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ETHICS EDUCATION EXCELLENCE

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All India Federation of Tax Practitioners
215, Rewa Chambers, 31, New Marine Lines, Mumbai-400 020 Tel.: 22006342/49706343
Fax : 22006343 | E-mail : aiftpho@gmail.com | Website : aiftponline.com

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CHIEF-EDITOR'S COMMUNIQUE

The discussion amongst the Professionals and the Business community is now revolving around the health of economy. The MSME Sector and the retailers etc. are suffering from shortage of fund, compliance issues under various Acts, toufging of Bank loans etc. The sales are going down and every body is looking what to do. The tax professionals have a big role at this stage to play. They have to explain the issues relating to compliances of GST, ROC, Income Tax and other relevant Acts. If we see than all the regulating Acts have taken a stringent view in relation to the methodology. The issues relating to RERA, FSSAI, Labour Laws etc. have to be seen in this context. All these Acts have a very huge effect on the working of the middle income group segment.

We are also seen that the complications in filing of return whether it is of GST, Income Tax etc. are more and the network or the server is not supporting. Either the clarifications are not coming from the Government in time or there is ambiguity in the provisions and the same is not clarified. The Professionals are seeing that most of there time is wasted at the computer and some times without any productivity. With the last dates of GST and Income Tax coming soon it is a nightmare for the Professionals now and we expect from the government that clarity on legal and technical issues should be issued very fast and the server working should be improved.

This issue of the Journal is covering more of the recent GST Judgments pronounced by various courts. The law is new and with the judgments from the court the issues are likely to be settled.

We again request all Professionals to subscribe this Journal and to send their Articles and judgments for publication.

Regards,
PANKAJ GHIYA
Chief Editor & Vice-President (CZ)
9829013626

ALL INDIA FEDERATION OF TAX PRACTIONERS
215, Rewa Chambers, 31, New Marine Lines, Mumbai-400 020
E-mail: aiftp@vsnl.com
Website: www.aiftponline.org

Membership of All India Federation of Tax Practitionersas on 16th, August - 2019

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Zone	Associate	Individual	Association	Corporate	Total
Central	0	1059	25	0	**1084**
Eastern	6	1620	36	0	**1662**
Northern	0	1218	18	1	**1237**
Southern	1	1312	19	4	**1336**
Western	5	2393	37	6	**2441**
Total	**12**	**7602**	**135**	**11**	**7760**

PRESIDENT'S COMMUNIQUE

Dear Friends,

The Government has announced various majors to boost the economy. It is an open secret that the economy is under pressure and pro active action from the government is needed. The government have accordingly acted as per the announcement made had issued various directions and proposed amendments. The major relief has been given corporates where for the CSR violation the criminal offence as proposed has been replaced with Civil liability. Further under the Income Tax to address the complaints of harassment it has been decided that w.e.f. 1st October, 2019 all notices, summons, orders etc. by the Income Tax authorities shall be issued through a central system and will contain documents identification number. The surcharge on long term / short term capital gains has been withdrawn. Further the provision of the Income tax Act regarding angel tax has been withdrawn for the startups and there investors. Extra credit support has been announced for NBFC / HFC and other facilities regarding Aadhar verification etc. has been provided for them. Other majors has also been introduced. GST refunds will be issued within a time bound period and pending refunds would be issued within 30 days. Additional depreciation of 15% on vehicles purchased within stipulated period has been provided. The measures announced by the government are welcome and was much needed.

The AIFTP International Tour to Eastern Europe will depart on 27th August, 2019 with around 135 delegates. The other programmes of AIFTP are scheduled including NEC at Varanasi in November and the National Convention at Mumbai in December. Representations on Direct Tax and Indirect Tax has been submitted on the various issues as informed by the Members.

Wish you all the best.

DR. ASHOK SARAF
National President, AIFTP
9435009811
drashoksaraf@gmail.com
23.05.2019

RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

Adv. Deepak Garg, Jaipur

NOTIFICATIONS - CENTRAL TAX

DATE	NOTIFICATION NO.	REMARKS
29.07.2019	35/2019-CENTRAL TAX	Seeks to extend the last date for furnishing FORM GST CMP-08 for the quarter April - June 2019 till 31.08.2019
20.08.2019	36/2019-CENTRAL TAX	Seeks to extend the date from which the facility of blocking and unblocking of e-way bill facility as per the provision of Rule 138E of CGST Rules, 2017 shall be brought into force to 21.11.2019.

NOTIFICATIONS - CENTRAL TAX (RATE)

DATE	NOTIFICATION NO.	REMARKS
31.07.2019	12/2019-CENTRAL TAX (RATE)	Seeks to reduce the GST rate on Electric Vehicles, and charger or charging stations for Electric vehicles.
31.07.2019	13/2019-CENTRAL TAX (RATE)	Seeks to exempt the hiring of Electric buses by local authorities from GST.

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TIMELINE - GST

Adv. Abhay Singla
Sangaria (Hanumangarh)

A. GOODS & SERVICE TAX

Sr. No.	Particulars	Form	Period	Due Date
(i)	Monthly Summery GST Return	GSTR-3B		
	(a) Regular Taxpayers		August, 2019	20th Sep 2019
			September, 2019	20th Oct 2019
(ii)	Detail of Outward Supplies: -	GSTR-1		
	(a) Taxpayers with annual aggregate turnover up to Rs. 1.5 Cr.		July to Sep 2019	31st Oct 2019
	(b) Taxpayers with annual aggregate turnover more than Rs. 1.5 Cr.		August, 2019	10th Sep 2019
			September, 2019	10th Oct 2019
(iii)	Quarterly return for Composite taxable persons	CMP-08	April to June 2019	31st August 2019
(iv)	Return for Non-resident taxable person	GSTR-5	Non-resident taxpayers have to file GSTR-5 by 20th of next month.	
(v)	Details of supplies of OIDAR Services by a person located outside India to Non-taxable person in India	GSTR-5A	Those non-resident taxpayers who provide OIDAR services have to file GSTR-5A by 20th of next month.	

(vi)	Details of ITC received by an Input Service Distributor and distribution of ITC.	GSTR-6	The input service distributors have to file GSTR-6 by 13th of next month.	
(vii)	Return to be filed by the persons who are required to deduct TDS (Tax deducted at source) under GST.	GSTR-7	July 2019	31st Aug 2019
			August 2019	10th Sep 2019
(viii)	Return to be filed by the e-commerce operators who are required to deduct TCS (Tax collected at source) under GST	GSTR-8	August 2019	10th Sep 2019
			September 2019	10th Oct 2019
(ix)	Details of inputs/capital goods sent for job-work. Quarterly Form	GST ITC-04	July 2017 to June 2019	31st Aug 2019
(x)	Annual GST return and GST Audit	GSTR-9/9A/9C	FY 2017-18	31st Aug 2019

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COMPULSORY LICENSING UNDER THE INDIAN PATENT ACT

Dileep Shivpuri
Advocate

Intellectual Property Rights are, as the phrase suggests, claims that arise out of property created as a result of application of human intellect. They are intangible rights, that is, they do not have a form, cannot be felt or touched. These Intellectual Property rights, or IPRs, as they are popularly called, are meant to protect the interest of the creators by providing them property rights over their creations. Once granted, they allow the creator of the intellectual property to exclude others from exploiting them commercially for a given period of time.

IPRs are of many types, one of which is a patent. A patent is a statutory right granted to an inventor for a novel, non-obvious invention having practical utility, for a limited period of time. The patent system deals with protection of products or processes and bestows rights on the inventor as a reward for the labour he has put in.

Normally, a patent holder is allowed free reign to exploit his creation for the period of time specified. But there is one restriction put in by the Indian Patent Act, 1970 to this free reign, whose existence needs to be explained. This is known as 'compulsory licensing' and is explained in Section 84 of the Indian Patent Act, in the following language:

***"84. Compulsory licenses** – (1) At any time after the expiration of three years from the date of grant of patent , any person interested may make an application to the Controller for grant of compulsory license on patent on any of the following grounds, namely: -*

(a) That the reasonable requirements of the public with respect to the patented invention have not been satisfied, or

(b) That the patented invention is not available to the public at a reasonably affordable price, or

(c) That the patented invention is not worked in the territory of India.

(2) An application under this section may be made by any person notwithstanding that he is already the holder of a license under the patent and no person shall be estopped from alleging that the reasonable requirements of the public with respect to the patented invention are not satisfied or that the patented invention is not working in the territory of India or that the patented invention is not available to the public at a reasonably affordable price by reason of any admission made by him,

whether in such license or otherwise or by reason of his having accepted such a license.

(3) Every application under sub-section (1) shall contain a statement setting out the nature of the applicant's interest together with such particulars as may be prescribed and the facts upon which the application is based.

(4) The Controller, if satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not worked in the territory of India or that the patented invention is not available to the public at a reasonably affordable price, may grant a licence upon such terms as he may deem fit.

(5) Where a Controller directs the patentee to grant a licence he may, as incidental thereto, exercise the powers set out in Section 88.

(6) In considering the application field under this section, the Controller shall take into account, -

(i) the nature of the invention, the time which has elapsed since the sealing of the patent and the measures already taken by the patentee or any licensee to make full use of the invention;

(ii) the ability of the applicant to work the invention to the public advantage;

(iii) the capacity of the applicant to undertake the risk in providing capital and working the invention, if the application were granted;

(iv) as to whether the applicant has made efforts to obtain a licence from the patentee on reasonable terms and conditions and such efforts have not been successful within a reasonable period as the Controller may deem fit:

Provided that this clause shall not be applicable in case of national emergency or other circumstances of extreme urgency or in case of public non-commercial use or on establishment of a ground of anticompetitive practices adopted by the patentee,

But shall not be required to take into account matters subsequent to the making of the application.

***Explanation** – For the purpose of clause (iv), "reasonable period" shall be construed as a period not ordinarily exceeding a period of six months.*

(7) For the purposes of this chapter, the reasonable requirements of the public shall be deemed not to have been satisfied –

(a) if, by reason of the refusal of the patentee to grant licence or licences on reasonable terms, -

(i) an existing trade or industry or the development thereof or the establishment of any new trade or industry in India or the trade or industry of any person or class of persons trading or manufacturing in India is prejudiced; or

(ii) the demand for the patented article has not been met to an adequate extent or on reasonable terms; or

(iii) a market for export of the patented article manufactured in India is not being supplied or developed; or

(iv) the establishment or development of commercial activities in India is prejudiced; or

(b) if, by reason of conditions imposed by the patentee upon the grant of licences under the patent or upon the purchase, hire or use of the patented article or process, the manufacture, use or sale of materials not protected by the patent, or the establishment or development of any trade or industry in India, is prejudiced; or

(c) if the patentee imposes a condition upon the grant of licences under the patent to provide exclusive grant back, prevention to challenges to the validity of patent or coercive package licensing; or

(d) If the patented invention is not being worked in the territory of India on a commercial scale to an adequate extent or is not being worked to the fullest extent that is reasonably practicable; or

(e) if the working of the patented invention in the territory of India on a commercial scale is being prevented or hindered by the importation from abroad of the patented article by –

(i) the patentee or persons claiming under him or

(ii) persons directly or indirectly purchasing from him; or

(iii) other persons against whom the patentee is not taking or has not taken proceedings for infringement.

Section 85 of the Patent Act gives powers to the Controller to revoke the compulsory license in case the grantee of the license is also unable to work the license subject to the conditions already mentioned in sub-section (1) above.

It is plain that the language of Section 84 lays down the conditions under which a compulsory license may be granted, and to whom. The three conditions specified in sub-section (1) are:

(i) That the reasonable requirement of the public are not being met;

(ii) That the patented invention is not available to the public at a reasonably affordable price, or

(iii) That the patented invention is not being worked in the territory of India.

To understand these 3 conditions which have been stipulated as reasons for departure from the basic ethos of a patent, it is necessary to know the background facts because of which the powers of compulsory licensing came to be embedded in the Patent Act of India.

There are certain drugs manufactured by big pharmaceutical companies which are essential for the control of diseases that occur as pandemics, affecting a whole nation or a whole continent. HIV AIDS is one such disease that affected large swathes of population in the African continent. It was found that the fight to combat AIDS was being seriously hampered because the drug against it was very costly. Since the countries worst-affected were poor countries, neither their Government nor the people could afford to buy these drugs. There was a real threat to the whole global population. Similarly, cancer-controlling drugs are also prohibitively expensive, taking them out of reach of the poor and the underprivileged.

It was in these circumstances that the concept of compulsory licensing was incorporated in TRIPS or Trade Related Aspects of Intellectual Property Rights Agreement, an Agreement that is managed by WTO, or the World Trade Organisation. Taking cue from TRIPS, a host of countries introduced the concept of compulsory licensing in their Patent regime.

Compulsory licensing is now an important part of the Indian Patent regime also. Introduced by the Indian Patents (Amendment) Act, 2002, Section 84 lays down detailed conditions and procedure before a compulsory license is granted.

Of course, pharmaceutical companies, with their financial and political muscle, have been exerting tremendous pressure on the Government of India to do away with this provision, which, they say, is against the spirit of free-trade espoused by the WTO. Some years back, to stave off the pressure for the time-being, the Government of India formed a group to study the provision in all its entirety, and report back. But, be as it may, Section 84 still remains on the statute book.

The first case of compulsory licensing in India was when Natco's application for a compulsory license for Nexavar was filed before the Controller General of Patents in 2011, under section 84(1) of the Indian Patents Act. Chemically known as 'SorafenibTsylate', the drug Nexavar is used for the treatment of advanced stage liver and kidney cancer. By stopping the growth of new blood vessels and impacting other cellular growth mechanisms, the drug can extend the life of a patient, the duration being 6 months to 5 years.

In a judgment delivered on March 09, 2012, the Controller granted license to Natco, against which Bayer, the manufacturer of Nexavar, filed an appeal before IPAB (Intellectual Property Appellate Board). Even though the IPAB's decision was largely the same as that of the Controller, they differed slightly on some aspects. The Board decided as follows:

1. IPAB dismissed Bayer's contention that they had not been heard or given notice before arriving at a *prima facie* determination under Section 87(1) of the Act.

2. They disagreed with Bayer's contention that Natco had not made reasonable efforts to negotiate the terms of a potential license, as per Section 84(6) (iv) of the Act;
3. On Natco's failure to file evidence for its claim, the IPAB opined that there was no such specific requirement;
4. They concluded that the sales of Nexavar made by CIPLA could not be included in the sales made by Bayer for the purpose of finding whether the drug was meeting the 'reasonable requirement of the public'. CIPLA was selling the drug at a much lower price of Rs. 30,000/- per month, compared to Bayer's Rs. 2,80,428/ per month.
5. They reiterated that the patent holder's position was irrelevant in the consideration of compulsory licenses, and the affordability of the patented product for the public was the sole factor in the determination of a compulsory license application.
6. They refused to accept Bayer's plea, on the issue of the 'working' of the drug in Indian Territory that it was not feasible to manufacture the drug in India and that importation was the only option. This part of the ruling is important firstly, because it imposes an evidentiary burden on the patentee to prove that it cannot meet the requirement of section 84(1) by local manufacture, Secondly, it demonstrates how the IPAB cleverly avoided a potential challenge at the WTO for violation of Article 27.1 of TRIPS by stating that compulsory licensing does not destroy the use of a patent, it is only an intermediary step, taken only for a limited period of time, and thirdly, it contradicted its own stance by conceding that in certain cases patents may be granted purely for import purposes.

The decision in Natco v. Bayer (Bayer Corporation v. NatcoPharma Ltd., Order No. 45/2013, Intellectual Property Appellate Board, Chennai) will serve to encourage other manufacturers to apply for compulsory licenses, leading, perhaps, to increase in number of applications. In turn, it will lead to increased competition in the pharma industry and lead to lowering of drug prices, thereby providing some respite in the form of cheaper access to essential medicines. More importantly, it may lead, in the long run, to less application for compulsory licenses since pharma industry may become more open to permit voluntary licensing.

As stated before, the issue of compulsory licensing runs counters to the generally accepted norm enshrined in TRIPS that "*patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced."* This power granted to the Government has, therefore, to be justified on the altar of greater public good. This is a measure by which public health and safety has been given more importance than profitability.

The decision in Natco v. Bayer is, therefore, one more case caught in the contrasting views held bypharma companies on the one side, and Government of developing countries on the other. Pharmacompanies, supported by Governments of developed countries, demand increased patent protection within the confines of IPR regimes. Their stand is that they put a lot of effort and money into R&D (Research & Development), and it because of their effort that new medicines come into the market. The cost they charge for a new life-saving drug factors in the time, effort and money pumped into research for that drug. It is for this reason that a new life-saving drug is costly. As time passes, its cost reduces.

Thus, their argument is that if these drugs are sold at a much cheaper rate by competitors who have not spent money in the R&D of that drug, it would disincentivise R&D effort and stifle innovation, which, in turn, may lead to lesser and lesser new drugs , and patents, in the market. This may not be in the best interests of patients all over the world.

They also argue that compulsory licensing is a barrier to free trade, which is driven by demand and supply, and if Governments keep interfering in the flow of free trade, the repercussions can be huge.

On the other hand is the argument of Governments of developing countries that compulsory licensing is an important tool in their hands to ensure greater access of their population to essential medicines. They argue that low incomes and poor infrastructure, coupled with inadequate delivery system makes it very difficult for Governments to provide essential medicines at affordable prices in large quantities to their populace.

Both the arguments having some worth, depending on which side one is on, the tool of compulsory licensing will have to be used sparingly, and only in a situation which is alarming. However, the case of Nitco v. Bayer has come as a shot in the arm for not only the Government of India but governments of other developing countries, like Thailand, Brazil, and Ecuador etc. who are keen to use this tool for providing life-saving medicines at affordable rates to their citizens.

Note:

DileepShivpuri is a retired Chief Commissioner of Income-Tax presently working as an Independent Lawyer, mostly before the Delhi and Rajasthan High Court. He has done a Diploma Course in IPR Law from National Law School of India University, Bangaluru and LL.M. in International Trade Law & WTO from National Law School, Jodhpur.

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GST IMPLICATIONS ON EDUCATIONAL SECTOR SERVICES

S Venkataramani, Chartered Accountant, Bangalore
Siddeshwar Yelamali, Chartered Accountant, Bangalore

I. Background

The educational service sector had its own set of litigations on applicability of tax under the erstwhile Sales Tax Laws and State Value Added Tax laws (for brevity, 'State Tax'). There were demands of tax in respect of supply of food to the students. Courts in catena of cases held that the supply of food to students is not liable to State Tax [Indian Institute of Technology, Kalyanpur, Kanpur vs State of Uttar Pradesh [1976] 38 STC 428 (All); Swadeshi Cotton Mills Company Limited vs Sales Tax Officer [1964] 15 STC 505 (All); Scholors Home Senior Secondary School vs State of Uttarakhand and another reported in 42 VST 530; Gowtham Residential Junior College vs Commercial Tax Officer, Benz Circle, Vijaywada [2009] 19 VST 305 (AP)].

In the case of Manipal University 2014 (7) TMI 72 - Karnataka High Court, the Hon'ble Karnataka High Court held that prospectus of the University cannot be treated as "book" or "book meant for reading". It is a printed document which could be called a brochure or a catalogue or a printed document detailing the courses, facilities etc. of their colleges. In any case, it cannot be treated as a book meant for reading as is known in common parlance. The prospectus of the University cannot be treated even as periodical or journal. Sale of prospectus and application forms would fall under Entry 71 of the Third Schedule and thus taxable.

The erstwhile service tax law provided certain exemption to educational sector vide Notification No. 25/2012-Service Tax dated 20.06.2012.

The applicability of Goods and Services Tax (for brevity, 'GST') law to educational sector needs a careful reading of the exemption notification, since the exemption notification uses the words 'service provided by' and 'service provided to'. In this article an attempt is made to understand the applicability of tax on outward supplies under the Central Goods and Services Tax Act, 2017 (for brevity, "CGST Act") on certain services provided by educational institution.

II. Central Goods and Services Tax Act, 2017

A. Exemptions

1. Meaning of certain terms provided in Notification 12/2017 Central Tax (Rate) dated 28.06.2017 which are relevant in this context are given below
   a. **Educational institution** means an institution providing services by way of -
      i. pre-school education and education up to higher secondary school or equivalent;
      ii. education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force;
      iii. Education as a part of an approved vocational education course.
   b. **Approved vocational education course** means -
      i. A course run by an industrial training institute or an industrial training centre affiliated to the National Council for Vocational Training or State Council for Vocational Training offering courses in designated trades notified under the Apprentices Act, 1961 (52 of 1961); or
      ii. A Modular Employable Skill Course, approved by the National Council of Vocational Training, run by a person registered with the Directorate General of Training, Ministry of Skill Development and Entrepreneurship
   c. Central and State Educational Boards shall be treated as Educational Institution for the limited purpose of providing services by way of conduct of examination to the students

2. The following services provided ***by an*** educational institution is exempt (reference Sl. No. 66 of Notification 12/2017 Central Tax (Rate) dated 28.06.2017)

   a. Following services provided to its students, faculty and staff
      - Pre-school education and education up to higher secondary school or equivalent
      - Education as a part of a curriculum for obtaining a qualification recognised ***by any law*** for the time being in force. Thus, it means that it is not necessary that it should be recognised by Government; as long as the qualification is recognised under any law, the same is covered under exemption. Further, as per the paper writers view, as the words used in the notification is 'by any law for time being in force', qualification as a part of curriculum recognised by law of a Country outside India will also qualify for exemption.
      - Education as a part of an approved vocational education course. Vocational education course means course as defined in paragraph A 1 (b) supra.

   b. By way of conduct of entrance examination against consideration in the form of entrance fee

3. The following services provided ***to an*** educational institution is exempt (reference Sl. No. 66 of Notification 12/2017 Central Tax (Rate) dated 28.06.2017)
   a. Following service **provided only** to educational institution being pre-school education and education up to higher secondary school or equivalent is exempt
      - Transportation of students, faculty and staff;
      - Catering, including any mid-day meals scheme sponsored by the Central Government, State Government or Union territory;
      - Security services
      - Cleaning services;
      - House-keeping services

      Thus, if the above services are provided to educational institution ***not being*** pre-school education and education up to higher secondary school or equivalent, the service provider is required charge the tax at the rates applicable to the respective service.
   b. Services relating to admission to education institution.
   c. Services relating to conducting examination by education institution.
      - In the case of **Edutest Solutions Private Limited 2018 (10) TMI 201 - Authority For Advance Ruling, Gujarat** it has been held that the expression 'relating to' used in sub-item (iv) of item (b) of Sr. No. 66 of Notification No. 12/2017-Central Tax (Rate) widens the scope of the said entry and printing of question papers would be covered by the phrase 'services relating to admission to, or conduct of examination by, such institution'. Therefore, service provided to educational institutions by way of printing of question papers for conduct of examination by such institutions would be covered by Sr. No. 66 of Notification No. 12/2012-Central Tax (Rate), as amended and Notification No. 12/2012-State Tax (Rate) and thus exempt.
      - In the case of **KL HI-TECH Secure Print Ltd 2018 (10) TMI 445 - Authority For Advance Ruling, Hyderabad Telangana** it has been held that (i) Printing of Pre-examination items like question papers, OMR sheets (Optical Mark Reading), answer booklets etc; (ii) Printing of Post-examination items like marks card, grade card, certificates to the educational boards upto higher secondary (iii) Scanning and processing of results of examinations are services to 'educational institutions' for conducting of examinations and thus eligible for exemption under entry No.66 of Notification No. 12/2017- Central Tax (Rate) dt. 28.6.2017.
   d. Supply of online educational journals or periodicals to education institution. However, there is **no exemption** is provided to supply of online educational

journals or periodicals to (i) pre-school education and education up to higher secondary school or equivalent (ii) education as a part of an approved vocational education course

B. Taxability

1. **Private coaching classes:** Services provided by private coaching classes would not get covered under the Notification 12/2017 Central Tax (Rate) dated 28.06.2017. The same will be liable to tax at 18% (9% CGST + 9% SGST or 18% IGST) as the case maybe) under HSN 9992.

   In the case of **Simple Rajendra Shukla 2018 (5) TMI 648 - Authority For Advance Ruling – Maharashtra** held that activity of preparing students for entrance exams related to MBBS, Engineering and other science related examinations is not covered under the definition of educational institution. The private institute does not have any specific curriculum and does not conduct any examination or award any qualification recognized by any law which would be covered in the above notification. The activity of applicant is not covered by the specific definition provided for interpretation of exemption notification. The education service provided in the case is taxable at the rate of 9 % under CGST ACT and 9 % SGST Act.

2. **Supply of food in canteens of schools / colleges:** Supply of food in canteens if schools / colleges is liable to tax at 5% (2.5% CGST + 2.5% SGST) under HSN 9963. Further, input tax credit goods and services used in supplying the service is not allowed to be claimed.

   In the case of **Prism Hospitality Services (P) Ltd. 2018 (12) TMI 1088 - Authority For Advance Ruling, Hyderabad Telangana** held that the activity of supply of food in canteens of office, factory, hospital, college, industrial unit etc. on contractual basis excepting that supply is not event based or on specific occasions, constitute supply of service in terms of amended Notification No.13/2018-Central Tax(Rate) dt.26.7.18 and is taxable at the rate of 2.5% CGST + 2.5% SGST and the supplier is not eligible for the input tax credit as per the condition stipulated therein.

3. **Premise provided on rent by hospital for non-residential purpose viz canteen / parking:** Premise provided on rent for non-residential purpose is liable to tax at 18% (9% CGST + 9% SGST) under HSN 9972.

4. **Hostel fee to students:** Accommodation service in hostels including by Trusts having declared tariff below one thousand rupees per day is exempt - Circular No.

32/06/2018-GST dated 12.02.2018. The Maharashtra Authority for Advance Ruling in the case of **Students Welfare Association 2019 (3) TMI 1473** held that accommodation service in hostels including by Trusts having declared tariff below one thousand rupees per day is exempt.

Sl. No. 14 of Notification No. 12/2017- Central Tax (Rate) dated 28.06.2018 exemption to services by a hotel, inn, guest house, club or campsite, ***by whatever name*** called, for residential or lodging purposes, having value of supply of a unit of accommodation below Rs. 1,000/- per day or equivalent.

Therefore, if the value of supply of hostel rent is more than Rs. 1,000/- per day, then the same would be taxable in terms of Sl. No. 7 of Notification No. 11/2017- Central Tax (Rate) dated 28.06.2018 as under:

Description	GST Rate
Accommodation in hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having value of supply of a unit of accommodation of Rs. 1,000/- and above but less than Rs.2,500/- per unit per day or equivalent.	CGST 6% + SGST 6%
Accommodation in hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having value of supply of a unit of accommodation of Rs.2,500/- and above but less than Rs.7,500/- per unit per day or equivalent.	CGST 9% + SGST 9%
Accommodation in hotels including five star hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having value of supply of a unit of accommodation of Rs.7,500/- and above per unit per day or equivalent.	CGST 14% + SGST14%

An attempt has been made in this article to make a reader understand the outwards supplies impact for educational sector under the GST law. This article is written with a view to incite the thoughts of a reader who could have different views of interpretation. Disparity in views would only result in better understanding of the underlying principles of law and lead to a healthy debate or discussion. The views written in this article is as on August 11, 2019

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CONCEPT OF PURE AGENT UNDER GST

S.S.Satyanarayana,
Tax Practitioner, Hyderabad

A 'pure agent' is a person who liaises between his client (Principal) and another person. Under this concept, while providing services to the client, he also undertakes to receive other services from other service providers, and incurs expenditure on behalf of his client. The actual expenditure incurred by a pure agent is later claimed as reimbursement. In other words, over and above the value of services rendered to his client, any other expenditure incurred by a pure agent (on behalf of his client) will be a reimbursement and is not considered as part of the value of services provided by him for the payment of tax.

1. Service Tax regime :

The concept of pure agent was first introduced in the erstwhile Service Tax regime. The concept as defined under Service Tax (Determination of Value) Rules, 2006 is as under:

Rule 5(2) : Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely:-

i. the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured

ii. the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;

iii. the recipient of service is liable to make payment to the third party;

iv. the recipient of service authorises the service provider to make payment on his behalf;

v. the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;

vi. the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;

vii. the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and

viii. the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

Explanation1.–For the purposes of sub- rule (2), "pure agent" means a person who–

(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;

(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;

(c) does not use such goods or services so procured; and

(d) receives only the actual amount incurred to procure such goods or services

2. GST regime :

Identical provisions were brought into the GST regime also:

Section 2(5) of the CGST Act, 2017 defines the expression "agent" as under :

"agent" means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;

The expression "supplier" has been defined under Section 2(105) of the CGST Act, 2017 reads as follows:

"supplier" in relation to any goods or services or both, shall mean the person supplying the said goods or services or both and shall include an agent acting as such on behalf of such supplier in relation to the goods or services or both supplied;

The value of taxable supply by the pure agent is as per the Rule 33 of the CGST Rules, 2017, which reads as under:

Value of supply of service in case of pure agent:

Notwithstanding anything contained in the provisions of this Chapter, the expenditure or costs incurred by a supplier as a pure agent of the recipient of supply shall be excluded from the value of supply, if all the following conditions are satisfied, namely.-

(i) the supplier acts as a pure agent of the recipient of the supply, when he makes the payment to the third party on authorisation by such recipient;

(ii) the payment made by the pure agent on behalf of the recipient of supply has been separately indicated in the invoice issued by the pure agent to the recipient of service; and

(iii) the supplies procured by the pure agent from the third party as a pure agent of the recipient of supply are in addition to the services he supplies on his own account.

Explanation - For the purposes of this rule, the expression "pure agent" means a person who-

(a) enters into a contractual agreement with the recipient of supply to act as his pure agent to incur expenditure or costs in the course of supply of goods or services or both;

(b) neither intends to hold nor holds any title to the goods or services or both so procured or supplied as pure agent of the recipient of supply;

(c) does not use for his own interest such goods or services so procured; and

(d) receives only the actual amount incurred to procure such goods or services in addition to the amount received for supply he provides on his own account.

Illustration- Corporate services firm A is engaged to handle the legal work pertaining to the incorporation of Company B. Other than its service fees, A also recovers from B, registration fee and approval fee for the name of the company paid to the Registrar of Companies. The fees charged by the Registrar of Companies for the registration and approval of the name are compulsorily levied on B. A is merely acting as a pure agent in the payment of those fees. Therefore, A's recovery of such expenses is a disbursement and not part of the value of supply made by A to B.

3. Further, the concept of pure agent has been explained in Chapter 26 of GST flyers released by CBIC. Relevant extracts are as under :

The GST Act defines an Agent as a person including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other

mercantile agent, by whatever name caned, who carries on the business of supply or receipt of goods or services or both on behalf of another.
Broadly speaking, a pure agent is one who while making a supply to the recipient, also receives and incurs expenditure on some other supply on behalf of the recipient and claims reimbursement (as actual, without adding it to the value of his own supply) for such supplies from the recipient of the main supply. While the relationship between them (provider of service and recipient of service) in respect of the main service is on a principal to principal basis, the relationship between them in respect of other ancillary services is that of a pure agent.
Let's understand the concept by taking an example. A is an importer and B is a Custom Broker. "A" approaches B for customs clearance work in respect of an import consignment. The clearance of import consignment and delivery of the consignment to A would also require taking service of c transporter. So, A, also authorises B, to incur expenditure on his behalf for procuring the services of a transporter and agrees to reimburse B for the transportation cost at actuals. In the given illustration, B is providing Customs Brokers service to A, which would be on a principal to principal basis. The ancillary service of transportation is procured by B on behalf of A as a pure agent and expenses incurred by B on transportation should not form port of value of Customs Broker service provided by B to A. This, in sum and substance is the relevance of the pure agent concept in GST.

