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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.03.2022

CORAM :

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

Writ Petition Nos.23382 & 22952 of 2019
and
W.M.P.No.23137, 23138 and 22596 of 2019

Blueline Foods (India) Pvt. Ltd,
Represented by its Managing Director
... Petitioner in W.P.No.23382 of 2019

Bismi Fisheries Pvt Ltd,
Represented by its Managing Director
... Petitioner in W.P.No.22952 of 2019

-Vs-

1. Principal Additional Director General,
Directorate General of GST Intelligence,
Chennai Zonal Unit,
C-3, C-Wing, II Floor, Rajaji Bhavan,
Besant Nagar, Chennai 600 090.
...Respondent in W.P.No.23382 of 2019

2. Union of India,
Represented by its Secretary,
Ministry of Finance,
Department of Revenue, Central Secretariat,
New Delhi 110001.

3. Central Board of Indirect Taxes and Customs (CBI & C)
Tax Research Unit,
Ministry of Finance,
Department of Revenue, Central Secretariat,
New Delhi 110001.

4. The Commissioner of Central Excise & Central Tax (CGST),
Office of the Commissioner of Central Excise & Central Tax (CGST),
7th Floor, Trade Centre,
Bunts Hostel Road,
Mangaluru-575003. ... Respondents in both WP's

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1. Union of India,
Represented by its Secretary,
Ministry of Finance,
Department of Revenue, Central Secretariat,
New Delhi 110001.

2. Central Board of Indirect Taxes and Customs (CBI & C)
Tax Research Unit,
Ministry of Finance,
Department of Revenue, Central Secretariat,
New Delhi 110001.

3. The Commissioner of GST & Central Excise,
Office of the Commissioner of GST & Central Excise,
No.1, Williams Road, Cantonment,
Tiruchirappalli-620 001.

... Respondents in W.P.No.22952 of 2019

Prayer in W.P.No.23382 of 2019 :

Writ Petition under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari calling for the records in the proceedings of the third respondent in clarification contained in Paragraph No.4 of Circular No.80/54/2018-GST dated 31.12.2018 issued by the third respondent and quash the same.

Prayer in W.P.No.22952 of 2019 :

Writ Petition under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari calling for the records in the proceedings of the second respondent in clarification contained in Paragraph No.4 of Circular No.80/54/2018-GST dated 31.12.2018 issued by the second respondent and quash the same.

In both W.P's

For Petitioner s : Mr.Joseph Prabakar

For Respondents : Mr.V.Sundereswaran,
Senior Standing Counsel

COMMON O R D E R

The prayer sought for herein is for a Writ of Certiorari calling for the records in the proceedings of the second and

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third respondent in clarification contained in Paragraph No.4 of Circular No.80/54/2018-GST dated 31.12.2018 issued by the second and third respondent and quash the same.

2. The prayer sought for in both the Writ Petitions since are arising out of the same issue, on the request of the learned counsel for the petitioners and with the consent of the learned Government Counsel, both the Writ Petitions were heard together and disposed of by way of this common order.

3. Learned counsel for the petitioner submits that insofar as the liability of paying the tax under the hands of the respondents for the product being manufactured by the petitioner's company viz., Fish Meal is concerned, it is exempted by Notification issued in this regard and this issue when was raised in Jenefa India vs. Union of India and others in W.P.(MD) No.16770 of 2019 etc., batch of cases, this Court, after hearing both sides, made an exhaustive judgment dated 05.10.2021 and the issue was decided in favour of the assessee.

4. Relying upon the said decision reported in 2021-VIL-763-MAD, the learned counsel for the petitioners would seek the indulgence of this Court to extend the same benefit to the present Writ Petitioners also those who are similarly placed with the same set of facts.

