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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE CIVIL JURISDICTION

WRIT PETITION NO. 6998 OF 2018

Nelco Limited
a Company registered under the
Companies Act, 1956 having its office at
Francysters Centre, 3rd Floor, Evcharistic
Congress Bldg. No. III, 5 Convent Street,
Colaba, Mumbai – 400 001. … Petitioner

V/s.

1. The Union of India
through the Revenue Secretary,
Department of Revenue, Ministry of
Finance having his office at 128-A/
North Block, New Delhi.

2. The Central Board of Indirect Taxes
and Customs through its Chairman
having his office at North Block,
New Delhi – 110 001.

3. The State of Maharashtra
through the Government Pleader,
High Court, Mumbai

4. The Goods and Services Tax Council
having its office at 5th floor, Tower II,
Jeevan Bharti Building, Janpath Road,
Connaught Place, New Delhi – 110001

5. The Commissioner of State Tax
having his office at 8th floor Vikrikar
Bhavan, Mazgaon, Mumbai-400 010

6. Goods and Services Tax Network
a Private Limited Company registered
under the Companies Act, 1956
having its office at 4th floor, East Wing,
World Mark-1, Aerocity, New Delhi

7. The Superintendent,
Range-V, Belapur-IV GST,
Ground Floor, CGO Complex,
CBD Belapur, New Mumbai. ... Respondents

Mr. V. Sridharan, Senior Advocate a/w. Mr. Prakash Shah and Mr. Sriram Sridharan i/b. PDS Legal for the Petitioner.

Mr. Anil Singh, Addl. Solicitor General a/w. Mr. Pradeep S. Jetly, Senior Advocate a/w. Mr. J.B. Mishra for the Respondents 1,2,4,6 & 7
Ms. Shruti D. Vyas, 'B' Panel Counsel for the Respondent No.3.

CORAM : NITIN JAMDAR &
M.S. KARNIK, JJ.

RESERVED ON : 21 FEBRUARY 2020.

PRONOUNCED ON : 20 MARCH 2020.

JUDGMENT (PER NITIN JAMDAR, J.) :-

Rule. Rule made returnable forthwith. Respondents waive service. Taken up for final disposal.

2. The Petitioner - Nelco Limited is a Company incorporated under the Companies Act. It supplies and undertakes various network-related services. Respondent No.1 is the Union of India. Respondent No.2 is the Central Board of Indirect Taxes. Respondent No.3 is the State of Maharashtra. Respondent No.4 is the Goods and Services Tax Council. Respondent No.5 is an officer exercising powers under the Maharashtra Goods and Services Tax Act, 2017. Respondent No.6 is a company which operates the online portal known as GSTN. Respondent No.7 is the Assessing Officer having jurisdiction over the Petitioner.

3. The Goods and Services Act was brought into force from 1 July 2017. This tax replaced and subsumed various indirect taxes in India. For the transition between the old and new regimes, provisions have been made under the Act. Goods and Services Tax Act provides for utilization of Input Tax Credit accumulated under the earlier tax laws upon certain conditions. The Goods and Services Tax Rules framed under the Act provides for filing of a form known as GST TRAN-1 for availing of such input tax credit. The Rules provide for a time limit within which the TRAN-1 Form has to be filed. This time limit is the subject of debate in this Petition.

4. Goods and Service Tax is levied on the supply of goods

and services. It is a destination-based consumption tax. The GST has introduced a unique concept where both, the Central and the State, levy taxes on a joint base. The GST levied by the State Governments is called a State GST, in short SGST. GST levied by the Central Government is called a Central GST, that is the CGST. Regarding Inter-State supply, the levy is called Integrated GST, the IGST. The GST has replaced various taxes collected by the Central and the State. CGST has subsumed Central Excise Duty, Additional Excise Duty, Service Tax, Additional Customs Duty, Special Additional Duty of Customs, Excise Duty on Medicinal & Toilet Preparations. SGST has subsumed Sales Tax, Value Added Tax, Entertainment Tax, Central Sales Tax, Octroi &, Entry Tax, Purchase Tax, Luxury Tax, Taxes on Lottery, Betting & Gambling. A Goods and Services Tax Council is established. The Council comprises of the Union Finance Minister, the Union Minister of State, Minister nominated by each State government. Out of several functions of the GST Council, one of them is the resolution of disputes.

5. The timeline of the statutory enactment as follows. On 19 June 2017 the Central Goods and Services Tax Rules, 2017 were notified. Rule 117 was introduced on 28 June 2017 into the CGST Rules with effect from 1 July 2017 to provide that every registered person may file TRAN-1 Form within 90 days of 1 July 2017. Rule 117(1) *Proviso* stipulated that the Commissioner may on the

recommendations of the GST Council extend this period by a further 90 days. GST regime was implemented in the country from 1 July 2017 with the enactment of the Central Goods and Services Tax Act, 2017 along with the allied Central GST Acts and the State GST Acts. Rule 120A was introduced on 15 September 2017 in the CGST Rules with effect from 15 September 2017 providing for a one-time revision of TRAN-1 Form within the same time prescribed in Rule 117. Time was extended for revising and filing TRAN-1 Form to 31 October 2017. On 28 October 2017, this was further extended to 30 November 2011. On 10 November 2017 a press release issued stating that the time of filing/revising Form TRAN-1 had been extended till 31 December 2017, however on 15 November 2017, the time limit was extended only to 27 December 2017. On 3 April 2018 by a circular was issued by the CBEC on the directions of the GST Council an IT Grievance Redressal Mechanism was enacted. On 10 September 2018 Rule 117(1A) inserted into the CGST Rules providing the extension of the time for filing TRAN-1 Form for persons who faced technical difficulties in filing the TRAN-1 Form. Further, under Rule 117(1A) time for filing TRAN-1 Form was extended till 31 January 2019 for persons facing technical difficulties. With further extensions now it is extended to 31 March 2020 for the persons specified in Rule 117(1A).

6. Reverting to the facts of this case. The Petitioner had accumulated CENVAT Credit during its activities and payment of taxes. According to the Petitioner, the Petitioner attempted to file TRAN-1 Form on 27 December 2017. However, it could not file the same, as according to the Petitioner, there were problems on the common portal run of Respondent No.6. It is the Petitioner's case that the Petitioner sent an e-mail to the official complaint portal of the Respondents for GST related issues**,** and the Petitioner received no response. Further, it is the case of the Petitioner that when the Petitioner tried again to file TRAN-1 Form on 28 December 2017, it did not permit an option for filing of the TRAN-1 Form. Another e-mail was sent by the Petitioner on 12 January 2018 to resolve the technical difficulties but the Petitioner which received no response. It is the case of the Petitioner that the Deputy Commissioner (Anti-Evasion) and Superintendent (Anti-Evasion) of Central Goods and Services Tax Authority visited the Petitioner's premises on 28 March 2018 regarding GSTR-3B; however, they did not remedy the grievance of the Petitioner regarding TRAN-1 Form.

7. According to the Petitioner, the Petitioner is entitled to avail CENVAT Credit, details of which are given in the Petition, under Section 140 of the Central Goods and Services Tax Act and the Maharashtra Goods and Services Sales Tax Act. It is the grievance of the Petitioner that last communication made by the

Petitioner on 23 April 2018 requesting the Respondents to permit filing TRAN-1 Form has not been answered and there is no option of manually filing the TRAN-1 Form, and the Petitioner is in danger of losing the CENVAT Credit accrued, the Petitioner is constrained to file this Petition.

8. The Petitioner has challenged the Rule 117 of the Central Goods and Services Tax Rules, 2017 as *ultra-vires* Sections 140(1), 140(2), 140(3) and 140(5) of the Central Goods and Services Act, 2017 to the extent that it prescribes a time limit for filing of TRAN-1 Form. Consequently, the validity of CBEC's Orders dated 21 September 2017, 28 October 2017 and 15 November 2017 issued under Rule 117 of CGST are challenged. The Petitioner has further sought for a direction to the Respondents to permit the filing of TRAN-1 Form.

9. The Respondents have filed reply affidavit and have supported the impugned enactment, and have opposed the relief sought for. As regards the Petitioner's case of the Petitioner making a bonafide attempt to file the GST TRAN-1, reply affidavit has been filed by the Commissioner of Central Goods and Services Tax and Central Board of Excise and Customs. It is stated that the Petitioner did not specify the nature of technical difficulties, produced no proof of having been encountered technical difficulties and the e-mail on 27 December 2017 was sent on 17.53 hours. Since no proof was

produced that the Petitioner made any bonafide attempt and encountered technical difficulties, the Petitioner cannot be held to be a person facing technical difficulties to give the benefit of the extended period. The case of the Petitioner was examined based on the system log of the portal, and it is clear that the Petitioner had encountered no technical difficulties and no evidence of error was found on the system log.

10. The Petitioner has filed an affidavit in rejoinder stating that the Petitioner made various followup attempt by forwarding scanned copies of the letter dated 23 April 2018 to the jurisdictional officer and met the officers to resolve the issue. The Petitioner has asserted in the rejoinder that the Petitioner encountered the technical difficulties in submitting TRAN-1 Form on 27 December 2017 due to technical difficulties on GSTN common portal. The Petitioner contends that once the Respondents admit there is an IT-related difficulty on the common portal, then it cannot ask the Petitioner to produce the proof thereof.

