IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P.(T)No. 1719 of 2022
With
W.P.(T)No. 2649 of 2022
With
W.P.(T) No. 2650 of 2022
With
W.P.(T) No. 2651 of 2022
With
W.P.(T) No. 2655 of 2022
With
W.P.(T) No. 2704 of 2022
With
W.P.(T) No. 2710 of 2022
With
W.P.(T) No. 2790 of 2022
With
W.P.(T) No. 2796 of 2022
With
W.P.(T) No. 2797 of 2022
With
W.P.(T) No. 403 of 2023
With
W.P.(T) No. 404 of 2023
With
W.P.(T) No. 405 of 2023
With
W.P.(T) No. 1986 of 2023

M/s. Tata Steel Limited ..…Petitioners
(In all these cases)

Versus

1. Union of India, through the Secretary, Ministry of Finance, Department of Revenue, North Block, New Delhi, P.O.-G.P.O., P.S.-Sansad Marg, District-New Delhi.
2. Central Board of Indirect Taxes and Customs, through its chairman, North Block, New Delhi, P.O.-G.P.O., P.S.-Sansad Marg, District-New Delhi.
3. Commissioner of Central Goods and Services Tax & Central Excise, Jamshedpur Commissionerate, having its office at Outer Circle Road, Bistupur P.O. and P.S. Bistupur, Town, Jamshedpur, District-Singhbhum East, Jharkhand.
4. Deputy Commissioner of Central Goods and Services Tax & Central Excise, Division-I, Jamshedpur Commissionerate, 5 -E Road, Bistupur P.O. and P.S. Bistupur, District-Singhbhim (East), Jamshedpur.
5. Assistant Commissioner of Central Goods and Services Tax & Central Excise, Division- I, Jamshedpur Commissionerate, 5 -E Road, Bistupur P.O. and P.S. Bistupur, District-Singhbhim (East), Jamshedpur.
6. Joint Commissioner (Appeals), Central Goods and Services Tax & Central Excise, Ranchi, Grand Emerald Building, 2nd & 3rd Floors, Ashok Nagar, Kadru Argora Main Road, P.O. & P.S. Kadru, District-

Ranchi. ….. Respondents (in all these cases)

CORAM: Hon'ble Mr. Justice Rongon Mukhopadhyay
Hon'ble Mr. Justice Deepak Roshan

For the Petitioner : Mr. Tarun Gulati, Sr. Adv
Mr. Sumeet Gadodia, Adv.
Mr. Salona Mittal, Adv. (in all the cases)
For the Resp.- UOI : Mr. Anil Kumar, Addl. SGI
For the Respondents : Mr. P.A.S.Pati, Adv.
Mrs. Ranjana Mukherjee, Adv.

CAV On. 21.07.2023 **Pronounced on. 21.08.2023**

J U D G M E N T

Per Deepak Roshan, J: Heard learned counsel for the parties.

2. Since common issue is involved in all these writ applications and pertains to the same assessee for different period, as such all are being heard together and disposed of by this common judgment. For brevity; the facts of W.P.(T) No. 1719 of 2022 are being referred herein. The petitioner has prayed for the following reliefs;

(i) For the issuance of an appropriate writ/ order/ direction, quashing and setting aside the part of Paragraph 47 of Circular No. 125/44/2019-GST dated 18.11.2019 (Annexure 6) ("Impugned Circular") issued by Respondent No. 2 which stipulates that while processing refund claims in case of exports, the lower of the values indicated in the tax invoice and the shipping bill should be taken into account, as being beyond the purview of and ultra vires the provisions of the Central Goods and Services Tax Act, 2017, and the Central Goods and Services Tax Rules, 2017, as well as being manifestly arbitrary, unreasonable and violative of Articles 14 and 19(1)(g) of the Constitution of India.

(ii) As an alternative prayer (i), for the issuance of an appropriate writ/order/ direction including a writ in the nature of a declaration, holding and declaring that stipulation contained in paragraph 47 of the Impugned Circular will not be applicable in cases where the value of exports has been subsequently amended in Table 9 of GSTR-1 of the subsequent tax period on the basis of the shipping bills to reflect the actual transaction value of export of goods, and thus such cases will in turn be governed by Paragraph 18 of the said circular which mandates that information contained in Table

9 of FORM GSTR-1 of the relevant tax period as well as that of the subsequent tax periods should be taken into cognizance while processing refund claims.

