IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.08.2020

and 03.09.2020

Delivered on: 2109.2020

C O R A M

The Hon'ble **Mr. A.P.SAHI, THE CHIEF JUSTICE**
and
The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

Writ Petition Nos.8596, 8597, 8602, 8603, 8605, 8608, 14799, 21432 32308, 32311, 32314, 32316, 32317, 32327, 34219 and 34221 of 2019 and 12028, 12037, 12040, 12041 and 12042 of 2020
and
WMP.Nos.14781, 32599, 32600, 32602, 32603, 32604, 32619 of 2019

W.P.Nos.8596, 8597, 8602, 8603, 8605 and 8608 of 2019

Tvl.Transtonnelstroy Afcons Joint venture,
Rep. by its Authorised Signatory,
13th Main Road, Anna Nagar West,
Chennai – 40. ... Petitioner

vs.

1.Union of India,
Rep. by its Secretary,
Ministry of Finance,
(Department of Revenue) No.137,
North Block, New Delhi – 110 001,

2.The Goods and Services Tax Council,
Rep. by its Secretary,
Office of the GST Council Secretariat,
5th Floor, Tower II,
Jeevan Bharti Building, Janpath Road,
Cannaught Place, New Delhi – 110 001.

3.Assistant Commissioner ST,
Vepery Assessment Circle,
No.10, Greams Road,
Chennai – 600 006. ... Respondents

W.P.No.14799 of 2019

Tvl.Essa Garments Private Limited,
Rep. by its Managing Director,
S.Sadiqali
No.44(2) Kangeyam Road,
Venkatesaiya Colony,
Tirupur – 641 604. ... Petitioner

Vs

1.The Union of India,
Rep. by its Secretary,
Ministry of Finance,
(Department of Revenue) No.137,
North Block, New Delhi – 110 001.

2.The Union of India,
Rep. by its Secretary,
Ministry of Law & Justice,
4th Floor, "A", Wing, Rajendra Prasad Road,
Shastri Bhavan, New Delhi – 110 001.

3.The Goods and Services Tax Council,
Rep. by its Secretary,
Office of the GST Council Secretariat,
5th Floor, Tower II,
Jeevan Bharti Building, Janpath Road,
Cannaught Place, New Delhi – 110 001.

4.The State of Tamil Nadu
Rep. By its Chief Secretary,
St. George Fort, Chennai – 600 009.

5.The Assistant Commissioner,
Central Tax,
Tirupur Division,
Tirupur – 641 601. ... Respondents

W.P.Nos. 21432,32308,32311,32314,32316,32317 and 32327 of 2019

India Dyeing Mills (P) Limited,
Rep. By its Authorised Signatory,
Rajaseharan Subramanian,
No.5/591, Sri Lakshmi Nagar,
Pitchampalayam Pudur,
Tirupur – 641 603. ... Petitioner

vs.

1.The Union of India,
Rep. by its Secretary,
Ministry of Finance,
(Department of Revenue) No.137,
North Block, New Delhi – 110 001.

2.The Union of India,
Rep. by its Secretary,
Ministry of Law & Justice,
4th Floor, "A", Wing, Rajendra Prasad Road,
Shastri Bhavan, New Delhi – 110 001.

3.The Goods and Services Tax Council,
Rep. by its Secretary,
Office of the GST Council Secretariat,
5th Floor, Tower II,
Jeevan Bharti Building, Janpath Road,
Cannaught Place, New Delhi – 110 001.

4.The State of Tamil Nadu
Rep. by the Secretary,
Commercial Taxes and Registration Department,
HR & CE Board,
Fort St. George, Chennai – 600 009.

5.The Assistant Commissioner,
Office of the Assistant Commissioner of
GST & Central Excise,
Tirupur Division,
Tirupur – 641 601 ... Respondents

W.P.Nos.34219 and 34221 of 2019

M/s.Veekesy Footcare (India) Pvt. Ltd.,
Rep. by its Director,
10-12,Sidco Industrial Estate,
Malumichampatty, Coimbatore,
Tamil Nadu – 641 050. ... Petitioner

vs.

1.Union of India,
Rep. by its Secretary,
Ministry of Finance,
Department of Revenue
North Block, New Delhi – 110 001.

2.State of Tamil Nadu
Through its Principal Secretary,
Finance Department, Fort St. George,
Chennai – 600 009.

3.Assistant Commissioner State Tax,
Podannur Assessment Circle,
Second Floor, Commercial Tax Buildings,
Dr.Balasundaram Road,
Coimbatore – 641 018. ... Respondents

W.P.No.12028 of 2020

Kaleesuwari Refinery Pvt Ltd,
Rep. by its CFO
S.Suriyanaranayanan
No.53, Rajasekaran Street,
(Opp. Kalyani Hospital, Radhakrishnan Salai),
Chennai – 600 004. ... Petitioner

vs.

1.The Union of India,
Rep. by its Secretary,
Ministry of Finance,
(Department of Revenue) No.137,
North Block, New Delhi – 110 001.

2.The Union of India,
Rep. by its Secretary,
Ministry of Law & Justice,
4th Floor, "A", Wing, Rajendra Prasad Road,
Shastri Bhavan, New Delhi – 110 001.

3.The Goods and Services Tax Council,
Rep. by its Secretary,
Office of the GST Council Secretariat,
5th Floor, Tower II,
Jeevan Bharti Building, Janpath Road,
Cannaught Place, New Delhi – 110 001.

4.The State of Tamil Nadu
Rep. by the Secretary,
Commercial Taxes and Registration Department,
HR & CE Board,
Fort St. George, Chennai – 600 009.

5.The Assistant Commissioner,
(Commercial Tax),
Royapuram Assessment Circle,
Wall Tax Road,(Near Elephant Gate Police Station,
Wall Tax Road, Chennai – 600 001. ... Respondents

W.P.Nos. 12037, 12040, 12041 and 12042 of 2020

Victur Dyeings
SF No.53/2, Chetturai Thottam,
Karalpudur Village,
Veerapandi (PO)
Tirupur – 641 605. ... Petitioner

vs.

1.The Union of India,
Rep. by its Secretary,
Ministry of Finance,
(Department of Revenue) No.137,
North Block, New Delhi – 110 001.

2.The Goods and Services Tax Council,
Rep. by its Secretary,
Office of the GST Council Secretariat,
5th Floor, Tower II,
Jeevan Bharti Building, Janpath Road,
Cannaught Place, New Delhi – 110 001.

3.Assistant Commissioner ST,
Tirupur Gandhi Nagar Assessment Circle. ... Respondents

PRAYER IN W.P.Nos.8596 & 8597 of 2019 : Petitions filed under Article 226 of the Constitution of India praying to issue a writ of Declaration to declare the provisions of impugned clause (ii) to proviso of Section 54(3) of the CGST Act, 2017 as ultra vires the Constitution of India, violative of the fundamental rights guaranteed by the Constitution under Article 14, 19(i)(g) of the Constitution of India.

PRAYER IN W.P.Nos.8602 & 8603 of 2019 : Petitions filed under Article 226 of the Constitution of India praying to issue a writ of Declaration to declare the provisions of impugned Rule 89(5) of the CGST Rules, 2017 as ultra vires Article 14 of the Constitution as also ultra vires Section 54 of the CGST Act,2017 in so far as it excludes the component of credit of input services from the definition of "Net ITC" in the formula prescribed for claiming refund of unutilized credit in cases of inverted duty structure.

PRAYER IN W.P.Nos.8605 & 8608 of 2019 : Petitions filed under Article 226 of the Constitution of India praying to issue a writ of Mandamus to direct the third Respondent to process and allow refunds in accordance with law by factoring input services in the computation of Net ITC for the purpose of formula prescribed in Rule 89(5) of the CGST Rules.

PRAYER IN W.P.Nos.14799, 21432, 32308, 32311, 32314, 32316, 32317 and 32327 of 2019 : Petitions filed under Article 226 of the Constitution of India praying to issue a writ of Declaration to declare that the amended Rule 89(5) of the CGST Rules, 2017 vide Notification G.S.R.No.54[E] dated 13.06.2018 and Rule 89(5) of the TNGST Rules, 2017 vide

Notification 26/2018-CT Dated 13.06.2018 as ultra vires, violative of the fundamental rights guaranteed under Article 14, 19(1)(g) of the Constitution of India.

PRAYER IN W.P.Nos.34219 & 34221 of 2019 : Petitions filed under Article 226 of the Constitution of India, praying to issue a writ of Declaration to declare Rule 89(5) of the CGST Rules as ultra vires Section 54 of the CGST Act, as well as violative of Article 14 of Constitution of India.

PRAYER IN W.P.No.12028 of 2020 : Petitions filed under Article 226 of the Constitution of India praying to issue a writ of Declaration to declare that Rule 89(5) of the Central Goods and Services Tax Rules, 2017, as amended vide Notification No.21/2018 – Central Tax dated April 18, 2018 and Notification No.26/2018 – Central Tax dated June 13, 2018, to the extent that the said provision denies grant of refund of unutilised tax credit in respect of tax paid on input services, is ex facie ultra vires the Constitution of India and the provisions of the Central Goods and Services Act, 2017 and is without authority of law, manifestly, unreasonably, discriminatory, illegal and void.

PRAYER IN W.P.Nos.12037, 12040, 12041 and 12042 of 2020: Petitions filed under Article 226 of the Constitution of India praying to issue a writ of Declaration to declare the provisions of impugned clause (ii) to proviso to Section 54(3) of the TNGST Act, 2017 as ultra vires the Constitution of India, violative of the fundamental rights guaranteed by the Constitution

under Article 14, 19(1)(g) of the Constitution of India, only in so far as it denies the benefit of refund for input Tax Credit from input Services.

For Petitioners	**Mr.Sujit Ghosh for Mr.Adithya Reddy** (in W.P.Nos.8596, 8597, 8602, 8603,8605 and 8608 of 2019 and W.P.Nos.12037, 12040, 12041 and 12042 of 2020)
	Mr.R.Parthasarathy (in W.P.Nos.34219 and 34221 of 2019)
	Mr.P.B.Harish (in W.P.Nos.32308, 32311, 32314, 32316, 32317, 32327 and 21432 of 2019 and 12028 of 2020)
	Mr.R.Senniappan (in W.P.No.14799 of 2019)
For Respondents	**Mr.R.Sankaranarayanan, ASGI, Assisted by Mr.Venkataswamy Babu,** (For R1 in W.P.Nos.34221 and 34219 of 2019 and W.P.Nos.12037, 12040, 12041 and 12042 of 2020) (For R1 to R3 in W.P.Nos.32308, 32316, 32314, 32317 and 32327 of 2019) (For R1 and R2 in W.P.No.12028 of 2020) **Mr.Mohammed Shaffiq, Spl.G.P.(Taxes)** (For R4 and R5 in W.P.Nos.32308,

	32311,32314, 21432, 32316, 32317, 32327 and 14799 of 2019 and R-4 and R-5 in W.P.No.12028 of 2020 and R-3 in W.P.Nos.12037, 12040, 12041 and 12042 of 2020) (For R2 and R3 in W.P.Nos.34219 and 34221 of 2019)(R-3 in W.P.Nos.8596, 8597, 8602, 8603, 8605 and 8608 of 2019) --- **Mr.A.P.Srinivas, Counsel for GST Department in all cases(WPs)** (R3 & R5 in W.P.No.14799 of 2019) (R-5 in W.P.No.32314 of 2019) and (R1,3 & 5 in W.P.No.32311 of 2019) --- **Mrs.Hema Muralikrishnan, CGSC** (for R1 & R2 in W.P.Nos.8596, 8597, 8602, 8608, 8603 and 8605 of 2019)

C O M M O N O R D E R

SENTHILKUMAR RAMAMOORTHY J.,

INTRODUCTION

At the heart of this batch of writ petitions is the question whether the Petitioners are entitled to a refund of the entire unutilised input tax credit that each of them has accumulated on account of being subjected to an inverted duty structure. In certain cases, the constitutional validity of

Section 54(3)(ii) of the Central Goods and Services Tax Act, 2017(the CGST Act) is impugned, whereas, in others, a declaration is prayed for that the amended Rule 89(5) of the Central Goods and Services Tax Rules,2017(the CGST Rules) is *ultra vires* Section 54 of the CGST Act and the Constitution of India. As a corollary, a declaration of entitlement to refund is also prayed for in some cases.

2. One of the issues that takes centre-stage in these cases is the correct meaning to be ascribed to the word "inputs" in Section 54(3)(ii) of the CGST Act and in the definition of "Net ITC" in the amended Rule 89(5) of the CGST Rules. Therefore, except while dealing with the text of Section 54 and Rule 89 where the word "inputs" is used, for the sake of clarity, the words 'input goods' is used while dealing with goods that are used as inputs, and 'input services' is used while dealing with services that are used as inputs. All the Petitioners are engaged in businesses wherein the rate of tax on input goods and/or input services exceeds the rate of tax on output supplies. This contingency is referred to as an inverted duty structure. As a result, the registered person is unable to adjust the available input tax credit fully against the tax payable on output supplies; consequently, there is an

accumulation of unutilised input tax credit. The case of the Petitioners is that they are entitled to a refund of the entire unutilised input tax credit, irrespective of whether such credit accumulated on account of procurement of input goods and/or input services by paying tax at a higher rate than that paid on output supplies. On the contrary, the case of the Union of India and the Tax Department, both at the Central and State level, is that refund of unutilised input tax credit is permissible only in respect of the quantum of credit that has accumulated due to the procurement of input goods at a higher rate than that paid on output supplies, and that credit accumulation on account of procuring input services at a rate of tax higher than that paid on output supplies is liable to be disregarded for refund purposes.

