DELHI
SALES TAX CASES

Containing important decisions of the Supreme Court of India, High Courts, Sales Tax Appellate Tribunal, Other Appellate and Revisional Authorities, Notifications, Circulars, Articles, etc.

Editors-in-Chief
S.K. KHURANA
KUMAR JEE BHAT
H.L. MADAN

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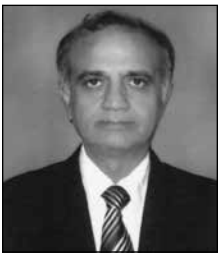

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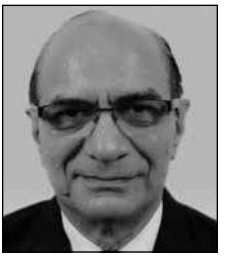

H.L. Madan

FROM THE DESK OF EDITORS-IN-CHIEF

"Law is not static, it is dynamic and it is not dry subject"

– Altmas Kabir, Ex-CJI

It has been the endeavor of Sales Tax Bar Association to keep the members of the Bar abreast of the latest developments in the field of Value Added Tax Laws and Goods and Services Tax Law. Publishing monthly Journal is one of the best modes of updating the members. It is a matter of great pride and pleasure that our Bar has completed 57 Years of publication of its journal, Delhi Sales Tax Cases.

Appointment of Editors-in-Chief is highly responsible and arduous job. A lot of pressure and responsibility was fastened on us to maintain regularity of publication and also to maintain its quality. However, We accepted this challenge believing that it will take us to the road of hard work, long hours and extreme devotion toward this task

As the last issue of 2019, this gives us an opportunity to thank all those authors of the Articles published during this year and to acknowledge generous help which both the authors and editors obtained from peer reviewers. The journal will continue to publish the quality judgments and other relevant material relating to GST and other allied laws in future as well.

With the change in law, we also tried to update the journal, so as to cater the needs of the Bar and the Bench. We worked hard to keep you abreast with the latest law and the judgments, circulars, notifications and press notes etc., This will increase the page numbers of the journal in future, as the GST practice will be based on these notifications, circulars and other press releases of the department as it used to be in the Excise Act. Though the law on GST is in initial stage and it will take time to develop, with the advent of complicacies faced by the traders and adjudication on the subject by the lower authorities and the Courts in particular will settle down it with the time to come. The initial glitches will also be removed either *suo moto* by the Government or with interference of the Courts. The next editorial Board shall report all the matters which shall come before the courts. We however, always welcomed the suggestions and criticism from our esteemed readers for further improvement of the journal.

We extend our gratitude towards Sh. H.C Bhatia & Raj K. Batra, patrons of our journal who have been source of our inspiration and we sought their guidance throughout the year. We are thankful to authors of Article, Sh.

Puneet Agrawal, Sh. Sushil Verma, Sh. Chakit Singhal, Sh. H. L. Taneja, Sh. Gaurav Gupta. We are also thankful to our friends and members like P.K Bansal, S.N Garg, M.L Garg, S. K. Bansal, Neetika Khanna, Vasdev Lalwani, A.K Babbar and Ravi Chandok who provided us a lot of orders and judgments' to publish in our journal.

Wish you a Happy New Year, 2020 to you and your family. We convey our best wishes to new team for the year 2020.

We request new executive committee to appoint young energetic team. We have played our innings.

"Law is the command of the sovereign" – AUSTIN

Editors-in-Chief
S.K. Khurana, Kumar Jee Bhat & H. L. Madan

FROM THE DESK OF THE PRESIDENT

Hare Krishna,

Wishing You and your family a
Happy & Prosperous New Year 2020

Today 23rd December, 2019 on the eve of demitting office as the President of our esteemed Bar Association, I extend my gratitude to all the members for reposing confidence in me to shoulder the responsibility as President of this August Bar for a second time. I understand that it is the duty of the Executive Committee to keep the members abreast about the latest developments on the taxation side, especially after the implementation of GST Law which is evolving at an extraordinary pace. In order to keep step with such frequent changes, the best way is to conduct Study Circle Meetings and publish the monthly Journal, which become the best modes of updating the members.

The K & D Committee had been constituted and which consisted of both, the experienced and younger members. A meeting of the Committee was conducted and valuable suggestions were noted. Dr. Gaurav Gupta voluntarily offered his services to prepare legal updates and which included latest Circulars & Notifications, Gist of Rulings of the Advance Ruling Authority and other Important Judgments.

Now, with great pleasure and pride, I inform that during the year 2019, we have completed one full volume of the DSTC and also present the Bar with Part 9 & 10 of Volume 57 (2019) of DSTC. All this has been possible due to the untiring efforts of the team of the Editorial Board led by Sh. S.K. Khurana, Sh. H.L. Madan & Sh. Kumar Jee Bhat as Chief Editors and the able guidance provided by Sh. H.C. Bhatia & Sh. Raj K. Batra as Patrons. I am also thankful to the Convenor, Sh. Suresh Aggarwal and all the other members of this Committee.

Keeping our commitment to make the Bar Association more vibrant, a variety of activities were undertaken with the blessings of Lord Krishna and the unstinted support of all members. With the limited space here, I can pen down only a few of our achievements during the year:

- 21 Study Circle meetings covering important topics of GST, Income Tax and other allied tax laws. It is noteworthy that No Speaker was Repeated. All the meetings received overwhelming response from the members.
- 8 Group Discussions as part of the Continuous Education Programme. No Panelists (16 in Nos.) were repeated.

- 7 Sessions of Grooming the Young Programme on different topics were held under the aegis of Sh. H.C. Bhatia and with an eye to help the young members.
- Two Days Conference on Indirect and Direct Taxes at the prestigious India Habitat Centre, with 7 technical sessions on topical subjects was organised and which was addressed by many Stalwart Speakers. Most of the sessions were chaired by a High Court Judge. Around 475 delegates participated, amidst handsome participation by the Officers of the T&T Department.
- Residential Refresher Conference (3 days) at Shervani Hill Top Nainital. Around 100 delegates from the Bar along with their families attended. 4 Prominent Speakers from the Bar led the Technical sessions. Yoga & Palmistry were an added bonanza in this Conference.
- International Tour cum Tax Conference (10 days) on GST at Mauritius and Dubai. Around 106 members from the Bar along with their families attended. The First Secretary to the High Commissioner of India at Mauritius graced the Conference and also released a Souvenir.
- Representation to various Authorities .... Commissioner DGST, Chief Commissioner CGST, GSTN CEO and Sr. Officers, GST Council officers, GST Policy Officers relating to various glitches of GST portal, difficulties faced for refund issues and simplification of GST returns. These meetings were hugely successful and many of our problems were addressed. Due to our continuous and effective representations before the Court, and with the strength and support provided by all our professional brethren, the GST Policy Wing was directed to prepare a detailed agenda for the 38th Meeting of GST Council on 18.12.2019 and the constitution of a Grievance Redressal Committees at Zonal / State Levels, with both CGST and CGST Officers, representatives of GSTN including representatives of Trade & Industry and other GST stakeholders. Further, the GSTN was directed to provide a list of Nodal Officers of the State & Centre at one place and on the website of both the State and the Centre for IT Grievance Redressal Committee (ITGRC).
- Representation to Bar Council - On a call given by the Bar Council of Delhi to voice concerns and raise demand for the welfare of advocates, a large number of our Bar members participated in a Protest March from Patiala House Courts to Jantar Mantar and which proved fruitful inasmuch as the Govt. of NCT of Delhi allotted a Fund of Rs. 50 Crores for the Welfare of Advocates.
- Court cases before Hon'ble Supreme Court and Delhi High Court - The Hon'ble Supreme Court on 13.11.2019 has quashed the Notified Rules of the Finance Act, 2017. Writ Petitions in Delhi High Court for issuance of Refunds under GST and portal glitches under GST have been argued by Sh. Puneet Agrawal, Advocate and which have yielded beneficial results from time to time.

- Additions to the Bar Library - Books are the backbone of our profession. Several books on various subjects have been added in the library for the benefit of members. Many authors have given copies of their latest published books. Lately BCD has also promised to grant E-library and latest computers for use of our members.
- Cultural Activities – Holi Milan programme, Independence Day Celebrations and Deepawali Festival were celebrated in the Bar with full zeal and enthusiasm. Sh. Manish Sisodia, Hon'ble Dy. Chief Minister of Delhi, graced the programme as Chief Guest on the occasion of Diwali.
- Special Lectures - To commemorate Gita Jayanti, a Discourse on Shrimad Bhagwad Gita by Sh. H.G. Rohini Nandan Das from Raman Behari Gaudiya Math was organised in the Bar.
- Chambers - Due to persistent efforts during the year, the FAR of the Chambers Building was got increased to 300%. The revised Building Plan and status of construction of the Annexe Building has been reviewed in the detailed meetings held in the office of the Commissioner with the Office Bearers of the STBA, Senior Officers of the Department, Senior Officers of PWD, and the Architect. Now the Building will be constructed with 2 Basements, 1 Stilt Parking and 12 floors (earlier 8 Floors).
- Blood Donation Camp
- Health Check-up Camp and Package
- Sports Activities - Memorable Sports Events were organised, wherein various competitions such as Carrom & Chess tournaments were held in the bar premises and the Lawn Tennis, Table Tennis and Badminton tournaments organised at the Siri Fort Sports Complex. A Cricket Match was also organised between the Presidents' XI [Sales Tax Bar Association (Regd.)] and the Commissioner DVAT XI. Also organised a Cricket Match between veterans and the younger members of the Association. The Bar also played the 4th Edition of the N.C. Sikri Memorial Cricket Match.
- Tree Plantation Drive – To make the environment "Go Green" and to celebrate 25 years of occupation of the Bar premises in the Trade & Taxes Building, a Tree Plantation Drive was organised in the parking area of Vyapar Bhawan.
- Swachhata Abhiyan - To Commemorate 150th Birth Anniversary of Mahatma Gandhi ji, a Peace March around the Building of Trade & Taxes was also undertaken. The Commissioner and other Officers of Department and also large number of our members attended the programme.
- Constitution Day Celebrations – For first time in the Bar's history, we celebrated the 70th Constitution Day in its premises. On this occasion,

the members took an oath regarding the duties they owe towards the nation. The undersigned read out from the Constitution and exhorted all the members to adhere to the things laid down in our Constitution.

- ➢ An Advocate Welfare Scheme Camp was organised for renewal of the Bar Council ID Cards and enrolment of members to the Advocates Welfare Fund.
- ➢ Felicitation function of our members who are holding important portfolios in the BCD, Central Council & NIRC of the Institute of Chartered Accountants of India.
- ➢ Felicitation of members for their pro-bono services in Court Case matters.
- ➢ Sales Tax Bar Association website was made vibrant and active during the year.
- ➢ New I Cards, Welfare Fund Stamps, Car Parking Stickers, ITAT Cause List.
- ➢ Emails, SMS and Whatsapp Study Groups were actively used as important tools of communication, learning and use. Throughout the year, all the Circulars / Amendments / Notifications / Determinations / Orders / other important information and Case Laws relating to the profession were sent to all the members through Whatsapp & E-mail.
- ➢ Bar Renovation – To add an extra degree of comfort for the members, 5 Window Air Conditioners were installed in the Bar by PWD. An extensive renovation work was carried out in the Bar premises, including repairing / polishing of old chairs / tables etc.
- ➢ Facilities in Lunch Room - New crockery was purchased and also the kitchen was reconditioned with new racks etc. The R.O. was got repaired and which ensured provision of cold water for the members. Two new Microwaves Ovens were also purchased.
- ➢ Diary-cum-Referencer 2020, containing vital information on GST and Income Tax was released. This would be of immense use for the members in their professional pursuits.

Time and tide does not spare anybody. So it is time for me to lay down office of the President of our Bar Association for my successor. I have in this 1 year been devoting my time and energy for discharging the responsibilities given to me by the members of the Bar with utmost sincerity at my command.

SANJAY SHARMA
President

New Delhi
December 23, 2019

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GENERAL INDEX

Adjournment

Assessment of Duty Under Customs Act

Block of Refund Under GST Act

SUPPLIES RECEIVED UPTO 31/07/2018 SHALL LAPSE – CIRCULAR No. 56/30/2018 GST DT 24/08/2018 – PRESCRIBING THE PROCEDURE TO BE FOLLOWED FOR LAPSING OF UNUTILIZED INPUT TAX CREDIT – WRIT PETITION CHALLENGING NOTIFICATIONS, CIRCULAR AND PROVISION BEING ILLEGAL AND REQUIRED TO BE STRUCK DOWN AS UNCONSTITUTIONAL ON THE GROUND OF THAT IT TOOK AWAY THE VESTED RIGHT OF THE TRADERS – PETITIONER ARGUED BEFORE THE COURT THAT POWER U/S 54(3) (ii) OF GST ACT IS LIMITED AS TO NOTIFY THE SUPPLIES NOT ENTITLED TO REFUND OF ITC ACCUMULATED – IMPUGNED NOTIFICATIONS TO EXTEND PROVIDING FOR LAPSING OF ITC WERE DISCRIMINATORY – REVENUE EXCEEDED POWERS DELEGATED U/S 54(3) (ii) OF CGST ACT.

REVENUE CONTENDED THAT THE POWER TO LAPSE OF ITC FLOWS INHERENTLY FROM THE POWER DENY REFUND OF ACCUMULATED ITC ON ACCOUNT OF INVERTED DUTY STRUCTURE – PETITIONERS WERE NOT ABLE TO TAKE THE BENEFIT OF THIS CREDIT AS REFUND ON ACCOUNT OF INVERTED DUTY STRUCTURE WAS BLOCKED – PRIOR TO ISSUE THE CIRCULAR 56/30/2018 GST DT 24/08/2018 THAT ALL THE ISSUES WERE CLARIFIED TO TRADERS – COURT HELD THAT SECTION 54(3) (ii) DID NOT EMPOWER RESPONDENTS TO FORM RULE PROVIDING LAPSING OF INPUT TAX CREDIT – ITC ONCE VALIDLY TAKEN IS INDEFEASIBLE AND VESTED RIGHT IS ACCRUED IN FAVOUR OF REGD PERSON TO UTILIZE THE SAME WITHOUT ANY LIMITATION – WRIT ACCEPTED.

[Shabnam Petrofils Pvt. Ltd. J-362]

Cancellation of GST Registration

CANCELLATION OF REGISTRATION UNDER SECTION 30 OF THE GOODS AND SERVICES TAX ACT, 2017 – GSTR 3B RETURNS NOT FILED FOR 9 MONTHS – REPLY GIVEN AGAINST SHOW CAUSE NOTICE – THAT DELAY WAS ON ACCOUNT OF SHORTAGE OF WORKING CAPITAL – CANCELLATION ORDER PASSED WITHOUT REFERENCE TO THE SUBMISSIONS MADE. WRIT PETITION – CHALLENGING CANCELLATION ORDER, WHETHER JUSTIFIED; HELD – NO.

CIRCULARS ISSUED BY CBIC FOR RELAXING TIME LIMITS FOR SUBMISSIONS OF RETURNS NOT CONSIDERED – DIRECTION ISSUED TO CBIC TO CONSIDER AND PASS ORDERS UPON THE APPLICATION OF THE PETITIONER SEEKING LEAVE TO PAY PENDING DUES IN INSTALLMENTS.

[Asean Aromatics Private Limited J-162]

Cancellation of Issued C Forms

CANCELLATION OF ISSUED C FORMS – INVOKING RULE 17(20) OF CENTRAL SALES TAX (RAJASTHAN) RULES, 1957 – CANCELLATION OF REGISTRATION

CERTIFICATE WITH RETROSPECTIVE EFFECT – CANCELLATION OF C FORMS ADVERSELY AFFECTED THE PETITIONER – WRIT PETITION CHALLENGING THE VALIDITY OF RULES 17(20) ULTRA VIRES OF SECTION 8(4), 13(1)(d), 13(3) & 13(4)(e) OF CENTRAL SALES TAX ACT, 1956 – PETITIONER HAD NO REGISTRATION IN RAJASTHAN – MAINTAINABILITY OF WRIT – LOCUS OF PETITIONER TO CHALLENGE THE CANCELLATION OF C FORMS AND OTHER ISSUES – RESPONDENT DEALERS NEVER AVAILED ALTERNATE REMEDY BEFORE ANY APPELLATE AUTHORITY – WHETHER RULE 17(20) OF CENTRAL SALES TAX (RAJASTHAN) RULES CONSTITUTIONALLY VALID; HELD – NO.

OVERRULING THE OBJECTIONS OF RESPONDENT ON THE ISSUE OF MAINTAINABILITY OF WRIT AND AVAILING ALTERNATIVE REMEDY, THE COURT HELD THAT SECTION 13(4)(e) OF CENTRAL SALES TAX ACT DID NOT CONFER ANY AUTHORITY ON STATE TO FRAME A RULE TO CANCEL FORMS ONCE ALREADY ISSUED – SECTION 13(3) OF THE CST ACT EMPOWERED THE STATE TO MAKE THE RULES BUT WITH THE RIDER THAT SUCH RULES SHOULD NOT BE INCONSISTENT WITH THE PROVISIONS OF THE CST ACT – THE COURT CONFINED ITS CONSIDERATION AS TO THE VALIDITY OF CANCELLATION OF C FORMS AND DID NOT GO INTO VALIDITY OF CANCELLATION OF THE REGISTRATION OF THE RESPONDENT DEALERS– RULE 17(20) OF RAJASTHAN RULES DECLARED ULTRA VIRES OF SECTION 8(4), 13(1)(d), 13(3) and 13(4)(e) OF THE CST ACT.

[Combined Traders J-107]

Cancellation of VAT Registration

CANCELLATION OF REGISTRATION U/S 22 OF DVAT ACT, 2004 WITH RETROSPECTIVE EFFECT – DVAT 10 AND 11 ISSUED BUT NOT SERVED – REASONS WERE RECORDED THAT APPELLANT MAKING SUSPICIOUS CENTRAL PURCHASES AND MADE STOCK TRANSFER TO OTHER STATE – OHA DISMISSED THE OBJECTION ON THE BASIS OF APPELLANT INVOLVED IN SUSPICIOUS TRANSACTIONS AND VIOLATING SECTION 40A. WETHER CORRECT; HELD – NO. VATO CANCELLED THE REGISTRATION ON DIFFERENT GROUND WHICH IS NOT MENTIONED IN SECTION 22 OF DVAT ACT, 2004 WHILE OHA REJECTED OBJECTION ON THE BASIS OF ORDER PASSED BY VATO THAT APPELLANT INVOLVED IN SUSPICIOUS TRANSACTION AND VOILATING SECTION 40A – ORDER PASSED BY VATO & OHA SET ASIDE AND REGISTRATION RESTORED.

[Salasar Trading Company J-258]

Condonation of Delay

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Deduction of Payment Under EPF And MP Act

Denial of ITC Under VAT

Detention of Goods

WAS ISSUED WITHOUT COMPLYING THE REQUIREMENTS OF SECTION 129 OF THE ACT – INTERIM ORDER PASSED DIRECTIONS WERE ISSUED TO RELEASE THE GOODS & VEHICLE SUBJECT TO FILING OF UNDERTAKING.

[Synergy Fertichem Pvt. Ltd. J-88]

DETENTION – GOODS OF THE DEALER DETAINED FOR THE REASON PART B OF E-WAY BILL NOT UPDATED – WRIT PETITION – DEALER CONTENDED TO PAY ONE TIME TAX UNDER CGST AND SGST FOR THE PURPOSE OF RELEASING THE GOODS – DIRECTION WERE GIVEN TO PAY TAX WITHIN FOUR DAYS TO THE DEALER AND RESPONDENT TO RELEASE THE GOODS AFTER RECEIPT OF PAYMENT. DEALER AT LIBERTY TO AGITATE THE MATTER BEFORE APPROPRIATE AUTHORITY.

[Preethi Kitchen Appliances Pvt. Ltd. J-226]

SECTION 129 OF CGST ACT, 2017 – DETENTION OF GOODS AND VEHICLE – PART B OF E-WAY BILL NOT GENERATED BY TRANSPORTER DUE TO SOME TECHNICAL PROBLEM – GOODS DURING MOVEMENT FROM CUSTOM WAREHOUSE TO DEALER'S OWN WAREHOUSE AFTER PAYMENT OF CUSTOM DUTY AND IGST ON IMPORTS WERE DETAINED WITH VEHICLE – RESPONDENT ISSUED DIRECTION TO MAKE PAYMENT OF TAX AND 100% PENALTY WITHIN SEVEN DAYS.

HELD – PETITIONER WAS DIRECTED TO FURNISH SECURITY OF RS. 12,00,000/- ONLY FOR THE PURPOSE OF IMMEDIATE RELIEF AND RELEASE OF GOODS WITH VEHICLE AS THE GOODS IN QUESTION WERE PERISHABLE IN NATURE. MATTER RESTORED TO THE COMPETENT AUTHORITY WHO WOULD DECIDE THE SAME AFRESH IN ACCORDANCE WITH LAW AND PASS SPEAKING ORDER AFTER DULY CONSIDERING THE SUBMISSIONS ADVANCED BY PETITIONER.

[Neuvera Wellness Ventures (P.) Ltd. & Anr. J-203]

SECTION 129 OF CGST ACT, 2017 – DETENTION/SEIZURE OF GOODS AND CONVEYANCE IN TRANSIT – VEHICLE CARRYING GOODS INTERCEPTED BY OFFICER – DETENTION ORDER PASSED IN FORM GST MOV-06 FOR THE REASON OF MISTAKE IN VEHICLE NUMBER MENTIONED – WRIT PETITION CHALLENGING DETENTION ORDER ON THE GROUND THAT NONE OF THE RELEVANT FIELDS OF THE SAID ORDER WAS TICKED AND ALMOST ALL FIELDS WERE LEFT BLANK – WHETHER IMPUGNED ORDER OF DETENTION COULD NOT BE SUSTAINED OR DESERVED TO BE SET ASIDE – HELD; DETENTION ORDER QUASHED. BEING INCOMPLETE AND WHOLLY NON SPEAKING.

[G. Murugan J-164]

SECTION 129 OF CGST ACT, 2017 – DETENTION/SEIZURE OF GOODS AND VEHICLE – VEHICLE TRANSPORTING TWO WHEELERS INSTEAD OF HALTING AT VIRUDHNAGAR, HAD MOVED TOWARDS SIVAKASI – VEHICLE INTERCEPTED WHEN ENROUTE TO SIVAKASI AND 7 KM AWAY FROM VIRUDHNAGAR – VEHICLE HAD BEEN SEIZED AND DETAINED – PENALTY OF Rs. 18,96,000/- LEVIED – WRIT PETITION SEEKING RELIEF AND TO CONDONE THE MINOR LAPSES ON THE BASIS OF CIRCULAR DT 14.09.2018 – HELD, DIRECTION TO RELEASE THE GOODS AND VEHICLE ON PAYMENT OF Rs. 5,000/- BY THE DEALER AS A FINE.

E-Way Bill

E-WAY BILL SUPPORTING THE TRANSPORTATION OF GOODS EXPIRED ON 22.04.2019 – CONSIGNMENT REACHED ITS DESTINATION IN TIME – VEHICLE FOUND IN MOVEMENT – EXERCISE OF POWER U/S 68(3) READ WITH SECTION 129(1) AND SECTION 129(3) OF BGST ACT, 2017 – DEMAND NOTICE FOR ALLEGED VIOLATION OF PROVISION – FRESH E-WAY BILL GENERATED ON 26.04.2019 PRIOR TO PASSING DETENTION ORDER – WHETHER DETENTION ORDER VALID; HELD – NO. ENTIRE EXERCISE WAS DEHORS THE PROVISIONS OF AMENDED RULE 138 AS NOTIFIED ON 07.03.2018 WHICH ENABLED A CONSIGNOR TO VALIDATE THE E-WAY BILL WHICH WAS DONE BY PETITIONER – QUASHED THE PROCEEDINGS IN ITS ENTIRETY TOGETHER WITH DEMAND.

SECTION 68 READ WITH SECTION 129 OF CGST ACT, 2017 – INSPECTION OF GOODS IN MOVEMENT – E-WAY BILL NOT FILED BY THE DEALER FOR TRANSPORTATION OF DRIED CHICK PEAS FROM SALEM TO DINDIGUL ON VIEW THAT GOODS WERE CLASSIFIABLE UNDER CHAPTER 0713 OF HSN – GOODS WERE UNDER MOVEMENT WERE DETAINED UNDER THE CLASSIFICATION (FRIED OR ROASTED GRAMS) FALLING UNDER CHAPTER 2106 OF HSN.

HELD – WRIT PETITION ALLOWED – DIRECTION GIVEN TO THE COMMISSIONER OF COMMERCIAL TAXES, CHENNAI TO ISSUE A CIRCULAR TO ALL THE INSPECTING SQUAD OFFICERS IN TAMIL NADU NOT TO DETAIN GOODS OR VEHICLE WHERE THERE IS A BONAFIDE DISPUTE AS REGARDS THE EXIGIBILITY OF TAX OR RATE OF TAX.

Filing of Tran-1

FILING OF TRAN-1 FORM FOR CLAIMING INPUT TAX CREDIT – ATTEMPT MADE BUT FORM COULD NOT FILE DUE TO PREVALENT GLITCHES IN SYSTEM – GRIEVANCE APPLICATION FILED AND EMAIL ALSO SENT – PERSONALLY VISITED TO GST DEPARTMENT TO MEET OFFICER – BUT ISSUE NOT RESOLVED – WRIT PETITION – DIRECTION GIVEN TO EITHER OPEN THE PORTAL OR TO ACCEPT A MANUALLY FILED TRAN-1 FORM.

[VASS Impex J-382]

GST Return 3B

FURNISHING OF RETURN U/S 39 OF CGST ACT,2017 RULE 61 OF CGST RULES, 2017 RELATING TO THE FORM AND MANNER OF SUBMISSION OF MONTHLY RETURN – RULE 61(5) SPECIFYING THE MANNER AND CONDITIONS TO FURNISHING FORM GSTR-3B – TIME LIMIT FOR CLAIMING INPUT TAX CREDIT OF TAX INVOICE ISSUED FROM JULY 2017 TO MARCH 2018 U/S 16(4) OF THE ACT – PRESS RELEASE DT 18-10-2018 CLARIFYING THE DATE FOR AVAILING ITC FROM JULY 2017 TO MARCH 2018 IS LAST DATE OF FILING 3B – WRIT PETITION CHALLENGING THE LEGALITY AND VALIDITY OF PRESS RELEASE – WHETHER THE SAID CLARIFICATION COULD BE SAID TO THE CONTRARY TO SECTION 16(4) OF THE CGST ACT READ WITH SECTION 39(1) OF THE ACT AND READ WITH RULE 61 OF CGST RULES/GSGST RULES – WHETHER GSTR-3B IS ONLY STOP-GAP ARRANGEMENT AND NOT A RETURN IN LIEU OF FORM GSTR-3; HELD - YES NOTIFICATION NO 10/2017 DT 28-06-2017 INTRODUCED GSTR-3B IN LIEU OF GSTR-3 LATER ON RECTIFIED IT MISTAKE RETROSPECTIVELY VIDE NOTIFICATION NO 17/17 DT 27-07-2017. IMPUGNED PRESS RELEASE HELD TO BE ILLEGAL.

[AAP AND CO. J-287]

HSN Code on Goods

SULEKH SARITA PART I TO V – PRINTED BOOKS CLASSIFIABLE UNDER HSN 4901 OR EXERCISE BOOKS UNDER HSN 4820 OF GST ACT, 2017 – FUNCTIONAL CHARACTERISTICS OF BOOKS – THE BOOKS POSE QUESTIONS TO THE CHILD TO ANSWER AND TEACHERS EVALUATE ABOUT CHILD'S ABILITY AND UNDERSTANDING – EXERCISE BOOKS ARE SIMPLY BOUND VOLUME OF BLANK PAGES CONTAINING LINES TO FACILITATE WRITING –REVERSING AAR RULING, COURT SAID PRACTICE BOOKS PUBLISHED AND SOLD BY THE PETITIONER WERE CLASSIFIABLE UNDER HSN 49.01 AND EXEMPTED FROM GST.

[Sonka Publication (India) Pvt. Ltd. J-149]

HSN Code on Service

COMPANY PROVIDING ONLINE FANTASY SPORTS GAMING AND PAYING GST UNDER ENTRY 998439 – WHETHER IT WAS CONDUCTING ILLEGAL OPERATIONS OF GAMBELLING/BETTING/WAGERING IN THE GUISE OF ONLINE FANTASY SPORTS GAMING; HELD – NO. ONLINE FANTASY SPORTS ARE NOT GAMBELLING BUT A GAME OF SKILL, NOR OF MERE CHANCE. WHETHER COMPANY IN ERROR TO PAY GST @ 18% UNDER ENTRY 998439 FOR ON-LINE GAMING ACTIVITIES; HELD – NO.

[Gurdeep Singh Sacher J-210]

Input Tax Credit under DVAT

DISALLOWANCE OF INPUT TAX CREDIT U/S 9(2)(g) of DVAT ACT, 2004. REFUND U/S 38(3) OF THE ACT – REVENUE DISALLOWED ITC ON THE BASIS OF TAX NOT VERIFIED OF SELLING DEALER AND HIS EXTENDED DEALER – DEFAULT ASSESSMENT OF TAX & INTEREST ISSUED – DEMAND CREATED AGAINST LONG OVERDUE REFUND – REVENUE APPLIED SECTION 40A WITHOUT ADDUCING EVIDENCE ON RECORD TO PROVE THE COLLUSION BETWEEN PURCHASERS AND SELLING DEALER – WHETHER CORRECT; HELD NO – BECAUSE THERE WAS NO PRIVITY OF CONTRACT BETWEEN APPELLANT AND SUPPLIER OF SELLING DEALER. APPEAL ALLOWED.

[Pratishtha Industries J-98]

INPUT TAX CREDIT DISALLOWANCE U/S 9(2)(g) OF DVAT ACT, 2004 – DEFAULT ASSESSMENT OF TAX & INTEREST AND NOTICE OF ASSESSMENT OF PENALTY U/S 86(10) ISSUED – MISMATCH IN 2A & 2B – SELLING DEALER DID NOT DEPOSIT THE TAX – APPELLANT PRODUCED BILL AND BANK STATEMENT AND REFERRED THE JUDGEMENT OF DELHI HIGH COURT. OHA DISMISSED THE OBJECTION AND ALSO IMPROVED THE ORDER OF ASSESSING AUTHORITY BY INVOKING SECTION 40(A) OF THE DVAT ACT, 2004 – OHA TOOK THE PLEA THAT WHY DEALER DID NOT PURSUE TO RECOVER THE TAX FROM PURCHASING DEALER – WHETHER JUSTIFIED; HELD – NO. OHA HAD NO POWER TO REVIEW THE ORDER PASSED BY VATO – ORDER SET ASIDE.

[Vicky Plast J-271]

INPUT TAX CREDIT U/S 9(1) OF DVAT ACT, 2004 – REFUND U/S 38(3) – NO MISMATCH IN ANNEXURE 2A & 2B REPORT – ITC NOT VERIFIED ON THE BASIS OF PROFILE of EXTENDED SELLING DEALERS – SECTION 9(2)(g) INVOKED – SECTION 40A APPLIED – DEFAULT ASSESSMENT FRAMED. REFUND ADJUSTED – WHETHER JUSTIFIED; HELD – NO.

Interest Liability

DAYS- DELAY CAUSED DUE TO SHORTAGE OF FUNDS TO PAY THE BALANCE TAX LIABILITY AFTER SET OFF OF ITC AVAILABLE – WHETHER INTEREST PAYABLE ON NET TAX LIABILITY AFTER DEDUCTING ITC OR GROSS TAX LIABILITY?

HELD - INTEREST PAYABLE ON GROSS TAX LIABILITY FOR THE REASON THAT TAX PAID ON INPUTS BECOMES INPUT TAX CREDIT ONLY WHEN A CLAIM IS MADE IN THE RETURN FILED AS SELF ASSESSED.

[Megha Engineering & Infrastructures Ltd. J-128]

Inter-State Sales

CENTRAL SALES TAX – INTERSTATE SALES – CONCESSIONAL RATE OF TAX U/S 8 OF CENTRAL SALES TAX ACT,1956 READ WITH RULE 12 OF CENTRAL SALES TAX RULES,1957 – CLAIM DISALLOWED FOR NOT PRODUCING GR – NOTICE OF DEFAULT ASSESSMENT OF TAX AND INTEREST AND NOTICE OF ASSESSMENT OF PENALTY ISSUED – OHA RELIED UPON THE STATEMENT OF TRANSPORTER AND REJECTED THE OBJECTION PETITION – OPPORTUNITY OF CROSS EXAMINATION OF TRANSPORTER DENIED – VIOLATION OF PRINCIPLE OF NATURAL JUSTICE – VATO AUDIT HAD NO JURISDICTION TO ASSESS AS POWER NOT DELEGATED U/S 68 OF DVAT ACT – PENALTY ORDER PASSED WITHOUT SERVING SHOW CAUSE NOTICE AND NONE OF THE CONDITIONS WERE SATISFIED U/S 86(10) – WHETHER ORDER LEVYING PENALTY JUSTIFIED; HELD – NO.

VATO (AUDIT) PASSED THE ORDERS WITHOUT AUTHORITY OF LAW. IN THE LIGHT OF SUPREME COURT AND HIGH COURT JUDGMENTS CITED IN THE BODY OF ORDERS – VAT TRIBUNAL SET ASIDE THE ORDERS OF VATO (AUDIT) AS WELL AS THE ORDER OF OHA – APPEAL ALLOWED.

[Amit Industries J-385]

ITC Through Tran - 1

TRAN-1 APPLICATION U/S 140 OF BIHAR GOODS AND SERVICES TAX ACT,2017 – CLAIMING TRANSITIONAL BGST CREDIT ON THE BASIS OF CARRY FORWARD INPUT TAX CREDIT EARNED UNDER BVAT ACT AND ENTRY TAX ACT AS MANIFEST FROM ASSESSMENT ORDERS FOR YEAR 2007 AND 2011 – DUE TO MISTAKE OF ACCOUNTANT CARRY FORWARD OF ITC NOT REFLECTING IN SUBSEQUENT YEARS – REVENUE REJECTED TRAN-1 APPLICATION INVOKING SECTION 73(1) OF BGST ACT,2017 – TAX, INTEREST AND PENALTY ORDER PASSED – WRIT PETITION FOR QUASHING OF THE ORDER BEING ILLEGAL AND WITHOUT JURISDICTION IN TERM OF SECTION 73(1) OF BGST ACT – WHETHER THE PETITIONER COULD NOT HAVE BEEN SUBJECTED TO A PROCEEDING UNDER

SECTION 73 OF THE BGST ACT,2017 FOR THE ENTIRE CREDIT REFLECTING IN THE LEDGER WITHOUT QUANTIFICATION OF THE AMOUNT WHICH HAS BEEN EITHER AVAILED OR UTILIZED; HELD – NO.

MERE REFLECTION OF THE TRANSITIONAL CREDIT IN THE APPLICATION U/S 140 WOULD NOT AMOUNT TO EITHER AVAILMENT OR UTILIZATION OF THE CREDIT – ALL TAXES PAID TILL DATE – THERE IS NO QUESTION OF AVAILMENT OR UTILIZATION – NO CHANGE IN CREDIT BALANCE SINCE JULY,2017 UPTO NOV., 2018 EXCEPT SOME MINOR SHIFTS HERE AND THERE – THE LEGISLATIVE INTENT REFLECTED FROM A PURPOSEFUL READING TO THE PROVISIONS UNDERLYING SECTION 140 ALONGSIDE THE PROVISIONS OF SECTION 73 AND RULES 117 AND 121 IS THAT EVEN A WRONGLY REFLECTED TRANSITIONAL CREDIT IN AN ELECTRONIC LEDGER ON ITS OWN IS NOT SUFFICIENT TO DRAW PENAL PROCEEDINGS UNTIL THE SAME OR ANY PORTION THEREOF, IS PUT TO USE SO AS TO BECOME RECOVERABLE ORDER PASSED BY REVENUE U/S 73 OF BGST ACT – HELD ILLEGAL AND AN ABUSE OF THE STATUTORY JURISDICTION AND QUASHED AND SET ASIDE.

[Commercial Steel Engineering Corporation J-326]

Limitation for Dipose of Objection Under DVAT Act

LIMITATION FOR DISPOSE OF OBJECTION UNDER SECTION 74(8) OF DVAT ACT, 2004 – OBJECTION PENDING BEFORE THE OBJECTION HEARING AUTHORITY – NOT DECIDED WITH IN TIME PRESCRIBED IN SECTION 74(7) – OHA BEING BUSY – NOTICE DVAT-41 SERVED TO COMMISSIONER – HEARING OF OBJECTION TOOK PLACE AND ALL RELEVANT DOCUMENTS PRODUCED – 15 DAYS PERIOD TO DECIDE THE OBJECTION AFTER SERVICE OF NOTICE EXPIRED – ANOTHER NOTICE OF HEARING SERVED ON THE PETITIONER – WRIT PETITION FOR QUASHING THE FRESH HEARING NOTICE AND FOR DECLARATION THAT THE OBJECTION SHOULD BE DEEMED ALLOW U/S 74(9) – DEEMING PROVISION OF SECTION 74(9) WOULD ONLY GET TRIGGERED IF THE CONDITIONS PROVIDED U/S 74(8) ARE SATISFIED – REVENUE SUBMISSIONS ON GROUND OF SERVICE OF DVAT-41 NOT IN TERMS OF SECTION 74(8) AS NOTICE WAS NOT SERVED TO OHA WERE REJECTED – LIMITATION PERIOD AS PER SECTION 34(2) OF THE ACT WOULD NOT APPLY AS TO ONE YEAR PERIOD FOR COMMISSIONER TO DEAL WITH OBJECTION –THE COURT DECLARED THAT THE OBJECTION FILED IN TERMS OF SECTION 74(7) READ WITH SECTION 74(8) AND 74(9) DEEMED TO HAVE BEEN ALLOWED BY OHA.

[Combined Traders J-343]

Penalty

NOTICE OF ASSESSMENT OF PENALTY UNDER SECTION 86(14) OF DELHI

VALUE ADDED TAX ACT, 2004 – NON COMPLIANCE OF NOTICE UNDER SECTION 59(2). APPELLANT ARGUED BEFORE OHA THAT NO NOTICE WAS SERVED – OHA REDUCED PENALTY TO Rs. 25,000/- APPELLANT ARGUED BEFORE VAT TRIBUNAL THAT ANNUAL TURNOVER WERE Rs. 26,00,000/- WITH NO TAX LIABILITY – PENALTY REDUCED TO Rs. 10,000/-.

[Style AD J-199]

WHETHER SUBMISSION OF UNSIGNED HARD COPY OF RETURN FOLLOWED BY QUARTERLY RETURN FILED ELECTRONICALLY LIABLE TO PENALTY U/S 86 (10) OF DVAT ACT, 2004 READ WITH SECTION 9(2) OF CST ACT, 1956 – NO DEFICIENCY OR CORRECTION NOTICE ISSUED BY DVAT DEPARTMENT – PENALTY LEVIED BY A.A. REDUCED BY TRIBUNAL – WHETHER PENALTY JUSTIFIED – HELD – NON-SIGNING IN THIS CASE WAS A IRREGULARITY WHICH COULD HAVE BEEN CURED BY ASKING THE ASSESSE TO SUBMIT A SIGNED COPY AND IT DID NOT MAKE A RETURN FALSE, MISLEADING OR DECEPTIVE U/S 86 (10) – PENALTY ORDER SET ASIDE.

[Asian Computronics & Elecs. J-357]

[See also Inter State Sales J-385]

Power of Inspection, Search & Seizure

SECTION 67 OF CGST ACT, 2017 – POWER OF INSPECTION, SEARCH AND SEIZURE – PROCEEDINGS FOR CONFISCATION OF GOODS AND CRIMINAL PROSECUTION INITIATED AGAINST PETITIONER – PETITION SEEKING DIRECTION TO AUTHORITIES TO OPEN THE SEAL TO THE PREMISES – PETITIONER ADVISED TO MAKE AN APPLICATION U/S 67(6) BEFORE COMPETENT AUTHORITY WHO SHALL LOOK INTO THE SAME AND PASS APPROPRIATE ORDER.

[Ikhlaq Mohammad Ismail Shaikh J-535]

Power to Arrest

ARREST – GST - ANTICIPATORY BAIL – HELD - THE OFFENCE UNDER CGST WILL BE NON-BAILABLE ONLY IF CLEAR CUT VIOLATION OF MORE THAN RS. 5.00 CRORE IS FOUND AS PROVIDED UNDER SEC. 132 OF THE CGST ACT. RESPONDENT FINDS CLEAR VIOLATION OF Rs.3.00 CRORES IN THIS CASE – INVESTIGATION ALREADY GOING ON AND ACTUAL ITC RANGES UPTO Rs.24.00 CRORES, BUT STILL INVESTIGATION NOT COMPLETED.

DIRECTION ISSUED TO RESPONDENT THAT IN CASE AFTER INVESTIGATION OF FINDING ANY OFFENCE WHICH IS NON-BAILABLE AS PER PROVISION OF CGST ACT I.E. UNDER SECTION 132 OF THE ACT IS MADE OUT, RESPONDENT WILL

GIVE A NOTICE OF FOUR DAYS TO APPLICANT PRIOR TO ARREST – APPLICANT WILL KEEP ON JOINING THE INVESTIGATION AS & WHEN REQUIRED UNDER SECTION 70 OF THE CGST ACT.

THE ORDER IS VALID FOR TWO MONTHS.

[Gaurav Singhal J-90]

POWER OF ARREST UNDER SECTION 69 OF CGST ACT – REFUND SCAM – DUMMY EXPORT FIRMS AVAILED REFUND – SEARCH AT RESIDENCE OF PETITIONER No. 2 WHO ALLEGED TO BE OWNER OF EXPORT FIRMS – PETITIONER No.2 PARTICIPATED IN SEARCH TO ASSIST CLIENTS BEING TAX ADVOCATE – COMMOTION TOOK PLACE BETWEEN PETITIONER AND GST OFFICIALS – FIR LODGED AND PETITIONER WERE ARRESTED AND RELEASED ON BAIL – STATEMENTS RECORDED OF DUMMY EXPORTERS WHO DISCLOSED THE NAME OF PETITIONER No. 1 BESIDES PETITIONER No. 2 – SEARCH TOOK PLACE – NO MATERIAL FOUND – FIR LODGED AGAINST PETITIONER No. 2 FOR ABSTRUCTION IN PERFORMANCE OF OFFICIAL DUTY – PETITIONER No. 2 ARRESTED – SUMMON SERVED TO PETITIONER No. 1. WRIT PETITION SEEKING QUASHING OF SUMMONS – NO EVIDENCE AGAINST PETITIONERS TO CONNECT THEM WITH FRAUD IF ANY COMMITTED BY ALLEGED FOUR DUMMY EXPORTERS – RESPONDENTS CONTENDED THAT PETITIONER No. 1 IS INVOLVED IN THE FRAUD – COURT DIRECTED NOT TO TAKE HIM IN CUSTODY WITHOUT PRIOR APPROVAL OF THE COURT – THE PETITIONER No. 1 SHALL APPEAR BEFORE RESPONDENTS AS AND WHEN SUMMONED.

[Akhil Krishan Maggu & Anr. J-637]

SECTION 69 OF CGST ACT, 2017 – POWER TO ARREST – WRIT PETITION SEEKING DIRECTION TO GST DEPARTMENT NOT TO TAKE ANY ACTION AGAINST THE PETITIONER U/S 69 READ WITH SECTION 132 WITHOUT FOLLOWING DUE PROCEDURE OF LAW OF ASSESSMENT AND ADJUDICATION OF ALLEGED EVASION OF GST – POWER OF ARREST TO BE EXERCISED WITH LOT OF CARE AND CIRCUMSPECTION – PROSECUTION SHOULD NORMALLY BE LAUNCHED ONLY AFTER THE ADJUDICATION WAS COMPLETED – DIRECTION ISSUED FOR NO COERCIVE STEPS OF ARREST SHALL BE TAKEN AGAINST THE PETITIONER.

[Vimal Yashwantgiri Goswami J-634]

Pre-Deposit

PRE-DEPOSIT – THIRD PROVISO TO SECTION 74(1) OF DVAT ACT, 2004 – ASSESSING AUTHORITY CREATED HUGE DEMAND WITHOUT PROPER SERVICE OF NOTICES AND NO REASONABLE OPPORTUNITY OF HEARING WAS GIVEN – OHA DIRECTED TO DEPOSIT Rs. 22,00,000/- IN RESPECT OF TAX AND INTEREST AND Rs. 8,00,000/- IN RESPECT OF PENALTY ORDER – NO SEPARATE NOTICE WAS ISSUED BEFORE IMPOSING PENALTY ORDER. ASSESSMENT ORDERS

Public Interest Litigation

Recovery Proceedings

Rectification of 3B Manually

Refund

INVOICE ISSUED BEING CONSIDERED AS PROOF OF EXPORT OF GOODS – WHETHER CORRECT PROPOSITION IN VIEW OF IGST ACT OR IT IS INTRASTATE SUPPLY LIABLE TO CGST AND SGST? HELD- NEITHER CUSTOM DUTY NOR IGST IS PAYABLE ON GOODS IMPORTED AND KEPT IN CUSTOM WAREHOUSE AND ACCUMULATED UNUTILISED ITC REFUNDABLE TO DUTY FREE SHOP ON SALES TO INTERNATIONAL PASSENGERS.

[Atin Krishna J-231]

REFUND U/S 38(3) OF DELHI VALUE ADDED TAX ACT, 2004 – INTEREST U/S 42 – INPUT TAX CREDIT DISALLOWANCE U/S 9(2)(g) – DEFAULT ASSESSMENT ORDERS PASSED AFTER EXPIRY OF FOUR ASSESSMENT YEARS – LIMITATION OF SIX YEARS UNDER PROVISO TO SECTION 34(1) EXERCISED – DEFAULT ASSESSMENT ORDERS DID NOT REVEAL ANY MISMATCH OF ANNEXURE 2A WITH 2B – WRIT PETITION CHALLENGING ASSESSMENT ORDERS – NO FINDING OF CONCEALING MATERIAL PARTICULARS FOR INVOCATION OF THE EXTENDED PERIOD OF 6 YEARS – IMPUGNED ORDERS CREATING DEMAND SET ASIDE AND DIRECTION ISSUED TO GIVE REFUND WITH INTEREST.

[Rockwell Industries J-143]

REFUND – SECTION 54 OF CGST ACT, 2017 – ONLINE APPLICATIONS RFD-01A FOR THE TAX PERIOD JULY, AUGUST AND SEPTEMBER, 2017 FOR CLAIMING REFUND OF EXCESS ITC OF Rs. 3,51,03,950/- WERE FILED ON 03.09.2018 & 12.09.2018 – THREE DEFICIENCY MEMOS DT 12.11.2018 ISSUED BY STATE GST AUTHORITY GIVING DIRECTION TO APPEAR AND SUBMIT THE DOCUMENTS – DEALER COMPLIED WITH THE DIRECTIONS – NO RESPONSE RECEIVED – WRIT PETITION FOR RELEASE OF REFUND – RESPONDENT DIRECTED TO PASS A SPEAKING ORDER WITHIN ONE MONTH IN ACCORDANCE WITHIN LAW – FURTHER DIRECTED IN CASE DEALER FOUND ENTITLED TO THE REFUND, RELEASE THE SAME WITHIN ONE MONTH.

[Datawind Innovations Pvt. Ltd. J-224]

WRIT PETITION – REFUND OF IGST PAID ON EXPORTS – PENDING FOR THE REASON PETITIONER AVAILED LOWER RATE DRAWBACK BUT MISTAKENLY DECLARED AVAILED AT HIGHER RATE IN THE SHIPPING BILL – COMPUTER GENERATED SYSTEM DID NOT PROCESS REFUND DUE TO INADVERTANT ERROR OF THE PETITIONER AND WHERE EGM ALSO CLOSED AND THEREFORE, RESPONDENT NOT IN A POSITION TO PROCESS REFUND DUE TO AMENDMENT IN THE SHIPPING BILL NOT POSSIBLE ON CLOSER OF EGM – WHETHER THE PETITIONER COULD BE MADE HELPLESS JUST BECAUSE THE COMPUTER SYSTEM DID NOT ENABLE RESPONDENT TO REFUND IGST AMOUNT? HELD – NO AND RESPONDENT WAS DIRECTED TO REFUND THE AMOUNT WITHIN 8 WEEKS.

[M/s. VSG Exports PVT., LTD., J-181]

WRIT PETITION SEEKING DIRECTION TO PROCESS REFUND WITH INTEREST – ORDER PASSED WITHOUT INTEREST – PETITIONER RAISED OBJECTION FOR NOT GRANTING INTEREST – DIRECTION WAS GIVEN TO PRESENT COMMISSIONER BEFORE THE COURT – REVENUE FILED COUNTER AFFIDAVIT AND ARGUED THAT THE PETITIONER DID NOT FURNISH STATUTORY FORMS – PETITIONER RELIED UPON RULE 4 OF CENTRAL SALES TAX (DELHI) AMENDMENT RULES, 2014 WHICH STATES THE COMMISSIONER MAY DIRECT THE DEALER TO FURNISH SUCH FORMS AS AND WHEN REQUIRED BY HIM DURING THE PERIOD OF SEVEN YEAR.

[Lohia Warehouse Pvt. Ltd. J-31]

WRIT PETITION SEEKING DIRECTION FOR RELEASE OF REFUND – RESPONDENT FRAMED ASSESSMENT AND INVOKED SECTION 40A OF DVAT ACT – NO JURISDICTION TO PASS THE ORDERS AS VATO HAD NOT BEEN DELEGATED AUTHORITY BY THE COMMISSIONER – ORDER QUASHED. DIRECTION TO PASS THE ORDERS FRESH.

[Mahamaya Enterprises J-478]

[See also Input Tax Credit J-279]

[See also Interest Liability J-319]

[See also Power to Arrest J-637]

[See also Supply of Goods to Duty Free Shops J-32]

Refund under Income Tax Act for Belated period

REFUND U/S 237 OF INCOME TAX ACT, 1961 – REFUND OF TDS NOT CLAIMED IN RETURN – APPLICATION FOR CONDONING THE DELAY FOR FILING THE APPLICATION FOR REFUND U/S 119(2)(B) – THE PETITIONER HAD CLAIMED THAT ITS CHARTERED ACCOUNTANT HAD INADVERTENTLY OVERLOOKED THE TDS AMOUNT AT THE TIME OF FILING OF THE RETURN – NOT FILED ANY EVIDENCE TO PROVE THAT CREDIT OF TDS WAS NOT AVAILABLE IN FORM 26AS AT THE TIME OF FILING THE RETURN – REVISED RETURN NOT FILED DUE TO THE LACK OF KNOWLEDGE OF CHARTERED ACCOUNTANT ABOUT THE CLAIM OF TDS OF RS. 31,25,000.00 – CLAIM OF THE PETITIONER WAS NOT SUBSTANTIATED WITH ANY EVIDENCE – APPLICATION FOR CONDONING THE DELAY FOR FILING THE APPLICATION FOR REFUND REJECTED. WRIT PETITION FILED TO CHALLENGE THE ORDER OF COMMISSIONER OF INCOME TAX – WHETHER REJECTION ORDER PASSED BY COMMISSIONER WAS CORRECT – HELD; NO – THERE CANNOT BE NECESSARILY BE INDEPENDENT PROOF OR MATERIAL TO ESTABLISH THAT THE AUDITOR IN FACT ACTED WITHOUT DILIGENCE – IMPUGNED ORDER REJECTING APPLICATION FOR CONDONING

DELAY SET ASIDE AND QUASHED – PETITIONER PERMITTED TO FILE ITS REFUND CLAIM WITHIN 2 WEEKS.

[G.V. Infosutions Pvt. Ltd. J-24]

Release of Goods

SPECIAL LEAVE PETITION – RELEASE OF GOODS UNDER SECTION 67(8) OF CGST ACT, 2017 READ WITH RULE 141 OF CGST RULE, 2017 – HIGH COURT PASSED INTERIM ORDER DIRECTING THE STATE TO RELEASE THE SEIZED GOODS SUBJECT TO DEPOSIT OF SECURITY OTHER THAN CASH OR BANK GUARANTEE – WHETHER CORRECT; HELD – NO. HIGH COURT HAS ERRONEOUSLY EXTRICATED THE RESPONDENTS OF THIS CASE FROM PAYING THE APPLICABLE TAX AMOUNT IN CASH WHICH IS CONTRARY TO THE PROVISIONS OF GST ACT – THERE WAS NO REASON WHY ANY OTHER INDULGENCE NEED TO BE SHOWN WHEN MECHANISM ALREADY PROVIDED IN THE ACT AND RULES FOR RELEASE OF GOODS – SLP ACCEPTED.

[KAY PAN Fragrance Pvt. Ltd. J-525]

Reversal of ITC

AUDIT ASSESSMENT ORIGINALLY FRAMED CREATING NIL DEMAND – NOTICE OF DEFAULT ASSESSMENT OF TAX & INTEREST ISSUED U/S 32 AND NOTICE OF ASSESSMENT OF PENALTY ISSUED U/S 33 OF DVAT ACT – TIME BARRED NOTICE ISSUED FOR RECTIFICATION AND WITHOUT JURISDICTION THEREBY REVIEWING THE ORIGINAL ASSESSMENT ON GROUND THAT APPELLANT CLAIMED ITC ON PURCHASES FROM UNREGISTERED DEALER – OHA DID NOT GIVE FINDING WHY OBJECTIONS WERE REJECTED – APPELLANT DID NOT CLAIM ITC OF UNREGISTERED DEALER – PENALTY IMPOSED WITHOUT SERVING SHOW CAUSE. WHETHER CORRECT; HELD – NO – APPELLANT PRODUCED TAX INVOICES AND SHOWED PAYMENT MADE BY BANKING CHANNEL – VATO FAILED TO POINT OUT THE CONTINGENCY FOR WHICH DEFAULT ASSESSMENT HAD BEEN MADE – APPEAL ALLOWED.

[Softel Solution (P) Ltd. J-505]

Review Under DVAT Act

REVIEW PETITION U/S 76(13) OF DVAT ACT, 2004 – NON-ATTENDANCE OF APPELLANT – COUNSEL'S FATHER HAD SUDDEN HEART ATTACK WHICH ULTIMATELY LED TO DEATH – SUFFICIENT CAUSE FOR NON-ATTENDANCE – TRIBUNAL PASSED EX-PARTE ORDER – RESTORATION APPLICATION REJECTED ON THE BASIS OF MENTIONING WRONG DATE OF NON-ATTENDANCE – IN

REVIEW – REASON OF MENTIONING DATE FOR NON-ATTENDANCE WAS EXPLAINED – IT WAS BONA FIDE MISTAKE – APPELLANT SHOULD NOT SUFFER DUE TO DEFAULT OF COUNSEL – REVIEW PETITION ALLOWED.

[Pratham Telecom India (P.) Ltd. J-243]

Sales Return Under VAT

CENTRAL SALES TAX ACT, 1956 – GOODS SOLD IN 3RD QTR RETURNED IN 4TH QTR- NO REVISED RETURN FILED FOR 3RD QTR BY THE DEALER BUT VALUE OF GOODS RETURNED WERE REDUCED FROM THE TURNOVER OF THE 4TH QTR – WITHOUT SHOWING SEPARATELY IN THE COLUMN OF 'SALES RETURNS' WHETHER GOODS RETURNED WERE TAXABLE FOR NON - FILING OF REVISED RETURN - HELD – NO.

[Ranko Impex J-521]

Search and Seizure

SEARCH AND SEIZURE – RAID AT BUSINESS PREMISES BY RESPONDENT AGAINST THE INFORMATION OF HUGE CONSPIRACY AND CREATION OF BOGUS BILLS – ORDER FOR PROVISIONAL ATTACHMENT OF BANK ACCOUNT SERVED WITHOUT ANY OPPORTUNITY OF HEARING – RESPONDENT FURTHER CONDUCTED RAID AT THE PREMISES AND SEIZED SALE & PURCHASE REGISTER AND OTHER FILES – SERVED SUMMON U/S 70 OF CGST ACT – AMOUNT OF INPUT TAX CREDIT LEDGER BLOCKED WITHOUT SERVING ANY ORDER – POWER U/S 83 OF CGST ACT FOR PROVISIONAL ATTACHMENT COULD BE TERMED AS VERY DRASTIC AND FAR REACHING POWER AND SHOULD BE EXERCISED WITH EXTREME CARE AND CAUTION, ONLY IF THERE WAS SUFFICIENT MATERIAL ON RECORD – IF THE INTEREST OF THE REVENUE SUFFICIENTLY SECURED BY REVERSING THE INPUT TAX CREDIT, THEN THE AUTHORITY MAY NOT BE JUSTIFIED IN INVOKING POWER U/S 83 – OVERALL VIEW CONVINCED THAT RESPONDENTS HAD NOT ACTED IN ACCORDANCE WITH LAW – WRIT ALLOWED.

WHETHER DEMAND ORDER AND ORDER FOR PRO VISIONAL ATTACHMENT OF STOCK AND BANK ACCOUNTS LIABLE TO BE SET ASIDE, HELD – YES.

WETHER BLOCKAGE OF INPUT TAX CREDIT HELD TO BE ILLEGAL AND LIABLE TO BE SET ASIDE, HELD – YES.

[Valerius Industries J-591]

SEARCH AND SURVEY BY ENFORCEMENT TEAM U/S 60 OF DVAT ACT, 2004 – ALLEGING PURCHASES MADE FROM NON-FUNCTIONAL AND CANCELLED DEALERS – SURVEY TEAM FORCEFULLY COLLECTED Rs. 52,24,000/- AND TAKEN

STATEMENT OF APPELLANT FOR CLAIMING WRONG ITC – ITC DISALLOWED U/S 9(2)(g) – DEAMAND CREATED – ASSESSMENT FRAMED AND PENALTY IMPOSED – OHA REJECTED THE OBJECTION PETITION ON THE BASIS OF STATEMENT OF APPELLANT GIVEN BEFORE SURVEY TEAM – WHETHER JUSTIFIED; HELD – NO. DISPUTED TRANSACTIONS Were NOT VERIFIED – DIRECTION GIVEN TO ISSUE NOTICE TO SELLING DEALERS – PENALTY IMPOSED PRIOR TO GIVING SEPARATE NOTICES – ORDERS SET ASIDE TO REFRAME ASSESSMENT, AFRESH.

[Grape Marketing (P) Ltd. J-248]

SECTION 67(4) OF CGST ACT, 2017 – POWER OF INSPECTION, SEARCH AND SEIZURE – A SEARCH WAS CONDUCTED AT BUSINESS PREMISES OF THE PETITIONER AND THE SAME WAS SEALED BY COMPETENT AUTHORITY FOR THE REASON THAT COMPUTER SYSTEM OF THE DEALER STOPPED FUNCTIONING ALL OF A SUDDEN ALONG WITH INTERNET CONNECTION – WRIT PETITION – COURT DIRECTED THE REVENUE TO UNSEAL THE PREMISES AND to THE PETITIONER to CO-OPERATE FOR INSPECTION / SEARCH OF THE PREMISES, INCLUDING THE COMPUTER SYSTEM.

[Steel Hypermart India Pvt. Ltd. J-228]

Search Under Service Tax

SEARCH UNDERTOOK BY ANTI-EVASION UNIT OF SERVICE TAX – SCN ISSUED ALLEGING TAX NOT PAID ON TAXABLE SERVICES – HUGE AMOUNT OF TAX WAS SPECIFIED TO BE PAID – PETITIONER DREW THE ATTENTION TO THE MASTER CIRCULAR DT 10th MARCH, 2017 READ WITH INSTRUCTION DT 21st DEC,2015 ISSUED BY CBEC WHETHER THE PETITIONER WAS TO BE SERVED PRE-NOTICE – CONCLUSION IN TERMS OF PARA 5.0 OF MASTER CIRCULAR – HELD - YES. THE MANDATORY CHARACTER OF MASTER CIRCULAR IS GIVEN TO SECTION 83 OF THE FINANCE ACT,1994 – WRIT PETITION ALLOWED WITHOUT EXPRESSING ANY VIEW ON MERITS .THE RESPONDENT WILL NOW FIX A DATE ON WHICH THE AUTHORIZED REPRESENTATIVE OF THE PETITIONER WOULD BE HEARD. THE HIGH COURT SET ASIDE THE IMPUGNED SCN.

[Amadeus India Pvt. Ltd. J-310]

Seizure and Release of Goods

SEIZURE AND RELEASE OF GOODS U/S 129 OF CGST ACT, 2017 – GOODS WERE NOT ACCOMPANIED BY E-WAY BILL – GOODS AND VEHICLE SEIZED – PETITIONER CONTENDED THAT SITE WAS NOT FUNCTIONING, THE E-WAY BILL COULD NOT BE GENERATED. SUBSEQUENTLY THE SAME WAS DOWNLOADED.

NO INTENTION TO EVADE TAX – WRIT PETITION CHALLENGING SEIZURE – DIRECTION ISSUED TO RELEASE THE GOODS AND VEHICLE ON FURNISHING SECURITY OTHER THAN CASH AND BANK GUARANTEE.

[Abhay Traders J-83]

Show Cause Notice

SECTION 74 OF CGST ACT, 2017 – WRIT CHALLENGING LEGALITY AND VALIDITY OF THE SHOW CAUSE NOTICE ISSUED BY DY. COMMISSIONER OF STATE TAX IN EXERCISE OF HIS POWERS U/S 74(1) OF CGST/GGST ACT – DY. COMMISSIONER OF STATE TAX HAD NO JURISDICTION TO ISSUE SUCH A SHOW CAUSE NOTICE – RELIEF GRANTED TO THE PETITIONER THROUGH INTERIM ORDER IN HIS FAVOUR – NOTICE ISSUED TO THE GST AUTHORITY.

[Nayara Energy Ltd. J-539]

Special Leave Petition

SPECIAL LEAVE PETITION – NOTICE TO CLUB FOR NON DEPOSIT OF SALES TAX FOR SUPPLY OF FOODS, DRINKS, ETC. TO ITS PERMANENT MEMBERS – RESPONDENTS ARGUED ON DOCTRINE OF MUTUALITY AND TO BE TREATED AS AGENT OF PERMANENT MEMBERS – BODY OF PERSONS WILL NOT INCLUDE AN INCORPORATED COMPANY, NOR WILL IT INCLUDE ANY OTHER FORM OF INCORPORATION INCLUDING AN INCORPORATED COOPERATIVE SOCIETY.

COURT HELD THAT CLUBS CANNOT BE TREATED AS SEPARATE FROM THEIR MEMBERS – NO SALES TAX OR SERVICE TAX LEVIABLE.

[Calcutta Club Limited & Ors. J-395]

[See also Release of Goods J-525]

Stay of Deposit

SECTION 171 OF CGST ACT, 2017 AND CHAPTER XV OF CGST RULES – NATIONAL ANTI-PROFITEERING AUTHORITY (NAPA) GAVE DIRECTION TO DEPOSIT Rs. 41,42,97,629.35 WITH CENTRAL AND STATE CONSUMER WELFARE FUNDS IN A 50:50 RATIO FOR INDULGING IN PROFITEERING BY CHARGING MORE PRICE – WRIT PETITION FILED TO CHALLENGE ORDER PASSED BY NAPA.

HELD – PETITIONER MADE OUT A PRIMA FACIE CASE – DIRECTION TO STAY THE DEPOSIT THE SUM OF Rs. 20 CRORE PAYABLE TO CENTRAL CWF – FURTHER PROCEEDINGS PURSUANT TO NOTICE DT 4.02.2019 WERE STAYED AS WELL.

[Jubilant Foodworks Ltd. & Anr. J-174]

Stock Transfer

STOCK TRANSFER U/S 6A OF CENTRAL SALES TAX ACT, 1956 – STOCK TRANSFERRED TO BRANCH IN MARCH, 2013 – BRANCH RECEIVED GOODS IN APRIL – "F" FORMS ISSUED FOR APRIL MONTH – EXEMPTION DENIED – DEFAULT ASSESSMENT U/S 9(2) OF CST ACT – WHETHER CORRECT; HELD NO.

PROCEDURAL IRREGULARITIES AND TECHNICALITIES CANNOT OVERRIDE THE SUBSTANTIVE PROVISIONS AND BENEFIT OF "F" FORM CANNOT BE DENIED.

[Madhura Garments J-93]

Supply of Goods to Duty Free Shops

TAXABLE SUPPLY UNDER GOODS AND SERVICES TAX ACT, 2017 – REFUND U/S 54 – DEFINITION OF EXPORT OF GOODS U/S 2(5) OF IGST ACT, 2017 – INTENTION TO SUPPLY GOODS TO DUTY FREE SHOPS WITHOUT PAYMENT OF GST SITUATED IN DUTY FREE AREA AT INTERNATIONAL AIRPORT – WRIT PETITION FILED SEEKING DIRECTION OF GOODS AND SERVICE MADE BY THE INDIAN SUPPLIER TO THE DUTY FREE SHOPS IN INDIA TO BE TREATED AS AN EXPORT WITHOUT PAYMENT OF CGST AND IGST SINCE LOCATION OF BUYER IS BEYOND THE CUSTOM FRONTIER OF INDIA – SEEKING DIRECTION ALSO REFUND IS TO BE PROVIDED AGAINST INPUT TAX CREDIT LEVIED ON GOODS SUPPLIED BY SUPPLIER TO THE DUTY FREE SHOPS IN INDIA.

DUTY FREE AREA AT INTERNATIONAL AIRPORT CANNOT BE SAID TO BE LOCATED OUTSIDE INDIA INSTEAD THE DUTY FREE SHOP IS LOCATED WITHIN INDIA – SUPPLY DOES NOT QUALIFY AS EXPORT OF GOODS UNDER GST AND CONSEQUENTLY NO REFUND CAN BE CLAIMED OF UNUTILIZED INPUT TAX CREDIT – COURT DECLINED TO ISSUE WRIT OF MANDAMUS DIRECTING RESPONDENTS NOT TO CHARGE GST – WRIT PETITION DISMISSED.

[Vasu Clothing Private Limited J-32]

Time Extension for Final Registration

WRIT PETITION SEEKING EXTENSION OF TIME TO OBTAIN FINAL REGISTRATION – PREMISES OF PETITIONER LOCATED AT A VERY REMOTE AREA – POLITICAL DISTURBANCES WERE GOING ON AND PREVENTING THE PETITIONER FROM TAKING APPROPRIATE STEPS TO OBTAIN FINAL REGISTRATION – DIRECTION ISSUED TO CONSIDER THE REQUEST OF THE PETITIONER.

[MGI Infra Pvt. Ltd. J-84]

Time Limit for Filing Tran-1

SECTION 140 OF CGST ACT, 2017 – TRANSITIONAL ARRANGEMENTS FOR INPUT TAX CREDIT – NO TIME LIMIT PRESCRIBED UNDER SECTION 140 TO CARRY FORWARD UNUTILIZED CREDIT – RULE 117 OF CGST RULES PRESCRIBED TIME LIMIT OF 90 DAYS – PETITIONERS COULD NOT FILE TRANS – 1 OR INCORRECT FORM UPLOADED – WRIT PETITIONS – CONTENDING UNUTILIZED INPUT TAX CREDIT IS VESTED RIGHT WHICH COULD NOT BE WASHED AWAY – REVENUE HAS NO AUTHORITY TO DENY CREDIT ON TECHNICAL OR PROCEDURAL GROUNDS – THE COURT HELD THAT TIME PRESCRIBED UNDER RULE 117 FOR PURPOSES OF CLAIMING TRANSITIONAL CREDIT MERE PROCEDURAL IN NATURE NOT A MANDATORY PROVISION – DIRECTIONS ISSUED TO PERMIT THE PETITIONERS TO FILE OR REVISE WHERE ALREADY FILED INCORRECT TRAN-1 EITHER ELECTRONICALLY OR MANUALLY – WRIT PETITIONS ALLOWED.

[Adfert Technologies Pvt. Ltd. J-449]

Tran-1

GST – TRAN-1 FORM – CLAIMING INPUT TAX CREDIT ON STCOK HELD UPTO 30.06.2017 UNDER SECTION 140 OF CGST ACT – TECHNICAL GLITCHES IN UPLOADING TRAN-1 FORM – PETITIONER UPLOADED FORM BUT CREDIT NOT REFLECTED IN ELECTRONIC CREDIT LEDGER – EMAIL RECEIVED FROM GSTIN ABOUT SUCCESSFUL FILING.

WRIT PETITION SEEKING RELIEF – DIRECTION ISSUED TO THE RESPONDENTS TO EITHER OPEN THE PORTAL AS TO TRAN-1 – TO ENABLE PETITIONER TO FILE AGAIN OR TO ACCEPT MANUALLY.

[Bhargava Motors J-157]

REVISION OF DECLARATION IN FORM GST TRAN – 1 UNDER SECTION 140(3) OF CGST ACT READ WITH RULE 117, 118, 119, 120 AND RULE 120A – CREDIT OF SAD COULD NOT CLAIM IN ORIGINAL TRAN-1 – CORRESPONDANCE MADE WITH GST COUNSEL BUT NO RESULT CAME OUT – WRIT PETITION SEEKING DIRECTION TO FILE A REVISED DECLARATION – WHETHER COMMISSIONER HAS POWER TO EXTEND THE TIME FOR AN UNLIMITED OR INDEFINITE PERIOD; HELD – NO. THAT SURETY COULD NOT HAVE BEEN THE PURPOSE AND INTENTION OF THE LEGISLATURE – FIRST PROVSIO TO RULE 117 SPEAK FOR EXTENSION NOT EXCEEDING NINETY DAYS – WRIT DISMISSED.

[Ingersoll-Rand Technologies and Services Pvt. Ltd. J-669]

SECTION 140(3) OF CGST ACT, 2017 READ WITH RULE 117 OF CGST RULES – WRIT PETITION – APPLICANT FAILED TO FILE GST TRAN-1 DUE TO TECHNICAL GLITCHES – WHETHER DIRECTION CAN BE GIVEN TO RESPONDENTS FOR BEING PERMITTED TO FILE DECLARATION IN FORM GST TRAN-1 AND GST TRAN-2 RESPECTIVELY TO ENABLE THE WRIT APPLICANTS TO CLAIM TRANSITIONAL CREDIT OF THE ELIGIBLE DUTIES IN RESPECT OF THE INPUTS HELD IN STOCK ON APPOINTED DAY; HELD – YES.

WHETHER DUE DATE CONTEMPLATED UNDER RULE 117 OF CGST RULES FOR THE PURPOSES OF CLAIMING TRANSITIONAL CREDIT WAS PROCEDURAL IN NATURE AND THUS SHOULD NOT BE CONSTRUED AS A MANDATORY PROVISION; HELD - YES.

[Siddharth Enterprises J-545]

Transitional Credit of Cess In GST

WRIT PETITION CHALLENGING THE DENIAL OF TRANSITIONAL CREDIT OF EDUCATION CESS / SECONDARY AND HIGHER EDUCATION CESS AND KRISHI KALYAN CESS – TRANSITIONAL ARRANGEMENTS FOR CLAIMING INPUT TAX CREDIT U/S 140 OF GOODS AND SERVICE TAX ACT, 2017 – DECLARATION IN FORM – TRAN -1 CLAIMING CREDIT OF EC, SHEC AND KKC ACCRUED IN SERVICE TAX REGIME- APPLICATION FOR CARRY FORWARD AND UTILIZATION OF CREDIT REJECTED ON THE GROUND THAT CREDIT COULD BE SET OFF ONLY AGAINST SPECIFIC DUTIES AND TAXES ENUMERATED IN THE EXPLANATION TO SECTION 140(1) OF THE ACT R/W 117 OF THE RULES.

PETITIONER'S CONTENTION WERE THAT NO SPECIFIC PROVISION PROVIDED FOR LAPSING OF THE CREDIT ACCUMULATED IN CENVAT REGISTER – SECTION 140(8) OF CGST ACT ENTITLES TO AVAIL UTILIZATION OF THE CREDIT CARRIED FORWARD IN A RETURN ENDING WITH THE DAY IMMEDIATELY PRECEDING THE APPOINTED DATE – PROVISO OF SECTION 140(1) SPECIFICALLY DELINEATES THESE CIRCUMSTANCES AND CONDITIONS WHEREIN CREDIT AVAILED MAY NOT BE UTILIZED AND THERE IS NOTHING THEREUNDER TO MILITATE AGAINST THE AVAILMENT IN QUESTION – STATUTORY PROVISIONS CANNOT BE INTERPRETED IN SUCH A WAY AS TO DEFEAT A LEGITIMATE STATUTORY RIGHT.

REVENUE ARGUED THAT SECTION 140 DOES NOT PROVIDE FOR UTILIZATION OF EC, SHEC, AND KKC AND CESS WAS ABOLISHED IN 2015 & 2016 – THE COURT OBSERVED THAT INSTRUCTIONS ISSUED BY CBEC DT 07/12/2015 FOR NOT TO ALLOW UTILIZATION OF ACCUMULATED CREDIT OF EC, SHEC NOWHERE STATED THAT CREDIT HAD LAPSE. REVENUE HAD NOT MADE

OUT ANY BAR FOR THE TRANSITIONING OF EC, SHEC AND KKC INTO THE GST REGIME- SECTION 140(8) DELT WITH CENTRALISED REGISTRATION AND PROVIDED TRANSITIONING OF CREDIT REFLECTING CARRY FORWARD OF CLOSING BALANCE – AMENDMENT CARRIED OUT IN SECTION 25 TO INSERT THE PHRASE ELIGIBLE DUTIES AFTER THE PHRASE CENVAT CREDIT WAS RESTRICTED ONLY TO SUB SECTION (1) OF SECTION 140 BUT DID NOT TOUCH SUB SECTION (8) OF THE SECTION 140 – WRIT ALLOWED.

[Sutherland Global Services Pvt. Ltd. J-479]

Transitional Provisions

TRANSITIONAL PROVISIONS - CENTRAL GOODS AND SERVICES TAX ACT, 2017 – CONSTITUTIONAL VALIDITY OF CLAUSE (IV) OF SUB-SECTION (3) OF SECTION 140 – CONDITION TO CLAIM CREDIT OF ELIGIBLE DUTIES BY A FIRST STAGE DEALER THAT "SUCH INVOICES OR OTHER PRESCRIBED DOCUMENTS SHOULD NOT BE EARLIER THAN 12 MONTHS IMMEDIATELY PRECEDING THE APPOINTED DATE" CHALLENGED BY WAY OF WRIT PETITION – HELD THE PROVISION ACTS HARSHLY, UNJUSTLY, ARBITRARILY, DISCRIMINATORY AND TAKES AWAY THE VESTED RIGHT TO CLAIM CREDIT – THE PROVISION HELD TO BE UNCONSTITUTIONAL REJECTING THE EXPLANATION OF THE REVENUE FOR IMPOSING CONDITION TO CLAIM CREDIT THAT PHYSICAL IDENTIFICATION OF GOODS WAS ESSENTIAL FOR PREVENTING UNDUE ADVANTAGE BEING TAKEN BY FIRST STAGE DEALERS AND FOR ADMINISTRATIVE CONVENIENCE – FURTHER, NO SUCH LIMITATION OF TIME PRESCRIBED IN THE PROVISO TO SUB-SECTION (3) OF SECTION 140 WHEN A DEALER IS NOT IN POSSESSION OF ANY INVOICE OR OTHER DOCUMENT EVIDENCING PAYMENT OF DUTY – COURT HELD THAT IMPUGNED PROVISION DID NOT MAKE HOSTILE DISCRIMINATION BETWEEN SIMILAR SITUATED PERSONS BUT IMPOSED A BURDEN WITH RETROSPECTIVE EFFECT WITHOUT ANY JUSTIFICATION AND STRUCK DOWN THE SAME BEING UNCONSTITUTIONAL.

[Filco Trade Centre Pvt. Ltd. J-2]

Validity of C Form

NOTIFICATION ISSUED BY COMMISSIONER VAT DECLARING AND ACTED UPON ISSUED C FORMS AS OBSOLETE AND INVALID – RULE 5(13) & 5(14) OF CENTRAL SALES TAX (DELHI) RULES MADE THE REQUIREMENT OF SURRENDER OF THE UNUSED FORMS OF SERIES, DESIGN OR COLOUR – THE COURT DID NOT ACCEPT THE PRAYER OF RESPONDENTS THAT THE MATTER WAS COVERED BY JAIN MANUFACTURING (INDIA) PVT. LTD. AND JAI GOPAL INTERNATIONAL IMPEX PVT. LTD. IN WHICH SUPREME COURT HAD GRANTED

STAY – NOTIFICATION ISSUED UNDER RULE 5(13) BY THE COMMISSIONER VAT, NEW DELHI QUASHED – WRIT PETITION ALLOWED.

[Maa Jagdamba Traders J-316]

Validity of Notification

EXERCISE OF POWER BY VAT COMMISSIONER UNDER RULE 8(10) OF CENTRAL SALES TAX (DELHI) RULES, 2005 – VALIDITY OF ISSUANCE OF NOTIFICATION FOR CANCELLATION OF "F" FORMS – THE POWER ALLOWS TO DECLARE UNUSED FORMS OF A PARTICULAR SERIES, COLOUR AND DESIGN AS OBSOLETE. WRIT PETITION CHALLENGING THE POWER OF COMMISSIONER ALSO CHALLENGING RULE 8(10) OF CST (DELHI) RULES, 2005 AS BEING ULTRAVIRES THE RULE MAKING POWER OF THE GOVERNMENT UNDER SECTION 13(4)(e) OF CST ACT – REVENUE RELIED ON THE ORDER PASSED BY THE COURT IN THE CASE OF JAI GOPAL INTERNATIONAL IMPEX PVT. LTD. AND JAIN MANUFACTURING (INDIA) PVT. LTD. WHEREIN PETITIONERS GOT RELIEF BUT THE ORDERS HAVE BEEN STAYED BY THE SUPREME COURT. THE COURT DISTINGUISHED THE CASE WITH JAI GOPAL INTERNATIONAL IMPEX PVT. LTD. AND JAIN MANUFACTURING (INDIA) PVT. LTD. – NOTIFICATION STAYED ISSUED BY COMMISSIONER DT 18.06.2018 CANCELLING "F" FORMS ISSUED BY THE DEALER.

[Sheel Chand Agroils (P) Ltd. J-85]

Writ Petition

[See also Block of Refund under GST Act J-362]
[See also Cancellation of Issued C Forms J-107]
[See also Detention of Goods J-164]
[See also Detention of Goods J-177]
[See also Detention of Goods J-226]
[See also E-way Bills J-169]
[See also Filing of Tran-1 J-382]
[See also GST Return 3B J-287]
[See also Rectification of 3B Manually J-447]
[See also Interest Liability J-128]
[See also Interest Liability J-319]
[See also ITC through Tran-1 J-326]
[See also Power to Arrest J-634]
[See also Recovery Proceedings J-586]

[2019] 57 DSTC 1 (Delhi)

In the Supreme Court of India

[Hon'ble Justice A.K. Sikri, Hon'ble Justice S. Abdul Nazeer and Hon'ble Justice M.R. Shah]

Civil Appeal No. 9142-9144/2010
with Civil Appeal No. 6156/2012

Ram Siromani Tripathi & Ors. ... Appellant(s)

Vs.

State of U.P. & Ors. ... Respondent(s)

Date of Order: 07.02.2019

COUNSEL OUT OF STATION – WHETHER A GROUND TO SEEK ADJOURNMENT – HELD; NO. REQUEST FOR ADJOURNMENT REJECTED AND EVEN APPLICATION FOR RESTORATION NOT TO BE ENTERTAINED.

Present for the Appellant(s) : Mr. R.K. Ojha, Adv.
For Mr. Balraj Dewan, AOR (N.P.)
Dr. Vinod Kumar Tewari, AOR (N.P.)

Present for Respondent(s) : Mr. Pramod Swarup, Sr. Adv.
Ms. Prerna Swarup, Adv.
Ms. Alka Sinha, Adv.
Mr. Ravindra Kumar, AOR
Mr. Anuvrat Sharma, AOR

Order

Mr. R.K. Ojha, learned counsel appears on behalf of the counsel for the appellants and submits that the learned counsel for the appellants is not present in the Court today. It is stated that he is out of station. This is no ground to seek adjournment. We therefore reject the request for adjournment. We have asked the learned counsel to argue the matter. He submits that he does not know anything about the case.

In these circumstances, we dismiss the appeals for non-prosecution.

We make it clear that since we have not found it to be a good ground for adjournment, under no circumstances, application for restoration shall be entertained.

UPON hearing the counsel the Court made the following Order

The appeals are dismissed for non-prosecution in terms of the signed order. We make it clear that since we have not found it to be a good ground for adjournment, under no circumstances, application for restoration shall be entertained.

[2019] 57 DSTC 2 (Ahmedabad)

In the High Court of Gujarat at Ahmedabad
[Hon'ble Justice Akil Kureshi and Hon'ble Justice B. N. Karia]

R/Special Civil Application No. 18433/2017 & 20185/2017

Filco Trade Centre Pvt. Ltd. ... Petitioner(s)

Vs.

The Union of India ... Respondent(s)

Date of Order: 05.09.2018

TRANSITIONAL PROVISIONS - CENTRAL GOODS AND SERVICES TAX ACT, 2017 – CONSTITUTIONAL VALIDITY OF CLAUSE (IV) OF SUB-SECTION (3) OF SECTION 140 – CONDITION TO CLAIM CREDIT OF ELIGIBLE DUTIES BY A FIRST STAGE DEALER THAT "SUCH INVOICES OR OTHER PRESCRIBED DOCUMENTS SHOULD NOT BE EARLIER THAN 12 MONTHS IMMEDIATELY PRECEDING THE APPOINTED DATE" CHALLENGED BY WAY OF WRIT PETITION – HELD THE PROVISION ACTS HARSHLY, UNJUSTLY, ARBITRARILY, DISCRIMINATORY AND TAKES AWAY THE VESTED RIGHT TO CLAIM CREDIT – THE PROVISION HELD TO BE UNCONSTITUTIONAL REJECTING THE EXPLANATION OF THE REVENUE FOR IMPOSING CONDITION TO CLAIM CREDIT THAT PHYSICAL IDENTIFICATION OF GOODS WAS ESSENTIAL FOR PREVENTING UNDUE ADVANTAGE BEING TAKEN BY FIRST STAGE DEALERS AND FOR ADMINISTRATIVE CONVENIENCE – FURTHER, NO SUCH LIMITATION OF TIME PRESCRIBED IN THE PROVISO TO SUB-SECTION (3) OF SECTION 140 WHEN A DEALER IS NOT IN POSSESSION OF ANY INVOICE OR OTHER DOCUMENT EVIDENCING PAYMENT OF DUTY – COURT HELD THAT IMPUGNED PROVISION DID NOT MAKE HOSTILE DISCRIMINATION BETWEEN SIMILAR SITUATED PERSONS BUT IMPOSED A BURDEN WITH RETROSPECTIVE EFFECT WITHOUT ANY JUSTIFICATION AND STRUCK DOWN THE SAME BEING UNCONSTITUTIONAL.

Facts of the Case

Petitioner No.1 was a company registered under the Companies Act and Petitioner No.2 was the Director of the company. Petitioner Company was engaged in trading of specialized industrial bearings of various types. The petitioner also imports certain goods. Under the old regime, i.e. before introduction of Goods and Services Tax, the excise duty on local goods or the countervailing duty paid on imports was not to be borne by the petitioners. The credit could be utilised for payment of tax. According to the petitioners, the company had to maintain sufficient stock of different kinds of such bearings, many of which items may not be immediately sold. The petitioners would therefore, have longer cycle of such goods remaining with the petitioners after purchasing from the manufacturer before they were sold.

Before introduction of Goods and Services Tax regime (GST), the petitioners' transactions of purchase and sale of goods were covered under the Central Excise Act, 1944,Central Excise Tariff Act, 1985 and CENVAT Credit Rules,2004 (the Rules of 2004). Under such statutes, a manufacturer would not bear the burden of excise duty on the product manufactured by him. If the petitioners and other similarly situated first stage dealers were not granted similar benefits in some form or the other, the petitioners' business would become wholly unviable. If the petitioners were loaded with the burden of excise duty, the petitioners' sales to its ultimate consumers or second stage dealers would be commercially non-viable. Instead, the purchases would be made directly from the manufacturer. The law existing prior to introduction of GST therefore, made suitable provisions to ensure that the first stage dealers like the petitioners were not burdened with the excise duty component. The Court would advert to these provisions in detail at a later stage. Suffice it to record at this stage that as long as the petitioners fulfill the necessary conditions provided in the said Rules of 2004, the petitioners could pass on the credit of the duty paid on the purchases to their purchasers-manufacturers.

Case of the petitioners in nutshell was that prior to enactment of IGST Act, the petitioner company as a first stage dealer was not burdened with the excise duty paid on the purchases and this was without any restriction on time during which the goods must be sold. In earlier regime, the first stage dealers were put at par with manufacturers. A registered manufacturer could avail CENVAT credit of tax paid on purchases which could be utilized towards duty liability of goods manufactured by him. As against this, a first stage dealer or an importer could pass on the credit of tax paid on their purchases to the customers who could utilize such credit against their duty liability on product manufactured by them. Clause (iv) of sub-section(3) of Section 140 of the CGST Act has now imposed a condition for availing of such a benefit which not only acts harshly and unjustly to the petitioners and other similarly situated first stage dealers but acts retrospectively. It was also arbitrary and discriminatory.

Held

The judgements cited before the Court indicated that the right that the petitioner had to pass on the credit of excise duty paid on goods purchased at the time of sale of such goods was a vested right. It was as good as the duty paid by the assessee to the Government revenue which could be utilised by the purchasers of such goods from the petitioner against future liabilities of course subject to fulfillment of conditions. When the new regime was therefore introduced through goods and service tax statutes, through

migration these existing rights were being adjusted in terms of provisions contained in sections 139 and140 of the CGST Act. The legislature also recognized such existing rights and largely protected the same by allowing migration thereof in the new regime. In the process, however, a condition was imposed to enable the assessees in the nature of first stage dealer such as the petitioner-company viz. that the invoices or other prescribed documents on the basis of which credit was claimed were issued not earlier than twelve months immediately preceding the appointed day. In effective terms, this condition restricted the enjoyment of existing credit in respect of goods purchased not prior to one year of the appointed day. In relation to all goods purchased prior to such day, no credit would be available under the credit ledger to be maintained under the CGST Act. Such credit would be lost. Undoubtedly, therefore, this condition had retrospective operation and took away an existing right. This by itself might not be sufficient to hold the provision as ultra vires or unconstitutional. However, in addition to these findings, the Court also found that no justification and reasonable or plausible reason was shown for making such retrospective provision taking away the vested rights. Secondly, no limitation of time was prescribed in the proviso to sub-section (3) of section 140 where a dealer was not in possession of any invoice or any other document evidencing payment of duty in respect of inputs in which case credit at the prescribed rate would be granted.

The Court was 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 retrospectivety given to the provision had no rational or reasonable basis for imposition 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.

The Court held that though the impugned provision did not make hostile discrimination between similarly situated persons, the same did impose a burden with retrospective effect without any justification.

The Court found that clause (iv) of sub-section (3) of Section 140 was unconstitutional. The Court, therefore, struck down the same.

Present for the Petitioner(s) : Uchit N Sheth, Advocate

Present for Respondent(s) : Jaimin A Gandhi and Ms Trusha K Patel, Advocates

ORAL JUDGMENT
(Per : Honourable Mr. Justice Akil Kureshi)

1. The petitions arise in similar background. For convenience, we may record facts from Special Civil Application No.18433/2017.

2. Petitioner no.1 is a company registered under the Companies Act and would here-in-after be referred to as “the petitioner company”. Petitioner no.2 is the Director of the company. Petitioner company is engaged in trading of specialized industrial bearings of various types. The petitioner also imports certain goods. Under the old regime, i.e. before introduction of Goods and Service Tax, the excise duty on local goods or the countervailing duty paid on imports was not to be borne by the petitioners. The credit could be utilised for payment of tax. According to the petitioners, the company has to maintain sufficient stock of different kinds of such bearings, many of which items may not be immediately sold. The petitioners would therefore, have longer cycle of such goods remaining with the petitioners after purchasing from the manufacturer before they are sold.

3. Before introduction of Goods and Service Tax regime (“GST” for short), the petitioners' transactions of purchase and sale of goods were covered under the Central Excise Act 1944, Central Excise Tariff Act 1985 and CENVAT Credit Rules, 2004 (“the Rules of 2004” for short). Under such statutes, a manufacturer would not bear the burden of excise duty on the product manufactured by him. If the petitioners and other similarly situated first stage dealers were not granted similar benefits in some form or the other, the petitioners' business would become wholly unviable. If the petitioners were loaded with the burden of excise duty, the petitioners' sales to its ultimate consumers or second stage dealers would be commercially non viable. Instead, the purchasers would be made directly from the manufacturer. The law existing prior to introduction of GST therefore, made suitable provisions to ensure that the first stage dealers like the petitioners are not burdened with the excise duty component. We would advert to these provisions in detail at a later stage. Suffice it to record at this stage that as long as the petitioners fulfill the necessary conditions provided in the said Rules of 2004, the petitioners could pass on the credit of the duty paid on the purchases to their purchasers-manufacturers.

4. The Union legislature framed different laws to usher in the GST regime in substitution of the existing Central Excise and Value Added tax provisions and certain other taxing statutes. The Central Goods and Services Tax Act, 2017 ("CGST Act" for short) was brought into effect from 1.7.2017. Section 9 thereof is a charging section providing for levy and collection of tax. Sub-section(1) of section 9 authorises collection of tax called the central goods and service tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption at the prescribed rates not exceeding twenty per cent to be paid by the taxable person. Section 16 of CGST Act pertains to eligibility and condition for taking input tax credit. Sub-section(1) of section 16 envisages entitlement of tax credit of input tax charged on any registered person on supply of goods or services or both which would be credited to electronic credit ledger of such person. Chapter XX of the CGST Act contains transitional provisions. Section 139 makes provisions for migration of the existing tax payers to the new regime. Section 140 contains provisions for transitional arrangements for input tax credit. Sub-section(3) of section 140 allows several classes of persons including first stage dealers to take credit of the eligible duties of the finished goods held in stock on the appointed day subject to conditions prescribed therein. Clause(iv) of sub-section(3) of section 140 imposes a condition that such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day. It is this condition which has aggrieved the petitioners and the constitutional validity thereof is challenged before us.

5. Case of the petitioners in nutshell is that prior to enactment of IGST Act, the petitioner company as a first stage dealer was not burdened with the excise duty paid on the purchases and this was without any restriction on time during which the goods must be sold. In earlier regime, the first stage dealers were put at part with manufacturers. A registered manufacturer could avail CENVAT credit of tax paid on purchases which could be utilized towards duty liability of goods manufactured by him. As against this, a first stage dealer or an importer could pass on the credit of tax paid on their purchases to the customers who could utilize such credit against their duty liability on product manufactured by them. Clause(iv) of subsection(3) of section 140 of the CGST Act has now imposed a condition for availing of such a benefit which not only acts harshly and unjustly to the petitioners and other similarly situated first stage dealers but acts retrospectively. It is also arbitrary and discriminatory.

6. The respondents have appeared and filed the reply in which it is contended that there is a reasonable classification. Such classification

need not be scientifically perfect. The wisdom of legislature in imposing such a condition cannot be questioned. Distinction is sought to be drawn between the manufacturers and the dealers by pointing out that in case of manufactures claiming credit co-relation of tax paid goods and the goods sold was not necessary, unlike in case of dealers where such co-relation is essential. In case of dealers, in earlier law, they were entitled to pass on CENVAT credit of the duty paid to the manufacturer to the purchaser. This required co-relation of the goods and the duty paid. In such background, it is contended that "since the physical identification of goods is necessary for the same, so as to ensure that the first stage dealers do not take any undue advantage of such benefit and so as to accommodate the administrative convenience, the stature has provided for the restriction of 12 months." The petitioners' case was also distinguished from the case of an unregistered dealer by pointing out that under section 140 of the CGST Act, limited benefits have been granted to unregistered dealers.

7. In background of such facts and pleadings, learned counsel Shri Uchit Sheth for the petitioners raised the following contentions :

1) In the earlier regime, the first stage dealers were put at the same position as the manufactures by removing the burden on such dealers of the duty on manufacture. Under sub-section(3) of section 140 of the CGST Act in respect of goods purchased by a first stage dealer from the manufacturer prior to one year, the dealer is put in disadvantageous position.

2) The distinction drawn in case of the first stage dealer is arbitrary and discriminatory. The first stage dealers are not accorded the same treatment as is given to the manufactures. Our attention was also drawn to certain other provisions of section 140 to argue that even in case of an unregistered dealer, certain benefits are recognised without any reference to time limit. In short, according to the counsel, a first stage dealer is landed in more disadvantageous situation than the manufacturer or even an unregistered dealer by virtue of such provision.

3) Counsel submitted that in respect of CVD also similar position would obtain. CVD is meant to off-set the element of excise duty to put the imports on same pedestal as a local manufacturer. Here also, for any of the imports made prior to one year, CVD component by virtue of section 140(3) of CGST Act would have to be borne by the petitioners.

4) Counsel further submitted that impugned statutory provisions take away the vested right. Under the old regime, the duty borne by the

petitioners on the goods purchased from the manufacturer or paid in the form of CVD on imports were granted CENVAT credit which could be utilised for discharge of duty liabilities. Such benefit is withdrawn in respect of goods which are purchased or imported one year before. The law thus acts with retrospective effect. There is no plausible reason or logic provided for making such retrospective tax legislation.

5) In support of his contentions, counsel relied on the following judgments :

i) Decisions in case of **Eicher Motors Ltd. v. Union of India** reported in 1999 (106) ELT 3 (SC) and in case of **Collector of Central Excise, Pune v. Daiichi Karkaria Ltd.** reported in 1999 (112) ELT 353 (SC) were cited to contend that CENVAT credit is form of a duty paid by the concerned person and therefore, such benefit cannot be withdrawn with retrospective effect. For the same purpose, reference was also made to the decisions of Supreme Court in case of **Jayaswal Neco Ltd. v. Commissioner of Central Excise, Raipur** reported in 2015 (322) ELT 587 (SC) and in case of **Commissioner of Central Excise, Patna v. New Swadeshi Sugar Mills** reported in (2016) 1 Supreme Court Cases 614.

ii) Decisions of Supreme Court in case of **Thermax Private Ltd. v. Collector of Customs** reported in 1992 (61) ELT 352 (SC) and in case of **Hyderabad Industries Ltd. v. Union of India** reported in 1999 (108) ELT 321 (SC) were cited to highlight the nature of CVD and purpose of imposition of the same.

iii) Following decisions were cited to contend that even the taxing statutes must be in conformity with Article 14 of the Constitution:

a) **The State of AP and another v. Nalla Raja Reddy and others** reported in AIR 1967 Supreme Court 1458.

b) **John Vallamattom and another v. Union of India** reported in AIR 2003 Supreme Court 2902.

c) **Kunnathat Thathunni Moopil Nair etc. v. State of Kerala and another** reported in AIR 1961 Supreme Court 552.

Certain other decisions were cited in the context of testing a taxing statute framed by the parliament and the parameters within with the Court would strike down the statute. To the extent necessary, we would refer to these judgments at an appropriate stage.

8. On the other hand, learned ASGs Shri Jaimin Gandhi and Ms. Trusha Patel opposed the petitions. Their contentions were :

1) In taxing statutes, parliament has much greater latitude. The Court would not expect precise or scientific division before approving the classification.

2) It is not a case of hostile discrimination. First stage dealers form a special class. Their position cannot be compared either with the manufactures.

3) Allowing CENVAT credit is in the nature of a concession granted to an assessee and is always made subject to conditions imposed by the legislature. The legislature in its wisdom has made enjoyment of right to take CENVAT credit conditional on fulfilling the conditions which is within the competence of the parliament to do. The petitioners had no vested right to claim the benefit.

4) Putting a reasonable restriction on enjoying such a right would not amount to taking away any vested right with retrospective effect. Without admitting, the counsel submitted that even if the vested right was being taken away, same had a definite purpose. As pointed out in the affidavit in reply, it was not possible to co-relate the duty paid purchases with the sales made by the first stage dealers for indefinite period of time. The legislature therefore, imposed reasonable condition for enjoyment of such right as long as the purchases were made not prior to one year.

5) In support of the contentions, counsel relied on the following judgments :

   i) Heavy reliance was place on the decision of Division Bench of Bombay High Court in case of JCB India Limited and others v. Union of India and others, judgment dated 20.3.2018 in Writ Petition No. 3142/2017 and connected matters, in which this very provision came to be challenged. The High Court dismissed the petition upholding the vires of the provisions.

ii) Following judgements were cited in support of the contention that legal incidence of sales tax falls on the dealer, he may, if the law permits, pass it on to the purchaser, however, it is not necessary that the taxing statute must permit it and the tax cannot be declared invalid merely because the provision does not permit the dealer to pass it on purchaser:

a) **M/s.J.K. Jute Mills Co. Ltd. v. State of Uttar Pradesh and another** reported in AIR 1961 Supreme Court1534.

b) **Konduri Buchirajalingam v. The State of Hyderabad and others** reported in AIR 1958 Supreme Court 756.

c) **Associated Cement Co. Ltd. Tamil Nadu v. State of Tamil Nadu and another** reported in (1974) 4 Supreme Court Cases 422.

iii) In support of the contention that merely because the classification leads to disadvantage to the petitioners itself is not a ground to invalidate the statute, reliance was placed on the decision of Supreme Court in case of **State of Bihar and others v. Sachchidanand Kishore Prasad Sinha and others** reported in (1995) 3 Supreme Court Cases 86.iv) In support of the contention that a taxing statute cannot be challenged on the ground that it is unjust or acts harshly against some, decision of Supreme Court in case of **Union of India and others v. Nitdip Textile Processors Private Limited and another** reported in (2012) 1 Supreme Court Cases 226.

v) Decision in case of **State of W.B and another v. E.I.T.A. India Ltd. and others** reported in (2003) 5 Supreme Court Cases 239 was cited in support of the contention that in taxing statute, the legislature enjoys greater latitude.

vi) On the basis of decisions in case of **Ramrao and others v. All India Backward Class Bank Employees Welfare Association and others** reported in (2004) 2 Supreme Court Cases 76 and in case of **University Grants Commission v. Sadhana Chaudhary and others** reported in (1996) 10 Supreme Court Cases 536, it was canvassed that it is always open for the legislature to introduce a cut-off date for granting any benefit. Merely because such cut-off date creates two classes, would not be a ground to hold that the law is unconstitutional.

vii) Referring to the decisions in case of **R.K. Garg v. Union of India and others** reported in (1981) 4 Supreme Court Cases 675 and in case of **Government of Andhra Pradesh and others v. Smt. P. Laxmi Devi (SMT)** reported in (2008) 4 Supreme Court Cases 720, it was argued that State collects tax in exercise of its eminent domain and wisdom of legislature is therefore, not amenable to judicial review.

viii) Our attention was drawn to the decision of Supreme Court in case of **Osram Surya (P) Ltd. v. Commissioner of Central Excise, Indore** reported in (2002) 9 Supreme Court Cases 20, in which first proviso to Rule 57-G of the Modvat Credit Rules was challenged. With introduction of said proviso, a manufacturer would not be allowed to take the modvat credit after six months from the date of the documents specified in the said proviso. Supreme Court while upholding the validity of the provision held that same does not take away a vested right.

9. On the basis of submissions made before us the following questions arise for our consideration :

1) Whether the impugned provision makes an impermissible distinction between similarly situated persons forming a homogenus class?

2) Whether the provision in question without proper justification takes away the vested right of the petitioners and thus acts with retrospective effect? Question can be re-framed as to whether the legislation in question imposes a burden with retrospective effect and in absence of any justification for the same, is not a valid statute?

3) On any of the grounds above, whether clause(iv) of subsection (3) of section 140 of the CGST Act is required to be declared unconstitutional?

10. Before taking up these questions for consideration, we may peruse the statutory provisions applicable more minutely.

11. As is well known in the tax structure existing prior to introduction of GST regime, a manufacturer or producer of a specified product or a provider of input service was allowed to take credit of the excise duties

paid by him. Clause (ij) of Rule 2 of the Rules of 2004 define the term "first stage dealer" as under :

> (ij) "first stage dealer" means a dealer, who purchases the goods directly from,-
>
> (i) the manufacturer under the cover of an invoice issued in terms of the provisions of Central Excise Rules, 2002 or from the depot of the said manufacturer, or from premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer, under cover of an invoice; or
>
> (ii) an importer or from the depot of an importer or from the premises of the consignment agent of the importer, under cover of an invoice;"

12. Sub-rule(1) of Rule 3 of the Rules of 2004 empowered a manufacturer or producer of final products or a provider of input service to take CENVAT credit of the excise duty and other duties specified therein. Rule 9 inter-alia provided that CENVAT credit shall be taken by the manufacturer on the basis of documents mentioned therein. Sub-clause(iv) of clause (a) of sub-rule(1) of Rule 9 pertained to an invoice issued by a first stage dealer or a second stage dealer, as the case may be, in terms of of the provisions of Central Excise Rules, 2002. Thus upon the first stage dealer issuing invoice, his purchaser- manufacturer would be entitled to take CENVAT credit of the duty paid. Like-wise clause(c) of subrule (1) of Rule 9 pertained to bill of entry. Sub-rule (4) of Rule 9 enables purchase of input or capital goods from a first stage dealer or second stage dealer, provided certain conditions are fulfilled. Sub-rule(4) reads as under :

> "(4) The CENVAT credit in respect of input or capital goods purchased from a first stage dealer or second stage dealer shall be allowed only if such first stage dealer or second stage dealer, as the case may be, has maintained records indicating the fact that the input or capital goods was supplied from the stock on which duty was paid by the producer of such input or capital goods and only an amount of such duty on pro rata basis has been indicated in the invoice issued by him :
>
> Provided that provisions of this sub-rule shall apply mutatis mutandis to an importer who issues an invoice on which CENVAT credit can be taken."

13. As per sub-rule(8) of Rule 9, a first stage dealer or a second stage dealer had to submit within fifteen days from the close of each quarter of a year to the Superintended of Central Excise, a return in the form specified by notification by the Board. In terms of the said rules, thus the incident of duty on manufactured goods was not to be borne by first stage dealer.

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14.With the introduction of GST replacing several taxing statutes, it became necessary to make provisions for switching over from the old to the new regime which, in legal parlance, often times, is referred to as transitional provisions. Such transitional provisions are contained in Chapter XX of CGST Act. As noted, as per sub-section (1) of section 139 from the appointed day, every person registered under any of the existing laws and having a valid Permanent Account Number would be issued a certificate of registration on provisional basis subject to conditions. Under sub-section (2) of section 139 final certificate of registration would be granted in prescribed format subject to fulfillment of conditions which may be prescribed. Section 140 also contained in said Chapter XX is of considerable importance for us and carries caption note Transitional arrangement for input tax credit. Sub-section (3) of section 140 reads as under:

“140. Transitional arrangements for input tax credit.

(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012—Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:—

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iii) the said registered person is in possession of invoice or other

prescribed documents evidencing payment of duty under the existing law in respect of such inputs;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and

(v) the supplier of services is not eligible for any abatement under this Act:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed."

15. As per this provision, several classes of persons including a first stage dealer would be entitled to take in his credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to fulfillment of conditions specified therein. The petitioners have no grievance about any of the conditions except condition No. (iv) which provides that such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day. This condition would limit the eligibility of a first stage dealer to claim credit of the eligible duties in respect of goods which were purchased from the manufacturers prior to twelve months of the appointed day.

16.While considering the rival contentions with respect to the constitutionality of this provision, we may broadly refer to the contours of the Court's powers in holding a law made by the legislation as unconstitutional and the limits of such powers. In case of **Budhan Choudhry and ors vs. State of Bihar** reported in AIR 1955 Supreme Court 191, seven Judge Bench of the Supreme Court held and observed that when Article 14 forbids class legislation, it does not forbid reasonable classification. However, for the classification to be reasonable, two conditions must be fulfilled viz. (i) that the classification must be founded on a intelligible differentia which distinguishes persons or things that are grouped together from this legal difference of the credit and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

17.In case of **The State of Jammu & Kashmir vs. Triloki Nath Khosa and ors** reported in AIR 1974 SC 1 the Constitution Bench of the Supreme Court upheld the legislation classifying Assistant Engineers into Degree-holders and Diploma-holders for the purpose of promotion. It was observed that classification on the basis of educational qualifications made with a view to achieving administrative efficiency cannot be said to rest on any fortuitous circumstances and one has always to bear in mind the facts and circumstances in order to judge the validity of a classification. It was observed that there is a presumption of constitutionality of a statute. The burden is on one who canvasses that certain statute is unconstitutional to set out facts necessary to sustain the plea of discrimination and to adduce cogent and convincing evidence to prove those facts. In order to establish that the protection of the equal opportunity clause has been denied to them, it is not enough for the petitioners to say that they have been treated differently from others, not even enough that a differential treatment has been accorded to them in comparison with other similarly circumstanced. Discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis.

18. On the question of the grounds on which a law framed by the legislation i.e. the parliament of the State assembly the decision of three Judge Bench of Supreme Court in case of **State of A.P. And ors vs. Macdowell and Co. and ors** reported in (1996) 3 SCC 709 held the field and was often referred. In the said judgement, the Supreme Court had opined that the grounds for striking down a statute framed by the legislature are only two viz. (1) lack of legislative competence, or (2) violation of fundamental rights or any other constitutional provision. If enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause or the equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6). No enactment can be struck down by just saying that it is arbitrary or unreasonable. 'Arbitrariness' is an expression used widely and rather indiscriminately-an expression of inherently imprecise import. Hence, some or the other constitutional infirmity has to be found before invalidating the Act. An enactment cannot be struck down on the ground that the Court thinks it unjustified. Parliament and legislatures, composed as they are of the representatives of the people and supposed to know and be aware of the need of the people and every what is good and bad for them. The Court cannot sit on the judgement over their wisdom.

19. In the recent judgement of the Supreme Court in case of **Shayra Bano vs. Union of India and ors** reported in (2017) 9 SCC 1, Rohinton Fali Nariman, J., however, expressed a somewhat different view. It was observed that a statute can also be struck down if it is manifested arbitrary. It was observed as under:

> "101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers v. Union of India, (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/ or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

20. It is well settled that as long as the legislation has necessary competence to frame a law and the law so framed is not violative of the fundamental rights enshrined in the constitution or any of the constitutional provision, the Court would not strike down the statute merely on the perception that the same is harsh or unjust. Particularly, in taxing statutes the Courts have recognized much greater latitude in the legislation in framing suitable laws. Reference in this respect can be made to the well known judgement of Supreme Court in case of **R.K.Garg vs. Union of India and ors** (supra) it was observed as under:

> "8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrine or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater

play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislature judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Dond 354 US 457 where Frankfurter, J. said in his inimitable style:

> In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial difference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events-selflimitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

The court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry" that exact wisdom and nice adoption of remedy are not always possible and that "judgment is largely a prophecy based on meagre and un-interpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There, may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Reig Refining Company 94 Lawyers Edition 381 be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must

> therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

21. It is equally well settled that wherever the parliament has the power to frame a statute it also includes the power to make the law retrospective. In other words, the parliament also has wide powers to frame the laws including taxing statutes with retrospective effect. However, the Courts have recognized certain inherent limitations in framing retrospective tax legislations.

22. In ***Tata Motors Ltd vs. State of Maharashtra and ors*** reported ***(2004) 5 SCC 783***, it was observed that it is undoubtedly true that the legislature has the powers to make laws retrospectively including tax laws. Levies can be imposed or withdrawn but if a particular levy is sought to be imposed only for a particular period and not prior or subsequently, it is open to debate whether the statute passes the test of reasonableness at all.

23. In **Commissioner of Income Tax vs. Vatika Township petitioner. Ltd** reported in 367 ITR 466 the Constitution Bench of the Supreme Court observed as under:

> "31. 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 bed rock 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 vs. Eyre[3], 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.

32. The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in the decision reported in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co.Ltd[4]. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

33. We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India & Ors. v. Indian Tobacco Association[5], the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra & Ors.[6] It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here."

24.In case of Jayam and Co. vs. Assistant Commissioiner and anr reported in (2016) 15 SCC 125, the Supreme Court noted as approval observations made in case of R.C.Tobacco (P.) Ltd vs. Union of India reported in (2005) 7 SCC 725 as under:

"14. With this, let us advert to the issue on retrospectivity. No doubt, when it comes to fiscal legislation, the Legislature has power to make the provision retrospectively. In R. C. Tobacco Pvt. Ltd. v. Union of India, this court stated broad legal principles while testing a retrospective statute, in the following manner:

"(i) A law cannot be held to be unreasonable merely because it operates retrospectively;

(ii) The unreasonability must lie in some other additional factors;

(iii) The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be unreasonable as to violate constitutional norms;

(iv) Where taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of tax or that is confiscatory, courts will be justified in striking down the impugned statute as unconstitutional;

(v) The other factors being period of retrospectivity and degree of unforeseen or unforeseeable financial burden imposed for the past period;

(vi) Length of time is not by itself decisive to affect retrospectivity."

25.We may now come to the nature of the right enjoyed by the petitioner as a first stage dealer prior to introduction of GST and the changes made by the new law concerning the petitioner's right to enjoy such benefits. As already recorded, the statutory provisions till enactment of goods and service tax statutes recognized the right of the petitioner to pass on credit of the duty on manufactured goods purchased from manufacturers. In some form or the other the burden of duty element of the goods so purchased or the CVD value of the imported goods would be shifted from the petitioner-company as first stage dealer. Duty element suffered on the goods purchased from manufacturers would be neutralized at the time of sale of such goods by the dealer. In case of **Eicher Motors Ltd vs. Union of India (supra)**, the Supreme Court considered the nature of Modvat credit and observed that if on the inputs the assessee had already paid the taxes on the basis that when the goods are utilized in the manufacture of further products as inputs thereto, then the tax on these goods get adjusted which are finished subsequently. The Court therefore held that a right accrued to the assessee on the date when the paid 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. This concept was further elaborated by the Supreme Court in case of Collector of **Central Excise, Pune vs. Dai Ichi Karkaria Ltd** (supra) observing that it is clear from the Modvat Rules that a manufacturer obtains credit for the excise duty he paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. The Rules do not make any provision for reversal of the credit. The credit is therefore, indefeasible. The Supreme Court therefore, reiterated that a credit under the Modvat scheme is as good as tax paid. In case of **Jayswal Neco Ltd vs. Commissioner of Central Excise, Raipur** reported in 2015 (322) LET 587 (SC), these principles were applied to hold that even in a situation where on account of delay in payment of duty within stipulated time the facility of payment of excise duty in installments on fortnightly basis is suspended, the assessee could pay the duty through CENVAT credit.

26. In case of Indusr Global Ltd vs. Union of India reported in 2014 (310) ELT 833 Guj Division Bench of this Court was considering vires of Rule 8 (3A) of the Central Excise Rules, 2002 which provided that if an assessee defaults in payment of duty beyond thirty days from the date prescribed under subrule (1) then notwithstanding anything contained in the subrule(1), the assessee shall pay excise duty for each consignment at the time of removal without utilizing the CENVAT credit till the assessee pays the outstanding amount including interest. The Court while striking down such Rule unconstitutional observed as under:

> "31.This extreme hardship is not the only element of unreasonableness of this provision. It essentially prevents an assessee from availing cenvat credit of the duty already paid and thereby suspends, if not withdraws, his right to take credit of the duty already paid to the Government. It is true that such a provision is made because of peculiar circumstances the assessee lands himself in. However, when such provision makes no distinction between a willful defaulter and the rest, we must view its reasonableness in the background of an ordinary assessee who would be hit and targeted by such a provision. As held by the Supreme Court in the case of Eicher Motors Ltd (supra) an assessee would be entitled to take credit of input already used by the manufacturer in the final product. In the said case, the Supreme Court was dealing with rule 57F which was introduced in the Central Excise Rules, 1944 under which credit lying unutilized in the Modvat credit account

of an assessee on 16th March 1995 would lapse. Such provision was questioned. The Supreme Court held that since excess credit could not have been utilized for payment of the excise duty on any other product, the unutilised credit was getting accumulated. For the utilization of the credit, all vestitive facts or necessary incidents thereto had taken place prior to 16.3.1995. Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory of the manufacturer of the final product and the final product which had been cleared from the factory was sought to be lapsed. The Supreme Court struck down the rule further observing that if on the inputs the assessee had already paid the taxes on the basis that when the goods are utilized in the manufacture of further products as inputs thereto then the tax on those goods gets adjusted which are finished subsequently. Thus a right had 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. We may also recall that in the case of Dai Ichi Karkaria Ltd (supra) it was reiterated that a manufacture obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable produce immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product."

27.These judgements would thus indicate that the right that the petitioner had to pass on the credit of excise duty paid on goods purchased at the time of sale of such goods was a vested right. It was as good as the duty paid by the assessee to the Government revenue which could be utilised by the purchasers of such goods from the petitioner against future liabilities of course subject to fulfillment of conditions. When the new regime was therefore introduced through goods and service tax statutes, through migration these existing rights were being adjusted in terms of provisions contained in sections 139 and 140 of the CGST Act. The legislature also recognized such existing rights and largely protected the same by allowing migration thereof in the new regime. In the process, however, a condition was imposed to enable the assessees in the nature of first stage dealer such as the present petitioner-company viz. that the invoices or other prescribed documents on the basis of which credit was claimed were issued not earlier than twelve months immediately preceding the appointed day. In effective terms, this condition restricted the enjoyment of existing credit in respect of goods purchased not prior to one year of the appointed day. In relation to all goods purchased prior to such day, no credit would be available under

the credit ledger to be maintained under the CGST Act. Such credit would be lost. Undoubtedly, therefore, this condition has retrospective operation and takes away an existing right. This by itself may not be sufficient to hold the provision as ultra vires or unconstitutional. However, in addition to these findings, we also find that no just reasonable or plausible reason is shown for making such retrospective provision taking away the vested rights. Had the statutory provision given a time limit from the appointed day for utilization of such credit, the issue would stand on an entirely different footing. Such a provision could be seen as a sunset clause permitting the dealers to manage their affairs for which reasonable time frame is provided. The present condition however without any basis limits the scope of a dealer to enjoy existing tax credits in relation to purchases made prior to one year from the appointed day. No such restriction existed in the prior regime. Merely the stated grounds in the affidavit in reply that the provision is introduced since physical identification of goods is necessary so as to ensure that the first stage dealers do not take any undue advantage of such benefit and also to accommodate the administrative convenience would not be sufficient. Firstly, as noted, there was no such restriction in the CENVAT Credit Rules or analogous provisions of similar rules in the past. Since decades therefore the credits would be available to a first stage dealer on all purchases towards the manufacturing duty. No time frame of the past dealings was envisaged under such rules. The same grounds of physical identification of goods preventing undue advantage being taken and the administrative convenience would exist even then. Secondly, no limitation of time is prescribed in the proviso to sub-section (3) of section 140 where a dealer is not in possession of any invoice or any other document evidencing payment of duty in respect of inputs in which case credit at the prescribed rate would be granted.

28. The judgement of the Supreme Court in case of **Osram Surya (petitioner) Ltd vs. Commissioner of Central Excise,** Indore reported in (2002) 9 SCC 20 involved different facts. It was a case in which, first provisio which was introduced in Rule 57-G of the MODVAT Credit Rules was challenged. By virtue of this provisio a manufacturer would not be allowed to take MODVAT credit after six months from the date of the documents specified therein. It was on this background the Supreme Court had, while upholding the validity of the provision held and observed that the same did not take away a vested right. The important distinction in the present case as compared to the facts of our case is that the Legislature, by introducing a condition for enjoyment of an existing right, provided prospective time limit of six months which did not exist earlier. In other words, from the date of introduction of the proviso, the benefit of utilization of CENVAT credit under certain circumstances would be restricted to a period of six months. This provision thus, did not act with retrospective effect.

29. We are conscious that the Bombay High Court in case of **JCB India Limited and others v. Union of India and others** (supra) has taken a different view. We have given our detailed reasons for the view that we have adopted. Needless to record, we are unable to adopt the line chosen by the Bombay High Court in case of **JCB India Limited and others v. Union of India and others** (supra).

30. 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 140A 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 imposition 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.

31. In the conclusion we hold that though the impugned provision does not make hostile discrimination between similarly situated persons, the same does impose a burden with retrospective effect without any justification.

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

[2019] 57 DSTC 24 (Delhi)

In the High Court of Delhi at New Delhi

[Hon'ble Justice S. Ravindra Bhat and Hon'ble Justice Prateek Jalan]

W.P. (c) 8436/2018

G.V. Infosutions Pvt. Ltd. ... Petitioner

Vs.

Deputy Commissioner of Income Tax, Circle 10(2) & Anr. ... Respondents

Date of Order: 24.01.2019

REFUND U/S 237 OF INCOME TAX ACT, 1961 – REFUND OF TDS NOT CLAIMED IN RETURN – APPLICATION FOR CONDONING THE DELAY FOR FILING THE

APPLICATION FOR REFUND U/S 119(2)(B) – THE PETITIONER HAD CLAIMED THAT ITS CHARTERED ACCOUNTANT HAD INADVERTENTLY OVERLOOKED THE TDS AMOUNT AT THE TIME OF FILING OF THE RETURN – NOT FILED ANY EVIDENCE TO PROVE THAT CREDIT OF TDS WAS NOT AVAILABLE IN FORM 26AS AT THE TIME OF FILING THE RETURN – REVISED RETURN NOT FILED DUE TO THE LACK OF KNOWLEDGE OF CHARTERED ACCOUNTANT ABOUT THE CLAIM OF TDS OF RS. 31,25,000.00 – CLAIM OF THE PETITIONER WAS NOT SUBSTANTIATED WITH ANY EVIDENCE – APPLICATION FOR CONDONING THE DELAY FOR FILING THE APPLICATION FOR REFUND REJECTED. WRIT PETITION FILED TO CHALLENGE THE ORDER OF COMMISSIONER OF INCOME TAX – WHETHER REJECTION ORDER PASSED BY COMMISSIONER WAS CORRECT – HELD; NO – THERE CANNOT BE NECESSARILY BE INDEPENDENT PROOF OR MATERIAL TO ESTABLISH THAT THE AUDITOR IN FACT ACTED WITHOUT DILIGENCE – IMPUGNED ORDER REJECTING APPLICATION FOR CONDONING DELAY SET ASIDE AND QUASHED – PETITIONER PERMITTED TO FILE ITS REFUND CLAIM WITHIN 2 WEEKS.

Facts of the Case

The petitioner/assessee filed its Income Tax Return on 20.09.2013, covering Assessment Year 2013-2014. Its return reflected the tax deducted at source (TDS) as Rs.15,62,500/-. It appeared, however, that a larger amount – Rs.31,25,000/- had escaped the attention of the Assessee; so it could not be claimed. As an adjustment or for the purpose of consequent refund, the assessee paid the amounts due in terms of its calculation and assessment was framed under Section 143(1). The period for revising the demands ended on 31.03.2015 (Assessment year 2013-2014), however the error that had crept in while furnishing the returns was not rectified through an application or a refund undertaken. The petitioner claims that when it did discern the error or claim, it had applied on 12.09.2016 to the Chief Commissioner, for condoning the delay for filing the application for refund. The application was rejected by the Commissioner on 28.03.2018. In its application, the assessee had claimed that its Chartered Accountant had inadvertently overlooked the TDS amounts, as a consequence it could not have sought appropriate refund at the first instance or even claimed it before the period of seeking refund had expired.

Held

The rejection of the petitioner's application under Section 119(2)(b) was only on the ground that according to the Chief Commissioner's opinion the plea of omission by the auditor was not substantiated. The court had difficulty to understand what more plea or proof any assessee could have brought on record, to substantiate the inadvertence of its advisor. The net result of the impugned order was in effect that the petitioner's claim of inadvertent mistake was sought to be characterised as not bonafide. The

court was of the opinion that an assessee had to take leave of its senses if it deliberately wishes to forego a substantial amount as the assessee was ascribed to have in the circumstances of this case. "Bonafide" was to be understood in the context of the circumstance of any case. Beyond a plea of the sort the petitioner raises (concededly belatedly), there could not necessarily be independent proof or material to establish that the auditor in fact acted without diligence. The petitioner did not urge any other grounds such as illness of someone etc., which could reasonably have been substantiated by independent material. In the circumstances of the case, the petitioner, in our opinion, was able to show bonafide reasons why the refund claim could not be made in time.

The impugned order dated 28.03.2018 rejecting the petitioner's application under Section 119(2)(b) was hereby set aside and quashed. The application for condonation of delay was hereby allowed for these reasons. The petitioner was permitted to prefer its refund claim within two weeks from today. In such event, the concerned Assessing Officer shall verify the concerned claim and pass the order in accordance with law within six weeks thereafter. Any amount due to the petitioner shall also be remitted to it within three weeks thereafter.

Present for the Petitioner : Mr. Salil Kapoor, Ms. Soumya Singh, Mr. Sumit Lalchandani, Advocates

Present for Respondent(s) : Mr. Sanat Kapoor, Advocate

O R D E R

S. Ravindra Bhat, J. (Oral)

1. The petitioner is aggrieved by an order of the Commissioner of Income Tax, rejecting its application under Section 119(2)(b). It had applied for condoning the delay in filing a refund application.

2. Facts for the purpose of deciding this writ petition are that the petitioner/assessee filed its Income Tax Return on 20.09.2013, covering Assessment Year 2013-2014. Its return reflected the tax deducted at source (TDS) as Rs.15,62,500/-. It appears, however, that a larger amount – Rs.31,25,000/- had escaped the attention of the Assessee; so it could not be claimed. As an adjustment or for the purpose of consequent refund, the assessee paid the amounts due in terms of its calculation and assessment was framed under Section 143(1). The period for revising the demands ended on 31.03.2015 (Assessment year 2013-2014), however the error

that had crept in while furnishing the returns was not rectified through an application or a refund undertaken. The petitioner claims that when it did discern the error or claim, it had applied on 12.09.2016 to the Chief Commissioner, for condoning the delay for filing the application for refund. The application was rejected by the Commissioner – on 28.03.2018. In its application, the assessee had claimed that its Chartered Accountant had inadvertently overlooked the TDS amounts, as a consequence it could not have sought appropriate refund at the first instance or even claimed it before the period of seeking refund had expired.

3. The Chief Commissioner rejected the application, giving reasons as follows:

> "5. Explaining reasons/causes for not claiming the TDS of Rs.31,25,000/- while filing return of income for AY 2013-14 it was submitted that due to the mistake of the Chartered Accountant of the assessee Company the claim of the TDS was omitted to be made while filing return of income for the year under consideration. However, on being specifically questioned to furnish evidence that the credit of TDS was not available in form 26AS at the time of filing of ITR on 29.09.2013, the AR for the assessee failed to produce any evidence to prove that credit of TDS was not available in form 26AS at the time of filing of ITR on 29.09.2013, the AR for the assessee failed to produce any evidence to prove that credit of TDS was not actually available in form 26AS at the time of filing ITR on 29.09.2013. It is amply clear from the facts of the case that the claim of the assessee that information of TDS of Rs.31,25,000/- was actually available to it at the time of filing ITR has not been proved during the course of proceedings before me. In absence of any such relevant evidence, the claim of the assessee that due to the mistake of the CA, claim of TDS was not made has remained unproved.
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> 6. In this case, return for the AY 2013-14 was filed on 29.09.2013 and the assessee could have revised the return by 31.03.2015. However, the assessee had not filed the revised ITR to claim refund of Rs.31,25,000/-. Considering no action by the assessee to claim substantial amount of refund of Rs.31,25,000/- during available period of more than one and a half year from the date of filing of ITR, the assessee was asked to explain reason for such inaction when the company had incurred substantial expenditure in seeking professional help of Chartered Accountants. IN response to the query, it was as submitted by the AR for the assessee that

revised return could not be filed due to lack of knowledge about claim of credit of TDS of Rs.31,25,000/-. It is pertinent to mention here that as per audited account the assessee had disclosed a net profit of Rs.24,78,142/- for the year and the claim of the assessee was that due to the lack of information about non-credit of TDS of Rs.31,25,000/- (the amount of TDS was more than the income) revised return could not be filed. However, the claim of the assessee was not substantiated with any evidence and it is difficult to believe that the assessee would be so careless that it was not aware about the pending TDS credit which was more than the profit for the year under consideration.

7. The assessee is a company which has availed services of independent auditor, inhouse finance professional and Chartered Accountant engaged for the purpose of filing ITRs and other compliance issues for the year under consideration and for subsequent years. Both, under the Company Act as well as under the Income Tax Act, the assessee company was liable to record each transaction i.e. gross receipt, net receipt, tax deducted at source and expenses etc. and get its accounts audited. The claim of the assessee company that even after having gone through the process of audit, credit of TDS of Rs.31,25,000/- could not be made at the time of filing of return of income or during time available to file the revised return of income for bonafide reason cannot be accepted in absence of any verifiable credible material evidence in support of the claim."

4. It is pointed out on behalf of the assessee by Mr. Kapoor, that the TDS portal maintained by the Revenue in fact reflected at the relevant time that for Assessment Year 2013-2014, additional TDS credit to the extent of Rs.31,25,000/- was payable which in turn implied that the amounts were paid. Counsel relied on statements made in the application to say that inadvertence or omission in claiming appropriate adjustment and consequent refund was on account of its auditor/chartered accountant's lack of diligence. The petitioner relied upon a Division Bench ruling of this court in Indglonal Investment & Finance Ltd. vs. Income Tax Officer, [2012 343 ITR 44(Delhi)].

5. The learned counsel for the revenue relied upon the impugned order and submitted that the petitioner's claim for condonation of delay was justifiably rejected. Counsel submitted that as pointed out by the Chief Commissioner there was no material to substantiate the plea urged, i.e. that the concerned auditor or chartered accountant had inadvertently omitted to claim the refund amount. It is further pointed out that in fact the

period provided by law for claiming the refund ended on 31.03.2015 and only much later did the assessee claim refund, and move to application under Section 119(2)(b) – on 12.09.2016.

6. Concededly the facts disclose; firstly, that according to the petitioner a sum of Rs.31,25,000/- was inadvertently left out by its auditor/chartered accountant in the calculation while filing the return; secondly, the court notices that the amount in fact reflected on the web portal maintained by the Income Tax Department itself at the relevant time. It is also a fact that the petitioner does not seem to have noticed its omission, at least before September 2016. In the meanwhile, the period of limitation to claim refund ended on 31.03.2015.

7. In Indglonal Investment & Finance Ltd. (supra) a Division Bench of this court, while dealing with the claim for refund, which was made belatedly but rejected by the Revenue, considered the relevant judgments of the Supreme Court including Commissioner of Income Tax Vs. Shelly Products and Anr., (2003) 261 ITR 367, and held as follows :

> "11. Provisions of assessment are independent of provisions of refund, but the provisions relating to refund may be dependent on the assessment. (See Commissioner of Income Tax, West Bengal vs. Central India Industries Ltd. (1971) 82 ITR 555). An assessment order or an order quantifying the income/net wealth can be rectified or modified in the proceedings as contemplated by the enactment. The assessment order or the order quantifying the income or taxable wealth cannot be challenged on merits while the authorities examine the question of refund. The authorities cannot go behind the assessment order or the order quantifying net wealth/income. Section 242 of the 1961 Act is apposite and is reproduced below:-
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> > "242. Correctness of assessment not to be questioned.--In a claim under this Chapter, it shall not be open to the assessee to question the correctness of any assessment or other matter decided which has become final and conclusive or ask for a review of the same, and the assessee shall not be entitled to any relief on such claim except refund of tax wrongly paid or paid in excess.
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> 12. Another principle is that the refund provisions should be interpreted in a reasonable and practical manner and when warranted liberally in favour of the assessee. If there is substantial compliance of the provisions for refund, it may not be denied

because it is not made strictly in the form or the prescribed manner. The forms prescribed may be merely intended to facilitate payment of refund. The tax authorities have to act judiciously when they exercise their power under an enactment. The power given to the tax authorities under the enactments are mandated with the duty to exercise them when the statutory provisions so warrant. It is imperative upon them to exercise their authority in an appropriate manner. In case the Assessing Officer or tax authority comes to know that an assessee is entitled to deduction, relief or refund on the facts of the case and the assessee has omitted to make the claim, he should draw the attention of the assessee. The tax authorities should act as facilitators and not occlude and obstruct. The role of tax authorities has been aptly described in CIT versus Rajesh Jhaveri Stock Brokers Pvt. Ltd. (2008) 14 SCC 208 as :-

> "19…… The function of the assessing officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers."

8. The rejection of the petitioner's application under Section 119(2)(b) is only on the ground that according to the Chief Commissioner's opinion the plea of omission by the auditor was not substantiated. This court has difficulty to understand what more plea or proof any assessee could have brought on record, to substantiate the inadvertence of its advisor. The net result of the impugned order is in effect that the petitioner's claim of inadvertent mistake is sought to be characterised as not bonafide. The court is of the opinion that an assessee has to take leave of its senses if it deliberately wishes to forego a substantial amount as the assessee is ascribed to have in the circumstances of this case. "Bonafide" is to be understood in the context of the circumstance of any case. Beyond a plea of the sort the petitioner raises (concededly belatedly), there can not necessarily be independent proof or material to establish that the auditor in fact acted without diligence. The petitioner did not urge any other grounds such as illness of someone etc., which could reasonably have been substantiated by independent material. In the circumstances of the case, the petitioner, in our opinion, was able to show bonafide reasons why the refund claim could not be made in time.

9. The statute or period of limitation prescribed in provisions of law meant to attach finality, and in that sense are statutes of repose; however, wherever the legislature intends relief against hardship in cases where such statutes lead to hardships, the concerned authorities – including Revenue Authorities have to construe them in a reasonable manner. That was the effect and purport of this court's decision in Indglonal Investment

& Finance Ltd. (supra). This court is of the opinion that a similar approach is to be adopted in the circumstances of the case.

10. For the above reasons, the impugned order dated 28.03.2018 rejecting the petitioner's application under Section 119(2)(b) is hereby set aside and quashed. The application for condonation of delay is hereby allowed for these reasons. The petitioner is permitted to prefer its refund claim within two weeks from today. In such event, the concerned Assessing Officer shall verify the concerned claim and pass the order in accordance with law within six weeks thereafter. Any amount due to the petitioner shall also be remitted to it within three weeks thereafter.

11. The writ petition is disposed of in the aforesaid terms.

[2019] 57 DSTC 31 (Delhi)

In the High Court of Delhi at New Delhi

[Hon'ble Justice S. Ravindra Bhat and Hon'ble Justice Prateek Jalan]

W.P. (c) 13107/2018

Lohia Warehouse Pvt. Ltd. ... Petitioner

Vs.

Commissioner of VAT & Anr. ... Respondents

Date of Order: 18.12.2018

WRIT PETITION SEEKING DIRECTION TO PROCESS REFUND WITH INTEREST – ORDER PASSED WITHOUT INTEREST – PETITIONER RAISED OBJECTION FOR NOT GRANTING INTEREST – DIRECTION WAS GIVEN TO PRESENT COMMISSIONER BEFORE THE COURT – REVENUE FILED COUNTER AFFIDAVIT AND ARGUED THAT THE PETITIONER DID NOT FURNISH STATUTORY FORMS – PETITIONER RELIED UPON RULE 4 OF CENTRAL SALES TAX (DELHI) AMENDMENT RULES, 2014 WHICH STATES THE COMMISSIONER MAY DIRECT THE DEALER TO FURNISH SUCH FORMS AS AND WHEN REQUIRED BY HIM DURING THE PERIOD OF SEVEN YEAR.

Present for the Petitioner : Mr. M.A. Ansari, Mr. Khursheed Ahmed, Mr. Saket Grover, Mr. Naveen Upadhyay & Mr. Mohit Bhardwaj, Advocates

Present for Respondent(s) : Mr. Ramesh Singh, Std. Counsel with Mr. Anuj Aggarwal, Addl. Std. Counsel with Mr. Kanishk Rana, Advocate for R-1 & 2 with Ms. Sonika Singh, Spl. Commissioner.

Order

Ms.Sonika Singh, Special Commissioner is present, pursuant to the previous order dated 05.12.2018.

In compliance of the Court's order dated 05.12.2018, the respondents have filed a counter affidavit, which seems to indicate prime facie that the funds were not released, on account of the petitioner not furnishing the appropriate statutory forms. Learned counsel for the petitioner relies upon the Central Sales Tax (Delhi) [Amendment] Rules, 2014, which reads as follows:

> "Amendment of rule 4.:- In the said rules, rule 4 shall be substituted, namely –
>
> "(1) In addition to the returns required under rule 3, every dealer shall also furnish to the Commissioner, a Reconciliation Return for a year in Form 9 relating to receipt of declarations / certificates (hereinafter referred to as „statutory forms") within a period of six months from the end of the year to which it relates. The returns shall be filed electronically.:
>
> PROVIDED that the return can be filed for a quarter or more than one quarter of the year, any time during the year but not later than the limitation period specified in sub-rule(1):
>
> PROVIDED ALSO that provisions of sub-rule (5) of rule 5, clause (a) of sub rule (5) of rule 7, sub-rule (2) of rule 9, rule 6A and rule 6B shall not apply in so far as periodicity of filing of reconciliation return and furnishing of declaration(s) / certificate(s) is concerned."
>
> (2) The statutory forms received in original, in lieu of concessional sale or stock transfer shall be retained by the dealer with him. The Commissioner may direct the dealer to furnish such forms as and when required by him during the period of seven years from the end of the year to which the forms relate."
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> List on 8th March, 2018, for arguments.

[2019] 57 DSTC 32 (Indore)

In the High Court of Madhya Pradesh: Bench at Indore
[Hon'ble Justice S. C. Sharma and Hon'ble Justice Virender Singh]

W.P. (c) 17999/2018

Vasu Clothing Private Limited ... Petitioner

Vs.

Union of India and Others ... Respondents

Date of Order: 17.12.2018

TAXABLE SUPPLY UNDER GOODS AND SERVICES TAX ACT, 2017 – REFUND U/S 54 – DEFINITION OF EXPORT OF GOODS U/S 2(5) OF IGST ACT, 2017 – INTENTION TO SUPPLY GOODS TO DUTY FREE SHOPS WITHOUT PAYMENT OF GST SITUATED IN DUTY FREE AREA AT INTERNATIONAL AIRPORT – WRIT PETITION FILED SEEKING DIRECTION OF GOODS AND SERVICE MADE BY THE INDIAN SUPPLIER TO THE DUTY FREE SHOPS IN INDIA TO BE TREATED AS AN EXPORT WITHOUT PAYMENT OF CGST AND IGST SINCE LOCATION OF BUYER IS BEYOND THE CUSTOM FRONTIER OF INDIA – SEEKING DIRECTION ALSO REFUND IS TO BE PROVIDED AGAINST INPUT TAX CREDIT LEVIED ON GOODS SUPPLIED BY SUPPLIER TO THE DUTY FREE SHOPS IN INDIA.

DUTY FREE AREA AT INTERNATIONAL AIRPORT CANNOT BE SAID TO BE LOCATED OUTSIDE INDIA INSTEAD THE DUTY FREE SHOP IS LOCATED WITHIN INDIA – SUPPLY DOES NOT QUALIFY AS EXPORT OF GOODS UNDER GST AND CONSEQUENTLY NO REFUND CAN BE CLAIMED OF UNUTILIZED INPUT TAX CREDIT – COURT DECLINED TO ISSUE WRIT OF MANDAMUS DIRECTING RESPONDENTS NOT TO CHARGE GST – WRIT PETITION DISMISSED.

Facts of the Case

The petitioner was a manufacturer and exporter of garments in India and he intended to supply goods to Duty Free Operator (DFO), who in turn was selling the goods from Duty Free Shops (DFSs). It had been further contended that Duty Free Operator, operating in India imports goods like liquor, tobacco products, souvenirs, eyewear, watches, fashion, chocolates, perfumes, etc. by filing import general manifest and Bill of Entry for warehousing with the customs department without payment of import duty on the first importation subject to certain conditions. The bill of entry clearly indicated the Duty Free Operator as an "importer". The imported goods were warehoused at a bonded warehouse (customs warehouse) and the bill of entry also disclosed that the goods imported were for "sale only for Duty Free Shop / Export".

The Duty Free Operator also took on rent a private bonded warehouse located near the airport as well as certain shops called "Duty Free Shops" at the arrival and departure terminals of international airports in India. The goods were sold to international passengers without payment of duties and taxes. It has been further contended that the Duty Free Operator was granted special warehouse license under Section 58-A of the Customs Act, 1962 for depositing notified class of goods and such warehouse were kept locked by the proper officer and no entry of any person or removal of goods therefrom were allowed without the permission of the proper officer.

Held

The issue involved in the case had not been decided in the case of M/s. Hotel Ashoka as it was not a case of supplier supplying goods to a Duty Free Operator.

Similarly the judgment delivered by the Bombay High Court in the case of A-1 Cuisines Pvt. Ltd. did not deal with the subject involved in the writ petition. It was a case of a person seeking issuance of writ of mandamus directing the respondents therein to exempt the petitioner from charging applicable taxes under the GST legislations on sale of cosmetic products in respect of retail outlet which he intended to setup at Domestic Security Area at Dr. Babasaheb Ambedkar International Airport. Again the judgment was distinguishable on facts and did not help the petitioner in any manner.

The petitioner could not escape the liability to pay GST. The petitioner was manufacturing certain goods and supplying to a person, who was having a Duty Free Shop. It was not the petitioner, who was exporting the goods or taking goods out of India. The petitioner was selling to a person, who was having Duty Free Shop (to a Duty Free Operator), which was locatedin India as per the definition clause as contained under the GST Act. In light of the aforesaid, the Court did not find any reason to issue writ of mandamus directing the respondents not to charge GST on the petitioner or to legislate on the subject granting exemptions as prayed by the petitioner.

A statute was an edict of the legislature and the Courts did not have the power to enact a statute and the Court could only do interpretation of statute and once the Court did not have power to legislate, the question of granting exemption in absence of any statutory provision to the petitioner under the GST Act did not arise.

Present for the Petitioner : Shri Vikram Nankani, Senior Counsel with Shri Raktim Gogoi, Shri Alok Barthwal, Shri Kartikeya Singh and Shri Varun Saluj, Counsel

Present for Respondent(s) : Shri Prasanna Prasad, Counsel

Order

The petitioner before this Court is a Private Limited Company incorporated under the Companies Act, 1956 having its registered office at

75, Readymade Complex, Industrial Area, Pardeshipura, Indore has filed this present petition seeking indulgence of this Court for grant of relief from payment of goods and service tax by way of exemption and on the goods and service supply to the Duty Free Shops (DFSs) at the international Airports in India.

2. The petitioner's contention is that after enactment of Central Goods and Service Tax Act, 2017 and the Rules framed thereunder, the petitioner is entitled to supply goods and services to Duty Free Shops without payment of taxes and similar supplies from all over the world except India are permitted without payment of taxes.

3. The petitioner has stated that petitioner is a manufacturer and exporter of garments in India and he intends to supply goods to Duty Free Operator (DFO), who in turn is selling the goods from Duty Free Shops (DFSs). It has been further contended that Duty Free Operator operating in India imports goods like liquor, tobacco products, souvenirs, eyewear, watches, fashion, chocolates, perfumes, etc. by filing import general manifest and Bill of Entry for warehousing with the customs department without payment of import duty on the first importation subject to certain conditions. The bill of entry clearly indicates the Duty Free Operator as an “importer”. The imported goods are warehoused at a bonded warehouse (customs warehouse) and the bill of entry also discloses that the goods imported are for “sale only for Duty Free Shop / Export”.

4. It has been further stated that the Duty Free Operator also takes on rent a private bonded warehouse located near the airport as well as certain shops called “Duty Free Shops” at the arrival and departure terminals of international airports in India. The goods are sold to international passengers without payment of duties and taxes. It has been further contended that the Duty Free Operator is granted special warehouse license under Section 58-A of the Customs Act, 1962 for depositing notified class of goods and such warehouse are kept locked by the proper officer and no entry of any person or removal of goods therefrom are allowed without the permission of the proper officer.

5. It has been further stated that Duty Free Operators transfers the goods from customs warehouse to the private bonded warehouse / special warehouse without payment of duty whenever required by executing a warehousing bond under Section 59 of the Act for a period as prescribed under Section 61 of the Act and under the permission of the Customs Officer as prescribed under Section 60 of the Act. The goods so warehoused are then brought to the Duty Free Shop without payment of duty under escort

of the bond officer and then the goods are sold at the Duty Free Shops at the arrival and departure terminals. The overall all supervision and control is of the Customs Officer.

6. The petitioner has further stated that the entire movement of goods from special warehouse to Duty Free Shops for the purpose of sale at arrival and departure takes place strictly in consonance with the warehousing provisions under Chapter IX of the Act and under the custom supervision and control. It has been further stated that as per Section 71 of the Act, the goods so deposited can either be cleared from the warehouse for home consumption (under Section 68) or for export (under Section 69) or for removal to another warehouse or otherwise provided under the Act.

7. The petitioner's contention is that the goods are sold to international passengers at the departure terminal Duty Free Shops and the operator has cleared the goods only for export under Section 69 of the Act. It has been further contended that duty free purchases made from Duty Free Shops at international airports in India are generally paid for in approved currency including foreign currency and this uniqueness brings in valuable foreign currency reserves into the country and there is a significant growth in such sale.

8. The petitioner has further stated that prior to implementation of GST legislation, the duty free operations in India were exempted from payment of Customs Duty, Countervailing Duty (CVD), Special Additional Customs Duty (SACD), Excise Duty, VAT / Sales Tax, OCTROI, etc. The petitioner's contention is that principle for exemption from payment of VAT / Sales Tax by an Indian Duty Free Shop was evolved pursuant to the judgment delivered by the Hon'ble Supreme Court in the case of **M/s. Hotel Ashoka (Indian Tourism Development Corporation Limited) Vs. Assistant Commissioner of Commercial Taxes and Another** (Civil Appeal No.2560/2010, decided on 03/02/2012).

9. The petitioner has further stated that the Duty Free Shops at international airports were permitted to retail of attractive products of foreign origin including liquor, tobacco, confectionery, perfumes, cosmetics, souvenirs, eyewear, watches, fashion, chocolates, etc. It has been further contended that in respect of indigenous products manufactured in India, which were subjected to payment of Excise Duty and VAT and Government of India in the year 2013, based upon representations received from industry and in order to promote “Brand India” to the world, issued notifications so as to allow excise duty free sale of goods manufactured in India to international passengers or members of crew arriving from abroad at the

Duty Free Shops located in the arrival halls of international airports and to passengers going out of India at the Duty Free Shops located in the departure halls of international airport in the country.

10. It has been further stated that Central Board of Excise and Customs issued a notification on 23/05/2013 granting exemption in respect of payment of taxes subject to certain terms and conditions in respect of certain goods. It has also been brought to the notice of this Court that earlier also notification dated 19/05/1989 has been issued and there were exemptions available to specified goods falling under Chapter 85, when removed for sale from Duty Free Shops at customs airports and since the notification by Government of India was to extend the benefit on all goods, the Central Board of Excise and Customs issued a notification on 23/05/2013 and rescinded the earlier notification.

11. The petitioner has also referred to various other notifications issued from time to time by Central Board of Excise and Customs (CBEC). In notification No.07/2013-CE NT, dated 23/05/2013, the Government extended the facility of removal without payment of duty to all excisable goods intended for storage in a godown or retail outlet of a Duty Free Shop in the Departure Hall or the Arrival Hall, of international airport, appointed or licensed as "warehouse" under Section 57 or 58 of the Customs Act, and for sale therefrom, against foreign exchange to passengers going out of India or to the passengers or members of crew arriving from abroad, subject to limitations, conditions and safeguards as may be specified by the Central Board of Excise and Customs.

12. By another notification No.08/2013-CE NT, dated 23/05/2013, CBEC appointed officers of Customs under whose jurisdiction the godowns and retail outlets of Duty Free Shops at the international airport are located, to be Central Excise Officers. In notification No.09/2013-CE NT, dated 23/05/2013, the CBEC stated that where a godown or retail outlet of a Duty Free Shop is appointed or licensed under the provisions of Sections 57 or 58 of the Customs Act, such godown or retail outlet shall be deemed to be registered as warehouse under Rule 9 of the Central Excise Rules, 2002. By the CBEC circular No.970/04/2013-CX, dated 23/05/2013 the procedure governing the movement of excisable indigenous goods to the Warehouses or retail outlets of Duty Free Shops was laid down.

13. The petitioner has further stated that in the year 2017 the Central Goods and Services Tax Act, 2017 (CGST) and the Integrated Goods and Services Tax Act, 2017 (IGST) were enacted. The petitioner in the month of June, 2018 keeping in view the notifications issued from time to time by

the Central Board of Excise and Customs contacted one of the Duty Free Operators namely "Flemingo Travel Retail Limited", which operates Duty Free Shops at Delhi and Mumbai International Airport and requested that the petitioner being one of the premier exporters of garments in India would like to retail its products at the Duty Free Shops operated by the Flemingo Travel Retail Limited and a meeting took place, however, the petitioner was informed that on account of enactment of GST Act and Rules, there is no clarity on the previous exemptions which were provided on the basis of various exemptions notification issued from time to time.

14. The petitioner has further stated that he was told to pay GST and in those circumstances, he is being deprived his potential business opportunity to sell the goods from Duty Free Shops. The petitioner's grievance is that in absence of exemption notification under the Central Goods and Services Tax Act, 2017 and the Integrated Goods and Services Tax Act, 2017, the Duty Free Operators are unable to buy the goods manufactured in India without paying the applicable rate of taxes as provided under the CGST, IGST or SGST as the case may be.

15. The petitioner's contention is that supplies from all over the world (except India) are permitted to be at an Indian Duty Free Shop without payment of duties and taxes. The petitioner has prayed for following relief:-

"(i) Issue a writ of Mandamus or any other appropriate Writ, Order or Direction in the nature of Mandamus, ordering and directing any supply of goods and services made by an Indian supplier to the duty free shops in India to be treated as an export without payment of CGST and IGST, since, the duty free shops at international airports in India are located beyond the customs frontier of India and any transaction that takes place in a duty free shop is said to have taken place outside India.

(ii) Issue a writ of Mandamus or any other appropriate Writ, Order or Direction in the nature of Mandamus, ordering and directing supply of goods and services made by an Indian supplier to the duty free shops in India to be without payment of CGST and IGST, since, transaction undertaken at duty free shop is treated as an export of goods or services.

(iii) Issue a writ of Mandamus or any other appropriate Writ,Order or Direction in the nature of Mandamus, ordering and directing input tax credit on CGST, SGST, IGST levied on the goods and services supplied by the Indian supplier to the duty free

shops and refund the input tax credit thereof, enabling supply of goods and services made by an Indian supplier to the duty free shops in India to be free of CGST, SGST and IGST.

(iv) Pass such other or further orders or directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

16. The petitioner has raised various grounds before this Court and his contention is that the action of the respondents authorities in enacting the GST legislation without clarifying the position regarding supply of goods and services by an Indian supplier without payment of taxes including GST is illegal and has resulted in loss of business opportunity to the petitioner and other identically placed persons.

17. A further ground has been raised stating that sale from Duty Free Shops in the past has helped to maximize non-aeronautical revenues at airports, which ultimately bring down aeronautical tariffs for the passengers and ultimately the Government of India is the biggest gainer as it has and will receive significantly large funds from the supplies made from Duty Free Shops at international airport in India as revenue share. The revenue so generated can be utilized by the Government of India to provide air connectivity to far flung corners of the country where private investment may not be forthcoming due to long gestation periods.

18. It has been stated that on account of enactment of GST, the benefits of earlier circulars / notifications is not available and therefore, an appropriate writ, order or direction be issued granting exemption from payment of CGST / IGST / SGST. It has also been stated that various global brands from all over the world can be sold in Indian Duty Free Shops without payment of any taxes and duties and the products manufactured in India can not be sold at Duty Free Shops without payment of taxes and therefore, the action of the respondents authorities has severely failed to carry forward its Brand India initiative.

19. It has also been argued that Indian supplier cannot export goods without payment of GST and on account of lack of similar exemptions, which were available during the pre GST regime and the action of the respondent is violative of Articles 12, 14 and 19 (1) (g) of the Constitution of India. The action of the respondent authorities is also in violation of Article 21 of the Constitution of India. It has been argued by learned Senior Counsel appearing before this Court to issue a writ of mandamus by directing the respondents to treat the Duty Free Shops in India as an

export without payment of CGST and IGST, since the shops are located beyond the customs frontier of India and any transaction that takes place in a Duty Free Shop is said to have taken place outside India.

20-Learned counsel for the petitioner has placed reliance upon judgments delivered in the case of **Hotel Ashoka (Indian Tourism Development Corporation Limited) Vs. Assistant Commissioner of Commercial Taxes and another** reported in **(2012) 276 ELT 433 SC, J. V. Gokal & Co. (Pvt.) Ltd. Vs. Assistant Collector Sales Tax (Inspection) and Others reported in AIR 1960 SC 595, Commissioner of Service Tax-VII Vs. Flemingo Duty Free Shop Pvt. Ltd. reported in Manu/ CM/0675/2017, DFS India Pvt. Ltd. Vs. Commr. Of Customs** passed by apex Court in Special Leave to Appeal (Civil) No.2436/2010 decided on 12/03/2010, **DFS India Pvt. Ltd. and Another Vs. The Commissioner of Customs** passed by Bombay High Court in Writ Petition No.2578/2009 decided on 17/03/2010, **All India Federation of Tax Practitioners and Others Vs. Union of India and Others** reported in **AIR 2007 SC 2990, Union of India and Others Vs. Bengal Shrachi Housing Development Ltd. and others** reported in AIR 2017 SC 5228 and **A-1 Cuisines Pvt. Ltd. Vs. Union of India and Another** passed by Bombay High Court in Writ Petition No.8034/2018 on 28/11/2018.

21. A detailed and exhaustive reply has been filed on behalf of the revenue and the respondents have vehemently opposed the reliefs prayed by the petitioner. The contention of learned counsel for the respondent is that present petition has been filed seeking issuance of a writ to enact a subordinate legislation of a particular nature and a prayer has been made for issuance of a writ, order or direction directing the supply of goods and services to Duty Free Shops in India to be treated as an export without payment of CGST and IGST.

22. It has been argued that keeping in view the cardinal principles of jurisprudence, no such writ / direction can be issued as the same is policy matter and is within the exclusive domain of the legislature to enact any such legislation and the petition deserves to be dismissed on this ground alone.

23. The respondents have also stated that the judgment relied upon by the petitioner in the case of M/s. Hotel Ashoka (Supra) is of the year 2012 is of no help to the petitioner as it was a judgment delivered prior to GST regime and in the year 2016 CGST Act has been implemented and an entirely new scheme of statute with various definitions have been introduced to the statute book and in such circumstances, various defining

clauses have to be seen and examined in back drop of the present statute, which is in force as on today. It has been further stated that as per Union Budget, 2017, the definition of Indian territory has been extended to 200 nautical miles and in such circumstances also, all such duty free shops fall within the territory of India and the claim of the petitioner deserve to be dismissed.

24. The respondents have also stated that a similar issue was examined by the Authority on Advance Ruling and the same was analyzed in back drop of the judgment passed by the Hon'ble Supreme Court in the case of **M/s. Hotel Ashoka** (Supra) and the respondents have quoted the relevant portion of the Rule and their contention is that by no stretch of imagination the petitioner can be exempted from payment of CGST / IGST / SGST.

25. The respondents have argued before this Court that so far as point of sale is concerned the case goods are being manufactured at Indore, price of the goods is being received at Indore and they are being dispatched to Duty Free Shops, which is certainly within the territory of India and the person, who is purchasing the goods from the Duty Free Shop is the exporter or the person, who has purchased the goods, meaning thereby, the Duty Free Shop is an exporter and not the petitioner.

26. It has also been argued that exemptions cannot be claimed as a matter of right and the competent authority granting exemption can very well withdraw the exemption granted. In the present case, earlier exemption was not under the GST and therefore, the question of granting exemption keeping in view the fact that petitioner is manufacturing the goods in India, is selling them from Indore to a Duty Free Shop, the question of grant of exemption to the petitioner and to such a class to which the petitioner belongs does not arise. The respondents have prayed for dismissal of the writ petition.

27. It has also been stated that the petitioner does have an alternative remedy also under Section 96 of CGST Act and the petition deserves to be dismissed. It has been argued by Shri Prasanna Prasad, learned counsel for the respondent that this Court is not the competent authority to legislate on a particular subject nor this Court can issue exemption certificate granting exemption to the petitioner as the statute does not provide for any such exemption as prayed by the petitioner.

28. It has been further contended by the respondents that the judgment of the Hon'ble Supreme Court in the case of **M/s. Hotel Ashoka (Indian Tourism Development Corporation Limited) Vs. Assistant**

Commissioner of Commercial Taxes and another (Civil Appeal No.2560/2010) reported in **(2012) 276 ELT 433 SC** was delivered under the erstwhile VAT regime wherein the authority of State to levy VAT on sale of goods taking place at DFS located at international airports was challenged. Sales Tax / VAT Acts of various States have been subsequently subsumed under the GST Law. Also, the present petition does not relate to levy of VAT on sale of goods. Instead, it challenges the discontinuation of exemption that existed under erstwhile Central Excise regime wherein the supply of domestically manufactured goods to DFS was exempted from the payment of Central Excise Duty vide notification No.19/2013-CE (Non-Tariff). However, exemption from payment of GST for such supplies has not been provided under the current GST regime.

29. Learned counsel for the respondent submits that according to sub-section (5) of Section 2 of the IGST Act, 2017, “Export of Goods” with its grammatical variations and cognate expressions, means taking out of India to a place outside India. Further, moreover, as per Section 2 (56) of CGST Act, 2017 “India” means the territory of India as referred to in Article 1 of the Constitution, its Territorial Waters, Seabed and Sub-soil underlying such Waters, Continental Shelf, Exclusive Economic Zone (EEZ) or any other Maritime Zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 and the air-space above its territory and territorial waters. For the purpose of CGST Act, India extends the Exclusive Economic Zone upto 200 nautical miles from baseline. The location of the DFS, whether within customs frontier or outside, shall be within India as long as it is not beyond EEZ (200 nautical miles). Therefore, DFS cannot be said to be located outside India. Instead, the DFS is located within India. As the supply to a DFS by an Indian supplier is not to 'a place outside India', therefore, such supplies do not qualify as 'Export of Goods' under GST. Consequently, such supplies cannot be made without payment of duty by furnishing a Bond / Letter or Undertaking (LUT) under Rule 96-A of the CST Rules, 2017. Also, he cannot claim refund of unutilized Input Tax Credit (ITC) under Section 54 of the CGST Act, 2017.

30. It has been argued by learned counsel that in alternative and without prejudice to whatever has been stated above, under the GST law, the power to grant exemption to such supplies or to clarify such issues is vested with the GST Council (a constitutional body constituted under Article 279-A of the Constitution of India) which comprises of the Union Finance Minister and the Finance Minister of all the States and it is not within the domain of this Court to issue such exemption notifications.

31. The respondents have placed reliance upon the judgments delivered in the case of **Mathew Antony Vs. State of Keral**a reported in 1991 SCC Online Ker 361, **Shri Sarvan Singh and Another Vs. Shri Kasturilal** reported in (1977) 1 SCC 750 and **Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise Meeru**t reported in (1997) 1 SCC 203. A prayer has been made for dismissal of the writ petition.

32. Heard learned counsel for the parties at length, perused the record and the matter is being disposed of finally with the consent of the parties.

33. Article 265 of the Constitution of India provides that no tax shall be levied or collected except by authority of law. As per Article 246 of the Constitution, Parliament has exclusive powers to make laws in respect of matters given in Union List (List I of the Seventh Schedule) and State Government has the exclusive jurisdiction to legislate on the matters containing in State List (List II of the Seventh Schedule). In respect of the matters contained in Concurrent List (List III of the Seventh Schedule), both the Central Government and State Governments have concurrent powers to legislate.

34. Before advent of GST, the most important sources of indirect tax revenue for the Union were customs duty (entry 83 of Union List), central excise duty (entry 84 of Union List), and service tax (entry 97 of Union List). Although entry 92C was inserted in the Union List of the Seventh Schedule of the Constitution by the Constitution (Eighty-eighth Amendment) Act, 2003 for levy of taxes on services, it was not notified. So tax on services were continued to be levied under the residual entry, i.e. entry 97, of the Union List till GST came into force. The Union also levied tax called Central Sales Tax (CST) on inter-State sale and purchase of goods and on inter-State consignments of goods by virtue of entry 92A and 92B respectively. CST however is assigned to the State of origin, as per Central Sales Tax Act, 1956 made under Article 269 of the Constitution.

35. On the State side, the most important sources of tax revenue were tax on sale and purchase (entry 54 of the State List), excise duty on alcoholic liquors, opium and narcotics (entry 51 of the State List), Taxes on luxuries, entertainments, amusements, betting and gambling (entry 62 of the State List), Octroi or entry tax (entry 52 of the State List) and electricity tax (entry 53 of the State List). CST was also an important source of revenue though the same was levied by the Union.

36. The need arose in respect of imposition of uniform taxation scheme and the unification of Central VAT and State VAT was possible in form of a

dual levy under the constitutional scheme. Power of taxation is assigned to either Union or States subject-wise under Schedule-VII of the Constitution. While the Centre is empowered to tax goods upto the production or manufacturing stage, the States have the power to tax goods at distribution stage. The Union can tax services using residuary powers but States could not. Under a unified Goods and Services Tax scheme, both should have power to tax the complete supply chain from production to distribution, and both goods and services. The scheme of the Constitution did not provide for any concurrent taxing powers to the Union as well as the States and for the purpose of introducing goods and services tax, amendment of the Constitution conferring simultaneous power on Parliament as well as the State Legislatures to make laws for levying goods and services tax on every transaction of supply of goods or services was necessary.

37. The Constitution (115th Amendment) Bill, 2011, in relation to the introduction of GST, was introduced in the Lok Sabha on 11/03/2011. The Bill was referred to the Standing Committee on Finance on 29/03/2011. The Standing Committee submitted its report on the Bill in August, 2013. However, the Bill, which was pending in the Lok Sabha, lapsed with the dissolution of the 15th Lok Sabha.

38-The Constitution (122nd Amendment) Bill, 2014 was introduced in the 16th Lok Sabha on 19th December, 2014. The Constitution Amendment Bill was passed by the Lok Sabha in May, 2015. The Bill was referred to the Select Committee of Rajya Sabha on 12/05/2015. The Select Committee submitted its Report on the Bill on 22/07/2015. The Bill with certain amendments was finally passed in the Rajya Sabha and thereafter, by Lok Sabha in August, 2016. Further the bill was ratified by required number of States and received assent of the President on 8/09/2016 and has since been enacted as Constitution (101st Amendment) Act, 2016 w.e.f. 16/09/2016.

39-The important changes introduced in the Constitution by the 101st Amendment Act are the following:

a) Insertion of new article 246-A which makes enabling provisions for the Union and States with respect to the GST legislation. It further specifies that Parliament has exclusive power to make laws with respect to GST on inter-State supplies.

b) Article 268-A of the Constitution has been omitted. The said article empowered the Government of India to levy taxes on services. As tax on services has been brought under GST, such a provision was no longer required.

c) Article 269-A has been inserted which provides for goods and services tax on supplies in the course of inter-State trade or commerce which shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council. It also provides that Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

d) Article 270 has been amended to provide for distribution of goods and services tax collected by the Union between the Union and the States.

e) Article 271 has been amended which restricts power of the Parliament to levy surcharge under GST. In effect, surcharge cannot be imposed on goods and services which are subject to tax under Article 246-A.

f) Article 279-A has been inserted to provide for the constitution and mandate of GST Council.

g) Article 366 has been amended to exclude alcoholic liquor for human consumption from the ambit of GST, and services have been defined.

h) Article 368 has been amended to provide for a special procedure which requires the ratification of the Bill by the legislatures of not less than one half of the States in addition to the method of voting provided for amendment of the Constitution. Thus, any modification in GST Council shall also require the ratification by the legislatures of one half of the States.

i) Entries in List I and List II have been either substituted or omitted to restrict power to tax goods or services specified in these Lists or to take away powers to tax goods and services which have been subsumed in GST.

j) Parliament shall, by law, on the recommendation of the Goods and Services Tax Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for five years.

k) In case of petroleum and petroleum products, it has been provided that these goods shall not be subject to the levy of Goods and Services Tax till a date notified on the recommendation of the Goods and Services Tax Council.

40. After the constitutional amendment, the Central Government introduced The Central Goods and Services Tax Act, 2017, The Integrated Goods and Services Tax Act, 2017, The Union Territory Goods and Services Tax, 2017, The Goods and Services Tax (Compensation to States) Act, 2017 in Lok Sabha on 27/03/2017. After a long discussion in Parliament, the Lok Sabha has passed these bills on 29/03/2017, while Rajya Sabha passed them on 06/04/2017. The President of India assented them on 12/04/2017 and the law enacted are known as CGST Act, 2017 (12 of 2017), the Integrated GST Act, 2017 (13 of 2017), the Union Territory GST Act, 2017 (14 of 2017) and the GST (Compensation to States) Act, 2017 (15 of 2017).

41. The petitioner before this Court has made a prayer for directing the respondents to treat the goods supplied to the petitioner as an export without payment of CGST and IGST, only on the ground that Duty Free Shop at international airport are located beyond the customs frontier of India and any transaction that takes place in a Duty Free Shop is said to have taken place outside India.

42. The petitioner by virtue of earlier exemption notifications, which were issued under the Excise Act and Customs Act dated 23/05/2013 i.e. Notification No.07/2013-CE NT, Notification No.08/2013-CE NT, Notification No.09/2013-CE NT and CBEC Circular No.970/04/2013-CX is claiming exemption in the matter of payment of GST.

43. No provision of law has been brought to the notice of this Court under the Central Goods and Services Tax Act, 2017, which grants exemption from payment of taxes. A taxing statute has to be strictly construed. In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used (Principles of Statutory Interpretation by Justice G.P. Singh, Tenth Edition, General Principles of Strict Construction).

44-The Hon'ble Supreme Court has enunciated in similar words the principle of interpretation of taxing laws as under:-

“Bhagwati, J. stated the principles as follows : “In construing fiscal statutes and in determining the liability of a subject to tax one must

have regard to the strict letter of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the Legislature and by considering what was the substance of the matter" [A. V. Fernandez Vs. State of Kerala, AIR 1957 SC 657, p. 661].

Shah, J., has formulated the principles thus : "Interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency" [Sales Tax Commissioner Vs. Modi Sugar Mills, AIR 1961 SC 1047, p. 1051].

K. Iyer, J., more recently observed : "Taxation consideration may stem from administrative experience and other factors of life and not artistic visualisation or neat logic and so the literal, though pedestrian interpretation must prevail" [Martand Dairy and Farm vs. Union of India, AIR 1975 SC 1492, p. 1494]. Before taxing any person it must be shown that he falls within the ambit of the charging section by clear words used in the section [Commissioner of Wealth Tax, Gujarat Vs. Ellis Bridge Gymkhana, AIR 1998 SC 120, pp. 125, 126].

The statute governing the field does not provide any such exemption as prayed by the petitioner.

45-The relevant statutory provisions, which are necessary for adjudicating the present controversy reads as under:-

"Article 269(1) and Article 286(1) of the Constitution of India:-

(i) Article 269(1) before amendment on 08/09/2016 : Taxes on the sale or purchase of goods and taxes on the consignment of goods shall be levied and collected by the Government of India but shall be assigned and shall be deemed to have been assigned to the States on or after the 1st day of April, 1996 in the manner provided in clause (2).

Explanation.—For the purposes of this clause,—

(a) the expression "taxes on the sale or purchase of goods" shall mean taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce;

(b) the expression "taxes on the consignment of goods" shall mean taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

(ii) Article 286(1) before amendment on 08/09/2016 : Restrictions as to imposition of tax on the sale or purchase of goods :

(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Section 5 and Section 2(ab) of the Central Sales Tax Act, 1956:-

5. When is a sale or purchase of goods said to take place in the course of import or export.— (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India

shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.

(4) The provisions of sub-section (3) shall not apply to any sale or purchase of goods unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner a declaration duly filled and signed by the exporter to whom the goods are sold in a prescribed form obtained from the prescribed authority.

(5) Notwithstanding anything contained in sub-section (1), if any designated Indian carrier purchases Aviation Turbine Fuel for the purposes of its international flight, such purchase shall be deemed to take place in the course of the export of goods out of the territory of India.

Explanation — For the purposes of this sub-section, "designated Indian carrier" means any carrier which the Central Government may, by notification in the Official Gazette, specify in this behalf.]

2(ab). “Crossing the customs frontiers of India" means crossing in the limits of the area of a customs station in which imported goods or export goods are ordinarily kept before clearance by customs authorities.

Explanation — For the purposes of this clause, "customs station" and "customs authorities" shall have the same meanings as in the Customs Act, 1962 (52 of 1962).

Sections 2(4), 2(5), 2(23) and 16(1) of the Integrated Goods and Services Tax Act, 2017:-

> 2(4).“customs frontiers of India” means the limits of a customs area as defined in section 2 of the Customs Act, 1962 (52 of 1962);
>
> 2(5).“export of goods” with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India;
>
> 2(23).“zero-rated supply” shall have the meaning assigned to it in section 16;

16(1).“zero rated supply” means any of the following supplies of goods or services or both, namely:—

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

Section 2(56) of the Central Goods and Services Tax Act, 2017:-

2(56).“India” means the territory of India as referred to in article 1 of the Constitution, its territorial waters, seabed and sub-soil underlying such waters, continental shelf, exclusive economic zone or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and the air-space above its territory and territorial waters;

Sections 2(11), 2(18) and 2(27) of the Customs Act, 1962:-

2(11)."customs area" means the area of a customs station or a warehouse and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities;

2(18)."export", with its grammatical variations and cognate expressions, means taking out of India to a place outside India;

2(27)."India" includes the territorial waters of India;

Section 3(1), (2) and (3) of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976:-

(1) The sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as the territorial waters) and to the seabed and sub-soil underlying, and the airspace over, such waters.

(2) The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline.

(3) Notwithstanding anything contained in sub-section (2), the Central Government may, whenever it considers necessary so

to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the territorial waters."

46. Undisputedly, the petitioner is supplying goods to Duty Free Shops and as per Section 2(5) of IGST Act, 2017 export of goods takes place only when goods are taken out to a place outside India. India is defined under Section 2(27) of Customs Act,1962 as "India includes territorial waters of India". Similarly under the CGST Act, 2017 under Section 2(56) "India" means the territory of India including its territorial waters and the air-space above its territory and territorial waters and therefore, the goods can be said to be exported only when they cross territorial waters of India and the goods cannot be called to be exported merely on crossing customs frontier of India.

47. The petitioner's contention is that no GST is payable on such supply taking place beyond the customs frontiers of India as the same should be considered as export of goods under Section 2(5) of the IGST Act, 2017 and should be zero rated supply under Section 2(23) read with Section 15(1) of the IGST Act, 2017 is misconceived. The term "Export of Goods" has been defined under Section 2(5) of the IGST Act, 2017 as taking goods out of India to a place outside India.

48. The India is defined under Section 2(56) of the CGST Act as "India" means the territory of India as referred to in Article 1 of the Constitution, its territorial waters, seabed and sub-soil underlying such waters, continental shelf-exclusive economic zone or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and the air-space above its territory and territorial waters and therefore, the export of goods can be treated and it is complete only when the goods crosses air space limits or its territory or territorial waters of India.

49. Undisputedly, in light of the definition as contained under the IGST Act, 2017 a Duty Free Shop situated at the airport cannot be treated as territory out of India. The petitioner is not exporting the goods out of India. He is selling to a supplier, who is within India and the point of sale is also at Indore as the petitioner is receiving price of goods at Indore.

50. The petitioner is a manufacturer and exporter of garments in India and specializes in manufacturing of high quality products for children with customer base in Middle East, South Africa and USA. He intends to supply goods to Duty Free Shops (DFSs) situated in the duty free area at

international airports. The petitioner is aggrieved by the fact that the benefit available to him under the erstwhile central excise regime of removing goods from his factory to DFS located in the international airports without payment of duty is not available to him under the GST regime.

51. Vide notification No.19/2013-Central Excise dated 23/05/2013 and notification No.07/2013-Central Excise (NT) dated 23/05/2013, the Central Government had exempted the goods falling under the First Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as indigenous goods) when brought into DFS located in the arrival halls at the international customs airports from the factories of their manufacture situated in India for sale to passengers or members of crew arriving from abroad, from the whole of the duty of excise leviable thereon. No such exemption notification has been issued under GST till date.

52. In the case of **Kothari Industrial Corporation Limited Vs. Tamil Nadu Electricity Board and Anothe**r reported in **(2016) 4 SCC 134**, the apex Court has held that there is no estoppel against law and recipient of a concession has no legally enforceable right against the Government to grant or to continue to grant a concession except to enjoy benefits of concession during the period of its grant. The apex Court in paragraph No.10 and 11 of the aforesaid judgment has held as under:-

> "10. The question referred to this bench, as noticed, is whether the State would be estopped from altering/modifying the benefit of concessional tariff by means of the impugned G.O No. 861 dated 30.4.1982 on the principle of promissory estoppel. In fact, insofar as the caustic soda unit of M/s. Kothari Industrial Corporation Ltd., subsequently taken over by Southern Petro Chemical Industrial Corporation Ltd., is concerned, strictly speaking, the above question would not even arise inasmuch as at the time when the unit was set up and had started commercial production, the Act had not yet come into force. The promise, if any, was made by the letter dated 29.6.1976 on the terms noticed above, namely, the tariff payable by the industry was to be at a rate less than what was applicable to the other two units of the State for the first three years and thereafter at the rate equivalent to what was being paid by the said two units.
>
> 11. Be that as it may, the question referred has been squarely answered by this Court in Shree Sidhbali Steels Limited vs. State of Uttar Pradesh & Ors.[1] wherein this Court has considered a similar question with regard to the withdrawal of concessional tariff/

rebate to an industrial unit carrying on business in the hill areas of the State of U.P. (now the State of Uttarakhand). After an in depth consideration of the provisions of Section 48/49 of the Electricity Supply Act, 1948 under which the concessional tariff/rebate was granted and the provisions of Section 21 of the General Clauses Act as well as the provisions of the U.P. Electricity Reforms Act, 1999 under which the concessional tariff/rebate was later withdrawn this Court in para 51 came to the following conclusion –

> "From the above discussion, it is clear that the petitioners cannot raise plea of estoppel against the Notification dated 7.8.2000 reducing hill development rebate to 0% as there can be no estoppel against the statute."

In light of the aforesaid judgment, the concessions / exemptions granted earlier during the pre-GST regime cannot be claimed as a matter of right.

53. In addition, the petitioner in paragraph 7(i) of the petition has prayed this Court to issue a writ of mandamus ordering and directing that any supply of goods and services made by and Indian supplier to the DFSs in India to be treated as export since the DFS are located beyond the customs frontier of India and any transaction that takes place in a DFS is said to have taken place outside India. Further, in para 7(ii) of the petitioner it has been prayed to allow supply of goods and services by an Indian supplier to the DFS without payment of GST as the transaction undertaken at DFS is treated as an export of goods or services.

54. As per Section 2(5) of the Integrated Goods and Services Tax Act, 2017, "export of goods" with its grammatical variations and cognate expressions, means taking out of India to a place outside India. Further, as per Section 2(56) of Central Goods and Services Tax Act, 2017 "India" means the territory of India as referred to in Article 1 of the Constitution, its Territorial Waters, Seabed and Sub-oil underlying such waters, Continental Shelf, Exclusive Economic Zone (EEZ) or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and the air space above its territory and territorial waters. For the purpose of CGST Act, India extends upto the Exclusive Economic Zone upto 200 nautical miles from baseline. The location of the DFS, whether within customs frontier or beyond, shall be within India as long as it is not beyond EEZ (200 nautical miles). Therefore, DFS cannot be said to be located outside India. Instead, the DFS is located within India. As the supply to a DFS by an Indian supplier is not to 'a place outside India', therefore, such supplies do not qualify as 'export of goods'

under GST. Consequently, such supplies cannot be made without payment of duty by furnishing a bond/letter of undertaking (LUT) under rule 96-A of the CGST Rules, 2017. Also, he cannot claim refund of unutilized input tax credit (ITC) under Section 54 of the CGST Act, 2017.

55. In light of the above, the petitioner is liable to pay GST on supply of indigenous goods to DFS. Whether, transaction under taken at a DFS (i.e. sale of goods to outgoing passengers) are to be treated as export of goods or services does not form part of the instant writ petition.

56. The judgment relied upon by the learned counsel in the case of M/s. Hotel Ashoka (Indian Tourism Development Corporation Limited (Supra) is not at all applicable in the peculiar facts and circumstances of the case. The Duty Free Shop is situated within India and it is not at all situated outside of India / beyond air-space or territorial waters of India and the petitioner is selling the goods to a Duty Free Operator.

57. The other judgments relied upon by the learned counsel for the petitioner are in respect of regime and keeping in view the specific definition as per Section 2(56) of the Central Goods and Services Tax Act, 2017, the judgments relied upon by learned counsel for the petitioner are of no help to the petitioner, who is producer / manufacturer of garments at Indore and intent to supply indigenous goods to Duty Free Shops.

58. Respondents have placed reliance upon judgment delivered in the case of Mathew Antony Vs. State of Kerala reported in 1991 SCC Online Ker 361. In the aforesaid case, it has been held that binding nature of the decision would come to an end when the law is changed subsequently. Paragraph No.8 of the aforesaid judgment reads as under:

> “8. Section 11 of the Code of Civil Procedure is only applicable to suits. S. 141 of the Code makes the procedure regarding suits applicable to proceedings. Explanation to Section 141 excludes proceedings under Art. 226 from the purview of the Section. Even then general principles of respondent judicata are applicable to such proceedings also though S. 11 as such is not applicable. Though a decision to inter parties may not be respondent judicata even under general principles which do not take in the rigour of S. 11, the law laid down by the High Court is binding on it. Decisions may be on questions of facts, questions of law or on mixed question of fact and law. If a decision on facts is rendered by applying the relevant provisions of law to the facts the binding nature of the decision on that point will come to an end when the law is changed

subsequently. That is because the law as then stood alone was interpreted in relation to the facts. When the law is changed the cause of action itself is changed. Though the former decision which has become final may continue to bind the parties thereto, when the law is changed and thus the cause of action became different, the new law will have to be applied to the facts in the subsequent case even though facts are same because law applicable is different. The Division Bench rendered the decision by defining "place" with reference to the law applicable at that time. Now the definition underwent radical changes to embrace another room int he same building or a nearby building within a radius of 50 meters in such a way that the existing distance is not further reduced. The definition of "place" in 1991 (1) KLT 543 cannot therefore be relied on now as the law binding the parties in this case. There is no case that Door No.7/597 is more than 50 meters away from Door No.7/594 or that the distance is further reduced. Both are in the same building and as earlier pointed out, the distance is only seven meters as found in the said decision itself. Admittedly, Door No.7/597 was used for the same purpose continuously from 1987-88 upto the end of 1989-90. I do not think that there is any violation of any of the Rules involved."

In light of the aforesaid judgment, as no such exemption is available to the petitioner in light of the GST Act, 2017, the judgment relied upon by the petitioner is of no help and the petitioner cannot escape from the liability of payment of GST.

59. Reliance has also been placed in the case of **Shri Sarvan Singh and Another Vs. Shri Kasturilal** reported in **(1977) 1 SCC 75**0. Paragraph No.21 of the aforesaid judgment reads as under:-

"21. For resolving such inter se conflicts, one other test may also be applied through the persuasive force of such a test is but one of the factors which combine to give a fair meaning to the language of the law. That test is that the later enactment must prevail over the earlier one. Section 14A and Chapter IIIA having been enacted with effect from December 1, 1975 are later enactments in reference to Section 19 of the Slum Clearance Act which, in its present form, was placed on the statute book with effect from February 28, 1965 and in reference to Section 39 of the same Act, which came into force in 1956 when the Act itself was passed. The legislature gave over- riding effect to Secition14A and Chapter IIIA with the knowledge that Sections 19 and 39 of the Slum Clearance

Act contained non-obstante clauses of equal efficacy. Therefore the later enactment must prevail over the former. The same test was mentioned with approval by this Court in Shri Ram Narain's case (Supra) at page 615."

In the aforesaid judgment, it has been held that later act would prevail over the former enactment and therefore, as a new enactment has come into existence i.e. Central Goods and Services Tax Act, 2017, the statutory provisions under the Act or 2017 are to be followed.

60. In the case of Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise Meerut reported in (1997) 1 SCC 203, it has been held that the judgment is not a precedence on a preposition which it did not decide. Paragraph 8 of the aforesaid judgment reads as under:-

"8.Learned counsel for Revenue submitted that if even a weighbridge was excisable, as held in the case of Narne Tulaman Manufacturers Pvt. Ltd. [(1989) 1 SCC 172] so was a mono vertical crystalliser. The only argument on behalf a Narne Tulaman Manufacturers Pvt. Ltd. was that it was liable to excise duty in respect of the indicating system that it manufactured and not the whole weighbridge. The contention that weighbridges were not 'good' within the meaning of the Act was not raised and no evidence in that behalf was brought on record. We cannot assume that weighbridges sand on the same footing as mono vertical crystallisers in that regard and told that because weighbridges were held to be exigible to excise duty so must mono vertical crystalliser. A decision cannot be relied upon in support of a proposition that it did not decide."

In light of the aforesaid judgment, the issue involved in the present case has not been decided in the case of M/s. Hotel Ashoka (Supra) as it was not a case of supplier supplying goods to a Duty Free Operator.

61. Similarly the judgment delivered by the Bombay High Court in the case of A-1 Cuisines Pvt. Ltd (Supra) does not deal with the subject involved in the present writ petition. It was a case of a person seeking issuance of writ of mandamus directing the respondents therein to exempt the petitioner from charging applicable taxes under the GST legislations on sale of cosmetic products in respect of retail outlet which he intended to setup at Domestic Security Area at Dr. Babasaheb Ambedkar International Airport. Again the judgment is distinguishable on facts and does not help the petitioner in any manner.

62. The petitioner cannot escape the liability to pay GST. He is manufacturing certain goods and supplying to a person, who is having a Duty Free Shop. It is true that we cannot export our taxes but the facts remains that it is not the petitioner, who is exporting the goods or taking goods out of India. He is selling to a person, who is having Duty Free Shop (to a Duty Free Operator), which is located in India as per the definition clause as contained under the GST Act. In light of the aforesaid, this Court does not find any reason to issue writ of mandamus directing the respondents not to charge GST on the petitioner or to legislate on the subject granting exemptions as prayed by the petitioner.

63. A statute is an edict of the legislature and the Courts do not have the power to enact a statute and the Court can only do interpretation of statute and once the Court does not have power to legislate, the question of granting exemption in absence of any statutory provision to the petitioner under the GST Act does not arise.

64. With the aforesaid, writ petition stands dismissed.

Certified copy as per rules.

No order as to costs.

[2019] 57 DSTC 59

In the Supreme Court of India

[Hon'ble Justice A. K. Sikri and Hon'ble Justice S. Abdul Nazeer]

Civil Appeal Nos. 18300-18305/2017

Commissioner of Central Excise and Service Tax, Noida ... Appellant(s)

Vs.

M/s. Sanjivani Non-Ferrous Trading Pvt. Ltd. ... Respondent(s)

Date of Order: 10.12.2018

ASSESSMENT OF DUTY UNDER SECTION 14 OF THE CUSTOMS ACT, 1962 – RULE 4(1) & 4(2) OF CUSTOMS VALUATION RULES – REJECTION OF TRANSACTION VALUE AND INCREASING THE ASSESSABLE VALUE – RULE 4(2) NOT COMPLIED WITH – IMPORTER & EXPORTER NOT RELATED TO EACH OTHER – NO MATERIAL PLACED FOR VARIATION OF PRICE IN IDENTICAL GOODS – EVEN NOT CONFRONTED WITH ANY CONTEMPORANEOUS MATERIAL RELIED UPON BY REVENUE FOR ENHANCING THE PRICE DECLARED IN BILL OF ENTRY – WHETHER JUSTIFIED, HELD NO – APPEALS OF REVENUE DISMISSED.

Facts of the Case

The appeals pertained to the transaction value/assessable value in respect of imported Aluminium Scrap, which was imported by the respondent herein. The respondent had imported various varieties of the said Aluminium scrap during the period 27thAugust, 2013 to 29th December, 2014 and filed 843 Bills of Entry alongwith invoices and purchase orders in respect therein declaring the transaction value of the imported goods for the purpose of paying custom duty. The declared value was not accepted by the Assessing Officer who found the same to be low. Accordingly, the said declared value was rejected and reassessment was done by increasing the assessable value.

In a writ petition filed by the respondent in the High Court of Allahabad, on the directions of the High Court directed the Deputy Commissioner of Customs, NOIDA passed a speaking order dated 25th March, 2015,giving his reasons to reject the transaction value as declared by the respondent and enhancing the same by taking into consideration the value of imported goods, namely, grades of scrap Aluminium contents therein as well as quantum of presence of other metals.

The assessment order dated 25th March, 2015 passed by the Assessing Officer was challenged by filing appeals before the Commissioner (Appeals), Central Excise and Customs, NOIDA. All the appeals were dismissed.

Challenging the order of the Commissioner (Appeals), the respondent approached the Customs, Excise and Service Tax Appellate Tribunal. By the impugned common judgment dated 17th January, 2017, the appeals of the respondent were allowed thereby rejecting the enhancement of assessable value by the Revenue. It was the said order of the Tribunal, which was the subject matter of the appeals.

Held

The observations of the Tribunal made in the impugned judgment were to be appreciated in the light of the principles of law specified in the aforesaid judgment, inasmuch as the Tribunal had categorically remarked that the normal rule was that assessable value had to be arrived at on the basis of the price which was actually paid, as provided by Section14 of the Customs Act and the case law referred to by it (In paragraph 5,the Tribunal referred to its own judgments which follow the aforesaid principle laid down by this Court).

It was, therefore, rightly contended by Senior Counsel appearing for the respondent that the reason given for setting aside the order that the normal rule was that the assessable value had to be arrived at on the basis of the price which was actually paid, and that was mentioned in the Bills of Entry. The Tribunal had clearly mentioned that this declared price could be rejected only with cogent reasons by undertaking the exercise as to on what basis the Assessing Authority could hold that the paid price was not the sole consideration of the transaction value. Since there was no such exercise done by the Assessing Authority to reject the price declared in the Bills of Entry, Order-in-Original was, therefore, clearly erroneous.

Present for the Appellant(s)	:	Mr. B. Krishna Prasad, Adv.
Present for Respondent(s)	:	Mr.Chirag M. Shroff, Adv. Ms. Neha Sangwan, Adv. Ms. Mahima C. Shroff, Adv.

A.K. Sikri, J.

The issue raised in these appeals pertains to the transaction value/ assessable value in respect of imported Aluminum Scrap, which was imported by the respondent herein. The respondent had imported various varieties of the said Aluminum scrap during the period 27th August, 2013 to 29th December, 2014 and filed 843 Bills of Entry along with invoices and purchase orders in respect therein declaring the transaction value of the imported goods for the purpose of paying custom duty. The declared value

was not accepted by the Assessing Officer who found the same to be low. Accordingly, the said declared value was rejected and reassessment was done by increasing the assessable value.

2) In a writ petition filed by the respondent in the High Court of Allahabad, on the directions of the High Court directed the Deputy Commissioner of Customs, NOIDA passed a speaking order dated 25th March, 2015, giving his reasons to reject the transaction value as declared by the respondent and enhancing the same by taking into consideration the value of imported goods, namely, grades of scrap Aluminum contents therein as well as quantum of presence of other metals.

3) The assessment order dated 25th March, 2015 passed by the Assessing Officer was challenged by filing appeals before the Commissioner (Appeals), Central Excise and Customs, NOIDA. All these appeals were dismissed. Challenging the order of the Commissioner (Appeals), the respondent approached the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as the "Tribunal"). By the impugned common judgment dated 17th January, 2017, the appeals of the respondent were allowed thereby rejecting the enhancement of assessable value by the Revenue. It is the said order of the Tribunal, which is the subject matter of these appeals.

4) The entire basis of the order of the Tribunal is contained in paragraph 7 of the impugned judgment and since that paragraph contains the reasons which persuaded the Tribunal to set aside the order of the authorities below, we reproduce this para along with paragraph 8 which disclosed the outcome of the appeals, in entirety.

> "7. Having considered the rival contentions and on perusal of record, we find that the Original Authority was directed by the Hon'ble High Court to pass speaking order on the enhancement of assessable value. We find that the Original Authority in its Order-in-Original dated 25/03/2015 passed comments on the ground of writ petition and did not properly examine the evidence available with the department required to be examined for enhancement of assessable value. Further, we find that as held in the case laws stated above and as provided by Section 14 of Customs Act, 1962, the assessable value has to be arrived at on the basis of the price which is actually paid and in a case the price is not sole consideration or if the buyers and sellers are related persons then after establishing that the price is not sole consideration the transaction value can be rejected and taking the other evidences

into consideration the assessable value can be arrived at. Such exercise has not been done in these cases on hand. Therefore, we reject the enhancement of assessable value in respect of the Bills of Entry which are involved in all the appeals being decided and we restore the assessable value as declared by the appellant in said Bills of Entry.

8. In result, we set aside all the impugned Orders-in-Appeal and allow all the appeals. The appellant shall be entitled for consequential relief, if any, in accordance with law.

5) The precise submission of Mr. K. Radhakrishna, learned senior counsel appearing for the Revenue was that as per the Tribunal itself, the reasons for upsetting the order in original are:

(a) That he did not properly examine the evidences available with the Department, which were required to be examined for the purpose of enhancement of assessable value.

(b) As per the provisions of Section 14 of the Customs Act, 1962 and the case law in respect thereof, the assessable value has to be arrived at on the basis of the price which is actually paid and in case the price is not the sole consideration or if the buyers and sellers are related persons then after establishing that the price is not the sole consideration, the transaction value can be rejected. However, such exercise has not been done in these cases.

6) It was submitted that if the Original Authority/Assessing Officer had failed to examine the evidence that was available with the Department and had not undertaken the exercise regarding price being not the sole consideration, the Tribunal should have remanded the case back to the Assessing Officer for examining the material and undertaking that exercise. To put it otherwise, the entire thrust of the argument of Mr. Radhakrishna was that appeals could not have been allowed straightaway by accepting the transaction value given by the respondent/assessee and another opportunity should have been given to the Assessing Authority in this behalf.

7) This argument may seem to be attractive, but only when there is a cursory look at the aforesaid observations of the Tribunal that the Assessing Officer did not examine the evidence available with the Department which was necessitated for such a purpose. However, the observations of the Tribunal have to be understood in their entirety and in the context in which these are made. The Tribunal has categorically mentioned that as per the

provisions of Section 14 of the Customs Act and the principles laid down in the case law (which it referred to in the earlier part of the judgment) interpreting this provision, the assessable value has to be arrived at on the basis of the price which is actually paid. It is the basic principle enshrined in the aforesaid provision, i.e., Section 14, which can be culled out from the catena of judgments pronounced by this Court.

8) In Eisher Tractors Ltd., Haryana vs. Commissioner of Customs, Mumbai[1], this Court held as under:

> "6. Under the Act customs duty is chargeable on goods. According to Section 14(1) of the Act, the assessment of duty is to be made on the value of the goods. The value may be fixed by the Central Government under Section 14(2). Where the value is not so fixed, the value has to be determined under Section 14(1). The value, according to Section 14(1), shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation — in the course of international trade. The word "ordinarily" necessarily implies the exclusion of "extraordinary" or "special" circumstances. This is clarified by the last phrase in Section 14 which describes an "ordinary" sale as one "where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale …". Subject to these three conditions laid down in Section 14(1) of time, place and absence of special circumstances, the price of imported goods is to be determined under Section 14(1-A) in accordance with the Rules framed in this behalf.
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> 9. These exceptions are in expansion and explicatory of the special circumstances in Section 14(1) quoted earlier. It follows that unless the price actually paid for the particular transaction falls within the exceptions, the Customs Authorities are bound to assess the duty on the transaction value.
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> 12. Rule 4(1) speaks of the transaction value. Utilisation of the definite article indicates that what should be accepted as the value

1 1(2001) 1 SCC 315

for the purpose of assessment to customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4(2). “Payable” in the context of the language of Rule 4(1) must, therefore, be read as referring to “the particular transaction” and payability in respect of the transaction envisages a situation where payment of price may be deferred.

xxx xxx xxx

13. That Rule 4 is limited to the transaction in question is also supported by the provisions of the other rules each of which provide for alternate modes of valuation and allow evidence of value of goods other than those under assessment to be the basis of the assessable value. Thus, Rule 5 allows for the transaction value to be determined on the basis of identical goods imported into India at the same time; Rule 6 allows for the transaction value to be determined on the value of similar goods imported into India at the same time as the subject goods. Where there are no contemporaneous imports into India, the value is to be determined under Rule 7 by a process of deduction in the manner provided therein. If this is not possible the value is to be computed under Rule 7-A. When value of the imported goods cannot be determined under any of these provisions, the value is required to be determined under Rule 8 “using reasonable means consistent with the principles and general provisions of these Rules and subsection (1) of Section 14 of the Customs Act, 1962 and on the basis of data available in India”. If the phrase “the transaction value” used in Rule 4 were not limited to the particular transaction then the other rules which refer to other transactions and data would become redundant.

xxx xxx xxx

22. In the case before us, it is not alleged that the appellant has misdeclared the price actually paid. Nor was there a misdescription of the goods imported as was the case in Padia Sales Corpn. [1993 Supp (4) SCC 57] It is also not the respondent's case that the particular import fell within any of the situations enumerated in Rule 4(2). No reason has been given by the Assistant Collector for rejecting the transaction value under Rule 4(1) except the price list of vendor. In doing so, the Assistant Collector not only ignored Rule 4(2) but also acted on the basis of the vendor's price list as if a price list is invariably proof of the transaction value. This was erroneous

and could not be a reason by itself to reject the transaction value. A discount is a commercially-acceptable measure which may be resorted to by a vendor for a variety of reasons including stock clearance. A price list is really no more than a general quotation. It does not preclude discounts on the listed price. In fact, a discount is calculated with reference to the price list. Admittedly in this case a discount up to 30% was allowable in ordinary circumstances by the Indian agent itself. There was the additional factor that the stock in question was old and it was a one-time sale of 5-year-old stock. When a discount is permissible commercially, and there is nothing to show that the same would not have been offered to anyone else wishing to buy the old stock, there is no reason why the declared value in question was not accepted under Rule 4(1)."

9) To the same effect, are other judgments, reiterating the aforesaid principle, such as, Commissioner of *Customs, Calcutta vs. South India Television (P) Ltd.*[2], *Chaudhary Ship Breakers vs. Commissioner of Customs, Ahmedabad*\[3] and Commissioner of Customs, Vishakhapatnam vs. Aggarwal Industries Ltd.[4].

10) The law, thus, is clear. As per Sections 14(1) and 14(1-A), the value of any goods chargeable to ad valorem duty is deemed to be the price as referred to in that provision. Section 14(1) is a deeming provision as it talks of 'deemed value' of such goods. Therefore, normally, the Assessing Officer is supposed to act on the basis of price which is actually paid and treat the same as assessable value/transaction value of the goods. This, ordinarily, is the course of action which needs to be followed by the Assessing Officer. This principle of arriving at transaction value to be the assessable value applies. That is also the effect of Rule 3(1) and Rule 4 (1) of the Customs Valuation Rules, namely, the adjudicating authority is bound to accept price actually paid or payable for goods as the transaction value. Exceptions are, however, carved out and enumerated in Rule 4(2). As per that provision, the transaction value mentioned in the Bills of Entry can be discarded in case it is found that there are any imports of identical goods or similar goods at a higher price at around the same time or if the buyers and sellers are related to each other. In order to invoke such a provision it is incumbent upon the Assessing Officer to give reasons as to why the transaction value declared in the Bills of Entry was being rejected; to establish that the price is not the sole consideration; and to give the

2 (2007) 6 SCC 373

3 (2010) 10 SCC 576

4 4(2012) 1 SCC 186

reasons supported by material on the basis of which the Assessing Officer arrives at his own assessable value.

11) In *South India Television (P) Ltd.*, the Court explained as to how the value is derived from the price and under what circumstances the deemed value mentioned in Section 14(1) can be departed with. Following discussion in the said judgment needs to be quoted hereunder:

> "10. We do not find any merit in this civil appeal for the following reasons. Value is derived from the price. Value is the function of the price. This is the conceptual meaning of value. Under Section 2(41), "value" is defined to mean value determined in accordance with Section 14(1) of the Act. Section 14 of the Customs Act, 1962 is the sole repository of law governing valuation of goods. The Customs Valuation Rules, 1988 have been framed only in respect of imported goods. There are no rules governing the valuation of
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> export goods. That must be done based on Section 14 itself. In the present case, the Department has charged the respondent importer alleging misdeclaration regarding the price. There is no allegation of misdeclaration in the context of the description of the goods. In the present case, the allegation is of underinvoicing. The charge of underinvoicing has to be supported by evidence of prices of contemporaneous imports of like goods. It is for the Department to prove that the apparent is not the real. Under Section 2(41) of the Customs Act, the word "value" is defined in relation to any goods to mean the value determined in accordance with the provisions of Section 14(1). The value to be declared in the bill of entry is the value referred to above and not merely the invoice price.
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> 12. However, before rejecting the invoice price the Department has to give cogent reasons for such rejection. This is because the invoice price forms the basis of the transaction value. Therefore, before rejecting the transaction value as incorrect or unacceptable, the Department has to find out whether there are any imports of identical goods or similar goods at a higher price at around the same time. Unless the evidence is gathered in that regard, the question of importing Section 14(1-A) does not arise. In the absence of such evidence, invoice price has to be accepted as the transaction value. Invoice is the evidence of value. Casting suspicion on invoice produced by the importer is not sufficient to reject it as

evidence of value of imported goods. Undervaluation has to be proved. If the charge of undervaluation cannot be supported either by evidence or information about comparable imports, the benefit of doubt must go to the importer. If the Department wants to allege undervaluation, it must make detailed inquiries, collect material and also adequate evidence. When undervaluation is alleged, the Department has to prove it by evidence or information about comparable imports. For proving undervaluation, if the Department relies on declaration made in the exporting country, it has to show how such declaration was procured. We may clarify that strict rules of evidence do not apply to adjudication proceedings. They apply strictly to the courts' proceedings. However, even in adjudication proceedings, the AO has to examine the probative value of the documents on which reliance is placed by the Department in support of its allegation of undervaluation. Once the Department discharges the burden of proof to the above extent by producing evidence of contemporaneous imports at higher price, the onus shifts to the importer to establish that the invoice relied on by him is valid. Therefore, the charge of under invoicing has to be supported by evidence of prices of contemporaneous imports of like goods.

13. Section 14(1) speaks of “deemed value”. Therefore, invoice price can be disputed. However, it is for the Department to prove that the invoice price is incorrect. When there is no evidence of contemporaneous imports at a higher price, the invoice price is liable to be accepted. The value in the export declaration may be relied upon for ascertainment of the assessable value under the Customs Valuation Rules and not for determining the price at which goods are ordinarily sold at the time and place of importation. This is where the conceptual difference between value and price comes into discussion.”

12) The observations of the Tribunal made in the impugned judgment are to be appreciated in the light of the principles of law specified in the aforesaid judgment, inasmuch as the Tribunal has categorically remarked that the normal rule is that assessable value has to be arrived at on the basis of the price which is actually paid, as provided by Section 14 of the Customs Act and the case law referred to by it (In paragraph 5, the Tribunal referred to its own judgments which follow the aforesaid principle laid down by this Court).

13) It is, therefore, rightly contended by Mr. Dushyant A. Dave, learned senior counsel appearing for the respondent that the reason given for

setting aside the order that the normal rule was that the assessable value has to be arrived at on the basis of the price which was actually paid, and that was mentioned in the Bills of Entry. The Tribunal has clearly mentioned that this declared price could be rejected only with cogent reasons by undertaking the exercise as to on what basis the Assessing Authority could hold that the paid price was not the sole consideration of the transaction value. Since there is no such exercise done by the Assessing Authority to reject the price declared in the Bills of Entry, Order-in-Original was, therefore, clearly erroneous.

14) In Commissioner of Customs vs. Prabhu Dayal Prem Chand[5], this Court was confronted with almost same kind of fact situation. On the basis of the information received subsequently from the London Metal Exchange (for short, 'LME') to the effect that the price of the two metals, viz., brass scrap and copper scrap, in LME as on the date of import was more than the price declared by the respondent, demanded additional duty amounting to Rs. 90,248/- and Rs. 1,94,035 respectively, from the assessee on the said two Bills of Entry. This order was set aside by the Tribunal and appeals there against by the Customs were dismissed by this Court. The Court noted, while accepting the plea of the assessee, that they were not confronted with any contemporaneous material relied upon by the Revenue for enhancing the price declared by them in the Bills of Entry. It also noted the following remarks of the Tribunal:

> "In the present case as mentioned above, even though there is a reference to contemporaneous import in the order passed by the Deputy Commissioner no material regarding such import has been placed before us or made available by the appellant at any point of time. Therefore, assessment in this case has to be taken as having been made purely on the basis of LME bulletin without any corroborative evidence of imports at or near that price which is not permissible under law. We, therefore, set aside the impugned order and allow the appeal."

Dismissing the appeals, this Court observed as follows:

> "….It is manifest from the aforeextracted order of the Tribunal that no details of any contemporaneous imports or any other material indicating the price notified by LME had either been referred to by the adjudicating officer in the adjudication order or such material was placed before the Tribunal at the time of hearing of the appeal. The learned counsel for the Revenue has not been able to controvert

5 (2010) 13 SCC 535

the said observations by the Tribunal. In that view of the matter no fault can be found with the order passed by the Tribunal setting aside the additional demand created against the assessee."

15) We, thus, do not find any merit in these appeals and dismiss the same.

[2019] 57 DSTC 69

In the Supreme Court of India

[Hon'bleJustice Arun Mishra and Hon'ble Justice Navin Sinha]

Civil Appeal No. 6221/2011
Civil Appeal Nos. 3965-66/2013
Civil Appeal Nos. 3967-68/2013
Civil Appeal Nos. 3969-70/2013
Transfer Case (c) No. 19/2019

The Regional Provident Fund Commissioner (II)
West Bengal & Ors. ... Appellant(s)

Vs.

Vivekananda Vidyamandir and Ors. ... Respondent(s)

Date of Order: 28.02.2019

EMPLOYEES PROVIDENT FUND AND MISCELLANEOUS PROVISIONS ACT, 1952 – BASIC WAGES UNDER SECTION 2(b)(ii) – COMPUTATION OF DEDUCTION FOR PAYMENT OF PROVIDENT FUND UNDER SECTION 6 OF THE ACT.

WHETHER SPECIAL ALLOWANCE PAID BY AN ESTABLISHMENT TO ITS EMPLOYEE WOULD FALL WITHIN THE EXPRESSION OF BASIC WAGES – HELD; YES. NO MATERIAL HAS BEEN PLACED BY THE ESTABLISHMENT TO DEMONSTRATE THAT THE ALLOWANCES PAID TO ITS EMPLOYEES WERE EITHER VARIABLE OR WERE LINKED TO ANY INCENTIVES FOR PRODUCTION RESULTING HIGH OUTPUT BY AN EMPLOYEE AND SUCH ALLOWANCE WERE NOT PAID TO ALL EMPLOYEE.

WHETHER DEDUCTION WAS ALLOWED ON HOUSE RENT ALLOWANCE, SPECIAL ALLOWANCE, MANAGEMENT ALLOWANCE, CONVEYANCE ALLOWANCE, EDUCATION ALLOWANCE, FOOD CONCESSION, MEDICAL ALLOWANCE, SPECIAL HOLIDAYS, NIGHT SHIFT INCENTIVES AND CITY COMPENSATORY ALLOWANCE FROM BASIC WAGES – HELD; NO.

Facts of the Case

Civil Appeal No. 6221 of 2011*: The respondent was an unaided school giving special allowance by way of incentive to teaching and non-teaching*

staff pursuant to an agreement between the staff and the management. The incentive was reviewed from time to time upon enhancement of the tuition fees of the students. The authority under the Act held that the special allowance was to be included in basic wage for deductionof provident fund. The Single Judge set aside the order. The Division Bench initially after examining the salary structure allowed the appeal on 13.01.2005 holding that the special allowance was a part of dearness allowance liable to deduction. The order was recalled on 16.01.2007 at the behest of the respondent as none had appeared on its behalf. The subsequent Division Bench dismissed the appeal holding that the special allowance was not linked to the consumer price index, and therefore did not fall within the definition of basic wage, thus not liable to deduction.

Civil Appeal Nos. 396566of 2013*: The appellant was paying basic wage + variable dearness allowance (VDA) + house rent allowance (HRA) + travel allowance + canteen allowance + lunch incentive. The special allowances not having been included in basic wage, deduction for provident fund was not made from the same. The authority under the Act held that only washing allowance was to be excluded from basic wage. The High Court partially allowed the writ petition by excluding lunch incentive from basic wage. A review petition against the same by the appellant was dismissed.*

Civil Appeal Nos. 396970of 2013*: The appellant was not deducting Provident Fund contribution on house rent allowance, special allowance, management allowance and conveyance allowance by excluding it from basic wage. The authority under the Act held that the allowances had to be taken into account as basic wage for deduction. The High Court dismissed the writ petition and the review petition filed by the appellant.*

Civil Appeal Nos. 396768of 2013*: The appellant company was not deducting Provident Fund contribution on house rent allowance, special allowance, management allowance and conveyance allowance by excluding it from basic wage. The authority under the Act held that the special allowances formed part of basic wage and was liable to deduction. The writ petition and review petition filed by the appellant were dismissed.*

Transfer Case (C) No.19 of 2019 (arising out of T.P. (C) No.1273 of 2013)*: The petitioner filed W.P. No. 25443 of 2010 against the show cause notice issued by the authority under the Act calling for records to determine if conveyance allowance, education allowance, food concession, medical allowance, special holidays, night shift incentives and city compensatory*

allowance constituted part of basic wage. The writ petition was dismissed being against a show cause notice and the statutory remedy available under the Act, including an appeal. A Writ Appeal (Civil) No.1026 of 2011 was preferred against the same and which has been transferred to this Court at the request of the petitioner even before a final adjudication of liability.

Held

The Act was a piece of beneficial social welfare legislation and must be interpreted as such was considered in The Daily Partap vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh, (1998) 8 SCC 90.

Applying the aforesaid tests to the facts of these appeals, no material had been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it had to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. There was no data available on record to show what were the norms of work prescribed for those workmen during the relevant period. It was therefore not possible to ascertain whether extra amounts paid to the workmen were infact paid for the extra work which had exceeded the normal output prescribed for the workmen. The wage structure and the components of salary had been examined on facts, both by the authority and the appellate authority under the Act, who had arrived at a factual conclusion that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. There was no occasion for the court to interfere with the concurrent conclusions of facts. The appeals by the establishments therefore merit no interference. Conversely, for the same reason the appeal preferred by the Regional Provident Fund Commissioner deserved to be allowed.

Resultantly, Civil Appeal No. 6221 of 2011 was allowed. Civil Appeal Nos. 396566 of 2013, Civil Appeal Nos. 396768of 2013,Civil Appeal Nos. 396970 of 2013 and Transfer Case (C) No.19 of 2019 were dismissed.

JUDGMENT

Navin Sinha, J.

The appellants with the exception of Civil Appeal No. 6221 of 2011, are establishments covered under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "Act"). The appeals raise a common question of law, if the special allowances paid by an establishment to its employees would fall within the expression "basic wages" under Section 2(b)(ii) read with Section 6 of the Act for computation of deduction towards Provident Fund. The appeals have therefore been heard together and are being disposed by a common order.

2. It is considered appropriate to briefly set out the individual facts of each appeal for better appreciation.

Civil Appeal No. 6221 of 2011 : The respondent is an unaided school giving special allowance by way of incentive to teaching and nonteaching staff pursuant to an agreement between the staff and the management. The incentive was reviewed from time to time upon enhancement of the tuition fees of the students. The authority under the Act held that the special allowance was to be included in basic wage for deduction of provident fund. The Single Judge set aside the order. The Division Bench initially after examining the salary structure allowed the appeal on 13.01.2005 holding that the special allowance was a part of dearness allowance liable to deduction. The order was recalled on 16.01.2007 at the behest of the respondent as none had appeared on its behalf. The subsequent Division Bench dismissed the appeal holding that the special allowance was not linked to the consumer price index, and therefore did not fall within the definition of basic wage, thus not liable to deduction.

Civil Appeal Nos. 396566 of 2013: The appellant was paying basic wage + variable dearness allowance (VDA) + house rent allowance (HRA) + travel allowance + canteen allowance + lunch incentive. The special allowances not having been included in basic wage, deduction for provident fund was not made from the same. The authority under the Act held that only washing allowance was to be excluded from basic wage. The High Court partially allowed the writ petition by excluding lunch incentive from basic wage. A review petition against the same by the appellant was dismissed.

Civil Appeal Nos. 396970 of 2013: The appellant was not deducting Provident Fund contribution on house rent allowance, special allowance,

management allowance and conveyance allowance by excluding it from basic wage. The authority under the Act held that the allowances had to be taken into account as basic wage for deduction. The High Court dismissed the writ petition and the review petition filed by the appellant.

Civil Appeal Nos. 396768 of 2013: The appellant company was not deducting Provident Fund contribution on house rent allowance, special allowance, management allowance and conveyance allowance by excluding it from basic wage. The authority under the Act held that the special allowances formed part of basic wage and was liable to deduction. The writ petition and review petition filed by the appellant were dismissed.