11. The Petitioner, by an additional affidavit dated 13 March 2019 has sought to produce a screenshot of the browsing history from the laptop of its officer to demonstrate that bonafide attempt was made to file the TRAN-1 Form. It is also stated that history was extracted in March 2019, and the extracted history may not contain

full details.

12. We have heard Mr. V. Sridharan, learned Senior Advocate along with Mr. Prakash Shah and Mr. Sriram Sridharan, learned Advocates for the Petitioner and Mr. Anil Singh, the learned Additional Solicitor General along with Mr. Pradeep Jetly, learned Senior Advocate and Mr. J.B. Mishra, learned Advocate for Respondent Nos.1,2,4,6 and 7 and Ms. Shruti Vyas, learned Additional Government Pleader for Respondent No.3.

13. Various petitions have been filed in this Court challenging the time limit stipulated. These Petitions are listed together and notified on board. The challenge on the ground of *ultra-vires* and violative of Article 14 of the Constitution of India is common in all the Petitions. During the hearing of the present Petition, we permitted the Advocates in other Petitions to address on these legal issues and treated the present Petition as a lead Petition. Accordingly, Mr. Bharat Raichandani, Mr. Ishaan Patkar, Mr. Prithviraj Choudhari and Mr. Chandrakant Thakar, the learned Advocates have addressed us. Mr. V.A. Sonpal, the learned Advocate, has addressed us for the Respondents in some of the Petitions.

14. The discussion can be divided under four heads - (i) the challenge to the impugned Rule on the ground of it being *ultra-vires* of the parent statute; (ii) the challenge on the ground of the

Rule being unreasonable and violative of Article 14 of the Constitution on India; (iii) the meaning of the phrase 'technical difficulties' under Rule 117(1A) and the role of the IT Redressal Cell and whether by creating categories discretion is being fettered; (iv) relief to the Petitioner, if any.

15. First, we take the ground of *ultra-vires*. Second, the challenge based on Article 14 of the Constitution of India. Third, the aspect of technical difficulties under Rule 117(1A) and last, the relief to the present Petitioner.

16. In short, the Petitioner's contentions on the first aspect are: Rule 117 is *ultra-vires* of Section 140 and is not traceable to any provision of the Act. The phrase used in Section 140 as "prescribed manner" cannot mean a rule-making power to prescribe the period of limitation. This phrase is judicially construed. The Supreme Court and various High Courts have construed the phrase "prescribed manner" as not to include the power to make rules imposing a time limit. After the judicial pronouncement, if the legislature later has used the same phrase, it has to be construed as it is judicially interpreted. There is intrinsic evidence in the Act itself to show that whenever the legislature wanted to confer rule-making power, specific phraseology is used. Therefore, whenever the legislature wanted to confer rule-making power to prescribe time

limit, it has been specifically so prescribed. It is a uniform and settled legislative practice to use the phrase "prescribed manner" when the legislature does not intend to confer rule-making power to provide limitation. The rule-making power to prescribe time limit cannot be traced to general rule-making power under Section 164. Merely because the Rules have been placed before the Parliament does not cure the inherent lack of power. Section 140 prescribes a self-declaration to be confirmed later during the stipulated period and therefore, no prejudice to the Respondents. Rule 117 so far as it prescribes time limit to submit TRAN-1 Form cannot be traced either to Section 140 nor to Section 164 nor any other provision of the Act. Therefore, Rule 117, to the extent it provides a time limit, is *ultra-vires* of the parent statute. The input tax credit has always been a core feature of goods and services tax all over the world and denial of the input tax credit when the levy is imposed on output strikes at the core. Under the new GST law, every supply is taxable. The GST is applicable on the appointed date, despite the contract entered into. Provisions are made for the automatic transaction to GST to enable the collection of GST for output, and there is no choice. Under the scheme of the Act, therefore the input tax credit for the earlier period has to be given. Filing of the form is necessary only for the procedural formalities, and therefore, filing of return is contemplated. However, the Parliament has given a right to the Input Tax Credit for the earlier period under Section 140(1), and

this right cannot be taken away by rules. A right to input tax credit existed under the old regime and also the same is continued under the new regime.

17. The reply of the Respondents, in brief, is as follows. There is a presumption to the legality and validity of subordinate legislation, and the burden is heavy on those who assert its invalidity. Even with subordinate legislation, the Court should be slow in concluding invalidity. The input tax credit, in the transitionary provision under section 140, is a nature of exemption and is not a matter of right. Section 140 is a transitional provision which by very nature is limited by the time duration. The provisions under the Act could have easily taken away the input credit accrued under the earlier regime, but by way of concession, input credit is continued with conditions. As regards the rule-making power, Section 164(2) is the general rule-making power. Section 164(2) is couched in most extensive terms, and Rule 117 is traceable to this power. The time limit under Rule 117 is not contrary to any provisions of the Act, nor it takes away any substantive right. The judicial pronouncements about the rule-making power and time limit within the earlier tax regime would not *if so facto* apply for interpreting the transitionary provisions. Further, the GST tax regime and the transitionary provisions are unique. For determining the challenge based on lack of rule-making power, the scheme and

the Act have to be seen. The Rules once placed before the Parliament and approved cannot be debated upon for their validity. The availment of Input Tax Credit is regulated by the rules and must be availed within a time period.

18. Rule 117 falls under chapter XIV of the Goods and Services Tax Rules. Chapter XIV is titled Transitional Provisions. This chapter contains six Rules. Rule 117 deals with a tax or duty credit carried forward on the appointed date. Section 118 is regarding the person to whom Section 142(11)(c) applies. Rule 119 is regarding the declaration of stock. Rule 120 deals with details of goods sent on approval basis. Section 120A deals with revision of declaration of TRAN-1 Form. Section 121 is regarding recovery of credit wrongly availed. The part of Rule 117 relevant for this discussion is reproduced below:

> *Rule 117: Tax or Duty Credit Carried Forward under any Existing Law or on Goods Held in Stock on the Appointed Day (Chapter-XIV: Transitional Provisions)*
>
> *(1) Every registered person entitled to take credit of input tax under section 140 shall, within ninety days of the appointed day, submit a declaration electronically in FORM GST TRAN-1, duly signed, on the common portal specifying therein, separately, the amount of input tax credit to which he is entitled under the provisions of the said section:*

Provided that the <u>Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days.</u>

* * *

(1A) * * *

(2) * * *

(3) * * *

(4) * * *

(emphasis supplied)

Rule 117(1), thus, states that the person entitled to take credit of input tax under Section 140 would file a declaration electronically in a form known as GST TRAN-1 within 90 days. The period can be extended on the recommendation of the Council for a further period not exceeding 90 days.

19. Before we deal with the challenge to Rule 117, two positions must be borne in mind. First, there is a presumption to the legality of the statute. This presumption also applies to a subordinate instrument. Second, both Section 140 and 117 fall in that part of the statute which deals with transitionary provision between two regimes of taxation. In this context validity of Rule 117 has to be examined.

20. The challenge to the time limit under Rule 117, so far as it mandates time limit, being *ultra-vires*, it has two parts. First is referring to Section 140(1) of the Act and the rule-making power

then. Second is based on Section 164 of the Act, and the general rule-making power. The Petitioner has advanced elaborate submission on how the rule-making power to prescribe time limit Rule 117 does not originate from Section 140, since the only phrase used in this regard is `in such manner as may be prescribed'. Several decisions have been cited on the proposition that this phrase cannot confer power to prescribe time limit. The Respondents, however, have relied upon Section 164 of the Act. Nevertheless, for completeness, we refer to the contentions of the Petitioner regarding Section 140 and the phraseology used for the rule-making power.

21. Chapter XX of the Act deals with Transitionary Provisions. Section 139 is of migration of existing taxpayers, which states that from on and from the appointed day, every person registered under the existing laws and having a valid Permanent Account Number, would be issued a certificate of registration on a provisional basis. Section 139 states that the conditions of form and manner would be as prescribed. The final certificate and the conditions thereof would be as prescribed. Section 140 deals with the transitional arrangement of input tax credit. Section 140 of the CGST Act reads:

> *"140. (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit of eligible duties carried forward in*

the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed:

Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:—

(i) where the said amount of credit is not admissible as input tax credit under this Act; or

(ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or

(iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.

(2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law and is also admissible as input tax credit under this Act.

Explanation: For the purposes of this sub-section, the expression "unavailed CENVAT credit" means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of CENVAT credit to

which the said person was entitled in respect of the said capital goods under the existing law.

(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:–

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and

(v) the supplier of services is not eligible for any abatement under this Act:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such

conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

(4) A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994, but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger,—

(a) the amount of CENVAT credit carried forward in a return furnished under the existing law by him in accordance with the provisions of sub-section (1); and

(b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods or services, in accordance with the provisions of sub-section (3).

(5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day:

Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:

Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section.

(6) A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:–

1(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is not paying tax under section 10;

(iii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs; and

(v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

(7) Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall be eligible for distribution as credit under this Act even if the invoices relating to such services are received on or after the appointed day.

(8) Where a registered person having centralised registration under the existing law has obtained a

registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier:

Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act:

Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account Number for which the centralised registration was obtained under the existing law.

(9) Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such credit can be reclaimed subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.

(10) The amount of credit under sub-sections (1), (3), (4) and (6) shall be calculated in such manner as may be prescribed.