THE STATUTORY MATRIX

3. Section 54 (1) of the CGST Act deals with refund and Sub-section (3) deals with the refund of unutilised input tax credit. These provisions are as under:

"*Section 54(1) and (3) – Refund of tax*

(1) Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry

of two years from the relevant date in such form and manner as may be prescribed:

PROVIDED that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in the return furnished under section 39 in such manner as may be prescribed.

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

PROVIDED that no refund of unutilized input tax credit shall be allowed in cases other than-

(i) Zero rated supplies made without payment of tax;

(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies(other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

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

Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both

avails drawback in respect of central tax or claims refund of the integrated tax paid on such supplies."

Rule 89(5) of the CGST Rules deals with applications for refund of tax, interest, penalty, fees or any other amount. Sub-rule 5 thereof, as amended on 13.06.2018, with effect from 01.07.2017, reads as under:

"(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount= {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} – tax payable on such inverted rated supply of goods and services.

Explanation:- For the purposes of this sub-rule, the expressions -

(a) Net ITC shall mean input tax credit availed on inputs during the relevant periods other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and

(b) "Adjusted Total turnover" and "relevant period" shall have the same meaning as assigned to them in sub-rule (4)"

The said sub rule was amended on two occasions. At the time of entry into force of the CGST Act on 01.07.2017, Rule 89(5) was, in relevant part, as

under:

"89. Application for refund of tax, interest, penalty, fees or any other amount:-

....

....

....

(4) In the case of zero-rated supply of goods or services or both without the payment of tax on bond or letter of undertaking in accordance with the provisions of sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), refund of input tax credit shall be granted as per the following formula-

*Refund amount = (Turnover of zero-rated supply of goods+Turnover of zero-rated supply of services) * Net ITC /Adjusted Total Turnover; ....*

(B) "Net ITC" means input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4-A) or (4-B) or both; ....

(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula -

Maximum Refund Amount= {(Turnover of inverted rated supply of goods) x Net ITC ÷ Adjusted Total Turnover} – tax payable on such inverted rated supply of goods

Explanation:- For the purposes of this sub rule, the expressions "Net ITC" and "Adjusted Total turnover"

shall have the same meanings as assigned to them in sub-rule (4)."

The relevant definitions from Section 2 of the CGST Act are extracted below:

"(52) "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;"

(59) "input" means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business;

(60) "input service" means any service used or intended to be used by a supplier in the course or furtherance of business;

(62) "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;

(63) "input tax credit" means the credit of input tax;

(83) "outward supply" in relation to a taxable person, means supply of goods or services or both, whether by sale, transfer, barter, exchange, licence, rental, lease or disposal or any other mode, made or agreed to be made by such person in the course or furtherance of business;

(94) "registered person" means a person who is registered under Section 25 but does not include a person having a Unique Identity Number;

(102) "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or

denomination, to another form, currency or denomination for which a separate consideration is charged.

[Explanation.-- For the removal of doubt, it is hereby clarified that the expression "services" includes facilitating or arranging transactions in securities;]"

The relevant definitions from Article 366 of the Constitution of India are as under:

"(12) "goods" includes all materials. Commodities, and articles;

(12A) "goods and service tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption;

(26A) "Services" means anything other than goods"

4. We heard Mr.Sujit Ghosh, the learned counsel for the Petitioner in W.P.Nos.8596, 8597, 8602, 8603, 8605, 8608 of 2019 and W.P. Nos.12037, 12040, 12041 and 12042 of 2020; Mr.R.Parthasarathy, the learned counsel for the Petitioner in W.P.Nos.34219 and 34221 of 2019; Mr.P.B.Harish, the learned counsel for the Petitioner in W.P.Nos.32308,

32311, 32314, 32316, 32317, 32327, 21432 of 2019 and W.P. No. 12028 of 2020; Mr.R.Senniappan, the learned counsel for the Petitioner in W.P.No.14799 of 2019; Mr.Mohammed Shaffiq, the learned Special Government Pleader, Taxes, appearing for R4 and R5 in W.P. Nos.32308, 32311, 32314, 32316, 32317, 32327, 21432 and 14799 of 2019; for R2 and R3 in W.P.Nos.34219 and 34221 of 2019 and for R3 in W.P.Nos.8596, 8597, 8602, 8603, 8605 and 8608 of 2019 and R-4 and R-5 in W.P.No.12028 of 2020 and R-3 in W.P.Nos.12037, 12040, 12041 and 12042 of 2020; Mr.A.P.Srinivas, the learned counsel for the GST Department in all cases and R3 and R5 in W.P.No.14799 of 2019, R-5 in W.P.No.32314 of 2019 and R1,R3 and R5 in W.P.No.32311 of 2019; M/s.Hema Murali Krishnan, the learned Central Government Standing Counsel for R1 and R2 in W.P.Nos.8596, 8597, 8602, 8603, 8605 and 8608 of 2019; and Mr.R.Sankaranarayanan, the learned Additional Solicitor General for R-1 in W.P.Nos.43221 of 2019 and 34219 of 2019 and W.P.Nos.12037, 12040, 12041, 12042 and 12028 of 2020 and R1 to R3 in W.P.Nos.32308, 32316, 32314, 32317 and 32327 of 2019.

CONTENTIONS

ON BEHALF OF THE PETITIONERS

5. Mr.Sujit Ghosh opened the submissions on behalf of the Petitioners. He pointed out that the Petitioner is a contractor providing services to the Chennai Metro Rail Limited and that in the course of business, the Petitioner uses both input goods and input services in its output supplies. Both the input goods and, particularly, the input services are subjected to a higher rate of tax than the rate of tax on output supplies of the Petitioner. Consequently, there is substantial accumulation of unutilised input tax credit. Mr.Ghosh contends that Section 54 of the CGST Act was designed for the purpose of enabling persons such as his client to obtain a refund of any unutilised input tax credit. He further submits that the object and purpose of the GST laws, in general, and the CGST Act, in particular, is to consolidate the indirect tax legislations and provide for a common regime that deals with both goods and services. Besides, the GST laws are intended to avoid the cascading of taxes so as to ensure that double taxation is completely eliminated.

6. With the above introduction, Mr.Ghosh invited the attention of the Court to the relevant provisions of the CGST Act and the CGST Rules.

He first referred to Section 54 (1) and (3) of the CGST Act, which are extracted *supra*. He pointed out that Section 54(1) deals with refund and enables the framing of rules only in respect of the form and manner of seeking refund. According to Mr.Ghosh, clauses that empower the framing of rules with regard to the form and manner of an application for refund are limited in scope. In order to substantiate this contention, he referred to the judgment of the Hon'ble Supreme Court in **Sales Tax Officer v. K.T.Abraham, AIR 1967 SC 1823 (K.T. Abraham)**, wherein the Court interpreted a provision which used the language 'in the manner prescribed' and held that it does not empower the framing of rules for fixing a time limit. In response to a question as to why the rule making power under Section 164 of the CGST Act cannot be resorted to for framing rules in respect of Section 54, he contended that such general rule making power cannot be resorted to create disabilities that are not contemplated by the CGST Act. For this proposition, he relied upon the judgment of the Hon'ble Supreme Court in **Kunj Behari Lal Butail v. State of H.P. (2000) 3 SCC 40.**

7. His next contention was with reference to Section 54(3) of the

CGST Act. He pointed out that Section 54(3) enables a registered person to claim a refund of any unutilised input tax credit. According to him, Section 54(3) is couched in language that clearly enables a registered person to obtain a full refund of all unutilised input tax credit. Therefore, he contends that the proviso to Section 54(3) should be construed by bearing in mind the context. The proviso to Section 54(3) specifies two classes of registered persons who are entitled to refund. The first class is persons who have zero-rated supplies, namely, exporters of goods and services. The second class is relevant for the purposes of this case and consists of persons who have accumulated unutilised credit on account of being subject to an inverted duty structure, i.e. the rate of tax on input goods and input services procured by them is higher than the rate of tax on their output supplies. According to Mr.Ghosh, this is the most natural and logical way of construing Section 54(3)(ii). For this purpose, he contends that the word "inputs" in Section 54(3)(ii) should be construed as per common parlance. If construed as per common parlance, the word "inputs" would mean both input goods and input services. He further submits that the meaning ascribed to the word "input" in Section 2(59) of the CGST Act should not be adopted to for the purpose of interpreting Section 54(3)(ii). In support of

this contention, he points out that Section 54 (3)(ii) uses the words "output supplies" in juxtaposition with the word "inputs". The words "output supplies" are not defined in the CGST Act, whereas the words "outward supplies" are defined. Therefore, he contends that the intention of Parliament was to deploy the words "inputs" and "output supplies" as per their meaning in common parlance. In support of this contention, he pointed out that Section 2 of the CGST Act opens with the words "unless the context otherwise requires." By referring to the judgment of the Hon'ble Supreme Court in **Whirlpool Corporation v. Registrar of Trade Marks (1998) 8 SCC 1 (Whirlpool Corporation)**, he pointed out that while dealing with statutory definitions, the Court should first examine the context; if the context indicates that the meaning of the word in common parlance should be applied, the Court should do so. Only if the common parlance meaning is inapplicable, the Court should take into consideration the statutory definition. In this connection, he also referred to the judgment of a Division Bench of this Court in **M. Jamal and Co v. Union of India, 1985 (21) ELT 369,** wherein the Court interpreted the expression "India" as not including the territorial waters although "India" is defined in Section 2(27) of the Customs Act,1962 as including the territorial waters. His next

contention is that even if the Court is of the view that the word "inputs" in Section 54(3)(ii) should be construed as per the statutory definition, it is a fit case to read the words 'input services' into Section 54. In other words, he contends that the rule of *casus omissus* is not absolute or universal. In certain contexts, words may be supplied even in a taxing statute. For this proposition, he relied upon the judgment of the Hon'ble Supreme Court in **Padma Sundara Rao v. State of T.N. (2002) 3 SCC 553,** wherein, at paragraph 15, the Hon'ble Supreme Court held that words may be supplied to a statute so as to avoid manifest absurdity.

8. As regards the contention that a tax statute should be construed strictly and literally, Mr.Ghosh contended that this principle is only applicable to charging and exemption provisions of a tax statute but not to other provisions. For this proposition, he referred to paragraphs 8, 9, 10, 11 and 12 of the judgment of the Hon'ble Supreme Court in **Gursahai Sehegel v. CIT, AIR 1963 SC 1062,** and paragraphs 23, 25, 26 and 27 of **ITC Limited v. CCE (2004) 7 SCC 591**. He pointed out that the latter judgment does not deal only with the machinery provisions of a tax statute. On the other hand, it deals with all the provisions of a tax statute except the

charging and exemption sections. The next contention of Mr.Ghosh was that unless Section 54(3)(ii) is read in the manner indicated by him, it would violate Article 14 of the Constitution. He substantiated this contention by pointing out that all contractors who avail input services and input goods constitute one class. Consequently, if Section 54(3)(ii) is construed as being applicable only to contractors who avail input goods and not to those who avail input services, it would amount to discrimination between persons who are similarly situated by making an invidious classification. For this proposition, he relied upon the judgment of the Hon'ble Supreme Court in **Government of Andhra Pradesh and others v. Lakshmi Devi (2008) 4 SCC 720 (Lakshmi Devi).** Therefore, he submitted that the word "inputs" in Section 54(3)(ii) should be interpreted in its wide, common parlance meaning so as to uphold the constitutional validity of the said provision.

9. The next contention of Mr.Ghosh was that the validity of the provision may also be upheld by resorting to reading down. For this purpose, he relied upon the judgment of the Hon'ble Supreme Court in **Delhi Transport Corporation v. Mazdoor Congress and others 1991 (Supplement) 1 SCC 600 (Delhi Transport Corporation)** wherein, at

paragraph 255, the Hon'ble Supreme Court held that reading down can be resorted to either to save a statute from being struck down on account of its unconstitutionality or where provisions of the statute are vague and ambiguous and it is not possible to gather the intention of the legislature from the object and context. In the case at hand, unless the word "inputs" is read down, there would be a violation of constitutional provisions. In order to demonstrate that the interpretation of the word "inputs", as per the definition in Section 2(62), would result in invidious discrimination, he referred to the table at page 8 of the affidavit in support of W.P. Nos.8596 and 8597 of 2019 and pointed out that a person who avails input services, such as the Petitioner, would not be entitled to refund whereas a person who utilizes input goods would be entitled to a substantial refund although both are contractors engaged in the same business. On this issue, he referred to the judgment of the Hon'ble Supreme Court in **Spences Hotel Pvt. Ltd and another v. State of West Bengal and others (1991) 2 SCC 154 (Spences Hotel)** and, in particular, paragraphs 23, 26 and 27, wherein the Hon'ble Supreme Court concluded that classification which discriminates between persons who are similarly situated violates Article 14 of the Constitution.

10. Mr.Ghosh also referred to Article 38 of the Constitution so as to emphasise that legislation should be interpreted in such a manner as to ensure that inequalities are mitigated. In order to substantiate that Article 38 may be relied upon even in the context of tax legislations, he relied upon the judgment in **Sri Srinivasa Theatre and others v. Government of Tamil Nadu and others (1992) 2 SCC 643,** which is a judgment in the context of the imposition of entertainment tax. He also relied upon the judgment of the Hon'ble Supreme Court in **Kasturi lal Lakshmi Reddy and another v. State of Jammu and Kashmir and another (1980) 4 SCC 1** and, in particular, paragraph 12 thereof, with regard to the role of distributive justice in the grant of state largesse. By relying upon the judgment in **Union of India v. N.S.Rathnam (2015) 10 SCC 681,** he contended that once the common class/genus is identified, there should be no discrimination as between the different species in that genus/class.