The important thing to note is that a pure agent does not use the goods or services so procured for his own interest and this fact has to be determined from the terms of the contract. In the illustration of importer and Customs Broker given above, assuming that the Contract was for clearance of goods and delivery to the importer at the price agreed upon in the contract. In such case, the Customs Broker would be using the transport service for his own Interest (as the agreement requires him to deliver the goods at the importers place) and thus would not be considered as a pure agent for the services of transport procured.
Another important fact is that, the person who provides any service as a pure agent receives only the actual amount for the services provided. Coming back to our example of importer and Customs Broker, the agreement provides reimbursement of transport services utilised at actuals. In this case, let's say the value of transport service was ₹ 10,000/-, if the Customs Broker charges any amount more than ₹ 10,000/-, then he will not be considered as a pure agent for

the services of transport and the value of transport service will be included in the value of his Customs Broker service.

EXCLUSION FROM VALUE

The supplier would have to satisfy the following conditions (in addition to the condition required to be satisfied to be considered as a pure agent) for exclusion from value:-

> *i. the supplier acts as a pure agent of the recipient of the supply, when he makes payment to the third party on authorization by such recipient;*
> *ii. the payment made by the pure agent on behalf of the recipient of supply has been separately indicated in the invoice issued by the pure agent to the recipient of service; and*
> *iii. the supplies procured by the pure agent from the third party as a pure agent of the recipient of supply are in addition to the services he supplies on his own account.*

In case the conditions are not satisfied, such expenditure incurred shall be included in the value of supply under GST.
The following illustration will make the concept clearer:

- *Corporate services firm A is engaged to handle the legal work pertaining to the incorporation of Company B.*
- *Other than its service fees, A also recovers from B, registration fee and approval fee for the name of the company paid to Registrar of the Companies.*
- *The fees charged by the Registrar of the companies, registration and approval of the name are compulsorily levied on B.*
- *A is merely acting as a pure agent in the payment of those fees.*
- *Therefore, A's recovery of such expenses is a reimbursement and not part of the value of supply made by A to B.*

Some examples of pure agent are:

> *1. Port fees, Port charges, Custom duty, dock dues, transport charges etc. paid by Customs Broker on behalf of owner of goods.*
> *2. Expenses incurred by C & F agent and reimbursed by principal such as freight, godown charges*

Illustration:
Suppose a Customs Broker issues on invoice for reimbursement of a few expenses and for consideration towards agency service rendered to an importer. The amounts charged by the Customs Broker are as below:

S.No.	Component Charged in Invoice	Amount
1	Agency Income	₹ 10,000
2	Travelling expenses; Hotel expenses	₹ 15,000
3	Customs Duty	₹ 55,000
4	Docks Dues	₹ 5,000

In the above situation, agency income and travelling/ hotel expenses shall be added for determining the value of supply by the Customs Broker whereas Docks dues and the Customs Duty Shall not be added to the value provided the conditions of pure agent are satisfied.

4. Advance Rulings :

i. In the Advance Ruling issued by the AAR, West Bengal in the case of **Premier Vigilance & Security (P.) Ltd., reported in [2018] 99 taxmann.com 79 (AAR-WEST BENGAL),** the Authority held that security service provider paid toll charges so that his vehicles could access roads to provide security services to its client-banks, such charges were cost of service provided to banks and reimbursement of said charges from bank could not be excluded from value of supply and GST would be payable at applicable rate on entire value of supply, including toll charges paid.

ii. In another Advance Ruling issued by AAR, Maharashtra in the case of **E-Square Leisure (P.) Ltd., reported in [2019] 104 taxmann.com 258 (AAR - MAHARASHTRA),** the Authority held that GST has to be charged by lessor on electricity and water charges collected from lessee on actual basis is in addition to rent and forms a part of 'composite supply'.

The Authority observed that renting of 'theatre' is the main supply and supply of utilities such as electricity, water supply, fuel, etc. is in the nature of

ancillary supply. All these utilities are interdependent and if one of them is removed then the nature of supply would be affected. Further, from the terms of the agreement, no such authorization has been obtained by the applicant from the recipient of services to act as a 'pure agent' for amount collected on supply of such utilities. Therefore, the Applicant is not a pure agent and amount collected for such utilities cannot be excluded from the value of supply.

iii. **In another Advance Ruling issued by AAR, Maharashtra in the case of DRS Marine Services P Ltd., reported in 2018 (12) TMI 893, the Authority held that the reimbursements received by the applicant towards the** salary paid to Crews of Ships on behalf of his foreign client, is acting as 'pure agent' and is not liable to pay GST on such reimbursements as the entire amount received by them as Crews' Salary will be disbursed to the Crew and no amounts from the said receipt will be used by the applicant for his own interest. In fact, for performing as a pure agent they will also be receiving compensation separately in the form of fixed fees to be charged as service charges.

Hence, it depends upon the facts of each case and the terms of agreement entered into between the agent and the principal to determine the nature of the transaction with regard to classification.

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JUDICIAL PRECEDENTS UNDER GST

Adv. Mukul Gupta
Sharnam Legal, Gaziabad

1. **HSN classification under CGST Act, 2017**: The court observed that the main purpose ("Functional characteristics") of Printed Books is to evaluate child's understanding. The Court held that the goods in question are classifiable as 'Printed Books' HSN 4901 which are wholly exempt from tax and not as 'Exercise Books' HSN 4820.
   Sonka Publication (India) Private Limited v. UOI, 2019-VIL-206-DEL, W.P. (C) 10022/2018 & CM 39032/2018 (stay)

2. **Rule 96A of CGST Rules, 2017**: The Court held that taxpayer cannot be deprived of refund for failure of automated system to process the same. Further, as per *CircularNo. 8/2018 dated March 23, 2018*, officers are directed to provide alternate mechanism in case of difficulties faced by exporters with advent of GST. The Court directed for disbursal of refund of the taxpayer.
   VSG Exports Private Limited v. CC, 2019-VIL-197-MAD, W.P.MD.No.24793 of 2018 and W.M.P. (MD) No.22481 of 2018

3. **Section 54 CGST ACT, 2017**: This is case where the inverted tax structure refund of excess duty is not granted. There being no express provision in section 54(3) empowering Central Government to provide for lapsing of unutilised ITC, petitioners have a vested right to the unutilised ITC accumulated on account of rate of tax on inputs which are higher than rate of tax on output supplies.
   Shabnam Petrofils (P.) Ltd. v. Union of India [2019] 108 taxmann.com 15 (Gujarat); R/SPECIAL CIVIL APPLICATION NO. 16213 of 2018, R/SPECIAL CIVIL APPLICATION NO. 20626 of 2018

4. **Section 140(1), Section 140(5) of CGST Act, 2017 read with Rule 117 / Rule120 A of the CGST Rules 2017**: The Court observed that the Nodal Officer appointed under GST is obligated to consider complaint vis-à-vis technical issues faced by taxpayers while filing FORM GST TRAN-1. The Court directed the Nodal Officer to examine and expeditiously resolve the complaint filed by the Petitioner.
   Yokogawa India Limited v. UOI, 2019-VIL-190-KAR, WRIT PETITION No.15854/2019 (T - RES)

5. **Section 51 CGST ACT, 2017 and Rule 9 of CGST Rules 2017**: The department tried intimating the defects in registration application to the taxpayer. However, due to technical snag, the taxpayer could not receive the intimation for such defects. The taxpayer deemed that it is registered since it did not receive any information within the stipulated time period of 3 days. The Court observed that the department was working promptly in respect of communicating defects to the taxpayer. The Court held that taxpayer cannot take advantage of deeming provision on account of non-receipt of intimation within stipulated time period as the department attempted to do so within stipulated time. The Court directed the taxpayer to file fresh application for registration.
   West Bengal Lottery Stockists Syndicate Private Limited v. UOI, 2019-VIL-235-KER, MANU/KE/1454/2019

6. **Section 39, 16 CGST Act and Rule 61 of CGST Rules*:* Form GSTR-3B is not the monthly return contemplated under the provisions of Section 39 of the CGST Act.**FORM GSTR-3B is not in lieu of FORM GSTR-3. GSTR-3 is a return whereas GSTR- 3B is only filed as contemplated under sub-rule (5) of rule 61 of the rules.
   AAP And Co. Vs Union of India (Gujarat High Court) *Special Civil Application No. 18962 of 2018, 2018 TaxPub (GST) 0848 (Guj- HC)*

7. **Section 132 of CGST Act 2017:** Where Competent Authority had arrested assessee for an offence punishable under clauses (b) and (c) of section 132 of Central Goods and Services Tax Act, 2017 which says - clause(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilization of input tax credit or refund of tax; clause (c) avails input tax credit using such invoice or bill referred to in clause (b). 57 days were over since his arrest as view of the provisions of Section 167(2) of the Code of Criminal Procedure, he will be entitled to be released on default bail after completion of 60 days if the charge-sheet is not filed, assesse was released on bail.
   Prasad Purshottam Mantri v. Union of India [2019] 107 taxmann.com 202 (Bombay); CR. WRIT PETITION NO. 1516 OF 2019

8. **Section 75 CGST ACT:** Where Competent Authority had rejected refund claim of assessee and thereafter issued a show cause notice on assessee for payment of tax along with interest and penalty and assessee filed preliminary objections to show

cause notice, but no response had been received till date, said authority was directed to take a decision on preliminary objections by passing a speaking order.
Parexel International Services India (P) Ltd. v. Union of India [2019] 107 taxmann.com 145 (Punjab & Haryana); CWP-11537-2019

9. **Section32 of Cigarettes and Other Tobacco Products Act, 2003,Section 7 (2) of the IGST Act, Sections 2 (10), 2(4) of IGST Act and Sections 2 (11) and 2 (13) of Customs Act, 1962**: The Court observed that Duty Free Shop situated at International Airports, are beyond the Customs frontiers of India. Hence, it is in non-taxable area and their sales whether at arrival or departure lounge, are considered as export. The Court observed that exemption provided under COTPA for export of tobacco is rightly conferred on DFS.
Sandeep Patil v. UOI, 2019-VIL-232-BOM, 634/2018- CUS (WZ)/ASRA/Mumbai

10. **Section 30 CGST Act, 2017**: Where Competent Authority had cancelled registration of assesse for not furnishing returns well within time from October, 2018 to April, 2019, assesse was directed to submit relevant returns before Competent Authority, who would consider same and cancellation of registration could be revoked.
Banyan Projects India (P) Ltd. v. Local Goods & Services Tax Officer, Bangalore - [2019] 107 taxmann.com 248 (Karnataka)

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ISSUE OF C DECLARATION FORM – POST GST

M. Ramachandra Murthy,
CA, Hyderabad

Very often, post-GST, a question is being raised in relation to the issue of C declaration form under the Central Sales Tax Act, 1956 (for short 'CST Act') for the inter State purchases made by the registered dealers. Under Section 8 (1) of the CST Act, if the inter State sale of goods of the description referred to in Section 8 (3) of the CST Act is covered by declaration in form C, then the rate of tax would be 2% or the local VAT rate, whichever is lower. Such concessional rate of tax would be available against C form, only if the goods purchased are meant for---

a) re-sale by the purchasing dealer
b) or subject to any rules made by the Central Government in this behalf, for use by him in the manufacture or processing of **goods** for sale
c) or in the telecommunications network
d) or in mining
e) or in generation or distribution of electricity or any other form of power.
f) are containers or other materials specified in the certificate of registration of the registered dealer purchasing the goods, being containers or materials intended for being used for the packing of goods for sale;
g) are containers or other materials used for the packing of any goods or classes of goods specified in the certificate of registration referred to in clause (b) or for the packing of any containers or other materials specified in the certificate of registration referred to in clause(c).

If the goods purchased are for a purpose other than any one of the above purposes, C form cannot be issued and consequently no concessional rate would be available. The question that had arisen is what would be the status after implementation of the GST law. Section 2 (d) of the CST Act originally defined 'goods' as -----

*"'**goods**" includes all materials, articles, commodities and all other kinds of movable property, but does not include Newspapers, actionable claims, stocks, shares and securities"*

Vide the Constitution (One Hundred First Amendment) Act, 2016; Article 269 of the Constitution of India has been amended. Article 269 relates to levy of tax on inter-State sale of goods. By this amendment, 'goods', which are covered under the Goods and

Services tax have been excluded from the scope of levy of the Central Sales Tax. Accordingly the Taxation Laws (amendment) Act, 2017 (No.18 of 2017 published on 5.5.2017) made certain changes in the CST Act. The definition of '**goods'** under Section 2 (d) has been amended as below.

*"**Goods** means—*
(i) Petroleum crude;
(ii) High speed diesel;
(iii) Motor spirit (commonly known as petrol);
(iv) Natural gas;
(v) Aviation turbine fuel; and
(vi) Alcoholic liquor for human consumption."

As a result of this amendment in the CST Act, wherever the word "goods" occurs, words "petroleum crude, high speed diesel, petrol, aviation turbine fuel, natural gas or alcoholic liquor for human consumption" are to be read and understood. Therefore currently, petroleum crude, high speed diesel, petrol, aviation turbine fuel, natural gas and alcoholic liquor for human consumption are not covered under the Goods and Services tax. All other goods are not 'goods' for the purposes of the CST Act consequent on implementation of GST. The said six commodities purchased against C form can be resold in the same form or they can be used **to** manufacture other goods. However petroleum products above mentioned, can be used for generation of electricity or any other form of power or in mining, as the same are covered by Section 8 (3) (b) of the CST Act. Under the amended definition 'Alcoholic liquor' must be fit for human consumption.

The next question is whether the 'goods' mentioned in Section 8 (3) are the very same goods mentioned in the definition of 'goods' for the purpose of issuing C form. There is ambiguity. Generally wherever the word 'goods' is used in the Act it shall have the meaning assigned to it in the Act and no expansion is possible. As Section 8 (3) (b) says that the goods purchased must be used 'in the manufacture or processing of **goods** for sale', whether the goods to be manufactured must also be the same six goods defined in Section 2 (d) is an issue for debate. If it is to be so interpreted then those six goods must be purchased only to manufacture those six goods and nothing else.

For example a dealer manufactures cement. Cement is not in the definition of 'goods' in the CST Act. He can purchase Diesel oil for manufacture of 'goods'. Authorities may interpret that 'cement' is not goods as per the definition in the CST Act and hence Diesel oil cannot be purchased for manufacture of cement. Though the seller is protected to some extent if he is in receipt of C form for paying concessional rate of tax of 2%, the purchaser may be punished with one and half times the tax due as penalty

for issuing C form. In such cases, the purchaser may not issue C form to the seller. Result would be higher rate of CST will be levied on the seller.

However in the case of **Shree Raipur Cement Plant (a unit of Shree Cement Limited) Vs State of Chhattisgarh and others (2018) 3 GSTL 38 (CG),** the Chhattisgarh High Court dealt with a case where the question involved was whether the petitioner is entitled to be issued C-Form under the Central Sales Tax Act, 1956 read with the Central Sales Tax (Registration and Turnover) Rules, 1957 in respect of high speed diesel purchased by it in the course of inter-State trade and used by it in the course of manufacturing of cement, after the promulgation of the CGST Act, 2017 with effect from 1st July, 2017. On a consideration of the provisions in the CST Act, it has been held as follows:-

"On the basis of aforesaid analysis, it is held that the petitioner is a registered dealer under the provisions of the CST Act, 1956 read with the Rules of 1957 and his registration certificate under the CST Act, 1956 read with the Rules of 1957 continues to be valid for the purpose of inter-State sale and purchase of high speed diesel despite the petitioner having been migrated to the GST regime with effect from 1st July, 2017, as the definition of goods as defined in section 2(d) of the CST Act, 1956 has been amended prior to coming into force of the CGST Act, 2017 from 1st July, 2017 which includes high speed diesel. Further, under section 9(2) of the CGST Act, 2017, the GST Council has not made any recommendation for bringing high speed diesel within the ambit of the CGST Act, 2017 and therefore the Central Government has not notified high speed diesel to be within the ambit and sweep of the CGST Act, 2017. Thus, the petitioner's registration certificate under the CST Act, 1956 is still valid for the goods defined in section 2(d) of the CST Act, 1956, including high speed diesel, and the petitioner is entitled for issuance of C-Form for inter-State purchase/sale of high speed diesel against the said C-Form. Accordingly, the respondents shall be liable and are directed to issue C-Form to the petitioner in respect of **high speed diesel to be purchased by the petitioner and used in the course of manufacture of cement** and for that, it is further directed to rectify and remove the error on their official website and entertain the petitioner's application submitted on-line on the official website seeking issuance of C Form to the petitioner for said goods."

In yet another case of **Carpo Power Limited, VS State of Haryana and others (2018) 53 GSTR 24**, the Punjab and Haryana High Court dealt with a question whether C form can be issued by the purchaser of natural gas for use in the generation or distribution of electricity. It has been held as follows:-

"The issue involved in the present petition is whether after the amendment of the CST Act, the petitioner is entitled to be issued C Forms in respect of the natural gas purchased

by it in the course of inter-State sales and used by it for the generation of electricity……. In these circumstances, the writ petition is allowed. It is held that the respondents are liable to issue C forms in respect of the natural gas purchased by the petitioner from the oil companies in Gujarat and used in the generation or distribution of electricity at its power plants in Haryana. In the event of the petitioner having had to pay the oil companies any amount on account of the first respondent's wrongful refusal to issue C forms the petitioner shall be entitled to refund and/or adjustment of the same from the concerned authorities who collected the excess tax through the oil companies or otherwise. The concerned authorities shall process such a claim within twelve weeks of the same being made by the petitioner in writing and the petitioner furnishing the requisite documents/form."

One of the purposes mentioned in Section 8 (3) (b) is 'mining'. I am of the view that Diesel oil purchased by the issue of C form can be used in 'mining' activity. Further Rule 13 of CST (R&T) Rules, 1956 is to the following effect:-

"**13. Prescription of goods for certain purposes**—The goods referred to in clause (b) of sub-section (3) of section 8 which a registered dealer may purchase shall be goods intended for use by him as raw materials, processing materials, machinery, plant, equipment, tools, stores, spare parts, accessories, **fuel**, or lubricants, in the manufacture or processing of goods for sale or in **mining**, or in the generation or distribution of electricity or any other form of power."

It may be seen from the above that fuel can be purchased for the purposes specified in the above Rule. In accordance with the above Rule, Government of India circulated to all States, in Ministry of Finance Letter No.9 (88)-ST/57 dated 12.11.1958, a list of such goods with reference to certain industries for the guidance of sales tax authorities. In that Form No.54 deals with 'Mining'. This Form No. 54 reads as follows:-

"1. FUELS: (1) Coal, (2) Oil, and (3) Others."

Thus even according to the Government of India, Fuels can be purchased for mining purpose by the issue of C form. It is amply clear from the above Rule that specified goods can be purchased for use as fuel in mining.

In the cases of **(1) Sadbhav Engineering Ltd. V. State of U.P. and others (2) Sushee Hi-Tech Constructions Pvt. Ltd. V. State of U.P. and others and (3) Mahalaxmi Engineering Co. V. State of U.P. and other (76 VST 62),** Allahabad High Court was concerned with the same issue. In these cases, the petitioner is a limited company and undertakes works contract for different companies. Northern Coalfields Ltd., Sonebhadra (hereinafter referred to as "NCL") has an open cast coal mines and pays royalty to the State Government. Open cast mine is a different method on extracting rock or minerals

from the earth by their removal from an open pit or burrow. This is different from the mining of minerals, which requires tunnelling into the earth. Open pit mines are used where deposits of minerals is found near the surface, i.e., where the overburden (surface material cove ring the valuable deposit) is relatively thin or the material of interest is structurally unsuitable for tunnelling. NCL has open cast mines and, consequently, the first primary steps to extract the mineral, namely, coal is to remove the overburden, i.e., the surface material covering the valuable deposits of coal. For this purpose, NCL floated tender inviting offers from various contractors. The scope of the work was removal of overburden by hiring of equipment such as excavators, tippers, dumpers, etc. The petitioner applied and gave his bid which was accepted and a letter of acceptance dated September 20, 2007 was issued. The scope of work as defined in the letter of acceptance was hiring of equipment for overburden removal. Based on the letter of acceptance in favour of the petitioner, the petitioner applied for registration under the U. P. as well as under the CST Act. While applying for registration under the CST Act, the petitioner disclosed in the application its nature of business as "earth work, civil works, overburden removal contract". The petitioner also disclosed in his application that goods such as "heavy earth movers, excavators, tippers, dumpers, etc." would be used in mining activities. The respondents, after verifying the scope of work, granted registration to the petitioner under the U. P. as well as under the CST Act for the works contract. Form 15 and form B were issued to the petitioner under the U. P. and Central Sales Tax Act. While issuing the certificate of registration in form B the Assistant Commissioner, Commercial Tax Department, respondent No. 3, granted facility to the petitioner to purchase goods, namely, heavy earth movers, excavators, dumpers, tippers, etc., at concessional rate of tax against form C. The petitioner started executing the works contract and, for the purpose of removing the overburden, required machineries for the execution of the works contract. Since the petitioner was eligible to purchase the same from outside the State of U. P. at concessional rate of tax, the petitioner applied for issuance of form C from the office of respondent No. 3. In the application, the petitioner categorically stated that form C would be required for the purchase of machinery such as excavators from outside the State of U. P. for use in the works contract at the site of NCL. Respondent No. 3, after verifying the contents issued requisite form C to the petitioner. The petitioner thereafter purchased machineries from outside the State worth Rs. 10,40,40,000 at concessional rate of tax against form C. According to the petitioner, these machineries are being used in the execution of the works contract and are not being used for any other purpose. On a consideration of the rival contentions, the High Court held as follows:-

"From a perusal of section 8 (3) (b) of the Act, as extracted above, clearly indicates that the goods have been purchased for the purpose of mining. The petitioner has

been given a works contract for removal of the over burden, which means the removal of the surface material covering the valuable deposit of coal, which is nothing but a form of mining as is clear from the works contract. The petitioner was granted a registration for the purpose of execution of the works contract or removal of the overburden while issuing the certificate of registration in form B. Respondent No. 3 granted the facility to the petitioner to purchase at concessional rate of tax against form C on the goods, namely, heavy earth movers, excavators, dumpers, etc. The petitioner purchased these equipments on the basis of form C issued by respondent No. 3 for the purpose of execution of the works contract.

We find from a perusal of the counter-affidavit that nothing has been indicated that the equipment so purchased was not in consonance with the declaration given in form B nor it has been disclosed that the equipments so purchased are not being used by the petitioner. In the light of the aforesaid, we find that the imposition of penalty was wholly illegal and without any basis."

In this context, Government of India has issued clarification in Office Memorandum No. F.28011/03/2014-ST-II dated 7th November, 2017 of Ministry of Finance, Department of Revenue, State Tax Division, New Delhi. The following is the relevant extract:-

"4. The Ministry of Finance, Department of Revenue, State Tax Division, New Delhi has issued a clarification in Office Memorandum dated 7th November 2017 vide reference (2) above, clarifying " 'Goods' referred to in section 8 (3) (b) of the CST Act, 1956 will have the same meaning as defined and amended under section 2(d) of the said Act. However it does not affect the provisions of section 8 (3) (b) of the CST Act relating to communication network or mining or generation or distribution of electricity or any other form of power".

5. Further, the goods referred to in section 8(3)(b) of the CST Act are the class or classes of goods specified in the certificate of registration of the registered dealer purchasing the goods as being intended for resale by him or subject to any rules made by the Central Government in this behalf, for use by him in the manufacture or processing of goods for sale or in the telecommunication network or in mining or in the generation or distribution of electricity or any other form of power."

Pursuant to the above, Commissioners of State Tax, Karnataka and Telangana have issued circular instructions that effective from 1.7.2017, C forms can be issued only for the purchase of the said six goods specified in the definition in Section 2 (d) of the CST Act for use in the manufacture or processing of the said six goods only for sale, etc., etc.

It may be seen from the clarification of the Government of India that on the one hand it says ''Goods' referred to in section 8 (3) (b) of the CST Act, 1956 will have the same meaning as defined and amended under section 2 (d) of the said Act' and on the other

hand it says 'however it does not affect the provisions of section 8 (3) (b) of the CST Act relating to communication network or mining or generation or distribution of electricity or any other form of power'. The GOI clarification suggests that for the purpose of 'communication network or mining or generation or distribution of electricity or any other form of power', goods purchased by the issue of C form can be used for the purposes other than the manufacture of six specified goods.

In the case of **Hindustan Zinc Limited and others Vs State of Rajasthan (S.B.C.W.P. No.5506/2018 dated 18.3.2018)** it has been held as follows:-

"Accordingly, the present writ petitions are allowed in the same terms as Carpo Power Limited (supra). It is held that the respondents are liable to issue `C' Forms in respect of the High Speed Diesel procured for mining purposes through interstate trade."

It shall be pertinent to state that in the above case, the Rajasthan High Court observed on the clarification of the GOI 'thus, any clarification in the existence of a clear Act will not supersede the provisions of the same.'

GOVERNMENT OF KARNATAKA
(DEPARTMENT OF COMMERCIAL TAXES)
No. KSA.GST.CR-16/2017-18
Office of the Commissioner of Commercial Taxes,
(Karnataka) Vanijya Terige Karyalaya, Gandhinagar
Bengaluru-560009
COMMISSIONER OF COMMERCIAL TAXES
Circular No. 16/2017-18, dated: 02/03/2018.

Sub: Issuance and use of C-Form declaration under the Central Sales Tax Act, 1956 from 1st July, 2017 onwards – reg

Ref: 1. The **Taxation Laws (Amendment) Act, 2017** (Central Act No.18 of 2017) dated 4th May, 2017.

2. Office Memorandum dated 7th November, 2017 issued by Ministry of Finance, Department of Revenue, State Tax Division, New Delhi vide F No.28011/03/2014-ST-II

Representations have been received from different dealers regarding issuance of declarations in Form-C under the Central Sales Tax Act, for inter-state purchase of High Speed Diesel for use in Captive power generation, mining activity etc., in view of **implementation of Goods and Services Tax** with effect from 1st July 2017.

2. The matter is examined.

i) The definition of "goods" in Central Sales Tax Act, 1956 under Section 2(d) upto 30th June 2017 was as under:

> '(d) "goods" includes all materials, articles, commodities and all other kinds of movable property, but does not include newspapers, actionable claims, stocks, shares and securities'.

3. In view of implementation of GST with effect from 1st July 2017, definition of "goods" under clause(d) of Section 2 of CST Act, 1956 has been amended vide reference (1) above and the same is reproduced as under:

'(d) "goods" means-
(i) petroleum crude;
(ii) high speed diesel;
(iii) motor spirit (commonly known as petrol);
(iv) natural gas;
(v) aviation turbine fuel; and
(vi) alcoholic liquor for human consumption'.

4. The Ministry of Finance, Department of Revenue, State Tax Division, New Delhi has issued aclarification in Office Memorandum dated 7th November 2017 vide reference (2) above, clarifying " 'Goods' referred to in section 8(3)(b) of the CST Act, 1956 will have the same meaning as defined and amended under section 2(d) of the said Act. However it does not affect the provisions of section 8(3)(b) of the CST Act relating to communication network or mining or generation or distribution of electricity or any other form of power".

5. Further, the goods referred to in section 8(3)(b) of the CST Act are the class or classes of goods specified in the certificate of registration of the registered dealer purchasing the goods as being intended for resale by him or subject to any rules made by the Central Government in this behalf, for use by him in the manufacture or processing of goods for sale or in the telecommunication network or in mining or in the generation or distribution of electricity or any other form of power.

6. In view of the above clarification issued by the Government of India and the provisions of CST Act, the following instructions are issued:

i) Form-C declarations are to be issued for the period from 1st July 2017 onwards only in respect of inter-state purchase of goods enumerated in para (3) above for any of the following purposes:
   a) resale of above **six goods;**
   b) use in the manufacture or processing **of above six goods for sale;**
   c) use in the telecommunication network or in mining or in the generation or distribution of electricity or any other form of power.

ii) This Circular cannot be made use of for legal interpretation of the provisions of law, as it is clarificatory in nature.

(M S SRIKAR)
Commissioner of Commercial Taxes,
(Karnataka), Bengaluru

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FOREIGN DIRECT INVESTMENT

CA Paresh P. Shah
CA Mitali Gandhi

1. Introduction

1.1 Foreign Direct Investment (FDI) in common parlance is investments in the form of controlling ownership made by a firm or individual in one country, into an entity of another country. It is a critical driver for economic growth and also a source of non-debt financial resource for the economic development of the country. It also assists in improving innovation and increasing productivity & competitiveness in a country receiving FDI. Foreign companies invest in India to take advantage of relatively lower wages, special investment privileges such as tax exemptions, higher interest rates.

1.2 Initially, foreign investment into India was governed by the Foreign Exchange Management (Transfer or Issue of Security by Persons Resident outside India) Regulations, 2000 (notification No. FEMA 20/2000-RB notified on May 3, 2000). This had evolved over the years owing to the numerous amendments made to it. While the changes may have been necessary, they also resulted in unintended inconsistencies.

To address such inconsistencies, FEMA 20 was superseded by Notification No. FEMA 20(R)/ 2017-RB (hereinafter referred to as "Fema 20(R)) which consolidated all the amendments and introduced certain key changes to ease the process of foreign investment in India in line with the governments focus on ease of doing business. A Master direction titled Master Direction – Foreign Investment in India has been issued by FED Master Direction No. 11/2017-18 as amended from time to time. The Master Directions consolidates instructions on rules and regulations framed by the Reserve Bank from time to time.

Some of the key changes brought about by FEMA 20(R) include the following:

i. Detailed definition of 'capital instruments' has been introduced, listing various modes of investments that non-resident investors can choose from to invest in Indian companies.

ii. The definition of 'foreign investments' now clarifies that investments made on a non-repatriable basis are to be treated as domestic investments.

iii. The new definition of 'foreign direct investment' ("FDI") also differentiates between foreign investments in Indian companies based on

whether the investee company is listed or unlisted. Investments into capital instruments of unlisted companies are to be treated as FDI. However, if the investee company is listed, the investment will be treated as FDI only if the investment constitutes more than 10% of the post issue paid-up equity capital of the company, calculated on a fully diluted basis.

iv. Foreign investment in an Indian listed company amounting to less than 10% of the post-issue paid up equity share capital or 10% of the paid-up value in respect of each series of instrument of the company calculated on a fully diluted basis, will be categorised as 'foreign portfolio investment' under FEMA 20(R).

1.3 This Article deals with the overall regulations governing foreign investments in India into an entity. The detailed article covering entire subject of foreign investment has been divided into several parts with series of articles, each part covering a different facet of foreign investment in India in the forthcoming journal/s.

2. Important Terms used in this article

i. 'Foreign Investment' means any investment made by a PROI on a repatriable basis in capital instruments of an Indian company or to the capital of an LLP; A PROI outside India may hold foreign investment as FDI or Foreign Portfolio Investment (FPI).

(*Explanation: If beneficial interest being held by a person resident outside India, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment.)*

Foreign currency convertible bonds and Depositary Receipts having underlying instruments being in the nature of debt, shall not be treated as foreign investment. However, any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned as foreign investment.

ii. FDI means investment through capital instruments by a PROI in an unlisted Indian company; or in 10 percent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company; if the existing investment falls below the 10 percent level, then too the investment will continue to be FDI.

