IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 5758 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 5759 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 5760 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 5762 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA **Sd/-**
and
HONOURABLE MR.JUSTICE A.C.RAO **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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M/S SIDDHARTH ENTERPRISES THROUGH PARTNER MAHESH LILADHAR TIBDEWAL
Versus
THE NODAL OFFICER

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Appearance:
MR. VINAY SHRAFF WITH MR. VISHAL J. DAVE WITH MR. NIPUM SINGHVI for the Petitioner(s)No.1
MR SOAHAM JOSHI, AGP for the Respondent(s)No.2
NOTICE SERVED BY DS for the Respondent(s)No.1,3

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR.JUSTICE A.C. RAO

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Date : 06/09/2019

COMMON CAV JUDGMENT
(PER: HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. Since the issues raised in all the captioned writ-applications are the same, those were heard analogously and are being disposed of by this common judgment and order.

2. RULE returnable forthwith in all the captioned writ-applications. Mr.Soaham Joshi, the learned AGP waives service of notice of rule for and on behalf of the respondents nos.1 and 2 respectively.

3. For the sake of convenience, the Special Civil Application No.5758 of 2019 is treated as the lead matter. By this writ-application under Article 226 of the Constitution of India, the writ-applicant, a partnership firm, has prayed for the following reliefs :

> *"(a) Your Lordships may be pleased to issue writ of mandamus and/or any other appropriate writ(s) to allow filing of declaration in form GST Tran-1 and GST Tran-2, to enable it to claim transitional credit of eligible duties in respect of inputs held in stock on the appointed day in terms of Section 140(3) of the Central Goods and Services Tax Act, 2017;*
>
> *(b) Your Lordships may be pleased to issue writ of declaration and/or any other appropriate writ(s) for declaration of the due date contemplated under Rule 117 of the CGST Rules to claim the transitional credit as being*

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procedural in nature and thus merely directory and not a mandatory provision;

(c) Your Lordships may be pleased to grant ad-interim relief with respect to prayer under Para (a) and Para (b) above;

(d) Your Lordships may be pleased to award costs of and incidental to this application be paid by the respondents;

(e) Your Lordships may be pleased to issue order(s), direction(s), writ(s) or any other relief(s) as this Hon'ble Court deems fit and proper in the facts and circumstances of the case and in the interest of justice;"

4. The writ-applicant is a partnership firm having its registered office at Bharuch, State of Gujarat. The writ-applicant is in the business of import-export and distributor of branded housewares registered under the CGST Act vide registration bearing No.GSTIN24ABJFS7809M1ZL

5. It appears from the materials on record that the writ-application has been filed seeking appropriate writ, order or direction to the respondents for being permitted to file declaration in the form GST TRAN-1 and GST TRAN-2 respectively to enable the writ-applicants to claim transitional credit of the eligible duties in respect of the inputs held in the stock on the appointed day in terms of Section 140(3) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as, 'the Act') read with Rule 117 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as, 'the Rules').

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6. It is the case of the writ-applicants that the declaration in the form GST TRAN-1 could not be filed on account of the technical glitches in terms of poor net connectivity and other technical difficulties on the common portal. The writ-applicants, in the alternative, have prayed for a declaration that the due date contemplated under Rule 117 of the Rules to claim transitional credit is procedural in nature, and thus, merely directory and not a mandatory provision.

SUBMISSIONS ON BEHALF OF THE WRIT-APPLICANTS :

7. Mr.Shraff, the learned counsel appearing with Mr.Dave for the writ-applicants, vehemently submitted that when the Indirect Tax regime transitioned from the Central Excise regime to the Goods and Services Tax regime, the CGST Act, 2017, allowed the carry forward of the CENVAT credit on the duty paid stock on the appointed day, i.e. 1st July 2017.

8. It is submitted that the CGST was payable on such duty paid stock and, therefore, the credit was allowed because the intention of the Government was not to collect tax twice on the same goods. It is pointed out that in such cases, it was provided that the credit of the duty/tax paid earlier would be admissible as credit.

9. The learned counsel submitted that as his clients were not able to file the form GST TRAN-1 within the date specified, i.e. 27th December 2017, on account of the technical difficulties, they had to physically lodge their claim of transitional credit on

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stock in the form GST TRAN-1 and GST TRAN-2 respectively with their Jurisdictional Officer.

10. The learned counsel submitted that his clients also met the Jurisdictional Officer time to time and also addressed various letters to the Nodal Officer and the Jurisdictional Officer for being allowed to file on-line form GST TRAN-1 and GST TRAN-2 respectively in terms of the decision of the Goods and Services Council and the Circular No.39/13/2018-GST dated 3rd April 2018.

11. The learned counsel pointed out that his clients also requested that they be allowed to file the above referred forms in terms of the Notification No.48/2018-C.T. dated 10th September 2018 read with Order No.01/2019-GST dated 31st January 2019 which extended the period for submitting declaration in the form GST TRAN-1 till 31st March 2019 for all those tax payers who could not submit the said declaration by the due date on account of the technical difficulties on the common portal.

12. The learned counsel submitted that the Jurisdictional Officer of his client twice addressed a communication in writing to the Nodal Officer recommending the case of the writ-applicants for being allowed to file the form GST TRAN-1 and GST TRAN-2 respectively. However, the Jurisdictional Officer has not received any official communication till date from the Nodal Officer neither denying nor allowing to file the above referred forms. However, the office of the Nodal Officer informed that the writ-applicants cannot be permitted to file the form GST TRAN-1 because as per the GST System Logs, the tax payer has neither

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tried for saving/submitting or filing the form GST TRAN-1. Mr.Shraff, the learned counsel pointed out that the very same stance is reflected in the affidavit-in-reply filed on behalf of the respondent no.2.

13. The learned counsel submitted that without giving any opportunity of hearing to his clients, the office of the Nodal Officer reached to the conclusion that the writ-applicants had neither tried for saving/submitting or filing the form GST TRAN-1 as per the GST System Logs.

14. The learned counsel submitted that this could be termed as violative of the principles of natural justice. The learned counsel also submitted that in the absence of the meaning of the phrase "technical difficulties on the common portal" in the CGST Act or Rules, the same should be given a liberal interpretation because it is a settled principle of law that an interpretation unduly restricting the scope of a beneficial provision should be avoided so that it may not take away with one hand what the policy gives with the other.

15. The learned counsel, in support of his submissions, has placed strong reliance on the decision of the Supreme Court in the case of Union of India v. Suksha International & Nutan Gems and another, 1989 (39) ELT 503 (SC) [para-9].

16. The learned counsel, in the last, submitted that the technology has been added to the system for the benefit and convenience of the tax payers but it should not be subservient to the purpose and hence the impediments, if any, should not make the writ-applicants servants of the technology.

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17. In such circumstances referred to above, the learned counsel prays that there being merit in all the writ-applications, those be allowed and the reliefs as prayed for be granted.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS :

18. Mr.Soaham Joshi, the learned AGP, has vehemently opposed all the writ-applications. Mr.Joshi submitted that none of the grievances redressed by the writ-applicants are tenable in law. At the same time, Mr.Joshi fairly submitted that the Jurisdictional Officer, Bharuch, did bring to the notice of the Nodal Officer about the various problems and difficulties faced by the tax payers. Mr.Joshi submitted that the role of the Nodal Officer is to collect all such complaint and grievances of the tax payers across the State and forward them to the GSTM and the GSTM, upon verification, would further forward the grievances to the IT Redressal Grievance Committee. Mr.Joshi submitted that in the case on hand the Nodal Officer had acted promptly and had also forwarded the grievances of the tax payers to the GSTM. Mr.Joshi placed strong reliance on the following averments made in the affidavit-in-reply filed on behalf of the respondents.