Transfer Case (C) No.19 of 2019 (arising out of T.P. (C) No. 1273 of 2013): The petitioner filed W.P. No. 25443 of 2010 against the show cause notice issued by the authority under the Act calling for records to determine if conveyance allowance, education allowance, food concession, medical allowance, special holidays, night shift incentives and city compensatory allowance constituted part of basic wage. The writ petition was dismissed being against a show cause notice and the statutory remedy available under the Act, including an appeal. A Writ Appeal (Civil) No.1026 of 2011 was preferred against the same and which has been transferred to this Court at the request of the petitioner even before a final adjudication of liability.

3. We have heard learned Additional Solicitor General, Shri Vikramajit Banerjee and Shri Sanjay Kumar Jain appearing for the Regional Provident Fund Commisioner and Shri Ranjit Kumar, learned Senior Counsel who made the lead arguments on behalf of the Establishment appellants, and also Mr. Anand Gopalan, learned counsel appearing for the petitioner in the transfer petition.

4. Shri Vikramajit Banerjee, learned Additional Solicitor General appearing for the appellant in Civil Appeal No. 6221 of 2011, submitted that the special allowance paid to the teaching and nonteaching staff of the respondent school was nothing but camouflaged dearness allowance liable to deduction as part of basic wage. Section 2(b)(ii) defined dearness allowance as all cash payment by whatever name called paid to an employee on account of a rise in the cost of living. The allowance shall therefore fall within the term dearness allowance, irrespective of the nomenclature, it being paid to all employees on account of rise in the cost of living. The special allowance had all the indices of a dearness allowance. A bare perusal of the breakup of the different ingredients of the salary noticed in the earlier order of the Division Bench dated 13.01.2005

makes it apparent that it formed part of the component of pay falling within dearness allowance. The special allowance was also subject to increment on a time scale. The Act was a social beneficial welfare legislation meant for protection of the weaker sections of the society, i.e. the workmen, and was therefore, required to be interpreted in a manner to subserve and advance the purpose of the legislation. Under Section 6 of the Act, the appellant was liable to pay contribution to the provident fund on basic wages, dearness allowance, and retaining allowance (if any). To exclude any incentive wage from basic wage, it should have a direct nexus and linkage with the amount of extra output. Relying on Bridge and Roof Co. (India) Ltd. vs. Union of India, (1963) 3 SCR 978, it was submitted that whatever is payable by all concerns or earned by all permanent employees had to be included in basic wage for the purpose of deduction under Section 6 of the Act. It is only such allowances not payable by all concerns or may not be earned by all employees of the concern, that would stand excluded from deduction. It is only when a worker produces beyond the base standard, what he earns would not be a basic wage but a production bonus or incentive wage which would then fall outside the purview of basic wage under Section 2(b) of the Act. Since the special allowance was earned by all teaching and nonteaching staff of the respondent school, it has to be included for the purpose of deduction under Section 6 of the Act. The special allowance in the present case was a part of the salary breakup payable to all employees and did not have any nexus with extra output produced by the employee out of his allowance, and thus it fell within the definition of “basic wage”.

5. The common submission on behalf of the appellants in the remaining appeals was that basic wages defined under Section 2(b) contains exceptions and will not include what would ordinarily not be earned in accordance with the terms of the contract of employment. Even with regard to the payments earned by an employee in accordance with the terms of contract of employment, the basis of inclusion in Section 6 and exclusion in Section 2(b)(ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose of contribution under Section 6. But whatever is not payable by all concerns or may not be earned by all employees of a concern are excluded for the purposes of contribution. Dearness allowance was payable in all concerns either as an addition to basic wage or as part of consolidated wages.

Retaining allowance was payable to all permanent employees in seasonal factories and was therefore included in Section 6. But, house rent allowance is not paid in many concerns and sometimes in the same concern, it is paid to some employees but not to others, and would therefore stand excluded from basic wage. Likewise overtime allowance though in

force in all concerns, is not earned by all employees and would again stand excluded from basic wage. It is only those emoluments earned by an employee in accordance with the terms of employment which would qualify as basic wage and discretionary allowances not earned in accordance with the terms of employment would not be covered by basic wage. The statute itself excludes certain allowance from the term basic wages. The exclusion of dearness allowance in Section 2(b)(ii) is an exception but that exception has been corrected by including dearness allowance in Section 6 for the purpose of contribution.

6. Attendance incentive was not paid in terms of the contract of employment and was not legally enforceable by an employee. It would therefore not fall within basic wage as it was not paid to all employees of the concern. Likewise, transport/conveyance allowance was similar to house rent allowance, as it was reimbursement to an employee. Such payments are ordinarily not made universally, ordinarily and necessarily to all employees and therefore will not fall within the definition of basic wage. To hold that canteen allowance was paid only to some employees, being optional was not to be included in basic wage while conveyance allowance was paid to all employees without any proof in respect thereof was unsustainable.

7. Basic wage, would not ipsofacto take within its ambit the salary breakup structure to hold it liable for provident fund deductions when it was paid as special incentive or production bonus given to more meritorious workmen who put in extra output which has a direct nexus and linkage with the output by the eligible workmen. When a worker produces beyond the base or standard, what he earns was not basic wage. This incentive wage will fall outside the purview of basic wage.

8. We have considered the submissions on behalf of the parties. To consider the common question of law, it will be necessary to set out the relevant provisions of the Act for purposes of the present controversy.

“Section 2 (b): “Basic Wages” means all emoluments which are earned by an employee while on duty or (on leave or on holidays with wages in either case) in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include-

(i) The cash value of any food concession;

(ii) Any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account

of a rise in the cost of living), houserent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment.

(iii) Any presents made by the employer;

Section 6: Contributions and matters which may be provided for in Schemes. – The contribution which shall be paid by the employer to the Fund shall be ten percent. Of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employees whether employed by him directly or by or through a contractor, and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding ten percent of his basic wages, dearness allowance and retaining allowance if any, subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under thissection:

Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words "ten percent", at both the places where they occur, the words "12 percent" shall be substituted:

Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for rounding off of such fraction to the nearest rupee, half of a rupee, or quarter of a rupee.

Explanation I – For the purposes of this section dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

Explanation II. – For the purposes of this section, "retaining allowance" means allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services."

9. Basic wage, under the Act, has been defined as all emoluments paid in cash to an employee in accordance with the terms of his contract of employment. But it carves out certain exceptions which would not fall within the definition of basic wage and which includes dearness allowance apart from other allowances mentioned therein. But this exclusion of dearness allowance finds inclusion in Section 6. The test adopted to determine if any payment was to be excluded from basic wage is that the payment under the scheme must have a direct access and linkage to the payment of such special allowance as not being common to all. The crucial test is one of universality. The employer, under the Act, has a statutory obligation to deduct the specified percentage of the contribution from the employee's salary and make matching contribution. The entire amount is then required to be deposited in the fund within 15 days from the date of such collection. The aforesaid provisions fell for detailed consideration by this Court in Bridge & Roof (supra) when it was observed as follows:

> "7. The main question therefore that falls for decision is as to which of these two rival contentions is in consonance with s. 2(b). There is no doubt that "basic wages" as defined therein means all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash. If there were no exceptions to this definition, there would have been no difficulty in holding that production bonus whatever be its nature would be included within these terms. The difficulty, however, arises because the definition also provides that certain things will not be included in the term "basic wages", and these are contained in three clauses. The first clause mentions the cash value of any food concession while the third clause mentions that presents made by the employer. The fact that the exceptions contain even presents made by the employer shows that though the definition mentions all emoluments which are earned in accordance with the terms of the contract of employment, care was taken to exclude presents which would ordinarily not be earned in accordance with the terms of the contract of employment. Similarly, though the definition includes "all emoluments" which are paid or payable in cash, the exception excludes the cash value of any food concession, which in any case was not payable in cash. The exceptions therefore do not seem to follow any logical pattern which would be in consonance with the main definition.

8. Then we come to clause (ii). It excludes dearness allowance, houserent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment. This exception suggests that even though the main part of the definition includes all emoluments which are earned in accordance with the terms of the contract of employment, certain payments which are in fact the price of labour and earned in accordance with the terms of the contract of employment are excluded from the main part of the definition of "basic wages". It is undeniable that the exceptions contained in clause (ii) refer to payments which are earned by an employee in accordance with the terms of his contract of employment. It was admitted by counsel on both sides before us that it was difficult to find any one basis for the exceptions contained in the three clauses. It is clear however from clause (ii) that from the definition of the word "basic wages" certain earnings were excluded, though they must be earned by employees in accordance with the terms of the contract of employment. Having excluded "dearness allowance" from the definition of "basic wages", s. 6 then provides for inclusion of dearness allowance for purposes of contribution. But that is clearly the result of the specific provision in s. 6 which lays down that contribution shall be 61/ 4 per centum of the basic wages, dearness allowance and retaining allowance (if any). We must therefore try to discover some basis for the exclusion in clause (ii) as also the inclusion of dearness allowance and retaining allowance (for any) in s. 6. It seems that the basis of inclusion in s. 6 and exclusion in clause (ii) is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose, of contribution under s. 6, but whatever is not payable by all concerns or may not be earned by all employees of a concern is excluded for the purpose of contribution. Dearness allowance (for examples is payable in all concerns either as an addition to basic wages or as a part of consolidated wages where a concern does not have separate dearness allowance and basic wages. Similarly, retaining allowance is payable to all permanent employees in all seasonal factories like sugar factories and is therefore included in s. 6; but houserent allowance is not paid in many concerns and sometimes in the same concern it is paid to some employees but not to others, for the theory is that houserent is included in the payment of basic wages plus dearness allowance or consolidated wages. Therefore, houserent allowance which may not be payable

to all employees of a concern and which is certainly not paid by all concern is taken out of the definition of "basic wages", even though the basis of payment of houserent allowance where it is paid is the contract of employment. Similarly, overtime allowance though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment; but because it may not be earned by all employees of a concern it is excluded from "basic wages". Similarly, commission or any other similar allowance is excluded from the definition of "basic wages" for commission and other allowances are not necessarily to be found in all concerns; nor are they necessarily earned by all employees of the same concern, though where they exist they are earned in accordance with the terms of the contract of employment. It seems therefore that the basis for the exclusion in clause (ii) of the exceptions in s. 2(b) is that all that is not earned in all concerns or by all employees of concern is excluded from basic wages. To this the exclusion of dearness allowance in clause (ii) is an exception. But that exception has been corrected by including dearness allowance in s. 6 for the purpose of contribution. Dearness allowance which is an exception in the definition of "basic wages", is included for the propose of contribution by s. 6 and the real exceptions therefore in clause (ii) are the other exceptions beside dearness allowance, which has been included through S. 6."

10. Any variable earning which may vary from individual to individual according to their efficiency and diligence will stand excluded from the term "basic wages" was considered in Muir Mills Co. Ltd., Kanpur Vs. Its Workmen, AIR 1960 SC 985 observing:

"11. Thus understood "basic wage" never includes the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production. The quantum of earning in such bonuses varies from individual to individual according to their efficiency and diligence; it will vary sometimes from season to season with the variations of working conditions in the factory or other place where the work is done; it will vary also with variations in the rate of supplies of raw material or in the assistance obtainable from machinery. This very element of variation, excludes this part of workmen's emoluments from the connotation of "basic wages"…"

11. In Manipal Academy of Higher Education vs. Provident Fund Commissioner, (2008) 5 SCC 428, relying upon Bridge Roof's case it was observed:

"10. The basic principles as laid down in Bridge Roof's case (supra) on a combined reading of Sections 2(b) and 6 are as follows:

(a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.

(b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages. By way of example it was held that overtime allowance, though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment but because it may not be earned by all employees of a concern, it is excluded from basic wages.

(c) Conversely, any payment by way of a special incentive or work is not basic wages."

12. The term basic wage has not been defined under the Act. Adverting to the dictionary meaning of the same in Kichha Sugar Company Limited through General Manager vs. Tarai Chini Mill Majdoor Union, Uttarakhand, (2014) 4 SCC 37, it was observed as follows:

"9. According to http://www.merriamwebster. com (Merriam Webster Dictionary) the word 'basic wage' means as follows:

1. A wage or salary based on the cost of living and used as a standard for calculating rates of pay

2. A rate of pay for a standard work period exclusive of such additional payments as bonuses and overtime.

10. When an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning. In our opinion, those wages which are universally, necessarily and ordinarily paid to all the employees across the board are basic wage. Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot be included in the basic wage. As for example,

> the overtime allowance, though it is generally enforced across the board but not earned by all employees equally. Overtime wages or for that matter, leave encashment may be available to each workman but it may vary from one workman to other. The extra bonus depends upon the extra hour of work done by the workman whereas leave encashment shall depend upon the number of days of leave available to workman. Both are variable. In view of what we have observed above, we are of the opinion that the amount received as leave encashment and overtime wages is not fit to be included for calculating 15% of the Hill Development Allowance."

13. That the Act was a piece of beneficial social welfare legislation and must be interpreted as such was considered in The Daily Partap vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh, (1998) 8 SCC 90.

14. Applying the aforesaid tests to the facts of the present appeals, no material has been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. There is no data available on record to show what were the norms of work prescribed for those workmen during the relevant period. It is therefore not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen. The wage structure and the components of salary have been examined on facts, both by the authority and the appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees.

There is no occasion for us to interfere with the concurrent conclusions of facts. The appeals by the establishments therefore merit no interference.

Conversely, for the same reason the appeal preferred by the Regional Provident Fund Commissioner deserves to be allowed.

15. Resultantly, Civil Appeal No. 6221 of 2011 is allowed. Civil Appeal Nos. 396566 of 2013, Civil Appeal Nos. 396768 of 2013, Civil Appeal Nos. 396970 of 2013 and Transfer Case (C) No.19 of 2019 are dismissed.

[2019] 57 DSTC 83 (Allahabad)

In the Allahabad High Court
[Hon'ble Justice Pankaj Mithal and Hon'ble Justice Jayant Banerji]

Writ Tax No. 909/2018

Abhay Traders ... Petitioner

Vs.

State of U.P. &Ors. ... Respondent(s)

Date of Order: 08.06.2018

SEIZURE AND RELEASE OF GOODS U/S 129 OF CGST ACT, 2017 – GOODS WERE NOT ACCOMPANIED BY E-WAY BILL – GOODS AND VEHICLE SEIZED – PETITIONER CONTENDED THAT SITE WAS NOT FUNCTIONING, THE E-WAY BILL COULD NOT BE GENERATED. SUBSEQUENTLY THE SAME WAS DOWNLOADED. NO INTENTION TO EVADE TAX – WRIT PETITION CHALLENGING SEIZURE – DIRECTION ISSUED TO RELEASE THE GOODS AND VEHICLE ON FURNISHING SECURITY OTHER THAN CASH AND BANK GUARANTEE.

Present for the Petitioner : Satyawan Shahi

Present for Respondent(s) : C.S.C., A.S.G.I.

Order

The goods of the petitioner in transportation along with the vehicle was seized under Section 129 of the Uttar Pradesh Goods and Services Tax Act, 2017 on 02.06.2018 for the reason that they were not accompanied by the E-way bill.

The submission of learned counsel for the petitioner is that as the site was not operative, the bill could not be generated but subsequently the E-way bill was downloaded on 03.06.2018 at 11.18 a.m. and was produced before the authorities. There was no intention to evade any tax to permit seizure.

Learned Standing Counsel appearing for the respondents may file counter affidavit within a month. Two weeks thereafter are allowed to the petitioner for filing rejoinder affidavit.

List for admission/final disposal immediately on the expiry of above period. In the meantime, the seized goods and the vehicle shall be released in favour of the petitioner on furnishing security other than cash and bank guarantee to the satisfaction of the authority concerned of the amount equivalent to the value of the goods only.

[2019] 57 DSTC 84 (Calcutta)

In the Calcutta High Court
[Hon'ble Justice Debangsu Basak]

W. P. No. 10646(W) /2018

MGI Infra Pvt. Ltd. ... Petitioner

Vs.

Assistant Commissioner State Goods & Service Tax & Ors. ... Respondent(s)

Date of Order: 09.07.2018

WRIT PETITION SEEKING EXTENSION OF TIME TO OBTAIN FINAL REGISTRATION – PREMISES OF PETITIONER LOCATED AT A VERY REMOTE AREA – POLITICAL DISTURBANCES WERE GOING ON AND PREVENTING THE PETITIONER FROM TAKING APPROPRIATE STEPS TO OBTAIN FINAL REGISTRATION – DIRECTION ISSUED TO CONSIDER THE REQUEST OF THE PETITIONER.

Present for the Petitioner : Mr. Boudhyan Bhattacharyya, Mr. Anindya Bagchi

Present for Respondent(s) : Mr. Abhratosh Mazumder, Ld. Addl. A.G., Mr. Prithu Dudhoria, Mr. Debasish Ghosh, Mr. K. K. Maity, Bhaskar Prasad Banerjee

Debangsu Basak, J.

The petitioner seeks consideration of an application for extension of time to obtain the final registration under the provisions of the Central Goods and Service Tax Act, 2017 and the West Bengal Goods and Service Tax Act, 2017.

Learned Advocate appearing for the petitioner submits that, although the petitioner enjoys provisional registration, the final registration could not have done as the office of the petitioner is located at a very remote area. Such area had faced various political problems over a considerable period of time, preventing the petitioner from taking appropriate steps with regard to obtaining of final registration.

The State and the Central authorities are represented.

The Central Goods and Service Tax Act, 2017 and West Bengal Goods and Service Tax Act, 2017 are new in their operation. In the facts of the

present case, it appears that, the petitioner has suffered under circumstances beyond its control, preventing the petitioner to take appropriate steps under the two Acts of 2017.

In such circumstances, it would be appropriate to request the first respondent so far as the State authorities are concerned and 4th respondent so far as the central authorities are concerned to consider and decide the request of the petitioner for grant of permanent registration, in accordance with law.

The first and fourth respondents are requested to take a pragmatic practical and sympathetic to the problems.

The State and the Central Government will consider the grant of final registration under their respective jurisdiction in accordance with the West Bengal Goods and Service Tax Act, 2017 and the Central Goods and Service Tax Act, 2017 respectively.

No order as to costs. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance of the requisite formalities.

[2019] 57 DSTC 85 (Delhi)

In the High Court of Delhi

[Hon'bleJustice S. Muralidhar and Justice I. S. Mehta]

W. P. (c)3245/2019

Sheel Chand Agroils (P) Ltd. ... Petitioner

Vs.

Government of NCT of Delhi & Anr. ... Respondent(s)

Date of Order: 01.04.2019

EXERCISE OF POWER BY VAT COMMISSIONER UNDER RULE 8(10) OF CENTRAL SALES TAX (DELHI) RULES, 2005 – VALIDITY OF ISSUANCE OF NOTIFICATION FOR CANCELLATION OF "F" FORMS – THE POWER ALLOWS TO DECLARE UNUSED FORMS OF A PARTICULAR SERIES, COLOUR AND DESIGN AS OBSOLETE. WRIT PETITON CHALLENGING THE POWER OF COMMISSIONER ALSO CHALLENGING RULE 8(10) OF CST (DELHI) RULES, 2005 AS BEING ULTRAVIRES THE RULE MAKING POWER OF THE GOVERNMENT UNDER SECTION 13(4)(e) OF CST ACT – REVENUE RELIED ON THE ORDER PASSED BY THE COURT IN THE CASE OF JAI GOPAL INTERNATIONAL IMPEX PVT. LTD. AND JAIN MANUFACTURING (INDIA) PVT. LTD. WHEREIN PETITIONERS GOT RELIEF BUT THE ORDERS HAVE BEEN

STAYED BY THE SUPREME COURT. THE COURT DISTINGUISHED THE CASE WITH JAI GOPAL INTERNATIONAL IMPEX PVT. LTD. AND JAIN MANUFACTURING (INDIA) PVT. LTD. – NOTIFICATION STAYED ISSUED BY COMMISSIONER DT 18.06.2018 CANCELLING "F" FORMS ISSUED BY THE DEALER.

Present for the Petitioner	:	Mr. Puneet Agrawal, Mr. Bharat Agarwal & Mr. Anubhav Gupta, Advocates.
Present for Respondent(s)	:	Mr. ShadanFarasat, ASC with Ms. Hafsa Khan & Ms. Rudrakshi Deo, Advocates.

S. Muralidhar, J.

CM Appl.No. 14890/2019 (Exemption)

1. Exemption allowed, subject to all just exceptions.

W.P.(C) 3245/2019 & CM Appl.No. 14889/2019 (stay)

2. Notice. Mr. Shadan Farasat, Advocate accepts notice for the Respondents. Counter affidavit be filed within four weeks. Rejoinder be filed before the next date.

3. The Petitioner is a registered dealer located in Uttarakhand and is engaged in the business of manufacturing and trading of edible oils, fats and oleo chemicals. The Petitioner supplied edible oil on stock transfer basis to one M/s Kumar & Company registered under the Central Sales Tax Act and located in Delhi during the Financial Years (FYs) 2014-15 & 2015-16. It is stated that „edible oil" is mentioned in the Registration Certificate Form B, issued by the Delhi VAT Authorities under the CST Act to the said Kumar & Company.

4. For the sales made of the edible oil, Kumar & Company made payments to the Petitioner through banking channels and issued Form F prescribed under Section 6A of the CST Act read with Rule 12(5) of Central Sales Tax (Registration & Turnover) Rules, 1957 (CST R & T Rules). A total of twelve „Form F" forms were issued to the Petitioner by the said Kumar & Company during 2014-15 & 2015-16. The details of these forms have been set out in para 5 of the Petition. These forms were generated electronically from the online portal of Department of Trade and Taxes, (DT & T) Govt. of NCT of Delhi (GNCTD). On its part, the Petitioner verified that the forms were valid before furnishing them to the Assessing Authority in Uttarakhand.

5. On 18th June, 2018 the VAT Commissioner (Respondent No.2) in Delhi in purported exercise of the powers under Rule 8 (10) of the Central Sales Tax (Delhi) Rules, 2005 ("CST Delhi Rules") issued a notification cancelling the aforementioned twelve F Forms issued by Kumar and Company to the Petitioner as obsolete and invalid for all purposes with immediate effect. This was reflected on the DVAT portal with the date of the cancellation as 15th June, 2018.

6. The Petitioner apprehends that in view of the aforementioned cancellation of the Forms-F, the Petitioner will now be called upon by its Assessing Authority in Uttarakhand to pay CST by treating the transaction of stock transfer as an the inter-state section under the deeming section of Section 6A of CST Act.

7. Mr. Puneet Agrawal, learned counsel for the Petitioner, refers to Rule 8 (10) of the CST Delhi Rules and submits that it was meant to weed out unused manual forms and not for cancelling forms already issued. In other words, it is submitted that Section 6A of CST Act is intended to decommission unused forms, which position becomes clear on a combined reading of Rule 8 (10) with Rule 8 (11) of the CST Delhi Rules. Mr. Agrawal submitted that there is no power in the VAT Commissioner under the aforementioned rules to declare used forms as obsolete. The power is only to declare unused forms of a particular series, colour and design, as obsolete.

8. Mr. Agrawal also pointed out that Rule 8A of the CST Delhi Rules makes the issuance of manual forms redundant. All forms now are generated electronically through the website of the DTT and qua particular transactions/suppliers. He accordingly submits that there was no occasion for the VAT Commissioner to invoke Rule 8 (10) read with Rule 8 (11) of the CST Delhi Rules to cancel the F Forms already issued to the Petitioner. The present petition also challenges Rule 8 (10) of the CST Delhi Rules as being ultra vires the Rule making power of the Government under Section 13 (4) (e) of the CST Act.

9. In reply, Mr. Shadan Farasat, learned counsel for the Respondent relies on an order passed by this Court on 23rd July, 2018 in WP(C) No. 7563/2018 (M/s. Jai Gopal International Impex Pvt. Ltd. v. Commissioner of Delhi Value Added Tax) which in turn relied on the decision of this Court in Jain Manufacturing (India) Pvt. Ltd. v. Commissioner of Value Added Tax (2016) 93 VST 326 (Del) granting the Assessee in that case relief in similar

circumstances. He pointed out that the said order relief has been stayed by the Supreme Court in SLP (C) No. 27177/2018 by an order dated 22nd October, 2018 and which stay has continued.

10. A careful examination of the order in M/s. Jai Gopal International Impex Pvt. Ltd. (supra) reveals that a parallel cannot be drawn between the facts of the said case and that the case on hand.

11. The Court is satisfied that the Petitioner has made out a prima facie case for grant if an ad interim order in its favour. It is accordingly directed that till the next date of hearing, the impugned notification dated 18th June, 2018 issued by the Respondent No.2 shall remain stayed.

12. List on 5th August, 2019.

[2019] 57 DSTC 88 (Ahmedabad)

In the High Court of Gujarat at Ahmedabad
[Hon'ble Justice Harsha Devani and Hon'ble Justice Bhargav D. Karia]

R/Special Civil Application Nos. 4730/2019

Synergy Fertichem Pvt. Ltd. ... Petitioner

Vs.

State of Gujarat ... Respondent(s)

Date of Order: 08.03.2019

DETAINING & SEIZING THE GOODS U/S 129(3) OF THE CGST ACT – SHOW CAUSE NOTICE U/S 130 OF THE ACT – GOODS WERE NOT ACCOMPANIED WITH E-WAY BILL – INTEGRATED GOODS AND SERVICES TAX ALREADY PAID – GOODS IN QUESTION WERE PERISHABLE – SHOW CAUSE NOTICE U/S 130 WAS ISSUED WITHOUT COMPLYING THE REQUIREMENTS OF SECTION 129 OF THE ACT – INTERIM ORDER PASSED DIRECTIONS WERE ISSUED TO RELEASE THE GOODS & VEHICLE SUBJECT TO FILING OF UNDERTAKING.

Present for the Petitioner : Uchit N.Sheth

ORAL ORDER

(Per : Honourable Ms. Justice Harsha Devani)

1. On 06.03.2019 this Court had passed an order in the following terms;

"1. Mr. Uchit Sheth, learned advocate for the petitioners invited the attention of the court to the provisions of sections 129 and 130 of the Central Goods and Services Tax Act, 2017, to point out the procedure which is required to be followed by the respondent authorities in case where any goods are in transit in contravention of the provision of the Act or the rules made thereunder. It was pointed out that firstly, under section 129 of the Act, the officer is required to issue a notice as contemplated under subsection (3) thereof and thereafter, after affording an opportunity of hearing to the person concerned, pass an order thereunder. It was submitted that it is only if there is no compliance of the order passed under section 129 of the Act, that the provisions of section 130 of the IGST Act can be resorted to. The attention of the court was invited to the impugned show cause notice dated 1.3.2019, to submit that the same seeks to impose penalty, redemption fine and confiscation under section 130 of the Act without initiating any proceedings under section 129 of the Act, which is not permissible in law. It was further submitted that the integrated goods and services tax has already been paid on the goods in question at the time of import thereof and that the goods in question are perishable goods with a limited shelflife.

2. Having regard to the submissions advanced by the learned counsel for the petitioners, Issue Notice returnable on 8th March, 2019. Direct Service is permitted today."

2. In response to the notice, Mr. Soham Joshi, learned Assistant Government Pleader, has appeared on behalf of the respondents.

3. The learned Assistant Government Pleader has invited the attention of the Court to the detention order dated 14.02.2019 issued by the proper officer under subsection (1) of section 129 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the CGST Act") and other relevant statutes. It was submitted that the goods in question were not accompanied by an Eway bill during the course of transit and therefore, the respondents are fully justified in passing the detention order under section 129(1) of the CGST Act.

4. Subsection (3) of section 129 of the CGST Act provides that the proper officer detaining or seizing the goods or conveyances shall issue a notice specifying the tax and penalty payable and thereafter, pass an order for payment of tax and penalty under clause (a) or clause (b) or clause (c). Subsection (4) provides that no tax, interest or penalty shall be determined

under subsection (3) without giving the person concerned an opportunity of being heard.

5. In the present case, the show cause notice dated 01.03.2019 has been issued under section 130 of the CGST Act calling upon the petitioner to show cause as to why the goods in question as well as the vehicle should not be confiscated for nonpayment of an amount of Rs.60,72,639/, as detailed therein. On a query by the Court, the learned Assistant Government Pleader is not in a position to point out that the procedure, as contemplated under subsections (3) and (4) of section 129 of the CGST Act, has been followed. Thus, prima facie, it appears that the showcause notice under section 130 of the CGST Act has been issued without complying with the requirements of section 129 of the CGST Act. It is also an admitted position that the goods in question are perishable in nature.

6. In the aforesaid premises, in the opinion of this Court, the petitioner has made out a strong prima facie case for the grant of interim relief. By way of interim relief, the respondents are hereby directed to forthwith release the goods in question and the Truck bearing registration no. GJ07UU7250 detained / seized under purported exercise of powers under sections 129 and 130 of the CGST Act. However, the petitioner shall file an undertaking before this Court within a week from today to the effect that in case the petitioner, ultimately, does not succeed in the petition, he shall duly cooperate in the further proceedings.

7. Stand over to 27.03.2019, so as to enable the respondents to file affidavit in reply, if any, in the matter.

Direct service is permitted today.

[2019] 57 DSTC 90 (Gurugram)

Before the Sessions Division, Gurugram
[Ravi Kumar Sondhi, D & S Judge]

IS No. BA/1006/2019

Gaurav Singhal ... Applicant

Vs.

The Principal Commissioner, Central Tax GST,
Gurugram & Ors. ... Respondent(s)

Date of Order: 10.04.2019

ARREST – GST - ANTICIPATORY BAIL – HELD - THE OFFENCE UNDER CGST WILL BE NON-BAILABLE ONLY IF CLEAR CUT VIOLATION OF MORE THAN RS.

5.00 CRORE IS FOUND AS PROVIDED UNDER SEC. 132 OF THE CGST ACT. RESPONDENT FINDS CLEAR VIOLATION OF RS.3.00 CRORES IN THIS CASE – INVESTIGATION ALREADY GOING ON AND ACTUAL ITC RANGES UPTO RS.24.00 CRORES, BUT STILL INVESTIGATION NOT COMPLETED.

DIRECTION ISSUED TO RESPONDENT THAT IN CASE AFTER INVESTIGATION OF FINDING ANY OFFENCE WHICH IS NON-BAILABLE AS PER PROVISION OF CGST ACT I.E. UNDER SECTION 132 OF THE ACT IS MADE OUT, RESPONDENT WILL GIVE A NOTICE OF FOUR DAYS TO APPLICANT PRIOR TO ARREST – APPLICANT WILL KEEP ON JOINING THE INVESTIGATION AS & WHEN REQUIRED UNDER SECTION 70 OF THE CGST ACT.

THE ORDER IS VALID FOR TWO MONTHS.

Present for the Applicant	:	Sh. A.K. Babbar, Surender Kumar & Sumit Mehta
Present for Respondent	:	Sh. Pramod Bahuguna, nominated counsel for the respondent CGST Department along with Sh. Amar Kumar Singh Investigating Officer, CGST, Gurugram.

ORDER

Reply filed. During the course of arguments learned nominated counsel, who appeared on behalf of the respondent CGST Department, stated that as explained in the reply as on today the Department has found the clear violation to the extent of about 3.00 Crores ₹ but since the investigations are already going on and the actual input credit ranges upto ₹ 24.00 Crores, but still the Department has not completed the investigations and as required under Section 69 of the CGST Act, permission of the Commissioner concerned is required to arrest a person, as such as and when any such situation will arise a proper notice of four days will be given to the applicant if his arrest will be required provided he keeps on joining the investigations as and when required and co-operate in reply to the concerned issue under Section 70 of the CGST Act. On the contrary, learned counsel for the applicant stated that after filing of this bail application the applicant has already joined the investigations and he will keep on joining the investigations and when called as per law.

After considering the contentions, it comes out that the offence under CGST Act will be non-bailable only if a clear cut violation of more than ₹5.00 Crores will be found as provided under Section 132 of the CGST Act. Since the investigations are already going on and at present the

respondent Department is having no intention to arrest the applicant as per the factual position mentioned above, the present application stands disposed of with a direction to the respondent-complainant that in case after investigations it finds that any offence which is non-bailable as per the provisions of CGST Act is made out, it will give a notice of four days to the applicant before his arrest. However, this order is subject to the condition that the applicant will keep on joining the investigations as and when required by the complainant CGST as per the notices issued under Section 70 of the CGST Act. However this order will also ensure for a period of two months from this day. Needless to say any observations made in this order are purely for the purposes of interim provisions as given above and anything stated in this regard shall not be misconstrued as an expression of opinion on the merits of the controversy. A copy of this order be given to the complainant Investigating Officer Amar Kumar Singh duly attested by the Reader of the Court. File be consigned to the record room after due compliance.

[2019] 57 DSTC 93 (Delhi)

Before the Appellate Tribunal, Value Added Tax, Delhi
[M.S. Wadhwa, Member (J)]

Appeal No. 302/ATVAT/17-18

Madhura Garments ... Appellant

Vs.

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 29.03.2019

STOCK TRANSFER U/S 6A OF CENTRAL SALES TAX ACT, 1956 – STOCK TRANSFERRED TO BRANCH IN MARCH, 2013 – BRANCH RECEIVED GOODS IN APRIL – "F" FORMS ISSUED FOR APRIL MONTH – EXEMPTION DENIED – DEFAULT ASSESSMENT U/S 9(2) OF CST ACT – WHETHER CORRECT; HELD NO.

PROCEDURAL IRREGULARITIES AND TECHNICALITIES CANNOT OVERRIDE THE SUBSTANTIVE PROVISIONS AND BENEFIT OF "F" FORM CANNOT BE DENIED.

Facts of the Case

The appellant was engaged in the business of sale of ready-made garments. The default assessment u/s 9(2) of the CST Act was completed by the ld. Assessing Authority on 29/3/2017, creating an additional demand of Rs. 33,13,978/- including interest of Rs. 12,10,388/-.

The appellant filed objections before the ld. SOHA alongwith 3-Forms worth Rs. 3,23,15,009/- and one F-form photocopy for Rs. 77,19,879/- as original form pertains to assessment year 2013-14.

The dealer in Delhi sent the goods on transfer to Maharashtra between 26/3/2013 to 29/3/2013 and at Maharashtra these goods were received in April, 2013.

The Delhi office of the appellant correctly declared transfer in the month of March-2013 and branch at Maharashtra received the goods in April, 2013 and issued F-form No. 27031643854559, which includes amount of Rs. 77,19,879/- which the Delhi dealer has dispatched to Maharashtra branch from 26/3/2013 to 29/3/2013 and branch at Maharashtra received the said goods from 1st April to 3rd April. Hence only one consolidated F-form has been issued in April, 2013.

The appellant filed photocopy of F-form and showed original F-form to the ld. SOHA but the ld. SOHA ignored this form and did not allow benefit

of Rs. 77,19,879/- on the basis of F-form and levied both VAT & interest on such sales.

Held

Appellant had filed a chart showing details of stock transfer made in March, 2013 which was received at Maharashtra office in April, 2013 alongwith F-form, copy of GR showing movement of goods from Delhi to Maharashtra and transfer out note, which amply proved that it was a case of transfer of goods, which has been reflected in the F-form of Maharashtra office of the month of April, 2013. In Tribunal view, in these circumstances benefit of this F-form was wrongly denied by the ld. SOHA vide impugned orders dated 10/10/2017. If benefit of this statutory form which was issued in the month of April, 2013 was refused, then it means nobody will do business in the last 3-4 days of every quarter, so far as transfer of goods from one State to another State was concerned. So tax and interest was wrongly imposed. Procedural irregularities and technicalities could not override the substantive provisions and benefit of F-form could not be denied to the appellant in such circumstances. Accordingly, the appeal was allowed and impugned orders dated 10/10/2017 passed by ld. SOHA was hereby set-aside and matter was remanded back to the concerned VATO to re-frame assessment afresh after giving an opportunity of hearing to the appellant and after considering the F-form and other documents submitted by the appellant to prove that it was a case of transfer of goods from one State to another.

Present for the Appellant : O.P. Aggarwal, Advocate

Present for Respondent : S.B. Jain, Advocate

ORDER

1. The present appeal has been filed against the impugned orders dated 10/10/2017 passed by Ld. Spl. OHA, hereinafter called Objection Hearing Authority, who reviewed the assessment orders dated 29/3/2017 u/s 74B(5) DVAT Act and directed appellant to deposit Rs. 3,87,837/- towards tax and Rs. 2,59,479/- towards interest regarding 4th qtr. of 2012-13.

2. The brief facts of the present appeal are that appellant is engaged in the business of sale of ready-made garments.

3. That default assessment u/s 9(2) of the CST Act was completed by the Id. Assessing Authority. on 29/3/2017, creating an additional demand of Rs. 33,13,978/- including interest of Rs. 12,10,388/-.

4. That appellant filed objections before the ld. SOHA alongwith 3-Forms worth Rs. 3,23,15,009/- and one F-form photocopy for Rs. 77,19,879/- as original form pertains to assessment year 2013-14.

5. That dealer in Delhi sent the goods on transfer to Maharashtra between 26/3/2013 to 29/3/2013 and at Maharashtra these goods were received in April, 2013. (Details enclosed between 1st April, 2013 to 3rd April, 2013 by the appellant).

6. That Delhi office of the appellant correctly declared transfer in the month of March-2013 and branch at Maharashtra received the goods in April, 2013 and issued F-form No. 27031643854559, which includes amount of Rs. 77,19,879/- which the Delhi dealer has dispatched to Maharashtra branch from 26/3/2013 to 29/3/2013 and branch at Maharashtra received the said goods from 1st April to 3rd April. Hence only one consolidated F-form has been issued in April, 2013.

7. That the appellant filed photocopy of F-form and showed original F-form to the ld. SOHA but the ld. SOHA ignored this form and did not allow benefit of Rs. 77,19,879/- on the basis of F-form and levied both VAT & interest on such sales.

8. The appellant has challenged the impugned orders dated 10/10/2017 passed by ld. SOHA on following grounds before this Tribunal —

i) That the impugned order passed by ld. SOHA is against law and facts.

ii) That the ld. SOHA erred while not allowing deduction on transfer of goods of Rs. 77,19,879/- in the 4th qtr. of 2012-13, inspite of possessing valid F-form.

iii) That Delhi branch of the appellant has dispatched to their branch in March, 2013 and correctly declared transfer in the month of March 2013 and Maharashtra Branch has received the said goods in the month of April, 2013 and correctly issued F-form for the month of April, 2013 which includes transfer of Rs. 77,19,879/- which was dispatched by the Delhi branch in the month of March, 2013.

iv) That even otherwise, deeming provision of sale are not applicable on the dealer as both Delhi branch and Maharashtra are the same person as both branches belong to one owner i.e. Madura

Garments Life Style Retail Co. Ltd. It is not covered under the definition of "sale".

9. On the basis of above facts and grounds of appeal, it has been prayed that impugned order dated 10/10/2017 passed by ld. SOHA be set-aside to the extent of imposition of tax and interest after consideration of F-form filed by the appellant regarding the month of April, 2012-13.

10. Heard to applicant's ld. Counsel Mr. O.P. Aggarwal and Mr. S.B. Jain on behalf of the revenue and perused the file.

11. As stated above, appellant transferred certain goods from Delhi office to Maharashtra office during the period of 26/3/2013 to 29/3/2013, which was received by Maharashtra office between the periods of 1st April, 2013 to 3rd April, 2013. The short controversy, in the present appeal is whether benefit of F-form relating to the month of April, 2012-13, which includes disputed transfer made between 26/3/2013 to 29/3/2013 by the appellant from Delhi to Maharashtra can be given and whether it is a sale, so that tax and interest was rightly imposed by the respondent. Before proceeding further, it would be appropriate to reproduce following observations by the Hon'ble High court in the case of EsjyapeeImpex (P) Ltd. Vs. Commercial Tax Officer, Sowcarpet-I (42 VST Page-61), where similar question arose before the Hon'ble Court —

> "In my view, no rule or regulation has been brought to the notice of court stipulating any outer time limit for filling such Form F declaration. Therefore, denial of exemption cannot be solely due to the default committed by the petitioner, which according to them was beyond their control. In any event, if the petitioner possesses the required statutory document which would justify their claim for exemption, the respondent authority cannot refuse to look into those documents, unless he has been statutorily prohibited from doing so. When technicalities and equity are pitted against each other equity alone shall triumph. That apart, the issue involved in the present case is a money claim and therefore, the petitioner is entitled to effective and reasonable opportunity."

12. If we apply the ratio of the above case to the facts of the case in hand, we find that appellant is in possession of required F-form but it is part of the F-form for the month of April, 2012-13. The ld. counsel for the revenue has invited attention of this Tribunal towards Rule-12 of Central Sales Tax Rules, particularly III proviso to this Rule, which is as follows —

"Provided also that where, in the case of any transaction of sale, the delivery of goods is spread over to different quarters in a financial year or of different financial years, it shall be necessary to furnish a separate form. "

13. It is clear from the bare reading of the above provision that it is applicable in case of any transaction of sale but in present appeal, it is a case of transfer of goods from one office to another office of the same party. There is even no 'deemed sale' in the present case. The burden to prove that it is a case of transfer of goods from one State to another State and it is not a sale, lies on the appellant as per section 6A (1) of CST Act, which is as follows —

"Where any dealer claims that he is not liable to pay tax under this Act, in respect of any goods, on the ground that the movement of such goods from one State to another was occasioned by reason of transfer of such goods by him to any other place of his business or to his agent or principal, as the case may be and not by reason of sale, the burden of proving that the movement of those goods was so occasioned shall be on that dealer and for this purpose he may furnish to the assessing authority, within the prescribed time or within such further time as that authority may, for sufficient cause, permit, a declaration, dully filled and signed by the principal officer of the other place of business, or his agent or principal, as the case may be, containing the prescribed particulars in the prescribed form obtained from the prescribed authority, along with the evidence of dispatch of such goods (and if the dealer fails to furnish such declaration, then, the movement of such goods shall be deemed for all purposes of this Act to have been occasioned as a result of sale)."

14. Appellant has filed a chart showing details of stock transfer made in March, 2013 which was received at Maharashtra office in April, 2013 alongwith F-form, copy of GR showing movement of goods from Delhi to Maharashtra and transfer out note, which amply proves that it is a case of transfer of goods, which has been reflected in the F-form of Maharashtra office of the month of April, 2013. In my view, in these circumstances benefit of this F-form was wrongly denied by the ld. SOHA vide impugned orders dated 10/10/2017. If benefit of this statutory form which was issued in the month of April, 2013 is refused, then it means it directly that nobody will do business in the last 3-4 days of every quarter, so far

as transfer of goods from one State to another State is concerned. As it is not a case of sale from one State to another, so in my view tax and interest was wrongly imposed. Procedural irregularities and technicalities cannot override the substantive provisions and benefit of F-form cannot be denied to the appellant in such circumstances. Accordingly, present appeal is allowed and impugned orders dated 10/10/2017 passed by ld. SOHA are hereby set-aside and matter is remanded back to the concerned VATO to re-frame assessment afresh after giving an opportunity of hearing to the appellant and after considering the F-form and other documents submitted by the appellant to prove that it is a case of transfer of goods from one State to another.

15. Order pronounced in the open court.

16. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2019] 57 DSTC 98 (Delhi)

Before the Appellate Tribunal, Value Added Tax, Delhi
[M.S. Wadhwa, Member (J)]

Appeal No. 56/ATVAT/18-19

Pratishtha Industries ... Appellant

Vs.

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 04.04.2019

DISALLOWANCE OF INPUT TAX CREDIT U/S 9(2)(g) OF DVAT ACT, 2004. REFUND U/S 38(3) OF THE ACT – REVENUE DISALLOWED ITC ON THE BASIS OF TAX NOT VERIFIED OF SELLING DEALER AND HIS EXTENDED DEALER – DEFAULT ASSESSMENT OF TAX & INTEREST ISSUED – DEMAND CREATED AGAINST LONG OVERDUE REFUND – REVENUE APPLIED SECTION 40A WITHOUT ADDUCING EVIDENCE ON RECORD TO PROVE THE COLLUSION BETWEEN PURCHASERS AND SELLING DEALER – WHETHER CORRECT; HELD NO – BECAUSE THERE WAS NO PRIVITY OF CONTRACT BETWEEN APPELLANT AND SUPPLIER OF SELLING DEALER. APPEAL ALLOWED.

Facts of the Case

The appellant firm filed VAT returns for all the four quarters of the assessment year 2013-14. The return of VAT for the tax period 1/1/2014

to 31/3/2014, claiming a refund of Rs. 3,89,284/- was filed by the appellant on 8/10/2014.

That the assessing officer vide notices of default assessment of tax & interest u/s 32 DVAT Act, dated 13/9/2017, while processing the refund claimed by the appellant in its return of 4th qtr. of 2013-14, disallowed the entire ITC of Rs. 4,44,749/- claimed by the appellant firm in its return of VAT, on account of purchases made from one M/s Dee Pee Gupta (Tin No. 07420228385), a registered dealer and created a demand of Rs. 7,08,491/- (tax Rs. 4,44,749/- + interest Rs. 2,63,7421). As per the 2A submitted by the appellant with the 2B submitted by the M/s Dee Pee Gupta, there is no mis-match of sales and purchases between them. Further, it is alleged that the RC of M/s Dee Pee Gupta has been cancelled w.e.f. 1/2/2017, whereas the purchases have been made by the appellant from the above dealer in the assessment year 2013-14, when the selling dealer was registered with the department. ITC claimed by the appellant, on account of purchases made from M/s Dee Pee Gupta have been disallowed u/s 9(2)(g) of the DVAT Act.

That the above dealer issued tax invoices which clearly mention the Tin No. of dealer on its invoices and has even submitted its VAT return for the assessment year 2013-14. All the purchases of the appellant from the above dealer were supported by tax invoices as well as payments thereof have been made through accounts payee cheques and duly reflected in the books of accounts of the appellant firm.

That against the notices of default assessment of tax & interest, the appellant filed objections before the ld. OHA on various grounds, but the ld. OHA in a mechanical manner, without looking into facts of the case and various judgments by Hon'ble High Court and Hon'ble Supreme Court, on the application of section 9(2)(g) and in defiance of the settled law, had dismissed the objections vide orders dated 10/4/2018.

Held

The registration of selling dealer was cancelled w.e.f. 1/2/2017 whereas the purchases have been made by the appellant from the above dealer in the assessment year 2013-14, when the selling dealer was registered with the department and there was no mis-match between the 2A & 2B of the purchasing and selling dealer. No doubt there was no mis-match in the 1st, 2nd & 3rd qtr. but in 4th qtr. there was mis-match but in the 4th qtr. amount of ITC claimed by the appellant was Rs. 132,083.15 whereas output tax deposited by the selling dealer M/s Dee Pee Gupta and Company was

Rs. 1,47,668.80 which is more than the ITC claimed by the appellant. In Tribunal view, ld. VATO wrongly disallowed ITC claimed by the appellant without issuing notices to the selling dealer. A similar question arose before the Hon'ble Delhi High Court in the case of On Quest Merchandising India (P) Ltd. Vs. Govt. of NCT of Delhi and Ors. 55 DSTC 1181.

After applying the ratio of the above case to the facts of the case in hand, Tribunal came to the conclusion that in this appeal also ITC was wrongly denied to the appellant as appellant was in possession of valid tax invoices and there was no mis-match between the 2A & 2B of the purchasing and selling dealer. Ld. VATO in the assessment orders dated 13/9/2017 had applied section 40A but no evidence to prove the collusion between the appellant and selling dealer had been filed. The selling dealer M/s Dee Pee Gupta even deposited more tax in the 4th qtr. of assessment year 2013-14 than the ITC claimed by the appellant. The Tribunal agreed to the submissions of the appellant's ld. counsel that ld. VATO was not expected to look into sales made by the M/s Global Impex to the selling dealer M/s Dee Pee Gupta & Company because there was no privity of contact between the appellant and M/s Global Impex. The appellant was required to see whether selling dealer was registered on the date of purchases by the appellant. The selling dealer had also filed quarterly return of the disputed tax period of 1/1/2014 to 31/3/2014 and registration of the selling dealer was cancelled on 1/2/2017. As observed by Hon'ble Delhi High Court in the case of Shanti Kiran Vs. Commissioner of VAT that unless any collusion was proved between the selling and purchasing dealer, ITC could not be disallowed to the purchasing dealer when the purchasing dealer had no mechanism to have any access to the returns submitted by the selling dealer.

It was also correct to say that as tax period of the appellant firm was quarterly for which the appellant firm also filed quarterly returns, the ld. VATO was required to frame assessment according to the quarterly tax period as held by Hon'ble Supreme Court in the case of ShyamaCharan Shukla Vs. State of M.P.

0n the basis of above discussion, impugned orders dated 10/4/2018 passed by ld. OHA were hereby set-aside and this appeal was allowed with the direction to the concerned VATO to re-frame assessment afresh after giving notice to the concerned selling dealer M/s Dee Pee Gupta and after giving an opportunity of hearing to the appellant. Appellant was directed to appear before the concerned VATO on 2/5/2019.

Present for the Appellant : V. Lalwani, Advocate

Present for Respondent : S.B. Jain, Advocate

ORDER

1. The present appeal has been filed against the impugned orders dated 10/4/2018 passed by Ld. Jt. Commissioner, here-in-after called Objection Hearing Authority (in short OHA), who vide these orders upheld the order of assessment of tax and interest u/s 32 DVAT Act, passed by ld. AVATO (Ward-88) vide orders dated 13/9/2017.

2. The brief facts, relevant for the disposal of present appeal, are that the appellant is registered with the Department of Trade & Taxes vide Tin No. 07680306230 in Ward-88, New Delhi.

3. That the appellant firm filed VAT returns for all the four quarters of the assessment year 2013-14. The return of VAT for the tax period 1/1/2014 to 31/3/2014, claiming a refund of Rs. 3,89,284/- was filed by the appellant on 8/10/2014.

4. That the assessing officer vide notices of default assessment of tax & interest u/s 32 DVAT Act, dated 13/9/2017, while processing the refund claimed by the appellant in its return of 4th qtr. of 2013-14, disallowed the entire ITC of Rs. 4,44,749/- claimed by the appellant firm in its return of VAT, on account of purchases made from one M/s Dee Pee Gupta (Tin No. 07420228385), a registered dealer and created a demand of Rs. 7,08,491/- (tax Rs. 4,44,749/- + interest Rs. 2,63,7421). As per the 2A submitted by the appellant with the 2B submitted by the M/s Dee Pee Gupta, there is no mis-match of sales and purchases between them. Further, it is alleged that the RC of M/s Dee Pee Gupta has been cancelled w.e.f. 1/2/2017, whereas the purchases have been made by the appellant from the above dealer in the assessment year 2013-14, when the selling dealer was registered with the department. ITC claimed by the appellant, on account of purchases made from M/s Dee Pee Gupta have been disallowed u/s 9(2)(g) of the DVAT Act.

5. That the above dealer issued tax invoices which clearly mention the Tin No. of dealer on its invoices and has even submitted its VAT return for the assessment year 2013-14. All the purchases of the appellant from the above dealer are supported by tax invoices as well as payments thereof have been made through accounts payee cheques and duly reflected in the books of accounts of the appellant firm.

6. That against the above notices of default assessment of tax & interest, the appellant filed objections before the ld. OHA on various grounds, but the ld. OHA in a mechanical manner, without looking into facts of the case

and various judgments by Hon'ble High Court and Hon'ble Supreme Court, on the application of section 9(2)(g) and in defiance of the settled law, has dismissed the objections vide orders dated 10/4/2018", against which present appeal has been filed on various grounds, which are as follows—

i) That the order of AVATO framing the notice of default assessment of tax and interest as well as order of ld. OHA dismissing the objections are illegal and void.

ii) That the order of AVATO framing the notice of default assessment of tax and interest is illegal and void as impugned order is a system generated order without application of mind.

iii) In the present case, the appellant firm never made any purchases from M/s Global Impex and had no privity of contact with M/s Global Impex. Under section 9(2)(g), the ITC can be disallowed only if there is any discrepancy between the sale and purchases of purchasing dealer with the selling dealer and only the circumstances given u/s 9(2)(g). The Hon'ble Delhi High Court in the case of Shanti Kiran Vs. Commissioner, of VAT clearly held that unless any collusion is proved between selling and purchasing dealer, the ITC cannot be disallowed to the purchasing dealer when the purchasing dealer has no mechanism to have any access to the returns submitted by the selling dealer but the provision does not empower the AO to travel beyond the transaction between the selling and purchasing dealer.

iv) That the impugned orders passed by lower authorities are illegal and void as AVATO failed to consider the fact that there was no mis-match between the 2A & 2B of the selling and purchasing dealer. The ld. OHA dismissed the objections in a mechanical manner and failed to consider the documents submitted by the appellant before the ld. OHA. Appellant submitted 2A, 2B, DVAT-31 and Bank Statement showing the genuineness of the transaction between the M/s Dee Pee Gupta and the appellant firm.

v) That the impugned order of AVATO as well as that of ld. OHA is illegal and void as they ignored various judgments by the Hon'ble Delhi High Court on this issue. In this regard appellant referred to the case of Smart Mobile Technology (P) Ltd. Vs. Commissioner of VAT (2017) 55 DSTC 1 and judgment of On Quest Merchandising India (P) Ltd. Vs. Govt. of NCT of Delhi and Ors. 55 DSTC 1181.

vi) The ITC claimed by the appellant has been illegally disallowed in view of the fact that the appellant firm has claimed the ITC u/s 9(1) r/w section 50 of the DVAT Act. The AVATO has illegally disallowed the claim of ITC ignoring the statutory provisions contained in section 22(8) of the DVAT Act as the purchasing dealer has no notice of cancellation of registration certificate of the selling dealer by the department. Whereas, in the present case the appellant firm purchased goods from the dealers who were registered with the department but for some reason not known to the appellant, the registration certificate of those dealers were cancelled.

vii) That the ld. VATO has disallowed the claim of ITC u/s 9(2)(g) of the DVAT Act, without verifying the fact that even the M/s Dee Pee Gupta has also filed its return of VAT for the tax period 1/1/2014 to 31/3/2014, which show the selling dealer was also not aware about the cancellation of its registration certificate by the department, in view of the fact that there was no compliance of section 22(8) of the DVAT Act.

viii) That the ld. lower authorities have illegally ignored the settled law on this issue in the case of the judgment by the Hon'ble Delhi High Court in the case of CST Vs. Hari Ram Oil Company (1992) 87 STC 493, according to which even where the registration of a dealer has been cancelled before the sales took place, but such cancellation is not notified in the official gazette subsequent to the date of sale, then the selling dealer cannot be deprived of the benefit of the scheme of the Act. The VAT Tribunal, Delhi in the case of Shri Sidhi Vinayak Traders Vs Commissioner of Trade and Taxes also relied upon the above judgment.

ix) That the impugned notice of default assessment of tax and interest under the DVAT Act is illegal and void. The tax period of the appellant firm is quarterly for which the appellant firm has also filed its return of VAT and CST quarterly. The assessments have also to be framed according to the tax period in accordance with the provisions of DVAT Act as held by the Hon'ble Supreme Court in the case of Shyama Charan Shukla Vs State of Madhya Pradesh.

x) That the impugned orders of lower authorities are illegal as the assessment has been framed with a mala-fide intention only to with hold the refunds due to the registered dealers who have claimed

the refunds in their return but instead of processing the refund as per section 38(3) of the DVAT Act, the default assessments are framed after various years of filing of returns only with the intention to illegally with hold or adjust the amount of demand so created against the long overdue refund.

7. On the basis of above facts and grounds of appeal, appellant has prayed that impugned order dated 10/4/2018 passed by ld. OHA be set-aside and present appeal be allowed.

8. Heard to appellant's ld. counsel Mr. V. Lalwani & Mr. S.B. Jain on behalf of the revenue and perused the file, on the basis of which, present appeal is being disposed off as follows.

9. As stated above, present appeal pertains to tax period, Annual, 2013-14. Ld. VATO vide order dated 13/9/2017 denied the ITC claimed by the appellant, on the purchases made by the appellant from the M/s Dee Pee Gupta & Co. on the ground that registration of selling dealer was cancelled and secondly, selling dealer has not deposited or lawfully adjusted output tax liability, hence ITC claimed by the appellant was denied and tax & interest to the tune of Rs. 7,08,491/- was imposed. Against these assessment orders, appellant filed objections which were also rejected vide impugned orders dated 10/4/2018, against which present appeal has been filed. Appellant's Ld. Counsel submitted that appellant claimed ITC as per section 9(1) of the DVAT Act. Appellant is in possession of valid tax invoices as per section 50 of the DVAT Act, issued by the selling dealer M/s Dee Pee Gupta and Company. Appellant has also submitted that purchases were made through account payee cheques and they are duly reflected in the books of accounts of the appellant firm. It is also clear from the facts that registration of selling dealer was cancelled w.e.f. 1/2/2017 whereas the purchases have been made by the appellant from the above dealer in the assessment year 2013-14, when the selling dealer was registered with the department and there is no mis-match between the 2A & 2B of the purchasing and selling dealer. No doubt there is no mis-match in the 1st, 2nd & 3rd qtr. but in 4th qtr. there is mis-match but in the 4th qtr. amount of ITC claimed by the appellant is Rs. 132,083.15 whereas output tax deposited by the selling dealer M/s Dee Pee Gupta and Company is Rs. 1,47,668.80 which is more than the ITC claimed by the appellant. In my view, ld. VATO wrongly disallowed ITC claimed by the appellant without issuing notices to the selling dealer. A similar question arose before the Hon'ble Delhi High Court in the case of On Quest Merchandising India (P) Ltd. Vs. Govt. of NCT of Delhi and Ors. 55 DSTC 1181, where Hon'ble

Delhi High Court made the following observations —

> 53. In light of the above legal position, the Court hereby holds that the expression "dealer or class of dealer' occurring in Section 9(2) (g) of the DVAT Act should be interpreted as not including a purchasing dealer who has bonfide entered into purchase transactions with validly registered selling dealers who have issued tax invoices in accordance with section 50 of the Act where there is no mismatch of the transactions in Annexures 2A and 2B. Unless the expression 'dealer or class of dealers' in section 9(2)(g) is 'read down' in the above manner, the entire provision would have to be held to be violative of Article 14 of the Constitution.
>
> 54. The result of such reading down would be that the Department is precluded from invoking Section 9(2)(g) of the DVAT Act to deny ITC to a purchasing dealer who has bonfide entered into a purchase transaction with a registered selling dealer who has issued a tax invoice reflecting the TIN number. In the event that the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC. Where, however, the Department is able to come across material to show that the purchasing dealer and the selling dealer acted in collusion then the Department can proceed under Section 40A of the DVAT Act.

10. If we apply the ratio of the above case to the facts of the case in hand, we come to the conclusion that in the present appeal also ITC was wrongly denied to the appellant as appellant was in possession of valid tax invoices and there was no mis-match between the 2A & 2B of the purchasing and selling dealer. Ld. VATO in the assessment orders dated 13/9/2017 has applied section 40A but no evidence to prove the collusion between the appellant and selling dealer has been filed. The selling dealer M/s Dee Pee Gupta even deposited more tax in the 4th qtr. of assessment year 2013-14 than the ITC claimed by the appellant. I agree to the submissions of the appellant's ld. counsel that ld. VATO was not expected to look into sales made by the M/s Global Impex to the selling dealer M/s Dee Pee Gupta & Company because there was no privity of contact between the appellant and M/s Global Impex. The appellant was required to see whether selling dealer was registered on the date of purchases by the appellant. The selling dealer has also filed quarterly return of the disputed tax period of 1/1/2014 to 31/3/2014 and registration of the selling dealer was cancelled on 1/2/2017. As observed by Hon'ble

Delhi High Court in the case of Shanti Kiran Vs. Commissioner of VAT that unless any collusion is proved between the selling and purchasing dealer, ITC cannot be disallowed to the purchasing dealer when the purchasing dealer has no mechanism to have any access to the returns submitted by the selling dealer.

11. It is also correct to say that as tax period of the appellant firm is quarterly for which the appellant firm also filed quarterly returns, the ld. VATO was required to frame assessment according to the quarterly tax period as held by Hon'ble Supreme Court in the case of Shyama Charan Shukla Vs. State of M.P.

12. On the basis of above discussion, impugned orders dated 10/4/2018 passed by ld. OHA are hereby set-aside and present appeal is allowed with the direction to the concerned VATO to re-frame assessment afresh after giving notice to the concerned selling dealer M/s Dee Pee Gupta and after giving an opportunity of hearing to the appellant. Appellant is directed to appear before the concerned VATO on 2/5/2019.

13. Order pronounced in the open court.

14. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2019] 57 DSTC 107 (Jaipur)

In the High Court of Rajasthan

[Hon'ble Justice Mohammad Rafiq and Hon'ble Justice Goverdhan Bardhar]

C. W. 11580/2018

Combined Traders ... Petitioner

Vs.

State of Rajasthan & Ors. ... Respondent(s)

Date of Order: 01.05.2019

CANCELLATION OF ISSUED C FORMS – INVOKING RULE 17(20) OF CENTRAL SALES TAX (RAJASTHAN) RULES, 1957 – CANCELLATION OF REGISTRATION CERTIFICATE WITH RETROSPECTIVE EFFECT – CANCELLATION OF C FORMS ADVERSELY AFFECTED THE PETITIONER – WRIT PETITION CHALLENGING THE VALIDITY OF RULES 17(20) ULTRA VIRES OF SECTION 8(4), 13(1)(d), 13(3) & 13(4)(e) OF CENTRAL SALES TAX ACT, 1956 – PETITIONER HAD NO REGISTRATION IN RAJASTHAN – MAINTAINABILITY OF WRIT – LOCUS OF PETITIONER TO CHALLENGE THE CANCELLATION OF C FORMS AND OTHER ISSUES – RESPONDENT DEALERS NEVER AVAILED ALTERNATE REMEDY BEFORE ANY APPELLATE AUTHORITY – WHETHER RULE 17(20) OF CENTRAL SALES TAX (RAJASTHAN) RULES CONSTITUTIONALLY VALID; HELD – NO.

OVERRULING THE OBJECTIONS OF RESPONDENT ON THE ISSUE OF MAINTAINABILITY OF WRIT AND AVAILING ALTERNATIVE REMEDY, THE COURT HELD THAT SECTION 13(4)(e) OF CENTRAL SALES TAX ACT DID NOT CONFER ANY AUTHORITY ON STATE TO FRAME A RULE TO CANCEL FORMS ONCE ALREADY ISSUED – SECTION 13(3) OF THE CST ACT EMPOWERED THE STATE TO MAKE THE RULES BUT WITH THE RIDER THAT SUCH RULES SHOULD NOT BE INCONSISTENT WITH THE PROVISIONS OF THE CST ACT – THE COURT CONFINED ITS CONSIDERATION AS TO THE VALIDITY OF CANCELLATION OF C FORMS AND DID NOT GO INTO VALIDITY OF CANCELLATION OF THE REGISTRATION OF THE RESPONDENT DEALERS– RULE 17(20) OF RAJASTHAN RULES DECLARED ULTRA VIRES OF SECTION 8(4), 13(1)(d), 13(3) AND 13(4)(e) OF THE CST ACT.

Facts of the case

The petitioner, was a registered dealer in Delhi, had made sales in the first quarter of 2017-18 under Section 8(1) of the Central Sales Tax Act, 1956 to Respondent No.4 M/s. H.G. International, TIN No.08372171209 and Respondent No.5 M/s. Saraswati Enterprises, TIN No.08942179286. As per petitioner, the said sales were duly recorded in the books of accounts against which payments had also been received through the banking channels. The ledger accounts of the respondents have been enclosed to the writ petition. To claim reduced rate of tax under Section 8(1), the petitioner had furnished 'C' forms, as per the requirement of Section 8(4) of the Act. As per second proviso to Rule 12(1) of the Central Sales Tax (Registration and Turnover) Rules, 1957 a single 'C' form was required to be submitted

for a quarter, which was issued by each of the respondents towards the transactions made in the first quarter of 2017-18. As per petitioner, the 'C' forms were obtained by the Respondents No.4 and 5 online on 06.07.2017 after qualifying the conditions under Rule 17(8), (9), (10), (11), (12) and (13) of the Central Sales Tax (Rajasthan) Rules, 1957. The petitioner had claimed refund in the return filed on 11.07.2017 for the first quarter of 2017-18 under the Delhi Value Added Tax Act, 2004. When the said refund was not given within a period of two months from the date of filing of return, petitioner approached the Delhi High Court by filing Writ Petition (Civil) No.8283/2017, which vide order dated 18.09.2017, directed the authorities in Delhi to refund the amount along with due interest within four weeks and two weeks thereafter respectively. On 25.10.2017, the Respondent No.3 informed the VATO, Ward-17, Delhi about the cancellation of 'C' forms of the Respondents No.4 and 5 on the ground that they have not been found functioning at their business premises. By another letter dated 30.11.2017, Delhi VAT authority was informed about cancellation of the said 'C' forms as well as the registration certificates of the Respondents No.4 and 5. The registration certificates of Respondents No.4 and 5 were cancelled on 07.12.2017, under Section 16(4) of the Rajasthan Value Added Tax Act, 2003. The Petitioner preferred the Writ petition before High Court of Judicature for Rajasthan.

Held

No doubt, there was always a presumption in favour of constitutionality or validity of a subordinate legislation and burden was upon the person who attacked it to show that it was invalid. However, lack of legislative competence to make the subordinate legislation and failure to conform to the statute under which it was made or exceeding the limits of authority conferred by the enabling Act, were well recognised parameters for judicial review of a subordinate legislation.

The obligation of a registered dealer selling the goods to another registered dealer to avail the benefit of tax provided under Section 8(1) was only confined to furnish to the prescribed authority in the prescribed manner a declaration duly filled and signed by the registered dealer to whom he sells the goods. Such declaration should contain the prescribed particulars in the prescribed form and manner. Proviso to Section 8(4) stipulated that the selling dealer has to furnish such declaration within the prescribed time or within such further time as the authority may, for sufficient reason, extend. Rule 12 of the Central Rules provides a form of declaration, the particulars to be contained therein, the period within which it had to be furnished, consequence of loss of the declaration form,

and the course to be adopted in that event. However, this provision did not provide for cancellation of Form C issued. No doubt, Section 13(3) of the CST Act empowered the State to make the Rules but with the rider that such Rules should not be inconsistent with the provisions of the CST Act and the Rules made by the Central Government under Section 13(1), to make the Rules to carry out the purpose of the Act. Section 13(4) of the CST Act inter-alia provided that in particular and without prejudice to the powers conferred by sub-section (3), the State Government may make rules for all or any of the purposes listed therein from Clauses (a) to (g). Clause (e) provided that the State Government may make rules prescribing "the authority from whom, the conditions subject to which and fees, subject to payment of which, any form of certificate prescribed under clause (a) of the first proviso to sub-section (2) of section 6 or of declaration prescribed under sub-section (1) of section 6A or subsection(4) of section 8, may be obtained, the manner in which such forms shall be kept in custody and records relating there to maintained and the manner in which any such form may be used and any such certificate or declaration may be furnished;" Beyond and in addition to that, no authority has been conferred on the States and therefore it could be safely deduced therefrom that no power has been conferred on the States to frame any Rule for cancellation of the declaration once validly issued. Rule 17(20) of the Rajasthan Rules was thus marred by lack of legislative competence and did not conform to the CST Act, having exceeded the authority conferred on the State Government under which it was purported to have been made.

The Court was inclined to hold that State had no authority to frame a rule providing for cancellation of validly issued declaration form/form-C.

In the result, the writ petition deserved to succeed and hereby allowed. Rule 17(20) of the Rajasthan Rules declared ultra vires Section 8(4), 13(1)(d), 13(3) and 13(4)(e) of the CST Act. The communications dated 20.11.2017 and 30.11.2017 sent by the respondent No.3 to the VATO Ward-17, New Delhi, with regard to cancellation of 'C' Form, were declared illegal and consequently quashed and set aside. The cancellation of 'C' Forms made vide order dated 07.12.2017 was also quashed and set aside. The petitioner was held entitled to avail benefit of rates of tax under Section 8 of the CST Act.

Present for the Petitioner : Mr. Rajesh Jain with Mr. Virag Tiwari and Mr.Shobit Vyas

Present for Respondent(s) : Mr. R.B. Mathur with Ms.Tanvi Sahai

Judgment

Per Hon'ble Mr. Justice Mohammad Rafiq:

This writ petition has been filed by petitioner, namely, Combined Traders, praying for declaring Rule 17(20) of the Central Sales Tax (Rajasthan) Rules, 1957 (for short, 'the Rajasthan Rules'), as introduced through notification dated 14.07.2014, ultra vires of Section 8(4), 13(1)(d), 13(3) & 13(4)(e) of the Central Sales Tax Act, 1956. Further prayer is made to declare the cancellation of 'C' forms permitted to be downloaded on the website of the Department to respondents no.4 and 5, vide order dated 07.12.2017, as illegal, without the authority of law and violative of Article 19(1)(g) of the Constitution of India. Prayer is also made for quashing and setting aside the communications dated 20.11.2017 and 30.11.2017 sent by the respondent no.3 to the VATO Ward-17, New Delhi, as being preposterous and not sustainable as the said communications preceded the date of cancellation of 'C' form, which was 07.12.2017. The petitioner has further prayed for declaration that the registration certificates of the respondents no.4 and 5, which were cancelled on 07.12.2017 with retrospective effect from 01.05.2017, were valid during the period when transactions were made by the petitioner and that even according to Section 16(4) of the Rajasthan Value Added Tax Act, 2003 such cancellation can only be effective from the date of the order or the hoisting of such cancellation on the portal of the department and would not come into effect retrospectively. It is also prayed to declare the communication dated 27.12.2017 sent by the respondent no.2 to the Commissioner VAT/GST, Delhi as without the authority of law and thus quash and set aside the same. Lastly, prayer is made for a direction to the respondent no.1 to validate the 'C' forms issued to the respondents no.4 and 5 on 06.07.2017 immediately thus enabling the petitioner to claim the benefit of Section 8(1) as he had already submitted the said 'C' forms verified on TINXSYS on 14.09.2017.

Briefly stated, the facts of the case are that the petitioner, as a registered dealer in Delhi, had made sales in the first quarter of 2017-18 under Section 8(1) of the Central Sales Tax Act, 1956 ('for short, 'the Act') to respondent no.4 M/s. H.G. International, TIN No.08372171209 and respondent no.5 M/s. Saraswati Enterprises, TIN No.08942179286. As per petitioner, the said sales were duly recorded in the books of accounts against which payments had also been received through the banking channels. The ledger accounts of the respondents have been enclosed to the writ petition. To claim reduced rate of tax under Section 8(1), the petitioner had furnished 'C' forms, as per the requirement of Section 8(4) of the Act. As

per second proviso to Rule 12(1) of the Central Sales Tax (Registration and Turnover) Rules, 1957 (for short, 'the Rules of 1957') a single 'C' form is required to be submitted for a quarter, which was issued by each of the respondents towards the transactions made in the first quarter of 2017-18. As per petitioner, the 'C' forms were obtained by the respondents no.4 and 5 online on 06.07.2017 after qualifying the conditions under Rule 17(8), (9), (10), (11), (12) and (13) of the Central Sales Tax (Rajasthan) Rules, 1957 (for short, 'the Rajasthan Rules'). The petitioner had claimed refund in the return filed on 11.07.2017 for the first quarter of 2017-18 under the Delhi Value Added Tax Act, 2004 (for short, 'the DVAT Act'). When the said refund was not given within a period of two months from the date of filing of return, petitioner approached the Delhi High Court by filing Writ Petition (Civil) No.8283/2017, which vide order dated 18.09.2017, directed the authorities in Delhi to refund the amount along with due interest within four weeks and two weeks thereafter respectively. On 25.10.2017, the respondent no.3 informed the VATO, Ward-17, Delhi about the cancellation of 'C' forms of the respondents no.4 and 5 on the ground that they have not been found functioning at their business premises. By another letter dated 30.11.2017, Delhi VAT authority was informed about cancellation of the said 'C' forms as well as the registration certificates of the respondents no.4 and 5. The registration certificates of respondents no.4 and 5 were cancelled on 07.12.2017, under Section 16(4) of the Rajasthan Value Added Tax Act, 2003 (for short, 'RVAT Act'). Hence this writ petition.

Mr. Rajesh Jain, learned counsel for petitioner, argued that while sub-section (1) of Section 13 of the Act confers power on the Central Government to make Rules, sub-section (4) of Section 13 gives that power to the State Government. Section 13(3) provides that the Rules framed by the State Government should not be inconsistent with the provisions of the Act and the Rules made under sub-section (1). Sub-section (4) in clauses (a) to (j) stipulates the purposes for which the State Government can make the Rules. As per clause (e) of Section 13(4) of the Act, the State could make rules as regards, (a) the authority from whom; (b) conditions subject to which; (c) the fee subject to payment of which any form or certificate prescribed under sub-section (4) of Section 8 (as relevant in this case) may be obtained. In addition, this clause also permits the State to frame Rules so as to decide the manner in which such form shall be kept in custody and records relating thereto maintained and the manner in which any such form may be used or any such certificate or declaration may be furnished. Therefore, the rule making power available to the State under Section 13(4)(e) does not confer any authority on the respondent no.1 to frame a rule so as to provide cancellation of the 'C' form once issued. Rule 17(20) notified on 14.07.2014 by respondent no.1 is not only inconsistent with the Act

but is also outside the scope of rule making power of the State. Invoking this Rule, the 'C' forms issued by the respondents no.4 and 5 have been illegally cancelled for which no provision exists under the Act. Reliance in support of this argument is placed on the judgments of the Supreme Court in **Sales Tax Officer, Ponkunnam and Another Vs. K.I. Abraham – 1967 (2) STC 367 (SC), India Carbon Vs. State of Assam – (1997) 106 STC 460 (SC), Dawar Brothers, Bhopal Vs. State of M.P. and Others – (1979) 44 STC 286 (MP).** Learned counsel, Mr. Rajesh Jain also relied on the judgment of the Supreme Court in **General Officer Commanding-in-Chief and Another Vs. Dr. Subhash Chandra Yadav and Another – (1988) 2 SCC 351**, and submitted that the Supreme Court therein held Rule 5-C of the Cantonment Fund Service Rules, 1937 to be ultra-vires of Section 280(2)(c) of the Cantonment Act, 1924. Reliance is also placed on the judgment of the Supreme Court in **Laghu Udyog Bharti and Another Vs. Union of India and Others – (1999) 6 SCC 418** and judgment of the Delhi High Court dated 22.10.2018 in Areness Foundation Vs. Government of NCT of Delhi and Another in Writ Petition (Civil) No.9123/2018.

Mr. Rajesh Jain, learned counsel, argued that there exists no provision under the Act for cancellation of 'C' form. This has also been accepted by the department before Delhi High Court in the case of **Jain Manufacturing (India) Pvt. Ltd. Vs. Commissioner of VAT Delhi – 2016 (93) VST 326 (Del)**. The Special Leave Petition preferred against that judgment was dismissed by the Supreme Court vide order dated 25.10.2016. The decision in **Jain Manufacturing**, supra, was followed by the Delhi High Court in **Emami Agrotech Ltd. Vs. Commissioner of VAT. The Delhi High Court, vide order dated 30.08.2016**, directed the respondent Commissioner to validate the statutory 'C' forms issued to the petitioner therein.

It is argued that the Central Government, while making the Rules, has not carved out any rule thereunder permitting cancellation of the declaration form. Even Section 13(1)(c) of the Act permits the Centre to make Rules providing for the cases and circumstances in which and conditions subject to which any registration granted under the Act may be cancelled. Quite contrary to the stipulations contained under Section 13(3), the respondent no.1 through the notification S.O. 50, dated 14.07.2014, introduced Rule 17(20) of the Rajasthan Rules after a gap of 57 years from the date of its introduction. No other State in their Rules has any provision permitting the State authority to make Rules providing for cancellation of 'C' form once issued to the selling dealer, which would be evident from the set of rules of other States cited during the course of hearing.

On the question of cancellation of registration certificate, it is submitted that the registration certificates of the respondents no.4 and 5 have been

cancelled on 07.12.2017 under Section 16(4) of the RVAT and not under Section 7(4)(b) of the Act. Registration certificate under the CST Act cannot be cancelled by applying the provisions of the RVAT. For this, reference is made to Section 9(2) of the Act, which starts with the expressions "subject to the other provisions of the Act and the Rules made thereunder". RVAT can only be resorted to where the matter relates to "registration of the transferee's business" and not for cancellation of registration under the Act. Thus, for cancellation of registration certificate under the Act, Section 7(4)(b) would be applicable where it has been made permissible at the instance of the department and Section 7(5) when it is at the instance of an assessee. Rules which contemplate the cancellation process are Rule 9(3) for Section 7(4)(b) and Rule 10 of the Rules for Section 7(5). In the rule making power available under Section 13(4) of the Act, none of the clauses from (a) to (g) deals with cancellation of the registration certificate. Thus, it is clear that the States have not been empowered to make Rules for cancellation of either 'C' forms or registration certificate validly issued under the Act. Even as per Section 16(4) of the RVAT where certificate of registration can be cancelled as may be deemed appropriate by the authority, the same cannot be understood to have conferred power on the authority to cancel the registration certificate retrospectively. Cancellation under Section 7(5) takes effect from the end of the year. Thus, when registrations of respondents no.4 and 5 were cancelled on 07.12.2017, such cancellation would take effect either from 07.12.2017 or on a subsequent date when such cancellations were hosted on the website of the department. Learned counsel, in support of his submissions, has placed reliance on the judgment of Delhi High Court in **Chhabra Electric Stores Vs. Commissioner of Delhi – 1972 (30) STC 85 (Del)**. He submitted that as held by the Delhi High Court in **Jain Manufacturing**, supra, retrospective cancellation under the Act is not envisaged under Section 7(4)(b). It is argued that notwithstanding cancellation of the registration certificate of the purchasing dealers, the petitioner cannot be denied the benefit of deduction, who has acted on the strength of the registration certificates of respondents no.4 and 5, which were valid at the time of transactions. To buttress his argument, learned counsel also relied on the judgments of the Supreme Court in **State of Maharashtra Vs. Suresh Trading Company – (1998) 109 STC 439 (SC) and State of Madras Vs. Radio Electricals Ltd. - (1966) 18 STC 222 (SC)**.

It is submitted that the preliminary objection raised by the respondents no.1, 2 and 3 as regards the maintainability of the writ petition, is liable to be rejected. Since vires of Rule 17(20) of the Rajasthan Rules have been challenged, therefore, it could only be done by invoking the writ jurisdiction of this Court under Article 226/227 of the Constitution of India.

The authorities appointed under the Statute are creatures of the Statute who cannot go into the validity of the provisions of the Act and the Rules. Moreover, challenge by the petitioner is also supported with the judgment of Delhi High Court in **Jain Manufacturing**, supra. The judgment of the Supreme Court in **Commissioner of Sales Tax Vs. Shree Krishna Engg. - (2005) 2 SCC 692**, relied upon by the respondents, is not applicable inasmuch as it deals with the situation where no 'C' forms have been issued and the selling dealers approached the Court for a direction to the concerned Sales Tax Department to issue of such 'C' forms. In that case the court was dealing with a situation where no C-Form was issued and the selling dealer had approached the court for a direction to the concerned Sales Tax Department to issue such C-Form. In that context, the Supreme Court observed that the registration is really in the nature of a concession and not a matter of right and that it was conditional upon fulfillment of certain statutory requirements. The aforesaid judgment has been distinguished in **Jain Manufacturing**, supra.

Lastly, Mr. Rajesh Jain, learned counsel, submitted that cancellation of 'C' forms has adversely affected the petitioner. When transactions were effected under Section 3 of the Act, which have also been accepted by the authority in Delhi, then on the submission of the 'C' forms, obligation of the petitioner as contemplated under Section 8(1) and (4) of the Act stood discharged and came to an end. If the respondent authorities had any cause of action against respondents no.4 and 5, then they could invoke any proceedings under the Act against them including assessment of tax, interest and penalty for which petitioner has no grievance. Learned counsel in this connection has relied on the judgment of the Orissa High Court in **State of Orissa Vs. Santosh Kumar and Co. - (1983) 54 STC 322 (Orissa).** It is submitted that when the respondent no.4 stood registered with the respondents no.2 and 3 for over a period of three years and respondent no.5 for six months, then cancellation of 'C' forms is arbitrary and violative of Articles 14 and 19 (1)(g) of the Constitution of India.

On the contrary, Mr. R.B. Mathur, learned counsel appearing for the respondent submitted that the tax authorities at Delhi wrote a letter to the tax authorities in Rajasthan to verify the genuineness of the 'C Forms' issued by two traders, namely M/S H&G International and M/S Sarswati Enterprise, alleged to be registered dealers in the state of Rajasthan. It was pointed out that vide the C- forms goods worth RS.4,89,51,010.00/- and Rs.7,20,53,338/- were purchased by the present petitioner from M/s H&G International and M/s Saraswati Enterprises, respectively on 06.07.2017. On due inquiry made by the tax authorities in Rajasthan, it was found that no business activity was done at the address given by the dealers, both

the addresses were of residential areas and on inquiry made from the neighboring people, they denied any knowledge of any business activity at the given address. Giving a logical end to the enquiry, show-cause notices were issued to both the registered dealers by the sales tax authorities in Rajasthan. Despite notices, no one appeared and consequently the registration of the dealers were cancelled w.e.f 03.12.2014. The order cancelling the registration of the traders was never put to challenge before any of the authorities by the aggrieved parties, and thus has attained finality. The authorities at Delhi were also informed regarding the proceedings against the dealers at Rajasthan and the cancellation of their 'C' Forms.

Mr. R.B. Mathur, learned counsel, submitted that the petitioner in the present case challenged validity of the Central Sales Tax Rule, 1957, even though he is not even a dealer registered in the state of Rajasthan. It is submitted that following a due inquiry, registration of two dealers, namely, M/s H&G International and M/S Saraswati Enterprise was cancelled by the assessing authority vide an order passed under Rule 17(20) of Central Sales Tax rule, 1957, read with Rule 48, Rajasthan Value Added Tax Rules, 2006 and Section 16(4) Rajasthan Value Added Tax Act, 2003. The present petitioner is a stranger to the assessment/penalty order passed by the assessing authority and has no locus to challenge the vires of the Rules. Learned counsel argued that the said order was never challenged by the concerned dealers registered in Rajasthan before any appellate authority and hence has attained finality. Further, the registered dealers to whom the C-forms were issued have not even put in appearance before this court, raising a serious cloud of doubt on the actions of the present petitioner and filling of the present petition. It is a settled principle of law that no proceedings can be initiated by a person who is stranger to the case. Thus, the present writ deserves to be dismissed on this ground alone.

Mr. R.B. Mathur, learned counsel appearing for revenue, further submitted that the Central Sales Tax Act 1956 is a complete code in itself. The Act provides for a provision of appeal before the appropriate authorities. Neither the petitioner nor the dealer registered in the State of Rajasthan has made any challenge to the order cancelling 'C' forms. In such circumstances the order of the Assessing Officer after attaining finality cannot be challenged at this stage and the authority of this court cannot be used as a measure to bypass the provisions of the above mentioned Act. Learned counsel relying on the judgment of the Apex Court in the case of **Tithagur Paper Mills v/s State of Orissa - AIR 1983 SC 603** has submitted that it has been held therein that courts should be slow in interfering in matters where adequate appellate machinery is available to the petitioner. The powers available to the court under Articles 226 of

the constitution are discretionary in nature and should be applied with abundant caution, especially in taxation matters, where greater latitude is available to the authorities. Reliance in support of this argument is placed on judgment of the Supreme Court in **Authorized Officer, State Bank of Travancore and Another Vs. Mathew K.C. - AIR 2018 SC 676**.

Mr. R.B. Mathur, learned counsel for the respondent, submitted that it is a settled principle of law that while interpreting a question, challenging the vires of the act/rules, the court should be slow in holding an act/rules ultra vires, and there is a general presumption in favor of constitutionality of the statute. It is submitted that the Supreme Court in the case of **Hindustan Zinc Ltd. v/s Rajasthan Electricity Regulatory Commission - (2015) 12SCC 611**, has held that where the validity of subordinate legislation is challenged, question to be asked is whether power given to the rule making authority has been exercised for the purpose for which it was given. The Court has to examine the nature, object and scheme of the legislation as a whole to consider what is the area over which powers are conferred upon the rule making authority. However, the court has to start with the presumption that the rule is intra vire and has to be read down only to save it from being declared ultra vires in case the court finds that the above presumptions stand rebutted and the impugned Regulations are relatable to the specific provisions contained in Section 86(1)(e) of the Act. Learned Counsel further submitted that the Supreme Court very recently in the case of **TVS Company V/s. State of Tamil Nadu reported in (2018) AIR (SC) 5624** has reiterated the principle that the court should be slow in the reviewing the fiscal laws and any concession claimed should be strictly in accordance with law.

Mr. R.B. Mathur, learned Counsel for the respondent, submitted that the Rajasthan Value Added Act, 2003 and the Central Sales Tax Act, 1956, each is a complete code. A bare perusal of the various provisions of either of the Acts, makes it amply clear that the rules envisaged under Rule 17(20) of the Central Sales Tax (Rajasthan) Rules, 1957, are in consonance therewith. Reference is made to various provisions of the Central Sales Tax Act, 1956, especially sections 8, 9, 13, 16 and Rules 9 and 17 of the Central Sales Tax (Registration and Turnover) Rules of 1967. Learned counsel, submitted that it is of utmost relevance that in an era of e-filing of documents and returns, the chances of physical verification by the sales tax authorities have been reduced. This in turn has increased the possibility of sham transactions and filing of returns and declarations by shell companies. With a view to check the loss of state exchequer and safeguarding interest of the state revenue, the provisions relating to filling of returns and declarations were made more stringent. The apex court as

well as various high courts of the country have consistently held that any rule to promote the cause of the Act should be held intra-vires. Once an Act is promulgated, a reasoning which gives it teeth to ensure the furtherance of purpose of the Act, should be adopted. It is submitted that the Apex Court in the case of **Commissioner of Sales Tax V/s. Shree Krishna Engg. Co./ & ors. reported in (2005) 2 SCC 693** has held that it is a settled law that equity plays only a minuscule role in fiscal matters, even if such considerations were to be applied, there would still be no justification for an application adverse to the interest of the state. The dealer who has chosen to trust the other dealer must suffer for his mercantile recklessness.

Learned Counsel further argued that a similar controversy came up before the Gujarat High Court in the case of **Willowood Chemicals Pvt. Ltd. Vs. Union of India – 2018 (19) GSTL 228**, wherein the court while examining the provisions of Section 13(4) of the Central Sales Tax Act, 1956, held that it was well within the legislative competence of the state to formulate rules for submission of declaration forms within the stipulated time period.

We have bestowed our anxious consideration to rival submissions, perused the material on record and studied the cited precedents.

Before proceeding to examine the merits of the case, we would begin with by referring to some of the cited case law. The Supreme Court in **State of Maharashtra Vs. Suresh Trading Company**, supra, was dealing with a case in which the respondents, who were registered dealers under the Bombay Sales Tax Act, 1959, purchased goods from Sulekha Enterprises Corporation between 1st January and 31st December, 1967. It was not disputed that on the date of such sale, Sulekha Enterprises Corporation held a valid registration. The respondent on that basis claimed deduction in the turnover of sales, however, the Sales Tax Officer disallowed the same on the premise that registration of Sulekha Enterprises Corporation stood cancelled on 20.08.1967 with retrospective effect from 01.01.1967. The Bombay High Court reversed the decision of the Sales Tax Officer. The Supreme Court while affirming the decision of the Bombay High Court held as under:-

> "….A purchasing dealer is entitled by law to rely upon the certificate of registration of the selling dealer and to act upon it. Whatever may be the effect of a retrospective cancellation upon the selling dealer, it can have no effect upon any person who has acted upon the strength of a registration certificate when the registration was current. The argument on behalf of the department that it was the

duty of persons dealing with registered dealers to find our whether a state of facts exists which would justify the cancellation of registration must be rejected. To accept it would be to notify the provisions of the statute which entitle persons dealing with registered dealers to act upon the strength of registration certificates."

The aforesaid decision of the Supreme Court was followed by the Delhi High Court in **Shanti Kiran India Pvt. Ltd. Vs. Commissioner Trade & Tax Department – (2013) 57 VST 405 (Delhi)**, by holding thus:-

"This court is of the opinion that in the absence of any mechanism enabling a purchasing dealer to verify if the selling dealer deposited tax, for the period in question, and in the absence of notification in a manner that can be ascertained by men in business that a dealer's registration is cancelled (as has happened in this case) the benefit of input credit, under Section 9(1) cannot be denied. Furthermore, this Court notices that the cancellation of both selling dealers' registration occurred after the transactions with the appellant. The VAT authorities observed that the scanty amounts deposited by the selling dealers was incommensurate with the transactions recorded, and straightaway proceeded to hold that they colluded with the appellant. Such a prior conclusions are based on no material, or without inquiry, and accordingly unworthy of acceptance."

The Orissa High Court in **State of Orissa Vs. Santosh Kumar**, supra, was dealing with a case where deduction in respect of sales made to a registered dealer was disallowed on the ground that the purchasing dealer was fictitious although it (purchasing dealer) held a valid registration on the date of the transaction. In those facts, it was held as under:-

"….Once a certificate of registration is issued to a person and he becomes a registered dealer, he is entitled to certain benefits under the Act. Certificates granted by the public officers have their value and people in the commercial field would in normal course accept such certificates to be genuine. The fact that registration has been granted, yet the person holding the certificate is a fictitious one seem to be contradictions in term. A certificate of registration can be granted only when the dealer, apart from being a businessman, satisfies the other requirements prescribed by law. A registration certificate cannot be granted to a non-existent person. The fact that there have been some persons who are labelled by the department as fictitious dealers goes to show that the officers under the Act either collude with dishonest people in the field or fail to exercise due diligence and allow fraud to be practised in the commercial

field. Whether it is collusion or negligence, these officers bring disrepute to the State and introduce uncertainty and lack of confidence into a true field of trust. It is high time that the State Government institutes appropriate enquiries, take such steps as are necessary to eliminate fictitious dealers from the field and also take strong action against persons connected with such matters so that there be no recurrence of it in future."

The Supreme Court in **State of Madras Vs. Radio Electricals Ltd.**, supra, while considering as to what precaution a seller is required to exercise while entering into a transaction of sale with a buyer, observed as under:-

"….He (the seller) must satisfy himself that the purchaser is a registered dealer, and the goods purchased are specified in his certificates but his duty extends no further. If he is satisfied on these two matters, on a representation made to him in the manner prescribed by the Rules. and the representation is recorded in the certificate in Form 'C' the selling dealer is under no further obligation to see to the application of the goods for the purpose for which it was represented that the goods were intended to be used. If the purchasing dealer misapplies the goods he incurs a penalty under Section 10. That penalty is incurred by the purchasing dealer and cannot be visited upon the selling dealer. ….."

A somewhat identical controversy came up for consideration before the Delhi High Court in **Jain Manufacturing**, supra. The petitioner in that case was engaged in trading of duty entitlement pass book scrips and was having its registered office in Kanpur (Uttar Pradesh). The petitioner was also registered under the Central Sales Tax Act, 1956, and was given a Tax Identification Number (TIN) in the State of Uttar Pradesh. The petitioner was aggrieved by the action of the Commissioner, Value Added Tax (VAT) in the Department of Trade and Taxes, New Delhi, in, inter alia, cancelling the Form-C issued with regard to the purchases made from the petitioner by one Keshav Corporation (respondent no.2). It was conceded before the High Court on behalf of the department that there was no provision in the CST Act for cancellation of the C-Form and that registration once granted under the CST Act can be cancelled by the authority, which granted it only in accordance with the provisions of the CST Act, but retrospective cancellation of a registration is not contemplated. In those facts, the Delhi High Court held as under:-

"The central issue in the present case is whether there exists a power in the Commissioner VAT, Delhi under the CST Act and the

Rules thereunder to cancel a C-Form and further if such power exists then whether in the facts and circumstances of the present case such power was rightly exercised.

No provision in the CST Act has been brought to the notice of the Court which enables an authority issuing a C-Form to cancel the C-Form. Rule 5(4) of the Central Sales Tax (Delhi) Rules, 2005 enables the authority which has to issue a C-Form to "withhold" the C-Form. The contingencies under which a C Form may be withheld are set out in Rule 5(4). For instance, Rule 5 (4) (v) envisages that some adverse material has been found by the Commissioner "suggesting any concealment of sale or purchase or furnishing inaccurate particulars in the returns." The Commissioner could, in terms of the proviso to Rule 5(4), instead of withholding the C-Form, issue to the applicant such forms in such numbers and subject to such conditions and restrictions, as he may consider necessary. However, there is no specific provision even under the aforementioned Rules which enables the Commissioner to cancel the C-Form that has already been issued.

There is merit in the contention that one of the primary requirements for issuance of a C-Form is that the dealer to whom the C-Form is issued has to have a valid CST registration on the date that the C Form is issued. If the purchasing dealer does not possess a valid CST registration on the date of the transaction of sale, then the selling dealer cannot insist on being issued a CForm. In the present case, on the date of the transaction i.e. 10th March, 2015 the purchasing dealer viz., Respondent No. 2 did posses a valid CST registration. The name of the purchasing dealer as shown in the invoices, and the name and address of the registered purchasing dealer as reflected in the C-Forms issued by the DT&T matched. The cancellation of the CST registration of Respondent No. 2 took place subsequently on 4th August 2015. Therefore , there was no means for the Petitioner as the selling dealer to suspect as of the date of sale or soon thereafter that the payments made to it RTGS was not by Respondent No.2 but by some other entity with the same name. It is not possible, therefore, to straightaway infer any collusion between the Petitioner and Respondent No. 2 or for that matter the other entity of the same name spoken of by the DT&T.

In any event, from the point of view of the Petitioner, the requirement of Section 8(1) of the CST stood fully satisfied. The purchasing dealer had a valid CST registration on the date of purchase of

goods by the Respondent No. 2 from the Petitioner. The C-Form issued by the DT&T confirmed the registration of Respondent No.2 under the CST Act."

In **Jain Manufacturing**, supra, the argument was also raised with regard to locus of the petitioner to challenge the cancellation of C-Form issued to respondent no.2 and the registration of the respondent no.2. The Delhi High Court held that the petitioner was constrained to also challenge the cancellation of the registration of the respondent no.2 only because this was the main reason for cancellation of the C-Form. However, the court confined its consideration as to the validity of cancellation of CForm and did not go into validity of cancellation of the registration of the respondent no.2. It was held that the petitioner was directly affected by the decision of the Department to cancel the C-Form. It was held that the purchasing dealer cannot be said to be affected by that decision since the purchasing dealer has taken advantage of Section 8(1) (b) of the CST Act and paid the lesser tax of 2%, however, the selling dealer would be directly affected by such decision. The writ petition was therefore entertained because an important question of law regarding the absence of power under the CST Act or the Rules made thereunder, to cancel a C-Form was raised.

We are also of the view that in the present matter as well, not only important question of law regarding competence of the State to retrospectively cancel validly issued declaration form/form-C is involved, validity of Rule 17(20) of the Rules of 2017 is also under challenge. These issues cannot be decided by alternative foras provided in the Act. We therefore overrule the objection of alternative remedy.

In Sa**les Tax Officer, Ponkunnam and Another Vs. K.I. Abraham,** supra, the respondent-assessee was a dealer in coconut-oil business having inter-State sales, who was assessed to sales tax for the year 1959-60 under Section 8 of the Central Sales Tax Act. Out of total turnover determined by the Sales Tax Officer, only a part thereof was supported by proper declaration Form 'C', with regard to which tax was imposed at concessional rate, and remaining part was not so supported with regard to which tax was imposed at higher rate on the premise that he did not file the declaration form on or before the prescribed date, i.e., 16.02.1961, but actually filed the declaration forms on 08.03.1961 but before the order of assessment was made. The assessee sought to explain the delay by submitting that he had received the declaration form late from the purchaser in Madras. Both the appeal and the revision filed by the assessee before the respective authorities were dismissed. The Kerala High Court, however, allowed his writ petition and quashed the orders of

assessment of sales tax and directed the Sales Tax Officer to make a fresh order of assessment after taking into consideration the declaration forms furnished by the assessee on 08.03.1961. The State of Kerala in exercise of its powers delegated to it by Section 13(3) of the CST Act, framed the Central Sales Tax (Kerala) Rules, 1957, the third proviso to Rule 6(1) thereof stipulated that all declaration forms pending submission by dealers on 02.05.1960 shall be submitted not later than 16.02.1961. The argument of the assessee before the Supreme Court was that the third proviso to Rule 6(1) was ultra vires Section 8(4) read with Section 13(3) and (4) of the Central Sales Tax Act, 1956, and that prescription of outer date for submission of the declaration form cannot be covered by the expression "in the prescribed manner" even in Section 8(4) read with Section 13(3) and (4) of the Central Sales Tax Act, 1956. Upholding the argument, the Supreme Court held as under:-

> "….In our opinion, the phrase "in the prescribed manner" occurring in section 8(4) of the Act only confers power on the rule-making authority to prescribe a rule stating what particulars are to be mentioned in the prescribed form, the nature and value of the goods sold, the parties to whom they are sold, and to which authority the form is to be furnished. But the phrase "in the prescribed manner" in section 8(4) does not take in the time-element. In other words, the section does not authorise the rule making authority to prescribe a time-limit within which the declaration is to be filed by the registered dealer. The view that we have taken is supported by the language of section 13(4)(g) of the Act which states that the State Government may make rules for "the time within which, the manner in which and the authorities to whom any change in the ownership of any business or in the name, place or nature of any business carried on by any dealer shall be furnished." This makes it clear that the Legislature was conscious of the fact that the expression "in the manner" would denote only the mode in which an act was to be done, and if any time-limit was to be prescribed. for the doing of the, act, specific words such as "the time within which" were also necessary to be put in the statute. ….."

Under challenge before the Supreme Court in **India Carbon Ltd. Vs. State of Assam**, supra, was the judgment of the Gauhati High Court. The appellants before the Supreme Court were engaged in the manufacturing and sale of petroleum coke. The appellants were registered dealer under the Central Act and were liable to pay Central sales tax on the petroleum coke, which was the subject of inter-State sales. The appellants were required by the respondent State, in exercise of its powers conferred under

Section 35-A of the Assam Sales Tax Act, 1947, to pay interest at the rate of 24% per annum on the delayed payment of the tax for the assessment years 1974 to 1980. The appellants in the writ petition challenged imposition of such interest on the premise that there being no mention of interest in the first part of Section 9(2) of the CST Act, the appellants were not liable to pay interest. Considering the question of competence of the State in demanding the interest while interpreting Section 9(2) of the CST Act, and relying on its earlier Constitution Bench judgment in **Khemka & Company Vs. State of Maharashtra – 1975 (3) SCR 753**, the Supreme Court in para 14 of the report held as under:-

> "Now, the words "charging or payment or interest" in Section 9(2) occur in what may be called the letter part thereof. Section 9(2) authorises the sales tax authorities of a State to assess, reassess, collect and enforce payment of the Central sales tax payable by a dealer as if it was payable under the State Act; this is the first part of Section 9(2). By the second part thereof, these authorities are empowered to exercise the powers they have under the State Act and the provisions of the State Act, including provisions relating to charging and payment of interest, apply accordingly. Having regard to what has been said in the case of Khemka & Co., it must be held that the substantive law that the States' sales tax authorities must apply is the Central Act. In such application, for procedural purposes alone, the provisions of the State Act are available. The provision relating to interest in the latter part of Section 9(2) can be employed by the States' sales tax authorities only if the Central Act makes a substantive provision for the levy and charge of interest on Central sales tax and only to that extent. There being no substantive provision in the Central Act requiring the payment of interest on Central sales tax the States' sales tax authorities cannot, for the purpose of collecting and enforcing payment of Central sales tax, charge interest thereon."

Adverting now to the facts of the present case, it may be noted that the CST Act came into force on 05.01.1957 and has throughout substantially retained Section 13 in its original form, which invests the States with the power to frame Rules. The Central Act did not confer any authority on the States to frame the Rules empowering them to cancel the declaration form/ C-Form once issued. This has been taken to so mean by all other State except the State of Rajasthan, which perhaps is the only State providing so in sub-rule (20) in Rule 17 of the Rajasthan Rules on 14.07.2014, i.e., more than 61 years thereafter. This provision is apparently not only contrary to the provisions of Section 8(4) but also Section 13(1)(d), 13(3) and (4)(e).

As would be seen from the Central Sales Tax Rules framed by different States, which have been produced by the petitioner for perusal of the court during the course of argument, no other State has any such provision in their Rules, like the one which is impugned in the present writ petition, i.e., Rule 17(20) of the Rajasthan Rules, conferring unto itself power for cancellation of validly issued declaration form/C-Form. Rule 17(20) of the Rajasthan Rules reads thus:-

> "(20) Where any dealer has generated declaration Form(s) or Certificate(s) by misrepresentation of facts or by fraud or in contravention to the provisions of the Central Sales Tax Act, 1956 and rules made there under, the assessing authority or any officer authorised by the Commissioner, after affording such dealer an opportunity of being heard cancel such declaration Form(s) or Certificate(s), and the list of declaration Form(s) or Certificate(s) so cancelled shall be published on the official web-site of the Department. The declaration Form(s) or Certificate(s) so cancelled shall be deemed to have not been generated through the official web-site of the Department."

Section 7(4)(a) of the CST Act provides that a certificate of registration granted under this Section either on the application of a dealer to whom it has been granted or, where no such application has been made, after due notice to the dealer, be amended by the authority granting it. Section 7(4)(b) and Section 7(5) of the CST Act are the only provisions in the Act which provide for cancellation of the registration once granted. Section 7(4)(b) stipulates that such registration can be cancelled by the granting authority, where he is satisfied, after due notice to the dealer to whom it has been granted, that he has ceased to carry on business or has ceased to exist or has failed without sufficient cause, to comply with an order under sub-section (3A) or with the provisions of sub-section (3C) or sub-section (3E) or has failed to pay any tax or penalty payable under this Act, or in the case of a dealer registered under sub-section (2) has ceased to be liable to pay tax under the sales tax law of the appropriate State or for any other sufficient reason. As per Section 7(5) of the CST Act, registration of a dealer may be cancelled on his own application provided he is not liable to pay tax. Since, in the case in hand, we are confining our consideration only to the validity of Rule 17(20) of the Rajasthan Rules, therefore, except for what is observed above, we have restrained ourselves from going into the correctness of the order cancelling the registration certificate. This is for two reasons; firstly, that the validity of Rule 17(20) can be independently decided without going into the validity of cancellation of registration and; secondly, registration having been cancelled otherwise than on own

application of the dealer, it is always open to the dealer, whose registration has been cancelled, to assail the correctness of the same and also equally open to the authorities concerned, to defend whether in the scope of Section 7(4)(b) such cancellation could be justified.

The Delhi High Court in **Chhabra Electric Stores**, supra, was dealing with the question referred under section 21(3) of the Bengal Finance (Sales Tax) Act, 1941, as extended to Delhi, whether the order cancelling the registration could be enforced with retrospective effect. It was held that the dealer who sold goods to a purchasing dealer during the period 1st April to 30th June, 1956, could not be deprived of the benefit of the deduction contemplated by Section 5(2) of the Act in respect of the sales, on the ground that the certificate of registration of the purchasing dealer was cancelled in November, 1956, subsequent to the dates of sale, with retrospective effect from 1st April, 1956. It was further held that the words "from such date as may be specified in the order" in Rule 12(1)(d) of the Delhi Sales Tax Rules, 1951 should be construed to mean either the date of the order cancelling the registration certificate or a date subsequent to the date of the order and not a date prior to the date of the order.

In **General Officer Commanding-in-Chief**, supra, the Supreme Court held that any rule must conform to the provisions of the statute under which it is framed. It must also come within the scope and purview of the Rule making power of the authority framing the Rules. If either of the two conditions is not fulfilled, the Rules so framed would be void. Applying these two tests, the Supreme Court held that Rule 5-C framed by the Central Government was in excess of its Rule making power as contained in Clause (c) of sub-section (2) of Section 280 of the Cantonment Act before its amendment by the substitution of Clause (c). It is therefore void.

The Supreme Court in **State of Tamil Nadu Vs. P. Krishnamoorthy – (2006) 4 SCC 515**, delineated the law on the scope of judicial review while examining the validity of a subordinate legislation in the following terms:-

> "15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:
>
> (a) Lack of legislative competence to make the subordinate legislation.
>
> (b) Violation of fundamental rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or nonconformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."

No doubt, there is always a presumption in favour of constitutionality or validity of a subordinate legislation and burden is upon the person who attacks it to show that it is invalid. However, lack of legislative competence to make the subordinate legislation and failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act, are well recognised parameters for judicial review of a subordinate legislation.

The obligation of a registered dealer selling the goods to another registered dealer to avail the benefit of tax provided under Section 8(1) is only confined to furnish to the prescribed authority in the prescribed manner a declaration duly filled and signed by the registered dealer to whom he sells the goods. Such declaration should contain the prescribed particulars in the prescribed form and manner. Proviso to Section 8(4) stipulates that the selling dealer has to furnish such declaration within the prescribed time or within such further time as the authority may, for sufficient reason, extend. Rule 12 of the Central Rules provides a form of declaration, the particulars to be contained therein, the period within which it has to be furnished, consequence of loss of the declaration form, and the course

to be adopted in that event. However, this provision does not provide for cancellation of Form C issued. No doubt, Section 13(3) of the CST Act empowers the State to make the Rules but with the rider that such Rules should not be inconsistent with the provisions of the CST Act and the Rules made by the Central Government under Section 13(1), to make the Rules to carry out the purpose of the Act. Section 13(4) of the CST Act inter-alia provides that in particular and without prejudice to the powers conferred by sub-section (3), the State Government may make rules for all or any of the purposes listed therein from Clauses (a) to (g). Clause (e) provides that the State Government may make rules prescribing "the authority from whom, the conditions subject to which and fees, subject to payment of which, any form of certificate prescribed under clause (a) of the first proviso to sub-section (2) of section 6 or of declaration prescribed under sub-section (1) of section 6A or subsection (4) of section 8, may be obtained, the manner in which such forms shall be kept in custody and records relating thereto maintained and the manner in which any such form may be used and any such certificate or declaration may be furnished;" Beyond and in addition to that, no authority has been conferred on the States and therefore it can be safely deduced therefrom that no power has been conferred on the States to frame any Rule for cancellation of the declaration once validly issued. Rule 17(20) of the Rajasthan Rules is thus marred by lack of legislative competence and does not conform to the CST Act, having exceeded the authority conferred on the State Government under which it is purported to have been made.

In view of what we have held above, we are inclined to hold that State has no authority to frame a rule providing for cancellation of validly issued declaration form/form-C.

In the result, the writ petition deserves to succeed and is hereby allowed. Rule 17(20) of the Rajasthan Rules is declared ultra vires Section 8(4), 13(1)(d), 13(3) and 13(4)(e) of the CST Act. The communications dated 20.11.2017 and 30.11.2017 sent by the respondent no.3 to the VATO Ward-17, New Delhi, with regard to cancellation of 'C' Form, are declared illegal and consequently quashed and set aside. The cancellation of 'C' Forms made vide order dated 07.12.2017 is also quashed and set aside. The petitioner is held entitled to avail benefit of rates of tax under Section 8 of the CST Act.

This also disposes of stay application.

[2019] 57 DSTC 128 (Hyderabad)

In the High Court of Telangana

[Hon'bleJustice V. Ramasubramanian and Hon'ble Justice P. Keshava Rao]

W. P. (c)44517/2018

Megha Engineering & Infrastructures Ltd. ... Petitioner

Vs.

Commissioner of Central Tax &Ors. ... Respondent(s)

Date of Order: 18.04.2019

WRIT PETITION - LIABILITY OF INTEREST – SECTION 50 – CGST ACT, 2017 – DELAY IN FILING OF RETURNS OF DIFFERENT TAX PERIOD BY ONE DAY TO 29 DAYS- DELAY CAUSED DUE TO SHORTAGE OF FUNDS TO PAY THE BALANCE TAX LIABILITY AFTER SET OFF OF ITC AVAILABLE – WHETHER INTEREST PAYABLE ON NET TAX LIABILITY AFTER DEDUCTING ITC OR GROSS TAX LIABILITY?

HELD - INTEREST PAYABLE ON GROSS TAX LIABILITY FOR THE REASON THAT TAX PAID ON INPUTS BECOMES INPUT TAX CREDIT ONLY WHEN A CLAIM IS MADE IN THE RETURN FILED AS SELF ASSESSED.

Facts of the case

The petitioner engaged in the manufacture of M S Pipes and in the execution of infrastructure projects .There was a delay on the part of the petitioner in filing the returns in GSTR 3B Forms, for the period from October, 2017 to May, 2018. This was due to the shortage of ITC, available to offset the entire tax liability. The delay in filing the returns was also not huge. The returns for the months of October and November, 2017 and February and May, 2018 were filed with a delay of only one day. The return for December, 2017 was filed with a delay of three days. The return for January, 2018 was filed with a delay of seventeen days, the return for April, 2018 was filed with a delay of nineteen days and the return for March, 2018 was filed with a delay of twenty nine days. The total tax liability of the petitioner for the period from July, 2017 to May, 2018 was Rs.1014,02,89,385/ and the ITC available to the credit of the petitioner during this period was Rs.968,58,86,133/ . Thus, there was a short fall to the extent of 45,44,03,252/ , which the petitioner was obliged to pay by way of cash. The petitioner, could not make payment and file the return within time due to certain constraints. However, the entire liability was wiped out in May, 2018.

The case of the dealer was that GST portal is designed in such a manner that unless the entire tax liability is discharged by the assesse,

the system will not accept the return in GSTR-3B. As a result, even if an assesse was entitled to set off, 95% by utilising the ITC, the return could not be filed unless remaining 5% is also paid.

After the petitioner discharged the entire tax liability, the Superintendent of Central Tax issued letters demanding interest at 18%, in terms of Section 50 of the CGST Act, 2017. The Assistant Commissioner also issued a letter demanding payment of interest. The petitioner submitted that interest is to be calculated only on the net tax liability after deducting ITC from the total tax liability. The petitioner also paid an amount of Rs.30,92,522/- towards interest on their net tax liability. However, the Department demanded interest on the total tax liability and hence the petitioner has come up with the above writ petition.

The petitioner relied upon an approval made in principle by the GST Council for the amendment of the Act. The Press release of the Ministry of Finance in this regard reads as follows:

> "*The GST Council in its 31st meeting held today at New Delhi gave in principle approval to the following amendments in the GST Acts.*
>
> *Amendment of section 50 of the CGST Act to provide that interest should be charged only on the net tax liability of the taxpayer, after taking into account the admissible input tax credit, i.e., interest would be leviable only on the amount payable through the electronic cash ledger.*
>
> *The above recommendations of the Council will be made effective only after the necessary amendments in the GST Acts are carried out."*

Held

It was true that the tax paid on the inputs charged on any supply of goods and/services, is always available. But, it is available in the air or cloud. Just as information is available in the server and it gets displayed on the screens of our computers only after connectivity is established, the tax already paid on the inputs, is available in the cloud. Such tax becomes an input tax credit only when a claim is made in the returns filed as self-assessed. It is only after a claim is made in the return that the same gets credited in the electronic credit ledger. It is only after a credit is entered in the electronic credit ledger that payment could be made, even though the payment is only by way of paper entries.

In view of the above, the claim made by the respondents for interest on the ITC portion of the tax cannot be found fault with. Hence, the Writ Petition was dismissed. However, in the circumstances, there shall be no order as to cost.

Present for the Petitioner : Mr.Gandra Mohan Rao

Present for Respondent(s) : Mr. B. Narsimha Sarma, Sr. Standing Counsel

ORDER

Per Hon'ble Sri Justice V. Ramasubramanian

Aggrieved by a demand made by the respondent for payment of interest on the ITC portion of the tax paid for the months of July, 2017 to May, 2018, the petitioner has come up with the above writ petition.

2. Heard Mr. Gandra Mohan Rao, learned counsel for the petitioner and Mr. B. Narasimha Sarma, learned Senior Standing Counsel for the Department.

3. The petitioner is engaged in the manufacture of MS Pipes and in the execution of infrastructure projects. After the enactment of the Central Goods and Services Tax Act, 2017 (for short 'CGST Act, 2017'), the petitioner registered themselves as a dealer under the Act and they claim to be regularly filing returns and paying taxes.

4. Under the CGST Act, 2017, the registration of dealers, input tax credit, filing of returns, payment of duty and issue of notices, all happen only on-line. All Assesses are required to log into the GST Portal for payment of duty and for filing of returns. The Assesses are required under the Act to file a return in Form GSTR - 3B on or before the 20th of every month, for the discharge of their liability of the previous month. The GST liability is permitted to be discharged by utilizing the ITC available. An electronic ledger is maintained, showing the amount available to the account of an assessee through the ITC.

5. The case of the petitioner is that the GST Portal is designed in such a manner that unless the entire tax liability is charged by the assessee, the system will not accept the return in GSTR - 3B Form. As a result, even if an Assessee was entitled to set off, to the extent of 95%, by utilizing the ITC, the return cannot be filed unless the remaining 5% is also paid.

6. It appears that there was a delay on the part of the petitioner in filing the returns in GSTR - 3B Forms, for the period from October, 2017 to May, 2018. This was due to the shortage of ITC, available to off-set the entire tax liability. According to the petitioner, the delay in filing the returns was also not huge. The returns for the months of October and November, 2017 and February and May, 2018 were filed with a delay of only one day. The return for December, 2017 was filed with a delay of three days. The return for January, 2018 was filed with a delay of seventeen days, the return for April, 2018 was filed with a delay of nineteen days and the return for March, 2018 was filed with a delay of twenty nine days.

7. According to the petitioner, the total tax liability of the petitioner for the period from July, 2017 to May, 2018 was Rs.1014,02,89,385/- and the ITC available to the credit of the petitioner during this period was Rs.968,58,86,133/-.

8. Thus, there was a short fall to the extent of 45,44,03,252/-, which the petitioner was obliged to pay by way of cash. According to the petitioner, they could not make payment and file the return within time due to certain constraints. However, the entire liability was wiped out in May, 2018.

9. After the petitioner discharged the entire tax liability, the Superintendent of Central Tax issued letters dated 29.06.2018 and 06.07.2018 demanding interest at 18%, in terms of Section 50 of the CGST Act, 2017. The Assistant Commissioner also issued a letter dated 04.10.2018 demanding payment of interest.

10. In response, the petitioner sent a letter dated 15.10.2018, pointing out that interest is to be calculated only on the net tax liability after deducting ITC from the total tax liability. The petitioner also paid an amount of Rs.30,92,522/- towards interest on their net tax liability.

11. However, the Department demanded interest on the total tax liability and hence the petitioner has come up with the above writ petition.

12. The respondents have filed a counter affidavit contending inter alia that under Section 39(7), every registered person, who is required to furnish a return, should have paid to the Government, the tax due as per such return, not later than the last date on which he is required to furnish such return; that Section 50 of the Act imposes a burden in the form of interest, upon every person who is liable to pay tax, but failed to pay the same; that the liability to pay interest under Section 50 (1), is a statutory obligation which the registered persons are obliged to comply

on their own accord; that Section 50 (1) is not confined only to the cash component of the tax payable; that the claim of the petitioner is based upon the wrong presumption as though ITC amount was lying with the Government Treasury; and that since the liability under Section 50 is not penal in nature, the petitioner cannot escape liability.

13. From the pleadings, the only issue that arises for consideration is as to whether the liability to pay interest under Section 50 of the CGST Act, 2017 is confined only to the net tax liability or whether interest is payable on the total tax liability including a portion of which is liable to be set-off against ITC?

14. For finding an answer to the said question, we may have to look at (i) the procedure for filing of returns and payment of tax; (ii) the eligibility and conditions for taking input tax credit and (iii) the wording of Section 50.

FILING OF RETURNS:

15. Under Section 40 of the CGST Act, 2017, the procedure for filing of the first return, corresponding to the period between the date on which the dealer became liable to registration, till the date on which registration is granted, is prescribed.

16. Under Section 39, a detailed procedure is stipulated for the filing of the monthly returns. In brief, the Scheme of Section 39 is as follows:

i) Every registered person should furnish for every Calendar Month or part thereof, a return, electronically, of inward and outward supplies of goods or services, ITC availed, tax payable, tax paid etc., on or before the 20th day of the succeeding calendar month;

ii) The Commissioner is empowered to extend, by notification, for reasons to be recorded in writing, the time limit for furnishing the returns, for such Class of registered persons;

iii) Every registered person, who is required to furnish a return, should pay to the Government the tax due as per such return not later than the last date on which he is required to furnish such return;

iv) If a registered person discovers any omission or incorrect particulars in the return already filed by him, he shall rectify such omission or incorrect particulars in the return to be furnished.

17. We should point out that what we have indicated in the preceding paragraph as the essence of Section 39, are confined only to every registered person other than an input service distributor or a non-resident taxable person or a person paying tax under Section 10/51/52.

CLAIM OF ITC:

18. Section 41 deals with the claim of ITC and the provisional acceptance thereof. Under this provision, every registered person is entitled to take the credit of eligible input tax, as self-assessed in his return. The amount so claimed shall be credited on a provisional basis to his electronic credit ledger. But, this credit can be utilized only for payment of selfassessed out-put tax as per the return.

19. While Section 41 deals with the claim of ITC and provisional acceptance, Section 16 deals with the eligibility and conditions for taking ITC. Under Section 16 (1), every registered person shall be entitled to take credit of input tax charged on any supply of goods or services, which are used or intended to be used in the course of his business. The amount should be credited to the electronic credit ledger of such a person. But, the entitlement to take credit of input tax is subject to such conditions and restrictions as may be prescribed and in the manner specified in Section 49.

20. Sub-section (2) of Section 16 lays down four conditions subject to which a registered person will be entitled to the credit of any input tax. These conditions are (i) he should be in possession of a tax invoice or debit note issued by a supplier registered under the Act; (ii) he should have received the goods or services; (iii) the tax charged in respect of such supply should have been actually paid to the Government, either in cash or through utilisation of ITC; and (iv) he should have filed the return under Section 39.

21. Section 49 of the Act, which deals with payment of tax, also speaks about the manner in which ITC shall be credited. Sub-section (2) of Section 49 stipulates that the input tax credit as self-assessed in the return of a registered person should be credited to his electronic credit ledger in accordance with Section 41. The amount available in the electronic credit ledger may be used by virtue of Sub-section (4) of Section 49, for making any payment towards output tax under the Act.

22. Thus, the broad scheme of Section 39 which deals with the filing of returns, Section 41 which deals with the claim of ITC and its provisional

acceptance, Section 16 which deals with the conditions and eligibility for taking ITC and Section 49 which deals with payment of tax, make it clear that the moment all the four conditions stipulated in Sub-section (2) of Section 16 are complied with, a person becomes entitle to take credit of ITC. Once a person takes credit of ITC, the amount gets credited on a provisional basis to his electronic credit ledger under Section 41 (1).

23. In other words, Section 16 (2) makes a registered person entitled to take credit of input tax. Section 41 (1) provides for a credit entry to be made on a provisional basis in the electronic credit ledger. But, the time at which this credit is made under Section 41 (1) is important. Section 41 reads as follows:

> **"41. Claim of input tax credit and provisional acceptance thereof**
>
> (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as selfassessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger.
>
> (2) The credit referred to in sub-section (1) shall be utilized only for payment of self-assessed output tax as per the return referred to in the said sub-section."

24. It is seen from Section 41 (1) that a person gets credited with the input tax, in his electronic credit ledger, only upon his filing of the return on self-assessment basis. Till a return is filed, no credit becomes available to his electronic credit ledger.

25. It is only after a credit becomes available in the electronic credit ledger that the utilization of the same for payment of self-assessed out-put tax, arises under Section 41 (2).

26. Thus, the scheme of the Act makes a distinction between (i) the entitlement to take credit which comes first; (ii) the actual entry of credit in the electronic credit ledger, which comes next; and (iii) the actual payment from out of the credit, which comes last.

27. There can be no doubt about the fact that even in respect of the input tax credit available in the electronic credit ledger, there is a necessity to make payment. Section 41(2) talks about utilization of the credit available

in the electronic credit ledger, for payment of the selfassessed output tax. Section 49(2) also confirms the stage at which a credit entry is made and Section 49(4) enables a registered person to make payment from out of the credit so available in the electronic credit ledger. Therefore, for finding an answer to the dispute on hand, one must find out (i) when a credit entry is entered in the electronic credit ledger of the registered person; and (ii) when payment out of the same is made in lieu of cash. Once it is statutorily prescribed that payment can be made either by way of cash or from out of the credit available in the electronic credit ledger, the date of payment in respect of both assumes significance for determining the liability to pay interest.

Wording of section 50

28. Having thus seen the scheme of Sections 39, 41, 16 and 49, let us now take a look at Section 50 about which present dispute revolves, which reads as under:

> **50. Interest on delayed payment of tax-** (1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made there under, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.
>
> (2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.
>
> (3) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council."

29. It is seen from Sub-section (1) of Section 50 that the liability to pay interest arises automatically, when a person who is liable to pay tax, fails to pay the tax to the Government within the period prescribed. The liability to pay interest is in respect of the period for which the tax remains unpaid.

In fact, the liability to pay interest under Section 50 (1) arises even without any assessment, as the person is required to pay such interest "on his own".

30. While Sub-Section (1) of Section 50 speaks about the liability to pay interest under one contingency, viz., the failure to pay tax within the period prescribed, Sub-Section (3) of Section 50 speaks about the liability to pay interest under a different contingency. Whenever an undue or excess claim of ITC is made or whenever an undue or excess reduction in out-put tax liability is made, a liability to pay interest arises under Sub-section (3). The words "on his own" used in Sub-section (1), are not used in Sub-section (3) of Section 50.

31. Therefore, it is clear that the liability to pay interest under Section 50 (1) is self-imposed and also automatic, without any determination by any one. Hence, the stand taken by the department that the liability is compensatory in nature, appears to be correct.

32. Once it is clear that the liability to pay interest arises for nonpayment within the period prescribed, we should see; (i) what is the period prescribed for payment of tax and (ii) the mode of such payment. Under Section 39 (7), every registered person (other than an Input Service Distributor or a Non-resident taxable person or a person paying tax under Sections 10/51/52) is obliged to pay to the Government, the tax due as per such return, not later than the date on which he is required to furnish such return. Sub-sections (1) and (7) of Section 39 read as follows:

> **"39. Furnishing of Returns**- (1) Every registered person, other than an Input Service Distributor or a nonresident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, in such form, manner as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars as may be prescribed on or before the twentieth day of the month succeeding such calendar month or part thereof.
>
> (2) x x x x
> (3) x x x x
> (4) x x x x
> (5) x x x x
> (6) x x x x

(7) Every registered person, who is required to furnish a return under sub-section (1) or sub-section (2) or subsection (3) or sub-section (5), shall pay to the Government the tax due as per such return not later than the last date on which he is required to furnish such return.

(8) x x x x

(9) x x x x

(10) x x x x"

33. Therefore, the period prescribed for payment of tax in respect of every month is on or before the 20th day of the succeeding calendar month.

34. The mode of payment is stipulated in Section 49. Section 49 reads as follows:

"49. Payment of tax, interest, penalty and other amounts- (1) Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.

(2) The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with section 41, to be maintained in such manner as may be prescribed.

(3) The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.

(4) The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act, 2017 (Act No.13 of 2017) in such manner and subject to such conditions and within such time as may be prescribed.

(5) The amount of input tax credit available in the electronic credit ledger of the registered person on account of,–

(a) integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards the payment of central tax and State tax, or as the case may be, Union Territory tax, in that order;

(b) the central tax shall first be utilised towards payment of central tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;

(c) the State tax shall first be utilised towards payment of State tax and the amount remaining, if any, may be utilised towards payment of integrated tax;

(d) the Union territory tax shall first be utilised towards payment of Union territory tax and the amount remaining, if any, may be utilised towards payment of integrated tax;

(e) the central tax shall not be utilised towards payment of State tax or Union territory tax; and

(f) the State tax or Union territory tax shall not be utilised towards payment of central tax.

(6) The balance in the electronic cash ledger or electronic credit ledger after payment of tax, interest, penalty, fee or any other amount payable under this Act or the rules made thereunder may be refunded in accordance with the provisions of section 54

(7) All liabilities of a taxable person under this Act shall be recorded and maintained in an electronic liability register in such manner as may be prescribed.

(8) Every taxable person shall discharge his tax and other dues under this Act or the rules made thereunder in the following order, namely:–

(a) self-assessed tax, and other dues related to returns of previous tax periods;

(b) self-assessed tax, and other dues related to the return of the current tax period;

(c) any other amount payable under this Act or the rules made thereunder including the demand determined under section 73 or section 74.

(9) Every person who has paid the tax on goods or services or both under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such tax to the recipient of such goods or services or both.

Explanation:- For the purposes of this section,-

(a) the date of credit to the account of the Government in the authorised bank shall be deemed to be the date of deposit in the electronic cash ledger;

(b) the expression,—

(i) "tax dues" means the tax payable under this Act and does not include interest, fee and penalty; and

(ii) "other dues" means interest, penalty, fee or any other amount payable under this Act or the rules made thereunder."

35. It is seen from Sub-section (2) of Section 49 that a credit entry is made in the electronic credit ledger of a registered person, only when the ITC, as self-assessed, is found in the return of a registered person. After a credit entry is made in the electronic credit ledger, the same becomes available for making payment. This is clear from Sub-section (3) of Section 49. If after payment, a balance is still available in the electronic credit ledger, the same is liable to be refunded in accordance with Section 54.

36. Therefore, in the entire scheme of the Act three things are of importance. They are; (i) the entitlement of a person to take credit of eligible in-put tax, as assessed in his return; (ii) the credit of such eligible in-put tax in his electronic credit ledger on a provisional basis under Section 41 (1) and on a regular basis under Section 49 (2); and (iii) the utilization of credit so available in the electronic credit ledger for making payment of tax, interest and penalty etc., under Section 49 (3).

37. In other words, **until a return is filed as self-assessed, no entitlement to credit and no actual entry of credit in the electronic credit ledger takes place. As a consequence, no payment can be made from out of such a credit entry. It is true that the tax paid on**

the inputs charged on any supply of goods and/services, is always available. But, it is available in the air or cloud. Just as information is available in the server and it gets displayed on the screens of our computers only after connectivity is established, the tax already paid on the inputs, is available in the cloud. Such tax becomes an in-put tax credit only when a claim is made in the returns filed as self-assessed. It is only after a claim is made in the return that the same gets credited in the electronic credit ledger. It is only after a credit is entered in the electronic credit ledger that payment could be made, even though the payment is only by way of paper entries.

38. If we take a common example of banking transactions, this can be illustrated much better. **An amount available in the account of a person, though available with the bank itself, is not taken to be the money available for the benefit of the bank. Money available with the bank is different from money available for the bank till the bank is allowed to appropriate it to itself**. Similarly, the tax already paid on the in-puts of supplies of goods or services, available somewhere in the air, should be tapped and brought in the form of a credit entry into the electronic credit ledger and payment has to be made from out of the same. If no payment is made, the mere availability of the same, there in the cloud, will not tantamount to actual payment.

39. Admittedly, the petitioner filed returns belatedly, for whatever reasons. As a consequence, the payment of the tax liability, partly in cash and partly in the form of claim for ITC was made beyond the period prescribed. Therefore, the liability to pay interest under Section 50 (1) arose automatically. The petitioner cannot, therefore, escape from this liability.

40. Let us look at it from another angle. Suppose a registered person under the Act purchases goods, which have suffered tax, to be used as inputs in the goods to be sold by him. Let us assume that the purchase is made in January and hence the same is reflected in the return filed by February 20. While filing the return in February, the dealer could have taken credit and it is possible that the credit is available in the electronic credit ledger for the month of February. If after some kind of processing, the goods are sold in March, the output tax becomes payable while filing the return by April 20. This payment can be either by way of cash or by way of adjustment against the claim for ITC. The payment is made by way of cheque in the case of the former and by way of a claim made in the return by way of an entry. Only when the payment is so made, the Government gets a right over the money available in the ledger. Since ownership of such money is with the dealer till the time of actual VRS,J &

PKR,J W.P.No.44517/2018 15 payment, the Government become entitled to interest upto the date of their entitlement to appropriate it.

41. Mr. Gandra Mohan Rao, learned counsel relied upon an approval made in principle by the GST Council for the amendment of the Act. The Press release of the Ministry of Finance in this regard reads as follows:

> "The GST Council in its 31st meeting held today at New Delhi gave in principle approval to the following amendments in the GST Acts:
>
> 1. Creation of a Centralised Appellate Authority for Advance Ruling (AAAR) to deal with cases of conflicting decisions by two or more State Appellate Advance Ruling Authorities on the same issue.
>
> 2. Amendment of section 50 of the CGST Act to provide that interest should be charged only on the net tax liability of the taxpayer, after taking into account the admissible input tax credit, i.e., interest would be leviable only on the amount payable through the electronic cash ledger.
>
> The above recommendations of the Council will be made effective only after the necessary amendments in the GST Acts are carried out."

42. But, unfortunately, the recommendations of the GST Council are still on paper. Therefore, we cannot interpret Section 50 in the light of the proposed amendment.

43. The learned counsel for the petitioner relied upon two decisions of the Gujarat High Court, one in **State of Gujarat v. Dashmesh Hydraulic Machinery, dated 19.01.2015**, and another in **State of Gujarat v. Nishi Communication, dated 29.01.2015**.

44. But, both the above decisions arose out of Gujarat Value Added Tax Act. substantially. Therefore, these decisions do not go to the rescue of the petitioner.

45. In view of the above, the claim made by the respondents for interest on the ITC portion of the tax cannot be found fault with. Hence, the Writ Petition is dismissed. However, in the circumstances, there shall be no order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending in the writ petition, shall stand closed.

[2019] 57 DSTC 142 (New Delhi)

IN THE HIGH COURT OF DELHI

[Justice S.muralidhar and Justice Asha Menon]

WP(C) No. 6055/2019

M/s Landmark Lifestyle ... Petitioner

Versus

Union of India & Ors. ... Respondent

Order 27.05.2019

DELHI HIGH COURT HAS GRANTED STAY FROM RECOVERY OF INTEREST DEMANDED ON GROSS GST LIABILITY TILL NEXT HEARING TO BE HELD ON 30TH SEPTEMBER, 2019.

Present for Petitioner	:	Mr. J.K.Mittal, Advocate
Present for Respondent	:	Mr. Harpreet Singh, Sr. Standing Counsel for Revenue

Order

CM Appl.No. 26115/2019 (Exemption)

1. Exemption allowed, subject to all just exceptions.

WP(C) No. 6055/2019 & CM Appl.No. 26114/2019

2. Mr. Mittal points out that the calculation of the interest payable for delayed payment of GST as determined by the Respondent is erroneous. According to him, interest has been calculated even on the amount constituting the input tax credit which is in fact to be adjusted against the tax liability. He states that on the actual tax liability, interest has been paid by the Petitioner. He further states that against the total tax liability of Rs.3.31 crores the interest liability works out to 8.19 crores which makes it unreasonable and erroneous.

3. Notice. Mr. Harpreet Singh, Advocate accepts notice for the Respondents.

4. Till the next date, no coercive action be taken against the Petitioner for non-payment of the interest amount.

5. List the matter before the Registrar on 5th August, 2019 for completion of pleadings.

6. List the matter before the Court on 30th September, 2019.

[2019] 57 DSTC 143 (New Delhi)

In the High Court of Delhi

[Hon'ble Justice S. Muralidhar and Justice Prateek Jalan]

W. P. (c)393/2019

Rockwell Industries ... Petitioner

Vs.

Commissioner of Trade & Taxes & Anr. ... Respondent

Date of Order: 08.05.2019

REFUND U/S 38(3) OF DELHI VALUE ADDED TAX ACT, 2004 – INTEREST U/S 42 – INPUT TAX CREDIT DISALLOWANCE U/S 9(2)(g) – DEFAULT ASSESSMENT ORDERS PASSED AFTER EXPIRY OF FOUR ASSESSMENT YEARS – LIMITATION OF SIX YEARS UNDER PROVISO TO SECTION 34(1) EXERCISED – DEFAULT ASSESSMENT ORDERS DID NOT REVEAL ANY MISMATCH OF ANNEXURE 2A WITH 2B – WRIT PETITION CHALLENGING ASSESSMENT ORDERS – NO FINDING OF CONCEALING MATERIAL PARTICULARS FOR INVOCATION OF THE EXTENDED PERIOD OF 6 YEARS – IMPUGNED ORDERS CREATING DEMAND SET ASIDE AND DIRECTION ISSUED TO GIVE REFUND WITH INTEREST.

Present for the Petitioner : Mr. Puneet Rai, Advocate

Present for Respondent(s) : Mr. Anuj Aggarwal, ASC, GNCTD

Order

Prateek Jalan, J. (Oral)

1. The challenge in this writ petition is to default assessment orders dated 14.11.2018 and consequent refund adjustment order dated 15.11.2018 passed by the authorities under the Delhi Value Added Tax Act, 2004, ("hereinafter referred to as the DVAT Act").

2. The petitioner is engaged in trading of shoe accessories and is registered under the DVAT Act. In accordance with the provisions of the statute, the petitioner pays tax on purchases made within the state („input tax") which is adjusted against the tax payable on sales („output tax"). The petitioner claims refunds on account of the fact that its output tax liability is less than the input tax paid. To the extent that the petitioner"s sales are inter-state sales, it is entitled to a concessional rate of tax of 2% against C forms.

3. For the quarter 01.01.2014 to 31.03.2014, the petitioner filed a return claiming a refund of ₹17,59,874/-. The failure of the respondents to issue

the refund led to the filing of W.P(C) 8762/2018 before this Court. However, after notice was issued in that petition on 21.08.2018, default assessment orders dated 14.11.2018 were passed in respect of five quarters, resulting in a demand of ₹17,66,883/-. These pertain to the fourth quarter of F.Y. 2012-13 and all the quarters of F.Y. 2013-14.

4. Mr. Puneet Rai, learned counsel for the petitioner, submitted that the refund was required to be made within a period of two months from the date of filing of the returns under Section 38(3)(ii) of the DVAT Act. He submitted that the assessment in the present case (for F.Y. 2013-14) had already been made on 12.01.2017 and statutory forms had also been filed. The default assessment orders, according to him, do not reveal any mismatch between the selling dealer and the petitioner, or any finding that the petitioner has concealed material particulars which could justify the invocation of the extended period under Section 34 of the DVAT Act.

5. Mr. Anuj Aggarwal, learned Additional Standing Counsel for the Government of NCT of Delhi, submits that the default assessment orders dated 14.11.2018 are based upon a mismatch in the account of dealers from whom the petitioner had made purchases. Mr. Aggarwal submitted that this justifies the suo motu review of the assessment order in the present case.

6. Section 38 of the DVAT Act provides as follows:

"38 Refunds

(1) Subject to the other provisions of this section and the rules, the Commissioner shall refund to a person the amount of tax, penalty and interest, if any, paid by such person in excess of the amount due from him.

(2) Before making any refund, the Commissioner shall first apply such excess towards the recovery of any other amount due under this Act, or under the CST Act, 1956 (74 of 1956).

(3) Subject to 1 [sub-section (4) and sub-section (5)] of this section, any amount remaining after the application referred to in sub-section (2) of this section shall be at the election of the dealer, either –

[(a) refunded to the person, –

(i) within one month after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is one month;

(ii) within two months after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is a quarter; or] (b) carried forward to the next tax period as a tax credit in that period.

(4) Where the Commissioner has issued a notice to the person under section 58 of this Act advising him that an audit, investigation or inquiry into his business affairs will be undertaken 1 [or sought additional information under section 59 of this Act,] the amount shall be carried forward to the next tax period as a tax credit in that period.

(5) The Commissioner may, as a condition of the payment of a refund, demand security from the person pursuant to the powers conferred in section 25 of this Act 2 [within fifteen days from the date on which the return was furnished or claim for the refund was made.] 3

[(6) The Commissioner shall grant refund within fifteen days from the date the dealer furnishes the security to his satisfaction under sub-section (5).

[(7) For calculating the period prescribed in clause (a) of sub-section (3), the time taken to –

(a) furnish the security under sub-section (5) to the satisfaction of the Commissioner; or

(b) furnish the additional information sought under section 59; or

[(c) furnish returns under section 26 and section 27; or (d) furnish the declaration or certificate forms as required under Central Sales Tax Act, 1956,] shall be excluded.]

[(8)] Notwithstanding anything contained in this section, where –

(a) a registered dealer has sold goods to an unregistered person; and

(b) the price charged for the goods includes an amount of tax payable under this Act;

(c) the dealer is seeking the refund of this amount or to apply this amount under clause (b) of sub-section (3) of this section;

no amount shall be refunded to the dealer or may be applied by the dealer under clause (b) of sub-section (3) of this section unless the Commissioner is satisfied that the dealer has refunded the amount to the purchaser.

[(9)] Where –

(a) a registered dealer has sold goods to another registered dealer; and

(b) the price charged for the goods expressly includes an amount of tax payable under this Act,

the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section and the Commissioner may reassess the buyer to deny the amount of the corresponding tax credit claimed by such buyer, whether or not the seller refunds the amount to the buyer.

[(10)] Where a registered dealer sells goods and the price charged for the goods is expressed not to include an amount of tax payable under this Act the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section without the seller being required to refund an amount to the purchaser.

[(11) Notwithstanding anything contained to the contrary in sub-section (3) of this section, no refund shall be allowed to a dealer who has not filed any return due under this Act.]"

7. It will be evident from the above that the refund, in respect of the petitioner's quarterly returns, ought to have been made within a period of two months after the filing of the return, i.e. by 25.06.2014. The assessment for the F.Y. 2012-13 was also carried out on 07.06.2014, and for F.Y. 2013-14 on 12.01.2017. The impugned default assessment orders, having been made only on 14.11.2018, could not justify withholding of the refunds which the DVAT authorities ought to have processed already, particularly during the pendency of the petitioner's writ petition in respect of the same.

8. The petitioner has also placed on record a certified copy of the order sheets from the file of the respondents which reveal that the authorities were processing the petitioner's refund claim until 17.09.2018, when the file was put up to the concerned Special Commissioner. It appears that, pursuant to a discussion at the instance of the Special Commissioner, a further note was prepared on 12.11.2018 disclosing the "mismatch at first and second level" and seeking approval for raising a demand of the amounts mentioned. The approval having been granted by the Commissioner on the same date, the impugned default assessment was made and the refund adjustment order was issued.

9. On similar facts, this Court in *(M/s S.K. Engg. Works vs. Commissioner of Delhi Value Added Tax & Anr.)* [W.P.(C) 2124/2017, decided on 02.05.2017] held as follows:-

> "1. The Petitioner‟s refund application for the 4th quarter of 2013-14 has been pending with the Respondent DVAT Department since 24th June, 2014. The present petition was filed on 4th March, 2017 and notice was issued on 7th March, 2017. On that date, this Court was not informed by the counsel for the Respondent that on 3rd February, 2017, the VATO of Ward No. 49 had in fact passed a notice of default under Section 32 of the Delhi Value Added Tax Act, 2004 („DVAT Act‟). On the same date, by a separate „Adjustment Order‟ passed by the VATO the entire amount of refund stood adjusted against a fresh demand of Rs. 3,10,526. Thus the refund amount got reduced to Nil.
>
> 2. A copy of the notice of the default assessment tax with interest by the VATO passed on 3rd February, 2017 is placed on record. The reasons for creating a fresh demand reads as under:
>
> > "The dealer has claimed refund in 4th Qtr 2013, to the tune of Rs. 1,97,494/-. The amount has been generated after carry forward of ITC of Rs. 95,700/- from 3rd Qtr 2013. On analyzing 2A of the dealer for 3rd Qtr 2013-14 up to the 4th stage the amount of ITC verified is Rs. 97,239/- allowed. Rest of amount of Rs. 1,28,900/- is disallowed. On analyzing 2A of the dealer for 4th Qtr 2013-14 up to the 4th stage the amount of ITC verified is Rs. 3,217/- allowed. Rest of amount of Rs. 1,81,646/- is disallowed. A part from this registration of M/s Sharda Enterprise (07810471786) was cancelled W.E.F.12-12- 2013. Therefore, ITC to tune of Rs. In 2013-14 is disallowed."
>
> 3. This court in several judgments including *Swarn Darshan Impex (P) Ltd. v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del) and Prime Papers and Packers v. Commissioner VAT (2016)94 VST 347 (Del)* emphasized that the pendency of a refund application should not be viewed by the Department as an opportunity to create a fresh demand particularly if the time limits not only for making the refund but even for re-opening the assessments of previous years has long been crossed.
>
> 4. Yet, that is precisely what the Department has done here. The entire exercise indulged in by the VATO as above at the stage of

refund is wholly without the authority of law. The re-opening of the assessments of earlier periods is time-barred and not in accordance with the procedure set out for that purpose under the DVAT Act.

5. The Court, therefore, has no hesitation in hereby setting aside the notice of default assessment of tax, interest and penalty dated 3rd February 2017 under Sections 32 and 33 of the DVAT Act and the consequential 'Adjustment Order' of the same date.

6. The Court therefore directs that the refund amount in the sum of Rs. 1,97,494/- together with interest payable thereon under Section 42 of the DVAT Act shall be directly paid into the account of the Petitioner by the Respondent DVAT Department not later than two weeks from today.

7. The Court further directs that the DVAT Department will abide by the above time lines. In the event that the Petitioner has any grievance either on account of non-payment of the refund amount together with interest as directed or non-compliance with any of the above directions, it would be open to the Petitioner to seek appropriate remedies in accordance with law.

8. The petition is allowed in the above terms."

10. To similar effect is the decision in *(Pradeep Enterprises vs. Commissioner of Trade & Taxes & Anr.) [W.P.(C) 2583/2017*, decided on 19.04.2017] where a default assessment order was set aside as being in abuse of statutory powers.

11. From the facts recited above, it appears to us that in the present case also the default assessment order has been generated only to defeat the refund claim of the petitioner, which, in any event, ought to have been paid well before the impugned orders were made. The impugned default assessment orders expressly state that there is no mismatch between the selling and purchasing dealers. Yet a demand is sought to be raised in respect of alleged mismatch.

12. Following the judgments of this Court, inter alia in *M/s S.K. Engg. Works (supra)* and Pradeep Enterprises (supra), we are of the view that the impugned default assessment orders dated 14.11.2018 and the refund adjustment order dated 15.11.2018 cannot be sustained, and the same are hereby set aside. Consequently, the petitioner is entitled to refund of the amount of ₹17,59,874/- claimed by it. The said amount, along with interest

payable under Section 42 of the DVAT Act, shall be disbursed by the DVAT authorities within four weeks from today.

13. The writ petition is allowed in the above terms.

[2019] 57 DSTC 149 (New Delhi)

In the High Court of Delhi

[Hon'bleJustice S. Muralidhar and Justice Rekha Palli]

W. P. (C)10022/2018

Sonka Publication (India) Pvt. Ltd. ... Petitioner

Vs.

Union of India &Ors. ... Respondents

Date of Order: 07.05.2019

SULEKH SARITA PART I TO V – PRINTED BOOKS CLASSIFIABLE UNDER HSN 4901 OR EXERCISE BOOKS UNDER HSN 4820 OF GST ACT, 2017 – FUNCTIONAL CHARACTERISTICS OF BOOKS – THE BOOKS POSE QUESTIONS TO THE CHILD TO ANSWER AND TEACHERS EVALUATE ABOUT CHILD'S ABILITY AND UNDERSTANDING – EXERCISE BOOKS ARE SIMPLY BOUND VOLUME OF BLANK PAGES CONTAINING LINES TO FACILITATE WRITING –REVERSING AAR RULING, COURT SAID PRACTICE BOOKS PUBLISHED AND SOLD BY THE PETITIONER WERE CLASSIFIABLE UNDER HSN 49.01 AND EXEMPTED FROM GST.

Facts of the case

The Petitioner filed an application for advancing ruling on 9th January 2018, seeking a clarification whether the books published by the Petitioner, viz., Sulekh Sarita Parts I to V were printed books classifiable under HSN 4901 to 10 or as "Exercise Books" under HSN 4820. Another issue raised by the Petitioner was whether a person exclusively supplying goods that were wholly exempted under tax was required to be registered under the GST Act.

The Authority for Advancing Ruling (AAR) passed an order dated 6th April, 2018 holding that the aforementioned books Sulekh Sarita Parts I to V, printed and sold by the Petitioner, were classifiable as "Exercise Books" under HSN 4820. The AAR also held the Petitioner has to get itself registered if it had GST liability under Reverse Charge Mechanism (RCM) i.e. under Section 24 (iii) of the CGST Act notwithstanding that under Section 23 (i) (a), it might not be liable to pay any tax.

It was significant that in the petition, which challenged the order of the AAR, all the grounds raised by the Petitioner pertained to the first issue regarding classification of the books printed and sold by the Petitioner and not the second issue concerning registration under the CGST Act.

Held

The emphasis was on a "functional characteristics" of a book. In other words, the Court must ask what purpose will the book serve? In the case, a question to be asked was whether the books in question merely help the child in improving the child's handwriting by providing space in a book by copying from a written text or did it pose questions to the child to answer and whether the teacher then can evaluate, on the basis of such answers, the child's ability and understanding? In the case, the "work books" or "practice books" printed and sold by the Petitioner certainly fall in the latter category i.e. they test the child's knowledge, ask questions which the child has to answer, and facilitate evaluating the child's understanding.

These books were not "exercise books" as understood by the trade. It must be mentioned at this stage that the Petitioner has produced before the Court samples of such "exercise books/ exercise note books" as understood in trade parlance. These were simply bound volumes of blank pages which may contain lines to facilitate writing. They do nothing more than providing space for writing.

Consequently, the Court was satisfied that in the case, the books published and sold by the Petitioner were classifiable under HSN 49.01 and not HSN 48.02. In terms of Notification No.2/2017-Central Tax (Trade) dated 28th June, 2017 i.e. Entry No.119 thereunder, such goods classifiable under HSN 49.01 i.e. "printed books, including Braille books" were wholly exempted from tax.

Since, this was the only question that has been raised before the Court, the impugned order dated 9th April 2018 to that extent was hereby set aside.

Present for the Petitioner	**:**	Mr. Vineet Bhatia, Advocate
Present for Respondent(s)	**:**	Mr. Amit Bansal and Mr. Aman Rewaria, Advocates for R-3. Mr. Satyakam, Addl. Standing Counsel, GNCTD

ORDER

Dr. S. Muralidhar, J.:

1. A very short but interesting question that arises for consideration in the present petition is whether the books '*Sulekh Sarita Parts I to V*' are 'Printed Books' classifiable under 'HSN 4901' or 'Exercise Books' under 'HSN 4820' of the Central Goods and Service Tax Act (CGST Act)? If the books are classified under HSN 4901, as contended by the Petitioner, then they would be completely exempt from tax in terms of the CGST Act as well as Delhi GST Act. If they are to be considered as 'Exercise Books' classified under HSN 4820, as contended by the Respondents, then they are subject to 6% tax.

2. A similar question arose in the context of the Central Excise Tariff Act before this Court in W.P. (C) No.7198/2016 *(The Central Press Private Limited v. Union of India)*. There the publisher contended that their „work books" were used in the Sarva Shiksha Abhiyan as a basic tool for education. By an order dated 31st August 2016, this Court directed the Central Board of Excise and Customs ('CBEC') to consider all aspects of the matter and pass an appropriate order.

3. In examining the said issue pursuant to the order passed by this Court, the CBEC issued a Circular No.1057/6/2017 – CX dated 7th July, 2017 where, inter alia, it was observed as under:

> "(ii) The issue has been examined. Exercise Books have been explained in HSN under explanatory note (2} to Heading 48.20 as, "These may simply contain sheets of lined paper but may also include printed examples of handwriting for copying in manuscript". Such exercise Books are specifically classified under heading 4820 of the erstwhile CETA, 1985. These are nothing but stationary items having blank pages with lines for writing and may also include printed texts for copying manually. In common parlance they are more akin to handwriting "note books" for practising rather than "work books" containing printed exercise. This definition of Exercise Books is in harmony with other items specified under Chapter Heading 4820 of erstwhile CETA, 1985 such as registers, note books, diaries, letter pads etc. where printing is incidental to their primary use i.e. writing. The fact that printing is incidental to their primary use is the guiding principle for classification of Exercise Books under heading 4820 of erstwhile CETA, 1985.

(iii) Printed work books on the other hand are books where printing is not merely incidental to the primary use. HSN Explanatory notes (A) to the heading 49.01 reads as, "Books and booklets consisting essentially of textual matter of any kind, and printed in any language or characters include textbooks (including educational workbooks sometimes called writing books), with or without narrative texts, which contains questions or exercises (usually with spaces for completion in manuscript). Thus, printed work books containing questions followed by spaces for writing or other exercises would fall within the scope of Chapter 49. The said goods are different from Exercise Books falling under Chapter 48 which are stationary items with blank pages with lines for writing and some time may also include printed texts for copying manually, as explained in the preceding para. Further, since printing in case of printed workbooks is not merely incidental to the primary use of the of the goods, such goods are classifiable under Chapter 49, in terms of Chapter note 12 to Chapter 48 of erstwhile CETA, 1985.

(iv) Similarly, HSN Chapter note (6) to Chapter 49 read with HSN explanatory note under heading 49.03 covers children's workbooks consisting essentially of pictures with complementary texts, for writing or other exercises, and children's drawing or colouring books, provided the pictures form the principal interest and are not subsidiary to the text. Thus, children's drawing books which are in harmony with said HSN Chapter note (6) and HSN Explanatory note to heading 4903 would fall under Chapter 49."

4. As far as the present case is concerned, the Petitioner filed an application for advancing ruling on 9th January 2018, seeking a clarification whether the books published by the Petitioner, viz., Sulekh Sarita Parts I to V are printed books classifiable under HSN 4901 to 10 or as „Exercise Books" under HSN 4820. Another issue raised by the Petitioner was whether a person exclusively supplying goods that are wholly exempted under tax is required to be registered under the GST Act.

5. The Authority for Advancing Ruling (AAR) passed an order dated 6th April, 2018 holding that the aforementioned books Sulekh Sarita Parts I to V, printed and sold by the Petitioner, are classifiable as 'Exercise Books' under HSN 4820. The AAR also held the Petitioner has to get itself registered if it had GST liability under Reverse Charge Mechanism ('RCM') i.e. under Section 24 (iii) of the CGST Act notwithstanding that under Section 23 (i) (a), it may not be liable to pay any tax.

6. It is significant that in the present petition, which challenges the aforementioned order of the AAR, all the grounds raised by the Petitioner pertain to the first issue regarding classification of the books printed and sold by the Petitioner and not the second issue concerning registration under the CGST Act. Learned counsel for the Petitioner states that notwithstanding the ruling of the AAR against it on the second issue, the Petitioner has got itself registered under the CGST Act. Accordingly, this Court is not examining the second issue.

7. The reasoning of the AAR for holding that the Petitioner"s books are classifiable under HSN 4820 proceeds as under:

> (i) Heading 49.01 generally covers “textual reading material/books including text-books, catalogues, prayer books etc. It specifically covers ‘educational workbooks or writing books’. Heading 49.03 generally covers ‘children's picture, drawing or colouring books wherein pictures form the principal interest in the books’. Heading 48.20 generally covers ‘stationery books’. Exercise books that contain ‘simple sheets with printed lines or may even have printed examples of handwriting for copying by the students’ also covered Heading 48.20.
>
> (ii) The main feature which differentiates ‘work books’ of Heading 49.01 from ‘exercise books’ of Heading 48.20 is that ‘the work books of Heading 49.01 contained questions or exercise within the space given for writing the answers whereas, the exercise books under Heading 48.20 contained printed text with space for copying manually.’
>
> (iii) An examination of the books printed and sold by the Petitioner revealed that “only in very few pages, any printed exercise or questions is given. Hence, in these books, the primary use is writing and printing is incidental". Further since none of the books contained any pages with ‘children's picture’, drawing or colouring matter", classification of any of them under heading 49.03 is not possible. Therefore, the goods were to be correctly classified under HSN 4820.

8. This Court has heard the submissions of Mr Vineet Bhatia, learned counsel for the Petitioner, Mr Amit Bansal learned counsel for the Principal Commissioner, GST and Mr Satyakam, Addl. Standing Counsel, GNCTD. This Court has also examined the books printed by the Petitioner, viz.,

Sulekh Sarita Parts I to V. Illustratively, the Court would like to refer to *Sulekh Sarita* Part V.

9. To begin with, the name of the author of the book is prominently printed on the first page as is the ISBN number. It has a contents page which explains the broad features of the book. The first part contains practice exercises where the student is expected to copy the printed text in the lines given immediately below. But, that would be a very limited way of looking at the book as a whole. In fact, there are many portions of the book subsequently where a student is expected to answer questions. The student is expected to write down the meaning of Hindi words. The student is expected to write a short essay on a given aspect.

10. It appears from reading the book *Sulekh Sarita* Part V (and this holds good for the other Parts I to IV) as a whole that while in the initial phases, the teacher is expected to guide the student and the book is used as a tool in that endeavour, there are substantial portions of the book where after completing that phase, the student is asked to write words of his or her own. For instance in page 16, the student is expected to listen to at least 40 difficult words that the teacher might speak out in the class and write down those words in the space provided in the book. In other words, the student is not merely copying from a printed text. Here the listening and retentive abilities of the student are being tested.

11. Then there are at least three pages (50 to 52) where the Hindi word is given in the left hand column and the student is expected to give the meaning of the word, in Hindi, after locating it in the dictionary. This again is not a mechanical exercise of simply copying from a written text that is already provided in the book. In page 53 of the book, the student is expected to join two Hindi words to make another Hindi word. An example already given in that page is the word ‘swatantra’. There are many words possible to be made by combining two of the many Hindi words in that page. This tests the student"s comprehension. It requires application of mind.

12. Then at page 54, the teacher is asked to dictate 40 difficult words or a paragraph and the student after listening to it is expected to write it down in the space provided. In the last two pages i.e. 61 and 62, the student is expected to write a short piece on the topic already suggested like ‘ped lagane ke labh’, ‘maccharo se bacho – kyon awshyak – kaise bache’ and so on. Here again, the student is not expected to copy words from a printed text but think of his or her own topics and write a few sentences on the topic.

13. This Court, therefore, is not persuaded to concur with the assessment made by the AAR of the above book that “only in very few pages, any printed exercise or questions is given.” An educational text is like a handholding exercise for a child. While in the first few pages, it may appear that the child is asked to mechanically reproduce from the printed text, as the course progresses, the child is encouraged to think on his or her own. This is what precisely this „work book", or as the Court would like to rephrase it, this „practice book" does. At the end of the course, by using these books, the attempt is to enhance the educational value addition as far as the child is concerned. The attempt is to help the child think on his own and to enable the teacher to evaluate the child"s output. By no means can it be said that these books are for enabling a child to merely copy words from a printed text in order to improve his or her own handwriting.

14. The Court is conscious that in the note appended to the HSN, it has been stated that Heading 49.01 excludes ‘children’s workbook consisting essential pictures with complementary text, for writing another exercises’. But then none of the books which form the subject matter of the present petition can be viewed as a mere text „for writing or other exercises". These books are meant to help the child think, apply his or her mind and come up with some creative answers. It also tests the listening, comprehension and retention skills of the child; of what is spoken in the classroom and for testing the understanding of the child of that which has been taught.

15. While no two cases are identical, it may be useful to refer to a few decisions only to understand the approach the Court is expected to adopt in matters of classification. In C.C. (General), New Delhi v. Gujarat Perstorp Electronics Ltd. 2005 (186) ELT 532 (SC), the Supreme Court was seized of the issue “whether the goods and materials imported by the Company in the form of FEEP comprising of equipments, drawings, designs and plans are classifiable under Chapter Heading 49.01 or 49.06 of Schedule 1 of the Customs Tariff Act, 1975 and the Company is entitled to the benefit under Notification Nos. 107/93-Cus and 38/94-Cus. or they are classifiable under Chapter Heading 4911.99 as contended by the department?” In the process of answering the said question in favour of the Assessee, the Supreme Court observed as under:

> “In popular sense, "book" means a collection of a number of leaves or sheets of paper or of other substance, blank, written or printed, of any size, shape and value, held together along one of the edges so as to form a material whole and protected on the front and back with a cover of more or less durable material. The Court also referred to dictionary meaning. It was observed that one must

> refer not only to the physical, but also functional characteristic of "book". It must be functionally useful for the purpose of assessee's business or profession. To put it differently, it must be a tool of his trade _ an article which must be part of the apparatus with which his business or profession was carried on. It must have utility value enabling its owner to pursue his business or profession with greater advantage. It must, thus, satisfy a dual test. It must bear both physical and functional characteristics of a book. It must be a collection of a number of sheets of paper or of other substance, having suitable size, shape and value, bound together at one edge so as to form a material whole and protected on the front and back with covers of some kind and functionally useful to the assessee for carrying on his business or profession."

16. Therefore, the emphasis was on a „functional characteristics" of a book. In other words, the Court must ask what purpose will the book serve? In this case, a question to be asked is whether the books in question merely help the child in improving the child's handwriting by providing space in a book by copying from a written text or does it pose questions to the child to answer and whether the teacher then can evaluate, on the basis of such answers, the child's ability and understanding? In the present case, the 'work books' or 'practice books' printed and sold by the Petitioner certainly fall in the latter category i.e. they test the child's knowledge, ask questions which the child has to answer, and facilitate evaluating the child's understanding.

17. These books are not 'exercise books' as understood by the trade. It must be mentioned at this stage that the learned counsel for the Petitioner has produced before the Court samples of such "exercise books/exercise note books' as understood in trade parlance. These are simply bound volumes of blank pages which may contain lines to facilitate writing. They do nothing more than providing space for writing.

18. Consequently, this Court is satisfied that in the present case, the books published and sold by the Petitioner are classifiable under HSN 49.01 and not HSN 48.02. In terms of Notification No.2/2017-Central Tax (Trade) dated 28th June, 2017 i.e. Entry No.119 thereunder, such goods classifiable under HSN 49.01 i.e. 'printed books, including Braille books' are wholly exempted from tax.

19. Since, this is the only question that has been raised before the Court, the impugned order dated 9th April 2018 to that extent is hereby set

aside. 20. The writ petition is accordingly allowed, but in the circumstances, with no orders as to costs. The pending application is also disposed of.

[2019] 57 DSTC 157 (New Delhi)

In the High Court of Delhi

[Hon'bleJustice S. Muralidhar and Justice I. S. Mehta]

W. P. (C)1280/2018

Bhargava Motors ... Petitioner

Vs.

Union of India & Ors. ... Respondents

Date of Order: 13.05.2019

GST – TRAN-1 FORM – CLAIMING INPUT TAX CREDIT ON STCOK HELD UPTO 30.06.2017 UNDER SECTION 140 OF CGST ACT – TECHNICAL GLITCHES IN UPLOADING TRAN-1 FORM – PETITIONER UPLOADED FORM BUT CREDIT NOT REFLECTED IN ELECTRONIC CREDIT LEDGER – EMAIL RECEIVED FROM GSTIN ABOUT SUCCESSFUL FILING.

WRIT PETITION SEEKING RELIEF – DIRECTION ISSUED TO THE RESPONDENTS TO EITHER OPEN THE PORTAL AS TO TRAN-1 – TO ENABLE PETITIONER TO FILE AGAIN OR TO ACCEPT MANUALLY.

Facts of the Case

Petitioner was a trader and a dealer/distributor of the automobile company Mahindra & Mahindra Ltd. The Assessee was engaged in the business of trading of auto parts. He stands registered under the Delhi Value Added Tax Act, 2004. After the enactment of the Central Goods & Services Tax Act 2017, the Petitioner was granted registration thereunder. Under Section 140 (3) of the CGST Act, the Petitioner was entitled to claim credit of eligible duties in respect of the inputs held in stock and the inputs contained in semi furnished or furnished goods held in stock on the appointed day i.e. 30th June 2017. On this basis according to the Petitioner, although he was not liable to be registered under the Central Excise Act, 1944, he was entitled to claim credit of the excise duty paid on the goods in stock with him. He had accordingly calculated the credit due to him as Rs.74,96,069/-.

Held

The Court was satisfied that the Petitioner's difficulty in filling up a correct credit amount in the TRAN-1 form was a genuine one which should

not preclude him from having his claim examined by the authorities in accordance with law. A direction was accordingly issued to the Respondents to either open the portal so as to enable the Petitioner to again file TRAN-1 electronically or to accept a manually filed TRAN-1 on or before 31st May 2019. The Petitioner's claims will thereafter be processed in accordance with law.

Present for the Petitioner : Mr. Vineet Bhatia, Advocate

Present for Respondent(s) : Mr. Dev P Bhardwaj, CGSC for UOI with Mr. Jatin Teotia and Mr Rahella Khan, Advocates for R-1.
Ms. Vabhooti Malhotra, Advocate for R-3.
Ms. Nidhi Mohan Parashar, Advocate with Ms. Umang Kumar Singh and Mr. Pratyaksh Sharma, Advocates for R-4.

Order

Dr. S. Muralidhar, J.:

1. A procedural glitch in the GST Network that has prevented the Petitioner from claiming input tax credit of the excise duty paid by its vendor, is the subject matter of the present petition.

2. The Petitioner states that he is a trader and a dealer/distributor of the automobile company Mahindra & Mahindra Ltd. The Assessee is engaged in the business of trading of auto parts. He stands registered under the Delhi Value Added Tax Act, 2004. After the enactment of the Central Goods & Services Tax Act 2017 (CGST Act), the Petitioner was granted registration thereunder. Under Section 140 (3) of the CGST Act, the Petitioner is entitled to claim credit of eligible duties in respect of the inputs held in stock and the inputs contained in semi furnished or furnished goods held in stock on the appointed day i.e. 30th June 2017. On this basis according to the Petitioner, although he was not liable to be registered under the Central Excise Act, 1944, he is entitled to claim credit of the excise duty paid on the goods in stock with him. He has accordingly calculated the credit due to him as Rs.74,96,069/-.

3. According to the Petitioner there are certain other goods which do not involve the central excise component and the approximate credit that can be claimed by him thereon, which has to be postponed to the stage of actual sale of such goods, works out to Rs.10.5 lakhs. He states that as regards the excise duty credit he has to fill up form TRAN-1 and for the other type of credit he has to fill up form TRAN-2.

4. According to the Petitioner there were a lot of technical glitches in uploading TRAN-1 form on the common portal within the prescribed period of 90 days. The due date for furnishing TRAN-1 was accordingly postponed from time to time and finally up to 27th December 2017. The Petitioner states that he filed GST TRAN-1 on 27th December 2017 claiming the credit of Rs.74,96,069/-. He also furnished details of the stock held by him on that date. He claims to have received an e-mail from the GST Network (GSTN) portal about successful filing of the said TRAN-1 form. According to the Petitioner he was surprised to note that in his electronic credit ledger the aforementioned credit was not reflected. He thereafter approached the GST help desk and also wrote an e-mail. In the circumstances, he filed the present writ petition in which notice was issued on 13th February 2018.

5. A detailed order was passed by this Court on 7th January 2019 discussing the affidavit filed on behalf of the GSTN (Respondent No.4) which manages/administers the electronic portal. Reference was also made to the minutes of the meeting of the IT Grievance Redressal Committee held on 21st August 2018. The Court then observed in paras 5, 6 and 7 in order dated 7th January 2019.

> "5. Given these circumstances and the fact that the petitioner has asserted that substantial credit was available to it on the transactions which it conducted prior to 30.03.2017, for which the law entitled it to credit, it appears to the Court that the authorities have so far not looked into the merits of the claim for input credit but rather rejected his entire entitlement itself on the ground that the credit reflected in the electronic ledger does not show any figure. The conundrum which the Court is presented with here is that if the petitioner were to obtain a screenshot of the figures it had filled just before it actually uploaded TRAN-I, the Revenue would have then contended that those figures were inchoate as the document would not have been final and was merely at the stage of preparation. It also appears to the Court that after the electronic form is filled, no provision for its "review" was made available to the assessee before uploading it. The lack of this facility has complicated the issue, because if such facility or provision would be made available, the individual assessees could have obtained screenshots just before uploading the form. The other method by which this issue could have been resolved was that the automatically generated response could have itself indicated the figures. That, however, does not appear to be the case.
>
> 6. In these circumstances, the Court is of the opinion that the respondents should disclose as to what was actually filled in the

TRAN-I Form [whether for the first time or the second time when it was uploaded], by the petitioner in this case and the basis of its assertion that no credit was available to it, having regard to the fact that the petitioner claims credit on the basis of real transactions in real goods.

7. The concerned respondents, i.e. GST Council and the respondent No.4 shall file affidavits before the Court within two weeks. The respondent No.4 shall also make available to the Court the necessary files relating to this case."

6. Pursuant thereto affidavits have been filed on behalf of the GSTN and on behalf of the Commissioner, Central Tax GST, Delhi. In the affidavit dated 14th February 2019 it is stated on behalf of the GSTN as under:

"16. I state that once value is entered in the FORM GST TRAN-1 and is duly saved and submitted, the same is posted in electronic ledger of the taxpayer for use to set off liabilities when the taxpayer "submits" FORM GST TRAN-1. The electronic ledger is visible on the portal to the taxpayer. The taxpayer can also view the FORM GST TRAN-1 by clicking on individual TRAN-1 form by logging into GST Portal. This FORM GST TRAN-1 is available with the Petitioner even after submission and the Petitioner has deliberately not filed the same. The logs as available with the Respondent No.4 are being placed before this Court hereinabove."

7. It is not in dispute that the documents with the Petitioner to support its claim for the aforementioned excise duty and other credit are yet to be examined by the authorities. At this stage they find themselves precluded from doing so because the TRAN-1 filled by the Petitioner on the portal does not reflect the amount claimed as a credit towards excise duty already paid. 8. Counsel for the Petitioner points out that as of present the portal does not permit a registered trader/dealer to save on his/her system the filled up TRAN-1 or TRAN-2 form. According to him it does not even permit a print out of a filled up form. This makes it difficult for the trader/registered dealer to know whether the form has been correctly filled up. Counsel for the Respondents on the other hand points out that a revision is possible, but only once in terms of Rule 120 A. She states that despite the Petitioner having availed of the facility of revision, the TRAN-1 form still does not reflect the credit amount.

9. At this stage, the Court is not concerned with the issue whether the Petitioner is entitled to the input tax credit as claimed by him. This is

yet to be examined by the authorities. However, the issue is about the technical glitch in the system which does not permit a rectification in a situation where a dealer may have, due to inadvertence, or a bonafide error, not correctly filled up a form or where the system, due to a limitation in the algorithm/software programme, does not accept the entries sought to be made by the dealer.

10. The GST system is still in a „trial and error phase‟ as far as its implementation is concerned. Ever since the date the GSTN became operational, this Court has been approached by dealers facing genuine difficulties in filing returns, claiming input tax credit through the GST portal. The Court‟s attention has been drawn to a decision of the Madurai Bench of the Madras High Court dated 10th September 2018 in W.P.(MD) No.18532/2018 (Tara Exports v. Union of India) where after acknowledging the procedural difficulties in claiming input tax credit in the TRAN-1 form that Court directed the Respondents “either to open the portal, so as to enable the petitioner to file the TRAN 1 electronically for claiming the transitional credit or accept the manually filed TRAN 1” and to allow the input credit claimed “after processing the same, if it is otherwise eligible in law”.

11. In the present case also the Court is satisfied that the Petitioner‟s difficulty in filling up a correct credit amount in the TRAN-1 form is a genuine one which should not preclude him from having his claim examined by the authorities in accordance with law. A direction is accordingly issued to the Respondents to either open the portal so as to enable the Petitioner to again file TRAN-1 electronically or to accept a manually filed TRAN-1 on or before 31st May 2019. The Petitioner’s claims will thereafter be processed in accordance with law.

12. With a view to ensure that in future such glitches can be overcome, the Court directs the Respondents to consider providing in the software itself a facility of the trader/dealer being able to save onto his/her system the filled up form and also a facility for reviewing the form that has been filled up before its submission. It should also permit the dealer to print out the filled up form which will contain the date/time of its submission online. The Respondents will also consider whether there can be a message that pops up by way of an acknowledgment that the Form with the credit claimed has been correctly uploaded.

13. The petition is disposed of in the above terms.

14. Dasti.

[2019] 57 DSTC 162 (Madras)

In the High Court of Madras

[Hon'ble Dr. Justice Anita Sumanth]

W.P. No. 807/2019

Asean Aromatics Private Limited ... Petitioner

Vs.

Assistant Commissioner (Circle) GST,
Tamil Nadu State GST ... Respondent

Date of Order: 22.02.2019

CANCELLATION OF REGISTRATION UNDER SECTION 30 OF THE GOODS AND SERVICES TAX ACT, 2017 – GSTR 3B RETURNS NOT FILED FOR 9 MONTHS – REPLY GIVEN AGAINST SHOW CAUSE NOTICE – THAT DELAY WAS ON ACCOUNT OF SHORTAGE OF WORKING CAPITAL – CANCELLATION ORDER PASSED WITHOUT REFERENCE TO THE SUBMISSIONS MADE. WRIT PETITION – CHALLENGING CANCELLATION ORDER, WHETHER JUSTIFIED; HELD – NO.

CIRCULARS ISSUED BY CBIC FOR RELAXING TIME LIMITS FOR SUBMISSIONS OF RETURNS NOT CONSIDERED – DIRECTION ISSUED TO CBIC TO CONSIDER AND PASS ORDERS UPON THE APPLICATION OF THE PETITIONER SEEKING LEAVE TO PAY PENDING DUES IN INSTALLMENTS.

Present for the Petitioner : Mr. K. Jayachandran

Present for Respondent : Mr. Mohammed Shafiq, Spl. Govt. Pleader (Taxes) assisted by Mr. V. Haribabu, AGP (Taxes)

Order

The petitioner challenges an order dated 08.11.2018 cancelling his registration for non filing of returns of returns, on the ground that GSTR 3B returns have been filed upto December 2017 and GSTR-1 only UPTO August 2018.

2. Mr. K. Jayachandran, learned counsel appears for the petitioner and Mr. Mohammed Shafiq, Special Government pleader for the respondent.

3. A show cause notice had been received by the petitioner on 04.10.2018 for cancellation of registration, in response to which the petitioner filed a reply on 10.10.2018 stating that the delay was on account of severe working capital shortage. He had also stated that enhancement

of working capital was awaited and the dues would be settled at the earliest. While this is so, the impugned order has been passed without reference to the objections raised.

4. Learned Standing Counsel draws attention to the provisions of Section 30 of the Goods and Service Tax Act, 2017 requiring returns to be filed for the entire period of non compliance along with tax dues, in order for the cancellation of the registration to be revoked.

5. Learned counsels have referred, in extenso, to a slew of circulars issued by the Centre (the Central Board of Indirect Taxes and Customs) and the State (the Principal Secretary/Commissioner of Commercial Taxes) relaxing the time limits fixed for submission of returns for various periods.

6. I consciously refrain from referring to details of the circulars as neither of the learned counsels is in a position to explain with clarity what the prevailing position is with regard to the extended/applicable time limit for submission of returns. Suffice it to say that the overall impression that I get is that the authorities, both Centre and State have taken into consideration the fact that Goods and Service Tax is nascent in its application and is an evolving regime. The interests of small traders have thus weighed consideration with the authorities in granting the relaxation in time limits.

7. In the circumstances, I am inclined to direct the Principal Secretary/ Commissioner of Commercial Taxes, Chennai, to consider and pass orders upon the application of the petitioner dated 18.12.2018 wherein the petitioner seeks leave topay pending GST dues in six (6) monthly instalments, a sum of Rs.10,00,000/- having been paid as first instalment on 14.12.2018. Let the Principal Secretary/Commissioner of Commercial Taxes bear in mind the technical difficulties faced by the assessee, the fact that the petitioner has not engaged in any business transactions, on account of the cancellation of registration, for the last four (4) months as well as relevant circulars issued by the authorities till date, in disposing the application.

8. The petitioner will appear before the Principal Secretary/ Commissioner of Commercial taxes on 04.03.2019 at 10:30 am or on a date as proximate to the aforesaid date as convenient to Principal Secretary/Commissioner of Commercial taxes and communicated to the petitioner and orders will be passed by him on the Application within two (2) weeks thereafter.

9. This Writ Petition is disposed of in the aforesaid terms. No Costs. Consequently, connected Miscellaneous Petitions are closed.

[2019] 57 DSTC 164 (Madras)

In the High Court of Madras

[Hon'ble Dr. Justice Anita Sumanth]

W.P. No. 4106/2019

G. Murugan ... Petitioner

Vs.

Government of India & Ors. ... Respondents

Date of Order: 14.02.2019

SECTION 129 OF CGST ACT, 2017 – DETENTION/SEIZURE OF GOODS AND CONVEYANCE IN TRANSIT – VEHICLE CARRYING GOODS INTERCEPTED BY OFFICER – DETENTION ORDER PASSED IN FORM GST MOV-06 FOR THE REASON OF MISTAKE IN VEHICLE NUMBER MENTIONED – WRIT PETITION CHALLENGING DETENTION ORDER ON THE GROUND THAT NONE OF THE RELEVANT FIELDS OF THE SAID ORDER WAS TICKED AND ALMOST ALL FIELDS WERE LEFT BLANK – WHETHER IMPUGNED ORDER OF DETENTION COULD NOT BE SUSTAINED OR DESERVED TO BE SET ASIDE – HELD; DETENTION ORDER QUASHED. BEING INCOMPLETE AND WHOLLY NON SPEAKING.

Facts of the Case

The petitioner had carried goods of Schaeffler India Ltd, from its warehouse at Chettipedu, Sriperumbudur, Tamil Nadu to Sriperumbudur. The goods were accompanied by all required documents, such as tax invoices, E-Way bills and delivery Challan. The value of the goods was Rs.8,63,595/-. The vehicle was intercepted by the officials of the Commercial Taxes, Department who proceeded to cause inspection of the same. A statement had been recorded in Form GST Mov-01, from the driver who was incharge of the goods in conveyance. Admittedly, the statement at Column 10 thereof, admits that there was a mistake in the vehicle number mentioned. Thereafter, Form GST Mov- 02, ordering the physical verification/inspection of the conveyance, goods and documents was issued. The order, dated 04.02.2019, though signed by the Proper Officer was blank in so far as all relevant fields were concerned.

Held

In the sworn statement recorded from the lorry driver, a mistake had crept in, in the mentioning of the lorry number as TN 19 U 7857 instead of TN 19 U 7873. One assumed this to be a reason for the detention. However, detention of the conveyance and goods was an extreme step that seriously prejudices an assesse and it was incumbent upon the statutory authority/

the Proper Officer arrayed as Respondent No. 2, to have made mention of the contravention in the field provided in the impugned order for such purpose. This has not been done.

Though Section 107 of the Act provided for appeals or revisions that may be filed by any person aggrieved by any decision or order passed under this Act by an adjudicating authority, the Court not inclined, in the circumstances of the case, to relegate the petitioner to the statutory remedy provided. Any appeal that the petitioner might file would have to assume the contraventions that the impugned order was based upon since the impugned order was incomplete and wholly non-speaking, leaving even mandatory fields in the order, blank.

The Court was of the view that the order of detention could not be sustained and the same was quashed. The vehicle shall be released forthwith upon receipt of a copy of the order. The writ petition was allowed and connected miscellaneous petitions were closed.

Present for the Petitioner : Mr. K. Krishnamoorthy.

Present for Respondent(s) : Mr. Dhana Madhri, Government Advocate.

O R D E R

This writ petition challenges FORM GST MOV-06 dated 04.02.2019 issued by the 2nd respondent, the State Tax Officer/Proper Officer Roving Squad-5 Enforcement (North) on various grounds.

2. Ms.Dhanamadhri, learned Government Advocate took notice on behalf of the respondents on 12.02.2019 and sought time to take instructions.

3. Heard Mr. K.Krishnamoorthy, learned counsel for the petitioner and Ms.Dhanamadhri, learned Government Advocate for the respondents. By consent of learned counsel on both sides, the writ petition is taken up for final hearing and disposal at the stage of admission, finally.

4. The admitted facts are that the petitioner had carried goods of Schaeffler India Ltd, from its warehouse at Chettipedu, Sriperumbudur, Tamil Nadu to Sriperumbudur. According to the petitioner, the goods were accompanied by all required documents, such as tax invoices , E-Way bills and delivery Challan. The value of the goods was Rs.8,63,595/-.

5. While this was so, the vehicle was intercepted by the officials of the Commercial Taxes, Department who proceeded to cause inspection of the same. A statement had been recorded in Form GST Mov-01, from the driver who was incharge of the goods in conveyance. Admittedly, the

statement at Column 10 thereof, admits that there is a mistake in the vehicle number mentioned. Thereafter, Form GST Mov- 02, ordering the physical verification/inspection of the conveyance, goods and documents was issued. The order, dated 04.02.2019, though signed by the Proper Officer is blank in so far as all relevant fields are concerned.

6. The Form, in toto, is extracted herein for ready reference:

Form GST MOV-02

ORDER FOR PHYSICAL VERIFICATION/INSPECTION OF THE CONVEYANCE, GOODS AND DOCUMENTS

The goods conveyance bearing no.TN19U/7873 carrying goods was intercepted by the undersigned STO RS-I (Designation of the Officer), on 04.02.2019 at PM at 4.00 (Place). The owner/driver/person-in-charge of the goods conveyance has:

1. Failed to tender any document for the goods in movement, or

2. Tendered the documents mentioned in the Annexure to FORM GST MOV-01 for verification.

Upon verification of the documents tendered, the undersigned is of the opinion that the inspection of the goods under movement is required to be done in accordance with the provisions of sub-section (3) of section 68 of the Central Goods and Service Tax Act, 2017 read with State/UT goods and Services Tax Act, 2017 or under section 20 of the integrated Goods and Services Tax Act, 201 for the following reasons.

The Owner/driver/person-in-charge of the conveyance has not tendered any documents for the goods in movement.
Prima Facie the documents tendered are found to be defective
The genuineness of the goods in transit (its quantity etc) and/or tendered documents requires further verification
E-Way bill not tendered for the goods in movement
Others (Specify)

Hence you are hereby directed,-

(1). To station the conveyance carrying goods at_____(place) at your own risk and responsibility,

(2) to allow and assist in physical verification and inspection of the goods in movement and related documents,

(3) not to move the goods and conveyance from the place at which it is stationed until further orders and not to part with the goods in question.

Proper Officer
sd/-

7. Pursuant thereto, the impugned order has been issued on 04.02.2019 and theorder in the prescribed Form is also extracted below:

GOVERNMENT OF INDIA

FORM GST MOV-06

ORDER OF DETENTION UNDER SECTION 129(1) OF THE CENTRAL GOODS AND SRVICES TAX ACT, 2017 AND THE STATE/UNION TERRITORY GOODS AND SERVCES TAX ACT, 2017/UNDER SECTION 20 OF THE INTEGRATED GOODS AND SERVICES TAX ACT,2017

The goods conveyance bearing No.TN19U7873 was intercepted and inspected by the undersigned on 04.02.2019 at 04.00 (place and time) P.M. at the time of interception, the owner/driver/person in charge of te goods/conveyance is Shri G.Murugan, S/o A.Gandhi.

The owner/driver/person in charge of the goods conveyance Shri _____ has not tendered any documents for the goods in movement.
Prima Facie the documents tendered are found to be defective
The genuineness of the goods in transit (its quantity etc) and/or tendered documents requires further verification
E-Way bill not tendered for the goods in movement
Others (Specify)

For the above said reasons, an order for physical verification/inspection of the conveyance, goods and documents was issued in Form GST Mov-02 dated 04.02.2019 and served on the owner/driver/person in charge of the conveyance. A physical verification and inspection of goods in movement was conducted on _____ by _____ (name and designation) in the presence of the owner/driver/person in charge of the goods in (name and designation) in the presence of the owner/driver/person in charge of the conveyance Shri_____ and a report was drawn in FORM GST MOV-04. The follwing discrepancies were noticed.

In view of the above discrepancies, the goods and conveyance are required to be detained for further proceedings. Hence, the goods and above conveyance are detained by the undersigned and the driver/person in charge of the conveyance is hereby directed to station the conveyance at Sriperumbudur Tool Sale (place) at his own risk and responsibility and not to part with any goods, till the issue of release order in FORM GST MOV-05.

State Tax Officer/Roving Squad-V
Enforcement (North), Chennai-6

To,

Shri G.Murugan S/o.A.Gandhi
Driver/Person in Charge
Vehicle/Conveyance No:TN19U7873
Address: Manthahveli Street,
Annamangalam Post,
Gingee, Villupuram District

8. The provisions of Section 129 of the Goods and Services Tax, 2017 provide for detentions, seizure and release of goods and conveyances in transit in a situation where the transit is in contravention of the provisions of the Act or the Rules made therein. Section 129(1) is extracted herein.

> **129 Detention, Seizure And Release Of Goods And Conveyances In Transit**
>
> (1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released,- (a) on payment of the applicable tax and penalty equal to one hundred per cent. of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty; (b) on payment of the applicable tax and penalty equal to the fifty per cent. of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent. of the value of goods or twentyfive thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such tax and penalty; (c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed: Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.'

9. Thus, detention/seizure is provided for only in cases where the Department is prima facie convinced that there is a contravention of the provisions of the Act and the Rules. The order of detention has to reflect the reasons for which the seizure of the conveyance/goods has been effected.

10. A perusal of the impugned order reveals that none of the relevant fields have been ticked and almost all fields have been left blank. It is thus entirely unclear as to what statutory provision or Rule the petitioner has contravened. A pointed query put in this regard to the learned Additional Government Pleader appearing on behalf of the respondents also elicits no details and he is also unable to enlighten the Court on what the contraventions might be.

11. Admittedly, in the sworn statement recorded from the lorry driver, a mistake had crept in, in the mentioning of the lorry number as TN 19 U 7857 instead of TN 19 U 7873. One assumes this to be a reason for the detention. However, detention of the conveyance and goods is an extreme step that seriously prejudices an assessee and it is incumbent upon the statutory authority/the Proper Officer arrayed as respondent No.2, to have made mention of the contravention in the field provided in the impugned order for such purpose. This has not been done.

12. Though Section 107 of the Act provides for appeals or revisions that may be filed by any person aggrieved by any decision or order passed under this Act by an adjudicating authority, I am not inclined, in the circumstances of the present case, to relegate the petitioner to the statutory remedy provided. Any appeal that the petitioner might file would have to assume the contraventions that the impugned order is based upon since the impugned order is incomplete and wholly non-speaking, leaving even mandatory fields in the order, blank.

13. In the light of the above discussion, I am of the view that the present order of detention cannot be sustained and the same is quashed. The vehicle shall be released forthwith upon receipt of a copy of this order. The writ petition is allowed and connected miscellaneous petitions are closed. No costs.

[2019] 57 DSTC 169 (Madurai)

In the High Court of Madras

[Hon'ble Justice G. R. Swaminathan]

W.P. (MD) No. 937/2019

Jeyyam Global Foods (P.) Ltd. ... Petitioner

Vs.

Union of India & Ors. ... Respondents

Date of Order: 23.01.2019

SECTION 68 READ WITH SECTION 129 OF CGST ACT, 2017 – INSPECTION OF GOODS IN MOVEMENT – E-WAY BILL NOT FILED BY THE DEALER FOR TRANSPORTATION OF DRIED CHICK PEAS FROM SALEM TO DINDIGUL ON VIEW THAT GOODS WERE CLASSIFIABLE UNDER CHAPTER 0713 OF HSN – GOODS WERE UNDER MOVEMENT WERE DETAINED UNDER THE CLASSIFICATION (FRIED OR ROASTED GRAMS) FALLING UNDER CHAPTER 2106 OF HSN.

HELD – WRIT PETITION ALLOWED – DIRECTION GIVEN TO THE COMMISSIONER OF COMMERCIAL TAXES, CHENNAI TO ISSUE A CIRCULAR TO ALL THE INSPECTING SQUAD OFFICERS IN TAMIL NADU NOT TO DETAIN GOODS OR

VEHICLE WHERE THERE IS A BONAFIDE DISPUTE AS REGARDS THE EXIGIBILITY OF TAX OR RATE OF TAX.

Facts of the Case

The petitioner was a manufacturer of dried chick peas, gram flour, pulses and grams. The petitioner's claim was that they purchase chick peas, dry them by heating them to a certain degree and the resultant product was known as "Dried Chick Peas". This would have to be classified only under Chapter 0713 of HSN. The petitioner had transported the dried chick peas from Salem to Dindigul. The petitioner had not filed any E-Way bill in view of the exemption statutorily granted. While so, the consignment of the dried chick peas sent by the petitioner was intercepted by the fourth respondent on 21.12.2018. The fourth respondent seized the goods and also detained the vehicle in which the goods were being transported. The fourth respondent took the view that what was transported by the petitioner comes under the classification (fried or roasted grams) falling under Chapter 2106 of HSN.

Held

Recording the undertaking given by the petitioner, the proceedings impugned in the writ petition stand quashed. This writ petition was allowed. The matter could not rest there. The dealer would strongly press that the Court will have to direct the Commissioner of Commercial Taxes, Chennai to issue appropriate directives in this regard. The Court found force in the said request. The Court therefore suo motu impleads the Commissioner of Commercial Taxes, Chennai as the fifth respondent in the writ petition and directed Shri.Aayiram K.Selvakumar, Additional Government Pleader to take notice for him also.

The Commissioner of Commercial Taxes, Chennai was directed to issue a circular to all the inspecting squad officers in Tamil Nadu not to detain goods or vehicles where there was a bonafide dispute as regards the exigibility of tax or rate of tax. The circular shall embody the essence of the decision reported in 2018 (1) TMI 1503 (N.V.K.Mohammed Sulthan Rawther and Sons and Willson Vs. Union of India). Such a circular shall be issued within a period of eight weeks from the date of receipt of a copy of this order.

Present for the Petitioner : Mr. S. Jaikumar

Present for Respondent(s) : Mr.P. Dharmraj for R1
Mr. Vijayakarthikeyan for R2 & R3
Mr. Aayiram K. Selvakumar,
Additional Govt. Pleader for R4

The petitioner is a manufacturer of dried chick peas, gram flour, pulses and grams. The petitioner's claim is that they purchase chick peas, dry them by heating them to a certain degree and the resultant product is known as “Dried Chick Peas”. According to the petitioner, this would have to be classified only under Chapter 0713 of HSN. The petitioner had transported the dried chick peas from Salem to Dindigul. The petitioner had not filed any E-Way bill in view of the exemption statutorily granted. While so, the consignment of the dried chick peas sent by the petitioner was intercepted by the fourth respondent on 21.12.2018. The fourth respondent seized the goods and also detained the vehicle in which the goods were being transported. The fourth respondent took the view that what was transported by the petitioner comes under the classification (fried or roasted grams) falling under Chapter 2106 of HSN.

2. In this view of the matter, he issued a detention notice and levied tax with equal penalty. The petitioner paid the said amount as demanded by the fourth respondent under protest and he also obtained release of the goods as well as the vehicle. The order is under challenge in this writ petition principally on the ground that when a bonafide dispute as to classification had arisen, it is only the jurisdictional assessing officer, namely, the third respondent who could have ruled on the classification and that it was not open to the Squad Officer to have done so.

3. Heard the learned counsel on either side. The contesting respondent is only the fourth respondent. The fourth respondent official appeared in person and assisted this Court. He also filed a detailed counter affidavit.

4. According to the fourth respondent, he is statutorily empowered under Section 68 r/w Section 129 of the Tamil Nadu Goods and Services Tax Act, 2017. Section 68 of the said Act reads as under :

> “Section 68 (1) : The Government may require the person in charge of a conveyance carrying any consignment of goods of value exceeding such amount as may be specified to carry with him such documents and such devices as may be prescribed.
>
> (2) The details of documents required to be carried under sub-section (1) shall be validated in such manner as may be prescribed.
>
> (3) Where any conveyance referred to in sub-section (1) is intercepted by the proper officer at any place, he may require the person in charge of the said conveyance to produce the documents prescribed under the said sub-section and devices for verification, and the said person shall be liable to produce the documents and devices and also allow the inspection of goods.”

Section 129(1) of the Act reads as under :

> 129.(1)Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released, –-
>
> (a) on payment of the applicable tax and penalty equal to one hundred per cent of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty;
>
> (b) on payment of the applicable tax and penalty equal to the fifty per cent. of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent. of the value of goods or twenty five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such tax and penalty;
>
> (c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed: Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods."

5. The stand of the fourth respondent is that he is entitled to call upon the person in charge of the conveyance to produce the documents in question for verification. In the present case, there is no dispute as to the goods that were actually transported. But then, according to the petitioner, they would qualify only as dried chick peas. But, according to the fourth respondent this would have to be classified as roasted grams.

6. The Commissioner of Commercial Taxes, Chennai has issued a notification bearing Rc.No.085/2016 Taxation A1, dated 12.07.2017 notifying the Deputy Commissioner, Assistant Commissioner, State Tax Officer, Deputy State Tax Officer as the Proper Officer to exercise the powers and perform the functions conferred on them under Tamil Nadu Goods and Services Tax Act, 2017 and the rules made thereunder and to exercise the powers under Section 129 of the Act in the matter of detention, seizure and release of goods and conveyances in transit. Therefore, there

cannot be any doubt that the fourth respondent is the notified Proper Officer in this case. But then, the issue that arises for consideration is whether the inspecting squad officer is entitled to rule on the appropriate classification.

7. A Similar issue came up for consideration before the Hon'ble Kerala High Court in the decision reported in 2018 (1) TMI 1503 (N.V.K.Mohammed Sulthan Rawther and Sons and Willson Vs. Union of India). The Hon'ble Kerala High Court held that in such cases at best the inspecting authority can alert the assessing authority to initiate the proceedings "for assessment of any alleged sale, at which the petitioner will have all his opportunities to put forward his pleas on law and on fact." The process of detention of the goods cannot be resorted to when the dispute is bona fide, especially, concerning the exigibility of tax and, more particularly, the rate of tax.

8. I am in full agreement with the aforesaid enunciation of law laid down by the Hon'ble Kerala High Court. Here, a bonafide dispute with regard to the classification has arisen between the transporter of goods and the squad officer. I am of the view that the squad officer can intercept the goods, detain them for the purpose of preparing the relevant papers for effective transmission to the jurisdictional assessing officer. It is not open to the squad officer to detain the goods beyond a reasonable period. The process can at best take a few hours. Of course, the person who is in-charge of transportation will have to necessarily cooperate with the squad officer for preparing the relevant papers. I hold that the final call will have to be taken only by the jurisdictional assessing officer.

9. The learned counsel appearing for the writ petitioner submitted that they would not press for refund of the amount that were already paid by them and that they would abide by the ultimate outcome of the proceedings that may be initiated by the third respondent in this regard. This submission of the learned counsel for the writ petitioner is placed on record.

10. Recording the undertaking given by the petitioner's counsel, the proceedings impugned in this writ petition stand quashed. This writ petition is allowed. The matter cannot rest there. The learned counsel for the writ petitioner would strongly press that this Court will have to direct the Commissioner of Commercial Taxes, Chennai to issue appropriate directives in this regard. I find force in the said request. This Court therefore suo motu impleads the Commissioner of Commercial Taxes, Chennai as the fifth respondent in this writ petition and directs Shri.Aayiram K.Selvakumar, the learned Additional Government Pleader to take notice for him also.

11. The Commissioner of Commercial Taxes, Chennai is directed to issue a circular to all the inspecting squad officers in Tamil Nadu not to detain goods or vehicles where there is a bonafide dispute as regards the

exigibility of tax or rate of tax. The circular shall embody the essence of the decision reported in 2018 (1) TMI 1503 (N.V.K.Mohammed Sulthan Rawther and Sons and Willson Vs. Union of India). Such a circular shall be issued within a period of eight weeks from the date of receipt of a copy of this order.

12. With these directions, this writ petition is allowed.

[2019] 57 DSTC 174 (New Delhi)

In the High Court of Delhi

[Hon'ble Justice S. Murlidhar and Hon'ble Justice I. S. Mehta]

W.P. (C) 2347/2019

Jubilant Foodworks Ltd. & Anr. ... Petitioners

Vs.

Union of India & Ors. ... Respondents

Date of Order: 13.03.2019

SECTION 171 OF CGST ACT, 2017 AND CHAPTER XV OF CGST RULES – NATIONAL ANTI-PROFITEERING AUTHORITY (NAPA) GAVE DIRECTION TO DEPOSIT RS. 41,42,97,629.35 WITH CENTRAL AND STATE CONSUMER WELFARE FUNDS IN A 50:50 RATIO FOR INDULGING IN PROFITEERING BY CHARGING MORE PRICE – WRIT PETITION FILED TO CHALLENGE ORDER PASSED BY NAPA.

HELD – PETITIONER MADE OUT A PRIMA FACIE CASE – DIRECTION TO STAY THE DEPOSIT THE SUM OF RS. 20 CRORE PAYABLE TO CENTRAL CWF – FURTHER PROCEEDINGS PURSUANT TO NOTICE DT 4.02.2019 WERE STAYED AS WELL.

Present for the Petitioner(s): Mr. Mukul Rohatgi, Sr. Advocate with Mr. V. Lakshmi Kumaran, Mr. Rachit Jain, Mr. Karan Sachdev, Mr. Yogendra Aldak & Ms. Devanshi Singh, Advocates.

Present for Respondent(s) : Mr. Farman Ali with Mr. Akash Mohan & Mr. Aman Malik, Advocates for R1/UOI. Mr. Amit Bansal, Sr. Standing Counsel with Mr. Aman Rewaria Advocate for R2 & R3.

O R D E R

CM APPL. 10979/2019 (Exemption)

1. Allowed, subject to all just exceptions.

W.P.(C) 2347/2019 & CM APPL. 10978/2019 (Stay)

2. Notice. Mr. Farman Ali, Advocate, accepts notice for Respondent No.1/UOI. Mr. Amit Bansal, Advocate, accepts notice for Respondent Nos.2 & 3. Notice be served on Respondent No.4 through e-mail.

3. The challenge inter alia in the present petition is not only to an order dated 31st January 2019 passed by the National Anti-Profiteering Authority („NAPA") (Respondent No.2) but also to the statutory provisions under which the said authority is exercising its powers i.e. Section 171 of the Central Goods and Services Tax Act, 2017 („CGST Act") and Chapter XV of the CGST Rules and in particular Rules 126, 127 and 133 as being violative of Articles 14 and 19 of the Constitution of India.

4. The challenge is also to an impugned notice dated 4th February 2019 issued to the Petitioner No.1 by the Director General of Anti-Profiteering (Respondent No.3) proposing penal action against the Petitioners consequent upon the order dated 31st January 2019 of the NAPA.

5. This Court has heard the submissions of Mr. Mukul Rohatgi, learned Senior Counsel for the Petitioners, Mr. Farman Ali, learned counsel for the Respondent No.1 and Mr. Amit Bansal, Sr. Standing Counsel for Respondent Nos.2 and 3.

6. The Court has been informed that there are other petitions already pending in this Court which raise a similar challenge to the constitutional validity of the above provisions apart from challenging the orders of the NAPA. One such petition is WP(C) 378 of 2019 (Hindustan Unilever Ltd. v. Union of India) in which an order was passed by Division Bench of this Court on 16th January 2019 including an interim direction regarding deposit of part of the amount required to be paid under the orders of the NAPA.

7. As far as the present case is concerned the Petitioner No.1 which is operating restaurants under the name and style of „Dominos Pizza" has been held by the NAPA by the impugned order dated 31st January 2019 as having resorted to "profiteering by charging more price than what he could have charged by issuing wrong tax invoices."

8. One of the principal grounds of challenge concerns the constitution of the NAPA itself. Under Rule 122 (a) of the CGST Rules the NAPA consists of a Chairman who holds or has held a post equivalent in rank to the Secretary of Government of India. Under Rule 122 (b) the 4 technical members are those who are or have been Commissioners of State Tax or

Central Tax for at least one year or have held an equivalent post under the existing law. The Chairman and Members of the NAPA are to be nominated by the GST Council. In other words, there is no judicial member in the NAPA. It is further pointed out that under the CGST Rules there is no provision for constitution of an appellate authority to review the orders passed by the NAPA.

9. Another feature of the functioning of the NAPA is that under Rule 126 it is the NAPA which determines the „methodology and procedure" for determining as to whether the reduction in the rate of tax on the supply of goods and services on benefit of Input Tax Credit („ITC") has been passed on by the registered person to recipient by way of „commensurate reduction in prices". In other words it is the NAPA who determines what can amount to profiteering in a given situation. It is further pointed out that it is the NAPA which issues notice to the suspected profiteer and it is the NAPA which adjudicates the said notice without any provisions for an appeal. It is contended that is contrary to the settled legal position regarding the constitution and functioning of quasi judicial authorities and tribunals as explained by the Supreme Court in Union of India v. Madras Bar Association 2010 (11) SCC 1.

10. As far as the facts of the present case are concerned, one grievance is that although the Petitioners deal in as many as 393 products, and even according to the NAPA they are compliant in regard to the price of many of such products, the NAPA has been selective in drawing an adverse conclusion in respect of the price charged for a few of the products. It is submitted that if the pricing of all the products is considered cumulatively, and not individually as done by the NAPA, then the Petitioners would not fall foul of the law. It is further submitted by Mr. Mukul Rohatgi, learned Senior counsel for the Petitioners, that in law there is no restriction on what price the Petitioner No.1 can charge for its product. Therefore, it is open to Petitioner No.1, notwithstanding the reduction in the rate of tax after 15 November 2017 to raise the base price of the product so that the ultimate price payable by the customer inclusive of tax remains what it was prior to 15 November 2017. Mr. Rohatgi points out that simultaneously with the reduction of tax the ITC was taken away and this is an additional factor that has to be considered while determining whether the Petitioner could be held to be a „profiteer" from the reduction of rate of tax.

11. The Court is of the view that the Petitioners have made out a prima facie case and that at this stage the balance of convenience is also in their favour for an interim order being passed in the manner indicated hereafter.

12. Under the impugned order of the NAPA, the Petitioners are required to deposit an amount of Rs.41,42,97,629.35 with the Central and State Consumer Welfare Funds („CWFs") in a 50:50 ratio. It is accordingly directed that subject to the Petitioners depositing the sum of Rs.20 crores with the Central CWF within a period of four weeks from today, there shall be a stay of the impugned order dated 31st January 2019 of the NAPA as well as stay of further proceedings pursuant to the impugned notice dated 4th February 2019 issued by the Respondent No.2.

13. Reply be filed to the writ petition and application for stay within six weeks. Rejoinder thereto, if any, be filed before the next date.

14. List on 22nd August 2019.

16. Order "dasti"

[2019] 57 DSTC 177 (Madurai)

In the High Court of Madras

[Hon'ble Justice G. R. Swaminathan]

W.P. (MD) No. 1287/2019

R K Motors ... Petitioner

Vs.

State Tax Officer ... Respondent

Date of Order: 24.01.2019

SECTION 129 OF CGST ACT, 2017 – DETENTION/SEIZURE OF GOODS AND VEHICLE – VEHICLE TRANSPORTING TWO WHEELERS INSTEAD OF HALTING AT VIRUDHNAGAR, HAD MOVED TOWARDS SIVAKASI – VEHICLE INTERCEPTED WHEN ENROUTE TO SIVAKASI AND 7KM AWAY FROM VIRUDHNAGAR – VEHICLE HAD BEEN SEIZED AND DETAINED – PENALTY OF RS. 18,96,000/- LEVIED – WRIT PETITION SEEKING RELIEF AND TO CONDONE THE MINOR LAPSES ON THE BASIS OF CIRCULAR DT 14.09.2018 – HELD, DIRECTION TO RELEASE THE GOODS AND VEHICLE ON PAYMENT OF RS. 5,000/- BY THE DEALER AS A FINE.

Facts of the Case

Petitioner was an authorised dealer for Bajaj Auto Limited. They were dealing in two wheelers. They have registered themselves as an assessee under the Goods and Service Tax Act, 2017 with the respondent. The dealer had placed orders with their principal for delivery of 40 numbers of two wheelers [Pulsar Bike]. The goods were shipped from Pune to be delivered at Branch Office of the dealer at Virudhunagar. The goods were moved from Pune on 23.12.2018. It appeared that the vehicle transporting

two wheelers instead of halting at Virudhunagar, had moved towards Sivakasi. When the vehicle was enroute to Sivakasi and 7 km away from Virudhunagar, it was intercepted by the respondent roving squad. The respondent seized the vehicle and called upon the driver of the vehicle to cooperate. It appeared that the driver of the vehicle did not extend proper cooperation. In these circumstances, the impugned order of the detention came to be passed. The respondent had also passed release order putting the dealer on terms. A sum of Rs.18,96,000/- had been levied as a penalty. The vehicle had also been seized and detained.

Held

The only question that the respondent ought to have posed was whether there was any attempt at evasion. It was not as if the goods had already been offloaded. The vehicle was intercepted when it was in transit. The respondent ought to have directed the driver of the vehicle to move back towards Virudhunagar. Instead adopting such a procedure, the respondent had chosen to be harsh and vindictive. When the writ petitioner was a registered dealer, when the tax in respect of the goods have already been remitted and when the transportation of goods was duly covered by proper documentation, the respondent ought to have taken a sympathetic and indulgent view of the lapse committed by the driver of the vehicle. The detention order dated 28.12.2018 and the order dated 11.01.2019 suffered from vice of gross unreasonableness and disproportionality. When a power was conferred on a statutory authority, it should be exercised in a reasonable manner.

The circular dated 14.09.2018 issued by the Government of India, calling upon the officials to condone the minor lapses and not to proceed under Section 129 of the Tamil Nadu Goods and Services Tax Act, 2017. The said circular contemplates levy of only a minor fine of Rs.500/-.

Dealer submitted that he would pay a sum of Rs.5,000/- as fine to the respondent.

By directing the Dealer to pay a sum of Rs.5,000/- towards fine to the respondent, the orders impugned in the writ petition stands quashed. The respondent shall forthwith release the vehicle as well as the goods in question. Accordingly, the writ petition was allowed.

Present for the Petitioner	:	Mr. A. Chandrasekaran.
Present for Respondent(s)	:	Mr. Aayiram K. Selvakumar Additional Government Pleader..

Order

Heard the learned counsel appearing for the writ petitioner and the learned Additional Government Pleader appearing for the respondent.

2. Mr.A.Valivittan, DCTO (Sattur Road) Roving Squad, O/o.The Assistant Commissioner (ST) (Enforcement), Virudhunagar is present and assisted this Court today.

3. By consent of both parties, this writ petition is taken up for disposal at the stage of admission itself.

4. The writ petitioner is an authorised dealer for Bajaj Auto Limited. They are dealing in two wheelers. They have registered themselves as an assessee under the Goods and Service Tax Act, 2017 with the respondent. While so, the writ petitioner had placed orders with their principal for delivery of 40 numbers of two wheelers [Pulsar Bike]. The invoice dated 23.12.2018 is enclosed at Page No.1 of the typed set of papers. E-way bill is also enclosed. The goods were shipped from Pune to be delivered at Branch Office of the writ petitioner at Virudhunagar. The goods were moved from Pune on 23.12.2018. It appears that the vehicle transporting two wheelers instead of halting at Virudhunagar, had moved towards Sivakasi. When the vehicle was enrout to Sivakasi and 7 km away from Virudhunagar, it was intercepted by the respondent roving squad. The respondent seized the vehicle and called upon the driver of the vehicle to cooperate. It appears that the driver of the vehicle did not extend proper cooperation. In these circumstances, the impugned order of the detention came to be passed. The respondent had also passed release order putting the writ petitioner on terms. A sum of Rs.18,96,000/- had been levied as a penalty. The vehicle has also been seized and detained. Unless the writ petitioner remitted the said penalty amount, it has been made clear that the goods as well as the vehicle would not be released. It has been further made clear that the goods would be liable for confiscation and further proceedings under Section 130 of the Tamil Nadu Goods and Services Tax Act, 2017 would be taken. Hence, this writ petition has been filed questioning the detention order dated 28.12.2018 and the order dated 11.01.2019 passed under Section 129(3) of the Tamil Nadu Goods and Services Tax Act, 2017.

5. The respondent official would submit that the vehicle ought to have halted at Virudhunagar and the goods carried in the vehicle should have been offloaded in the branch office of the writ petitioner at Virudhunagar. But, the vehicle did not stop at Virudhunagar, instead, it moved towards Sivakasi. Only when the vehicle had travelled a distance of 7 km away

from Virudhunagar, the respondent roving squad intercepted the vehicle. The respondent official would point out that the driver of the conveyance / vehicle was enquired and he had categorically stated that the vehicle moved towards Sivakasi only on the instructions of an official representing the writ petitioner.

6. No doubt the vehicle ought to have stopped at Virudhunagar and the goods ought to have been offloaded at Virudhunagar itself. But then, the question is whether a drastic order passed by the respondent herein was really warranted in the facts and circumstances of the case.

7. It is not in dispute that the writ petitioner is an authorised dealer of Bajaj Auto Limited. It is also not in dispute that the goods are covered by appropriate documents. The tax payable has also been paid by the writ petitioner's principal. Thus, it is not a case of any evasion of tax. It is not in dispute that the writ petitioner is carrying on the business of dealing in two wheelers for the past several years. The driver, who drove the vehicle in question is not a Tamilian. His name is Badrinath Bhandari. He hails from Maharashtra.

8. The learned counsel appearing for the writ petitioner states that the said driver knows neither English nor Tamil. He knows only Marathi and Hindi.

9. The specific stand taken by the writ petitioner is that the driver without knowing the correct route had taken a wrong turn and headed towards Sivakasi.

10. It is also not in dispute that the bill is addressed only to the writ petitioner's principal office at Sivakasi; delivery alone is to be made at Virudhunagar. I am of the view that even if by mistake, a wrong instruction had been given to the driver of the vehicle to head towards Sivakasi. Still it would not really matter. The only question that the respondent ought to have posed is whether there is any attempt at evasion. It is not as if the goods had already been offloaded. The vehicle was intercepted when it was in transit. The respondent ought to have directed the driver of the vehicle to move back towards Virudhunagar. Instead adopting such a procedure, the respondent had chosen to be harsh and vindictive. When the writ petitioner is a registered dealer, when the tax in respect of the goods have already been remitted and when the transportation of goods is duly covered by proper documentation, the respondent ought to have taken a sympathetic and indulgent view of the lapse committed by the driver of the vehicle. The detention order dated 28.12.2018 and the order dated 11.01.2019 suffer from vice of gross unreasonableness and disproportionality. When a power is conferred on a statutory authority, it should be exercised in a reasonable manner.

