund claim is time barred, since the date of FIRC's is after one year from the date of receipt of the respective payments in convertible foreign exchange. In support of such a contention, he relied upon the following decisions namely, 1) **The Commissioner of Central Excise & Service Tax and Ors. V. Fosroc Chemicals (India) Pvt. Ltd. and Ors.; Mehler Engineered Products India Pvt. Ltd. v The Union of India and Ors.** [2018 (364) E.L.T. 27 (Mad.)] and **The Commissioner of Central Excise, Chennai II Commissionerate Vs. S.P.Fabricators Pvt. Ltd. and Ors.**

6. The short point involved in the present Writ Petitions is as to whether the reckoning of the relevant period brought about through the notification No.14/16 dated 01.03.2016 by substitution would be prospective or retrospective in nature.

7. For the sake of convenience, the mode of reckoning the relevant date under the Notification No.27/12 dated 18.06.2012 and the subsequent amendment under Notification No.14/16 dated 01.03.2016 are reproduced below:-

Notification: 27/2012-C.E. (N.T) dated 18-Jun-2012

3. Procedure for filing the refund claim:

(b) The application in the Form A along with the documents specified therein and enclosures relating to the quarter for which refund is being claimed shall be filed by the claimant, before the expiry of the period specified in section 11B of the Central Excise Act, 1944 (1 of 1944).

Notification : 14/2016-C.E.(N.T) dated 01-Mar-2016

In the said notification, in Paragraph 3, for clause (b), the

following shall be substituted, namely;-

(ii) in case of service provider, before the expiry of one year from the date of-

(a) receipt of payment in convertible foreign exchange, where provision of service had been completed prior to receipt of such payment ; or

(b) issue of invoice, where payment for the service had been received in advance prior to the date of issue of the invoice."

8. As stated earlier, Section 11B of the Central Excise Act requires the applicant to make an application before the expiry of one year from the relevant date for the purpose of claiming refund of Excise Duty and interest. Under Rule 5 of the CENVAT, the "relevant period" means the period for which the claim is filed. Originally, Notification No.27/12 dated 18.06.2012 prescribed the procedure for filing the refund claims, by which, the claimant was required to file the application before the expiry of period specified in Section 11B of the Central Excise Act. Clause 3(b) of the Notification No.27/12 dated 18.06.2012 came to be "substituted", whereby the relevant date would be one year from the date of receipt of payment in convertible foreign

exchange, where provision of service has been completed prior to payment. The Notification No.14/2016 is a substitution to the original paragraph 3(b) of Notification No.27/2012.

9. The term "Substitution" literally means as a thing acting or used in place of another.

10. In other words, to substitute certain words or phrases or sentences in the original notification, would mean that the subsequent substitution would replace those words, phrases or sentences. In effect, what originally stood in the notification is replaced with the subsequent notification brought through substitution. While that being so, it cannot be construed as a new amendment for giving effect to certain procedures prospectively, but rather requires to be interpreted as having replaced the original procedure and thereby, the replacement would come into effect for the same time as the original procedure was provided for.

11. If this interpretation is applied to the facts of the case involved, the reasoning of the respondent adduced in the impugned

order that the relevant date would be the date of receipt of payment in convertible foreign exchange and thereby, the findings that the application was time barred, cannot be found fault with.

12. By relying upon **TARAJYOT POLYMERS LTD's case** (supra), the learned counsel for the petitioner would submit that if the amendment is applied retrospectively, the vested right of the petitioner would be destroyed and therefore, such an amendment would be construed to be prospective. For the same proposition, the learned counsel also relied upon **SODEXO FOOD SOLUTIONS'** case (supra). The ratio laid down in the aforesaid decisions may not be applicable to the issue involved in the present cases. The reason being, the present amendment in Notification No.14/2016 dated 01.03.2016 is only a substitution of the earlier Notification No.27/12 dated 18.06.2012 and the above decision relied upon by the petitioner does not deal with the case of substitution of a provision. When the original provision itself has been substituted, the procedure contemplated in the original notification becomes redundant and the subsequent substitution would have been replaced therein.

13. The learned Standing Counsel for the respondent relied upon a decision in the case of Mehler Engineers' case (supra), which rightly clarified the effect of substitution in the following manner :-

"10. The legal principles deducible from the above decisions is that if subsequent Act amends as earlier one in such a way as it incorporate itself or a part of itself into the earlier, the act must be construed as 'retrospective'. This is so, because the word "substituted" would mean 'to put one in the place of another' or 'to replace'. Thus, on account of such substitution whatever consequences which have to follow would naturally be applicable to the assessee by such substitution. Thus notification dated 22.02.2016 in Notification No,51 of 2016-Cus (ADD) having substituted Entry 5402 47 in the notification dated 21.10.2015 bearing Notification No.51 of 2015:MANU/CUSA/0054/2015, it would mean that the Entry in the Notification dated 21.10.2015 shall be 5402 47 for all purpose and it shall be so with effect from 21.10.2015.