Explanation 1: For the purposes of sub-sections (3), (4) and (6), the expression "eligible duties" means–

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957;

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975;

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975;

(iv) omitted

(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985;

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985; and

(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001,

in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day.

Explanation 2: For the purposes of Sub-sections (1) and (5), the expression "eligible duties and taxes" means–

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957;

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975;

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975;

(iv) omitted

(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985;

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985;

> *(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001; and*
>
> *(viii) the service tax leviable under section 66B of the Finance Act, 1994,*
>
> *in respect of inputs and input services received on or after the appointed day.*
>
> *Explanation 3: For removal of doubts, it is hereby clarified that the expression "eligible duties and taxes" excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975."*

Subsections 1, 2, 3 and 5 lay down the terms and conditions for transfer of credit from CENVAT Credit to Input Tax Credit. Section 140(1) deals with the return to be filed for transfer of credit under the pre- GST regime. Section 140(2) deals with transferring credit regarding Capital Goods. Credit of eligible duties on inputs or finished goods or semi-finished goods held in stock on the appointed day and transition is dealt with under Section 140(3) of the Act. Section 140(5) refers to transferring credit regarding inputs or input services in transit on the appointed day. Section 140 deals with transitional arrangement of input tax credit, and for the present topic, Section 140(1) 1 is material.

22. According to the Petitioner, section 140(1) confers right on a registered person to take CENVAT Credit of the eligible duties

in its electronic trading ledger the to be carried forward and the said right can be regulated only in *such manner as may be prescribed,* and thus, regulated by framing Rules. The phrase *as may be prescribed* has been judicially construed as not to include within its ambit the prescription of limitation. On this proposition, reliance is placed on the decision of the Supreme Court in the case of *Sales Tax Officer Ponkunnam and Anr. v/s. K.I. Abraham*[1], *Bharat Barrel and Drum Mfg. Co. Ltd. v. Employees State Insurance Corporation*[2] *CIT, Patiala v. Shri Krishen Chand Charitable Trust*[3], *Second ITO v. M.C.T. Trust*[4], *CIT v. Trustees of Shri Techchand Chandiram Trust*[5] and the decision of Division Bench of Madras High Court in *M/s. Solar Works v/s. Employees State Insurance Corporation*[6]. A perusal of these decisions does indicate that the phrase "prescribed manner" has been construed not to include within its ambit a rule-making power to prescribe a time limit. Different phrases have been employed in the Act such as Section 37 uses the phrase "within such time", Section 38 uses the phrase "within such time" as may be prescribed, Sections 25,28, 29, 30, 32, 37,38, 40, 43, 49, 50, 52, 53, 53A, 84, 141 also use different phrases regarding time limit.

23. However, as stated earlier, the primary reliance of the Respondents is on Section 164, that is the general rule-making

1 (1967) 3 SCR 518
2 (1971) 2 SCC 860
3 (1975) 98 ITR 387 (J & K)
4 (1976) 102 ITR 138 (Madras)
5 (1990) 184 ITR 537 (Bom)
6 AIR 1964 MAD 376

power. Section 164 empowers the Government to makes rules on the recommendations of the Council for carrying out the provisions of the Act. Without prejudice to the generality of the provisions, it also confers powers on the Government to make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules.

24. The Division Bench of Gujarat High Court in the case of *Willowood Chemicals Ltd. v/s. Union of India*[7] has negatived the contention of Rule 117(1) being ultra-vires referring to Section 164 of the Act. The criticism of the Petitioner on this approach of Gujarat High Court is that though the Court noticed the decision of the Supreme Court in the case of *K.I. Abraham*, it failed to notice that in the Supreme Court has held that imposition of the time limit could not be referred to the general rule-making power.

25. In the case of *K.I. Abraham*, the Supreme Court was considering the Central Sales Tax Act. Reliance is placed on the observations of the Supreme Court in the following passage:-

> *"4. It was contended on behalf of the appellants that the assessee had not filed the declarations in form "C" before February 16, 1961 according to the third proviso to Rule 6(1) and in view of the breach of this Rule the assessee was not entitled to take advantage of the lower*

7 (2014) 306 ELT 551

rate of assessment under s. 8(1) of the Act. The opposite view-point was put forward on behalf of the assessee and it was argued that the third proviso to Rule 6(1) was ultra vires of s. 8(4) read with s. 13(4)(e) of the Act. The decision of the question at issue therefore depends on the construction of the phrase "in the prescribed manner" in s. 8(4) read with s. 13 of the Act. In our opinion, the phrase "in the prescribed manner" occurring in s. 8(4) of the Act only confers power on the rule-making authority to prescribe a rule stating what particulars are to be mentioned in the prescribed form, the nature and value of the goods sold, the parties to whom they are sold, and to which authority the form is to be furnished. But the phrase "in the prescribed manner" in s. 8(4) does not take in the time-element. In other words, the section does not authorities the rule-making authority to prescribe a time-limit within which the declaration is to be filed by the registered dear. The view that we have taken is supported by the language of s. 13(4)(g) of the Act which states that the State Government may make rules for "the time within which, the manner in which and the authorities to whom any change in the ownership of any business or in the name, place or nature of any business carried on by any dealer shall be furnished." This makes it clear that the Legislature was conscious of the fact that the expression "in the manner" would denote only the ode in which an act was to be done, and if any time-limit was to be prescribed for the doing of the act, specific words such as "the time within which" were also necessary to be put in the statute. In Stroud's Judicial Dictionary it is said that the words "manner and form" refer only "to the mode in which the thing is to be done, and do not introduce anything from the Act referred to as to the thing which is to be done or the time for doing it. "In Acraman v. Herniman 117 E.R. 1164 the plaintiffs had become the assignees in

bankruptcy proceedings against Garret who had executed on March 4, 1850 a warrant of attorney to the defendant Herniman on the strength of which the latter had obtained judgment against him and sold his goods. A copy of the warrant of attorney was filed with the officer acting as clerk of the documents and judgments in the court of Queen's Bench on March 11, 1850, but no affidavit of the time of execution of such warrant of attorney was filed at any time. Stat. 12 and 13 Vict. C. 106, s. 136 provided that any warrant of attorney given by a trader to confess judgment in a personal action, not filed within twenty-one days after execution in the manner and form provided by State. 3. G-4, C. 39 should be deemed fraudulent, null and void Section 1 of Stat. 3 G. 4, C. 39 required that such warrant of attorney should be filed together with an affidavit of the time of execution thereof, within twenty-one days of the execution of the warrant of attorney. Section 2 provided that if after twenty-one days, the party giving such warrant of attorney shall be declared a bankrupt, then unless the warrant or a copy thereof shall have been filed as aforesaid within 21 days from the execution or unless judgment shall have been signed or execution issued thereon within the same period, such warrant of attorney and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees, As already stated, judgment had been signed on March 11, 1850, i.e., within twenty-one days of the execution of the warrant of attorney, and it was contended on behalf of the defendant that the judgment was valid notwithstanding the failure to file the affidavit as required by section 1 of Stat. 3 G. 4 C. 39. The arguments was rejected and it was held by the Queen's Bench that the warrant of attorney and the judgment thereon were void as against the assignees in bankruptcy. In the course of his judgment, Lord Campbell C.J.

observed as follows :

"The enactment of stat. 12 & 13 Vict. C. 106, s. 136, is very plain; and I cannot agree to put a forced construction upon it. The Legislature has said there that any warrant of attorney given by a trader to confess judgment in a personal action, not filed within twenty-one days after execution in manner and form provided by star. 3. G 4. C. 39, shall be deemed fraudulent, null and void. the manner directed by that Act is filing the warrant or copy, with an affidavit of the time of execution. Here are a judgment and execution on a warrant of attorney given by a trader, and the warrant filed, but without an affidavit. The plain meaning of the late Act is that such a warrant shall be null and void against the assignees. The words 'in manner and form, 'refer only to the mode in which the thing is to be done, and do not introduce anything from the Act referred to, as to the thing which is to be done or the time for doing it."

5. The view that we have expressed as to the interpretation of s. 8(4) of the Act is also supported by the 'Note' to the form of declaration - Form C - prescribed by Rule 12 of the Central Sales Tax (Registration & Turnover) Rules, 1957. The Note states that the form is to be furnished to the prescribed authority in accordance with the rules framed under section 13(4)(c) by the appropriate State Government. For the reasons expressed, we hold that the third proviso to Rule 6(1) is ultra vires of s. 8(4) read with s. 13(3) and (4) of the act. It follows therefore that the assessee was not bound to furnish declarations in Form 'C' before February 16, 1961 in the present case. In the absence of any such

> *time-limit it was the duty of the assessee to furnish the declarations in form C within a reasonable time, and in the present case it is the admitted position that the assessee did furnish the declaration on March 8, 1961 before the order of assessment was made by the Sales Tax Officer. We are accordingly of the opinion that the assessee tax furnished the declarations in Form C in the percent case within a reasonable time and there has been a compliance with the requirements of s. 8(4)(a) of the act. It follows that the High Court was right in quashing the order of assessment made by the Sales Tax Officer and directing him to make a fresh order of assessment taking into consideration the declaration forms furnished by the assessee on March 8, 1961."*

Thus, the Supreme Court considered the phrase 'prescribed manner' in Section 8(4) of Central State Tax Act, and Section 13(4)(g) to declare the invalidity. As our further analysis will show that the provisions under consideration of the Supreme Court and the context of the legislation were completely different than one at hand.