(iii) For the issuance of an appropriate writ/ order/ direction for quashing and setting aside the Order in Original dated 2.2.2021 issued in Form GST RFD-06 (Annexure - 9) and the Order in Appeal dated 11.10.2021 (Annexure - 12) in as much as they seek to curtail the amount of refund of unutilised balance of Input Tax Credit ("ITC") of compensation cess on account of zero-rated supplies of goods to which the Petitioner is entitled, by solely placing reliance on Paragraph 47 of Circular No. 125/44/2019-GST dated 18.11.2019 (Annexure - 6).

(iv) For the issuance of an appropriate writ/ order / direction including a writ in the nature of mandamus to direct the Respondent Authorities to refund the amount of Rs. 1,12,49,220/- being the shortfall amount to which the Petitioner is entitled to be refunded as per the formula prescribed in Rule 89(4) of the CGST Rules and as per the figures provided by the Petitioner in its application for refund in Form GST RFD-01 dated 22.12.2020 (Annexure - 5) along with the stipulated interest under Section 56 of the Central Goods and Services Tax Act, 2017.

For convenience a chart is being given below which will indicate the alleged amount of refund/interest and demand involved in respective writ applications for concerned period with respective order in original (OIO) and order in appeal (OIA).

Sl. No	**Writ Petition No.**	**Period**	**Amount (Rs)**	**Details of OIO**	**Details of OIA**
1.	WPT No. 403/2023	Nov to Dec'2019	85,42,660/-	23.12.2021	30.8.2022
2.	WPT No. 1719 of 2022 (**Lead Matter**)	Jan to Feb 2019	1,12,49,220/-	2.2.2021	11.10.2021
3.	WPT No. 2649/2022	March 2019	29,65,413/-	17.3.2021	25.10.2021
4.	WPT No. 2650/2022	Sept to Oct 2018	41,08,693/-	28.10.2020	11.6.2021
5.	WPT No. 2651/2022	April 2018	27,75,802/-	6.5.2020	25.1.2021
6.	WPT No. 2655/2022	May' 2018	26,63,544/-	4.6.2020	25.1.2021
7.	WPT No 2704/2022	Aug 2018	30,31,925/-	8.9.2020	9.2.2021
8.	WPT No. 2710/2022	April to May	15,51,996/-	20.4.2021	11.4.2022

		2019			
9.	WPT No. 2790/2022	June 2018	22,67,825/-	8.9.2020	9.2.2021
10.	WPT No. 2796/2022	Nov to Dec 2018	62,61,069/-	11.12.2020	7.10.2021
11.	WPT No. 2797/2022	July' 2018	28,88,065/-	8.9.2020	9.2.2021
12.	WPT No.404/2023	Aug to Oct'2019	1,38,85,741/-	1.9.2021	30.8.2022
13.	WPT No. 405/2023	June to July'2019	45,02,427/-	18.6.2021	20.7.2022
14.	WPT No. 1986/2023	Nov' 2017 to Mar'2018	2,04,30,905/-	16.12.2019	25.1.2021

3. The brief fact of the case as revealed in the writ application [W.P.(T) No.1719 of 2022] that the Petitioner requires coal for manufacturing iron and steel. This coal is procured *inter alia* by way of purchase from other vendors on which applicable Goods and Services Tax and Compensation Cess is charged under Section 8(2) read with the Schedule to the Goods and Services Tax (Compensation to States) Act, 2017 ("**Compensation Cess Act**"). The petitioner avails Input Tax Credit ("ITC") of the said compensation cess charged on supply of coal. Since the Petitioner undertakes export of goods under Bond/ Letter of Undertaking without payment of tax, it results in accumulation of balance of ITC of Compensation Cess.

During the period in dispute (January to February 2019) goods were cleared for export from the factory against tax invoices. Since the price of the goods could not be determined with certainty at that point of time, therefore, as a uniform practice, for such dispatches, the Petitioner reflected the "cost price" of the goods as the "taxable value" as well as the "invoice value". In its GSTR-1 for the said months, the Petitioner furnished details of 4932 tax invoices under Table 6A of a value of Rs. 603,81,13,133/- (2,101 and 2,831 invoices for the months of January and February 2019 respectively). This amount reflected the 'cost price'.

