

Court No. - 1**Case :-** P.I.L. CIVIL No. - 31650 of 2019**Petitioner :-** Ashish Katiyar**Respondent :-** U.O.I.Thru.Revenue Secy. Ministry Of Finance New Delhi &Ors**Counsel for Petitioner :-** Ritesh Verma**Counsel for Respondent :-** A.S.G.**Hon'ble Pankaj Kumar Jaiswal,J.****Hon'ble Alok Mathur,J.**

- 1) Vakalatnamas filed by Sri Shubham Tripathi, Advocate on behalf of respondent Nos.4 and 5 are taken on record.
- 2) Heard Sri Ritesh Verma, learned counsel for the petitioner, Sri S. B. Pandey, learned Senior Counsel assisted by Sri Varun Pandey, learned counsel for respondent Nos.1 to 3 and Sri Shubham Tripathi, learned Counsel for respondent Nos.4 and 5.
- 3) The petitioner, who is an Advocate by profession, has filed this petition in the nature of Public Interest Litigation and prays for issuance of directions to the respondent No.2 to conduct an independent, free and fair enquiry against the concerned officers in respect of all refund claims of excess tax (compensation cess) paid prior to the Notification dated 30.9.2019 (Annexure - 1) and accumulated due to inverted tax structure in relation to "Tobacco and manufactured tobacco substitutes" including the Officer who passed the impugned orders dated 4.10.2019 (Annexure 2) and to prevent grant of any further refund claims. He is also seeking direction to the respondent No.3 to file a statutory appeal against the impugned orders dated 4.10.2019.
- 4) Section - 54 of the Central Goods and Services Tax Act, 2017 [hereinafter referred to as '**CGST Act**'] which came into force w.e.f. 1.7.2017 provides that refund of excess tax, interest or

any other amount paid can be claimed before expiry of two years from the relevant date. In CGST Act, the purchaser gets credit of the tax paid by it on its inputs. On removal of the goods as output, it can utilize the credit taken. If the tax on the output is at a lower rate, the credit gets accumulated. This accumulated input tax credit can be claimed as refund, provided the goods are not notified under Section 54 (3) (ii) of CGST Act read with Section 9 (2) Goods and Services Tax (Compensation to States) Act, 2017.

- 5) On 20.9.2019, GST Council in the 37th meeting at Goa *inter alia* recommended restriction on refund of compensation cess on "Tobacco and manufactured tobacco substitutes" (in case of inverted duty structure).
- 6) The Central Government in exercise of powers conferred by Clause (ii) of the proviso to sub-section (3) of Section 54 of the CGST Act read with sub-section (2) of Section 9 of the Goods and Services Tax (Compensation to States) Act, 2017 published Notification No.3/2019 - Compensation Cess (Rate) dated 30.9.2019, thereby restricting the refund of unutilized input tax credit of compensation cess, where the credit was accumulated on account of rate of compensation cess on inputs being higher than the rate of compensation cess on the output supplies of tobacco and manufactured tobacco substitutes.
- 7) According to the petitioner, notwithstanding the date of excess tax payment and credit taken in respect of these goods, even if the payment and credit taken is prior to the date of issuance of the said Notification, no refund shall be granted in respect of unutilized input tax credit. The purpose behind the Notification was to prevent refund of tax paid to anybody involved in a business activity which is premised on the usage of tobacco, which are known to be a public health hazard. Since huge amount of public money is involved, the application of the Notification should be retrospective. The Notification, though

published on 30.9.2019, as per the petitioner, the same shall be construed as applicable retrospectively, not only for the refund of accumulated credit of excess tax on inputs in the month of September, but even prior thereto.

- 8) By both the impugned orders dated 4.10.2019, by which respondent No.3 sanctioned refund of unutilized input tax credit of compensation cess, admittedly paid prior to the date of Notification. According to the petitioner, respondent No.3 acted in an arbitrary manner while passing the impugned orders. To prevent the officers of respondent Nos.1 to 3 from acting in any manner, contrary to the said Notification by presuming the same to be applicable prospectively, this petition has been filed in public interest.
- 9) It is well settled that personal injury or loss of the Advocate was not an essential requirement and only a person acting *bona fide* and having sufficient interest in the proceeding of PIL will alone have a locus standi and can approach the Court, but not a person for personal gain or private profit or political motive or any oblique consideration. The Apex Court has time and again said that the public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest, an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens.
- 10) Learned Counsel for respondents, who are appearing in advance notice, submits that the instant P.I.L. petition is clear misuse of abuse of process of law and the same shall be liable to be dismissed with exemplary costs.
- 11) In the case of *CIT v. Vatika Township Private Ltd. [(2015) 1 SCC 1]*, the Hon'ble Supreme Court has clarified the position

regarding general principles against retrospectivity as principle of 'fairness' while holding that legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective.

