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(*Contd. on cover page 3*)

under section 26(3) leading to assessment under section 31 of the "VAT Act" is clearly distinct to the procedure based on a audit objection by the "CAG" for even though the Legislature has empowered the Commissioner to hold audit on deemed assessment and initiate an exercise for the purpose of assessment under section 31, no such privilege is given to the "CAG" to exercise jurisdiction on a deemed assessment.

Much stress has been given by Mr. Vikash Kumar to the term "assess- **32** ment" present at section 33 to include cases of deemed assessment as well but in our opinion where the Legislature has consciously not included a situation of "deemed assessment" in section 33 even while conferring overriding powers on the Commissioner to hold audit in cases of deemed assessment, any interpretation by us, on the lines as advanced by Mr. Vikash Kumar would amount to supplying "casus" and we refrain from doing so.

It is unfortunate that the "VAT Act" was enforced in the year 2005 and **33** despite such long lapse of time, the statutory authorities acting thereunder, yet are oblivious of their limitations.

The legal proposition in this regard is too well settled for any confusion **34** and that is :

(a) A taxing statute has to be strictly construed as per the language used, without additions or subtractions ; and

(b) where the law itself provides for the manner and the circumstances in which the statutory authority can exercise jurisdiction then neither can the statutory authority acting thereunder, enlarge the scope of its exercise nor can he travel beyond the statutory provisions to draw power from other prescriptions available in the enactment simply because it caters to a similar situation.

The complete non-application of mind with which the issue has been **35** handled is manifest from the audit report itself available at annexure 5 which after recording the alleged excess input-tax credit claimed by the petitioner relegates him to a proceeding under section 31(2) of the "VAT Act" completely oblivious of the fact that while it is under the statutory prescriptions of section 33 that the power was being exercised by the "CAG", section 31(2) of the "VAT Act" is a penalty exercise in circumstances where an assessment/re-assessment is conducted on the basis of an audit conducted under the orders of the Commissioner under section 26(3) of the "VAT Act" and not on the basis of audit objection by the "CAG" under section 33 of the "VAT Act".

The illegalities in the proceeding do not stop here rather are perpetuated **36** by the mechanical discharge by the assessing authority who has blindly

proceeded on the audit objection without recording any satisfaction as to its lawfulness as per the mandate of rule 25(1) of "the Rules".

37 Rule 25 of "the Rules" has been reproduced by us above and provides for the procedure for holding assessment/reassessment on an audit objection by the "CAG". A plain reading of the provisions would manifest that a discharge by the prescribed authority on receipt of an audit objection by the "CAG" is not mechanical, rather he is to draw satisfaction on its lawfulness and it is only after he records his assent or dissent thereon that he can proceed thereafter. The two situations stand discussed in sub-rules (1) and (2) respectively and in case the prescribed authority is satisfied to the lawfulness of the audit objection then after giving opportunity to the dealer under sub-section (3) that he shall proceed to hold assessment in the manner provided under rule 24 of "the Rules". However in case he is not satisfied with the audit objection then after recording reasons he shall communicate his views to the Commissioner together with the copy of the original order and the audit objection recorded by the "CAG".

38 A plain reading of the notice forwarding the audit objection impugned at annexure 5 would reflect that no such satisfaction is recorded by the prescribed authority on the audit objection rather it is by simply enclosing a copy of the audit report of the "CAG" that the petitioner has been asked to give his response.

39 The issue as regarding the manner of discharge by the prescribed authority under rule 25 of "the Rules" was a subject matter of writ petition arising from CWJC No. 22765 of 2018 and CWJC No. 23380 of 2018 (*Molson Coors Cobra India Pvt. Ltd.* v. *State of Bihar* [2020] 77 GSTR 235 (Patna)) and this court having examined the statutory provisions which also finds discussed hereinabove has struck down a similar audit objection by the "CAG" which was followed by an identical mechanical discharge by the assessing officer.

40 As already noted, a cursory glance of the assessment order passed under section 33 read with section 39 of the "VAT Act" impugned at annexure 8 would again confirm a complete non-application of mind by the prescribed authority who appears to be thoroughly confused on his statutory discharge for even when he opens up with an exercise of power drawn from section 33 of the "VAT Act" while imposing penalty, he seeks refuge under section 31(2) of the "VAT Act" which is not available to a proceeding initiated on an audit objection made by the "CAG" under section 33.

41 Mr. Giri has also raised an issue that the order was passed ex parte but considering that the petitioner did respond to the notice vide annexure 5 and kept taking time on the pretext of pending assessment for the financial

years 2015-16 and 2016-17, it is not a case of ex parte assessment rather a case of the petitioner failing to respond to the notice. To that extent we do not subscribe with the arguments advanced by Mr. Giri.

Having heard learned counsel for the parties and for the reasons and discussions that we have held above, we are persuaded to hold that neither the discharge by the "CAG" to record their audit objection at annexure 5 is in tune with the statutory prescriptions because the provision underlying the "VAT Act" does not vest jurisdiction in the "CAG" to hold audit on the basis of deemed assessment and thus the audit report is held illegal and without statutory support and consequentially the assessment proceeding based thereon are rendered illegal because not only the prescribed authority has proceeded on an illegal audit objection rather he has also failed to record his satisfaction as to the lawfulness of the audit objection and has mechanically proceeded to draw the proceeding under section 33 of the "VAT Act" completely unmindful of the obligation cast on him under rule 25(1) and (2) of "the Rules". **42**

The entire proceeding thus culminating in the assessment order and the demand notice impugned at annexures 8 and 8/1 respectively are outcome of an infracted proceeding not only on statutory violation but also on the manner of discharge. Accordingly the entire proceeding culminating in the assessment order impugned at annexure 8 together with the demand notice impugned at annexure 8/1 are quashed and set aside. **43**

In so far as the interlocutory applications are concerned, in our opinion in the nature of relief claimed in the writ petition, the relief sought to be incorporated through interlocutory applications cannot be permitted to be espoused in the present proceeding for they raise separate cause of action and if so advised, the petitioner can take recourse to independent proceeding for such cause. **44**

The writ petition is allowed. **45**

[2020] 77 GSTR 260 (Patna)

[IN THE PATNA HIGH COURT]

KALIKA COOLING SYSTEM

v.

STATE OF BIHAR AND OTHERS

JYOTI SARAN and **PARTHA SARTHY** JJ.

July 18, 2019.

HF ▶ Assessee

VALUE ADDED TAX—REASSESSMENT—ESCAPED TURNOVER—LIMITATION—ASSESSING AUTHORITY—AUDIT—ASSESSMENT YEAR 2012-13—RETURNS SUBMITTED BY PETITIONER BUT NO SCRUTINY OR ASSESSMENT CARRIED OUT BEFORE "DUE DATE", I.E., DECEMBER 31, 2013—DEPARTMENTAL AUDIT ON RETURNS AND NOTICE ISSUED—AUDIT WITHIN PERIOD OF LIMITATION—ASSESSING AUTHORITY REOPENING PROCEEDINGS UNDER SECTION 31 BASED ON DEPARTMENT AUDIT AND CULMINATING IN ORDER OF REASSESSMENT—ACCOUNT OF PETITIONER ATTACHED—REVISION PENDING BEFORE COMMISSIONER AND STAY APPLICATION NOT ENTERTAINED—WRIT PETITION TO RELEASE BANK ACCOUNT ATTACHED FOLLOWED BY INTERLOCUTORY APPLICATION QUESTIONING ASSESSMENT PROCEEDINGS—INITIATION OF PROCEEDINGS AND CULMINATION IN REASSESSMENT ORDER WITHIN PERIOD OF LIMITATION ON FACTS—ASSESSING AUTHORITY NOT RECORDED ITS OPINION ON CORRECTNESS OF AUDIT OBJECTION AND SATISFACTION THEREON BEFORE ISSUING NOTICE UNDER SECTION 31—ASSESSMENT ORDER, DEMAND NOTICE ALONG WITH ATTACHMENT NOTICE TO BE QUASHED—MATTER REMITTED TO ASSESSING AUTHORITY FOR FRESH CONSIDERATION—BIHAR VALUE ADDED TAX ACT (27 of 2005), ss. 22, 24, *Expln.*, 26, 27, 31, 74—BIHAR VALUE ADDED TAX RULES, 2005, r. 22(8), (c).

The petitioner filed his returns on August 31, 2013 for the assessment year 2012-13 ending on March 31st disclosing particulars in terms of the provision underlying section 24 of the Bihar Value Added Tax Act, 2005. Since no scrutiny or assessment was carried out before the due date within the meaning of the Explanation *attached to section 24 of "the Act", i. e., by December 31, 2013 relatable to the financial year 2012-13, in terms of the provisions underlying section 26(1) of the Act the returns were deemed assessed. A departmental audit followed under section 26(3) of the Act on the returns filed by the petitioner in the light of order dated March 10, 2015 when notice was issued to the petitioner to co-operate. The petitioner responded to the*

notice and participated in the audit which was completed on May 25, 2016. The report was approved by the Joint Commissioner, Audit, who recommended for action thereon and consequentially, a proceeding under section 31(1) of the Act was drawn on October 23, 2017 when notice was issued to the petitioner and it got concluded by order dated March 31, 2018. The petitioner approached the Commissioner under section 74 of the Act by application which remained pending. The account of the petitioner was attached through memo dated January 24, 2019, notice issued under section 47 of the Act and since the revision of the petitioner was not being heard by the Commissioner nor the stay application being entertained he filed a writ petition seeking a direction in the nature of mandamus to release the bank account of the petitioner from attachment under section 47 of "the Act". The petitioner also prayed for a direction to the Commissioner to decide the revision application which remained pending before him. During the course of consideration of such prayer an issue arose on the validity of the assessment proceedings and the petitioner had filed the interlocutory application to question the proceedings itself which had since been allowed by the court :

Held, *that the departmental audit had been done within the limitation prescribed under section 26(3) of the Act. A conjoint reading of section 31 and section 27 would confirm that while liberty had been granted to the assessing authority to proceed in the matter of reassessment based on a departmental audit made under section 26(3) of the Act, within four years of the "due date", the outer-limit for conclusion of such obligation was found in the third proviso attached to section 27 (outer-limit provided for conclusion of proceeding on reopening of such assessment, was two years from the date of initiation) for the reason that the omission or failure or non-disclosure had been treated equivalent to a non-filing of the return as manifest from the legislative intent. Therefore the reopening of the proceedings under section 31 and its culmination in the order of reassessment dated March 31, 2018 as well as the consequential demand notice dated March 31, 2018 were within the period of limitation prescribed.*

(ii) That the assessing authority had failed on his obligation as cast upon him under section 31(1) of the Act read alongside rule 22(8)(c) of the Rules framed thereunder, whereby the Legislature had cast an obligation on the assessing authority to not only record its opinion on the correctness of the audit objection but also to record satisfaction thereon before he proceeded to issue a notice thereunder. The order dated October 23, 2017 showed that proceeding had been mechanically initiated by the assessing authority on a simple consideration of the departmental audit objection and on receipt of the

report. The extract of the provisions relevant for consideration were a confirmation of the responsibility cast on the assessing authority regarding formation of "opinion" as well as of recording "satisfaction" warranting reopening of assessment. There was complete absence of either "opinion" expressed by the assessing authority or any "satisfaction" drawn as mandated under section 31(1) and rule 22(8) of "the Rules" which was an essential prerequisite to be satisfied before he proceeded to initiate any such proceeding to reopen the assessment. Therefore the assessment order dated March 31, 2018 together with the demand notice of the same date, along with the attachment notice dated January 24, 2019, were quashed and set aside. The revision application filed by the petitioner under section 74 of the Act pending before the Commissioner was rendered infructuous.

[*The matter was remitted to the assessing authority who would consider the audit objection and proceed in the matter in accordance with law within a maximum period of three months from the date of receipt/production of a copy of this judgment.*]

MOLSON COORS COBRA INDIA PVT. LTD. *v.* STATE OF BIHAR [2020] 77 GSTR 235 (Patna) *applied*.

MOLSON COORS COBRA INDIA PVT. LTD. *v.* STATE OF BIHAR [2020] 77 GSTR 235 (Patna) (para 19) *referred to*.

Civil Writ Jurisdiction Case No. 8478 of 2019.

Chiranjiva Ranjan for the petitioner.

Vikash Kumar, Standing Counsel-11, for the respondents.

JUDGMENT[1]

The judgment of the court was delivered by

1 JYOTI SARAN J.—Heard Mr. Chiranjiva Ranjan, learned counsel appearing for the petitioner and Mr. Vikash Kumar, learned standing counsel No. 11 for the State.

Re : I. A. No. 1 of 2019 :

2 This interlocutory application is filed to question the assessment proceedings itself held by the assessing authority in purported exercise of power vested in him under section 31 of the Bihar Value Added Tax Act, 2005 (hereinafter referred to as "the Act") and the Rules framed thereunder, inter alia, on grounds that it was barred by limitation and thus, void ab initio. Mr. Chiranjiva Ranjan, learned counsel for the petitioner while admitting to the position that a revision application bearing C. C. No.(s)

1. Oral.

404 of 2018-19 under section 74 of "the Act" is pending disposal before respondent No. 2, would submit that where action complained itself is void, the petitioner may not be relegated and the matter be disposed of accordingly.

In the nature of the issue that was raised that we permit the petitioner to question the proceedings in the present writ petition itself as it requires an interpretation of the statutory provisions and thus having heard learned counsel for the parties, we are persuaded to allow the petitioner to question the assessment proceedings itself in the present writ petition. Consequentially, I. A. No. 1 of 2019 filed in the present writ petition is allowed. 3

Re : CWJC 8478 of 2019 :

As we have observed above, the writ petition was initially filed, seeking a direction in the nature of mandamus to release the bank account of the petitioner from attachment under section 47 of "the Act". The petitioner also prayed for a direction to the Commissioner of Commercial Taxes, Bihar respondent No. 2 to decide the revision application which remains pending before him. It is because during the course of consideration of such prayer of the petitioner an issue arose on the very validity of the assessment proceedings that the petitioner seeking leave has filed the interlocutory application to question the proceedings itself and which has since been allowed by us as recorded above. We thus have proceeded to consider the validity of assessment proceeding itself on its exercise under section 31 of "the Act" read alongside rule 22 of "the Rules" framed thereunder and section 27 of "the Act". 4

The matter in contest relates to assessment year 2012-13 ending on March 31, 2013. The petitioner filed his returns on August 31, 2013 disclosing particulars in terms of the provision underlying section 24 of "the Act". Since no scrutiny or assessment was carried out before the "due date" within the meaning of the explanation attached to section 24 of "the Act", i. e., by December 31, 2013 relatable to the financial year 2012-13, that in terms of the provisions underlying section 26(1) of "the Act" the returns were deemed assessed. A departmental audit followed under section 26(3) of "the Act" on the returns filed by the petitioner in the light of Order No. 14 dated March 10, 2015 when notice was issued to the petitioner to co-operate. The petitioner responded to the notice and participated in the audit as manifest from the order recorded on April 28, 2016 in the file relating to the proceedings in question produced by Mr. Vikash Kumar, learned SC-11. Since the provision of section 26(3) of "the Act" gives liberty to the Department to hold internal audit within 36 months of the due date of the year to which the return relates, we find no infirmity in 5

the audit so held and which was completed on May 25, 2016 as manifest from the report of the Deputy Commissioner, Commercial Taxes (Audit), East Division, Patna also present in the file. The report was approved by the Joint Commissioner, Audit who recommended for action thereon vide order dated May 28, 2016 and consequentially, a proceeding under section 31(1) of "the Act" was drawn on October 23, 2017 when notice was issued to the petitioner through Memo No. 3463 dated October 23, 2017 as also confirmed from the order sheet in the file.

6 The petitioner perhaps did not participate in the reassessment despite notice and which got concluded vide order dated March 31, 2018, a copy of which is enclosed at annexure 1 to the writ petition with the demand notice at annexure 1/2. It is raising various grounds to question the order of reassessment that the petitioner approach the Commissioner under section 74 of "the Act" vide application at annexure 2 and which remains pending. It is when the account of the petitioner was attached through Memo No. 451, dated January 24, 2019 through notice issued under section 47 of "the Act" impugned at annexure 3 and since the revision of the petitioner was not being heard by the Commissioner nor the stay application being entertained that he approached this court and for the reasons that we have recorded above, we have allowed him to question the reassessment proceeding including the attachment order on its validity.

7 Mr. Chiranjiva Ranjan has questioned the reopening of the proceedings under section 31 and its culmination in the order of reassessment dated March 31, 2018 as well as the consequential demand notice also dated March 31, 2018 on grounds that it is an exercise without jurisdiction, inasmuch as according to the petitioner it is hopelessly barred by limitation as well as on grounds that the pre-requisites to such exercise is not satisfied. The argument has been contested by Mr. Vikash Kumar, learned SC-11 on grounds that the assessment is within the limitation prescribed under "the Act".

8 We have already recorded that the audit was held within the limitation prescribed and thus the two issues which fall for consideration is :

(a) Whether the time-limit prescribed under section 31 of "the Act" has been followed in the present case, and

(b) Whether the exercise under section 31 of "the Act" alongside rule 22 of "the Rules" is in tune with the stipulations.

9 While Mr. Chiranjiva Ranjan, learned counsel appearing for the petitioner has reiterated the position as we have already noted above to question the proceedings on limitation, Mr. Vikash Kumar, learned SC-11 has taken us through the provisions of section 31 of "the Act" to submit that

the period prescribed thereunder requires the assessing authority to initiate action for reassessment but the outer limit to conclude such proceeding so initiated is provided under section 27 and which allows the assessing authority to complete the proceeding within a period of two years of such initiation.

10 Placing reliance on the order dated October 23, 2017 of the assessing authority as present in the order-sheet, he submits that a notice under section 31 of "the Act" was issued on October 23, 2017 and which confirms that the proceeding initiated was within a period of four years from the due date which in the present case would be December 31, 2013 and expiring only on December 31, 2017, i.e four years from the due date within the meaning of section 24 of "the Act".

11 Proceeding here from it is the submission of Mr. Vikash Kumar that a notice issued for reopening of the assessment under section 31(1) of "the Act" inter alia on grounds of concealment, omission or failure to disclose full and correct particulars of sale or purchase or input-tax credit, has been treated to be a notice under section 27 of "the Act" and a plain reading of the third proviso attached to section 27 would confirm that the outer limit provided for conclusion of proceeding on reopening of such assessment, is two years from the date of initiation.

12 According to Mr. Vikash Kumar while the limit for initiation of a proceeding under section 31(1) is provided in the said section, the culmination of such proceedings can be found in the third proviso to section 27 of "the Act" because a default of the kind noted in section 31 which leads to reopening of an assessment, has been treated equivalent to a default of non-filing of return.

13 We are in complete agreement with the submission of Mr. Vikash Kumar, learned SC-11 for a conjoint reading of section 31 and section 27 would confirm that while liberty has been granted to the assessing authority to proceed in the matter of reassessment based on a departmental audit made under section 26(3) of "the Act", with four years of the "due date", the outer limit for conclusion of such obligation is found in the third proviso attached to section 27 and the reason is because the omission or failure or non-disclosure has been treated equivalent to a non-filing of the return as manifest from the legislative intent. Having observed thus, we find no infirmity in so far as the issue of limitation raised by Mr. Ranjan is concerned and we hold the proceedings to be within time.

14 In our opinion the problem for the State does not end here and we say so because even though the departmental audit has been done within the limitation prescribed under section 26(3) and even the initiation under

section 31(1) of "the Act" and its culmination has taken place within the period stipulated as held by us but while doing so the assessing authority has failed on his obligation as cast upon him under section 31(1) of "the Act" read alongside rule 22(8)(c) of "the Rules" framed thereunder, whereby the Legislature has cast an obligation on the assessing authority to not only record its opinion on the correctness of the audit objection but also to record satisfaction thereon before he proceeds to issue a notice thereunder.

15 It is in compliance of our order dated July 11, 2019 that the records have been produced and we have gone through the orders passed in the proceedings.

16 In our considered opinion, the assessing authority has completely failed on his discharge and which is confirmed from the order dated October 23, 2017 whereby proceeding has been mechanically initiated by the assessing authority on a simple consideration of the departmental audit objection and on receipt of the report. For the sake of convenience we reproduce the relevant extracts of section 31 as well as rule 22(8)(c) of "the Rules" which are self eloquent of discharge expected of an assessing authority : based upon a departmental audit.

> "31. *Assessment or reassessment of tax of escaped turnover.*—(1) *If the prescribed authority is satisfied, either on the basis of audit conducted* under sub-section (3) of section 26 or otherwise, that reasonable ground exist to believe that, in respect of any assessment under this Act or under the Bihar Finance Act, 1981 (Bihar 5 of 1981), as it stood before its repeal by section 94, during any period, any sale or purchases of goods liable to tax under this Act or the said Act, for any reason, has been under-assessed or has escaped assessment, or has been assessed to tax at a lower rate, or any deduction therefrom has been wrongly made, or an input tax credit has incorrectly been claimed ; the prescribed authority shall, in such manner as may be prescribed and after serving on the dealer a notice in the form and in the manner prescribed, proceed to assess or re-assess, as the case may be, the tax payable by such dealer within four years from the expiry of the year during which the original order of assessment or re-assessment was passed, in a case where the dealer has concealed, omitted or failed to disclose full and correct particulars of such sale or purchase or input tax credit, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice under this sub-section was a notice under section 27 :
>
> Provided that the amount of tax shall be assessed or re-assessed after allowing such deductions as were allowable during the said

period and at the rates at which it would have been assessed had the turnover not escaped assessment.

. . .

R. 22. *Audit and reassessment of tax*.—. . .

(8)(a) A copy of the final audit report, drawn up by the audit team in terms of the provisions of sub-rule (7) shall be forwarded by the Joint Commissioner, incharge of the audit to the concerned circle incharge within two months of the preparation of the final audit report.

(b) The concerned circle incharge shall allot the file to any officer posted under him.

(c) *If, after considering the final report, the officer to whom the file has been allotted is of the opinion that the dealer had not disclosed his correct tax liability* or had concealed or omitted any fact or, as the case may be, presented any fact in such a manner, that has led to any reduction in the tax payable by the dealer, he shall proceed to initiate proceedings under section 31 of the Act :

Provided no reassessment under section 31 shall be made unless the dealer is served with a notice in from N-V." (emphasis supplied[1] by us).

17 The extract of the provisions relevant for consideration reproduced above are a confirmation of the responsibility cast on the assessing authority regarding formation of "opinion" as well as of recording "satisfaction" on the default warranting re-opening of assessment.

18 Though Mr. Vikash Kumar, learned SC-11 has tried to justify the action but the records fail the justification because there is complete absence of either "opinion" expressed by the assessing authority or any "satisfaction" drawn as mandated under section 31(1) and rule 22(8) of "the Rules" which is an essential prerequisite to be satisfied before he proceeds to initiate any such proceeding to reopen the assessment.

19 The issue of re-opening of assessment resting on the audit objection by the Comptroller and Audit General under section 33 of "the Act" was a subject-matter of a judgment rendered by this court reported in [2020] 77 GSTR 235 (Patna) ; [2019] 3 BLJ 414 (*Molson Coors Cobra India Pvt. Ltd.* v. *State of Bihar*), to conclude that a reopening of assessment based on audit objection is not a mechanical exercise because a concluded exercise under "the Act" in respect of a dealer, is sought to be questioned by the audit and thus before the assessing authority proceeds to act thereupon, he

1. Here italicised.

has to record his satisfaction as to the objection recorded and whether it warrants any further action. Unfortunately despite such issues having been settled by courts in catena of judgments, the statutory authorities discharging obligation under "the Act", remain oblivious of their obligation as well as the duty cast under the statute.

20 Though Mr. Chiranjiva Ranjan advocates for putting a quietus to the matter on lapse but since the initiation is within the time frame and indulgence is invited on account of procedural irregularity in the proceeding, we are persuaded to remit the matter to the assessing authority, who shall consider the audit objection and proceed in the matter in accordance with law bearing in mind the legal position settled, within a maximum period of three months from the date of receipt/production of a copy of this judgment.

21 In result, the assessment order dated March 31, 2018 together with the demand notice of the same date, impugned at annexures 1 and 1/2 to the writ petition, along with the attachment notice dated January 24, 2019, impugned at annexure 3, are quashed and set aside.

22 In view of the conclusion that we have drawn above, the revision application filed by the petitioner under section 74 of "the Act" bearing C. C. No.(s) 404 of 2018-19 pending before the Commissioner is rendered infructuous and is accordingly disposed of.

23 The writ petition is allowed with the directions above.

24 Let the record so produced by Mr. Vikash Kumar. Learned SC-11 be returned for its transmission to the Department.

[2020] 77 GSTR 268 (Guj)

[IN THE GUJARAT HIGH COURT]

ANOPSINH KIRITSINH SARVAIYA

v.

STATE OF GUJARAT

J. B. PARDIWALA and **BHARGAV D. KARIA** JJ.

February 6, 2020.

HF ▶ Petitioner

GOODS AND SERVICES TAX—POWER OF INSPECTION, SEARCH AND SEIZURE—GODOWN CLOSED WITH A SEAL AFFIXED ON IT VIDE SEALING MEMOS DATED NOVEMBER 17, 2018 AND NOVEMBER 19, 2018—WRIT APPLICATION BY APPLICANT CLAIMING TO BE OWNER OF GODOWN AND

SUBMITTING THAT GODOWN GIVEN ON RENT TO FIVE DISTINCT ENTITIES, FOR STORING AGRICULTURAL PRODUCE, COULD NOT BE SEALED FOR INDEFINITE PERIOD OF TIME—REASONS RECORDED IN MEMOS FOR STOPPING FURTHER ACTION BY AUTHORITIES COULD BE IN FORM OF ACCUSATION AGAINST DEALERS—SEAL TO BE REMOVED WITHOUT PREJUDICE TO RIGHTS OF DEPARTMENT TO PROCEED AGAINST DEALERS IN ACCORDANCE WITH LAW—DIRECTION TO OFFICERS CONCERNED TO VISIT GODOWN ON SPECIFIED DATE, BREAK OPEN SEAL, SEARCH BY DRAWING APPROPRIATE PANCHNAMA—MAY SEIZE GOODS IF THERE IS REASON TO BELIEVE THAT GOODS STORED ARE LIABLE TO CONFISCATION—DIRECTION TO WRIT APPLICANT TO REMAIN PRESENT WITH DOCUMENTS EVIDENCING OWNERSHIP—CENTRAL GOODS AND SERVICES TAX ACT (12 OF 2017), S. 67—GUJARAT GOODS AND SERVICES TAX ACT (25 OF 2017).

Pursuant to the application of seal on a godown by sealing memos dated November 17, 2018 and November 19, 2018, respectively by the Central goods and services tax authorities in exercise of power under section 67 of the Goods and Services Tax Act, 2017 a writ application was filed by the applicant claiming to be an agriculturist and submitting that he owned the godown which had been given on rent to five distinct entities, to be used by them for the purpose of storing agricultural produce, the relationship between them being that of landlord and tenant. It was the case of the applicant that if the five dealers, had contravened any of the provisions of the Act or the Rules, then it was always open for the authorities to proceed against them in accordance with law and that he, being the owner of the godown, the seal which had been affixed, could not be for an indefinite period of time.

Held, *allowing the petition, that the provisions of section 67(2) and (4) made it clear that if the proper officer, either pursuant to a search carried out under sub-section (1) or otherwise had reasons to believe that any goods liable to confiscation or any documents or books, which in the opinion of the proper officer, might be useful or relevant to any proceedings or such goods were liable to be secreted to any place, then the proper officer might authorize in writing any other officer to search and seize them and clause (4) empowered the authorized officer to seal or break open the door of any premises where access to such premise was denied. If it was the case of the Department that the five dealers had stored goods or other articles which were liable to confiscation, then the authorities could have seized such goods and documents long time back. Once the goods and other articles were seized from the premises, then there could be no good reason to keep the godown in a sealed condition. In the case on hand, the writ applicant, being the owner of the godown was*

concerned with the seal which had been affixed and which continued till date. The seal could be removed without prejudice to the rights of the Department to proceed against the dealers in accordance with law.

[The court directed the concerned officials of the Department to make a statement that they would visit the place on a specified date, break open the seal and undertake the search of the godown by drawing appropriate Panchnama. If there were reasons to believe that the goods stored in the godown were liable to confiscation or any documents or books or things, which in their opinion, might be useful or relevant to any proceedings under this Act, then they might seize such goods, documents, etc. The court also directed the writ applicant to be present on that date with the documents evidencing ownership. The court viewed that the authorities could not insist for such documents and if they wanted to proceed against the five dealers, they might do so.]

R/Special Civil Application No. 2705 of 2020.

MS. Vaibhavi K. Parikh (3238) for petitioner No. 1.

Chintan Dave, Assistant Government Pleader/PP(99), for respondent No. 1.

ORDER[1]

The order of the court was made by

1 J. B. PARDIWALA J.—Rule returnable forthwith. Mr. Chintan Dave, 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 has prayed for the following reliefs :

> "(A) quash and set aside the sealing memos at annexure A (Colly) in relation to the Godown No. 14 situated at Marketing Yard, Gondal.
>
> (B) pending the admission, hearing and final disposal of this petition, stay the implementation and operation of the impugned sealing memos in relation to the Godown No. 14 situated at Marketing Yard, Gondal at annexure A (colly) ;
>
> (C) any other and further relief deemed just and proper be granted in the interest of justice.
>
> (D) to provide for the cost of this petition."

3 The facts, giving rise to this writ application, may be summarized as under :

1. Oral.

3.1 The writ applicant claims to be an agriculturist. It is his case that he owns a godown bearing No. 14, situated at the Marketing Yard at Gondal, District : Rajkot. According to him, the said Godown No. 14, situated at the Marketing Yard has been given on rent to five distinct entities, namely, (i) Ajayraj & Co., (ii) Dharamraj Exports, (iii) Kamani Exports, (iv) R. L. Enterprise, and (5) Ruturaj & Co. It is the case of the writ applicant that this particular godown is used by the above referred entities for the purpose of storing agricultural produce like cotton bales and cotton yarn. According to him, the relationship is that of landlord and tenant.

3.2 On November 17, 2018, the authorities under the CGST Act, visited the godown, and in exercise of power under section 67 of the Act, applied seal on the godown. The godown in question came to be sealed by the officials of the Department vide sealing memos dated November 17, 2018 and November 19, 2018 respectively. The sealing memo dated November 17, 2018 reads thus :

"*Office of the Deputy Commissioner of State Tax Enforcement, Div. I, Ahmedabad, Gujarat State, A4, Rajya Kar Bhavan, Ashram Road, Ahmedabad, 380 009.*

Date :

SEALING MEMO

M/s. Dharamraj Export

GSTN : 24AAKFD 8036B12R

Date of search : 17.11.2018 Time : 01:30 Hrs.

According to Central Goods and Services Tax Act, 2017 and Gujarat Goods and Services Tax Act, 2017 search activity has been conducted in the case above dealer/transporter but due to reason given below, it is decided to cessation the search activity for today.

Reasons :

Authorized person not present.

Place : Gondal Signature name

Date : 19.11.2018 Designation

Round Seal Dealer sign

Note :

1. This seal is done in the presence of two witness and decided to open at time to next search proceeding.

2. Any attempt on the part of the tamper with the sealing memo, books of account is punishable with imprisonment and/or fine under

the Act read with sections 179, 191 and 4128 of the Indian Penal Code."

3.3 The Sealing Memo dated November 19, 2018 reads thus ;

"*Office of the Additional State Tax Commissioner, B4, State Tax Bhavan, Ashram Road, Gujarat State, Ahmedabad, 380 009.*

Date : 19.11.2018

SEALING MEMO

M/s. Kamani Export

GSTN : 24AAPFR 2818MIZY

Date of search : 17.11.2018 Time : 1:30 p.m.

To 19.11.2018 Time : 5:30 p.m.

According to the Central Goods and Services Tax Act, 2017 and Gujarat Goods and Services Tax Act, 2017 search activity has been conducted in the case above dealer/transporter but due to reason given below, it is decided to cessation the search activity for today.

Reasons :

1. To avail wrong ITC.

2. Collected tax wrongly and not deposited to Government treasury.

3. Try to neglect searching team.

4. Non-co-operation in search process.

Place : Gondal Signature Name

Date : 19.11.2018 Designation

Round Seal Dealer sign

Note :

1. This seal is done in the presence of two witness and decided to open at time to next search proceeding.

2. Any attempt on the part of the tamper with the sealing memo, books of accounts is punishable with imprisonment and/or fine under the Act read with sections 179, 191 and 4128 of the Indian Penal Code."

3.4 It is the case of the writ applicant that if the five dealers, referred to above, have contravened any of the provisions of the Act or the Rules, then it is always open for the authorities to proceed against them in accordance with law. However, the grievance of the writ applicant is that he, being the owner of the godown, the seal which has been affixed, cannot be for an indefinite period of time. According to the writ applicant, if

the five dealers, referred to above, have stored anything in the godown in the form of goods or other documents, then they may be liable to confiscation, but being the owner of the godown, he has nothing to do with the alleged contravention of the provisions of the Act or the Rules.

3.5 It is in the aforesaid set of circumstances that the writ applicant is here before this court, seeking appropriate relief, as prayed for in this writ application.

3.6 Ms. Vaibhavi Parikh, the learned counsel appearing for the writ applicant would submit that there is no point in keeping the godown sealed for an indefinite period. According to Ms. Parikh, the authorities ought to have undertaken the search by breaking open the lock as they are empowered to do so under section 67(4) of the Act, and in the course of the search or inspection, if they would have found goods liable to confiscation, then such goods could have been seized. Ms. Parikh would submit that since 2018 till this date, there has been no further action on the part of the Department. According to Ms. Parikh, even as on date, the godown remains with the seal affixed way back in the year 2018.

3.7 Ms. Parikh would submit that her client, as the owner of the godown, is ready and willing to cooperate. She would submit that if the authorities would like to look into the documents of ownership, etc., then he is ready and willing to produce those documents. However, the seal should be now removed from the godown without prejudice to the right of the Department to proceed against the occupants or the users of the godown, i. e, the dealers.

On the other hand, this writ application has been vehemently opposed 4
by Mr. Dave, the learned Assistant Government Pleader appearing for the State-respondents. According to Mr. Dave, the action which has been taken by the GST Authorities is in accordance with law. According to Mr. Dave, the Department has the information that the five dealers, who are jointly in occupation of the godown and who have stored their goods in the godown, have contravened the provisions of the Act and the Rules and, therefore, they are liable to be proceeded in accordance with law. Mr. Dave would submit that the authorities have the power under section 67(4) of the Act to affix the seal on the premises. According to Mr. Dave, as on date, there is nothing with the Department, on the basis of which, it can come to the conclusion that the writ applicant is the owner of the godown in question and the dealers are the tenants of the writ applicant. In such circumstances, referred to above, Mr. Dave prays that there being no merit in this writ application, the same be rejected.

5 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 writ applicant is entitled to the reliefs as prayed for in this writ application.

6 We may straightway, once again, look into the sealing memos. The plain reading of the contents of the sealing memos would indicate that after the seal was affixed, the authorities had to stop further action for the reasons recorded in the memos. The reasons recorded in the memos are as under :

"(1) To avail wrong ITC.

(2) Collected tax wrongly and not deposited to Government treasury.

(3) Try to neglect searching team.

(4) Non-co-operation in search process."

7 In one of the memos, it has been stated that the place of business is found to be closed and no authorized person was found to be present. We are not able to understand how could such grounds be the reason for not taking further action in the matter. What has been stated above could be in the form of accusation against the dealers, for which, it is always open for the Department to proceed in accordance with law. It is not the case of the respondents that the writ applicant is also involved along with the dealers in one way or the other. Section 67 of the Act, 2017 is with regard to power of inspection, search and seizure. Section 67(2), relevant for our purpose, reads thus ;

"67(2) *Where the proper officer, not below the rank of Joint Commissioner, either pursuant* to an inspection carried out under sub-section (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 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."

Section 67(4), also relevant for our purpose, reads thus : 8

> "67. (4) The officer authorised 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."

The plain reading of the aforesaid two provisions of law makes it clear 9 that if the proper officer, not below the rank of Joint Commissioner, either pursuant to a search carried out under sub-section (1) or otherwise has reasons to believe that any goods liable to confiscation or any documents or books, which in the opinion of the proper officer, may be useful or relevant to any proceedings which may be undertaken or such goods are liable to be secreted to any place, then the proper officer may authorize in writing any other officer of the State tax to search and seize the goods, documents or books or things. Clause (4), referred to above, empowers the authorized officer to seal or break open the door of any premises where access to such premise is denied.

If it is the case of the Department that the five dealers have stored goods 10 or other articles which are liable to confiscation, then the authorities could have seized such goods and documents long time back. Once the goods and other articles are seized from the premises, then there could be no good reason to keep the godown in a sealed condition. In the case on hand, the writ applicant, being the owner of the godown is concerned with the seal which has been affixed and which continues as on date.

In the case on hand, we have not been shown anything to indicate that 11 the proper officer had any reasons to believe that the goods stored in the godown in question are liable to confiscation. However, for the time being, we are not going into this issue. We are trying to find a way out, by which, the seal can be removed without prejudice to the rights of the Department to proceed against the dealers in accordance with law.

We dispose of this writ application with the following directions : 12

> "(i) The officials of the Department, who are present in the court today for the purpose of assisting the learned Assistant Government Pleader, makes a statement that they will visit the place where the godown in question is situated on February 10, 2020 at 2 p.m. They further make a statement that they will break open the seal and undertake the search of the godown by drawing appropriate Panchnama. If there are reasons to believe that the goods stored in the godown are liable to confiscation or any documents or books or things, which in their opinion, may be useful or

relevant to any proceedings under this Act, then they may seize such goods, documents, etc.

(ii) Once the aforesaid exercise is completed, it shall be open for the writ applicant to take over the possession of the godown. At the same time, we direct the writ applicant to remain present on February 10, 2020 at 2 p.m. at the place where his godown is situated with the documents evidencing ownership. However, the authorities should not be more concerned with the contractual relationship between the writ applicant and the dealers. We are still not able to understand why the authorities, under the GST Act, are insisting for proof of ownership and rent agreement. We are of the view that the authorities cannot insist for such documents. If they want to proceed against the five dealers, they may proceed. They should be concerned with the goods or other articles stored in the godown which may be liable to confiscation. There is no point in keeping the godown closed with a seal affixed on it.

13 With the above directions, this writ application is disposed of.

Direct service is permitted.

[2020] 77 GSTR 276 (Guj)

[IN THE GUJARAT HIGH COURT]

GUJARAT CO-OPERATIVE MILK MARKETING FEDERATION LIMITED

v.

UNION OF INDIA

MS. HARSHA DEVANI and **MS. SANGEETA K. VISHEN** JJ.

December 13, 2019.

HF ▶ Assessee

GOODS AND SERVICES TAX—EXEMPTION—MILK—AGRICULTURAL PRODUCE—SUPPORT SERVICES—CHILLING AND PACKING SERVICES PROVIDED BY CONTRACTORS TO PETITIONERS (DISTRICT CO-OPERATIVE SOCIETIES OF FARMERS AND AGRICULTURISTS OPERATING PLANTS KNOWN AS DAIRIES ENGAGED IN PRODUCING MILK AND MILK PRODUCTS IN RESPECT OF RAW UNPROCESSED MILK)—ARE SUPPORT SERVICES TO AGRICULTURAL PRODUCE—EXEMPTED BY VIRTUE OF SERIAL NO. 24 OF TABLE TO NOTIFICATION NO. 11/2017-CENTRAL TAX (RATE) DATED JUNE 28, 2017—LETTER/CIRCULAR DATED AUGUST 9, 2018 NOT IN CONSONANCE WITH PROVISIONS CONTAINED IN SERIAL NO. 24 OF TABLE TO NOTIFICATION NO. 11/2017,

DATED JUNE 28, 2017 AND CANNOT BE SUSTAINED—CENTRAL GOODS AND SERVICES TAX ACT (12 OF 2017)—GUJARAT GOODS AND SERVICES TAX ACT (25 OF 2017).

Petitioner No. 1 (Gujarat Co-operative Milk Marketing Federation Limited) was a co-operative society registered under the Gujarat Co-operative Societies Act, 1961, an apex body for marketing of milk and milk products produced by the various District Co-operative Milk Producers Unions which were co-operative societies of farmers and agriculturists of various districts and were also registered as co-operative societies under the said Act. Petitioners Nos. 2 to 5 were four of such district co-operative societies which were members of the federation and were operating plants popularly known as dairies engaged in the activities of producing milk and milk products on co-operative principles and the goods so produced by the dairies were sold and marketed by the federation. In the normal course of their activities, petitioner Nos. 2 to 5 had engaged various contractors for maintaining and operating milk chilling centres, where services of chilling, storing of milk and packing thereof in respect of pouch packing of milk were provided to the dairies under regular agreements and chilling charges as well as packing charges were paid to the service providers in accordance with the rates agreed between the parties. After the introduction of the goods and services tax laws with effect from July 1, 2017, support services to agriculture, forestry, fishing and animal husbandry were classified under Heading 9986 of the GST Tariff. At Serial No. 24 of the Table to the Notification No. 11/2017-Central Tax (Rate), dated June 28, 2017, specifying effective rates of GST for various services, support services to agriculture, forestry, fishing and animal husbandry were specified and a nil rate of tax was prescribed by the Central Government in respect of CGST as well as IGST without laying any condition for these services. By virtue of the Explanation *under Serial No. 24 of the notification, the Government had explained as to what were the support services qualifying for nil rate of tax. The term "agricultural produce" was also explained by virtue of paragraph 4(vii) of the notification. It was the case of the petitioners that since any produce out of rearing of any life form of animals was considered to be an agricultural produce for the notification, milk was an agricultural produce for the purpose of this notification, inasmuch as milk was a produce out of rearing of animals like cows and buffalos and that since packing as well as storage of agricultural produce was considered to be support service to agriculture for the purpose of this notification, chilling and packing of agricultural produce like milk were support services to agriculture, and hence chargeable to nil rate of tax. Accordingly a letter dated August 1, 2018 was*

submitted by the Federation before the Government of India seeking confirmation about rate of GST being nil for milk chilling and packing services. In reply thereto, Circular F. No. 354/292/2018-TRU, dated August 9, 2018, had been issued by the Government of India through its tax research unit whereby it was clarified that chilling and packing of milk was not exempted from GST. It was also clarified that services by way of job-work in relation to all food and food products falling under Chapters 1 to 22 attracted GST at the rate of five per cent. and accordingly, the activity of chilling and packing of milk by the job-workers attracted GST at the rate of five per cent. The petitioners filed a writ petition contending that the Central Government had granted exemption to milk chilling, storage and packing service by virtue of Serial No. 24 of Notification No. 11/2017, dated June 28, 2017, but this exemption was now denied to the petitioners by virtue of Circular F. No. 354/292/2018-TRU, dated August 9, 2018 issued by the TRU :

Held, *allowing the petition, (i) that vide Notification No. 11/2017, dated June 28, 2017, services falling under Heading 9986 were exempted from payment of tax under Central Goods and Services Tax Act, 2017, State Goods and Services Tax Acts, 2017, Union Territory Goods and Services Tax Act, 2017 and the Integrated Goods and Services Tax Act, 2017. The services falling under clause (i) of the Heading 9986 were "support services to agriculture, forestry, fishing, animal husbandry". The* Explanation *to clause (i), defined "support services to agriculture, forestry, fishing, animal husbandry and Note 4 below the notification defined agricultural produce". It was not in dispute that milk was an agricultural produce, it being a produce out of rearing of life forms of animals and for food. The present case related to raw and unprocessed milk. What was brought to the centres was raw milk in which no further processing had been done and therefore, such milk was an agricultural produce. The chilling and packing services provided by the contractors to the petitioners were in respect of raw milk. As farmers involved in rearing animals for the purpose of milk could not directly connect to each of the consumers of the supply of milk, such farmers joined hands to form a village co-operative society and supplied milk to the member unions. It could not be disputed that for storage of milk it would have to be chilled. Milk could not be stored without chilling as otherwise it would get spoiled. Therefore, storage of milk would include chilling of milk. Chilling of milk did not alter any of its essential characteristics and it still remained raw milk, and it was this raw milk which was thereafter packed. Consequently, if the raw milk was only stored and packed, the support services would fall under Heading 9986 of the table to Notification No. 11/2017-Central Tax (Rate). Therefore milk*

chilling and packing service provided by the contractors to the petitioners were exempted by virtue of serial No. 24 of the table to Notification No. 11/ 2017-Central Tax (Rate) dated June 28, 2017.

(ii) That a perusal of the impugned circular showed that it had been issued in the context of the subject : GST on job-work charges for chilling and packing of milk. On a perusal of paragraph 3 of the impugned circular, it was evident that the same was based on sub-clause (c) of clause (i) of the Explanation *to clause (i) under heading 9986, inasmuch as, according to the respondents the process of chilling and packing of milk was not usually done by the cultivator or producer and were not carried out at an agricultural farm. If the petitioners were claiming that the support services to agricultural produce fell under sub-clause (c) of clause (i) of the* Explanation, *the respondents might have been justified in coming to such conclusion. However, it was the case of the petitioners that the support services were of packing and storage of agricultural produce falling under sub-clause (e) of clause (i) of the* Explanation *which read thus : "(e) loading, unloading, packing, storage or warehousing of agricultural produce".*

(iii) That the support services were not provided to chilled and packed milk, but support services of storage and packing were provided to raw milk which was an agricultural produce. Therefore, it could not be said that chilled and packed milk for retail sale was not covered by the definition of agricultural produce. It was sub-clause (c) of clause (i) of the Explanation *which required processes to be carried out at an agricultural farm; whereas, sub-clause (e) did not contain any such prescription. Therefore it could not be said that such processes were not carried out at an agricultural farm.*

(iv) That the present case related to providing services of storage and packing and not transportation and hence, no reliance could be placed on entries for transportation of agricultural produce and for transportation of milk (Serial Nos. 20 and 21) of Notification No. 12/2017-Central Tax (Rate) dated June 28, 2017).

(v) That in the impugned circular, it was also stated that chilling and packing was not exempt from GST inasmuch as services by way of job-work in relation to all food and food products falling under Chapters 1 to 22 attracted levy of GST at five per cent. and therefore, the activity of chilling and packaging of milk provided by way of job-work attracted levy of GST at five per cent. In this regard, the levy of five per cent. GST on job-work on food and food products falling under Chapters 1 to 22 would be attracted if the services provided were not "support services" as contemplated under clause (i) of Heading 9986 at Serial No. 24 of the table to Notification No. 11/2017,

dated June 28, 2017. Therefore the interpretation given by the respondents to the activities of chilling and packing of milk as contained in the impugned letter/circular dated August 9, 2018 was not in consonance with the provisions contained in Serial No. 24 of the Table to Notification No. 11/2017, dated June 28, 2017 and, therefore, the impugned letter/circular could not be sustained.