11. The learned counsel appearing for the writ petitioner draws my attention to the circular dated 14.09.2018 issued by the Government of India, calling upon the officials to condone the minor lapses and not to proceed under Section 129 of the Tamil Nadu Goods and Services Tax Act, 2017. The said circular contemplates levy of only a minor fine of Rs.500/-.

12. As rightly pointed out by the learned counsel appearing for the writ petitioner, the goods in question are two wheelers. They cannot be sold without proper registration with the Motor Vehicle Authorities. That would require proper documentation. Therefore, in a case of this nature, the writ petitioner could not have evaded his statutory obligations in any manner. This aspect of the matter ought to have been taken note by the respondent.

13. The learned counsel appearing for the writ petitioner submits that the writ petitioner would pay a sum of Rs.5,000/- as fine to the respondent.

14. The above submission of the learned counsel appearing for the writ petitioner is recorded. By directing the writ petitioner to pay a sum of Rs.5,000/- [Rupees Five Thousand only] towards fine to the respondent, the orders impugned in this writ petition stands quashed. The respondent shall forthwith release the vehicle as well as the goods in question. Accordingly, this writ petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

[2019] 57 DSTC 181 (Madurai)

BEFORE THE MADRAS HIGH COURT

[The Honourable Mr. Justice Abdul Quddhose]

W.P. (MD) No. 24793/2018

M/s. VSG Exports PVT., LTD., ... Petitioner

Vs

The Commissioner of Customs & Others ... Respondents

Date of Order: 02.04.2019

WRIT PETITION – REFUND OF IGST PAID ON EXPORTS – PENDING FOR THE REASON PETITIONER AVAILED LOWER RATE DRAWBACK BUT MISTAKENLY DECLARED AVAILED AT HIGHER RATE IN THE SHIPPING BILL – COMPUTER GENERATED SYSTEM DID NOT PROCESS REFUND DUE TO INADVERTANT ERROR OF THE PETITIONER AND WHERE EGM ALSO CLOSED AND THEREFORE, RESPONDENT NOT IN A POSITION TO PROCESS REFUND DUE TO AMENDMENT IN THE SHIPPING BILL NOT POSSIBLE ON CLOSER OF EGM – WHETHER THE PETITIONER COULD BE MADE HELPLESS JUST BECAUSE THE COMPUTER SYSTEM DID NOT ENABLE RESPONDENT TO REFUND IGST AMOUNT? HELD – NO AND RESPONDENT WAS DIRECTED TO REFUND THE AMOUNT WITHIN 8 WEEKS.

Facts of The Case

According to the petitioner, they have exported Polished Granite Slabs to various countries on payment of IGST through the Shipping Bills.

As per Rule 96A of CGST Rules, 2017, Shipping Bills filed by an exporter of goods shall be deemed to be an application for refund of integrated tax paid on the goods exported out of India. However, respondent has not refunded the IGST amount paid on the above mentioned goods. On enquiry, it was found that IGST refund was pending for the reason that the petitioner has availed drawback at higher side i.e., Composite Rate.

According to the petitioner, they are entitled to claim refund of IGST paid on exports. It is also the case of the petitioner that Circular No.05/2018-Customs, dated 23.02.2018 provides alternate mechanism with officer interface for refund of IGST paid on exports wherein, it is mentioned that "Once all the invoices pertaining to Shipping Bill are verified by the officer, the system shall calculate the scroll amount against the Shipping Bill, after subtracting the drawback amount for each invoice, where applicable and display the refund amount to the officer for approval".

According to the petitioner, they have claimed lower rate drawback as per Notification 131/2016(NT), dated 31.10.2016, the petitioner has mistakenly declared in the Shipping Bills that they have availed higher drawback by selecting A instead of B.

According to the petitioner, this is purely an inadvertent error committed by the petitioner. The CBEC has issued various Circulars to rectify the same kind of errors committed by the exporters.

According to the petitioner, one such error is discussed in CBEC Circular No.8/2018 Cus., dated 23.03.2018 as follows:-

> *"Exporters that by mistake they have mentioned the status of IGST payment as "NA" instead of mentioning "P" in the Shipping Bill. In other words, the exporter has wrongly declared that the shipment is not under payment of IGST, despite the fact that they have paid the IGST. As a onetime exception, it has been decided to allow refund of IGST through an officer interface, wherein, the officer can verify and satisfy himself of the actual payment of IGST based on GST return information forwarded by GSTIN. DG (Systems) shall open a physical interface for this purpose".*

According to the petitioner, in the instant case, the mistake committed by the petitioner is similar to the mistake referred to in CBEC Circular

No.8/2018-Cus dated 23.03.2018. According to the petitioner, the department can very well check the availment of lower drawback from the shipping bill filed by the petitioner and similar facility can also be extended to the petitioner as in the case of Circular No.08/2018, dated 23.03.2018 referred to above.

The learned counsel appearing for the petitioner drew the attention of this court to a Judgment of the Hon'ble Supreme Court in the case of **Share Medical Care Vs. Union of India** *reported in* **2007 (209) E.L.T 321 (S.C.)** *and referring to the said judgment, the learned counsel for the petitioner submitted that "Even if the applicant does not claim any benefit under a particular notification at initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage.*

Held

The case on hand will clearly indicate that only due to inadvertence, the drawback code in the shipping bill was wrongly mentioned as 680203A instead of 680203B. Further, it is undisputed by the respondents as seen from Paragraph No. 11 of the counter affidavit filed by them that IGST refund is payable for the aforementioned shipping bills to the petitioner. But only due to the fact that Export General Manifest for the shipping bills have been closed by the computer system, it is not possible to refund the IGST amount to the petitioner. The petitioner cannot be made helpless, just because the computer system does not enable them to refund the IGST amount. Being an undisputed fact that IGST refund is payable to the petitioner, the petitioner is absolutely entitled to the IGST refund from the respondents.

The learned counsel appearing for the petitioner relied upon the judgment of the Hon'ble Supreme Court in a case of **Commissioner of Customs, Calcutta Vs. Indian Oil Corporation Limited reported in 2004 (165) E.L.T 257 (S.C.)** *and submitted that although the circular is not binding on the Court or an assessee, revenue cannot raise contention contrary to binding circular. However, according to him, when a circular remains in operation, revenue is bound by it and cannot be allowed to plea that it is not valid nor it is contrary to the terms of statute.*

Considering the aforesaid factors and in the light of the various Judgments referred this Court is of the considered view that the respondents ought to have refunded the IGST amount for the aforementioned shipping bills to the petitioner.

In the result, the respondents are directed to refund the undisputed IGST amount payable to the petitioner within a period of eight weeks from the date of receipt of a copy of this order and the writ petition is allowed.

O R D E R

The instant writ petition has been filed for a mandamus to direct the second respondent to settle and release the pending refund of IGST amount paid on the Shipping Bill Nos. 8676491/15.09.2017, 8898781/26.09.2017, 8930537/27.09.2017, 8997183/29.09.2017 and 8997165/29.09.2017.

2. It is the case of the petitioner that they are regular exporters of Polished Granite Slabs and had registered with all the Government Authorities. According to the petitioner, they have exported Polished Granite Slabs to various countries on payment of IGST through the following Shipping Bills. The amount of IGST paid is mentioned against each Shipping Bills in the following table:

Sl. No.	Invoice No.	Date	Shipping No.	Date	IGST paid
1.	VSG/EXP/GST/01	09.07.2017	7254660	11.07.2017	552604.10
2.	VSG/EXP/GST/02	09.07.2017	7256106	11.07.2017	730700.00
3.	VSG/EXP/GST/03	10.07.2017	7265768	11.07.2017	605987
4.	VSG/EXP/GST/04	30.07.2017	7709921	31.07.2017	306321.30
5.	VSG/EXP/GST/05	03.08.2017	7816155	04.08.2017	139867.43
6.	VSG/EXP/GST/06	08.08.2017	7903380	09.08.2017	192596.73
7.	VSG/EXP/GST/08	15.08.2017	8024352	16.08.2017	208489.13
8.	VSG/EXP/GST/011	20.08.2017	8129114	21.08.2017	166515
9.	VSG/EXP/GST/13	24.08.2017	8213317	24.08.2017	146614
10.	VSG/EXP/GST/14	24.08.201	8213105	24.08.2017	177550
11.	VSG/EXP/GST/15	30.08.2017	8351457	31.08.2017	211768
12.	VSG/EXP/GST/16	31.08.2017	8383716	01.09.2017	152218
13.	VSG/EXP/GST/17	05.09.2017	8474843	06.09.2017	313015
14.	VSG/EXP/GST/18	06.09.2017	8501257	07.09.2017	152040
15.	VSG/EXP/GST/19	06.09.2017	8501277	07.09.2017	265114

3. According to the petitioner, as per Rule 96A of CGST Rules, 2017, Shipping Bills filed by an exporter of goods shall be deemed to be an application for refund of integrated tax paid on the goods exported out of India. However, it is the case of the petitioner that the second respondent has not refunded the IGST amount paid on the above mentioned goods. According to the petitioner, on enquiry, it was found that IGST refund was pending for the reason that the petitioner has availed drawback at higher side i.e., Composite Rate.

4.According to the petitioner, they are eligible for the refund of the above mentioned IGST refund paid on export of goods. It is the case of the petitioner that consequent upon implementation of GST with effect from 01.07.2017, Customs Central Excise Duties and Service Tax Drawback Rules, 1995 were continued for a transition period of three months ie., from July 2017 to September 2017, vide Notification No.22/2017-Customs, dated 30.06.2017. The learned counsel appearing for the petitioner submits that the Drawback rates have been prescribed in Drawback Schedule annexed to the Customs, Central Excise duties and Service Tax Drawback Rules, 1995, as amended vide Notification No.131/2016-CUSTOMS(N.T), dated 31.10.2016. In the above schedule, the goods exported by the petitioner i.e., Polished Granites Slabs are classifiable under Tariff Item No.680203.

5. According to the petitioner, in the Notification No.131/2016-CUSTOMS(N.T.), dated 31.10.2016, it is mentioned that “If the rate indicated is the same in the columns(4) and (6), it shall mean that the same pertains to only Customs component and is available irrespective of whether the exporter has availed of CENVAT Facility or not”. The learned counsel appearing for the petitioner further submits that as the claimant's commodity Polished Granite Slabs, it attracts the same rate under both the columns(4) & (6), it is evident that the petitioner has claimed drawback of customs component only for their exports.

6.It is also the case of the petitioner that under the Circular No. 22/2017-Customs, dated 30.06.2017, which deals with drawback claims for the transition period, clearly provides that “While a transition period of three months has been allowed, the exporters shall have an option to claim only Customs portion of AIRs of duty drawback i.e., rates and caps given under column (6) and (7) respectively of the Schedule of AIRs of duty drawback and avail input tax credit, CGST or IGST or refund of IGST paid on exports.” Furthermore, it is the case of the petitioner that CBEC vide Circular No.37/11/2018 GST in F.No.349/47/2017 GST, dated 15.03.2018 has clarified that a supplier availing drawback only with respect to basic custom duty shall be eligible for refund of GST.

7. According to the petitioner, they are entitled to claim refund of IGST paid on exports. It is also the case of the petitioner that Circular No.05/2018-Customs, dated 23.02.2018 provides alternate mechanism with officer interface for refund of IGST paid on exports wherein, it is mentioned that “Once all the invoices pertaining to Shipping Bill are verified by the officer, the system shall calculate the scroll amount against the Shipping Bill, after subtracting the drawback amount for each invoice, where applicable and display the refund amount to the officer for approval”.

8. According to the petitioner, they have claimed lower rate drawback as per Notification 131/2016(NT), dated 31.10.2016, the petitioner has mistakenly declared in the Shipping Bills that they have availed higher drawback by selecting A instead of B.

9.According to the petitioner, this is purely an inadvertent error committed by the petitioner. The CBEC has issued various Circulars to rectify the same kind of errors committed by the exporters. According to the petitioner, one such error is discussed in CBEC Circular No.8/2018 Cus., dated 23.03.2018 as follows:-

> "Exporters that by mistake they have mentioned the status of IGST payment as "NA" instead of mentioning "P" in the Shipping Bill. In other words, the exporter has wrongly declared that the shipment is not under payment of IGST, despite the fact that they have paid the IGST. As a onetime exception, it has been decided to allow refund of IGST through an officer interface, wherein, the officer can verify and satisfy himself of the actual payment of IGST based on GST return information forwarded by GSTIN. DG (Systems) shall open a physical interface for this purpose".

10. According to the petitioner, in the instant case, the mistake committed by the petitioner is similar to the mistake referred to in CBEC Circular No.8/2018-Cus dated 23.03.2018. According to the petitioner, the department can very well check the availment of lower drawback from the shipping bill filed by the petitioner and similar facility can also be extended to the petitioner as in the case of Circular No.08/2018, dated 23.03.2018 referred to above.

11. According to the petitioner, due to inadvertent error, a huge amount of refund of IGST has been deprived to the petitioner. According to the petitioner, they have been sending repeated remainders to the respondents requesting them to refund the IGST amount for the export of Polished Granite Slabs under the aforementioned Shipping Bills and the last such remainder was made on 06.09.2018.

12. According to the petitioner, since the respondents have not refunded the IGST amount, they were constrained to file this instant writ petition.

13. A counter affidavit has also been filed by the respondents, wherein, they have admitted in Paragraph 11 of the counter affidavit that the petitioner has inadvertently made an error by wrongly declaring the

Drawback Code as 680203A instead of 680203B. Further, they have admitted that the petitioner is entitled to refund of IGST amount, but could not be processed due to the fact that the IGST refund is processed and sanctioned by the computer generated system. Since the Export General Manifest(EGM) has already been closed for the aforementioned shipping bills by the computer system, the refund of IGST amount could not be made by the respondents to the petitioner.

14. It is also stated in the counter affidavit that amendment in the shipping bill is not possible, if EGM is closed and the shipping bill status has gone to history. They have also not disputed the circulars referred to by the petitioner in the affidavit filed in support of the writ petition, namely, Circular No.05/2018, dated 23.02.2018 and Circular No.08/2018, dated 23.03.2018. Under Circular No.05/2018, the respondents have admitted that by way of alternate mechanism to correct the error code submitted by the exporters, refund of IGST can be processed.

15. Heard Mr.A.K.Jayaraj, learned counsel appearing for the petitioner and Mr.R.Aravindan, learned counsel appearing for the respondents.

16. According to the learned counsel for the petitioner, it is not in dispute that IGST refund for the aforementioned shipping bill is payable to the petitioner.

17. The learned counsel appearing for the petitioner drew the attention of this Court to the counter affidavit filed by the respondents and in particular, he referred Paragraph 11, wherein, the respondents have admitted that only because of the inadvertent error in mentioning wrong drawback code ie., 680203A instead of 680203B, the petitioner's claim for refund of IGST for the aforementioned shipping bills could not be processed, as the process is done through a computer generated system.

18. The learned counsel appearing for the petitioner drew the attention of this Court to Circular No.08/2018, dated 23.03.2018, issued by the CBEC, dated 23.02.2018, which allows the refund of IGST through an officer interface specially opened by DG(Systems), a one time exception, where IGST refund is held up due to invoice mismatch (error code SB005) and errors due to discontinuance of transference copy of the shipping bill (error code SB006) and due to the mistaken declaration of the exporter's status of IGST payment as 'NA' instead of mentioning “P”.

19. Referring to the said Circular, the learned counsel appearing for the petitioner would point out that the case on hand is similar to the same as

only due to an inadvertent error by declaring wrong drawback code instead of correct drawback code, the refund of IGST by the respondent could not be processed. Further, according to him, under Circular No.8/2018, dated 23.03.2018, the facility is available for shipping bills filed upto 23.3.2018. But in the instant case, the last shipping bills were filed on 07.09.2017 and therefore, according to him, Circular No.08/2018, dated 23.03.2018 is squarely applicable for the petitioner.

20. The learned counsel appearing for the petitioner drew the attention of this court to a Judgment of the Hon'ble Supreme Court in the case of Share Medical Care Vs. Union of India reported in 2007 (209) E.L.T 321 (S.C.) and referring to the said judgment, the learned counsel for the petitioner submitted that “Even if the applicant does not claim any benefit under a particular notification at initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage.

21. In the instant case also, according to him, Circular No. 8/2018, dated 23.03.2018, has not been repealed by the subsequent Circular No.37/2018, dated 09.10.2018. Further, it is the case of the petitioner that circular pertains to a different matter not pertaining to the issue on hand. Further, it is his case that Circular No.37/2018, dated 09.10.2018 cannot have retrospective effect.

22. Per contra, learned Standing Counsel appearing for the respondents fairly admitted that refund of IGST is payable for the shipping bills to the petitioner,but the same could not be processed only due to the fact that being a computer generated system, the system will not process the IGST refund, if the drawback code has not been correctly mentioned. According to him, once EGM is closed for the said exports, it cannot be reopened by the computer system.

Discussion:-

23. Admittedly, due to wrong mentioning of the drawback code by the petitioner, refund of IGST for the aforementioned shipping bills could not be processed by the respondents. Only to over come such inadvertent errors, CBEC, Ministry of Finance, Government of India, issued a Circular No.8/2018, dated 23.03.2018 it reads as follows:-

> “CBEC has issued Circular No.5/2018-Customs dated 23.02.2018 which provided for an alternative mechanism with officer interface to resolve invoice mismatch cases. In the said circular, it was provided that the mechanism would be available for the shipping

bills filed till 31.12.2017. Although the cases having SB005 error have now greatly reduced due to continuous outreach done by the Board and increased awareness amongst the trade, but some exporters have neverthless, have committed errors in filing invoice details in shiiping bill and GST returns. Therefore, keeping in view the difficulties likely to be faced by the exporters in case SB005 are allowed to be corrected through officer interface for Sbs filed upto 31.12.2017, it has been decided to extend his facility to those shipping bills filed till 28.02.2018.

2. Further, representations have also been received from:

(I) filed formation seeking resolution of SB006 errors due to discontinuance of transference copy of shipping bill. It has been proposed by the filed formations that in lieu of transference copy either the final Bill of Lading issued by the shipping lines or written confirmation from the custodian of the gateway port, may be treated as valid document for the purpose of integration with the EGM. The proposal from the filed formation has been examined in the Board. The proposal send from filed formation in such EGM error cases has been agreed.

(ii) exporters that by mistake they have mentioned the status of IGST payment as “NA” instead of mentioning “P” in the shipping bill. IN other words, the exporter has wrongly declared that the shipment is no under payment of IGST, despite the fact that they have paid the IGST. As a one time exception, it has been decided to allow refund of IGST through an officer interface wherein the officer can verify and satisfy himself of the actual payment of IGST based on GST return information forwarded by GSTn. DG(Systems) shall open a physical interface for this purpose.”

24. It is evident from the aforesaid Circular that the Government of India has provided an alternate mechanism in cases where, the exporters have committed errors in the shipping bills filed by them before the Customs Authority.

25. The case on hand will clearly indicate that only due to inadvertence, the drawback code in the shipping bill was wrongly mentioned as 680203A instead of 680203B. Further, it is undisputed by the respondents as seen from Paragraph No. 11 of the counter affidavit filed by them that IGST refund is payable for the aforementioned shipping bills to the petitioner. But only due to the fact that Export General Manifest for the shipping bills

have been closed by the computer system, it is not possible to refund the IGST amount to the petitioner. The petitioner cannot be made helpless, just because the computer system does not enable them to refund the IGST amount. Being an undisputed fact that IGST refund is payable to the petitioner, the petitioner is absolutely entitled to the IGST refund from the respondents.

26. In the counter affidavit, the respondents have referred to Circular No.37/2018, dated 09.10.2018 issued by the CBEC, which reads as follows:-

> "3. It has been noted that exporters had availed the option to take drawback at higher rate in place of IGST refund out of their own volition. Considering the fact that exporters have made aforesaid declaration while claiming the higher rate of drawback, it has been decided that it would not be justified allowing exporters to avail IGST refund after initially claiming the benefit of higher drawback. There is no justification for re-opening the issue at this stage."

27. As seen from the aforesaid circular, the said circular applies only to cases where the exporters had availed option to take drawback at higher rate in place of IGST refund out of their own volition. In the instant case, the petitioner had never availed the option to take drawback at higher rate in place of IGST refund and therefore, the said Circular No.37/2018, dated 09.10.2018 is not applicable to the facts of the instant case. Further, the Circular No. 37/2018, dated 09.10.2018 issued by CBEC has also not rescinded the earlier Circular No.08/2018, dated 23.03.2018.

28. The judgment relied upon by the learned counsel for the petitioner referred to supra in 2004 (165) E.L.T. 257 (S.C.) is squarely applicable for the facts of the instant case as Circular No. 808/18/23.03.2018, has not been rescinded by the subsequent circular and therefore, it is binding upon the respondents to follow the Circular No.8/18, dated 23.03.2018, wherein, an alternative mechanism has been provided to the respondents for processing refund of IGST claim whenever, there is an inadvertent error in the shipping bills submitted by the exporters or any other documents submitted by the exporters.

29. The learned counsel appearing for the petitioner relied upon the judgment of the Hon'ble Supreme Court in a case of Commissioner of Customs, Calcutta Vs. Indian Oil Corporation Limited reported in 2004 (165) E.L.T 257 (S.C.) and submitted that although the circular is not binding on the Court or an assessee, revenue cannot raise contention

contrary to binding circular. However, according to him, when a circular remains in operation, revenue is bound by it and cannot be allowed to plea that it is not valid nor it is contrary to the terms of statute.

30. Considering the aforesaid factors and in the light of the Judgments referred to above, this Court is of the considered view that the respondents ought to have refunded the IGST amount for the aforementioned shipping bills to the petitioner.

31. In the result, the respondents are directed to refund the undisputed IGST amount payable to the petitioner for the below mentioned Shipping Bill Nos., Viz, 7254660/11.07.2017, 7256106/11.07.2017, 7265768/11.07.2017, 7709921/31.07.2017, 78161550/04.08.2017, 7903380/09.08.2017, 8024352/16.08.2017, 8129114/21.08.2017, 8213317/24.08.2017, 8213105/24.08.2017, 8351457/31.08.2017, 8383716/01.09.2017, 8474843/06.09.2017, 8501257/07.09.2017 and 8501277/07.09.2017, within a period of eight weeks from the date of receipt of a copy of this order and the writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

[2019] 57 DSTC 192 (Delhi)

Before the Appellate Tribunal, Value Added Tax, Delhi

[M. S. Wadhwa, Member (J)]

Appeal No. 245-246/ATVAT/17-18

Bansal Insulation Products (P.) Ltd. ... Appellant

Vs.

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 10.05.2019

PRE-DEPOSIT – THIRD PROVISO TO SECTION 74(1) OF DVAT ACT, 2004 – ASSESSING AUTHORITY CREATED HUGE DEMAND WITHOUT PROPER SERVICE OF NOTICES AND NO REASONABLE OPPORTUNITY OF HEARING WAS GIVEN – OHA DIRECTED TO DEPOSIT RS. 22,00,000/- IN RESPECT OF TAX AND INTEREST AND RS. 8,00,000/- IN RESPECT OF PENALTY ORDER – NO SEPARATE NOTICE WAS ISSUED BEFORE IMPOSING PENALTY ORDER. ASSESSMENT ORDERS AND OHA ORDER SET-ASIDE – MATTER REMANDED BACK TO THE VATO TO PASS FRESH ORDER FOR ASSESSMENT.

Facts of the case

The appellant filed objections u/s 74(1) of the DVAT Act against the orders dated 24/8/2017 passed by VATO (Ward-91) whereby a disputed demand of Rs. 1,14,65,295/- as tax and interest and Rs. 76,12,832/- as penalty u/s 32 & 33 respectively was created.

The OHA invoking the Third Proviso to section 74(1) of the DVAT Act passed the impugned orders and directed appellant to deposit Rs. 22,00,000/- in respect of tax and interest and Rs. 8,00,000/- in respect of penalty as pre-deposit before the objections filed by the objector could be heard on merit.

Held

It was correct to say that without giving specific finding that notices were served on the appellant for 9/8/2017, decision of the VATO to pass ex-parte orders of assessment of tax, interest and penalty were contrary to law.

The VATO had not issued separate notices to the appellant before imposition of penalty and penalty was imposed consequentially, penalty imposed by the VATO vide orders dated 24/8/2017 was liable to be set-aside.

The Tribunal was aware that appellant had assailed the impugned orders dated 23/10/2017 passed by OHA vide which pre-condition before hearing the objections have been assailed. At the same time, appellant had also assailed the assessment orders dated 24/8/2017, which were basis for filing objections. In these circumstances, Tribunal was forced to look into the assessment orders first. It was clear that VATO vide orders dated 24/8/2017 imposed tax, interest and penalty on the appellant without giving a proper opportunity of hearing to him. So no purpose would be served if Tribunal set-aside the impugned orders dated 23/10/2017 passed by OHA, without setting aside the assessment orders of tax, interest and penalty dated 24/8/2017 passed by VATO Ward-91. Hence, both the orders i.e. order dated 23/10/2017 passed by OHA and order dated 24/8/2017 passed by VATO regarding imposition of tax, interest and penalty were hereby set-aside and the appeals were allowed. Instead of remanding back the matter to the concerned OHA, matter was remanded back to the concerned VATO to reframe assessment afresh, after giving an opportunity of hearing to the appellant. Appellant was directed to appear before the concerned VATO.

Present for the Appellant : Sh. H. L. Taneja, Advocate

Present for Respondent : Sh. C. M. Sharma, Advocate

ORDER

1. These appeals have been filed against the impugned orders dated 23/10/2017 passed by Ld. Addl. Commissioner, here-in-after called Objection Hearing Authority (in short OHA), who in exercise of powers as given in Third Proviso to section 74(1) of DVAT Act directed appellant to deposit Rs. 22,00,000/- in respect of tax and interest and Rs. 8,00,000/- in respect of penalty as a precondition for hearing the objections on merit.

2. The brief facts of the present appeals are that the appellant filed objections u/s 74(1) of the DVAT Act against the orders dated 24/8/2017 passed by ld. VATO (Ward-91) whereby a disputed demand of Rs. 1,14,65,295/- as tax and interest and Rs. 76,12,832/- as penalty u/s 32 & 33 respectively was created.

3. The ld. OHA invoking the Third Proviso to section 74(1) of the DVAT Act passed the impugned orders and directed appellant to deposit Rs. 22,00,000/- in respect of tax and interest and Rs. 8,00,000/- in respect of penalty as pre-deposit before the objections filed by the objector could be heard on merit.

4. According to appellant, before this ld. VATO (ward-91) issued three notices for the year 2014-15. The first notice was issued for hearing on

20/3/2017. The appellant appeared but his case was not taken up. The second notice dated 17/5/2017 fixing the case for 25/5/2017 was issued. This notice was online and a judgment of the Hon'ble Delhi High Court reported as 85 VST 367 has not recognized such notices which are system generated, hence the ld. VATO could not take any adverse action. Third notice was issued for hearing on 9/8/2017 but the appellant received this notice on 14/8/2017. It is clear from the above that third notice was received by the appellant much after the date of hearing, hence the assessment orders passed by ld. AVATO are not legal as they were passed without giving an opportunity of hearing to the appellant and on this ground Hon'ble Madras High Court allowed the appeal in the case of Copier Company Vs. Appellate Deputy Commissioner (CT), Chennai (South), Chennai and Anr. [(2017) 102 VST 323].

5. From the above facts, it is clear that not the first & second notice but the third notice was crucial after issuance of which the impugned orders were passed without ascertaining that the notice issued had been properly served. To conclude, it can safely be said that the impugned orders passed by ld. VATO was a nullity because it violated the principles of natural justice. In support of this argument, appellant referred to the judgment given by Hon'ble Supreme Court in the case of AIR 1964 Supreme Court page 1300.

6. So far as the imposition of penalty is concerned, appellant challenged it on the grounds that before imposition of penalty separate notice should be issued which were not issued in the present case and in this regard he referred to the judgment by Hon'ble Delhi High Court in the case of Bansal Dye Chem (P) Ltd. Vs. Commissioner of Trade & Tax.

7. Appellant also submitted that the third proviso to section 74(1) of the DVAT Act is not mandatory but directory. What is required in the third proviso to section 74(1) DVAT Act is that before asking for advance payment the Commissioner has to comply with the fact that an opportunity of hearing has been given to the appellant and then the dealer can be asked to deposit an amount deemed reasonable out of the amount under dispute. As the impugned orders passed by ld. VATO are not sustainable so the orders passed by ld. OHA has no legs to stand. Appellant has prayed that as the impugned orders passed by ld. VATO are nullity, hence impugned orders passed by ld. OHA are not sustainable in law, so appeals be allowed.

8. While the Ld. counsel for the revenue vehemently defended the impugned orders dated 23/10/2017 passed by ld. OHA and submitted that

the impugned orders are well reasoned and speaking orders. At the stage of first hearing of the objections, while passing the impugned orders, ld. OHA has briefly discussed and supported the assessment orders passed by ld. VATO and then came to the conclusion that in the facts and circumstances of the present objections, it is just and reasonable to direct appellant to deposit Rs. 22,00,000/- towards disputed amount of tax and interest and Rs. 8,00,000/- towards disputed amount of penalty as condition precedent for hearing objections on merit, hence impugned orders dated 23/10/2017 warrant no interference. So present appeals be dismissed.

9. Heard to appellant's ld. Counsel Mr. H.L. Taneja and C.M. Sharma on behalf of revenue and perused the file and case laws on the basis of which present appeals are being disposed of as follows.

10. Appellant has assailed impugned orders dated 23/10/2017 passed by ld. OHA as well as assessment orders of tax, interest and penalty dated 24/8/2017 passed by ld. VATO. So far as assessment orders of tax, interest and penalty are concerned, appellant has submitted that three notices were issued by the ld. VATO u/s 59(2), first of which was dated 16/3/2017 directing appellant to appear with record on 20/3/2017 but his case was not taken up on dated fixed while according to VATO neither appellant nor his representative attended the proceedings. Later on, reminder notices for 25/5/2017 and 9/8/2017 were issued but according to appellant last notice for 9/8/2017 was received after the date of hearing on 14/8/2017 but so far as notice dated 25/5/2017 is concerned, appellant has himself admitted that it was online which is not admissible as per judgment of Hon'ble Delhi High Court. According to appellant no notice was served upon him, hence it is violation of principle of natural justice. So far as OHAs impugned orders dated 23/10/2017 are concerned, appellant has assailed these orders on the ground that no opportunity of hearing was given and as foundation of the assessment orders has been assailed, it being nullity because no opportunity of hearing was given, hence on the basis of these assessment orders which have been assailed before ld. OHA direction to deposit Rs. 22,00,000/-towards tax & interest and Rs. 8,00,000/- cannot be given and secondly powers as given in third proviso to section 74(1), are directory and they are not mandatory, so in each and every case condition cannot be imposed.

11. It is clear from the factual background of the present appeals that ld. VATO vide orders dated 24/8/2017 imposed tax and interest to the tune of Rs. 1,14,65,295/- and penalty u/s 33 read with section 86 (10) Rs. 76,12,832/-. Appellant challenged these assessment orders before the ld. OHA who vide impugned orders dated 23/10/2017 imposed condition

of pre-deposit in exercise of powers as given in 3rd Proviso to section 74(1) of the DVAT Act, against which present appeals have been filed.
Main thrust of the appellant's arguments is that as assessment orders of tax, interest and penalty are not as per law, hence ld. OHA wrongly imposed pre-condition of depositing Rs. 22,00,000/- in respect of tax and interest and Rs. 8,00,000/- in respect of penalty. Appellant has initially challenged the assessment orders firstly on the ground that no notices were given to the appellant and secondly reasonable opportunity of hearing was not given. Perusal of assessment orders dated 24/8/2017 shows that three notices u/s 59(2) were issued to the appellant. First notice dated 16/3/2017 was given to attend the office of the assessing authority on 20/3/2017 and second reminder notice dated 17/5/2017 was sent to the appellant to appear on 25/5/2017 and lastly notice dated 2/8/2017 was given to appear on 9/8/2017. According to appellant, on the first date of hearing i.e. 20/3/2017, appellant appeared, but ld. VATO had not taken up the appellant's case. Regarding second notice dated 17/5/2017, appellant's argument was that they were on line notices and as per judgment of Hon'ble Delhi High Court they are no notices in the eye of law and lastly third notice dated 2/8/2017 in which dated of appearance was 9/8/2017, was received on 14/8/2017 i.e. after date fixed it was received. Appellant's ld. counsel submitted that reasonable opportunity of hearing should be given. In all the notices, only one week's time was given which cannot be by any standard said to be a reasonable time. In this regard, appellant's ld. counsel referred to judgment by Hon'ble Supreme Court in the case of C.B. Gautam Vs. Union of India (1993) 199 ITR 530, where Hon'ble Apex Court made following observations

> "The courts have generally read into the provisions of the relevant sections a requirement of giving a reasonable opportunity of being heard before an order is made which would have adverse civil consequences for the parties affected. This would be particularly so in a case where the validity of the section would be open to a serious challenge for want of such an opportunity."

12. In my considered view, in the present matter no reasonable opportunity of hearing was given by the concerned VATO. Appellant has also assailed that it is not sufficient that notices were sent by the concerned VATO, it is also important to see whether notices were received by the appellant before the date fixed. Appellant has submitted that last notice for 9/8/2017, on the basis of which assessment was framed ex-parte was received by the appellant on 14/8/2017, so appellant could not appear before the VATO. No specific findings have been given by the concerned VATO that notices were served on the appellant. In this regard, appellant

referred to the judgment by Hon'ble Madras High Court in the case of Copier Company Vs. Appellate Dy. Commissioner (CT) Chennai (2017) 102 VST 323, in which case Hon'ble Madras High Court held as follows —

> "Held, that the Appellate Authority had noted only the issuance of the notice and not given any specific finding whether such notice was served on the dealer, hence, appeal allowed."

13. It is correct to say that without giving specific finding that notices were served on the appellant for 9/8/2017, decision of the ld. VATO to pass ex-parte orders of assessment of tax, interest and penalty were contrary to law.

14. Appellant has also assailed imposition of penalty by the ld. VATO vide impugned orders dated 24/8/2017 on the ground that no separate notices and opportunity of hearing was given to the appellant before imposition of penalty. In this regard, appellant referred to the judgments by Hon'ble Delhi High Court in the case of Bansal Dye Chem (P) Ltd. Vs. Commissioner VAT, Delhi (2016) 87 VST 50 and another judgment by the same Court in the case of IRCTC Vs Govt. of NCT of Delhi and Ors. decided on 19/7/2010. In the case of Bansal Dye Chem (Supra), following observations by Hon'ble Delhi High Court are relevant for these appeals also —

> "The very nature of the proceedings under section 33 of the DVAT Act read with Rule 36 (2) of the DVAT Rules underscore the need for the VATO to observe the principles of natural justice while making the penalty order. This entails serving on the Assessee a separate notice to show cause why penalty should not be imposed and affording the Assessee an opportunity of being heard prior to passing the penalty order. The imposition of penalty is not a mechanical or automatic exercise but requires application of mind by the assessing authority to the facts and circumstances of the case. The fact that an Assessee is found liable to pay enhanced taxes and interest does not ipso facto determine whether the Assessee is also liable to pay a penalty".

15. As the ld. VATO had not issued separate notices to the appellant before imposition of penalty and penalty was imposed consequentially, hence in the light of above judgment penalty imposed by the ld. VATO vide orders dated 24/8/2017 is liable to be set-aside.

16. Appellant has also assailed the impugned orders dated 23/10/2017 passed by ld. OHA on the ground that powers given in 3rd Proviso to section

74(1) are directory and they are not mandatory and before imposition of pre-condition, opportunity of hearing should be given to the dealer and then only reasonable amount be directed to be deposited. According to appellant, when orders passed by ld. VATO are not sustainable on the ground that they are against the principles of natural justice, hence impugned orders passed by ld. OHA have no legs to stand, so appeals be allowed. It is correct to say that powers given to the ld. OHA in 3rd proviso to section 74(1) DVAT Act, are not mandatory but they are directory, depending upon the facts and circumstances of each case and conditions also have been imposed before imposing the pre-condition that opportunity of hearing should be given to the objector and reasonable condition be imposed keeping in mind the disputed amount of tax, interest and penalty.

17. The Tribunal is aware that appellant has assailed the impugned orders dated 23/10/2017 passed by ld. OHA vide which pre-condition before hearing the objections have been assailed. At the same time, appellant has also assailed the assessment orders dated 24/8/2017, which were basis for filing objections. In these circumstances, Tribunal was forced to look into the assessment orders first. It is clear from the above discussion that ld. VATO vide orders dated 24/8/2017 imposed tax, interest and penalty on the appellant without giving a proper opportunity of hearing to him. So no purpose would be served if Tribunal set-aside the impugned orders dated 23/10/2017 passed by ld. OHA, without setting aside the assessment orders of tax, interest and penalty dated 24/8/2017 passed by ld. VATO Ward-91. Hence, both the orders i.e. order dated 23/10/2017 passed by ld. OHA and order dated 24/8/2017 passed by ld. VATO regarding imposition of tax, interest and penalty are hereby set-aside and present appeals are allowed. Instead of remanding back the matter to the concerned ld. OHA, matter is remanded back to the concerned VATO to reframe assessment afresh, after giving an opportunity of hearing to the appellant. Appellant is directed to appear before the concerned VATO on 11/6/2019.

18. Order pronounced in the open court.

19. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2019] 57 DSTC 199 (Delhi)

Before the Appellate Tribunal, Value Added Tax, Delhi

[M. S. Wadhwa, Member (J)]

Appeal No. 162/ATVAT/18-19

Style AD ... Appellant

Vs.

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 15.04.2019

NOTICE OF ASSESSMENT OF PENALTY UNDER SECTION 86(14) OF DELHI VALUE ADDED TAX ACT, 2004 – NON COMPLIANCE OF NOTICE UNDER SECTION 59(2). APPELLANT ARGUED BEFORE OHA THAT NO NOTICE WAS SERVED – OHA REDUCED PENALTY TO RS. 25,000/- APPELLANT ARGUED BEFORE VAT TRIBUNAL THAT ANNUAL TURNOVER WERE RS. 26,00,000/- WITH NO TAX LIABILITY – PENALTY REDUCED TO RS. 10,000/-.

Present for the Appellant : Sh. S. P.Gogia, Advocate

Present for Respondent : Sh. M. L. Garg, Advocate

ORDER

1. This appeal has been filed by the appellant against the impugned orders dated 26.06.2018 passed by Ld. Addl. Commissioner, hereinafter called Objection Hearing Authority (in short OHA), who vide these orders reduced the penalty amount from Rs.50,000/- to Rs.25,000/- imposed by Ld. VATO vide order dated 02.03.2017.

2. The brief facts of the present appeal are that the appellant is engaged in the business of manufacturing and trading of packing material and registered with the Department since 2007. Appellant is filing returns timely and properly. Ld. VATO imposed a penalty of Rs.50,000/- on the appellant due to non-appearance on fixed date. Appellant came to know regarding this, when he visited the Department to know the status of his refund claim, which appellant was claiming since the year 2010-11.

3. Appellant immediately applied for the copy of the same and filed objections before the Ld. OHA, who vide impugned orders dated 26.06.18 partly allowed the objections and reduced the penalty amount. Against these orders appellant has filed present appeal before this Tribunal on following grounds:-

(i) That the impugned order is against the facts and law of the case.

(ii) That the Appellant has not been given proper opportunity of hearing which is against the principles of the natural justice.

(iii) That the appellant has not been served any notice to appear before the Ld. VATO on the particular date. It was available on the portal of Department which was not seen by the appellant.

(iv) The impugned orders passed by Ld. VATO are arbitrary as no effort has been made by the Ld. VATO to know the reason for non appearance on a single date and issuing a single notice cannot be deemed to be proper opportunity of hearing.

(v) That penalty proceedings are in the nature of • quasi criminal proceedings and no penalty should imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in disregard of its obligations.

4. On the basis of above facts and grounds of appeal, it has been prayed that impugned orders dated 26.06.2018 be set aside and present appeal be allowed.

5. Heard to appellant's Ld. Counsel Mr. S.P. Gogia and Mr. M.L. Garg on behalf of the revenue and perused the file, on the basis of which present appeal is being disposed off as follows.

6. The short controversy in the present appeal is whether penalty was rightly imposed and secondly, in the facts and circumstances of the present appeal, quantum of penalty is reasonable. As is clear from the above facts that Ld. VATO issued notice dated 01.02.2017 u/s 59(2) of the DVAT Act to the appellant to appear and produce before the Ld. VATO books of account and other desired documents but appellant failed to produce them on date fixed, hence, Ld. VATO imposed penalty u/s 33 r/w section 86(14). According to appellant, no notices were received by him and it is only when appellant came to the Department regarding refund cla'im inquiry, appellant came to know about impugned penalty orders. Appellant has also admitted that notices which were posted on the portal of the Department were not seen by him. Revenue side has not produced any evidence to prove that notices were sent also through post. Ld. OHA vide impugned order dated 26.06.2018 has reduced the penalty amount from Rs.50,000/- to Rs.25,000/-. It is an admitted fact that appellant failed to appear and produce books of accounts and other necessary documents on date fixed. So, in my opinion, penalty was rightly imposed.

7. Next question arises whether in the facts and circumstances of the present appeal, amount of penalty is reasonable. Appellant's Ld. Counsel has submitted that the annual turnover of the appellant is around Rs.26,00,000/- with no tax liability. So, ends of justice will be achieved if penalty amount is reduced from Rs.25,000/- to Rs.10,000/-. Appellant has filed adjustment order dated 02.03.2017, according to which penalty amount of Rs.25,000/- has already been adjusted against the refund claim amount of Rs.39,834/- and pending amount is Rs.10,166/-. Hence, appellant will be entitled to claim balance refund claim after adjustment of penalty of Rs.10,000/-. Accordingly, present appeal is partly allowed.

8. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2019] 57 DSTC 203 (Ahmedabad)

In the High Court of Gujarat

[Hon'ble Ms. Justice Harsha Devani and Mr. Justice Bhargav D. Karia]

R/Special Civil Application No. 7189/2019

Neuvera Wellness Ventures (P.) Ltd. & Anr. ... Petitioner(s)

Vs.

State of Gujarat & Anr. ... Respondent(s)

Date of Order: 18.04.2019

SECTION 129 OF CGST ACT, 2017 – DETENTION OF GOODS AND VEHICLE – PART B OF E-WAY BILL NOT GENERATED BY TRANSPORTER DUE TO SOME TECHNICAL PROBLEM – GOODS DURING MOVEMENT FROM CUSTOM WAREHOUSE TO DEALER'S OWN WAREHOUSE AFTER PAYMENT OF CUSTOM DUTY AND IGST ON IMPORTS WERE DETAINED WITH VEHICLE – RESPONDENT ISSUED DIRECTION TO MAKE PAYMENT OF TAX AND 100% PENALTY WITHIN SEVEN DAYS.

HELD **–** PETITIONER WAS DIRECTED TO FURNISH SECURITY OF RS. 12,00,000/- ONLY FOR THE PURPOSE OF IMMEDIATE RELIEF AND RELEASE OF GOODS WITH VEHICLE AS THE GOODS IN QUESTION WERE PERISHABLE IN NATURE. MATTER RESTORED TO THE COMPETENT AUTHORITY WHO WOULD DECIDE THE SAME AFRESH IN ACCORDANCE WITH LAW AND PASS SPEAKING ORDER AFTER DULY CONSIDERING THE SUBMISSIONS ADVANCED BY PETITIONER.

Facts of the case

Petitioner was engaged in import and sale of dietary food products such as protein powder of different flavours. The petitioner was required to pay customs duty as well as IGST payable on such imports before clearance for home consumption. The petitioner had imported consignments of Whey Protein Powder from Budapest Hungary and United States at Mundra Port under four different invoices and warehousing bills of entry were filed for such imports. Thus, the imported goods were kept in customs bonded warehouse of the petitioner and thereafter such goods were cleared by the petitioner for home consumption by filing ex-bond bills of entry on 9.3.2019, 11.3.2019 and 22.3.2019. The petitioner had paid the applicable customs duty as well as IGST payable on imports. The goods of the petitioners were being transported to their warehouse in Bhiwandi, Maharashtra. It appeared that Part-A of four separate E-way bills was uploaded by the petitioners, but Part-B of these four E-way bills was not generated by the transporter due to some technical problem.

However, since the goods were of perishable nature, the transporter did not wait for Part-B of the E-way bills. The truck and the goods were

detained by the respondent on the ground that Part-B of the E-way bills was not generated. Thereafter an order dated 27.3.2019 issued for physical verification in FORM GST MOV-02 and an order dated 27.3.2019 for detention of goods and vehicle in FORM GST MOV-06 were served upon the transporter of the goods. The petitioners upon being informed about the detention, immediately generated Part-B of the E-way bills in respect of the transactions and approached the respondent and gave explanation. It was submitted that the goods being perishable in nature and due to urgency of transporting the goods, the transporter had commenced transportation of goods immediately on clearance by the customs authorities without waiting for Part-B of the E-way bills. It was also submitted that the imported goods were taken by the petitioner to its own godown directly from the bonded warehouse and, therefore, it was not a transaction for supply in respect of which GST would be leviable and that IGST had already been paid on the transaction even before the commencement of movement of the goods.

The respondent, however, refused to release the goods on the ground of absence of Part-B of E-way bills and issued notices in FORM GST MOV-07 dated 31.3.2019 under section 129(3) of the Gujarat Goods and Services Tax Act, 2017 and the CGST Act and insisted upon payment of GST of Rs.5,93,505/- and 100% penalty of Rs.5,93,505/- under section 129 of the GST Acts. The petitioner filed its reply to the notice vide letter dated 1.4.2019 and requested to release the goods. By the impugned order of demand dated 2.4.2019 issued in FORM GST MOV-09, the respondent directed the first petitioner to make payment of tax and 100% penalty within seven days from the date of the order and recorded that in case of failure of payment of tax and penalty, action under section 130 of the GST Acts would be initiated.

Held

The Court did not intend to enter into the merits of the submissions advanced by the advocate for the petitioners as regards the liability or otherwise to pay tax and penalty and the quantum of tax payable by the petitioners. A perusal of the impugned order dated 2.4.2019 passed by the second respondent in FORM GST MOV-09 whereby tax and penalty have been demanded, revealed that the basis for computing the additional tax was the IGST paid by the petitioners. Moreover, in the impugned order there was not even a whisper as regards the submissions advanced on behalf of the petitioners, nor have the same been dealt with in the body of the order. No reasons have been assigned by the respondent for the purpose of holding the petitioner liable to payment of tax and penalty despite the fact that IGST had already been paid on such transaction and the goods were being moved from the customs warehouse to the petitioner's own

godown and it being the case of the petitioners that there was no supply, and hence, the provisions of GST Act were not applicable. The impugned order was, therefore, totally bereft of any reasoning. Reasons, it was well known, were the heart and soul of an order passed by a judicial/quasi-judicial order, without which it was difficult to pronounce one way or other as regards the validity of such order. In the absence of any reasons to support the findings given by a judicial/quasi judicial authority, it was not possible to ascertain as to how the authority came to a particular conclusion. Under the circumstances, in the absence of any reasons in support of the tax and penalty levied by the second respondent, the impugned order stands vitiated as being an unreasoned order and as such could not be sustained. However, the matter was required to be restored to the file of the respondent for deciding the same afresh in accordance with law by passing a speaking order after duly considering the submissions advanced by the petitioners.

For the foregoing reasons, the petition partly succeeds and was, accordingly allowed to the following extent:

The impugned order dated 2.4.2019 passed by the respondent was hereby quashed and set aside. The matter was restored to the file of the respondent who shall decide the same afresh in accordance with law after giving an opportunity of hearing to the petitioner. It need not be stated that the respondent shall pass a speaking order, dealing with all the contentions raised by the petitioners. In the meanwhile, as the goods in question are perishable goods, for the purpose of grant of immediate relief to the petitioners, the goods in question together with truck No. MH-43-U-8620 were ordered to be released, subject to the petitioners furnishing security by way of bond of an amount of rupees twelve lakhs (Rs.12,00,000/-) to the respondent authorities. It was clarified, that the Court has directed the petitioners to furnish security of Rs.12,00,000/- only for the purpose of granting immediate relief to the petitioners as the goods in question were perishable goods, and the same shall not be construed as if the Court had expressed any opinion that the petitioner was liable to pay such amount of tax and penalty. The liability of the petitioner shall be considered independently on the basis of the submissions advanced by the advocate for the petitioner, namely, that IGST had already been paid on the goods in question and that there was no transaction of supply in the case and any other submission that may be made before the respondent. Rule was made absolute accordingly to the aforesaid extent.

Present for the Petitioner(s) : Mr. Kuntal Parikh, Advocate

Present for Respondent(s) : Mr. Utkarsh Sharma,
Assistant Government Pleader

Oral Judgment

(Per : Honourable Ms.justice Harsha Devani)

1. Rule. Mr. Utkarsh Sharma, learned Assistant Government Pleader waives service of notice of rule on behalf of the respondents.

2. Having regard to the controversy involved in the present case, which lies in a narrow compass and with the consent of the learned advocates for the respective parties, the matter was taken up for final hearing.

3. By this petition under Article 226 of the Constitution of India, the petitioners have challenged the demand order dated 2.4.2019 passed by the second respondent State Tax Officer, (2), Mobile Squad-2, Enforcement-7, Surat, and seeks a direction to the respondents to forthwith release the goods with Truck No.MH-43-U-8620 detained and seized in exercise of powers under sections 129 and 130 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as “the CGST Act) and other related statutes.

4. Shortly stated the case of the petitioners is that the first petitioner is engaged in import and sale of dietary food products such as protein powder of different flavours. Insofar as import transactions are concerned, the petitioner is required to pay customs duty as well as integrated goods and services tax (hereinafter referred to as “IGST”)payable on such imports before clearance for home consumption. The first petitioner had imported consignments of Whey Protein Powder from Budapest Hungary and United States at Mundra Port under four different invoices and warehousing bills of entry were filed for such imports. Thus, the imported goods were kept in customs bonded warehouse of the first petitioner and thereafter such goods were cleared by the first petitioner for home consumption by filing ex-bond bills of entry on 9.3.2019, 11.3.2019 and 22.3.2019. It is the case of the petitioners that at the time of clearance of goods, the first petitioner had paid the applicable customs duty as well as IGST payable on imports. The goods of the petitioners were being transported to their warehouse in Bhiwandi, Maharashtra. It appears that Part-A of four separate E-way bills was uploaded by the petitioners, but Part-B of these four E-way bills was not generated by the transporter due to some technical problem. However, since the goods were of perishable nature, the transporter did not wait for Part-B of the E-way bills. On 27.3.2019 at 10:00 PM, the truck bearing No.MH-43-U-8620 transporting the goods of the first petitioner was stopped for verification at Kamrej Toll by the second respondent. It is the case of the petitioners that the transporter had duly produced all documents relating to the goods, including the four bills of entry for home consumption evidencing

payment of IGST on the transaction. The truck and the goods were detained by the second respondent on the ground that Part-B of the E-way bills was not generated. Thereafter an order dated 27.3.2019 issued for physical verification in FORM GST MOV-02 and an order dated 27.3.2019 for detention of goods and vehicle in FORM GST MOV-06 were served upon the transporter of the goods. It is the case of the petitioners that upon being informed about the detention, the petitioners immediately generated Part-B of the E-way bills in respect of the transactions and approached the second respondent and gave explanation. It was submitted that the goods being perishable in nature and due to urgency of transporting the goods, the transporter had commenced transportation of goods immediately on clearance by the customs authorities without waiting for Part-B of the E-way bills. It was also submitted that the imported goods were taken by the first petitioner to its own godown directly from the bonded warehouse and, therefore, it was not a transaction for supply in respect of which goods and services tax (GST) would be leviable and that IGST had already been paid on the transaction even before the commencement of movement of the goods.

5. The second respondent, however, refused to release the goods on the ground of absence of Part-B of E-way bills and issued notices in FORM GST MOV-07 dated 31.3.2019 under section 129(3) of the Gujarat Goods and Services Tax Act, 2017 (hereinafter referred to as the "GGST Act") and the CGST Act and insisted upon payment of GST of Rs.5,93,505/- and 100% penalty of Rs.5,93,505/- under section 129 of the GST Acts. The petitioner filed its reply to the notice vide letter dated 1.4.2019 and requested to release the goods. By the impugned order of demand dated 2.4.2019 issued in FORM GST MOV-09, the second respondent directed the first petitioner to make payment of tax and 100% penalty within seven days from the date of the order and recorded that in case of failure of payment of tax and penalty, action under section 130 of the GST Acts would be initiated. Being aggrieved, the petitioners have filed the present petition.

6. Mr. Kuntal Parikh, learned advocate for the petitioners, invited the attention of the court to the provisions of section 129(1) of the CGST Act to submit that clause (a) thereof provides for release of goods that have been detained or seized on payment of the applicable tax and penalty equal to one hundred per cent of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty. It was submitted that in the facts of the present case since there

was no supply of goods, the question of payment of GST would not arise, and hence, there was no question of payment of applicable tax. It was submitted that, therefore, at best the second respondent ought to have considered the goods as exempted goods and called upon the petitioner to pay the amount equal to two per cent of the value of goods or twenty-five thousand rupees, whichever is less. It was contended that in the absence of any liability of the petitioner to pay GST, the question of payment of applicable tax and penalty equal to hundred percent of such tax did not arise.

6.1 The attention of the court was further invited to clause (c) of sub-section (1) of section 129 of the CSGT Act, which provides for release of goods and conveyance detained and seized upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed. It was submitted that, therefore, considering the fact that the goods in question are perishable goods, the second respondent was not justified in not releasing the goods and calling upon the petitioner to furnish security equivalent to the amount payable under clause (a) or clause (b). Reference was also made to sub-section (2) of section 129 of the CGST Act which provides that the provisions of sub-section (6) of section 67 shall *mutatis mutandis* apply for detention and seizure of goods and conveyances. Reference was made to sub-section (6) of section 67 of the Act which provides that the goods so seized under sub-section (2) shall be released on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, as may be prescribed or on payment of applicable tax, interest and penalty payable, as the case may be.

6.2 The attention of the court was further invited to the written submissions made by the petitioner on 29.3.2019 made to the second respondent.

6.3 Referring to the impugned order, it was pointed that the same is totally a non-reasoned order and that the second respondent has not considered the submissions advanced by the petitioners that the petitioners had already paid IGST on the goods in question and hence, the question of again paying IGST amount of Rs.5,93,503/- would not arise as it would tantamount to applicability of total input credit tax on the same transaction. It was submitted that the impugned order being contrary to the provisions of section 129 of the GGST and CGST Acts and being a non-speaking order deserves to be quashed and set aside and the respondents should be directed to release the goods in question, subject to such conditions as this court may deem fit.

7. On the other hand, Mr. Utkarsh Sharma, learned Assistant Government Pleader for the respondents, supported the impugned order by submitting that admittedly the goods were not accompanied by Part-B of the E-way bills and hence, the second respondent was wholly justified in detaining the conveyance and goods. It was further submitted that as there was a contravention of the provisions of the GST Act and the rules made thereunder, inasmuch as the goods were being transported without Part B of the E-way bills, the second respondent was wholly justified in imposing tax and penalty thereon. It was urged that the petition being devoid of merit, deserves to be dismissed.

8. This court has considered the submissions advanced by the learned advocates for the respective parties and has perused the record of the case as available before this court. 9. For the reasons that follow, this court does not intend to enter into the merits of the submissions advanced by the learned advocate for the petitioners as regards the liability or otherwise to pay tax and penalty and the quantum of tax payable by the petitioners. A perusal of the impugned order dated 2.4.2019 passed by the second respondent in FORM GST MOV-09 whereby tax and penalty have been demanded, reveals that the basis for computing the additional tax is the IGST paid by the petitioners. Moreover, in the impugned order there is not even a whisper as regards the submissions advanced on behalf of the petitioners, nor have the same been dealt with in the body of the order. No reasons have been assigned by the second respondent for the purpose of holding the petitioner liable to payment of tax and penalty despite the fact that IGST had already been paid on such transaction and the goods were being moved from the customs warehouse to the petitioner's own godown and it being the case of the petitioners that there was no supply, and hence, the provisions of GST Act are not applicable. The impugned order is, therefore, totally bereft of any reasoning. Reasons, it is well known, are the heart and soul of an order passed by a judicial/quasi-judicial order, without which it is difficult to pronounce one way or other as regards the validity of such order. In the absence of any reasons to support the findings given by a judicial/quasi judicial authority, it is not possible to ascertain as to how the authority came to a particular conclusion. Under the circumstances, in the absence of any reasons in support of the tax and penalty levied by the second respondent, the impugned order stands vitiated as being an unreasoned order and as such cannot be sustained. However, the matter is required to be restored to the file of the second respondent for deciding the same afresh in accordance with law by passing a speaking order after duly considering the submissions advanced by the petitioners.

10. However, the goods of the petitioner being perishable goods, it would not be just, proper and reasonable to keep such goods under

detention any longer. Under the circumstances, the petitioners would be entitled to the release of the conveyance as well as the goods in question subject to compliance of clause (c) of section 129(1) of the CGST/GGST Acts.

11. For the foregoing reasons, the petition partly succeeds and is, accordingly allowed to the following extent: The impugned order dated 2.4.2019 passed by the second respondent (Annexure-H to the petition) is hereby quashed and set aside. The matter is restored to the file of the second respondent who shall decide the same afresh in accordance with law after giving an opportunity of hearing to the petitioner. It need not be stated that the second respondent shall pass a speaking order, dealing with all the contentions raised by the petitioners. In the meanwhile, as the goods in question are perishable goods, for the purpose of grant of immediate relief to the petitioners, the goods in question together with truck No.MH-43-U-8620 are ordered to be released, subject to the petitioners furnishing security by way of bond of an amount of rupees twelve lakhs (Rs.12,00,000/-) to the respondent authorities. It is clarified, that this court has directed the petitioners to furnish security of Rs.12,00,000/- only for the purpose of granting immediate relief to the petitioners as the goods in question are perishable goods, and the same shall not be construed as if this court has expressed any opinion that the petitioner is liable to pay such amount of tax and penalty. The liability of the petitioner shall be considered independently on the basis of the submissions advanced by the learned advocate for the petitioner, namely, that IGST has already been paid on the goods in question and that there is no transaction of supply in the present case and any other submission that may be made before the second respondent. Rule is made absolute accordingly to the aforesaid extent. Direct service is permitted.

[2019] 57 DSTC 210 (Bombay)

In the High Court of Bombay

[Hon'ble Justice Ranjit More and Justice Smt. Bharati Dangre]

Criminal PIL Stamp No. 22/2019

Gurdeep Singh Sacher ... Petitioner

Vs.

Union of India & Ors. ... Respondents

Date of Order: 30.04.2019

COMPANY PROVIDING ONLINE FANTASY SPORTS GAMING AND PAYING GST UNDER ENTRY 998439 – WHETHER IT WAS CONDUCTING ILLEGAL OPERATIONS OF GAMBELLING/BETTING/WAGERING IN THE GUISE OF ONLINE FANTASY

SPORTS GAMING; HELD – NO. ONLINE FANTASY SPORTS ARE NOT GAMBELLING BUT A GAME OF SKILL, NOR OF MERE CHANCE. WHETHER COMPANY IN ERROR TO PAY GST @ 18% UNDER ENTRY 998439 FOR ON-LINE GAMING ACTIVITIES; HELD – NO.

Facts of the Case

The petitioner claimed himself as a public spirited advocate practising in this High Court, and seeks directions to initiate criminal prosecution against the respondent No.3- a Company named "Dream 11 Fantasy Pvt. Ltd.", firstly for allegedly conducting illegal operations of gambling/betting/ wagering in the guise of Online Fanstasy Sports Gaming, which as per the petitioner shall attract penal provisions of Public Gambling Act, 1867, and secondly for alleged evasion of Goods & Service Tax (GST) payable by it by violating the provisions of Goods and Service Tax Act and the Rule 31A of CGST Rules, 2018.

Held

It was evident that the expressions 'betting' or 'gambling' were used interchangeably in Section 65B(15) of the Finance Act, 1994. Again the test applicable was whether it was a game of chance or game of skill. Only if the result of the game/contest was determined merely by chance or accident, any money put on stake with consciousness of risk and hope to gain, would be 'gambling' or 'betting'. There was no merit in the submission that the result of their fantasy game/contest shall be considered as merely by chance or accident notwithstanding involvement of substantial skill. The petitioner claimed that the result would depend largely on extraneous factors such as, who amongst the players actually play better in the real game on a particular day, which according to the petitioner would be a matter of chance, howsoever skillful a participant player in the online fantasy game may be. The petitioner had lost sight of the fact that the result of the fantasy game contest on the platform of respondent No.3, was not at all dependent on winning or losing of any particular team in the real world game. Thus, no betting or gambling was involved in their fantasy games. Their result was not dependent upon winning or losing of any particular team in real world on any given day. In these circumstances, there was no plausible reason to take a contrary view than that taken by the Hon'ble Punjab and Haryana High court, which judgment has already been upheld by the Hon'ble Supreme Court in the SLP filed against the respondent No. 3 itself. Moreover, the said issue was also covered by a judgment of 3 Judge Bench of the Hon'ble Supreme Court, to which detailed reference was made in the order of the Hon'ble Punjab and Haryana High Court. It was thus cleared that the activity of the respondent No. 3 did not amount

to 'gambling' or 'betting' or 'wagering' even if the definition contained in Finance Act, 1994 was taken into consideration.

Since the Online Fantasy Sports Gaming of respondent No. 3 were not gambling services, the respondent No. 3 was not in error in paying GST under this entry for its on-line gaming activities, by paying applicable GST @ 18%.

It was seen that the entire case of the Petitioner was wholly untenable, misconceived and without any merit. It could be seen that success in Dream 11's fantasy sports depends upon user's exercise of skill based on superior knowledge, judgment and attention, and the result thereof was not dependent on the winning or losing of a particular team in the real world game on any particular day. It was undoubtedly a game of skill and not a game of chance. The attempt to reopen the issues decided by the Punjab and Haryana High Court in respect of the same online gaming activities, which were backed by a judgment of the three judges bench of the Apex Court in K. R. Lakshmanan**,** that too, after dismissal of SLP by the Apex Court was wholly misconceived.

Present for the Petitioner	:	Dr. Sujay Kantawala and Mr. Sarosh Damania, Advocates
Present for Respondent(s)	:	Mr. Vikram Nankani, Sr. Advocate with Mr. Lavesh Nankani, Mr. Ramnath Prabhu and Mr. Prithviraj, Mr. Nikhil Rungta, Advocate for Respondent No. 3. Ms. Sangeeta D. Shinde, APP for the State.

JUDGMENT

Ranjit More, J.

1. Rule. Rule is made returnable forthwith and, by consent, the matter is heard finally.

2. Heard Dr. Kantawala, learned counsel for the petitioner and Mr.Nankani, learned senior counsel for the respondent No.3.

3. The petitioner claims himself as a public spirited advocate practising in this High Court, and seeks directions to initiate criminal prosecution against the respondent No.3- a Company named "Dream 11 Fantasy Pvt.

Ltd.", firstly for allegedly conducting illegal operations of gambling/betting/ wagering in the guise of Online Fanstasy Sports Gaming, which as per the petitioner shall attract penal provisions of Public Gambling Act, 1867, and secondly for alleged evasion of Goods & Service Tax (GST) payable by it by violating the provisions of Goods and Service Tax Act and the Rule 31A of CGST Rules, 2018.

3. The petitioner has placed on record a copy of the print-out taken from the web-site of respondent No.3 for giving the details and manner of selecting virtual teams and playing free or paid online fantasy games on internet on the web-site of the respondent No.3. It is the case of the petitioner that players can create different virtual teams for playing fantasy games. Admittedly, for understanding and getting a know-how of the game, option to play for free is also available on the website. He, however, claims that the fantasy games are such that after some time people tend to pay with their hard earned money, instead of playing for free. According to him, these fantasy games are nothing but means to lure people to spend their money for quick earning by taking a chance, and most of then end up losing their money in the process, which is thus gambling/betting/wagering, being different forms of "gambling". According to his belief, a fantasy game of this nature is merely a game of chance or luck, which is totally dependent upon the luck of a player on a particular day. He further claims that upon entering in various contests and putting alleging bet money in them, the player receives a tax invoice in which tax is being charged only on the amount received and retained by respondent No.3 towards platform fee say 20%, and not on the entire money which is put a stake by the player. For the balance 80% amount only "acknowledgement" is given. Admittedly, this "acknowledgement" amount collected from each player is pooled in as Escrow Account and their contribution ultimately gets distributed amongst the players themselves as price money immediately upon conclusion of game, as a result of which, some players get more than their contribution, and some lose money. According to the petitioner, since these activities are nothing but 'gambling' or 'betting' even if this acknowledgement amount is separately kept in an Escrow account and not retained by the respondent No.3, GST would be payable even on this amount. However, since GST is not being paid on this "acknowledgement" amount by the respondent No.3 and since the activities such as those being conducted by the respondent No.3, are nothing but 'betting' or 'gambling', the same according to the petitioner shall be governed by Rule 31A(3) of CGST Rules, 2018. According to him, like horse racing the said Rule shall apply even ins such fantasy games amounting to gambling and/or betting and/ or wagering, and thus GST shall be payable on 100% amount collected by the respondent No.3, which shall be under proper classification so as

to pay Tax @ 28% instead of @18%. The petitioner in effect submits that the activities of the respondent No.3 is nothing but 'gambling'/'betting', and for promoting gambling/betting and for evading payment of CGST/ IGST, suitable action shall be taken for criminal prosecution of the said respondent No.3.

4. At the outset, it is submitted on behalf of the respondent No.3 that the main issue raised by the petitioner is substantially decided in a judgment dated 18th April, 2017 passed by the Hon'ble Punjab and Haryana High Court, in another such petition filed against the respondent No.3, which is also referred in the petition. Admittedly, the said judgment dated 18th April, 2017, records the introduction Dream 11- the online gaming platform of respondent no.3 for online fantasy sports games, and gives in detail the activities carried out on their platform. After detailed consideration of the facts as well as law, the Hon'ble Punjab and Haryana High Court categorically held that success in Dream 11's Fantasy Sports basically arises out of user exercise of superior knowledge, judgment and attention thus as per their skill; and that their fantasy games are exempt from the application of the penal provisions, in view of section 18 of 1867 Act, and held that they have protection guaranteed under Article 19(1)(g) of the Constitution of India. A SLP against this judgment of Punjab and Haryana High Court was admittedly dismissed by the Hon'ble Supreme Court vide Order dated 15.09.2017. Despite this admitted position, the petitioner effectively seeks to reopen not only the issue decided therein, but also seeks to reopen a judgment of 3 Judges Bench of the Hon'ble Supreme Court in K. R. Lakshmanan v. State of Tamil Nadu [AIR 1996 SC 1153] which was relied upon by the Punjab and Haryana High Court to hold that since success in Dream 11's fantasy sports basically arises out of user's exercise of superior knowledge, judgment and attention, it is a game of skill and not a game of chance. The 3 judges bench of the Hon'ble Apex Court held that the “horse racing” is not gambling, and is a game of skill, nor of mere chance. The Petitioner erroneously claims that these judgment are per incurium. It is the case of the respondent No. 3 that such frivolous and misconceived petitions are being filed by targeting them before different forums in the guise of PILs, and even the present petition is abuse of process of law, and each of the Petitioner's claim for seeking criminal prosecution of the respondent No.3 is on such frivolous grounds, which lack in bona fide and merits. In the written submissions tendered on behalf of the respondent No.3, it is also contended that the Online Fantasy Sports Gaming conducted by it is predominantly game of skill, where users/participants create virtual teams comprising as many players as in real life teams, e.g., in cricket, he creates team of 11 real players out of the 30 probables, for upcoming matches. There has to be a mix of players

from both the competing teams between whom the real life matches being played. The users/ participants compete against such virtual teams created by other users / participants. The winners are decided based on points scored, using statistical data generated by the real-life performance of the players on the ground. Further, the deadline to create a team is latest by the official match start time. No changes can be made after the deadline. The participants do not bet on the outcome of the match and merely play a role akin to that of selectors in selecing the team. The points are scored by the participants for the entire duration of the whole match and not any part of the match. Their Online Fantasy Sports Gaming are “games of skill” and not any “games of chance” and therefore outside the purview of Rule 31A(3). It was submitted that present PIL is gross abuse of the process of the Court and ought to be dismissed in the light of the judgment of the Hon'ble Supreme Court in State of Uttaranchal v. Balwant Singh Chaufal and others [(2010) 3 SCC 402].

5. After perusing the records and considering the arguments, there are mainly two issues which arise for consideration :-

(a) Whether the activities of the respondent No. 3 amount to 'Gambling' \ 'Betting' ?

(b) Whether there is any merit in the allegation of violation of Rule 31A(3) of CGST Rules, 2018 and erroneous classification ?

6. In respect of the first issue, after considering the very same activities of the respondent No.3 at considerable length, it has already been held by the Punjab and Haryana High Court that the activities performed by the respondent No.3 do not amount to 'gambling', even as per the Public Gambling Act, 1867. The respondent No.3 refers and relies on the findings contained in the said judgment. Admittedly, SLP filed thereagainst has been dismissed. The Punjab and Haryana High Court has categorically held that these are games of skill and not games of chance. Various judgments have been referred and relied upon in the said judgment. There is no reason to take a different view. The Punjab and Haryana High Court has relied upon a three Judges Bench decision of the Hon'ble Apex Court in K. R. Lakshmanan (Dr.) v.State of T.N.,(1996) 2 SCC 226, wherein it was held as under-

> “9. On the same day when this Court decided Chamarbaugwala's case, the same four-Judge Bench presided over by S.R. Das, Chief Justice, delivered judgment in another case between the same parties titled R.M.D. Chamarbaugwala & Anr. vs. Union of

India & Anr. The validity of some of the provisions of the Prize Competitions Act (42 of 1955) was challenged before this Court by way of petitions under Article 32 of the Constitution. Venkatarama Ayyar J. speaking for the Court noticed the contentions of the learned counsel for the parties in the following words:-

"Now, the contention of Mr. Palkhiwala, who addressed the main argument in support of the petitions, is that prize competition as defined in S. 2(d) would include not only competitions in which success depends on chance but also those in which it would depend to a substantial degree on skill; .... that even if the provisions could be regarded as reasonable restrictions as regards competitions which are in the nature of gambling, they could not be supported as regards competitions wherein success depended to a substantial extent on skill, and that as the impugned law constituted a single inseverable enactment, it must fail in its entirety in respect of both classes of competitions. Mr Seervai who appeared for the respondent, disputes the correctness of these contentions. He argues that `prize competition' as defined in S.2 (d) of the Act, properly construed, means and includes only competitions in which success does not depend to any substantial degree on skill and are essentially gambling in their character; that gambling activities are not trade or business within the meaning of that expression in Art. 19(1) (g), and that accordingly the petitioners are not entitled to invoke the protection of Art. 19(6); and that even if the definition of `prize competition' in S.2(d) is wide enough to include competitions in which success depends to a substantial degree on skill and Ss. 4 and 5 of the Act and Br. 11 and 12 are to be struck down in respect of such competitions as unreasonable restrictions not protected by Art. 19 (6), that would not affect the validity of the enactment as regards the competitions which are in the nature of gambling, the Act being severable in its application to such competitions."

The learned Judge thereafter observed as under:- "We must hold that as regards gambling competitions, the petitioners before us cannot seek the protection of Art. 19(1) (g)...

(5) As regards competitions which involve substantial skill however, different considerations arise. They are business activities, the protection of which is guaranteed by Art. 19(1) (g)..."

Finally, Venkatarama Ayyr, J. speaking for the Court held as under:- "(23) Applying these principles to the present Act, it will

not be questioned that competitions in which success depends to a substantial extent on skill and competitions in which it does not so depend, form two distinct and separate categories. The difference between the two classes of competitions is as clearcut as that between commercial and wagering contracts. On the facts there might be difficulty in deciding whether a given competition falls within one category or not; but when its true character is determined, it must fall either under the one or the other. The distinction between the two classes of competitions has long been recognised in the legislative practice of both the United Kingdom and this country, and the Courts have, time and again, pointed out the characteristic features which differentiate them. And if we are now to ask ourselves the question would Parliament have enacted the law in question if it had known that it would fail as regards competitions involving skill, there can be no doubt, having regard to the history of the legislation, as to what our answer would be. The conclusion is therefore inescapable that the impugned provisions, assuming that they apply by virtue of the definition in S.2(d) to all kinds of competitions, are severable in their application to competitions in which success does not depend to any substantial extent on skill."

This Court, therefore, in the two Chamarbaugwala-cases, has held that gambling is not trade and as such is not protected by Article 19(1) (g) of the Constitution. It has further been authoritatively held that the competitions which involve substantial skill are not gambling activities. Such competitions are business activities, the protection of which is guaranteed by Article 19(1) (g) of the Constitution. It is in this background that we have to examine the question whether horse-racing is a game of chance or a game involving substantial skill.

19. We may now take-up the second question for consideration. Section 49 of the Police Act and Section 11 of the Gaming Act specifically provide that the penal provisions of the two Acts shall not apply to the games of "mere skill wherever played". The expression "game of mere skill" has been interpreted by this Court to mean "mainly and preponderantly a game of skill". In State of Andhra Pradesh vs. K. Satyanarayana & Ors. (1968) 2 SCR 387, the question before this Court was whether the game of Rummy was a game of mere skill or a game of chance. The said question was to be answered on the interpretation of Section 14 of the Hyderabad Gambling Act (2 of 1305 F) which was pari materia

to Section 49 of the Police Act and Section 11 of the Gaming Act. This Court referred to the proceedings before the courts below in the following words:

"The learned Magistrate who tried the case was of the opinion that the offence was proved, because of the presumption since it was not successfully repelled on behalf of the present respondents. In the order making the reference the learned Sessions Judge made two points: He first referred to Section14 of the Act which provides that nothing done under the Act shall apply to any game of mere skill wherever played and he was of opinion on the authority of two cases decided by the Madras High Court and one of the Andhra High Court that the game of Rummy was a game of skill and therefore the Act did not apply to the case."

This Court held the game of Rummy to be a game of mere skill on the following reasoning:

"We are also not satisfied that the protection of s.14 is not available in this case. The game of Rummy is not a game entirely of chance like the `three- card' game mentioned in the Madras case to which we were referred. The `three card' game which goes under different names such as `flush', `brag' etc. is a game of pure chance. Rummy, on the other hand requires certain amount of skill because the fall of the cards has to be memorised and the building up of Rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of Rummy is a game of entire chance. It is mainly and preponderantly a game of skill. The chance in Rummy is of the same character as the chance in a deal at a game of bridge. In fact in all games in which cards are shuffled and dealt out, there is an element of chance, because the distribution of the cards is not according to any set pattern but is dependent upon how the cards find their place in the shuffled pack. From this alone it cannot be said that Rummy is a game of chance and there is no skill involved in it."

20. The judgments of this Court in the two Chamarbaugwala cases and in the Satyanarayana case clearly lay-down that (i) the competitions where success depends on substantial degree of skill are not `gambling' and (ii) despite there being an element of chance if a game is preponderantly a game of skill it would nevertheless be a game of "mere skill". We, therefore, hold that the expression "mere skill" would mean substantial degree or preponderance of skill.

7. The petitioner himself admits that in the 'How to Play' link of the website, the steps to start playing are as follows:

"Follow these 5 easy steps to get started*:

*** Select A Match :**

Select any of the upcoming matches from any of the current or upcoming cricket series

*** Create Your Team:**

Use your sports knowledge and showcase your skills to create your Dream11 team within a budget of 100 credits

*** Join a Contest:**

Join any Dream 11 free or cash contest to win cash and the ultimate bragging rights to showoff your improvement in the Free/ Skill contest on Dream 11!

*** Follow the Match:**

Watch the real match and track you fantasy scorecard (updated every 2 minutes)"

*** Withdraw your Winnings:**

Instantly withdraw your winning from your Dream11 account (One Time Verification required)"

8. The petitioner has relied upon the definition of "Betting or Gambling" in Finance Act, 1994 as contained in definition in Section 65-B(15) thereof, as follows:-

"Section 65-B. Interpretations:

(15) Betting or gambling means putting on stake something of value, particularly money, with consciousness of risk and hope of gain on the outcome of a game or a contest, whose result may be determined by chance or accident, or on the likelihood of anything occurring or not occurring."

It is evident that the expressions 'betting' or 'gambling' were used interchangeably in Section 65B(15) of the Finance Act, 1994. Again the

test applicable was whether it was a game of chance or game of skill. Only if the result of the game/contest is determined merely by chance or accident, any money put on stake with consciousness of risk and hope to gain, would be 'gambling' or 'betting'. There is no merit in the submission that the result of their fantasy game/contest shall be considered as merely by chance or accident notwithstanding involvement of substantial skill. The petitioner claims that the result would depend largely on extraneous factors such as, who amongst the players actually play better in the real game on a particular day, which according to the petitioner would be a matter of chance, howsoever skillful a participant player in the online fantasy game may be. The petitioner has lost sight of the fact that the result of the fantasy game contest on the platform of respondent No.3, is not at all dependent on winning or losing of any particular team in the real world game. Thus, no betting or gambling is involved in their fantasy games. Their result is not dependent upon winning or losing of any particular team in real world on any given day. In these circumstances, there is no plausible reason to take a contrary view than that taken by the Hon'ble Punjab and Haryana High court, which judgment has already been upheld by the Hon'ble Supreme Court in the SLP filed against the respondent No.3 itself. Moreover, the said issue is also covered by a judgment of 3 Judge Bench of the Hon'ble Supreme Court, to which detailed reference is made in the order of the Hon'ble Punjab and Haryana High Court. It is thus clear that the activity of the respondent No.3 do not amount to 'gambling' or 'betting' or 'wagering' even if the definition contained in Finance Act, 1994 is taken into consideration.

9. The allegation of the petitioner regarding GST evasion or erroneous classification is also directly based on the outcome of the above first issue. Only, if their Online Fantasy Sports Gaming is 'gambling' or 'betting', there is a scope to infer possibility of any tax evasion.

10. In this context, meaning of the expressions 'supply' and 'consideration' and explanatory notes to classification 998439 would be relevant. Section 7 of CGST Act defines the scope of the expression 'supply'. It reads as under-

> **"7. Scope of supply-** (1) For the purposes of this Act, the expression "supply" includes -
>
> ….....
>
> **(2) Notwithstanding anything contained in subsection (1)-**
>
> **(a) activities or transactions specified in Schedule III; or**

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services." (3)....."

11. The said Schedule III referred in Section 7(2) of the Act reads as under -

"SCHEDULE III
[See Section 7]

Activities or transactions which shall be treated neither as a supply of goods nor a supply of services

1.....

6.Actionable claims, other than lottery, betting and gambling."

12. Thus, the activities mentioned in Schedule III under the CGST Act are not taxable as the same are neither 'supply' of goods nor 'supply' of services. The entry in schedule III relevant for the instant case is Entry 6 which includes actionable claims, other than lottery, betting and gambling.

13. In the instant case, admittedly, there is no dispute that the amounts pooled in the escrow account is an 'actionable claim', as the same is to be distributed amongst the winning participating members as per the outcome of a game. But, as held hereinabove since the activities of the respondent No.3 do not amount to lottery, betting and gambling, the said actionable claim would fall under Entry 6 of the Schedule III under Section 7(2) of CGST Act. Therefore, this activity or transaction pertaining to such actionable claim can neither be considered as supply of goods nor supply of services, and is thus clearly exempted from levy of any GST.

14. Thus, there is no merit in the submission that the entire deposit received from the member is taxable. It is also erroneously contended that even this amount shall be included in the definition of expression 'consideration' as per Section 2(31) of the Act, which reads as under-

(31) "**consideration**" in relation to **the supply of goods or services or both includes -**

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of,

the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government.

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government; Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;

The scope of definition of 'consideration' extends only in relation to “the supply of goods or services or both”. Since, the said activity or transaction relating to the actionable claim qua the amounts of participants pooled in escrow arrangement, for which only acknowledgement is given, is neither supply of goods nor supply of services, the same is clearly out of the purview of the expression 'consideration'.

15. Since the CGST Act itself do not allow the imposition of Tax on such 'actionable claim' in relation to the Online Fantasy Sports Gaming of the respondent No.3, it being other than lottery, betting and gambling, the said Rule 31A(3) of CGST Rules 2018 cannot be read in such a manner so as to override the parent CGST Act. The said Rule 31A(3) reads as under :-

“31A. Value of supply n case of lottery, betting, gambling and horse racing.-

(3) the value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator.”

Since the actionable claim in the Online Fantasy Sport Gaming of the respondent No.3 are amongst such actionable claims as per Schedule III and Section 7(2) of the Act, which are not considered as 'supply of goods' or 'supply of services', Rule 31A has no application. Moreover, actionable claim referred to in Rule 31A is limited to only activities or transactions in the form of chance to win in “lottery” or “betting” or “gambling” or “horse racing in a race club”. Thus, Rule 31A which is restricted only to such four supplies of actionable claim, has no application in this case.

16. It is further claimed by the Petitioner that respondent No. 3 is liable to levy GST @ 28%, however, respondent No.3 wrongfully, to

evade tax, claims classification under entry 998439 on the sum received by it as platform fees. Even this submission is wholly misconceived. The "Explanatory Notes" to the said classification under entry 998439 read as follows :-

> **"Explanatory Notes to the Scheme of Classification of Services**
> **"998439 Other on-line content n.e.c.**
>
> This service code includes games that are intended to be played on the Internet such as role-playing games (RPGs), strategy games, action games, card games, children's games: software that is intended to be executed on-line, except game software, mature theme, sexually explicit content published or broadcast over the Internet including graphics, live feeds, interactive performances and virtual activities; content provided on web search portals, I.e, extensive database of Internet addresses and content in an easily searchable format; statistics or other information, including streamed news; other non-line content not included above such as greeting cards, jokes, cartoons, graphics, maps.
>
> Note: Payment may be by subscription, membership fee, pay-perplay or pay- per-view.
>
> This service code does not include :
>
> – software downloads cf. 998434
> – on-line gambling services, cf. 999692
> – adult content in on-line newspapers, periodicals, books, directories, cf 998431" [emphasis supplied]

The said entry, as clarified in these Explanatory Notes, evidently covers host of online games which are intended to be played on the Internet and involve payment by subscription, membership fee, pay-per-play or payper view. The said entry however excludes on-line gambling services. Since the Online Fantasy Sports Gaming of respondent No.3 are not gambling services, the respondent No. 3 is not in error in paying GST under this entry for its on-line gaming activities, by paying applicable GST @ 18%.

17. The authorities have therefore not taken any coercive steps against the respondent No.3, and rightly so. No case for issuing any directions is made out. It is seen that the entire case of the Petitioner is wholly untenable, misconceived and without any merit. It can be seen that

success in Dream 11's fantasy sports depends upon user's exercise of skill based on superior knowledge, judgment and attention, and the result thereof is not dependent on the winning or losing of a particular team in the real world game on any particular day. It is undoubtedly a game of skill and not a game of chance. The attempt to reopen the issues decided by the Punjab and Haryana High Court in respect of the same online gaming activities, which are backed by a judgment of the three judges bench of the Apex Court in K. R. Lakshmanan (supra), that too, after dismissal of SLP by the Apex Court is wholly misconceived.

18. Rule discharged. The criminal PIL is dismissed. No order as to costs.

[2019] 57 DSTC 224 (Chandigarh)

In the High Court of Punjab & Haryana

[Hon'ble Justice Ajay Kumar Mittal and Justice Manjari Nehru Kaul]

CWP 6353/2019

Datawind Innovations Pvt. Ltd. ... Petitioner

Vs.

Union of India & Ors. ... Respondents

Date of Order: 08.03.2019

REFUND – SECTION 54 OF CGST ACT, 2017 – ONLINE APPLICATIONS RFD-01A FOR THE TAX PERIOD JULY, AUGUST AND SEPTEMBER, 2017 FOR CLAIMING REFUND OF EXCESS ITC OF RS. 3,51,03,950/- WERE FILED ON 03.09.2018 & 12.09.2018 – THREE DEFICIENCY MEMOS DT 12.11.2018 ISSUED BY STATE GST AUTHORITY GIVING DIRECTION TO APPEAR AND SUBMIT THE DOCUMENTS – DEALER COMPLIED WITH THE DIRECTIONS – NO RESPONSE RECEIVED – WRIT PETITION FOR RELEASE OF REFUND – RESPONDENT DIRECTED TO PASS A SPEAKING ORDER WITHIN ONE MONTH IN ACCORDANCE WITHIN LAW – FURTHER DIRECTED IN CASE DEALER FOUND ENTITLED TO THE REFUND, RELEASE THE SAME WITHIN ONE MONTH.

Present for the Petitioner : Mr. Sandeep Goyal, Advocate

ORDER

Ajay Kumar Mittal, J.

1. In this writ petition filed under Articles 226/227 of the Constitution of India, the petitioner has prayed for issuance of a writ of mandamus

directing the respondents to refund the excess Input Tax Credit (ITC) of ` 3,51,03,950/- for which the online applications RFD-01A dated 3.9.2018 and 12.9.2018 (Annexures P-5 to P-7, respectively) for the months of July, August and September, 2017 and subsequent reminders dated 20.9.2018 (Annexure P-13) had been moved.

2. The petitioner is a manufacturer and seller of automatic data processing machines and units thereof, like tablets and smart phones etc. It was registered in the State of Punjab having registration certificate dated 8.8.2017 (Annexure P-1). The petitioner filed its return at Amritsar for the month of July, 2017 with a total excess unutilized ITC of ₹ 2,33,75,586/- as is clear from the GSTR-3B (Annexure P-2). Similarly, the petitioner filed its return in Form GSTR-3B (Annexure P-3) for the month of August, 2017 and had an excess of ` 28,62,814/- after adjustment of output tax liability. For the month of September, 2017, the petitioner filed its return (Annexure P-4) and after the adjustment of output tax liability, it had an excess of ` 15,97,047/-. Since the petitioner was eligible for refund of ITC, it applied vide online applications in RFD-01A on 3.9.2018 and 12.9.2018 (Annexures P-5 to P-7, respectively) for the months of July, 2017 to September, 2017 as is discernible from the ARN receipts dated 3.9.2018 and 12.9.2018 (Annexures P-8 to P-10, respectively). Subsequent to the filing of the online applications, the petitioner also submitted the documents for GST Refund physically with the Assistant Commissioner, Division-II, Amritsar vide letter dated 10.9.2018 (Annexure P-11) and also submitted the necessary documents vide letter dated 18.9.2018 (Annexure P-12). Thereafter, the President and CEO of the petitioner vide email dated 20.9.2018 (Annexure P-13) requested the respondents for refund of the amount. Vide letter dated 25.9.2018 (Annexure P-14), the petitioner was informed that the refund application was required to be processed by the State GST authorities. Pursuant thereto, the petitioner submitted the documents to respondent No.4 vide letter dated 25.9.2018 (Annexure P-15). Similarly, vide letters dated 25.9.2018 (Annexures P-16 and P-17, respectively), the petitioner submitted documents for GST refund. However, the petitioner has received three deficiency memos dated 12.11.2018 (Annexure P-18 to P-20, respectively) from respondent No.4 with a direction to appear and submit the documents. In response thereto, the petitioner appeared and submitted documents, but no response has been received till date. Hence, the present writ petition.

3. Learned counsel for the petitioner submitted that for the relief claimed in the writ petition, the petitioner has moved online applications dated 3.9.2018 and 12.9.2018 (Annexures P-5 to P-7, respectively) for the months of July, August and September, 2017, but no action has so far been taken thereon.

4. After hearing learned counsel for the petitioner, perusing the present petition and without expressing any opinion on the merits of the case, we dispose of the present petition by directing respondent No.4 to take a decision on the applications dated 3.9.2018 and 12.9.2018 (Annexures P-5 to P-7, respectively), moved by the petitioner, in accordance with law by passing a speaking order and after affording an opportunity of hearing to the petitioner within a period of one month from the date of receipt of certified copy of the order. It is further directed that in case, the petitioner is found entitled to the refund of the amount, the same be released within next one month, in accordance with law.

[2019] 57 DSTC 226 (Madras)

In the High Court of Madras

[Hon'ble Justice K. Ravichandrabaabu]

W.P. No. 52/2019
W.M.P. No. 54/2019

Preethi Kitchen Appliances Pvt. Ltd. ... Petitioner

Vs.

The State Tax Officer & Ors. ... Respondents

Date of Order: 04.01.2019

DETENTION – GOODS OF THE DEALER DETAINED FOR THE REASON PART B OF E-WAY BILL NOT UPDATED – WRIT PETITION – DEALER CONTENDED TO PAY ONE TIME TAX UNDER CGST AND SGST FOR THE PURPOSE OF RELEASING THE GOODS – DIRECTION WERE GIVEN TO PAY TAX WITHIN FOUR DAYS TO THE DEALER AND RESPONDENT TO RELEASE THE GOODS AFTER RECEIPT OF PAYMENT. DEALER AT LIBERTY TO AGITATE THE MATTER BEFORE APPROPRIATE AUTHORITY.

Present for the Petitioner : Mr. R. Kumar for Mr. N. Murali

Present for Respondent(s) : Mrs. Dhana Madhri,
Government Advocate (Tax)

Order

Mrs. G.Dhana Madhri, learned Government Advocate (Tax) takes notice for the respondents. By consent of the parties, this main writ petition is taken up for final disposal at the admission stage itself.

2. This writ petition is filed challenging the order of detention of goods dated 27.12.2018.

3. The impugned detention order was passed on the reason that the Part-B of the E-Way bill was not updated. According to the petitioner, the Part-B of the E-Way bill was properly filled up and also updated and therefore, the consignment could not be intercepted. Ventilating such grievance, the petitioner has also made a representation on 28.12.2018 itself before the third respondent and sought for release of the consignment. However, as the said representation has not been considered so far, the present writ petition is filed before this Court.

4. Though several contentions are raised by the petitioner before this Court as against the impugned detention order, the learned counsel for the petitioner submitted that without prejudice to the contention of the petitioner, they will pay one time tax under the CGST Act and SGST Act for the purpose of releasing the goods and agitate the matter before appropriate authority by way of filing revision.

5. The learned Government Advocate appearing for the respondents is not having any objection, if the petitioner is willing to pay one time tax liability.

6. Considering the above stated facts and circumstances and without expressing any view on the merits of the contentions raised by the petitioner as well as the respondents in the impugned detention proceedings, this writ petition is disposed of as follows:

(a) The petitioner shall pay one time tax liability of Rs.1,61,032.78 under the CGST Act and Rs.1,61,032.78 under the SGST Act before the second respondent within a period of four days from today.

(b) On receipt of such payment, the detained goods shall be released forthwith.

(c) The petitioner is given liberty to agitate the atter before appropriate authority by filing appropriate petition.

No costs. Connected miscellaneous petition is closed.

[2019] 57 DSTC 228 (Bengaluru)

In the High Court of Karnataka

[Hon'ble Mrs. Justice S Sujhatha]

W.P. No. 2253/2019 (T-Res)

Steel Hypermart India Pvt. Ltd. ... Petitioner

Vs.

Additional Commissioner of Commercial Taxes & Anr. ... Respondents

Date of Order: 31.01.2019

SECTION 67(4) OF CGST ACT, 2017 – POWER OF INSPECTION, SEARCH AND SEIZURE – A SEARCH WAS CONDUCTED AT BUSINESS PREMISES OF THE PETITIONER AND THE SAME WAS SEALED BY COMPETENT AUTHORITY FOR THE REASON THAT COMPUTER SYSTEM OF THE DEALER STOPPED FUNCTIONING ALL OF A SUDDEN ALONG WITH INTERNET CONNECTION – WRIT PETITION – COURT DIRECTED THE REVENUE TO UNSEAL THE PREMISES AND TO THE PETITIONER TO CO-OPERATE FOR INSPECTION / SEARCH OF THE PREMISES, INCLUDING THE COMPUTER SYSTEM.

Present for the Petitioner : Sri Nanda Kumar, Advocate for
Sri Nischal Dev B. R., Advocate

Present for Respondent(s) : Sri T. K. Vedamurthy, A.G.A.

ORDER

Learned Additional Government Advocate accepts notice for the respondents.

2. The petitioner has assailed the order passed by the respondent No.2 dated 09.01.2019 under Section 67[4] of the Karnataka Goods and Services Tax Act, 2017/Central Goods and Services Tax Act, 2017 ['Act' for short].

3. The petitioner company is claiming to be a private limited company incorporated under the Companies Act, 2013 and a dealer registered under the provisions of the Act. The petitioner holds controlling shareholding in another company M/s. Singhi Buildtech Pvt. Ltd. The two companies are promoted by the same individuals though belongs to same family. It transpires that the respondent officers along with team of officers visited the registered office of the petitioner at Jigani, Anekal Taluk, Bengaluru. It is contended that due to administrative convenience, the day-to-day

business activities of the petitioner were also being carried out from the premises of M/s. Singhi buildtech Pvt. Ltd, at go-down of the petitioner building situated at Sy.Nc.184, Khaneshurnari 5371 to 6, Jigani Main Road, Jigani Hobii, Anekal Taluk, Bengaluru. Considering the same, the respondent officials begun conducting the search in the said premises. It is the grievance o**f the petitioner that respondent officers have sealed the said premises without authority of law.**

4. Learned counsel appearing for the petitioner would submit that the first respondent issued authorization of search on 08.01.2019 on a suspicion that the directors would be involved in circular trading with other companies located in Bengaluru and Hosur. Mere suspicion is not suffice for issuing any authorization. The authorization order does not authorize the officer who had pass the order impugned, under Section 67[4] of she Act. Learned counsel further submitted that Section 67 [4] of the Act does not empower the respondent No.2 to seal the business premises since access to the business premises was not denied by the petitioner as ref1(cted in the order impugned.

5. Learned Additional Government Advocate appearing for the Revenue has made available the original file before the Court, wherein an authorization in the prescribed format - GST INS-1 has been issued by the Additional Commissioner of Commercial Taxes [Enforcement], South Zone, Bangalore on 08.01.2019 authorizing Sri. Jaideep N. Gaonkar, Assistant Commissioner of Commercial Taxes [Enf], SZ-03, VTK-2, Koramangala, Bangalore-560047 to conduct inspection/search/seizure of the premises in question. In view of the said authorization issued, the first argument of the learned counsel for the petitioner fails.

6. Section 67[4] of the Act contemplates that the officer authorized under Sub-section [2] shall have the power to seal or break open the door of any premises or to break open any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied.

7. It is the contention of the Revenue that the books of accounts of some other companies were maintained in the premises where the inspection was carried on. However, the computer system wherein the business transaction of the company was stored, including the tally software stopped functioning all of a sudden along with internet connection abruptly. In the absence of tally information and internet connection,

complete verification of the books of accounts of the company was not possible as the same was maintained in the tally software in the server. The directors of the petitioner company did not put any efforts to set out the said disruption. There being denial of access to the computer system, Section 67[4] was invoked to seal the premises in question.

8. However, learned Additional Government Advocate on instructions of the respondent No.2 - Sri. Jaideep N. Gaonkar, who is present before the Court, fairly submits that the premises of the petitioner company in question shall be unsealed/de-sealed in the presence of the petitioner on any date convenient to the petitioner subject to the petitioner co-operating for inspection /search of the computer system and other records available in the premises.

9. The said submission of the learned Additional Government Advocate is placed on record.

10. In the circumstances, this Court is of the considered view that the justice would be sub-served in directing the Revenue to unseal the premises in question on 05.02.2019 at 11.00 a.m., which is convenient to the petitioner and the petitioner shall co¬operate for inspection /search of the premises in question, including the computer system.

With the aforesaid observations, the writ petition stands disposed of.

SSJ: W.P.No.2253/2019

01.02.2019

ORDER

Before finalizing the order, learned counsel for the petitioner has filed a memo seeking revision of the date fixed by this Court i.e., 05.02.2019 for de-sealing the premises in question and accordingly seeks to fix the date on 11.02.2019.

Learned Additional Government Advocate has no objections for the same.

Hence, the date is fixed on 11.02.2019 at 11.00 a.m., to unseal the premises in question.

Sd/-
JUDGE

[2019] 57 DSTC 231 (ALLAHABAD)

In the High Court of Allahabad

[Hon'ble Justice Pankaj Kumar Jaiswal and Hon'ble Justice Rajnish Kumar]

PIL Civil No. 12929/2019

Atin Krishna ... Petitioner

Vs.

Union of India & Ors. ... Respondent

Date of Order: 03.05.2019

PIL – DUTY FREE SHOPS (DFS) - GST PROVISIONS BE IMPLEMENTED IN PROPER MANNER QUA DUTY FREE SHOPS AT INTERNATIONAL AIRPORT, LUCKNOW TO PREVENT LOSS TO PUBLIC EXCHEQUER – DUTY FREE SHOPS ARE NOT PAYING IGST ON GOODS IMPORTED INTO TERRITORY OF INDIA AND BEING GRANTED REFUND OF GST ON SALES MADE TO INTERNATIONAL PASSENGERS AT THE DEPARTURE TERMINAL TREATING IT AS EXPORTS (ZERO RATED) AND SALE INVOICE ISSUED BEING CONSIDERED AS PROOF OF EXPORT OF GOODS – WHETHER CORRECT PROPOSITION IN VIEW OF IGST ACT OR IT IS INTRASTATE SUPPLY LIABLE TO CGST AND SGST? HELD- NEITHER CUSTOM DUTY NOR IGST IS PAYABLE ON GOODS IMPORTED AND KEPT IN CUSTOM WAREHOUSE AND ACCUMULATED UNUTILISED ITC REFUNDABLE TO DUTY FREE SHOP ON SALES TO INTERNATIONAL PASSENGERS.

Facts of the case

The petitioner alleged that the respondent, has been operating at the arrival and departure termination of Airport since 2004 and the operations of these duty free shops are governed in accordance with the provisions of Customs Act 1962. The activity undertaken by the respondents attracted the provisions of GST Act. However, the provisions of these enactments are being mis-interpreted and the DFS operated by the respondent are presently enjoying various exemptions causing severe loss of revenue to the public exchequer.

The contention of the petitioner was as under:-

The respondent was liable to pay IGST on the goods imported into the territory of India, which it is not doing.

Despite DFS operated by the respondent being in the state of Uttar Pradesh, the goods were sold to the International passengers without charging the applicable taxes under CGST and SGST Acts. The petitioner submitted that the requirement to charge applicable CGST and SGST on the sale of goods at the DFS of the respondent was prior to Amendment of GST Act i.e. upto 31st January, 2019.

The respondent was incorrectly permitted to claim refund of accumulated input tax credit of GST paid on service of renting of immovable property by AAI and procurement of domestic goods and services. This refund was being granted under the grounds that the sale made to the International passengers at the departure terminal DFS was exports of goods and hence zero-rated. The sale invoice issued to the International passengers was incorrectly being considered as proof of exports of goods.

Held

The observations of Hon'ble Apex Court in various Judgement cited make it clear that the effective taxable event for the purpose of levy of Customs Duty is the time only when the goods cross the customs barrier and the bill of entry for home consumption is filed i.e. when the goods become part of the mass of goods within the country. Therefore, when the goods are imported from outside India and are kept in customs warehouse and exported therefrom, the stage for payment of customs duty under Customs Act, 1962 does not arise. Hence neither Custom duty nor IGST is payable.

The warehouse goods are supplied by the DFS to the International arriving passengers before its clearance for home consumption. The arriving passengers thereafter cross the customs frontier at the airport along with the goods and only then clears the same for home consumption. The passenger is therefore liable to pay the applicable duties of customs. The goods being a part of passenger's bonafide baggage are cleared for home consumption by the passenger under the Baggage Rules, 2016 and not by the DFS, hence no customs duty is payable by the DFS and therefore under proviso of Section 5(1) of the IGST Act read with Section 12 of the Customs Act 1962, No IGST is payable either.

The supply of warehoused goods by the DFS at the departure terminal is to departing International passengers i.e. the passengers travelling from India to a foreign destination. Thus, the goods supplied are never cleared for home consumption and the warehoused goods are exported by the DFS, therefore the levy Customs duty and of the IGST do not arise.

The above observations conclude that IGST is not payable on the supply either to or from the DFS located at the arrival or at departure terminal.

It is clear that the goods sold to passengers at the International departure terminal DFS are not cleared for home consumption nor for

removal to another warehouse or otherwise provided in the Customs Act, 1962 and hence the goods are cleared without payment of duty only for export under Section 69 of the Customs Act under an invoice which is also deemed to be a shipping bill.

Hence the sale/supply at the International departure terminals DFS would be export of goods under Customs Law and therefore will be considered as export of goods under GST Act, since the definition of "export of goods" under both the laws is the same.

The supply from DFS of the respondent at departure terminal of the Airport is similar to a FOB export, the only difference being that in the case of DFS supply, the international passenger also acts as carrier of goods out of India.

In view of above discussion, we find that exemption under GST on goods supplied to and from DFS is rightly conferred and the claims of any accumulated unutilized ITC are refundable to respondent. The petition is devoid of merit and the same deserves to be dismissed.

Accordingly, we dismiss the Public Interest Litigation.

Present for the Petitioner	:	Atin Krishna (In Person)
Present for the Respondent(s)	:	C.S.C., A.S.G., Sheeran Mohiuddin Alavi, Shubham Tripathi

Order

Hon'ble Pankaj Kumar Jaiswal,J.
Hon'ble Rajnish Kumar,J.

1. Heard Sri Atin Krishna petitioner-in-person, Sri Savitra Vardhan Singh, learned counsel for the Union of Indiarespondent no.1 Sri Manish Mishra, learned counsel for the State-respondent no.2 and Sri Sameer Rohatgi, learned counsel for the respondent no.3.

2. This petition is filed in public interest seeking to ensure that the provisions of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "CGST Act") Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as "SGST Act") and Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "IGST Act") are implemented in proper manner qua the duty free shops (hereinafter referred to as "DFS") operated at Chaudhary Charan Singh International Airport, Lucknow (hereinafter referred to as "Airport") by respondent no.3.

3. The petitioner submitted that due to the misinterpretation of the provisions of CGST/SGST/IGST Acts, (GST Act), the public exchequer is being made to suffer huge financial loss and therefore, it is necessary in public interest that this Court provides true and correct interpretation of the applicable provisions of the aforesaid enactments so as to ensure that the revenue loss to the public exchequer is forthwith prevented.

4. The petitioner alleged that the respondent no.3 herein, has been operating at the arrival and departure termination of Airport since 2004 and the operations of these shops are governed in accordance with the provisions of Customs Act 1962. The respondent no.3 is required to obtain registration of its business under CGST Act and SGST Act and is allotted respective GSTIN numbers and owing to registration obtained under the respective Acts, the activity undertaken by the respondent no.3 also attracts the provisions of GST Act. However, the provisions of these enactments are being mis-interpreted and the DFS operated by the respondent no.3 are presently enjoying various exemptions causing severe loss of revenue to the public exchequer.

5. The contention of the petitioner is as under:-

(i) The respondent no.3 is liable to pay IGST on the goods imported into the territory of India, which it is not doing.

(ii) Despite the DFS operated by the respondent no.3 being in the State of Uttar Pradesh, the goods were sold to the International passengers without charging the applicable taxes under CGST and SGST Acts. The petitioner submitted that the requirement to charge applicable CGST and SGST on the sale of goods at the DFS of the respondent no.3 was prior to Amendment of GST Act i.e. upto 31st January, 2019.

(iii) The respondent no.3 is incorrectly permitted to claim refund of accumulated input tax credit of GST paid on service of renting of immovable property by AAI and procurement of domestic goods and services. This refund is being granted under the grounds that the sale made to the International passengers at the departure terminal DFS is exports of goods and hence zero-rated. The sale invoice issued to the International passengers is incorrectly being considered as proof of exports of goods.

6. The petitioner submitted that a transaction must suffer IGST the moment the supply of goods cross the territorial waters of India. Therefore, the supply of imported goods to respondent no.3 needs to be subjected

to tax under Section 5 of the IGST Act. He further submitted that from the standpoint of Section 8 (1) of the IGST Act, the sale made to International passengers at the arrival terminal DFS of the respondent no.3 should be considered as intra state supply of goods and accordingly, such sale shall attract applicable CGST and SGST under Section 9 (1) of the CGST Act and SGST Act upto 31st January, 2019 and that the activity undertaken from the departure terminal DFS operated by the respondent no.3 is not an export of goods under GST Act as the essential ingredients to qualify for export is nothing being satisfied by the respondent no.3. The grounds mentioned in the writ petition is based upon a reported decision of Hon'ble Apex Court rendered in the matter of Burmah Shell Oil Storage and Distributing Co. of India Ltd. Vs. CTO (1961) 1 SCT 902, State of Kerala Vs. Cochin Coal (1961) 12 STC 1 (SC), Madras Marine Co. Vs. State of Madras, 1986 (3) SCC 552 as well as Judgement rendered by Bombay High Court in the matter of Narang Hotels and Resorts Pvt. Ltd. Vs. Stateof Maharastra and others (2004 135 STC 289 (Bom.)

7. Learned counsel for the respondent no.3 opposed the petition by filing reply. He submitted that supply of goods to and from the DFS is before the clearance of imported goods for home consumption/export and the supply of goods from DFS at International Airports are considered as export of goods. He relied upon the decision of Hon'ble Supreme Court rendered in the matter of M/s Hotel Ashoka (India Tourism Development Corporation Limited) Vs. Assistant Commissioner of Commercial Taxes and another (Civil Appeal No. 2560 of 2010) reported in 2012 (276) FLT 433 (SCC), judgement rendered by Bombay High Court in the matter of Sandeep Patil Vs. Union of India & another in Criminal Public Interest Litigation St. No.3 of 2019 and the Central Government's order dated 31.08.2018 bearing No. 634/2018- CUS (WZ)/ASRA/Mumbai passed under Section 129 DD of the Customs Act, 1962 in the case of Aarish Altaf Tinwala.

8. Learned counsel for the respondent no.3 has further submitted that the provisions of IGST Act (i.e. Sections 5, 7 and 8) are relevant for the purpose of addressing the contentions raised in the present PIL. The supply of goods imported into the territory of India till they cross customs frontiers are considered as Inter-State Supply as per Section 7 (2) of the IGST Act which reads as follows:-

> "7(2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce"

9. On a careful reading of Section 7 (2) along with Sections 2 (10), 2(4) of IGST Act and Sections 2 (11) and 2 (13) of Customs Act, 1962, it

is concluded that "crossing the customs frontier of India" under the IGST Act means crossing the limits of custom area which includes the area of customs port, customs airport or land customs station or a warehouse and also any area in which imported goods are ordinarily kept before clearance by customs authority. The DFS located in the custom airport, the custom warehouse are both part of the custom area as defined under Section 2 (11) of the Customs Act, 1962. The supply of imported goods to and from the DFS do not cross the customs frontier and hence these supplies will be an inter-State supply in accordance to Section 7 (2) of the IGST Act. Consequently, they cannot be an inter-State supply liable to CGST and SGST under Section 9 of the CGST Act and SGST Act. 10. The point of time is one of the essential ingredients for levy of integrated tax on supply of goods imported into India and is governed by the proviso of Section 5 (1) of the IGST Act read with the provisions of Customs Act, 1962. Section 5 (1) of the IGST Act provides for levy of GST on inter-State supply, which reads as follows:-

> "5(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and service tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under Section 15 of the Central Goods and Service Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person: Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975 on the value as determined under the said Act at the point when duties of customs are levied on the said goods under Section 12 of the Customs Act, 1962"
>
> (ii) Sub-Section (7) of Section 3 of the Customs Tariff Act, 1975 reads as under:- "(7) Any article which is imported into India shall, in addition, be liable to integrated tax at such rate, not exceeding forty per cent as is leviable under Section 5 of Integrated Goods and Services Tax Act, 2017 on a like article on its supply in India, on the value of imported as determined under sub- Section (8).

11. Section 7 (2) read with proviso of Section 5 (1) of the IGST Act states that integrated tax on "goods imported into India" shall be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975. Further, such tax is required to be levied "at the point"

when the duties of customs are levied on the said goods under Section 12 of the Customs Act, 1962 and at no other point. 12. The point of time when duties of customs are levied on goods imported into India under Customs Act, 1962 is only when such goods are cleared for home consumption. It is read as under:-

> "12(1) Except as otherwise provided in this Act or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force on goods imported into, or exported from India".

13. Hon'ble Apex Court in the matter of Kiran Spinning Mills Vs. Collector of Customs, 1999 (113) ELT 0753 SC held as under:-

> "...this Court has held in Sea Customs Act-1964 (3) SCR 787 at page 803 that in the case of duty of customs the taxable event is the import of goods within the customs barriers. In other words, the taxable event occurs when the customs barrier is crossed. In the case of goods which are in the warehouse the customs barriers would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country".

14. Similarly, Hon'ble Apex Court, in the matter of Garden Silk Mills Ltd. Vs. Union of India, 1999 (113) ELT 0358 S.C., observed that the taxable event for levy of customs duty is reached when the bill of entry for home consumption is filed. The relevant part of the judgement reads as follows:-

> "...It would appear to us that the import of goods into India would commence when the same cross into the territorial waters but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the customs barriers and the bill of entry for home consumption is filed".

15. The above observations of Hon'ble Apex Court make it clear that the effective taxable event for the purpose of levy of Customs Duty is the time only when the goods cross the customs barrier and the bill of entry for home consumption is filed i.e. when the goods become part of the mass of goods within the country. Therefore, when the goods are imported from outside India and are kept in customs warehouse and exported therefrom, the stage for payment of customs duty under Customs Act, 1962 does not arise. Hence neither Custom duty nor IGST is payable. 16. The warehouse

goods are supplied by the DFS to the International arriving passengers before its clearance for home consumption. The arriving passengers thereafter cross the customs frontier at the airport along with the goods and only then clears the same for home consumption. The passenger is therefore liable to pay the applicable duties of customs. The goods being a part of passenger's bonafide baggage are cleared for home consumption by the passenger under the Baggage Rules, 2016 and not by the DFS, hence no customs duty is payable by the DFS and therefore under proviso of Section 5 (1) of the IGST Act read with Section 12 of the Customs Act 1962, No IGST is payable either. 17. The supply of warehoused goods by the DFS at the departure terminal is to departing International passengers i.e. the passengers travelling from India to a foreign destination. Thus, the goods supplied are never cleared for home consumption and the warehoused goods are exported by the DFS, therefore the levy Customs duty and of the IGST do not arise.

18. The above observations conclude that IGST is not payable on the supply either to or from the DFS located at the arrival or at departure terminal.

19. The definition of "exports of goods: in Section 2 (5) is simply taking of goods from India to a place outside India. This definition is identical to the definition in Section 2 (18) of Customs Act 1962. In the case of Collector of Customs, Calcutta Vs. Sun Industries 1988 SCR (3) 500 under the Customs Act, 1962, the issue was as to whether the goods loaded on a ship which had passed beyond the territorial waters of India, by reason of some engine trouble decided to sail back into the territorial waters of India, can be said to have been exported out of India. Section 2 (18) of the Customs Act, 1962 defines the term "export" as under:-

> "2(18) "export", with its grammatical variations and cognate expressions, means taking out of India to a place outside India."

The Apex Court, analysing the above Section held as under:-

> "... But the expression "taking out to a place outside India" would also mean a place in high seas. It is beyond the territorial waters of India. High Seas would also mean a place outside India, if it is beyond the territorial waters of India. Therefore, the goods were taken out to the high seas outside territorial waters of India, they will come within the ambit of expression "taking out to a place outside India". Indubitably the goods had been taken out of India. "Place" according to Webster Comprehensive Dictionary, International

Edition page 964 means a particular point or portion of space, especially that part of space occupied by or belonging to a thing under consideration; a definite locality or location. It also means an open space or square in a city. Therefore, in international trade the ship beyond the territorial waters of a country would be a place outside the country, if the goods are taken to that place, that is to say, a situation outside the territorial waters of a country and the title to the goods passes to the purchasers. Then, in our opinion, the goods are taken to a place outside India...."

20. The Hon'ble Apex Court held that "taking out to a place outside India" would also mean a place beyond territorial waters, i.e. high seas hence in the context of Section 2 (5) of IGST Act, to constitute an "export" mere taking out of India, is enough.

21. Export of goods is a zero rated supply and a person making zero rated supplies can claim refund of unutilised ITC as provided in Section 16 (1) and Section 16 (3) of the IGST Act, which reads as under:-

"16 (1) "zero rated supply" means any of the following supplies of goods or services or both, namely:

(a) export of goods or services or both;

or .....

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:-

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or..."

Thus for claiming the benefit of refund, the supply must be a zero rated supply such as "exports of goods".

22. Since the entire activity of a DFS namely, warehousing, stocking and sale/supply happens as per the provisions under Chapter IX of the Customs Act and under Customs supervision and control. The sale of goods takes place only to International passengers and on obtaining from them payment in approved currency. Every sale is covered by a sale voucher, which shall be deemed to be the Shipping Bill or Bill of Entry under Section 69 or 68 as the case may be. As a condition of the license granted to DFS under Section 58A of the Customs Act, DFS are permitted to

deposit the goods at the warehouse without payment of duty on execution of a bond. As per Section 71 of the Customs Act, the goods so deposited can either be cleared from the warehouse for home consumption (u/s 68) or for export (u/s 69) or for removal to another warehouse or otherwise provided in the Customs Act. Further Section 73A, Custody and Removal of Warehoused Goods, of the Customs Act provides that all warehoused goods shall remain in the custody of person who is granted a license under Sections 57/58/58A of the Customs Act until they are cleared for home consumption or transferred to another warehouse or are exported or removed as otherwise provided in the Customs Act. Such warehoused goods are thereafter only allowed to be cleared for home consumption after filing a bill of entry under Section 68 and payment of duty. In the event where the warehoused goods are not cleared for home consumption, they can be cleared for export, without payment of duty under Section 69 after filing shipping bill for export.

23. The Public Notice dated 22.07.2004 [Para 4.1], Standing Order dated 03.03.2008 (para 3.3) and Public Notice dated 21.12.2018 [Para 7.1] submitted by the respondent no.3 further clarifies that the invoice issued to passenger at International departure terminal is deemed to be a "shipping bill" for the purpose of exports under Section 69 of the Customs Act and the Section 50 of the Customs Act provides that a 'shipping bill' has to be presented to the customs officer for export of goods in an aircraft.

24. It is clear that the goods sold to passengers at the International departure terminal DFS are not cleared for home consumption nor for removal to another warehouse or otherwise provided in the Customs Act, 1962 and hence the goods are cleared without payment of duty only for export under Section 69 of the Customs Act under an invoice which is also deemed to be a shipping bill.

25. Hence the sale/supply at the International departure terminals DFS would be export of goods under Customs Law and therefore will be considered as exports of goods under GST Act, since the definition of "export" and "export of goods" under both the laws is the same.

26. The supply from DFS of the respondent no.3 at departure terminal of the Airport is similar to a FOB export, the only difference being that in the case of DFS supply, the International passenger also acts as carrier of goods out of India.

27. The Bombay High Court in the case of Sandeep Patil (supra) has taken a similar position with respect to DFS which reads as under:-

"6. Respondent no.2 while selling the goods from its duty free shops at departure terminal hold themselves as exporters of the goods and therefore it falls under the ambit of "exporter" as defined in section 2 (20) of the Customs Act, 1962. Applying the definition provided in the Customs Act, in this context, the goods supplied to the duty free shops by the Indian and international manufacturers/ suppliers are 'exported goods' and on reading this definition in conjunction with the definition of exporter, it is clear that the duty free shop operator is the "exporter" and the supply of goods to the international passengers is an export.

8. The above policy shows that the export oriented units which undertake to export their entire quantity of goods and services, are permitted to do so by setting up retail outlets i.e. duty free shops at International Airports. Even as per the FTP of India, sales undertaken from the said duty free shops are exports and the duty free shop operator is the exporter. It is also worth to mention that COTPA itself provides for reasonable restriction wherever the legislature intended to impose such restriction.

11. In the matter of DFS India Private Limited Vs. Commissioner of Customs, the Apex Court took cognizance of the fact that business undertaken at the departure duty free shop is in the nature of export. In fact pursuant to this order, the stocks of tobacco products held by respondent no.2 at duty free shops came to be released by the Department of Customs after being satisfied that the business undertaken from the duty free shops at departure is export. In pursuance of this order of the Apex Court, the High Court in the matter of DFS India Pvt. Ltd. Vs. The Commissioner of Customs also granted final relief in favour of respondent no.2. If the legislature intent which is also supported by various precedents noted above, is not to extent the restriction under the COTPA to shops situated beyond India and not to apply the restrictions on passengers importing tobacco products, that is not trade or commerce. Even in GST regime, duty free shops at international airports are considered non taxable area and their sales whether at arrival or departure lounge are considered as export."

28. The claim of the petitioner is that there is no 'export' of goods since the goods do not have a specific destination. It is however, observed that the facts of the four cases relied upon by the petitioner in the present petition are of a different nature as compared to the operation undertaken from the DFS. In all the four cases, the destination of the goods were

very clear viz aircraft (in Burmah Sheel and Narang Hotel) and ship (in Coching Coal and Madras Marine). Thus, the destination was within the Indian territorial waters. In the present case of DFS, it is very clear that if a foreign destination of the foreign going passenger, the passenger also acts as a carrier and the goods are appropriated outside India. In view thereof, it is clear that the decisions relied upon by the petitioner are misplaced, have no relevance to the facts of the present PIL and therefore cannot be relied upon in the context of the business undertaken by the answering respondent no.3.

29. In view of above discussion, we find that exemption under GST on goods supplied to and from DFS is rightly conferred and the claims of any accumulated unutilized ITC are refundable to respondent no.3. The petition is devoid of merit and the same deserves to be dismissed.

30. Accordingly, we dismiss the Public Interest Litigation.

31. No order as to cost.

[2019] 57 DSTC 243 (Delhi)

Before the Appellate Tribunal, Value Added Tax, Delhi
[M. S. Wadhwa, Member (J)]

Review No. 01/ATVAT/18-19

Pratham Telecom India (P.) Ltd. ... Appellant

Vs.

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 20.03.2019

REVIEW PETITION U/S 76(13) OF DVAT ACT, 2004 – NON-ATTENDANCE OF APPELLANT – COUNSEL'S FATHER HAD SUDDEN HEART ATTACK WHICH ULTIMATELY LED TO DEATH - SUFFICIENT CAUSE FOR NON-ATTENDANCE – TRIBUNAL PASSED EX-PARTE ORDER – RESTORATION APPLICATION REJECTED ON THE BASIS OF MENTIONING WRONG DATE OF NON-ATTENDANCE – IN REVIEW – REASON OF MENTIONING DATE FOR NON-ATTENDANCE WAS EXPLAINED – IT WAS BONA FIDE MISTAKE – APPELLANT SHOULD NOT SUFFER DUE TO DEFAULT OF COUNSEL – REVIEW PETITION ALLOWED.

Facts of the case

The appellant was registered under DVAT Act and CST Act vide Tin No. 07910308383. The appellant was engaged in the activity of trading of telecommunication equipment's, which was covered under the Entry No. 41 of the III schedule of the DVAT Act and was accordingly taxable @ 4% during the financial year 2008-09. The appellant had during this financial year of 2008-09, made sales against C & F-forms amounting to Rs. 34,93,279/- and Rs. 13,55,94,506/- respectively. The appellant had vide DVAT-51 submitted two C-forms and 117 F-forms worth Rs. 33,21,647/- and Rs. 13,55,94,506/- respectively. Accordingly, the dealer was left with missing sale (in respect of C-forms sales made earlier) worth Rs. 1,71,632/- , which was liable to be taxed for differential tax @ 2%. In this way, the tax liability after assessment should have been Rs. 3,433/- only.

That the VATO (Ward-91) vide order dated 1/2/2013, made default assessment of tax and interest u/s 32 of the DVAT Act, assessing the dealer's turnover of Rs. 13,86,73,635/-, thereby raising demand of tax of Rs. 1,73,34,204/- and interest of Rs. 1,14,69,069/-, aggregating to Rs. 2,88,03,273/-. VATO also imposed penalty u/s 33 vide order dated 1/1/2013, imposing penalty of Rs. 3,27,61,645/-.

The assessment order was not served upon the appellant. Subsequently, on receipt of recovery notice on 19/2/2016, the appellant became aware of

the assessment order and appellant got true copy of order on 23/2/2016 against which appellant filed objections before the OHA.

The OHA vide order dated 27/4/2017 had prescribed a pre-condition for hearing the objection, subject to the appellant depositing an amount of Rs. 61,56,495/- i.e. 10% of the demand raised under two orders of Rs. 2,88,03,273/- and Rs. 3,27,61,645/- aggregating to Rs. 6,15,64,918/.

That stay amount of Rs. 6,15,64,918/-, imposed by the OHA was beyond the scope and means of the appellant. Further, the stay amount prescribed on adhoc percentage of 10% was also bad in the eyes of law, as no tax was actually due from the dealer.

Against the orders, appellant filed an appeal before the Tribunal.

Held

Appellant had submitted that reason for non-appearance on 8/11/2017 was that Mrs. Mahima Arora, VAT Practitioner, who was looking after this case on behalf of the CA of the appellant company, could not appear in Tribunal due to the reason that her father got sudden heart attack, which ultimately led to death of her father on 9/11/2017. The Tribunal vide impugned order dated 21/3/2018 rejected the misc. application for restoration on the ground that applicant had given justification for non-appearance on 10/11/2017, while appeal was fixed in the Tribunal on 8/11/2017 and as no justification for non-appearance on date fixed in the Tribunal has been given, hence application was rejected. The appellant had submitted that one of the reason for mentioning 10/11/2017 was that, appellant filed another appeal against the order dated 27/4/2017 on 29/12/2017 in which appellant wrongly mentioned the date of hearing as 10/11/2017 in para- (h), (i) & (k) at page 5 & 6 of the application dated 29/12/2017. To substantiate this fact, appellant had also drawn attention of the Tribunal towards application dated 17/11/2017 moved on behalf of the appellant, in which date of hearing and dismissal of appeal has been mentioned as 8/11/2017. According to appellant, it was a bona-fide mistake and secondly, for the default of counsel on date fixed, appellant could not suffer because applicant was prevented by sufficient cause from appearing before the Tribunal on 8/11/2017 and absence of appellant from Tribunal was neither deliberate nor willful, so on this ground appellant could not be deprived of his statutory right of appeal. Appellant in support of his arguments referred to the case of Rafiq Vs. Munshi Lal and other cases in which, it was held that due to default of counsel of appellant, appellant could not suffer.

Present for the Appellant : Sh. R. S. Gupta, Advocate

Present for Respondent : Sh. M. L. Garg, Advocate

ORDER

Disposal of Review Application dated 9/4/2018 by the appellant.

1. The present application has been filed by the appellant. According to application, the appellant is registered under DVAT Act and CST Act vide Tin No. 07910308383. The appellant is engaged in the activity of trading of telecommunication equipments, which is covered under the Entry No. 41 of the III schedule of the DVAT Act and was accordingly taxable @ 4% during the financial year 2008-09. The appellant had during this financial year of 2008-09, made sales against C & F-forms amounting to Rs. 34,93,279/- and Rs. 13,55,94,506/- respectively. The appellant had vide DVAT-51 submitted two C-forms and 117 F-forms worth Rs. 33,21,647/- and Rs. 13,55,94,506/- respectively. Accordingly, the dealer is left with missing sale (in respect of C-forms sales made earlier) worth Rs. 1,71,632/-, which is liable to be taxed for differential tax @ 2%. In this way, the tax liability after assessment should have been Rs. 3433/- only.

2. That the VATO (Ward-91) vide order dated 1/2/2013, made default assessment of tax and interest u/s 32 of the DVAT Act, assessing the dealer's turnover of Rs. 13,86,73,635/-, thereby raising demand of tax of Rs. 1,73,34,204/- and interest of Rs. 1,14,69,069/-, aggregating to Rs. 2,88,03,273/-. Ld. VATO also imposed penalty u/s 33 vide order dated 1/1/2013, imposing penalty of Rs. 3,27,61,645/-.

3. The assessment order was not served to the appellant. Subsequently, on receipt of recovery notice on 19/2/2016, the appellant became aware of the assessment order and appellant got true copy of order on 23/2/2016 against which appellant filed objections before the Id. OHA.

4. The Ld. OHA vide order dated 27/4/2017 had prescribed a pre-condition for hearing the objection, subject to the appellant depositing an amount of Rs. 61,56,495/- i.e. 10% of the demand raised under two orders of Rs. 2,88,03,273/- and Rs. 3,27,61,645/- aggregating to Rs. 6,15,64,918/.

5. That stay amount of Rs. 6,15,64,918/-, imposed by the Ld. OHA is beyond the scope and means of the appellant. Further, the stay amount prescribed on adhoc percentage of 10% is also bad in the eyes of law, as no tax is actually due from the dealer.

6. Against these orders, appellant filed an appeal before this Tribunal. The case was fixed for hearing on 8/11/2017. The appellant failed to attend the hearing proceedings on 8/11/2017, as the entire track of the case was being handled by Mrs. Mahima Arora, VAT Practitioner from the office of the counsel of the appellant, whose father got a sudden heart attack which ultimately culminated into the death of her father on 9/11/2017. As the entire attention and concentration of Mrs. Mahima Arora, had diverted towards the death of her father so she failed to coordinate .the attendance of the counsel of dealer before the Tribunal on 8/11/2017. In the absence of the counsel of the appellant on 8/11/2017, the Tribunal passed an ex-parte order dated 10/11/2017, rejecting the objections filed by the dealer.

7. As the non-attendance of the dealer on 8/11/2017 was beyond the scope of dealer and the counsel was prevented by sufficient cause for non attendance. Realizing the non compliance on the part of the dealer, the dealer had vide its letter dated 17/11/2017, requested the VAT Tribunal to allow another opportunity of being heard.

8. Subsequently, the dealer was asked to file fresh objection against the orders dated 27/4/2017. Accordingly, objection dated 29/12/2017 was filed. The dealer was allowed the hearing of the case in respect of application dated 17/11/2017 on 20/2/2018.

9. In view of the same application dated 17/11/2017, the fresh application dated 29/12/2017 is liable to be merged.

10. The Tribunal vide its order dated 22/3/2018 passed subsequent to hearing held on 20/2/2018 dismissed the application of dealer.

11. The main fact stated in para 3 & 4 of the order dated 22/3/2018 was that the dealer had failed to attend the proceedings on 10/11/2017, whereas the fact was that the hearing of the case was scheduled for 8/11/2017 and the dealer had failed to attend the hearing on 8/11/2017, which is clear from the application dated 17/11/2017, based on which order dated 22/3/2018 had been passed.

12. It may be stated that confusion over the date of hearing i.e. 10/11/2017 had arisen from the typographical error made by the applicant in para (h), (i) & (k) at page 5 & 6 of the application dated 29/12/2017, where in the date of hearing had been mentioned as 10/11/2017 instead of 8/11/2017.

13. That the order dated 22/3/2018 passed by this Tribunal be reviewed, u/s 76(13) of DVAT Act, considering the date of hearing as 8/11/2017, which the dealer failed to attend due to circumstances beyond the control of dealer.

14. 0n the basis of above facts, it has been prayed that orders dated 21/3/2018 passed in misc. application 25/ATVAT/17-18, be set-aside and appeal No. 89-90/ATVAT/17-18 be re-stored to its original number.

15. Heard to applicant's Id. counsel Mr. R.S. Gupta & Mr. M.L. Garg on behalf of the revenue. Appellant has also filed written arguments, on the basis of which review application is being disposed off as follows.

16. As averred above, appeal No. 89-90/ATVAT/17-18, M/s. Pratham Telecom India (P) Ltd., was fixed for hearing on 8/11/2017. On date fixed, nobody was present on behalf of the appellant while revenue side was represented by Mr. P. Tara, Adv., so in absence of appellant, appeal was dismissed on 8/11/2017.

17. Appellant filed restoration application No. M-25/ATVAT/17-18, which was dismissed vide orders dated 21/3/2018 of this Tribunal, against which present review application has been filed.

18. Appellant has submitted that reason for non-appearance on 8/11/2017 was that Mrs. Mahima Arora, VAT Practitioner, who was looking after this case on behalf of the CA of the appellant company, could not appear in Tribunal due to the reason that her father got sudden heart attack, which ultimately led to death of her father on 9/11/2017. The Tribunal vide impugned order dated 21/3/2018 rejected the misc. application for restoration on the ground that applicant has given justification for non-appearance on 10/11/2017, while appeal was fixed in the Tribunal on 8/11/2017 and as no justification for non-appearance on date fixed in the Tribunal has been given, hence application was rejected. The appellant has submitted that one of the reason for mentioning 10/11/2017 was that, appellant filed another appeal against the order dated 27/4/2017 on 29/12/2017 in which appellant wrongly mentioned the date of hearing as 10/11/2017 in para- (h),(i) & (k) at page 5 & 6 of the application dated 29/12/2017. To substantiate this fact, appellant has also drawn attention of the Tribunal towards application. dated 17/11/2017 moved on behalf of the appellant, in which date of hearing and dismissal of appeal has been mentioned as 8/11/2017. According to appellant, it was a bona-fide mistake and secondly, for the default of Id. counsel on date fixed, appellant cannot suffer because applicant was prevented by sufficient cause from appearing before the Tribunal on 8/11/2017 and absence of his Tribunal was neither deliberate nor willful, so on this ground appellant cannot be deprived of his statutory right of appeal. Appellant in support of his arguments referred to the case of Rafiq Vs. Munshi Lai and other cases in which, it was held that due to default of counsel of appellant, appellant cannot suffer.

19. Appellant has also drawn attention of the Tribunal towards the cases in which this Tribunal on nominal cost or without imposing any cost liberally allowed review application or restoration application. While Id. counsel for the revenue has submitted that as there is sufficient justification for review application, it may be allowed.

20. As is clear from the above facts that on date fixed i.e. 8/11/2017, appellant failed to appear because her counsel's father got heart attack and on 9/11/2017, he expired, which is clear from the application dated 17/11/2017 moved by the applicant, hence there was sufficient ground for non appearance and the date 10/11/2017 in the impugned order dated 21/3/2018 passed by this Tribunal crept in due to the reason that appellant in the subsequent application dated 29/12/2017 mentioned the date of hearing as 10/11/2017 instead of 8/11/2017 and this was due to the reason that on 10/11/2017 copy was issued to dealer. Hence, in view of these facts, review application for review of order dated 21/3/2018 passed by this Tribunal is allowed and consequently appeal No. 89-90/ATVAT/17-18 are restored to their original number. Appeals are fixed for hearing on merit on 29/4/2019.

21. Order pronounced in the open court.

22. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2019] 57 DSTC 248 (Delhi)

Before the Appellate Tribunal, Value Added Tax, Delhi

[M. S. Wadhwa, Member (J)]

Appeal No. 317-322/ATVAT/17-18

Grape Marketing (P) Ltd. ... Appellant

Vs.

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 28.02.2019

SEARCH AND SURVEY BY ENFORCEMENT TEAM U/S 60 OF DVAT ACT, 2004 – ALLEGING PURCHASES MADE FROM NON-FUNCTIONAL AND CANCELLED DEALERS – SURVEY TEAM FORCEFULLY COLLECTED RS. 52,24,000/- AND TAKEN STATEMENT OF APPELLANT FOR CLAIMING WRONG ITC – ITC DISALLOWED U/S 9(2)(g) – DEMAND CREATED – ASSESSMENT FRAMED AND PENALTY IMPOSED – OHA REJECTED THE OBJECTION PETITION ON THE BASIS OF STATEMENT OF APPELLANT GIVEN BEFORE SURVEY TEAM – WHETHER JUSTIFIED; HELD – NO. DISPUTED TRANSACTIONS WERE NOT VERIFIED – DIRECTION GIVEN

TO ISSUE NOTICE TO SELLING DEALERS – PENALTY IMPOSED PRIOR TO GIVING SEPARATE NOTICES – ORDERS SET ASIDE TO REFRAME ASSESSMENT, AFRESH.

Facts of the case

The appellant was a Private Ltd. Company, registered under the Companies Act, 1956. Appellant was registered under DVAT Act vide Tin No. 07760294449 (Ward-63).

That an inspection / survey of the company was conducted on 29/7/2015 by the Enforcement-1 Branch. It was alleged that the appellant had been claiming inappropriate ITC on the basis of purchases made from non-existing/ non-functional/ cancelled firms. That a notice was issued u/s 59(2) of the DVAT Act dated 24/8/2015 with direction to appellant for hearing along with relevant documents and books of accounts, in compliance of which appellant had submitted all the documents as directed in the notice but VATO did not rely on the documents and raised the demand annually 2013-14, 1st qtr. & 2nd qtr. 2014-15 and the penalty was also imposed. VATO imposed tax Rs. 46,85,386/-, interest 9,37,837/- and penalty Rs. 32,49,294/- total amounting to Rs. 88,72,517/-. The details of orders passed by VATO were as under —

Tax Period	Tax	Interest	Penalty
Annual 2013-14	2078712/-	488128/-	1692908/-
1st Qtr. 2014-15	2147781/-	384835/-	1331574/-
2nd Qtr. 2014-15	458893/-	64874/-	224812/-
Total Rs. -	4685386/-	937837/-	3249294/-

That the appellant was forced to deposit Rs. 52,24,000/- at the time of search. The demand was raised mainly on the ground that appellant had made purchases from M/s. S.K. & Company having Tin No. 07440462435 and M/s. Shashi Sales Marketing (P) Ltd., were bogus / cancelled dealers, although there was no evidence to prove that the dealers were suspicious / bogus dealers. The VATO disallowed ITC u/s 9(2)(g) of DVAT Act without applying the same in letter and spirit.

That VATO also relied upon the statement of the appellant in which the appellant accepted the fact that M/s S.K. & Company was a bogus dealer without appreciating that statement was taken forcefully and on the condition of de-sealing of premises, even otherwise a statement taken under coercion was unlawful and same could not be relied upon.

The appellant filed objections before the OHA, which were rejected and direction was given to the VATO to consider the deposit of tax of Rs. 52,24,000/- by the appellant in pursuance of the Enforcement survey.

Held

The appellant made purchases from the dealers on the date when the dealers were registered dealers and they issued tax invoices to the appellant. Appellant had filed copies of tax invoices on which TIN numbers of these registered dealers was mentioned. Not only this 2A report of the purchasing dealer and 2B report of the selling dealers was verified by the system of the Department. In these circumstances, ITC was wrongly denied to the appellant without giving any notice and opportunity of hearing to the selling dealers.

It was also astonishing that by simply writing that selling dealers were bogus/suspicious dealers, the ITC has been denied to the appellant who was a bona fide purchaser. No definition of word bogus/suspicious dealers has been given under DVAT Act and no evidence has been produced by the revenue side to prove that selling dealers were bogus/suspicious dealers. Revenue side had not produced any evidence to prove that there was any collusion between the purchasing and selling dealers.

It was correct to say that appellant had no access to returns filed by the selling dealers as they were confidential. When appellant had no access to returns of selling dealers, how appellant could come to know that selling dealers had not deposited the tax with the Govt. or adjusted it against output tax liability.

In view of the Tribunal, whether statement was voluntary or under coercion, crux of the matter in the appeals was whether appellant made bona fide purchases after payment of VAT to the selling dealers. If these payments were made, then State was not entitled to again impose tax for the same transactions. VATO was required to issue notices to the selling dealers and after examination of disputed transactions should have framed assessment.

So far as the imposition of penalty was concerned, it could not be imposed without prior notice as held by Hon'ble Delhi High Court in the case of M/s Bansal Dye Chem Pvt. Ltd. Vs CTT case decided on 24.09.15.

Impugned orders dated 27.06.17 passed by OHA were hereby set aside and appeals were allowed and matter was remanded back to the

concerned VATO to reframe assessment afresh after giving opportunity of hearing to appellant as well as selling dealers and adjust amount of Rs.52,24,000/- accordingly.

Present for the Appellant : Sh. R. K. Aggarwal, Advocate

Present for Respondent : Sh. S. B. Jain, Advocate

ORDER

1. The present appeals have been filed against the impugned orders dated 27/6/2017, passed by Ld. Spl. Commissioner, here-in-after called Objection Hearing Authority (in short OHA), who vide these orders upheld the imposition of tax, interest & penalty by ld. VATO (Audit) vide order dated 30/9/2015. As common question of law and facts are involved in all these appeals, hence they are being disposed off by following common orders.

2. The brief facts of the present appeals are that the appellant is a Private Ltd. Company, registered under the Companies Act, 1956. Appellant is registered under DVAT Act vide Tin No. 07760294449 (Ward-63).

3. That an inspection / survey of the company was conducted on 29/7/2015 by the Enforcement-1 Branch. It was alleged that the appellant had been claiming inappropriate ITC on the basis of purchases made from non-existing/ non-functional/ cancelled firms. That a notice was issued u/s 59(2) of the DVAT Act dated 24/8/2015 with direction to appellant for hearing alongwith relevant documents and books of accounts, in compliance of which appellant had submitted all the documents as directed in the notice but ld. VATO did not rely on the documents and raised the demand annually 2013-14, 1st qtr. & 2nd qtr. 2014-15 and the penalty was also imposed. Ld. VATO imposed tax Rs. 46,85,386/-, interest 9,37,837/- and penalty Rs. 32,49,294/- total amounting to Rs. 88,72,517/-. The details of orders passed by ld. VATO are as under —

Tax Period	Tax	Interest	Penalty
Annual 2013-14	2078712/-	488128/-	1692908/-
1st Qtr. 2014-15	2147781/-	384835/-	1331574/-
2nd Qtr. 2014-15	458893/-	64874/-	224812/-
Total Rs. -	4685386/-	937837/-	3249294/-

4. That the appellant was forced to deposit Rs. 52,24,000/- at the time of search. The demand was raised mainly on the ground that appellant had

made purchases from M/s. S.K. & Company having Tin No. 07440462435 and M/s. Shashi Sales Marketing (P) Ltd., were bogus / cancelled dealers, although there was no evidence to prove that the dealers were suspicious / bogus dealers. The ld. VATO disallowed ITC u/s 9(2)(g) of DVAT Act without applying the same in letter and spirit.

5. That ld. VATO also relied upon the statement of the appellant in which the appellant accepted the fact that M/s S.K. & Company was a bogus dealer without appreciating that statement was taken forcefully and on the condition of de-sealing of premises, even otherwise a statement taken under coercion is unlawful and same cannot be relied upon.

6. The appellant filed objections before the ld. OHA, which were rejected and direction was given to the ld. VATO to consider the deposit of tax of Rs. 52,24,000/- by the appellant in pursuance of the Enforcement survey. Appellant has filed present appeals before this Tribunal on various grounds, which are as follows —

i) Because the id. OHA has passed the impugned order based on conjecture and surmises, which is illegal both on facts and law and is liable to be set aside.

ii) Because the ld. OHA has failed to appreciate that ld. VATO (Audit) has no jurisdiction to pass the assessment order of tax, interest and penalty and only ward officer, VATO (Ward-63) has jurisdiction to assess appellant u/s 32 and 33 of the DVAT Act, on the basis of notice u/s 59(2) of the DVAT Act.

iii) That ITC has been wrongly denied. Appellant claimed ITC u/s 9(1) of the DVAT Act and there was no mis-match between the returns of appellant and selling dealers.

iv) Because there is no mechanism enabling the appellant to verify, if the selling dealer deposited tax for the disputed period.

v) Because ITC has been wrongly denied to the appellant on the basis of purchase from suspicious / bogus dealers, without bringing any evidence on the record.

vi) Because it has not been appreciated by lower authorities at the time of framing of impugned orders that section 9(2)(g) has two limbs, (1) tax paid by the purchasing dealer has actually been deposited by the selling dealer with the Govt. or (2) tax has been lawfully adjusted against output tax liability and correctly reflected

for the respective tax period and in the present case, the selling dealer has lawfully adjusted the tax paid by the appellant against the output tax liability, as there is no mis-match on the part of appellant.

vii) Because it is settled by the Hon'ble Delhi High Court that the department is precluded from invoking section 9(2)(g) of the DVAT Act to deny ITC to a purchasing dealer who has bonafide entered into a purchase transaction with a registered selling dealer who has issued a tax invoice reflecting the Tin No. In the event, that the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC. Where, however, the department is able to come across material to show that the purchasing dealer and the selling dealer acted in collusion, then the department can proceed u/s 40-A of the DVAT Act.

viii) Because the interest charged in the impugned order was illegal, unwarranted and uncalled for.

ix) Because impugned orders of penalty are illegal, unwarranted and un-called for, because no opportunity of hearing was given to the appellant and it is against the judgment of Hon'ble Delhi High Court in the case of J.T. Export 132 STC 22.

x) Because the appellant has not claimed wrong ITC as alleged by ld. VATO and therefore, the penalty u/s 86(12) DVAT Act cannot be imposed upon the appellant.

xi) Because the OHA has not appreciated that penalty procedure is not automatic and it is quasi-criminal in nature, without giving any opportunity to the dealer penalty cannot be imposed as held by Hon'ble Delhi High Court in the case of M/s. Bansal Dye Chem (P) Ltd. V/s. CTT.

xii) Without prejudice to the above grounds of appeal, the penalty has not been mitigated as per section 87 (6) of the DVAT Act, despite the fact that all the conditions given in the above section have been complied with.

7. On the basis of above facts and grounds of appeals, it has been prayed that impugned orders dated 27/6/2017 be set-aside and present appeals be allowed.

8. Heard to appellant's Ld counsel Mr. R.K. Aggarwal & Mr. S.B. Jain on behalf of the revenue and perused the file and judgments referred by appellant in support of its arguments.

9. These appeals pertain to assessment made by the Ld. VATO vide order dated 30.09.15 with regard to Annual 2013-14, 1St and 2nd quarter of assessment year 2014-15. Before this assessment, a survey was conducted on 29.07.2015, by the Enforcement-I Branch. During the survey it was found that appellant was claiming ITC on the basis of purchases made from bogus/suspicious dealers. A notice dated 24.08.15 was issued u/s 59(2) of the DVAT Act vide which appellant was directed to produce relevant documents along with books of accounts and in compliance thereof, appellant submitted all the documents as desired by the Ld. VATO. Even then Ld. VATO vide impugned orders dated 30.09.2015 imposed tax interest and penalty as given above.

10. According to appellant, the ITC was claimed as per section 9(1) of the DVAT Act. Ld. VATO, on the basis of the fact that appellant made purchases from M/s S.K. & Co. and M/s Shashi Sales Marketing Pvt. Ltd., which were bogus/cancelled dealers, denied ITC to the appellant. While according to appellant, on the date of purchases, these dealers were registered dealers and they issued valid tax invoices in favour of the appellant and 2A report of the appellant and 2B report of the selling dealers was verified, even then ITC was wrongly denied to the appellant u/s 9(2)(g) of the DVAT Act. The Ld. VATO while framing the assessment also relied. upon the statement of the appellant in which appellant accepted the fact that M/s S.K. & Co. was a bogus dealer. According to appellant, this statement was taken under coercion and on the condition of desealing of the premises.

11. In support of his arguments, appellant's Ld. Counsel referred to the case of Progressive Alloys India Pvt. Ltd. Vs Commissioner, Commercial Taxes and submitted that as there is no mismatch report in 2A and 2B, hence, section 9(2)(g) of the DVAT Act will not apply. The following para of judgment by the Hon'ble Delhi High Court is relevant for disposal of present appeals —

> There is yet another aspect of the matter which requires to be adverted to. The 'Verification Report' of Annexures-2A and 2B for the third quarter of the financial year 2013-14 produced before the Court shows that the very purchase transactions involving GSA and OSC had a corresponding match and this has been verified by the computerized system. In other words, in respect of the same purchase transaction, the Annmexure-2A Form produced by the purchaser has matched the Annexure-2B Form produced by the

> seller and the system verified the match. It is inconceivable that on the one hand the system verifies the match in respect of purchase transactions and, on the other hand, the DT&T treats those very transactions as having been made from 'bogus/suspicions 'dealers whose registration have been cancelled Where the registration of a dealer has been cancelled for whatever reason, the system cannot possibly veriji the matching of Annexures 2A and 2B in respect of the transactions involving such dealer. The system will have to be suitably programmed by the DT&T to remove such anomaly.

12. In my considered view, the ratio of above judgment squarely applies to the facts of the present appeals. The appellant made purchases from these dealers on the date when these dealers were registered dealers and they issued tax invoices to the appellant. Appellant has filed copies of tax invoices on which TIN numbers of these registered dealers is mentioned. Not only this 2A report of the purchasing dealer and 2B report of the selling dealers was verified by the system of the Department. In these circumstances, ITC was wrongly denied to the appellant without giving any notice and opportunity of hearing to the selling dealers.

13. Section 9(2)(g) of the DVAT Act, as submitted by Appellant's Ld. Counsel has two limbs, (1) tax paid by the purchasing dealer has actually been deposited by the selling dealer with Government or (2) tax has been lawfully adjusted against the output tax liability and correctly reflected in the respective tax period. According to appellant, in the present case, the selling dealers had lawfully adjusted the tax paid by the appellant against the output tax liability, as there is no mismatch. In these circumstances, Ld. VATO was required to issue notices to the concerned selling dealers as burden lies on them to collect and deposit the tax with the Government. So far as, tax collected by the selling dealer from the purchasing dealer is concerned, the selling dealer is a trustee of the Govt.

14. In Smart Mobile Technology Private Limited Vs Commissioner of VAT & ANR decided on 25.04.17, Hon'ble Delhi High Court made following observations with reference to section 9(2)(g) of the DVAT Act, which relevant for disposal of present appeals also:-

> Particularly, with reference to Section 9(2)(g) of the DVAT Act, it requires to be noticed that it envisages a situation where a selling dealer fails to deposit the tax that has been collected or fails to lawfully adjust it against the output tax liability. Therefore, the mere fact that what may have been deposited does not match what has been collected will not automatically mean that Section 9(2)(g) of the DVAT Act is attracted. In any event, this cannot be done without notice to the Petitioner and without affording an opportunity

of providing an explanation. In any event it ought not to have been resorted to at a stage when the refund was long overdue. The entire exercise is fraught with illegality and is an abuse of the process of the law by the VATO. dated 11th April, 2017.

15. It is also astonishing that by simply writing that selling dealers are bogus/suspicious dealers, the ITC has been denied to the appellant who is a bonafide purchaser. No definition of word bogus/suspicious dealers has been given under DVAT Act and no evidence has been produced by the revenue side to prove that selling dealers are bogus/suspicious dealers. Revenue side has not produced any evidence to prove that there was any collusion between the purchasing and selling dealers.

16. In the case of On Quest Merchandising India Pvt. Ltd. Vs Govt. of NCT of Delhi, similar issue arose before Hon'ble Delhi High Court and Hon'ble Court held as follows:-

53. The light of the above legal position, the Court hereby holds that the expression "dealer or class of dealer' occurring in Section 9(2) (g) of the DVAT Act should be interpreted as not including a purchasing dealer who has bonfide entered into purchase transactions with validly registered selling dealers who have issued tax invoices in accordance with section 50 of the Act where there is no mismatch of the transactions in Annexures 2A and 2B. Unless the expression 'dealer or class of dealers' in section 9(2)(g) is 'read down' in the above manner, the entire provision would have to be held to be violative of Article 14 of the Constitution.

54. The result of such reading down would be that the Department is precluded from invoking Section 9(2)(g) of the DVAT Act to deny ITC to a purchasing dealer who has bonfide entered into a purchase transaction with a registered selling dealer who has issued a tax invoice reflecting the TIN number. In the event that the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC. Where, however, the Department is able to come across material to show that the purchasing dealer and the selling dealer acted in collusion then the Department can proceed under Section 40A of the DVAT Act.

17. In my view, ratio of the above judgment, squarely applies to the facts of the present appeals. Appellant made bonafide purchases from the registered dealers who issued him valid tax invoices as per section 50 of the DVAT Act. There is no mismatch between the 2A and 2B report of the

selling and purchasing dealers and verification report has been filed by the appellant. Revenue side has alleged that appellant made purchases from cancelled dealers but no evidence to prove this fact has been filed by the Revenue side that on date of sale transactions, selling dealers were not registered dealers.

18. It is correct to say that appellant has no access to returns filed by the selling dealers • as they are confidential. When appellant has no access to returns of selling dealers, how appellant can come to know that selling dealers have not deposited the tax with the Govt. or adjusted it against output tax liability.

19. Ld. OHA in his impugned orders dated 27.06.17 has stated that appellant himself made the voluntary statement on 31.07.15 and surrendered ITC claimed on the basis of purchases from M/s S.K. & Co. and M/s Shashi Sales & Marketing Pvt. Ltd. On the contrary, appellant has submitted that the statement of the appellant was recorded under coercion. Appellant's premises were sealed and for desealing them, statement of the appellant was written by the Department officials on blank letterhead of the Company, which is clear from the writing in statement dated 29.07.15 which was written by Director Chetan Jain of the Company himself. Appellant's Ld. Counsel has submitted that only on the basis of statement of the appellant, ITC cannot be denied and as statement was not voluntary it cannot be admitted. In this regard, appellant's Ld. Counsel referred to the case of Commissioner of Income Tax Vs Dhingra Metal Works decided on 04.10.10 by Hon'ble Delhi High Court.

20. In my view, whether statement was voluntary or under coercion, crux of the matter in the present appeals is whether appellant made bonafide purchases after payment of VAT to the selling dealers. If these payments were made, then State is not entitled to again impose tax for the same transactions. Ld. VATO was required to issue notices to the selling dealers and after examination of disputed transactions should have framed assessment.

21. Appellant has also assailed the impugned order on the ground that benefit of section 87(6) was not given to him by the Ld. VATO while framing the assessment. In my view, provisions of this section are not applicable in facts and circumstances of present appeals because appellant has not voluntary disclosed in writing to the survey team, addressed to Ld. Commissioner that there is tax deficiency. On this ground, penalty can be reduced. On the contrary, appellant has challenged the statement which was recorded during the survey on the ground that it was written under coercion. So benefit of section 87(6) was rightly not given to the appellant. Appellant has also submitted that tax amount of Rs. 52,24,000/- was taken from the appellant under pressure which was not as per law. In this regard,

appellant referred to the judgment by Hon'ble Delhi High Court in the case of M/s Gullu's decided on 14.03.2016 and the circular dated 11.03.16 issued by the Spl. Commissisoner, Department of Trade & Taxes and later on another circular dated 11.04.16 issued by the Ld. Commissioner, Trade & Taxes. The above judgments and circulars were passed after the assessment was framed in the present appeals but even then the survey team was required to follow the provisions as given in section 36 and Rule 31 of the DVAT Act and Rules respectively. Even if appellant voluntarily offered to deposit tax to get benefit of section 87(6), survey team was required to direct him to deposit tax as given in section 36 DVAT Act and Rule 31 DVAT Rules.

22. Appellant has assailed imposition of interest and penalty also. Imposition of interest is corollary to the imposition of tax. If tax is not due, interest cannot be imposed.

23. So far as the imposition of penalty is concerned, it cannot be imposed without prior notice as held by Hon'ble Delhi High Court in the case of M/s Bansal Dye Chem Pvt. Ltd. Vs CTT case decided on 24.09.15.

24. On the basis of above discussion, impugned orders dated 27.06.17 passed by Ld. OHA are hereby set aside and appeals are allowed and matter is remanded back to the concerned VATO to reframe assessment afresh after giving opportunity of hearing to appellant as well as selling dealers and adjust amount of Rs.52,24,000/- accordingly.

25. Order pronounced in the open court.

26. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2019] 57 DSTC 258 (Delhi)

Before the Appellate Tribunal, Value Added Tax, Delhi

[M. S. Wadhwa, Member (J)]

Appeal No. 39/ATVAT/18-19

Salasar Trading Company ... Appellant

Vs.

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 13.03.2019

CANCELLATION OF REGISTRATION U/S 22 OF DVAT ACT, 2004 WITH RETROSPECTIVE EFFECT – DVAT 10 AND 11 ISSUED BUT NOT SERVED –

REASONS WERE RECORDED THAT APPELLANT MAKING SUSPICIOUS CENTRAL PURCHASES AND MADE STOCK TRANSFER TO OTHER STATE – OHA DISMISSED THE OBJECTION ON THE BASIS OF APPELLANT INVOLVED IN SUSPICIOUS TRANSACTIONS AND VIOLATING SECTION 40A. WETHER CORRECT; HELD – NO. VATO CANCELLED THE REGISTRATION ON DIFFERENT GROUND WHICH IS NOT MENTIONED IN SECTION 22 OF DVAT ACT, 2004 WHILE OHA REJECTED OBJECTION ON THE BASIS OF ORDER PASSED BY VATO THAT APPELLANT INVOLVED IN SUSPICIOUS TRANSACTION AND VOILATING SECTION 40A – ORDER PASSED BY VATO & OHA SET ASIDE AND REGISTRATION RESTORED.

Facts of the case

The registration of the appellant was cancelled by issuing form DVAT -11 on 14/9/2017 w.e.f. 23/9/2016.

The registration was cancelled on the ground "the dealer has shown suspicious central purchase against C-forms and make stock transfer to dealer of other state". The registration was cancelled without considering that the cancellation of registration had been from retrospective date and on grounds which were not as per law.

That the intimation in DVAT-10 on which DVAT-11 had been issued, had not been given to the appellant, which was a primary condition for cancellation of registration certificate. No show cause notice was served upon the appellant. There was no provision under the Act which authorized the VATO to cancel the registration of the appellant from the retrospective date.

The appellant filed objections against the cancellation of registration before the OHA who vide impugned orders dated 17/4/2018, dismissed the objections. Appellant submitted before the OHA that no notices in DVAT -10 form was issued to him and neither it was served upon him and the appellant was still working. Moreover, the registration had been cancelled after the DVAT Act had been superseded by GST Act, the provision of section 22 were no more in existence to pass the impugned order. VATO could not cancel the registration certificate on the ground that appellant was making suspicious central purchase against C-forms and made stock transfer to dealer of other state.

The OHA vide impugned orders acted beyond the jurisdiction which was against the spirit of law and provisions of DVAT Act. The OHA in his impugned orders had observed that 'the assessment order framed by the Ward Incharge indicates that M/s Salasar Trading Company was involved in suspicious transaction and violating section 40A. OHA hereby upheld the orders passed by the AA Ward-62 and dismissed the objections as

filed by the objector'. According to appellant, OHA failed to appreciate, that whether registration of the appellant could be cancelled after appellant had migrated to GST and on the basis of grounds given by the VATO.

Held

Perusal of cancellation order shows that registration of the dealer had been cancelled on the ground of "central purchase against C-forms and make stock transfer to dealer of other state". The Tribunal agreed to the submissions of appellant's counsel in this regard, that this ground had not been mentioned as a ground of cancellation in Section 22. It was also axiomatic and interesting that OHA upheld the cancellation orders passed by VATO on different ground. OHA in the impugned order dated 17/4/2018 had observed that 'the assessment order framed by the Ward Incharge indicated that M/s Salasar Trading Company was involved in suspicious transaction and violating section 40A. The Tribunal hereby upheld the orders passed by the AA Ward-62 and dismissed the objections as filed by the objector". VATO had cancelled the registration on the different ground which was not mentioned in section 22 and OHA had cancelled the registration u/s 40A DVAT Act on the ground that appellant made false and paper transaction as the selling dealer had not sold any goods to the appellant. Revenue side had not produced any evidence to prove these allegations.

As in the appeal, registration was cancelled retrospectively on the ground not mentioned in DVAT Act and without giving any notice to the appellant, hence appeal was allowed and impugned orders dated 17/4/2018 passed by OHA were hereby set-aside and registration of the appellant was restored from the date of cancellation.

Present for the Appellant	:	Sh. R. K. Aggarwal, Advocate
Present for Respondent	:	Sh. Suman Kapoor, Advocate

ORDER

1. The present appeal has been filed against the impugned orders dated 17/4/2018 passed by ld. Jt. Commissioner here-in-after called Objection Hearing Authority, who vide these orders upheld the cancellation orders of registration of appellant passed by ld. AVATO.

2. The brief facts of the present appeal are that the registration of the appellant was cancelled by issuing form DVAT -11 on 14/9/2017 w.e.f. 23/9/2016.

3. The registration was cancelled on the ground "the dealer has shown suspicious central purchase against C-forms and make stock transfer to dealer of other state". The registration was cancelled without considering that the cancellation of registration has been from retrospective date and on grounds which are not as per law.

4. That the intimation in DVAT-10 on which DVAT-11 has been issued, has not been given to the appellant, which is a primary condition for cancellation of registration certificate. No show cause notice was served upon the appellant. There is no provision under the Act which authorizes the ld. VATO to cancel the registration of the appellant from the retrospective date.

5. The appellant filed objections against the cancellation of registration before the ld. OHA who vide impugned orders dated 17/4/2018, dismissed the objections. Appellant submitted before the ld. OHA that no notices in DVAT -10 form was issued to him and neither it was served upon him and the appellant is still working. Moreover, the registration has been cancelled after the DVAT Act has been superseded by GST Act, the provision of section 22 are no more in existence to pass the impugned order. Ld. VATO cannot cancel the registration certificate on the ground that appellant is making suspicious central purchase against C-forms and make stock transfer to dealer of other state.

6. The ld. OHA vide impugned orders acted beyond the jurisdiction which is against the spirit of law and provisions of DVAT Act. The ld. OHA in his impugned orders has observed that 'the assessment order framed by the Ward Incharge indicates that M/s Salasar Trading Company is involved in suspicious transaction and violating section 40A. I hereby upheld the orders passed by the AA Ward-62 and dismiss the objections as filed by the objector'. According to appellant, ld. OHA failed to appreciate, that whether registration of the appellant can be cancelled after appellant has migrated to GST and on the basis of grounds given by the ld. VATO.

7. Still aggrieved, appellant has filed present appeal on following grounds-

i) Because the ld. OHA has erred in law and facts while passing the impugned orders.

ii) Because the registration was cancelled on 14/9/2017 on a date, when provision of section 22 are not in existence as the dealer has migrated to GST and whatever action could be initiated

for cancellation of registration that can only be initiated under provision of GST and not under DVAT Act.

iii) Because registration has been cancelled by issuing form DVAT-11 on 14/9/2017 w.e.f. 23/9/2016 from date of registration, which is not sustainable under the law because there is no provision under the Act which authorize Id. VATO to cancel the registration certificate of the appellant from retrospective date.

iv) Because the registration has been cancelled on the ground which is not a ground for cancellation of registration under the DVAT Act.

v) Because the DVAT-10 has never been served upon the appellant. It is instructed by Hon'ble Delhi High Court in the case of M/s Swastic Polymers Vs. CTT vide order dated 19/5/2017 that as and when they sign any order and upload a digitally signed copy thereof on the system, there must be a noting on the file as to the date and time when it was so uploaded. Further, the software must facilitate online verification of the date and time of order being digitally signed. If not already issued, a circular to the above effect should be issued and a copy thereof be placed before the Court by the next date of hearing.

vi) Because this Tribunal in the case of M/s Laksh Trade Impex Vs. CTT, vide order dated 18/12/2015 held that the impugned order of cancellation is not in accordance with law, also for the reason that it was made effective from retrospective date. The above case is squarely applicable in the present case and hence impugned order is liable to be set aside.

8. On the basis of above facts and grounds of appeal, it has been prayed that impugned orders passed by Id. OHA in above appeal be set aside and present appeal be allowed.

9. Heard to appellant's Id. counsel Mr. R.K. Aggarwal and Mrs. Suman Kapoor on behalf of the revenue and perused the record on the basis of which present appeal is being disposed off as follows.

10. Appellant has assailed the impugned orders dated 17/4/2018 passed by Id. OHA and cancellation of registration order dated 14/9/2017 passed by Id. AVATO on various grounds. One of the ground on which cancellation of registration has been assailed is that registration cannot be cancelled retrospectively. In this regard, perusal of cancellation order

in DVAT -11 shows that it was issued on 14/9/2017 while registration has been cancelled w.e.f. 23/9/2016. In my view, registration can be cancelled prospectively. Secondly, before cancelling registration, it is mandatory that notice be given to the appellant and opportunity of hearing should be given before cancellation of the registration. In this regard, section 22 (1) is relevant, according to which before cancellation of registration ld. Commissioner is required to serve a notice in the prescribed form and after providing the dealer an opportunity of being heard, cancel the registration of the dealer w.e.f the date specified by him in the notice. Similarly, in Rule-16 of the DVAT Rules, it is explicitly written that it is mandatory for the ld. Commissioner to serve upon the person a notice in form DVAT-10 in the manner prescribed in Rule-62. The use of the word 'shall' clearly shows the intention of the legislature that it is mandatory to issue notice to the concerned dealer before cancellation of the registration.

11. In M/s. Balkishan Gopal Das case, which was decided by this Tribunal, similar question arose. In this case, the RC of the appellant was cancelled and the appellant had pleaded that no notice was served upon him and his RC was cancelled without giving an opportunity of hearing to him, this Tribunal while allowing the appeal held as follows —

i) A careful perusal of the sec. 22 (1) reproduced as above shows that Ld. Commissioner gets a jurisdiction to cancel the registration after the notice in the prescribed form, has been served upon the dealer and dealer has been provided an opportunity of hearing. When action of the Commissioner canceling the registration is challenged then it is for the Commissioner to establish that a notice in the prescribed form was served before canceling the registration and opportunity of hearing had also been given to the dealer. Thus, in the case before us, the onus was upon the Revenue to establish that the notice as required u/s 22(1) of the Act was in fact served upon the appellant. The fact that Ld. Counsel for Revenue could not controvert the submission of the Ld. Counsel for the appellant that no notice before cancelling the registration was 'served itself shows that no notice was in fact served before canceling the registration. Thus, we have no hesitation In holding that the order dated 08.03.2011 cancelling the registration of the appellant is not in accordance with law and the same deserves to be set aside.

ii) It is also to be noted that the Ld. VATO cancelled registration of the appellant vide order dated 08.03.2011 with retrospective effect from 08.01.2011. As a matter of fact, VATO could cancel

the registration as per law but only with prospective effect and not by giving a retrospective effect to the cancellation order. Here it is useful to refer to a judgment reported as Chhabra Electric Stores Vs The Chief Commissioner, Delhi: (1972) 30 STC 85 (Delhi). In this case, Their Lordships, while considering section 7(7) of Bengal Finance Act as extended to Delhi, which is a provision pan materia to the provision as contained in sec.22(1) of the DVAT Act and reproduced as above, have held that the scheme of the Act does not warrant the giving of retrospective effect to the order of cancellation of a registration certificate. Thus, the impugned order dated 8.3.2011 is not in accordance with law, also for the reason that it was made effective with a retrospective date.

iii) In view of the foregoing discussion, we quash the order of the Ld. VATO dated 8.3.2011, canceling the registration of the appellant w.e.f. 08.01.2011 as well as the order of the Ld. Addl. Commissioner- IV rejecting the objections of the appellant. We hereby direct the Ld. VATO to restore the registration of the appellant with effect from the date, it was cancelled, i.e. with effect from 08.01.2011."

12. Coming to the facts of the present appeal, appellant has submitted that no notice has been received by him. Revenue has not placed on record any document to prove that the notice dated 5/9/2017 was served upon the appellant. In the case cited above, this Tribunal has observed that once the receipt of notice is disputed, it is for the revenue to establish that the notice in fact has been issued and served upon the appellant in accordance with the provisions of the law.

13. Appellant has also referred to the recent judgment by Hon'ble Delhi High Court in the case of Swastic Polymers Vs. Commissioner of Trade & Taxes. This case was decided on 19/5/2017 and registration of the appellant was cancelled on 2/6/2017. It means that department was expected to follow the guidelines given by Hon'ble Delhi High Court in the above case. If notices were uploaded on the system of the department even then these instructions were required to be followed. According to above judgment, "as and when they sign any order and upload a digitally signed copy thereof on the system, there must be a noting on the file as to the date and time when it was so uploaded. Further, the software must facilitate online verification of the date and time of order being digitally signed".

14. Revenue side has not filed any evidence to prove that notices were issued and served upon the appellant as per Rule-62. No noting

of the concerned file has been placed before the Tribunal. So I come to the conclusion, that no notices were served upon the appellant and as cancellation of registration is done retrospectively, it is not in accordance with law.

15. Appellant has also assailed the cancellation of registration on the ground that registration has been cancelled on a ground which is not mentioned in section 22 of the DVAT Act. Before proceeding further, it would be appropriate to reproduce section 22 of the DVAT Act, which is as follows —

Sec. 22 Cancellation of registration

(1) Where —

(a) a registered dealer who is required to furnish security under the provisions of this Act has failed to furnish or maintain such security;

(b) a registered dealer has ceased to carry on any activity which would entitle him to be registered as a dealer under this Act;

(c) an incorporated body is closed down or otherwise ceases to exist;

(d) the owner of a proprietorship business dies leaving no successor to carry on the business;

(e) in the case of a firm or association of persons, it is dissolved;

(f) registered dealer has ceased to be liable to pay tax under this. Act;

(g) a registered dealer knowingly furnishes a return which is misleading or deceptive in a material particular;

(h) a registered dealer has committed one or more offences or contravened the provisions of this Act and the offence or contravention is, in the opinion of the Commissioner, of such magnitude that it is necessary to do so; or

(i) the Commissioner, after conducting proper inquiries, is of the view that it is necessary to do so;

the Commissioner may, after service of a notice in the prescribed form and after providing the dealer an opportunity of being heard, cancel the registration of the dealer with effect from the date specified by him in the notice.

(2) Where —

(a) a registered dealer has ceased to carry on any activity which would entitle him to be registered as a dealer under this Act;

(b) an incorporated body is closed down or otherwise ceases to exist;

(c) the owner of a proprietorship business dies leaving no successor to carry on business;

(d) in the case of a firm or association of persons, it is dissolved; or

(e) a registered dealer has ceased to be liable to pay tax under this Act; the registered dealer or the dealer's legal representative in case of clause (c) above, shall apply for cancellation of his registration to the Commissioner in the manner and within the time prescribed. .

Explanation.- For the purpose of this sub-section "legal representative" has the meaning assigned to it in clause (11) of section 2 of the code of Civil Procedure, 1908 (5 of 1908).

3. On receipt of such application, if the Commissioner is satisfied that the dealer has ceased to be entitled to be registered, he may cancel the registration.

4. If a registered dealer ceases to be registered, the Commissioner shall cancel the dealer's registration with effect from a specified date.

5. If a dealer's registration which has been cancelled under this section is reinstated as a result of an appeal or other proceeding under this Act, the registration of the dealer shall be restored and he shall be liable to pay tax as if his registration had never been cancelled.

6. If any registered dealer whose registration has been restored under sub-section (5) of this Section satisfies the Commissioner that excess tax has been paid by him during the period his registration was inoperative which but for the cancellation of his registration he would not have paid, then the amount of such tax shall be adjusted or refunded in such manner as may be prescribed.

7. Every registered dealer who applies for cancellation of his registration shall surrender with his application the certificate of

registration granted to him and every registered dealer whose registration is cancelled otherwise than on the basis of his application shall surrender the certificate of registration within seven days of the date of communication to him of the cancellation.

8. The Commissioner shall, at intervals not exceeding three months, host on the departmental website, such particulars as may be prescribed, of registered dealers whose registration has been cancelled.

9. The cancellation of registration shall not affect the liability of any person to pay tax due for any period and unpaid as on the date of such cancellation or which is assessed thereafter notwithstanding that he is not otherwise liable to pay tax under this Act.

14. Rule. 16 Cancellation of registration

4. Where the Commissioner proposes to cancel the registration of a dealer under sub-section (1) of section 22, the Commissioner shall serve upon the person a notice in Form DVAT-10 in the manner prescribed in rule 62.

5. Every registered dealer whose registration is cancelled under subsection (1) of section 22, shall deliver to the Commissioner the certificate of registration by the date stated in Form DVAT- 11

6. Provided that where a dealer has made an objection to the Commissioner under section 74 against the cancellation of the registration, the dealer may retain the certificate of registration pending resolution of the objection.

16. Perusal of cancellation order shows that registration of the dealer has been cancelled on the ground of “central purchase against C-forms and make stock transfer to dealer of other state”. I agree to the submissions of appellant’s ld. counsel in this regard, that this ground has not been mentioned as a ground of cancellation in section-22. It is also axiomatic and interesting that ld. OHA upheld the cancellation orders passed by ld. VATO on different ground. Ld. OHA in the impugned order dated 17/4/2018 has observed that ‘the assessment order framed by the Ward Incharge indicates that M/s Salasar Trading Company is involved in suspicious transaction and violating section 40A. I hereby upheld the orders passed by the AA Ward-62 and dismiss the objections as filed by the objector”. Ld. VATO has cancelled the registration on the different ground which is not mentioned in section 22 and ld. OHA has cancelled the registration u/s 40A DVAT Act on the ground that appellant made false and paper transaction

as the selling dealer has not sold any goods to the appellant. Revenue side has not produced any evidence to prove these allegations.

17. As in the present appeal registration was cancelled retrospectively on the ground not mentioned in DVAT Act and without giving any notice to the appellant, hence appeal is allowed and impugned orders dated 17/4/2018 passed by ld. OHA are hereby set-aside and registration of the appellant is restored from the date of cancellation.

18. Order pronounced in the open court.

19. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2019] 57 DSTC 268 (Delhi)

Before the Appellate Tribunal, Value Added Tax, Delhi

[M. S. Wadhwa, Member (J)]

Appeal No. Misc - 19/ATVAT/18-19

Sunny Textile ... Appellant

Vs.

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 11.03.2019

CONDONATION OF DELAY IN FILING THE APPEAL BEFORE VAT TRIBUNAL – NON AVAILABILITY OF THE KEY SIGNING PERSON – FINDING A NEW COUNSEL AND RETRIEVING DOCUMENTS FROM THE OLD COUNSEL – WHETHER SUFFICIENT CAUSE; HELD – YES. DELAY CONDONED ON PAYMENT OF RS. 2,000/- TOWARDS COST.

Facts of the case

According to the application, it was humbly submitted that the original appeal should have been filed on or before 21/5/2018, whereas the same was being filed as on 19/7/2018, after a delay of 52 days.

The delay in filing the appeal had occurred due to non availability of the key signing person of the firm. Further, the initial delay has also been caused due to the fact that there has been a change in counsel of the assessee, as it could be apparently seen that some other counsel was dealing before the lower authority. Hence, finding a new counsel, retrieving

documents from the old counsel and preparing up the case has also been a factor in the delay of filing the appeal. Appellant had prayed that in view of these facts delay in filing the appeal be condoned.

Held

Appellant had shown 'sufficient cause' for delay in filing the appeal and in the light of judgments cited, in the interest of justice, delay in filing the appeal was condoned on payment of Rs. 2,000/-towards cost within 15 days. On compliance of these orders, registry was directed to register this appeal on regular side. Let appeal be fixed for hearing on merit on 27/3/2019.

Present for the Appellant	:	Sh. H. R. Aggarwal, Advocate
Present for Respondent	:	Sh. M. L. Garg, Advocate

Order

1. The present condonation application has been moved by the appellant. According to the application, it is humbly submitted that the original appeal should have been filed on or before 21/5/2018, whereas the same is being filed as on 19/7/2018, after a delay of 52 days.

2. The delay in filing the appeal has occurred due to non availability of the key signing person of the firm. Further, the initial delay has also been caused due to the fact that there has been a change in ld. counsel of the assessee, as it can be apparently seen that some other counsel was dealing before the lower authority. Hence, finding a new counsel, retrieving documents from the old counsel and preparing up the case has also been a factor in the delay of filing the appeal. Appellant has prayed that in view of these facts delay in filing the appeal be condoned.

3. Heard to appellant's ld. Counsel Mr. H.R. Aggarwal and Mr. M.L. Garg on behalf of the revenue and perused the file. Appellant ld. Counsel reiterated the above facts and in support of his arguments referred to judgment by Hon'ble High Court of Gauhati in the case of Hindustan Unilever Ltd. Vs. Commissioner of Central Excise (2014) 45 taxmann.com 521.

4. While ld. Counsel for the revenue submitted that applicant is supposed to justify each day's delay and delay may be condoned on payment of cost.

5. So far as present appeal is concerned, according to appellant it was delayed by 52 days. Hon'ble Supreme Court in the case of M. Balakrishna made following observation while disposing of application for condonation of delay, which are relevant for the disposal of present application —

> "It is axiomatic that condonation of delay is a matter of discretion of the court Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be un-condonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in reversional jurisdiction, unless the exercise of discretion was on whole untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammeled by the conclusion of the lower court."

6. Similarly in the case of Collector, Land Acquisition, Anantnag & Anr supra), Hon'ble Supreme Court made following observation regarding condonation of delay —

> "The Legislature has conferred the power to condone delay by enacting Section 5 of the Limitation Act of 1963 in order to enable the court to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the Legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which sub-serves the ends of justice — that being the life-purpose of the existence of the institution of courts. It is common knowledge that this court has been making a justifiable liberal approach in matters instituted in this court. But the message does not appear to have percolated down to all the other courts in the hierarchy."

7. In the case of Hindustan Unilever Ltd. Vs. Commissioner of Central Excise (2014) 45 taxmann.com 521, Hon'ble Gauhati High Court made following observations while condoning the delay of 95 days in filing the anneal —

"Condoning the delay always advances cause of justice and afford opportunity to parties to contest the case on merits whereas; not condoning the delay results in denial of justice and deprive them of an opportunity. By this expression, we do not want to say that in every case delay should always be condoned, but by and large, approach of the court should not be so technical, but it should be always to ensure that substantial justice is done by giving them an opportunity of being heard to both the parties."

8. As appellant has shown 'sufficient cause' for delay in filing the present appeal and in the light of above judgments, in the interest of justice, delay in filing the appeal is condoned on payment of Rs. 2,000/-towards cost within 15 days. On compliance of these orders, registry is directed to register this appeal on regular side. Let appeal be fixed for hearing on merit on 27/3/2019.

9. Order pronounced in the open court.

10. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2019] 57 DSTC 271 (Delhi)

Before the Appellate Tribunal, Value Added Tax, Delhi

[M. S. Wadhwa, Member (J)]

Appeal No. 205-206/ATVAT/18-19

Vicky Plast ... Appellant

Vs.

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 29.01.2019

INPUT TAX CREDIT DISALLOWANCE U/S 9(2)(g) OF DVAT ACT, 2004 – DEFAULT ASSESSMENT OF TAX & INTEREST AND NOTICE OF ASSESSMENT OF PENALTY U/S 86(10) ISSUED – MISMATCH IN 2A & 2B – SELLING DEALER DID NOT DEPOSIT THE TAX – APPELLANT PRODUCED BILL AND BANK STATEMENT AND REFERRED THE JUDGEMENT OF DELHI HIGH COURT. OHA DISMISSED THE OBJECTION AND ALSO IMPROVED THE ORDER OF ASSESSING AUTHORITY BY INVOKING SECTION 40(A) OF THE DVAT ACT, 2004 – OHA TOOK THE PLEA THAT WHY DEALER DID NOT PURSUE TO RECOVER THE TAX FROM PURCHASING DEALER – WHETHER JUSTIFIED; HELD – NO. OHA HAD NO POWER TO REVIEW THE ORDER PASSED BY VATO – ORDER SET ASIDE.

Facts of the case

The appellant was assessed by the VATO u/s 32 and section 33 read with section 86(10) of the DVAT Act, invoking the provisions of section 9(2)(g) of the DVAT Act, vide his order dated 15/6/2015 whereby he disallowed input tax credit (ITC) of Rs. 14,100/- and created demand of Rs. 18,121 -including interest of Rs. 4,021/-. Ld. VATO also imposed penalty u/s 33 read with section 86 (10) of the DVAT Act for Rs. 14,100/-.

That the VATO created the demand by a non speaking order by invoking provisions of section 9(2)(g) of the DVAT Act with the observations that the selling dealer had not deposited the tax, which has been charged by him at the time of sale and there was mis-match information filed in 2A & 2B, hence dealer was liable to pay tax, interest & penalty.

That the VATO failed to appreciate that if selling dealer had committed any mistake or had not paid tax, then purchasing dealer could not be burdened with tax liability for the act done by the selling dealer. The VATO had without issuing any show cause notice created the demand and disallowed the benefit of ITC claimed by the appellant.

Being aggrieved from the assessment orders, appellant filed objections before the OHA and submitted that in view of change of law settled by Hon'ble Delhi High Court, the order of VATO deserved to be set-aside.

Since the VATO had disallowed the ITC, without passing any speaking order or providing any reason, the OHA had failed to appreciate that in case where selling dealer had not deposited the tax collected as per section 2(1)(r) of the DVAT Act, which he had charged, purchasing dealer was not liable to make good the payment on behalf of the selling dealer. Further, dealer filed every evidence e.g., copy of purchase bill, bank statement in respect of the purchase transaction, in respect of purchases before the OHA and submitted that appellant was eligible for ITC on the basis of purchases made by a registered dealer and referred to the judgment by Hon'ble Jurisdictional Delhi High Court in the case of On Quest Merchandising India (P) Ltd. VS. Government of NCT. The Id OHA not only dismissed the objections but also improved the order of the assessing authority by invoking section 40(A) of DVAT Act. The OHA on one hand admitted that the dealer fulfilled all the requirements in accordance with law but he dismissed the objections on the basis of that why dealer did not pursue to recover the tax from the

purchasing dealer which had not been deposited by the purchasing dealer.

The OHA misunderstood the law laid down by Hon'ble High Court in the case of On Quest Merchandising India (P) Ltd. Vs. Govt. of NCT & Ors. in W.P.C. No. 6093/2017, wherein Hon'ble High Court clearly directed to the department in case selling dealer had not deposited the tax, then remedy would be to proceed against the defaulting selling dealer to recover such tax, not to deny the ITC to the purchasing dealer.

Held

It was clear from the orders that despite unequivocal instructions by Commissioner to all Zonal incharges, section 40A of the DVAT Act had been applied in the appeals by rejecting the objections filed by the appellant. Despite the fact that no complete fraudulent chain and also apparent collusion on the part of the selling and purchasing dealer had been established, OHA by invoking section 40A of the DVAT Act rejected the objections. Perusal of impugned orders shows that only on the basis of conduct of the appellant that appellant was not seriously pursuing the matter with the selling dealer while contrary to it seriously pursuing the matter with the department, hence applied section 40A of the DVAT Act and rejected the objections. In view of the Tribunal without establishing fraudulent chain and collusion between the parties, section 40A of the DVAT Act could not be invoked. Secondly, the Tribunal agreed to the arguments advanced by appellant's counsel that on different findings, assessment orders could not be upheld.

Perusal of impugned orders dated 27/8/2015 passed by OHA also showed that these orders were passed in exercise of powers as given under section 74(b) of the DVAT Act. Power of review could be exercised by the authority which passed original orders. Superior authority could not exercise these powers and passed review order regarding original order passed by lower authority. On this ground also impugned orders dated 27/8/2018 were liable to be set aside. It was alto axiomatic that OHA without fixing the turnover in the impugned orders imposed tax, interest and penalty on the appellant.

On the basis of above discussion, impugned orders dated 27/8/201;8 passed by OHA were hereby set-aside and the matter was remanded back to the concerned VATO to reframe assessment afresh in the light of above observations and after giving an opportunity of hearing to the appellant and selling dealer. Appellant was directed to appear before the concerned VATO on 25/02/2019.

Present for the Appellant : Sh. Rajesh Mahana, Advocate

Present for Respondent : Sh. Suman Kapoor, Advocate

ORDER

These appeals have been filed against the impugned orders dated 77/8/2018 passed by Spl. Objection Hearing Authority (in short Spl. OHA), who vide these orders upheld the assessment of tax, interest penalty orders dated 15/6/2015 passed by Ld. VATO (Ward-49) regarding 1st qtr. of assessment year 2013-14. As common question of law and facts are involved in both these appeals, hence they are being disposed off as follows.

2. The brief facts of the present appeals are the appellant was assessed by the ld. VATO 32 and section 33 read with section 86(10) of the DVAT Act, invoking the provisions of section 9(2)(g) of the DVAT Act, vide his order dated 15/6/2015 whereby be disallowed input tax credit (ITC) of Rs. 14,100/- and created demand of Rs. 18,121 -including interest of Rs. 4,021/-. Ld. VATO also imposed penalty u/s 33 read with section 86 (10) of the DVAT Act for Rs. 14,100/-.

3. That the ld. VATO created the demand by a. non speaking order by invoking provisions of section 9(2)(g) of the DVAT Act with the observations that the selling dealer has not deposited the tax, which has been charged by him at the time of sale and there was mis-match information filed in 2A & 2B, hence dealer is liable to pay tax, interest & penalty as given above.

4. That the ld. VATO failed to appreciate that if selling dealer has committed any mistake or has not paid tax, then purchasing dealer cannot be burdened with tax liability for the act done by the selling dealer. The id. VATO has without issuing any show cause notice created the demand and disallowed the benefit of ITC claimed by the appellant.

5. Being aggrieved from the assessment orders, appellant filed objections before the Ld. OHA and submitted that in view of change of law settled by Hon'ble Delhi High Court, the order of VATO deserves to be set-aside.

6. Since the ld. VATO had disallowed the ITC, without passing any speaking order or providing any reason, the ld. OHA has failed to appreciate that in case where selling dealer has not deposited the tax

collected as per section 2(1)(r) of the DVAT Act, which he has charged,, purchasing dealer is not liable to make good the payment on behalf of the selling dealer. Further, dealer filed every evidence e.g., copy of purchase bill, bank statement in respect of the purchase transaction, in respect of purchases before the ld. OHA and submitted that appellant is eligible for ITC on the basis of purchases made by a registered dealer and referred to the judgment by Hon'ble Jurisdictional Delhi High Court in the case of On Quest Merchandising India (P) Ltd. VS. Government of NCT. The ld OHA not only dismissed the objections but also improved the order of the assessing authority by invoking section 40(A) of DVAT Act. The Ld. OHA on one hand admitted that the dealer fulfilled all the requirements in accordance with law but he dismissed the objections on the basis of that why dealer not pursue to recover the tax from the purchasing dealer which have not been deposited by the purchasing dealer.

7. The ld. OHA misunderstood the law laid down by Hon'ble High Court in the case of Onquest Merchandising India (P) Ltd. Vs. Govt. of NCT & Ors. In W.P.C. No. 6093/2017, wherein Hon'ble High Court clearly directed to the department in case selling dealer has not deposited the tax, then remedy would be to proceed against the defaulting selling dealer to recover such tax, not deny the purchasing dealer the ITC. Dismissal of objection by the OHA is nothing less than contempt of the court on the following grounds —

i) The ld. OHA failed to appreciate that he cannot improve the assessment order, ld. AO denied the input tax credit on the basis of 9(2)(g) of DVAT Act, and ld. OHA cannot change the finding of the assessment order. Hence, order passed by the OHA is illegal and bad in law.

ii) The ld. OHA failed to appreciate that in terms of judgment of the Hon'ble High Court in the case of M/s On Quest Merchandising India (P) Ltd. Vs. Govt. of NCT & Ors. In W.P.C. Nb. 6093/2017, dealer has fulfilled all such requirement but invoking section 40A of DVAT Act for rejecting the objection is illegal and bad in law.

iii) Because the ld. OHA has failed to appreciate that dealer has filed the copy of tax invoices and Bank Statement and he discharged his obligation. Department has to recover such tax from the selling dealer not from the purchasing dealer, hence order passed by the OHA is illegal and bad in law.

iv) Because the order passed by objection hearing authority confirming the order of the assessment Authority but changed the finding of the A.O., is illegal and bad in law.

v) Because the ld. OHA has failed to appreciate that in terms of section 74 of DVAT Act, the OHA either accept the objection in whole or in part or to refuse the objection but he cannot improve the order of the Assessing Authority or change the finding of the Assessing Authority which is totally illegal and bad in law.

8. On the basis of the above facts and grounds of appeal, it has been prayed that impugned orders dated 27/8/2018 passed by ld. Spl. OHA,, be set-aside and present appeals be allowed.

9. Heard to appellant's ld. counsel Mr. Rajesh Mahana & Mrs. Suman Kapoor, on behalf of the revenue and perused the file on the basis of which present appeals are being disposed of as follows.

10. Before proceeding further, it would be appropriate to reproduce the assessment orders of tax & interest dated 15/6/2015 passed by 141. VATO (Ward-49), which are as follows —

> "Cross checking of the purchase related data filed by the dealer online in Annexure-2A with the Annexxure-2B filed by respective selling dealers reveals that more Input Tax Credit has been claimed than the corresponding output tax, if any, reported by the selling dealer. The dealer has thus claimed excess input tax credit in violation of the provisions of clause (g) of sub section (2) of section 9 of Delhi Value Added Tax Act, 2004 and is therefore, liable for default assessment as per clause (c) and (d) of sub section (1) of section 32 of Delhi Value Added Tax Act, 2004."

11. It is clear from the above assessment orders that only on the basis that selling dealer has not deposited the tax collected from the appellant, ITC was denied to the appellant. According to appellant, appellant was entitled for ITC as appellant fulfilled all the conditions prescribed by section 9 DVAT Act. Appellant in support of claim of ITC filed copy of purchase bill, bank statement in respect of the purchase transactions and tax invoices before the ld. lower authorities, even then without issuing notices to the selling dealer, appellant was denied ITC claimed by him. Hon'ble Delhi High Court in the case of On Quest Merchandising India (P) Ltd., read down the provisions of section 9(2)(g) which was the basis of disallowance of ITC and held that in the event of the selling dealer failing to deposit the tax collected by him on his sales, purchasing dealer cannot be denied

the benefit of ITC. The remedy of the department would be to proceed against that defaulting selling dealer to recover such tax and not to deny the purchasing dealer, it the ITC claimed in his returns.

12. It is also astonishing that while disposing of objections, vide impugned orders dated 27/8/2018, ld. OHA rejected the objections by applying section 40(A) of the DVAT Act. Ld. Commissioner vide orders dated 9/7/2018 passed an order which is also relevant for the disposal 4 present appeals, because these orders were passed in compliance of orders passed by Hon'ble Delhi High court in the case of On Quest Merchandising India (P) Ltd. case (supra), which is being reproduced as follows —

> This is in continuation to the Note No. F.PS/CVAT/2018/4547 dated 8/5/2018 on the issue of mismatch/verification of 2A-2B statements of the dealers. It has been brought to my notice that the said instructions are not being followed properly in the wards in so much as demands are being created without establishing the complete fraudulent chain and also apparent collusion on the part of the selling and purchasing dealers. Such orders may not stand scrutiny in the eyes of the law in view of the various orders passed by the Hon'ble High Courts on this issue.
>
> The ward authorities are hereby instructed to ensure that unless clear chain of bonafide transaction is established between the parties, which could invariably attract section 40(A) of DVAT Act, 2014 and thereby invoicing the section 40(A) with a detailed reasoned order, keeping in view the rulings in W.P.(C)6093/2017 & CM No. 25293/2017, On Quest Merchandising India (P) Ltd Vs. Government of NCT of Delhi &Ors., no mechanical application of mismatches should be done However, 2A-2B mismatches at the first stage should invariably be subjected to scrutiny and demand raised accordingly.

13. It is clear from the above orders that despite unequivocal instructions by ld. Commissioner to all Zonal incharges, section 40A of the DVAT Act has been applied in the present appeals by rejecting the objections filed by the appellant. Despite the fact that no complete fraudulent chain and also apparent collusion on the part of the selling and purchasing dealer has been established, Ld. OHA by invoking section 40A of the DVAT Act rejected the objections. Perusal of impugned orders shows that only on the basis of conduct of the appellant that appellant is not seriously pursuing the matter with the selling dealer while contrary to it seriously pursuing the matter with the department, hence applied section 40A of the DVAT Act and

rejected the objections. In my view without establishing fraudulent chain and collusion between the parties, section 40A of the DVAT Act cannot be invoked. Secondly, I agree to the arguments advanced by appellant's ld. counsel that on different findings, assessment orders cannot be upheld.

14. Perusal of impugned orders dated 27/8/2015 passed by Ld. OHA also shows that these orders were passed in exercise of powers as given under section 74(b) of the DVAT Act. Power of review can be exercised by the authority which passed original orders. Superior authority cannot exercise these powers and pass review order regarding original order passed by lower authority. On this ground also impugned orders dated 27/8/2018 are liable to be set aside. It is alto axiomatic that ld. OHA without fixing the turnover in the impugned orders imposed tax, interest and penalty on the appellant.

15. On the basis of above discussion, impugned orders dated 27/8/201;8 passed by ld. OHA are hereby set-aside and the matter is remanded back to the concerned VATO to reframe assessment afresh in the light of above observations and after giving an opportunity of hearing to the 1 appellant and selling dealer. Appellant is directed to appear before the concerned VATO on 25/02/2019.

16. Order pronounced in the open court.

17. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2019] 57 DSTC 279 (Delhi)

Before the Objection Hearing Authority
Department of Trade & Taxes, Delhi

Objection No. 380773e &380774
Ref. No. 113/117

M/s. Advantage Scaffolding ... Objector

Date of Order: 17.05.2019

INPUT TAX CREDIT U/S 9(1) OF DVAT ACT, 2004 – REFUND U/S 38(3) – NO MISMATCH IN ANNEXURE 2A & 2B REPORT – ITC NOT VERIFIED ON THE BASIS OF PROFILE OF EXTENDED SELLING DEALERS – SECTION 9(2)(g) INVOKED – SECTION 40A APPLIED – DEFAULT ASSESSMENT FRAMED. REFUND ADJUSTED – WHETHER JUSTIFIED; HELD – NO.

NO MISMATCH IN ANNEXURE 2A & 2B ACCRUED – REVENUE DID NOT BRING ANY MATERIAL ON RECORD FOR COLLUSIONS BETWEEN PURCHASING AND SELLING DEALERS – PAYMENT HAVE MADE THROUGH BANKING CHANNEL.

Present for the Objector : Sh. Khurseed Ahmed, Advocate

ORDER

Two objections are filed by the M/s ADVANTAGE SCAFFOLDING of Delhi registered vide Tin No. 07270372561 on dated 18.07.2018 against assessment orders of tax and interest issued under section 32 of DVAT Act by the Assessing Authority/ VATO of Ward 57 on dated 25.05.2018, whereby created additional demands of Rs. 4,75,497/-for assessment year 2012-13 and Rs. 48,121/- for assessment year 2013-14.

The brief facts of the case are:

1. The objector is engaged in the business of "Iron & Steel & scaffolding". The objector dealer sought the refund of Rs. 3,49,906/- in the return of 4th.qtr FY 2013- 14. The objector dealer filed W.P. (C) No. 2673/2018 in the Hon'ble High Court of Delhi for giving directions to the Assessing Authority for granting said refund. Hon'ble High Court of Delhi vide order dated 26.04.2018 directed the Department of Trade and Taxes to pass a speaking order within two weeks in case refund is payable the same would be paid within a week. The matter was adjourned for 20.5.2018.

Thereafter, the Hon'ble High Court of Delhi vide order dated 28.05.2018 disposed of the writ petition and giving liberty to the objector dealer/

petitioner to challenge the orders in accordance with law. In case the objector dealer/petitioner succeeds in the challenge, it would be entitled to refund and interest as per the provisions of Delhi Value Added Tax Act, 2004.

The objector dealer filed two objections for FY 2012-13 and FY 2013-14 accordingly. The impugned Assessment orders dated 25.05.2018 of the Assessing Authority are reproduced as below:

For assessment year 2012-13

The dealer has filed W.P. (C.) 2673/2018 before Hon'ble of High Court of Delhi for release of refund for amount of Rs. 3,49,906/- for the tax period 4th qtr. 2013-14. as per the direction of the Hon'ble High Court of Delhi order dated 30-05-2018 with regard to the processing of refund, in the light of the order dated 30-05-2018 passed by the Hon'ble High Court of Delhi it was observed that after scrutiny of the refund case, the ITC for amount of Rs. 32,376/-for the month of May, Rs. 54,085/-for the month of June, Rs. 97,100/- for the month of July and Rs. 47,639/- for the month October 2012-13 in respect of M/s Om Iron and Steel Co (07250415252) is not verified as per the provisions of Rs. 34(9) of DVAT Act 2005, which states as "Before allowing the claim for refund to a dealer under section 38 of the Act, the authority concerned shall satisfy himself that the condition laid down in clause (g) of sub section (2) of section 9 of the Act, are fulfilled' It was also observed that as per the verification report of 2A & 2B of the selling dealers in respect of M/s. Om iron & steel trading Co. (07250415252) these mismatch were noticed (1) The type 2 mismatch for amount of R. 10,596/- with a) M/s 3 K Steel Links (07500362977), b) type 2 mismatch with M/s 3 N & Co. (07750267952) for amount of Rs. 6665/-, type 2 mismatch with M/s Sapra Iron Stores (07840349792) for amount of Rs. 2557/- during the month of May 2012-13 (2) The type 3 mismatch with M/s Pacific Trade Link (07700392743) for amount of Rs. 4,19,033/- during the month of June 2012-13, (3) type 2 mismatch with a) M/s Chawla Iron Traders (07100363391) for amount of Rs. 12,196/- and b) M/s Asiana [spat Ltd. (07846263559) for amount of Rs. 1018/- during the month of July 2012-13 (4) Type 2 mismatch M/s GiriRaj Global Ltd. (07610391774) for amount of Rs. 14,681/- and b) M/s Chawla Iron Traders (07100363391) for amount of Rs. 9168/- during the month of August 2012-13 (5) Type 2 mismatch with a) M/s G.G. Sales (07560425121) for amount of Rs. 15,560/-, b) M/s Giri Raj Global Ltd. (07610391774) for amount of Rs. 10,133/- c) Asiana (spat Ltd. (07846263559) for amount of Rs. 3912/- and b) M/s Kamdhenu Ltd. (07250192734) for amount of Rs. 2207/- during the month of September 2012-13. (6) Type 3 mismatch

a) M/s G.G. Sales (07560425121) for amount of Rs. 35,353/-, b) type 2 mismatch with M/s Giriraj Global Ltd. (07610391774) for amount of Rs. 6255/- and M/s Asiana !spat Ltd (07846263559) for amount of Rs. 980/- during the month of November 2012-13. (7) Type 2 mismatch with M/s Shri Balaji Sales (07800426153) for amount of Rs. 11,699/- and b) M/s Asiana !spat Ltd. (07846263559) for amount of Rs. 1023/-during the month of December 2012-13 (8) Type 3 mismatch with a) M/s Yash Sales Co. (07460447777) for amount of Rs. 10,66,366/- b) Arushi Trading Co. (07120437197) for amount of Rs. 1,71,140/- type 2 mismatch with c) M/s Tirupati Balaji Impex (07440386484) for amount of Rs. 1,77,255/- through M/s Laxmi Sales Co. (07580435392). And type 3 mismatch with M/s Bansal Poles (07930429816) for amount of Rs. 8,65,189/- & M/s High Tech Enterprises (07430409624) for amount of Rs. 2,44,855/- through M/s Lord Krishna Enterprises (07960426162) during the month of March 2012-13 M/s Advantage Scaffolding (07270372561) has claimed ITC from M/s Om Iron & Steel Trading Co. (07250415252) for amount of Rs. 32,376/- during the month of May, Rs. 71,585/- during the month of June, Rs. 1,18,498/- during the month of July, Rs. 69,683/- during the month of August, Rs. 28,566/- during the month of September, Rs.19,053/- during the month of November Rs. 35,718/- during the month of December and Rs. 1,00,018/- during the month of March for the year 2012-13, against the purchase which is reflected in type 2 & type 3 mismatch (i.e. not reflected in the 2B of the selling dealer). Hence' all the claimed ITC during the month of May to September, November, Decmber and March 2012-13 for amount of Rs. 4,75,497/- is disallowed as per the rule 34(9) of DVAT Act, 2005 read with Section 40A of DVAT Act, and created the demand of Rs. 4,75,497/- against the dealer for the year 2012-13. The said order is passed in accordance with the section 34(1))b) of DVAT Act.

Assessment year 2013-14

"The dealer has filed WP(C) 2673/2018 before Hon'ble of High Court of Delhi release for of refund for amount of Rs. 3,49,906/- for the tax period 4th qtr. 2013-14. As per the direction of the Hon'ble High Court of Delhi order dated 30-05-2018 with regard to the processing of refund, in the light of the order dated 30-05-2018 passed by the Hon'ble High Court of Delhi it was observed that after scrutiny of the refund case, the ITC for amount of Rs. 3893/- for the 15' Qtr. 2013-14 in respect of M/s Om Iron and Steel Co. (07250415252) is not verified as per the provision of Rule 34(9) of DVAT Act, 2005, which states as "Before allowing the claim for refund to a dealer under section 38 of the Act, the authority concerned shall satisfy himself that the condition laid down in clause (g) of sub section (2) of section 9 of the Act, are fulfilled, it was also observed that as per the verification report

of 2A & 28 of the selling dealers in respect of M/s Om Iron & Steel Trading Co. (07250415252) these mismatch were noticed (1) The type 3 mismatch for amount of Rs. 1,56,893/- with a) M/s Karan Traders through M/s R K Trading Co. (07490462165) b) type 3 mismatch with M/s Shri Balaji Udyog (07880477616) through M/s R.K. Trading Co. (07490462165) for amount of Rs. 91,890/- during the 1st Qtr. 2013-14 (2) The type 2 Mismatch with a) M/s Shiv Shakti Enterprises (07890440314) for amount of Rs. 29,110/- b) type 3 mismatch with M/s Aditya Trading Co. (07110479058) for amount of Rs. 2,26,469/- during the 2nd Qtr. 2013-14. M/s Advantage Scaffolding (07270372561) has claimed ITC from M/s Om Iron & Steel Trading Co. (07250415252) for amount of Rs. 23,838/- during 15' Qtr. And Rs. 24,283/-during the 2nd Qtr. For the year 2013-14, against the purchase which is reflected in type 2 & type 3 mismatch (i.e. not reflected in the 28 of the selling dealer). Hence all the claimed ITC during the 15t and 2nd Qtr. 2013-14 for amount of Rs. 48,121/- is disallowed as per the rule 34(9) of DVAT Act, 2005 read with Section 40A of DVAT Act, and created the demand of Rs. 48,121/- against the dealer for the year 2013-14. The said order is passed in accordance with the section 34(1) (b) of DVAT Act".

2. The objector served notice in Form DVAT-41 on 25.03.2019 and notice of hearing was issued on 29.03.2019. Thereafter, objection was taken up for hearing on 05.04.2019 and the Authorized Representative filed the Statement of Facts & written submissions.

3. In the statement of Facts, the objector dealer, has inter alia, taken the following grounds:

a) The assessment framed is unlawful, illegal and against the natural law of justice.

b) The learned VATO was not justified in rejecting the input of the objector as there is no violation to the proviso 9(2)(g) of DVAT, 2004.

c) That the objector is quit eligible to get the credit of input, thus deserves to claim it.

d) The objector is not default in law anywhere and had also complied with the terms of law in filing the returns as well as providing any information in accordance to the law, thus, the rejection their claim was not justified.

e) That the grant of ITC to the purchasing dealer is subject to producing the tax invoices in support of purchasing dealer having paid VAT

on his purchases from the selling dealer. The purchasing dealer has only, to take precaution that the selling dealer from whom he is purchasing the goods is a registered dealer from whom the purchasing dealer has obtained the tax invoice, as regards deposit of VAT by selling dealer collected by him from the purchasing dealer has no mechanism to make sure that the selling dealer has deposited the tax with the government or has lawfully adjusted against his output liability.

f) That as per circular No.6 dated 15.06.2005 the return of the dealer is to be scrutinized within 15 days from receipt of return , if the tax period of dealer is quarterly , unless case of dealer is picked up for scrutiny . Audit assessment or additional information asked u/s 59 of DVAT Act, 2004, within 10 days of filing of the return since section 38 of the DVAT Act, 2004 case a duty to release the refund within time bound framework as held by Hon'ble High in the matter of M/s Swaran Darshan Impex Pvt. Ltd. Vs. Commissioner of Trade and Taxes, W.P.(C) 3817/2010.

g) That the dealer has filed sale/purchase summary DVAT 30/31 & DVAT 51 along with original statuary forms at the time of CST assessment dated 20.01.2015 and again the dealer submitted the copy of ledger account bank statement and copy of sale purchase bill with GR's after filing of W.P.(C) 2673/2018 and all the payments made by account payee cheque which is established the identity of genuine transaction.

h) That the maximum purchase of the objector is from M/s. OM IRON & STEEL TRADING CO.(07250415252) who had also declared the output as well as the sale in Form 2B filed by them, however, the learned VATO rejected the claim of the objector that the selling dealer M/s. OM IRON & STEEL TRADING CO. was not eligible to claim the input, it is humbly submitted that the humble objector cannot go beyond to the dealer with whom he entered into transactions, in the instant case there are no mismatch in between the objector and seller M/s Om Iron Steel Co.(07250415252) , thus there could be no reason to disapprove the claim of the objector as held by Hon'ble High Court of Delhi in the matter of On Quest Merchandising India Pvt. Ltd. vs. Government of NCT of Delhi & ORS, WP(C) No.6093/2017 decided on 26.10.2017.

i) It is exclusively the onus of the department to establish the status of third parties i.e. M/s Karan Traders through M/s R.K. Trading

Co. (07490462165) , M/s Shri Balaji Udyog (07880477616), M/s Shiv Shakti Enterprises (07890440314), M/s Aditya Trading Co.(07110479058) etc. for assessment year 2012-13 and M/s. j K steel Links (07500362977), M/s. J N & Co. (07750267925), M/s. Sapra Iron Stores (07840349792),M/s. Pacific Tadre Link (07700392743), M/s. Chawla Iron Traders (07100363391), M/s. Asianalspat Ltd. (07846263559), M/s. GiriRaj Global Ltd. (07610391774)„M/s, G.G. Sales(07560425121), M/s. Kamdhenu Ltd (07250192734) , M/s. Yash Sales Co. (07460447777) Arushi TradingCo.(07120437197), M/s. Tirupati Balaji Impex (07440386484), M/s. Laxmi Sales Co. (07580435392). , M/s. Bansal Poles (07930429816), M/s. High Tech Enterprises (07430409624) M/s. Lord Krishna Enterprises (07960426162)etc. for assessment year 2013-14, thus the claim of the objector are not to be rejected where he is not in default anywhere.

4. I have perused the entire records available/made available, written submissions/Statement of Facts filed by the Ld. AR for the objector dealer The verification of the purchase is a question of fact and can be best examined by way of documentary evidences such as purchase invoices, bank records etc. The objector dealer has placed on record necessary evidences in support of his claim of ITC u/s 9(1) of the DVAT Act. The objector dealer in his submission as well as through documentary evidences has tried to impress that the claim u/s 9(1) is correct and lawful. The objector has further submitted that in these circumstances, provisions as contained u/s 9(2)(g) read with section 40A are not attracted. The objector has relied upon the mismatch verification report as available on the DVAT Portal regarding Annexure 2A & 2B for the period 2013-14. The objector has also placed on record copies of tax invoices issued by the selling dealers, Ledger Account and Bank Statement. On careful perusal of said report it can be easily ascertained that there is no mismatch in Annexure 2A-2B of the objector dealer with its selling dealers. The dealer has also relied upon the latest judgment passed by the Hon'ble High Court of Delhi in the matter of On Quest Merchandising India Pvt. Ltd. vs. Government of NCT of Delhi & ORS, WP(C) No.6093/2017decided on 26.10.2017 wherein the Hon'ble Court while reading down section 9(2)g has observed in para 39, 53,54& 55 as under:

"39. Applying the law explained in the above decision, it can be safely concluded in the present case that there is a singular failure by the legislature to make a distinction between purchasing dealers who have bona fide transected with the selling dealer by taking all precaution as required by the DVAT Act and those that have not.

Therefore , there was need to restrict the denial of ITC only to the selling dealers who had failed to deposit the tax collected by them and not punish bona fide purchasing dealers. The letter cannot be expected to do the impossible. It is trite that a law that is not capable of honest compliance will fail in achieving its objective. If it seeks to visit disobedience with disproportionate consequences to a bona fide purchasing dealer, it will become vulnerable to invalidation on the touchstone of Article 14 of the Constitution."

"53 In the light of the above legal position, the Court hereby holds that the expression 'dealer or class of dealers' occurring in Section 9 (2) (g) of the DVAT Act should be interpreted as not including a purchasing dealer who has bona fide entered into purchase transactions with validity registered selling dealers who have issued tax invoices in accordance with Section 50 of the Act where there is no mismatch of the transactions in Annexures 2A and 28. Unless the expression 'dealer or class of dealers' in Section 9 (2) (g) is 'read down' in the above manner, the entire provision would have to be held to be violative of Article 14 of the Constitution."

"54 The result of such reading down would be that the Department is precluded from invoking section 9(2)(g) of the DVAT to deny ITC to a purchasing dealer who has bona fide entered into a purchase transactions with a registered selling dealer who has issued a tax invoice reflecting the TIN number In the event that the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC. Where, however, the Department is able to come across material to show that the purchasing dealer and the selling dealer acted in collusion then the Department can proceed under section 40A of the DVAT Act."
"55 Resultantly, the default assessment orders of tax, interest and penalty issued under section 32 and 33 of the DVAT Act, and the orders of the OHA and Appellate Tribunal insofar as they create and affirm demands created against the Petitioner purchasing dealers by invoking Section 9(2)(g) of the DVAT Act for the default of the selling dealer, and which have been challenged in each of the petitions, are hereby set aside,

5. SLP filed by the Department against the judgment passed in On Quest Merchandising India Pvt. Ltd. (Supra) has been dismissed by Hon'ble Supreme Court of India in SLP (C) No. 36750/2017.

6. Further, The Commissioner (T&T) Delhi vide note No. F.PS/ CVAT/2018/3100 dated 09.07.2018 has also issued instruction to all wards authorities to ensure that "unless clear chain of non bonafide transaction is established between the parties, which could invariably attract section 40(A) of DVAT Act, 2014 and thereby invoking the section 40(A) with a detailed reasoned order, keeping in view the ruling In W.P.(C) 6093/2017 & CM No. 25293/2017, On Quest Merchandise India Pvt, Ltd. Vs Government of NCT of Delhi & ORS, no mechanical application of mismatches should be done . However, 2A-2B mismatches at the first stage should invariably be subject to scrutiny and demand raised accordingly."

