

F. No. CBEC-20/10/11/2019-GST | 1001
Government of India 22/06/2020
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes & Customs
GST Policy Wing

Room No. 159-A, North Block
New Delhi, Dated: 22nd June, 2020

To,

All the Principal Chief Commissioners / Chief Commissioners of Central Tax,

Subject: - Writ petitions filed in various High Court(s) related to transitional provisions in GST – regarding

As you are aware that a number of writ petitions / PILs / appeals have been or are being filed in the various High Court(s) by taxpayers who were not able to carry forward or transition the accumulated CENVAT credit under the erstwhile regime to GST regime due to non-filing of TRAN-1/ TRAN-2 within due date due to technical glitches or various other reasons. Correspondences, in this regard, are received from the field formations / jurisdictional Commissionerates seeking comments / inputs on the policy issues or questions of law challenged in the said Writ petitions for filing counter affidavit in the matter. In all these cases, the petitioners, time and again, challenge the transitional provisions of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as CGST Act, 2017) and rules made thereunder.

2. The issues raised in most of such writ petitions/ PILs/ Appeals are similar in nature. However, inputs/ comments on the policy issues/ questions of law have to be provided to the field formations by the Policy Wing separately in each such reference from the filed formations. This not only requires duplication of efforts of the Policy Wing, but also may result in undue delay in filing appropriate reply/ counter affidavit in the Courts by the field formations.
3. For ease of reference and in order to ensure that no such separate references are required to be made by the field formations to Policy Wing of CBIC seeking inputs/ comments on policy matters in the writ petitions / PILs / appeals filed on issues pertaining to transitional credit, including issues related to non-filing of TRAN-1/ TRAN-2 by due date and other related issues, a list of policy issues / questions of law, that are often challenged in the said writ petitions, has been compiled along with the comments of the Policy Wing thereon and is enclosed as **Annexure - A**.

4. It is requested that the field formations, under your jurisdiction may be advised to refer to the comments of the Policy Wing given in the said Annexure while filing any reply / counter affidavit against the writ petitions / PILs / appeals related to transitional provisions. No separate reference may be made to the Policy Wing in respect of the issues covered in the said Annexure. Only if any fresh policy issue/ question of law is raised in any writ petitions / PILs / appeals which is not covered under **Annexure-A** enclosed herewith, the matter should be referred to the Policy Wing giving details of the specific policy issue/ question of law on which comments/ inputs of the Policy Wing are sought.

5. It is also reiterated that references should not be made to Policy Wing in the routine manner seeking para-wise comments on the Writ petitions/ PILs/ appeals as such and only a self-contained reference may be made to the Policy Wing clearly pointing out the exact policy issue(s) (which is/ are not covered under Annexure-A) on which comments / inputs are sought from the Policy Wing. Further, such references need to be made only with the approval of the concerned Commissioner.

6. **This issues with the approval of Member, GST.**

Yours faithfully,

Sanjay Mangal
22/6/2020

(Sanjay Mangal)

Commissioner, GST Policy Wing - II

Copy to: -

The Special Secretary, GST Council Secretariat, 5th Floor, Tower – II, Jeevan Bharti Building, Janpath Road, Connaught Place, New Delhi..... With a request to take similar action with respect to the States.

COMMENTS ON WRIT PETITIONS RELATED TO TRANSITIONAL PROVISIONS

1. Writ Petitions stating that: -

Cenvat / Input Tax Credit is a vested or absolute right and this substantive right to claim credit under Section 140 of CGST Act, 2017 cannot be denied by imposition of a procedural time limit.

Provisions of Rule 117 / 120A of CGST Rules, 2017 of CGST Rules, 2017 as ultra vires to the CGST Act, 2017 and the petitioner should be allowed to file / revise the TRAN 1 FORM under Rule 117 / Rule 120 A of the CGST Rules, 2017 and the substantive right to claim credit under Section 140 of CGST Act, 2017 cannot be denied by imposition of a procedural time limit.

Comments of Policy Wing: -

I. CENVAT CREDITS OR INPUT TAX CREDITS ARE NOT ABSOLUTE / VESTED RIGHTS OVER AND ABOVE STATUE AND ARE SUBJECT TO STATUTORY PROVISIONS AND RULE UNDER WHICH THEY EXISTS

(A). It may be noted that credit can be availed only to the extent allowed by law and reasonable restrictions on availing credit can be imposed. **The contention of the petitioner that CENVAT Credit / Input Tax Credit are absolute / vested rights is fundamentally flawed, legally erroneous and ex-facie contrary to the law laid down by the Hon'ble Supreme Court in at least three (03) judgments which are detailed as below, -**

(i). In the case of *Osram Surya Pvt. Ltd. vs. Commissioner of Central Excise, Indore, (2002) 9 SCC 20* the Hon'ble Supreme Court has held that a rule fixing a time limit for exercise of a right does not take amount to taking away any vested right. The Hon'ble Supreme Court held that: -

“... in the instant case by the introduction of the second proviso to Rule 57G, the credit in the account of a manufacturer was not taken away but only the manner and the time within which the said credit was to be taken or utilized alone was stipulated. It is to be noted at this juncture that the substantive right has not been taken away by the introduction of the proviso to the Rule in question but a procedural restriction was introduced which, in our opinion, is permissible in law.”

(ii). Similarly, Hon'ble Supreme Court in the case of *ALD Automotive (P) Ltd. v. CTO, (2019) 13 SCC 225: 2018 SCC OnLine SC 1945* at page 242, has held that *“input credit is in the nature of benefit/concession extended to the dealer under the statutory scheme. The concession can be received by the beneficiary only as per the scheme of the statute.”*

(iii). The same view has been reiterated by the Hon'ble Supreme Court in the decision of *Jayam & Co. v. Commr.*, (2016) 15 SCC 125: 2016 SCC OnLine SC 909 at page 134 wherein it was held as follows:

“(a) ITC is a form of concession provided by the legislature. It is not admissible to all kinds of sales and certain specified sales are specifically excluded.

(b) Concession of ITC is available on certain conditions mentioned in this section.

(c) One of the most important condition is that in order to enable the dealer to claim ITC it has to produce original tax invoice, completed in all respect, evidencing the amount of input tax....

...13. For the same reasons given above, challenge to the constitutional validity of sub-section (20) of Section 19 of the VAT Act has to fail. When a concession is given by a statute, the legislature has power to make the provision stating the form and manner in which such concession is to be allowed. Sub-section (20) seeks to achieve that. There was no right, inherent or otherwise, vested with dealers to claim the benefit of ITC but for Section 19 of the VAT Act.”

(B). Sub-Section (1) of Section 140 of the CGST Act, 2017, which deals with the transitional provisions, permits carry forward of the CENVAT credit of eligible duties. It is submitted that merely because a carry-forward of CENVAT Credit is permitted from the earlier regime to the new regime it does not mean that this right is absolute in nature and can be claimed over and above the time and manner prescribed in the present statutory regime. In fact, on the contrary the very fact that the Legislature had to provide for this right under the statute means that it is a statutory right, which can only be availed of in the manner provided for in the statute.

(C). Section 140(1) itself provides that a registered person shall be entitled to take the amount of CENVAT Credit carried forward in the Return relating to the period ending with the day immediately preceding the appointed day furnished by him under the existing law within such time and in such manner as maybe prescribed. The exercise or availing of the right of carrying forward of CENVAT credit in the plenary provision itself has been made subject to “*such manner as maybe prescribed*”. Therefore, when Rule 117 lays down the time and manner in which such right can be exercised, it can neither be said that the Act did not envisage the time and manner in which CENVAT credit can be availed and nor can it be said that such Rule in any manner was in exercise of excessive delegation. As discussed above, the Hon'ble Supreme Court has held that the manner in which a right can be exercised cannot mean that such a right is taken away. It is well-settled that when a statute provides for a manner to do something, it can be done only in that manner or not done at all. Therefore, when Rule 117 of CGST Rules is the law prescribing the manner in which transitional credit can be availed of, then it can be so availed only in such manner prescribed and the provision and its rigours cannot be circumvented by referring to such a provision as directory. [*Mackinnon Mackenzie & Co. Ltd. v. Mackinnon Employees Union* (2015) 4

SCC 544; Babu Verghese v. Bar Council of Kerala [(1999) 3 SCC 422; Taylor v. Taylor [(1875) LR 1 Ch D 426] which was followed by Lord Roche in Nazir Ahmad v. King Emperor [(1935-36) 63 IA 372 : (1936) 44 LW 583 : AIR 1936 PC 253]

(D). The CENVAT Credit claimed by the petitioner, arose under an erstwhile regime which has been discontinued. The Credits enabled the petitioner to adjust/set-off the Credits against the taxes payable by it under the said erstwhile regime which has been discontinued. There was no obligation or requirement whatsoever on the Parliament to recognize and permit the carrying forward of CENVAT Credits to the new GST Regime. The benefit of carrying forward of the CENVAT Credit is therefore a creature of the statute and is a newly created right/benefit under the GST Regime. **It would therefore necessarily be subject to the limitations and restrictions that are laid down by or under the CGST Act, 2017 and the rules made thereunder.**

(E). The Hon'ble Supreme Court in the case of *ALD Automotive (P) Ltd. v. CTO, (2019) 13 SCC 225: 2018 SCC OnLine SC 1945 at page 242*, has held that the benefit of carried forward CENVAT Credits is a newly created right under the CGST Act, 2017:

*“34. The input credit is in the nature of benefit/concession extended to the dealer under the statutory scheme. The concession can be received by the beneficiary only as per the scheme of the statute. Reference is made to the judgment of this Court in *Godrej & Boyce Mfg. Co. (P) Ltd. v. CST [Godrej & Boyce Mfg. Co. (P) Ltd. v. CST, (1992) 3 SCC 624]* . Rules 41 and 42 of the *Bombay Sales Tax Rules, 1959* provided for the set-off of the purchase tax. This Court held that the rule-making authority can provide curtailment while extending the concession. In para 9 of the judgment, the following has been laid down: (SCC pp. 631-32)*

“9. In law (apart from Rules 41 and 41-A) the appellant has no legal right to claim set-off of the purchase tax paid by him on his purchases within the State from out of the sales tax payable by him on the sale of the goods manufactured by him. It is only by virtue of the said Rules—which, as stated above, are conceived mainly in the interest of public—that he is entitled to such set-off. It is really a concession and an indulgence. More particularly, where the manufactured goods are not sold within the State of Maharashtra but are despatched to out-State branches and agents and sold there, no sales tax can be or is levied by the State of Maharashtra. The State of Maharashtra gets nothing in respect of such sales effected outside the State. In respect of such sales, the rule-making authority could well have denied the benefit of set-off. But it chose to be generous and has extended the said benefit to such out-State sales as well, subject, however to deduction of one per cent of the sale price of such goods sent out of the State and sold there. We fail to understand how a valid grievance can be made in respect of such deduction when the very extension of the benefit of set-off is itself a boon or a concession. It was open to the rule-making authority to provide for a small abridgement or curtailment while extending a concession. Viewed from this angle,

the argument that providing for such deduction amounts to levy of tax either on purchases of raw material effected outside the State or on sale of manufactured goods effected outside the State of Maharashtra appears to be beside the point and is unacceptable. So is the argument about apportioning the sale-price with reference to the proportion in which raw material was purchased within and outside the State.””