For the purpose of refund, the Petitioner claimed refund on 4927 invoices. Monthly return filed by the Petitioner in GSTR – 3B, also reflects the total zero-rated supplies in column (b) of Table 3.1 of the said return. The details of shipping bills are also required to furnish in Table 6A of GSTR-1. However, as details of shipping bills and corresponding commercial value were not available immediately due to various reasons, therefore GSTR-1, as per instruction No. 8, itself allows details of shipping bills to be updated by amending Table 9 of subsequent GSTR-1 return, the Petitioner updated details of 4932 invoices as per the commercial value in Table 9A of GSTR-1 in the month of September 2019 when it became aware of the final price of goods (reflected in shipping bill) at the time of actual export. Table 9A contains details of 14516 invoices which includes details of 4932 invoices having commercial value of Rs. 775,17,57,704/-.

The Petitioner claimed refund of only 4927 invoices having commercial value of Rs. 774,44,24,401/-. However, the impugned Circular was issued by Respondent No. 2 in exercise of powers under Section 168 of the CGST Act. Para 18 of the Impugned Circular provided that while processing refund claims, information in Table 9 GSTR-1 of subsequent tax periods should also be taken into account. Petitioner filed its application for refund of unutilized ITC of Compensation Cess in respect of zero-rated supplies made during January and February 2019, claiming refund of Rs. 4,95,64,373/-. Refund was claimed as per the formula prescribed in 89(4). The component "Turnover of zero-rated supply of goods" is defined as the '*value of zero-rated supply of goods …".* Therefore, the Petitioner reflected the actual value of exports (reflected I GSTR-1 of September 2019).

The case of the petitioner company is that an amount of Rs. 3,32,08,130/- was provisionally refunded to the Petitioner in terms of Section

54(6) of the CGST Act read with Rule 91(2) of the CGST Rules. Thereafter, a show cause notice was issued to the Petitioner in RFD-08. It was indicated that value of "Turnover of zero rated supply of goods" indicated in the refund application could not be ascertained with certainty. Petitioner replied to the show cause notice in RFD-09. Thereafter, Impugned Order in Original ("**OIO**") was passed in RFD-06 denying refund to the tune of Rs. 1,12,49,220/-. Reliance was placed on paragraph 47 of the Impugned Circular to arrive at a figure of Rs. 583,86,12,617/- as the "Turnover of zero-rated supply of goods". Para 33 of the Writ Petition contains a table which shows how the figure of Rs. 583,86,12,617/- has been arrived at. The OIO itself states that export invoice details were amended. Refund has also been denied on 149 invoices, details of which could not be found on ICEGATE website. This allegation was absent in the notice and neither were any details regarding the same were provided.

Subsequently, Petitioner filed an appeal under Section 107 of the CGST Act. Due to file size restrictions, all the annexures to the memo of appeal was sent vide email. This also included the Bank Realization Certificates ("**BRC**") which were proof of actual amounts received for the exports. Impugned Order in Appeal ("**OIA**") was passed dismissing the appeal filed by the Petitioner. At multiple places in the OIA, it has been stated that paragraph 47 of the Impugned Circular was in the form of directions / instruction.

The further case of the petitioner company is that there was no need to arrive at transaction value, therefore furnishing of BRC would not have made a difference. There is no discussion / finding regarding 149 invoices in respect of which there was no details on ICEGATE and which had been specifically addressed in paragraphs 59 to 63 of the memo of appeal.

Further, Explanation inserted in Rule 89(4) of the CGST Rules, 2017, vide notification no. 14/2022 – Central Tax, which purportedly is on the same lines as paragraph 47 of the Impugned Circular.

4. The details which is sufficient to dispose of all the respective writ applications has already been indicated herein above in the chart for convenience.

5. Mr. Tarun Gulati, Sr. Advocate assisted by Mr. Salona Mittal, learned counsels for the petitioner made following submissions;

(i) As per the scheme of the CGST Act, more particularly Section 15 thereof, the value of supply of goods is the transaction value i.e., the price actually payable for the said supply. This is the only price that can be taken into account while calculating the refund amount. Paragraph 47 of the Impugned Circular cannot arbitrarily impose a new condition to determine the value of zero rated exports to whittle down the benefit of refund granted in the Act / Rules.

(ii) It is further well settled that a Circular must be within the four corners of the parent Act. In the present case, neither the CGST Act nor the CGST Rules contemplated comparison of the values of the tax invoice and the shipping bill and then take the lower of the two values. The said stipulation has been introduced for the first time in the Impugned Circular without there being any underlying provision.

