[2022] 142 taxmann.com 400 (Andhra Pradesh)/[2022] 65 GSTL 263 (Andhra Pradesh)/[2022] 94 GST 672 (Andhra Pradesh)[26-08-2022]

GST : Reports of Regional Energy Account filed by exporter could be made basis to deal with claim for refund of Input Tax Credit in case of export of electricity

GST : Amendment to rule 89 of CGST Rules, 2017 brought by rule 89 of CGST (Amendment) Rules, 2022 in respect of documentary evidence for export of electrical energy was merely clarificatory and hence, same was retrospective in nature

GST : When Tribunal was not yet constituted by GST Council and appeals of similar issues had already been rejected by Appellate authority, writ petition could be entertained

[2022] 142 taxmann.com 400 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

Sembcorp Energy India Ltd.

v.

State of Andhra Pradesh*

C. PRAVEEN KUMAR AND TARLADA RAJASEKHAR RAO, JJ.
WRIT PETITION NOS. 11194, 11198, 11206, 11263, 17275, 28836 & 30292 OF 2021
AUGUST 26, 2022

Refund - Unutilized Input Tax Credit - Export of electrical energy - Actual units of electricity supplied by petitioner to Bangladesh recorded in Regional Energy Account (REA) was issued on monthly basis by Southern Regional Power Committee, unit of Central Electricity Authority in India - Fact of transmission to Bangladesh by petitioner was accepted in subsequent notices - Production of shipping bills as proof of export could not be made applicable to electricity as export of electricity can only be done through transmission line - Petitioner was justified in not producing shipping bills to prove quantity of energy units transmitted and reports of REA filed by petitioner could be made basis to deal with claim for refund of Input Tax Credit [Section 54 of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017, read with section 16(3) of IGST Act, 2017 - Rule 89(2)(h) of Central Goods and Services Tax Rules, 2017 and rule 89(2)(ba) of Central Goods and Services Tax (Amendment) Rules, 2022] [Paras 21, 23, 26 and 34]

Refund - Export of electrical energy - Documentary evidence - Amendment to rule 89 of CGST (Amendment) Rules, 2022 was carried out to cure defect in rule 89 of Central Goods and Services Tax Rules, 2017, because of problem faced by power generating units in filing refund claims of unutilised Input Tax Credit on export of electricity - Statement of scheduled energy for export of electricity issued by Regional Power Committee (RPC) Secretariat, as part of Regional Energy Account (REA) under clause (nnn) of sub-regulation (1) of regulation 2 of Central Electricity Regulatory Commission was made basis to show number of units of electricity, transmitted and supplied across border - Amendment was carried out by rule 89(2)(ba) of Central Goods and Services Tax (Amendment) Rules, 2022 only to clarify anomaly existing with regard to production of material evidencing export of electricity which is intangible in nature - Production of shipping bills could not prove or establish quantity of energy transmitted - Hence, amendment was not declaratory but clarificatory in nature and required to be treated as retrospective in operation [Section 54 of Central Goods and

Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017, read with rule 89 of Central Goods and Services Tax Rules, 2017] [Paras 28, 29, 39, 40 and 42]

Writ jurisdiction - Alternate remedy - Tribunal being not yet constituted by GST Council, no efficacious remedy was available to petitioner, except approaching instant Court - Appeals of similar issues having been rejected by Appellate authority, no useful purpose would have been served in preferring appeal before same authority again, by same party, seeking very same relief - Therefore, Writ petitions could be entertained by instant Court [Sections 101 and 109 of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017 - Article 226 of Constitution of India] [Paras 17 and 18] [In favour of assessee]

Circulars and Notifications : C.B.I.&C. Circular No. 175/07/2022-GST, dated 6-7-2022 and Notification No. 14/2022-C.T., dated 5-7-2022

CASE REVIEW

Assistant Commissioner of State Tax v. *Commercial Steel Ltd.* [2021] 130 taxmann.com 180/52 GSTL 385/88 GST 799 (SC) (paras 15 & 17); *Wipro Ltd.* v. *Union of India* [2013] 32 taxmann.com 113/39 STT 639/29 STR 545 (Delhi) (para 31); *Commissioner of Customs* v. *Frontier Aban Drilling (India) Ltd.* 2010 (254) ELT 63 (Mad.) (para 33); *R.B. Jodha Mal Kuthiala* v. *CIT* [1971] 82 ITR 570 (SC) (para 42); CIT v. *Alom Extrusions Ltd.* [2009] 185 Taxman 416/319 ITR 306/227 CTR 417 (SC)/[2010] 1 SCC 489 (para 43); *CIT* v. *J.H. Gotla* [1985] 23 Taxman 14J/156 ITR 323/[1986] 48 CTR 363 (SC) (para 43); *CIT* v. *Vatika Township (P.) Ltd.* [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 446/271 CTR 1 (SC)/[2015] 1 SCC 1 (para 44) and *T. Kaliamurthi* v. *Five Gori Thaikkal Wakf* [2008] 9 SCC 306 (para 45) *followed.*

