IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.11.2022

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P.Nos.4995 of 2019 & 6412 of 2022 &
WMP.Nos.5702 & 5704 of 2019 & 7306 of 2022

WP.No.4995 of 2019

M/s.K.N.R.Constructions Ltd.,
Rep. by its Authorized Signatory,
Mr.S.Rajasekaran
No.268/2C, Periya Manali Post,
Tiruchengode Taluk,
Namakkal District – 637 401. ...Petitioner

Vs.

1.The Government of India,
Ministry of Finance, Department Revenue,
Office of the Principal Commissioner of
GST and Central Taxes,
Tamil Nadu and Puducherry,
No.261, Mahatma Gandhi Road,
Chennai-600 034.

2.The Office of the Superintendent
Central Tax and Central Excise,
Petroleum Products Range,
GST Bhawan, Kathrikadavu,
Kalloor-682017.

3.Bharat Petroleum Corporation Ltd.,
(A Govt. of India Enterprise),

Coimbatore Territory,
Rep. by its Area Manager (Ind.) Salem,
No.19/2, Burmah Shell Lane,
Big Bazaar Street, Coimbatore-641 001.

4.Government of Tamil Nadu,
Highways Department,
Project Direction (A/c),
Tamil Nadu Road Sector Project-II,
T.N.M.B. Building 1st floor,
171, South Kesavaperumalpuram,
R.A.Puram, Chennai-600 028. ...Respondents

Prayer: Writ Petitions filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari to call for the Notification No.10/2017CE dated 30.06.2017 quash the same in so far as the petitioner with particular reference to the contract undertaken by the petitioner signed in Contract No.07/2015-16 dated 08.06.2015 with the 4th respondent.

AND

WP.No.6412 of 2022

KNR Constructions Ltd.,
Rep. by its Authorized Signatory S.Rajasekaran
KNR House, 3rd and 4th floor,
Plot No.113 & 114, Phase-I, Kavuri Hills,
Jubilee Hills, Road No.36,
Hyderabad – 500 033. ...Petitioner

Vs.

1.Tamil Nadu Road Sector Project – II,
Rep by its Director,
TNMB Buildings, No.171, South Kesava Perumalpuram,

Greenways Road, RA Puram,
Chennai-600 028.

2.Bharat Petroleum Corporation Ltd.,
Coimbatore Territory,
P.B.No:183, 19/2,
Burmah Shell Lane, Big Street,
Coimbatore – 641 001.

3.The Principal Chief Commissioner of GST & Central Excise,
Tamil Nadu & Puducherry,
26/1 Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034. ...Respondents

Prayer: Writ Petitions filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari to call for the records of the 2nd Respondent in the Impugned order dated 22.02.2022 bearing No.I&C. CBE.25.KNR.AED.2 issued by the 2nd Respondent and Quash the same.

For Petitioner (In both WPs) : Mr.V.Lakshmi Narayanan
for Mr.P.J.Rishikesh

For Respondents (In WP.4995/2019) : Ms.Geetha (for R1 & R2)
for Mr.Rajnish Pathiyil
Senior Panel Counsel

Mr.M.Vijayan and Bensi Rema
for King & Patridge (for R3)

Mr.Haja Nazirudeen
Additional Advocate General-I,
for Mr.M.Venkateswaran (for R4),
Special Government Pleader

For Respondents (In WP.6412/2022) : Mr.Haja Nazirudeen
Additional Advocate General-I,
for Mr.M.Venkateswaran (for R1),

Special Government Pleader
Mr.M.Vijayan and Bensi Rema
for King & Patridge (for R2)
Ms.Geetha (for R3)
for Mr.Rajnish Pathiyil
Senior Panel Counsel

COMMON ORDER

A common order is passed in these two writ petitions since the issues to be decided are substantially one and the same. The parties who have been arrayed as respondents are also substantially the same in both writ petitions.

2. The array of party shall be referred to by name and as follows; the petitioner as petitioner, Government of Tamil Nadu, Highways Department Project Direction (A/c)/the Tamil Nadu Road Sector Project-II as TNRSP, Bharat Petroleum Corporation Limited as BPCL and the Principle Chief Commissioner of GST and Central Excise/Superintendent, Central Tax and Central Excise Petroleum Products Range as GST Authorities/Central Excise Authority/Department.

3. The petitioner is a contractor that had entered into an agreement with the TNRSP on 08.06.2015 for the upgradation of Malliyakarai-Rasipuram-Thiruchengode-Erode Road (SH 79) Km 0/000 to Km 30/600 and Km 51/400 to Km 71/300 on engineering, procurement & construction (EPC) basis.