Direct Investment is related to control or significant influence and tends to be associated with lasting relationship. Direct Investors are actively involved in the management decisions.

iii. FPI means any investment made by a PROI through capital instruments where such investment is less than 10 percent of the post issue paid-up share capital on a fully diluted basis of a listed Indian company or less than 10 percent of the paid up value of each series of capital instruments of a listed Indian company. FPI have lesser role in decision making of an enterprise and are more associated with the financial markets. FPI is only permitted in listed Indian companies.

iv. Capital instruments means equity shares, fully and mandatorily convertible debentures and preference shares and share warrants issued by Indian company.

v. Indian Entity means an Indian company or an LLP.

vi. Sectoral cap means the maximum investment including both foreign investment on a repatriation basis by PROI in capital instruments of a company or the capital of an LLP, as the case may be, and indirect foreign investment, unless provided otherwise.

vii. Indirect Foreign Investment means Investment by an intermediate Indian company, which is not owned and controlled by Resident Indian citizens or which is owned or controlled by PROI into another Indian entity is considered as Indirect Foreign Investment (IFI) or downstream investment.

3. <u>Modes & Types of Investment</u>

3.1. Investment can be:

i. With prior approval or on automatic basis

ii. With or without repatriation benefits

iii. In different instruments (debt or capital instruments)

iv. In a company or in a different form of entity

v. Can be a portfolio or direct investment

vi. Can be by issue of capital instruments or transfer of instruments

3.2. Mode of Investment**:**

i. Automatic Route: No prior approval from RBI/Govt is required for investment into that sector or company in India.

ii. Approval Route: prior approval of the concerned Administrative Ministries /Departments is required.

3.3. Types of Investment:

FDI can be done as Greenfield or Brownfield Investment.

i. Greenfield Investment: Foreign company invests into a fresh production facility in India by setting up a new joint venture or a subsidiary in India. It is a situation where an MNC starts a new venture in India by constructing new operational facilities.

ii. Brownfield Investment: Foreign company invests into the existing production facilities in India. Brownfield Investment is done through Share purchase, Amalgamation/Merger/Demerger of companies, conversion of external commercial borrowings, share swap, issue of bonus, rights, sweat equity shares.

4. Various methods of Investment for a PROI

Notification Fema 20(R) comprises of ten schedules that contains the various schemes for inbound investment. In the current article we will be covering Schedule 1, which talks about FDI by a PROI in Indian company; The above mentioned ten schedules are as under.

Sch. 1	Purchase / Sale of capital instruments of Indian company by PROI (i.e. Foreign Direct Investment ('FDI') Scheme)
Sch. 2	Purchase/Sale of capital instruments of listed Indian company on recognised stock exchange in India by Foreign Portfolio Investor (i.e. Portfolio Investment scheme)
Sch. 3	Purchase/Sale of capital instruments of listed Indian company on recognised stock exchange in India by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on repatriation basis (i.e. Portfolio Investment Scheme)
Sch. 4	Purchase/Sale of capital instruments or convertible notes of an Indian company or Units or contribution to capital of an LLP by NRI or OCI on non-repatriation basis
Sch. 5	Purchase and Sale of Securities other than capital instruments by a PROI
Sch. 6	Investment in a Limited Liability Partnership (LLP)
Sch. 7	Investment by a Foreign Venture Capital Investor (FVCI)
Sch. 8	Investment by a PROI in an Investment Vehicle
Sch. 9	Investment in Depository receipts by a person resident outside India
Sch. 10	Issue of Indian Depository Receipts (IDRs)

Thus capital instrument of a company, issued or transferred on a repatriation basis is covered under schedule 1. Instruments other than capital instruments and investment in LLP are covered under above schedules.

5. Pricing Guidelines

5.1 Pricing of capital instruments issued by an Indian company to a PROI shall not be less than:

i. In case of a listed Indian company or a company going through delisting process - The price worked out as per SEBI guidelines.

ii. The price at which preferential allotment can be made as per SEBI guidelines in case of a listed Indian company or a company going through delisting process.

iii. In case of an unlisted Indian company - The price worked out as per internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant/SEBI registered merchant banker/practicing cost accountant.

5.2 Pricing of capital Instruments transferred from a PRII to a PROI shall not be less than

The price worked out as per internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant/SEBI registered merchant banker/practicing cost accountant.

5.3 Pricing of capital instruments transferred from a PROI to a PRII shall not exceed

The price worked out as per internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant/SEBI registered merchant banker/practicing cost accountant.

5.4 In case of swap of capital instruments, the pricing will have to be computed by a Merchant Banker registered with SEBI or an Investment Banker outside India registered with the appropriate regulatory authority in the host country.

5.5 Pricing of shares issued to PROI by way of by way of subscription to Memorandum of Association shall be made at face value subject to entry route and sectoral caps.

5.6 In case of convertible capital instruments, the price of the instrument should be based on conversion formula which has to be determined / fixed upfront. Price at the time of conversion should not be less than the fair value worked out, at the time of issuance of these instruments.

5.6 Pricing guidelines will not be applicable in case of transfer of shares between two PROI, or in case of investment in capital instruments by a PROI on non repatriation basis.

5.7 In order to protect the interest of resident Indians the above pricing is stipulated. Any sale by a PRII to a PROI has a cap on the minimum price needed for transfer, whereas in the case of transfer of capital instruments by a PROI to a PRII there is a cap on the maximum price at which such transfer can take place.

6. <u>Transfer of capital Instruments of an Indian company</u>

A PROI holding capital instruments can transfer the capital instruments of an Indian company or units in accordance with the regulations specified hereunder:

6.1 Transfer under Automatic Route

i. A PROI (including non-resident Indian (NRI) or overseas citizen of India (OCI) holding instruments on repatriable basis) can transfer the capital instruments by way of sale or gift to any PROI.
ii. A PROI can transfer the capital instruments to any PRII or on a stock exchange by way of sale or gift, subject to the adherence to pricing guidelines, documentation and reporting requirements for such transfers.
iii. A PRII (including an NRI or OCI holding the capital instrument on Non Repatriable basis) can transfer by way of sale to a PROI, subject to the adherence to entry routes, sectoral caps/ investment limits, pricing guidelines, documentation and reporting requirements as may be specified by Reserve Bank.
iv. A NRI/OCI holding capital instruments on non repatriable basis can transfer the same by way of Gift to any other NRI/OCI who shall hold it on non repatriable basis.
v. An FPI can transfer the capital instruments by way of sale to a PRII, where the acquisition of capital instruments has resulted in the breach of FPI limits.

6.2 Transfer under Approval Route

i. A PRII (including an NRI or OCI holding the capital instrument on Non Repatriable basis) can transfer by way of gift to a PROI provided:
    a. The donee is eligible to hold such a security under these Regulations.
    b. The gift does not exceed 5 percent (on cumulative basis by a single person to another single person) of the paid up capital of the Indian company/ each series of debentures/ each mutual fund scheme.
    c. The applicable sectoral cap in the Indian company is not breached.
    d. (The donor and the donee shall be 'relatives' within the meaning in section 2(77) of the Companies Act, 2013.
    e. The value of security to be transferred by the donor together with any security transferred to any person residing outside India as gift during the financial year does not exceed the rupee equivalent of USD50,000.

6.3 Other provisions for transfer

i. Transfer of capital instrument between a PRII and a PROI for an amount not exceeding 25% of the total consideration can be settled through
    a. Payment by buyer on deferred basis within eighteen months from date of transfer agreement.

b. An escrow account arrangement between the buyer and the seller for a period not exceeding eighteen months from the date of the transfer agreement.
c. Can be indemnified by the seller for a period not exceeding eighteen months from the date of the payment of the full consideration, if the total consideration has been paid by the buyer to the seller.

ii. PROI holding capital instruments containing Optionality clause & exercising the option may exit without any assured return subject to pricing guidelines and lock in period of 1 year.

iii. Transfer of capital instruments of an Indian company or units of an Investment Vehicle by way of pledge is permitted through following means:
   a. A promoter of a company that has raised External Commercial Borrowing (ECB), may pledge the shares of the borrowing company or its associate resident companies for the purpose of securing the ECB raised by the borrowing company subject to the following conditions:
      - Period of Pledge is co terminus with Maturity of ECB
      - In case of invocation of pledge, transfer shall be in accordance with RBI directions
      - Statutory Auditor certificate for utilization of ECB proceeds for permitted end use only
      - NOC of AD shall be obtained for Pledge
   b. A PROI holding capital instruments in an Indian company or units of an investment vehicle may pledge the capital instruments or units, as the case maybe
      - In favour of an Indian Bank/RBI registered NBFC to secure credit facilities being extended to such Indian company for bona fide purposes
      - In favour of an overseas bank to secure credit facilities being extended to such person or a PROI who is the promoter of such Indian company or the overseas group company of such Indian company

6.4 Prior Government Approval be required for any transfer in case the company is engaged in sector which requires government approval.

6.5 Pricing guidelines shall not be applicable for any transfer by way of sale done in accordance with SEBI regulations where the pricing is prescribed by SEBI.

7. <u>Reporting Requirements</u>

Following are the reporting requirements for any Investment by a PROI

No	Particulars	Form
1.	For any kind of allotment of capital instruments (includes Fresh Shares /Partly paid shares/Bonus /Rights Shares /ESOP/ Convertible Debentures / Convertible Preference Shares /Conversion of ECB / Royalty / Lumpsum Technical Know-how Fee / Import of Capital Goods by SEZs /Pre-operative/Pre-incorporation Expenses/Legitimate dues/ Amalgamation/ Merger) - within 30 days of issue	FC-GPR
2.	Return on Foreign Assets & Liabilities - before 15th July every year	FLA
3.	For Transfer of Capital Instruments between -PROI (repatriable basis) & PROI (non repatriable basis) -PROI(repatriable basis) & PRII -Transfer by PROI on stock exchange -Transfer of cap instruments on deferred basis -Transfer of participating rights in oil fields - within 60 days of transfer of capital instrument or receipt of funds whichever is earlier	FC-TRS
4.	Indian company issuing ESOP to PROI who are its employees/ directors or employees/ directors of its holding company/ joint venture/ wholly owned overseas subsidiaries - within 30 days of issuing stock Option	ESOP
5.	Domestic Custodian issuing or transferring depositary receipts - within 30 days of close to the issue	DRR
6.	An LLP receiving sums for capital contribution & acquisition of profit shares – within 30 days from the date of receipt of the amount of consideration	LLP (I)
7.	Transfer/Disinvestment of capital contribution/Profit share between a PRII and a PROI – within 60 days of receipt of amount of consideration	LLP (II)
8.	Indian Entity making downstream investment (DI) – within 30 days from date of allotment of capital instrument	DI
9.	Indian startup company issuing Convertible Notes (CN) (Discussed ahead) to a PROI - within 30 days of such issue.	CN
10.	An Investment vehicle that has issued units to PROI - within 30 days	InVi

7.1. With a view to promoting the ease of reporting of transactions under foreign direct investment (FDI), the RBI, through A.P (DIR Series) Circular No.30 June 07, 2018 ("New Reporting Circular"), has integrated all forms for reporting foreign investment like FC-TRS, FC-GPR, ESOP, DI, Form LLP-I, Form LLP-II, Form DRR, Form InVi into one Single Master Form(SMF).

7.2. Reporting in case of sale of by Non-resident Indian ('NRI') / Non-resident ('NR') on the stock exchange – Issue in FDI Policy

i. Form FC-TRS requires details of non resident shareholding pre and post the relevant transaction, But in cases where the NRI acquires shares from another NRI reporting under FEMA is not required. Subsequently when the shares are sold on stock exchange by the NRI form FC-TRS is required to be filled.

ii. For a NR who has acquired the shares by way of secondary acquisition and is not part of the FDI, it usually has no connection with the issuing company and hence cannot access the shareholding pattern. Also, in a listed company, it is not possible for a NR transferee to get the latest shareholding pattern.

8. <u>Downstream Investment</u>

i.FDI can be made directly in the Indian company, or indirectly through an intermediate Indian company. Investment by an intermediate Indian company, which is not owned and controlled by Resident Indian citizens or which is owned or controlled by PROI into another Indian entity is considered as Indirect Foreign Investment (IFI) or downstream investment.

ii.Ownership of a company means beneficial holding of more than 50 percent of the capital instruments of such company. Ownership of an LLP' shall mean contribution of more than 50 percent in its capital and having majority profit share.

iii. Control means

a. the right to appoint majority of the directors or
b. to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreement or voting agreement.

iv. Indian Entities which has received indirect foreign investment shall comply with the entry route, sectoral caps, pricing guidelines and other attendant conditions as applicable for foreign investment.

v. Downstream investment by an LLP not owned and not controlled by resident Indian citizens or owned or controlled by PROI is allowed in an Indian company operating in sectors where foreign investment up to 100 percent is permitted under automatic route and there are no FDI linked performance conditions.

vi. Total Foreign Investment means the total of foreign investment and indirect foreign investment and the same will be reckoned on a fully diluted basis.

8.1. Calculation of Downstream Investment

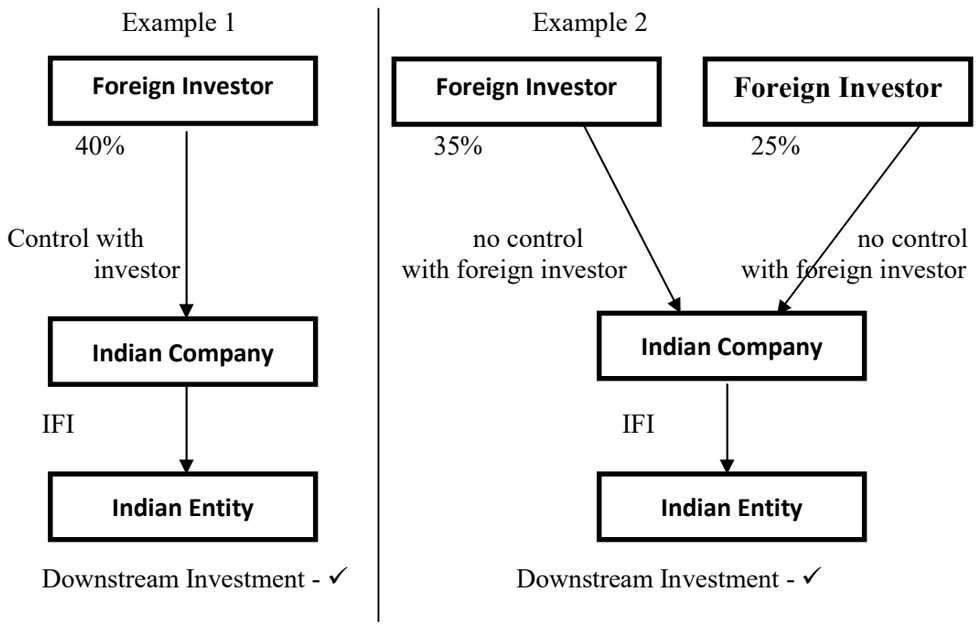
i. Foreign investment in an Indian company shall include investment under:

a. FDI
b. Investment by FII / FPI (calculated as of March 31 of the previous financial year in which the downstream investment is made)
c. NRI investment (Repatriable)
d. Investment by Investment vehicles
e. Fully, compulsorily and mandatorily convertible preference shares/ debentures / units of an Investment Vehicle

ii. Methodology for calculation will apply at each stage of Investment.

iii. The indirect foreign investment received by a wholly owned subsidiary of an Indian company will be limited to the total foreign investment received by the company making the downstream investment.

Meaning of Downstream Investment – Example



In both the above cases there is downstream investment. Either because control is with PROI or because ownership of more than 50% is with PROI.

8.2. Valuation of shares:

i. Valuation of shares will apply in case of transfer of shares in the capital of downstream company by a PRII to the holding company. Though the transfer is from resident to resident, but since the shares are transferred to a company owned and controlled by foreigner, valuation of shares will have to be done in compliance with the valuation norms.

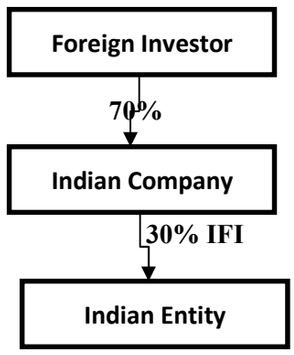
ii. Once the foreign investment in the holding company increases to more than 50%, investment in the operating company by holding company is a downstream investment even if no further investment is done by holding company.

iii. Until the shareholding of holding company is lower than 50%, valuation of holding company will have to be carried out for the purpose of reporting. Once downstream investment is made or the operating company becomes downstream company, valuation of downstream as well as holding company will have to be carried out for the purpose of reporting.

iv. In a case where holding company is only an investment holding company, valuation of only operating company will be required for the purpose of reporting.

8.3 Calculation of Downstream Investment: If an Indian company is considered as indirect foreign investor, the entire investment by Indian company will be considered as Indirect Foreign Investment, there is no proportionality. Thus if there is foreign investment of 70% in IC, investment by IC in downstream company will be entirely considered as IFI. IFI will not be restricted to 70%.

Example



In the above example, entire 30% will be considered as downstream investment and not just 21% (70% of 30)

8.4. Issues in FDI Policy for Downstream Investment

i. Company X has 51% Indian shareholding and 49% NRI shareholding. When it makes a downstream investment in Company Y to the extent of 51% and offers 49% shareholding of Company Y to NRIs, the total foreign investment in Company Y is 49% (being 49% direct foreign investment in Company Y + 0% Indirect Foreign Investment as Company X is owned and controlled by resident Indian citizens).

ii. Thus, in the above arrangement, NRI shareholding is 49% in Company X and it is also 49% in Company Y. Consequently, the beneficial ownership with NRIs in Company Y is not 49% but is actually 73.99% (49% of 51% in Company Y + 49% direct NRs in Company Y). **Admittedly, the NRIs are not in control of Company X and consequently also not in control of Company Y, but in case of entitlement to dividend flow and also to capital gains on dis-investment, the NRIs would take benefit of 73.99% and not 49%.**

iii. Further, if the sectoral cap for the sector in which the downstream entity is operating is 49%, the above arrangement would meet with the norms, however the beneficial ownership of all NRIs in Company Y would exceed 49%.

9. <u>Automatic Route of Investment to PROI – Sch. 1</u>

Eligible persons allowed investing under Sch 1:

i. A PROI may purchase capital instruments of a listed Indian company on a stock exchange in India provided that the PROI making the investment has already acquired control of such company in accordance with SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 and continues to hold such control – This clause permits existing shareholders to increase their stake in the company. Thus a PROI may be entitled to subscribe to the capital by way of preferential allotment or purchase the shares on stock exchange only if he has control as per SEBI guidelines or else PROI is required to acquire the shares, only if offered is made under SEBI code.

ii. A wholly owned subsidiary set up in India by a non-resident entity, operating in a sector where 100% foreign investment is allowed in the automatic route and there are no FDI linked performance conditions, may issue capital instruments to

the said non-resident entity against pre-incorporation/ preoperative expenses incurred by the said non-resident entity up to a limit of five percent of its authorised capital or USD 500,000 whichever is less subject to filing of Form FC-GPR and utilization certificate of statutory auditor.

iii. An Indian company may issue capital instruments to a PROI, if the Indian investee company is engaged in an automatic route sector, against:
   a. Swap of capital instruments; or
   b. Import of capital goods/ machinery/ equipment (excluding second-hand machinery); or
   c. Pre-operative/ pre-incorporation expenses (including payments of rent etc.).

However, Government approval shall be obtained if the Indian investee company is engaged in a sector under Government route. It may be noted that the limits as provided in paragraph 9.2 is not applicable in this case.

iv. An Indian company may issue equity shares against any funds payable by it to a person resident outside India, provided such remittance:
   a. Is permitted under the Act or the rules and regulations, or
   b. Does not require prior permission of the Central Government or the RBI, or
   c. has been permitted by the RBI.

In case where permission has been granted by the RBI for making remittance, the Indian company may issue equity shares against such remittance provided all regulatory actions with respect to the delay or contravention under FEMA or the rules or the regulations framed thereunder have been completed.

9.1. Mode of Payment:

The amount of consideration shall be paid as inward remittance through banking channels or out of funds held in NRE/ FCNR(B)/ Escrow account along with compliance of KYC requirements.

9.2. Investment under Approval route:

i. Investment is only permitted for investment in sectors that fall under the Automatic route. For sectors falling under the Approval route, the work of granting approval for foreign investment under the extant FDI Policy and FEMA Regulations has been entrusted to the concerned Administrative Ministries / Departments after abolition of FIPB w.e.f 05.06.2017.

ii. Currently there are ten notified sectors/activities requiring government approval, these are Defence/cases relating to FDI in small arms, Broadcasting, Print media, Civil Aviation, Satellites, Telecom, Private Security Agencies, Multi brand Retail, Financial services not regulated or regulated by more than one regulator/ Banking Public and Private (as per FDI Policy) and Pharmaceuticals.

iii. The Department of Industrial Policy and Promotion, Ministry of Commerce & Industry has been given the responsibility of overseeing the applications filed on the Foreign Investment Facilitation Portal (fifp.gov.in) and to forward the same to the concerned Administrative Ministry.

iv. A Standard Operating Procedure (SOP) developed by DIPP in consultation with the concerned Administrative Ministries is being followed for processing of the FDI applications. Approval letters in Standard Format will be uploaded on the Portal itself for the benefit of the Investors.

9.3. Eligible Investors for FDI:

i. PROI other than citizen of Pakistan, entities of Pakistan.

ii. Bangladesh Citizens & entities only with prior approval of foreign investment promotion board.

9.4. Sch 1 permits investment in an unlisted company. Investment of a single share also in an unlisted company is considered as FDI.

10. <u>Investment in Indian company – Other Modes</u>

10.1. A PROI having investment in an Indian company may make investment in capital instruments (other than share warrants) issued by such company as a rights issue or a bonus issue provided that

i. Price offered to PROI is not lower than that offered to PRII.

ii. Such issue does not result in breach of sectoral cap.

iii. The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in non resident external/ Foreign currency non resident bank account.

10.2. Under a scheme of merger/amalgamation approved by NCLT, the transferee Indian company may issue capital instruments to the existing holders of the transferor company resident outside India, subject to the condition of sectoral cap.

Such transaction should be reported to RBI within 30 days of such NCLT order of amalgamation with percentage of capital held by PROI in transferor, transferee or new company before or after the transfer.

10.3. Indian company may issue "employees' stock option" and/or "sweat equity shares" to its employees/directors or employees/directors of its holding company or joint venture or wholly owned overseas subsidiary/subsidiaries who are resident outside India subject to conditions.

10.4. A PROI (other than an individual who is citizen of Pakistan or Bangladesh or an entity which is registered/ incorporated in Pakistan or Bangladesh), may purchase convertible notes issued by an Indian startup company for an amount of twenty five lakh rupees or more in a single tranche.

Convertible Note' means an instrument issued by a startup company evidencing receipt of money initially as debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of such startup company, within a period not exceeding five years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument.

Issue of equity shares against such convertible notes shall be in compliance with the entry route, sectoral caps, pricing guidelines & other conditions for foreign investment.

11. <u>Prohibited Activities for Investment by a PROI</u>

i. Lottery Business including Govt/Pvt/Online lottery
ii. Gambling & Betting, including casinos
iii. Chit Funds

(The Registrar of Chits/Authorised officer, may, in consultation with the State Government concerned, permit any chit fund to accept subscription from Non-resident Indians and Overseas Citizens of India who shall be eligible to subscribe, through banking channel and on non- repatriation basis, to such chit funds, without limit subject to the conditions stipulated by RBI)

iv. Nidhi Company
v. Trading in Transferable Development Rights
vi. Real Estate Business/Construction of Farmhouse

Real estate business' means dealing in land and immovable property with a view to earning profit therefrom and does not include development of

townships, construction of residential/ commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships

Earning of rent income on lease of the property, not amounting to transfer, will not amount to real estate business

vii. Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes

viii. Activities/ sectors not open to private sector investment e.g. (I) Atomic energy and (II) Railway operations

ix. Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for Lottery Business and Gambling and Betting activities

12. Sectoral Caps

i. Sectoral cap for the following sectors/ activities is the limit indicated against each sector.

ii. In Sectors/Activities not listed in the schedule or not prohibited under Reg 15 of Fema 20(R), (Para ii) foreign investment is permitted up to 100 percent under Automatic route.

iii. Foreign Investment in investing companies not registered as Non-Banking Financial Companies with the Reserve Bank and in core investment companies (CICs), both engaged in the activity of investing in the capital of other Indian entities, will require prior Government approval.

iv. Foreign investment in investing companies registered as Non-Banking Financial Companies (NBFCs) with the Reserve Bank, will be under 100% automatic route.

v. An Indian company which does not have any operations and also has not made any downstream investment may receive investment in its capital instruments from PROI under automatic route, for undertaking activities which are under automatic route and without FDI linked performance conditions. As and when such a company commences business(s) or makes downstream investment, it will have to comply with the relevant sectoral conditions on entry route, conditionalities and caps.

Investment under Automatic Route

Sector/Activity	**Sectoral Cap**
Agriculture & Animal Husbandry	100%

Plantation (like tea, coffee, rubber, cardamom, etc)	100%
Mining (of metal and non-metal ores including diamond, gold, silver,etc)	100%
Petroleum & Natural Gas	100%
Manufacturing	100%
Construction Development: Townships, Housing, Built-up infrastructure	100%
Industrial Parks (quality infrastructure in the form of plots of developed land or built up space or a combination with common facilities, is developed and made available to all the allottee units for the purposes of industrial activity)	100%
Trading	100%
Railway Infrastructure (foreign investment beyond 49 percent sensitive areas from security point of view, will be brought by the Ministry of Railways before the Cabinet Committee on Security (CCS) for consideration)	100%

Partly Automatic & Partly under Government route with/ without conditions

Sector/ Activity	Automatic	Approval
Defence	Up to 49%	Beyond 49%
Broadcasting	100% Automatic or 49% Approval depending on activity	
Print Media	26% / 100% under Automatic route depending on activity	
Civil Aviation (like Airports, Helicopter services)	100%Upto 49% for air transport service)	Beyond 49% for air transport service
Satellites - Establishment and operation	-	100%
Private Security Agencies	-	49%
Telecom Services	Up to 49%	Beyond 49%
E- Commerce	100%	Multi Brand Retail Trading -51%
Pharmaceuticals	Greenfield – 100% Brownfield upto 74%	Brownfield beyond 74%
Financial Services	20%,49%,74%, and 100% for automatic as well as approval route depending on activity	

13. Conclusion

The Indian government's favourable policy regime and robust business environment have ensured that foreign capital keeps flowing into the country. The government has taken many initiatives in recent years such as relaxing FDI norms across sectors such as defence, PSU oil refineries, telecom, power exchanges, and stock exchanges, among others.

According to Department for Promotion of Industry and Internal Trade (DPIIT), FDI equity inflows in India in 2018-19 stood at US$ 44.37 billion vis-à-vis US$ 44.85 billion in 2017-18. Data for 2018-19 indicates that the services sector attracted the highest FDI equity inflow of US$ 9.16 billion, followed by computer software and hardware – US$ 6.42 billion, trading – US$ 4.46 billion and telecommunications – US$ 2.67 billion. Most recently, the total FDI equity inflows for the month of March 2019 touched US$ 3.60 billion. During 2018-19, India received the maximum FDI equity inflows from Singapore (US$ 16.23 billion), followed by Mauritius (US$ 8.08 billion), Netherlands (US$ 3.87 billion), USA (US$ 3.14 billion), and Japan (US$ 2.97 billion).

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OFFENCES AND PENALTIES UNDER REAL ESTATE (REGULATION & DEVELOPMENT) ACT, 2016

Shiva Nagesh, Adv.
Partner- Litigation & Advisory
SHARNAM LEGAL

Nainshree Goyal, Adv
Associate Lawyer
SHARNAM LEGAL

Real Estate (Regulation and Development) Act, 2016 is a very recent law but has a very far reaching impact on the economy, legal market as well real estate market. The series of article on RERA provides the brief of the basic provisions of the law and the impact on the Real Estate industry including the home buyers. The last chapter of the statute is offences and penalties under the Act and hence, this is the last article in the series.

RERA Act, 2016 provides for offences and penalties for contravention of the various provisions of the Act and the consequential adjudication process from Section 59 onwards to Section 72 of the Act.

While Sections 59 to 70 categorises the nature of offences by promoters, real estate agents, allottees and company has been prescribed, whereas Section 71 and 72 lays down the adjudication process.

Penalties on the Promoter

Since registration of 'Real Estate Project' is mandatory under Real Estate Law, non-compliance of the provision to register attracts penalty under section 59 of the Act which is up to ten percent of the estimated cost of the Real Estate Project as determined by the Authority. Real Estate Project is defined under Section 2(zn) - "Real Estate Project" *means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto.* If even after the penalty, the offence continues, he shall be punishable with imprisonment for a term which may extend up to three years or with fine which may extend up to a further ten percent of the estimated cost of the Real Estate Project, or with both.

Every Promoter is responsible to provide true and fair information as required under the Act. The information required under the Act or by the Authorities is not given specifically under the Act. It is to be understood in the light of the situation or the compliance under a specific provision. Hence, the purview of the word "Information" is very wide. If any Promoter provides false information or contravenes the provisions of section 4, he shall be liable to a penalty which may extend up to five percent of the estimated cost of the Real Estate Project, as determined by the Authority under sec 60.

Section 61 is general penalty clause for all the Promoters who contravenes any of the provisions of the Act will be penalised which may extend up to five percent of the estimated cost of the Real Estate Project as determined by the Authority.

Section 63 says if any Promoter, who fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to five percent of the estimated cost of the Real Estate Project as determined by the Authority.

Section 64 provides that the Promoter is also duty bound to comply with the orders of Appellate Tribunal. If any Promoter, who fails to comply with, or contravenes any of the orders, decisions or directions of the Appellate Tribunal, he shall be punishable with imprisonment for a term which may extend up to three years or with fine for every day during which such default continues, which may cumulatively extend up to ten percent of the estimated cost of the Real Estate Project, or with both.

Penalties on the Real Estate Agents:

Section 62 provides for penalty to be imposed on the Real Estate Agent for contravention of provisions of section 9 or section 10. He shall be subject to penalty of Rs.10, 000/- for every day during which the default continues, which may cumulatively extend up to 5% of the cost of the Real Estate Project.
It is quite justified to penalise a Promoter on the basis of the Real Estate Project, but the same on Real Estate Agent can be challenging in the legal scenario. It is very important to note here, that the Agent does not usually own a particular project. It will be a challenge and may lead to further prolonged litigations and confusions wherein the penalty upon the Agents is levied and the quantum is decided on the basis of cost of the Real Estate Project.

Section 65 provides for penalties on the Real Estate Agent needs to comply with section 9 or 10 of RERA (i.e. duties of Real Estate Agent to get itself registered and the other duties under the Act), failure to do so will attract penalty of ten thousand rupees for every day under section 62, during which if such default continues, which may cumulatively extend up to five percent of the cost of plot, apartment or buildings, as the case may be, of the Real Estate Project, for which the sale or purchase has been facilitated as determined by the Authority. These Agents are under the duty to adhere with the orders of the Authority. Under section 65 if any Real Estate Agent, who fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to five percent, of the estimated cost of plot, apartment or building, as the case may be, of the Real Estate Project, for which the sale or purchase has been facilitated and as determined by the Authority.

Under section 66, the Real Estate Agent can be punishable with imprisonment for a term which may extend up to one year or with fine for every day during which the default continues, which may cumulatively extend up to ten percent of the estimated cost of the plot, apartment or building, as the case may be, of the Real Estate Project, for which the sale or purchase has been facilitated, or with both.
Section 66 and section 67 are similar prescribing penalties for Real Estate Agent and Allottee respectively.