11. Mr.Parthasarathy made submissions next in W.P. Nos.34219 and 34221 of 2019. He pointed out that his clients were manufacturers of foot wear and that both input goods and input services were utilized by his clients. Until the amendment to Rule 89(5) in April 2018, his clients applied for and received refunds both in respect of input goods and input

services. In contrast to Mr.Ghosh, he submitted that he is not impugning the constitutional validity of Section 54(3). Instead, he contended that Section 54(3) sets out the general rule as to entitlement to refund in respect of any unutilised tax credit. The proviso thereto qualifies the principal sub-section by setting out the eligible classes and, in each class, the criteria for claiming refund. As per the proviso, the two classes of registered persons who are entitled to refund are those who have zero rated supplies, namely, exporters, and those who have accumulated credit on account of the fact that the rate of tax on the "inputs" procured by them is greater than the rate of tax on their "output supplies". Mr.Parthasarathy contends that his clients satisfy the condition or entry barrier, i.e. they have accumulated credit because the rate of tax on the input goods procured by them exceeds the rate of tax on their output supplies. According to him, once this entry barrier or threshold is crossed, the entitlement to refund would be governed by Section 54(3) and not by the proviso. To put it differently, the proviso does not curtail the entitlement to refund of the entire unutilised input tax credit and merely sets out the eligibility conditions for claiming such refund.

12. With regard to the CGST Rules pertaining to refund of

unutilised input tax credit, he submitted that the rules were introduced primarily to prescribe a method of determining the proportion of refund in cases wherein a particular registered person is engaged in multiple lines of business, some of which result in the accumulation of unutilised input tax credit on account of being subjected to an inverted duty structure and some of which do not. Consequently, the rules originally prescribed a formula which enabled refunds on both input goods and input services and also provided a method of ascertaining the proportion of refund in the situation described above. However, by the amendment that was introduced in April 2018, the definition of net ITC was amended so as to exclude credit accumulation on account of input services. According to Mr.Parthasarathy, this amendment is *ultra vires* Section 54(3). In this connection, he also points out that Section 54(3)(i) which deals with the zero rated supplies, i.e. supplies by exporters, provides for a refund both in respect of input goods and input services. This is indicative of the fact that the legislative intent is not to limit such refund only to input goods. He further submitted that the Division Bench of the Gujarat High Court in **VKC Footsteps India Pvt. Ltd. v. Union of India, Judgment Dated 24.07.2020 (VKC Footsteps),** at paragraphs 23-27, accepted the contention that the amended Rule 89(5) is

contrary to Section 54(3) on the basis that a registered person may claim a refund of "any unutilised input tax credit" under Section 54(3), whereas the restriction of such claim to the credit accumulating only from "inputs" in Rule 89(5) is *ultra vires* Section 54(3) of the CGST Act. Thus, he concluded his submissions by reiterating that the proviso to Section 54 merely sets out the eligibility conditions or entry barriers and that once such entry barriers are crossed, the quantum of refund would extend to the entire unutilised input tax credit of the registered person concerned.

13. Mr.P.B.Harish supplemented the submissions of Mr.Parthasarathy by drawing the attention of the Court to the use of the expression “in the cases” in the proviso to Section 54(3). The use of the said expression, according to him, indicates that the proviso is intended to specify the classes of registered persons who would be entitled to a refund of unutilised input tax credit and not to curtail the quantum or type of unutilised input tax credit in respect of which refund may be claimed. He further contended that when the statute does not curtail the quantum of refund, it cannot be curtailed by amending the relevant rules. He further submitted that the quantum is indicated under Section 54(3) itself by

specifying that registered persons would be entitled to a refund of any unutilised input tax credit.

CONTENTIONS ON BEHALF OF THE RESPONDENTS

14. Mr.Mohammed Shaffiq made submissions, in response, on behalf of the State Tax Department. He pointed out that he would first deal with the question as to whether Section 54(3)(ii) violates Article 14 of the Constitution. On this question, his first contention was that if the Court construes Section 54(3)(ii) as infringing Article 14, the consequence would be to strike down the said provision and not to expand it so as to include the person who is discriminated against. For this proposition, he relied upon the judgment of the Hon'ble Supreme Court in **Jain Exports Pvt. Ltd. v. Union of India 1996 (86) E.L.T. 478(S.C.).** With regard to whether reading down could be resorted to while interpreting Section 54(3)(ii), he submitted that it is the settled position that reading down is intended to provide a restricted or narrow interpretation and not for the purpose of providing an expansive or wide interpretation. By reference to the judgment in **Delhi Transport Corporation (cited supra)**, he pointed out that the Hon'ble Supreme Court concluded that the Court cannot remake the statute.

He also referred to the judgment in **Union of India v. Star Television News Limited (2015) 12 SCC 665** and contended that words cannot be added to the statute for the purpose of reading down the statute.

15. His second contention was that wide Parliamentary latitude is recognised and affirmed while construing tax and other economic legislations. For this purpose, he referred to the judgment of the Hon'ble Supreme Court in **Federation of Hotel and Restaurant Association of India v. Union of India (1989) 3 SCC 634 (Federation of Hotel),** wherein the Hon'ble Supreme Court held that Parliament has wide latitude in tax legislation. He also relied upon the judgment in **Swiss Ribbons Private Limited v. Union of India and others (2019) 4 SCC 17,** wherein the Court, at paragraph 13, held that the Court should adopt a hands-off approach *qua* economic legislation.

16. His third contention was that the classification of registered persons into those who are entitled to a refund of unutilised input tax credit and those who are not by differentiating between those who procure input goods and input services is legitimate. In this case, the class consists of persons who accumulate unutilised input tax credit arising out of the

inverted duty structure in the procurement of input goods, and not input services.

17. He next responded to the submission with regard to the power to prescribe rules for the purposes of claiming a refund of unutilised input tax credit. On this issue, he pointed out that the critical question is whether Section 54(3)(ii) limits entitlement to refund to the accumulated credit on account of input goods or whether it extends such entitlement to input services. If Section 54(3)(ii) is interpreted as limited to credit accumulated out of input goods, Rule 89(5), including the amendment thereto, is valid. As regards rule making power, he pointed out that Section 164 is couched in extremely wide language, and that the only limitation is that the rules should be for fulfilling the purposes of the CGST Act. In that context, he also submitted that no restriction should be read into the rule making power. He relied upon the judgment in **K. Damodarasamy Naidu v. State of Tamil Nadu and another 2000(1) SCC 521** wherein, in the context of a composite supply, the Hon'ble Supreme Court concluded that the differentiation between goods and service is valid. Thus, he contended that Rule 89(5) merely supplements Section 54(3)(ii) and that it fulfills the

purpose of eliminating arbitrariness in determining the entitlement to refund on the basis of Section 54(3)(ii).

18. Mr.Shaffiq's fifth contention was that both the CGST Act as well as the Constitution clearly differentiate between goods and services. As regards the Constitution, he referred to Article 366(12), which defines goods and Article 366(26)(A) which defines services. He also referred to paragraph 76 of **Federation of Hotel** to reiterate that wide latitude is provided to Parliament/legislatures in classifying the subjects of taxation. On the issue of latitude in methods of valuation for tax purposes, he also relied upon the judgment in **Bharat Hari Singhania v. CWT 1994 Supplement (3) SCC 46** at paragraphs 3,12 and 13. The judgment in the **Maharashtra State Board of Secondary and Higher Education v. Paritosh Bhupeshkumar Sheth (1984) 4 SCC 27** and, in particular, paragraphs 14 and 15, were relied upon with regard to the power to make regulations to fulfil the objects of the enactment.

19. His sixth contention was that a refund provision should be treated on a par with an exemption provision. For this principle, he referred

to the judgment in **AC v. Dharmendra Trading Co. (1988) 3 SCC 760,** wherein, at paragraph 6, the Supreme Court held that though styled as a refund of sales tax, the benefit is in the nature of an exemption or reduction of tax. By relying upon the judgment of the Five Judge Bench of the Hon'ble Supreme Court in **Commissioner of Customs v. Dilip Kumar (2018) 9 SCC 1 (Dilip Kumar),** he pointed out that the Supreme Court concluded that an exemption provision in a tax statute should be construed strictly and any ambiguity should be resolved in favour of the revenue. In particular, he referred to paragraphs 12,16,45, 53 and 66. He also referred to the recent judgment of the Hon'ble Supreme Court in **Ramnath v. CTO (2020) 108 CCH 0020 ISCC (Ramnath)**, wherein the Hon'ble Supreme Court, at paragraphs 18 and 19, concluded that all provisions for incentive, rebate or any form of concession should be interpreted in the same manner as an exemption provision.

20. In light of the above legal position, Mr.Shaffiq contended that Section 54(3) and the proviso thereto should be interpreted strictly and by extending the benefit of ambiguity to the revenue and not to the registered persons. With this background, he contended that the expression "any unutilised input tax credit" in Section 54(3) is the genus and the sub-

clauses thereto the species. According to him, the two sub-clauses to Section 54(3) perform the function of curtailing the ambit of Section 54(3). If Section 54(3)(ii) is construed in the manner suggested by Mr.Parthasarathy, a person with unutilised input tax credit arising only on account of availing input services would be ineligible for a refund, whereas a person who accumulates unutilised input tax credit by procuring both input goods and input services would be entitled to a refund of the entire unutilised input tax credit, including the unutilised input tax credit accumulated as a result of availing input services. This is an absurd and anomalous situation, which Parliament did not intend to create while enacting Section 54 and the proviso thereto. Therefore, Mr.Shaffiq contended that Section 54(3)(ii) is intended to curtail not only the class of persons who are entitled to a refund of unutilised input tax credit but also the type, on the basis of source, of eligible unutilised credit and the quantum thereof. To put it differently, the expression "where the credit has accumulated on account of rate of tax on inputs" qualifies and curtails the expression "refund of any unutilised input tax credit" in Section 54(3) in multiple respects as narrated above. With regard to the meaning of the expression " on account of ", he referred to the judgment of the U.S.

Supreme Court in **Kelly M. O'Gilvie v. United States 519 U.S. 79, 136 L.Ed. 2d 454**, wherein, by the majority opinion, the U.S Supreme Court concluded that the expression "on account of" indicates a strong causal connection. According to Mr.Shaffiq, the use of the words "on account of" in Section 54(3)(ii) underscores the fact that only unutilised input tax credit that has accumulated on account of the rate of tax on input goods being higher than the rate of tax on output supplies should be considered for purposes of refund and not the entire unutilised input tax credit, which is available to the credit of the registered person as a result of being subjected to an inverted duty structure. He next contended that Section 54(3)(ii) uses the expression "the credit". The use of the definite article " the " emphasises that Parliament's intention is to limit a claim for refund to the credit that has accumulated on account of the rate of tax on input goods being higher than that on output supplies. For this principle, he relied upon the judgment of the Hon'ble Supreme Court in **American Express Bank v. Calcutta Steel (1993) 2 SCC 199** and, in particular, paragraph 17 thereof. With regard to the object, purpose and function of provisos, he referred to the judgment of the Hon'ble Supreme Court in **H.E.H. Nizam's Religious Endowment Trust, Hyderabad v. Commissioner of Income Tax, Andhra Pradesh,**

Hyderabad, AIR 1966 SC 1007 (Para-7) (H.E.H. Nizam) and **Kedarnath Jute Manufacturing Co. Ltd. v. Commercial Tax Officer and others, AIR 1966 SC 12 (Para 8).**

21. The next contention of Mr.Shaffiq was that the word " inputs" in Section 54(3)(ii) of the CGST Act is intended to carry the meaning ascribed to the said word in Section 2(59) of the CGST Act. In order to substantiate this contention, he referred to the explanation to Section 54 wherein the word refund is defined as under:

> *" Refund " includes refund of tax paid on zero rated supplies of goods or services or both or on inputs or inputs services used in making such zero rated supplies, or refund of tax on the supply of goods recorded as deemed exports, or refund of unutilised input tax credit has provide under Sub Section (3)."*

From the above explanation, he pointed out that Parliament has consciously and intentionally used either the defined term "inputs" or "input services" as appropriate in Section 54. He also relied upon two judgments of the Hon'ble Supreme Court to substantiate the contention that a term defined in the statute should bear the meaning ascribed in such definition. The said judgments are **CIT, NEW DELHI v. East West Import and Export (P) Ltd, (1989) 1 SCC 760**(Para-7) and **Commissioner of Sales Tax, State of**

Gujarat v. Union Medical Agency (1981) 1 SCC 51 (Para 14). The next contention of Mr.Shaffiq was that the Central Government is entitled to retrospectively amend the rules so as to bring the rules in line with Section 54(3). On this issue, he relied upon the judgment of the Hon'ble Supreme Court in **Assistant Commissioner of Urban Land Tax and others v. Buckingham and Carnatic Co. Ltd. (1969) 2 SCC 55.**

22. With regard to the nature of input tax credit, he relied upon the judgment of the Hon'ble Supreme Court in **Jayam and Co. v. AC (CT) (2016) 15 SCC 125 (Jayam)**, wherein input tax credit was equated with a concession and, therefore, it was held that the terms and conditions relating to availing such concession should be strictly complied with. For the same proposition, he also relied upon the judgment in **ALD Automotive Pvt. Ltd. v. AC (CT) 2018 SCC Online SC 1945 (ALD Automotive).** With regard to the judgment of the Gujarat High Court, he pointed out that the Gujarat High Court examined Section 54(3) and Rule 89(5) but failed to consider the proviso to Section 54(3). Consequently, the fact that the ambit and scope of the expression "any unutilised input tax credit" in Section 54(3) is curtailed by the proviso especially in the context of claims arising out of or

relating to an inverted duty structure was not adverted to and no findings were recorded in respect thereof. Consequently, he contended that this Court should not concur with the conclusion of the Gujarat High Court. On this issue, he also relied upon the Judgment of the Hon'ble Supreme Court in **Municipal Corporation of Delhi v. Gurnam Kaur (1989)(1) SCC 101.** The next contention of Mr.Shaffiq was that equity is not a relevant consideration in the interpretation of a tax statute. For this proposition, he relied upon the judgment in **Dilip Kumar** and concluded his submissions by pointing out that the unutilised input tax credit would continue to be reflected in the ledger of the registered persons and that the proviso only prevents the registered person from claiming a refund unless the conditions specified therein are fulfilled. In other words, the unutilised input tax credit does not lapse merely because the registered person is unable to claim a refund of the same.