The finding of this Hon'ble Court in the case of **ALD Automotive (supra)**, reproduced hereinabove has been distinguished in the impugned judgment on the sole ground that “*in the instant cases, the input tax credit had been claimed in the erstwhile regime and was being reflected in the CENVAT credit ledger.*” As has already been submitted, the right under the CGST Act, 2017 to carry forward CENVAT Credits, is a newly created right under the statute. Hence, the mere fact that the CENVAT Credits were reflected on the CENVAT credit ledger under the old regime, does not render inapplicable the well-established law that the Cenvat credit / input tax credit shall be available only as per the statutory scheme in accordance with the provisions of the Statute and Rules framed thereunder.

(F). In similar matter, there have been a number of judgements of the Hon'ble Supreme Court / High Courts, the relevant portion of which are reproduced below for reference, -

(i). The Hon'ble Supreme Court in the case of **TVS Motor Co. Ltd. v. State of T.N., (2019) 13 SCC 403** that:

“40. It is very clear from the aforesaid discussion that this Court held that ITC is a form of concession which is provided by the Act; it cannot be claimed as a matter of right but only in terms of the provisions of the statute;”

(ii). Also, the Hon'ble Supreme Court, in the case of **Assistant Collector of Customs vs. Anam Electrical Manufacturing Co. (2002 TIOL 650 SC CUS)**, relying on the case of **Mafatlal Industries vs. Union of India (2002 TIOL 54 SC CX)** held that, -

*“..... Pursuant to the directions given in **Mafatlal Industries vs. Union of India 1997 (89) ELT 247 (SC) 1996 (9) SCALE 457**, the appeals/ Special Leave Petitions coming up for disposal shall be disposed of in terms of one of the other of the clauses below:*

(1) Where a refund application was filed by the manufacturer/ purchaser beyond the period prescribed by the central Excise Act/ Customs Act in that behalf, such petition must be held to be untenable in law. Even if an any appeal, suit or writ petition, direction has been given that the refund application shall be considered with reference to the period of limitation prescribed in the Central Excise Act/ Customs Act....”

(iii). In the case of **Collector of Central Excise, Chandigarh vs. M/s Doaba Cooperative Sugar Mills Ltd. Jalandhar (1988 (37) ELT 478)** it was inter alia laid down by the Hon'ble Supreme Court that:

“But in making claims for refund before the departmental authority, an assessee is bound within four corners of the Statute and the period of limitation prescribed in the Central Excise Act and the Rules framed there under must be adhered to. The authorities functioning under the Act are bound by the provisions of the Act. If the proceedings are taken under the Act by the department, the provisions of limitation prescribed in the Act will prevail”

(iv). The Hon'ble High Court of Rajasthan in the case of **Shree Motors vs. Union of India (2020) SCCOnline Raj 381**, while considering the case of persons who claimed that they were unable to submit the TRAN- 1 Form within the prescribed time-limit on account of technical glitches, but were unable to tender any evidence to substantiate the said claim, held:

“33. The theory of vested rights and the implication of limitation on the said aspect of vested right has been considered by Hon'ble Supreme Court in the case of Osram Surya (P) Ltd. (supra), wherein, while considering the proviso II to Rule 57G of the Act of 1944 it was laid down that by providing limitation the statute has not taken away any of the vested rights, which accrue to the manufacturers and what is restricted is the time, within which, the manufacturer has to enforce that right and, therefore, once the provisions of Rule 117 of the CGST Rules, which prescribe limitation has been upheld, the plea raised pertaining to the denial of vested right on account of petitioners failing to submit/file Form GST Tran-1 in time cannot be countenanced.”

(v). The Hon'ble High court of Bombay in the case of **JCB India Ltd. vs. Union of India &Ors., (2018) SCCOnline Bom 997**, while upholding clause (iv) of Section 140(3) of the CGST Act, 2017 which provides that the Transitional Input Tax Credit under Section 140(3) can be availed only if the invoice pertaining to the input was not issued earlier than twelve months preceding the appointed date, held as follows:

“58. To our mind, therefore, the learned Additional Solicitor General is right in his contention that a CENVAT credit is a mere concession and it cannot be claimed as a matter of right. If the CENVAT Credit Rules under the existing legislation themselves stipulate and provide for conditions for availment of that credit, then, that credit on inputs under the existing law itself is not a absolute but a restricted or conditional right. It is subject to fulfilment or satisfaction of certain requirements and conditions that the right can be availed of. It is in these circumstances that we are unable to agree with the Counsel appearing for the petitioners that the impugned condition defeats any accrued or vested right. It was never vesting in them in such absolute terms, as is argued before us. If the existing law itself imposes condition for its enjoyment or availment, then, it is not possible

to agree with the Counsel that such rights under the existing law could have been enjoyed and availed of irrespective of the period or time provided therein. The period or the outer limit is prescribed in the existing law and the Rules of CENVAT credit enacted thereunder. In the circumstances, it is not possible to agree with the Counsel appearing for the petitioners that imposition of the condition vide Clause (iv) is arbitrary, unreasonable and violative of Articles 14 and 19(1)(g) of the Constitution of India.”

(vi). In the case of **U.O.I &Anr. Kirloskar Pneumatic Co. Ltd. (1996 SCC (4) 453)** while considering the question of limitation provided under the Customs Act, it was inter alia held that it is not permissible for the High Court to direct the authorities under the said Act to act contrary to the aforesaid statutory provisions. The power conferred under Article 226/227 of the Constitution of India is designed to effectuate the law, to enforce the rule of law and to ensure that the several authorities and organs of the State act in accordance with law. It cannot be invoked for directing the authorities to act contrary to law.

(G). From above, it is clear that a taxpayer cannot claim input credit of the duty or tax paid as a vested right under GST and input credit is in the form of a concession / benefit and reasonable restrictions on availing such credit can be imposed. Thus, a taxpayer cannot claim credit accumulated under the erstwhile taxation regime (Central Excise and Service Tax) as a vested right for transition under GST. Provisions have been made under section 140 of the CGST for transition of credit for different class of tax payers and restrictions, if any, placed on a particular class of taxpayers are reasonable in nature and by no stretch of imagination be termed as perverse, arbitrary and unreasonable.

II. RULE 117 / 120A OF CGST RULES 2017 ARE WITHIN THE RULE-MAKING POWER OF THE CENTRAL GOVERNMENT UNDER THE CGST ACT, 2017

(H). Section 140 of the CGST Act, 2017, provides for the transitional arrangement for input tax credit. Further the said section envisages certain benefits, in the form of tax credits, to be carried forward during the regime change. Such benefits of tax credits at a large scale cannot be allowed to linger indefinitely as it would have a direct impact at the tax collection, estimates and budgetary allocations. **Section 140(1) of the said Act, as amended with effect from 01.07.2017**, by Section 128(a) of the Finance Act, 2020, itself provides that a registered person shall be entitled to take the amount of CENVAT Credit carried forward in the Return relating to the period ending with the day immediately preceding the appointed day furnished by him under the existing law **within such time and in such manner as maybe prescribed.**

(I). The words “*within such time*” has been retrospectively added to **Section 140(1) of the CGST Act, 2017 by Section 128(a) of the Finance Act, 2020.** The amendment has been brought about **with effect from 01.07.2017** and notified on **16.05.2020.** Section 128(a) of the Finance Act, 2020 reads as follows:

“128. In section 140 of the Central Goods and Services Tax Act, with effect from the 1st day of July, 2017, —

*(a) in sub-section (1), after the words “existing law”, the words “**within such time and**” shall be inserted and shall be deemed to have been inserted;”*

Therefore, the exercise or availing of the right of carrying forward CENVAT credit in the plenary provision itself has been made subject to “within such time and in such manner as maybe prescribed”. Therefore, when Rule 117 lays down the manner in which such Right can be prescribed, it cannot be said that such Rule in any manner was an excessive delegation. The petitioner has fallen into error in holding that there is nothing sacrosanct in sub-rule (1A) of Rule 117 in laying down the outer limit as 31.12.2019.