Penalty on the Allottee

Section 67 penalises Allottee who does not comply with orders or decisions of the authorities with cumulatively extending up to five percent of the plot, apartment or building cost, as determined by the Authority. Allottee is also penalised if it does not comply with orders of Appellate Tribunal.

Section 68 provides that Allottee shall be punishable with imprisonment for a term which may extend up to one year or with fine for every day during which such default continues, which may cumulatively extend up to ten percent of the plot, apartment or building cost, as the case may be, or with both.

A tabular presentation on applicable penalties is enclosed for easy understanding:

Penalty & Punishments imposable on the Promoter, Real Estate Agent and the Allottee

Section	Offence	Penalties / Punishment
59(1)	If any promoter does advertising, marketing, booking, selling etc. of a real estate project without first registering the project with RERA u/s 3	Penalty up to 10% of estimated project cost as determined by the authority.
59(2)	If any promoter does comply with the orders, decisions or direction in relation to above penalty or continues to violate section 3	I. Imprisonment up to 3 years; or II. Fine up to up to 10% of estimated project cost as determined by the authority, or III. With both However, this offence is compoundable.
60	If any promoter provides false information or fails to apply for registration wit in the time stipulated u/s 4(1)	Penalty up to 5% of estimated project cost as determined by the authority.
61	If any promoter contravention any other provisions of this Act or rules or regulations made there under.	Penalty up to 5% of estimated project cost as determined by the authority.
62	If any Real estate agent fails to comply with or contravenes the provisions of the acts.	Penalty of Rs. 10,000/- for every day during which may cumulatively extend up to 5% of estimated project cost.
63	If any promoter fails to comply with, or contravenes any order or directions of the Authority	Penalty for every day during which default continues, which may cumulatively extend up to 5% of estimated project cost as determined by the authority.
64	If any promoter fails to comply with, or contravenes any order or decision or directions of the Appellate Tribunal	I. Imprisonment up to 3 years; or II. Fine for every day during which default continues, which may cumulatively extend up to 10% of estimated project cost as determined by the authority., or III. With both.

65	If any Real estate agent fails to comply or contravenes any orders or directions of the authority	Penalty which may cumulatively extend up to 5% of the estimated cost of the project
66	If any Real estate agent fails to comply or contravenes any of the orders of the Real estate appellate tribunal	Imprisonment for a term 1 year or with fine for every day during which such default continues which may cumulatively extend upto 10% of the estimated cost of the project.
67	If any allottee fails to comply with the orders of the authority	Penalty upto 5% of the plot, apartment, building cost, as the case may be as determined by the authority for the period during which the default continues.

It is to be noted here that Section 70 provides for compounding of offences if any person is punished with imprisonment under this Act and the punishment will be compounded by the Court either before or after the institution of the prosecution. This compounding provision is available not withstanding anything contained in the Code of Criminal Procedure 1973.

Offences by the Company

Section 69 (1) Where an offence under this Act has been committed by a Company, every person who, at the time, the offence was committed was in charge of, or was responsible to the Company for the conduct of, the business of the Company, as well as the Company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section, shall render any such person liable to any punishment under this Act if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Section 69 (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a Company, and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the Company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Compounding of Offences

Section 70 Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), if any person is punished with imprisonment under this Act, the punishment may, either before or after the institution of the prosecution, be compounded by the court on such terms and conditions and on payment of such sums as may be prescribed:

Provided that the sum prescribed shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded.

It is evident that the RERA Act provides for compounding of offences committed by any person and who has been sentenced to imprisonment under this Act. It is to be noted that the above section starts with a non obstante clause and effectively the compounding of offences under this Act shall be allowed in spite of the person being sentenced under the provisions of Criminal Procedure Code as applicable in the case of any other crime punishable under Indian Penal Code.

The objective of the law makers to allow the compounding under permission from the Court seems to achieve the twin objective of treating the offence punishable under IPC and at the time same allowed to be compounded so that the person who files the complaint (complainant) reaches a mutual agreement or understanding to end the compliant with the permission of the Court.

Adjudication process

Section 71, the Authority shall appoint in consultation with the appropriate Government one or more Judicial Officer, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard.

Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

(2) The application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application:

Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections.

The adjudicating officer shall look into the following factors as given under section 72, to decide the compensation or interest under section 71 as discussed above:

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; (b) the amount of loss caused as a result of the default; (c) the repetitive nature of the default; (d) such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.

There can be compounding of offences under section 70 of the Act notwithstanding anything contained under Cr. P.C 1973, provided that the sum prescribed shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded.

Mens Rea under RERA provisions and penalties

Section 90 of the Act gives protection to any act done with good faith and no suit or legal proceedings to lie against a person who is acting in a bona fide with all care and precaution. It is also very important to note that mental state needs to be kept in mind in provisions which involve the culpable mental state, intention or a thought process while committing any act.

Conclusion

Before parting we would like to comment that the RERA Act imposes very stiff penalties for any noncompliance or contravention of the provisions of Act. The penalty ranges from stages of lighter to heavy monetary penalty and extends to imprisonments in continued cases of violation and extended non-compliance. Only time will tell us how deterrent these penalties will prove and to what extent all the stake holders i.e. the Promoter, Allottee, Real Estate Agent and the Company have been able to fulfil the objectives of the RERA Act in true letter & spirit.

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JUDGMENTS

HIGH COURT FOR THE STATE OF GUJARAT

R/Special Civil Application No. 20126 Of 2018
JUNE 27, 2019

M/s AMIT COTTON INDUSTRIES …. Petitioner
VERSUS
PRINCIPAL COMMISSIONER OF CUSTOMS …. Respondents

For the Petitioner (S): Mr D K Trivedi
For the Respondent (S): Mr Parth H Bhatt

The Hon'ble Court has allowed IGST refund upon post facto surrendering of higher rate of drawback over-rules, overruling circular 37/2018-Cus denying IGST in the present cases. Court not impressed by the unavailability of the functionality in the system to consider the claim.

HON'BLE JUSTICE JB PARDIWALA
HON'BLE JUSTICE AC RAO

FACTS

1. Writ-applicant had exported goods in July 2017. It is the case of the writ-applicant that it is eligible to seek refund of the IGST in accordance with the provisions of the IGST Act, 2017. However, according to the writ-applicant, without any valid reason the refund to the tune of Rs.19,05,121/- has been withheld. According to the writ-applicant, despite many representations addressed to the respondent no.2, i.e. the Deputy Commissioner of Customs, no cognizance has been taken so far as regards the claim for the lawful refund of the requisite amount.
2. Writ-applicant vehemently submitted that there is no legal embargo on availing the drawback at the rate of 1% higher rate on one hand and availing refund of the IGST paid in regard to the 'Zero Rated Supply', i.e. the goods exported out of India, on the other.
3. It is submitted that the refund ought to have been sanctioned immediately irrespective of the fact, whether the drawback was claimed at the rate of 1% (higher rate) or at the rate of 0.15% (lower rate).

4. Writ-applicant further submits that the stance of the respondents that the writ-applicant is not entitled to claim refund as the writ-applicant had availed drawback at the higher rate in regard to the finished goods exported out of India, is not sustainable in law.
5. It is not in dispute that his client paid back to the department the differential drawback amount, i.e. 0.85%, along with interest.
6. Referring to and relying upon the aforesaid provisions of law, more particularly, Rule 96, it is submitted that the claim for refund can be withheld only on two grounds as enumerated in the sub-clauses (a) and (b) of clause (4) of Rule 96 of the Rules.
7. That it is not in dispute that the goods were exported to Bangladesh; that in such circumstances the said export supplies are 'zero rated supplies' in accordance with Section 16 of the IGST Act; that as provided in Section 16(3)(b) of the IGST Act, 2017, the writ-applicant had the option to first pay the integrated tax in regard to the said supplies and then claim the refund of such tax in accordance with the provisions of Section 54 of the CGST Act, 2017.
8. It is further submitted that as the export supplies were 'zero rated supplies', the writ-applicant is entitled to refund as provided in Section 54 of the CGST Act, 2017.
9. In such circumstances, there being merit in this writ-application, the same be allowed and a writ of mandamus be issued directing the authorities to immediately sanction the refund of the IGST paid in regard to the goods exported, i.e. 'zero rated supplies', within the shipping bills referred to above.
10. Counsel for Revenue submitted that the writ-applicant is not entitled to claim the refund of the IGST paid as the writ-applicant had availed higher duty drawback; that in the case on hand, the writ-applicant having availed the higher drawback, the provisions of Section 16 of the IGST Act, 2017, as well as the provisions of Section 54 of the CGST Act, 2017, will have no application; that the writ-applicant might have returned the differential drawback amount, but that was a unilateral act on the part of the writ-applicant not recognized in law; that the IGST refund mechanism is system based and processed electronically in accordance with the declaration which the exporter may give in the shipping bill and the GST return; that as the writ-applicant had availed the higher drawback, the system declined the IGST refund.
11. Circular No. 37/2018-Customs dated 9th October 2018 issued by the Government of India, Ministry of Finance, Department of Revenue, as regards the IGST refunds isvrelied upon to buttress the Revenue argument that there being no merit in the writ-application, the same needs to be rejected.

Held:

12. It is not in dispute that the goods in question are one of zero rated supplies. A registered person making zero rated supplies is eligible to claim refund under the options as provided in sub-clauses (a) and (b) to clause (3) of Section 16 referred to above.
13. Respondents have fairly conceded that the case of the writ-applicant is not falling within sub-clauses (a) and (b) respectively of clause (4) of Rule 96 of the Rules, 2017.
14. The stance of the department is that, as the writ-applicant had availed higher duty drawback and as there is no provision for accepting the refund of such higher duty drawback, the writ-applicant is not entitled to seek the refund of the IGST paid in connection with the goods exported, i.e. 'zero rated supplies'.
15. If the claim of the writ-applicant is to be rejected only on the basis of the circular issued by the Government of India dated 9th October 2018 referred to above, then we are afraid the submission canvassed on behalf of the respondents should fail as the same is not sustainable in law. We are not impressed by the stance of the respondents that although the writ-applicant might have returned the differential drawback amount, yet as there is no option available in the system to consider the claim, the writ-applicant is not entitled to the refund of the IGST. First, the circular upon which reliance has been placed, in our opinion, cannot be said to have any legal force. The circular cannot run contrary to the statutory rules, more particularly, Rule 96 referred to above.
16. Rule 96 is relevant for two purposes. The shipping bill that the exporter may file is deemed to be an application for refund of the integrated tax paid on the goods exported out of India and the claim for refund can be withheld only in the following contingencies as enumerated in sub-clauses (a) and (b) respectively of clause (4) of Rule 96 of the Rules, 2017
17. Insofar as the circular is concerned, apart from being merely in the form of instructions or guidance to the concerned department, the circular is dated 9th October 2018, whereas the export took place on 27th July 2017. Over and above the same, the circular explains the provisions of the drawback and it has nothing to do with the IGST refund. Thus, the circular will not save the situation for the respondents. We are of the view that Rule 96 of the Rules, 2017, is very clear.
18. In view of the same, the writ-applicant is entitled to claim the refund of the IGST.
19. In the result, this writ-application succeeds and is hereby allowed.
20. The respondents are directed to immediately sanction the refund of the IGST paid in regard to the goods exported, i.e. 'zero rated supplies', with 7% simple interest from the date of the shipping bills till the date of actual refund.

Writ-Application allowed

JUDGEMENT

Per: J B Pardiwala:

1. RULE returnable forthwith. Mr. Parth Bhatt, the learned counsel 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. Your Lordships may be pleased to admit this petition;

   B. Your Lordships may be pleased to allow this petition;

   C. Your Lordships may be pleased to issue writ of mandamus or any other appropriate writ directing the respondent authorities to immediately sanction the refund of IGST paid in regard to the goods exported i.e. 'Zero Rated Supplies' made vide shipping bills mentioned herein above;

   D. Your Lordships may be pleased to direct the respondent authorities to pay interest @ 9% to the petitioner herein on the amount of refund of IGST mentioned herein above from the date of shipping bills uptill the date on which the amount of refund is paid to the petitioner herein, as the same is arbitrarily and illegally withheld by the respondent authorities;

   E. Your Lordships may be pleased to grant an ex-parte, ad interim order in favour of the petitioner herein in terms of prayer clause 'C' and 'D' herein above;

   F. Since the petitioner are constrained to approach Your Lordships by way of this petition only because of illegal act of respondent authorities, Your Lordships may be pleased to direct the respondent authorities to pay a cost of this litigation to the petitioner herein;

   G. Your Lordships may be pleased to grant such other and further relief/(s) that may be deemed fit and proper in the interest of justice in favour of the petitioner.

3. The case of the writ-applicant in its own words as pleaded in the writ-application is as under:

   "5.1. The petitioner herein is a Cotton Ginning Mill. They are engaged in a business of procuring raw cotton from farmers, ginning the same, pressing the same, carrying out necessary process, converting it into bales and then exporting these cotton bales out of India

   5.2. As required under the statute, they are registered with the Goods and Service Tax (hereinafter referred to as 'GST') Authorities. The hold GST Registration certificate bearing No. 24AAEFA672D1Z1.

   5.3. Any supplies made from registered premises i.e. factory of the petitioner herein would attract GST. Therefore, GST is paid by the petitioner in accordance

with law. However, since the goods are exported out of India, the same are to be termed as 'Zero Rate Supply' in accordance with Section 16 of the IGST Act.

5.4. According to the said provision, a registered person making 'Zero Rated Supply' has an option to claim refund in accordance with Section 16(3)(b) in a manner as to, he may supply goods or services or both, on payment of Integrated Tax and claim refund of such tax paid on goods or services or both supplied, in accordance with Section 54 of CGST Act.

5.5. As provided in Rule 96 of the CGST Rules, 2017 the shipping bill filed by an exported of goods shall be deemed to be an application for refund of Integrated Tax paid on the goods exported out of India and such application shall deemed to have been filed only when the person in charge of conveyance carrying the export goods duly files an export manifest or an export report covering the number and the date of shipping bills or bills of export and the applicant has furnished a valid return in Form - GSTR-3 or Form GSTR-3B.

5.6. Accordingly, the petitioner had for the purpose of exporting goods out of India issued Commercial Invoice, Export Invoice, and Shipping Bills. Export General Manifest and Bill of Lading were also generated by the Shipping Line.

Sr. No.	Commercial Invoice No. & Date	Export Invoice No. & Date	Shipping Bill No. & Date	Export General Manifest No. & Date	Bill of Lading No. & Date
1	AC/EXP/ 17-18/09 17/07/2017	AC/EXP/ 17-18/09 17/07/2017	7437636 18/07/2017	131676 01/01/2018	MSCUUD505 394 20/07/2017
2	AC/EXP/ 17-18/10 20/07/2017	AC/EXP/ 17-18/10 20/07/2017	7512885 21/07/2017	131913 01/08/2017	EID0191773 26/07/2017
3	AC/EXP/ 17-18/11 27/07/2017	AC/EXP/ 17-18/11 27/07/2017 7662194 28	7662194 28/07/2017	132230 08/08/2017	EID0192292 03/08/2017

On perusing the same, it may be observed that goods are exported top Bangladesh under the aforesaid documents. It may also be found that following IGST is paid in regard to the aforesaid goods:

Sr. No.	Shipping Bill No & Date	Amount of IGST Paid (Rs)
1	7437636 - 19/07/2017	6,98,628/-
2	7512885 - 21/07/2017	6,88,986/-,
3	7662194 - 28/07/2017	5,17,506/-
	TOTAL	19,05,120/-

5.7. As provided in Section 54 of CGST Act, 2017, read with Section 16 of IGST Act, 2017, immediately after the goods are exported, considering the shipping bills as application for refund of IGST paid in regard to the export goods, the respondent authorities are supposed to immediately refund the said amount of IGST to the petitioner.

5.8. In this case, exports were made in July 2017 but till date, IGST is not refunded. It is pertinent to note that no reason for withholding the amount of refund is assigned by the respondent authorities so far.

5.9. Time and again, the petition herein had approached respondent No.02 herein and requested him to kindly sanction refund of IGST. It was requested that the same may be credited in the concerned bank account of the petitioner in accordance with law. The respondent No.02 had verbally informed the petitioner that only because the petitioner had claimed drawback @ 1% in regard to the exported goods, therefore, refund of IGST would not be sanctioned. It is also informed that if the petitioner would have claimed drawback @ 0.15% instead of 1%, their refund would have been sanctioned.

5.10. Although there is no provision of law under which refund of IGST could be withheld because of aforesaid reasons, since the petitioner was suffering from cash crunch and was in dire need of the refund amount, they have given away the balance drawback i.e. 0.85% (1% - 0.15%) along with interest. Subsequently, on 16/10/2018, petitioner had also written a letter to the Deputy Commissioner of Customs, Drawback Section (Export), Mundra, and informed him regarding return of excess drawback claim under the aforesaid shipping bills. Copy of letter dtd. 16/10/2018 along with relevant challans and copies of demand drafts under which the so-called excess drawback is paid back along with interest are collectively annexed herewith and marked as ANNEXURE-C Colly.

5.11. Since the respondent authorities had not credited the refund of IGST in the concerned bank account of the petitioner so far, vide letter dtd. 05/11/2018; copy whereof is annexed herewith and marked as ANNEXURE-D, the petitioner herein had informed the respondent No.1 about reversal of so-called excess drawback along with interest. It was once again requested that at least in light of the fact that

the aforesaid amount of drawback was given away along with interest, the legally payable refund of IGST amount may kindly be credited to the concerned bank account of the petitioner in accordance with law.

5.12. Despite repeated follow ups with the respondent No.01 herein, before and after the date on which aforesaid letter dtd. 05/11/2018 was submitted, till date, the refund of IGST amount is not credited to the concerned bank account of the petitioner herein.

5.13. In response to aforesaid letter dated 5/11/2018 of the petitioner being addressed to the respondent No.2, the petitioner is in receipt of email dated 28.11.2018 from the email i.d. mundraigst2018@gmail.com. The same confirms that only reason for withholding refund is that the petitioner had first claimed more rate of draw-back. However, very conveniently, it failed to deal with the fact that the said higher rate is given away/paid back by the petitioner. A copy of the said email is annexed herewith and marked as Annexure-G. On perusing the said email, it may be found that the same further talks about circular No.37/2018-Customs, dated 9.10.2018. However, the said circular is not relevant in this case because the circular restricts Drawback if refund is availed and not the other way around. In any case, since the higher rate of draw-back is now given away/paid-back, even otherwise the question of with-holding refund would not arise."

4. Thus, it appears from the pleadings as aforesaid that the writ-applicant had exported goods in July 2017. It is the case of the writ-applicant that it is eligible to seek refund of the IGST in accordance with the provisions of the IGST Act, 2017. However, according to the writ-applicant, without any valid reason the refund to the tune of Rs.190512.00 has been withheld. According to the writ-applicant, the respondent no.1 is the Jurisdictional Head of the Mundra Customs House. Since the goods were exported from the Mundra Port, it is the respondent no.1 that is responsible for the refund in question. According to the writ-applicant, despite many representations addressed to the respondent no.2, i.e. the Deputy Commissioner of Customs, no cognizance has been taken so far as regards the claim for the lawful refund of the requisite amount.
5. Mr.D.K.Trivedi, the learned counsel appearing for the writ applicant, vehemently submitted that there is no legal embargo on availing the drawback at the rate of 1% higher rate on one hand and availing refund of the IGST paid in regard to the 'Zero Rated Supply', i.e. the goods exported out of India, on the other.
6. It is submitted that the refund ought to have been sanctioned immediately irrespective of the fact, whether the drawback was claimed at the rate of 1% (higher rate) or at the rate of 0.15% (lower rate).

7. Mr.Trivedi would submit that the stance of the respondents that the writ-applicant is not entitled to claim refund as the writ applicant had availed drawback at the higher rate in regard to the finished goods exported out of India, is not sustainable in law.
8. Mr. Trivedi submitted that it is not in dispute that his client paid back to the department the differential drawback amount, i.e. 0.85%, along with interest.
9. In the aforesaid context, Mr. Trivedi invited the attention of this Court to page-44 of the paper-book (Annexure-C collectively). Annexure-C is a letter dated 16th October 2018 addressed by the writ-applicant to the Deputy Commissioner of Customs, Mundra, with respect to the return of the excess drawback. The letter reads thus:
   XXXXXXX
10. Mr. Trivedi invited the attention of this Court to Section 16 of the **IGST Act, 2017**, which is with respect to the 'zero rated supply'. Our attention was thereafter invited to Section 54 of the **CGST Act, 2017**, which is with respect to refund of tax. In the last, Mr. Trivedi invited the attention of this Court to Rule 96 of the **CGST Rule, 2017** which is in respect of the refund of the integrated tax paid on goods or services exported out of India. Referring to and relying upon the aforesaid provisions of law, more particularly, Rule 96, it is submitted that the claim for refund can be withheld only on two grounds as enumerated in the sub-clauses (a) and (b) of clause (4) of Rule 96 of the Rules.
11. Mr. Trivedi submitted that it is not in dispute that the goods were exported to Bangladesh. He pointed out that the Export Invoices, Shipping Bills, Export General Manifest and Bill of Lading were generated as regards the export. He would submit that in such circumstances the said export supplies are 'zero rated supplies' in accordance with Section 16 of the IGST Act. He submitted that as provided in Section 16(3)(b) of the **IGST Act, 2017,** the writ-applicant had the option to first pay the integrated tax in regard to the said supplies and then claim the refund of such tax in accordance with the provisions of Section 54 of the **CGST Act, 2017**.
12. Mr. Trivedi submitted that as the export supplies were 'zero rated supplies', his client is entitled to refund as provided in Section 54 of the **CGST Act, 2017.** Mr. Trivedi invited our attention to grounds nos.(E), (F), (G), (H), (I), (J) and (K) as raised in the writ-application. The aforesaid grounds read thus:
   "E. It is pertinent to note that under normal circumstances, i.e. in case of refund of tax, the proper officer shall issue order for refund within six months from the date of receipt of application and the said refund amount must be credited to the fund referred to in Section 57 of CGST Act, 2017. Same is in accordance with Section

54(5) read with Section 54(7) of CGST Act, 2017. However, as provided in Section 54(8) of CGST Act, 2017, instead of crediting the refund amount to the fund; same shall be refunded to the petitioner at the earliest because it is a case of refund of tax paid on 'Zero Rated Supplies'. Since the same is not done, Your Lordships may direct the respondent authorities to kindly sanction the refund at the earliest.

F. As provided in Rule 96 of CGST Rules, 2017, the shipping bill filed by an exporter of goods shall be deemed to be an application for refund of Integrated Tax paid on the goods exported out of India and such application shall be deemed to have been filed only when the person in charge of the conveyance carrying the export goods duly files an export manifest or an export report covering the number and the date of shipping bills or bills of export and the applicant has furnished a valid return in Form GSTR-3 or Form GSTR- 3B. In this case, as could be observed from the documents mentioned herein above, shipping bills were generated and Export General Manifest was also generated. The petitioner has also furnished valid Return in GSTR-3B. Therefore, all the necessary requirements under Rule 96(1) are complied with. As such, no formal refund application is required to be filed. The respondent authorities are required to sanction refund amount considering the shipping bills as refund application. However, the same is not done so far; therefore Your Lordships may direct the respondent authorities to kindly sanction the refund at the earliest.

G. As provided in Rule 96(2) and 96(3), the details of export invoices in respect of export of goods contained in Form GSTR-1 shall be transmitted electronically by the common portal to the system designated by the Customs and the said system shall electronically transmit to the common portal, a confirmation that goods covered by the said invoice have been exported out of India. The refund amount shall be automatically credited to the concerned bank account of the petitioner herein. Needless to mention that since in the case of the petitioner, they had filed their GSTR-1 return for the month of July 2017 automatically the system must have acted in accordance with the said provisions and the refund ought to have been credited to the concerned bank account of the petitioner. However, the same is not done; therefore Your Lordships may direct the respondent authorities to kindly sanction the refund at the earliest.

H. Refund could only be withheld if the circumstances mentioned in Rule 96(4) arise. However, in this case, no such circumstances arise. Further, if it would have arisen, the petitioner was required to be intimated about the same in accordance with Rule 96(5) and subsequently, an order in Part-B of Form GST RFD-07 ought to have been passed and then the procedures required under Rule 96(7) should

have been followed. However, in this case neither is the refund withheld because of the circumstances mentioned in Rule 96(4) nor are they intimated, nor is any order passed or nor is any procedure in accordance with the aforesaid provision is followed. Therefore, the manner in which the refund is withheld is completely erroneous, illegal, and arbitrary and therefore Your Lordships may direct the respondent authorities to kindly sanction the refund at the earliest.

I. On perusing email dated 28.11.2018 being sent to the petitioner in response to their letter dated 5.11.2018, it may be observed that the same talks about circular no.37/2018- Customs, dated 9.10.2018. On perusing the same it may be observed that although it is issued with a purpose to clarify situations where IGST refunds have not been granted due to claiming higher rate of drawback or where higher rate and lower rate are identical, in order to clarify the same, relevant Notifications and conditions pertaining to the drawback are discussed. A reading of these Notifications and Rules would suggest that in all cases where IGST refund is availed, the authorities concerned may not allow higher rate of drawback. However, there is no provision in the Central Goods and Service Tax Act, 2017 or the Integrated Goods and Service Tax, 2017 or that there is no such circular or instructions even, under the GST law which would provide for restriction of IGST refund for the reason that higher rate of drawback is claimed. In short, the provisions discussed in the circular relied upon in the email pertains to reverse situation than the present one. Therefore, the circular is not correct.

J. Without prejudice to the above, it is further submitted that in any case, the circulars are not law. They are not binding precedents. They are only binding on the department and not the assessee. Even in that view of the matter, reliance placed on the said circular is not sustainable for the purpose of withholding refund.

K. In any view of the matter, as far as the petitioner is concerned, since they have already reversed/paid back the difference amount of the higher rate and lower rate in order to restrict the drawback claim to lower rate, even the said circular may not prevent the refund of IGST."

13. In such circumstances referred to above, Mr.Trivedi prays that there being merit in this writ-application, the same be allowed and a writ of mandamus be issued directing the authorities to immediately sanction the refund of the IGST paid in regard to the goods exported, i.e. 'zero rated supplies', within the shipping bills referred to above.
14. On the other hand, this writ-application has been vehemently opposed by Mr.Parth Bhatt, the learned standing counsel appearing for the respondents. Mr.Bhatt submitted that the writ-applicant is not entitled to claim the refund of the IGST paid

as the writ-applicant had availed higher duty drawback. Mr.Bhatt pointed out that in the case on hand, the writ applicant having availed the higher drawback the provisions of Section 16 of the IGST Act, 2017, as well as the provisions of Section 54 of the CGST Act, 2017, will have no application. Mr.Bhatt submitted that the contention canvassed on behalf of the writ-applicant that as the differential drawback (higher drawback) amount came to be refunded to the department, he is entitled to seek sanction of the refund of the IGST paid, is without any merit. The argument of Mr.Bhatt is that the writ applicant might have returned the differential drawback amount, but that was a unilateral act on the part of the writ-applicant not recognized in law. According to Mr.Bhatt, the IGST refund mechanism is system based and processed electronically in accordance with the declaration which the exporter may give in the shipping bill and the GST return. According to Mr.Bhatt, as the writ-applicant had availed the higher drawback, the system declined the IGST refund.

15. Mr.Bhatt placed reliance on the following averments made in the affidavit-in-reply filed on behalf of the respondents duly affirmed by one Shri B.Jeyanth Malaiyandi, Deputy Commissioner of Customs :

> "10. I say and submit that the legal positions related to Drawback claims are as under, Notification 131/2016-Cus (N.T.) dated 31.10.2016 specified the rate of drawback subject to the notes and conditions mentioned in the notification.
>
> I say and submit that condition 7 of the notification dated 31.10.2016 mentions that if any exporter claims drawback under Column (4) and (5), it means that drawback includes Customs, Central excise and Service Tax component and it's called Higher drawback. Similarly, if any exporter claims drawback under Column (6) and (7), it means the drawback included Customs only and it's called Lower drawback.
>
> I say and submit that after the introduction of IGST, the condition 11 of Notification 131/2016-Cust(N.T) dated 31.10.2016 has been amended by Notification 59/2017 dated 29.06.2017. I submit that the condition no. 11(d) mentions that drawback under Column (4) and (5) i.e. Higher Drawback is not applicable to the goods if good is exported by claiming refund of integrated goods and services tax paid on such exports
>
> I submit that in the present case, the Petitioner has exported goods and claimed Higher drawback. The drawback details as claimed by the petitioner obtained from Customs system have been given in Annex A. The claiming of higher drawback can be ascertained from the facts that the drawback serial number has been affixed with 'A' which denotes higher drawback.

I submit that in spite of exporting goods under payment of IGST, the exporter has claimed Higher Drawback and violated condition 11(d) of the Notification 131/2016-Cus (N.T.) dated 31.10.2016 as amended by notification 59/2017 dated 29.06.2017 to gain unlawful benefits.

12. I say and submit that a new condition, condition no.12A has been introduced after GST in the Notification 131/2016-Cus (N.T.) dated 31.10.2016 vide Notification 59/2017 dated 29.06.2017 for the purpose of claiming Higher drawback.

13. I submit that as per the condition no.12A, it is made clear that the exporter who avails drawback under Column (4) and (5) i.e. Higher drawback has to satisfy the condition that no refund of IGST paid on export product shall be claimed. In this case, the petitioner has availed Higher drawback after giving declaration that no refund of IGST shall be claimed. In this case, after availing the higher drawback, now the petitioner is claiming for IGST refund which is undue as per the declaration made by the petitioner.

14. In response to para 5.8 of the petition, I say and submit that when the IGST refund is undue as detailed in the above paras, the question of withholding the refund doesn't arise.

15. In response to para 5.10 of the petition, I say and submit that the petitioner has paid back the differential drawback (Between Higher drawback and Lower drawback) along with interest to claim IGST refund. It's to be highlighted here that the petitioner on their own paid the differential amount. However, there is no procedure prescribed under any law/notification that if differential amount of drawback has been paid, the exporter would be eligible for IGST refund. I further say and submit that when a procedure is non-existent, expecting IGST refund is not proper.

16. In response to para 5A of the petition, I say and submit that the Petitioner has alleged that there Is no embargo for simultaneously availed both Higher drawback and refund of IGST paid in regard to the Zero Rated Supply. I say and submit that the same is not proper. I submit that it is clearly provided in the respective provisions of IGST refund and Drawback that either higher drawback or IGST refund only can be availed but not both.