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> *"8. It is respectfully submitted that the petitioner has annexed various articles from various websites such as business standard, financial express which are of the year 2017. In light of the same it is respectfully submitted that, these articles are secondary evidence in nature under the Indian Evidence Act. Therefore, reliance placed upon these articles can be taken into consideration only when there is*

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no primary evidence available. It is respectfully submitted that, the petitioner has further annexed the minutes of the 26th GST Council meetings held on 10.03.2018, the same is annexed from page 50 to the memorandum of the application and upon perusal of the agenda as mentioned at page 50 of the 26th GST Council meeting agenda 7 reads as under:

> *"Agenda 7: Grievance Redressal Mechanism in GST Regime in light of recent judgments of Hon'ble High Court of Allahabad and Mumbai."*

In light of the same it is respectfully submitted that the agenda approved the setting up of the Grievance Redressal Committee and further the agenda also approved that instead of setting up new Grievance Redressal Committee the GIC shall act as the IT Grievance Redressal Committee.

9. It is respectfully submitted that, the nodal officer had forwarded the grievance of the petitioner to GSTN and the case of the petitioners were considered by the 33rd GST Council meeting dated 20.02.2019.

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10. It is respectfully submitted that the petitioner has placed reliance upon two decisions of the Hon'ble High Court of Allahabad and Hon'ble High Court of Mumbai which is averred in paragraph 2.14 and paragraph 2.15 to the memorandum of application. In light of the same upon reading the cause title of the case the respondent was the Union of India and in the present case the petitioner has not joined the Union of India as party respondent.

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11. It is respectfully submitted that, upon perusal of the 33rd GST Council meeting the said report contains 195 pages and agenda item 4 reads as decisions/ recommendations of the 4th I.T. Grievance Redressal Committee for information of the council, which is at page no.104 of the report and agenda item on GST Tran-1 cases were discussed and decided on 12/02/2019. The Hon'ble Court may be please to consider the submission made at the time of argument as far as the said report is concerned.

12. It is also respectfully submitted that, the petitioner has not joined GSTN nor the I.T. Grievance Redressal Committee as party respondent and therefore, the petitioner suffices of lack of non-joinder/mis-joinder of parties."

19. In such circumstances referred to above, Mr.Joshi prays that there being no merit in the writ-applications, those be rejected.

सत्यमेव जयते
THE HIGH COURT OF GUJARAT

20. Having heard the learned counsel appearing for the parties and having gone through the materials on record, we would like to address ourselves on the following aspects :

(1) Section 140(3) of the CGST Act provides for a substantive right which cannot be curtailed or defeated on account of the procedural lapses.

(2) The entitlement of the credit of carry forward of the eligible duties is a vested right.

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(3) The rights accrued under the existing law have been saved by the CGST Act.

(4) The right to carry forward the CENVAT credit is a constitutional right.

(5) It is arbitrary, irrational and unreasonable to discriminate in terms of the time limit to allow the availment of the input tax credit with respect to the purchase of the goods and services made in the pre-GST regime and post-GST regime and the same could be termed as violative of Article 14 of the Constitution of India.

(6) The doctrine of legitimate expectation also could be said to be violated.

(7) By not allowing the right to carry forward the CENVAT credit for not being able to file the form GST TRAN-1 within the due date would definitely have a serious impact on the working capital of the writ-applicants and such action could be termed as violative of Article 19(1)(g) of the Constitution of India.

(8) The liability to pay GST on sale of stock carried forward from the previous tax regime without corresponding input tax credit would lead to double taxation on the same subject matter.

(9) The action could be also termed as violative of Article 300A of the Constitution of India.

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ANALYSIS :

21. Section 140(3) of the CGST Act allows carry forward of the eligible duties in respect of the inputs held in stock subject to the fulfillment of conditions (i) to (v) as mentioned therein. Section 140(3) of the CGST Act is a complete Code in itself and the substantive right conferred by the Act cannot be curtailed by way of rules.

22. In the aforesaid context, we may refer to the following decisions :

(1) The Madras High Court, in the case of Tara Exports v. Union of India, reported in 2019 (20) G.S.T.L. 321 (Madras), has held as under :

> *"8. GST is a new progressive levy. One of the progressive ideal of GST is to avoid cascading taxes. GST Laws contemplate seamless flow of tax cred its on all eligible inputs. The input tax credits in TRAN-1 are the credits legitimately accrued in the GST transition. The due date contemplated under the laws to claim the transitional credit is procedural in nature. In view of the GST regime and the IT platform being new, it may not be justifiable to expect the users to back up digital evidences. Even under the old taxation laws, it is a settled legal position that substantive input credits cannot be denied or altered on account of procedural grounds."*

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(2) The Supreme Court, in the case of Union of India v. Suksha International & Nutan Gems & Anr., reported in 1989 (39) E.L.T. 503 (S.C.), has held that an interpretation unduly restricting the scope of a beneficial provision should be avoided so that it may not take away with one hand what the policy gives with the other. We may quote the relevant paragraph 9 of the judgment thus :

> *"9. We have considered the rival contentions on the point. Para 185(4) was intended to provide certain incentives to the Export Houses which, upon grant of Imprest-Licences, fulfill their countervailing obligations in the matter of export commitments. The provision is a beneficial one. Clauses (4) and (7), no doubt, on their plain wording present certain constructional difficulties and the view sought to be put across by Shri Subba Rao for the appellants, on the plain language of Clause (7), is not without possibilities. However, the basis of a harmonious construction which commended itself to the High Court in other similar cases appears to us to advance and promote the objects of the policy in paragraph 185(4) and is, at all events, not an unreasonable view to take of the matter. In so me of these cases this Court has declined to interfere with this interpretation by rejecting petitions for special leave. Acceptance of the interpretation suggested by Shri Subba Rao would, in our opinion, unduly restrict the scope of the beneficial provision and, in many instances which would*

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otherwise fall within the beneficial scope of the policy in para 185(4), take away with one hand what the policy gives with the other. We think we should accept the submissions of Shri Harish Salve which is consistent with the view taken of the matter by the High Court in other cases and hold that the conditions in para 185(4) of the policy would not be attracted to the case of Export Houses which are granted Imprest Licences.

Accordingly we hold and answer contention (a) against the appellants."

(3) The Supreme Court, in the case of Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner, reported in 1991 (55) E.L.T. 437 (S.C.), has held that the mere fact that a condition is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It would be erroneous to attach equal importance to the non-observance of all the conditions irrespective of the purposes they were intended to serve. We may quote the relevant paragraph 11 of the judgment thus :

"11. We have given our careful consideration to these submissions. We are afraid the stand of the Revenue suffers from certain basic fallacies, besides being wholly technical. In Kedarnath's case, the question for

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consideration was whether the requirement of the declaration under the proviso to Section 5(2)(a)(ii) of the Bengal Finance (Sales-tax) Act, 1941, could be established by evidence aliunde. The court said that the intention of the Legislature was to grant exemption only upon the satisfaction of the substantive condition of the provision and the condition in the proviso was held to be of substance embodying considerations of policy. Shri Narasimha Murthy would say the position in the present case was no different. He says that the notification of 11th August, 1975 was statutory in character and the condition as to 'prior-permission' for adjustment stipulated therein must also be held to be statutory. Such a condition must, says counsel, be equated with the requirement of production of the declaration form in Kedarnath's case and thus understood the same consequences should ensue for the non-compliance. Shri Narasimhamurthy says that there was no way out of this situation and no adjustment was permissible, whatever be the other remedies of the appellant. There is a fallacy in the emphasis of this argument. The consequence which Shri Narasimha Murthy suggests should flow from the non-compliance would, indeed, be the result if the condition was a substantive one and one fundamental to the policy underlying the exemption. Its stringency and mandatory nature must be justified by the purpose intended to be served. The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be

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substantive , mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve.