(iii) The above principles of law have also been applied in the context of circulars issued under Section 168 of the CGST Act and it has been held by various Hon’ble High Courts that a circular which is repugnant to the parent legislation cannot be applied to oust the legitimate claim of refund of ITC.

(iv) Further, the Respondent No. 2 does not have the jurisdiction, by way of issuing the Impugned Circular, to direct that the actual value of goods is to

be disregarded. There is absolutely no justification to use a different parameter, i.e., taking a figure other than the actual amount paid against exports, only for the purpose of calculating refund.

(v) The fiction introduced by the circular is thus against the scheme of the CGST which stipulates that actual price is to be accepted for it is trite law that subordinate legislation cannot create a deeming fiction.

(vi) Moreover, the findings of the Appellate Authority that he was bound by the Impugned Circular which contains certain directions and instructs to take lower of the two values is wholly misplaced since he was acting in a quasi-judicial capacity and thus his power was not controlled by directions issued by the Board. This is also borne out from a reading of Section 5(4) of the CGST Act.

(vii) Sl. No. 8 of the instructions appended to GSTR-1 as well as paragraph 18 of the Impugned Circular specifically provide that (i) value of export invoices can be amended, and (ii) the amended value should be taken into account while processing refunds. If as per paragraph 47, the value in the shipping bill is to be ignored (when its value is greater than the tax invoice), then it would render not only paragraph 18 of the Impugned Circular redundant, but also the instructions appended to GSTR-1.

(viii) Though submissions had been made in paragraphs 59 to 63 of the memo of appeal in respect of 149 invoices in respect of which there was allegedly no details uploaded on the ICEGATE Portal, the Order in Appeal does not contain any discussion / finding on the same. Moreover, the said finding was beyond the allegations contained in the show cause notice dated 15.1.2021 and was illegal on that ground alone.

(ix) Reliance on paragraph 14.1 of Circular No. 37/11/2018-GST dated 15.3.2018 demonstrates a complete non application of mind. The said

paragraph directs scrutiny of the invoices issued by the suppliers of the exporter to ensure that the ITC claimed by the exporter on the strength of its purchases is not fraudulent. The said paragraph does not direct scrutiny of the tax invoices issued by the exporter itself, i.e., the Petitioner in this case to determine the value of zero-rated supply turnover.

(x) The finding that BRCs have not been enclosed to the memo of appeal is also ex-facie incorrect, in view of the fact that all the annexures were sent vide email dated 22.4.2021 (Annexure – 11).

(xi) In the OIO, though the value of "Turnover of zero-rated supply of goods" has been calculated as Rs. 583,86,12,617/-; while calculating the value of "Adjusted Total Turnover", the value of "Turnover of zero-rated supply of goods" has been taken to be Rs 603,81,13,134/-, a higher amount, instead of Rs. 583,86,12,617/-. As result of taking the higher amount on the denominator side of the formula, the eligible refund of the Petitioner has been reduced. Thus, this action of the Respondent authorities in deliberately taking a higher figure in the denominator side, despite their own finding to the contrary, is clearly arbitrary and illegal.

6. Learned senior counsel further raised an additional ground to the extent that in the counter-affidavit the respondents have come with a statement that since the notification issued by CBEC has now been made a Rule in view of amendment in Rule 89(4) of CGST Rules, 2017, vide Notification No. 14 / 2022 – Central Tax dated 05.07.2022; he contended that the rule was not in existence at the time of passing of the Order in Appeal in respective cases and thus cannot be relied upon to justify the impugned Order in Appeal. He further submits that even in the said notification the retrospective effect of other rules has been indicated and by

bare perusal of those extracts it appears that except Rules 7, 9, 10 and 19; no Rule has been given retrospective effect.

Relying upon the aforesaid submission, learned senior counsel contended that even if this court does not interfere with the circular, notification which came into effect from 05.07.2022 will have no application in the above writ applications, as such the respective OIO and OIA deserves to be quashed and set aside and consequently the refund amount involved in respective writ applications may be refunded along with statutory interest.

