

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

MISC. CIVIL APPLICATION (FOR REVIEW) NO. 1 of 2019
In R/SPECIAL CIVIL APPLICATION NO. 5758 of 2019

With

MISC. CIVIL APPLICATION (FOR RECALL) NO. 1 of 2019
In R/SPECIAL CIVIL APPLICATION NO. 5759 of 2019

With

MISC. CIVIL APPLICATION (FOR RECALL) NO. 1 of 2019
In R/SPECIAL CIVIL APPLICATION NO. 5760 of 2019

With

MISC. CIVIL APPLICATION (FOR RECALL) NO. 1 of 2019
In R/SPECIAL CIVIL APPLICATION NO. 5762 of 2019

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THE NODAL OFFICER

Versus

The Goods and Service Tax Council (GST Council) through office
of GST council Secretariate

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Appearance:

MR CHINTAN DAVE, ASST. GOVERNMENT PLEADER for the
PETITIONER(s) No.

MR VINAY SHRAFF FOR MR.VISHAL J DAVE for the
RESPONDENT(s) No.

NOTICE NOT RECD BACK for the RESPONDENT(s) No.

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CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA
and
HONOURABLE MR.JUSTICE A.C. RAO

Date : 14/02/2020

IA ORDER

(PER : HONOURABLE MR.JUSTICE A.C. RAO)

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1. The present Misc. Civil Applications have been filed by the applicants – original respondents praying for review of the judgement and order dated 06.09.2019 passed by this Court in the main writ applications being the Special Civil Applications Nos. 5758, 5759, 5760 and 5762 of 2019

allowing all the four writ applications on the ground that the same is *per incuriam*.

2. Since the issues raised in all the captioned Miscellaneous Applications are same, those were heard analogously and are being decided by this common judgement and order.

3. By way of present applications, the applicants – original respondents have prayed for review of the judgement and order dated 06.09.2019 passed by this Court on the ground that due to inadvertence, they could not point out the judgement of this Court rendered in the case of ***Willowood Chemicals Pvt. Ltd. vs. Union of India in the Special Civil Application No.4252 of 2018 reported in 2018 (19) GSTL 228 (Guj)*** and in the case of ***Jay Chemicals Industries Ltd. vs. Union of India in the Special Civil Application No.10828 of 2018 reported in 2018 (19) GSTL 440 (Guj)***.

3.1 It is submitted by Mr. Chintan Dave, the learned Assistant Government Pleader, appearing on behalf of the applicants that in both the above referred cases, this Court has noted the statutory provisions, the scale of operations and

the possible repercussions; if such time limit contained in Rule 117 of the CSGT Rules is annihilated and a registered person is allowed to make declaration of the left over residuary duty of credit at the time of migration to the new tax structure, the time limit provisions cannot be seen as merely technical in nature. It is further held by this Court that this plenary prescription of time limit within which necessary declaration must be made, is neither without authority nor unreasonable.

4. Per contra, Mr. Vinay Shraff, the learned counsel appearing on behalf of Mr. Vishal J. Dave, the learned counsel for the respondents herein, submitted that it is a settled principal of law that a judgement or order passed *per incuriam* does not create a binding precedent.

4.1 In this regard, Mr. Shraff, the learned counsel for the respondents herein, has placed reliance on the judgement of the Apex court in the case of ***Babu Parasu Kaikadi (Dead) by Lrs. vs. Babu (Dead) through Lrs. reported in (2004) 1 SCC 681*** and contended that the Apex Court has categorically stated that if the co-ordinate Bench has not noticed the earlier binding precedent of the co-ordinate Bench and having not considered the mandatory provisions of the

Act, the decision should be rendered *per incuriam* and it, therefore, does not constitute a binding precedent. The same view is also taken by the Kolkata High Court in the case of ***Hindustan Cables Ltd. and Ors. vs. Tapan Kumar Sarkar and Ors. reported in (2016) 4 CALLT 220 (HC)*** and several other High Courts namely, (1) the Bombay High Court in the case of ***Kuresh Taherbhai Rajkotwala vs. Union of India reported in 2007 (209) E.L.T. 347 (Bom.)***, (2) the Kerala High Court in the case of ***Collector of Customs, Cochin vs. State of Kerala reported in 1993 (66) E.L.T. 351 (Ker)*** and (3) the Orissa High Court in the case of ***Pravasini Behera vs. Sankar Das and Seven Ors. reported in 105 (2008) CLT 851***.