12) The Gujarat High Court in its recent judgment dated 17.7.2019 in R/Special Civil Application No.20626 of 2018, ***Shabnam Petrofils Pvt. Ltd. v. Union of India***, which is also concerning notifications issued under Section 54 (3) (ii) of the CGST Act has taken similar view.

13) The subject Notification No.3/2019 dated 30.9.2019 reads as under:-

"In exercise of the powers conferred by clause (ii) of the proviso to sub-section (3) of section 54 of the Central Goods and Services Tax Act, 2017 (12 of 2017) read with sub-section (2) of Section 9 of the Goods and Services Tax (Compensation to States) Act, 2017, the Central Government, on the recommendations of the Council, hereby notifies the goods, the description of which is specified in column (3) of the Table below and falling under the tariff item, heading, sub-heading or Chapter, as the case may be, as specified in the corresponding entry in column (2) of the said Table, in respect of which no refund of unutilized input tax credit of compensation cess shall be allowed, where the credit has accumulated on account of rate of compensation cess on inputs being higher than the rate of compensation cess on the output supplies of such goods (other than nil rated or fully exempt supplies).

TABLE

S. No.	Tariff item, heading, subheading or Chapter	Description of Goods
(1)	(2)	(3)
1.	24	Tobacco and manufactured tobacco substitutes

- Explanation --
- (1) In this Table, "tariff item", "sub-heading", "heading" and "Chapter" shall mean respectively a tariff item, sub-heading, heading or chapter, as specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).
- (2) The rules for the interpretation of the First Schedule to the said Customs Tariff Act, 1975, including the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of this notification."
- 14) The goods specified have thus been notified with the publication of the said Notification in the official gazette on 30.9.2019. If any credit of Input Tax paid on the said specified inputs supplies is taken after this Notification, i.e. after 30.9.2019, no refund of such input tax credit of compensation cess shall be allowed, even if the credit has accumulated on account of rate of compensation cess on such input supplies being higher than the rate of compensation cess on the output supplies. Plain reading of the Notification thus shows a new disability attached to the eligibility for refund, but without any express intention to have retrospective application.
- 15) The Constitution Bench of the Apex Court in *Vatika Township Pvt. Ltd. (supra)* has made it absolutely clear that there is a presumption against retrospectivity as a principle of fairness. Since the notification dated 30.9.2019 modified accrued rights and attaches a new disability, the same is necessarily prospective. Thus, if any excess tax is paid after issuance of this Notification and credit accumulated due to inverted tax structure, refund of such tax would not be available. However,

when the excess tax is paid and credit taken before issuance of the notification dated 30.9.2019, the Notification cannot be applied retrospectively to deny the refund of such accumulated excess tax paid to the Notification.

- 16) The judgment of the Gujarat High Court in ***Shabnam Petrofils Pvt. Ltd. (supra)*** also negates the contentions of the petitioner. While holding that when credit is taken it is indefeasible with its benefit available to the manufacturer without any limitation in time and that a right is accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility thereto gets worked out or until those goods existed, the Gujarat High Court relied upon ***Eicher Motors Ltd. v. Union of India [(1999) 106 ELT 3 (SC)]*** and ***Collector of Central Excise v. Dai Ichi Karkaria Ltd [(1999) 112 ELT 353 (SC)]*** and observed as follows:-

"5.03 In the case of ***Dal Ichi Karkaria Ltd. (supra)***, the Apex Court in the context of rule 57A to 57J of the Central Excise Rules, 1944 has held that a manufacturer obtains credit for central excise duty on raw material to be used by him in the production of an excisable product immediately it make the requisite declaration and obtains an acknowledgement thereof. Therefore, it is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. The Court held that the credit is indefeasible.

"5.04.In the case of ***Eicher Motors Ltd. (supra)***, the Apex Court has observed and held as under:-

We may look at the matter from another angle. If on the inputs, the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right

would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which 15 impugned herein and therefore we may have no hesitation to hold that the Rule cannot be applied to the goods manufactured prior to 16/3/1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods."