(J). In this regard, a Division Bench of the Hon’ble High Court of Delhi in the case of ***SML Isuzu Ltd. vs. UoI, (2016) 340 ELT 643***, was dealing with a challenge to Sections 132(1)(a) and 132(2) of the Finance Act, 1999 which were enacted to validate sub-rule (4A) of Rule 57F of the Central Excise Rules, 1944. Sub-rule (4A) of Rule 57F of the Central Excise Rules, 1944 provided for the lapsing of MODVAT credits lying unutilized as on 16.03.1995. The said sub-rule was challenged before this Hon’ble Court in the case of ***Eicher Motors Pvt. Ltd. vs. Union of India 1999 (106) ELT 3***. In its Judgment, this Court had inter-alia held sub-rule (4A) of Rule 57F of the Central Excise Rules, 1944 to be beyond the Rule-making powers of the Central Government. Subsequently, in order to overcome the aforesaid decision of this Hon’ble Court in ***Eicher Motors (supra)***, the impugned sections were enacted adding sub-clause (xxviii) to Sub-section (2) of Section 37 of the Central Excise Act, 1944 empowering the Central Government to prescribe Rules to provide for the lapsing of credit of duty lying unutilized. Further, an express provision validating sub-rule (4A) of Rule 56F was enacted. The Hon’ble High Court in ***SML Isuzu (supra)*** was considering the validity of these amendments that were brought about to overcome the effect of the Judgment in ***Eicher Motors (supra)***. Upholding these provisions, it was held by the Hon’ble High Court in ***SML Isuzu (supra)*** that:

“24. As indicated above, the only ground on which the Supreme Court held that Rule 57F(4A) could not be applied to MODVAT credit already accumulated with the manufacturers was that the same would affect the rights of parties which had crystallized and the Central Government was not empowered to frame any subordinate legislation for taking away the said accrued rights. Indisputably, the said defect has been cured inasmuch as the Parliament has by Section 131 of the Finance Act, 1999 specifically empowered the Central Government to frame Rules for lapsing of accumulated credit on a specified date. Thus, if we assume - for the purposes of considering the challenge to the retrospective affirmation of Rule 57F(4A) of the Rules - that there was no defect in Rule 57F(4A) at the time when it was initially made except that the Central Government lacked the power to do so, it is at once clear that the challenge to Section 132(2) of the Act is without merit. This is so, because it is now well settled that the legislature can enact laws to operate retrospectively and enforce an earlier invalid legislation

provided:(i) the defect for which the earlier legislation had been invalidated is cured; and (ii) the legislature has the legislative competence over the object of the legislation. It is well established that to legislate on the object within the field of the legislative competence and to enforce the legislative policy - including by way of a retrospective legislation - is a perfectly permissible exercise of legislative power.”

The aforesaid Judgment was challenged before the Hon’ble Supreme Court in two different SLPs: (i) ***V.E. Commercial Vehicle Ltd. vs. Union of India &Ors., Special Leave to Appeal (C) CC No. 24250 of 2016;*** and (ii) ***M/s SML Isuzu Ltd. vs. Union of India &Ors., Special Leave to Appeal (C) CC no. 449-450 of 2017.*** Both these SLPs were dismissed in-limine vide Orders dated 02.01.2017 and 13.01.2017 respectively. Furthermore, the aforesaid Sections 131 and 132 of the Finance Act, 1999 retrospectively validating the lapsing of MODVAT Credits under Rule 57F of the Central Excise Rules, 1944, were also upheld by the Hon’ble High Court of Bombay in the case of ***Coral Cosmetics Limited vs. Union of India &Ors., (2005) SCCOnline Bom 1501***, wherein it was held:

“32. The above amendment has changed the entire basis or foundation of the judgment rendered in Eicher Motors Ltd. Case (supra) which was well within the legislative competence of the Parliament. In other words, sections 131 and 132 of the Finance Act have removed the illegality pointed out by the Supreme Court in the case of Eicher Motors Ltd. (supra), wherein the foundation on which the decision was based, has been fundamentally altered by the said provision. The Parliament, inter alia; validated clause (e) of sub-rule (17) of rule 57 of the said Rules with retrospective effect.

33. It is no doubt true that in Eicher Motors Ltd. (supra) the Apex Court ruled that the modvat credit standing to the credit of the assessee on 31 st September, 1997 was a vested right; which was accrued in favour of the petitioner or, at any rate, it was an existing right. It is a settled principle of interpretation of statutes that a vested right or even an existing right, including a right of action is not affected or allowed to be taken away unless it is so affected or taken away by the enactment expressly or by necessary implication. It is no doubt true that a declaratory or a procedural enactment which is, normally, held to be retrospective. A remedial Act, on the contrary, is not necessarily retrospective, it may be either enlarging or restraining and it takes effect prospectively, unless it has retrospective effect by express terms or necessary intendment. [see AIR 1960 SC 12 (para 29) - The Central Bank of India v. Their Workman and also AIR 1973 SC 1227 - The Workmen of Firestone Tyre and Rubber Co. of India P. Ltd. v. The Management] Sometimes it becomes necessary to examine whether the enactment has a prospective or retrospective effect so as to affect the existing or vested right which has accrued to the subject prior to the enactment. Examined from this angle, it is clear from the text of sections 131 and 132 of the Finance Act, 1999 that it has been specifically given a retrospective effect w.e.f. 1.10.1997 so as to effect

existing or vested right which had accrued to the petitioner prior to the said enactment. The defect in the legislation, which was noticed by the Apex Court, stood removed by virtue of the said amendment.”

(K). Further, the broad scope of rule-making power of the Central Government under Section 164 of the CGST Act, 2017 needs to be taken into consideration which reads as follows:

“164. Power of Government to make rules.—(1) The Government may, on the recommendations of the Council, by notification, make rules for carrying out the provisions of this Act.

(2) Without prejudice to the generality of the provisions of sub-section (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules.

(3) The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act come into force.

(4) Any rules made under sub-section (1) or sub-section (2) may provide that a contravention thereof shall be liable to a penalty not exceeding ten thousand rupees.”

It is in exercise of the powers vested under Section 164 of the said Act and on the recommendation of the Council, the Government has framed the CGST Rules, 2017 to carry out the provisions of the CGST Act. Sub-rule (1) of Rule 117 of the CGST Rules, 2017 prescribes filing of FORM TRAN-1 and time limit, besides other things, for every dealer entitled to take credit of input tax under Section 140 of CGST Act, 2017. Therefore, when Rule 117 lays down the manner in which such Right can be prescribed, it cannot be said that such Rule in any manner was an excessive delegation

(L). In this regard, the Hon’ble High Court of Bombay has traced the rule making power for prescribing the deadline under Rule 117 to Section 164 of the CGST Act, 2017, in the case of *M/s Nelco Ltd. (supra)*, wherein the Hon’ble High Court held:

“47. Thus, the time limit in Rule 117(1) is traceable to the rule-making power conferred in Section 164(2). The credit envisaged under Section 140(1) being a concession, it can be regulated by placing a time limit. Therefore, the time limit under Rule 117(1) is not ultra-vires of the Act.”

The Hon’ble High Court of Gujarat has also so traced the rule making power for prescribing the deadline under Rule 117 to Section 164 of the CGST Act, 2017 in the case of *Willowood Chemicals Pvt. Ltd. vs. Union of India & Ors., SCA No. 4252 of 2018*, wherein the Hon’ble High Court held:

“26..... Section 140 of the CGST Act, which is a transitional provision, essentially preserves all taxes paid or suffered by a dealer. Credit thereof is to be given in electronic credit register under the new statute, only subject to making necessary declarations in prescribed format within the prescribed time. As noted, sub-section [1] of Section 164 of the CGST Act authorizes the Government to make rules for carrying out the provisions of the Act on recommendations of the Council. Sub-section [2] of Section 164 further provides that without prejudice to the generality of the provisions of sub-section [1], the Government could also make rules for all, or any of the matters, which by this Act are required to be or may be prescribed or in respect of which, provisions are to be or may be made by the rules. Combined effect of the powers conferred to subordinate legislature under sub-sections [1] and [2] of Section 164 of the CGST Act would convince us that the prescription of time limit under sub-rule [1] of Rule 117 of the CGST Rules is not ultra vires the Act.”

III. TIME LIMIT PRESCRIBED UNDER RULE 117 / 120A OF CGST RULES 2017 IS RATIONAL AND MANDATORY

(M). It is well-settled that cut-off dates are in the realm of the legislature to lay down and the Courts especially in fiscal statutes should not interfere with such cut-off dates. Reliance is placed on the following finding of the Hon'ble Supreme Court in the case of **Govt. of A.P. v. N. Subbarayudu, (2008) 14 SCC 702 at page 703:**

“5. In a catena of decisions of this Court it has been held that the cut-off date is fixed by the executive authority keeping in view the economic conditions, financial constraints and many other administrative and other attending circumstances. This Court is also of the view that fixing cut-off dates is within the domain of the executive authority and the court should not normally interfere with the fixation of cut-off date by the executive authority unless such order appears to be on the face of it blatantly discriminatory and arbitrary. (See State of Punjab v. Amar Nath Goyal [(2005) 6 SCC 754: 2005 SCC (L&S) 910].

7. There may be various considerations in the mind of the executive authorities due to which a particular cut-off date has been fixed. These considerations can be financial, administrative or other considerations. The court must exercise judicial restraint and must ordinarily leave it to the executive authorities to fix the cut-off date. The Government must be left with some leeway and free play at the joints in this connection.

8. In fact several decisions of this Court have gone to the extent of saying that the choice of a cut-off date cannot be dubbed as arbitrary even if no particular reason is given for the same in the counter-affidavit filed by the Government (unless it is shown to be totally capricious or whimsical), vide State of Bihar v. Ramjee Prasad [(1990) 3 SCC 368 : 1991 SCC (L&S) 51] , Union of India v. Sudhir

Kumar Jaiswal [(1994) 4 SCC 212 : 1994 SCC (L&S) 925 : (1994) 27 ATC 561] (vide SCC para 5), Ramrao v. All India Backward Class Bank Employees Welfare Assn. [(2004) 2 SCC 76 : 2004 SCC (L&S) 337] (vide SCC para 31), University Grants Commission v. Sadhana Chaudhary [(1996) 10 SCC 536 : 1996 SCC (L&S) 1431] , etc. It follows, therefore, that even if no reason has been given in the counter-affidavit of the Government or the executive authority as to why a particular cut-off date has been chosen, the court must still not declare that date to be arbitrary and violative of Article 14 unless the said cut-off date leads to some blatantly capricious or outrageous result.”