CASES REFERRED TO

Asstt. Commissioner of State Tax v. *Commercial Steel Ltd.* [2021] 130 taxmann.com 180/52 GSTL 385/88 GST 799 (SC) (paras 15), *Wipro Ltd.* v. *Union of India* [2013] 32 taxmann.com 113/39 STT 639/29 STR 545 (Delhi) (para 31), *PVR Ltd.* v. *State of Telangana* [W.P. No. 1008 of 2019, dated 6-9-2019] (para 32), *Commissioner of Customs* v. *Frontier Aban Drilling (India) Ltd.* 2010 (254) ELT 63 (Mad.) (para 33), *R.B. Jodha Mal Kuthiala* v. *CIT* [1971] 82 ITR 570 (SC) (para 42), *CIT* v. *Alom Extrusions Ltd.* [2009] 185 Taxman 416/319 ITR 306/227 CTR 417 (SC)/[2010] 1 SCC 489 (para 43), *CIT* v. *J.H. Gotla* [1985] 23 Taxman 14J/156 ITR 323/[1986] 48 CTR 363 (SC) (para 43), *CIT* v. *Vatika Township (P.) Ltd.* [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 446/271 CTR 1 (SC)/[2015] 1 SCC 1 (para 44) and *T. Kaliamurthi* v. *Five Gori Thaikkal Wakf* [2008] 9 SCC 306 (para 45).

Raghavan Ramabhadran *for the Petitioner.* **Suresh Kumar Routhu**, Sr. Standing Counsel *for the Respondent.*

ORDER

C. Praveen Kumar, J. - Heard Sri Raghavan Ramabadran, learned counsel for the petitioner, learned Special Government Pleader for Commercial Tax, for respondent no. 1 and Sri Suresh Kumar Routhu, learned Senior Standing Counsel for Central Board of Indirect Taxes and Customs [for short, "CBIC"] for respondent nos.2 and 3.

2. The issues involved in all the seven (7) writ petitions are one and the same. It is to be noted that W.P.Nos.11194, 11206 & 11263 of 2021 came to be filed against the order of Additional Commissioner, (GST Appeals) and W.P.Nos.11198, 17275, 28836 & 30292 of 2021 are filed against the order of Deputy Commissioner of Central Tax.

3. W.P. No. 11194 of 2021, which is filed, against the order in Appeal No. GUN-GST-000-APP-001-20-21 GST, dated 30-4-2020, wherein the order rejecting refund was upheld, is taken as a lead petition for the purpose of deciding the issues involved.

4. In a nut-shell, the facts in issue, are that there was a Memorandum of Understanding for the purpose of supply of power between India and Bangladesh. The petitioner participated in the tender process floated by the Bangladesh Power Development Board [for short, "BPDB"] and was awarded contract by BPDB, pursuant to which, a Letter of Intent for purchase of 250 MW electricity power, was issued on 7-8-2018. Thereafter, the petitioner entered into a Power Purchase Agreements (PPAs) with BPDB and started supplying

electricity/electrical energy to BPDB in accordance with the Indian Electricity Act, 2003 and the Rules and Regulations made thereunder. The Central Electricity Regulatory Commission, which is a statutory body under section 76 of the Electricity Act, 2003, framed Regulations and Guidelines on Cross Border Trade of Electricity (Guidelines for Import/Export (Cross Border) of Electricity, 2018). Necessary guidelines to that effect were issued on December, 2018. As per the Regulations, the participating entities in India, proposing to engage in cross border trade of electricity with neighbouring countries, shall first obtain approval of designated authority appointed by the Central Electricity Authority. The material on record show that the petitioner, after obtaining approval from the Central Electricity Authority, Ministry of Power, Government of India, entered into Power Purchase Agreement, with a unit in Bangladesh. It is needless to mention that the electricity to be supplied by the petitioner to BPDB would be as per the dispatch schedule provided by BPDB and then injected to the Transmission Grid at the interconnection point located in Andhra Pradesh. Reading meters would be installed at the place, where the electricity generated is injected into Inter¬State transmission line, so as to record the quantum of electricity that has been supplied by the petitioner to BPDB. The injected electricity would then get transmitted from the interconnection point to Bohrompur substation, West Bengal, India, which is the 'Delivery Point' through an Inter-State transmission line. From the said point, the electricity would be transmitted to Bangladesh through the cross border transmission line, between Bohrompur substation, India and Bheramara substation, Bangladesh.

(*a*) The material on record further indicates that Regional Energy Account (REA) report is being issued on monthly basis by the Southern Regional Power Committee, which is a unit of Central Electricity Authority of Government of India, indicating the number of units of electricity transmitted by each supplier of electricity to a particular recipient. The report also identifies the destination to which electricity is supplied by the petitioner.

5. The circumstances, which made the petitioner to file the writ petition, are:—

(*a*) Since export of electrical energy is treated as Zero rated supply under section 16 of IGST Act, 2017, the petitioner applied for refund of unutilized Input Tax Credit through a refund claim by filing application under Form GST RFD-01A in terms of section 54 of CGST Act, 2017 read with section 16(3) of IGST Act, 2017.