5. However, the learned Standing Counsel appearing for the respondents submits that, as against the said order dated 05.10.2021 passed by the Writ Court, an intra Court appeal was filed. Though no stay was granted, notice was ordered to the respondents to respond. Therefore, since the Division Bench is seized off the matter , the benefit arising out of the said decision dated 05.10.2021 may not be extended to other assessees like the present petitioners.

6. The learned Standing Counsel appearing for the respondents further submits that subsequent to the decision of the Writ Court dated 05.10.2021, the Finance Act, 2022 has been passed and the effect of the said Finance Act has not been taken care of while disposing the said cases. Therefore, that issue also can be canvased as an additional ground in support of the Revenue. Therefore, on that ground the petitioner is not entitled to get same relief as has been granted in the said case dated 05.10.2021.

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7. I have considered the rival submissions made by the learned counsel for the petitioners as well as the respondents and have perused the materials placed before this Court.

8. As has been rightly pointed out by the learned counsel appearing for the petitioners that the present issue raised in these Writ Petitions before this Court is squarely covered by the decision made in Jenefa India case cited supra where, I have passed detailed order considering the pros and cons of the issue after hearing the assessee as well as the revenue.

9. In order to have a ready reference of what has been decided in the said Jenefa India case, the following text of the judgment is reproduced hereunder:

> "4. I have considered the rival submissions elaborately made by the learned Counsel appearing for both sides and also have perused the materials placed before this Court.
>
> 5. Though such an extensive submissions were made in this batch of cases, by learned Counsel appearing for both sides, the issue to be answered, in the considered opinion of this Court, is in a very narrow campass.
>
> 6. After the GST regime, which came into effect from 01.07.2017, the Customs Tariff Act, 1975 classification selectively has been adopted by the GST regime. Therefore, few days prior to the implementation of the GST regime, these two notifications, namely, Notification No.1/17 and Notification No.2/17, were issued by the Central Government, of course, by exercising their powers under Sections 9(1) and 11(1) of the CGST Act, respectively.
>
> 7. Under Notification No.1/17, what are all the items or entries in chapter heading and sub-heading are to be included for the purpose of levying tax, had been provided in six Schedules which had been discussed hereinabove. We are concerned only about the goods specified in Schedule I, which are liable to be levied a 5% GST. In the list of goods specified in schedule I, as per Notification No.1/17, in Sl.No.103,

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the entry 2301 has been mentioned which has been quoted hereinabove, where the words flours, meals and pellets of meat or meat offal of fish or of crustaceans, molluscs etc., has been given.

8. If we have a conjoint reading of these words by using the
proper grammatical method, it should be read only as flours of fish, meals of fish, pellets of fish. Therefore, even under entry 2301, the fish meal, the fish pellet and fish flour can be said to be included.

9. Like that, in entry 2309, it is mentioned that, preparations of a kind used in animal feeding. Among various goods under subheading 2309 90 20 feeds for fish, (prawn etc)., is mentioned. In sub-heading 2309 90 31, prawn and shrimp feed is mentioned. In sub-heading 2309 90 32, fish meal in powdered form is mentioned. It is to be noted that, the entire entries of the heading 2309 are in Nil GST category. It may be a food for fish, which includes prawn etc., it may be a fish meal in powdered form. Therefore, one thing becomes clear that, if it is a fish meal in powdered form, that can very well be exempted. If it is a food of fish which means food for prawn etc., which may extend to various other category of animals or sea living creatures for whom also if the feeds of fish are used, that can also be treated as an exempted one.

10. If we come to entry 2301, in sub-heading 2301 20, it says flours, meals and pellets of fish and also it says fish meal unfit for human consumption. In sub-heading 2301 20 11, it further says, in powdered form. Therefore, flours, meals and pellets of fish unfit for human consumption in powdered form, can also be exempted, because it comes under 2301 entry, which also forms part of Sl.No. 102 of Exemption Notification No.2/17.

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11. Therefore, it may be either under 2301 or may be under entry 2309. In both way, the fish meal is explicitly provided under exemption category.