(N). Without prejudice to the above it is submitted that the time-limit prescribed under Rule 117 is rational and reasonable. It is submitted that limitations of time in filing any form or return are needed for effective administration of the tax regime and so that the administrative machinery functions properly. Insofar as the reasonableness of the provision is concerned, it is submitted that Rule 117 of the CGST Rules, 2017 provides for transition of credit by filing of form TRAN-1 within a period of 90 days from the appointed date i.e. 01.07.2017, subject to an extension of the last date by a further period of not exceeding 90 days. Thus, the law provided for a period of 90 days from the appointed date i.e. 01.07.2017 subject to an extension of the last date by a further period not exceeding 90 days. It therefore provided a maximum window of 180 days to allow filing of form TRAN-1. The last date for filing of TRAN-1 was extended from time to time as shown below:

Order No.	Date	Issue
Order No. 03/2017- GST	21.09.2017	Late date of filing of TRAN-1 extended till 31.10.2017
Order No. 07/2017-GST	28.10.2017	Last date of filing of TRAN-1 extended till 30.11.2017.
Order No. 09/2017-GST	15.11.2017	Last date of filing of TRAN-1 extended till 27.12.2017.

Further, the facility for revision of TRAN-1 was inserted as Rule 120 A of CGST Rules, 2017 vide Notification No. 34/2017 – Central Tax dated 15.09.2017. This facility of revision was to be used once. The last date for revision of TRAN-1 forms had also been extended from time to time as shown below:

Order No.	Date	Issue
Order No. 02/2017-GST	18/09/2017	Last date of revision of TRAN-1 extended till 31.10.2017
Order No. 08/2017-GST	28/10/2017	Last date of revision of TRAN-1 extended till 30.11.2017
Order No. 10/2017-GST	15/11/2017	Last date of revision of TRAN-1 extended till 27.12.2017

Thus, it can be seen that a reasonable period of time was provided to taxpayers, keeping in view their constraints, to file as well as revise TRAN-1 Form. The information regarding last date for filing and revision was placed in public domain and given due publicity as well

by way of press release. For example, Press release dated 12.01.2017 was issued to give publicity regarding last dates for filing and revision.

(O). Further, it is noteworthy that prescription of time-limits for availment of input credits is consistent with the Scheme of the CGST Act, 2017. It is not only for the carrying forward of the CENVAT Credits that a deadline has been prescribed. To illustrate, Section 16(4) of the CGST Act, 2017 reads as follows:

“(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.”

(P). The deadline prescribed under Rule 117 has been upheld by the Hon’ble High Court of Bombay in the case of *Nelco (supra)*. The Hon’ble High Court held:

“53. We do not find that the time limit in the impugned rule is arbitrary or unreasonable. To plan to allocate resources, it is necessary to know the amount of taxes available by a particular time. For an efficient administration of a tax system, certainty, especially in terms of time, is important. Calculations of the tax liability dictated by subjective conditions can lead to uncertainty. Such uncertainty makes it difficult to budget and ensure that funds are allocated where they are most required. The time limit for availing of input tax credit in the transitional provisions is thus rooted in the larger public interest of having certainty in allocation and planning. The time limit under Rule 117 is thus not irrelevant.”

(Q). It is too well settled that there is no equity in fiscal statutes and therefore the view in placing equity over the express provisions of the law is contrary to well established principles of law. Hon’ble Supreme Court in the case of *New India Assurance Co. Ltd. vs. Hilli Multi-purpose Cold Storage Pvt. Ltd. Civil Appeals No. 10941-10942 of 2013*, while considering Section 13(2) of the Consumer Protection Act, 1986 that provides for a cut-off period for filing a Written Statement, held that if a law provides for a limitation period, the same has to be strictly complied with and cannot be supplanted by considerations of equity.

(R). It is also well-settled that when a statute provides for a manner to do something, it can be done only in that manner or not done at all. Therefore, when Rule 117 of CGST Rules is the law prescribing the manner in which transitional credit can be availed of, then it can be so availed only in such manner prescribed and the provision and its rigours cannot be circumvented by referring to such a provision as directory. The Hon’ble Supreme Court in *Mackinnon Mackenzie & Co. Ltd. v. Mackinnon Employees Union (2015) 4 SCC 544* with regard to the mandatory compliance of the statutory procedure observed as follows:

“42. ... holding that if a statutory provision prescribes a particular procedure to be followed by the authority to do an act, it should be done in that particular manner only. If such procedure is not followed in the prescribed manner as provided under the statutory provision, then such act of the authority is held to be null and void ab initio in law...

43. It would be appropriate for us to refer to the decision of this Court in *Babu Verghese v. Bar Council of Kerala* [(1999) 3 SCC 422], to show that if the manner of doing a particular act is prescribed under any statute, and the same is not followed, then the action suffers from nullity in the eye of the law, the relevant paragraphs of the above said case are extracted hereunder: (SCC pp. 432-33, paras 31-32)

“31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in *Taylor v. Taylor* [(1875) LR 1 Ch D 426] which was followed by Lord Roche in *Nazir Ahmad v. King Emperor* [(1935-36) 63 IA 372 : (1936) 44 LW 583 : AIR 1936 PC 253 (2)] who stated as under: (*Nazir Ahmad case* [(1935-36) 63 IA 372 : (1936) 44 LW 583 : AIR 1936 PC 253 (2)] , IA pp. 381-82)

‘... where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.’”

(S). The Hon’ble High Court of Chhattisgarh in the case of *M/s Jagadamba Hardware Stores vs. Union of India &Ors., WP(T) No. 31 of 2020*, treated the time-limit under Rule 117 to be mandatory and refused to grant relief to the Petitioner therein and direct the authorities to permit the belated submission of the TRAN- 1 Form by the Petitioner. It was held by the Hon’ble High Court:

“10. If we go through Annexure P/3, it clearly reflects that the Govt. of India was very clear on the issue that the last date of filling up of TRAN-1 extended up till 31.04.2018 (sic) shall not be applicable in general, but would be entitled for only those genuine tax payers who had in the past attempted to fill TRAN-1 but were unsuccessful. The circular also very clearly had laid down that the circular dated 03.04.2018 would be implemented in line with the procedure prescribed under circular dated 03.04.2018 and also on fulfilling the conditions prescribed therein.

12. Another aspect which requires to be borne in mind is that, the relief sought for by the petitioner cannot be extended to those cases where the assessee defaults in not filling up of TRAN-1 even within the extended period up till 27.12.2017. The petitioner also failed to establish of having approached any of the officers in the department, nor is there any proof in his possession. There is also no document to show any correspondence made with any of the officers in the department in this regard. The writ benefit cannot be extended to such indolent persons who sleeps

over their rights and duties without any plausible explanation and justification and now at the belated stage woke up from slumber and is trying to get a relief from the High Court without any bonafide ground.

13. All the aforesaid fact compels this court to draw an inference that the petitioner had infact never tried to fill TRAN-1 within the stipulated period or within the extended period and also was not able to take advantage of circular dated 03.04.2018 if at all if he had bonafidely tried to fill TRAN-1.

14. For all the aforesaid reasons, this court is of the opinion that no strong case is made out by the petitioner for issuance of any sort of writ to the respondents. The writ petition fails and is accordingly rejected.”

(T). The Hon’ble High Court of Allahabad in the case of ***Ingersoll-Rand Technologies and Services Pvt. Ltd. vs. Union of India, (2019) SCCOnline All 4759***, treating the time-limit under Rule 117 to be mandatory refused to grant a Writ in the nature of Mandamus directing the Authorities to permit the Petitioner therein to file a belated revised declaration in Form TRAN- 1. It was held by the Hon’ble High Court that:

“5. A conjoint reading of the above two rules clearly reveals that every registered person who has submitted a declaration electronically in FORM G.S.T.T.R.A.N-1 within the period specified in Rule 117 or Rule 118 or Rule 119 or Rule 120 is allowed to revise such declaration once and submit the revised declaration in FORM G.S.T. T.R.A.N -1 electronically on the common portal, “within the period specified in the said rules or such further period as may be extended by the Commissioner in this behalf.” This further period - as may be extended by the Commissioner-which is provided under Rule 120-A, therefore, cannot go beyond the time-frame provided under Rule 117 of the Uttar Pradesh Goods & Services Tax Rules, 2017. The period of extension has been statutorily circumscribed at 90 days and that too is possible only on the recommendation of the Council.”

IV. SUB-RULE (1A) OF RULE 117 OF CGST RULES, 2017 CANNOT BE TERMED AS ARBITRARY OR VAGUE AND IS WELL WITHIN THE FOUR CORNERS OF THE STATUE

(U). It is contended that the root cause for various taxpayers not being able to file FORM TRAN – 1 is the failure of the network to work seamlessly is erroneous for the reason that **9.41 Lakh number of TRAN- 1 Returns have been successfully filed from 01.07.2017 till 27.12.2017**, thereby highlighting that the network has been working and the petitioner has admittedly failed to file necessary returns along with proper documentation within the relevant time period for reasons other than technical difficulties. In contradiction to the large number of people who were filing the TRAN-1 Returns correctly within the prescribed time, the Petitioners and a handful of others did not do so. **The number of TRAN-1 declarations successfully filed at the fag end of the limitation are enumerated below:**

Date	TRAN-1 declarations successfully filed
24.12.2017	36349
25.12.2017	97939
26.12.2017	233455
27.12.2017	165723