26. It is necessary to examine the scheme of the Act, the terminology employed conferring general rule-making power and the nature of the Legislation to adjudicate the charge of lack of rule-making power. When the court is called upon to decide a challenge to the validity of subordinate legislation, it will have to consider the nature, object, and scheme of the Act, and the area over which power has been delegated under the Act.

27. The Respondents have stressed upon the distinctiveness of the Act and constitutional amendments governing it. With GST, a large number of Central and State taxes were subsumed in a single tax. The Constitution of India provides for segregation of fiscal powers between the Centre and the States essentially with no overlap. However, by the 100th Constitution Amendment Act, 2016, for the first time, both Centre and the States concurrently have the power to levy and collect GST. A mechanism for the joint operation of GST is evolved. Union levies CGST and the States levy SGST. The Parliament has exclusive power to levy IGST on interstate trade or commerce. The Goods and Service Tax Council has been established. For dealing with the IT system, Goods and Services Tax Network (GSTN) has been set up. The point to stress here is that with Goods and Services Tax, the indirect taxation regime in India has undergone a complete overhaul and it has brought about a unique amalgam of fiscal powers.

28. Another unique feature is the chapter XX of the Act, which incorporates Section 140. The Petitioner bases it's right to section 140. The heading of Chapter XX is *'Transitional provisions'*. The heading of S.140 is *'Transitional Arrangements for Input Tax Credit'*. The words used provide a clue to the nature of this provision. The word 'arrangement' means action, process, plan. 'Transition' means a process or period changing from one state or

condition to another[8]. Thus, the plain language understanding of these two phrases, juxtaposed, is a process of regulating the change from one position to another. Under this Chapter, the legislature has devised an arrangement during the transitional period from the earlier tax system to GST regime. This transitionary provision is a unique legislative provision and merits different approach by the Courts.

29. The amplitude of rulemaking power is regulated by and is conditional upon the phraseology of the provision of the Act conferring it. If the provision granting rulemaking power is couched in widest terms, then the doctrine of *ultra vires* cannot be casually applied.

30. Thus now to examine the phraseology used in Section 164 of the Act. Section 164 reads thus:

> *"S. 164 Power of Government to Make Rules*
>
> *(1) The Government may, on the recommendations of the Council, by notification, make rules for carrying out the provisions of this Act.*
>
> *(2) Without prejudice to the generality of the provisions of sub-section (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules.*

8 Concise Oxford English Dictionary 11th Edition, Oxford University Press.

> *(3) The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act come into force.*
>
> *(4) Any rules made under sub-section (1) or sub-section (2) may provide that a contravention thereof shall be liable to a penalty not exceeding ten thousand rupees."*

31. Section 164 (1) empowers the government, on the recommendation of the GST Council, to make rules for carrying out the provisions of the Act. Sub-section (3) declares that power to make a rule under this section also include the power to give retrospective effect. A power to levy penalty in the contravention is declared in sub-section (4). Sub-section (2) is in most extensive terms. The Government can make rules for all or any of the matters which by this Act *are required to be, or may be prescribed* or in respect of which provisions *are to be* or *may be made* by rules. It is clear from reading Section 164(2), that the Government has the power to make rules not only for the matters already prescribed but those may be prescribed in future or in respect of which provisions are to be made by rules. Thus, section 164 governs the most comprehensive range of rule-making power.

32. The reason behind granting an extensive range of rule-making power under this Act is not difficult to comprehend. It is

because of the nature of the legislation in question. GST has overhauled the existing multiple tax regimes into a single tax. This a first of its kind in the country. Since the system and the principles under it are new, quick adaption to the peculiar situations that may arise is crucial. It is necessary that the system is dynamic to keep pace with technological and commercial developments. It should be flexible to meet the emerging challenges to the revenue needs on an ongoing basis. It is for this flexibility that the legislature has conferred an extensive rule-making power.

33. The reason for alluding to the legislative backdrop and the language of section 164 is because each disputes relating to limitation of rule-making power will have to be resolved with reference to the language of each provision. The doctrine of *ultra vires* should not be uniformly applied without examining the terminology of the concerned statute.

34. Turning now to the decisions cited by the Petitioner. The rule-making power which arose for consideration of the Supreme Court in the Central Sales Tax Act in the case of *A.K. Abraham* was Section 8(4) and Section 13. The Petitioner has drawn comparison to Section 13(3) of the Central Sales Tax Act with Section 164 of the CGST Act. Relevant provisions are reproduced by the in para 3 of the judgment, as under :

3. Section 8 of the Act, it stood on the material date, was to the following effect :

"8. (1) Every dealer, who in the course of inter-State trade or commerce -

(a) sells to the Government any goods; or

(b) sells to a registered dealer other than the Government goods of the description referred to in sub-section (3);

Shall be liable to pay tax under this Act, which shall be one per cent, of his turnover.

(2) the tax payable by any dealer on his turnover in so far as the turnover or any part thereof relates to the sale of gods in the course of inter-State trade or commerce not falling within sub-section (1) -

(a) in the case of declared goods, shall be calculated at the rate applicable to the sale or purchase of such goods inside the appropriate State; and

(b) in the case of goods other than declared goods, shall be calculated at the rate of seven per cent, or at the rate applicable to the sale or purchase of such goods inside the appropriate State, which-ever is higher :

and for the purpose of making any such calculation any such dealer shall be deemed to be a dealer liable to pay tax under the sales tax law of the appropriate State, notwithstanding that the, in fact, may not be so liable under that law.

* * *

(4) the provisions of sub-suction (1) shall not apply to any sale in the course of inter-State trade or cannoneers unless the dealer selling the goods furnished to the prescribed authority in the prescribed manner -

(a) a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority; or

(b) if the goods are sold to the Government, not being a registered dealer, a certificate in the prescribed form duly filled and signed by a duly authorised officer of the Government."

Section 13 states :

"(1) The Central Government may, by notification in the Official Gazette, make rules providing for -

(a) the manner in which applications for registration may be made under this Act, the particulars to be contained therein the procedure for the grant of such registration, the circumstance in which registration may be refused and the form in which the certificate of registration may be given :

(b) the period of turnover, the manner in which the turnover in relation to the sale of any goods under this Act shall be determined, and the deductions which may be made in the process of such determination :

(c) the cases and circumstances in which and the conditions subject to which any registration granted under this Act may be cancelled;

(d) the form in which and the particulars to be contained in any declaration or certificate to be given under this Act;

* * *

(3) The State Government may make rules, not inconsistent with the provisions of this Act and the rules made under sub-section (1) to carry out the purpose of this Act.

(4) In particular and without prejudice to the powers conferred by sub-section (3), the State Government may make rules for all or any of the following purpose, namely;-

* * *

(e) the authority from whom, the conditions subject

to which and the fees subject to payment of which any form declaration prescribed under sub-section (4) of section 8 may be obtained, the manner in which the form shall be kept in custody and records relating thereto maintained, the manner in which any such form may be used an any such declaration may be furnished;

(f) in the case of an undivided Hindu family, association, club, society, firm or company or in the case of a person who carries on business as a guardian or trustee or otherwise on behalf of another person, the furnishing of a declaration stating the name of the person who shall be deemed to be the manager in relation to the business of the dealer in the State and the form which such declaration may be given.

(g) the time within which the manner in which and the authorities to whom any change in the ownership of any business or in the name, place or nature of any business carried on by any dealer shall be furnished……."

Section 13(1) of the Central Sales Tax Act empowered the government to make rules for manner of applying for registration, the period of turnover, cancellation of registration, the form and particulars and fees for form of declaration, declaration in certain classes of persons, and the general rule-making power of making rules 'not in consistent with the provisions of the act and rules' to carry out the purpose of the act. A bare perusal of this provision shows it deals with specific contingencies and granted limited rule making power. In none of the decisions cited before us by the Petitioner, including that of *K.I. Abraham*, wide ambit of rule-

making power as in Section 164 and that too to deal with transitional provisions of two tax regimes, has been considered. Therefore, the decisions cited cannot be straightway made applicable without reference to the language of section 164 to hold that Rule 117 is *ultra vires*.

35. The situation regarding input tax credit within GST regime, is also relevant to note. It is governed by Section 16(4) of the Act. Section 16(4) reads thus :

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

Section 16(4) provides that a registered person shall not be entitled to take input tax credit regarding any invoice or debit note for supply of goods or services after the due date of furnishing of the return under section 39 for the month of September following the end of the financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier. Section 16. Thus under the GST regime, also Input Tax Credit is not without time limit. Prescribing a time limit

under the impugned Rule is not contrary to the object of the Act.

36. The respondents have, thus, rightly relied on Section 164. The powers conferred by Section 164(2) are broad and pervasive and take within its sweep the impugned Rule.