12. Only in this context, the Revenue has taken a stand that,
if the fish meal is utilised for feeding the fish or aqua including prawn, then it can be treated as a finished product, for which, exemption can be claimed. However, this fish meal is being sold to another manufacturer to prepare the feed for cattle, poultry etc. Therefore, in such manufacturing process, this so called fish meal will be used only as raw material. Therefore such kind of raw material cannot be treated as an exempted one within the meaning of entry 2301 or under entry 2309.

13. The fallacy of the said argument, even if we take the reason cited in para 4.2. of the impugned circular, may appear to be a clever distinction, but factually it is not so. The reason being that, what is the nature of the product being manufactured by an industry or a manufacturer is the matter. Here, both under entry 2301 as well as 2309, the fish meal in the form of finished product used for feeding the fish, aqua, including prawn etc., and also flours, meals and pellets of fish etc., in the powdered form are exempted.

14. Merely because such a finished product of fish meal produced by the petitioners' industries are being utilised also for the purpose of further manufacturing of further animal feed or poultry feed, by that reason itself, it cannot be stated that, it is only a raw material and not a finished product.

15. In this context, if we look at the reasoning given by the
Board in the impugned Circular, in Clause (ii) it says, fish meal and other raw materials are used for making cattle / poultry / aquatic feed. Therefore, their intention is to separate the fish meal being used as raw material for making

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cattle / poultry or aquatic feed from the purview of exemption. Assuming that, if this is the intention of the Central Government, while giving the Exemption Notification, where they already inserted all items covered under entry 2301 & 2309, the present attempt made by the Board through the Circular to separate these fish meals in the case of raw material for making cattle feed, that separation is impossible because the manufacturer maufactures this fish meal primarily for feeding of fish and aqua. But, at the same time, incidentally that product is being used as one of the raw material in some other industries to prepare animal feed or cattle feed or poultry feed, because of which, the very finished product, namely, fish meal would not lose its character and identity.

16. The Central Government while giving Exemption Notification No.2/17, though originally included only Entry Nos. 2302, 2304, 2305, 2306, 2308 & 2309, subsequently, issued a corrigendum that entry 2302 should be read as 2301 & 2302. Therefore, 2301 also is included.

17. Subsequently, when Amendment Notification No.28/17
dated 22.09.2017 was issued, under Clause (vi) of the notification, the amendment made is that Sl.No.102 for the entries in Column (2), the entries "2301, 2302, 2308 & 2309" shall be substituted. Therefore, the final conclusion which was arrived by the Central Government is that, what are all the items covered under entry 2301, 2302, 2308 & 2309 are to be totally exempted and that is the reason why the amendment notification was issued by exercising its powers under sub-section 1 of section 6 of IGST Act, 2017.

18. On the said notification originally issued ie., Notification No.2/17 under Section 11(1) of the IGST Act, 2017 as well as an Amendment Notification issued under Section 6(1) of CGST Act, 2017, if we take a coherent and conjoint reading, it explicitly makes it clear that the

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goods covered under four entries namely 2301, 2302, 2308 & 2309 are exempted.

19. If at all anything to be taken away from the purview of such exemption already provided under those entries, it is for the Central Government to come to the rescue of the Revenue by issuing further amendment to the Exemption Notification No.2/17 as amended by the Amendment Notification No.28/2017 and can issue a fresh or additional amendment, showing the proper intention of the Central Government to take away the exemption provided in any particular type of goods or product covered under the four entries referred to. Such an action has not been taken by the Central Government so far.