(V). However, in recognition of the technical difficulties being faced by the taxpayers, on recommendations of GST Council in its **26th Meeting held on 10.03.2018**, an IT Grievance Redressal Mechanism was put in place vide CBIC's Circular No. 39/13/2018-GST dated 03.04.2018 to address difficulties faced by the taxpayers on account of technical glitches on common portal, including the cases pertaining to non-filing of TRAN-1 due to IT glitches. Further, vide notification no. 48/2018-GST dated 10th September, 2018, a sub-rule (1A) was inserted in Rule 117 of the CGST Rules, 2017 was inserted to extend the last date for submitting the declaration electronically in FORM GST TRAN 1 and GST TRAN 2 by a further period not beyond 31.03.2019 and 30.04.2019 respectively in respect of registered persons who could not submit the said declaration by due date on account of technical difficulties on the common portal and in respect of whom the Council has made a recommendation for such extension. Further, sub-rule (1A) of Rule 117 of CGST Rules, 2017 was amended vide notification no. 49/2019-CT dated 09.10.2019 whereby the last date for submitting declaration electronically in FORM TRAN 1 was further extended to 31.12.2019 in respect of registered persons who could not submit the said declaration by due date on account of technical glitches and in respect of whom the Council has made a recommendation for such extension. The last date under Sub-Rule (1A) of Rule 117 of CGST Rules, 2017 was further extended vide notification no. **02/2020 dated 01.01.2020 for submitting the declaration electronically in FORM GST TRAN 1 and GST TRAN 2 by a further period not beyond 31.03.2020 and 30.04.2020 respectively in such cases.** The list of notifications w.r.t extension of last dates for filing FORM TRAN 1 and TRAN 2, under sub – rule 117(1A), is as below, -

Not. No.	Date	Last date for filing		Condition
		TRAN 1	TRAN 2	
48/2018-CT	10.09.18	31.03.19	30.04.19	In respect of registered persons who could not submit the said declaration by the due date on account of technical difficulties on the common portal and in respect of whom the Council has made a recommendation for such extension.
49/2019-CT	09.10.19	31.12.19	31.01.20	
02/2020 – CT	01.01.20	31.03.20	30.04.20	

Besides, GST Council in its 32nd Meeting held on 10th January 2019, decided to enhance the scope of ITGRC to include non-technical TRAN-1 cases(errors apparent on the face of record) also covered by the order of Hon'ble High Court of Madras and any other Hon'ble

High Court, sent by State or Central Authority, to the GST Council Secretariat by 31st January 2019, subject to the following conditions:

- (i). TRAN-1, including revision thereof, has been filed on or before 27th December, 2017 and there was an error apparent on the face of the record (such cases of error apparent on the face of the record will not cover instances where there is a mistake like wrong entry of an amount e.g. Rs.10,000/- entered for Rs.1,00,000/-);
- (ii). The case should be recommended to the ITGRC through GSTN by the concerned jurisdictional Commissioner or an officer authorized by him in this behalf (in case of credit of Central taxes/duties, by the Central authorities and in the case of credit of State taxes, the State authorities, notwithstanding the fact that the taxpayer is allotted to the Central or the State authority)

Thus, a well-defined mechanism is already put in place for redressal of grievances of the genuine taxpayers who could not file / submit FORM TRAN 1 / TRAN 2 by the due date owing to the technical glitches on common portal. A genuine taxpayer who faced technical glitches on the portal may take recourse of the procedure prescribed in IT GRC mechanism for redressal.

(W). There is hence an intelligible differentia between taxpayers who are unable to submit the TRAN- 1 form within the deadline on account of Technical problems, from others who never filed the TRAN-1 within the time limit. The relaxation, prima-facie, has a reasonable nexus to the problem of technical difficulties being faced by the taxpayers. There being an intelligible differentia having a nexus with the objective sought to be achieved, Rule 117(1A), meets the well-established principles of Article 14 of the Constitution of India. With regard to the issue of the scope of the word “technical difficulties” and the manner in which the same is proved/established, it is submitted that evidence of technical difficulty in the form of system-logs has been upheld by the Hon’ble High Court of Bombay in the case of *Nelco Ltd. vs. Union of India &Ors., WP No. 6998 of 2018*. The Hon’ble High Court held as follows in the said case:

“67. Petitioner then contends that the phrase ‘technical difficulty’ in Rule 117(1A) has to be broadly construed. It is not possible to do so. Rule 117(1A) refers to technical difficulties in online submission of TRAN-1 Form on the common portal. These technical difficulties are not the ones faced in general but on the common portal of the GST. The meaning of the phrase ‘technical difficulty’ is, thus clear that is the technical difficulties are those which arise at the common portal of GST.

68. The IT Grievance Redressal Cell has taken the system log on the common portal as evidence of attempts made. There is no merit in the criticism of the Petitioner in taking system logs as a basis for determining technical difficulties. Since Rule 117(1A) refers only to the technical difficulties on the common portal, the record on the common portal would be a material piece of evidence. Since the phrase “technical difficulty” does not envisage any other difficulties, the IT Grievance Redressal Committee rightly evolved the criteria of system logs. The

system log is an auto-generated data which records the activities performed. A system log maintained by the portal shows details of requests made at the page. This data is not manually collected but auto-generated. From the system log, it can be ascertained whether an attempt was made to access the data. Therefore, not only there is nothing arbitrary insisting on system log but a correct criterion to be adopted.

69. Petitioner then contended that insisting on system log as proof from the very system which has technical difficulties, is arbitrary and unworkable. There is no merit in this contention. It is not the case that common portal had stopped working or that none of the taxpayers could submit the declarations. As per the data given by the Respondents, thousands of registered users could submit their TRAN-1 Form declarations. In the affidavit-in-reply filed by the Commissioner, the number of entries made between the last four days of the closing facility of TRAN-1 has been placed on record. These are : 24 December 2017 – 36349; 25 December 2017 – 97939; 26 December 2017 – 233455 and on 27 December 2017 – 165723. The object of bringing in Rule 117(1A) did acknowledge that certain registered user encountered technical difficulties in the common portal. However, it does not mean that the common portal had stopped working; only that some registered users could not submit their forms. Whether they made an effect could be seen from the system logs.

70. There would be some who never attempted to submit the TRAN-1 Form. There would be some who attempted but encountered difficulties at their end. There would some who encountered difficulties on the common portal. Since it is the only third category covered by Rule 117(1A), it had to be asserted from the system log of the common portal itself. Insisting on system log as proof of technical difficulties, thus, is neither arbitrary. The Respondents have pointed out that the cases where there were technical difficulties on the common portal as seen from the system log, recommendations have been made in their favour. It is also pointed out that many taxpayers did not file their applications until the last minute. It has been tried to be suggested that filing of TRAN-1 Form was deliberately delayed by some to create fake invoices.

71. Petitioner contended that the categorization based on system log amounts to a fettering of discretion. There is no merit in this submission. The categorization made by the Cell is not fettering the discretion but involving rules of evidence to determine whether a registered user encountered difficulties while submitting forms on the common portal. It is only if the registered user encountered technical difficulties on the common portal, that Rule 117(1A) comes into play.

72. In some decisions referred to in para 57, the Courts have directed the Respondents to open the portal. It is observed therein that many of the registered persons come from a rural and semiliterate background and they may have no record, and they cannot be made to suffer when the systems of the Respondents

were not efficient. This approach proceeds on the basis that once there is an acknowledgment of technical difficulties, a liberal view must be taken. However, though the Respondents have accepted there have been technical difficulties, they have not admitted a complete failure. A mechanism has been set up. A uniform and technically capable criteria to determine technical difficulties on the portal of system logs has been evolved. There is no allegation, nor there is any question of any personal malafides while ascertaining the system logs. The system logs are generated automatically and based on such system logs categorization has been made.

73. The input tax credit in the transitional provision is a concession to be utilised in a time-bound manner, and further extension is given if the GST Council finds that there was a technical difficulty at its end. If there is no technical difficulty on the common portal for the registered user, this additional concession is not extended. Whether to grant further concession as Rule 117(1A) will be determined from examination the system logs from the portal. Exercise of equity jurisdiction in some cases and not in other cases would cause an anomalous situation, particularly when a time limit has been placed in a taxing statute for achieving certainty and finality.”

(X). The Hon’ble High Court of Rajasthan, in a similar matter, in the case of ***Shree Motors vs. Union of India (2020) SCCOnline Raj 381***, held as follows:

“29. A perusal of the above communication dated 12.12.2019 reveals that the GST Council referred to the ITGRC meeting, wherein, cases of the petitioners were considered and indicated that their cases fell in B-1 category and B-1 category has been described as ‘as per GST system log, there are no evidences of error or submission/filing of Tran-1’.

31. In view of the fact that this Court while deciding the writ petitions filed by the petitioners had laid down the specific parameters for grant of relief to the petitioners and it has been found by the respondents as a fact that there was no evidences of error or submission/filing of Form GST Tran-1 by the petitioners, the petitioners apparently are bound by the said outcome and, as such, are not entitled to any relief.”

V. RECENT JUDGEMENTS

(Y). In case of ***Adfert Technologies Pvt. Ltd. And 101 other parties***, Punjab and Haryana High Court has allowed filing of TRAN-1 irrespective of time limit provided under Rule 117 and Rule 117A. An SLP was filed by the Department against the said judgment in Supreme Court only in case of one party, viz M/s Adfert Technologies Pvt Ltd. Hon’ble Supreme Court, however, in the facts and circumstances of the case, was not inclined to exercise its jurisdiction under Article 136 of the Constitution and accordingly dismissed the

Special Leave Petition. It is mentioned that the said SLP was dismissed by Hon'ble Supreme Court at the admissions stage only in view of specific facts and circumstances of the case and **no law has been laid by Hon'ble Supreme Court in the said order**. This Order is applicable only to M/s Adfert Technologies and hold no binding precedence to other cases. **Further, the said SLP was filed before the retrospective amendment to section 140 of the CGST Act, 2017**. The position stands changed after the retrospective amendment in Section 140 of CGST Act.

Furthermore, in a recent judgement dated 05.05.2020 in the case of **M/s Brand Equity Treaties Limited vs UOI** [W.P. (C) 11040/2018 and C.M. No. 42982/2018] and other petitioners, the Hon'ble Delhi High Court held that period of 90 days for claiming input tax credit in TRAN-1 is directory and therefore, period of limitation of 3 years under the Limitation Act would apply. The Court had directed the Department to allow all assessee to claim input tax credit in TRAN-1 by 30.6.2020. Court further said that the direction would apply to all those who could not file TRAN-1 and claim input tax credit. The court further directed that it should be advertised that all taxpayers who have not filed TRAN 1 can do so by 30.6.2020.

