2022 (2) TMI 934 - JHARKHAND HIGH COURT

M/S RUNGTA MINES LIMITED VERSUS THE COMMISSIONER OF CENTRAL GOODS & SERVICE S TAX AND CENTRAL EXCISE, THE COMMISSIONER (APPEALS) , CENTRAL GOODS & SERVICES TAX AND CENTRAL EXCISE, 2, THE ASST. COMMISSIONER, CENTRAL GOODS & SERVICES TAX AND CENTRAL EXCISE, DIVISION I, JHARKHAND

W.P.(T) No. 2245 of 2020

Dated: - 15-2-2022

Refund of input service Credit - transitional provision under Section 142(3) of Central Goods and Service Tax Act, 2017 read with Section 11-B of Central Excise Act, 1944 and Rule 2(l) and Rule 3 of the CENVAT Credit Rules, 2004 - HELD THAT:- In a recent judgement of the Hon'ble Supreme Court, in the case of UNION OF INDIA & ORS. VERSUS VKC FOOTSTEPS INDIA PVT LTD. [2021 (9) TMI 626 - SUPREME COURT], the Hon'ble Supreme Court dealt with the provision of refund of tax under Section 54 of the CGST Act and has extensively dealt with the principles of refund in the matter of taxation. In the said case, the Hon'ble Supreme Court was dealing with the conflicting view of Hon'ble Gujarat High Court and Hon'ble Madras High Court on the point of validity of Rule 89 (5) which provided a formula for a refund of ITC and the case of refund on account of inverted duty structure under sub-Section 3 and Section 54 inter alia dealing with credit accumulation on account of rate of tax on inputs being higher than the rate of tax on output supplies. The Hon'ble Supreme Court ultimately held that refund is statutory right and the extension of the benefit of refund only to the unutilised credit that accumulates on account of rate of tax on input goods being higher than the rate of tax on output supplies, by excluding unutilised input tax credit that accumulated on account of input services, is a valid classification and a valid exercise of legislative power.

Though in the instant case we are not dealing with section 54 of CGST Act but are concerned with transitional provisions dealing with "refund" under section 142(3) of the CGST Act "in cash" under certain circumstances in connection with taxes suffered under the previous regime. However, the fundamental concepts and the interpretation of law relating to refund would still be the same and what is to be seen is whether the petitioner qualifies for entitlement of refund under section 142(3) of CGST Act in the light of the facts and circumstances of this case.

In the instant case the petitioner has failed to follow the prescribed procedure to avail such a credit and consequently having lost such a right, he cannot claim revival of such a right and claim refund of the same by virtue of transitional provisions under Section 140(3) of the CGST Act. The facts involved in the present case would demonstrate that the petitioner had no existing right on the date of coming into force of CGST Act to avail credit of the service tax paid on "port services" as CENVAT Credit and accordingly, the provision of Section 140(3) of the CGST Act cannot be construed to have conferred

such a right which never existed on the date of coming into force of CGST Act.

From the entire records of the case this court does not find any explanation from the side of the petitioner as to under what circumstances the Bill dated 23.05.2017 was received by them as late as on 20.09.2017 (although as per the petitioner the port services were availed and the payment including service tax was made to the port authorities in the month of April 2017), except the statement that delayed receipt of the bill was beyond their control.

The provision of section 142(3) does not entitle a person to seek refund who has no such right under the existing law or where the right under the existing law has extinguished or where right under the new CGST regime with respect to such claim has not been exercised in terms of the provision of CGST, Act and the rules framed and notifications issued. Meaning thereby, section 142(3) does not confer a new right which never existed under the old regime except to the manner of giving relief by refund in cash if the person is found entitled under the existing law in terms of the existing law - the argument of the petitioner by referring to second proviso to section 142(3) of CGST Act that it indicates that section 142(3) would apply to the situations where the assessee has failed to take transitional credit under section 140(1), is also devoid of any merits. The second proviso only indicates that if the assessee has taken transitional credit he will not be entitled to refund. Certainly, an assessee cannot simultaneously claim transitional credit as well as refund of the same amount. The second proviso to section 143(2) cannot be said to be an eligibility condition to claim refund but is only a condition which governs refund as an assessee cannot be permitted to have transitional credit as well as refund of the same tax amount.