7. Mr. Anil Kumar, learned ASGI assisted by Mr. P. A. S. Pati, learned counsel for the respondents submit that indisputably the Circular No. 125/44/2019-GST dated 18.11.2019 has been issued by the CBIC under section 168(1) of the CGST Act, 2017 to lay down the procedure for electronic submission and processing of refund applications. Article 265 of the Constitution of India provides that no tax shall be collected except by authority of law. There being no challenge either to the levy or collection of taxes, taxes paid into the coffers of the Union Government or the States become property of the Union/State. The refund of taxes is neither a fundamental right nor a constitutional right rather; it is policy of the Government of India to extend benefits for promoting the export. The conditions & limitations of refund is the policy of the State and it need not be challenged. There is no constitutional right to refund. Refund is always a matter of statutory prescription and can be regulated by the statute to conditions and limitations.

He further submits that Paragraph 18 of Circular No. 125 is related to scrutiny of refund application. Para 19 below para 18 clearly speaks about "Clarification on issues related to making zero rated supplies". Para 19 of the Circular No. 125 states, *"Detailed guidelines laid down in subsequent*

paragraphs of this Circular covering various types of refund claims may also be followed while scrutinizing refund claims for completeness and eligibility". Accordingly, as per para 19 which prescribes detailed guidelines on "scrutinizing refund claims for completeness and eligibility" the demand of issuance of writ/order/direction and quashing and setting aside the part of paragraph 47 of Circular No. 125 is without any legal basis.

8. Learned senior counsel further submits that the refund granting authority was in right earnest verifying the turnover of zero-rated supply by going through invoices issued by the Assessee under Rule 46 of the CGST Rules in such zero-rated supply. Even Central Board of Excise & Customs while clarifying various issues in relation to processing of claims for refund vide Circular No. 37/11/2018-GST dated 15-032018 detailed out necessity of verification of invoices produced by claimants while processing refund claim on ITC.

Clause 14.1 of this circular state, **"…..** *For processing of refund claims of input tax credit, verifying the invoice details is quintessential. In a completely electronic environment, the information of the recipients' invoices would be dependent upon the suppliers' information, thus putting an in-built check-and-balance in the system. However, as the refund claims are being filed by the recipient in a semi-electronic environment and is completely based on the information provided by them, it is necessary that invoices are scrutinized."*

The petitioner-assessee has revised invoice values in most of the invoices as per Range officer report which has been mentioned in the OIO, but the Range officer also marked certain abnormalities such as claimant has not claimed refund in respect of some invoices and some invoices remain unchanged. However, no rectification was submitted by the assessee-

company in respect of such abnormalities. As no fresh evidence produced by the petitioner to authenticate their claimed value. Thus, the OIO and OIA passed by the competent authority is proper and legitimate and in accordance with the Section 54(3) of the CGST ACT.

9. Learned ASGI further submits that in case where the enhanced value remained unclear and issue of discrepancy between values of tax invoice and shipping bill has emerged while granting refund in zero rated supply, a clear guideline has been provided by the CBIC vide clause-9 of Circular No. 37/11/2018-GST dated 15-03-2018, which states *"It has been brought to the notice of the Board that in certain cases, where the refund of unutilized input tax credit on account of export of goods is claimed and the value declared in the tax invoice is different from the export value declared in the corresponding shipping bill under the Customs Act, refund claims are not being processed. The matter has been examined and it is clarified that the zero-rated supply of goods is affected under the provisions of the GST laws. An exporter, at the time of supply of goods declares that the goods are for export and the same is done under an invoice issued under rule 46 of the CGST Rules. The value recorded in the GST invoice should normally be the transaction value as determined under Section 15 of the CGST Act read with the rules made thereunder. The same transaction value should normally be recorded in the corresponding shipping bill / bill of export. During the processing of the refund claim, the value of the goods declared in the GST invoice and the value in the corresponding shipping bill / bill of export should be examined and the lower of the two values should be sanctioned as refund."*

The same instruction has again been emphasized in Para 47 of the Circular No. 125/44/2019-GST 18.11.2019 where for granting refund, lower

between the two values has been stressed upon for refund consideration. The petitioner in their submission reiterated that during course of export they raised commercial invoice at port on the basis of revised upgraded value. These enhanced values then been declared in Table 9A of GSTR-1 in the month of September-2019 to revise and enforce amendment in export value and with such revision they intend to claim refund on the upgraded value. But in the aforesaid Circular certain directions have been given in case where difference exists in values between tax invoice generated under rule 46 of the CGST Rules and corresponding Shipping bill. Para 47 of Circular No. 125/44/2019-GST dated 18.11.2019 is very specific in such cases where it instructs to take lower value of the two. Thus, all the writ applications are very well covered under para-47 where instruction has been given for processing of refund distinctly for those cases where differences exist between tax invoice issued under rule 46 of the CGST, Rule and corresponding shipping bill values.