11. The learned counsel for the Revenue vehemently contended that the product classification is indicative only and is in no way binding on the anti-dumping duty investigation. In the instant case,

the question of considering this submission does not arise, in the light of the Notification No.5 of 2016 : MANU/CUSA/0009/2016, dated 22.02.2016, which clearly states that it is a notification issued in substitution dated 22.02.2016, which clearly states that it is a notification issued in substitution of the earlier notification. Therefore, the proper of reading Notification No.51 of 2015: MANU/CUSA/0054/2015, dated 21.10.2015 is to read the Entry as 5402 47.

12. Thus, for the above reasons it is held that the Notification No.5 of 2016:MANU/CUSA/0009/2016, dated 22.02.2016 being substitutive in nature is held to be retrospective."

14. In the same lines, the Hon'ble Division Bench of the **Karnataka High Court** in **Fosroc's** case (supra) has held as follows:

"9. What is the effect of "substitution" of a provision in the place of an existing one is no more res-integra. The Constitution Bench of the Hon'ble Apex Court in the case of SHAMARAO V. PARULEKAR vs. THE DISTRICT MAGISTRATE, THANA, BOMBAY & Others reported in AIR 1952 SC page 324, dealing with the scope of substitution of a provision by way of

amendment held as under:-

"When a subsequent Act amends an earlier one in such a way as to incorporate itself or a part of itself into the earlier, then the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that there is no need to refer to the amending Act at all."

10. Yet another Constitution Bench of the Hon'ble Supreme Court in the case of *SHYAM SUNDER & Others vs. RAM KUMAR & Another* reported in AIR 2001 SC page 2472, while dealing with the question whether a substituted provision necessarily means the amended provision is retrospective in nature has held as under:

"A substituted section in an Act is the product of an amending Act and all the effects and consequences that follow in the case of an amending Act the same would also follow in the case of a substituted section in an Act."

11. In fact, the Division Bench of this Court in the case of *SHA CHUNNILAL SOHANRAJ VS. T.GURUSHANTAPPA* reported in 1972(1) MYS.L.J. PAGE 327 DB has held as under:

"When an amending Act has stated that the old sub-section has been substituted by the new sub-section the inference is that the Legislature intended that the substituted

provision should be deemed to have been part of the Act from the very inception."

12. Recently, the Hon'ble Apex Court in the case of GOVERNMENT OF INDIA VS. INDIAN TOBACCO ASSOCIATION reported in 2005(187) ELT PAGE 162 (SC), while dealing with the exemption notification which was issued by way of substitution, held as under:-

"15. The word 'substitute' ordinarily would mean 'to put (one) in place of another', or 'to replace'. In Black's Law Dictionary, Fifth Edition, at page 1281, the word 'substitute' has been defined to mean 'To put in the place of another person or thing', or 'to exchange'. In Collins English Dictionary, the word 'substitute' has been defined to mean 'to serve or cause to serve in place of another person or thing'; 'to replace (an atom or group in a molecule) with (another atom or group)"; or 'a person or thing that serves in place of another, such as a player in a game who takes the place of an injured colleague'.

16. By reason of the aforementioned amendment no substantive right has been taken away nor any penal consequence has been imposed. Only an obvious mistake was sought to be removed thereby.

17. There cannot furthermore be any doubt whatsoever that when a person is held to be eligible to obtain the benefits of an exemption notification, the same should be liberally construed."

15. The Hon'ble Division Bench of this Court had also an occasion to interpret the term "Substitution" in the S.P. Fabricators' case (supra) in the following manner :-

"17.On a reading of the above amendment, it is evident that clause (i) of sub-rule 6 of Rule 6 was substituted, thereby, the provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty or either cleared to a unit in a special economic zone or to a developer of a special economic zone for their authorised operations. Thus, the question would be as to what would be the meaning of the word 'substitute';.

