IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE GOPINATH P.

WEDNESDAY, THE 7TH DAY OF DECEMBER 2022 / 16TH AGRAHAYANA, 1944

WP(C) NO. 27373 OF 2022

PETITIONER:

M/S MANAPPURAM FINANCE LTD,
AGED 73 YEARS
MANAPPURAM HOUSE, VALAPAD PO,
THRISSUR, PIN - 680 567
REPRESENTED BY GENERAL MANAGER OF
M/S MANAPPURAM FINANCE LTD,
SHRI MV BABU, S/O SHRI MT VARGHESE,
RESIDING AT MAZHUVANCHERRY PARAMBATH HOUSE,
AYYAMPILLY, ERNAKULAM., PIN - 682501

BY ADVS.
V.RAGHURAMAN (SR. COUNSEL)
K.S.BHARATHAN
ALPHIN ANTONY
AADITHYAN S.MANNALI
VISAKH ANTONY
CHRISTINE MATHEW
RANCE R.

RESPONDENTS:

1 ASSISTANT COMMISSIONER, CENTRAL TAX AND EXCISE,
THRISSUR DIVISION, CR BUILDING,
ST NAGAR, THRISSUR, PIN - 680 001, PIN - 680001

2 JOINT COMMISSIONER (APPEALS),
CENTRAL REVENUE BUILDING, IS PRESS ROAD,
KOCHI., PIN - 682018

BY ADV SREEJITH P. R

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 07.12.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

The petitioner is a non-banking finance company and is an assessee under the GST Regime. This writ petition has been filed challenging Ext.P1 order in appeal to the extent it found that the petitioner is liable to pay tax on notice pay received from the former employees of the petitioner. The appellate authority upheld the orders of the original authority, which had rejected the claim for refund made by the petitioner for a refund of GST paid on notice pay received from the erstwhile employees. It is the case of the petitioner that since the GST Appellate Tribunal has not been constituted, the petitioner has no other remedy other than to approach this Court under Article 226 of the Constitution of India.

2. Sri. V. Raghuraman, the learned senior counsel appearing for the petitioner on the instructions of Adv. K.S. Bharathan would contend that the question as to whether the petitioner is liable to pay GST on notice pay received from erstwhile employees has been considered by the Central Board of Indirect Taxes and Customs vide Circular bearing No.178/10/2022-GST dated 3.8.2022 where in paragraphs 7.5, it has been clearly stipulated as follows:-

> ***"Forfeiture of salary or payment of bond amount in the event of the employee leaving the employment before the minimum agreed period.***
> *7.5 An employer carries out an elaborate selection process and incurs expenditure in recurring an employee, invests in his training and makes him a part of the organization, privy to its processes and business secrets*

> *in the expectation that the recruited employee would work for the organization for a certain minimum period. Premature leaving of the employment results in disruption of work and an undesirable situation. The provisions for forfeiture of salary or recovery of bond amount in the event of the employee leaving the employment before the minimum agreed period are incorporated in the employment contract to discourage non-serious candidates from taking up employment. The said amounts are recovered by the employer not as a consideration for tolerating the act of such premature quitting of employment but as penalties for dissuading the non-serious employees from taking up employment and to discourage and deter such a situation. Further, the employee does not get anything in return from the employer against payment of such amounts. Therefore, such amounts recovered by the employer are not taxable as consideration for the service of agreeing to tolerate an act or a situation."*

It is submitted that with the issuance of the aforesaid Circular, it is now clear that the petitioner is clearly not required to pay any GST on notice pay received from employees. It is submitted that though the Circular (Ext.P8) was issued only on 3.8.2022, the said Circular should be treated as applying to all past transactions as well, as it is settled law that the beneficial Circular must be applied retrospectively. Reference is made in this regard relying on the judgment of the Supreme Court in ***Suchitra Components Ltd.*** v. ***Commissioner of Central Excise;*** **(2006) 12 SCC 452.** The learned senior counsel also referred to the judgments in ***Navnit Lal C. Javeri*** v. ***K.K. Sen ;*** **1965 (56) ITR 198**, ***K.P. Varghese*** v. ***Income Tax Officer,Ernakulam and another;*** **(1981) 4 SCC 173**, ***Madhu Silica Pvt. Ltd*** v. ***Commissioner of Income Tax and another; (1997) 227 ITR 350*** to contend that Circulars in the nature of Ext.P8 are binding on the GST Department. It is also submitted that the ***Madras High Court in GE T & D India***

Ltd v. ***Deputy Commissioner of Central Excise***; **2020 (35) G.S.T.L. 89 (Mad.)** has considered the very same issue and has come to the conclusion that notice pay received from employees does not amount to a rendition of service for the purposes of the Finance Act, 1994.