I say and submit that Section 16 of the IGST Act of 2016 mentions that the IGST refund shall be claimed in accordance with the provisions of Section 54 of the CGST Act, 2017. The bare provision of Section 16 relevant to the issue is reproduced hereunder:

XXXXX

16. Mr.Bhatt invited the attention of this Court to the Circular No. **37/2018-Customs** dated 9th October 2018 issued by the Government of India, Ministry of Finance, Department of Revenue, as regards the IGST refunds. The Circular relied upon by the respondents reads thus:
    XXXXXX
17. In such circumstances referred to above, Mr.Bhatt, the learned standing counsel appearing for the respondents, prays that there being no merit in this writ-application, the same be rejected.
18. 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 respondents are justified in withholding the refund of the IGST paid by the writ-applicant in connection with the goods exported, i.e. 'zero rated supplies'.
19. On 20th December 2018, this Court passed the following order :
    "1. The learned advocate for the petitioner has tendered a draft amendment. The amendment is allowed in terms of the draft. The same shall be carried out forthwith.
    The learned advocate for the petitioner invited the attention of the court to the provisions of section 16 of the Integrated Goods and Services Tax Act, 2017 which makes a provision for "Zero rated supply". It was submitted that under sub-section (3) thereof, a registered person making zero rated supply is eligible to claim refund as provided therein. It was submitted that the provision for refund of integrated tax paid on goods exported out of India is made under rule 96 of the Central Goods and services Tax Rules, 2017 (hereinafter referred to as "the rules"). It was submitted that all the requirements for claiming refund under the said rule have been fulfilled by the petitioner. Referring to sub-rule (4) of rule 96 of the rules, it was submitted that the claim for refund can be withheld only in the two eventualities mentioned therein, none of which are attracted in the present case. Reference was made to the email dated 28.11.2018 issued by the IGST Section, Customs House, Mundra drawing the attention of the petitioner to the Board Circular No. 37/2018-Customs dated 9.8.2018 wherein it is clearly mentioned that by declaring drawback claim serial number suffixed with A or C, the exporters consciously relinquished their IGST/ITC claim. Reference was made to Circular No. 37/2018-Customs dated 9.10.2018 to submit that the same does not relate to IGST and would have no applicability to the facts of the present case. It was submitted that in any case, the petitioner has already returned back the differential drawback amount, and hence, there is no impediment in the way of the respondents in granting the refund to the petitioner. Having regard to the

submissions advanced by the learned advocate for the petitioner, Issue Notice returnable on 24th January, 2019. "

20. Before adverting to the rival submissions canvassed on either side, we may refer to the three provisions of law relevant for the purpose of deciding the controversy between the parties. Section 16 of the IGST Act, 2017, reads thus:
    XXXXXX
21. Section 54 of the CGST Act, 2017, reads thus:
    XXXXXX
22. Rule 96 of the CGST Rules, 2017, reads thus:
    XXXXXX
23. Section 16 of the IGST Act, 2017 referred to above provides for zero rating of certain supplies, namely exports, and supplies made to the Special Economic Zone Unit or Special Economic Zone Developer and the manner of zero rating.
24. It is not in dispute that the goods in question are one of zero rated supplies. A registered person making zero rated supplies is eligible to claim refund under the options as provided in sub-clauses (a) and (b) to clause (3) of Section 16 referred to above.
25. Section 54 of the CGST Act, 2017 provides that any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, shall make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed. If, on receipt of any such application, the proper officer is satisfied that the whole or part of the amount claimed as refund is refundable, he may make an order accordingly and the amount so determined will have to be credited to the Fund referred to in Section 57 of the CGST Act, 2017.
26. Rule 96 of the CGST Rules provides for a deeming fiction. The shipping bill that the exporter of goods may file is deemed to be an application for refund of the integrated tax paid on the goods exported out of India. Section 54 referred to above should be read along with Rule 96 of the Rules. Rule 96(4) makes it abundantly clear that the claim for refund can be withheld only in two circumstances as provided in sub-clauses (a) and (b) respectively of clause (4) of Rule 96 of the Rules, 2017.
27. In the aforesaid context, the respondents have fairly conceded that the case of the writ-applicant is not falling within sub-clauses (a) and (b) respectively of clause (4) of Rule 96 of the Rules, 2017. The stance of the department is that, as the writ applicant had availed higher duty drawback and as there is no provision for accepting the refund of such higher duty drawback, the writ-applicant is not entitled

to seek the refund of the IGST paid in connection with the goods exported, i.e. 'zero rated supplies'.

28. If the claim of the writ-applicant is to be rejected only on the basis of the circular issued by the Government of India dated 9th October 2018 referred to above, then we are afraid the submission canvassed on behalf of the respondents should fail as the same is not sustainable in law.
29. We are not impressed by the stance of the respondents that although the writ-applicant might have returned the differential drawback amount, yet as there is no option available in the system to consider the claim, the writ-applicant is not entitled to the refund of the IGST. First, the circular upon which reliance has been placed, in our opinion, cannot be said to have any legal force. The circular cannot run contrary to the statutory rules, more particularly, Rule 96 referred to above.
30. Rule 96 is relevant for two purposes. The shipping bill that the exporter may file is deemed to be an application for refund of the integrated tax paid on the goods exported out of India and the claim for refund can be withheld only in the following contingencies:

    (a) a request has been received from the jurisdictional Commissioner of central tax, State tax or Union territory tax to withhold the payment of refund due to the person claiming refund in accordance with the provisions of subsection (10) or sub-section (11) of Section 54; or

    (b) the proper officer of Customs determines that the goods were exported in violation of the provisions of the Customs Act, 1962.

31. Mr.Trivedi invited our attention to two decisions of the Supreme Court as regards the binding nature of the circulars and instructions issued by the Central Government.
32. In the case of ***Commissioner of Central Excise, Bolpur v. Ratan Melting and Wire Industries, reported in 2008(12) S.T.R. 416 (S.C.) = 2008-TIOL-194-SC-CX-CB***, the Supreme Court observed as under :

    "4. Learned counsel for the Union of India submitted that the law declared by this Court is supreme law of the land under Article 141 of the Constitution of India, 1950 (in short the 'Constitution'). The Circulars cannot be given primacy over the decisions.

    Learned counsel for the assessee on the other hand submitted that once the circular has been issued it is binding on the revenue authorities and even if it runs counter to the decision of this Court, the revenue authorities cannot say that they are not bound by it. The circulars issued by the Board are not binding on the assessee but are binding on revenue authorities. It was submitted that once the Board issues a circular, the revenue authorities cannot take advantage

of a decision of the Supreme Court. The consequences of issuing a circular are that the authorities cannot act contrary to the circular. Once the circular is brought to the notice of the Court, the challenge by the revenue should be turned out and the revenue cannot lodge an appeal taking the ground which is contrary to the circular.

Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.

5. As noted in the order of reference the correct position vis-a-vis the observations in para 11 of Dhiren Chemical's case (supra) has been stated in Kalyani's case (supra). If the submissions of learned counsel for the assessee are accepted, it would mean that there is no scope for filing an appeal. In that case, there is no question of a decision of this Court on the point being rendered. Obviously, the assessee will not file an appeal questioning the view expressed vis-avis the circular. It has to be the revenue authority who has to question that. To lay content with the circular would mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme Court. That would be against very concept of majesty of law declared by this Court and the binding effect in terms of Article 141 of the Constitution."

33. In the case of ***J.K. Lakshmi Cement Limited v. Commercial Tax Officer, Pali, reported in 2018(14) G.S.T.L. 497 (S.C.) 2016-TIOL-160-SC-CT***, *the Supreme Court observed as under:*

"25. The understanding by the assessee and the Revenue, in the obtaining factual matrix, has its own limitation. It is because the principle of res judicata would have no application in spite of the understanding by the assessee and the Revenue, for the circular dated 15.04.1994, is not to the specific effect as suggested and, further notification dated 07.03.1994 was valid between 1st April, 1994 up to 31st March, 1997 (upto 31st March, 1997 vide notification dated 12.03.1997) and not thereafter. The Commercial Tax Department, by a

circular, could have extended the benefit under a notification and, therefore, principle of estoppel would apply, though there are authorities who opine that a circular could not have altered and restricted the notification to the determent of the assessee. Circulars issued under tax enactments can tone down the rigour of law, for an authority which wields power for its own advantage is given right to forego advantage when required and considered necessary. This power to issue circulars is for just, proper and efficient management of the work and in public interest. It is a beneficial power for proper administration of fiscal law, so that undue hardship may not be caused. Circulars are binding on the authorities administering the enactment but cannot alter the provision of the enactment, etc. to the detriment of the assessee. Needless to emphasise that a circular should not be adverse and cause prejudice to the assessee. (See: UCO Bank, Calcutta v. Commissioner of Income Tax, West Bengal - (1999)4 SCC 599 = 2002-TIOL-697-SC-IT-LB.

26. In Commissioner of Central Excise, Bolpur v. Ratan Melting and Wire Industries - (2008)13 SCC 1 2008-TIOL-194-SC-CX-CB, it has been held that circulars and instructions issued by the Board are binding on the authorities under respective statute, but when this Court or High Court lays down a principle, it would be appropriate for the Court to direct that the circular should not be given effect to, for the circulars are not binding on the Court. In the case at hand, once circular dated 15.04.1994 stands withdrawn vide circular dated 16.04.2001, the appellant-assessee cannot claim the benefit of the withdrawn circular.

The controversy herein centres round the period from 1st April, 2001 to 31st March, 2002. The period in question is mostly post the circular dated 16.04.2001. As we find, the appellant-assessee has pleaded to take benefit of the circular dated 15.04.1994, which stands withdrawn and was only applicable to the notification dated 07.03.1994. It was not specifically applicable to the notification dated 21.01.2000. The fact that the third paragraph of the notification dated 21.01.2000 is identically worded to the third paragraph of the notification dated 07.03.1994 but that would not by itself justify the applicability of circular dated 15.04.1994.

In this context, we may note another contention that has been advanced before us. It is based upon the doctrine of contemporanea exposition. In our considered opinion, the said doctrine would not be applicable and cannot be pressed into service. Usage or practice developed under a statute is indicative of the meaning prescribed to its words by contemporary opinion. In case of an ancient statute, doctrine of contemporanea exposition is applied as an

admissible aid to its construction. The doctrine is based upon the precept that the words used in a statutory provision must be understood in the same way in which they are usually understood in ordinary common parlance by the people in the area and business. (See: G.P. Singh's Principles of Statutory Interpretation, 13th Edition-2012 at page 344). It has been held in Rohitash Kumar and others v. Om Prakash Sharma and others - (2013)11 SCC 451 that the said doctrine has to be applied with caution and the Rule must give way when the language of the statute is plain and unambiguous. On a careful scrutiny of the language employed in paragraph 3 of the notification dated 21.01.2000, it is difficult to hold that the said notification is ambiguous or susceptible to two views of interpretations. The language being plain and clear, it does not admit of two different interpretations.

In this regard, we may state that the circular dated 15.04.1994 was ambiguous and, therefore, as long as it was in operation and applicable possibly doctrine of contemporanea exposition could be taken aid of for its applicability. It is absolutely clear that the benefit and advantage was given under the circular and not under the notification dated 07.03.1994, which was lucid and couched in different terms. The circular having been withdrawn, the contention of contemporanea exposition does not commend acceptation and has to be repelled and we do so. We hold that it would certainly not apply to the notification dated 21.01.2000."

34. We take notice of two things so far as the circular is concerned. Apart from being merely in the form of instructions or guidance to the concerned department, the circular is dated 9th October 2018, whereas the export took place on 27th July 2017. Over and above the same, the circular explains the provisions of the drawback and it has nothing to do with the IGST refund. Thus, the circular will not save the situation for the respondents. We are of the view that Rule 96 of the Rules, 2017, is very clear. 35. In view of the same, the writ-applicant is entitled to claim the refund of the IGST. 36. In the result, this writ-application succeeds and is hereby allowed. The respondents are directed to immediately sanction the refund of the IGST paid in regard to the goods exported, i.e. 'zero rated supplies', with 7% simple interest from the date of the shipping bills till the date of actual refund.

35. Rule made absolute.

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HIGH COURT OF DELHI AT NEW DELHI

W.P. (C) 3798/2019
JULY 22, 2019

M/S BLUE BIRD PURE PVT LTD. …. Petitioner
VERSUS
UNION OF INDIA & ORS. …. Respondents

For the Petitioner (S): Mrs. Anjali J. Manish and Mr. Priyadarshi Manish,
For the Respondent (S): Mr. Anil Dabas and Mr. Praveen Kumar, Advocates for Respondent No. 1 Mr. Harpreet Singh, Senior Standing Counsel for Respondent Nos. 2 and 3 with Ms. Suhani Mathur, Advocate Mr. Satyakam, ASC, Govt. Of NCT of Delhi/ Respondent Nos. 4 and 5

The Court directed the department to either open the Portal to enable the Petitioner to again file the rectified TRAN-I Form electronically or accept the manually filed TRAN-I Form with the correction on or before 31st July, 2019. The penalty and interest for the late filing of GSTR-3B were waived off in view of the above directions, subject, of course, to the Petitioner being permitted to filing the rectified TRAN-1 Form as directed.

HON'BLE JUSTICE S.MURALIDHAR
HON'BLE JUSTICE TALWANT SINGH

Dr. S. Muralidhar, J.:

1. Notice. Notice is accepted by learned counsel for the Respondents.

2. Counter-affidavit filed on behalf of Respondent Nos. 2 and 3 is already on record.

3. The Petitioner is a company having its registered office in New Delhi, engaged in the manufacturing and trading of water purifiers. It is duly registered with the Excise Department and under the Central Excise Act, 1944 and the Rules under which it is entitled to take the CENVAT credit on input used for manufacturing of the finished goods. After the enactment of Central Goods and Services Act, 2017 (CGST Act), the Petitioner got itself registered with the Goods and Service Tax Department. A registration number was issued to it on 26th September, 2017.

4. The Central Government in exercise of the powers under Section 140(5) read with Section 164 of CGST Act read with Rule 117 of the CGST Rules prescribed the GST TRAN- 1 Form which was required to be filed online as a condition precedent for allowing the Petitioner to carry forward the CENVAT credit that was available to it as on the date of coming into force of the CGST Act. The Petitioner states that it filled and filed online the GST TRAN-1 Form on 27th December, 2017. The specific averment is that it committed an inadvertent error in showing the available stock of goods as on 30th June, 2017 in column 7(d) of the Form instead of column 7(a) of the Form. It is stated that as a result of this error, the Petitioner has been unable to avail of the Central GST Credit in respect thereof.

5. It is further averred in the petition that after the due date for filing of the TRAN-1 Form was crossed, the system got locked down at the portal and no tax payer was able to view/mend their TRAN-1 forms. The portal opened up on 15th March, 2018 for filing the TRAN- 2 Returns. It was at that stage that the Petitioner realised that it had committed an inadvertent error in the TRAN-1 Form. The system, however, did not permit the Petitioner to revise the TRAN-1 Form.
6. On 23rd April, 2018, the Petitioner addressed a representation to Officer, Single Point of Contact (SPOC) Delhi, GST-ITO (Respondent No. 5), admitting to having committed the abovementioned inadvertent error and seeking permission to rectify the mistake. The credit amount involved was Rs.20,34,807/-. It is pointed out that on account of inability to avail of the above credit amount, the Petitioner was not in a position to file the GSTR-3B returns.

7. The Petitioner further states that on the said representation, the GSTO stated that it will be forwarded to the GST Council for further action. However, nothing happened. The Petitioner addressed further letters on 19th September, 2018 to SPOC and 24th September, 2018 to the Commissioner, Delhi GST, but was not permitted to rectify the TRAN-1 Form already filed online. An e-mail was addressed to the GSTN Nodal Officer on 22nd October, 2018 explaining the Petitioner's difficulty. After several reminders bore no results, the present petition was filed.

8. Learned counsel for the Petitioner has referred to the two decisions of this Court, namely, ***Bhargava Motors v. Union of India,*** decision dated 13th May, 2019 in WP(C) 1280/2018 and ***Kusum Enterprises Pvt. Ltd v. Union of India, 2019-TIOL-1509-HC-DEL-GST***, where in similar circumstances, the Court issued directions to

the Respondents to either open the portal to enable the Petitioner to rectify the TRAN-1 Form electronically or permit the Petitioner to do it manually.

9. Learned counsel for Respondents sought to distinguish the applicability of the above decisions on the ground that in those cases there was a glitch in the system which prevented those Petitioners from correcting the credit amount in the TRAN-1 Form, whereas in the present case the mistake was by the Petitioner in filling up the stock quantity in the wrong column.

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*** *(supra)* as under:

> "10. The GST System is still in a 'trial and error phase' as far as its implementation is concerned. Ever since the date the GSTN became operational, this Court has been approached by dealers facing genuine difficulties in filing returns, claiming input tax credit through the GST portal. The Court's attention has been drawn to a decision of the Madurai Bench of the Madras High Court dated 10th September, 2018 in W.P. (MD) No. 18532/2018 (Tara Exports vs. Union of India) where after acknowledging the procedural difficulties in claiming input tax credit in the TRAN-1 form that Court directed the respondents "either to open the portal, so as to enable the petitioner to file the TRAN1 electronically for claiming the transitional credit or accept the manually filed TRAN1" 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 31st May, 2019. The Petitioner's claims will thereafter be processed in accordance with law.

12. With a view to ensure that in future such glitches can be overcome, the Court directs the Respondents to consider providing in the software itself a facility of the trader/dealer being able to save onto his/her system the filled up form and also a facility for reviewing the form that has been filled up before its submission. It should also permit the dealer to print out the filled up form which will contain the date/time of its submission online. The Respondents will also consider whether there can be a message that pops up by way of an 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.***(*supra*).

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-1instead 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. 27th December, 2017. Thus, such facility was rendered impractical and meaningless.

13. The Court also notes with some concern that the representations repeatedly made by the Petitioner were not attended to by the Respondents which resulted in the Petitioner having to approach this Court for relief. The apprehension of the Respondents that orders of the kind in ***Bhargava Motors*** *(supra)* and ***Kusum Enterprises****(supra)* can open the 'flood gates' can easily be allayed by the Respondents themselves if they provide a robust Grievance Redressal Mechanism that can address such genuine grievances of the traders instead of compelling every trader to approach this Court for relief.

14. Mr. Harpreet Singh, learned counsel for the Respondents 2 and 3 informs the Court that there is in fact, an Information Technology Grievances Redressal Committee (ITGRC) to address the technical glitches encountered by the traders and to enable them to avail of the input tax and other credit which they are entitled to under the law. When enquired why the said ITGRC was unable to redress the Petitioner's complaint, Mr. Harpreet Singh speculated that the Petitioner's case perhaps did not fall within the 'parameters' for consideration of the grievance by the said ITGRC. There is nothing on record to suggest that the Petitioner's repeated representations

were ever placed before the ITGRC for its consideration. Even the counter affidavit filed in the present case does not suggest so.

15. Accordingly, this Court directs the Respondents to either open the online portal so as to enable the Petitioner to again file the rectified TRAN-I Form electronically or accept the manually filed TRAN-I Form with the correction on or before 31st July, 2019.

16. The Petitioner will correspondingly be permitted to thereafter file the return in TRAN-2. The penalty and interest for the late filing of GSTR-3B will be waived off in view of the above directions, subject, of course, to the Petitioner being permitted to and in fact filing the rectified TRAN-1 Form as directed.

17. The writ petition is disposed of in the above terms.

18. A copy of this order be given *dasti* to the parties under the signatures of the Court Master.

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HIGH COURT FOR THE STATE OF GUJARAT

R/Special Civil Application No. 13679 Of 2019
AUGUST 07, 2019

AAP AND CO., Chartered Accounts through Authorised Partner …. Petitioner
VERSUS
UNION OF INDIA & ORS …. Respondents

For The Petitioner (S): Mr Avinash Poddar, Mr Vishal J Dave, Mr Nipun Singhvi
For The Respondent (S): Ms Maithili Mehta, Mr Nirzar S Desai

The press release dated 18th October 2018 could be said to be illegal to the extent that its para-3 purports to clarify that the last date for availing input tax credit relating to the invoices issued during the period from July 2017 to March 2018 is the last date for the filing of return in Form GSTR-3B. The said clarification could be said to be contrary to Section 16(4) of the CGST Act/GGST Act read with Section 39(1) of the CGST Act/GGST Act read with Rule 61 of the CGST Rules/GGST Rules.

HON'BLE JUSTICE J.B. PARDIWALA
HON'BLE JUSTICE A.C. RAO

(PER: HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. By this writ-application under Article 226 of the Constitution of India, the writ-applicant has prayed for the following reliefs:

"a. To issue writ of or in the nature of mandamus or any other appropriate writ, order or direction to quash and set aside the press release dated 18.10.2018 to the extent that its para 3 purports to clarify that the last date for availing input tax credit relating to the invoices issued during the period from July, 2017 to March, 2018 is the last date for the filing of return in Form GSTR-3B;

b. To issue necessary writ(s), direction(s), and/or pass necessary order(s) directing the Respondents to allow/ consider taking input tax credit relating to the invoices issued during the period from July, 2017 to March, 2018 till the due date for the filing of return in for GSTR-3 or annual return whichever is earlier;

c. To issue writs(s) and/or direction(s) in the nature of prohibition commanding the Respondents, their servants, agents and/or subordinates from resorting to any coercive measure during the pendency of the writ petition before this Hon'ble Court;

d. To issue order(s), direction(s), writ(s) or any other relief(s) as this Hon'ble Court deems fit and proper in the facts and circumstances of the case and in the interest of justice;

e. To issue Rule Nisi in terms of prayers (a) to (g) above;

f. To Grant ad-interim reliefs in terms of prayers above;

g.To award Costs of and incidental to this application be paid by the Respondents."

2. The case of the writ-applicant, in his own words as pleaded in the writ-application, is as follows:

3. It is submitted that the writ-applicant is a practicing Chartered Accountant having GST registration No. 24AARFA8951B1ZF. It is submitted that Section 16(4) of the Central Goods and Services Tax Act, 2017 (for short, 'the CGST Act')/Gujarat Goods and Services Tax Act, 2017 (for short, 'the GGST Act') provides that a registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under Section 39 for the month of September following the end of the financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

4. The writ-applicant would submit that the relevant provision of Section 16(4) of the CGST Act/ GGST Act reads thus:

"Section 16(4) - A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier."

5. It is further submitted that it would be evident from the bare perusal of Section 16(4) of the CGST Act/GGST Act that the last date for taking the input tax credit in respect of any invoice or debit note pertaining to a financial year is due date of furnishing of the return under Section 39 for the month of September following the end of financial year or furnishing of the relevant annual return, whichever is earlier.

6. The writ-applicant would submit that Section 39(1) of the CGST Act/GGST Act provides that every registered person except few categories of persons shall furnish a monthly return in such form and manner as may be prescribed.

7. The writ-applicant would further submit that the relevant provision of Section 39(1) of the CGST Act/ GGST Act reads thus:

"Section 39: Furnishing of returns. - (1) Every registered person, other than an Input Service Distributor or a nonresident taxable person or a person

paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax paid and such other particulars as may be prescribed, on or before the twentieth day of the month succeeding such calendar month or part thereof."

XXXXX

8. It is submitted that the form and the manner of submission of monthly return is provided in Rule 61 of the CGST/GGST Rules. It is submitted that sub-rule (1) of the CGST/GGST Rules provides that every registered person except a few categories of persons shall furnish a return specified under sub-section (1) of Section 39 in Form GSTR-3 electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner. It is further submitted that sub-rule (5) of Rule 61 of the Central Goods and Services Tax Rules (for short, 'the CGST Rules')/Gujarat Goods and Services Tax Rules (for short, 'the GGST Rules') provides that where the time limit for furnishing of the details in Form GSTR-1 under Section 37 and in Form GSTR-2 under Section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in Form GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.
9. It is submitted that Rule 61 of the CGST/GGST Rules relating to the form and manner of submission of monthly return reads thus:

"61: Form and Manner of Submission of Monthly Return - (1) Every registered person other than a person referred to in section 14 of the Integrated Goods and Services Tax Act, 2017 or an Input Service Distributor or a non-resident taxable person or a person paying tax under section 10 or section 51 or, as the case may be, under section 52 shall furnish a return specified under sub-section (1) of section 39 in FORM GSTR-3 electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

(2) Part A of the return under sub-rule (1) shall be electronically generated on the basis of information furnished through FORM GSTR-1, FORM GSTR-2 and based on other liabilities of preceding tax periods.

(3) Every registered person furnishing the return under subrule (1) shall, subject to the provisions of section 49, discharge his liability towards tax, interest, penalty, fees or any other amount payable under the Act or the

provisions of this Chapter by debiting the electronic cash ledger or electronic credit ledger and include the details in Part B of the return in FORM GSTR-3.
XXXXX

10. It is submitted that the bare perusal of Rule 61 of the CGST/GGST Rules would indicate that the return prescribed in terms of Section 39 is a return required to be furnished in Form GSTR-3 and not GSTR-3B.
11. It is submitted that in the notification no.10/2017 – Central Tax dated 28th June 2017 it was provided in terms of sub-rule (5) of Rule 61 of the CGST Rules that where the time limit for furnishing of details in Form GSTR-1 under Section 37 and in Form GSTR-2 under Section 38 has been extended and the circumstances so warrant, return in Form GSTR-3B, in lieu of Form GSTR-3, may be furnished in such manner and subject to such conditions as may be notified by the Commissioner. An analogous notification no.10/2017 – State Tax (Rate) dated 30th June 2017 was also issued by the Government of Gujarat under the GGST Rules.
12. It is submitted on behalf of the writ-applicant that sub-rule (5) of Rule 61 of the CGST Rules was retrospectively amended with effect from 1st July 2017 vide Notification No.17/2017 – Central Tax dated 27th July 2017 to omit the wordings return in Form GSTR-3B being in lieu of Form GSTR-3.
13. It is further submitted that it would be obvious from a conjoint reading of Rule 61(1) and Rule 61(5) of the CGST/GGST Rules and the aforesaid Notification that the return required to be furnished in Form GSTR-3B is not the return in lieu of a return specified in Form GSTR-3. The Central and the State Government has consciously omitted reference to return required to be furnished in Form GSTR-3B being in lieu of Form GSTR-3 through Notification no.17/2017 – Central Tax dated 27th July 2017. The following sub-rule (6) in Rule 61 has been added subsequently after sub-rule (5) by Notification no.17/2017 – Central Tax dated 27th July 2017 :

"(6) Where a return in FORM GSTR-3B has been furnished, after the due date for furnishing of details in FORM GSTR-2:

(a) Part A of the return in FORM GSTR-3 shall be electronically generated on the basis of information furnished through FORM GSTR-1, FORM GSTR-2 and based on other liabilities of preceding tax periods and PART B of the said return shall be electronically generated on the basis of the return in FORM GSTR-3B furnished in respect of the tax period;

(b) the registered person shall modify Part B of the return in FORM GSTR-3 based on the discrepancies, if any, between the return in FORM GSTR-3B and the return in FORM GSTR3 and discharge his tax and other liabilities, if any;

(c) where the amount of input tax credit in FORM GSTR-3 exceeds the amount of input tax credit in terms of FORM GSTR-3B, the additional amount shall be credited to the electronic credit ledger of the registered person."

14. It is submitted on behalf of the writ-applicant that it is obvious from the bare perusal of the clause (c) of sub-rule (6) of Rule 61 of the CGST/GGST Rule that if any input tax credit is taken after filing of the GSTR-3B return and it is reflected in return filed in Form GSTR-3 then the same will have to be credited to the electronic credit ledger of the registered person. Further, the discrepancies, if any, in discharge of his tax and other liabilities can also be rectified through the return filed in form GSTR-3.
15. It is further submitted that the decision to add return in form GSTR-3B was taken in the 18th GST Council held on 30th June 2017 on account of the reason stated as 'shorter return for first two months of roll out'. It has not been introduced as a return in substitute of return to be filed in form GSTR-3. Therefore, it is quite obvious that return in form GSTR-3B is only a temporary stop gap arrangement till due date of filing return in form GSTR-3 is notified in the GSTN portal. It is therefore, submitted that it is quite obvious that the return to be filed in form GSTR-3 is the final return for taking additional input tax credit as well as discharging of additional tax liabilities after filing of return in form GSTR-3B. It is, therefore, submitted that the last date for availing the input tax credit relating to the invoices issued during the period from July 2017 to March 2018 is the last date for filing of the return in form GSTR-3 and not GSTR-3B.
16. It is submitted that para 3 of the press release dated 18th October 2018 says that, "With taxpayers self-assessing and availing ITC through return in FORM GSTR-3B, the last date for availing ITC in relation to the said invoices issued by the corresponding supplier(s) during the period from July, 2017 to March, 2018 is the last date for the filing of such return for the month of September, 2018 i.e. 20th October, 2018".
17. Thus, it appears from the pleadings that the writ-applicant seeks to question the legality and validity of the press release dated 18th October 2018 to the extent that its para-3 purports to clarify that the last date for availing the input tax credit relating to the invoices issued during the period between July 2017 and March 2018 would be the last date for filing of the return in Form GSTR-3B on the ground that the said clarification is contrary to Section 16(4) of the Central Goods and Services Tax Act, 2017 and Section 16(4) of the Gujarat Goods and Services Tax Act, 2017 read with Section 39(1) of the CGST Act/GGST Act read with Rule 61 of the Central Goods and Services Tax Rules, 2017 (for short, 'the CGST Rules') and Rule 61 of the Gujarat Goods and Services Tax Rules, 2017 (for short, 'the GGST Rules).

18. The case of the writ-applicant is that the impugned press release is without the authority of law, unreasonable, illegal and void.
19. On 7th December 2018, this Court passed the following order :

"1. Mr. Vinay Shraff, learned counsel for the petitioner has invited the attention of the court to the impugned press release dated 18.10.2018 to point out that according to section 16(4) of the Central Goods and Services Tax Act, 2017, a registered person is not entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier. It was pointed out that the relevant return under section 39 of the CGST Act is FORM GSTR-3 as provided under rule 61(1) of the Central Goods and Services Tax Rules. The attention of the court was invited to Notification No.10/2017 – Central Tax dated 28th June, 2017 whereby the Central Goods and Services Tax (Second Amendment) Rules, 2017 came to be notified and more particularly, sub-rule (5) of rule 61 thereof, which provides thus:-

"(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, return in FORM GSTR-3B, in lieu of FORM GSTR-3, may be furnished in such manner and subject to such conditions as may be notified by the Commissioner."

2. It was pointed out that the Central Government realising its mistake thereafter, vide Notification No.17/2017-Central Tax dated 27th July, 2017 notified the the Central Goods and Services Tax (Fourth Amendment) Rules, 2017 whereby sub-rule (5) of rule 61 came to be substituted as follows :-

"(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify that return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner."

3. It was submitted that, therefore, FORM GSTR-3B is not in lieu of FORM GSTR-3 and is applicable only in the circumstances stipulated under sub-rule (5) of rule 61 of the rules.

4. Referring to the impugned press release, it was submitted that the same provides that with tax payers selfassessing and availing ITC through return in FORM GSTR3B, the last date for availing ITC in relation to the said invoices issued by the corresponding suppliers during the period from July, 2017 to March, 2018 is the last date for the filing of such return for the month of September, 2018 i.e. 20th October, 2018. It was submitted that sub-section (4) of section 16 of the Act contemplates furnishing of return under section 39 thereof which is in FORM GSTR-3 whereas FORM GSTR-3B is to be furnished in the circumstances, as contemplated under sub-rule (5) of rule 61 of the rules. It was submitted that, therefore, the impugned press release is contrary to the provisions of the Act and the rules.

5. Having regard to the submissions advanced by the learned counsel for the petitioner, Issue Notice returnable on 9th January, 2019. "

20. In response to the notice issued by this Court, the respondents have appeared through Mr.Nirzar S.Desai, the learned standing counsel for the Union of India.
21. Mr.Desai has tendered his written submissions. Those are as under :

"1. Section 16(4) of the CGST Act, 2017 defines the due date after which a registered person cannot take input tax credit (ITC) for the invoices of a particular Financial Year. The last date of taking ITC as defined by Section 16(4) of the CGST Act, 2017 is the due date of filing of return under Section 39 of the CGST Act, 2017 or annual return whichever is earlier.

Section 16(4) of the CGST Act, 2017 reads as under:

"(4) - A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier."

2. The petition has been filed against Press release dated 18.10.2018 which gives clarification regarding last date of taking ITC for the invoices pertaining to 2017-18 as per Section 16(4) of the CGST Act, 2017. The due date of annual return for F.Y. 2017-18 as per Section 44 of CGST Act, 2017 is 31st December, 2018. However, as per the request of trade the due date has been extended upto 31st August, 2019. The due date of filing of GSTR-3B for the month of September, 2018 was 20th October, 2018.