"6.00 In view of the above, both these petitions succeed. The impugned Notification dated 26.07.2018 bearing No.20/2018 and Circular dated 24.08.2018 bearing Circular No.56/30/2018-GST to be extent it provides that the input tax credit lying unutilized in balance, after payment of tax for and upto the month of July, 2018, on the inward supplies received upto the 31st day of July, 2018, shall lapse, are hereby quashed and set aside and are hereby declared as ultra vires and beyond the scope of section 54 (3) (ii) CGST Act, as section 54 (3)(ii) of the CGST Act does not empower to issue such notifications and consequently, it is held that the petitioners and members of the petitioners are entitled for the credit and it be granted to them."

"(x) The members of the writ applicants have a vested right to unutilized ITC, accumulated on account of rate of tax on inputs being higher than the rate of tax on the output supplies.

(xi) It is a well settled principle that the delegated legislation has to be in conformity with the provisions of the parent statute. By prescribing for lapsing of ITC, the Notification No.05/2017-C.T. (Rate) dated 28.06.2017, as amended by Notification No. 20/2018-C.T. (Rate) dated 26.07.2018, has exceeded the power delegated under Section 54(3)(ii) of the CGST Act.

(xii) In view of the above, proviso (ii) of the opening paragraph of the Notification

No.05/2017-C.T. (Rate) dated 28.06.2017, inserted vide Notification No.20/2018-C.T. (Rate) dated 26.07.2018, is ex-facie invalid and liable to be strike down as being without any authority of law."

- 17) In the case of ***Siddharth Enterprises v. Nodal Officer [2019 (29) G.S.T.L. 664 (Guj.)]*** a Division Bench of Gujarat High Court has held that the denial of carry forward of tax paid on stock on the appointed day may lead to cascading effect of tax because the GST will again have to be paid on the Central Excise duty already suffered on the stock. It is an established principle of law that it is necessary to look into the mischief against which the statute is directed, other statutes in *pari materia* and the state of the law at the time. Section 16 of the CGST Act allows the entitlement to take input tax credit in respect of the post-GST purchase of goods or services within return to be filed under Section 39 for the month of September following the end of financial year to such purchase or furnishing of the relevant annual return, whichever is earlier. Whereas, Rule 117 allows time-limit only up to 27th December 2017 to claim transitional credit on pre-GST purchases. Therefore, it is arbitrary and unreasonable to discriminate in terms of the time-limit to allow the availment of the input tax credit with respect to the purchase of goods and services made in pre-GST regime purchases. Therefore, it is arbitrary and unreasonable to discriminate in terms of the time-limit to allow the availment of the input tax credit with respect to the purchase of goods and services made in pre-GST regime and post-GST regime. This discrimination does not have any rationale and, therefore, it is violative of Article 14 of the Constitution. It is legitimate for a going concern to expect that it will be allowed to carry forward and utilise the CENVAT credit after satisfying all the conditions as mentioned in the Central Excise Law and, therefore, disallowing such vested right is offensive against Article 14 of the Constitution as it goes against the essence of

doctrine of legitimate expectation. By not allowing the right to carry forward the CENVAT credit for not being able to file the form GST Tran-1 within the due date may severely dent the writ-applicants working capital and may diminish their ability to continue with the business. Such action violates the mandate of Article 19(1)(g) of the Constitution of India.

18) For the above-mentioned reasons, we are of the view that in view of the doctrine of legitimate expectation, and the principle against retrospectivity, the Notification dated 30.9.2019, shall necessarily apply prospectivity in respect of the goods notified on 30.09.2019 to restrict only those refund claims which are in respect of accumulated credit of excess tax paid on such notified input supplies after 30.9.2019. Both the impugned orders dated 04.10.2019 are not in respect of any such accumulated credit of excess tax paid after 30.9.2019 on such notified input supplies. Therefore, there is no infirmity in these orders granting refund, warranting any interference.

19) Looking to the nature of relief claimed by the writ petitioner, we are of view that an individual dispute should not be allowed to be converted into a PIL. It cannot be ruled that this writ petition may be sponsored by some interested persons who are having any grudge against the private respondents. Accordingly, the Public Interest Litigation petition is *dismissed* with Rs.5,000/- cost and the cost shall be deposited in the account of Secretary, High Court Legal Services Sub-Committee, Lucknow within a period of fifteen days from today, else the cost shall be recovered from the petitioner as arrears of land revenue.

[Alok Mathur, J.] [Pankaj Kumar Jaiswal, J.]

Order Date :- 18.11.2019
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NOTE:

It is to be noted that the instant judgment has been dictated and signed by Hon'ble Mr. Justice Pankaj Kumar Jaiswal. In this matter a separate judgment of the same date has been dictated and signed by Hon'ble Mr. Justice Alok Mathur.