R/Special Civil Application No. 8320 of 2019.

Amal Paresh Dave (8961) and *Paresh M. Dave* (260) for petitioner Nos. 1, 2, 3, 4 and 5.

Ms. Trusha K. Patel (2434) and *Viral K. Shah* (5210) for respondent Nos. 1, 2 and 3.

JUDGMENT[1]

The judgment of the court was delivered by

1 MS. HARSHA DEVANI J.—By this petition under article 226 of the Constitution of India, the petitioners have challenged the letter/Circular F. No. 354/292/2018-TRU, dated August 9, 2018 issued by the Government of India through the tax research unit (hereinafter referred to as "TRU"). The petitioners also seek a declaration that milk chilling and packing services provided by the contractors to the petitioners' dairies are exempted by virtue of Serial No. 24 of the table to Notification No. 11/2017-Central Tax (Rate), dated June 28, 2017. The petitioners also seek a direction to the respondents to return the amount recovered and collected from the petitioners through their contractors as GST on milk chilling and packing services.

2 Petitioner No. 1–M/s. Gujarat Co-operative Milk Marketing Federation Limited is a co-operative society, registered under the Gujarat Co-operative Societies Act, 1961. The Federation is an apex body for marketing of milk and milk products produced by the various District Co-operative Milk Producers Unions which are co-operative societies of farmers and agriculturists of various districts and are also registered as co-operative societies under the said Act. Petitioner Nos. 2 to 5 are four of such district co-operative societies which are members of the Federation. Petitioner Nos. 2 to 5 are operating plants popularly known as dairies for production of milk and milk products.

3 The dairies are engaged in the activities of producing milk and milk products on co-operative principles and the goods so produced by the dairies are sold and marketed by the Federation.

1. Oral.

Prior to July 1, 2017, that is before the goods and services tax laws came into force, the goods produced by the dairies were excisable goods covered under various chapters of the First Schedule to the Central Excise Tariff Act, 1985. Prior to July 1, 2017, a few of the products were chargeable to excise duty, whereas most of the products like milk, milk powder, etc., were chargeable to nil rate of excise duty. Most of the activities like chilling of milk and packing of milk were also not chargeable to any Central excise duty or service tax at that time. 4

In the normal course of their activities, petitioner Nos. 2 to 5 have engaged various contractors for maintaining and operating milk chilling centres, where milk belonging to the dairies is stored at a particular temperature. In addition to providing such services of chilling and storing of milk, the contractors are also providing packing service to the dairies in respect of pouch packing of milk. Regular agreements are made between the dairies and such contractors, most of whom are individuals or firm of individuals. 5

It is the case of the petitioners that the dairies have been paying milk chilling charges as well as packing charges to the service providers in accordance with the rates agreed between the parties. The charges are paid by the dairies based on the quantum of work executed or service rendered by the contractors and the packing charges are paid on the quantum of milk packed. The dairies have made payment to the contractors in accordance with such invoices, which according to the petitioners have always been in accordance with rates agreed under the agreements between the parties. 6

After the introduction of the goods and services tax laws with effect from July 1, 2017, support services to agriculture, forestry, fishing and animal husbandry are classified under Heading 9986 of the GST Tariff. The Central Government has issued a Notification No. 11/2017-Central Tax (Rate), dated June 28, 2017, thereby specifying effective rates of GST for various services. At Serial No. 24 of the table to the above notification, support services to agriculture, forestry, fishing and animal husbandry are specified; and a nil rate of tax is prescribed by the Central Government in respect of CGST as well as IGST. No condition is laid down for nil rate of tax for these services. This notification has been brought into force with effect from July 1, 2017 is still in force. 7

By virtue of the *Explanation* under Serial No. 24 of the notification, the Government has explained as to what are the support services qualifying for nil rate of tax. The term "agricultural produce" is also explained by virtue of paragraph 4(vii) of the notification. It is the case of the petitioners 8

that since any produce out of rearing of any life form of animals is considered to be an agricultural produce for the notification, milk is an agricultural produce for the purpose of this notification, inasmuch as milk is a produce out of rearing of animals like cows and buffalos. Since packing as well as storage of agricultural produce is considered to be support service to agriculture for the purpose of this notification, chilling and packing of agricultural produce like milk are support services to agriculture, and hence chargeable to nil rate of tax. Accordingly, the contractors of the dairies, that is, petitioner Nos. 2 to 5 herein had not been discharging liability of GST on chilling and packing services for milk. However, for any other services, that is, other than the chilling and packing of milk, the levy of GST is discharged by the contractors at appropriate leviable rates.

9 Though the Federation had received a legal opinion that GST was not chargeable on milk chilling and packing charges, the Federation being an apex body of various dairies located all over the State, and the interest of such farmers and agriculturists co-operative societies being the prime concern of the Federation, a letter dated August 1, 2018 was submitted by the Federation before the Government of India seeking confirmation about rate of GST being nil for milk, chilling and packing services.

10 In reply thereto, Circular F. No. 354/292/2018-TRU, dated August 9, 2018, has been issued by the Government of India through its tax research unit whereby it is clarified that chilling and packing of milk is not exempted from GST. It is also clarified that services by way of job-work in relation to all food and food products falling under Chapters 1 to 22 attract GST at the rate of five per cent. and accordingly, the activity of chilling and packing of milk by the job-workers attract GST at the rate of five per cent.

11 It is the case of the petitioners that there are several contractors with whom agreements are made by the dairies for operating and maintaining milk chilling centres in the State and also in other States. All such contractors supply the same services, that is, chilling and storing of milk, and packing of milk in pouch. Since all the dairies, namely, the member Unions of the Federation are selling and supplying milk all over the country and since their activities are not confined only within the State of Gujarat, chilling centres are kept and maintained at various places in the country, and milk belonging to the dairies is stored in a chilled condition and then packed, as required by the dairies at all such chilling centres.

12 Since the Government of India through TRU has clarified that milk chilling and packing was not an exempt service, the Federation has informed the dairies about this clarification ; and accordingly, the dairies have been discharging the burden of GST on milk chilling and packing services

rendered by all contractors. Since GST is an indirect tax and the contractors of the dairies are not to be saddled with liability and burden of such indirect tax for the above services supplied by them to the dairies, the contractors have been depositing GST with the Government on milk chilling and packing charges invoiced and collected from them from the dairies, and in turn the dairies have been reimbursing the contractors with the amount of GST so deposited by them with the Government in addition to payment of milk chilling and packing charges. It is thus the dairies, that is, petitioners No. 2 to 5 herein, who have been bearing burden of GST on milk chilling and packing service supplied to them by the contractors. In addition to the regular payment of GST being made after the above referred circular and clarification by the Government of India, the dairies have also reimbursed the contractors with the entire amount of GST recoverable on milk chilling and packing services supplied by them for the period prior to the above referred clarification by the Government of India. A substantial financial burden for such past supplies is borne and discharged by the dairies, and GST burden at the rate of five per cent. is being discharged regularly for the period after clarification of the Government also.

It is the case of the petitioners that the Central Government has granted **13**
exemption to milk chilling, storage and packing service by virtue of serial No. 24 of Notification No. 11/2017, dated June 28, 2017, but this exemption is now denied to the petitioners by virtue of Circular F. No. 354/292/2018-TRU, dated August 9, 2018 issued by the TRU. The petitioners are, therefore, constrained to deposit substantially high amounts as GST for milk chilling and packing charges recovered from them by their contractors. The petitioners have suffered because substantial amount running into several crores of rupees had to be deposited/paid as GST for the period prior to issuance of the above referred circular, and the petitioners are constrained to pay/deposit huge amount running into crores of rupees for similar services regularly provided by the contractors, for chilling, storing and packing milk belonging to the petitioners. Thus, huge financial burden falls on the petitioners, who are obliged to reimburse the contractors with GST deposited by them with the Government on milk chilling and packaging services supplied to the petitioners for their milk. According to the petitioners, these liabilities are not only contrary to the exemption allowed by the Government, but it is also against the objective of the Government of not imposing taxes on a product like milk and on activities of farmers and agriculturist co-operative societies. It is in these circumstances, that the petitioners have approached this court seeking the reliefs noted hereinabove.

14 The respondents have filed an affidavit-in-reply in response to the averments made in the memorandum of petition, wherein a reference has been made to Serial No. 24 of Notification No. 11/2017-Central Tax (Rate) and it is stated that chilling of milk is usually not done by a cultivator or producer of milk nor is it carried out for making it marketable in the primary market. Chilling takes place in chilling plants and is carried out as part of the process for making milk ready for sale in the secondary and tertiary market. The farmer or agriculturist who produces milk does not sell chilled milk in the primary market. Thus, it is clear that chilled milk is not an agricultural produce therefore, packing of chilled milk cannot be called as packing of agricultural produce.

14.1 It is further stated that the issue of GST rate on packing of processed milk was discussed in the 22nd meeting of the GST Council and the Council recommended a rate of five per cent. on job-work services in relation to food and food products falling under Chapters 1 to 22 of HS Code to cover such process vide para 24.3(i) of the minutes of the 22nd GST council meeting held on October 6, 2017. Thus, chilling and packing of such chilled milk is not exempt from GST. Services by way of job-work in relation to all food and food products falling under Chapters 1 to 22 attract levy of GST at five per cent. vide Serial No. 26(i)(f) of Notification No. 11/2017–Central Tax (Rate) dated June 28, 2017 as amended vide Notification No. 31/2017-Central Tax (Rate) dated October 13, 2017. Accordingly, the activity of chilling and packaging of such chilled milk provided by way of job-work attracts levy of GST at five per cent. Therefore, the petitioners' claim that such services are exempt from GST is not legally and factually correct. It is further averred that the circular or clarification issued by TRU is not contrary to any legal position or GST Act or the notifications issued thereunder. Further, by setting aside the impugned circular of TRU, the petitioners or their job-workers cannot escape or be exempted from payment of GST on such services as the liability to pay GST on such services provided by their job-workers/contractors are imposed by virtue of serial No. 26(i)(f) of Notification No. 11/2017-Central Tax (Rate), dated June 28, 2017 as amended vide Notification No. 31/2017-Central Tax (Rate), dated October 13, 2017 on the recommendation of the GST Council. It is further submitted in the affidavit-in-reply that the petitioners have not challenged the validity of Serial No. 26(i)(f) of Notification No. 11/2017-Central Tax (Rate), dated June 28, 2017 as amended vide Notification No. 31/2017-Central Tax (Rate), dated October 13, 2017 ; and that the farmer or agriculturist who produces milk does not sell chilled milk in the primary market.

Mr. Paresh Dave, learned advocate for the petitioners submitted that **15**
"support services" to agriculture, forestry, fishing and animal husbandry are chargeable to nil rate of duty by virtue of Serial No. 24 of the Table to Notification No. 11/2017-Central Tax (Rate) dated June 28, 2017. "Support services" are explained under Serial No. 24 to mean, inter alia, "services relating to cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products or agricultural produce". Several services are specified under clauses (a) to (g) under the *Explanation* ; and clause (e) inter alia covers "packing, storage or warehousing of agricultural produce". It was submitted that admittedly chilling is a support service by way of storage of milk. Even packing of milk is also specified as a support service. Thus, the expressions "packing" and "storage" under clause (e) of the *Explanation* under Serial No. 24 of the table to the notification cover chilling and packing of milk in tetra packs or plastic pouches.

15.1 It was further submitted that chilling and packaging of milk are processes which are undertaken after milk is produced. It was submitted that under para 4(vii) of the notification, "agricultural produce" is explained to mean any produce out of cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market. It was contended that by milk chilling process or even by packing of milk in plastic pouches, tetra packs or the like, the essential characteristics of milk do not get altered, but such agricultural produce only becomes marketable. It was submitted that a harmonious reading of relevant portions and clauses of Serial No. 24 of the above notification would mean that services relating to rearing of all life forms of animals for food, or agricultural produce are "support services to agriculture", and packing as well as storage of agricultural produce is also considered to be support services to agriculture. Hence, any produce out of rearing of any life form of animals is considered to be an agricultural produce for the purpose of the notification, and therefore milk which is a produce out of rearing of animals like cows, buffalos and the like, is also an agricultural produce ; and packing as well as storage of such agricultural produce (that is, milk) are support services to agriculture. It was urged that such services are fully exempt from recovery of GST, and the impugned circular which takes a contrary view is therefore liable to be set aside.

15.2 The learned advocate for the petitioners further submitted that chilling is a process for preserving milk, and when milk chilling is carried out by third parties, it is a support service rendered by such third parties for the milk belonging to dairies. Milk is stored in chilling plants, and thus milk chilling is a support service by way of storage of milk, which is an agricultural produce. Even "packing" of milk (which is an agricultural produce within the meaning of this term under the notification) is also specified as a support service and, therefore, packing services by the contractors, which would include packing in tetra packs or plastic pouches and the like, is also chargeable to nil rate of tax by virtue of Serial No. 24 of the above notification. It was argued that considering the scope of exemption under Serial No. 24 of the Table to Notification No. 11/2017, dated June 28, 2017, milk chilling services and also packing of milk are fully exempt from payment of GST and, therefore, no CGST is chargeable from the petitioners' contractors or any other person providing such services in relation to milk.

15.3 The learned advocate further submitted that the clarification issued by the TRU is incorrect and erroneous, inasmuch as this clarification is apparently based on a misconception about the scheme of exemption contained at Serial No. 24 of Notification No. 11/2017, dated June 28, 2017. It was submitted that the impugned TRU clarification proceeds on the basis that chilled and packed milk for retail sale was not covered by the definition of "agricultural produce" as according to the TRU, the processes of chilling and retail packing of milk were usually not done by a cultivator or a producer. It was contended that this may be true, but that would only mean that chilled and packed milk was not "agricultural produce"; whereas the question involved in this case is not whether chilled and packed milk was "agricultural produce" or not. The question is whether ordinary milk (that is, before it is chilled and packed milk) is "agricultural produce" or not, because the "support services" in the nature of chilling and packing have been provided by third parties for such ordinary milk. It was submitted that unfortunately, this position has not been addressed by the TRU, and the impugned clarification is given as if exemption of "support services" was claimed for chilled and packed milk ; although, admittedly, the exemption is claimed for ordinary milk, and the exemption is claimed for "support services" in the nature of chilling (that is storage) and packing. It was accordingly, urged that the petition deserves to be allowed in terms of the reliefs prayed for in the petition.

16 Mr. Viral K. Shah, learned senior standing counsel for the respondents, reiterated the averments made in the affidavit-in-reply as referred to hereinabove. It was submitted that the services availed of by the contractors,

are clearly not support services for agricultural produce and hence, vide the communication dated August 9, 2018, the respondents have rightly stated that chilling and packing of milk is not exempt from GST.

From the facts and contentions noted hereinabove, it appears that it is **17** not in dispute that milk is an agricultural produce, it being a produce out of rearing of life forms of animals and for food. The present case relates to raw and unprocessed milk. What is brought to the centres is raw milk in which no further processing has been done and therefore, such milk is an agricultural produce.

The chilling and packing services provided by the contractors to the **18** petitioners are in respect of raw milk. As farmers involved in rearing animals for the purpose of milk cannot directly connect to each of the consumers of the supply of milk, such farmers join hands to form a village co-operative society and supply milk to the member unions.

Vide Notification No. 11/2017, dated June 28, 2017, services falling **19** under Heading 9986 were exempted from payment of tax under the Central Goods and Services Tax Act, 2017, the State Goods and Services Tax Acts, 2017, the Union Territory Goods and Services Tax Act, 2017 and the Integrated Goods and Services Tax Act, 2017. The services falling under clause (i) of the Heading 9986 are "support services to agriculture, forestry, fishing, animal husbandry". The *Explanation* to clause (i), to the extent the same is relevant for the present purpose, reads thus :

> "*Explanation*.—'Support services to agriculture, forestry, fishing, animal husbandry' mean,—
>
> (i) Services relating to cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products or agricultural produce by way of—
>
> (a) and (b) . . .
>
> (c) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations, which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market.
>
> (d) . . .
>
> (e) loading, unloading, packing, storage or warehousing of agricultural produce."

20 Note 4 below the notification, to the extent the same is relevant for the present purpose, reads thus :

> "Note 4. For the purposes of this notification :
>
> (vii) 'agricultural produce' means any produce out of cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw materials or other similar products, on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market."

As noted earlier, the above notification was brought into force from July 1, 2017.

21 Since the letter/circular dated August 9, 2018 issued by the respondent No. 2, namely, tax research unit of the Government of India, Ministry of Finance, Department of Revenue, is subject-matter of challenge in the petition, it may be germane to refer to the said circular. A perusal of the impugned circular shows that it has been issued in the context of the subject : GST on job-work charges for chilling and packing of milk. Paragraphs 3 to 5 of the circular read thus :

> "3. Chilled and packed milk for retail sale is not covered by the definition of 'agricultural produce' as the process of chilling and retail packing of milk are usually not done by a cultivator or producer. This is the reason why separate exemption entry exists for 'transportation of agricultural produce' and for 'transportation of milk (Sl. Nos. 20 and 21 of Notification No. 12/2017-Central Tax (Rate), dated June 28, 2017 as refer). The processes of chilling and packing are not processes carried out at an agricultural farm.
>
> 4. Thus, chilling and packing of milk is not exempt from GST. Services by way of job-work in relation to all food and food products falling under Chapters 1 to 22 attract levy of GST at five per cent. (Sl. No. 26 (i)(f) of Notification No. 11/2017-Central Tax (Rate)). Accordingly, the activity of chilling and packaging of milk provided by way of job-work, attracts levy of GST at five per cent.
>
> 5. As stated by you, job-workers make substantial investment in plant and machinery for chilling and packing of milk. Exempting chilling and packing of milk would block input credit of job-workers and increase their costs."

22 At this juncture it may be germane to refer to clause (i) of Heading 9986 (Serial No. 24 of the table to Notification No. 11/2017, dated June 28, 2017) and sub-clause (c) of clause (i) of the *Explanation* thereto, which read thus:

"(i) Support services to agriculture, forestry, fishing, animal husbandry.

Explanation.—'Support services to agriculture, forestry, fishing, animal husbandry' mean . . .

(c) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market."

On a perusal of paragraph 3 of the impugned circular, it is evident that the same is based on sub-clause (c) of clause (i) of the *Explanation* to clause (i) under Heading 9986, inasmuch as, according to the respondents the process of chilling and packing of milk is not usually done by the cultivator or producer and are not carried out at an agricultural farm.

23 In the opinion of this court, if the petitioners were claiming that the support services to agricultural produce fall under sub-clause (c) of clause (i) of the *Explanation*, the respondents may have been justified in coming to such conclusion. However, it is the case of the petitioners that the support services are of packing and storage of agricultural produce falling under sub-clause (e) of clause (i) of the *Explanation* which reads thus : "(e) loading, unloading, packing, storage or warehousing of agricultural produce".

24 In the present case, the agricultural produce in respect of which support services are availed is raw unprocessed milk. It cannot be disputed that for storage of milk it would have to be chilled. Milk cannot be stored without chilling as otherwise it would get spoiled. Therefore, storage of milk would include chilling of milk. Chilling of milk does not alter any of its essential characteristics and it still remains raw milk, and it is this raw milk which is thereafter packed. Therefore, chilling and storage of raw milk and packing it would clearly fall under sub-clause (e) of clause (i) of the *Explanation*. Consequently, if the raw milk is only stored and packed, the support services would fall under Heading 9986 of the table to Notification No. 11/2017-Central Tax (Rate).

25 In the impugned circular, it is the case of the respondents that chilled and packed milk for retail sale is not covered by the definition of agricultural produce. While saying so, what is lost sight of is that support services are not provided to chilled and packed milk, but support services of storage and packing are provide to raw milk which is an agricultural produce. Therefore, the very basic premise on which the respondents have proceeded is fallacious and based on a factually incorrect premise. Another

ground stated is that such processes are not carried out at an agricultural farm. This ground is based on a misconception of the nature of services being provided, inasmuch as, it is sub-clause (c) of clause (i) of the *Explanation* which requires processes to be carried out at an agricultural farm ; whereas, sub-clause (e) does not contain any such prescription.

26 According to the respondents, there are separate exemption entries for transportation of agricultural produce and for transportation of milk (Serial Nos. 20 and 21) of Notification No. 12/2017-Central Tax (Rate), dated June 28, 2017). In this regard, a perusal of Serial No. 20 of the said notification indicates that the same relates to services by way of transportation by rail or a vessel from one place in India to another of the goods enumerated thereunder. The present case does not relate to transportation of goods by rail or by a vessel and hence, reference to the said entry is also misconceived. The entry at Serial No. 21 relates to services provided by a goods transport agency, by way of transport in a goods carriage of the goods listed thereunder. The present case relates to providing services of storage and packing and not transportation and hence, no reliance can be placed on the said entry.

27 In the impugned circular, it is also stated that chilling and packing is not exempt from GST inasmuch as services by way of job-work in relation to all food and food products falling under Chapters 1 to 22 attract levy of GST at five per cent. and therefore, the activity of chilling and packaging of milk provided by way of job-work attracts levy of GST at five per cent. In this regard, this court is of the view that the levy of five per cent. GST on job-work on food and food products falling under Chapters 1 to 22 would be attracted if the services provided are not "support services" as contemplated under clause (i) of Heading 9986 at Serial No. 24 of the Table to Notification No. 11/2017, dated June 28, 2017.

28 In the light of above discussion, the court is of the view that the interpretation given by the respondents to the activities of chilling and packing of milk as contained in the impugned letter/circular dated August 9, 2018 is not in consonance with the provisions contained in Serial No. 24 of the Table to Notification No. 11/2017, dated June 28, 2017 and, therefore, the impugned letter/circular cannot be sustained.

29 For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned letter/circular F. No. 354/292/2018-TRU dated August 9, 2018 (annexure F to the petition) issued by the Government of India, through the Tax Research Unit, New Delhi, is hereby quashed and set aside. It is hereby held that milk chilling and packing service provided by the contractors to the petitioners are exempted by virtue of Serial No. 24

of the Table to Notification No. 11/2017-Central Tax (Rate) dated June 28, 2017 (annexure D to the petition).

In so far as the relief claimed for returning of the amount recovered and collected from the petitioners through their contractors as GST on milk chilling and packaging service, the petitioner may move appropriate application for refund in accordance with law. 30

Rule is made absolute accordingly to the aforesaid extent with no order as to costs. 31

[2020] 77 GSTR 291 (Mad)

[IN THE MADRAS HIGH COURT]

ESCORTS LIMITED

(formerly M/s. Escorts Construction Equipment Limited)

v.

COMMERCIAL TAX OFFICER-II, PUDUCHERRY

C. SARAVANAN J.

January 10, 2020.

HF ▶ Assessee

SALES TAX—CENTRAL SALES TAX—PENDING ASSESSMENT FOR PERIOD UP TO 2006-07—VALUE ADDED TAX—ASSESSMENT YEAR 2001-02—RETURNS FILED BY PETITIONER UNDER CST AND PONDICHERRY SALES TAX ACT—NOTICE DATED AUGUST 25, 2016 ISSUED TO PETITIONER TO FURNISH RECORDS IN SUPPORT OF RETURNS—WRIT PETITION—RESPONDENTS OUGHT TO HAVE PASSED DEEMED ASSESSMENT ORDER UNDER PONDICHERRY GENERAL SALES TAX (ASSESSMENT) RULES, 2007 AND THEREAFTER, INITIATED FRESH PROCEEDINGS UNDER VAT ACT, 2007 READ WITH RULES, 2007—NOTICE QUASHED—DIRECTION TO RESPONDENT TO PASS APPROPRIATE ASSESSMENT ORDERS IN TERMS OF PONDICHERRY GENERAL SALES TAX (ASSESSMENT) RULES, 2007—PONDICHERRY GENERAL SALES TAX ACT (6 of 1967)—PUDUCHERRY VALUE ADDED TAX ACT (9 of 2007)—PONDICHERRY GENERAL SALES TAX (ASSESSMENT) RULES, 2007—CENTRAL SALES TAX ACT (74 of 1956).

A notice dated August 25, 2016 was issued to the petitioner giving him a final opportunity of being heard either in person or through authorised representative and to produce statutory forms for the concession claimed along with the books of account and auditor's report in Form XXVII at the office of the respondent on or before September 12, 2016 in support of the

returns filed for the year 2001-02 under the Pondicherry General Sales Tax Act, 1967 and Central Sales Tax Act, 1956. On a writ petition contending that there was no valid reason for the respondent to call for such records in the light of Pondicherry General Sales Tax (Assessment) Rules, 2007 which was implemented on the eve of Pondicherry Value Added Tax Act, 2007 with effect from December 1, 2007 :

Held, *allowing the petition, that the assessment order in question pertained to the period 2001 to 2002 for which the petitioner had also filed returns. Since PGST Act, 1967 was being replaced with Puducherry VAT Act, 2007, the Government of Puducherry issued the Pondicherry General Sales Tax (Assessment) Rules, 2007. The purpose of the aforesaid Rules was to bring finality to the assessment proceedings which had remained incomplete as on May 1, 2007. The respondents ought to have passed a deemed assessment order and thereafter, initiated fresh proceedings under the provisions of the newly inserted Pondicherry VAT Act, 2007 read with Pondicherry General Sales Tax (Assessment) Rules, 2007. Instead, they delayed in passing deemed assessment order in terms of the aforesaid Rules. Therefore there was no merit in the notice and it was to be quashed.*

[*The court directed the respondent to pass appropriate assessment orders in terms of the Pondicherry General Sales Tax (Assessment) Rules, 2007.*]

W. P. No. 32333 of 2016 and W. M. P. No. 28047 of 2016.

Mrs. Hema Muralikrishnan for the petitioner.

J. Kumaran, Additional Government Pleader (Puducherry), for the respondent.

ORDER

1 C. SARAVANAN J.—The petitioner has challenged the impugned notice dated August 25, 2016. The petitioner was given a final opportunity of being heard either in person or through authorised representative and to produce statutory forms for the concession claimed along with the books of account and auditor's report in Form XXVII in support of the returns filed for the year 2001-02 under the Pondicherry General Sales Tax Act, 1967 and Central Sales Tax Act, 1956 at the office of the respondent on or before September 12, 2016.

2 The impugned notice has been challenged by the petitioner on the ground that there is no valid reason for the respondent to call for such records in the light of Pondicherry General Sales Tax (Assessment) Rules, 2007 which was implemented on the eve of Pondicherry VAT Act, 2007 with effect from December 1, 2007.

Learned counsel for the petitioner submits that in the light of the above 3
rules, the respondent may be directed to pass deemed assessment order as rule 3 applies pending assessment for the period up to 2006-2007 under Pondicherry General Sales Tax Act, 1967 (hereinafter referred to as the PGST Act, 1967) and also to pending assessment under Central Sales Tax Act, 1956 (hereinafter referred to as the CST Act, 1956). She further submits that similarly placed persons, namely, ELGI Electric & Industries were also issued with deemed assessment order by the respondent vide order dated August 12, 2010 which reads as under :

"COMMERCIAL TAXES DEPARTMENT

ASSESSMENT ORDER

Proceedings of the Dy. Commercial Tax Officer-I

Station : Puducherry

Present : Thiru R. M. Vaithianathan

Date : 12.8.2010

1.	Assessment number and year	:	105135/2004-05	
2.	Name of the assessee(s)	:	Elgi Electric & Industries Ltd.	
3.	Nature of business	:	Sale of alternator and motors	
4.	Place or place of business Puducherry	:	No. 50, 100 Feet Road, Ellaipillaichavady.	
5.	Turnover reported	(1) Total		Rs. 3,16,87,017
		(2) Taxable		Rs. 3,16,87,017
6.	Turnover accepted	(1) Total		Rs. 3,16,87,017
		(2) Taxable		Rs. 3,16,87,017

ORDER

M/s. Elgi Electric & Industries Ltd., dealers in sale of alternator and motors at No. 50, 100 Feet Road Ellaipillaichavady, Puducherry reported in their return in Form A1/A2 for the year 2004-05 a turnover of Rs.3,16,87,017 and taxable turnover of Rs. 3,16,87,017 respectively, claiming exemption on a turnover of Rs. 0.

The dealer is found eligible for deemed assessment under the Pondicherry General Sales Tax (Assessment) Rules, 2007 and the return filed by the dealer is accepted and assessed under the Pondicherry General Sales Tax Act, 1967 :

Sl. No.	*Description*	*Turnover (Rs.)*	*Rate %*	*Tax due (Rs.)*
1.	Sale of Alternator	3,14,20,855.00	1.00	3,14,209.00
2.	Motor	2,66,162.00	8.00	21,293.00
	Total	3,16,87,017.00		3,35,502.00

Tax due	:	Rs. 3,35,502.00
Tax paid	:	Rs. 3,35,502.00
Difference	:	Rs. Nil

(Sd.) Dy. Commercial Tax Officer-I,
Puducherry

To :

The dealer."

4 Learned counsel for the petitioner submits that impugned notice dated August 25, 2016 calling for the information pertaining to the assessment of the year 2001-2002 for the returns filed under PGST Act, 1967 and CST Act, 1956, is belated and is contrary to the mandate under rules 2 and 3 of the aforesaid Rules.

5 Defending the notice, learned Additional Government Pleader who appears on behalf of the respondent submits that right from December 2007 vide letter dated December 14, 2007, the petitioner was called upon to furnish the records. However, the petitioner repeatedly kept taking time and therefore left with no other option, the respondent was compelled to issue the impugned notice on August 25, 2016 and therefore the respondent cannot be faulted for issuing the aforesaid notice.

6 Heard learned counsel for the petitioner and learned Special Government Pleader appearing for the respondents.

7 The assessment order in question pertains to 2001 to 2002 for which the petitioner has also filed returns. Since PGST Act, 1967 was being replaced with Puducherry VAT Act, 2007, the Government of Puducherry issued the above Rules. The purpose of the aforesaid Rules was to bring finality to the assessment proceedings which had remained incomplete as on May 1, 2007. The respondents ought to have passed a deemed assessment order and thereafter, initiated fresh proceedings under the provisions of the newly inserted Pondicherry VAT Act, 2007 read with Pondicherry General Sales Tax (Assessment) Rules, 2007. Instead, they delayed in passing deemed assessment order in terms of the aforesaid Rules. Therefore, I do not find any merits in the impugned notice.

8 Therefore, the impugned notice is quashed and the respondent is directed to pass appropriate assessment orders in terms of the Pondicherry General Sales Tax (Assessment) Rules, 2007. At the same time, liberty is given to the respondent to initiate appropriate proceedings in accordance with law.

9 The present writ petition is allowed with the above observations. No cost. Consequently, connected miscellaneous petition is closed.

[2020] 77 GSTR 295 (Bom)

[IN THE BOMBAY HIGH COURT]

NEELKAMAL REALTORS POWER PVT. LTD. AND ANOTHER

v.

UNION OF INDIA AND OTHERS

M. S. SANKLECHA and **S. C. GUPTE** JJ.

July 30, 2019.

HF ▶ Assessee

CENVAT CREDIT—REVERSAL—DEPARTMENT COMPELLING ASSESSEE UNDER THREAT OF ARREST TO REVERSE CENVAT CREDIT BEFORE ISSUE OF SHOW-CAUSE NOTICE OR ADJUDICATION ORDER—ACTION HIGH HANDED AND ILLEGAL—DEPARTMENT TO ALLOW ASSESSEE TO RECREDIT AMOUNT—ASSESSEE NOT TO UTILISE IT TILL ADJUDICATION OF NOTICE.

The assessee was under investigation for incorrectly availing of Cenvat credit. During the investigation, i.e., before any show-cause notice was issued, the assessee reversed the Cenvat credit of Rs. 11.25 crores. On a writ petition claiming that this was under pressure from the officers of the Department more particularly because of the threat of arrest and in spite of the assessee furnishing the opinions of advocates pointing out that in these facts, no arrest proceedings could be initiated against the assessee, the Department filed an affidavit stating that if the Department had given such threats to the assessee, the assessee should have approached the proper forum for its redressal :

Held, *allowing the petition, that the undisputed facts were that the assessee was under investigation for incorrectly availing of Cenvat credit. The fact that there was pressure from the officers of the Department, more particularly threat of arrest was evident from the fact that the assessee had sought the opinion of legal experts, whether on the facts of the case, it was possible for the Department to arrest the officers of the assessee. This opinion was also furnished on May 2, 2018 to the officers of the Department, and this fact was recorded in the assessee's letter dated May 7, 2019 along with the fact of continuing pressure of the Department to reverse the credit. The letter dated May 7, 2018 was not disputed by the Department. Thus, the assessee was coerced to reverse the Cenvat credit under the threat of arrest. The contention of the Department that the assessee was a builder and could not be coerced to reverse the Cenvat credit on the threat of arrest was no explanation for the unbecoming conduct of the officers of the State who were duty-bound to treat*

all equally. The affidavit-in-reply merely stated that if the Department had given such threats to the assessee, the assessee should have approached the proper forum for redressal. This did not meet the allegations made by the assessee on oath that the assessee were threatened with possible arrest if it did not reverse a Cenvat credit of Rs. 11.25 crores. The officers' perception about whether or not the assessee would act upon the threat, could not give a licence to the Department to act in an illegal and high handed manner. The events as well as the material placed on record by the assessee, after considering the affidavits filed by the Department, led to the conclusion that the Department had acted in a high handed manner and forced the assessee under the threat of arrest to reverse the Cenvat credit of Rs. 11.25 crores before the show-cause notice was issued or before any adjudication order thereon was passed. In these circumstances, the Department was to allow the assessee to recredit the amount of Rs. 11.25 crores in its Cenvat credit account. However, the assessee was prohibited from utilising it till the adjudication of the show-cause notice dated September 28, 2018 by the Commissioner.

DABUR INDIA LTD. *v.* STATE OF UTTAR PRADESH [1990] 4 SCC 113, VODAFONE ESSAR SOUTH LTD. *v.* UNION OF INDIA [2009] 237 ELT 35 (Bom) *and* CLEARTRIP PRIVATE LTD. *v.* UNION OF INDIA [2016] 7 VST-OL 311 (Bom) *relied on.*

Officers of the Department could not take the law into their hands or take extra legal steps or manoeuvre to collect amounts which had not yet been held by judicial or quasi-judicial order as payable by the assessee.

Cases referred to :

Cleartrip Private Ltd. *v.* Union of India [2016] 7 VST-OL 311 (Bom) (paras 1, 3, 6)

Dabur India Ltd. *v.* State of Uttar Pradesh [1990] 4 SCC 113 (paras 1, 3, 6)

Vodafone Essar South Ltd. *v.* Union of India [2009] 237 ELT 35 (Bom) (paras 1, 3, 6)

Writ Petition No. 8835 of 2018.

Shriram Shridharan instructed by *PDS Legal* for the petitioners.

Vijay Kantharia with ***Ram Ochani*** for respondent Nos. 1 to 5.

JUDGMENT

1 On July 26, 2019, we passed the following order :

> "This petition under article 226 of the Constitution of India challenges the action of the respondents in compelling the petitioners to pay (by reversing the Cenvat credit available) an amount of Rs. 11.25

crores to the Revenue before the issue of any show-cause notice under the Finance Act, 1994.

2. It is the case of the petitioners that the aforesaid amount of Rs. 11.25 crores was reversed by the petitioners as the respondents during investigation threatened arrest in the absence of payment/ reversal of Cenvat credit. This even though the petitioners had given to the officers of the Revenue opinions of advocates to the effect that no arrest in such facts is permissible. The petitioners placed reliance upon the decisions of the Supreme Court in *Dabur India Ltd.* v. *State of Uttar Pradesh* [1990] 4 SCC 113 along with the orders of this court in *Vodafone Essar South Ltd.* v. *Union of India* [2009] 237 ELT 35 (Bom) and *Cleartrip Private Ltd.* v. *Union of India* [2016] 7 VST-OL 311 (Bom) ; [2016] 42 STR 948 (Bom), to contend that strong arm tactics by the officers of the Revenue in recovering the amount allegedly due even before the show-cause notice has been adjudicated is bad in law. In fact, it is a clear case of subversion of rule of law. In the facts of this case, due to strong arm tactics of the Revenue, the petitioners were compelled under the threat of arrest to reverse the Cenvat credit, even when no show-cause notice was issued, much less adjudicated upon.

3. On the other hand, Mr. Kantharia, learned counsel for the respondents, states that on affidavit the officer of the respondents stated that there was no threat of arrest ever issued to the petitioners. Therefore, the statement of the petitioners should not be accepted. He further submits that a show-cause notice has already been issued. Therefore, no orders should be passed. We are, in the facts of the case and evidence placed before us, not impressed with the submissions made on behalf of the respondents and were proceeding to pass an order finally. At that time, Mr. Kantharia, learned counsel for the respondents, sought time to take further instructions and prepare himself better, as this petition was shown under the caption of admission.

4. In the above view, we grant time at the request of the Revenue. However, we put to notice parties to the petition that it will be taken up for final hearing on July 30, 2019."

Today, when the matter was called out, Mr. Kantharia, learned counsel **2**
appearing for the respondents, filed an additional affidavit in reply of Mr. Abhijit Thorat, Assistant Commissioner of CGST and Central Excise, Mumbai (East) Commissionerate, dated July 29, 2019. In the above affidavit, the deponent has explained the reason why the show-cause notice

dated September 28, 2018, as amended by the corrigendum dated October 9, 2018, could not be adjudicated till today.

3 The issue in the present facts, as pointed out above, was the action of the respondents in pressuring the petitioners under the threat of arrest of its directors/officers at the time of investigation to reverse Cenvat credit amounting to Rs. 11.25 crores taken as tax paid on services provided by one Indo Global Soft Solutions and Technologies Pvt. Ltd. This in the absence of any adjudication order adverse to the petitioners being passed or even issue of any show-cause notice. In view of the threat of arrest during investigation, the petitioners had furnished to the Revenue, at a meeting held on May 2, 2018, opinions of advocates pointing out that in these facts, no arrest proceedings could be initiated against the petitioners. In spite of the above, the officers of the respondents, as recorded by the petitioners in their letter dated May 7, 2018, continued to pressurise the petitioners of coercive proceedings, if the Cenvat credit was not reversed. In this view of the matter, the petitioners were compelled to reverse the Cenvat credit of Rs. 11.25 crores. It is further pointed out that the aforesaid letter dated May 7, 2018 was not disputed by the officers at any point of time prior to the filing of this petition. This action of the respondents, it is submitted, is in the face of binding decisions of the apex court and this court in *Dabur India Ltd.* [1990] 4 SCC 113, *Vodafone Essar South Ltd.* [2009] 237 ELT 35 (Bom) and *Cleartrip Private Ltd.* [2016] 7 VST-OL 311 (Bom) ; [2016] 42 STR 948 (Bom).

4 Mr. Kantharia, learned counsel appearing for the Revenue, submits that the petitioners are builders and they are not one to be coerced or threatened by the officers informing them about the possibility of arrest and therefore, it is not correct to proceed on the basis that the petitioners paid the amount only because of threat. Moreover, reliance is placed on the affidavits filed by the Revenue that no threat of arrest was given to the petitioners. There is no reason to disbelieve the Revenue. Thus, no interference in writ jurisdiction is warranted. It is further submitted that the show-cause notice is pending adjudication and therefore, no purpose would be served by permitting the petitioners to re-credit the amount, which was reversed by the petitioners at the instance of the respondents, as if the show-cause notice is adjudicated in favour of the petitioners, the amount would be refunded to the petitioners in any case. Thus, dismiss the petition.

5 We have considered the rival submissions. The issue raised in the petition, if correct, gives rise to a very serious issue of rule of law. However, the above issue would only arise for our consideration on first determining whether in the facts, the grievance of the petitioners that the recovery of

the Cenvat credit under the threat of arrest is true. The undisputed facts are that the petitioners were under investigation for incorrectly availing of Cenvat credit. During the time of investigation, i.e., even before any show-cause notice was issued, the petitioners reversed the Cenvat credit of Rs. 11.25 crores. This, the petitioners claim, was under pressure from the officers of the Revenue, more particularly because of the threat of arrest. This we find is evident from the fact that the petitioners had sought opinion of legal experts, whether on the facts of the case, is it possible for the Revenue to arrest them. This opinion was also furnished on May 2, 2018 to the officers of the Revenue, this fact is recorded in the petitioners' letter dated May 7, 2019 along with the fact of continuing pressure of the Revenue to reverse the credit. The aforesaid letter dated May 7, 2018 was not disputed by the Revenue, in spite of the serious charge of threating to arrest the petitioners' director. It is only now for the first time, the Revenue in the affidavit in reply of Mr. Clint D'Silva, Assistant Commissioner of CGST and Central Excise, Mumbai (East) Commissionerate, dated August 10, 2018 has responded to the petitioners' allegation of threat of arrest, by stating as under :

> "The Department would like to state that neither any written nor oral communications were issued to the petitioners for 'the threat of arrest'. The contention of the petitioner is far from the truth. Assuming without accepting the malicious allegations levelled by the petitioners, they being the responsible citizens of India, ought to have approached the proper forum for their redressal than approaching this honourable High Court."

This does not dispute the facts contemporaneously recorded in the petitioners' letters dated May 7, 2018. Thus, in these facts, we find that the petitioners were coerced to reverse the Cenvat credit under the threat of arrest.

Therefore, we now examine the issue, whether such action on the part **6**
of the Revenue is at all permissible. The contentions of the Revenue is that the petitioners are builders and could not be coerced in reversing the Cenvat credit on the threats of arrests. This is no explanation for the unbecoming conduct of the officers of the State who are duty bound to treat all equally. The officers' perception about, whether the petitioners would act upon the threat or not, cannot give a licence to the respondents to act in such illegal and high handed manner. The Supreme Court in *Dabur India Ltd.* [1990] 4 SCC 113 has observed in para 31 as under :

> ". . . . We would not like to hear from a litigant in this country that the Government is coercing citizens of this country to make payment

of duties which the litigant is contending not to be leviable. Government, of course, is entitled to enforce payment and for that purpose to take all legal steps but the Government, Central or State, cannot be permitted to play dirty games with the citizens of this country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the Government, the Government should take steps but not take extralegal steps or manoeuvre . . ."

Further this court in *Vodafone Essar South Ltd.* v. *Union of India* [2009] 237 ELT 35 (Bom) has in similar circumstances passed strictures against the officers of D. R. I., who terrorized the petitioners therein and forced them to pay the money which was not permissible in law. The court observed that the conduct of the officers was high handed and a gross abuse of the powers vested in them under the Customs Act. Similarly, in *Cleartrip Private Ltd.* v. *Union of India* [2016] 7 VST-OL 311 (Bom) ; [2016] 42 STR 948 (Bom), this court observed as under (pages 315 and 316 in 7VST-OL) :

"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 cooperate 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 non-

bailable, 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, an 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."

7 Therefore, the Supreme Court as well as our High Court has repeatedly held that rule of law has to be followed and no officers of the respondent can take law in his own hands or take extralegal steps or manoeuvre so as to collect amounts which have not yet been held by judicial and/or quasi-judicial order as payable by the petitioners to the respondent. The affidavit-in-reply merely states that if the respondents had given such threats to the petitioners, then the petitioners should have approached the proper forum for their redressal. This does not meet the allegations made by the petitioners on oath that the petitioners were threatened with possible arrest if they do not reverse a Cenvat credit of Rs. 11.25 crores. It is pertinent to note that there is no contemporaneous evidence inasmuch as there is no reply by the respondents to the petitioners' letter dated May 7, 2018 that clearly speaks about the threat of arrest. This serious allegation was not responded to by any denial on the part of the respondents at that time. The events as well as the material placed on record by the petitioners, after considering the affidavits filed by the respondents, lead us to conclude that the respondents have acted in a high handed manner and forced the petitioners under the threat of arrest to reverse the Cenvat credit of Rs. 11.25 crores before the show-cause notice was issued or before any adjudication order thereon was passed. In these circumstances, we direct the respondents to allow the petitioners to re-credit the amount of Rs. 11.25 crores in their Cenvat credit account. However, the petitioners are prohibited from utilising the same till the adjudication of the show-cause notice dated September 28, 2018 by the Commissioner, GST and CX.

8 Mr. Kantharia, learned counsel appearing for the respondents states that the show-cause notice would be adjudicated, as expeditiously as possible, and latest within a period of five weeks from today. This of course subject to the petitioners cooperating the respondents.

9 The petition is allowed in the above terms.

[2020] 77 GSTR 302 (Patna)

[IN THE PATNA HIGH COURT]

PARSVNATH DEVELOPERS LTD.

v.

STATE OF BIHAR AND OTHERS

JYOTI SARAN and PARTHA SARTHY JJ.

August 17, 2019.

HF ▶ Assessee

VALUE ADDED TAX—REASSESSMENT—AUDIT—ACCOUNTANT GENERAL—JURISDICTION—OBJECTION RAISED BY ACCOUNTANT GENERAL IN CASE OF DEEMED ASSESSMENT FOR WHICH HE LACKED JURISDICTION AND SUBSEQUENT FAILURE OF ASSESSING OFFICER TO RECORD SATISFACTION THEREON—ENTIRE PROCEEDINGS INCLUDING ASSESSMENT ORDER AND DEMAND NOTICE QUASHED—BIHAR VALUE ADDED TAX ACT (27 of 2005), s. 33.

Held, *that the Accountant General lacked jurisdiction to raise objection in a case of deemed assessment in view of the clear jurisdiction set up in the provision of section 33 of the Bihar Value Added Tax Act, 2005, and the assessing authority proceeded thereon without recording a satisfaction that the objection needed to be proceeded accordingly. Therefore the entire proceedings including the assessment order together with demand notice were to be quashed and set aside.*

TATA PROJECT LTD. *v.* STATE OF BIHAR [2020] 77 GSTR 247 (Patna) *followed*.

TATA PROJECT LTD. *v.* STATE OF BIHAR [2020] 77 GSTR 247 (Patna) (paras 3, 5, 6, 9) *referred to*.

Civil Writ Jurisdiction Case No. 12352 of 2019.

Usha Kumari for the petitioner.

Kumar Manish, (SC 5), for the respondents.

JUDGMENT[1]

The judgment of the court was delivered by

1 JYOTI SARAN J.—Heard Mr. Rakesh Kumar Singh, learned counsel for the petitioner and Mr. Kumar Manish, S. C. 5 for the State.

2 This writ petition is filed to question the notice dated May 6, 2015 issued by respondent No. 4, the Deputy Commissioner, State Taxes, Patna Circle

1. Oral.

Patna in purported exercise of power vested in him to reopen the assessment under section 33 of the Value Added Tax Act, 2005 (hereinafter referred to as "the Act") for the assessment year 2012-13 on the audit objection of the Accountant General.