(*b*) On 17-5-2019, the third respondent issued a Memo, demanding the petitioner to file (1) Copy of Input Tax Credit Register; (2) Copy of Input Tax Credit Invoices and (3) A statement containing the number and date of shipping bills or bills of exports and the number and date of the relevant export invoices. Except for the statement containing the number and date of shipping bills or bills of export, the petitioner submitted all other documents including the Regional Energy Account showing the units of electricity exported as demanded in the memo. In so far as non- submission of the shipping bill, the petitioner addressed a letter to third respondent, stating that shipping bill will not be available and there is no requirement under the Customs Law, for filing of shipping bill or any similar documents showing export of electrical energy as required for physical export of tangible goods. It is stated that generation and filing of shipping bill is not possible for transmission of electricity and there is no requirement for filing of any shipping bill or bill of export for electrical energy.

(*c*) On 28-6-2019, a Show Cause Notice was served on the petitioner, rejecting the claim for refund to an extent of Rs. 5,67,94,499/-, on the ground that as the Petitioner failed to submit shipping bill and Export General Manifest [EGM] along with refund application, evidencing delivery of electricity at Bohrompur Station, the same cannot be termed as 'export of goods' under section 2(5) of the IGST Act. A detailed reply came to be filed by the petitioner on 24-7-2019 and a personal hearing was also given. On 20-9-2019, the third respondent rejected the request for the month of March, 2019. An appeal came to be filed before the second respondent reiterating the submissions.

(*d*) On 30-4-2020, the impugned order came to be passed upholding the order-in-original, rejecting the claim of refund on the following grounds (1) there is no provision of law, exempting the submission of shipping bill in respect of export of electricity and that the sanctioning authority cannot extend an exception which is not there in the law; (2) Adjudicating Authority cannot be expected to condone or overlook non-filing of shipping bill since they are not vested with such discretion power and (3) as the delivery point of electricity is in India, it cannot be said that the impugned transaction amounts to export of goods. Challenging the same, the present writ petitions came to be filed.

6. From the above, it is clear that the request came to be rejected mainly on the two grounds. (1) The shipping bill, as required under rule 89(2)(*b*) of Central Goods and Service Tax Rules, 2017, is not submitted to the authorities and (2) There is no evidence to show that the power transmitted by the petitioner from Bohrompur Substation, Murshidabad, India is the same power which reached Bheramara substation, Bangladesh.

7. Coming to the first issue, namely, non-submission of the shipping bills, learned counsel for the petitioner would contend that under rule 89 of CGST Rules, 2017 application for refund of Input Tax Credit should be accompanied by statements containing the number and date of shipping bills or bills of export etc. According to him, in so far as transmission of electricity is concerned, it is impossible to generate such bills, as the supply from one place to another place and from one country to another country is only through transmission lines. In other words, his argument is that shipping bill is a custom document and the same cannot be made applicable to show supply of Electricity; which is intangible in nature.

8. To substantiate that there was export of electricity, learned counsel for the petitioner submits that he has placed other documents (REA reports), which amply establish the same. According to him, in a meeting held on 18-2-2020, with the Ministry of Power, under the Chairmanship of the Central Electrical Authority, it was decided that monthly Regional Energy Accounts [REAs] issued by the Regional Power Committee [RPC] can be used as a document to establish proof of export in case of electricity. He also placed on record the Notification dated 5-7-2022 issued by the Government of India amending rule 89 of CGST Rules, 2017, which gives clarification as to how the export of electricity can be proved.

9. In so far as, the second issue is concerned, learned counsel for the petitioner would contend that though in first three cases, the authorities issued show cause notice demanding proof, for export of electricity to Bheramara substation, Bangladesh, but in subsequent notices issued for the months-June, 2019 to September, 2021, they realized their mistake and dropped the said issue in the notice. The very fact of dropping the demand, with regard to filing of proof in respect of export of electricity in the subsequent notices, would show that the authorities realized the impossibility in fulfiling the same and as such the same applies to earlier notices as well. The learned counsel further submits that amendment to rule 89(2) of CGST Rules, should be given a retrospective effect as it is a beneficial legislature.

10. A counter came to be filed by the second and third respondents, disputing the averments made in the affidavit filed in support of the writ petition. A reading of the counter shows that the documents produced by the petitioner do not confirm export of goods, as defined in section 2(5) of IGST Act. It is further urged that in the absence of any material showing that the energy generated by the petitioner was the same energy which was transmitted from India to Bangladesh, and in the absence of any documents evidencing the same, in terms of rule 89 of CGST Rules, 2017, the order impugned warrants no interference.

11. In other words, the argument of Sri Suresh Kumar Routhu, learned Senior Standing Counsel for CBIC, for second and third respondents, appears to be that there is no separate procedure to waive the requirement of producing shipping bills as proof of export. He further submits that some of the writ petitions filed directly before this Court under article 226 of Constitution of India without availing the alternate remedy is bad in law. He relied upon the judgments of Hon'ble Supreme Court in support of the same. He further submits that rejection for refund is made not only on the ground of procedural violation, but also on the ground that the supply of electricity by the petitioner does not constitute export of goods, as the delivery point is only up to a local area. Learned Standing Counsel further submits that the transmission of power supply by the petitioner stands established only till Bohrompur, West Bengal and not beyond that. Hence, they cannot claim any benefit of refund of Input Tax credit. Learned Standing Counsel further submits that the petitioner has no dedicated electrical lines for transmission of electrical energy from their thermal plant to Bohrompur sub-station and has no dedicated International/Cross Border Transmission lines for transmission of electricity to Bangladesh. The power is transmitted pursuant to an agreement with Central Electricity Authority under the supervision of Government of India and as such, no benefit can be given for refund of input tax credit.