7. The first test of no mismatch in annexure 2A-2B report as well as interpretation of section 9(2)(g) of the DVAT Act by the Hon'ble Delhi High Court in On Quest Merchandising India Pvt. Ltd. (Supra) . it is clear to hold that unless and until bonafides of purchases transactions are under doubt then dealer deserves the benefit of ITC and incase bonafides of purchases are in doubt then it is required to go into other details of transactions to cross verify the bonafides of purchases. However, in the given facts of the case and on careful perusal of default assessment notice the AA has neither alleged any collusion between the selling dealer and purchasing dealer nor any proof of proving bonafides of the purchases made by the dealer has been brought on record. Also, the transactions between the objector with its selling dealer are duly reflected in the Annexure 2A-2B. Moreover, payments have been made through banking channel as reflected from the Bank Statement placed on record. 8. Therefore, in view of the above facts and legal position, both the impugned default assessment orders of tax and interest dated 25.05.2018 for the period 2012-13 and 2013-14 are hereby set aside and both the objections are upheld.

9. However, Assessing Authority of ward 57, is further directed to take action against all purchasing dealers and selling dealers who acted in collusion, in accordance with the relevant provisions including section 40A of DVAT Act. In this regard, the Assessing Authority is liable to inform to the jurisdictional Assessing Authorities of other wards for taking action against such purchasing / selling dealers, if those dealers are registered under the jurisdiction of other Assessing Authorities.

10. Ordered accordingly.

[2019] 57 DSTC 287 (Ahmedabad)

In the High Court of Gujarat

[Hon'ble Mr. Justice J. B. Pardiwala and Mr. Justice A. C. Rao]

R/Special Civil Application No. 18962/2018

AAP AND CO. ... Petitioner

Vs.

Union of India & Ors. ... Respondent(s)

Date of Order: 24.06.2019

FURNISHING OF RETURN U/S 39 OF CGST ACT,2017 RULE 61 OF CGST RULES, 2017 RELATING TO THE FORM AND MANNER OF SUBMISSION OF MONTHLY RETURN – RULE 61(5) SPECIFYING THE MANNER AND CONDITIONS TO FURNISHING FORM GSTR-3B – TIME LIMIT FOR CLAIMING INPUT TAX CREDIT OF TAX INVOICE ISSUED FROM JULY 2017 TO MARCH 2018 U/S 16(4) OF THE ACT – PRESS RELEASE DT 18-10-2018 CLARIFYING THE DATE FOR AVAILING ITC FROM JULY 2017 TO MARCH 2018 IS LAST DATE OF FILING 3B – WRIT PETITION CHALLENGING THE LEGALITY AND VALIDITY OF PRESS RELEASE – WHETHER THE SAID CLARIFICATION COULD BE SAID TO THE CONTRARY TO SECTION 16(4) OF THE CGST ACT READ WITH SECTION 39(1) OF THE ACT AND READ WITH RULE 61 OF CGST RULES/GSGST RULES – WHETHER GSTR-3B IS ONLY STOP-GAP ARRANGEMENT AND NOT A RETURN IN LIEU OF FORM GSTR-3; HELD - YES NOTIFICATION NO 10/2017 DT 28-06-2017 INTRODUCED GSTR-3B IN LIEU OF GSTR-3 LATER ON RECTIFIED IT MISTAKE RETROSPECTIVELY VIDE NOTIFICATION NO 17/17 DT 27-07-2017. IMPUGNED PRESS RELEASE HELD TO BE ILLEGAL.

Facts of the Case

The writ-applicant was a practicing Chartered Accountant having GST registration No. 24AARFA8951B1ZF. It was submitted that Section 16(4) of the Central Goods and Services Tax Act, 2017/Gujarat Goods and Services Tax Act, 2017 provided that a registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under Section 39 for the month of September following the end of the financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Held

It would be apposite to state that initially it was decided to have three returns in a month, i.e. return for outward supplies i.e. GSTR-1 in terms of Section 37, return for inward supplies in terms of Section 38, i.e. GSTR-2 and a combined return in Form GSTR-3. However, considering technical glitches in the GSTN portal as well as difficulty faced by the tax payers it

was decided to keep filing of GSTR-2 and GSTR-3 in abeyance. Therefore, in order to ease the burden of the taxpayer for some time, it was decided in the 18th GST Council meeting to allow filing of a shorter return in Form GSTR-3B for initial period. It was not introduced as a return in lieu of return required to be filed in Form GSTR-3. The return in Form GSTR-3B was only a temporary stop gap arrangement till due date of filing the return in Form GSTR-3 was notified. Notifications were being issued from time to time extending the due date of filing of the return in Form GST-3, i.e. return required to be filed under Section 39 of the CGST Act/GGST Act. It was notified vide Notification No.44/2018 Central Tax dated 10th September 2018 that the due date of filing the return under Section 39 of the Act, for the months of July 2017 to March 2019 shall be subsequently notified in the Official Gazette.

It would also be apposite to point out that the Notification No.10/2017 Central Tax dated 28th June 2017 which introduced mandatory filing of the return in Form GSTR-3B stated that it was a return in lieu of Form GSTR-3. However, the Government, on realising its mistake that the return in Form GSTR-3B was not intended to be in lieu of Form GSTR-3, rectified its mistake retrospectively vide Notification No.17/2017 Central Tax dated 27th July 2017 and omitted the reference to return in Form GSTR-3B being return in lieu of Form GSTR-3.

The impugned press release dated 18th October 2018 could be said to be illegal to the extent that its para-3 purports to clarify that the last date for availing input tax credit relating to the invoices issued during the period from July 2017 to March 2018 was the last date for the filing of return in Form GSTR-3B.

The said clarification could be said to be contrary to Section 16(4) of the CGST Act/GGST Act read with Section 39(1)of the CGST Act/GGST Act read with Rule 61 of the CGST Rules/GGST Rules.

Present for Petitioner	:	Mr. Avinash Poddar, Mr. Vishal J Dave, Mr. Nipun Singhvi and Mr. Vinay Shraff, Advocates
Present for Respondent(s)	:	Ms. Maithili Mehta, AGP and Mr. Nirzar S Desai

ORAL JUDGMENT

Honourable Mr. Justice J.B. Pardiwala

1. By this writ-application under Article 226 of the Constitution of India, the writ-applicant has prayed for the following reliefs :

"a. To issue writ of or in the nature of mandamus or any other appropriate writ, order or direction to quash and set aside the press release dated 18.10.2018 to the extent that its para 3 purports to clarify that the last date for availing input tax credit relating to the invoices issued during the period from July, 2017 to March, 2018 is the last date for the filing of return in Form GSTR-3B;

b. To issue necessary writ(s), direction(s), and/or pass necessary order(s) directing the Respondents to allow/ consider taking input tax credit relating to the invoices issued during the period from July, 2017 to March, 2018 till the due date for the filing of return in for GSTR-3 or annual return whichever is earlier;

c. To issue writs(s) and/or direction(s) in the nature of prohibition commanding the Respondents, their servants, agents and/or subordinates from resorting to any coercive measure during the pendency of the writ petition before this Hon'ble Court;

d. To issue order(s), direction(s), writ(s) or any other relief(s) as this Hon'ble Court deems fit and proper in the facts and circumstances of the case and in the interest of justice;

e. To issue Rule Nisi in terms of prayers (a) to (g) above;

f. To Grant ad-interim reliefs in terms of prayers above;

g. To award Costs of and incidental to this application be paid by the Respondents."

2. The case of the writ-applicant, in his own words as pleaded in the writ-application, is as follows :

3. It is submitted that the writ-applicant is a practicing Chartered Accountant having GST registration No. 24AARFA8951B1ZF. It is submitted that Section 16(4) of the Central Goods and Services Tax Act, 2017 (for short, 'the CGST Act')/Gujarat Goods and Services Tax Act, 2017 (for short, 'the GGST Act') provides that a registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under Section 39 for the month of September following the end of the financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

4. The writ-applicant would submit that the relevant provision of Section 16(4) of the CGST Act/ GGST Act reads thus:

> "Section 16(4) - A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier."

5. It is further submitted that it would be evident from the bare perusal of Section 16(4) of the CGST Act/GGST Act that the last date for taking the input tax credit in respect of any invoice or debit note pertaining to a financial year is due date of furnishing of the return under Section 39 for the month of September following the end of financial year or furnishing of the relevant annual return, whichever is earlier.

6. The writ-applicant would submit that Section 39(1) of the CGST Act/ GGST Act provides that every registered person except few categories of persons shall furnish a monthly return in such form and manner as may be prescribed.

7. The writ-applicant would further submit that the relevant provision of Section 39(1) of the CGST Act/ GGST Act reads thus:

> "Section 39. Furnishing of returns. - (1) Every registered person, other than an Input Service Distributor or a nonresident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax paid and such other particulars as may be prescribed, on or before the twentieth day of the month succeeding such calendar month or part thereof."
>
> 2) A registered person paying tax under the provisions of section 10 shall, for each quarter or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of turnover in the State or Union territory, inward supplies of goods or services or both, tax payable and tax paid within eighteen days after the end of such quarter.

(3) Every registered person required to deduct tax at source under the provisions of section 51 shall furnish, in such form and manner as may be prescribed, a return, electronically, for the month in which such deductions have been made within ten days after the end of such month.

(4) Every taxable person registered as an Input Service Distributor shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, within thirteen days after the end of such month.

(5) Every registered non-resident taxable person shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, within twenty days after the end of a calendar month or within seven days after the last day of the period of registration specified under sub-section (1) of section 27, whichever is earlier.

(6) The Commissioner may, for reasons to be recorded in writing, by notification, extend the time limit for furnishing the returns under this section for such class of registered persons as may be specified therein: Provided that any extension of time limit notified by the Commissioner of State tax or Union territory tax shall be deemed to be notified by the Commissioner.

(7) Every registered person, who is required to furnish a return under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (5), shall pay to the Government the tax due as per such return not later than the last date on which he is required to furnish such return.

(8) Every registered person who is required to furnish a return under sub-section (1) or sub-section (2) shall furnish a return for every tax period whether or not any supplies of goods or services or both have been made during such tax period.

(9) Subject to the provisions of sections 37 and 38, if any registered person after furnishing a return under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (4) or sub-section (5) discovers any omission or incorrect particulars therein, other than as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities, he shall rectify such omission or incorrect particulars in the return to be furnished for the month or quarter

during which such omission or incorrect particulars are noticed, subject to payment of interest under this Act: Provided that no such rectification of any omission or incorrect particulars shall be allowed after the due date for furnishing of return for the month of September or second quarter following the end of the financial year, or the actual date of furnishing of relevant annual return, whichever is earlier.

(10) A registered person shall not be allowed to furnish a return for a tax period if the return for any of the previous tax periods has not been furnished by him."

8. It is submitted that the form and the manner of submission of monthly return is provided in Rule 61 of the CGST/GGST Rules. It is submitted that sub-rule (1) of the CGST/GGST Rules provides that every registered person except a few categories of persons shall furnish a return specified under sub-section (1) of Section 39 in Form GSTR-3 electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner. It is further submitted that sub-rule (5) of Rule 61 of the Central Goods and Services Tax Rules (for short, 'the CGST Rules')/Gujarat Goods and Services Tax Rules (for short, 'the GGST Rules') provides that where the time limit for furnishing of the details in Form GSTR-1 under Section 37 and in Form GSTR-2 under Section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in Form GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

9. It is submitted that Rule 61 of the CGST/GGST Rules relating to the form and manner of submission of monthly return reads thus :

"61: Form and Manner of Submission of Monthly Return - (1) Every registered person other than a person referred to in section 14 of the Integrated Goods and Services Tax Act, 2017 or an Input Service Distributor or a non-resident taxable person or a person paying tax under section 10 or section 51 or, as the case may be, under section 52 shall furnish a return specified under sub-section (1) of section 39 in FORM GSTR-3 electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

(2) Part A of the return under sub-rule (1) shall be electronically generated on the basis of information furnished through FORM

GSTR-1, FORM GSTR-2 and based on other liabilities of preceding tax periods.

(3) Every registered person furnishing the return under subrule (1) shall, subject to the provisions of section 49, discharge his liability towards tax, interest, penalty, fees or any other amount payable under the Act or the provisions of this Chapter by debiting the electronic cash ledger or electronic credit ledger and include the details in Part B of the return in FORM GSTR-3.

(4) A registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in Part B of the return in FORM GSTR-3 and such return shall be deemed to be an application filed under section 54.

(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

(6) Where a return in FORM GSTR-3B has been furnished, after the due date for furnishing of details in FORM GSTR-2:

(a) Part A of the return in FORM GSTR-3 shall be electronically generated on the basis of information furnished through FORM GSTR-1, FORM GSTR-2 and based on other liabilities of preceding tax periods and PART B of the said return shall be electronically generated on the basis of the return in FORM GSTR-3B furnished in respect of the tax period;

(b) the registered person shall modify Part B of the return in FORM GSTR-3 based on the discrepancies, if any, between the return in FORM GSTR-3B and the return in FORM GSTR-3 and discharge his tax and other liabilities, if any;

(c) where the amount of input tax credit in FORM GSTR-3 exceeds the amount of input tax credit in terms of FORM GSTR-3B, the additional amount shall be credited to the electronic credit ledger of the registered person."

10. It is submitted that the bare perusal of Rule 61 of the CGST/GGST Rules would indicate that the return prescribed in terms of Section 39 is a return required to be furnished in Form GSTR-3 and not GSTR-3B.

11. It is submitted that in the notification no.10/2017 – Central Tax dated 28th June 2017 it was provided in terms of sub-rule (5) of Rule 61 of the CGST Rules that where the time limit for furnishing of details in Form GSTR-1 under Section 37 and in Form GSTR-2 under Section 38 has been extended and the circumstances so warrant, return in Form GSTR-3B, in lieu of Form GSTR-3, may be furnished in such manner and subject to such conditions as may be notified by the Commissioner. An analogous notification no.10/2017 – State Tax (Rate) dated 30th June 2017 was also issued by the Government of Gujarat under the GGST Rules.

12. It is submitted on behalf of the writ-applicant that sub-rule (5) of Rule 61 of the CGST Rules was retrospectively amended with effect from 1st July 2017 vide Notification No.17/2017 – Central Tax dated 27th July 2017 to omit the wordings return in Form GSTR-3B being in lieu of Form GSTR-3.

13. It is further submitted that it would be obvious from a conjoint reading of Rule 61(1) and Rule 61(5) of the CGST/GGST Rules and the aforesaid Notification that the return required to be furnished in Form GSTR-3B is not the return in lieu of a return specified in Form GSTR-3. The Central and the State Government has consciously omitted reference to return required to be furnished in Form GSTR-3B being in lieu of Form GSTR-3 through Notification no.17/2017 – Central Tax dated 27th July 2017. The following sub-rule (6) in Rule 61 has been added subsequently after sub-rule (5) by Notification no.17/2017 – Central Tax dated 27th July 2017 :

> "(6) Where a return in FORM GSTR-3B has been furnished, after the due date for furnishing of details in FORM GSTR-2:
>
> (a) Part A of the return in FORM GSTR-3 shall be electronically generated on the basis of information furnished through FORM GSTR-1, FORM GSTR-2 and based on other liabilities of preceding tax periods and PART B of the said return shall be electronically generated on the basis of the return in FORM GSTR-3B furnished in respect of the tax period;
>
> (b) the registered person shall modify Part B of the return in FORM GSTR-3 based on the discrepancies, if any, between the return in FORM GSTR-3B and the return in FORM GSTR-3 and discharge his tax and other liabilities, if any;

(c) where the amount of input tax credit in FORM GSTR-3 exceeds the amount of input tax credit in terms of FORM GSTR-3B, the additional amount shall be credited to the electronic credit ledger of the registered person."

14. It is submitted on behalf of the writ-applicant that it is obvious from the bare perusal of the clause (c) of sub-rule (6) of Rule 61 of the CGST/ GGST Rule that if any input tax credit is taken after filing of the GSTR-3B return and it is reflected in return filed in Form GSTR-3 then the same will have to be credited to the electronic credit ledger of the registered person. Further, the discrepancies, if any, in discharge of his tax and other liabilities can also be rectified through the return filed in form GSTR-3.

15. It is further submitted that the decision to add return in form GSTR-3B was taken in the 18th GST Council held on 30th June 2017 on account of the reason stated as 'shorter return for first two months of roll out'. It has not been introduced as a return in substitute of return to be filed in form GSTR-3. Therefore, it is quite obvious that return in form GSTR-3B is only a temporary stop gap arrangement till due date of filing return in form GSTR-3 is notified in the GSTN portal. It is therefore, submitted that it is quite obvious that the return to be filed in form GSTR-3 is the final return for taking additional input tax credit as well as discharging of additional tax liabilities after filing of return in form GSTR-3B. It is, therefore, submitted that the last date for availing the input tax credit relating to the invoices issued during the period from July 2017 to March 2018 is the last date for filing of the return in form GSTR-3 and not GSTR-3B.

16. It is submitted that para 3 of the press release dated 18th October 2018 says that, "With taxpayers self-assessing and availing ITC through return in FORM GSTR-3B, the last date for availing ITC in relation to the said invoices issued by the corresponding supplier(s) during the period from July, 2017 to March, 2018 is the last date for the filing of such return for the month of September, 2018 i.e. 20th October, 2018".

17. Thus, it appears from the pleadings that the writ-applicant seeks to question the legality and validity of the press release dated 18th October 2018 to the extent that its para-3 purports to clarify that the last date for availing the input tax credit relating to the invoices issued during the period between July 2017 and March 2018 would be the last date for filing of the return in Form GSTR-3B on the ground that the said clarification is contrary to Section 16(4) of the Central Goods and Services Tax Act, 2017 and Section 16(4) of the Gujarat Goods and Services Tax Act, 2017 read with Section 39(1) of the CGST Act/GGST Act read with Rule 61 of the Central

Goods and Services Tax Rules, 2017 (for short, 'the CGST Rules') and Rule 61 of the Gujarat Goods and Services Tax Rules, 2017 (for short, 'the GGST Rules).

18. The case of the writ-applicant is that the impugned press release is without the authority of law, unreasonable, illegal and void.

19. On 7th December 2018, this Court passed the following order :

"1. Mr. Vinay Shraff, learned counsel for the petitioner has invited the attention of the court to the impugned press release dated 18.10.2018 to point out that according to section 16(4) of the Central Goods and Services Tax Act, 2017, a registered person is not entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier. It was pointed out that the relevant return under section 39 of the CGST Act is FORM GSTR-3 as provided under rule 61(1) of the Central Goods and Services Tax Rules. The attention of the court was invited to Notification No.10/2017 – Central Tax dated 28th June, 2017 whereby the Central Goods and Services Tax (Second Amendment) Rules, 2017 came to be notified and more particularly, sub-rule (5) of rule 61 thereof, which provides thus:-

> "(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, return in FORM GSTR-3B, in lieu of FORM GSTR-3, may be furnished in such manner and subject to such conditions as may be notified by the Commissioner."

2. It was pointed out that the Central Government realising its mistake thereafter, vide Notification No.17/2017-Central Tax dated 27th July, 2017 notified the the Central Goods and Services Tax (Fourth Amendment) Rules, 2017 whereby sub- rule (5) of rule 61 came to be substituted as follows :-

> "(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify that return shall

be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner."

3. It was submitted that, therefore, FORM GSTR-3B is not in lieu of FORM GSTR-3 and is applicable only in the circumstances stipulated under sub-rule (5) of rule 61 of the rules.

4. Referring to the impugned press release, it was submitted that the same provides that with tax payers selfassessing and availing ITC through return in FORM GSTR- 3B, the last date for availing ITC in relation to the said invoices issued by the corresponding suppliers during the period from July, 2017 to March, 2018 is the last date for the filing of such return for the month of September, 2018 i.e. 20th October, 2018. It was submitted that sub-section (4) of section 16 of the Act contemplates furnishing of return under section 39 thereof which is in FORM GSTR-3 whereas FORM GSTR-3B is to be furnished in the circumstances, as contemplated under sub-rule (5) of rule 61 of the rules. It was submitted that, therefore, the impugned press release is contrary to the provisions of the Act and the rules.

5. Having regard to the submissions advanced by the learned counsel for the petitioner, Issue Notice returnable on 9th January, 2019."

20. In response to the notice issued by this Court, the respondents have appeared through Mr.Nirzar S.Desai, the learned standing counsel for the Union of India.

21. Mr.Desai has tendered his written submissions. Those are as under :

"1. Section 16(4) of the CGST Act, 2017 defines the due date after which a registered person cannot take input tax credit (ITC) for the invoices of a particular Financial Year. The last date of taking ITC as defined by Section 16(4) of the CGST Act, 2017 is the due date of filing of return under Section 39 of the CGST Act, 2017 or annual return whichever is earlier.

Section 16(4) of the CGST Act, 2017 reads as under :

"(4) - A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply

> of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier."

2. The petition has been filed against Press release dated 18.10.2018 which gives clarification regarding last date of taking ITC for the invoices pertaining to 2017-18 as per Section 16(4) of the CGST Act, 2017. The due date of annual return for F.Y. 2017-18 as per Section 44 of CGST Act, 2017 is 31st December, 2018. However, as per the request of trade the due date has been extended upto 31st August, 2019. The due date of filing of GSTR-3B for the month of September, 2018 was 20th October, 2018.

3. In view of above as per Section 16(4) of the CGST Act, 2017 the last date for taking input tax credit for the period 2017-18 should be 25th October, 2018 and accordingly the Press release dated 18.10.2018 was issued. However, on request of the trade due date of filing of GSTR-3B was extended upto 25th October, 2018.

4. The petitioner is contending that GSTR-3B is not a return under Section 39 of the CGST Act, 2017 and hence its due date cannot be considered for Section 16(4) of the CGST Act, 2017 and hence the due date for filing the annual return of 2017-18 should be the last date for taking input tax credit for the F.Y. 2017-18.

Section 39(1) reads as under :

> "(1) Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax paid and such other particulars as may be prescribed, on or before the twentieth day of the month succeeding such calendar month or part thereof."

Rule 61(5) reads as under :

> "(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under

section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in FORM GSTR- 3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner."

On going through Section 39 of the CGST Act, 2017 it can be seen that no specific name has been given to the return to be filed under this Section. The only condition mentioned in the Section is that the return should contain the details of (I) inward and outward supplies of goods or services or both (ii) input tax credit availed (iii) tax payable, tax paid.

Rule 61(5) of the CGST Rules, 2017 says that in case time limit of furnishing of details in Form GSTR-1 under Section 37 of the CGST Act, 2017 and GSTR-2 under Section 38 of the CGST Act, 2017 has been extended in that case the Commissioner may notify to file return GSTR-3B. This return contains all the details i.e. (i) inward and outward supplies of goods or services or both (ii) input tax credit availed (iii) tax payable, tax paid as mentioned in Section 39 of the CGST Act, 2017. On reading Section 39(1) of the CGST Act, 2017 along with rule 61(5) of the CGST Rules, 2017 it is amply clear that FORM GSTR-3B is a return which is to be furnished under section 39 of the CGST Act, 2017.

5. From above, it is evident that the impugned press release dated 18.10.2018 has rightly publicized the last date for availing ITC to be the last date for the filing of return in FORM GSTR-3B for the month of September, 2018 i.e. 20th October, 2018 and therefore, is not contrary to the section 16(4) of the CGST Act, 2017 read with section 39(1) of the CGST Act, 2017, read with rule 61 of the CGST Rules, 2017."

22. An affidavit-in-reply has been filed on behalf of the respondent no.4, inter alia, stating as under :

"14. With regard to para 2.19 of the petition, I say that Section 39(1) of the said Act has to be read along with rule 61(5) of the said Rules which provides for the filing of FORM GSTR-3B and reads as "Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner

may, by notification, specify the manner and conditions subject to which the return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner". Thus, it is amply clear that FORM GSTR-3B is a return which is to be furnished under section 39 of the said Act.

16. With regard to para 2.21 to 2.23 of the petition, I say that Section 39(1) of the said Act has to be read along with rule 61(5) of the said Rules which provides for the filing of FORM GSTR-3B and reads as "Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner". Thus, it is amply clear that FORM GSTR-3B is a return which is to be furnished under section 39 of the said Act. From above, it is evident that the impugned press release has rightly publicised the last date for availing ITC to be the last date for the filing of return in FORM GSTR-3B for the month of September, 2018 i.e. 20th October, 2018 and therefore, is not contrary to the section 16(4) of the said Act read with section 39(1) of the said Act, read with rule 61 of the said Rules.

17. With regard to Grounds A to E of the petition, I say that whatever is stated in Grounds A to E is totally disputed and denied in toto and the petitioner is put to strict proof in support of whatever is stated in Grounds A to E. I say that para 3 of press release dated 18.10.2018 is aligned with Section 16(4) CGST Act/GGST Act, read with Section 39(1) of the CGST Act/CGST Act, read with rule 61 of the CGST/GGST Rules, 2017.

Section 16(4) of the said Act reads as "A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier." Further, section 39(1) of the said Act reads as "Every registered person, other than an Input Service Distributor or a non-resident taxable person or a

person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax paid and such other particulars as may be prescribed, on or before the twentieth day of the month succeeding such calendar month or part thereof". Further, section 39(1) of the said Act has to be read along with rule 61(5) of the said Rules which provides for the filing of FORM GSTR-3B and reads as "Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner". Thus, it is amply clear that FORM GSTR-3B is a return which is to be furnished under section 39 of the said Act. From above, it is evident that the impugned press release has rightly publicised the last date for availing ITC to be the last date for the filing of return in FORM GSTR-3B for the month of September, 2018 i.e. 20th October, 2018 and therefore, is not contrary to the section 16(4) of the said Act read with section 39(1) of the said Act, read with rule 61 of the said Rules.

Further, the Hon'ble High Court of Delhi in its order dated 26.11.2018 on W.P.(C) 9019/2017 & CM APPL. No.36921/2017, in the matter of Anil Goel and Associated versus Union of India & Ors., has accepted that "learned counsel for the respondent has drawn our attention to the counter affidavit filed on behalf of the Commissioner of Central Tax, GST, Delhi-east, wherein it has been stated that the return filed in FORM GSTR-3B is not in addition to the return in FORM GSTR-3. Rule 61(5) of the Rules prescribe that where time for furnishing of details/returns in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 are extended, the Commissioner may, by notification specify that return may be filed under GSTR-3B. In other words, wherever the Commissioner has issued notification in terms of sub-rule 5 of Rule 61, the assessee would be required to file return in FORM GSTR-3B and not in FORM GSTR-3. Learned counsel for the petitioner is substantially satisfied as the statement made clarifies that FORM GSTR-3B and not GSTR-3 is to be filed in case covered by Rule 61(5) of the Rules".

19. With regard to Grounds G to J of the petition, I say that whatever is stated in Grounds G to J is totally disputed and denied in toto and the petitioner is put to strict proof in support of whatever is stated in Grounds G to J. I say that Section 39(1) of the said Act has to be read along with rule 61(5) of the said Rules which provides for the filing of FORM GSTR-3B and reads as "Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner". Thus, it is amply clear that FORM GSTR-3B is a return which is to be furnished under section 39 of the said Act. From above, it is evident that the impugned press release has rightly publicised the last date for availing ITC to be the last date for the filing of return in FORM GSTR-3B for the month of September, 2018 i.e. 20th October, 2018 and therefore, is not contrary to the section 16(4) of the said Act read with section 39(1) of the said Act, read with rule 61 of the said Rules.

Further, the Hon'ble High Court of Delhi in its order dated 26.11.2018 on W.P.(C) 9019/2017 & CM APPL. No.36921/2017, in the matter of Anil Goel and Associated versus Union of India & Ors., has accepted that "learned counsel for the respondent has drawn our attention to the counter affidavit filed on behalf of the Commissioner of Central Tax, GST, Delhi-east, wherein it has been stated that the return filed in FORM GSTR-3B is not in addition to the return in FORM GSTR-3. Rule 61(5) of the Rules prescribe that where time for furnishing of details/returns in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 are extended, the Commissioner may, by notification specify that return may be filed under GSTR-3B. In other words, wherever the Commissioner has issued notification in terms of sub-rule 5 of Rule 61, the assessee would be required to file return in FORM GSTR-3B and not in FORM GSTR-3. Learned counsel for the petitioner is substantially satisfied as the statement made clarifies that FORM GSTR-3B and not GSTR-3 is to be filed in case covered by Rule 61(5) of the Rules".

20. With regard to Grounds K to M of the petition, I say that whatever is stated in Grounds K to M is totally disputed and denied

in toto and the petitioner is put to strict proof of whatever is stated in Grounds K to M. I say that the petitioner has wrongly contended that unless GSTR-1 of outward supplies is filed it will not possible for tax payer to calculate the amount of credit for the purpose of availment.

Para 4 of press release dated 18.10.2018 reads as under :

> "It is clarified that the furnishing of outward details in FORM GSTR-1 by the corresponding supplier(s) and the facility to view the same in FORM GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis in consonance with the provisions of section 16 of the Act. The apprehension that ITC can be availed only on the basis of reconciliation between FORM GSTR-2A and FORM GSTR-3B conducted before the due date for filing of return in FORM GSTR-3B for the month of September, 2018 is unfounded as the same exercise can be done thereafter also."

The press release dated 18.10.2018 specifically states that the furnishing of outward details in FORM GSTR-1 by the corresponding supplier(s) and the facility to view the same in FORM GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis in consonance with the provisions of section 16 of the Act.

To facilitate trade and industry, based on the recommendation of the GST Council in its 31st meeting held on 22.01.2018. Order No. 02/2018 - Central Tax dated 31.12.2018 has been issued vide which the last date for availing ITC has been extended subject to specified conditions. Thus, a registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for the furnishing the details under sub-section (1) of said section for the month of March, 2019.

21. With regard to Ground N of the petition, I say that whatever is stated in Ground N is totally disputed and denied in toto and the Petitioner is put to strict proof in support of whatever is stated in Ground N. I say that Section 39(1) of the said Act has to be read along with rule 61(5) of the said Rules which provides for the filing of FORM GSTR-3B and reads as "Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner". Thus, it is amply clear that FORM GSTR-3B is a return

which is to be furnished under section 39 of the said Act. From above, it is evident that the impugned press release has rightly publicised the last date for availing ITC to be the last date for the filing of return in FORM GSTR-3B for the month of September, 2018 i.e. 20th October, 2018 and therefore, is not contrary to the section 16(4) of the said Act read with section 39(1) of the said Act read with rule 61 of the said Rules.

Further, the Hon'ble High Court of Delhi in its order dated 26.11.2018 on W.P.(C) 9019/2017 & CM APPL. No. 36921/2017, in the matter of Anil Goel and Associated versus Union of India & Ors, has accepted that "learned counsel for the respondent has drawn our attention to the counter affidavit filed on behalf of the Commissioner of Central Tax, GST, Delhi-east, wherein it has been stated that the return filed in FORM GSTR-3B is not in addition to the return in FORM GSTR-3. Rule 61(5) of the Rules prescribe that where time for furnishing of details/ returns in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 are extended, the Commissioner may, by notification specify that return may be filed under GSTR-3B. In other words, wherever the Commissioner has issued notification in terms of sub-rule 5 of Rule 61, the assessee would be required to file return in FORM GSTR-3B and not in FORM GSTR-3. Learned counsel for the petitioner is substantially satisfied as the statement made clarifies that FORM GSTR-3B and not GSTR-3 is to be filed in case covered by Rule 61(5) of the Rules."

23. The impugned press release reads thus :

"PRESS RELEASE

18.10.2018

Last date to avail input tax credit in respect of invoices or debit notes relating to such invoices pertaining to period from July, 2017 to March, 2018

There appears to be misgiving about the last date for taking input tax credit (ITC) in relation to invoices or debit notes relating to such invoices pertaining to period from July, 2017 to March, 2018. Such uncertainty seems to stem from the Government's decision to extend the last date for furnishing of details of outward supplies in FORM GSTR-1 from time to time.

2. According to section 16(4) of the CGST Act, 2017, a registered person shall not be entitled to take ITC in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains (hereinafter referred to as "the said invoices") or furnishing of the relevant annual return, whichever is earlier.

3. With taxpayers self-assessing and availing ITC through return in FORM GSTR-3B, the last date for availing ITC in relation to the said invoices issued by the corresponding supplier(s) during the period from July, 2017 to March, 2018 is the last date for the filing of such return for the month of September, 2018 i.e. 20th October, 2018.

4. It is clarified that the furnishing of outward details in FORM GSTR-1 by the corresponding supplier(s) and the facility to view the same in FORM GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis in consonance with the provisions of section 16 of the Act. The apprehension that ITC can be availed only on the basis of reconciliation between FORM GSTR-2A and FORM GSTR-3B conducted before the due date for filing of return in FORM GSTR-3B for the month of September, 2018 is unfounded as the same exercise can be done thereafter also.

5. It may, however, be noted that the Government has extended the last date for furnishing of return in FORM GSTR-3B for the month of September, 2018 for certain taxpayers who have been recently migrated from erstwhile tax regime to GST regime vide notification No. 47/2018- Central Tax dated 10th September, 2018. For such taxpayers, the extended date i.e. 31st December, 2018 or the date of filing of annual return whichever is earlier will be the last date for availing ITC in relation to the said invoices issued by the corresponding suppliers during the period from July, 2017 to March, 2018.

6. All the taxpayers are encouraged to take note of the legal requirements and be compliance savvy. ”

24. In the course of the hearing of this matter, Mr. Desai submitted that this writ-application has become infructuous as a fresh press release has been issued dated 21st June 2019, which reads thus :

“35th GST Council Meeting, New Delhi
21st June 2019
***
PRESS RELEASE
(Law and Procedure related changes)

The GST Council, in its 35th meeting held today at New Delhi, recommended the following:

1. In order to give ample opportunity to taxpayers as well as the system to adapt, the new return system to be introduced in a phased manner, as described below:

i. Between July, 2019 to September, 2019, the new return system (FORM GST ANX-1 & FORM GST ANX-2 only) to be available for trial for taxpayers. Taxpayers to continue to file FORM GSTR-1 & FORM GSTR-3B as at present;

ii. From October, 2019 onwards, FORM GST ANX-1 to be made compulsory. Large taxpayers (having aggregate turnover of more than Rs. 5 crores in previous year) to file FORM GST ANX-1 on monthly basis whereas small taxpayers to file first FORM GST ANX-1 for the quarter October, 2019 to December, 2019 in January, 2020;

iii. For October and November, 2019, large taxpayers to continue to file FORM GSTR-3B on monthly basis and will file first FORM GST RET-01 for December, 2019 in January, 2020. It may be noted that invoices etc. can be uploaded in FORM GST ANX-1 on a continuous basis both by large and small taxpayers from October, 2019 onwards. FORM GST ANX-2 may be viewed simultaneously during this period but no action shall be allowed on such FORM GST ANX-2;

iv. From October, 2019, small taxpayers to stop filing FORM GSTR-3B and to start filing FORM GST PMT-08. They will file their first FORM GST- RET-01 for the quarter October, 2019 to December, 2019 in January, 2020;

v. From January, 2020 onwards, FORM GSTR-3B to be completely phased out

2. On account of difficulties being faced by taxpayers in furnishing the annual returns in FORM GSTR-9, FORM GSTR-9A and reconciliation statement in FORM GSTR-9C, the due date for furnishing these returns/reconciliation statements to be extended till 31.08.2019

3. To provide sufficient time to the trade and industry to furnish the declaration in FORM GST ITC-04, relating to job work, the due date for furnishing the said form for the period July, 2017 to June, 2019 to be extended till 31.08.2019

4. Certain amendments to be carried out in the GST laws to implement the decisions of the GST Council taken in earlier meetings.

5. Rule 138E of the CGST rules, pertaining to blocking of eway bills on non-filing of returns for two consecutive tax periods, to be brought into effect from 21.08.2019, instead of the earlier notified date of 21.06.2019 6. Last date for filing of intimation, in FORM GST CMP-02, for availing the option of payment of tax under notification No. 2/2019-Central Tax (Rate) dated 07.03.2019, to be extended from 30.04.2019 to 31.07.2019

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(Note: The recommendations of the GST Council have been presented in this release in simple language for information of all

stakeholders. The same would be given effect through relevant Circulars/Notifications which alone shall have the force of law.) ”

25. Thus, according to Mr.Desai, the grievance as redressed in the writ-application would not survive and the petition be disposed of accordingly. However, the learned counsel submitted that as a neat question of law has been raised, this Court may look into the legality and validity of the impugned press release and decide the matter on merits.

26. The writ-application has been filed seeking quashing and setting aside of the press release dated 18th October 2018 to the extent that its para 3 purports to clarify that the last date for availing the input tax credit relating to the invoices issued during the period from July 2017 to March 2018 is the last date for the filing of the return in Form GSTR-3B for the month of September 2018. As per the above clarification, a taxpayer will not be able to claim the input tax credit for the period from July 2017 to March 2018 after filing of the return in Form GSTR-3B for the month of September 2018. It disentitles a taxpayer to claim the input tax credit for the aforesaid period which could not be taken on account of any error or omission. It is submitted that the aforesaid clarification is not in consonance with Section 16(4) of the CGST Act/GGST Act which provides for the last date for taking the input tax credit. It is submitted that the last date of taking the input tax credit should be due date of filing of return in Form GSTR-3 or annual return whichever is earlier.

27. Section 16(4) of the CGST Act/GGST Act provides that the last date for taking the input tax credit in respect of any invoice or debit note pertaining to a financial year is the due date of furnishing of the return under Section 39 for the month of September following the end of the financial year or furnishing of the relevant annual return, whichever is earlier.

28. Therefore, the moot question is, whether the return in Form GSTR-3B is a return required to be filed under Section 39 of the CGST Act/GGST Act. The aforesaid press release is valid and in consonance with Section 16(4) of the CGST Act/GGST Act only if Form GSTR-3B is a return required to be filed under Section 39 of the CGST Act/GGST Act. 29. Section 39(1) of the CGST/GGST Act provides that every taxpayer, except a few special categories of persons, shall furnish a monthly return in such form and manner as may be prescribed. Rule 61 of the CGST Rules/GGST Rules prescribes the form and manner of submission of monthly return. Sub-rule 1 of Rule 61 of the CGST Rules/GGST Rules provides that the return required to be filed in terms of Section 39(1) of the CGST/GGST Act is to be furnished in Form GSTR-3.

30. It would be apposite to state that initially it was decided to have three returns in a month, i.e. return for outward supplies i.e. GSTR-1 in terms of Section 37, return for inward supplies in terms of Section 38, i.e. GSTR-2 and a combined return in Form GSTR-3. However, considering technical glitches in the GSTN portal as well as difficulty faced by the tax payers it was decided to keep filing of GSTR-2 and GSTR-3 in abeyance. Therefore, in order to ease the burden of the taxpayer for some time, it was decided in the 18th GST Council meeting to allow filing of a shorter return in Form GSTR-3B for initial period. It was not introduced as a return in lieu of return required to be filed in Form GSTR-3. The return in Form GSTR-3B is only a temporary stop gap arrangement till due date of filing the return in Form GSTR-3 is notified. Notifications are being issued from time to time extending the due date of filing of the return in Form GST- 3, i.e. return required to be filed under Section 39 of the CGST Act/GGST Act. It was notified vide Notification No.44/2018 Central Tax dated 10th September 2018 that the due date of filing the return under Section 39 of the Act, for the months of July 2017 to March 2019 shall be subsequently notified in the Official Gazette.

31. It would also be apposite to point out that the Notification No.10/2017 Central Tax dated 28th June 2017 which introduced mandatory filing of the return in Form GSTR-3B stated that it is a return in lieu of Form GSTR-3. However, the Government, on realising its mistake that the return in Form GSTR-3B is not intended to be in lieu of Form GSTR-3, rectified its mistake retrospectively vide Notification No.17/2017 Central Tax dated 27th July 2017 and omitted the reference to return in Form GSTR-3B being return in lieu of Form GSTR-3.

32. Thus, in view of the above, the impugned press release dated 18th October 2018 could be said to be illegal to the extent that its para-3 purports to clarify that the last date for availing input tax credit relating to the invoices issued during the period from July 2017 to March 2018 is the last date for the filing of return in Form GSTR-3B.

33. The said clarification could be said to be contrary to Section 16(4) of the CGST Act/GGST Act read with Section 39(1) of the CGST Act/GGST Act read with Rule 61 of the CGST Rules/GGST Rules.

34. With the above, this writ-application stands disposed of.

[2019] 57 DSTC 310 (New Delhi)

IN THE HIGH COURT OF DELHI

[Hon'ble Justice S. Muralidhar and Justice Prateek Jalan]

W.P.(C) 914/2019 & CM APPL. 4125/2019 (for stay)

Amadeus India Pvt. Ltd. ... Petitioner

Versus

Principal Commissioner, Central Excise,
Service Tax and
Central Tax Commissionerate ... Respondent

Date of Order : 8 May, 2019

SEARCH UNDERTOOK BY ANTI-EVASION UNIT OF SERVICE TAX – SCN ISSUED ALLEGING TAX NOT PAID ON TAXABLE SERVICES – HUGE AMOUNT OF TAX WAS SPECIFIED TO BE PAID – PETITIONER DREW THE ATTENTION TO THE MASTER CIRCULAR DT 10TH MARCH, 2017 READ WITH INSTRUCTION DT 21ST DEC,2015 ISSUED BY CBEC WHETHER THE PETITIONER WAS TO BE SERVED PRE-NOTICE – CONCLUSION IN TERMS OF PARA 5.0 OF MASTER CIRCULAR – HELD - YES. THE MANDATORY CHARACTER OF MASTER CIRCULAR IS GIVEN TO SECTION 83 OF THE FINANCE ACT,1994 – WRIT PETITION ALLOWED WITHOUT EXPRESSING ANY VIEW ON MERITS .THE RESPONDENT WILL NOW FIX A DATE ON WHICH THE AUTHORIZED REPRESENTATIVE OF THE PETITIONER WOULD BE HEARD. THE HIGH COURT SET ASIDE THE IMPUGNED SCN.

Facts of the Case

The facts in brief were that the Petitioner provides, inter alia, computer data processing software, which was used by travel agents and ticket booking entities in the Airline industry. The question whether the services provided by the Petitioner was amenable to service tax engaged the attention of the Customs Excise Services Tax Appellate Tribunal ('CESTAT') Principal Bench in *Acquired Services Pvt. Ltd. v. Commissioner of Service Tax (2014) 36 STR 1148 (TRI-10)*. The CESTAT held that the services provided by AIPL to overseas entities did not constitute either business auxilliary services or export of services. The said decision was stated to be pending in appeal before the Supreme Court ofIndia.

The Anti-evasion Unit of the Service Tax Commisionerate undertook a search of the registered premises of the Petitioner. During the course of search which continued till 5th September, 2016, statements of representatives of the Petitioner were recorded under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

In response to the queries raised by the Respondents, the Petitioner furnished details by a letter dated 5th September,2016.

After nearly 2 years, on 10th Augus,t 2018, fresh summons were issued to the Petitioner seeking the audited balance sheets, reconciliation statements of taxable value declared in ST-3 returns, month wise invoices copies of agreements between the Amadeus IT Group etc. According to the Petitioner, it submitted the requisite information on 17th August, 2018 and again on 24th August, 2018 and 30th August, 2018. A copy of the said submission dated 24th August, 2018 filed by the Petitioner in response to a letter dated 20th August, 2018 was placed before the Court.

Present for Petitioner	:	Mr. M.S. Syali, Senior Advocate with Mr. Mayank Nagi and Mr. Tarun Singh, Advocates.
Present for Respondent	:	Mr. Harpreet Singh, Sr. Standing Counsel with Ms. Suhani Mathur, Advocate.

Order

Dr. S. Muralidhar, J.:

1. The present writ petition by Amadeus India Pvt. Ltd.(AIPL) is in a narrow compass. The question that arises is whether prior to issuing the impugned show cause notice (SCN) dated 4th September 2018, the Office of the Principal Commissioner, Central Excise, Service Tax and Central Tax Commissionerate, Delhi South (the Respondent herein) ought to have held a pre-notice consultation with the Petitioner in terms of para 5.0 of „Master Circular" dated 10th March, 2017 issued by the Central Board of Excise and Customs ('CBEC')?

2. The facts in brief are that the Petitioner provides, inter alia, computer data processing software, which is used by travel agents and ticket booking entities in the Airline industry. The question whether the services provided by the Petitioner is amenable to service tax engaged the attention of the Customs Excise Services Tax Appellate Tribunal ('CESTAT') Principal Bench in *Acquired Services Pvt. Ltd. v. Commissioner of Service Tax (2014) 36 STR 1148 (TRI-10)*. The CESTAT held that the services provided by AIPL to overseas entities did not constitute either business auxilliary services or export of services. The said decision is stated to be pending in appeal before the Supreme Court of India.

3. It appears that on 20th August 2016, the Anti-evasion Unit of the Service Tax Commisionerate undertook a search of the registered premises of the Petitioner. During the course of search which continued till 5th September, 2016, statements of representatives of the Petitioner were recorded under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. In response to the queries raised by the Respondents, the Petitioner furnished details by a letter dated 5th September, 2016.

4. After nearly 2 years, on 10th August 2018, fresh summons were issued to the Petitioner seeking the audited balance sheets, reconciliation statements of taxable value declared in ST-3 returns, month wise invoices copies of agreements between the Amadeus IT Group etc. According to the Petitioner, it submitted the requisite information on 17th August 2018 and again on 24th August, 2018 and 30th August, 2018. A copy of the said submission dated 24th August, 2018 filed by the Petitioner in response to a letter dated 20th August, 2018 has been placed before this Court.

5. Thereafter on 4th September, 2018 the impugned SCN was issued by the Respondent to the Petitioner, inter alia, alleging that tax was not paid on taxable services rendered by the Petitioner. The SCN specified the quantum of tax that was required to be paid by the Petitioner as Rs. 99,45,64,411/-. The Petitioner was also asked to show cause why penalty under Section 76 of the Finance Act, 1994 read with Section 174 of the Central Goods & Services Tax Act, 2017 (CGST Act) should not be levied, in addition to the recovery of interest under Section 75 of the Finance Act, 1994.

6. On 3rd October 2018, the Petitioner drew the attention of the Respondent to the Master Circular dated 10th March, 2017 read with an instruction dated 21st December, 2015 issued by the CBEC in terms of which a pre-show cause notice consultation was mandatory in cases involving demand of duty above Rs. 50 Lakhs. A reminder was again sent by the Petitioner on 13th November, 2018. When no response was received, the present writ petition was filed on 13th December, 2018.

7. While directing notice to be issued on 12th February, 2019 this Court required the Respondent to produce the records „including summary or the report pursuant to the investigatins and enquiry, which pre-dated the impugned show cause notice".

8. This Court has heard the submissions of Mr. M.S. Syali, learned senior counsel for the Petitioner and Mr. Harpreet Singh, learned Sr. Standing Counsel for the Respondent.

9. Before proceeding to examine the facts leading to the filing of the present petition, it is necessary to advert to the background to the issuance of the Master Circular by the CBEC. The first report of the Tax Administration Reform Commission ('TARC') made a recommendation that

> "It is desirable to avoid disputes where a collaborative approach can provide a solution. An administrative pre-dispute consultation mechanism may be instituted in both the organizations for resolving tax disputes at the pre-notice stage through an open dialogue with the taxpayer, in which both sides articulate and discuss their respective positions and views on the matter at hand. An amicable resolution would be possible when a common view emerges on the facts and the legal position. It is expected that this process, if followed in proper spirit, would lead to elimination of a large number disputes leaving only a few contentious matters in which mutual agreement is not reached. Such disputes would follow other legal channels."

10. Further, the TARC was of the view that the tax officers should not be allowed to resort to coercive actions for recoveries during the consultation process. The TARC recommended that only those officers competent to issue notices should engage in such consulation; they should adopt „an open and receptive attitude and give full consideration to tax payer"s points of view first before formulating their own opinion." This exercise was to narrowed down the issues and confine the notice only „in respect of unreserved issues". Further the points on which agreement has been reached should not be contested any further by either party.

11. The above recommendations were accepted and the CBEC issued the Master Circular on 10th March, 2017. The relevant paragraph of the said Master Circular, which has been relied upon by both parties reads as under:

> "5.0 Consultation with the noticee before issue of Show Cause Notice: Board has made pre show cause notice consultation by the Principal Commissioner/ Commissioner prior to issue of show cause notice in cases involving demands of duty above Rs. 50 lakhs (except for preventive/ offence related SCNs) mandatory vide instruction issued from F No. 1080/09/DLA/MISC/15 dated 21st December 2015. Such consultation shall be done by the adjudicating authority with the assessee concerned. This is an important step towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing show cause notice."

12. It will be immediately noticed that there are two exceptions carved out for the Respondent to engage in a pre-SCN consultation. The first is that the SCN is preventive and the second is that it is related to an offence in terms of the Finance Act, 1994.

13. In the present case, as is evident from the impugned SCN, the alleged non-payment of service tax pertains to period between 2012-2013 to 2016-2017. Consequently, there is no „preventive" aspect involved in the SCN and this is not even disputed by learned counsel for the Respondent. However, what is urged before the Court by the Respondent is that since the SCN was preceded by a search that was conducted in the business premises of the Petitioner, and the Petitioner also rendered itself liable for penal action „for suppression of facts and contravention of various statutory provisions with intent to evade payment of due service tax" and other incidental levies, the SCN partakes of the character of an „offence related" SCN and therefore falls within the exceptions carved out under para 5.0 of the Master Circular.

14. The above submission runs contrary to the very object of para 5.0 which is to narrow down the scope of the dispute by engaging the Assessee on specific areas where the Respondent may require information/ clarification from the Assessee regarding alleged evasion of service tax. In the context of the present case, in relation to documents recovered during the search and statements recorded of representatives to the Petitioner in that process, several questions may have arisen for consideration by the Respondent which may require a clarification from the Petitioner as to its conduct. It is to facilitate this very exercise that para 5.0 finds place in the Master Circular. The mere possibility that at the end of the adjudication process, the Petitioner may have to face consequences for having committed an 'offence' under Finance Act, 1994 need not per se render the SCN itself as an 'offence related' SCN. If that were to be the logic, then in every case para 5.0 can be dispensed with on the ground that the adjudication of the SCN is likely to be lead to the noticee facing proceedings for having committed an offence. The exception would then become the rule and not vice versa, and the need for any pre-notice consultation being rendered redundant. Further, without the conclusion of the adjudication on the SCN, the Respondent would not be in a position to decide whether an offence is made out.

15. In any event, as far as the present case is concerned the officers of the Respondent do not appear to have taken any conscious decision in regard to the requirement of the Master Circular. A pointed question

was posed by the Court to Mr. Harpreet Singh whether prior to issuing the impugned SCN, a decision was taken by the Respondent in the light of para 5.0 of the Master Circular not to undertake the pre-notice consultation. After going through the notes in file, Mr. Harpreet Singh stated that there was no noting in the file to that effect. In other words, it appears that the Respondent completely ignored the Master Circular before proceeding to issue the impugned SCN.

16. The mandatory character of the Master Circular can be traced to Section 83 of the Finance Act, 1994 which makes Section 37 B of the Central Excise Act, 1944 applicable in relation to service tax. In terms Section 37 B of the Central Excise Act, 1944 instructions issued by the CBEC would be binding on the officers of the Department.

17. The legal position in this regard is well-settled. Illustratively a reference may be made to the decision in State of Tamil Nadu v. India Cements Ltd. (2011) 13 SCC 247 (SC). Specific to the Master Circular, a reference may be made to the judgment dated 9th February, 2018 passed by the High Court of Judicature at Madras in W.P.(C). 11858/2017 (Tube Investment of India Ltd. v. Union of India). In that case, after noticing that para 5.0 of the Master Circular was not adhered to, the High Court set aside the SCN challenged and delegated the parties to stage prior to the issuance of the SCN.

18. In the present case, the Court is satisfied that it was necessary in terms of para 5.0 of the Master Circular for the Respondent to have engaged with the Petitioner in a pre SCN consultation, particularly, since in the considered view of the Court neither of the exceptions specified in para 5.0 were attracted in the present case.

19. Accordingly, without expressing any view on the merits of the case of either party in relation to the issues raised in the impugned SCN, the Court sets aside the impugned SCN dated 4th September, 2018 and relegates the parties to the stage prior to issuance of impugned SCN. The Respondent will now fix a date on which the authorised representative of the Petitioner would be heard in relation to the issues highlighted in the submissions dated 24th August, 2018 of the Peititioner in response to the communicatioin dated 20th August, 2018 addressed to it by the Respondent. Needless to state that the Petitioner will extend its full cooperation to the Respondent by providing the necessary information.

20. The petition is allowed in the above terms. The application is disposed of. No order as to costs.

[2019] 57 DSTC 316 (New Delhi)

In the High Court of Delhi

[Hon'ble Justice S. Murlidhar and Justice Talwant Singh]

W.P.(C) 13365/2018

Maa Jagdamba Traders ... Petitioner

Versus

The Commissioner of Value Added Tax ... Respondent

Date of Order: 9 July, 2019

NOTIFICATION ISSUED BY COMMISSIONER VAT DECLARING AND ACTED UPON ISSUED C FORMS AS OBSOLETE AND INVALID – RULE 5(13) & 5(14) OF CENTRAL SALES TAX (DELHI) RULES MADE THE REQUIREMENT OF SURRENDER OF THE UNUSED FORMS OF SERIES, DESIGN OR COLOUR – THE COURT DID NOT ACCEPT THE PRAYER OF RESPONDENTS THAT THE MATTER WAS COVERED BY JAIN MANUFACTURING (INDIA) PVT. LTD. AND JAI GOPAL INTERNATIONAL IMPEX PVT. LTD. IN WHICH SUPREME COURT HAD GRANTED STAY – NOTIFICATION ISSUED UNDER RULE 5(13) BY THE COMMISSIONER VAT, NEW DELHI QUASHED – WRIT PETITION ALLOWED.

Facts of the Case

"C" Form issued by M/s. Sarv Manglam Sales in favour of the Petitioner was declared obsolete and invalid for all purposes with effect from the date of issuance of such forms.

The said "C" Form was issued in favour of the petitioner on 22nd January 2016 and it was valid for the third quarter 2015-16. The petitioner was registered as a dealer under the Jammu and Kashmir Value Added Tax (JKVAT) and the Central Sale Tax, 1956 (CST Act) in the State of Jammu and Kashmir. The petitioner made an inter-State sale of goods to Sarv Manglam Sales (the purchasing dealer) registered in Delhi under the CST Act. The sale was made against the "C" Form prescribed under the Central Sales Tax (Registration and Turnover) Rules 1957. The sale was made during the first quarter of 2016-17 in the sum of Rs. 74,72,806/-. Since both the dealer and the purchasing dealer were registered under the CST Act, the rate of tax was 2%. The dealer in Delhi i.e. Sarv Manglam Sales issued the above "C" Form in favour of the Petitioner which was then presented by the Petitioner before the authority of Jammu and Kashmir in support of the payment of 2% tax. The return disclosing the said transaction and payment of tax of the said percentage was accepted by the authority in Jammu and Kashmir.

Held

The Court found that independent of the decisions in Jain Manufacturing and Jai Gopal International the petition should succeed since here there was no legal basis for the Respondents to have declared by the impugned notification, the "C" Forms already issued and acted upon as "obsolete". In fact, neither in Jain Manufacturing India Private Limited nor in Jai Gopal International did the Commissioner invoke its power under Rule 5 (13) of the CST Delhi Rules to declare the "C" Form already issued as obsolete.

The impugned notification dated 11th July 2018 issued by the CVAT was hereby set aside. The writ petition was allowed.

Present for Petitioner	:	Mr. Ravi Chandhok and Mr. Vasudev Lalwani, Advocates.
Present for Respondent(s)	:	Mr. Satyakam, ASC for GNCTD.

ORDER

1. The prayer in this writ petition is for quashing a notification dated 11th July, 2018 issued by the Commissioner of Value Added Tax (CVAT) under Rule 5 (13) of the Central Sales Tax Act (Delhi) Rules, 2005 ('CST Delhi Rules') to the effect that a „C" Form issued by M/s. Sarv Manglam Sales in favour of the present petitioner is declared obsolete and invalid for all purposes with effect from the date of issuance of such forms.

2. The said „C" Form was issued in favour of the present petitioner on 22nd January 2016 and it was valid for the third quarter 2015-16. The petitioner is registered as a dealer under the Jammu and Kashmir Value Added Tax (JKVAT) and the Central Sale Tax, 1956 (CST Act) in the State of Jammu and Kashmir. The petitioner made an inter-State sale of goods to Sarv Manglam Sales (the purchasing dealer) registered in Delhi under the CST Act. The sale was made against the „C" Form prescribed under the Central Sales Tax (Registration and Turnover) Rules 1957. The sale was made during the first quarter of 2016-17 in the sum of Rs. 74,72,806/-. Since both the dealer and the purchasing dealer were registered under the CST Act, the rate of tax was 2%. The dealer in Delhi i.e. Sarv Manglam Sales issued the above „C" Form in favour of the Petitioner which was then presented by the Petitioner before the authority of Jammu and Kashmir in support of the payment of 2% tax. The return disclosing the said transaction and payment of tax of the said percentage was accepted by the authority in Jammu and Kashmir.

3. The short question that arises is whether there was any justification for the CVAT in New Delhi to retrospectively declare the „C" Form which had already been acted upon by the authority in Jammu and Kashmir as "obsolete". The attention of the Court is drawn to Rule 5(13) of the CST Delhi Rules reads as under:

> 5(13) The Commissioner may, by notification, declare that Declaration Forms of a particular series, design or colour shall be deemed as obsolete and invalid with effect from such date as may be specified in the notification.

4. It is clear from the reading of the above Rule that the declaration of any Form being obsolete takes effect from such date as may be specified in a notification. The above sub-rule has to be read with Rule 5(14) which reads as under:

> 5(14)"When a notification, declaring Forms of a particular series, design or colour obsolete and invalid, is published under sub-rule (13), all registered dealers shall, on or before the date with effect from which the Forms are so declared obsolete and invalid, surrender to the Commissioner all unused Forms of that series, design or colour which may be in their possession and shall be issued in exchange for the Forms so surrendered, such new Forms as may be substituted for the Forms declared obsolete and invalid:
>
> PROVIDED that new Forms shall not be issued to a dealer until he has accounted for the old Forms lying with him and returned the balance, if any, in his hand to the Commissioner.

5. A collective reading of both the sub rules makes it clear that once the form that has been issued is utilized, the question of subsequently declaring such used forms as obsolete would not arise. Rule 5(14) makes the requirement of surrender of the 'unused forms' of the series design or colour that have been rendered obsolete clear and provides that only for such unused forms would new forms be issued. It is, therefore, plain that the above rules do not permit the CVAT to declare forms that have already been issued and acted upon as obsolete.

6. In the counter affidavit filed on behalf of the Respondent, it is contended that the judgment of this Court in Jain Manufacturing (India) Private Limited v. Commissioner of Value Added Tax 2016 SCC Online Delhi 3656 had held that the CVAT has no power to cancel „C" Form already issued. Although the SLP against the said decision has been dismissed by

the Supreme Court, it is pointed out that in the subsequent decision of this court in *Jai Gopal International Impex Pvt. Limited v. Commissioner of VAT* (decision dated 23rd July 2018 in W.P. (C) 7563 of 2018) the said decision in Jain Manufacturing was followed and SLP (C) 27177 of 2018 filed against the decision of this Court in Jai Gopal International is pending before the Supreme Court. In the said SLP a stay has been granted by the Supreme Court on 27th October, 2018 of the said judgment of this Court. It is accordingly submitted that the present petition should await the decision in the said SLP.

7. The Court finds that independent of the decisions in Jain Manufacturing (supra) and Jai Gopal International the present petition should succeed since here there is no legal basis for the Respondents to have declared by the impugned notification, the 'C' Forms already issued and acted upon as "obsolete". In fact, neither in Jain Manufacturing India Private Limited nor in Jai Gopal International did the Commissioner invoke its power under Rule 5 (13) of the CST Delhi Rules to declare the 'C' Form already issued as obsolete.

8. For the aforementioned reasons, the impugned notification dated 11th July 2018 issued by the CVAT is hereby set aside. The writ petition is allowed in the above terms.

[2019] 57 DSTC 319 (New Delhi)

IN THE HIGH COURT OF DELHI

[Hon'ble Justice S. Muralidhar and Justice Talwant Singh]

W.P.(C) 12876/2018

Corsan Corviam Construccion
S.A.- Sadhbhav Engineering Ltd. JV ... Petitioner

Versus

Commissioner Of Trade & Taxes ... Respondent

Date of Order : 22 July, 2019

OBLIGATION TO PAY INTEREST U/S 42(1) OF DVAT ACT, 2004 – INTEREST NOT PROVIDED ALONG WITH REFUND – WRIT PETITION SEEKING DIRECTION TO GRANT INTEREST – REVENUE ARGUED THAT RETURN FILED ON 10TH JULY, 2015 AND THE PERIOD OF TWO MONTHS 38(3)(a)(ii) OF THE DVAT ACT WOULD COMMENCE FROM 13TH JULY BECAUSE TWO DAYS FOLLOWING THE DATE OF FILING OF RETURN HAPPENED TO BE HOLIDAYS – INGENUOUS ARGUMENT

AND REJECTED NOTICE ISSUED U/S 59(2) WAS BEYOND THE PERIOD OF TWO MONTHS – NO LEGAL EFFECT – EXPRESSION GIVEN IN SECTION 42 MEANS THE DATE ON WHICH THE REFUND AMOUNT IS ACTUALLY RECEIVED – WRIT PETITION ALLOWED – DIRECTION GIVEN TO RESPONDENT TO CALCULATE INTEREST IN THE TERM OF SECTION 42 READ WITH RULE 34 AND 36 OF DVAT RULES.

Facts of the Case

The admitted facts, as evident from the order granting refund, were that the Petitioner, a registered dealer under the Delhi Value Added Tax Act, 2004 (DVAT Act), filed a return claiming refund on 10th July, 2015. The tax period for which refund was claimed was the fourth quarter of 2014. The refund claimed was Rs 2,56,57,120/- and refund allowed was Rs.1,30,96,335/- After set off/adjustments the net amount of refund worked out to Rs.1,30,96,335/-.

On account of the failure of the Respondents to pay interest for the period between 11th September, 2015 (i.e. expiry of two months after filing of the refund application) and 14th September, 2017, the date when the refund amount was received by it, the Petitioner had filed the petition.

Held

The wording of Section 42(1) of DVAT Act is unambiguous. It talks of the two dates i.e. date the refund was due to be paid to the person and "until the date" on which the refund is "given". The word should in the context of the provision mean, the date on which the refund amount is actually received by the Petitioner and not the date simply on which the refund order is issued. As a matter of routine, the Court noted that invariably, the refund amount was not received by an Assessee on the date of issuance of the refund order. That date is usually a later date. In the case, as already noted, the Respondent has not disputed the fact that the refund amount was in fact received by the Petitioner only on 14th September, 2017.

In that view of the matter, it was held that the Petitioner was entitled to interest on the refund amount issued by the order dated 25th August, 2017 for the period from 11th September, 2015 till 14th September, 2017. The said interest amount calculated in terms of Section 42 read with Rule 34 and 36 of the DVAT Rules will be credited to the Petitioners account not later than 16th August, 2019. It is further directed that if the said amount is not credited by that date, the Respondent will pay the Petitioner Rs.50,000/- as compensation.

Present for Petitioner	:	Mr. Rajesh Jain, Mr. Virag Tiwari and Mr. Ramashish, Advocates
Present for Respondent	:	Mr. Anuj Aggarwal, ASC, GNCTD with Mr. Atul Goyal, Advocates

Order

Dr. S. Muralidhar, J.:

1. A short issue is involved in this petition regarding the obligation of the Respondent to pay interest on the refund issued to the Petitioner by an order dated 20th August, 2017.

2. The admitted facts, as evident from the order granting refund, are that the Petitioner, a registered dealer under the Delhi Value Added Tax Act, 2004 (DVAT Act), filed a return claiming refund on 10th July, 2015. The tax period for which refund was claimed was the fourth quarter of 2014. The refund claimed was Rs.2,56,57,120/- and refund allowed was Rs.1,30,96,335/- After set off/adjustments the net amount of refund worked out to Rs.1,30,96,335/-.

3. On account of the failure of the Respondents to pay interest for the period between 11th September, 2015 (i.e. expiry of two months after filing of the refund application) and 14th September, 2017, the date when the refund amount was received by it, the Petitioner has filed the present petition.

4. In response to the petition, a counter affidavit has been filed, wherein it is sought to be contended by the Respondent that the revised return was filed on a Friday i.e. 10th July, 2015 and the period of two months as per Section 38 (3)(a)(ii) of the DVAT Act would commence from the following Monday i.e. 13th July, 2015. It is further stated that on 11th September, 2015, a notice under Section 59(2) of DVAT Act was issued to the Petitioner and this was therefore within the period of two months as stipulated under Section 38 (3)(a)(ii) of the DVAT Act.

5. Section 38 (3) of the DVAT Act and Section 38(7) read as under:

Section 38 (3)

(3) Subject to sub-section (4) and sub-section (5] of this section, any amount remaining after the application referred to in sub-

section (2) of this section shall be at the election of the dealer, either—

(a) refunded to the person,

(i) within one month after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is one month;

(ii) within two months after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is a quarter; or

(b) carried forward to the next tax period as a tax credit in that period

Section 38(7)

'(7) For calculating the period prescribed in clause (a) of sub-section (3), the time taken to—

(a) furnish the security under sub-section (5) to the satisfaction of the Commissioner; or

(b) furnish the additional information sought under section 59; or

(c) furnish returns under section 26 and section 27; or

(d) furnish the declaration or certificate forms as required under Central Sales Tax Act, 1956, shall be excluded."

6. With the Petitioner having admittedly filed the return claiming the refund on 10th July 2015, the question of construing the starting of the limitation period of two months from 13th July, 2015 does not arise. It is indeed an ingenuous argument that merely because two days following the date of filing happened to be holidays, the date of filing of the revised return would get postponed to the next working day. This is untenable and is rejected as such.

7. In that view of the matter, the notice issued under Section 59(2) of the Act on 11th September, 2015 was beyond the period of two months after the filing of the revised return and to no legal effect. In terms of 38 (3) (a)(ii) read with Section 38 (7) of the DVAT Act, the period for which interest will become payable would run from 11th September, 2015 itself.

8. The legal position has been clearly explained by this Court in its decision in IJM Corporation Berhard v. Commissioner of Trade and Taxes, 2018 (48) GSTR 102 (Del) in Para 15, where it was observed as under:

> "15. When we harmoniously read sections 38 and 42 of the Act, which relate to processing: of claim for refund and payment of interest, it is crystal dear that the interest is to be paid from the date when the refund was due to be paid to the assessee or date when the overpaid amount was paid, whichever is later. The date when the refund was due would be with reference to the date mentioned in section 38, i.e., clause (a) to sub-section (3). This would mean that interest would be payable after the period specified in clause (a) to sub-section (3) to section 38 of the Act, i.e., the date on which the refund becomes payable. Two sections, namely, sections 38(3) and 42(1) do not refer to the date of filing of return. This obviously as per the Act is not starting point for payment of interest."

9. In the same decision in the context of Section 39 (1) of the DVAT Act, it was further explained as under:

> "19. The interpretation given by us gets affirmation from section 39 of the Act, which relates to power to withhold refund in certain cases. Section 39 of the Act reads as under:
>
> 39. Power to withhold refund in certain cases.-
>
> (I) Where a person is entitled to a refund and any proceeding under this Act, including an audit under section 58 of this Act, is pending against him, and the Commissioner is of the opinion that payment of such refund is likely to adversely affect the revenue and that it may not be possible to recover the amount later, the Commissioner may for reasons to be recorded in writing, either obtain a security equal to the amount to be refunded to the person or withhold the refund till such time the proceeding or the audit has been concluded.
>
> (2) Where a refund is withheld under sub-section (1) of this section, the person shall be entitled to interest as provided under subsection (1) of section 42, of this Act if as a result of the appeal or further proceeding, or any other proceeding he becomes entitled to the refund,"

Sub-section (1) gives power to the Commissioner, who may for reasons to be recorded in writing either obtain security equal to

the amount to be refunded or withhold the refund till such time the proceedings or audit has been concluded. The said power can be exercised as prescribed and stipulated in sub-section (1). Sub-section (2) states that where refund is withheld under sub-section (1), the person would be entitled to interest if as a result of the appeal or further proceedings or any other proceedings, he becomes entitled to the refund. In other words, under sub-section (2), interest would begin from the period specified in clause (a) to sub-section (3) to section 38 of the Act, albeit the quantum of refund would depend upon the adjudication. To this extent on interpretation of sub-section (2) to section 38, counsel for the parties are ad idem."

10. In that view of the matter, the stand taken by the Respondents in the counter affidavit that the Petitioner is not entitled to interest on refund is hereby rejected.

11. Mr. Rajesh Jain, learned counsel for the Petitioner points out that although the refund order was issued on 25th August 2017, the actual refund amount was credited in the Petitioner"s account only on 14th September, 2017. This is not disputed by Mr. Anuj Agarawal, learned counsel for the Respondent. Mr. Jain refers to Section 42(1) of the DVAT Act to contend that the interest payable on the refund amount would be for a period till the date the refund amount was actually received i.e. from 11th September, 2015 till 14th September, 2017.

12. Section 42 of the DVAT Act reads as under:

"42. Interest (1) A person entitled to a refund under this Act, shall be entitled to receive, in addition to the refund, simple interest at the annual rate notified by the Government from time to time, computed on a daily basis from the later of—

(a) the date that the refund was due to be paid to the person; or

(b) the date that the overpaid amount was paid by the person, until the date on which the refund is given:

Provided that the interest shall be calculated on the amount of refund due after deducting therefrom any tax, interest, penalty or any other dues under this Act, or under the Central Sales Tax Act, 1956 (74 of 1956):

Provided further that if the amount of such refund is enhanced or reduced, as the case may be, such interest shall be enhanced or reduced accordingly.

Explanation: If the delay in granting the refund is attributable to the said person, whether wholly or in part, the period for the delay attributable to him shall be excluded from the period for which the interest is payable.

(2) When a person is in default in making the payment of any tax, penalty or other amount due under this Act, he shall, in addition to the amount assessed, be liable to pay simple interest on such amount at the annual rate notified by the Government from time to time, computed on a daily basis, from the date of such default for so long as he continues to make default in the payment of the said amount.

(3) Where the amount of tax including any penalty due is wholly reduced, the amount of interest, if any, paid shall be refunded, or if such amount is varied, the interest due shall be calculated accordingly.

(4) Where the collection of any amount is stayed by the order of the Appellate Tribunal or any court or any other authority and the order is subsequently vacated, interest shall be payable for any period during which such order remained in operation.

(5) The interest payable by a person under this Act may be collected as tax due under this Act and shall be due and payable once the obligation to pay interest has arisen."

13. The wording of Section 42(1) of DVAT Act is unambiguous. It talks of the two dates i.e. date the refund was due to be paid to the person and 'until the date' on which the refund is 'given'. The word 'given' should in the context of the provision mean, the date on which the refund amount is actually received by the Petitioner and not the date simply on which the refund order is issued. As a matter of routine, the Court notes that invariably, the refund amount is not received by an Assessee on the date of issuance of the refund order. That date is usually a later date. In the present case, as already noted, the Respondent has not disputed the fact that the refund amount was in fact received by the Petitioner only on 14th September, 2017.

14. In that view of the matter, it is held that the Petitioner is entitled to interest on the refund amount issued by the order dated 25th August, 2017 for the period from 11th September, 2015 till 14th September, 2017. The said interest amount calculated in terms of Section 42 read with Rule 34 and 36 of the DVAT Rules will be credited to the Petitioner"s account not later than 16th August, 2019. It is further directed that if the said amount is not credited by that date, the Respondent will pay the Petitioner Rs.50,000/- as compensation.

15. The petition is disposed of in the above terms.

16. Allowed, subject to all just exceptions.

[2019] 57 DSTC 326 (Patna)

IN THE HIGH COURT OF JUDICATURE AT PATNA

[Hon'ble Mr. Justice Jyoti Saran and Hon'ble Mr. Justice Arvind Srivastava]

Civil Writ Jurisdiction Case No.2125 of 2019

M/s Commercial Steel Engineering Corporation ... Petitioner

Versus

The State of Bihar & Ors. ... Respondents

Date of Judgment : 27 June, 2019

TRAN-1 APPLICATION U/S 140 OF BIHAR GOODS AND SERVICES TAX ACT,2017 – CLAIMING TRANSITIONAL BGST CREDIT ON THE BASIS OF CARRY FORWARD INPUT TAX CREDIT EARNED UNDER BVAT ACT AND ENTRY TAX ACT AS MANIFEST FROM ASSESSMENT ORDERS FOR YEAR 2007 AND 2011 – DUE TO MISTAKE OF ACCOUNTANT CARRY FORWARD OF ITC NOT REFLECTING IN SUBSEQUENT YEARS – REVENUE REJECTED TRAN-1 APPLICATION INVOKING SECTION 73(1) OF BGST ACT,2017 – TAX, INTEREST AND PENALTY ORDER PASSED – WRIT PETITION FOR QUASHING OF THE ORDER BEING ILLEGAL AND WITHOUT JURISDICTION IN TERM OF SECTION 73(1) OF BGST ACT – WHETHER THE PETITIONER COULD NOT HAVE BEEN SUBJECTED TO A PROCEEDING UNDER SECTION 73 OF THE BGST ACT,2017 FOR THE ENTIRE CREDIT REFLECTING IN THE LEDGER WITHOUT QUANTIFICATION OF THE AMOUNT WHICH HAS BEEN EITHER AVAILED OR UTILIZED; HELD – NO.

MERE REFLECTION OF THE TRANSITIONAL CREDIT IN THE APPLICATION U/S 140 WOULD NOT AMOUNT TO EITHER AVAILMENT OR UTILIZATION OF THE CREDIT – ALL TAXES PAID TILL DATE – THERE IS NO QUESTION OF AVAILMENT OR UTILIZATION – NO CHANGE IN CREDIT BALANCE SINCE JULY,2017 UPTO NOV., 2018 EXCEPT SOME MINOR SHIFTS HERE AND THERE – THE LEGISLATIVE

INTENT REFLECTED FROM A PURPOSEFUL READING TO THE PROVISIONS UNDERLYING SECTION 140 ALONGSIDE THE PROVISIONS OF SECTION 73 AND RULES 117 AND 121 IS THAT EVEN A WRONGLY REFLECTED TRANSITIONAL CREDIT IN AN ELECTRONIC LEDGER ON ITS OWN IS NOT SUFFICIENT TO DRAW PENAL PROCEEDINGS UNTIL THE SAME OR ANY PORTION THEREOF, IS PUT TO USE SO AS TO BECOME RECOVERABLE ORDER PASSED BY REVENUE U/S 73 OF BGST ACT – HELD ILLEGAL AND AN ABUSE OF THE STATUTORY JURISDICTION AND QUASHED AND SET ASIDE.

Facts of the Case

The petitioner was a partnership firm having its works at Bihta in the district of Patna. The petitioner was registered under the Bihar Value Added Tax Act, 2005 (hereinafter referred to as 'the VAT Act'), the Central Sales Tax Act, 1956 (hereinafter referred to as 'the CST Act') and the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale therein Act,1993 (hereinafter referred to as 'the Entry Tax Act').

The issue in contest related to the financial year 2007-08 and 2011-12 for which the petitioner filed his returns under 'the VAT Act'. An assessment proceeding was held under section 31 of 'the VAT Act' and an assessment order was passed on 7.9.2010 showing an input tax credit of Rs.18,33,304.76 for the financial year 2007-08. However, since no input tax credit was to be allowed in respect of purchase of cartridge on which tax to the tune of Rs.112.00 was payable, hence direction was issued for deposit of tax on the said cartridge to the tune of Rs.112.52 by the Commercial Tax Officer, Patliputra Circle, Patna vide his order dated 7.9.2010 at Annexures 2 series.

In a similar manner, an assessment order was passed for the financial year 2011-12 on 27.8.2016 showing an input tax credit of Rs.20,79,256.00. However, on a default made by the petitioner on filing of annual returns that a penalty of Rs.5000/- was imposed for which the assessing authority i.e. the Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna directed for issuance of demand notice which is enclosed with the assessment order at Annexures 2 series. As indicated, the assessment orders so passed for the period in question i.e. 2007-08 and 2011-12 shows input tax credit admissible to the petitioner to the tune of Rs.18,33,304.76 and Rs.20,79,256.00 and has attained finality because it has not been appealed against.

According to the petitioner, though he was entitled to carry forward this input tax credit but due to inadvertent mistake of the Accountant, this was not reflected in the returns filed for the subsequent years and it is only in 2017 that the mistake of unadjusted input tax credit of Rs.18,33,304.76 for

the period 2007- 08 and Rs.20,79,256.00 for the financial year 2011-12 was detected. A refund application in the statutory form was filed, copies of which is at Annexures 3 series and in so far as the refund application for the financial year 2007-08 is concerned, it has been rejected, inter alia, on grounds that it was time barred.

Held

Had it been a case where the credit shown in electronic ledger, was availed or utilized for meeting any tax liability for any year, there would be no error found in the action complained but it would be stretching the term 'availment' beyond prudence to treat the mere reflection of the transitional credit in the electronic credit ledger as an act of availment, for drawing a proceeding under section 73(1) of 'the BGST Act'. The provisions underlying Section 73 is self eloquent and it is only if such availment is for reducing a tax liability that it vests jurisdiction in the assessing authority to recover such tax together with levy of interest and penalty under section 50 but until such time that the statutory authority is able to demonstrate that any tax was recoverable from the petitioner, a reflection in the electronic credit ledger cannot be treated as an 'availment'.

The judgment of the Supreme Court rendered in the case of Ind. Swift Laboratories Ltd. (supra) is an expression on situation where such credit has been utilized by a dealer and it is in such circumstances that the Supreme Court bearing note on the adjudication done by Settlement Commission, has recorded its opinion.

The legislative intent reflected from a purposeful reading of the provisions underlying section 140 alongside the provisions of section 73 and Rules 117 and 121 is that even a wrongly reflected transitional credit in an electronic ledger on its own is not sufficient to draw penal proceedings until the same or any portion thereof, is put to use so as to become recoverable.

This important aspect of the matter has eluded the wisdom of the respondent no.3 while passing the order. In fact it is on a complete misappreciation of legal position which lies at the foundation of the demand raised by the impugned order whereby the credit amount reflected in the credit ledger to the tune of Rs.42,73,869.00 has been treated as an outstanding tax liability against the petitioner to order for its recovery together with interest and penalty even when the electronic credit ledger status at Annexure 7 confirms to a credit in favour of the petitioner i.e. a negative tax liability.

The order dated 6.11.2018 passed by the respondent in purported exercise of power vested in him under section 73 of 'the BGST Act' held per se illegal and an abuse of the statutory jurisdiction and accordingly quashed and set aside.

For the Petitioner/s : Mr. Gautam Kumar Kejriwal, Adv.

For the Respondent/s : Mr. Vikash Kumar, SC11

JUDGMENT

Honourable Mr. Justice Jyoti Saran

The petitioner by filing this writ petition under Article 226 of the Constitution of India has made the following prayer:

" a) For issuance of a writ in the nature of certiorari for quashing of the order dated 6.11.2018 passed by the respondent no.3 being illegal and without jurisdiction in terms of Section 73(1) of the Bihar Goods and Service Tax Act, 2017 (hereinafter referred to as the Act for short);

b) For issuance of a writ in the nature of mandamus directing the respondents specially the respondent no.3 for grant of transitional credit or adjustment of excess of input tax credit against future liabilities of the petitioner for a sum of Rs.18,33,304.76 and Rs.20,79,256.00 which amount is lying with the respondent department in terms of order of assessment for the financial year 2007-08 and 2011-12.

(c) For holding and a declaration that once the respondent department is holding in hand the excess of input tax credit already standing to the credit of the petitioner the same has to be given adjustment against future liabilities and a denial of such adjustment would be an act giving rise to unjust enrichment and also would be violative of Article 265 of the Constitution of India.

(d) For restraining the respondents specially the respondent no.3 from taking any coercive action against the petitioner for recovery of the said demand as contained in the impugned order dated 6.11.2018."

When this matter is taken up for consideration Mr. Gautam Kejriwal, learned counsel appearing for the petitioner in reference to the supplementary affidavit filed on 12.2.2019 has submitted that he would be restricting the present writ petition to the relief prayed in paragraph 1(a) of the writ petition and in so far as the rejection by the statutory authority to the claim for refund of the surplus value added tax deposited by the petitioner for the period in question is concerned, the petitioner, as advised, would take recourse to the remedy as may be available to him in law. Learned counsel thus submits that he would not pressing the relief as present in paragraph 1(b) and (c) to the writ petition.

Having considered the submissions so advanced by Mr. Kejriwal and while allowing the writ petitioner to pursue his remedy in so far as the issue of refund is concerned before the statutory authority, we allow the petitioner to press the writ petition in so far as relief 1(a) is concerned and which questions the order of respondent no.3, Assistant Commissioner of State Taxes, Patliputra Circle, Patna on its legality.

Bare facts essential for disposal of the writ petition which needs to be taken note of are as follows:

The petitioner is a partnership firm having its works at Bihta in the district of Patna. The petitioner is registered under the Bihar Value Added Tax Act, 2005 (hereinafter referred to as 'the VAT Act'), the Central Sales Tax Act, 1956 (hereinafter referred to as 'the CST Act') and the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale therein Act,1993 (hereinafter referred to as 'the Entry Tax Act').

The issue in contest relates to the financial year 2007-08 and 2011-12 for which the petitioner filed his returns under 'the VAT Act'. An assessment proceeding was held under section 31 of 'the VAT Act' and an assessment order was passed on 7.9.2010 showing an input tax credit of Rs.18,33,304.76 for the financial year 2007-08. However, since no input tax credit was to be allowed in respect of purchase of cartridge on which tax to the tune of Rs.112.00 was payable, hence direction was issued for deposit of tax on the said cartridge to the tune of Rs.112.52 by the Commercial Tax Officer, Patliputra Circle, Patna vide his order dated 7.9.2010 at Annexures 2 series.

In a similar manner, an assessment order was passed for the financial year 2011-12 on 27.8.2016 showing an input tax credit of Rs.20,79,256.00. However, on a default made by the petitioner on filing of annual returns that a penalty of Rs.5000/- was imposed for which the assessing authority

i.e. the Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna directed for issuance of demand notice which is enclosed with the assessment order at Annexures 2 series. As indicated, the assessment orders so passed for the period in question i.e. 2007-08 and 2011-12 shows input tax credit admissible to the petitioner to the tune of Rs.18,33,304.76 and Rs.20,79,256.00 and has attained finality because it has not been appealed against.

According to the petitioner, though he was entitled to carry forward this input tax credit but due to inadvertent mistake of the Accountant, this was not reflected in the returns filed for the subsequent years and it is only in 2017 that the mistake of unadjusted input tax credit of Rs.18,33,304.76 for the period 2007- 08 and Rs.20,79,256.00 for the financial year 2011-12 was detected. A refund application in the statutory form was filed, copies of which is at Annexures 3 series and in so far as the refund application for the financial year 2007-08 is concerned, it has been rejected, inter alia, on grounds that it was time barred. Copy of the order dated 12.6.2017 is at Annexure 4.

Mr. Kejriwal has fairly submitted that the statement at paragraph-16 of the writ petition that, the petitioner has filed a writ petition to question such rejection, is a bonafide typographical error because the matter is pending before the Commissioner of Commercial Taxes and not the High Court. Mr. Kejriwal also informs that in so far as the refund application in relation to the financial year 2011-12 is concerned, the petitioner has no information as regarding its outcome.

According to the petitioner, in between this exercise the Goods and Services Tax Act, 2017 was enforced which came into effect from 1.7.2017. The petitioner filed an application in terms of Section 140 of the Bihar Goods and Services Tax Act, 2017 (hereinafter referred to as 'the BGST Act') to take credit of the surplus Value Added Tax and Entry Tax and to carry forward the same in his electronic ledger in form TRAN-1 for the two years 2007-08 and 2011-12. According to the petitioner, the sum total of the credit for the period 2007-08 and 2011-12 comes to Rs.39,12,560.76 and which credit alongwith the credits earned by the petitioner for the subsequent period as until 1.7.2017 was reflected in the electronic credit ledger to read Rs.43,21,945.00.

It is admitted by the petitioner that as against this input tax credit reflected in the electronic ledger, though a sum of Rs.96,077/- was utilized but the same was remitted as manifest in the return filed for the month of August, 2018. It is also the case of the petitioner that since the tax liability

for the month of October, 2018 was to the tune of Rs.1,14,237/- and the input tax credit for the said month came to Rs.59,103/-, the balance tax liability to the tune of Rs.55,134/- was deposited and reflected in the monthly return filed for the month of October, 2018 in November, 2018. Learned counsel in support of his submissions has enclosed extract of the electronic cash ledger at Annexure 9 to the rejoinder.

In so far as the application of the petitioner under section 140 of 'the BGST Act' is concerned, the same came to be rejected by the order impugned passed by respondent no.3, the Assistant Commissioner of State Taxes, Patliputra Circle, Patna, impugned at Annexure 8 to the writ petition and while rejecting the same, the respondent no.3 has raised a demand on tax liability to the tune of Rs.42,73,869.00 on which transitional credit was allegedly claimed and by imposing interest at the rate of 18% for availment of such credit quantified at Rs.9,16,833.00 and imposing a penalty equivalent to 10% of tax quantified at Rs.4,27,387.00 that a demand of Rs.56,18,089.00 was raised which is followed by a demand notice and feeling aggrieved the petitioner is before this Court.

Mr. Kejriwal, learned counsel for the petitioner while straightway inviting the attention of this Court to Section 140 of 'the BGST Act' submitted that the same enables the taxpayers to carry forward the input tax credit under the Value Added Tax Act and/or Entry Tax Act, as the case may be, to his electronic credit ledger and for which a period has been prescribed. According to Mr. Kejriwal, it is under this enabling provision that the petitioner filed his application at Annexure 5 to carry forward the input tax credit earned by the petitioner under 'the VAT Act' and 'Entry Tax Act' which application according to Mr. Kejriwal was within time. According to the learned counsel, the respondent Assistant Commissioner of State Taxes in absolute abuse of statutory power while rejecting the said application, has proceeded to exercise jurisdiction under section 73 of 'the BGST Act' and since according to respondent no.3, the petitioner had wrongly availed input tax credit under 'the VAT Act' and 'Entry Tax Act', the claim for transitional credit to the tune of Rs.42,73,869.00 was held contrary to the provisions of Section 140 of 'the BGST Act' read alongside Rule 117 framed thereunder and thus liable for rejection.

According to Mr. Kejriwal, learned counsel for the petitioner, even if the application filed by the petitioner under section 140 of 'the BGST Act' on the claim of transitional BGST credit was not found lawfully sustainable, it was liable for rejection but certainly a rejection of such claim did not empower the respondent no.3, Assistant Commissioner of State Taxes to

convert the said proceedings into a proceeding under section 73 of 'the Act' for assessment of liability as well as for levy of interest and penalty. According to Mr. Kejriwal, the two proceedings are independent to each other and could not have been amalgamated.

Questioning the order passed by the Assistant Commissioner of State Taxes on merits, it is the argument of Mr. Kejriwal that the application filed by the petitioner under section 140 of 'the BGST Act' claiming transitional BGST credit on the basis of carry forward input tax credit earned by the petitioner under 'the VAT Act' and 'the Entry Tax Act' as manifest from the assessment orders at Annexures 2 series which confirms the credit earned by the petitioner to the tune of Rs.18,33,304.76 for the financial year 2007-08 and Rs.20,79,256.00 for the financial year 2011-12, is a matter of record. It is the argument of Mr. Kejriwal that even if a refund application has been rejected, the petitioner would be taking statutory recourse but in so far as the issue of claiming transitional BGST credit is concerned, since as according to the petitioner, he was entitled to claim such transitional credit, which on application made by the petitioner was reflected in his electronic credit ledger as also confirmed from the chart at Annexure 7 as on 1.7.2017 but until such time that the respondents can demonstrate that the petitioner either availed or utilized the said credit, no proceeding under section 73 of 'the BGST Act' is sustainable and the exercise is dehors the statutory prescriptions.

The short argument advanced by Mr. Kejriwal is that a mere reflection of the transitional credit on the application filed by the petitioner under section 140 of 'the Act', would not amount to either availing or utilizing the credit nor would be sufficient to invite a proceeding under section 73 of 'the Act' until such time that the respondents by reference to records are able to demonstrate that the said credit was either availed of or utilized by the petitioner. As regarding utilization of the input tax credit of Rs.96,077/- is concerned, learned counsel submits that apart from the fact that this credit is not relatable to the financial year 2007-08 or 2011-12, the said amount was remitted back and shown in the return filed for the month of August, 2018. He submits that similarly in so far as the tax for the period October, 2018 is concerned, the deficit amount of Rs.55,134/- was deposited and thus, the petitioner has never availed credit or utilized credit so reflected in the ledger for the period 2007-08 or 2011-12. In reference to the credit balance reflected in the ledger of the petitioner at Annexure 7 he submits that while the opening balance shown in July, 2017 reads Rs.43,21,945.00, the said balance has more or less remained at the same position. It is the specific case of Mr. Kejriwal that never has the petitioner claimed any

credit rather as on date the petitioner has paid all his taxes and thus, there cannot be any issue of either availment or utilization of the credit reflected in his electronic credit ledger.

The argument of Mr. Kejriwal has been contested rather seriously by Mr. Vikash Kumar, learned SC11, and the main thrust is on the conduct of the petitioner in filing an application under section 140 of 'the BGST Act' to claim transitional credit of the input tax credit earned by the petitioner under 'the VAT Act' and 'the Entry Tax Act' liable to be carried forward under 'the BGST Act, 2017'. According to the learned State Counsel, the very fact that the petitioner filed an application under section 140 of 'the Act' and the credit balance got reflected in his electronic credit ledger on 1.7.2017, it would amount to availing credit and thus, in view of the provisions underlying Rule 117 read alongside Rule 121 of 'the Rules', since the petitioner had wrongly availed credit, he was liable for being proceeded under section 73 of 'the BGST Act' and there is thus no infirmity in the order passed by the respondent no.3. Learned counsel in reference to the provisions underlying Section 73 of 'the Act' submits that it allows penal proceedings against a dealer who has wrongly availed or utilized input tax credit. According to Mr. Vikash Kumar, learned SC11, even if, learned counsel for the petitioner has tried to demonstrate that he has not utilized the transitional credit but the moment the same is reflected in the electronic credit ledger, on the application filed by the petitioner under section 140 of 'the BGST Act', it amounts to availment and the period for which such availment has been made by the petitioner, he is liable to pay interest as well as penalty. Learned counsel in support of his submissions has relied upon the judgment of the Supreme Court reported in (2011)4 SCC 635 (Union of India & ors. vs. Ind. Swift Laboratories Ltd.) and in particular reference to the opinion expressed at Paragraphs 15,16, 18 and 21 of the judgment it is submitted that the position has been clarified by the Supreme Court and the petitioner cannot escape liability. Learned State Counsel in reference to the stand taken by the department at paragraphs 5, 8, 13, 15 and 17 of the counter affidavit has submitted that the respondents in reference to the statutory prescriptions present in 'the BGST Act' on the issue have suitably explained the reasons for initiation of the penal proceeding as well as for raising of the demand.

Having heard learned counsel for the parties I am of the opinion that two preliminary issues fall for consideration and which has also been noted in the order of this Court passed on 15.3.2019 which reads under:

"(a) Whether or not the reflection of Rs.42 lacs approximately in

the electronic credit ledger of the petitioner is a confirmation of availment or his entitlement for utilization.

(b) Whether the petitioner could have been subjected to a proceeding under section 73 of the Bihar Goods and Service Tax Act, 2017 for the entire credit reflecting in the ledger without quantification of the amount which has been either availed or utilized.

The facts on record are not in dispute rather what is to be seen is whether, the credit reflected in the electronic credit ledger of the petitioner amounts to either availment or utilization of the credit.

Annexures 2 series are a confirmation of the fact that there was an input tax credit to the tune of Rs.18,33,304.76 in favour of the petitioner for the period 2007-08 and to the tune of Rs.20,79,256.00 for the period 2011-12 for the taxes deposited under 'the VAT Act' and 'the Entry Tax Act'. It is again not in dispute that one of the refund applications for these credits, have been rejected and the petitioner would be taking recourse to the statutory remedy as available to him in law to pursue his grievance as canvassed by Mr. Kejriwal.

In so far as the issue in dispute is concerned, while it is the argument of Mr. Kejriwal that the petitioner having paid all his taxes as until date, there is no question of either availment or utilization of transitional credit, the argument has been contested by Mr. Vikash Kumar, learned SC11 by submitting that the reflection in the electronic credit ledger itself would amount to availment and since according to the assessing authority, the petitioner was not entitled to such availment, he is liable for proceeding under section 73 read alongside Rules 117 and 121 of the Rules framed thereunder.

Whether or not the claim of the petitioner under section 140 of 'the Act' in seeking transitional credit has been rightly rejected, I would express no opinion in view of the stand taken by the petitioner in not pressing the relief No. 1(b) and (c) of the writ petition as according to Mr. Kejriwal the petitioner would be taking recourse to the statutory remedy so available to him in law for such relief.

In order to appreciate whether the proceedings initiated by the Assistant Commissioner of State Taxes under section 73 of 'the BGST Act' read with section 50 thereof, is in tune with the statutory provisions regulating such exercise, I am persuaded to bear note of the statutory prescriptions which lie at the foundation of such exercise and has been relied upon by the learned counsel for the parties.

The order passed by the Assistant Commissioner of State Taxes put to challenge in this writ petition in so far as it raises a demand of tax together with interest and penalty thereon holds that since the claim of transitional BGST credit amounting to Rs.42,73,869.00 could not be substantiated by the returns filed by the petitioner that for recovery of wrongly availed credit a proceedings under section 73 of 'the BGST Act, 2017' was initiated and show cause notice was served on the petitioner. This is the foundation for the penal proceedings. The order also records appearance of the representative of the petitioner, who submitted that the transitional credit was not utilized and thus, no penal proceeding was sustainable. The Assistant Commissioner of State Taxes by placing reliance on Section 142(3) of 'the BGST Act' rejected the claim of transitional BGST credit amounting to Rs.42,73,869.00 as not being in tune with the prescriptions underlying section 140 of 'the BGST Act' read with Rules 117 of the Rules and consequentially, it is for recovery of the wrongly availed credit that the demand was raised.

The issue before us is whether at all the credit was availed by the petitioner, for which the proceeding was initiated. Annexure 7 is the extract of electronic credit ledger showing credit balance in favour of the petitioner and confirms that right since July, 2017 as until November, 2018 there has been no change in situation on the credit balance except for minor shifts here and there. As I have noted, it is the specific argument of Mr. Kejriwal that at no stage any credit has been availed by the petitioner. It is rather contended that the petitioner has regularly deposited his taxes which were found payable. There is nothing on record of the proceedings nor the impugned order anywhere discusses that this credit was ever availed of by the petitioner to meet any tax liability for any particular period and which was recoverable under the proceedings so initiated.

Section 73 of 'the Act' relied upon by the learned State Counsel in support of the impugned action together with Rule 117 and Rule 121 reads under:

> "S.73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any willful misstatement or suppression of facts.- (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilized for any reason, other than the reason of fraud or any willful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which

has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilized input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under Section 50 and a penalty leviable under the provisions of this Act or the rules made there under. (2) The proper officer shall issue the notice under subsection (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order. (3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under subsection (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under Section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under subsection (1) or sub-section (3) pays the said tax along with interest payable under Section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under subsection (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax. (Emphasis supplied)

Rule 117. Tax or duty credit carried forward under any existing law or on goods held in stock on the appointed day.-(1) Every registered person entitled to take credit of input tax under Section 140 shall, within ninety days of the appointed day, submit a declaration electronically in FORM GST TRAN-1, duly signed, on the common portal specifying therein, separately, the amount of input tax credit to which he is entitled under the provisions of the said section.

Provided that the Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days:

Provided that in the case of a claim under subsection (1) of Section 140, the application shall specify separately-

(i) the value of claims under Section 3, sub-section (3) of Section 5, Section 6 and 6A and sub-section (8) of Section 8 of the Central Sales Tax Act, 1056 made by the applicant; and

(ii) the serial number and value of declarations in Forms C and/or F and certificates in Forms E and/or H or Form I specified in Rue 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957 submitted by the applicant in support of the claims referred to in subclause (i) above.

(2) Every declaration under sub-rule (1) shall-

(a) in the case of a claim under sub-section (2) of Section 140, specify separately the following particulars in respect of every item of capital goods as on the appointed day-

(i) the amount of tax or duty availed or utilized by way of input tax credit under each of the existing laws till the appointed day; and

(ii) the amount of tax or duty yet to be availed or utilized by way of input tax credit under each of the existing laws till the appointed day;

(b) in the case of a claim under sub-section (3) or clause (b) of sub-section (4) or sub-section (6) or sub section (8) of Section 140, specify separately the details of stock held on the appointed day;

(c) in the case of a claim under sub-section (5) of Section 140, furnish the following details, namely:-

(i) the name of the supplier, serial number and date of issue of the invoice by the supplier or any document on the basis of which credit of input tax was admissibe under the existing law;

(ii) the description and value of the goods or services;

(iii) the quantity in case of goods and the unit or unit quantity code thereof;

(iv) the amount of eligible taxes and duties or, as the case may be, the value added tax or entry tax charged by the supplier in respect of the goods or services; and

(v) the date on which the receipt of goods or services is entered in the books of account of the recipient.

(3) The amount of credit specified in the application in Form GST TRAN-1 shall be credited to the electronic credit ledger of the applicant maintained in FORM GST PMT-2 on the common portal.

(4) (a)(i) A registered person, holding stock of goods which have suffered tax at the first point of their sale in the State and the subsequent sales of which are not subject to tax in the State availing credit in accordance with the proviso to sub-section (3) of Section 140 shall be allowed to avail input tax credit on goods

held in stock on the appointed day in respect of which he is not in possession of any document evidencing payment of value added tax

(ii) The credit referred to in sub-clause (i) shall be allowed at the rate of sixty per cent on such goods which attract State tax at the rate of nine per cent or more and forty per cent for other goods of the State tax applicable on supply of such goods after the appointed date and shall be credited after the State tax payable on such supply has been paid; Provided that where integrated tax is paid on such goods, the amount of credit shall be allowed at the rate of thirty per cent and twenty per cent respectively of the said tax.

(iii) The scheme shall be available for six tax periods from the appointed date.

(b) Such credit of State tax shall be availed subject to satisfying the following conditions, namely:-

(i) such goods were not wholly exempt from tax under the Bihar Value Added Tax Act, 2005;

(ii) the document for procurement of such goods is available with the registered person;

(iii) the registered person availing of this scheme and having furnished the details of stock held by him in accordance with the provisions of clause (b) of sub-rule (2) of Rule 1, submits a statement of FORM GST TRAN 2 at the end of each of the six tax periods during which the scheme is in operation indicating therein the details of supplies of such goods effected during the tax period;

(iv) the amount of credit allowed shall be credited to the electronic credit ledger of the applicant maintained in FORM GST PMT-2 on the Common Portal.

(v) the stock of goods on which the credit is availed is so stored that it can be easily identified by the registered person.

Rule 121. Recovery of credit wrongly availed.- The amount credited under sub-rule (3) of Rule 117 may be verified and proceedings under section 73 or, as the case may be, Section 74 shall be initiated in respect of any credit wrongly availed, whether wholly or partly."

While Section 73 of 'the BGST Act' enables proceedings for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for reasons other than fraud or willful misstatement or suppression of fact, where such default is committed by reason of fraud or willful misstatement or suppression of fact, a similar procedure inviting such action is provided under section 74 of 'the BGST Act'.

It is undisputed that it is on the application made by the petitioner under section 140 of 'the BGST Act' that the credit earned got reflected on the electronic credit ledger on 28.8.2017 as admitted by Mr.. Kejriwal showing a credit balance of Rs.42,73,891.00 as also taken note of in the order impugned.

Section 73 makes a dealer liable for proceedings in case of short payment of taxes or erroneously refunded taxes or for wrongly availing or utilizing input tax credit. According to Mr. Vikash Kumar, learned SC11, the reflection on the electronic credit ledger is a confirmation of a wrong availment even if, the said credit was not utilized and which act is liable for proceeding under section 73 of 'the BGST Act'.

I have reproduced the relevant provisions of the 'BGST Act' which finds mention in the discussion held for ready reference. The legislative intent present in these provisions is eloquent and I am in no confusion to hold that be it a charge of wrong availment or utilization, each is a positive act and it is only when such act is substantiated that it makes the dealer concerned, liable for recovery of such amount of tax as availed from the input tax credit or utilized by him but in each of the two circumstances, the tax available at the credit of the dealer concerned must have been brought into use by him thus, reducing the credit balance. A plain reading of Section 73 would confirm that it is only on such availment or utilization of credit to reduce tax liability, which is recoverable under section 73(1) read alongside the other provisions present thereunder. In fact the position is made even more clear by reading the said provision alongside sub-section (5), (7), (8), (9) to (11).

Despite the legal intent being so loud and clear, it is on absolute misappreciation of the statutory prescriptions and even when the amount of Rs.42 lacs and odd yet remains to the credit of the petitioner which is also confirmed from the credit ledger status available at Annexure 7 that the Assistant Commissioner of State Taxes by treating the said amount to be a tax outstanding on wrong availment by the petitioner, initiates proceeding for recovery of the said tax amount and since according to

the Assistant Commissioner of State Taxes it was an act of wrong availment by the petitioner, the respondent no.3 subjects him to interest as well as penalty which together quantifies a demand of Rs.56,18,089.00.

In my opinion, the Assistant Commissioner of State Taxes has somewhere got confused to treat the transitional credit claimed by the dealer as an availment of the said credit when in fact an availment of a credit is a positive act and unless carried out for reducing any tax liability by its reflection in the return filed for any financial year, it cannot be a case of either availment or utilization. It is rightly argued by Mr. Kejriwal that even if the respondent no.3 was of the opinion that the petitioner was not entitled to such transitional credit at best, the claim could be rejected but such rejection of the claim for transitional credit does not bestow any statutory jurisdiction upon the assessing authority to correspondingly create a tax liability especially when neither any such outstanding liability exists nor such credit has been put to use.

Had it been a case where the credit shown in electronic ledger, was availed or utilized for meeting any tax liability for any year, there would be no error found in the action complained but it would be stretching the term 'availment' beyond prudence to treat the mere reflection of the transitional credit in the electronic credit ledger as an act of availment, for drawing a proceeding under section 73(1) of 'the BGST Act'. The provisions underlying Section 73 is self eloquent and it is only if such availment is for reducing a tax liability that it vests jurisdiction in the assessing authority to recover such tax together with levy of interest and penalty under section 50 but until such time that the statutory authority is able to demonstrate that any tax was recoverable from the petitioner, a reflection in the electronic credit ledger cannot be treated as an 'availment'.

The judgment of the Supreme Court rendered in the case of Ind. Swift Laboratories Ltd. (supra) is an expression on situation where such credit has been utilized by a dealer and it is in such circumstances that the Supreme Court bearing note on the adjudication done by Settlement Commission, has recorded its opinion.

In so far as the present case is concerned, Annexure 2 series confirms that the petitioner has an input tax credit in his favour under the Value Added Tax Act and the Entry Tax Act. Now whether he is entitled for refund of this credit or entitled to carry it forward in the transitional credit, may be a subject matter of proceeding pending before the statutory authority but nonetheless, it is definitely a confirmation of the fact that there is no tax outstanding against the petitioner which is recoverable.

The legislative intent reflected from a purposeful reading of the provisions underlying section 140 alongside the provisions of section 73 and Rules 117 and 121 is that even a wrongly reflected transitional credit in an electronic ledger on its own is not sufficient to draw penal proceedings until the same or any portion thereof, is put to use so as to become recoverable.

This important aspect of the matter has eluded the wisdom of the respondent no.3 while passing the order. In fact it is on a complete misappreciation of legal position which lies at the foundation of the demand raised by the impugned order whereby the credit amount reflected in the credit ledger to the tune of Rs. 42,73,869.00 has been treated as an outstanding tax liability against the petitioner to order for its recovery together with interest and penalty even when the electronic credit ledger status at Annexure 7 confirms to a credit in favour of the petitioner i.e. a negative tax liability.

For the reasons and discussions above, the order dated 6.11.2018 passed by the respondent no.3, the Assistant Commissioner of State Taxes in purported exercise of power vested in him under section 73 of 'the BGST Act' is held per se illegal and an abuse of the statutory jurisdiction and is accordingly quashed and set aside.

The writ petition is allowed.

[2019] 57 DSTC 343 (New Delhi)

IN THE HIGH COURT OF DELHI

[Hon'ble Justice S. Muralidhar and Hon'ble Justice Talwant Singh]

COMBINED TRADERS ... Petitioner

versus

COMMISSIONER OF TRADE & TAXES ... Respondent

Date Of Order : 24 July, 2019

LIMITATION FOR DISPOSE OF OBJECTION UNDER SECTION 74(8) OF DVAT ACT, 2004 – OBJECTION PENDING BEFORE THE OBJECTION HEARING AUTHORITY – NOT DECIDED WITH IN TIME PRESCRIBED IN SECTION 74(7) – OHA BEING BUSY – NOTICE DVAT-41 SERVED TO COMMISSIONER – HEARING OF OBJECTION TOOK PLACE AND ALL RELEVANT DOCUMENTS PRODUCED – 15 DAYS PERIOD TO DECIDE THE OBJECTION AFTER SERVICE OF NOTICE EXPIRED – ANOTHER NOTICE OF HEARING SERVED ON THE PETITIONER – WRIT PETITION FOR QUASHING THE FRESH HEARING NOTICE AND FOR DECLARATION THAT THE

OBJECTION SHOULD BE DEEMED ALLOW U/S 74(9) – DEEMING PROVISION OF SECTION 74(9) WOULD ONLY GET TRIGGERED IF THE CONDITIONS PROVIDED U/S 74(8) ARE SATISFIED – REVENUE SUBMISSIONS ON GROUND OF SERVICE OF DVAT-41 NOT IN TERMS OF SECTION 74(8) AS NOTICE WAS NOT SERVED TO OHA WERE REJECTED – LIMITATION PERIOD AS PER SECTION 34(2) OF THE ACTWOULD NOT APPLY AS TO ONE YEAR PERIOD FOR COMMISSIONER TO DEAL WITH OBJECTION –THE COURT DECLARED THAT THE OBJECTION FILED IN TERMS OF SECTION 74(7) READ WITH SECTION 74(8) AND 74(9) DEEMED TO HAVE BEEN ALLOWED BY OHA.

Facts of the Case

There have been several earlier rounds of litigation concerning the Petitioner and the Respondent. The background facts are that the Petitioner is a proprietorship concern engaged in the sale/purchase and export of motor parts, tractor parts, accessories and other allied items. The Petitioner is registered with the Department of Trade and Taxes (DT & T), Government of NCT of Delhi (GNCTD) under the DVAT Act, 2004 as well as the Central Sales Tax Act, 1956.

On 19th January, 2019 the period of 15 days to decide the objection after service of notice on 4th January, 2019 in Form DVAT-41 expired. On 30th January, 2019 the OHA issued a fresh notice of hearing for 11th February, 2019. On 2nd February, 2019 another hearing notice dated 30th January, 2019 was served on the Petitioner fixing the objections for hearing on 11th February, 2019.

On account of the failure of the OHA to decide the objections within the time stipulated in Section 74 (8) DVAT Act, the Petitioner filed the present petition seeking the relief of quashing of the hearing notice dated 30th January, 2019 and also for declaration that the objection dated 13th March, 2018 filed by the Petitioner should be deemed to be allowed by the OHA in terms of Section 74(9) of the DVAT Act read with Section 9 (2) of the CST Act.

Held

Respondent submitted that the Petitioner had not complied with Section 74 (8) of the DVAT Act since the notice under DVAT-41 was not served 'in person' on the OHA but on the Commissioner. He submitted that unless the conditions for applicability of Section 74 (8) of the DVAT Act read with Rule 56 of the DVAT Rules are fulfilled, it cannot be invoked and in support thereof relied on the decision in Mancheri Puthusseri Ahmed v. Kuthiravattam Estate Receiver (1996) 6 SCC 185.

The above submission appeared to overlook the fact that the Respondent had not controverted the statements made on oath by the Petitioner in the petition that despite best efforts to personally serve the DVAT 41 on the OHA he could not do so. It was seen from Annexure P-5 to the petition, that on the copy of the DVAT-41 Form served on the Commissioner by the Petitioner, there was an acknowledgement stamp with the diary no. E-820717 dated 4th January, 2019. The stamp is of the Central Resources Unit, DT& T.

This Court was of the view that Section 34 (2) which has to be read in the context of Section 34 (1) of the DVAT Act would not apply in the facts and circumstances of the present case, which was essentially concerned with the failure of the OHA to dispose of the objections filed under Section 74 (1) of the DVAT Act. It must be recalled that what was set aside by this Court by its judgment dated 28th September 2018 was the decision dated 17th May 2018 of the OHA under Section 74 (7) of the DVAT Act which was a specific provision dealing with objections whereas Section 34 (2) of the DVAT Act appeared to be a general provision relating to assessments. In the case there was no occasion for the Commissioner to pass any order of 'assessment'. As rightly pointed out by the Petitioner the re-assessment order dated 8th January, 2018 passed by the VATO was not disturbed by this Court when it remanded to the OHA the objections of the Petitioner for a fresh consideration.

For the aforementioned reasons, none of the submissions of Respondent merit acceptance. Resultantly, the Court declared that the objections filed by the Petitioner on 13th March, 2018 should, in terms of Section 74 (7) read with Section 74 (8) and 74 (9) of the DVAT Act be deemed to have been allowed by the OHA.

The writ petition allowed.

Present for Petioner	:	Mr. Rajesh Jain, Mr. Virag Tiwari, Mr. V.K. Jain & Mr. Ramashish, Advocates
Present for Respondent	:	Mr. Shadan Farasat, ASC, Ms. Rudrakshi Deo, Mr. Amit Sharma & Mr. Om Prakash, Advocates for Respondent/GNCTD.

Order

Dr. S. Muralidhar, J.:

1. An interesting question of law involving the interpretation of Section 74 (7) read with Section 74 (8) and (9) of the Delhi Value Added Tax, 2004 (DVAT Act) arises for consideration in the present petition.

2. There have been several earlier rounds of litigation concerning the Petitioner and the Respondent. The background facts are that the Petitioner is a proprietorship concern engaged in the sale/purchase and export of motor parts, tractor parts, accessories and other allied items. The Petitioner is registered with the Department of Trade and Taxes (DT & T), Government of NCT of Delhi (GNCTD) under the DVAT Act, 2004 as well as the Central Sales Tax Act, 1956 ('CST Act').

3. The Petitioner had filed a return for the first quarter of 2017-2018 on 11th July, 2017 claiming the refund of Rs.2,94,55,403/-. On 14th September, 2017 the Petitioner submitted eight 'C' forms and seven 'H' forms in original along with the GRs, Bill of Lading and other documents against the sales made under Sections 8(1) and 5(3) of the CST Act.

4. When the refund was not granted within two months as mandated by Section 38 (3) (a) (ii) of the DVAT Act, the Petitioner filed WP(C) No. 8283/2017 in this Court. On 18th September, 2017 the said writ petition was disposed of by this Court directing the DT & T to process the Petitioner"s refund within four weeks and to credit the refund along with interest directly to the Petitioner"s account within two weeks.

5. The Petitioner states that on 25th October, 2017 the Value Added Tax Officer (VATO), Ward 17 issued a default notice for assessment of tax and interest under the CST Act specifically relating to the first quarter of 2017-18. In the said order he acknowledged that 'C' forms for Rs.30,95,51,062/- had been filed. He accordingly made an assessment of Nil demand.

6. On 8th November, 2017 the VATO sent a further letter without referring to his earlier letter dated 18th October 2017 and assessment order passed by him on 25th October, 2017, asking the Petitioners to submit, by 13th November, 2017 the sale bills along with GRs, Purchase Vouchers, DVAT 30-31 and also to disclose the mode of payment to the transporter. The Petitioner replied on 10th November, 2017 pointing out that since the order passed by this Court on 18th September, 2017 in WP(C) No. 8283/2017 had not been complied with, he had filed Contempt

Case (Civil) No. 753/2017 in this Court, which was listed for hearing on 10th November, 2017.

7. On 15th November, 2017 the VATO withdrew the aforementioned notice. On 8th January, 2018 the VATO passed another order reviewing the earlier assessment order dated 25th October, 2017. Aggrieved by the said order the Petitioner filed WP(C) No.1081/2018 in this Court on 3rd February 2018.

8. On 10th January, 2018 the VATO passed a separate order rejecting the refund claim for the first quarter 2017-18. Against this order the Petitioner filed WP(C) No. 1080/2018 in this Court. 9. As far as WP(C) No. 1081/2018 which challenged the review order dated 8th January, 2018 is concerned, this Court on 21st February, 2018 disposed of the writ petition with an order, the operative portion of which reads as under:

> "(i) The petitioner would file objections within three weeks.
>
> (ii) The Special Commissioner, who is not a part of the Refund Committee, would be, as a special case, appointed to hear and decide the objections raised by the petitioner.
>
> (iii) The Objections Hearing Authority will pass a speaking order within a period of six weeks from the date of filing of objections.
>
> (iv) The petitioner, if aggrieved by the order of the Objections Hearing Authority, will be entitled to challenge the order passed in accordance with law.
>
> (v) In case respondent initiate coercive action for recovery, the petitioner would be entitled to ask for stay and, if the request is rejected, can take recourse to appropriate remedy."

10. Pursuant to the above order, the Petitioner filed objections before the Objection Hearing Authority („OHA") on 13th March 2018. When nothing was heard from the OHA on the objections filed by the Petitioner and the Petitioner"s application for cross-examination was not taken up for consideration, the Petitioner filed WP (C) No. 3667/2018 in this Court seeking a direction to the OHA to permit cross-examination of the desired persons as had been mentioned in the Petitioner"s letter dated 12th March, 2018. The said writ petition was disposed of by this Court on 13th April, 2018 with the direction that the proceedings before the Special Commissioner would continue. The Petitioner was permitted to file written

submissions. The period of six weeks granted earlier was extended by another six weeks within which time the OHA was directed to consider the Petitioner"s objections and contentions including the summoning of the orders from the authorities in the State of Rajasthan and Haryana for which a specific request was made by the Petitioner and to pass a speaking order.

11. On 17th May, 2018 the OHA passed an order rejecting the objections without summoning the records or allowing cross-examination of the persons and without dealing with the Petitioner"s written submissions placed on record. Aggrieved by the order dated 17th May, 2018 of the OHA the Petitioner filed WP(C) No. 7538/2018 which was disposed of on 28th September, 2018 by this Court setting aside the order of the OHA. The said order requires to be reproduced in full as under:

> "The petitioner is aggrieved by the order of the Special Commissioner of 15 (17).05.2018, which had rejected the appeal against an order of the VATO - who had demanded Rs.3,18,82,488/-in respect of the Financial Year 2017-18 first quarter.
>
> At the outset, while issuing notice this Court had noticed that the Objection Hearing Authority had virtually not adduced any reasons in respect of the conclusions that the appeal was unwarranted.
>
> The impugned order refers to the inadmissibility of all the 'C' and 'H' Forms claimed by the petitioner however, without any discussion as to why the assessee"s claim was unwarranted. Considering that this Court had remitted the matter to the OHA under special circumstances, the least was expected from that appellate authority was to not only adduce reasons but also deal with the contentions urged before her. Sadly that inadequacy had resulted in yet another avoidable litigation. The impugned order is consequently set aside.
>
> The Objection Hearing Authority shall give fresh hearing and provide full and adequate opportunity to the petitioner to make submissions including as to the validity of the 'C' Forms. A reasoned order dealing with all contentions urged on behalf of the petitioner shall be thereafter made. The entire process shall be completed as expeditiously as possible.
>
> It is open to the OHA to exercise all powers available in law including summoning the records and considering the effect of local State Rules.

Petition is allowed in the above terms. Pending application stands disposed of accordingly."

12. The Petitioner points out that in the above order the review order dated 8th January, 2018 passed by the VATO reviewing the earlier assessment order was left undisturbed and the OHA was asked to dispose of the Petitioner‟s objections expeditiously. It must be noted there that as far as W. P. (C) 1080/2018 challenging the VATO‟s order dated 10th January 2018 rejecting the refund claim for the first quarter of 2017-18 is concerned, this Court disposed it of by an order dated 9th July, 2018 remitting the matter to the OHA and giving the Petitioner three week‟s time to file objections.

13. On 13th December, 2018 the ETO-cum-Assessing Authority, Ward-6, Panipat issued a letter to the Assistant Commissioner, Ward-17, Delhi stating that the earlier letter dated 3rd January, 2018 declaring the „C‟ forms cancelled stood withdrawn. He also mentioned that the said C-forms should be considered as declarations and in compliance of Section 8(4) of the CST Act.

14. The Petitioner states that when no hearing took place even after the expiry of three months from the date of the order passed by this Court i.e. 28th September, 2018, the Petitioner's counsel on 3rd January, 2019 visited the office of the OHA to serve DVAT-41 in relation to the objection dated 13th March, 2018 pending with the OHA. It is stated that the OHA asked the counsel to come again on 4th January, 2019. On 3rd January, 2019 itself the OHA issued a notice for hearing on 8th January, 2019 concerning the objections of first quarter of 2017-18 with reference to this Court‟s order dated 28th September, 2018.

15. It is stated by the Petitioner that despite two visits to the office of the OHA on 4th January, 2019, service of the DVAT-41 could not be effected. Left with no option, the counsel served notice in form DVAT-41 in terms of Rule 56 of the Delhi Value Added Tax Rules, 2005 (DVAT Rules) in person on the Commissioner in terms of Section 74 (8) of the DVAT Act. The text of the letter so served by the counsel for the Petitioner reads as under:

"Sub.: (i) Filing of DV AT -41 along with documents (ii) Furnishing of letter NO. 8811 dated 13.12.2018 and other documents

In the matter of M/s Combined Traders TIN 07130038085 Tax Period (1st Qtr. 2017-18)

Sir,

Please find enclosed DV AT -41 and other Letter with documents all dated 03.01.2019. Yesterday I met the Spl. Commissioner Ms. Sonika Singh (OHA) to accept the above said form and letter along with documents but informed that she will take these documents tomorrow i.e. 04.01.2019 as she has to check the relevant provision etc. Today, I visited her office to meet the Spl. Commissioner, Ms. Sonika Singh (OHA) at about 12.30 pm but on my two visits, I have been informed by her staff that Madam (OHA) is busy and unable to meet.

In view of the above, I am filing before your goodself being Commissioner, head of the Department and do the needful in the matter Submitted and prayed accordingly."

16. On 8th January, 2019 hearing of the objections took place and all relevant documents were produced before the OHA. The case was adjourned to 11th January, 2019. On 11th January 2019 the matter could not be heard by the OHA due to paucity of time and it was again listed for 16th January, 2019. Again on that date, the matter could not be heard as the OHA was pre-occupied with some other engagements. On 17th January, 2019 through a letter dated 16th January, 2019 the Petitioner waived off the right of hearing and requested the OHA to decide the objections on the basis of the grounds, written submissions and judgments placed on record.

17. On 19th January, 2019 the period of 15 days to decide the objection after service of notice on 4th January, 2019 in Form DVAT-41 expired. On 30th January, 2019 the OHA issued a fresh notice of hearing for 11th February, 2019. On 2nd February, 2019 another hearing notice dated 30th January, 2019 was served on the Petitioner fixing the objections for hearing on 11th February, 2019.

18. On account of the failure of the OHA to decide its objections within the time stipulated in Section 74 (8) DVAT Act, the Petitioner filed the present petition seeking the relief of quashing of the hearing notice dated 30th January, 2019 and also for declaration that the objection dated 13th March, 2018 filed by the Petitioner should be deemed to be allowed by the OHA in terms of Section 74(9) of the DVAT Act read with Section 9 (2) of the CST Act.

19. It must be noted at this juncture that notice was issued in this petition on 11th February 2019. On that date the Court directed that till

the next date of hearing, the OHA would not pass a final order on the objections. On the next date i.e. 6th May 2019, when no counter affidavit was filed, the Respondents were given a final opportunity to do so within four weeks. The interim order was made absolute during the pendency of the petition.

20. Today the Court found that no counter affidavit has still been filed. Mr. Shadan Farasat, learned counsel appearing for the Respondents stated that he was prepared to argue the petition without a counter affidavit. Accordingly the petition was finally heard.

21. Mr. Rajesh Jain, learned counsel appearing for the Petitioner, drew the attention of this Court to the decision in Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association (1992) 3 SCC 1 to urge that the quashing of the earlier order dated 17th May, 2018 of the OHA restoring the objections to the file of the OHA would result in restoration of the position as it stood on the date of passing an order which had been quashed. In other words, according to Mr. Jain the three month period within which the objections had to be decided started running from the date of the order of this Court i.e. 28th September, 2018. Moreover, in terms of Section 74 (8) of the DVAT Act, the fifteen day period after service of the DVAT-41 on the Commissioner on 4th January 2019 (after repeated attempts by the Petitioner to serve it on the OHA failed) also was crossed without the OHA taking a decision. Therefore, according to Mr. Jain, under Section 74(9) of the DVAT Act, the OHA should be deemed to have allowed the objection. He pointed out that on 8th January, 2019 when the Petitioner appeared for hearing before the OHA, the earlier DVAT-41 notice served on the Commissioner had been placed before her.

22. Mr. Jain also placed reliance on the decision of this Court in CST v. Behl Construction (2009) 21 VST 261 (Del) in support of his plea that the fifteen day period in terms of Section 74 (8) of the DVAT Act was the mandatory time limit and if an order was not passed within that period the objection would be deemed to have been accepted. Mr. Jain submitted that the time limit under Section 34 (2) of the DVAT Act, which provides that the Commissioner may make an assessment of tax within one year after the date of the decision of the Appellate Tribunal or Court, would not apply in the instant case. In the Petitioner‟s case the re-assessment order was of 8th January, 2018 which had not been disturbed by this Court while remanding the matter to the OHA on 28th September, 2018. All that the OHA was required to do was to dispose of the objections under Section 74 of the Act. The order that had been set aside by this Court was the one dated 17th May, 2018 of the OHA passed under Section 74(7) of the Act.

23. In reply, Mr. Shadan Farasat, learned counsel for the Respondent, first submitted that after the order dated 17th May, 2018 had been passed by the OHA rejecting the earlier objections, the question of three months period again reviving in terms of Section 74 (6) read with Section 74(8) did not arise. According to him, after the order dated 28th September, 2018 of this Court restoring the Petitioner‟s objections to the file of the OHA for a fresh disposal, there was no time limit as such for the OHA to dispose of the objections.

24. This Court is unable to agree with the above submissions of Mr. Farasat. To begin with, reference may be made to the relevant statutory provisions of the DVAT Act as under:

“Section 74 Objections

(1) Any person who is dissatisfied with

(a) an assessment made under this Act (including an assessment under section 33 of this Act); or

(b) any other order or decision made under this Act; may make an objection against such assessment, or order or decision, as the case may be, to the Commissioner; ……

(2) A person who is aggrieved by the failure of the Commissioner to reach a decision or issue any assessment or order, or undertake any other procedure under this Act, within six months after a request in writing was served by the person, may make an objection against such failure. …

(7) Within three months after the receipt of the objection, the Commissioner shall either

(a) accept the objection in whole or in part and take appropriate action to give effect to the acceptance (including the remission of any penalty assessed either in whole or in part); or

(b) refuse the objection or the remainder of the objection, as the case may be; and in either case, serve on the person objecting, a notice in writing of the decision and the reasons for it, including a statement of the evidence on which it is based:

PROVIDED that where the Commissioner within three months of the making of the objection notifies the person in writing, he

may continue to consider the objection for a further period of two months:

PROVIDED FURTHER that the person may, in writing, request the Commissioner to delay considering the objection for a period of up to three months for the proper preparation of its position, in which case the period of the adjournment shall not be counted towards the period by which the Commissioner shall reach his decision.

(8) Where the Commissioner has not notified the person of his decision within the time specified under sub-section (7) of this section, the person may serve a written notice requiring him to make a decision within fifteen days.

(9) If the decision has not been made by the end of the period of fifteen days after being given the notice referred to in sub-section (8) of this section, then, at the end of that period, the Commissioner shall be deemed to have allowed the objection."

25. The above provision has to be read with Rule 56 of the DVAT Rules which reads thus:

"Rule 56. Delay

(1) A notice for the purpose of sub-section (8) of section 74 shall be in Form DVAT-41.

(2) The notice shall be signed by the person making the objection or his authorised signatory and shall be served in person on the Commissioner or the Value Added Tax Authority deciding the objection."

26. The sacrosanct nature of the limitation periods in the above provisions has been emphasized by this Court in CST v. Behl Construction (supra) where it was observed as under:

"20. The time-limits of three months, five months, six months or eight months are merely directory: However, if such time-limit expires and the notice under section 74(8) of the said Act is issued then the period of 15 days would be mandatory. The consequence: of not passing an order is dearly spelt out and that is that the objections would be deemed to have been accepted. It is apparent that the scheme is not left open-ended as submitted

by the learned counsel for the respondents and wrongly assumed by the Tribunal. If it is contended that it is left at the whim and fancy of the Commissioner to pass an order when he likes, the answer is, what prevents the objector from issuing a notice under section 74(8) of the said Act and thereby fixing a terminal date for passing the order? If the contention is that why should the objector issue such a notice as by virtue of section 3.5 (2) of the said Act he enjoys a virtual stay during the pendency of his objections, the answer is that such an objector would have to choose between the protection of section 35(2) and invoking the deeming provisions of section 74(9) He cannot eat his cake and have it too", as it were. He cannot let the applicable time-limit (and more) slip by, all this while enjoying the virtual stay, and also say, at the end of it without issuing the peremptory 15 days notice under section 74(8) of the said Act, that his objections are deemed to have been accepted. Accepting the contentions of d1e respondents and the conclusions of the Tribunal would amount to re-writing the provisions which are clear and unequivocal. When the meaning of a statutory provision is clear and without doubt it does not call for any exercise of interpretation. Nor can we introduce a meaning which the Legislature did not intend.

21. For all these reasons we hold that an objection pending before the Commissioner cannot be deemed to have been accepted simply because of the fact that the time specified in section 74(7) of the Delhi Value Added Tax Act 2004 has expired and the Commissioner has not exercised either of the options set out in section 74(7)(a) or 74(7)(b). The. deeming provision of section 74(9) of the said Act would get triggered only if the conditions precedent provided under section 74(8) of the said Act are satisfied. We also hold that the Tribunal erred in law in fixing a mandatory period of eight months, within which the Commissioner has to dispose of the objection pending before him under section 74 (7) of said Act particularly, when no such stipulation is provided by the statute."

27. As far as this case is concerned, once objections were restored to the file of the OHA by the order dated 28th September 2018 of this Court, the three months period would start to run again from that date. As pointed out in Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association (supra) where the order under challenge is set aside, it results in restoration of the position that existed on the date of the order that has been quashed. The relevant observations of the Supreme Court in the said decision read as under:

> "Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority."

28. Learned counsel for the Petitioner is right in his contention that this three-months period not having been adhered to, the procedure under Section 74(8) of the DVAT Act would kick in. The Respondent has not controverted the assertion of the Petitioner that despite best efforts service of notice under DVAT-41 could not be effected in person on the OHA and was ultimately served on the Commissioner on 4th January 2019. Admittedly, the objections were not decided within fifteen days from that date.

29. Mr. Farasat next submitted that the Petitioner had not complied with Section 74 (8) of the DVAT Act since the notice under DVAT-41 was not served 'in person' on the OHA but on the Commissioner. He submitted that unless the conditions for applicability of Section 74 (8) of the DVAT Act read with Rule 56 of the DVAT Rules are fulfilled, it cannot be invoked and in support thereof relied on the decision in Mancheri Puthusseri Ahmed v. Kuthiravattam Estate Receiver (1996) 6 SCC 185.

30. The above submission appears to overlook the fact that the Respondent has not controverted the statements made on oath by the Petitioner in the petition that despite best efforts to personally serve the DVAT 41 on the OHA he could not do so. It is seen from Annexure P-5 to the petition, that on the copy of the DVAT-41 Form served on the Commissioner by the Petitioner, there is an acknowledgement stamp with the diary no. E-820717 dated 4th January, 2019. The stamp is of the Central Resources Unit, DT& T.

31. Mr. Jain produced before this Court reply received by him from the Public Information Officer (PIO)/Assistant Commissioner in the DT&T, GNCTD dated 22nd February, 2017 in response to an application under the Right to Information Act where in response to the specific question: "What is the medium of personal service of documents in the CVAT"s office generally? How they are received and who receives them?", the response received was:

"Generally, an employee is deployed for receiving letter/DAK to receive the same of personal service of documents in Commissioner (VAT) Office."

32. The above reply appears to be consistent with the general practice in Government offices where services of notice upon public officials are usually done at one desk where the offices are located. There is a clerk who usually receives all notices and gives an acknowledgement. The Court is therefore unable to accept the plea of Mr. Farasat that there was non-compliance with Section 74(8) of the DVAT Act read with Rule 56 of the DVAT Rules.

33. Lastly, Mr. Farasat submitted that in the instant case, the limitation period as stated in Section 34 (2) of the DVAT Act would apply. His submission was that in terms thereof, there was a one-year period for the Commissioner to deal with the objections.

34. Section 34 of the DVAT Act reads as under:

"34. Limitation on assessment and re-assessment

(1) No assessment or re-assessment under section 32 of this Act shall be made by the Commissioner after the expiry of four years from

(a) the end of the year comprising of one or more tax periods for which the person furnished a return under section 26 or 28 of this Act; or

(b) the date on which the Commissioner made an assessment of tax for the tax period, whichever is the earlier:

PROVIDED that where the Commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully material particulars on the part of the person, the said period shall stand extended to six years.

(2) Notwithstanding sub-section (1), the Commissioner may make an assessment of tax within one year after the date of any decision of the Appellate Tribunal or court where the assessment is required to be made in consequence of, or to give effect to, the decision of the Appellate Tribunal or court which requires the re-assessment of the person."

35. This Court is of the view that Section 34 (2) which has to be read in the context of Section 34 (1) of the DVAT Act would not apply in the facts and circumstances of the present case, which is essentially concerned with the failure of the OHA to dispose of the objections filed under Section 74 (1) of the DVAT Act. It must be recalled that what was set aside by this Court by its judgment dated 28th September 2018 was the decision dated 17th May 2018 of the OHA under Section 74 (7) of the DVAT Act which is a specific provision dealing with objections whereas Section 34 (2) of the DVAT Act appears to be a general provision relating to assessments. In the present case there was no occasion for the Commissioner to pass any order of 'assessment'. As rightly pointed out by the learned counsel for the Petitioner the re-assessment order dated 8th January, 2018 passed by the VATO was not disturbed by this Court when it remanded to the OHA the objections of the Petitioner for a fresh consideration.

36. For the aforementioned reasons, none of the submissions of learned counsel for the Respondent merit acceptance. Resultantly, the Court declares that the objections filed by the Petitioner on 13th March, 2018 should, in terms of Section 74 (7) read with Section 74 (8) and 74 (9) of the DVAT Act be deemed to have been allowed by the OHA.

37. The writ petition is accordingly allowed. The consequential orders granting the Petitioner"s refund together with interest thereon will now be issued by the DT&T within four weeks from today. The refund and interest amount shall be credited directly to the account of the Petitioner not later than two weeks thereafter failing which the Respondent will pay the Petitioner compensation of Rs.50,000. If the Petitioner is aggrieved by the orders regarding refund and interest, it will be open to the Petitioner to seek appropriate remedies in accordance with law.

[2019] 57 DSTC 357 (New Delhi)

In the High Court of Delhi

[Hon'ble Mr. Justice Sanjiv Khanna and Mr. Justice Sanjeev Sachdeva]

STA-2/2013

Asian Computronics & Elecs. ... Appellant

Vs.

Value Added Tax Officer & Ors. ... Respondent(s)

Date of Order: 16.07.2013

WHETHER SUBMISSION OF UNSIGNED HARD COPY OF RETURN FOLLOWED BY QUARTERLY RETURN FILED ELECTRONICALLY LIABLE TO PENALTY U/S 86 (10)

OF DVAT ACT, 2004 READ WITH SECTION 9(2) OF CST ACT, 1956 – NO DEFICIENCY OR CORRECTION NOTICE ISSUED BY DVAT DEPARTMENT – PENALTY LEVIED BY A.A. REDUCED BY TRIBUNAL – WHETHER PENALTY JUSTIFIED – HELD – NON-SIGNING IN THIS CASE WAS A IRREGULARITY WHICH COULD HAVE BEEN CURED BY ASKING THE ASSESSE TO SUBMIT A SIGNED COPY AND IT DID NOT MAKE A RETURN FALSE, MISLEADING OR DECEPTIVE U/S 86 (10) – PENALTY ORDER SET ASIDE.

Held

No doubt, the Rules required that a return submitted in a hard copy should be signed and verified in accordance with the rules but non-signing to a return would be an irregularity which could be cured, more so, in case where the online and the hard copy of the return were identical and at the first available opportunity the defect was rectified by filing an affidavit.

In view of the above, the question answered in favour of the assesse and consequently the order passed by the Tribunal (VAT) was set aside and the penalties imposed were quashed.

Present for Appellant : Mr. Balram Singhal, Advocate

Present for Respondent : Mr. A. K. Babbar, Advocate

Order

1. This appeal under Section 81 of the Delhi Value Added Tax Act, 2004, impugns the order dated 6.9.2012 passed by the Appellate Tribunal for Value Added Tax. Appellate Tribunal for Value Added Tax by a majority decision of two members, confirmed the penalty imposed upon the appellant under second Proviso to Clause 2 of Section 86 of the Value Added Tax Act.

2. On 14.1.2013, the following substantial questions of law were framed by this Court:

> "(1) Whether, in the case of online filing of returns under Rule 27 of the DVAT Rules, 2005, it is necessary that the hard copies should also be signed and verified by the person who is required to do so under law? (2) Whether failure to submit a signed hard copy of the electronic return would entail penalty under Section 86(10) of the DVAT Act, 2004 read with Section 9(2) of the Central Sales Tax Act, 1956?"

3. The appellant is a proprietory concern of Sh. Brij Kumar and is registered with Value Added Tax (Delhi). The appellant was required to file

quarterly returns online and also file a hard copy of the return under the Delhi Value Added Tax Act and the Central Sales Tax Act, 1956 within 25 days and 28 days respectively on expiry of each quarter.

4. The quarterly return for the third quarter ending on 31.12.2010 was filed by the appellant online on 24.1.2011. The online returns was not required to be signed. At the time of filing of the hard copy of the return for the third quarter, it is the case of the appellant that inadvertently an unsigned office copy of the said returns was tendered at the counter in place of the signed copy and the said unsigned hard copy of the returns was duly acknowledged by the department. No deficiency or correction notice/letter was issued to rectify the technical lapse.

5. It is an admitted case of the parties that both the returns, i.e, the online return and the hard copy are identical and there is no variation either in the figures of turnover of purchases and sales or the amount of tax payable.

6. The Value Added Tax authority imposed a penalty of Rs.10,000/- each on the appellant under the Delhi Value Added Tax Act and the Central Sales Tax Act. The reason for imposition of the penalty was mentioned as “returns filed without signatures”.

7. The appellant filed objections against the penalties imposed before the Objection Hearing Authority and along with objections produced the duly acknowledged copy of the unsigned hard copy and filed an affidavit affirming that the figures of both the online return and the hard copy thereof were same and tallied with the books of accounts of the appellant.

8. The Objection Hearing Authority dismissed the objections of the appellant on the ground that the hard copy of the return was required to be duly authenticated by the signatures of the deponent/applicant under Section 29 of the Delhi Value Added Tax Act and further held that any document bearing no signatures could not be termed as true or authenticated document and was liable to be taken as a false document.

9. The appellant aggrieved by the order of the Value Added Tax authority, as confirmed by the Objection Hearing Authority, filed an appeal before the Appellate Tribunal, Value Added Tax, Delhi.

10. By the impugned order the majority members of the appellate Tribunal while dismissing the appeal of the appellant reduced the penalty to Rs.2000/- in each of the appeals. The reason given by the Members (Administrative) for imposing reduced penalty is that any document filed

unsigned cannot be treated as true and authenticated. However, the said Member has found, as a fact, that the figures in the returns filed online and the hard copy are identical and there is no discrepancy in the figures in both the copies and that there was no loss to the revenue. Member (Administrative) also found that the appellant would not have gained anything by filing an unsigned copy of the returns deliberately. Having found so, the Member (Administrative), while taking a lenient view, reduced the penalty to Rs.2000/- from Rs.10000/- in each of the appeals.

11. The Member (Judicial) while agreeing that the conclusion arrived at by the Member (Administrative) has held that furnishing of an unsigned returns is an omission from the return of a material particular/matter without which the return is misleading as well as deceptive in material particulars. Having held so, the Member (Judicial) further held that it was a fit case for remission of penalty under second Proviso to Clause 2 of Section 86.vHowever, he held that the jurisdiction vested with the Objection Hearing Authority which had failed to exercise the same under Section 74 read with Section 86 of the DVAT Act. Thereafter, the Member (Judicial) agreed with the findings of the Member (Appellate) and in these circumstances, in terms of the majority view, the appellant has been held liable to pay Rs.2000/- as penalty in each case.

12. Chairman of the Tribunal in his minority decision held that penalty under section 86(10) should not be imposed because of language of Rule 27 and as hard copy of return was filed. Secondly, if it was a case of no-return, the „return" cannot be treated as false, misleading or deceptive.

13. Being aggrieved by the majority view of the Appellate Tribunal, Value Added Tax, the appellant has preferred the present appeal.

14. Section 86 (10) of the DVAT Act lays down as under:

"86. Penalties (10) Any person who—

(a) furnishes a return under this Act which is false, misleading or "deceptive in a material particular; or

(b) Omits from a return furnished under this Act any matter or thing without which the return is false, misleading or deceptive in a material particular, shall be liable to pay, by way of penalty, a sum of ten thousand rupees or the amount of the tax deficiency, whichever is the greater."

15. From a bare reading of Section 86(10) it is clear that only a person

who furnishes the return which is false, misleading or deceptive in any material particular or omits from a returns any matter or thing which would render the returns as false, misleading or deceptive in a material particular is liable for penalty.

16. The admitted position of the revenue and also as found by the Tribunal is that the contents of the return filed online and the hard copy of the return are identical and there is no variation either in the figures of the turnover of purchases and sales or the amount of tax payable. The appellant had even filed an affidavit before the objection hearing authority to the said effect that the figures in both the returns were identical and also the same figures appear in the books of accounts of the appellant. The majority view of the Tribunal also is that neither there is any loss to the revenue nor would the appellant have gained anything by filing an unsigned copy of the return deliberately.

17. The explanation which was rendered by the appellant before the objection hearing authority that on account of a bona fide mistake an unsigned office copy of the return in place of the signed copy of the return was tendered before the authorities and the same was also acknowledged by the DAK Counter is also plausible and shows the bonafides of the Appellant.

18. In our considered view, a mere fact that the hard copy of the return is not signed would not per se by itself render the return as false, misleading or deceptive in a material particular. The non-signing of the return would be an irregularity which could have been cured by asking the assessee to submit a signed copy. No such letter or notice was issued to remedy and rectify the omission. It is not the case that unsigned return was filed for ulterior motive, by way of disguise or deception. There was no intention or desire to mislead or take, advantage of the fact that the hard copy was unsigned. In the facts of the present case, since the admitted position is that the unsigned hard copy tallied in all respects with the online copy filed by the assessee thus non-signing of the hard copy was mere an irregularity,which could have been cured. The assessee had even given a plausible reason for not filing a signed copy. It does not appeal to reason as to why an assessee would purposely not file a signed copy of the return when admittedly the hard copy of the returns tallies with the online return filed. The appellant has accepted the hard copy and had filed an affidavit affirming and validating the return.

19. We are of the considered opinion that a mistake of not signing the hard copy would not bring the case within the purview of Section 86(10)

of the DVAT Act and would not render the assessee liable for penalties envisaged therein, unless there are circumstances to suggest that the intention or desire was to mislead, or deceive the authorities.

20. No doubt, the Rules require that a return that is submitted in a hard copy should be signed and verified in accordance with the rules but non-signing to a return would be an irregularity which could be cured, more so, in case where the online and the hard copy of the return are identical and at the first available opportunity the defect was rectified by filing an affidavit.

21. In view of the above, the question No.2, accordingly answered in favour of the assessee, the appellant herein, and consequently the order dated 6.9.2012 passed by the Tribunal (VAT) is set aside and the penalties imposed are quashed. In view of our findings above and in the facts of the case, we have not answered the question No.1. No order as to costs.

[2019] 57 DSTC 362 (Ahmedabad)

In the High Court of Gujarat

[Hon'ble Mr. Justice J. B. Pardiwala and Mr. Justice A. C. Rao]

R/Special Civil Application No. 16213/2018

Shabnam Petrofils Pvt. Ltd. ... Petitioner

Vs.

Union of India & Ors. ... Respondent(s)

Date of Order: 17.07.2019

GOODS AND SERVICES TAX ACT, 2017 – NOTIFICATION FOR BLOCK OF REFUND – AMENDED NOTIFICATION ALLOWING REFUND WITH RESTRICTION TO LAPSE OF UNUTILISED INPUT TAX CREDIT – WRIT PETITION – NOTIFICATION AND CIRCULAR QUASHED HOLDING THAT NO EXPRESS PROVISION IN SECTION 54(3) EMPOWERING RESPONDENT TO LAPSE THE UNUTILISED INPUT TAX CREDIT.

NOTIFICATION NO. 5/2017-CENTRAL TAX (RATE) DT 28/06/2017 BLOCKING REFUND OF UNUTILIZED INPUT TAX CREDIT ACCUMULATED ON ACCOUNT OF THE RATE OF TAX ON INPUTS BEING HIGHER THAN RATE OF TAX ON OUTPUT SUPPLIES – NOTIFICATION NO. 20/2018-CENTRAL TAX (RATE) DT 26/07/2018 GRANTING REFUND OF ITC ACCUMULATED ON ACCOUNT OF INVERTED RATE STRUCTURE IN RESPECT OF FABRICS WEAVERS AND KNITTERS W.E.F. 01/08/2018 – ACCUMULATED ITC LAYING UNUTILIZED IN BALANCE AFTER THE PAYMENT OF TAX FOR AND UPTO MONTH OF JULY 2018 ON THE INWARD SUPPLIES RECEIVED UPTO 31/07/2018 SHALL LAPSE – CIRCULAR NO. 56/30/2018 GST DT 24/08/2018 – PRESCRIBING THE PROCEDURE TO BE FOLLOWED FOR

LAPSING OF UNUTILIZED INPUT TAX CREDIT – WRIT PETITION CHALLENGING NOTIFICATIONS, CIRCULAR AND PROVISION BEING ILLEGAL AND REQUIRED TO BE STRUCK DOWN AS UNCONSTITUTIONAL ON THE GROUND OF THAT IT TOOK AWAY THE VESTED RIGHT OF THE TRADERS – PETITIONER ARGUED BEFORE THE COURT THAT POWER U/S 54(3) (II) OF GST ACT IS LIMITED AS TO NOTIFY THE SUPPLIES NOT ENTITLED TO REFUND OF ITC ACCUMULATED – IMPUGNED NOTIFICATIONS TO EXTEND PROVIDING FOR LAPSING OF ITC WERE DISCRIMINATORY – REVENUE EXCEEDED POWERS DELEGATED U/S 54(3) (II) OF CGST ACT.

REVENUE CONTENDED THAT THE POWER TO LAPSE OF ITC FLOWS INHERENTLY FROM THE POWER DENY REFUND OF ACCUMULATED ITC ON ACCOUNT OF INVERTED DUTY STRUCTURE – PETITIONERS WERE NOT ABLE TO TAKE THE BENEFIT OF THIS CREDIT AS REFUND ON ACCOUNT OF INVERTED DUTY STRUCTURE WAS BLOCKED – PRIOR TO ISSUE THE CIRCULAR 56/30/2018 GST DT 24/08/2018 THAT ALL THE ISSUES WERE CLARIFIED TO TRADERS – COURT HELD THAT SECTION 54(3) (II) DID NOT EMPOWER RESPONDENTS TO FORM RULE PROVIDING LAPSING OF INPUT TAX CREDIT – ITC ONCE VALIDLY TAKEN IS INDEFEASIBLE AND VESTED RIGHT IS ACCRUED IN FAVOUR OF REGD PERSON TO UTILIZE THE SAME WITHOUT ANY LIMITATION – WRIT ACCEPTED.

Facts of the Case

The petitioner was a company registered under the Companies Act, 1956 and was engaged in manufacturing polyester texturized yarn (HSN Code: 5402) and also manufactured polyester woven fabrics and polyester knitted fabrics from polyester partially oriented yarn/ polyester texturized yarn (HSN Code: 5402) while the other petitioner was a duty registered under the Maharashtra Public Trust Act, 1950 and Societies Registration Act and representing its members who were mostly MMF fabric weavers. The said petitioner represents 25 associations consisting of more than 35,000 registered power looms units employing other than 4,00,000 workers. The other petitioner was an Association of persons and representing its members who were mostly knitters engaged in the manufacture and sale of MMF knitted fabrics.

According to the petitioners, the impugned Notification No.5/2017 (Central Tax (rate) dated 28.6.2017 issued by the Government of India with regard to clause (ii) of the proviso to sub-section (3) of section 54 of the Central goods and Service Tax Act, 2017, no refund of unutilized input tax credit shall be allowed, where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on the output supplies of such goods (other than nil rated or fully exempt) supplies with regard to the goods described in Column No.(3) of the Table. The said notification came into force w.e.f. 1/7/2017.

Thereafter, Government of India, Ministry of Finance (Department of Revenue issued Notification No. 20/2018- central Tax (Rate) dated

26/7/2018 with regard to clause (2) of proviso to sub-section (3) of section 54 of the Central Goods and Service Tax Act, 2017 by which it has been resolved as under :-

"Provided that, [i] nothing contained in this notification shall apply to the input tax credit accumulated on supplies received on or after the 1st day of August, 2018, in respect of goods mentioned at serial numbers 1, 2, 3, 4, 5, 6, 6A, 6B, 6C and 7 of the Table below; and

[ii] In respect of the said goods, the accumulated input tax credit lying unutilized in balance after payment of tax for and upto the month of July, 2018, on the inward supplies received up to the 31st day of July, 2018 shall lapse."

According to the petitioners, Notification No. 20/2018 dated 26/7/2018 extending the restriction on the utilization of unutilized input tax credit for and up to the month of July, 2018 and further states that on the inward supplies received upto 31.7.2018 shall lapse.

Feeling aggrieved with notifications and circular petitioner filed writ petition before Gujarat High Court.

Held

The CGST Act itself provided for the lapsing of the ITC at Sections 17(4) and 18(4) respectively of the CGST Act. Thus, where the legislature wanted the ITC to lapse, it has been expressly provided for in the Act itself. No such express provision has been made in Section 54(3) of the CGST Act.

No inherent power could be inferred from the provision of Section 54(3) of the CGST Act empowering the Central Government to provide for the lapsing of the unutilized ITC accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies.

The writ applicants had a vested right to unutilize ITC accumulated on account of rate of tax on inputs being higher than the rate of tax on the output supplies.

It was 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, exceeded the power delegated under Section 54(3)(ii) of the CGST Act.

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, was ex-facie invalid and liable to be struck down being without any authority of law.

Present for Petitioner	:	Mr. R C Jani with Mr. Avinash Poddar for R C Jani and Associates
Present for Respondent(s)	:	Mr. Devang Vyas for the Respondent No. 1 Mr Viral K Shah for the Respondent No. 1

ORAL ORDER

Honourable Mr. Justice A.C. Rao

1.00. As common question of law arise in both these petition and as in both these petitions, the petitioners have challenged the provisions of Central Goods and Service Tax Act, 2017 and Notification and Circular issued thereunder, by which the inverted tax structure refund of excess duty is not granted, the same are heard, decided and disposed of by this common order.

2.00. By way of Special Civil Application No.16213 of 2018, petitioner – Shabnam Petrofils Pvt. Ltd. has prayed for the following main reliefs:-

"16[B]. Your Lordships may be pleased to issue writ of mandamus or any other writ in the nature of mandamus or any other appropriate writ quashing and setting aside the Notification dated 26.07.2018 being No.20/2018 and Circular dated 24.08.2018 being Circular No.56/30/2018-GST as contrary to Section 54(3) of the Central Goods and Service Tax Act, 2017 as well as notification dated 28.06.2017 being Notification No.5/2017-Central Tax [Rate] and declare the said Notification and Circular as violative of Articles 14 and 19(1)(g) of the Constitution of India.

2.01. By way of Special Civil Application No.20626 of 2018, petitioners – federation of Gujarat Weavers Welfare Association and others have prayed for the following main reliefs:-

"9(a). YOUR LORDSHIPS may be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioners case and after going into

the validity and legality thereof to quash and set aside:

(i). 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 issued by the Respondent No. 1;

(ii). proviso (ii) of the opening paragraph of the Notification No. 05/2017-S.T. (Rate) dated 30.06.2017 inserted vide Notification No. 20/2018- S.T. (Rate) dated 26.07.2018 issued by the Respondent No. 2; and

(iii). proviso (ii) of the opening paragraph of the Notification No. 05/2017-I.T. (Rate) dated 28.06.2017 inserted vide Notification No. 21/2018- I.T. (Rate) dated 26.07.2018 issued by the Respondent No. 1; and

(b). YOUR LORDSHIPS may be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioners case and after going into the validity and legality thereof to quash and set aside the Circular No. 56/30/2018-GST dated 24.08.2018 issued by the Respondent No. 4;

(c). YOUR LORDSHIPS may be pleased to issue writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, or order or direction under Article 226 of the Constitution of India, ordering and directing the Respondents, their subordinate servants and agents to forthwith withdraw and cancel:

(i). 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 issued by the Respondent No. 1;

(ii). proviso (ii) of the opening paragraph of the Notification No. 05/2017-S.T. (Rate) dated 30.06.2017 inserted vide Notification No. 20/2018- S.T. (Rate) dated 26.07.2018 issued by the Respondent No. 2; and

(iii). proviso (ii) of the opening paragraph of the Notification No. 05/2017-I.T. (Rate) dated 28.06.2017 inserted vide

Notification No. 21/2018- I.T. (Rate) dated 26.07.2018 issued by the Respondent No. 1; and

(d). YOUR LORDSHIPS may be pleased to issue writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India, ordering and directing the Respondents, their subordinate servants and agents to forthwith withdraw and cancel the Circular No. 56/30/2018- GST dated 24.08.2018 issued by the Respondent No. 4."

2.02. Thus, in both these petitions petitioners have challenged Notification No.20/2018-central Tax (Rate) dated 26.07.2018 issued by the Government of India, Ministry of Finance, Department of Revenue, by which it is resolved that, the accumulated input tax credit lying unutilised in balance in respect of the goods specified at Sr.Nos.1, 2, 3, 4, 5, 6, 6A, 6B, 6C, and 7 of the table below Notification dated 28/6/2017, after payment of tax for and upto the month of July, 2018, on the inward supplies received upto 31st day of July, 2018, shall lapse. In short, by way of the aforesaid Government Resolution, the inverted tax structure refund of excess duty is not granted.

3.00. The petitioner of Special Civil Application No.16213 of 2018, is a company registered under the Companies Act, 1956 and is engaged in manufacturing polyester texturized yarn (HSN Code : 5402) and also manufactures polyester woven fabrics and polyester knitted fabrics from polyester partially oriented yarn / polyester texturized yarn (HSN Code : 5402) while the petitioner No.1 of Special Civil Application No.20626 of 2018 is a duly registered under the Maharashtra Public Trust Act, 1950 and Societies Registration Act and representing its members who are mostly MMF fabric weavers. The said petitioner No.1 represents 25 associations consisting of more than 35,000 registered power looms units employing ore than 4,00,000 workers. The petitioner No.2 of Special Civil Application No.20626 of 2018 is an Association of persons and representing its members who are mostly knitters engaged in the manufacture and sale of MMF knitted fabrics. The petitioner No.3 of Special Civil Application No.20626 of 2018 is the Secretary and authorized signatory of the petitioner No.1 while petitioner No.4 is the President and authorized signatory of the petitioner No.2.

3.01. According to the petitioners, the impugned Notification No.5/2017 (Central Tax (rate)] dated 28.6.2017 issued by the Government of India

with regard to clause (ii) of the proviso to sub-section (3) of section 54 of the Central goods and Service Tax Act, 2017, no refund of unutilized input tax credit shall be allowed, where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on the output supplies of such goods (other than nil rated or fully exempt) supplies with regard to the goods described in Column No.(3) of the Table. The said notification came into force w.e.f. 1/7/2017.

3.02. Thereafter Government of India, Ministry of Finance (Department of Revenue issued Notification No.20/2018- central Tax (Rate) dated 26/7/2018 with regard to clause (2) of proviso to sub-section (3) of section 54 of the Central Goods and Service Tax Act, 2017 by which it has been resolved as under :-

> "Provided that,
>
> [i] nothing contained in this notification shall apply to the input tax credit accumulated on supplies received on or after the 1M day of August, 2018, in respect of goods mentioned at serial numbers 1, 2, 3, 4, 5, 6, 6A, 6B, 6C and 7 of the Table below; and
>
> [ii] In respect of the said goods, the accumulated input tax credit lying unutilized in balance after payment of tax for and upto the month of July, 2018, on the inward supplies received up to the 31st day of July, 2018 shall lapse."

3.03. According to the petitioners, Notification No.20/2018 dated 26/7/2018 issued extends the restriction on the utilization of unutilized input tax credit for and up to the month of July, 2018 and further states that on the inward supplies received upto 31.7.2018 shall lapse and further states that inward supplies received upto 31st day of July, 2018, shall lapse. It is contended by the learned counsel for the petitioners that the impugned notification is without application of mind inasmuch as the assessees are losing huge amount of money paid towards input tax credit. It is contended that a registered person's right to claim input tax credit arises from section 16 of the CGST Act. It is contended by the learned counsel for the petitioners that there is no statutory provision under the CGST Act empowering the respondents to issue notifications providing for lapsing of input tax credit. It is contended that rule can be made or notification can be issued under the guise of section 164 for lapsing input tax credit. It is also contended that power under section 54(3)(ii) of the CGST Act is limited to notify the supplies not entitled to refund of input tax credit accumulated on account of the inverted rate structure. It is contended that the the

impugned notifications have exceeded powers delegated under section 54(3)(ii) of the CGST Act. It is contended that the impugned notification to the extend providing for the lapsing of input tax credit are discriminatory. It is vehemently contended that the input tax credit is as good as tax paid by the assessee and a valid claim of input tax credit under the GST Act creates an indefeasible right in favour of the taxable person.

3.04. In support of the above contention, learned counsel for the petitioners have relied on the decision of the Apex Court in the case of Dipak Vegetable Oil Industries Ltd. Vs. Union of India reported in 1991 (52) ELT 222 (Gujarat), wherein the Apex Court has held as under :-

> "13. The learned counsel Shri Trivedi also relied upon the following observations made by the supreme court in Shri Vijayalakshmi Rice Mills v. State of M.P. - AIR 1976 SC 1471 :
>
> "5. ...It is a well recognized rule of interpretation that in the absence of express words or appropriate language from which retrospectivity may be inferred, a notification takes effect from the date it is issued and not from any prior date. The principle is also well settled that statutes should not be construed so as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the Amending Act came into force...."
>
> 14. He also relied upon similar observations made by the Supreme Court in Govinddas v. Income-tax Officer, AIR 1977 SC 552 :
>
> "10. Now it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure....."
>
> 15. These observations of the Supreme Court also support the view that a right which is acquired as a result of operation of a statutory provision cannot be taken away retrospectively unless the statutory provision so provides or by necessary implication it has the same effect. As pointed out, here in this case, what has been done is to rescind the notifications and not the Rules. Though the right of the manufacturers like petitioners to credit of money had crystalized only after issuance of the notifications and the extent of it was governed by the terms of the notifications, once the said right got

crystallized in terms of money, in our opinion, it was not intended to be taken away or could not be taken away merely by rescinding the notifications. The effect of the rescinded notifications is, in our opinion, that from the date on which the said notifications came to be rescinded, the manufacturers of Vanaspati and soap ceased to earn the benefit of credit of money while manufacturing their final products - Vanaspati or soap - with the help of notified inputs, but they were not deprived of their right to utilise the credit of money which they had already earned validly so long as the same was or intended to be used for payment of excise duty in the manufacture of Vanaspati or soap, as the case may be, merely because the notifications have been rescinded, it cannot be said that Rule 57N has ceased to operate. For these reasons the contention raised on behalf of the respondents will have to be rejected."

3.05. The learned counsel for the petitioners has also And the decision of the Apex Court in the case of Eicher Motors Ltd. Vs. Union of India, reported in 1999 (106) ELT 3 (S.C.). The Apex Court in the case of Eicher Motors Ltd. (supra) has observed and held as under :-

"5. Rule 57F (4A) was introduced into the Rules pursuant to Budget for 1995-96 providing for lapsing of credit lying unutilised on 16-3-1995 with a manufacturer of tractors falling under Heading No. 87.01 or motor vehicles falling under Heading No. 87.02 and 87.04 or chassis of such tractors or such motor vehicles under Heading No. 87.06. However, credit taken on inputs which were lying in the factory on 16-3-1995 either as parts or contained in finished products lying in stock on 16-3-1995 was allowed. Prior to 1995-96 Budget, central excise/additional duty of customs paid on inputs was allowed as credit for payment of excise duty on the final products, in the manufacture of which such inputs were used. The condition required for the same was that the credit of duty paid on inputs could have been used for discharge of duty/ liability only in respect of those final products in the manufacture of which such Inputs were used. Thus it was claimed that there was a nexus between the inputs and the final products. .in 1995-96 Budget Modvat scheme was liberalised/simplified and the credit earned on any input was allowed to be utilised for payment of duty on any final product manufactured within the same factory irrespective of whether such inputs were used in its manufacture or not. The experience showed that credit accrued on inputs is less than the duty liable to be paid on the final products and thus the

credit of duty earned on inputs gets fully utilised and some amount has to be paid by the manufacturer by way of cash. Prior to 1995-96 Budget. the excise duty on inputs used in the manufacture of tractors. commercial vehicles varied from 15% to 25%. whereas the final products were attracted excise duty of 10% or 15% only. The value addition was also not of such a magnitude that the excise duty required to be paid on final products could have exceeded the total input credit allowed. Since the excess credit could not have been utilised for payment of the excise duty on any other product, the unutilised credit was getting accumulated. The stand of the assessees is that they have utilised the facility of paying excise duty on the inputs and canted the credit towards excise duty payable on the finished products. For the purpose at utilisation of the credit all vestitive facts or necessary incidents thereto have taken place prior to 16-3-1995 or utilisation of the finished products prior to 16- 3-1995. Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory on the basis of the existing scheme. Now by application of Rule 57F(4A) credit attributable to inputs already used in the manufacture of the final products and the final products which have already been cleared from the factory alone is sought to be lapsed, that is, the amount that is sought to be lapsed relates to the inputs already used in the manufacture of the final products but the final products have already been cleared from the factory before 16-3-1995. Thus the right to the credit has become absolute at any rate when the input is used in the manufacture of the final product. The basic postulate, that the scheme is merely being altered and, therefore, does not have any retrospective or retro-active effect. submitted on behalf of the State, does not appeal to us. As pointed out by us that when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered. necessarily it follows that right, which had accrued to a party such as availability of a scheme, is affected and. in particular. it loses sight of the fact that provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessees concerned. Therefore. the scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier scheme was applied under which the assessees had

availed of the credit facility for payment of taxes. It is on the basis of the earlier scheme necessarily the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said rule would result in affecting the rights of the assessees.

6. We may look at the matter from another angle. If on the inputs the assessee had already paid the taxes on the basis at 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 is 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.

7. There are several decisions referred to by the learned Counsel on either side but we do not think that those decisions have any relevance to the point under discussion.

8. We allow the petitions filed by the assessees and declare that the said rule cannot be applied except in the manner indicated by us above. No orders as to costs."

3.06. Learned counsel for the petitioners contended that the aforesaid ratio has been followed in the following cases :-

[1] Samtel India Ltd. V/s. Commissioner of Central Excise, Jaipur [2003 (155) ELT 14 SC]

[2] Jayam and Co. V/s. Assistant Commissioner (2016) 96 VST 1(SC)

[3] Collector of Central Excise V/s. Dai Ichi Karkaria Ltd. 1999 (112) ELT 353 (SC)

[4] Jayaswal Neco Ltd. V/s. Commissioner of Central Excise 2015 (322) ELT 587(SC)

[5] Commissioner of Central Excise Vs/ New Swadeshi Sugar Mills (2016) 1 SCC 614,

[6] TATA Engineering & Locomotive Co. Ltd. V/s. Union of India [2003 (159) ELT 129 (Bom.)]

[7] Grasim Industries Ltd. V/s. CBEC [2004 (163) ELT 10] &

[8] Shree Rajastban Texchem Ltd. V/s. Union of India [2005 (182) ELT 311.

3.07. It is further contended by the learned counsel appearing for the petitioners that from the above, it is clear that the impugned notification and circular are required to be struck down as unconstitutional on the ground that it took away the vested right of the assessee without there being any justifiable reason.

4.00. Both these appeals are vehemently opposed by the learned counsel for the respondents - revenue. It is contended that to reduce the accumulation of ITC with fabrics weavers, the GST council, in its meeting held on 6th October 2017 recommended reduction in GST rate on man-made fiber yarns from 18% to 12% which was notified vide notification No. 35/2017-Central Tax (Rate) dated 13th October 2017. This gave significant relief to the sector and accumulation of ITC got reduced. Subsequently, requests were received from textile industry to relax the said condition to allow refund of accumulated credit. While in the 28th meeting the request to remove restriction on refund of accumulated input tax credit was agreed to by the GST Council. this change was made with prospective effect and a conscious decision was taken by the Council that the input tax credit lying in balance on the date of the notification implementing the new provision, shall lapse. This lapsing of accumulated input tax credit was in the spirit of earlier rate structure which envisaged that refund of accumulated credit was not to be allowed.

4.01. The learned counsel appearing for the respondents - revenue further contended that in terms of the GST Council decision, Notification No. 5/2017-Central Tax (Rate) dated 28th June, 2017 was amended vide Notification No. 20/2018-Central Tax (Rate) dated 26th July. 2018 to allow refund or no on purchases made alter 1st August. 2018 and to lapse the input tax credit on account of inverted duty structure lying in balance after payment of GST for the month of July. 2018 (on purchases made on or before the 31’ July, 2018). The power to lapse the input tax credit flows inherently from the power deny refund of accumulated input tax credit on

account of inverted duty structure. It is contended that the petitioners even prior to the date of coming into force of the notification were not able to take the benefit of this credit as refund on account of inverted duty structure was blocked. It is contended that allowing the utilization of the credit would have led to allowance of the blocked credit and thus in a way would negate the earlier position of blockage of input tax credit refund. Attention of this Court is invited to circular No. 56/30/2018-GST dated 24.08.2018, wherein all the issues raised by the textile industry were clarified after due consultation with the trade. It is contended that, in fact, on the whole issue, there was extensive discussion and deliberations with trade and industry and other stakeholders including at the level of Union Finance Minister. It is further contended that the inputs from all the State Governments were also taken before issuance of the impugned circular.

4.02. The learned counsel appearing for the respondents - revenue has contended that in the case of Kapil Mohan Vs. Commissioner of Income Tax reported in 1999 (1) SCC 430, the Apex Court has held that it is now well settled in the field of taxation, hardship or equity has no role to play in determining eligibility to tax and it is for the legislature to determine the same.

5.00. Heard the learned counsel for the respective parties and considered the material on record.

5.01. Having heard the rival submissions and considering the provisions of section 54(3(ii), which empowers the respondents – revenue to frame the rules, does not empower the respondents – Central Government to frame rule providing for lapsing of the input tax credit.

5.02. The decision of the Apex Court in the case of Dal Ichi Karkaria Ltd. (supra) as well as decision of the Apex Court in the case of Eicher Motors Ltd. (supra) are squarely applicable to the facts of the case on hand.

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 makes the requisite declaration and obtains an acknowledgment 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 the 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 untra vires and beyond the scope of section 54(3)(ii) of the 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.

In view of the disposal of the main Special Civil Application, Civil Application No.1 of 2019 in Special Civil Application No.20626 of 2019 also stands disposed of. No costs.

Sd/-
(J. B. PARDIWALA, J.)

Sd/-
(A. C. RAO, J.)

PER : J.B. PARDIWALA, J. :-

7.00. I am in complete agreement with the final conclusion arrived at by my esteemed brother Justice Rao. However, I would like to add few words of my own:

8.00. The writ applicant No.1 is a society representing its members who are mostly MMF fabric weavers. The writ applicant No.2 is an Association of Person representing its members who are mostly knitters engaged in the manufacture and sale of MMF knitted fabrics.

9.00. The members of the writ applicants are engaged in the supply of textiles and textile articles of Chapters 52 to 63 of the First Schedule to the Customs Tariff Act, 1975.

10.00. With the introduction of the Goods and Services Tax (hereinafter referred to as "GST') in India w.e.f. 01.07.2017, the Central Goods and Service Tax Act, 2017 ("CGST Act"), Integrated Goods and Service Tax Act, 2017 ("IGST Act"), and Gujarat Goods and Service Tax Act, 2017 ("SGST Act"), has come into force.

11.00. The CGST Act and SGST Act provides for the levy and collection of the GST on the supply of goods and services within the State of Gujarat. The IGST Act levies and collects GST on the inter-state supply of goods and services.

12.00. The Scheme of levy of GST is to tax supply of goods and services on value addition.

13.00. Section 16 of the CGST Act allows the registered person to take input tax credit ("ITC") of tax charged on the inputs and input services or both used or intended to be used in the course or furtherance of his business.

14.00. Section 140 of the CGST Act allows a registered person to take credit in his electronic credit ledger of the amount of CENVAT Credit carried forward in the return relating to the period ending with the date immediately preceding the appointed day i.e. 01.07.2017.

15.00. Similarly, Section 140 of the SGST Act enables a registered person to take credit in his electronic credit ledger of the amount of Value Added Tax and Entry Tax carried forward in the return relating to the period ending with the date immediately preceding the appointed day i.e. 01.07.2017.

16.00. Section 54(3) of the CGST Act provides for the refund of the unutilised ITC in two circumstances viz. (i) zero rated supplies made without payment of tax (export of goods and services); and (ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (popularly known as inverted rate of tax).

17.00. Section 54(3)(ii) of the CGST Act further provides that the Central Government, on the recommendation of the GST Council, may notify the goods or services or both to which the refund of {TC accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies shall not be available. Section 54(3) of the CGST Act reads thus:

> "(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:
>
> Provided that no refund of unutilised input tax credit shall be allowed in cases other than -
>
> (i) zero rated supplies made without payment of tax;
>
> (ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:
>
> Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:
>
> Provided also that no refund of input tax credit shall be allowed. If the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies."

18.00. In terms of Section 20 of the IGST Act, Section 54(3) of the CGST Act shall mutatis mutandis apply to the IGST Act.

19.00. Section 54(3) of the SGST Act reads thus:

> "(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the

end of any tax period:

Provided that no refund of unutilised input tax credit shall be allowed in cases other than (I) zero-rated supplies made without payment of tax, (ii) where the credit has accumulated an account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council :

Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty : Provided also that no refund of input tax credit shall be allowed, If the supplier of goods or services or both claims refund of the integrated tax paid on such supplies."

20.00. Vide Notification No.05/2017-Central Tax (Rate) dated 28.06.2017, as amended by Notification No. 29/2017- Central Tax (Rate) dated 22.09.2017 and Notification No. 44/2017-Central Tax (Rate) dated 14.11.2017, the Central Government, on recommendation of the GST Council (Respondent No. 3 herein), in exercise of powers conferred upon it under section 54(3) of the CGST Act, inter alia, notified following textile and textile goods (listed at Sr. Nos. 1 to 7 of the Table thereto) under Section 54(3) of the Act in respect of which refund of ITC accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies.

S. No.	Tariff item, heading, subheading or chapter	Description of Goods
1	5007	Woven fabrics of silk or of silk waste
2	5111 to 5113	Woven fabrics of wool or ofanimal hair
3	5208 to 5212	Woven fabrics of cotton
4	5309 to 5311	Woven fabrics of other vegetable textile fibres, paper yarn.
5	5407, 5408	Woven fabrics of manmade textile materials
6	5512 to 5516	Woven fabrics of manmade staple fibres

6A	5608	Knotted netting of twine, cordage or rope; made up fishing nets and other made up nets, of textile materials
6B	5801	Corduroy fabrics
6C	5806	Narrow woven fabrics, other than goods of heading 5807; narrow fabrics consisting of warp without weft assembled by means of an adhesive (bolducs)"
7	60	Knitted or crocheted fabrics [All goods].

21.00. The effect of the Notification No. 05/2017-Centra1 Tax (Rate) dated 28.06.2017, as amended by the Notification No. 29/2017-Central Tax (Rate) dated 22.09.2017 and Notification No. 44/2017-Centra1 Tax (Rate) dated 14.1

1.2017, was that the aforesaid goods were not entitled to refund of the ITC accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies.

22.00. Vide Notification No.20/2018-Centra1 Tax (Rate) dated 26.07.2018, issued in exercise of powers conferred upon Central Government under section 54(3) of the Act, the above Notification No. 05/2017-Centra1 Tax (Rate) dated 28.06.2017 was amended with effect from 01.08.2018.

23.00. The effect of the amending notification is to denotify the goods mentioned at Sr. Nos.1 to 7 to the table to the Notification No. 05/2017-Central Tax (Rate) dated 28.06.2017 thereby paving way for the refund of the ITC accumulated on account of the inverted rate structure in respect of the said goods w.e.f. 01.08.2018.

24.00. The amending notification further provided that the accumulated ITC lying unutilized in balance, after payment of tax for and up to the month of July, 2018, on the inward supplies received up to the 31.07.2018, shall lapse.

25.00. The relevant extracts of the Notification No.20/2018-Central Tax (Rate) dated 26.07.2018 are reproduced as follows:

"Refund of unutilized/accumulated credit on specified fabrics - Amendment to Notification No. 5/2017-C. T. (Rate)

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), the Central Government, on the recommendations of the Council, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 5/2017-Central Tax (Rate), dated the 28th June, 2017, published in the Gazette of India, Extraordinary, Part 1], Section 3, Sub-section (i). vide number G.S.R. 677(E), dated the 28th June, 2017, namely:

In the said notification. In the opening paragraph the following proviso shall be inserted. Namely : "Provided that,

(i) nothing contained in this notification shall apply to the input tax credit accumulated on supplies received on or after the 1st day of August, 2018, in respect of goods mentioned at serial numbers 1, 2, 3, 4, 5, 6, 6A, 6B, 6C and 7 of the Table below; and

(ii) in respect of said goods, the accumulated input tax credit lying unutilised in balance, after payment of tax for and upto the month of July, 2018, on the inward supplies received up to the 31st day of July 2018, shall lapse."

26.00. In the case on hand, the writ applicants have challenged the 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.

27.00. The challenge is essentially on the following grounds:

(i) The Respondents have no power under Section 54(3) of the CGS'T Act to lapse the accumulated ITC lying unutilised in balance on 31.07.2018.

(ii) The only power conferred upon the Respondents under Section 54(3) of the CGST Act is to notify the goods and services not entitled for refund of ITC accumulated on account of inverted rate structure.

(iii) The Central Board of Indirect Taxes and Customs (Respondent No. 4 herein), vide Circular No.56/30/2018- GST dated 24.08.2018

has clarified that the legislative power of providing for lapsing of ITC flows inherently from the power to deny refund of ITC accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies.

(iv) It is the case of the writ applicants that the ITC once validly taken is indefeasible and vested right is accrued in favour of the registered person to utilize the same without any limitation.

(v) Strong reliance has been placed upon the decision of the Supreme Court in the case of Collector of Central Excise, Pune v. Dai Ichi Karnataka Ltd, 1999 (112) E.L.T. 353 (S.C.), wherein it is held that when credit has been validly taken, its benefit is available to the manufacturer without any limitation in time. The credit is indefeasible.

(vi) Reliance is also placed upon the decision of the Supreme Court in the case of Eicher Motors Ltd. v. Union of India, 1999 (106) E.L.T. 3(S.C.), for the proposition that 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 thereto gets worked out or until those goods existed.

(vii) Further reliance is placed on the decision of this Court in the case of Baroda Rayon Corporation Limited – 2014 (306) E.L.T. 551 (Guj.).

ANALYSIS:

(viii) The CGST Act itself provides for the lapsing of the ITC at Sections 17(4) and 18(4) respectively of the CGST Act. Thus, where the legislature wanted the ITC to lapse, it has been expressly provided for in the Act itself. No such express provision has been made in Section 54(3) ofthe CGST Act.

(ix) No inherent power can be inferred from the provision of Section 54(3) of the CGST Act empowering the Central Government to provide for the lapsing of the unutilised ITC accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies (inverted rate structure).

(x) The members of the writ applicants have a vested right to unutilised 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.

[2019] 57 DSTC 382 (New Delhi)

In the High Court of Delhi

[Hon'ble Justice S. Muralidhar and Justice Talwant Singh]

W. P. (C) 3243/2019

VASS Impex ... Petitioner

Vs.

Union of India & Ors. ... Respondent(s)

Date of Order: 30.07.2019

FILING OF TRAN-1 FORM FOR CLAIMING INPUT TAX CREDIT – ATTEMPT MADE BUT FORM COULD NOT FILE DUE TO PREVALENT GLITCHES IN SYSTEM – GRIEVANCE APPLICATION FILED AND EMAIL ALSO SENT – PERSONALLY VISITED TO GST DEPARTMENT TO MEET OFFICER – BUT ISSUE NOT RESOLVED – WRIT PETITION – DIRECTION GIVEN TO EITHER OPEN THE PORTAL OR TO ACCEPT A MANUALLY FILED TRAN-1 FORM.

Present for Petitioner : Mr. Puneet Rai, Advocate

Present for Respondent(s) : Ms. Aakanksha Kaul &
Mr. Prabodh Singh, Advocates for R-1
Ms. Sonu Bhatnagar,
Sr. Standing Counsel, Mr. Vaibhav Joshi
& Ms. Anushree Narain, Advocates for
Respondents No. 2 & 4

ORDER

1. This is yet another petition where the Petitioner is disabled from availing the Cenvat Credit/Input Tax Credit due to the prevalent glitches in

the GST system and in particular with the filing of the TRAN-1 form online.

2. The brief facts are that as on 30th June, 2017 the Petitioner had an Input Tax Credit of eligible duty (CVD) of Rs.25,11,633/- on goods lying in stock. The carry forward amount of Input Tax Credit ('ITC') filed with the Delhi VAT return was Rs.36,21,393/-.

3. With the coming into force of the GST regime on 1st July, 2017 the Petitioner expected, and legitimately, that it would be able to carry forward the aforementioned Cenvat Credit/ITC. The Petitioner states that when the Petitioner filed the TRAN-1 Form on 27th December, 2017 online, although the figures of ITC/Cenvat credit were available online, the TRAN-1 could not be filed on account of glitches in the portal. The Petitioner filed an online grievance application on 24th March, 2018 followed by an E-mail on 26th September, 2018. The Sole Proprietor of the Petitioner also claimed to have met the officers concerned and yet the issues were not resolved.

4. In the short affidavit filed on behalf of the Respondents, reference is made to the circular dated 3rd April, 2018. It is averred that:

> "It has been decided that all such taxpayers, who tried but were not able to complete TRAN-1 procedure (original or revised) of filing them on or before 27.12.2017 due to IT-glitch, shall be provided the facility to complete TRAN-1 filing. It is clarified that the last date for filing of TRAN 1 is not being extended in general and only these identified taxpayers shall be allowed to complete the process of filing TRAN-1."

5. The said affidavit is however silent on whether the Petitioner's case has been considered by the IT Grievance Redressal Committee constituted by the Respondents to look into the complaints regarding the difficulties with the online filing system. Learned counsel for the Respondent on instructions states that the Petitioner's grievance is still under consideration before the GSTN.

6. The Court has in several recent orders including order dated 13th May, 2019 in WP(C) No. 1280/2018 (Bhargava Motors v. Union of India) and order dated 29th July, 2019 in WP(C) No.13772/2018 (Uninav Developers Private Limited v. Union of India) directed the Respondents in similar circumstances to either re-open the portal to enable the Petitioners therein to again file the TRAN-I form electronically or to accept a manually filed TRAN-1 form.

7. For the reasons explained in the above mentioned orders, the Court directs the Respondents in the present case also to either open the portal so as to enable the Petitioner to file the TRAN-1 electronically or to accept a manually filed TRAN-1 form on or before 31st August, 2019. The Petitioner's claims thereafter be processed in accordance with law.

8. The petition is disposed of in the above terms.

9. A copy of this order be given dasti under the signatures of Court Master.

[2019] 57 DSTC 385 (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI
[M.S. WADHWA: MEMBER (J)]

Appeal No. 328-329/ATVAT/15-16

M/s. Amit Industries
7D, 7th Floor, Bigjo's Tower,
Netaji Subhash Place,
Pitampura, Delhi. Appellant

Versus

Commissioner of Trade & Taxes, Delhi Respondent

Date of Order: 12 April, 2019

CENTRAL SALES TAX – INTERSTATE SALES – CONCESSIONAL RATE OF TAX U/S 8 OF CENTRAL SALES TAX ACT,1956 READ WITH RULE 12 OF CENTRAL SALES TAX RULES,1957 – CLAIM DISALLOWED FOR NOT PRODUCING GR – NOTICE OF DEFAULT ASSESSMENT OF TAX AND INTEREST AND NOTICE OF ASSESSMENT OF PENALTY ISSUED – OHA RELIED UPON THE STATEMENT OF TRANSPORTER AND REJECTED THE OBJECTION PETITION – OPPORTUNITY OF CROSS EXAMINATION OF TRANSPORTER DENIED – VIOLATION OF PRINCIPLE OF NATURAL JUSTICE – VATO AUDIT HAD NO JURISDICTION TO ASSESS AS POWER NOT DELEGATED U/S 68 OF DVAT ACT – PENALTY ORDER PASSED WITHOUT SERVING SHOW CAUSE NOTICE AND NONE OF THE CONDITIONS WERE SATISFIED U/S 86(10) – WHETHER ORDER LEVYING PENALTY JUSTIFIED; HELD – NO.

VATO (AUDIT) PASSED THE ORDERS WITHOUT AUTHORITY OF LAW. IN THE LIGHT OF SUPREME COURT AND HIGH COURT JUDGMENTS CITED IN THE BODY OF ORDERS – VAT TRIBUNAL SET ASIDE THE ORDERS OF VATO (AUDIT) AS WELL AS THE ORDER OF OHA – APPEAL ALLOWED.

Present for Appellant : Shri Ravi Chandhok, Advocate

Present for Respondent : Shri C. M. Sharma, Advocate

ORDER

1. The instant appeals have been filed against the impugned order dated 02.12.2015 passed by Ld. Additional Commissioner, hereinafter called Objection Hearing Authority (in short OHA) who vide these orders upheld the imposition of tax, interest and penalty u/s 32 and section 33 respectively by Ld. VATO vide orders dated 23.12.2011.

2. The brief facts of the present appeals are that Amit Industries, the appellant is engaged in manufacturing and trading of silicon sheets. The

goods are either sold infra-state or inter-state on payment of applicable Value Added Tax (VAT)/Central Sales Tax (CST), as the case may be. The appellant is registered under both the Acts vide TIN No. 07260066289.

3. In terms of Section 8 of the CST Act read with Rule 12 of the Central Sales Tax (Registration and turnover) Rules, 1957 inter-state sales to a registered dealer against form C are liable to tax @2%.

4. That appellant during the period of July 2008-2009 made inter-state sales of goods to N.K. Metals against invoice No. 32 dated July 30, 2008. Since the purchaser is registered under the CST Act, sale of the goods was made at concessional rate of tax of 2% against declaration form C. The goods were transported through transporter, Ahuja Transport Service vide goods receipt No. 79 dated July 30, 2008. Payment for the sale made has been received through Bank and purchaser had issued C Form No. 04V788936 dated Oct. 07, 2008.

5. An audit of business affairs of the dealer was conducted by the officials of Audit Branch of the department. During the course of audit, the appellant submitted all information/records asked for by the officials.

6. Thereafter the appellant received notices of default assessment of tax u/s 32 of the DVAT Act and assessment of penalty u/s 33 of the DVAT Act issued by the Ld. VATO Audit. Vide the assessment orders the Ld. VATO disallowed claim of sale to the purchaser N.K. Metals at concessional rate on the ground that GR was not produced and created the following demands against the appellant.

Tax	Interest	Total	Penalty
55,792/-	27,629/-	83,421/-	55,792/-

Aggrieved with the above orders, appellant filed objections before Ld. OHA. During the course of hearing of objections, the appellant submitted copies of the invoices, GR and form C before Ld. OHA as evidence of inter-state sale made to the purchaser. However, the Ld. OHA vide impugned orders dated 02.12.2015 rejected the objections. The objections were rejected on the ground that the transporter in statement dated October 13, 2015 has mentioned that the GR was not issued by his firm and the said record is not available.

8. Still aggrieved, appellant has challenged the impugned order dated

02.12.2015 before this Tribunal on following among other grounds:-

(1) That the Ld. OHA erred in relying upon the statement without confronting the same.

(2) That the inter-state sales cannot be assessed under DVAT Act.

(3) That assessment orders have been passed without authority of law.

(4) That penalty has been wrongly imposed.

(5) That the impugned orders have been passed without application of mind.

(6) That interest has been wrongly charged.

9. The present appeals were heard on merit after compliance of orders dated 14.03.2016 passed u/s 76(4) of DVAT Act.

10. Heard to appellant's Ld. Counsel Mr. Ravi Chandhok and Mr. C.M. Sharma on behalf of the revenue and perused the file and judgments cited by the appellant's Ld. Counsel during the course of arguments to give force to his arguments.

11. The short controversy in these appeals is whether lower authority rightly treated sale by appellant to N.K. Metals as 'local sales'. As noted from the above facts appellant during period July 2008-09 made inter-state sale of goods to N.K. Metals against invoice No. 32 dated July 30, 2008. Since the purchaser is registered under CST Act, sale of the goods was made at concessional rate of tax of 2% against declaration Form 'C'. The goods were transported through transporter Ahuja Transport Service vide goods receipt No. 079 dated July 30, 2008. Later on, an audit of the business affairs was conducted by officials of audit branch and Ld. VATO Audit on the basis of audit imposed impugned tax, interest and penalty on the ground that appellant failed to prove movement of goods to N.K. Metals Jammu, hence this transaction was treated as local sale and accordingly tax and interest and penalty were also imposed.

12. Against these orders, appellant filed objections alongwith copy of invoice, GR and copy of C Form. Even then Ld. OHA rejected the objections and upheld the assessment orders passed by Ld. VATO. The ground on which objections were rejected was that VATI recorded the statement of the transporter Mr. Praveen Kumar of M/s Ahuja Transport Service on

13.10.2015 who stated that GR No. 079 dated 30.07.2008 was not issued by his firm and the said record is not available with them.

13. Now the question arises whether without giving an opportunity of cross examination of Mr. Praveen Kumar to the appellant, the impugned orders were passed legally. In support of his arguments that these orders are contrary to law, appellant's Ld. Counsel referred to the judgment of Hon'ble Supreme Court in the case of M/s Andman Timber Industries Vs. CCE (2015) 281 CTR 241. Before proceeding further it would be fruitful to reproduce following observations of Hon'ble Supreme Court in this case which are as follows:-

> "According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected.. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to not that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them."

14. Perusal of above orders passed by Hon'ble Supreme Court shows that ratio of above case squarely applies to the facts of the present appeals because in present appeals, the statement of Mr. Praveen Kumar was not brought to the knowledge of the appellant while hearing the objections raised by the appellant. The impugned orders were passed on the basis of this statement. In my considered view, it's a worst case than above one because there after recording examination in chief, opportunity to

cross examine was denied to the assessee but in present case without knowledge of appellant, statement of transporter was recorded and orders were passed on this basis treating inter-state sales as intra-state sale. As held by Hon'ble Supreme Court that if the testimony of transporter is discredited, there was no material with the department on the basis of which it could justify its action as the statement of the transporter was only basis for passing the impugned orders by Ld. OHA. So, on this ground impugned orders dated 02.12.2015 are liable to be set aside as they are against the principle of natural justice. In my view, the quasi judicial authorities are supposed to know basic principles of law which has been violated in present appeal.

15. The next ground on which the impugned orders have been assailed by appellant is that inter-state sales cannot be assessed under the DVAT Act. According to appellant, the Ld. VATO in the assessment orders has mentioned that sale to the purchaser was inter-state sale, even then he assessed tax on the same under the DVAT Act. It is submitted that once it is accepted that a particular sale is a inter-state sale in nature the same cannot be assessed under DVAT Act. This argument raised by appellant's Ld. Counsel prima facie appears to be attractive but it has no force because in the impugned orders he referred to the claim made by the appellant in the relevant record but on finding that appellant has failed to prove inter-state sale in the absence of documentary proof, so he treated this sale as 'local sale' and accordingly taxed. Hence, I do not find any force in these arguments that inter-state sale cannot be assessed under DVAT Act. Ld. VATO after treating disputed sale as 'local sale' taxed it under DVAT Act.

16. The next ground on which the impugned orders passed by lower authorities have been assailed is that audit of accounts of the company was conducted by the officials under chapter-X of the DVAT Act. In terms of section 68 of the DVAT Act, for conducting audit, Ld. Commissioner ought to have delegated powers to the officials. Further, Rule 65 of DVAT Rules prescribes that where the Ld. Commissioner appoints officers to exercise powers under Chapter-X of DVAT Act, the same shall be granted in DVAT 50 prescribed thereof and authority shall be granted to specific person. Hence, to conduct audit on behalf of the Ld. Commissioner, the officials ought to have special authority granted by the Ld. Commissioner in DVAT-50. In this regard, appellant drew attention of this Tribunal towards order dated 12.10.2011 passed by the then Ld. Commissioner Mr. Rajender Kumar according to which powers u/s 58 can be exercised by all officers appointed under sub-section 2 of section 66 of DVAT Act not below the rank of AVATO. According to appellant, in terms of section 68 of the DVAT Act read with Rule 65 of the DVAT Rules, the Commissioner can delegate

powers to undertake proceedings under Chapter X thereof to specific persons i.e. the Ld. Commissioner has to mention name of the officers to whom powers under section 58 of the DVAT Act has been delegated. However, vide the order the Ld. Commissioner gave general delegation to all officers not below the rank of AVATO. Appellant's Ld. Counsel further submitted that general delegation of power is contrary to provisions of section 68 of DVAT Act read with Rule 65 of the DVAT Rules. In support of his arguments, appellant's Ld. Counsel referred to recent judgment of Hon'ble Delhi High Court in Capri Bathaid Pvt. Ltd.. Perusal of assessment order dated 23.12.2011 shows that it was passed by VATO Audit. Revenue side has failed to bring on record any evidence that Ld. Commissioner specially delegated power of assessment to Ld. VATO (Audit), neither authority in DVAT-50 has been filed by the revenue on record. The impugned orders passed by Ld. VATO (Audit) are also violative of notification dated 12.10.2011 (supra) on the ground that Ld. Commissioner has specifically directed that these powers u/s 58 shall be exercised by the officers in their respective jurisdiction. Prima facie, the impugned assessment order does not appear to be passed by jurisdictional VATO. In this regard, before proceeding further it would be appropriate to record following observations of Hon'ble Supreme Court in the celebrated judgment of Commissioner of Sale Tax, U.P. Vs. Sarjoo Prasad Ram Kumar which are as follows:-

> "Lucknow was one of the circles formed under the U.P. Sales Tax Act, 1948, and, in that circle, there were several Assistant Sales Tax Officers. The assesse carried on his business in Sector III for which sector there was a separate Assistant Sales Tax Officer. For the assessment year 1959-60, the Assistant Sales Tax Officer, Sector II, issued to the assessee a notice under section 21 of the Act and, in due course, made an assessment on him. It was not shown that the Assistant Sales Officer, Sector II, had also been conferred with jurisdiction to assess the dealers in Sector III. On appeal, the assessee contended that the Assistant Sales Tax Officer, Sector II, had no jurisdiction to assess him. That contention was upheld by the appellate authority, the revisional authority and the High Court. On appeal to the Supreme Court:
>
> Held, (i) that the Assistant Sales Tax Officer, Sector II, had no jurisdiction to assess the dealer in Sector III. The rule-making authority had empowered the Commissioner to allocate separate areas for separate Assistant Sales Tax Officers. When such an allocation was made, the jurisdiction of each officer was confined to the area allotted to him;

(ii) that unless there was some provision either in the Act or in the Rules framed which precluded the assessee from raising any objection as to jurisdiction, if the same was not raised before the assessing authority, the assessee could not be precluded from raising that objection at a later stage. An objection as to jurisdiction goes to the root of the case."

17. Perusal of above judgments shows that ratio of these cases squarely applies to the facts of the present appeals. The Ld. VATO (Audit) was not specially delegated powers to frame assessment and he had no jurisdiction to frame assessment as he was not VATO of the concerned ward.

18. In the impugned orders, there is clear non-compliance with the requirement of section 32(1) also. It is clear from the bare perusal of the assessment orders, that the Ld. VATO was required to be satisfied for the purpose of section 32(1) of the DVAT Act as to which of the ground is attracted in the present appeals. But the Ld. VATO chose to use a standard format as observed by Hon'ble Delhi High Court in the judgment of Samsung India Electronic Pvt. Ltd. decided on 07.04.2016. It shows that none of the alternatives provided in Section 32 (1) of DVAT ACT has been specially tick marked by the Ld. VATO. It is therefore, unclear as to the precise ground on which the VATO was proceeding to exercise its powers u/s 32(1) of the DVAT Act. On this ground also default notices of assessment are liable to be quashed as held by Hon'ble Delhi High Court in the above case.

19. The next ground on which the impugned orders dated 02.12.2015 passed by Ld. OHA, upholding assessment orders by VATO is that in the present circumstances penalty has been wrongly imposed. He further submitted that penalty u/s 86(10) of the DVAT Act can only be imposed on the following grounds:-

(a) When a person furnishes a false, misleading or deceptive return; or

(b) When a person omits from a return any matter or thing without which return furnished is false, misleading and deceptive.

20. According to appellant, none of the above condition in the present appeals are satisfied to attract penalty under section 86(10) of the DVAT Act. The appellant in return filed under the DVAT Act filled all information required to be reflected therein, which also tallies with DVAT-30 & 31 submitted with the Ld. VATO during the course of hearing. Therefore,

by no stretch of imagination, it can be inferred that appellant filed false, misleading or deceptive return.

21. In support of above arguments appellant's Ld. Counsel referred to the judgement of Hon'ble Delhi High Court in the Jatinder Mittal Engineers & Contractors Vs. Commissioner of Trade & Taxes, Delhi. The following were facts of this case-

> "the assesse had filed the return in accordance with Section 5(2) of the Act as it is engaged in the business of construction activities on contract basis. As per this provision, it was permissible for the assessee to disclose the net turn-over after excluding the charges towards labour, services and other like charges subject to such conditions as may be prescribed It is because of this reason that the assessee had shown a turn-over of Rs. 15,36,120/- after deducting labour/services charges as well as other like charges. Though there is an omission in not showing the gross turn-over, the fact remains that when default assessment notice was issued to the assessee, he explained the expenses incurred on the aforesaid accounts."
>
> "It is also noted above that the assessee had maintained the centralized books of accounts, particularly, profit and loss Account, which the assessee is supposed to do as per the normal accounting practice. The assessee had allocated proportionate expenses to Delhi Sales incurred on account of labour/services."

22. In view of above facts, Hon'ble Delhi High Court held that penalty u/s 86(10) is not sustainable. The Hon'ble High Court observed as follows:-

> "It is a different thing that such an approach on the part of the assessee was not accepted by the OHA or the Tribunal. It can safely be inferred that the aforesaid approach of the assessee was bonafide. It cannot be said that the return filed by the assessee was false, misleading and deceptive in material particular. The claim was bonafide may be the assessee was not able to prove the same, even otherwise, we find that it was an arguable case. For this reason, we are of the opinion that provision to sub-Section 10 of Section 86 could not be invoked in a matter like this. This condition stipulated therein is not satisfied and we, thus, decide the question of law no. 1 in favour of the assessee and delete the penalty imposed under Section 86(10) of the Act."

23. In the present appeals, ratio of above case squarely applies as

appellant treated sale to the purchaser as inter-state sale and it was reflected accordingly in books of account and statutory documents such as DVAT30 & 31 prescribed under the DVAT Rules. In support of his claim that it is an inter-state sale, he filed invoice, GR and C Form supplied by the purchaser. In these circumstances, it cannot be held that appellant furnished false, misleading or deceptive return, hence penalty u/s 86(10) of DVAT Act was wrongly imposed and so it is liable to be set aside.

24. The assessment of penalty has also been assailed on the ground that the Ld. VATO before levying penalty did not give any opportunity of hearing to the appellant. In support of this submission appellant's Ld. Counsel referred to various judgment including that of J.T. (India) Exports and Another Vs. UOI and Another (132 STC 22 (Del. HC FB) wherein the Hon'ble Delhi High Court held that opportunity of being heard should be given to a person before imposing penalty even if relevant legislation does not provide for the same . The relevant para of the above judgment is being reproduced as below:-

> "Even if grant of an opportunity is not specifically provided for it has to be read into the unoccupied interstices and unless specifically excluded the principles of natural justice have to be applied. Even if a statue is silent and there are no positive words in the Act or Rules spelling out the need to hear the party whose right and interests are likely to be affected, the requirement to follow fair procedure before taking a decision must be read into the statue, unless the statue provided otherwise. Reference is accordingly disposed off"

25. Before closing discussion on the fact that penalty was wrongly imposed , it would be fruitful to reproduce following para of celebrated judgement of Hon'ble Delhi High Court in the case of Barisal Dye Chem Pvt. Ltd. Vs. Commissioner of Value Added Tax, Delhi and another (STA No. 29/2015) which is as follows:-

> "Assessment of penalty is an exercise separate from the main assessment for determining the tax and interest payable. The very nature of the proceedings under Section 33 of the DVAT Act read with Rule 36(2) of the DVAT Rules underscore the need for the VATO to observe the principles of natural justice while making the penalty order. This entails serving on the Assessee a separate notice to show cause why penalty should not be imposed and affording the Assessee an opportunity of being heard prior to passing the penalty order. The imposition of penalty is not a

mechanical or automatic exercise but requires application of mind by the assessing authority to the facts and circumstances of the case."

26. In the present case also the Ld. VATO without issuing notices and giving an opportunity of hearing, in a mechanical way imposed penalty without giving a finding on what grounds he found returns filed by the appellant false, misleading or deceptive. Hence, in the light of above discussion and on the basis of ratio of above cases, I hereby set aside the penalty imposed u/s 33 read with Section 86(10) of DVAT Act.

27. The next ground advanced by the appellant's Ld. Counsel during the course of argument was that impugned order were passed without application of mind due to the reason that objections were rejected on the basis of statement of transporter but appellant was not afforded an opportunity of cross examination. Secondly, without giving an opportunity of hearing penalty was imposed and Ld. VATO passed assessment orders without authority of law. In the light of above discussion, I hold that the impugned orders were passed without application of mind so they are liable to be set aside.

28. Appellant's Ld. Counsel has also assailed the imposition of interest. According to appellant, u/s 42 of the DVAT Act , interest can be demanded only when a person is in default of making tax, penalty or any other amount due thereof. Therefore, demand of interest is dependent upon liability to pay tax, penalty or other amount due under the DVAT Act. If there is no tax, penalty or other liability, no interest can be demanded. I agree with the appellant's Ld. Counsel's submissions that in the present circumstances there was no default on the part of the appellant in making payment of tax, penalty or any other amount, hence in my considered view interest amount was wrongly demanded by Ld. VATO and which was upheld by Ld. OHA vide impugned orders dated 02.12.2015.

29. On the basis of above discussion and in the light of judgments cited in the body of orders, I hereby set aside the impugned orders dated 02.12.2015 passed by Ld. OHA and accordingly, present appeals are allowed.

30. Order pronounced in the open court

31. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

32. File be consigned to record room.

[2019] 57 DSTC 395 (New Delhi)

In the Supreme Court of India

[Hon'bleMr.Justice R. F. Nariman, Hon'ble Mr. Justice Surya Kant and Hon'bleMr.Justice V. Ramasubramanian]

Civil Appeal No.: 4184/2009

State of West Bengal & Ors. ... Appellants

Vs.

Calcutta Club Limited & Ors. ... Respondent(s)

Date of Order: 03.10.2019

SPECIAL LEAVE PETITION – NOTICE TO CLUB FOR NON DEPOSIT OF SALES TAX FOR SUPPLY OF FOODS, DRINKS, ETC. TO ITS PERMANENT MEMBERS – RESPONDENTS ARGUED ON DOCTRINE OF MUTUALITY AND TO BE TREATED AS AGENT OF PERMANENT MEMBERS – BODY OF PERSONS WILL NOT INCLUDE AN INCORPORATED COMPANY, NOR WILL IT INCLUDE ANY OTHER FORM OF INCORPORATION INCLUDING AN INCORPORATED COOPERATIVE SOCIETY.

COURT HELD THAT CLUBS CANNOT BE TREATED AS SEPARATE FROM THEIR MEMBERS – NO SALES TAX OR SERVICE TAX LEVIABLE.

Facts

The Assistant Commissioner of Commercial Taxes issued a notice to the respondent Club assessee apprising it that it had failed to make payment of sales tax on sale of food and drinks to the permanent members during the quarter ending 30-6-2002. After the receipt of the notice, the respondent Club submitted a representation and the assessing authority required the respondent Club to appear before it on 18-10-2002. The notice and the communication sent for personal hearing was assailed by the respondent before the Tribunal praying for a declaration that it was not a dealer within the meaning of the Act as there was no sale of any goods in the form of food, refreshments, drinks, etc. by the Club to its permanent members and hence, it was not liable to pay sales tax under the Act. A prayer was also made before the Tribunal for nullifying the action of the Revenue threatening to levy tax on the supply of food to the permanent members.

It was contended before the Tribunal that there could be no sale by the respondent Club to its own permanent members, for doctrine of mutuality would come into play. To elaborate, the respondent Club treated itself as the agent of the permanent members in entirety and advanced the stand that no consideration passed for supplies of food, drinks or beverages, etc. and there was only reimbursement of the amount by the members and therefore, no sales tax could be levied.

The Tribunal accepted the contention of the respondent Club and opined that it was not eligible to tax under the Act.

Being dissatisfied with the aforesaid order passed by the Tribunal, the Revenue preferred a writ petition and the High Court opined that the decision rendered in Automobile Assn. of Eastern India [Automobile Assn.of Eastern India v. State of W.B., (2017) 11 SCC 811 :(2002) 40 STA 154 (SC)] , was not a precedent and came to hold that reading of the constitutional amendment, as well as the provisions of the definition under the Act, it was clear that supply of food, drinks and beverages had to be made upon payment of consideration, either in cash or otherwise, to make the same exigible to tax but in the case at hand, the drinks and beverages were purchased from the market by the Club as agent of the members. The High Court further ruled that the members collectively was the real life and the Club was a superstructure only and, therefore, mere fact of presentation of bills and non-payment thereof consequently, striking off membership of the Club, did not bring the Club within the net of sales tax. The High Court further opined that in the obtaining factual matrix the element of mutuality was not obliterated. The expression of the aforesaid view persuaded the High Court to lend concurrence to the opinion projected by the Tribunal.

Held

Sales tax was concerned applies on all fours to service tax; as, if the doctrine of agency, trust and mutuality was to be applied qua members' clubs, there had to be an activity carried out by one person for another for consideration. The Court had seen how in the judgment relating to sales tax, the fact as that in members' clubs there was no sale by one person to another for consideration, as one could not sell something to oneself. This would apply on all fours when the Court were to construe the definition of "service" under Section 65B (44) as well.

It will be noticed that "club or association" was earlier defined under Section 65(25a) and 65(25aa) to mean "any person" or "body of persons" providing service. In these definitions, the expression "body of persons" could not possibly include persons who were incorporated entities, as such entities had been expressly excluded under Section 65(25a)(i) and 65 (25aa)(i) as "anybody established or constituted by or under any law for the time being in force". "Body of persons", therefore,would not, within these definitions, include a body constituted under any law for the time being in force.

The Court therefore is of the view that the Jharkhand High Court and the Gujarat High Court were correct in their view of the law in following "Young Men's Indian Association". The Court were also of the view that

from 2005 onwards, the Finance Act of 1994 did not purport to levy service tax on members' clubs in the incorporated form.

The appeals of the Revenue were, therefore dismissed. Writ Petition (Civil) No.321 of 2017 was allowed in terms of prayer (i)therein. Consequently, show-cause notices, demand notices and other action taken to levy and collect service tax from incorporated members' clubs were declared to be void and of no effect in law.

Present for Appellant(s) : Madhumita Bhattacharjee, Advocate

Present for Respondent(s) : Partha Sil, Advocate

J U D G M E N T

R.F. Nariman, J.

C.A. No.4184 of 2009

1. This Appeal arises out of a reference order by a Division Bench of this Court, reported in State of West Bengal v. Calcutta Club Limited (2017) 5 SCC 356. The facts of Civil Appeal No. 4184 of 2009 are set out in the said reference order as follows:

> "2. The facts that are necessary to be stated are that the Assistant Commissioner of Commercial Taxes issued a notice to the respondent Club assessee apprising it that it had failed to make payment of sales tax on sale of food and drinks to the permanent members during the quarter ending 30-6-2002. After the receipt of the notice, the respondent Club submitted a representation and the assessing authority required the respondent Club to appear before it on 18-10-2002. The notice and the communication sent for personal hearing was assailed by the respondent before the Tribunal praying for a declaration that it is not a dealer within the meaning of the Act as there is no sale of any goods in the form of food, refreshments, drinks, etc. by the Club to its permanent members and hence, it is not liable to pay sales tax under the Act. A prayer was also made before the Tribunal for nullifying the action of the Revenue threatening to levy tax on the supply of food to the permanent members.
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> 3. It was contended before the Tribunal that there could be no sale by the respondent Club to its own permanent members, for doctrine of mutuality would come into play. To elaborate, the respondent

Club treated itself as the agent of the permanent members in entirety and advanced the stand that no consideration passed for supplies of food, drinks or beverages, etc. and there was only reimbursement of the amount by the members and therefore, no sales tax could be levied.

4. The Tribunal referred to Article 366(29-A) of the Constitution of India, Section 2(30) of the Act, its earlier decision in Hindustan Club Ltd. v. CCT [Hindustan Club Ltd. v. CCT, (1995) 98 STC 347 (Tri)] , distinguished the authority rendered in Automobile Assn. of Eastern India v. State of W.B. [Automobile Assn. of Eastern India v. State of W.B., (2017) 11 SCC 811 : (2002) 40 STA 154 (SC)] and, eventually, opined as follows:

"Considering the relevant fact presented before us and the different judgments of the Supreme Court and the High Court we find that supplies of food, drinks and refreshments by the petitioner clubs to their permanent members cannot be treated as "deemed sales" within the meaning of Section 2(30) of the 1994 Act. We find that the payments made by the permanent members are not considerations and in the case of Members' Clubs the suppliers and the recipients (Permanent Members) are the same persons and there is no exchange of consideration."

Being of this view, the Tribunal accepted the contention of the respondent Club and opined that it is not eligible to tax under the Act.

5. Being dissatisfied with the aforesaid order passed by the Tribunal, the Revenue preferred a writ petition and the High Court opined that the decision rendered in Automobile Assn. of Eastern India [Automobile Assn. of Eastern India v. State of W.B., (2017) 11 SCC 811 : (2002) 40 STA 154 (SC)] , was not a precedent and came to hold that reading of the constitutional amendment, as well as the provisions of the definition under the Act, it was clear that supply of food, drinks and beverages had to be made upon payment of consideration, either in cash or otherwise, to make the same exigible to tax but in the case at hand, the drinks and beverages were purchased from the market by the Club as agent of the members. The High Court further ruled that the members collectively was the real life and the Club was a superstructure only and, therefore, mere fact of presentation of bills and non-payment thereof consequently, striking off membership of the Club, did not bring the Club within the net of sales tax. The High

> Court further opined that in the obtaining factual matrix the element of mutuality was not obliterated. The expression of the aforesaid view persuaded the High Court to lend concurrence to the opinion projected by the Tribunal.
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> xxx xxx xxx
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> 9. At the very outset, we may mention certain undisputed facts. It is beyond cavil that the respondent is an incorporated entity under the Companies Act, 1956. The respondent assessee charges and pays sales tax when it sells products to the non-members or guests who accompany the permanent members. But when the invoices are raised in respect of supply made in favour of the permanent members, no sales tax is collected."

2. After setting out the definition of "sale" in Section 2(30) of the West Bengal Sales Tax Act, 1994 (hereinafter referred to as the "West Bengal Sales Tax Act") and Article 366(29-A) of the Constitution of India, the Court then referred to the Constitution Bench decision in C.T.O. v. Young Men's Indian Association (1970) 1 SCC 462 as follows:

> "14. Earlier the Constitution Bench decision in CTO v. Young Men's Indian Assn. [CTO v. Young Men's Indian Assn., (1970) 1 SCC 462] dealing with the liability of a club to pay sales tax when there is supply of refreshment to its members, the Court had concluded thus: (SCC pp. 467-68, para 11)
>
> "11. The essential question, in the present case, is whether the supply of the various preparations by each club to its members involved a transaction of sale within the meaning of the Sale of Goods Act, 1930. The State Legislature being competent to legislate only under Schedule VII List II Entry 54 to the Constitution the expression "sale of goods" bears the same meaning which it has in the aforesaid Act. Thus in spite of the definition contained in Section 2(n) read with Explanation I of the Act if there is no transfer of property from one to another there is no sale which would be eligible to tax. If the club even though a distinct legal entity is only acting as an agent for its members in matter of supply of various preparations to them no sale would be involved as the element of transfer would be completely absent. This position has been rightly accepted even in the previous decision of this Court."