It is apparent from the impugned orders that the specific case of the respondent is that the petitioner had claimed CENVAT Credit under ST-3 return thereby treating the services involved in the present case as their input services used for providing output service, whereas they are not output service provider and the same cannot be used for providing output services. Therefore, it cannot be their input services under Rule 2 (l) of CENVAT Credit Rules, 2004 - the authority has rightly held that petitioner had wrongly claimed Credit of the impugned service tax under ST-3 return and omitted to claim the impugned service tax as CENVAT Credit in ER-1 Return.

The authorities have held in the impugned orders that in the instance case, the timeline for claiming CENVAT Credit qua the service tax paid on port services was not followed by the petitioner, although the services were availed, the entire payment was made and the bill was also generated in the month of April/May, 2017. Further, it has also been held in the impugned orders that the petitioner not only failed to claim the CENVAT Credit as per law, but illegally claimed the credit of the same while filing service tax return although the petitioner was not entitled to do so as the petitioner was not registered as a service provider. The authorities have also held that the service tax paid on port service was not eligible for refund under the existing law as the said services were not utilised for export - the petitioner never had a right to claim refund under the existing law and had failed to exercise their right to claim CENVAT Credit as per law and wrongly claimed the impugned amount as credit in Service Tax Return (S.T. 3 return).

There are no reason to interfere with the findings and reasons assigned by the adjudicating authority as well as the appellate authority rejecting the application for refund filed by the petitioner under section 11B of Central Excise Act read with Section 142(3) and 174 of CGST Act - petition dismissed.

Judgment / Order

Hon'ble Mr. Ju stice Aparesh Kumar Singh And Hon'ble Mrs. Justice Anubha Rawat Choudhary

For the Petitioner : : Mr. K. Kurmi, Advocate, Mr. Nitin Kumar Pasari, Advocate, Ms. Sidhi Jalan, Advocate

For the Respondents : : Mr. Amit Kumar, Advocate

ORDER

PER ANUBHA RAWAT CHOUDHARY, J.

1. Heard Mr. K. Kurmi, learned Advocate appearing on behalf of the petitioner along with Mr. Nitin Kumar Pasari and Ms. Sidhi Jalan, Advocates.

2. Heard Mr. Amit Kumar, learned counsel appearing on behalf of the respondents.

3. The present writ petition has been filed for following reliefs: -

a. For setting aside the order in Appeal dated 03.2.2020 (Annexure-1) passed by the appellate authority, i.e. the Respondent No.2.

b. For setting aside the order in Original dated 25.1.2019 (Annexure-2) passed by the adjudicating authority i.e. the Respondent No. 3.

c. For setting aside the show-cause notice bearing dated 24.7.2018, issued by the adjudicating authority proposing to reject the refund application of the petitioner of CENVAT Credit of ₹ 10,88,328/-.

d. For a relief of refund of CENVAT Credit of the aforesaid amount of input service credit in terms of transitional provision under Section 142(3) of Central Goods and Service Tax Act, 2017 read with Section 11-B of Central Excise Act, 1944 and Rule 2(l) and Rule 3 of the CENVAT Credit Rules, 2004.

4. The following are the foundational facts for filing of the present writ petition: -

Date	Events
period 26.04.2017 to 29.04.2017	The petitioner was registered under Central Excise Act, 1944 for manufacture of excisable goods in which the inputs Iron Ore, Coal, Dolomite etc. are used. The petitioner used to procure input i.e. coal, domestically as well as from outside the territory of India and for importing coal, the petitioner availed input services such as 'Port Services'.
period 26.04.2017 to 29.04.2017	At the relevant point of time, the petitioner was also registered under Chapter V of the Finance Act, 1994 as a person liable to pay tax on receipt of taxable services under reverse charge mechanism as a recipient of "Goods Transport Agency Services".