However, SLP against the said order was filed by the Department before Hon'ble Supreme Court and Hon'ble Supreme Court vide order dated 19.06.2020 in SLP(C) stayed the operation of the said order.

VI. CONCLUSION

(Z). It is clear from the above discussions that the Government cannot be held responsible for negligence and dereliction of duty by a responsible taxpayer. Thus, Rule 117 and Rule 120 A of CGST Rules, 2017, prescribing time limit, are well within the ambit of Section 140 of the CGST Act, 2017 and nowhere goes beyond the Act. It may be noted that if the contention of the petitioner were to be accepted by providing the facility of filing / revision of TRAN – 1, it would jeopardize Government revenue on account of similar demands from other taxpayers who could not file / revise in time due to negligence and it would be difficult for the Government to verify bona fides of such claims. Further, if the same ratio is accepted then any time limit provided in fiscal statutes like filing of statutory appeals, claim for refunds, issue of demand notices etc. would be necessarily challenged thereby setting a chaos in the system.

2. Writ Petitions challenging: -

the constitutionality, vires and legality of Section 28 of the Central Goods and Services Tax (Amendment) Act, 2018 and Circular No. 87/06/2019-GST dated 02.01.2019 in as much as it retrospectively disallows the transition and carry forward of credit of Education Cess (EC) and Secondary Higher Education Cess (SHEC). The impugned amendment seeks to deny and take away vested and accrued rights and violates Article 14 and 19(1)(g) of the Constitution.

Comments of Policy Wing: -

I. SECTION 28 OF THE CGST (AMENDMENT) ACT, 2018 & CIRCULAR NO. -87/06/2019-GST DATED 02.01.2019 ARE LEGAL AND WITHIN THE FOUR CORNERS OF THE STATUE

(A). Section 140 of the CGST Act, 2017 read with Rule 117 of the CGST Rules, 2017 provides for transitional arrangement for input tax credit. Further the said section envisages certain benefits, in the form of tax credit, to be carried forward during the regime change. It has always been the intention of the GST Council to make available transitional credit of eligible duties only and not for all credits. All agendas, decisions and minutes of GST Council are available on GST Council website.

(B). In this regard, minutes and agenda of 18th GST Council meeting held on 30th June, 2017 may be referred. The above-mentioned meeting approved addition of the words '*of eligible duties and taxes, as defined in explanation 2 to section 140*' to Rule 117(1) of CGST Rules, 2017 to clarify that there will be no transition of various cesses in GST. The agenda for the said proposal and the decision of GST Council on the issue is reproduced below:

“Agenda Item 3(vii) - Proposal to amend rule 117 (1) of the CGST Rules, 2017

6.9.1. Rule 117 (1) of the CGST Rules, 2017 currently reads as:

“(I) Every registered person entitled to take credit of input tax under section 140 shall, within ninety days of the appointed day, submit a declaration electronically in FORM GST TRAN-I, duly signed, on the common portal specifying therein, separately, the amount of input tax credit to which he is entitled under the provisions of the said section: ... ”

6.9.2 To clarify that there will be no transition of credit of various cesses in GST, it is proposed to add 'of eligible duties and taxes, as defined in Explanation 2 to section 140' since cesses are not covered in the definition of 'eligible duties

and taxes' This will also ensure that it applies uniformly to transition of all credits. The amended sub-rule (1) shall read as:

"(1) Every registered person entitled to take credit of input tax under section 140 shall, within ninety days of the appointed day, submit a declaration electronically in FORM GST TRAN-I, duly signed, on the common portal specifying therein, separately, the amount of input tax credit of eligible duties and taxes, as defined in Explanation 2 to section 140, to which he is entitled under the provisions of the said section:"

The Council agreed to this proposal.

(C). In accordance with the decision of GST Council, Notification No. 15/2017 dated 01.07. 2017 was issued adding the words *'of eligible duties and taxes, as defined in explanation 2 to section 140'* in **Rule 117(1) of CGST Rules, 2017 w.e.f. 1.7.2017**. As **Education Cess (EC) and Secondary Higher Education Cess (SHEC) are not included in the "eligible duties and taxes" under Explanation 2 to section 140 of CGST Act, no credit of EC and SHEC was permissible under Section 140 of CGST Act, 2017.**

(D). The issue was further clarified vide 28th GST Council Meeting held on 21st July 2018. In this regard, agenda (Vol. I) for **28th GST Council Meeting** may be referred where retrospective amendment to Section 140(1) of CGST Act, 2017 and Explanation 1 and 2 of section 140 of CGST Act, 2017 was proposed, along with addition of Explanation 3 in section 140 of CGST Act, 2017 to clarify that only transitional credit of eligible duties can be carried forward in the return, not of all credits and cesses. This provision was already there in Rule 117(1) of the CGST Rules, 2017. **Thus, amendment was merely clarificatory in nature. The same was approved by 28th GST Council meeting held on 21st July, 2018.**

(E). Thus, it may be noted that it was always the intention of Council to ensure that only transitional credit of eligible duties can be carried forward in the return and that there was no transition of credit of various cesses available in GST. **Therefore, retrospective amendment made in Section 140 of CGST Act, 2017 vide Section 28 of CGST (Amendment) Act 2018 were only clarificatory in nature.**

(F). Furthermore, Section 168 of the CGST Act, 2017 empowers the Board to issue orders, instructions or directions to the Central tax officers for the purpose of uniformity in the implementation of Act. In exercise of these powers, the Board has issued Circular No. 87/06/2019-GST dated 02.01.2019, whereby para 5 stipulates that no transition of credit would be allowed in terms of Explanation 3 to Section 140, inserted vide sub-section (d) of Section 28 of CGST Amendment Act, 2018 which shall come into effect from a date to be notified giving it a retrospective effect, as discussed above paras. The said sub-section (d) of Section 28 of the CGST (Amendment) Act, 2018 has been notified vide Notification No. –

02/2019- Central Tax dated 29.01.2019. Accordingly, the said Circular only clarifies the position of the law and is well within the four corners of the CGST Act.

(G). Further, judgment of Delhi High Court in the case of **Cellular Operators Association of India (supra)** may also be referred. In the said case, the association had filed a writ petition for direction that credit accumulated on account of Education Cess and Secondary & Higher Education Cess should be allowed to be utilized for the payment of service tax/ excise liability. Under the CENVAT Credit Rules, 2004 credit of EC & SHE could be utilized for payment of EC & SHE respectively. The cross utilization of EC & SHE towards excise duty or service tax was impermissible and not permitted. Later on, EC & SHE were abolished from 01.03.2015. The appellant claimed that they have a vested right to claim benefit of any unutilized amount of EC & SHE. It was also the contention that EC & SHE were subsumed in the Central Excise Duty and therefore the amount lying in credit towards EC & SHE should be allowed for availing CENVAT Credit as both became a part of excise duty or service tax. It was observed by Delhi High Court that *“It is no doubt that the two cesses, in the present case, were in nature of taxes and not fee, but it would be incorrect and improper to treat the two cesses as excise duty or service tax. They were specific cesses for the objective and purpose specified.....”* and further observed that EC & SHE did not subsume in the excise duty or service tax and accordingly dismissed the said writ petition.

(H). Noticeably the two cesses and the excise duty and service tax was always treated as different and separate and cross utilization was never permitted. **Thus, the Delhi High Court judgment made it clear that cesses and duties are separate levies and cannot be equated. As such, credit of Education Cess (EC) and Secondary Higher Education Cess (SHEC) cannot be carried forward.**

(I). In a similar issue, the Hon’ble High Court of Madras, vide its Order dated 05.09.2019, in the case **M/s Sutherland Global Services Private Limited vs UoI&Ors. [in the W.P. No. 4773 of 2018 and WMP Nos. 5916 & 13148 of 2018]** allowed transition of various cess viz-a-viz Education Cess (EC), Secondary Higher Education Cess (SHEC) and Krishi Kalyan Cess (KKC) under Section 140 of the CGST Act, 2017. **The department had already filed an appeal before the Division bench of Hon’ble High Court of Madras. The Division bench of Hon’ble High Court vide its Order dated 24.01.2020 has stayed the aforesaid Order dated 05.09.2019.**

II. CENVAT CREDITS OR INPUT TAX CREDITS ARE NOT ABSOLUTE / VESTED RIGHTS OVER AND ABOVE STATUTE AND ARE SUBJECT TO STATUTORY PROVISIONS AND RULE UNDER WHICH THEY EXISTS

(A). It may be noted that credit can be availed only to the extent allowed by law and reasonable restrictions on availing credit can be imposed. **The contention of the petitioner that CENVAT Credit / Input Tax Credit are absolute / vested rights is fundamentally**

flawed, legally erroneous and ex-facie contrary to the law laid down by the Hon'ble Supreme Court in at least three (03) judgments which are detailed as below, -

(i). In the case of *Osram Surya Pvt. Ltd. vs. Commissioner of Central Excise, Indore, (2002) 9 SCC 20* the Hon'ble Supreme Court has held that a rule fixing a time limit for exercise of a right does not take amount to taking away any vested right. The Hon'ble Supreme Court held that: -

“... in the instant case by the introduction of the second proviso to Rule 57G, the credit in the account of a manufacturer was not taken away but only the manner and the time within which the said credit was to be taken or utilized alone was stipulated. It is to be noted at this juncture that the substantive right has not been taken away by the introduction of the proviso to the Rule in question but a procedural restriction was introduced which, in our opinion, is permissible in law.”

(ii). Similarly, Hon'ble Supreme Court in the case of *ALD Automotive (P) Ltd. v. CTO, (2019) 13 SCC 225: 2018 SCC OnLine SC 1945* at page 242, has held that

“input credit is in the nature of benefit/concession extended to the dealer under the statutory scheme. The concession can be received by the beneficiary only as per the scheme of the statute.”

(iii). The same view has been reiterated by the Hon'ble Supreme Court in the decision of *Jayam & Co. v. Commr., (2016) 15 SCC 125: 2016 SCC OnLine SC 909* at page 134 wherein it was held as follows:

“(a) ITC is a form of concession provided by the legislature. It is not admissible to all kinds of sales and certain specified sales are specifically excluded.