18.The Hon'ble Supreme Court in the case of Government of India vs. Indian Tobacco Association [2005(187) E.L.T.162(S.C.) explained the meaning of the word 'substitute' on the following lines:

"15.The word "substitute" ordinarily would mean "to put (one) in place of another", or "to replace". In Black's Law Dictionary, Fifth Edition, at page 1281, the word "substitute" has been defined to mean "To put in the place of another person or thing", or "to exchange". In Collins English Dictionary, the word "substitute" has been defined to mean "to serve or cause to serve in place of another person or thing", "to replace (an atom

*or group in a molecule) with (another atom or group)”;
or “a person or thing that serves in place of another,
such as a player in a game who takes the place of an
injured colleague.”*

19. Thus, the 'substitution' by way of an amendment dated 31.12.2008 has to be read to put in place instead of the Rule, which was in existence prior to the said Notification. In other words, it has to be read as a replacement of an existing Rules.

20. The Hon'ble Supreme Court in the case of Zile Singh vs. State of Haryana and Others [(2004) 8 SCC pg.1 brought about the distinguishing features between 'substitution' and 'supersession' and explained the same as under:-

"24. The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. "Substitution" has to be distinguished from "supersession" or a mere repeal of an existing provision.

25. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (see Principles of Statutory

Interpretation, ibid.,p.565). If any authority is needed in support of the proposition, it is to be found in West U.P.Sugar Mills Assn.v. State of U.P. [(2002)2 SCC 645], State of Rajasthan v. Mangilal Pindwal [(1996) 5 SCC 60], Koteswar Vittal Kamath v. K.Rangappa Baliga and Co.[(1969)1 SCC 255] and A.L.V.R.S.T.Veerappa Chettiar v. S.Michael [AIR 1963 SC 933]. In West U.P.Sugar Mills Assn. Case a three Judge Bench of this Court held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centring around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal case, this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar case, a three-Judge Bench of this Court emphasised the distinction between 'supersession' of a rule and 'substitution' of a rule and held that the process of substitution consists of two steps: first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place."

16. On an overall appreciation of the decisions referred above and the discussions made by this Court, I do not find any merits in the contentions raised by the petitioner. Accordingly, both the Writ Petitions stand dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.

05.08.2020

Index:Yes/No
Internet:Yes/No
Order: Speaking/Non Speaking

DP

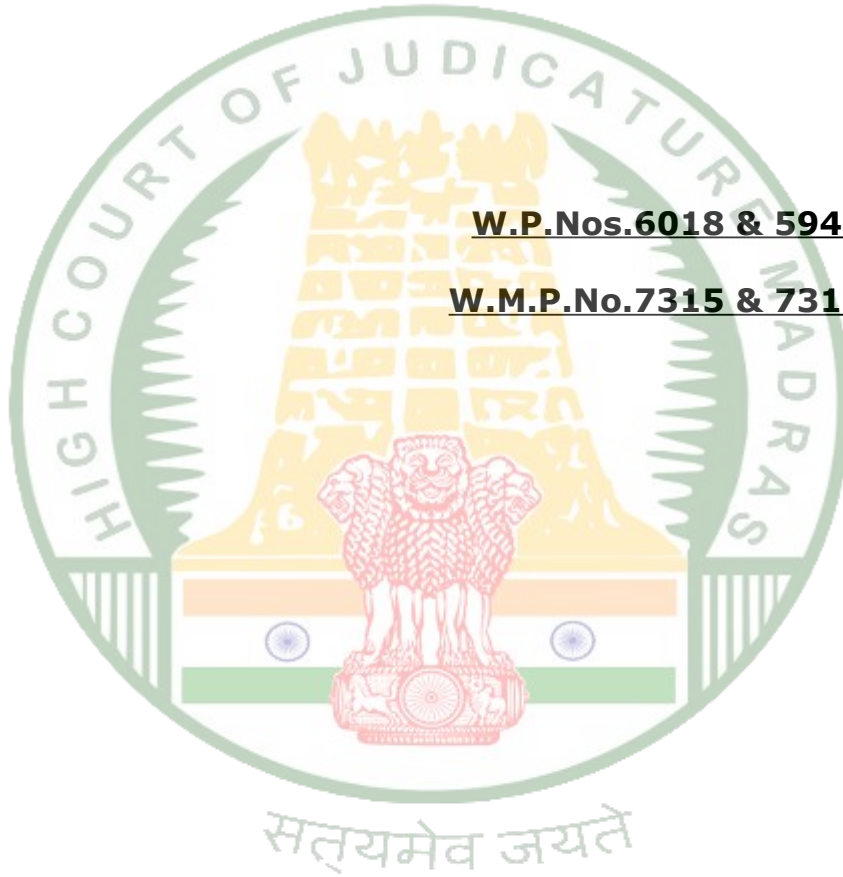
To

The Assistant Commissioner,
Office of the Commissioner of GST and Central Excise,
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