Court No. - 1

Case :- P.I.L. CIVIL No. - 31650 of 2019

Petitioner :- Ashish Katiyar

Respondent :- U.O.I.Thru.Revenue Secy. Ministry Of Finance New Delhi &Ors

Counsel for Petitioner :- Ritesh Verma

Counsel for Respondent :- A.S.G.

Hon'ble Pankaj Kumar Jaiswal,J.

Hon'ble Alok Mathur,J.

1. I have had the privilege of going through the judgement of my learned brother, but with great respect I regret my inability to agree with the findings recorded therein despite the fact that I agree with the conclusion that the writ petition deserves to be dismissed.

2. The present writ petition filed in the nature of a Public Interest Litigation has been preferred seeking a writ of mandamus to command the respondent no. 2 to conduct an independent free and fair enquiry against the concerned officers in respect of all refund claims of excess tax (compensation cess) paid prior to the notification dated 30/09/19 and accumulated due to inverted tax structure in relation to “Tobacco and Manufactured Tobacco Substitutes”, including the officer who passed the impugned orders dated 04/10/19, and to prevent the grant of any further refund apart from seeking a direction to

respondent no. 3 to file a statutory appeal against the impugned orders dated 04/10/2019.

3. This court at the very outset had confronted the counsel for the petitioner with regard to the maintainability of the petition, and the source of his obtaining the impugned orders dated 04/10/19 inasmuch as the same had not been served on the petitioner and is otherwise in relation to respondent no. 4&5, and further sought an explanation as to his bona fides in pursuing his grievance against private individuals i.e the respondents no. 4&5 despite the fact that there exist sufficient remedies provided under the GST act for reopening/challenging such orders.

4. The counsel for the petitioner informed the Court that the petitioner has obtained secret information with regard to the orders impugned herein, and that the source of information could not be disclosed to the court. He could not justify his bona fides and much less did not even attempt to answer the query of the court, and therefore the Bench of the view that the public interest litigation was just a subterfuge to settle personal scores at the behest of a person who had sponsored this petition, to settle individual scores.

5. Appearance was putting on behalf of the respondents no. 4&5, despite the fact that they have not been put to notice, and

in as much as the Bench was of the view that the petition was not maintainable. The counsel for respondents no. 4&5 was not even called upon to defend the averments made in the writ petition. The order was dictated in the open court and the writ petition was dismissed only the ground of maintainability. The occasion to write a separate opinion has occurred only after receipt of the copy of the judgement/order of my esteemed brother wherein the merits of the assessment as well as the validity of the notification no. 3/2019 dated 03/09/19 has been dealt elaborately and in paragraph no.8-18 after a detailed discussion and even the orders dated 04/10/2019 as well as the Notification dated 03.09.2019, have been upheld.

6. We are of the unanimous view that the present writ petition, styled as a public interest litigation, would not be maintainable in the present facts and circumstances of the case, where firstly, no public interest is involved wherein the assessment orders of certain individuals have been challenged, and secondly the bona fides of the petitioner himself is questionable. In such a scenario, the Hon'ble Apex court has held that a public interest litigation should not be entertained. In light of the above, the present public interest litigation was dismissed on the ground of maintainability with the cost of Rs. 5000/-.

7. The dismissal of the writ petition on the ground of maintainability, would preclude the court from proceeding and considering the case on merits. That while dismissing the petition on maintainability, the respondents were not called upon either to justify the orders impugned therein, nor was any counter affidavit sought from any of the parties, and therefore in my opinion that is no occasion for this court to delve into the merits of the case and to judge the validity of the refund orders passed in favour of the respondent no. 4 in 5. That in my considered opinion even otherwise the validity of the refund orders could not have been upheld as the same would be beyond the scope of the writ petition, and otherwise without hearing the revenue or giving them any opportunity, upholding of the said order would necessarily preclude the revenue from challenging the same before the competent authority, which right cannot be denied to them at this stage, while on the other hand creating an indefeasible right in favour of respondent no. 4 in 5.

8. In case the impugned orders are found to be erroneous then the Revenue has a remedy under Section 108 or even under Chapter XIII of the CGST Act. That any finding recorded by this Court will adversely effect the rights of the revenue, and without hearing or providing any opportunity of hearing/filing counter affidavit, no finding can be recorded adverse to them.