20. In this context, it has been pointed out by the learned Counsel for the petitioner that, if at all the impugned Circular have been issued by the Board, that should have been issued by the Board exercising the powers under Section 168. For the sake of convenience, Section 168 of the said Act is extracted hereunder:

> "168. Power to issue instructions or directions:
> (1) The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this Act, issue such orders, instructions or directions to the central tax officers as it may deem fit, and thereupon all such officers and all other persons employed in the implementation of this Act shall observe and follow such orders, instructions or directions.
>
> (2) The Commissioner specified in clause (91) of section 2, sub-section (3) of section 5, clause (b) of sub-section (9) of section 25, subsections (3) and (4) of section 35, sub-section (1) of section 37, sub-section (2) of section 38, sub-section (6) of section 39, sub-section (5) of section 66, sub-section

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> (1) of section 143, subsection (1) of section 151, clause (1) of subsection (3) of section 158 and section 167 shall mean a Commissioner or Joint Secretary posted in the Board and such Commissioner or Joint Secretary shall exercise the powers specified in the said sections with the approval of the Board.”

21. Section 168(1) makes it clear that, only for the purpose of uniformity in the implementation of the Act, orders or directions to the Central Tax Officers, as deem fit, may be issued by the Board. Therefore, most probably, such kind of orders, instructions or directions must be procedural in nature, not substantive in nature.

22. The exemption provided by the Central Government by exercising its powers either under Section 11(1) of CGST Act, 2017 or under Section 6(1) of IGST Act, 2017 are the substantive right provided to the stake-holders by giving such exemption. Therefore, such kind of exemptions cannot be taken away or done away by issuing clarificatory Circulars by the Board, in exercise of its powers under Section 168 of the CGST Act, 2017.

23. Therefore, for the said reason also, this Court feels that the impugned clarificatory Circular cannot override the exemption provided under the notifications referred to above.

24. Though the judgment in Sun Export Corporation case and Dilip Kumar case have been relied upon by both sides, the said judgment can be taken as an aid only for the limited purpose to know what has been stated in the said judgment with regard to the present issue.

25. However, when we look at the decision in Sun Export Corporation case, the law propounded by the Hon'ble Supreme Court is that, if there is any ambiguity in the notification like exemption notification, such benefit arising out of

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ambiguity be conferred on the assessee. However, the said law laid down in Sun Export Corporation case has been negated and overruled by the Constitution Bench in Dilip Kumar case, referred to above, where the Hon'ble Supreme Court ultimately has held as follows:

> "52. To sum up, we answer the reference holding as under –
> (1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.
>
> (2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of revenue.
>
> (3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled.
>
> 53. The instant civil appeal may now be placed before appropriate Bench for considering the case on merits after obtaining orders from the Hon'ble Chief Justice of India."

26. As has been asserted by the learned Counsel appearing for the petitioners, no where in the said judgment in Dilip Kumar case, the Hon'ble Supreme Court has held that the inputs for animal feed are different from the animal feed.

27. This issue was never figured in the decision in Dilip Kumar case, where the larger principle of law alone was considered and it was held in

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paragraph No.52, which has been quoted hereinabove. Therefore, the reason cited by the Board in paragraph 4.2. of the impugned Circular being one of the reasons to issue this clarification is also untenable and therefore, for that reason also, the respondent / Revenue cannot sustain the impugned Circular.

28. It has also been brought to the notice of this Court by the learned Counsel for the petitioners that, in the Finance Act, 2020, (the Act No.12 of 2020) in Section 132, the parliament thought it fit to give exemption from levying the Central Tax in respect of supply of fish meal falling under heading 2301 during the period commencing from the first day of July, 2017 and ending with 30th day of September, 2019. In order to have a quick reference to Section 132 of the Finance Act, 2020, the same is extracted hereunder:

> "132. Retrospective exemption from, or levy or collection of, central tax in certain cases. – (1) Notwithstanding anything contained in the notification of the Government of India in the Ministry of Finance (Department of Revenue) number G.S.R. 673(E), dated the 28th June, 2017, issued by the Central Government, on the recommendations of the Council, in exercise of the powers under sub-section (1) of section 9 of the Central Goods and Services Tax Act, 2017 (12 of 2017), -
> (i) no central tax shall be levied or collected in respect of supply of fishmeal (falling under heading 2301), during the period commencing from the 1st day of July, 2017 and ending with the 30th day of September, 2019 (both days inclusive);
> (ii) central tax at the rate of six percent, shall be levied or collected in respect of supply of pulley, wheels and other parts (falling under heading