In Kedarnath's case itself this Court pointed but that the stringency of the provisions and the mandatory character imparted to them were matters of important policy. The Court observed:

> *"...The object of Section 5(2)(a)(ii) of the Act and the rules made thereunder is self-evident. While they are obviously intended to give exemption to a dealer in respect of sales to registered dealers of specified classes of goods, it seeks also to prevent fraud and collusion in an attempt to evade tax. In the nature of things, in view of innumerable transactions that may be entered into between dealers, it will well nigh be impossible for the taxing authorities to ascertain in each case whether a dealer has sold the specified goods to another for the purposes mentioned in the section.Therefore, presumably to achieve the two fold object, namely, prevention of fraud and facilitating administrative efficiency, the exemption given is made subject to a condition that the person*

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claiming the exemption shall furnish a declaration form in the manner prescribed under the section. The liberal construction suggested will facilitate the commission of fraud and introduce administrative inconveniences, both of which the provisions of the said clause seek to avoid." (See : [1965] 3 SCR 626)

Such is not the scope or intendment of the provisions concerned here. The main exemption is under the 1969 notification. The subsequent notification which contain condition of prior-permission clearly envisages a procedure to give effect to the exemption. A distinction between the provisions of statute which are of substantive character and were built-in with certain specific objectives of policy on the one hand and those which are merely procedural and technical in their nature on the other must be kept clearly distinguished. What we have here is a pure technicality. Clause 3 of the notification leaves no discretion to the Deputy Commissioner to refuse the permission if the conditions are satisfied. The words are that he "will grant". There is no dispute that appellant had satisfied these conditions. Yet the permission was withheld-not for any valid and substantial reason but owing to certain extraneous things concerning some inter-depart-mental issues. Appellant had nothing to do with those issues. Appellant is now told "we are sorry. We should have given you the permission But now that the period is over, nothing can be done". The

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answer to this is in the words of Lord Denning: "Now I know that a public authority can not be estopped from doing its public duty, but I do think it can be estopped from relying on a technicality and this is a technicality." (See: Wells v. Minister of Housing and Local Government [1967] 1WLR 1000.

Francis Bennion in his "Statutory Interpretation", 1984 edition, says at page 683:

> *"Unnecessary technicality: Modern courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfilment of the purposes of the legislation.""*

(4) The Supreme Court, in the case of State of Mysore and Ors. v. Mallick Hashim & Co., reported in AlR 1972 SC 1449, has held that no conditions could be imposed which destroy the right to a refund which is otherwise absolute. The conditions authorised are conditions which regulate the refund and not conditions which result in the extinguishment of the right to a refund which the Legislature has created under the proviso. We may quote the relevant paragraph 20 of the judgment thus :

"As mentioned earlier the petitioner in the two Writ Petitions are dealers in hides and skins whereas the petitioner in the Sales Tax Revision Petition before the

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High Court is a dealer in copra and coconuts. It is not disputed that hides and skins as well as copra and coconuts are declared goods under Section 14 of the Central Sales Tax Act, 1956. It is also not disputed that at the time of purchase of those goods the dealers in question had paid the purchase tax. Further it is admitted that these goods were sold in the course of inter-State sale transactions. It is not denied that the petitioners had a right to apply for refund of the taxes paid by them but the objection raised by the State is those refund applications were not filed within the period mentioned in Rule 39-A (2) and (3) and further in two cases it is contended that the applications were not made in the prescribed form. The High Court has taken the view that Rule 39-A is ultra vires the rule-making power. It has opined that the rules made under Section 5 (4) of the Mysore Sales Tax Act, 1957, are those which must relate to the manner and conditions under which refund has to be made and such a rule cannot in substance deprive the dealer of the right to get refund to which he is entitled to under S. 15 of the Central Sales Tax Act, 1956, as well as Section 5 (4) of the Mysore Sales Tax Act, 1957. We have not thought it necessary to go into that question as, in our opinion, sub-rules (2) and (3) of rule 39-A are wholly unreasonable rules and consequently these cannot be sustained. Sub-rule (3) of Rule 39-A provides that before a person is entitled to refund under Section 15 of the Central Sales Tax Act. 1956, as well as under Section 5 (4) of the Mysore Sales Tax

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Act, 1957, he must have made the refund application within the time before which he should have submitted his Sales-tax return. In many States the dealers have to submit quarterly returns. Under Rule 18 framed under the Mysore Sales Tax Act, 1957, we are informed that a dealer will have to submit his annual return within 30 days of the end of the financial year. That means even if a sale in the course of inter-State trade has been made on the 31st March of a year, the refund application will have to be made within 30 days from that date. The position will be worse still if the dealer is required to submit quarterly returns. The learned counsel for the State was not in a position to tell us whether in the Mysore State the dealers have to file quarterly returns. In our opinion the impugned Rule is merely an attempt to deny the dealers the refund to which they are entitled under the law or at any rate to make the enforcement of that right unduly difficult."

(5) The Supreme Court, in the case of Commissioner of Central Excise, Madras v. Home Ashok Leyland Ltd., reported in 2007 (210) E.L.T. 178 (S.C.), has held that Rule 57A recognizes the right of the manufacturer to take credit for the specified duty paid on the inputs. whereas Rule 57E is a procedural provision. Rule 57E being procedural and classificatory would not affect the substantive rights of the manufacture of the specified final product to claim the Modvat credit for the duty paid on the inputs subsequent to the date of the receipt of those inputs. We may quote the relevant paragraphs 3 and 4 of the judgment thus :

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"3. The above discussion indicates that the right to claim MODVAT credit existed only in Rule 57A. Even Rule 57E says so. There can be no doubt that right from its inception the right to claim MODVAT credit is under Rule 57A. Rule 57A recognizes the right of the manufacturer to claim credit. Rule 57E recognizes not only the right of the manufacturer to claim credit but also the extent to which credit could be claimed for the duty paid on inputs. Therefore, Rule 57A is a substantive provision. However, the procedure of adjustment finds place in Rule 57E. Rule 57E is procedural provision. It deals with adjustments in duty credit. The object behind enacting Rules 57A, 57E and 57G is to avoid duty on duty whereby the price of the final product is loaded. Therefore, Rule 57A recognizes the right of the manufacturer to take credit for the specified duty paid on the inputs, whereas Rule 57E deals with adjustment in the duty credit, such adjustment mean on account of reduction on the credit allowed. It could also be in the event of refund. Suffice it to state that Rule 57E deals only with adjustment in the duty credit. Rule 57G states that credit shall not be taken unless the manufacturer of the final product maintains his records regarding receipt of the inputs in his factory like having again bill of entry certain types of registers (RR-1) or any other document prescribed by Central Board of Excise and Customs.

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4. In our view, therefore, the courts below were right in holding that Rule 57E was procedural, clarificatory and therefore would not affect the substantive rights of the manufacturer of the specified final product to claim MODVAT credit for the duty paid on the inputs subsequent to the date of the receipt of those inputs. Consequently, the respondent-manufacturer in the present case was entitled to take credit between the period 16.8.1987 to 30.12.1987 in the sum of Rs.6,43,994.57."

(6) The Madras High Court, in the case of Hospira Health Care India P. Ltd. v. Development Commissioner, MEPZ, SEZ & Heous, Chennai, reported in 2016 (340) ELT 668 (Madras), has held that a procedure should not run contrary to the substantive right in the policy. If the procedural norms are in conflict with the policy, then the policy will prevail and the procedural norms to the extent they are in conflict with the policy, are liable to be held bad in law. We may quote the relevant paragraphs 27, 28 and 33 of the judgment thus :

"27. It is a settled position that the procedure formulated under any Policy is only to operationalise the right and not to prevent the same. If a statute is workable even without framing of the rules, the same has to be given effect to When the petitioner had stated that in respect of the purchases made from EOUs was earlier allowed by the respondents, the same would establish that the respondents had followed the provisions of paragraph 6.11.

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28. When the Policy gives a substantive right, the Appendix cannot restrict the substantive right provided in the policy and the Appendix is meant for effectuating the rights contained in the policy and cannot be a tool for narrowing or frustrating the objective and operation of the substantive right granted to the petitioner.