Although exhaustive arguments have been advanced by learned State counsel to object to the submission of Mr. Singh that the issue in hand is squarely covered by the judgment of this court rendered in the case of *Tata Project Ltd.* v. *State of Bihar* reported in [2020] 77 GSTR 247 (Patna) ; [2019] 4 BLJ 387 but in our opinion it is a failed attempt. 3

We have already held in the judgment under reference that the Comptroller and Auditor General has no jurisdiction to raise audit objection in a case of deemed assessment in view of the clear jurisdiction set up in the provision of section 33. We have also held that there cannot be a mechanical discharge by the assessing officer to proceed thereon until he records a satisfaction that the objection needs to be proceeded accordingly. 4

It is in reference to the judgment of *Tata Project Ltd.* [2020] 77 GSTR 247 (Patna) ; [2019] 4 BLJ 387 that Mr. Singh submits that the petitioner filed his returns on March 31, 2013 for the assessment year in question, a copy of which is at Annexure 2 and although certain queries were made but on reply filed, they were not proceeded thereafter nor there any assessment order was passed to such effect. Such is the submission made in paragraphs 6 and 8 to the writ petition. He further submits that the final orders have been passed by the assessing officer on May 6, 2019 and which has been questioned by filing I. A. No. 2 of 2019 and the consequential demand notice has been questioned by filing I. A. No. 1 of 2019 at Annexures 8 and 6 respectively to the said interlocutory application. 5

While submitting that the entire proceedings, is de hors the statutory provisions of section 33 of "the Act" and is fit to be struck down in view of the judgment of this court in *Tata Project Ltd.* [2020] 77 GSTR 247 (Patna) ; [2019] 4 BLJ 387, he prays for allowing the amendment to question the orders so passed. 6

We permit him to do so and consequently I. A. No. 1 of 2019 and I. A. No. 2 of 2019 are allowed. 7

Mr. Kumar Manish, S. C. 5 in reference to the counter-affidavit attempts to object to the submission of Mr. Singh by submitting that the case is not covered because the returns of the petitioner itself was belatedly filed and thus would not sail into the jurisdiction of a deemed assessment and for which he relies upon a statement made in the rejoinder to the interlocutory application in which it is stated that annual return was filed on January 24, 2014. We are not persuaded to accept such statement of the assessing 8

officer in absence of any records to support such submission and in absence of any denial to the statement of the petitioner made in paragraph 6 of the writ petition in which it is specifically stated that the annual return was filed on March 31, 2013. In fact, the respondents while replying to the statement made at paragraph 6 have simply stated that it is a matter on record as manifest from the statement present at paragraph 16 of the counter-affidavit to the writ petition. In fact the statement made in paragraph 5 onward of the counter-affidavit itself confirms that it is on a simple objection raised by the Accountant General under section 33 of "the Act" that the proceeding was initiated to result in the orders impugned.

9 We have heard learned counsel for the parties and we have perused the records and though an attempt is made by the respondent-authorities in the Commercial Taxes Department to wriggle out of the judgment of *Tata Project Ltd.* [2020] 77 GSTR 247 (Patna) ; [2019] 4 BLJ 387 but in our opinion the case is hopeless for on each of the two issues, i. e., lack of jurisdiction on the Accountant General to raise objection in a case of deemed assessment as well as on the failure of the assessing officer to record satisfaction thereon, that we find the entire proceedings de hors the statutory discharge as well as our opinion in *Tata Project Ltd.* [2020] 77 GSTR 247 (Patna) ; [2019] 4 BLJ 387 and consequently, the entire proceedings including the assessment order at Annexure 8 of I. A. No. 2 of 2019 together with demand notice at Annexure 6 to I. A. No. 1 of 2019 are quashed and set aside.

10 The writ petition is allowed.

11 Let the records so produced by Mr. Kumar Manish, S. C. 5 be returned to its transmission to the Department.

[2020] 77 GSTR 304 (SC)

[IN THE SUPREME COURT OF INDIA]

COMMERCIAL TAXES OFFICER

v.

BOMBAY MACHINERY STORE

DEEPAK GUPTA and ANIRUDDHA BOSE JJ.

April 27, 2020.

HF ▶ Assessee

CENTRAL SALES TAX—INTER-STATE SALE—EXEMPTION—SECOND OR SUBSEQUENT INTER-STATE SALE BY TRANSFER OF DOCUMENTS OF TITLE TO

GOODS—AUTHORITIES CANNOT IMPOSE TIME-LIMIT WITHIN WHICH DELIVERY OF GOODS TO BE TAKEN FROM CARRIER—CENTRAL SALES TAX ACT (74 of 1956), SS. 3, 6.

CONSTRUCTION OF TAXING STATUTES—NO ROOM FOR INTENDMENT.

On the question whether as a condition for granting the benefit of section 6(2) of the Central Sales Tax Act, 1956, the tax authorities could impose a limit or time-frame within which delivery of the respective goods had to be taken from the carrier when the goods were delivered to the carrier for transmission in the course of inter-State sale :

Held, *(i) that a legal fiction created in the first* Explanation *to section 3 of the Central Sales Tax Act, 1956 was that the movement of goods, from one State to another shall terminate where the goods had been delivered to a carrier for transmission, at the time when delivery was taken from such carrier. There was no concept of constructive delivery either express or implied in the provision. On a plain reading of the statute, the movement of the goods, for the purposes of clause (b) of section 3 of the Act, would terminate only when delivery was taken, having regard to the first* Explanation *to that section. There was no scope for incorporating any further word to qualify the nature and scope of the expression "delivery" within the section. The Legislature had eschewed from giving that word an expansive meaning.*

(ii) That in terms of the two circulars dated September 16, 1997and April 15, 1998 issued by the Commissioner, Commercial Taxes Department, retention of goods by the transporter beyond the time stipulated therein (being 30 days in terms of the later circular) would imply that constructive delivery of the goods had been made by the transporter to the consignee. In such a situation, the transit status of the goods would stand terminated and the deeming provision in the first Explanation *to section 3 of the Act conceiving the time-point of delivery as termination of movement should cease to operate. Therefore fixing a time-frame by order of the tax administration of the State would not be permissible.*

(iii) That in the event the authorities felt that any assessee or dealer was taking unintended benefit under those provisions of the Act, the proper course would be legislative amendment. The tax administration authorities could not give their own interpretation to legislative provisions on the basis of their own perception of trade practice. This administrative exercise, in effect, would result in supplying words to legislative provisions, as if to cure omissions of the Legislature.

There is no place for any intendment in taxing statutes.

ARJAN DASS GUPTA AND BROS. *v.* COMMISSIONER OF SALES TAX [1980] 45 STC 52 (Delhi) *overruled*.

Decision of the Jaipur Bench of the Rajasthan High Court in COMMERCIAL TAXES OFFICER *v.* BOMBAY MACHINERY STORE (S. B. S. T. R. No. 186 of 2005—decided on September 14, 2007—Rajasthan High Court) *affirmed*.

Cases referred to :

Arjan Dass Gupta and Bros. *v.* Commissioner of Sales Tax [1980] 45 STC 52 (Delhi) (paras 5, 6, 15)

Commercial Taxes Officer *v.* Bombay Machinery Store (S. B. S. T. R. No. 186 of 2005, decided on September 14, 2007—Rajasthan High Court) (paras 2, 4, 5)

Guljag Industries Limited *v.* State of Rajasthan [2003] 129 STC 3 (Raj) (paras 6, 7, 8)

Civil Appeal Nos. 2217 of 2011 with 2220 of 2011, 10000 and 10001 of 2017.

Appeal from the judgment and order dated September 14, 2007 in S. B. S. T. R. No. 186 of 2005 of the Jaipur Bench of the Rajasthan High Court.

Milind Kumar, Advocate, for the appellant.

U. A. Rana, *Himanshu Mehta* and *P. V. Yogeswaran*, Advocates, for the respondent.

JUDGMENT

The judgment of the court was delivered by

1 ANIRUDDHA BOSE J.—All these four appeals are being dealt with by this judgment as they all involve adjudication on a common question of law arising out of sections 3 and 6 of the Central Sales Tax Act, 1956 ("1956 Act"), which was operational at the material point of time. The question is as to whether as a condition of giving the benefit of section 6(2) of the said Act, the tax authorities can impose a limit or time-frame within which delivery of the respective goods has to be taken from a carrier when the goods are delivered to a carrier for transmission in course of inter-State sale. For proper appreciation of the dispute involved in these appeals, the aforesaid provisions are reproduced below :

> "3. *When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce*.—A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase,—

(a) occasions the movement of goods from one State to another ; or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1.—Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2.—Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State.

Explanation 3.—Where the gas sold or purchased and transported through a common carrier pipeline or any other common transport or distribution system becomes co-mingled and fungible with other gas in the pipeline or system and such gas is introduced into the pipeline or system in one State and is taken out from the pipeline in another State, such sale or purchase of gas shall be deemed to be a movement of goods from one State to another.

. . . .

6. *Liability to tax on inter-State sales*.—(1) Subject to the other provisions contained in this Act, every dealer shall, with effect from such date as the Central Government may, by notification in the Official Gazette, appoint, not being earlier than thirty days from the date of such notification, be liable to pay tax under this Act on all sales of goods other than electrical energy effected by him in the course of inter-State trade or commerce during any year on and from the date so notified :

Provided that a dealer shall not be liable to pay tax under this Act on any sale of goods which, in accordance with the provisions of sub-section (3) of section 5, is a sale in the course of export of those goods out of the territory of India.

(1A) A dealer shall be liable to pay tax under this Act on a sale of any goods effected by him in the course of inter-State trade or commerce notwithstanding that no tax would have been leviable (whether on the seller or the purchaser) under the sales tax law of the appropriate State if that sale had taken place inside that State.

(2) Notwithstanding anything contained in sub-section (1) or sub-section (1A), where a sale of any goods in the course of inter-State trade or commerce has either occasioned the movement of such goods from one State to another or has been effected by a transfer of documents of title to such goods during their movement from one State to another, any subsequent sale during such movement effected by a transfer of documents of title to such goods,—

(a) to the Government, or

(b) to a registered dealer other than the Government, if the goods are of the description referred to in sub-section (3) of section 8,

shall be exempt from tax under this Act :

Provided that no such subsequent sale shall be exempt from tax under this sub-section unless the dealer effecting the sale furnishes to the prescribed authority in the prescribed manner and within the prescribed time or within such further time as that authority may, for sufficient cause, permit,—

(a) a certificate duly filled and signed by the registered dealer from whom the goods were purchased containing the prescribed particulars in a prescribed form obtained from the prescribed authority ; and

(b) if the subsequent sale is made—

(i) to a registered dealer, a declaration referred to in clause (a) of sub-section (4) of section 8, or

(ii) to the Government, not being a registered dealer, a certificate referred to in clause (b) of section (4) of section 8 :

Provided further that it shall not be necessary to furnish the declaration or the certificate referred to in clause (b) of the preceding proviso in respect of a subsequent sale of goods if,—

(a) the sale or purchase of such goods is, under the sales tax law of the appropriate State exempt from tax generally or is subject to tax generally at a rate which is lower than four per cent. (whether called a tax or fee or by any other name) ; and

(b) the dealer effecting such subsequent sale proves to the satisfaction of the authority referred to in the preceding proviso that such sale is of the nature referred to in clause (a) or clause (b) of this sub-section.

(3) Notwithstanding anything contained in this Act, if,—

(a) any official or personnel of,—

(i) any foreign diplomatic mission or consulate in India ; or

(ii) the United Nations or any other similar international body, entitled to privileges under any convention to which India is a party or under any law for the time being in force ; or

(b) any consular or diplomatic agent of any mission, the United Nations or other body referred to in sub-clause (i) or sub-clause (ii) of clause (a), purchases any goods for himself or for the purposes of such mission, United Nations or other body, then, the Central Government may, by notification in the Official Gazette, exempt, subject to such conditions as may be specified in the notification, the tax payable on the sale of such goods under this Act.

(4) The provisions of sub-section (3) shall not apply to the sale of goods made in the course of inter-State trade or commerce unless the dealer selling such goods furnishes to the prescribed authority a certificate in the prescribed manner on the prescribed form duly filled and signed by the official, personnel, consular or diplomatic agent, as the case may be."

We shall narrate the factual context of Civil Appeal No. 2217 of 2011, **2** before we address the legal issue involved in these appeals, treating this to be the lead case. The dispute relating to the other three appeals are not identical, but the question of law being the same in all these appeals, we shall avoid narrating in detail the sequence of events which led to filing of the said appeals, except to the extent such narration is necessary for understanding the scope of these appeals. In Civil Appeal No. 2217 of 2011, the period of assessment is 1995-96. The respondent-assessee, Bombay Machinery Store, had purchased electricity motors and its parts in the said financial year out of the State and sold them to purchasers within the Kota region of the State of Rajasthan. For such sales, they obtained the benefit of exemption under section 6(2) of the 1956 Act. These goods had remained with the transport company upon arrival in Kota for more than a month. The Revenue's case is that after importing these goods into Rajasthan, sale was effected through bilty (transport receipt) on obtaining separate orders. Such sale, it is the Revenue's case, constituted sale within the State and hence taxable at 12 per cent. per annum under the Rajasthan Sales Tax Act, 1954. Civil Appeal No. 2220 of 2011 relates to the same firm but for the assessment year 1994-95. Quantum of sales for the year 1994-95 effected through the same process was Rs. 3,15,639 and for 1995-96 it was Rs. 2,60,93. Claim of benefit under section 6(2) of the 1956 Act was rejected and tax along with interest and penalty was imposed under the State Act by Commercial Tax Officer, Anti-Evasion Circle-I, Kota, after a survey by

two orders, both dated December 11, 1997. The appeals by the Bombay Machinery Stores were allowed by the Deputy Commissioner (Appeals), Commercial Taxes, Kota, following a decision delivered on March 8, 1996 by the Rajasthan Tax Board in the case of *CTO* v. *Bhagwandas & Sons* [1996] Tax World 107. The orders of the first appellate authority were passed on interpretation of the first *Explanation* to section 3(b) of the 1956 Act. Imposition of tax, interest and penalty under the State Act was quashed. In State tax authority's appeal before the Tax Board, reliance was placed on two circulars issued by the Commissioner bearing S. No. 1132A : CCT Circular F.11(3)CST/Tax/CCT/1/61, dated April 15, 1998, clarified by a further circular dated July 19, 1999. The Board did not take into consideration these two circulars. These were not referred to in the orders of the Tax Assessment Officer. The Board sustained the view of the Deputy Commissioner (Appeals) in a composite order. This order was challenged by the Revenue by filing two revision petitions before the High Court, as two appeals were disposed of by the Board by its order dated November 24, 2004. The High Court, in the judgment delivered on September 14, 2007 confirmed the Board's order and quashed two circulars bearing S. No. 115B dated September 16, 1997 and S. No. 1132A, dated April 15, 1998. These circulars sought to impose a time-limit on retention of goods in the carrier's godown, beyond which time the Revenue was to treat obtaining of constructive delivery of the goods involved. That judgment is under appeal before us. Before we deal with this judgment, we shall briefly refer to the other appeals which have been heard together.

3 In Civil Appeal No. 2220 of 2011, incidences of sale relate to different dates between March 24, 1994 and January 30, 1995.

4 Civil Appeal No. 10000 of 2017 and Civil Appeal No. 10001 of 2017 relate to another assessee, Unicolour Chemicals Company. That firm purchased chemical and colour from a Gujarat based company, and the goods reached the godown of the carrier transport company on May 12, 2000. They were sold to a firm in Jaipur in two tranches, after 55 days and 80 days from the date of arrival. The monetary value of these goods was Rs. 1,27,592. In Civil Appeal No. 10001 of 2017, the Revenue's case is that survey of the business place of the same firm revealed that :

> "the stock of taxable goods colour chemical of price Rs. 4,72,653 has been found less and on doubt on the nature of sale showing in section 6(2) of the Central Sales Tax Act and seeing the possibility of tax evasion the record found in the survey of the business firm has been seized."
>
> (quoted from the order annexed to the paper book)

These goods had reached the godown of the transport company on July 25, 2001. These were brought against bilty and the documents were transferred to the same firm on September 4, 2001. There was thus delay of 41 days. The tax fixation authorities directed application of the State Act treating the transactions to be local sales. This order was sustained by the Deputy Commissioner (Appeals) and the order of the Tax Board also went against Unicolour. The High Court, following the judgment in the case of *Bombay Machinery Store* (S. B. S. T. R. No. 186 of 2005—decided on September 14, 2007—Rajasthan High Court) (which we are treating as the lead case in this judgment), quashed the orders of the statutory authorities in both the appeals and also invalidated the two circulars.

The two circulars issued by the Commissioner, Commercial Taxes Department, Rajasthan, have been quoted in the impugned judgment in the case of *Bombay Machinery Store* (S. B. S. T. R. No. 186 of 2005—decided on September 14, 2007—Rajasthan High Court). Henceforth, wherever we refer to the expression judgment under appeal, we shall imply that judgment only, unless we specifically refer to any of the three other decisions under appeal. These circulars read : 5

"S. No. 1115B : CCT Circular F.11(3)/CST/Tax/CCT/1997/1563 dated September 16, 1997 :

As you are aware of the fact that to avoid multiple taxation of goods sold by transfer of documents of title to the goods in their single movement from one State to another, provisions for exemption of such transaction are embodied in section 6(2), CST Act, 1956. It appears that application of this provision has been made more or less mechanical by the assessing authorities inasmuch as on furnishing form E-I/E-II and C forms without looking into the material facts regarding single inter-State movement of such goods, benefits are conferred to such dealers. If the movement of the goods from one State to another terminates, the subsequent sales will be treated as intra-State sales and benefit of the above sub-section (2) of section 6 will not be available in such cases. It is found that trade is often claiming large exemptions under this provision, particularly in respect of paper, dyes and chemicals, etc. It is, therefore, directed that all the assessing authorities should specifically examine the nature of transactions before granting benefit under the said section.

It may be argued that in view of the *Explanation I* to section 3 of the CST Act, 1956, inter-State movement of goods continues until the consignee obtains physical delivery of goods from the carrier, after arrival of these goods at the destination. This argument is based on

the incorrect notion that 'delivery' in the *Explanation* means only 'physical delivery'. This argument can be countered on the basis of the well settled proposition of 'constructive delivery'.

The material fact to be looked into by the assessing authorities while granting benefit of section 6(2) of the CST Act relates to the termination of the movement of goods in the inter-State transactions. If after arrival of the goods at the destination, the consignee asks the transporter expressly or impliedly, to retain the goods at his godown until further directions, then the carrier ceases to hold the goods as transporter, and in the eyes of law, the goods are as much in possession of the consignee as if he had taken them into his own godown. As per the settled legal concept this sequence of events tantamounts to constructive delivery of the goods by transporter to the consignee and transit ends. Any sale by the consignee thereafter will be local sale and benefit of section 6(2) will not be available.

The transporters, whether Railways or Roadways, impose condition of delivery of goods transported through them at the destination usually within ten days and the consignee is required to check up with such transporting agency as to the arrival of the goods. In these circumstances, if the carrier retains the goods for an extended period, then there is a clear inference that the consignee was aware of the arrival of his goods and the transporter is holding the goods on his behalf as a bailee for the consignee. These factual matrix leads to the conclusion that there is a local sale and not sale under the said section 6(2). Payment of warehouse rent/demurrage charges by the consignee to the transporter is conclusive evidence that transporters have assumed the role of bailee and transit having ended. It may be observed that bailment can be either gratuitous or for remuneration or partially both. In law, there can also be bailment without contract.

As per legal position, 'transit' gets over as soon as a reasonable time elapses for the consignee to elect whether he would take the goods away or leave them in the transporters premises, because at the conclusion of reasonable time there is deemed to be a constructive delivery of goods from the transporters to the consignee. If a dealer claims that he had not obtained the delivery of goods, the burden of proving that the goods really remained with the carrier from the date of their arrival till the date of their clearance is on the dealer. If the dealer fails to furnish this proof, then the assessing authority would be justified in concluding that the dealer had himself taken physical

delivery of the goods from the carrier and thereby disallowing his claim of exemption under section 6(2), CST Act.

The decision of the Delhi High Court in *Arjan Dass Gupta and Bros.* v. *Commissioner of Sales Tax, New Delhi*, reported in [1980] 45 STC 52 (Delhi), lays down the basic guidelines regarding exemption of sales under section 6(2), CST Act. The Delhi High Court had held that *Explanation I* to section 3(b) of the CST Act, 1956 did not permit the dealer to expand the movement of goods beyond the time of physical landing of the goods in the Union Territory of Delhi. As to the knowledge except this there are no other directly relevant or contra judgment reported from any other High Court. It is understood that special leave petition is pending in the Supreme Court on the issue but there is no stay. As such the Delhi High Court judgment holds the field.

It is therefore, enjoined upon the assessing authorities that in future they should not grant the benefit of exemption under section 6(2), CST Act, simply on furnishing of the form E-I/E-II and C form. If on the contrary it is found that assessee had taken physical delivery or the goods remained with the transporter beyond a reasonable time looking to the facts and circumstances of each case, the doctrine of constructive delivery should be invoked and action be taken accordingly.

S. No. 1132A : CCT Circular F.11(3)CST/Tax/CCT/61 dated April 15, 1998 :

It may be recalled that vide circular dated September 16, 1997 (S. No. 1115B), instructions were issued clarifying therein the legal position of granting benefits under section 6(2) of the CST Act, 1956. It has been clarified that the concept of constructive delivery shall also be invoked while determining when the transit comes to an end. It was also clarified that the Railways or Roadways usually impose conditions of delivery of goods transported by them at the destination within 10 days and the consignee is required to check up with such transporting agency as to the arrival of the goods. In view of this, it was desired by the above referred circular that the AAs should ascertain the fact that whether the goods remained with the transporter beyond reasonable time. Looking to the facts and circumstances of each case, the doctrine of constructive delivery should be invoked and action be taken accordingly.

The representatives of various associations of trade and industry had brought to the notice that in almost all cases the AAs are

invoking the doctrine of constructive delivery in a mechanical manner immediately after ten days of arrival of the goods at the destination. As per these Associations, this approach has resulted in hardship to the dealers and avoidable harassment is being caused to them with adverse effect on the trade. They have requested for increasing this limit.

Keeping in view these factual aspects and the discussions at the Government level, it is reiterated that the reasonability of the time should be looked into after analysing the facts and circumstances of each case and the usual period of treating constructive delivery which may even extend up to thirty days instead of ten days as suggested in the above referred circular.

Deputy Commissioner (Admn.) should ensure that, while ensuring the State revenue, no harassment shall be caused to the dealers by enthusiastic assessing authorities while determining the end of transit."

6 The High Court has referred to two decisions, one by the Rajasthan High Court itself, in the case of *Guljag Industries Limited* v. *State of Rajasthan* reported in [2003] 129 STC 3 (Raj) and the other of the Delhi High Court in the case of *Arjan Dass Gupta and Bros.* v. *Commissioner of Sales Tax, Delhi Administration* reported in [1980] 45 STC 52 (Delhi). In the latter decision, a Bench of the Delhi High Court construed certain provisions of 1956 Act and the Bengal Finance (Sales Tax) Act, 1941 (as it was applicable to Delhi at the material point of time). On the aspect of what would be implication of the expression "delivery" in section 3(b) of the 1956 Act, it was, inter alia, held[1] :

"10. . . . Normally, when the goods are carried by a carrier from one State to another, the delivery is taken by the importer immediately after the goods land in the importing State. Thus, normally, the landing of the goods in the importing State and the delivery of the goods are almost simultaneous acts, although technically there will be some hiatus between the two. Considering these commercial facts, it is difficult to accede to the retailer's contention that the movement of goods continues even if the goods have landed in Delhi only because the importer has transferred the documents of title to the purchasing retailers and such retailers take delivery from the railways at a subsequent time. If taking delivery is the test of termination of movement and not the landing of the goods in an importing State, *Explanation 1* to section 3(b) of the Central Sales Tax Act would lead to anomalous

1. Page 57 in 45 STC.

results. If, after the landing of the goods in Delhi, the railway receipts are endorsed one after another to ten persons and the delivery is taken by the tenth person, say after three months, the movement of goods would on the dealer's interpretation artificially continues for three months after the landing of the goods in Delhi."

In the judgment under appeal, the Rajasthan High Court, however, dis- 7
agreed with this view of the Delhi High Court relying on the case of *Guljag Industries Limited*[1], in which three appeals were dealt with in a common judgment. It was held by the High Court in the judgment under appeal :

"12. Therefore, the proposition of law by the learned Commissioner in the impugned circulars that 'as per legal position, "transit" gets over as soon as a reasonable time elapses for the consignee to elect whether he would take the goods away or leave them in the transporters premises, because at the conclusion of reasonable time there is deemed to be a constructive delivery of goods from the transporter to the consignee', cannot be said to be a correct legal position. The subsequent circular dated April 15, 1998 purportedly issued to ameliorate the situation for dealers created by previous circular dated September 16, 1997, merely ended up extending the time-limit of 10 days to 30 days without undoing the damage done by the previous circular by propounding a particular view of constructive delivery. In fact, the very power to issue such circulars by the learned Commissioner giving a particular interpretation of law purportedly binding on all the assessing authorities is doubtful. There is no specific provision in the Sales Tax Act, either under the RST Act or under the CST Act, empowering the Commissioner to issue such circulars, as against such powers conferred under section 119 of the Income-tax Act on the Central Board of Direct Taxes. Even section 119 of the Income-tax Act, which empowers the highest administrative body under the Act, namely, CBDT, by way of its proviso restricts and provides that no such order, instruction or direction shall be issued so as to require any income-tax authority to make a particular assessment or dispose of a particular case in a particular manner and such orders or instructions shall also not interfere with the discretion of the Commissioner (Appeals) in exercise of its appellate functions. Therefore, this court cannot countenance the issuance of such circulars by the Commissioner of Sales Tax, which unduly fetter with the quasi-judicial discretion of the assessing authorities, who are expected in law to give their findings of fact and interpret the statutory law in their own

1. [2003] 129 STC 3 (Raj).

quasi-judicial discretion in accordance with the law as interpreted by the Supreme Court or jurisdictional High Court. The circulars issued by the Commissioner in the aforesaid manner like done vide circulars dated September 16, 1997 and April 15, 1998 are likely to hamper and throttle such quasi-judicial discretion which vests with the assessing authorities. Therefore, the aforesaid circulars issued by the Commissioner aforesaid on April 15, 1998 (S. No. 1132A) and September 16, 1997 (S. No. 1115B) are in conflict with the Division Bench decision of this court in *Guljag Industries Limited*[1] and even otherwise they are found to be without any authority of law. Consequently, both these circulars are found to be ultra vires and are hereby quashed.

13. In view of aforesaid, since there was no basis for the learned Commissioner to stipulate the time frame of 10 days or 30 days and thereafter, to require the assessing authority to invoke the concept of constructive delivery so as to deny the exemption of CST on subsequent sales made by transfer of documents of title to the goods made under section 6(2) of Act, though requisite conditions of section 6(2) of the Act are fulfilled by the dealer and such circulars have already been held to be ultra vires and have been quashed and in absence of any other material justifying the denial of exemption under section 6(2) of the Act to the assessee, the impugned order of the Tax Board allowing such exemption to the assessee is not required to be interfered with in the present revision petitions filed by the Revenue."

8 We must add here that the decision in the case of *Guljag Industries Limited*[1] was subsequently carried up in appeal before this court. It appears from the records of this court that two of these appeals were disposed of on September 30, 2010 as the assessee chose to approach the statutory forum whereas another appeal was dismissed having regard to the quantum of tax involved in the appeal.

9 We, accordingly, shall test the Revenue's case including the question of legality of the said two circulars in the context of the provisions of sections 3 and 6 of the 1956 Act. The respondent in this case had taken benefit of sub-section (2) on the ground that this was a case involving inter-State sale and the sale took place by way of transfer of documents of title of such goods during their movement from one State to another. It is also the respondents' case that the requisite forms and certificates were duly furnished pertaining to such sales. On the part of the State, barring retention of the goods in the transporters' godown at the destination point for a long period of time, default on no other count by the assesses has been asserted.

1. [2003] 129 STC 3 (Raj).

In the two appeals in which the respondent is Bombay Machinery Stores, sales pertained to financial years before the circulars came into subsistence. In these instances of sales, the Commercial Tax Officer in the respective orders treated retention of goods beyond 30 days in the transporters' godown as the cut-off period. After that date, the assessee was deemed to have had taken constructive delivery of goods and sale beyond that period within the State of Rajasthan was held to be local sales and subjected to sales tax under the State law. Same reasoning was followed in the respective orders of the tax authorities forming subject-matters of two appeals involving Unicolour Chemicals Company. The Tax Board, while deciding the issue in favour of the Revenue, referred to the aforesaid two circulars in upholding the concept of constructive delivery. **10**

As per the aforesaid circulars, retention of goods by the transporter beyond the time stipulated therein (being 30 days as per the later circular) would imply that constructive delivery of the goods has been made by the transporter to the consignee. In such a situation, the transit status of the goods would stand terminated and the deeming provision in first *Explanation* to section 3 of the 1956 Act conceiving the time-point of delivery as termination of movement shall cease to operate. **11**

In this set of appeals we have already indicated that transfer of documents of title were effected subsequent to the goods reaching the location within destination State. But when the goods are delivered to a carrier for transmission, first *Explanation* to section 3 of the 1956 Act specifies that movement of the goods would be deemed to commence at the time when goods are delivered to a carrier and shall terminate at the time when delivery is taken from such carrier. The said provision does not qualify the term "delivery" with any time-frame within which such delivery shall have to take place. In such circumstances fixing of time-frame by order of the Tax Administration of the State in our opinion would be impermissible. **12**

Before the High Court, the revenue authorities has relied on section 51 of the Sale of Goods Act, 1930 (hereinafter referred to as the "1930 Act"). But the said provision also does not aid or assist the Revenue. Section 51 of the 1930 Act reads : **13**

> "51. *Duration of transit*.—(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer and the carrier or other bailee continues to be in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods."

14 Sub-clause (1) of the said provision specifies when the goods shall be deemed to be in course of transit and sub-clause (3) thereof lays down the conditions for termination of transit. That condition is an acknowledgment to the buyer or his agent by the carrier that he holds the goods on his behalf. There is no material to suggest such an acknowledgment was made by the independent transporter in these appeals. In such circumstances we do not think the decision of the High Court requires any interference.

15 In the case of *Arjan Dass Gupta*[1] principle akin to constructive delivery was expounded and we have quoted the relevant passage from that decision earlier in this judgment. In our opinion, however, such construction would not be proper to interpret the provisions of section 3 of the 1956 Act. A legal fiction is created in first *Explanation* to that section. That fiction is that the movement of goods, from one State to another shall terminate,

1. [1980] 45 STC 52 (Delhi).

where the goods have been delivered to a carrier for transmission, at the time of when delivery is taken from such carrier. There is no concept of constructive delivery either express or implied in the said provision. On a plain reading of the statute, the movement of the goods, for the purposes of clause (b) of section 3 of the 1956 Act would terminate only when delivery is taken, having regard to first *Explanation* to that section. There is no scope of incorporating any further word to qualify the nature and scope of the expression "delivery" within the said section. The Legislature has eschewed from giving the said word an expansive meaning. The High Court under the judgment which is assailed in Civil Appeal No. 2217 of 2011 rightly held that there is no place for any intendment in taxing statutes. We are of the view that the interpretation of the Division Bench of the Delhi High Court given in the case of *Arjan Dass Gupta*[1] does not lays down correct position of law. In the event, the authorities felt any assessee or dealer was taking unintended benefit under the aforesaid provisions of the 1956 Act, then the proper course would be legislative amendment. The Tax Administration Authorities cannot give their own interpretation to legislative provisions on the basis of their own perception of trade practise. This administrative exercise, in effect, would result in supplying words to legislative provisions, as if to cure omissions of the Legislature.

For these reasons, we do not want to interfere with the judgments of the **16**
High Court in these four appeals. The appeals are dismissed. Any connected applications shall also stand disposed of.

There shall be no order as to costs. **17**

[2020] 77 GSTR 319 (SC)

[IN THE SUPREME COURT OF INDIA]

STATE OF WEST BENGAL AND OTHERS

v.

HINDUSTAN UNILEVER LTD.

S. A. BOBDE C. J. I., **B. R. GAVAI** and **SURYA KANT** JJ.

February 5, 2020.

HF ▶ Assessee

SALES TAX—EXPORT OF TEA—EXEMPTION—DECLARATION FORM—DEALER PERMITTED BY COURT TO APPLY FOR DECLARATION FORM FOR CLAIMING EXEMPTION—WEST BENGAL SALES TAX ACT (49 of 1994), S. 17(3)—WEST BENGAL SALES TAX RULES, 1995, rr. 42, 81 ; FORM 9.

1. [1980] 45 STC 52 (Delhi).

The court permitted the respondent, a public limited company having its units at Kolkata, Pune and Cochin for preparing packet tea, blended tea and tea bags, to file application for issuance of form 9 prescribed under rule 42 of the West Bengal Sales Tax Rules, 1995 or any other appropriate form for the purpose of claiming exemption in respect of assessment years in question within a period of three months.

HINDUSTAN UNILEVER LIMITED *v.* ASSISTANT COMMISSIONER, COMMERCIAL TAXES [2020] 77 GSTR 320 (Cal) *referred to.*

Civil Appeal No. 8033 of 2009.

Appeal from the judgment and order dated January 15, 2008 of the Calcutta High Court in W. P. T. T. No. 636 of 2007 (*Hindustan Unilever Limited* v. *Assistant Commissioner, Commercial Taxes*). The judgment of the High Court (PINAKI CHANDRA GHOSE *and* PRABUDDHA SANKAR BANERJEE JJ.) delivered by PINAKI CHANDRA GHOSE J. ran as follows :

"JUDGMENT

PINAKI CHANDRA GHOSE J.—The writ petition has been directed against an order of the West Bengal Taxation Tribunal (hereinafter referred to as 'the learned Tribunal') dated August 10, 2007.

Facts of the case briefly are as follows :

The petitioner is a public limited company having its unit at Kolkata, Pune and Cochin for preparing packet tea, blended tea and tea bags. According to the petitioner, the said units are 100 per cent. export oriented undertakings. The petitioner is a registered dealer under the provisions of the West Bengal Sales Tax Act, 1994 (hereinafter referred to as 'the said Act') and the Central Sales Tax Act, 1956 (hereinafter referred to as 'the 1956 Act'). The petitioner purchased tea at Kolkata and Siliguri tea auctions through tea brokers.

The West Bengal Sales Tax Rules, 1995 framed rule 42 made pursuant to section 17(3)(a)(xi) of the Act and rule 81 made pursuant to section 17(3)(a)(iii) of the Act which provided for exemption of tax on sales of tea at such auctions if such tea with or without further processing is exported. It further appears that under the said provision, for availing such exemption the petitioner has to furnish a declaration in the prescribed form 9 to the seller which has to be obtained from sales tax authorities.

The case of the petitioner that the petitioner used to apply for such declaration forms from the authorities and used to furnish the same to its sellers at the auctions. In the year 2001, the sales tax authorities refused to give such declaration forms to the petitioner. Representations were filed which were rejected on the ground that tea purchased at the auctions were

sent by its two units in Pune and Cochin for blending and for packeting and were exported from the said place and the said sales tax authorities held that in terms of rule 42 of the Rules such activities, i. e., blending, packeting, etc., had to be undertaken within the territory of West Bengal for availing the exemption and the exports also should have been made from West Bengal only.

The petitioner went before the learned Tribunal, learned Tribunal passed an interim order directing the sales tax authorities to issue the declaration forms to the petitioner to enable it to furnish to its sellers and the petitioners were directed to furnish a bank guarantee to the tune of Rs. 50 lakhs in favour of the authorities and to keep the same alive.

Subsequently, after the pleadings were filed before the learned Tribunal, the matter was taken up by the learned Tribunal. The contention before the learned Tribunal that there is no such restrictions/conditions had been made by the Legislators in rule 42 of the said Rules and such conditions cannot be imposed by the sales tax authorities.

However, learned Tribunal held that on August 10, 2007 the petitioner is not entitled to claim the exemption and the authorities were justified in refusing to issue declaration forms sought for by it. But the learned Tribunal further accepted the contention of the petitioner that there is no restriction has been imposed under the said rule 42 with regard to geographical restriction as to the place from which the export was to be effected and the petitioner could not be denied the benefit only on the ground that the exports were not made from West Bengal. But it appears that learned Tribunal further proceeded that said rule 42 was made with reference to section 5(1) of the 1956 Act and the said rule had no application in case of the petitioner and further held that transfer of the goods/tea by the petitioner from Kolkata unit to Cochin and Pune units amounted to an intervening transaction which was covered by declaration in form F. Therefore, the petitioner was not entitled to have the benefit of exemption.

Mr. Bajoria, learned advocate appearing on behalf of the petitioner submitted that article 286 of the Constitution debars the States from levying any tax on the sale or purchase of goods where it takes place in the course of exports of goods out of the territory of India and under the said article, Parliament was authorised to formulate the principles for determining when a sale or purchase so takes place. He further drew our attention to sub-section (3) of section 5 of the 1956 Act and submitted that the said sub-section provides that the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of India shall also be deemed to take place in the course of such export. However,

such last sale or purchase takes place applying with the agreement or order for or in relation to such export. He also drew our attention to section 17(3)(a)(xi) and section 17(3)(a)(iii) and submitted that where goods purchased are exported in India, it would be excluded from taxable turnover and section 17(3)(a)(xi) provides for excluding such other sales on such conditions or restrictions as may be prescribed and he drew our attention to rule 42 which was framed in accordance with section 17(3)(a)(xi) of the Act. The said rule 42 is set out hereunder :

"42. *Exemption from tax on sales of tea for the purpose of export*.—(1) Where any dealer makes sale in auction held in Kolkata under the auspices of the Calcutta Tea Traders' Association or at Siliguri under the auspices of Siliguri Tea Auction Committee or on internet under the auspices of the Teauction. Com Limited, an auction house for tea holding licence issued by the Tea Board, Calcutta, to a registered dealer, of tea (including containers or other materials for its packing sold along with the tea) for the purpose of export (whether the export sale of tea is made after further processing or blending by him or not) by the purchasing dealer out of the territory of India, such dealer may, for the purpose of determining his taxable turnover of sales, deduct such sale under sub-clause (xi) of clause (a) of sub-section (3) of section 17 from his gross turnover of sales, subject to the conditions provided in sub-rule (2) and sub-rule (3).

(2) No claim for deduction of sale as referred to in sub-rule (1) shall be allowed unless—

(a) tea including containers and other materials for its packing is exported by the purchasing dealer out of the territory of India within six months from the date of such sale ;

(b) the dealer making the sale of such tea furnishes, on demand, a declaration in form 9, obtainable from the appropriate assessing authority, duly filled in and signed by the purchasing dealer or by such other person as may be authorised in this behalf by the purchasing dealer, along with the evidence for export as prescribed in the Schedule appended to the said declaration :

Provided that in a case where—

(i) tea (including containers and other materials for its packing sold along with the tea) cannot be exported by the purchasing dealer out of the territory of India for reasons beyond the control of such purchasing dealer within a period of six months from the date of such sale as specified in clause (a) of this sub-rule ; and

(ii) the dealer making such sale in auction as referred to in sub-rule (1) before the expiry of the said period of six months makes an application to the Commissioner, stating all particulars in respect of such sale of tea and in respect of the intended export thereof by the purchasing dealer and the reason for seeking extension of such period to such date as may be required by such purchasing dealer to effect the export of such goods,

the Commissioner may, if he is satisfied with the reasons shown in the application for extension referred to in clause (ii) of this proviso, extend ; by an order in writing, such period to such date as he thinks fit and proper.

(3) Where tea covered by a single sale in the auction referred to in sub-rule (1) is partly exported out of the territory of India by the purchasing dealer, exemption shall not exceed that part of sale price of tea so exported by the purchasing dealer." (emphasis[1] added)

He further drew our attention to rule 81 which is also necessary to reproduce herein :

"81. *Declaration and evidence for deduction of sale of tea at auction immediately preceding export*.—(1) Where a dealer makes a sale to a registered dealer of tea at auction held in Kolkata under the auspices of the Calcutta Tea Traders' Association or at Siliguri under the auspices of the Siliguri Tea Actuion Committee or on internet under the auspices of the Teauction.Com Limited, an auction house for tea holding license issued by the Tea Board Kolkata and such sale is claimed to be the last sale for export within the meaning of sub-section (3) of section 5 of the Central Sales Tax Act, 1956 and he intends to claim deduction of such sale under sub-clause (iii) of clause (a) of sub-section (3) of section 17, such dealer shall, on demand by appropriate assessing authority, furnish a declaration in form 9 obtainable from the purchasing dealer duly filled in and signed by the dealer who exports such tea out of the territory of India along with the evidence therefor as referred to in the Schedule to the declaration as aforesaid." (emphasis[1] added)

He further pointed out that rule 81 has been made with reference to section 17(3)(a)(iii) read with section 5(3) of the 1956 Act to cover cases where goods purchased are exported without being subjected to further processing. Rule 42 has been made with reference to section 17(3)(a)(xi) to exempt sales of tea which is ultimately exported after processing. Rule 42

1. Here italicised.

is specific for tea only and has been made in view of features peculiar to the tea trade.

Mr. Bajoria also contended that learned Tribunal has erred in holding that rule 42 was made with reference to section 5(1) of the Act of 1956. The learned Tribunal failed to appreciate that in case of a transaction within the scope of section 5(1), neither rule 42 nor rule 81 has any relevance. The transaction referred to in section 5(1) is that between the Indian seller and the foreign buyer. Therefore, there is scope for foreign buyer to obtain any declaration form from any assessing authority or of his furnishing it to the dealer exporting the goods.

He further pointed out that learned Tribunal also erred in holding that the petitioner's case did not fall within the scope of rule 42 or that the petitioner had not applied for the forms under the said rule. Mr. Bajoria pointed out that several letters were addressed to the sales tax authorities claiming the benefit under rule 42/81 of the Rules.

Mr. Bajoria further pointed out that the provisions of rules 42 and 81 are self-evident. Rule 42 grants exemption to sales made for the purpose of export, whether after processing or blending or not, under section 17(3)(a)(xi) of the Act whereas rule 81 grants exemption to sale immediately preceding the export under section 5(3) of the 1956 Act read with section 17(3)(a)(iii) of the Act. Rule 81 deals with the situation where the export is immediately made all the goods purchased at the auctions. Rule 42 is an independent exemption granted to cover cases of export of tea after processing or blending to which section 5(3) of the 1956 Act may not be attracted. Rule 42 recognizes the features peculiar to the tea trade, namely, that tea purchased at the auctions cannot be exported as such in most cases and blending or other processing is inevitable to meet the requirements of the foreign buyer. Rule 42 has been made by the State Government in view of the nature of the tea export trade. According to Mr. Bajoria, most of the tea is grown in the gardens of Assam and West Bengal. Such tea is mostly sold at auctions, which are primarily held at Kolkata and Siliguri. Blending and packeting are most important elements of tea trade both within and outside India. Therefore, he submitted that rule 42 equally applies in the case of processing or blending of tea purchased at the auctions to be done only in West Bengal or such activities can be undertaken outside West Bengal and whether exports have to be made only from West Bengal. He further submitted that rule 42 does not provide so. No restrictions or conditions can be added to rule 42. Learned Tribunal also accepted that there is no geographical limitation that export has to be made only from a place in

West Bengal. In these circumstances, he drew our attention to certain sections, which are specifically mentioned about West Bengal. The said sections are as follows :

> '*Section 17(2)(b)(i)* : Four per centum of such part of his taxable turnover of sales as represents sales to a registered dealer of goods, other than goods specified in Part B of the Schedule IV, of the class or classes specified in the certificate of registration of such dealer, as being intended for use by him directly in the manufacture in West Bengal of goods other than taxable goods, or newspapers for sales, other than the sale referred to in section 15, by him in West Bengal, and of containers and other materials for the packing of goods of the class or classes so specified.
>
> *Section 17(2)(ca)* : Four per centum of such part of his taxable turnover of sales as represents sales to a registered dealers of containers and other materials for the packing of goods which are intended for used by him in the packing in West Bengal of goods, other than taxable goods or newspaper, manufactured by him in West Bengal, for sale, other than the sales referred to in section 15, by him in West Bengal.'

From these two sections, it would be apparent that the restrictions on place of manufacture only but not on place of sale only made under section 17(2)(b)(ii), section 17(2)(c), section 17(2)(e), section 17(2)(hh), section 17(2)(hhh) and he further drew our attention to section 17(2)(d) where no restriction has been made under the said provision. After drawing our attention to all these sections Mr. Bajoria contended that rule 42 does not stipulate that the processing or blending should be carried out in West Bengal or that the export should be made from West Bengal and he relied upon the decisions of the honourable Supreme Court reported in [1978] 41 STC 409 (SC) (*Polestar Electronic (Pvt.) Ltd.* v. *Additional Commissioner, Sales Tax*), [1981] 48 STC 239 (SC) (*Assessing Authority-cum-excise and Taxation Officer, Gurgaon* v. *East India Cotton Mfg. Co. Ltd.*), [1999] 112 STC 248 (Patna) (*Hindalco Industries Limited* v. *State of Bihar*) and [2007] 8 VST 466 (SC) (*State of Haryana* v. *Nipha Exports Pvt. Ltd.*). Accordingly, he submitted that the export which has been made by the company from its units only and further the said units are not distinguished or independent from the petitioner, but are merely the establishments of the petitioner. According to Mr. Bajoria, the learned Tribunal completely overlooked and ignored the provisions of rule 42 and could not appreciate the submissions made by him on the basis of the said rule. He further pointed out that the learned Tribunal further erred in holding that there was a transaction

declaration in form F for movement of tea purchased at the auctions to the petitioner's unit at Pune and Cochin. Under section 6A of the 1956 Act whenever movement of the goods takes place otherwise on sale the goods have to be covered by such declaration in form F. Therefore, use of form F is only for procedural purpose and further for ensuring that there is no evasion of tax. Therefore, Mr. Bajoria submitted that the order of the learned Tribunal holding that the sales of tea at the tea auctions to the petitioner are not entitled to exemption be set aside and such sales are entitled to get the exemption under rule 42 of the Rules and the respondents should be directed to issue form 9 to the petitioner and the bank guarantee already furnished by the petitioner, should be discharged.