(b) Concession of ITC is available on certain conditions mentioned in this section.

(c) One of the most important condition is that in order to enable the dealer to claim ITC it has to produce original tax invoice, completed in all respect, evidencing the amount of input tax....

...13. For the same reasons given above, challenge to the constitutional validity of sub-section (20) of Section 19 of the VAT Act has to fail. When a concession is given by a statute, the legislature has power to make the provision stating the form and manner in which such concession is to be allowed. Sub-section (20) seeks to achieve that there was no right, inherent or otherwise, vested with dealers to claim the benefit of ITC but for Section 19 of the VAT Act.”

(B). Furthermore, in similar matter, there have been a no. of judgements of the Hon'ble Supreme Court / High Courts declaring that the credit is only in the form of concession /

benefit and is not an accrued right. The relevant portion of which are reproduced below for reference, -

(i). The Hon'ble Supreme Court in the case of **TVS Motor Co. Ltd. v. State of T.N., (2019) 13 SCC 403** that:

“40. It is very clear from the aforesaid discussion that this Court held that ITC is a form of concession which is provided by the Act; it cannot be claimed as a matter of right but only in terms of the provisions of the statute;”

(ii). Also, the Hon'ble Supreme Court, in the case of **Assistant Collector of Customs vs. Anam Electrical Manufacturing Co. (2002 TIOL 650 SC CUS)**, relying on the case of **Mafatlal Industries vs. Union of India (2002 TIOL 54 SC CX)** held that, -

“..... Pursuant to the directions given in Mafatlal Industries vs. Union of India 1997 (89) ELT 247 (SC) 1996 (9) SCALE 457, the appeals/ Special Leave Petitions coming up for disposal shall be disposed of in terms of one of the other of the clauses below:

(1) Where a refund application was filed by the manufacturer/ purchaser beyond the period prescribed by the central Excise Act/ Customs Act in that behalf, such petition must be held to be untenable in law. Even if an any appeal, suit or writ petition, direction has been given that the refund application shall be considered with reference to the period of limitation prescribed in the Central Excise Act/ Customs Act....”

(iii). In the case of **Collector of Central Excise, Chandigarh vs. M/s Doaba Cooperative Sugar Mills Ltd. Jalandhar (1988 (37) ELT 478)** it was inter alia laid down by the Hon'ble Supreme Court that:

“But in making claims for refund before the departmental authority, an assessee is bound within four corners of the Statute and the period of limitation prescribed in the Central Excise Act and the Rules framed there under must be adhered to. The authorities functioning under the Act are bound by the provisions of the Act. If the proceedings are taken under the Act by the department, the provisions of limitation prescribed in the Act will prevail”

(iv). Similar stand is taken by the Hon'ble High Court of Bombay in the case of **M/s JCB India Limited vs. Union of India** [in W.P. No. 3142 of 2017 & other similar writ petitions], where the Court in its judgment dated 19-20.03.2018 held that, -

“56. CENVAT credit is a mere concession and it cannot be claimed as a matter of right and it cannot be claimed as a matter of right. If the CENVAT Credit Rules under the existing legislation themselves stipulate and provide for conditions for availment of that credit, then, that credit on inputs under the existing law itself is not an absolute but a restricted or conditional right. It is

subject to fulfillment or satisfaction of certain requirements and conditions that the right can be availed of.”

(C). Sub-Section (1) of Section 140 of the CGST Act, 2017, which deals with the transitional provisions, permits carry forward of the CENVAT credit of eligible duties. It is submitted that merely because a carry-forward of CENVAT Credit is permitted from the earlier regime to the new regime it does not mean that this right is absolute in nature and can be claimed over and above the present statutory regime. In fact, on the contrary the very fact that the Legislature had to provide for this right under the statute means that it is a statutory right, which can only be availed of in the as provided for in the statute.

(D). From above, it is clear that a taxpayer cannot claim input credit of the duty or tax paid as a vested right under GST and input credit is in the form of a concession / benefit and reasonable restrictions on availing such credit can be imposed. Thus, a taxpayer cannot claim credit accumulated under the erstwhile taxation regime (Central Excise and Service Tax) as a vested right for transition under GST. Provisions have been made under section 140 of the CGST Act for transition of credit for different class of tax payers and restrictions, if any, placed on a particular class of taxpayers are reasonable in nature and by no stretch of imagination be termed as perverse, arbitrary and unreasonable. Furthermore, since credit of cesses itself cannot be treated as vested right or a privilege and is a mere concession, as discussed above, the denial of carry forward of Education Cess (EC) or Secondary Higher Education Cess (SHEC) or Krishi Kalyan Cess (KCC) **is not** contrary to clause (c) of sub-section (2) of Section 174 of CGST Act, 2017 which stipulates that repeal of the existing Acts (prior to GST) shall not affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts.

III. THE SAID AMENDMENT DOES NOT VIOLATES ARTICLE 14 OR 19(1)(g) OF THE CONSTITUTION OF INDIA

(A). Further, the petitioner is trying to invoke violation of Article 14 of the Constitution in the subject Petition. Although, taxing statutes are not outside the purview of Article 14, but there is catena of pronouncements of Hon'ble Supreme Court which highlights that Legislature enjoys wide latitude in taxation statutes and same should not be subjected to the minute gravities of Article 14. In this regard, the case laws of Federation of Hotel and Restaurant Association of India etc. Vs. Union of India & others, reported in 1988 AIR 1291 and Union of India vs Nitdip Textile Processors Pvt Ltd, reported in 2011 (273) ELT 321 may be referred. Further, in the cases of E.P. Royappa Vs State of Tamil Nadu, reported in AIR 1974 SC 555 and Maneka Gandhi Vs Union of India, reported in AIR 1978 SC 597, the Hon'ble Apex Court highlights that Article 14 strikes at arbitrariness in State action and ensures fairness and equality in treatment. **It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant consideration, because that would be denial of equality.** In the impugned case, the retrospective amendment to Section 140 of the CGST Act, 2017 (done vide Section 28 of the CGST

(Amendment) Act, 2018) cannot be termed as violative to Article 14 of the Constitution of India as the same is applicable to all the persons equally who are covered within its ambit. Further, freedom of trade, commerce and intercourse throughout the territory of India is also not restricted by the said provisions.

(B). In respect of violation of Article 19(1)(g), question involved here is that whether the freedom of trade, commerce and intercourse is an absolute freedom? For an absolute freedom of trade, commerce and intercourse may lead to economic confusion and misuse of the same. Therefore, the wide amplitude of the freedom granted by Article 19(1)(g) and Article 301 is limited by Articles 302-305.

(C). Parliament is given power to regulate trade and commerce in public interest under Article 302 subject to Article 303. As such, as enshrined by Article 301 of the Constitution of India freedom of trade, commerce and intercourse throughout the territory of India is also not restricted by the said amendment, rather Section 28 of CGST (Amendment) Act, 2018 is merely clarificatory in nature.

3. Writ Petitions stating that: -

There is no procedure for availing credit of CVD and SAD paid by the petitioner for non-fulfillment of export obligations and thus it becomes a cost for the petitioner under GST regime. The respondents may be directed to re-assess the bill of entry under the IGST Scheme, and

The petitioner is liable to avail credit of CVD / SAD in accordance with the provisions of Section 16 of the CGST Act. Furthermore, credit of CVD / SAD is vested right with the petitioner and denial of the same is against the Article 14 of the Constitution.

Comments of Policy Wing: -

I. THE CREDIT OF CVD / SAD PAID BY THE PETITIONER FOR NON FULFILLMENT OF EXPORT OBLIGATION IS NOT ELIGIBLE AS INPUT TAX CREDIT.

(A). Chapter XX of the CGST Act, 2017 deals with the Transitional Provisions. Section 139 to Section 142 of the said Act therein provides for transitional arrangement for CENVAT credit as input tax credit in GST regime. Further the said sections envisage certain benefits, in the form of tax credits, to be carried forward during the regime change.

(B). Section 142 of the CGST Act, 2017 deals with the miscellaneous transitional provisions. Clause (a) of sub-section (8) of Section 142 of the CGST Act, 2017 categorically deals with the cases where assessment / adjudication proceedings are instituted on or before the appointed date i.e. 01.07.2017, under the existing law i.e. in pre-GST regime. The relevant portion of Section 142 is reproduced below for reference, -

“142. Miscellaneous Transitional Provisions

(8) (a). where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act.”

(emphasis supplied)

(C). There are also cases wherein capital goods were imported under the EPCG Authorization in pre - GST regime foregoing the Basics Customs Duty (BCD), Countervailing Duty (CVD) and Special Additional Duty (SAD). The Bill of Entry for the said Capital Goods had been assessed (under EPCG Scheme) at the time of import in pre-GST regime, **subject to the conditions** that if the petitioner fails to fulfill the export obligation (or decides to exit the EPCG Scheme), he is required to pay duties of customs (including CVD and SAD) plus the interest as applicable. Similarly, there are cases where the goods were imported under Advance Authorization without payment of applicable

customs duties (BCD, CVD , SAD etc.) in pre-GST regime, subject to fulfillment of export obligation by the importer.

(D). Thus, payment of customs dues (including CVD and SAD) on non-fulfillment of export obligations, as prescribed under EPCG Scheme, Advance Authorization Scheme etc. is in pursuance of the conditional assessment proceedings instituted under existing law (at the time of import. Hence, the instant case is amply covered under the provisions of clause (a) of sub-section (8) of Section 142 of the said Act and as per the provisions thereof, the amount recoverable is to be recovered under the existing law and **the amount recovered is not admissible as input tax credit under the said Act.** Accordingly, no input tax credit of the said quantum of CVD and SAD paid by the taxpayer after appointed day is admissible as per the said provisions.