33. In the present case, when the policy provides for reimbursement under paragraph 6.11, the said objective was prevented or diluted by the Appendix. As already stated, the Appendix is meant for effectuating the rights contained in the policy and not to frustrate the operation of the substantive right. The Appendix should be meant only for reaching the objective and definitely should not be meant for defeating a person from getting the fruits of the substantive right provided in the policy. A procedure should not run contrary to the substantive right in the policy. In the case on hand, it is only a procedural amendment and not a policy amendment. When the policy gives a right to the petitioner for claiming refund of taxes, it cannot be prevented by making an amendment in the procedure. The petitioner can be prevented only if the policy is amended prohibiting refund of tax for the purchases made from an 100% EOU. The procedure was to be prescribed by an authority in implementing the policy and must be in consonance with the policy. If the procedural norms

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are in conflict with the policy, then the policy will prevail and the procedural norms to the extent they are in conflict with the policy, are liable to be held to be bad in law."

(7) This High Court, in the case of Baroda Rayon Corporation Ltd. v. Union of India, reported in 2014 (306) E.L.T. 551 (Gujarat), has held that the manner in which the credit taken is required to be utilised is laid down under sub-rule (2) and is subject to the conditions and restrictions, if any, specified in the notification issued under sub-rule (1) of Rule 57A of the Rules. Thus, if the time-limit within which the credit taken under sub-rule (1) of Rule 57A is to be restricted, the same would have to be provided under the notification issued under Rule 57A(1) of the Rules. Insofar as Rule 57G of the Rules is concerned, there is no power vested in the Central Government to restrict the time-limit within which the credit is required to be taken. To put it differently, the right to avail of credit is conferred under Rule 57A of the Rules. Rule 57G only provides the procedure to be observed by the manufacturer. Thus, while exercising the powers under Rule 57G of the Rules, the Central Government is not empowered to curtail any right conferred under Rule 57A of the Rules. In such circumstances, the impugned notification issued in exercise of the powers under Rule 57G of the Rules insofar as the same prescribes a time-limit for taking of credit, being in excess of the powers conferred under the said rule was held to be ultra vires the same and not sustainable to that extent. We may quote the relevant paragraphs 8 and 9 of the judgment thus :

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"8. Rule 57G of the Rules as it stood at the relevant time, insofar as the same is relevant for the present purpose reads thus:-

> *"RULE 57G. Procedure to be observed by the manufacturer.- (1) Every manufacturer intending to take credit of the duty paid on inputs under rule 57A, shall file a declaration with the Assistant Collector of Central Excise having jurisdiction over his factory, indicating the description of the final products manufactured in his factory and the inputs intended to be used in each of the said final products and such other information as the said Assistant Collector may require, and obtain a dated acknowledgement of the said declaration.*
>
> *(2) A manufacturer who has filed a declaration under sub-rule (1) may, after obtaining the acknowledgement aforesaid, take credit of the duty paid on the inputs received by him:*
>
> *Provided that no credit shall be taken unless the inputs are received in the factory under the cover of an invoice, issued under rule 52A, an AR-1, or triplicate copy of a Bill of Entry, a certificate issued by an Appraiser of Customs*

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> *posted in Foreign Post Office or any other document as may be prescribed by the Central Government by notification in the Official Gazette in this behalf evidencing the payment of duty on such inputs."*

The subject notification has been issued in exercise of powers conferred by the first proviso to rule 57G of the Rules which provides for prescription of any other document evidencing the payment of duty on such inputs as may be prescribed by the Central Government by notification in the Official Gazette. Thus, from the language employed in the provision, it is apparent that the Central Government is empowered to prescribe any other document in addition to the documents prescribed under the said rule evidencing the payment of duty on such inputs. However, the said power is limited to prescribing any other document in addition to the documents prescribed and does not extend to prescribing a time limit within which credit has to be taken. In other words, once such documents are prescribed, there is no further power vested in the Central Government to prescribe a time limit for taking credit. Insofar as taking credit is concerned the same is governed by rule 57A of the Rules which lays down that the provisions of the said section shall apply to such finished excisable products as the Central Government may, by notification in the Official Gazette, specify in this behalf for the purpose of allowing credit of any

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duty of excise or additional duty under section 3 of the Customs Tariff Act, 1975, (referred to as specified duty) as may be specified in the notification paid on the goods used in the manufacture of the said final products (referred to as the inputs). Sub-rule (2) of rule 57A provides that the credit of specified duty allowed under sub-rule (1) shall be utilised towards payment of duty of excise leviable on final products, whether under the Act or any other Act, as may be specified in the notification issued under sub-rule (1) and subject to the provisions of the said section and the conditions and restrictions, if any, specified in the said notification. Thus, the manner in which credit taken is required to be utilised is laid down under sub-rule (2) and is subject to the conditions and restrictions, if any, specified in the notification issued under sub-rule (1) of rule 57A of the Rules. Thus, if the time limit within which credit taken under sub-rule (1) of rule 57A is to be restricted, the same would have to be provided under the notification issued under rule 57A (1) of the Rules. Insofar as rule 57G of the Rules is concerned, there is no power vested in the Central Government to restrict the time limit within which credit is required to be taken. To put it differently, the right to avail of credit is conferred under rule 57A of the Rules. Rule 57G only provides the procedure to be observed by the manufacturer. Thus, while exercising powers under rule 57G of the Rules, the Central Government is not empowered to curtail any right conferred under rule 57A of the Rules. In the circumstances, the impugned

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notification issued in exercise of powers under rule 57G of the Rules insofar as the same prescribes a time limit for taking of credit, being in excess of the powers conferred under the said rule is ultra vires the same and as such cannot be sustained to that extent.

9. Another aspect of the matter is that by curtailing the time limit within which the credit taken is to be availed, in effect and substance the said notification provides for lapsing of the credit that has already accrued in favour of the petitioner. In this regard it may be noted that the petition pertains to credit taken in the year 1994. At the relevant time there was no provision in the Act empowering the Central Government to frame rules providing for lapsing of credit of duty. Clause (xxviii) of sub-section (2) of section 37 of the Act, which empowers the Central Government to frame rules providing for lapsing of credit has been inserted with retrospective effect from 16th March, 1995. Hence, the said provision would not be applicable to the facts of the present case. In the circumstances, apart from the fact that rule 57G of the Act does not empower the Central Government to prescribe a time limit for taking credit, at the relevant time the Central Government was not empowered to frame a rule providing for lapsing of the credit taken. Hence, the present case would be squarely covered by the decisions of the Supreme Court in the case of Collector of Central Excise, Pune vs. Dai Ichi Karkaria Ltd , (supra) and in the case of Eicher Motors Ltd. vs.

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Union of India, (supra). In Collector of Central Excise, Pune vs. Dai Ichi Karkaria Ltd. (supra), the Supreme Court in the context of rules 57A to 57J of the Central Excise Rules, 1944 has held that a manufacturer obtains credit for central excise duty on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. The court held that the credit is indefeasible. In Eicher Motors Ltd. vs. Union of India, (supra) the Supreme Court held thus:

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

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1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods.""

(8) The Madhya Pradesh High Court, in the case of Bharat Heavy Electricals Ltd. v. Commissioner of Central Excise, Bhopal, reported in 2016 (332) E.L.T. 411 (M.P.), has held that when power is exercised under Rule 57G, the Central Government is not empowered to curtail any right conferred by the substantive provision of Rule 57A and, therefore, the notification issued under Rule 57G prescribing the time limit for taking the credit as found by this Court in Baroda Rayon Corporation (supra) was declared to be ultra vires, as it was beyond the power and was in conflict with the impugned provision of Rule 57A. The ruling is based on the principle laid down by the Supreme Court in the cases of Eicher Motors Limited and Dai Ichi Karkaria Limited. We may quote the relevant paragraphs 10 and 11 of the judgment thus :

"10. Therefore, in the case of Baroda Rayon Corporation Limited Vs. Union of India, 2014 (306) ELT 551 (Guj), the Gujarat High Court has considered question identical in nature as is posed before us. In the case of Baroda Rayon Corporation Limited also, the benefit of MODVAT credit was denied to the assessee only because of an entry made in RG-23 A Part I & Part II, showing a date beyond six months. In the said case, the principle of law governing grant of MODVAT credit; the requirement of Rules 57A and

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57G; the law laid down in the case of Eicher Motors Limited (supra) and Dai Ichi Karkaria Limited (supra) have all been considered and it has been held by the Gujarat High Court in the aforesaid case has held that merely because the entry of date made in Part II is beyond six months, the benefit of MODVAT credit cannot be denied when from all other material available, including the entry made in Part I, it is found that the benefit can be granted to the assessee.