3. In view of above as per Section 16(4) of the CGST Act, 2017 the last date for taking input tax credit for the period 2017-18 should be 25th October, 2018 and accordingly the Press release dated 18.10.2018 was issued. However, on request of the trade due date of filing of GSTR-3B was extended upto 25th October, 2018.

4. The petitioner is contending that GSTR-3B is not a return under Section 39 of the CGST Act, 2017 and hence its due date cannot be considered for Section 16(4) of the CGST Act, 2017 and hence the due date for filing the annual return of 2017-18 should be the last date for taking input tax credit for the F.Y. 2017-18.

Section 39(1) reads as under:

"(1) Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax paid and such other particulars as may be prescribed, on or before the twentieth day of the month succeeding such calendar month or part thereof."

Rule 61(5) reads as under:

"(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in FORM GSTR3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner."

On going through Section 39 of the CGST Act, 2017 it can be seen that no specific name has been given to the return to be filed under this Section. The only condition mentioned in the Section is that the return should contain the details of (I) inward and outward supplies of goods or services or both (ii) input tax credit availed (iii) tax payable, tax paid.

Rule 61(5) of the CGST Rules, 2017 says that in case time limit of furnishing of details in Form GSTR-1 under Section 37 of the CGST Act, 2017 and GSTR-2 under Section 38 of the CGST Act, 2017 has been extended in that case the Commissioner may notify to file return GSTR-3B. This return contains all the details i.e. (i) inward and outward supplies of goods or services or both (ii) input tax credit availed (iii) tax payable, tax paid as mentioned in Section 39 of the CGST Act, 2017. On reading Section 39(1) of the CGST Act, 2017 along with rule 61(5)

of the CGST Rules, 2017 it is amply clear that FORM GSTR-3B is a return which is to be furnished under section 39 of the CGST Act, 2017.

5. From above, it is evident that the impugned press release dated 18.10.2018 has rightly publicized the last date for availing ITC to be the last date for the filing of return in FORM GSTR-3B for the month of September, 2018 i.e. 20th October, 2018 and therefore, is not contrary to the section 16(4) of the CGST Act, 2017 read with section 39(1) of the CGST Act, 2017, read with rule 61 of the CGST Rules, 2017."

22. An affidavit-in-reply has been filed on behalf of the respondent no.4, inter alia, stating as under:

"14. With regard to para 2.19 of the petition, I say that Section 39(1) of the said Act has to be read along with rule 61(5) of the said Rules which provides for the filing of FORM GSTR-3B and reads as "Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner". Thus, it is amply clear that FORM GSTR-3B is a return which is to be furnished under section 39 of the said Act.

16. With regard to para 2.21 to 2.23 of the petition, I say that Section 39(1) of the said Act has to be read along with rule 61(5) of the said Rules which provides for the filing of FORM GSTR-3B and reads as "Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner". Thus, it is amply clear that FORM GSTR-3B is a return which is to be furnished under section 39 of the said Act. From above, it is evident that the impugned press release has rightly publicised the last date for availing ITC to be the last date for the filing of return in FORM GSTR-3B for the month of September, 2018 i.e. 20th October, 2018 and therefore, is not contrary to the section 16(4) of the said Act read with section 39(1) of the said Act, read with rule 61 of the said Rules.

17. With regard to Grounds A to E of the petition, I say that whatever is stated in Grounds A to E is totally disputed and denied in toto and the petitioner is put to strict proof in support of whatever is stated in Grounds A to E. I say that para 3 of press release dated 18.10.2018 is aligned with Section 16(4) CGST Act/GGST Act, read with Section 39(1) of the CGST Act/CGST Act, read with rule 61 of the CGST/GGST Rules, 2017.

Section 16(4) of the said Act reads as "A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier." Further, section 39(1) of the said Act reads as "Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax paid and such other particulars as may be prescribed, on or before the twentieth day of the month succeeding such calendar month or part thereof". Further, section 39(1) of the said Act has to be read along with rule 61(5) of the said Rules which provides for the filing of FORM GSTR-3B and reads as "Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner". Thus, it is amply clear that FORM GSTR-3B is a return which is to be furnished under section 39 of the said Act. From above, it is evident that the impugned press release has rightly publicised the last date for availing ITC to be the last date for the filing of return in FORM GSTR-3B for the month of September, 2018 i.e. 20th October, 2018 and therefore, is not contrary to the section 16(4) of the said Act read with section 39(1) of the said Act, read with rule 61 of the said Rules.

Further, the Hon'ble High Court of Delhi in its order dated 26.11.2018 on W.P.(C) 9019/2017 & CM APPL. No.36921/2017, in the matter of Anil Goel and Associated versus Union of India & Ors., has accepted that "learned counsel for the respondent has drawn our attention to the counter affidavit filed on behalf of the Commissioner

of Central Tax, GST, Delhi-east, wherein it has been stated that the return filed in FORM GSTR-3B is not in addition to the return in FORM GSTR-3. Rule 61(5) of the Rules prescribe that where time for furnishing of details/returns in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 are extended, the Commissioner may, by notification specify that return may be filed under GSTR-3B. In other words, wherever the Commissioner has issued notification in terms of sub-rule 5 of Rule 61, the assessee would be required to file return in FORM GSTR-3B and not in FORM GSTR-3. Learned counsel for the petitioner is substantially satisfied as the statement made clarifies that FORM GSTR-3B and not GSTR-3 is to be filed in case covered by Rule 61(5) of the Rules".

19. With regard to Grounds G to J of the petition, I say that whatever is stated in Grounds G to J is totally disputed and denied in toto and the petitioner is put to strict proof in support of whatever is stated in Grounds G to J. I say that Section 39(1) of the said Act has to be read along with rule 61(5) of the said Rules which provides for the filing of FORM GSTR-3B and reads as "Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner". Thus, it is amply clear that FORM GSTR-3B is a return which is to be furnished under section 39 of the said Act. From above, it is evident that the impugned press release has rightly publicised the last date for availing ITC to be the last date for the filing of return in FORM GSTR-3B for the month of September, 2018 i.e. 20th October, 2018 and therefore, is not contrary to the section 16(4) of the said Act read with section 39(1) of the said Act, read with rule 61 of the said Rules.

Further, the Hon'ble High Court of Delhi in its order dated 26.11.2018 on W.P.(C) 9019/2017 & CM APPL. No.36921/2017, in the matter of Anil Goel and Associated versus Union of India & Ors., has accepted that "learned counsel for the respondent has drawn our attention to the counter affidavit filed on behalf of the Commissioner of Central Tax, GST, Delhi-east, wherein it has been stated that the return filed in FORM GSTR-3B is not in addition to the return in FORM GSTR-3. Rule 61(5) of the Rules prescribe that where time for furnishing of details/returns in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 are extended, the Commissioner may, by notification specify that return may be filed under GSTR-

3B. In other words, wherever the Commissioner has issued notification in terms of sub-rule 5 of Rule 61, the assessee would be required to file return in FORM GSTR-3B and not in FORM GSTR-3. Learned counsel for the petitioner is substantially satisfied as the statement made clarifies that FORM GSTR-3B and not GSTR-3 is to be filed in case covered by Rule 61(5) of the Rules".

20. With regard to Grounds K to M of the petition, I say that whatever is stated in Grounds K to M is totally disputed and denied in toto and the petitioner is put to strict proof of whatever is stated in Grounds K to M. I say that the petitioner has wrongly contended that unless GSTR-1 of outward supplies is filed it will not possible for tax payer to calculate the amount of credit for the purpose of availment.

Para 4 of press release dated 18.10.2018 reads as under:
"It is clarified that the furnishing of outward details in FORM GSTR-1 by the corresponding supplier(s) and the facility to view the same in FORM GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis in consonance with the provisions of section 16 of the Act. The apprehension that ITC can be availed only on the basis of reconciliation between FORM GSTR-2A and FORM GSTR-3B conducted before the due date for filing of return in FORM GSTR-3B for the month of September, 2018 is unfounded as the same exercise can be done thereafter also."

The press release dated 18.10.2018 specifically states that the furnishing of outward details in FORM GSTR-1 by the corresponding supplier(s) and the facility to view the same in FORM GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis in consonance with the provisions of section 16 of the Act.

To facilitate trade and industry, based on the recommendation of the GST Council in its 31st meeting held on 22.01.2018. Order No. 02/2018 - Central Tax dated 31.12.2018 has been issued vide which the last date for availing ITC has been extended subject to specified conditions. Thus, a registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier

under sub-section (1) of section 37 till the due date for the furnishing the details under sub-section (1) of said section for the month of March, 2019.

21. With regard to Ground N of the petition, I say that whatever is stated in Ground N is totally disputed and denied in toto and the Petitioner is put to strict proof in support of whatever is stated in Ground N. I say that Section 39(1) of the said Act has to be read along with rule 61(5) of the said Rules which provides for the filing of FORM GSTR-3B and reads as "Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner". Thus, it is amply clear that FORM GSTR-3B is a return which is to be furnished under section 39 of the said Act. From above, it is evident that the impugned press release has rightly publicised the last date for availing ITC to be the last date for the filing of return in FORM GSTR-3B for the month of September, 2018 i.e. 20th October, 2018 and therefore, is not contrary to the section 16(4) of the said Act read with section 39(1) of the said Act read with rule 61 of the said Rules.

Further, the Hon'ble High Court of Delhi in its order dated 26.11.2018 on W.P.(C) 9019/2017 & CM APPL. No. 36921/2017, in the matter of Anil Goel and Associated versus Union of India & Ors, has accepted that "learned counsel for the respondent has drawn our attention to the counter affidavit filed on behalf of the Commissioner of Central Tax, GST, Delhi-east, wherein it has been stated that the return filed in FORM GSTR-3B is not in addition to the return in FORM GSTR-3. Rule 61(5) of the Rules prescribe that where time for furnishing of details/ returns in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 are extended, the Commissioner may, by notification specify that return may be filed under GSTR-3B. In other words, wherever the Commissioner has issued notification in terms of sub-rule 5 of Rule 61, the assessee would be required to file return in FORM GSTR-3B and not in FORM GSTR-3. Learned counsel for the petitioner is substantially satisfied as the statement made clarifies that FORM GSTR-3B and not GSTR-3 is to be filed in case covered by Rule 61(5) of the Rules."

23. The impugned press release reads thus:

"PRESS RELEASE 18.10.2018

Last date to avail input tax credit in respect of invoices or debit notes relating to such invoices pertaining to period from July, 2017 to March, 2018

There appears to be misgiving about the last date for taking input tax credit (ITC) in relation to invoices or debit notes relating to such invoices pertaining to period from July, 2017 to March, 2018. Such uncertainty seems to stem from the Government's decision to extend the last date for furnishing of details of outward supplies in FORM GSTR-1 from time to time.

2. According to section 16(4) of the CGST Act, 2017, a registered person shall not be entitled to take ITC in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains (hereinafter referred to as "the said invoices") or furnishing of the relevant annual return, whichever is earlier.

3. With taxpayers self-assessing and availing ITC through return in FORM GSTR-3B, the last date for availing ITC in relation to the said invoices issued by the corresponding supplier(s) during the period from July, 2017 to March, 2018 is the last date for the filing of such return for the month of September, 2018 i.e. 20th October, 2018.

4. It is clarified that the furnishing of outward details in FORM GSTR-1 by the corresponding supplier(s) and the facility to view the same in FORM GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis in consonance with the provisions of section 16 of the Act. The apprehension that ITC can be availed only on the basis of reconciliation between FORM GSTR-2A and FORM GSTR-3B conducted before the due date for filing of return in FORM GSTR-3B for the month of September, 2018 is unfounded as the same exercise can be done thereafter also.

5. It may, however, be noted that the Government has extended the last date for furnishing of return in FORM GSTR-3B for the month of September, 2018 for certain taxpayers who have been recently migrated from erstwhile tax regime to GST regime vide notification No. 47/2018- Central Tax dated 10th September, 2018. For such taxpayers, the extended date i.e. 31st December, 2018 or the date of filing of annual return whichever is earlier will be the last date for availing ITC in

relation to the said invoices issued by the corresponding suppliers during the period from July, 2017 to March, 2018.

6. All the taxpayers are encouraged to take note of the legal requirements and be compliance savvy. ”

24. In the course of the hearing of this matter, Mr.Desai submitted that this writ-application has become infructuous as a fresh press release has been issued dated 21st June 2019, which reads thus:

“35th GST Council Meeting, New Delhi
21st June 2019
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PRESS RELEASE
(Law and Procedure related changes)

The GST Council, in its 35th meeting held today at New Delhi, recommended the following:

1. In order to give ample opportunity to taxpayers as well as the system to adapt, the new return system to be introduced in a phased manner, as described below:

i. Between July, 2019 to September, 2019 the new return system (FORM GST ANX-1 & FORM GST ANX-2 only) to be available for trial for taxpayers. Taxpayers to continue to file FORM GSTR-1 & FORM GSTR-3B as at present;

ii. From October, 2019 onwards, FORM GST ANX-1 to be made compulsory. Large taxpayers (having aggregate turnover of more than Rs. 5 crores in previous year) to file FORM GST ANX-1 on monthly basis whereas small taxpayers to file first FORM GST ANX-1 for the quarter October, 2019 to December, 2019 in January, 2020;

iii. For October and November, 2019, large taxpayers to continue to file FORM GSTR-3B on monthly basis and will file first FORM GST RET-01 for December, 2019 in January, 2020. It may be noted that invoices etc. can be uploaded in FORM GST ANX-1 on a continuous basis both by large and small taxpayers from October, 2019 onwards. FORM GST ANX-2 may be viewed simultaneously during this period but no action shall be allowed on such FORM GST ANX-2;

iv. From October, 2019, small taxpayers to stop filing FORM GSTR-3B and to start filing FORM GST PMT-08. They will file their first FORM GST- RET-01 for the quarter October, 2019 to December, 2019 in January, 2020;

v. From January, 2020 onwards, FORM GSTR-3B to be completely phased out

2. On account of difficulties being faced by taxpayers in furnishing the annual returns in FORM GSTR-9, FORM GSTR-9A and reconciliation statement in FORM GSTR-9C, the due date for furnishing these returns/reconciliation statements to be extended till 31.08.2019

3. To provide sufficient time to the trade and industry to furnish the declaration in FORM GST ITC-04, relating to job work, the due date for furnishing the said form for the period July, 2017 to June, 2019 to be extended till 31.08.2019

4. Certain amendments to be carried out in the GST laws to implement the decisions of the GST Council taken in earlier meetings.

5. Rule 138E of the CGST rules, pertaining to blocking of eway bills on non-filing of returns for two consecutive tax periods, to be brought into effect from 21.08.2019, instead of the earlier notified date of 21.06.2019 6. Last date for filing of intimation, in FORM GST CMP-02, for availing the option of payment of tax under notification No. 2/2019-Central Tax (Rate) dated 07.03.2019, to be extended from 30.04.2019 to 31.07.2019
(Note: The recommendations of the GST Council have been presented in this release in simple language for information of all stakeholders. The same would be given effect through relevant Circulars/Notifications which alone shall have the force of law.) ”

25. Thus, according to Mr.Desai, the grievance as redressed in the writ-application would not survive and the petition be disposed of accordingly. However, the learned counsel submitted that as a neat question of law has been raised, this Court may look into the legality and validity of the impugned press release and decide the matter on merits.

26. The writ-application has been filed seeking quashing and setting aside of the press release dated 18th October 2018 to the extent that its para 3 purports to clarify that the last date for availing the input tax credit relating to the invoices issued during the period from July 2017 to March 2018 is the last date for the filing of the return in Form GSTR-3B for the month of September 2018. As per the above clarification, a taxpayer will not be able to claim the input tax credit for the period from July 2017 to March 2018 after filing of the return in Form GSTR-3B for the month of September 2018. It disentitles a taxpayer to claim the input tax credit for the aforesaid period which could not be taken on account of any error or omission. It is

submitted that the aforesaid clarification is not in consonance with Section 16(4) of the CGST Act/GGST Act which provides for the last date for taking the input tax credit. It is submitted that the last date of taking the input tax credit should be due date of filing of return in Form GSTR-3 or annual return whichever is earlier.

27. Section 16(4) of the CGST Act/GGST Act provides that the last date for taking the input tax credit in respect of any invoice or debit note pertaining to a financial year is the due date of furnishing of the return under Section 39 for the month of September following the end of the financial year or furnishing of the relevant annual return, whichever is earlier.

28. Therefore, the moot question is, whether the return in Form GSTR-3B is a return required to be filed under Section 39 of the CGST Act/GGST Act. The aforesaid press release is valid and in consonance with Section 16(4) of the CGST Act/GGST Act only if Form GSTR-3B is a return required to be filed under Section 39 of the CGST Act/GGST Act.

29. Section 39(1) of the CGST/GGST Act provides that every taxpayer, except a few special categories of persons, shall furnish a monthly return in such form and manner as may be prescribed. Rule 61 of the CGST Rules/GGST Rules prescribes the form and manner of submission of monthly return. Sub-rule 1 of Rule 61 of the CGST Rules/GGST Rules provides that the return required to be filed in terms of Section 39(1) of the CGST/GGST Act is to be furnished in Form GSTR-3.

30. It would be apposite to state that initially it was decided to have three returns in a month, i.e. return for outward supplies i.e. GSTR-1 in terms of Section 37, return for inward supplies in terms of Section 38, i.e. GSTR-2 and a combined return in Form GSTR-3. However, considering technical glitches in the GSTN portal as well as difficulty faced by the tax payers it was decided to keep filing of GSTR-2 and GSTR-3 in abeyance. Therefore, in order to ease the burden of the taxpayer for some time, it was decided in the 18th GST Council meeting to allow filing of a shorter return in Form GSTR-3B for initial period. It was not introduced as a return in lieu of return required to be filed in Form GSTR-3. The return in Form GSTR-3B is only a temporary stop gap arrangement till due date of filing the return in Form GSTR-3 is notified. Notifications are being issued from time to time extending the due date of filing of the return in Form GST3, i.e. return required to be filed under Section 39 of the CGST Act/GGST Act. It was notified vide Notification No.44/2018 Central Tax dated 10th September 2018 that the due date of filing the

return under Section 39 of the Act, for the months of July 2017 to March 2019 shall be subsequently notified in the Official Gazette.

31. It would also be apposite to point out that the Notification No.10/2017 Central Tax dated 28th June 2017 which introduced mandatory filing of the return in Form GSTR-3B stated that it is a return in lieu of Form GSTR-3. However, the Government, on realising its mistake that the return in Form GSTR-3B is not intended to be in lieu of Form GSTR-3, rectified its mistake retrospectively vide Notification No.17/2017 Central Tax dated 27th July 2017 and omitted the reference to return in Form GSTR-3B being return in lieu of Form GSTR-3.

32. Thus, in view of the above, the impugned press release dated 18th October 2018 could be said to be illegal to the extent that its para-3 purports to clarify that the last date for availing input tax credit relating to the invoices issued during the period from July 2017 to March 2018 is the last date for the filing of return in Form GSTR-3B.

33. The said clarification could be said to be contrary to Section 16(4) of the CGST Act/GGST Act read with Section 39(1) of the CGST Act/GGST Act read with Rule 61 of the CGST Rules/GGST Rules.

34. With the above, this writ-application stands disposed of.

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HIGH COURT FOR THE STATE OF JHARKHAND

W.P.(T) No. 2775 Of 2017
JULY 09, 2019

BRAHMAPUTRA METALLICS LIMITED, RANCHI …. Petitioner
VERSUS
STATE OF JHARKHAND & ORS …. Respondents

For the Petitioner (S): Ms. Sumeet Gadodia, Mr. Ranjeet Kushwaha, Mr. Ritesh Kumar Gupta
For the Respondent (S): Mr. Atanu Banerjee, Mr. Apura

Coal used for generation of electricity in the captive power plant of the petitioner and electricity generated, in turn utilized exclusively for the manufacture of finished goods, is to be treated as raw material of the finished goods and, would qualify for the benefit of Input Tax Credit as per Section - 18(4)(iii) of the JVAT Act, 2005

HON'BLE JUSTICE H.C. MISHRA
HON'BLE JUSTICE DEEPAK ROSHAN

(PER: Deepak Roshan, J. :-)

1. The instant application is directed against the Order dated 09.02.2017 passed by the Commercial Taxes Tribunal, Jharkhand, Ranchi in Revision Petition bearing No. Hz 60 of 2016 pertaining to Assessment Year 2011-12, whereby the revision petition filed by the petitioner has been dismissed. The petitioner has further challenged the order dated 22.12.2015 passed in Appeal Case No. RG/JVAT/A-03/15-16 whereby the appeal filed by the petitioner against the assessment order dated 12.03.2015 has been rejected. The petitioner has also assailed the assessment order dated 12.03.2015 passed by the respondent No.4, the Assistant Commissioner of Commercial Taxes, Ramgarh Circle, Ramgarh to the extent claim of the petitioner for Input Tax Credit has been rejected.
2. In the instant writ application, two questions of law have been raised which is enumerated hereunder:-
   (i) Whether the petitioner is entitled to claim Input Tax Credit (ITC in short) on tax paid by it on purchase of coal which is used by it for generation of electricity in its captive power plant and in turn, electricity so generated is used by the petitioner for manufacturing and processing of its finished goods for sale ?; and

(ii) Whether in absence of production of statutory declaration form JVAT 404, the claim of ITC can be denied to the petitioner inspite of the fact that the petitioner produced substantial evidence to demonstrate it has purchased goods i.e. inputs after payment of Input Tax?

3. The petitioner is a Company registered under the Companies Act, 1956 and is primarily engaged in the business of manufacture of Sponge Iron and M.S. Billet and is having an integrated manufacturing unit situated in the district of Ramgarh. The integrated manufacturing unit of the petitioner comprises of the following, namely,
   (i) Direct Reduced Iron Unit (DRI Unit) with 350 Tonne per day (TDP) Capacity;
   (ii) Steel Melting Shop or Induction furnaces with a monthly capacity of 12500.00 M.T.; and
   (iii) Captive Thermal Power Plant of 20 MW for generation and captive consumption of electricity.
4. The Captive Thermal Power Plant of 20 MW is exclusively used by the petitioner for generation of captive power. It is the case of the petitioner that the petitioner utilizes the electricity generated by its Captive Power Plant in its kiln of Sponge Iron Unit as well as for the purpose of fuelling of Steel Melting Induction Furnaces relating to its M.S. Billet plant. It is the case of the petitioner that the aforesaid process of manufacture undertaken by the petitioner is a continuous process and in absence of electrical energy which is being generated in its Captive Power Plant, it is not possible to manufacture the final product of the petitioner i.e. Sponge Iron and M.S. Billet, which are admittedly sold in the market on payment of tax. Thus, as per the petitioner, manufacturing activity to be undertaken by the petitioner is dependent on the electrical energy generated by it in its Captive Power Plant without which petitioner could not have undertaken the manufacturing activity of its finished product.
5. The petitioner for the purpose of generation of electrical energy for its Captive Power Plant purchases coal from registered dealers with in the State of Jharkhand on payment of tax which is used by it for generation of power. As per provision of Section-18 of the Jharkhand Value Added Tax Act, 2005 (hereinafter referred to as :JVAT Act, 2005"), particularly Section- 18(4)(iii), a Dealer registered under the JVAT Act, 2005 is entitled to the benefit of ITC in respect of goods purchased by it within the State of Jharkhand, from a registered dealer holding a valid certificate of registration and, "which are intended for the purpose of use as Raw Material for direct use in manufacturing or processing of goods for sale".
6. It is further case of the petitioner that despite the fact that in terms of Section-18(4)(iii) of the JVAT Act, 2005, the petitioner was entitled to claim ITC on the

coal utilized by it as raw material for generation of electrical energy, which in turn, was utilized for carrying out manufacturing activity, the Assessing Officer at the time of passing of assessment order pertaining to the Assessment Year 2011-12 denied benefit of ITC on coal purchased by the petitioner, and utilized by it for generation of electricity, which in turn, was utilized for carrying out the manufacturing activity.

The said Assessment Order to the extent of denial of benefit of ITC on purchase of coal utilized for generation of electricity was assailed by the petitioner by filing statutory appeal under Section- 79 of the JVAT Act, 2005 before the Appellate Authority, i.e., the Joint Commissioner of Commercial Taxes, Hazaribagh Division, Hazaribagh, vide Appeal Case No. RG/JVAT/A-03/15-16. However, the appeal of the petitioner was dismissed vide order dated 22.12.2015 and while dismissing the appeal, reliance was placed upon the definition of "Goods" as contained under Section- 2(xxii) of the JVAT Act, 2005 and it was held inter-alia that since "Electricity" is not "goods" as per the aforesaid definition, the petitioner is not entitled for benefit of ITC on the purchase of coal which is used for generation of electricity.

The petitioner further assailed the appellate order by filing Revision Application in terms of Section- 80(2)(b) of the JVAT Act, 2005 before the Commercial Taxes Tribunal, Jharkhand, Ranchi. During the hearing of said revision application, the petitioner relied upon the decision of the Hon'ble Supreme Court of India in the case of "M/s J.K.Cotton Spinning & Weaving Mills Co. Ltd Vs. Sales Tax Officer, Kanpur, reported in AIR 1965 SC 1310" as well as decision of the Hon'ble Supreme Court in the case of "Commercial Taxation Officer, Udaipur Vs. Rajasthan Taxchem Ltd, reported in (2007) 3 SCC 124", to contend inter-alia that if the process or activity is so integrally related to the manufacture of goods so that without that process or activity manufacture may, even if theoretically possible, be commercially in expedient, goods intended for use in the process or activity, would be categorized as raw material intended for manufacture of ultimate finished goods. The petitioner further, while relying upon the decision of the Hon'ble Supreme Court in the case of Commercial Taxation Officer, Udaipur Vs. Rajasthan Taxchem Ltd (Supra), contended before the Commercial Taxes Tribunal, Jharkhand that almost identical issue was the subject matter of adjudication before the Hon'ble Supreme Court wherein the question to be decided was "Whether Diesel can be called raw material in the manufacture of polyester yarn? As per the petitioner, Hon'ble Apex Court in the said decision after considering several earlier decisions, held in categorical terms that Diesel which is being used for the purpose of running

generator set for generation of electricity which is utilized for the purpose of manufacturing of Polyester Yarn, is to be treated as raw material and not otherwise.

7. The learned counsel for the petitioner submitted that despite the aforesaid authoritative pronouncements of the Hon'ble Supreme Court, the learned Commercial Taxes Tribunal, Jharkhand posed unto itself a wrong question and answered the same wrongly, and thus, committed an error in law, in dismissing the Revision Application.
8. It is the case of the petitioner that the learned Commercial Taxes Tribunal distinguished the aforesaid judgments of the Hon'ble Apex Court which was directly applicable in the facts and circumstances of the petitioner's case, on an erroneous reasoning that ITC is only available in respect of such goods which when are sold within the State or by way of interstate sales, generates tax liability and if the goods is of such nature which does not generate any output tax liability, then ITC shall not be admissible. It is the submission of the learned counsel for the petitioner that said reasoning adopted by the Commercial Taxes Tribunal is wholly erroneous and is contrary to the very concept of Value Added Tax regime in the Country of India including promulgation of JVAT Act, 2005 by the State of Jharkhand.
9. The petitioner in order to buttress its contention that it is entitled for ITC on purchase of coal utilized by it for generation of electricity which in turn, is utilized for carrying out the manufacturing activity of Sponge Iron and M.S. Billet, has relied upon the following decisions before this Hon'ble Court, namely;
   (i) Collector of Central Excise, Jaipur Vs. Rajasthan State Chemical Works, Deedwana, Rajasthan, reported in (1991) 4 SCC 473 (Relevant paragraph- 1,3,7, 5,17,20,21 and 26)
   (ii) Collector of Central Excise New Delhi Vs. M/s Ballarpur Industries Ltd, reported in (1989) 4 SCC 566 (Relevant paragraph- 13,17,18 and 19)
   (iii) M/s J.K.Cotton Spinning & Weaving Mills Co. Ltd Vs. Sales Tax Officer, Kanpur, reported in AIR 1965 SC 1310: (1965) 1 SCR 900 (Relevant paragraph-9)
   (iv) Commercial Taxation Officer, Udaipur Vs. Rajasthan Taxchem Ltd, reported in (2007) 3 SCC 124 (Relevant paragraph- 2,3,4,5,8 and 29)
   (v) Maruti Suzuki Limited Vs. Commissioner of Central Excise, Delhi- III reported in (2009) 9 SCC 193 (Relevant paragraph- 29, 30, 31, 32, 43 and 45)
   (vi) National Aluminium Company Ltd Vs. Deputy Commissioner of Commercial Taxes, Bhubneshwar III Circle, Khurda, reported in [2012] 56 VST 68 (Ori)
10. So far as the second issue is concerned, the counsel for the petitioner submitted that the petitioner during the relevant assessment year, made purchases within the State of Jharkhand of goods worth Rs.86,91,17,429/- and paid VAT on the said purchase

of Rs.4,31,14,838/- and accordingly claimed ITC in respect of the same. The petitioner produced 39 numbers of JVAT 404 form of a value of Rs.84,40,83,955/- evidencing payment of VAT of Rs.3,97,76088/-. However, for the balance amount towards payment of VAT amounting to Rs.33,38,740/- the petitioner was not supplied copy of JVAT 404 form by the registered dealer situated within the State from whom the petitioner purchased goods due to which claim of ITC of the petitioner to the extent of the aforesaid amount of Rs.33,38,740/- was rejected.

It is the submission of the counsel for the petitioner that the petitioner was in possession of original tax invoices in respect of aforesaid balance purchase of goods also, for which it could not produce JVAT 404 form, and as per provision of Section-18(6) of the JVAT Act, 2005, claim of ITC of the petitioner was required to be considered by the assessing officer on the strength of tax invoices in original produced by the petitioner showing payment of tax of Rs.33,38,740/-However, said claim of the petitioner was denied by the Assessing Officer by relying upon Rule-35(2) of The Jharkhand Value Added Tax Rules, 2006 (hereinafter referred to as "JVAT Rules, 2006") which apart from prescribing the condition of production of original tax invoices also lays down additional condition of producing declaration in Form JVAT 404. It has been submitted by the counsel for the petitioner that Rule-35(2) of the JVAT Rules, 2006 to the extent it provides for furnishing declaration Forms JVAT 404 for availing benefit of ITC cannot be treated to be mandatory in nature and the same can, at best, be treated as directory in nature, especially in view of fact that Section-18(6) of the JVAT Act, 2005 does not provide for furnishing of JVAT 404 forms for the purpose of claiming benefit of ITC and it only contemplates production of tax invoices in original and even in appropriate case, the Assessing Officer can even dispense with requirement of production of tax invoices in original for good and sufficient reason to be recorded in writing . In support of the said contention, learned counsel has relied upon the following decisions, namely;

(i) State of Orissa Vs. M.A. Tulloch & Co. Ltd, reported in AIR 1966 SC 365: (1964) 7 SCR 816 (Relevant paragraph-2,3 and 4)

(ii) Food Corporation of India , Patna Vs. The Commissioner of Commercial Taxes, Bihar, Patna, reported in (1993) 2 PLJR 625 (Relevant paragraph- 2,5,6,22, 27 and 28)

11. Per Contra, the counsel appearing for the respondent-State of Jharkhand has supported the decision of the Assessing Officer as upheld upto the Commercial Taxes Tribunal, Jharkhand on both the issues.
12. With respect to the issue no.(i), the counsel for the respondent submitted that ITC is in the nature of "Concession" extended by the State of Jharkhand and the conditions

enumerated for availing benefit of ITC is necessarily required to be complied with by an Assessee in order to avail ITC credit. In support of said contention, the counsel for the respondent-State has relied upon the following decisions of the Hon'ble Supreme Court namely,

(i) Jayam and Company Vs. Assistant Commissioner and Ors, reported in (2016) 15 SCC 125

(ii) TVS Motor Corporation Ltd Vs The State of Tamil Nadu and Ors - Civil Appeal No.10566 of 2018, decided on 12.10.2018.