37. The second limb of the petitioner's argument is that assuming there is general rule-making power under Section 164(2), it cannot be exercised to take away substantive rights. This submission is founded on the proposition that CENVAT credit is a right; the same cannot be taken away. Petitioner contends that the right to input credit may not be a common law right, but the statute confers it under Section 140, and the same, thus, cannot be abridged by the executive through a rule-making power. Relying on the decision of the Supreme Court in the case of *Bharat Barrel,* it is contended that where substantive rights are affected, the power of prescribing limitation is kept by the Legislation to itself. Thus, substantive rights can be done away only by the Parliament and not by its subordinates. The Respondents contend that the input tax credit, which is in the nature of exemption, is not a matter of right. Respondents rely on the decisions of this Court. The Counsel for the parties have cited various decisions on this point; however, it is not necessary to refer to all as it is a reiteration of the same basic principle. We have, therefore restricted our discussion of the case-

laws cited on those which are closer to the controversy at hand. According to us, two decisions referred below are most relevant, having construed the very same provision and the same arguments.

38. The question of input credit tax being a right or otherwise has in the context of Section 140 has been directly considered by this Court in the case of *JCB India Ltd.* and by the Gujarat High Court in the case of *Willowood*. The Division Bench of this Court in the case of *JSW Dharmatar Port Pvt. Ltd. v/s. Union of India*[9], in the context of refund for limitation has followed the decision in *Willowood*.

39. First, the decision of Gujarat High Court in *Willowood*. Here the Court was considering a challenge to the constitutionality of Section 140(1) of the Gujarat Goods and Services Tax Act. The vires of Rule 117 of the Central and the Gujarat Goods and Services Tax Rules was also challenged. Prayers were sought to permit carry forward of the CENVAT credit. Gujarat High Court took a review of case law on the subject. It referred to Rule 164 of the Act. It observed thus:

> *"25. Section 140 of the Act envisages certain benefits to be carried forward during the regime change. As is well-settled, the reduced rate of duty or concession in payment of duty are in the nature of an exemption and is*

9 2019(20) GSTL 721 (Bom.)

> *always open for the Legislature to grant as well as to withdraw such exemption. As noted in case of Jayam & Co. [2016] 96 VST 1 (SC) : [2016] 15 SCC 125, the Supreme Court had observed that input-tax credit is a form of concession provided by the Legislature and can be made available subject to conditions. Likewise, in the case of Reliance Industries Limited [2018] 50 GSTR 14 (SC) : [2017] 16 SCC 28, it was held and observed that how much tax credit has to be given and under what circumstances is a domain of the Legislature. In the case of Godrej & Boyce Mfg. Co. Pvt. Ltd. [1992] 87 STC 186 (SC) : [1992] 3 SCC 624, the Supreme Court had upheld a rule which restricts availment of Modvat credit to six months from the date of issuance of the documents specified in the proviso. The contention that such amendment would take away an existing right was rejected.*
>
> (Emphasis supplied)

The Gujarat High Court held that the Input Tax Credit under Section 140 was a matter of concession. The contention of the Petitioner that Gujarat High Court in *Willowood* has mixed up various concepts is neither warranted nor justified. The arguments were advanced regarding the reasonableness of restriction and the rulemaking power and that the input credit being a right or otherwise, and they were considered together. The Court kept in mind the distinction between the concepts. Merely because various heads of challenges have been dealt with together, it does not mean they have been mixed up.

40. Division Bench of this Court in *JCB India Ltd.* considered the provisions of Section 140 of the Act. Here the petitioner manufactured certain heavy machinery had in certain stock machines as of 30 June 2016, and according to it, it did not have to pay excise duty again after the onset of GST regime. In this context, the challenge was made to the provision. The Petitioner had contended that Input Tax Credit being an integral part of GST law; it is a right, and it is not a concession by the Government. The Respondent – State contended the claim of the Petitioner that the credit being right. The contention of the State is reproduced in para 30, which is the same advanced before us, is as under:-

> *"30. Our attention has been invited by Mr. Anil Singh to the settled principle that insofar as economic legislation is concerned, the grounds on which its constitutionality can be challenged are extremely limited. In the sense, if that legislation incorporates a policy measure, then the wisdom thereof cannot be questioned by this Court. Mr. Anil Singh would submit that this matter is of a concession or relaxation. Nobody can claim a vested right in such measures evolved by the Legislature. It is entirely for the Legislature to make a provision and restrict the benefit or concession or relaxation either to a class of persons or even if it extends to all, it can restrict the term or period or limit up to which the concession can be availed of. In the instant case, the period of twelve months is provided as a safeguard against potential misuse of availment of credit during the transition period by placing restriction on availing credit based on documents which are not very old. There is no concept as equality in Tax matters. Apart therefrom,*

similar restrictions had been in place on the manufacturers/service providers under the Firth proviso to sub-rule (7) of Rule 4 of the erstwhile CENVAT Credit Rules, 2004. It is also argued by Mr. Anil Singh that when in a Value Added Tax there was a restriction on availing of credit in law, now, there is a substantive provision in the new law. However, it is only the transitional provision which inserts or incorporates the above condition, as the Legislature deemed it fit and proper to enforce the new regime from 1-7-2017. When the new regime replaces a bundle of legislations seeking to tax the activity of manufacturers, sales and extension of service, then, it was deemed fit and proper that the transition to the new regime, from the old one, should be smooth. For it to be smooth and proper, a restriction has been placed on availment of CENVAT credit during the transitional period and by making the above statutory prescription. Mr. Anil Singh would submit that it is entirely for the Legislature to make such a provision and its power in that behalf is not questioned. If there is no challenge to the impugned condition on the ground of competence of the Legislature, then, the competent Legislature could have made a restrictive provision and which is precisely the intent. The transition from the old regime to the new one should be smooth and expedient. Hence, a reasonable period of twelve months has been provided. Why it is only twelve months and why it does not date back to the stage, the petitioners in these petitions would deem it fit and proper, is not the test which can be evolved and applied for considering the constitutionality of the legislation. Ultimately, it is the Legislature which is the best Judge and in its wisdom, insofar as fiscal policies are concerned, it has imposed this condition. That is, therefore, reasonable and as explained in the affidavit in reply. On all counts, therefore, the challenge is devoid of merits according to

Mr. Anil Singh and it deserves to be repelled."
(emphasis supplied)

Therefore, the issue as to the input credit contemplated under transitional provision being a concession or right was squarely put forth for consideration. The Division Bench analyzed the decisions on the subject of the Supreme Court in *Jayram and Company v/s. Assistant Commissioner & Anr.*[10], *Eicher Motors Ltd. v/s. Union of India*[11], *Osram Surya (P) Ltd. v/s. Commissioner of Central Excise, Indore*[12], *Samtel India Ltd. v/s. Commissioner of Central Excise, Jaipur*[13] and concluded by observing thus:-

> *"56. To our mind, therefore, the learned Additional Solicitor General is right in his contention that CENVAT credit is a mere concession and it cannot be claimed as a matter of right. If the CENVAT Credit Rules under the existing legislation themselves stipulate and provide for conditions for availment of that credit, then, that credit on inputs under the existing law itself is not a absolute but a restricted or conditional right. It is subject to fulfilment or satisfaction of certain requirements and conditions that the right can be availed of. It is in these circumstances that we are unable to agree with the Counsel appearing for the petitioners that the impugned condition defeats any accrued or vested right. It was never vesting in them in such absolute terms, as is argued before us. If the existing law itself imposes condition for its enjoyment or availment, then, it is not possible to agree with the Counsel that*

10 2016(15) SCC 125
11 1999(106) ELT 3 SC
12 2002(142) ELT 5 SC
13 2003(155) ELT 14 SC

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

57. We would refer to the Judgments which are heavily relied upon in this context. It is stated that the rights and privileges accrued during the existing law have been specifically saved under Section 174 of the CGST Act, 2017. If what are saved are the rights and privileges of the nature noted above, then it cannot be said de hors the conditions or de hors the restriction on availment or enjoyment of that right they have been saved by the CGST Act. In other words, if rights are conferred with conditions under the existing law, then, they are saved by the CGST Act with such conditions and not otherwise. There must be clear provision to grant it otherwise than in terms of the existing Law or in other words, the restrictions or conditions on availment of that right are removed totally. No such provision has been brought to our notice. It is clear that if right to availment of CENVAT credit itself is conditional and not restricted or absolute, then, the right to pass on that credit cannot be claimed in absolute terms. It is argued that it is a vested right accruing to the petitioner.

58. In the case of Elcher Motors (supra), what was in issue before the Supreme Court must be noted. In Elcher Motors, the Three Judge Bench of the Supreme Court of India was concerned with the validity and

application of the scheme, as modified by introduction to Rule 57F {read as 57F(4A)} of the Central Excise Rules, 1944, under which credit which was lying unutilised on 163 995 with the manufacturers, stood lapsed in the manner set out in the provision. That was questioned.

60. In para 5 of this Judgment, the introduction was traced and it was held that 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. Thus, this is a case where the Rule, as introduced, provided for total lapsing of that credit which was lying unutilised with the manufacturer on 1631995. That was held to be impermissible within the scheme of the law. We are not considering here such a situation.

61. We are not confronted with a situation of the lapsing of the credit though the petitioners may equate the position before us with that of Elcher Motors. We are dealing with the validity and legality of a condition imposed in the transitional arrangement. While moving from one legislation to another comprehensive legislation, in the latter legislation the Legislature deemed it fit and proper to continue the earlier or erstwhile arrangement by terming it as a transition or transitional one. That continuation was with conditions and one of the conditions which is questioned here is consistent with the conditions imposed under the existing law. Such a situation was not dealt with in

Elcher Motors. Thus, the decision is clearly distinguishable.