4. The copy of the agreement, which is placed in the typed set is not complete and hence the tenure of the project is not available. However, parties agree that the project has been completed by the petitioner and handed over to TNRSP on 12.04.2018. All payments due and payable under the contract to the contractor are stated to have been settled by TNRSP.

5. The project itself had been an initiative under the World Bank Loan Assistance Scheme and the Government of India had approved the execution of this project referring to Loan No. 8499-IN. In terms thereof there was an exemption from excise duty in regard to supplies of high speed diesel (HSD) manufactured and supplied by BPCL.

6. The exemption was sought and admittedly available to the petitioner under Central Excise Notification No.108/95 CE dated 28.08.1995. The exemption request was made by the BPCL and certificates had been issued by TNRSP under Certificate Nos.TNRSP II/EPC06/08 dated 25.02.2016 and TNRSP II/EPC06/21 dated 22.03.2019.

7. BPCL had also duly communicated to the Central Excise Department the request of the petitioner by its letters dated 10.03.2016 and 03.05.2017. The deliveries were hence, made by BPCL to the petitioner duty-free, in terms of Exemption Notification No.108/95 CE dated

28.08.1995. The notification reads thus:

> *"In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excises and Salt Act, 1944 (1 of 1944) read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts all goods falling under the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the said goods) when supplied to the United Nations or an international organisation for their official use or supplied to the projects financed by the said United Nations or an international organisation and approved by the Government of India, from the whole of-*
>
> *(1) the duty of excise leviable thereon under section 3 of the Central Excises Act, 1944 (1 of 1944); and*
>
> *(ii) the additional duty of excise leviable thereon under sub-section (1) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957):*
>
> *Provided that before clearance if the said goods, the manufacturer produces before the Assistant Commissioner of Central Excise having jurisdiction over his factory -*
>
> *(a) ....*
>
> *(b) in case of the said goods are-*
>
> *(i) Supplied to an international organisation listed in the Annexure appended to this notification for use in a project that has been approved by the Government of India and financed (whether by a loan or a grant) by such an organisation, a certificate from such an organisation that the said goods are required for the execution of the said project and that the said project has duly been approved by the Government of India; or*
>
> *..........*
>
> *(c) in case the said goods are intended to be supplied to a project financed (whether by a loan or a grant) by the World Bank, the Asian Development Bank or any international organisation, other than those listed in the Annexure, and*

....

(ii) if the said project has been approved by the Government of India for implementation by the Government of a State or a Union Territory, a certificate from the executive head of the Project Implementing Authority and countersigned by the Principal Secretary or the Secretary (Finance), as the case may be, in the concerned State Government or the Union Territory, that the said goods are required for the execution of the said project, and that the said project has duly been approved by the Government of India for implementation by the concerned State Government."

8. While this is so, the Government of India withdrew the benefit under the aforesaid Notification by virtue of a subsequent Notification bearing No.10 of 2017-Central Excise dated 30.06.2017 being satisfied that such withdrawal of exemption was warranted in public interest. The withdrawal is in the following terms:

"G.S.R. (E)-In exercise of the powers conferred by sub-section (1) of section SA of the Central Excise Act, 1944 (1 of 1944) and in suppression of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 108/95-Central Excise, dated the 28th August, 1995, published in the Gazette of India, Extraordinary, vide number G.S.R. 602(E), dated the 28th August, 1995, except as respects things done or omitted to be done before such suppression, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts all goods falling under the Fourth Schedule to the Central Excise Act, 1944 (1 of 1944) (hereinafter referred to as the said goods) when supplied to the United Nations or an international organisation for their official use from the whole of the duty of excise leviable thereon under section 3 of the said Act.

Provided that before clearance of the said goods, the manufacturer produces before the Assistant commissioner of central excise having jurisdiction over his factory, a certificate from the United Nations or an international organisation that the said goods are intended for the official use by the United Nations or the said international organisation.

Explanation. For the purposes of this notification "international organisation" means an international organisation to which the Central Government has declared, in pursuance of section 3 of the United Nations (Privileges and Immunities)Act, 1947 (46 of 1947), that the provisions of the Schedule to the said Act shall apply.

2.This notification shall come into force with effect from the 15 day of July, 2017."