3. After then referring to a number of decisions on the doctrine of mutuality, the Court observed:

"23. In the light of the aforesaid position and the law of mutual concerns, we have to ascertain the impact and the effect of sub-clause (e) to clause (29-A) to Article 366 of the Constitution of India, as enacted vide 46th Amendment in 1982 and applicable and applied to sales or VAT tax. The said clause refers to tax on supply of goods by an unincorporated association or body of persons. The question would be whether the expression "body of persons" would include any incorporated company, society, association, etc. The second issue is what would be included and can be classified as transactions relating to supply of goods by an unincorporated association or body of persons to its members by way of cash, deferred payment or valuable consideration. Such transactions are treated and regarded as sales. The decisions of the Court in Fateh Maidan Club [Fateh Maidan Club v. CTO, (2017) 5 SCC 638 : (2008) 12 VST 598 (SC)] and Cosmopolitan Club [Cosmopolitan Club v. State of T.N., (2017) 5 SCC 635 : (2009) 19 VST 456 (SC)] in that context have drawn a distinction when a club acts as an agent of its members and when the property in the goods is sold i.e. the property in food and drinks is passed to the members. The said distinction, it is apparent to us, has been accepted by the two Benches. However, the decisions do not elucidate and clearly expound, when the club is stated and could be held as acting as an agent of the members and, therefore, would not be construed as a party which had sold the goods. The agency precept necessarily and possibly refers to a third party from whom the goods i.e. the food and drinks had been sourced and provided to by the club acting as an agent of the members, to the said members. These are significant and relevant facets which must be elucidated and clarified so that there is no ambiguity in appreciating and understanding the aforesaid concepts "acting as an agent of the members" or when property is transferred in the goods sold to the members."

4. The Division Bench then set out 3 questions to be answered by a larger Bench as follows:

"30.1. (i) Whether the doctrine of mutuality is still applicable to incorporated clubs or any club after the 46th Amendment to Article 366(29-A) of the Constitution of India?

30.2. (ii) Whether the judgment of this Court in Young Men's Indian Assn. [CTO v. Young Men's Indian Assn., (1970) 1 SCC 462] still holds the field even after the 46th Amendment of the Constitution

of India; and whether the decisions in Cosmopolitan Club [Cosmopolitan Club v. State of T.N., (2017) 5 SCC 635 : (2009) 19 VST 456 (SC)] and Fateh Maidan Club [Fateh Maidan Club v. CTO, (2017) 5 SCC 638 : (2008) 12 VST 598 (SC)] which remitted the matter applying the doctrine of mutuality after the constitutional amendment can be treated to be stating the correct principle of law?

30.3. (iii) Whether the 46th Amendment to the Constitution, by deeming fiction provides that provision of food and beverages by the incorporated clubs to its permanent members constitute sale thereby holding the same to be liable to sales tax?"

5. Shri Rakesh Dwivedi, learned Senior Advocate appearing on behalf of the Appellants, referred to the 'Sixty-First Law Commission Report on Certain Problems Connected With Powers of the States to Levy a Tax on the Sale of Goods and with the Central Sales Tax Act, 1956 (May, 1974)' (hereinafter referred to as the "61st Law Commission Report"), which preceded the enactment of Article 366(29-A) of the Constitution of India; the 'Statement of Objects and Reasons' appended to the Constitution (Forty-sixth Amendment) Bill, 1981 [enacted as the Constitution (Forty-sixth Amendment) Act, 1982] (hereinafter referred to as the "Statement of Objects and Reasons"), which led to the insertion of Article 366(29-A); and then referred, in particular, to Article 366(29-A)(e) and (f). According to the learned Senior Advocate, 366(29-A)(e) was inserted in order to do away with the doctrine of agency/trust or mutuality, insofar as it applied to members' clubs and, therefore, sought to do away with the basis of the judgment in Young Men's Indian Association (supra). He argued that the language of 366(29-A)(e) did away with transfer of property in goods and was specifically differently worded from 366(29-A)(a) and (b), which referred to such transfer. According to him, the expression "unincorporated association or body of persons" in sub-clause (e) must be read disjunctively, and so read would include incorporated persons such as companies, cooperative societies, etc. According to him, it is important to construe a provision of the Constitution broadly, and in consonance with the object sought to be achieved, that being, to do away with the doctrine of mutuality in all its forms. According to him, even assuming that "body of persons" under 366(29-A)(e) did not include incorporated persons, 366(29-A)(f) would take within its wide sweep the supply of goods, being food or any other article for human consumption or drink, given that sub-clause (f) does not refer to incorporated or unincorporated bodies, and takes within its sweep a tax in the supply of goods "in any other manner whatsoever", which are words of extremely wide import. He then took us through the West Bengal

Sales Tax Act and referred to the definition of "dealer" in Section 2(10) and "sale" in Section 2(30), and then adverted to the charging Section 9 of the aforesaid Act. According to him, a reading of the definition of "dealer" and explanation (1) thereof in particular, would make it clear that the explanation is not really an explanation in the classical sense, but seeks to rope in members' clubs which sell goods to their members. Thus, the explanation stands apart from the main part of the definition of "dealer", which requires a person to carry on the business of selling and purchasing goods. He then relied heavily on Deputy Commercial Tax Officer, Saidapet & Anr. v. Enfield India Ltd., Co-operative Canteen Ltd. (1968) 2 SCR 421 for the proposition that the English cases which dealt with the doctrine of mutuality had no application in the context of a taxing statute, as these judgments dealt with criminal liability. He also relied strongly on this judgment to show that profit-motive is totally unnecessary where a supply of goods by a club to its members, falls within the definition of "sale" under the Madras General Sales Tax Act, 1959 in that case. He also distinguished Inland Revenue Commissioners v. Westleigh Estates Company, Limited 1924 K.B. 390 from the present case, by stating that all observations on mutuality were made in the context of whether a business corporation's profits could be brought to tax. He instead relied upon the observations made in Walter Fletcher v. Income Tax Commissioner (1972) Appeal Cases 414, stating that the mutuality principle was not of universal application, even when it applied to members' clubs, and it is important to find out in the facts of a case when relationship of mutuality ends and when trading begins. In any case, according to the learned Senior Advocate, the doctrine of mutuality has no application when a members' club is in the corporate form, as it is clear from Bacha F. Guzdar v. Commissioner of Income Tax, Bombay (1955) 1 SCR 876, where it was held that a shareholder is not the owner of the assets of a company and, therefore, the aforesaid principle cannot possibly apply to members' clubs in corporate form. According to him, it makes no difference that the company is one registered under Section 25 of the Companies Act, 1956 ("hereinafter referred to as the "Companies Act"), as is the case in the appeal in the present case.

6. Shri Jaideep Gupta, learned Senior Advocate appearing on behalf of the Respondent, has on the other hand referred to Section 2(5) of the West Bengal Sales Tax Act, and stated that the very first pre-requisite for falling within the provisions of that Act is that there should be a profit motive, as defined, and since there is none in members' clubs, the charging section will not be attracted on the facts of these cases. He relied strongly upon State of Gujarat v. Raipur Manufacturing Co. Ltd. (1967) 1 SCR 618, for the proposition that the expression "profit-motive" does not refer to surplus being made, but only refers to a motive of making money from sale

transactions. He then referred to Section 25 of the Companies Act and, in particular, Section 25(1)(b), which states that a company is registered under Section 25 only if it intends to apply its profits and other income in promoting its objects, and prohibits payment of dividend to its members. For this reason, the ratio of Bacha F. Guzdar (supra) cannot possibly apply to members' clubs in the form of Section 25 companies. He then referred to the Statement of Objects and Reasons, which according to him, made it clear that only unincorporated clubs or associations of persons were referred to in Article 366(29-A)(e). He also argued that under no circumstances can a company be fitted within "body of persons", as a result of which Article 366(29-A)(e) will not apply to sales of food or refreshments by a club to its members. According to him, the Constitution (Forty-sixth Amendment) Act, 1982 ("hereinafter referred to as the "46th Amendment"), which inserted Clause (29-A) into Article 366 of the Constitution, has not done away with the Young Men's Indian Association (supra), as there cannot possibly be a supply of goods by one person to itself; and that, therefore, the doctrine of agency/trust/mutuality continues as before. He referred to the definition of "consideration" in Section 2(d) of the Indian Contract Act, 1872, which according to him made it clear that consideration must flow from one person to another and in the absence of two players, as in the case of Young Men's Indian Association (supra), Article 366(29-A) would have no application. When it came to the application of 366(29-A)(f), Shri Gupta stated that it is clear that (f) was enacted for a very different purpose, namely, to get over the judgment of Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi (1978) 4 SCC 36, which dealt with the service element contained in a bill for food or drinks being consumed in restaurants. The expression "in any other manner whatsoever" only seeks to re-emphasise that where goods are supplied in such restaurants, then the service element will not interdict the State Legislature from taxing food etc. under Article 366(29-A)(f). In any case, going back to sub-clause (e), the learned Senior Advocate said that it is clear that the expression "unincorporated associations" must be read as ejusdem generis with "body of persons" and so read would not include members' clubs in corporate form.

7. Having heard the learned Senior Advocates on behalf of both sides, it is important to first set out the relevant Constitutional and statutory provisions. Article 366(29-A) reads as follows:

"366. (29-A) "tax on the sale or purchase of goods" includes—

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

8. The relevant Sections in the West Bengal Sales Tax Act are also set out herein below:

"2. Definitions

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(5) "business" includes—

(a) any trade, commerce, manufacture, execution of works contract or any adventure or concern in the nature of trade, commerce, manufacture or execution of works contract, whether or not such trade, commerce, execution of works contract, adventure or concern is carried on with the motive to make profit and whether or not any profit accrues from such trade, commerce, manufacture, execution of works contract, adventure or concern; and

(b) Any transaction in connection with, or ancillary or incidental to, such trade, commerce, manufacture, execution of works contract, adventure or concern;

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(10) "dealer" means any person who carries on the business of selling or purchasing goods in West Bengal or any person making sales under section 15, and includes—

(a) an occupier of a jute-mill or shipper of jute;

(b) Government, a local authority, a statutory body, a trust or other body corporate which, or a liquidator or a receiver appointed by a Court in respect of a person, being a dealer as defined in this clause, who, whether or not in the course of business, sells, supplies or distributes directly or otherwise goods for cash or for deferred payment or for commission, remuneration or other valuable consideration.

Explanation I: A co-operative society or a club or any association which sells goods to its members is a dealer.

Explanation II: A factor, a broker, a commission agent, a del credere agent, an auctioneer, an agent for handling or transporting of goods or handling of document of title to goods or any other mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of selling goods and who has, in the customary course of business, authority to sell goods belonging to principals, is a dealer;

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(30) "sale" means any transfer of property in goods for cash, deferred payment or other valuable consideration, and includes-

(a) any transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) any delivery of goods on hire-purchase or any system of payment by instalments;

(c) any transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(d) any supply, by way of, or as part of, any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink(whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;

(e) any supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration,

and such transfer, delivery, or supply of any goods shall be deemed to be a sale of those goods by the person or unincorporated association or body of persons making the transfer, delivery, or supply and a purchase of those goods by the person to whom such transfer, delivery, or supply is made, but does not include a mortgage, hypothecation, charge or pledge.

Explanation: A sale shall be deemed to take place in West Bengal if the goods are within West Bengal –

(a) In the case of specific or ascertained goods, at the time of the contract of sale is made; and

(b) In the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller, whether the assent of the buyer to such appropriation is prior or subsequent to the appropriation:

PROVIDED that where there is a single contract of sale in respect of goods situated in West Bengal as well as in places outside West Bengal, provisions of this Explanation shall apply as if there were a separate contract of sale in respect of the goods situated in West Bengal.

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9. Incidence of tax on sale

(1) Subject to the provisions of this Act, with effect from the appointed day –

(a) Every dealer –

(i) who has been liable immediately before the appointed day to pay tax under section 4 or section 8 of the Bengal Finance (Sales Tax) Act, 1941 (Bengal Act VI of 1941), and who would have continued to be so liable on such appointed day under that Act had this Act not come into force, or

(ii) whose gross turnover during a year first exceeds the taxable quantum as applicable to him under the Bengal Finance (Sales Tax) Act, 1941, on the day immediately preceding the appointed day,

(b) Every dealer registered under the West Bengal Sales Tax Act, 1954 (West Bengal Act IV of 1954), who is in possession of a registration certificate under that Act on the day immediately before the appointed day, and to whom clause (a) does not apply, and

(c) Every dealer registered under the West Bengal Motor Spirits Sales Tax Act, 1974, (West Bengal Act XI of 1974), who is in possession of a registration certificate under that Act on the day immediately before the appointed day, and to whom clause (a) or clause (b) does not apply,

shall be liable to pay tax under this Act on all sales, other than those referred to in section 15, effected on or after the appointed day.

(2) Every dealer to whom sub-section (1) does not apply shall, if his gross turnover of sales calculated from the commencement of any year exceeds the taxable quantum at any time within such year, be liable to pay tax under this Act on all sales, other than those referred to in section 15, effected on and from the date immediately following the day on which such gross turnover of sales first exceeds the taxable quantum.

(3) In this Act the expression “taxable quantum” means-

(a) In relation to any dealer who imports for sale any goods, other than those specified in Schedule IV, into West Bengal, 30,000 Rupees; or

(b) [***]

(c) In relation to any dealer who manufactures or produces any goods, other than those specified in Schedule IV [***] for sale, 1,00,000 rupees; or

(d) [***]

(e) In relation to any other dealer, 5,00,000 rupees, excluding turnover of sales of goods specified in Schedule IV.

(4) Every dealer who has become liable to pay tax under sub-section (1) or sub-section (2) shall continue to be so liable until the expiry of three consecutive years, during each of which his gross turnover of sales has failed to exceed the taxable quantum, and such further period after the date of such expiry as may be prescribed, and on the expiry of this later period his liability to pay tax under subsection (1) or sub-section (2) shall cease.

Explanation: For the purposes of sub-section (4), in computing the period of three consecutive years in respect of a dealer who has become liable to pay tax under sub-section (1), the year or years which expired before the appointed day during which or each of which the gross turnover failed to exceed the taxable quantum referred to in the Bengal Finance (Sales Tax) Act, 1941, shall be included.

(5) Every dealer whose liability to pay tax under subsection (1) or sub-section (2) has ceased under subsection (4), shall, if his gross turnover of sales calculated from the commencement of any year again exceeds the taxable quantum at any time within such year, be liable to pay such tax on all sales, other than those referred to in Section 15, effected on and from the date immediately following the day on which such gross turnover of sales against first exceeds the taxable quantum.

(6) The Commissioner shall, after making such enquiry as he may think necessary and after giving the dealer an opportunity of being heard, fix the date on and from which such dealer shall become liable to pay tax under sub-section (2) or sub-section (5).'"

9. The 61st Law Commission Report, which deliberated on the subject matter of Article 366 (29-A), dealt with sales by associations to members

under Chapter 1-D. of the Report. It began by referring to Enfield India Ltd. (supra) and then referred to Young Men's Indian Association (supra) as follows:

> "1D.3. Unincorporated associations- Though the above case related to a co-operative society, the court (Shah, J.) did make certain observations as to the position in regard to unincorporated societies, as follows:-
>
> > "In the case of an unincorporated society, club or a firm or an association, ordinarily the supply and distribution by such a society, club, firm or an association, of goods belongs to its members, may not result in sale of the goods which are jointly held for the benefit of the members of the society, club, firm or the association, when, by virtue of the relinquishment of the common rights of the members, the property stands transferred to a member in payment of a price, and the transaction may not prima facie be regard as a 'sale' within the meaning of the Act."
>
> But the Court made it very clear (towards the end of the judgment) that it was not called upon in this case to decide whether an unincorporated club which supplies goods for a price to its members, may be regarded as selling goods to its members.
>
> 1D.4. Supply by club to members not 'sale'.- Then, there are clubs. In a case decided by the Supreme Court on appeal from Madras, the Cosmopolitan club, Madras, the Youngmen's Indian Association, Madras and the Lawley Institute, Ootacamund, filed writ petitions under Article 226 of the Constitution, challenging the levy of sales tax under Madras General Sales Tax Act, 1959, on snacks, beverages and other articles supplied to their members or guests. The High Court held that the club was not a 'dealer' within the meaning of section 2(g), read with Explanation I, of the Madras Act and that there was no 'sale' within the meaning of section 2(h), read with Explanation I, of the Act. On appeal to the Supreme Court it was held that a member's club cannot be made subject to the provisions of the Sale Tax Act concerning sales, because the members are joint owners of all the club property. The supply of articles to a member at a fixed price by the Club cannot be regarded as a "sale";
>
> 1D.5.No 'sale' in such circumstances in England.- It is necessary to mention here that, in England, it was held in Graff v. Evans, that

a transaction whereby a member of a club acquired liquor which was the property of the club was not sale but merely transfer of special property. This case was decided eleven years before the English Act relating to the sale of goods was passed in 1893. The basis of the decision was that the transaction was a release of the rights of the other members to the "purchaser". It might have been thought, therefore, that when section 1(1) of the Sale of Goods act specifically enacted (in 1893) that—

"……There may be a contract of sale between one part owner and another,"

The basis of Graff v. Evans had ceased to be valid.

It may be noted that the Indian Sale of Goods Act has a similar provision. But in Davies v. Burnett, a Divisional Court followed the earlier case, and the Sale of Goods Act was not even referred to. A well-known writer has stated, that "this view of the law has now been accepted for so long that it is unlikely to be upset by a higher court."

The English cases mostly relate to licensing. But the point to be noted is, that the provision in the Sale of Goods Act as to "part owner" has not come in their way.

The position in this respect, as was observed in an Australian case, is simply that "a part of the common property is appropriated to the separate use of the members, and he makes a corresponding contribution from his separate property to the common fund." The question must, of course, always be as to the meaning of the word "sale' or "sell" in the particular statute which comes under consideration. If no reason is seen for giving the word an extended meaning, one would think it perfectly correct to say that an ordinary unincorporated members' club does not "sell", in the true sense, liquor which a member obtains from the common store on payment of money to the common fund.

1D.6. General observations.- The broad general principle which constitutes a common feature of these transactions, in the absence of the transfer of property. It would appear that these transactions are not "sale", because there is no transfer of property.

1D.6A. This, then, is the present position. The question now to be considered is , whether is desirable that the taxability of such transactions should be provided for by expanding the concept of

"sale" for the purpose of the legislative power of the States,—a result which can be achieved only by amending the Constitution.

1D.7. Amendment of Constitution not needed.- We do not think that it would be appropriate to amend the Constitution of this purpose. The number of such clubs and associations would not be very large. Moreover, taxation of such transactions might discourage the co-operative movement.

1D.8. Unincorporated associations exist various arrangements. - Unincorporated associations exist in a "myriad of structural arrangements." As a general proposition, each is liable for the activities of its members when the activity has been authorised, supported, or ratified by the association.

1D.9. No evasion.- It should be also noted that there can be no serious question of evasion in such cases. A member really takes his own goods.

1D.10. We, therefore, do not recommend any change."

10. It will be seen from the above that the Law Commission was of the view that the Constitution ought not to be amended so as to bring within the tax net members' clubs. It gave three reasons for so doing. First, it stated that the number of such clubs and associations would not be very large; second, taxation of such transactions might discourage the cooperative movement; and third, no serious question of evasion of tax arises as a member of such clubs really takes his own goods.

11. However, despite the aforesaid, Article 366(29-A) included within it sub-clause (e).

12. At this point, it is important to refer to the Statement of Objects and Reasons which led upto the 46th Amendment. The relevant portions of the Statement of Objects and Reasons read as follows:

"Sales tax laws enacted in pursuance of the Government of India Act, 1935 as also the laws relating to sales tax passed after the coming into force of the Constitution proceeded on the footing that the expression "sale of goods", having regard to the rule as to broad interpretation of entries in the legislative lists, would be given a wider connotation. However, in Gannon Dunkerley's case (A.I.R. 1958 S.C. 560), the Supreme Court held that the expression "sale of goods" as used in the entries in the Seventh Schedule to the Constitution has the same meaning as in the Sale of Goods Act,

1930. This decision related to works contracts.

By a series of subsequent decisions, the Supreme Court has, on the basis of the decision in Gannon Dunkerley's case, held various other transactions which resemble, in substance, transactions by way of sales, to be not liable to sales tax. As a result of these decisions, a transaction, in order to be subject to the levy of sales tax under entry 92A of the Union List or entry 54 of the State List, should have the following ingredients, namely, parties competent to contract, mutual assent and transfer of property in goods from one of the parties to the contract to the other party thereto for a price.

This position has resulted in scope for avoidance of tax in various ways. An example of this is the practice of inter- State consignment transfers, i.e., transfer of goods from head office or a principal in one State to a branch or agent in another State or vice versa or transfer of goods on consignment account, to avoid the payment of sales tax on inter-State sales under the Central Sales Tax Act. While in the case of a works contract, if the contract treats the sale of materials separately from the cost of the labour, the sale of materials would be taxable, but in the case of an indivisible works contract, it is not possible to levy sales tax on the transfer of property in the goods involved in the execution of such contract as it has been held that there is no sale of the materials as such and the property in them does not pass as moveables. Though practically the purchaser in a hire-purchase agreement gets the goods on the date of the hire-purchase, it has been held that there is sale only when the purchaser exercises the option to purchase at a much later date and therefore only the depreciated value of the goods involved in such transaction at the time the option to purchase is exercised becomes assessable to sales tax. Similarly, while sale by a registered club or other association of persons (the club or association of persons having corporate status) to its members is taxable, sales by an unincorporated club or association of persons to its members is not taxable as such club or association, in law, has no separate existence from that of the members. In the Associated Hotels of India case (A.I.R. 1972 S.C. 1131), the Supreme Court held that there is no sale involved in the supply of food or drink by a hotelier to a person lodged in the hotel.

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> The proposed amendments would help in the augmentation of the State revenues to a considerable extent. Clause 6 of the Bill seeks to validate laws levying tax on the supply of food or drink for consideration and also the collection or recoveries made by way of tax under any such law. However, no sales tax will be payable on food or drink supplied by a hotelier to a person lodged in the hotel during the period from the date of the judgment in the Associated Hotels of India case and the commencement of the present Amendment Act if the conditions mentioned in sub-clause (2) of clause 6 of the Bill are satisfied. In the case of food or drink supplied by Restaurants this relief will be available only in respect of the period after the date of judgment in the Northern India Caterers (India) Limited case and the commencement of the present Amendment Act."
>
> (emphasis supplied)

13. At this juncture, it is important to advert to the decision of this Court in BSNL v. Union of India (2006) 3 SCC 1. This judgment concerned itself with the nature of the transaction by which mobile phone connections are enjoyed. The question that arose before this Court was whether the transaction in question was a service transaction and not a transaction for sale or supply of goods. In answering this question, the Court, after referring to Article 366(29-A), observed as follows:

> "41. Sub-clause (a) covers a situation where the consensual element is lacking. This normally takes place in an involuntary sale. Sub-clause (b) covers cases relating to works contracts. This was the particular fact situation which the Court was faced with in Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] and which the Court had held was not a sale. The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] was directly overcome. Sub-clause (c) deals with hire-purchase where the title to the goods is not transferred. Yet by fiction of law, it is treated as a sale. Similarly the title to the goods under sub-clause (d) remains with the transferor who only transfers the right to use the goods to the purchaser. In other words, contrary to A.V. Meiyappan decision [(1967) 20 STC 115 (Mad)] a lease of a negative print of a picture would be a sale.

> Sub-clause (e) covers cases which in law may not have amounted to sale because the member of an incorporated association would have in a sense begun as both the supplier and the recipient of the supply of goods. Now such transactions are deemed sales. Sub-clause (f) pertains to contracts which had been held not to amount to sale in State of Punjab v. Associated Hotels of India Ltd. [(1972) 1 SCC 472 : (1972) 29 STC 474] That decision has by this clause been effectively legislatively invalidated."

14. In the separate concurring judgment of Lakshmanan, J., the learned Judge observed thus:

> "105. The amendment introduced fiction by which six instances of transactions were treated as deemed sale of goods and that the said definition as to deemed sales will have to be read in every provision of the Constitution wherever the phrase "tax on sale or purchase of goods" occurs. This definition changed the law declared in the ruling in Gannon Dunkerley & Co. [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] only with regard to those transactions of deemed sales. In other respects, law declared by this Court is not neutralised. Each one of the sub-clauses of Article 366(29-A) introduced by the Forty-sixth Amendment was a result of ruling of this Court which was sought to be neutralised or modified. Sub-clause (a) is the outcome of New India Sugar Mills Ltd. v. CST [(1963) 14 STC 316 : 1963 Supp (2) SCR 459] and Vishnu Agencies (P) Ltd. v. CTO [(1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR 1978 SC 449] . Sub-clause (b) is the result of Gannon Dunkerley & Co. [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] Sub-clause (c) is the result of K.L. Johar and Co. v. CTO [(1965) 2 SCR 112 : AIR 1965 SC 1082] . Sub-clause (d) is consequent to A.V. Meiyappan v. CCT [(1967) 20 STC 115 (Mad)] . Sub-clause (e) is the result of CTO v. Young Men's Indian Assn. (Regd.) [(1970) 1 SCC 462] . Sub-clause (f) is the result of Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi [(1978) 4 SCC 36 : 1978 SCC (Tax) 198] and State of Punjab v. Associated Hotels of India Ltd. [(1972) 1 SCC 472 : (1972) 29 STC 474]"

15. The observations made in the judgment on sub-clause (e) cannot possibly be said to form the ratio-decidendi of the judgment, as what came up for consideration in that case was whether electro-magnetic waves can be said to be 'goods', so as to be the subject matter of taxation within Article 366. This was answered in the negative as follows:

> "71. For the reasons stated by us earlier we hold that the electromagnetic waves are not "goods" within the meaning of the word either in Article 366(12) or in the State legislations. It is not in the circumstances necessary for us to determine whether the telephone system including the telephone exchange is not goods but immovable property as contended by some of the petitioners."

In any case, paragraph 41 of the judgment, when it refers to sub-clause (e), cannot possibly refer to "incorporated" associations contrary to the plain language of sub-clause (e), which refers to "unincorporated" associations.

16. In point of fact, this Court went on to state that the judgment in State of Madras v. Gannon Dunkerley AIR 1958 SC 560 was not done away with altogether and actually survived the 46th Amendment in at least two respects as follows:

> "43. Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] survived the Forty- sixth Constitutional Amendment in two respects. First with regard to the definition of "sale" for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Article 366(29-A) operate. By introducing separate categories of "deemed sales", the meaning of the word "goods" was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery, etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. The courts must move with the times. [See Attorney General v. Edison Telephone Co. of London Ltd., (1880) 6 QBD 244 : 43 LT 697] But the Forty-sixth Amendment does not give a licence, for example, to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the Forty-sixth Amendment. That ingredient of a sale continues to have the same definition. The second respect in which Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29-A). Transactions which are mutant sales are limited to the clauses of Article 366(29-A). All other transactions would have to qualify as sales within the meaning of the Sales of Goods Act, 1930 for the purpose of levy of sales tax."

17. We have thus to discover for ourselves whether the doctrine of mutuality has been done away with by Article 366(29-A)(e), and whether the ratio of Young Men's Indian Association (supra) would continue to operate even after the 46th Amendment.

18. At this juncture, it is important to set out the two pillars, so to speak, on which the Young Men's Indian Association (supra) is largely based. In Graff v. Evans (1882) 8 Q.B. 373, the Grosvenor Club was incorporated in the form of a trust, the Appellant Graff acting as Manager of the club, for and on behalf of a Managing Committee, which conducted the general business of the club. Food and refreshments such as wine, beer and spirits were served to members on payment for the same. The question was whether a license was required under the Licence Act, 1872, to sell liquor by retail. In this context, the Queen's Bench Division held:

> "I think the true construction of the rules is that the members were the joint owners of the general property in all the goods of the club, and that the trustees were their agents with respect to the general property in the goods, although they had other agents with respect to special properties in some of the goods. I am unable to follow the reasoning of the learned magistrate in saying that the question depends upon whether or not a profit was made upon the sale of the liquors. It appears to me immaterial whether the sum a member pays for the liquor is equal to or more or less than the cost price. The transaction does not become the more or the less a sale on that account. It cannot be the true view that if the member pays a sum exactly equal to the cost price there is no sale within the section, but that if he pays more than the cost price there is. The section must be construed by looking at the language used, and taking a large view of the object of the legislation. The legislature have come to the conclusion that it is unadvisable that intoxicating liquors should be sold anywhere without a license. The enactment is limited to "sales" of intoxicating liquors, and only seems aimed at sales by retail traders, because the wholesale trader is not touched. The question here is, Did Graff, the manager, who supplied the liquors to Foster, effect a "sale" by retail? I think not. I think Foster was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association by which he subscribed a sum to the funds of the club,

> and became entitled to have ale and whisky supplied to him as a member at a certain price. I cannot conceive it possible that Graff could have sued him for the price as the price of goods sold and delivered. There was no contract between two persons, because Foster was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor."

19. Likewise, in Trebanog Working Men's Club and Institute Ltd. v. Macdonald (1940) 1 K.B. 576, a similar question arose before the Kings Bench Division. Graff (supra) was applied and followed thus:

> "In our opinion, the decision in Graff v. Evans applies to and governs the present case. Once it is conceded that a members' club does not necessarily require a licence to serve its members with intoxicating liquor, because the legal property in the liquor is not in the members themselves, it is difficult to draw any legal distinction between the various legal entities that may be entrusted with the duty of holding the property on behalf of the members, be it an individual, or a body of trustees, or a company formed for the purpose, so long as the real interest in the liquors remains, as in this case it clearly does, in the members of the club. There is no magic in this connection in the expressions "trustee" or "agent." What is essential is that the holding of the property by the agent or trustee must be a holding for and on behalf of, and not a holding antagonistic to, the members of the club. We are dealing here with a quasi-criminal case, where the Court seeks to deal with the substance of a transaction rather than the legal form in which it may be clothed."

20. The stage is now set for a consideration of the judgment in Young Men's Indian Association (supra). Three separate appeals were heard and decided by a Six Judge Bench of this Court in this case. The first considered the Cosmopolitan Club, Madras, which was registered under Section 26 of the Companies Act, 1913 as a non-profit earning institution. Young Men's Indian Association was also considered, being a Society registered under the Societies Registration Act, 1860. The third case involved the Lawley Institute which came into existence by a deed of trust. In all these cases, food preparations were supplied to members at prices fixed by the club. In the Cosmopolitan Club case, a member is allowed to bring guests with him, but if any article of food is consumed by the guest, it is the member who has to pay for the same, which was similar to the position in the Young Men's Indian Association. The Madras Sales Tax Act,

1959 came up for consideration in the aforesaid judgment. This Court referring to the two English cases cited hereinabove held:

> "7. The law in England has always been that members' clubs to which category the clubs in the present case belong cannot be made subject to the provisions of the Licensing Acts concerning sale because the members are joint owners of all the club property including the excisable liquor. The supply of liquor to a member at a fixed price by the club cannot be regarded to be a sale. If, however, liquor is supplied to and paid for by a person who is not a bona fide member of the club or his duly authorised agent there would be a sale. With regard to incorporated clubs a distinction has been drawn. Where such a club has all the characteristics of a members' club consistent with its incorporation, that is to say, where every member is a shareholder and every shareholder is a member, no licence need be taken out if liquor is supplied only to the members. If some of the shareholders are not members or some of the members are not shareholders that would be the case of a proprietary club and would involve sale. Proprietary clubs stand on a different footing. The members are not owners of or interested in the property of the club. The supply to them of food or liquor though at a fixed tariff is a sale. (See Halsbury's Laws of England, 3rd Edn., Vol. 5, pp. 280- 281). The principle laid down in Graff v. Evans [(1882) 8 QBD 373] had throughout been followed. In that case Field, J., put it thus:
>
> "I think the true construction of the Rules is that the members were the joint owners of the general property in all the goods of the club, and that the trustees were their agents with respect to the general property in the goods."
>
> The difficulty felt in the legal property ordinarily vesting in the trustees of the members' club or in the incorporated body was surmounted by invoking the theory of agency i.e. the club or the trustees acting as agents of the members. According to Lord Hewart (L.C.J.) in Trebanog Working Men's Club and Institute Ltd. v. Macdonald [(1940) 1 AELR 454] once it was conceded that a members' club did not necessarily require a licence to serve its members with intoxicating liquor it was difficult to draw any distinction between the various legal entities which might be entrusted with the duty of holding the property on behalf of members, be it an individual or a body of trustees or a company formed for the purpose so long as the real interest in the liquor remained in the members of the club.

What was essential was that the holding of the property by the agent or trustee must be a holding for and on behalf of and not a holding antagonistic to members of the club.

8. In the various cases which came to be decided by the High Courts in India the view which had prevailed in England was accepted and applied. We may notice the decisions of the Madhya Pradesh High Court in Bengal Nagpur Cotton Mills Club, Rajnandangaon v. Sales Tax Officer, Raipur [8 STC 781] and of the Mysore High Court in Century Club v. State of Mysore [16 STC 38]. In the former it was held that the supply to the member of a members' club registered under Section 26 of the Indian Companies Act, 1913 of refreshments purchased out of club funds which consisted of members' subscription was not a transfer of property from the club as such to a member and the club was not liable to Sales Tax under the C.P. and Berar Sales Tax Act, 1947, in respect of such supplies of refreshments. The principle adverted to in Trebanog Working Men's Club was adopted and it was said that if the agent or a trustee supplied goods to the members such supplies would not amount to a transaction of sale. The Mysore court expressed the same view that a purely members' club which makes purchases through a Secretary or Manager and supplies the requirements to members at a fixed rate did not in law sell those goods to the members."

21. The judgment heavily relied upon by Shri Dwivedi, namely, Enfield India Ltd. (supra) was then distinguished thus:

"9. On behalf of the appellants reliance has been placed on a decision of this Court in Deputy Commercial Tax Officer v. Enfiend India Ltd. [(1968) 2 SCR 421] In that case the Explanation to Section 2(g) was found to be intra vires and within the competence of the State Legislature. The judgment proceeded on the footing that when a cooperative society supplied refreshments to its members for a price the following four constituent elements of sale were present: (1) parties competent to contract; (2) mutual consent; (3) thing, the absolute or general property in which is transferred from the seller to the buyer and (4) price in money paid or promised. The mere fact that the society supplied the refreshments to its members alone and did not make any profit was not considered sufficient to establish that the society was acting only as an agent of its members. As a registered society was a body corporate it could not be assumed that the property which it held was the

property of which its members were owners. The English decisions were distinguished on the ground that the courts in those cases were dealing with matters of quasi-criminal nature."

22. Finally, the Court concluded:

"11. The essential question, in the present case, is whether the supply of the various preparations by each club to its members involved a transaction of sale within the meaning of the Sale of Goods Act, 1930. The State Legislature being competent to legislate only under Entry 54, List II, of the Seventh Schedule to the Constitution the expression "sale of goods" bears the same meaning which it has in the aforesaid Act. Thus in spite of the definition contained in Section 2(n) read with Explanation I of the Act if there is no transfer of property from one to another there is no sale which would be eligible to tax. If the club even though a distinct legal entity is only acting as an agent for its members in matter of supply of various preparations to them no sale would be involved as the element of transfer would be completely absent. This position has been rightly accepted even in the previous decision of this Court.

12. The final conclusion of the High Court in the judgment under appeal was that the case of each club was analogous to that of an agent or mandatory investing his own monies for preparing things for consumption of the principal, and later recouping himself for the expenses incurred. Once this conclusion on the facts relating to each club was reached it was unnecessary for the High Court to have expressed any view with regard to the vires of the Explanations to Sections 2(g) and 2(n) of the Act. As no transaction of sale was involved there could be no levy of tax under the provisions of the Act on the supply of refreshments and preparation by each one of the clubs to its members."

(emphasis supplied)

23. Shah, J., who was the author in Enfield India Ltd. (supra), arrived at the same conclusion - but without applying the English cases - stating that the English cases dealt with criminal proceedings, whereas the present case was the case of a taxing statute.

24. It can be seen that Young Men's Indian Association (supra) expressly distinguished Enfield India Ltd. (supra), in paragraph 9 therein. The judgment in Enfield India Ltd. (supra), held on the facts of that case that there was nothing to show that the society in that case was acting as

an agent of its members in providing facilities for making food available to them. A distinction was then made between a society which is a body corporate and its members, stating that the body corporate is a separate person in law. It then referred to various English judgments including Trebanog (supra), and refused to apply them on the ground that they were cases which dealt with criminal proceedings. The judgment then ended by stating that the Court was not called upon to decide whether an unincorporated club, supplying goods for a price to its members, may be regarded as selling goods to its members.

25. It can be seen from the above, that the ratio of the Three Judge Bench in Enfield India Ltd. (supra) does not square with the ratio of the Six Judge Bench in Young Men's Indian Association (supra). Young Men's Indian Association (supra) is expressly based upon the English judgments which disregarded the corporate form and stated that there could not be a sale, on the facts of those cases, between two persons because Foster, i.e. a member of the club, could be regarded as vendor as well as purchaser in Graff (supra). Likewise, in Trebanog (supra), the form in which the club was clothed was of no moment, it being stated that there is no magic in the expressions "trustee or agent". What is essential is that the holding of the property by the trustee or agent must be a holding for and on behalf of, and not a holding antagonistic to, the members of the club.

26. It is thus clear that Enfield India Ltd. (supra) does not take the matter any further. Young Men's Indian Association (supra) made no distinction between a club in the corporate form and a club by way of a registered society or incorporated by a deed of trust. What is the essence of the judgment is that the holding of property must be a holding for and on behalf of the members of the club, there being no transfer of property from one person to another. Proprietary clubs were distinguished, as there the owner of the club would not be the members themselves, but somebody else.

27. Shri Dwivedi sought to rely upon Bacha F. Gazdar (supra) for the proposition that a shareholder acquires no interest in the assets of the company, as a result of which the judgment in Young Men's Indian Association (supra) needs to be revisited. The present appeal deals with a company that is registered under Section 25 of the Companies Act. Section 25(1) reads as follows:

> "25. Power to dispense with "Limited" in name of charitable or other company. – (1) Where it is proved to the satisfaction of the Central Government that an association–

(a) is about to be formed as a limited company for promoting commerce, art, science, religion, charity or any other useful object, and

(b) intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members,

the Central Government may by licence, direct that the association may be registered as a company with limited liability, without the addition to its name of the word "Limited" or the words "Private Limited".

28. It will thus be seen that in these companies, payment of dividend to shareholders is prohibited, and the profits, if any, have to be applied to promote the objects of the company. Bacha F. Guzdar (supra) did not deal with a Section 25 company - it dealt with two tea companies which were Public Limited Companies, registered under the Companies Act. It is in this context that this Court held:

"That a shareholder acquires a right to participate in the profits of the company may be readily conceded but it is not possible to accept the contention that the shareholder acquires any interest in the assets of the company. The use of the word 'assets' in the passage quoted above cannot be exploited to warrant the inference that a shareholder, on investing money in the purchase of shares, becomes entitled to the assets of the company and has any share in the property of the company. A shareholder has got no interest in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them…The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders. The dividend is a share of the profits declared by the company as liable to be distributed among the shareholders. Reliance is placed on behalf of the appellant on a passage in Buckley's Companies Act (12th Edn.), p. 894 where the etymological meaning of dividend is given as dividendum, the total divisible sum but in its ordinary sense it means the sum paid and received as the quotient forming the share of the divisible sum payable to the recipient. This statement does not justify the contention that shareholders are owners of a divisible sum or that they are owners of the property of the company. The proper approach to the solution of the Question 1s to concentrate on the

plain words of the definition of agricultural income which connects in no uncertain language revenue with the land from which it directly springs and a stray observation in a case which has no bearing upon the present question does not advance the solution of the question. There is nothing in the Indian law to warrant the assumption that a shareholder who buys shares buys any interest in the property of the company which is a juristic person entirely distinct from the shareholders. The true position of a shareholder is that on buying shares an investor becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. He has undoubtedly a further right to participate in the assets of the company which would be left over after winding up but not in the assets as a whole as Lord Anderson puts it."

In Cricket Club of India Ltd. v. Bombay Labour Union (1969) 1 SCR 600, this Court decided a preliminary objection taken in favour of the Cricket Club of India, that the said Club is not an "industry", and consequently, the Industrial Disputes Act, 1947 would not apply to such members' club. A contention was raised against this proposition - that the said Club had been incorporated as a limited company under the Companies Act, and would thus have to be treated as a separate legal entity apart from its members, and would therefore fall within the definition of "industry" under the Industrial Disputes Act, 1947. This was negatived by the Court, stating at page 614 of the said judgment:

"Lastly, reference was made to the circumstance that, unlike the Madras Gymkhana Club, the Club has been incorporated as a Limited Company under the Indian Companies Act. It was urged that the effect of this incorporation in law was that the Club became an entity separate and distinct from its Members, so that, in providing catering facilities, the Club, as a separate legal entity, was entering into transactions with the Members who were distinct from the Club itself. In our opinion, the Tribunal was right in holding that the circumstance of incorporation of the Club as a Limited Company is not of importance. It is true that, for purposes of contract law and for purposes of suing or being sued, the fact of incorporation makes the Club a separate legal entity; but, in deciding whether the Club is an industry or not, we cannot base our decision on such legal technicalities. What we have to see is

the nature of the activity in fact and in substance. Though the Club is incorporated as a Company, it is not like an ordinary Company constituted for the purpose of carrying on business. There are no shareholders. No dividends are ever declared and no distribution of profits takes place. Admission to the Club is by payment of admission fee and not by purchase of shares. Even this admission is subject to balloting. The membership is not transferable like the right of shareholders. There is the provision for expulsion of a Member under certain circumstances which feature never exists in the case of a shareholder holding shares in a Limited Company. The membership is fluid. A person retains rights as long as he continues as a Member and gets nothing at all when he ceases to be a Member, even though he may have paid a large amount as admission fee. He even loses his rights on expulsion. In these circumstances, it is clear that the Club cannot be treated as a separate legal entity of the nature of a Limited Company carrying on business. The Club, in fact, continues to be a Members' Club without any shareholders and, consequently, all services provided in the Club for Members have to be treated as activities of a self-serving institution."

29. Given the differences pointed out in Cricket Club of India (supra) between clubs registered as Companies under Section 25 of the Companies Act and other companies, it is clear that the ratio decidendi in the judgment in Bacha F. Guzdar (supra) would not apply to such clubs - there being no shareholders, no dividends declared, and no distribution of profits taking place. Such clubs, therefore, cannot be treated as separate in law from their members.

30. The doctrine of mutuality as applied to clubs is elaborately discussed in Bangalore Club v. Commissioner of Income Tax and Anr. (2013) 5 SCC 509. In discussing the fact that in members' clubs there is a complete identity between contributors and participators, this Court held:

"16. On this aspect of the doctrine, especially with regard to the non-members, Halsbury's Laws of England, 4th

Edn., Reissue, Vol. 23, Paras 222 and 224 (pp. 152 and 154) states:

"222.General features of mutual trading.— … Where the trade or activity is mutual, the fact that as regards certain activities, certain members only of the association take advantage of the facilities which it offers does not affect the mutuality of the enterprise.

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224.Clubs, etc.—Members' clubs are an example of a mutual undertaking; but, where a club extends facilities to non-members, to that extent the element of mutuality is wanting."

17.Simon's Taxes, Vol. B, 3rd Edn., Paras B1.218 and B1.222 (pp. 159 and 167) formulate the law on the point, thus:

"… it is settled law that if the persons carrying on a trade do so in such a way that they and the customers are the same persons, no profits or gains are yielded by the trade for tax purposes and therefore no assessment in respect of the trade can be made. Any surplus resulting from this form of trading represents only the extent to which the contributions of the participators have proved to be in excess of requirements. Such a surplus is regarded as their own money and returnable to them. In order that this exempting element of mutuality should exist it is essential that the profits should be capable of coming back at some time and in some form to the persons to whom the goods were sold or the services rendered….

***

It has been held that a company conducting a members' (and not a proprietary) club, the members of the company and of the club being identical, was not carrying on a trade or business or undertaking of a similar character for purposes of the former corporation profits tax

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A members' club is assessable, however, in respect of profits derived from affording its facilities to non-members. Thus, in Carlisle and Silloth Golf Club v. Smith (Surveyor of Taxes) [(1913) 3 KB 75 (CA)], where a members' golf club admitted non-members to play on payment of green fees it was held that it was carrying on a business which could be isolated and defined, and the profit of which was assessable to income tax. But there is no liability in respect of profits made from members who avail themselves of the facilities provided for members."

18. In short, there has to be a complete identity between the class of participators and class of contributors; the particular label or form by which the mutual association is known is of no consequence. Kanga and Palkhivala explain this concept in The Law and Practice of Income Tax (8th Edn., Vol. I, 1990) at p. 113 as follows:

> "1. Complete identity between contributors and participators.—'… The contributors to the common fund and the participators in the surplus must be an identical body. That does not mean that each member should contribute to the common fund or that each member should participate in the surplus or get back from the surplus precisely what he has paid.' The Madras, Andhra Pradesh and Kerala High Courts have held that the test of mutuality does not require that the contributors to the common fund should willy-nilly distribute the surplus amongst themselves: it is enough if they have a right of disposal over the surplus, and in exercise of that right they may agree that on winding up the surplus will be transferred to a similar association or used for some charitable objects."

Rowlatt, J.'s observations in Thomas (Inspector of Taxes) v. Richard Evans & Co. Ltd. (1927) 1 K.B. 33 were then referred to as follows:

> "… But a company can make a profit out of its members as customers, although its range of customers is limited to its shareholders. If a railway company makes a profit by carrying its shareholders, or if a trading company, by trading with the shareholders even if it is limited to trading with them, makes a profit, that profit belongs to the shareholders in a sense, but it belongs to them qua shareholders. It does not come back to them as purchasers or customers; it comes back to them as shareholders upon their shares. Where all that a company does is to collect money from a certain number of people—it [does not matter] whether they are called members of the company or participating policy-holders —and apply it for the benefit of those same people, not as shareholders in the company, but as the people who subscribed it, then, as I understand Styles case [New York Life Insurance Co. v. Styles (Surveyor of Taxes), (1889) LR 14 AC 381 : (1886-90) All ER Rep Ext 1362 : (1889) 2 TC 460 (HL)] , there is no profit. If the people were to do the thing for themselves, there would be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference; there is still no profit. This is not because the entity of the company is to be disregarded; it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of shareholders, but in the character of those who have paid it. That, as I understand [it], is the effect of the decision in Styles case [New York Life Insurance Co. v. Styles (Surveyor of Taxes), (1889) LR 14 AC 381 : (1886-90) All ER Rep Ext 1362 : (1889) 2 TC 460 (HL)] ."

Given these observations, it is clear that if persons carry on a certain activity in such a way that there is a commonality between contributors

of funds and participators in the activity, a complete identity between the two is then established. This identity is not snapped because the surplus that arises from the common fund is not distributed among the members – it is enough that there is a right of disposal over the surplus, and in exercise of that right they may agree that on winding up, the surplus will be transferred to a club or association with similar activities. Most importantly, the surplus that is made does not come back to the members of the club as shareholders of a company in the form of dividends upon their shares. Since the members perform the activities of the club for themselves, the fact that they incorporate a legal entity to do it for them makes no difference. This judgment was also followed by this Court in Income Tax Officer, Mumbai v. Venkatesh Premises Cooperative Society Limited (2018) 15 SCC 37. What is of essence, therefore, in applying this doctrine is that there is no sale transaction between two persons, as one person cannot sell goods to itself.

31. What arises for deliberation now is whether the 46th Amendment has done away with the principles contained in Young Men's Indian Association (supra) and the other judgments on the doctrine of mutuality, as applied to members' clubs.

32. It can be seen that the 61st Law Commission Report had observed that there cannot be said to be any evasion of tax as a member of members' clubs "really takes his own goods" and, therefore, did not seek to tax such goods. The framers of the 46th Amendment thought otherwise, and made it plain that they sought to bring to tax sales made by unincorporated clubs or an association of persons to their members, as it was thought that such transactions were not taxable, as such club or associations in law has no separate existence from that of the members.

33. Quite obviously, the Statement of Objects and Reasons has not read the case of Young Men's Indian Association (supra) in its correct perspective. As has been noticed hereinabove, Young Men's Indian Association (supra) had three separate appeals before it, in one of which a company was involved. To state, therefore, that under the law as it stood on the date of the 46th Amendment, a sale of goods by a club having a corporate status to members is taxable, is wholly incorrect. Proceeding on this incorrect basis, what the 46th Amendment sought to do was to then bring to tax sales by clubs which have no separate existence from that of their members. In so doing, the 46th Amendment used the expression "any unincorporated association or body of persons". This expression, when read with the Statement of Objects and Reasons, makes it clear that it was only clubs which are not in corporate form that were sought to be

brought within the tax net, as it was wrongly assumed that sale of goods by members' clubs in the corporate form were taxable. "Any" is the equivalent of "all". This word, therefore, also lends itself to the aforesaid interpretation, as the emphasis of the legislature is on all unincorporated associations or bodies being brought within sub-clause (e).

34. Thus, it is clear that even going by Shri Dwivedi's eloquent argument as to the intention of the legislature, as seen through the object that the legislature sought to achieve, would lead to the aforesaid expression applying only to clubs which were not in the corporate form.

35. Even otherwise, on the assumption that "unincorporated association or body of persons" must be read disjunctively, "a body of persons" cannot be equated with "person". "Person" as defined by the General Clauses Act, (which applies to the interpretation of the Constitution vide Article 367) reads as follows:

"3. Definitions.-

xxx xxx xxx

(42) "person" shall include any company or association or body of individuals, whether incorporated or not;

Article 366(29-A) does not use this expression, as "person" would then include corporate persons as well. On the other hand, "body of persons" is used to make it clear beyond doubt that corporate persons are not referred to.

36. The definition of "person" in other Acts such as the Income Tax Act, 1961 is also very wide, and includes an association of persons or body of individuals, whether incorporated or not – see Section 2(31) of the Income Tax Act, 1961. Quite clearly, this language was available and in common usage by the legislature, as the definition of "person" under the Income Tax Act has stood in the statute book since 1961. The contrast in the language of the Income Tax Act, 1961 and Article 366(29-A)(e) again leads to the conclusion that "body of persons" would not refer to the corporate form unless "person" by itself is accompanied by the expression "whether incorporated or not".

37. Even otherwise, the "supply" of goods by an unincorporated association or body of persons has to be to a member for cash, deferred payment or other valuable consideration. As has been correctly argued by

Shri Jaideep Gupta, the definition of "consideration" in Section 2(d) of the Indian Contract Act, 1872 necessarily posits consideration passing from one person to another. The definition of "consideration" as stated in the Indian Contract Act, 1872 is as follows:

> "2. Interpretation-clause. - In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-
>
> xxx xxx xxx
>
> (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;"

The expression "valuable consideration" has, as has been pointed out in 'Pollock and Mulla, The Indian Contract & Specific Relief Acts (16th ed.)', been taken from an old English case Currie v. Misa (1875) LR 10 EX 153, and explained as follows:

> "A valuable consideration in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.
>
> The above definition brings out the idea of reciprocity as the distinguishing mark; it is the gratuitous promise that is unenforceable in English law."

38. This is further reinforced by the last part of Article 366(29-A), as under this part, the supply of such goods shall be deemed to be sale of those goods by the person making the supply, and the purchase of those goods by the person to whom such supply is made. As the Young Men's Indian Association (supra) case and the doctrine of mutuality state, there is no sale transaction between a club and its members. As has been pointed out above, there cannot be a sale of goods to oneself. Here again, it is clear that the ratio of Young Men's Indian Association (supra) has not been done away with by the limited fiction introduced by Article 366(29-A)(e).

39. But, says Shri Dwivedi, even if sub-clause (e) does not apply, sub-clause (f) would apply, given the width of its language. Here again, it is clear that the reason for sub-clause (f), as has been stated in the Statement of

Objects and Reasons, is the doing away with of two judgments of this Court, namely, State of Punjab v. Associated Hotels of India Limited AIR 1972 SC 1131 and Northern India Caterers (India) Ltd. (supra).

40. This is clear not only from the Statement of Objects and Reasons, but from the subject matter of sub-clause (f) (which does not include "goods" in their entirety, but only food or any other article for human consumption, or any drink), which is the serving of such food or drink in hotels or restaurants. This is further made clear by Section 6 of the 46th Amendment Act, which is a validation and exemption provision. Section 6(1)(a) specifically refers to transactions referable to the aforesaid two Supreme Court judgments. The exemption provision puts the matter beyond doubt. Section 6(2) of the Amendment Act reads as follows:

> "…(2) Notwithstanding anything contained in sub-section (1), any supply of the nature referred to therein shall be exempt from the aforesaid tax-
>
> (a) where such supply has been made, by any restaurant or eating house (by whatever name called), at any time on or after the 7th day of September, 1978 and before the commencement of this Act and the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time; or
>
> (b) where such supply, not being any such supply by any restaurant or eating house (by whatever name called), has been made at any time on or after the 4th day of January, 1972 and before the commencement of this Act and the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time:
>
> Provided that the burden of proving that the aforesaid tax was not collected on any supply of the nature referred to in clause (a) or, as the case may be, clause (b), shall be on the person claiming the exemption under this sub-section."

41. Sub-clause (a) refers to 7th September, 1978, which is the date on which Northern India Caterers (supra) was pronounced and sub-clause (b) refers to 4th January, 1972, which is the date on which Associated Hotels of India Ltd. (supra) was pronounced. The 46th Amendment Act, therefore, when read as a whole, would make it clear that Article 366(29-A)(f) refers only to an undoing of the aforesaid two judgments, the subject

matter being the taxability of food or drink served in hotels and restaurants. This being the case, it is obvious that the taxability of food or drink served in members' clubs is not the subject matter of sub-clause (f).

42. Looked at from another point of view, a members' club may supply goods which are not food or drink – for example, soap, cosmetics and other household items. These items would be "goods", but would not be within sub-clause (f) - not being food or drink, and cannot, therefore, be taxed under sub-clause (f), leading to the absurd situation of the supply of food and drink being taxable in members' clubs, and the supply of other goods in such clubs being outside the tax net. For this reason also, it is clear that the subject matter of sub-clause (f) is entirely different and distinct from that of sub-clause (e), and cannot possibly apply to members' clubs. In this view of the matter, the expression "in any manner whatsoever", being part and parcel of sub-clause (f) cannot be held to extend to a supply of all goods so as to bring such goods to tax when applied to members' clubs.

43. Judgments of this Court have also held that the subject matter of sub-clause (f) related to food and drink supplied in hotels and restaurants, the deeming fiction of sub-clause (f) being introduced only to get over certain judgments of this Court. In K. Damodarasamy Naidu & Bros. and Ors. v. State of T.N. and Anr. (2000) 1 SCC 527, this Court referred to Article 366(29-A)(f) as follows:

> "9. The provisions of sub-clause (f) of clause (29-A) of Article 366 need to be analysed. Sub-clause (f) permits the States to impose a tax on the supply of food and drink. The supply can be by way of a service or as part of a service or it can be in any other manner whatsoever. The supply or service can be for cash or deferred payment or other valuable consideration. The words of sub-clause (f) have found place in the Sales Tax Acts of most States and, as we have seen, they have been used in the said Tamil Nadu Act. The tax, therefore, is on the supply of food or drink and it is not of relevance that the supply is by way of a service or as part of a service. In our view, therefore, the price that the customer pays for the supply of food in a restaurant cannot be split up as suggested by learned counsel. The supply of food by the restaurant-owner to the customer though it may be a part of the service that he renders by providing good furniture, furnishing and fixtures, linen, crockery and cutlery, music, a dance floor and a floor show, is what is the subject of the levy. The patron of a fancy restaurant who orders a plate of cheese sandwiches whose price is shown to be Rs 50 on the bill of fare knows very well that the innate cost of the bread,

butter, mustard and cheese in the plate is very much less, but he orders it all the same. He pays Rs 50 for its supply and it is on Rs 50 that the restaurant-owner must be taxed."

44. In a recent judgment of this Court, Federation of Hotel and Restaurant Associations of India v. Union of India and Ors. (2018) 2 SCC 97, this Court referred to the reason for the enactment of sub-clause (f) as follows:

"11. As has been stated in the trilogy of judgments in Associated Hotels of India Ltd. [State of Punjab v. Associated Hotels of India Ltd., (1972) 1 SCC 472] and the two Northern India Caterers (India) Ltd. [Northern India Caterers (India) Ltd. v. State (UT of Delhi), (1978) 4 SCC 36 : 1978 SCC (Tax) 198 : (1979) 1 SCR 557] , [Northern India Caterers (India) Ltd. v. State (UT of Delhi), (1980) 2 SCC 167 : 1980 SCC (Tax) 222] , it is clear that when "sale" of food and drinks takes place in hotels and restaurants, there is really one indivisible contract of service coupled incidentally with sale of food and drinks. Since it is not possible to divide the "service element", which is the dominant element, from the "sale element", it is clear that such composite contracts cannot be the subject-matter of sales tax legislation, as was held in those judgments.

12. Bearing these judgments in mind, Parliament amended the Constitution and introduced the Constitution (Forty-sixth Amendment) Act, by which it introduced Article 366(29-A). Sub-clause (f), with which we are directly concerned, reads as follows:

"366. (29-A)(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

A reading of the constitutional amendment would show that supply by way of or as part of any service of food or other article for human consumption is now deemed to be a sale of goods by the person making the transfer, delivery or supply."

45. That the doctrine of mutuality has not been done away with by sub-clause (e) is also clear when sub-clause (e) is contrasted with certain

provisions of the Income Tax Act, 1961. Section 2(24) (vii) of the Income Tax Act, 1961, reads as under:

> "2. Definitions.-
>
> xxx xxx xxx
>
> (24) "income" includes-xxx xxx xxx
>
> (vii)the profits and gains of any business of insurance carried on by a mutual insurance company or by a co-operative society, computed in accordance with section 44 or any surplus taken to be such profits and gains by virtue of the provisions contained in the First Schedule"
>
> This has to be read with Section 44 of the Income Tax Act, 1961 which reads as under:
>
> "44. Insurance business.-Notwithstanding anything to the contrary contained in the provisions of this Act relating to the computation of income chargeable under the head "Interest on securities", "Income from house property", "Capital gains" or "Income from other sources", or in section 199 or in sections 28 to 43B, the profits and gains of any business of insurance, including any such business carried on by a mutual insurance company or by a co-operative society, shall be computed in accordance with the rules contained in the First Schedule."

46. A reading of the aforesaid provisions makes it clear that when profits and gains of a mutual insurance company are sought to be brought to tax, they are so done by express reference to the fact that the business of insurance is carried on by a mutual insurance company. The absence of any such language in sub-clause (e) of Article 366(29-A) is also an important pointer to the fact that the doctrine of mutuality cannot be said to have been done away with by the said 46th Amendment.

47. In fact, Section 2(24)(vii) has been expressly noticed in Venkatesh Premises Cooperative Society Limited (supra) as follows:

> "14. The doctrine of mutuality, based on common law principles, is premised on the theory that a person cannot make a profit from himself. An amount received from oneself, therefore, cannot be regarded as income and taxable. Section 2(24) of the Income Tax Act defines taxable income. The income of a cooperative society from business is taxable under Section 2(24)(vii) and will stand excluded from the principle of mutuality."

48. Also, Section 45(2) of the Income Tax Act, 1961 is an example of a provision by which a deemed transfer by a person to himself gets taxed. Section 45(2) reads as follows:

> "45. Capital gains.-
>
> xxx xxx xxx
>
> (2) Notwithstanding anything contained in sub-section (1), the profits and gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as, stock-in-trade of a business carried on by him shall be chargeable to income-tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him and, for the purposes of Section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset."

It can be seen from this provision that profits or gains arising from a transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business, is by a deeming fiction brought to tax, despite the fact that there is no transfer in law by the owner of a capital asset to another person. Modalities such as these to bring to tax amounts that would do away with any doctrine of mutuality are conspicuous by their absence in the language of Article 366(29-A)(e).

49. In light of the view that we have taken, it is unnecessary to advert to Shri Dwivedi's arguments that the explanation (1) to Section 2(10) of the West Bengal Sales Tax Act is a stand-alone provision and not an explanation in the classical sense. We, therefore, answer the three questions posed by the Division Bench in State of West Bengal v. Calcutta Club Limited (supra) as follows:

(1) The doctrine of mutuality continues to be applicable to incorporated and unincorporated members' clubs after the 46th Amendment adding Article 366(29-A) to the Constitution of India.

(2) Young Men's Indian Association (supra) and other judgments which applied this doctrine continue to hold the field even after the 46th Amendment.

(3) Sub-clause (f) of Article 366(29-A) has no application to members' clubs.

50. Having gone through the judgment and order of the West Bengal

Taxation Tribunal dated 3rd July, 2006 and the impugned Calcutta High Court judgment dated 1st February, 2008, and in view of the answers to the three questions referred to the present Three Judge Bench (as listed hereinabove), we are of the view that no interference is called for in the findings of fact or declaration of law in this case. Accordingly, C.A. No. 4184 of 2009 stands dismissed.

C.A. No.7497 of 2012 and other connected matters

51. Delay condoned. Leave is granted.

52. By an order dated 13th December, 2017 by a Division Bench of this Court in Civil Appeal No.7497 of 2012 and its connected matters, this Court listed these appeals involving the levy of service tax upon members' clubs as follows:

> "The issue involved in these cases has been referred to the larger Bench and the reference order is reported as 'State of West Bengal & Ors. v. Calcutta Club Ltd.' [2017(5) SCC 356][Civil Appeal No. 4184 of 2009].
>
> Let these appeals be also listed before the larger Bench along with the aforesaid matter after taking orders from Hon'ble the Chief Justice of India."

53. Primarily two judgments have been impugned before us by the Revenue; one by the High Court of Jharkhand at Ranchi in W.P (T) No.2388 of 2007 dated 15th March, 2012; and the other by the High Court of Gujarat in S.C.A. Nos.13654-13656 of 2005 dated 25th March, 2013. The impugned judgment dated 15th March, 2012 by the High Court of Jharkhand set out the relevant provisions of the Finance Act, 1994 (hereinafter referred to as the "Finance Act"), by which service tax was levied on members' clubs, and arrived at the conclusion that such clubs stand on a different footing from proprietary clubs, as has been held in Young Men's Indian Association (supra). The High Court following Young Men's Indian Association (supra) then held, stating:

> "18. However, learned counsel for the petitioner submits that sale and service are different. It is true that sale and service are two different and distinct transaction. The sale entails transfer of property whereas in service, there is no transfer of property. However, the basic feature common in both transactions requires existence of the two parties; in the matter of sale, the seller and buyer, and in the matter of service, service provider and service

receiver. Since the issue whether there are two persons or two legal entity in the activities of the members' club has been already considered and decided by the Hon'ble Supreme Court as well as by the Full Bench of this Court in the cases referred above, therefore, this issue is no more res integra and issue is to be answered in favour of the writ petitioner and it can be held that in view of the mutuality and in view of the activities of the club, if club provides any service to its members may be in any form including as mandap keeper, then it is not a service by one to another in the light of the decisions referred above as foundational facts of existence of two legal entities in such transaction is missing. However, so far as services by the club to other than members, learned counsel for the petitioner submitted that they are paying the tax.

19. Therefore, this writ petition deserves to be allowed and it is held that rendering of service by the petitioner- club to its members is not taxable service under the Finance Act, 1994 and the writ petition of the petitioner is allowed accordingly."

54. Likewise, the Gujarat High Court by the judgment dated 25th March, 2013, followed the judgment of the High Court of Jharkhand and declared the following:

"8. In the result, these petitions are allowed and it is hereby declared that Section 65(25a), Section 65(105) (zzze) and Section 66 of the Finance (No.2) Act, 1994 as incorporated/ amended by the Finance Act, 2005 to the extent that the said provisions purport to levy service tax in respect of services purportedly provided by the petitioner club to its members, to be ultra vires. Rule is made absolute with no order as to costs."

55. The appeals that are listed before us concern impugned judgments that have in essence followed these two judgments, insofar as service tax that is levied on members' clubs is concerned. The vast majority of cases before us concerns members' clubs that have been registered as Companies under Section 25 of the Companies Act, or registered co-operative societies under various State Acts, such societies being bodies corporate under the aforesaid Acts.

56. Shri Dhruv Agarwal, learned Senior Advocate appearing on behalf of the Revenue, after taking us through the relevant provisions, submitted that service tax was levied on members' clubs with effect from 2005. With effect from 2012, after statutory changes had been made, service tax continued to be levied on such clubs and was attracted even to members'

clubs in incorporated form, i.e., as companies or as registered cooperative societies. According to Shri Agarwal, the principle of mutuality that is laid down in Young Men's Indian Association (supra) has been expressly done away with in the service tax context, as there is in these cases no transaction of sale, unlike the sales tax cases that have just been heard. He cited a number of judgments to buttress his proposition that the High Courts of Jharkhand and Gujarat wrongly applied the judgment of Young Men's Indian Association (supra), which was in the context of Sales Tax acts, to Service Tax, and hence did not lay down the law correctly.

57. On the other hand, learned counsel appearing on behalf of the Respondents in these cases argued that when service tax was introduced in 1994, the legislature indicated activities which amounted to service, which were then selected for the purpose of imposition of tax. In 2005, despite the fact that members' clubs were so selected, members' clubs in incorporated form were expressly excluded from service tax. Post-2012, there was a sea change, as a result of which service tax was imposed on all taxable services, short of those which were in a negative list contained in Section 66D of the Finance Act. According to the learned counsel appearing on behalf of the Respondents, the same position that obtained re: incorporated members' clubs continued after 2012, despite the introduction of Explanation 3 to Section 65B(44). All the learned counsel argued that the doctrine of mutuality, insofar as incorporated institutions are concerned, was not done away with in the service tax regime, and the Jharkhand and Gujarat High Court were correct in applying the judgment in Young Men's Indian Association (supra) to these cases.

58. As was stated hereinabove, service tax was introduced for the first time by the Finance Act, 1994. Under Section 64(3), Chapter V of the Finance Act applied to taxable services as defined, with effect from 16th June, 2005. Under Section 65(25a), "club or association" was defined as follows:

> "club or association" means any person or body of persons providing services, facilities or advantages, for a subscription or any other amount, to its members, but does not include-
>
> (i) anybody established or constituted by or under any law for the time being in force, or
>
> (ii) any person or body of person engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry, or
>
> (iii) any person or body of person engaged in any activity having

objectives which are in the nature of public service and are of a charitable, religious or political nature, or

(iv) any person or body of persons associated with press or media.

59. Under Section 65(105)(zze), "taxable service" was defined as follows:

""Taxable service" means any service provided-

(zze) to its members by any club or association in relation to provision of services, facilities or advantages for a subscription or any other amount."

60. With effect from 1st May, 2011, "club or association" was defined by Section 65(25aa) as follows:

"club or association" means any person or body of persons providing services, facilities or advantages, primarily to its members for a subscription or any other amount but does not include-

(i) anybody established or constituted by or under any law for the time being in force, or

(ii) any person or body of person engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry, or

(iii) any person or body of person engaged in any activity having objectives which are in the nature of public service and are of a charitable, religious or political nature, or

(iv) any person or body of persons associated with press or media.

61. Likewise, in Section 65(105)(zzze), the expression "or any other person" was added after the expression "to its members", thus making it clear that the tax net had now been widened so as to include non-members of clubs or associations as well.

62. Under Section 66, it was stated that there shall be levied the tax (referred to as "the service tax") at the rate of 12% of the value of taxable services referred to in sub-clauses…(zzze) of clause (105) of section 65, and collected in such manner as may be prescribed.

63. Under Section 67, where service tax is chargeable on any taxable service with reference to its value, it was stated:

"67. Valuation of taxable services for charging service tax (1)

Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, -

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for consideration which is not ascertainable. be the amount as may be determined in the prescribed manner."

64. Likewise, under Section 68, it was stated:

"68. Payment of service tax

(1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed."

65. With effect from 1st July, 2012, Sections 65 and 65A were made inapplicable, and a new Section 65B introduced, in which under Section 65B(37), the term "person" was defined as follows:

"(37) "person" includes,-

(i) an individual,
(ii) a Hindu undivided family,
(iii) a company,
(iv) a society,
(v) a limited liability partnership
(vi) a firm,
(vii) an association of persons or body of individuals, whether incorporated or not,

(viii) Government,

(ix) a local authority, or

(x) every artificial juridical person, not falling within any of the preceding sub-clauses;

66. Under Section 65B(44), "service" was defined as follows:

"(44) "service" means any activity carried out by a person for another for consideration and includes a declared service but shall not include-

(a) an activity which constitutes merely,-

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods, which is deemed to be sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

xxx xxx xxx

Explanation 3. For the purposes of this Chapter;-

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons."

67. A new Section 66B was then introduced, which states as follows:

"66B. Charge of service tax on and after Finance Act, 2012

There shall be levied a tax (hereinafter referred to as the service

tax) at the rate of fourteen per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."

68. As was stated hereinabove, service tax was thus leviable on all services as defined, short of a negative list of services which was then set out in Section 66D of the Act.

69. In an interesting judgment of this Court, Union of India and Ors. v. Margadarshi Chit Funds Private Limited and Ors. (2017) 13 SCC 806, this Court outlined the history of service tax as follows:

"19. The amendment was carried w.e.f. 1-6-2007 whereby the words "but does not include cash management" were deleted. This provision remained on statute book up to 30-6-2012. By the Finance Act, 2012, entire scheme of service tax was completely changed and overhauled with the introduction of altogether new system of service tax. There was a paradigm shift in the service tax regime. Initially, service tax was levied only on three services by the Finance Act, 1994. The Finance Act, 1996 extended the levy to three more services. Twelve more services were brought under the service tax net by the Finance Act, 1997 and its scope was further enlarged by the Finance Act, 1998 when twelve more services were brought under the service tax net. Three services were exempted from the service tax by the Finance Act, 1998 and one more service by the Finance Act, 2000. Its scope was further widened by the Finance Act, 2001 when service tax was extended to include fifteen more services. The Finance Act, 2002 further levied service tax on ten more services. The Finance Act, 2003 brought 8 new services within the ambit of service tax. Further, the Finance (No. 2) Act, 2004 brought 13 new services under service tax which included reintroduction of service tax on 3 services and also made applicable service tax on risk cover in life insurance under the life insurance service, whereas this service was introduced in the year 2002. The Finance Act, 2005 brought 9 new services under the service tax net. The Finance Act, 2006 brought 15 new services under the service tax net. The Finance Act, 2007 brought 7 new services under the service tax net and six telecom related services were omitted and merged into one new category of taxable service. Further, the Finance Act, 2008 w.e.f. 16-5-2008, introduced 6 new services. Further, the Finance (No. 2) Act, 2009 w.e.f. 1-9-2009 introduced 3 new services. Likewise, the Finance

> Act, 2010 w.e.f. 1-7-2010 vide Notification No. 24/2010- ST, dated 22-6-2010 introduced 8 new services. By the Finance Act, 2011 w.e.f. 1-5-2011 vide Notification No. 29/2011-ST dated 25-4-2011, 2 new services were brought within its net and at the same time, health service was exempted w.e.f. 1-5-2011 by Notification No. 30/2011-ST dated 25-4-2011. Thus, the service tax was on a total of 115 services.
>
> 20. Thus, right from 1994 till 2011, the mode adopted was to specify those services on which it was intended to levy service tax. However, Parliament by the Finance Act, 2012 w.e.f. 1-7-2012 has introduced altogether new system of taxation of services by making a paradigm shift. Now, the scheme of taxation of services is based on negative list of services. Therefore, earlier list of taxable services is no longer applicable. Instead two things have happened. First, the term "service" is defined whereas there was no definition of "service" in the Finance Act, 1994 which position remained till 2012. Earlier, each individual service on which tax was levied (known as taxable service) was defined. Secondly, the definition of "service" given now contains a negative list which is contained in Section 66-D of the Act. In other words, it specifically excludes certain transactions from the ambit of service. Thus, those transactions which are specifically excluded are not liable for service tax. Any other kind of service which qualifies the definition of "service" contained in the Act would be exigible to service tax."

70. In All-India Federation of Tax Practitioners and Ors. v. Union of India and Ors. (2007) 7 SCC 527, this Court upheld the constitutional validity of the levy of service tax, also stating:

> "8. As stated above, service tax is VAT. Just as excise duty is a tax on value addition on goods, service tax is on value addition by rendition of services. Therefore, for our understanding, broadly "services" fall into two categories, namely, property based services and performance based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas, etc. Performance based services are services provided by service providers like stockbrokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents, etc."

After exhaustively reviewing a number of judgments, the Court stated that Parliament has legislative competence to levy service tax under Entry 97 List I of the Constitution of India.

71. With this background, it is important now to examine the Finance Act as it obtained, firstly from 16th June, 2005 uptil 1st July, 2012.

72. The definition of "club or association" contained in Section 65(25a) makes it plain that any person or body of persons providing services for a subscription or any other amount to its members would be within the tax net. However, what is of importance is that anybody "established or constituted" by or under any law for the time being in force, is not included. Shri Dhruv Agarwal laid great emphasis on the judgments in DALCO Engineering Private Limited v. Satish Prabhakar Padhye and Ors. Etc. (2010) 4 SCC 378 (in particular paragraphs 10, 14 and 32 thereof) and CIT, Kanpur and Anr. v. Canara Bank (2018) 9 SCC 322 (in particular paragraphs 12 and 17 therein), to the effect that a company incorporated under the Companies Act cannot be said to be "established" by that Act. What is missed, however, is the fact that a Company incorporated under the Companies Act or a cooperative society registered as a cooperative society under a State Act can certainly be said to be "constituted" under any law for the time being in force. In R.C. Mitter & Sons, Calcutta v. CIT, West Bengal, Calcutta (1959) Supp. 2 SCR 641, this Court had occasion to construe what is meant by "constituted" under an instrument of partnership, which words occurred in Section 26A of the Income Tax Act, 1922. The Court held:

> "The word "constituted" does not necessarily mean "created" or "set up", though it may mean that also. It also includes the idea of clothing the agreement in a legal form. In the Oxford English Dictionary, Vol. II, at ap. 875 & 876, the word "constitute" is said to mean, inter alia, "to set up, establish, found (an institution, etc.)" and also "to give legal or official form or shape to (an assembly, etc.)". Thus the word in its wider significance, would include both, the idea of creating or establishing, and the idea of giving a legal form to, a partnership. The Bench of the Calcutta High Court in the case of R.C. Mitter and Sons v. CIT [(1955) 28 ITR 698, 704, 705] under examination now, was not, therefore, right in restricting the word "constitute" to mean only "to create", when clearly it could also mean putting a thing in a legal shape. The Bombay High Court, therefore, in the case of Dwarkadas Khetan and Co. v. CIT [(1956) 29 ITR 903, 907] , was right in holding that the section could not be restricted in its application only to a firm which had been created by an instrument of partnership, and that it could reasonably and in conformity with commercial practice, be held to apply to a firm which may have come into existence earlier by an oral agreement,

> but the terms and conditions of the partnership have subsequently been reduced to the form of a document. If we construe the word "constitute" in the larger sense, as indicated above, the difficulty in which the learned Chief Justice of the Calcutta High Court found himself, would be obviated inasmuch as the section would take in cases both of firms coming into existence by virtue of written documents as also those which may have initially come into existence by oral agreements, but which had subsequently been constituted under written deeds."

73. It is, thus, clear that companies and cooperative societies which are registered under the respective Acts, can certainly be said to be constituted under those Acts. This being the case, we accept the argument on behalf of the Respondents that incorporated clubs or associations or prior to 1st July, 2012 were not included in the service tax net.

74. The next question that arises is - was any difference made to this position post 1st July, 2012?

75. It can be seen that the definition of "service" contained in Section 65B(44) is very wide, as meaning any activity carried out by a person for another for consideration. "Person" is defined in Section 65B(37) as including, inter alia, a company, a society and every artificial juridical person not falling in any of the preceding sub-clauses, as also any association of persons or body of individuals whether incorporated or not.

76. What has been stated in the present judgment so far as sales tax is concerned applies on all fours to service tax; as, if the doctrine of agency, trust and mutuality is to be applied qua members' clubs, there has to be an activity carried out by one person for another for consideration. We have seen how in the judgment relating to sales tax, the fact is that in members' clubs there is no sale by one person to another for consideration, as one cannot sell something to oneself. This would apply on all fours when we are to construe the definition of "service" under Section 65B(44) as well.

77. However, Explanation 3 has now been incorporated, under sub-clause (a) of which unincorporated associations or body of persons and their members are statutorily to be treated as distinct persons.

78. The explanation to Section 65, which was inserted by the Finance Act of 2006, reads as follows:

> "Explanation: For the purposes of this section, taxable service includes any taxable service provided or to be provided by any unincorporated association or body of persons to a member thereof, for cash, deferred payment or any other valuable consideration:"

79. It will be noticed that the aforesaid explanation is in substantially the same terms as Article 366(29-A)(e) of the Constitution of India. Earlier in this judgment qua sales tax, we have already held that the expression "body of persons" will not include an incorporated company, nor will it include any other form of incorporation including an incorporated co-operative society.

80. It will be noticed that "club or association" was earlier defined under Section 65(25a) and 65(25aa) to mean "any person" or "body of persons" providing service. In these definitions, the expression "body of persons" cannot possibly include persons who are incorporated entities, as such entities have been expressly excluded under Section 65(25a)(i) and 65(25aa)(i) as "anybody established or constituted by or under any law for the time being in force". "Body of persons", therefore, would not, within these definitions, include a body constituted under any law for the time being in force.

81. When the scheme of service tax changed so as to introduce a negative list for the first-time post 2012, services were now taxable if they were carried out by "one person" for "another person" for consideration. "Person" is very widely defined by Section 65B(37) as including individuals as well as all associations of persons or bodies of individuals, whether incorporated or not. Explanation 3 to Section 65B(44), instead of using the expression "person" or the expression "an association of persons or bodies of individuals, whether incorporated or not", uses the expression "a body of persons" when juxtaposed with "an unincorporated association".

82. We have already seen how the expression "body of persons" occurring in the explanation to Section 65 and occurring in Section 65(25a) and (25aa) does not refer to an incorporated company or an incorporated cooperative society. As the same expression has been used in Explanation 3 post-2012 (as opposed to the wide definition of "person" contained in Section 65B(37)), it may be assumed that the legislature has continued with the pre-2012 scheme of not taxing members' clubs when they are in the incorporated form. The expression "body of persons" may subsume within it persons who come together for a common purpose, but cannot possibly include a company or a registered cooperative society. Thus, Explanation 3(a) to Section 65B(44) does not apply to members' clubs which are incorporated.

83. The expression "unincorporated associations" would include persons who join together in some common purpose or common action – see ICT, Bombay North, Kutch and Saurashtra, Ahmedabad v. Indira

Balkrishna (1960) 3 SCR 513 at page 519-520. The expression "as the case may be" would refer to different groups of individuals either bunched together in the form of an association also, or otherwise as a group of persons who come together with some common object in mind. Whichever way it is looked at, what is important is that the expression "body of persons" cannot possibly include within it bodies corporate.

84. We are therefore of the view that the Jharkhand High Court and the Gujarat High Court are correct in their view of the law in following Young Men's Indian Association (supra). We are also of the view that from 2005 onwards, the Finance Act of 1994 does not purport to levy service tax on members' clubs in the incorporated form.

85. The appeals of the Revenue are, therefore dismissed. Writ Petition (Civil) No.321 of 2017 is allowed in terms of prayer (i) therein. Consequently, show-cause notices, demand notices and other action taken to levy and collect service tax from incorporated members' clubs are declared to be void and of no effect in law.

[2019] 57 DSTC 447 (Amaravathi)

In the High Court of Andhra Pradesh

[Hon'ble Mr. Justice M. Seetharama Murti and Hon'ble Ms. Justice J. Uma Devi]

I.A. No. 1/2019 in WP No.: 8662/2019

Panduranga Stone Crushers ... Petitioner

Versus

Union of India & Ors. ... Respondent(s)

Date of Order: 14.08.2019

INADVERTENTLY AND BY MISTAKE IGST INPUT TAX CREDIT REPORTED IN THE COLUMN RELATING TO IMPORT OF GOODS AND SERVICES – WRIT PETITION TO RECTIFY THE GSTR 3B MANUALLY – SECTION 39(9) OF CGST ACT DOES NOT COVER RECTIFICATION OF CLERICAL ERRORS – PETITIONER PERMITTED TO RECTIFY GSTR 3B MANUALLY.

Present for the Petitioner : B. Srinivasa Rao, Advocate

Present for the Respondents : Krishna Mohan, ASG

ORDER

"We have heard the submissions of learned senior counsel appearing for the petitioner and of learned Assistant Solicitor General appearing for respondent nos.1 and 2. We have perused the material record.

The facts, which are discernible from the pleadings and the submissions and which are relevant for consideration at this stage of passing of an interim order, may be stated, in brief, as follows:

"For the months of July, 2017 to March, 2018 i.e., for the financial year 2017-18, the petitioner submitted GSTR-3B returns through GST portal as required under law reporting the transactions of outward taxable supplies and inward taxable supplies reporting the ultimate tax liability arising as a difference between output tax liability and input tax liability under all the three respective enactments viz., IGST, CGST and SGST in terms of the annexed statements showing the input tax credit which the petitioner is entitled to every month. However, according to the petitioner, while claiming IGST input, the petitioner has inadvertently and by mistake reported IGST input tax credit in a column relating to import of goods and services instead of placing that particular amount viz., IGST input

tax credit in all other ITC column. Therefore, the petitioner, inter alia, contending that in the absence of any provision in Section 39 of GST Act, 2017 or the relevant rules, the petitioner is entitled to rectify the mistake that has crept in GSTR-3B returns."

However, learned Assistant Solicitor General appearing for respondent Nos. 1 and 2, having invited our attention to the relief claimed in the writ petition and also to Section 39(9) of the GST Act, contended that the said provision covers the present contingency because even according to the petitioner's own showing, there is a mention of incorrect particulars and hence, the petitioner has an opportunity under the proviso to the said provision to rectify the omission but the petitioner did not avail the chance to rectify or modify the returns and hence, the petitioner is not entitled to the relief claimed in the writ petition or an interim order.

Learned senior counsel appearing for the petitioner has invited the attention of this Court to the decision of Gujarat High Court in AAP and Co., Chartered Accounts through *Authorised Partner v. Union of India* [C/SCA/18962/2018] on 24.06.2019, wherein the question considered by the learned Division Bench of that High Court is as follows:

'Whether the return in Form GSTR-3B is a return required to be filed under Section 39 of the CGST Act/GGST Act. The aforesaid press release is valid and in consonance with Section 16(4) of the CGST Act/GGST Act only if Form GSTR-3B is a return required to be filed under Section 39 of the CGST Act/GGST Act.'

In para 31 of the said judgment, the learned Division Bench observed as follows:

'31. It would also be apposite to point out that the Notification No.10/2017 Central Tax dated 28th June, 2017 which introduced mandatory filing of the return in Form GSTR-3B stated that it is a return in lieu of Form GSTR-3. However, the Government, on realizing its mistake that the return in Form GSTR-3B is not intended to be in lieu of Form GSTR-3, rectified its mistake retrospectively vide Notification No.17/2017 Central Tax dated 27th July, 2017 and omitted the reference to return in Form GSTR-3B being return in lieu of Form GSTR-3.'

Finally, Gujarat High Court held in para 32 of the said judgment as follows:

'32. Thus, in view of the above, the impugned press release dated 18th October, 2018 could be said to be illegal to the extent that its

para-3 purports to clarify that the last date for availing input tax credit relating to the invoices issued during the period from July, 2017 to March, 2018 is the last date for the filing of return in Form GSTR-3B.'

Reliance is also placed on a decision in W.P.(C)No. 35368 of 2018 of the High Court of Kerala at Ernakulam reported on 12.11.2018, wherein the said High Court permitted the request of transfer of tax liability from the head 'SGST' to 'IGST' notwithstanding the contention of the revenue, as it would be inequitable for the petitioners therein to suffer on the count that the transfer would take sometime. Learned senior counsel would further contend that the provision in Section 39(9) of CGST Act referred to supra would cover other contingencies like under declaration of tax etc., but does not cover rectification of clerical errors and in the case on hand, there is also no revenue implication.

Having regard to the facts and submissions, we are satisfied that a prima facie case is made out and that as the issues raised in the writ petition require detailed examination, this is a fit case to grant the interim order.

Accordingly, the petitioner is permitted to rectify GSTR-3B statements for the months of August and December, 2017 and January and February, 2018 manually subject to the outcome of the writ petition. It is made clear that if the petitioner submits a rectified statements for the above purpose, the respondents shall process the same in accordance with the procedure established by law."

[2019] 57 DSTC 449 (Chandigarh)

In the High Court of Punjab & Haryana

[Hon'ble Mr. Justice Jaswant Singh and Hon'ble Mr. Justice Lalit Batra]

CWP No.: 30949/2018 (O & M)

Adfert Technologies Pvt. Ltd. ... Petitioner

Versus

Union of India & Ors. ... Respondent(s)

Date of Order: 04.11.2019

SECTION 140 OF CGST ACT, 2017 – TRANSITIONAL ARRANGEMENTS FOR INPUT TAX CREDIT – NO TIME LIMIT PRESCRIBED UNDER SECTION 140 TO CARRY FORWARD UNUTILIZED CREDIT – RULE 117 OF CGST RULES PRESCRIBED TIME LIMIT OF 90 DAYS – PETITIONERS COULD NOT FILE TRANS – 1 OR INCORRECT FORM UPLOADED – WRIT PETITIONS – CONTENDING UNUTILIZED INPUT TAX

CREDIT IS VESTED RIGHT WHICH COULD NOT BE WASHED AWAY – REVENUE HAS NO AUTHORITY TO DENY CREDIT ON TECHNICAL OR PROCEDURAL GROUNDS – THE COURT HELD THAT TIME PRESCRIBED UNDER RULE 117 FOR PURPOSES OF CLAIMING TRANSITIONAL CREDIT MERE PROCEDURAL IN NATURE NOT A MANDATORY PROVISION – DIRECTIONS ISSUED TO PERMIT THE PETITIONERS TO FILE OR REVISE WHERE ALREADY FILED INCORRECT TRAN-1 EITHER ELECTRONICALLY OR MANUALLY – WRIT PETITIONS ALLOWED.

Facts

The Petitioners were registered with Respondent department under Central/State Goods and Services Tax Act, 2017. The Petitioners were registered under erstwhile Punjab VAT Act, 2005 or Haryana VAT Act, 2003 and/or Central Excise Act, 1944. The registered persons upon enforcement of GST regime on the appointed date i.e. 1.7.2017 were either having stock of inputs and capital goods which had already suffered duty under erstwhile Taxation Statutes or they were having unutilized CENVAT credit accrued under Central Excise Act, 1944 or Input Tax Credit accrued under State VAT Act. As per Section 140 of the CGST Act, 2017 registered persons were eligible to carry forward unutilized CENVAT credit and credit of duties/taxes paid on inputs/capital goods lying in stock. No time limit was prescribed under Section 140 of the CGST Act to carry forward unutilized credit, however under Rule 117 of the CGST Rules, 2017 period of 90 days from appointed day i.e. 1.7.2017 was prescribed which was extended from time to time and ultimately last date was fixed 27.12.2017. Due to one or another reason, Petitioners either could not load prescribed form electronically or incorrect form was loaded which could not be corrected within prescribed time. In this backdrop all the Petitions have come up for consideration before the Court.

Held

Article 300A provides that no person shall be deprived of property saved by authority of law. While right to the property was no longer a fundamental right but it was still a constitutional right. CENVAT credit earned under the erstwhile Central Excise Law was the property of the writ applicants and it could not be appropriated for merely failing to file a declaration in the absence of Law in this respect. It could have been appropriated by the government by providing for the same in the CGST Act but it could not be taken away by virtue of merely framing Rules in this regard.

In the result, all the four writ-applications succeed and were hereby allowed. The respondents were directed to permit the writ applicants to allow filing of declaration in form 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 Act. It was further declared that the due date contemplated under Rule 117 of the CGST Rules for the purposes of claiming transitional credit was procedural in nature and thus should not be construed as a mandatory provision."

Delhi High Court in a series of cases had expressed similar view as by Gujrat High Court. In its recent judgment in the case of Krish Authomotors Pvt. Ltd. Vs UOI and others 2019-TIOL-2153-HC-DELGST, Delhi High Court has noted its various previous orders and directed as under:

Accordingly, a direction was issued to the Respondents to permit the Petitioner to either submit the TRAN-1 form electronically by opening the electronic portal for that purpose or allow the Petitioner to tender said form manually on or before 15th October, 2019 and thereafter, process the Petitioner's claim for ITC in accordance with law. The petition was disposed of in the above terms.

The Court agreed with findings of Hon'ble Gujrat and Delhi High Court noticed hereinabove and found no reason to take any contrary view. The Court was not in agreement with the cited judgment by the Revenue of Hon'ble Gujrat High Court in Willowood Chemicals case as the Gujrat High Court itself in subsequent judgments and Delhi High Court in a number of judgments have permitted petitioners to file TRAN-I Forms even after 27.12.2017. The Court also found that the Sub Rule (1A) added/inserted to Rule 117 w.e.f. 10.09.2018 had not been noticed in the said cited judgment by the Revenue, which goes to the roots of findings recorded by the Hon'ble Gujrat High Court. Thus all the petitions deserve to succeed and were hereby allowed.

The Court directed Respondents to permit the Petitioners to file or revise where already filed incorrect TRAN-1 either electronically or manually statutory Form(s) TRAN-1 on or before 30th November 2019. The Respondents were at liberty to verify genuineness of claim of Petitioners but nobody shall be denied to carry forward legitimate claim of CENVAT / ITC on the ground of non-filing of TRAN-I by 27.12.2017.

Order

Jaswant Singh, J.

Through the instant common order, bunch*(102 mentioned at the footnote of the judgment) of Civil Writ Petitions, involving identical issue are disposed of. The Petitioners are registered under Central/State Goods and Services Tax Act, 2017 and seeking direction under Article 226 of

Constitution of India to Respondents to permit carry forward of unutilized CENVAT credit of duty paid under Central Excise Act, 1944 and Input Tax Credit (for short 'ITC') of VAT paid under PVAT Act, 2005 or HVAT Act, 2003 which could not be carry forwarded on account of nonfiling or incorrect filing of prescribed statutory Form i.e. TRAN-1 by the stipulated last date i.e. 27.12.2017.

2. The Petitioners are registered with Respondent department under Central/State Goods and Services Tax Act, 2017 (for short 'CGST Act, 2017'). The Petitioners were registered under erstwhile Punjab VAT Act, 2005 or Haryana VAT Act, 2003 and/or Central Excise Act, 1944. The registered persons upon enforcement of GST regime on the appointed date i.e. 1.7.2017 were either having stock of inputs and capital goods which had already suffered duty under erstwhile Taxation Statutes or they were having unutilized CENVAT credit accrued under Central Excise Act, 1944 or Input Tax Credit accrued under State VAT Act. As per Section 140 of the CGST Act, 2017 registered persons are eligible to carry forward unutilized CENVAT credit and credit of duties/taxes paid on inputs/capital goods lying in stock. No time limit was prescribed under Section 140 of the CGST Act to carry forward unutilized credit, however under Rule 117 of the CGST Rules, 2017 period of 90 days from appointed day i.e. 1.7.2017 was prescribed which was extended from time to time and ultimately last date was fixed 27.12.2017. Due to one or another reason, Petitioners either could not load prescribed form electronically or incorrect form was loaded which could not be corrected within prescribed time. In this backdrop all the Petitions have come up for consideration before us.

3. To sum up, on the introduction of GST w.e.f. 1.7.2017, Petitioners migrated from VAT regime to GST regime. As per Section 140 of CGST Act, 2017 read with Rule 117 of CGST Rules, 2017, every registered person was required to file electronically FORM GST TRAN-1 with respect to unutilized input tax credit of duties and taxes paid under erstwhile tax regime. As per Rule 120A of the CGST Rules, 2017 registered person may revise his declaration once and submit revised declaration within the time period specified in Rule 117, 118, 119 and 120 of CGST Rules, 2017.

4. From the perusal of record and arguments of counsel for both sides, we find that there are two types of cases namely (i) registered persons who did/could not file TRAN-1 by 27.12.2017 and have no evidence of attempt to load TRAN-1 (ii) registered persons loaded TRAN-1 by 27.12.2017 but there is mistake and they want to revise already loaded TRAN-1.

5. Counsel for the Petitioners contended that there were so many reasons for non-filing of TRAN-I by 27.12.2017 which included press release

showing last date 31.12.2017, availability of utilities to upload TRAN-I in September' 2017 instead of July' 2017, heavy load upon accountants who were having number of assesses, lack of proper knowledge of computer system, complexity in filling different columns of TRAN-I etc. On the question of incorrect loading of TRAN-I, it is common argument of all the counsel that people dealing with filing TRAN-I electronically are not well conversant with electronic system and on account of multiple columns mistake occurred which was unintentional.

The Petitioners further contended that unutilized CENVAT/ITC of duty/ tax paid under Central Excise Act/VAT Act is vested right of Petitioners which cannot be washed away and any contrary interpretation would amount to violation of Article 14 as well 3000A of Constitution of India. It would further amount to double taxation which cannot be permitted in any taxation regime. The Petitioners prior to July' 2017 were duly registered with tax authorities under Central Excise Act, Finance Act, 1994 (Service Tax) and/or State VAT Act and Respondent-department has complete record of unutilized CENVAT/ITC thus department has no authority to deny credit on technical or procedural grounds. An assessee is entitled to ITC of GST paid on inputs/capital goods purchased after 01.07.2017 so there is no logic to deny ITC of duty/tax paid under old taxation regime.

On the question of incorrect filing of TRAN-I, it was contended that Respondent permitted registered persons to file TRAN-I by extending time upto 31.03.2019 who submitted evidence of attempt to load TRAN-I by 27.12.2017, thus there is no reason to deny same opportunity to those persons who filed incorrect TRAN-I. The department is entitled to raise demand in case any person has carry forwarded ITC in excess of its entitlement, thus there seems no reason to deny registered person to revise its TRAN-I if he has succeeded to carry forward less amount of credit.

The Petitioners in alternative contended that no Section or Rule of CGST Act, 2017 provides that unutilized ITC would lapse, if TRAN-I is not filed by due date thus, refund in cash may be sanctioned in terms of proviso to Section 142(3) of CGST Act, 2017 if it is held that Petitioners are not entitled to carry forward ITC because they failed to file TRAN-I by 27.12.2017.

6. Counsel for the Respondent contended that Government time to time extended period to load TRAN-I and it was mistake on the part of Petitioners who did not attempt to load by 27.12.2017. Government has permitted all those registered persons to file TRAN-I by 31.03.2019 who

furnished evidence of attempt to load TRAN-I upto 27.12.2017. There would be no end if Petitioners are permitted to load TRAN-I at this stage. The Petitioners cannot take excuse of technical glitches because they did not attempt to load TRAN-I by 27.12.2019. Hon'ble Gujrat High Court in the case of Willowood Chemicals Pvt. Ltd. Vs. Union of India 2018(19) G.S.T.L. 228 (Guj.) has upheld vires of Rule 117 of CGST Rules, 2017 and present Petitioners are not assailing vires of Rule 117 of CGST Rules, thus they are not entitled to any relief.

On the question of incorrect filing of TRAN-I, it was contended that one opportunity was granted to registered persons to revise TRAN-I, however present Petitioner failed to file revise TRAN-I by last date prescribed under Rule 120A of CGST Rules, 2017.

7. Before dealing with present controversy, it would be useful to look at relevant provisions of CGST Act, 2017 and rules made thereunder. The relevant provisions are extracted below:

> **Section 140. Transitional arrangements for input tax credit.** (1) A registered person, other than a person opting to pay tax under section 10, **shall be entitled to take,** in his electronic credit ledger, the amount of CENVAT credit **carried forward in the return** relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed:
>
> **Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:-**
>
> (i) where the said amount of credit is not admissible as input tax credit under this Act; or
>
> (ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or
>
> (iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.
>
> (2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by

him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law and is also admissible as input tax credit under this Act.

Explanation.– For the purposes of this sub-section, the expression "unavailed CENVAT credit" means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of CENVAT credit to which the said person was entitled in respect of the said capital goods under the existing law.

(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:–

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and

(v) the supplier of services is not eligible for any abatement under this Act:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

(4) A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 (1 of 1944) or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994(32 of 1994), but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger,-

(a) the amount of CENVAT credit carried forward in a return furnished under the existing law by him in accordance with the provisions of sub-section (1); and

(b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods or services, in accordance with the provisions of Sub-Section (3).

(5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day:

Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:

Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section.

(6) A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of

eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:–

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is not paying tax under section 10;

(iii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs; and

(v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

(7) Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall be eligible for distribution as credit under this Act even if the invoices relating to such services are received on or after the appointed day.

(8) Where a registered person having centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier:

Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act: Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account

Number for which the centralised registration was obtained under the existing law.

(9) Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to nonpayment of the consideration within a period of three months, such credit can be reclaimed subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.

(10) The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may be prescribed.

Explanation 1.- For the purposes of sub-sections (3), (4) and (6), the expression "eligible duties" means–

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957;

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (58 of 1957);

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);

(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); and

(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), in respect of inputs held in stock and inputs contained in semifinished or finished goods held in stock on the appointed day.

Explanation 2.- For the purposes of sub-section (5), the expression "eligible duties and taxes" means–

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);

(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001); and

(viii) the service tax leviable under section 66B of the Finance Act, 1994 (32 of 1994), in respect of inputs and input services received on or after the appointed day.

Section 142. Miscellaneous transitional provisions.- (1) Where any goods on which duty, if any, had been paid under the existing law at the time of removal thereof, not being earlier than six months prior to the appointed day, are returned to any place of business on or after the appointed day, the registered person shall be eligible for refund of the duty paid under the existing law where such goods are returned by a person, other than a registered person, to the said place of business within a period of six months from the appointed day and such goods are identifiable to the satisfaction of the proper officer: Provided that if the said goods are returned by a registered person, the return of such goods shall be deemed to be a supply.

(2) (a) where, in pursuance of a contract entered into prior to the appointed day, the price of any goods or services or both is revised upwards on or after the appointed day, the registered person who had removed or provided such goods or services or both shall issue

to the recipient a supplementary invoice or debit note, containing such particulars as may be prescribed, within thirty days of such price revision and for the purposes of this Act such supplementary invoice or debit note shall be deemed to have been issued in respect of an outward supply made under this Act;

(b) where, in pursuance of a contract entered into prior to the appointed day, the price of any goods or services or both is revised downwards on or after the appointed day, the registered person who had removed or provided such goods or services or both may issue to the recipient a credit note, containing such particulars as may be prescribed, within thirty days of such price revision and for the purposes of this Act such credit note shall be deemed to have been issued in respect of an outward supply made under this Act: Provided that the registered person shall be allowed to reduce his tax liability on account of issue of the credit note only if the recipient of the credit note has reduced his input tax credit corresponding to such reduction of tax liability.

(3) Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944:

Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse: Provided further that no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act.

(4) Every claim for refund filed after the appointed day for refund of any duty or tax paid under existing law in respect of the goods or services exported before or after the appointed day, shall be disposed of in accordance with the provisions of the existing law: Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse:

Provided further that no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on

the appointed day has been carried forward under this Act.

(5) Every claim filed by a person after the appointed day for refund of tax paid under the existing law in respect of services not provided shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944.

(6) (a) every proceeding of appeal, review or reference relating to a claim for CENVAT credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law, and any amount of credit found to be admissible to the claimant shall be refunded to him in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of subsection (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act:

Provided that no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act;

(b) every proceeding of appeal, review or reference relating to recovery of CENVAT credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law and if any amount of credit becomes recoverable as a result of such appeal, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act.

(7) (a) every proceeding of appeal, review or reference relating to any output duty or tax liability initiated whether before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and if any amount becomes recoverable as a result of such appeal, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of duty or tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act.

(b) every proceeding of appeal, review or reference relating to any output duty or tax liability initiated whether before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and any amount found to be admissible to the claimant shall be refunded to him in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act.

(8) (a) where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act;

(b) where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes refundable to the taxable person, the same shall be refunded to him in cash under the said law, notwithstanding anything to the contrary contained in the said law other than the provisions of subsection (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act.

(9) (a) where any return, furnished under the existing law, is revised after the appointed day and if, pursuant to such revision, any amount is found to be recoverable or any amount of CENVAT credit is found to be inadmissible, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act;

(b) where any return, furnished under the existing law, is revised after the appointed day but within the time limit specified for such revision under the existing law and if, pursuant to such revision, any amount is found to be refundable or CENVAT credit is found to be admissible to any taxable person, the same shall be refunded to him in cash under the existing law, notwithstanding anything to

the contrary contained in the said law other than the provisions of subsection (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act.

(10) Save as otherwise provided in this Chapter, the goods or services or both supplied on or after the appointed day in pursuance of a contract entered into prior to the appointed day shall be liable to tax under the provisions of this Act.

(11) (a) notwithstanding anything contained in section 12, no tax shall be payable on goods under this Act to the extent the tax was leviable on the said goods under the Value Added Tax Act of the State;

(b) notwithstanding anything contained in section 13, no tax shall be payable on services under this Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994;

(c) where tax was paid on any supply both under the Value Added Tax Act and under Chapter V of the Finance Act, 1994, tax shall be leviable under this Act and the taxable person shall be entitled to take credit of value added tax or service tax paid under the existing law to the extent of supplies made after the appointed day and such credit shall be calculated in such manner as may be prescribed.

(12) Where any goods sent on approval basis, not earlier than six months before the appointed day, are rejected or not approved by the buyer and returned to the seller on or after the appointed day, no tax shall be payable thereon if such goods are returned within six months from the appointed day:

Provided that the said period of six months may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding two months:

Provided further that the tax shall be payable by the person returning the goods if such goods are liable to tax under this Act, and are returned after a period specified in this sub-section:

Provided also that tax shall be payable by the person who has sent the goods on approval basis if such goods are liable to tax under

this Act, and are not returned within a period specified in this sub-section.

(13) Where a supplier has made any sale of goods in respect of which tax was required to be deducted at source under any law of a State or Union territory relating to Value Added Tax and has also issued an invoice for the same before the appointed day, no deduction of tax at source under section 51 shall be made by the deductor under the said section where payment to the said supplier is made on or after the appointed day.

Explanation.—For the purposes of this Chapter, the expressions "capital goods", "Central Value Added Tax (CENVAT) credit", "first stage dealer", "second stage dealer", or "manufacture" shall have the same meaning as respectively assigned to them in the Central Excise Act, 1944 or the rules made thereunder.

SECTION 16. Eligibility and conditions for taking input tax credit. — (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless, —

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(b) he has received the goods or services or both. Explanation. — For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services —

    (i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either

by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person.

(c) subject to the provisions of section 41 or section 43A, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39 :

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed :

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961 (43 of 1961), the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019.

Rule 117. Tax or duty credit forward under any existing law or on goods held in stock on the appointed day. –

(1) Every registered person entitled to take credit of input tax under section 140 shall, within ninety days of the appointed day, submit a declaration electronically in FORM GST TRAN-1, duly signed, on the common portal specifying therein, separately, the amount of input tax credit of eligible duties and taxes, as defined in Explanation 2 to section 140, to which he is entitled under the provisions of the said section:

Provided that the Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days:

Provided further that where the inputs have been received from an Export Oriented Unit or a unit located in Electronic Hardware Technology Park, the credit shall be allowed to the extent as provided in sub-rule (7) of rule 3 of the CENVAT Credit Rules, 2004.

(1A) Notwithstanding anything contained in sub-rule (1), the Commissioner may, on the recommendations of the Council, extend the date for submitting the declaration electronically in FORM GST

TRAN-1 by a further period not beyond 31st March, 2019, in respect of registered persons who could not submit the said declaration by the due date on account of technical difficulties on the common portal and in respect of whom the Council has made a recommendation for such extension.

(2) Every declaration under sub-rule (1) shall-

(a) in the case of a claim under sub-section (2) of Section 140, specify separately the following particulars in respect of every item of capital goods as on the appointed day-

(i) the amount of tax or duty availed or utilized by way of input tax credit under each of the existing laws till the appointed day; and

(ii) the amount of tax or duty yet to be availed or utilized by way of input tax credit under each of the existing laws till the appointed day;

(b) in the case of a claim under sub-section (3) or clause (b) of sub-section (4) or sub-section (6) or sub-section (8) of section 140, specify separately the details of stock held on the appointed day;

(c) in the case of a claim under sub-section (5) of section 140, furnish the following details, namely:-

(i) the name of the supplier, serial number and date of issue of the invoice by the supplier or any document on the basis of which credit of input tax was admissible under the existing law;

(ii) the description and value of the goods or services;

(iii) the quantity in case of goods and the unit or unit quantity code thereof;

(iv) the amount of eligible taxes and duties or, as the case may be, the value added tax or entry tax charged by the supplier in respect of the goods or services; and

(v) the date on which the receipt of goods or services is entered in the books of account of the recipient.

(3) The amount of credit specified in the application in FORM GST TRAN-1 shall be credited to the electronic credit ledger of the applicant maintained in FORM GST PMT-2 on the common portal.

(4)(a)(i) A registered person who was not registered under the existing law shall, in accordance with the proviso to sub-section

(3) of section 140, be allowed to avail of input tax credit on goods (on which the duty of central excise or, as the case may be, additional duties of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975, is leviable) held in stock on the appointed day in respect of which he is not in possession of any document evidencing payment of central excise duty.

(ii) The input tax credit referred to in sub-clause (i) shall be allowed at the rate of sixty per cent. on such goods which attract central tax at the rate of nine per cent. or more and forty per cent. for other goods of the central tax applicable on supply of such goods after the appointed date and shall be credited after the central tax payable on such supply has been paid: Provided that where integrated tax is paid on such goods, the amount of credit shall be allowed at the rate of thirty per cent. and twenty per cent. respectively of the said tax;

(iii) The scheme shall be available for six tax periods from the appointed date.

(b) The credit of central tax shall be availed subject to satisfying the following conditions,namely:-

(i) such goods were not unconditionally exempt from the whole of the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 or were not nil rated in the said Schedule;

(ii) the document for procurement of such goods is available with the registered person;

(iii) the registered person availing of this scheme and having furnished the details of stock held by him in accordance with the provisions of clause (b) of sub-rule (2), submits a statement in FORM GST TRAN 2 at the end of each of the six tax periods during which the scheme is in operation indicating therein, the details of supplies of such goods effected during the tax period;

(iv) the amount of credit allowed shall be credited to the electronic credit ledger of the applicant maintained in FORM GST PMT-2 on the common portal; and

(v) the stock of goods on which the credit is availed is so stored that it can be easily identified by the registered person. Rule 120A.

Revision of declaration in FORM GST TRAN-1 - Every registered person who has submitted a declaration electronically in FORM GST TRAN-1 within the time period specified in rule 117, rule 118, rule 119 and rule 120 may revise such declaration once and submit the revised declaration in FORM GST TRAN- 1electronically on the common portal within the time period specified in the said rules or such further period as may be extended by the Commissioner in this behalf.

Emphasis Supplied

8. From the conjoint reading of above quoted provisions, we find that:

i) A registered person to carry forward or avail credit of duty/tax paid on inputs and capital goods under old taxation statutes was required to file TRAN-I;

ii) Certain restrictions are prescribed in proviso to Section 140(1) but restriction in terms of time frame is prescribed under Rule 117 (1) of the Rules;

iii) As per Rule 117 (1), TRAN-1 was required to be filed by due date which was declared 27.12.2017. There is no power under Rule 117 (1) to extend last date beyond 27.12.2017, however Rule 117(1A) was inserted w.e.f. 10.9.2018 by which last date was extended upto 31.12.2019.

iv) The last date i.e. 27.12.2017 prescribed under Rule 117(1) was extended upto 31.12.2019 where TRAN-I could not be filed due to technical glitches. In other words a registered person who is able to establish that he has failed to file TRAN-I by 27.12.2017 due to technical glitches was entitled to file TRAN-I upto 31.12.2019.

v) There is no provision to permit filing of TRAN-1 at subsequent stage who failed to furnish evidence of attempt to file by 27.12.2017.

vi) As per Rule 120A, one time amendment is permitted within time prescribed under Rule 117, 118, 119 or 120 or within the time period as may be extended by the Commissioner.

The Introduction of Rule 117(1A) & Rule 120A and absence of any time period prescribed under Section 140 of the Act indicate that there is no intention of government to deny carry forward of unutilized credit of duty/ tax already paid on the ground of time limit.

9. Having scrutinized record of the case(s) and heard arguments of both sides, we find that on the introduction of GST regime, Government granted opportunity to registered persons to carry forward unutilized credit of duties/taxes paid under different erstwhile taxing statues. GST is an electronic based tax regime and most of people of India are not well conversant with electronic mechanism. Most of us are not able to load simple forms electronically whereas there were a number of steps and columns in TRAN-1 forms thus possibility of mistake cannot be ruled out. Various reasons assigned by Petitioners seem to be plausible and we find ourselves in consonance with the argument of Petitioners that unutilized credit arising on account of duty/tax paid under erstwhile Acts is vested right which cannot be taken away on procedural or technical grounds. The Petitioners who were registered under Central Excise Act or VAT Act must be filing their returns and it is one of the requirements of Section 140 of CGST Act, 2017 to carry forward unutilized credit. The Respondent authorities were having complete record of already registered persons and at present they are free to verify fact and figures of any Petitioner thus inspite of being aware of complete facts and figures, the Respondent cannot deprive Petitioners from their valuable right of credit.

10. During the course of arguments, counsel for the Petitioners submitted various judgments and we find that a Division Bench of Gujrat High Court in the case of Siddharth Enterprises Vs The Nodal Officer 2019-TIOL-2068-HC-AHM-GST has dealt with issue involved at length. It has been held that denial of credit of tax/duty paid under existing Acts would amount to violation of Article 14 and 300A of Constitution of India. Unutilized credit has been recognized as vested right and property in terms of Article 300A of the Constitution of India. We deem it appropriate to reproduce relevant extracts as below:

> "33. In our opinion, it is arbitrary, irrational 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 the pre-GST regime and post-GST regime and, therefore, it is violative of Article 14 of the Constitution.
>
> 34. 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 and post- GST regime. This discrimination does not have any rationale and, therefore, it is violative of Article 14 of the Constitution.

35. The Supreme Court, in the case of Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors., reported in AIR 1981 SC 487, has held that Article 14 strikes at the arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. The doctrine of classification which is evolved by the courts is not para-phrase of Article 14 nor is it the objective and end of that Article. Wherever there is arbitrariness in the State action, whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and nonarbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution. We may quote the relevant paragraphs 16 and 17 of the judgment thus :

> "16. If the Society is an "authority" and therefore "State" within the meaning of Article 12, it must follow that it is subject to the constitutional obligation under Article 14. The true scope and ambit of Article 14 has been the subject matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that that Article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely. (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in E. P. Ayyappa v. State of Tamil Nadu, (1974) 2 SCR 348

: (AIR 1974 SC 555), that this Court laid bare a new dimension of Article 14 and pointed out that that Article has highly activist magnitude and it embodies a guarantee against arbitrariness. This Court speaking through one of us (Bhatgwati, J.) said:

" The basic principle which therefore informs both Articles 14 and 16 is equality and inhibition against discrimination. Now what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

17. This vital and dynamic aspect which was till then lying latent and submerged in the few simple but pregnant words of Article 14 was explored and brought to light in Royappa's case and it was reaffirmed and elaborated by this Court in Maneka Gandhi v. Union of India, (1978) 2 SCR 621 : (AIR 1978 SC 597), where this Court again speaking through one of us (Bhagwati, J.) observed :-

> "Now the question immediately arises as to what is the requirement of Art. 14: what is the content and reach of the great equalising principle enunciated in this article, There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be

> subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits..... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."

This was again reiterated by this Court in International Airport Authority's case ((1979) 3 SCR 1014) at p. 1042: (AIR 1979 SC 1628) (supra) of the Report. It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the Courts is not paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Art. 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

36. 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.

37. The Supreme Court, in the case of MRF Ltd. v. Assistant Commissioner (Assessment) Sales Tax, reported in 2006 (206) E.L.T. 6 (S.C.) = 2006-TIOL-124-SC-CT, has held that a person may have a 'legitimate expectation' of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The doctrine of legitimate expectation has an important place in developing law of judicial review. We may quote the relevant paragraph 38 of the judgment thus:

"38. The principle underlying legitimate expectation which is based on Article 14 and the rule of fairness has been restated by this Court in Bannari Amman Sugars Ltd. v. Commercial Tax Officer, 2005 (1) SCC 625. It was observed in paras 8 and 9:

> "8. A person may have a 'legitimate expectation' of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review. It is generally agreed that 'legitimate expectation' gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightway from the administrative authorities as no crystallized right as such is involved. The protection of such

legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation is not fulfilled by taking a particular decision then the decision maker should justify the denial of such expectation by showing some overriding public interest. (See : Union of India and Ors. v. Hindustan Development Corporation and Ors., AIR 1994 SC 988)

9. While the discretion to change the policy in exercise of the executive power, when not trammeled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.""

38. 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 writapplicants 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.

39. This High Court, in the case of Indsur Global Ltd. v. Union of India, reported in 2014 (310) E.L.T. 833 (Gujarat) = 2014-TIOL-2115-HC-AHM-CX, has held as under:

> "34. By no stretch of imagination, the restriction imposed under sub-rule (3A) of Rule 8 to the extend it requires a defaulter irrespective of its extent, nature and reason for the default to pay the excise duty without availing Cenvat credit to his account can be stated to be a reasonable restriction. It leads to a situation so harsh and a position so unenviable that it would be virtually impossible for an assessee who is trapped in the whirlpool to get out of his financial difficulties. This is quite apart from being wholly reasonable, being irrational and arbitrary and therefore, violative of Article 14 of the Constitution. It prevents him from availing credit of duty already paid by him. It also is a serious affront to his right to carry on his trade or business guaranteed under Article 19(1)(g) of the Constitution. On both the counts, therefore, that portion of sub-rule (3A) of rule must fail."

40. The liability to pay GST on sale of stock carried forward from the previous tax regime without corresponding input tax credit would lead to double taxation on the same subject matter and, therefore, it is arbitrary and irrational.

41. C.B.E. & C. Flyer No.20, dated 1.1.2018 had clarified as under:

> "(c) Credit on duty paid stock : A registered taxable person. other than manufacturer or service provider, may have a duty paid goods in his stock on 1st July 2017. GST would be payable on all supplies of goods or services made after the appointed day. It is not the intention of the Government to collect tax twice on the same goods. Hence, in such cases, it has been provided that the credit of the duty/tax paid earlier would be admissible as credit."

> 42. Article 300A provides that no person shall be deprived of property saved by authority of law. While right to the property is no longer a fundamental right but it is still a constitutional right. CENVAT credit earned under the erstwhile Central Excise Law is the property of the writapplicants and it cannot be appropriated for merely failing to file a declaration in the absence of Law in this respect. It could have been appropriated by the government by providing for the same in the CGST Act but it cannot be taken away by virtue of merely framing Rules in this regard.
>
> 43. In the result, all the four writ-applications succeed and are hereby allowed. The respondents are directed to permit the writ applicants to allow filing of declaration in form 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 Act. It is further declared that the due date contemplated under Rule 117 of the CGST Rules for the purposes of claiming transitional credit is procedural in nature and thus should not be construed as a mandatory provision. "

11. Delhi High Court in a series of cases has expressed similar view as by Gujrat High Court. In its recent judgment in the case of Krish Authomotors Pvt. Ltd. Vs UOI and others 2019-TIOL-2153-HC-DELGST, Delhi High Court has noted its various previous orders and directed as under:

> 11. Accordingly, a direction is issued to the Respondents to permit the Petitioner to either submit the TRAN-1 form electronically by opening the electronic portal for that purpose or allow the Petitioner to tender said form manually on or before 15th October, 2019 and thereafter, process the Petitioner's claim for ITC in accordance with law. The petition is disposed of in the above terms.

12. We fully agree with findings of Hon'ble Gujrat and Delhi High Court noticed hereinabove and find no reason to take any contrary view. We are not in agreement with the cited judgment by the Revenue of Hon'ble Gujrat High Court in Willowood Chemicals case (Supra) as the Gujrat High Court itself in subsequent judgments and Delhi High Court in a number of judgments (as noticed hereinabove) have permitted petitioners (therein) to

file TRAN-I Forms even after 27.12.2017. We also find that the Sub Rule (1A) added/inserted to Rule 117 w.e.f. 10.09.2018 has not been noticed in the said cited judgment by the Revenue, which goes to the roots of findings recorded by the Hon'ble Gujrat High Court. Thus all the petitions deserve to succeed and are hereby allowed.

Accordingly, we direct Respondents to permit the Petitioners to file or revise where already filed incorrect TRAN-1 either electronically or manually statutory Form(s) TRAN-1 on or before 30th November 2019. The Respondents are at liberty to verify genuineness of claim of Petitioners but nobody shall be denied to carry forward legitimate claim of CENVAT / ITC on the ground of non-filing of TRAN-I by 27.12.2017.

No order as to costs.

[2019] 57 DSTC 478 (New Delhi)

In the High Court of Delhi

[Hon'ble Mr. Justice Vipin Sanghi and Hon'ble Mr. Justice Sanjeev Narula]

W.P.(C) 11254/2017

Mahamaya Enterprises ... Petitioner

Vs.

Commissioner of Trade & Taxes & Anr. ... Respondent(s)

Date of Order: 16.09.2019

WRIT PETITION SEEKING DIRECTION FOR RELEASE OF REFUND – RESPONDENT FRAMED ASSESSMENT AND INVOKED SECTION 40A OF DVAT ACT – NO JURISDICTION TO PASS THE ORDERS AS VATO HAD NOT BEEN DELEGATED AUTHORITY BY THE COMMISSIONER – ORDER QUASHED. DIRECTION TO PASS THE ORDERS FRESH.

For the Petitioner : Mr. Nitin Gulati, Adv.

For the Respondent : Mr. Satyakam, Adv.

The original relief sought in the writ petition was to seek a direction to the respondents to refund an amount of Rs. 22,75,348/- along with interest thereon which the petitioner claimed is due in law. The respondents filed their counter-affidavit wherein they sought to deny the said claim by placing reliance on several orders dated 08.02.2018 passed by the Assessing Officer/ Value Added Tax Officer (VATO) (WARD-48). The petitioner then sought to amend the writ petition to assail the said orders dated 08.02.2018

on the ground that the Assessing Officer/ Value Added Tax Officer (VATO) (WARD-48) did not have jurisdiction to pass the said orders as he had not been delegated the said authority by the Commissioner concerned.

Mr. Satyakam does not dispute the fact that the (VATO) (WARD-48) had not statutory authority to pass the orders dated 08.02.2018. That being the position, the said orders cannot be sustained and are therefore quashed. In the light of the aforesaid, we direct the respondents to proceed to consider the petitioner's claim for refund subject to such other orders that may be passed by the Competent Authority. However, the competent authority should proceed to pass fresh orders within the next four weeks, failing which the refund shall be processed and disbursed to the petitioner within four weeks thereafter.

The petition stands disposed of in the aforesaid terms.

Dasti.

[2019] 57 DSTC 479 (Madras)

In the High Court of Judicature at Madras

[Hon'ble Dr. Justice Anita Sumanth]

WP No.: 4773/2018

Sutherland Global Services Pvt. Ltd. ... Petitioner

Vs.

Union of India & Ors. ... Respondent(s)

Date of Order: 05.09.2019

WRIT PETITION CHALLENGING THE DENIAL OF TRANSITIONAL CREDIT OF EDUCATION CESS / SECONDARY AND HIGHER EDUCATION CESS AND KRISHI KALYAN CESS – TRANSITIONAL ARRANGEMENTS FOR CLAIMING INPUT TAX CREDIT U/S 140 OF GOODS AND SERVICE TAX ACT, 2017 – DECLARATION IN FORM – TRAN -1 CLAIMING CREDIT OF EC, SHEC AND KKC ACCRUED IN SERVICE TAX REGIME- APPLICATION FOR CARRY FORWARD AND UTILIZATION OF CREDIT REJECTED ON THE GROUND THAT CREDIT COULD BE SET OFF ONLY AGAINST SPECIFIC DUTIES AND TAXES ENUMERATED IN THE EXPLANATION TO SECTION 140(1) OF THE ACT R/W 117 OF THE RULES.

PETITIONER'S CONTENTION WERE THAT NO SPECIFIC PROVISION PROVIDED FOR LAPSING OF THE CREDIT ACCUMULATED IN CENVAT REGISTER – SECTION 140(8) OF CGST ACT ENTITLES TO AVAIL UTILIZATION OF THE CREDIT CARRIED FORWARD IN A RETURN ENDING WITH THE DAY IMMEDIATELY PRECEDING THE APPOINTED DATE – PROVISO OF SECTION 140(1) SPECIFICALLY DELINEATES

THESE CIRCUMSTANCES AND CONDITIONS WHEREIN CREDIT AVAILED MAY NOT BE UTILIZED AND THERE IS NOTHING THEREUNDER TO MILITATE AGAINST THE AVAILMENT IN QUESTION – STATUTORY PROVISIONS CANNOT BE INTERPRETED IN SUCH A WAY AS TO DEFEAT A LEGITIMATE STATUTORY RIGHT.

REVENUE ARGUED THAT SECTION 140 DOES NOT PROVIDE FOR UTILIZATION OF EC, SHEC, AND KKC AND CESS WAS ABOLISHED IN 2015 & 2016 – THE COURT OBSERVED THAT INSTRUCTIONS ISSUED BY CBEC DT 07/12/2015 FOR NOT TO ALLOW UTILIZATION OF ACCUMULATED CREDIT OF EC, SHEC NOWHERE STATED THAT CREDIT HAD LAPSE. REVENUE HAD NOT MADE OUT ANY BAR FOR THE TRANSITIONING OF EC, SHEC AND KKC INTO THE GST REGIME- SECTION 140(8) DELT WITH CENTRALISED REGISTRATION AND PROVIDED TRANSITIONING OF CREDIT REFLECTING CARRY FORWARD OF CLOSING BALANCE – AMENDMENT CARRIED OUT IN SECTION 25 TO INSERT THE PHRASE ELIGIBLE DUTIES AFTER THE PHRASE CENVAT CREDIT WAS RESTRICTED ONLY TO SUB SECTION (1) OF SECTION 140 BUT DID NOT TOUCH SUB SECTION (8) OF THE SECTION 140 – WRIT ALLOWED.

Facts

The petitioner was registered as an Assessee under the provisions of the Central Goods and Service Tax Act, 2017 (in short Act) and was a company providing Information Technology enabled services to customers worldwide. It had eight (8) units registered under the Act, five (5) units registered in Special Economic Zones (SEZ), two (2) units in Software Technology Parks of India (STPI) and one (1) unit in a Domestic Tariff Area (DTA).

In the era prior to levy of goods and service tax (in short GST) the petitioner was assessed to service tax and was availing CENVAT credit on inputs, capital goods and input services, utilizing the same against payment of service tax liability.

Vide Finance Act 2004, Parliament introduced the levy of Education Cess and, vide Finance Act 2007, the levy of Secondary and Higher Education Cess. The CENVAT Credit Rules 2004, enabled a manufacturer of final products or a provider of output services to avail CENVAT credit in respect of EC and SHEC against duty levied on excisable goods or taxable services in terms of Rules 3(1)(vi), (via), (x) and (x-a) thereof. The Rules specifically provided that once availed, the utilization thereof shall be only as against payment of EC or SHEC respectively.

While this was so, the levy of EC and SHEC on taxable services was abolished vide Finance Act 2015, with effect from 01.06.2017. Notification No.14/2015-CE exempted all goods falling within the first schedule to the Central Excise Tariff Act from the levy of EC and SHEC. In the light of the

specific stipulation that EC and SHEC availed could be set of/utilised only against the payment of EC and SHEC respectively, the credit that had been accumulated on this account lay unutilised in the CENVAT account of the petitioner.

Vide Finance Act 2016, Krishi Kalyan Cess was levied on taxable services by the Central Government with effect from 01.06.2016 with the avowed object of financing and promoting initiatives, including agriculture or related activities. Notification No.28/2016-CE (MT) dated 26.05.2016 enabled a provider of output services to avail CENVAT credit and utilise the same against KKC liability.

The Central Goods and Services Tax Act (CGST) came into effect on 01.07.2017 and the petitioner sought to avail accumulated credit as against its tax liability. Various particulars in regard to the petitioners' claim were sought for by the Assessing Officer vide communication dated 04.01.2018, such as service tax returns for the period April-2016 to September-2016, October-2016 to March-2017 and April-2017 to June-2017, invoices for credit availed by the petitioner for the period 01.07.2016 to 30.06.2017 and CENVAT credit availed for the period 2016- 2017 and 2017-2018 till June 2017, month wise. All details sought for were furnished.

The request of the petitioner for carry forward and utilisation of credit was rejected vide impugned order dated 09.02.2018 on the ground that credit could be set-off only as against the specific duties and taxes enumerated in the Explanation to Section 140(1) of the Act r/w 117 of the Rules.

Held

A fiscal statute had to be read and understood, as seen. The interpretation should be on the basis of what was apparent, apart from being strict.

These were settled principles that need no reiteration, nor with support of case law. If one were to apply these propositions to the case on hand, the provisions of section 140(1) provide for the transfer of all credits and levies, barring those set out in the proviso, which was, (i) where the said amount of credit was inadmissible as ITC (ii) where an assessee had not furnished returns required under the existing law for six preceding months or (iii) where the said credit relates to goods manufactured and cleared under exemption notifications. These were the only three conditions/ embargos that bar the transfer of accumulated credit. The language of section 140(1)

and (8), both made it clear that an assessee to GST was entitled to transition of 'the amount of cenvat credit carried forward in the return relating to the period ending with the date preceding the appointed date' and this in the present case includes accumulated credit of EC, SHEC and KKC. Section 140(8) which specifically deals with centralised registration also provides for transitioning of credit conditional upon an original or revised return being filed within three months of the appointed date reflecting a carry forward of the credit from the closing balance available. The intention, to my mind, was clear, to the effect that the credit reflected in the earlier returns was sought to be permitted to be transitioned, except if specifically barred. The other two conditions under section 140(8) were that the credit should be admissible as ITC and that credit was freely transferrable inter se the units under centralised registration. These conditions also do not stand in the way of the claim of the petitioner. the revenue had not made out any bar for the transitioning of EC, SHEC and KKC into the GST regime and the petitioner satisfies all conditions both under sub-section (1) and (8) of section 140. The embargo placed by Rule 3(7)(b) was long gone with the introduction of GST. Certainly the powers-that-be were conscious of these factors in drafting the new legislation and the specific provision in question i.e., Section 140.

Thus the Revenue argued that the accumulated credit of EC, SHEC and KKC was dead and gone and there was nothing that the assessee could claim as having been carried forward. This argument was rejected. At the risk of repetition, accumulated credit cannot be said to have been wiped out unless there was a specific order under which it lapses. Though there may be embargos placed by the Statutes and Rules, such as the embargo against cross – utilisation placed by Rule 3(7)(b) of the CCR, the accumulated credit continued in the books of the assessee till specifically wiped out, for availment.

Significantly, the amendment proposed, to insert the phrase 'eligible duties' after the phrase 'cenvat credit' was restricted only to sub-section (1) of Section 140. Moreover, Explanation (1) defining 'eligible duties' that was originally made applicable only to sub-sections (3) and (4) of Section 140 was extended to cover sub-section (1) as well. However, sub-section (8) of Section 140 remained untouched. As a result, Section 140(8) continues, as on date, to read that where a registered person having a centralised registration under the existing law had obtained a registration under this Act, such person should be allowed to take, in his electronic credit ledger, credit of the amount of cenvat credit carried forward in a return furnished under the existing law by him, in respect of the period ending with the

day immediately preceding the appointed day in such manner as may be prescribed. Thus, even if one were to assume that EC, SHEC and KKC were not liable to be transitioned, since they were not 'eligible', though the provisions of sub- sections (1), (3) (4) and (6) may contain a limitation to this effect, sub-section (8) contains no such limitation and any credit carried forward, without restriction of eligibility or otherwise, can be transitioned.

Impugned order set aside and writ petition, allowed.

Present for the Petitioner	:	Mr. Raghavan Ramabadran
Present for the Respondents	:	Ms. Aparna Nandakumar – R1, 2, 4 and 5 Mr. M. hariharan, AGP – R3 Mr. V. Sundareswaran, Standing Counsel – R6

Order

The petitioner prays for a writ of Certiorari quashing letter dated 14.02.2018 issued by the 1st respondent Assessing Officer. As a consequence thereof the petitioner would be entitled to avail and utilise accumulated credit pertaining to Education Cess (in short 'EC'), Secondary and Higher Education Cess (in short 'SHEC') and Krishi Kalyan Cess (in short KKC').

2. The petitioner is registered as an Assessee under the provisions of the Central Goods and Service Tax Act, 2017 (in short Act) and is a company providing Information Technology enabled services to customers worldwide. It has eight (8) units registered under the Act, five (5) units registered in Special Economic Zones (SEZ), two (2) units in Software Technology Parks of India (STPI) and one (1) unit in a Domestic Tariff Area (DTA).

3. In the era prior to levy of goods and service tax (in short GST) the petitioner was assessed to service tax and was availing CENVAT credit on inputs, capital goods and input services, utilizing the same against payment of service tax liability.

4. Vide Finance Act 2004, Parliament introduced the levy of Education Cess and, vide Finance Act 2007, the levy of Secondary and Higher Education Cess. The CENVAT Credit Rules 2004, (in short Rules) enabled a manufacturer of final products or a provider of output services to avail CENVAT credit in respect of EC and SHEC against duty levied on

excisable goods or taxable services in terms of Rules 3(1)(vi), (via), (x) and (x-a) thereof. The Rules specifically provided that once availed, the utilization thereof shall be only as against payment of EC or SHEC respectively.

5. While this was so, the levy of EC and SHEC on taxable services was abolished vide Finance Act 2015, with effect from 01.06.2017. Notification No.14/2015-CE exempted all goods falling within the first schedule to the Central Excise Tariff Act from the levy of EC and SHEC. In the light of the specific stipulation that EC and SHEC availed could be set of/utilised only against the payment of EC and SHEC respectively, the credit that had been accumulated on this account lay unutilised in the CENVAT account of the petitioner.

6. Vide Finance Act 2016, Krishi Kalyan Cess (in short 'KKC') was levied on taxable services by the Central Government with effect from 01.06.2016 with the avowed object of financing and promoting initiatives, including agriculture or related activities. Notification No.28/2016-CE (MT) dated 26.05.2016 enabled a provider of output services to avail CENVAT credit and utilise the same against KKC liability.

7. The Central Goods and Services Tax Act (CGST) came into effect on 01.07.2017 and the petitioner sought to avail accumulated credit as against its tax liability. Various particulars in regard to the petitioners' claim were sought for by the Assessing Officer vide communication dated 04.01.2018, such as service tax returns for the period April-2016 to September-2016, October-2016 to March-2017 and April-2017 to June-2017, invoices for credit availed by the petitioner for the period 01.07.2016 to 30.06.2017 and CENVAT credit availed for the period 2016-2017 and 2017-2018 till June 2017, month wise. All details sought for were furnished.

8. The request of the petitioner for carry forward and utilisation of credit was rejected vide impugned order dated 09.02.2018 on the ground that credit could be set-off only as against the specific duties and taxes enumerated in the Explanation to Section 140(1) of the Act r/w 117 of the Rules. According to the Assessing Officer, since the explanation did not cover cesses such as EC, SHEC and KKC, the same could not be carried forward. The petitioner was thus directed to reverse the aforesaid credits. Hence the present writ petition.

9. We are concerned, in this writ petition, with the interpretation of Section 140 of the Act which provides for Transitional arrangements for input tax credit and I thus extract the provision in full hereunder:

'140. Transitional arrangements for input tax credit.- (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit [of eligible duties] carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed:

Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:—

(i) where the said amount of credit is not admissible as input tax credit under this Act; or

(ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or

(iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.

(2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law and is also admissible as input tax credit under this Act.

Explanation.–For the purposes of this sub-section, the expression "unavailed CENVAT credit" means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of CENVAT credit to which the said person was entitled in respect of the said capital goods under the existing law.

(3) A registered person, who was not liable to be registered under

the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012—Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:–

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and

(v) the supplier of services is not eligible for any abatement under this Act:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

(4) A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 (1 of 1944) or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994, (32 of 1994), but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger,—

(a) the amount of CENVAT credit carried forward in a return furnished under the existing law by him in accordance with the provisions of sub-section (1); and

(b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods or services, in accordance with the provisions of sub-section (3).

(5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day:

Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:

Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section.

(6) A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:–

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is not paying tax under Section 10;

(iii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iv) the said registered person is in possession of invoice or other

prescribed documents evidencing payment of duty under the existing law in respect of inputs; and

(v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

(7) Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall be eligible for distribution as credit under this Act even if the invoices relating to such services are received on or after the appointed day.

(8) Where a registered person having centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier:

Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act:

Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account Number for which the centralised registration was obtained under the existing law.

(9) Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such credit can be reclaimed subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.

(10) The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may be prescribed.

Explanation 1.—For the purposes of [sub-sections (1), (3), (4)] and (6), the expression "eligible duties" means–

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975); [***]

(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); and

(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001, (14 of 2001), in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day.

Explanation 2.—For the purposes of [sub-sections (1) and (5)], the expression "eligible duties and taxes" means–

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

[***]

(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001); and

(viii) the service tax leviable under section 66-B of the Finance Act, 1994 (32 of 1994), in respect of inputs and input services received on or after the appointed day.

[Explanation 3.— For removal of doubts, it is hereby clarified that the expression "eligible duties and taxes" excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975).]

10. The scheme of transition of credit as set out under the Act has been referred to by both Mr. Raghavan Ramabadran, learned counsel appearing for the petitioner as well as Ms. Aparna Nandakumar, learned counsel appearing for the Revenue, in some detail.

11. In the present case, the petitioner followed the procedure for carrying forward CENVAT credit availed under the erstwhile regime, set out in terms of Rule 117 of the Central Goods and Service Tax (CGST) Rules, 2017 (in short Rules). The Rules provide that every person entitled to input tax credit under Section 140 shall submit a declaration electronically in Form GST Tran-1 within 90 days of the appointed date, being 01.07.2017, for carrying forward such credit to be utilised against turnover from taxable services. The petitioner had a closing balance of a total of Rs.18,80,85,930/- comprising, credit availed on input services directly of an amount of Rs.17,77,77,224/-, EC of an amount of Rs.55,84,569/- and SHEC of an amount of Rs.29,99,337/-. This is the sum total of the closing balance of credit available for being carried forward for utilisation in the new regime.

12. The provisions of Section 140(8) of the Act provide for Centralised Registration in respect of all the petitioners' units, pan India, and this was reflected in the Tran-1 return filed by it. There is no specific provision providing for the lapsing of the credit accumulated in the CENVAT register. The petitioner argues that the provisions of Section 140(8) entitle it to avail utilisation of the credits carried forward in a return relating to the period ending with the day immediately proceeding the appointed day. The provisions of Section 140(1) use the expression '..Central Value Added Tax (CENVAT) credits as having the same meaning as assigned in the Central Excise Act 1944 and connected rules'. The petitioner points out that for the purpose of the Central Excise Act and Rules, EC, SHEC as well as KKC are 'credits' and thus, in the light of the explanation to Section 140, such credits would also be eligible to be credited, transitioned and utilised.

13. Going further, the proviso to Section 140(1) specifically delineates those circumstances/conditions under which credit availed may not be utilised and there is nothing thereunder, to militate against the availment in question.

14. The provisions of Section 140(8), which set out the credit utilisation among different units of the petitioner, also support its claim as the phrase used therein is 'CENVAT credit' and not 'eligible credit'. In any event, it is pointed out that the Explanation to Section 140 which defines the phrase 'eligible duties and taxes' is specific only to Section 140(5) whereas, the present transition and utilisation is sought under Section 140(1) and 140(8) of the Act. The petitioner argues that the law has provided for such availment and utilisation, and the statutory provisions cannot be interpreted in such a way as to defeat a legitimate, statutory right.

15. The petitioner relies on the following cases:

(1) Union of India v. Ind-Swift Laboratories Ltd. (2012 (25) STR 184)

(2) Eicher Motors Ltd. V. Union of India ((1999) 106 ELT 3)

(3) SML Isuzu Ltd. V. Union of India ((2016) 340 ELT 643)

(4) Commissioner of C. Ex., Bolpur v. Ratan Melting & Wire Industries ((2008) 231 ELT 22)

(5) J.K.Lakshmi Cement Ltd. v. Commercial Tax Officer, Pali ((2018) 14 GSTL 497)

(6) Commissioner of Central Excise, Bhopal v. Minwool Rock Fibres Ltd ((2012) 278 ELT 581)

16. A counter has been filed by the Revenue reiterating the rationale of the impugned order and stating that the claims of the petitioner for transition of EC, SHEC and KKC are not tenable in law. The Revenue points out that though the right to input tax credit is a statutory right it may not be claimed by the assessee as a vested right and it is only when all conditions under statute are complied with in full that the petitioner may claim utilisation of ITC.

17. In the present case, the scheme of Section 140 nowhere provides for utilisation of EC, SHEC and KKC. The learned counsel for the Revenue points out that with the abolishing of EC, SHEC and KKC in 2015 and 2016 respectively, the levy as well as availment of credit in regard to the aforesaid cesses has been removed from the sweep of the Act. To a pointed query from the Bench as to why the assessee was permitted to carry forward the credit manually in CENVAT register, the Revenue would

only state, while admitting the aforesaid as a fact, that that by itself would not be a determinating factor as to the proper utilisation of the credit. The Revenue relies on the following cases:

(1) M/s.Osram Surya P. Ltd. v. Commissioner of Central Excise, Indore

(2) Union of India (UOI) and Ors. v. Uttam Steel Ltd. reported in (2015 (4) ABR 505)

(3) Jayam and Co. v. Assistant Commissioner and Ors. reported in AIR 2016 SC 4443)

(4) ALD Automotive Pvt. Ltd. v. The Commercial Tax Officer and Ors. reported in AIR 2018 SC 5235

(5) Cellular Operators Association of India and Others v. Union of India and another

(6) JCB India Limited v. Union of India and Others

18. Having heard the rival contentions, I am of the view that the claim of the petitioner is liable to be accepted. Goods and Service Tax was introduced with much fanfare in 2017 with discussions preceding the enactment nearly from 2009 onwards. The scheme of Goods and Service Tax (GST) was to provide a comprehensive indirect tax levy subsuming various indirect tax enactments that had been in force prior thereto. Empowered committees were set up to deliberate extensively on the various details of the GST model to be implemented after taking into account the views of the State and Central Governments. The first discussion paper on GST in India set out the salient features that were incorporated in the report of the Thirteenth Finance Commission issued in December 2009. Prior to enumerating the Central and the State taxes to be integrated with GST the outline of the model was itself set out in paragraph-5.25 of the report as follows:-

'Thirteenth Finance Commission
2010-2015
Volume I : Report
December 2009

.....

The Model GST

Outline of the Model GST 5.25. Keeping in mind the recommendations of the task force, we outline the design and modalities of a model GST law. Such a model GST would not distinguish between goods and services. It should be levied at a

single positive rate on all goods and services. Exports should be zero-rated. Tax compliance costs should be low and tax credits should be available seamlessly across tax jurisdictions. The other design and operational modalities of a model GST are outlined below....."

19. The taxes that had been subsumed were many and included among others, Central excise, Additional excise, Additional Customs Duty, all Central and State surcharges and cesses, Value Added Tax, Central Sales Tax, Entry Tax, Luxury Tax, Taxes on lottery, Entertainment Tax, Purchase Tax, State Excise Duties, Stamp Duty, Taxes on vehicles, Tax on goods and passengers, Taxes and duties on electricity as well as service tax. While integrating the taxes, the intention of the Government was evidently to provide a seamless model for transitioning of all credits hitherto availed of by an assessee under the erstwhile VAT and other indirect tax levies to the Goods and Service Tax regime as well. The benefits that had been made available and that had been permitted to continue in the erstwhile taxing regime were thus meant to be continued.

20. EC was introduced in 2004, SHEC in 2007 and KK Cess in 2016. Upon introduction of the levy of EC in 2004, Section 95 of Finance Act, 2004 provided that EC would be levied in addition to service tax on taxable services and could be availed of and utilised against payment of EC alone. Likewise for SHEC, introduced in 2007, it was made clear that the benefits of SHEC on input were available to be utilised only as against the respective payments alone and not on the payment of excise duty or service tax on manufactured goods or taxable services. Likewise for KK cess.

21. Both EC and SHEC were abolished with effect from 01.06.2015 and consequently the unutilised credit of EC and SHEC available could not be set of and accumulated. KK Cess was abolished in July, 2017. However, since the CGST Act did not provide specifically for the levy of KK cess, as such there was no avenue to claim the same after 01.07.2017. In all three of the aforesaid cases the unutilised portion of EC, SHEC and KKC continued in the electronic credit ledgers of assesses, but could not be practically utilised in the absence of an enabling provision.

22. This issue can be clinched in favour of the petitioners for two reasons. The impugned order proceeds on the basis that the petitioner has no entitlement to claim set off of credit and thus denies it. However, such credit continues to be available till such time it is expressly stated to have lapsed. Lapsing is not a concept unknown to the respondents. In

fact, there are multiple instances where the Board/Government provides for specified credits to lapse mentioning the exact point in time when the lapsing would commence and/or stipulating other conditions in this regard.

23. That the authorities are conscious of the provisions for lapsing of credit, having utilised them in several situations and instances, is clear from the following instance:

'F.No.137/72/2008-CX.4, dated 21-11-2008

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject: Utilization of accumulated Cenvat credit restricted in terms of erstwhile Rule 6(3)(c) of Cenvat Credit Rules, 2004 – Regarding.

Kindly refer to your letter C.No. 715/Hqrs/Audit/08 dated 20-11-2008 on the subject mentioned above wherein the issue of utilization of accumulated Cenvat credit has been raised.

The matter has been examined and the following points emerged during its consideration.

Prior to 1-4-2008 [before the amendment in Rule 6(3)] the option available to the taxpayer, under rule 6(3), was that, he was allowed to utilize credit only to the extent of an amount not exceeding 20% of the amount of service tax payable on taxable output service. However, there was no restriction in taking Cenvat credit and also there was no provision about the periodic lapse of balance credit. This resulted in accumulation of credit in many cases. W.e.f. 1-4-2008, under the amended rule 6(3), the following options are available to the taxpayers not maintaining separate accounts;

(i) Option No.1 – In respect of exempted goods, he may pay an amount equal to 10% of the value of exempted goods; and in respect of exempted/non-taxable services, he may pay an amount equal to 8% of the value of such exempted/non-taxable service; OR

(ii) Option No.2 – He may pay an amount equivalent to Cenvat credit attributable to inputs and input services attributable to exempted goods and non-taxable/exempted services.

> As stated earlier, may taxpayers had accumulated Cenvat credit balance as on 1-4-2008. The matter to be considered was whether this credit balance should be allowed to be utilized for payment of service tax after 1-4-2008. As no lapsing provision was incorporated and that the existing Rule 6(3) of the Cenvat Credit Rules does not explicitly bar the utilization of the accumulated credit, the department should not deny the utilization of such accumulated Cenvat credit by the taxpayer after 1-4-2008. Further, it must be kept in mind that taking of credit and its utilization is a substantive right of a taxpayer under value added taxation scheme. Therefore, in the absence of a clear legal prohibition, this right cannot be denied. Pending issues may be decided accordingly.'

24. In the present case, admittedly, there is no notification/circular/ instruction that has expressly provided that the credit accumulated would lapse. Not only this, the credit has been carried forward manually and reflected in the returns from time to time and such accumulated credits stare the Revenue in the face. Having permitted the assessee to carry forward the credit, the authorities cannot now take a stand that such credit is unavailable for use. The provisions of sub-section (1) read with sub-section (8) of section 140, and the Explanation thereunder make it more than clear that all available credit as on the date of transition would be available to an assessee for set off.

25. The Full Bench of the Supreme Court, in fact, makes this position clear in the case of Eicher Motors and another V. Union of India and others (106 ELT 3) while considering the applicability of Rule 57F. The aforesaid Rule provided for the lapse of credit lying unutilised as on 16.03.1995 stating clearly that such credit would not be allowed to be utilised for payment of duty on any excisable goods, whether cleared for home consumption or export. The proviso to the Rule clarified that such lapsing would not affect credit of duty, if any, in respect of inputs lying in stock or contained in finished products lying in stock on 16.03.1995. The Bench opined that Modvat Credit lying to the balance of an assessee represented a vested right accrued or acquired by the assessee. The right in respect of the credit had become absolute at that point when the input was used in the manufacturing of the final product.

26. The Bench stated that when, on the strength of the available Rules and Regulations, certain acts were carried out, all logical consequences must follow in sequence. If any alteration is brought about to this Scheme, then it would have a deleterious effect. The alteration of a credit scheme

loses sight of fact that the provision for facility of credit is as good as tax paid till such time the taxes are adjusted on future goods on the basis of commitments made commercially by the assessee. Thus, altering a scheme of credit would affect the rights of the assessee. The impugned Rule was thus quashed, the Bench stating that it cannot be applied to goods manufactured prior to 16.03.1995, where duty payment stood discharged and credit available for further manufacture.

27. The relevant observations are extracted hereunder:

> '5. ..... As pointed out by us that when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that right, which had accrued to a party such as availability of a scheme is affected and, in particular, it loses sight of the fact that provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assesses concerned. .....
>
> 6. 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 is 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.'

The ratio of this judgment is directly applicable to the facts and legal position before me.

28. Great reliance has been placed by the revenue upon the decision of the Division Bench of the Delhi High Court in the case of Cellular Operators Association of India and others Vs. Union of India and Another (W.P.(civil) No.7837 of 2016 dated 15.2.2018). At paragraph 5, the Bench records the crux of the petitioners' case as follows:

'5. ..... The contention is that EC and SHE, which were earlier imposed and then withdrawn from 1st March, 2015 and 1st June 2015 for excisable goods and taxable services respectively, had been submitted and included in the excise duty and service tax, and therefore, the amount lying in the credit towards EC and SHE should be available for availing CENVAT credit. ....."

The arguments stood rejected in the following terms:

16. The decision in the case of Eicher Motors Limited and Another (supra) is distinguishable, for in the said case, what was subject matter of challenge was Rule 57-F(4-A), which had stipulated that unutilized credit as on 16th March, 1995 lying with the manufacturers of tractors under Heading 87.01 or motor vehicles 87.02 and 87.04 or chassis of tractors or motor vehicles under Heading 87.06 shall lapse and shall not be allowed to be utilized for payment of duty on excisable goods. The proviso, however, had stipulated that nothing shall apply to the credit of duty, if any, in respect of inputs lying in stock or contained in finished products lying in stock as on 16th March, 1995, thereby creating an anomalous situation. Credit of tax paid on inputs and even finished products was available, but not in respect of the sold products. This was clearly taking away a vested right in the form of an amendment to the Rule. There was lapse of credit, which could not be utilized, though the tax/duty had not been withdrawn. The Supreme Court noticed that the credit attributable to inputs had already been used in manufacture of final products that had been cleared, and this alone was sought to be lapsed, notwithstanding the fact that the right had become absolute. On a holistic reading of the entire scheme, it was observed that when acts have been done by the parties concerned on the strength of the Rules, incidence following thereto must take place in accordance with the scheme or the Rules, otherwise it would affect the rights of the assessees. Further, right had accrued on the date when the assessee had paid tax on the raw materials or inputs and the same would continue till the facility available thereto got worked out or until the goods existed. As noticed above, tax/duty had not been withdrawn. Lastly and more importantly, Section 37 of the Central Excise Tariff Act, 1985 did not enable the authorities to make the Rule impugned therein. The legal ratio in Eicher Motors Limited and Another (supra) was followed in Samtel India Limited (supra) wherein amended Rule 57-F(17) of the Central Excise Rules, 1944 was challenged. The Rules had postulated lapsing of credit in

case of manufactured goods falling under sub-heading 8540.12, though the proviso had provided for credit of duty in respect of inputs lying in stock or contained in finished goods lying in stocks. It was held that the said scheme of credit of input tax, in view of amended provision, could not be made applicable to goods which had already come into existence and under which the assessee had claimed credit facility. As noticed above, in the present case, credit of EC and SHE could be only allowed against EC and SHE and could not be crossutilized against the excise duty or service tax. In fact, what the petitioners seek is an amendment of the scheme to allow them to take cross utilization of the unutilized EC and SHE upon the two cesses being withdrawn against excise duty and service tax, though this was not the position even earlier. Both EC and SHE were withdrawn and abolished. They ceased to be payable. In these circumstances, it is not possible to accept the contention that a vested right or claim existed and legal issue is covered against the respondents by the decision in Eicher Motors Limited and Another (supra) and Samtel India Limited (supra). The said decisions are distinguishable and inapplicable.

29. Reliance on the case of Cellular Operators Association of India (supra) does not advance the case of the revenue. The Division Bench in that case was concerned with a prayer for quashing Notification dated 29.10.2015 and for a direction that the credit accumulated on account of EC and SHEC be permitted to be utilised for payment of service tax on telecommunication services. The Bench, right at the outset, at paragraph 3, highlights the 'accepted and admitted case that benefit of EC and SHEC on inputs etc. could not have been utilised for payment of excise duty/service tax on the output, i.e., manufactured goods or taxable services'. Thus the premise on which the Bench has proceeded is that cross utilisation of EC and SHEC as against excise duty or service tax was impermissible in the context of the provisions and rules extant then.

30. The claim of the petitioner before the Delhi High Court was that a vested right to avail the benefit of unutilised EC or SHEC credit was available as on 01.03.2015 and 01.06.2015 as against payment of tax on excisable goods and services. Simultaneous therewith the petitioners also challenged Instruction dated 07.12.2015 that provided as follows:

B.21 - Hyderabad, Coimbatore, Vadodara, Vishakhapatnam, Delhi Zone- Cenvat Credit - Balance of Education Cess and Secondary & Higher Education Cess lying in the CENVAT Credit Account:

Issue:

Exemption from levy of Education Cess and Secondary & Higher Education Cess has been provided w.e.f. 01.03.2015 vide notification no. 14/2015-CE & 15/2015-CE both dated 01.03.2015, Sub-rule 7(b) of Rule 3 of CENVAT Credit Rules, 2004, specifies that CENVAT credit of specified duties shall be utilized for payment of those specified duties only. CENVAT Credit of Education Cess and Secondary & Higher Education Cess can be utilized only for payment of Education Cess and Secondary & Higher Education Cess, respectively. Consequent upon grant of exemption there is issue of utilization of the accumulated credit of the past. It is suggested that an amendment to sub-rule 7(b) of Rule 3 of CENVAT Credit Rules, 2004 may be made to allow the utilization of balance CENVAT Credit of Education Cess and Secondary & Higher Education Cess towards payment of either duty of excise or Service Tax.

Discussion & Decision The conference after discussion and briefing from the officers from the Board noted that it was Government's conscious policy ? decision to withdraw the Education Cess and Secondary & Higher Education Cess. It is a policy decision to not allow utilization of accumulated credit of education cess and secondary and higher education cess after these Cesses have been phased out. As these Cesses have been phased out and no new liability to pay such Cess arises, no vested right can be said to exist in relation to the accumulated credit of the past.The rule and notifications as they exist need to be followed and do not need any amendment.?

31. The argument advanced by the parties was crystallised at paragraph 5 of the decision to the effect that though the levy on EC and SHEC itself been abolished, they had been 'subsumed' within the rate of tax itself, since the rate of service tax had increased to 12%-14% and excise duty from 12% to 12.50%. Thus according to them since the cesses had been subsumed into the basic tax/duty rate, they should be allowed to set off the accumulated credit of EC and SHEC against the same.

32. This argument was rejected by the Division Bench, that held, after analysing the judgments of the Supreme Court in the case of i) Hingir-Rampur Coal Company Limited and Others versus State of Orissa and Others, ((1961) 2 SCR 537) , ii) B.K. Industries and Others versus Union of

India and Others, (1993 Supp (3) SCC 621), iii) Shashikant Laxman Kale and Another versus Union of India and Another, ((1990) 4 SCC 366), iv) Tarlochan Singh Flora versus Wakom (Heathrow) Ltd., ([2006] EWCA Civ 1103, Brooke LJ), that though cess may be of the nature of tax and not a fee, it would not be proper to treat either of the cesses as excise duty or service tax. The two cesses on the one hand and excise duty and service tax on the other were always to be treated as different and separate and cross utilisation was, according to the Bench, never permitted. Thus the use of the word 'subsumed' by the then Finance Minister, upon which great reliance was placed by the petitioners, was held not to be determinative of the true object of the Legislation.

33. In summary, the Division Bench rejected the prayer of the petitioners to quash notification dated 29.10.2015 denying them the direction sought.

34. I have carefully read the aforesaid decision relied upon by the Revenue. The decision and the observations made therein have to be seen in the context of the prayer advanced in that case and in the light of the statutory provisions/rules existing at the relevant point in time.

35. Firstly, the Instructions issued by the Central Board of Excise and Customs dated 07.12.2015, reveal a policy decision, not to allow utilisation of accumulated credit of EC and SHEC, but nowhere states that the credit has lapsed. The Board only says that the cesses have been phased out and since there is no new liability to pay these cesses, no vested right can be said to exist in relation to the past accumulated credit in the light of Rule 3(7)(b) of the Cenvat Credit Rules, 2004 which stipulates that Cenvat Credit shall be utilised only as against payment of specified duties. The request of the petitioner in that case has to be seen in this perspective and specifically in the light of the embargo placed by Rule 3(7)(b) as aforesaid. The Board could well have stated even at that juncture that the credit lapsed, but did not choose to do so.

36. Then again, the Division Bench while considering the rival contentions of the assessee and the Revenue has not anywhere indicated that the credit has lapsed, but only that, in the light of the embargo placed by Rule 3(7)(b), set off/credit as claimed could not be permitted.

37. Thirdly, even after the decision of the Division Bench, there has been no instructions/notification/circular from the Board till date to state that the accumulated credit has lapsed. Thus though there were a good many occasions that presented themselves to the Board to clearly stipulate that the accumulated credit had lapsed, this was not done. The petitioner

had been permitted to carry forward the cesses in question without any move whatsoever to state that the credits could not be so carried forward, since they had lapsed. Not having done so, the provisions of Section 140 should be given full effect and meaning.

38. The revenue has placed reliance upon the conclusions of the Supreme Court in the cases of (i) Jayam and Co. vs. Assistant Commissioner and Ors. (AIR 2016 SC 4443) and (ii) ALD Automotive Pvt. Ltd. V. The Commercial Tax Officer and Others (AIR 2018 SC 5235), to state that the grant of ITC cannot be sought for as a right by an assessee and no such right vests in an assessee.

39. There is a material distinction between the cases relied upon by the revenue and the case before me. In Jayam and Company and ALD Automotive Pvt. Ltd. (supra), the Court was concerned with a claim of Input Tax Credit (ITC) by an assessee. It is in this context that the Benches state that the grant of ITC is a concession which is not admissible to all kinds of sales. Specified transactions are alone entitled to the benefit of ITC on specified situations and that too, upon satisfaction of conditions imposed. Thus no vested right could be claimed by an assessee in that regard.

40. In the present case, the situation is entirely different. The assessee only avails utilization of the credit accumulated, particularly since there is no prohibition in this regard either for the accumulation itself or for the utilization thereof under CGST.

41. A certain amount of planning and strategizing is undertaken by an assessee bearing in mind the credits and concessions available as well as liabilities imposed by a taxing Statute at any given point in time. The credit available in regard to EC, SHEC and KKC are no different. In strategising and conducting its business, the assessee would certainly have taken into account that credit was available for set-off against output tax liability. Such credit accumulated has not been stated to have lapsed. The impugned action of the assessing authority in rejecting the claim has however the consequence of insertion of a Rule/Regulation to this effect, which, in my view, is impermissible.

42. A fiscal statute has to be read and understood, as seen. The interpretation should be on the basis of what is apparent, apart from being strict. These are settled principles that need no reiteration, nor support of case law. If one were to apply these propositions to the case on hand, the provisions of section 140(1) provide for the transfer of all credits and levies, barring those set out in the proviso, which is, (i) where the said amount

of credit is inadmissible as ITC (ii) where an assessee has not furnished returns required under the existing law for six preceding months or (iii) where the said credit relates to goods manufactured and cleared under exemption notifications. These are the only three conditions/ embargos that bar the transfer of accumulated credit. The language of section 140(1) and (8), both make it clear that an assessee to GST is entitled to transition of 'the amount of cenvat credit carried forward in the return relating to the period ending with the date preceding the appointed date' and this in the present case includes accumulated credit of EC, SHEC and KKC.

43. Section 140(8) which specifically deals with centralised registration also provides for transitioning of credit conditional upon an original or revised return being filed within three months of the appointed date reflecting a carry forward of the credit from the closing balance available. The intention, to my mind, is clear, to the effect that the credit reflected in the earlier returns is sought to be permitted to be transitioned, except if specifically barred. The other two conditions under section 140(8) are that the credit should be admissible as ITC and that credit is freely transferrable inter se the units under centralised registration. These conditions also do not stand in the way of the claim of the petitioner.

44. Thus, in my view, the revenue has not made out any bar for the transitioning of EC, SHEC and KKC into the GST regime and the petitioner satisfies all conditions both under sub-section (1) and (8) of section 140. The embargo placed by Rule 3(7)(b) is long gone with the introduction of GST. Certainly the powers-that-be are conscious of these factors in drafting the new legislation and the specific provision in question i.e., Section 140.

45. Reliance placed by Ms.Nandakumar upon the decision in the case of Union of India and others. V. Uttam Steel Ltd. ((2015) 13 SCC 209) does not impress. In Uttam Steel (supra) a Division Bench of the Supreme Court considered a claim for rebate. Originally and as per prevailing law, an assessee was required to file a claim for rebate within six months from the date of shipment. Admittedly, the claims were filed beyond the period of six months. Thereafter, Section 11B was amended on 12.05.2000, extending the period of limitation from six months to one year. The benefit of extension of time as sought by the assessee was granted and the assessee's appeal allowed. In appeal before the Supreme Court, the Bench held that the timeline of six months had expired on 20.11.1999 and 10.12.1999 respectively, whereas, the claims had been filed only on 28.12.1999. The provisions of amended 11B were held not to be applicable to revive a claim that was already beyond time. The Bench noted that the amendment would ordinarily be retrospective in nature. Thus the benefit of

one year for filing claim for rebate would be available from 12.05.2000 when the limitation was extended from six months to 12 months. Moreover, the proviso had been added in the section itself to the effect that the amended provision would not have the effect of bringing to life a dead claim.

46. The judgments in the case of S.S.Gadgil V. Lal and Co. (AIR 1965 SC 171), J.P.Jani, Income Tax Officer V. Induprasad Devshanker Bhatt (AIR 1969 SC 778), New India Insurance Co. Ltd. V. Shanti Misra ((1975) 2 SCC 840, T.Kaliamurthi V. Five Gori Thaikkal Wakf ((2008) 9 SCC 306), Thirumalai Chemicals Ltd. V. Union of India ((2011) 6 SCC 739 and Mafatlal Industries Ltd. V. Union of India ((1997) 5 SCC 536 were cited by the Supreme Court in allowing the Revenues' appeal and holding that a dead claim could not be revived by a subsequent benefit.

47. Thus the Revenue argues that the accumulated credit of EC, SHEC and KKC is dead and gone and there is nothing that the assessee could claim as having been carried forward. This argument is rejected. At the risk of repetition, accumulated credit cannot be said to have been wiped out unless there is a specific order under which it lapses. Though there may be embargos placed by the Statutes and Rules, such as the embargo against cross –utilisation placed by Rule 3(7)(b) of the CCR, the accumulated credit continues in the books of the assessee till specifically wiped out, for availment.

48. Finally, the Central Goods and Service Tax Act, 2018 has seen several amendments. Section 28 of CGST (Central Goods and Service Tax) Amendment Act, 2018 proposes the following amendment, which is reproduced below in entirety.

> 28. In section 140 of the principal Act, with effect from the 1st day of July, 2017,— (a) in sub-section (1), after the letters and word "CENVAT credit", the words "of eligible duties" shall be inserted and shall always be deemed to have been inserted; (b) in the Explanation 1— (i) for the word, brackets and figures "sub-sections (3), (4)", the word, brackets and figures "sub-sections (1), (3), (4)" shall be substituted and shall always be deemed to have been substituted; (ii) clause (iv) shall be omitted and shall always be deemed to have been omitted; (c) in the Explanation 2— (i) for the word, brackets and figure "sub-section (5)", the words, brackets and figures "sub-sections (1) and (5)" shall be substituted and shall always be deemed to have been substituted; (ii) clause (iv) shall be omitted and shall always be deemed to have been omitted; (d) after Explanation 2 as so amended, the following Explanation shall

be inserted and shall always be deemed to have been inserted, namely:— 'Explanation 3.—For removal of doubts, it is hereby clarified that the expression "eligible duties and taxes" excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975.'.

49. Significantly, the amendment proposed, to insert the phrase 'eligible duties' after the phrase 'cenvat credit' is restricted only to sub-section (1) of Section 140. Moreover, Explanation (1) defining 'eligible duties' that was originally made applicable only to sub-sections (3) and (4) of Section 140 was extended to cover sub-section (1) as well. However, sub-section (8) of Section 140 remains untouched. As a result, Section 140(8) continues, as on date, to read that where a registered person having a centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of cenvat credit carried forward in a return furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day in such manner as may be prescribed. Thus, even if one were to assume that EC, SHEC and KKC are not liable to be transitioned, since they are not 'eligible', though the provisions of subsections (1), (3) (4) and (6) may contain a limitation to this effect, sub-section (8) contains no such limitation and any credit carried forward, without restriction of eligibility or otherwise, can be transitioned. I make it clear that this conclusion is over and above my conclusion on the larger issue of eligibility under Section 140(1), which I have held in favour of the assessee.

50. In the light of the discussion above, the impugned order is set aside and this writ petition, allowed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

[2019] 57 DSTC 505 (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI
[M. S. WADHWA: MEMBER (J)]

Appeal No. 111-112/ATVAT/18-19

Softel Solution (P) Ltd. ... Appellant

Versus

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 08.05.2019

AUDIT ASSESSMENT ORIGINALLY FRAMED CREATING NIL DEMAND – NOTICE OF DEFAULT ASSESSMENT OF TAX & INTEREST ISSUED U/S 32 AND NOTICE OF ASSESSMENT OF PENALTY ISSUED U/S 33 OF DVAT ACT – TIME BARRED NOTICE ISSUED FOR RECTIFICATION AND WITHOUT JURISDICTION THEREBY REVIEWING THE ORIGINAL ASSESSMENT ON GROUND THAT APPELLANT CLAIMED ITC ON PURCHASES FROM UNREGISTERED DEALER – OHA DID NOT GIVE FINDING WHY OBJECTIONS WERE REJECTED – APPELLANT DID NOT CLAIM ITC OF UNREGISTERED DEALER – PENALTY IMPOSED WITHOUT SERVING SHOW CAUSE. WHETHER CORRECT; HELD – NO – APPELLANT PRODUCED TAX INVOICES AND SHOWED PAYMENT MADE BY BANKING CHANNEL – VATO FAILED TO POINT OUT THE CONTINGENCY FOR WHICH DEFAULT ASSESSMENT HAD BEEN MADE – APPEAL ALLOWED.

Facts of the Case

The appellant was engaged in the business of sale of computer hard ware and soft-wares and was registered with the Department since 2004. The appellant had always been assessed on the basis of its book-version of sale, and thus, had an accepted history. Books of accounts of the appellant were liable to compulsory audit.

An audit assessment of the appellant for the year 2011-12 was originally framed vide orders dated 29/5/2014, creating 'Nil' demand. Subsequently, the appellant was shocked to receive, a notice of default assessment of tax and interest u/s 32 and notice of assessment of penalty u/s 33 of the DVAT Act for the 4th qtr. of 2011-12 creating a demand of tax Rs. 3,09,166/- interest of Rs. 2,29,588/- and penalty Rs. 3,09,166/-. OHA did not give any relief.

Held

Appellant's counsel assailed the impugned orders dated 7/5/2018 passed by OHA on the ground that they were non-speaking orders passed

in a mechanical manner, hence liable to be set aside on this ground also. Perusal of impugned orders showed that no reason or finding had been given by the OHA, why objections made by the appellant were being rejected. OHA after mentioning the objections put forward by the appellant's CA, made observations that the plea of the objector was not accepted as the mismatch was checked on portal during the hearing proceeding in which Type-III mismatch as explained above was detected. Hence, OHA accordingly reject the objection and upheld the demand so imposed by the AA. In Tribunal's view, OHA had failed to show any reason that without prior notices, why penalty imposed by the VATO had been upheld despite the judgment by Hon'ble Delhi High Court in the case of Bansal Dye Chem (P) Ltd. case and why ITC refused by VATO had been upheld despite the fact that appellant had produced tax invoices and submitted that payments were made by cheque and books of accounts and ledgers were also produced before him and without issuing notices to the selling dealer, ITC was refused by the VATO.

Appellant had also assailed the assessment orders dated 10/4/2017 passed by VATO on the ground that VATO had failed to point out the contingency for which default assessment had been made. It was correct to say that VATO in the assessment order dated 10/4/2017 had used verbatim language of section-32 but failed to point out under which of the contingency, assessment orders were framed and on this ground also assessment orders were liable to be set-aside, which were upheld by the OHA vide impugned orders dated 7/5/2018.

Orders dated 7/5/2018 passed by OHA were liable to be set-aside and accordingly the appeals were allowed.

Present for the Appellant : Sh. H.C. Bhatia & Sh. Sanjay Sharma, Adv.

Present for the Respondent : Sh. P. Tara, Adv.

ORDER

1. These appeals have been filed against the impugned orders dated 7/5/2018 passed by Ld. R. Commissioner, here-in-after called Objection Hearing Authority (in short OHA), who vide these orders upheld the assessment orders of tax, interest and penalty dated 10/4/2017 passed by Id. VATO (Ward-116) (Spl. Zone).

2. The brief facts of the present appeals are that the appellant is engaged in the business of sale of computer hard ware and soft-wares

and is registered with the Department since 2004. The appellant has always been assessed on the basis of its book-version of sale, and thus, has an accepted history. Books of accounts of the appellant are liable to compulsory audit.

3. An audit assessment of the appellant for the year 2011-12 was originally framed vide orders dater' 29/5/2014, creating 'Nil' demand. Subsequently, the appellant was shocked to receive, a notice of default assessment of tax and interest u/s 32 and notice of assessment of penalty u/s 33 of the DVAT Act for the 4th qtr. of 2011-12 creating a demand of tax of Rs. 3,09,166/- and interest of Rs. 2,29,588/- and penalty of Rs. 3,09,166/-

4. According to appellant, the aforesaid demands were created after issuing a notice for rectification and thereby reviewing the assessment dated 29/5/2014, on the ground that the appellant had claimed ITC in respect of some unregistered dealers as well as ITC in respect of one registered dealer, namely, M/s Nidhi Sales Corporation. No details of ITC claimed from unregistered dealers were given. According to appellant, in fact the appellant had not made any purchases what-so-ever from any unregistered dealers against which ITC may have been claimed. Even with regard to the purchases made from M/s Nidhi Sales Corporation, the purchases were made in the normal and regular course of business against which M/s Nidhi Sales Corporation had issued tax invoices and payment was made to them through banking channels. Although, the appellant made total purchases of Rs. 43,60,621/- from M/s Nidhi Sales Corporation, against which the appellant had claimed ITC of Rs. 2,18,031/- , the assessing authority in its review order has disallowed ITC of Rs. 3,09,166/- and created an impugned demand of Rs. 5,38,754/-including interest of Rs. 2,29,588/-, charged on the tax demand of Rs. 3,09,166/-. M/s Nidhi Sales Corporation has confirmed that they had made sales worth Rs. 43,60,621/- to the appellant, on which they had charged tax amount of Rs. 2,18,031/- and that they had paid due taxes to the Department.

5. Further, although the Id. VATO had issued a notice of rectification, he stated that he was reviewing the assessment order dated 29/5/2014 but, no orders of review were passed u/s 74B of the DVAT Act and instead notice of default assessment of tax, interest and penalty were passed. The said notices were not even signed by the Id. VATO and hence, were void and liable to be quashed.

6. Against these assessment orders of tax, interest and penalty, appellant filed objections, which were rejected, vide impugned orders dated 7/5/2018, against which present appeals have been filed on various grounds which are as follows:-

i) That the impugned orders dated 7/5/2018 passed by Id. OHA are contrary to law and facts of the case.

ii) That the Id. OHA failed to appreciate that the impugned orders are liable to be quashed as Id. VATO had issued a notice for rectification of the order dated 29/5/2014, but instead of exercising jurisdiction of rectification, decided to exercise power of review but did not pass any order of review also.

iii) That the Id. OHA failed to note and appreciate that notices of default assessment of tax, interest and penalty were not even signed by the Id. VATO and hence were void and liable to be declared as non-est and required to be quashed.

iv) That the Id. OHA passed the impugned orders in a mechanical way without application of mind and without giving any reason.

v) That the Id. OHA failed to note and appreciate that the impugned notice of default assessment of tax and interest passed u/s 32 and notice of assessment of penalty passed u/s 33, were bad in law and liable to be set-aside as the Id. VATO had failed to point out contingency for which the default assessment had been made-whether it was for non filing of returns or for filing incorrect returns or for filing returns which did not comply with the requirement of the Act, a practice, which has not found favour with the Hon'ble Delhi High Court and deprecated by the Court.

vi) That the Id. VATO had wrongly disallowed ITC, on the alleged ground that the appellant had claimed ITC in respect of some unregistered dealers as no details of ITC claimed from unregistered dealers were given. In fact, the appellant had not made any purchase whatsoever from any unregistered dealer against which ITC may have been claimed by the appellant.

vii) That even with regard to the purchase made from M/s Nidhi Sales Corporation, the said purchases were made in the normal and regular course of business against which M/s. Nidhi Sales Corporation had issued tax invoices and payments were made to them through banking channels.

viii) That the appellant had made a total purchases of Rs. 43,60,621/- on which ITC of Rs. 2,18,031/- was claimed but the assessing authority disallowed ITC of Rs. 3,09,166/-.

ix) That the disallowance of ITC is bad in law as the Id. VATO has failed to note and appreciate that the registration had been granted to the selling dealer by the VAT Department itself and registration could not have been granted to the dealers who are not genuine

x) That the ITC has been wrongly disallowed as the appellant had made the purchases after payment of tax to the selling dealers who were also confirming that they had made the sales in question to the appellant, on which they had collected the tax shown in the tax invoices from the appellant which was either deposited by them or lawfully adjusted by them against their liability. It shows that demands have been wrongly created.

xi) That, without prejudice, merely because a selling dealer had made some default, the appellant could not be penalized in the manner as has been done by the VATO, as no enquiry whatsoever was made by the VATO from the selling dealer.

xii) That the Id. VATO in charging interest, failed to note the distinction between the tax due and tax assessed and has charged interest on the tax assessed. That charging of interest is also contrary to the judgment of the Hon'ble Supreme Court in the case of J.K. Synthetic and Frick India Ltd.

xiii) That the impugned penalty u/s 86(10) of the DVAT Act is contrary to law and the facts of the case and has been wrongly imposed.

xiv) That the impugned penalty is liable to be quashed as no notice as held by Hon'ble Delhi High Court before imposing the penalty was issued to the appellant.

xv) That the Id. VATO also failed to note that section 86(10) DVAT Act was not at all applicable as it could not be said that the returns filed by the appellant were false, misleading or deceptive.

7. On the basis of above facts and grounds of appeal, it has been prayed that impugned orders dated 7/5/2018 passed by Id. OHA are liable to be set aside and present appeals be allowed.

8. Heard to appellant's Id. counsel Mr. H.C. Bhatia & Mr. Sanjay Sharma and Mr. P. Tara on behalf of the revenue and perused the file.

9. Appellant's Id. counsel Mr. H.C. Bhatia reiterated the above facts during the course of arguments and submitted that impugned order dated 7/5/2018 passed by Id. OHA be set-aside and present appeals be allowed.

10. While Id. counsel for the revenue supported the impugned orders dated 7/5/2018 passed by Id. OHA and submitted that appellant had claimed wrong ITC in respect of purchases made from some unregistered dealers and in respect of one registered dealer M/s Nidhi Sales Corporation, hence it was rightly denied and tax, interest and penalty were imposed. Impugned orders are as per law, hence warrant no interference and present appeals be rejected.

11. As averred above, Id. VATO imposed tax, interest and penalty in 4th qtr. of assessment year 2011-12 on the ground that appellant wrongly claimed ITC regarding purchases made from unregistered dealers and one registered dealer M/s Nidhi Sales Corporation. According to appellant, no purchases were made from unregistered dealers and secondly, regarding purchases made from M/s Nidhi Sales Corporation, appellant had paid due taxes, ITC was rightly claimed. Ld. counsel for the revenue had filed a profile of the appellant to prove that appellant made certain purchases from unregistered dealers. Appellant has also filed summery of purchases as per DVAT -30. At serial number 13, sellers name is mentioned as Netlab Solutions (India) Pvt.\. Ltd. and before start of serial number-14 two columns are blank where no seller's name has been mentioned. Ld. counsel for the revenue submitted that these are the purchases which were made from unregistered dealers but in my view these two columns which do not show the name of any seller are in fact continuation of other two purchases made from Netlab Solutions (India) Pvt. Ltd. Revenue side has failed to produce any evidence to prove that appellant made purchases from some unregistered dealers also. Assessment was also framec: vide orders dated 10/4/2017 by Id. VATO on the ground that one registered dealer M/s. Nidhi Sales Corporation has not shown any sales to appellant in its 2B return while appellant has produced a certificate to the effect from the seller M/s. Nidhi Sales Corporation that in the relevant qtr. sales to the tune of Rs. 43,60,621/- was made to the appellant and tax to the tune of Rs. 2,18,031/- was collected from the appellant and tax invoices were also issued to the appellant. Ld. VATO was required to issue notices to the selling dealer before denying ITC to the appellant. In these circumstances, it is right to say that appellant has been penalized for no fault of him.

12. Perusal of assessment order dated 10/4/2017 also shows that it is an unsigned order, which is not a valid order in the eyes of law. Secondly, perusal of this order also shows that initially vide assessment orders dated 29/5/2014, nil demand was created against the appellant and that too after desk audit of appellants business affairs. Books of account and other documents, i.e. DVAT 30, 31, sale and purchase bills and copy of

stock inventory were checked and then only concerned VATO came to the conclusion that no discrepancies were found and then notices for rectification of the assessment were sent to the appellant but in fact review orders were passed u/s 74B(5) but ultimately notices under section 32 of default assessment of tax and interest and u/s 33 for penalty were sent. This course adopted by the Id. VATO was not as per law. Ld. counsel for the revenue tried to defend these orders u/s 80 of the DVAT Act. As these assessment orders are not in substance and effect in conformity with the provisions of DVAT Act, hence are liable to be set-aside on this ground.

13. Appellant has also assailed the assessment orders dated 10/4/2017 passed by Id. VATO as time barred. These orders pertain to 4th qtr. of assessment year 2011-12. Ld. VATO was required to frame the assessment within four years as per section 34 of the DVAT Act. Ld. counsel for the revenue tried to defend it under the garb of section 34 (1)(b) proviso. The proviso to section 34 provides that where the Commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully material particular on the part of the person, the said period shall stand extended to six years. It is important to note that no record of the order sheet of file of assessment of appellant has been produced before the Tribunal to prove on what basis, the Id. VATO came to the conclusion and satisfaction that appellant has concealed certain sales on which tax has not been paid, so benefit of extended period of six years cannot be given to the revenue side in the present facts and circumstances. It is correct to say that assessment orders of tax, interest and penalty framed by Id. VATO vide orders dated 10/4/2017 are time barred and on this ground also they are liable to be set-aside.

14. Appellant has also assailed the impugned orders on the ground that VATO (ward-116) (Spl. Zone), had no jurisdiction to frame assessment of appellant as appellant comes under the jurisdiction of Ward-95. In support of this argument, appellant has referred to the judgment of Hon'ble Delhi High Court in the case of Capri Bathaid (P) Ltd. Vs. Commissioner of Trade & Taxes (2014) 52 DSTC 612. In this • judgment, appellant drew attention of this Tribunal towards following observations by the Hon'ble Delhi High Court, which are relevant for the disposal of present appeals —

> "This is significant since in the present petitions, the powers of assessment have been exercised by the AVATO Enf.-1 without there being a delineation of the specific jurisdiction of the A VA TO Enf.-1 in relation to the ward in question within the jurisdiction of which the Assessee in question falls. In the absence of such a

specific order, it is the jurisdictional VATO and not the A VA TO Enf.-1 who will continue to exercise the power of assessment vis-a-vis the Assessee."

15. In this regard, before proceeding further, it would be appropriate to record following observations by Hon'ble Supreme Court in the celebrated judgment of Commissioner of Sales Tax, UP Vs. Sarjoo Prasad Ram Kumar which are as follows —

"Lucknow was one of the circles formed under the U.P. Sales Tax Act, 1948, and, in that circle, there were several Assistant Sales Tax Officers. The assesse carried on his business in Sector III for which sector there was a separate Assistant Sales Tax Officer. For the assessment year 1959-60, the Assistant Sales Tax Officer, Sector II, issued to the assessee a notice under section 21 of the Act and, in due course, made an assessment on him. It was not shown that the Assistant Sales Officer, Sector II, had also been conferred with jurisdiction to assess the dealers in Sector III. On appeal, the assessee contended that the Assistant Sales Tax Officer, Sector II, had no jurisdiction to assess him. That contention was upheld by the appellate authority, the revisional authority and the High Court. On appeal to the Supreme Court:

Held, (I) that the Assistant Sales Tax Officer, Sector II, had no jurisdiction to assess the dealer in Sector III. The rule-making authority had empowered the Commissioner to allocate separate areas for separate Assistant Sales Tax Officers. When such an allocation was made, the jurisdiction of each officer was confined to the area allotted to him;

(ii) that unless there was some provision either in the Act or in the Rules framed which precluded the assessee from raising any objection as to jurisdiction, if the same was not raised before the assessing authority, the assessee could not be precluded from raising that objection at a later stage. An objection as to jurisdiction goes to the root of the case."

16. The ratio of the above cases squarely applies to the facts of present appeals also as appellant comes under the jurisdiction of Ward-95, VATO (Ward-116) (Spl. Zone) was not conferred powers to assess by the ld. Commissioner specifically, hence VATO Ward-116 (Spl. Zone) had no jurisdiction to frame assessment of tax, interest and penalty dated 10/4/2017 and on this ground also impugned orders dated 7/5/2018 by which assessment orders were upheld are also liable to be set-aside.

17. Appellant has also assailed charging of interest on the ground that on the date of filing of returns, no tax was due against the appellant and id. VATO has charged interest on the tax assessed. It is correct to say that as on the date of filing of returns, appellant deposited tax as per law and no tax was due against the appellant, hence interest was wrongly imposed on the appellant.

18. Appellant has also assailed the imposition of penalty on the ground that no notices Were issued before framing the assessment order of penalty. Hon'ble' Delhi High Court in the judgment of Bansal Dye Chem (P) Ltd. Vs. Commissioner of Value Added Tax, Delhi & Ors. (DSTC 2014) 52 HC J-396, made following observations which are relevant to decide whether in the present facts and circumstances, penalty was rightly imposed-

> "The very nature of the proceedings under section 33 of the DVAT Act read with Rule 36 (2) of the DVAT Rules underscore the need for the VATO to observe the principles of natural justice while making the penalty order. This entails serving on the Assessee a separate notice to show cause why penalty should not be imposed and affording the Assessee an opportunity of being heard prior to passing the penalty order. The imposition of penalty is not a mechanical or automatic exercise but requires application of mind by the assessing authority to the facts and circumstances of the case. The fact that an Assessee is found liable to pay enhanced taxes and interest does not ipso facto determine whether the Assessee is also liable to pay a penalty'.

19. Appellant's Id. counsel also assailed the impugned orders dated 7/5/2018 passed by Id. OHA on the ground that they are non¬speaking orders passed in a mechanical manner, hence liable to be set aside on this ground also. Perusal of impugned orders shows that no reason or finding has been given by the Id. OHA, why objections made by the appellant are being rejected. Ld. OHA after mentioning the objections put forward by the appellant's Id. CA, made observations that in view of the facts and circumstances of the case and also in the light of the above contention made by the objector, the plea of the objector is not accepted as the mis-match was checked on portal during the hearing proceeding in which Type-III mis-match as explained above is detected. Hence, I accordingly reject the objection and upheld the demand so imposed by the M. In my view, Ld. OHA has failed to show any reason that without prior notices, why penalty imposed by the Id. VATO has been upheld despite the judgment by Hon'ble Delhi High Court in the case of Bansal Dye Chem (P) Ltd. case (supra) and why ITC refused by Id. VATO has been upheld despite the

fact that appellant has produced tax invoices and submitted that payments were made by cheque and books of accounts and ledgers were also produced before him and without issuing notices to the selling dealer, ITC was refused by the ld. VATO.

20. Appellant has also assailed the assessment orders dated 10/4/2017 passed by ld. VATO on the ground that ld. VATO has failed to point out the contingency for which default assessment has been made. It is correct to say that ld. VATO in the assessment order dated 10/4/2017 has used verbatim language of section-32 but failed to point out under which of the contingency, assessment orders were framed and on this ground also assessment orders are liable to be set-aside, which were upheld by the ld. OHA vide impugned orders dated 7/5/2018.

21. On the basis of above discussion, impugned order dated 7/5/2018 passed by ld. OHA are liable to be set-aside and accordingly present appeals are allowed.

22. Order pronounced in the open court.

23. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2019] 57 DSTC 514 (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[M. S. Wadhwa: Member (J)]

Appeal Nos. 137(i) to 137(iv) /ATVAT/13-14

Koncept Steel Pvt. Ltd. ... Appellant

Vs.

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 08.08.2019

DENIAL OF INPUT TAX CREDIT U/S 9(2) OF DELHI VALUE ADDED TAX ACT, 2004 ALLEGING SELLING DEALER WAS A CANCELLED DEALER – PROCEDURE FOR GAZETTE NOTIFICATION U/S 22(8) FOR CANCELLED DEALER NOT FOLLOWED BY RESPONDENT – PENALTY ORDERS PASSED WITHOUT ISSUANCE OF SEPARATE NOTICES – NOT JUSTIFIED – APPEALS ALLOWED.

Facts of the Case

An audit of the business affairs of the appellant firm for the year 2008-09 was conducted by the audit team of the department and during the

audit proceedings, it was observed by the audit team that the appellant had carried out the works contracts for M/s. NBCC Ltd. and that in these works contracts, the appellant had used the S.S. Pipes and for fixing the S.S. Pipes, the appellant had utilized the S.S. Clamps, screws and other hardware items in finalizing the works. Further, as the clamps used in these works contracts were manufactured by the appellant himself from the S.S. Rods purchased by him as such and were not used in the works contracts in the same form in which they were purchased, as per provisions of section 4(1)(d) read with section 5(2) of DVAT Act, the rate of tax applicable to them was held by the AA to be of 12.5%. Hence, taking the value of hardware items and the clamps used by the appellant in these works contract as 10% of the total amount of the works contracts, the AA taxed it @ 12.5% along with interest and penalty.

It was noticed by the Audit Team that in month of November, 2008-09, the appellant had made local purchases from one M/s. Mahadev International and claimed the ITC on it. However, during the scrutiny, it was noticed that the R.C. of M/s. Mahadev International stands already cancelled w.e,f, 21.10.2008 and all the purchases were made by the appellant after the date of cancellation of the RC of M/s. Mahadev International. Therefore, as the appellant had made the purchases from M/s. Mahadev International after cancellation of its RC, the Assessing Authority disallowed the ITC claimed by the appellant as above and recovered it along with interest and penalty. Assessing Authority imposed tax, interest and penalty for the same against the dealer.

Held

No gazette notification was made by the department regarding cancellation of M/s. Mahadev International and appellant made bona-fide purchases from this dealer, so appellant could not be penalized for the fault of the respondent department. In view of the ratio laid down by Delhi High Court in the matter of Commissioner of Sales Tax Vs. Hari Ram Oil Company (1992 STC 493)In these circumstances, ITC was wrongly denied to the appellant.

Appellant had also assailed imposition of the penalty on the ground that no separate notices were issued and opportunity of hearing was not given before imposition of penalty. In this regard, judgment by Honble Delhi High Court in the case of M/s. Bansal Dye Chem (P) Ltd, was relevant, where Hon'ble High Court held that penalty proceedings were separate proceedings and separate notices must be given before imposition of penalty. As no separate notices were given in the appeals and no

opportunity of hearing was given to the appellant, so penalty was wrongly imposed, so it was also set-aside.

Impugned orders dated 4/2/2013 passed by ld. OHA were partly set-aside and partly upheld and accordingly appeals were allowed.

Present for the Appellant : Sh. A. K. Babbar, Adv.

Present for the Respondent : Sh. N. K. Gulati, Adv.

Order

1. The present appeals have been filed against the impugned orders dated 4/2/2013 passed by ld. Addl. Commissioner, hereinafter called Objection Hearing Authority (in short OHA) who vide these orders partly allowed the objections in respect of use of Hardware item i.e. clamps, screws in the execution of the works contracts and the claim of the ITC on the purchase of 'Polish' and rejected the objections in respect of local purchases made by the appellant from M/s Mahadev International and claimed ITC against them and the disallowance of ITC on the purchase of GAS Electrodes, Drill, Belt, Gloves etc. whereas the matter in respect of non-furnishing of the original G.R. at the time of the Audit remanded to the Assessing Authority with a directions to afford an opportunity of being heard to the appellant to produce GRs and other evidence in support of his case and to pass orders afresh after examining them properly in detail as per law. As common question of law and facts are involved in all these appeals, hence they are being disposed'of by following common orders.

2. The Assessing Authority earlier to the impugned orders had carried out default assessment of tax and interest u/s 32 of the DVAT Act and the penalty u/s 33 r/w Sec. 86(10) of the DVAT Act for the respective months of Sep, Oct, Nov, Dec, Jan, Feb & March, 2008-09 and created the following demands:

S.No.	A.Y. (2008-09)	Tax & Interest	Penalty
1	Sep	23636	15847
2	Oct	14109	10000
3	Nov	70801	48281
4	Dec	66380	45663
5	Jan	5028	10000
6	Feb	83870	58673
7	Mar	139538	98494

3. The brief facts of the present appeals are that an audit of the business affairs of the appellant firm for the year 2008-09 was conducted by the audit team of the department and during the audit proceedings, it was observed by the audit team that the appellant had carried out the works contracts for M/s. NBCC Ltd. and that in these works contracts, the appellant had used the S.S. Pipes and for fixing the S.S. Pipes, the appellant had utilized the S.S. Clamps, screws and other hardware items in finalizing the works. Further, as the clamps used in these works contracts were manufactured by the appellant himself from the S.S. Rods purchased by him as such and were not used in the works contracts in the same form in which they were purchased, as per provisions of section 4(1)(d) read with section 5(2) of DVAT Act, the rate of tax applicable to them was held by the AA to be of 12.5%. Hence, taking the value of hardware items and the clamps used by the appellant in these works contract as 10% of the total amount of the works contracts, the AA taxed it @ 12.5% along with interest and penalty.

4. It was also observed by the Audit Team that the dealer had made inter-state sales against 'C' Forms but failed to produce the original/proof of movement of goads outside Delhi hence rejected the inter-state sales which was treated as local sale and taxed @ 4%. It was also noticed by the Audit Team that in month of November, 2008-09, the appellant had made local purchases from one M/s. Mahadev International and claimed the ITC on it. However, during the scrutiny, it was noticed that the R.C. of M/s. Mahadev International stands already cancelled w.e,f, 21.10.2008 and all the purchases were made by the appellant after the date of cancellation of the RC of M/s. Mahadev International. Therefore, as the appellant had made the purchases from M/s. Mahadev International after cancellation of its RC, the Assessing Authority disallowed the ITC claimed by the appellant as above and recovered it along with interest and penalty. It was further noticed by the Audit Team that in the month of March, 2008-09, appellant had also made the purchases of Gas, Electrodes, Drills, Polishing, Belt, Polishing Material, Gloves etc and claimed the ITC on the purchases but the Assessing Authority disallowed the ITC claimed by the appellant on the ground that 'Gas" is a non-creditable item, hence Assessing Authority had imposed tax, interest and penalty for the same against the dealer.

5. Appellant filed objections against the assessment orders which were partly allowed and partly rejected vide impugned order dated 4/2/2013, against which present appeals have been filed before this Tribunal on various grounds which are as follows.

i) The impugned order confirming demands on account of tax, Interest and penalty is wrong on facts and erroneous on points of law.

ii) The reason given by the VATO and confirmed by ld. OHA for denying the ITC in respect of purchases made from M/s. Mahadev International and denial of ITC on purchases of Gas, Electrodes, Drill, Polishing, Belt, Gloves etc. is wrong. The said claim had been denied on the reasoning that the business activities of the above said dealer were not found in order and as such the ITC claimed by the company on purchase of such goods was disallowed, which Is against the provisions of DVAT Act which are contained in section 9 read with Rule-6 & 7 of the DVAT Act/ Rule. The perusal of these provisions clearly depicts that claim of ITC cannot be denied on mere suspicion. Suspicion, howsoever strong cannot take the place of evidence, The AO's reason for denying the ITC and confirmation by OHA that dealer has not furnished any concrete evidence in support of purchases made from M/s Mahadev International is no reason to deny ITC. The denial is in violation of section 9 of the DVAT Act and also judgment by Hon'ble Delhi High Court in the case of Shanti Kiran India (P) Ltd. Vs. CTT. The dealer had made genuine purchases from registered dealer and payment had been made by account payee cheques.

iii) The deprivation of ITC on reason mentioned in impugned order on other aspect are also bad in law and without jurisdiction and liable to be quashed. None of the reasons cited for denying the ITC is covered u/s 9 of the DVAT Act. The appellant had submitted that M/s Mahadev International was filing the DVAT returns and that on inspection of the file of this dealer, it was found by appellant that M/s Mahadev International was functioning during that period and that registration of M/s Mahadev International was cancelled by the department on 21/10/2008 by mistakes and whereas it was after revival of his registration subsequently that it was got cancelled by the said dealer himself voluntarily only on 6/1/2010.

iv) That law does not provide any machinery in the hands of the appellant to take care of other dealer's business activity. Once a dealer had purchased goods on tax invoice, the dealer is to be allowed the benefit of ITC as per scheme of the Act In respect of said purchases

v) The denial of ITC on purchases of Gas, Electrodes, Drill, Polishing, Belt, Gloves etc, is also illegal.

vi) That the upholding of interest and penalty is too without authority of law and same is arbitrary and excessive.

6. On the basis of above facts and grounds of appeals, it has been prayed that the impugned orders dated 4/2/2013 passed by ld. OHA be set-aside and present appeals be allowed.

7. Heard to appellant's ld. counsel Shri A. K. Babbar, Adv. and Shri N.K. Gulati, Adv., Ld. Counsel for Revenue and have perused the material placed on record, grounds of appeal as well as the impugned orders carefully.

8. Appellant's ld. counsel, at the outset submitted that he is only assailing the tax, interest and penalty imposed during the month of Nov., Dec., and Feb., 2008-09, which has been upheld by the ld. OHA vide impugned order dated 4/2/2013. According to appellant's ld. counsel, appellant made local purchases from one M/s. Mahadev International and claimed ITC on these purchases but on the basis of audit, assessing authority denied ITC claimed by the appellant on the ground that registration of the selling dealer was cancelled on the date of purchases made by the appellant. According to appellant, selling dealer was filing DVAT returns and on inspection of the file of M/s Mahadev International, it was found that it was functioning. Appellant made bona-fide purchases and tax invokes were issued by the selling dealer and appellant made payments through banking channels, so ITC was wrongly denied to the appellant, No Gazette notification was made regarding cancellation of the selling dealer by the department. Appellant was not aware on the date of purchases that selling dealer's registration has been cancelled. In this regard, appellant's ld. counsel drew attention of the Tribunal towards section 22(8) of the DVAT Act, which was as follows, at the relevant time —

> "The Commissioner shall, at intervals not exceeding three months, publish in the official Gazette such particulars as may be prescribed, of registered dealers whose registration has been cancelled.'

9. Ld. counsel for the revenue was given sufficient opportunity to file Gazette notification regarding cancellation of registration of selling dealer but even then, he miserably failed to submit any evidence in support of this fact. Ld. counsel for the revenue during the course of arguments on stay application fairly admitted that no gazette notification are carried out by the department. So, in these circumstances, when appellant was unaware about the cancellation of registration of the selling dealer on the date of purchases, then ITC was wrongly denied by the department to the appellant The similar question arose before the Honble Delhi High Court in the case. of Commissioner of Sales Tax, New Delhi Vs. Hari Ram Oil Company (1992 STC 493). The following observations by the Hon'ble Delhi High Court are

relevant for the disposal of present appeal, where declarations issued by purchasing dealer were not admitted by the department on the ground that registration of purchasing dealer cancelled before sales took place —

> "It appears to us that the intention of the legislature in promulgating rule 12 clearly was that the factum of cancellation of registration must be made known to the whole world. It is only for this reason that the rule requires publication about the cancellation in the official gazette. Such publication is always regarded as information to the world at large. Once the factum about the cancellation of the registration is published thereafter, no dealer can plead that it was ignorant about the cancellation having been effected. It is no doubt true that the purchasing dealers may have been aware that their registration certificates had been cancelled and they may have wrongly issued the declarations but as far as the selling dealer is concerned if he obtains a declaration certificate and it is not known to him that the registration certificate of the purchaser had been cancelled and that cancellation is not notified in the official gazette then the selling dealer is entitled to the benefit under the Act. He cannot be penalized for the inaction of the department in non-publication or late publication or late publication in the official gazette. The selling dealer, in the present case, has acted in good faith and as far as he is concerned he had obtained valid declaration certification at the time of making the sales."

10. The ratio of above case, applies to the facts of the present appeals. As no gazette notification was made by the department regarding cancellation of M/s. Mahadev International and appellant made bona-fide purchases from this dealer, so appellant cannot be penalized for the fault of the respondent department. In these circumstances, ITC was wrongly denied to the appellant.

11. Appellant has also assailed imposition of the penalty on the ground that no separate notices were issued and opportunity of hearing was not given before imposition of penalty. In this regard, judgment by Honble Delhi High Court in the case of M/s. Bansal Dye Chem (P) Ltd, is relevant, where Hon'ble High Court held that penalty proceedings are separate proceedings and separate notices must be given before imposition of penalty. As no separate notices were given in the present appeals and no opportunity of hearing was given to the appellant, so penalty was wrongly imposed, so it is also set-aside,

12. On the basis of above discussion, Impugned orders dated 4/2/2013 passed by ld. OHA are partly set-aside and partly upheld and accordingly present appeals are allowed.

13. Order announced in the open court.

14. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2019] 57 DSTC 521 (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[Rakesh Bali: Member (A) & M. S. WADHWA: MEMBER (J)]

Appeal No. 234/ATVAT/18-19

Ranko Impex ... Appellant

Vs.

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 05.09.2019

CENTRAL SALES TAX ACT, 1956 – GOODS SOLD IN 3RD QTR RETURNED IN 4TH QTR- NO REVISED RETURN FILED FOR 3RD QTR BY THE DEALER BUT VALUE OF GOODS RETURNED WERE REDUCED FROM THE TURNOVER OF THE 4TH QTR – WITHOUT SHOWING SEPARATELY IN THE COLUMN OF 'SALES RETURNS' WHETHER GOODS RETURNED WERE TAXABLE FOR NON - FILING OF REVISED RETURN - HELD – NO

Facts

The dealer filed returns for the 3rd Qtr i.e. Oct, Nov, Dec. 2011, under CST Act declaring total inter-state turnover against C-forms of Rs. 3,35,35,981/- . That goods worth Rs. 17,09,426/- sold in 3rd Qtr. Vide Invoice Nos. 630, 643 & 648 were returned back in 4th Qtr. (within Six months from the date of sale) and were reduced from the turnover of the 4th Qtr. and the balance turnover was declared in the return.

That value of goods returned in 4th Qtr., out of sale of 3rd Qtr was reduced from the total turnover of 4th Qtr. and was not shown separately against the coloumn of 'Sales Return'.

That based on the information in Form-9 submitted by the appellant, assessment was completed by the Assessing authority, taxing the missing C- Forms turnover of Rs. 20,94,468/- alongwith interest due thereon without any opportunity of being heard to the appellant.

Appellant filed objections before the OHA and submitted that no tax should be levied on goods returned as no C – forms

are required for the same and as the goods were sold in 4th Qtr., the C-Form for the same were submitted. OHA rejected the objections stating that no revised return for the 3rd Qtr. had been filed by the dealer for the goods returned and, hence no benefit was to be given to the appellant for missing C – forms.

Held

The appellant has failed to file the revised return for the 3rd Qtr. reflecting the return of the goods but adjusted the amount in the 4th Qtr. The appellant may have failed to follow the procedure as prescribed under the DVAT Act & Rules, which as per their submission was 'inadvertent'. In Tribunal's view requirement under the rule was a directory one but it did not affect the issue of genuineness of the transaction in question.

Accordingly, the appeal was allowed and the matter was remanded back to the AA to reframe the assessment.

Present for Appellant	:	Sh. H. L. Madan, CA
Present for the Respondent	:	Sh. M. L. Garg, Advocate

Order

1. The present appeal has been filed against the impugned orders dated 15/5/2018 passed by Ld. OHA. Alongwith this appeal, stay application was also filed which was disposed of by order dated 16/04/2019.

2. The brief facts are that the appellant is a proprietorship concern engaged in the trading of petroleum products and is registered with Ward-64 with Tin No. 07510356618.

3. That the dealer filed returns for 3rd qtr. i.e. Oct., Nov. & Dec. 2011, under CST Act declaring total inter-State turnover against C-forms of Rs. 3,35,35,981/-. That goods worth Rs. 17,09,426/- sold in 3rd qtr. vide invoice Nos. 630, 643 & 648 were returned back in 4th qtr. (within six months from the date of sale) and were reduced from the total turnover of the 4th qtr. and the balance turnover was declared in the return.

4. That the appellant submitted DVAT-51 for 3rd qtr., stating turnover against C-forms Rs. 3,35,35,981/- on 25/3/2013, without reducing the value of goods returned 'inadvertently' and also submitted original C-forms worth Rs. 3,14,85,298/- (invoice value) alongwith having sale value of Rs. 3,09,08,353/-.

5. That value of goods returned in 4th qtr., out of sale of 3rd qtr. was reduced from the total turnover of 4th qtr. and was not shown separately against the column of 'sales return'.

6. That based on the information in form-9 submitted by the appellant, assessment was completed by the ld. assessing authority, taxing the missing C-forms turnover of Rs. 20,94,468/- @ 18% alongwith interest due thereon without any opportunity of being heard to the appellant.

7. Appellant filed objections before the Ld. OHA and submitted that no tax should be levied on goods returned as no C-forms are required for the same and as the goods returned were sold in 4th qtr., the C-forms for the same were submitted. Ld. OHA rejected the objections stating that no revised return for the 3rd qtr. had been filed by the dealer for the goods returned and, hence no benefit was be given to the appellant for missing C-forms.

8. Aggrieved with the impugned orders passed by Ld. OHA, the appellant filed this appeal before the Tribunal and assailed the orders on the following grounds:-

i. That no tax should be levied for the goods returned as no C Forms were required for the same. The goods returned were sold in 4th Quarter, for which C Forms were submitted by the appellant.

ii. That as per law no revised return for the 3rd Quarter was required to be filed for the goods returned in 4th quarter (Sold in 3rd Qtr) and the same was to be reduced from the turnover of the 4th quarter, which has been correctly done by the appellant and therefore, no tax is leviable both in law as well as on the facts of the case.

9. Heard to Applicant's Ld. counsel Mr. H.L. Madan and Mr. M.L. Garg on behalf of the revenue and perused the file. Appellant has filed a chart (Page No. 5 in paper book) showing re-conciliation of inter-State sales and goods returned corresponding to 3rd & 4th qtr. of tax period 2011-12, which shows that appellant made inter-State sales to the tune of Rs. 3,35,35,981/- and goods which were returned in 4th qtr. amounted to Rs. 17,09,426/-. Appellant also received C-forms regarding this qtr. to the tune of Rs. 3,09,08,353/-. Appellant also received C-form regarding sales of 4th qtr. in which C-forms for 3rd qtr. of bill no. 656 dated 28/12/2011 issued by Marico Ltd. was also included. In this way for remaining C-forms, which appellant failed to procure by now, appellant has deposited Rs. 38,476/- @ 18% towards tax and Rs. 32,320/- towards interest, total amounting to Rs. 70,797/-.

10. We carefully considered the submission of the appellant and the revenue as well as perused the file. It is clear from the above facts that short controversy in the present appeal is whether goods sold in 3rd qtr. of tax period 2011-12 but returned in 4th qtr. can be taxed? The Ld. OHA in the impugned order has observed that since the appellant failed to intimate the department within prescribed time through revision of return, the objection is rejected.

11. The appellant has failed to file the revised return for the 3rd quarter reflecting the return of goods but adjusted the amount in the 4th quarter. The appellant may have failed to follow the procedure as prescribed under the DVAT Act and Rules, which as per their submission was 'inadvertent'. In our considered view requirement under the rule was a directory one but but it did not affect the issue of genuineness of the transaction in question. Accordingly, the appeal is allowed and the matter is remanded back to AA to reframe the assessment. The Appellant is directed to appear before the AA Ward-64 on 03/10/19.

12. Order pronounced in the open court.

13. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2019] 57 DSTC 525 (New Delhi)

In the Supreme Court of India

[Hon'ble Mr. Justice A. M. Khanwilkar and Hon'ble Mr. Justice Dinesh Maheshwari]

Civil Appeal No.: 8941/2019

The State of Uttar Pradesh & Ors. ... Appellant(s)

Vs.

KAY PAN Fragrance Pvt. Ltd. ... Respondent(s)

Date of Order: 22.11.2019

SPECIAL LEAVE PETITION – RELEASE OF GOODS UNDER SECTION 67(8) OF CGST ACT, 2017 READ WITH RULE 141 OF CGST RULE, 2017 – HIGH COURT PASSED INTERIM ORDER DIRECTING THE STATE TO RELEASE THE SEIZED GOODS SUBJECT TO DEPOSIT OF SECURITY OTHER THAN CASH OR BANK GUARANTEE – WHETHER CORRECT; HELD – NO. HIGH COURT HAS ERRONEOUSLY EXTRICATED THE RESPONDENTS OF THIS CASE FROM PAYING THE APPLICABLE TAX AMOUNT IN CASH WHICH IS CONTRARY TO THE PROVISIONS OF GST ACT – THERE WAS NO REASON WHY ANY OTHER INDULGENCE NEED TO BE SHOWN WHEN MECHANISM ALREADY PROVIDED IN THE ACT AND RULES FOR RELEASE OF GOODS – SLP ACCEPTED.

Facts

Appeals were filed by the State of U.P., questioning the interim order passed by the High Court directing the State to release the seized goods, subject to deposit of security other than cash or bank guarantee or in the alternative, indemnity bond equal to the value of tax and penalty to the satisfaction of the Assessing Authority. It had come on record that similar orders came to be passed in several other writ petitions by the High Court, details whereof have been mentioned in the affidavit filed by the State in the Court. It was brought to the Court notice that the High Court, after passing the said interim order would then dispose of the main Writ Petition as having become infructuous, consequent to release of goods by the appropriate authority in terms of the interim order of the High Court.

Held

There was no reason why any other indulgence need be shown to the assessees, who happened to be the owners of the seized goods. They must take recourse to the mechanism already provided for in the Act and the Rules for release, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, respectively,

as may be prescribed or on payment of applicable taxes, interest and penalty payable, as the case may be, as predicated in Section 67 (6) of the Act. In the interim orders passed by the High Court which were subject matter of assailed before the Court, the High Court had erroneously extricated the assesses concerned from paying the applicable tax amount in cash, which was contrary to the said provision.

In the Court opinion, therefore, the orders passed by the High Court which were contrary to the stated provisions shall not be given effect to by the authorities. Instead, the authorities shall process the claims of the concerned assessee afresh as per the express stipulations in Section 67 of the Act read with the relevant rules in that regard. In terms of this order, the competent authority shall call upon every assessee to complete the formality strictly as per the requirements of the stated provisions disregarding the order passed by the High Court in his case, if the same deviated from the statutory compliances. That be done within four weeks without any exception.

The Court reiterated that any order passed by the High Court which was contrary to the stated provisions need not be given effect to in respect of all the cases referred in the affidavit by the State Government before the Court and fresh cases which may have been filed or likely to be filed before the High Court in connection with the subject matter of these appeals, by all concerned and were deemed to have been set aside/modified in terms of this order.

In view of the order, all the Writ Petitions pending before the High Court, list whereof has been furnished in the affidavit were deemed to have been disposed of accordingly. The Court had passed this common order to cover all cases of seizure during the relevant period, to obviate inconsistency in application of Law and also to do away with multiple appeals required to be filed by the State/ assessee to assail the unstatable orders/directions passed by the High Court in subject writ petition(s) referred to in the affidavit filed by the State before the Court.

Present for the Petitioner(s) : Mr. S.K. Bagaria, Sr. Adv.,
Mr. Rupesh Kumar, AOR,
Mrs. Pankhuri Shrivastava, Adv.,
Mr. Aditya Kumar, Adv.,
Ms. Neelam Sharma, Adv.,
Mr. Pravesh Bahuguna, Adv.,
Ms. Vizokenuo Shua, Adv.,
Ms. Vasvi Nagar, Adv.,

Ms. Aishwarya Bhati, Sr. Adv.,
Mr. Bhakti Vardhan Singh, AOR,
Ms. Megha Agrawal, Adv.,
Mr. Surjit Singh, Adv., Mr. Nitin, Adv.,
Ms. Chitrangda R., Adv., Mr. Nithin P., Adv.