(iii) M/s ALD Automotive Ltd, Civil Appeal No. 10412-13 of 2018, decided on 12.10.2018

13. The counsel for the respondents-State of Jharkhand has submitted that provisions of Section 18(4)(iii) of the JVAT Act, 2005, ITC is applicable to a registered dealer if the said registered dealer purchases goods within the State of Jharkhand from a registered dealer and which is utilized by it for use as raw material for direct use in the manufacturing or processing of goods for sale. It has been emphasised that word "for direct use" in the manufacturing or processing of goods for sale is intended to deny the benefit of ITC in respect of such goods which are though used as raw material, but is consumed in an anterior process of the manufacturing activity and is not found in the finished goods.
14. By raising the aforesaid contention, counsel for the respondents-State contended that admittedly coal has been utilized for generation of electricity which is not the finished good of the petitioner and which has not been sold by the petitioner in the market, but was utilized for further manufacturing process of Sponge Iron and Billet. In view of same, it was contended that coal was used as raw material for generation of electricity which was an anterior process of manufacture of finished goods i.e. Sponge Iron and Billet and, hence, the petitioner was not entitled to claim ITC on coal to the extent it was utilized for production of electricity.
15. The counsel appearing for the respondent-State further by relying upon the provision of Section- 18(3) of the JVAT Act, 2005, read with Assessment order, contended that Section-18(3) of the JVAT Act, 2005 permits the State of Jharkhand to lay down condition and restriction for allowing partial or proportionate ITC to a dealer in certain circumstances. While referring to the assessment order it was contended that from bare reading of assessment order, it would be evident that proportionate ITC has been granted to the petitioner and only ITC in respect of coal utilized for manufacturing of electricity has been denied, which is in accordance with law and the scheme of the JVAT Act, 2005.
16. The counsel for the respondent-State of Jharkhand further by relying upon the definition of "Goods" as contained under Section- 2(xxii) of the JVAT Act, 2005

has submitted that Electricity is not falling under the definition of "goods" under the JVAT Act, 2005 and hence, on that ground also the petitioner-Company is not entitled to the benefit of ITC on coal which is utilized by it for generation of electricity , especially when the electricity itself is not "Goods" under the JVAT Act, 2005.

17. The counsel for the State of Jharkhand by further relying upon the provisions of Section- 18(1) of the JVAT Act, 2005 has contended that since there is no generation of output tax liability in the process of manufacture of electricity from inputs i.e. coal and since electricity is consumed for further manufacturing of Sponge Iron and Billet, under the scheme of the JVAT Act, 2005, in absence of any output tax liability payable on generation of electricity by utilizing coal, benefit of ITC on the tax paid on such coal cannot be extended to the petitioner.
18. The learned counsel for the State further while relying upon the registration certificate of the petitioner issued under the provisions of the JVAT Rules, contended inter-alia that from the said certificate itself it would be evident that the petitioner was entitled to purchase coal as a raw material for manufacture of Sponge Iron and not for the manufacture of electricity and, thus, it was contended that the petitioner is not entitled to benefit of ITC on the purchase of coal to the extent it has been utilized for the purpose of generation of electricity.
19. Further, while supporting the impugned orders on the second issue, it has been submitted by the counsel for the State that Rule- 35(2) of the JVAT Rule, 2006 mandates not only production of original tax invoices but also declaration in JVAT 404 forms for availing benefit of ITC. It has been submitted that the petitioner itself produced 39 numbers JVAT 404 forms and was, thus, extended benefit of ITC in respect of tax paid by it of Rs.3,97,76,088/-. However, since the petitioner in respect of balance amount of Rs.33,38,740/- has not furnished JVAT 404 forms, claim of ITC of the petitioner was rightly denied by the Assessing Officer which has been upheld up to the Commercial Taxes Tribunal.
20. The counsel for the respondent-State further while relying upon section- 18(3) of the JVAT Act, 2005 has contended that it is open for the State of Jharkhand to prescribe certain conditions and/or restriction for grant of partial or proportionate ITC to an Assessee and it is in exercise of said power under Section – 18(3), Rule-35(2) has been framed providing production of JVAT 404 forms as a condition precedent for availing benefit of ITC.

    In view of aforesaid, it has been submitted by the counsel for the respondent-State that the impugned orders are perfectly justified in the eyes of law and have been passed in accordance with the provisions of the JVAT Act and Rules and do not require any interference by this Hon'ble Court.

21. Heard learned counsels for the parties. In order to properly appreciate the issues involved in the instant writ application, it would be appropriate to quote certain provisions of the Jharkhand Value Added Tax Act, 2005 and the Jharkhand Value Added Tax Rules, 2006 which are quoted hereunder:-

(I) Section-2 (xxii) "Goods" means all kinds of movable property (other than newspapers, actionable claims, electricity, stocks and shares and securities) and includes livestock, all materials, computer software sold in any form, Sim cards used in Mobile Telephony or for any other similar activation purposes, commodities and articles and every kind of property (whether as goods or in some other form involved in the execution of a works contract, and all growing crops, grass, trees and things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale;

(II) Section-2 (xxviii) "Input" means, goods purchased in course of business - (a) for resale in the same form; or (b) for use in manufacturing or processing of taxable goods for sale; or (c) for directly use in mining or use as containers or packing materials for taxable goods; or (d) for the execution of works contract, but excluding purchases of Petrol, Diesel, Furnace Oil and steam and Natural Gas and for use as Capital Goods as specified in Appendix-I of this Act.

(III) Section-2 (xxix) "Input Tax" means the tax paid or payable under this Act, by a registered dealer to another registered dealer on the purchase of goods, in the course of business for resale or for use in manufacturing or processing of taxable goods for sale, or for directly use in mining or use as containers or packing materials for taxable goods or for the execution of works contract;

Provided that input tax shall also include tax paid on the entry of goods into the local area as specified in Schedule-III.

Provided further that input tax shall also include tax paid on the capital goods for Registered Start-up-business and shall qualify for Input Tax Credit as prescribed.

Provided further, that tax charged at Maximum Retail Price; shall not be treated as Input Tax, for the purpose of resellers, when reselling medicines or drugs, specified in the Drugs (Prices Control) Order 1995.

(IV) Section- 16 Input Tax — Input tax in relation to a registered dealer means the tax charged under this Act by the selling dealer to such dealer on the sale to him of any goods for resale or for use in manufacturing or processing of goods for sale or for directly use in mining or use as containers or packing materials or for the execution of works contract. It shall also include the tax paid on entry of goods as mentioned in schedule III by a registered dealer.

(V) Section- 17 Tax Payable — (1) The tax payable by a registered dealer for any tax period shall be the difference between the output tax payable plus purchase tax,

if any, and the input tax paid, which can be determined, from the following formula:
Tax payable = (O+P)-I
Where 'O' denotes the output tax payable for any tax period as determined under Section 15, 'P' denotes the purchase tax paid by a registered dealer for any tax period as determined under Section 10 and 'I' denotes the input tax paid or payable and includes tax paid on Entry of Goods, for the said tax period as determined under Section 15.
(VI) Section- 18- Input Tax Credit —

(1) Subject to the provisions of this Act, for the purpose of calculating the tax payable by a registered dealer for any tax period after being registered, an input tax credit as determined under this Section shall be allowed to such registered dealer for the tax paid or payable in respect of all taxable sales other than any other sales as may be prescribed, or purchases under Section 10 during that period,

(2) The input tax credit to which the registered dealer is entitled shall be the amount of tax paid by the registered dealer to another registered dealer, on his turnover of purchases made during any tax period, intended to be used for the purposes and subject to the conditions as specified in sub Section (3), sub- Section (4), sub-Section (5) and sub-Section(6) and calculated in such manner as may be prescribed.

(3) Subject to such conditions and restrictions as may be prescribed, partial or proportionate input tax credit may be allowed in such cases as may be used (xxx) for their respective uses.

(4) Input Tax credit shall be allowed on purchase of goods made within the State of Jharkhand from a registered dealer holding a valid certificate of registration and which are intended for the purpose of-

(i) ……..

(ii) …….

(iii) use as raw material and for direct use in manufacturing or processing of goods for sale, or for directly use in mining, or for use as capital goods, other than those goods exempt from tax under this Act and the goods specified in Part E of schedule II, intended for sale in the State of Jharkhand or in the course of interstate trade and commerce;

(VII) Section-18(6) - Input Tax credit shall not be claimed by the dealer until the tax period in which the dealer receives the tax invoice in original containing the prescribed particulars of the sale evidencing the amount of input tax paid.

Provided that input tax credit shall be claimed by a registered dealer on the tax paid, on the entry of goods mentioned in schedule III evidencing the amount of tax paid, as prescribed.

Provided further that for good and sufficient reasons, to be recorded in writing, where a registered dealer is prevented from producing the Tax Invoice in original or evidence of payment of tax paid on entry of goods, in original, the prescribed authority may allow, such input tax credit as prescribed.

(VIII) Rule- 35(2) of Jharkhand Value Added Tax Rules, 2006:-

35. Evidence in support of claims in respect of goods leviable to Output Tax at the First Point of Sale within the State of Jharkhand

(2) Any VAT dealer, who claims Input Tax Credit under sub-section (4) of Section 18 of the Act and his Output Tax payable requires the Input Tax Credit, for the sales made at the stage(s) under sub-section (1) of Section 9 of the Act, shall substantiate for such claim before the authority prescribed, by producing a true Declaration in writing, issued by the preceding VAT selling dealer, in Form JVAT 404 evidencing that the goods in question have already been subjected to Tax at the preceding stage of their sale in the State of Jharkhand.

22. From the reading of the aforesaid provisions of the JVAT Act, 2005 it would transpire that said provisions are in consonance with the scheme of Value Added Tax Regime introduced in the Country. From the scheme of JVAT, 2005 it would be thus evident that output tax liability of a dealer was required to be determined after subtracting therein the input tax paid by the dealer.

23. Section-18 of the JVAT Act, 2005 provides for determination of the Input Tax Credit which is available to a dealer in respect of input tax paid by it on the goods. For the purpose of adjudication of the dispute pertaining to issue no. (i), provision of Section- 18(4)(iii) of JVAT Act, 2005 is relevant. A bare reading of provision of Section – 18(4)(iii) of the JVAT Act, 2005 it would be evident that the following conditions are required to be complied with by a dealer in order to avail Input Tax Credit on raw materials used by it in manufacture and /or processing of goods for sale, namely,

(i) Purchase of goods should be made within the State of Jharkhand.

(ii) Purchase should be made from registered dealer holding valid certificate of registration;

(iii) Goods purchased should be intended for the purpose of use as raw material for direct use in manufacturing or processing of goods for sale.

24. So far as condition no. (i) and (ii) aforesaid is concerned, there is no dispute that goods were purchased within the State of Jharkhand from Registered dealer holding valid certificate of registration. The only dispute for adjudication is "Whether Coal which was purchased on payment of input tax and was utilized for generation of electricity, which was in turn, utilized for manufacturing of finished products

namely Sponge Iron and M.S. Billet, would meet the conditions prescribed aforesaid to be entitled to be claimed as Input Tax Credit"?

25. It is an admitted fact, that the petitioner is having an integrated manufacturing unit, wherein, it undertakes manufacturing of Sponge Iron and M.S. Billet and is having its captive power plant from which electricity is generated, which is, exclusively consumed by the petitioner for carrying out the manufacturing activity. The electricity so generated is utilized in its kilns of Sponge Iron unit and also for the purpose of fuelling of its steel melting induction furnaces relating to its M.S.Billet. The manufacturing process undertaken by the petitioner is a continuous process and in absence of electrical energy which is being generated in its captive power plant, it is not possible for the petitioner to manufacture final product i.e. Sponge Iron and M.S.Billet which is ultimately sold in the market on payment of tax.
26. The respondent-State of Jharkhand in its counter affidavit has not disputed the fact that generation of electricity by the petitioner by utilization of coal as input is so integrally connected with the ultimate manufacturing process, that but for that process, manufacture or processing of goods would be commercial inexpedient. Further it has also not been disputed by the Respondent-State nor it was the case of the Respondent-State that the electricity produced by the Petitioner was not exclusively used for manufacturing the final product.

    In the backdrop of aforesaid undisputed facts, it is required to be determined whether the petitioner is entitled to ITC under Section- 18(4)(iii) of the JVAT Act, 2005 on input tax paid by it on coal which was utilized for generation of electricity, which in turn, was exclusively used for manufacturing and processing of finished product of the petitioner for sale.
27. The Hon'ble Supreme Court in its decision in the case of "M/s J.K. Cotton Spinning & Weaving Mills Co. Ltd Vs. Sales Tax Officer, Kanpur, reported in AIR 1965 SC 1310: (1965) 1 SCR 900" as held as under:-

    8..... The expression "in the manufacture of goods" should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connection with the ultimate production of goods that but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would, in our judgment fall within the expression "in the manufacture of goods". For instance, in the case of a cotton textile manufacturing concern, raw cotton undergoes various processes before cloth is finally turned out. Cotton is cleaned, carded, spun into yarn, then cloth is woven, put on rolls, dyed, calendered and pressed.

All these processes would be regarded as integrated processes and included "in the manufacture" of cloth. It would be difficult to regard goods used only in the process of weaving cloth and not goods used in the anterior processes as goods used in the manufacture of cloth. To read the expression "in the manufacture" of cloth in that restricted sense, would raise many anomalies.....

9. In our judgment, if a process or activity is so integrally related to the ultimate manufacture of goods so that without that process or activity manufacture may, even if theoretically possible, be commercially in expedient, goods intended for use in the process or activity as specified in Rule 13 will qualify for special treatment. ....."(emphasis supplied)

In the said judgment, the Hon'ble Supreme Court was considering the provision of Section- 8(1) and 8(3)(b) of the Central Sales Tax Act, 1956 which is almost parametria to the provisions of Section 18(4)(iii) of the JVAT Act, 2005 and has held, in substance, that if a process or activity is so integrally related to the ultimate production of goods so that without that process or activity manufacture would be commercially inexpedient, goods required in that process would fall within the expression " in the manufacture of goods".

28. Similarly, the Hon'ble Supreme Court in its judgment rendered in the case of "Collector of Central Excise, Jaipur Vs. Rajasthan State Chemical Works, Deedwana, Rajasthan, reported in (1991) 4 SCC 473" while following the decision of "M/s J. K. Cotton Spinning & Weaving Mills Co. Ltd Vs. Sales Tax Officer, Kanpur" (Supra), vide paragraph 20 of the said judgment has held as under: -

"20. A process is a manufacturing process when it brings out a complete transformation for the whole components so as to produce a commercially different article or a commodity. But, that process itself may consist of several processes which may or may not bring about any change at every intermediate stage. But the activities or the operations may be so integrally connected that the final result is the production of a commercially different article, Therefore, any activity or operation which is the essential requirement and is so related to the further operations for the end result would also be a process in or in relation to manufacture to attract the relevant clause in the exemption notification. In our view, the work 'process' in the context in which it appears in the aforesaid notification includes an operation or activity in relation to manufacture."

29. Further the Hon'ble Supreme Court in the case of "Collector of Central Excise New Delhi vs. M/s Ballarpur Industries Ltd, reported in (1989) 4 SCC 566" differentiated between the expressions "Used in the manufacture" and "Used as Input (raw material)". In the said judgment, it was held that undoubtedly the said two expressions are distinct and separate, but when an ancillary process aids the making

of an end product, then ancillary process gets integrally connected to the end product.

Thus, from the ratio lay down from the aforesaid judgments it would be evidently clear that use of coal by the petitioner-Company for generation of electricity, which in turn, was used for manufacturing of finished product, was integrally connected with the ultimate finished goods. Under the said circumstances, coal used for generation of electricity is to be categorized as raw material for ultimate production of the finished goods of the petitioner i.e. Sponge Iron and M.S. Billet. Our aforesaid view is further fortified by the decision of the Hon'ble Supreme Court rendered in the case of "Commercial Taxation Officer, Udaipur Vs. Rajasthan Taxchem Ltd, (Supra). In the said judgment, specific question for consideration before the Hon'ble Supreme Court was "Whether diesel can be called raw material in the manufacture of Polyester yarn"? The Hon'ble Supreme Court in the said judgment noticed that Assessee in the said case was manufacturer of polyester yarn and it purchased diesel which was used by it for manufacturing electricity through Diesel Generator Set and the electricity so generated was used for manufacture of ultimate final product i.e. polyester yarn. In the aforesaid factual background, the Hon'ble Supreme Court in the said judgment held as under: -

"29. In view of the fact that the diesel is being used for the purpose of running the generator set for the production of the ultimate product which is also required for the purpose of manufacturing the end product, the diesel can only be termed as raw material and not otherwise. The Rajasthan Tax Board was, therefore, justified in setting aside the orders passed by the Assessing authority as confirmed by the Deputy Commissioner (Appeal)"

30. The learned counsel for the respondent-State of Jharkhand, during the course of arguments, tried to distinguish the said judgment of Hon'ble Supreme Court by contending inter-alia that in the said judgment, Hon'ble Apex Court noticed that in the certificate of registration of the Assessee, diesel was entered as raw material and it is in that background alone the Hon'ble Supreme Court has held that diesel would be categorized as raw material for the manufacture of polyester yarn. We do not agree to the interpretation advanced by the learned counsel for the State. The Hon'ble Supreme Court in the said case specifically framed question as to whether diesel can be treated as raw material in the manufacture of polyester yarn and it answered the said question in affirmative. Incidentally, before the Hon'ble Supreme Court, it was also argued that diesel was even entered in the registration certificate of the Assessee as a raw material and on that basis, it was contended that diesel should be treated as raw material. The Hon'ble Supreme Court while delivering its judgment has even upheld the said submission of Assessee that once a commodity

was already entered in its registration certificate as raw material, it would not be open for the Revenue to contend that said commodity/goods is not a raw material.

31. Incidentally, the ratio of the judgment of the Hon'ble Supreme Court rendered in the case of "Commercial Taxation Officer, Udaipur Vs. Rajasthan Taxchem Ltd, (Supra)" has been further discussed by the Hon'ble Supreme Court in its subsequent decision rendered in the case of "Maruti Suzuki Limited Vs Commissioner of Central Excise, Delhi-III reported in (2009) 9 SCC 193" wherein it was held as under: -

"43. In CCE V. Rajathan State Chemical Works, the test laid down by this Hon'ble Court is whether the process and the use are integrally connected. As stated above, electricity generation is more of a process having its own economics. Applying the said test, we hold that when the electricity generation is a captive arrangement and the requirement is for carrying out the manufacturing activity and the "input" used in that electricity generation is an input used in the manufacture of final product....."

32. Learned counsel for the State during his arguments has relied upon the finding of the Commercial Taxes Tribunal wherein the Commercial Taxes Tribunal, Jharkhand has held that Input Tax Credit shall not be admissible in respect of such goods which do not generate any output tax liability. By relying upon the aforesaid finding as well as provision of Section- 18(1) of the JVAT Act, 2005, it has been contended by the State-Respondent that since coal was utilized for generation of electricity which was captively consumed and not sold in the market generating any output tax liability, petitioner was not entitled to the benefit of Input Tax Credit. In our opinion, finding given by learned Commercial Taxes Tribunal that Input Tax credit is only available in respect of such goods which generate output tax liability is wholly misplaced and beyond the scheme of JVAT Act, 2005. From a bare reading of Section- 18(4)(iii) of the JVAT Act, 2005 it would be evident that Input Tax Credit is available even in respect of goods which are "intended for use in mining" without there being any condition that mined goods should be sold. Similarly, under section- 18(4)(iii), Input Tax Credit is even available in respect of goods which are used as capital goods other than the goods exempted from tax under the Act. Thus, the legislature was conscious while extending the benefit of Input Tax Credit on goods used directly in mining, and has not provided that goods so used in mining should generate output tax liability. Further, the legislature while providing for Input Tax Credit on goods for use as capital goods, specifically denied ITC on such goods which are exempted from tax. Thus, it cannot be said that merely because coal was utilized by the petitioner for generation of electricity, which was not sold, benefit of ITC would not be available to the petitioner. Section-18(4)(iii) provides

for grant of benefit of ITC if the goods are intended for the purpose of "use as raw material for direct use in manufacturing or processing of goods for sale". We have already held in preceding paragraphs of the instant judgment that coal was utilized by the petitioner for generation of electricity, which in turn, was utilized for manufacturing of finished goods and the said process was integrally connected with each other without which final product could not have been manufactured. We have further held that coal would be treated as raw material for manufacturing of finished product i.e. Sponge Iron and M.S. Billet. It is an admitted fact that Sponge Iron and M.S. Billet manufactured by the petitioner has been intended for sale and even output tax liability has been generated and thus, the petitioner is complying with the provision of Section- 18(4)(iii) of the JVAT Act, 2005 and is entitled for ITC accrued on coal utilized by it for generation of electricity.

33. The learned counsel for the respondent-State while relying upon the definition of goods under Section- 2(xxii) of the JVAT Act, 2005 has contended that since electricity is not "goods" under the Act, the petitioner would not be entitled to the benefit of ITC. We do not agree to the said arguments advanced by the learned counsel for the respondent-State as admittedly, the petitioner is not claiming Input Tax Credit on electricity, but is claiming ITC on tax paid by it on purchase of coal, and, admittedly coal is "Goods" as per definition as contained under Section-2(xxii) of the JVAT Act, 2005. The contention of respondent-State for denying the benefit of ITC on electricity would have been justified, if, electricity would have been purchased by the petitioner and the petitioner would have claimed ITC on the input tax paid on it, if any. Under the said circumstances, the petitioner would not have been allowed the benefit of ITC on electricity in view of provision of Section-18(4) of the Act which uses the term "Input tax Credit shall be allowed on purchase of goods".

34. The counsel for the respondent-State further contended inter-alia that since in the certificate of registration of the petitioner, coal is not shown as a raw material for the purpose of generation of electricity, the petitioner cannot be extended benefit of ITC on tax paid on such coal. In this regard, we may hasten to state that in the preceding paragraphs of the present judgment, we have already enumerated three conditions which are required to be fulfilled by a dealer for claiming benefit of ITC, from which it would be evident that there is no stipulation under the JVAT Act, 2005 that Input Tax Credit shall be allowed only in respect of such goods which are enumerated in the certificate of registration of the petitioner. In absence of such condition being stipulated in the JVAT Act, 2005, we are unable to accept the arguments of the learned Counsel for the State in that regard.

35. Further, the counsel for the respondent-State has relied upon judgments to contend that ITC is a concession and the conditions are required to be fulfilled for availing such concession. We may hasten to add that there is no dispute regarding the aforesaid proposition of law that in order to avail benefit of concession, condition prescribed therein are required to be followed. However, for the reasons stated herein above, we are of the considered opinion that the petitioner has fulfilled requisite conditions of availing benefit of ITC on coal utilized by it for generation of electricity.
36. So far as the second issue regarding availability of benefit of ITC to the petitioner in absence of production of Statutory JVAT 404 Forms is concerned, it appears that from bare reading of Section- 18(6) of the JVAT Act, 2005 would reveal that ITC can be claimed by a dealer on production of tax invoices in original containing the prescribed particulars of sale evidencing the amount of tax paid. Further, said section contemplates that even for good and sufficient reasons to be recorded in writing where a dealer is prevented from furnishing tax invoices in original the prescribed authority may even then allow ITC by recording its reason. Thus, Section-18(6) of the JVAT Act, 2005 does not contemplate production of JVAT - 404 Forms as a mandatory condition for availing benefit of ITC. However, Rule- 35(2) of the JVAT Rules, 2006 stipulates further condition of production of JVAT 404 Form as requirement for claiming benefit of ITC. To this extent, Rule- 35(2) of the JVAT Rules, 2006 is inconsistent with the provision of Section- 18(6) of the JVAT Act, 2005 and is required to be held directory in nature and not mandatory.
37. It would be relevant to state here that under the scheme of the JVAT Act, 2005 output liability is required to be reduced to the extent of Input Tax paid by a dealer. The State Government in order to protect its revenue and to ensure that benefit of ITC is not availed by a dealer without discharge of Input Tax liability, can lay down sufficient safeguards to ensure that credit of Input Tax is granted to a dealer only where such dealer has actually paid input tax liability. It is in that background that requirement has been prescribed under Section- 18(6) of the JVAT Act, 2005 itself mandating a dealer to claim ITC by "producing tax invoices in original containing the prescribed particulars of sale evidencing the amount of input tax paid". Once such documents are furnished by a dealer, the State Government is required to extend benefit of ITC to such dealer subject to other provisions of the Act. Merely because a dealer has failed to produce JVAT 404 would not be sufficient to deny the benefit of Input Tax Credit.
38. It is always open for the State Tax Authorities on the strength of tax invoices produced before it by a dealer to verify the genuineness of said invoices and to ascertain that said dealer has in fact discharged liability of input tax on such

invoices in respect of which ITC is being claimed. Thus, in our opinion, production of JVAT- 404 Form for the purpose of claiming ITC is merely directory in nature and not mandatory. Under similar circumstances Hon' be Supreme Court in the case of "State of Orissa Vs. M.A. Tulloch & Co. Ltd, reported in AIR 1966 SC 365: (1964) 7 SCR 816, had occasion to interpret the provision of Section – 5(2)(a)(ii) of the Orissa Sales Tax Act, 1947 read with Rule- 27(2) of the Orissa Sales Tax Rules, 1947. The Hon'ble Supreme Court while interpreting almost similar provisions of the Act and the Rules, has held as under: -

".....,.. In our opinion, Rule 27(2) must be reconciled with the Section and the Rule can be reconciled by treating it as directory. But the rule must be substantially complied with in every case. It is for the Sales Tax Officer to be satisfied that, in fact, the certificate of registration of the buying dealer contains the requisite statement, and if he has any doubts about it, the selling dealer must satisfy his doubts. But if he is satisfied from other facts on the record, it is not necessary that the selling dealer should produce a declaration in the form required in Rule- 27(2), before being entitled to a deduction....."

39. The Division Bench of Hon'ble Patna High Court while following the ratio of Hon'ble Supreme Court in the case of State of Orissa Vs. M.A. Tulloch & Co. Ltd (Supra), in the case of Food Corporation of India, Patna Vs. The Commissioner of Commercial Taxes, Bihar, Patna, reported in (1993) 2 PLJR 625 has held similar provisions of furnishing declaration Form- IX-C under Bihar Sales Tax Rules, 1957 as directory in nature and not mandatory.

40. For the reasons stated hereinabove, our conclusion is as follows: -

(i) Coal used for generation of electricity in the captive power plant of the petitioner and electricity generated, in turn utilized exclusively for the manufacture of finished goods, is to be treated as raw material of the finished goods and, would qualify for the benefit of Input Tax Credit as per Section- 18(4)(iii) of the JVAT Act, 2005. Accordingly, we direct the respondent-State of Jharkhand to extend the benefit of Input Tax Credit to the petitioner on tax paid by it on purchase of coal utilized by it for generation of electricity;

(ii) We further conclude and hold that the provisions of Rule-35(2) of the JVAT Rules, 2006 which prescribes the condition of furnishing of JVAT- 404 Forms for the purpose of claiming Input Tax Credit is merely directory in nature and not mandatory. However, the Assessee who fails to produce JVAT- 404 Forms in terms of Rule- 35(2) of the JVAT Rules, 2006 is required to substantiate its claim of Input Tax Credit by producing documents as enumerated under Section 18(6) of the JVAT Act, 2005. It is open for the respondent-State of Jharkhand to verify the genuineness of the said documents and to ascertain as to whether said Assessee, in

fact, has discharged the liability of input tax at the time of procurement of inputs. Accordingly, we direct the respondent-State of Jharkhand to re-examine the claim of the petitioner towards its claim of Input Tax Credit amounting to Rs.33,38,740/- in respect of which the petitioner has not submitted JVAT-404 Forms, by verifying the said claim from tax invoices in original containing particulars of sale evidencing the amount of input tax paid and on being satisfied that the petitioner has paid input tax as aforesaid, extend the benefit of Input Tax Credit to the petitioner.

41. Accordingly, for the reasons and judicial pronouncements stated herein above, the impugned order dated 09.02.2017 passed in Revision Petition bearing No. Hz 60 of 2016 by the Commercial Taxes Tribunal, Jharkhand, Ranchi pertaining to the period 2011-12, and Appellate Order dated 22.12.2015 passed in Appeal Case No. RG/JVAT/A-03/15-16 and Assessment Order dated 12.3.2015 passed by the Respondent no.4, the Assistant Commissioner of Commercial Taxes, Ramgarh Circle, Ramgarh, are hereby, quashed and the concerned Assessing Authority is directed to give effect to the order passed by this Court within a period of eight weeks from the date of receipt of copy of the order.

42. This writ application is accordingly, allowed, with the directions as above.

*****

HIGH COURT FOR THE STATE OF GUJARAT

R/Special Civil Application No. 13679 Of 2019
AUGUST 07, 2019

VIMAL YASHWANTGIRI GOSWAMI …. Petitioner
VERSUS
STATE OF GUJARAT …. Respondents

For the Petitioner (S): Mr Chetan Pandya
For the Respondent (S):

Anticipatory Bail granted by the Hon'ble Court where there is a violation of provisions of GST Law.

HON'BLE JUSTICE J.B. PARDIWALA
HON'BLE JUSTICE A.C. RAO

(PER: HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. One of the main reliefs prayed for by the writ applicant in the present writ application reads as follows:

   "16(A) To issue a Writ of Mandamus and/or Writ of Prohibition and/or any other appropriate writ, order of direction, directing the respondents not to take any actions against the petitioner being proprietor of the Heugo Metal exercising powers under Section 69 read with Section 132 without following due procedure of law of assessment and adjudication of alleged evasion of GST as contemplated under Section 61, Section 73 of under Section 74 of the Central Goods and Service Tax Act, 2017 i.e. before following provisions of Chapter XII of Central Goods and Service Tax Act, 2017 and Gujarat Goods and Service Tax Act, 2017 and Chapter VIII of Central Goods and Service Tax Rules, 2017 and Gujarat Goods and Service Tax Rules, 2017 in connection with File No.ACST/UNIT-9/2019-20/B registered with State Tax (2), Unit-9, Ahmedabad."

2. Mr. Chetan K. Pandya, the learned counsel appearing for the writ applicant has placed strong reliance on the decision of the Delhi High Court in the case of **MAKEMYTRIP (INDIA) PVT. LTD. vs. UNION OF INDIA, reported in 2016 (44) S.T.R. 481 (Del.)** as well as on the decision of the Madras High Court in the case of **M/s. Jayachandran Alloys (P) Ltd. vs. The Superintendent of GST and**

Central Excise and Others in the Writ Petition No.5501 of 2019 decided on 4th April, 2019.

3. We take notice of the fact that the Delhi High Court decision referred to above has been affirmed by the Supreme Court. The ratio as laid in the Delhi High Court decision is as under:

"(i) The scheme of the provisions of the Finance Act 1994 (FA), do not permit the DGCEI or for that matter the Service Tax Department (ST Department) to bypass the procedure as set out in Section 73A (3) and (4) of the FA before going ahead with the arrest of a person under Sections 90 and 91 of the FA. The power of arrest is to be used with great circumspection and not casually. It is not to be straightway presumed by the DGCEI, without following the procedure under Section 73A (3) and (4) of the FA, that a person has collected service tax and retained such amount without depositing it to the credit of the Central Government.