4. Sri. P.R. Sreejith, the learned counsel appearing for the respondent Department, would, on the other hand, contend that the writ petition is not maintainable before this Court merely because the GST Appellate Tribunal has not been constituted. It is submitted that the Central Goods and Service Tax (Ninth Removal of Difficulties) Order, 2019, clarifies that the starting point of limitation for the purposes of filing any appeal against any order before the GST Appellate Tribunal shall count only from the date of the constitution of the tribunal. It is contended that Ext.P1 order, which is impugned in the present writ petition, is an order upholding the decision of the original authority to reject the claim for refund and therefore, the petitioner can very well wait for the constitution of the appellate tribunal for adjudication of its grievances, as there is no demand against the petitioner. It is submitted that the question as to whether the provisions of Ext.P8 Circular will apply retrospectively is a matter to be considered and decided by the Tribunal, having regard to the facts of the case and terms of the Circular, and it is not open to the petitioner to now contend before this Court, in a writ petition under Article 226 of the Constitution of India, that the

benefits of the Circular should be extended to the petitioner. It is pointed out that the Circular was issued only about 2 ½ months after the issuance of Ext.P1 order, and therefore, the issuance of a Circular does not advance the case of the petitioner in any manner.

5. Having heard the learned senior counsel appearing for the petitioner and the learned standing counsel appearing for the respondent Department, I am of the view that the petitioner is entitled to succeed. The terms of Ext.P8 Circular specifically deal with the question arising for consideration in this case. The relevant portion of the Circular, which has been extracted hereinabove, clarifies that the amount of money received by the petitioner as notice pay from erstwhile employees is not a taxable transaction for the purposes of the GST laws. As rightly contended by the learned senior counsel, the decisions of the Supreme Court in ***Navnit Lal (supra)*** which was applied and followed in ***K.P. Varghese (supra)*** are binding precedents for the proposition that Circulars in the nature of Ext.P8 are binding on the Department and no officer can take a view contrary to stipulations contained in such Circulars. The Supreme Court in ***K.P. Varghese (supra)*** held as follows:-

> *"11. There is also one other circumstance which strongly reinforces the view we are taking in regard to the construction of sub-section (2). Soon after the introduction of sub-section (2), the Central Board of Direct Taxes, in exercise of the power conferred under S.119 of the Act, issued a circular dated 7th July,1964 explaining the scope and object of sub-section (2) in the following words :*

> *"S.13 of the Finance Act has introduced a new sub-section (2) in S.52 of the Income Tax Act with a view to countering evasion of tax on capital gains through the device of an understatement of the full value of the consideration received or receivable on the transfer of a capital asset.*
>
> *The provision existing in S.52 of the Income Tax Act before the amendment (which has now been renumbered as sub-section (2)) enables the computation of capital gains arising on transfer of a capital asset with reference to its fair market value as on the date of its transfer, ignoring the amount of the consideration shown by the assessee, only if the following two conditions are satisfied :*
> *(a) the transferee is a person who is directly or indirectly connected with assessee, and*
> *(b) the Income Tax officer has reason to believe that the transfer was effected with object of avoidance or reduction of the liability of assessee to tax on capital gains.*
>
> *In view of these conditions, this provision has a limited operation and does not apply to other cases where the tax liability on capital gains arising on transfer of capital assets between parties not connected with each other, is sought to be avoided or reduced by an understatement of the consideration paid for the transfer of the asset."*

The circular also drew the attention of the Income Tax Authorities to the assurance given by the Finance Minister in his speech that sub-section (2) was not aimed at perfectly honest and bona fide transactions where the consideration in respect of the transfer was correctly disclosed or declared by the assessee, but was intended to deal only with cases where the consideration for the transfer was understated by the assessee and was shown at a lesser figure than that actually received by him. It appears that despite this circular, the Income Tax Authorities in several cases levied tax by invoking the provision in sub-section (2) even in cases where the transaction was perfectly, honest and bona fide and there was no understatement of the consideration. This was quite contrary to the instructions issued in the circular which was binding on the Tax Department and the Central Board of Direct Taxes was, therefore, construed to issue another circular on 14th January, 1974 whereby the Central Board, after reiterating the assurance given by the Finance Minister in the course of his speech, pointed out:

> *"It has come to the notice of the Board that in some cases the Income Tax officers have invoked the provisions of S.52 (2) oven when the transactions were bona fide. In this context reference is invited to the decision of the Supreme Court in Navnit Lal C. Jhaveri v. K. K. Sen (1965 (56) ITR 198 : AIR 1965 SC 1375) and Ellerman Lines Ltd. v. Commr. of Income Tax, West Bengal (1971 (82) ITR 913 :AIR 1972 SC 524) wherein it*

> *was held that the circular issued by the Board would be binding on all officers and persons employed in the execution of the Income Tax Act. Thus the Income Tax officers are bound to follow the instructions issued by the Board."*

and instructed the Income Tax officers that "while completing the assessments they should keep in mind the assurance given by the Minister of Finance and the provisions of S.52(2) of the Income Tax Act may not be invoked in cases of bona fide transactions".

These two circulars of the Central Board of Direct Taxes are, as we shall presently point out, binding on the Tax Department in administering or executing the provision enacted in sub-section (2), but quite apart from their binding character, they are clearly in the nature of contemporanea expositio furnishing legitimate aid in the construction of sub-section (2). The rule of construction by reference to contemporanea expositio is a well established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous. This rule has been succinctly and felicitously expressed in Crawford on Statutory Construction (1940 ed) where it is stated in para 219 that

> *"administrative construction (i.e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned: such a construction,commonly referred to as practical construction, although non controlling, is nevertheless entitled to considerable weight; it is highly persuasive."*

The validity of this rule was also recognised in Baleshwar Bagarti v. Bhagirathi Dass, (1908 ILR 35 Cal 701) where Mookerjee, J. stated the rule in these terms :

> *"It is a well settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it."*

and this statement of the rule was quoted with approval by this Court in Deshbandhu Gupta and Co. v. Delhi Stock Exchange Association Ltd., (1979 (4)SCC 565 : AIR 1979 SC 1049). It is clear from these two circulars that the Central Board of Direct Taxes, which is the highest authority entrusted with the execution of the provisions of the Act, understood sub-section (2) as limited to cases where the consideration for the transfer has been understated by the assessee and this must be regarded as a strong circumstance supporting the construction which we are placing on, that sub-section.

12. But the construction which is commending itself to us does not rest merely on the principle of contemporanea expositio. The two circulars of the Central Board of Direct Taxes to which we have just referred are legally binding on the Revenue and this binding character attaches to the two circulars even if they be found not in accordance with the correct interpretation of sub-section (2) and they depart or deviate from such construction. It is now well settled as a result of two decisions of this Court, one in Navnitlal C. Jhaveri v. K. K. Sen, (1965 (56) ITR 198 : AIR 1965 SC 1375) and the other in Ellerman Lines Ltd. v. Commr. of Income Tax, West Bengal (1971 (82) ITR 913 : AIR 1972 SC 524) that circulars issued by the Central Board of Direct Taxes under S.119 of the Act are binding on all officers and persons employed in the execution of the Act even if they deviate from the provision of the Act. The question which arose in Navnitlal C. Jhaveri's case (supra) was in regard to the constitutional validity of S.2(6A) (e) and 12(1B) which were introduced in the Indian Income Tax Act 1922 by the Finance Act 1955 with effect from 1st April, 1955. These two sections provided that any payment made by a closely held company to its shareholder by way of advance or loan to the extent to which the company possesses accumulated profits shall be treated as dividend taxable under the Act and this would include any loan or advance made in any previous year relevant to any assessment year prior to the assessment year 1955-56, if such loan or advance remained outstanding on the first day of the previous year relevant to the assessment year 1955-56. The constitutional validity of these two sections was assailed on the ground that they imposed unreasonable restrictions on the fundamental right of the assessee under Art.19(1)(f) and (g) of the Constitution by taxing outstanding loans or advances of past years as dividend. The Revenue however relied on a circular issued by the Central Board of Revenue under S.5(8) of the Indian Income Tax Act 1922 which corresponded to S.119 of the present Act and this circular provided that if any such outstanding loans or advances of past years were repaid on or before 30th June, 1955, they would not be taken into account in determining the tax liability of the shareholders to whom such loans or advances were given. This circular was clearly contrary to the plain language of S.2(6A)(e) and S.12(1B), but even so this Court held that it was binding on the Revenue and since