12. An additional affidavit came to be filed on behalf of the second and third respondents, referring to Notification, dated 5-7-2022, amending rule 89 of CGST Rules, 2017 and the said notification being published in the Gazette on 5-7-2022. Hence, submits that any relief to the petitioner can be extended only be after 5-7-2022 and the same cannot be retrospective in operation.

13. In the rejoinder filed by the petitioner, it is stated that the petitioner has not challenged the statutory provision, but only prays that rule 89 of CGST Rules, 2017 requiring production of shipping bills as proof of export, is impossible to be fulfilled in their case, owing to its intangible nature.

14. The point that arises for consideration is, whether the authorities were right in rejecting the refund claim made by the petitioner?

15. Before dealing with issues involved, learned counsel for Respondents raised an objection with regard to the maintainability of writ petitions. He submits that, the present writ petitions are not maintainable, as some writ petitions are filed against order-in-appeal and some are filed against order-in-original, without availing the remedy provided under the statutory provisions and approached this court directly under Article 226 of the Constitution of India. He placed reliance on " *Asstt. Commissioner of State Tax* v. *Commercial Steel Ltd.* [2021] 130 taxmann.com 180/52 GSTL 385/88 GST 799 (SC)".

16. Whereas, learned counsel for the Petitioner urged that though the remedy of filing of an appeal lies before the GST Tribunal, but the same is not done, as the Tribunal is not yet constituted and that there was no efficacious or alternative remedy as on the date of filing of the writ petitions. It is further urged that when some of the appeals filed before the Appellate Authority are rejected, against which, the writ petitions are filed, no useful purpose would be served in preferring an appeal before the Appellate Authority again seeking the very same relief. In these circumstances, it is pleaded that filing of writ petitions directly before this Court, questioning the order-in-original cannot be said to be improper or incorrect. Having regard to the above circumstances, learned counsel for the petitioner contends that order under challenge requires interference.

17. It is well settled principle that this court can entertain writ petitions only in exceptional circumstances, as laid down in *Asstt. Commissioner of State Tax* case [*supra* 1 cited]. The existence of an alternate remedy is also not an absolute bar to the maintainability of the writ petitions. However, coming to present case, as Tribunal is not yet constituted by the GST Council and as there is no efficacious remedy available to the Petitioner, except approaching this court, we are of the view that the writ petitions can be entertained. Moreover, the respondents' contention that the petitioner has to approach Tribunal under section 112 of CGST Act, when and where it is constituted, cannot be accepted as it may cause irreparable loss to the petitioner.

18. With regard to the Writ Petitions filed against order-in-original, this court is inclined towards the contention raised by the Petitioner, wherein it is urged that when appeals of similar issues are rejected by Appellate authority, it would serve no useful purpose to file the same again before the same authority, by the same party, seeking the very same relief.

19. Coming to the point for consideration and to appreciate the rival arguments advanced, on the legal issues involved, it would be appropriate to refer section 16 of IGST Act, 2017 which reads as under:—

(1) "zero rated supply" means any of the following supplies of goods or services or both, namely:—

(*a*) export of goods or services or both; or

(*b*) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:—

(*a*) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(*b*) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied,

in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder.

A reading of section 16(3) of IGST Act will clearly indicate that a person making zero-rated supply shall be entitled to the claim under two options, mentioned in clauses (*a*) and (*b*). In so far as clause (*b*) is concerned,

the claim would be in accordance with the provisions of section 54 of CGST Act and the Rules made thereunder.

20. A perusal of section 54 of CGST Act, 2017, which deal with claim for refund, would show that the petitioner is entitled to claim refund of Input Tax Credit. This provision nowhere refer to furnishing of shipping bill for claim of refund, which aspect is not disputed. However, the authorities only refer to rule 89 2(*b*) of CGST Rules, 2017, for production of shipping bills, so as to accept the claim made. A situation of this nature would not have been contemplated, at the time when rule 89 of CGST Rules was framed and incorporated in the statute book. The transmission of electricity across the border is a phenomena that has come into existence from the recent past *i.e.* after incorporation of Rule 89, and as such, suitable amendments ought to have been made at the time when permissions are granted for transmission of electricity to other countries.