period 26.04.2017 to 29.04.2017	The dispute relates to the period 26.04.2017 to 29.04.2017, when the petitioner imported 23000 MT of Coal from outside the territory of India through Haldia Port under Bill of Entry dated 27.04.2017 for using the same in or in relation to manufacture of their final product i.e. Sponge Iron. For the purposes of clearance/handing of the said coal from Haldia Port, the petitioner received bundle of services under “Port Services” from Kolkata Port Trust, Haldia. M/s Kolkata Port Trust raised their Bill dated 23.05.2017 for value of ₹ 89,36,836/- including service tax component amounting to ₹ 10,88,328/-.
23.05.2017	Though the said services were availed by the petitioner during the period 26.04.2017 to 29.04.2017 and payment of the same including service tax thereon was made by the petitioner to M/s Kolkata Port Trust during April, 2017, the bills for provision of services though raised on 23.05.2017 by M/s Kolkata Port Trust, however the bill in original was not received by them till 20.09.2017.
01.07.2017	The Central Excise Act, 1944 including CENVAT Credit Rules, 2004 as well as Chapter V of Finance Act, 1994 including Rules framed thereunder have been omitted by Section 173 and Section 174 of the Central Goods & Services Act, 2017 (CGST Act) with effect from 01.07.2017, the appointed date. The petitioner obtained registration under CGST Act with effect from 01.07.2017.
June, 2017	The petitioner is totally silent about monthly return for the month of May, 2017 which was to be filed by 10.06.2017 and could be revised till 30.06.2017 as per Rule 12 of the Central Excise Rules.
10.07.2017	The petitioner filed their monthly ER-1 return under Central Excise Act for the month of June, 2017 on 10.07.2017 under Rule 12 of Central Excise Rules, 2002 but the credit of aforesaid amount of ₹ 10,88,328/- was not claimed as the bill dated 23.05.2017 in original was not yet received by the petitioner. It has been stated that ER-1 return is required to be filed by 10th of the following month i.e. 10th of July for the month of June, 2017 which could be revised by the end of the calendar month i.e. 31.07.2017 as per the provisions of Clause- a of sub-Rule (8) of Rule 12 of the Central Excise Rules, 2002.
30.07.2017	Monthly ER-1 return for the month of June, 2017 was revised on 30.07.2017 claiming all the CENVAT Credit up to 30.06.2017 for which duty paying documents/bills were already received by the petitioner except credit of aforesaid amount of ₹ 10,88,328/- as the bill dated 23.05.2017 in original was not yet received by the petitioner.
20.09.2017	The ‘original’ of the bill dated 23.05.2017 was delivered to the petitioner only on 20.09.2017 and it is the specific case of the petitioner that such delay was beyond their control.

22.09.2017	on 22.09.2017 the petitioner filed their ST-3 return for the period April, 2017 to June, 2017 under Chapter V of the Finance Act, 1994 taking all service invoices where they were liable to pay service tax under reverse charge basis. Further it is the case of the petitioner that in the said ST-3 return the petitioner disclosed the said Input Service Credit on "port services" amounting to ₹ 10,88,328/- with a view to keep the said transaction above the board so that their claim is not lost.
31.10.2017	The time for filing TRAN-1 for claiming transitional credit was extended till 31.10.2017 vide notification issued by Central Board of Direct Taxes and Customs. However, the petitioner did not claim the aforesaid service tax paid on "port services" in TRAN-1 although by this time the original bill was received as the said CENVAT Credit of the said transaction was not included in ER-1 return which was already filed.
28.06.2018	On 28.06.2018, the petitioner submitted its refund application in Form-R, praying for refund of the CENVAT Credit of ₹ 10,88,328/- being the service tax paid on "port services".
24.07.2018	The petitioner was served with a show-cause notice dated 24.07.2018 as to why the application for refund of CENVAT Credit of Input Service amounting to ₹ 10,88,328/- be not rejected.
13.09.2018	The petitioner filed its response to the show-cause notice vide letter dated 13.09.2018 and also attended personal hearing.
25.01.2019 03.02.2020 Impugned orders	The respondent no. 3, by the impugned order in original dated 25.01.2019, rejected the application of the petitioner for refund. The said order dated 25.01.2019 was challenged before the appellate authority vide memo of appeal dated 25.03.2019. Thereafter, the respondent no. 2, by the impugned Order-in- Appeal dated 03.02.2020, rejected the appeal and upheld the adjudication order dated 25.01.2019.
	The petitioner has filed the present writ petition challenging the show-cause, Order-in-Original and Order-in-Appeal and has also sought a writ of mandamus upon the respondents to refund the aforesaid amount of ₹ 10,88,328/- being the service tax paid to the port authorities on "port services".