Mrs. Roy, learned advocate appearing in support of the respondents contended that once the goods have already been transferred from the State to the other, then automatically the said rule 42 has no application in case of the petitioner's export in question. Therefore, she submitted that learned Tribunal correctly held that the said rule 42 has no application in the case of the petitioner and the petitioner is not entitled any benefit out of that. Accordingly, she submitted that this application should be dismissed and furthermore, on the ground of furnishing the form F, is nothing but to prove that goods were transferred from West Bengal to Cochin and therefore, the petitioner has no right to get benefit under rule 42 of the said Rules.

After analyzing the facts of this case and the Rules as well as the sections as placed before us, it appears to that in the case *Polestar Electronic (Pvt.) Ltd.* v. *Additional Commissioner, Sales Tax* [1978] 41 STC 409 (SC), the honourable Supreme Court has held at page 428 of the reports as follows :

> 'Similarly, for the same reasons, which we need not repeat again, "manufacture" and "sale" in section 5(2)(a)(ii) and the second proviso mean manufacture and sale anywhere without any geographical limitation and neither "manufacture" or "sale" is restricted to the territory of Delhi. There are no words like 'inside the Union territory of Delhi' to qualify "manufacture" or "sale" and there is no cogent or compelling reason for reading such words in section 5(2)(a)(ii) and the second proviso. The use of the goods purchased as raw materials in the manufacture of goods may, therefore, take place anywhere and not necessarily inside Delhi and equally the sale of goods so manufactured may be effected anywhere, whether inside or outside Delhi. The only end use of the goods purchased required to be made for attracting the applicability of section 5(2)(a)(ii) is that the goods must be utilised by the purchasing dealer as raw materials in the manu-

facture of goods and the goods so manufactured must be sold, irrespective whether the manufacture or sale takes place inside Delhi or outside. . .'

At page 429 of the reports it was further held as under :

'The subsequent history of the Act also supports the construction which we are inclined to place on section 5(2)(a)(ii) and the second proviso. Section 5(2)(a)(ii) was amended with effect from May 28, 1972, by the Finance Act, 1972, and the words "in the Union Territory of Delhi" were added after the word "manufacture" so as to provide that manufacture should be inside the territory of Delhi. It was also provided by the amendment that the sale of manufactured goods should be inside Delhi or in the course of inter-State trade or commerce or in the course of export outside India. This amendment clearly excluded manufacture of goods as also sale of manufactured goods outside Delhi. It is clear from the statement of objects and reasons that this amendment was not introduced by the Parliament ex abundanti cautela, but in order to restrict the applicability of the exemption clause in section 5(2)(a)(ii). The statement of objects and reasons admitted in clear and explicit terms that :

"At present sales of raw materials in Delhi are exempted from tax irrespective of the fact whether the goods manufactured therefrom are sold in Delhi or not. It is, therefore, made clear that sales of raw materials will be tax-free only when such sales are made by those who manufacture in Delhi taxable goods for sale".'

At pages 435-6 of the reports, it was further held as under :

'Lastly, it was contended that the resales effected by the branches of the assessees outside Delhi could not be regarded as resales by the assessees within the meaning of section 5(2)(a)(ii) and the second proviso and hence the assessees must be held to have utilised the goods for a purpose of different from that for which the goods were purchased, namely, resale by them, and the price of the goods purchased must be included in their taxable turnover under the second proviso. But this contention fails to take into account the plain and obvious fact that when the branches of the assessees resell the goods outside Delhi, it is really the assessees who resell the goods, for the branches are not distinct and independent from the assessees but are merely establishments of the assessees. Re-sales effected by the branches are nothing else than resales made by the assessees at the branches and hence it is not possible to say that when the goods were

resold by the branches, the resales were not by the assessees so as to attract the applicability of the second provisos.' (emphasis[1] added)

In the case of *Assessing Authority-cum-excise and Taxation Officer, Gurgaon* v. *East India Cotton Mfg. Co. Ltd.* [1981] 48 STC 239 (SC) the honourable Supreme Court held at page 246 as follows :

'Now here we find that the expression used by the Legislature as also the rule-making authority is simpliciter "for use . . . In the manufacture . . . of goods for sale" without any addition of words indicating that the sale must be by any particular individual. The Legislature has designedly abstained from using any words of limitation indicating that the sale should be by the registered dealer manufacturing the goods. It is significant to note that where the Legislature wanted to restrict the sale to one by the registered dealer himself, the Legislature used the qualifying words "by him" after the words "for resale" in the first sub-clause of section 8(3)(b) indicating clearly that the resale contemplated by that provision is resale by the registered dealer purchasing the goods and by no one else, but while enacting the second sub-clause of section 8(3)(b) the Legislature did not qualify the words "for sale" by adding the words "by him". This deliberate omission of the words "by him" after the words "for sale" clearly indicates that the Legislature did not intend that the sale of the manufactured goods should be restricted to the registered dealer manufacturing the goods. If the Legislature intended that the sale of the manufactured goods should be by the registered dealer manufacturing the goods and by no one else, there is no reason why the words "by him" should have been omitted after the words "for sale" when the Legislature considered it necessary to introduce those words after the words "for resale" in the first sub-clause of section 8(3)(b). The omission of the words "by him" is clearly deliberate and intentional and it cannot be explained away on any reasonable hypothesis except that the Legislature did not intend that sale should be limited to that by the registered dealer manufacturing the goods. The court must construe the language of section 8(3)(b) according to its plain word and it cannot write in the section words which are not there. To read the words "by him" after the words "for sale" in section 8(3)(b) would not be construction but judicial paraphrase which is impermissible to the court. It is also important to note that the word "use" is followed by the words "by him" clearly indicating that the use of goods purchased in the manufacture of goods for sale must

1. Here italicised.

be by the registered dealer himself but these words are significantly absent after the words "for sale". On a plain grammatical construction these words govern and qualify only "use" and cannot be projected into the words "for sale". The goods purchased by the registered dealer must be used by him in the manufacture of goods which are intended for sale but such sale need not be by the registered dealer himself ; it may be by anyone.' (emphasis[1] added)

In the case of *Hindalco Industries Limited* v. *State of Bihar* [1999] 112 STC 248 (Patna), the honourable Patna High Court held at page 257 of the reports as follows :

'. . . I accordingly find and hold that section 13(1)(b) of the Bihar Finance Act, 1981 cannot be constructed so as to put a geographical limitation on the situs of manufacture or sale of manufactured goods within the State of Bihar and it is sufficient for the purpose of that section that the purchased goods are directly used in the manufacture of goods though the manufacture might take place outside the State.' (emphasis[1] added)

In the case of *State of Haryana* v. *Nipha Exports Pvt. Ltd.* [2007] 8 VST 466 (SC), the honourable Supreme Court held at page 469 of the reports as under :

'We agree with the view taken by the High Court (*Nipha Exports P. Ltd.* v. *State of Haryana* [1998] 108 STC 337 (P&H)) that the movement of the goods from Faridabad to Calcutta was occasioned in the course of export out of India and there could be no sale between the branch office and the head office. Accordingly, we do not find any merit in these appeals and dismiss the same leaving the parties to bear their own costs.' (emphasis[1] added)

After analyzing the said decisions and the facts of this case, we hold that rule 42 provides for blending or further processing of the tea should take place in or the export should be made from West Bengal. Therefore, in our opinion, the said rule 42 does not create any restriction with regard to the place of blending/processing of tea. It is true that the concept of a transaction can only arise when there are two parties. Transfer from one branch to other, cannot be treated as a sale and there cannot be any scope of any transfer between the different branches of a same company, merely because the goods were shifted from one branch to another for certain purpose and that too within the meaning of rule 42, i. e., blending, packeting, etc. Learned Tribunal has wrongly held that rule 42 has no application in

1. Here italicised.

the facts and circumstances of this case. On the contrary, we hold that the said rule is applicable and the petitioner is bound to get the benefit under the said rule in terms of the order passed by the honourable Supreme Court. The honourable Supreme Court has already considered the issue whether the sales tax provisions applicable to Delhi allowing exemption from tax against declaration for purchase of raw materials for use in manufacture could be construed as requiring such use for manufacture in Delhi only or it could be done at the assessee's other units. But in the instant rule it would appear that there is no restriction has been imposed under the said rule and that export has to be done from West Bengal or after purchasing the same that as per blended or processed within the territory of West Bengal. Therefore, in our opinion, the petitioner must get that benefit and accordingly, we set aside the order so passed by the learned Tribunal and we hold that the petitioner is entitled to get exemption under rule 42 of the said Rules and the respondents are directed to issue form 9 to the petitioner. Bank guarantee already furnished by the petitioner, also to be discharged.

For the reasons stated hereinabove, this application is allowed.

Xerox certified copy of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

PRABUDDHA SANKAR BANERJEE J.—I agree."

Rakesh Dwivedi, Senior Advocate, (*Ms. Madhumita Bhattacharjee*, AOR *Ms. Sreja Choudhury* and *Ms. Sansriti Pathak*, Advocates with him), for the appellants.

Kavin Gulati, Senior Advocate, (*Ms. Ruby Singh Ahuja, Anupam Prakash, Ashutosh P. Shukla, Ajay Aggarwal* and *Ms. Mallika Joshi* for M/s. Karanjawala & Co., AOR, Advocates with him), for the respondent.

ORDER

1 After hearing the matter at length, Shri Rakesh Dwivedi, learned senior counsel appearing on behalf of the appellants has fairly stated that if the respondents make a request for issuance of form 9 or any other appropriate form for the purpose of claiming exemption in respect of assessment years in question, the same will be given to them.

2 Accordingly, the respondents, if so advised, may make such claim, as they are entitled to under law, for the purpose of claiming exemption in respect of sales tax for the assessment years in question. This would not affect any claim for exemption made earlier nor result in re-opening of any

assessment already made. Obviously, assessments, if any, will be made according to law.

We make it clear that application for issuance of form 9 or any other 3
appropriate form for the purpose of claiming exemption in respect of assessment years in question shall be made by the respondent within a period of three months from today.

Shri Kavin Gulati, learned senior counsel appearing for the respondent 4
has no objection to this proposal.

The appeal is disposed of in the above terms. 5

[2020] 77 GSTR 331 (Mad)

[IN THE MADRAS HIGH COURT]

FREIGHT SYSTEMS (INDIA) PRIVATE LIMITED

v.

COMMISSIONER OF CENTRAL GOODS AND SERVICES TAX AND CENTRAL EXCISE-AUDIT II COMMISSIONERATE, CHENNAI

DR. ANITA SUMANTH J.

February 28, 2019.

HF ▶ Assessee

SERVICE TAX—CONSULTATIVE PROCESS—EFFECT OF CIRCULARS AND INSTRUCTIONS—"CONSULTATION" BETWEEN ASSESSEE AND DEPARTMENT PRIOR TO ISSUANCE OF SHOW-CAUSE NOTICE—OPPORTUNITY OF PERSONAL HEARING TO BE GRANTED TO ASSESSEE—SHOW-CAUSE NOTICE AGAINST LEVY OF TAX, INTEREST AND PENALTY—SET ASIDE AND DIRECTION TO AFFORD ASSESSEE OPPORTUNITY OF PERSONAL HEARING—FINANCE ACT (32 of 1994), ss. 73(1), 75, 76, 78—CIRCULARS DATED DECEMBER 21, 2015, JULY 8, 2016, OCTOBER 13, 2016 AND MARCH 10, 2017.

Notice was issued to the assessee to show cause against levy of service tax of Rs. 16,18,93,417 payable for the period from October, 2012 to June, 2017 under the proviso to section 73(1) of the Finance Act, 1994, interest under section 75 of the Act, and penalty under sections 76 and 78 of the Act. The assessee replied to the audit query by letter dated May 7, 2018 but did not seek a personal hearing. On a writ petition :

Held, *allowing the petition, that the tenor of the circulars and instruction dated December 21, 2015, July 8, 2016, October 13, 2016 and March 10, 2017 made it clear that the introduction of the consultative process was a*

measure of alternative dispute resolution to reduce litigation wherever possible in the light of the responses sought and received from the assessee thus obviating the necessity of even a show-cause notice where the dispute can be resolved in an amicable fashion. The objections of the assessee dated May 7, 2018 were in general terms. However, no opportunity had been extended to the assessee for a face-to-face with the assessing officer, which was what a "consultation" entailed. Although no personal hearing had been sought in this case and in any event, such hearing would be afforded prior to decision whether to confirm the proposals in the show-cause notice or otherwise, the import of the circulars and instructions was to provide a medium for "consultation" between the assessee and the Department, prior to issuance of show-cause notice. In fact, master circular dated March 10, 2017 used the phrase "such consultation shall be done by the adjudicating authority with the assessee concerned". The consultative process as envisaged by the Department mandated an opportunity of personal hearing with the assessee, face to face, in order to make the process an effective one. The assessee had been denied this opportunity. The show-cause notice was to be set aside and the Commissioner was to call upon the assessee to appear before him with all relevant materials and afford it full opportunity of hearing and consultation prior to issuance of show-cause notice, if at all necessary.

GAUTAM (C. B.) *v.* UNION OF INDIA [1993] 199 ITR 530 (SC) *relied on*.

Cases referred to :

Gautam (C. B.) *v.* Union of India [1993] 199 ITR 530 (SC) (para 18)

Kraipak *v.* Union of India [1970] 1 SCR 457 (para 18)

Olga Tellis *v.* Bombay Municipal Corporation [1985] 2 SCR 51 (para 18)

Union of India *v.* Col. J. N. Sinha [1970] IILLJ 284 SC (para 18)

Writ Petition No. 1618 of 2019 and W. M. P. Nos. 1800, 1801, 5609 and 5624 of 2019.

S. Muthu Venkataraman for the petitioner.

Pramod Kumar Chopda, Senior Standing Counsel, for the respondent.

ORDER

1 DR. ANITA SUMANTH J.—The writ petitioner challenges Notice No. 7/2018, dated August 29, 2018, for the period from October, 2012 to June, 2017 calling upon the petitioner to show cause in the following terms :

> ". . . 9. Therefore, M/s. Freight Systems India Private Limited, Rathna Tower No. 1 Super A-7 Thiru-vi-ka Industrial Estate, Guindy,

Chennai 600 032 is required to show cause to the Commissioner of CGST and Central Excise, Chennai South Commissionerate, MHU Complex, 692 Anna Salai, Nandanam, Chennai 600 035, as to why—

(i) the service tax totally amounting to Rs. 16,18,93,417 (rupees sixteen crore eighteen lakhs ninety three thousand four hundred and seventeen only) payable for the period from October, 2012 to June, 2017 should not be demanded from them under proviso to section 73(1) of the Finance Act, 1994.

(ii) interest at the appropriate rate on the amount of Rs. 16,18,93,417 should not be recovered from them under the provisions of section 75 of the Finance Act, 1994, and

(iii) penalty should not be imposed upon them under section 76 and section 78 of the Finance Act, 1994."

Mr. S. Muthu Venkataraman, learned counsel appearing for the petitioner assails the impugned show-cause notice on two grounds. The first ground is that circulars issued by the Central Board of Excise, Customs and Service Tax as well as Departmental Instructions have formulated a procedure, whereby a process of consultation is envisaged as between the assessee and the service tax authorities to arrive at an amicable resolution of disputes raised by the Tax Department, prior to escalation of disputes to the level of issuance of show-cause notice. The first instruction is dated December 21, 2015, in F. No. 1080/09/DLA/Misc/15, the second instruction/clarification is dated July 8, 2016 in F. No. 1080/09/DLA/Misc/15, the third instruction/clarification is dated October 13, 2016 in F. No. 1080/09/DLA/CC Conference/2016 and the fourth circular is issued in F. No. 96/1/2017-CX/1, dated March 10, 2017. According to the learned counsel, the process of consultation has not been followed in the present case. **2**

The second contention raised by the learned counsel is that the show-cause notice seeks to bring to tax the income from certain activities carried out by the petitioner that have been clarified as "business auxiliary service" or "business support service", in terms of the Finance Act, 1994. The identical issue has been held in favour of the petitioner for later periods by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), vide its order dated March 28, 2018. Thus, even on merits, the impugned show-cause notice is untenable in law. **3**

Per contra, Mr. Pramod Kumar Chopda, learned senior standing counsel appearing for the respondent/Revenue would deny the allegation that the consultative process has not been followed in the present case. He draws attention to communication dated May 3, 2018 from the Assistant Commissioner of CGST and Central Excise to the petitioner putting the **4**

petitioner to notice about e-mail dated April 19, 2018 from the audit group regarding liability of service tax to the tune of Rs. 16,91,06,992 received as per credit note from its foreign branches for the period in question. The detailed objection of the audit department is annexed to the aforesaid letter, wherein at paragraphs 8 and 9, after extracting all relevant statutory provisions and Rules, the Assessing Officer states as follows :

"(8) In this case, the goods are consigned by the foreign entities to the assessee to undertake the activity of break bulk of the goods at the port of destination in the Indian Territory, on behalf of them, for delivery to the importer of such goods in India. Thus in terms of the provisions of rule 4 of the said Rules supra, the place of provision of service provided by the assessee falls within the taxable territory. Further the service provided by the assessee to their foreign entities is not covered within the negative list of services specified under section 66D of the Finance Act, 1994. Hence the service provided by the assessee is a taxable service and the consideration received by way of credit note issued by their foreign entities as profit sharing is leviable to service tax under section 66B of the Finance Act, 1994.

(9) The service tax totally amounting to Rs. 16,91,06,992 shall be payable on the credit note received for the period from October, 2012 to June, 2017."

The officer has thus called for the reply of the petitioner to be furnished urgently.

5 The assessee has replied to the aforesaid audit query by its letter, dated May 7, 2018 in the following terms :

"Apropos above, the following factual submissions are made to clarify your queries regarding income received through credit notes.

1. We are licensed multi-modal transport operator (MTO) engaged in providing freight forwarding services by sea and air.

2. The copy of the agreement provided to you was drafted in 2004. Our business model has undergone drastic changes depending on the growth, specialization and core business activities and areas of strength with further factors of business climate and environment and economic constructs.

3. The agreements are broad based and non-exclusive, taking into account out business interests and specializations and operate on mutually agreed terms and conditions. The present business model envisages that we share in equal ratio, the profits derived from the freight differentials earned.

4. The profit share, which is nothing but the freight differentials earned by us and the foreign entities in their respective territories, is paid through credit notes on a monthly basis through an accounting and settlement mechanism after reconciliation process."

No personal hearing has been sought and none afforded by the officer.

Thus, according to Mr. Chopda, the consultation process, has been faithfully followed in the present case and there is absolutely no justification on the part of the petitioner to have approached this court. Mr. Chopda, urges that the writ petition is not maintainable and the petitioner be directed to appear before the assessing officer and place on record all materials in support of its contentions. He points out that the order of the CESTAT dated August 29, 2018 has not even been referred to in the petitioners' reply to the audit objection and that the impugned show-cause notice only calls for the attendance of the petitioner and no grievance has been caused to it. He also draws the attention of this court to the contents of the show-cause notice, wherein the assessing officer has discussed the reply filed by the petitioner before the audit wing. Thus, there has been application of mind by the assessing officer to the objections filed by the assessee and this, in effect, is, according to him, substantial compliance with the requirement for consultative process. 6

Heard learned counsel. 7

The tenor of the circulars/instructions makes it clear that the introduction of the consultative process is as a measure to avoiding litigation. I refer to the circulars/instructions in some detail, since it is necessary to understand the purpose for which the process has been introduced. 8

In its instructions dated December 21, 2015 the Board states as follows : 9

"5. Pre show-cause notice consultation with the Principal Commissioners and Commissioners is being made mandatory prior to issue of SCN in the case of demands of duty above Rs. 50 lakhs (except for preventive/offence related SCN's".

Thereafter, instruction/clarification, dated July 8, 2016 referring to the earlier circular dated December 21, 2015 provides for a clarification in the following terms : 10

"Please refer to the instruction issued vide F. No. 1080/09/DLA/Misc/15, dated December 21, 2015, wherein, pre show-cause notice consultation with 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 SCN's) has been made mandatory.

2. Certain doubts have been expressed with regard to this. It is clarified that the pre show-cause notices consultation shall be done by the adjudicating authority with the assessee concerned. This is a step towards trade facilitation and promoting voluntary compliance and also to reduce the necessity of issuing show-cause notice."

11 Instruction/Clarification F. No. 1080/11/DLA/CC Conference/2016/2096/02148, dated October 13, 2016, further clarifies the consultative process in the following terms :

"*Subject* : Pre-show-cause notice consultation in cases other than those detected by preventive/anti-evasion and amount involved being more than Rs. 50 lakhs—Reg.

Please refer to the notification issued vide F. No. 1080/11/DLA/CC Conference/2016, dated June 28, 2016, wherein it has been clarified that the pre-show-cause notice consultation with the assessee concerned shall be done by the adjudicating authority.

2.0 Certain doubts have been further expressed with regard to this. As per Circular No. 985/09/2014-CX, dated September 22, 2014 Audit Commissionerate has been made responsible to issue the show-cause notices, wherever necessary, after the audit objections are confirmed in the MCMs. Such show-cause notices are answerable to and adjudicated by the Executive Commissioner or the Subordinate officers of the Executive Commissionerate as per the adjudication limits. In such cases, show-cause notice issuing authority and adjudicating authority are different.

3.0 Hence, it is clarified that in cases where show-cause notice issuing authority/Commissionerate and adjudicating authority/Commissionerate are different, pre-show-cause notice consultation with the assessee concerned shall be done by the Commissioner of show-cause notice issuing authority/Commissionerate.

4.0 In cases where the SCN issuing authority is from the Executive Commissionerate, the pre-SCN consultation shall be done by the concerned Commissioner.

5.0 All cases of pre-SCN consultation which leads to closure of case without issuing of SCN, either in part or whole, the file shall be submitted to the relevant reviewing authority for case of such nature to keep the reviewing authority informed of the decision."

12 Master Circular No. 1053/02/2017-CX, dated March 10, 2017, deals with the subject of Consultation at paragraph 5 in the following terms :

"5.0 Consultation with the notice 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 SCN's) mandatory vide instruction issued from F. No. 1080/09/DLA/MISC/15, dated December 21, 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."

A holistic reading of the above extracts makes it clear that the Customs **13** Department has incorporated the consultative process as a measure of alternative dispute resolution to reduce litigation wherever possible. This is to facilitate resolution of disputes raised by the audit in the light of the responses sought and received from the assessee thus obviating the necessity of even a show-cause notice where the dispute can be resolved in an amicable fashion.

Clarifications dated July 8, 2016 and March 10, 2017 make it expressly **14** clear that these are steps towards trade facilitation and promoting voluntary compliance and also a measure to reduce the necessity of issuing show-cause notices where avoidable. This is thus, a laudable initiative that has to be diligently pursued for maximum benefit to both the assessee as well as the Revenue. In the present case, the objections dated May 7, 2018 are in general terms. The petitioner points out that the document in the possession of the Department is of the year 2004, whereas the enquiry relates to the period October, 2012 to June, 2017. The business activities and methods of doing business are likely to have changed over the years. There is also no reference, as rightly pointed out by Mr. Chopda, to the order of the CESTAT, dated March 28, 2018. However, there has been no opportunity extended to the assessee for a face-to-face with the assessing officer, which, in my view, is what a "consultation" entails. One could argue, as Mr. Chopda has, that no personal hearing has been sought in this case and in any event, such hearing will be afforded by the respondent prior to his decision whether to confirm the proposals in the show-cause notice or otherwise.

That may be so. However, the import of the circulars/instructions is to **15** provide a medium for "consultation" between the assessee and the Department, prior to issuance of show-cause notice. In fact, master circular dated March 10, 2017 uses the phrase "*such consultation shall be done by the adjudicating authority with the assessee concerned*".

16 According to *Black's Law Dictionary*, the word "consultation" is defined as follows :

> "1. The act of asking the advice or opinion of someone. 2. A meeting in which parties consult or confer. 3. International law. The interactive methods by which states seek to prevent or resolve disputes."

17 The obvious inference is that consultation has to be between the assessee and the officer and prior to the stage of issuance of show-cause notice. In fine, I conclude that the consultative process as envisaged by the Department mandates an opportunity of personal hearing with the assessee, face to face, in order to make the process an effective one. The petitioner, in this case, has been denied this opportunity.

18 Moreover it is not unusual for courts to read an opportunity of personal hearing into a statutory provision where the provision may not contain such requirement. The Supreme Court in the case of *C. B. Gautam* v. *Union of India* [1993] 199 ITR 530 (SC), was considering the provisions of Chapter XXC of the Income-tax Act, 1961, dealing with compulsory acquisition of immovable property and read into the chapter the requirement of personal hearing to the assessee, prior to passing of an order of compulsory acquisition. This is all the more so, in the case of a scheme of alternative dispute resolution where the emphasis and very purpose is to make the consultative process as effective as possible. In *C. B. Gautam*'s case [1993] 199 ITR 530 (SC), it has been held as follows (pages 551-554 in 199 ITR) :

> "26. The next question to which we propose to address ourselves is whether the provisions of Chapter XX-C are bad in law as there is no provision for giving the concerned parties an opportunity of being heard before an order is passed under the provisions of section 269UD of the said chapter for the purchase by the Central Government of an immovable property agreed to be sold in an agreement of sale. In this regard, a plain reading of the provisions of the said Chapter clearly shows that they do not contain any provision for giving the concerned parties an opportunity to be heard before an order for compulsory purchase of the property by the Central Government is made. In connection with the requirement of opportunity of being heard before an order for compulsory purchase is made, we find that somewhat similar questions have been considered by this court on a number of occasions. In the case of *Union of India* v. *Col. J. N. Sinha* [1970] IILLJ 284 SC the facts were that the first respondent who was in the class-I service of the Survey of India and rose to the position of Deputy Director was compulsorily retired by an order under rule 56(j) of the Fundamental Rules, and no reasons were given in the order.

Respondent No. 1 challenged the order on the ground that it violated the principles of natural justice and no opportunity had been given to the first respondent to show cause against his compulsory retirement. A Division Bench of this court in its judgment in that case observed as follows :

'Rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. As observed by this Court in *Kraipak* v. *Union of India* [1970] 1 SCR 457 "the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it." It is true that if a statutory provision can be read consistently with the principles of natural justice, the courts should do so because it must be presumed that the Legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But, if, on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the court cannot ignore the mandate of the Legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power.'

27. In the case of *Olga Tellis* v. *Bombay Municipal Corporation* [1985] Supp 2 SCR 51 at 89, a Constitution Bench comprising five learned judges of this court had occasion to deal with the provisions of section 314 of the Bombay Municipal Corporation Act, 1888. Chandrachud, C. J., (as he then was) delivering the judgment of the court, held that 'the said section confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. The court must lean in favour of this interpretation because this helps to sustain the validity of the law.' Chandrachud, C. J., went on to observe as follows :

'It must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that

the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule ("hear the other side") could be presumed to have been intended. Section 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.'

28. It must, however, be borne in mind that 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.

29. It is true that the time-frame within which the order for compulsory purchase has to be made is a fairly tight one but, in our view, the urgency is not such as would preclude a reasonable opportunity of being heard or to show cause being given to the parties likely to be adversely affected by an order of purchase under section 269UD(1). The enquiry pursuant to the explanation given by the intending purchaser or the intending seller might be a somewhat limited one or a summary one but we decline to accept the submission that the time limit provided is so short as to preclude an enquiry or show cause altogether.

30. In the light of what we have observed above, we are clearly of the view that the requirement of a reasonable opportunity being given to the concerned parties, particularly, the intending purchaser and the intending seller must be read into the provisions of Chapter XX-C. In our opinion, before an order for compulsory purchase is made under section 269UD, the intending purchaser and the intending seller must be given a reasonable opportunity of showing cause

against an order for compulsory purchase being made by the appropriate authority concerned. . . . Although Chapter XX-C does not contain any express provision for the affected parties being given an opportunity to be heard before an order for purchase is made under section 269UD, not to read the requirement of such an opportunity would be to give too literal and strict an interpretation to the provisions of Chapter XX-C and, in the words of judge learned hand of the United States of America 'to make a fortress out of the dictionary.' Again, there is no express provision in Chapter XX-C barring the giving of a show-cause notice or reasonable opportunity to show cause nor is there anything in the language of Chapter XX-C which could lead to such an implication. The observance of the principles of natural justice is the pragmatic requirement of fair play in action. In our view, therefore, the requirement of an opportunity to show cause being given before an order for purchase by the Central Government is made by an appropriate authority under section 269UD must be read into the provisions of Chapter XX-C. There is nothing in the language of section 269UD or any other provision in the said chapter which would negate such an opportunity being given. Moreover, if such a requirement were not read into the provisions of the said chapter, they would be seriously open to challenge on the ground of violations of the provisions of article 14 on the ground of non-compliance with the principles of natural justice. The provision that when an order for purchase is made under section 269UD reasons must be recorded in writing is no substitute for a provision requiring a reasonable opportunity of being heard before such an order is made."

19 In the light of the aforesaid discussion, the impugned show-cause notice is set aside. The respondent will call upon the petitioner to appear before him with all relevant materials and afford it full opportunity of hearing and consultation prior to issuance of show-cause notice, if at all necessary.

20 This writ petition is allowed in the aforesaid terms. There will be no order as to costs. Consequently, the connected WMPs are closed.

[2020] 77 GSTR 342 (SC)

[IN THE SUPREME COURT OF INDIA]

ASSISTANT COMMISSIONER (CT) LTU, KAKINADA AND OTHERS

v.

GLAXO SMITH KLINE CONSUMER HEALTH CARE LIMITED

A. M. KHANWILKAR and **DINESH MAHESHWARI** JJ.

May 6, 2020.

HF ▶ Department

VALUE ADDED TAX—HIGH COURT—WRITS UNDER CONSTITUTION—APPEAL—ASSESSMENT—WRIT PETITION AGAINST ASSESSMENT ORDER AFTER EXPIRY OF PERIOD OF LIMITATION FOR APPEAL UNDER STATUTE—NOT TO BE ENTERTAINED—ANDHRA PRADESH VALUE ADDED TAX ACT (5 OF 2005), S. 31—CONSTITUTION OF INDIA, art. 226.

Even though the High Court can entertain a writ petition against any order or direction passed or action taken by the State under article 226 of the Constitution, it ought not to do so as a matter of course when the aggrieved person could have availed of an effective alternative remedy in the manner prescribed by law.

THANSINGH NATHMAL *v.* SUPERINTENDENT OF TAXES [1964] 15 STC 468 (SC), BABURAM PRAKASH CHANDRA MAHESHWARI *v.* ANTARIM ZILA PARISHAD [1969] AIR 1969 SC 556 *and* NIVEDITA SHARMA *v.* CELLULAR OPERATORS ASSOCIATION OF INDIA [2011] 14 SCC 337 *followed*.

Where a right or liability is created by a statute, which gives a special remedy for enforcing it, the remedy provided by that statute alone must be availed of.

TITAGHUR PAPER MILLS CO. LTD. *v.* STATE OF ORISSA [1983] 53 STC 315 (SC) ; [1983] 142 ITR 663 (SC) *followed*.

The fact that the High Court has wide jurisdiction under article 226 of the Constitution, does not mean that it can disregard the substantive provisions of a statute and pass orders which can be settled only through a mechanism prescribed by the statute.

MAFATLAL INDUSTRIES LTD. *v.* UNION OF INDIA [1998] 111 STC 467 (SC) *followed*.

Indubitably, the powers of the High Court under article 226 of the Constitution are wide, but certainly not wider than the plenary powers bestowed on the Supreme Court under article 142 of the Constitution. Article 142 is a

conglomeration and repository of the entire judicial powers under the Constitution, to do complete justice to the parties. Even while exercising that power, the Supreme Court is required to bear in mind the legislative intent and not to render the statutory provision otiose.

Oil and Natural Gas Corporation Limited *v.* Gujarat Energy Transmission Corporation Limited [2017] 5 SCC 42 *relied on.*

A priori, what the Supreme Court cannot do in exercise of its plenary powers under article 142 of the Constitution, the High Court cannot take a different approach in the matter in reference to article 226 of the Constitution. The principle underlying the rejection of such argument by the Supreme Court would apply on all fours to the exercise of power by the High Court under article 226 of the Constitution.

If an assessee approaches the High Court before the statutory period of appeal expires to challenge the assessment order by way of writ petition on the ground that the order is without jurisdiction or is passed in excess of jurisdiction by overstepping or crossing the limits of jurisdiction including in flagrant disregard of law and rules of procedure or in violation of the principles of natural justice, where no procedure is specified, the High Court may accede to such a challenge and also non-suit the assessee on the ground that alternative efficacious remedy is available and that be invoked by the assessee. However, if the assessee chooses to approach the High Court after expiry of the maximum limitation period prescribed under the Act, the High Court cannot disregard the statutory period for redressal of the grievance and entertain the writ petition of such a party as a matter of course. The fact that the High Court has wide powers, does not mean that it can issue a writ which may be inconsistent with the legislative intent regarding the dispensation explicitly prescribed under the Act. That would render the legislative scheme and intention behind the stated provision otiose.

The remedy of appeal is a creature of statute. If the appeal is presented by the assessee beyond the extended statutory limitation period and is, therefore, not entertained, it is incomprehensible how it would become a case of violation of fundamental right, much less statutory or legal right as such.

On the question whether the High Court in exercise of its writ jurisdiction under article 226 of the Constitution of India ought to entertain a challenge to the assessment order on the sole ground that the statutory remedy of appeal under section 31 of the Andhra Pradesh Value Added Tax Act, 2005 against that order stood foreclosed by the law of limitation :

Held, *(i) that the dealer had asserted that it was not aware about the passing of assessment order dated June 21, 2017 although it admitted that the*

order was served on its authorised representative on June 22, 2017. The date on which the dealer became aware about the order was not expressly stated either in the application for condonation of delay filed before the appellate authority, the affidavit filed in support of the application or for that matter, in the memo of writ petition. On the other hand, an amount equivalent to 12.5 per cent. of the tax amount was deposited on September 12, 2017 for and on behalf of the dealer, without filing an appeal and without any demur after the expiry of the statutory period of 60 days, prescribed under section 31 of the Andhra Pradesh Value Added Tax Act, 2005. Not only that, the dealer filed a formal application under rule 60 of the Andhra Pradesh Value Added Tax Rules, 2005 on May 8, 2018 and pursued it in appeal, which was rejected on August 17, 2018. Furthermore, the appeal against the assessment order was filed only on September 24, 2018 without disclosing the date on which the dealer in fact became aware about the existence of the assessment order dated June 21, 2017. On the other hand, in the affidavit of a site director of the dealer filed in support of the application for condonation of delay before the appellate authority, it was stated that the company became aware about the irregularities committed by its erring official in the month of July, 2018, which presupposed that the dealer must have become aware about the assessment order, at least in July, 2018. In the same affidavit, it was asserted that the dealer was not aware about the assessment order, as it was not brought to its notice by the employee concerned due to his negligence. The dealer in the writ petition had averred that the appeal was rejected by the appellate authority on the ground that it had no power to condone the delay beyond 30 days, when in fact, the order examined the cause set out by the dealer and concluded that it was unsubstantiated by the dealer. That finding had not been examined by the High Court, but the High Court was more impressed by the fact that the dealer was in a position to offer some explanation about the discrepancies in respect of the volume of turnover and that the dealer had already deposited 12.5 per cent. of the additional amount in terms of the previous order passed by it. That reason could have no bearing on the justification for not filing the appeal within the statutory period. Notably, the dealer had relied on the affidavit of the site director and no affidavit of the employee or at least the other employee who was associated with the erring employee during the relevant period, had been filed in support of the stand taken in the application for condonation of delay. Pertinently, no finding had been recorded by the High Court that it was a case of violation of principles of natural justice or non-compliance with statutory requirements in any manner. Be that as it may, since the statutory period specified for filing of appeal had expired in August, 2017 itself and the appeal was filed by the dealer only on September

24, 2018, without substantiating the plea about inability to file appeal within the prescribed time, no indulgence could be shown to the dealer at all.

It is well settled that rejection of delay application by the appellate forum does not entail in merger of the assessment order with that order.

Raja Mechanical Co. (P) Ltd. *v.* Commissioner of Central Excise [2012] 15 GSTR 1 (SC) ; [2012] 51 VST 447 (SC) *followed*.

Decision of the Telangana and Andhra Pradesh High Court (printed at page 346 infra) *set aside.*

Cases referred to :

Antulay (A. R.) *v.* R. S. Nayak [1988] 2 SCC 602 (para 13)

Attorney-General of Trinidad and Tobago *v.* Gordon Grant & Co. Ltd. [1935] AC 532 (para 11)

Baburam Prakash Chandra Maheshwari *v.* Antarim Zila Parishad [1969] AIR 1969 SC 556 (para 11)

Bar Assn. *v.* Union of India [1998] 4 SCC 409 (para 13)

Chhattisgarh State Electricity Board *v.* Central Electricity Regulatory Commission [2010] 5 SCC 23 (paras 12, 13)

Commissioner of Customs & Central Excise *v.* Hongo India (P) Ltd. [2009] 24 VST 298 (SC) ; [2010] 2 GSTR 305 (SC) ; [2009] 315 ITR 449 (SC) (para 12)

Delhi Judicial Service Assn. *v.* State of Gujarat [1991] 4 SCC 406 (para 13)

Electronics Corporation of India Limited *v.* Union of India [2019] 7 GSTR-OL 48 (T&AP) (para 8, 9, 15)

Glaxo Smith Kline Consumer Health Care Limited *v.* Assistant Commissioner (CT) [2020] 77 GSTR 346 (T&AP) (paras 1, 4, 10))

ITC Ltd. *v.* Union of India [1998] 8 SCC 610 (para 17)

K. S. Rashid and Son *v.* Income-tax Investigation Commission [1954] 25 ITR 167 (SC) (para 16)

M. P. Steel Corporation *v.* Commissioner of Central Excise [2015] 80 VST 402 (SC) (para 13)

Mafatlal Industries Ltd. *v.* Union of India [1998] 111 STC 467 (SC) (para 11)

Neville *v.* London Express Newspapers Ltd. [1919] AC 368 (para 11)

Nivedita Sharma *v.* Cellular Operators Association of India [2011] 14 SCC 337 (para 11)

Oil and Natural Gas Corporation Limited *v.* Gujarat Energy Transmission Corporation Limited [2017] 5 SCC 42 (paras 12, 15)

Panoli Intermediate (India) Pvt. Ltd. *v.* Union of India [2015] AIR 2015 Guj 97 (para 15)

Phoenix Plasts Company *v.* Commissioner of Central Excise [2014] 25 GSTR 325 (Karn) (para 15)

Prem Chand Garg *v.* Excise Commr. [1963] AIR 1963 SC 996 (para 13)

Raja Mechanical Co. (P) Ltd. *v.* Commissioner of Central Excise [2012] 15 GSTR 1 (SC) ; [2012] 51 VST 447 (SC) (para 20)

Secretary of State *v.* Mask & Co. [1940] AIR 1940 PC 105 (para 11)

Singh Enterprises *v.* Commissioner of Central Excise, Jamshedpur [2008] 12 VST 542 (SC) (para 12)

State *v.* Mushtaq Ahmad [2016] 1 SCC 315 (para 13)

Suryachakra Power Corporation Limited *v.* Electricity Department [2016] 16 SCC 152 (paras 12, 13)

Thansingh Nathmal *v.* Superintendent of Taxes, Dhubri [1964] 15 STC 468 (SC) (para 11)

Titaghur Paper Mills Co. Ltd. *v.* State of Orissa [1983] 53 STC 315 (SC) ; [1983] 142 ITR 663 (SC) (para 11)

Union Carbide Corpn. *v.* Union of India [1991] 4 SCC 584 (para 13)

Wolverhampton New Waterworks Co. *v.* Hawkesford [1859] 6 CBNS 336 (para 11)

Civil Appeal No. 2413 of 2020.

Appeal by special leave from the judgment and order dated November 19, 2018 of the Telangana and Andhra Pradesh High Court in W. P. No. 39418 of 2018 (*Glaxo Smith Kline Consumer Health Care Limited* v. *Assistant Commissioner (CT)*). The judgment of the High Court (V. RAMASUBRAMANIAN and Ms. J. UMA DEVI JJ.) delivered by V. RAMASUBRAMANIAN J. ran as follows :

"JUDGMENT

V. RAMASUBRAMANIAN J.—The petitioner has come up with the above writ petition challenging an order passed by the first respondent under the Central Sales Tax Act, 1956.

Heard S. Dwarakanath, learned counsel for the petitioner and Mr. Shaik Jeelani Basha, learned Special Government Pleader for Central Taxes appearing for respondents 1 and 2.

The impugned order of assessment is dated June 21, 2017. As against the said order the petitioner filed an appeal with a delay. Since the delay was beyond the period after which it can be condoned, the same was not

entertained. Therefore, the petitioner has come up with the above writ petition.

The reason stated by the petitioner is that one of the employees who was in charge, indulged in malpractices forcing the management to suspend him and initiate disciplinary proceedings. The petitioner claims that they were not aware of these orders. Therefore, the petitioner seeks one opportunity.

The reason why the petitioner seeks one opportunity is that F forms submitted by the petitioner were rejected by the assessing officer, on the ground that the value of the goods transferred to branch office have not been disclosed in F forms. But the claim of the petitioner is that the value was wrongly reported in the CST returns and that the amount indicated in the F forms was more than the turnover. Therefore, they seek one opportunity to explain this discrepancy.

In view of the peculiar circumstances, even while granting an opportunity to the petitioner, we wanted to put them on condition. Therefore, on November 8, 2018 we passed an interim order to the following effect :

> 'It is represented by Mr. S. Dwarakanath, learned counsel for the petitioner that the petitioner has already paid 12.5 per cent. of the disputed tax, for the purpose of filing an appeal. But, the employee, who was in-charge and who was subsequently, suspended in contemplation of disciplinary proceedings, failed to file the appeal. The contention of the learned counsel for the petitioner is that the issue lies in a narrow campus.
>
> Since the petitioner has already paid 12.5 per cent. of the disputed tax, the request of the petitioner for granting one more opportunity would be considered favourably, if the petitioner pays an additional amount equivalent to 12.5 per cent. of the disputed tax. The petitioner shall make such payment within a period of one week.
>
> Post on November 19, 2018 for orders.'

Pursuant to the aforesaid order, the petitioner made payment of Rs. 9,59,190, representing 12.5 per cent. of the taxes for the year 2013-14 (CST). The amount was paid on November 13, 2018.

Therefore, the writ petition is ordered, the impugned order is set aside and the matter is remanded back to the first respondent. The petitioner shall appear before the first respondent on December 10, 2018 and explain the discrepancies. After such personal hearing, the first respondent may pass orders afresh.

As a sequel, pending miscellaneous petitions, if any, shall stand closed. No costs."

Counsel for the appearing parties :

Other Advocates : *G. N. Reddy, Hemal Kirit Kumar Sheth, T. Vijaya Bhaskar Reddy, V. Lakshmikumaran, Ms. Charanya Lakshmikumaran, Aaditya Bhattacharya, Ms. Apeksha Mehta, Ms. Mounica Kasturi* and *Ms. Ishita Mathur*.

JUDGMENT

The judgment of the court was delivered by

1 A. M. KHANWILKAR, J.—Leave granted.

2 The moot question in this appeal emanating from the judgment and order dated November 19, 2018 in Writ Petition No. 39418 of 2018[1] passed by the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh[2] is : whether the High Court in exercise of its writ jurisdiction under article 226 of the Constitution of India ought to entertain a challenge to the assessment order on the sole ground that the statutory remedy of appeal against that order stood foreclosed by the law of limitation ?

3 The respondent is a registered dealer on the rolls of the Assistant Commissioner of Commercial Taxes, Large Tax Payer Unit at Kakinada Division[3] under the provisions of the Andhra Pradesh Value Added Tax Act, 2005[4] and the Central Sales Tax Act, 1956[5] and is engaged in the business of manufacturing and sale of Horlicks, Boost, biscuits, ghee, ayurvedic medicines, etc. The Assistant Commissioner had called upon the respondent to produce books of accounts for the assessment year 2013-14 for finalisation of assessment under the 1956 Act. The authorised representative of the respondent produced declaration in form F in support of its claim that certain transactions are inter-State transfers. The information and declaration furnished by the respondent was duly verified and after giving personal hearing to the respondent, final assessment order came to be passed by the Assistant Commissioner on June 21, 2017, raising demand of Rs. 76,73,197 (rupees seventy six lakhs seventy three thousand one hundred ninety seven only) against turnover of Rs. 3,44,15,240 (rupees

1. Reported as *Glaxo Smith Kline Consumer Health Care Limited* v. *Assistant Commissioner (CT)* [2020] 77 GSTR 346 (T&AP).
2. For short, "the High Court".
3. For short, "the Assistant Commissioner".
4. For short, "the 2005 Act".
5. For short, "the 1956 Act".

three crores forty four lakhs fifteen thousand two hundred forty only) on the finding that the respondent had failed to submit form F to the tune of the turnover reported in the Central sales tax (CST) return. This assessment order was duly served on the respondent on June 22, 2017. The respondent did not file appeal against this assessment order within the statutory period. Instead, amount equivalent to 12.5 per cent. of the demand was deposited on September 12, 2017. The respondent then filed an application under rule 60 of the Andhra Pradesh Value Added Tax Rules, 2005[1], highlighting the error made in raising the demand based on incorrect turnover reported by the respondent. This application was filed only on May 8, 2018, which came to be rejected by the Assistant Commissioner vide order dated May 11, 2018. Aggrieved by the decision dated May 11, 2018, the respondent filed an appeal before the Appellate Deputy Commissioner of Commercial Taxes, Vijayawada[2] on May 28, 2018, which came to be rejected on August 17, 2018. It is only thereafter, the respondent-assessee was advised to file appeal before the Appellate Deputy Commissioner on September 24, 2018 against the assessment order dated June 21, 2017. In the meantime, another assessment order came to be passed on March 31, 2018 in relation to the audit taken up for the tax period from April 1, 2013 to March 31, 2017. We are not concerned with the said order in the present appeal.