9. The withdrawal of the Notification was duly brought to the notice of trade and industry vide Central Excise Trade Notice No.006/2017 dated 05.07.2017, wherein this Notification figures at Serial No.2.

10. Be that as it may, all parties that is the petitioner, TNRSP and BPCL disavow of knowledge of the withdrawal till such time there was an audit inspection by the authorities of the Central Excise Department in the premises of BPCL.

11. With the inspection, an audit objection was raised bringing to the notice of the BPCL that the grant of exemption in regard to supplies of HSD was incorrect. Recovery was made of a sum of Rs.1.88 crores (approx)

towards additional excess duty for the period March 2016 to June 2017 along with interest of a sum of Rs.1.01 crore (approx) for the period up to 12.06.2020 being the date of payment made to the Excise Department by BPCL. Immediately thereupon, BPCL communicated the recovery to the petitioner.

12. However, and this forms the subject matter of WP.No.6412 of 2022, the demand for the period March 2016 up to 30.06.2017, is, in my considered view, contrary to law insofar as the impugned notification dated 30.06.2017 comes into effect only from 01.07.2017. To this end, the recovery of duty for any period prior to 01.07.2017 is held to be bad in law and shall be refunded to BPCL forthwith.

13. For this purpose, BPCL is permitted to appear before the office of the Central Excise Officer concerned on Friday, the 18th of November, 2022 at 10.30 a.m, without awaiting any further notice in this regard for a reconciliation. Upon reconciliation, the amount shall be refunded to BPCL within a period of two weeks from that date.

14. The thrust of WP.No.4995 of 2019 is that the withdrawal of exemption is itself bad in law. For this purpose the petitioner raise two arguments, firstly, that the exemption ought not to have been withdrawn

during the currency of the agreement between the petitioner and TNRSP and secondly, even assuming that the exemption was to be withdrawn, the Government cannot merely cite 'public interest' but must be able to establish what the specific circumstances of public interest were, that justified such withdrawal.

15. For this purpose, the petitioner relies on a judgment of the Hon'ble Supreme Court in the case of *State of Uttar Pradesh and Another Vs. Birla Corporation Ltd*. [(2020) 20 SCC 320].

16. Per contra learned Standing Counsel appearing for the Central Excise Department would point out that it would suffice that the withdrawal was merely stated, to be in public interest. He cites a slew of cases where the Hon'ble Supreme Court as well as other Courts have reiterated the proposition that it was entirely the matter of discretion of the authorities to decide as to whether an exemption ought to be granted, continued or terminated.

17. It is not for the taxpayers to raise a dispute in regard to the same. Learned Standing Counsel would, however, fairly accede to the position that reversal would only be from date of coming into effect of the Notification which was 01.07.2017 and not prior thereto.

18. Two cases are cited by the revenue, one delivered by a three Judge Bench of the Hon'ble Supreme Court in the case of *Union of India and Others Vs. Unicon Industries,* [(2019) 10 SCC 575] and the other by a Division Bench of the Hon'ble Supreme Court in the case of *DPF Textiles Ltd. Vs. Union of India,* [(1997) 92 ELT 28].

19. Having heard the rival contentions on this issue, I would accept the stand of the revenue. The case law cited by the petitioner being *Birla Corporation* (supra) would be distinguishable for the reason that in that case the exemption notification had been issued and thereafter withdrawn even prior to the date of grant of the exemption.

20. It was in those circumstances that the Bench was persuaded to state at paragraph 26 to 28 that rescinding of rebate facility, from a date prior to the date of notification granting the rebate, would not have any placid or expressed approval in law.

21. In the present case, however, these facts do not arise for consideration as the exemption has been withdrawn only in 2017, having been in force from 28.08.1995 onwards. Thus, in light of the distinction as noted above, reliance of the petitioner on the case of *Birla Corporation* (supra) is of no avail.

22. In the case of *Unicorn Industries* (supra), the three Judge Bench of the Hon'ble Supreme Court considered the similar question as to whether the withdrawal of an exemption notification would result in the benefit of the argument of promissory estoppal being available to the petitioner.

23. Upon consideration of several judgments that have been rendered earlier, *Kasinka Trading Vs. Union of India* [1995 (1) SCC 274], *Sales Tax Officer Vs. Shree Durga Oil Mills* [1998 (1) SCC 572], *Shree Durga Oil Mills vs. Sales Tax Officer* [1989 (74) STC 10], *Shrijee Sales Corporation Vs. Union of India* [1997 (3) SCC 398], *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of U.P.* [1979 (2) SCC 409], *State of Rajasthan Vs. Mahaveer Oil Industries* [1999 (4) SCC 357], *Shree Sidhbali Steels Ltd., Vs. State of U.P.* [2011 (3) SCC 193] & *Directorate General of Foreign Trade Vs. Kanak Exports* [2016 (2) SCC 226], the Court concluded that the modification or withdrawal of a notification in public interest would fall fully within the domain and discretion of the, public authorities, that is, either the Government or revenue authorities.