21. Keeping this in the background, it is now to be seen (A) whether the petitioner has supplied Electrical Energy across the border? and (B) whether he is entitled for refund of Input Tax Credit? It is to be noted here that the petitioner has been awarded a contract for supply of power pursuant to a tender floated by BPDB and the Letter of Intent for producing 250 MW of electricity power. The Power Purchase Agreements were entered into with BPDB and the petitioner started supply of energy. Initially, the supply was from 15-2-2018 to December, 2019, but, on extension, the petitioner entered into a long term agreement with BPDB for supply of energy beginning from 1-1-2020 to 31-7-2033. The supply of electricity by the petitioner is made as per the schedule, in terms of which, electricity is generated and injected into transmission grid at the interconnection point located in Andhra Pradesh. The reading meters at the interconnection/injection points are erected, to record the supply of electricity by the petitioner. The injected electricity gets transmitted to Bohrompur sub-station, Murshidabad District, West Bengal [delivery point] by the Interstate transmission lines of M/s. Power Grid Corporation of India Limited. From there, it reaches Bangladesh by cross border transmission line, between Bohrompur sub-station and Bheramara sub-station of Bangladesh, through Power Grid Company Bangladesh. The material on record also shows that the actual units of electricity supplied by the petitioner to Bangladesh is recorded in Regional Energy Account, issued on monthly basis, by Southern Regional Power Committee, which is a unit of Central Electricity Authority in India. As the supply of electrical energy, is treated as zero-rated supply, under section 16 of IGST Act, 2017, the petitioner applied for refund of unutilised input tax credit through a refund claim by filing applications in required forms. It is also not in dispute that the petitioner has generated electrical energy and transmitted through transmission lines of Power Corporation of India and the same reached Bohrompur sub-station and transmission to Bangladesh would be under the supervision of Central Electricity Authority, which is a Government of India undertaking.

22. At this stage, it is to be noted that out of seven writ petitions, three writ petitions came to be rejected on two grounds, namely:—

(*a*) the shipping bill which is required in terms of rule 89(2) of the CGST Rules, 2017 was not submitted, and

(*b*) no material show that the petitioner has not exported electricity to Bangladesh, as the delivery point is only at Bohrompur in India.

whereas the other four writ petitions were rejected on the sole ground that bills were not produced by the petitioner.

23. A perusal of the above rejection orders would show that the authorities have realized the mistake committed in insisting on production of material, evidencing export of energy to Bangladesh from the delivery point in Bohrompur, West Bengal, and for the said reason, in the subsequent orders the refund claim was rejected only on the ground that shipping bills were not produced. In other words, the subsequent show cause notices, for the period June, 2019 to September, 2021 does not dispute export of energy to Bangladesh as the claim came to be rejected due to non- production of shipping bills only. Hence, transmission to Bangladesh by the petitioner was accepted. Therefore, the argument of Sri Suresh Kumar Routhu, learned Standing Counsel that the petitioner never transmitted energy across the border cannot be accepted as it is now verifiable.

24. The next question, which falls for consideration would be with regard to rejection of refund claim for non-production of shipping bills in terms of rule 89(2)(*h*) of CGST Rules, 2017, which reads, as under:—

> "89(2)(*h*):- a statement containing the number and the date of the invoices received and issued during a tax period in a case where the claim pertains to refund of any unutilized input tax credit under sub-section

(3) of section 54 where the credit has accumulated on account of the rate of tax on the inputs being higher than the rate of tax on output supplies, other than nil-rated or fully exempt supplies."

25. As stated earlier, the petitioner made multiple representations to various authorities, informing them about the difficulty in producing shipping bills for export of electricity. The said issue was also raised before Regional Power Committee meeting, in which it was stated that REA reports made available by Regional Power Committee on monthly basis can be used as proof of export. It would be useful to extract the relevant portion, which is as under:—

"9. After deliberations, following was concluded:

a. Total energy from a generation project may be sold through a single or more than one contracts, which may include both 'export' and 'domestic sale'.

b. Taxes are paid by the generators for various components of the inputs that are used in generation of electricity from their project. Therefore, the inputs need to be apportioned between 'exports' and 'domestic sale' for the purpose of allowing input tax credits.

c. Regional Energy Accounts (REAs) which are made available by each Regional Power Committee (RPC) on monthly basis, provide energy scheduled under each contract from a particular generating station situated in their region. Thus, this scheduled energy as available in REA can be used for proof of export of sale.

d. However, it would be better to use the variable charge component of the bills, if available separately, for proportionating the input tax credit between 'export' and 'domestic sale'. It would still be better to proportionate the input tax credit on the basis of energy instead of revenue."

26. As observed earlier, rule 89 of CGST Rules, 2017, deals with a procedure for claiming refund. But, requiring them to produce shipping bills, as proof of export cannot be made applicable to electricity, as it is impossible to produce shipping bill for export of electricity, since the Custom Law does not refer to electricity and shipping bill is a Customs document. Export of electricity can only be through transmission line, but not through rail, road or water, for which, necessary documents can be made available.