23. Mr.A.P.Srinivas made submissions, thereafter, on behalf of the GST Department. Mr.Srinivas provided a historical over view of the evolution of GST laws. He pointed out that under the Customs Act,1962, customs duty was levied on imports and an additional duty of Central

Excise was also levied on such imports. This position continued until MODVAT credit was introduced in the year 2002. MODVAT credit could be availed of only in respect of input goods. After service tax was introduced, MODVAT credit was replaced by CENVAT credit. Under the CENVAT Rules, it was possible to avail credit both in respect of input goods and input services. In order to establish this contention, he referred to the CENVAT Rules and, in particular, to Rule 2(l) of the said Rules. He also referred to Rule 18 of the Central Excise Rules with regard to rebate and pointed out that such rebate is applicable only in respect of input goods and not in respect of input services. He also referred to Section 17B of the Central Excise Act. On the above basis, he contended that even historically goods and services have been subjected to different treatment and merely because the GST Act deals with both goods and services, it cannot be concluded that all the benefits that are available to a person who avails input goods should be extended to those who avail input services. With this background, he turned his attention to Section 54 and pointed out that Section 54(3)(i) deals with zero-rated supplies made without payment of tax. This clause excludes registered persons who make zero-rated supplies after payment of tax. By way of explanation, he pointed out that exporters

of goods and services fall under two categories, namely, those who make such supplies upon payment of tax and those who provide a bond or undertaking and make the supply without payment of tax. Out of the said two categories, only those who make supplies without payment of tax are entitled to refund under Section 54(3)(i). In order to substantiate the contention that Parliament has consciously and intentionally excluded input services in Section 54(3)(ii), he referred to the explanation to Section 54 and pointed out that the definitions of both "refund" and "relevant date" use the words "inputs" or "input services" with the same meaning ascribed to those words in Section 2. For example, he pointed out that, as regards exporters, it is clear that they are entitled to a refund both in respect of input goods and input services. By contrast, as regards deemed exports, he pointed out that they would be entitled to refund only in respect of input goods and not input services. Thus, he contended that there are three classes of registered persons who could accumulate unutilised input tax credit on account of being subjected to an inverted duty structure. These classes comprise persons who: use capital goods as inputs; are engaged in zero-rated supplies; and use input goods and/or input services and pay a higher rate of tax thereon than that paid on their output supplies. From these classes,

Parliament has either completely excluded the class or permitted particular sub-classes to claim refund and not others. He further contended that the meaning of the words "inputs" and "input services" is well known in the trade. Therefore, even if the meaning specified in Section 2 is not adopted, in trade parlance also the same meaning is ascribed to the terms.

24. Mr.Sankaranarayanan, the learned Additional Solicitor General of India, made submissions on behalf of the Union of India. The focus of his submissions was on the interpretation of Section 54(3) of the CGST Act. His first contention was that the expression "any unutilised input tax credit" is used in Section 54(3) so as to convey the meaning that it would apply in all the five situations set out in Section 2(62) and 2(63). In specific, he points out that as per the aforesaid definitions, input tax is paid by way of IGST on import of goods; CGST in terms of Sub-section 3 and 4 of Section 9; IGST under Sub Section 3 and 4 to Section 5; SGST under Sub section 3 and 4 of Section 9; and UTGST under Sub-section 3 and 4 of Section 7. In all the above-mentioned instances, input tax is paid and credit would accrue in respect of such input tax. According to him, the words "any unutilised input tax credit" are used in Section 54(3) to convey that the

credit can be accumulated on account of payment of input tax in any of the five situations mentioned above. His next contention is that both Section 54(3)(ii) and Rule 89(5) use the expression "inputs". Therefore, the amended Rule 89(5) is in conformity with Section 54(3)(ii) of the CGST Act. In other words, the amendment was made so as to bring Rule 89(5) in line with Section 54(3)(ii). The next contention of Mr.Sankaranarayanan is that a proviso performs various functions such as curtailing, excluding, exempting or qualifying the enacted clause. In fact, the proviso may even take the shape of a substantive provision. On the interpretation of provisos, he referred to the judgment of the Hon'ble Supreme Court in **S.Sundaram Pillai and others v. V.R.Pattabiraman and others (1985) 1 SCC 591.** In particular, he referred to paragraphs 30, 37 and 43 thereof. He also referred to the judgment in the case of **Laxminarayanan R. Bhattad v. State of Maharashtra (2003) 5 SCC 413.** By relying upon the aforesaid judgments, he reiterated that the proviso to Section 54(3) has the effect of curtailing the refund of unutilised input tax credit to the credit accumulated on account of the difference between the rate of tax on input goods and the rate of tax on output supplies. The next contention of Mr.Sankaranarayanan was that the Central Government is entitled to give retrospective effect to Rule 89(5).

On this issue, he referred to the judgment of the Hon'ble Supreme Court in **P. Kannadasan v. State of T.N. (1995) 5 SCC 670**, wherein it was held that Parliament's power to impose a tax with retrospective effect cannot be curtailed or restricted in any manner provided the intention to impose the tax retrospectively is specified in the relevant provision. In the present case, it is expressly stated that Rule 89(5) shall apply retrospectively with effect from 01.07.2017.

25. The learned Additional Solicitor General made submissions thereafter with regard to the constitutional validity of Section 54(3)(ii). His first contention was that goods and services have always been treated as separate classes. In order to buttress this submission, he referred to quasi-contracts under Section 70 of the Indian Contract Act, 1872. He pointed out as to how services, which are provided non-gratuitously without a prior agreement, are required to be compensated reasonably by applying the principles of *quantum meruit*, whereas if the price of goods is not decided by a prior contract but goods are supplied non-gratuitously by the seller and accepted by the buyer, the buyer is required to pay a reasonable price for the goods on application of the principles of *quantum valebant*. Thus, the

distinction between goods and services has existed from time immemorial. In this connection, he also referred to Article 366 of the Constitution wherein goods are defined in Article 366(12) and services in Article 366(26)(A). On the question of classification, he relied upon the judgment of the Hon'ble Supreme Court in **Union of India and others v. Nitpid Textile Processors Private Limited and another (2012) 1 SCC 226**, wherein, at paragraphs 66 and 67, the Hon'ble Supreme Court summarised the principles relating to interference with tax legislation. In particular, the Hon'ble Supreme Court held that such interference is warranted only if the legislation is arbitrary, artificial or evasive. He pointed out that the law on the subject was extensively surveyed in paragraph 52 to 65 before drawing the aforesaid conclusion. He also relied upon the judgment in **Hiralal Ratanlal v. State of UP (1973) 1 SCC 216** (paragraph 20) as well as the judgment in **Kunnathat Thatehunni Moopil Nair v. State of Kerala, AIR 1961 SC 552.**

REJOINDER SUBMISSIONS OF THE PETITIONERS

26. Mr.Parthasarathy made submissions by way of rejoinder. In order to illustrate various scenarios in which there could be accumulation of

unutilised input tax credit, he referred to a chart wherein these scenarios are set out. He pointed out that unless the rate of tax on input goods is higher than the rate of tax on output supply, a claim for refund cannot be made. Similarly, if the registered person procures only input services, even if there is unutilised input tax credit because the rate of tax is higher on such input services as compared to the rate of tax on output supplies of such registered person, refund cannot be claimed. On the other hand, if a person procures both input goods and input services, such person can claim a refund provided the rate of tax on input goods procured by such person is higher than the rate of tax on the output supplies. By drawing reference to the aforesaid chart, Mr.Parthasarathy reiterated that Section 54(3)(ii) only specifies the cases wherein a registered person is entitled to refund. Once it is established that a registered person is entitled to refund on account of clearing the barrier or threshold in Section 54(3)(ii), the quantum of refund would be determined only by Section 54(3) and not by the proviso thereto. With regard to the case of zero-rated supply, he referred to Section 16 of the Integrated Goods and Services Tax Act so as to contend that a zero-rated supplier who effected supply upon payment of tax would be entitled to a refund under Section 54(1) and therefore has been excluded from the

purview of Section 54(3)(i).

27. The next contention of Mr.Parthasarathy is that the words "on inputs" in the definition of Net ITC in Rule 89(5) should be deleted so as to ensure that Rule 89(5) is not *ultra vires* Section 54(3). If the words "on inputs" are not omitted by reading down Rule 89(5), the Rule would be *ultra vires* Section 54(3) inasmuch as it would unlawfully whittle down the scope and ambit of Section 54(3). In support of the contention that the offending portion of Rule 89(5) could be severed or read down, he referred to two judgments of the Hon'ble Supreme Court. The said judgments are **Lohara Steel Industries Ltd and another v. State of A.P. and another (1997) 2 SCC 37,** at paragraph 10, and **D.S. Nakara and others v. Union of India (1983) 1 SCC 305,** at paragraphs 59 and 60, wherein the Hon'ble Supreme Court held that there is no rule that prevents the reading down of a provision in such a manner as to expand its scope.

28. Mr.P.B.Harish made submissions by way of rejoinder. His first contention was that it is necessary to harmoniously construe the

enacted clause, namely, Section 54(3), and the proviso thereto given the fact that the quantum of unutilised input tax credit has already been specified in Section 54(3). Therefore, the proviso should not be construed in such a manner as to curtail the quantity of unutilised input tax credit. It only sets out the two cases wherein there is entitlement to refund of unutilised input tax credit.

29. Mr.Sujit Ghosh made submissions in rejoinder to the submissions of the learned counsel for the Respondents. His first contention was that the validity of classification depends on the frame of reference. Consequently, what is considered to be a reasonable classification when viewed from one frame of reference may be construed as unreasonable when viewed from a different frame. He illustrated this contention with several examples. The first example was from the context of the Advocates Act 1961. He pointed out that advocates were legitimately classified into two classes, namely, senior advocates and advocates. However, the restriction imposed in the State of Andhra Pradesh by excluding advocates who were not practicing in the Courts in Andhra Pradesh was construed as violative of Article 14 in **J.Pandurangarao v.**

Andhra Pradesh Public Service Commission, Hyderabad, AIR 1963 SC 268 (paragraphs 7,10 and 11). His next illustration was in the context of debts. While debts may be classified as debts due to the Government and private debts, in the specific context of debts due to a Jagir, as compared to debts due to the Government, the Hon'ble Supreme Court held that the classification is invalid. The third illustration was with regard to medicines. In **Ayurveda Pharmacy and another v. State of Tamil Nadu (1989) 2 SCC 285,** the Hon'ble Supreme Court held that the imposition of a higher rate of tax on certain Ayurveda medicines on the basis of alcohol content was in violation of Article 14. Similarly, in **State of Uttar Pradesh and others v. Deepak Fertilizers and Petrochemical Limited (2007) 10 SCC 342,** the classification was held as bad. The fourth illustration was based on the judgment in **S.K.Devi, AIR 1969 SC 658,** in paras 13 to 15. By relying upon the aforesaid judgments, Mr.Ghosh contended that the validity or invalidity of classification would depend on the frame of reference.

30. As regards the GST laws, he pointed out that the GST laws represent a paradigm shift from a tax regime that taxed production or business activities to a regime that taxes consumption. According to him, a

regime that taxes consumption is required to ensure that the tax does not attach to the business throughout the supply chain until the point of consumption by the consumer. In order to substantiate this contention, he relied upon the 1994 Report of the National Institute for Public Finance and Policy (NIPFP) on Reform of Domestic Trade Taxes in India and, in particular, paragraph 131 thereof. He also referred to the Report of the Select Committee on the Constitution 122nd Amendment relating to GST reforms. By drawing reference to judgments of the European Court, he emphasized that GST is a destination based tax on consumption and that tax neutrality is at the heart of the design and structure of the GST regime. On the above basis, Mr.Ghosh contended that the disparate treatment of goods and services militates against the basic structure of GST and creates distortion in the system. His next contention was that there are four key elements to a tax statute. These are the taxable event, the taxable person, the rate of tax and the measure of tax. By drawing reference to the relevant provisions of the CGST Act, he contended that goods and services are treated in identical fashion with regard to all the aforesaid four elements of taxation. He also pointed out that the CGST Act is designed in such a manner that charging provisions, machinery provisions, penal provisions

and enforcement provisions apply equally to goods and services. The only differentiation is with regard to provisions that relate to the place of supply such as Section 12 and 13. In effect, the differentiation between goods and services, in GST legislation, is only from the view point of administrative convenience. With regard to the question as to why services are separately defined in the Constitution and in the CGST Act, he pointed out that service tax was levied during pre-GST era, under the Finance Act, by relying on Entry 97 of List - 1. Moreover, services are defined very broadly in such a manner as to include everything other than goods. It is for this limited purpose that the expression services is defined and not to indicate any material difference in the treatment of goods and services under GST laws.

31. With regard to the contention that the classification is valid, Mr.Ghosh contended that the burden of proof is on the Tax Department to establish validity, as held in **Government of Andhra Pradesh v. Lakshmi Devi,** and that the Tax Department had failed miserably in discharging this burden. By drawing reference to the judgment of the Hon'ble Supreme Court in **C.B.Gautam v. Union of India (1993) 1 SCC 78 (C.B. Gautam),** he contended that the Court struck down, read down, and interpreted

provisions of the Income Tax Act in the said judgment. For this purpose, he referred to paragraph 6,14,19,22,25,26,28, etc. of the said judgment.