11. We are in full agreement with the principle laid down by the Gujarat High Court wherein also under similar circumstances, identical action has been quashed and MODVAT credit extended. We agree with the Gujarat High Court when it says that the right to avail all credit conferred under Rule 57A and Rule 57G only provides the procedure to be observed by the manufacturer. Therefore, when power is exercised under Rule 57G, the Central Government is not empowered to curtail any right conferred by the substantive provision of Rule 57A and, therefore, the Notification issued under Rule 57G prescribing the time limit for taking the credit as found by the High Court of Gujarat is found to be ultra vires, as it is beyond the power and is in conflict to the impugn provision of Rule 57A, these are based on the principle laid down by the Hon'ble Supreme Court in the cases of Eicher Motors Limited (supra) and Dai Ichi Karkaria Limited (supra). ”

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(9) The Allahabad High Court, in the case of Global Sugar Ltd. v. Commissioner of Central Excise, Kanpur, reported in 2016 (334) E.L.T. 604 (Allahabad), has held that Rule 57T of the Rules is only procedural in nature. The Modvat credit cannot be denied on a technical ground that the procedure for availing Modvat credit was not followed at the relevant moment of time. We may quote the relevant paragraphs-7 to 13 of the judgment thus :

> *"7. We find from a perusal of the order that the applicant had filed the application under sub rule (3) of Rule 57T along with an application for condonation of delay showing cause that they were not aware of the procedure for claiming declaration under the said Rule and have filed the same at the earliest opportune moment. It was contended that this is only a procedural/technical lapse and that the substantive right of Modvat credit could not be denied on account of such procedural/technical lapse. The claim of the applicant for Modvat credit was disallowed on the ground that mandatory permission as required under Rule 57-T was not granted by the competent authority though it is admitted that such application was filed by the applicant.*
>
> *8. Having heard Sri Piyush Agarwal, the learned counsel for the applicant and Sri R.C.Shukla, the learned counsel for the respondents, we find that the procedure involved for availing Modvat credit under Rule 57-T of the Rules is more or less akin as provided*

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under Section 57G of the Rules. This Court in Commissioner of Central Excise, Kanpur vs. M/s Balmer Lawrie & Co. Ltd., decided on 29.9.2016 (2016 UPTC 137) held that the provision of Rule 57-G of the Rules was not mandatory and that it was only a procedural provision and if there was a procedural lapse, it could not mean that Modvat credit could not be availed. The same principle is applicable in the instant case.

9. We find that Modvat credit is basically a duty collecting procedure which allows relief to a manufacture on the duty element borne by him in respect of the inputs used by him. The object behind Rule 57-T of the Rules in the instant case is utilization of credit allowed towards such inputs which was being exclusively used for erection of a shed and was not exclusively used for production of a final product. Sub-clause (6) of Rule 57-T indicates as to when a Modvat credit could be availed, namely, that if the capital goods are received in the factory premises of the manufacturer under cover of a document specified under Rule 57-G evidencing the payment of duty on such capital goods.

10. In the instant case, it is not disputed that the goods were received in the factory premises and was consumed for the purpose of erection of shades for boiler houses, etc. It is also not disputed that the goods so received showed evidence of payment of

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duty on such goods. When these two conditions are existing which are the mandatory requirement, in such case, Modvat credit should be allowed and could not be denied on the ground that there was a procedural lapse in not applying for a declaration within a stipulated period.

11. Sub-rule (3) of Rule 57-T of the Rules clearly indicates that if the declaration is not filed within the specified period, the same can be considered after the expiry of period on sufficient cause being shown. In the instant case, the applicant clearly stated that they were not aware of such procedure for claiming Modvat credit and the moment they came to know applied for Modvat credit. The fact, that the applicant applied for Modvat credit has not been disputed. Once this is not disputed, it is not open to the respondents to deny Modvat credit on the ground that permission was not granted by the competent authority. There is no evidence that the application of the applicant was rejected. In our opinion, even if there is a procedural lapse, it does not mean that Modvat credit could not be availed.

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12. In Commissioner of Central Excise, Allahabad vs. Hindalco Industries Pvt. Ltd, 2013 (293)ELT 208, this Court after considering the provision of Rule 52-A and 57-G of the Rules held that Rule 57-G of the Rules only prescribes the procedure for availing Modvat credit and did not affect any substantial right. In our opinion, the said decision is clearly applicable.

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13. In the light of the aforesaid, we hold that Rule 57-T of the Rules is only procedural in nature. We are also of the opinion, that Modvat credit cannot be denied on a technical ground that the procedure for availing Modvat credit was not followed at the material moment of time."

(10) The Supreme Court, in the case of Sambhaji and Others v. Gangabai and Others, reported in (2008) 17 SCC 117, has held that procedure cannot be a tyrant but only a servant. It is not an obstruction in the implementation of the provisions of the Act, but an aid. The procedures are handmaid and not the mistress. It is a lubricant and not a resistance. A procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. We may quote the relevant paragraphs 11 and 12 of the judgment thus :

"11. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive. No person has a vested right in

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any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed.

12. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. A Procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

23. The entitlement of credit of eligible duties on the purchases made in the pre-GST regime as per the then existing Cenvat credit rules is a vested right and, therefore, it cannot be taken away by virtue of Rule 117 of the Central GST Rules, 2017, with retrospective effect for failure to file the form GST Tran-1 within the due date, i.e. 27.12.2017. The provision for facility of credit is as good as the tax paid till the tax is adjusted and, therefore, the right to the credit had become absolute under the Central Excise Act and, therefore, the credit is indefeasible and the same cannot be taken away.

24. This High Court, in the case of Filco Trade Centre Pvt. Ltd. v. Union of India, reported in 2018 (17) G.S.T.L. 3 (Gujarat),

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while striking down clause (iv) of sub-section (3) of Section 140 of the CGST Act, recognized that the benefit of credit of eligible duties on the purchases made by the first stage dealer as per the then existing Cenvat credit rules was a vested right and it cannot be taken away by virtue of clause (iv) of sub-section (3) of Section 140 with retrospective effect in relation to the goods which were purchased prior to one year from the appointed day. We may quote the relevant paragraphs 26 to 31 of the judgment thus :

> *"26. In case of Indusr Global Ltd v. Union of India, 2014 (310) ELT 833 (Guj) Division Bench of this Court was considering vires of Rule 8 (3A) of the Central Excise Rules, 2002 which provided that if an assessee defaults in payment of duty beyond thirty days from the date prescribed under sub-rule (1) then notwithstanding anything contained in the sub-rule(1), the assessee shall pay excise duty for each consignment at the time of removal without utilizing the CENVAT credit till the assessee pays the outstanding amount including interest. The Court while striking down such Rule unconstitutional observed as under:*
>
> > *"31. This extreme hardship is not the only element of unreasonableness of this provision. It essentially prevents an assessee from availing cenvat credit of the duty already paid and thereby suspends, if not withdraws, his right to take credit of the duty already paid to the Government. It is true that such a provision is made because of peculiar circumstances the assessee lands himself in. However, when such provision makes no distinction between a willful*

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defaulter and the rest, we must view its reasonableness in the background of an ordinary assessee who would be hit and targeted by such a provision. As held by the Supreme Court in the case of Eicher Motors Ltd (supra) an assessee would be entitled to take credit of input already used by the manufacturer in the final product. In the said case, the Supreme Court was dealing with rule 57F which was introduced in the Central Excise Rules, 1944 under which credit lying unutilized in the Modvat credit account of an assessee on 16th March 1995 would lapse. Such provision was questioned. The Supreme Court held that since excess credit could not have been utilized for payment of the excise duty on any other product, the unutilised credit was getting accumulated. For the utilization of the credit, all vestitive facts or necessary incidents thereto had taken place prior to 16.3.1995. Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory of the manufacturer of the final product and the final product which had been cleared from the factory was sought to be lapsed. The Supreme Court struck down the rule further observing that if on the inputs the assessee had already paid the taxes on the basis that when the goods are utilized in the manufacture of further products as inputs thereto then the tax on those goods gets adjusted which are finished subsequently. Thus a right had accrued to the assessee on the date when they paid the tax on the

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raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. We may also recall that in the case of Dai Ichi Karkaria Ltd (supra) it was reiterated that a manufacture obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable produce immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product."