10. Learned ASGI further submits that the said clarification was carried out with the approval of GST Council, which is a constitutional body established under Article 279A of the Constitution of India and entrusted with the task to make recommendations to the Union of India and the states on all matters related to GST. Further, refund is not an unfettered right and Government is well within its power to impose certain restrictions, conditions and safeguards for grant of refund. This view has been upheld by the Hon'ble Supreme Court in the case of ***Mafatlal Industries Limited. v. Union of India*** reported in (1997) 5 SCC 536 wherein Hon’ble Apex court held that the right of refund is not automatic. Further, Hon'ble Supreme Court in the case of ***Union of India Vs. VKC Footsteps India Pvt. Ltd.***

reported in (2022) 2 SCC 603, has held that the refund is not a constitutional right but a matter of a statutory prescription.

Learned counsel for the revenue further relied upon the following decisions;

(i) (2022) 4 SCC 328 para 45

(ii) (2022) SCC 603 Para 50

(iii) Writ application No. 13185 of 2020 passed by High Court of Karnataka at Bengaluru dated 16.02.2023.

11. Having heard learned counsel for the parties and after going through the averments made in the respective affidavits and also documents available on record especially the Circular No. 26/26/2017-GST and the notification w.r.t. amendment in Rule 89(4) of CGST Rules, 2017, vide Notification No. 14 / 2022 – Central Tax dated 05.07.2022, we are of the opinion that since there is now an amendment in the Rule 89 (4) itself; as such we refrain ourself from deliberating upon prayer no. 1 and 2 i.e. for setting aside part of paragraph 47 of Circular No. 125/44/2019-GST dated 18.11.2019 and also the alternative contention for declaring the stipulation contained in paragraph 47 of the aforesaid circular as not applicable in these cases.

We are confining our interpretation on the question of retrospective effect of the amendment that came in the year 2022, so far as its applicability in the aforesaid writ applications for the sole reason that the vires of the said rule is not under challenge.

12. As far as the explanation inserted by way of amendment in Rule 89(4) of the CGST Rules, 2017, vide Notification No. 14 / 2022 – Central Tax dated 5.7.2022 is concerned; these rules were not in existence at the time of passing of the Order in Appeal dated 11.10.2021. Rule 1(2) of 2022 Amendment Rules, specifically provides that **"*save as otherwise provided in these rules, they shall come into force on the date of their publication in***

the Official Gazette". Except for Rules 7, 9, 10, and 19 for which dates with retrospective operation have been provided, no other rules have been given any retrospective effect.

In order to decide the question as to whether the amendment in Rule 89(4) of the CGST Rules, 2017 which has introduced the explanation that came in the year 2022 has a retrospective effect; we will have to see the other parameters also. The 2022 Amendment Rules inserts a new stipulation for comparison between two values. Such an exercise was not contemplated prior to the amendment as what was taken into account was the actual transaction value. Therefore, by way of the amendment, a substantive change has been brought about in the law and therefore the amendment ought to operate prospectively. Further, mere use of the term "explanation" will not be indicative of the fact that the amendment is clarificatory / declaratory. While Paragraph 47 contemplates comparison of the value of export in the tax invoice and in the shipping bill, i.e., the export document (which can either be FOB or CIF value), the explanation requires comparison of the value in tax invoice with only the FOB value. Thus, the explanation cannot be said to be on similar lines as Paragraph 47. A policy can be changed only by way of an amendment under the parent Act and not by a circular and the policy change will be effective from the date of the amendment.

13. At this stage it is relevant to refer the judgment cited by learned ASGI, rendered in the case of ***M/s Tonbo Karnatak High Court***. We observed that in the said case the vires of Rule 89(4) (C) of the CGST rule was under challenge; as such the same is not applicable in the instant case. So far as judgment passed in the case of ***Bharti Airtel Limited Supra and V CAsh India*** (Supra), the same will not be applicable, inasmuch as, we are not

deliberating with the merit of the impugned circular and/or the amended notification.