Present for the Respondents : Ms. Anubha Agrawal, AOR

O R D E R

Leave granted.

Heard the learned counsels appearing for the parties.

These appeals throw up common issues for consideration. The first set of appeals is filed by the State of U.P., questioning the interim order passed by the High Court directing the State to release the seized goods, subject to deposit of security other than cash or bank guarantee or in the alternative, indemnity bond equal to the value of tax and penalty to the satisfaction of the Assessing Authority. It has come on record that similar orders came to be passed in several other writ petitions by the High Court, details whereof have been mentioned in the affidavit filed by the State in this Court. It was brought to our notice that the High Court, after passing the said interim order would then dispose of the main Writ Petition as having become infructuous, consequent to release of goods by the appropriate authority in terms of the interim order of the High Court. In the context of that grievance, this Court had to pass an order on 16.9.2019 which reads thus:“

> Applications for exemption from filing certified copy of the impugned order and official translation are allowed.
>
> Issue notice on the special leave petition as also on the prayer for interim relief.
>
> Dasti allowed.
>
> Tag with Special Leave Petition (C) Diary No.24795 of 2019.
>
> Considering the fact that in the present case goods have already been released pursuant to the impugned order, no interim relief can be granted.
>
> However, our attention was invited to an order dated 31.01.2019 passed by the High Court in a similar matter i.e. Writ Tax No.141 of

2019 and couple of other case(s), wherein the High Court allowed the writ petitioner(s) to withdraw writ petition(s) after release of goods pursuant to the interim order, despite the fact that the interim order passed by it directing release of goods was subject matter of challenge pending before this Court. That cannot be countenanced. For, the claim of the State cannot be made faitaccompli in this manner.

In future, if such occasion arises including in the case of writ petitioners in this case, it will be open to the petitioner(s) (Department) to invite the attention of High Court regarding the pending special leave petition before this Court. We are certain that the High Court will consider the request for withdrawal of writ petition appropriately."

(emphasis in italics supplied)

It is now brought to our notice that after the aforementioned order of this Court, the High Court is disposing of Writ Petitions by referring to Section 67 (8) of the Central Goods and Services Act, 2017 (for short, 'the Act') and Rule 141 of the relevant Rules. We deem it proper to advert to one such order passed by the High Court, which is assailed by the assessee in the second set of appeal filed before this Court. The said order reads thus:"

Heard learned counsel for the petitioner and learned Additional Advocate General for the State.

It has been brought to notice of the Court that the goods are perishable and hazardous in nature.

Sri Manish Goyal, learned Addl. Advocate General has submitted that the Central Goods and Services Tax Act, 2017 provides a complete procedure for release of such goods, as contained in Section 67(8) of the Act read with Rule 141 of the relevant Rules, which are quoted herein below:"

Section 67(8). The Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification, specify the goods or class of goods which shall, as soon as may be, after its seizure under subsection (2), be disposed of by the proper officer in such a manner, as may be prescribed.

> Rule 141. Procedure in respect of seized goods.(1) Where the goods or things seized are of perishable or hazardous nature, and if the taxable person pays an amount equivalent to the market price of such goods or things or the amount of tax, interest and penalty that is or may become payable by the taxable person, whichever is lower, such goods or, as the case may be, things shall be released forthwith, by an order in FORM GST INS05, on proof of payment."

Subject to compliance of the above provisions of law, the goods so seized may be considered for release within next one week.

The writ petition is, accordingly, disposed of."

In the first place, we find force in the submission canvassed by the State that a complete mechanism is predicated in the Act and the Rules for release and disposal of the seized goods and for which reason, the High Court ought to have been loathe to entertain the Writ Petitions questioning the seizure of goods and to issue directions for its release.

In the second set of appeal filed by the assessee, the relief claimed by way of Writ Petitions before the High Court is as under:(

> a) issue a suitable writ, order or direction in the nature of certiorari quashing the seizure order dated 25.7.2019 passed by the respondent No.2 and 3 under Section 67(2) of the Act and the panchnamas dated 19.7.2019 (Annexure – 2 & 3) to the writ petition respectively.
>
> (b) issue a writ, order or direction in the nature of mandamus/ prohibition declaring the search and seizure proceedings dated 25.7.2019, to be void and restraining the respondent authorities from taking any coercive action against the petitioner.
>
> (c) issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to release the goods of the petitioner forthwith without demanding any security.
>
> (d) issue any such order and further orders which this Court may deem fit and proper in the facts and circumstances of the case.
>
> (e) Award the cost of the Writ Petition to the petitioner.

It is broadly agreed that similar relief has been claimed in all the writ petitions filed before the High Court, including the one disposed of by the

High Court as infructuous or by passing order which is impugned by the assessee in the second set of appeal referred to above.

For the sake of consistency, we have no hesitation in observing that the High Court in all such cases ought to have relegated the assessees before the appropriate Authority for complying with the procedure prescribed in Section 67 of the Act read with Rules as applicable for release (including provisional release) of seized goods.

Section 67 of the Act reads thus:

"Section 67 Power of inspection, search and seizure

67. (1) Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that—

(a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or

(b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act, he may authorize in writing any other officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.

(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under subsection (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorize in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things:

Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorized by him, may serve on

the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer:

Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

(3) The documents, books or things referred to in subsection (2) or any other documents, books or things produced by a taxable person or any other person, which have not been relied upon for the issue of notice under this Act or the rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice.

(4) The officer authorized under subsection (2) shall have the power to seal or break open the door of any premises or to break open any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied.

(5) The person from whose custody any documents are seized under subsection (2) shall be entitled to make copies thereof or take extracts therefrom in the presence of an authorized officer at such place and time as such officer may indicate in this behalf except where making such copies or taking such extracts may, in the opinion of the proper officer, prejudicially affect the investigation.

(6) The goods so seized under subsection (2) shall be released, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, respectively, as may be prescribed or on payment of applicable tax, interest and penalty payable, as the case may be.

(7) Where any goods are seized under subsection (2) and no notice in respect thereof is given within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the period of six months may, on sufficient cause being shown, be extended by the proper officer for a further period not exceeding six months.

(8) The Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification, specify the goods or class of goods which shall, as soon as may be after its seizure under subsection (2), be disposed of by the proper officer in such manner as may be prescribed.

(9) Where any goods, being goods specified under subsection (8), have been seized by a proper officer, or any officer authorized by him under subsection (2), he shall prepare an inventory of such goods in such manner as may be prescribed.

(10) The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure, shall, so far as may be, apply to search and seizure under this section subject to the modification that subsection (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the word "Commissioner" were substituted.

(11) Where the proper officer has reasons to believe that any person has evaded or is attempting to evade the payment of any tax, he may, for reasons to be recorded in writing, seize the accounts, registers or documents of such person produced before him and shall grant a receipt for the same, and shall retain the same for so long as may be necessary in connection with any proceedings under this Act or the rules made thereunder for prosecution.

(12) The Commissioner or an officer authorized by him may cause purchase of any goods or services or both by any person authorized by him from the business premises of any taxable person, to check the issue of tax invoices or bills of supply by such taxable person, and on return of goods so purchased by such officer, such taxable person or any person in charge of the business premises shall refund the amount so paid towards the goods after cancelling any tax invoice or bill of supply issued earlier."

(emphasis in italics supplied)

The relevant rules for release of seized goods are Rules 140 and 141 and the same read thus:"

Rule 140 – Bond and security for release of seized goods

(1) The seized goods may be released on a provisional basis upon execution of a bond for the value of the goods in FORM GST

INR04 and furnishing of a security in the form of a bank guarantee equivalent to the amount of applicable tax, interest and penalty payable.

Explanation. - For the purposes of the rules under the provisions of this Chapter, the "applicable tax" shall include Central Tax and State Tax or Central Tax and the Union Territory Tax, as the case may be and the cess, if any, payable under the Goods and Services Tax (Compensation to States) Act, 2017 (15 of 2017)

(2) in case the person to whom the goods were released provisionally fails to produce the goods at the appointed date and place indicated by the proper officer, the security shall be encashed and adjusted against the tax, interest and penalty and fine, if any, payable in respect of such goods.

Rule 141 – Procedure in respect of seized goods

(1) Where the goods or things seized are of perishable or hazardous nature, and if the taxable person pays an amount equivalent to the market price of such goods or things or the amount of tax, interest and penalty that is or may become payable by the taxable person, whichever is lower, such goods or, as the case may be, things shall be released forthwith, by an order in FORM GST INS05, on proof of payment.

(2) Where the taxable person fails to pay the amount referred to in subrule (1) in respect of the said goods or things, the Commissioner may dispose of such goods or things and the amount realized thereby shall be adjusted against the tax, interest, penalty, or any other amount payable in respect of such goods or things."

There is no reason why any other indulgence need be shown to the assessees, who happen to be the owners of the seized goods. They must take recourse to the mechanism already provided for in the Act and the Rules for release, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum (even upto the total value of goods involved), respectively, as may be prescribed or on payment of applicable taxes, interest and penalty payable, as the case may be, as predicated in Section 67 (6) of the Act. In the interim orders passed by the High Court which are subject matter of assail before this Court, the High Court has erroneously extricated the assessees concerned from paying the applicable tax amount in cash, which is contrary to the said provision.

In our opinion, therefore, the orders passed by the High Court which are contrary to the stated provisions shall not be given effect to by the authorities. Instead, the authorities shall process the claims of the concerned assessee afresh as per the express stipulations in Section 67 of the Act read with the relevant rules in that regard. In terms of this order, the competent authority shall call upon every assessee to complete the formality strictly as per the requirements of the stated provisions disregarding the order passed by the High Court in his case, if the same deviates from the statutory compliances. That be done within four weeks without any exception.

We reiterate that any order passed by the High Court which is contrary to the stated provisions need not be given effect to in respect of all the cases referred in the affidavit by the State Government before this Court and fresh cases which may have been filed or likely to be filed before the High Court in connection with the subject matter of these appeals, by all concerned and are deemed to have been set aside/modified in terms of this order.

In view of this order, all the Writ Petitions pending before the High Court, list whereof has been furnished in the affidavit are deemed to have been disposed of accordingly. We have passed this common order to cover all cases of seizure during the relevant period, to obviate inconsistency in application of Law and also to do away with multiple appeals required to be filed by the State/ assessee to assail the unstatable orders/directions passed by the High Court in subject writ petition(s) referred to in the affidavit filed by the State before this Court. Accordingly, the appeals are disposed of in the aforestated terms. All pending applications are also disposed of.

[2019] 57 DSTC 535 (Ahmedabad)

In the High Court of Gujarat

[Hon'ble Mr. Justice J. B. Pardiwala and Hon'ble Mr. Justice A. C. Rao]

R/SCA No.: 11137/2019

Ikhlaq Mohammad Ismail Shaikh ... Petitioner

Vs.

State of Gujarat ... Respondent

Date of Order: 25.07.2019

SECTION 67 OF CGST ACT, 2017 – POWER OF INSPECTION, SEARCH AND SEIZURE – PROCEEDINGS FOR CONFISCATION OF GOODS AND CRIMINAL PROSECUTION INITIATED AGAINST PETITIONER – PETITION SEEKING DIRECTION TO AUTHORITIES TO OPEN THE SEAL TO THE PREMISES – PETITIONER ADVISED TO MAKE AN APPLICATION U/S 67(6) BEFORE COMPETENT AUTHORITY WHO SHALL LOOK INTO THE SAME AND PASS APPROPRIATE ORDER.

Present for the Petitioner : Mr. N K Majmudar, Advocate

Present for the Respondent : Ms Maithili Mehta, AGP

ORAL ORDER
(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1.00. By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following main relief :-

> "8(B). Issue appropriate writ, order or direction quashing and setting aside the action of applying seal to the premises of the petitioner i.e. principal place of business of the petitioner and the respondents authorities may be directed to open the seal to the premises of the petitioner i.e. principal place of business of petitioner at the earliest on such terms and conditions as may be deemed fit and proper by this Hon'ble Court."

2.00. It appears from the materials on record that the writ applicant is engaged in the business of scrap. The writ applicant is carrying on business in the name and style of M/s. Any Steel. The writ applicant is the proprietor of the proprietary concern. The writ applicant is registered under the Gujarat Goods and Services Tax Act, 2017. It appears that proceedings have been initiated by the competent authority for confiscation of the goods stored in the warehouse of the writ applicant. It also appears that the criminal prosecution has been instituted and the writ applicant as on date is in judicial custody.

2.01. The grievance redressed in this writ application is that the authorities have affixed a seal on the warehouse. According to

Mr. Majmudar, the learned counsel appearing for the writ applicant, under section 67 of the Act, if the proper officer or the competent authority has reason to believe that any goods are liable to confiscation or any document or books or things, which in his opinion may be useful or relevant to any proceeding under the Act and if there is likelihood that the goods or any documents or books or things may be secreted to any place or have been secreted, then, proper officer may authorise in writing any other officer to search and seize or may himself search and seize such goods, documents or books or things. However, according to Mr. Majmudar, there was no good reason for the authorised officer to affix seal on the warehouse. The submission of Mr. Majmudar is that an appropriate order could have been passed restraining the writ applicant from removing the goods or any other articles like books of accounts etc. from the premises in question.

3.00. On the other-hand, this writ application has been vehemently opposed by Ms. Maithali Mehta, learned counsel appearing for the respondents. Ms. Mehta submitted that the officer authorised under sub-section (2) of section 76 of the Act has the power to affix seal. Ms. Mehta, pointed out that the criminal prosecution has been initiated and the writ applicant as on the date is in judicial custody. According to Ms. Mehta, no illegality could have been said to have been committed in the action taken by authorised officer.

4.00. Having heard the learned counsel appearing for the parties and having gone through the materials on record, we propose to dispose of this writ application with a liberty to the writ applicant to make appropriate application under section 76(6) of the Act for the release of the goods so seized on the provisional basis upon execution of a bond and furnishing of a security. We order accordingly. If such an application is preferred by the writ applicant, the competent authority shall look into the same and pass appropriate order in accordance with law. With the above, this writ application is disposed of.

[2019] 57 DSTC 536 (Bengaluru)

In the High Court of Karnataka

[Hon'ble Mrs. Justice S. Sujatha]

W.P. No.: 28876/2019 (T-RES)

LC Infra Projects (P.) Ltd. ...Petitioner

Vs.

Union of India & Ors. ... Respondent(s)

Date of Order: 22.07.2019

SECTION 50 OF CGST ACT, 2017 – INTEREST ON DELAYED PAYMENT OF TAX – ITC CLAIMED NOT TALLIED WITH PORTAL – TAX LEVIED ON THE UNPAID TAX WITHOUT ISSUING SHOW CAUSE NOTICE – DEMAND NOTICE HAS BEEN ISSUED CLAIMING TAX OF RS. 13,63,864/- AND INTEREST OF RS. 81,29,684/- PAYABLE BY THE ASSESSE – LETTER BY RESPONDENT FOR ATTACHMENT OF BANK ACCOUNT – ISSUANCE OF SHOW CAUSE NOTICE IS SINE QUA NON TO PROCEED WITH RECOVERY OF INTEREST PAYABLE – SECTION 75(12) APPLICABLE ONLY TO THE SELF-ASSESSMENT MADE BY THE ASSESSE AND NOT TO QUANTIFICATION OR DETERMINATION MADE BY THE AUTHORITY – WHETHER INTEREST LEVIED UPON ASSESSE DESERVED TO BE SET ASIDE – HELD, YES.

Present for the Petitioner : Sh. Ajay J. Nandalike, Advocate

Present for the Respondents : Sh. Vikram A. Huilgol, Advocate

O R D E R

The petitioner has sought for following reliefs:

i. Issue writ holding that Section 50(1) of Central Goods and Service Tax (CGST) Act, 2017 and Section 50(1) of the Karnataka Goods and Services Tax, 2017 is unconstitutional to the extent that the burden of interest is imposed on the Input Tax Credit Available to the Credit of the petitioner.

ii. Issue writ or order or direction quashing the email dated 04.03.2019 bearing OC.No.76/2019 (Annexure-J) demanding payments.

iii. Issue a writ or order or direction quashing the letter dated 07.05.2019 bearing No.V/15/16/2019 GST Adjn631/19 issued under GST DRC-13 (Annexure-L) to the Indian Overseas Bank attaching the account of the petitioner.

Relief No.1 is not pressed, reserving all the contentions raised thereto being kept open.

2. The petitioner is a dealer registered under the provisions of the Goods and Service Tax (GST) Act, 2017 (hereinafter referred to as the 'Act for short). The petitioner was entitled to claim the Input Tax Credit for the GST paid by the sub-contractors while filing its GST returns. Since some of the subcontractors had not uploaded the invoices and filed their returns as a result of which ITC to which the petitioner was entitled to was not being tallied. The third respondent addressed an e-mail seeking clarification of availments of ITC. The third respondent contended that there was an

excess availment of ITC to the tune of Rs. 2,62,48,383/-. The petitioner pointed out that the ITC differential credit is not pertaining to the petitioner, relating to the tax period in question. The petitioner has been levied tax on the unpaid tax without issuing Show Cause Notice and thereafter, the Demand Notice has been issued claiming the tax amount of Rs. 13,63,864/- and interest amount of Rs. 81,29,684/- payable by the petitioner. The third respondent vide its letter dated 07.05.2019 has sought for attachment of the bank account of the petitioner. In the said background, the petitioner is before this Court challenging the action of the respondents in quantifying the interest and attaching the bank account without issuing Show Cause Notice as contemplated under Section 73 of the Act.

3. The learned counsel for the petitioner would submit that the mandatory requirement of issuing show cause notice before quantifying interest and attaching bank account of the petitioner not being complied with, the orders impugned at Annexures – J and N deserves to be set aside.

4. The learned counsel for the Revenue fairly submitted that no notice as contemplated under Section 73 of the Act was issued to the petitioner to show Cause before quantifying interest amount and attaching bank account of the petitioner. It is based on Section 75(12) of the Act, Respondent-Authorities have proceeded to recover the tax and interest by attaching the bank account of the petitioner.

5. I have carefully considered the rival submissions made by the parties. Perused the materials on record. Section 73 of the Chapter XV of the Act – contemplates that where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

6. Thus, the issuance of Show Cause notice is sine qua non to proceed with the recovery of interest payable thereon under Section 50 of the Act and penalty leviable under the provisions of the Act or the Rules. Undisputedly, the interest payable under Section 50 of the Act has been determined by

the third respondent – Authority without issuing Show Cause Notice, which is in breach of principles of natural justice. It is trite law that any order passed by the quasi-judicial authorities in contravention of the principles of natural justice, cannot be sustained. Similarly, after determination of the interest liable to be paid by the petitioner, no notice has been issued before attaching the bank account of the petitioner. There is a lapse on the part of the third respondent – Authority. The notion of the third respondent – Authority that Section 75(12) of the Act empowers the authorities to proceed with recovery without issuing Show Cause Notice is only misconceived. The said Section is applicable only to the self-assessment made by the assessee and not to quantification or determination made by the Authority.

7. Considering these aspects, it is ex-facie apparent that action of the third respondent is perverse and illegal and the same deserves to be set aside. Hence, the orders impugned at Annexure–J dated 04.03.2019 as well as Annexure– L dated 07.05.2019 are quashed with liberty to the third respondent to proceed in accordance with law. All rights and contentions of the parties are left open.

[2019] 57 DSTC 539 (Ahmedabad)

In the High Court of Gujarat

[Hon'ble Mr. Justice J. B. Pardiwala and Hon'ble Mr. Justice A. C. Rao]

R/SCA No.: 10825/2019

Nayara Energy Ltd. Petitioner

Vs.

Union of India ... Respondent

Date of Order: 26.06.2019

SECTION 74 OF CGST ACT, 2017 – WRIT CHALLENGING LEGALITY AND VALIDITY OF THE SHOW CAUSE NOTICE ISSUED BY DY. COMMISSIONER OF STATE TAX IN EXERCISE OF HIS POWERS U/S 74(1) OF CGST/GGST ACT – DY. COMMISSIONER OF STATE TAX HAD NO JURISDICTION TO ISSUE SUCH A SHOW CAUSE NOTICE – RELIEF GRANTED TO THE PETITIONER THROUGH INTERIM ORDER IN HIS FAVOUR – NOTICE ISSUED TO THE GST AUTHORITY.

Present for the Petitioner	:	Mr. Mihir Joshi, Senior Advocate with Mr. Roshil Nichani, Mr Aayog Doshi, Mrs. imple Gohil, Advocates
Present for the Respondents	:	Ms. Maithili Mehta, AGP

ORAL ORDER
(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. The writ-applicant is a company incorporated under the Companies Act, 1956. The writ-applicant seeks to challenge the legality and validity of the show-cause notice, purported to have been issued by the Dy. Commissioner of State Tax, Petroleum 1 and 2, Ahmedabad, in exercise of his powers under Section 74(1) of the Gujarat Goods and Services Tax Act, 2017, and Section 74(1) of the Central Goods and Services Tax Act, 2017.

2. The principal argument canvassed by the learned senior counsel appearing on behalf of the writ-applicant is that the Dy. Commissioner of State Tax has no jurisdiction to issue such a show-cause notice.

3. Mr. Joshi, the learned senior counsel appearing for the writ-applicant, first invited the attention of this Court to the definition of the term "proper officer" as provided in Section 2 (91) of the Act. Section 2 (91) reads thus :

> (91) "proper officer" in relation to any function to be performed under this Act, means the Commissioner or the officer of the central tax who is assigned that function by the Commissioner in the Board;"

4. Thereafter, our attention was drawn to Section 3 of the GST Act, 2017. Section 3 clarifies who would be the officers under the Act. Section 3 reads thus :

> "3. The Government shall, by notification, appoint the following classes of officers for the purposes of this Act, namely:-
>
> (a) Principal Chief Commissioners of Central Tax or Principal Directors General of Central Tax,
>
> (b) Chief Commissioners of Central Tax or Directors General of Central Tax,
>
> (c) Principal Commissioners of Central Tax or Principal Additional Directors General of Central Tax,
>
> (d) Commissioners of Central Tax or Additional Directors General of Central Tax,
>
> (e) Additional Commissioners of Central Tax or Additional Directors of Central Tax,

(f) Joint Commissioners of Central Tax or Joint Directors of Central Tax,

(g) Deputy Commissioners of Central Tax or Deputy Directors of Central Tax,

(h) Assistant Commissioners of Central

(i) any other class of officers as it may deem fit:”

5. The proviso to Section 3 of the Act clarifies the officers appointed under the Act shall be deemed to be the officers appointed under the provisions of this Act.

6. The submission of the learned senior counsel is that, till this date the Government has not issued any notification for appointing any of the officers enumerated from clauses (a) to (g) of Section 3, except the Commissioner of State Tax Act.

7. Mr. Joshi also invited the attention of this Court to Section 5, which is in respect of the powers of the officers. Section 5 reads thus :

“Section 5 Powers of Officers :-

(1) Subject to such conditions and limitations as the Board may impose, an officer of central tax may exercise the powers and discharge the duties conferred or imposed on him under this Act. ;

(2) An officer of central tax may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of central tax who is subordinate to him.

(3) The Commissioner may, subject to such conditions and limitations as may be specified in this behalf by him, delegate his powers to any other officer who is subordinate to him.

(4) Notwithstanding anything contained in this section, an Appellate Authority shall not exercise the powers and discharge the duties conferred or imposed on any other officer of central tax.”

8. In short, the submission canvassed is that in the absence of any specific notification issued by the State Government appointing the Dy. Commissioner of State Tax, he could not have issued the show-cause notice under Section 74 of the Act, 2017.

9. The second submission of Mr. Joshi is that the show-cause notice under challenge is also contrary to the judgment of this Court in the case of State of Gujarat v. ONGC, reported in (2017) 97 VST 506 (Guj., wherein while interpreting the scope of the expression 'for use' in the context of sale of LPG for domestic use, this Court held the same to cover sales which are 'intended for use' by domestic household consumers. Since the notification concerned in the show-cause notice is similarly worded, the said judgment would squarely apply.

10. Having heard the learned counsel appearing for the respective parties and having gone through the materials on record, we are of the view that the writ-applicant has been able to lay down a strong prima facie case to have an interim order in its favour in terms of Para 48 (c). We, accordingly, grant such relief.

11. Let Notice be issued to the respondents, returnable on 17th July 2019. Ms. Maithili Mehta, the learned AGP waives service of notice for and on behalf of the respondent-State. Direct service is permitted.

12. To be heard along with the Special Civil Application Nos.2699 of 2019, 8177 of 2019 and 8185 of 2019.

13. On the returnable date, all the matters shall be clubbed and notified together.

[2019] 57 DSTC 542 (Patna)

In the High Court of Judicature at Patna

[Hon'ble Mr. Justice Jyoti Saran and Hon'ble Mr. Justice Partha Sarthy]

CWJC No.: 11221/2019

Ram Charitra Ram Harihar Prasad ... Petitioner(s)

Vs.

State of Bihar & Ors. ... Respondent(s)

Date of Order: 06.08.2019

E-WAY BILL SUPPORTING THE TRANSPORTATION OF GOODS EXPIRED ON 22.04.2019 – CONSIGNMENT REACHED ITS DESTINATION IN TIME – VEHICLE FOUND IN MOVEMENT – EXERCISE OF POWER U/S 68(3) READ WITH SECTION 129(1) AND SECTION 129(3) OF BGST ACT, 2017 – DEMAND NOTICE FOR ALLEGED VIOLATION OF PROVISION – FRESH E-WAY BILL GENERATED ON 26.04.2019 PRIOR TO PASSING DETENTION ORDER – WHETHER DETENTION ORDER VALID; HELD – NO. ENTIRE EXERCISE WAS DEHORS THE PROVSIONS OF AMENDED

RULE 138 AS NOTIFIED ON 07.03.2018 WHICH ENABLED A CONSIGNOR TO VALIDATE THE E-WAY BILL WHICH WAS DONE BY PETITIONER – QUASHED THE PROCEEDINGS IN ITS ENTIRETY TOGETHER WITH DEMAND.

Facts

The goods in question were being transported from the district of Vaishali to the district of Kishanganj and E-Way Bills to such effect under the provision of Section 138 was generated on 18.04.2019 which had a validity until 22.04.2019. The goods were tax paid goods and the documents accompanying the consignment had been enclosed at Annexure-1 series to the writ petition which confirms to the position. As per the respondent authorities in the Commercial Taxes Department stationed at Kishanganj though the consignment reached its destination on 22.04.2019, yet the vehicle was found in movement and which led to its seizure/detention under Section 129 and the proceedings initiated thereunder with service of notice on the dealer. The proceedings on record so initiated which have been placed on record by the respondents in the counter affidavit so filed at Annexure-A bearing case no. 18 of 2019-2020 would confirm that no sooner the position was gathered by the petitioner that a fresh E-Way Bill was generated at 6.16 A.M. in the morning of 26.04.2019 validating the transportation and which fact was taken note of by the Deputy Commissioner in his order recorded on 26.04.2019 whereby the proceedings had been initiated.

Held

The document at Annexure -A series would confirm that the goods were tax paid and thus the exercise had to be regulated under the provisions of Section 129(1)(b) which provided for a lenient applicability of the penal provisions and understandably because the tax amount on the goods had already been paid by the dealer.

Perhaps this important aspect of the matter had eluded the assessing authority while carrying out the exercise. In the Court opinion the entire exercise was dehors the provisions of amended Rule 138 as notified in the gazette dated 07.03.2018 which enabled a consignor of goods to validate his E-Way Bill and which was done by the petitioner on 26.4.2019 i.e. before the order of detention could be passed under Section 129 on 27.4.2019.

In the Court considered opinion, once the assessing authority i.e. the Deputy Commissioner, State Tax had recorded in his proceedings on 26.04.2019 that the E-Way Bill had been generated, meaning thereby

the goods carried a valid E-Way Bill, the proceedings ought to have been brought to a close, rather than to perpetuate the illegality as done in the case.

For the reasons so recorded, the Court quashed the proceedings in its entirety together with the demand dated 07.05.2019 impugned at Annexure-5 which was accordingly quashed and set aside. The conditional release of the goods together with the vehicle vide order passed on 17.5.2019 was confirmed and the petitioner was discharged from the liability of the security directed under the interim order.

Present for the Petitioner(s) : Mr. Jayanta Ray Chaudhury, Adv.
Mr. Binay Kumar, Adv.

Present for the Respondents : Mr. Vikash Kumar, SC-11

ORAL ORDER

(Per: HONOURABLE MR. JUSTICE JYOTI SARAN) 2 17-05-2019 Heard Mr. Jayant Ray Choudhary,learned counsel for the petitioner and Mr. Vikash Kumar, learned SC 11 representing the State.

While praying for quashing of an order dated 07.05.2019 passed by Respondent no. 3 -Deputy Commissioner of State Tax, Kishanganj Circle, Kishanganj, whereby in purported exercise of power vested in him under Section 68(3) read alongside Section 129(1) and 129(3) of the Bihar Goods and Service Tax Act, 2017 (hereinafter referred to as 'the Act'), not only the goods loaded on the Truck bearing Registration No. Patna High Court CWJC No.11221 of 2019(2) dt.17-05-2019 WB-23C-8474 have been seized, a demand as well has been raised for tax to the tune of Rs.2,30,722/- together with penalty of equal amount which comes to Rs.4,61,444/-.

It is stated by Mr. Jayant Ray Choudhury that it is under the valid transport document including an 'E Way Bill' that the goods in question were being transported from Hajipur to Kishanganj and though the show cause notice mentions that it was intercepted during movement but the fact is that the exercise was carried out outside the godown of the distributor who is the petitioner before this Court. He submits that allegation against the petitioner is not of transporting the goods beyond the city of Kishanganj rather even while it was stationed that the proceeding has been initiated, tax assessed and penalty imposed.

Mr. Vikash Kumar, learned counsel representing the State counters the statement of the petitioner to submit that the vehicle was in movement.

We shall allow the State respondents to file their counter affidavit but in the nature of the goods that is found loaded coupled with the fact that proceedings have been initiated for an alleged default within the city of Kishanganj and not beyond the destination and bearing in mind the provisions of Patna High Court CWJC No.11221 of 2019(2) dt.17-05-2019 Section 129(1)(c) of the Act, we direct respondent no. 3 or the authority competent to do so, to release the goods in question within 48 hours of receipt/production of a copy of this order on furnishing of security by the petitioner in terms of the provisions underlying Section 129(1)(c) of 'the Act'. In so far as the inter- party contest is concerned, as prayed, we allow Mr. Vikash Kumar to seek instruction and file counter affidavit when the matter would come up under the heading 'For Orders-I' on 27 th June, 2019 with a view to its final disposal.

List this case on 27th June, 2019.

[2019] 57 DSTC 545 (Ahmedabad)

In the High Court of Gujarat

[Hon'ble Mr. Justice J. B. Pardiwala and Hon'ble Mr. Justice A. C. Rao]

R/SCA No.: 5758-60, 5762/2019

Siddharth Enterprises ... Petitioner

Vs.

Nodal Officer ... Respondent

Date of Order: 06.09.2019

SECTION 140(3) OF CGST ACT, 2017 READ WITH RULE 117 OF CGST RULES – WRIT PETITION – APPLICANT FAILED TO FILE GST TRAN-1 DUE TO TECHNICAL GLITCHES – WHETHER DIRECTION CAN BE GIVEN TO RESPONDENTS FOR BEING PERMITTED TO FILE DECLARATION IN FORM GST TRAN-1 AND GST TRAN-2 RESPECTIVELY TO ENABLE THE WRIT APPLICANTS TO CLAIM TRANSITIONAL CREDIT OF THE ELIGIBLE DUTIES IN RESPECT OF THE INPUTS HELD IN STOCK ON APPOINTED DAY; HELD – YES.

WHETHER DUE DATE CONTEMPLATED UNDER RULE 117 OF CGST RULES FOR THE PURPOSES OF CLAIMING TRANSITIONAL CREDIT WAS PROCEDURAL IN NATURE AND THUS SHOULD NOT BE CONSTRUED AS A MANDATORY PROVISION; HELD - YES.

Facts of the Case

The writ-applicant was a partnership firm having its registered office at Bharuch, State of Gujarat. The writ-applicant was in the business of import-export and distributor of branded housewares registered under the CGST Act vide registration bearing GSTIN No. 24ABJFS7809M1ZL.

The writ application had been filed seeking appropriate writ, order or direction to the respondents for being permitted to file declaration in the form GST TRAN-1 and GST TRAN-2 respectively to enable the writ-applicants to claim transitional credit of the eligible duties in respect of the inputs held in the stock on the appointed day in terms of Section 140(3) of the Central Goods and Services Tax Act, 2017 read with Rule 117 of the Central Goods and Services Tax Rules, 2017.

The declaration in the form GST TRAN-1 could not be filed on account of the technical glitches in terms of poor net connectivity and other technical difficulties on the common portal. The writ-applicants, in the alternative, have prayed for a declaration that the due date contemplated under Rule 117 of the Rules to claim transitional credit was procedural in nature, and thus, merely directory and not a mandatory provision.

Held

In the Court opinion, it was arbitrary, irrational 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 the pre-GST regime and post-GST regime and, therefore, it was violative of Article 14 of the Constitution.

Section 16 of the CGST Act allowed 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 was earlier. Whereas, Rule 117 allowed time-limit only up to 27th December 2017 to claim transitional credit on pre-GST purchases. Therefore, it was 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 did not have any rationale and, therefore, it was violative of Article 14 of the Constitution.

It was legitimate for a going concern to expect that it will be allowed to carry forward and utilised the CENVAT credit after satisfying all the conditions

as mentioned in the Central Excise Law and, therefore, disallowing such vested right was offensive against Article 14 of the Constitution as it went 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.

The liability to pay GST on sale of stock carried forward from the previous tax regime without corresponding input tax credit would lead to double taxation on the same subject matter and, therefore, it was arbitrary and irrational.

Article 300A provided that no person shall be deprived of property saved by authority of law. While right to the property was no longer a fundamental right but it was still a constitutional right. CENVAT credit earned under the erstwhile Central Excise Law was the property of the writ-applicants and it could not be appropriated for merely failing to file a declaration in the absence of Law in this respect. It could have been appropriated by the government by providing for the same in the CGST Act but it could not be taken away by virtue of merely framing Rules in this regard.

In the result, all the four writ-applications succeed and were hereby allowed. The respondents were directed to permit the writ-applicants to allow filing of declaration in form 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 Act. It was further declared that the due date contemplated under Rule 117 of the CGST Rules for the purposes of claiming transitional credit was procedural in nature and thus should not be construed as a mandatory provision.

Present for the Petitioner : Mr. Vinay Shraff with Mr. Vishal J. Dave with Mr. Nipum Singhvi, Adv.

Present for the Respondents : Mr. Soaham Joshi, AGP

COMMON CAV JUDGMENT
(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. Since the issues raised in all the captioned writ applications are the same, those were heard analogously and are being disposed of by this common judgment and order.

2. RULE returnable forthwith in all the captioned writ applications. Mr.Soaham Joshi, the learned AGP waives service of notice of rule for and on behalf of the respondents nos.1 and 2 respectively.

3. For the sake of convenience, the Special Civil Application No.5758 of 2019 is treated as the lead matter. By this writ application under Article 226 of the Constitution of India, the writ-applicant, a partnership firm, has prayed for the following reliefs :

> "(a) Your Lordships may be pleased to issue writ of mandamus and/or any other appropriate writ(s) to allow filing of declaration in form GST Tran-1 and GST Tran-2, to enable it to claim transitional credit of eligible duties in respect of inputs held in stock on the appointed day in terms of Section 140(3) of the Central Goods and Services Tax Act, 2017;
>
> (b) Your Lordships may be pleased to issue writ of declaration and/or any other appropriate writ(s) for declaration of the due date contemplated under Rule 117 of the CGST Rules to claim the transitional credit as being procedural in nature and thus merely directory and not a mandatory provision;
>
> (c) Your Lordships may be pleased to grant ad-interim relief with respect to prayer under Para (a) and Para (b) above;
>
> (d) Your Lordships may be pleased to award costs of and incidental to this application be paid by the respondents;
>
> (e) Your Lordships may be pleased to issue order(s), direction(s), writ(s) or any other relief(s) as this Hon'ble Court deems fit and proper in the facts and circumstances of the case and in the interest of justice;"

4. The writ-applicant is a partnership firm having its registered office at Bharuch, State of Gujarat. The writ-applicant is in the business of import-export and distributor of branded housewares registered under the CGST Act vide registration bearing No.GSTIN24ABJFS7809M1ZL

5. It appears from the materials on record that the writapplication has been filed seeking appropriate writ, order or direction to the respondents for being permitted to file declaration in the form GST TRAN-1 and GST TRAN-2 respectively to enable the writ-applicants to claim transitional credit of the eligible duties in respect of the inputs held in the stock on

the appointed day in terms of Section 140(3) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as, 'the Act') read with Rule 117 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as, 'the Rules').

6. It is the case of the writ-applicants that the declaration in the form GST TRAN-1 could not be filed on account of the technical glitches in terms of poor net connectivity and other technical difficulties on the common portal. The writ-applicants, in the alternative, have prayed for a declaration that the due date contemplated under Rule 117 of the Rules to claim transitional credit is procedural in nature, and thus, merely directory and not a mandatory provision.

SUBMISSIONS ON BEHALF OF THE WRIT-APPLICANTS :

7. Mr. Shraff, the learned counsel appearing with Mr. Dave for the writ-applicants, vehemently submitted that when the Indirect Tax regime transitioned from the Central Excise regime to the Goods and Services Tax regime, the CGST Act, 2017, allowed the carry forward of the CENVAT credit on the duty paid stock on the appointed day, i.e. 1st July 2017.

8. It is submitted that the CGST was payable on such duty paid stock and, therefore, the credit was allowed because the intention of the Government was not to collect tax twice on the same goods. It is pointed out that in such cases, it was provided that the credit of the duty/tax paid earlier would be admissible as credit.

9. The learned counsel submitted that as his clients were not able to file the form GST TRAN-1 within the date specified, i.e. 27th December 2017, on account of the technical difficulties, they had to physically lodge their claim of transitional credit on stock in the form GST TRAN-1 and GST TRAN-2 respectively with their Jurisdictional Officer.

10. The learned counsel submitted that his clients also met the Jurisdictional Officer time to time and also addressed various letters to the Nodal Officer and the Jurisdictional Officer for being allowed to file on-line form GST TRAN-1 and GST TRAN-2 respectively in terms of the decision of the Goods and Services Council and the Circular No.39/13/2018-GST dated 3rd April 2018.

11. The learned counsel pointed out that his clients also requested that they be allowed to file the above referred forms in terms of the Notification

No.48/2018-C.T. dated 10th September 2018 read with Order No.01/2019-GST dated 31st January 2019 which extended the period for submitting declaration in the form GST TRAN-1 till 31st March 2019 for all those tax payers who could not submit the said declaration by the due date on account of the technical difficulties on the common portal.

12. The learned counsel submitted that the Jurisdictional Officer of his client twice addressed a communication in writing to the Nodal Officer recommending the case of the writ applicants for being allowed to file the form GST TRAN-1 and GST TRAN-2 respectively. However, the Jurisdictional Officer has not received any official communication till date from the Nodal Officer neither denying nor allowing to file the above referred forms. However, the office of the Nodal Officer informed that the writ-applicants cannot be permitted to file the form GST TRAN-1 because as per the GST System Logs, the tax payer has neither tried for saving/ submitting or filing the form GST TRAN-1. Mr. Shraff, the learned counsel pointed out that the very same stance is reflected in the affidavit-in-reply filed on behalf of the respondent no.2.

13. The learned counsel submitted that without giving any opportunity of hearing to his clients, the office of the Nodal Officer reached to the conclusion that the writ-applicants had neither tried for saving/submitting or filing the form GST TRAN- 1 as per the GST System Logs.

14. The learned counsel submitted that this could be termed as violative of the principles of natural justice. The learned counsel also submitted that in the absence of the meaning of the phrase “technical difficulties on the common portal” in the CGST Act or Rules, the same should be given a liberal interpretation because it is a settled principle of law that an interpretation unduly restricting the scope of a beneficial provision should be avoided so that it may not take away with one hand what the policy gives with the other.

15. The learned counsel, in support of his submissions, has placed strong reliance on the decision of the Supreme Court in the case of Union of India v. Suksha International & Nutan Gems and another, 1989 (39) ELT 503 (SC) [para-9].

16. The learned counsel, in the last, submitted that the technology has been added to the system for the benefit and convenience of the tax payers but it should not be subservient to the purpose and hence the impediments, if any, should not make the writ-applicants servants of the technology.

17. In such circumstances referred to above, the learned counsel prays that there being merit in all the writ-applications, those be allowed and the reliefs as prayed for be granted.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS :

18. Mr. Soaham Joshi, the learned AGP, has vehemently opposed all the writ-applications. Mr.Joshi submitted that none of the grievances redressed by the writ-applicants are tenable in law. At the same time, Mr. Joshi fairly submitted that the Jurisdictional Officer, Bharuch, did bring to the notice of the Nodal Officer about the various problems and difficulties faced by the tax payers. Mr. Joshi submitted that the role of the Nodal Officer is to collect all such complaint and grievances of the tax payers across the State and forward them to the GSTM and the GSTM, upon verification, would further forward the grievances to the IT Redressal Grievance Committee. Mr. Joshi submitted that in the case on hand the Nodal Officer had acted promptly and had also forwarded the grievances of the tax payers to the GSTM. Mr. Joshi placed strong reliance on the following averments made in the affidavit-in-reply filed on behalf of the respondents.

> "8. It is respectfully submitted that the petitioner has annexed various articles from various websites such as business standard, financial express which are of the year 2017. In light of the same it is respectfully submitted that, these articles are secondary evidence in nature under the Indian Evidence Act. Therefore, reliance placed upon these articles can be taken into consideration only when there is no primary evidence available. It is respectfully submitted that, the petitioner has further annexed the minutes of the 26th GST Council meetings held on 10.03.2018, the same is annexed from page 50 to the memorandum of the application and upon perusal of the agenda as mentioned at page 50 of the 26th GST Council meeting agenda 7 reads as under:
>
> > "Agenda 7: Grievance Redressal Mechanism in GST Regime in light of recent judgments of Hon'ble High Court of Allahabad and Mumbai."
>
> In light of the same it is respectfully submitted that the agenda approved the setting up of the Grievance Redressal Committee and further the agenda also approved that instead of setting up new Grievance Redressal Committee the GIC shall act as the IT Grievance Redressal Committee.

9. It is respectfully submitted that, the nodal officer had forwarded the grievance of the petitioner to GSTN and the case of the petitioners were considered by the 33rd GST Council meeting dated 20.02.2019.

10. It is respectfully submitted that the petitioner has placed reliance upon two decisions of the Hon'ble High Court of Allahabad and Hon'ble High Court of Mumbai which is averred in paragraph 2.14 and paragraph 2.15 to the memorandum of application. In light of the same upon reading the cause title of the case the respondent was the Union of India and in the present case the petitioner has not joined the Union of India as party respondent.

11. It is respectfully submitted that, upon perusal of the 33rd GST Council meeting the said report contains 195 pages and agenda item 4 reads as decisions/ recommendations of the 4th I.T. Grievance Redressal Committee for information of the council, which is at page no.104 of the report and agenda item on GST Tran-1 cases were discussed and decided on 12/02/2019. The Hon'ble Court may be please to consider the submission made at the time of argument as far as the said report is concerned.

12. It is also respectfully submitted that, the petitioner has not joined GSTN nor the I.T. Grievance Redressal Committee as party respondent and therefore, the petitioner suffices of lack of non-joinder/mis-joinder of parties."

19. In such circumstances referred to above, Mr.Joshi prays that there being no merit in the writ-applications, those be rejected.

20. Having heard the learned counsel appearing for the parties and having gone through the materials on record, we would like to address ourselves on the following aspects :

(1) Section 140(3) of the CGST Act provides for a substantive right which cannot be curtailed or defeated on account of the procedural lapses.

(2) The entitlement of the credit of carry forward of the eligible duties is a vested right.

(3) The rights accrued under the existing law have been saved by the CGST Act.

(4) The right to carry forward the CENVAT credit is a constitutional right.

(5) It is arbitrary, irrational 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 the goods and services made in the pre-GST regime and post-GST regime and the same could be termed as violative of Article 14 of the Constitution of India.

(6) The doctrine of legitimate expectation also could be said to be violated.

(7) 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 would definitely have a serious impact on the working capital of the writ-applicants and such action could be termed as violative of Article 19(1)(g) of the Constitution of India.

(8) The liability to pay GST on sale of stock carried forward from the previous tax regime without corresponding input tax credit would lead to double taxation on the same subject matter.

(9) The action could be also termed as violative of Article 300A of the Constitution of India.

ANALYSIS :

21. Section 140(3) of the CGST Act allows carry forward of the eligible duties in respect of the inputs held in stock subject to the fulfillment of conditions (i) to (v) as mentioned therein. Section 140(3) of the CGST Act is a complete Code in itself and the substantive right conferred by the Act cannot be curtailed by way of rules.

22. In the aforesaid context, we may refer to the following decisions :

(1) The Madras High Court, in the case of Tara Exports v. Union of India, reported in 2019 (20) G.S.T.L. 321 (Madras), has held as under :

> “8. GST is a new progressive levy. One of the progressive ideal of GST is to avoid cascading taxes. GST Laws contemplate seamless flow of tax cred its on all eligible inputs. The input tax credits in TRAN-1 are the credits legitimately accrued in

the GST transition. The due date contemplated under the laws to claim the transitional credit is procedural in nature. In view of the GST regime and the IT platform being new, it may not be justifiable to expect the users to back up digital evidences. Even under the old taxation laws, it is a settled legal position that substantive input credits cannot be denied or altered on account of procedural grounds."

(2) The Supreme Court, in the case of Union of India v. Suksha International & Nutan Gems & Anr., reported in 1989 (39) E.L.T. 503 (S.C.), has held that an interpretation unduly restricting the scope of a beneficial provision should be avoided so that it may not take away with one hand what the policy gives with the other. We may quote the relevant paragraph 9 of the judgment thus :

"9. We have considered the rival contentions on the point. Para 185(4) was intended to provide certain incentives to the Export Houses which, upon grant of Imprest-Licences, fulfill their countervailing obligations in the matter of export commitments. The provision is a beneficial one. Clauses (4) and (7), no doubt, on their plain wording present certain constructional difficulties and the view sought to be put across by Shri Subba Rao for the appellants, on the plain language of Clause (7), is not without possibilities. However, the basis of a harmonious construction which commended itself to the High Court in other similar cases appears to us to advance and promote the objects of the policy in paragraph 185(4) and is, at all events, not an unreasonable view to take of the matter. In so me of these cases this Court has declined to interfere with this interpretation by rejecting petitions for special leave. Acceptance of the interpretation suggested by Shri Subba Rao would, in our opinion, unduly restrict the scope of the beneficial provision and, in many instances which would otherwise fall within the beneficial scope of the policy in para 185(4), take away with one hand what the policy gives with the other. We think we should accept the submissions of Shri Harish Salve which is consistent with the view taken of the matter by the High Court in other cases and hold that the conditions in para 185(4) of the policy would not be attracted to the case of Export Houses which are granted Imprest Licences.

Accordingly we hold and answer contention (a) against the appellants."

(3) The Supreme Court, in the case of Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner, reported in 1991 (55) E.L.T. 437 (S.C.), has held that the mere fact that a condition is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It would be erroneous to attach equal importance to the non-observance of all the conditions irrespective of the purposes they were intended to serve. We may quote the relevant paragraph 11 of the judgment thus :

> "11. We have given our careful consideration to these submissions. We are afraid the stand of the Revenue suffers from certain basic fallacies, besides being wholly technical. In Kedarnath's case, the question for consideration was whether the requirement of the declaration under the proviso to Section 5(2)(a)(ii) of the Bengal Finance (Sales-tax) Act, 1941, could be established by evidence aliunde. The court said that the intention of the Legislature was to grant exemption only upon the satisfaction of the substantive condition of the provision and the condition in the proviso was held to be of substance embodying considerations of policy. Shri Narasimha Murthy would say the position in the present case was no different. He says that the notification of 11th August, 1975 was statutory in character and the condition as to 'prior-permission' for adjustment stipulated therein must also be held to be statutory. Such a condition must, says counsel, be equated with the requirement of production of the declaration form in Kedarnath's case and thus understood the same consequences should ensue for the non-compliance. Shri Narasimhamurthy says that there was no way out of this situation and no adjustment was permissible, whatever be the other remedies of the appellant. There is a fallacy in the emphasis of this argument. The consequence which Shri Narasimha Murthy suggests should flow from the non-compliance would, indeed, be the result if the condition was a substantive one and one fundamental to the policy underlying the exemption. Its stringency and mandatory nature must be justified by the purpose intended to be served. The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive , mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-

observance of all conditions irrespective of the purposes they were intended to serve.

In Kedarnath's case itself this Court pointed but that the stringency of the provisions and the mandatory character imparted to them were matters of important policy. The Court observed:

> "...The object of Section 5(2)(a)(ii) of the Act and the rules made thereunder is self-evident. While they are obviously intended to give exemption to a dealer in respect of sales to registered dealers of specified classes of goods, it seeks also to prevent fraud and collusion in an attempt to evade tax. In the nature of things, in view of innumerable transactions that may be entered into between dealers, it will well nigh be impossible for the taxing authorities to ascertain in each case whether a dealer has sold the specified goods to another for the purposes mentioned in the section. Therefore, presumably to achieve the two fold object, namely, prevention of fraud and facilitating administrative efficiency, the exemption given is made subject to a condition that the person claiming the exemption shall furnish a declaration form in the manner prescribed under the section. The liberal construction suggested will facilitate the commission of fraud and introduce administrative inconveniences, both of which the provisions of the said clause seek to avoid." (See : [1965] 3 SCR 626)

Such is not the scope or intendment of the provisions concerned here. The main exemption is under the 1969 notification. The subsequent notification which contain condition of prior-permission clearly envisages a procedure to give effect to the exemption. A distinction between the provisions of statute which are of substantive character and were built-in with certain specific objectives of policy on the one hand and those which are merely procedural and technical in their nature on the other must be kept clearly distinguished. What we have here is a pure technicality. Clause 3 of the notification leaves no discretion to the Deputy Commissioner to refuse the permission if the conditions are satisfied. The words are that he "will grant". There is no dispute that appellant had satisfied these conditions. Yet the permission was withheld-not for any

valid and substantial reason but owing to certain extraneous things concerning some inter-depart-mental issues. Appellant had nothing to do with those issues. Appellant is now told “we are sorry. We should have given you the permission But now that the period is over, nothing can be done”. The answer to this is in the words of Lord Denning: “Now I know that a public authority can not be estopped from doing its public duty, but I do think it can be estopped from relying on a technicality and this is a technicality.” (See: Wells v. Minister of Housing and Local Government [1967] 1WLR 1000.

Francis Bennion in his “Statutory Interpretation”, 1984 edition, says at page 683:

> “Unnecessary technicality: Modern courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfilment of the purposes of the legislation.””

(4) The Supreme Court, in the case of State of Mysore and Ors. v. Mallick Hashim & Co., reported in AIR 1972 SC 1449, has held that no conditions could be imposed which destroy the right to a refund which is otherwise absolute. The conditions authorised are conditions which regulate the refund and not conditions which result in the extinguishment of the right to a refund which the Legislature has created under the proviso. We may quote the relevant paragraph 20 of the judgment thus :

> “As mentioned earlier the petitioner in the two Writ Petitions are dealers in hides and skins whereas the petitioner in the Sales Tax Revision Petition before the High Court is a dealer in copra and coconuts. It is not disputed that hides and skins as well as copra and coconuts are declared goods under Section 14 of the Central Sales Tax Act, 1956. It is also not disputed that at the time of purchase of those goods the dealers in question had paid the purchase tax. Further it is admitted that these goods were sold in the course of inter-State sale transactions. It is not denied that the petitioners had a right to apply for refund of the taxes paid by them but the objection raised by the State is those refund applications were not filed within the period mentioned in Rule 39-A (2) and (3) and further in two cases it is contended that the applications were not made in the prescribed form. The High Court has taken the view that

Rule 39-A is ultra vires the rulemaking power. It has opined that the rules made under Section 5 (4) of the Mysore Sales Tax Act, 1957, are those which must relate to the manner and conditions under which refund has to be made and such a rule cannot in substance deprive the dealer of the right to get refund to which he is entitled to under S. 15 of the Central Sales Tax Act, 1956, as well as Section 5 (4) of the Mysore Sales Tax Act, 1957. We have not thought it necessary to go into that question as, in our opinion, sub-rules (2) and (3) of rule 39-A are wholly unreasonable rules and consequently these cannot be sustained. Sub-rule (3) of Rule 39-A provides that before a person is entitled to refund under Section 15 of the Central Sales Tax Act. 1956, as well as under Section 5 (4) of the Mysore Sales Tax Act, 1957, he must have made the refund application within the time before which he should have submitted his Sales-tax return. In many States the dealers have to submit quarterly returns. Under Rule 18 framed under the Mysore Sales Tax Act, 1957, we are informed that a dealer will have to submit his annual return within 30 days of the end of the financial year. That means even if a sale in the course of inter-State trade has been made on the 31st March of a year, the refund application will have to be made within 30 days from that date. The position will be worse still if the dealer is required to submit quarterly returns. The learned counsel for the State was not in a position to tell us whether in the Mysore State the dealers have to file quarterly returns. In our opinion the impugned Rule is merely an attempt to deny the dealers the refund to which they are entitled under the law or at any rate to make the enforcement of that right unduly difficult."

(5) The Supreme Court, in the case of Commissioner of Central Excise, Madras v. Home Ashok Leyland Ltd., reported in 2007 (210) E.L.T. 178 (S.C.), has held that Rule 57A recognizes the right of the manufacturer to take credit for the specified duty paid on the inputs. whereas Rule 57E is a procedural provision. Rule 57E being procedural and classificatory would not affect the substantive rights of the manufacture of the specified final product to claim the Modvat credit for the duty paid on the inputs subsequent to the date of the receipt of those inputs. We may quote the relevant paragraphs 3 and 4 of the judgment thus :

"3. The above discussion indicates that the right to claim MODVAT credit existed only in Rule 57A. Even Rule 57E

says so. There can be no doubt that right from its inception the right to claim MODVAT credit is under Rule 57A. Rule 57A recognizes the right of the manufacturer to claim credit. Rule 57E recognizes not only the right of the manufacturer to claim credit but also the extent to which credit could be claimed for the duty paid on inputs. Therefore, Rule 57A is a substantive provision. However, the procedure of adjustment finds place in Rule 57E. Rule 57E is procedural provision. It deals with adjustments in duty credit. The object behind enacting Rules 57A, 57E and 57G is to avoid duty on duty whereby the price of the final product is loaded. Therefore, Rule 57A recognizes the right of the manufacturer to take credit for the specified duty paid on the inputs, whereas Rule 57E deals with adjustment in the duty credit, such adjustment mean on account of reduction on the credit allowed. It could also be in the event of refund. Suffice it to state that Rule 57E deals only with adjustment in the duty credit. Rule 57G states that credit shall not be taken unless the manufacturer of the final product maintains his records regarding receipt of the inputs in his factory like having again bill of entry certain types of registers (RR-1) or any other document prescribed by Central Board of Excise and Customs.

4. In our view, therefore, the courts below were right in holding that Rule 57E was procedural, clarificatory and therefore would not affect the substantive rights of the manufacturer of the specified final product to claim MODVAT credit for the duty paid on the inputs subsequent to the date of the receipt of those inputs. Consequently, the respondent-manufacturer in the present case was entitled to take credit between the period 16.8.1987 to 30.12.1987 in the sum of Rs.6,43,994.57."

(6) The Madras High Court, in the case of Hospira Health Care India P. Ltd. v. Development Commissioner, MEPZ, SEZ & Heous, Chennai, reported in 2016 (340) ELT 668 (Madras), has held that a procedure should not run contrary to the substantive right in the policy. If the procedural norms are in conflict with the policy, then the policy will prevail and the procedural norms to the extent they are in conflict with the policy, are liable to be held bad in law. We may quote the relevant paragraphs 27, 28 and 33 of the judgment thus :

"27. It is a settled position that the procedure formulated under any Policy is only to operationalise the right and not to prevent

the same. If a statute is workable even without framing of the rules, the same has to be given effect to When the petitioner had stated that in respect of the purchases made from EOUs was earlier allowed by the respondents, the same would establish that the respondents had followed the provisions of paragraph 6.11.

28. When the Policy gives a substantive right, the Appendix cannot restrict the substantive right provided in the policy and the Appendix is meant for effectuating the rights contained in the policy and cannot be a tool for narrowing or frustrating the objective and operation of the substantive right granted to the petitioner.

33. In the present case, when the policy provides for reimbursement under paragraph 6.11, the said objective was prevented or diluted by the Appendix. As already stated, the Appendix is meant for effectuating the rights contained in the policy and not to frustrate the operation of the substantive right. The Appendix should be meant only for reaching the objective and definitely should not be meant for defeating a person from getting the fruits of the substantive right provided in the policy. A procedure should not run contrary to the substantive right in the policy. In the case on hand, it is only a procedural amendment and not a policy amendment. When the policy gives a right to the petitioner for claiming refund of taxes, it cannot be prevented by making an amendment in the procedure. The petitioner can be prevented only if the policy is amended prohibiting refund of tax for the purchases made from an 100% EOU. The procedure was to be prescribed by an authority in implementing the policy and must be in consonance with the policy. If the procedural norms are in conflict with the policy, then the policy will prevail and the procedural norms to the extent they are in conflict with the policy, are liable to be held to be bad in law."

(7) This High Court, in the case of Baroda Rayon Corporation Ltd. v. Union of India, reported in 2014 (306) E.L.T. 551 (Gujarat), has held that the manner in which the credit taken is required to be utilised is laid down under sub-rule (2) and is subject to the conditions and restrictions, if any, specified in the notification issued under sub-rule (1) of Rule 57A of the Rules. Thus, if the time-limit within which the credit taken under sub-rule (1) of Rule 57A is to be restricted,

the same would have to be provided under the notification issued under Rule 57A(1) of the Rules. Insofar as Rule 57G of the Rules is concerned, there is no power vested in the Central Government to restrict the time-limit within which the credit is required to be taken. To put it differently, the right to avail of credit is conferred under Rule 57A of the Rules. Rule 57G only provides the procedure to be observed by the manufacturer. Thus, while exercising the powers under Rule 57G of the Rules, the Central Government is not empowered to curtail any right conferred under Rule 57A of the Rules. In such circumstances, the impugned notification issued in exercise of the powers under Rule 57G of the Rules insofar as the same prescribes a timelimit for taking of credit, being in excess of the powers conferred under the said rule was held to be ultra vires the same and not sustainable to that extent. We may quote the relevant paragraphs 8 and 9 of the judgment thus :

"8. Rule 57G of the Rules as it stood at the relevant time, insofar as the same is relevant for the present purpose reads thus:-

> "RULE 57G. Procedure to be observed by the manufacturer.- (1) Every manufacturer intending to take credit of the duty paid on inputs under rule 57A, shall file a declaration with the Assistant Collector of Central Excise having jurisdiction over his factory, indicating the description of the final products manufactured in his factory and the inputs intended to be used in each of the said final products and such other information as the said Assistant Collector may require, and obtain a dated acknowledgement of the said declaration.
>
> (2) A manufacturer who has filed a declaration under sub-rule (1) may, after obtaining the acknowledgement aforesaid, take credit of the duty paid on the inputs received by him:
>
> Provided that no credit shall be taken unless the inputs are received in the factory under the cover of an invoice, issued under rule 52A, an AR-1, or triplicate copy of a Bill of Entry, a certificate issued by an Appraiser of Customs posted in Foreign Post Office or any other document as may be prescribed by the Central Government by notification in the Official Gazette in this behalf evidencing the payment of duty on such inputs."

The subject notification has been issued in exercise of powers conferred by the first proviso to rule 57G of the Rules which

provides for prescription of any other document evidencing the payment of duty on such inputs as may be prescribed by the Central Government by notification in the Official Gazette. Thus, from the language employed in the provision, it is apparent that the Central Government is empowered to prescribe any other document in addition to the documents prescribed under the said rule evidencing the payment of duty on such inputs. However, the said power is limited to prescribing any other document in addition to the documents prescribed and does not extend to prescribing a time limit within which credit has to be taken. In other words, once such documents are prescribed, there is no further power vested in the Central Government to prescribe a time limit for taking credit. Insofar as taking credit is concerned the same is governed by rule 57A of the Rules which lays down that the provisions of the said section shall apply to such finished excisable products as the Central Government may, by notification in the Official Gazette, specify in this behalf for the purpose of allowing credit of any duty of excise or additional duty under section 3 of the Customs Tariff Act, 1975, (referred to as specified duty) as may be specified in the notification paid on the goods used in the manufacture of the said final products (referred to as the inputs). Sub-rule (2) of rule 57A provides that the credit of specified duty allowed under sub-rule (1) shall be utilised towards payment of duty of excise leviable on final products, whether under the Act or any other Act, as may be specified in the notification issued under sub-rule (1) and subject to the provisions of the said section and the conditions and restrictions, if any, specified in the said notification. Thus, the manner in which credit taken is required to be utilised is laid down under sub-rule (2) and is subject to the conditions and restrictions, if any, specified in the notification issued under sub-rule (1) of rule 57A of the Rules. Thus, if the time limit within which credit taken under sub-rule (1) of rule 57A is to be restricted, the same would have to be provided under the notification issued under rule 57A (1) of the Rules. Insofar as rule 57G of the Rules is concerned, there is no power vested in the Central Government to restrict the time limit within which credit is required to be taken. To put it differently, the right to avail of credit is conferred under rule 57A of the Rules. Rule 57G only provides the procedure to be observed by the manufacturer. Thus, while exercising powers under rule 57G of the Rules, the Central Government is not empowered to curtail any right conferred under rule 57A of the Rules. In the circumstances, the impugned notification issued in exercise of powers under rule

57G of the Rules insofar as the same prescribes a time limit for taking of credit, being in excess of the powers conferred under the said rule is ultra vires the same and as such cannot be sustained to that extent.

9. Another aspect of the matter is that by curtailing the time limit within which the credit taken is to be availed, in effect and substance the said notification provides for lapsing of the credit that has already accrued in favour of the petitioner. In this regard it may be noted that the petition pertains to credit taken in the year 1994. At the relevant time there was no provision in the Act empowering the Central Government to frame rules providing for lapsing of credit of duty. Clause (xxviii) of sub-section (2) of section 37 of the Act, which empowers the Central Government to frame rules providing for lapsing of credit has been inserted with retrospective effect from 16th March, 1995. Hence, the said provision would not be applicable to the facts of the present case. In the circumstances, apart from the fact that rule 57G of the Act does not empower the Central Government to prescribe a time limit for taking credit, at the relevant time the Central Government was not empowered to frame a rule providing for lapsing of the credit taken. Hence, the present case would be squarely covered by the decisions of the Supreme Court in the case of Collector of Central Excise, Pune vs. Dai Ichi Karkaria Ltd , (supra) and in the case of Eicher Motors Ltd. vs. Union of India, (supra). In Collector of Central Excise, Pune vs. Dai Ichi Karkaria Ltd. (supra), the Supreme Court in the context of rules 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 makes the requisite declaration and obtains an acknowledgment thereof. 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. In Eicher Motors Ltd. vs. Union of India, (supra) the Supreme Court held thus:

> “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 is 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.""

(8) The Madhya Pradesh High Court, in the case of Bharat Heavy Electricals Ltd. v. Commissioner of Central Excise, Bhopal, reported in 2016 (332) E.L.T. 411 (M.P.), has held that when power is exercised under Rule 57G, the Central Government is not empowered to curtail any right conferred by the substantive provision of Rule 57A and, therefore, the notification issued under Rule 57G prescribing the time limit for taking the credit as found by this Court in Baroda Rayon Corporation (supra) was declared to be ultra vires, as it was beyond the power and was in conflict with the impugned provision of Rule 57A. The ruling is based on the principle laid down by the Supreme Court in the cases of Eicher Motors Limited and Dai Ichi Karkaria Limited. We may quote the relevant paragraphs 10 and 11 of the judgment thus :

"10. Therefore, in the case of Baroda Rayon Corporation Limited Vs. Union of India, 2014 (306) ELT 551 (Guj), the Gujarat High Court has considered question identical in nature as is posed before us. In the case of Baroda Rayon Corporation Limited also, the benefit of MODVAT credit was denied to the assessee only because of an entry made in RG-23 A Part I & Part II, showing a date beyond six months. In the said case, the principle of law governing grant of MODVAT credit; the requirement of Rules 57A and 57G; the law laid down in the case of Eicher Motors Limited (supra) and Dai Ichi Karkaria Limited (supra) have all been considered and it has been held by the Gujarat High Court in the aforesaid case has held that merely because the entry of date made in Part II is beyond six months, the benefit of MODVAT credit cannot be denied when from all other material available, including the entry made in Part I, it is found that the benefit can be granted to the assessee.

11. We are in full agreement with the principle laid down by the Gujarat High Court wherein also under similar circumstances, identical action has been quashed and MODVAT credit extended. We agree with the Gujarat High Court when it says

that the right to avail all credit conferred under Rule 57A and Rule 57G only provides the procedure to be observed by the manufacturer. Therefore, when power is exercised under Rule 57G, the Central Government is not empowered to curtail any right conferred by the substantive provision of Rule 57A and, therefore, the Notification issued under Rule 57G prescribing the time limit for taking the credit as found by the High Court of Gujarat is found to be ultra vires, as it is beyond the power and is in conflict to the impugn provision of Rule 57A, these are based on the principle laid down by the Hon'ble Supreme Court in the cases of Eicher Motors Limited (supra) and Dai Ichi Karkaria Limited (supra). "

(9) The Allahabad High Court, in the case of Global Sugar Ltd. v. Commissioner of Central Excise, Kanpur, reported in 2016 (334) E.L.T. 604 (Allahabad), has held that Rule 57T of the Rules is only procedural in nature. The Modvat credit cannot be denied on a technical ground that the procedure for availing Modvat credit was not followed at the relevant moment of time. We may quote the relevant paragraphs-7 to 13 of the judgment thus :

"7. We find from a perusal of the order that the applicant had filed the application under sub rule (3) of Rule 57T along with an application for condonation of delay showing cause that they were not aware of the procedure for claiming declaration under the said Rule and have filed the same at the earliest opportune moment. It was contended that this is only a procedural/ technical lapse and that the substantive right of Modvat credit could not be denied on account of such procedural/ technical lapse. The claim of the applicant for Modvat credit was disallowed on the ground that mandatory permission as required under Rule 57-T was not granted by the competent authority though it is admitted that such application was filed by the applicant.

8. Having heard Sri Piyush Agarwal, the learned counsel for the applicant and Sri R.C.Shukla, the learned counsel for the respondents, we find that the procedure involved for availing Modvat credit under Rule 57-T of the Rules is more or less akin as provided under Section 57G of the Rules. This Court in Commissioner of Central Excise, Kanpur vs. M/s Balmer Lawrie & Co. Ltd., decided on 29.9.2016 (2016 UPTC 137) held that the provision of Rule 57-G of the Rules was not

mandatory and that it was only a procedural provision and if there was a procedural lapse, it could not mean that Modvat credit could not be availed. The same principle is applicable in the instant case.

9. We find that Modvat credit is basically a duty collecting procedure which allows relief to a manufacture on the duty element borne by him in respect of the inputs used by him. The object behind Rule 57-T of the Rules in the instant case is utilization of credit allowed towards such inputs which was being exclusively used for erection of a shed and was not exclusively used for production of a final product. Sub-clause (6) of Rule 57-T indicates as to when a Modvat credit could be availed, namely, that if the capital goods are received in the factory premises of the manufacturer under cover of a document specified under Rule 57-G evidencing the payment of duty on such capital goods.

10. In the instant case, it is not disputed that the goods were received in the factory premises and was consumed for the purpose of erection of shades for boiler houses, etc. It is also not disputed that the goods so received showed evidence of payment of duty on such goods. When these two conditions are existing which are the mandatory requirement, in such case, Modvat credit should be allowed and could not be denied on the ground that there was a procedural lapse in not applying for a declaration within a stipulated period.

11. Sub-rule (3) of Rule 57-T of the Rules clearly indicates that if the declaration is not filed within the specified period, the same can be considered after the expiry of period on sufficient cause being shown. In the instant case, the applicant clearly stated that they were not aware of such procedure for claiming Modvat credit and the moment they came to know applied for Modvat credit. The fact, that the applicant applied for Modvat credit has not been disputed. Once this is not disputed, it is not open to the respondents to deny Modvat credit on the ground that permission was not granted by the competent authority. There is no evidence that the application of the applicant was rejected. In our opinion, even if there is a procedural lapse, it does not mean that Modvat credit could not be availed.

12. In Commissioner of Central Excise, Allahabad vs. Hindalco Industries Pvt. Ltd, 2013 (293)ELT 208, this Court after

considering the provision of Rule 52-A and 57-G of the Rules held that Rule 57-G of the Rules only prescribes the procedure for availing Modvat credit and did not affect any substantial right. In our opinion, the said decision is clearly applicable.

13. In the light of the aforesaid, we hold that Rule 57-T of the Rules is only procedural in nature. We are also of the opinion, that Modvat credit cannot be denied on a technical ground that the procedure for availing Modvat credit was not followed at the material moment of time."

(10) The Supreme Court, in the case of Sambhaji and Others v. Gangabai and Others, reported in (2008) 17 SCC 117, has held that procedure cannot be a tyrant but only a servant. It is not an obstruction in the implementation of the provisions of the Act, but an aid. The procedures are handmaid and not the mistress. It is a lubricant and not a resistance. A procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. We may quote the relevant paragraphs 11 and 12 of the judgment thus :

"11. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed.

12. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. A Procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

23. The entitlement of credit of eligible duties on the purchases made in the pre-GST regime as per the then existing Cenvat credit rules is a vested right and, therefore, it cannot be taken away by virtue of Rule 117 of the Central GST Rules, 2017, with retrospective effect for failure to file the form GST Tran-1 within the due date, i.e. 27.12.2017. The provision for facility of credit is as good as the tax paid till the tax is adjusted and, therefore, the right to the credit had become absolute under the Central Excise Act and, therefore, the credit is indefeasible and the same cannot be taken away.

24. This High Court, in the case of Filco Trade Centre Pvt. Ltd. v. Union of India, reported in 2018 (17) G.S.T.L. 3 (Gujarat), while striking down clause (iv) of sub-section (3) of Section 140 of the CGST Act, recognized 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 and it cannot be taken away by virtue of clause (iv) of sub-section (3) of Section 140 with retrospective effect in relation to the goods which were purchased prior to one year from the appointed day. We may quote the relevant paragraphs 26 to 31 of the judgment thus :

> "26. In case of Indusr Global Ltd v. Union of India, 2014 (310) ELT 833 (Guj) Division Bench of this Court was considering vires of Rule 8 (3A) of the Central Excise Rules, 2002 which provided that if an assessee defaults in payment of duty beyond thirty days from the date prescribed under sub-rule (1) then notwithstanding anything contained in the sub-rule(1), the assessee shall pay excise duty for each consignment at the time of removal without utilizing the CENVAT credit till the assessee pays the outstanding amount including interest. The Court while striking down such Rule unconstitutional observed as under:
>
> > "31. This extreme hardship is not the only element of unreasonableness of this provision. It essentially prevents an assessee from availing cenvat credit of the duty already paid and thereby suspends, if not withdraws, his right to take credit of the duty already paid to the Government. It is true that such a provision is made because of peculiar circumstances the assessee lands himself in. However, when such provision makes no distinction between a willful defaulter and the rest, we must view its reasonableness in the background of an ordinary assessee who would be hit

and targeted by such a provision. As held by the Supreme Court in the case of Eicher Motors Ltd (supra) an assessee would be entitled to take credit of input already used by the manufacturer in the final product. In the said case, the Supreme Court was dealing with rule 57F which was introduced in the Central Excise Rules, 1944 under which credit lying unutilized in the Modvat credit account of an assessee on 16th March 1995 would lapse. Such provision was questioned. The Supreme Court held that since excess credit could not have been utilized for payment of the excise duty on any other product, the unutilised credit was getting accumulated. For the utilization of the credit, all vestitive facts or necessary incidents thereto had taken place prior to 16.3.1995. Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory of the manufacturer of the final product and the final product which had been cleared from the factory was sought to be lapsed. The Supreme Court struck down the rule further observing that if on the inputs the assessee had already paid the taxes on the basis that when the goods are utilized in the manufacture of further products as inputs thereto then the tax on those goods gets adjusted which are finished subsequently. Thus a right had 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. We may also recall that in the case of Dai Ichi Karkaria Ltd (supra) it was reiterated that a manufacture obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable produce immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product."

27. These judgements would thus indicate that the right that the petitioner had to pass on the credit of excise duty paid on goods purchased at the time of sale of such goods was a vested right. It was as good as the duty paid by the assessee to the Government revenue which could be utilised by the purchasers of such goods from the petitioner against future liabilities of course subject to fulfilment of conditions. When

the new regime was therefore introduced through goods and service tax statutes, through migration these existing rights were being adjusted in terms of provisions contained in sections 139 and 140 of the CGST Act. The legislature also recognized such existing rights and largely protected the same by allowing migration thereof in the new regime. In the process, however, a condition was imposed to enable the assessees in the nature of first stage dealer such as the present petitioner-company viz. that the invoices or other prescribed documents on the basis of which credit was claimed were issued not earlier than twelve months immediately preceding the appointed day. In effective terms, this condition restricted the enjoyment of existing credit in respect of goods purchased not prior to one year of the appointed day. In relation to all goods purchased prior to such day, no credit would be available under the credit ledger to be maintained under the CGST Act. Such credit would be lost. Undoubtedly, therefore, this condition has retrospective operation and takes away an existing right. This by itself may not be sufficient to hold the provision as ultra vires or unconstitutional. However, in addition to these findings, we also find that no just reasonable or plausible reason is shown for making such retrospective provision taking away the vested rights. Had the statutory provision given a time limit from the appointed day for utilization of such credit, the issue would stand on an entirely different footing. Such a provision could be seen as a sunset clause permitting the dealers to manage their affairs for which reasonable time frame is provided. The present condition however without any basis limits the scope of a dealer to enjoy existing tax credits in relation to purchases made prior to one year from the appointed day. No such restriction existed in the prior regime. Merely the stated grounds in the affidavit in reply that the provision is introduced since physical identification of goods is necessary so as to ensure that the first stage dealers do not take any undue advantage of such benefit and also to accommodate the administrative convenience would not be sufficient. Firstly, as noted, there was no such restriction in the CENVAT Credit Rules or analogous provisions of similar rules in the past. Since decades therefore the credits would be available to a first stage dealer on all purchases towards the manufacturing duty. No time frame of the past dealings was envisaged under such rules. The same grounds of physical identification of goods preventing undue advantage

being taken and the administrative convenience would exist even then. Secondly, no limitation of time is prescribed in the proviso to sub-section (3) of section 140 where a dealer is not in possession of any invoice or any other document evidencing payment of duty in respect of inputs in which case credit at the prescribed rate would be granted.

28. The judgment of the Supreme Court in case of Osram Surya (P.) Ltd. (supra) involved different facts. It was a case in which, first provisio which was introduced in Rule 57-G of the MODVAT Credit Rules was challenged. By virtue of this provision a manufacturer would not be allowed to take MODVAT credit after six months from the date of the documents specified therein. It was on this background the Supreme Court had, while upholding the validity of the provision held and observed that the same did not take away a vested right. The important distinction in the present case as compared to the facts of our case is that the Legislature, by introducing a condition for enjoyment of an existing right, provided prospective time limit of six months which did not exist earlier. In other words, from the date of introduction of the proviso, the benefit of utilization of CENVAT credit under certain circumstances would be restricted to a period of six months. This provision thus, did not act with retrospective effect.

29. We are conscious that the Bombay High Court in case of JCB India Limited (supra) has taken a different view. We have given our detailed reasons for the view that we have adopted. Needless to record, we are unable to adopt the line chosen by the Bombay High Court in case of JCB India Ltd. (supra).

30. 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 140A 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 imposition 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.

31. In the conclusion we hold that though the impugned provision does not make hostile discrimination between similarly situated persons, the same does impose a burden with retrospective effect without any justification."

25. The Supreme Court, in the case of Eicher Motors Ltd. v. Union of India, reported in 1999 (106) E.L.T. 3 (S.C.), has recognized the provision for facility of credit as a vested right and has held that the facility of credit is as good as tax paid till the tax is adjusted on future goods. We may quote the relevant paragraphs 5 and 6 of the judgment thus :

"5. Rule 57F(4A) was introduced into the Rules pursuant to Budget for 1995-96 providing for lapsing of credit lying unutilised on 16-3-1995 with a manufacturer of tractors falling under heading No. 87.01 or motor vehicles falling under heading No. 87.02 and 87.04 or chassis of such tractors or such motor vehicles under heading No. 87.06. However, credit taken on inputs which were lying in the factory on 16-3-1995 either as parts or contained in finished products lying in stock on 16-3-1995 was allowed. Prior to 1995-96 Budget, central excise/additional duty of customs paid on inputs was allowed as credit for payment of excise duty on the final products, in the manufacture of which such inputs were used. The condition required for the same was that the credit of duty paid on inputs could have been used for discharge of duty/liability only in respect of those final products in the manufacture of which such inputs were used. Thus it was claimed that there was a nexus between the inputs and the final products. In 1995-96 Budget MODVAT scheme was liberalised/simplified and the credit earned on any input was allowed to be utilised for payment of duty on any final product manufactured within the same factory irrespective of whether such inputs were used in its manufacture or not. The experience showed that credit accused on inputs is less than the duty liable to be paid on the final products and thus the credit of duty earned on inputs gets fully utilised and some amount has to be paid by the manufacturer by way of cash. Prior to 1995-96 Budget, the

excise duty on inputs used in the manufacture of tractors, commercial vehicles varied from 15% to 25%, whereas the final products were attracted excise duty of 10% or 15% only. The value addition was also not of such a magnitude that the excise duty required to be paid on final products could have exceeded the total input credit allowed. Since the excess credit could not have been utilised for payment of the excise duty on any other product, the unutilised credit was getting accumulated. The stand of the assessees is that they have utilised the facility of paying excise duty on the inputs and carried the credit towards excise duty payable on the finished products. For the purpose of utilisation of the credit all vestitive facts or necessary incidents thereto have taken place prior to 16-3- 1995 or utilisation of the finished products prior to 16-3- 1995. Thus the assessee became entitled to take the credit of the input instantaneously once the input is received in the factory on the basis of the existing scheme. Now by application of Rule 57F(4A) credit attributable to inputs already used in the manufacture of the final products and the final products which have already been cleared from the factory alone is sought to be lapsed, that is, the amount that is sought to be lapsed relates to the inputs already used in the manufacture of the final products but the final products have already been cleared from the factory before 16-3- 1995. Thus the right to the credit has become absolute at any rate when the input is used in the manufacture of the final product. The basic postulate, that the scheme is merely being altered and, therefore, does not have any retrospective or retro-active effect, submitted on behalf of the State, does not appeal to us. As pointed out by us that when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that right, which had accrued to a party such as availability of a scheme, is affected and, in particular, it loses sight of the fact that provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessees concerned. Therefore, the scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier scheme

was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the earlier scheme necessarily the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said rule would result in affecting the rights of the assessees.

6. 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 is 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."

26. The Supreme Court, in the case of Collector of Central Excise, Pune v. Dal Ichi Karkaria Ltd., reported in 1999 (112) E.L.T. 353 (S.C.), has held that the credit taken is indefeasible. We may quote the relevant paragraphs 17 and 18 of the judgment thus :

"17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw

> material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.
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> 18. It is, therefore, that in the case of Eicher Motors Ltd. v. Union of India (1999) 106 ELT 3 : (1999 AIR SCW 563 : AIR 1999 SC 892) this Court said that a credit under the MODVAT scheme was "as good as tax paid"."

27. The right to carry forward credit is a right or privilege, acquired and accrued under the repealed Central Excise Act, 1944 (1 of 1944) and it has been saved under Section 174(2)(c) of the CGST Act, 2017 and, therefore, it cannot be allowed to lapse under Rule 117 of the CGST, 2017, for failure to file declaration form GST Tran-1 within the due date, i.e. 27.12.2017.

28. The right to carry forward CENVAT credit for not being able to file the form GST Tran-1 within the due date offends the policy of the Government to remove the cascading effect of tax by allowing the input tax credit as mentioned in the Objects and Reasons of the Constitution 122nd Amendment Bill, 2014. The Objects and Reasons of the Constitution 122nd Amendment Bill, 2014 clearly set out that it is intended to remove the cascading effect of taxes and to bring out a nationwide taxation system.

29. The cascading of taxes, in simple language, is 'tax on tax'. 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.

30. It was held by the Supreme Court in the case of Macquarie Bank Limited v. Shilpi Cable Technologies Ltd., reported in AIR 2018 SC 498, that :

> "It is thus clear on a reading of English, U.S., Australian and our own Supreme Court judgments that the 'Lakshman Rekha' has in fact been extended to move away from the strictly literal Rule of interpretation back to the Rule of the old English case of

> Heydon, where the Court must have recourse to the purpose, object, text, and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the Rule as stated in 1584 in Heydon's case, which was then waylaid by the literal interpretation Rule laid down by the Privy Council and the House of Lords in the mid 1800s, and has come back to restate the Rule somewhat in terms of what was most felicitously put over 400 years ago in Heydon's case."

31. It was held by the Supreme Court in the case of District Mining Officer and Ors. v. Tata Iron and Steel Co. and Ors., reported in AIR 2001 SC 3134 that, "the process of construction combines both literal and purposive approaches. In other words, the legislative intention, i.e. the true or legal meaning of an enactment, is derived by considering the meaning of the words used in the enactment in light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. We may quote the relevant paragraph 14 of the judgment thus :

> "14. Dr. A.M.Singhvi, the learned senior counsel, appearing for the assessee-respondent in S.L.P. (Civil) No. 13106/96 and S.L.P. (Civil) No. 15442-15443/98 contended that the intention of the Parliament in enacting the Validation Act was only to save the State Governments from refunding the monies already collected under Statutes declared void ab initio by the Courts and it never intended to confer a right on the State to make any fresh levy or collection in respect of the cess and taxes, which could be collected up to 4-4-91, as contended by Mr. Dwivedi, appearing for the State of Bihar. According to Dr. Singhvi, when this Court in Orissa Cement's case, following the earlier judgment of the Court in India Cement, invalidated levies made under different Statutes enacted by the States of Orissa, Madhya Pradesh and Bihar and issued a mandamus, directing refund of the monies collected under such void Statutes, the State Governments would have been under a constitutional obligation to carry out the directions issued and were bound to refund the monies collected from the respective States from the date of the Judgment of the High Court, which would have ruinous consequences on the States economy. When the State Governments apprised these problems to the Central Government, the Parliament intervened and to save the State Governments from refunding the monies collected,

enacted the Cess and Other Taxes on Minerals (Validation) Act, 1992 to validate imposition and collection of such levies under the State laws which were declared void by the Court. The Statement of Objects and Reasons of the Validation Act unequivocally proclaims that the Act was promulgated to validate collection of such levies by the State Governments up to 4th of April, 1991. The date 4-4-91 was chosen because on the date, the Supreme Court delivered the judgment in Orissa Cement case. To bring about the uniformity among all the States, the cut off date was selected in the Validation Act as 4-4-91. Parliament also consciously did not desire or choose to prescribe different dates for different States in the schedule to Validation Act containing 11 enactments in respect of 7 States. The Parliament, thus devised the method of prospective overruling and the language used in sub-section (2) of Section 2 of the Validation Act makes the intention more explicit, and as such it must be held that it allowed the States to retain the amount of cess already collected but did not authorise to make any fresh collection which has not been collected up to 4-4-91. Dr. Singhvi further contends that the deliberate and conscious omissions by Parliament of a saving clause in the Validation Act, permitting levies or actions after 4-4-91 points to the only effect that Parliament did not intend any levy to be imposed or any collection to be made after 4-4-1991. Had it been the intention, then a specific and unambiguous saving clause could have been provided as was done in Jaora Sugar Mills' case (1966) 1 SCR 523 and Prithvi Cotton Mills Ltd. case (1969) 2 SCC 283. A bare perusal of the Validation Act in Jaora Sugar Mills case and the Validation Act in the present case would unequivocally indicate that in the case in hand, the Parliament never intended to confer a right on the States to collect and impose any levy subsequent to 4-4-91 and on the other hand merely allowed the State to retain the collection already made. According to Dr.Singhvi in Kannadasan's case, this Court drew wrong analogy from Gangopadhyaya's case and held that the provisions therein were identical to the provisions in the Validation Act, which was under consideration. Dr. Singhvi further urged that this Court in Kannadasan's case, has not appreciated the fact that Parliament deliberately and consciously omitted to incorporate a saving clause in the Validation Act. Dr. Singhvi urged that by the Validation Act life was infused into void State Statutes only up to 4-4-91 and

consequently, the levies which may have accrued prior to 4-4-91 could not be permitted to be collected after 4-4-91. With reference to Article 265 of the Constitution, the learned counsel urged that the Constitution of India imposes a limitation on the taxing power of the State in so far as it provides that no tax can be levied or collected except by authority of law. Thus not only the levy, but also the collection must be only by authority of law. The expression "authority of law" would mean that there should be in existence, a lawful enactment, which authorises the levy or collection of a tax. After 4-4-91, there being no valid law in existence, which could authorise collection of the levy of cess and taxes on minerals, it is difficult to comprehend how the State could be permitted to make the levy and collection of the dues subsequent to 4.4.91. According to Dr. Singhvi, and interpretation of the provisions of the Validation Act, authorising realisation of levy after 4-4-91 for the past period would be contrary to equity, justice and fair-play."

32. It was held by the Supreme Court, in the case of U.P. Bhoodan Yagna Samiti, U.P. v. Braj Kishore and Ors., reported in AIR 1988 SC 2239, that it is clear that when one has to look to the intention of the Legislature, one has to look to the circumstances under which the law was enacted, the Preamble of the law, the mischief which was intended to be remedied by the enactment of the statute. We may quote the relevant paragraph 16 of the judgment thus :

"16. And it is clear that when one has to look to the intention of the Legislature, one has to look to the circumstances under which the law was enacted. The Preamble of the law, the mischief which was intended to be remedied by the enactment of the statute and in this context, Lord Denning, in the same book at Page No. 10, observed as under :

"At one time the Judges used to limit themselves to the bare reading of the Statute itself - to go simply by the words, giving them their grammatical meaning and that was all. That view was prevalent in the 19th century and still has some supporters today. But it is wrong in principle. The Statute as it appears to those who have to obey it - and to those who have to advise them what to do about it; in short, to lawyers like yourselves. Now the eccentrics cut off from all that is happening around them. The Statute comes to

> them as men of affairs - who have their own feeling for the meaning of the words and know the reason why the Act was passed just as if it had been fully set out in a preamble. So it has been held very rightly that you can enquire into the mischief which gave rise to the Statute - to see what was the evil which it was sought to remedy."

It is now well settled that in order to interpret a law one must understand the background and the purpose for which the law was enacted. And in this context as indicated earlier if one has bothered to understand the common phrase used in the Bhoodan Movement as 'Bhoomihin Kissan' which has been translated into English to mean 'landless persons' there would have been no difficulty but apart from it even as contended by learned counsel that it was clearly indicated by S. 15 that the allotments could only be made in accordance with the scheme of Bhoodan Yagna. In order to understand the scheme of Bhoodan and the movement of Shri Vinoba Bhave, it would be worthwhile to quote from 'Vinoba And His Mission' by Suresh Ram printed with an introduction by Shri Jaya Prakash Narain and foreword by Dr. S. Radhakrishnan. In this work, statement of annual Sarvodaya Conference at Sevapuri has been quoted as under :

> "The fundamental principle of the Bhoodan Yagna movement is that all children of the soil have an equal right over the Mother Earth, in the same way as those born of a mother have over her. It is, therefore, essential that the entire land of the country should be equitably redistributed anew, providing roughly at least five acres of dry land or one acre of wet land to every family. The Sarvodaya Samaj, by appealing to the good sense of the people, should prepare their minds for this equitable distribution and acquire within the next two years at least 25 lakhs of acres of land from about five lakhs of our villages on the rough basis of five acres per village. This land will be distributed to those landless labourers who are versed in agriculture, want to take to it, and have no other means of subsistence."

This would clearly indicate the purpose of the scheme of Bhoodan Yagna and it is clear that S.15 provided that all allotments in accordance with S.14 could only be done under the scheme of the Bhoodan Yagna."

33. In our opinion, it is arbitrary, irrational 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 the pre-GST regime and post-GST regime and, therefore, it is violative of Article 14 of the Constitution.

34. 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 and post-GST regime. This discrimination does not have any rationale and, therefore, it is violative of Article 14 of the Constitution.

35. The Supreme Court, in the case of Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors., reported in AIR 1981 SC 487, has held that Article 14 strikes at the arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that Article. Wherever there is arbitrariness in the State action, whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution. We may quote the relevant paragraphs 16 and 17 of the judgment thus :

> "16. If the Society is an "authority" and therefore "State" within the meaning of Article 12, it must follow that it is subject to the constitutional obligation under Article 14. The true scope and ambit of Article 14 has been the subject matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of

classification. Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that that Article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely. (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in E. P. Ayyappa v. State of Tamil Nadu, (1974) 2 SCR 348 : (AIR 1974 SC 555), that this Court laid bare a new dimension of Article 14 and pointed out that that Article has highly activist magnitude and it embodies a guarantee against arbitrariness. This Court speaking through one of us (Bhatgwati, J.) said :

> "The basic principle which therefore informs both Articles 14 and 16 is equality and inhibition against discrimination. Now what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

17. This vital and dynamic aspect which was till then lying latent and submerged in the few simple but pregnant words of Article 14 was explored and brought to light in Royappa's case and it was reaffirmed and elaborated by this Court in Maneka Gandhi v. Union

of India, (1978) 2 SCR 621 : (AIR 1978 SC 597), where this Court again speaking through one of us (Bhagwati, J.) observed :-

> "Now the question immediately arises as to what is the requirement of Art. 14: what is the content and reach of the great equalising principle enunciated in this article, There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits..... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."
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> This was again reiterated by this Court in International Airport Authority's case ((1979) 3 SCR 1014) at p. 1042: (AIR 1979 SC 1628) (supra) of the Report. It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the Courts is not paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Art. 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

36. 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.

37. The Supreme Court, in the case of MRF Ltd. v. Assistant Commissioner (Assessment) Sales Tax, reported in 2006 (206) E.L.T. 6 (S.C.), has held that a person may have a 'legitimate expectation' of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The doctrine of legitimate expectation has an important place in developing law of judicial review. We may quote the relevant paragraph 38 of the judgment thus :

> "38. The principle underlying legitimate expectation which is based on Article 14 and the rule of fairness has been restated by this Court in Bannari Amman Sugars Ltd. v. Commercial Tax Officer, 2005 (1) SCC 625. It was observed in paras 8 and 9:
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> > "8. A person may have a 'legitimate expectation' of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review. It is generally agreed that 'legitimate expectation' gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate expectation

does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation is not fulfilled by taking a particular decision then the decision-maker should justify the denial of such expectation by showing some overriding public interest. (See : Union of India and Ors. v. Hindustan Development Corporation and Ors., AIR 1994 SC 988)

9. While the discretion to change the policy in exercise of the executive power, when not trammeled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.""

38. 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.

39. This High Court, in the case of Indsur Global Ltd. v. Union of India, reported in 2014 (310) E.L.T. 833 (Gujarat), has held as under:

"34. By no stretch of imagination, the restriction imposed under sub-rule (3A) of Rule 8 to the extend it requires a defaulter

> irrespective of its extent, nature and reason for the default to pay the excise duty without availing Cenvat credit to his account can be stated to be a reasonable restriction. It leads to a situation so harsh and a position so unenviable that it would be virtually impossible for an assessee who is trapped in the whirlpool to get out of his financial difficulties. This is quite apart from being wholly reasonable, being irrational and arbitrary and therefore, violative of Article 14 of the Constitution. It prevents him from availing credit of duty already paid by him. It also is a serious affront to his right to carry on his trade or business guaranteed under Article 19(1)(g) of the Constitution. On both the counts, therefore, that portion of sub-rule (3A) of rule must fail."

40. The liability to pay GST on sale of stock carried forward from the previous tax regime without corresponding input tax credit would lead to double taxation on the same subject matter and, therefore, it is arbitrary and irrational.

41. C.B.E. & C. Flyer No.20, dated 1.1.2018 had clarified as under:

> "(c) Credit on duty paid stock : A registered taxable person. other than manufacturer or service provider, may have a duty paid goods in his stock on 1st July 2017. GST would be payable on all supplies of goods or services made after the appointed day. It is not the intention of the Government to collect tax twice on the same goods. Hence, in such cases, it has been provided that the credit of the duty/tax paid earlier would be admissible as credit."

42. Article 300A provides that no person shall be deprived of property saved by authority of law. While right to the property is no longer a fundamental right but it is still a constitutional right. CENVAT credit earned under the erstwhile Central Excise Law is the property of the writ-applicants and it cannot be appropriated for merely failing to file a declaration in the absence of Law in this respect. It could have been appropriated by the government by providing for the same in the CGST Act but it cannot be taken away by virtue of merely framing Rules in this regard.

43. In the result, all the four writ-applications succeed and are hereby allowed. The respondents are directed to permit the writ applicants to allow filing of declaration in form 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 Act. It is further declared that the due date contemplated under Rule 117 of the CGST Rules for the purposes of claiming transitional credit is procedural in nature and thus should not be construed as a mandatory provision.

44. Rule made absolute to the aforesaid extent.

[2019] 57 DSTC 586 (Madras)

In the High Court of Judicature at Madras

[Hon'ble Mr. Justice K. Ravichandrabaabu]

W. P. No.: 26187/2019

V. N. Mehta & Company ... Petitioner

Vs.

The Assistant Commissioner & Ors. ... Respondent(s)

Date of Order: 08.11.2019

RECOVERY PROCEEDINGS U/S 79 OF THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 – BANKER WAS DIRECTED TO RECOVER RS. 53,28,645.00 – NO ASSESSMENT PROCEEDING WAS PENDING AGAINST THE PETITIONER – SUPERINTENDENT RECORDED THE STATEMENT OF PETITIONER FOR AVAILING ITC ON THE STRENGTH OF FAKE INVOICES – SUBSEQUENTLY RETRACTED BY THE PETITIONER – WRIT PETITION CHALLENGING RECOVERY PROCEEDINGS – TAX LIABILITY HAS NOT DETERMINED BY RESORTING TO THE PROCEDURE IN LAW – COURT FOUND THAT IMPUGNED PROCEEDINGS ISSUED UNDER SECTION 79 NOT SUSTAINABLE – PERUSAL OF SECTION 83 WOULD SHOW THAT SUCH PROVISIONAL ATTACHMENT CAN BE RESORTED TO ONLY WHEN PROCEEDINGS ARE PENDING UNDER ANY SECTION 62, 63, 64, 67, 73 AND 74 – WRIT PETITION ALLOWED.

Facts of the Case

Writ petition was filed challenging the proceedings of the first respondent dated 07.08.2019 addressed to the fourth respondent through which, the fourth respondent was directed to recover a sum of Rs.53,28,645/- from the account maintained by the petitioner on the reason that the said sum on account of tax, cess, interest and penalty was payable by the petitioner under the provisions of the GST Act and that the petitioner had failed to make such payment.

The grievance of the petitioner against the impugned proceedings was that the same was issued straightaway, even before making an assessment or atleast initiating proceedings for making the assessment.

It was the specific case of the petitioner that no proceedings whatsoever, was issued against the petitioner for determining either the tax, cess or interest or penalty totally amounting to Rs.53,28,645/- as claimed in the impugned proceedings. Therefore, it was contended that Section 79 of the Central Goods and Services Tax Act, 2017, could not be invoked by the first respondent to recover the said sum as if, such sum was an arrear payable by the petitioner. The petitioner further pointed out that though a statement was obtained from the petitioner on 19.06.2019, by the Superintendent of GST, stating as if the petitioner availed input credit during the period from June - 2018 to October - 2018 on the strength of invoices of fake units, the said statement was subsequently retracted by the petitioner through communication dated 26.06.2019, specifically, by stating that the petitioner's answer was to be read as that they had so far taken ITC of Rs.53,28,645/- for goods received along with invoices.

Held

Therefore, the Court found that the impugned proceedings issued under Section 79 was not sustainable. No doubt, the first respondent sought to rely upon Section 83 to contend that the first respondent was entitled to make the provisional attachment.

Perusal of Section 83 would show that the such provisional attachment could be resorted to only when proceedings were pending under any of the provisions viz., Section 62, 63, 64, 67, 73 and 74.

In the case, as admitted by the counsel appearing for the first respondent, no such proceedings were pending as on day under any of the above provisions. Therefore, the Court was of the view that Section 83 also would not came to the rescue of the respondent to sustain the impugned proceedings.

Thus, the Court found that the impugned proceedings were not maintainable. Accordingly, the writ petition was allowed and the impugned proceedings was set aside. However, it was made clear that the Court was not expressing any view on the merits of the allegation made by the respondent against the petitioner, as it was for them to adjudicate the matter in a manner known to law.

Present for the Petitioner(s)	:	Mr. P. Rajkumar, Adv.
Present for the Respondents	:	Mr. M. Santharaman, Sr. Standing Counsel, Mr. M. Hariharan, Additional Government Pleader (Taxes)

Order

This writ petition is filed challenging the proceedings of the first respondent dated 07.08.2019 addressed to the fourth respondent through which, the fourth respondent was directed to recover a sum of Rs.53,28,645/- from the account maintained by the petitioner on the reason that the said sum on account of tax, cess, interest and penalty is payable by the petitioner under the provisions of the GST Act and that the petitioner had failed to make such payment.

2. The grievance of the petitioner against the impugned proceedings is that the same was issued straightaway, even before making an assessment or atleast initiating proceedings for making the assessment. It is the specific case of the petitioner that no proceedings whatsoever, was issued against the petitioner for determining either the tax, cess or interest or penalty totally amounting to Rs.53,28,645/- as claimed in the impugned proceedings. Therefore, it is contended that Section 79 of the Central Goods and Services Tax Act, 2017, cannot be invoked by the first respondent to recover the said sum as if, such sum is an arrear payable by the petitioner. The learned counsel for the petitioner further pointed out that though a statement was obtained from the petitioner on 19.06.2019, by the Superintendent of GST, stating as if the petitioner availed input credit during the period from June - 2018 to October - 2018 on the strength of invoices of fake units, the said statement was subsequently retracted by the petitioner through communication dated 26.06.2019, specifically, by stating that the petitioner's answer is to be read as that they have so far taken ITC of Rs.53,28,645/- for goods received along with invoices.

3. The learned counsel also invited this Court's attention to the answer made by the petitioner to question No.17 where the petitioner has specifically stated that the petitioner received invoices along with goods from the mentioned companies and paid the amount through Bank account. Therefore, it is contended that based on the mere statement which is subsequently retracted by the petitioner, the impugned proceedings cannot be issued.

4. A counter affidavit is filed by the first and second respondents wherein, it is stated that the petitioner has admitted his liability through his statement and therefore, the proper officer may deduct the amount so payable from any money owing to such person as provided under Section 79 of CGST Act, 2017. It is further stated in the counter that it is not necessary to issue show cause notice and mere admitted liability is enough for invoking the provision under Section 79 of the said Act.

5. Apart from reiterating the above contentions in the counter affidavit, the learned counsel appearing for the first and second respondents also submitted that even otherwise as per Section 83 of the Central Goods and Services Tax Act, 2017, the first respondent is entitled to make provision to protect the interest of the Revenue. Even though, he said so, to a specific question put by this Court, whether any proceeding is pending against the petitioner, the learned counsel appearing for the first respondent answered in negative.

6. Under the above stated facts and circumstances, this Court has to see, as to whether the impugned proceedings can be sustained in the eye of law.

7. It is seen that except issuing the proceedings under Section 79, no other proceedings was ever issued against the petitioner determining their tax etc., liability, amounting to Rs.53,28,645/- as claimed in the impugned proceedings. Section 79 of the CGST Act, 2017 contemplates that any amount payable by a person to the Government under any of the provisions of the said Act or the Rules made there under is not paid, the proper officer shall proceed to recover the amount by one or more of the modes referred to therein. Therefore, it is evident that the term “amount payable by a person” is to mean that such liability arises only after determination of such amount in a manner known to law.

8. In this case, the first respondent sought to rely upon the so called admission made by the petitioner in the statement given on 19.06.2019. It is true that question No.13 and answer to the the said question is against the interest of the petitioner. At the same time, question No.17 and answer to the said question contradicts the statement said to have been given by the petitioner to question No.13. For better clarity, both question Nos.13 and 17 as well as the answer to those questions are extracted hereunder :-

> “Q 13. How much input credit you have availed during the period from July 2018 to October 2018 on the strength of those invoices of above fake units?
>
> A 13. I have so far taken input tax credit of Rs.53,28,645/- based on fake invoices of above two units.
>
> Q 17. By wrongly availing ITC on the basis of fake invoices issued by above fake units without receipt of goods, you are liable to pay the amount of ITC wrongly availed as per Section 74 of the CGST Act, 2017 along with the interest payable thereon under Section 50 and penalty as per the provision of CGST Act, 2017. Comment.

A 17. I state that I received invoice along with goods from the above mentioned companies. I have paid them through bank account. In respect of documentary evidence I can provide you Stock register, packing slip, E-way bills, vehicle details, bank account details through which we made the bank transfer."

9. Therefore, it is apparent that the petitioner's statement given on 19.06.2019, to question Nos.13 and 17, contradicts with each other. Apart from doing so, the petitioner has also retracted the statement made to question No : 13 through communication dated 26.06.2019, specifically stating that the answer to question No.13 should be read as follows:

"I have so far taken ITC of Rs.53,28,645/- for goods received along with invoices."

10. Therefore, it is evident that the statement said to have been given on 19.06.2019 claims to be so called admission by the petitioner, is not available before the Revenue anymore and on the other hand, it is for them to determine the tax liability by resorting to the procedures in accordance with law, instead of issuing the impugned proceedings straightaway under Section 79 based on the so called admission which is subsequently retracted.

11. Therefore, I find that the impugned proceedings issued under Section 79 is not sustainable. No doubt, the first respondent sought to rely upon Section 83 to contend that the first respondent is entitled to make the provisional attachment.

12. Perusal of Section 83 would show that the such provisional attachment can be resorted to only when proceedings are pending under any of the provisions viz., Section 62, 63, 64, 67, 73 and 74.

13. In this case, as admitted by the learned counsel appearing for the first respondent, no such proceedings are pending as on today under any of the above provisions. Therefore, I am of the view that Section 83 also would not come to the rescue of the respondent to sustain the impugned proceedings.

14. Thus, I find that the impugned proceedings are not maintainable. Accordingly, the writ petition is allowed and the impugned proceedings is set aside. However, it is made clear that this Court is not expressing any view on the merits of the allegation made by the respondent against the petitioner, as it is for them to adjudicate the matter in a manner known to law. No costs. Connected miscellaneous petitions are closed.

[2019] 57 DSTC 591 (Ahmedabad)

In the High Court of Gujarat

[Hon'ble Mr. Justice J. B. Pardiwala and Hon'ble Mr. Justice A. C. Rao]

R/SCA No.: 13132/2019

Valerius Industries ... Petitioner

Vs.

Union of India ... Respondent

Date of Order: 28.08.2019

SEARCH AND SEIZURE – RAID AT BUSINESS PREMISES BY RESPONDENT AGAINST THE INFORMATION OF HUGE CONSPIRACY AND CREATION OF BOGUS BILLS – ORDER FOR PROVISIONAL ATTACHMENT OF BANK ACCOUNT SERVED WITHOUT ANY OPPORTUNITY OF HEARING – RESPONDENT FURTHER CONDUCTED RAID AT THE PREMISES AND SEIZED SALE & PURCHASE REGISTER AND OTHER FILES – SERVED SUMMON U/S 70 OF CGST ACT – AMOUNT OF INPUT TAX CREDIT LEDGER BLOCKED WITHOUT SERVING ANY ORDER – POWER U/S 83 OF CGST ACT FOR PROVISIONAL ATTACHMENT COULD BE TERMED AS VERY DRASTIC AND FAR REACHING POWER AND SHOULD BE EXERCISED WITH EXTREME CARE AND CAUTION, ONLY IF THERE WAS SUFFICIENT MATERIAL ON RECORD – IF THE INTEREST OF THE REVENUE SUFFICIENTLY SECURED BY REVERSING THE INPUT TAX CREDIT, THEN THE AUTHORITY MAY NOT BE JUSTIFIED IN INVOKING POWER U/S 83 – OVERALL VIEW CONVINCED THAT RESPONDENTS HAD NOT ACTED IN ACCORDANCE WITH LAW – WRIT ALLOWED.

WHETHER DEMAND ORDER AND ORDER FOR PRO VISIONAL ATTACHMENT OF STOCK AND BANK ACCOUNTS LIABLE TO BE SET ASIDE, HELD – YES.

WETHER BLOCKAGE OF INPUT TAX CREDIT HELD TO BE ILLEGAL AND LIABLE TO BE SET ASIDE, HELD – YES.

Facts of the Case

The petitioner firm was engaged in the business of purchasing and selling the material of copper whereby the scrap material of copper was purchased by the firm and the same was being melted and converted into the copper pipes before selling it into the market. The petitioner firm was registered with the GST department with GSTIN No. 24AANFV4191NIZH.

According to the business practice, the petitioner firm had purchased the copper scrap material from the Various firms/companies, which was volumed as 291538.38 kilograms, amounting Rs.15,51,00,399/- in the tax year of 2017-18.

The payment of Rs.2,60,16,769/- for the aforementioned purchases was disbursed by the petitioner's firm by RTGS/cheque mode to the respective firms/companies into their bank account. Further, the goods and service tax was credited by the aforementioned firms into their GST/ R2A and the same was reflected in it.

The aforementioned firms/companies had not remitted the amount of GST tax though the tax amount was already credited into their GSTR2A.

The rest of the consideration payment of Rs.2,37,04,340/- for the purchase of goods was made by selling the goods of copper pipes to the firms/companies, and the petitioner firm had also paid the GST tax of Rs.36,15,918/- to the GST department for the aforementioned transactions.

That on 20.11.2018, the Respondent No. 3 had raided the premises of the petitioner firm and informed that there was a huge conspiracy and creation of bogus bills by the aforementioned firms and therefore they were investigating the entire case. Further, without giving an opportunity of hearing and explaining, the executives of the petitioner's firm were served with the order of provisional attachment of the petitioner's current account bearing' A/C No. 01880200001055 and FD/RD CC A/C No. 01880500000081, registered at Bank of Baroda, Alkapuri Branch, Vadodara, passed kar the State Tax Officer at Vadodara, Gujarat in reference No. AC/ U44/ STo1/ Va1erius/201819, whereby the aforementioned accounts were provisionally attached under the provisions of Gujarat GST Act, 2017 and the transactions of the accounts were completely restrained. However, the bank had denied the attachment of the CC A/C No. 01880500000081 as it was not the asset of the petitioner firm.

That on 27.11.2018, the respondent No. 13 had again raided the premises of the petitioner firm and seized the sales and purchase register and files and Bank/RTGS files. Further, on the very same day, the petitioner firm was served with summons under Section 70 of Central GST Act, 2017 whereby the legal representative of the firm was directed to remain present on 18.12.2018. However, legal representative was not allowed to explain to aforementioned transaction of sales and purchases and the credit of GST tax into the account of afore stated 4 firms. Further it was also instructed by the authority that the petitioner will receive the show cause notice from the department as an opportunity of explanation and they were concerned with the statement presently.

That on 13.02.2019, the legal representative partner of the firm had received the email on his mail id from mail id donotreply@gst.gov.in, wherein

it was mentioned that the input tax credit amounting to Rs.30,55,680/- had been blocked. That though the present partner had issued the email, questioning existence of the order as no order was served to him either personally or on his email. The same request was disrespected and kept unheard till date.

Held

The order of provisional attachment before the assessment order was made, may be justified if the assessing authority or any other authority empowered in law was of the opinion that it was necessary to protect the interest of revenue. However, the subjective satisfaction should be based on some credible materials or information and also should be supported by supervening factor. It was not any and every material, howsoever vague and indefinite or distant remote or far fetching, which would warrant the formation of the belief.

The power conferred upon the authority under Section 83 of the Act for provisional attachment could be termed as a very drastic and far reaching power. Such power should be used sparingly and only on substantive weighty grounds and reasons.

The power of provisional attachment under Section 83 of the Act should be exercised by the authority only if there was a reasonable apprehension that the assessee may default the ultimate collection of the demand that was likely to be raised on completion of the assessment. It should, therefore, be exercised with extreme care and caution.

The power under Section 83 of the Act for provisional attachment should be exercised only if there was sufficient material on record to justify the satisfaction that the assessee was about to dispose of wholly or any part of his / her property with a view to thwarting the ultimate collection of demand and in order to achieve the said objective, the attachment should be of the properties and to that extent, it was required to achieve this objective.

The power under Section 83 of the Act should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee.

The attachment of bank account and trading assets should be resorted to only as a last resort or measure. The provisional attachment under Section 83 of the Act should not be equated with the attachment in the course of the recovery proceedings.

The authority before exercising power under Section 83 of the Act for provisional attachment should take into consideration two things: (i) whether it was a revenue neutral situation (ii) the statement of "output liability or input credit". Having regard to the amount paid by reversing the input tax credit if the interest of the revenue was sufficiently secured, then the authority may not be justified in invoking its power under Section 83 of the Act for the purpose of provisional attachment.

In the overall view of the matter, the Court was convinced that the respondents had not acted in accordance with law.

The writ application succeeds and was hereby allowed. The assessment order dated 17th June 2019 passed by the respondent No. 4 – Commercial Tax Officer at Vadodara demanding total amount of Rs.1,60,79,302/- towards tax, penalty and interest was hereby quashed and set aside. However, it was clarified that if the authority wanted to proceed against the writ applicant under Section 74 of the Act, then it shall be open for the authority to do so after issuing appropriate show cause notice and gave an opportunity of hearing to the writ applicant.

The order of provisional attachment of the stock of goods amounting to Rs.1,60,00,000/- dated 27th November 2018 as well as the order of provisional attachment of the writ applicant's current account bearing account No.01880200001055 and FD/RD CC account No.01880500000081 registered at the Bank of Baroda, Alkapuri Branch, Vadodara dated 20th November 2018 was hereby quashed and set aside. The blockage of input tax credit dated 13th February 2019 by way of computer entry was also held to be illegal and was ordered to be released forthwith. Rule was made absolute.

Present for the Petitioner(s) : Mr. Deven Parikh, Senior Counsel with Mr Nisarg N Jain, Adv.

Present for the Respondents : Ms. Maithili Mehta, AGP

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1 Rule returnable forthwith. Ms. Maithili Mehta, the learned Assistant Government Pleader waives service of notice of rule for and on behalf of the respondents.

2 By this writ application under Article 226 of the Constitution of India, the writ applicant – a partnership has prayed for the following reliefs:

"(A) Your Lordships may kindly be pleased to issue a writ of certiorari or an appropriate writ, orders, directions and thereby be pleased to quash and set aside the order dated 17.06.2019, passed by the respondent No.4 – Commercial Tax Officer at Vadodara, Gujarat in reference No.ZA2406190010233 whereby the petitioner is demanded to pay the total amount of Rs.1,60,79,302/;

(B) Your Lordships may kindly be pleased to issue a writ of certiorari or an appropriate writ, orders, directions and thereby be pleased to quash and set aside the orders of provisional attachment of the stock of goods, amounting Rs.1,60,00,000/dated 27.11.2018 and the orders of provisional attachment of the petitioner's current account bearing A/C No.01880200001055 and FD/RD CC A/c No.01880500000081, registered at Bank of Baroda, Alkapuri Branch, Vadodara dated 20.11.2018 and the blockage of Input Tax Credit dated 13.2.2019 passed by the respondent No.3 – State Tax Officer at Vadodara, Gujarat.

(C) Pending hearing and final disposal of the present petition, Your Lordships may kindly be pleased to issue an appropriate writ, orders, directions and thereby be pleased to stay the operation and implementation of the orders dated 17.06.2019 passed by the respondent No.4 and the orders of provisional attachment dated 27.11.2018 dated 20.11.2018 and the orders of blockage of input tax credit of the petitioner.

(D) Exparte adinterim relief in terms of para 6(C) may kindly be granted.

(E) To grant any other such relief in the nature of case may require."

3 The writ applicant seeks to challenge the order dated 17th June 2019 (Annexure : 'A' to this writ application) passed by the respondent No.4 – Commercial Tax Officer at Vadodara, State of Gujarat in the Reference No.ZA2406190010233 whereby a demand has been raised of the total amount of Rs.1,60,79,302/(One Crore Sixty Lakh Seventy Nine Thousand Three Hundred Two only) (tax + interest + penalty) under the provisions of the Central Goods and Services Tax Act, 2017 and the Gujarat Goods and Services Tax Act, 2017 (for short, "the GST Act, 2017). The writ applicant also seeks to challenge the action of blockage of the input tax credit passed whereby the input tax credit of the writ applicant is blocked under the provisions of the GST Act, 2017. The writ applicant also seeks to challenge the order of provisional attachment of the stock of goods

valued at Rs.1,60,00,000/(Rupees One Crore Sixty Lakh only) dated 27th November 2018 and the order of provisional attachment of the writ applicant's current account being Account No.01880200001055 and FD/ RD CC Account No.01880500000081 registered at the Bank of Baroda, Alkapuri Branch, Vadodara dated 20th November 2018 passed by the respondent No.3, State Tax Officer, Vadodara. The State Tax Officer – 1, Unit 44, Vadodara has provisionally attached the aforementioned accounts in exercise of powers under Section 83 of the GST Act, 2017.

4 The case of the writ applicant, as pleaded in the writ application, is as follows:

"2.1 The petitioner is a partnership firm and therefore the present petition is filed by its partner, who has been authorized to be the legal representative of the firm to perform and act all the legal representation, who is the national and citizen of India and hence he is entitled to the fundamental and civil rights guaranteed under the Constitution of India.

2.2 The petitioner respectfully states that the petitioner firm is engaged in the business of purchasing and selling the material of copper whereby the scrap material of copper is purchased by the firm and the same is being melted and converted into the copper pipes before selling it into the market. The petitioner firm is registered with the GST department with GSTIN No. 24AANFV4191NIZH.

2.3. The petitioner respectfully states that according to the business practice, the petitioner firm has purchased the copper scrap material from the Various firms/companies, which is volumed as 291538.38 kilograms, amounting Rs.15,51,00,399/in the tax year of 201718. That out of the said amount of volume, the following limited amount of material was purchased from the below mentioned firm:

Name of the firm / company	Amount of volume (In Rs.)	Central and State GST
Adideva Enterprize	64,88,624/-	11,67,954/-
Laxmiraj Enterprize	1,42,84,362/-	25,71,183/-
Radhesh Traders	33,87,911/-	06,09,823/-
Raghav Traders	1,79,15,638/	32,35,614/-
Total	4,21,36,534/-	75,84,575/-
Total	4,97,21,109/-	

2.4 The petitioner respectfully states that the payment of Rs.2,60,16,769/- for the aforementioned purchases was disbursed by the petitioner's firm by RTGS/cheque mode to the respective firms/companies into their bank account. Further, the goods and service tax was credited by the aforementioned firms into their GST/R2A and the same is reflected in it.

2.5 The petitioner respectfully states that the aforementioned firms/ companies have not remitted the amount of GST tax though the tax amount is already credited into their GSTR2A.

2.6 The petitioner respectfully states that the rest of the consideration payment of Rs.2,37,04,340/- for the aforementioned purchase of goods was made by selling the goods of copper pipes to the aforementioned firms/companies, and the petitioner firm has also paid the GST tax of Rs.36,15,918/- to the GST department for the aforementioned transactions.

2.7 That on 20.11.2018, the respondent NO.3 had raided the premises of the petitioner firm and informed that there is a huge conspiracy and creation of bogus bills by the aforementioned firms and therefore they are investigating the entire case. Further, without giving an opportunity of hearing and explaining, the executives of the petitioner's firm were served with the order of provisional attachment of the petitioner's current account bearing' A/C No. 01880200001055 and FD/RD CC A/C No. 01880500000081, registered at Bank of Baroda, Alkapuri Branch, Vadodara, passed kar the State Tax Officer at Vadodara, Gujarat in reference No. AC/U44/ STo1/ Va1erius/201819, whereby the aforementioned accounts are provisionally attached under the provisions of Gujarat GST Act, 2017 and the transactions of the accounts are completely restrained. However, the bank has denied the attachment of the CC A/C No. 01880500000081 as it is not the asset of the petitioner firm.

2.8 That on 27.11.2018, the respondent No. 13 had again raided the premises of the petitioner firm and seized the sales and purchase register and files and Bank/RTGS files. Further, on the very same day, the petitioner firm was served with summons under Section 70 of Central GST Act, 2017 whereby the legal representative of the firm was directed to remain present on 18.12.2018. However, he was not allowed to explain to aforementioned transaction of sales and purchases and the credit of GST tax into the account

of aforestated 4 firms. Further it was also instructed by the authority that the petitioner will receive the show cause notice from the department as an opportunity of explanation and they are concerned with the statement presently.

2.9. That on 13.02.2019, the present legal representative partner of the firm has received the email on his mail id i.e. kotharidinesh57@gmail.com from mail id donotreply@gst.gov.in, wherein it was mentioned that the input tax credit amounting to Rs.30,55,680/ has been blocked. That though the present partner had issued the email, questioning existence of the order as no order was served to him either personally or on his email, the same request is disrespected and kept unheard till today."

5 Mr. Deven Parikh, the learned senior counsel appearing for the writ applicant vehemently submitted that the order of provisional attachment of property under Section 83 of the GST Act, 2017 is without jurisdiction and not tenable in law. Mr. Parikh submitted that the power to order provisional attachment with a view to protect revenue under Section 83 of the Act has been conferred upon the Commissioner. Mr. Parikh pointed out that in case on hand, the impugned order of provisional attachment under Section 83 of the Act, 2017 has been passed by the State Tax Officer – 1, Unit 44, Vadodara. The same is per se illegal. Mr. Parikh submitted that the action on the part of the respondent No.3 in blocking the credit balance of Rs.30,55,680/- (Rupees Thirty Lakh Fifty Five Thousand Six Hundred Eighty only) by a computer entry could also be termed as absolutely illegal and not tenable in law. Mr. Parikh further submitted that the order passed by the respondent No.4 dated 17th June 2019 is also illegal, arbitrary, unjust and contrary to the provisions of Section 74 of the Act, 2017. According to Mr. Parikh, the impugned order dated 17th June 2019 came to be passed without affording any opportunity of hearing to the writ applicant. The same is violative of the principles of natural justice. Mr. Parikh submitted that all the three impugned orders dated 20th November 2018, 27th November 2018 and 13th February 2019 are illegal and contrary to the provisions of Section 83 of the GST Act. According to Mr. Parikh, the action on the part of the respondent No.3 in seizing the input tax credit without issue of any show cause notice is illegal and contrary to Section 74 of the GST Act.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

6 Ms. Mehta, the learned A.G.P. has vehemently opposed this writ application. She submitted that no error, not to speak of any error of law could be said to have been committed by the respondents Nos.3 and 4 in

passing the impugned orders. Ms. Mehta submitted that Section 83 of the Act, 2017 undoubtedly provides that during the pendency of any proceeding under Sections 62, 63, 64, 67 and 73 or Section 74, as the case may be, the Commissioner has the power to pass an order of provisional attachment if he is of the opinion that it is necessary to do so for the purpose of protecting the interest of the government revenue. Ms. Mehta submitted that although the power has been conferred by the statute upon the Commissioner and the satisfaction has to be of the Commissioner, yet, by order dated 15th January 2018 bearing No.GSLS5(1)S83B14, the Commissioner of State Tax, Gujarat State, Ahmedabad has delegated his power under Section 83 conferred upon him by the statute to : (1) Deputy Commissioner (2) Assistant Commissioner and (3) State Tax Officer. In view of such order delegating the power, the State Tax Officer could be said to be empowered to pass the impugned order of provisional attachment of property under Section 83 of the Act. According to Ms. Mehta, it cannot be argued that the impugned order of provisional attachment passed by the State Tax Officer is without jurisdiction. Ms. Mehta further submitted that in the same manner, the State Tax Officer could be said to have been empowered to order provisional attachment of the bank accounts also.

7 Ms. Mehta placed strong reliance on the following averments made in the affidavitinreply filed on behalf of the respondent No.3 duly affirmed by one Devendrakumar Dahyabhai Chauhan, State Tax Officer 1, Unit 6, Vadodara:

> "6 It is submitted that, raid was carried on the premises of the present petitioner being & factory premises on 20.11.2018 thereafter, on 20.11.2018 during the raid it was found that the petitioner herein had entered into bogus billing transaction/only papers trails from four enterprises namely Adideva Enterprise, Laxmiraj Enterprise, Raghav Traders, Radhesh Traders.
>
> 7 It is respectfully submitted that, the raid was carried on for a period of seven days from 20.11.2018 to 27.11.2018 and the summon was issued on 27.11.2018 and the hearing was kept on 18.12.2018, the authority issued herewith and marked as ANNEXURERI (Colly) are the copies of the INSO1 and INSO2. The said INSO1 and INS02 was issued as prescribed under rule 139(1) of the GGST/CGST Act. It is respectfully submitted that, upon perusal of the Rule 139 which reads as nomenclature as inspection search and seizure. Where it is mentioned that for the purpose of inspection, search or seizure in accordance with the provision of section 67 INSO1 is required to be issued authorizing any other Officer subordinate to

him i.e. joint Commissioner to conduct the inspection or search or as the case may be seizure of goods, documents book or things liable to confiscation. Thereafter, seizure order is required to be given in form INS 02.

8 It is respectfully submitted that, upon perusal of the order of seizure in form GST INSOz dated 27.11.2018. It is categorically mentioned that as per rule56(12), the details of raw material or service used in manufacture and quantitative details of the goods shown manufacture including the waste and by products thereof, the petitioner herein has not maintained such books of account and therefore, there is contravention to the provisions of the CGST/ GGST Act, 2017 with an intention to evade payment of tax. It is also respectfully submitted that, upon perusal of the form GST INSOZ in paragraph no.2 of the said order of seizure. It is categorically mentioned that the petitioner has not received any physical goods as per the said invoices and the petitioner has availed credit fraudulently. It is further observed in the seizure order that, some of the transactions shown in the books as well as return of the petitioners are found fictitious and only billing activities/papers trails without entering into Physical transactions of goods has been undertaken.

9 It is respectfully submitted that, the summon was issued on 27.11.2018, and the bearing Was kept on 18.12.2018, the petitioner had Visited the office and the statement was recorded on 18.12.2018 . Upon perusal of the said statement in question no.20, 21 and 29. It is categorically mentioned that upon asking of the bills as well as the existence of the dealers with whom billing transactions was done, the petitioner herein was not in a position to answer affirmatively and therefore, there is subjective satisfaction on behalf of the respondent authorities to believe that the said transaction was fictitious transactions and with an intention to evade payment of tax as well as with an intention to fraudulently avail Input Tax Credit. Annexed herewith and marked as ANNEXURE II is the copy of the statement dated 18.12.2018. It is further respectfully submitted that, one dealer namely Mr. Sunny Pravinchand Nagar Statement was recorded on 20.03.2019, since stated that he has incorporated/registered fourteen fictitious entities/dealers and the present petitioner namely Valerius Industries is also part of the said fourteen fictitious entities/dealers. Annexed herewith and marked as Annexure-R-III is the copy of such statement dated 23.01.2019.

10 It is respectfully submitted that, the bank account was provisionally attached under rule 159(1) of the GGST/CGST rule, on 20.11.2018 and the ITC Input Tax Credit was blocked on 11.02.2019 under section 17 (5) of the GGST/CGST Act. Annexed herewith and marked as ANNEXURERIV is the copy of the letter dated 11.02.2019.

11 It is respectfully submitted that, the order Passed under DRC, 07 has attained finality and the petitioner has alternative statutory remedy and the petitioner may be relegated to prefer appeal under section 107 of GGST/CGST Act."

8 Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the State Tax Officer 1, Unit 44, Vadodara could have exercised powers under Section 83 of the GST Act, 2017 for the purpose of provisional attachment of the property owned by the writ applicant.

9 Before adverting to the rival submissions canvassed on either side, we must look into the few relevant provisions of the Act, 2017. Section 62 of the Act, 2017 reads as follows:

"62. Assessment of nonfilers of returns.

(1) Notwithstanding anything to the contrary contained in section 73 or section 74, where a registered person fails to furnish the return under section 39 or section 45, even after the service of a notice under section 46, the proper officer may proceed to assess the tax liability of the said person to the best of his judgement taking into account all the relevant material which is available or which he has gathered and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates.

(2) Where the registered person furnishes a valid return within thirty days of the service of the assessment order under subsection (1), the said assessment order shall be deemed to have been withdrawn but the liability for payment of interest under subsection (1) of section 50 or for payment of late fee under section 47 shall continue."

10 Section 63 of the Act, 2017 reads as follows:

"63. Assessment of unregistered persons.

Notwithstanding anything to the contrary contained in section 73 or section 74, where a taxable person fails to obtain registration even though liable to do so or whose registration has been cancelled under subsection (2) of section 29 but who was liable to pay tax, the proper officer may proceed to assess the tax liability of such taxable person to the best of his judgement for the relevant tax periods and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates:

Provided that no such assessment order shall be passed without giving the person an opportunity of being heard."

11 Section 64 of the Act, 2017 reads as follows:

"64. Summary assessment in certain special cases.

(1) The proper officer may, on any evidence showing a tax liability of a person coming to his notice, with the previous permission of Additional Commissioner or Joint Commissioner, proceed to assess the tax liability of such person to protect the interest of revenue and issue an assessment order, if he has sufficient grounds to believe that any delay in doing so may adversely affect the interest of revenue:

Provided that where the taxable person to whom the liability pertains is not ascertainable and such liability pertains to supply of goods, the person in charge of such goods shall be deemed to be the taxable person liable to be assessed and liable to pay tax and any other amount due under this section.

(2) On an application made by the taxable person within thirty days from the date of receipt of order passed under subsection (1) or on his own motion, if the Additional Commissioner or Joint Commissioner considers that such order is erroneous, he may withdraw such order and follow the procedure laid down in section 73 or section 74."

12 Section 67 of the Act, 2017 reads as follows:

"67. Power of inspection, search and seizure.

(1) Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that—

(a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or

(b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act, he may authorise in writing any other officer of State tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.

(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under subsection (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of State tax to search and seize or may himself search and seize such goods, documents or books or things: Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorised by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer:

Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

(3) The documents, books or things referred to in subsection (2) or any other documents, books or things produced by a taxable person or any other person, which have not been relied upon for the issue of notice under this Act or the rules made thereunder,

shall be returned to such person within a period not exceeding thirty days of the issue of the said notice.

(4) The officer authorised under subsection (2) shall have the power to seal or break open the door of any premises or to break open any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied.

(5) The person from whose custody any documents are seized under subsection (2) shall be entitled to make copies thereof or take extracts therefrom in the presence of an authorised officer at such place and time as such officer may indicate in this behalf except where making such copies or taking such extracts may, in the opinion of the proper officer, prejudicially affect the investigation.

(6) The goods so seized under subsection (2) shall be released, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, respectively, as may be prescribed or on payment of applicable tax, interest and penalty payable, as the case may be.

(7) Where any goods are seized under subsection (2) and no notice in respect thereof is given within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized: Provided that the period of six months may, on sufficient cause being shown, be extended by the proper officer for a further period not exceeding six months.

(8) The Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification, specify the goods or class of goods which shall, as soon as may be after its seizure under subsection (2), be disposed of by the proper officer in such manner as may be prescribed.

(9) Where any goods, being goods specified under subsection (8), have been seized by a proper officer, or any officer authorised by him under subsection (2), he shall prepare an inventory of such goods in such manner as may be prescribed.

(10) The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure, shall, so far as may be, apply to

search and seizure under this section subject to the modification that subsection (5) of section 165 of the said Code shall have effect as if for the word “Magistrate”, wherever it occurs, the word “Commissioner” were substituted.

(11) Where the proper officer has reasons to believe that any person has evaded or is attempting to evade the payment of any tax, he may, for reasons to be recorded in writing, seize the accounts, registers or documents of such person produced before him and shall grant a receipt for the same, and shall retain the same for so long as may be necessary in connection with any proceedings under this Act or the rules made thereunder for prosecution.

(12) The Commissioner or an officer authorised by him may cause purchase of any goods or services or both by any person authorised by him from the business premises of any taxable person, to check the issue of tax invoices or bills of supply by such taxable person, and on return of goods so purchased by such officer, such taxable person or any person in charge of the business premises shall refund the amount so paid towards the goods after cancelling any tax invoice or bill of supply issued earlier.”

13 Section 73 of the Act, 2017 reads as follows:

“73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful misstatement or suppression of facts.

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

(2) The proper officer shall issue the notice under subsection (1) at least three months prior to the time limit specified in subsection

(10) for issuance of order.

(3) Where a notice has been issued for any period under subsection (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under subsection (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under subsection (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under subsection (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under subsection (1) or, as the case may be, the statement under subsection (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under subsection (1) or, as the case may be, the statement under subsection (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under subsection (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in subsection (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under subsection (1) or subsection (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under subsection (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in subsection (6) or subsection (8), penalty under subsection (9) shall be payable where any amount of selfassessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax."

14 Section 74 of the Act, 2017 reads as follows:

"74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts.

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under subsection (1) at least six months prior to the time limit specified in subsection (10) for issuance of order.

(3) Where a notice has been issued for any period under subsection (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under subsection (1), on the person chargeable with tax.

(4) The service of statement under subsection (3) shall be deemed to be service of notice under subsection (1) of section 73,

subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilfulmisstatement or suppression of facts to evade tax, for periods other than those covered under subsection (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under subsection (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under subsection (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under subsection (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in subsection (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under subsection (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under subsection (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under subsection (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation 1.– For the purposes of section 73 and this section, -

i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.

Explanation 2.—For the purposes of this Act, the expression "suppression" shall mean nondeclaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."

15 Section 83 of the Act, 2017, which is relevant for our purpose, reads as under:

"83. Provisional attachment to protect revenue in certain cases.

(1) Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under subsection (1)."

16 The plain reading of Section 83 of the Act referred to above makes it clear that the powers have been conferred by the legislature upon the Commissioner. The subjective satisfaction that for the purpose of protecting the interest of the government revenue, it is necessary that the goods should be provisionally attached should be that of the Commissioner. The Commissioner has been conferred with the power to pass an order in writing for the purpose of attaching provisionally any property including the bank account belonging to the taxable person. Indisputably, in the case on hand, the order of provisional attachment of the

bank account as well as the goods has not been passed by the Commissioner, the same has been passed by the State Tax Officer i.e. the respondent No.3 herein.

17 The order of provisional attachment of property under Section 83 in form NO.GST DRC22 in accordance with Rule 159(1) of the Rules reads as follows:

FORM GST DRC – 22
[See rule 159(1)]

Reference NO.AC/U44/ STO1/ Valerius/201819 dated : 20/11/2018

To,

The Manager
Bank of Baroda
Alkapuri Branch, Vadodara

Provisional attachment of property under Section 83

It is to inform that M/s. Valerius Industries, having principal place of business at 26/1 GIDC Industrial Estate bearing registration number as 24AANFV4191N12H (GSTIN/ID), PAN: AANFV4191N is a registered taxable person under the Gujarat Goods and Services Tax Act 2017 & Central Goods and Services tax Act 2017. Proceedings have been launched against the aforesaid taxable person under section 67 of the said Act to determine the tax or any other amount due from the said person.

As per information available with the department, it has come to my notice that the said person has Current Account No 01880200001055 FD RD & CC Account No.01880500000081 account in your bank. In order to protect the interests of revenue and in exercise of the powers conferred under section 83 of the Act, R R Bhatiya, State Tax Officer 1, Unit44, Vadodara, hereby provisionally attach the aforesaid account / property.

No debit shall be allowed to be made from the said account or any other account operated by the aforesaid person on the same PAN without the prior permission of this department. The property mentioned above shall not be allowed to be disposed of without the prior permission of this department.

Sd/-
R.R. Bhatiya)
State Tax Officer 1,
Unit 44, Vadodara."

18 The order of provisional attachment of the goods valued at Rs.1,60,00,000/- reads as under:

"Details of goods seized:

M/s Valerius Industries 26/1 G.I.D.C. Industrial Estate, Kalol, Dist: Panchamahal GSTN:24AANFV4191N1ZH

The process of site inspection was held at your business premises from 20/11/18. In this connection, it has come to the notice during this inspection and the site inspection of the business premises of the other dealers conducted by the concerned officers that, out of the purchases shown in the books of accounts by you, following dealers have been prima facie found to be engaged only in the billing activity.

SR. NO	TAX PAYER NAME	GST NO.	TOTAL VALUE OF PUR-CHASES SHOWN	CGST + SGST
1	ADIDEV ENTERPRISE	24HEGPS2435C1ZN	6488624	1167954
2	LAXMIRAJ ENTERPRISE	24GTXPS2601K1Z3	14284362	2571183
3	RADHESH TRADERS	24DFNPP9188F1ZR	3387911	609823
4	RAGHAV TRADERS	24APHPY6226N1Z8	17975638	3235614
TOTAL			42136534	7584575

Thus, the tax credit of purchases made by you from the above mentioned dealers is liable to be rejected and tax, interest and penalty are liable to be levied. For the security of the government tax, you have to maintain goods stock of Rs.1,60,00,000/against the proposed dues from the spot goods stock of Rs.2,48,59,485 as produced by you during the site inspection. The said stock of goods has been provisionally attached.

Place: Kalol
Date: 27/11/2018

Sd/-
(R.R.Bhatiya)
State Tax Officer-1
Unit-6, Vadodara"

19 We shall now look into the order passed by the Commissioner of State Tax delegating his power of provisional attachment under Section 83 of the Act to : (1) Deputy Commissioner (2) Assistant Commissioner and (3) State Tax Officer. The order reads as under:

ORDER
By the Commissioner of State Tax,
Gujarat State, Ahmedabad

No.GSL/S.5(1)/S.83/B.14

Specification of proper officers under the Gujarat Goods and Services Tax Act, 2017

In exercise of the power conferred upon me by subsection of section 5 read with clause (91) of section 2 of the Gujarat Goods and Services Tax Act, 2017 and the rules framed thereunder, I do hereby assign the functions to be performed under this Act by a proper officer as defined in clause (91) of section 2 under different sections of the said Act mentioned in the entry in column (2) of the Schedule below and described in the corresponding entry at column (3) of the said Schedule to the Proper Officers specified in the corresponding entry in column (4) thereof, subject to the condition that the functions hereby assigned shall be performed only within their jurisdiction unless specific jurisdiction is mentioned there against.

SCHEDULE – A

Sl No.	Section	Functions assigned	Designation of proper officer
1	2	3	4
1	83	Provisional attachment to protect revenue in certain cases	Deputy Commissioner, Assistant Commissioner, State Tax Officer

Sd/-
P D Vaghela)
Commissioner of State Tax
Gujarat State, Ahmedabad."

20 The first and the foremost question that needs to be answered is whether the Commissioner could have delegated his power by virtue of the aforesaid order. Ms. Mehta, the learned A.G.P. seeks to rely upon Section 5 of the Act, 2017. Section 5 of the State GST Act reads as under:

> "5. Powers of Officers (1) Subject to such conditions and limitations as the Commissioner may impose, an officer of State tax may exercise the powers and discharge the duties conferred or imposed on him under this Act and discharge the duties conferred or imposed on him under this Act.
>
> (2) An Officer of State tax may exercise the powers and discharge the duties conferred or imposed under this Act on any other Officer of State tax who is subordinate to him.
>
> (3) The Commissioner may, subject to such conditions and limitations as may be specified in this behalf by him, delegate his powers to any other Officer who is subordinate to him.
>
> (4) Notwithstanding anything contained in this section, an Appellate Authority shall not exercise the powers and discharge the duties conferred or imposed on any other Officer of State tax."

21 According to Ms. Mehta, by virtue of Section 5(3) of the Act, the Commissioner is empowered to delegate his power to any other officer who is subordinate to him.

22 Ms. Mehta, thereafter, invited the attention of this Court to two definitions of "Commissioner" and "Commissioner in the Board" as defined under Sections 2(24) and 2(25) respectively of the Gujarat Goods and Services Tax Act, 2017. The two definitions read as under:

> "2(24). Commissioner" means the Commissioner of State tax appointed under section 3 and includes the Chief Commissioner or Principal Commissioner of State tax appointed under section 3;"
>
> "2(25). "Commissioner in the Board" means the Commissioner referred to in section 168 of the Central Goods and Services Tax Act;"

23 Ms. Mehta, thereafter, invited the attention of this Court to Section 167 of the Gujarat Goods and Services Tax Act, 2017 (fort short, 'the GGST Act, 2017), which is with regard to the delegation of powers. Section 167 of the GGST Act, 2017 reads as under:

"The Commissioner may, by notification, direct that subject to such conditions, if any, as may be specified in the notification, any power exercisable by any authority or officer under this Act may be exercisable also by another authority or officer as may be specified in such notification."

24 In the last, Ms. Mehta invited the attention of this Court to Section 168 of the GGST 2017. Section 168 of the GGST, 2017 reads as under:

"168. Power to issue instructions or directions. The Commissioner may, if he considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this Act, issue such orders, instructions or directions to the State tax officers as it may deem fit, and thereupon all such officers and all other persons employed in the implementation of this Act shall observe and follow such orders, instructions or directions.

25 Ms. Mehta submitted that by virtue of the aforesaid provisions of the State GST Act, the Commissioner State Tax could be said to be empowered to delegate his powers of provisional attachment under Section 83 of the State GST Act.

26 At this stage, it is necessary to look into few provisions of the Central GST Act, 2017. Section 2(24) of the CGST Act, 2017 defines "Commissioner" as under:

""Commissioner" means the Commissioner of State tax appointed under section 3 and includes the Chief Commissioner or Principal Commissioner of State tax appointed under section 3;"

27 Section 2(25) of the CGST Act defines "Commissioner in the Board" as under:

"2(25) "Commissioner in the Board" means the Commissioner referred to in section 168;"

28 Section 83 of the CGST Act is pari materia to Section 83 of the State GST Act. Section 167 of the CGST Act with regard to the delegation of powers reads as under:

"167. Delegation of powers.The Commissioner may, by notification, direct that subject to such conditions, if any, as may be specified in the notification, any power exercisable by any authority or officer

under this Act may be exercisable also by another authority or officer as may be specified in such notification."

29 Section 168 of the CGST Act, 2017 reads as under:

" 168. (1) The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this Act, issue such orders, instructions or directions to the central tax officers as it may deem fit, and thereupon all such officers and all other persons employed in the implementation of this Act shall observe and follow such orders, instructions or directions.

(2) The Commissioner specified in clause (91) of section 2, subsection (3) of section 5, clause (b) of subsection (9) of section 25, subsections (3) and (4) of section 35, subsection (1) of section 37, subsection (2) of section 38, subsection (6) of section 39, subsection (5) of section 66, subsection (1) of section 143, subsection (1) of section 151, clause (l) of subsection (3) of section 158 and section 167 shall mean a Commissioner or Joint Secretary posted in the Board and such Commissioner or Joint Secretary shall exercise the powers specified in the said sections with the approval of the Board."

30 The comparison of the provisions of the State GST Act and the CGST would indicate that there is a vast difference between the two. Section 168(2) of the CGST Act clarifies that the Commissioner specified in subsection (3) of Section 5 shall mean a Commissioner or Joint Secretary posted in the Board and such Commissioner or Joint Secretary shall exercise the powers specified in the said section with the approval of the Board. Thus, the distinguishing feature is that so far as the CGST Act is concerned, the power of delegation under Section 5(3) of the Act therein is with the Commissioner in the Board and not the Commissioner of the Central Tax. Whereas, so far as Section 5(3) of the State GST Act is concerned, the Commissioner would be the Commissioner of the State Tax. If the provisions of the CGST Act would have been applicable to the facts of the present case, then there would have been no difficulty at all in quashing the order passed by the Commissioner of the State Tax delegating his power of Section 83 to the subordinate officers on the ground that the same is without jurisdiction. However, it appears that so far as the State GST Act is concerned, the Commissioner, in Section 5(3) of the Act, would be the Commissioner of the State Tax and in the same manner, the Commissioner, in Sections 167 and 168 of the Act respectively, shall also be the Commissioner of the State Tax.

31 Delegation is the act of making or commissioning a delegate. It generally means parting of powers by the person who grants the delegation and conferring of an authority to do things which otherwise that person would have to do himself. Delegation is defined in Black's Law Dictionary as "the act of entrusting another with authority by the empowering another to act as an agent or representative". In P. Ramanatha Aiyar's, The Law Lexicon, "delegation is the act of making or commissioning a delegate. Delegation generally means parting of powers by the person who grants the delegation, but it also means conferring of an authority to do things which otherwise that person would have to do himself". Justice Mathew in Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. v. The Assistant Commissioner of Sales Tax and Others [1974 (4) SCC 98], has succinctly discussed the concept of delegation. Paragraph 37 reads as follows:

> "37. … Delegation is not the complete handing over or transference of a power from one person or body of persons to another. Delegation may be defined as the entrusting, by a person or body of persons, of the exercise of a power residing in that person or body of persons, to another person or body of persons, with complete power of revocation or amendment remaining in the grantor or delegator. It is important to grasp the implications of this, for, much confusion of thought has unfortunately resulted from assuming that delegation involves or may involve, the complete abdication or abrogation of a power. This is precluded by the definition. Delegation often involves the granting of discretionary authority to another, but such authority is purely derivative. The ultimate power always remains in the delegator and is never renounced."

32 As a general rule, whatever a person has power to do himself, he may do by means of an agent. This broad rule is limited by the operation of the principle that a delegated authority cannot be redelegated, delegatus non potest delegare. The naming of a delegate to do an act involving a discretion indicates that the delegate was selected because of his peculiar skill and the confidence reposed in him and there is a presumption that he is required to do the act himself and cannot redelegate his authority. As a general rule, "if the statute directs that certain acts shall be done in a specified manner or by certain persons, their performance in any other manner than that specified or by any other person than one of those named is impliedly prohibited. Normally, a discretion entrusted by the Parliament to an administrative organ must be exercised by that organ itself. At the same time, it is settled position of law that the maxim "delegatus nonpotest delegare" must not be pushed too far. The maxim does not embody a rule of law. It indicates a rule of construction of a statute or other instrument

conferring an authority. Prima facie, a discretion conferred by a statute on any authority is intended to be exercised by that authority and by no other. However, the intention may be negatived by any contrary indications in the language, scope or object of the statute. The construction that would best achieve the purpose and object of the statute should be adopted."

33 At this stage, in the aforesaid context, we may deal with the submission canvassed by Ms. Mehta that in the case on hand, the order of provisional attachment under Section 83 of the Act came to be passed because of the pendency of proceedings under Section 67 of the Act. The submission of Ms. Mehta is that Section 67 of the Act confers power of inspection, search and seizure. Where the proper officer not below the rank of Joint Commissioner has reasons to believe that a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has indulged in contravention of any of the provisions of the Act or the rules made thereunder to evade tax under the Act 2017, then such proper officer not below the rank of Joint Commissioner may authorize in writing any other officer of the State Tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place. According Ms. Mehta, if, ultimately, the entire exercise of inspection, search and seizure is undertaken by an authorized person, then such authorized officer can always be delegated with the power to pass an order of provisional attachment under Section 83 if the authorized officer who is of the opinion that it is necessary so to do for the purpose of protecting the interest of the government revenue. We are afraid we are not in a position to accept this argument.

34 The first and the foremost thing which needs to be noted is that even for the purpose of Section 67, the satisfaction has to be of the proper officer not below the rank of the Joint Commissioner. If the proper officer not below the rank of the Joint Commissioner has reasons to believe that a taxable person has indulged in contravention of any of the provisions of the Act, 2017 or the rules, then in such circumstances, he may authorize in writing any other officer to carry out the inspection, search and seizure. Therefore, when an authorized officer carries out an inspection, search and seizure, the same is merely on the basis of the satisfaction recorded or arrived at by the proper officer not below the rank of the Joint Commissioner. The authorized officer is merely executing or implementing the order that may be passed by the proper officer not below the rank of the Joint Commissioner for the purpose of Section 67 of the Act, 2017. 35 In the case on hand, Section 83 makes it abundantly clear that it is the Commissioner's opinion which is relevant. The Legislature has thought fit to

confer this power upon the Commissioner. Whether such power conferred upon the Commissioner by the legislature could have been delegated to the three subordinate officers referred to above by virtue of the order dated 15th January 2018 passed in exercise of power under subsection (3) of Section 5 read with clause 19 of Section 2 of the Act and the rules framed thereunder. In our opinion, the answer has to be in the negative. Although there is no specific challenge to the order dated 15th January 2015 passed by the Commissioner of State Tax delegating his power under Section 83 to the subordinate officers, yet, we are of the view that by virtue of such order, such impugned order of provisional attachment cannot be defended.

36 We now propose to examine the matter from a different angle. Let us for the time being proceed on the footing that it was within the powers of the Commissioner to delegate his power of provisional attachment under Section 83 of the Act upon the three subordinate officers by virtue of subsection (3) of Section 5 read with clause 91 of Section 2 of the Act, 2017. Section 83 talks about the opinion which is necessary to be formed for the purpose of protecting the interest of the government revenue. Any opinion of the authority to be formed is not subject to objective test. The language leaves no room for the relevance of an official examination as to the sufficiency of the ground on which the authority may act in forming its opinion. But, at the same time, there must be material based on which alone the authority could form its opinion that it has become necessary to order provisional attachment of the goods or the bank account to protect the interest of the government revenue. The existence of relevant material is a precondition to the formation of opinion. The use of the word “may” indicates not only the discretion, but an obligation to consider that a necessity has arisen to pass an order of provisional attachment with a view to protect the interest of the government revenue. Therefore, the opinion to be formed by the Commissioner or take a case by the delegated authority cannot be on imaginary ground, wishful thinking, howsoever laudable that may be. Such a course is impermissible in law. At the cost of repetition, the formation of the opinion, though subjective, must be based on some credible material disclosing that is necessary to provisionally attach the goods or the bank account for the purpose of protecting the interest of the government revenue. The statutory requirement of reasonable belief is to safeguard the citizen from vexatious proceedings. “Belief” is a mental operation of accepting a fact as true, so, without any fact, no belief can be formed. It is equally true that it is not necessary for the authority under the Act to state reasons for its belief. But if it is challenged that he had no reasons to believe, in that case, he must disclose the materials upon which his belief was formed, as it has been held by the Supreme Court in Sheonath Singh’s case [AIR 1971 SC 2451], that the Court can examine

the materials to find out whether an honest and reasonable person can base his reasonable belief upon such materials although the sufficiency of the reasons for the belief cannot be investigated by the Court. In the case at hand, Ms. Mehta, the learned A.G.P. appearing for the respondents very fairly submitted that not only the impugned order of provisional attachment is bereft of any reason, but there is nothing on the original file on the basis of which this Court may be in a position to ascertain the genuineness of the belief formed by the authority. The word "necessary" means indispensable, requisite; indispensably requisite, useful, incidental or conducive; essential; unavoidable; impossible to be otherwise; not to be avoided; inevitable. The word "necessary" must be construed in the connection in which it is used. The formation of the opinion by the authority should reflect intense application of mind with reference to the material available on record that it had become necessary to order provisional attachment of the goods or the bank account or other articles which may be useful or relevant to any proceedings under the Act. [see: Bhikhubhai Vithlabhai Patel and others vs. State of Gujarat AIR 2008 SCC 1771].

37 In J. Jayalalitha vs. U.O.I. [AIR 1999 SC 1912], the Supreme Court while construing the expression "as may be necessary" employed in Section 3 (1) of the Prevention of Corruption Act, 1988 which conferred the discretion upon the State Government to appoint as many Special Judges as may be necessary for such area or areas or for such case or group of cases to try the offences punishable under the Act, observed :

> "The legislature had to leave it to the discretion of the Government as it would be in a better position to know the requirement. Further, the discretion conferred upon the Government is not absolute. It is in "The nature of a statutory obligation or duty. It is the requirement which would necessitate exercise of power by the Government. When a necessity would arise and of what type being uncertain the legislature could not have laid down any other guideline except the guidance of "necessity". It is really for that reason that the legislature while conferring discretion upon the Government has provided that the Government shall appoint as many Special Judges as may be necessary. The words "as may be necessary" in our opinion is the guideline according to which the Government has to exercise its discretion to achieve the object of speedy trial. The term "necessary" means what is indispensable, needful or essential."

38 In Barium Chemicals Ltd. vs. Company Law Board [AIR 1967 SC 295], the Supreme Court pointed out, on consideration of several English

and Indian authorities that the expressions "is satisfied", "is of the opinion" and "has reason to believe" are indicative of subjective satisfaction, though it is true that the nature of the power has to be determined on a totality of consideration of all the relevant provisions. The Supreme Court while construing Section 237 of the Companies Act, 1956 held :

> "64. The object of S. 237 is to safeguard the interests of those dealing with a company by providing for an investigation where the management is so conducted as to jeopardize those interests or where a company is floated for a fraudulent or an unlawful object. Clause (a) does not create any difficulty as investigation is instituted either at the wishes of the company itself expressed through a special resolution or through an order of the court where a judicial process intervenes. Clause (b), on the other hand, leaves directing an investigation to the subjective opinion of the government or the Board. Since the legislature enacted S. 637 (i) (a) it knew that government would entrust to the Board its power under S. 237 (b). Could the legislature have left without any restraints or limitations the entire power of ordering an investigation to the subjective decision of the Government or the Board? There is no doubt that the formation of opinion by the Central Government is a purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the government and not of the court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. But the Authority is required to arrive at such an opinion from circumstances suggesting what is set out in subclauses (i), (ii) or (iii). If these circumstances were not to exist, can the government still say that in its opinion they exist or can the Government say the same thing where the circumstances relevant to the clause do not exist? The legislature no doubt has used the expression "circumstances suggesting". But that expression means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose is still to be adduced through an investigation. But the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. That expression points out that there must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three subclauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is

> also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process. These analysis finds support in Gower's Modern Company Law (2nd Ed.) p. 547 where the learned author, while dealing with S. 165(b) of the English Act observes that "the Board of Trade will always exercise its discretionary power in the light of specified grounds for an appointment on their own motion" and that "they may be trusted not to appoint unless the circumstances warrant it but they will test the need on the basis of public and commercial morality." There must therefore exist circumstances which in the opinion of the Authority suggest what has been set out in subclauses (i), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of nonapplication of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

39 The Supreme Court while expressly referring to the expressions such as "reason to believe", "in the opinion" of observed :

> "Therefore, the words, "reason to believe" or "in the opinion of do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective to process not lending itself even to a limited scrutiny by the court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits or as Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative."

40 In the Income Tax Officer, Calcutta and Ors. vs. Lakhmani Mewal Das [AIR 1976 SC 1753], the Supreme Court construed the expression "reason to believe" employed in Section 147 of the Income Tax Act, 1961 and observed: the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Incometax Officer

and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully or truly all material facts. It is not any or every material, howsoever vague and indefinite or distant which would warrant the formation of the belief relating to the escapement of the income of the assessee from assessment. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.

41 In Bhikhubhai Vithalabhai Patel (supra), the Supreme Court observed in paras 32 and 33 as under:

> "32. We are of the view that the construction placed on the expression "reason to believe" will equally be applicable to the expression "is of opinion" employed in the proviso to Section 17 (1) (a) (ii) of the Act. The expression "is of opinion", that substantial modifications in the draft development plan and regulations, "are necessary", in our considered opinion, does not confer any unlimited discretion on the Government. The discretion, if any, conferred upon the State Government to make substantial modifications in the draft development plan is not unfettered. There is nothing like absolute or unfettered discretion and at any rate in the case of statutory powers. The basic principles in this regard are clearly expressed and explained by Prof. Sir William Wade in Administrative Law (Ninth Edn.) in the chapter entitled 'abuse of discretion' and under the general heading the principle of reasonableness' which read as under :
>
> > "The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.
> >
> > The powers of public authorities are therefore essentially different from those of private persons. A man making his will

> may, subject to any rights of his dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed."

> 33. The Court is entitled to examine whether there has been any material available with the State Government and the reasons recorded, if any, in the formation of opinion and whether they have any rational connection with or relevant bearing on the formation of the opinion. The Court is entitled particularly, in the event, when the formation of the opinion is challenged to determine whether the formation of opinion is arbitrary, capricious or whimsical. It is always open to the court to examine the question whether reasons for formation of opinion have rational connection or relevant bearing to the formation of such opinion and are not extraneous to the purposes of the statute."

42 In the absence of any cogent or credible material, if the subjective satisfaction is arrived at by the authority concerned for the purpose of passing an order of provisional attachment under Section 83 of the Act, then such action amounts to malice in law. Malice in its legal sense means such malice as may be assumed from the doing of a wrongful act intentionally but also without just cause or excuse or for want of reasonable or probably cause. Any use of discretionary power exercised for an unauthorized purpose amounts to malice in law. It is immaterial whether the authority acted in good faith or bad faith. In the aforesaid context, we may refer to and rely upon a decision of the Supreme Court in the case of Smt. S.R. Venkatraman vs. Union of India reported in (1979) ILLJ 25(SC) where it had been held:

> "There will be an error of fact when a public body is prompted by a mistaken belief in the existence of a nonexisting fact or circumstances. This is so clearly unreasonable that what is done

under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience and as things go, they may well be said to run into one another. The influence of extraneous matters will be undoubtedly there where the authority making the order has admitted their influence. An administrative order which is based on reasons of fact which do not exist must be held to be infected with an abuse of power."

We may also refer to and rely upon a decision of the Supreme Court in the case of ITO Calcutta vs. Lakhmani Mewal Das reported in [(1976) 103 ITR 437 (SC)] wherein it had been held as under:

"The reasons for the formation of the belief contemplated by Section 147(a) of the Income Tax Act, 1961, for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the I.T.O. and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the I.T.O. on the point as to whether action should be initiated for reopening the assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment.

The reason for the formation of the belief must be held in good faith and should not be a mere pretence."

43 There is one another pertinent feature of this matter. When the search of the industrial premises of the writ applicant was undertaken, the further inquiry in that regard revealed that there were no goods involved, but there were only billing transactions. At the time of the search, goods worth Rs.2,48,59,485/were found stored at the industrial premises of the writ applicant. The authority came to the conclusion that the tax liability which may be determined in future under Section 74 of the Act may be to the tune of Rs.1,60,00,000/(Rupees One Crore Sixty Lakh only), and in such circumstances, thought fit to provisionally attach the goods worth only Rs.1,60,00,000/from the total goods worth Rs.2,48,59,485/(Rupees Two Crore Forty Eight Lakh Fifty Nine Thousand Four Hundred Eighty Five only).

44 We would like to add something more to what we have stated above. It would be a big mistake on the part of the respondents to understand that the reasons to believe necessary for the purpose of carrying out inspection, search and seizure under Section 67 of the Act, 2017 would be sufficient enough for the purpose of formation of the opinion that it is necessary to provisionally attach the goods or other articles for the purpose of protecting the interest of the government revenue. In our opinion, Section 83 of the Act stands altogether on a different footing. The considerations also are quite different for the purpose of exercising the power of provisional attachment under Section 83 of the Act. Just because, some proceedings are initiated under Section 67 by itself would not be sufficient to arrive at the satisfaction that it is necessary to provisionally attach the property for the purpose of protecting the interest of the government revenue. The power has been specifically conferred upon the Commissioner to form such an opinion. The legislature was quite alive to the fact that an order of provisional attachment cannot be as a matter of course. It is one of the drastic measures which the authority may be compelled to take if the situation demands for the purpose of protecting the interest of the government revenue. Under Section 67 of the Act, 2017, the legislature has thought fit to use the words "proper officer not below the rank of Joint Commissioner". In Section 83, even that discretion is taken away and it is only the Commissioner who has been empowered to act under Section 83 of the Act. In our opinion, therefore, the subjective satisfaction, which is required for the purpose of Section 83 of the Act, is not dependent on Section 67 of the Act or to put it in other words, just because, a search has been undertaken resulting in seizure of goods by itself may not be sufficient to arrive at the subjective satisfaction that it is necessary to pass an order of provisional attachment to protect government revenue.

45 In the case on hand, the challenge is also to the order in form GST DRC – 07 (Rule 142(5) of the Rules. This order dated 17th June 2019 [Annexure : 'A' to this writ application) is an assessment order purported to have been passed under Section 74 of the Act. Section 74 reads as under:

> **"74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts.**
>
> (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax,

he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under subsection (1) at least six months prior to the time limit specified in subsection (10) for issuance of order.

(3) Where a notice has been issued for any period under subsection (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under subsection (1), on the person chargeable with tax.

(4) The service of statement under subsection (3) shall be deemed to be service of notice under subsection (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilfulmisstatement or suppression of facts to evade tax, for periods other than those covered under subsection (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under subsection (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under subsection (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under subsection (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in subsection (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under subsection (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under subsection (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under subsection (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation 1.– For the purposes of section 73 and this section, (i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.

Explanation 2.—For the purposes of this Act, the expression "suppression" shall mean nondeclaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."

46 Thus, Section 74 provides for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized

by reason of fraud or any wilful misstatement or suppression of fact. The case of the department is very specific.

47 Rule 142(5) of the Rules 2017 reads as under:

"142. Miscellaneous transitional provisions.

(5) Notwithstanding anything to the contrary contained in this Act, any amount of input tax credit reversed prior to the appointed day shall not be admissible as input tax credit under this Act."

48 It appears from the materials on record that without issue of any show cause notice, the tax liability came to be determined under Section 74 of the Act. Section 74 makes it abundantly clear that the defaulter should be called upon to show cause as to why he should not be paid the amount specified in the notice along with the interest payable thereon. There could not have been any assessment under Section 74 of the Act without giving any opportunity of hearing to the writ applicant. In such circumstances, the order is not tenable in law and deserves to be quashed and set aside. We also fail to understand as to on what basis the input tax credit could have been blocked by way of computer entry. At the most, the same could have been ordered to be provisionally attached, but how could the same have been blocked. Such action is also not sustainable in law.

49 Section 83 of the Act, 2017 is in pari materia with the provisions of Section 281B of the Income Tax Act, 1961. Section 281B of the Act, 1961 also provides for a provisional attachment of the property of an assessee pending the adjudication an assessment / reassessment proceedings where the income tax department believes that such attachment is necessary to protect the interest of the revenue. The provisions of Section 281B of the Act, 1961 is extracted below for the sake of completion and to demonstrate that the provisions of Section 83 have been framed along identical lines as Section 281B:

"1) Where during the pendency of any proceeding (or the assessment of any income or for the assessment or reassessment of any income which has escaped assessment, the Assessing Officer is of the opinion that for the purpose of protecting the interests of the revenue it is necessary so to do, he may, with the previous approval of the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director, by order in writing, attach provisionally any property

belonging to the essessee in the manner provided in the IncomeTax Act, 1961.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under head (1).

However, the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director may, for reasons to be recorded in writing. extend the aforesaid period by such further period or periods as he thinks fit. so, however, that the total period of extension shall not in any case exceed two years or sixty days after the date of order of assessment or reassessment. whichever is later.

(3) Where the assessee furnishes a guarantee from a scheduled bank for an amount not less than the fair market value of the property provisionally attached under head (1) the Assessing Officer shall, by an order in writing, revoke such attachment.

However where the Assessing Officer is satisfied that a guarantee from a scheduled bank for an amount lower than the fair market value of the property is sufficient to protect the interests of the revenue, he may accept such guarantee and revoke the attachment.

(4) The Assessing Officer may, for the purposes of determining the value of the property provisionally attached under head (1), make a reference to the Valuation Officer referred to in the provision of the IncomeTax Act, 1961 who shall estimate the fair market value of the property in the manner provided under that provision and submit a report of the estimate to the Assessing Officer within a period of thirty days from the date of receipt of such reference.

(5) An order revoking the provisional attachment under head (3) shall be made

(a) within fortyfive days from the date of receipt of the guarantee, where a reference to the Valuation Officer has been made under head (4); or (b) within fifteen days from the date of receipt of guarantee in any other cases.

(6) Where a notice of demand specifying a sum payable is served upon the assessee and the assessee fails to pay that sum within

the time specified In the notice of demand, the Assessing Officer may invoke the guarantee furnished under head (3) wholly or in part, to recover the amount.

(7) The Assessmg Officer shall. In the interests of the revenue. invoke the bank guarantee, if the assessee falls to renew the guarantee referred to in head (3), or falls to furnish a new guarantee from & scheduled bank for an equal amount. fifteen days before the expiry of the guarantee referred to in head (3).

(8) The amount realised by invoking the guarantee referred to In head (3) shall be adjusted against the existing demand which is payable by the assessee and the balance amount, if any, shall be deposited in the Personal Deposit Account of the Principal Commissioner or Commissioner in the branch of the Reserve Bank of India or the State Bank of India or of its subsidiaries or any bank as may be appointed by the Reserve Bank of India as its agent under the provisions of subsection (1) of section 45 of the Reserve Bank of India Act, 1934 at the place where the office of the Principal Commissioner or Commissioner is situate.

(9) Where the Assessing Officer is satisfied that the guarantee referred to in head (3) is not required anymore to protect the interests of the revenue, he shall release that guarantee forthwith.

For the purposes of this provision13. the expression “scheduled bank” shall mean a bank included in the Second Schedule to the Reserve Bank of India Act, 1934.”

50 In the aforesaid context, we may quote:

“Halbury’s Laws of India (Direct Tax II, Vol 32), 2nd Edn. Halsbury’s Laws of India (Direct Tax II, Vol 32) 2nd edn. 7. Miscellaneous

This provision relating to making an attachment before judgment, ie, before assessment order is made, is legal if assessing authority is of opinion that it is necessary to protect interests of revenue and same is supported by supervening factor. It gives guidelines for making provisional attachment and is, thus, constitutionally valid. The power conferred upon the Assessing Officer under this provision is a very drastic farreaching power and that power has to be used sparingly and only on substantive weighty grounds

and reasons. To ensure that this power is not misused, a number of safeguards have been provided in the provision itself. This power should be exercised by the Assessing Officer only if there is a reasonable apprehension that the assessee may default the ultimate collection of the demand that is likely to be raised on completion of the assessment. It should therefore be exercised with extreme care and caution. Moreover. power under this provision is to be exercised only if there is sufficient material on record to justify satisfaction that assessee is about to dispose of whole or any part of his property with a view to thwarting ultimate collection of demand and in order to achieve said objective attachment should be of properties and to extent it is required to achieve this object. It should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee. Attachment of bank accounts and trading assets should be resorted to only as a last resort. In any event, attachment under this provision should not be equated with attachment in the course of recovery proceedings. In the event the revenue is adequately protected by attachment, there is no justification for Assessing Officer for making an order of demand directing assessee to deposit entire demand within seven days of order of assessment. Further, provisional attachment can be levied even in cases where proceedings under provisions of the IncomeTax Act, 1961 dealing with search and Seizure are yet to be initiated. Therefore, invoking this provision and issuing notice under the provision of the lncomeTax Act, 1961 dealing with assessment in case of search or requisition on same day would not effect validity of order passed under this provision.

Where on facts Assessing Officer was satisfied that it was necessary to attach properties of assessee in order to protect interest of revenue and due approval was taken from concerned Commissioner who opined that it was üt case for provisional attachment, order passed under this provision in respect of certain properties of assessee would not warrant judicial review. It is for assessing authority to decide as to which of assets could be liquidated without difficulty for realization of tax assessed. Moreover. an assessee cannot compel Assessing Officer to attach any particular property. Since this provision provides for attachment of property of assessee only and, therefore. an order directing attachment of fixed deposits of assessee would be illegal. However this provision does not contain requirement of hearing before passing order of provisional attachment of assessee’s bank

account. Application of the assessee pending before Assistant Commissioner for release of assets attached must be disposed of the earliest for the ends of justice.

An order for provisional attachment passed under this provision is valid only for a period of six months and ceases to have effect after the expiry of six months from the date of the order. However, time can be extended for a further period of six month. Appropriate order for extension of period of provisional attachment would only be passed upon satisfaction of the criteria listed out. An injunction/ stay order passed during pendency of assessment proceedings does not on its own or by deeming fiction. extend period stipulated in order. Upon the expiry of the period stipulated in the order demanding provisional attachment, assessee is entitled to encash his money minus any tax due. An extension of provisional attachment without recording any reasons, such order must be taken to be illegal and non est. When assessee has filed an appeal challenging order of assessment within time period prescribed under the provision of the Income Tax Act, 1961 dealing with appealable orders along with a stay application, Assessing Officer cannot not pass an order of attachment in terms of this provision during pendency of said appeal. When property, which' is subject matter of provisional attachment, is sufficient to satisfy tax liability and safeguard interest of revenue, petitioner can seek release of provisional attachment in respect of other properties and amounts due from debtors and depositors."

51 Thus, although the provisions of Section 281B of the Income Tax Act is pari materia to Section 83 of the State GST Act, yet one pertinent feature of Section 281B of the Income Tax Act is that it gives guidelines for making the provisional attachment. Such guidelines are missing so far as Section 83 of the State GST Act is concerned.

52 Our final conclusions may be summarized as under:

[1] The order of provisional attachment before the assessment order is made, may be justified if the assessing authority or any other authority empowered in law is of the opinion that it is necessary to protect the interest of revenue. However, the subjective satisfaction should be based on some credible materials or information and also should be supported by supervening factor. It is not any and every material, howsoever vague and indefinite or distant remote or farfetching, which would warrant the formation of the belief.

[2] The power conferred upon the authority under Section 83 of the Act for provisional attachment could be termed as a very drastic and farreaching power. Such power should be used sparingly and only on substantive weighty grounds and reasons.

[3] The power of provisional attachment under Section 83 of the Act should be exercised by the authority only if there is a reasonable apprehension that the assessee may default the ultimate collection of the demand that is likely to be raised on completion of the assessment. It should, therefore, be exercised with extreme care and caution.

[4] The power under Section 83 of the Act for provisional attachment should be exercised only if there is sufficient material on record to justify the satisfaction that the assessee is about to dispose of wholly or any part of his / her property with a view to thwarting the ultimate collection of demand and in order to achieve the said objective, the attachment should be of the properties and to that extent, it is required to achieve this objective.

[5] The power under Section 83 of the Act should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee.

[6] The attachment of bank account and trading assets should be resorted to only as a last resort or measure. The provisional attachment under Section 83 of the Act should not be equated with the attachment in the course of the recovery proceedings.

[7] The authority before exercising power under Section 83 of the Act for provisional attachment should take into consideration two things: (i) whether it is a revenue neutral situation (ii) the statement of “output liability or input credit”. Having regard to the amount paid by reversing the input tax credit if the interest of the revenue is sufficiently secured, then the authority may not be justified in invoking its power under Section 83 of the Act for the purpose of provisional attachment.

53 In the overall view of the matter, we are convinced that the respondents have not acted in accordance with law.

54 In such circumstances referred to above, this writ application succeeds and is hereby allowed. The assessment order dated 17th

June 2019 passed by the respondent No.4 – Commercial Tax Officer at Vadodara demanding total amount of Rs.1,60,79,302/towards tax, penalty and interest is hereby quashed and set aside. However, it is clarified that if the authority wants to proceed against the writ applicant under Section 74 of the Act, then it shall be open for the authority to do so after issuing appropriate show cause notice and give an opportunity of hearing to the writ applicant.

55 The order of provisional attachment of the stock of goods amounting to Rs.1,60,00,000/dated 27th November 2018 as well as the order of provisional attachment of the writ applicant's current account bearing account No.01880200001055 and FD/RD CC account No.01880500000081 registered at the Bank of Baroda, Alkapuri Branch, Vadodara dated 20th November 2018 is hereby quashed and set aside. The blockage of input tax credit dated 13th February 2019 by way of computer entry is also held to be illegal and is ordered to be released forthwith. Rule is made absolute.

[2019] 57 DSTC 634 (Ahmedabad)

In the High Court of Gujarat

[Hon'ble Mr. Justice J. B. Pardiwala and Hon'ble Mr. Justice A. C. Rao]

R/SCA No.: 13679/2019

Vimal Yashwantgiri Goswami ... Petitioner

Vs.

State of Gujarat ... Respondent

Date of Order: 07.08.2019

SECTION 69 OF CGST ACT, 2017 – POWER TO ARREST – WRIT PETITION SEEKING DIRECTION TO GST DEPARTMENT NOT TO TAKE ANY ACTION AGAINST THE PETITIONER U/S 69 READ WITH SECTION 132 WITHOUT FOLLOWING DUE PROCEDURE OF LAW OF ASSESSMENT AND ADJUDICATION OF ALLEGED EVASION OF GST – POWER OF ARREST TO BE EXERCISED WITH LOT OF CARE AND CIRCUMSPECTION – PROSECUTION SHOULD NORMALLY BE LAUNCHED ONLY AFTER THE ADJUDICATION WAS COMPLETED – DIRECTION ISSUED FOR NO COERCIVE STEPS OF ARREST SHALL BE TAKEN AGAINST THE PETITIONER.

Present for the Petitioner(s) : Mr. Chetan K Pandya, Advocate

Present for the Respondents : Government Pleader

ORAL ORDER
(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. One of the main reliefs prayed for by the writ applicant in the present writ application reads as follows :

> "16(A) To issue a Writ of Mandamus and/or Writ of Prohibition and/or any other appropriate writ, order of direction, directing the respondents not to take any actions against the petitioner being proprietor of the Heugo Metal exercising powers under Section 69 read with Section 132 without following due procedure of law of assessment and adjudication of alleged evasion of GST as contemplated under Section 61, Section 73 of under Section 74 of the Central Goods and Service Tax Act, 2017 i.e. before following provisions of Chapter XII of Central Goods and Service Tax Act, 2017 and Gujarat Goods and Service Tax Act, 2017 and Chapter VIII of Central Goods and Service Tax Rules, 2017 and Gujarat Goods and Service Tax Rules, 2017 in connection with File No.ACST/UNIT-9/2019-20/B registered with State Tax (2), Unit-9, Ahmedabad."

2. Mr. Chetan K. Pandya, the learned counsel appearing for the writ applicant has placed strong reliance on the decision of the Delhi High Court in the case of MAKEMYTRIP (INDIA) PVT. LTD. vs. UNION OF INDIA, reported in 2016 (44) S.T.R. 481 (Del.) as well as on the decision of the Madras High Court in the case of M/s. Jayachandran Alloys (P) Ltd. vs. The Superintendent of GST and Central Excise and Others in the Writ Petition No.5501 of 2019 decided on 4th April, 2019.

3. We take notice of the fact that the Delhi High Court decision referred to above has been affirmed by the Supreme Court. The ratio as laid in the Delhi High Court decision is as under :

> "(i) The scheme of the provisions of the Finance Act 1994 (FA), do not permit the DGCEI or for that matter the Service Tax Department (ST Department) to bypass the procedure as set out in Section 73A (3) and (4) of the FA before going ahead with the arrest of a person under Sections 90 and 91 of the FA. The power of arrest is to be used with great circumspection and not casually. It is not to be straightway presumed by the DGCEI, without following the procedure under Section 73A (3) and (4) of the FA, that a person has collected service tax and retained such amount without depositing it to the credit of the Central Government.

(vii) In terms of C.B.E. & C.'s own procedures, for the launch of prosecution there has to be a determination that a person is a habitual offender. There is no such determination in any of these cases. There cannot be a habitual offender if there is no discussion by the DGCEI with the ST Department regarding the history of such Assessee. Assuming that, for whatever reasons, if the DGCEI does not talk to ST Department, certainly it needs to access the service tax record of such Assessee. Without even requisitioning that record, it could not have been possible for the DGCEI to arrive at a reasonable conclusion whether there was a deliberate attempt of evading payment of service tax. In the case of MMT, the decision to go in for the extreme step of arrest without issuing an SCN under Section 73 or 73A (3) of the FA, appears to be totally unwarranted."

3.1 To put it in other words, the powers of arrest under Section 69 of the Act, 2017 are to be exercised with lot of care and circumspection. Prosecution should normally be launched only after the adjudication is completed. To put it in other words, there must be in the first place a determination that a person is "liable to a penalty". Till that point of time, the entire case proceeds on the basis that there must be an apprehended evasion of tax by the assessee. In the two decisions referred to above, emphasis has been laid on the safeguards as enshrined under the Constitution of India and in particular Article 22 which pertains to arrest and Article 21 which mandates that no person shall be deprived of his life and liberty for the authority of law. The two High Courts have extensively relied upon the decision of the Supreme Court in the case of D.K. Basu vs. State of West Bengal reported in 1997 (1) SCC 416.

4. Let Notice be issued to the respondents returnable on 18th September, 2019.

4.1 In the meantime, no coercive steps of arrest shall be taken against the writ applicant. Direct service is permitted.

4.2 On the returnable date, notify this matter on top of the Board.

4.3 We propose to take up this matter for final hearing as far as possible on the returnable date. The State is requested to be ready with the matter having regard to the important issues which have been raised in the writ application.

[2019] 57 DSTC 637 (Chandigarh)

In the High Court of Punjab & Haryana

[Hon'ble Mr. Justice Jaswant Singh and Hon'ble Mr. Justice Lalit Batra]

CWP No.: 24195/2019 (O&M)

Akhil Krishan Maggu & Anr. ... Petitioner(s)

Vs.

Deputy Director, Directorate General of GST Inelligence & Ors. ... Respondent(s)

Date of Order: 15.11.2019

POWER OF ARREST UNDER SECTION 69 OF CGST ACT – REFUND SCAM – DUMMY EXPORT FIRMS AVAILED REFUND – SEARCH AT RESIDENCE OF PETITIONER NO. 2 WHO ALLEGED TO BE OWNER OF EXPORT FIRMS – PETITIONER NO.2 PARTICIPATED IN SEARCH TO ASSIST CLIENTS BEING TAX ADVOCATE – COMMOTION TOOK PLACE BETWEEN PETITIONER AND GST OFFICIALS – FIR LODGED AND PETITIONER WERE ARRESTED AND RELEASED ON BAIL – STATEMENTS RECORDED OF DUMMY EXPORTERS WHO DISCLOSED THE NAME OF PETITIONER NO. 1 BESIDES PETITIONER NO. 2 – SEARCH TOOK PLACE – NO MATERIAL FOUND – FIR LODGED AGAINST PETITIONER NO. 2 FOR ABSTRUCTION IN PERFORMANCE OF OFFICIAL DUTY – PETITIONER NO. 2 ARRESTED – SUMMON SERVED TO PETITIONER NO. 1.

WRIT PETITION SEEKING QUASHING OF SUMMONS – NO EVIDENCE AGAINST PETITIONERS TO CONNECT THEM WITH FRAUD IF ANY COMMITTED BY ALLEGED FOUR DUMMY EXPORTERS – RESPONDENTS CONTENDED THAT PETITIONER NO. 1 IS INVOLVED IN THE FRAUD – COURT DIRECTED NOT TO TAKE HIM IN CUSTODY WITHOUT PRIOR APPROVAL OF THE COURT – THE PETITIONER NO. 1 SHALL APPEAR BEFORE RESPONDENTS AS AND WHEN SUMMONED.

Facts

Akhil Krishan Maggu (Petitioner No. 1) son of Sanjeev Maggu-Petitioner No. 2 was a practising lawyer in the field of taxation. The Petitioners through instant petition under article 226 of Constitution of India were seeking quashing of summons dated 28.8.2019 issued by Senior Intelligence Officer, Directorate General of GST Intelligence.

The pleaded case of the Petitioners was that Petitioner No. 1 as an Advocate, on behalf of four exporters who had retracted their statements made at the first instance filed Writ Petitions before Delhi High Court against DGGI. As per Respondent these four exporters had availed huge amount of refund of IGST and they were dummy owners. The DGGI Respondent on 15.8.2019 searched Gurugram residence of Ramesh Wadhera-alleged

owner of dummy export firms who happened to be neighbour of Petitioners. On the request of Ramesh Wadhera, Petitioners came to his residence and some commotion took place between Petitioners and official of DGGI. At the behest of DGGI, Police registered FIR dated 15.8.2019 under Section 186, 353 IPC at DLF Police Station, Gurugram against both the Petitioners and arrested them on the same day. Both were released on bail on 22.8.2019 after a week incarceration.

The DGGI on 27.8.2019 again recorded statements of said dummy exporters, who allegedly disclosed name of Petitioners apart from earlier names of Ramesh Wadhera and Mukesh Kumar as also being involved. The Respondent-DGGI on 28.8.2019 searched Gurugram residence of Petitioners who at that point of time were not at home. The Respondents after completing search took away younger brother of Petitioner No. 1 to their office and arrested him on 29.8.2019. The DGGI on 2.9.2019 lodged another FIR against Petitioner No. 2 under Section 186, 34 & 353 IPC at DLF Police Station, Gurugram alleging that petitioner called police at the time of search of his residence on 28.8.2019 which amounts to obstruction in performance of official duty. The DGGI-Respondent vide summons dated 28.8.2019 directed Petitioners to appear before SIO to tender their statement in connection with export made by dummy export firms. Apprehending coercive action, the Petitioners approached the Court by way of writ petition.

Held

The persons who were having established manufacturing units and paying good amount of direct or indirect taxes; persons against whom there was no documentary or otherwise concrete evidences to establish direct involvement in the evasion of huge amounts of tax, should not be arrested prior to determination of liability and imposition of penalty. Similarly, arrest of Chartered Accountant or Advocates who had filed returns or otherwise assisted in business but were not beneficiary or part of fraud merely on the basis of statement without any corroborative evidence linking the professional with alleged offence should be avoided. It was well known that if top brass of a running concern was arrested, there were all possibilities of closure of unit which results into unemployment and wastage of precious natural resources.

In the case in hand, the Court found that Petitioner No. 2 was interrogated on 11.9.2019 & 12.9.2019 by DGGI and thereafter handed over to DRI, who arrested him. There was nothing on record showing admission by Petitioner No. 2 and no further statement had been recorded

in jail though petitioner was in judicial custody since 13.9.2019. Petitioner No. 1 had already put appearance on various occasions and there was nothing in file to show which indicated that Petitioner No. 1 was connected with alleged illegal refund sought by Exporters. Concededly, the Petitioner No. 1 was neither proprietor nor partner nor shareholder of any Exporter Concern/Firm/Company, who availed refund of IGST. There was no evidence of transfer of funds in the accounts of Petitioners or withdrawal of cash by any one of them. The Petitioner No. 1 was in legal profession since 2017 and after introduction of GST he had not dealt with directly or indirectly with export consignments. The Respondent had produced copy of an order dated 1.10.2019 passed by Tribunal wherein Petitioner No. 1 had represented Appellants as an Advocate which buttress the argument of Petitioner that he in practice and appeared as an Advocate on behalf of four exporters who availed alleged illegal refund of IGST.

The Court found that it was case of some mis-understanding between Petitioners and officers of Respondent/DGGI who now want to implicate Petitioner and his family members. The investigation was going on for last couple of months and Respondents were unable to produce any evidence showing direct involvement of Petitioners. The Respondent did not record statement while both the Petitioners were in judicial custody for a week in FIR dated 15.8.2019 lodged at the instance of DGGI, and till date no statement of Petitioner No. 2 had been recorded though petitioner was in judicial custody since 13.9.2019. The Respondent-DGGI handed over Petitioner No. 2 to DRI after recording his statement and there was nothing on record to show that petitioner made any confession. The Respondents were recording one after another statement of Petitioner No. 1 with perhaps to intimidate him in giving a self incriminating confession. They have not been able to arrest him because of the oral assurance given before the Court, and had not handed him over to DRI for arrest because petitioner was not required by DRI in any case. Intention of Respondents seems only to arrest Petitioner No. 1, one way or the other, which was evident from the fact that Petitioner No. 2 was handed over to DRI without concluding investigation at least qua petitioner no.2 and there was nothing contained in different affidavits of Respondent, filed before the Court, indicating that involvement of Petitioner No. 2 was apparent from his statements.

Though the Petitioners had prayed quashing of summons, however on the directions of the Court both the Petitioners had already put their appearance. The Petitioner No. 2 was handed over to DRI on 12.9.2019 and since 13.9.2019 petitioner was in judicial custody, hence no direction was warranted *qua* him, however *qua* Petitioner No. 1, the Court deemed it appropriate to direct to Respondent not to take him in custody without prior

approval of the court. The Petitioner No. 1 shall appear before Respondent as and when summoned between 10 AM to 5 PM.

Petition was disposed of in above terms. The Court made it clear that the Court had not expressed any opinion on merits of the controversy and Respondents were free to continue with their investigation and thereafter proceed as per law.

Present for the Petitioner(s)	:	Mr. Jagmohan Bansal, Advocate
Present for the Respondents	:	Mr. Satya Pal Jain, Additional Solicitor General of India (Senoir Advocate) assisted by Sh. Sourabh Goel, Advocate & Mr. Tajender K. Joshi, Advocate

Order

Jaswant Singh, J.

1. Akhil Krishan Maggu (Petitioner No. 1) son of Sanjeev Maggu-Petitioner No. 2 is a practising lawyer in the field of taxation. The Petitioners through instant petition under article 226 of Constitution of India are seeking quashing of summons dated 28.8.2019 (Annexure P-11) issued by Senior Intelligence Officer (for short 'SIO'), Directorate General of GST Intelligence (for short 'DGGI').

2. The pleaded case of the Petitioners is that Petitioner No. 1 as an Advocate, on behalf of four exporters who had retracted their statements made at the first instance filed Writ Petitions before Delhi High Court against DGGI. As per Respondent these four exporters had availed huge amount of refund of IGST and they are dummy owners. The DGGIRespondent on 15.8.2019 searched Gurugram residence of Ramesh Wadhera-alleged owner of dummy export firms who happens to be neighbour of Petitioners. On the request of Ramesh Wadhera, Petitioners came to his residence and some commotion took place between Petitioners and official of DGGI. At the behest of DGGI, Police registered FIR dated 15.8.2019 under Section 186, 353 IPC at DLF Police Station, Gurugram against both the Petitioners and arrested them on the same day. Both were released on bail on 22.8.2019 after a week incarceration.

The DGGI on 27.8.2019 again recorded statements of said dummy exporters, who allegedly disclosed name of Petitioners apart from earlier

names of Ramesh Wadhera and Mukesh Kumar as also being involved. The Respondent-DGGI on 28.8.2019 searched Gurugram residence of Petitioners who at that point of time were not at home. The Respondents after completing search took away younger brother of Petitioner No. 1 to their office and arrested him on 29.8.2019. The DGGI on 2.9.2019 lodged another FIR against Petitioner No. 2 under Section 186, 34 & 353 IPC at DLF Police Station, Gurugram alleging that he called police at the time of search of his residence on 28.8.2019 which amounts to obstruction in performance of official duty. The DGGI-Respondent vide summons dated 28.8.2019 (Annexure P-11) directed Petitioners to appear before SIO to tender their statement in connection with export made by dummy export firms. Apprehending coercive action, the Petitioners approached this Court by way of present writ petition.

3. This court while issuing notice of motion vide order 10.9.2019 directed Petitioners to appear before Senior Intelligence Officer, DGGI. Both the Petitioners appeared before Respondent on 11 & 12th September' 2019. The DGGI-Respondent on 12.9.2019 handed over Petitioner No. 2 to Directorate of Revenue Intelligence, New Delhi who arrested him on 12.9.2019. On 13.9.2019, the Petitioner No. 2 was sent to judicial custody and till date he is stated to be in judicial custody. The Petitioner No. 1 again appeared before DGGI-Respondent on 28.9.2019 & 1.10.2019 but statement could not be recorded. The Petitioner again appeared before Respondent on 7.10.2019 and tendered his statement. The Petitioner appeared before Respondent on 11.10.2019 & 16.10.2019 but his further statement was not recorded.

4. Counsel for the Petitioners contends that it is case of vendetta and there is no evidence against Petitioners to connect them with fraud if any committed by alleged four dummy exporters or alleged owner Ramesh Wadhera. The Respondents did not record statement of Petitioners while they were in judicial custody for a week in the FIR lodged by them and at present Petitioner No. 2 is again in judicial custody since 13.9.2019, however till date no statement has been recorded. It shows that intention of Respondent is just to arrest Petitioners and tarnish their reputation. The Respondents just due to filing of writ petitions before Delhi High Court on behalf of four exporters and commotion at the residence of Ramesh Wadhera want to implicate Petitioner even though they have already remained in custody for altercation which took place at the Gurugram residence of Ramesh Wadhera. The Respondents during the course of investigation could not gather even a single piece of evidence against Petitioners still they are running after their blood. The Respondents want that Petitioner No. 1 should accept that he is involved in refund scam

though even his father was not found involved and Respondents/DGGI got arrested him from DRI. Intention of Respondent is just to arrest Petitioner which is evident from the fact that Respondent/DGGI remained silent when Petitioner No. 2 was in custody in FIR case and thereafter in DRI matter.

5. Counsel for the Respondent contended that Petitioner No. 1 is neither cooperating nor answering questions asked by SIO. He is involved in the fraud and deserves no sympathy of this court. The exporters are not real owners of exporting firm and it is Petitioners who in connivance with Ramesh Wadhera and one Mukesh Kumar had created bogus/dummy firms and availed refund of IGST. The Petitioner No. 1 who earlier was customs clearing agent is mis-using his professional position and needs to be interrogated without cover of protection of this court.

6. Counsel for the Respondents on 24.10.2019 submitted record of investigation in sealed cover. We have perused a number of documents submitted by counsel in sealed cover but we do not find in record any statement of Petitioners, Dhruv Maggu-brother of Petitioner No. 1, Ramesh Wadhera and Mukesh Kumar to ascertain disclosure made by all of them. Except Petitioner No. 1, all other named persons have been arrested so their statements are necessary to ascertain prime facie role of Petitioners. Statements of dummy exporters who had retracted their earlier statements, were again recorded on 27.8.2019 i.e. after incurrence of incident at residence of Ramesh Wadhera on 15.8.2019 and arrest of both Petitioners by Gurugram Police have been produced, however, the earlier Statements recorded on 13.5.2019 of all the exporters are not produced probably because of the fact that these statements do not indict/implicate present Petitioners. Documents relating to Petitioner No. 2 working as Customs House Agent and Petitioner No. 1 as 'H' card holder are produced, which are not relevant because as per Respondent itself Petitioner No. 1 joined profession in 2017 and present controversy relates to GST which came into force w.e.f. 1.7.2017.

7. Before adverting to present controversy, it would be profitable to look at judicial pronouncements relating to the issue involved. The provisions of CGST Act, 2017 qua arrest and prosecution are para materia with provisions of Finance Act, 1994 (Service Tax). While dealing with power of arrest prior to determination of tax liability, Delhi High Court in the case of Make My Trip Vs. Union of India 2016 (44) STR 481 (Del.) has thoroughly examined scheme of the Act and concluded in Para 116 as below:

" 116. To summarise the conclusions in this judgment :

(i) The scheme of the provisions of the Finance Act, 1994 (FA), do not permit the DGCEI or for that matter the Service Tax Department

(ST Department) to by-pass the procedure as set out in Sections 73A(3) and (4) of the FA before going ahead with the arrest of a person under Sections 90 and 91 of the FA. The power of arrest is to be used with great circumspection and not casually. It is not to be straightway presumed by the DGCEI, without following the procedure under Sections 73A(3) and (4) of the FA, that a person has collected service tax and retained such amount without depositing it to the credit of the Central Government.

(ii) Where an assessee has been regularly filing service tax returns which have been accepted by the ST Department or which in any event have been examined by it, as in the case of the two petitioners, without commencement of the process of adjudication of penalty under Section 83A of the FA, another agency like the DGCEI cannot without an SCN or enquiry straightway go ahead to make an arrest merely on the suspicion of evasion of service tax or failure to deposit service tax that has been collected. Section 83A of the FA which provides for adjudication of penalty provision mandates that there must be in the first place a determination that a person is "liable to a penalty", which cannot happen till there is in the first place a determination in terms of Section 72 or 73 or 73A of the FA.

(iii) For a Central Excise officer or an officer of the DGCEI duly empowered and authorised in that behalf to be satisfied that a person has committed an offence under Section 89(1)(d) of the FA, it would require an enquiry to be conducted by giving an opportunity to the person sought to be arrested to explain the materials and circumstances gathered against such person, which according to the officer points to the commission of an offence. Specific to Section 89(1)(d) of the FA, it has to be determined with some degree of certainty that a person has collected service tax but has failed to pay the amount so collected to the Central Government beyond the period of six months from the date on which such payment is due and further that the amount exceeds Rs. 50 lakhs (now enhanced to Rs. 1 crore).

(iv) A possible exception could be where a person is shown to be a habitual evader of service tax. Such person would have to be one who has not filed a service tax return for a continuous length of time, who has a history of repeated defaults for which there have been fines, penalties imposed and prosecutions launched, etc. That history can be gleaned only from past records of the ST Department. In such instances, it might be possible to justify

resorting to the coercive provisions straightaway, but then the notes on file must offer a convincing justification for resorting to that extreme measure.

(v) The decision to arrest a person must not be taken on whimsical grounds; it must be based on 'credible material'. The constitutional safeguards laid out in D.K. Basu's case (supra) in the context of the powers of police officers under the Cr PC and of officers of Central Excise, Customs and enforcement directorates, are applicable to the exercise of powers under the FA in equal measure. An officer whether of the Central Excise department or another agency like the DGCEI, authorised to exercise powers under the CE Act and/ or the FA will have to be conscious of the constitutional limitations on the exercise of such power.

(vi) In the case of MMT, without even an SCN being issued and without there being any determination of the amount of service tax arrears, the resort to the extreme coercive measure of arrest followed by the detention of Mr. Pallai was impermissible in law.

(vii) In terms of C.B.E. & C.'s own procedures, for the launch of prosecution there has to be a determination that a person is a habitual offender. There is no such determination in any of these cases. There cannot be a habitual offender if there is no discussion by the DGCEI with the ST Department regarding the history of such assessee. Assuming that, for whatever reasons, if the DGCEI does not talk to ST Department, certainly it needs to access the service tax record of such assessee. Without even requisitioning that record, it could not have been possible for the DGCEI to arrive at a reasonable conclusion whether there was a deliberate attempt of evading payment of service tax. In the case of MMT, the decision to go in for the extreme step of arrest without issuing an SCN under Section 73 or 73A(3) of the FA, appears to be totally unwarranted.

(viii) For the exercise of powers of search under Section 82 of the FA, (i) an opinion has to be formed by the Joint Commissioner or Additional Commissioner or other officers notified by the Board that "any documents or books or things" which are useful for or relevant for any proceedings under this Chapter are secreted in any place, and (ii) the note preceding the search of a premises has to specify the above requirement of the law. The search of the premises of the two petitioners is in clear violation of the mandate of Section 82 of the FA. It is unconstitutional and legally unsustainable.

(ix) The Court is unable to accept that payment by the two petitioners of alleged service tax arrears was voluntary. Consequently, the amount that was paid by the petitioners as a result of the search of their premises by the DGCEI, without an adjudication much less an SCN, is required to be returned to them forthwith.

(x) It was imperative for the DGCEI to first check whether the entity whose employees are sought to be arrested has regularly been filing service tax returns or is a habitual offender in that regard. It is only after checking the entire records and seeking clarification where necessary, that the investigating agency can possibly come to a conclusion that Section 89(1)(d) is attracted. None of the above safeguards were observed in the present case. The DGCEI acted with undue haste and in a reckless manner.

(xi) Liberty is granted to the officials of MMT and IBIBO to institute appropriate proceedings in accordance with law against the officers of the DGCEI in which the supplementary affidavits filed in these proceedings and the replies thereto can be relied on. This holds good for the officials of the DGCEI as well when called upon to defend those proceedings in accordance with law.

(xii) The Court cannot decline to exercise its jurisdiction and clarify the legal position as regards the interpretation of the scope and ambit of the powers under Sections 89, 90 and 91 of the FA. This is clearly within the powers of this Court. That is why this Court has decided to proceed with these petitions notwithstanding that the criminal petitions may be pending in the criminal jurisdiction of this Court.

(xiii) The Court is satisfied that in the present case the action of the DGCEI in proceeding to arrest Mr. Pallai, Vice-President of MMT, was contrary to law and that Mr. Pallai's Constitutional and Fundamental Rights under Article 21 of the Constitution have been violated. The Court is conscious that Mr. Pallai has instituted separate proceedings for quashing of the criminal case and, therefore, this Court does not propose to deal with that aspect of the matter.

Delhi High Court in Para 80-82 has carved out exceptions where power of arrest may be resorted. Para 80-82 are extracted below:

"80. One caveat, however, may be where a person is shown to be a habitual evader of service tax. Such person would have to be

one who has not filed a service tax return for a continuous length of time, who has a history of repeated defaults for which there have been fines, penalties imposed and prosecutions launched, etc. That history can be gleaned only from past records of the ST Department. In such instance, it might be possible to justify resorting to the coercive provisions straightaway. But then the notes on file must offer a convincing justification for resorting to that extreme a measure. What, however, requires reiteration is that the potent power of arrest should not be lightly and casually exercised to induce fear into an assessee and the consequential submission to the unreasonable demands made by officers of the investigating agency during the interrogation and while in custody. To again quote the Bombay High Court in ICICI Bank Ltd. v. Union of India (supra) :

> "At the cost of repetition we may say that if a tax payer fraudulently or with the intention to deprive Revenue of its legitimate dues evades payment thereof not only that, if the Central Excise Officer is of the opinion that for the purpose of protecting the interest of the Revenue it is necessary provisionally to attach any property belonging to the person on whom the notice is served under Section 73 or Section 73 A of the Act, he is empowered to do so, however with the previous approval of the Commissioner of Central Excise. However, at the same time, law enforcers cannot be permitted to do something that is not permitted within the four corners of law."

81. In Technomaint Contractors Ltd. v. Union of India - 2014 (36) S.T.R. 488 (Guj.), the Gujarat High Court held that Section 73C of the FA cannot be activated for making a recovery even before adjudication. 82. In the context of the provisions for arrest under the Central Excise Act, 1944, the DGCEI has published a Manual in 2004 containing guidelines to the CE Officers on when and in what circumstances resort should be had to the coercive step of arrest. In Chapter X Para 7 of the said Manual, it is stated that arrest can be made prior to the issue of an SCN but only "where fraudulent intent is clear (prima facie there is evidence of mens rea) or where the evidence is enough to secure a conviction or where the person is likely to abscond, tamper with evidence or influence the witnesses if left at large. Arrest at the investigation stage should be resorted to only when it is unavoidable."

(Emphasis supplied)

Concededly, Hon'ble Supreme Court vide order dated 23.01.2019 has upheld aforesaid decision of Delhi High Court.

7.1 Relying upon decision of Delhi High Court, in the case of Jayachandran Alloys (P) Ltd. Vs. Superintendent of GST & C. Ex., Salem 2019 (25) G.S.T.L. 321 (Mad.), Madras High Court has concluded, in the relevant Paras as below:

> "36. Though the discussions and conclusions therein have been rendered in the context of Chapter V of the Finance Act, 1994, levying service tax, I am of the view that they are equally applicable to the provisions of the CGST Act as well. Section 132 of the Act as extracted earlier, imposes a punishment upon the Assessee that 'commits' an offence. There is no dispute whatsoever that the offences set out under [clauses] (a) to (l) of the provision refer to those items, that constitute matters of assessment and would form part of an order of assessment, to be passed after the process of adjudication is complete and taking into account the submissions of the Assessee and careful weighing of evidence found and explanations offered by the Assessee in regard to the same.
>
> 37. The use of words 'commits' make it more than amply clear that the act of committal of the offence is to be fixed first before punishment is imposed. The allegation of the revenue in the present case is that the petitioner has contravened the provisions of Section 16(2) of the Act and availed of excess ITC in so far as there has been no movement of the goods in the present case as against the supplier and the Petitioner and the transactions are bogus and fictitious, created only on paper, solely to avail ITC. The manner of recovery of credit in cases of excess distribution of the same is set out in Section 21 of the Act. This section provides that where the Input Service Distributor distributes credit in contravention of the provisions contained in Section 20 resulting in excess distribution of credit to one or more recipients, the excess credit so distributed shall be recovered from such recipients along with interest, and the provisions of Section 73 or Section 74, as the case may be, shall, mutatis mutandis, apply for determination of amount to be recovered.
>
> 38. Thus, 'determination' of the excess credit by way of the procedure set out in Section 73 or 74, as the case may be is a pre-requisite for the recovery thereof. Sections 73 and 74 deal with assessments and as such it is clear and unambiguous that such

recovery can only be initiated once the amount of excess credit has been quantified and determined in an assessment. When recovery is made subject to 'determination' in an assessment, the argument of the department that punishment for the offence alleged can be imposed even prior to such assessment, is clearly incorrect and amounts to putting the cart before the horse.

39. The exceptions to this rule of assessment are only those cases where the assessee is a habitual offender, that/who has been visited consistently and often with penalties and fines for contraventions of statutory provisions. It is only in such cases that the authorities might be justified in proceedings to pre-empt the assessment and initiate action against the assessee in terms of Section 132, for reasons to be recorded in writing. There is no allegation, either oral or in writing in this case that the petitioner is an offender, let alone a habitual one.

40. In the present case, the Department does not dispute that action was intended or envisaged in the light of Section 132 of the CGST Act, the counter fairly stating that the provisions of Section 132 of the CGST Act were 'shown' to the Assessee. There is thus no doubt in my mind that the Department intended to intimidate the petitioner with the possibility of punishment under 132 and this action is contrary to the scheme of the Act. While the activities of an assessee contrary to the scheme of the Act are liable to be addressed swiftly and effectively by the Department, (the statute in question being a revenue statute where strict interpretation is the norm), officials cannot be seen to be acting in excess of the authority vested in them under the statute. I am of the considered view that the power to punish set out in Section 132 of the Act would stand triggered only once it is established that an assessee has 'committed' an offence that has to necessarily be post-determination of the demand due from an assessee, that itself has to necessarily follow the process of an assessment.

41. I draw support in this regard from the decision of the Division Bench of the Delhi High Court in the case of Make My Trip (India) (supra), as confirmed by the Supreme Court reiterating that such action, as in the present case, would amount to a violation of Constitutional rights of the petitioner that cannot be countenanced.

42. The decision of this Court in Criminal Original Petition No. 30467 of 2018 (batch case), dated 12-2-2019 is relied upon by

the respondents. The Learned Single Judge states that 'in the light of the grave position put forth by the prosecution and also the fact that the investigation was at very early stages', the request for Anticipatory Bail should be rejected and proceeds to do so. This decision does not take into consideration the decision of the Delhi High Court in the case of Make My Trip (India) Pvt. Ltd., (supra), confirmed by the Supreme Court and also does not take into account the relevant statutory provisions of the Revenue enactment, that in my view are necessary to appreciate the lis in proper perspective. The decision is thus distinguishable on facts and in law.

43. As far as the decision rendered by the Rajasthan High Court is concerned, it is distinguishable on facts, as at Paragraph 20 thereof, the Learned Judge records that the petitioner therein did not controvert the claim that the claim of Input Tax Credit is made based on fake invoices. Thus, no defence was put forth by the petitioner to the allegation of Bill Trading in that case, which is not so in the case before me. This decision is also distinguishable on facts.

44. The Learned Single Judge of the Bombay High Court, in Anticipatory Bail Application, in the case of Meghraj Moolchand Burad v. Directorate General of GST (Intelligence), Pune and Another, Anticipatory Bail Application No. 2333 of 2018 [2019 (21) G.S.T.L. 125 (Bom.)] has considered a similar case and has rejected the Anticipatory Bail taking into consideration the conduct of the applicant, gravity of offence and the serious allegations made. This order has travelled to the Supreme Court in Petition for Special Leave to Appeal Crl. Nos. 244/2019, dated 9-1-2019 [2019 (24) G.S.T.L. J82 (S.C.)] by the petitioner therein, wherein the Bench has issued notice and granted interim protection in the following terms :-

> ' Issued notice.
>
> In the meantime, the petitioner shall not be arrested, provided he appears before the Directorate General of GST Intelligence and in the event of his arrest, he shall be released on bail on furnishing security to the satisfaction of the competent authority.
>
> Learned Counsel for the petitioner has submitted that the petitioner shall regularly appear, as and when he is called. '

45. Moreover, the High Court of Karnataka at Bengaluru in Criminal Petition No. 979 of 2019 c/w Criminal Petition No. 980/2019, dated 19-2- 2019 [2019 (23) G.S.T.L. 449 (Kar.)] while considering the grant of Anticipatory Bail, in circumstances very similar to the matter before me, has allowed the petition and granted bail in favour of the Assessee with conditions.

46. Issue (ii) is answered in favour of the petitioner. Issue (iii) is allowed, directing the respondents to conclude the process of adjudication within a period of twelve (12) weeks from today, after issuing show cause notice to the petitioner setting out the proposals for assessment, affording full opportunity to the petitioner to respond to the same and advance submissions in person, and pass a reasoned and speaking order, in accordance with law. ”

(Emphasis Supplied)

7.2 Gujarat High Court in the case of VIMAL YASHWANTGIRI GOSWAMI Vs STATE OF GUJARAT 2019-TIOL-1746-HC-AHMGST has concluded in relevant Para as below:

“ 3.1 To put it in other words, the powers of arrest under Section 69 of the Act, 2017 are to be exercised with lot of care and circumspection. Prosecution should normally be launched only after the adjudication is completed. To put it in other words, there must be in the first place a determination that a person is “liable to a penalty”. Till that point of time, the entire case proceeds on the basis that there must be an apprehended evasion of tax by the assessee. In the two decisions referred to above, emphasis has been laid on the safeguards as enshrined under the Constitution of India and in particular Article 22 which pertains to arrest and Article 21 which mandates that no person shall be deprived of his life and liberty for the authority of law. The two High Courts have extensively relied upon the decision of the Supreme Court in the case of D.K. Basu vs. State of West Bengal reported in 1997 (1) SCC 416 = 2002-TIOL-230-SCMISC.

7.3. Gujarat High Court in the case of CLEARTRIP PVT LTD MUMBAI & ORS Vs THE UNION OF INDIA 2016-TIOL-863-HCMUM- ST has concluded in relevant para as below:

“ 16. We are clear in our minds and from the scheme of the Act and the Law as a whole that coercive measures, including effecting any

arrest, would arise only when investigation has been completed and on launching the prosecution. If the prosecution is a criminal prosecution, then, there is no question of deviating or defeating from the Criminal Law. The Criminal Law contains several provisions including protective measures, which would enable the Petitioners to resist any arrest, as apprehended. In the scheme of the Criminal Law and particularly the Finance Act, 1994 as well, if it contains any penal provisions, it is not as merely because the investigations are underway that the arrest would be effected. Eventually, all that the Respondents are presently contemplating is to investigate the matter. The Petitioners do not dispute the right to investigate and in accordance with law. That they have already attended the offices of the concerned Respondents and once the statement of the Petitioners was recorded goes without saying that on further summons being issued and on called upon to attend the Officers of the Respondents, they will attend and co-operate in these investigations by producing all the documents and answering the requisite queries, subject, of-course, to their rights in law. It is only when these investigations conclude that the authorities would be in a position to take a decision whether to launch any prosecution. In such a prosecution as well, if the provisions of the Criminal Law, which enable arrest in cases of cognizable offences and nonbailable, that the Petitioners can have an apprehension and which also can be taken care of by approaching a competent Criminal Court. Secondly, there is no question of any recovery of tax by coercive means, unless the investigation results into issuance of a show cause notice, an opportunity to the Petitioner to resist the demand, a adjudication thereof by a reasoned order and protective remedies such as appeals. We do not think that any recovery by coercive measures is straightway permissible and particularly in the given facts and circumstances of the case.

17. Once we also note the stand of the Respondents as not precipitating the matter particularly harming the life and liberty of those, who are in-charge of Petitioner No.1-Company, then, all the more, any detailed discussion by referring to the arguments in-depth, consideration of the case law becomes unnecessary. ”

7.4 Hon’ble Supreme Court in the case of C. PRADEEP Petitioner(s) VERSUS THE COMMISSIONER OF GST AND CENTRAL EXCISE SELAM & ANR. Special Leave to Appeal (Crl.) No(s). 6834/2019 has passed interim order as below:

" Learned counsel for the petitioner submits that indisputably assessment for the relevant period has not been completed by the Department so far. In which case, invoking Section 132 of the Central Goods and Services Tax Act, 2017 does not arise. He further submits that, even if, the alleged liability of Rs. 19 crores as is assumed by the Department is accepted, it is open to the petitioner to file appeal after the assessment order is passed; and as per the statutory stipulation, such appeal could be filed upon deposit of only 10% of the disputed liability. In that event, the deposit amount may not exceed Rs. 2,00,00,000/- (Rupees Two Crores), which the petitioner is willing to deposit within one week from today without prejudice to his rights and contentions in the assessment proceedings and the appeal to be filed thereafter, if required.

Issue notice on condition that the petitioner shall deposit Rs. 2,00,00,000/- (Rupees Two Crores) to the credit of C.No. IV/16/27/201HPU on the file of the Commissioner of GST & Central Excise, Salem, Tamil Nadu and produce receipt in that behalf in the Registry of this Court within ten days from today, failing which the special leave petition shall stand dismissed for non prosecution without further reference to the Court.

Subject to the above, notice returnable within three weeks. Dasti, in addition, is permitted.

For a period of one week, no coercive action be taken against the petitioner in connection with the alleged offence and the interim protection will continue upon production of receipt in the Registry about the deposit made with the Department within one week from today, until the disposal of this Special Leave Petition.