62. Reliance is then placed on another decision in the case of Jayam & Company (supra). Once again we must see what was dealt with in Jayam & Company. The argument before the Hon'ble Supreme Court in Jayam & Company was whether subsection (20) of Section 19 of the Tamil Nadu Value Added Tax Act, 2006 could be given retrospective effect. The appellants were dealers and registered as such under the provisions of the above VAT Act. They argued that they had dealt in electronic home appliances. They purchased them from local registered dealers on payment of VAT under the VAT invoice issued by the vendors. Thereafter, there was a resale to consumers under the VAT invoice charging appropriate VAT on their selling price. On resale, VAT is paid by the dealer. The dealer is entitled to avail input VAT credit and he is entitled to credit on VAT which was paid to the vendors on purchase of TV sets from the vendors. What had happened was, after the original tax invoice and availing the input tax credit, the vendor gave a discount and purchase credit note was issued for a lesser price. The dealer took into account the price which it had paid to the vendor after adjusting the discount that was subsequently given to the dealer to arrive at net cost and adding VAT which was limited to the vendors by the dealers. The goods were resold at a lesser price. After the introduction of subsection (20) in Section 19 and once again, which has a nonobstante clause, the obligation was to reverse the input tax credit. In other words, if the registered dealer sold goods at a price lesser than the price of the goods purchased by him, he had to reverse the amount of input tax credit over and above the output tax of those goods. It was such an issue which was considered and in considering

that the definitions and substantive provisions of the Tamil Nadu Value Added Tax Act, 2006 were referred. The Supreme Court noted that input tax credit is a form of concession provided by the Legislature. It is not permissible to all kinds of sales and certain specified sales are specifically excluded. The concession of input tax credit is available on certain conditions mentioned in this section, namely, Section 19 and one of the most important condition was that, in order to enable the dealer to claim that credit it has to produce the original tax invoice, complete in all respect, evidencing the amount of input tax. It is in these circumstances that the Hon'ble Supreme Court held that the challenge to the constitutional validity had to fail. It clearly held that when there was a concession given by the statute, the Legislature has to make provision stating the form and manner in which the concession is to be allowed and the subsection (20) seeks to achieve that. There was no right, inherent or otherwise, vested with dealers to claim the benefit of input tax credit but for Section 19 of the VAT Act. We, therefore, do not see how de hors this position a reliance can be placed only on some paras of this Judgment. We cannot ignore what was essentially decided. This is not a matter of retrospective operation of a fiscal statute, as was projected before us in the passing. This is a clear case as operating within the ambit of Jayam & Company itself. As is before us, a concession is being provided by the Legislature which but for the provision granting such concession could have not been availed. The availment of CENVAT credit or input tax credit is clearly termed as a concession. With the conditions imposed, the concession could have been availed of. In the absence of a substantive provision granting such concession, there would have been no concession at all. Thus, one cannot pick and choose a condition for challenge by alleging

> *that the availment is undisputedly conditional but one of the conditions, though having nexus with the availment, is unconstitutional or arbitrary and excessive. The nature of that condition, its placement consistent with the scheme is then conveniently ignored. We cannot allow this argument to be built on the basis of reliance on para 18 of the Judgment in Jayam (supra).*
>
> (emphasis supplied)

The ratio laid down by the Division Bench in *JCB India Ltd.* interpreting the Transitional Provisions and distinguishing the other decisions, is unequivocal.

41. The Petitioner has sought to distinguish the decisions in *Willowood and JCB India Ltd.* contending that the Division Bench was not considering Section 140(1) and the right under different subsections of section 140 are different and operate in different fields and what is relevant for one class cannot be made applicable to another class. It is submitted that the decisions in *JCB India Ltd.* and *Willowood* have considered section 140(3) of the Act. We do not think these decisions can be distinguished in this manner. The decisions in *JCB India Ltd.* and *Willowood* have laid down a general principle of law. The question of credit in a transitional provision being a concession or a right was argued and has been considered. We have not been shown any decision of this Court to the contrary. As a matter of judicial discipline, we will have to follow the dicta laid

down by the Division Bench of this Court in *JCB India Ltd.*

42. The decision of the Supreme Court in the case of *Collector of Central Excise, Pune v. Dai Ichi Karkaria Ltd.*[14] cited by the Petitioner refers to MODVAT credit and in deciding a co-relation of the raw material and final product. The Apex Court held that it is not as if the credit can be taken only on the final product manufactured out of a particular raw material in which the credit is related. It was held that the credit may be taken on a final product on the very day it has become available. It is in this context, the nature of MODVAT credit was held to be indefeasible. The learned Additional Solicitor General has rightly distinguished this decision by pointing out that this decision does not consider the contingency of time limit on availment of credit, and also not in a transitionary provision. Under the impugned Rule, the input credit has been denied *per se*, but a time limit has been placed on its availment.

43. The CENVAT Credit Rules prescribe conditions for availment of that credit. The rights and privileges accrued during the existing law have been saved under Section 174 of the Act. If what is saved from the earlier regime was conditional, then it cannot be converted to something without conditions in the new regime during the period of transition. If, before and after the GST regime, the availment of input credit is conditional, it cannot be that it is

14 1999 (112) ELT 353 (SC)

without any limit in the transitional period. With the advent of an entirely new tax regime, the earlier credit could have lapsed, but as and by way of concession it is permitted to be carried forward for a limited time. Thus, going by the scheme of the Act, under Section 140(1), the reference to Input Tax Credit is not by way of a right, but as a concession.

44. The Petitioner advanced certain ancillary submissions. First, Section 164(1) contemplates recommendation of the GST Council, and the GST Council had recommended a longer period. It was contended that the GST Council recommendations are binding regarding the rule-making power. However, this argument overlooks that power under Section 164(2) is without prejudice to the power under Section 164(1) regarding the recommendation of the GST Council.

45. Second, that the same relief sought for by the Petitioner can be granted under section 54 of the Act and, therefore, necessary directions be issued. This argument is advanced for the first time across the bar with no pleadings or prayers. The Respondents had no opportunity to deal with the same.

46. Third, the scheme of the Act is that there is self-declaration which has to confirmed later and, therefore, there is no prejudice to the Respondents if credit is given now. It was

contended that the submission of return under section 140 is subject to confirmation under the provisions governing Assessment. This submission is incorrect. Acceptance of Assessment is not subject to confirmation but being based on the principle of self-assessment, is open for verification; which is a different aspect. It is contended that claim of the input tax credit is in the Returns to be filed and Form is not important, and once this procedure is laid down, a time limit cannot be provided. Once it is held that the rulemaking power exists and the placing of time limit on the concession is not *ultra vires*, then the further tinkering with the statutory scheme on hypertechnical and academic arguments is neither desirable nor necessary.

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

48. As regards laying of the Rule before the Parliament, the Petitioner contends that laying of the Rule before the Parliament will not cure the defect if there is no rule-making power exist. For this purpose, reliance is placed on the decision in the case of *Hukam Chand v/s. Union of India*[15]. It is contended that the fact that the

15 1972 (2) SCC 601

Rules have to be laid before the Parliament does not confer validity if the rule is made not in conformity with the Act. In view of our finding that the rule-making power exists for Rule 117 and traceable to Section 164, laying the Rule before the Parliament strengthen the case of the Respondents for supporting its validity.

49. We now turn to the second part of the discussion that is the challenge to the Rule on the touchstone of Article 14 of the Constitution of India.

50. The Petitioner contends that the time limit imposed under Rule 117 is arbitrary, reasonable and in violation of Article 14. It is contended that the right accrued to the Petitioner of input credit is being taken away by the impugned Rule. The Petitioner contends that section 140 of the Act, through its subsections, operate in different scenarios, and need to be treated differently. It is contended that under the CENVAT Credit Rules, 2004, the taxpayer was entitled to 50% of credit in the earlier year of purchase of capital goods and balance 50% in the subsequent year and, therefore, on the relevant date right to take the balance of 50% credit had accrued. It is contended that this right has been saved by saving clause in section 174. The Petitioner has placed strong reliance on the decisions of the Supreme Court in the cases of *Eicher Motors* and *Osram Surya (P) Ltd.* It is contended that the time limit has no

nexus to the Act. The Respondents have supported the impugned legislation contending that without time limit, the concept of transitional provisions will become nugatory.

51. This analysis needs be prefixed by referring to the scope of judicial scrutiny in the matters of economic legislations. When economic legislation is questioned, the Courts are slow to strike down a provision which may lead to financial complications. The Supreme Court has sounded a note of caution in the cases of *R.K Garg v/s. Union of India*[16], *Bhavesh D. Parish v/s. Union of India*[17], *Director General of Foreign Trade v/s. Kanak Exports*[18], *Swiss Ribbons Pvt. Ltd. and Ors. vs. Union of India*[19]. The summary of the principles laid down is as follows. Taxation issues are highly sensitive and complex. Legislations in the economic matters are based on experimentations. The Court should decide the constitutionality of such legislation by the generality of its provisions. The Court cannot assess or evaluate the impact of provision and whether it would serve the purpose in view or not. Trial and error method is inherent in the economic endeavours of the State. In matters of economic policy, the accepted principle is that the courts should be cautious to interfere. The interference by

16 1981(4) SCC 675

17 2000(5) SCC 471

18 2016(2) SCC 226

19 *2019(4) SCC 17*

the Courts in a complex taxation regime can have large-scale ramifications. Unless the provision is plainly unjust or glaringly unconstitutional, the courts should show judicial restraint. In complex economic matters, rules are generally based on trial and error and their validity cannot be tested on any rigid prior considerations or by applying straitjacket formulas.