27. These judgements would thus indicate that the right that the petitioner had to pass on the credit of excise duty paid on goods purchased at the time of sale of such goods was a vested right. It was as good as the duty paid by the assessee to the Government revenue which could be utilised by the purchasers of such goods from the petitioner against future liabilities of course subject to fulfilment of conditions. When the new regime was therefore introduced through goods and service tax statutes, through migration these existing rights were being adjusted in terms of provisions contained in sections 139 and 140 of the CGST Act. The legislature also recognized such existing rights and largely protected the same by allowing migration thereof in the new regime. In the process, however, a condition was imposed to enable the assessees in the nature of first stage dealer such as the present petitioner-company viz. that the invoices or other prescribed documents on the basis of which credit was claimed were issued not earlier than twelve months

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immediately preceding the appointed day. In effective terms, this condition restricted the enjoyment of existing credit in respect of goods purchased not prior to one year of the appointed day. In relation to all goods purchased prior to such day, no credit would be available under the credit ledger to be maintained under the CGST Act. Such credit would be lost. Undoubtedly, therefore, this condition has retrospective operation and takes away an existing right. This by itself may not be sufficient to hold the provision as ultra vires or unconstitutional. However, in addition to these findings, we also find that no just reasonable or plausible reason is shown for making such retrospective provision taking away the vested rights. Had the statutory provision given a time limit from the appointed day for utilization of such credit, the issue would stand on an entirely different footing. Such a provision could be seen as a sunset clause permitting the dealers to manage their affairs for which reasonable time frame is provided. The present condition however without any basis limits the scope of a dealer to enjoy existing tax credits in relation to purchases made prior to one year from the appointed day. No such restriction existed in the prior regime. Merely the stated grounds in the affidavit in reply that the provision is introduced since physical identification of goods is necessary so as to ensure that the first stage dealers do not take any undue advantage of such benefit and also to accommodate the administrative convenience would not be sufficient. Firstly, as noted, there was no such restriction in the CENVAT Credit Rules or analogous provisions of similar rules in the past. Since decades therefore the credits would be available

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to a first stage dealer on all purchases towards the manufacturing duty. No time frame of the past dealings was envisaged under such rules. The same grounds of physical identification of goods preventing undue advantage being taken and the administrative convenience would exist even then. Secondly, no limitation of time is prescribed in the proviso to sub-section (3) of section 140 where a dealer is not in possession of any invoice or any other document evidencing payment of duty in respect of inputs in which case credit at the prescribed rate would be granted.

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

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

30. To sum up we are of the opinion that the benefit of credit of eligible duties on the purchases made by the first stage dealer as per the then existing CENVAT credit rules was a vested right. By virtue of clause (iv) of sub-section (3) of section 140A such right has been taken away with retrospective effect in relation to goods which were purchased prior to one year from the appointed day. This retrospectivity given to the provision has no rational or reasonable basis for imposition of the condition. The reasons cited in limiting the exercise of rights have no co-relation with the advent of GST regime. Same factors, parameters and considerations of "in order to co-relate the goods or administrative convenience" prevailed even under the Central Excise Act and the CENVAT Credit Rules when no such restriction was imposed on enjoyment of CENVAT credit in relation to goods purchased prior to one year.

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

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25. The Supreme Court, in the case of Eicher Motors Ltd. v. Union of India, reported in 1999 (106) E.L.T. 3 (S.C.), has recognized the provision for facility of credit as a vested right and has held that the facility of credit is as good as tax paid till the tax is adjusted on future goods. We may quote the relevant paragraphs 5 and 6 of the judgment thus :

> *"5. Rule 57F(4A) was introduced into the Rules pursuant to Budget for 1995-96 providing for lapsing of credit lying unutilised on 16-3-1995 with a manufacturer of tractors falling under heading No. 87.01 or motor vehicles falling under heading No. 87.02 and 87.04 or chassis of such tractors or such motor vehicles under heading No. 87.06. However, credit taken on inputs which were lying in the factory on 16-3-1995 either as parts or contained in finished products lying in stock on 16-3-1995 was allowed. Prior to 1995-96 Budget, central excise/additional duty of customs paid on inputs was allowed as credit for payment of excise duty on the final products, in the manufacture of which such inputs were used. The condition required for the same was that the credit of duty paid on inputs could have been used for discharge of duty/liability only in respect of those final products in the manufacture of which such inputs were used. Thus it was claimed that there was a nexus between the inputs and the final products. In 1995-96 Budget MODVAT scheme was liberalised/simplified and the credit earned on any input was allowed to be utilised for payment of duty on any final product manufactured within the same factory irrespective of whether such inputs were used in its manufacture or not. The experience showed that credit*

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accused on inputs is less than the duty liable to be paid on the final products and thus the credit of duty earned on inputs gets fully utilised and some amount has to be paid by the manufacturer by way of cash. Prior to 1995-96 Budget, the excise duty on inputs used in the manufacture of tractors, commercial vehicles varied from 15% to 25%, whereas the final products were attracted excise duty of 10% or 15% only. The value addition was also not of such a magnitude that the excise duty required to be paid on final products could have exceeded the total input credit allowed. Since the excess credit could not have been utilised for payment of the excise duty on any other product, the unutilised credit was getting accumulated. The stand of the assessees is that they have utilised the facility of paying excise duty on the inputs and carried the credit towards excise duty payable on the finished products. For the purpose of utilisation of the credit all vestitive facts or necessary incidents thereto have taken place prior to 16-3-1995 or utilisation of the finished products prior to 16-3-1995. Thus the assessee became entitled to take the credit of the input instantaneously once the input is received in the factory on the basis of the existing scheme. Now by application of Rule 57F(4A) credit attributable to inputs already used in the manufacture of the final products and the final products which have already been cleared from the factory alone is sought to be lapsed, that is, the amount that is sought to be lapsed relates to the inputs already used in the manufacture of the final products but the final products have already been cleared from the factory before 16-3-1995. Thus the right to the credit has become absolute at

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any rate when the input is used in the manufacture of the final product. The basic postulate, that the scheme is merely being altered and, therefore, does not have any retrospective or retro-active effect, submitted on behalf of the State, does not appeal to us. As pointed out by us that when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that right, which had accrued to a party such as availability of a scheme, is affected and, in particular, it loses sight of the fact that provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessees concerned. Therefore, the scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier scheme was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the earlier scheme necessarily the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said rule would result in affecting the rights of the assessees.

6. We may look at the matter from another angle. If on the inputs the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus

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a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the rule cannot be applied to the goods manufactured prior to 16-3-1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods."

26. The Supreme Court, in the case of Collector of Central Excise, Pune v. Dal Ichi Karkaria Ltd., reported in 1999 (112) E.L.T. 353 (S.C.), has held that the credit taken is indefeasible. We may quote the relevant paragraphs 17 and 18 of the judgment thus :

"17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is

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available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.

18. It is, therefore, that in the case of Eicher Motors Ltd. v. Union of India (1999) 106 ELT 3 : (1999 AIR SCW 563 : AIR 1999 SC 892) this Court said that a credit under the MODVAT scheme was "as good as tax paid"."