27. Pursuant to repeated representations by Generators of Electrical Energy, and their negotiations with the Central Authorities from the year 2020, fructified into a notification, which came to be issued in the month of July, 2022, amending rule 89 of CGST (Amendment) Rules, 2022, which reads as under:

'8. In the said rules, in rule 89, -

(*a*) in sub-rule (1), after the fourth proviso, the following *Explanation* shall be inserted, namely:-

'*Explanation*. —For the purposes of this sub-rule, ?specified officer means a ?"specified officer" or an ? "authorised officer" as defined under rule 2 of the Special Economic Zone Rules, 2006.';

(*b*) in sub-rule (2), -

(*i*) in clause (*b*), after the words ?on account of export of goods, the words ?, other than electricity shall be inserted;

(*ii*) after clause (*b*), the following clause shall be inserted, namely:

"(*ba*) a statement containing the number and date of the export invoices, details of energy exported, tariff per unit for export of electricity as per agreement, along with the copy of statement of scheduled energy for exported electricity by Generation Plants issued by the Regional Power Committee Secretariat as a part of the Regional Energy Account (REA) under clause (nnn) of sub- regulation 1 of Regulation 2 of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 and the copy of agreement detailing the tariff per unit, in case where refund is on account of export of electricity;";

(*c*) in sub-rule (4), the following *Explanation* shall be inserted, namely:?

"*Explanation*. - For the purposes of this sub-rule, the value of goods exported out of India shall be taken as -

(*i*) the Free on Board (FOB) value declared in the Shipping Bill or Bill of Export form, as the case may be, as per the Shipping Bill and Bill of Export (Forms) Regulations, 2017; or

(*ii*) the value declared in tax invoice or bill of supply, whichever is less.";

(*d*) in sub-rule (5), for the words "tax payable on such inverted rated supply of goods and services", the brackets, words and letters "(tax payable on such inverted rated supply of goods and services x (Net ITC' ITC availed on inputs and input services))." Shall be substituted;'

28. A reading of the above amendment, *inter alia*, makes it clear that the petitioner herein can now prove the quantity of electricity transmitted basing on the statement of scheduled energy for export of electricity issued by Regional Power Committee [RPC] Secretariat, as a part of Regional Energy Account [REA] under clause (*nnn*) of sub-regulation (1) of regulation (2) of Central Electricity Regulatory Commission.

29. Further, the amendment to Rule 89(2)(*ba*) of CGST (Amendment) Rules, 2022 [July, 2022] clearly show that the number and date of the export invoices, details of energy exported, tariff per unit of export as per agreement, along with the copy of scheduled energy for exported electricity by Generation Plants, issued by the Regional Power Committee Secretariat, can be made the basis to show the number of units of electricity, transmitted and supplied across the border. This amendment makes it clear that information relating to generation of electrical energy and its transmission across the border, can be obtained from Regional Power Committee Secretariat or Regional Energy Account under the regulations of Central Regulatory Committee.

30. The situation reminds of an age old maxim *'Lex Non Cogit ad impossibilia'*, meaning that the law does not compel a man to do things which he cannot possibly perform.

31. Dealing with the aspect of impossibility of compliance, in *Wipro Ltd.* v. *Union of India* [2013] 32 taxmann.com 113/39 STT 639/29 STR 545, the High Court of Delhi, held as under:—

"9. We are of the view that there is a good deal of force in what the appellant says. Any condition imposed by the notification must be capable of being complied with. If it is impossible of compliance, then there is no purpose behind it. The appellant is in the business of rendering IT-enabled services such as technical support services, customer-care services, back-office services etc. which are considered to be "business auxiliary services" under the Finance Act, 1994 for the purpose of levy of service tax. The nature of the services is such that they are rendered on a continuous basis without any commencement or terminal points; it is a seamless service. It involves attending to cross-border telephone calls relating to a variety of queries from existing or prospective customers in respect of the products or services of multinational corporations. The appellant's unit in Okhla is one of those places which are popularly known as "Call Centres"-business process outsourcing (BPO) centres. The wealth of skilled, English-speaking, computer-savvy youth in our country are a great source of manpower required by the multinational corporations for such services. The BPO centres become very active from evening because of the time-difference between India and the European and American continents. The mainstay of the call centres is a sophisticated computer system and a technically strong and sophisticated international telephone network. The service consists of providing information relating to the products and services of the MNCs, queries relating to maintenance and after-sales services, providing telephonic assistance in case of glitches during operating the consumer-products or while utilising the services and so on. For instance, the customer sitting in USA has a problem operating a washing machine sold to him by an American company. When he calls the company, the local telephone number would be linked to the call centre number in India and it will actually be an employee of the Indian call centre who would answer the queries and assist the customer in USA get over the problem. Another example could be of a person in USA wanting to book an international air-ticket from an airline; his queries over the phone will be answered by the employee of the Indian call centre, sitting in some place in India. The American manufacturer of the washing machine or the American airline company is the source of revenue for the Indian call centre or BPO centre.

13. All the lower authorities, including the CESTAT, are unanimous in their view that the requirement, though one of procedure, is nevertheless inflexible as it is conceived with a view to preventing the evasion of service tax and dispensing with the same would deprive the service tax authorities from carrying out the necessary preventive and audit-checks. The correctness of this view, as a broad proposition, need not be decided in this case. The question here is one of impossibility of compliance with the requirement. If, having regard to the nature of the business and its peculiar features-which are not in dispute-the description, value and the amount of service tax and cess payable on input-services actually required to be used in providing the taxable service to be exported are not determinable prior to the date of export but are determinable only after the export and if, further, such particulars are furnished to the service tax authorities within a reasonable time along with the necessary documentary evidence so that their accuracy and genuineness may be examined, and if those particulars are not found to be incorrect or false or unauthenticated or unsupported by documentary evidence, we do not really see how it can be said that the object and purpose of the requirement stand frustrated. In the present case, no irregularity or inaccuracy or falsity in the figures furnished by the appellant both on 5-2-2007 and in the rebate claims has been alleged. Moreover, it appears to us somewhat strange that none of the authorities below has demonstrated as to how the appellant could have complied with the requirement prior to the date of the export of the IT-enabled services."