Reverting to the appeal filed by the respondent against the assessment **4**
order dated June 21, 2017, the same was dismissed on October 25, 2018 being barred by limitation and also because no sufficient cause was made out. The respondent was then advised to file writ petition before the High Court being Writ Petition No. 39418 of 2018[3], solely for quashing and setting aside of assessment order dated June 21, 2017 for tax period April, 2013 to March, 2014 (CST) being contrary to law, without jurisdiction and in violation of principles of natural justice to the extent of levy on the branch transfer turnovers and to direct the Assistant Commissioner (CT) to re-do the assessment and reckon the correct branch transfer turnover and grant exemption on the basis of form "F". The respondent did not challenge the order passed by the Appellate Deputy Commissioner, rejecting the statutory appeal preferred by the respondent against the assessment order dated June 21, 2017, for reasons best known to the respondent. The Division Bench of the High Court, on November 8, 2018[3], noted that the respondent had already paid 12.5 per cent. of the disputed tax, for the

1. For short, "the 2005 Rules".
2. For short, "the Appellate Deputy Commissioner" or "the appellate authority", as the case may be.
3. Reported as *Glaxo Smith Kline Consumer Health Care Limited* v. *Assistant Commissioner (CT)* [2020] 77 GSTR 346 (T&AP).

purpose of filing an appeal. It also noted the stand taken by the respondent that the employee who was in charge of the tax matters of the respondent, had defaulted and was subsequently suspended in contemplation of disciplinary proceedings, as a result of which statutory appeal could not be filed within the prescribed time. The Division Bench of the High Court directed the respondent to pay an additional amount equivalent to 12.5 per cent. of the disputed tax within one week and posted the matter for November 19, 2018. This was an ex parte order. The respondent, in terms of the stated order, deposited an additional amount equivalent to 12.5 per cent. of the disputed tax amount. The writ petition was then taken up for hearing on November 19, 2018, when after hearing the counsel for the parties, the writ petition came to be allowed and the order passed by the Assistant Commissioner, dated June 21, 2017 has been quashed and set aside and the respondent relegated before the Assistant Commissioner for reconsideration of the matter afresh after giving personal hearing to the respondent to explain the discrepancies. This order has also noted that the respondent had paid Rs. 9,59,190 (rupees nine lakhs fifty-nine thousand one hundred ninety only) equivalent to the 12.5 per cent. of the taxes in the year 2013-14 (CST) on November 13, 2018.

5 Feeling aggrieved, the appellants have filed the present appeal. It is urged that the respondent having failed to avail of statutory remedy of appeal within the prescribed time and also because the delay in filing appeal had not been satisfactorily explained, the High Court ought not to have entertained the writ petition at the instance of such person and more so, because the respondent had allowed the order passed by the appellate authority rejecting the appeal on the ground of delay to become final. In substance, the argument is that the High Court exceeded its jurisdiction and committed manifest error in setting aside the assessment order dated June 21, 2017 passed by the Assistant Commissioner.

6 The respondent, on the other hand, would urge that the High Court has had ample power under article 226 of the Constitution of India to grant relief to the respondent considering the peculiar facts of the present case being an exceptional situation which if not remedied, would result in failure of justice.

7 We have heard Mr. G. N. Reddy, learned counsel for the appellants and Mr. V. Lakshmikumaran, learned counsel for the respondent.

8 From the indisputable facts, it is evident that the assessment order dated June 21, 2017 was challenged by the respondent by way of statutory appeal before the Appellate Deputy Commissioner only on September 24, 2018.

Section 31 of the 2005 Act provides for the statutory remedy against an assessment order. The same, as applicable at the relevant time, reads thus :

"31. *Appeal to appellate authoity*.—(1) Any VAT dealer or TOT dealer or any other dealer objecting to any order passed or proceeding recorded by any authority under the provisions of the Act other than an order passed or proceeding recorded by an Additional Commissioner or Joint Commissioner or Deputy Commissioner, may, within thirty days from the date on which the order or proceeding was served on him, appeal to such authority as may be prescribed :

Provided that the appellate authority may within a further period of thirty days admit the appeal preferred after a period of thirty days if he is satisfied that the VAT dealer or TOT dealer or any other dealer had sufficient cause for not preferring the appeal within that period :

Provided further that an appeal so preferred shall not be admitted by the appellate authority concerned unless the dealer produces the proof of payment of tax, penalty, interest or any other amount admitted to be due, or of such instalments as have been granted, and the proof of payment of twelve and half per cent. of the difference of the tax, penalty, interest or any other amount, assessed by the authority prescribed and the tax, penalty, interest or any other amount admitted by the appellant, for the relevant tax period, in respect of which the appeal is preferred.

(2) The appeal shall be in such form, and verified in such manner, as may be prescribed and shall be accompanied by a fee which shall not be less than Rs. 50 (rupees fifty only) but shall not exceed Rs. 1,000 (rupees one thousand only) as may be prescribed.

(3)(a) Where an appeal is admitted under sub-section (1), the appellate authority may, on an application filed by the appellant and subject to furnishing of such security or on payment of such part of the disputed tax within such time as may be specified, order stay of collection of balance of the tax under dispute pending disposal of the appeal ;

(b) Against an order passed by the appellate authority refusing to order stay under clause (a), the appellant may prefer a revision petition within thirty days from the date of the order of such refusal to the Additional Commissioner or the Joint Commissioner who may subject to such terms and conditions as he may think fit, order stay of collection of balance of the tax under dispute pending disposal of the appeal by the appellate authority ;

(c) Notwithstanding anything in clause (a) or (b), where a VAT dealer or TOT dealer or any other dealer has preferred an appeal to the Appellate Tribunal under section 33, the stay, if any, ordered under clause (b) shall be operative till the disposal of the appeal by such Tribunal, and, the stay, if any ordered under clause (a) shall be operative till the disposal of the appeal by such Tribunal, only in case where the Additional Commissioner or the Joint Commissioner on an application made to him by the dealer in the prescribed manner, makes specific order to that effect.

(4) The appellate authority may, within a period of two years from the date of admission of such appeal, after giving the appellant an opportunity of being heard and subject to such rules as may be prescribed,—

(a) confirm, reduce, enhance or annul the assessment or the penalty, or both ; or

(b) set aside the assessment or penalty, or both, and direct the authority prescribed to pass a fresh order after such further enquiry as may be directed ; or

(c) pass such other orders as it may think fit.

(4A) Where any proceeding under this section has been deferred on account of any stay orders granted by the High Court or Supreme Court in any case or by reason of the fact that an appeal or other proceeding is pending before the High Court or the Supreme Court involving a question of law having a direct bearing on the order or proceeding in question, the period during which the stay order is in force or the period during which such appeal or proceeding is pending, shall be excluded, while computing the period of two years specified in sub-section (4) for the purpose of passing appeal order under this section.

(5) Before passing orders under sub-section (4), the appellate authority may make such enquiry as it deems fit or remand the case to any subordinate officer or authority for an inquiry and report on any specified point or points.

(6) Every order passed in appeal under this section shall, subject to the provisions of sections 32, 33, 34 and 35 be final."

Going by the text of this provision, it is evident that the statutory appeal is required to be filed within 30 days from the date on which the order or proceeding was served on the assessee. If the appeal is filed after expiry of prescribed period, the appellate authority is empowered to

condone the delay in filing the appeal, only if it is filed within a further period of not exceeding 30 days and sufficient cause for not preferring the appeal within prescribed time is made out. The appellate authority is not empowered to condone delay beyond the aggregate period of 60 days from the date of order or service of proceeding on the assessee, as the case may be. In the present case, admittedly, the appeal was filed way beyond the total 60 days' period specified in terms of section 31 of the 2005 Act. In that, the respondent had filed the appeal accompanied by an application for condonation of delay setting out reasons in the following words :

"2. It is submitted that the impugned order-in-original dated June 21, 2017 was received by the applicant on June 22, 2017 and the appeal ought to have been filed by the applicant on July 21, 2017 in terms of section 31 of the Andhra Pradesh VAT Act, 2005. Thus, there is delay in filing the appeal. The applicants further submits that the delay is not due to any negligence on part of the applicant.

3. It is submitted that the impugned order was received by Mr. P. Sriram Murthy, but the receipt of this assessment order was not informed to any other person of the company.

4. Mr. P. Sriram Murthy was authorized to handle day to day affairs of sales tax (VAT), service tax and excise and he was also authorized to sign and submit documents with the tax Departments, file periodic tax returns and represent the company before concerned tax authorities.

5. However, the company has alleged Mr. P. Sriram Murthy with committing certain irregularities for past more than 12 months and initiated disciplinary proceedings against him. He has been suspended from his official duties with effect from July 26, 2018.

6. It is only post his suspension that the applicant came to know about the receipt of impugned order. Also, the appellant has come to know that Mr. Murthy paid the 12.5 per cent. of the demand amount on September 12, 2017 as if it is a regular tax payment. Further, since he did not file the appeal in time, therefore to protect himself from the disciplinary action, he adopted alternate route and filed rectification application under rule 60 which is not permissible under law in case demand has been raised on technical grounds.

7. A separate affidavit as to the facts of the case is also attached herewith.

8. It is stated that in view of the facts and circumstances mentioned above and in the attached affidavit, your honour would appreciate

that the delay in filing the appeal is completely unintentional and for the bona fide reasons stated above. The applicant company should not be imposed with tax liabilities due to inaction and mala fide intention on one employee. The applicants further submit that if the delay in filing the above numbered appeal is not condoned, the applicant would be put to great injustice and irreparable injury. On the other hand, no prejudice would be caused if the delay is condoned.

WHEREFORE, it is prayed that the learned Appellate Joint Commissioner (ST) be pleased to allow the application for condonation of delay as prayed for."

As stated in the application for condonation of delay in filing the statutory appeal, the respondent caused to file affidavit of Mr. Sreedhar Routh, son of late Mr. R. Seetha Rama Swamy, who was working as site director in the respondent-company. In this affidavit, in support of the application for condonation of delay, it is averred thus :

"That Mr. P. Sriram Murthy, Deputy Manager, Finance, was authorized to handle day to day affairs of sales tax (VAT), service tax and excise. He was also authorized to sign and submit documents with the tax departments, file periodic tax returns and represent the company before concerned tax authorities.

That the CST assessment for the period 2013-14 was completed by the Assistant Commissioner (CT) LTU raising demand of Rs.76,73,197 vide assessment order dated June 21, 2017.

That the assessment order was received by Mr. P. Sriram Murthy. But, the receipt of this assessment order was not informed to any other person of the company.

That Mr. P. Sriram Murthy filed application under rule 60 of the Andhra Pradesh Act, 2005 without informing the company about such filing.

That Mr. P. Sriram Murthy also engaged a chartered accountant and filed an appeal against rejection of application filed under rule 60. The appointment of chartered accountant and filing this appeal was also not informed to the company.

That the company has alleged Mr. P. Sriram Murthy with committing certain irregularities and initiated disciplinary proceedings against him.

That Mr. P. Sriram Murthy has been suspended from his official duties with effect from July 26, 2018. Investigation in this matter is going on.

That it is only post his suspension that we have come to know about the demand of Rs. 76,73,197 lakhs raised vide CST assessment order for the year 2013-14 and therefore could not respond or take any action in respect of this order/demand.

It is prayed that the learned Appellate Joint Commissioner (ST) be pleased to allow the application for condonation of delay as prayed for."

The appellate authority vide order dated October 25, 2018, considered the reasons offered by the respondent for the delay in filing of the appeal and concluded that the same were not substantiated with sufficient cause. On that finding including that the delay beyond the period of 60 days from the date of service of the assessment order on the respondent-assessee cannot be condoned, the appellate authority observed thus :

"However, to abide the principles of natural justice, the appellant has been issued notices dated October 3, 2018 and October 19, 2018 to appear for admission hearings to be held on October 10, 2018 and October 25, 2018 respectively, in the office of Appellate Deputy Commissioner (CT), Vijayawada for explaining reasons and his contentions in support of the admission of appeal petition. *The A. R. appeared for the admission hearing on October 25, 2018 and prayed for admission of appeal petition, but not submitted any reliable grounds and substantial documentary evidence in support of their submission that they were unaware of the receipt of original assessment order*.

It is further pertinent here to record that after receiving the original assessment order, the appellant-dealer has filed a request letter before the assessing authority for reassessment under rule 60 of APVAT Rules, 2005. However, the AA has not considered reassessment request, and issued an endorsement dated May 11, 2018, rejecting the re-assessment request. The appellant also filed an appeal on such endorsement. That appeal petition based on endorsement has also not been admitted in this office and rejected vide ADC's Orders No. 3470, dated August 17, 2018. Therefore, cannot be assumed under any circumstances, and by no stretch of imagination that the appellant-dealer was not aware of the service of original assessment orders. Hence, it is to be affirmed that the causes put-forth for delay condonation are not rational and against the facts of the case. It is also relevant here to state that whatever may be circumstances, the delay beyond 60 days could not be condonable in the hands of the appellate authority, therefore, such request prima-facie is not in tune with the provisions of the Act, hence, liable to be rejected.

From the aforesaid discussion, it is construed that no favourable grounds can be made to admit the appeal, since the appellant have failed to file appeal petition within the prescribed time under the APVAT Act, 2005. It is also pertinent here to note that the Department has duly served the original assessment order to the appellant without any procedural lapse, and also the appellant has admitted that the original orders were received on June 22, 2017.

In view of the above, since the appellant failed to prefer an appeal on the original assessment order dated June 21, 2017, which was duly served on the appellant, and as such the original assessment order has become final, and the present appeal filed by the appellant on September 24, 2018 with a delay of 1 year 62 days, hence cannot be admitted.

Further the appellants have not submitted any valid reasons/sufficient cause for not preferring the appeal within the prescribed and condonable time of 30 + 30 = 60 days of receipt of the original assessment order. Hence the appeal petition is hereby REJECTED *as per the provisions of section 31 of APVAT Act*." (emphasis[1] supplied)

The appellate authority was pleased to reject the explanation that the respondent was not aware of the service of assessment order, as it remained unsubstantiated by the respondent. When the matter travelled to the High Court, the Division Bench, after hearing the respondent, proceeded to pass an ex parte order on November 8, 2018, which reads thus :

"ORDER

It is represented by Mr. S. Dwarakanath, learned counsel for the petitioner that the petitioner has already paid 12.5 per cent. of the disputed tax, for the purpose of filing an appeal. But, the employee, who was in-charge and who was subsequently, suspended in contemplation of disciplinary proceedings, failed to file the appeal. The contention of the learned counsel for the petitioner is that the issue lies in a narrow campus.

Since the petitioner has already paid 12.5 per cent. of the disputed tax, the request of the petitioner for granting one more opportunity would be considered favourably, if the petitioner pays an additional amount equivalent to 12.5 per cent. of the disputed tax. The petitioner shall make such payment within a period of one week.

Post on November 19, 2018 for orders."

1. Here italicised.

Be it noted that the respondent was advised to file writ petition merely for setting aside of the assessment order dated June 21, 2017, presumably, in light of the decision of Full Bench of the same High Court in *Electronics Corporation of India Limited* v. *Union of India*[1].

We may advert to the assertions made in the writ petition (on the basis of which the High Court was pleased to grant relief to the respondent), to explain the delay in filing of the statutory appeal including the reason why the respondent should be given one opportunity. The same read thus : 9

"....

7. From the above, it can be summarized that the total disputed demand has arisen on account of two reasons. Firstly, the first respondent has considered the total branch transfer turnover as per monthly CST returns and ignored the revised turnover as per VAT 200-B. Even though, the such revised stock transfer value was considered by the first respondent while computing the ITC credit as per rule 20(8) of the AP VAT Act. Secondly, receipt of excess forms on account of inclusion of value of freebies, free samples, etc. by receiving State while issuing the F forms. The first respondent treated these excess F forms value as concealment by the petitioner and levied tax even, on this branch transfer value duly covered by F forms which is (sic) grossly against the principle of law.

8. It is submitted that the order was served on the petitioner on June 22, 2017 against which, the petitioner could have preferred appeal before the second respondent within 30 days from the said date. Unfortunately, no steps were taken to file any appeal within the due date for the reason that the day to day affairs of the sales tax, service tax and excise law was being handled by one Mr. P. Sri Ram Murthy, who was working as Deputy Manager (Finance) in the company, who failed to take appropriate steps to prefer an appeal within time, by his negligence. Excepting Mr. P. Sri Ram Murthy, there was no other person who was well conversant with the facts and the steps to be taken against the assessment order. The other person Mr. Siddhant Belgaonker, Senior Manager (Finance) who attended the assessment hearing also left the services of the petitioner on January 31, 2018. Consequently, the assessment order remained uncontested.

9. It is respectfully submitted that apart from this act of negligence, Mr. P. Sri Ram Murthy also committed certain other irregularities over a period of one year, which came to the light of the management

1. [2019] 7 GSTR-OL 48 (T&AP) ; [2018] 361 ELT 22 (AP).

of the company in the month of July, 2018. Immediately, disciplinary proceedings were initiated against him, by issuing a notice on July 26, 2018 (ex. P-3) and also suspending him from official duties with immediate effect.

10. It is submitted that the petitioner was not aware of the impugned order since that fact was not brought to the notice by its own employee, due to this negligence.

11. It appears, the said Mr. P. Sri Ram Murthy having realized his negligence, made further mistake, by filing an application under rule 60 of the APVAT Rules read with rule 14A(10) of the CST (AP) Rules on May 9, 2018 (Ex. P-4) contending, inter-alia, that the revised value of stock transfer as per VAT 200-B should have been considered instead of Rs. 8,66,25,15,490. In the said representation, it is claimed that it has filed revised returns under the VAT Act, disclosing the correct F form turnover for the purposes of restricting the input tax credit while filing form 200-B at the end of the year. The ITC credit under VAT was also allowed by the first respondent, considering the stock transfer turnover as Rs. 8,63,33,95,259. In the said representation, it was contended that the turnover of Rs. 1,85,03,360, could not have been levied with the tax since it is admittedly covered by F forms.

12. The representation of the petitioner under rule 60 was rejected by the first respondent, by endorsement, dated May 11, 2018 (Ex. P-5) on the ground, that it is not a case for considering it as a mistake rectifiable under rule 60. It is also submitted that Mr. P. Sri Ram Murthy appear to have filed an appeal against the endorsement of the first respondent dated May 11, 2018 to second respondent on May 28, 2018. This was also without knowledge of the petitioner's management.

13. It is submitted that the petitioner was not aware of these developments till the misdeeds of Mr. P. Sri Ram Murthy were being enquired into. It is submitted that Mr. P. Sri Ram Murthy has in fact, remitted an amount of Rs. 9,59,150 being 12.5 per cent. of the disputed tax in the assessment order online, on September 12, 2017 (Ex. P-6). The payment was made as if it is towards miscellaneous tax payment for June, 2014. When the petitioner was seeking to reconcile as to how this amount was deposited and under what account it came to known it is for the purpose of preferring an appeal against the impugned order. All this verification happened post suspension of Mr. P. Sri Ram Murthy.

14. The petitioner faced with this unfortunate situation, filed an appeal under section 31 of the VAT Act on September 24, 2018 on the bona fide belief that there are good grounds for condonation of the delay since the petitioner cannot suffer for the errors committed by one of its employees.

15. It is submitted that the second respondent, vide order, dated October 25, 2018 (Ex. P-7), rejected the appeal on the ground that he has no power to condone the delay beyond 30 days. It is also observed in the said order that appeal against the endorsement was also dismissed by him on August 17, 2018. However, copy of the order is not yet served on the petitioner. The second respondent observed that the petitioner cannot dispute the service of assessment order on June 22, 2017 and failure to file the appeal within 60 days would mean that the assessment order has attained finality.

16. The petitioner submits that filing of a further appeal to the APVAT Appellate Tribunal at Visakhapatnam is a futile exercise, since as a creature under the Act, the Tribunal cannot find fault with the second respondent for not condoning the delay beyond 30 days.

17. The petitioner has lost the appellate remedy by efflux of time. It does not mean that the petitioner should be left remediless. The petitioner submits that a Full Bench of this honourable court in *Electronics Corporation of India Limited*[1] (Writ Petition Nos. 9482 and 9485 of 2017, dated March 13, 2018), dealing with similar situation, under Central Excise Act, held that even if the appeal time under the Act has expired, it does not prevent the assessee from preferring a writ petition under article 226 of the Constitution."

The High Court finally allowed the writ petition vide the impugned **10**
judgment and order on the ground that the statutory remedy had become ineffective for the respondent (writ petitioner) due to expiry of 60 days from the date of service of the assessment order. Inasmuch as, the appellate authority had no jurisdiction to condone the delay after expiry of 60 days, despite the reason mentioned by the respondent of an extraordinary situation due to the act of commission and omission of its employee who was in charge of the tax matters, forcing the management to suspend him and initiate disciplinary proceedings against him. Soon after becoming aware about the assessment order, the respondent had filed the appeal, but that was after expiry of 60 days' period. The High Court was also impressed by the contention pressed into service by the respondent that it ought to be given one opportunity to explain to the authority (Assistant Commissioner)

1. [2019] 7 GSTR-OL 48 (T&AP).

about the discrepancies between the value reported in the CST returns and the amount indicated in form F relating to the turnover. The additional reason as can be discerned from the impugned order is that the respondent had already deposited an additional amount equivalent to 12.5 per cent. of the disputed tax amount in terms of the earlier order. We deem it apposite to reproduce the impugned order of the High Court[1]. The same reads thus[2]:

> "....
>
> The impugned order of assessment is dated June 21, 2017. As against the said order the petitioner filed an appeal with a delay. Since the delay was beyond the period after which it can be condoned, the same was not entertained. Therefore, the petitioner has come up with the above writ petition.
>
> The reason stated by the petitioner is that one of the employees who was in charge, indulged in malpractices forcing the management to suspend him and initiate disciplinary proceedings. The petitioner claims that they were not aware of these orders. Therefore, the petitioner seeks one opportunity.
>
> The reason why the petitioner seeks one opportunity is that F forms submitted by the petitioner were rejected by the assessing officer, on the ground that the value of the goods transferred to branch office have not been disclosed in F forms. But the claim of the petitioner is that the value was wrongly reported in the CST returns and that the amount indicated in the F forms was more than the turnover. Therefore, they seek one opportunity to explain this discrepancy.
>
> In view of the peculiar circumstances, even while granting an opportunity to the petitioner, we wanted to put them on condition. Therefore, on November 8, 2018 we passed an interim order to the following effect :
>
> 'It is represented by Mr. S. Dwarakanath, learned counsel for the petitioner that the petitioner has already paid 12.5 per cent. of the disputed tax, for the purpose of filing an appeal. But, the employee, who was in-charge and who was subsequently, suspended in contemplation of disciplinary proceedings, failed to file the appeal. The contention of the learned counsel for the petitioner is that the issue lies in a narrow campus.

1. Reported as *Glaxo Smith Kline Consumer Health Care Limited* v. *Assistant Commissioner (CT)* [2020] 77 GSTR 346 (T&AP).
2. Pages 346-348 in 77 GSTR.

Since the petitioner has already paid 12.5 per cent. of the disputed tax, the request of the petitioner for granting one more opportunity would be considered favourably, if the petitioner pays an additional amount equivalent to 12.5 per cent. of the disputed tax. The petitioner shall make such payment within a period of one week.

Post on November 19, 2018 for orders.'

Pursuant to the aforesaid order, the petitioner made payment of Rs. 9,59,190, representing 12.5 per cent. of the taxes for the year 2013-14 (CST). The amount was paid on November 13, 2018.

Therefore, the writ petition is ordered, the impugned order is set aside and the matter is remanded back to the first respondent. The petitioner shall appear before the first respondent on December 10, 2018 and explain the discrepancies. After such personal hearing, the first respondent may pass orders afresh.

As a sequel, pending miscellaneous petitions, if any, shall stand closed. No costs."

11 In the backdrop of these facts, the central question is : whether the High Court ought to have entertained the writ petition filed by the respondent ? As regards the power of the High Court to issue directions, orders or writs in exercise of its jurisdiction under article 226 of the Constitution of India, the same is no more res integra. Even though the High Court can entertain a writ petition against any order or direction passed/action taken by the State under article 226 of the Constitution, it ought not to do so as a matter of course when the aggrieved person could have availed of an effective alternative remedy in the manner prescribed by law (see *Baburam Prakash Chandra Maheshwari* v. *Antarim Zila Parishad now Zila Parishad, Muzaffarnagar*[1] and also *Nivedita Sharma* v. *Cellular Operators Association of India)*[2]. In *Thansingh Nathmal* v. *Superintendent of Taxes, Dhubri*[3], the Constitution Bench of this court made it amply clear that although the power of the High Court under article 226 of the Constitution is very wide, the court must exercise self-imposed restraint and not entertain the writ petition, if an alternative effective remedy is available to the aggrieved person. In paragraph 7, the court observed thus[4] :

"7. Against the order of the Commissioner an order for reference could have been claimed if the appellants satisfied the Commissioner or the High Court that a question of law arose out of the order. But

1. AIR 1969 SC 556.
2. [2011] 14 SCC 337.
3. [1964] 15 STC 468 (SC) ; AIR 1964 SC 1419.
4. Page 474 in 15 STC.

the procedure provided by the Act to invoke the jurisdiction of the High Court was bypassed ; the appellants moved the High Court challenging the competence of the Provincial Legislature to extend the concept of sale, and invoked the extraordinary jurisdiction of the High Court under article 226 and sought to reopen the decision of the taxing authorities on a question of fact. The jurisdiction of the High Court under article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the articles. *But the exercise of the jurisdiction is discretionary ; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the court will not entertain a petition for a writ under article 226, where the petitioner has an alternative remedy, which, without being unduly onerous, provides an equally efficacious remedy*. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. *The High Court does not therefore act as a court of appeal against the decision of a court or Tribunal, to correct errors of fact, and does not by assuming jurisdiction under article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another Tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."* (emphasis[1] supplied)

We may usefully refer to the exposition of this court in *Titaghur Paper Mills Co. Ltd.* v. *State of Orissa*[2], wherein it is observed that where a right or liability is created by a statute, which gives a special remedy for enforcing it, the remedy provided by that statute must only be availed of. In paragraph 11, the court observed thus[3] :

1. Here italicised.
2. [1983] 53 STC 315 (SC) ; [1983] 142 ITR 663 (SC) ; [1983] 2 SCC 433.
3. Pages 321 in 53 STC.

"11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under sub-section (1) of section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under section 24 of the Act. *The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.* This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford* [1859] 6 CBNS 336, 356 in the following passage :

'There are three classes of cases in which a liability may be established founded upon statute. . . . But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it . . . The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.'

The rule laid down in this passage was approved by the House of Lords in *Neville* v. *London Express Newspapers Ltd.* [1919] AC 368 and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad and Tobago* v. *Gordon Grant & Co. Ltd.* [1935] AC 532 and *Secretary of State* v. *Mask & Co.*, AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this court throughout. The High Court was therefore justified in dismissing the writ petitions in limine." (emphasis[1] supplied)

In the subsequent decision in *Mafatlal Industries Ltd.* v. *Union of India*[2], this court went on to observe that an Act cannot bar and curtail remedy under article 226 or 32 of the Constitution. The court, however, added a word of caution and expounded that the Constitutional court would certainly take note of the legislative intent manifested in the provi-

1. Here italicised.
2. [1998] 111 STC 467 (SC) ; [1997] 5 SCC 536.

sions of the Act and would exercise its jurisdiction consistent with the provisions of the enactment. To put it differently, the fact that the High Court has wide jurisdiction under article 226 of the Constitution, does not mean that it can disregard the substantive provisions of a statute and pass orders which can be settled only through a mechanism prescribed by the statute.

12 Indubitably, the powers of the High Court under article 226 of the Constitution are wide, but certainly not wider than the plenary powers bestowed on this court under article 142 of the Constitution. Article 142 is a conglomeration and repository of the entire judicial powers under the Constitution, to do complete justice to the parties. Even while exercising that power, this court is required to bear in mind the legislative intent and not to render the statutory provision otiose. In a recent decision of a three-Judge Bench of this court in *Oil and Natural Gas Corporation Limited* v. *Gujarat Energy Transmission Corporation Limited*[1], the statutory appeal filed before this court was barred by 71 days and the maximum time-limit for condoning the delay in terms of section 125 of the Electricity Act, 2003 was only 60 days. In other words, the appeal was presented beyond the condonable period of 60 days. As a result, this court could not have condoned the delay of 71 days. Notably, while admitting the appeal, the court had condoned the delay in filing the appeal. However, at the final hearing of the appeal, an objection regarding appeal being barred by limitation was allowed to be raised being a jurisdictional issue and while dealing with the said objection, the court referred to the decisions in *Singh Enterprises* v. *Commissioner of Central Excise, Jamshedpur*[2], *Commissioner of Customs & Central Excise* v. *Hongo India (P) Ltd.*[3], *Chhattisgarh State Electricity Board* v. *Central Electricity Regulatory Commission*[4] and *Suryachakra Power Corporation Limited* v. *Electricity Department represented by its Superintending Engineer, Port Blair*[5] and concluded that section 5 of the Limitation Act, 1963 cannot be invoked by the court for maintaining an appeal beyond maximum prescribed period in section 125 of the Electricity Act.

13 The principle underlying the dictum in this decision would apply proprio vigore to section 31 of the 2005 Act including to the powers of the High Court under article 226 of the Constitution. Notably, in this decision, a submission was canvassed by the assessee that in the peculiar facts of that

1. [2017] 5 SCC 42.
2. [2008] 12 VST 542 (SC) ; [2008] 3 SCC 70.
3. [2009] 24 VST 298 (SC) ; [2010] 2 GSTR 305 (SC) ; [2009] 315 ITR 449 (SC) ; [2009] 5 SCC 791.
4. [2010] 5 SCC 23.
5. [2016] 16 SCC 152.

case (as urged in the present case), the court may exercise its jurisdiction under article 142 of the Constitution, so that complete justice can be done. This argument has been considered and plainly rejected in the following words :

"12. In *A. R. Antulay* v. *R. S. Nayak* [1988] 2 SCC 602, while explicating and elaborating the principles under article 142, Sabyasachi Mukharji, J. (as his Lordship then was) opined thus (SCC page 656, para 50) :

'50. . . . The fact that the rule was discretionary did not alter the position. Though article 142(1) empowers the Supreme Court to pass any order to do complete justice between the parties, the court cannot make an order inconsistent with the fundamental rights guaranteed by Part III of the Constitution. No question of inconsistency between article 142(1) and article 32 arose. Gajendragadkar, J., speaking (*Prem Chand Garg* v. *Excise Commr.*, AIR 1963 SC 996) for the majority of the judges of this court said that article 142(1) did not confer any power on this court to contravene the provisions of article 32 of the Constitution. Nor did article 145 confer power upon this court to make rules, empowering it to contravene the provisions of the fundamental right. At AIR pages 1002-03, para 12 ; SCR page 899 of the report, Gajendragadkar, J., reiterated that the powers of this court are no doubt very wide and they are intended and "will always be exercised in the interests of justice". But that is not to say that an order can be made by this court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. It was emphasised that *an order which this court could make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws.* The court therefore, held that it was not possible to hold that article 142(1) conferred upon this court powers which could contravene the provisions of article 32.' (emphasis[1] in original)

13. The said decision has been clarified by a Constitution Bench in *Union Carbide Corpn.* v. *Union of India* [1991] 4 SCC 584, wherein M. N. Venkatachaliah, J. (as his Lordship then was) speaking for the majority, ruled that (SCC pages 634-35, para 83) :

'83. It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this court under

1. Here italicised.

article 142(1) of the Constitution. These issues are matters of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the apex court under article 142(1) is unsound and erroneous. In both *Prem Chand Garg* v. *Excise Commr.*, AIR 1963 SC 996, as well as *A. R. Antulay* v. *R. S. Nayak* [1988] 2 SCC 602, cases the point was one of violation of constitutional provisions and constitutional rights. The observations as to the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the court under article 142 insofar as quashing of criminal proceedings are concerned is not exhausted by section 320 or 321 or 482, Cr. P. C. or all of them put together. The power under article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers—limited in some appropriate way—is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Shri Sorabjee, learned Attorney General, referring to *Garg* case (*Prem Chand Garg* v. *Excise Commr.*, AIR 1963 SC 996), said that limitation on the powers under article 142 arising from "inconsistency with express statutory provisions of substantive law" must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression "prohibition" is read in place of "provision" that would perhaps convey the appropriate idea. But *we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under article 142 and in assessing the needs of "complete justice" of a cause or matter, the apex court will take note of the express prohibitions in any substantive statutory provision based*

on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the court under article 142, but only to what is or is not "complete justice" of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise.' (emphasis[1] in original)

14. In this regard, another Constitution Bench in Supreme Court *Bar Assn.* v. *Union of India* [1998] 4 SCC 409 opined (SCC pages 437-38, para 56) :

'56. As a matter of fact, the observations on which emphasis has been placed by us from the *Union Carbide* case *(Union Carbide Corpn.* v. *Union of India* [1991] 4 SCC 584*), A. R. Antulay* case *(A.R. Antulay* v. *R. S. Nayak* [1988] 2 SCC 602*)* and *Delhi Judicial Service Assn.* v. *State of Gujarat* [1991] 4 SCC 406, *go to show that they do not strictly speaking come into any conflict with the observations of the majority made in Prem Chand Garg* case *(Prem Chand Garg* v. *Excise Commr.*, AIR 1963 SC 996*)*. It is one thing to say that "prohibitions or limitations in a statute" cannot come in the way of exercise of jurisdiction under article 142 *to do complete justice* between the parties in the pending "cause or matter" arising out of that statute, but quite a different thing to say that while exercising jurisdiction under article 142, this court can altogether ignore the substantive *provisions of a statute*, dealing with the subject and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. This court did not say so in *Union Carbide* case (*Union Carbide Corpn.* v. *Union of India* [1991] 4 SCC 584) either expressly or by implication and on the contrary it has been held that the apex court *will take note of the express provisions of any* substantive statutory law and regulate the exercise of its power and discretion accordingly. . .' (emphasis[1] in original)

15. From the aforesaid decisions, it is clear as crystal that the Constitution Bench in Supreme Court *Bar Assn.* v. *Union of India* [1998] 4 SCC 409, has ruled that there is no conflict of opinion in *Antulay* case (*A. R. Antulay* v. *R. S. Nayak* [1988] 2 SCC 602) or in *Union Carbide Corpn.* case (*Union Carbide Corpn.* v. *Union of India* [1991] 4 SCC 584) with the principle set down in *Prem Chand Garg* v. *Excise Commr.*, AIR 1963 SC 996. *Be it noted, when there is a statutory command by the legislation as regards limitation and there is the postulate*

1. Here italicised.

that delay can be condoned for a further period not exceeding sixty days, needless to say, it is based on certain underlined, fundamental, general issues of public policy as has been held in *Union Carbide Corpn.* case (*Union Carbide Corpn.* v. *Union of India* [1991] 4 SCC 584). As the pronouncement in *Chhattisgarh State Electricity Board* v. *Central Electricity Regulatory Commission* [2010] 5 SCC 23, lays down quite clearly that the policy behind the Act emphasising on the constitution of a special adjudicatory forum, is meant to expeditiously decide the grievances of a person who may be aggrieved by an order of the adjudicatory officer or by an appropriate Commission. The Act is a special legislation within the meaning of section 29(2) of the Limitation Act and, therefore, the prescription with regard to the limitation has to be the binding effect and the same has to be followed regard being had to its mandatory nature. *To put it in a different way, the prescription of limitation in a case of present nature, when the statute commands that this court may condone the further delay not beyond 60 days, it would come within the ambit and sweep of the provisions and policy of legislation. It is equivalent to section 3 of the Limitation Act. Therefore, it is uncondonable and it cannot be condoned taking recourse to article 142 of the Constitution.*

16. We had stated earlier that we will be adverting to the passage in *Suryachakra Power Corpn. Ltd.* v. *Electricity Deptt.* [2016] 16 SCC 152. There, the court had referred to section 14 of the Limitation Act. It fundamentally relied on *M. P. Steel Corporation* v. *Commissioner of Central Excise* [2015] 7 SCC 58[1], wherein the court after referring to certain authorities, analysed thus (*M. P. Steel Corpn.* case), SCC p. 91, para 43) :

'43. . . . when a certain period is excluded by applying the principles contained in section 14, there is no delay to be attributed to the appellant and the limitation period provided by the statute concerned continues to be the stated period and not more than the stated period. We conclude, therefore, that the principle of section 14 which is a principle based on advancing the cause of justice would certainly apply to exclude time taken in prosecuting proceedings which are bona fide and with due diligence pursued, which ultimately end without a decision on the merits of the case'."(emphasis in italics—in original, and in bold—supplied)[2]

1. [2015] 80 VST 402 (SC).
2. Here italicised.

Similarly, in *State* v. *Mushtaq Ahmad*[1], this court opined that where minimum sentence is provided for an offence then no court can impose lesser punishment on ground of mitigating factors.

A priori, we have no hesitation in taking the view that what this court **14**
cannot do in exercise of its plenary powers under article 142 of the Constitution, it is unfathomable as to how the High Court can take a different approach in the matter in reference to article 226 of the Constitution. The principle underlying the rejection of such argument by this court would apply on all fours to the exercise of power by the High Court under article 226 of the Constitution.

We may now revert to the Full Bench decision of the Andhra Pradesh **15**
High Court in *Electronics Corporation of India Limited* v. *Union of India*[2], which had adopted the view taken by the Full Bench of the Gujarat High Court in *Panoli Intermediate (India) Pvt. Ltd.* v. *Union of India*[3] and also of the Karnataka High Court in *Phoenix Plasts Company* v. *Commissioner of Central Excise, (Appeal-I), Bangalore*[4]. The logic applied in these decisions proceeds on fallacious premise. For, these decisions are premised on the logic that provision such as section 31 of the 1995 Act, cannot curtail the jurisdiction of the High Court under articles 226 and 227 of the Constitution. This approach is faulty. It is not a matter of taking away the jurisdiction of the High Court. In a given case, the assessee may approach the High Court before the statutory period of appeal expires to challenge the assessment order by way of writ petition on the ground that the same is without jurisdiction or passed in excess of jurisdiction—by overstepping or crossing the limits of jurisdiction including in flagrant disregard of law and rules of procedure or in violation of principles of natural justice, where no procedure is specified. The High Court may accede to such a challenge and can also non-suit the petitioner on the ground that alternative efficacious remedy is available and that be invoked by the writ petitioner. However, if the writ petitioner chooses to approach the High Court after expiry of the maximum limitation period of 60 days prescribed under section 31 of the 2005 Act, the High Court cannot disregard the statutory period for redressal of the grievance and entertain the writ petition of such a party as a matter of course. Doing so would be in the teeth of the principle underlying the dictum of a three-Judge Bench of this court in *Oil and Natural Gas Corporation Limited*[5]. In other words, the fact that the High Court has

1. [2016] 1 SCC 315.
2. [2019] 7 GSTR-OL 48 (T&AP) ; [2018] 361 ELT 22 (AP).
3. AIR 2015 Guj 97.
4. [2014] 25 GSTR 325 (Karn) ; [2013] 298 ELT 481 (Karn).
5. [2017] 5 SCC 42.

wide powers, does not mean that it would issue a writ which may be inconsistent with the legislative intent regarding the dispensation explicitly prescribed under section 31 of the 2005 Act. That would render the legislative scheme and intention behind the stated provision otiose.

16 The respondent had relied on the decision of this court in *K. S. Rashid and Son* v. *Income-tax Investigation Commission*[1]. This decision of the Constitution Bench, no doubt, deals with the extent of power of the High Court under article 226 of the Constitution and the situation when the High Court can refuse to exercise its discretion, such as when alternative efficacious remedy is available to the aggrieved party. In paragraph 4 (last paragraph) of this decision, however, the court plainly noted that it was not necessary to express any final opinion on the question as to whether section 8(5) of the Taxation on Income (Investigation Commission) Act, 1947 (Act XXX of 1947) is to be regarded as providing the only remedy available to the aggrieved party and that it excludes altogether the remedy provided for under article 226 of the Constitution.

17 Reliance was then placed on a three-Judge Bench decision of this court in *ITC Ltd.* v. *Union of India*[2]. In that case, the High Court had dismissed the writ petition on the ground that the petitioner therein had an adequate alternative remedy by way of an appeal under section 35 of the Central Excise Act. Concededly, this court was pleased to uphold that opinion of the High Court. However, whilst considering the difficulty expressed by the petitioner therein that the statutory remedy of appeal had now become time-barred during the pendency of the proceedings before the High Court and before this court, the court permitted the petitioner therein to resort to remedy of statutory appeal and directed the appellate authority to decide the appeal on merits. This obviously was done on the basis of concession given by the counsel appearing for the Revenue as noted in paragraph 2(1) of the order, which reads thus :

> "2. The High Court has dismissed the writ petition filed by the petitioner on the ground that there is an adequate alternative remedy by way of an appeal under section 35 of the Central Excise Act. Learned counsel for the petitioner submits that the petitioner will face certain difficulties in pursuing this remedy :
>
> (1) This remedy may not be any longer available to it because the appeal has to be filed within a period of three months from the date of the assessment order and delay can be condoned only to the extent of three more months by the Collector under section 35 of the Act. It

1. [1954] 25 ITR 167 (SC) ; AIR 1954 SC 207.
2. [1998] 8 SCC 610.

is pointed out that the petitioner did not file an appeal because the Collector (Appeal) at Madras had taken a view in a similar matter that an appeal was not maintainable. That apart, the petitioner in view of the huge demand involved filed a writ petition and so did not file an appeal. In the circumstances of the case, we are of the opinion that the ends of justice will be met if we permit the petitioner to file a belated appeal within one month from today with an application for condonation of delay, whereon the appeal may be entertained. *Learned counsel for the Revenue has stated before us that the Revenue will not object to the entertainment of the appeal on the ground that it is barred by time. In view of this direction and concession, the petitioner will have an effective alternative remedy by way of an appeal.*" (emphasis[1] supplied)

In that case, it appears that the writ petition was filed within statutory period and legal remedy was being pursued in good faith by the assessee (appellant).

Suffice it to observe that this decision is on the facts of that case and **18** cannot be cited as a precedent in support of an argument that the High Court is free to entertain the writ petition assailing the assessment order even if filed beyond the statutory period of maximum 60 days in filing appeal. The remedy of appeal is creature of statute. If the appeal is presented by the assessee beyond the extended statutory limitation period of 60 days in terms of section 31 of the 2005 Act and is, therefore, not entertained, it is incomprehensible as to how it would become a case of violation of fundamental right, much less statutory or legal right as such.

Arguendo, reverting to the factual matrix of the present case, it is noticed **19** that the respondent had asserted that it was not aware about the passing of assessment order dated June 21, 2017 although it is admitted that the same was served on the authorised representative of the respondent on June 22, 2017. The date on which the respondent became aware about the order is not expressly stated either in the application for condonation of delay filed before the appellate authority, the affidavit filed in support of the said application or for that matter, in the memo of writ petition. On the other hand, it is seen that the amount equivalent to 12.5 per cent. of the tax amount came to be deposited on September 12, 2017 for and on behalf of respondent, without filing an appeal and without any demur–after the expiry of statutory period of maximum 60 days, prescribed under section 31 of the 2005 Act. Not only that, the respondent filed a formal application under rule 60 of the 2005 Rules on May 8, 2018 and pursued the same in

1. Here italicised.

appeal, which was rejected on August 17, 2018. Furthermore, the appeal in question against the assessment order came to be filed only on September 24, 2018 without disclosing the date on which the respondent in fact became aware about the existence of the assessment order dated June 21, 2017. On the other hand, in the affidavit of Mr. Sreedhar Routh, Site Director of the respondent-company (filed in support of the application for condonation of delay before the appellate authority), it is stated that the company became aware about the irregularities committed by its erring official (Mr. P. Sriram Murthy) in the month of July, 2018, which pre-supposes that the respondent must have become aware about the assessment order, at least in July, 2018. In the same affidavit, it is asserted that the respondent-company was not aware about the assessment order, as it was not brought to its notice by the employee concerned due to his negligence. The respondent in the writ petition has averred that the appeal was rejected by the appellate authority on the ground that it had no power to condone the delay beyond 30 days, when in fact, the order examines the cause set out by the respondent and concludes that the same was unsubstantiated by the respondent. That finding has not been examined by the High Court in the impugned judgment and order at all, but the High Court was more impressed by the fact that the respondent was in a position to offer some explanation about the discrepancies in respect of the volume of turnover and that the respondent had already deposited 12.5 per cent. of the additional amount in terms of the previous order passed by it. That reason can have no bearing on the justification for non-filing of the appeal within the statutory period. Notably, the respondent had relied on the affidavit of the Site Director and no affidavit of the concerned employee (P. Sriram Murthy, Deputy Manager-Finance) or at least the other employee (Siddhant Belgaonker, Senior Manager (Finance)), who was associated with the erring employee during the relevant period, has been filed in support of the stand taken in the application for condonation of delay. Pertinently, no finding has been recorded by the High Court that it was a case of violation of principles of natural justice or non-compliance of statutory requirements in any manner. Be that as it may, since the statutory period specified for filing of appeal had expired long back in August, 2017 itself and the appeal came to be filed by the respondent only on September 24, 2018, without substantiating the plea about inability to file appeal within the prescribed time, no indulgence could be shown to the respondent at all.

20 Reverting to the contention that the respondent having failed to assail the order passed by the appellate authority, dated October 25, 2018 rejecting the application for condonation of delay, the assessment order passed

by the Assistant Commissioner, dated June 21, 2017 stood merged, need not detain us in view of the exposition of this court in *Raja Mechanical Co. (P) Ltd*. v. *Commissioner of Central Excise, Delhi-I*[1]. It is well-settled that rejection of delay application by the appellate forum does not entail in merger of the assessment order with that order.

Taking any view of the matter, therefore, the High Court ought not to **21**
have entertained the subject writ petition filed by the respondent herein. The same deserved to be rejected at the threshold.

Accordingly, we allow this appeal and set aside the impugned judgment **22**
and order passed by the High Court and dismiss the writ petition. There shall be no order as to costs.

Pending interlocutory applications, if any, shall stand disposed of. **23**

[2020] 77 GSTR 373 (SC)

[IN THE SUPREME COURT OF INDIA]

HIGH RANGE COFFEE CURING PVT. LTD.

v.

STATE OF KARNATAKA AND OTHERS

A. M. KHANWILKAR and **DINESH MAHESHWARI** JJ.

February 5, 2020.

HF ▸ Department

SALES TAX—INDUSTRIAL POLICY—CONCESSION—BENEFIT OF CONCESSION AND INCENTIVES UNDER INDUSTRIAL POLICY—ONLY IN RESPECT OF SALES TAX—NOT TO BE EXTENDED TO PURCHASE TAX—KARNATAKA SALES TAX ACT (25 of 1957), s. 5—INDUSTRIAL POLICY, 1996.

The Industrial Policy, 1996 issued under the Karnataka Sales Tax Act, 1957 by Government Order No. CI.30.SPC.96 dated March 15, 1996 provides for concession and incentives only in respect of sales tax and not for purchase tax as such.

MALNAD ARECA PROCESSING & MARKETING LTD. *v.* DY. COMMISSIONER OF COMMERCIAL TAXES (ASSESSMENT) [2008] 13 VST 581 (SC) *followed*.

There is a distinction between sale and purchase as different aspects of the same transaction. The State can levy tax both at the sale point and/or at the purchase point. That distinction being clear, the question of assuming that

1. [2012] 15 GSTR 1 (SC) ; [2012] 51 VST 447 (SC) ; [2012] 12 SCC 613.

the purchase tax was also part of the industrial policy under consideration cannot be countenanced.