32. He rebutted the contention that a tax statute should always be construed strictly by drawing reference to the judgment in **Dilip Kumar**. In particular, he pointed out that strict interpretation may be defined in multiple ways such as literal interpretation, narrow interpretation, etc. He further submitted that the **Dilip Kumar** case is distinguishable inasmuch as it dealt with the interpretation of an exemption notification. He submitted that a refund is not akin to an exemption. On this issue, he also referred to the judgment of the Hon'ble Supreme Court in **Ramnath**. By drawing specific reference to paragraph 75 thereof, he pointed out that the said judgment dealt with and equated exemptions, incentives, rebates and things akin thereto. The refund of unutilised input tax credit is not akin to an exemption, rebate, incentive, etc.

33. With regard to the scope and function of a proviso, he referred to the judgment in **ICFAI v. Council of the Chartered Accountants of India, (2007) 12 SCC 210 (ICFAI),** wherein, at paragraph

20, it was held that the purpose of a proviso is to exempt, exclude or curtail and not to expand. Therefore, he pointed out that a proviso, as a rule, performs the aforesaid function and it is only in exceptional cases that it plays the role of a substantive or enacting clause. On the question as to whether the unutilised input tax credit lapses, he referred to the frame work in respect of accounting standards under the Companies Act and pointed out if the probability of adjusting or obtaining a refund of such unutilised input tax credit is low, it would have to be shown as an expense in the profit and loss account. Therefore, in effect, it would lapse as the credit would be available only in theory.

34. Mr.Sujit Ghosh responded briefly to the submissions of the learned ASG on the constitutional validity of Section 54. His first contention was that GST represents a paradigm shift and therefore the historical segregation between goods and services cannot be relied upon to contend that the unequal treatment of goods and services is valid. In this connection, he reiterated that the object and purpose of GST legislation is to consolidate goods and services and treat them similarly by keeping in mind that taxes are imposed on consumption, irrespective of whether goods or

services are consumed. His next contention was that Section 54 is a refund provision and not a charging provision. Therefore, it cannot be compared or equated with tax provisions that enable the state to harvest revenue. He further submitted that the registered person is entitled to avail input tax credit on both input services and input goods. Consequently, whenever the duty structure is inverted, there is accumulation of unutilised input tax credit. Only at the stage of granting refund, Section 54(3)(ii) arbitrarily discriminates against registered persons who procure input services.

SUR-REJOINDER BY THE RESPONDENTS

35. Mr.Mohammed Shaffiq made submissions by way of sur-rejoinder. With regard to Mr.Ghosh's contention on severability, he relied upon paragraph 22.6 of the judgment in **RMD Chaumbargwala v. Union of India, AIR 1957 SC 628,** so as to contend that words cannot be added while resorting to the principle of severability. With regard to reading down, he relied upon the judgment of the Hon'ble Supreme Court in **B.R.Kapur v. State of T.N. (2001) 7 SCC 231** (Para 39) and contended that the Hon'ble Supreme Court held categorically that reading-up is not permitted while resorting to the principle of reading-down. He further

submitted that this is a judgment of a Constitution Bench and would therefore prevail over judgments of smaller benches to the contrary. On this issue, he also relied upon the judgment of the Hon'ble Supreme Court in **Cellular Operators Association v. TRAI (2016) 7 SCC 703** and, in particular, paragraphs 51 and 52 thereof. His next contention was with regard to the interpretation of the expression 'inputs". On this issue, he contended that if a definition of a term is contained in the statute, the Court would first consider and apply such definition, and only in the absence of a statutory definition the Court would consider the common parlance meaning of the term. The judgment of the Hon'ble Supreme Court in **Bakelite Hylam Ltd. v. Collector of Central Excise, Hyderabad (1998) 5 SCC 621** (para 7) was relied upon for the above principle. Similarly, **Chiranjit Lal Anand v. State of Assam and another 1985 Supplement SCC 392** and **Sant Lal Gupta v. Modern Co-operative Group Housing Society (2010) 13 SCC 336** (Para 14) were also relied upon.

36. His next contention was that refund is akin to an exemption/rebate/incentive. In order to substantiate this contention, he relied on the judgment in **Satnam Overseas Export v. State of Haryana**

(2003) 1 SCC 561 (para 16) and **State of UP v. Jaiprakash Associates (2014) 4 SCC 720** (Paragraphs 53 and 60). He also relied upon a judgment of the Division Bench of this Court in Writ Appeal No.547 of 2018. He further contended that refund is not a vested right. At best, it is a statutory right and therefore such right cannot be exercised unless the statute grants such right. With regard to the distinction between goods and services, he pointed out that it is not merely a historical distinction and that the distinction has been carried forward into the CGST Act for the reason that the nature and character of goods and services are distinct and inherently different. He relied upon the judgment of the Hon'ble Supreme Court in **Superintendent and Rememberancer of Legal Affairs, West Bengal v. Girish Kumar Navalakha and another (1975) 4 SCC 754** in support of the above submission. He further pointed out that, *inter se* persons who avail input goods and those who avail input services, there is no discrimination and all persons within each of the said classes are treated equally. For this proposition, he relied upon the judgment of the Hon'ble Supreme Court in **State of Gujarat v. Ambika Mills (1974) 4 SCC 656** (Paragraphs 54 and 55) and **R.K.Garg v. Union of India (1981) 4 SCC 675** (in Para 7).

37. With regard to tax neutrality, he pointed out that India is not a signatory to the OECD convention and therefore the OECD guidelines are not binding on India. Even otherwise, he pointed out that the European Community also permits differential treatment as between different suppliers. For this proposition, he relied upon the judgment of the European Court in **Finanzamt Frankfurt v. Deutsche Bank, EU case C-44/11** and **Her Majesty's Revenue and Customs v. Rank Group EU C-259/10**. He also relied upon the judgment of the Hon'ble Supreme Court in **Jindal Stainless Limited and another v. State of Haryana and others (2017) 12 SCC 1** (Para 28). He concluded his submissions by contending that on account of the differing nature of goods and services, tax evasion is for easier in respect of services. This is borne out by the available data and statistics and justifies the differential treatment as between goods and services when it comes to refund. Mr.Sujit Ghosh rebutted this contention by pointing out that tax evasion cannot be the basis to treat goods and services differently and that Section 132 of the CGST Act, which deals with evasion, applies equally to goods and services. He also relied upon **Coca Cola India Pvt. Ltd. v. CCE Pune, 2009 (242) ELT 168 (Bom.)** on this

issue.

QUESTIONS FOR CONSIDERATION

38. The contentions, including notes on submissions, of the learned counsel for the respective parties were duly considered and they raise several questions for the consideration of this Court. The said questions are as under:

(1) Whether Section 54(3)(ii) infringes Article 14 of the Constitution?

(2) Whether it is necessary to read the word "inputs" in Section 54(3)(ii) as encompassing both goods and services so as to ensure that the said provision is not struck down?

(3) Whether the words input services may be read into the word "inputs" by resorting to the interpretive principle of reading down the statute?

(4) Whether the words input services may be read into Section 54(3)(ii) as an exception to the general rule of *casus omissus*?

(5) Whether the proviso to Section 54(3) qualifies and curtails the

scope of the principal clause to the limited extent of specifying the two cases in which registered persons become eligible for a refund of the unutilised input tax credit?

(6) Whether sub-clause (ii) of the proviso merely stipulates the eligibility conditions for claiming a refund of the unutilised input tax credit or whether it also curtails the entitlement to refund to unutilised input tax credit from a particular source, namely, input goods and excludes input services?

(7) Whether the rule making power under Section 164 empowers the Central Government to make Rule 89(5) as amended?

(8) Whether Rule 89(5) of the CGST Rules, as amended, is *ultra vires* Section 54(3) of the CGST Act?

(9) Whether the definition of the term Net ITC, as contained in Rule 89(5), is liable to be read as encompassing both input goods and input services?

DISCUSSION AND ANALYSIS

THE VKC FOOTSTEPS JUDGMENT

39. The Gujarat High Court examined Section 54(3) and Rule

89(5) of the CGST Act and Rules, respectively, before concluding that Rule 89(5) is *ultra vires* Section 54(3). Paragraphs 23, 25-27 of the judgment are relevant and are set out below:

> *"From the conjoint reading of the provisions of Act and Rules, it appears that by prescribing the formula in Sub-rule 5 of Rule 89 of the CGST Rules, 2017 to exclude refund of tax paid on "input service" as part of the refund of unutilised input tax credit is contrary to the provisions of Sub-section 3 of Section 54 of the CGST Act, 2017 which provides for claim of refund of "any unutilised input tax credit". The word "input tax credit" is defined in Section 2(63) means the credit of input tax. The word "input tax" is defined in Section 2(62), whereas the word "input" is defined in Section 2(59) means any goods other than capital goods and "input service" as per Section 2(60) means any service used or intended to be used by a supplier. Whereas "input tax" as defined in Section 2(62) means the tax charged on any supply of goods or services or both made to any registered person. Thus "input" and "input service" are both part of the "input tax" and "input tax credit". Therefore, as per provision of sub-section 3 of Section 54 of the CGST Act, 2017, the legislature has provided that registered person may claim refund of "any unutilised input tax", therefore, by*

way of Rule 89(5) of the CGST Rules, 2017, such claim of the refund cannot be restricted only to "input" excluding the "input services" from the purview of "input tax credit". ***Moreover, clause (ii) of proviso to sub-section 3 of Section 54 also refers to both supply of goods or services and not only supply of goods as per amended Rule 89(5) of the CGST Rules, 2017.(emphasis added).***

25. We are of the opinion that Explanation (a) to Rule 89(5) which denies the refund of "unutilised input tax" paid on "input services" as part of "input tax credit" accumulated on account of inverted duty structure is ultra vires the provision of Section 54(3) of the CGST Act , 2017.

26. In view of the above, Explanation (a) to the Rule 89(5) is read down to the extent that Explanation (a) which defines "Net Input Tax Credit" means "input tax credit" only. The said explanation (a) to the provisions of Rule 89(5) of the CGST Rules is held to be contrary to the provisions of Section 54(3) of the CGST Act. In fact the Net ITC should mean "input tax credit" availed on "inputs" and "input services" as defined under the Act".

We observe that the proviso to Section 54(3) of the CGST Act and, more

significantly, its import and implications do not appear to have been taken into consideration in **VKC Footsteps** except for the brief reference in paragraph 23, which we have emphasised in bold font *supra.* In any event, we intend to independently analyse the relevant provisions before concluding as to whether we subscribe to the view in **VKC Footsteps.**

INTERPRETATION OF SECTION 54 AND RULE 89

40. We propose to first deal with the questions relating to the interpretation of Section 54 before dealing with the constitutional validity thereof. On the question as to whether Section 54 should be construed strictly or liberally or purposively, Mr.Shaffiq contended that a refund provision is akin to an exemption provision and therefore should be construed strictly. For this purpose, he relied upon the judgment in the case of **Dilip Kumar** as well as the recent judgment in the case of **Ramnath.** On the contrary, Mr.Ghosh contended that Section 54(3)(ii) is not an exemption provision and therefore there is no reason to apply the rule of strict construction. In our opinion, in connection with the interpretation of any statute and more so a tax statute, the first step in the interpretive process is to carefully examine the text of the statute while bearing in mind the context. In **Reading Law: The Interpretation of Legal Texts, Thomson**

West, 2012 Edition, Justice Antonin Scalia and Bryan Garner formulated the supremacy-of-text principle, which they define as under:

> "the words of a governing text are of paramount concern, and what they convey, in their context, is what the text means".

If such approach is adopted as regards Section 54 of the CGST Act, it is evident that Section 54 is a generic refund provision. Section 54(3) is specific to refund of unutilised input tax credit. The proviso thereto qualifies Section 54(3) by confining the benefit of refund to the two cases specified in sub clauses (i) and (ii). We propose to examine Section 54(3) from a fair reading perspective, i.e. by subjecting it to both a textual and contextual analysis. Both Mr.Parthasarathy and Mr.P.B.Harish contended that Section 54(3) quantifies the amount of input tax credit, which may be claimed by way of refund by the registered person. Because Section 54(3) uses the words "a registered person may claim refund of any unutilised input tax credit at the end of any tax period", the learned counsel contended that the entitlement to a refund of the entire unutilised input tax credit is recognized and provided for in Section 54(3). According to them, if the intention of Parliament was to curtail the quantity of unutilised input tax credit in respect of which a refund claim may be made, it would have been

indicated in Section 54(3) by qualifying the words used therein. However, no such qualification is contained therein. As regards the proviso thereto, according to the learned counsel, they set out the two cases in which a registered person may claim a refund of the unutilised input tax credit. The first of these cases relates to zero-rated supplies made without payment of tax. This case pertains to exporters. Even among exporters, only those who make zero-rated supplies without payment of tax by executing a bond or undertaking would be entitled to a refund under Section 54(3). The exporters who undertake supplies upon payment of tax can claim a refund under Section 54(1) but not under Section 54(3). The second case pertains to registered persons who accumulate input tax credit on account of the rate of tax on input goods being higher than the rate of tax on output supplies. As regards this class, the proviso sets out the eligibility condition. Once the said eligibility condition is satisfied by a registered person, such person is entitled to claim a refund of the entire unutilised input tax credit as per Section 54(3). To put it differently, the contention is that this proviso does not curtail the entitlement to the entire unutilised input tax credit provided the rate of tax on input goods procured by such registered person is higher than the rate of tax on the said registered person's output supplies.