32. In *PVR Ltd.* v. *State of Telangana* [W.P. No. 1008 of 2019, dated 6-9-2019], the High Court of Telangana, observed as under:—

"11. Logically, the Film Development Corporation would not be in a position to issue such a certificate without knowing the number of prints of the movie that had been released. As already noted *supra*, a low budget feature film was one where the number of prints was less than 35. This fact could only be ascertained after release of the movie and not prior thereto. In effect, the condition was practically impossible to perform.

12. Significantly, the petitioner company asserted that it was alone being singled out for this discriminatory treatment and other similarly situated theatres were allowed to furnish the certificates from the Film Development Corporation later and not in advance. This assertion by the petitioner company was not rebutted by the third respondent in. her counter-affidavit. No explanation is forthcoming even now as to why the petitioner company alone is being picked upon for violation of the condition of furnishing the certificates in advance. The third respondent also does not dispute, that the certificates were produced by the petitioner company after release of the movies and there is no shortcoming or lacuna in this regard. If that is so, mere failure on the part of the petitioner company to produce such certificates in advance, which it could not have done in any event, is not a ground to deny it the benefit of G.O. Ms. No. 604 dated 22-4-2008. The assessment orders, which proceeded only on the premise that such benefit could not be extended to the petitioner company owing to belated production of the certificates, therefore cannot be countenanced."

33. In *Commissioner of Customs* v. *Frontier Aban Drilling (India) Ltd.* 2010 (254) ELT 63, the Madras High Court observed as under:—

"4. We have carefully considered the arguments of the learned Counsel for the appellant and perused the materials available on record as well as the orders of the lower Authorities. No such condition has been imposed or stated to be imposed in the Notification. It is the admitted case of the Department that the blow out preventer and its accessories were immersed in the deep water of the sea and became irretrievable. Hence, the importer cannot be directed to perform the function, which is impossible of performance. It is a different matter if it is the case of the Department that the importer retrieved the sheared off part of the drill ship and diverted it for some other purpose. On the contrary, it is the admitted case of the Department that the blow out preventer has been sheared off and immersed in the deep water of the sea, which is irretrievable. That was the reason given by the Tribunal for confirming the order of the Commissioner of Customs, who *set aside* the proposal of the Department to recover a sum of Rs. 5,75,84,140/- and for imposition of penalty. We do not find any merit in this case so as to entertain the appeal in the above stated facts and circumstances of the case."

34. Having to the above discussion and the judgments referred to above, we hold that the rule 89 of CGST Rules, 2017 and the amendment made thereto cannot curtail the benefit of Input Tax Credit. The petitioner, in our view, was justified in not producing shipping bills to prove the quantity of energy units transmitted and

that the reports of REA filed by the petitioner, could be made the basis to deal with the claim for refund of Input Tax Credit.

35. At this stage, Sri Suresh Kumar Routhu, learned Senior Standing Counsel for CBIC submits that the amendment/notification issued by the Government of India on 5-7-2022 to rule 89(3) of CGST (Amendment) Rules, 2022 cannot be made retrospective in operation, more so, when the notification in the Gazette postulates that it will come into effect from 5-7-2022.

36. On the other hand, learned counsel for the petitioner submits that though the amended Rule came into effect from 5-7-2022 but since this being a clarificatory and beneficial legislation, it has to be given retrospective effect.

37. The issue that props up now for adjudication at this stage is to whether amended rule 89(2) of CGST Rules, 2022 is clarificatory or declaratory?

38. Circular No.175/07/2022-GST dated 06-7-2022 issued by Ministry of Finance, Government of India, with regard to the manner of securing refund of unutilized ITC on account of export of electricity, is as under:—

> "Reference has been received from Ministry of Power regarding the problem being faced by power generating units in filing of refund of unutilised Input Tax Credit (ITC) on account of export of electricity. It has been represented that though electricity is classified as "goods" in GST, there is no requirement for filing of Shipping Bill/Bill of Export in respect of export of electricity. However, the extant provisions under rule 89 of CGST Rules, 2017 provided for requirement of furnishing the details of shipping bill/bill of export in respect of such refund of unutilised ITC in respect of export of goods. Accordingly, a clause (ba) has been inserted in sub-rule (2) of rule 89 and a Statement 3B has been inserted in FORM GST RFD-01 of the CGST Rules, 2017 *vide* notification No. 14/2022-CT dated 5th July, 2022. In order to clarify various issues and procedure for filing of refund claim pertaining to export of electricity, the Board, in exercise of its powers conferred by section 168(1) of the CGST Act, hereby prescribes the following procedure for filing and processing of refund of unutilised ITC on account of export of electricity."