The fact that the assessee's industry has been included or added in Appendix IV does not mean that the substance of the policy has undergone any change. The purport of amendment is only to include more industries which were left out in the first notification of 15th March, 1996.

The assessee, after recall of the decision dated March 9, 2004, participated in the appeal proceedings before the Division Bench of the High Court and argued the matter on the merits. As a result, the technical plea raised by the assessee regarding the justness of exercise of jurisdiction by the High Court in recalling the entire decision at the instance of the assessee, who had merely moved an application for recall and clarification of one sentence occurring in the decision, could not be the basis to undo the entire judgment which otherwise was in conformity with the legal principle stated in the case of Malnad Areca Processing & Marketing Ltd. *v.* Dy. Commissioner of Commercial Taxes (Assessment) [2008] 13 VST 581 (SC).

The opening ground urged by the assessee that the High Court ought not to have entertained the appeals on the merits without condoning the delay in filing of appeals though attractive at the first blush, does not take the matter any further as the delay was only of 71 and 283 days respectively and sufficient explanation has been offered by the respondent(s) which could be condoned in the interest of justice.

Decision of the Karnataka High Court (printed at page 375 infra) *affirmed.*

Cases referred to :

Devi Dass Gopal Krishnan *v.* State of Punjab [1967] 20 STC 430 (SC) (paras 4, 8)

Malnad Areca Processing & Marketing Ltd. *v.* Dy. Commissioner of Commercial Taxes (Assessment) [2008] 13 VST 581 (SC) (paras 3, 9, 10)

State of Karnataka *v.* High Range Coffee Curing Pvt. Ltd. [2020] 77 GSTR 375 (Karn)

Civil Appeal Nos. 10680-10683 with 10684 of 2011.

Appeal by special leave from the judgment and order dated October 30, 2007 in STRP Nos. 27 and 28 of 2006 and W. A. No. 7739-7741 of 2003 of the Karnataka High Court (*State of Karnataka* v. *High Range Coffee Curing Pvt. Ltd.*). The judgment of the High Court (V. GOPALA GOWDA and L. NARYANA SWAMY JJ.) ran as follows :

"Judgment

The judgment of the court was delivered by

V. Gopala Gowda J.—This writ appeal and revision petitions are filed by both the State and the assessees questioning the correctness of the order dated July 27, 2003 passed by the learned single judge impugned in the appeal and the revision petitions questioning the correctness of the orders passed by the KAT urging various grounds to set aside the order of the learned single judge in granting relief to the assessee. The assessees have also challenged the order passed by the Second Appellate Tribunal questioning the correctness of the assessment orders passed by the Assistant Commissioner affirmed by the first appellate authority-the second respondent, i. e., the Joint Commissioner of Commercial Taxes (Appeals), in the revision petitions whose order is affirmed by the Karnataka Appellate Tribunal (hereinafter in short called as 'the KAT') in exercise of its powers conferred upon it, urging various legal contentions and prayed to comply with the order passed by this court in W. P. No. 38367 of 2001 connected with W. P. No. 38687 of 2001 and another connected matter, which common order is under challenge in the writ appeal referred to supra and also prayed to set aside the impugned orders in the revision petitions and allow the appeal filed before the Karnataka Appellate Tribunal placing strong reliance upon the Government Order No. CI.30SPC.96(I), dated March 15, 1996 with regard to the industrial liberalization/economic industrial trade policy framed by the Government of Karnataka in July 1991 and the industrial policy which has been in operation in the State of Karnataka for more than 2½ years and has attracted substantial investment flows in the industrial sector. In terms of the said Government Order certain manufacturing industries have been granted commercial tax incentives concessions as mentioned in Annexure III to the Government Order. In the said annexure III, the names of the assessees/manufacturing industries were not included in the said notification. The said benefit has been extended by another Government order dated April 14, 1999 passed by the State Government extending the benefit of commercial tax incentives and concessions under Government Order dated March 15, 1996 in respect of the non-manufacturing units in Appendix IV to its earlier G. O. Under clause B of the said G. O. there were 20 non-manufacturing units. In those units the assessee have opted to avail the above said commercial tax benefits and also placed strong reliance upon the notification dated March 15, 1996 issued by the State Government in exercise of its power under section 15C of the Karnataka Sales Tax Act, 1957 (hereinafter referred to as 'the Act') granting exemption from payment of sales tax by them under the Act in

respect all the goods manufactured and sold at new industrial units mentioned in column No. 2 of total items allocated in the appendix during the period and to the extent mentioned in column No. 3 of the Table.

Smt. Sujatha, learned Additional Government Advocate appearing for the appellants in the writ appeal placing strong reliance upon clause 5 of the commercial taxes incentives and concessions extended to industries mentioned in the above said G. O. under clause B passed by the State Government in respect of the industrial investments including the assessees/non-manufacturing units, the concessions extended is only in respect of the sales tax exemption/deferral but not purchase tax. The item coffee is enumerated in both the two schedules as item No. 18 insofar as the sales tax is concerned. Schedule 3, item No. 3 is mentioned m respect of coffee beans are other seeds roasted but excluding coffee powder. Therefore the coffee seeds purchased from the producers is exempted, but the payment of purchase tax by the assessees is not exempted in the Government Orders dated March 15, 1996 and May 14, 1999. She has placed strong reliance on and unreported decision of this court in W. P. No. 18392 of 2005 (T-KST) C/W STRP No. 91/04 and 92/2004 in the case of *Malnad Areca Processing & Marketing Ltd.* v. *Deputy Commissioner of Commercial Taxes (Asst.)*, wherein the Division Bench of this court after referring and considering the aforesaid G.O.'s regarding commercial tax incentives and concessions of the above mentioned non manufacturing industries particularly in the context of sales tax in respect of the goods of arecanut was examined. With reference to the statement of objections filed by the State Government in granting incentives and concessions to the non-manufacturing units with regard to the sales tax exemption has referred to the relevant portions of the said G.O.'s and also referred to the statement of objections filed by the State Government in relation to the non-manufacturing units at paragraph 21 of the above decision, after extracting another decision of this court in the case of *Diamond Feeds* v. *Deputy Commissioner of Commercial Taxes* [2007] 8 VST 537 (Karn) passed in W. P. No. 5059/02 and connected matters disposed of on September 29, 2005 and after referring clause 5 of the G. O. dated March 15, 1996 of the industrial policy published by the State Government for the period 1996-2001, provides for sales tax concession and incentives and held that there is no concession in relation to the purchase tax and the Division Bench has also referred to the order impugned in the writ appeal passed in the case of *High Range Coffee Curing Pvt. Ltd.* v. *State of Karnataka* passed in W. P. No. 38367 of 2001 and connected matters referred to supra disposed of on July 24, 2003 and held that the judgment is not binding upon the D. B. and further made an

observation that the said judgment rendered by the learned single judge does not lay down any law and whatever that is in the order, in our view, is binding only inter parties. Smt. Sujatha, learned Additional Government Advocate has rightly placed strong reliance upon the aforesaid decision.

After hearing the learned Additional Government Advocate and the learned counsel for the assessees and after careful perusal of the incentives and concessions offered to the industries as per Industrial policy formulated by the State Government in its order and in view of the industrial mobilization policy incentive package issued in July 1991 and the industrial policy which has been in operation for the past more than 2½ years as on March 15, 1996, the G. O. was published extending the incentives and sales tax concessions as stated under item No. 5 in relation to the manufacturing units and certain other non-manufacturing industries in respect of the assessees by way of another G. O. dated May 14, 1999 Item No. 1 Sl. No. 7 in respect of the assessees also included to the Appendix IV extending the concession of sales tax payable in respect of the coffee seeds.

In our considered view we are in respectful agreement with the view taken by the Division Bench of this court in *Malnad Areca Processing & Marketing Ltd.* case, though it is in relation to arecanut, the goods involved in these cases are coffee seeds.

The Division Bench of this court on a careful examination of the industrial incentives and concession granted in favour of the manufacturing industries mentioned in Appendix IV including assesses, the coffee manufacturing industries vide G. O. dated May 14, 1999 found that what is exempted to them is only the sales tax but not the purchase tax. The learned counsels for the assessees have tried to distinguish the *Malnad's* case by placing reliance upon section 5, sub-section (3) of clause (b) of the KST Act, which provisions deal with the purchase tax. It is also further contended by the learned counsel for the assessees that the assessees are not liable to pay sales tax. There was reason to include the non-manufacturing industries in the Government notification, if, it were to be the policy of the Government that it has not intended to extend the purchase tax, the said submission cannot be accepted for the reason that merely because the assessees are not liable to pay sales tax under section 5(3)(b) inclusion of the assessees industries to Appendix IV in the G. O. dated March 15, 1996, by passing another G. O. dated May 14, 1999 the purchase tax concession is not extended in the above Government Order. We are in respectful agreement with the above said decision of the Division Bench decision of this court in *Malnad Areca Processing & Marketing Ltd.* case referred to supra with all fours applicable to the fact situation of these cases. There-

fore, the State Government must succeed, the order impugned in the writ appeal is liable to be set aside. Writ appeal is allowed and the STRPs are also dismissed affirming the orders of the assessing officers passed against the petitioners-assesses in the revision petitions."

Yashraj Singh Deora, Ms. Shivangi Sud, Ms. Sonal Mashankar for *M/S. Mitter & Mitter Co.*, Advocates, for the appellant.

Basava Prabhu S. Patil, Senior Advocate (*V. N. Raghupathy*, *Manendra Pal Gupta, Ms. Rachitha Hirenath, Ms. Rudrali Patil, Joseph Aristotle S.* and *Ms. Radha Rangaswamy*, Advocates, with him), for the respondents.

ORDER

1 Heard counsel for the parties.

2 The opening ground urged by the appellant is that the High Court ought not to have entertained the appeals on the merits without condoning the delay in filing of appeals. This argument though attractive at the first blush, does not take the matter any further as we find the delay was only of 71 and 283 days respectively and sufficient explanation has been offered by the respondent(s) which could be condoned in the interest of justice and we order accordingly.

3 The core issue raised in these appeals, in our opinion, is no more res integra. It has been answered in the decision of this court in *Malnad Areca Processing & Marketing Ltd.* v. *Dy. Commissioner of Commercial Taxes (Assessment)* reported in [2008] 11 SCC 536[1].

4 This very Industrial Policy, 1996 was considered by the court. The court opined that the same provides for exemption only in respect of sales tax and not for purchase tax as such. The relevant discussion in this behalf can be discerned from paragraph Nos. 15 to 19 of the said decision, which read thus[2] :

> "15. In the Government order what is provided to new industrial units is the sales tax exemption or deferral of sales tax under the Act and the Central Sales Tax Act, 1956 (in short, 'the CST Act').
>
> 16. Clause 5 of the Government order dated March 15, 1996 of the Industrial Policy, 1996-2001 provides for sales tax concession and incentives. The said clause provides for an option to industrial investments in the tiny/SSI/medium and large-scale sectors to claim either sales tax exemption or sales tax deferral.

1. [2008] 13 VST 581 (SC).
2. Paras 16-19, pages 585 and 586 in 13 STC.

17. A sale and a purchase are two different aspects of the same transaction. Whether sale or purchase, it will have same ingredients, both in common law and also under the Sale of Goods Act. As stated by this court in *Devi Dass Gopal Krishnan* v. *State of Punjab*[1], the transaction, which the sales tax laws are concerned with, is a transfer of property in goods for price, inter vivos, both in the case of sale as well as purchase.

18. In the Government order, what is provided to the new industrial units, is an option to claim sales tax exemption or deferment of sales tax both under the Act and the CST Act. In the field of taxation, it is recognized that the power to classify the objects or persons to be taxed or exempted from levy is with the Legislature. It also enjoys the power to select persons or transactions. A law of the State, could therefore, levy tax both at the sale point and at the purchase point.

19. Under the Government order, the policy of the Government as spelt out is, that tiny and small-scale industries and medium-and large-scale industries may exercise their option either for sales tax exemption or sales tax deferment for number of years prescribed in the Government order itself. In the context in which these expressions are used, they only mean 'sales tax holiday' or exemption from payment of sales tax for number of years specified, depending on where the tiny or small-scale industry is located. 'Sales tax' refers to any tax which includes within its scope all 'business of sale of goods' specified in the Schedule. Similarly, 'sales tax deferral' only means the aforesaid industries are entitled to collect tax but they need not pay sales tax collected immediately to the State. If understood in this manner and thereafter the New Industrial Policy of the State Government for the years 1993-1998 and the exemption notification is looked into, the only conclusion that can be drawn is, what is exempted under the notification issued by the State Government is tax leviable under section 5 of the Act on the goods manufactured and sold by an industrial unit. Therefore, the notification is in no way in variance or contrary to the industrial policy for the years 1993-1998. The above position has been rightly highlighted by the High Court."

We are in agreement with the opinion as recorded in the aforesaid decision, that the Government Order No. CI.30.SPC.96, dated March 15, 1996, namely, the industrial policy merely provides for sales tax concession and incentives and nothing more. 5

1. [1967] 20 STC 430 (SC) ; AIR 1967 SC 1895 ; [1967] 3 SCR 557.

6 Counsel for the appellant was at pains to distinguish the judgment on the argument that it has only considered the situation covered under section 6 of the Karnataka Sales Tax Act, 1957, whereas section 5 of the Act deals with both sale as well as purchase, and purchase being the part of the same sale, the benefit under the policy concerned must be extended also for purchase, especially, because of the amendment to the policy by inserting the industry of the appellant in appendix IV. We are not impressed by this submission.

7 The fact that the appellant/assessee's industry has been included or added in Appendix IV does not mean that the substance of the policy has undergone any change. The purport of amendment is only to include more industries which were left out in the first notification of 15th March, 1996.

8 Counsel for the appellant had also placed reliance on the Constitution Bench decision of this court in *Devi Dass Gopal Krishnan*[1], in particular, paragraph 24, which reads as under[2] :

> "Bearing that in mind let us look at clause (ff) in section 2 of the Principal Act in which the said clause was inserted. The ingredients of the definition of 'purchase' are as follows : (i) there shall be acquisition of goods ; (ii) the acquisition shall be for cash or deferred payment or other valuable consideration ; (iii) the said valuable consideration shall not be other than under a mortgage, hypothecation, charge or pledge. Clause (h) of section 2 defines 'sale' thus :
>
> ' "sale" means any transfer of property in goods other than goods specified in Schedule C for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge.'
>
> If we turn to the Sale of Goods Act, section 4 thereof defines a contract of sale of goods. It reads :
>
> 'A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. . .'
>
> The essential requisite of sale are : (i) there shall be a transfer of property or agreement to transfer property by one party to another ; and (ii) it shall be for consideration of money payment or promise thereof by the buyer. A sale and a purchase are different aspects of the same transaction. If we look at it from the standpoint of the purchaser it is a purchase and if we look at it from the standpoint of

1. [1967] 20 STC 430 (SC) ; AIR 1967 SC 1895 ; [1967] 3 SCR 557.
2. Pages 444 and 445 in 20 STC.

the seller it is a sale. Whether purchase or sale it shall have the said ingredients both in common law and under the Indian Contract Act. 'Price' has been defined in the Sale of Goods Act to mean money consideration for the sale of goods : see section 2(10) of the Indian Sale of Goods Act. It will, therefore, be seen that the definition of 'purchase' in the Act prima facie appears to be wider in scope than 'sale'. While transfer of goods from one person to another is the ingredient of 'sale' in general law, acquisition of goods, which may in its comprehensive sense take in voluntary as well as involuntary transfers, is an ingredient of 'purchase' in clause (ff). While 'price', i.e., money consideration, is the ingredient of 'sale', cash, deferred payment or any valuable consideration is an ingredient of 'purchase'. But a closer scrutiny compels us to give a restricted meaning to the expression 'acquisition' and 'price'. Acquisition is the act by which a person acquires property in a thing. 'Acquire' is to become the owner of the property. One can, therefore, acquire a property either by voluntary or involuntary transfer. But the Sales Tax Act applies only to 'sale' as defined in the Act. Under clause (ff) of section 2 of the Act it is defined as a transfer of property. As purchase is only a different, aspect of sale, looked at from the stand point of the purchaser, and as the Act imposes tax at different points in respect of sales, having regard to the purpose of the sale, it is unreasonable to assume that the Legislature contemplated different categories of transactions when the taxable event is at the purchase point. Whether it is sale or purchase the transaction is the same. If it was a transfer inter vivos, in the case of a sale, it must equally be so in the case of a purchase. Context, consistency and avoidance of anomaly demand a restricted meaning. That it must only mean transfer is also made clear by the nature of the transactions excluded from the acquisition, namely, mortgage, hypothecation, charge or pledge-all of them belong to the species of transfer. We must, therefore, hold that the expression 'acquisition' in clause (ff) of section 2 of the Act means only 'transfer'."

9 The exposition in paragraph 24 of the stated decision extracted above itself recognizes the distinction between sale and purchase as different aspects of the same transaction. As observed in the case of *Malnad*[1], the State can levy tax both at the sale point and/or at the purchase point. That distinction being clear, the question of assuming that the purchase tax was also part of the industrial policy under consideration cannot be counte-

1. [2008] 13 VST 581 (SC) ; [2008] 11 SCC 536.

nanced. As a result, we find no reason to deviate from the view taken by the High Court in following the principle expounded in the decision of *Malnad*[1].

10 The companion appeal, Civil Appeal No. 10684 of 2011, again raises a technical plea regarding justness of exercise of jurisdiction by the High Court in recalling the entire decision dated March 9, 2004 at the instance of the appellant, who had merely moved an application for recall/clarification of one sentence occurring in the said decision. The fact remains that the appellant, after recall of the entire decision, participated in the appeal proceedings before the Division Bench and argued the matter on merits. As a result, this technical plea cannot be the basis to undo the entire judgment which otherwise is in conformity with the legal principle stated in the case of *Malnad*[1].

11 Hence, these appeals must fail and the same are dismissed accordingly. All pending applications are also disposed of.

[2020] 77 GSTR 382 (Delhi)

[IN THE DELHI HIGH COURT]

A. B. PAL ELECTRICALS PVT. LTD.

v.

UNION OF INDIA AND OTHERS

VIPIN SANGHI and SANJEEV NARULA JJ.

December 17, 2019.

HF ▶ Assessee

GOODS AND SERVICES TAX—TRANSITION PROVISIONS—INPUT-TAX CREDIT—ASSESSEE UNABLE TO UPLOAD FORM TRAN-1—ASSESSEE'S CASE NOT FALLING UNDER "TECHNICAL GLITCHES"—INPUT-TAX CREDIT IS PROPERTY OF ASSESSEE—ASSESSEE CANNOT BE DEPRIVED WITHOUT AUTHORITY OF LAW—TIME-LIMIT FOR FILING FORM NOT SACRO SANCT—ASSESSEE TO BE ALLOWED TO FILE FORM ELECTRONICALLY OR MANUALLY—DEPARTMENT TO PROCESS FORM—CENTRAL GOODS AND SERVICES TAX ACT (12 of 2017), SS. 140, 174—CENTRAL GOODS AND SERVICES TAX RULES, 2017, r. 117—NOTIFICATION NO. 49 OF 2019 DATED OCTOBER 9, 2019.

The assessee was a registered dealer under the value added tax and sales tax laws. Upon coming into force of the goods and services tax regime the assessee migrated to it with effect from July 1, 2017 and, in order to claim

1. [2008] 13 VST 581 (SC) ; [2008] 11 SCC 536.

input- tax credit in respect of the transitional tax paid on opening stock as held on July 1, 2017, it was required under section 140(3), (4) and (5) of the Central Goods and Services Tax Act, 2017 to file its claim in form TRAN-1 within the time as prescribed. The managing director of the assessee-company was not keeping well and was unable to attend to the business affairs of the company for a long time. The personnel responsible for dealing with compliances required to be made by the company were consistently reporting to him that the goods and services tax portal was not working properly, and therefore, they were unable to access the portal and file requisite details. Therefore, the requisite information could not be filed in the prescribed form TRAN-1. On recovery, the managing director followed up with the company personnel and the tax authorities and was apprised of the fact that the time to file TRAN-1 had been extended up to March 31, 2019, for taxpayers who could not submit the said declaration by the due date on account of technical difficulties on the common portal and whose cases had been recommended by the Goods and Services Tax Council. The case of the assessee neither fell under the category of technical glitches nor had been recommended by the Council. Therefore, the assessee filed a representation dated March 28, 2019 before the Council requesting them to consider its case on compassionate grounds. Having received no response to the representation, the assessee filed a writ petition :

Held, *that though the case of the assessee could not be strictly categorized as covered by "technical glitches", the goods and services tax system was still in a "trial and error phase" as far as its implementation was concerned and although the failure was on the part of the assessee, the error was inadvertent. The assessee did not have any evidence or proof in support of its submission that the personnel responsible for dealing with the compliances were unable to file the requisite form due to non-functioning of goods and services tax portal. However, in a large number of matters, assessees had similarly complained that before the deadline, they were not able to access the portal. This could be presumably because of low band with, given the fact that before the deadline, a large number of tax payers all over the country, were trying to submit the declaration in form TRAN-1. In these circumstances, the benefit of doubt was to be given to the assessee. By Notification No. 49 of 2019 dated October 9, 2019 the date prescribed for filing of form TRAN-1 under rule 117(1A) of the Central Goods and Services Tax Rules, 2017 had been extended to December 31, 2019. This demonstrated that the Department recognised the fact that assessees were not able to upload the form TRAN-1 due to glitches in the system. It was not fair to expect each person who might not have been*

able to upload form TRAN-1 to have preserved some evidence of it. From the documents placed on record, the Department had no cogent ground to deny the benefit of Notification No. 49 of 2019 dated October 9, 2019 issued specifically to grant relief to taxpayers who faced difficulty in filing form TRAN-1 due to technical glitches. The credit standing in favour of an assessee was "property" and the assessee could not be deprived of it save by authority of law in terms of article 300A of the Constitution of India. There was no law which extinguished the right to property of the assessee in the credit standing in its favour. Thus, the Department was to either open the online portal so as to enable the assessee to file form TRAN-1 electronically, or to accept it manually on or before December 31, 2019 and process the assessee's claim in accordance with law once the form was filed.

BLUE BIRD PURE PVT. LTD. *v.* UNION OF INDIA [2019] 68 GSTR 340 (Delhi) *applied*.

Cases referred to :

Aadinath Industries *v.* Union of India [2020] 72 GSTR 247 (Delhi) (para 5)

Adfert Technologies Pvt. Ltd. *v.* Union of India [2020] 73 GSTR 267 (P&H) (para 5)

Bhargava Motors *v.* Union of India [2019] 66 GSTR 114 (Delhi) (para 5)

Blue Bird Pure Pvt. Ltd. *v.* Union of India [2019] 68 GSTR 340 (Delhi) (paras 4, 5, 6)

Godrej & Boyce Mfg. Co. Ltd. *v.* Union of India [2020] 73 GSTR 107 (Delhi) (para 5)

Krish Automotors Private Limited *v.* Union of India [2019] 71 GSTR 386 (Delhi) (para 5)

Kusum Enterprises Pvt. Ltd. *v.* Union of India [2019] 68 GSTR 338 (Delhi) (para 5)

Lease Plan India Private Limited *v.* Government of National Capital Territory of Delhi [2020] 72 GSTR 116 (Delhi) (para 5)

Sare Realty Projects Private Limited *v.* Union of India (W. P. (C) No. 1300 of 2018, decided on August 1, 2018) (para 4)

Tara Exports *v.* Union of India [2018] 58 GSTR 46 (Mad) (para 5)

W. P. (C) No. 6537 of 2019.

Raj K. Batra, Sumit K. Batra and *Ms. Neetika Khanna* for the petitioner.

Asheesh Jain, Central Government Standing Counsel, with *Adarsh Kumar Gupta* for respondent No. 1.

Harpreet Singh with *Arunesh Sharma, Ms. Suhani Mathur* and *Ankit Singh* for respondents No. 2 and 3.

Satyakam, Additional Standing Counsel, (GNCTD) with *Akhil Dehlan* for the respondents.

JUDGMENT[1]

The judgment of the court was delivered by

Sanjeev Narula J.—The present petition under article 226 of the Constitution of India seeks the following reliefs : 1

> "(a) Issue a writ of mandamus or any other writ, order or direction in the nature thereof thereby declaring rule 117 of the CGST Rules providing time-limit for filing TRAN-1 as ultra vires, contrary and in violation to section 140 and 174 of the CGST Act, 2017.
>
> (b) Issue a writ of mandamus or any other writ, order or directions declaring that the petitioner is entitled to tax credit on account of input-tax credit of excise duty of Rs. 4,07,63,917.55 and that being a onetime entitlement, the petitioner should not be deprived from claiming said credit due to technicalities of law especially when new law is yet to be settle down and allows petitioner to claim legitimate input-tax credit by directing respondent to accept TRAN-1 of petitioner.
>
> (c) pass any other order(s) as this honourable court may deem fit and proper in the facts and circumstances of the present case."

At the outset, learned counsel for the petitioner submits that if the court were to issue directions as sought in prayers (b) and (c), he would not press the remaining prayers. 2

The case of the petitioner as stated in the petition is that it was registered as a "registered dealer" under Delhi Value Added Tax Act, 2004 and under Central Sales Tax Act, 1956. Upon coming into force of the GST regime the petitioner migrated to the same with effect from July 1, 2017 and was allotted Registration No. 07AABCA1608G1Z7. Under the GST regime, dealers wishing to claim input-tax credit in respect of the transitional tax paid on opening stock as held by them on July 1, 2017, were required under section 140(3), (4) and (5) of the Central GST Act to file their claim for said amount in form TRAN-1 within the time as prescribed. Petitioner-company held an opening stock worth Rs. 24,61,87,846 as on July 1, 2017 and was entitled to claim a tax credit of Rs. 4,07,63,917.55 and in order to claim the same, the petitioner was required to file TRAN-1. The 3

1. Oral.

Managing Director of the company was not keeping well and was unable to attend to the business affairs of the company for a long time. The personnel responsible for dealing with compliances required to be made by the company were consistently reporting to him that the GST portal was not working properly, and therefore, they were unable to access the portal and file requisite details. Therefore, the requisite information could not be filed in the prescribed form TRAN-1. Further, it is alleged that during illness, whenever the managing director enquired about the compliances required to be made under the GST regime, he was informed that the GST portal was not working properly and data was being collated to complete the necessary compliances. On recovery, the managing director followed up with the company personnel and the tax authorities and was apprised of the fact that as per CBIC order 1/2019 dated January 31, 2019, the time to file TRAN-1 has been extended up to March 31, 2019, for taxpayers who could not submit the said declaration by the due date on account of technical difficulties on the common portal and whose cases have been recommended by the Council. The case of the petitioner neither falls under the category of technical glitches nor has been recommended by the Council. Therefore, the petitioner-company filed a representation dated March 28, 2019 before the GST Council requesting them to consider the case of the petitioner-company on compassionate grounds owing to reasons which were beyond the control of the petitioner-company, as substantial amount of credit which is a substantive right would otherwise go waste. Aggrieved by no response to the said representation and claiming that the time-limit prescribed to avail input-tax credit under the GST regime is an unrealistic and unreasonable condition, the petitioner has filed present writ petition.

4 The petitioner relies upon several decisions of this court including *Blue Bird Pure Pvt. Ltd.* v. *Union of India* [2019] 68 GSTR 340 (Delhi) ; [2019] SCC OnLine 9250 and *Sare Realty Projects Private Limited* v. *Union of India*, W. P. (C) No. 1300 of 2018, decided on August 1, 2018 to urge that the court has granted reliefs to several other parties who were in similar situation.

5 We have considered the submissions of the parties. The nature of reliefs sought in the present petition and the facts disclosed herein is fully covered by the decision of this court in *Blue Bird Pure Pvt. Ltd.* v. *Union of India* [2019] 68 GSTR 340 (Delhi) decided on July 22, 2019, wherein, following the decisions of this court in *Bhargava Motors* v. *Union of India* [2019] 66 GSTR 114 (Delhi), decision dated 13th May, 2019 in W. P. (C) 1280 of 2018 and *Kusum Enterprises Pvt. Ltd.* v. *Union of India* [2019] 68 GSTR 338 (Delhi) ; [2019-TIOL-1509-HC-DEL-GST], the court had directed the

respondents to either open the online portal or to enable the petitioner to file the rectified TRAN-1 electronically or accept the same manually. The said decision has also been followed by this court in *Aadinath Industries* v. *Union of India* [2020] 72 GSTR 247 (Delhi), W. P. (C) 9775 of 2019, decided on September 20, 2019 ; *Lease Plan India Private Limited* v. *Government of National Capital Territory of Delhi* [2020] 72 GSTR 116 (Delhi), W. P. (C) 3309 of 2019, decided on September 13, 2019 ; *Godrej & Boyce Mfg. Co. Ltd., through its Branch Commercial Manager* v. *Union of India* [2020] 73 GSTR 107 (Delhi), W. P. (C) 8075 of 2019, decided on October 15, 2019. The decision of this Court in *Krish Automotors Private Limited* v. *Union of India* [2019] 71 GSTR 386 (Delhi) ; [2019-TIOL-2153-HC-DEL-GST] has also been followed by the Punjab and Haryana High Court in *Adfert Technologies Pvt. Ltd.* v. *Union of India* [2020] 73 GSTR 267 (P&H) in C. W. P. No. 30949 of 2018 (O&M) decided on November 4, 2019. The relevant paragraphs of *Blue Bird* [2019] 68 GSTR 340 (Delhi) read as under (pages 343 and 344 in 68 GSTR) :

> "10. Having carefully examined those decisions, the court is unable to find any distinguishing feature that should deny the petitioner a relief similar to the one granted in those cases. In those cases also, there was some error committed by the petitioners which they were unable to rectify in the TRAN-1 form and as a result of which, they could not file the returns in TRAN-2 form and avail of the credit which they were entitled to. In both the said decisions, the court noticed that GST system is still in the 'trial and error phase' insofar as its implementation is concerned. It was observed in *Bhargava Motors* v. *Union of India* [2019] 66 GSTR 114 (Delhi) as under (pages 118 and 119 in 66 GSTR) :
>
> '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 of 2018 (*Tara Exports* v. *Union of India* [2018] 58 GSTR 46 (Mad)) 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 its 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 May 31, 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 acknowledgement that the form with the credit claimed has been correctly uploaded.'

11. Similar directions were issued by this court in *Kusum Enterprises Pvt. Ltd.* [2019] 68 GSTR 338 (Delhi).

12. In the present case, the court is satisfied that, although the failure was on the part of the petitioner to fill up the data concerning its stock in column 7(d) of form TRAN-1 instead of column 7(a), the error was inadvertent. The respondents ought to have provided in the system itself a facility for rectification of such errors which are clearly bona fide. It should be noted at this stage that although the system provided for revision of a return, the deadline for making the revision coincided with the last date for filing the return, i.e., December 27, 2017. Thus, such facility was rendered impractical and meaningless."

6 The factual position in the present case is not any different. Though, the case of the petitioner cannot be strictly categorized as covered by "technical glitches", however, as held in *Blue Bird* [2019] 68 GSTR 340 (Delhi), the GST system is still in a "trial and error phase" as far as its implementation is concerned and although the failure was on the part of the petitioner, the error was inadvertent. The petitioner does not have any evidence or proof in support of his submission that the personnel responsible for dealing with the compliances was unable to file the requisite form due to non-functioning of GST portal. However, we have noticed that in large number

of matters, the petitioner have similarly complained that before the deadline, they were not able to access the GST portal. This could be presumably because of low bandwith, given the fact that before the deadline, a large number of tax payers all over the country, were trying to submit the declaration in form TRAN-1. In these circumstances, we would thus give the benefit of doubt to the petitioner.

7 At this juncture, it may be noted that as per Notification No. 49/2019 dated October 9, 2019 issued by CBIC, the date prescribed for filing of form GST TRAN-1 under rule 117(1A) of the CGST Rules has been extended to December 31, 2019. This itself demonstrates that the respondents recognise the fact that the registered persons were not able to upload the form GST TRAN-1 due to the glitches in the system. It is not fair to expect that each person who may not have been able to upload the form GST TRAN-1 should have preserved some evidence of it—such as, by taking a screen shot. Many of the registered dealers/traders come from rural/semiliterate background. They may not have had the presence of mind to create any record of their having tried, and failed, to upload the form GST TRAN-1. They cannot be made to suffer in this background, particularly, when the systems of the respondents were not efficient. From the documents placed on record, it emanates that the respondents have no cogent ground to deny the benefit of Notification No. 49/2019 dated October 9, 2019 issued specifically to grant relief to taxpayers who faced difficulty in filing form GST TRAN-1 due to technical glitches.

8 We may further add that the credit standing in favour of an assessee is "property" and the assessee could not be deprived of the said property save by authority of law in terms of article 300(A) of the Constitution of India. There is no law brought to our notice which extinguishes the said right to property of the assessee in the credit standing in their favour.

9 Thus, we allow the present petition and direct the respondents to either open the online portal so as to enable the petitioner to file the form TRAN-1 electronically, or to accept the same manually on or before December 31, 2019. The respondents shall process the petitioner's claim in accordance with law once the form GST TRAN–1 is filed. The petition is allowed in the aforesaid terms.

[2020] 77 GSTR 390 (Delhi)

[IN THE DELHI HIGH COURT]

(1) BRAND EQUITY TREATIES LIMITED

(W. P. (C) No. 11040 of 2018 and C. M. No. 42982 of 2018)

(2) DEVELOPER GROUP INDIA PRIVATE LIMITED

(W. P. (C) No. 8496 of 2019)

(3) RELIANCE ELEKTRIK WORKS

(W. P. (C) No. 13203 of 2019)

v.

UNION OF INDIA AND OTHERS

MICROMAX INFORMATICS LTD.

(W. P. (C) No. 196 of 2019 and C. M. Appl. No. 965 of 2019)

v.

UNION OF INDIA AND ANOTHER

VIPIN SANGHI and **SANJEEV NARULA** JJ.

May 5, 2020.

HF ▸ Assessee

GOODS AND SERVICES TAX—TRANSITION PROVISIONS—CENVAT CREDIT—CONDITION OF FILING FORM TRAN-1—TIME-LIMIT FOR FILING—EXTENSION WHERE TECHNICAL GLITCHES EXPERIENCED—NOT RESTRICTED TO GLITCHES ON WEBSITE BUT ALSO TO THOSE EXPERIENCED BY ASSESSEE—NO PRESCRIPTION OF TIME-LIMIT IN ACT—RULE-MAKING POWER—CANNOT BE EXERCISED TO BRING LIMITATION WHERE NONE PRESCRIBED IN ACT—TIME-LIMIT PRESCRIBED IN RULES DIRECTORY NOT MANDATORY—TIME OF THREE YEARS ALLOWABLE—CENTRAL GOODS AND SERVICES TAX ACT (12 of 2017), s. 140—CENTRAL GOODS AND SERVICES TAX RULES, 2017, r. 117.

All the four writ petitions sought identical relief in the nature of a writ of mandamus directing the respondents to permit the petitioners to avail of input-tax credit of the accumulated Cenvat credit as of June 30, 2017 by filing declaration form TRAN-1 beyond the period provided under the Central Goods and Services Tax Rules, 2017. Additionally, petitioners also assailed rule 117 of the CGST Rules on the ground that it was arbitrary, unconstitutional and violative of article 14 to the extent it imposed a time-limit for carrying forward the Cenvat credit to the GST regime :

Held, *allowing the petitions, (i) that although the facts did not indicate or allege any error or glitch on the network of the Department relating to the filing of the TRAN-1 forms, since the cause for not filing the TRAN-1 form within time was sufficiently explained and justified, there was no good ground or reason to deny the assessees another opportunity to belatedly file their TRAN-1 forms. As a result, the assessees might not have concrete evidence to convincingly exhibit that they faced a technical issue on the portal while uploading the declaration in GST TRAN-1. Notification No. 49 of 2019, dated October 9, 2019 itself demonstrated that the Department recognised the fact that the registered persons were not able to upload form TRAN-1 due to the glitches in the system. It was not fair to expect that each person who might not have been able to upload form GST TRAN-1 should have preserved some evidence of it such as, by taking a screen shot. He could not be made to suffer in this background, particularly, when the systems of the Department were not efficient. The credit standing in favour of an assessee was property and the assessee could not be deprived of the property save by authority of law in terms of article 300A of the Constitution of India. There was no law which extinguished the right to property of the assessee in the credit standing in their favour.*

(ii) That the only mechanism for utilisation of input-tax credit remaining at the beginning of the goods and services tax regime was by migrating it to the goods and services tax regime by way of filing declaration form TRAN-1. The manner and procedure to carry forward the credit was to be "prescribed". The word "prescribed" had been defined under section 2(87) to mean "prescribed by Rules made under this Act on the recommendation of the Council". Initially, the time-limit prescribed under rule 117 for transitioning was 90 days, was extended from time to time. There was no other provision in the Act prescribing time-limit for the transition of the Cenvat credit. The proviso vested power with the Commissioner to extend the period on the recommendations of the Council and the Commissioner exercised such power and extended the time period till December 29, 2017. Thus, there was nothing sacrosanct about the time-limit so provided. The Act did not completely restrict the transition of Cenvat credit in the goods and services tax regime by a particular date, and there was no rationale for curtailing the period, except under the law of limitations. The arbitrary classification, introduced by way of sub-rule (1A), restricting the benefit only to taxpayers whose cases were covered by "technical difficulties on common portal" subject to recommendations of the Goods and Services Tax Council, was arbitrary, vague and unreasonable.

(iii) That there was no definition of "technical difficulty on the common portal". "Technical difficulty" could not have a narrow interpretation, or application. Further, technical difficulties could not be restricted to a difficulty faced by or on the part of the respondent. It would include within its purview any such technical difficulties faced by the taxpayers as well, which could also be a result of the respondent's follies. It was very unfair on the part of the respondents, in these circumstances, to expect that the taxpayers should have been fully geared to deal with the new system on day one, when they themselves were completely ill-prepared, which led to creation of a complete mess. Courts could not be oblivious to the fact that a large population of this country did not have access to the internet and the filing of TRAN-1 was entirely shifted to electronic means.

(iv) That the introduction of sub-rule (1A) in rule 117 did not recognise the entirety of the situation. It sneaked in an exception, which, as worded, was an artificial construction of technical difficulties, limiting it to those existing on the common portal. It would be an erroneous approach to attach undue importance to the concept of "technical glitch" only to that which occured on the goods and services tax common portal, as a pre-condition, for an assessee to be granted the benefit of sub-rule (1A) of rule 117. The purpose for which sub-rule (1A) to rule 117 was to save and protect the rights of taxpayers to avail of the Cenvat credit lying in their account. That objective should also serve other taxpayers, such as the assessees. The approach of the Government should be fair and reasonable. It could not be arbitrary or discriminatory, if it had to pass the muster of article 14 of the Constitution. The extremely narrow interpretation that the Department advanced, of the concept of "technical difficulties", in order to avail of the benefit of sub-rule (1A), was contrary to the statutory mechanism built in the transitory provisions of the Act. The Legislature had recognized existing rights and had protected it by allowing migration thereof in the new regime under the provision. In order to avail of the benefit, no restriction had been put under any provisions of the Act in terms of the time-period for transition. The time-limit prescribed for availing of the input-tax credit with respect to the purchase of goods and services made in the pre-goods and services tax regime, could not be discriminatory and unreasonable. In the absence of a rationale it would be violative of article 14 of the Constitution.

(v) That rule 117, whereby the mechanism for availing of the credits had been prescribed, was procedural and directory, and could not affect the substantive right of the registered taxpayer to avail of the existing and accrued and vested Cenvat credit. The procedure could not run contrary to the subs-

tantive right vested under sub-section (1) of section 140. No consequence had been provided in rule 117 of the Rules on account of failure to file TRAN-1. Section 140(1) was categorical. It stated that the registered person 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. Only the procedure of carrying forward was left to be provided by use of the words "in such manner as may be prescribed". Under the garb of framing Rules which were subordinate legislation, the width of those limitations could not have been expanded as was sought to be done by introduction of sub-rule (1A).

(vi) That therefore, rule 117 had to be read as being directory in nature, insofar as it prescribed the time-limit for transitioning of credit and therefore, would not result in the forfeiture of the rights, in case the credit was not availed of within the period prescribed.

(vii) That however, availing of Cenvat credit could not be in perpetuity. In the absence of any specific provisions under the Act, in terms of the residuary provisions of the Limitation Act, the period of three years should be the guiding principle and thus a period of three years from the appointed date would be the maximum period for availing of such credit. Since all the assessees had filed or attempted to file form TRAN-1 within the period of three years they would be entitled to avail of the input-tax credit accruing to them. They were thus, permitted to file relevant TRAN-1 form on or before June 30, 2020.

A. B. PAL ELECTRICALS PVT. LTD. *v.* UNION OF INDIA [2020] 77 GSTR 382 (Delhi) *relied on*.

Cases referred to :

A. B. Pal Electricals Pvt. Ltd. *v.* Union of India [2020] 77 GSTR 382 (Delhi) (paras 10, 16, 19)

Aadinath Industries *v.* Union of India [2020] 72 GSTR 247 (Delhi) (para 16)

Adfert Technologies Pvt. Ltd. *v.* Union of India [2020] 73 GSTR 267 (P&H) (paras 16, 20)

ALD Automotive Pvt. Ltd. *v.* Commercial Tax Officer [2018] 58 GSTR 468 (SC) (paras 11, 20, 21)

Bhargava Motors *v.* Union of India [2019] 66 GSTR 114 (Delhi) (paras 14, 16)

Blue Bird Pure Pvt. Ltd. *v.* Union of India [2019] 68 GSTR 340 (Delhi) (paras 14, 16)

Commissioner of Central Excise *v.* Home Ashok Leyland Ltd. [2007] 8 RC 481 (para 21)

Godrej & Boyce Mfg. Co. Pvt. Ltd. *v.* Commissioner of Sales Tax [1992] 87 STC 186 (SC) (para 20)

Godrej & Boyce Mfg. Co. Ltd. *v.* Union of India [2020] 73 GSTR 107 (Delhi) (para 16)

Indsur Global Ltd. *v.* Union of India [2015] 33 GSTR 103 (Guj) (para 20)

JakapMetind Pvt. Ltd. *v.* Union of India [2019] VIL-556-GUJ (para 20)

Krish Automotors Private Limited *v.* Union of India [2019] 71 GSTR 386 (Delhi) (para 16)

Kusum Enterprises Pvt. Ltd. *v.* Union of India [2019] 68 GSTR 338 (Delhi) (paras 14, 16)

Lease Plan India Private Limited *v.* Government of National Capital Territory of Delhi [2020] 72 GSTR 116 (Delhi) (para 16)

Salem Advocates Bar Association *v.* Union of India AIR 2003 SC 189 (para 21)

Sare Realty Projects Pvt. Limited *v.* Union of India (W. P. (C) No. 1300/2018, decided on August 1, 2018—Delhi High Court) (paras 14, 16)

SCG Contracts India Pvt. Ltd. *v.* KS Chamankar Infrastructure Pvt. Ltd. [2019] SCC OnLine SC 226 (para 10)

Siddharth Enterprises *v.* Nodal Officer [2019] 71 GSTR 346 (Guj) (para 20)

Tara Exports *v.* Union of India [2018] 58 GSTR 46 (Mad) (para 16)

Willowood Chemicals Pvt. Ltd. *v.* Union of India [2018] 58 GSTR 310 (Guj) (paras 11, 20)

W. P. (C) Nos. 11040 of 2018, 196, 8496 and 13203 of 2019 and C. M. No. 42982 of 2018 and C.M. Appeal No. 965 of 2019.

Abhishek A. Rastogi, Alok Yadav, Ms. Kavita Jha, Shammi Kapoor, Ms. Kritika Kapoor, Ms. Swati Agarwal, Ruchir Bhatia and *Ms. Madhura M. N.* for the petitioners.

Ms. Shiva Lakshmi, Central Government Standing Counsel, for Union of India.

Amit Bansal, Special Standing Counsel with *Aman Rewaria* and *Ms. Vipasha Mishra* for respondent Nos. 2 and 3.

Ms. Nidhi Mohan Parashar, Government Pleader for respondent No. 1.

Ashim Sood, Central Government Standing Counsel with *Armaan Pratap Singh*, Advocate, for respondent No. 1.

Anuj Aggarwal and *Ankit Monga*, Advocates, for respondent No. 3.

Harpreet Singh and *Ms. Suhani Mathur* for GST.

JUDGMENT

The judgment of the court was delivered by

SANJEEV NARULA J.—All the four writ petitions seek identical relief in **1**
the nature of a writ of mandamus directing the respondents to permit the petitioners to avail input-tax credit of the accumulated Cenvat credit as of June 30, 2017 by filing declaration Form TRAN-1 beyond the period provided under the Central Goods and Services Tax Rules, 2017 (hereinafter, the "CGST Rules"). Additionally, petitioners also assail rule 117 of the CGST Rules on the ground that it is arbitrary, unconstitutional and violative of article 14 to the extent it imposes a time-limit for carrying forward the Cenvat credit to the GST regime. However, all the petitioners have unanimously stated that if the court were to give directions to the respondents to permit them to file the statutory Form TRAN-1 to avail the input-tax credit, they would be satisfied and not press for the relief of challenging the vires of the provisions of the Act.

This court has allowed numerous petitions, relating to availment of **2**
input-tax credit on account of delayed filing of Form TRAN-1. The controversy in the present petitions is no different, but nonetheless respondents have strongly objected to the directions sought in the present petitions, contending that the factual situation in each one of the present cases is quite different, and does not merit the relief granted to other taxpayers. It is argued that the court has allowed the petitions only in those cases, where the delay had been occasioned on account of technical glitches in the Goods and Services Tax Network (GSTN). The facts of the instant cases are substantially distinguishable, and do not indicate or allege any such error or glitch on the network of the respondents relating to the filing of the TRAN-1 forms. It is further contended that the pleadings disclose that the delay in their cases did not occur on account of any technical glitch on the portal, but arose owing to other technical difficulties at the end of the assessees, i. e., the petitioners controvert the stand of the respondent, and contend that they are entitled to similar relief, notwithstanding the fact that the cases of the petitioners may not be strictly covered by the circular of the respondents specifically dealing with cases where technical glitches had restrained or blocked or caused difficulties to the taxpayers from filing of the TRAN-1 forms on the common GST portal.

3 Regardless of the respondents' objection that there were no technical anomalies in the fling, viz-a-viz., the petitioners, we perceive no significant difference in the circumstances recounted in the cases before us in comparison to those decided earlier. Pertinently, since the cause for not filing the TRAN-1 Form within time is sufficiently explained and justified, we see no good ground or reason to deny the petitioners another opportunity to belatedly file their TRAN-1 forms. Nevertheless, since the respondents fervently contest the petitions, we permitted the learned counsels to make elaborate submissions as we feel that an authoritative decision is necessary to put the controversy to rest. Thus, this decision, exhaustively sets forth our reasons for allowing the petitions.