5. Arguments of the learned counsel for the petitioner are as under:

i) Section 140 of CGST Act read with Rule 117 of CGST Rules, provides for the mechanism which inter alia envisages that the closing balance of CENVAT Credit available under the existing law as per the last return filed (ER-1 return) shall be carried forward to the new GST regime by filing declaration in Form GST TRAN-1 and thereupon, such transitional credit shall be credited

to the Electronic Credit Ledger of the assessee maintained under CGST Act. It is submitted that under Section 140 (5) of the CGST Act, there is no requirement of claiming the credit in the ER-1 returns for the month of June, 2017 for obvious reasons that by the time invoices are received the limitation for filing ER-1 would have expired. Hence, in such case mere disclosure of the receipt of services in the books of accounts is enough. Section 141 of CGST Act deals with the transitional provision relating to job work which is not relevant in the present case. It is the specific case of the petitioner that Section 142 of CGST Act deals with miscellaneous transitional provisions which are not covered under Section 140 or Section 141 of the CGST Act. The case of the petitioner is covered under Section 142 (3) of the CGST Act which is the substantive provision which allows refund of CENVAT Credit in certain contingencies as transitional measures.

ii) Sub-Section 3 of Section 142 of the CGST Act, inter alia provides for refund of CENVAT Credit in cash accruing to the assessee under the CENVAT Credit Rules. The provisions of Section 142 are residuary substantive provisions which deal with refund of CENVAT Credit in cases/contingencies which are not specifically covered or contemplated under Section 140 of the Central Goods & Services Tax Act.

iii) The second proviso to Section 142 (3) envisages that if carry forward of the transitional credit is claimed (under Section 140), then refund of such CENVAT Credit would not be admissible. This itself shows that cases not falling under Section 140/Rule 117 are covered under Section 142 (3) of the CGST Act.

iv) Under Section 142 (3) of the CGST Act, there is no requirement of disclosure of the CENVAT Credit in the ER-1 returns like Section 140 (5) and unlike Section 140 (1) of the said Act. Section 142 (3) of the CGST Act is a residuary provision which deals with refund of CENVAT Credit in accordance with existing law (Central Excise Act, 1944) in cash for cases not falling in specific transitional provision under Section 140 of the Central Goods & Services Tax Act.

v) For the month of June, 2017 monthly return ER-1 under Central Excise Act was to be filed as per Rule 12 (1) of Central Excise Rules and the credit claimed in ER-1 (June, 2017) was to be claimed under the new GST regime by filing a declaration in Form GST – TRAN – 1. ER-1 return is required to be filed by 10th of the following month i.e., 10th July, 2017 for the month of June, 2017 and which can be revised by end of the calendar month i.e. by 31st July, 2017 as per Clause (a) of sub-Rule (8) of the said Rule 12 of the Central Excise Rules.

vi) Central Board of Indirect Taxes & Customs (formerly Central Board of Excise & Customs) vide Circular No.207/5/2017-ST dated 28.09.2017 has clarified that assessee can file declaration in GST TRAN – 1 under Section 140 (1) / Rule 117 upto 31.10.2017 and the same can be revised. The said last date for filing GST TRAN – 1 was further extended till 27.12.2019 in case where the claim of input service credit is already disclosed in the ER-1 return for June, 2017 unlike the case of the petitioner.

vii) While assailing the impugned orders rejecting the claim of refund, it has been submitted that the same are ex facie illegal and without authority of law and claim of refund of the petitioner is in the nature of vested/accrued/substantive right and therefore, the orders refusing to refund are

violative of Articles 14, 19 (1) (g), 265 and 300 A of the Constitution of India.

viii) The provisions of Section 142 (3) of the CGST Act have not been properly considered by the learned authorities below and the provision under Section 142 (3) is a substantive provision, which deals with refund of CENVAT Credit in special circumstances like the present case, where the original invoice dated 23.05.2017 was received by the petitioner on 20.09.2017 i.e., after coming into force of GST Act.

ix) It is submitted by the petitioner that the CENVAT Credit of said amount of service tax paid on port service earned lawfully under the existing laws which is a substantive benefit conferred by and earned under the existing law which cannot be defeated or taken away without authority of law contrary to mandates of Article 14, Article 19 (1) (g), Article 265 and Article 300A of the Constitution of India.

x) The respondent authorities erred in law while holding that there is no provision of law granting refund of tax paid on input services under Section 11 B of Central Excise Act relatable to the facts and circumstances of this case.

xi) The legislature was well aware of the fact that during the transitional period, there might be situations which might not be covered under Section 140 of the CGST Act and such claims are required to be refunded in cash and therefore, saved Section 11B (2) of the Central Excise Act and provided for such refund under Section 142 (3) of the Act.

xii) In spite of specific plea of the petitioner that their claim is under Section 142(3) of the CGST Act read with Section 11B of the Central Excise Act, the respondent No.2 in the impugned Order – in – Appeal dated 03.02.2020 (Annexure – 1), arbitrarily and without authority of law, rejected the claim by referring to Section 140 of the CGST Act and ignoring Section 142 (3) of the CGST Act and thereby failed to act in a judicious manner.