The above Circular clearly establishes that amendment to rule 89 of CGST (Amendment) Rules, 2022 was carried out to cure the defect in rule 89 of CGST Rules, 2017, because of the problem faced by power generating units in filing refund claims of unutilised Input Tax Credit on export of electricity.

39. Further, a perusal of the amendment to rule 89(2) of CGST Rules, would inter-alia show that the said Rule came to be amended only to clarify the anomaly that was existing with regard to production of material evidencing export of a thing which is intangible in nature. This clarification came to be made since the situation namely transmission of energy could not have been visualized when rule 89(2) was incorporated in the Statute book. Production of shipping bills will not prove or establish by any means the quantity of energy transmitted. Hence, by no stretch of imagination, the amendment can be said to be declaratory in nature, but it can only be a one, which would be curing the defect by issuing necessary clarification as to how transmission of electrical energy can be proved.

40. Hence, we are of the view that the rule 89 of CGST (Amendment) Rules, 2022 is only clarificatory in nature.

41. When amendment/notification dated 5-7-2022 issued by Government of India is held to be curative or clarificatory in nature, the question now would be whether the said clarification is retrospective in nature?

42. A proviso, which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole. [*R.B. Jodha Mal Kuthiala* v. *CIT* [1971] 82 ITR 570 (SC) .

43. In *CIT* v. *Alom Extrusions Ltd.* [2009] 185 Taxman 416/319 ITR 306/227 ITR 417 (SC)/[2010] 1 SCC 489, the Parliament has explicitly stated that Finance Act, 2003, will operate with effect from 1st April, 2004, but the matter before the Court involved the principle of construction with regard to the provisions of Finance Act, 2003. Referring to judgment of *CIT* v. *J.H. Gotla* [1985] 23 Taxman 14J/156 ITR 323/[1986] 48 CTR 363, the Hon'ble Supreme Court held that the Finance Act, 2003, to the extent indicated above, should be read as retrospective. In fact, in *J.H. Gotla* case [supra 6 cited], the Hon'ble Supreme Court observed:-

"We should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result, *i.e.*, a result not intended to be subserved by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction."

44. The Constitutional Bench of Hon'ble Supreme Court in *CIT* v. *Vatika Township (P.) Ltd.* [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466/271 CTR 1 (SC)/[2015] 1 SCC 1 while deciding the question as to whether the insertion of proviso to Section 113 by Finance Act, 2002 is retrospective, discussed the general principles concerning retrospectivity. The Hon'ble Supreme Court observed as under:—

"30. We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators' object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In *Govt. of India* v. *Indian Tobacco Assn.* [(2005) 7 SCC 396] , the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in Vijay v. State of Maharashtra [(2006) 6 SCC 289] . It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are (sic not) confronted with any such situation here."

45. It is well settled law that no statute shall be construed to have a retrospective operation until its language is such that would require such conclusion. The exception to this rule is enactments dealing with procedure. This court held that the law of limitation, being a procedural law, is retrospective in operation in the sense that it will also apply to the proceedings pending at the time of enactment as also to the proceedings commenced thereafter, notwithstanding that the cause of action may have arisen before the new provisions came into force. However, the Court held that there is an exception to the rule also, where the right of suit is barred under the law of limitation in force before the new provision came into operation and a vested right has accrued to another, the new provision cannot revive the barred right or take away the accrued vested right. [*T. Kaliamurthi* v. *Five Gori Thaikkal Wakf* [2008] 9 SCC 306].

46. From the judgments referred to above, it is very clear that any benefit that gets accrued by way of legislation cannot be denied/curtailed, more so, when it is clarificatory in nature like the present one and as such it has to be made retrospective in operation.

47. The petitioner's contention on the retrospective operation is also substantiated by the department action through the deficiency memo dated 7-7-2022 issued by the Assistant Commissioner, Nellore Division, for the refund claim filed for the period January, 2022 to March, 2022. The deficiency memo has advised the Petitioner to resubmit the refund application as prescribed *vide* CBIC Circular No. 175/07/2022-GST dt.06-7-2022 along with all supporting documents. Copy of the refund claim in RFD-01 filed on 23-6-2022 along with deficiency memo dated 7-7-2022 is submitted before this Court along with a memo in USR No. 42132 of 2022 dated 15-7-2022.

48. From the above, it is clear that the department has applied the Notification No. 14/2022 - Central Tax dated 5-7-2022 even for the refund claim filed for the period prior to 4-7-2022 acknowledging the amendment as retrospective in operation.

49. Accordingly, these writ petitions are allowed and the orders under challenge are set aside and the W.P.Nos.11194, 11206 & 11263 of 2021 are remanded back to Additional Commissioner [GST Appeals] and the W.P.Nos.11198, 17275, 28836 & 30292 of 2021 are remanded back to the Deputy Commissioner of Central Tax to deal with the claim of refund in terms of this common order. The petitioner shall file relevant reports evidencing transmission of electricity before appropriate authorities, if not already filed. There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

*In favour of assessee.