(vii) In terms of C.B.E. & C.'s own procedures, for the launch of prosecution there has to be a determination that a person is a habitual offender. There is no such determination in any of these cases. There cannot be a habitual offender if there is no discussion by the DGCEI with the ST Department regarding the history of such Assessee. Assuming that, for whatever reasons, if the DGCEI does not talk to ST Department, certainly it needs to access the service tax record of such Assessee. Without even requisitioning that record, it could not have been possible for the DGCEI to arrive at a reasonable conclusion whether there was a deliberate attempt of evading payment of service tax. In the case of MMT, the decision to go in for the extreme step of arrest without issuing an SCN under Section 73 or 73A (3) of the FA, appears to be totally unwarranted."

3.1 To put it in other words, the powers of arrest under Section 69 of the Act, 2017 are to be exercised with lot of care and circumspection. Prosecution should normally be launched only after the adjudication is completed. To put it in other words, there must be in the first place a determination that a person is "liable to a penalty". Till that point of time, the entire case proceeds on the basis that there must be an apprehended evasion of tax by the assessee. In the two decisions referred to above, emphasis has been laid on the safeguards as enshrined under the Constitution of India and in particular Article 22 which pertains to arrest and Article 21 which mandates that no person shall be deprived of his life and liberty for the authority of law. The two High Courts have extensively relied upon the decision of the Supreme

Court in the case of D.K. Basu vs. State of West Bengal reported in 1997 (1) SCC 416.

4. Let **Notice** be issued to the respondent's returnable on **18th September, 2019**.

4.1 In the meantime, no coercive steps of arrest shall be taken against the writ applicant. Direct service is permitted.

4.2 On the returnable date, notify this matter on top of the Board.

4.3 We propose to take up this matter for final hearing as far as possible on the returnable date. The State is requested to be ready with the matter having regard to the important issues which have been raised in the writ application.

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HIGH COURT FOR THE STATE OF TELANGANA

WP No. 16885 Of 2019
AUGUST 07, 2019

RAGHAVA CONSTRUCTIONS ….
Petitioner
VERSUS
UNION OF INDIA & ORS. ….
Respondents

For the Petitioner (S): SRl. K. VIJAY KUMAR
For the Respondent (S): SRl. B. NARASIMHA SARMA

The Hon'ble High Court has stayed the attachment of Bank Account without issue of Notice to the Respondents.

HON'BLE SRI JUSTICE SANJAY KUMAR
HON'BLE SRI JUSTICE P. KESHAVA RAO

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the writ petition, the High Court may be pleased to stay the proceedings of letter C.No. V/04/06/2019-Arrears, dated 31.07.2019, issued by 2nd respondent, pending disposal of WP.No.16885 of 2019 on the file of the High Court.

The court while directing issue of notice to the Respondents herein to show cause as to why this application should not be complied with, made the following. (The receipt of this order will be deemed to be the receipt of notice in the case).

ORDER:

As to whether the amendment to Section 50 of the Central GST Act, 2017 would be retrospective and whether a notice was liable to be issued to the petitioner before attachment of his account requires examination.

There shall accordingly be interim stay of the proceedings as prayed for.

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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 16213 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 20626 of 2018
With
CIVIL APPLICATION (FOR ORDERS) NO. 1 of 2019
In R/SPECIAL CIVIL APPLICATION NO. 20626 of 2018

SHABNAM PETROFILS PVT. LTD. …. Petitioner
VERSUS
UNION OF INDIA & 1 other(s) …. Respondents

Appearance: SCA No.16213/2018 :
MR RC JANI WITH MR AVINASH PODDAR for
RC JANI AND ASSOCIATE(6436) for the Petitioner(s) No. 1
MR DEVANG VYAS(2794) for the Respondent(s) No. 1
MR VIRAL K SHAH(5210) for the Respondent(s) No. 2

Appearance : SCA No.20626/2018 :
MR PRAKASH SHAH WITH MR ARUN JAIN with
MR DHAVAL SHAH (2354) for the Petitioners
MR DEVANG VYAS, for the Respondent(s) No. 1
MR SOAHAM JOSHI, AGP for the Respondent No.2

There being no express provision in section 54(3) empowering Central Government to provide for lapsing of unutilised ITC, petitioners have a vested right to unutilised ITC accumulated on account of rate of tax on inputs being higher than rate of tax on output supplies (inverted rate structure)

HONOURABLE MR.JUSTICE J.B.PARDIWALA
HONOURABLE MR.JUSTICE A.C. RAO
Date : 17/07/2019
ORAL ORDER
(PER : HONOURABLE MR.JUSTICE A.C. RAO)

1.00. As common question of law arise in both these petition and as in both these petitions, the petitioners have challenged the provisions of Central Goods and Service Tax Act, 2017 and Notification and Circular issued thereunder, by which the

inverted tax structure refund of excess duty is not granted, the same are heard, decided and disposed of by this common order.

2.00. By way of Special Civil Application No.16213 of 2018, petitioner – Shabnam Petrofils Pvt. Ltd. has prayed for the following main reliefs:-

> *"16[B]. Your Lordships may be pleased to issue writ of mandamus or any other writ in the nature of mandamus or any other appropriate writ quashing and setting aside the Notification dated 26.07.2018 being No.20/2018 and Circular dated 24.08.2018 being Circular No.56/30/2018-GST as contrary to Section 54(3) of the Central Goods and Service Tax Act, 2017 as well as notification dated 28.06.2017 being Notification No.5/2017-Central Tax [Rate] and declare the said Notification and Circular as violative of Articles 14 and 19(1)(g) of the Constitution of India.*

2.01. By way of Special Civil Application No.20626 of 2018, petitioners – federation of Gujarat Weavers Welfare Association and others have prayed for the following main reliefs:-

> *"9(a). YOUR LORDSHIPS may be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioners case and after going into the validity and legality thereof to C/SCA/16213/2018 ORDER quash and set aside:*
>
> *(i). proviso (ii) of the opening paragraph of the Notification No. 05/2017-C.T. (Rate) dated 28.06.2017 inserted vide Notification No. 20/2018- C.T. (Rate) dated 26.07.2018 issued by the Respondent No. 1;*
>
> *(ii). proviso (ii) of the opening paragraph of the Notification No. 05/2017-S.T. (Rate) dated 30.06.2017 inserted vide Notification No. 20/2018- S.T. (Rate) dated 26.07.2018 issued by the Respondent No. 2; and*
> *(iii). proviso (ii) of the opening paragraph of the Notification No. 05/2017-I.T. (Rate) dated 28.06.2017 inserted vide Notification No. 21/2018- I.T. (Rate) dated 26.07.2018 issued by the Respondent No. 1; and*

(b). YOUR LORDSHIPS may be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioners case and after going into the validity and legality thereof to quash and set aside the Circular No. 56/30/2018-GST dated 24.08.2018 issued by the Respondent No. 4;

(c). YOUR LORDSHIPS may be pleased to issue writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, or order or direction under Article 226 of the Constitution of India, ordering and directing the Respondents, their subordinate servants and agents to forthwith withdraw and cancel:

(i). proviso (ii) of the opening paragraph of the Notification No. 05/2017-C.T. (Rate) dated 28.06.2017 inserted vide Notification No. 20/2018- C.T. (Rate) dated 26.07.2018 issued by the Respondent No. 1;

(ii). proviso (ii) of the opening paragraph of the Notification No. 05/2017-S.T. (Rate) dated 30.06.2017 inserted vide Notification No. 20/2018- S.T. (Rate) dated 26.07.2018 issued by the Respondent No. 2; and

(iii). proviso (ii) of the opening paragraph of the Notification No. 05/2017-I.T. (Rate) dated 28.06.2017 inserted vide Notification No. 21/2018- I.T. (Rate) dated 26.07.2018 issued by the Respondent No. 1; and

(d). YOUR LORDSHIPS may be pleased to issue writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India, ordering and directing the Respondents, their subordinate servants and agents to forthwith withdraw and cancel the Circular No. 56/30/2018-GST dated 24.08.2018 issued by the Respondent No. 4."

2.02. Thus, in both these petitions petitioners have challenged Notification No.20/2018-central Tax (Rate) dated 26.07.2018 issued by the Government of India, Ministry of Finance, Department of Revenue, by which it is resolved that, the accumulated input tax credit lying unutilised in balance in respect of the goods specified

at Sr.Nos.1, 2, 3, 4, 5, 6, 6A, 6B, 6C, and 7 of the table below Notification dated 28/6/2017, after payment of tax for and upto the month of July, 2018, on the inward supplies received upto 31st day of July, 2018, shall lapse. In short, by way of the aforesaid Government Resolution, the inverted tax structure refund of excess duty is not granted.

3.00. The petitioner of Special Civil Application No.16213 of 2018, is a company registered under the Companies Act, 1956 and is engaged in manufacturing polyester texturized yarn (HSN Code : 5402) and also manufactures polyester woven fabrics and polyester knitted fabrics from polyester partially oriented yarn / polyester texturized yarn (HSN Code : 5402) while the petitioner No.1 of Special Civil Application No.20626 of 2018 is a duly registered under the Maharashtra Public Trust Act, 1950 and Societies Registration Act and representing its members who are mostly MMF fabric weavers. The said petitioner No.1 represents 25 associations of more than 35,000 registered power looms units employing ore than 4,00,000 workers. The petitioner No.2 of Special Civil Application No.20626 of 2018 is an Association of persons and representing its members who are mostly knitters engaged in the manufacture and sale of MMF knitted fabrics. The petitioner No.3 of Special Civil Application No.20626 of 2018 is the Secretary and authorized signatory of the petitioner No.1 while petitioner No.4 is the President and authorized signatory of the petitioner No.2.

3.01. According to the petitioners, the impugned Notification No.5/2017 (Central Tax (rate)] dated 28.6.2017 issued by the Government of India with regard to clause (ii) of the proviso to sub-section (3) of section 54 of the Central goods and Service Tax Act, 2017, no refund of unutilized input tax credit shall be allowed, where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on the output supplies of such goods (other than nil rated or fully exempt) supplies with regard to the goods described in Column No.(3) of the Table. The said notification came into force w.e.f. 1/7/2017.

3.02. Thereafter Government of India, Ministry of Finance (Department of Revenue issued Notification No.20/2018- central Tax (Rate) dated 26/7/2018 with regard to clause (2) of proviso to sub-section (3) of section 54 of the Central Goods and Service Tax Act, 2017 by which it has been resolved as under :-

"Provided that,

[i] nothing contained in this notification shall apply to the input tax credit accumulated on supplies received on or after the 1M day of August, 2018, in respect of goods mentioned at serial numbers 1, 2, 3, 4, 5, 6, 6A, 6B, 6C and 7 of the Table below; and

[ii] In respect of the said goods, the accumulated input tax credit lying unutilized in balance after payment of tax for and upto the month of July, 2018, on the inward supplies received up to the 31st day of July, 2018 shall lapse."

3.03. According to the petitioners, Notification No.20/2018 dated 26/7/2018 issued extends the restriction on the utilization of unutilized input tax credit for and up to the month of July, 2018 and further states that on the inward supplies received upto 31.7.2018 shall lapse and further states that inward supplies received upto 31st day of July, 2018, shall lapse. It is contended by the learned counsel for the petitioners that the impugned notification is without application of mind inasmuch as the assessees are losing huge amount of money paid towards input tax credit. It is contended that a registered person's right to claim input tax credit arises from section 16 of the CGST Act. It is contended by the learned counsel for the petitioners that there is no statutory provision under the CGST Act empowering the respondents to issue notifications providing for lapsing of input tax credit. It is contended that rule can be made or notification can be issued under the guise of section 164 for lapsing input tax credit. It is also contended that power under section 54(3)(ii) of the CGST Act is limited to notify the supplies not entitled to refund of input tax credit accumulated on account of the inverted rate structure. It is contended that the the impugned notifications have exceeded powers delegated under section 54(3)(ii) of the CGST Act. It is contended that the impugned notification to the extend providing for the lapsing of input tax credit are discriminatory. It is vehemently contended that the input tax credit is as good as tax paid by the assessee and a valid claim of input tax credit under the GST Act creates an indefeasible right in favour of the taxable person.

3.04. In support of the above contention, learned counsel for the petitioners have relied on the decision of the Apex Court in the case of **Dipak Vegetable Oil Industries Ltd. Vs. Union of India reported in 1991 (52) ELT 222 (Gujarat),** wherein the Apex Court has held as under :-

"13. The learned counsel Shri Trivedi also relied upon the following observations made by the supreme court in Shri Vijayalakshmi Rice Mills v. State of M.P. - AIR 1976 SC 1471 :

> *"5. ...It is a well recognized rule of interpretation that in the absence of express words or appropriate language from which retrospectivity may be inferred, a notification takes effect from the date it is issued and not from any prior date. The principle is also well settled that statutes should not be construed so as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the Amending Act came into force...."*

14. He also relied upon similar observations made by the Supreme Court in Govinddas v. Income-tax Officer, AIR 1977 SC 552 :

> *"10. Now it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure....."*

15. These observations of the Supreme Court also support the view that a right which is acquired as a result of operation of a statutory provision cannot be taken away retrospectively unless the statutory provision so provides or by necessary implication it has the same effect. As pointed out, here in this case, what has been done is to rescind the notifications and not the Rules. Though the right of the manufacturers like petitioners to credit of money had crystalized only after issuance of the notifications and the extent of it was governed by the terms of the notifications, once the said right got crystallized in terms of money, in our opinion, it was not intended to be taken away or could not be taken away merely by rescinding the notifications. The effect of the rescinded notifications is, in our opinion, that from the date on which the said notifications came to be rescinded, the manufacturers of Vanaspati and soap ceased to earn the benefit of credit of money while manufacturing their final products - Vanaspati or soap - with the help of notified inputs, but they were not deprived of their right to utilise the credit of money which they had already earned validly so long as the same was or intended to be used for payment of excise duty in the manufacture of Vanaspati or soap, as the case may be, merely because the notifications have been rescinded, it cannot be

said that Rule 57N has ceased to operate. For these reasons the contention raised on behalf of the respondents will have to be rejected."

3.05. The learned counsel for the petitioners has also And the decision of the Apex Court in the case of Eicher Motors Ltd. Vs. Union of India, reported in 1999 (106) ELT 3 (S.C.). The Apex Court in the case of Eicher Motors Ltd. (supra) has observed and held as under :-

"5. Rule 57F (4A) was introduced into the Rules pursuant to Budget for 1995-96 providing for lapsing of credit lying unutilised on 16-3-1995 with a manufacturer of tractors falling under Heading No. 87.01 or motor vehicles falling under Heading No. 87.02 and 87.04 or chassis of such tractors or such motor vehicles under Heading No. 87.06. However, credit taken on inputs which were lying in the factory on 16-3-1995 either as parts or contained in finished products lying in stock on 16-3-1995 was allowed. Prior to 1995-96 Budget, central excise/additional duty of customs paid on inputs was allowed as credit for payment of excise duty on the final products, in the manufacture of which such inputs were used. The condition required for the same was that the credit of duty paid on inputs could have been used for discharge of duty/liability only in respect of those final products in the manufacture of which such Inputs were used. Thus it was claimed that there was a nexus between the inputs and the final products. .in 1995-96 Budget Modvat scheme was liberalised/simplified and the credit earned on any input was allowed to be utilised for payment of duty on any final product manufactured within the same factory irrespective of whether such inputs were used in its manufacture or not. The experience showed that credit accrued on inputs is less than the duty liable to be paid on the final products and thus the credit of duty earned on inputs gets fully utilised and some amount has to be paid by the manufacturer by way of cash. Prior to 1995-96 Budget. the excise duty on inputs used in the manufacture of tractors. commercial vehicles varied from 15% to 25%. whereas the final products were attracted excise duty of 10% or 15% only. The value addition was also not of such a magnitude that the excise duty required to be paid on final products could have exceeded the total input credit allowed. Since the excess credit could not have been utilised for payment of the excise duty on any other product, the unutilised credit was getting accumulated. The stand of the assessees is that they have utilised the facility of paying excise duty on the inputs and canted the credit towards excise duty payable on the finished products. For the purpose at utilisation of the credit all vestitive facts or necessary incidents thereto have taken place prior to 16-3-1995 or

utilisation of the finished products prior to 16- 3-1995. Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory on the basis of the existing scheme. Now by application of Rule 57F(4A) credit attributable to inputs already used in the manufacture of the final products and the final products which have already been cleared from the factory alone is sought to be lapsed, that is, the amount that is sought to be lapsed relates to the inputs already used in the manufacture of the final products but the final products have already been cleared from the factory before 16-3-1995. Thus the right to the credit has become absolute at any rate when the input is used in the manufacture of the final product. The basic postulate, that the scheme is merely being altered and, therefore, does not have any retrospective or retro-active effect. submitted on behalf of the State, does not appeal to us. As pointed out by us that when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered. necessarily it follows that right, which had accrued to a party such as availability of a scheme, is affected and. in particular. it loses sight of the fact that provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessees concerned. Therefore. the scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier scheme was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the basis of the earlier scheme necessarily the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said rule would result in affecting the rights of the assessees.

6. We may look at the matter from another angle. If on the inputs the assessee had already paid the taxes on the basis at when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore. it becomes clear that Section 37 of the Act does not enable the authorities

concerned to make a rule which is impugned herein and therefore, we may have no hesitation to hold that the rule cannot be applied to the goods manufactured prior to 16-3-1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods.

7. There are several decisions referred to by the learned Counsel on either side but we do not think that those decisions have any relevance to the point under discussion.

8. We allow the petitions filed by the assessees and declare that the said rule cannot be applied except in the manner indicated by us above. No orders as to costs."

3.06. Learned counsel for the petitioners contended that the aforesaid ratio has been followed in the following cases :-

[1] Samtel India Ltd. V/s. Commissioner of Central Excise, Jaipur [2003 (155) ELT 14 SC]
[2] Jayam and Co. V/s. Assistant Commissioner (2016) 96 VST 1(SC)
[3] Collector of Central Excise V/s. Dai Ichi Karkaria Ltd. 1999 (112) ELT 353 (SC)
[4] Jayaswal Neco Ltd. V/s. Commissioner of Central Excise 2015 (322) ELT 587(SC)
[5] Commissioner of Central Excise Vs/ New Swadeshi Sugar Mills (2016) 1 SCC 614,
[6] TATA Engineering & Locomotive Co. Ltd. V/s. Union of India [2003 (159) ELT 129 (Bom.)]
[7] Grasim Industries Ltd. V/s. CBEC [2004 (163) ELT 10] &
[8] Shree Rajastban Texchem Ltd. V/s. Union of India [2005 (182) ELT 311.

3.07. It is further contended by the learned counsel appearing for the petitioners that from the above, it is clear that the impugned notification and circular are required to be struck down as unconstitutional on the ground that it took away the vested right of the assessee without there being any justifiable reason.

4.00. Both these appeals are vehemently opposed by the learned counsel for the respondents - revenue. It is contended that to reduce the accumulation of ITC with fabrics weavers, the GST council, in its meeting held on 6th October 2017 recommended

reduction in GST rate on man-made fiber yarns from 18% to 12% which was notified vide notification No. 35/2017-Central Tax (Rate) dated 13th October 2017. This gave significant relief to the sector and accumulation of ITC got reduced. Subsequently, requests were received from textile industry to relax the said condition to allow refund of accumulated credit. While in the 28th meeting the request to remove restriction on refund of accumulated input tax credit was agreed to by the GST Council. this change was made with prospective effect and a conscious decision was taken by the Council that the input tax credit lying in balance on the date of the notification implementing the new provision, shall lapse. This lapsing of accumulated input tax credit was in the spirit of earlier rate structure which envisaged that refund of accumulated credit was not to be allowed.

4.01. The learned counsel appearing for the respondents - revenue further contended that in terms of the GST Council decision, Notification No. 5/2017-Central Tax (Rate) dated 28th June, 2017 was amended vide Notification No. 20/2018-Central Tax (Rate) dated 26th July. 2018 to allow refund or no on purchases made alter 1st August. 2018 and to lapse the input tax credit on account of inverted duty structure lying in balance after payment of GST for the month of July. 2018 (on purchases made on or before the 31' July, 2018). The power to lapse the input tax credit flows inherently from the power deny refund of accumulated input tax credit on account of inverted duty structure. It is contended that the petitioners even prior to the date of coming into force of the notification were not able to take the benefit of this credit as refund on account of inverted duty structure was blocked. It is contended that allowing the utilization of the credit would have led to allowance of the blocked credit and thus in a way would negate the earlier position of blockage of input tax credit refund. Attention of this Court is invited to circular No. 56/30/2018-GST dated 24.08.2018, wherein all the issues raised by the textile industry were clarified after due consultation with the trade. It is contended that, in fact, on the whole issue, there was extensive discussion and deliberations with trade and industry and other stakeholders including at the level of Union Finance Minister. It is further contended that the inputs from all the State Governments were also taken before issuance of the impugned circular.

4.02. The learned counsel appearing for the respondents - revenue has contended that in the case of Kapil Mohan Vs. Commissioner of Income Tax reported in 1999 (1) SCC 430, the Apex Court has held that it is now well settled in the field of taxation, hardship or equity has no role to play in determining eligibility to tax and it is for the legislature to determine the same.

5.00. Heard the learned counsel for the respective parties and considered the material on record.

5.01. Having heard the rival submissions and considering the provisions of section 54(3(ii), which empowers the respondents – revenue to frame the rules, does not empower the respondents – Central Government to frame rule providing for lapsing of the input tax credit.

5.02. The decision of the Apex Court in the case of Dal Ichi Karkaria Ltd. (supra) as well as decision of the Apex Court in the case of Eicher Motors Ltd. (supra) are squarely applicable to the facts of the case on hand.

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

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

> "We may look at the matter from another angle. If on the inputs, the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed Therefore. it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which 15 impugned herein and therefore we may have no hesitation to hold that the Rule cannot be applied to the goods manufactured prior to 16/3/1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods."

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

In view of the disposal of the main Special Civil Application, Civil Application No.1 of 2019 in Special Civil Application No.20626 of 2019 also stands disposed of. No costs.

Sd/-
(J. B. PARDIWALA, J.)
Sd/-
(A. C. RAO, J.)

PER : J.B. PARDIWALA, J. :-

7.00. I am in complete agreement with the final conclusion arrived at by my esteemed brother Justice Rao. However, I would like to add few words of my own:

8.00. The writ applicant No.1 is a society representing its members who are mostly MMF fabric weavers. The writ applicant No.2 is an Association of Person representing its members who are mostly knitters engaged in the manufacture and sale of MMF knitted fabrics.

9.00. The members of the writ applicants are engaged in the supply of textiles and textile articles of Chapters 52 to 63 of the First Schedule to the Customs Tariff Act, 1975.

10.00. With the introduction of the Goods and Services Tax (hereinafter referred to as "GST') in India w.e.f. 01.07.2017, the Central Goods and Service Tax Act, 2017 ("CGST Act"), Integrated Goods and Service Tax Act, 2017 ("IGST Act"), and Gujarat Goods and Service Tax Act, 2017 ("SGST Act"), has come into force.

11.00. The CGST Act and SGST Act provides for the levy and collection of the GST on the supply of goods and services within the State of Gujarat. The IGST Act levies and collects GST on the inter-state supply of goods and services.

12.00. The Scheme of levy of GST is to tax supply of goods and services on value addition.

13.00. Section 16 of the CGST Act allows the registered person to take input tax credit ("ITC") of tax charged on the inputs and input services or both used or intended to be used in the course or furtherance of his business.

14.00. Section 140 of the CGST Act allows a registered person to take credit in his electronic credit ledger of the amount of CENVAT Credit carried forward in the return relating to the period ending with the date immediately preceding the appointed day i.e. 01.07.2017.

15.00. Similarly, Section 140 of the SGST Act enables a registered person to take credit in his electronic credit ledger of the amount of Value Added Tax and Entry Tax carried forward in the return relating to the period ending with the date immediately preceding the appointed day i.e. 01.07.2017.

16.00. Section 54(3) of the CGST Act provides for the refund of the unutilised ITC in two circumstances viz. (i) zero rated supplies made without payment of tax (export of goods and services); and (ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (popularly known as inverted rate of tax).

17.00. Section 54(3)(ii) of the CGST Act further provides that the Central Government, on the recommendation of the GST Council, may notify the goods or services or both to which the refund of {TC accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies shall not be available. Section 54(3) of the CGST Act reads thus:

> "(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:
>
> Provided that no refund of unutilised input tax credit shall be allowed in cases other than-

(i) zero rated supplies made without payment of tax;
(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty: Provided also that no refund of input tax credit shall be allowed. If the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies."

18.00. In terms of Section 20 of the IGST Act, Section 54(3) of the CGST Act shall mutatis mutandis apply to the IGST Act.

19.00. Section 54(3) of the SGST Act reads thus:

"(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:

Provided that no refund of unutilised input tax credit shall be allowed in cases other than (I) zero-rated supplies made without payment of tax, (ii) where the credit has accumulated an account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council :

Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty :

Provided also that no refund of input tax credit shall be allowed, If the supplier of goods or services or both claims refund of the integrated tax paid on such supplies."

20.00. Vide Notification No.05/2017-Central Tax (Rate) dated 28.06.2017, as amended by Notification No. 29/2017- Central Tax (Rate) dated 22.09.2017 and Notification No. 44/2017-Central Tax (Rate) dated 14.11.2017, the Central Government, on recommendation of the GST Council (Respondent No. 3 herein), in exercise of powers conferred upon it under section 54(3) of the CGST Act, inter alia, notified following textile and textile goods (listed at Sr. Nos. 1 to 7 of the Table thereto) under Section 54(3) of the Act in respect of which refund of ITC accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies.

S. No	**Tariff item, heading, subheading**	**Description of Goods**
1	5007	Woven fabrics of silk or of silk waste
2	5111 to 5113	Woven fabrics of wool or of animal hair
3	5208 to 5212	Woven fabrics of cotton
4	5309 to 5311	Woven fabrics of other vegetable textile fibres, paper yarn.
5	5407, 5408	Woven fabrics of manmade textile materials
6	5512 to 5516	Woven fabrics of manmade staple fibres
6A	5608	Knotted netting of twine, cordage or rope; made up fishing nets and other made up nets, of textile materials
6B	5801	Corduroy fabrics
6C	5806	Narrow woven fabrics, other than goods of heading 5807; narrow fabrics consisting of warp without weft assembled by means of an adhesive (bolducs)"
7	60	Knitted or crocheted fabrics [All goods].

21.00. The effect of the Notification No. 05/2017-Centra1 Tax (Rate) dated 28.06.2017, as amended by the Notification No. 29/2017-Central Tax (Rate) dated 22.09.2017 and Notification No. 44/2017-Centra1 Tax (Rate) dated 14.11.2017, was that the aforesaid goods were not entitled to refund of the ITC accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies.

22.00. Vide Notification No.20/2018-Centra1 Tax (Rate) dated 26.07.2018, issued in exercise of powers conferred upon Central Government under section 54(3) of the Act, the above Notification No. 05/2017-Centra1 Tax (Rate) dated 28.06.2017 was amended with effect from 01.08.2018.

23.00. The effect of the amending notification is to denotify the goods mentioned at Sr. Nos.1 to 7 to the table to the Notification No. 05/2017-Central Tax (Rate) dated 28.06.2017 thereby paving way for the refund of the ITC accumulated on account of the inverted rate structure in respect of the said goods w.e.f. 01.08.2018.

24.00. The amending notification further provided that the accumulated ITC lying unutilized in balance, after payment of tax for and up to the month of July, 2018, on the inward supplies received up to the 31.07.2018, shall lapse.

25.00. The relevant extracts of the Notification No.20/2018-Central Tax (Rate) dated 26.07.2018 are reproduced as follows:

> *"Refund of unutilized/accumulated credit on specified fabrics - Amendment to Notification No. 5/2017-C. T. (Rate)*
>
> *In exercise of the powers conferred by clause (ii) of the proviso to sub-section (3) of section 54 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 5/2017-Central Tax (Rate), dated the 28th June, 2017, published in the Gazette of India, Extraordinary, Part 1], Section 3, Sub-section (i). vide number G.S.R. 677(E), dated the 28th June, 2017, namely :*
>
> *In the said notification. In the opening paragraph the following proviso shall be inserted. Namely :*
>
> *"Provided that,*

(i) nothing contained in this notification shall apply to the input tax credit accumulated on supplies received on or after the 1st day of August, 2018, in respect of goods mentioned at serial numbers 1, 2, 3, 4, 5, 6, 6A, 6B, 6C and 7 of the Table below; and
(ii) in respect of said goods, the accumulated input tax credit lying unutilised in balance, after payment of tax for and upto the month of July, 2018, on the inward supplies received up to the 31st day of July 2018, shall lapse. "

26.00. In the case on hand, the writ applicants have challenged the proviso (ii) of the opening paragraph of the Notification No.05/2017-C.T. (Rate) dated 28.06.2017 inserted Page 26 of 29 C/SCA/16213/2018 ORDER vide Notification No. 20/2018-C.T. (Rate) dated 26.07.2018.

27.00. The challenge is essentially on the following grounds:

(i) The Respondents have no power under Section 54(3) of the CGS'T Act to lapse the accumulated ITC lying unutilised in balance on 31.07.2018.

(ii) The only power conferred upon the Respondents under Section 54(3) of the CGST Act is to notify the goods and services not entitled for refund of ITC accumulated on account of inverted rate structure.

(iii) The Central Board of Indirect Taxes and Customs (Respondent No. 4 herein), vide Circular No.56/30/2018- GST dated 24.08.2018 has clarified that the legislative power of providing for lapsing of ITC flows inherently from the power to deny refund of ITC accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies.

(iv) It is the case of the writ applicants that the ITC once validly taken is indefeasible and vested right is accrued in favour of the registered person to utilize the same without any limitation.

(v) Strong reliance has been placed upon the decision of the Supreme Court in the case of Collector of Central Excise, Pune v. Dai Ichi Karnataka Ltd, 1999 (112) E.L.T. 353 (S.C.), wherein it is held that when credit has been validly taken, its benefit is available to the manufacturer without any limitation in time. The credit is indefeasible.

(vi) Reliance is also placed upon the decision of the Supreme Court in the case of Eicher Motors Ltd. v. Union of India, 1999 (106) E.L.T. 3(S.C.), for the proposition that a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility thereto gets worked out or until those goods existed.

(vii) Further reliance is placed on the decision of this Court in the case of Baroda Rayon Corporation Limited – 2014 (306) E.L.T. 551 (Guj.).

ANALYSIS:

(viii) The CGST Act itself provides for the lapsing of the ITC at Sections 17(4) and 18(4) respectively of the CGST Act. Thus, where the legislature wanted the ITC to lapse, it has been expressly provided for in the Act itself. No such express provision has been made in Section 54(3) of the CGST Act.

(ix) No inherent power can be inferred from the provision of Section 54(3) of the CGST Act empowering the Central Government to provide for the lapsing of the unutilised ITC accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies (inverted rate structure).

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

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

(xii) In view of the above, proviso (ii) of the opening paragraph of the Notification No.05/2017-C.T. (Rate) dated 28.06.2017, inserted vide Notification No.20/2018- C.T. (Rate) dated 26.07.2018, is ex-facie invalid and liable to be strike down as being without any authority of law.

Sd/-

(J. B. PARDIWALA, J.)

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