xiii) Learned counsel for the petitioner has relied upon the following judgements:

a) K.S. Paripoornan Vs. State of Kerela and Others, (1994) 5 SCC 593, to submit that transitional provisions are special provisions for the application of legislation to the circumstances which exist at the time when the legislation comes into force.

b) J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. State of U.P., AIR 1961 SC 1170 to submit that in case of conflict between specific provision and a general provision, the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the specific provision.

c) “Union of India and Others Vs. Filip Tiago De Gama of Vedem De Gama” reported in (1990) 1 SCC 277 to submit that provisions of transition are to be purposively construed.

d) “Commissioner of Income Tax, Bangalore Vs. J.H. Gotla, Yadagiri” reported in (1985) 4 SCC 343 to submit that even in the taxation if strict literal construction leads to absurdity, construction which results in equity rather than injustice should be preferred.

e) “Gammon India Ltd. Vs. Special Chief Secretary and Others” reported in (2006) 3 SCC 354 to submit that when rights are saved by saving provisions, it continues even after

repeal.

f) “Baraka Overseas Traders Vs. Director General of Foreign Trade and Another” reported in (2006) 8 SCC 103 to submit that accrued rights under old law, continue to be available under new law.

g) “State of Punjab and Ors. Vs. Bhajan Kaur and Ors.” reported in (2008) 12 SCC 112 to submit that Section 6 of General Clauses Act does not create new rights, it saves existing rights and the existing rights have to be determined on the basis of the existing law unless different intention appears.

h) “Eicher Motors Ltd. and Another Vs. Union of India and Others” reported in (1999) 2 SCC 361 to submit that rights accrued under existing law not to be altered.

i) “Commissioner of Central Excise, Indore Vs Grasim Industries Ltd. through its Secretary” reported in (2018) 7 SCC 233 to submit that excise duty / CENVAT is value added tax.

j) “Kunal Kumar Tiwari Alias Kunal Kumar Vs. State of Bihar and Another” reported in (2018) 16 SCC 74 to submit that an interpretation which advances the purpose or object underlying the Act should be preferred.

k) “M/s DMR Constructions Vs. Assistant Commissioner, Commercial Tax Department, Rasipuram Namakkal District”, a judgement passed by Hon’ble Madras High Court reported in 2021- TIOL-831-HC-MAD-GST to submit that considering the purposive construction, the Hon’ble Madras High Court has granted transition of credit of tax deducted at source under VAT law even when Section 140 of Tamil Nadu GST Act, 2017 does not specifically provide for it.

l) “Glaxo Smith Kline PLC and others Vs. Controller of Patents and Designs and Others” reported in (2008) 17 SCC 416 to submit that pre-existing right prior to coming into force of the new law continues to be governed by the old law and their rights under the old statute are not destroyed.

6. Submission of the Respondents: -

Learned counsel for the respondents, on the other hand, has vehemently opposed the prayer of the petitioner and has submitted that the impugned orders passed by the authorities are well reasoned orders. There is neither any illegality nor any perversity calling for interference in those orders in writ jurisdiction. He submits that the authorities have rightly rejected the claim of refund as the petitioner was not entitled to refund under the existing law and did not claim CENVAT Credit in time as per the provisions of existing law and therefore could not claim credit through TRAN – 1 under Section 140 of CGST Act dealing with transitional arrangement for input tax credit. He submits that filing of refund application was itself mis-conceived and without any merits and Section 142 (3) of the CGST Act has no applicability under the facts and circumstances of this case. He submits that mode and manner to avail CENVAT Credit in connection with the impugned input service was available under Section 140 of CGST Act by claiming it firstly through ER-1 monthly return and then claiming it through TRAN- 1, but the petitioner did not avail of its rights in time. He submits that the matter of refund is strictly governed

by the provision of law and the petitioner has not acted as per the law. He submits that neither Section 142 (3) nor Section 140 (5) of the CGST Act, has any applicability under the facts and circumstances of this case.