4 The facts of each case are different, however, since the controversy is identical, it is not necessary to meticulously note the details of each case and it would suffice to take note of only the essential facts of each case.

W. P. No. 8496/2019 :

5 The petitioner is in the business of advertising, brand promotion and public relation management, as a part of Bennett Coleman Group of companies (Times Group). It operates from various States throughout India, including New Delhi. It was registered under the provisions of Chapter V of the Finance Act, 1994 for service tax and was discharging its liability by way of filing service tax returns. The service tax return for the period from April, 2017 to June, 2017 was filed on August 11, 2018 and the same exhibited an accumulated Cenvat credit of INR 7,28,05,293. This accumulated Cenvat credit balance is inter alia attributable to the New Delhi premises of the petitioner. Petitioner had Cenvat credit reflected in the service tax return for the period April, 2017 to June, 2017 and was eligible to carry forward the said Cenvat credit amounting to Rs. 60,15,498. Petitioner contends that on January 2, 2018, based on the advice of its consultant, it was under the belief that it was eligible for refund under section 142(3) of the CGST Act, and the consultant filed an online refund application. However due to technical glitch, an error appeared on the screen. Thereafter, on February 13, 2018, when petitioners' consultant again tried to upload the refund application for Cenvat credit, yet again an error occurred and the message "proxy error" was displayed on the screen. The petitioner's consultant visited the office of the Assistant Commissioner of GST to enquire about the error and was informed that petitioner was not eligible for the refund under section 142 (3) of the Act. On being apprised of this legal position, physical copy of Form TRAN-1 was filed on August 24, 2018 along with supporting invoices before Deputy/Assistant Commissioner of Central Excise, GST East Division. Petitioner was informed that the appli-

cation would be verified and it would be intimated about the outcome. Thereafter, vide letter dated August 30, 2018, additional documents as required by the respondents were also submitted, but nothing was heard in this regard. Eventually, petitioner filed writ petition W. P. (C) No. 3099/2019 before this court praying for refund or carry forward of all the accumulated Cenvat credit. Vide order dated March 28, 2019, respondents were directed to obtain instructions as to whether the refund/carry forward credit application could be processed and if GST Council can consider such cases of hardship on individual basis.

Petitioner has now filed the present petition seeking writ in the nature of certiorari impugning rule 117(1) of the CGST Rules as ultravires section 140(1) of the CGST Act and in the alternative, seeking directions to read down the provisions of rule 117. 6

W. P. (C) No. 11040/2019 :

In this case, petitioner claims that in terms of the latest service tax return from April, 2017 to June, 2017, it had accumulated Cenvat credit balance of INR 72,80,529. Petitioner forms part of a bigger conglomerate and the tax operations are undertaken at group level. Owing to dependence at group level in the context of tax compliances and multiple entities involved, petitioner was unable to file the declaration in Form TRAN-1 within the prescribed due date. As a result, it was deprived of taking forward the accumulated credit in the GST regime. 7

W. P. (C) No. 196/2019 :

In terms of the last service tax return, petitioner had Cenvat credit of Rs. 6,04,47,033. It submitted form GST TRAN-1 online on November 24, 2017 in order to avail the transitional credit. Thereafter, it received a letter dated January 1, 2018 from the office of Assistant Commissioner GST seeking its response in relation to verification of input-tax credit claimed in form TRAN-1. While collating the documents in response to the said communication, petitioner realised that credit of Rs. 6,04,47,033 was mistakenly not carried forward. Petitioner again tried to submit the said form on the GST common portal with a view to avail this credit. Additionally, petitioner replied to the afore noted communication dated January 1, 2018 explaining that it had inadvertently missed reflecting the correct Cenvat credit in the form, in conformity with the last service tax return. In support of its claim, petitioner also furnished the last service tax return (ST-3 form). On April 6, 2018, petitioner made another reference to the respondents highlighting the circular issued by Central Board of Indirect Taxes and Customs wherein a mechanism was introduced to assist the taxpayers who had faced difficulties owing to technical glitches. Despite repeated follow ups, no reply was 8

received from the respondents and finally, vide letter dated May 9, 2018, respondents informed the petitioner that the credit of Rs. 6,04,47,033 was not populated in TRAN-1 and, thus, the credit thereof cannot be extended to the petitioner.

W. P. (C) No. 13203/2019 :

9 In this case as well, petitioner contends that it had been trying to upload its claim for carrying forward the credit in form GST TRAN-1 but could not do so due to error in the system of the respondents. The petitioner enquired from other professionals and learnt that apart from it, large number of assessees were facing similar problems and could not upload the claim of input credit on account of system error/failure. The petitioner submits that on account of utter confusion and chaos that resulted in failure to upload Form GSTR TRAN-1, it could not upload the claim on the common portal within time. The petitioner also engaged in correspondence with the respondents, however there has been no effective resolution to its grievance.

Submissions of the parties :

10 The learned counsels for the petitioners have strongly relied upon the judgment in *A. B. Pal Electricals Pvt. Ltd.* v. *Union of India* [2020] 77 GSTR 382 (Delhi) (W. P. (C) No. 6537/2019 decided on December 17, 2019) and several others, which have been referred therein to canvass that the instant cases are squarely covered by the said decision. At the same time it is urged that since the GST system at the relevant point of time, and even presently, is in a nascent "trial and error" phase, petitioners should not be made to suffer on account of inefficiency in the systems of the respondents ; by denying them the credit of the accumulated Cenvat credit on the due date. Besides, it was argued that the Cenvat credit accumulated in the erstwhile regime represents the property of the petitioner which is a vested right in their favour. Such accrued or vested right cannot be taken away by the respondents on account of failure to fulfil conditions which are merely procedural in nature. The accumulated Cenvat credit is the property of the assessee and a constitutionally protected right under article 300A of the Constitution, which cannot be taken away by framing Rules without there being any substantive provision in this regard under the Act. On another note, it is urged that the time-limit specified in rule 117 of the CGST Rules is procedural in nature, and not a mandatory provision, and thus period provided therein cannot be enforced so as deprive the petitioners from availing their vested right. In support of this contention, reliance is placed upon the decision of the Supreme Court in the case of *SCG Contracts India Pvt. Ltd.* v. *KS Chamankar Infrastructure Pvt. Ltd.* [2019] SCC OnLine SC 226.

Mr. Amit Bansal, and other learned senior standing counsels for the **11**
Revenue, on the other hand, have strongly opposed the petitions. They have argued that the petitioners do not deserve any sympathy from this court, as the facts of each case exhibit a casual approach on their part. The petitioners' failure to file the declaration Form TRAN-1 within the due date is not attributable to any technical glitches while uploading the forms. The delay is a result of their follies and do not warrant relief similar to what has been granted by this court in several other cases. It is also pointed out that some of the petitioners attempted to file TRAN-1 for the first time after the expiry of the last date for filing TRAN-1, as admitted in the pleadings. The petitioners were negligent, and do not deserve any leniency. Mr. Bansal defended rule 117 of the CGST Rules by arguing that under sub-section (1) of section 164 of the CGST Act, Government is authorised to make rules for carrying out the provisions of the Act on recommendation of the Council. He submitted that the CGST Rules laid down by the Central Government, including the Rules impugned in the present petition, flow from the Act and are in consonance with the intention of the Legislature. Mr. Bansal emphasized on the words "*in such manner as may be prescribed*" which are appearing in sub-section (1) of section 140 as follows :

> "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*" (emphasis[1] supplied)

He submits that this provision empowers the Government to fix the time frame for availing the carry forward of input-tax credit by transitioning the Cenvat credit into the GST regime. He further submits that benefit of taking credit is not a vested right of an assessee and certainly cannot be claimed in perpetuity. The same is subject to certain conditions, safeguards and limitations in such manner as may be prescribed. Mr. Bansal further argued that the input-tax credit is in the nature of benefit/concession extended as per the scheme of this statute. The rules, therefore, can be framed to limit the benefit while extending the concession. In support of his submissions, Revenue relied upon the case of *Willowood Chemicals Pvt. Ltd.* v. *Union of India* [2018] 58 GSTR 310 (Guj) ; [2018] 19 GSTL 228 (Guj) and *ALD Automotive Pvt. Ltd.* v. *Commercial Tax Officer* [2018] 58 GSTR 468 (SC) ; [2018] 364 ELT 3 (SC).

1. Here italicised.

Analysis and conclusion :

12 On July 1, 2017, the new indirect tax regime was introduced in the country by way of enactments, including the Central Goods and Services Tax Act, 2017 (CGST Act). The CGST Act introduced transitionary provisions to enable the taxpayers to migrate from the erstwhile indirect tax regime to the new GST regime. Section 140 of the CGST Act deals with the transitionary provisions. Section 140 has several sub-clauses, however, since all the four petitioners are covered by sub-clause (1) of section 140, we are focusing on the said provision alone, and the same reads as under :

> "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."

13 In pursuance of the above noted provision, respondent No. 1 framed the Central Goods and Services Tax Rules, 2017 ("CGST Rules"). Rule 117 of the said rules imposed a time-limit of 90 days for availing benefit of the accumulated Cenvat credit as provided under section 140(1) in its input-tax credit register under the CGST Act. The said rule reads as under :

> "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 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 December, 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."

14 The transition from the erstwhile regime to GST for the availment of the Cenvat credit was to be by way of a declaration to be submitted electronically in Form GST TRAN-1. The date prescribed for filing of the said form was extended several times by way of orders issued from time to time, finally till December 27, 2019. Several taxpayers however could not meet the deadline. This was on account of several factors-predominantly being inadequacies in the network of the respondents, which failed to meet the expectations and serve the needs of taxpayers. Thousands of taxpayers complained that there was low bandwidth and despite several attempts being made on the GST network, they were unsuccessful in filing the statutory GST TRAN-1 form online. Scores of complaints were made on the portal and it was also brought to the notice of the Government. The technical difficulties faced by the taxpayer were acknowledged and an IT Grievance Redressal Committee was constituted and assigned the task of redressing the grievance of the taxpayers. The recommendations of the Grievance Redressal Committee were also brought to the notice of the GST Council and the matter was deliberated upon. Several cases got settled at the Government level, however some cases were contested on the ground that taxpayers did not put forward any evidence to suggest that they faced any technical glitch on the portal that prevented them to submit the GST TRAN-1 Form within the prescribed time-limit. Many such matters travelled to courts. Majority of them were allowed in favour of the taxpayers, and directions were issued to the respondents to permit the filing of TRAN-1 Form beyond the extended date. Some cases where such reliefs have been granted by this court are *Blue Bird Pure Pvt. Ltd.* v. *Union of India* [2019] 68 GSTR 340 (Delhi) ; [2019] SCC OnLine 9250, *Sare Realty Projects Pvt. Limited* v. *Union of India* (W. P. (C) No. 1300/2018, decided on August 1, 2018), *Bhargava Motors* v. *Union of India* [2019] 66 GSTR 114 (Delhi) (W.P. (C) No. 1280/2019 decision dated May 13, 2019) , *Kusum Enterprises Pvt. Limited* v. *Union of India* [2019] 68 GSTR 338 (Delhi) (W. P. (C) No. 7423/2019, decided on July 12, 2019). It would also be worthwhile to note that in this period, the Government also acknowledged that on account of technical difficulties, the taxpayers were indeed unable to file the statutory form within time and CBIC vide notifications issued from time to time, extended the date prescribed for filing of Form GST TRAN-1 under rule 117(1A) of the CGST Rules. This period, as on date, is being extended by various notifications. Notably, vide Notification No. 48/2018-CT, dated September 10, 2018, the Government inserted sub-rule (1A) to rule 117, whereby, on the recommendation of the Council, it is now permissible for the Commissioner to extend the date for submitting the declaration electronically in Form GST TRAN-1, by a further period 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. The said sub-rule, reads as under :

> "(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 December, 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."

The insertion of sub-rule (1A) and, thereafter, extensions being granted for filing of GST TRAN-1, notwithstanding the period envisaged under sub-rule (1) of rule 117, demonstrates that the respondents recognize the fact that the registered persons were not able to upload GST TRAN-1 due to technical difficulties on the common portal. This also substantiates that the period for filing the TRAN-1 is not considered either by the Legislature, or the executive as sacrosanct or mandatory.

In the above factual background, in some of the cases that came up **15**
before this court, the petitioners cited difficulties in filing the TRAN-1 Form which were of a different nature. In some cases, there were bona fide errors on the part of the taxpayer and in others, the difficulty arose on account of lack of understanding of the complete overhaul of the indirect tax system ; or complicated filing procedure and the statutory forms resulting in erroneous information being stated therein. Even in such cases, to note a few, this court has declined to make a differentiation and given the benefit of the doubt to the taxpayers, realizing that respondent's network and system, and the change, had posed multifarious problems that require a reasonable approach. One such petition has been preferred by the Sales Tax Bar Association (W. P (C) No. 9575/2017) narrating scores of technical problems being faced on the portal. We adopted a proactive approach in the said matter and have endeavoured to identify root cause for failure of the network to work seamlessly. In the said proceedings, we had also held a special hearing inviting the senior officials from the GSTN network as well as the officers of the Council and the policy makers. As a result of such deliberations, some headway has been made and recently we were informed that the respondents have revamped the GST redressal mechanism so as to address the problems at a grass-root level. The upshot of this experience is that the GSTN network, indeed, is riddled with shortcomings

and inadequacies. This is palpably evident from the sheer number of cases being presented before us, in relation to such technical difficulties and inadequacies. The benchmark, in our view, is that the online system brought into force by the GSTN Ltd. should be able to perform all functions and should have all flexibilities/options, which were available in the pre-GST regime.The problems on the GSTN cannot be wished away, and have to be resolved in the right earnest. This requires sensitivity on the part of the Government which has, unfortunately, not been exhibited in adequate measure.

16 Now, coming back to the facts of the present cases. Are the facts before us such, as to deny the petitioners the relief extended to taxpayers covered by the category of "technical glitches or technical difficulties" ? The facts of each case enumerated above indicate that the petitioners have, either, not been vigilant of the time lines, or have been victims of the chaos and confusion that was prevailing at the time when the GST regime was introduced. As a result, petitioners may not have concrete evidence in their hand to convincingly exhibit that they faced a technical issue on the GSTN portal while uploading the declaration in GST TRAN-1. We were faced with a similar situation in the case of *A. B. Pal Electricals Pvt. Ltd.* v. *Union of India* [2020] 77 GSTR 382 (Delhi) in W. P. (C) No. 6537/2019, decided vide judgment dated December 17, 2019. In the said case, the assessee could not file the form within prescribed time for the reason that the managing director of the company was not keeping well, and as a result was unable to attend to the business affairs of the company for a long time. The personnel responsible for dealing with compliances required to be made by the company, constantly reported that the GST portal was not working properly and, therefore, they were unable to access the portal and file the requisite details. When the managing director recovered from his illness, he followed up with the authorities by submitting a representation seeking benefit of the CBIC's orders issued from time to time-extending the last date for submission of the TRAN-1 Form. The case was considered by the GST Council, but it failed to redress his grievance and the matter reached before us. We considered the situation and accepted respondents' contention that the case of the petitioner could not be strictly considered as one covered by the situation of "technical glitches". Yet, we extended the benefit of the circular to the said petitioner in the following terms (pages 386-389 in 77 GSTR) :

> "4. Petitioner relies upon several decisions of this court including *Blue Bird Pure Pvt. Ltd.* v. *Union of India* [2019] 68 GSTR 340 (Delhi) ; [2019] SCC OnLine 9250 and *Sare Realty Projects Private*

Limited v. *Union of India* (W. P. (C) No. 1300/2018, decided on August 1, 2018) to urge that the court has granted reliefs to several other parties who were in similar situation.

5. We have considered the submissions of the parties. The nature of reliefs sought in the present petition and the facts disclosed herein is fully covered by the decision of this court in *Blue Bird Pure Pvt. Ltd.* [2019] 68 GSTR 340 (Delhi) ; [2019] SCC OnLine 9250 decided on July 22, 2019, wherein, following the decisions of this court in *Bhargava Motors* v. *Union of India* [2019] 66 GSTR 114 (Delhi), decision dated May 13, 2019 in W. P. (C) No. 1280/2018 and *Kusum Enterprises Pvt. Ltd.* v. *Union of India* [2019] 68 GSTR 338 (Delhi) ; [2019] TIOL-1509-HC-DEL-GST, the court had directed the respondents to either open the online portal or to enable the petitioner to file the rectified TRAN-1 electronically or accept the same manually. The said decision has also been followed by this court in *Aadinath Industries* v. *Union of India* [2020] 72 GSTR 247 (Delhi), W. P. (C) No. 9775/2019, decided on September 20, 2019, *Lease Plan India Private Limited* v. *Government of National Capital Territory of Delhi* [2020] 72 GSTR 116 (Delhi), W. P. (C) No. 3309/2019, decided on September 13, 2019, *Godrej & Boyce Mfg. Co. Ltd. Through its Branch Commercial Manager* v. *Union of India* [2020] 73 GSTR 107 (Delhi), W. P. (C) No. 8075/2019, decided on October 15, 2019. The decision of this court in *Krish Automotors Private Limited* v. *Union of India* [2019] 71 GSTR 386 (Delhi) ; [2019] TIOL-2153-HC-DEL-GST has also been followed by the Punjab and Haryana High Court in *Adfert Technologies Pvt. Ltd.* v. *Union of India* [2020] 73 GSTR 267 (P&H) in C. W. P. No. 30949/2018 (O&M), decided on November 4, 2019. The relevant paragraphs of *Blue Bird* [2019] 68 GSTR 340 (Delhi) ; [2019] SCC OnLine 9250 read as under (pages 343 and 344 in 68 GSTR) :

'10. Having carefully examined those decisions, the court is unable to find any distinguishing feature that should deny the petitioner a relief similar to the one granted in those cases. In those cases also, there was some error committed by the petitioners which they were unable to rectify in the TRAN-1 Form and as a result of which, they could not file the returns in TRAN-2 Form and avail of the credit which they were entitled to. In both the said decisions, the court noticed that GST system is still in the "trial and error phase" in so far as its implementation is concerned. It was observed in *Bhargava*

Motors [2019] 66 GSTR 114 (Delhi) as under (pages 118 and 119 in 66 GSTR) :

"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 September 10, 2018 in W. P. (MD) No. 18532/2018 (*Tara Exports* v. *Union of India* [2018] 58 GSTR 46 (Mad)) 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 its 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 May 31, 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 acknowledgement that the Form with the credit claimed has been correctly uploaded."

11. Similar directions were issued by this court in *Kusum Enterprises Pvt. Ltd.* [2019] 68 GSTR 338 (Delhi) ; [2019] TIOL-1509-HC-DEL-GST.

12. In the present case, the court is satisfied that, although the failure was on the part of the petitioner to fill up the data concerning its stock in column 7(d) of Form TRAN 1 instead of column 7(a), the

error was inadvertent. The respondents ought to have provided in the system itself a facility for rectification of such errors which are clearly bona fide. It should be noted at this stage that although the system provided for revision of a return, the deadline for making the revision coincided with the last date for filing the return, i. e., December 27, 2017. Thus, such facility was rendered impractical and meaningless.'

6. The factual position in the present case is not any different. Though, the case of the petitioner cannot be strictly categorized as covered by 'technical glitches', however, as held in *Blue Bird* [2019] 68 GSTR 340 (Delhi) ; [2019] SCC OnLine 9250, the GST system is still in a 'trial and error phase' as far as its implementation is concerned and although the failure was on the part of the petitioner, the error was inadvertent. The petitioner does not have any evidence or proof in support of his submission that the personnel responsible for dealing with the compliances was unable to file the requisite form due to non-functioning of GST portal. However, we have noticed that in large number of matters, the petitioner have similarly complained that before the deadline, they were not able to access the GST portal. This could be presumably because of low bandwidth, given the fact that before the deadline, a large number of taxpayers all over the country, were trying to submit the declaration in form TRAN-1. In these circumstances, we would thus give the benefit of doubt to the petitioner.

7. At this juncture, it may be noted that as per Notification No. 49/2019, dated October 9, 2019 issued by CBIC, the date prescribed for filing of Form GST TRAN-1 under rule 117(1A) of the CGST Rules has been extended to December 31, 2019. This itself demonstrates that the respondents recognise the fact that the registered persons were not able to upload the Form GST TRAN-1 due to the glitches in the system. It is not fair to expect that each person who may not have been able to upload the Form GST TRAN-1 should have preserved some evidence of it—such as, by taking a screen shot. Many of the registered dealers/traders come from rural/semiliterate background. They may not have had the presence of mind to create any record of their having tried, and failed, to upload the Form GST TRAN-1. They cannot be made to suffer in this background, particularly, when the systems of the respondents were not efficient. From the documents placed on record, it emanates that the respondents have no cogent ground to deny the benefit of Notification No. 49/2019, dated

October 9, 2019 issued specifically to grant relief to taxpayers who faced difficulty in filing Form GST TRAN-1 due to technical glitches.

8. We may further add that the credit standing in favour of an assessee is 'property' and the assessee could not be deprived of the said property save by authority of law in terms of article 300(A) of the Constitution of India. There is no law brought to our notice which extinguishes the said right to property of the assessee in the credit standing in their favour.

9. Thus, we allow the present petition and direct the respondents to either open the online portal so as to enable the petitioner to file Form TRAN-1 electronically, or to accept the same manually on or before December 31, 2019. Respondents shall process the petitioner's claim in accordance with law once the Form GST TRAN–1 is filed. The petition is allowed in the aforesaid terms."

17 The above decision would also cover the case of the petitioners, and there can be no two views about this proposition and we would like to extend similar benefit to them. Nevertheless, let's delve into the more fundamental question—Whether the Government could curtail the accrued and vested right, and restrict it to 90 days by a subordinate legislation ? To answer this vexed query, let's first examine the legal provisions. Sub-section (1) of section 140 which deals with the transitory provision, permits carry forward of the Cenvat credit. This presupposes that the amount of Cenvat credit of eligible duties has therefore accrued and is existing and reflected in the Cenvat credit register. Sub-section (1) of section 140 enables a registered person to carry forward such credit in the return relating to the period ending with the day (June 30, 2017) immediately preceding the appointed date which is July 1, 2017 furnished by him under the existing law. The provisions of the service tax under Chapter V of the Finance Act stood repealed by virtue of the GST legislation as provided under section 174 of the CGST Act. Thus, on the appointed date, the credits which existed under the previous regime were required to be transitioned to the new regime. This credit in every sense stood accumulated, acquired and vested on the appointed date as it was reflected in the said Cenvat credit register in the previous regime. On enactment of the CGST Act, no mechanism was provided for the refund of the credit that existed on the said date. The only mechanism was for utilization of such credit by migrating the same to the GST regime by way of filing declaration Form TRAN-1. The manner and procedure to carry forward the said Cenvat credit under sub-section (1) of section 140 was to be "prescribed". The word "prescribed" has also been defined under section 2(87) to mean *"prescribed by Rules*

made under this act on the recommendation of the Council". This brings us to rule 117 of the CGST Rules, the relevant provision prescribing the manner in which the Cenvat credit has to be transitioned. Initially, the time-limit prescribed under rule 117 for transitioning was 90 days, as explained above, was extended from time to time. Evidently, there is no other provision in the Act prescribing time-limit for the transition of the Cenvat credit, and the same has been introduced only by way of rule 117. This provision also contains a proviso, which vests power with the Commissioner to extend the period on the recommendations of the Council. Indeed, the Commissioner has exercised such power and time period which was initially to expire after 90 days, has been, as a matter of fact, extended till December 29, 2017. In fact, as noticed above, under sub-rule (1A) of rule 117, for a specific class of persons, the time-limit has gone way beyond the period originally envisaged, and has still not expired. Thus, there is nothing sacrosanct about the time-limit so provided. It is not as if the Act completely restricts the transition of Cenvat credit in the GST regime by a particular date, and there is no rationale for curtailing the said period, except under the law of limitations. The period of 90 days has no rationale and as noted above, extensions have been granted by the Government from time to time, largely on account of its inefficient network.

In above noted circumstances, the arbitrary classification, introduced by **18**
way of sub-rule (1A), restricting the benefit only to taxpayers whose cases are covered by "technical difficulties on common portal" subject to recommendations of the GST Council, is arbitrary, vague and unreasonable. What does the phrase "technical difficulty on the common portal" imply ? There is no definition to this concept and the respondent seems to contend that it should be restricted only to "technical glitches on the common portal". We, however, do not concur with this understanding. "Technical difficulty" is too broad a term and cannot have a narrow interpretation, or application. Further, technical difficulties cannot be restricted only to a difficulty faced by or on the part of the respondent. It would include within its purview any such technical difficulties faced by the taxpayers as well, which could also be a result of the respondent's follies. After all, a completely new system of accounting ; reporting of turnover ; claiming credit of prepaid taxes ; and, payment of taxes was introduced with the implementation of the GST regime. A basket of Central and State taxes were merged into a single tax. New forms were introduced and, as aforesaid, all of them were not even operationalised. Just like the respondents, even the taxpayers required time to adapt to the new systems, which was introduced as a completely online system. Apart from the shortcomings in the system

developed by GSTN Ltd., the assessees also faced the challenges posed by low bandwidth and lack of computer knowledge and skill to operate the system. It is very unfair on the part of the respondents, in these circumstances, to expect that the taxpayers should have been fully geared to deal with the new system on day-one, when they themselves were completely ill-prepared, which led to creation of a complete mess. The respondents cannot adopt different standards—one for themselves, and another for the taxpayers. The GST regime heralded the system of seamless input-tax credits. The successful migration to the new system was a formidable and unprecedented task. The fractures in the system, after its launch, became visible as taxpayers started logging in closer to the deadline. They encountered trouble filing the returns. Petitioners who are large and mega corporations–despite the aid of experts in the field, could not collate the humongous data required for submission of the statutory forms. Courts cannot be oblivious to the fact that a large population of this country does not have access to the Internet and the filing of TRAN-1 was entirely shifted to electronic means. The nodal officers often reach to the conclusion that there is no technical glitch as per their GST system laws, as there is no information stored/logged that would indicate that the taxpayers attempted to save/submit the filing of Form GST TRAN-1. Thus, the phrase "technical difficulty" is being given a restrictive meaning which is supplied by the GST system logs. Conscious of the circumstances that are prevailing, we feel that taxpayers cannot be robbed of their valuable rights on an unreasonable and unfounded basis of them not having filed TRAN-1 Form within 90 days, when civil rights can be enforced within a period of three years from the date of commencement of limitation under the Limitation Act, 1963.

19 The introduction of sub-rule (1A) in rule 117 is a patchwork solution that does not recognise the entirety of the situation. It sneaks in an exception, without addressing situations taken note of by us. This exception, as worded, is an artificial construction of technical difficulties, limiting it to those existing on the common portal. It is unfair to create this distinction and restrict it to technical snags alone. In our view, there could be various different types of technical difficulties occurring on the common portal which may not be solely on account of the failure to upload the form. The access to the GST portal could be hindered for myriad reasons, sometimes not resulting in the creation of a GST log-in record. Further, the difficulties may also be offline, as a result of several other restrictive factors. It would be an erroneous approach to attach undue importance to the concept of "technical glitch" only to that which occurs on the GST common portal, as a pre-condition, for an assessee/taxpayer to be granted the benefit of sub-

rule (1A) of rule 117. The purpose for which sub-rule (1A) to rule 117 has been introduced has to be understood in the right perspective by focusing on the purpose which it is intended to serve. The purpose was to save and protect the rights of taxpayers to avail of the Cenvat credit lying in their account. That objective should also serve other taxpayers, such as the petitioners. The approach of the Government should be fair and reasonable. It cannot be arbitrary or discriminatory, if it has to pass the muster of article 14 of the Constitution. The Government cannot turn a blind eye, as if there were no errors on the GSTN portal. It cannot adopt different yardsticks while evaluating the conduct of the taxpayers, and its own conduct, acts and omissions. The extremely narrow interpretation that the respondents seek to advance, of the concept of "technical difficulties", in order to avail the benefit of sub-rule (1A), is contrary to the statutory mechanism built in the transitory provisions of the CGST Act. The Legislature has recognized such existing rights and has protected the same by allowing migration thereof in the new regime under the aforesaid provision. In order to avail the benefit, no restriction has been put under any provisions of the Act in terms of the time period for transition. The time-limit prescribed for availing the input tax credit with respect to the purchase of goods and services made in the pre-GST regime, cannot be discriminatory and unreasonable. There has to be a rationale forthcoming and, in absence thereof, it would be violative of article 14 of the Constitution. Further, we are also of the view that the Cenvat credit which stood accrued and vested is the property of the assessee, and is a constitutional right under article 300A of the Constitution. The same cannot be taken away merely by way of delegated legislation by framing rules, without there being any over arching provision in the GST Act. We have, in our judgment in *A. B. Pal Electricals* [2020] 77 GSTR 382 (Delhi) emphasized that the credit standing in favour of the assessee is a vested property right under article 300A of the Constitution and cannot be taken away by prescribing a time-limit for availing the same.

Now, let us also examine the case law relied upon by the respondents. **20**
We find that the judgments cited by Mr. Amit Bansal are distinguishable on facts. In the case of *ALD Automotive Pvt. Ltd.* v. *Commercial Tax Officer* [2018] 58 GSTR 468 (SC) ; [2018] 364 ELT 3 (SC) reference was made to the judgment of the Supreme Court in *Godrej & Boyce Mfg. Co. Pvt. Ltd.* v. *Commissioner of Sales Tax* [1992] 87 STC 186 (SC) ; [1992] 3 SCC 624. The relevant portion of the judgment is extracted herein below (para 32, pages 486 and 487 in 58 GSTR) :

> "34. The input credit is in the nature of benefit/concession extended to the dealer under the statutory scheme. The concession can be

received by the beneficiary only as per the scheme of the statute. Reference is made to the judgment of this court in (*Godrej & Boyce Mfg. Co. Pvt. Ltd.* v. *Commissioner of Sales Tax* [1992] 87 STC 186 (SC) ; [1992] 3 SCC 624). Rules 41 and 42 of the Bombay Sales Tax Rules, 1959 provided for the setoff of the purchase tax. This court held that the rule-making authority can provide curtailment while extending the concession. In para 9 of the judgment, the following has been laid down (SCC pages 631 and 32 ; pages 193 and 194 in 87 STC) :

'9. In law (apart from rules 41 and 41-A) the appellant has no legal right to claim set-off of the purchase tax paid by him on his purchases within the State from out of the sales tax payable by him on the sale of the goods manufactured by him. It is only by virtue of the said Rules—which, as stated above, are conceived mainly in the interest of public—that he is entitled to such set-off. It is really a concession and an indulgence. More particularly, where the manufactured goods are not sold within the State of Maharashtra but are despatched to out-State branches and agents and sold there, no sales tax can be or is levied by the State of Maharashtra. The State of Maharashtra gets nothing in respect of such sales effected outside the State. In respect of such sales, the rule-making authority could well have denied the benefit of set-off. But it chose to be generous and has extended the said benefit to such out-State sales as well, subject, however to deduction of one per cent of the sale price of such goods sent out of the State and sold there. We fail to understand how a valid grievance can be made in respect of such deduction when the very extension of the benefit of set-off is itself a boon or a concession. It was open to the rule-making authority to provide for a small abridgement or curtailment while extending a concession. Viewed from this angle, the argument that providing for such deduction amounts to levy of tax either on purchases of raw material effected outside the State or on sale of manufactured goods effected outside the State of Maharashtra appears to be beside the point and is unacceptable. So is the argument about apportioning the sale-price with reference to the proportion in which raw material was purchased within and outside the State'."

In the said case, the appellant-company was a registered dealer under the Tamil Nadu Value Added Tax Act, 2006 (Tamil Nadu VAT Act) who was engaged in the business of leasing—management of the motor vehicles and resale of used motor vehicles. It claimed entitlement to input-tax credit of the amount paid on the purchases made from the registered

dealer of motor vehicle as per section 19(2) of the Tamil Nadu VAT Act. As per section 19(11), if a dealer had not claimed input-tax credit for a particular month, the dealer could claim the input-tax credit before the end of the financial year or before 90 days from the date of purchase, whichever was later. When the petitioner filed its return for the assessment year 2007-08 - for want of tax invoices, the said input-tax credit could not be claimed. Thereafter, he filed revised returns claiming input-tax credit. This was disallowed by the commercial tax officer, which was then assailed in the writ petition before the High Court. The High Court set aside the order confirming the proposal to disallow. The matter reached before the apex court. Examining this controversy, the court made the observations as noted in para 32 above. In the said case, the input-tax credit was not claimed and thus, in these circumstances, the court concluded that the benefits envisaged in the taxing statue has to be extended as per the restrictions and conditions therein. Since the statute did not give any indication with reference to extension of time for claim of input-tax credit, the period could have been extended by authority. However, in the instant cases, the input-tax credit had been claimed in the erstwhile regime and was being reflected in the Cenvat credit ledger. This credit, under section 140(1), has to be carried forward and in that sense, the vested right of the property of the petitioner stood accrued and the same cannot be taken away by the respondents by way of Rules. Likewise, the judgment of the Gujarat High Court in *Willowood* [2018] 58 GSTR 310 (Guj) ; [2018] 19 GSTL 228 (Guj) is also not relevant. Moreover, the Punjab and Haryana High Court in *Adfert Technologies Pvt. Ltd.* v. *Union of India* [2020] 73 GSTR 267 (P&H) (C. W. P. No. 30949/2018 (O&M) decided on November 4, 2019), took note of the decision in *Willowood* [2018] 58 GSTR 310 (Guj) ; [2018] 19 GSTL 228 (Guj) and observed that the Gujarat High Court itself, as well as this court in subsequent judgments, has taken a contrary view to that expressed in *Willowood* [2018] 58 GSTR 310 (Guj) ; [2018] 19 GSTL 228 (Guj) (Ref : *Siddharth Enterprises* v. *Nodal Officer* [2019] 71 GSTR 346 (Guj) ; [2019] VIL-442-GUJ, *JakapMetind Pvt. Ltd.* v. *Union of India* [2019] VIL-556-GUJ and *Indsur Global Ltd.* v. *Union of India* [2015] 33 GSTR 103 (Guj) ; [2014] 310 ELT 833 (Guj). The court therefore, proceeded to grant relief by permitting the taxpayer to file TRAN-1 Form electronically and manually beyond the stipulated date. We have been further informed that the decision of the Punjab and Haryana High Court was assailed before the apex court by Revenue in SLP 4408/2020 and, the same has resulted in a dismissal by order dated February 28, 2020. Even otherwise, the observations made in *Willowood* [2018] 58 GSTR 310 (Guj) ; [2018] 19 G. S. T. L. 228

(Guj) have to be read in light of the fact that the time-limit for filing TRAN-1 has been extended multiple times and the implementation of the GST regime and the transition thereto has been inefficient and rough.

21 Lastly, we also find merit in the submissions of the petitioners that rule 117, whereby the mechanism for availing the credits has been prescribed, is procedural and directory, and cannot affect the substantive right of the registered taxpayer to avail of the existing/accrued and vested Cenvat credit. The procedure could not run contrary to the substantive right vested under sub-section (1) of section 140. While interpreting Order VIII, rule 1, CPC, the Supreme Court has observed that the time-limit for filing written statement is directory in nature and not mandatory, and that "*procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice*" (Ref : *Salem Advocates Bar Association* v. *Union of India*, AIR 2003 SC 189). Reference may also be made to *Commissioner of Central Excise, Madras* v. *Home Ashok Leyland* [2007] 8 RC 481 ; [2007] 4 SCC 51, wherein it was observed that rule 57E of the Central Excise Rules, 1944 was a procedural provision, which provides procedure for adjustment of Modvat credit available to the taxpayer and, hence, the right available under the substantive provision cannot be deprived for non-compliance with the procedural provision. There is no consequence provided in rule 117 of the GST Rules on account of failure to file GST TRAN-1. The argument of the respondents is that the consequence is provided in sub-section (1) of section 140 by way of a pre-condition for being entitled to transit the Cenvat credit in his electronic credit register under the GST regime. We do not agree. Section 140(1) is categorical. It states that the registered person "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 . . .". Only the manner, i. e., the procedure of carrying forward was left to be provided by use of the words "in such manner as may be prescribed". The limitation on the right to carry forward the Cenvat credit is substantively provided by the proviso to the said section. Those are the only limitations on the said statutory right. Under the garb of framing Rules—which are subordinate legislation, the width of those limitations could not have been expanded as is sought to be done by introduction of rule 117(1A). In absence of any consequence being provided under section 140, to the delayed filing of TRAN-1 Form, rule 117 has to be read and understood as directory and not mandatory. Further, even in *ALD Automotive Pvt. Ltd.* v. *Commercial Tax Officer* [2018] 58 GSTR 468 (SC) ; [2019] 13 SCC 225, while dealing with the question of whether the provision prescribing time-limit for claim of input tax credit is

directory or mandatory in nature, it was observed that "*whether particular provision is mandatory or directory has to be determined on the basis of object of particular provision and design of the statute*" and "*such interpretation should not be put which may promote the public mischief and cause public inconvenience and defeat the main object of the statute*". Therefore, in the present cases, the purport of the transitory provisions is to allow a smooth migration from the erstwhile service tax regime to the new GST regime and the interpretation must be in consonance with the said purpose.

We, therefore, have no hesitation in reading down the said provision **22**
(Rule 117) as being directory in nature, insofar as it prescribes the time-limit for transitioning of credit and therefore, the same would not result in the forfeiture of the rights, in case the credit is not availed within the period prescribed. This however, does not mean that the availing of Cenvat credit can be in perpetuity. Transitory provisions, as the word indicates, have to be given its due meaning. Transition from pre-GST regime to GST regime has not been smooth and therefore, what was reasonable in ideal circumstances is not in the current situation. In absence of any specific provisions under the Act, we would have to hold that in terms of the residuary provisions of the Limitation Act, the period of *three years* should be the guiding principle and thus a period of three years from the appointed date would be the maximum period for availing of such credit.

Accordingly, since all the petitioners have filed or attempted to file Form **23**
TRAN-1 within the aforesaid period of three years they shall be entitled to avail the input-tax credit accruing to them. They are thus, permitted to file relevant TRAN-1 Form on or before June 30, 2020. Respondents are directed to either open the online portal so as to enable the petitioners to file declaration TRAN-1 electronically, or to accept the same manually. Respondents shall thereafter process the claims in accordance with law. We are also of the opinion that other taxpayers who are similarly situated should also be entitled to avail the benefit of this judgment. Therefore, respondents are directed to publicise this judgment widely including by way of publishing the same on their website so that others who may not have been able to file TRAN-1 till date are permitted to do so on or before June 30, 2020.

All the petitions are allowed in the above terms. **24**

[2020] 77 GSTR 416 (Mad)

[IN THE MADRAS HIGH COURT]

FAABER PAINTS PVT. LTD.

v.

ASSISTANT COMMISSIONER (CT), SRIPERUMBUDUR ASSESSMENT CIRCLE, VARADARAJAPURAM AND ANOTHER

R. MAHADEVAN J.

March 9, 2020.

HF ▶ Assessee

VALUE ADDED TAX—ASSESSMENT—WRITS UNDER CONSTITUTION—ASSESSING OFFICER SIMPLY RECORDING STATEMENT OF ENFORCEMENT WING OFFICIALS AND PASSING ORDERS WITHOUT PROPERLY APPLYING HIS MIND TO DOCUMENTARY EVIDENCE FILED BY DEALER—ORDERS LIABLE TO BE SET ASIDE AND MATTERS REMANDED FOR PASSING ORDERS AFRESH.

For the assessment years from 2006-07 to 2010-11, assessment orders were passed by the Assistant Commissioner after taking note of the defects pointed out by the enforcement wing officials, and proposed to levy tax with penalty. On a writ petition contending that the assessing officer had simply recorded the statement made by the enforcement wing officials and passed the orders without properly applying his mind to the documentary evidence filed by the petitioner-dealer :

Held, *allowing the petition, that the Department had not seriously disputed the submissions of the dealer. The assessment orders passed by the Assistant Commissioner were liable to be set aside and the matters remitted back to him for passing orders afresh. The dealer was to file necessary objections with documentary evidence, if any, and the Assistant Commissioner shall consider them and pass appropriate orders, on the merits and in accordance with law, after affording due opportunity of personal hearing to the dealer.*

AMUTHA METALS *v.* COMMERCIAL TAX OFFICER [2007] 9 VST 478 (Mad) *and* ASSISTANT COMMISSIONER (CT) *v.* EMERALD STONE EXPERT (W. A. (MD) Nos. 558 and 559 of 2013, dated December 14, 2018—Madras High Court) *applied*.

AMUTHA METALS *v.* COMMERCIAL TAX OFFICER [2007] 9 VST 478 (Mad) (para 2) *and* ASSISTANT COMMISSIONER (CT) *v.* EMERALD STONE EXPERT (W. A. (MD) Nos. 558 and 559 of 2013, dated December 14, 2018—Madras High Court) (para 2) *referred to*.

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A DIRECTOR AND HIS GST LIABILITY

V. SRIKANTH[1]

Whether the services provided by a director of a company or a body corporate to the company or the body corporate can be subjected to tax under the CGST Act and consequently whether the tax is payable by the company or body corporate on reverse charge basis as per Notification No. 13/2017, dated 28th June, 2017[2] issued by the Government of India ?

Clause 1 of Schedule III to the CGST Act provides that the services by an employee to the employer in the course of or in relation to his employment shall be treated as activities or transactions which are neither a supply of goods nor a supply of services. The consequence of an activity specified in the Schedule III is that the activity is not taxable under the Act.

The question that arises for consideration is whether the director of a company can be regarded as an employee of the company notwithstanding the notification issued by the Government of India directing the recipient of the services to pay tax on reverse charge basis. If the director of a company can be regarded as an employee of the company then it follows that tax cannot be levied under the Act since the activity falls under clause 1 of Schedule III to the CGST Act.

Recently, in [2020] 76 GSTR 302 (AAR) ; [2020] 116 taxmann.com 114 (AAR-Raj) (*In re : Clay Craft India Pvt. Ltd., Rajasthan*), the Advance Ruling Authority at Rajasthan, had taken the view that in view of the Notification No. 13/2017, dated 28 June, 2017[2], the consideration paid to the directors of the company shall be subject to tax on reverse charge basis. The Advance Ruling Authority simply held the directors were not employees of the company. The Advance Ruling Authority at Karnataka, in [2020] 76 GSTR 296 (AAR) ; [2019] 30 GSTL 678 (AAR-Karn), (*In re :*

1. Advocate, High Court, Madras.
2. See [2017] 46 GSTR (St.) 218.

Alcon Consulting Engineers (India) Pvt. Ltd.), had taken an identical view, relying on the aforesaid notification.

The above Advance Ruling Authorities had not referred to an earlier decision of the Tribunal in [2020] 76 GSTR 316 (CESTAT-Mum) ; [2019] 24 GSTL 207 (Mumbai-CESTAT) *(Allied Blenders and Distillers Pvt. Ltd.* v. *Commissioner of Central Excise and Service Tax, Aurangabad)* where in the Tribunal when considering an identical question, came to the conclusion that the directors were employees of the company and hence service tax was not leviable on the value of the consideration paid to the directors by the company. The Tribunal was considering the issue arising in the context of levy of service tax on reverse charge basis.

Under the Finance Act, the definition of "service" excluded the provision of service by an employee to the employer in the course of or in relation to his employment. There was also a Notification No. 30/2012, dated 20th June, 2012[1] whereby the company was required to pay service tax on reverse charge basis on the value of services provided by the director to the company. The Tribunal held that the directors were employees of the company and hence service tax cannot be imposed. It was found by the Tribunal that with regard to the directors, the company had made deductions on account of provident fund, professional tax and TDS as applicable to an employee of the company. The Tribunal also found that in the salary return filed by the company with the income-tax authorities, the names of the directors had been included. It was found that the company did not pay any sitting fee to the directors. It was established the directors were involved in the day today functioning of the company and did not participate only in the board meetings.

The Tribunal seems to have made a distinction between directors who are involved in the day-to-day functioning of the company and directors who attend only board meetings. This decision of the Tribunal has not been brought to the notice of the advance ruling authorities.

The Tribunal had referred to a decision of the Supreme Court reported in [1972] 86 ITR 122 (SC) ; [1972] 2 SCC 696 (*Ram Prashad* v. *Commissioner of Income-tax)*. The Supreme Court was considering the question as to whether the director of a company can be regarded as an employee of the company. The Supreme Court held that person who is engaged to manage a business may be a servant or an agent according to the nature of his service and the authority of his employment. The nature of the particular business and the nature of the duties of the employee will be required to be

1. See [2012] 51 VST (St.) 249.

considered in each case in order to arrive at a conclusion as to whether the person employed is a servant or an agent.

The court further held that the control which the company exercises over the person need not necessarily be one which tells him what to do from day to day. That would be too narrow a view of the test to determine the character of the employment. Nor the supervision implies that it should be a continuous exercise of the power to oversee the work to be done. The control and supervision is exercised and is exercisable in terms of the articles of association by the board of directors and the company in its general meeting. As a managing director of the company, he also functions as a member of the board of directors whose collective decisions he has to carry out in terms of the articles of association and he can do nothing which is not permitted to do so.

Every power which is given to the managing director therefore emanates from the articles of association which describes the limits of the exercise of that power. The powers of the directors have to be exercised within the terms and limitations prescribed and subject to the control and supervision of the board of directors which in view of the court indicates that the director is a servant of the company.

The Supreme Court in the decision reported in [1998] 1 SCC 86 (*Employees State Insurance Corporation* v. *Apex Engineering Private Limited*) was considering the question whether a managing director was an employee of the company in the context of the definition of "employee" in the Employees State Insurance Act, 1948. The Supreme Court held that the particular person was one of the directors of the company and was also entrusted with the work of the managing director on a monthly remuneration and in view of the remuneration he had to discharge his extra duties as managing director even apart from its functions as an ordinary director. It was not denied that the duties of a managing director were entrusted to him in connection with the work of the establishment and for such work which he would carry out, he was entitled to the remuneration of a managing director. The Supreme Court was therefore of the view that the managing director of the company was an employee of the company for the purpose of the provisions of the Employees State Insurance Act, 1948.

Under section 7 of the CGST Act when an activity is mentioned in Schedule III the Government does not have the power to levy tax on such activities. The mere fact that there is a notification stating that with regard to the services provided by a director the tax shall be paid by the recipient of services does not automatically mean that a director is not an employee of the company. Notification only proceeds on the presumption that a

director is not an employee of the company but the presumption is a rebuttable presumption and the exercise of the power to issue such a notification is subject to the activities mentioned in Schedule III.