4.2 Relying on the decisions of the above referred several High Courts, Mr. Shraff, the learned counsel for the respondents herein, contended that in the cases of Willowood Chemicals Pvt. Ltd. (supra) and Jay Chemicals Industries Ltd. (supra), the co-ordinate Bench has not considered the binding precedent in the case of ***Filco Trade Centre Pvt. Ltd. vs. Union of India reported in 2018 (17) G.S.T.L. 3 (Guj.)***, wherein the reliance was placed on the judgement of the Apex Court in the case of ***Shayra Bano vs. Union of India***

reported in 2017 (9) SCC 1 and other pronouncements of the Apex Court. In the case of Filco Trade Centre Pvt. Ltd. (supra) the co-ordinate Bench has concluded as under :

"To sum up we are of the opinion that the benefit of credit of eligible duties on the purchases made by the first stage dealer as per the then existing Cenvat credit rules was a vested right. By virtue of clause (iv) of sub-section (3) of Section 140 such right has been taken away with retrospective effect in relation to goods which were purchased prior to one year from the appointed day. This retrospectivity given to the provision has no rational or reasonable basis for imposing of the condition. The reasons cited in limiting the exercise of rights have no co-relation with the advent of GST regime. Same factors, parameters and considerations of "in order to co-relate the goods or administrative convenience" prevailed even under the Central Excise Act and the Cenvat Credit Rules when no such restriction was imposed on enjoyment of Cenvat credit in relation to goods purchased prior to one year."

4.3 It is vehemently submitted by Mr. Shraff, the learned counsel for the respondents herein that the principle underlying in Filco Trade Centre Pvt. Ltd. (supra) would be a binding precedent in a case which comes up for decision subsequently. A decision takes its colour from the question involved in the case in which it is rendered. To substantiate his submission, the learned counsel has placed reliance on the judgement of the Supreme Court in the case of ***The Divisional Controller, KSRTC vs. Mahadev Shetty and Ors. reported in (2003) 7 SCC 197.***

4.4 It is vehemently submitted by the learned counsel

for the respondents that the principal question involved in the case of Filco Trade Centre Pvt. Ltd. (supra) was whether transitional credit is a vested right or substantive right. It is further submitted that in the cases of Willowood Chemicals Pvt. Ltd. (supra) and Jay Chemicals Industries Ltd. (supra), a diametrically opposite view has been taken by the Court than in the case of Filco Trade Centre Pvt. Ltd. (supra). It is submitted that the view taken by the co-ordinate Bench is correct and the said judgment is followed by the High Court of Punjab and Haryana in the case of ***Adfert Technologies ((P.) Ltd. vs. Union of India reported in (2019) 111 taxmann.com 27***, by the Karnataka High Court in the case of ***Asiad paints Ltd. vs. Union of India reported in (2020) 113 taxmann.com 82***, by the Delhi High Court in the case of ***Aadinath Industries vs. Union of India reported in (2019) 110 taxmann.com 420***. It is submitted by the learned counsel that the same view is taken by the Delhi High Court in the cases of ***Triveni Needles (P.) Ltd. vs. Union of India reported in (2020) 113 taxmann.com 223*** and ***Lease Plan India (P.) Ltd. vs. Government of National Capital Territory of Delhi reported in (2019) 110 taxmann.com 423***.