(E). Furthermore, the import which would have normally suffered duty but has escaped the same due to claiming benefit of EPCG scheme/ Advance Authorization Scheme, etc at the time of import. However, the benefit of duty free/ concessional duty at the time of import was subject to the fulfilment of conditions associated with the scheme, including export obligation, and if the said conditions are not fulfilled, the importer loses the privileges and the only way is to tax the import. Also, the availability of credit on inputs, despite failure to meet with the export obligation, may not hold good here since, firstly, it was a conditional import and secondly, such import was to be exclusively used as per Foreign Trade Policy. The failure to fulfil the conditions of EPCG license/ Advance Authorization, etc. does not entitle the petitioner any benefit under the said scheme.

(G). The petitioners' contention that he is eligible to claim credit under the provisions of Section 16 of the CGST Act, 2017 is also not proper. Section 16(1) of CGST Act,2017 inter alia provides that the registered person shall be entitled to take credit of input tax charged on any supply of goods or services or both to him, subject to such conditions and restrictions as may be prescribed. Further, "input tax" has been defined in Section 2(62) of CGST Act, 2017 as follows: "**input tax**" in relation to a registered person, means the Central tax, State tax, Integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes-

(a) the integrated goods and services tax charged on import of goods;

(b) the tax payable under the provisions of sub-sections (3) and (4) of [section 9](#);

(c) the tax payable under the provisions of sub-sections (3) and (4) of [section 5](#) of the Integrated Goods and Services Tax Act;

(d) the tax payable under the provisions of sub-sections (3) and (4) of [section 9](#) of the respective State Goods and Services Tax Act; or

(e) the tax payable under the provisions of sub-sections (3) and (4) of [section 7](#) of the Union Territory Goods and Services Tax Act,

but does not include the tax paid under the composition levy.

On perusal of the above definition, it is clear that any pre-existing taxes or duties viz-a-viz excise duty, Service Tax, Additional duty of Customs (CVD) paid under provisions of

Section 3(1) of Customs Tariff Act and Special Additional duty of Customs (SAD) paid under Section 3(5) of Customs Tariff Act etc. are not covered under the definition of “input tax” and hence, cannot be governed by the provisions of Section 16 of the said Act. These taxes are to be governed by the transitional provisions laid under Section 139 to Section 142 of the CGST Act 2017, as discussed above, which specifically provides for transitional arrangement for CENVAT credit as input tax credit in GST regime. In the present case, Clause (a) of sub-section (8) of Section 142 of the CGST Act, 2017 specifically provides the mechanism to deal with such cases, as discussed above which does not allow for any input tax credit of amount of CVD and SAD paid after the appointed day.

II. CENVAT CREDITS OR INPUT TAX CREDITS ARE NOT ABSOLUTE / VESTED RIGHTS OVER AND ABOVE STATUTE AND ARE SUBJECT TO STATUTORY PROVISIONS AND RULE UNDER WHICH THEY EXISTS

(A). It may be noted that credit can be availed only to the extent allowed by law and reasonable restrictions on availing credit can be imposed. **The contention of the petitioner that CENVAT Credit / Input Tax Credit are absolute / vested rights is fundamentally flawed, legally erroneous and ex-facie contrary to the law laid down by the Hon’ble Supreme Court in at least three (03) judgments** which are detailed as below, -

(i). In the case of *Osram Surya Pvt. Ltd. vs. Commissioner of Central Excise, Indore, (2002) 9 SCC 20* the Hon’ble Supreme Court has held that a rule fixing a time limit for exercise of a right does not take amount to taking away any vested right. The Hon’ble Supreme Court held that: -

“... in the instant case by the introduction of the second proviso to Rule 57G, the credit in the account of a manufacturer was not taken away but only the manner and the time within which the said credit was to be taken or utilized alone was stipulated. It is to be noted at this juncture that the substantive right has not been taken away by the introduction of the proviso to the Rule in question but a procedural restriction was introduced which, in our opinion, is permissible in law.”

(ii). Similarly, Hon’ble Supreme Court in the case of *ALD Automotive (P) Ltd. v. CTO, (2019) 13 SCC 225: 2018 SCC OnLine SC 1945* at page 242, has held that

“input credit is in the nature of benefit/concession extended to the dealer under the statutory scheme. The concession can be received by the beneficiary only as per the scheme of the statute.”

(iii). The same view has been reiterated by the Hon’ble Supreme Court in the decision of *Jayam& Co. v. Commr., (2016) 15 SCC 125: 2016 SCC OnLine SC 909* at page 134 wherein it was held as follows:

“(a) ITC is a form of concession provided by the legislature. It is not admissible to all kinds of sales and certain specified sales are specifically excluded.

(b) Concession of ITC is available on certain conditions mentioned in this section.

(c) One of the most important condition is that in order to enable the dealer to claim ITC it has to produce original tax invoice, completed in all respect, evidencing the amount of input tax....

*...13. For the same reasons given above, challenge to the constitutional validity of sub-section (20) of Section 19 of the VAT Act has to fail. **When a concession is given by a statute, the legislature has power to make the provision stating the form and manner in which such concession is to be allowed. Sub-section (20) seeks to achieve that. There was no right, inherent or otherwise, vested with dealers to claim the benefit of ITC but for Section 19 of the VAT Act.**”*

(B). Furthermore, in similar matter, there have been a no. of judgements of the Hon’ble Supreme Court / High Courts declaring that the credit is only in the form of concession / benefit and is not an accrued right. The relevant portion of which are reproduced below for reference, -

(i). The Hon’ble Supreme Court in the case of *TVS Motor Co. Ltd. v. State of T.N., (2019) 13 SCC 403* that:

“40. It is very clear from the aforesaid discussion that this Court held that ITC is a form of concession which is provided by the Act; it cannot be claimed as a matter of right but only in terms of the provisions of the statute;”

(ii). Also, the Hon’ble Supreme Court, in the case of **Assistant Collector of Customs vs. Anam Electrical Manufacturing Co. (2002 TIOL 650 SC CUS)**, relying on the case of **Mafatlal Industries vs. Union of India (2002 TIOL 54 SC CX)** held that, -

*“..... Pursuant to the directions given in *Mafatlal Industries vs. Union of India 1997 (89) ELT 247 (SC) 1996 (9) SCALE 457*, the appeals/ Special Leave Petitions coming up for disposal shall be disposed of in terms of one of the other of the clauses below:*

(1) Where a refund application was filed by the manufacturer/ purchaser beyond the period prescribed by the central Excise Act/ Customs Act in that behalf, such petition must be held to be untenable in law. Even if an any appeal, suit or writ petition, direction has been given that the refund application shall be considered with reference to the period of limitation prescribed in the Central Excise Act/ Customs Act....”

(iii). In the case of **Collector of Central Excise, Chandigarh vs. M/s Doaba Cooperative Sugar Mills Ltd. Jalandhar (1988 (37) ELT 478)** it was inter alia laid down by the Hon’ble Supreme Court that:

“But in making claims for refund before the departmental authority, an assessee is bound within four corners of the Statute and the period of limitation prescribed in the Central Excise Act and the Rules framed there under must be adhered to. The authorities functioning under the Act are bound by the provisions of the Act. If the proceedings are taken under the Act by the department, the provisions of limitation prescribed in the Act will prevail”

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“56. CENVAT credit is a mere concession and it cannot be claimed as a matter of right and it cannot be claimed as a matter of right. If the CENVAT Credit Rules under the existing legislation themselves stipulate and provide for conditions for availment of that credit, then, that credit on inputs under the existing law itself is not an absolute but a restricted or conditional right. It is subject to fulfillment or satisfaction of certain requirements and conditions that the right can be availed of.”

(C). Section 140 of the CGST Act, 2017, which deals with the transitional provisions, permits carry forward of the CENVAT credit of eligible duties. It is submitted that merely because a carry-forward of CENVAT Credit is permitted from the earlier regime to the new regime it does not mean that this right is absolute in nature and can be claimed over and above the present statutory regime. In fact, on the contrary the very fact that the Legislature had to provide for this right under the statute means that it is a statutory right, which can only be availed of as provided for in the statute. Provisions have been made under Chapter XX of the CGST for transition of credit for different class of tax payers and restrictions, if any, placed on a particular class of taxpayers are reasonable in nature and by no stretch of imagination be termed as perverse, arbitrary and unreasonable.

III. DENIAL OF CREDIT VIOLATES ARTICLE 14 & 19(1)(g) OF THE CONSTITUTION.

(A). Further, the petitioner is trying to invoke violation of Article 14 of the Constitution in the subject Petition. Although, taxing statutes are not outside the purview of Article 14, but there is catena of pronouncements of Hon'ble Supreme Court which highlights that Legislature enjoys wide latitude in taxation statutes and same should not be subjected to the minute gravities of Article 14. In this regard, the case laws of Federation of Hotel and Restaurant Association of India etc. Vs. Union of India & others, reported in 1988 AIR 1291 and Union of India vs Nitdip Textile Processors Pvt Ltd, reported in 2011 (273) ELT 321 may be referred. Further, in the cases of E.P. Royappa Vs State of Tamil Nadu, reported in AIR 1974 SC 555 and Maneka Gandhi Vs Union of India, reported in AIR 1978 SC 597, the Hon'ble Apex Court highlights that Article 14 strikes at arbitrariness in State action and ensures fairness and equality in treatment. **It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-**

discriminatory: it must not be guided by any extraneous or irrelevant consideration, because that would be denial of equality. In the impugned case, the provisions of Section 142 (8)(a) of the said Act are not violative of Article 14 of the Constitution of India as they are applicable to all the persons equally who are covered within its ambit. Further, freedom of trade, commerce and intercourse throughout the territory of India is also not restricted by the said provisions.

(B). In respect of violation of Article 19(1)(g), question involved here is that whether the freedom of trade, commerce and intercourse is an absolute freedom? For an absolute freedom of trade, commerce and intercourse may lead to economic confusion and misuse of the same. Therefore, the wide amplitude of the freedom granted by Article 19(1)(g) and Article 301 is limited by Articles 302-305.

(C). Parliament is given power to regulate trade and commerce in public interest under Article 302 subject to Article 303. As such, as enshrined by Article 301 of the Constitution of India freedom of trade, commerce and intercourse throughout the territory of India is also not restricted by the said provisions of the Act.