Learned counsel also referred the judgment passed in the case of ***Sri. Sree Sankaracharya University of Sanskrit and Others Versus Dr. Manu and Another***, reported in ***2023 SCC Online SC 640***. For brevity paragraph 45 of the said judgment is quoted hereinbelow:-

> *"45. It is trite that any legislation or instrument having the force of law, which is clarificatory or explanatory in nature and purport and which seeks to clear doubts or correct an obvious omission in a statute, would generally be retrospective in operation, vide Ramesh Prasad Verma. Therefore, in order to determine whether the Government Order dated 29th March, 2001 may be made applicable retrospectively, it is necessary to consider whether the said order was a clarification or a substantive amendment."*

14. At the cost of repetition, we may refer to the Notification No. 14/ 2022 – Central Tax dated 05.07.2022 itself. Rule 1 (2) of 2022 Amendment Rule specifically provides that save as otherwise provided in these Rules they shall come into force on their publication in the officials' gazette. From the said notification it is also evident that except for Rule 7, 9, 10 and 19 for which dates with retrospective operation have been provided, no other rules have been given any retrospective effect. Actually, the legislature expressly indicated the date of application of respective rules and for Rule 89 (4), no retrospective date has been indicated in the notification itself; thus, from bare perusal of the notification itself the amendment made to Rule 89 (4) by Rule 8 of Amendment Rules will have a prospective effect.

15. As indicated hereinabove, the 2022 Amendment Rules inserts a new stipulation for comparison between the two values. Such an exercise was not contemplated prior to the amendment as what was taken into account was the actual transaction value. Therefore, by way of the amendment a substantive

change has been brought about in law and therefore, we are of the view that amendment will operate prospectively. In this regard. Reference may be made in the case ***CIT Versus Vatika Township (P) Ltd***., reported in ***2015 (1) SCC 1*** wherein at para 28 and 44 the law has been laid down as under:-

> ***"28.*** *Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Phillips v. Eyre [(1870) LR 6 QB 1], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.*
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> ***44.*** *The Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of undisclosed income was made prospective. Such a stipulation is contained in the second proviso to sub-section (3) of Section 2 of the Finance Act, 2003. This proviso reads as under:*
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> *"Provided further that the amount of income tax computed in accordance with the provisions of Section 113 shall be increased by a surcharge for purposes of the Union as provided in Paras A, B, C, D or E, as the case may be, of Part III of the First Schedule of the Finance Act of the year in which the search is initiated under Section 132 or requisition is made under Section 132-A of the Income Tax Act:"*
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> *Addition of this proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in*

*nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove "hardships" only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from 1-6-2002.***"**

16. As a matter of fact, way back in the year 2005 itself the Hon'ble Apex Court in the case of ***Sedco Forex International Drill. Inc. Versus CIT***, reported in ***(2005) 12 SCC 717*** has laid down the law and held at para 17 and 19 as under:-

"17. *As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139 : 1980 SCC (Tax) 67] .) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of U.P., (1981) 2 SCC 585, 598 : AIR 1981 SC 1274, 1282 para 24] . If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482, 506] . But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".*

19. *When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect*

from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively."

17. The law is now no more *res integra* that mere use of the term explanation will not be indicative of the fact that the amendment is clarificatory/declaratory. In this regard, reference may be made in the case of ***Union of India v. Martin Lottery Agencies Ltd.,*** reported in ***(2009) 12 SCC 209*** wherein the Hon'ble Apex Court has held at para 34, 37, 43, 50, 51 as under:-

"34. *No doubt, the Explanation begins with the words "for removal of doubts". Does it mean that it is conclusive in nature? In law, it is not. It is not a case where by reason of a judgment of a court, the law was found to be vague or ambiguous. There is also nothing to show that it was found to be vague or ambiguous by the executive. In fact, the Board circular shows that invocation of sub-clause (ii) had never been in contemplation of the taxing authorities.*

37. *As it is not possible for us to arrive at the said conclusion, we have no other option but to hold that by inserting the Explanation appended to clause (19) of Section 65 of the Act, a new concept of imposition of tax has been brought in. Parliament may be entitled to do so. It would be entitled to raise a legal fiction, but when a new type of tax is introduced or a new concept of tax is introduced so as to widen the net, it, in our opinion, should not be construed to have a retrospective operation on the premise that it is clarificatory or declaratory in nature.*