9. The public interest petition was dismissed at the very threshold on the ground of maintainability and for lack bona fides of the petitioner. As observed earlier, the very fact that the counsel for respondent no. 4 & 5 put in appearance before this Bench, without any notices having been issued to them, raises enough suspicion, that the petition could have been filed as a result of collusion between the petitioner and respondent no. 4 & 5, to obtain approval of the High Court with regard to the refund orders dated 04/10/2019 for an amount of Rs.55,30,00,000/- with respect to respondent no. 5, and for an amount of Rs.52,62,42,925/- with respect to respondent no. 4 respectively.

10. While entertaining a writ petition in the nature of public interest litigation, the Hon'ble Apex court has repeatedly cautioned the High Court's to be circumspect, and to be satisfied upon the issue being raised in the nature of a public interest litigation, and also with regard to the bona fides of the petitioner approaching the courts for exercise of such extraordinary jurisdiction.

11. The manner of exercise of jurisdiction in entertaining Public Interest Litigations has been extensively dealt with by the Hon'ble Apex Court in the case of *State of Uttaranchal v. Balwant Singh Chaufal*, (2010) 3 SCC 402 the same are as follows:-

Abuse of Public Interest Litigation

143. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non-monetary directions by the courts.

144. In BALCO Employees' Union v. Union of India [(2002) 2 SCC 333 : AIR 2002 SC 350] this Court recognised that there have been, in recent times, increasing instances of abuse of public interest litigation. Accordingly, the Court has devised a number of strategies to ensure that the attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. Firstly, the Supreme Court has limited standing in PIL to individuals "acting bona fide". Secondly, the Supreme Court has sanctioned the imposition of "exemplary costs" as a deterrent against frivolous and vexatious public interest litigations. Thirdly, the Supreme Court has instructed the High Courts to be more selective in entertaining the public interest litigations."

12. The Hon'ble Apex court after referring to its judgment in the case of **State of Uttaranchal v. Balwant Singh Chaufal** , in the case of **Tehseen Poonawalla v. Union of India, (2018) 6 SCC 72** held as under:-

98. The misuse of public interest litigation is a serious matter of concern for the judicial process. Both this Court and the High Courts are flooded with litigations and are burdened by arrears. Frivolous or motivated petitions, ostensibly invoking the public interest detract from the time and attention which courts must devote to genuine causes. This Court has a long list of pending cases where the personal liberty of citizens is involved. Those who await trial or the resolution of appeals against orders of conviction have a legitimate expectation of early justice. It is a travesty of justice for the resources of the legal system to be consumed by an avalanche of misdirected petitions purportedly filed in the public interest which, upon due scrutiny, are found to promote a personal, business or political agenda. This has spawned an industry of vested interests in litigation. There is a grave danger that if this state of affairs is allowed to continue, it would seriously denude the efficacy of the judicial system by detracting from the ability of the court to devote its time and resources to cases which legitimately require attention. Worse still, such petitions pose a grave danger to the credibility of the judicial process. This has the propensity of endangering the credibility of other institutions and undermining public faith in democracy and the rule of law. This will happen when the agency of the court is utilised to settle extra-judicial scores. Business rivalries have to be resolved in a competitive market for goods and services. Political rivalries have to be resolved in the great hall of democracy when the electorate votes its representatives in and out of office. Courts resolve disputes about legal rights and entitlements. Courts protect the rule of law. There is a danger that the judicial process will be reduced to a charade, if disputes beyond the ken of legal parameters occupy the judicial space.

13. Applying the ratio as well as the tests laid down by the Hon'ble Apex court for entertaining Public Interest Litigation, I am of the considered opinion that the instant petition is not in public interest litigation and has been filed at the behest of an interested party. The issue raised in the petition is also not a

public interest, in as much as such notifications in the field of taxation can very well be challenged by the persons aggrieved by the same, and further, there are various safeguards provided in the GST Act to take care of such situations and even to rectify any order passed by the assessing authority, by the superior authority.

14. Looking into the nature of relief claim by the writ petitioner, I am of the view that an individual dispute should not be allowed to be converted into PIL. It cannot be ruled out that his writ petition has not been sponsored by some interested persons who are having any grudge against the private respondent's. Accordingly, the public interest litigation is dismissed with Rs. 5000 cost and the cost shall be deposited in the account of Secretary, High Court Legal Services Subcommittee, Lucknow with a period of 15 days from today, else the cost shall be recovered from the petitioner as arrears of land revenue.

Order Date :- 18.11.2019

A. Verma

(Alok Mathur, J.)

Note :-

It is to be noted that the instant judgment has been dictated and signed by Hon'ble Mr. Justice Alok Mathur. In this matter a separate judgment of the same date has been dictated and signed by Hon'ble Mr. Justice Pankaj Kumar Jaiswal.