24. No assessee can claim an exemption as a matter of right. No doubt, in this case an exemption had been granted in respect of duty liability in respect of those projects that have been funded by the World Bank and

the assessees had been availing the benefit of this exemption from 1989 onwards.

25. However, in its wisdom, and in avowed public interest, the Government of India had thought it fit to reverse this exemption and the affidavit filed by the petitioner in this writ petition does not allege bias, prejudice or anything malafide in this decision having been taken.

26. In such circumstances, it would suffice, in the considered view of this Court, that the exemption granted or the reversal thereafter, be justified by reference to public interest and there requires no further effort or attempt on the part of the State or the authorities to justify the same. The challenge to Notification dated 30.06.2017 is hence rejected.

27. The contract between the parties provides for a Change in Law in Article 19.17 that reads as follows:

> ***"19.17 Change in law***
>
> *19.17.1 If as a result of Change in Law, the Contractor suffers any additional costs in the execution of the Works or in relation to the performance of its other obligations under this Agreement, the Contractor shall, within 15 (fifteen) days from the date it becomes reasonably aware of such addition in cost, notify the authority with a copy to the Authority's Engineer of such additional cost due to Change in Law.*
>
> *19.17.2 If as a result of Change in Law, the Contractor benefits from any reduction in costs for the execution of this Agreement or in accordance with the provisions of this*

Agreement, either Party shall, within 15 (fifteen) days from the date it becomes reasonably aware of such reduction in cost, notify the other Party with a copy to the Authority's engineer of such reduction in cost due to Change in Law.

19.17.3 The Authority's Engineer shall, within 15 (fifteen) days from the date of receipt of the notice from the Contractor or the Authority, determine any addition or reduction to the Contract Price, as the case may be, due to the Change in Law."

28. Thus, the parties are aware of a possibility of there being a change in law, pending the currency of the contract. This is supported by the fact that a public trade notice had been issued by the authorities bringing to the notice of the assessees concerned, reversal of the exemption. This would support the conclusion that the reversal of the exemption is a fact to be taken note of by the parties, going forward.

29. However, Article 19.17.1 does provide for the authorities to sit across a a table and decide the impact of such change in law. Learned Additional Advocate General appearing for TNRSP would attempt to argue that the impact would only be to the detriment of the petitioner and not to the TNSRP.

30. However, this is a matter of contract and hence, I desist from interpreting the terms of the contract as it would be more appropriate for the parties to do so.

31. Hence, the petitioner is permitted to make a representation before

the TNRSP on its interpretation of the exemption notification and the consequent liability as well as who is to bear such resultant liability. Such representation, if received within four weeks from date of receipt of this order, shall be acted upon by TNRSP by calling upon the petitioner to appear before it and orders passed in regard to the same.

32. The Central Excise Department shall determine refund/additional demand taking note of the amounts that have been collected from BPCL as well as paid by the petitioner to BPCL, and raise demands accordingly.

33. WP.No.6412 of 2022, challenges a demand made by BPCL upon the petitioner for the entirely of the period for 2015 to 2018 and as held in paragraph 12 infra, there shall be no demand for the period prior to 01.07.2017.

34. As far as the demand relating to the period post 01.07.2017, BPCL appears to have threatened the petitioner that it would invoke a bank guarantee that was in its possession though unrelated to the present contract.

35. While the petitioner would deplore the action of BPCL in making such a threat, ultimately the payment has been effected by the petitioner to BPCL suo motu and has not been recovered by BPCL by invoking bank guarantee.

36. In the facts and circumstance as noted above, I leave this aspect of the matter as such without comment except to state that the amount as above shall remain in the possession of BPCL till a final demand is raised by the Customs Authorities.

37. These writ petitions are disposed in light of the order as above. No costs. Connected miscellaneous petitions are closed.

07.11.2022

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Index : Yes/No
Speaking Order

To

1.The Government of India,
Ministry of Finance, Department Revenue,
Office of the Principal Commissioner of
GST and Central Taxes,
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DR.ANITA SUMANTH, J.

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