27. The right to carry forward credit is a right or privilege, acquired and accrued under the repealed Central Excise Act, 1944 (1 of 1944) and it has been saved under Section 174(2)(c) of the CGST Act, 2017 and, therefore, it cannot be allowed to lapse under Rule 117 of the CGST, 2017, for failure to file declaration form GST Tran-1 within the due date, i.e. 27.12.2017.

28. The right to carry forward CENVAT credit for not being able to file the form GST Tran-1 within the due date offends the policy of the Government to remove the cascading effect of tax by allowing the input tax credit as mentioned in the Objects and Reasons of the Constitution 122nd Amendment Bill, 2014. The Objects and Reasons of the Constitution 122nd Amendment Bill, 2014 clearly set out that it is intended to remove the cascading effect of taxes and to bring out a nationwide taxation system.

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29. The cascading of taxes, in simple language, is ‘tax on tax'. The denial of carry forward of tax paid on stock on the appointed day may lead to cascading effect of tax because the GST will again have to be paid on the Central Excise duty already suffered on the stock. It is an established principle of law that it is necessary to look into the mischief against which the statute is directed, other statutes in *pari materia* and the state of the law at the time.

30. It was held by the Supreme Court in the case of Macquarie Bank Limited v. Shilpi Cable Technologies Ltd., reported in AIR 2018 SC 498, that :

> *“It is thus clear on a reading of English, U.S., Australian and our own Supreme Court judgments that the 'Lakshman Rekha' has in fact been extended to move away from the strictly literal Rule of interpretation back to the Rule of the old English case of Heydon, where the Court must have recourse to the purpose, object, text, and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the Rule as stated in 1584 in Heydon's case, which was then waylaid by the literal interpretation Rule laid down by the Privy Council and the House of Lords in the mid 1800s, and has come back to restate the Rule somewhat in terms of what was most felicitously put over 400 years ago in Heydon's case.”*

31. It was held by the Supreme Court in the case of District Mining Officer and Ors. v. Tata Iron and Steel Co. and Ors.,

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reported in AIR 2001 SC 3134 that, "the process of construction combines both literal and purposive approaches. In other words, the legislative intention, i.e. the true or legal meaning of an enactment, is derived by considering the meaning of the words used in the enactment in light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. We may quote the relevant paragraph 14 of the judgment thus :

> *"14. Dr.A.M.Singhvi, the learned senior counsel, appearing for the assessee-respondent in S.L.P. (Civil) No. 13106/96 and S.L.P. (Civil) No. 15442-15443/98 contended that the intention of the Parliament in enacting the Validation Act was only to save the State Governments from refunding the monies already collected under Statutes declared void ab initio by the Courts and it never intended to confer a right on the State to make any fresh levy or collection in respect of the cess and taxes, which could be collected up to 4-4-91, as contended by Mr. Dwivedi, appearing for the State of Bihar. According to Dr. Singhvi, when this Court in Orissa Cement's case, following the earlier judgment of the Court in India Cement, invalidated levies made under different Statutes enacted by the States of Orissa, Madhya Pradesh and Bihar and issued a mandamus, directing refund of the monies collected under such void Statutes, the State Governments would have been under a constitutional obligation to carry out the directions issued and were bound to refund the monies collected from the respective States from the date of the Judgment of the High Court, which would have ruinous consequences on the States economy. When the State*

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Governments apprised these problems to the Central Government, the Parliament intervened and to save the State Governments from refunding the monies collected, enacted the Cess and Other Taxes on Minerals (Validation) Act, 1992 to validate imposition and collection of such levies under the State laws which were declared void by the Court. The Statement of Objects and Reasons of the Validation Act unequivocally proclaims that the Act was promulgated to validate collection of such levies by the State Governments up to 4th of April, 1991. The date 4-4-91was chosen because on the date, the Supreme Court delivered the judgment in Orissa Cement case. To bring about the uniformity among all the States, the cut off date was selected in the Validation Act as 4-4-91. Parliament also consciously did not desire or choose to prescribe different dates for different States in the schedule to Validation Act containing 11 enactments in respect of 7 States. The Parliament, thus devised the method of prospective overruling and the language used in sub-section (2) of Section 2 of the Validation Act makes the intention more explicit, and as such it must be held that it allowed the States to retain the amount of cess already collected but did not authorise to make any fresh collection which has not been collected up to 4-4-91. Dr. Singhvi further contends that the deliberate and conscious omissions by Parliament of a saving clause in the Validation Act, permitting levies or actions after 4-4-91 points to the only effect that Parliament did not intend any levy to be imposed or any collection to be made after 4-4-1991. Had it been the intention, then a specific and unambiguous saving clause could have been

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provided as was done in Jaora Sugar Mills' case (1966) 1 SCR 523 and Prithvi Cotton Mills Ltd. case (1969) 2 SCC 283. A bare perusal of the Validation Act in Jaora Sugar Mills case and the Validation Act in the present case would unequivocally indicate that in the case in hand, the Parliament never intended to confer a right on the States to collect and impose any levy subsequent to 4-4-91 and on the other hand merely allowed the State to retain the collection already made. According to Dr.Singhvi in Kannadasan's case, this Court drew wrong analogy from Gangopadhyaya's case and held that the provisions therein were identical to the provisions in the Validation Act, which was under consideration. Dr. Singhvi further urged that this Court in Kannadasan's case, has not appreciated the fact that Parliament deliberately and consciously omitted to incorporate a saving clause in the Validation Act. Dr. Singhvi urged that by the Validation Act life was infused into void State Statutes only up to 4-4-91 and consequently, the levies which may have accrued prior to 4-4-91 could not be permitted to be collected after 4-4-91. With reference to Article 265 of the Constitution, the learned counsel urged that the Constitution of India imposes a limitation on the taxing power of the State in so far as it provides that no tax can be levied or collected except by authority of law. Thus not only the levy, but also the collection must be only by authority of law. The expression "authority of law" would mean that there should be in existence, a lawful enactment, which authorises the levy or collection of a tax. After 4-4-91, there being no valid law in existence, which could authorise collection of the levy of cess and taxes on minerals, it is

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difficult to comprehend how the State could be permitted to make the levy and collection of the dues subsequent to 4.4.91. According to Dr. Singhvi, and interpretation of the provisions of the Validation Act, authorising realisation of levy after 4-4-91 for the past period would be contrary to equity, justice and fair-play."

32. It was held by the Supreme Court, in the case of U.P. Bhoodan Yagna Samiti, U.P. v. Braj Kishore and Ors., reported in AIR 1988 SC 2239, that it is clear that when one has to look to the intention of the Legislature, one has to look to the circumstances under which the law was enacted, the Preamble of the law, the mischief which was intended to be remedied by the enactment of the statute. We may quote the relevant paragraph 16 of the judgment thus :

"16. And it is clear that when one has to look to the intention of the Legislature, one has to look to the circumstances under which the law was enacted. The Preamble of the law, the mischief which was intended to be remedied by the enactment of the statute and in this context, Lord Denning, in the same book at Page No. 10, observed as under :

"At one time the Judges used to limit themselves to the bare reading of the Statute itself - to go simply by the words, giving them their grammatical meaning and that was all. That view was prevalent in the 19th century and still has some supporters today. But it is wrong in principle. The Statute as it appears to those

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who have to obey it - and to those who have to advise them what to do about it; in short, to lawyers like yourselves. Now the eccentrics cut off from all that is happening around them. The Statute comes to them as men of affairs - who have their own feeling for the meaning of the words and know the reason why the Act was passed just as if it had been fully set out in a preamble. So it has been held very rightly that you can enquire into the mischief which gave rise to the Statute - to see what was the evil which it was sought to remedy."