> *"past transactions which would normally have attracted the stringent provisions of S.12(1B) as it was introduced in 1955, were substantially granted exemption from the operation of the said provisions by making it clear to all the companies and their shareholders that if the past loans were genuinely refunded to the companies they would not be taken into account under S.12 (1B),"*

S.2(6A)(e) and 12(1B) did not suffer from the vice of unconstitutionality. This decision was followed in Ellerman Lines' case (AIR 1972 SC 524) (supra) where referring to another circular issued by the Central Board of Revenue under S.5(8) of the I.T. Act 1922 on which reliance was placed on behalf of the assessee, this Court observed (at p. 528):

> *"Now, coming to the question as to the effect of instructions issued under S.5(8)of the Act, this Court observed in Navnit Lal C. Jhaveri v. K. K. Sen, Appellate Assistant Commissioner, Bombay;*
>
> *"It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution of the Act under S.5 (8) of the Act. This circular pointed out to all the officers that it was likely that some of the companies might have advanced loans to their shareholders as a result of genuine transactions of loans, and the idea was not to affect such transactions and not to bring them within the mischief of the new provision."*
>
> *The directions given in that circular clearly deviated from the provisions of the Act, yet this Court held that the circular was binding on the Income Tax officers."*
>
> *The two circulars of the Central Board of Direct Taxes referred to above must therefore be held to be binding on the Revenue in the administration or implementation of sub-section (2) and this sub-section must be read as applicable only to cases where there is understatement of the consideration in respect of the transfer."*

The fact that the Circular was issued only after the issuance of Ext.P1 order of the first appellate authority is no reason to hold that the petitioner is not entitled to the benefits of the Circular. I am inclined to hold so since the Circular only clarifies the existing law. In that view of the matter, the question as to whether the Circular has any retrospective effect need not be considered. Even otherwise, in the light of the law laid down in ***Suchitra Components Ltd (supra)***, the provisions of a Circular in the nature of Ext.P8 will have to be deemed to apply retrospectively.

6. The contention raised by the learned counsel for the respondent Department that the petitioner has an effective alternative

remedy before the GST Appellate Tribunal does not appeal to this Court for the simple reason that the GST Appellate Tribunal is yet to be constituted. The fact that the period of limitation will start to run only from the date of the constitution of the Appellate Tribunal is no solace to the petitioner. The petitioner is, therefore, entitled to exercise the jurisdiction of this Court under Article 226 of the Constitution of India to challenge the orders impugned in this writ petition.

As a result of the aforesaid findings, this writ petition is allowed. Ext.P1 and all orders rejecting the application of the petitioner for a refund of GST paid on notice pay received by the petitioner from its employees will stand quashed. The applications filed by the petitioner for refund shall stand restored to the file of the 1st respondent, who shall reconsider the matter, having regard to the findings contained in this judgment.

Sd/-

GOPINATH.P.
JUDGE

acd

APPENDIX OF WP(C) 27373/2022

PETITIONER EXHIBITS

Exhibit P1	TRUE COPY OF THE ORDER IN APPEAL BEARING NO. COC - GST - 000 - APP - 31 - 53 - 2022 - JC DATED 19.05.2022.
Exhibit P2	TRUE COPY OF A SAMPLE AGREEMENT DATED 23.11.2019.
Exhibit P3	TRUE COPY OF ONE SUCH APPLICATION FOR REFUND DATED NIL.
Exhibit P4	TRUE COPY OF ONE SUCH NOTICE FOR REJECTION DATED 01.07.2020.
Exhibit P5	TRUE COPY OF ONE SUCH REPLY TO NOTICE DATED 08.07.2020.
Exhibit P6	TRUE COPY OF ONE SUCH REFUND REJECTION ORDER BEARING NO C.NO IV/01/18/39/2019 GST REFUND DATED 21.08.2020.
Exhibit P7	TRUE COPY OF THE APPEAL MEMORANDUM FILED IN FORM GST APL 01 DATED 10.09.2020.
Exhibit P8	TRUE COPY OF THE CIRCULAR NO. 178/10/2022-GST DATED 03.08.2022.
Exhibit P9	TRUE COPY OF THE FAQ RELEASED BY GOI ON THE APPLICABILITY OF GST ON NOTICE PAY RECEIPT DATED NIL.
Exhibit P10	TRUE COPY OF OFFICE MEMORANDUM DATED 06.07.2022.