52. One of the foundations of the argument that the time limit in Rule 117 is unreasonable is that it takes a right. In view of two conclusions we have reached much of the force of this argument is diluted. Firstly what is claimed by the Petitioner is not a right but concession. Secondly, the Rule is not *ultra-vires*. Even on the aspect of unreasonableness, judicial pronouncements already hold the field. Division Bench of this Court in *JCB India Ltd.* observed that the object and purpose sought to be achieved of not permitting the existing arrangement to continue endlessly. For the new regime to come into force, the transitional arrangements have been made. Division Bench observed that Section 140 has a clear nexus to the object sought to be achieved and can be struck down as having no such relation or nexus. The Gujarat High Court in the case of *Willowood* on the same aspect has observed thus in the economic matters of such vast scale and the broader considerations of the State exchequer, cannot be kept out of purview while interpreting a statutory provision. The Court noted that the entire exercise was unprecedented in the Indian context. The claims of carrying forward

of the existing duties and credits during the period of migration, therefore, had to be within the prescribed time. The Court observed that doing away with the time-limit for making declarations could cause multiple large-scale claims trickling in for years together after the new tax structure is put in place. The bench observed this would besides making matching of the credits impractical if not impossible, also affect the revenue collection estimates. The view taken by the Gujarat High Court in *Willowood* is that Rule 117 is not *ultra-vires* and there is no indefeasible right to carry forward CENVAT credit and the stipulation of the time limit is reasonable.

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

54. Section 140 read with Rule 117 under Chapter XX

deals with transitional provisions for availment of CENVAT credit. It permits availment of CENVAT credit, however within a stipulated transitional period. This availment is not absolute and is with a time limit. Upholding only the right to carry forward the credit and ignoring the time limit would make the transitional provision unworkable. The credit under the transitional provision is not a right to be exercised in perpetuity. By the very nature of the transitional provision, it has to be for a limited period.

55. The Petitioner has placed on record the Concept Notes and Flyers issued by CBEC to demonstrate the salient features of GST and how the input tax credit is a core of the GST regime. Based on this material and the statements and objects and reasons of the Act, it is contended that a transitional provision is for a smooth transition of existing taxpayers to GST regime and it is to avoid cascading effect of the taxes. The statements and objects of the Act cannot, of course, be debated, but nowhere there any indication that for availing of input tax credit in a transitional provision there is no time limit. The decision of the Supreme Court in *Sambhaji v. Gangabai*[20], the decision of the Allahabad High Court in *Global Sugar Ltd. v. Commissioner of Central Excise*[21] and the decision of the Madras High Court in *Hospira Health Care India P.Ltd. v. Dev. Commr., MEPZ SEZ & Heous, Chennai*[22] relied upon by the

20 2009 (240) ELT 161 (SC)
21 2016 (334) ELT 604 (All.)
22 2016 (340) ELT 668 (Mad.)

Petitioners are all the cases, as rightly pointed out by the Respondents are within a tax regime. None of these decisions deal with transitional provisions between two tax regimes.

56. Reference is already made to Section 16(4) of the Act. Section 16(4) provides that a registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for the supply of goods or services or both, after the due date of furnishing of the Return under section 39 for the month of September following the end of the financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier. Thus even under the GST law, the input tax credit cannot be availed without any time limit. It cannot be that under the GST law, there is a time limit, but for the transitional period, there is no such time limit. Once under the GST law for future transactions time limit is stipulated, then there is nothing unreasonable in the stipulated time limit for the transitional period.

57. Various decisions of the High Courts have been cited by the Petitioner regarding Rule 117 and Section 140 of the Act wherein directions have been issued in writ jurisdiction for opening the TRAN-1 Form. These are *Jakap Metind Pvt. Ltd. v/s. Union of India through the Secretary and Ors.*[23]. *Adinath Industries v. Union*

23 Special Civil Application 19951

of India[24], *Adfert Technologies Pvt.Ltd. v. Union of India*[25] *Afran Technology Pvt.Ltd, Asiad Paints Ltd v. Union of India*[26], *Gillette India Limited v. Union of India*[27], *Jakap Metind Pvt.Ltd. v. Union of India*[28], *Jay Bee Industries v. M/s.J.B. Industries v. Union of India*[29], *A.F. Babu v. Union of India*[30], *Tara Exports v. The Union of India*[31], *Siddharth Enterprises v. The Nodal Officer*[32] , *Ra Export Siddhartha Enterprise, Triveni Needdles Pvt. Ltd. v. Union of India*[33], *Bhargava Motors v/s. Union of India & Ors.*[34], *M/s. Blue Bird Pure Pvt. Ltd. v/s. Union of India*[35]. The decision in the case of *Adfert Technologies* of the Division Bench of Punjab and Haryana High Court relied by the Petitioner was one wherein direction was issued to permit the revision of incorrect TRAN-1 Form and after noticing the decision of Gujarat High Court of *Willowood*, the Division Bench stated that they are not in agreement with the view taken. However, we do not find there is no discussion in the said decision upholding the validity of Rule 117. The decision is based primarily on the CENVAT credit being a vested right. The decision of *Siddharth Enterprises* of Gujarat High Court does not refer to the decision in *Willowood* even though it was rendered prior. These

24 2019-VIL-526-DEL
25 2019-VIL-537-P&H
26 2019-VIL-598 KAR
27 2020-VIL-01-DEL
28 2019-VIL-556-GUJ
29 201-VIL-570-HP
30 2019-VIL-610-KER
31 2019-VIL-432-MAD
32 2019-VIL-442-GUJ
33 2019-VIL-618-DEL
34 2019-VIL-218-DEL WP(C) 1280/2018 dtd 13.05.2019
35 2019(7) TMI 1102 - 2019-VIL-347-DEL

decisions are founded on the basis that the CENVAT Credit is a vested right guaranteed under Article 300A of the Constitution of India. In none of the decisions, Rule 117 has been struck down as arbitrary.

58. The High Courts in the above decisions have exercised writ jurisdiction to direct the Respondents to give relief to the petitioners before it. The Courts may have done so in equity jurisdiction. We have concluded that the time limit stipulated is neither *ultra vires* nor unreasonable. Issuing a writ would mean overriding this time limit. The concept of a time limit under this provision is not casual but has a larger purpose to serve. The GST Act deals with the generation and distribution of the revenue. The collected revenue is expended on various functions for which budgetary allocations are made and time limits are stipulated for the execution of various schemes. For fiscal planning, certainty regarding receipt and distribution of revenue is necessary. If relief is to be granted to the individual Petitioner overriding the time limit on equity, the perception of what is equitable will differ from authority to authority. This would lead to uncertainty. The operation of this complicated tax system will become unworkable. The time limit placed under the impugned rule being rooted in need to have certainty in fiscal management, we are of the opinion that equity jurisdiction ought not to be exercised.

59. As another facet of arbitrariness it was argued that insistence on submitting declaration electronically creates a classification between those with needed capabilities and equipment and those who do not and hence it is violative of Article 14. There is no merit in this submission. Entire GST system, not only section 140 and Rule 117 envisage electronic filing. It has an intricate inter-linking regulated by software and data analysis. Numerous departments and enactments now mandate electronic submission of forms. With the ever-expanding sweep of digital data pervading almost all walks of life, it will be a retrograde step to declare a provision unreasonable because it mandates electronic compliance, especially when the enactment in question is an intricate tax regime powered by a software-based system.

60. To summarize, therefore, the time limit stipulated under Rule 117 is neither unreasonable or arbitrary nor violative of Article 14. This rule is in accordance with the purpose laid down in the Act.

61. Now we turn to the third aspect of the matter that is the meaning of the phrase 'technical difficulties' under Rule 117A and the role of the IT Redressal Cell and whether by creating categories discretion is being fettered; To appreciate the Petitioners' challenge, the procedure to be followed while submitting Form TRAN-1 needs

to be narrated. The Respondents have placed on record the procedure, which is: First, the taxpayer has to log in to the GST Portal. Then navigate to the TRAN-1 Form in Services Section. If the TRAN-1 is already submitted or filed, then a Reopen button is provided to the taxpayer to modify previously submitted/filed data or for adding missing records. Once the taxpayer clicks on the Reopen button, then the status of TRAN-1 is changed to Reopen. The taxpayer then fills up the respective sections of the TRAN-1 Form and then enters details under various tables such as Table 5A, 5B, 7A, 8 etc. The taxpayer then saves TRAN-1 and verifies the entered values. After that, the TRAN-1 is submitted on GST Portal. After its submission, TRAN-1 credit is calculated based on the values in the form and entries are made to the Electronic Input Tax Credit (ITC) ledger. Then the taxpayer is required to authenticate TRAN-1 by attaching digital signature using and file TRAN-1 Form. Then the filing process is complete. Thereafter the entries of the amount being posted in the Electronic ITC Ledger can set off liabilities in GSTR-3B. The credit of TRAN-1 is credited and posted in ledgers for use to set off liabilities when the taxpayer "submits" TRAN-1 Form. This is the method followed by the taxpayer.