41. Before embarking on an interpretation of the proviso to Section 54(3), it is apposite to consider the law on the scope and function of a proviso, which has been laid down in several judgments of the Hon'ble Supreme Court. In ***H.E.H. Nizam's Religious Endowment Trust v. CIT*, AIR 1966 SC 1007 (H.E.H. Nizam)**, it was held as under:

> 7. As has been pointed out by Craies in his book on *Statute Law*, 6th Edn., at p. 217, "The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it". The proviso to clause (i) excepts the two classes of income subject to the condition mentioned therein from the operation of the substantive clause. It comes into operation only when the said income is applied to religious or charitable purposes without the taxable territories. In that event, the Central Board of Revenue, by general or special order, may direct that it shall not be included in the total income. The proviso also throws light on the construction of the substantive part of clause (*i*) as the exception can be invoked only upon the application of the income to the said purposes outside the taxable territories. The application of the income *in presenti* or *in futuro* for purposes in or outside the taxable

territories, as the case may be, is the necessary condition for invoking either the substantive part of the clause or the proviso thereto."

As is evident from the above, in **H.E.H. Nizam,** the Supreme Court held that a proviso performs the function of qualifying the substantive clause. In **S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591(Sundaram Pillai),** the Supreme Court delineated the multiple roles that a proviso could play and held that a proviso could even acquire the tenor and colour of a substantive enactment. Paragraphs 27 and 43 of the said judgment are extracted below:

"**27.** The next question that arises for consideration is as to what is the scope of a proviso and what is the ambit of an Explanation either to a proviso or to any other statutory provision. We shall first take up the question of the nature, scope and extent of a proviso. The well established rule of interpretation of a proviso is that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be

torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment.

43. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:

(*1*) qualifying or excepting certain provisions from the ain enactment:

(*2*) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable:

(*3*) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(*4*) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.

The learned AGP Taxes contended that the proviso also curtails the quantity of unutilised input tax credit which would be liable to be refunded.

According to him, if Mr.Parthasarathy's contentions are accepted, a registered person who procures input goods at a rate of tax which is higher than the rate of tax on such person's output supply would be entitled to a refund on unutilised input tax credit arising not only out of procurement of input goods but also on the procurement of input supplies. On the other hand, a person who procures only input services would not be entitled to any refund of unutilised input tax credit. According to Mr.Shaffiq, such an interpretation is anomalous. He further contended that it would render the words "on account" in Section 54(3)(iii) as redundant. As regards the interpretation of the proviso, he had relied upon the judgments in **HEH Nizam,** which is extracted above, and **Kedarnath Jute Manufacturing Co. v. CTO, AIR 1966 SC 12** to contend that a proviso may perform the function of exempting, excluding or qualifying the enacting clause. The learned ASG relied upon the judgment of the Hon'ble Supreme Court in **Sundaram Pillai**, wherein it was held that a proviso could also perform the role of a substantive provision. In effect, the learned ASG contended that no limitation may be read into the scope of a proviso and that it should be interpreted based on the text of the proviso and its context. To the contrary, Mr. Sujit Ghosh contended that a proviso, as a rule, performs a qualifying

function by relying on **ICFAI.**

42. Keeping in mind the scope, function and role of a proviso as adumbrated above, we closely examined the text of Section 54(3)(ii) in order to test the tenability of the rival contentions. We find that Section 54(3) undoubtedly enables a registered person to claim refund of any unutilised input tax credit. However, the principal or enacting clause is qualified by the proviso which states that "provided that **no** refund of unutilised input tax credit shall be allowed in **cases other than**". Parliament has used a double negative in this proviso thereby making it abundantly clear that unless a registered person meets the requirements of clause (i) or (ii) of Sub-section 3, no refund would be allowed. On further examining sub-clause (ii), we find that it uses the phrase "where the credit accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies". If the interpretation canvassed by Mr.Parthasarathy and Mr.P.B.Harish is to be accepted, the words **"credit accumulated on account of "** would be rendered otiose or redundant, and the proviso would have to be recast as under by deleting the said words:

> Provided that no refund of unutilised input tax credit shall be allowed in cases other than-
>
> ....

(ii) where the rate of tax on inputs being higher than the rate of tax on output supplies....

While interpreting any statute, one of the cardinal rules of interpretation is that every word of the statute should be given meaning and one should not construe a statute in such a way as to render certain words redundant. As explained above, sub-clause (ii) would have merely stated "where the rate of tax on inputs being higher than the rate of tax on output supplies" and the words "credit has accumulated on account of" would not have been introduced if the intention was not to identify the source from which - i.e. input goods and the rate of tax thereon - unutilised input tax credit should accumulate for entitlement to refund, if the intention was to provide a refund of the entire unutilised input tax credit. Therefore, we are unable to countenance the contentions of Mr.Parthasarathy and Mr.P.B.Harish, in this regard, and we conclude that Section 54(3)(ii) qualifies the enacting clause by also limiting the source/type and, consequently, quantity of unutilised input tax credit in respect of which refund is permissible. Hence, the proviso to Section 54(3) does not merely set out the two cases in which registered persons become eligible for a refund of unutilised input tax credit. The proviso performs the larger function of also limiting the

entitlement of refund to credit that accumulates as a result of the rate of tax on input goods being higher than the rate of tax on output supplies.

43. Given the fact that we concluded that Section 54(3)(ii) enables a registered person to claim a refund of unutilised input tax credit only to the extent that such credit has accumulated on account of the rate of tax on input goods being higher than the rate of tax on output supplies, it remains to be considered whether Rule 89(5) is *ultra vires* the rule making power and Section 54(3). Keeping in mind that Section 164 confers power on the Central Government to frame rules for carrying out the provisions of the CGST Act and no fetters are discernible therein except that the rules should be in furtherance of the purposes of the CGST Act, as held by this Court in **P.R. Mani Electronics v. Union of India, W.P. No.8890 of 2020, Order dated 13.07.2020,** Rule 89(5) would be *intra vires* the CGST Act and the rule making power if it is in line with Section 54(3)(ii) and *ultra vires* both Sections 54(3)(ii) and 164 if it is not. Hence, that issue should be examined. We note that Section 54(1) empowers the prescription of the form and manner of a claim for refund and Section 54(4) contains procedural requirements as regards the application for refund. Rule 89 deals with applications for refund of tax, interest, penalty, fees or any other amount.

Sub-Rule 5 thereof was amended on two occasions. In the amended Rule 89(5), the expression “Net ITC” has been defined as meaning input tax credit availed on “inputs” during the relevant period. On the contrary, the expression Net ITC in Rule 89(5), as it stood between 01.07.2017 and 18.04.2018, defined the term the Net ITC as per the meaning in sub Rule 4 thereof. Sub Rule 4 defines Net ITC as input tax credit availed on "inputs” and “input services” during the relevant period.

44. When Rule 89(5), as it stands today, is analysed in the context of Section 54(3)(ii), it is clear that Net ITC has been re-defined in the amended Rule 89(5) so as to provide for a refund only on unutilised input tax credit that accumulates on account of input goods, whereas, as per the unamended Rule 89(5), Net ITC covered not only input tax credit availed on input goods but also on input services. In light of the conclusion that a refund is permitted only in respect of unutilised input tax credit that accrues or accumulates as a result of the higher rate of tax on input goods vis-a-vis output supplies, we are of the view that the amended Rule 89(5) is in conformity with the statute. On the other hand, the unamended Rule 89(5) exceeded the scope of Section 54(3)(ii) and extended the benefit of refund to

the credit that accumulates both on account of the rate of tax on "inputs" and "input services" being higher than the rate of tax on output supplies. Consequently, we conclude that Rule 89(5) of the CGST Rules, as amended, is *intra vires* both the general rule making power and Section 54(3) of the CGST Act. There is no dispute as regards the power to amend with retrospective effect either as such power is conferred under Section 164 of the CGST Act, albeit subject to the limitation that it cannot pre-date the date of entry into force of the CGST Act.

45. Mr.Parthasarathy also contended that the term Net ITC in the amended Rule 89(5) should be read as including both input goods and input services by resorting to reading down. In our view, Rule 89(5), as amended, is fully in line with Section 54(3)(ii). Therefore, there is no necessity to read into Rule 89(5). In fact, if the words input services are read into Rule 89(5), in our opinion, Rule 89(5) become *ultra vires* Section 54(3)(ii). This concludes our discussion and findings on the interpretation of Section 54(3). For all the above reasons, we are unable to subscribe to the conclusions in **VKC Footsteps.** In our view, the Gujarat High Court failed to take into consideration the scope, function and impact of the proviso to

Section 54(3).

THE CONSTITUTIONAL CHALLENGE

MEANING OF INPUTS

46. We now proceed to deal with the question pertaining to the constitutionality of Section 54(3)(ii). The contention of Mr.Sujit Ghosh was that the said section would infringe Article 14 of the Constitution unless the word “inputs”, as used therein, is read in such a manner as to include input services. This contention is premised on the ground that the classification of registered persons for purposes of entitlement to refund into two classes, namely, those who avail input tax credit on input goods and those who avail input tax credit on input services is an arbitrary and invidious classification. Mr. Ghosh contended that the word "inputs" in Section 54(3)(ii) should be read in its common parlance meaning so as to avert the eventuality of the provision being struck down as violative of Article 14. Although the word "input" is defined in Section 2(59) as "means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business", Mr. Ghosh contended that Section 2 opens with the words "unless the context otherwise requires" and, therefore, in the context of

Section 54(3)(ii), the word "inputs" should be understood as per its common parlance meaning. On the contrary, Mr.Shaffiq contended that terms defined in a statute should be construed per statutory definition and Mr. Srinivas contended that the trade parlance meaning and statutory definition correspond perfectly. The law on the subject throws considerable light on the tenability of the rival contentions and **Whirlpool Corporation** is a good place to start this enquiry given that it was the sheet anchor of Mr. Ghosh's contentions on this issue. In **Whirlpool Corporation,** it was held as under:

> **"25.**"Tribunal" has been defined under Section 2(1)(*x*) as under:
>
> "2. (1)(*x*) 'Tribunal' means the Registrar or, as the case may be, the High Court, before which the proceeding concerned is pending."
>
> This definition treats "High Court" and "Registrar" both as "Tribunal" for purposes of this Act.
>
> **28.** Now, the principle is that all statutory definitions have to be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or context. That is

why all definitions in statutes generally begin with the qualifying words, similar to the words used in the present case, namely "unless there is anything repugnant in the subject or context". Thus there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word had been used and that will be giving effect to the opening sentence in the definition section, namely "unless there is anything repugnant in the subject or context". In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words "under those circumstances". (see *Vanguard Fire and General Insurance Co. Ltd* . v. *Fraser & Ross*\ [AIR 1960 SC 971 : (1960) 3 SCR 857])

29. Before considering the contextual aspect of the definition of "Tribunal", we may first consider its ordinary and simple meaning. A bare look at the definition indicates that the High Court and the Registrar, on their own, are not "Tribunal". They become "Tribunal" if "the proceeding concerned" comes to be pending before either of them. In other words, if "the proceeding concerned" is pending before the High Court, it will be treated as "Tribunal". If, on

> the contrary, "the proceeding concerned" is pending before the Registrar, the latter will be treated as "Tribunal".
>
> **30..** Since "Tribunal" is defined in Section 2 which, in its opening part, uses the phrase "Unless the context otherwise requires", the definition, obviously, cannot be read in isolation. The phrase "Unless the context otherwise requires" is meant to prevent a person from falling into the whirlpool of "definitions" and not to look to other provisions of the Act which, necessarily, has to be done as the meaning ascribed to a "definition" can be adopted only if the context does not otherwise require."

47.Thus, it is clear that **Whirlpool Corporation** dealt with the Trade Marks Act, 1958, which defined the word "tribunal" expansively so as to cover both the "Registrar" and the "High Court" depending on context and the last sentence of paragraph 30 thereof cannot be construed as laying down a general proposition that one turns to the context first before examining the statutory definition. Another judgment that supports a contextual interpretation even in light of a statutory definition is **Vanguard Fire and General Insurance Co. Ltd. v. Fraser and Ross, AIR 1960 SC 971,** where it was held as under:

"6. The main basis of this contention is the definition of the word "insurer" in Section 2(9) of the Act. It is pointed out that that definition begins with the words "insurer means" and is therefore exhaustive. It may be accepted that generally the word "insurer" has been defined for the purposes of the Act to mean a person or body corporate etc. which is actually carrying on the business of insurance i.e. the business of effecting contracts of insurance of whatever kind they might be. But Section 2 begins with the words "in this Act, unless there is anything repugnant in the subject or context" and then come the various definition clauses of which (9) is one. It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statutes generally begin with the qualifying words similar to the words used in the present case, namely, unless there is anything repugnant in the subject or context. Therefore in finding out the meaning of the word "insurer" in various sections of the Act, the meaning to be ordinarily

given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word has been used and that will be giving effect to the opening sentence in the definition section, namely, unless there is anything repugnant in the subject or context. In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. Therefore, though ordinarily the word "insurer" as used in the Act would mean a person or body corporate actually carrying on the business of insurance it may be that in certain sections the word may have a somewhat different meaning."

48. By contrast, in the context of tax statutes, in **Bakelite Hylam v. CCE, 1998 5 SCC 621,** it was held as under:

7. The said finding recorded by the Tribunal has been assailed by Shri J. Vellapally, the learned Senior Counsel appearing for the appellant. Shri Vellapally has invoked the "common parlance test" and has submitted that in common parlance "Prepeg-F" cannot be regarded as cotton fabric. The learned counsel has placed reliance on the decision of this

Court in *Purewal Associates Ltd.* v. *CCE* [(1996) 10 SCC 752] . We do not find any substance in the said contention of Shri Vellapally. In *Purewal Associates Ltd.*[(1996) 10 SCC 752] this Court has taken note of the earlier decision in *Plasmac Machine Mfg. Co. (P) Ltd.* v. *CCE* [1991 Supp (1) SCC 57] wherein it was held that "where definition of a word has not been given, it must be construed in its popular sense". So also in *Indo International Industries* v. *CST* [(1981) 2 SCC 528 : 1981 SCC (Tax) 130] it has been held that: (SCC p. 530, para 4)

"If any term or expression has been defined in the enactment then it must be understood in the sense in which it is defined but in the absence of any definition being given in the enactment the meaning of the term in common parlance or commercial parlance has to be adopted."