43. *The question as to whether a subordinate legislation or a parliamentary statute would be held to be clarificatory or declaratory or not would indisputably depend upon the nature thereof as also the object it seeks to achieve. What we intend to say is that if two views are not possible, resort to clarification and/or declaration may not be permissible.*

50. *It is, therefore, evident that by reason of an explanation, a substantive law may also be introduced. If a substantive law is introduced, it will have no retrospective effect. The notice issued to the assessee by the appellant has, thus, rightly been held to be liable to be set aside.*

> ***51.*** *Subject to the constitutionality of the Act, in view of the Explanation appended to this [sic Section 65(19)(ii) of the Finance Act, 1994], we are of the opinion that the service tax, if any, would be payable only with effect from May 2008 and not with retrospective effect. In a case of this nature, the Court must be satisfied that Parliament did not intend to introduce a substantive change in the law.**"***

18. It goes without saying that a policy can be changed only by way of an amendment under the parent act and not by a circular and the law is well settled that no taxes shall be levied or collected by way of executive fiat. In this regard reference may be made to a celebrated Constitutional Bench judgment of the Hon'ble Apex Court rendered in the case of ***Kunnathat Thatehunni Moopil Nair etc. -versus State of Kerela and another*** reported in ***1960 SCC Online SC 7*** wherein the Hon'ble Supreme Court has held as under. Relevant portion of para-7 is extracted herein below: -

> "7. The most important question that arises for consideration in these cases, in view of the stand taken by the State of Kerala, is whether Article 265 of the Constitution is a complete answer to the attack against the constitutionality of the Act. It is, therefore, necessary to consider the scope and effect of that Article**. Article 265 imposes a limitation on the taxing power of the State insofar as it provides that the State shall not levy or collect a tax, except by authority of law, that is to say, a tax cannot be levied or collected by a mere executive fiat.** It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax proposed to be levied must be within the legislative competence of the legislature……..."
>
> Emphasis supplied

19. Having regard to the aforesaid discussions, we hold that the amendment in Rule 89 (4) of CGST Rules, 2017 which came into effect vide Notification No. 14/2022-Central Tax dated 05.07.2022 is not clarificatory in nature and thus will have a prospective effect. In all these writ applications since the period involved is prior to the amendment; as such, we hold that the respective impugned orders deserve to be quashed and set aside.

20. Consequently, the O.I.O 02.02.2021 and O.I.A. No. 11.10.2021 in W.P.(T) No. 1719 of 2022, O.I.O 17.03.2021 and O.I.A. No. 25.10.2021 in W.P.(T) No. 2649 of 2022, O.I.O 28.10.2020 and O.I.A. No. 11.06.2021 in W.P.(T) No. 2650 of 2022, O.I.O 06.05.2020 and O.I.A. No. 25.01.2021 in W.P.(T) No. 2651 of 2022, O.I.O 04.06.2020 and O.I.A. No. 25.01.2021 in W.P.(T) No. 2655 of 2022, O.I.O 23.12.2021 and O.I.A. No. 30.08.2022 in W.P.(T) No. 403 of 2023, O.I.O 08.09.2020 and O.I.A. No. 09.02.2021 in W.P.(T) No. 2704 of 2022, O.I.O 20.04.2021 and O.I.A. No. 11.04.2022 in W.P.(T) No. 2710 of 2022, O.I.O 08.09.2020 and O.I.A. No. 09.02.2021 in W.P.(T) No. 2790 of 2022, O.I.O 11.12.2020 and O.I.A. No. 07.10.2021 in W.P.(T) No. 2796 of 2022, O.I.O 08.09.2020 and O.I.A. No. 09.02.2021 in W.P.(T) No. 2797 of 2022, O.I.O 01.09.2021 and O.I.A. No. 30.08.2022 in W.P.(T) No. 404 of 2023, O.I.O 18.06.2021 and O.I.A. No. 20.07.2022 in W.P.(T) No. 405 of 2023 and O.I.O 16.12.2019 and O.I.A. No. 25.01.2021 in W.P.(T) No. 1986 of 2023 involved in the above writ applications are quashed and set aside.

21. As a result, all these writ applications are allowed. Pending, I.As., if any, also stands disposed of.

(Rongon Mukhopadhyay, J.)

(Deepak Roshan, J.)

Jharkhand High Court
Dated/21 /08 /2023
Amardeep/AFR