7.5. Telangana High Court in the case of P.V. RAMANA REDDY Vs. UNION OF INDIA 2019 (25) G.S.T.L. 185 (Telangana) relied upon by the Respondent has concluded in relevant Para as below:

" 48. That takes us to the next question as to whether the petitioners are entitled to protection against arrest, in the facts and circumstances of the case. We have already indicated on the basis of the ratio laid down by the Constitution Bench in Kartar Singh and the ratio laid down in Km. Hema Mishra that the jurisdiction under Article 226 of the Constitution of India to grant protection against arrest, should be sparingly used. Therefore, let us see

prima facie, the nature of the allegations against the petitioners and the circumstances prevailing in the case, for deciding whether the petitioners are entitled to protection against the arrest. We have already extracted in brief, the contents of the counter affidavits. We have summarized the contents of the counter affidavits very cautiously with a view to avoid the colouring of our vision. Therefore, what we will now take into account on the facts, will only be a superficial examination of facts.

49. In essence, the main allegation of the Department against the petitioners is that they are guilty of circular trading by claiming input tax credit on materials never purchased and passing on such Input Tax Credit to companies to whom they never sold any goods. The Department has estimated that fake GST invoices were issued to the total value of about Rs. 1,289 crores and the benefit of wrongful ITC passed on by the petitioners is to the tune of about Rs. 225 crores.

50. The contention of the petitioners is that the CGST Act, 2017 prescribes a procedure for assessment even in cases where the information furnished in the returns is found to have discrepancies and that unless a summary assessment or special audit is conducted determining the liability, no offence can be made out under the Act. Therefore, it is their contention that even a prosecution cannot be launched without an assessment and that therefore, there is no question of any arrest.

51. It is true that CGST Act, 2017 provides for (i) self assessment, under Section 59, (ii) provisional assessment, under Section 60, (iii) scrutiny of returns, under Section 61, (iv) assessment of persons who do not file returns, under Section 62, (v) assessment of unregistered persons, under Section 63, (vi) summary assessment in special cases, under Section 64 and (vii) audit under Sections 65 and 66.

52. But, to say that a prosecution can be launched only after the completion of the assessment, goes contrary to Section 132 of the CGST Act, 2017. The list of offences included in sub-section (1) of Section 132 of CGST Act, 2017 have no co-relation to assessment. Issue of invoices or bills without supply of goods and the availing of ITC by using such invoices or bills, are made offences under clauses (b) and (c) of subsection (1) of Section 132 of the CGST

Act. The prosecutions for these offences do not depend upon the completion of assessment. Therefore, the argument that there cannot be an arrest even before adjudication or assessment, does not appeal to us.

53. An argument was advanced by Mr. Raghunandan Rao, learned Senior Counsel for the petitioners that all the offences under the Act are compoundable under sub-section (1) of Section 138 of the CGST Act, 2017, subject to the restrictions contained in the proviso thereto and that therefore, there is no necessity to arrest a person for the alleged commission of an offence which is compoundable.

54. On the surface of it, the said argument of Mr. Raghunandan Rao, learned Senior Counsel for the petitioners is quite appealing. But, on a deeper scrutiny, it can be found that the argument is not sustainable for two reasons :

(1) Any offence under CGST Act, 2017 is compoundable both before and after the institution of prosecution. This is in view of the substantial part of sub-section (1) of Section 138 of the CGST Act, 2017. But, the petitioners have not offered to compound the offence, though compounding is permissible even before the institution of prosecution.

(2) Under the third proviso to sub-section (1) of 138, compounding can be allowed only after making payment of tax, interest and penalty involved in such cases. Today, the wrongful ITC allegedly passed on by the petitioners, according to the Department is to the tune of Rs. 225 Crores. Therefore, we do not think that even if we allow the petitioners to apply for compounding, they may have a meeting point with the Department as the liability arising out of the alleged actions on the part of the petitioners is so huge. Therefore, the argument that there cannot be any arrest as long as the offences are compoundable, is an argument of convenience and cannot be accepted in cases of this nature.

55. Another argument advanced by the learned Senior Counsel for the petitioners is that since the Proper Officer under the CGST Act, 2017, even according to the respondents is not a Police Officer, he cannot and he does not seek custody of the arrested person, for completing the investigation/enquiry. Section 69(2) obliges the Officer authorized to arrest the person, to produce the arrested person before a Magistrate within 24 hours. Immediately,

upon production, the Magistrate may either remand him to judicial custody or admit the arrested person to bail, in accordance with the procedure prescribed under the Code of Criminal Procedure. There is no question of police custody or custody to the Proper Officer in cases of this nature. Therefore, it is contended by Mr. Raghunandan Rao, learned Senior Counsel for the petitioners that the arrest under Section 69, does not advance the cause of investigation/enquiry, but only provides a satisfaction to the respondents that they have punished the arrested person even before trial. According to the learned Senior Counsel, the arrest of a person which will not facilitate further investigation, has to be discouraged, since the same has the potential to punish a person before trial.

56. But, the aforesaid contention proceeds on the premise as though the only object of arresting a person pending investigation is just to facilitate further investigation. However, it is not so. The objects of pre-trial arrest and detention to custody pending trial, are manifold as indicated in Section 41 of the Code. They are:

(a) to prevent such person from committing any further offence;

(b) proper investigation of the offence;

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner;

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer;

Therefore, it is not correct to say that the object of arrest is only to proceed with further investigation with the arrested person.

57. It is true that in some cases arising out of similar provisions for arrest under the Customs Act and other fiscal laws, the Supreme Court indicated that the object of arrest is to further the process of enquiry. But, it does not mean that the furthering of enquiry/ investigation is the only object of arrest.

58. Therefore, all the technical objections raised by the petitioners, to the entitlement as well as the necessity for the respondents to

arrest them are liable to be rejected. Once this is done, we will have to examine whether, in the facts and circumstances of these cases, the petitioners are entitled to protection against arrest. It must be remembered that the petitioners cannot be placed in a higher pedestal than those seeking anticipatory bail. On the other hand, the jurisdiction under Article 226 has to be sparingly used, as cautioned by the Supreme Court in Km. Hema Misra (cited supra).

59. We have very broadly indicated, without going deep, that the petitioners have allegedly involved in circular trading with a turnover on paper to the tune of about Rs. 1,289.00 crores and a benefit of ITC to the tune of Rs. 225.00 crores. The GST regime is at its nascent stage. The law is yet to reach its second anniversary. There were lot of technical glitches in the matter of furnishing of returns, making ITC claims etc. Any number of circulars had to be issued by the Government of India for removing these technical glitches.

60. If, even before the GST regime is put on tracks, someone can exploit the law, without the actual purchase or sale of goods or hiring or rendering of services, projecting a huge turnover that remained only on paper, giving rise to a claim for input tax credit to the tune of about Rs. 225.00 crores, there is nothing wrong in the respondents thinking that persons involved should be arrested. Generally, in all other fiscal laws, the offences that we have traditionally known revolve around evasion of liability. In such cases, the Government is only deprived of what is due to them. But in fraudulent ITC claims, of the nature allegedly made by the petitioners, a huge liability is created for the Government. Therefore, the acts complained of against the petitioners constitute a threat to the very implementation of a law within a short duration of its inception.

61. In view of the above, despite our finding that the writ petitions are maintainable and despite our finding that the protection under Sections 41 and 41A of Cr.P.C., may be available to persons said to have committed cognizable and non-bailable offences under this Act and despite our finding that there are incongruities within Section 69 and between Sections 69 and 132 of the CGST Act, 2017, we do not wish to grant relief to the petitioners against arrest, in view of the special circumstances which we have indicated above. ”

(Emphasis supplied)

From above quoted enunciation of law relating to arrest during investigation i.e. prior to determination of tax evaded under Finance Act, 1994 (service Tax) as well CGST Act, 2017 by different High Courts and interim order passed by Hon'ble Supreme Court, we find that it is consistent opinion of courts that power of arrest should be resorted in exceptional circumstances and with full circumspection. The maximum sentence prescribed under GST is 5 years and it is directly linked with quantum of evasion of tax. Prosecution of any person is directly linked with determination of evasion of tax because if there is no evasion of tax, there cannot be criminal liability. The determination of tax liability does not fall within realm of criminal courts whereas liability of tax and penalty is determined by adjudicating authority under GST Act which is subject to challenge before Tribunal and Courts. To record statement under CGST Act, 2017 summons are served and if any person complies with summons, the mandate of Section 41 and 41A of Criminal Procedure Code should be taken care of.

The opinion expressed by Telangana High Court cannot be made applicable to each and every case and cannot be treated an authority to conclude that DGGI has power to arrest in every case during investigation and that too without determination of tax evaded as well finding that accused has committed an offence described under Section 132 of the CGST Act, 2017.

8. Arrest deprives any person from his right of liberty enshrined under Article 21 of the Constitution of India. It would be useful to look at judgment of Hon'ble Supreme Court in the case of Siddharam Satlingappa Mhetre Versus State of Maharashtra and Others, 2011(1) SCC 694 where Hon'ble Court considering Article 21 of the Constitution has dealt at length with question of anticipatory bail and use of power of arrest. The relevant findings/ Paras are extracted below:

> " 118. A good deal of misunderstanding with regard to the ambit and scope of section 438 Criminal Procedure Code could have been avoided in case the Constitution Bench decision of this court in Sibbia's case (supra) was correctly understood, appreciated and applied.
>
> 119. This Court in the Sibbia's case (supra) laid down the following principles with regard to anticipatory bail:

a) Section 438(1) is to be interpreted in light of Article 21 of the Constitution of India.

b) Filing of FIR is not a condition precedent to exercise of power under section 438.

c) Order under section 438 would not affect the right of police to conduct investigation.

d) Conditions mentioned in section 437 cannot be read into section 438.

e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are discretionary to be exercised in light of the circumstances of each case.

f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such ad interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant.

120. The Law Commission in July 2002 has severely criticized the police of our country for the arbitrary use of power of arrest which, the Commission said, is the result of the vast discretionary powers conferred upon them by this Code. The Commission expressed concern that there is no internal mechanism within the police department to prevent misuse of law in this manner and the stark reality that complaint lodged in this regard does not bring any result. The Commission intends to suggest amendments in the Criminal Procedure Code and has invited suggestions from various quarters. Reference is made in this Article to the 41st Report of the Law Commission wherein the Commission saw 'no justification' to require a person to submit to custody, remain in prison for some days and then apply for bail even when there are reasonable grounds for holding that the person accused of an offence is not likely to abscond or otherwise misuse his liberty. Discretionary power to order anticipatory bail is required to be exercised

keeping in mind these sentiments and spirit of the judgments of this court in Sibbia's case (supra) and Joginder Kumar v. State of U.P. and Others, 1994(2) R.C.R.(Criminal) 601 : (1994) 4 SCC 260.

Relevant consideration for exercise of the power

121. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Criminal Procedure Code by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or the other offences.

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

123. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

124. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

125. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualise all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available.

126. Irrational and Indiscriminate arrest are gross violation of human rights. In Joginder Kumar's case (supra), a three Judge Bench of this Court has referred to the 3rd report of the National Police Commission, in which it is mentioned that the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails.

127. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.

128. In case, the State consider the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive.

    1) Direct the accused to join investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.

2) Seize either the passport or such other related documents, such as, the title deeds of properties or the Fixed Deposit Receipts/Share Certificates of the accused.

3) Direct the accused to execute bonds;

4) The accused may be directed to furnish sureties of number of persons which according to the prosecution are necessary in view of the facts of the particular case.

5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided.

6) Bank accounts be frozen for small duration during investigation.

129. In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer.

130. Exercise of jurisdiction under section 438 of Criminal Procedure Code is extremely important judicial function of a judge and must be entrusted to judicial officers with some experience and good track record. Both individual and society have vital interest in orders passed by the courts in anticipatory bail applications. ”

9. The provisions of CGST Act are not subject to exclusion of Criminal Procedure Code rather Section 67(10) as well Section 69(3) borrow provisions of Code of Criminal Procedure, 1973. As per Section 41(1)(b) as amended by Code of Criminal Procedure (Amendment) Act, 2008 applicable w.e.f. 01.11.2010, a person may be arrested if he has committed a cognizable offence punishable with imprisonment which may

be less than 7 year or may extent to 7 year if conditions specified therein are satisfied. As per Section 41A of Cr.P.C., a notice shall be issued to the person against whom complaint has been made or creditable information has been received or reasonable suspicion exists and he shall not be arrested if he complies with the notice. Relevant extracts of Section 41(1) and 41A are as under:

> 41. When police may arrest without warrant-(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-
>
> (a) who commits, in the presence of a police officer, a cognizable offence;
>
> (b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:
>
> (i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;
>
> (ii) the police office is satisfied that such arrest is necessary-
>
> (a) to prevent such person from committing any further offence; or
>
> (b) for proper investigation of the offence or;
>
> (c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or
>
> (d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or
>
> (e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured;

And the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest;

41-A Notice of appearance before police officer- (1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officers is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

9.1. Hon'ble Supreme in Dr. Rini Johar & Anr. Versus State of M.P. & Ors. 2016(11) SCC 703 while dealing with Section 41 and 41A of Code of Criminal Procedure has opined as under:

" 19. Mr. Fernandes, learned Amicus Curiae, in a tabular chart has pointed that none of the requirements had been complied with. Various reasons have been ascribed for the same. On a scrutiny of enquiry report and the factual assertions made, it is limpid that some of the guidelines have been violated. It is strenuously urged by Mr. Fernandes that Section 66A(b) of the Information Technology Act, 2000 provides maximum sentence of three years and Section 420 Cr.P.C. stipulates sentence of seven years and, therefore, it

was absolutely imperative on the part of the arresting authority to comply with the procedure postulated in section 41A of the Code of Criminal Procedure. The Court in Arnesh Kumar v. State of Bihar and another, 2014(3) R.C.R. (Criminal) 527 : (2014) 8 SCC 273, while dwelling upon the concept of arrest, was compelled to observe thus:-

> " Arrest brings humiliation, curtails freedom and casts scars forever. Lawmakers know it so also the police. There is a battle between the lawmakers and the police and it seems that the police has not learnt its lesson: the lesson implicit and embodied in CrPC. It has not come out of its colonial image despite six decades of Independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasised time and again by the courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive."

20. Thereafter, the Court referred to Section 41 Cr.P.C. and analysing the said provision, opined that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence. It has been further held that a police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts. Eventually, the Court was compelled to state:-

> " In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 Cr.P.C."

21. In the said authority, Section 41A Cr.P.C., which has been inserted by section 6 of the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009) was introduced and in that context, it has been held that Section 41A Cr.P.C. makes it clear that where the arrest of a person is not required under Section 41(1) Cr.P.C., the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 Cr.P.C. has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

22. We have referred to the enquiry report and the legal position prevalent in the field. On a studied scrutiny of the report, it is quite vivid that the arrest of the petitioners was not made by following the procedure of arrest. Section 41A Cr.P.C. as has been interpreted by this Court has not been followed. The report clearly shows there have been number of violations in the arrest, and seizure. Circumstances in no case justify the manner in which the petitioners were treated. "

(Emphasis Supplied)

10. Taking cue from judgment of Delhi High Court in the case of Make My Trip (Supra) followed by Madras High Court in the case of Jayachandran Alloys (P) Ltd (Supra), law laid down by Hon'ble Supreme Court in the case of Siddharam Satlingappa Mhetre (supra) as well keeping in mind Section 69 and 132 of CGST Act which empower Proper Officer to arrest a

person who has committed any offence involving evasion of tax more than Rs.5 Crore and prescribed maximum sentence of 5 years which falls within purview of Section 41A of Cr. P.C., we are of the opinion that power of arrest should not be exercised at the whims and caprices of any officer or for the sake of recovery or terrorising any businessman or create an atmosphere of fear, whereas it should be exercised in exceptional circumstances during investigation, which illustratively may be:

(i) a person is involved in evasion of huge amount of tax and is having no permanent place of business,

(ii) a person is not appearing inspite of repeated summons and is involved in huge amount of evasion of tax,

(iii) a person is a habitual offender and he has been prosecuted or convicted on earlier occasion,

(iv) a person is likely to flee from country,

(v) a person is originator of fake invoices i.e. invoices without payment of tax,

(vi) when direct documentary or otherwise concrete evidence is available on file/record of active involvement of a person in tax evasion.

10.1. The persons who are having established manufacturing units and paying good amount of direct or indirect taxes; persons against whom there is no documentary or otherwise concrete evidences to establish direct involvement in the evasion of huge amounts of tax, should not be arrested prior to determination of liability and imposition of penalty. Similarly, arrest of Chartered Accountant or Advocates who had filed returns or otherwise assisted in business but are not beneficiary or part of fraud merely on the basis of statement without any corroborative evidence linking the professional with alleged offence should be avoided. It is well known that if top brass of a running concern is arrested, there are all possibilities of closure of unit which results into unemployment and wastage of precious natural resources.

11. In the case in hand, we find that Petitioner No. 2 was interrogated on 11.9.2019 & 12.9.2019 by DGGI and thereafter handed over to DRI, who arrested him. There is nothing on record showing admission by Petitioner No. 2 and no further statement has been recorded in jail though

he is in judicial custody since 13.9.2019. Petitioner No. 1 has already put appearance on various occasions and there is nothing in file to show which indicates that Petitioner No. 1 was connected with alleged illegal refund sought by Exporters. Concededly, the Petitioner No. 1 is neither proprietor nor partner nor shareholder of any Exporter Concern/Firm/Company, who availed refund of IGST. There is no evidence of transfer of funds in the accounts of Petitioners or withdrawal of cash by any one of them. The Petitioner No. 1 is in legal profession since 2017 and after introduction of GST he had not dealt with directly or indirectly with export consignments. The Respondent has produced copy of an order dated 1.10.2019 (date of hearing 22.5.2019) passed by Tribunal wherein Petitioner No. 1 has represented Appellants as an Advocate which buttress the argument of Petitioner that he in practice and appeared as an Advocate on behalf of four exporters who availed alleged illegal refund of IGST.

12. We find that it is case of some mis-understanding between Petitioners and officers of Respondent/DGGI who now want to implicate Petitioner and his family members. The investigation is going on for last couple of months and Respondents are unable to produce any evidence showing direct involvement of Petitioners. The Respondent did not record statement while both the Petitioners were in judicial custody for a week in FIR dated 15.8.2019 lodged at the instance of DGGI, and till date no statement of Petitioner No. 2 has been recorded though he is in judicial custody since 13.9.2019. The Respondent-DGGI handed over Petitioner No. 2 to DRI after recording his statement and there is nothing on record to show that he made any confession. The Respondents are recording one after another statement of Petitioner No. 1 (Akhil Krishan Maggu) with perhaps to intimidate him in giving a self incriminating confession. They have not been able to arrest him because of the oral assurance given before this Court, and have not handed him over to DRI for arrest because he is not required by DRI in any case. Intention of Respondents seems only to arrest Petitioner No. 1, one way or the other, which is evident from the fact that Petitioner No. 2 was handed over to DRI without concluding investigation at least qua petitioner no.2 and there is nothing contained in different affidavits of Respondent, filed before this Court, indicating that involvement of Petitioner No. 2 is apparent from his statements.

13. Though the Petitioners have prayed quashing of summons, however on the directions of this Court both the Petitioners had already put their appearance. The Petitioner No. 2 was handed over to DRI on 12.9.2019 and since 13.9.2019 he is in judicial custody, hence no direction is warranted qua him, however qua Petitioner No. 1 (Akhil Krishan Maggu), we deem it appropriate to direct to Respondent not to take him in custody

without prior approval of this court. The Petitioner No. 1 shall appear before Respondent as and when summoned between 10 AM to 5 PM.

14. Petition is disposed of in above terms. We make it clear that we have not expressed any opinion on merits of the controversy and Respondents are free to continue with their investigation and thereafter proceed as per law.

[2019] 57 DSTC 669 (Allahabad)

In the High Court of Judicature at Allahabad

[Hon'ble Mr. Justice Biswanath Somadder and Hon'ble Mr. Justice Ajay Bhanot]

Writ Tax No.: 1120/2019

Ingersoll-Rand Technologies and Services Pvt. Ltd. ... Petitioner

Vs.

Union of India and Ors. ... Respondent(s)

Date of Order: 21.11.2019

REVISION OF DECLARATION IN FORM GST TRAN – 1 UNDER SECTION 140(3) OF CGST ACT READ WITH RULE 117, 118, 119, 120 AND RULE 120A – CREDIT OF SAD COULD NOT CLAIM IN ORIGINAL TRAN-1 – CORRESPONDANCE MADE WITH GST COUNSEL BUT NO RESULT CAME OUT – WRIT PETITION SEEKING DIRECTION TO FILE A REVISED DECLARATION – WHETHER COMMISSIONER HAS POWER TO EXTEND THE TIME FOR AN UNLIMITED OR INDEFINITE PERIOD; HELD – NO. THAT SURETY COULD NOT HAVE BEEN THE PURPOSE AND INTENTION OF THE LEGISLATURE – FIRST PROVSIO TO RULE 117 SPEAK FOR EXTENSION NOT EXCEEDING NINETY DAYS – WRIT DISMISSED.

Facts

Petitioner intended to avail the credit pertaining to SAD (Special Additional Duty) amounting to Rs. 22,51,380.21 in respect of goods held in stock as on 30th June, 2017. Petitioner had already submitted FORM GST TRAN-1 on 10th October, 2017, to carry forward the credits available to it as on 30th June, 2017. By a letter dated 28th March, 2019, addressed to the Hon'ble Chairman, Goods and Services Tax Council, Government of India, the petitioner requested the Council to consider its case and to allow the writ petitioner to re-submit FORM GST TRAN-1 within the extended period in order to enable the petitioner company to carry forward the credit of SAD amount of Rs. 22,51,380.21 in relation to stock of goods lying as on 30th June, 2017, under the transitional provisions of section 140(3) of the Uttar Pradesh Goods & Services Tax Rules, 2017.

Held

If Court was to assume that the Commissioner while exercising his powers under Rule 120-A of the Uttar Pradesh Goods & Services Tax Rules, 2017 could extend the time period for the purpose of filing of a revised declaration by a registered person in FORM GST TRAN-1 for an unlimited or an indefinite period, it would simply mean that any registered person could avail the benefit of filing a revised declaration in FORM GST TRAN-1 for an unlimited or indefinite period of time after submitting a declaration electronically in FORM GST TRAN-1 under Rule 117 of the Uttar Pradesh Goods & Services Tax Rules, 2017. That surely could not have been the purpose and intention of the legislature. Rather, the legislature in its wisdom had noticed Rule 117, Rule 118, Rule 119 and Rule 120, while framing Rule 120-A of the Uttar Pradesh Goods & Services Tax Rules, 2017.

In such circumstances, a writ in the nature of mandamus, as prayed for, could not be granted by the Court. However, it was open to the Council to take a decision in the matter in the light of the writ petitioner's letter dated 28th March, 2019.

Present for the Petitioner : Atul Gupta, Abhishek Kumar Tripathi

Present for the Respondents : A.S.G.I., C.S.C., Om Prakash Srivastava

Order

(Per: Hon'ble Biswanath Somadder, J.)

The writ petitioner - company has approached this Court essentially seeking its intervention to allow the writ petitioner to file a revised declaration in FORM G.S.T. T.R.A.N-1 or manually accept the same to enable the writ petitioner – company to avail the credit pertaining to SAD (Special Additional Duty) amounting to Rs. 22,51,380.21/-; which, according to the writ petitioner was not claimed by it, inadvertently.

The question as to whether we can issue a writ in the nature of mandamus as prayed for can be answered if we look into the applicable provisions of law in the facts of the instant case. However, before we do so, certain facts relevant to the issue before us are required to be taken note of.

The writ petitioner intends to avail the credit pertaining to SAD (Special Additional Duty) amounting to Rs. 22,51,380.21/- in respect of goods held

in stock as on 30th June, 2017. It is the admitted position that the writ petitioner has already submitted FORM G.S.T. T.R.A.N-1 on 10th October, 2017, to carry forward the credits available to it as on 30th June, 2017. By a letter dated 28th March, 2019, addressed to the Hon'ble Chairman, Goods and Services Tax Council, Government of India, the writ petitioner requested the Council to consider its case and to allow the writ petitioner to re-submit FORM G.S.T. T.R.A.N-1 within the extended period in order to enable the writ petitioner - company to carry forward the credit of SAD amount of Rs. 22,51,380.21/- in relation to stock of goods lying as on 30th June, 2017, under the transitional provisions of section 140(3) of the Uttar Pradesh Goods & Services Tax Rules, 2017. Relevant portion of the letter dated 28th March, 2019, is reproduced hereinbelow;-

> "In view of the above, we request the council to consider our case and allow us the extended period to re-submit Form GST TRAN-1 in order to enable us to carry forward the credit of SAD amounting to Rs.22,51,380.21/- in relation to stock of goods lying as on 30.06.2017 under the transitional provisions of Section 140(3) of CGST Act. We would again like to submit that as we were entitled to carry forward the credit of the said amount of SAD under the transitional provisions, such substantive benefit should not be denied to us due to a procedural lapse."

However, in spite of the above letter being on record, the writ petitioner has now come forward before this Court claiming that it is the Commissioner, Commercial Tax, U.P. who has the power to extend the time period for the purpose of submitting a revised declaration in FORM G.S.T. T.R.A.N-1.

The first of the relevant rules which we need to take notice of in the facts of the instant case is Rule 120-A of the Uttar Pradesh Goods & Services Tax Rules, 2017, which reads as follows;-

> "[120-A. [Revision of declaration in FORM G.S.T. T.R.A.N.-1] – Every registered person who has submitted a declaration electronically in FORM G.S.T. T.R.A.N.-1 within the period specified in Rule 117, Rule, 118, Rule 119 or Rule 120 may revise such declaration once and submit the revised declaration in FORM G.S.T. T.R.A.N.-1 electronically on the Common Portal within the period specified in the said rules or such further period as may be extended by the Commissioner in this behalf.]"

The other rule which we need to take notice of is Rule 117 of the Uttar Pradesh Goods & Services Tax Rules, 2017, which reads as follows;

"117. Tax or duty credit carried forward under any existing law or on goods held in stock on the appointed day.-(1) Every registered person entitled to take credit of input tax under Section 140 shall, within ninety days of the appointed day, submit a declaration electronically in FORM G.S.T. T.R.A.N.-1, duly signed, on the Common Portal specifying therein, separately, the amount of input tax credit [x x x] to which he is entitled under the provisions of the said section:

Provided that the Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days:

Provided that in the case of a claim under sub-section (1) of Section 140, the application shall specify separately-

(i) the value of claims under Section 3, sub-section (3) of Section 5, Sections 6 and 6A and sub-section (8) of Section 8 of the Central Sales Tax Act, 1956 made by the applicant; and

(ii) the serial number and value of declarations in Forms C or F and certificates in Forms E or H or Form I specified in Rule 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957 submitted by the applicant in support of the claims referred to in sub-clause (I);

[(1A) Notwithstanding anything contained in sub-rule (1), the Commissioner may, on the recommendations of the Council, extend the date for submitting the declaration electronically in FORM GST TRAN-1 by a further period not beyond 31st March, 2019, in respect of registered persons who could not submit the said declaration by the due date on account of technical difficulties on the common portal and in respect of whom the Council has made a recommendation for such extension.]

(2) Every declaration under sub-rule (1) shall,-

(a) in the case of a claim under sub-section (2) of Section 140, specify separately the following particulars in respect of every item of capital goods as on the appointed day-

(i) the amount of tax or duty availed or utilised by way of input tax credit under each of the existing laws till the appointed day; and

(ii) the amount of tax or duty yet to be availed or utilised by way of input tax credit under each of the existing laws till the appointed day;

(b) in the case of a claim under sub-section (3) or Clause (b) of sub- section (4) or sub-section (6) or sub-section (8) of Section 140, specify separately the details of stock held on the appointed day;

(c) in the case of a claim under sub-section (5) of Section 140, furnish the following details, namely:

(i) the name of the supplier, serial number and date of issue of the invoice by the supplier or any document on the basis of which credit of input tax was admissible under the existing law;

(ii) the description and value of the goods or services;

(iii) the quantity in case of goods and the unit or unit quantity code thereof;

(iv) the amount of eligible taxes and duties or, as the case may be, the value added tax [or entry tax] charged by the supplier in respect of the goods or services; and

(v) the date on which the receipt of goods or services is entered in the books of account of the recipient.

(3) The amount of credit specified in the application in FORM G.S.T. T.R.A.N.-1 shall be credited to the electronic credit ledger of the applicant maintained in FORM G.S.T. P.M.T.-2 on the Common Portal.

(4)(a)(i) A registered person, holding stock of goods which have suffered tax at the first point of their sale in the State and the subsequent sales of which are not subject to tax in the State availing credit in accordance with the proviso to sub-section (3) of Section 140 shall be allowed to avail input tax credit on goods held in stock on the appointed day in respect of which he is not in possession of any document evidencing payment of value added tax.

(ii) The credit referred to in sub-clause (i) shall be allowed at the rate of sixty per cent. on such goods which attract State tax at

the rate of nine per cent, or more and forty per cent, for other goods of the State tax applicable on supply of such goods after the appointed date and shall be credited after the State tax payable on such supply has been paid:

Provided that where integrated tax is paid on such goods, the amount of credit shall be allowed at the rate of thirty per cent and twenty per cent, respectively of the said tax;

(iii) The scheme shall be available for six tax periods from the appointed date.

(b) The credit of State tax shall be availed subject to satisfying the following conditions, namely:

(i) such goods were not wholly exempt from tax under the (Name of the State) Value Added Tax Act; ....

(ii) the document for procurement of such goods is available with the registered person;

[(iii) the registered person availing of this scheme and having furnished the details of stock held by him in accordance with the provisions of clause (b) of sub-rule (2), submits a statement in FORM G.S.T. T.R.A.N.-2 by 31st March, 2018, or within such period as extended by the Commissioner, on the recommendations of the Council, for each of the six tax periods during which the scheme is in operation indicating therein, the details of supplies of such goods effected during the tax period:]

[Provided that the registered persons filing the declaration in FORM GST TRAN-1 in accordance with sub-rule (1A), may submit the statement in FORM GST TRAN-2 by 30th April, 2019.]

(iv) the amount of credit allowed shall be credited to the electronic credit ledger of the applicant maintained in FORM G.S.T. P.M.T.-2 on the Common Portal; and

(v) the stock of goods on which the credit is availed is so stored that it can be easily identified by the registered person."

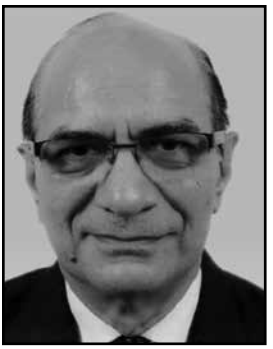
A conjoint reading of the above two rules clearly reveals that every registered person who has submitted a declaration electronically in FORM

G.S.T. T.R.A.N-1 within the period specified in Rule 117 or Rule 118 or Rule 119 or Rule 120 is allowed to revise such declaration once and submit the revised declaration in FORM G.S.T. T.R.A.N-1 electronically on the common portal, "within the period specified in the said rules or such further period as may be extended by the Commissioner in this behalf." This further period – as may be extended by the Commissioner – which is provided under Rule 120-A, therefore, cannot go beyond the time-frame provided under Rule 117 of the Uttar Pradesh Goods & Services Tax Rules, 2017. The period of extension has been statutorily circumscribed at 90 days and that too is possible only on the recommendation of the Council.

If we are to assume that the Commissioner while exercising his powers under Rule 120-A of the Uttar Pradesh Goods & Services Tax Rules, 2017 can extend the time period for the purpose of filing of a revised declaration by a registered person in FORM G.S.T. T.R.A.N-1 for an unlimited or an indefinite period, it would simply mean that any registered person can avail the benefit of filing a revised declaration in FORM G.S.T. T.R.A.N-1 for an unlimited or indefinite period of time after submitting a declaration electronically in FORM G.S.T. T.R.A.N-1 under Rule 117 of the Uttar Pradesh Goods & Services Tax Rules, 2017. That surely could not have been the purpose and intention of the legislature. Rather, the legislature in its wisdom has noticed Rule 117, Rule 118, Rule 119 and Rule 120, while framing Rule 120-A of the Uttar Pradesh Goods & Services Tax Rules, 2017. The first proviso attached to Rule 117 of the Uttar Pradesh Goods & Services Tax Rules, 2017, reads as follows;-

> "Provided that the Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days."

In such circumstances as stated above, a writ in the nature of mandamus, as prayed for, cannot be granted by this Court. However, it is open to the Council to take a decision in the matter in the light of the writ petitioner's letter dated 28th March, 2019. The writ petition is accordingly, disposed of.



Latest Clarifications - On Refunds Under GST - Big Relief

CA, H.L. Madan

Introduction

GST has been implemented w.e.f. 1st July, 2017 as 'One Nation-One Tax' in place of 17 indirect taxes for ease of doing business, to reduce corruption, to allow seamless credit of input tax paid and for many other reasons. In this regime, the prevailing 'C' forms and 'H' forms are dispensed with and the business now needs to pay input tax for all its taxable purchases of goods / services used for making outward supply within the state, Interstate or export outside India, and thereafter, to approach the Govt. for refund of input tax paid on such inward supplies if outward supply is export or under inverted duty structure.

To reduce corruption and inconvenience, while implementing GST, Govt. planned to make every transaction activity online through GSTN (Portal) and was of the view that refunds will be issued online within reasonable time as is being done by Income Tax Dept. by crediting to the bank account of a business without any interface with the GST officials.

However, the technology did not come up to the expectation till now, and large numbers of claims of refund are pending with the Govt resulting in blockage of working capital and business is facing financial difficulties.

Refund Fortnights: Inspite of the fact Govt organised the Refund Fortnights (Twice), in March 2018 May 2018 and many circulars have been issued to ease the difficulty of the taxpayer, yet the problem is not solved to the expectations of the tax payers and is a reason of hue and cry among the exporters and business where purchases are at higher rates of tax and outward supplies are at lower rate as the profit of the exporters have been stuck up in refunds with Govt.

Physical Submission of refund claims:

Due to non availability of complete/required refund module on GSTN PORTAL, and to remove difficulties of exporters, many circulars have been issued requiring the taxpayers to file refund applications in form GST RFD 01A online and submit the application reference number (ARN) print along

with all supporting documents physically with the jurisdictional proper officer. Some important circulars issued by GST policy wing are as under:

1. **Circular No. 17/17/2017 – GST dated 15.11.2017**

   Explained procedure of manual filing of refund application with various declarations, statements, invoices for inward and outward supplies, export documents, etc. and detailed procedure for processing of refund applications by GST officers.

2. **Circular No. 24/24/2017 – GST dated 21.12.2017**

Explained procedure for manual filing and processing of refund claims on account of inverted duty structure, deemed exports and excess balance in electronic cash ledger.

3. **Circular No. 37/11/2018 – GST dated 15.03.2018**
   Explained following issues:

   1. Non availment of drawback
   2. Amendment through Table 9 of GSTR-1
   3. Exports without LUT
   4. Exports after specified period
   5. Deficiency Memo
   6. Self Declaration of Non-prosecution
   7. Refund of Transitional Credit
   8 Discrepancies between value of GST Invoice & Shipping bill / bill of export
   9. Refund of Taxes under existing laws
   10. Filing frequency of refunds
   11. BRC/FIRC for export of goods
   12. Supplies to merchant exports
   13. Requirement of Invoices for processing of claims for refund.

4. **Circular No. 45/19/2018 – GST dated 30.05.2018**

   Explained refund of unutilized ITC of compensation cess availed on inputs in cases where the final product is not subject to levy of compensation cess.

5. **Circular No. 59/33/2018 – GST dated 04.09.2018**

   Explained following issues:

   - Submission of invoices for processing of claims of refund.

- System validations in calculating refund amount.
- Re-credit of electronic credit ledger in case of rejection of refund claim.
- Scope of rule 96(10) of CGST rules.
- Disbursal of refund amount after sanction by proper officer.
- Status of refund claim after issue of deficiency memo.
- Treatment of refund application for the amount claimed less than Rs.1000/-

6. **Circular No. 70/44/2018 – GST dated 26.11.2018**
Explained following issues:

- Status of refund claim after issuance of deficiency memo and credit of electronic credit ledger.

- Allowing exporters who have received capital goods under EPCG to claim refund of IGST paid on exports.

Inspite of above circulars clarifying many issues, taxpayers submitting GST RFD 01A physically and GST officers dealing with such applications of refund, were finding difficulties on many issues and, therefore, either the refund applications are being rejected or kept pending for disposal resulting delay in issue of refund.

LATEST CIRCULAR DATED 31.12.2018

In order to further clarify few more issues and to simplify refund process CBIC - (Central Board of Indirect Taxes and Customs) GST WING has issued **Circular No 79/53/2018 – GST dated 31.12.2018**. Issues now clarified are as under:

1. No need to submit any document in physical form

1.1 There will be no need to file, print of RFD 01A or any document / undertaking / statement or any supporting documents, physically with jurisdictional proper officer. All documents required shall be uploaded on the GSTN common portal at the time of submitting refund application.

It has been further clarified that even documents as required by circular No. 59/33/2018 – GST Dt. 04.09.2018 will also be submitted online. **This is a big relief to the taxpayers.**

1.2 **Submission of documents physically - optional** If the taxpayer so desire, he has the option, to submit above documents physically also,

but after submitting complete application in GST RFD-01A online.

1.3 **Mandatory physical submission of documents** A taxpayer who still remains unallocated to Centre or State Authorities has to submit refund application physically along with all supporting documents. However, he can file the refund application with any authority either the Central or State in view of Circular No. 17/17/2017 – GST Dt. 15.11.2017.

2. Generation of ARN:

The taxpayer should generate the ARN only after completing the process of filing GST RFD 01A and uploading of supporting documents / undertakings /statements/ invoices and debiting the Electronic Credit ledger wherever required.

3. Deemed filing of refund application

3.1 On the date of generation of ARN, the application shall be deemed to have been filed under CGST Rules 90(2) and there will be no need to go to GST office to submit the same.

3.2 Time of 15 days to issue Acknowledgement shall be counted from the date of generation of ARN.

3.3 The jurisdictional officer shall issue acknowledgment or deficiency memo manually based on the documents received online on common portal.

4. Rectified refund application

To be filed manually on receipt of deficiency memo – the taxpayer needs to file rectified refund application manually with ARN of original application as already clarified in Circular No 70/44/2018 – GST dated 26.10.2018.

5. Processing of refund application Other stages of processing of a refund claim submitted in RFD 01A by the jurisdictional officer shall be manually for the time being.

6 Calculation of refund amount of accumulated ITC in case of inverted duty structure.

6.1 **Where rate of GST on inputs is equal or lower than the rate on outward supply -** It has been clarified that where there are multiple inputs attracting different rates of tax, Net ITC availed cover ITC on all the inputs in the relevant period, irrespective of their rate. It is explained with the following illustration:

Assume – In a Manufacturing Process:-

Name of Inputs Used	Rate of GST on Inputs	Value of Inputs	Tax paid of Inputs	Outward Supply			Tax on Output Supply	Refund Due
				Name	Value	**Rate**		
1	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9(4-8)**
A	5%	500	25	Y	3000	12%	360	
B	18%	2000	360	-	-	-	-	-
TOTAL (Rs.)			**385**				**360**	**25**

Note: The above illustration is to clarify the position to GST officials as some of the officers were denying refund where GST rate on inputs was lower or equal to rate of output tax.

6.2 **Refund of accumulated ITC of input services and capital goods on account of inverted duty structure:-** It is clarified that both CGST Act and rules made thereunder clearly prevent the refund of tax paid on input services and capital goods as part of refund of ITC accumulated on account of inverted duty structure.

7. Interest on delayed refunds payable by Govt:

7.1 Section 56 of CGST Act provides to pay interest @ 6%, if the amount is not refunded within 60 days of the date of receipt of application (ARN) till the date of refund.

7.2 It is clarified that the tax shall be considered to have been refunded only when the amount is credited to the bank account of the claimant.

7.3 Therefore, the tax authorities are advised to issue the final refund sanction order within 45 days of the date of ARN so that disbursement can be completed within 60 days by both the Central and State Tax Authorities. Fate of refund applications generated on the Portal before 31.12.2018 but physically not received by the GST officer:-

8.1 If refund amount claimed is less than Rs.1000/- then the application shall be rejected by the GST officer and the amount will be credited to the electronic credit ledger of the applicant by issuance of Form GST RFD-01B.

8.2 List of applications of the refund where amount is greater than 1000/- shall be compiled and if the same are not received in the office of the tax officer within 60 days of ARN Generation, a communication will be sent on their registered E-Mail Id to submit the application physically within 15 days failing which the applications shall be summarily rejected and the amount shall be credited in their electronic credit ledger.

8.3 Refund has been claimed for excess amount in the Electronic Cash Ledger and application not submitted physically with the GST officer, then the amount debited in electronic cash ledger may be re-credited through Form GST RFD-01B if there are no liabilities in the electronic liability register and even though GSTR -3B has not been filed by the taxpayer for the relevant period. Non-consideration of ITC of GST paid on invoice of earlier tax period availed in subsequent period.

9.1 It is clarified that 'Net ITC' u/s 89(4) of CGST rules means ITC availed on inputs and input services during the relevant period for which refund is claimed by the taxpayer.

9.2 Therefore, ITC on invoices issued in earlier tax period 'say Aug'2017'can not be excluded from the calculation of the refund amount for the month of 'say Sept 2017' if ITC availed in Sept-2017.

9.3 This has been clarified for the reason that certain GST officer were denying to give refund of ITC for earlier tax periods claimed in subsequent tax period.

10. Misinterpretation of the meaning of the term 'inputs': It is clarified that ITC on inputs like stores and spares, packaging material, materials purchased for machinery repairs, printing and stationary items, is allowable as the same qualify as inputs and therefore, entitled for refund and GST officers should not deny the same, if the said goods are used or intended to be used in the course or furtherance of business and not covered u/s. 17(5) of CGST Act. Further, store and spares, the expenditure on which has been charged to revenue expenses cannot be held as capital goods and ITC for the same is available for refund. **Note:** The above has been clarified as many

GST officers were denying ITC on above items while processing refund claim.

11. Issues related to refund of accumulated ITC of compensation cess:

Vide Circular No 45/19/2018 GST dated 30.05.2018, CBEC clarified that refund of accumulated ITC of compensation cess on account of Zero rated supplies made under LUT/ Bond is available even if the exported product is not subject to levy of cess. Now following issues are further clarified:

(*a*) Calculation of refund of compensation cess of past periods:

How the amount of compensation cess to be refunded will be calculated in case the claimant claims the refund of accumulated cess for the period from July 2017 to May 2018 (i.e. upto the date on which circular No 45/19/2018 Dt. 30.05.2018 was issued) in the month of July, 2018 along with refund claim of ITC for the month of July, 2018.

It has been clarified, that refund on account of compensation cess is to be recomputed as if the same was available in the respective months in which the refund of unutilized credit of CGST/ SGST/ IGST/ UTGST was claimed on account of exports made under LUT/ Bond.

If the aggregate of these recomputed amounts of refund of compensation cess is less than or equal to the eligible refund of compensation cess calculated in respect of the month in which the same has actually been claimed, then the aggregate of the recomputed refund of compensation cess of the respective month would be admissible.

Further, the recomputed amount of eligible refund of compensation cess in respect of past periods (July 2017 to May 2018) would not be admissible for consignments exported on payment of IGST.

(*b*) No distinction between intermediate and final goods or services: Refund for compensation cess paid on coal which has been used for the captive generation for electricity which is further used for the manufacture and export of aluminium products will be allowed as there is no distinction between intermediate goods or services or final goods or services under GST.

In conclusion, clarifications given in latest Circular No 79/53/2018 – GST dated 31.12.2018 as discussed above, is a big relief to claimants of refund as now they can submit application and supporting documents online and need not to visit the office of jurisdictional proper officer to submit the documents physically. These clarifications are also guidance for tax officers in processing of refund claims related to zero rated supply, inverted duty structure and compensation cess (for past periods from July 2017 to May 2018) more smoothly and to do it within 45 days from the date of generation of ARN and crediting the refund amount in taxpayer's bank account within 60 days failing which interest will be payable by Govt.@6%.

No doubt Govt. has clarified the legal position for payment of Interest @ 6% on delayed refunds but how it will be monitored, whether tax officer has granted interest alongwith refund amount suo-moto, has not been clarified. It is a matter of record, that tax officers, have not paid interest in case of delayed processing of refunds for the period from July 2017 to March 2018 in most of the cases. Such tax payers may have to approach the higher authorities in appeals to claim the interest which is their right otherwise. Therefore, to give relief, to such taxpayers Govt. should advice the tax officers by way of another circular to compile the data of such cases of delayed refunds, calculate interest thereon, and credit the taxpayer bank account suo-moto instead taxpayer going for appeals in almost all cases. In my view Govt. will consider the issue if effectively brought to the knowledge of higher authorities and issue advisory to tax officers to allow interest of past periods and monitor that interest is paid in future refund claims along with the refund amount itself. In addition, if columns/rows for date of generation of ARN, date of sanction of refund, period of delay in sanction, interest on delay are added in GST-RFD-06(Refund sanction order), it will be a self check on the proper officer to calculate interest along with refund amount. This will save lot of precious time of taxpayers, energy, harassment and will reduce corruption also.

Re-Shaping The Indian Economy: The Enactment of Insolvency and Bankruptcy Code, 2016

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The Insolvency and Bankruptcy Code, 2016 (herein referred to as the "Code") is a major legal breakthrough towards assessing the viability of an enterprise and the overall resolution of the stressed assets laws in the country. The economy is straddled with humongous NPAs in the financial sector and the twin balance-sheet deficit problem is plaguing the banking sector no end. It's one of the largest legal advancement in the country's war to clean up around $117 billion of stressed assets in the economy.[1]

In such a situation Code provides for resolution in a time bound manner, promotes entrepreneurship which will lead to an improvement in credit availability and would balance interest of all stakeholders. The Code envisages to minimize the role of Adjudicating Authority and tackles laws of 100-year vintage like the Presidency Towns Insolvency Act, 1909, the Provincial Towns Insolvency Act, 1920 and Sick Industrial Companies (Special Provisions) Repeal Act, 2003[2] along with the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, and the Companies Act, 2013.

These statutes provided for a disparate process of debt restructuring, and asset seizure and realization in order to facilitate the satisfaction of outstanding debts. As is evident, a plethora of legislation dealing with insolvency and liquidation led to immense confusion in the legal system, and there was a grave necessity to overhaul the insolvency regime. All of these multiple legal avenues, and a hamstrung court system led to India witnessing a huge piling up of non-performing assets, and creditors waiting for years at end to recover their money. The Bankruptcy Code is an effort at a comprehensive reform of the fragmented regime of corporate insolvency

1 Insolvency and Bankruptcy Code, 2016: Resolving Insolvencies (A Simplified Guide) ICSI Insolvency Professionals Agency; https://www.icsi.edu/media/webmodules/IBC_2016_Final29Sept2017.pdf

2 Ibid.

framework, in order to allow credit to flow more freely in India and instilling faith in investors for speedy disposal of their claims.

It proposes a paradigm shift from the existing ***'Debtor in possession' to a 'Creditor in control'*** regime. The Code offers a uniform, comprehensive insolvency legislation encompassing all companies, partnerships and individuals (other than financial firms). One of the fundamental features of the Code is that it allows creditors to assess the viability of a debtor as a business decision, and agree upon a plan for its revival or a speedy liquidation. The Code creates a new institutional framework, consisting of a regulator, insolvency professionals, information utilities and adjudicatory mechanisms, that will facilitate a formal and time bound insolvency resolution process and liquidation.

The Interim BLRC Report, February 2015

The Mandate:

The **Bankruptcy Law Reform Committee also known as Vishwanathan Committee ("BLRC" or the "Committee")** was set up by the Department of Economic Affairs (DEA), Ministry of Finance (MoF), under the **Chairmanship of Mr. T.K. Vishwanathan (former Secretary General, Lok Sabha and former Union Law Secretary)** by an office order dated August 22, 2014 to **study** the **"corporate bankruptcy legal framework in India"** and submit a **report** to the Government for **reforming** the system.

During the course of its deliberations, the Committee decided to **divide the project into two parts**: **(i) to examine the present legal framework for corporate insolvency and suggest immediate reforms, and (ii) to develop an 'Insolvency Code' for India covering all aspects of personal and business insolvency**.[3]

The Legislative Competence:

The Vishwanathan Committee designed a set of processes to resolve insolvency and bankruptcy and with the suggestions of various committees, professionals and general public, the **Insolvency and Bankruptcy Code, 2016 (IBC) was enacted** and came into force with effect from **28th May, 2016**. The Parliament in **accordance with Article 254(1)**, Constitution of

3 https://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf (Assessed on 8th March, 2019)

India 1950 has the power to make laws with respect to any of the matters listed in **List I (Union List) and List III (Concurrent List)** of the **Seventh Schedule** to the Constitution of India, 1950 ("Constitution"). States also have the power to enact laws on matters listed in List III, besides List II (State List). In case of repugnancy, or conflict between laws made by the Parliament and State Legislature on a matter relatable to List III, the parliamentary law prevails. This is unless the State has sought presidential assent for its law, in which case it prevails in that state only**. 'Bankruptcy and Insolvency'** is an item specified in **Entry 9 of List III.**

Entry 43 of List I deals with 'incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations, but not including co-operative societies' whereas **Entry 44 of List I** deals with 'incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.' Further, **Entry 32 of List II** deals with 'incorporation, regulation and winding up of corporations, other than those specified in List I…' **While the entries in List I do not raise any issues regarding the Parliament's competence to pass a law on such entries, the power of the State Legislatures to enact a law on a matter under Entry 32 of List II does not, in any matter whatsoever, affect the Parliament's power to enact a law under Entry 9 of list III.**[4]

Some Significant Amendments Proposed To The Previous Acts By Virtue Of The Code, 2016:

1. Companies Act (CA), 1956/ 2013:

Chapter V of the CA 1956 provides for a mechanism by which corporate revival and rehabilitation may be undertaken. Section 391 of CA 1956 provides for a court-supervised process by which a company can enter into a scheme of arrangement or a compromise with its creditors and/or members. The nature of the scheme or compromise that can be proposed under this provision is very wide: it includes schemes or compromises that may be proposed to restore the company to profitability. The winding up proceedings under the CA 1956 are carried out voluntarily (members' voluntary liquidation, which is a liquidation procedure for solvent companies, and creditors' voluntary liquidation), or compulsorily by the High Court.

The CA 2013 **uses 'sickness' as the preliminary criterion for determining whether a company should be rescued or not.** However,

4 Innoventive Industries v. ICICI Bank, (2018) 1 SCC 408

it does not prescribe any statutory test for determining 'sickness' and leaves much to the discretion of the NCLT. The BLRC notes that if some of the procedural steps envisaged in Chapter XIX are collapsed, the viability of a business can be considered at the time of determination of sickness at a very early stage of the proceedings, which will also make the process of making that determination objective. The viability of the business can be considered by a committee of creditors (in a meeting convened by an interim administrator) only after a company has been declared sick. Liquidation should not be seen as a measure of last resort for unviable businesses that have become insolvent – they should be liquidated as soon as possible to minimize the losses for all the stakeholders.

The CA 2013 provides for **a moratorium on enforcement proceedings to be granted on an application to the NCLT, and for a fixed duration of 120 days**. The purpose of a moratorium is to (a) keep a debtor company's assets together during the rescue proceedings by providing relief from debt enforcement in certain circumstances and (b) avoid multiple legal actions without undermining the interest of the creditors. However, the provision on the grant of moratorium in CA 2013 suffers from the following problems: (i) wide discretion to the NCLT to determine whether a moratorium should be granted or not; (ii) no provision for lifting the moratorium or modifying its terms once it has been granted; (iii) no consideration of creditor interests in granting the moratorium; (iv) no express requirement for consideration by the NCLT of creditor interests in making the decision to granting the moratorium.

Chapter XIX of the CA 2013 (Section 253 to 258) relating to winding up of companies have not been notified yet. Provisions under Section 253 (1) permits a secured creditor or a debtor company to make a reference to the NCLT for declaring the company to be a 'sick company' if it is unable to pay/secure/compound the debt when a demand for payment has been made by **secured creditors representing 50% or more of the outstanding amount of debt within thirty days of the service of notice of demand.** The BLRC opines that the present criteria for initiating rescue proceedings by creditors and the debtor company may not facilitate early intervention and timely rescue. If a company has already defaulted on 50% of its outstanding debt, it is very likely that it has reached a stage where it would be very difficult to recue it effectively. Moreover, the Act concentrates more on the secured creditors rather than on unsecured creditors for determining the sickness of the Company.

The CA 2013 provides that an interim administrator or the company administrator can take-over the management of the debtor company

(which might facilitate siphoning of assets) (Section 260), but only on being directed to do so by the NCLT. Once again, it leaves too much to the discretion of the NCLT without providing any criteria to guide the exercise of such discretion. Given that an NCLT order for takeover of management can be appealed before the NCLAT (and subsequently before the Supreme Court), the law should specify a non-exhaustive list of grounds on which the NCLT may direct that the management may or may not be taken over to avoid the possibility of protracted disputes on the question of takeover of management. Also, the NCLT have been given wide powers to determine the powers and functions of the company administrator which again leaves room for abuse of law and discretion in the hand of NCLT.

CA 2013 provides for appointment of liquidators and administrator from a Government approved pool of private professionals. Although CA 2013 provides for a fairly comprehensive regime for the liquidators, some issues relating to the appointment, qualification and regulation remain to be addressed. Moreover, CA 2013 provisions in relation to regulation of administrators seem fairly underdeveloped and leave much to the discretion of the NCLT.

The current scheme of the CA 2013 does not provide for the participation of creditors in the appointment of the company administrator (who is appointed at a later stage for the purpose of preparing/ implementing a scheme of revival and/or taking over the management or assets). **He is to be appointed by the NCLT**. There is a strong case to be made for creditor involvement in the process of appointment of the company administrator. Creditors are likely to be most incentivised to select the person who is best suited for the task - as the fees payable to the company administrator may be taken out of the company's assets, the creditors will often choose a person who is familiar with the company's business, its activities or assets or has skills, knowledge or experience in handling the particular circumstances of the case.

1. Sick Industrial Companies (Special Provisions) Act, 1985

Failure of the Regime: lack of timely rescue mechanism: SICA as failing in its mandate to provide a timely rescue mechanism for sick industrial companies. It has been seen that delays were a routine matter with BIFR proceedings. It has been estimated that it takes about 5-7 years for a sick industrial company to be revived after BIFR proceedings. These delays are augmented by the routine challenges to BIFR decisions before the AAIFR and High Courts. Consequently, although the SICA was originally meant to limit judicial oversight to the minimum required, there has been a significant

degree of court involvement in the rescue process. The major setbacks for rehabilitation packages in SICA were the inability of the BIFR to distinguish between cases **suitable for rehabilitation and for winding up, the pro-debtor and anti-creditor nature of BIFR proceedings**, the provision of an automatic moratorium on enforcement proceedings and the debtor-in-possession regime. Another major drawback of SICA was reflected by the Goswami Committee and subsequently in the Eradi Committee in 2000, elaborated on the fact that since the Act concentrated on "debtor-in-possession" regime, this would give rise to risky implementation of rescue measures as the cost of the proceedings would be borne by the creditors. The RBI report (2001) has criticised SICA as being "seriously flawed" and "notoriously dilatory".

3. The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 :

The SARFAESI Act envisages specialised resolution agencies in the form of Asset Reconstruction Companies ("ARCs") to resolve Non-performing Assets ("NPAs") and other specified bank loans under distress. ARCs are seen as vehicles to increase the liquidity of banks which can divest themselves of bad loans by transferring them to the ARCs. But given their powers to resort to several measures (which includes taking over the management and conversion of debt into equity among others) for recovering the value underlying those loans, ARCs can (at least in theory) also help in insolvency resolution of a company. The banks are required to hold exposure in the sold loans through subscription to security receipts issued by the special purpose vehicle holding the assets under consideration. Such offloaded assets are generally held in trusts that issue security receipts and are managed by the ARCs in their capacity as trustees. It may be noted that an ARC can takeover the management of the borrower only for the purpose of 'realization of dues'. The management of the company has to be restored back to the borrower after realisation of the dues. Therefore, this mechanism is largely seen as a debt recovery tool and not an insolvency resolution tool (i.e., it does not facilitate rescue/ revival in practice).

Epilogue:

The report enlightens on the various factors which led to the failure of the Indian Corporate Insolvency Regime which were delays in execution of proceedings, unnecessary court intervention requirement at certain levels, lack of an institutional framework for a swift implementation, complicated priority regime for distribution (in liquidation), holdouts by certain creditors

in rescue through schemes of arrangement and compromises with creditors and multiple forums spread across different legislations leading to multiplicity of legal actions on the same cause of action and related conflicts.

Keeping this at reach, the report provides for an immediate response to the reforms for improving the corporate insolvency regime. The report also hints at the ingredients of an effective insolvency law stating that an ideal insolvency regime needs to strike the right balance between the interests of all the stakeholders by a reasonable allocation of risks among them. It also touches upon the need of hierarchy of payments and the ultimate aim of reorganisations i.e. promoting resurgence of the enterprise as a going concern, rather than death or liquidation of the enterprise.

The reasoning revolves around major issues with respect to debtor protection regime being substituted by creditor protection regime, promoting economic growth with a proper allocative efficiency mechanism as a sound corporate insolvency law can help this process by enabling reallocation of ‘inefficiently utilized resources’ and ‘ousting of inefficient participants’ from the market. Moreover, protection of credit markets in India have been given a boost up by this impressive legal move and its successful implementation will definitely aim at securing the interests of all the stakeholders at large.

PLACE OF SUPPLY – AN ENIGMA IN GST

Sushil Verma, Advocate
M.Com, PGDM and LL.B

Place of supply provisions under the GST law has a huge impact on your taxes, returns, and input tax credit.

Under GST Law there is only one taxable event i.e. Supply of Goods or Services.

As we all know under GST, 3 types of taxes can be charged in the invoice. SGST and CGST- in case of an intra-state transaction and IGST in case of an interstate transaction. But deciding whether a particular transaction is inter or intrastate is not an easy task and in fact poses the biggest challenge in GST regime - in view of the very complex Act and the Rules in GST.

The following shall be treated as Inter-state supply:

1. Supply of goods / services imported into the territory of India, till they cross the custom frontiers of India.
2. Supply where supplier is located in India and place of supply is outside India.
3. Supply to or by Special Economic Zone developer or Special Economic Zone unit.
4. Supply made to a tourist.
5. Supply within taxable territory which is neither Intra-state nor covered anywhere under the Act.

The stature of the transaction is defined by the place of supply and location of the supplier. The place from which the supplier provides the goods or services is called the location of the supplier. The place at which the recipient procures those goods or services is called the place of supply.

There are several reasons for determining place of supply:

- It is important for persons dealing in cross-border services
- It is also important for persons who deal in interstate transactions

- The suppliers who operate within India from multiple locations and supply goods or services from different locations also need to determine it
- Special transaction zones like SEZ, exempted zones etc. also need it

Think about an online training where customers are sitting in different parts of the world.

Say in case, hotel services, where the receiver may have an office in another state and may be visiting the hotel only temporarily, or where goods are sold on a train journey passing through different states.

To help address some of these situations, the IGST act lays down certain rules which define whether a transaction is inter or intrastate. These rules are called the place of supply rules.

1. There are a lot of questions raised in my office on this issue. The queries being raised are sometime very simple and sometime very complicated and answers are always in simple and straight. I personally see maximum litigation on the issue of “Place of Supply” and request all the associations to devote more and more time on this issue as it will affect lakhs of taxpayers after the Elections – rightly so.

2. Place of supply of goods under GST defines whether the transaction will be counted as intra-state or inter-state, and accordingly levy of SGST, CGST & IGST will be determined.

3. Section 103 envisages that order of advance ruling shall be binding only on the applicant who had sought it and the concerned officer or the jurisdictional officer in respect of the applicant. The Advance rulings are specific to each Assesee and are not binding on other assessees’ and/or jurisdictional officers. Where the facts of the case are same, this will lead to duplicity of rulings and higher quantum of applications pending with AAR, which would in turn lead to delay in AAR orders.

4. It is pertinent to note here that, the questions regarding the determination of the place of supply cannot be raised with the AAR or Appellate Authority for Advance Ruling (AAAR). In the case of M/s Pon Pure Chemical India Pvt. Ltd. (2018-TIOL-52-AAR-GST) Gujarat AAR has rejected the application stating that

"As the 'place of supply' is not covered by Section 97 (2) of the Acts, this authority is helpless to answer the questions raised in the application, as it is lacking jurisdiction to decide the issues and Issue of High Sea Sale falls in the domain of Customs and not under the Goods and Services Tax." This will lead the issue being left unresolved and boost the scope for litigation

5. It is important to note that, the assesee cannot file an appeal against the AAR or AAAR order in High Court and Supreme Court.

6. In case of 'bill to-ship to' transactions i.e. the receiver would be located in one state whereas person to whom goods are shipped would be located in another state and revenue of State Goods and Services Tax (SGST) would accrue to which state, i.e. the state where receiver is located or the state in which goods are delivered. These transactions which businesses typically execute (along with other transactions such as Sale in transit, High seas sales, Sale in the course of import) should be covered/clarified in the provisions to avoid ambiguity.

7. Further, it is not mentioned in the provisions wherein goods are sold by the supplier at its premises to the buyer and buyer arranges for transportation to another state. In such cases, the goods are consumed in another state, so whether the transaction should be subject to Integrated Goods and Services Tax (IGST) or CGST and SGST.

Also an issue may arise in case of works contract executed at a location other than the location of service receiver on whether the place of supply should be based on location of service receiver or where the contract is executed. The same would also have revenue implications in terms of accrual of SGST to which state.

8. **Place of Supply when there is movement of Goods**

8A. **Supply** - Involves movement of goods, whether by the supplier or the recipient or by any other person

Goods are delivered by the seller to a recipient on the direction of a third person, (whether agent or not) before or during movement of goods, by way of transfer of documents of title to the goods or some other way.

8B. **Place of Supply –** Location of the goods when the movement of goods termination for delivery to the recipient

It is assumed that the third person has received the goods and the place of supply of such goods will be the principal place of business of 3rd person.

For e.g. A manufacturer in Kolkata, West Bengal, has an order from a customer in Delhi. The manufacturer directs his branch in Mumbai, Maharashtra to ship the goods to Delhi. In this case, place of supply shall be Delhi, and thus entails an inter-state movement of goods and will attract levy of IGST.

For e.g. A dealer in Mumbai, Maharashtra sells products to a customer in Delhi. Delhi-based customer directs the Mumbai seller to send the materials to Kolkata-based customer. Although the place of delivery is Kolkata, since Delhi-based seller had directed such movement, then the place of supply shall be the principle place of business, i.e. Delhi and thus, charge IGST on such movement.

9. **Place of Supply where there is No Movement of Goods**

9A. **Supply** – No movement of goods, either by the supplier or the recipient. The goods are assembled or installed at site.

9B. **Place of Supply** – Location of such goods at the time of the delivery to the recipient (at the time of transfer of ownership) Place of such installation or assembly.

For e.g. A Ltd has its registered office in Hyderabad, Telangana, opens a branch in Bengaluru, Karnataka, and purchases workstations from B Ltd. Whose office is in Bengaluru, Karnataka. Even though the same is, a supply of goods but there is no movement of goods. Since the movement is intra-state, it will attract CGST and SGST.

10. Goods supplied on a vessel/conveyance

10A. Supply that involves no movement of goods, either by the supplier or the recipient. The goods are assembled or installed at site.

10B. Place of supply – Location of such goods at the time of the delivery to the recipient (at the time of transfer of ownership). Place of such installation or assembly.

For e.g. Howrah to New Delhi Rajdhani starts its journey from Howrah, West Bengal and passes through many states before ending its journey in New Delhi. The food served on board the train shall be considered as supply of goods. Thus, place of supply shall be Howrah since it is the first location of the goods.

11. **Where the supply includes installation of goods at site, then place of supply shall be the place of such installation**

    For e.g. Installation of telephone towers or lift in an office building.

12. ***For an immovable property****: Where such immovable property is located or* supposed to be located

    - **Where both service provider and recipient are required to be physically present**: Location of the service provided
    - **In case of an event**: The location where such event was held or amusement park is located
    - **Ancillary activities to the events**: If the person is registered, then his location or if the person is unregistered, then the place where the event was held

    Where the event is to be held across many States, then place of supply shall be treated as all the States in which such services are being provided on a proportionate basis as per the terms of the contract. Where no such contract exists, then on a reasonable basis or as may further be prescribed.

13. **Transportation of goods**: If the recipient is registered, then his location and if unregistered, then location of the goods from where they started for being delivered

    - **Passenger Transportation**: If the recipient is registered, then his location and if unregistered, then location from where the passenger embarks on his journey
    - **Supply of services on board a conveyance, vehicle, vessel, train or aircraft**: The first point of departure for that journey

14. **Telecommunication Services** :-

    - Fixed leased line, Internet leased line, cable or dish antenna: Place of installation

- Postpaid Mobile or Internet Connection: Billing Address of the recipient of service
- Prepaid Mobile or Internet Connection: Location where such pre-payment was made or vouchers are sold

When such a recharge is made through Internet Banking or E-Wallets, then the place of supply of service shall be the address of the recipient as on the record with the service provider.

15. **Banking or Financial Institutions to account holders**: Location of the recipient of the services as per record of the provider

Banking or Financial Institutions to non-account holders: Location of the supplier of service

Insurance: If the person is registered, then his location or if the person is unregistered, then the location of the recipient as per records of the service provider.

Restaurant, catering, personal grooming, beauty treatment, fitness and health services, cosmetic or plastic surgery: Location where the service is provided

In all the above cases, where the location of the recipient cannot be identified, which is generally the fixed establishment or registered office of the recipient, then the **usual place of residence** of the recipient shall be treated as the location of receipt.

16. Imports & Exports

The place of supply of goods:

- imported into India will be the location of the importer.
- exported from India shall be the location outside India.

Place of supply for an Ex Works sale- the often question we were asked from various suppliers – the possible answer we could give.

If as a buyer you pick up goods ex-works and all further costs are to you account, then whether such a supply by the supplier shall be intra-state or interstate? Think if you have charged a wrong tax – then both the State and the Central Authorities will get you legally entangled in litigation and rightly so.

Unless the supplier can bring on record the evidence that buyer was obliged to take the goods outside Delhi pursuant to the above oral contract,

the dispute about intra or interstate supply shall loom large on the face of this transaction. Therefore, in this case, a contract or a purchase order that specifically mentions the place of delivery of the goods, irrespective of the person arranging for transportation or bearing risk, would be essential to prove the intent of the buyer and seller.

Conclusion – One can imagine the highly complex transactions that multi-activities business will face. Any wrong legal advice or a wrong view taken or a view taken to a short circuit the law will entail heavy financial burden on the taxpayer. The intra-State transctions and inter-State transactions are covered by two different Acts. Like CST Act & VAT Acts, there was huge litigation on section 3 and section 6(1A) of CST Act and even the Supreme Court had to give different judgments under different circumstances, the inter-State transactions r/w "Place of Supply" law, in my considered view are much more complicated transactions than section 3 & section 6(1A) of CST Act.

Friends, please do not expose the taxpayer to a short circuit application of law. It will affect the provisions regarding set off of input tax credit, heavy demands, appeals and to some extent the provisions of section 73 and section 74 may also be invoked. Many small businesses may face extinction if such issues are not property handled resulting into heavy demands.

" Let us learn together"

Few leading queries received and their possible answers:

Sir: We are suppliers of E Rikshaw batters in Delhi. We are placed orders by parties in Haryana and advised to ship goods to UP registered parties in UP. What is the implication for us in GST and what taxes we shall charge to Haryana Party? We are grateful to you for answering various queries that are raised by our Association Members to you.

What is " Bill to-Ship to: transaction lets understand.

- **In GST, if the goods are supplied by the supplier to the recipient on the direction of a third person, it will be deemed that the third person has received the goods, and the place of supply will be the principal place of business of such third person." (10(1)(b) -IGST Act)**
- **There are three parties and all three in different States. If a Party in Delhi receives orders from a party in Haryana for**

supply of 100 e-riskhaw batteries an party in Haryana directs party in Delhi to ship the said batteries to Lucknow, we call such transactions "bill to Ship to" transactions.

- **The first and primary transaction is between Delhi and Haryana parties. Delhi party will raise invoice on Haryana Party and as per instructions of Haryana party will ship the batteries to the party in Lucknow.**
- **The second collateral transactionis between Haryana Party and the Lucknow Party. Haryana Party will bill to Lucknow party and can endorse the lorry receipt received from Delhi party in favor of Lucknow party who will then receive the supply of batteries based on this endorsed LR in original.**
- **In the example, on the instruction from Haryana Party Delhi party ships the batteries to Lucknow party. Therefore, the place of supply will be the principal place of business of the third person i.e., Haryana Party. Here, Haryana Party will be deemed as the third person. Therefore, the place of supply will be the principal place of business of the third person i.e., Haryana. Accordingly, Delhi party willchargee IGST on billing to Haryana party. The second part of transaction between Haryana Party and Lucknow party will also be interstate, and IGST will be charged**

2. Sir, we are a sub-contractor and a constructing a Mall in Delhi. We have purchased an Escalator from ABC Limited to be installed in the Mall. The supplier is situated in Maharashtra. The supplier wants us take us a bill with IGST? Is it legally right?

   In my view the transaction will be intra-transaction as the POS rules governing such a transactions is given u/s 10(1)(d) of IGST Act, 2017. The POS will be Delhi and accordingly the invoices have to be raised.

3. Sir, we are dealing in electronic goods. If a customer takes a computer from us and takes it outside Delhi OR if a customer takes a computer from us in Delhi and directs us to deliver in Guru Gram; will it make any difference.

   Yes, in the first case delivery is over the counter with no movement of goods and hence POS will be Delhi and you will raise invoice for intra-state supply charging CGST and SGST at prescribed rates.

In the second case since you are aware the POS to be in Gurugram and you actually deliver the computer there, it will be an inter-state transaction and you should charge IGST.

4. Sir, we are leading electronics goods trading chain have a sales outlet in Kundli H (Haryana) and also have a godown in Delhi.

A number of transactions happen like this on a daily basis: A resident of Delhi goes to the Kundli outlet, places an order for an air conditioner and instructs that the delivery be made at his residence in Delhi. Kundli office arranges for delivery of air-conditioner from its Delhi godown.

Please query No. 1 to this blog. Your transactions are similarly placed and will involve 2 IGST supplies- Kundli outlet to Delhi customer and by Delhi Godown to Kundli outlet.

Under the circumstances the goods were never delivered to the Kundli outlet store but were directly delivered from Delhi store to Delhi's customer. However, as the Delhi godown has delivered goods to the customer in Delhi on the directions of the Kundlistore(here 3rd person), it will be deemed that the Kundli outlet store has received the goods and then supplied these to the customer.

Insolvency And Bankruptcy Code, 2016: The Idea Of A Viable Economy

By Puneet Agrawal,
Partner, & Tejaswini Tripathy, Associate
[ALA LEGAL, ADVOCATES]

The Bankruptcy Law Reforms Committee (BLRC) submitted a report on the **Rationale and Design** of an Insolvency and Bankruptcy Code in November, 2015. The Committee was chaired by Mr. TK Viswanathan and 14 other prominent members. The report enunciates about the reforms made to the financial sector which has transformed the way of economic thinking in relation to equity, currency and commodity market. The key factor that holds back the credit market is the mechanism for resolving insolvency, or the failure of a borrower (debtor) to make good his repayment promises to the lender (creditor), notes the Report.

The BLRC Report proposed the introduction of a comprehensive Code on Insolvency and Bankruptcy which provides for a comprehensive reform, covering all aspects of insolvency and bankruptcy along with an aim for a time bound resolution mechanism in order to maximise the value of assets of all stakeholders. It is aimed to be efficient, cost effective, procedure driven and handled by properly trained insolvency professionals.

The Report underscores the following important aspects:

(a) Requisites of a sound law on Insolvency and Bankruptcy

(b) Discussion regarding the “erstwhile regime” qua bankruptcy

(c) Criticism and deficiency of the “erstwhile regime” qua bankruptcy

(d) Principles guiding the new Bankruptcy Code

(e) Recommendations of the Committee

A Sound Bankruptcy Law:

The Report provides the requisites of a sound law on bankruptcy.

- ***Firstly,*** improved handling of conflicts between creditors and debtor becomes crucial when the law has to be strengthened in terms of creditor possession, control and supremacy over the debtors.

- ***Secondly,*** the avoidance of destruction of value i.e. the value of the creditors and stakeholders also holds much importance read in line with the objects of the Code. A sound legal process also provides flexibility for parties to arrive at the most efficient solution to maximise value during negotiations. If the enterprise is insolvent, the payment failure implies a loss which must be borne by some of the parties involved. Across a restructuring of liabilities, and in the hands of a new management team and a new set of owners, some of this organisational capital can be protected. The objective of the bankruptcy process is to create a platform for negotiation between creditors and external financiers which can create the possibility of such rearrangements.

- ***Thirdly,*** under a weak insolvency regime, the stereotype of promoters of defaulting entities generates two strands of thinking: (a) the idea that all default involves malfeasance and (b) the idea that promoters should be held personally financially responsible for defaults of the firms that they control. Considering facts like, "some businesses will always go wrong" and understanding ideas which promulgates that the "control of a company is not a divine right", a line is ought to be drawn between malfeasance and business failure. This would facilitate the boosting of morale of honest debtors and penalise those who are mala fide.

The Erstwhile Regime Governing Insolvency And Bankruptcy Law:

The Report discusses the **erstwhile regime** and elaborates the same as below:

- The **Presidency Towns Insolvency Act, 1909**, covered the insolvency of individuals and of partnerships and associations of individuals in the three erstwhile Presidency towns of Chennai, Kolkata and Mumbai. **The Provincial Insolvency Act 1920**, is the insolvency law for individuals in areas other than the Presidency towns, deals with insolvency of individuals, including individuals as proprietors. Section 3(1) of the Provincial Insolvency Act, 1920, allows the State Government to empower subordinate courts to hear insolvency petitions, with district courts acting as the court of appeal.

- Companies are registered under the **Companies Act, 2013,** limited liability partnerships are registered under the **Limited Liability Partnership Act, 2008, the Micro, Small and Medium Enterprise Development Act, 2006**, registers Micro, Small and Medium

Enterprise (MSMEs) but does not have provisions for resolving insolvencies. Partnership firms are registered under the **Indian Partnerships Act, 1932,** which is administered by the Ministry of Corporate Affairs. But, like for sole proprietorships, insolvency and bankruptcy resolution of partnership firms is treated the same as under individual insolvency and bankruptcy law.

- The **Recovery of Debt Due to Banks and Financial Institutions Act (RDDBFI Act)** 1993 gives banks and a specified set of financial institutions greater powers to recover collateral at default. The law provides for the establishment of special Debt Recovery Tribunals (DRTs) to enforce debt recovery by these institutions only. The law also provides for the Debt Recovery Appellate Tribunals (DRATs) as the appellate forum.

- Under certain specified conditions, the **Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) 2002** enables secured creditors to take possession of collateral without requiring the involvement of a court or tribunal. This law provides for actions by secured creditors to take precedence over a reference by a debtor to Board of Industrial and Financial Reconstruction (BIRF). The Debt Recovery Tribunal (DRT) is the forum for appeals against such recovery.

- The law for rescue and rehabilitation remains the **Sick Industrial Companies (Special Provisions) Act (SICA), 1985,** although it applies exclusively to industrial companies. Under SICA, a specialised **Board of Industrial and Financial Reconstruction (BIFR)** assesses the viability of the industrial company. Once it has been assessed to be unviable, BIFR refers the company to the High Court for liquidation. The SICA was repealed in 2003, but the repealing act could not be notified as the National Company Law Tribunal (NCLT) proposed by a 2002 amendment to the Companies Act, 1956 got entangled in litigation.

Deficiency Of The Erstwhile Regime:

The following observations are made on how the previous laws were ineffective and obsolete with regard to the contemporary requirements of the debt-ridden interphase:

Firstly, It is **problematic that these different laws are implemented in different judicial fora.** Cases that are decided at the tribunal/BIFR

often come for review to the High Courts. This gives rise to two types of problems in implementation of the resolution framework. The first is the **lack of clarity of jurisdiction** as multiple forums for adjudication.

Secondly, One forum decides on matters relating to the rights of the creditor, while another decides on those relating to the rights of the debtor. This creates inconsistencies, confusion and delays. Further the decisions are readily appealed against and either stayed or overturned in a higher court.

Thirdly, The forums entrusted with adjudicating on matters relating to insolvency and bankruptcy may not have the business or financial expertise, information or bandwidth to decide on such matters. This leads to delays and extensions in arriving at an outcome, and increases the vulnerability to appeals of the outcome.

Fourthly, India being a common law country, is governed with reliance on the **principle of s*tare decisis***. Judicial precedent is set by "case laws" which helps in fleshing out the statutory laws. On the review of judgments, it was found that these are fragmented and contrary judgments and thus an environment of legislative and judicial uncertainty. World Bank (2014) reports that the average time to resolve insolvency is **four years in India**, compared **to 0.8 years in Singapore and 1 year in London.**

Principles of the New Code: Derived from the Core Features of UNCITRAL Legislative Guide on Insolvency Law

The Committee found the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency as a useful benchmark to base the design of the new Insolvency and Bankruptcy law for India. The principles of the new Code on insolvency in India are derived from three core features of **(UNCITRAL) Legislative Guide on Insolvency:**

Firstly, a linear process that both creditors and debtors follow when insolvency is triggered;

Secondly, a collective mechanism for resolving insolvency within a framework of equity and fairness to all stakeholders to preserve economic value in the process;

Thirdly, a time bound process either ends in keeping the firm as a going enterprise, or liquidates and distributes the assets to the various stakeholders.

- These features are common, and most well developed bankruptcy and insolvency resolutions share the same.
- These attributes ensure certainty in the process, starting from what constitutes insolvency, the processes to be followed to resolve the insolvency, or the process to resolve bankruptcy once it has been determined.
- Such a framework has to be implemented in its true essence so that it can incentivise all stakeholders to behave rationally.
- This will lead to speedy recovery and greater certainty about creditors rights in developing a corporate debt market.

Recommendations Of The Committee:

The BLRC Report recommendations are as follows:

- A unified or a single code for all companies, firms, individuals, and partnerships.
- Both the corporate debtor and the creditor shall have the eligibility to trigger insolvency resolution process.
- A strong base for the setting up of Information Utilities (IU) to support efficient implementation, flow of systematic information, and maintaining a strong database to make available all the relevant information to all stakeholders.
- The Adjudicating Authority shall make sure that the procedures are adhered to by the parties
- The insolvency professionals are given the task of assessing the viability of the business
- Proposal to establish a regulator being the Insolvency and Bankruptcy Board of India (IBBI) which shall be efficient and malleable and shall be responsible for the procedural detailing.
- Resolution of stressed assets of a corporate debtor to Commence in two phases, one being the allotment of a calm period meaning a collective negotiation to rationally access the viability of an enterprise, and the other being bankruptcy as an outcome of insolvency resolution.

The Experience Till Now:

With the above background, as detailed in the BLRC Report, the Insolvency and Bankruptcy Code, 2016 was introduced. Since its inception,

the Code has proved to be an effective mechanism for realization of viability of an enterprise by aiding the continuing of a business as a going concern rather than tagging it as failed business.

The Code has come a long way in changing the face of how the country deals with bad loans. The Government seems focused on remedying and updating the law, as is evident from the creation of the Insolvency Law Committees and the weight given to its recommendations and the subsequent amendments being introduced to the Code.

There is a strong focus on plugging all loopholes in the existing framework and working towards implementing national as well as international best practices which would further facilitate smooth inflow and outflow of credit in the economy and boost up the confidence and morale of the investors. It is interesting to note that since the provisions of Corporate Insolvency Resolution Process (CIRP) has come into force on 1st December, 2016, **nearly 1500 cases have been admitted into the CIRP** by the end of December, 2018. It is quite startling to note that in cases where resolution plan has been approved, **realization by Financial Creditors in comparison to liquidation value of the corporate debtors was 249%, while the realization by them in comparison to their claims, was 90%**. Also relevant to cite is the illustration of **Bhushan Steel**, the liquidation value3 amounted to 14,000 crore rupees, whereas the total amount of admitted claims stood at 56,000 crore rupees. However, the amount realized from the resolution plan was 35,571 crore rupees, thereby reducing the expected loss by more than half to 20,500 crore rupees (approx.). This itself speaks volumes of the success of the Code and the improving health of the banking sector.

The **World Bank** released its **Ease of Doing Business Report (EoDBR)** for the year 2019 in October 2018. In just one year, India has escalated its overall **ranking from 100 to 77** among 190 countries. **Under the "getting credit" parameter, India has substantially improved its ranking from 44 in 2017 Report to 29 in 2018 Report, and to 22 in 2019 Report.**

To conclude, the Code is proving to be a great success and is a significant step towards improving the state of the Indian Economy.

THE NEGOTIABLE INSTRUMENTS ACT, 1881
Dishonour of Cheque

By Chakit Singhal, Advocate

These days one of the most litigated issue before the Indian Courts are of Section 138 of Negotiable Instruments Act, 1881 (N.I. Act) which provided for 3 instruments namely Promissory Note, Bill of Exchange and Cheque.

The most common cases which are filled nowadays in courts under Sec. 138 of N. I. Act are based on dishonour of cheques. 3 Basic requirements for filling the case under this Section are:

(i) Cheque has to be presented to the bank within 3 months from the date on which it was drawn or within the period of its validity whichever is earlier.

(ii) The payee or holder makes a demand for payment of money specified in the cheque by giving a written notice within 30 days from the receipt of information from the bank that the cheque was returned unpayed to the drawer of cheque.

(iii) The drawer of the cheque fails to pay the said amount to the payee or holder within 15 days of receipt or notice.

Some of the latest case laws based on the dishonour of cheques for our updates are:

- Accused without himself entering into witness box, seeking sending of cheque to Handwriting expert - Application cannot be allowed. (2019(1) Civil Court Cases 141 (Bombay)

- Cheque issued under and in pursuance of agreement to sell - Payment made in pursuance of such an agreement is a payment made in pursuance of a duly enforceable debt or liability for the purpose of S.138 of N.I. Act. (2019(2) Civil Court Cases 292 (S.C.)

- Company - Director - Directions issued that in all cases where accused is a ‘Company’, before issuing summons to the accused persons trial Court/Magistrate shall direct complainant to produce a copy of Form No.32 and annual Return filed by the Company in

order to determine the persons, who were Directors on the date of commission of the offence. (2019(2) Civil Court Cases 238 (P&H)

- Complaint filed based on second statutory notice - Not barred. (2019(1) Civil Court Cases 299 (S.C.)
- Compromise - High Court after being satisfied that cheque amount with assessed cost and interest has been paid, can close proceedings even in absence of complainant. (2019(2) Civil Court Cases 200 (H.P.)
- Compromise - Deposit of 10% cheque amount - It is for accused to deposit said amount. (2019(1) Civil Court Cases 395 (Rajasthan)
- Condonation of delay - Plea of accused that envelope received did not contain notice and that he did not open the envelope and produced envelope in Court - Order to open envelope calls for no interference. (2019(2) Civil Court Cases 828 (Bombay)
- Friendly loan of Rs.15 lakhs by Income Tax practitioner to his client - Blank signed cheque issued for its repayment - Loan advanced not by cheque or demand draft or RTGS and without obtaining any writing to this effect - Such loan not shown in the income tax return of complainant - Held, (a) Fiduciary relationship between payee of cheque and its drawer would not disentitle payee to the benefit of presumption u/s 139 of the Act, in the absence of evidence of exercise of undue influence or coercion which is not the case of accused in the instant case ; (b) it is immaterial that cheque may have been filled by any person other than the drawer, if the cheque is duly signed by the drawer; (c) Blank cheque leaf, voluntarily signed and handed over by accused, which is towards some payment, would attract presumption u/s 139 of the Act in the absence of any cogent evidence to show that cheque was not issued in discharge of a debt; (d) Fact that loan is not advanced by a cheque or demand draft or a receipt not obtained, makes no difference - Fact that accused had given signed blank cheque to complainant shows that initially there was mutual trust and faith between them - High Court patently erred in holding that burden was on complainant to prove that he had advanced the loan and blank signed cheque was given to him in repayment of the same - Accused convicted. (2019(1) Civil Court Cases 580 (S.C.)
- Issuance of signed blank cheque - Subsequent filling in of an unfilled signed cheque is not an alteration. (2019(1) Civil Court Cases 580 (S.C.)

- It is not necessary that entire cheque has to be filled by accused to raise the presumption - It is sufficient that cheque is signed by accused. (2019(1) Civil Court Cases 141 (Bombay)

- Law as to : (a) Signature on cheque admitted - There is presumption that cheque was issued in discharge of debt or liability; (b) Presumption is rebuttable; (c) Financial capacity to advance loan - There was no satisfactory explanation to question put in cross examination as to financial capacity of complainant - It is a probable defence which shifts burden on complainant to prove his financial capacity and other facts; (d) Complainant failed to prove his financial capacity of lending money - Accused acquitted. (2019(2) Civil Court Cases 518 (S.C.)

- Loan - Cheque issued towards remaining loan amount - Provision of S.138 of the Act is applicable even in a case where cheque is issued for discharge of liability or debt in whole or in part. (2019(2) Civil Court Cases 846 (P&H)

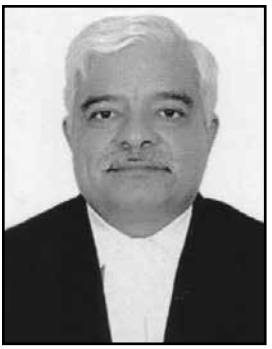
- Notice signed by complainant but without signatures of issuing Advocate - Notice is valid. (2019(2) Civil Court Cases 721 (Tripura)

- Offence by company - Complaint against Director of company without company arraigned as an accused is not maintainable - Company cannot be arraigned as an accused now when notice of demand is not issued to company - Complaint quashed. (2019(1) Civil Court Cases 809 (S.C.)

- Offence cannot be allowed to be compounded without consent of complainant. (2019(2) Civil Court Cases 042 (P&H)

- Voice sample - Recording of mobile phone very basis to succeed in the complaint - Application to take voice sample for analysis by CFSL allowed. (2019(2) Civil Court Cases 696 (P&H)

- Three cases - Same parties - Clubbing of cases - S.219 Cr.P.C. applies only to warrant cases and not to summons cases where no charges are framed. (2019(1) Civil Court Cases 377 (Rajasthan)



Notices and GST

Sushil Verma, Advocate

(1) Show cause notice is the first stage in any investigation in tax laws. In Goods and Services Tax Act, show cause notice is to be issued before any penalty is levied or demand is raised. SCN is also required to be issued while taking action for payment of Goods and Services tax collected from any person which has not been deposited with the Central Government.

(2) The relevant legal provisions affecting show cause notices are mainly : Chapter XII- Assessment (section 59, 60,61,62,63 and 64), Chapter XIV- Inspection, Search, Seizure and Arrest (section 67, 68,69,70,71), Chapter XV- Demands and Recovery (section 73, 74, 75, 76, 77, 78, 79) and Chapter XIX Offences and Penalties (section 122,123,125)

(3) The Revenue must ensure that the Proposal Notice is properly served on the assessee according to the modes of Service prescribed under Section 169 of the Kerala GST Act 2017.

(4) Types of Assessment under GST • Self-assessment • Provisional assessment • Scrutiny assessment • Best judgment assessment • Assessment of non-filers of returns • Assessment of unregistered persons • Summary assessment

(5) Section 61 CGST ACT 2017 :The proper officer can scrutinize the return to verify its correctness of the return and inform the tax payer for explanations on discrepancies noticed in If the officer finds the explanations furnished by the tax payer in satisfactory and pay the tax, interest and any other amount, then the taxable person will be informed and no further action will be taken. section 61 (2) . If the officer finds the explanation is not satisfactory then the proper officer will take action-If the taxable person does not give a satisfactory explanation within 30 days or he does not rectify the discrepancies within a reasonable time ,the officer may conduct Audit of the tax payer u/s 65 , Start Special Audit- procedure u/s 66 , Inspection and Search- the places of business of the tax payer u/s 67 and Start Demand and Recovery provision u/s 73 or 74 - section 61(3)

(6) Assessment of Non-Filers- Section 62 of CGST Act 2017: If the registered taxable person does not file his return (even with a notice under

section 46 is issued to him in the prescribed form) he will be sent a notice u/s 62 (1), even after the receipt of the notice, the tax payer does not file return, the proper officer will assess the tax liability to the best of his judgment in .He will assess on the basis of the available information. The assessment order will be issued within 5 years from the due date of the annual return. If the taxable person files a valid return within 30 days from the above assessment order, then the best judgment assessment order will be withdrawn. Valid return includes return along with payment of all due taxes i.e, late fees, penalty, interest will still be payable in best judgment orders.

(7) Assessment of Unregistered Persons- Section 63 of CGST Act, 2017: When a taxable person fails to obtain registration even though he is liable to do the officer will assess the tax liability for relevant tax periods to the best of his judgment. The taxable person will be sent a show cause notice an opportunity of being heard and allowing a time of 15 days to furnish his reply, if any, before passing the order. The officer can issue assessment order within 5 years from the due date of the annual return for the year when the tax was not paid. If it is found that he did not register when he was liable to, then demand and recovery for unpaid tax will commence and the penalty for not registering will also apply. This shows that even unregistered persons will be assessed to keep a check on their eligibility of not registering.

(8) Summary Assessment - Section 64. This assessment is done when the assessing officer has sufficient grounds to believe that any delay in assessing a tax liability can harm the interest of the revenue. To protect the interest of the revenue, he can pass the summary assessment under section 64(1) on the basis of evidence of tax liability. The prior permission of Additional/Joint commissioner is required. It is completed on a priority basis without the presence of the taxpayer because the delay in such assessments may lead to loss of revenue. Summary assessment is usually done in cases of defaulting or absconding taxpayers. The taxpayer can apply in FORM GST ASMT- 17 for withdrawal of the summary assessment order within 30 days from the date of receipt of order or he proves to the Additional/Joint Commissioner that the order was wrongly passed, and then the order will be cancelled under section 64(2). The Additional/Joint Commissioner can on his own, cancel the order if he is of the opinion that it was wrongly passed or reject the application in FORM GST ASMT- 18. After this, demand and recovery provisions u/s 73 & 74 will be applicable under section 64(2).

Often summary assessments are carried out in situations where it is not possible to identify the taxable person concerned in a case of supply of goods. In such cases, the person in charge of the goods will be deemed to be the taxable person. He will be assessed and held liable to pay tax and amount due under summary assessment.

This provision is not applicable for services.

(9) Both the authorities i.e. SGST and CGST have concurrent jurisdiction and there is not bar on CGST authorities investigating the matter even though the tax payer is registered with the State authorities.

(10) Directorate of Revenue Intelligence or DGCEI have all India character and they have jurisdiction on all the taxpayers in India.

(11) Exports/imports and their valuation – stupidly this issue is being picked up by the GST authorities without authority of law.

(A) Most common reasons for GST Notices

1. Mismatch in details reported between GSTR-1 & GSTR-3B: scrutiny notice

2. Differences in Input tax credit claims made in GSTR-3B vis-a-vis GSTR-2A

3. Delay in filing of GSTR-1 and GSTR-3B consecutively for more than six months

4. Inconsistent declaration in GSTR-1 and e-way bill portal

5. Non-reduction of prices due to reduced GST Rates with effect from the date notified by CBIC. Thereby, a default is committed by taxpayer (seller) for non-passing of the benefit of reduced prices (or GST rates) to the ultimate consumers. The practice is known as profiteering. Several anti-profiteering measures are taken by GST authorities to address the default.

6. Non-payment of GST liability (tax) or the short-payment of the tax with or without the intent to defraud: show cause notice (SCN)

7. GST Refund is wrongly made with or without the intent to defraud: show cause notice (SCN)

8. The Input tax credit is wrongly availed or utilised.

9. Where a business is liable but has failed to obtain GST registration and not discharged the tax and other liabilities under the GST Act

10. Inconsistencies in reporting of Exports in GSTR-1 with information available on ICEGATE. For example, Shipping Bill or the Bill of export lodged on ICEGATE but not reported in GSTR-1

11. For furnishing any information related to records to be maintained by a taxpayer

12. Conduct of the audit by tax authorities

13. Where information return was required to be furnished before tax authorities, but not submitted within the time limit stipulated.

(B) GST notice shall be served on a tax payer depending upon the motivation of the tax payer in evading taxes.

Case I: No Fraud – And the motivation was not to evade taxes: This section applies to non-fraud cases wherein:

- Tax is unpaid/short paid by the tax payer or,
- Refund is wrongly made by him or where,
- Input tax credit has been wrongly availed/utilized

The proper officer (i.e., GST authorities) will serve a show cause GST notice on the taxpayer. The tax payer will then be required to pay the amount due, along with interest and penalty.

Case II : Fraud - With the intention to evade taxes : This section applies to cases when there is reason for occurrence of fraud/ or involves any willful misstatement or suppression of facts and the intention was clearly to evade taxes where as a result of which:

- Tax is unpaid/short paid by the tax payer or,
- Refund is wrongly made by him or where,
- Input tax credit has been wrongly availed/utilized

Possible Defense:

- Don't avoid the receipt of SCN. If such notice is being served, there is no point in avoiding receiving it. First it has to be received and then contested / replied. Non-receipt is considered as a service.

- Your consultant shall decide if the notice is time barred and if it is so a suitable reply shall have to be put on record in writing.

- In case you are contemplating any SCN, and you feel that GST has to be paid, it would be advisable to pay GST plus interest as per law before SCN is issued. SCN cannot be issued for the amounts already paid.

- Whenever SCN is intended to enhance the liability of assessee or reduce the amount of refund, an opportunity of being heard is necessary and it cannot be denied by the revenue.

- You can challenge the validity and legality of SCN served on you on the basis of facts, time or even jurisdiction.

- SCN is always issued in writing. There is nothing like GST notice.

- SCN must mention amount demanded any SCN without amount is not valid. Also, amount of proposed penalty should be mentioned.

- Department cannot go beyond what is mentioned in SCN and adjudicate an issue which is not a subject matter of SCN.

- SCN is required to be replied within the stipulated time mentioned in the notice and must be replied accordingly.

- While efforts must be made to comply with the same, it would be advisable to seek extension of time or adjournment which is normally granted.

- Try to provide reply or explanation to all points covered in SCN and wherever necessary, substantiate the reply with documentary evidences.

- Detailed reply may be submitted along with earlier decided case laws.

- A list of evidences on which you are relying must also be submitted.

- Even where you have submitted a detailed and convincing reply to SCN, you should seek the option of personal hearing and carve to alter or amend or modify your reply to show cause at any stage during adjudication proceedings.

- Where penalty is levied or demand is confirmed or refund is revoked, you can always seek alternative measures for relief that there was a reasonable cause which prevented you from compliance of provisions.

- Orders issued against show cause notice are appealable.

- If you are not in a position to represent your case personally, better hire a professional to guide you in drafting a reply to SCN and represent your case at adjudication stage.

- SCNs have to be properly defended and argued for this stage builds the foundation for further actions.

(C) HSN classification and interpretation disputes.

(D) Interest not paid disputes.

(E) Input tax credit claimed in violation of Setion 16 provisions read with Section 17

(F) Wrong claims for export of goods or export of services.

(G) Disputes of intra state and interstate supplies.

(G) Related Party transactions and valuation issues.

The above is a simple analysis of the notices that you may receive.

GST: Whether it has lived up to the expectation?

Puneet Agrawal

Hon'ble Prime Minister, Sh. Narendra Modi's remarks at the Central Hall of Parliament on 30.06.2017 when Goods and Services Tax regime was set to be introduced in our country w.e.f. 01.07.2017 were:

> I request those who have fears to dismiss them….Similarly, if we try to adjust to the new system we will definitely be able to integrate ourselves with it.…Let the GST be carried forward till the point it has positive impact on the world's economy.

The Hon'ble Prime Minister led Government initiated holistic tax reforms with the introduction of nationwide Goods and Services Tax. With a mandate that put development over everything else, this Government while passing law bringing GST allayed fears of the opposition that GST was being brought in haste.

Step forward to July 2019, with the country celebrating two years anniversary of GST reforms, several systemic lacunaes have put a blot on the administration of the biggest nationwide reform. The Administration has been unable to streamline the return in past two years.

The very purpose of GST is to integrate State economies and boost overall growth by creating a single, unified Indian market to make the economy stronger. The scheme of law, aiming "One Nation One Tax" is being designed in such a manner that registered dealer's across the country have to file the details on a single web based portal with respect to their business.

There is high degree of uncertainty caused by the non-functional common portal, which is creating hurdles in every aspect of interaction of registered dealer with the common portal, as the functioning of the common portal is full of system lacunaes, causing inability to the registered dealer to effectively comply with the statutory provisions, even if they intend to so comply with the same.

That following issues are being faced by the registered dealers under GST:-

1. The system does not allow rectification of returns and is leading to divergence between figures in GSTR-3B and GSTR-1, as also divergence with figures in the books of accounts. GSTR once filed cannot be revised. There is no mechanism for revision of GSTR-3B to rectify any kind of error. There is complete system failure and law is not followed in letter and spirit.

2. The entire GSTR framework was based on invoice-wise matching system. The alternative mechanism put in place is to file monthly return in GSTR-3B on totals basis, and Form GSTR-9/9A requires additional information to be filed by the registered dealer, which were not required to be maintained by the registered dealer because earlier no such information was required to be submitted in any of the returns.

3. The Administration has cut itself from reality as the dealers are facing glitches on a regular basis as is evident from filing of GSTR Form 9C. The dealers are unable to fill GSTR Form 9C because of the generation and signing problem of Json file.

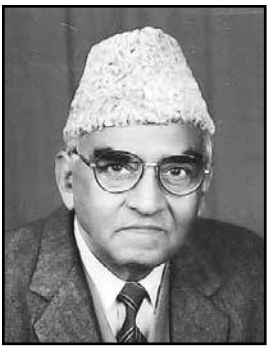
4. That deadline for filing Annual return Form GSTR Form 9 for the period 2017-18 has been extended to 31.08.2019 and that on portal, deadline for filing annual return for the period 18-19 has already been uploaded on the common portal.

5. That GSTR Form 9 is made available to the dealers only when deadline of filing is near and that makes it difficult for registered dealers

6. In case of refund for exporters, who have paid IGST on exports and have accidently declared it under head of domestic sales under GSTR3B in column 3(a) instead of export sales with payment of IGST under column 3(b) but have correctly shown the same as export sales in column 66 of GSTR-1. The details are not transmitted by the GSTIN. There is no mechanism available where an application can be made to GSTIN for correction of details in 3B and claim refund.

1st July 2017 marked a decisive turning point, in determining the future course of the country. Hon'ble PM remarked that just as Sardar Patel had ensured political integration of the country, GST would ensure economic integration. But the question still remains whether the Administration has lived up to the vision of the Hon'ble Prime Minister in promising a worry free

administration of indirect tax laws and whether the return filing mechanism has been streamlined enough to iron out the technical glitches and errors that are being faced by registered dealers. These issues are still faced by the dealers and the Administration needs to strengthen the framework in this regard.



Fairness in Quasi-Judicial Proceedings is Sine Qua Non

H.L.Taneja, M.A., LL.B. Advocate

Introduction

The Hon'ble Supreme Court in its judgment in the case of Swadeshi Cotton Mills v. Union of India[1] observed :-

> "It is trite law that even doing what is right may result in unfairness if it is done in the wrong way."

1. Distinction between judicial and quasi-judicial proceedings:

The Hon'ble Delhi High Court in its judgment in the case of Gee Vee Enterprises v. Addl. Commissioner of Income-Tax, Delhi & Ors[2] observed as under :-

> "…… The position and the function of the Income-Tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the of the pleading and evidence which comes before it. The Income-Tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further enquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an enquiry."

2. Nature of duty of the taxing authorities :

> "The taxing authorities who have certain duties assigned to them for the imposition and collection of tax, are not courts of law[3]; nor are they part of the judiciary[4]. But, in the process of collection of tax they have to perform many duties which are of quasi-judicial nature and certain other duties which are administrative duties. They follow a pattern of action which is considered judicial. They have to adhere to norms similar to that of a court. They have the trappings of a court[5]. The Supreme Court has, in its judgment in

State of Kerala Vs. K.T. Shaduli Yusuff[6], crystallized the nature of duties of such authorities in the following words:-

"Tax authorities entrusted with the power to make assessment of tax discharge quasi-judicial functions and they are bound to observe principles of natural justice in reaching their conclusions. Although a taxing officer is not lettered by technical rules of evidence and pleadings and he is entitled to act on materials which may not be accepted as evidence in the court of law that does not absolve him from the obligation to comply with the fundamental rules of justice which have come to be known in the jurisprudence of administrative law as principles of natural justice."

3. Article 265 of the Constitution :

This Article has been explained by the Hon'ble Supreme Court in its judgment in the case of Corporation Bank v. Saraswati Abharansala and Anr.[6A]

"21. Article 265 of the Constitution of India mandates that no tax shall be levied or collected except by authority of law.

22. In terms of the said provision, therefore, all acts relating to the imposition of tax providing, inter alia, for the point at which the tax is to be collected, the rate of tax as also its recovery must be carried out strictly in accordance with law.

23. If the substantive provision of a statute provides for refund, the State ordinarily by a subordinate legislation could not have laid down the tax paid even by mistake would not be refunded. If a tax has been paid in excess of the tax specified, save and except the cases involving the principle of "unjust enrichment", excess tax realized must be refunded. The State furthermore is bound to act reasonably having regard to the equality clause contained in article 14 of the Constitution of India."

4. **Judicial Discipline :**

"In its judgment in Vishnu Traders Vs. State of Haryana[7], the Hon'ble Supreme Court has, inter-alia, held that the need for consistency of approach and uniformity in the exercise of judicial discretion respecting causes and the desirability to eliminate occasions for grievances of discriminatory treatment require that all similar matters should receive similar treatment, except, where

factual differences require different treatment. So that, there is assurance of consistency, uniformity, predictability and certainty of judicial approach. The same was the ratio of the Apex Court in an earlier case[8], wherein it had been held, "It is essential that there should be continuity and consistency in judicial decisions and law should be certain and definite. It is almost as important that the law should be settled permanently as that it should be settled correctly. In another judgment in Ramchandra Ganpat Shinde & Anr. Vs. State of Maharashtra[9], the Hon'ble Apex Court held, "Respect of law is one of the cardinal principles for an effective operation of the Constitution, law and the popular Government. The faith of the people is the source and though ours is a nascent democracy which has now taken deep roots in our ethos of adjudication…. Be it judicial, quasi-judicial or administrative as hallmark."

5. **Fairness in action :**

There is a catena of judicial decisions where in the Courts of law have emphasized on fairness in action :-

(a) Supreme Court judgment in Commissioner of Income-tax. West Bengal Vs. Simon Carves Ltd.[10]

"The taxing authorities exercise quasi-judicial powers and in doing so they must act in a fair and not a partisan manner. Although it is a part of their duty to ensure that no tax which is legitimately due from an assessee should remain unrecovered, they must also at the same time not act in a manner as might indicate that scales are weighed against the assessee."

(b) Bombay High Court judgment in Anand Issardas Motiani Ors. Vs.Virji Raid[11]

"Now, we must say that fairness is all fundamental to justice. Fairness at the beginning, fairness during the proceedings and fairness at the conclusion of a judicial proceeding is the sine qua non of judicial administration. Justice in fact is another name of fairness."

(c) Madras High Court judgment in Industrial Rubber Products Vs. Commissioner of Income-tax & Ors.[12]

"Even in administrative acts, the shift is now to a broader notion of fairness. An administrative order which involves civil consequences

must be made consistently with the rule expressed in the Latin maxim audi alteram partem."

(d) Supreme Court judgment in U.P. Financial Corporation Vs. M/s. Gem Cap (India) Ptv. Ltd. & Ors.[13]

"The obligation to act fairly on the part of the administrative authorities was evolved to ensure the Rule of Law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice which the quasi-judicial authorities are bound to observe."

6. **Observance of the Principles of Natural Justice :**

(a) This is a well ploughed subject but, quite often not properly digested. Mere issuing a show cause notice and hearing the person does not meet the requirement of law. I can do no better than to reproduce what the Hon'ble Kerala High Court observed in its judgment in M.Appukutty Vs. Sales Tax Officer, Kozhikode.[14] This is what their Lordships observed to elucidate the scope of this most vital aspect of the law :-

"For over a century, Courts have been at pains to lay down principles to guide authorities who have to determine questions in a quasi-judicial manner and the insistence has always been on adherence to the principles of natural justice. This, of course, requires a fair opportunity being afforded to a person charged or a person to be taxed to show cause against the proposal and to state his case. It appears to me that this does not end here. By merely telling a person of the proposal and giving him a chance to explain, the principles of natural justice are not satisfied. If giving a mere opportunity to show cause and to explain would satisfy the principles of natural justice the notice to show cause becomes an empty formality signifying nothing, for, after issuing the notice to show cause, the authority can decide according to his whim and fancy. The judicial process does not end by making known to a person the proposal against him and giving him a chance to explain but extends further to a judicial consideration of his representations and the materials and a fair determination o the question involved."

(b) Law is also settled that the need to assign reasons while passing a quasi judicial order is an extended limb of the principles of natural justice.[15] Law is also settled that a finding without reasons is no finding in the eye of law. Recording of reasons is therefore the essence of a quasi-judicial

order[16]. Even otherwise, orders passed by the quasi-judicial authorities being appealable, reasons must be given.[17]

(c) Yet another limb of the Principles of Natural Justice is to provide reasonable opportunity. What is 'reasonable opportunity' is also no longer res-integra. That the reasonable opportunity must be effective and not illusory is well-known. But the ingredients of a 'reasonable opportunity' are crystallized in a judgment of the Supreme Court in Khem Chand Vs. U.O.I. wherein, their Lordships observed as under[18]

> "He must not only be given an opportunity but such opportunity must be a reasonable one, he should be informed about the charge or charges leveled against him and the evidence by which it is sought to be established."

7. Speedy disposal of cases :

The Hon'ble Supreme Court in one of its judgments[19], observed, "Hasty justice is step mother of misfortune." But, from this, one cannot and should not construe that there should not be speedy disposal of cases after hearing. It is a stark fact that there is quite often delay in disposal of cases; nay, some of the authorities have, in the past, left cases which had been heard and kept for orders, undisposed of. In this respect, the following observations made by the Hon'ble Supreme Court in Income Tax Officer Vs. Ramnarayan Bhojanagarwala, are quite apposite[20] :-

> "law must move quickly not merely in the courts but also before Tribunals and delay amounted to indiscipline subversive of the rule and law and defeats the whole purpose of creating quasi-judicial tribunals."
>
> It is felt that where an authority, on the eve of his transfer from the department has not been able to dispose of the cases which had been heard and kept for orders, he should keep/ give a note about these cases to his successor, so that, the latter could hear and dispose of those cases on priority basis."

8. **Exercise of discretionary power :**

(a) The Hon'ble members are well aware that there is enough judicial guidance available on this subject and, therefore, this aspect does not beg for much elucidation. Suffice it to say that statutory powers must be exercised bonafide, reasonably without negligence and for the purpose for which they were conferred.[21]

(b) The law on the subject is fully explained by Lord Halsbury L.C. speaking for the Judicial Committee in Susannah Sharp Vs. Wakefield in the following words[22] :-

> "……. When it is said that something is to be done within the discretion of the authorities that the something is to be done according to the rules of reason and justice, not according to private opinion but according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself."

(c) In a judgment in Vijay Power Generators Ltd. Vs. Commissioner, Sales-Tax,[23] the Hon'ble High Court of Delhi has given guidelines on this subject in the following words :-

> "It is to be noted that the prescribed authority is conferred with discretion to dispense with pre-deposit conditionally or in full or in part. Such discretion is governed by a maxim "Discretio est discermere per legen quid sit justim" (Discretion consists in knowing what is just in law) Discretion in general is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution, to discern between falsity and truth, between shadow and substance, between equity and colourable glosses and pretences and not to do according to the will and private affections or ill will. It has to be done according to the rules of reasons and justice, not according to private opinion. it has to be done according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular."

(d) The discretion conferred by a statue or a statutory rule should invariably be exercised by the authority who is called upon to exercise it. The Hon'ble Madras[24] and Allahabad High Courts[25] have held in the same vein that where a statue invests a discretionary power in a public officer it is normally for exercise in favour of the person concerned unless there is some sound and relevant reason for denying the benefit of the discretionary power. Last but not the least, the duty and obligation of the statutory authority is to adhere to the requirement of the statue and no extraneous matter ought to be taken note of. The creatures of the statue have to follow the rigours of law and no extraneous matter ought to be taken into consideration in interpreting a taxing statue.[26] A statutory functionary has to act within the four corners of the statue or not at all."

9. Decided Cases :-

(i) The majority judgment by the Hon'ble Supreme Court in McDOWELL & Co. Ltd. Vs. CTO[27], held speaking through Ranganath Misra J.

> "Tax planning may be legitimate provided it is within the framework of the law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honorable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges."

(ii) The Hon'ble Bombay High Court in its judgment in the case of Anand Issar Das Motiani & Ors. v. Virji Raisi[28]

> "17. Now, we must say that fairness is all fundamental to justice. Fairness at the beginning, fairness during the proceedings and fairness at the conclusion of a judicial proceeding is the sine qua non of judicial administration. Justice in fact is another name of fairness. It requires that before the Court makes up opinion one way or the other, particularly with regard to any party or a member of the profession, such party or a member of the profession should have an adequate notice and an opportunity of being heard."

(iii) Supreme Court judgment in the case of Orient Paper Mills Ltd. v. UOI[29] :

> "If the power exercised by the Collector was a quasi-judicial power – as we hold it to be that power cannot be controlled by the directions issued by the Board. No authority however high placed can control the decision of a judicial or a quasi-judicial authority."

(iv) Gujrat High Court judgment in the case of Chokshi Metal Refinery Vs. CIT, Gujrat-II[30]

> "Officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a tax payer in every reasonable way, particularly in the matter of claiming and securing relief and in this regard the Officer should take the initiative in guiding a tax payer where proceedings or other particulars before them indicate that some refund or relief is due to him……"

(v) Allahabad High Court judgment in the case of Shyam Cold Storage Vs. Sales Tax Officer, Saharanpur[31]

"It is however well settled that a person cannot be made to suffer on account of laches or delay on the part of public authorities."

(vi) Supreme Court judgment in the case of Pannalal Binjraj and Anr. Vs. The Union of India and Ors.[32]

"A humane and considerate administration of the relevant provisions of the Income-tax Act would go a long way in allaying the apprehensions of the assesses and if that is done in the true spirit, no assessee will be in a position to charge the Revenue with administering the provisions of the Act with "an evil eye and unequal hand."

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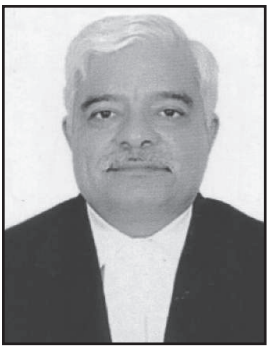
1. AIR 1981 SC 818-844
2. (1975) 99 ITR 375-386
3. Jagannath Prasad & Anr.Vs. the State of U.P.(1963) 14 STC 536 (SC)=AIR 1963 SC 416
4. Smt.Ujjam Bai Vs. the State of U.P. AIR 1962 SC 1621=(1963) SCR 778
5. Agarwal and Bros. Vs.Commissioner, Sales-Tax, U.P. (1974) 34 STC 53 (All.)
6. (1977) 39 STC 478 (SC)=AIR 1977 SC 1627=(1977) 2 SCC 777

6A. (2009) 19 VST 84

7. (1995) Supp.(1) SCC 461=STI 1993 SC 141
8. Distributors Baroda Pvt.Ltd. Vs. U.O.I. & Ors. 1985 UPTC 1105 (SC)
9. AIR 1994 SC 1673-1680 (p.13)
10. (1976) 105 ITR 212 (SC)
11. AIR 1984 (Bom) 39-45 (p.17)
12. (1992) 194 ITR 141
13. AIR 1993 SC 1435-1439 (p.11)
14. (1966) 17 STC 380-387 (p.14)
15. General Electrical Service Co. & Anr. Vs. State of Bihar & Ors. (1990) 76 STC 134 (Patna)
16. Commissioner, Sales-tax, U.P. Vs. Laxman Prasad Om Prakash, Agra 1984 UPTC 558, Bharat Brick Kiln Vs. The Commissioner, Sales-tax (1986) 61 STC 368 (All.) etc.
17. Mahahir Prasad Vs. State of U.P. AIR 1970 SC 1302-1304
18. AIR 1958 SC 300=(1958) SCR 1080-1095
19. Mithilesh Kumari & Anr. Vs. Fateh Bahadur Singh & Anr. JT.1991 (2) SC 75-82 (para 15)
20. (1976) 103 ITR 797 (SC)
21. The Sales Tax Officer, Trichur Vs. Sankaran (1986) 61 STC 370-371 (Kerala)

22. (1891) AC 173-179 (HL) in (1977) 108 ITR 695-706 (AP)
23. STI 2000 (Delhi) Hc 13-18
24. R.P. David & Ors. Vs. Agricultural ITO & Anr. (1982) 86 ITR 699 (Madras)
25. Prem Chand Suresh Chand Vs. Sales Tax Tribunal (1992) 84 STC 214-216 (Bottom) (Allahabad)
26. Shri Shiv Kumar Bajaj Vs. Addl. Commissioner, C.T., W.B. (1986) 63 STC 354 (Calcutta)
27. (1985) 59 STC 277
28. AIR 1984 (Bom) 39-45 (para 17)
29. AIR 1969 SC 48 in (2004) 137 STC 318-325
30. (1977) 107 ITR 63-71
31. (1976) 38 STC 386
32. (1957) 31 ITR 585-597=AIR 1957 SC 397



ARE WE NOW DETERMINED TO KILL GST IN INDIA?

Sushil Verma, Advocate

Rule 36(4) CGST Rules – One more step towards this destructive self-goal

1. All GST Revenue Authorities are now in an epic war against the alleged fraudulent tax invoices being issued to claim fake input tax credit and as per informal reports the evasion, on this score alone, as per GST Authorities now runs into tens of thousands of crores. And this continues unabatedly and perhaps will continue as the dispute between tax-payer and tax-collector is infinite.

   The Revenue shortfall is great and Central Government is unable to compensate the States and as per reports, few States even may approach Supreme Court for claiming their dues as per constitutional mandate that clearly laid down that States will be compensated for all the revenue shortfall compared to a base year with an assured growth of 14% per year – the growth has not happened and is not likely in the coming years especially with tremendous slow down in the Indian economy?

2. The evasion of taxes is always existed and shall always exist. The GST authorities especially the State authorities have no clue whatsoever about their revenue collections and how highly skewed their revenue collections are? I can say the same for central authorities who are simply on a spree to arrest taxpayers and professionals.

3. The real reason is complete lack of clarity in law and to complicate further already highly complicated law hundreds of notifications are being issued with or without authority along with hundreds of circulars. The result is complete chaos and mess that these notifications and circulars have created and this unending process has caused immense damage to the growth of businesses and also have made their stakeholders including professionals to “learn and de-learn” at the same time.

4. Imagine our Commerce Minister Sh. Piyush Goyal stating that “to achieve objective of Indian economy at five trillion dollars in next

three years, the service industry will contribute between 60 to 65%!" This means our economic model will not be a model based on manufacturing but predominantly we shall be a service oriented economy like tourism, medical, spiritual religious, BPOs and call centers etc.

And due to flawed provisions in the Act and Rules that are not in sync with each other and lack of clarity of law – the authorities are shamelessly denying genuine input tax credits to this very service sector like call centers, back-up office operations, BPOs and other so called "intermediaries" and further people are being shown horrors of section 132 dealing with four non-bailable offences? The complete lack and mess of legal dispute resolution machinery (completely ineffective and highly biased advance ruling authority mechanism), untrained First Appellate Authorities and with still no GST Tribunal in place, we are not only killing the manufacturing industry but also making serious attempts to ensure the service industry also shifts to Mauritius or Vietnam or China, who are serious competitors and where such a GST confusion does not exist. In addition to above, our GST return system, after two years is still at the threshold and not a single complete return has been filed.

The complete chaos about returns and Form-9, the continuously less collection of GST, huge litigation and non-giving of refunds – as if these were not enough to kill GST for last two years; now comes Rule 36(4) of CGST Rules.

In my view, this is the final nail in the coffin which the Authorities are trying to penetrate into the GST System.

5. Vide Notification 49/2019 dated 9th October, 2019, the claim of input tax credit has been restricted in the hands of recipient where the supplier has not filed GSTR-1 Form showing the tax payments on the supplies made by him to the recipient. This new condition is further in addition to enormous conditions specified in section 16 of the CGST Act. Section 16 provides input tax credit available only to registered tax-payers for receipt of supplies which are used in the course or furtherance of business - a phrase not defined in the Act and, in my view, likely to cause lot of problems in times to come. Further possession of tax invoice, the proof of receipt of supplies, actual tax payment on the supplies made by the supplier, furnishing of a valid return u/s 39 by the recipient and payment of invoice value along with tax thereon within 180 days by the supplier.

6. Now Rule 36(4) which may be within the legal domain of the lawmakers provides that input tax credit for those supplies which are not mentioned in GSTR-1 **shall not exceed 20% of the eligible credit available to the recipient where details of supplies have been uploaded by the supplier**.

   I wonder whether the person who recommended such a horrible provision even understood the wide ranging ramifications of this Rule. Lakhs of invoices are issued by suppliers that get reflected in GSTR-2A. Many invoices are mentioned in the return or taken by the recipient in next tax period. Mr. Lawmaker, did you ever realize how will the taxpayers or the professionals dealing with this will ever be able to reconcile such supplies which are not uploaded by tens of suppliers a recipient deals with. In other words, the taxpayer and the professional shall be continuously engaged in the process of reconciliation until all the invoices which were not uploaded by the supplier in the relevant tax period appear in subsequent GSTR-2A seen by the recipient. What a waste of effort and time!

7. Like in the past indirect tax regime, the GST Authorities, rather very stupidly are holding the recipients or buyers to ensure the tax is paid by the supplier. There is no action against the supplier by any kind of notification. Under any law of the world such kind of paradoxical provision are created to harass the seamless inflow of tax credits to the recipients.

   Now the High Courts are ceased with this notification and I am more than sure such an atrocious notification will not stand the test of law and will be quashed. Now if this is quashed, lakhs of taxpayers will have to rework their input tax credit availability.

8. Asking the taxpayers to make cash payments beyond 20% of the eligible input tax credit for supplies not uploaded by the supplier is a huge financial set back to the already very poor business environment. It will contract the economy further as people will be unwilling to pay cash and what they have already paid the tax to the supplier, who is going scot free.

9. Now one more Circular dated 11th November, 2019 clarifying restrictions with regard to input tax credit in terms of Rule 36(4) has been issued and it is clarified that the Circular of 9th October, 2019 should be read in consonance with the said Circular. The beauty is the restriction is not imposed through the common portal of

GST but the responsibility has been cast on the taxpayer that he must avail the credit and follow Rule 36(4) on a self-assessment basis.

The taxpayer has to calculate "the eligible tax credit" i.e. those invoices on which input tax is not available under any provision of the law including would not be considered for calculating 20% of the eligible tax credit.

10. The Circular refers section 37(1) of CGST Act. In other words, the Circular will be applicable to all the tax-paying documents and the taxpayer will have to ascertain the same from auto-populated Form GSTR-2A as available on the due date on filing of Form GSTR-1 under the section.

The complex issue of quarterly returns u/s 37(1) where the GSTR-1 shall be uploaded after a period of three months will further cause problems and complications and the Circular has gone totally silent on this issue.

11. The recipients who wish to claim input tax credit on taxes already paid by them to their suppliers are not entitled to claim input tax credit unless they match the details of their own self-assessed input tax credit in their GSTR-3 Form on the basis of auto-populated data available on GSTR-2 returns.

And Rule 36(4) is operational for only those taxpaying documents on which the recipients claim input tax credit after October 9, 2019 and my friends, GST is a self-assessed law. The onus to follow this Rule 36(4), till it is quashed by the Courts, is on the taxpayers and if it is not complied with, the taxpayers will face additional liabilities in addition to tax for interest & penalty.

In Economic Times of 27th September 2019 Sh. Piyush Goyal has observed that 65% of a dream five trillion economy by 2022, shall be the service industry – Sir, GST will ensure to kill this dream as all multinational service providers are already thinking of shifting their bases to other Asian countries where they do not have a GST that we have framed.

Undoubtedly the above highly biased and illegal notifications that have supplemented the law enacted by the Parliament have been challenged and Gujarat High Court has already issued notices to decide validity of these notifications. My view is that notwithstanding

the Court decision, the authorities in order to take shelter and to show that GST have a very ineffective and flawed GST law and for highly tax terrorized administration both for revenue authorities and for tax-payers are committing real mistakes and entire GST paying community is being subjected to a very expensive litigation. Imagine more than 50 High Courts judgments have been passed against GST law and I have not seen any SLP filed before Supreme Court or if filed where Supreme Court has stayed the operation of any High Court judgment on a legal issue. If this continues, I am afraid; GST regime will need a complete overhaul. It is difficult to replace GST system that will exist in India but this kind of law as is being administered by authorities and the understood by professionals is going to put Indian economy into a highly complex and underperforming economic situation and this will thwart our attempts to achieve a dream of five trillion dollars economy.

WAY FORWARD : In addition to continuous follow up with the information on GST portal for suppliers not uploading supplies in their GSTR-1 and follow up with them for compliance, I suggest for all supplies a taxpayer receives in the course of furtherance of business, let him hold back the tax payment till the supplier M.No. : 1834 complies with the law. Sounds difficult but in big cases there is no other way out otherwise huge tax liabilities will be faced by taxpayers and since it is a commercial contract between the supplier and the recipient, there is no law that can prohibit withholding of tax payment unless the supplier comply with the law. Yes, it may hurt “supply chain”, but taxpayers have “no way out”.

Restriction in Availment of Input Tax Credit – Complete Analysis

CA. (Dr.) Gaurav Gupta

Vide Notification No. 49/2019 – CT dated 9.10.2019, Rule 36(4) has been inserted in Central Goods and Services Tax Rules, 2017 to provide that Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 20 per cent. of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37.

In simple terms, it was understood that Input Tax Credit (ITC) shall be restricted to 1.2 time of amount as reflecting in GSTR 2A of the recipient. The Rule amendment was brought in without any corresponding change in the Central Goods and services Tax Act, 2017.

Is Rule 36(4) intra vires?

The new sub-rule provides as under:

– ITC ***to be availed*** by a registered person

– Such ITC should be ***in respect of*** invoices or debit notes, ***detail of which have not been uploaded*** by the supplier under Section 37(1)

– A restriction is imposed on such ITC ***to the extent of 20% of the eligible ITC*** available in respect of invoices or debit notes the ***details of which have been uploaded*** by the suppliers under Section 37(1)

It is hereby clarified that the ***details of*** invoices or debit notes ***which have been uploaded*** by the suppliers under Section 37(1) uploaded by a taxpayer in Form GSTR -1 are available to the recipient registered person in his GSTR - 2A. And thus, every registered taxpayer as a buyer knows as to detail of how many invoices or debit notes have been uploaded by the supplier.

At the outset, it is important to state that ITC under CGST Act is not a set of individual provisions but it is a scheme of closely knitted sections which lays down a complete manner of entitlement, availment, reversal, and add back of ITC which legislature wants a taxpayer should take. Thus, the law makers were of the view that the entire scheme has to be followed in the manner prescribed else the entire eco system is compromised. However, since GSTR 2 and GSTR 3 could never be effected, and provisions relating thereto still exists, there is a big handicap to which the entire system of GST ITC was exposed to. However, even though this system has become vulnerable to many issues, yet, in the opinion of the author, still the entire Act as it stands today does not provide liberty to the subordinates to provide for any rule which violates the very fabric of ITC made from interwoven sections.

Section 16(1) provides that every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

Thus, the Section provides for two separate events, one of entitlement to take credit and second the manner in which it shall be credited in his electronic Credit Ledger. While Rule 36 provides for the condition of entitlement, Section 49 read with Rule 86 provides for as to how much ITC shall be credited to the electronic credit ledger. There is a big difference between entitlement and crediting of amounts to the ledger. Any restriction on entitlement should be brought by way of Section 16, while any restriction on the crediting of such amount in the electronic credit ledger should be brought vide Section 49. The Sub Rule provides for the restricting the entitlement itself (as it forms part of Rule 36), which means that ITC which was otherwise available to him has been made ineligible merely on account of non uploading of details by the supplier. The sub rule has been brought in the very rule (Rule 36) which provides for the conditions of entitlement and such provision has been introduced ignoring all other provisions of Act. Section 37, 38, 41 and 42 provides for manner in which ITC not uploaded by the supplier shall be dealt with. This manner of restricting ITC was never warranted by the legislature when we read the other Sections as stated above. The legislature provided for availment of self assessed ITC even where the details are not uploaded by the supplier. Thus, the legislature never intended to restrict the ***entitlement*** of ITC in the first go itself in terms of details not uploaded by the supplier. The Act provides for mechanism which allows system to communicate such non uploaded

invoice to both parties and gives them a chance to rectify the same. In case if the same is not rectified within the given time frame, then such ITC is added to the output liability of such person. Thus, looking into the entire scheme it seems that the provision of sub rule 4 to Rule 36 travels beyond the Act and is thus, ultravires.

Further, the legislature has specifically introduced Section 43A providing for such restriction based on invoices upload and thus Section been brought as a non obstinate clause and overriding Section 37, 38, 41, 42 and 43 of the Act. Thus, the law makers were clear while drafting this section that in order to bring such a restriction they would need to provide overriding powers to the section over many other sections. However, this section is yet not notified and effected. Thus, this very section itself lays down that the manner in which sub rule (4) has been brought in Rule 36 is improper and goes beyond the scheme of the Act.

Secondly, a reading of Rule 36(4) gives an impression to the reader that such Rule is to be seen at the time of availing ITC (in credit ledger) and thus, this is a point concept. In other words, the entitlement is decided by the sub rule at that point when he is availing credit in his return. Thus, if an ITC is not reflecting in the form GSTR 2A at the time of availing, it shall become ineligible. Nowhere the sub rule provides for any carry forward of balance eligible ITC, nor it allows the registered taxpayer to avail such ITC when such ITC is updated in his GSTR 2A upon filing of details by the supplier. This means an ITC is lost forever. If we read this otherwise, whereby the ITC is availed only to the extent of 20% and balance is carried forward in books, then how come this provision provides for entitlement. There is a fine difference between entitlement (which Rule 36 provides) and time at which such entitled ITC can be taken. It is not entitlement but controlling the time of availment. Entitlement is the soul of ITC and not a mere procedural part.

Having discussed the new sub rule, it is also very important to question as to whether at this point when the new return system is due to be introduced from April 1, 2020, we have brought a new sub rule requiring a lot of resources for its implementation in terms of training the manpower filing the return and also the technology to allow the restriction, carry forward and management in ITC register and GSTR 2A for a taxpayer. Thus, we have defocused the entire tax base from their preparation of new return to the adoption of this new sub rule. Thus, in the humble opinion of the author, this temporary sub rule will become not only an additional cost to the entire system but also a disturbance in the introduction of new return form. Thus, it seems that both from legal as well practical positioning this new sub rule should be rolled back and focus should be on the promotion

and implementation of the new return system which itself require a lot of new understanding and adoption on part of taxpayers.

Clarifications in respect of computation

There has been a lot of apprehension in its application. Some of the concerns are addressed by the Board vide Circular No. 123/42/2019– GST dated 11.11.2019. The said clarifications are as under:

Date of application: The restriction of 36(4) will be applicable only on the invoices / debit notes on which credit is availed after 09.10.2019. Thus, even if an invoice is issued prior to 09.10.2019, but credit thereof is availed by the taxpayer post such date would be exigible to restriction.

ITC on which restriction is applicable: The invoices/debit notes the details of which were required to be uploaded by the supplier under section 37(1) of CGST Act, and which have not been uploaded are the invoice/ debit notes which are covered under Rule 36(4) of CGST Rules. Thus, the following ITC is therefore outside the ambit of rule 36(4)and shall be available without any reference to GSTR 2A:

a. GST paid on import

b. Documents issued under RCM

c. Credit received from ISD

ITC of ineligible purchases to be excluded: Ineligible ITC even though appearing in GSTR 2A of the recipient shall be excluded for the purpose of computation of limit under Rule 36(4). For eg.,

S.No.	Nature of Expense	Total ITC on purchase availed	Total ITC in GSTR 2A
1.	Raw material	1,00,000	50,000
2.	Job Work charges	2,00,000	1,50,000
3.	Motor Car	6,00,000	6,00,000
	Total	9,00,000	8,00,000

In this case, if ITC is computed under Rule 36(4) without excluding ineligible credit, total ITC available shall be 960,000 (limited to 900,000). However, when computed on eligible components, it shall be 240,000 (out of total available 300,000).

Manner of Computation: The restriction imposed is not supplier wise and shall be considered on a consolidated basis. Thus, the limit shall not be applicable supplier wise, for eg:

S.No.	Name of Vendor	Total ITC on purchase availed	Total ITC in GSTR 2A
1.	Ram & Co.	1,00,000	1,00,000
2.	Shyam& Co.	2,00,000	1,50,000
3.	Hemant & Co.	40,000	0
	Total	3,40,000	2,50,000

In this case, if vendor wise ITC is computed under Rule 36(4), total ITC available shall be 280,000. However, when computed on a consolidated basis, such value of available ITC limit shall be 300,000.

Date of computation of limit: The ITC admissible shall be computed on the due date of filing of GSTR-1, viz., 11th of subsequent month (unless extended). Thus, every taxpayer has to download his GSTR 2A on every 11th of subsequent month and compute his 20% limit as per date as reflected in such form.The balance ITC may be claimed by the taxpayer in any of the succeeding months provided details of requisite invoices are uploaded by the suppliers.

The eligible ITC has been explained below by way of illustration.

Computation of October 2019

S.No.	Name of Vendor	Total ITC on purchase availed	Total ITC in GSTR 2A
1.	Ram & Co.	1,00,000	1,00,000
2.	Shyam& Co.	2,00,000	1,50,000
3.	Hemant & Co.	40,000	0
4.	Gaurav & Co. (goods not received)	0	75,000
5.	Ford & Co. (Motor Car)	200,000	200,000
	Total	5,40,000	5,25,000

Computation to be made in the following manner:

S.No.	Particular	Amount
1.	Total ITC as per GSTR 2A:	525,000
2.	Less: Ineligible ITC	200,000
3.	Less: ITC not available in current month (goods or invoice not received)	75,000
4.	Add: ITC of earlier period updated by vendor	-
5.	Total eligible ITC	250,000
6.	Add: 20% limit	50,000
7.	Maximum ITC as per Rule 36(4) ('A)	300,000
8.	Total ITC as per register ('B')	340,000
9.	ITC which is to be availed in subsequent month (B-A)	40,000

Computation of November 2019

S.No.	Name of Vendor	Total ITC on purchase availed	Total ITC in GSTR 2A
1.	Sanjay & Co.	150,000	125,000
2.	Shyam& Co.	0	50,000
3.	Ajay & Co.	100,000	80,000
4.	Gaurav & Co. (goods received)	75,000	-
	Total	325,000	255,000

Hemant & Co. updated in October GSTR 2A

1.	Hemant & Co.	0	40,000

Computation to be made in the following manner:

S.No.	Particular	Amount
1.	Total ITC as per GSTR 2A:	255,000
2.	Less: Ineligible ITC	-
3.	Less: ITC not available in current month (goods or invoice not received)	-
4.	Add: ITC of earlier period updated by vendor	40,000

5.	Add: ITC of earlier period now available	75,000
6.	Total eligible ITC	390,000
7.	Add: 20% limit	78,000
8.	Maximum ITC as per Rule 36(4) ('A)	468,000
9.	ITC which can be availed (325,000+40,000) ('B')	365,000
10.	ITC which is to be availed in subsequent month (B-A) – this cannot be negative	-

A check of the above working can be made by doing a consolidated working for two months as under:

S.No.	Particular	Amount
1.	Total ITC as per GSTR 2A:	780,000
2.	Less: Ineligible ITC	200,000
3.	Less: ITC not available in current month (goods or invoice not received)	-
4.	Add: ITC of earlier period updated by vendor	-
5.	Total eligible ITC	580,000
6.	Add: 20% limit	116,000
7.	Maximum ITC as per Rule 36(4)	696,000
8.	Total ITC as per register	665,000
9.	ITC which is to be availed in two months	665,000

Common Errors in computation of Rule 36(4)

There are mistakes which a person can make while computing the limit under Rule 36(4):

a. Credit of Quarterly Tax payers are deferred: ITC of invoices from a person who is filing his GSTR 1 quarterly has been deferred to his filing of return. Usually the Quarterly taxpayers file their GSTR 1 between 25th to 30th of month subsequent to the Quarter. Thus, their ITC shall be reflected only on 11th of second month after the end of the quarter which shall be a long wait for the buyer. This might bring a resistance in making purchases from a Quarterly taxpayer and might affect the small assessee adversely.

b. Monthly working of ITC limit: Even taxpayers filing GSTR 1 quaterlyhave to make this computation on a monthly basis.

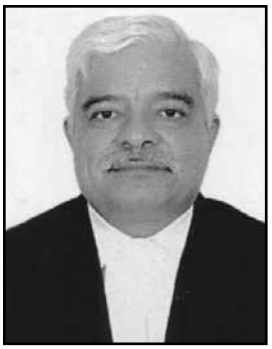
c. Credit Notes not considered by Rule - The Rule speaks of debit notes and invoices but fails to factor the change in GSTR 2A as brought out by Credit Notes. Thus, even though the Credit Note goes to reduce the ITC, it shall not be consdiered for computing limit of Rule 36(4), providing extra buffer of limit to assessees.

d. Weeding out Ineligible ITC: Ineligible ITC relating to motor car, food, person consumption etc has to be taken out before determining the 20% limit as all these ITC does not form part of eligible ITC, even though they are reflected in GSTR 2A of the assessee. Thus, any assessee working it on total GSTR 2A will definitely be liable to pay interest, if not reversal.

e. Only amount not availed is to be added in subsequent month: It may so happen that a person has availed the ITC basis the 20% limit of the credits not reflecting in GSTR 2A. Accordingly, one has to remember that he has already taken a part of ITC in his return. Thus, the balance amount (difference between ITC available and ITC availed as part of 20% limit) is the amount he should take in subsequent month and not the total ITC. for eg. ITC as per register in November 2019 was Rs. 100,000, while that reflecting in GSTR 2A was 80,000. ITC eligible as per Rule 36(4) will be Rs. 96,000 (80,000+20%) and the same is availed by the taxpayer. The vendor who has not uploaded invoice, uploads the same in December month. In December month, the taxpayer should be careful not to take the entire ITC of the November invoice uploaded bur should take only Rs.4,000 of the balance unavailed ITC.

f. GSTR 2A is dynamic. For proper availment of ITC, one need to keep a check on GSTR 2A of not only the current month, but also the earlier month. The reason is that GSTR 2A is dynamic and it shall stand updated once the supplier files his GSTR 1 for same month. Any invoice uploaded in GSTR 1 of any subsequent month shall be reflected in GSTR 2A such subsequent month. Thus, a check on past data is a must for an assessee to increase his eligible limit and avail full ITC as available to him.

The above exercise is a huge challenge for all assessees and we hope that minor abrasions of ITC availment shall be ignored and not penalised by the authorities later.



Inspection, Search, Seizure And Arrest Under GST – Procedure And Law

Sushil Verma, Advocate

IMPORTANT PROVISIONS

Power of Inspection, Search and Seizure (section 67) • Safeguards and basic requirements to be observed during search • Inspection of goods in movement (section 68) • Power to arrest (section 69) • Safeguards in relation to arrest • Difference between cognizable and non-cognizable offence • Power to summon (section 70) • CBEC guidelines on issuing summons • Access to business premises (section 71) • Officers required to assist CGST/SGST officers (section 72)

Rules 138 and 139 are Important.

1. The inspection can be carried out by an officer of CGST/SGST only upon a written authorization given by an officer of the rank of **Joint Commissioner or above**.

2.. A Joint Commissioner or an officer higher in rank can give such authorization only if he has reasons to believe that the person concerned has done one of the following actions: (a) Suppression of any transaction relating to supply of goods or services or stock in hand (b) Claimed excess input tax credit (c) Contravention of any provisions of the Act or the Rules to evade tax (d) Transporting or keeping goods which escaped payment of tax or manipulating accounts or stocks which may cause evasion of tax Inspection can also be done of the conveyance, carrying a consignment of value exceeding specified limit. The person in charge of the conveyance has to produce documents/devices for verification and allow inspection. **Inspection during transit can be done even without authorization of Joint Commissioner.**

3. **Inspection in movement of goods etc. (a) Any consignment exceeding Rs. 50,000/-, can be stopped at any place for verification of the documents/ devices prescribed for movement of such consignments. (b) If on verification of the consignment, during transit, it is found that the goods were**

removed without prescribed document or the same are being supplied in contravention of any provisions of the Act then the same can be detained or seized and may be subjected to penalties as prescribed.

4. Search & Seizure - can be carried out only under authorisation from an officer not below the rank of Joint Commissioner and if he has a reason to believe that the person concerned has done at least one of the following

(a) Goods liable to confiscation or any documents/books/ record/things, which may be useful for or relevant to any proceedings, are secreted in any place then all such places can be searched

(b) All such goods/documents/books/record/ things may be seized, however, if it is not practicable to seize any such goods then the same may be detained. The person from whom these are seized shall be entitled to take copies/extracts of seized records

(c) The seized documents/books/things shall be retained only till the time the same are required for examination/ enquiry/ proceedings and if these are not relied on for the case then the same shall be returned within 30 days from the issuance of show cause notice

(d) The seized goods shall be provisionally released on execution of bond and furnishing a security or on payment of applicable tax, interest and penalty

(e) In case of seizure of goods, a notice has to be issued within six months, if no notice is issued within a period of six months then all such goods shall be returned. However, this period of six months can be extended by Commissioner for another six months on sufficient cause.

(f) An inventory of the seized goods/documents/ records is required to be made by the officer and the person, from whom the same are seized, shall be given a copy of the same.

The Act stipulates that the searches and seizures shall be carried out in accordance with the provisions of Criminal Procedure Code, 1973. It ensures that any search or seizure should be made in the presence of two or more independent witnesses, a record of entire proceedings is made and forwarded to the Commissioner forthwith.

5. ARREST

Section 132(1) of Central Goods and Services Tax Act, 2017 (CGST) provides that whoever commits the offence of issuing invoice without supply of goods or services leading to wrongful availment or utilization of input tax credit (ITC) and person who avails ITC using such invoice, will be punishable with imprisonment and fine, if the amount of ITC wrongly claimed or utilized exceeds INR 1 crore.

As per Section 132(5) of CGST, if the amount of ITC wrongly claimed exceeds INR 5 crores, the offence shall be cognizable and non-bailable.

Section 69(1) of CGST provides powers to Commissioner to authorize any Central tax officer to arrest a person committing above offence

The GST Law also stipulates that arrests can be made only in those cases where the person is involved in offences specified for the purposes of arrest and the tax amount involved in such offence is more than the specified limit. The salient points of these provisions are:

(a) Provisions for arrests are used in exceptional circumstance and only with prior **authorisation from the Commissioner**.

(b) A person can be arrested only if the criteria stipulated under the law for this purpose is satisfied i.e. if he **has committed specified offences** (not any offence) and the tax amount is exceeding rupees 200 lakhs. However, the monetary limit shall not be applicable if the offences are committed again even after being convicted earlier i.e. repeat offender of the specified offences can be arrested irrespective of the tax amount involved in the case.

(c) Further, even though a person can be arrested for specified offences involving tax amount exceeding Rs. 200 lakhs, however, where the tax involved is less than Rs. 500 lakhs, the offences are classified as non-cognizable and bailable and all such arrested persons shall be released **on Bail by Deputy/Assistant Commissioner**. But in case of arrests for specified offences

where the tax amount involved is more than Rs. 500 lakhs, the offence is classified as cognizable and non-bailable and in such cases the bail can be considered by a Judicial Magistrate only.

Cognizable offence: Section 132 (5) All offences specified in clause **(a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section where the amount of tax evaded exceeds Rs. 5 crores, shall be cognizable and non-bailable** • Non-cognizable offence: Section 132(4) Other offences under the Act, except the offences referred to in Section 132(5) are non-cognizable and bailable

Where a person is arrested for a non-cognizable and bailable offence, the officer carrying out the arrest can grant him bail in accordance with **Section 436 of the Code of Criminal Procedure, 1973** • Where a person is arrested for a cognizable offence, he has to be produced within 24 hours of his arrest before a judicial Magistrate who will take a decision regarding releasing him on bail

As per Cr.P.C., for cognizable offence, the police officer has the authority to make an arrest without a warrant, whereas for non-cognizable offence, a police officer cannot make an arrest without a warrant • In GST under Section 69, arrest can be made both for cognizable and non-cognizable offence upon an authorisation by the Commissioner of CGST/SGST.

Was there a conflict in views of the high courts? Yes

SC noted that various High Courts (HC) had taken divergent views in the matter.

Telangana HC held that GST officers can arrest the taxpayer even before assessment or adjudication. Further, it denied anticipatory bail to the taxpayers considering facts and circumstances of the case. [The SC dismissed the Special Leave Petition (SLP) filed by taxpayers against the said order. On the other hand, Bombay HC granted interim relief to the taxpayers. While hearing SLP against Bombay HC ruling, SC held that as the taxpayers were granted the privilege of pre-arrest bail by the HC, at this stage, it was not inclined to interfere with the same. SC further directed that High Courts, while entertaining such request in future, should keep in mind that it had dismissed the SLP filed against order of the Telangana HC in a similar matter. Further, the SC referred the matter to a three-judge bench.

Telangana High Court Judgment

The taxpayer approached the Telangana High Court for anticipatory bail. The issue arose that whether a taxpayer can be given protection from arrest who has been summoned under section 70 of the CGST Act for enquiry and investigation for an offence under section 132 of the CGST Act.

The Telangana High Court in P.V. Ramana Reddy versus Union of India held that person who is summoned under section 70(1) and person **whose arrest is authorised under section 69(1)** is not to be treated as the one accused of any offence until a prosecution is launched by way of a private complaint with the previous sanction of the commissioner.

In other words, no criminal proceedings can be initiated until a prosecution is launched, by way of a private complaint with the previous sanction of the commissioner. Accordingly, the provisions of the Code of Criminal Procedure, 1973 providing for anticipatory bail would not be applicable.

However, the remedy in such cases is to file a writ before the High Court seeking protection from arrest. Nonetheless, based on the facts of this case, no relief from arrest was granted.

It was further held that the GST officer can initiate prosecution even before the completion of assessment or quantification of tax evaded and that the list of offences included in sub-section (1) of section 132 of CGST Act, 2017 has no correlation with assessment. The prosecutions for these offences do not depend upon the completion of the assessment.

The Madras High Court Judgment

This position conflicted with a judgment dated April 4, 2019, of Madras High Court in Jayachandran Alloys (P.) Ltd. versus Superintendent of GST & Central Excise, writ petition number 5501 of 2019, held that the power to punish set out in section 132 of the CGST Act would stand triggered only if it is established that an assessee has ‘committed’ an offence that has to be necessarily post-determination of demand due from an assessee, that itself has to necessarily follow process of an assessment. The high court relied on the judgement dated January 23, 2019, of the Supreme Court in the case of Union of India & Ors versus Make My Trip (India) Pvt. Ltd. in civil appeal number of 8080 of 2018.

Supreme Court in Make My Trip Case

The Supreme Court had in Make My Trip(India) Pvt. Ltd. (supra), upheld the judgement dated September 1, 2016, of the Delhi High Court in Make My Trip (India)(P.) Ltd. versus Union of India [2016] 96 VST 3 (Delhi), which examined the power to arrest the tax officer under the erstwhile service tax law.

It held that prosecution should normally be launched only after the adjudication is complete. The court further relied on Central Board of Indirect Taxes and Customs' (erstwhile Central Board of Excise and Customs) Circular No. 1009/16/2015-CX, dated 23-10-2015. The said circular provided that for the launch of prosecution there has to be a determination that a person is a habitual offender.

A taxpayer is treated as a habitual offender if:

– the amount of tax involved is more than Rs 1 crore in the past five years and

– he has been involved in three or more cases of confirmed demand (at the first appellate level or above) of Central Excise duty/ Service Tax/ due to misuse of Cenvat Credit and due to fraud, suppression of facts etc.

Bombay High Court's Position

Similar issues are pending before the Bombay High Court as well. In one such case, the Bombay High Court vide its interim order has given protection to the taxpayer from arrest until it hears arguments on merit. It may also be noted that the apex court has not interfered in the previous interim order dated April 11, 2019, of the Bombay High Court. However, it has advised all the high courts to take note of its order dated May 27, 2019, whereby the order of the Telangana High Court was affirmed.

Since the order of Telangana High Court has not been stayed by the Supreme Court, it is the law of the land until the three-judge bench takes a contrary view. In a nutshell, since the GST law provides a commissioner the power to arrest a person in case he has reasons to believe that the tax evasion is likely to be more than Rs 5 crore without waiting for the final determination of the tax liability. However, the taxpayer has the possibility of approaching respective high courts by way of a writ petition to seek protection from arrest.

In the case of D.K. Basu v. State of West Bengal reported in 1997 (1) SCC 416, the Hon'ble Supreme Court has laid down specific guidelines required to be followed while making arrests. One must go through this judgment and in case you want to have summary of precautions and rights, do contact me and I shall send you the summary

Section 70 Power to summon persons to give evidence and produce documents

CGST/SGST officer (Superintendent) is authorized to summon a person to present himself before the officer issuing the summon to: i. give evidence or ii. Produce a document or iii. Any other thing in any inquiry which an officer is making.

A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned

A person who is issued a summon is legally bound to attend either in person or by an authorized representative, as such officer may direct • It is to be noted that officer has the discretion to summon a person himself or to allow him to be represented by an authorized representative .

The exemptions under section 132 and 133 of Code of Civil Procedure, 1908 (CPC) applies to requisitions for attendance under the CGST/SGST Act.

Section 132 of CPC provides that the women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court

Section 133 of CPC provides entitlement to exemption from personal appearance in Court to some dignitaries, such as the President of India, the Vice President of India and some other high dignitaries of the State/ Government • All these exemptions will apply in respect of summons issued under the CGST/SGST Act

This proceeding will be deemed to be a "judicial proceeding" as understood under section 193 and section 228 of the Indian Penal Code, 1860 (IPC)

Section 193 of IPC contains penal provision for giving false evidence under summons.

Section 228 of IPC contains penal provisions for intentionally insulting or interrupting the Officer sitting in summons proceedings.

These provisions of IPC can be invoked where the person summoned under CGST/SGST Act gives false evidence or interrupts the proceedings under summons.

JUDGEMENTS

S. No	Relevant provision of CGST Act	Name of the Case	Decision of the Court
1	Anti – profiteering measures (Section 171 of CGST Act)	Director General Anti-Profiteering v. Satya Enterprises [2019]	It was alleged that the respondent had violated the provisions of Sec.171 of CGST Act by not passing the benefit of reduction in rate of tax to its customers which he gained on supply of 109 products from 15.11.17 to 31.5.18 and subsequently earned Rs.6,06,752.72. Moreover, the respondent remained silent against the report prepared by DGAP. The court directed the respondent to reduce the sale price of all products on which he increased the base price w.e.f. 15.11.2017 in proportion to the reduction in rate of tax. Moreover, he was directed to pay Rs.6,06,752.752 alongwith interest @ 18%.
2	Anti – profiteering measures (Section 171 of CGST Act)	Kerala State Screening Committee on Anti-Profiteering v. Maruti Suzuki India Ltd.	It was alleged that respondent had not passed the benefit of reduction in tax to customers on selling of four models of Motor car. For the same, the committee took into consideration invoice samples of the company related to pre GST and post GST era. It was held that pre GST, the rate of tax was 15.63% while post GST it has been increased to 29 %. Hence, the respondent had not contravened the provisons of Sec. 171 of the Act.
3	Anti – profiteering measures (Section 171 of CGST Act)	Kerala State Screening Committee on Anti-profiteering v. S.J. Spices Ltd.[2019]	It was alleged that respondent had not passed the benefit of reduction in tax on supply of black pepper. The DGAP presented a detailed report on the issue and submitted that pre GST, pepper product attracted VAT @5% and after GST, the tax rate was fixed at 5%. held that respondent had not contravened the provisions of Sec.171 of the Act.
4	Anti – profiteering measures (Section 171 of CGST Act)	Kerala State Screening Committee on Anti-profiteering v. Pulimoottill Silks [2019]	it was alleged that benefit of reduction in tax on supply of 'Little Star Dhoti' was not passed on tho the customers. The DGAP in his report submitted that pre GST, the rate of tax under VAT was 5% on dhoti and was exempted under excise Act. Moreover, after GST, the rate was fixed at 5%. it was held that there was no reduction and respondent had not cotravened the Sec. 171 of the Act.

5	Anti – profiteering measures (Section 171 of CGST Act)	Kerala State Screening Committee on Anti-profiteering v. Sudarsans[2019]	it was alleged that benefit of reduction in tax on supply of 'shorts(jockey shorts)' was not passed on tho the customers. The DGAP in his report submitted that pre GST, the rate of tax under VAT was 5% on product. Moreover, after GST, the rate was fixed at 5%. it was held that there was no reduction and respondent had not cotravened the Sec. 171 of the Act.
6	Anti – profiteering measures (Section 171 of CGST Act)	Kiran Chimirala v. Jubilant Food Work Ltd. [2019]	It was found that the company working under the name & style of Domino's Pizza had not passed on the benefit of reduction in taxes from 18% to 5% and earned Rs.41,42,97,635/- between the period 15.11.17 to 31.05.18. The respondent was directed to reduce the base price by way of proportionate reduction keeping in view the reduced rate of tax and the benefit of ITC denied. Moreover, a show cause notice was issued under Sec. 122(1)(i) of CGST Act to explain why penalty should not be imposed.
7	Anti – profiteering measures (Section 171 of CGST Act)	Shylesh Damodaran v. Landmark Automobiles (P.) Ltd. [2018]	The allegation was regarding non-passing of ITC benefit on reduction in rate of tax. Although through the records it was revealed that the base price charged by the respondent in post GST era was less than the price charged in pre-GST era. The reason being that in the pre GST era, the credit of excise duty, NCCD and cesses was not available to the respondent but after GST, the respondent was entitled to claim credit on whole GST paid. The respondent also revealed that base price charged from the applicant was reduced as the benefit of ITC was passed on to the applicant. Hence, the respondent had not contravened the provisions of Sec 171 of the Act and application was dismissed.
8	Detention, seizure and release of goods and conveyance in transit-General principles(Section 129 (1)of UPGST Act)	Sarvottam Rolling Mills (P.) Ltd. v. State of U.P. [2018]	The goods were seized on the premise of expiry of E-way bill. The petitioner contended that goods were seized an hour before the expiry of e-way bill. Moreover, the goods reached its destination well in time but due to no entry , the truck could not enter and detention order was passed. The court directed the release of vehicle along with goods on furnishing of bank guarantee.

9	Detention, seizure and release of goods and conveyances in transit (Sec. 129 of CGST Act)	Preethi Kitchen Appliances (P.) Ltd. v. State Tax Officer [2019]	The goods were detained because Part-B of E-WAY bill was not updated and order was passed. The petitioner argued that all entries were duly updated but his representation was not considered. having no option left, the petitioner submitted to deposit one time tax under CGST and SGST for the purpose of release of goods and thereafter agitated the matter before appellate authority. The petition was disposed of in favour of assessee.
10	Determination of Place of Supply (Sec. 12 of IGST Act)	Vasu Clothing (P.) Ltd. V. Union of India [2018]	The petitioner was a manufacturer and exporter of garments in India . The petitioner prayed for exemption from taxes on the basis that transactions done at Duty free shops be treated as exports since the Duty free shops are located beyond the customs frontier of India. The court defined 'India' as per Sec. 2(56) of CGST Act. The court held that the location of Duty free shop shall be India as long as it is not beyond EEZ and hence the supplies made to these shops shall not be exempt from taxes.
11	Repeal and saving (Sec. 174 of CGST Act)	Sheen Golden Jewels (India) (P.) Ltd v. State Tax Officer [2019]	The issue was whether the state has power to enact Sec. 174 of Kerala CGST Act and save past taxing events- when the Entry 54 , List II, stood omiited w.e.f. 16.9.2017. It was held that it is a mistaken belief in petitioner's understanding that states do not possess the power to enact Sec. 174 as Article 246A gives simultaneous power to both Union and States to legislate on certain items.
12	Return- Furnishing of- Grievance Redressal Mechanism(Section 39 of CGST Act)	"Coastal Freez Tech & Sanitaries v. Goods Service Tax Council [2019]"	The assessee failed to upload TRAN-1 on portal due to technical error and filed petition for seeking direction to enable him to take input tax credit of available input tax. The assessee was directed to apply to Nodal officer in this regard, who would look into the matter and facilitate assessee's uploading Form GST TRAN-1.

13	Return- Furnishing of- Grievance Redressal Mechanism(Section 39 of CGST Act)	Edayar Metals v. Union of India [2019]	The assessee failed to upload TRAN-1 on portal due to technical error and filed petition for seeking direction to enable him to take input tax credit of available input tax. The assessee was directed to apply to Nodal officer in this regard, who would look into the matter and facilitate assessee's uploading Form GST TRAN-1.
14	Return- Furnishing of- Grievance Redressal Mechanism(Section 39 of CGST Act)	"Leo Logistics v. Union of India [2019]"	The assessee failed to upload TRAN-1 on portal due to technical error and filed petition for seeking direction to enable him to take input tax credit of available input tax. The assessee was directed to apply to Nodal officer in this regard, who would look into the matter and facilitate assessee's uploading Form GST TRAN-1.
15	Value of Supply (Sec. 15 of CGST Act)	"PSN Automobiles (P.) Ltd. v. Union of India [2019]"	The petitioner used to collect Tax under Income Tax Act at the rate of 1% from the purchaser of motor vehicles. His contention was that it should not be considered as integral part of the value of supply as he merely acted as an agent of state and that amount of 1% would ultimately goes to the credit of purchaser. The court referred the case of Commissioner of Customs (Import), v. Dilip Kumar & Co. wherein it was held that ambiguities in taxing provisions should be resolved in State's favour and on this basis, the court in the present case preferred the case for deeper adjudication.

Advance Rulings

S. No	State	Case Name	Order No. & Date	Particulars	
1	Karnataka	Xiaomi Technology India Private Limited	No.1 dated 22.01.2019	**Brief Issue**	Whether the "Power Bank", traded by the Applicant, is classifiable under Heading 8504 40 90 as 'Static Converter – Others' ?
				Decision of Advance Ruling Authority	Power Bank traded by applicant is classifiable under Heading 8507 as Accumulator and not as Static Convertor.
2	Rajasthan	Mr. Kailash Chandra (M/s Mali Construction)	RAJ/AAR/2018-19/32 dated 31.01.2019	**Brief Issue**	Whether the activity of supply, design, installation, commissioning and testing of solar energy based water pumping systems supply of goods or supply of services and what shall be the rate of GST on it?
				Decision of Advance Ruling Authority	The activity of supply, design, installation, commissioning and testing of solar energy based water pumping systems and O&M work by applicant is a works contract of Composite Supply where supply of service is predominant. This supply is proposed to be taken by a government department and therefore rate of tax shall fall under HSN Code 99544 @ 12% IGST(6% CGST & SGST each).
3	Rajasthan	Mr. Kailash Chandra (M/s Mali Construction)	RAJ/AAR/2018-19/31 dated 31.01.2019	**Brief Issue**	Whether the activity of supply, design, installation, commissioning and testing of reverse osmosis plant is supply of goods or supply of services and what shall be the rate of GST on it?
				Decision of Advance Ruling Authority	The activity of supply, design, installation, commissioning and testing of reverse osmosis plant and O&M work by applicant is a works contract of Composite Supply where supply of service is predominant. This supply is proposed to be taken by a government department and therefore rate of tax shall fall under HSN Code 99544 @ 12% IGST(6% CGST & SGST each).
4	Rajasthan	IMF Cognitive Technology Pvt Ltd	RAJ/AAR/2018-19/30 dated 09.01.2019	**Brief Issue**	Whether the ITC of Central Tax paid in Haryana be available to the applicant who is registered in Rajasthan state, whereby such tax is paid on inward supplies used for business of person registered in Rajasthan?
				Decision of Advance Ruling Authority	ITC of Central Tax paid in Haryana is not available to the applicant who is registered in Rajasthan.
5	West Bengal	Storm Communications Pvt Ltd	39/ WBAAR/2018-19 dated 28.01.2019	**Brief Issue**	Whether tax paid on intra-state inward supply in one state can be used to pay output tax liability in another state, especially if the applicant is not registered in the state where he receives the inward supply?

S. No	State	Case Name	Order No. & Date	Particulars	
				Decision of Advance Ruling Authority	Tax paid on intra-state inward supply in one state cannot be used to pay output tax liability in another state if the applicant is not registered in the state where he receives the inward supply.
6	Rajasthan	K M Trans Logistics Private Limited	RAJ/AAR/2018-19/29 dated 09.01.2019	**Brief Issue**	What should be the place of business to be considered for the purpose of registration. Since no billing is done from any other state other than Jaipur and even input services bills are billed at Jaipur thus the applicant is required to take registration at Jaipur only or at any other state Whether having a vacant lands on lease for parking of trailers/ trucks at various cities for operational purpose requires registration at various cities when billing, control, registered office, head office and management is centralized located in Jaipur?
				Decision of Advance Ruling Authority	Place of Supply of services being provided is Rajasthan and therefore registration is required to be taken in Rajasthan only. No ruling for vacant land on lease as outside purview.
7	Rajasthan	Akshay Patra Foundation	RAJ/AAR/2018-19/28 dated 09.01.2019	**Brief Issue**	Whether preparation and serving food to children of Govt Schools under Mid-Day Meal Programme of Govt and serving of food under Govt sponsored Anganwadi meals program is covered under the scope of supply as per section 7 of CGST/RGST Act, 2017? Whether the transfer of goods/ capital equipments, exclusively used for Mid-Day Meal (MDM) program and Anganwadi meals program sponsored by Govt., between different kitchens of applicant which are distinct persons as per GST law is covered under the scope of supply as per section 7 of CGST/RGST Act, 2017? Whether the sale of scrap items which was generated during MDM program is an activity of sale and thus covered under the scope of supply as per section 7 of CGST/RGST Act, 2017?
				Decision of Advance Ruling Authority	A. Preparation and serving of food to children of government schools under Mid-Day meal Program of Government and serving of food under Government sponsored Anganwadi meals program is covered under the scope of 'supply' as per section 7 of CGST/RGST Act, 2017. B. The transfer of goods / capital equipments, exclusively used for Mid-Day Meal (MDM) program and Anganwadi meals program sponsored by Government, between different kitchens of applicant which are 'distinct persons as per GST law is covered under the scope of supply' as per section 7 of CGST/RGST Act, 2017.

S. No	State	Case Name	Order No. & Date	Particulars	
					C. The sale of scrap items which was generated curing Mid Day Meal program is an activity of sale and thus covered under the scope of supply' as section 7 of CGST/RGST Act, 2017.
8	West Bengal	Exservice-men Resettlement Society	38/ WBAAR/2018-19 dated 28.01.2019	**Brief Issue**	Whether security and scavenging services to the Govt is exempt under SL No. 3 or 3A of Notification No. 12/2017-CT(Rate) dated 28/06/2017, as amended from time to time?
				Decision of Advance Ruling Authority	Benefit of exemption from the payment of GST is not available to the Applicant for the supply of Security Services and the bundle of service that he describes as Scavenging Services as it is not covered under under Notification No 12/2017-CT(Rate) dated 28.06.2017.
9	West Bengal	NIS Management Ltd	37/ WBAAR/2018-19 dated 28.01.2019	**Brief Issue**	Whether sweeping service to the Govt is exempt under SL No. 3 or 3A of Notification No. 12/2017-CT(Rate) dated 28/06/2017, as amended from time to time?
				Decision of Advance Ruling Authority	Sweeping Service that the Applicant supplies to the Housing Directorate of the Government of West Bengal, cannot be classified as an activity in relation to any function entrusted to a Panchayat or in relation to any function entrusted to a Municipality and is therefore not exempt under Notification No 12/2017-CT (Rate) dated 28.06.2017.
10	West Bengal	Vedika Exports Tea Pvt Ltd	36/ WBAAR/2018-19 dated 28.01.2019	**Brief Issue**	Classification of the service to Hindustan Unilever Ltd for packing tea into tea bag pouches and its packaging?
				Decision of Advance Ruling Authority	The Applicant makes a composite supply to Hindustan Unilever Ltd, where the service of manufacturing tea bags from the physical inputs owned by the latter is the principal supply. It is classifiable under SAC 9988 and taxable at 5% rate under Sl No. 26(f) of Notification No. 11/2017 – CT (Rate).
11	West Bengal	Abhishek Tibrewal (HUF) carrying on business under trade name Avantika Industries	35/ WBAAR/2018-19 dated 28.01.2019	**Brief Issue**	Classification and rate of tax for springs of iron and steel for railways
				Decision of Advance Ruling Authority	Springs of Iron and Steel for Railways are classifiable under HSN Code no. 7320 (taxable @ 18%) under Serial No. 234 of Schedule III of Notification No. 1/2017-CT (Rate) dated 28.06.2017.
12	West Bengal	Dinman Polypacks Pvt Ltd	34/ WBAAR/2018-19 dated 28.01.2019	**Brief Issue**	Classification and rate of tax for Polypropylene Leno Bags
				Decision of Advance Ruling Authority	Poly Propylene Leno Bags" are to be classified as plastic bags under HSN 3923 and would attract 18% GST.

S. No	State	Case Name	Order No. & Date	Particulars	
13	West Bengal	ITD Cementation India Ltd	33/ WBAAR/2018-19 dated 08.01.2019	**Brief Issue**	Whether works contract service supplied to Inland Waterways Authority of India is taxable under Sl No. 3(vi) of Notification No. 11/2017 -CT(Rate) dated 28/6/2017, as amended from time to time?
				Decision of Advance Ruling Authority	Notification No. 11/2017 -CT(Rate) is not applicable to the Applicant's supply of works contract service for construction of the Multi-modal IWT Terminal at Haldia. It will attract GST at 18% rate under Serial No. 3(xii) of 11/2017–CT (Rate) dated 28/06/2017.
14	West Bengal	WEBFIL Ltd	32/ WBAAR/2018-19 dated 08.01.2019	**Brief Issue**	Whether Notification No. 50/2018-CT dated 13/09/2018 under the CGST Act, 2017 is applicable on a JV of two Govt companies?
				Decision of Advance Ruling Authority	Applicant, if established by government notification, is liable to deduct tax at source under section 51(1) read with Notification No. 1344-FT dated 13/09/2018, being a company controlled by the Central and the State Governments.
15	West Bengal	U S Polytech	31/ WBAAR/2018-19 dated 08.01.2019	**Brief Issue**	Classification and rate of tax for polypropylene non-woven bags
				Decision of Advance Ruling Authority	'PP Non-woven Bags' made from non woven Polypropylene fabric are plastic goods to be classified under Sub Heading 3923 29 and taxed at 18 % rate Notification no. 01/2017-C.T (Rate) dated 28-06-2017 under the CGST Act, 2017.
16	West Bengal	GGL Hotel & Resort Co Ltd	30/ WBAAR/2018-19 dated 08.01.2019	**Brief Issue**	Whether ITC is admissible on lease rent paid during pre-operative period for the leasehold land on which a resort is being constructed to be used for furtherence of business?
				Decision of Advance Ruling Authority	Input Tax Credit is not available to the Applicant for lease rent paid during pre-operative period for the leasehold land on which the resort is being constructed on his own account to be used for furtherance of business, when the same is being capitalised and treated as capital expenditure.
17	Tamil Nadu	The Bank of Nova Scotia	TN/23/AAR/2018 Dated 31.12.18	**Brief Issue**	1. Whether IGST is payable on Goods warehoused in FTWZ and supplied to a DTA unit, in addition to the customs duty payable [i.e. Basic Customs Duty(BCD) + IGST] on removal of goods from the FTWZ unit? 2. Whether the Circular No. 46/2017 is applicable to the present factual situation?

S. No	State	Case Name	Order No. & Date	Particulars	
				Decision of Advance Ruling Authority	1. For supply of warehoused goods, while being deposited in FTWZ on or after 01.04.2018, the Applicant is not liable to pay IGST at the time of removal of goods from the FTWZ to DTA under the provisions of IGST Act in addition to the duties payable under Customs Tariff Act, 1975 on removal of goods from the FTWZ unit. 2. Circular No. 46/2017 Customs dated 24.11.2017 is not applicable for supply of warehoused goods, while being deposited in FTWZ on or after 01.04.2018.
18	Karnataka	Nuetech Solar Systems Private Limited	33/2018 Dt. 31.12.2018	**Brief Issue**	Whether Evacuated / Vacuum Tube Collectors (VTC) falls under Chapter 84 of HSN which is covered in Sl. no 234 of Schedule –I under notification 1/2017 IGST rate dated 28-06-2017 ?
				Decision of Advance Ruling Authority	The product Evacuated / Vacuum Tube Collectors (VTC) falls under Chapter 84 heading 19 but is not covered under S No. 234 of Schedule-I of the notification 01/2017-Integrated Tax Rate dated 28/06/2017 effective form 01/07/2017 hence not entitled for the concessional rate of 5% IGST.
19	Tamil Nadu	Palaniappan Chinnadurai [Prop: M/s. Tuticorin Lime and Chemical Industries]	TN/25/AAR/2018 Dated 31.12.18	**Brief Issue**	What is the applicable chapter and GST rate for Industrial Grade Quick Lime having 86% of Calcium Oxide content and Industrial Grade Slacked Lime having 86% of Calcium Hydroxide content?
				Decision of Advance Ruling Authority	Industrial Grade Quick lime having 86 per cent of Calcium oxide content and industrial grade slaked lime having 86 % of Calcium hydroxide content are classifiable under CTH 28259090 and CTH 28259040 respectively and both are taxable at 9% CGST and 9% SGST as per Sl.No.38 of Schedule III of Notification No.1/2017-Central Tax (Rate) dated 28-6-2017.
20	Tamil Nadu	Sadesa Commercial Offshore De Macau Limited	TN/24/AAR/2018 Dated 31.12.18	**Brief Issue**	1. Whether sale of tanned bovine leather stored in Free Trade Warehousing Zone (FTWZ) by a foreign supplier which is cleared to Domestic Tariff Area (DTA) customer in India would result in supply subject to levy under sub section 1 of section 5 of the IGST Act 2017 or under the provisions of CGST Act, 2017 or Tamil Nadu GST Act, 2017 and the rules made there under?
					2. Whether the foreign supplier being the applicant, located outside the taxable territory and supplying goods to DTA customers on the goods stored in third party FTWZ unit is required to get registered under the IGST ACT 2017 or under the

S. No	State	Case Name	Order No. & Date	Particulars	
					provisions or CGST ACT 2017 or the Tamil Nadu Goods and Service Tax Act, 2017 and the rules made thereunder?
				Decision of Advance Ruling Authority	1. For supply of warehoused goods, while being deposited in FTWZ on or after 01.04.2018, the applicant is not liable to pay IGST at the time of removal of goods from the FTWZ to DTA under the provisions of IGST Act in addition to the duties payable under Customs Tariff Act, 1975 on removal of goods from the FTWZ unit. 2. On or after 01.04.2018, in the event the Applicant is exclusively conducting the activity described in their application of exporting goods to WWZ and which are subsequently sold to Indian customers who clear the same on payment of appropriate customs duties, they are not liable to Registration under Section 23(I) of CGST Act and TNGST Act.
21	Maharashtra	Pew Engg Pvt Ltd	29/ WBAAR/2018-19 dated 21.12.18	**Brief Issue**	Whether the contract for retro-fitment of air brakes in wagons is composite supply and what shall be the classification of the supply and rate of tax?
				Decision of Advance Ruling Authority	Applicant's contract for retro-fitment of Twin Pipe Air Brake System on Railway Wagons is to be treated as Composite Supply, where the Twin Pipe Air Brake System is the Principal Supply which is classifiable under Tariff Head 8607 21 00 and is taxable @ 5% [in terms of Serial No. 241 of Schedule I of Notification No. 01/2017 – CT (Rate) dated 28/06/2017].
22	West Bengal	Swapna Printing Works Pvt Ltd	28/ WBAAR/2018-19 dated 21.12.18	**Brief Issue**	Whether printing of books on order from foreign buyer and its delivery to customers in India is supply of service liable to GST?
				Decision of Advance Ruling Authority	Yes, Activity of printing Bible by applicant under specific orders received from foreign company is a supply of service classifiable under Heading 9989.
23	West Bengal	RITES Ltd	27/ WBAAR/2018-19 dated 21.12.18	**Brief Issue**	Whether the rate of GST for construction of private railway siding will be under Sl No. 3(v)(a) of Notification No. 11/2017-CT(Rate) dated 28/06/2017?
				Decision of Advance Ruling Authority	Construction of a private railway siding for carriage of coal and oil fuel is a composite supply of works contract taxable @ 12% under Serial No 3(v)(a) of Notification no 11/2017-CT(Rate) dated 28.06.2017.
24	Uttarakhand	Sharda Timber	Ruling No-12 Dated 03.12.18	**Brief Issue**	Whether the commodity of Eucalyptus/ Poplar wood waste in logs having length of 30 cm to 200 cm in girth of approx 10 cm to 60 cm is covered under HSN 4401 and chargeable under Uttarakhand State GST @ 2.5% and Under CGST @ 2.5%?

S. No	State	Case Name	Order No. & Date	Particulars	
				Decision of Advance Ruling Authority	Eucalyptus/Poplar woods waste in logs having length of 30cm to 200 cm and girth of approx. 10 cm to 60 cm does not fall under HSN 4401 and, therefore, not chargeable to GST at rate of 5 percent.
25	Rajasthan	Blackstone Diesels	RAJ/AAR/2018-19/26 Dated 18.12.2018	**Brief Issue**	Tax rate on "Air dryer complete with final filter used in breaking system of locomotive supplied to Railway" as per order attached given by Western Railway.
				Decision of Advance Ruling Authority	The Air Dryer complete with final filter used in breaking system of locomotive is classified under Chapter 8241 of GST Tariff Act 2017 which attracts GST @ 18%(CGST 9%+SGST 9%).
26	Karnataka	Bindu Ventures	32/2018 Dt. 03.12.2018	**Brief Issue**	1. Which date should be considered as the date of completion of the property – the date of receipt of necessary approvals from BBMP / Karnataka Pollution Control Board / Karnataka Electricity Board or the date of receipt of completion certificate from a registered Chartered Engineer? 2. Whether the applicant is liable to pay GST on any amount received as consideration towards sale of completed offices, after the date of completion, where part of the consideration was received prior to the date of completion as determined in question (a) above? 3. Whether the applicant is liable to pay GST on the consideration received as consideration towards the sale of completed offices, where the entire consideration is received after the date of completion of construction as determined in question number (a) above?
				Decision of Advance Ruling Authority	1. The date of Occupancy Certificate issued by the competent authority, i.e. Bruhat Bengaluru Mahanagara Palike should be treated as the date of completion of the construction. 2. If any part of the consideration is received before such date of completion, then the transaction would be considered as the supply of services in terms of entry No. 5 of Schedule II to the GST Acts, and liable for GST. 3. If the entire consideration is received after the date of completion, then the transaction would not be liable to GST.

S. No	State	Case Name	Order No. & Date	Particulars	
27	Chhattisgarh	Chhattisgarh Text Book Corporation	STC/ AAR/08/2018 dt. 24.12.2018	**Brief Issue**	GST rate on: Printing and Supply of books
				Decision of Advance Ruling Authority	Supply of specified printed Educational books by Chhattisgarh TextBook Corporation as per instructions of School Education Department CG (Loksikshan Sanchnalay) or as per instruction of various agencies of school Education Department CG such as Rajiv Gandhi Siksha Mission SCERT/office of District Education officer etc. consequent to printing of syllabus as decided by SCERT, merits consideration as supply of printed books attracting zero rate of tax under Notification No. 2/2017-State Tax (Rate) No. F-10-43/2017CT/V/70, dated 28-6-2017, under HSN Code 4901.
28	Chhattisgarh	Shri Dhananjay Kumar Singh	STC/AAR/6/2018 dt. 05.12.2018	**Brief Issue**	GST Rate on: Supply of services to Solid Waste Management Garbage Collection, Disposal Water Supply, Cleaning of Colony
				Decision of Advance Ruling Authority	Supply of services of colony maintenance work to Chhattisgarh Housing Board with regard to solid waste management, water supply operation, garbage collection door to door and disposal, cleaning of colony, i.e., garden, street and open area, drainage system, sewerage, water tank (All UG Sump & Overhead Tank), cleaning of common area in multistoried building, etc. and all other related work pertaining to operation and maintenance will be treated as exempt supply as per Notification No. 12/2017-State Tax (Rate), dated 28-6-2017. The exemption is not available if the service is provided to persons other than the State/Central government or Local/ government authority.
29	West Bengal	East Hooghly Polyplast Pvtb Ltd	12/ WBAAR/2018-19 dated 20-07-2018	**Brief Issue**	Whether tarpaulins made of HDPE woven fabrics are classifiable under HSN 6306?
				Decision of Advance Ruling Authority	'Tarpaulins made of HDPE woven fabrics' will not be classified under HSN 6306 of the GST Tariff.
30	Madhya Pradesh	Nagrani Warehouseing (P.) Ltd	ORDER NO. 21/2018 dated 14.12.2018	**Brief Issue**	Determination of classification of sacks and bags made from man made textile materials under GST Tariff No. 6305 which falls under Serial No. 224 of Schedule-I of Notification No. FA3-33-2017-1-V (42), dated 29.06.2017 issued vide Madhya Pradesh Gazette"
				Decision of Advance Ruling Authority	Sacks and bags specified shall be classifiable under Chapter 39 of the GST tariff as articles of Plastic and would attract appropriate rate prevailing at the date and time of supply.

S. No	State	Case Name	Order No. & Date	Particulars	
31	Daman, Diu & Dnh	Aristoplast Products	AR 04-05/ AR/DMN-SILVASA/2018	**Brief Issue**	Classification of Sprayers and broom sticks made of Plastic
				Decision of Advance Ruling Authority	Plastic Broom-Sticks is classifiable under Heading No. 96032100 as 'others' and is eligible for concessional rate of tax vide Notification No. 1/2017-CT (rate) dated 28-6-2017 i.e., 5 per cent IGST or 2.5 per cent CGST + 2.5 UTGST. 'Portable Sprayers' is classifiable under HSN Code 84244100. The rate shall be IGST 18 per cent or 9 per cent CGST + 9 per cent UTGST.

CIRCULARS AND NOTIFICATIONS IN BRIEF

Circulars: CGST

Circular No. 75/2019-CGST

Dated 27.12.2018

Detailed Guidelines for processing of applications for financial assistance under the Central Sector Scheme named 'Seva Bhoj Yojna' of the Ministry of Culture stated in the circular on the following:

1. Application for obtaining 'Seva Bhoj Yojna' Unique Identity Number
2. Application for claims for reimbursement of taxes in Form SBY-03
3. Processing of applications filed in form SBY-03
4. Reporting of the reimbursement claims filed and processed.

Circular No. 76/2018-CGST

Dated 31.12.2018

1. Government departments (i.e. Central Government, State Government, Union territory/local authority) shall be liable to get registered and pay GST on intra-State and inter-State supply of used vehicles, seized and confiscated goods, old and used goods, waste and scrap made by them to an unregistered person subject to the provisions of sections 22 and 24 of the CGST Act.

2. No Penalty is payable under the provisions of section 73(11) of the CGST Act where FORM GSTR-3B has been filed after the due date of filing such return as the aforementioned section is not invoked in such cases.

3. In case of revision of prices, after 01.07.2017, of any goods or services supplied before 01.07.2017 thereby requiring issuance of any supplementary invoice, debit note or credit note, the rate as per the provisions of the GST Acts (both CGST and SGST or IGST) would be applicable.

4. Provisions of section 51 of the CGST Act (TDS) are applicable only to such authority/ board/any other body set up by an Act of parliament/ State legislature/established by any Government in which fifty one per cent or more participation by way of equity or control, is with the Government.

5. Taxable value for the purposes of GST shall include the TCS amount collected under the provisions of the Income Tax Act since the value to be paid to the supplier by the buyer is inclusive of the said TCS.

6. If the invoice or any other specified document is accompanying the consignment of goods, then either the consignor or the consignee should be deemed to be the owner for purpose of Section 129(1).

Circular No. 77/2018-CGST

Dated 31.12.2018

1. When tax payer seeks withdrawal from the composition scheme, the effective date shall be the date indicated by him in his intimation/ application filed in FORM GST CMP-04 but such date may not be prior to the commencement of the financial year in which such intimation/ application for withdrawal is being filed.

2. In case of denial of option by the tax authorities, the effective date of such denial shall be from a date, including any retrospective date as may be determined by tax authorities, but shall not be prior to the date of contravention of the provisions of the CGST Act/Rules. In such cases, as provided under sub-section (5) of section 10 of the CGST Act, the proceedings would have to be initiated under the provisions of section 73 or section 74 of the CGST Act for determination of tax, interest and penalty for the period starting from the date of contravention of provisions till the date of issue of order in FORM GST CMP-07.

The registered person shall be liable to pay tax under section 9 of the CGST Act from the date of issue of the order in FORM GST CMP-07. Circular No. 77/51/2018-GST.Provisions of section 18(1)(c) of the CGST Act shall apply for claiming credit on inputs held in stock, inputs contained in semi-finished or finished goods held in stock and on capital goods on the date immediately preceding the date of issue of the order.

Circular No. 78/2018-CGST

Dated 31.12.2018

Tax treatment when an exporter of services located in India is supplying services to a recipient located outside India, either wholly or partly through any other supplier of services located outside India:

– If the full consideration for the services as per the contract value is not received in convertible foreign exchange in India (for the outsourced part of the services), that portion of the consideration shall also be treated as receipt of consideration for export of services in terms of section 2(6)(iv) of the IGST Act, provided the: (i) integrated tax has been paid by the supplier located in India for import of services on that portion of the services which has been directly provided by the supplier located outside India to the recipient of services located outside India; and (ii) RBI by general instruction or by specific approval has allowed that a part of the consideration for such exports can be retained outside India.

Circular No. 79/2018-CGST

Dated 31.12.2018

1. Refund of unutilized ITC in case of inverted tax structure, as provided in section 54(3) of the CGST Act, is available where ITC remains unutilized even after setting off of available ITC for the payment of output tax liability. Where there are multiple inputs attracting different rates of tax, in the formula provided in rule 89(5) of the CGST Rules, "Net ITC" covers the ITC availed on all inputs in relevant period, irrespective of their rate of tax.

2. Tax authorities should issue final sanction orders in FORM GST RFD-06 within 45 days of the date of generation of ARN, so that the disbursement of refund is completed within 60 days by both Central and State Tax Authorities.

3. Guidelines laid in circular for Refund applications which have been generated on the common portal but not yet physically received in the jurisdictional offices.

4. Net ITC, as used in the formula for calculating the maximum refund amount under rule 89(5) of the CGST Rules, shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both. Law prevents refund of tax paid on input services and capital goods as part of refund of input tax credit accumulated on account of inverted duty structure.

5. GST paid on inward supplies of stores and spares, packing materials etc. shall be available as ITC as long as these inputs are used for the purpose of the business and/or for effecting taxable supplies, including zero-rated supplies.

6. Input tax credit can be said to have been availed when it is entered into the electronic credit ledger of the registered person i.e. when the said taxable person files his/her monthly return in FORM GSTR-3B. As per Section 16(4) of the CGST Act, ITC may be claimed on or before the due date of filing of the return for the month of September following the financial year to which the invoice pertains or the date of filing of annual return, whichever is earlier.

7. Clarifications on specific Issues related to refund of accumulated Input Tax Credit of Compensation Cess stated in circular.

8. Instructions on submission of refund claims with jurisdictional proper officer stated in circular.

Circular No. 80/2018-CGST

Dated 31.12.2018

Rate & Classification of: (i) Chhatua or Sattu (ii) Fish meal and other raw materials used for making cattle/poultry/aquatic feed (iii) Animal Feed Supplements/ feed additives from drugs (iv) Liquefied Petroleum Gas for Domestic Use (v) Polypropylene Woven and Non-Woven Bags and PP Woven and Non-Woven Bags laminated with BOPP (vi) Wood logs for pulping (vii) Bagasse based laminated particle board (viii) Embroidered fabric sold in three pieces cloth for lady suits (ix) Waste to Energy Plant (x) Turbo Charger for railways (xi) Rigs, tools & Spares moving inter-state for provision of service; specified in the circular.

Circular No. 81/2018-CGST

Dated 31.12.2018

The term “sprinklers” in entry 195B of Notification No. 1/2017- Central Tax (Rate), covers sprinkler irrigation system. Sprinkler system consisting of nozzles, lateral and other components would attract 12% GST rate.

Circular No. 82/2018-CGST

Dated 01.01.2019

For the period 1st July, 2017 to 30th January, 2018:

– Two-year full time Post Graduate Programmes in Management for the Post Graduate Diploma in Management, to which

admissions are made on the basis of Common Admission Test (CAT) conducted by the Indian Institute of Management, Fellow programme in Management and Five years integrated programme in Management are Exempt from GST.

– One year Post Graduate Programs for Executives, any programs other than those mentioned at Sl. No. 67 of notification No. 12/2017-Central Tax (Rate) and all short duration executive development programs or need based specially designed programs (less than one year) are not exempt.

31st Jan 2018 onwards:

– All long duration programs (one year or more) conferring degree/ diploma as recommended by Board of Governors as per the power vested in them under the IIM Act, 2017 including one-year Post Graduate Programs for Executives are exempt from GST.

– All short duration executive development programs or need based specially designed programs (less than one year) which are not a qualification recognized by law are not exempt.

Circular No. 83/2019-CGST

Dated 01.01.2019

Services provided by IFC and ADB are exempt from GST in terms of provisions of IFC Act, 1958 and ADB Act. The exemption will be available only to the services provided by ADB and IFC and not to any entity appointed by or working on behalf of ADB or IFC.

Circular No. 84/2019-CGST

Dated 01.01.2019

Service of “printing of pictures” falls under service code “998386: Photographic and videographic processing services” and not Circular No. 84/03/2019-GST 2 under “998912: Printing and reproduction services of recorded media, on a fee or contract basis” of the scheme of classification of service annexed to notification No. 11/2017-Central Tax (Rate) dated 28.06.2018. The service of printing of pictures attracts GST @ 18% falling under item (ii), against serial number 21 of the Table in notification No. 11/2017-Central Tax (Rate) dated 28.06.2018.

Circular No. 85/2019-CGST

Dated 01.01.2019

Supply of food and beverages by an educational institution to its students, faculty and staff, where such supply is made by the educational institution itself, is exempt under Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017, vide Sl. No. 66 w.e.f. 01-07-2017 itself. However, such supply of food and beverages by any person other than the educational institutions based on a contractual arrangement with such institution is leviable to GST@ 5%.

Circular No. 86/2019-CGST

Dated 01.01.2019

Supply of food and beverages by an educational institution to its students, faculty and staff, where such supply is made by the educational institution itself, is exempt under Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017, vide Sl. No. 66 w.e.f. 01-07-2017 itself. However, such supply of food and beverages by any person other than the educational institutions based on a contractual arrangement with such institution is leviable to GST@ 5%.

Circular No. 87/2019-CGST

Dated 02.01.2019

The CENVAT credit of service tax paid under section 66B of the Finance Act, 1994 is available as transitional credit under section 140(1) of the CGST Act.

“Eligible duties” in section 140(1) cover the duties listed as “eligible duties” at sl. no. (i) to (vii) of explanation 1, and “eligible duties and taxes” at sl. no. (i) to (viii) of explanation 2 to section 140. “Eligible duties” does not in any way refer to the condition regarding goods in stock as referred in Explanation 1and 2 to section 140.

Circular No. 88/2019-CGST

Dated 01.02.2019

List of Circulars Amended to incorporate changes due to implementation of GST Amendment Acts 2018:

1. Circular No. 8/8/2017 dated 04.10.2017 regarding Realisation of Export Proceeds in Indian Rupees.
2. Circular No. 38/12/2018 dated 26.03.2018 regarding Job Work Procedure, Registration Requirements of Job Worker and Supply of Job Work services.
3. Circular No. 38/12/2018 dated 26.03.2018 regarding time allowed to owner/transporter to pay tax/penalty for seized goods being changed to 14 days
4. Circular No. 58/32/2018 dated 04.09.2018 to incorporate changes regarding modes of recovery of arrears of wrongly availed CENVAT credit under the existing law and inadmissible transitional credit.
5. Circular No. 69/43/2018 dated 26.10.2018 regarding suspension of registration.

Circular No. 89/2019-CGST

Dated 18.02.2019

The registered persons making inter-State supplies to unregistered persons shall report the details of such supplies along with the place of supply in Table 3.2 of FORM GSTR-3B and Table 7B of FORM GSTR–1 as mandated by the law.

Circular No. 90/2019-CGST

Dated 18.02.2019

All registered persons making supply of goods or services or both in the course of inter-State trade or commerce shall specify the place of supply along with the name of the State in the tax invoice. Contravention shall attracts penal action under the provisions of sections 122 or 125 of the CGST Act.

Circular No. 91/2019-CGST

Dated 18.02.2019

Suppliers who have paid central tax and state tax on supply of warehoused goods while deposited in custom bonded warehouses instead

of the applicable IGST, due to non-availability of the facility to report these in FORM GSTR-1 on the common portal, would be deemed to have complied with the provisions of law as far as payment of tax on such supplies is concerned as long as the amount of tax paid as central tax and state tax is equal to the due amount of integrated tax on such supplies for the period July 2017 to March 2018.

Circulars: IGST

Circular No. 04/01/2019-IGST

Dated 01.02.2019

Circular No. 03/01/2018-IGST dated 25th May, 2018 regarding supply of warehoused goods to any person before clearance for home consumption, is rescinded.

Order: CGST

Order No. 01/2019-CGST

Dated 31.01.2019

Sub.: Extension of time limit for submitting the declaration in FORM GST TRAN-1 under rule 117(1A) of the Central Goods and Service Tax Rules, 2017 in certain cases.

Extension of period for submitting the declaration in FORM GST TRAN-1 till 31st March, 2019.

Notification: CGST

Notification No. 67/2018-Central Tax

Dated 31.12.2018

Notification No.31/2018-Central Tax, dated the 6th August, 2018 amended to extend time limit of furnishing details by taxpayers to the jurisdictional nodal officer till 31st January, 2019 and furnishing details to GSTN by email till 28th February 2019.

Notification No. 68/2018-Central Tax

Dated 31.12.2018

Notification No. 21/2017– Central Tax, dated the 08th August, 2017 & notification No. 56/2017– Central Tax, dated the 15th November, 2017 amended to extend time limit for filing GSTR-3B for the period July, 2017 - February, 2019 till 31st March, 2019,for newly migrated taxpayers.

Notification No. 69/2018-Central Tax

Dated 31.12.2018

Notification No. 35/2017 – Central Tax, dated the 15th September, 2017 & notification No. 16/2018 – Central Tax, dated the 23rd March, 2018 amended to extend time limit for filing GSTR-3B for the period July, 2017 - February, 2019 till 31st March, 2019,for newly migrated taxpayers.

Notification No. 70/2018-Central Tax

Dated 31.12.2018

Notification No. 34/2018 – Central Tax, dated the 24th August, 2018 amended to extend time limit for filing GSTR-3B for the period July, 2017 - February, 2019 till 31st March, 2019,for newly migrated taxpayers.

Notification No. 71/2018-Central Tax

Dated 31.12.2018

Notification No. 44/2018- Central Tax, dated the 10th September, 2018 amended to extend time limit for filing GSTR-1 for the period July, 2017 - December, 2018 till 31st March, 2019,for newly migrated taxpayers with turnover below 1.5 crore.

Notification No. 72/2018-Central Tax

Dated 31.12.2018

Notification No. 44/2018- Central Tax, dated the 10th September, 2018 amended to extend time limit for filing GSTR-1 for the period July, 2017

- February, 2019 till 31st March, 2019,for newly migrated taxpayers with turnover over 1.5 crore.

Notification No. 73/2018-Central Tax

Dated 31.12.2018

Notification No. 50/2018- Central Tax dated the 13th September, 2018 amended to insert proviso which exempts supplies between person specified under clauses (a), (b), (c) and (d) of sub-section (1) of section 51 of the said Act from the TDS provisions.

Notification No. 74/2018-Central Tax

Dated 31.12.2018

Central Goods and Services Tax (Fourteenth Amendment) Rules, 2018.

Notification No. 75/2018-Central Tax

Dated 31.12.2018

Notification No. 4/2018 – Central Tax, dated the 23rd January, 2018,amended to insert proviso to waive late fee on furnishing GSTR-1 after the due date for the period July 2017 to September 2018 if it is furnished between 22nd December, 2018 to 31st March, 2019.

Notification No. 76/2018-Central Tax

Dated 31.12.2018

Late fee payable waived by any registered person for failure to furnish the return in FORM GSTR-3B for July, 2017 onwards by the due date under section 47 of the said Act, which is in excess of an amount of twenty-five rupees for every day during which such failure continues.

If central tax payable is NIL, late fee shall stand waived to the extent which is in excess of an amount of ten rupees for every day during which such failure continues.

Amount of late fee shall stand waived for the registered persons who failed to furnish the return in FORM GSTR-3B for the months of July, 2017

to September, 2018 by the due date but furnishes the said return between the period from 22nd December, 2018 to 31st March, 2019.

Notification No. 77/2018-Central Tax

Dated 31.12.2018

Notification No. 73/2017– Central Tax, dated 29th December, 2017 amended to insert Proviso to waive late fee on furnishing FORM GSTR 4 beyond the due date, for the period July 2017-September 2018 if the return is furnished between 22nd December 2018 to 31st March 2019.

Notification No. 78/2018-Central Tax

Dated 31.12.2018

Extension of time limit till the 31st March, 2019 for furnishing FORM GST ITC-04 in respect of goods dispatched to a job worker or received from a job worker, during the period July, 2017 to December, 2018.

Notification No. 79/2018-Central Tax

Dated 31.12.2018

Notification No. 02/2017-Central Tax dated the 19th June, 2017 amended to insert:

> "Notwithstanding anything contained in this notification, the central tax officer specified in column (3) of Table I and the officers subordinate to him shall exercise powers under sections 73, 74, 75 and 76 of Chapter XV of the said Act throughout the territorial jurisdiction of the corresponding central tax officer specified in column (2) of the said Table in respect of those cases as may be assigned by the Board".

Notification No. 01/2019-Central Tax

Dated 15.01.2019

Notification No. 48/2017-Central Tax dated the 18th October, 2017 amended to insert:

Provided that goods so supplied, when exports have already been made after availing input tax credit on inputs used in manufacture of such

exports, shall be used in manufacture and supply of taxable goods (other than nil rated or fully exempted goods) and a certificate to this effect from a chartered accountant is submitted to the jurisdictional commissioner of GST or any other officer authorised by him within 6 months of such supply,

Provided further that no such certificate shall be required if input tax credit has not been availed on inputs used in manufacture of export goods.

Notification No. 02/2019-Central Tax

Dated 29.01.2019

Provisions of the CGST (Amendment) Act, 2018 (31 of 2018), except clause (b) of section 8, section 17, section 18, clause (a) of section 20, sub-clause (i) of clause (b) and sub-clause (i) of clause (c) of section 28, shall come into force on 1st day of February, 2019.

Notification No. 03/2019-Central Tax

Dated 29.01.2019

Central Goods and Services Tax (Amendment) Rules, 2019.

Notification No. 04/2019-Central Tax

Dated 29.01.2019

Amendment in Notification No. 2/2017-Central Tax dated 19.06.2017(w.e.f. 1st Feb 2019) to define jurisdiction:

In opening paragraph, after serial number (k) and entries relating thereto, Insert: - “(l) Joint Commissioner of Central Tax (Appeals),”

In paragraph 2, in serial number (c), Insert “or Joint Commissioners” after the words, “Additional Commissioners”.

In paragraph 4, “Additional Commissioners of Central Tax (Appeals)” shall be substituted by “any officer not below the rank of Joint Commissioner (Appeals)”

In Table I and Table III, insert “or Joint Commissioner” after the words, “Additional Commissioner”, wherever they appear.

Notification No. 05/2019-Central Tax

Dated 29.01.2019

Amendment in the notification No.8/2017 - Central Tax, dated the 27th June, 2017, to align rates for Composition Scheme with CGST Rules, 2017

The portion beginning with the words “an amount calculated at the rate of” and ending with the words “half per cent. of the turnover of taxable supplies of goods in State in case of other suppliers” substituted by “an amount of tax calculated at the rate specified in rule 7 of the Central Goods and Services Tax Rules, 2017” w.e.f 1st Feb 2019.

Notification No. 06/2019-Central Tax

Dated 29.01.2019

Amendment in the notification No. 65/2017-Central Tax, dated the 15th November, 2017 regarding registration threshold under GST.

“sub-clause (g) of clause (4) of article 279A of the Constitution, other than the State of Jammu and Kashmir”, shall be substituted by “the first proviso to sub-section (1) of section 22 of the said Act, read with clause (iii) of the Explanation to the said section” w.e.f. 1st February 2019.

Notification No. 07/2019-Central Tax

Dated 31.01.2019

Time limit extended for furnishing the return by a registered person required to deduct tax at source under the provisions of section 51 of the said Act in FORM GSTR-7 for the months of October, 2018 to December, 2018; till the 28th of January, 2019.

Notification No. 08/2019-Central Tax

Dated 08.02.2019

Extends the time limit for furnishing return by registered person required to deduct tax at source under section 51 of CGST Act in FORM GSTR-7

of the CGST Rules, 2017 under sub-section (3) of section 39 of the CGST Act read with rule 66 of the CGST Rules, 2017 for the month of January, 2019 till 28th February, 2019.

Notification No. 09/2019-Central Tax

Dated 20.02.2019

Due date for filing the return in FORM GSTR 3B extended to 22nd February 2019 for all states and to 28th February 2019 for Jammu & Kashmir.

Notification: CGST (Rate)

Notification No. 24/2018-Central Tax (Rate)

Dated 31.12.2018

Entries inserted and omitted to amend Notification No.1/2017-Central Tax (Rate), dated the 28th June, 2017 to incorporate changes in rate of tax:

Schedule I-In S.No 123A,198A,224,225,234,243A

Schedule II-In S.No 101,102,126,171A,173,177

Schedule III- In S.No 121A,142-144,369A,376AA,383,384 & 440A

Schedule IV-In S.No 47,135,139,151,154,174 & 215.

Notification No. 25/2018-Central Tax (Rate)

Dated 31.12.2018

Notification No.2/2017-Central Tax (Rate), dated the 28th June, 2017 amended to insert entries in S. No 43A, 43B,121A and 153 related to exemption of GST.

Notification No. 26/2018-Central Tax (Rate)

Dated 31.12.2018

Intra-State supply of gold falling in heading 7108 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) exempted, when supplied

by Nominated Agency under the scheme for "Export Against Supply by Nominated Agency" as referred in paragraph 4.41 of the Foreign Trade Policy central tax leviable thereon, under section 9 of the CGST Act, 2017, subject to following conditions specified.

Notification No. 27/2018-Central Tax (Rate)

Dated 31.12.2018

Notification No.11/2017-Central Tax (Rate), dated the 28th June, 2017 amended to incorporate rate changes in S.No 3,7,8,15,17,21,25,34 and 38.

Notification No. 28/2018-Central Tax (Rate)

Dated 31.12.2018

Notification No. 12/2017- Central Tax (Rate) dated 28th June 2017 amended to insert entries at S.No 21B,27A,74A(regarding services by banking company, rehabilitation professionals and goods transport agency) to exempt services and amend S.No 34A,66,67 w.e.f. 1st January 2019.

Notification No. 29/2018-Central Tax (Rate)

Dated 31.12.2018

Notification No. 13/2017- Central Tax (Rate) amended to insert entries at S.No 12-14 (regarding Services by Business Facilitator, Agent of business correspondent & Security services) and add proviso in S.No 1 to specify Reverse Charge Applicability.

Notification No. 30/2018-Central Tax (Rate)

Dated 31.12.2018

Explanation inserted in notification No. 11/2017 -Central Tax (Rate) against S.No. 9(Goods Transport Services):

> "Nothing contained in this item shall apply to supply of a service other than by way of transport of goods from a place in India to another place in India."

Notification No. 01/2019-Central Tax (Rate)

Dated 29.01.2019

Notification No. 8/2017-Central Tax (Rate), dated the 28th June, 2017 regarding exemption of supplies from unregistered suppliers to registered recipient upto a value of Rs 5000, rescinded.

Notification: IGST

Notification No. 04/2018-IGST

Dated 31.12.2018

IGST Rules, 2017 amended to insert rules for determination of place of supply in case of inter-State supply under sections 12(3), 12(7), 12(11) and 13(7) of the IGST Act, 2017.

Notification No. 01/2019-IGST

Dated 29.01.2019

Provisions of the IGST (Amendment) Act, 2018 shall come into force from 1st February, 2019.

Notification No. 02/2019-IGST

Dated 29.01.2019

“151” substituted by “5” in clause (b) of Notification No.7/2017-Integrated Tax, dated the 14th September, 2017, to align with the amended Annexure to Rule 138(14) of the CGST Rules, 2017.

Notification No. 03/2019-IGST

Dated 29.01.2019

Notification No. 10/2017-Integrated Tax, dated the 13th October, 2017 amended to align Special Category States with the explanation in section 22 of CGST Act, 2017 w.e.f. 1st February 2019.

Notification: IGST (Rate)

Notification No. 25/2018-IGST (Rate)

Dated 31.12.2018

Amendments made in Notification No. 1/2017-Integrated Tax (Rate) dated 28.06.2017to notify rates:

Schedule I-In S.No 23,24,123,198A,224,225 &234

Schedule II-In S.No 101,102,126,171A,173,177

Schedule III- In S.No 121A,142-144,369A,376AA,383,384 & 440A

Schedule IV-In S.No 47,135,139,151,154,174 & 215

Notification No. 26/2018-IGST (Rate)

Dated 31.12.2018

Notification No. 2/2017-Integrated Tax (Rate) dated 28.06.2017 amended at S.No 43A,43B,121A and 153 to exempt specified goods. (Regarding Printed Music, Vegetables & Gifts received via government auction).

Notification No. 27/2018-IGST (Rate)

Dated 31.12.2018

Inter-State supply of gold falling in heading 7108 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when supplied by Nominated Agency under the scheme for “Export Against Supply by Nominated Agency” to registered persons, exempted from IGST leviable under section 5 of IGST Tax Act, 2017, subject to conditions specified; w.e.f. 1st January 2019.

Notification No. 28/2018-IGST (Rate)

Dated 31.12.2018

Notification No. 8/2017- Integrated Tax (Rate) amended to notify IGST rates of services at S.no 3,7,8,15,17,21,25,34 and 37.

Notification No. 29/2018-IGST (Rate)

Dated 31.12.2018

Notification No. 9/2017- Integrated Tax (Rate) amended to insert S.No 22B,28A,77A (regarding services by banking company, rehabilitation professionals and goods transport agency) and amend S.No 35A,69,70 w.e.f. 1st January 2019 to exempt services.

Notification No. 30/2018-IGST (Rate)

Dated 31.12.2018

Notification No. 10/2017- Integrated Tax (Rate) amended to insert entries at S.No 14-16 (regarding Services by Business Facilitator, Agent of business correspondent & Security services) and add proviso in S.No 2 to specify Reverse Charge Applicability.

Notification No. 31/2018-IGST (Rate)

Dated 31.12.2018

Explanation inserted in notification No. 8/2017 -Integrated Tax (Rate) against S.No 9 (Goods Transport Services):

> "Nothing contained in this item shall apply to supply of a service other than by way of transport of goods from a place in India to another place in India."

Notification No. 01/2019-IGST (Rate)

Dated 29.01.2019

Notification No. 32/2017-Integrated Tax (Rate), dated the 13th October, 2017 regarding exemption of IGST on supply received by a registered person from an unregistered supplier upto a value of Rs 5000,rescinded w.e.f. 1st Feb 2019.

Notification No. 02/2019-IGST (Rate)

Dated 29.01.2019

Serial number 10D and the entries relating thereto about to exemption of IGST on supply of services having place of supply in Nepal or Bhutan,

against payment in Indian Rupees., shall be omitted from the table in Notification No.9/2017- Integrated Tax (Rate), dated the 28th June, 2017.

Notification: UTGST

Notification No. 01/2019-UTGST

Dated 29.01.2019

Provisions of the UGST (Amendment) Act, 2018 shall come into force from 1st February, 2019.

Notification: UTGST (Rate)

Notification No. 24/2018-UTGST (Rate)

Dated 31.12.2018

Amendments made in Notification No. 1/2017-Union Territory Tax (Rate) dated 28.06.2017 to notify rates:

Schedule I-In S.No 23,24,123,198A,224,225,234,243A

Schedule II-In S.No 101A,101B,101C,102,126,171A,173,177

Schedule III- In S.No 121A,142-144,369A,376AA,383,384 & 440A

Schedule IV-In S.No 47,135,139,151,154,174 & 215

Notification No. 25/2018-UTGST (Rate)

Dated 31.12.2018

Notification No. 2/2017-Union Territory Tax (Rate) dated 28.06.2017 amended at S.No 43A,43B,121A and 153(Regarding Printed Music, Vegetables & Gifts received via government auction) to exempt specified goods.

Notification No. 26/2018-UTGST (Rate)

Dated 31.12.2018

Intra-State supply of gold falling in heading 7108 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when supplied by Nominated

Agency under the scheme for “Export Against Supply by Nominated Agency”, to registered persons exempted from UTGST under section 7 of the UTGST Act, 2017, subject to conditions specified.

Notification No. 27/2018-UTGST (Rate)

Dated 31.12.2018

Notification No. 8/2017- Integrated Tax (Rate) amended to notify UTGST rates of services at S.no 3,7,8,15,17,21,25,34 and 37 w.e.f. 1st January 2019.

Notification No. 28/2018-UTGST (Rate)

Dated 31.12.2018

Notification No. 9/2017- Integrated Tax (Rate) amended to insert S.No 21B,27A,74A(regarding services by banking company, rehabilitation professionals and goods transport agency) and amend S.No 34A,66,67 w.e.f. 1st January 2019 to exempt services.

Notification No. 29/2018-UTGST (Rate)

Dated 31.12.2018

Notification No. 13/2017- Integrated Tax (Rate) amended to insert entries at S.No 14-16 (regarding Services by Business Facilitator, Agent of business correspondent & Security services) and add proviso in S.No 1 to specify Reverse Charge Applicability w.e.f. 1st January 2019.

Notification No. 30/2018-UTGST (Rate)

Dated 31.12.2018

Explanation inserted in notification No.11/2017 - Union Territory Tax (Rate), dated the 28th June, 2017against S.No 9 (Goods Transport Services):

> “Nothing contained in this item shall apply to supply of a service other than by way of transport of goods from a place in India to another place in India.”

Notification No. 01/2019-UTGST (Rate)

Dated 29.01.2019

Notification No. 8/2017-Union Territory Tax (Rate) dated 28.06.2017 regarding exemption of supplies from unregistered suppliers to registered recipient upto a value of Rs 5000,rescinded.

UNREPORTED ORDERS AND JUDGMENTS

S. No	Relevant provision of CGST Act	Name of the Case	Order
1	Anti – profiteering measures (Section 171 of CGST Act)	Director General Anti-Profiteering v. Satya Enterprises [2019]	It was alleged that the respondent had violated the provisions of Sec.171 of CGST Act by not passing the benefit of reduction in rate of tax to its customers which he gained on supply of 109 products from 15.11.17 to 31.5.18 and subsequently earned Rs.6,06,752.72. Moreover, the respondent remained silent against the report prepared by DGAP. The court directed the respondent to reduce the sale price of all products on which he increased the base price w.e.f. 15.11.2017 in proportion to the reduction in rate of tax. Moreover, he was directed to pay Rs.6,06,752.72 alongwith interest @ 18%.
2	Anti – profiteering measures (Section 171 of CGST Act)	Kerala State Screening Committee on Anti-Profiteering v. Maruti Suzuki India Ltd.	It was alleged that respondent had not passed the benefit of reduction in tax to customers on selling of four models of Motor car. For the same, the committee took into consideration invoice samples of the company related to pre GST and post GST era. It was held that pre GST, the rate of tax was 15.63% while post GST it has been increased to 29 %. Hence, the respondent had not contravened the provisions of Sec. 171 of the Act.
3	Anti – profiteering measures (Section 171 of CGST Act)	Kerala State Screening Committee on Anti-profiteering v. S.J. Spices Ltd. [2019]	It was alleged that respondent had not passed the benefit of reduction in tax on supply of black pepper. The DGAP presented a detailed report on the issue and submitted that pre GST, pepper product attracted VAT @5% and after GST, the tax rate was fixed at 5%. Held that respondent had not contravened the provisions of Sec.171 of the Act.
4	Anti – profiteering measures (Section 171 of CGST Act)	Kerala State Screening Committee on Anti-profiteering v. Pulimoottill Silks [2019]	It was alleged that benefit of reduction in tax on supply of 'Little Star Dhoti' was not passed on to the customers. The DGAP in his report submitted that pre GST, the rate of tax under VAT was 5% on dhoti and was exempted under excise Act. Moreover, after GST, the rate was fixed at 5%. It was held that there was no reduction and respondent had not contravened the Sec. 171 of the Act.
5	Anti – profiteering measures (Section 171 of CGST Act)	Kerala State Screening Committee on Anti-profiteering v. Sudarsans[2019]	It was alleged that benefit of reduction in tax on supply of 'shorts (jockey shorts)' was not passed on to the customers. The DGAP in his report submitted that pre GST, the rate of tax under VAT was 5% on product. Moreover, after GST, the rate was fixed at 5%. It was held that there was no reduction and respondent had not contravened the Sec. 171 of the Act.