It is now well settled that in order to interpret a law one must understand the background and the purpose for which the law was enacted. And in this context as indicated earlier if one has bothered to understand the common phrase used in the Bhoodan Movement as 'Bhoomihin Kissan' which has been translated into English to mean 'landless persons' there would have been no difficulty but apart from it even as contended by learned counsel that it was clearly indicated by S. 15 that the allotments could only be made in accordance with the scheme of Bhoodan Yagna. In order to understand the scheme of Bhoodan and the movement of Shri Vinoba Bhave, it would be worthwhile to quote from 'Vinoba And His Mission' by Suresh Ram printed with an introduction by Shri Jaya Prakash Narain and foreword by Dr. S. Radhakrishnan. In this work, statement of annual Sarvodaya Conference at Sevapuri has been quoted as under :

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"The fundamental principle of the Bhoodan Yagna movement is that all children of the soil have an equal right over the Mother Earth, in the same way as those born of a mother have over her. It is, therefore, essential that the entire land of the country should be equitably redistributed anew, providing roughly at least five acres of dry land or one acre of wet land to every family. The Sarvodaya Samaj, by appealing to the good sense of the people, should prepare their minds for this equitable distribution and acquire within the next two years at least 25 lakhs of acres of land from about five lakhs of our villages on the rough basis of five acres per village. This land will be distributed to those landless labourers who are versed in agriculture, want to take to it, and have no other means of subsistence."

This would clearly indicate the purpose of the scheme of Bhoodan Yagna and it is clear that S.15 provided that all allotments in accordance with S.14 could only be done under the scheme of the Bhoodan Yagna."

33. In our opinion, it is arbitrary, irrational and unreasonable to discriminate in terms of the time-limit to allow the availment of the input tax credit with respect to the purchase of goods and services made in the pre-GST regime and post-GST regime and, therefore, it is violative of Article 14 of the Constitution.

34. Section 16 of the CGST Act allows the entitlement to take input tax credit in respect of the post-GST purchase of goods or

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services within return to be filed under Section 39 for the month of September following the end of financial year to such purchase or furnishing of the relevant annual return, whichever is earlier. Whereas, Rule 117 allows time-limit only up to 27th December 2017 to claim transitional credit on pre-GST purchases. Therefore, it is arbitrary and unreasonable to discriminate in terms of the time-limit to allow the availment of the input tax credit with respect to the purchase of goods and services made in pre-GST regime and post-GST regime. This discrimination does not have any rationale and, therefore, it is violative of Article 14 of the Constitution.

35. The Supreme Court, in the case of Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors., reported in AIR 1981 SC 487, has held that Article 14 strikes at the arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. The doctrine of classification which is evolved by the courts is not para-phrase of Article 14 nor is it the objective and end of that Article. Wherever there is arbitrariness in the State action, whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution. We may quote the relevant paragraphs 16 and 17 of the judgment thus :

> *“16. If the Society is an "authority" and therefore "State" within the meaning of Article 12, it must follow that it is*

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subject to the constitutional obligation under Article 14. The true scope and ambit of Article 14 has been the subject matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that that Article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely. (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in E. P. Ayyappa v. State of Tamil Nadu, (1974) 2 SCR 348 : (AIR 1974 SC 555), that this Court laid bare a new dimension of Article 14 and pointed out that that Article has highly activist magnitude and it embodies a guarantee against arbitrariness. This Court speaking through one of us (Bhatgwati, J.) said :

> *"The basic principle which therefore informs both Articles 14 and 16 is equality and inhibition against discrimination. Now what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic*

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approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

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17. This vital and dynamic aspect which was till then lying latent and submerged in the few simple but pregnant words of Article 14 was explored and brought to light in Royappa's case and it was reaffirmed and elaborated by this Court in Maneka Gandhi v. Union of India, (1978) 2 SCR 621 : (AIR 1978 SC 597), where this Court again speaking through one of us (Bhagwati, J.) observed :-

"Now the question immediately arises as to what is the requirement of Art. 14: what is the content and

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reach of the great equalising principle enunciated in this article, There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits..... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."

This was again reiterated by this Court in International Airport Authority's case ((1979) 3 SCR 1014) at p. 1042: (AIR 1979 SC 1628) (supra) of the Report. It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the Courts is not paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting

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denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Art. 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

36. It is legitimate for a going concern to expect that it will be allowed to carry forward and utilise the CENVAT credit after satisfying all the conditions as mentioned in the Central Excise Law and, therefore, disallowing such vested right is offensive against Article 14 of the Constitution as it goes against the essence of doctrine of legitimate expectation.

37. The Supreme Court, in the case of MRF Ltd. v. Assistant Commissioner (Assessment) Sales Tax, reported in 2006 (206) E.L.T. 6 (S.C.), has held that a person may have a 'legitimate expectation' of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past

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practice. The doctrine of legitimate expectation has an important place in developing law of judicial review. We may quote the relevant paragraph 38 of the judgment thus :

> *"38. The principle underlying legitimate expectation which is based on Article 14 and the rule of fairness has been re-stated by this Court in Bannari Amman Sugars Ltd. v. Commercial Tax Officer, 2005 (1) SCC 625. It was observed in paras 8 and 9:*
>
> > *"8. A person may have a 'legitimate expectation' of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review. It is generally agreed that 'legitimate expectation' gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The*

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doctrine does not give scope to claim relief straightway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation is not fulfilled by taking a particular decision then the decision-maker should justify the denial of such expectation by showing some overriding public interest. (See : Union of India and Ors. v. Hindustan Development Corporation and Ors., AIR 1994 SC 988)

9. *While the discretion to change the policy in exercise of the executive power, when not trammeled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of*

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arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.""

38. By not allowing the right to carry forward the CENVAT credit for not being able to file the form GST Tran-1 within the due date may severely dent the writ-applicants working capital and may diminish their ability to continue with the business. Such action violates the mandate of Article 19(1)(g) of the Constitution of India.

39. This High Court, in the case of Indsur Global Ltd. v. Union of India, reported in 2014 (310) E.L.T. 833 (Gujarat), has held as under:

"34. By no stretch of imagination, the restriction imposed under sub-rule (3A) of Rule 8 to the extend it requires a defaulter irrespective of its extent, nature and reason for the default to pay the excise duty without availing Cenvat credit to his account can be stated to be a reasonable restriction. It leads to a situation so harsh and a position so unenviable that it would be virtually impossible for an assessee who is trapped in the whirlpool to get out of his financial difficulties. This is quite apart from being wholly reasonable, being irrational and arbitrary and therefore, violative of

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Article 14 of the Constitution. It prevents him from availing credit of duty already paid by him. It also is a serious affront to his right to carry on his trade or business guaranteed under Article 19(1)(g) of the Constitution. On both the counts, therefore, that portion of sub-rule (3A) of rule must fail."

40. The liability to pay GST on sale of stock carried forward from the previous tax regime without corresponding input tax credit would lead to double taxation on the same subject matter and, therefore, it is arbitrary and irrational.

41. C.B.E. & C. Flyer No.20, dated 1.1.2018 had clarified as under :

"(c) Credit on duty paid stock : A registered taxable person. other than manufacturer or service provider, may have a duty paid goods in his stock on 1st July 2017. GST would be payable on all supplies of goods or services made after the appointed day. It is not the intention of the Government to collect tax twice on the same goods. Hence, in such cases, it has been provided that the credit of the duty/tax paid earlier would be admissible as credit."

42. Article 300A provides that no person shall be deprived of property saved by authority of law. While right to the property is no longer a fundamental right but it is still a constitutional right. CENVAT credit earned under the erstwhile Central Excise Law is the property of the writ-applicants and it cannot be appropriated for merely failing to file a declaration in the absence of Law in

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this respect. It could have been appropriated by the government by providing for the same in the CGST Act but it cannot be taken away by virtue of merely framing Rules in this regard.

43. In the result, all the four writ-applications succeed and are hereby allowed. The respondents are directed to permit the writ-applicants to allow filing of declaration in form GST TRAN-1 and GST TRAN-2 so as to enable them to claim transitional credit of the eligible duties in respect of the inputs held in stock on the appointed day in terms of Section 140(3) of the Act. It is further declared that the due date contemplated under Rule 117 of the CGST Rules for the purposes of claiming transitional credit is procedural in nature and thus should not be construed as a mandatory provision.

44. Rule made absolute to the aforesaid extent.

(J. B. PARDIWALA, J.)

(A. C. RAO, J.)

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