There is no definition of the term "employee" or "director" in the CGST Act. The term "director" has been defined in the Companies Act as meaning a director appointed to the board of a company. This definition is not of much help in understanding the status of a director of a company. When a person is appointed as director of a company it is natural that the terms of appointment of such person as a director will be reduced in writing. Therefore for the purpose of levy of tax under the CGST Act, the terms and conditions of his employment has to be gone into for deciding the question as to whether the particular director is an employee of the company or not.

The Companies Act provides for the appointment of independent directors, nominee directors, etc. There seems to be a distinction between directors who are engaged in the day to-day functioning of the company and those directors who attend board meetings only and get paid only to attend those meetings. The latter kind of directors cannot be regarded as employees of the company as they cannot be regarded as subject to the control and supervision of the board of directors. Such directors may not fall within the scope of clause 1 of Schedule III of the CGST Act. For such kind of persons there can be some justification to apply the notification and direct the company to pay tax on reverse charge basis in terms of the notification.

It cannot be disputed that there is no definition of "employee" under the CGST Act and therefore it is necessary to consider how the term has been judicially interpreted before deciding the question. It cannot be disputed that the decisions of the Supreme Court and of the Tribunal are binding on the Advance Ruling Authorities. The Advance Ruling Authorities did not consider the nature of the work performed by the directors of the company before coming to such a conclusion.

The Advance Ruling Authorities at Karnataka and Rajasthan did not examine the terms and conditions of employment of the persons who are appointed as directors of the company but took the easy way out by placing reliance on the notification issued by the Government of India and holding that the tax was payable by the company on reverse charge basis on the value of the services provided by the director of the company to the company or body corporate. This view of the Advance Ruling Authorities seems prima facie wrong and may require reconsideration in the light of the principle stated by the Supreme Court and by the Customs, Excise and Service Tax Appellate Tribunal.

NULLIFYING THE JUDGMENTS BY RETROSPECTIVE AMENDMENT UNDER SECTION 140 OF CGST ACT, 2017—WHETHER UNFAIR ?

Sanjay Bansal[1], Amit Parsad[2]

There is a conflict of opinion betwixt various High Courts on the question, whether the entitlement of credit of eligible duties on the purchases made in pre-GST regime as per the then Cenvat Credit Rules is a vested right and could not be taken away by virtue of rule 117 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as "CGST Rules") for failure to file the GST TRAN-1 form within the due date, i. e., December 27, 2017 which said date was later extended till March 31, 2020[3] by the Government and which was still further extended vide notification dated April 3, 2020[4] to June 30, 2020 in view of the spread of pandemic COVID-19 across India ; and as a result thereof, subsequently, an amendment having been made by the Parliament under section 140 of Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the CGST Act") with retrospective effect from July 1, 2017 validating the power of the Government for prescribing time-limit within which GST TRAN-1 form could be filed with a view to nullify the judgments rendered by various High Courts who could not file their GST TRAN-1 form within the period of limitation prescribed under the rule 117 of the CGST Rules by holding the said rule to be directory and not mandatory. Before analyzing the conflict of opinion and the validity of the amendment, it would be expedient to refer to the relevant provisions of section 140 of the CGST Act and rule 117 of the CGST Rules framed thereunder, which reads as under :

> "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

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2. Advocate, High Court of Punjab and Haryana, Chandigarh.
3. Order No. 1/2020-GST [F. No. CBEC-20/06/17/2018-GST (Pt. I)], dated 7-2-2020.
4. Notification No. 35/2020-Central Tax [F. No. CBEC-20/06/04/2020-GST], dated April 3, 2020—See [2020] 75 GSTR (St.) 108.

(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."

The said provisions were supplemented by rule 117, inter alia, providing for time-limit within which transitional credit could be claimed as there was no provision regarding time-limit prescribed under section 140 of the CGST Act. Rule 117 of the CGST Rules framed and enforced with effect from July 1, 2017 reads as under :

"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 of eligible duties and taxes, as defined in *Explanation 2* to section 140[1], 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.

(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 ;

1. Inserted by Central Goods and Services Tax (Third Amend.) Rules, 2017, w.e.f. 1-7-2017.

(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."

Thereafter, various amendments were brought in the provisions of section 140 of the Act with retrospective effect from July 1, 2017, being highlighted in bold, reading as under :

"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*[1] 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 *within such time and*[2] 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."

1. Inserted by the Central Goods and Services Tax (Amendment) Act, 2018, w. r. e. f. July 1, 2017—See [2018] 58 GSTR (St.) 237 and Circular No. 87/2019-GST—See [2019] 62 GSTR (St.) 128 for whether expression eligible duties would include Cenvat credit of service tax within its scope or not for the purpose of section 140(1) of the CGST Act, 2017.
2. Inserted by the Finance Act, 2020 w. r. e. f. July 1, 2017—See [2020] 75 GSTR (St.) 1.

Rule 117 amended as on date reads as under (amendments are highlighted in italics) :

"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 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.

[1](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, 2020)*[2] *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 ;

1. Sub-rule (1A) inserted by the Central GST (Ninth Amendment) Rules, 2018, with effect from September 10, 2018—See [20 18] 57 GSTR (St.) 95 .
2. Substituted for "31st December, 2019" by the Central Goods and Services Tax (Amendment) Rules, 2020, w. r. e. f. December 31, 2019. Prior to its substitution said words was amended by the Central Goods and Services Tax (Sixth Amendment) Rules, 2019, with effect from October 9, 2019—See [2019] 70 GSTR (St.) 1.

(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."

Thus, to summarize, it would be suffice to keep in mind that initially a period of limitation of 90 days under rule 117 of the CGST Rules was fixed by the Government with a view to enable the registered persons for filing of declaration in GST TRAN-1 form for claiming transitional credit of eligible duties in respect of inputs held in stock on the appointed day, namely, July 1, 2017. The substantive provisions, namely, section 140 of the CGST Act did not lay down the time period within which the declaration in GST TRAN-1 form could be filed. Thereafter, by notifications[1] issued by the Government the period of limitation of 90 days under rule 117(1A) was extended. Subsequently, with a view to legalize the period of limitation for filing GST TRAN-1 form up to March 31, 2020, the words "with in such time" preceding the existing words "in such manner as may be prescribed" in section 140(1) of the CGST Act were incorporated by an amendment introduced by Finance Act, 2020[2] with retrospective effect from July 1, 2017[3].

The right to carry forward credit is a right or privilege, acquired and accrued under the repealed Acts, which stands saved under section 174(2)(c) of the CGST Act, and relevant provisions in regard thereto, reads as under :

> "174. *Repeal and saving*.—(1) Save as otherwise provided in this Act, on and from the date of commencement of this Act, the Central Excise Act, 1944 (1 of 1944) (except as respects goods included in

1. Order No. 1/2020-GST [F.No. CBEC-20/06/17/2018-GST (Pt. I)], dated February 7, 2020 and Notification No. 35/2020-Central Tax [F. No. CBEC-20/06/04/2020-GST], dated April 3, 2020—See [2020] 75 GSTR (St.) 108.
2. Inserted by the Finance Act, 2020 w. r. e. f. July 1, 2017—See [2020] 75 GSTR (St.) 1.
3. Came into force on May 18, 2020 vide Notification No. 43/2020-Central Tax (F. No. CBEC-20/06/09/2019-GST), dated May 16, 2020—See [2020] 75 GSTR (St.) 116.

entry 84 of the Union List of the Seventh Schedule to the Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955), the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), and the Central Excise Tariff Act, 1985 (5 of 1986) (hereafter referred to as the repealed Acts) are hereby repealed.

(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (32 of 1994) (hereafter referred to as 'such amendment' ; or 'amended Act', as the case may be) to the extent mentioned in sub-section (1) or section 173 shall not—

(a) and (b) . . .

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts."

Judgments of various High Courts prior to the amendment :

Unanimity of opinion stands expressed by various High Courts[1] on the nature and scope of the provisions of section 140 of the CGST Act and rule 117 of the CGST Rules by pronouncing that—

(a) Section 140 of the CGST Act allows carry forward of the eligible duties and is a complete Code in itself. The substantive right conferred by the Act cannot be curtailed by way of rules.

(b) The entitlement of credit of eligible duties on the purchases made in the pre-GST regime as per the then existing Cenvat rules is a vested right and, therefore, it cannot be taken away by virtue of rule 117 of the CGST Rules, with retrospective effect for failure to file the GST TRAN-1 form within the due date.

(c) 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.

(d) 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

1. *Siddharth Enterprises* v. *Nodal Officer* [2019] 71 GSTR 346 (Guj) ; [2019] 109 taxmann.com 62 (Guj) ; [2019] 29 GSTL 664 (Guj) ; *Brand Equity Treaties Ltd.* v. *Union of India* [2020] 116 taxmann.com 415 (Delhi) ; [2020] 77 GSTR 390 (Delhi) ; *Adfert Technologies P. Ltd.* v. *Union of India* [2019] 73 GSTR 267 (P&H) ; [2019] 111 taxmann.com 27 (P&H) ; [2020] 32 GSTL 726 (P&H), SLP dismissed by the honourable Supreme Court of India in *Union of India* v. *Adfert Technologies (P.) Ltd.* [2020] 115 taxmann.com 29 (SC) ; *Jay Bee Industries* v. *Union of India* [2020] 74 GSTR 295 (HP) ; [2020] 32 GSTL 719 (HP).

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 Rules, 2017, for failure to file declaration GST TRAN-1 form within the due date.

(e) The right to carry forward Cenvat credit for not being able to file the GST TRAN-1 form 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.

(f) The due date contemplated under rule 117 of the CGST Rules for the purposes of claiming transitional credit is procedural/directory in nature and thus should not be construed as a mandatory provision. Section 140(1) is categorical. It states that the registered person "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 . . .". Only the manner, i.e., the procedure of carrying forward was left to be provided by use of the words "in such manner as may be prescribed". The limitation on the right to carry forward the Cenvat credit is substantively provided by the proviso to the said section. Those are the only limitations on the said statutory right. Under the garb of framing Rules—which are subordinate legislation, the width of those limitations could not have been expanded as is sought to be done by introduction of rule (1A). In absence of any consequence being provided under section 140, to the delayed filing of GST TRAN-1 form, rule 117 has to be read and understood as directory and not mandatory.

(g) The insertion of sub-rule (1A) and, thereafter, extensions being granted for filing of GST TRAN-1 form, notwithstanding the period envisaged under sub-rule (1) of rule 117, demonstrates that the Government recognized the fact that the registered persons were not able to upload GST TRAN-1 form due to technical difficulties on the common portal. This also substantiates that the period for filing the GST TRAN-1 form is not considered—either by the Legislature, or the executive as sacrosanct or mandatory.

(h) The Cenvat credit which stood accrued and vested is the property of the assessee, and is a constitutional right under article 300A of the Constitution. The same cannot be taken away merely by way of delegated legislation by framing rules, without there being any over arching provision

in the CGST Act. The credit standing in favour of the assessee is a vested property right under article 300A of the Constitution and cannot be taken away by prescribing a time-limit for availing of the same. In the 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.

(i) The provisions of rule 117 are directory in nature, insofar as it prescribes the time-limit for transitioning of credit and therefore, the same would not result in the forfeiture of the rights, in case the credit is not availed within the period prescribed. This however, does not mean that the availing of Cenvat credit can be in perpetuity. Transitory provisions, as the word indicates, have to be given its due meaning. Transition from pre-GST Regime to GST regime has not been smooth and therefore, what was reasonable in ideal circumstances is not in the current situation. In absence of any specific provisions under the Act, it would have to be held that in terms of the residuary provisions of the Limitation Act, the period of three years should be the guiding principle and thus a period of three years from the appointed date would be the maximum period for availing of such credit.

(j) GST is a new progressive levy. One of the progressive idea of GST is to avoid cascading taxes. GST laws contemplate seamless flow of tax credits 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. Therefore, 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.

The High Court of Bombay[1], Rajasthan[2] and Gujarat[3] on the contrary has ruled that transitional credit in not a vested right but a concessional/conditional right. Be that as it may, irrespective of the right attached to the transitional credit, the nature of rule 117 of the CGST Rules being mandatory

1. *JCB India Ltd.* v. *Union of India* [2018] 53 GSTR 197 (Bom) ; [2018] 92 taxmann.com 131 (Bom) ; [2018] 67 GST 52 (Bom) ; [2018] 15 GSTL 145 (Bom) ; *Nelco Ltd.* v. *Union of India* [2020] 116 taxmann.com 255 (Bom).
2. *Shree Motors* v. *Union of India* [2020] 115 taxmann.com 344 (Raj).
3. *Willowood Chemicals (P.) Ltd.* v. *Union of India* [2018] 58 GSTR 310 (Guj) ; [2018] 98 taxmann.com 100 (Guj) ; [2018] 19 GSTL 228 (Guj).

or directory stands unquestionably concluded by various High Courts[1]. Rule 117 of the CGST Rules providing for a time-limit in the absence of the period of limitation in section 140 of the CGST Act on a larger jurisprudential principle of interpretation is directory as no consequences are contemplated by the provisions of section 140 or rule 117 with regard to forfeiture of Cenvat credit in the event of non-filings of GST TRAN-1 form. Reference deserves to be made at this juncture to the following instructive observations in the decision rendered by the Constitutional Bench in the case of *State of U. P.* v. *Babu Ram Upadhya*[2] settling the principle for determining whether a provision of law is mandatory or directory :

> ". . . For ascertaining the real intention of the Legislature, the court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

Input-tax credit is a "property" and a vested right under article 300A of the Constitution of India and cannot be taken away by prescribing time-limit for availing of the same under the CGST Act and the CGST Rules. It is not a concession given to taxpayers as is evident from a bare perusal of the provisions of section 142(3) of the CGST Act which indicates that registered person/assessee who has filed GST TRAN-1 form giving details of Cenvat credit therein would not be entitled to refund of the same under the Act, meaning thereby that the Cenvat credit not declared in respect thereof in the GST TRAN-1 form, the registered person/assessee would be entitled to refund keeping in view the provisions of section 174(2)(c) of the CGST Act whereunder the benefit/right accruing to the assessee under the repealed Acts has been protected in its hands. Therefore, by an interpre-

1. *Siddharth Enterprises* v. *Nodal Officer* [2019] 71 GSTR 346 (Guj) ; [2019] 109 taxmann.com 62 (Guj) ; [2019] 29 GSTL 664 (Guj) ; *Brand Equity Treaties Ltd.* v. *Union of India* [2020] 116 taxmann.com 415 (Delhi) ; [2020] 77 GSTR 390 (Delhi) ; *Adfert Technologies P. Ltd.* v. *Union of India* [2019] 73 GSTR 267 (P&H) ; [2019] 111 taxmann.com 27 (P&H) ; [2020] 32 GSTL 726 (P&H), SLP dismissed by the honourable Supreme Court of India in *Union of India* v. *Adfert Technologies (P.) Ltd.* [2020] 115 taxmann.com 29 (SC) ; *Jay Bee Industries* v. *Union of India* [2020] 74 GSTR 295 (HP) ; [2020] 113 taxmann.com 619 (HP) ; [2020] 32 GSTL 719 (HP).

2. See [1961] AIR 1961 SC 751.

tative process inevitably it follows that a vested right which has accrued to the assessee under the repealed laws cannot be taken away as a result of non-filling of GST TRAN-1 form as contemplated by the provisions of section 140 of the CGST Act read with rule 117 of the CGST Rules framed under the said Act more so, when the filing of GST TRAN-1 form is not mandatory as the CGST Act provides for no penal consequences in the event of non-filling of the same and the assessee in view of provisions of section 174(2)(c) of the said Act is entitled to the refund of Cenvat credit representing stocks. The Cenvat credit representing stocks which is measurable in terms of money and which is a vested property right is in fact a debt payable by the Government and therefore, inability to file GST TRAN-1 form within the time-frame under the CGST Act and the CGST Rules would not invite forfeiture of the refund of Cenvat credit and in fact withholding of the same would be violative of articles 14 and 265 of the Constitution of India. The judgments rendered by various High Courts are perfectly in tune with the settled principles of law, namely, Cenvat credit is a vested[1] and indefeasible[2] right which is as good as tax paid till the tax is adjusted on future goods and therefore, legal and valid.

In an attempt to nullify the judgments rendered by various High Courts[3] holding that rule 117 of the CGST Rules is directory and not mandatory, the Legislature has amended the provisions of the Act and Rules retrospectively by adding the words "with such time and" preceding the words "in such manner as may be prescribed" in section 140(1) of the CGST Act and providing for a period of limitation up to 31st March, 2020 for filing GST TRAN-1 form under rule 117(1A) of the CGST Rules in respect of registered persons who could not submit the said form by the due date on account of technical difficulties. The effect of such an amendment raises the following question :

> "Whether the amendment made retrospectively which has the effect of nullifying the decisions rendered by various High Courts against the Department is arbitrary/unfair and hit by articles 14 and 265 of the Constitution of India ?"

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1. *Eicher Motors Ltd.* v. *Union of India* [1999] 2 SCC 361; [1999] 106 ELT 3 (SC).
2. *Collector of Central Excise* v. *Dal Ichi Karkaria Ltd.* [1999] 7 SCC 448.
3. *Siddharth Enterprises* v. *Nodal Officer* [2019] 71 GSTR 346 (Guj) ; [2019] 109 taxmann.com 62 (Guj) ; [2019] 29 GSTL 664 (Guj) ; *Brand Equity Treaties Ltd.* v. *Union of India* [2020] 116 taxmann.com 415 (Delhi) ; [2020] 77 GSTR 390 (Delhi) ; *Adfert Technologies P. Ltd.* v. *Union of India* [2019] 73 GSTR 267 (P&H) ; [2019] 111 taxmann.com 27 (P&H) ; [2020] 32 GSTL 726 (P&H), SLP dismissed by the honourable Supreme Court of India in *Union of India* v. *Adfert Technologies (P.) Ltd.* [2020] 115 taxmann.com 29 (SC) ; *Jay Bee Industries* v. *Union of India* [2020] 74 GSTR 295 (HP) ; [2020] 32 GSTL 719 (HP).

It is settled by now that taxation laws must also pass the test of article 14 of the Constitution of India and the extent of reasonability of any taxation statute lies in its efficiency to achieve the object sought to be achieved by the statute[1]. The Parliament as also the State Legislatures have plenary powers of legislation within the field of legislation committed to them and, subject to certain constitutional limitations/restrictions, they can legislate prospectively as well as retrospectively. The parameters of the power of the Legislature to legislate prospectively as well as retrospectively are well-settled. There is the following first statement of law by Mitter J., in *Mahal Chand Sethia* v. *State of West Bengal*[2] :

> "... A court of law can pronounce upon the validity of any law and declare the same to be null and void if it was beyond the legislative competence of the Legislature or if it infringed the rights enshrined in Part III of the Constitution. Needless to add it can strike down of declare invalid any Act or direction of a State Government which is not authorised by law. The position of a Legislature is, however, different. It cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an Amending Act to remedy the defects pointed out by a court of law or on coming to know of it uliunds. An amending Act simpliciter will cure the defect in the statute only prospectively. But as a Legislature has the competence to pass a measure with retrospective effect it can pass an Amending Act to have effect from a date which is past. ..."

Thereafter, follows even a more categorical assertion of the above said rule in the words of Shah J., speaking for the Constitution Bench in *Janapada Sabha* v. *Central Provinces Syndicate Ltd.*[3] :

> "... On the words used in the Act, it is plain that the Legislature attempted to overrule or set aside the decision of this court. That, in our judgment, it is not open to the Legislature to do under our constitutional scheme. It is open to the Legislature within certain limits to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to have been, but it is not open to the Legislature to say that the judgment of a court properly constituted and

1. *Aashirwad Films* v. *Union of India* [2007] 7 VST 714 (SC) ; [2007] 6 SCC 624 ; *Also See Moopil Nair* v. *State of Kerala* [1961] AIR 1961 SC 552, *East India Tobacco Company* v. *State of Andhra Pradesh* [1962] 13 STC 529 (SC) ; [1962] AIR 1962 SC 1733, *V. Venugopala Ravi Varma Rajah* v. *Union of India* [1969] AIR 1969 SC 1094, *Assistant Director of Inspection Investigation* v. *Kum. A. B. Shanthi* [2002] AIR 2002 SC 2188, *Associated Cement Companies Ltd.* v. *Government of Andhra Pradesh* [2006] AIR 2006 SC 928.
2. See [1969] 2 SCWR 500 ; [1969] UJ (SC) 616.
3. See [1971] AIR 1971 SC 57.

rendered in exercise of its powers in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the court." (p. 61)

Following the above-mentioned two judgments, Hegde J., speaking for the court in the *Municipal Corpn. of the City of Ahmedabad* v. *New Shrock Spg. & Wvg. Co. Ltd.*[1] this judgment was reported earlier in the AIR though rendered subsequently to *Janapada Sabha*'s case[2], was even more forthright in observing :

". . . The Legislatures under our Constitution have within the prescribed limits, powers to make laws prospectively as well as retrospectively. By exercise of those powers, the Legislature can remove the basis of a decision rendered by a Competent Court thereby rendering that decision ineffective. But no Legislature in this country has the power to ask the instrumentalities of the State to disobey or disregard the decisions given by the courts. . . ."

Subsequently, in *State of Tamil Nadu* v. *M. Rayappa Gounder*[3], the aforementioned principles has yet again been reaffirmed. Without multiplying authorities, it would perhaps suffice to mention the culminating judgment in *Smt. Indira Nehru Gandhi* v. *Raj Narain*[4], wherein Khanna J., observed as follows :

"190. A declaration that an Order made by a court of law is void is normally part of judicial function and is not a legislative function. Although there is in the Constitution of India no rigid separation of powers, by enlarge the spheres of judicial function and Legislative function have been demarcated and it is not permissible for the Legislature to encroach upon the judicial sphere. It has accordingly been held that a Legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the Legislature to declare the judgment of the court to be void or not binding . . ." (p. 2346)

In *Shri Prithvi Cotton Mills Ltd.* v. *Broach Borough Municipality*[5], a Constitution Bench of the Supreme Court of India, dealing with the question of validity of a validation Act passed with a view to get over the judgment of this court, held that even it has competence, the Legislature

1. See [1970] AIR 1970 SC 1292.
2. See [1971] AIR 1971 SC 57.
3. See [1971] AIR 1971 SC 231.
4. See [1975] AIR 1975 SC 2299.
5. See [1969] 2 SCC 283.

cannot merely pass a law that a decision of this court shall not bind. The court held as follows :

> ". . . Granted legislative competence, it is not sufficient to declare merely that the decision of the court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. . ."

In the matter of : *Cauvery Water Disputes Tribunal,* In re[1] a Constitution Bench of honourable Supreme Court of India after referring to a large number of authorities held as follows :

> "76. The principle which emerges from these authorities is that the Legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter parties and affect their rights and liabilities alone. Such an act on the part of the Legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or Tribunal."

In *S. R. Bhagwat* v. *State of Mysore*[2], a three-Judge Bench of the Supreme Court was dealing with a case where the petitioners were held entitled to certain promotions and service benefits from a particular date. Even though these benefits were given to them the State did not give them the monetary benefits and, in fact, passed a law which had the effect of denying the monetary benefits due to the petitioners, in terms of the judgments earlier passed in their favour. After dealing with the entire law on the subject the court held as follows :

> "12. It is now well-settled by a catena of decisions of this court that a binding judicial pronouncement between the parties cannot be made ineffective with the aid of any legislative power by enacting a provision which in substance overrules such judgment and is not in the realm of a legislative enactment which displaces the basis or foundation of the judgment and uniformly applies to a class of persons concerned with the entire subject sought to be covered by such an enactment having retrospective effect. . .
>
> 15. We may note at the very outset that in the present case the High Court had not struck down any legislation which was sought to

1. See [1993] Supp (1) SCC 96 (2).
2. See [1995] 6 SCC 16.

be re-enacted after removing any defect retrospectively by the impugned provisions. This is a case where on interpretation of existing law, the High Court had given certain benefits to the petitioners. That order of mandamus was sought to be nullified by the enactment of the impugned provisions in a new statute. This in our view would be clearly impermissible legislative exercise". (emphasis supplied)

In *State of Tamil Nadu* v. *State of Kerala*[1], the Constitution Bench of the Supreme Court again dealt with the question as to whether the Legislature could set at naught the decision of the superior courts. After referring to a large number of judgments, the court laid down the following principles :

(i) that the doctrine of separation of powers is an entrenched principle in the Constitution of India even though there is no specific provision in the Constitution ;

(ii) Independence of courts from executive and Legislature is fundamental to the rule of law and one of the basic tenets of the Indian Constitution ;

(iii) the doctrine of separation of powers between the three organs of the State—Legislature, Executive and the Judiciary is a consequence of principles of equality enshrined in article 14 of the Constitution of India. Consequently, a law can be set aside on the ground that it breaches the doctrine of separation of powers since that would amount to negation of equality under article 14 of the Constitution of India ;

(iv) the High Courts and the Supreme Court are empowered by the Constitution of India to determine whether a law made by the Parliament or State Legislature is void ;

(v) the doctrine of separation of powers applies to the final judgments of the courts. The Legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an amending Act to remedy the defects pointed out by a court of law or on coming to know of it aliunde ;

(vi) if the Legislature has the power and competence to make a validating law it can make the law retrospective ;

(vii) even where the law is enacted by the Legislature appears within its competence but if in substance it is shown as an attempt to interfere with the judicial process, such law can be invalidated being in breach of the doctrine of separation of powers.

The Supreme Court of India in the case of *State of Karnataka* v. *Karnataka Pawn Brokers Assn.*[2] after referring to the aforesaid judgments has

1. See [2014] 12 SCC 696 .
2. See [2018] 6 SCC 363 ; [2018] AIR 2018 SC 1441 ; [2018] 255 Taxman 12 (SC).

reiterated that the Legislature has the power to amend laws with retrospective effect. However, this can be done to remove causes of invalidity. It can remove the basis and foundation of judgment and if this done, the same does not amount to statutory overruling. The Legislature cannot set at naught the judgments which have been pronounced by amending the law not for the purpose of making corrections or removing anomalies but to bring in new provisions which did not exist earlier. The Legislature may have the power to remove the basis or foundation of the judicial pronouncement but the Legislature cannot overturn or set aside the judgment, that too retrospectively by introducing a new provision. *The Legislature is bound by the mandamus issued by the court.* A judicial pronouncement is always binding unless the very fundamentals on which it is based are altered and the decision could not have been given in the altered circumstances. The Legislature cannot, by way of introducing an amendment, overturn a judicial pronouncement and declare it to be wrong or a nullity. What the Legislature can do is to amend the provisions of the statute to remove the basis of the judgment. A mandamus cannot be set at naught by making the provisions retrospective. This would be a direct breach of the doctrine of separation of powers as ruled in the case of *State of Tamil Nadu*.[1]

Conclusion

The Legislature by bringing an amendment in section 140 of the CGST Act and rule 117 of the CGST Rules has attempted to nullify the writ of mandamus issued by various High Courts to the Government to open the online common portal allowing the filing of GST TRAN-1 form as the provisions of rule 117 of the Rules for purpose of claiming transitional credit were procedural in nature and not mandatory inasmuch as by virtue of the provisions of section 174(2)(c) of the CGST Act the Cenvat credit was not a concession but an accrued vested and indefeasible right protected under article 300A of the Constitution of India which 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 indirect tax laws is the property of the registered persons and it cannot be appropriated for merely failing to file a declaration in the absence of law in this respect. The provisions of section 174(2)(c) of the CGST Act have not been amended by the Legislature by declaring the right accrued in respect of Cenvat credit under the repealed Acts to be a conditional right which to the contrary has been interpreted to be an accrued vested and indefeasible right by the

1. [2014] 12 SCC 696.

honourable Supreme Court of India as well as various High Courts. In addition thereto, in the absence of any provision having been made in the CGST Act in regard to the consequences flowing from a result of non-filing of GST TRAN-1 form within the period of limitation that is forfeiture of the amount representing the Cenvat credit accrued as a right under the repealed Acts, the provisions as a result of amendment still continue to be directory and not mandatory by an interpretative process as ruled by various High Courts and therefore, the amendment made by the Legislature with retrospective effect in fact is an attempt to reverse and overrule judicial dictums which puts a big question mark on its sustainability on account of direct breach of doctrine of separation of powers. As stated by A. K. Sikri, J speaking for Constitution Bench in the case of *Commissioner of Income-tax (Central)-I, New Delhi* v. *Vatika Township P. Ltd.*[1], 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* v. *Eyre*[2], 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. 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 in *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.*[3] The High Courts had not struck down the provisions of section 140 of the CGST Act and rule 117 of the CGST Rules which were amended retrospectively. The High Courts on an interpretation of the said provisions as they stood prior to the amendment had issued a mandamus thereby granting benefit of opening of online common portal for filing GST TRAN-1 form under the CGST Act and CGST Rules by holding that provisions of rule 117 of the CGST Rules read with section 140 of the CGST Act to be directory and not mandatory. The order/judgment of mandamus is sought to be nullified by the retrospective amendment which is impressible legislative exercise and therefore, indeed unfair.

1. See [2014] 367 ITR 466 (SC) ; [2015] 1 SCC 1 ; [2014] 227 Taxman 121 (SC).
2. See [1870] LR 6 QB 1.
3. See [1994] 1 AC 486.

RETROSPECTIVE LEGISLATION WHEN CAN BE MADE, WHETHER SUCH RETROSPECTIVE LEGISLATION IS VALID OR NOT ?

M. V. J. K. Kumar[1]

The power to legislate a particular provision in a statute with a retrospective amendment is always available to the Union or State Legislatures. This power is a plenary power in respect of the fields that are demarcated to them and subject to constitutional restrictions and judicial review.

Passing a retrospective amendment after the courts have decided on an issue may be challenged on the ground that the retrospective Legislature is void ab initio. This statement is made by me because retrospective legislation is made by the Governments in order to see that the anomaly creeping in the Act is overcome by bringing an amendment, be that may, because of the decision of the courts or by a self realization or recognition.

Competence to make a law on a subject depending upon the circumstances and the competence to make that subject in the present law is always the Golden Metwand and needs to be considered when challenged.

The honourable courts have dealt with so many cases basing upon the situation that has come up before it and have held that whether a legislation giving a retrospective amendment is valid.

In particular in a taxing statute according to me retrospective legislation giving scope for levy of a higher rate of tax or giving scope for a section to fix the time-limit to file a return or to file an appeal is the precise question.

In order to give a retrospective validation, the Legislature may make a law which is in operation for a limited period of time prior to the date of the legislation giving retrospectivity.

By virtue of giving retrospectivity to the present legislation which is in force, would cease to be force, for the retrospective legislation would override the old legislation and would be treated as the legislation to be on the statute from the beginning of the introduction of the statute or from a date of the convenience as felt by the legislation.

It is my opinion that the legislation giving retrospectivity to a statue or a part thereof would be valid if the retrospectivity does not change the colours of the frontiers of a section—for example the rates of tax earlier mentioned in the schedules would be varying with a sequel addition to liability because of a retrospective legislation and the person or the dealer has obviously to pay the enhanced rate of tax on this particular subject.

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Then in indirect tax laws, as well known tax would be levied on a person and such tax has to be collected from the person who is paying the tax cannot be collected in better terms, I would say that the dealer would be acting as an agent on behalf of the principal. The principal herein is the Government and the dealer would be acting as an agent on behalf of the principal in collecting the taxes from the purchaser to makeover. By giving retrospectivity to a section or a schedule or a rule, Government would be demanding tax amount (i.e. enhanced rate) from the agent and the agent would be left with no other choice except to fulfil the demands and to pay the taxes from his own pockets as it would not be possible as also practicable to recover such enhanced amount in respect of concluded transactions.

The other aspect direct taxes and indirect tax laws by a retrospective amendment, tax would be enhanced or a section would be given retrospectivity depending upon ratio decidendi or proposition of law in the judgments of the courts or a self realization that may come to the Government on a later date, which is also improper as in direct taxes, the person who has to pay the tax would be thrived with a higher tax by virtue of the retrospectivity that is given to a particular section or the rate of tax then it would be very difficult for the person who is paying the tax to pay the enhanced rate of tax or deduct the TDS at an enhanced rate followed by the interest and penalties which would be waived by the Government, it would lead to a difficult situation.

I have only canvassed the two examples in order to make my article more easily understandable. The challenge to these sections or schedules would be logical and would be appropriate also as the Government would be burdening the citizens with tax that may not be bearable by the citizens.

The power to make retrospective legislation enables the Government to amend the Act completely and to repeal the law as it existed before amending the Act. This power has also been often used for validating prior executive and legislative act for curing the defect which led to the invalidity of a particular provision or the Act.

The other example is, an Act which can be passed only by Parliament but the State enacts the Act and when the Act is questioned before the courts such Act of the State would be set aside by the courts. Then what is destined to follow is the question : whether any retrospectivity can be possible in such cases. The answer is that Parliament can legislate such Acts and Parliament can retrospectively legislate such Act and such Acts of the Parliament are found to be valid. Please see the judgment in AIR 1996 SC 2560 in the case of *P. Kannadasan* v. *State of Tamil Nadu*.

Now the question is, can Parliament legislate an Act which is already legislated by the State and in the case of taxes whether such Act can be

considered as valid. My reply to such question would be the Parliament can legislate such Act with retrospective amendment and as the consumer or the taxpayer is paying the tax to the State, there would not be difficult for him as it would be between the State and the Centre to adjust their accounts.

Now the question is whether statutes dealing with the substantive rights can be amended by retrospective legislation. Naturally every statute would be considered prospective and it is the conditional principal of construction unless, it is expressly or by necessary implication made to have retrospective operation. Please see the case cited in AIR 1951 SC 128 in the case of *Keshavan Madhava Menon* v. *State of Bombay*.

The rule as general is applicable where the object of the statute is to effect vested rights to impose new burdens or to impair existing obligations. The intention of the legislation to effect the vested rights or to effect the existing obligation should be clear with no ambiguity and then also it is deemed to be prospective only. This is because the fundamental principle behind an amendment is to curb or validate or to change the effective rights or the statutory rights and in the concept of taxation, the rate of tax, etc., which shall be enforced by the Legislature prospectively as it is for the citizen who would be burdened with the plenary action of curbing or effecting and taxing at a higher rate.

As a logical corollary to general rule of retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implications, there is a subordinate rule to the effect that a statute or rule in a section in it is not be construed so as to have larger retrospective operation then its language renders necessary. Please see *S.S. Gadgil, Income-tax Officer* v. *Lal and Co.* [1964] 53 ITR 231 (SC) ; [1965] AIR 1965 SC 171, AIR 1966 SC 1499 (*Mohd. Idris* v. *Sat Narain*).

In other words , the word should be so clear and the language is vivid giving retrospectivity as intended by the Parliament so that the courts can determine whether the retrospectivity is proper or not. If the retrospectivity intended by the Parliament or State Legislature in the literal reading of the provision gives an anomaly or absurdity, then prima facie such retrospectivity would be considered as illegal.

This rule of strict construction in the case of retrospective legislation would not be applicable in the case of procedural law. The statute not dealing with substantive rights, but dealing with merely matters of procedure are presumed to be retrospective unless such construction is technically inadmissible. It does not apply to statutes which only, alter the form of procedure or the admissibility of evidence or the effect which the courts give to evidence. If the new Act effects procedure only then the retrospective ope-

ration would apply to the pending actions as well as future actions. See *K. Eapen Chacko* v. *Provident Investment Company* reported in AIR 1976 SC 2610.

A change in the forum should be considered as proper except in pending proceedings and therefore if a new Act requires certain types of original proceedings to be instituted before the Special Tribunals under the Act to exclude the civil courts, all the proceedings of that type whether based on old or new causes of action will have to be instituted before the Tribunal. See *New India Insurance Co. Ltd.* v. *Smt. Shanti Misra, Adult* [1977] 47 Comp Cas 453 (SC) ; AIR 1976 SC 237.

So also in the case of arbitration on the same principle it can be said that an arbitration award made in a foreign country is enforceable as a convention award, if the foreign country is a party to the present dispute when proceedings for enforcing the award are taken although it was not such a party at that time of making the award.

The classification of a statute cannot necessarily be determined whether that statute as a retrospective operation where the operation is considered to be substantive or procedural. For example a statute of limitation is generally regarded as a procedural, but if the application to a past cause of the action is the effect of reviving or extinguishing right of suit , such an operation cannot be said to be procedural.

The language also cannot be treated as decisive rule deciding the retrospective legislation but at the same time it cannot be stated as an inflexible rule that use of present tense or present perfect tense is decisive of the matter that the statute does not draw upon post events for its operation. See the judgment in AIR 1961 SC 307 in the case of *State of Maharashtra* v. *Vishnu Ramchandra*. Therefore the language cannot be found to be decisive by the courts to hold a particular retrospective legislation to be invalid or valid.

The statutes in the case of succession which are given retrospective amendment have to be held as invalid because the statutes that are given retrospectivity for regulating succession should not applicable to succession, which had already opened as the effect will be to divest the estate from the person in whom it has vested. In Hindu law Inheritance Act, 1921 it was held that in a case where the female heir died after coming into force of the Act though the male to whom she had succeeded has died prior to enforcement then by applying the retrospectivity it was not to deprive the person of the rights which are already vested in them for under the Hindu law of female heir, though a limited owner, fully represents the estate and the reversioners during her lifetime have no interest in it the words "dying

intestate" as used in the Act, were construed to me "in the case of intestacy of a Hindu Female" section 8 of the Hindu Succession Act, 1956 which enacts the property of a male Hindu "dying intestate" shall devolve according to the provisions of the Act has been held to be inapplicable to a case where succession opened before the Act. But the same has been applied to a case of a female limited owner who died after the Act although the male to whom she had succeeded had died prior to the Act. Succession in such a case opens again after the death of limited owner and to find out to whom are the heirs, who can succeed to the deceased male, the law in force at the time of the limited owners death has to be seen. See the case laws in the case of *Eramma* v. *Veerupana* reported in AIR 1966 SC 1879 and *Daya Singh (Dead) through L.Rs.* v. *Dhan Kaur* reported in AIR 1974 SC 665.

Section 14 of the Hindu Succession Act, 1956 which is enacted for the purpose that any property possessed by a female Hindu acquired whether before or after the Act shall be held by her as full owner thereof and not as a limited owner. The section is a retrospective one and the only qualification being that the Hindu female should possess the estate at the time of the Act came into force. Having regard to the object of the section ameliorate the status of Hindu female the word "possessed" has been construed in a broad sense so as to mean the state to owning or having anyone's hand or power and to include actual constitutes possession. For the section have not been given a retrospective operation then what the language permits and therefore it has been held that if the female Hindu had alienated the estate prior coming into force of the Act neither she or her alliance gets the right of full ownership under the section. But if the alliance reconveys the property to a Hindu female after commencement of the Act she would become full owner , she would then be possess the property acquired after act which is also covered by section 14(1). Therefore a widow losing her right to the property or right to maintenance, by virtue of which she was possessed of the property by her remarriage before the Act does not get the benefit of section 14(1). See the case of *Gummalapura Taggina* v. *Setra Veeravva* reported in AIR 1959 SC 577, *Munnalal* v. *Rajkumar*, AIR 1962 SC 1493, *Munshi Singh* v. *Sohan Bai (Dead)* in AIR 1989 SC 1179, *Kalawatibai* v. *Soiryabai* in AIR 1991 SC 1581, *Naresh Kutnari* v. *Shakshi Lal*, AIR 1999 SC 928 in *Jagannathan Pillai* v. *Kunjithapadam Pillai* in AIR 1987 SC 1493, *Velamuri Venkata Sivaprasad* v. *Kothuri Venkateswarlu* in AIR 2000 SC 434, *Amireddi Rajagopala Rao* v. *Amireddi Sitharamamma* in AIR 1965 SC 1970.

Coming to the fiscal statute, the general presumption is that when a retrospectivity is given to a statute in a whole or in part of the statute it would be generally governed by the normal presumption that it is not

retrospective and it is a cardinal principle of taxation law to be applied is the one which is in force in the assessment year unless otherwise provided expressly by necessary implication. As explained by me, a taxation statute cannot however be called retrospective if the taxes and events which are continuing or not complete when the amendment comes into force. A default which is a continuing default can be dealt with under the provisions of the new Act if it continues when the new Act came into force though it has commenced when the old Act was in force.

A penal statue can be only considered to be prospective in operation as the offence would be taking much prior to the amendment brought in and that would lead to entrenching the civil rights of a party and so the civil obligation of a party and the criminal obligation of the party. Offence may be a civil offence or criminal offence converging the civil offence into criminal offence by a retrospective amendment would violate the civil rights and also enhancing the present period or enhancing the tax rate of penalty with a retrospective legislation would also effect the rights of the human being which would be definitely violative of articles 14, 19, 21 and also article 265 of the Constitution. As per article 20 of the Constitution, to enact retrospective penal laws has no application of law, which only modifies the rigor of an existing penal law. Therefore article 20 of the Constitution of India safeguards and protects the rights of an individual which cannot be taken away by a retrospective legislation.

Coming to the statutes prescribing posterior disqualification and past conduct which would hold to be bad in law when the statute imposes the penalty after commencement of the statute, then certainly retrospectivity would be held invalid as the offence has commenced before the retrospectivity of a statute. See the case law in AIR 1961 SC 307 in the case of *State of Maharashtra* v. *Vishnu Ramchandra*.

Next comes is declarative status and the presumption against retrospective operation is not applicable to declaratory status. Here I would like to rely upon the statement of CRAIES and approved by the Supreme Court "for modern purpose declaratory Act may be defined as a Act to remove debts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing of declaratory Act is to set aside what parliament deems to have been judicial error whether statement of the common law or in the interpretation of statues. Usually, if not invariably such an Act contains preamble and also the word "it is declared as well as the word 'enacted'". The use of the words "it is declared" is not conclusive then the Act is declaratory for these words, may yet times used to introduced new rules of law as

the Act in the later case will only be amending the law and will not necessarily be retrospective.

It is well-settled that if a statue is curative or merely declaratory of the previous law of retrospective operation is generally intended.

In the absence of clear words indicating that the amending Act is declaratory it would not be so construed when the pre-amended provision was clear and unambiguous. An amendment Act may be purely clarificatory and a clear meaning of provision of the principal Act which would already implicit, clarificatory amendment of this nature will have retrospective effective and therefore the principal Act which was existing law then Amending Act also will be the part of the existing law. The judgments of *Keshavlal Jethalal Shah* v. *Mohanlal Bhagwandas* reported in AIR 1968 SC 1336, *K. Govindan and Sons* v. *Commissioner of Income-tax* in [2001] 247 ITR 192 (SC) ; AIR 2001 SC 254, *Birla Cement Works* v. *Central Board of Direct Taxes* reported in AIR 2001 SC 1080 where it was held that mere addition of an *Explanation* by an amending Act in a taxing Act cannot, without more be held to be clarificatory and retrospective. In *Commissioner of Income-tax, Bhopal* v. *Shelly Products* reported in [2003] 261 ITR 367 (SC) ; [2003] 5 SCC 461, it was held that provisos (a) and (b) added in section 240 of the Income-tax Act, 1961 by amending Act which came into force on 01-04-1989 were held to be clarificatory and retrospective. See also *Chennan Singh* v. *Jai Kaur* reported in AIR 1970 SC 349, *Commissioner of Income-tax* v. *Straw Products Ltd., Bhopal* reported in [1966] 60 ITR 156 (SC) ; AIR 1966 SC 1113, *Union of India* v. *S. Muthyam Reddy* reported in [1999] 7 SCC 545, *Punjab Traders* v. *State of Punjab* reported in [1991] 1 SCC 86, *R. Rajagopal Reddy (Dead) by L.Rs* v. *Padmini Chandrasekharan (Dead) by L.Rs* reported in [1995] 213 ITR 340 (SC) ; [1995] 1 Scale 692, *Allied Motors (P.) Ltd.* v. *Commissioner of Income-tax* reported in [1997] 224 ITR 677 (SC) ; AIR 1997 SC 1361. So any amendment unless it has the nature of a clarification cannot be construed as valid when it is given retrospective amendment and any retrospectivity cannot be held to be valid if it is not in the nature of a clarification, or giving a meaning by interpreting the section.

Coming to the statutes dealing with the appeal it has been held that the right of entering a superior court and invoking its aid and interposition to redress an error of the court below and though procedure does scored an appeal the central idea is the right this has been held by the Full Bench of Nagpur High Court led by Mohammad Hidayatullah as his Lordships was sitting.

The right of appeal has been recognized as a right which vests in the party who is initiating the original proceedings. Any charge in law after initiation of law would be held to be not applicable to the appeal and law

should be declared as prospective in operation only. For example an amendment has been brought by the Andhra Pradesh Government in the Sales Tax Act in 2001, i. e., November 30, 2001 whereby the appeal has to be filed by paying 12.5 per cent. or 25 per cent. or 50 per cent. when filed before the Tribunal such Act was held to be prospective only and should confine the law to be applicable for the appeals that would be filed from the year 2004 onwards.

But an amendment was also brought in 1995 to the appeals to be filed within 30 days and further period of 30 days to be condoned by the appellate authority and 60 days further period of 60 days if the appeal has to be filed before the Tribunal and such amendment was held to be retrospective in operation, means the appeals though they belong to the previous years, the amendment that was brought in the year 1995 would be applicable, if the appeal is filed in or after 1995.

Therefore retrospective operation in the case of appeals has to be strictly and stringently followed.

Now coming to the recent amendment that was brought by the Union of India to the GST Act by amending retrospectively section 140 read with section 148 because of the Delhi High Court decision in the case of *Reliance Elektrik Works* v. *Union of India* [2020] 77 GSTR 390 (Delhi) where Delhi High Court has said that the time-limit of three years as per the Limitation Act was applicable to claim the benefit of transitional relief and the time-limit would be applicable till 30th June 2020 as the section of the statute dealing with the transitional credit does not specify any time-limit but it is only the rule 117 that prescribes the time-limit which is extended from time to time.

According to me with great respect to the Union as also to the Delhi High Court, the section need not be amended when once in the Act the word prescribed is defined and to be referred by the rules, etc., the rule 117 prescribing the time-limit for filing the Tran-1 which was subsequently extended of various reasons of technical glitches, there is no requirement for any amendment to the statute or the section with great respect to the judgment of the Delhi High Court, article 300A cannot be made applicable or imposed into the fiscal statute which prescribes that the applicability of civil laws are ousted, cannot be made applicable and in my considered opinion the Union ought not to have amended section 140 giving a retrospectivity and the Delhi High Court with great respect should not have declared that article 300A which is a civil right has an application for the reason that giving input-tax credit is the sole right of the Union or the State and it is only the mercy of the Union or the State to give the input-tax credit.