6	Anti – profiteering measures (Section 171 of CGST Act)	Kiran Chimirala v. Jubilant Food Work Ltd. [2019]	It was found that the company working under the name & style of Domino's Pizza had not passed on the benefit of reduction in taxes from 18% to 5% and earned Rs.41,42,97,635/- between the period 15.11.17 to 31.05.18. The respondent was directed to reduce the base price by way of proportionate reduction keeping in view the reduced rate of tax and the benefit of ITC denied. Moreover, a show cause notice was issued under Sec. 122(1)(i) of CGST Act to explain why penalty should not be imposed.
7	Anti – profiteering measures (Section 171 of CGST Act)	Shylesh Damodaran v. Landmark Automobiles (P.) Ltd. [2018]	The allegation was regarding non-passing of ITC benefit on reduction in rate of tax. Although through the records it was revealed that the base price charged by the respondent in post GST era was less than the price charged in pre-GST era. The reason being that in the pre GST era, the credit of excise duty, NCCD and cesses was not available to the respondent but after GST, the respondent was entitled to claim credit on whole GST paid. The respondent also revealed that base price charged by the applicant was reduced as the benefit of ITC was passed on to the applicant. Hence, the respondent had not contravened the provisions of Sec 171 of the Act and application was dismissed.
8	Detention, seizure and release of goods and conveyance in transit-General principles(Section 129 (1)of UPGST Act)	Sarvottam Rolling Mills (P.) Ltd. v. State of U.P. [2018]	The goods were seized on the premise of expiry of E-way bill. The petitioner contended that goods were seized an hour before the expiry of e-way bill. Moreover, the goods reached its destination well in time but due to no entry, the truck could not enter and detention order was passed. The court directed the release of vehicle along with goods on furnishing of bank guarantee.
9	Detention, seizure and release of goods and conveyances in transit (Section. 129 of CGST Act)	Preethi Kitchen Appliances (P.) Ltd. v. State Tax Officer [2019]	The goods were detained because Part-B of E-WAY bill was not updated and order was passed. The petitioner argued that all entries were duly updated but his representation was not considered. Having no option left, the petitioner submitted to deposit one-time tax under CGST and SGST for the purpose of release of goods and thereafter agitate the matter before appellate authority. The petition was disposed of in favour of assessee.
10	Determination of Place of Supply (Section. 12 of IGST Act)	Vasu Clothing (P.) Ltd. V. Union of India [2018]	The petitioner was a manufacturer and exporter of garments in India. The petitioner prayed for exemption from taxes on the basis that transactions done at Duty free shops be treated as exports since the Duty free shops are located beyond the customs frontier of India. The court defined 'India' as per Sec. 2(56) of CGST Act. The court held that the location of Duty free shop shall

			be India as long as it is not beyond EEZ and hence the supplies made to these shops shall not be exempt from taxes.
11	Power of Inspection, Search and Seizure (Section. 67 of CGST Act)	Rimjhim Ispat Ltd., Juhi Alloys Ltd., L.D. Goyal Steels Pvt. Ltd. V. State of UP [2019]	Search and seizure operation conducted at factory premises was challanged by the petitioner as being colourable and mala fide exercise of statutory powers. Confiscation order passed during pendency of the writ petition was also challenged. The Department submitted that search was based on confidential information obtained, stating that the petitioner was involved in tax evasion activities. Now, the question was whether the search was conducted observing the 'substantive due process' as well as the 'procedural due process.' The court held that 'substantive due process', mentioned under sections 67(1) and 67(2) of the U.P. GST Act has been duly followed. The petition was dismissed as the petitioner failed to establish the search as illegal. Regarding confiscation order passed, it was held that authorities must have waited for the outcome of the challenge. Hence, the same was remanded.
12	Repeal and saving (Section. 174 of CGST Act)	Sheen Golden Jewels (India) (P.) Ltd v. State Tax Officer [2019]	The issue was whether the state has power to enact Sec. 174 of Kerala CGST Act and save past taxing events- when the Entry 54, List II, stood omitted w.e.f. 16.9.2017. It was held that it is a mistaken belief in petitioner's understanding that states do not possess the power to enact Sec. 174 as Article 246A gives simultaneous power to both Union and States to legislate on certain items.
13	Return- Furnishing of-Grievance Redressal Mechanism(Section 39 of CGST Act)	Coastal Freez Tech & Sanitaries v. Goods Service Tax Council [2019]	The assessee failed to upload TRAN-1 on portal due to technical error and filed petition for seeking direction to enable him to take input tax credit of available input tax. The assessee was directed to apply to Nodal officer in this regard, who would look into the matter and facilitate assessee's uploading Form GST TRAN-1.
14	Return- Furnishing of-Grievance Redressal Mechanism(Section 39 of CGST Act)	Edayar Metals v. Union of India [2019]	The assessee failed to upload TRAN-1 on portal due to technical error and filed petition for seeking direction to enable him to take input tax credit of available input tax. The assessee was directed to apply to Nodal officer in this regard, who would look into the matter and facilitate assessee's uploading Form GST TRAN-1.
15	Return- Furnishing of-Grievance Redressal Mechanism(Section 39 of CGST Act)	Leo Logistics v. Union of India [2019]	The assessee failed to upload TRAN-1 on portal due to technical error and filed petition for seeking direction to enable him to take input tax credit of available input tax. The assessee was directed to apply to Nodal officer in this regard, who would look into the matter and facilitate assessee's uploading Form GST TRAN-1.

16	Value of Supply (Section. 15 of CGST Act)	PSN Automobiles (P.) Ltd. v. Union of India [2019]	The petitioner used to collect Tax under Income Tax Act at the rate of 1% from the purchaser of motor vehicles. His contention was that it should not be considered as integral part of the value of supply as he merely acted as an agent of state and that amount of 1% would ultimately goes to the credit of purchaser. The court referred the case of Commissioner of Customs (Import), v. Dilip Kumar & Co. wherein it was held that ambiguities in taxing provisions should be resolved in State's favour and on this basis, the court in the present case preferred the case for deeper adjudication.

Advance Rulings

S. No	State	Case Name	Order No. & Date	Particulars	
1	Tamil Nadu	Rajiv Gandhi Centre for aquaculture	TN/09/ AAR/2019 dated 23.01.2019	**Brief Issue**	Considering the nature of transactions carried out by the Rajiv Gandhi Centre for Aquaculture (RGCA) and various exemption notification(s) under GST Laws, whether RGCA is required to register under GST Laws? If no registration is required for RGCA, whether compulsory registration u/s 24 is required to be made against any of the provisions of Section 24? If so, whether separate registration is to be taken from all the states where the offices of RGCA is situated? If registration is required to be made, what are the tax rates applicable to the transactions of RGCA?
				Decision	Applicant is liable to be registered under Section 22 of CGST Act and RGCA shall obtain registration in every state in which he is so liable. -Fish seeds, prawn/shrimp seeds and live fish supplied are classifiable under 0301 and exempt from CGST. -Artemia cysts supplied are classifiable under 0511 and taxable at 5% GST. -Research & Development activities of RGCA towards genetic testing of seeds, developing new species etc. are taxable at 18% GST under S No 18 of Notification 11/2017. -Consultancy services towards nursery technology, cage farming etc. are classifiable under SAC 9986 and exempt from GST. -Testing for pathogens of soil, water, seeds etc. are classifiable under SAC 9983 and taxable at 18% GST. - Training services of RGCA to farmers, hatcheries are agricultural extension services covered under SAC 9986 and exempt. -Training activities of RGCA to students, academia who are not directly involved in rearing of fish, aquaculture and are covered under SAC 9992 and taxable at 18% GST.
2	Tamil Nadu	HYT SAM INDIA(JV)	TN/08/ AAR/2019 dated 22.01.2019	**Brief Issue**	Whether the works awarded to the Applicant is composite supply of services? Whether the benefit of Sl.No.3(v) of Notification No.11/2017- Central Tax (Rate) is applicable to subject works. Whether the Applicant is required to raise invoice on completion of events/milestones and remit the tax. What is the value on which invoice has to be raised in case of event/milestone invoicing if required?
				Decision	1.The supply for erection, commissioning, installation of plant and machinery for a factory to manufacture stainless steel coaches covering schedule-I, II, III, supply of machine, plant and equipment including commissioning spares in schedule I, erection and commissioning of all civil structures in schedule II, supply of electrical equipment including commission

S. No	State	Case Name	Order No. & Date	Particulars	
					on spares in schedule III, is a composite supply of services. Supply in agreement for wet leasing of Robotic spot welding machine and laser cutting and welding machine as per schedule V(a) and (b) is also a composite supply of service. 2. The mentioned notification shall be applicable only on supply for erection, commissioning, installation of plant and machinery for a factory to manufacture stainless steel coaches covering Schedule I, II, III. It shall not be applicable on agreement of wet leasing of robotic spot welding machine and laser cutting and welding machine. 3. The value of supply shall be the transaction value and include any amounts specified in Section 15(2) and exclude any discount as per Section 15(3) of CGST Act.
3	Tamil Nadu	Subramani Sumathi	TN/07/ AAR/2019 dated 22.01.2019	**Brief Issue**	What is the rate of tax for the vadams made of maida and what is the HSN Code?
				Decision	"Maida Vadam/Papad" is classifiable under '19050540' and is exempted from CGST and SGST vide S1 no 96 of Notification No. 02l2017 -CT (Rate) dt 28.06.2017.
4	Tamil Nadu	Dream Runners Foundation	TN/06/ AAR/2019 dated 22.01.2019	**Brief Issue**	Whether the conduct of marathon events by the Trust through which donations are raised for charity is an exempted service under GST? The Trust is approved under Sec 12AA of the Income Tax Act 1961, which means that the service of the Trust is charitable in nature, does it not automatically become a charitable activity that is exempted under GST? As the service rendered by the Trust is a charitable activity within the definition of Clause 2(r) of Notification No.12/2017-Central Tax (Rate), is registration under GST required? Are donations received from participants of the marathon event exempted from GST as it is money paid for conduct of a marathon event for raising funds for charity?
				Decision	1.Conduct of Marathon event by the Applicant for the participants is a not an exempt supply under CGST/TNGST Act. 2. Only those activities of Applicant which fall under the definition of "charitable activities" as per Clause 2(r) of Notification 12l2017 Central Tax (Rate) shall be exempt. 3. Applicant is required to be registered as taxable supply of services such as organizing marathon is being undertaken and aggregate turnover exceeds twenty lakh rupees. 4. The money is collected from the participants for conduct of the Marathon in the event organized by the Applicant and is not exempted from CGST/ SGST.
5	Tamil Nadu	MRF Limited	TN/05/ AAR/2019 dated 22.01.2019	**Brief Issue**	Whether the Applicant can avail the Input Tax Credit of the full GST charged on the supply of invoice or a proportionate reversal of the same is required in case of post purchase discount given by the supplier of the goods or services.

S. No	State	Case Name	Order No. & Date	Particulars	
				Decision	Applicant can avail Input Tax Credit only to the extent of the invoice value raised by the suppliers less the discounts as per C2FO software which is paid by him to the suppliers.
6	Tamil Nadu	Vaya Life Private Limited	TN/04/ AAR/2019 dated 21.01.2019	**Brief Issue**	What is the Harmonized system of nomenclature (HSN) code and the applicable GST rate for VAYA TYFFN (lunch boxes) and VAYA Drynk (bottle) in terms of notification 01/2017- Central Tax (Rate) dated 28/06/2017 as amended from time to time?
				Decision	VAYA TYFFN (lunch boxes) and VAYA Drynk (bottle) are classifiable under CTH 96170019 and chargeable to 28% GST as per S. No 225 of schedule IV of notification 01/2017 upto 14th November 2017. From 15th November 2017 onwards,they are chargeable to 18% GST as per S.No 449B of schedule-III of notification 01/2017.
7	Tamil Nadu	Animal Feed Analytical and Quality Assurance Laboratory	TN/03/ AAR/2019 dated 21.01.2019	**Brief Issue**	Whether services related to rearing of all life forms of animals by way of testing include testing of Animal Feeds, Feed ingredients and Feed supplements used to make feeds are covered under notification no 12/2017 dated 28.06.2017?
				Decision	Services provided related to testing of animal feed/ feed ingredients are not covered under Notification No 12/2017 Central Tax(Rate).
8	Tamil Nadu	RmKV Fabrics Private Limited	TN/02/ AAR/2019 dated 21.01.2019	**Brief Issue**	Whether the Salwar / Churidar sets being sold by the applicant comprising of three piece of cloth viz Top, Bottom and Dupatta be classifiable as Fabrics under the relevant chapters and attract only 5% GST; or would they be classifiable as Articles of apparel and attract 5% GST if their sale price is below Rs. 1000 and attract 12% GST if their sale price is more than Rs.1000?
				Decision	1. Model 1: Both Top and Bottom not stitched-classifiable as fabric under Chapter 50 to 55 and attracts 5% tax. 2.Model 2:Top semi stitched and bottom not stitched, Model 3:Top stitched but botton unstitched, Model 4:Neck worked and both top and bottom not stitched-classifiable under Tariff heading 621142/621143/621149.Rate of tax of articles where sale value not exceeding Rs 1000/piece-5%. Rate of tax of articles where sale value exceeding Rs 1000/piece-12%.
9	Tamil Nadu	Kara Property Ventures LLP	TN/01/ AAR/2019 dated 21.01.2019	**Brief Issue**	What is the value of supply of services provided from July 1, 2017 in terms of the provisions of CGST ACT 2017 read with Notification No.11/2017-Central Tax (Rate) dated 28.06.2017(as amended from time to time)?
				Decision	Value of supply of services provided by the Applicant in the project 'One Crest' in Chennai, wherein the Applicant has entered into two separate agreements, viz., one for 'Sale of undivided share of land' and the other for 'Construction' with the customers, the measure of levy of GST on the supply of service of 'Construction' shall be 2/3rd of the total value charged for construction service and the amount charged for transfer of undivided share of land, as per entry No. 3(i) of Notification No. 11/2017-C.T.(Rate).

S. No	State	Case Name	Order No. & Date	Particulars	
10	West Bengal	Nipha Exports Pvt Ltd	43/ WBAAR/2018-19 dated 26/02/2019	**Brief Issue**	Whether ITC is admissible on purchase of an ambulance in November 2018 for the benefit of the employees under the legal requirements of the Factories Act, 1948?
				Decision	Input tax credit is not admissible on the ambulance purchased in November 2018, as Section 17(5) of the GST Act, as it stood in the relevant period, blocks any such enjoyment, even if provisioning of ambulance service to the employees is obligatory under the Factories Act, 1948.
11	West Bengal	Sarj Educational Centre	42/ WBAAR/2018-19 dated 26.02.2019	**Brief Issue**	Whether lodging along with food to the students by a private boarding house is a composite supply and eligible for exemption under Sl No. 14 of Notification No. 12/2017-CT(Rate) dated 28/06/2017.
				Decision	The Applicant is offering several individual services in different combinations to the recipients, depending upon their need for lodging facility. None of the combinations of services being offered is a composite supply, as defined under section 2(30) of the GST Act. They are mixed supplies within the meaning of section 2(74) and taxable in accordance with section 8(b) of the GST Act. Being mixed supply, value of the entire combination of services offered is taxable at the applicable rate.
12	West Bengal	Piyush Polytex Industries Pvt Ltd	41/ WBAAR/2018-19 dated 26.02.2019	**Brief Issue**	Classification for polypropylene non-woven bags
				Decision	1.Bags/Sacks (both with & without Handle) made of Laminated P.P. Nonwoven Fabric is classifiable under Sub-Heading 39232990, 2.Bags/Sacks (both with & without Handle) made of B.O.P.P. Pasted P.P. Nonwoven Fabric is classifiable under Sub-Heading 39232990, and 3.Bags/Sacks (both with & without Handle) made of Woven Fabric Pasted with Nonwoven Fabric have to be classified as per the General Rules for the Interpretation of the First Schedule of the Customs Tariff .
13	West Bengal	Tewari Warehousing Co Pvt Ltd	40/ WBAAR/2018-19 dated 18.02.2019	**Brief Issue**	Whether ITC is admissible on construction of a warehouse using pre-fabricated technology?
				Decision	The warehouse being constructed is immovable property. The input tax credit is, therefore, not admissible on the inward supplies for construction of the said warehouse, as the credit of such tax is blocked under section 17(5)(d) of the GST Act.
14	Uttarakhand	Opto Electronic Factory	Ruling No.19 dated 07.02.2019	**Brief Issue**	Classification and Rate of Applicable GST on various equipment manufactured for being used exclusively in various Tanks.
				Decision	Sight Vision Equipment manufactured and repaired by the applicant for further exclusive use in armoured tanks will be classified under HSN code 9013 and will attract 18% GST.
15	Uttarakhand	Elefo Biotech Pvt. Ltd.	Ruling No.18 dated 07.02.2019	**Brief Issue**	Recommendation on the HSN code and applicable tax rate to be used under GST for the AMI (said product) : (3002-HS Code of Antisera and other blood fractions and modified immunological products, whether or not obtained by means of biotechnological process or 0511-Animal products not elsewhere specified

S. No	State	Case Name	Order No. & Date	Particulars	
					or included; dead animals of chapter 1 or 3, unfit for human consumption, other than semen including frozen semen or 3101-All goods i.e. animal or vegetable fertilisers put up in unit containers and bearing a brand name.)
				Decision	Anaerobic Microbial Inoculums (AMI) shall be classified under sub heading 31010099 of the heading 3101 of the GST Tariff and attract 5% GST.
16	Uttarakhand	NHPC Ltd (Tanakpur Jalvidhyut Pariyojna Banbasa Champawat.)	Ruling No.17 dated 30.01.2019	**Brief Issue**	NHPC has been exempted from GST as per notification no. 12/2017,central tax (Rate) dated 28-06-17 (as amended time to time) but will this entail other agencies and contractor/ sub-contractors not to charge GST in their invoices. If the activity of constructing Indo-Nepal border rode is exempted as per advance ruling will this permit all the contractor and sub-contractors involved in this project be exempted or otherwise?
				Decision	Case referred to Appellate Authority
17	Uttarakhand	Goodwear Fashion Pvt Ltd.	Ruling No.16 dated 30.01.2019	**Brief Issue**	Whether interlining fabrics is Classified under HSN code 5903 or should be Classified as further blend of yarn (In chapter 52-55)?
				Decision	Polyester Viscose fusing interlining woven fabric does not fall under HSN code 5903. It will fall under chapters 50-55,58 or 60 as per chapter note 2(a)(4) of chapter 59 of the GST Tariff.
18	Uttarakhand	Premier Solar Systems Pvt Ltd.	Ruling No.15 dated 24.01.2019	**Brief Issue**	Whether the supply of Solar rooftop power plant along with design Erection, Commissioning and Installation is a 'Composite supply' and the applicability of GST rate? Whether the supply of solar irrigation water pumping system along withdesign erection, commissioning and installation is a 'composite supply' and the applicability of GST rate?
				Decision	Supply would be covered under Solar Power Generating System in terms of S No 234 of Schedule I of Notification No 01/2017-Central Tax and would be treated as composite supply. 70% of the gross value of supply shall be the value of supply of goods falling under Chapter 84,85 or 94 and shall attract 5% GST and the remaining 30% of value of supply shall attract 18% GST interms of notification no 27/2018.
19	Uttarakhand	Mahalaxmi Poly Pack Pvt Ltd.	Ruling No.14 dated 07.01.2019	**Brief Issue**	Identification of correct classification of poly Propylene Leno Bags among heading no. 63053300 and 39232990? Identification of rate of Duty applicable as per respective HSN of Poly Propylene Leno Bags?
				Decision	Poly Propylene Leno Bags" are to be classified as plastic bags under HSN 3923 and would attract 18% GST.
20	Rajasthan	Shambhu Traders Pvt Ltd.	RAJ/AAR/2018-19/35 Dated 15.02.2019	**Brief Issue**	When the Applicant is operating under the Margin Scheme notified under Rule 32(5) of the Central Goods and Service Tax Rules, 2017 ("CGST Rules, 2017") by selling the used lead acid batteries to other manufacturers, whether such used lead acid batteries qualify as 'second hand goods' and thus

S. No	State	Case Name	Order No. & Date	Particulars	
					covered under the Margin Scheme notified under Rule 32(5) of the CGST Rules, 2017? When the Applicant is selling goods under the Margin Scheme notified under Rule 32(5) of the Central Goods and Service Tax Rules, 2017. The Tax on Outward Supply under the Margin Scheme would be qualified under which of the following heading in GSTR-3B in following cases:- When Applicant selling the goods within the state? When Applicant selling the goods outside the state? When the Applicant is operating under the Margin Scheme notified under Rule 32(5) of the Central Goods and Service Tax Rules, 2017 ("CGST Rules, 2017") by selling the used lead acid batteries to manufacturers whether the goods when sold outside the state or when sold within the state of Rajasthan qualifies under the Margin Scheme.
				Decision	1.The used lead batteries qualify to be second hand goods. Therefore, the applicant is entitled to operate under the Margin scheme. 2.Applicant is entitled to make inter-state supplies under the Margin Scheme 3.No ruling on other issues as it is outside jurisdiction.
21	Rajasthan	Aravali Polyart Pvt Ltd.	RAJ/AAR/2018-19/34 Dated 15.02.2019	**Brief Issue**	What is the classification of service provided in accordance with Notification No. 11/2017-CT (Rate) dated 28.06.2017 read with annexure attached to it, by the State of Rajasthan to M/s Aravali Polyart Private Limited for which royalty is being paid? Whether said service can be classified under 9973, specifically under 997337 as Licensing services for the right to use minerals including its exploration and evaluation;or as any other service? What is the GST rate applicable on given services provided by State of Rajasthan to M/s Aravali Polyart Private Limited for which royalty is being paid?
				Decision	Activity undertaken by applicant is classifiable under heading 9973(Leasing or Rental services with or without operator) at S No 257 of Notification 11/2017-CT(Rate) and attracts 18% GST.Applicant is liable to discharge liability under reverse charge.
22	Odisha	Balasore Alloys Ltd.	08/Odisha/AAR/18-19 dated 13.02.2019	**Brief Issue**	Applicability of notification issued under the provisions of GST Act
				Decision	Application withdrawn,no ruling
23	Odisha	Indian Institute of Science Education and Research	07/Odisha/AAR/18-19 dated 13.02.2019	**Brief Issue**	Applicability of notification issued under the provisions of GST Act, and Determination of the liability to pay tax on any goods or services or both.
				Decision	1.Notification No-51/1996-Customs, dated 23.07.1996 read with Notification No- 43/2017-Customs dated 30.06.2017 and Minutes of the 14th.GST Council Decision dated 18th./19th. May, 2017 is applicable to the Applicant for import of specified Equipment as listed under column (3) of the aforesaid notifications and the said notifications are not applicable to the OEM suppliers of imported equipment. 2. Concessional rate of at 5% vide Notification No-45-CGST (Rate) is applicable on Scientific and

S. No	State	Case Name	Order No. & Date	Particulars	
					technical instruments, apparatus, equipment (including computers), accessories, parts, consumables and live animals (for experimental purposes), Computer software, Compact Disc Read Only Memory (CDROM), recorded magnetic tapes, microfilms, microfiches; proto-types, the C.I.F. value of which does not exceed rupees fifty thousand in a financial year; whether imported or indigenous.
24	Odisha	Prabhat Gudakhu Factory	06/Odisha/ AAR/18-19 dated 05.02.2019	**Brief Issue**	Classification of Gudkhu under GST Act, 2017.
				Decision	Gudakhu shall be classified under GST Tariff Heading '2403 99 90'.
25	Gujarat	House of Marigold	GUJ/GAAR/ R/2018/20 dated 10.10.2018	**Brief Issue**	Classification of the product Marigold Butterfly Bridal with watch
				Decision	Marigold Butterfly Bridal with Watch and similar jewellery products containing watch are classifiable under Heading 9101.
26	Gujarat	Ginni Filaments Limited	GUJ/GAAR/ R/2018/19 dated 10.10.2018	**Brief Issue**	Classification of the products (a) Wet Baby Wipes, (b) Wet Face Wipes, (c) Bed and Bath Towels and (d) Shampoo Towels
				Decision	Wet Baby Wipes, Wet Face Wipes, Bed and Bath Towels and Shampoo Towels are classifiable under Heading 3307 or 3401 depending upon their constituents. If these products are impregnated with perfumes or cosmetics, the same would fall under HS code 3307 and if they are coated with soap or detergent, then it would fall under HS code 3401.
27	Gujarat	Inox India Product Ltd	GUJ/GAAR/ R/2019/4 dated 28.02.19	**Brief Issue**	Classification of the product 'transport tank mounted on chassis of customer"
				Decision	The product 'Transport Tank mounted on chassis of customer' being supplied is classifiable under Heading 7311
28	Gujarat	Sonal Product	GUJ/GAAR/ R/2019/3 dated 22.02.19	**Brief Issue**	Classification of the product 'Un-fried Fryums'
				Decision	Un-fried Fryums' is classifiable under Tariff Item 2106 90 99 of the First Schedule to the Customs Tariff Act, 1975 and taxable at the rate of 18% GST
29	Gujarat	National Dairy Development board	GUJ/GAAR/ R/2019/1 dated 20.02.19	**Brief Issue**	Whether Applicant is considered as 'Financial Institution' for the purpose of section 17(4) of the CGST and GGST.
				Decision	National Dairy Development Board is 'Financial Institution' for the purpose of section 17(4)of the Central Goods and Services Tax Act, 2017 and the Gujarat Goods and Services Tax Act, 2017.
30	Gujarat	National Dairy Development board	GUJ/GAAR/ R/2019/2 dated 22.02.19	**Brief Issue**	Whether Applicant would be qualified as 'Government Authority"? Whether renting of immovable property service provided by NDDB to an educational institute would be exempted under Sl. No. 4 of Notification No. 12/2017-Central Tax (Rate)?
				Decision	National Dairy Development Board would qualify as 'government authority' from GST perspective, if it fulfils the condition namely 'with ninety percent or more participation by way of equity or

S. No	State	Case Name	Order No. & Date	Particulars	
					control to carry out any function entrusted to a municipality under article 243W of the Constitution. Renting of immovable property service provided by NDDB to an educational institute would be exempted under Sr. No. 4 of Notification No. 12/2017-Central Tax (Rate) and corresponding State Tax Notification, if it qualifies as 'governmental authority'.
31	Odisha	NALCO	02/Odisha-AAR/2018-19 Dated 28.09.2018	**Brief Issue**	Clarification on entitlement to take credit of tax paid on various goods and services used for maintenance of applicant's township, guest house, hospital, horticulture in its ordinary course of business.
				Decision	ITC admissibility in different situations are specified in detail in the ruling depending on the nature of transaction and inputs.
32	Maharashtra	Giriraj Renewables Pvt. Ltd.	GST-ARA-01/2017/B- 01 Mumbai, dt. 17.02.2018	**Brief Issue**	1.Whether supply of turnkey Engineering, Procurement and Construction('EPC') Contract for construction of a solar power plant wherein both goods and services are supplied can be construed to be a Composite Supply in terms of Section 2(30) of the Central Goods and Services Tax Act, 2017? 2.If yes, whether the Principal Supply in such case can be said to be 'solar power generating system' which is taxable at 5% GST. 3.Whether benefit of concessional rate of 5% of solar power generation system and parts thereof would also be available to sub-contractors.
				Decision	1.The major component (PV Module) said to have been constituting 70% of the whole project cannot be construed to be supplied by the applicant consequent upon High Sea Sale of the said product and hence it cannot be construed to be a principal supply of the project and thereby cannot be a composite supply. 2. Not relevant 3. Not answered
33	Haryana	Awla Infra	HAR/HAAR/R/2018-19/13 Dated 18.09.18	**Brief Issue**	Whether GST is exempt or is applicable on the Private Entrepreneurs Godowns built under the PEG-2008 scheme of the FCI and leased out to the Nodal Agency (UPSWC) on 'Lease and services basis' for the storage of FCI's food grain stocks (Wheat)?
				Decision	Leasing of immovable property and support services in relation to agricultural produce, provided by applicant are in nature of 'Mixed Supply' in terms of section 2 (74) and attract 9% CGST + 9% HGST (18% IGST) as applicable to SAC 997212.
34	Haryana	Boldrocchi India Pvt. Ltd.	HAR/HAAR/R/2018-19/12 Dated 18.09.18	**Brief Issue**	Clarify the HSN Code and the applicable rate of tax under the Goods and Service Tax Act, 2017 on the of WTE plant boilers flue gas cleaning system (FGCS) as specified in annexure B attached in the application.
				Decision	Pollution control device being supplied by applicant for use in waste to energy plants/devices are classifiable under chapter heading 8421 of first Schedule to Customs Tariff Act, 1975 and are covered by Sr. No. 234 of Schedule I of Notification No.01/2017-Central Tax (Rate) dt.28.06.2017 & Notification No.35/ST-2 dt.30.06.2017, chargeable to CGST and SGST @ 2.5%.

S. No	State	Case Name	Order No. & Date	Particulars	
35	Haryana	Pasco Motor LLP	HAR/HAAR/ R/2018-19/11 Dated 30.08.18	**Brief Issue**	Clarification needed regarding time of receipt of goods so as to understand the time when credit shall be available? Clarification needed regarding the time of supply of goods vis-à-vis raising the tax invoice to actual supply of goods?
				Decision	In case of invoices being raised by supplier in the previous month and goods being received in the succeeding month,input tax credit on goods so received shall be available to the applicant only after applicant has received the goods. The liability to pay tax shall arise on the basis of time of supply which in case of supply of supply of goods is earlier of the date of issue of invoice by the supplier or last date on which he is required under section 31(1) to issue invoice with respect to the supply or the date on which the supplier receives the payment with respect to the supply.
36	Haryana	United Mining Corporation	HAR/HAAR/ R/2018-19/05 Dated 14.08.18	**Brief Issue**	What shall be the classification of service provided by the State of Haryana to the party in accordance with Notification No.11/2017-CT(R) dated 28.06.17 read with annexure attached to it? Whether the said service can be classified under chapter number 9973 specifically under service code 997337 as "Licensing services for the right to use minerals including its exploration and evaluation" or as any other service under the said chapter? What shall be the rate of GST on given services provided by State of Haryana to the party for which royalty is being paid?
				Decision	Services for 'right to use' minerals including its exploration and evaluation, is included in group 99733 under heading 9973, as per Sr. No. 257 of Annexure appended to Notification No. 11/2017- Central Tax (Rate) dated 28-6-2017 attracting 5 per cent GST. The royalty/ dead rent paid is consideration against transfer of such rights as per lease granted by Govt. to applicant. The applicant is liable to discharge liability on such services provided to it by the government on reverse charge basis.
37	Haryana	YKK India Pvt. Ltd	HAR/HAAR/ R/2018-19/04 Dated 11.07.18	**Brief Issue**	1.Whether the Applicant is eligible to take input tax credit on: -GST charged by the Contractor for hiring of buses for transportation of employees? -GST charged by the Contractor for hiring of cars for transportation of employees? 2.Whether the restriction on 'Rent a Cab' service specified in Section 17(5)(b)(iii) is applicable to input tax credit on:- -GST charged by the Contractor for hiring of buses for transportation of employees? -GST charged by the Contractor for hiring of cars for transportation of employees?
				Decision	The applicant is not eligible to take Input Tax Credit on GST charged by the Contractor for hiring of buses for transportation of employees and by the Contractor for hiring of cars for transportation of employees.

S. No	State	Case Name	Order No. & Date	Particulars	
					The Restriction on 'Rent a Cab' service specified in Section 17(5)(b)(iii) is applicable to input tax credit on GST charged by the Contractor for hiring of buses for transportation of employees and by the Contractor for hiring of cars for transportation of employees.
38	Haryana	Oscar Security & Fire Service	HAR/HAAR/ R/2018-19/01 Dated 20.06.18	**Brief Issue**	The applicant M/s Oscar Security & Fire Service is providing Manpower services to Hospital cum General Medical College and State University (Education Institutions). The question is whether all medical education institutions and State Universities are not liable to pay GST as per Sr. No. 66 Heading 9992 in notification no. 12/2017- Central Tax (Rate) dated 28.06.2017.
				Decision	Manpower Services provided to Hospital Cum General medical college and State University do not qualify for Exemption under Sr. No 66 of Notification No. 12/2017 – CT(Rate) dated 28-6-2017.
39	Haryana	BM Industries	HAR/HAAR/ R/2018-19/02, Dated 29.06.18	**Brief Issue**	1.Whether, consequent to merger of proprietor concern as a going concern;with a private limited company, the ITC available in the credit ledger or cash ledger of the proprietorship firm is eligible to be transferred to the respective ledger account of the private limited company. 2. Whether applicant liable to pay GSTon merger of its proprietorship firm as a going concern with a private limited company on fixed/current asset including stocks of raw material, semi-finished and finished goods as transfer of business as a 'going concern'
				Decision	Applicant on merger of its proprietorship firm as a going concern with a private limited company is not liable to pay GST on fixed/current asset including stocks of raw material, semi-finished and finished goods as transfer of business as a 'going concern' is not treated as 'supply' as per Para 4(c) of Schedule II to CGST/HGST Act 2017. ITC available only in the credit ledger of the proprietorship firm is eligible to be transferred to the respective ledger account of the private limited company.
40	Andhra Pradesh	Agarwal Industries (P.) Ltd	AAR/AP/5 (GST) / 2018 dt. 08.06.2018	**Brief Issue**	What is the Correct HSN Code of the product i.e. "Energy-G premium oil"?
				Decision	HSN Code of said product is 1518 of Schedule 1 as per the Notification No. 1/2017-Central Tax (Rate) and it shall be subject to tax at rate of 5 per cent.
41	Madhya Pradesh	Narsingh Transport	02/2019 dated 18.02.2019	**Brief Issue**	Whether the GST paid on the cars provided to applicant's different customers on lease rent will be available to applicant as Input Tax Credit (ITC) in terms of Section 17(5) of Central Goods and Service Tax Act, 2017?
				Decision	Applicant is entitled to avail ITC on cars which are further supplied to customers on lease rent, subject to the conditions specified in notification number 11/2017-Central Tax (Rate). If the vehicle is not further leased to same/ other customer after the termination of contract, applicant shall be liable to reverse the ITC availed. Such leased vehicle should be registered with transport

S. No	State	Case Name	Order No. & Date	Particulars	
					authority in capacity of commercial use. ITC shall not be available if the vehicle is owned and personally used by applicant.
42	Madhya Pradesh	J C Genetic India Private Limited	01/2019 dated 21.01.2019	**Brief Issue**	Whether exemption provided under Sr No. 74 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 is applicable to the applicant?
				Decision	The applicant does not qualify as a clinical establishment, as required to avail the exemption and merely works as an ancillary or sub-contractor to other accredited companies. Therefore, the exemption is not applicable.
43	Tamil Nadu	Value Max Polyplast	TN/10/ AAR/2019 dated 27.02.2019	**Brief Issue**	Clarification on classification of plastic Seedling Trays and applicable rate of tax and on Input Tax Admissibility on Tax Paid
				Decision	Agricultural Seedling Trays made of base material of Polypropylene Granules manufactured by the Applicant as Plastic are classifiable under CTH 39269099 and taxable at the rate of 9% CGST. ITC shall be available subject to the conditions of Section 16 and 17 of CGST/TNGST Act.
44	West Bengal	Ratan Projects & Engg Co Pvt Ltd	49/ WBAAR/2018-19 dated 28.03.19	**Brief Issue**	Whether the inputs sent to the job-worker and consumed in the process of galvanisation should be treated as supply in terms of section 143(3)?
				Decision	Goods like furnace oil, zinc etc., consumed in the process of galvanising are inseparable from the galvanised goods and hence should not be treated as supply in terms of section 143(3) of the GST Act, provided they have been entirely used up in the process of galvanising.
45	West Bengal	The Bengal Rowing Club	48/ WBAAR/2018-19 dated 28.03.19	**Brief Issue**	Classification and rates of tax on the services supplied by the club.
				Decision	Supply of food, by way of or as part of any service or in any other manner whatsoever, from the Applicant's restaurant is classifiable under SAC 9963 and taxable under Sl No. 7(i) or 7(iii) of the Notification No. 11/2017-CT (Rate). If food is supplied by way of or as part of the services associated with organizing social events at the club premises, together with renting of such premises, it will be classifiable under SAC 9963 and taxable under Sl No. 7(vii) of the above-mentioned rate notification. All other services offered by the Applicant are classifiable under SAC 9995 and taxable under Sl No. 33 of the above rate notification.
46	West Bengal	Alok Bhanuka	47/ WBAAR/2018-19 dated 26.03.19	**Brief Issue**	Whether repairing of transformers is composite supply and what will be the applicable rate of tax?
				Decision	Repairing and servicing of transformers owned by another person is not job work as defined under section 2(68) of the GST Act. It is composite supply unless the contract specifies that the goods and services are to be separately charged. The principal supply is the service of repair of transformers classifiable under SAC 998719 and taxable under Sl No. 25(ii) of Notification No. 11/2017 – CT (Rate) at te rate of 9% CGST.

S. No	State	Case Name	Order No. & Date	Particulars	
47	West Bengal	Eskag Pharma Pvt Ltd	46/ WBAAR/2018-19 dated 26.03.19	**Brief Issue**	Classification of food supplements.
				Decision	Food supplements specified by the applicant are classifiable under HSN 2106, and taxable under Sl No. 23 of Schedule III of Notification No. 1/2017-CT (Rate) at the rate of 18% GST.
48	West Bengal	Udayan Cinema Pvt Ltd	45/ WBAAR/2018-19 dated 26.02.19	**Brief Issue**	Whether the producer of a feature film is liable to pay IGST on reverse charge basis on payment made to a line producer engaged in Brazil. If so, what should be the classification of the service of a line producer and the rate of IGST.
				Decision	The Line Producer to be engaged for the shooting of a feature film in Brazil is supplying motion picture production service, classifiable under SAC 999612. The Applicant is liable to pay IGST on the payments made to the above Line Producer in terms of Sl No. 1 of Notification No. 10/2017 – IGST (Rate) at 18% rate specified under Sl No. 34(vi) of Notification No. 08/2017 – IGST (Rate).
49	West Bengal	Shiva Writing Co Pvt Ltd	44/ WBAAR/2018-19 dated 13.03.19	**Brief Issue**	Classification of and rate of tax on tips and balls of ball point pens.
				Decision	"Tips and Balls" of Ball Point Pens are classifiable under GST Tariff Heading 9608 99 90 and included under Sl No. 453 of Schedule III of Notification No. 01/2017–Central Tax (Rate) and attract 9% CGST.
50	Karnataka	Xiaomi Technology India Private Limited	No.1 dated 22.01.2019	**Brief Issue**	Whether the "Power Bank", traded by the Applicant, is classifiable under Heading 8504 40 90 as 'Static Converter – Others'?
				Decision	Power Bank traded by applicant is classifiable under Heading 8507 as Accumulator and not as Static Convertor.
51	Rajasthan	Mr. Kailash Chandra (M/s Mali Construction)	RAJ/AAR/2018-19/32 dated 31.01.2019	**Brief Issue**	Whether the activity of supply, design, installation, commissioning and testing of solar energy based water pumping systems is supply of goods or supply of services and what shall be the rate of GST on it?
				Decision	The activity of supply, design, installation, commissioning and testing of solar energy based water pumping systems and O&M work by applicant is a works contract of Composite Supply where supply of service is predominant. This supply is proposed to be taken by a government department and therefore rate of tax shall fall under HSN Code 99544 @ 12% IGST(6% CGST & SGST each).
52	Rajasthan	Mr. Kailash Chandra (M/s Mali Construction)	RAJ/AAR/2018-19/31 dated 31.01.2019	**Brief Issue**	Whether the activity of supply, design, installation, commissioning and testing of reverse osmosis plant, supply of goods or supply of services and what shall be the rate of GST on it?
				Decision	The activity of supply, design, installation, commissioning and testing of reverse osmosis plant and O&M work by applicant is a works contract of Composite Supply where supply of service is predominant. This supply is proposed to be taken by a government department and therefore rate of tax shall fall under HSN Code 99544 @ 12% IGST(6% CGST & SGST each).

S. No	State	Case Name	Order No. & Date	Particulars	
53	Rajasthan	IMF Cognitive Technology Pvt Ltd	RAJ/AAR/2018-19/30 dated 09.01.2019	**Brief Issue**	Whether the ITC of Central Tax paid in Haryana is available to the applicant who is registered in Rajasthan state, whereby such tax is paid on inward supplies used for business of person registered in Rajasthan?
				Decision	ITC of Central Tax paid in Haryana is not available to the applicant who is registered in Rajasthan.
54	Rajasthan	K M Trans Logistics Private Limited	RAJ/AAR/2018-19/29 dated 09.01.2019	**Brief Issue**	What should be the place of business to be considered for the purpose of registration? Since no billing is done from any other state other than Jaipur and even input services bills are billed at Jaipur thus the applicant is required to take registration at Jaipur only or at any other state? Whether having a vacant lands on lease for parking of trailers/ trucks at various cities for operational purpose requires registration at various cities when billing, control, registered office, head office and management is centralized located in Jaipur?
				Decision	Place of Supply of services being provided is Rajasthan and therefore registration is required to be taken in Rajasthan only. No ruling for vacant land on lease as it is outside the purview.
55	Rajasthan	Akshay Patra Foundation	RAJ/AAR/2018-19/28 dated 09.01.2019	**Brief Issue**	Whether preparation and serving food to children of Govt. Schools under Mid-Day Meal Programme of Govt. and serving of food under Govt. sponsored Anganwadi meals program is covered under the scope of supply as per section 7 of CGST/RGST Act, 2017? Whether the transfer of goods/ capital equipments, exclusively used for Mid-Day Meal (MDM) program and Anganwadi meals program sponsored by Govt., between different kitchens of applicant which are distinct persons as per GST law is covered under the scope of supply as per section 7 of CGST/RGST Act, 2017 ? Whether the sale of scrap items which was generated during MDM program is an activity of sale and thus covered under the scope of supply as per section 7 of CGST/RGST Act, 2017?
				Decision	1. Preparation and serving of food to children of government schools under Mid-Day meal Program of Government and serving of food under Government sponsored Anganwadi meals program is covered under the scope of 'supply' as per section 7 of CGST/RGST Act, 2017. B. The transfer of goods / capital equipments, exclusively used for Mid-Day Meal (MDM) program and Anganwadi meals program sponsored by Government, between different kitchens of applicant which are 'distinct persons as per GST law is covered under the scope of supply' as per section 7 of CGST/RGST Act, 2017. C. The sale of scrap items which was generated curing Mid Day Meal program is an activity of sale and thus covered under the scope of supply' as section 7 of CGST/RGST Act, 2017.

S. No	State	Case Name	Order No. & Date	Particulars	
56	West Bengal	Storm Communica-tions Pvt Ltd	39/ WBAAR/2018-19 dated 28.01.2019	**Brief Issue**	Whether tax paid on intra-state inward supply in one state can be used to pay output tax liability in another state, especially if the applicant is not registered in the state where he receives the inward supply?
				Decision	Tax paid on intra-state inward supply in one state cannot be used to pay output tax liability in another state if the applicant is not registered in the state where he receives the inward supply.
57	West Bengal	Exservicemen Resettlement Society	38/ WBAAR/2018-19 dated 28.01.2019	**Brief Issue**	Whether security and scavenging services to the Govt. is exempt under SL No. 3 or 3A of Notification No. 12/2017-CT(Rate) dated 28/06/2017, as amended from time to time?
				Decision	Benefit of exemption from the payment of GST is not available to the Applicant for the supply of Security Services and the bundle of service that he describes as Scavenging Services as it is not covered under Notification No 12/2017-CT(Rate) dated 28.06.2017.
58	West Bengal	NIS Management Ltd	37/ WBAAR/2018-19 dated 28.01.2019	**Brief Issue**	Whether sweeping service to the Govt. is exempt under SL No. 3 or 3A of Notification No. 12/2017-CT(Rate) dated 28/06/2017, as amended from time to time?
				Decision	Sweeping Service that the Applicant supplies to the Housing Directorate of the Government of West Bengal, cannot be classified as an activity in relation to any function entrusted to a Panchayat or in relation to any function entrusted to a Municipality and is therefore not exempt under Notification No 12/2017-CT (Rate) dated 28.06.2017.
59	West Bengal	Vedika Exports Tea Pvt Ltd	36/ WBAAR/2018-19 dated 28.01.2019	**Brief Issue**	Classification of the service to Hindustan Unilever Ltd for packing tea into tea bag pouches and its packaging
				Decision	The Applicant makes a composite supply to Hindustan Unilever Ltd, where the service of manufacturing tea bags from the physical inputs owned by the latter is the principal supply. It is classifiable under SAC 9988 and taxable at 5% rate under Sl No. 26(f) of Notification No. 11/2017 – CT (Rate).
60	West Bengal	Abhishek Tibrewal (HUF) carrying on business under trade name Avantika Industries	35/ WBAAR/2018-19 dated 28.01.2019	**Brief Issue**	Classification and rate of tax for springs of iron and steel for railways
				Decision	Springs of Iron and Steel for Railways are classifiable under HSN Code no. 7320 (taxable @ 18%) under Serial No. 234 of Schedule III of Notification No. 1/2017- CT (Rate) dated 28.06.2017.
61	West Bengal	Dinman Polypacks Pvt Ltd	34/ WBAAR/2018-19 dated 28.01.2019	**Brief Issue**	Classification and rate of tax for Polypropylene Leno Bags
				Decision	Poly Propylene Leno Bags" are to be classified as plastic bags under HSN 3923 and would attract 18% GST
62	West Bengal	ITD Cementation India Ltd	33/ WBAAR/2018-19 dated 08.01.2019	**Brief Issue**	Whether works contract service supplied to Inland Waterways Authority of India is taxable under Sl No. 3(vi) of Notification No. 11/2017 –CT(Rate) dated 28/6/2017, as amended from time to time?

S. No	State	Case Name	Order No. & Date	Particulars	
				Decision	Notification No. 11/2017 –CT(Rate) is not applicable to the Applicant's supply of works contract service for construction of the Multi-modal IWT Terminal at Haldia. It will attract GST at 18% rate under Serial No. 3(xii) of 11/2017–CT (Rate) dated 28/06/2017.
63	West Bengal	WEBFIL Ltd	32/ WBAAR/2018-19 dated 08.01.2019	**Brief Issue**	Whether Notification No. 50/2018-CT dated 13/09/2018 under the CGST Act, 2017 is applicable on a JV of two Govt. companies?
				Decision	Applicant, if established by government notification, is liable to deduct tax at source under section 51(1) read with Notification No. 1344-FT dated 13/09/2018, being a company controlled by the Central and the State Governments.
64	West Bengal	U S Polytech	31/ WBAAR/2018-19 dated 08.01.2019	**Brief Issue**	Classification and rate of tax for polypropylene non-woven bags
				Decision	'PP Non-woven Bags' made from non woven Polypropylene fabric are plastic goods to be classified under Sub Heading 3923 29 and taxed at 18 % rate Notification no. 01/2017-C.T (Rate) dated 28-06-2017 under the CGST Act, 2017.
65	West Bengal	GGL Hotel & Resort Co Ltd	30/ WBAAR/2018-19 dated 08.01.2019	**Brief Issue**	Whether ITC is admissible on lease rent paid during pre-operative period for the leasehold land on which a resort is being constructed to be used for furtherance of business?
				Decision	Input Tax Credit is not available to the Applicant for lease rent paid during pre-operative period for the leasehold land on which the resort is being constructed on his own account to be used for furtherance of business, when the same is being capitalised and treated as capital expenditure.
66	Tamil Nadu	The Bank of Nova Scotia	TN/23/ AAR/2018 Dated 31.12.18	**Brief Issue**	1. Whether IGST is payable on Goods warehoused in FTWZ and supplied to a DTA unit, in addition to the customs duty payable [i.e. Basic Customs Duty(BCD) + IGST] on removal of goods from the FTWZ unit? 2. Whether the Circular No. 46/2017 is applicable to the present factual situation?
				Decision	1.For supply of warehoused goods, while being deposited to FTWZ on or after 01.04.2018, the Applicant is not liable to pay IGST at the time of removal of goods from the FTWZ to DTA under the provisions of IGST Act in addition to the duties payable under Customs Tariff Act, 1975 on removal of goods from the FTWZ unit 2.Circular No. 46/2017 Customs dated 24.11.2017 is not applicable for supply of warehoused goods, while being deposited in FTWZ on or after 01.04.2018
67	Karnataka	Nuetech Solar Systems Private Limited	33/2018 Dt. 31.12.2018	**Brief Issue**	Whether Evacuated / Vacuum Tube Collectors (VTC) falls under Chapter 84 of HSN which is covered in Sl. no 234 of Schedule –I under notification 1/2017 IGST rate dated 28-06-2017?
				Decision	The product Evacuated / Vacuum Tube Collectors (VTC) falls under Chapter 84 heading 19 but is not covered under S No. 234 of Schedule-I of the notification 01/2017-Integrated Tax Rate dated 28/06/2017 effective form 01/07/2017 hence not entitled for the concessional rate of 5% IGST.

S. No	State	Case Name	Order No. & Date	Particulars	
68	Tamil Nadu	Palaniappan Chinnadurai [Prop: M/s. Tuticorin Lime and Chemical Industries]	TN/25/ AAR/2018 Dated 31.12.18	**Brief Issue**	What is the applicable chapter and GST rate for Industrial Grade Quick Lime having 86% of Calcium Oxide content and Industrial Grade Slacked Lime having 86% of Calcium Hydroxide content?
				Decision	Industrial Grade Quick lime having 86 per cent of Calcium oxide content and industrial grade slaked lime having 86 % of Calcium hydroxide content are classifiable under CTH 28259090 and CTH 28259040 respectively and both are taxable at 9% CGST and 9% SGST as per Sl.No.38 of Schedule III of Notification No.1/2017-Central Tax (Rate) dated 28-6-2017.
69	Tamil Nadu	Sadesa Commercial Offshore De Macau Limited	TN/24/ AAR/2018 Dated 31.12.18	**Brief Issue**	1. Whether sale of tanned bovine leather stored in Free Trade Warehousing Zone (FTWZ) by a foreign supplier which is cleared to Domestic Tariff Area (DTA) customer in India would result in supply subject to levy under sub section 1 of section 5 of the IGST Act 2017 or under the provisions of CGST Act, 2017 or Tamil Nadu GST Act, 2017 and the rules made there under. 2. Whether the foreign supplier being the applicant, located outside the taxable territory and supplying goods to DTA customers on the goods stored in third party FTWZ unit is required to get registered under the IGST ACT 2017 or under the provisions or CGST ACT 2017 or the Tamil Nadu Goods and Service Tax Act, 2017 and the rules made thereunder.
				Decision	1.For supply of warehoused goods, while being deposited in FTWZ on or after 01.04.2018, the applicant is not liable to pay IGST at the time of removal of goods from the FTWZ to DTA under the provisions of IGST Act in addition to the duties payable under customs Tariff Act, 1975 on removal of goods from the FTWZ unit. 2.On or after 01.04.2018, in the event the Applicant is exclusively conducting the activity described in their application of exporting goods to WWZ and which are subsequently sold to Indian customers who clear the same on payment of appropriate customs duties, they are not liable to Registration under Section 23(I) of CGST Act and TNGST Act.
70	Maharashtra	Pew Engg Pvt Ltd	29/ WBAAR/2018-19 dated 21.12.18	**Brief Issue**	Whether the contract for retro-fitment of air brakes in wagons is composite supply and what shall be the classification of the supply and rate of tax?
				Decision	Applicant's contract for retro-fitment of Twin Pipe Air Brake System on Railway Wagons is to be treated as Composite Supply, where the Twin Pipe Air Brake System is the Principal Supply which is classifiable under Tariff Head 8607 21 00 and is taxable @ 5% [in terms of Serial No. 241 of Schedule I of Notification No. 01/2017 – CT (Rate) dated 28/06/2017].
71	West Bengal	Swapna Printing Works Pvt Ltd	28/ WBAAR/2018-19 dated 21.12.18	**Brief Issue**	Whether printing of books on order from foreign buyer and its delivery to customers in India is supply of service liable to GST?
				Decision	Yes,Activity of printing Bible by applicant under specific orders received from foreign company is a supply of service classifiable under Heading 9989.

S. No	State	Case Name	Order No. & Date	Particulars	
72	West Bengal	RITES Ltd	27/ WBAAR/2018-19 dated 21.12.18	**Brief Issue**	Whether the rate of GST for construction of private railway siding will be under Sl No. 3(v) (a) of Notification No. 11/2017-CT(Rate) dated 28/06/2017?
				Decision	Construction of a private railway siding for carriage of coal and oil fuel is a composite supply of works contract taxable @ 12% under Serial No 3(v) (a) of Notification no 11/2017-CT(Rate) dated 28.06.2017.
73	Uttarakhand	Sharda Timber	Ruling No-12 Dated 03.12.18	**Brief Issue**	Whether the commodity of Eucalyptus/Poplar wood waste in logs having length of 30 cm to 200 cm in girth of approx. 10 cm to 60 cm is covered under HSN 4401 and chargeable under Uttarakhand State GST @ 2.5% and Under CGST @ 2.5%?
				Decision	Eucalyptus/Poplar woods waste in logs having length of 30cm to 200 cm and girth of approx. 10 cm to 60 cm does not fall under HSN 4401 and, therefore, not chargeable to GST at rate of 5 percent.
74	Rajasthan	Blackstone Diesels	RAJ/AAR/2018-19/26 Dated 18.12.2018	**Brief Issue**	Clarification on Tax rate on "Air dryer complete with final filter for used in breaking system of locomotive supplied to Railway".
				Decision	The Air Dryer complete with final filter used in breaking system of locomotive is classified under Chapter 8241 of GST Tariff Act 2017 which attracts GST @ 18%(CGST 9%+SGST 9%).
75	Karnataka	Bindu Ventures	32/2018 Dt. 03.12.2018	**Brief Issue**	1. Which date should be considered as the date of completion of the property – the date of receipt of necessary approvals from BBMP / Karnataka Pollution Control Board / Karnataka Electricity Board or the date of receipt of completion certificate from a registered Chartered Engineer? 2.Whether the applicant is liable to pay GST on any amount received as consideration towards sale of completed offices, after the date of completion, where part of the consideration was received prior to the date of completion as determined in question (a) above? 3.Whether the applicant is liable to pay GST on the consideration received as consideration towards the sale of completed offices, where the entire consideration is received after the date of completion of construction as determined in question number (a) above?
				Decision	1.The date of Occupancy Certificate issued by the competent authority, i.e. Bruhat Bengaluru Mahanagara Palike should be treated as the date of completion of the construction. 2.If any part of the consideration is received before such date of completion, then the transaction would be considered as the supply of services in terms of entry No. 5 of Schedule II to the GST Acts, and liable for GST. 3.If the entire consideration is received after the date of completion, then the transaction would not be liable to GST.
76	Chhattisgarh	Chhattisgarh Text Book Corporation	STC/ AAR/08/2018 dt. 24.12.2018	**Brief Issue**	GST rate on:Printing and Supply of books

S. No	State	Case Name	Order No. & Date	Particulars	
				Decision	Supply of specified printed Educational books by Chhattisgarh Text Book Corporation as per instructions of School Education Department CG (Loksikshan Sanchnalay) or as per instruction of various agencies of school Education Department CG such as Rajiv Gandhi Siksha Mission/SCERT/office of District Education officer etc. consequent to printing of syllabus as decided by SCERT, merits consideration as supply of printed books attracting zero rate of tax under Notification No. 2/2017-State Tax (Rate) No. F-10-43/2017CT/V/70, dated 28-6-2017, under HSN Code 4901.
77	Chhattisgarh	Shri Dhananjay Kumar Singh	STC/ AAR/6/2018 dt. 05.12.2018	**Brief Issue**	GST Rate on:Supply of services to Solid Waste Management Garbage Collection, Disposal Water Supply, Cleaning of Colony
				Decision	Supply of services of colony maintenance work to Chhattisgarh Housing Board with regard to solid waste management, water supply operation, garbage collection door to door and disposal, cleaning of colony, i.e., garden, street and open area, drainage system, sewerage, water tank (All UG Sump & Overhead Tank), cleaning of common area in multistoried building, etc. and all other related work pertaining to operation and maintenance will be treated as exempt supply as per Notification No. 12/2017-State Tax (Rate), dated 28-6-2017. The exemption is not available if the service is provided to persons other than the State/Central government or Local/government authority
78	West Bengal	East Hooghly Polyplast Pvtb Ltd	12/ WBAAR/2018-19 dated 20-07-2018	**Brief Issue**	Whether tarpaulins made of HDPE woven fabrics are classifiable under HSN 6306?
				Decision	'Tarpaulins made of HDPE woven fabrics' will not be classified under HSN 6306 of the GST Tariff.
79	Madhya Pradesh	Nagrani Warehouseing (P.) Ltd	ORDER NO. 21/2018 dated 14.12.2018	**Brief Issue**	Determination of classification of sacks and bags made from man made textile materials under GST Tariff No. 6305 which falls under Serial No. 224 of Schedule-I of Notification No. FA3-33-2017-1-V (42), dated 29.06.2017 issued vide Madhya Pradesh Gazette"
				Decision	Sacks and bags specified shall be classifiable under Chapter 39 of the GST tariff as articles of Plastic and would attract appropriate rate prevailing at the date and time of supply.
80	Daman, Diu & Dnh	Aristoplast Products	AR 04-05/ AR/DMN-SILVASA/2018	**Brief Issue**	Classification of Sprayers and broom sticks made of Plastic
				Decision	Plastic Broom-Sticks is classifiable under Heading No. 96032100 as 'others' and is eligible for concessional rate of tax vide Notification No. 1/2017-CT (rate) dated 28-6-2017 i.e., 5 per cent IGST or 2.5 per cent CGST + 2.5 UTGST. 'Portable Sprayers' is classifiable under HSN Code 84244100. The rate shall be IGST 18 per cent or 9 per cent CGST + 9 per cent UTGST.

CIRCULARS AND NOTIFICATIONS IN BRIEF

Circulars: CGST

Circular No. 92/2019-CGST

Dated 07.03.2019

1. Samples which are supplied free of cost, without any consideration, do not qualify as "supply" under GST, except where the activity falls within the ambit of Schedule I of the Act and Input tax credit shall not be available to the supplier on the inputs, input services and capital goods to the extent they are used in relation to the gifts or free samples distributed without any consideration.

2. BOGO (buy one, get one free) offers, is not an individual supply of free goods but a case of two goods being supplied for the price of one and taxability shall depend on whether it is a composite or a mixed supply and ITC shall be available.

3. Discounts offered by the suppliers to customers (including staggered discount under 'Buy more, save more' scheme and post supply / volume discounts established before or at the time of supply) shall be excluded to determine the value of supply including the reversal of ITC by the recipient of the supply as is attributable to the discount on the basis of document (s) issued by the supplier.

4.Credit note(s) can be issued when secondary discount is provided which is not known at the time of supply. Such secondary discounts shall not be excluded while determining the value of supply.

Circular No. 93/2019-CGST

Dated 08.03.2019

Supply of Priority Sector Lending Certificates (PSLC) between banks may be treated as a supply of goods in the course of inter-State trade or commerce and IGST shall be payable on the supply of PSLC traded over e-Kuber portal of RBI. If bank liable to pay GST has already paid CGST/ SGST or CGST/UTGST as the case may be, such banks for payment already made, shall not be required to pay IGST towards such supply.

Circular No. 94/2019-CGST

Dated 28.03.2019

1.Refund of accumulated ITC on account of inverted tax structure, for the period (s) in which reversed ITC is required to be lapsed in terms of notification No. 20/2018-Central Tax (Rate) , is to be claimed under the category “any other” instead of under the category “refund of unutilized ITC on account of accumulation due to inverted tax structure” in FORM GST RFD-01A as onetime measure since a validation check on the common portal was preventing registered persons from claiming the eligible refund.

2. All registered persons who are yet to make a reversal in terms of the above notification, may reverse the amount through FORM GST DRC-03 instead of FORM GSTR-3B.

3. If any registered person reverses the amount of credit to be lapsed in FORM GSTR-3B for a month subsequent to the month of August, 2018 or through FORM GST DRC-03 subsequent to the due date of filing FORM GSTR-3B for August, 2018, he shall be eligible to claim refund but shall be be liable to pay interest under section 50(1) of the CGST Act on the amount reversed belatedly.

4. A merchant exporter can claim refund of input tax credit on supplies received on which the supplier has availed the benefit of notification No. 40/2017-Central Tax (Rate) or No. 41/2017-Integrated Tax (Rate), by applying under the category “any other” instead of under the category “refund of unutilized ITC on account of exports without payment of tax” in FORM GST RFD-01A along with required supporting documents.

5. In cases where input tax credit is re-credited the claimant may resubmit the refund application manually in FORM GST RFD-01A after correction of deficiencies pointed out in the deficiency memo, using the same ARN.

Circular No. 95/2019-CGST

Dated 28.03.2019

If application for revocation of cancellation of registration has not been filed by an applicant applying for new registration and the conditions due to

which an earlier /older registration of the applicant was cancelled, are still continuing, it may be considered as a ground for rejection of application for new registration by the proper officer.

Circular No. 96/2019-CGST

Dated 28.03.2019

Transfer or change in the ownership of business will include transfer or change in the ownership of business due to death of the sole proprietor for the purpose of section 18(3), section 22(3), section 85(1) of the CGST Act and sub-rule (1) of rule 41 of the CGST Rules. Unutilized Input tax credit is also allowed to be transferred to the transferee in case of death of sole proprietor if the business is continued by any person being transferee or successor.

ORDER: CGST

Order No. 02/2019-GST

Dated 12.03.2019

Appointment of Central tax Officers for purposes specified in the order.

NOTIFICATION: CGST

Notification No. 10/2019-Central Tax

Dated 07.03.2019

Threshold limit for GST registration increased to Rs 40 lakh for persons exclusively supplying goods, except category of persons specified in notification.

Notification No. 11/2019-Central Tax

Dated 07.03.2019

Due date of filing FORM GSTR 1 for April -June 2019 shall be 31st July 2019 for taxpayers with annual turnover up to 1.5 crore in preceding or current financial year.

Notification No. 12/2019-Central Tax

Dated 07.03.2019

Due date of filing FORM GSTR 1 for April -June 2019 shall be 11th of the succeeding month in each month for taxpayers with annual turnover more than 1.5 crore in preceding or current financial year.

Notification No. 13/2019-Central Tax

Dated 07.03.2019

Due date of filing FORM GSTR 3B for April -June 2019 shall be 20th of the succeeding month in each month.

Notification No. 14/2019-Central Tax

Dated 07.03.2019

Turnover limits for composition scheme increased to Rs. 1.5 crore for all eligible registered persons and to Rs. 75 Lakhs for Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Uttarakhand.

Notification No. 15/2019-Central Tax

Dated 28.03.2019

Extension of time limit for furnishing FORM GST ITC-04 in respect of goods dispatched to a job worker or received from a job worker, during the period July, 2017 to March, 2019 till the 30th June, 2019.

Notification No. 16/2019-Central Tax

Dated 28.03.2019

Central Goods and Services Tax (Second Amendment) Rules, 2019 relating to Rule 42, 43, 88A, 100 and 142 issued.

NOTIFICATION: CGST (RATE)

Notification No. 2/2019-Central Tax (Rate)

Dated 07.03.2019

CGST shall be levied at the rate of 3% on the intra-State supply of goods or services or both upto an aggregate turnover of fifty lakh rupees made on or after the 1st April in any financial year, by a registered person subject to the conditions specified.

Similar Notifications issued under IGST/UTGST: 2/2019-UTGST (rate)

Notification No. 3/2019-Central Tax (Rate)

Dated 29.03.2019

Notification No. 11/2017- Central Tax (Rate) amended to notify CGST rates of various services as recommended by Goods and Services Tax Council for real estate sector.

Similar Notifications issued under IGST/UTGST: 3/2019-IGST (Rate) and 3/2019-UTGST (Rate)

Notification No. 4/2019-Central Tax (Rate)

Dated 29.03.2019

Following intra-state supplies are exempted from tax subject to the conditions specified in the notification:

1.Service by way of transfer of development rights (herein refer TDR) or Floor Space Index (FSI) (including additional FSI) on or after 1 st April, 2019 for construction of residential apartments by a promoter in a project, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

2. Upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable in respect of service by way of

granting of long term lease of thirty years, or more, on or after 01.04.2019, for construction of residential apartments by a promoter in a project, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

Similar Notifications issued under IGST/UTGST: 4/2019-IGST (Rate) and 4/2019-UTGST (Rate)

Notification No. 5/2019-Central Tax (Rate)

Dated 29.03.2019

Reverse charge shall be applicable on promoter w.e.f 1st April 2019 in respect of the following supplies:

1.Services supplied by any person by way of transfer of development rights or Floor Space Index (FSI) (including additional FSI) for construction of a project by a promoter

2.Long term lease of land (30 years or more) by any person against consideration in the form of upfront amount (called as premium, salami, cost, price, development charges or by any other name) and/or periodic rent for construction of a project by a promoter.

Similar Notifications issued under IGST/UTGST: 5/2019-IGST (Rate) and 5/2019-UTGST (Rate)

Notification No. 6/2019-Central Tax (Rate)

Dated 29.03.2019

The liability to pay central tax by:

(i) a promoter who receives development rights or Floor Space Index (FSI) (including additional FSI) on or after 1st April, 2019 for construction of a project against consideration payable or paid by him, wholly or partly, in the form of construction service of commercial or residential apartments in the project or in any other form including in cash;

(ii) a promoter, who receives long term lease of land on or after 1st April, 2019 for construction of residential apartments in a project against

consideration payable or paid by him, in the form of upfront amount (called as premium, salami, cost, price, development charges or by any other name) shall arise on the date of issuance of completion certificate for the project, where required, by the competent authority or on its first occupation, whichever is earlier.

Similar Notifications issued under IGST/UTGST: 6/2019-IGST (Rate) and 6/2019-UTGST (Rate)

Notification No. 7/2019-Central Tax (Rate)

Dated 29.03.2019

Reverse charge shall be applicable on the promoter if supplies are received from an unregistered person in case of the following:

1.Supply of goods and services or both [other than services by way of grant of development rights, long term lease of land (against upfront payment in the form of premium, salami, development charges etc.) or FSI (including additional FSI)]

2. Cement falling in chapter heading 2523 in the first schedule to the Customs Tariff Act, 1975 (51 of 1975)which constitute the shortfall from the minimum value of goods or services or both required to be purchased by a promoter for construction of project, in a financial year(or part of the financial year till the date of issuance of completion certificate or first occupation, whichever is earlier)

3.Capital goods falling under any chapter in the first schedule to the Customs Tariff Act, 1975 (51 of 1975) supplied to a promoter for construction of a project on which tax is payable or paid at the rate specified in the notification.

Similar Notifications issued under IGST/UTGST: 7/2019-IGST (Rate) and 7/2019-UTGST (Rate)

Notification No. 8/2019-Central Tax (Rate)

Dated 29.03.2019

Supply of any goods other than capital goods and cement falling under chapter heading 2523 in the first schedule to the Customs Tariff Act, 1975

(51 of 1975), by an unregistered person to a promoter for construction of the project on which tax is payable by the promoter under reverse charge, shall attract 9% tax.

Similar Notifications issued under IGST/UTGST: 8/2019-IGST (Rate) and 8/2019-UTGST (Rate)

Notification No. 9/2019-Central Tax (Rate)

Dated 29.03.2019

Suppliers who have availed input tax credit and availing the benefit of lower tax rate under notification no 02/2019-Central Tax (Rate), shall pay an amount equivalent to the credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock and on capital goods as if the supply attracts the provisions of section 18(4) of the said Act and the rules made there-under and after payment of such amount, the balance of input tax credit, if any, lying in his electronic credit ledger shall lapse.

CGST Rules, 2017 as applicable to a composition dealer under Section 10, shall mutatis mutandis apply to such supplier.

Similar Notifications issued under IGST/UTGST: 9/2019-UTGST (Rate)

CIRCULARS AND NOTIFICATIONS IN BRIEF

Circulars: CGST

Circular No. 97/2019-CGST

Dated 05.04.2019

Clarification regarding payment of CGST at 3% on first supply of goods or services or both upto an aggregate turnover of Rs. 50,00,000 under Notification 02/2019 Central Tax(Rate):

1. Intimation shall be filed in FORM GST CMP-02 by 30th April 2019 and FORM ITC-03 shall also be furnished as per Rule 3(3) of CGST Rules.
2. While applying for registration to avail this lower rate, it must be indicated at serial no. 5 and 6.1(iii) of FORM REG-01
3. This option shall be applicable on all businesses registered under the same PAN Number.
4. The option shall be applicable from beginning of financial year or new date of registration as the case may be.

Circular No. 98/2019-CGST

Dated 23.04.2019

Clarification in respect of utilization of input tax credit under GST – Earlier as per Section 49A the input tax credit available from integrated tax has to be utilised for the payment of first integrated tax and then central tax and then the remaining can be used for payment of State tax liability. Whereas as per Rule 88A this restriction of utilisation of input tax credit from integrated tax has been eased now firstly the tax liability arising out of integrated tax has to be first discharge from input tax credit from integrated tax and then the remaining input tax credit can be utilised for payment of either central tax or state tax liability.

Circular No. 99/2019-CGST

Dated 23.04.2019

Clarification regarding filing of application for revocation of cancellation of registration:

Registration of several person has been cancelled because of non-filing of return in Form GSTR-3B or Form GSTR-4. The proper officer has been empowered to cancel the registration from retrospective effect. Thus registration have been cancelled either from the date of order of cancellation of registration or from retrospective effect.

a. If the registration has been cancelled on account of non-furnishing of returns then no application for revocation of registration shall be filed unless such returns are furnished and amount due in respect of those returns is paid.

b. If registration has been cancelled with effect from the date of order of cancellation of registration, then all returns due till date of such cancellation are required to be furnished before application for revocation can be filed and;

c. All the returns required to be furnished from the date of order of cancellation to the date of revocation of cancellation of registration have to be furnished within 30 days from the date of order of revocation.

d. If registration has been cancelled with retrospective effect – Then the person cannot file returns after the effective date of cancellation as return filing in not supported by the common portal so application for revocation of cancellation of registration cannot be filed in such cases.

The application of revocation for cancellation of registration can be furnished subject to the condition that the applicant has to file the returns relating to the period from the date of cancellation of registration to the date of order of revocation of cancellation of registration, within 30 days of the order of revocation of cancellation of registration.

Circular No. 100/2019-CGST

Dated 30.04.2019

GST Applicability on Seed Certification Tags-reg. It has been clarified by the government that the Tags applied by the Government for the certification of the seed may be procured by the department from other departments/manufacturers. So supply of tags by the other department is a supply of goods which is liable to tax. But the classification of tags will

depend on the material used for tagging it could be textile or paper. It has been further clarified that the charges collected at various stages by the seed certification Agency for seed testing and certification is exempt under Notification No. 12/2017-CT(R) SL. No. 47.

Circular No. 101/2019-CGST

Dated 30.04.2019

GST exemption on the upfront amount payable in instalments for long term lease of plots, under Notification no. 12/2017-CT(R), entry no. 41, dated 28.06.2017.

Notification no. 12/2017 is an exemption notification in which no tax shall be paid by the registered person for the services availed provided it is an intra-state transaction.

Entry no. 41 of notification no. 12/2017 says that if upfront amount (such as development charges, premium, cost charges etc) is paid by the recipient for the services by way of long term lease on industrial plot for development of infrastructure for financial business in any industrial or financial business area, the plot has been provided by the State government Industrial Development corporation or undertaking or any other undertaking of Government, then such upfront amount shall be exempt from GST.

It has been clarified by the Government that the upfront amount payable shall be exempt from GST irrespective of the amount is payable in one or many instalments. There is only one condition that the amount payable is determined upfront.

REMOVAL OF DIFFICULTY ORDERS: CGST

Order No. 5/2019 – Central Tax

Dated 23.04.2019

Order to extend the time limit for filing an application for revocation of cancellation of registration for specified taxpayers. Last date of filing of such application shall be 22.07.2019.

NOTIFICATION: CGST

Notification No. 17/2019 – Central Tax

Dated 10.04.2019

Extension for time limit for furnishing of form GSTR-1 in respect of Outward supplies, for the month of March 2019 shall be 13th April 2019.

Notification No. 18/2019 – Central Tax

Dated 10.04.2019

Extension of time limit for furnishing of return by the registered person required to deduct tax at source in form GSTR-7 for the month of March, 2019 till 12th day of April 2019.

Notification No. 19/2019 – Central Tax

Dated 22.04.2019

Extention of time limit for filing of form GSTR-3B for the month of March 2019, which can be furnished on or before 23rd of April 2019.

Notification No. 20/2019 – Central Tax

Dated 23.04.2019

Amendment in Central Goods and Service Tax (Third Amendment) Rules, 2019.

Notification No. 21/2019 – Central Tax

Dated 23.04.2019

The composition tax payer shall follow the special procedure of filing returns and payment of tax

1. Furnish quarterly statement of self-assessed tax in Form GST CMP-08, till 18th day of the month succeeding such quarter.

2. Annual return in Form GSTR-4, on or before 30th day of April at the end of financial year.

Notification No. 22/2019 – Central Tax

Dated 23.04.2019

Person applying for registration as TCS in a State or Union Territory where he does not have a physical presence shall mention by 21st June, 2019, the name of the state in which he does not have physical presence in Part A of Form GST REG-07 and in Part B the name of the State in which he has his principal place of business.

Notification No. 23/2019 – Central Tax

Dated 11.05.2019

Extention of time limit to file form GSTR-1 for the month of April 2019, for the registered persons whose principal place of business is in districts in the State of Odisha shall be furnished on or before 10th of June, 2019.

Notification No. 24/2019 – Central Tax

Dated 11.05.2019

Extension of time limit to file form GSTR-3B for the month of April 2019, for the registered person whose principal place of business is in State of Odisha, on or before 20th June, 2019.

NOTIFICATION: CGST (RATE)

Notification No. 10/2019 – Central Tax (Rate)

Dated 10.05.2019

Amendment of notification No. 11/ 2017- Central Tax (Rate) so as to extend the last date for exercising the option by promoters to pay tax at the old rates of 12% / 8% with ITC. The date has been changed to 20th of May 2019 for 10th of May 2019.

[Similar Notification issued under IGST/UTGST: 9/2019-IGST (Rate) & 10/2019-UTGST (Rate)]

JUDGMENTS

S. No	Relevant provision of CGST Act	Name of the Case	Decision of the Court
1	Power to arrest (Section 69 of CGST Act)	JVS Ferrous Enterprises (P.) Ltd. v. Union of India	Writ petition was filed and contention being raised was that power of arrest under Section 69(1) of the Act can be exercised only after completion of the assessment in accordance with the provisions of the Act and on raising of a demand on the petitioners, and only if it is found necessary to arrest the person having regard to his failure to comply with the summons issued by the CGST authorities. It was held that arrest of the petitioners is not prohibited prior to the completion of the assessment.
2	Apportionment of credit and blocked credits (Section 17 of CGST Act)	Safari Retreats (P.) Ltd. v. Chief Commissioner of Central Goods & Service Tax	Petitioner was carrying out business activity of construction of immovable property intended to be let out for rent. Materials like cement, steel, wires etc. and services in form of architectural services, legal service, engineering service etc. were used during said construction and GST was payable on the same. Rental income from letting out of property also attracts GST. However petitioner was asked by revenue authorities to deposit GST without taking any input tax credit in view of Section 17(5)(d). It was held that if assesse is required to pay GST on rental income arising out of investment made in construction of property on which he has paid GST, he is eligible to take benefit of input credit on GST paid for construction. The restriction under section 17(5)(d) is not applicable since the purpose of credit is to give benefit to the assesse.
3	Power to arrest (Section 69 of CGST Act)	P.V. Ramana Reddy v. Union of India	Summons were issued to the assesses under section 70 of the CGST Act calling upon them to appear before Court, to give evidence on matters concerning the enquiry after a search that was conducted in the premises of the Companies by the officials of the GST Commissionerate. These summons were challenged by assesses. The petitioners were allegedly involved in circular trading with a turnover on paper to the tune of about Rs.1,289.00 crores and a benefit of ITC to the tune of Rs.225.00 crores. It was held that this constituted a threat to the very implementation of law within a short duration of its inception and therefore no relief was granted to petitioners against arrest.

S. No	Relevant provision of CGST Act	Name of the Case	Decision of the Court
4	Punishment for certain offences (Section 132 of CGST Act)	Jayachandran Alloys (P.) Ltd. v. Superintendent of GST & Central Excise	Writ petition filed, praying for a mandamus directing the respondents to provide copies of the documents and records seized during the inspection of premises of the petitioner as well as copies of statements recorded by the inspecting authorities and to grant opportunity to the petitioner and pass an order of assessment in accordance with law. It was held that the power to punish under in Section 132 of the Act would stand triggered only once it is established that an assesse has 'committed' an offence that has to necessarily be post-determination of the demand due from an assesse, that itself has to necessarily follow the process of an assessment. Respondent was also directed to conclude the process of adjudication within a period of twelve (12) weeks after issuing show cause notice to the petitioner setting out the proposals for assessment, affording full opportunity to the petitioner to respond to the same and advance submissions in person, and pass a reasoned and speaking order, in accordance with law.
5	Anti-profiteering measure. (Section 171 of CGST Act)	Ms. Pallavi Gulati v. Puri Constructions (P.) Ltd.	Applicant had alleged profiteering by respondent by not passing the benefit of Input Tax Credit to buyer of flats. Respondent had submitted that benefit/loss could not be computed before completion of project and that there was possibility of a reversal of ITC in case of failure to sell flats before completion. It was held that the respondent had contravened the provisions of Section 171 of the Act. Respondent was ordered to reduce the prices to be realized from buyers commensurate with the benefit of ITC received by him. He was liable for penalty under Section 122 and a show cause notice regarding the same was to be issued to him.

Advance Rulings

S. No	State	Case Name	Order No. & Date	Particulars	
1	Tamil Nadu	Sameer Mat Industries	No.14/ AAR/2019 dated 22.03.2019	**Brief Issue**	Whether Polypropylene Mat which are plaited using polypropylene Straw falls under Chapter Heading 4601 or 3902? What is the tax rate for Polypropylene Mats ?
				Decision	1.Polypropylene Mat plaited using polypropylene Straw is classifiable under CTH 46019900. 2. The applicable tax rate from 1.7.2017 to 24.1.2018 is 9% CGST as per Sl. No. 453 of Schedule -III of Notification No. 01/2017 C.T. (Rate) dated 28.06.2017 as amended. The rate from 25.01 .2018 to 30.12.2018 is 2.5% CGST as per Sl No 198A of schedule I of Notification No. 01/2017 C.T. (Rate) dated 28.06.2017 as amended. The rate from 01.1.2019 onwards is 2.5% CGST as per Sl No 198AA of Schedule I of Notification No. 01/2017 C.T. (Rate) dated 28.06.2017 as amended.
2	Tamil Nadu	Malli Ramalingam Mothilal (M/S. M.R. Mothilal)	No.12/AAR/ 2019 dated 22.03.2019	**Brief Issue**	Whether Kalava Raksha Sutra is exempted under the Sl.No. 148 in any Chapter? Classification of HSN code of the product?
				Decision	Braided textile yarns supplied by the Applicant is classifiable under 56074900 if made of Polypropylene Yarn, classifiable under 56075090 if made of Other Synthetic Yarn and classifiable under 56079090 if made of Cotton.
3	Rajasthan	Rambagh Palace Hotels Pvt Ltd	RAJ/ AAR/2019-20/05 dated 30.04.2019	**Brief Issue**	a) Classification of goods or services or both. b) Admissibility of input tax credit of tax paid or deemed to have been paid.
				Decision	1. ITC of GST paid on : – building materials for repair of building – electrical fittings and electrical consumables for repair of existing electrical fittings – Sanitary fittings and consumables for repair of existimg sanitary fittings shall not be available to the extent of capitalisation of such materials. 2. ITC of GST paid on labour suppy for carrying out: – building repairs – repair of electrical installation/sanitary fittings where material and supervision provided by applicant; shall not be available to the extent of capitalisation of GST on labour supply.

					3. ITC of GST paid on wood, mica, paint etc. meant for repair of existing furniture and fixtures and of GST paid on labour supply for the said repairs shall be available as per Section 16 of CGST Act. 4. ITC shall be available for GST paid on purchase of new ready to use furniture as per Section 16 of CGST Act.
4	Rajasthan	Gitwako Farms India Pvt Ltd	RAJ/ AAR/2019-20/04 dated 16.04.2019	**Brief Issue**	What is the classification when the Frozen Chicken is sold in packaged form and it's HSN code? Whether frozen chicken as sold by the company is exempt under Entry No. 9 of Not. No. 02/2017-CT(R)?
				Decision	1. Branded Frozen Chicken supplied in a unit container is classifiable under HSN Code 02071200. 2. Frozen chicken supplied by applicant is not exempt under notification 02/2017-CT (Rate) dated 28.06.2017.
5	Rajasthan	Laxmi Agrotech Steel	RAJ/ AAR/2019-20/03 dated 16.04.2019	**Brief Issue**	Applicant had been charging a tax rate of 18% on the components of the sprinkler/drip irrigation system sold by them and sought advance ruling over the coverage of various parts of sprinkler system like Latch Clamp, C-Clamp, Foot Batten, Riser Pipe, Aluminium Rivet and Mini Sprinkler Rod etc. exclusively meant for use in Sprinklers and drip irrigation system and the tax rate applicable on such components/parts.
				Decision	Metal parts manufactured and supplied by applicant are not covered under entry no. 195B of Schedule II of notification 01/2017.
6	Rajasthan	Laxmi Rubber Industries	RAJ/ AAR/2019-20/02 dated 16.04.2019	**Brief Issue**	Whether items made of vulcanized rubber like Rubber Ring/GASKET/Seal, Rubber Foot Batten Washer and Rubber Grommets falling under the heading 4016 are taxable as specific rubber items having a GST rate of 18% or as components of sprinkler/Drip irrigation system having a tax rate of 12% under heading 84249000. (Items are designed and shaped so that these can be used only in sprinkler/drip irrigation equipment and have no other use.)
				Decision	Goods manufactured and supplied by applicant viz. rubber ring/gasket/seal, rubber for batten washer and rubber grommets are classifiable under chapter heading 4016 and attract GST @ 18%.
7	Rajasthan	Udyog Mandir	RAJ/ AAR/2019-20/01 dated 16.04.2019	**Brief Issue**	Will Khadi readymade garments to be included under the entry of Khadi fabric under chapter 50 to 55 of GST classification? If not, then what is the correct classification and rate of tax on Khadi readymade garments?
				Decision	Khadi readymade garments are not covered under chapter 50 to 55 of notification 02/2017-CT (Rate). They will be classifiable under tariff item 62 under notification 01/2017-CT(Rate).

					If sale value of garments manufactured is less than Rs. 1000,it attracts GST @5% but if it is more than Rs 1000,it attracts GST @12%.
8	Rajasthan	TATA Projects Pvt Ltd	RAJ/ AAR/2018-19/42 dated 29.03.2019	**Brief Issue**	Determination of the liability to pay tax on any goods or services or both.
				Decision	GST rate applicable on the project undertaken involving Civil, Structural and PH works for Plant and Non Plant Buildings, is 18%.
9	Rajasthan	G A Infra Pvt Ltd	RAJ/ AAR/2018-19/41 dated 25.03.2019	**Brief Issue**	Whether the activity of O & M of Fluoride control project on ESCO Model and O & M work, a supply of goods or a supply of services? What shall be the rate of GST on it?
				Decision	The activity is a composite supply of goods and services. If supply of goods is below 25% of total value of supply, GST shall be NIL. If supply of goods is more than 25% of total value of composite supply, it will attract GST @12%.
10	Rajasthan	Wolkem Industries Ltd	RAJ/ AAR/2018-19/39 dated 25.03.2019	**Brief Issue**	1. What is the classification of service provided by the State of Rajasthan to M/s Wolkem Industries Limited for which royalty is being paid? 2. Whether said service can be classified under 997337 as Licensing services for the right to use minerals including its exploration and evaluation or as any other service? 3. What is the rate of GST on given services provided by the State of Rajasthan to M/s Wolkem Industries Limited for which royalty is being paid?
				Decision	Activity undertaken by applicant is classifiable under Heading 997337 of Notification 11/2017-CT (Rate) and attracts GST @18%.Applicant is also liable to discharge tax liability under reverse charge on the leasing/licensing services being received from government.
11	Rajasthan	Rajasthan Rajya Sahakari Kriya Vikriya Sangh Ltd	RAJ/ AAR/2018-19/38 dated 22.03.2019	**Brief Issue**	Whether the applicant is liable for charging goods and service tax under the RGST Act, 2017 and CGST Act, 2017 on providing service for procurement of agricultural produce i.e. oilseeds and pulses from farmers either itself or through Kray Vikray Sahakari Samiti on behalf of it's principal i.e. National Agriculture CO-Operative Marketing federation of India Ltd. (NAFED)? Whether the applicant is liable for charging RGST/CGST or IGST as the case may be on it's outward supplies of goods as well as services after having procured through Krah Vikrah, Sahakari Samiti according to the purchase order of the NAFED? Whether the applicant being a Co-Operative society registered under the Rajasthan State Co-Operative Society Act, 1953 now consolidated in the Rajasthan Co-Operative Societies Act, 2001 is liable to deduct Tax at Source (TDS)

					from payment to or credit of Krah Vikrah, Sahakari Samiti /RAJFED under Notification No. 50/2018-central tax dated 13.09.2018 for their services of procurement of oilseeds and pulses for the applicant to be supplied by the applicant to it's principal NAFED? Whether the applicant being a Co-Operative society registered under the Rajasthan State Co-Operative Society Act, 1953 now consolidated in the Rajasthan Co-Operative Societies Act, 2001 is liable to deduct Tax at Source (TDS) from payment to or credit of RAJFED under Notification No. 50/2018-Central Tax dated 13.09.2018 for their services of procurement of gunny bags, transportation, insurance and services of surveyors for the applicant to be supplied by the applicant to it's principal NAFED itself?
				Decision	1. The applicant is not liable to charge GST on: – Service of procurement of agricultural produce from farmers as it is exempted under S.no 54 of notification 12/2017-CT(Rate). – Outward supply of pulses (other than branded) through Krah Vikrah Sahakari Samiti as it is exempted under notification 02/2017-CT (Rate) 2. Applicant not liable to deduct TDS on payment to or credit of Krah Vikrah Sahakari Samiti for their services of insurance, transportation etc. due to not being covered under Notification 50/2018-CT. 3. GST to be charged on outward supply of oilseeds(other than seed quality) through Krah Vikrah Sahakari Samiti and attracts 5% GST as per notification 01/2017-CT(Rate).
12	Rajasthan	Muncipal Corporation Pratapgarh	RAJ/ AAR/2018-19/37 dated 14.03.2019	**Brief Issue**	Classification of any goods or services or both. Determination of the liability to pay tax on any goods or services or both. Whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both, within the meaning of that term?
				Decision	1. Pure services will attract Nil rate of duty and GST TDS will not be applicable. 2. In composite supply: – when value of goods not more than 25% of total value: Nil rate of duty and no GST TDS shall apply
					– when value of goods more than 25% of total value, GST @12% applicable if activity falls under S.no 3 of Notification 11/2017-CT(Rate) or @18% if it doesn't. Provisions of GST TDS will apply.

13	Rajasthan	Mohan Infinity	RAJ/ AAR/2018-19/36 dated 14.03.2019	**Brief Issue**	What is the GST rate on Natural Calcite Powder?
				Decision	Natural Calcite Powder is classifiable under HSN Code 25309030 and attracts GST @5%.
14	Uttarakhand	Innovative Textile ltd	No.20 dated 26.03.2019	**Brief Issue**	Whether business transfer agreement as a going concern on slump sale basis is exempted from the levy of GST in terms of sl. no. 2 of the notification no.12/2017 central tax (Rate) dated 28-06-2017?
				Decision	Transfer of business to be treated as a going concern and exempted from GST under Notification 12/2017-CT (Rate) dated 28.06.2017.
15	Chhattis-garh	Ramnath Bhimsen Charitable Trust	STC/ AAR/11/2018 dt 02-03-2019	**Brief Issue**	GST Rates applicable in case of hostel on rent to various boarder.
				Decision	Applicant is providing accommodation services in their hostel and collecting an amount below the threshold limit of Rs. 1000/- per day and no other charges are being collected for providing other allied facilities / services therein. Therefore, exemption under S. No 14 of chapter 9963 in Notification No. 12/2017-State Tax (Rate) shall apply. The amount received for such supply by the applicant falling under tariff heading 9963 qualifies to be treated as nil rate tax exempted supply.
16	Chhattis-garh	Shri Nawodit Agarwal	STC/ AAR/10/2018 dt. 26-03-2019	**Brief Issue**	Whether to charge GST on Freight amount excluding diesel cost or on total amount which is inclusive of diesel.
				Decision	GST shall be charged on total amount including the diesel cost provided by recipient.
17	Chhattis-garh	NMDC Limited	STC/ AAR/09/2018 Dt. 22.02.2019	**Brief Issue**	Applicability of GST on royalty paid and determination of the liability to pay tax on contributions made to DMF and NMET.
				Decision	The royalty paid in respect of mining lease is classifiable under sub heading 997337: Licensing services for the right to use minerals including its exploration and evaluation and attracts GST at the same rate as applicable for the supply of like goods involving transfer of title in goods, under reverse charge basis. The contributions made to District Mineral Foundation (DMF) and National Mineral Exploration Trust (NMET) by M/s NMDC as per MMDR Act, 1957 are liable to GST, under reverse charge basis.

CIRCULARS AND NOTIFICATIONS IN BRIEF

Circulars: CGST

Circular No. 102/2019-CGST

Dated 28.06.2019

1. Any service fee/charge or any other charges levied in respect of the transactions related to extending deposits, loans or advances does not qualify to be interest as defined in notification No. 12/2017- Central Tax (Rate) dated 28.06.2017, and accordingly will not be exempt.

2. Transaction of levy of additional / penal interest on overdue loan does not fall within the ambit of entry 5(e) of Schedule II of the CGST Act i.e. “agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act”, as this levy of additional / penal interest satisfies the definition of “interest” as contained in notification No. 12/2017- Central Tax (Rate) dated 28.06.2017.

Circular No. 103/2019-CGST

Dated 28.06.2019

1. Services such as unloading of wagons, siding of wagons inside the port, etc., provided by the port are ancillary to cargo handling services and the place of supply of such services will be determined as per section 12(2) or section 13(2) of IGST Act, depending upon the terms of the contract between the supplier and recipient of such services.

2. Place of supply in case of Cutting and polishing activity on unpolished diamonds which are temporarily imported and not put to any use in India, would be determined as per the provisions of Section 13(2) of the IGST Act.

Circular No. 104/2019-CGST

Dated 28.06.2019

In cases, where reassignment of refund applications to the correct jurisdictional tax authority is not possible on the common portal, the processing of the refund claim should not be held up and it should be processed by the tax authority to whom the refund application has been

electronically transferred by the common portal. After the processing of the refund application is complete, the refund processing authority may inform the common portal about the incorrect mapping with a request to update it suitably on the common portal so that all subsequent refund applications are transferred to the correct jurisdictional tax authority.

Circular No. 105/2019-CGST

Dated 28.06.2019

1. If the post-sale discount is given by the supplier of goods to the dealer without any further obligation or action required at the dealer's end, then the post sales discount would not be included in the value of supply subject to the provisions of section 15(3) of the CGST Act.

2. If any additional discount given by the supplier of goods to the dealer is a post-sale incentive requiring the dealer to do some act like undertaking special sales drive, advertisement campaign etc, then such transaction would be a separate transaction and the additional discount will be the consideration for undertaking such activity. GST shall be charged on such discount and it would be eligible to be claimed as ITC.

3. A dealer will not be required to reverse ITC attributable to the tax already paid on post-sale discount received by him through issuance of financial / commercial credit notes by the supplier of goods as per the provisions of rule 37(1) of the CGST Rules read with section 16(2), as long as the dealer pays the value of the supply as reduced after adjusting such post-sale discount plus the amount of original tax charged by the supplier.

4. If additional discount is given by the supplier of goods to the dealer to offer a special reduced price by the dealer to the customer to augment the sales volume, such discount would be liable to be added to the consideration payable by the customer, for the purpose of arriving value of supply, in the hands of the dealer, under section 15 of the CGST Act.

Circular No. 106/2019-CGST

Dated 29.06.2019

Retail outlets established at departure area of the international airport beyond immigration counters are entitled to claim refund of all applicable Central tax, Integrated tax, Union territory tax and Compensation cess

paid by them on inward supplies of indigenous goods received by them for the purposes of subsequent supply of goods to eligible passengers. Prcocedure to claim refund has been specified:

1. Records with respect to duty paid indigenous goods being brought to the retail outlets and their supplies to eligible passengers shall be maintained in electronic form.

2. Refund to be granted is based on the invoices of the inward supplies of indigenous goods received by them. No refund of tax paid on input services, if any, will be granted to the retail outlet.

3. Supply made to eligible passenger by the retail outlets without payment of taxes by such retail outlets shall require declarations sepcified therein.

4. Retail outlets shall apply for refund by filing an application in FORM GST RFD-10B.

Retail outlets would be eligible to claim refund of taxes paid on inward supplies of indigenous goods received by them even prior to 01.07.2019 as long as all the conditions laid down in Rule 95A of the CGST Rules and this circular are fulfilled.

Circular No. 107/2019-CGST

Dated 18.07.2019

Supplier of ITeS services, who is not an intermediary in terms of sub-section (13) of section 2 of the IGST Act, can avail benefits of export of services if he satisfies the criteria mentioned in sub-section (6) of section 2 of the IGST Act.

Circular No. 108/2019-CGST

Dated 18.07.2019

1. The activity of sending / taking the goods out of India for exhibition or on consignment basis for export promotion, except when such activity satisfies the tests laid down in Schedule I of the CGST Act, do not constitute supply as the said activity does not fall within the scope of section 7 of the CGST Act since there is no consideration at that point in time. Therefore such activity cannot be considered as Zero rated supply.

2. The specified goods being taken outside India shall be accompanied with a delivery challan issued in accordance with the provisions of rule 55 of the CGST Rules.

3. The supply would be deemed to have taken place on the expiry of six months from the date of removal, if the specified goods are neither sold abroad nor brought back within 6 months. If the specified goods are sold abroad, fully or partially, within the specified period of six months, the supply is effected on the date of such sale in respect of the quantity sold.

4. The sender of specified goods can prefer refund claim even when the specified goods were sent / taken out of India without execution of a bond or LUT, if he is otherwise eligible for refund as per the provisions of section 54(3) of the CGST Act and rule 89(4) of the CGST Rules, in respect of zero rated supply of goods after he has issued the tax invoice. Refund claim cannot be preferred under rule 96 of CGST Rules as supply is taking place at a time after the goods have already been sent / taken out of India earlier.

Circular No. 109/2019-CGST

Dated 22.07.2019

1. Supply of service by RWA (unincorporated body or a non- profit entity registered under any law) to its own members by way of reimbursement of charges or share of contribution up to an amount of Rs. 7500 per month per member for providing services and goods for the common use of its members in a housing society or a residential complex are exempt from GST. In case the charges exceed Rs. 7500/- per month per member, the entire amount is taxable.

2. RWA shall be required to pay GST on monthly subscription/ contribution charged from its members, only if such subscription is more than Rs. 7500/- per month per member and the annual aggregate turnover of RWA by way of supplying of services and goods is also Rs. 20 lakhs or more

3. The ceiling of Rs. 7500/- per month per member shall be applied separately for each residential apartment owned by him

4. RWAs are entitled to take ITC of GST paid by them on capital goods, inputs and input services.

NOTIFICATION: CGST

Notification No. 26/2019-Central Tax

Dated 28.06.2019

Extension of time limit to file form GSTR-7 for the months of October 2018 to July 2019 till 31st August, 2019.

Notification No. 27/2019-Central Tax

Dated 28.06.2019

Due date of filing FORM GSTR 1 for July -September 2019 shall be 31st October 2019 for taxpayers with annual turnover up to 1.5 crore in preceeding or current financial year.

Notification No. 28/2019-Central Tax

Dated 28.06.2019

Due date of filing FORM GSTR 1 for July-September 2019 shall be 11th of the succeeding month in each month for taxpayers with annual turnover more than 1.5 crore in preceeding or current financial year.

Notification No. 29/2019-Central Tax

Dated 28.06.2019

Due date of filing FORM GSTR 3B for July-September 2019 shall be 20th of the succeeding month in each month.

Notification No. 30/2019-Central Tax

Dated 28.06.2019

Persons registered under section 24 and supplying online information and data base access or retrieval services from a place outside India to a person in India, other than a registered person, shall not be required to furnish Form GSTR 9 and Form GSTR-9C.

Notification No. 31/2019-Central Tax

Dated 28.06.2019

Central Goods and Services Tax (Fourth Amendment) Rules, 2019 relating to rule 10A,21,32A,46,49,66,67,87,92,94,95A,128,129,132133,138 and 138E.

Notification No. 32/2019-Central Tax

Dated 28.06.2019

Time limit extended for furnishing FORM GST ITC-04 in respect of goods dispatched to a job worker or received from a job worker, during the period July, 2017 to June, 2019 till 31st August, 2019.

Notification No. 33/2019-Central Tax

Dated 18.07.2019

Central Goods and Services Tax (Fifth Amendment) Rules, 2019 relating to 12,46, 54, 83B, 137, 138E and insertion of FORM GST PCT –05.

Notification No. 34/2019-Central Tax

Dated 18.07.2019

Time limit extended to furnish FORM GST CMP-08, for the quarter April-June 2019 till 31 July 2019.

Notification: CGST (Rate)

Notification No. 11/2019-Central Tax (Rate)

Dated 29.06.2019

Retail outlets established in the departure area of an international airport, beyond the immigration counters, making tax free supply of goods to an outgoing international tourist, shall be entitled to claim refund of

applicable central tax paid on inward supply of such goods, subject to the conditions specified in rule 95A of the Central Goods and Services Tax Rules, 2017 with effect from 1st July 2019.

NOTIFICATION: IGST (RATE)

Notification No. 10/2019-IGST (Rate)

Dated 29.06.2019

Retail outlets established in the departure area of an international airport, beyond the immigration counters, making tax free supply of goods to an outgoing international tourist, shall be entitled to claim refund of applicable integrated tax paid on inward supply of such goods, subject to the conditions specified in rule 95A of the Central Goods and Services Tax Rules, 2017 with effect from 1st July 2019.

Notification No. 11/2019-IGST (Rate)

Dated 29.06.2019

Any supply of goods by a retail outlet established in the departure area of an international airport, beyond the immigration counters, to an outgoing international tourist, shall be exempt from integrated tax leviable under section 5 of the Integrated Goods and Services Tax Act, 2017.

NOTIFICATION: UTGST (RATE)

Notification No. 11/2019-UTGST (Rate)

Dated 29.06.2019

Retail outlets established in the departure area of an international airport, beyond the immigration counters, making tax free supply of goods to an outgoing international tourist, shall be entitled to claim refund of applicable union tax paid on inward supply of such goods, subject to the conditions specified in rule 95A of the Central Goods and Services Tax Rules, 2017 with effect from 1st July 2019.

MINISTRY OF LAW AND JUSTICE
(Legislative Department)

Notification

New Delhi, the 5th August, 2019

G.S.R .551(E).— the following Order made by the President is published for general information:-

THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 2019 C.O. 272

In exercise of the powers conferred by clause (1) of article 370 of the Constitution, the President, with the concurrence of the Government of State of Jammu and Kashmir, is pleased to make the following Order:-

1. (1) This Order may be called the Constitution (Application to Jammu and Kashmir) Order, 2019.

   (2) It shall come into force at once, and shall thereupon supersede the Constitution (Application to Jammu and Kashmir) Order, 1954 as amended from time to time.

2. All the provisions of the Constitution, as amended from time to time, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows:—

To article 367, there shall be added the following clause, namely: —

"(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir—

(a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;

(b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir;

(c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers; and

(d) in proviso to clause (3) of article 370 of this Constitution, the expression "Constituent Assembly of the State referred to in clause (2)" shall read "Legislative Assembly of the State".

RAM NATH KOVIND,
President.

[F. No. 19(2)/2019-Leg.1]
Dr. G. NARAYANA RAJU, Secy.

Advance Rulings

S. No	State	Case Name	Order No. & Date	Particulars	
1	Goa	Chowgule & Co Pvt. Ltd	GOA/ GAAR/11 of 2018-19/514 Dated 21.05.2019	**Brief Issue**	Whether IGST at 5% of assessable value is applicable on import of iron for conversion into pellets and export the resultant product (Iron ore pellets) back to same supplier in view of the fact that import duty is not applicable in view of the exemption under General Exemption No. 66 (Exemption Notification No. 32/97-Cus dated 01st April, 1997) for job work. If answer to question 1 is yes, whether the applicant as recipient of imported iron ore will be liable to pay the IGST under applicant GSTIN as the applicant in any case is the consignee of the imported iron ore. If answer to question 2 is yes, whether the applicant can avail the input Tax Credit for the IGST so paid as per section 16 of CGST Act. Whether the applicant can claim refund of unutilised input tax credit on export of services as per section 16(3)(a) of IGST Act and 54(3) of CGST Act.
				Decision	The applicant is liable to pay IGST on import if iron ore and eligible to avail the ITC towards such payment. However, as per Sec.54 (3) of the CGST Act, the applicant is not eligible for refund of unutilised ITC on export of goods and services.
2	Goa	Chowgule Industries Private Limited	GOA/ GAAR/07 of 2018-19/4796 dated 29.03.2019	**Brief Issue**	Whether ITC on Motor Car purchased for Demo purpose can be availed as credit on capital goods & set off against output tax payable
				Decision	ITC on Motor Car purchased for Demonstration purpose can be availed as credit on capital goods & set off against output tax payable under GST.
3	Maha-rashtra	S.B. Reshellers Pvt. Ltd.	GST-ARA-97/2018-19/B- 24 Mumbai dated 02.03.2019	**Brief Issue**	The activity of converting the bare shaft/ beams supplied by the customer into ready to use sugar mill roller (by using one's own raw material) will be treatable as supply of goods or will be treatable as supply of service? Whether the cost of shaft/beam supplied by the customer is includible in the value of the said supply for the purpose of payment of GST?
				Decision	The activity of converting the bare shaft/beams supplied by the customer into ready to use sugar mill roller(by using one's own raw material) is supply of goods. Moreover, for the purpose of payment under GST Act, the cost of shaft/beam supplied by the customer is includible in the value of the said supply .
4	Maha-rashtra	TCPL Packaging Limited	GST-ARA-105/2018-19/B- 33 Mumbaidated 22.03.2019	**Brief Issue**	1. Whether the packaging materials viz. cut to size blanks manufactured by TCPL with corrugation and having requisite creases at designated places, supplied to the Customers in flat form with folding, can be categorized under Tariff Item Code no 4819 and subject to GST @ 12%?

					2. What would be the appropriate categorization and GST Rate of printed materials which are in flat form, e.g. hanging cards, without creases having corrugation and supplied to customer in flat form?
				Decision	1. Packaging materials viz. cut to size blanks manufactured by TCPL with corrugation and having requisite creases at designated places, supplied to the Customers in flat form with folding, is categorized under Tariff Item Code no 4819 and subject to GST @ 12%. 2. Printed materials in flat form, without creases having corrugation and supplied to customer in flat form, falls under CH 4823 and attracts GST @ 18%
5	Maha-rashtra	Tata Motors Limited	GST-ARA-104/2018-19/B- 32 Mumbaidated 22.03.2019	**Brief Issue**	Whether Tata Harrier vehicle, which has following specifications, is classifiable under Tariff Item 8703 32 91 or 8703 32 99 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)? If the vehicle satisfies only the conditions mentioned in main clause but is not satisfying any one or all of the conditions mentioned in Explanation', whether it would still be covered under Entry at Sr. No. 52B of Notification No. 1/2017-Compensation Cess (Rate) dated 28.06.2017 as amended? For the purpose of Cess @ 22% under Sr. No: 52B of Notification No. 1/2017 Compensation Cess (Rate) dated 28.06.2017 as amended, whether the ground clearance of the vehicle is to be considered in laden condition or in unladen condition? Whether Tata Harrier vehicle whose ground clearance in unladen condition is 205 mm and in laden condition is 160 mm, would fall under Sr. No. 52B of the Notification No. 1/2017-Compensation Cess. (Rate) dated 28.06.2017 as amended? Whether GST Compensation Cess @ 22% under Sr. No. 52B of Notification No. 1/2017-Compensation Cess (Rate) dated 28.06.2017 as amended, will be applicable to Tata Harrier vehicle? Vehicle whose ground clearance in unladen condition is more than 170 mm but below 170mm in laden condition, whether will get covered under Sr. No. 52B of Notification No. 1/2017-Compensation Cess (Rate) dated 28.06.2017?
				Decision	1. Tata Harrier vehicle is classifiable under Tariff Item 87033291 of the first schedule of the Customes Tariff Act, 1975. 2. The vehicle must satify conditions mentioned in the main clause as well as explanations to be covered under S.No 52B of Notificaton 1/2017-Compensation cess. 3. The ground clearance given in the notification must be arrived in unladen condition.

					4. Tata Harrier vehicle whose ground clearance in unladen condition is 205mm and in laden condition is 160mm, shall fall under S.No 52B of Notificaton 1/2017-Compensation cess as amended. 5. GST Compensation cess @22% shall be applicable on Tata Harrier as per the above mentioned notification. 6. The ground clearance should be 170mm or above in unladen condition to get covered in the above mentioned notification.
6	Maha-rashtra	Sterlite Technologies Limited	GST-ARA-106/2018-19/B- 34 Mumbaidated 28.03.2019	**Brief Issue**	Whether the supply of goods or services for 'setting up of network' would qualify as 'works contract' as defined in Section 2(119) of the CGST Act? If supplies contemplated as per the contract with BSNL are not treated as works contract, can these continue to qualify as composite supply? if yes what is the principle supply? What is the rate of tax applicable to the supplies made under the contract?
				Decision	Supply of goods and services for setting up network would qualify as composite supply of works contract as defined under Section2(119) of the CGST Act and would attract GST @18%
7	Maha-rashtra	Puranik Construction Pvt. Ltd.	GST-ARA-99 /2018-19/B-31 Mumbai dated 20.03.2019	**Brief Issue**	Is applicant eligible for Notification 01/2018-Central Tax (Rate) dated 25.01.2018 which provides for concessional rate of GST @ 12% on supply of works contract service in respect of Original Works pertaining to construction of a Low Cost House in an AHP
				Decision	The applicant will be eligible for concessional rate @12% however the rate shall be applicable only on residential units of under 60 sq mts and not for commercial units.
8	Maha-rashtra	Multiples Alternate Asset Management Private Limited	GST-ARA-81/2018-19/B- 25 Mumbai dated 06.03.2019	**Brief Issue**	Whether GST is applicable on the Advisory & Management Fees received in Indian Currency from Domestic Contributors located in India for the Services rendered by the applicant? Whether GST is applicable on the Advisory & Management Fees received in Foreign Currency from Overseas Contributors located outside India for the Services rendered by the applicant?
				Decision	Yes, GST is applicable on both the Advisory & Management Fees received in Indian Currency from Domestic Contributors located in India and in Foreign Currency from Overseas Contributors located outside India for the Services rendered by the applicant.
9	Maha-rashtra	Kansai Nerolac Paints Limited	GST-ARA-84/2018-19/B- 30 Mumbai dated 19.03.2019	**Brief Issue**	Whether value of supply of goods by one distinct entity (Factory/depot) as defined under sec 25(4) of the CGST Act 2017 as amended to another distinct entity (Factory/depot) can be determined on the basis of cost of production which depends mainly on cost of inputs and input services.
				Decision	Rule 28 of GST Rules can be applied to determine the value of supply of goods by one distinct entity to another distinct entity having the same PAN(factory/depot)

10	Maha-rashtra	C S Diesel Engineering Private Limited	GST-ARA-102/2018-19/B- 28 Mumbaidated 14.03.2019	**Brief Issue**	Please confirm that Main Propulsion engine for ships falling under HSN code 8408 1093, Marine Gear box falling under heading 8483 and marine generator falling under 8502 1100 and Marine engine for other applications like pumps falling under sub-heading 8408 10 would be considered as parts of Goods for Chapter 89, Further if the all above used in manufacturing of the boat/ ships under headings 8901, 8902, 8904, 8905, 8906 and 8907 shall be charged with 5% even if in their respective chapters, the rates of GST are higher: For example, GST for HSN code 8408 10 93 is 28%, but when supplied to shipyards would be 5% and also implied for chapters 8483 and 8502 1100 above. The invoice made by the dealer to the shipyard would be made under the respective product chapter, but with 5% GST. For example marine main propulsion engine would be made with 5% GST under HSN code 8408 1093 and not 28%. And also implied for chapters 8483 and 8502 1100 above with 5% GST. As a generator manufacturer, we buy a marine Engine from our principles (Ashok Leyland). Please conform if we could buy under 5% GST from Ashok Leyland with our letter of undertaking stating that we shall be supplying these Generators to Marine Shipyard also stating in the letter , the with Hull number (which is always unique)for a project and shipyard order copy. We would also submit a covering letter from the shipyard to Ashok Leyland for the same subject matter and yard number (which is always unique). With all this above procedure can Ashok Leyland supply us Marine Generator Diesel Engines with 5% GST under HSN code 8408 1093? When we have to sell an engine to shipyard for main Propulsion, we buy it from Ashok Leyland. under that context could we buy the engines with our letter of undertaking stating that we shall be supplying these engines to marine Shipyard name and Hull number (which is always unique) for that project and with shipyard order copy and also a covering letter from the shipyard for the same subject matter and yard number (which is always unique). With all this can we get the supplies from Ashok Leyland at 5% GST?
				Decision	1.Main Propulsion engine for ships falling under HSN code 8408 1093, Marine Gear box falling under heading 8483, marine generator falling under 8502 1100 and Marine engine for other applications like pumps falling under sub-heading 8408 10 would be considered as parts of Goods for Chapter 89 2. The goods supplied by the applicant used in the manufacturing of boats/ships under heading 8901, 8902,8904, 8905, 8906 and 8907 shall be charged at 5% GST even if their GST rates are higher as per Notification 01/2017-CT(Rate) 3. Yes, the invoice made by the dealer to the shipyard would be made under the respective product chapter, but with 5% GST.

11	Maha-rashtra	Arihant Enterprises	GST-ARA-126/2018-19/B- 29 Mumbaidated 19.03.2019	**Brief Issue**	Whether supply of ice-cream by the applicant from its retail outlets would be treated as supply of "goods" or supply of "service" or a "composite supply" and subject to GST accordingly? Whether the supply, not being a composite supply, would be treated as supply of service in terms of entry 6(b) of Schedule 11 attached to the CGST Act, 2017 and leviable to CGST @ 2.5% in terms of Notification No. 11/2017 as amended by Notification No.46/2017-Central Tax (Rate) (serial no. (i) entry no. 7) of the notification? In case the supply is held to be "composite supply", whether the taxability of the same should be treated as supply of service in terms of entry 6(b) of the Schedule II of the CGST act, 2017 or should be taxable on the basis of nature of principal supply in accordance with Section 8 of the Act? In case the supply is held to be a supply of service in terms of entry 6(b) of Schedule II to the CGST Act, 2017, would it be mandatory for the applicant to collect and pay CGST @ 2.5% inspite of the fact that entry 7(i) of Notification No. 11/2017 as amended by Notification No.46/2017-Central Tax is a conditional entry?
				Decision	1. Supply of ice-cream by the applicant from its retail outlets would be treated as supply of "goods" 2. Supply would not be treated as supply of service in terms of entry 6(b) of Schedule 11 attached to the CGST Act, 2017
12	Madhya Pradesh	Sanghi Brothers (Indore) Prv. Ltd.	NO. 06/19-20 dated 03.05.19	**Brief Issue**	Whether building of body after utilizing and consuming owned materials and providing labour and further amounting the same on chassis of the principal would amount to supply of Services
				Decision	Mounting of Bus/Truck/Ambulance body on chassis to be supplied by Principal on delivery challan or any other owner of chassis on which Bus/Truck/Ambulance body will be fabricated by collecting job work charges including inputs required for such fabrication work and in no case ownership of chassis will be transferred by applicant to job worker will be taxable under SAC 998881 'Motor vehicle and trailer manufacturing services' and under entry No. 26(ii) as 'Manufacturing services on physical inputs (goods) owned by other'. It is taxable at rate of 18% GST
13	Madhya Pradesh	E-DP Marketing Prv. Ltd.	NO. 05/19-20 dated 02.05.19	**Brief Issue**	Whether the applicant/importer is again required to pay IGST on the component of ocean freight under RCM mechanism on deemed amount which will amount to double taxation of IGST on the deemed component of ocean freight of the imported goods?
				Decision	As per Notification No.10/2017-IT(R) and Notification No.8/2017-IT(R), the Applicant shall be liable to pay IGST on ocean freight paid on imported goods under Reverse Charge Mechanism irrespective of the ocean freight component having been a part of the CIF value of imported goods.

14	Madhya Pradesh	Network For Information & Computer	NO. 04/19-20 dated 10.04.19	**Brief Issue**	Is exemption under Sr. No. 72 of Notification. No. 12/2017 Central Tax(Rate), dated 28-06-17 issued by the Central Government under CGST Act, 2017 applicable for the applicant?
				Decision	Applicant shall not be entitled to avail the exemption under S.No 72 of Notification 12/2017-CT(Rate) in respect of training provided to Uttar Pradesh Skill Development Corporation as that exemption is only available in respect of services provided to the government under any training program for which expenditure is borne by the government
15	Madhya Pradesh	Rohan Coach Builders	NO. 03/19-20 dated 10.04.19	**Brief Issue**	Whether the activity of building and mounting of the body by the applicant on the chassis provided by the Principle will result in supply of goods under HSN 8707 or supply of services under HSN 9988 taxable @ 18% irrespective of end use by the principle who shall affect the sale of Bus?
				Decision	Fabrication of bus body on the chassis to be supplied by the principal or any other owner, by collecting job work charges including inputs required for such fabrication work where the ownership of the chassis will not be transferred by the principal to the applicant, shall fall under SAC 998881and taxable @18%.
16	Karnataka	Bhutoria Refrigeration Private Limited	NO. 12/19-20 dated 25.06.19	**Brief Issue**	Whether the activity of building and mounting of the body on the chassis by the Applicant will result in supply of goods under HSN 8707 or supply of services under HSN 9988?
				Decision	1. Supply of ready build body and activity of mere mounting the body on chassis supplied by owner amounts to supply of goods under HSN 8707 and attracts GST @28%. 2. Activity of step by step building of the body on the chassis supplied by the owner using own inputs and capital goods amounts to supply of service and attracts 18% GST.
17	Karnataka	Sri. Kanyaka-parameshwari Oil Mills	N0. 11/19-20 dated 25.06.19	**Brief Issue**	1. What is rate of tax for “Perfumed Deepam Oil” which is prepared by mixing Gingely Oil, Palmoline Oil, Rice Bran Oil or any one oil with perfume or chemical and used for lighting lamp for God (not for cooking) with HSN Code. 2. What is rate of tax for “Non- perfumed Deepam Oil” which is prepared by mixing Gingely Oil, Palmoline Oil, Rice Bran Oil or any one oil without perfume or chemical and used for lighting lamp for God (not for cooking) with HSN Code. 3. What is rate of tax for a mixture of Gingely Oil, Palmoline Oil, Rice Bran Oil or any one oil
				Decision	1. “Perfumed Deepam Oil” which is prepared by mixing Gingely Oil, Palmoline Oil, Rice Bran Oil or any one oil with perfume, is covered under HSN 1518 and taxable @12% GST.

					2. "Deepam Oil" prepared by either a mixture of Gingely Oil, Palmoline Oil, Rice Bran Oil or any one oil which is not used for cooking, is covered under Chapter heading 1518 and taxable @12% GST. 3. Gingely Oiland Rice Bran Oil falling under Heading 1515, Palmoline Oil under heading 1511 and mixture of such edible oil falling under Heading 1517, are taxable @5% GST.
18	West Bengal	Time Tech Waste Solutions Pvt Ltd	14/WBAAR/ 2019-20 DATED 27.06.2019	**Brief Issue**	Whether notifications relating to TDS apply to supply of waste management service to a municipality and whether the applicant needs to be registered even if he makes exempted supplies only.
				Decision	1. The Applicant's supply to the Bally Municipal Corporation(collection, segregation, storing, transport and disposal of municipal solid waste from the municipal area of the BMC) is exempt from the payment of GST under Sl No. 3 of Notification No. 12/2017 - CT(Rate) 2. If the Applicant's turnover consists entirely of exempt supplies, he is not liable to registration in terms of section 23(1)(a) of the GST Act. 3. To the extent they mandate and deal with the mechanism of TDS, the provisions of section 51 and Notification No.50/2018 - Central Tax do not apply on the Applicant.
19	West Bengal	Borbheta Estate Pvt Ltd	13/WBAAR/ 2019-20 DATED 27.06.2019	**Brief Issue**	Whether applicant is liable to pay GST on leasing of a dwelling unit to a company for residential purpose.
				Decision	The Applicant's service of renting/leasing out the dwelling units for residential purpose is exempt under Sl No. 12 of Notification No. 12/2017-CT (Rate).
20	West Bengal	Dredging & Desiltation Company Pvt Ltd	12/WBAAR/ 2019-20 DATED 27.06.2019	**Brief Issue**	What will be the taxability of the service of upgrading navigability of a river-bed when supplied to Orissa Construction Ltd.
				Decision	The Applicant's supply to Orissa Construction Corporation Ltd was taxable @18% under Sl No. 3(vii) of Notification No. 8/2017 - Integrated Tax (Rate). The supply was taxable @ 5% under Sl 3(vii) of Notification No. 8/2017 - Integrated Tax (Rate) as amended, with effect from 13 October 2017 to 24 January 2018. It has since then, been exempted under Sl No. 3A of Notification No 9/2017 - Integrated Tax (Rate)(as amended)
21	West Bengal	Arihant Dredging Developers Pvt Ltd	11/WBAAR/ 2019-20 DATED 27.06.2019	**Brief Issue**	Whether exemption under Sl No. 3A of Notification No. 9/2017-Integrated Tax(Rate) dated 28/06/2017 applies to the activity of upgrading the navigability of a river bed, the contractee being the Irrigation and Waterways Directorate.

				Decision	The Applicant's supply to Orissa Construction Corporation Ltd was taxable @18% under Sl No. 3(vii) of Notification No. 8/2017 - Integrated Tax (Rate). The supply was taxable @ 5% under Sl 3(vii) of Notification No. 8/2017 - Integrated Tax (Rate) as amended, with effect from 13 Octtober 2017 to 24 January 2018. It has since then, been exempted under Sl No. 3A of Notification No 9/2017 - Integrated Tax (Rate)(as amended)
22	West Bengal	Champa Nandi	10/WBAAR/ 2019-20 DATED 25.06.2019	**Brief Issue**	Classification of supply of leasing out cranes, equipments, and locomotives to different companies and applicable rate of tax under Notification No 11/2017 CT(Rate) dated 28/06/2017
				Decision	The Applicant's service to the DVC is classifiable as "railway pushing and towing service" which comes under SAC 996731 and taxable @ 18% under Sl No 11(ii) of Notification No. 11/2017 - CT (Rate) .
23	West Bengal	Ashis Ghosh	09/WBAAR/ 2019-20 DATED 25.06.2019	**Brief Issue**	Whether filling of land with silver sand and earthwork for preparing the ground for construction is classifiable as supply of sand.
				Decision	The Applicant's supply to M/s Mackintosh Burn Ltd is works contract service, classifiable as "site preparation service" under SAC Group 99543 and taxable @ 18% under Sl No. 3(xii) of Notification No. 11/2017 - CT (Rate). Applicant's supply is not classifiable under HSN 2505.
24	West Bengal	Mohana Ghosh	08/WBAAR/ 2019-20 DATED 25.06.2019	**Brief Issue**	Whether input tax credit is admissible on purchase of motor vehicles for supply of rent-a-cab service
				Decision	GST paid on the inward supply of motor vehicles for supplying rent-a-cab service is not admissible for input tax credit in terms of section 17(5)(a) of the GST Act.
25	West Bengal	Indrajit Singh	07/WBAAR/ 2019-20 DATED 10.06.2019	**Brief Issue**	Whether notifications relating to TDS apply to supply of waste management service to a municipality.
				Decision	The Applicant's supply to Howrah Municipal Corporation is exempt from GST under Sl No. 3 of Notification No. 12/2017 - CT(Rate). To the extent they mandate and deal with the mechanism of TDS,the provisions of section 51 and Notification No.50/2018 - Central Tax do not apply to the applicant.
26	West Bengal	Neo-Built Corporation	05/WBAAR/ 2019-20 DATED 10.06.2019	**Brief Issue**	Whether exemption under Sl No. 3A of Notification No. 9/2017-Integrated Tax(Rate) applies to the activity of upgrading the navigability of a river, the contractee being the Irrigation and Waterways Directorate.
				Decision	The Applicant's supply to the Irrigation and Waterways Directorate is exempt from the payment of GST under Sl No.3A of Notification No 9/2017 - Integrated Tax (Rate).

27	West Bengal	Dredging & Desiltation Company Pvt Ltd	03/WBAAR/ 2019-20 DATED 10.06.2019	**Brief Issue**	Whether exemption under Sl No. 3A of Notification No. 9/2017-Integreted Tax (Rate) dated 28/06/2017, applies to the activity of upgrading the navigability of a river, the contractee being the WB Fisheries Corpn Ltd.
				Decision	The Applicant's supply to WB Fisheries Corpn Ltd. is exempt under Sl No.3A of Notification No 9/2017 - Integrated Tax (Rate).
28	Maha-rashtra	Shah Nanji Nagsi Exports Private Limited	GST-ARA-93/2018-19/B- 19 Mumbai dated 16.02.2019	**Brief Issue**	What will be the correct HSN code and rate of GST applicable on "Ready to cook popcorn premix i.e. Popcorn Maize with edible oil and salt", sold in retail pack size ranging from 30 grams to 350 grams.
				Decision	"Ready to cook popcorn premix i.e. Popcorn Maize with edible oil and salt" fall under HSN 20081990 amd attract GST @ 12%
29	Maha-rashtra	Orient Press Limited	GST-ARA-89/2018-19/B- 23 Mumbai dated 27.02.2019	**Brief Issue**	1. Whether supply of service of: (i) Printing of Pre-examination items like question papers, OMR sheets (Optical Mark Reading), answer booklets; (ii) Printing of Post-examination items like marks card, grade card, certificates to the educational boards of up to higher secondary; be treated as exempted supply of service by virtue of Entry No. 66 of the Notification No. 12/2017 - Central Tax (Rate), dated 28th June, 2017 as amended by Notification No.2/2018 - Central Tax (Rate),Entry No. 66 of Notification No. 12/2017 - State Tax (Rate), dated 29th June, 2017; and Entry No. 69 of the Notification No. 9/ 2017 - Integrated Tax (Rate), dated 28th June, 2017 as amended. 2. What would be the classification and the applicable GST rate, for the supply of Printing of cheque book / railway tickets ?
				Decision	1. Supply of service of printing of Pre and Post-examination items to the educational boards of up to higher secondary, shall be treated as exempted supply of service by virtue of Entry No. 66 of the Notification No. 12/2017 - Central Tax (Rate),Entry No. 66 of Notification No. 12/2017 - State Tax (Rate) and Entry No. 69 of the Notification No. 9/ 2017 - Integrated Tax (Rate). 2. Railway tickets where applicant uses their own physical input, is covered under heading 9989(i) of Notification No. 11/2017-CT(Rate) and attracts GST @ 12%. If applicant uses physical input supplied by the Railways , it shall be supply of printing services covered under Heading 9988(iia) and attract GST @ 12%. In case of cheques, if applicant uses own physical input i.e paper, it is covered under heading 9989(i) of Notification No. 11/2017-CT(Rate) and taxable @ 12% GST but if input is supplied by client, it shall be covered under heading 9988(ii)(c) and taxable@ 5% GST.

30	Maha-rashtra	Hyva India Pvt. Ltd	GST-ARA-96/2018-19/B- 20 Mumbai dated 18.02.2019	**Brief Issue**	What is the appropriate classification and rate of GST on the supply of "Hydraulic Kit" cleared to dealers / distributors or OEMs cleared as such, which comprises of the Hydraulic cylinder and wet kit (with or without pump)?
				Decision	Hydraulic Kits are classifiable as "Other Engines and Motors" under heading 8412 and the rate shall be as mentioned under the heading at the relevent time.
31	Maha-rashtra	Western Concessions Private Limited (formerly known as H-Energy Gateway Private Limited)	GST-ARA-94/2018-19/B- 22 Mumbai dated 22.02.2019	**Brief Issue**	Whether the applicants are eligible to avail ITC of GST paid on goods and services used for construction of Tie-in pipeline, for delivery of re-gasified LNG from FSRU to the National Grid.?
				Decision	FSRU is a factory and the pipeline is to be laid outside the factory and does not qualify to be an "equipment or apparel" for claiming ITC. Therefore the restriction under Section 17(5)(c)/(d) shall be applicable and no ITC shall be availabe to the applicant.
32	Maha-rashtra	Sun Pharmaceutical Industries Ltd.	GST-ARA-88/2018-19/B- 10 Mumbai dated 23.01.2019	**Brief Issue**	What is the appropriate classification of the Applicant's product, Prohance - D (Chocolate)?
				Decision	Prohance - D (Chocolate) is classified under heading 21069050
33	Maha-rashtra	Safset Agencies Private Ltd (Astaguru.com)	GST-ARA-86 /2018-19/B-07 Mumbai dated 15.01.2019	**Brief Issue**	1. Whether Applicant is dealing in second hand goods and tax is to be paid on the difference between selling price and purchase price as stipulated in Rule 32 (5) of CGST Rules, 2017? 2. The classification and HSN code of goods listed and GST rates applicable to such goods.
				Decision	1. Only in respect of old cars, jewellery and old watches, the liability will be discharged by applicant on the difference between selling price and purchase price as stipulated in Rule 32 (5) of CGST Rules, 2017 . 2. Classification and Rates of goods listed: -Paintings under heading 9701 attract GST @12% on sale value -Old jewellery falls under heading 7113 and rule 32(5) of the CGST rules applies on old jewellery purchased and then sold by them. -Antique jewellery, watches and books, of age exceeding 100 years fall under tariff 97060000 and attract GST@ 12%. -Old watches with case of precious metal fall under CH 9101 while watches other than those, are covered under CH 9102 and attract GST@18%. Rule 32(5) of the CGST rules applies. -Collectibles(Books) will fall under various sub headings of chapter 49 of GST Tariff depending on the case. -Old cars fall under heading 8703 attracting 28% GST but old cars may attract a lower rate as per notification 08/2018-CT(Rate) provided the conditions specified therein are satisfied.

34	Maha-rashtra	NR Energy Solutions India Pvt Ltd	GST-ARA-83/2018-19/B- 3 Mumbai dated 08.01.2019	**Brief Issue**	Whether the transaction / contract referred in the application to M/S APTRANSCO is in the nature of Works Contract Services and therefore liable to GST @ 18% under the HSN Code 995461 ? If the answer to above is in negative, whether the said transaction is Supply of Goods? a) If yes, liable to GST at what rate of tax and under which HSN Code ?
				Decision	1. Transaction is not in the nature of works contract. 2. Transaction is a composite supply where the principal supply is 'supply of goods' and falls under heading 8537 of the GST Tariff attracting GST @18%.
35	Maha-rashtra	Allied Digital Services Ltd	GST-ARA-90/2018-19/B- 159 Mumbai dated 19.12.2018	**Brief Issue**	Whether the amount received for supply of services during the post GST period to the Government of Maharashtra (Home Department) as per the contract in question are taxable under SGST/CGST Act ? If answer to the question No.1 is in affirmative then what is the rate of tax under SGST/CGST?
				Decision	Applicant's supply of service is taxable @18% GST and covered under Notification no. 11/2017.
36	Manipur	Emmes Metals Private Ltd	GST-ARA-80/2018-19/B- 174 Mumbai dated 29.12.2018	**Brief Issue**	Whether the Material Aluminium Alloys (HSN.76012010) can be supplied under Govt. Notification no. 47/2017 dated 14.11.2017
				Decision	Notification No. 47/2017-IGST, is not applicable to the transaction undertaken by the applicant and therefore not eligible for concessional rate of tax.
37	Maha-rashtra	General Manager Ordnance Factory Bhandara	GST-ARA-79/2018-19/B- 168 Mumbai dated 24.12.2018	**Brief Issue**	1) Being a part of the Ministry of Defence, Government of India, whether the organisation is liable to pay GST Advance on the supply of services specified? 2) Whether Input Tax Credit on expenditure on the goods and services consumed by the organisation in the specified activities shall be available? 3) Whether the exemption to a 'defence formation' for preparation and generation of E-way bills is applicable to Ordnance factories & other Central Government & Public Sector Undertakings(PSU's) that function under the Ministry of Defence, Government of India? 4) Whether exemption on payment of GST on transport of 'military or defence equipments through a goods transport agency applicable to goods transported by our organisation? 5) Whether Input Tax Credit is to be reversed on finished goods that are destroyed during testing? 6) Whether proportionate Input Tax Credit has to be reversed in cases where lesser payment is made to the supplier due to deduction on account of liquidated damages from supplier's dues? 7) Whether specified notifications are applicable to the organisation ?

				Decision	1. Applicant is liable to pay GST advance on Liquidated damages deducted from payments to be made to required suppliers in case of delayed delivery of goods or services, amount of Security deposit forfeited of suppliers due to non-fulfilment of certain contract conditions, Food and beverages supplied at industrial canteen inside factory premises, Community hall (Multipurpose Hall)provided on rental basis to employees of organisation and School bus facility provided to children of employees. 2. Only ITC on expenditure related to purchase of LPG cylinders used within industrial canteen shall be available to the applicant. 3. Exemption to a 'defence formation' for preparation and generation of E-way bills and exemption on payment of GST on transport of 'military or defence equipments through a GTA shall be applicable on the applicant. 4. Input Tax Credit is not required to be reversed on finished goods that are destroyed during testing.
					5. Proportionate Input Tax Credit has to be reversed in cases where lesser payment is made to the supplier due to deduction on account of liquidated damages from supplier's dues. 6. -Notification 02/2018-CT(Rate) does not apply to the applicant. -Renting of immovable property for non-residential purpose shall be taxable.
38	Maha-rashtra	Premium Transmission Private Limited	GST-ARA-78/2018-19/B- 167 Mumbai dated 24.12.2018	**Brief Issue**	What is the correct classification of 'Geared Motor' supplied by the applicant?
				Decision	Geared Motor supplied by the applicant falls under Tariff heading 8501
39	Maha-rashtra	Ujjwal Pune Limited	GST-ARA-75/2018-19/B- 173 Mumbai dated 29.12.2018	**Brief Issue**	Whether the services provided under the contract are covered under Sl.no. 3(vi)(a) of notification no. 11/2017 - Central Tax (Rate) dt.28th June 2017 as amended? What is the Rate of GST applicable for the Project?
				Decision	The services provided by the applicant are not covered under notification no. 11/2017 - Central Tax (Rate). The applicable GST rate for the project shall be 12%.
40	Maha-rashtra	Shradha Polymats	GST-ARA-74/2018-19/B- 169 Mumbai dated 27.12.2018	**Brief Issue**	What is the HSN Classification of Polypropylene Mats
				Decision	Polypropylene Mats are classifiable under HSN 4601

41	Maha-rashtra	Famous studios ltd.	GST-ARA-73/2018-19/B- 166 Mumbai dated 21.12.2018	**Brief Issue**	Whether the exemption from payment of GST on reverse charge basis under section 9(4) of the CGST Act / SGST Act for receipt of supply of goods and / or services from an unregistered person is applicable irrespective of any threshold limit right from 01-07-2017 vide Notification No.8/2017 dated 28.06.2017 read with Notification 38/2017 dated 13-10-2017?
				Decision	Reverse charge mechanism is applicable on transactions effected from 1 July 2017- 12 October 2017.
42	Maha-rashtra	Biostadt India Limited	GST-ARA-72/2018-19/B- 165 Mumbai dated 20.12.2018	**Brief Issue**	Whether Input Tax Credit (ITC) can be claimed by the applicant on procurement of Gold coins which are to be distributed to the customers at the end of scheme period for achieving the stipulated lifting or payment criteria?
				Decision	Input Tax Credit (ITC) cannot be claimed by the applicant on procurement of Gold coins which are to be distributed to the customers.
43	Maha-rashtra	E-Square Leisure Pvt Ltd	12/WBAAR/ 2019-20 DATED 27.06.2019	**Brief Issue**	1. Whether GST is levied on the reimbursement of expenses from the lessee by the lessor at actuals? 2.In case GST is levied, what is the rate of GST applicable to said reimbursement of expenses ?
				Decision	GST is leviable on reimbursement of expenses from the lessee by the lessor at actuals. Reimbursement of expenses constitute composite supply and would attract the rate as applicable on the principal supply.
44	Maha-rashtra	E-Square Leisure Pvt Ltd	GST-ARA-76/2018-19/B- 172 Mumbai dated 29.12.2018	**Brief Issue**	1. Whether GST would be applicable on interest free security deposit and notional interest if any? 2. In case GST is applicable what would be value of notional interest for levy of GST?
				Decision	GST is not applicable on interest free security deposit
45	Maha-rashtra	Ecosan Services Foundation	GST-ARA-70/2018-19/B- 163 Mumbai dated 19.12.2018	**Brief Issue**	Whether Services provided to (NGO) Non-profit organization registered as Trust, having registration U/s. 12AA of Income Tax Act, amounts to provision of service and any grant/ Donation received towards performing specific service towards preservation of environment as specified in notification no 12/2017, amounts to supply and liable to tax?
				Decision	Services provided by the applicant to various entities including NGO, amounts to provision of service. Grants/ Donations received towards service for preservation of environment shall be exempt under notification no 12/2017-CT(Rate).
46	Maha-rashtra	Siemens Limited	GST-ARA-69/2018-19/B- 164 Mumbai dated 19.12.2018	**Brief Issue**	Whether the freight charges recovered by the Applicant under the contract from the customer without issuance of consignment note will be eligible for exemption from CGST as prescribed in Serial no. 18 of Notification no. 12/2017 - Central Tax Rate F. No. 334/1/2017, dated 28 June 2017? Whether the freight charges recovered by the Applicant under the contract from the customer

					without issuance of consignment note will be eligible for exemption from SGST as prescribed in Serial no. 18 in Notification no. 12/2017 - State Tax (Rate) no. MGST 1017/C.R.103 (11)/ Taxation-1 dated 29 June 2017.
				Decision	The specified freight charges will not be covered under Notification no. 12/2017 - Central Tax Rate or Notification no. 12/2017 - State Tax (Rate) and therefore no exemption is available to the applicant.
47	Maha-rashtra	Cummins India Limited	GST-ARA-66 /2018-19/B-162 Mum-bai dated 19.12.2018	**Brief Issue**	1. Whether engine manufactured and supplied solely and principally for use in railways/ locomotives is classifiable under HSN Heading 8408 or under HSN Heading 8607 of the Customs Tariff as a part used solely or principally for Railways or Tramway Locomotives or Rolling Stock?" 2. Whether availment of input tax credit of tax on common input supplies on behalf of other unit/units registered as distinct person and further allocation of the cost incurred for same to such other units qualifies as supply and attracts levy of GST?
					3. If GST is leviable, whether assessable value can be determined by arriving at nominal value? 4. Once GST is levied and ITC thereof is availed by recipient unit, whether the Applicant is required to register itself as an Input Service Distributor for distribution of ITC on common input supplies?
				Decision	1. Engines manufactured and supplied solely and principally for use in railways/locomotives are classifiable under HSN Heading 8408. 2. Availment of input tax credit on common input supplies on behalf of other units registered as distinct person and further allocation of the cost incurred on same to such other units qualifies as supply and attracts levy of GST. 3. Rule 30 of the CGST Rules can be followed for determining Assessable value. 4. Applicant is required to get registered as Input Service Distributor as per Section 24 of the CGST Act.
48	Maha-rashtra	Cummins India Limited	GST-ARA-65/2018-19/B- 161 Mumbai dated 19.12.2018	**Brief Issue**	Determination of GST liability by deciding principal supply of the composite supply qua maintenance contracts executed between the customer and the Applicant.
				Decision	Principal supply in the given case is supply of service as maintenance service is being provided with spare parts.
49	Maha-rashtra	Students' Welfare Association	GST-ARA-55/2018-19/B- 170 Mumbai dated 29.12.2018	**Brief Issue**	1 Whether hostel accommodation provided by Trusts to students is covered within the definition of Charitable Activities and thus, exempt under Sl. No. 1 of notification No.12/2017-CT (Rate)? Whether the supply of residential or lodging services @ Rs. 22,250/-

					per annum is covered by Sr. No. 14 of Notification No. 12/2017 – CT (Rate)? 2. Whether different treatment would be required for use of hostel rooms given for residential purposes but ultimately used by the hirer for commercial use. 3. Whether the said notification would be applicable if the accommodation is decided to be given for commercial purposes in future or whether the activity still would be able to enjoy exemption under said notification? 4. Whether the large donations given by the donors would be treated as 'service and taxed accordingly and whether only sponsored donations are believed to be covered under said mega exemption notification.
				Decision	1. Hostel accommodation provided by Trusts to students is not covered under Sl. No. 1 of notification No.12/2017-CT (Rate). Supply of residential or lodging services @ Rs. 22,250/- per annum is covered by Sr. No. 14 of Notification No. 12/2017 – CT (Rate)?.
					2. Different treatment would not be required for use of hostel rooms given for residential purposes but ultimately used by the hirer for commercial use as the description of service is use based in the exemption entry. 3. The notification would not be applicable since the exemption is use based. 4. Insufficient information and therefore not answered.
50	Maha-rashtra	Nes Global Specialist Engineering Services Private Limited	GST-ARA-52/2018-19/B- 160 Mumbai dated 19.12.2018	**Brief Issue**	Whether the transaction in question is a Zero Rated Supply or a Normal Supply under the GST ACT? If the said supply is a Zero Rated Supply, then can the same be considered as an export of service under the GST Act?
				Decision	Transaction covered under the master service agreement between the applicant and NES Abu Dhabi is a zero rated supply and can be considered as export of service under GST.
51	Maha-rashtra	Allied Blenders And Distillers Private Limited	GST-ARA-67/2018-19/B- 155 Mumbai dated 15.12.2018	**Brief Issue**	Whether the Contract Bottling Unit is making a taxable supply to the Applicant (i.e. Brand Owner), or, alternatively, whether the Applicant (i.e. brand owner) is making a taxable supply to the Contract Bottling Unit? Whether the Applicant (i.e. Brand Owner) is paying consideration to the Contract Bottling Unit by way of bottling charges, or, alternatively, whether the Contract Bottling Unit is paying consideration to the Applicant by way of brand owner surplus?
				Decision	Applicant (i.e. brand owner) is not making a taxable supply to the Contract Bottling Unit. Remaining questions were not answered as it did not pertain to the applicant.

52	*Maha-rashtra*	*Cable Corporation of India Limited*	*GST-ARA-63/2018-19/B- 134 Mumbai dated 03.11.2018*	*Brief Issue*	*Whether the supply of transportation services, rendered by the Applicant, will be exempt from the levy of GST in terms of Sl. no. 18 of the Notification No. 12/2017 - Central Tax (Rate) dated 28th June, 2017*
				Decision	*The services rendered by the applicant are not exempt since these are in nature of composite supply of works contract which is a service and attracts 18% GST as per notification 11/2017-CT(Rate).*
53	*Maha-rashtra*	*Sadashiv Anajee Shete*	*GST-ARA-32/2018-19/B- 131 Mumbai dated 30.10.2018*	*Brief Issue*	*Whether exemption under Sr. No. 13 of Notification No. 12/2017 - Central Tax (Rate) dated 28th June 2017 is applicable to the Applicant? Whether the Applicant is liable to get registered under section 22/24 of CGST Act, 2017? If the Applicant is liable to pay GST, then on what value GST liability needs to be discharged, whether on the commission which the Applicant receives from pundits/website users or on the booking value received from website users?*
				Decision	*1. Exemption under Sr. No. 13 of Notification No. 12/2017 - Central Tax (Rate) is not applicable to the Applicant.* *2. Applicant is covered under "Electronic Commerce Operator" and is liable to get registered as per section 24 of the Act.* *3. Applicant is liable to pay GST on the commission received from pundits / website users.*
54	*Maha-rashtra*	*Merck Life Science Private Limited*	*GST-ARA-62/2018-19/B- 133 Mumbai dated 30.10.2018*	*Brief Issue*	*Whether applicant's direction to the seller (directed in agreement dated 21 June 2018) for direct transfer of BP business to MSPL and PM business to MPMPL, respectively would qualify as a 'supply between the applicant' and 'MSPL/MPMPL'? If the answer to the above question is 'affirmative' then as the parties are related, even in absence of the actual consideration does the applicant have to attribute a notional consideration and charge GST in line with schedule 1 of GST Act to be compliant? If the answer to both the questions are 'affirmative' then as the recipients (MSPL/ MPMPL) are eligible to avail full input tax credit then the notional consideration (percentage of the business transfer value) would be only academic and will the invoice value be considered as open market value?*
				Decision	*1. Role of applicant is a service covered under schedule-II of section 7 and qualifies as a supply.* *2. Value for levying GST is to be determined in terms of rule 28 of the CGST Rules.*

55	Maha-rashtra	National Security Services	GST-ARA-58/2018-19/B- 132 Mumbai dated 24.10.2018	**Brief Issue**	Whether the Exemption Notification No.12/2017-Central Tax (Rate) dated 28/06/2017 (Entry No. 3 of the Notfn.) is applicable to the applicant for the Pure services i.e. Security Services rendered to Pimpri Chinch wad Municipal Corporation in relation to functions entrusted to Municipality under Article 243 W of the Constitution thereby exempting the applicant service provider from the whole of GST.
				Decision	Applicant is providing pure services in relation to functions entrusted to Municipality, to PCMC and is eligible for the Exemption Notification No.12/2017- Central Tax (Rate)
56	Maha-rashtra	Enmarol Petroleum India Pvt. Ltd.	GST-ARA-53 /2018-19/B-127 Mum-bai dated 10.10.2018	**Brief Issue**	Whether the applicant is liable to pay GST on the supply of goods located outside India to customers within India without physically bringing the goods to India? Whether the out & out supplies in the facts of the present case will be considered as export supplies or exempted supplies for the purpose of the GST?
				Decision	Goods sold in the transaction are non taxable supply as no tax is leviable on them till the time of customs clearance according to Section 12 of the Customs Act and Section 3 of the Customs Tariff Act. The out and out supplies in the given case would be non taxable supply as per section 2(78) of the CGST Act
57	Maha-rashtra	Sir J. J. College of Architecture Consu Itancy Cell	GST-ARA-54/2018-19/B- 128 Mumbai dated 12.10.2018	**Brief Issue**	Whether applicant shall charge GST on the consultancy services rendered to Municipal Corporation of Greater Mumbai (MCGM) for an upcoming project of establishment & development of textile museum in Mumbai.
				Decision	Applicant shall charge GST on the consultancy services rendered to Municipal Corporation of Greater Mumbai (MCGM) for an upcoming project of establishment and development of textile museum in Mumbai
58	Maha-rashtra	Leena Powertech Engineers Pvt. Ltd.	GST-ARA-51/2018-19/B- 124 Mumbai dated 03.10.2018	**Brief Issue**	Whether CIDCO is covered under the definition of the term 'Government Entity' as per Notification No. 31/2017 - Central Tax (Rate) dated 13 October 2017? 2. If CIDCO falls under the definition of Government Entity whether the tax rate of 12% (CGST 6% + SGST 6%) is applicable to the contract entered into by the Applicant with CIDCO, in pursuance of Notification No. 24/2017 - Central Tax (Rate) dated 21 September2017 read with Notification No. 31/2017 - Central Tax (Rate) dated 13 October 2017?
				Decision	CIDCO is constituted and established by the state government of Maharashtra with 100% participation by way of equity or control to carry out function of development of new township and therefore covered under definition of governmnet entity. Concessional rate of tax@ 12% would apply on supply as per notification no 31/2017-CT(Rate).

59	Maha-rashtra	Bhutoria Refrigeration Private Limited	GST-ARA-64/2018-19/B- 125 Mumbai dated 03.10.2018	**Brief Issue**	Whether the Fan Coil Unit is covered under HSN Code 8418 under Goods and Service Tax Act, 2017.
				Decision	Fan coil unit is covered under HSN 8415
60	Maha-rashtra	SST Sutainable Transport Solutions India Pvt.Ltd,	GST-ARA-68/2018-19/B- 129 Mumbai dated 15.10.2018	**Brief Issue**	Classification of transaction undertaken
				Decision	Activity undertaken by the applicant is a supply of service and will be classified under s.no 10(ii), heading 9966 of notification 11/2017-CT(Rate)
61	West Bengal	Senco Gold Ltd	02/WBAAR/ 2019-20 DATED 08.05.2019	**Brief Issue**	Whether input tax credit is admissible when the applicant settles through book adjustment the debt created on inward supplies
				Decision	The GST Act and rules made there under does not restrict the recipient from claiming the input tax credit when consideration is paid through book adjustment, subject to the conditions and restrictions prescribed in Sections 16 and 49 of the GST Act.
62	West Bengal	Bengal Peerless Housing Development Co Ltd	01/WBAAR/ 2019-20 DATED 02.05.2019	**Brief Issue**	Whether supply of construction service bundled with preferential location service is a composite supply with construction service as the principal supply
				Decision	Applicant provided service of construction of a dwelling unit in a residential complex, bundled with services relating to the preferential location of the unit and right to use car parking space and common areas and facilities. It is a composite supply with construction service being the principal supply.Therefore the entire value of the composite supply is to be treated as supply of construction service, taxable under Sl No. 3(i) of Notification No 11/2017 - CT (Rate).
63	Tamil Nadu	Rossi Gear motors India Private Limited	TN/23/ AAR/2019 DATED 22.05.2019	**Brief Issue**	Whether the Geared Motor is to be classified under 8501 or under 8483 for the purpose of payment of GST? Whether the Geared Motor can be considered as Gears and Gearings? Whether the rate of CGST/SGST as per Notification No. 1/2017- CT (Rate) and GO (Ms) No: 62 date 29.06.2017 is. 9% as per Schedule – III (Sl.No:372); (OR) 9% as per Schedule – III (Sl.No:369A); (OR) 14% as per Schedule – IV (Sl.No:135).
				Decision	Gear Motors supplied by the applicant are to be classified under CTH 8501 and are taxable @18% GST as per Notification No 01/2017-C.T. (Rate)
64	Tamil Nadu	RAJENDRA-BABU AMBIKA (Proprietrix of M/s. Sri Dhanal-akshmi Welding Works)	TN/22/ AAR/2019 DATED 22.05.2019	**Brief Issue**	1. Whether applicant's dairy machinery works is liable to tax at 12% (HSN code-8434) or 18% (HSN Code-8413)? 2. In dairy machinery works, the Applicant has taken Milk processing, milk chilling Refrigeration system, Milk handling

					equipment's, Milk Packing equipment's and milk allied product making machinery. 3. Such supply and erection of dairy machinery involves service charges also. What will be the rate of tax on the service charges component? 4. Whether nature of activities undertaken falls under works contract or not. If so, what will be the rate of tax and its HSN code and the details of entries required to be made in monthly return GSTR-1.
				Decision	1. Insufficient information, no reply. 2. The activity of Supply undertaken by the applicant in respect of the awarded work order by the Tiruchirapaili District Coopertive Milk Producers Union Ltd and Kanchepuram Thiruva-llur District Co-operative Milk Producers Union Ltd, is classifiable under SAC 998717 and taxable @18% GST under Sl.No. 25(ii) of Notification No. 11/2017-C.T.(Rate) 3. The Activity of the applicant are not Works Contract as defined in Section 2(119) of the CGST/TNGST Act 2017 4. Outside purview
65	Tamil Nadu	VENKATASAMY JAGANNA-THAN	TN/19/ AAR/2019 DATED 21.05.2019	**Brief Issue**	Will the profit sharing agreement between the applicant as an employee and the shareholders, attract GST in his hands?
				Decision	The Profit Sharing Agreement between the applicant and various shareholders is an actionable claim and is neither a supply of goods nor a supply of services covered under Schedule III to CGST Act and SGST Act and hence is not taxable to CGST or SGST.
66	Tamil Nadu	Alekton Engineering Industries Pvt. Ltd.	TN/18/ AAR/2019 DATED 16.04.2019	**Brief Issue**	Whether the Triple Screw Pumps & Parts thereof falling under Chapter Heading 8413 can be treated as Parts of HSN 8901 ,8902 ,8904 ,8905 ,8906 ,8907 attracting IGST 5% as per Schedule I (Sl. No. 252) of Notification No.1/2017-Integrated Tax (Rate) dated 28.06.2017 or CGST 2.5% + SGST 2.5% as per Schedule I (Sl.No. 252) of Notification No.1/2017- Central Tax (Rate) dated 28.06.2017?
				Decision	Forced lubrication pumps, emergency lube oil pumps, DG lub oil transfer pumps and triple screw pumps manufactured by applicant supplied to Indian Navy for commissioning in it's vessels and warships are parts of "All types of vessels and warships" They are covered under entry at Sl. No. 252 of Schedule I of Notification No. 01/2017-C.T. (Rate) and attract 5% GST.
67	Tamil Nadu	Tata Projects Limited	TN/17/ AAR/2019 DATED 16.04.2019	**Brief Issue**	Whether supply of Engineering, Procurement and Construction(EPC) contract for establishment of Fluids Servicing System where in both goods and services are supplied can be construed to be a composite supply

					in terms of Section 2(30) of CGST Act, 2017. If Yes, Whether the Principal Supply in such case can be said to be " Establishment of Fluids Servicing System(FSS)" can be taxable at 5% GST vide notification No.45/2017-Central Tax(Rate) dated 14/11/2017. If Principal Supply taxable at 5%, whether the entire transaction in the contract is taxed as per the rate applicable to Principal Supply?
				Decision	1. Supply of Engineering, Procurement and Construction(EPC) contract for establishment of Fluids Servicing System between applicant and IPRC is a composite supply in terms of Section 2(30) of CGST Act, 2017. 2. The supply is works contract as per Section 2(119) of the Act and therefore notification No.45/2017- Central Tax(Rate) is not applicable. 3. Entire transaction is taxed as per the rate applicable to the supply of works contract.
68	Tamil Nadu	Daimler Financial Services India Private	TN/16/ AAR/2019 DATED 15.04.2019	**Brief Issue**	Whether the interest subvention income received by Daimler Financial Services India Private Limited(DFSI) from Mercedes-Benz India Private Limited(MB India) to reduce the effective interest rate to the final customer is chargeable to GST?
				Decision	The interest subvention income received by Daimler Financial Services India Private Limited(DFSI) from Mercedes-Benz India Private Limited(MB India) to reduce the effective interest rate to the final customer is chargeable to GST under SAC 999792 as other miscellaneous serives @18% GST as per Notification no 11/2017-CT(Rate) [as amended.]
69	Tamil Nadu	V. V.Enterprises Private Limited	TN/15/ AAR/2019 DATED 15.04.2019	**Brief Issue**	Whether in the facts and circumstances of the case and in view of the fact that Automatic Electric Filter Coffee Maker fall under Chapter Heading No. 8419 of the GST tariff and therefore Sl. No. 320 of Schedule III to notification No. 41/17 CTR dated 14.11.2017 and corresponding Sl.NO. 320 of Schedule III to G.O. M.s.No. 157 dated 14.11.2017 to be taxed at the rate of 18%. Whether in the facts and circumstances of the case and in view of the fact that Automatic Electric Filter Coffee Maker is a machinery not meant for domestic use and will therefore be classified under Chapter Heading No. 8419 of GST tariff to be charged at the rate of 18%. Whether in the facts and circumstances of the case and in view of the fact that, Manual/ Traditional Filter Coffee Maker, being not meant for domestic use and falling under Chapter Heading No. 8419 of GST tariff Sl. No. 320 of Schedule III to Notification No. 41/17 CTR dated 14.11.2017 and corresponding Sl. NO. 320 of Schedule III to G.O. Ms. No. 157 of 2017 is to be taxed at the rate of 18%.

				Decision	Gemini Modern Auto Coffee Filter and Gemini Modern Traditional Coffee Filter are classifiable under heading 84198190. It attracts GST @ 18% as per Notification no 01/2017-CT(Rate) under S.No 453 and S.No 320 of schedule-III for the period 1st July 2017- 14th November 2017 and 15th November onwards respectively.
70	Rajasthan	Jaipur Zila Dugdh Utpadak Sahakari Sangh Ltd.	RAJ/ AAR/2019-20/12 Dtd. 19.06.19	**Brief Issue**	Applicability of TDS on GST
				Decision	Applicant is neither covered under Societies Registration Act and nor is it established by any government.Hence provisions of Section 51 of the CGST Act do not appply and applicant is not liable to deduct TDS
71	Rajasthan	M/S Vedant Synergy Pvt. Ltd.	TN/19/ AAR/2019 DATED 21.05.2019	**Brief Issue**	1.Classification of any goods or services or both 2.Determination of the liability to pay tax on any goods or services or both;
				Decision	Goods and services supplied by the applicant are covered under HSN 998316 and attracts GST @18%
72	Rajasthan	Greentech Mega Food Park Pvt. Ltd.	RAJ/AAR/ 2019-20/10 Dated 28.05.19	**Brief Issue**	Whether the Lease Agreement between the Applicant Company i.e. the lessor and the lessee for a period of 99 years is a sale of immovable property and outside GST and is exempt from levy of GST? If the present transaction of giving land on lease of 99 years is taxable under GST, then at what rate and what HSN code is applicable?
				Decision	The lease agreement between the applicant, being the lessor, and the lessee is lease agreement of immovable property classifiable under HSN 9972 and attracts GST @18%.
73	Rajasthan	National Highway Authority of India (Regional Office)	RAJ/ AAR/2019-20/09 Dtd. 28.05.19	**Brief Issue**	Whether there is any 'Asset Transfer' involved which is a supply leviable to GST in the work of shifting & raising of transmission lines owned by RVPNL by NHAI in the course of widening, modification & diversification of its highways after completion of this work? Without prejudice to the submissions, if there is an 'Asset Transfer' which is a supply under GST, then who is liable to pay GST? If above GST is to be paid by the Appllicant, then the same will be exempt vide Entry 4 of Notification no. 12/2017 CT(R) dated 28.06.2017?
				Decision	The asset construed by the applicant does not fall under goods as defined under CGST Act and therefore no GST is leviable as it falls outside the scope of supply.
74	Rajasthan	Vinayak Stone Crusher	RAJ/ AAR/2019-20/08 Dtd. 17.05.19	**Brief Issue**	Classification of any goods or services or both; Determine the applicability of a notifications issued under the provisions of this Act;

				Decision	1. Service provided by the State of Rajasthan to the applicant falls under 997337 and GST is leviable @ 18%. 2. Applicant is liable to pay tax on reverse charge basis as per entry number 5 of notification no 13/2017-CT(Rate) 3. Services supplied by the State Government to ERCC by way of assigning the right to collect royalty on their behalf, is exempted as per notification no 12/2017-CT(Rate)
75	Rajasthan	All Rajasthan Corrugated Board and Box Manufacturers Association	RAJ/ AAR/2019-20/07 Dtd. 17.05.19	**Brief Issue**	Determine: Classification of any goods or services or both; Applicability of a notification issued under the provisions of this Act; Admissibility of input tax credit of tax paid or deemed to have been paid
				Decision	1. Service provided by the applicant is a composite supply and classifiable under code 998596 as per notification no 11/2017-CT(Rate). Brand promotion packages offered by the applicant is a composite supply classifibale under service code 998397 as per notification no 11/2017-CT(Rate) and applicant is liable to pay GST on the same. 2. ITC is admissible in case of services provided by the hotel including accomodation, food and beverages, supply of food and beverages by outside caterers and services provided by event manager.
76	Rajasthan	Pacific Quartz Surfaces LLP	RAJ/ AAR/2019-20/06 Dtd. 16.04.19	**Brief Issue**	What is the classification and rate of Slabs of Quartz (Artificial Stone)?
				Decision	The Slabs of Quartz (Artificial Stone) is classifiable under HSN Code 68101990 and GST is leviable @18%.
77	Goa	Alcon Resort Holdings Pvt. Ltd.	GOA/ GAAR/6/ 2018-19 dated 22.01.19	**Brief Issue**	Clarify applicability of Entry No.74 of notification no.12/2017-CT.
				Decision	The applicant qualifies to be a clinical establishment and the services provided qualify to be Health Care Services. The intra-state supply of said services attract NIL rate of central tax as per SL.No.74 of the Notification No. 12/2017-Central Tax (Rate) dated 28th June, 2017.

Judgements

S.No	Relevant provision of CGST Act	Name of the Case	Decision of the Court
1	Interest on Delayed Refunds (Section 56 of the CGST Act)	Saraf Natural Stone v. Union of India	Applicant filed writ seeking compensation and interest due to delay in granting of refund of Integrated Tax paid on the export of goods in terms of Section-16 of the Integrated Goods and Services Tax (IGST) Act, 2017 and the Rules made thereunder. It was held that as per the provisions of the Act, the respondent was liable to pay simple interest on the delayed payment at the rate of 9% per annum
2	Refund of integrated tax paid on goods or services exported out of India (Rule 96 of CGST Rules)	Amit Cotton Industries v. Principal Commissioner of Customs	Applicant filed writ seeking refund of IGST on export of goods which was withheld by the respondent on the grounds that higher duty drawback had been availed by the applicant. It was held that the circular relied upon by the respondent explains the provisions of drawback and has nothing to do with IGST refund and according to rule 96, the claim for refund can be withheld only in two circumstances as provided in sub-clauses (a) and (b) respectively of clause (4) of the said rule. The applicant does not fall under the above mentioned clauses. Therefore, the respondent was directed to sanction the refund of the IGST paid in regard to the goods exported, i.e. 'zero rated supplies' with 7% simple interest from the date of the shipping bills till the date of actual refund.
3	Anti-profiteering measure. (Section 171 of CGST Act)	Rahul Sharma v. H P India Sales (P.) Ltd.	Applicant alleged profiteering by respondent by not passing the benefit of GST reduction to the recipients on HP V202b 19.5 inch Computer Monitor. It was held that there was no reduction in rate of tax in the specified period and therefore the respondent had not contravened the provisons of Sec. 171 of the Act.

CIRCULARS & NOTIFICATIONS UNDER GST

S. No.	Contents
	NOTIFICATION (CGST)
1.	As per **Notification No. 35/2019 (CGST) dated 29.07.2019**, the due date for furnishing the statement containing the details of payment of self-assessed tax in said **FORM GST CMP-08, for the quarter April, 2019 to June, 2019** has been extended from **31.07.2019 to 31.08.2019**
2.	As per **Notification No. 36/2019 (CGST) dated 20.08.2019,** the date from which the facility of blocking and unblocking of e-way bill facility as per the provision of Rule 138E of CGST Rules, 2017 shall be brought into force has been extended to 21.11.2019 from 21.08.2019.
3.	As per **Notification No. 37/2019 (CGST) dated 21.08.2019,** due date for furnishing of FORM GSTR-3B for the month of July, 2019 was extended to 22.08.2019
4.	As per **Notification No. 38/2019 (CGST) dated 31.08.2019**, waive the filing of FORM GST ITC-04 for the period July, 2017 to March, 2019. The said persons shall furnish the details of all the challans in respect of goods dispatched to a job worker in the period July, 2017 to March, 2019 but not received from a job worker or not supplied from the place of business of the job worker as on the 31st March, 2019, in serial number 4 of FORM ITC-04 for the quarter April-June, 2019.
5.	As per **Notification No. 39/2019 (CGST) dated 31.08.2019**, the provisions of Section 103 (Disbursement of refund of State Tax) shall come into force from 01.09.2019.
6.	As per **Notification No. 40/2019 (CGST) dated 31.08.2019**, the due date for filing of GSTR-7 for the month of July, 2019 has been extended to 20.09.2019 for the persons whose registered place of business is in Jammu & Kashmir & some of the districts of Bihar, Gujarat, Karnataka, Kerala, Maharashtra, Odisha, Uttarakhand.
7.	As per **Notification No. 41/2019 (CGST) dated 31.08.2019**, the CG waives the late fees payable on filing of GSTR-1 for the month of July, 2019 on or before 20.09.2019 for the registered having aggregate turnover of more than 1.5 crore rupees in the preceeding FY or current FY having registered place of business in Jammu & Kashmir & some of the districts of Bihar, Gujarat, Karnataka, Kerala, Maharashtra, Odisha, Uttarakhand.

<table>
<tr><td></td><td>The due date for filing of GSTR-6 for the month of July, 2019 has been extended to 20.09.2019 for the persons whose registered place of business is in Jammu & Kashmir & some of the districts of Bihar, Gujarat, Karnataka, Kerala, Maharashtra, Odisha, Uttarakhand.</td></tr>
<tr><td>8.</td><td>As per <u>Notification No. 42/2019 (CGST) dated 24.09.2019</u>, provisions of Rules 10,11,12 and 26 of CGST (Fourth Amendment) Rules, 2019 [Notification No. 31/2019 (CGST) dt 28.06.2019] shall came into force w.e.f. 24.09.2019.</td></tr>
<tr><td>9.</td><td>As per <u>Notification No. 43/2019 (CGST) dated 30.09.2019</u>, manufacturers of aerated water cannot opt for composition scheme w.e.f 01.10.2019.</td></tr>
<tr><td>10.</td><td>As per <u>Notification No. 44/2019 (CGST) dated 09.10.2019</u>, FORM GSTR-3B for the month of October, 2019 to March,2020 shall be filed before 20th day of the next month.</td></tr>
<tr><td>11.</td><td>As per <u>Notification No. 45/2019 (CGST) dated 09.10.2019</u>, the due date for FORM GSTR-1 for registered persons having aggregate turnover of up to 1.5 crore rupees for the quarters:
<table>
<tr><th>Quarter</th><th>Due Date</th></tr>
<tr><td>October, 2019 to December, 2019</td><td>31st January, 2020</td></tr>
<tr><td>January, 2020 to March, 2020</td><td>30th April, 2020</td></tr>
</table></td></tr>
<tr><td>12.</td><td>As per <u>Notification No. 46/2019 (CGST) dated 09.10.2019</u>, the due date for FORM GSTR-1 for registered persons having aggregate turnover of more than 1.5 crore rupees for the months of October, 2019 to March, 2020 is 11th day of the next month.</td></tr>
<tr><td>13.</td><td>As per <u>Notification No. 47/2019 (CGST) dated 09.10.2019</u>, filing of annual return for F.Y. 2017-18 and 2018-19 is optional for small taxpayers whose aggregate turnover is less than Rs 2 crores.</td></tr>
<tr><td>14.</td><td>As per Notification No. 48/2019 (CGST) dated 09.10.2019, extension of due date for those registered persons whose principal place of business is in the State of Jammu & Kashmir:
<table>
<tr><th>Form</th><th>Due Date</th></tr>
<tr><td>GSTR-1 for the month of August, 2019</td><td>On or before 11th October, 2019</td></tr>
<tr><td>GSTR-7 for the month of July, 2019</td><td>On or before 10th October, 2019</td></tr>
<tr><td>GSTR-7 for the month of August, 2019</td><td>On or before 10th October, 2019</td></tr>
<tr><td>GSTR-3B for the month of July, 2019</td><td>On or before 20th October, 2019</td></tr>
<tr><td>GSTR-3B for the month of August, 2019</td><td>On or before 20th October, 2019</td></tr>
</table></td></tr>
</table>

15.	As per **Notification No. 49/2019 (CGST) dated 09.10.2019,** changes in GST Rules are: **(a) Insertion of sub-rule (4) in rule 36:** Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 20 per cent. of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37. **(b) Insertion of sub-rule (7A) in rule 97(7):** The Standing Committee shall make available to the Board 50 per cent. of the amount credited to the Consumer Welfare Fund each year, for publicity or consumer awareness on Goods and Services Tax, provided the availability of funds for consumer welfare activities of the Department of Consumer Affairs is not less than twenty-five crore rupees per annum. **(c) Insertion of sub-rule (1A) in Rule 142(1):** The proper officer shall, before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, shall communicate the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A **(d) Insertion of sub-rule (2A) in Rule 142(2):** Where the person referred to in sub-rule (1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he may make such submission in Part B of FORM GST DRC-01A
NOTIFICATION (CT-RATE)	
1.	As per **Notification No. 12/2019 (CT-Rate) dated 31.07.2019,** The GST rate on **charger or charging stations** for Electric vehicles be reduced from **18% to 5%.** The GST rate on all **electric vehicles including two and three wheeled electric vehicles** be reduced **from 12% to 5%.** **Electrically operated vehicles**" means vehicles which are run solely on electrical energy derived from an external source or from one or more electrical batteries fitted to such road vehicles **and shall include E- bicycles**. Applicable w.e.f. 01.08.2019

2.	As per **Notification No. 13/2019 (CT-Rate) dated 31.07.2019,** hiring of electric buses (of carrying capacity of more than 12 passengers) by local authorities be exempted from GST. "**Electrically operated vehicle**" means vehicle falling under Chapter 87 in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) which is run solely on electrical energy derived from an external source or from one or more electrical batteries fitted to such road vehicle. Applicable w.e.f. 01.08.2019
3.	As per **Notification No. 14/2019 (CT-Rate) dated 30.09.2019,** a) Goods to be taxed at 5%: • Marine Fuel 0.5% (FO) • Wet grinder consisting of stone as grinder b) Goods to be taxed at 12%: • Woven and non-woven bags and sacks of polyethylene or polypropylene strips or the like, whether or not laminated, of a kind used for packing of goods • Rail locomotives powered from an external source of electricity or by electric accumulators • Other rail locomotives; locomotive tenders; such as Diesel electric locomotives, Steam locomotives and tenders thereof • Self-propelled railway or tramway coaches, vans and trucks, other than those of heading 8604 • Railway or tramway maintenance or service vehicles, whether or not self-propelled • Railway or tramway passenger coaches, not self-propelled; luggage vans, post office coaches and other special purpose railway or tramway coaches, not self-propelled (Excluding those of heading 8604) • Railway or tramway goods vans and wagons, not self-propelled • Parts of railway or tramway locomotives or rolling-stock; such as Bogies, bissel-bogies, axles and wheels, and parts thereof • Railway or tramway track fixtures and fittings; mechanical (including electro-mechanical) signalling, safety or traffic control equipment for railways, tramways, roads, inland waterways, parking facilities, port installations or airfields; parts of the foregoing • Parts of slide fasteners c) Goods to be taxed at 28%: (i) Caffeinated beverages To be effective from 01.10.2019.

<table>
<tr><td>4.</td><td>As per <u>Notification No. 15/2019 (CT-Rate) dated 30.09.2019</u>, dried tamarind and cups, plates made of leaves, bark and flowers of plants are exempt under GST w.e.f 01.10.2019.</td></tr>
<tr><td>5.</td><td>As per <u>Notification No. 16/2019 (CT-Rate) dated 30.09.2019</u>, concessional rate of 2.5% to be applicable on Petroleum operations or coal bed methane operations undertaken under specified contracts under the Hydrocarbon Exploration Licensing Policy (HELP) or Open Acreage Licensing Policy (OALP) w.e.f 01.10.2019.</td></tr>
<tr><td>6.</td><td>As per <u>Notification No. 17/2019 (CT-Rate) dated 30.09.2019</u>, supplies of silver and platinum by nominated agencies to registered persons are exempt under GST w.e.f. 01.10.2019.</td></tr>
<tr><td>7.</td><td>As per <u>Notification No. 18/2019 (CT-Rate) dated 30.09.2019</u>, manufacturers of aerated water excluded from the purview of Composition scheme w.e.f. 01.10.2019</td></tr>
<tr><td>8.</td><td>As per <u>Notification No. 19/2019 (CT-Rate) dated 30.09.2019</u>, all the goods supplied to Food and Agricultural Organisation of the United Nations (FAO) for projects
1. Strengthening Capacities for Nutrition-sensitive Agriculture and Food systems,
2. Green Ag: Transforming Indian Agriculture for Global Environment benefits and the conservation of Critical Biodiversity and Forest landscape
are exempt under GST w.e.f 01.10.2019.</td></tr>
<tr><td>9.</td><td>As per <u>Notification No. 20/2019 (CT-Rate) dated 30.09.2019</u>, CGST rates for various services are:
<table>
<tr><th>S.No</th><th>Service</th><th>Rate</th></tr>
<tr><td>(i)</td><td>Supply of “hotel accommodation” having value of supply of a unit of accommodation above one thousand rupees but less than or equal to seven thousand five hundred rupees per unit per day or equivalent.</td><td>6%</td></tr>
<tr><td>(ii)</td><td>Supply of “restaurant service” other than at “specified premises”</td><td>2.5%</td></tr>
<tr><td>(iii)</td><td>Supply of goods, being food or any other article for human consumption or any drink, by the Indian Railways or Indian Railways Catering and Tourism Corporation Ltd. or their licensees, whether in trains or at platforms</td><td>2.5%</td></tr>
</table></td></tr>
</table>

	<table><tr><th>S.No</th><th>Service</th><th>Rate</th></tr><tr><td>(iv)</td><td>Supply of “outdoor catering”, at premises other than “specified premises” provided by any person other than- (a) suppliers providing “hotel accommodation” at “specified premises”, or (b) suppliers located in “specified premises”.</td><td>2.5%</td></tr><tr><td>(v)</td><td>Composite supply of “outdoor catering” together with renting of premises (including hotel, convention center, club, pandal, shamiana or any other place, specially arranged for organising a function) at premises other than “specified premises” provided by any person other than- (a) suppliers providing “hotel accommodation” at “specified premises”, or (b) suppliers located in “specified premises”</td><td>2.5%</td></tr><tr><td>(vi)</td><td>Accommodation, food and beverage services other than (i) to (v) above</td><td>9%</td></tr><tr><td>(vii)</td><td>Services by way of job work in relation to diamonds falling under chapter 71 in the First Schedule to the Customs Tariff Act, 1975 (51of 1975)</td><td>0.75%</td></tr><tr><td>(viii)</td><td>Services by way of job work in relation to bus body building</td><td>9%</td></tr></table>
10.	As per **Notification No. 21/2019 (CT-Rate) dated 30.09.2019**, the following services are exempt under GST: a) Services provided by and to Fédération Internationale de Football Association (FIFA) and its subsidiaries directly or indirectly related to any of the events under FIFA U-17 Women’s World Cup 2020 to be hosted in India. b) Services by way of storage or warehousing of cereals, pulses, fruits, nuts and vegetables, spices, copra, sugarcane, jaggery, raw vegetable fibres such as cotton, flax, jute etc., indigo, unmanufactured tobacco, betel leaves, tendu leaves, coffee and tea. c) Services of life insurance provided or agreed to be provided by the Central Armed Police Forces (under Ministry of Home Affairs) Group Insurance Funds to their members under the Group Insurance Schemes of the concerned Central Armed Police Force. d) Services by way of right to admission to the events organised under FIFA U-17 Women’s World Cup 2020. To be effective from 01.10.2019.

11.	As per **Notification No. 22/2019 (CT-Rate) dated 30.09.2019**, the following services on which RCM is applicable are: a) Supply of services by an author by way of transfer or permitting the use or enjoyment of a copyright covered under clause (a) of sub -section (1) of section 13 of the Copyright Act, 1957 relating to original literary works to a publisher. b) Services provided by way of renting of a motor vehicle provided to a body corporate. c) Services of lending of securities under Securities Lending Scheme, 1997 ("Scheme") of Securities and Exchange Board of India ("SEBI"), as amended. To be effective from 01.10.2019.
12.	As per **Notification No. 23/2019 (CT-Rate) dated 30.09.2019**, special procedure in relation to payment of tax by registered person supplying service by way of construction against transfer of development right and vice versa shall not apply to the development rights supplied on or after 1st April, 2019.
13.	As per **Notification No. 24/2019 (CT-Rate) dated 30.09.2019,** entry related to cement has been amended w.e.f 01.10.2019.
14.	As per **Notification No. 25/2019 (CT-Rate) dated 30.09.2019,** grant of alcoholic liquor license is neither a supply of services nor supply of goods
CIRCULAR (CGST)	
1.	As per **Circular No. 110/2019 (CGST) dated 03.10.2019,** registered person who has filed a NIL refund claim in FORM GST RFD-01A/RFD-01 for a given period under a particular category, may again apply for refund for the said period under the same category only if he satisfies the conditions.
2.	**Circular No. 111/2019 (CGST) dated 03.10.2019,** clarifies the procedure to be followed by a registered person to claim refund subsequent to a favourable order in appeal or any other forum against rejection of a refund claim in FORM GST RFD-06.
3.	As per **Circular No. 112/2019 (CGST) dated 03.10.2019,** Circular No. 105/24/2019-GST dated 28.06.2019 is withdraw wherein certain clarifications were given in relation to various doubts related to treatment of secondary or post-sales discounts under GST.

<table>
<tr><td>4.</td><td><u>Circular No. 113/2019 (CGST) dated 11.10.2019,</u> clarifies GST rates and classification of goods:
<table>
<tr><th>Goods</th><th>HSN</th><th>Rate</th></tr>
<tr><td>Leguminous vegetables when subject to mild heat treatment (parching) if
• branded and packed in a unit container
• all other cases</td><td>

0713
-</td><td>

5%
Exempt</td></tr>
<tr><td>Almond milk</td><td>2202 99 90</td><td>18%</td></tr>
<tr><td>Mechanical Sprayer</td><td>8424</td><td>12%</td></tr>
<tr><td>Imported stores for use in navy ships</td><td>-</td><td>Exempt</td></tr>
<tr><td>Goods imported under lease</td><td>-</td><td>Exempt</td></tr>
<tr><td>Parts including Solar Evacuated Tube for the manufacture of solar water heater and system</td><td>84, 85 and 94</td><td>5%</td></tr>
<tr><td>Parts and accessories suitable for use solely or principally with a medical device</td><td>9018, 9019, 9021 or 9022</td><td>12%</td></tr>
</table></td></tr>
<tr><td>5.</td><td><u>Circular No. 114/2019 (CGST) dated 11.10.2019,</u> clarifies support services to exploration, mining or drilling of petroleum crude or natural gas or both shall be governed by the explanatory notes to service codes 9983 and 9986 of the Scheme of Classification of Services.</td></tr>
<tr><td>6.</td><td>Circular No. 115/2019 (CGST)dated 11.10.2019, clarifiesGST on Airport levies:
(a) The airport operators shall pay GST on the PSF and UDF collected by them from the passengers through the airlines.
The collection charges paid by airport operator to airlines are a consideration for the services provided by the airlines to the airport operator (AAI, DAIL, MAIL etc) and airlines shall be liable to pay GST on the same under forward charge. ITC of the same will be available with the airport operator.</td></tr>
<tr><td>7.</td><td><u>Circular No. 116/2019 (CGST) dated 11.10.2019,</u> clarifies that the service of display of name or placing of name plates of the donor in the premises of charitable organisations receiving donation or gifts by individual donors is exempt from GST if the three conditions are satisfied:
(a) gift or donation is made to a charitable organization,
(b) the payment has the character of gift or donation and
the purpose is philanthropic (i.e. it leads to no commercial gain) and not advertisement</td></tr>
</table>

REMOVAL OF DIFFICULTY ORDER	
1.	As per **Removal of Difficulty Order No. 7/2019-Central Tax dated 26.08.2019**, the due date for filing of Annual return / Reconciliation Statement for the Financial year 2017-18 in FORMs GSTR-9, GSTR-9A and GSTR-9C has been extended to 30.11.2019.
2.	As per **Removal of Difficulty Order No. 8/2019-Central Tax dated 14.11.2019**, the due date for filing of Annual return/ Reconciliation Statement for FY 2017-18 in FORMs GSTR 9/9A and GSTR 9C has been extended to 31.12.2019 and for FY 2018-19 to 31.03.2020.
PRESS RELEASE	
1.	As per **Press release dated 27.07.2019** due date of filing of intimation in **FORM GST CMP-02** (for availing the option of payment of tax under composition scheme by supplier of services) has been extended from **31.07.2019 to 30.09.2019.**

Advance Rulings

S. No	State	Case Name	Order No. & Date	Particulars	
1	West Bengal	Kay Pee Equipments Pvt Ltd	25/WBAAR/ 2019-20 dated 23.09.2019	**Brief Issue**	What are the determinants for classifying railway supplies?
				Decision	The composite goods manufactured by applicant that are used primarily as parts of railway locomotives are to be classified under heading 8607 and attract GST @5% with no refund of the unutilized input tax credit. The same classification will apply to other supplies to the railways if they are used primarily as parts of railway locomotives, provided they are not excluded by Note 2 of Section XVII.
2	West Bengal	Golden Vacations Tours and Travels	26/WBAAR/ 2019-20 dated 23.09.2019	**Brief Issue**	What is the classification of the standalone service of arranging accommodation in a hotel?
				Decision	If only accommodation in hotels is arranged for clients, it is a supply of service classifiable under SAC 998552. It is taxable under Sl. No. 23(iii) of the Rate Notification and the applicant is eligible to claim the input tax credit on it as admissible under law.
3	Tamil Nadu	Chinnakani Arumuga selvaraja, (Proprietor, M/s Sri Venkateshwara Traders)	TN/34/ AAR/2019 DATED 26.07.2019	**Brief Issue**	Classification of 'Cattle Feed in Cake Form'.
				Decision	Cattle feed in cake form manufactured by the Applicant is classifiable under Chapter Heading 23099010 and is exempted under notification no 02/2017-CT(Rate).
4	Goa	Chief Electrical Engineer Goa	GOA/ GAAR/8/ 2018-19 dated 18.07.2019	**Brief Issue**	The GST rate applicable for various works/activity undertaken by the Goa Electricity Department.
				Decision	Activities carried on by the applicant (composite supply of works contract), except hiring of vehicles are liable to GST @18%. Hiring of vehicles attracts GST@ 5% or 12% subject to conditions in notification no 20/2017-CT (Rate).
5	Goa	Syngenta Bioscience Private Limited	GOA/ GAAR/09/ 2018-19 dated 29.08.2019	**Brief Issue**	Whether the activity of on the technical testing services carried out by the applicant be treated as 'zero-rated supply'? If the answer to the aforesaid question is negative, then is the applicant liable to pay IGST on the said 'supply'?
				Decision	Activity of on the technical testing services carried out by the applicant do not fall under export of service under section 2(6) of the IGST Act and applicant is liable to pay CGST and SGST on the same.
6	Tamil Nadu	HP India Private Limited	TN/40/ AAR/2019 dated 28.08.2019	Brief Issue	What is the rate of GST applicable on supply of desktops consisting of CPU, monitor, Keyboard and mouse or any combination of input/output unit?
				Decision	Supply of desktops consisting of CPU, monitor, keyboard and mouse are classifiable under CTH 8471 and attracts GST @ 18% under notification 01/2017-CT(Rate).

S. No	State	Case Name	Order No. & Date	Particulars	
7	Madhya Pradesh	NMDC Limited	MP/ AAR/09/ 2019 dated 18.07.2019	**Brief Issue**	Whether royalty paid in respect of Mining Lease can be classified under "Licensing services for the right to use minerals including its exploration and evaluation falling under the heading 9973 attracting GST at the same rate of tax as applicable on supply of like goods involving transfer of title in goods"? Determination of the liability to pay tax on contribution made to District Mineral Foundation (DMF) and National Mineral Exploration trust (NMET) as per MMDR Act, 1957?
				Decision	Service by way of granting licence to extract minerals shall be classified under tariff heading 99733. Additional contributions made to DMF and NMET are liable to be added to the value of supply as it is an addition to the royalty payable.
8	Madhya Pradesh	Directorate of Skill Development Global Skill Development	MP/ AAR/10/ 2019 dated 18.07.2019	**Brief Issue**	The applicant desired to Know, whether the services received by it form a provider of service located in a non-taxable territory would attract the provision of sec 5(3) read along with Notification No 10/2017 IT(R). In other words, whether applicant is liable to pay tax under reverse charge mechanism on the transaction mentioned above?
				Decision	Applicant shall be liable to pay IGST on import of service under reverse charge mechanism.
9	Rajasthan	Ashok Kumar Chaudhary (A B Enterprises)	RAJ/ AAR/2019-20/20 dated 03.09.2019	**Brief Issue**	What shall be rate of GST on activity of sub-contract for earthwork in relation to construction of access controlled Nagpur-Mumbai Super Communication Expressway (Maharashtra Samruddhi Mahamarg)?
				Decision	Work of earthwork attracts GST @18%.
10	Andhra Pradesh	M/s. Metro Aluminium	AAR No.06 / AP/ GST/2019 Dated: 14.02.2019	**Brief Issue**	Aluminium ladders –Generally used for Domestic / House –hold purpose. Made of aluminium metal and corners are concealed with plastic caps. Applicant selling this product under HSN: 7615 @ GST 12%. Applicant sought for the liability of tax to be collected. Aluminium industrial ladders – Aluminium is majorly used with other metals (S.S & M.S) used for tools and additional support. Applicant selling this Product under HSN:7616 @GST 18%. Applicant sought for the liability of tax to be collected.
				Decision	Aluminium ladders come under HSN code 7616 and attract GST @18% irrespective of end use of ladders.
11	Andhra Pradesh	M/s Tirumala Milk Products Private Limited	AAR No. 28/AP/ GST/2019 Dated 15.07.2019	**Brief Issue**	What is the rate of GST applicable on outward supply of "Flavoured Milk"?
				Decision	The HSN code for flavoured milk is 22029930 and attracts GST@ 12% under entry No. 50 of schedule-II of Notification No1/2017 - CT (Rate) as amended.
12	Maharashtra	Maansmarine Cargo International Llp	GST-ARA- 04 /2019-20/B-97 Mumbai dated 23.08.2019	**Brief Issue**	1. Whether GST is applicable on the reimbursement of expenses such as salaries, rent, office expenses, travelling cost etc.? 2. Whether GST will be applicable on the management fees charged by us to the Company for managing the job outsourced to us?

S. No	State	Case Name	Order No. & Date	Particulars	
				Decision	1. Yes, GST is applicable on the reimbursement of expenses such as salaries, rent, office expenses, travelling cost etc. 2. GST shall also be applicable on the management fees charged by applicant to the Company for managing the job outsourced to them.
13	Maharashtra	Nipro India Corporation Private Limited	GST-ARA-141/2018-19/B- 94 Mumbaidated 23.08.2019	**Brief Issue**	1. "Whether on facts and circumstances of the case, the product "Dialyzer" be treated as 'Disposable sterilized dialyzer or micro barrier of artificial kidney' as mentioned under Entry No. 255 of Schedule I to Notification Number 1/2017-Central Tax (Rate) 2. If the said product "Dialyzer" falls under Entry No. 255 of Schedule I to the Rate Notifications, whether it would be classified under Chapter 90 (i.e. Tariff item 9018 90 31) or Chapter 84 (i.e. Tariff item 8421 29 00).
				Decision	1. Yes, Dialyzer shall be treated as 'Disposable sterilized dialyzer or micro barrier of artificial kidney' as mentioned under Entry No. 255 of Schedule I to Notification Number 1/2017-Central Tax (Rate). 2. It is classifiable under tariff item 90189031.
14	Maharashtra	Yash Nirman Engineers & Contractor	GST-ARA-143/2018-19/B- 95 Mumbaidated 23.08.2019	**Brief Issue**	Whether the construction service provided by M/s. Yash Nirman Engineers and Contractors to M/s. Lakhani Builders Pvt. Ltd under the project " La-Riveria" qualifies for application of lower rate of CGST@6% and SGST @ 6% as provided in Sl. No: 3- Item (V) - sub item (da) vide notification no: 01/2018-CT (Rate) dated 25-01-2018?
				Decision	Yes, the construction service provided by M/s. Yash Nirman Engineers and Contractors to M/s. Lakhani Builders Pvt. Ltd qualifies for lower rate of GSTunder Sl. No: 3- Item (V) - sub item (da) under notification no: 01/2018-CT (Rate).
15	Maharashtra	Alligo Agrovet Private Limited	GST-ARA-02/2019-20/B- 101 Mumbai dated 26.08.2019	**Brief Issue**	Classification of goods and GST rate applicability in the case of goods manufactured by applicant.
				Decision	AUTUS, SJ NINJA, SJ ERASER, OPRAX, TELNAR, VK's NEMO and STRESSOUT are all classifiable under HSN Code 3808 and attract GST @18% under notification 01/2017-CT (Rate). Shyam Samruddhi is an organic fertiliser classifiable under HSN 3105 and attracts GST @5% under schedule -I of notification 01/2017-CT(Rate).
16	Karnataka	Intek Tapes Private Limited	KAR/ AAR/44/ 2019-20 dated 17.09.2019	**Brief Issue**	What is the "Applicable rate of tax on supply of Kapton Polyimide Film Adhesive Tape to Indian Railways for use in its railway locomotives"?
				Decision	Supply of Kapton Polyimide Film Adhesive Tape to Indian Railways to use in railway locomotives are covered under heading 8546 and taxable @18% GST.

S. No	State	Case Name	Order No. & Date	Particulars	
17	Maha-rashtra	The Bangalore Printing and Publishing Co.Ltd.,	KAR/ AAR/45/ 2019-20 dated 17.09.2019	**Brief Issue**	Whether the activity of printing of Question Paper book is to be covered under HSN 4901 under the description "Printed books, including Braille books" in Serial Number 119 of Notification No.2/2017 Central Tax (Rate) or under the sub-clause (vi) of clause (b) in serial Number 66 with SAC 9992 of Notification No.12/2017?
				Decision	Printing of question paper by applicant when content is being supplied by educational institutions is covered under heading 9989 of scheme of classification of services. Supply of such services to educational institute are covered under serial number 66 of notification no 12/2017-CT (Rate).
18	Karnataka	Pattabi Enterprises	KAR/ AAR/46/ 2019-20 dated 17.09.2019	**Brief Issue**	1. Whether 'Access Card' printed and supplied by the applicant i.e. Pattabi Enterprises based on the contents provided by their customers is rightly classifiable under HSN code 4901 10 20 under the description brochures, leaflets and similar printed matter whether or not in single sheet? 2. Whether such supply attracts GST rate of 5% in case of IGST and 2.5% CGST and 2.5% SGST in case of Intra State supplies. Vide Notification No. 1/2017-CT (Rate) Sl. No. 201 & 1/2017-IT (Rate) Sl.No.201 dated. 28.06.2017 and SGST/ UTGST Notifications?
				Decision	Access cards and similar material printed and supplied by applicant when the content is being supplied by recipient, are classifiable under SAC 9989 @ 18% GST.
19	Karnataka	S.K. Aagrotechh	KAR/ AAR/49/ 2019-20 dated 18.09.2019	**Brief Issue**	Whether "Pooja oil" can be classified under tariff item 1518 of Schedule-I (taxable at 5%) or Schedule-II (taxable at 12%) of Notification No.01/2017-CT(R) dated 28.06.2017, as amended from time to time?
				Decision	Pooja Oil is classified under tariff heading 1518 under entry number 27 of schedule-II of notification 01/2017-CT (Rate) and taxable @ 12% GST.
20	Karnataka	Yashaswini Enterprises	KAR/ AAR/51/ 2019-20 dated 18.09.2019	**Brief Issue**	Whether the transaction of the applicant relating to execution of the works contract pertains to energised borewells is it covered under article 243G of the Constitution, their supply is meant to the Government Entity and hence it is exempted under Sl.No.3A of Notification No. 2/2018 – Central Tax (Rate) dated 25/01/2018. Thus the applicant contends that their activity / service is taxable at NIL rate or not?
				Decision	Composite supply of energised borewells to government entities is covered under entry 3A of notification no 12/2017-CT (Rate) [as amended].
21	Karnataka	Toyota Tsusho India Private Ltd	KAR/ AAR/52/ 2019-20 dated 18.09.2019	**Brief Issue**	Whether the restriction introduced by Notification No. 3/2018 – Central tax (later substituted by Notification No.39/2018- Central Tax dated 04.09.2018 retrospectively from 23.10.2017) on claiming refund of IGST paid on export of goods by inserting Rule 96(10) is applicable only on such export of goods for which corresponding inward supplies were procured at a concessional rate of 0.10% GST under Notification

S. No	State	Case Name	Order No. & Date	Particulars	
					No. 40/2017- Central Tax (Rate), thereby holding that such restriction on IGST refund does not apply on export of goods which were procured on full payment of GST? Whether the above restriction prohibits refund of IGST paid in its entirety even on such exports where the goods have been procured on payment of full rate of GST by the person who procures only a small quantity of goods at concessional rate of 0.10% GST under Merchant Export Scheme as provided under Notification No. 40/2017- Central Tax (Rate)?
				Decision	Persons who procure goods by availing benefit of notification no 40/2017-CT(Rate) at concessional rates are not eligible to claim refund of IGST paid on exports as per rule 96(10) of CGST Rules irrespective of other transactions made by such person.
22	Karnataka	Parker Hannifin India Pvt. Ltd	KAR/ AAR/54/ 2019-20 dated 19.09.2019	**Brief Issue**	a) Whether filters manufactured solely and principally for use by/ in Indian Railways and supplied directly to Indian Railways are classifiable under HSN Heading 8421 or under HSN Heading 8607 of the Customs Tariff (which has been borrowed for classification purposes under GST regime)? b) Whether the aforementioned classifications of subject goods i.e. filter alter if identical goods are supplied to a distributor instead of Indian railways directly, and the distributor in turn effects supply to Indian railways?
				Decision	Filters are classifiable under HSN Heading 8421. Classification would not alter on account of supply by distributor to Railways.
23	Karnataka	Fulcrum Info Services LLP	KAR/ AAR/55/ 2019-20 dated 19.09.2019	**Brief Issue**	a) Whether the back-end support services provided by the applicant to the Juniper Inc. under the agreement would be classified as 'Support Services' under the Tariff Heading 9985 of Notification 11/2017 – Central Tax (Rate) dated 28.06.2017? b) Whether the services in question would be treated as Intermediary services or not?
				Decision	Back-end support services provided by the applicant are classifiable as "support services" under under service code 998599 of notification 11/2017-CGST(Rate) Applicant is engaged in providing service themselves and no third person is involved in providing or receiving services from Juniper and hence applicant is not an intermediary.
24	Karnataka	GDC Dimension Data Pvt. Ltd.	KAR/ AAR/57/ 2019-20 dated 19.09.2019	**Brief Issue**	What is the correct Service Accounting Code (SAC) for the services mentioned below in terms of Notification No.11/ 2017 – Central Tax (Rate) dated 28th June 2017? a. IT Support Services b. IT Managed Services

S. No	State	Case Name	Order No. & Date	Particulars	
				Decision	IT support services are covered under service code 998313 and IT managed services under SAC 998316.
25	Karnataka	Humble Mobile Solutions Pvt. Ltd.,	KAR/ AAR/58/ 2019-20 dated 19.09.2019	**Brief Issue**	Whether the applicant is liable to pay tax for supply of services by another person through the e-commerce platform operated by the applicant?
				Decision	Applicant is not liable to pay tax for supply of services by drivers through e-commerce platform operated by the applicant but he is liable to pay tax on service provided to such drivers by him.
26	Karnataka	Poppy Dorothy Noel	KAR/ AAR/59/ 2019-20 dated 20.09.2019	**Brief Issue**	Whether the IGST at 0% is applicable for the invoices raised to the SEZ Units, even if the accommodation services were rendered outside the SEZ Zone?
				Decision	If service provided to SEZ is not for authorised operations, they would not be treated as supplies to SEZ and therefore not zero rated supplies. It will be liable to IGST @18%. But if service is covered under authorised operations, it shall be zero rated supply.
27	Karnataka	Jairaj Ispat Limited.	KAR/ AAR/60/ 2019-20 dated 20.09.2019	**Brief Issue**	Whether the Char-Dolochar / Dolochar (waste emerged during the process of manufacturing Sponge Iron) supplied by him is classifiable under: (i) Tariff Item 2621 90 90 of Customs Tariff Act, 1975 and therefore, in view of Entry 30 of Schedule III of Notification 01/2017- Integrated Tax (Rate) dated 28 June 2017 as amended from time to time, attract a levy of 18%. Or (ii) Tariff Item 2701 20 90of Customs Tariff Act, 1975 and therefore, in view of Entry 158 of Schedule I of Notification 01/2017- Integrated Tax (Rate) dated 28 June 2017 as amended from time to time, attract a levy of 5%?
				Decision	Char-Dolochar / Dolochar is classifiable under tariff item 26190090 of CTA, 1975 and attracts GST@18% as per entry 28 of schedule-III of notification 01/2017-IGST (Rate).
28	Karnataka	Rashmi Hospitality Services Pvt. Ltd.	KAR/ AAR/61/ 2019-20 dated 20.09.2019	**Brief Issue**	Whether the subsidy received from the state government would form part of consideration under section 2(31) of the CGST Act?
				Decision	Subsidy received from government for supply of food to beneficiaries in Indian Canteens would not form part of consideration under section 2(31) of CGST Act.
29	Karnataka	Knowlarity Communications Pvt. Ltd.	KAR/ AAR/62/ 2019-20 dated 20.09.2019	**Brief Issue**	Whether or not a registered person under the Goods and Services Tax Act, 2017 can claim eligible input tax credit of goods and services tax paid on input invoices of goods or services procured or availed by a registered person before its effective date of registration under GST, where such inputs are eligible input credits and for the purpose of furtherance of business?

S. No	State	Case Name	Order No. & Date	Particulars	
				Decision	Input tax credit on goods or services procured before effective date of registration cannot be availed by a registered person. In case of goods, input tax credit of only stock lying on the day previous to such effective date, can be availed if used in course or furtherance of business subject to rule 40 of CGST Rules.
30	Karnataka	Aquarelle India Private Limited	KAR/ AAR/63/ 2019-20 dated 20.09.2019	**Brief Issue**	1. Whether disposing off assets (no CENVAT/ VAT Credit was taken) fastened to the building on delivering possession to the lesser, on which no consideration will be received, shall fall within the ambit of "Supply" as per Section 7 of Central Goods and Services Tax Act, 2017 and shall be chargeable with GST? 2. If the answer to above question is in affirmative, should the value appearing in the books as on the date of disposal may be construed as the "open market value" on which GST is to be discharged as per Rule 27 of the CGST rules 2017?
				Decision	1. Transfer of assets fastened to building in delivering possession to lessor free will amount to supply under section 7 of the CGST Act and attracts GST. 2. Value of such goods shall be: i. Open Market Value of supply ii. Value of supply of goods of like kind and quantity ii. 110% of book value of such goods

CIRCULARS & NOTIFICATIONS UNDER GST

S.No.	Contents
	NOTIFICATION (CGST)
1.	As per **Notification No. 50/2019 (CGST) dated 24.10.2019**, FORM GST CMP-08 for the quarters July to September 2019, shall be furnished by 22nd October 2019.
2.	As per **Notification No. 51/2019 (CGST) dated 31.10.2019**, Notification no. 2/2017- Central Tax amended to notify jurisdiction of Jammu Commissionerate over UT of J&K and UT of Ladakh.
3.	As per **Notification No. 52/2019 (CGST) dated 14.11.2019**, Extension of due date to file GSTR-1 for quarters July-September 2019 till 30th November 2019 for those persons whose principal place of business is in Jammu & Kashmir.
4.	As per **Notification No. 53/2019 (CGST) dated 14.11.2019**, Extension of due date to file GSTR-1 for July-September 2019 till 15th November 2019 for those persons whose principal place of business is in Jammu & Kashmir and aggregate turnover in preceding or current financial year exceeds Rs 1.5 crore.
5.	As per **Notification No. 54/2019 (CGST) dated 14.11.2019**, Extension of due date to file GSTR-3B for July-September 2019 till 20th November 2019 for those persons whose principal place of business is in Jammu & Kashmir.
6.	As per **Notification No. 55/2019 (CGST) dated 14.11.2019**, Extension of due date to file GSTR-7 for July- September 2019 till 15th November 2019 for those persons whose principal place of business is in Jammu & Kashmir.
7.	As per **Notification No. 56/2019 (CGST) dated 14.11.2019**, Central Goods and Services Tax (Seventh Amendment) Rules, 2019.
8.	As per **Notification No. 57/2019 (CGST) dated 26.11.2019**, Extension of due date to file GSTR-1 for July-September 2019 till 30th November 2019 for those persons whose principal place of business is in Jammu & Kashmir and aggregate turnover in preceding or current financial year exceeds Rs 1.5 crore.
9.	As per **Notification No. 58/2019 (CGST) dated 26.11.2019**, Extension of due date to file GSTR-1 for October 2019 till 30th November 2019 for those persons whose principal place of business is in Jammu & Kashmir and aggregate turnover in preceding or current financial year exceeds Rs 1.5 crore.

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10.	As per **Notification No. 59/2019 (CGST) dated 26.11.2019**, Extension of due date to file GSTR-7 for July- October 2019 till 30th November 2019 for those persons whose principal place of business is in Jammu & Kashmir.
11.	As per **Notification No. 60/2019 (CGST) dated 26.11.2019**, Extension of due date to file GSTR-3B for July-September 2019 till 30th November 2019 for those persons whose principal place of business is in Jammu & Kashmir.
12.	As per **Notification No. 61/2019 (CGST) dated 26.11.2019**, Extension of due date to file GSTR-3B for October 2019 till 30th November 2019 for those persons whose principal place of business is in Jammu & Kashmir.
13.	As per **Notification No. 62/2019 (CGST) dated 26.11.2019**, Transition plan with respect to J&K reorganization notified w.e.f. 31.10.2019.
14.	As per **Notification No. 63/2019 (CGST) dated 12.12.2019**, Extension of due date to file GSTR-1 for July-September 2019 till 20th December 2019 for those persons whose principal place of business is in Jammu & Kashmir and aggregate turnover in preceding or current financial year exceeds Rs 1.5 crore.
15	As per **Notification No. 64/2019 (CGST) dated 12.12.2019**, Extension of due date to file GSTR-1 for October 2019 till 20th December 2019 for those persons whose principal place of business is in Jammu & Kashmir and aggregate turnover in preceding or current financial year exceeds Rs 1.5 crore.
16.	As per **Notification No. 65/2019 (CGST) dated 12.12.2019**, Extension of due date to file GSTR-7 for July- October 2019 till 20th December 2019 for those persons whose principal place of business is in Jammu & Kashmir.
17.	As per **Notification No. 66/2019 (CGST) dated 12.12.2019**, Extension of due date to file GSTR-3B for July- September 2019 till 20th December 2019 for those persons whose principal place of business is in Jammu & Kashmir.
18.	As per **Notification No. 67/2019 (CGST) dated 12.12.2019**, Extension of due date to file GSTR-3B for October 2019 till 20th December 2019 for those persons whose principal place of business is in Jammu & Kashmir.

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19.	As per **Notification No. 68/2019 (CGST) dated 13.12.2019**, Insertion of sub rules 4, 5, 6 under rule 48 to CGST rules regarding manner of issue of invoice.
20.	As per **Notification No. 69/2019 (CGST) dated 13.12.2019**, Common Goods and Services Tax Electronic Portal notified for the purpose of preparation of e-invoice.
21.	As per **Notification No. 70/2019 (CGST) dated 13.12.2019**, Registered persons whose aggregate turnover exceeds 100 crore are required to prepare e-invoices under rule 48(4).
22.	As per **Notification No. 71/2019 (CGST) dated 13.12.2019**, Provisos to Rule 46 of CGST Rules inserted vide Central Goods and Services Tax (Fourth Amendment) Rules, 2019 shall come into force with effect from 1st April 2020.
23.	As per **Notification No. 72/2019 (CGST) dated 13.12.2019**, Invoice issued by a registered person to an unregistered person and whose aggregate turnover in a financial year exceeds Rs 500 crore, shall have Quick Response (QR) code.
NOTIFICATION (CT-RATE)	
1.	As per **Notification No. 26/2019 (CT-Rate) dated 22.11.2019**, Following explanation inserted against S.No 26, in column (3), in item (ic) of notification no.11/2017- Central Tax (Rate): “bus body building” shall include building of body on chassis of any vehicle falling under chapter 87 in the First Schedule to the Customs Tariff Act, 1975”.
CIRCULAR (CGST)	
1.	As per **Circular No. 117/2019 (CGST) dated 11.10.2019**, Maritime Institutes are educational institutions under GST Law and the courses conducted by them are exempt from levy of GST. The exemption is subject to meeting the conditions specified at Sl. No. 66 of the notification No. 12/ 2017- Central Tax (Rate) dated 28.06.2017.
2.	As per **Circular No. 118/2019 (CGST) dated 11.10.2019**, Place of supply of software/design by supplier located in taxable territory to service recipient located in non-taxable territory by using sample prototype hardware / test kits in a composite supply, where such testing is an ancillary supply, is the location of the service recipient as per Section 13(2) of the IGST Act. Provisions of Section 13(3)(a) of IGST Act do not apply separately for determining the place of supply for ancillary supply in such cases.

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3.	As per **Circular No. 119/2019 (CGST) dated 11.10.2019,** 1. The supply of lending of securities under the Securities Lending Scheme, 1997 is classifiable under heading 997119 and is leviable to GST@18% under Sl. No. 15(vii) of Notification No. 11/2017- Central Tax (Rate). 2. From 01.07.2017 to 30.09.2019, IGST was payable under forward charge by the lender However, if the service provider has already paid CGST / SGST / UTGST treating the supply as an intra-state supply, such lenders shall not be required to pay IGST again in lieu of such GST payments already made. With effect from 1st October, 2019, the borrower of securities shall be liable to discharge IGST as per Sl. No 16 of Notification No. 22/2019-Central Tax (Rate) under reverse charge mechanism (RCM).
4.	As per **Circular No. 120/2019 (CGST) dated 11.10.2019**, An explanation was inserted in notification No. 11/2017- CTR dated 28.06.2017, Sr. No. 3(vi) to the effect that for the purpose of the said entry, the activities or transactions under taken by Government and Local Authority shall be excluded from the term 'business'. This explanation shall be effective from 21.09. 2017.
5.	As per **Circular No. 121/2019 (CGST) dated 11.10.2019**, Service by way of grant of alcoholic liquor licence, against consideration in the form of licence fee or application fee or by whatever name it is called, by State Government is neither a supply of goods nor a supply of service. This only applies to supply of service by way of grant of liquor licenses by the State Governments and is not applicable in relation to grant of other licenses and privileges for a fee in other situations, where GST is payable.
6.	As per Circular No. 122/2019 (CGST) dated 05.11.2019, 1. No search authorization, summons, arrest memo, inspection notices and letters issued in the course of any enquiry shall be issued by any officer under the Board to a taxpayer or any other person, on or after the 8th day of November. 2019 without a computer generated Document Identification Number (DIN) being duly quoted prominently in the body of such communication. 2. Any specified communication which does not bear the electronically generated DIN and is not covered by the exceptions mentioned in the circular shall be treated as invalid and shall be deemed to have never been issued.

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	3. Steps to successfully add users for the DIN utility and enable them to electronically generate DINS has been prescribed therein.
7.	As per Circular No. 123/2019 (CGST) dated 11.11.2019, 1. The restriction of availment of ITC is imposed only in respect of those invoices / debit notes, details of which are required to be uploaded by the suppliers under sub-section (1) of section 37 and which have not been uploaded. The restriction of 36(4) will be applicable only on the invoices / debit notes on which credit is availed after 09.10.2019. 2. The restriction imposed under rule 36(4) is not supplier wise. Invoices on which ITC is not available under any of the provision would not be considered for calculating 20 percent of the eligible credit available. 3. The amount of input tax credit eligible shall be determined on the basis of details uploaded as on the due date of filing of the returns in FORM GSTR-1 of the suppliers for the said tax period. 4. The balance ITC may be claimed by the taxpayer in any of the succeeding months provided details of requisite invoices are uploaded by the suppliers.
8.	As per Circular No. 124/2019 (CGST) dated 18.11.2019, 1. Since it has been made optional to furnish the annual return for FY 2017-18 and 2018-19 for those registered persons whose aggregate turnover in a financial year does not exceed two crore rupees, tax payers under composition scheme, every registered person (other than an Input Service Distributor, a person paying tax under section 51 or section 52, a casual taxable person and a non-resident taxable person), may, at their own option file FORM GSTR-9A/ FORM GSTR-9(as applicable) for FY 2017-18 and 2018-19 before the due date. After the due date of furnishing the annual return for the year 2017-18 and 2018-19, the common portal shall not permit furnishing of FORM GSTR-9A/FORM GSTR-9 for the said period. 2. If any registered tax payer, during course of reconciliation of his accounts, notices any short payment of tax or ineligible availment of input tax credit, he may pay the same through FORM GST DRC-03.

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9.	As per Circular No. 125/2019 (CGST) dated 18.11.2019, 1. Procedure for electronic submission and processing of refund applications laid down in the circular. 2. It is clarified that the supplier who supplies goods at the concessional rate is also eligible for refund on account of inverted tax structure but the exporter of such goods can export the goods only under LUT / bond and cannot export on payment of Integrated tax. 3. ITC of the GST paid on inputs, including inward supplies of stores and spares, packing materials etc., shall be available as ITC as long as these inputs are used for the purpose of the business and/or for effecting taxable supplies, including zero-rated supplies, and the ITC for such inputs is not restricted under section 17(5) of the CGST Act.
10.	As per Circular No. 126/2019 (CGST) dated 22.11.2019, There is a clear demarcation between scope of the entries at item (id) and item (iv) under heading 9988 of Notification No. 11/2017-Central Tax (Rate) dated 28-06-2017. Entry at item (id) covers only job work services as defined in section 2 (68) of CGST Act, 2017, that is, services by way of treatment or processing undertaken by a person on goods belonging to another registered person. On the other hand, the entry at item (iv) specifically excludes the services covered by entry at item (id), and therefore, covers only such services which are carried out on physical inputs (goods) which are owned by persons other than those registered under the CGST Act.
11.	As per Circular No. 127/2019 (CGST) dated 04.12.2019, Circular No. 107/26/2019-GST dated 18.07.2019 related to clarifications on supply of Information Technology enabled Services (ITeS services) under GST, is withdrawn ab-initio.