5. Having heard the learned counsel appearing for the parties and having perused the materials on record, we find substance in the submissions made by Mr. Shraff, the learned counsel for the respondents herein. The applicants have relied on the case of Willowood Chemicals Pvt. Ltd. (supra). In that case, the *vires* of Section 164 of the CGST Act, 2017 was challenged and it was prayed that the respondents be directed to allow the petitioners to carry forward CENVAT credit in the electronic credit ledger, available as on 30th June, 2017 in terms of Section 140(3) of the Central Goods and Services Act, 2017, wherein the co-ordinate Bench had observed that the time limit provision contained in Rule 117 of the CGST Rules, 2017 is annihilated and cannot be seen as merely technical in nature and the petition was dismissed. While in the case of Jay Chemicals Industries Ltd. (supra), the co-ordinate Bench had relied on the judgment of Willowood Chemicals Pvt. Ltd. (supra) and stated that the Bench do not find any scope for directing the respondents to allow the petitioners to correct the TRAN-1 declaration already made. It was also observed that limited extension has been granted to cover cases where genuine hardships were felt in uploading said declaration due to technical glitches. In the said case, the writ applicant had filed the writ application for declaring Rule

117 of the CGST Rules, 2017 and form GST TRAN-1 as ultra vires to Section 140(5) and Section 164 of the CGST Act, 2017 and offend Article 14, 19(1)(g), 265 and 300A of the Constitution of India.

5.1 While in the case on hand, this Court has not declared the said Rule 117 of the CGST Rules, 2017 neither this Court has ordered the respondents to carry forward CENVAT credit beyond the time limit, but in the case on hand, the respondents herein had tried to upload form GST TRAN-1, but it could not be filed on account of technical glitches in terms of poor network connectivity and other technical difficulties at common portal. Under the circumstances, this Court has gone into the question that in such circumstances what would be the remedy if a person who tries to follow Rule 117 of the CGST Rules, 2017 but, without there being any fault on his side he could not upload the form due to technical glitches. Therefore, this Court has followed the judgement in the case of Filco Trade Centre Pvt. Ltd. (supra), wherein, after relying on number of judgements of the Apex Court, the co-ordinate Bench of this Court had followed the consistent findings of the Apex Court and held that the right accrued to the assessee on the date when the paid tax on the raw materials or the inputs and that right would continue by way

of CENVAT credit. The CENVAT credit is therefore indefeasible. Following the said principle, this Court had directed the applicants herein – original respondents to permit the respondents herein – original petitioners to allow filing declaration form in GST TRAN-1 and GST TRAN-2, so as to enable them to claim transitional credit of the eligible duties in respect of the inputs held in stock on the appointed day in terms of Section 140(3) of the GST Act. The co-ordinate Bench has also observed in paragraph 32 as under :

“32. For all these reasons we find that clause (iv) of sub-section (3) of Section 140 is unconstitutional. We therefore strike down the same. Petitions are allowed and disposed of.”

Thus, when the co-ordinate Bench had already declared clause (iv) of sub-section (3) of Section 140 as unconstitutional, we do not have any hesitation to declare Rule 117 of the CGST Rules, 2017 for the purpose of claiming transitional credit as procedural in nature and should not be construed as mandatory provision. In the two judgments of the Coordinate Bench, which are relied on by the applicant, the above ratio of the Apex Court is not followed and, therefore, we are of the view that the judgment in case of ***Filco Trade Center Pvt Ltd. vs. Union of India*** reported in **2018 (17) G.S.T.L. 3 (Guj.)** would be applicable to the facts

of the present case. In our order, we have already discussed the judgment of the ***Eicher Motors Ltd. vs. Union of India*** reported in **1999 (106) ELT 3 (SC)** and in the judgment rendered in the case of ***Collector of Central Excise, Pune vs. Dai Ichi Karkaria Ltd.*** reported in **[1999 (112) ELT 353 SC]**, which are also relied on by the Coordinate Bench in the case of ***Filco Trade Center Pvt Ltd. (supra)***.

5.2 For the foregoing reasons, the present applications deserve to be dismissed and are hereby dismissed. Notice is discharged in all the applications.

5.3 The applicants have not taken care to look into the previous judgement of the co-ordinate Bench of this Court in the case of *Filco Trade Centre Pvt. Ltd. (supra)* and have hurriedly filed these Misc. Civil Applications alleging the order of this Court *per incuriam* is required to be deprecated.

(J. B. PARDIWALA, J)

(A. C. RAO, J)

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