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> 8483) and used as parts of agricultural machinery (falling under headings 8432, 8433 and 8436), during the period commencing from the 1st day of July, 2017 and ending with the 31st day of December, 2018 (both days inclusive).
> (2) No refund shall be made of all such tax which has been collected, but which would not have been so collected, had sub-section (1) been in force at all material times."

29. Though only for a particular period such exemption has been provided under the aforesaid provision of the Finance Act, 2020, this has been quoted by the learned Counsel for the petitioners to substantiate the very intention of the Legislature that, such kind of exemption can be provided for levying Central Tax or collecting such tax on the supply of fish meal.

30. This is what is indicated by this Court in the earlier part of this order that, if at all the exemption provided by the Central Government in issuing the Exemption Notification No.2/17 is to be revisited or reviewed and certain items have to be taken away from the purview of exemption, such exercise shall be undertaken either by the Parliament by making a law as has been done in Finance Act, 2020 or by the Central Government by exercising their powers either under Section 11(1) of the CGST Act, 2017 or under Section 6(1) of the IGST Act, 2017, as under such exercise of powers only those Exemption Notifications No.2/17 as well as the Amendment Notification No.28/2017 were issued, and only then, such kind of amendment could be made.

31. However, no such attempt since has been made either by the Parliament or by the Central Government, by issuing a mere Circular exercising the powers under Section 168 of the CGST Act, 2017, such kind of right already vested, to get exemption,

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on the assessee, cannot be taken away by way of a clarificatory Circular, that too issued only to the benefit of the officials and staff of the department, as culled out from the language used in Section 168 of the Act. Therefore, for that reason also this Court feels that the impugned Circular would not stand in the legal scrutiny.

32. For the discussions hereinabove made and for all these reasons which have been quoted, this Court feels that the impugned Circular insofar as Clause (ii) of the same, namely, fish meal and other raw materials used for making cattle / poultry / aquatic feed is concerned, is unsustainable and therefore, insofar as the said product is concerned, whatever the clarification issued in the impugned Circular dated 31.12.2018 is set aside. As a sequel, the petitioners, so long as they make a finished product fish meal from their manufacturing units, can enjoy the benefit of exemption as provided under Sl.No.102 of Exemption Notification No.2/17 dated 28.06.2017. Therefore, all consequential actions, if any taken on the part of the Revenue against the petitioners pursuant to the impugned Circular, would not stand in the legal scrutiny. Therefore, they are also declared to be invalid.

33. With these directions and orders, all these writ petitions are allowed to the term indicated above. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

10. Since the issue has been decided in the said decision against which though appeal has been filed before the Division Bench of this Court where, the judgment of the Writ Court has not been stayed, therefore as on date the effect of the Judgment is very well available and it is prevailing. Therefore the benefit arising out of the said Judgment can very well be extended to the present petitioners who are similarly placed with the same set of facts. Hence, this Court is inclined to dispose of these Writ Petitions with the following order.

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11. These Writ Petitions are allowed on the same terms as they have been indicated in the said Jenefa India case cited supra. No Costs. Consequently, connected Miscellaneous Petitions are closed.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

anu/kst

To

1. The Principal Additional Director General,
Directorate General of GST Intelligence,
Chennai Zonal Unit,
C-3, C-Wing, II Floor, Rajaji Bhavan,
Besant Nagar, Chennai 600 090.

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Tiruchirappalli-620 001.

+2cc to Mr.Joseph Prabakar, Advocate Sr.17364
+2cc to Mr.Sundareshwaran, Advocate Sr.17660

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