62. The Respondents noted the existence of technical difficulties in the filing of TRAN-1 and incorporated Rule 117(1A).

Rule 117(1A) has been inserted with effect from 10 September 2018. Rule 117(1A) reads as under:

> *Rule 117: Tax or Duty Credit Carried Forward under any Existing Law or on Goods Held in Stock on the Appointed Day (Chapter-XIV: Transitional Provisions)*
>
> *(1)* * * *
>
> *(1A) Notwithstanding anything contained in sub-rule (1), the Commissioner may, on the recommendations of the Council, extend the date for submitting the declaration electronically in* ***FORM GST TRAN-1*** *by a further period not beyond 31st March, 2019, in respect of registered persons who could not submit the said declaration by the due date on account of technical difficulties on the common portal and in respect of whom the Council has made a recommendation for such extension.*
>
> * * *

This Rule provides that the Commissioner may, on the recommendations of the Council, extend the date for submitting the declaration electronically in FORM GST TRAN-1 by a further period not beyond 31 March 2019, regarding registered persons who could not submit the said declaration by the due date because of technical difficulties on the common portal and regarding whom the GST Council has made a recommendation for such extension.

63. First, the time limit was 31 March 2019. Now, with

further extension, it is extended to 31 March 2020. However, for the extended period to apply, certain criterion has to be satisfied. The extension applies to the submission of GST TRAN-1 to be made electronically. It applies only to those registered persons who could not submit their declaration by the due date under Rule 117(1) because of technical difficulties. The technical difficulties have to be the ones referable to the common portal of GST, and last, it in whose cases the Council has made a recommendation for an extension.

64. In the GST Council Meeting held 10 March 2018, a grievance redressal mechanism was set up to address the issue. This mechanism was called IT Grievance Redressal Cell. The IT-Grievance Redressal Cell consists of three members, namely – CEO (GSTN), DG (Systems) GBEC and a third member from any State nominated by Secretary. GST Council. GSTN, Central and State governments appointed nodal officers to address the problem a taxpayer faces due to the technical difficulties.

65. Details of the Grievance Redressal Mechanism is on record. An outline is: If the taxpayers encounter a technical difficulty regarding TRAN-1 Form, he has to apply to the Nodal officers. The technical difficulty relating to the Common Portal and not individual problems and local issues such as non-availability of internet connectivity, power failure or a problem of a specific

system. The application should show bonafide attempts by the taxpayer to comply with the due process of law. The application is forwarded to GSTN, who would on receipt of the application, after identifying the issue, forward the same to the IT Grievance Redressal Committee for decision. The cases are examined and are categorized broadly reason-wise and then further grouped into two major categories as Category ‘A’ and Category 'B". Category 'A' includes cases in which the taxpayer could not file TRAN-1 Form because of technical difficulties, whereas Category ‘B’ includes cases where detailed analysis at GSTN reveals that there were no technical issues in filing TRAN-1 Form as per the system logs. Category 'B' is further subdivided into eleven categories based on the claims of taxpayers and cases forwarded by Nodal Officer. System logs regarding the filing of TRAN-1 Form are examined to ascertain the evidence of error of submission/filing of TRAN-1 Form before the due date. In short, if, as per GST system log, there is no evidence of submission/filing of TRAN-1 Form on the common portal, it has to be concluded that the taxpayer did not try for saving/submitting or filing TRAN-1 Form before the due date and, not entitled to the benefit of the extended period under Rule 117(1A).

66. The petitioner contends that the ambit of phrase 'technical difficulties' will have to be defined by the Court and it cannot be left to the IT Grievance Cell of the GST Council to define

the same. Further, an ad-hoc criterion has been devised classifying the registered persons into arbitrary groups and for some recommendation is made, and for some, it is rejected. The Petitioner contends that is that the GST Council cannot delegate this power to the IT Grievance Redressal Committee. This submission cannot be accepted. The GST Council is not a body to resolve technical issues. Therefore, an IT Grievance Redressal Mechanism was developed by the GST Council. This Committee involved the CEO of the GST, Network Director General of Systems, CBSC and the Nominee from State as technical persons. Based on the report of this Technical Committee, a further recommendation would be made. Therefore, there is no merit in the contention that the power could not have been delegated to the IT Grievance Redressal Committee.

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

68. The IT Grievance Redressal Cell has taken the system

log on the common portal as evidence of attempts made. There is no merit in the criticism of the Petitioner in taking system logs as a basis for determining technical difficulties. Since Rule 117(1A) refers only to the technical difficulties on the common portal, the record on the common portal would be a material piece of evidence. Since the phrase "technical difficulty" does not envisage any other difficulties, the IT Grievance Redressal Committee rightly evolved the criteria of system logs. The system log is an auto-generated data which records the activities performed. A system log maintained by the portal shows details of requests made at the page. This data is not manually collected but auto-generated. From the system log, it can be ascertained whether an attempt was made to access the data. Therefore, not only there is nothing arbitrary insisting on system log but a correct criterion to be adopted.

69. Petitioner then contended that insisting on system log as proof from the very system which has technical difficulties, is arbitrary and unworkable. There is no merit in this contention. It is not the case that common portal had stopped working or that none of the taxpayers could submit the declarations. As per the data given by the Respondents, thousands of registered users could submit their TRAN-1 Form declarations. In the affidavit-in-reply filed by the Commissioner, the number of entries made between the last four days of the closing facility of TRAN-1 has been placed on record.

These are : 24 December 2017 – 36349; 25 December 2017 – 97939; 26 December 2017 – 233455and on 27 December 2017 – 165723. The object of bringing in Rule 117(1A) did acknowledge that certain registered user encountered technical difficulties in the common portal. However, it does not mean that the common portal had stopped working; only that some registered users could not submit their forms. Whether they made an effect could be seen from the system logs.

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

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

72. In some decisions referred to in para 57, the Courts have directed the Respondents to open the portal. It is observed therein that many of the registered persons come from a rural and semi-literate background and they may have no record, and they cannot be made to suffer when the systems of the Respondents were not efficient. This approach proceeds on the basis that once there is an acknowledgment of technical difficulties, a liberal view must be taken. However, though the Respondents have accepted there have been technical difficulties, they have not admitted a complete failure. A mechanism has been set up. A uniform and technically capable criteria to determine technical difficulties on the portal of system logs has been evolved. There is no allegation, nor there is any question of any personal *malafides* while ascertaining the system logs. The system logs are generated automatically and based on such system logs categorization has been made.

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

74. Last, turning now to the question of relief to the present Petitioner. A reply affidavit has been filed wherein it is stated that no details of technical difficulties were stated in the representations emailed nor any proof was provided. It is stated that the Petitioner sent an email on 27 December 2017 at 17.53 which was the final date for filing TRAN-1 Form. It is stated that the case of the Petitioner was discussed by the IT Redressal Cell in its meeting on 27 August 2018 and as per the GST System log, no evidence was available. The decision was communicated to the Petitioner on 10 July 2018. The Petitioner has filed a rejoinder, and it is reiterated that the Petitioner has now produced a screen-shot of the browsing

history extracted from the laptop of one of it's employee which reveals that the portal was accessed on 27 December 2017. It is stated that the history was extracted in March 2019 and there is a possibility that it may not contain full details and also there may not be a complete list of browsing history.

75. The Petitioner submits that based on the browsing history now produced by way of rejoinder, the fact that the Petitioner attempted and encountered technical difficulties be upheld. This submission cannot be accepted. We have held that the phrase technical difficulty in Rule 117(1A) of the Rules is in relation to the common portal and the criteria for determining the error on the common portal is a system log on the common portal. The system log is an unquestionable criterion for ascertaining the activity on the portal. An adjudication based on contemporaneous material besides the system log will make ascertainment of technical difficulties unguided. The existence of technical difficulties as seen from the system logs at the common portal is a cogent proof. In the absence thereof, the adjudication will be in the realm of subjectively. The system log on the common portal does not support the case of the Petitioner. This has been communicated to the Petitioner. No direction thus can be issued to the Respondents now to treat the case of the Petitioner as falling within the ambit of Rule 117(1A).

76. To conclude, the time limit stipulated under Rule 117 of the Rules is not *ultra vires* of the Act. This Rule is traceable to the power conferred under section 164(2) of the Act. The time limit stipulated in Rule 117 is in consonance with the transitional nature of the enactment, and it is neither arbitrary nor unreasonable. Availment of input tax credit under section 140(1) is a concession attached with conditions of its exercise within the time limit. The IT Grievance Redressal Cell is set up by the GST Council to examine the existence of technical difficulties on the common portal. Sufficient guidance is provided in the definition of technical difficulty in Rule 117(1A). Examining the system log to ascertain the existence of technical difficulties on the common portal for registered persons, is not arbitrary, nor does it lead to a fettering of discretion by the authorities. Those registered persons who could not submit the declaration by the due date because of technical difficulties on the common portal as can be evidenced from the system logs are given an extension on the recommendation of the Council. Where no such evidence is forthcoming, no recommendation is made. In the Petitioner's case, no such proof emerges and, therefore, no direction as sought for can be issued.

77 . As a result, the Petition is dismissed. Rule discharged. No costs.

M.S. KARNIK, J. NITIN JAMDAR, J.