In Item 19, the expression "cotton fabrics" has been defined to include "fabrics impregnated, coated or laminated with preparations of cellulose derivatives or of other artificial plastic materials". In view of the inclusive clause in the definition of "cotton fabrics" contained in Item 19 it cannot be said that "Prepeg-G" which is impregnated cotton fabric cannot be regarded as cotton fabric for the purpose of Item 19-III of the Tariff."

49. Likewise, in **Chiranjitlal Anand**, it was held as follows:

11. It is well-settled that in interpreting items in statutes like the Sales Tax Acts whose primary object is to raise revenue and for which

> purpose they classify diverse products, articles and substances, resort should be had not to the scientific and technical meaning of the terms or expressions used but to their popular meaning i.e. *the meaning attached to them by those dealing in them*. (emphasis supplied) If any term or expression has been defined in the enactment then it must be understood in the sense in which it is defined. But in the absence of any definition being given in the enactment, the meaning of the term in common parlance or commercial parlance has to be adopted. See the observations of this Court in *Indo International Industries* v. *CST* [(1981) 2 SCC 528 : 1981 SCC (Tax) 130 : (1981) 3 SCR 294] and also in the case of *His Majesty the King* v. *Planters Nut and Chocolate Co. Ltd.*[1951 CLR (Ex.) 122] (which decision was approved by this Court in *CST* v. *Jaswant Singh Charan Singh* [AIR 1967 SC 1454 : (1967) 2 SCR 720 : 19 STC 469]).

50.The principles that emerge from the judgments extracted above are that even in the context of non-tax legislation, while interpreting a defined term, the first port of call is the statutory definition and one turns to the trade or common parlance meaning if the context clearly points away from the statutory definition. In a tax statute context, the requirement to stay

true to the statutory definition is more compelling. The correct meaning of the word "inputs", as used in Section 54(3)(ii) of the CGST Act should be gleaned by applying the afore-stated principles. The text uses the word "inputs" and this word is defined in Section 2(59) as "any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business". Does the context indicate a departure from the meaning per definition and point toward adoption of the common parlance meaning? In our view, there are multiple factors that militate against reading the word "inputs" against the meaning per definition. The first is that the definition expressly excludes capital goods, whereas if the common parlance meaning, as advocated by Mr. Ghosh, is adopted, capital goods would be included and one would be drawing conclusions that are antithetical to the text. The second reason is that the immediate context, namely, Section 54 contains more than a few usages of the terms "inputs" and "input services" in other sub-sections. By way of illustration, reference may be made to Section 54(8)(a) which uses the words "inputs" and "input services" separately and distinctively in the context of refund of tax paid to exporters. Similarly, the Explanation to Section 54 uses the terms "inputs" and "input services" separately and distinctively, thereby indicating the legislative

intent to distinguish one from the other. Keeping in mind the aforesaid factors, we are unable to countenance Mr.Ghosh's submission that the word "inputs" should be read so as to include "input services" merely because the undefined word "output supplies" is used in Section 54(3)(ii). Hence, we conclude that both the statutory definition and the context point in the same direction, namely, that the word "inputs" encompasses all input goods, other than capital goods, and excludes input services.

NATURE OF REFUND

51. The other aspect to bear in mind before dealing with the validity of classification is the nature and character of input tax credit and the refund thereof. Both Mr.Ghosh and Mr.Parthasarathy contended that input tax credit is a vested right, whereas Mr.Shaffiq contended that input tax credit is a form of concession provided by the legislature and consequently, the availing of such concession is subject to statutory conditions. For this purpose, he relied upon the judgment in **Jeyam and ALD Automotive.** On close analysis, we find that a claim for input tax credit is in the nature of a set-off of tax liability by reckoning taxes paid on input goods and input services, and thereby reduces tax liability on output

supplies. Such provisions have been introduced to fulfil the object of eliminating cascading of taxes so as to ensure that double taxation is avoided. In **Jayam** and **ALD Automotive,** the availing of such input tax credit has been treated as a concession with the consequence that conditions precedent should be complied with strictly. While we are not called upon to decide on the nature of input tax credit, it has some bearing on the nature and character of a refund of unutilised input tax credit, which we turn to next. Mr.Shaffiq contended that a refund is in the nature of a reduction in tax and therefore is akin to a rebate or exemption or abatement. In support of this contention, he relied upon the judgments in **Dilip Kumar and Ramnath.** In **Dilip Kumar**, the Hon'ble Supreme Court was dealing with the interpretation of an exemption notification. In that context, the Hon'ble Supreme Court concluded that an exemption notification should be construed strictly and that any ambiguity should be decided in favour of the revenue. Paragraphs 53 and 66 are as under:

> **"53.** After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statute including, charging, computation and exemption clause (at the threshold

stage) should be interpreted strictly. Further, in case of ambiguity in charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State.

66. To sum up, we answer the reference holding as under:

66.1. Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

66.2. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue...."

52. In **Ramnath**, the said principle of strict interpretation was held as applicable to all rebates, incentives and concessions. Mr.Ghosh contends that the refund of input tax credit is not akin to an exemption or rebate. As compared to the availing of input tax credit, in our view, a refund of unutilised input tax credit would form a related but distinct category. It

cannot be equated with an exemption because it is not a provision that exempts a registered person from the payment of tax. Equally, it is not an incentive that is extended to a particular class of tax payer, such as an exporter, or to investments in particular regions of the country, so as to encourage particular forms of productive economic activities which are of paramount importance to the overall economy. A rebate has been defined as an abatement or discount or credit or a kind of repayment in **State of UP v. Jai Prakash Associates.** The refund of input tax credit cannot be equated with a discount or abatement either. In the context of a registered person being subject to an inverted duty structure and, therefore, not being in a position to set-off the entire input tax credit, instead of a set-off, Parliament has enabled a sub-class of such registered person to claim and receive a refund of unutilised input tax credit. This is clearly in the nature of a benefit or concession and cannot be equated with a refund claim for excessive taxes that were paid inadvertently or any other claim for a debt due to the registered person from the tax authorities. This form of refund can also be compared and contrasted with a claim for refund of excess taxes paid on account of the erroneous interpretation of applicable law or the declaration of a provision as unconstitutional. Those forms of refund claims were

discussed in the *locus classicus* on refund, **Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536.** Although there is a constitutional challenge in this case, the challenge is to a refund provision and this is not a refund claim arising out of a successful challenge to a provision under a tax statute that had imposed a liability. This issue can be approached from another perspective: would a registered person be entitled to such refund but for the statutory prescription in Section 54(3)(i) & (ii)? The answer is a resounding 'no'.

THE VALIDITY OF THE CLASSIFICATION

53. We now proceed to deal with the rival contentions on classification. Mr. Ghosh contended that a person who avails input services at a rate of tax that is higher than the rate of tax on output supplies is also entitled to and, therefore, accumulates input tax credit. In other words, there is no restriction when it comes to the accrual or accumulation of input tax credit. The differential treatment is limited to entitlement to refund. According to him, the Parliament/legislature is entitled to make a classification provided such classification is not arbitrary and bears a rational nexus to the object of the enactment, and the GST laws were

introduced so as to treat both goods and services alike and depart from the historical practice of treating goods and services differently. Mr.Ghosh contended that the charging provisions, the machinery provisions, the penal provisions, the enforcement provisions all apply equally to goods and services under the CGST Act. In fact, even the provisions related to input tax credit applies equally both to goods and services, and the differentiation only for purposes of refund of unutilised input tax credit violates Article 14. According to him, the classification for purposes of refund should be analysed by keeping in view this frame work. If so analysed, Mr.Ghosh contended that excluding registered persons who avail input services from the benefit of refund of unutilised input tax credit violates Article 14 of the Constitution.

54. On the contrary, both Mr.Shaffiq and Mr.Sankaranarayanan contended that Parliament has the right to make a classification and that a classification based on the distinction between goods and services is rational. Mr.Shaffiq admitted that the CGST Act was designed to consolidate the laws relating to tax on goods and services. However, he contended that the consolidation does not mean that the distinction between

goods and services has been obliterated. In support of this contention, he pointed out that both under Section 2 of the CGST Act and under Article 366 of the Constitution, goods and services are defined separately. He also relied upon various provisions of the CGST Act which underscore the fact that goods and services are treated separately. In particular, he referred to Sections 12 and 13 which pertain to the place of supply. He further contended that the burden of proof is on the person who assails the legislation by relying upon several judgments of the Hon'ble Supreme Court such as **State of West Bengal v. Anvar Ali, AIR 1952 SC 75.** In particular, Mr.Shaffiq contended that the selection of the subject of taxation is the essence of any tax legislation and any interference with that function would be an unwarranted curtailment of the power of taxation of Parliament.

55. Thus, the question that arises for consideration is whether the classification for purposes of refund is liable to be struck down as being in violation of Article 14. Before proceeding to analyse this issue, it is pertinent to bear in mind that the Court is required to begin with the presumption that the statute is constitutionally valid. No doubt, this a rebuttable presumption. One should also bear in mind that economic legislations are interpreted on a different benchmark especially when it

comes to classification. In **Federation of Hotel**, the Hon'ble Supreme Court held as under:

> **"46.** It is now well settled that though taxing laws are not outside Article 14, however, having regard to the wide variety of diverse economic criteria that go into the formulation of a fiscal policy legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc., for taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the allegations of a hostile, discriminatory treatment what is looked into is not its phraseology, but the real effect of its provisions. A legislature does not, as an old saying goes, have to tax everything in order to be able to tax something. If there is equality and uniformity within each group, the law would not be discriminatory. Decisions of this Court on the matter have permitted the legislatures to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes.
>
> **47.** But, with all this latitude certain irreducible desiderata of equality shall govern classifications for differential treatment in taxation laws as well. The classification must be rational and based on some

qualities and characteristics which are to be found in all the persons grouped together and absent in the others left out of the class. But this alone is not sufficient. Differentia must have a rational nexus with the object sought to be achieved by the law. The State, in the exercise of its governmental power, has, of necessity, to make laws operating differently in relation to different groups or classes of persons to attain certain ends and must, therefore, possess the power to distinguish and classify persons or things. It is also recognised that no precise or set formulae or doctrinaire tests or precise scientific principles of exclusion or inclusion are to be applied. The test could only be one of palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by experience.

48. Classifications based on differences in the value of articles or the economic superiority of the persons of incidence are well-recognised. A reasonable classification is one which includes all who are similarly situated and none who are not. In order to ascertain whether persons are similarly placed, one must look beyond the classification and to the purposes of the law."

56. Similarly, in **Lakshmi Devi**, in the context of the interpretation of Section 47-A of the Stamp Act, 1899, as applicable in Andhra Pradesh, the Supreme Court examined the law on classification in fiscal versus personal liberty proceedings, approved and endorsed Professor James Bradley Thayer's advocacy of judicial restraint in such matters, and held as under:

> "**72.** As regards fiscal or tax measures greater latitude is given to such statutes than to other statutes. Thus in the Constitution Bench decision of this Court in *R.K. Garg* v. *Union of India* [(1981) 4 SCC 675 : 1982 SCC (Tax) 30] this Court observed: (SCC pp. 690-91, para 8)
>
> "*8*. Another rule of equal importance is that *laws relating* to *economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc*. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to

be dealt with, greater play in the joints has to be allowed to the legislature.*The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved*. Nowhere has this admonition been more felicitously expressed than in *Morey* v. *Doud* [1 L Ed 2d 1485 : 354 US 457 (1957)] where Frankfurter, J. said in his inimitable style:

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

The court must always remember that 'legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not

abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry'; 'that exact wisdom and nice adaptation of remedy are not always possible' and that 'judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in *Secy. of Agriculture* v. *Central Roig Refining Co.*[94 L Ed 381 : 338 US 604 (1949)] , be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation

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

80. However, we find no paradox at all. As regards economic and other regulatory legislation judicial restraint must be observed by the court and greater latitude must be given to the legislature while adjudging the constitutionality of the statute because the court does not consist of economic or administrative experts. It has no expertise in these matters, and in this age of specialisation when policies have to be laid down with great care after consulting the specialists in the field, it will be wholly unwise for the court to encroach into the domain of the executive or legislative (*sic)* and try to enforce its own views and perceptions."

57. The law on classification in taxation disputes was also discussed in **Spences Hotel** and Mr. Ghosh placed considerable emphasis on this judgment, wherein it was held as under:

> **"22.** The intrinsic complexity of fiscal adjustments of diverse elements and wide discretion and latitude of the legislature in the matter of classification for taxation purposes was emphasised by Sabyasachi Mukharji, J. as he then was, in *State of Maharashtra* v. *Madhukar Balkrishna Badiya* [(1988) 4 SCC 290 : 1988 SCC (Tax) 506] which was a case under the Bombay Motor Vehicles Tax Act, 1958 (as amended by Maharashtra Act 14 of 1987). In para 14 of the report it was said : (SCC p. 298, para 14)
>
> "About discrimination it is well to remember that a taxation law cannot claim immunity from the equality clause in Article 14 of the Constitution. But in view of the intrinsic complexity of fiscal adjustments of diverse elements, a considerably wide discretion and latitude in the matter of classification for taxation purpose is permissible."
>
> **23.** From the propositions of law enunciated in the above cases by this Court, it is well settled that a taxation will be struck down as violative of Article 14 if there is no reasonable basis behind the classification made by it, or if the same class of property, similarly

situated, is subjected to unequal taxation as was held in *S.K. Dutta, ITO* v. *Lawrence Singh Ingty* [AIR 1968 SC 658, 661 : (1968) 2 SCR 165 : 68 ITR 272] . If there is no reason for the classification then also the law will be struck down. However, as was held in *Kunnathat Thathunni Moopil Nair* v. *State of Kerala* [(1961) 3 SCR 77, 90-92 : AIR 1961 SC 552] and *State of A.P.* v. *Nalla Raja Reddy* [AIR 1967 SC 1458 : (1967) 3 SCR 28] , if the taxation imposes a similar burden on everyone with reference to that particular kind and extent of property, on the same basis of taxation, the law shall not be open to attack on the ground that the result of the taxation is to impose unequal burdens on different persons. It was held in *Steelworth Ltd.* v. *State of Assam* [1962 Supp 2 SCR 589] , that in law of taxation of income it is competent for the legislature to graduate the rate of tax according to the ability to pay. In *Ganga Sugar Co. Ltd.*v. *State of U.P.* [(1980) 1 SCC 223 : 1980 SCC (Tax) 90 : AIR 1980 SC 286 : (1980) 1 SCR 769] also it has been held that in the matter of taxation laws the court permits a greater latitude to the discretion of the legislature and in *Khyerbari Tea Co.* v. *State of Assam* [AIR 1964 SC 925, 941 : (1964) 2 SCA 319] it has been held that in tax matters the State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so

reasonably. In *Twyford Tea Co.* v. *State of Kerala* [(1970) 1 SCC 189 : (1970) 3 SCR 383] it has been observed that when a statute divides the objects of tax into groups or categories, so long as there is equality and uniformity within each group, the tax cannot be attacked as violative of Article 14, although due to fortuitous circumstances or a particular situation some included within a group may get some advantage over others, provided of course they are not sought out for special treatment. It has repeatedly been held, for example, in *Khyerbari Tea Co.* [AIR 1964 SC 925, 941 : (1964) 2 SCA 319], *Gopal Narain* v. *State of U.P.* [AIR 1964 SC 370, 375 : (1964) 4 SCR 869 : 1964 All LJ 479] and *Steelworth* v. *State of Assam*[1962 Supp 2 SCR 589] and *V. Venugopala Ravi Varma* v. *Union of India* [(1969) 1 SCC 681 : AIR 1969 SC 1094 : (1969) 3 SCR 827] that as to what articles should be taxed is a question of policy and there cannot be any complaint merely because the legislature has decided to tax certain articles and not others. In *D.S. Nakara* v. *Union of India* [(1983) 1 SCC 305 : 1983 SCC (L&S) 145] , Desai, J. even expressed that too microscopic a classification may also be violative of Article 14. It was reiterated in *Bank of Baroda* v. *Rednam Nagachaya Devi* [(1989) 4 SCC 470] that the burden is always on the person alleging the violation of Article 14 of the

Constitution of India to raise specific pleas and grounds and to prove it.

24. Whether a particular tax is discriminatory or not must necessarily be considered in light of the nature and incidence of that particular tax and cannot be judged by what has been held in the context of other taxes except the general propositions. The precedents relating to property taxes such as land tax, building tax, plantation tax, and even income tax or a service tax will not be of direct relevance to a luxury tax, as it is neither a property tax, nor an income tax but a tax on the provision for luxury. In case of tax on provision for luxury different aspects peculiar to the tax have to be borne in mind. The system of taxation has changed a great deal from Kautilya to Kaldor and even thereafter. The history of taxation is one of evolution as is the case in all human affairs. Its progress is one of constant growth and development in keeping with the advancing economic and social conditions; and the fiscal intelligence of the State has been advancing concomitantly, subjecting by new means and methods hitherto untaxed property, income, service and provisions to taxation. With the change of scientific, commercial and economic conditions and ways of life new species of property, both tangible and intangible gaining enormous values have come into existence and

new means of reaching and subjecting the same to contribute towards public finance are being developed, perfected and put into practical operation by the legislatures and courts of this country, of course within constitutional limitations. The ability or capacity to pay has no doubt been regarded as the test in determining the justness or equality of taxation. It is the goal towards which the system has been, as it must be, steadily working. The equality, justness and fairness of this ideal is realised when one reflects upon the vast wealth accumulated by the advantaged ones but not by the people in general. The idea of distributive justice is more or less intuitive in this regard. This, however, has to harmonise well with a proportional system of taxation, that is to say, a tax at a fixed and uniform rate in proportion to the taxable event, a measure of providing air-conditioned space. In possible cases of simple space taxation or pollution taxation courts may be a little embarrassed in attempting to apply the principle of ability or capacity to pay. What, exactly is meant by equality in taxation may, therefore, have to be looked at from different angles in different kinds of taxes. This reminds us what John Stuart Mill said in Chapter V of *Utilitarianism*:

"Some people may think that they have rational insight into the truth of the proposition that men ought to be

> taxed equally, others that they have such insight into truth of the proposition that men ought to be taxed in proportion to what they earn, others that they have rational insight into the truth of the proposition that men ought to be taxed more than in proportion to what they earn. Can they be sure that in thinking this, they are not simply being influenced by the imaginative and quasi-aesthetic appeal of making the amount of payments proportionate to the number of people, or making it proportionate to their incomes?"

58. Upon considering the rival contentions on this issue, we note the following features of input tax credit and its refund:

(i) Registered persons who utilise input services, in their output supplies, are permitted to avail input tax credit, which is reflected in their ledger.

(ii) The unutilised input tax credit does not lapse if refund is not granted. However, it is possible that it may have to be written down on account of applicable accounting standards if the probability of utilization is low.

(iii) The differentiation between input goods and input services is only with regard to entitlement to refund. Section 54(3)(ii), as interpreted by

us, limits the entitlement to refund to the credit that accumulates on account of the rate of tax on input goods being higher than the rate of tax on output supplies.

(iv) *Inter se* registered persons who avail input services, the treatment is uniform as also *inter se* registered persons who procure input goods.

59. It should also be borne in mind that the refund of unutilised input tax credit entails the outflow of cash from the Government's coffers. We concluded earlier that a right of refund is purely statutory and, therefore, cannot be availed of except strictly in accordance with the conditions prescribed for the same. Mr.Shaffiq had relied upon the judgment in **Satnam Overseas Exports** and, in particular, paragraphs 60 & 61 thereof, wherein the court held that the right to refund is a statutory right and that the legislature may decide to include or omit classes of persons who would be entitled to such refund. Paragraph 60 of **Satnam Overseas Exports** is as follows:

> "60. We do not also find any force in the contention of Mr Chidambaram that in not granting refund of purchase tax only in regard to three goods —

> paddy, cotton and oilseeds — there is violation of Article 14 of the Constitution. It is a settled proposition of law that in the matter of taxation, the legislature has greater latitude to give effect to its policy of raising revenue and for that purpose selecting the goods for taxing. The classification of goods based on the policy of taxing some goods and leaving others outside the net of taxation cannot be assailed as violative of Article 14 of the Constitution. (See *Steelworth Ltd.*v. *State of Assam*[1962 Supp (2) SCR 589 : (1962) 13 STC 233] and *Gopal Narain* v. *State of U.P.*[AIR 1964 SC 370 : (1964) 4 SCR 869])"

60. In the case at hand also, we find that there is a classification of sources of unutilised input tax credit into sources that give rise to a right to refund, i.e. input goods, and those that do not, i.e. input services. As a corollary, registered persons may be entitled to full, partial or nil refund as regards unutilised input tax credit accumulating on account of being subject to an inverted duty structure. As correctly contended by Mr.Shaffiq, the latitude to make classification in matters related to taxation is wider than in other forms of legislation. This position is clear from judgments such as **Federation of Hotel** as well as **Ambika Mills.** In fact, in **Ambika Mills**,

the Hon'ble Supreme Court held that discrimination as between large and small is permissible so as to carry out reforms on a step-by-step basis by adopting a piece-meal approach. In the context of the CGST Act, we note that the legislation is intended to consolidate the indirect taxes on goods and services under a common umbrella. There is no doubt that the object and purpose of the present GST laws is to avoid the cascading of taxes and to impose a tax on consumption, be it goods or services. Thus, the long term objective appears to be to treat goods and services, as far as possible, similarly. Nonetheless, it must be borne in mind that this is an evolutionary process. By way of illustration, we may draw reference to the fact that the concept of input tax credit was not originally available under sales tax law and central excise law. It was first introduced in the form of MODVAT credit. MODVAT credit was initially available only in respect of goods. After the introduction of service tax through the Finance Act, CENVAT credit was introduced and made available both in respect of goods and services. However, refund of unutilised input tax credit was not provided. Thereafter, the GST laws have been introduced which enable registered persons to avail input tax credit both on goods and services but there are restrictions as regards refund. When viewed objectively and holistically, we

find that, under the GST laws, goods and services are treated similarly in certain respects but differently in other respects. Even with regard to rate of tax, almost all services attract a uniform rate of 18%, whereas goods are taxed at rates that vary considerably.

61. The subject matter of controversy is the entitlement to refund of unutilised input tax credit and not the availing of input tax credit. Under Section 54(3)(ii), Parliament has provided the right of refund only in respect of unutilised credit that accumulates on account of the rate of tax on input goods being higher than the rate of tax on output supplies. Goods and services have been treated differently from time immemorial, as reflected in the use of the expressions, *quantum valebant,* as regards the measure of payment for goods, and *quantum meruit,* as regards the measure of payment for services, supplied non-gratuitously and without a formal contract. While there has been a legislative trend towards a more uniform treatment as between goods and services, the distinction has certainly not been obliterated as is evident on perusal of the CGST Act, including provisions such as Sections 12 & 13, etc., which are specifically targeted at goods and services. Keeping in mind the following factors: the inherent differences

between goods and services, notwithstanding the trend towards similar treatment; the subject matter of classification, namely, curtailment of entitlement to refund of input tax credit to credit accumulated from the procurement of input goods; the equal treatment meted out to registered persons who avail input services *inter se* and those who procure input goods *inter se;* the wide Parliamentary latitude as regards classification *qua* tax and economic legislations, which is recognised and affirmed by the Supreme Court; and the nature and character of refund as a creation of statute and subject to statutory eligibility conditions, we are unable to countenance the contention of Mr.Ghosh that the non-conferment of the right of refund to the unutilised input tax credit from the procurement of input services violates Article 14. On the contrary, we conclude that the classification is valid, non-arbitrary and far from invidious.

62. Given the fact that we have concluded that Section 54(3)(ii), on a plain reading, does not violate Article 14, it is not necessary to draw definitive conclusions on the scope of reading down or to examine if the *casus omissus* rule should be deviated from in this case. Nonetheless, extensive submissions were advanced as regards reading down. While

Mr.Ghosh contended that the principle of reading down may be resorted to so as to read the word input services into Section 54(3)(ii) by referring to judgments such as **C.B. Gautam**, Mr.Shaffiq contended that reading down may be resorted to only to curtail the scope of a provision and not to expand it. Indeed, he submitted that reading down does not mean reading up. For this proposition, he referred to the judgment in **V.R.Kapur** as well as the judgment in **Cellular Operators Association.** The ambit of reading down and the exceptions to the *casus omissus* rule would have to await an appropriate case that warrants a finding on these issues.

CONCLUSIONS

63. Thus, we arrive at the following conclusions:

(1) Section 54(3)(ii) does not infringe Article 14.

(2) Refund is a statutory right and the extension of the benefit of refund only to the unutilised credit that accumulates on account of the rate of tax on input goods being higher than the rate of tax on output supplies by excluding unutilised input tax credit that accumulated on account of input services is a valid classification and a valid exercise of legislative power.

(3) Therefore, there is no necessity to adopt the interpretive device of reading down so as to save the constitutionality of Section 54(3)(ii).

(4) Section 54(3)(ii) curtails a refund claim to the unutilised credit that accumulates only on account of the rate of tax on input goods being higher than the rate of tax on output supplies. In other words, it qualifies and curtails not only the class of registered persons who are entitled to refund but also the imposes a source-based restriction on refund entitlement and, consequently, the quantum thereof.

(5) As a corollary, Rule 89(5) of the CGST Rules, as amended, is in conformity with Section 54(3)(ii). Consequently, it is not necessary to interpret Rule 89(5) and, in particular, the definition of Net ITC therein so as to include the words input services.

64. In view of the aforesaid analysis and discussions we hold as follows:

(i) All the writ petitions challenging the constitutional validity of Section 54(3)(ii) are dismissed.

(ii) All the writ petitions challenging the validity of Rule 89(5) of the CGST Rules on the ground that it is *ultra vires* Section 54(3)(ii) of the CGST Act and/or the Constitution are dismissed.

(iii) Consequently, all the writ petitions for a mandamus to direct the refund claims to be processed are dismissed.

(iv) Hence, all the connected miscellaneous petitions are closed. There will be no order as to costs in the facts and circumstances.

(A.P.S.,C.J.) **(S.K.R.,J.)**
21.09.2020

Index :Yes
Internet :Yes
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THE HON'BLE CHIEF JUSTICE

and

SENTHILKUMAR RAMAMOORTHY J.,

rrg

Pre-Delivery Common Order in
W.P.Nos.8596, 8597, 8602, 8603, 8605, 8608, 14799, 21432, 32308, 32311, 32314, 32316, 32317, 32327, 34219 and 34221 of 2019 and 12028, 12037, 12040, 12041 and 12042 of 2020