He submits that the petitioner was not entitled to refund of service tax paid on “input service” relating to “port service” and accordingly, application for refund by referring to Section 11 (B) of Central Excise Act, 1944 was itself not available. He also submits that the refund of credit is available to such assesses only who are covered by Rule 5 of CENVAT Credit Rules, 2004 as per the provisions of law which existed prior to coming into force of GST Act, 2017, according to which refund of CENVAT Credit of input services is available only to provider of output services or goods which are exported. Thus, the refund application under Section 11 B of Central Excise Act, 1944 read with Rule 5 of Central Excise Rules, 2004 was not maintainable.

It has been submitted that Section 140 of CGST Act, 2017 specifically talks about transitional arrangement for input tax credit and the board also clarified certain transitional issues of similar nature vide Circular dated 28.09.2017 under which also, the case of the petitioner is not covered. Section 142 (3) of CGST Act has no applicability. The petitioner was rightly served show cause notice denying the refund of CENVAT Credit of “input service” under Section 142 read with Section 174 of CGST Act, 2017 read with Section 11 B of Central Excise Act, 1944 as made applicable under Section 83 of Chapter V of the Finance Act, 1994. The petitioner failed to incorporate the CENVAT Credit in ER- 1 return in time and consequently, was not eligible to claim the said credit through TRAN – 1 under Section 140 of CGST Act, 2017 read with Rule 117 of CGST Rules. He submits that the petitioner was entitled to CENVAT Credit had he claimed the same in time by reflecting it in monthly return ER-1 and then through TRAN – 1 and there is no other mechanism to claim input tax credit other than TRAN- 1. It is further submitted that the petitioner had illegally taken credit of the impugned amount of service tax in ST-3 return though the petitioner was not an output service provider and was registered under Service Tax only for the purposes of discharging its liability under reverse charge mechanism. The petitioner failed to declare the CENVAT Credit arising out of input service tax in the last return ER-1 filed for the month of June, 2017 and did not claim the credit through TRAN-1 return even till the extended date. The petitioner was entitled to avail the input credit only through TRAN-1 under transitional arrangement for credit which was required to be done within the prescribed time.

Findings.

Legal proposition on the point of refund: -

7. In a recent judgement of the Hon’ble Supreme Court, in the case of “Union of India and Others Vs. VKC Footsteps India Private Ltd.” reported in 2021 SCC online SC 706, the Hon’ble Supreme Court dealt with the provision of refund of tax under Section 54 of the CGST Act and has extensively dealt with the principles of refund in the matter of taxation. In the said case, the Hon’ble Supreme Court was dealing with the conflicting view of Hon’ble Gujarat High Court and Hon’ble Madras High Court on the point of validity of Rule 89 (5) which provided a formula for a refund of ITC and the case of refund on account of inverted duty structure under sub-Section 3 and Section 54 inter alia dealing with credit accumulation on account of rate of tax on inputs being higher than the rate of tax on output supplies. The Hon’ble Supreme Court ultimately upheld the view of the Hon’ble Madras High Court which held that refund is statutory right and the extension of the benefit of refund only to the unutilised credit that

accumulates on account of rate of tax on input goods being higher than the rate of tax on output supplies, by excluding unutilised input tax credit that accumulated on account of input services, is a valid classification and a valid exercise of legislative power. The Hon'ble Supreme Court accepted the submission of Mr. N. Venkataraman, learned ASG on the legal proposition on the point of refund. The submissions of Mr. N. Venkataraman, learned ASG on the point of legal proposition have been recorded in para-D.1.3 Part (III), as under: -

"(i) Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. There being no challenge either to the levy or collection of taxes in these cases, taxes paid into the coffers of the Union Government or the States become the property of the Union/States;

(ii) The refund of taxes is neither a fundamental right nor a constitutional right. The Constitution only guarantees that the levy should be legal and that the collection should be in accordance with law. There is no constitutional right to refund. Refund is always a matter of a statutory prescription and can be regulated by the statute subject to conditions and limitations;

(iii) Even in the case of an illegal levy or a levy which is unconstitutional, the decision of the nine judges Bench in Mafatlal Industries Limited v. Union of India held that the right of refund is not automatic. The burden of proof lies on the claimant to establish that it would not cause unjust enrichment;

(iv) Though tax enactments are subject to Articles 14 and 19(1)(g) of the Constitution, this is subject to two well-settled principles:

(a) Discriminatory treatment under tax laws is not per se invalid. It is invalid only when equals are treated unequally or unequals are treated equally. Both under the Constitution and the CGST Act, goods, services, input (goods) and input services are not one and the same. These are distinct species, though covered by a common code; and

(b) The legislature is entitled to the widest latitude when it identifies categories of classification and unless things constituting the same class are treated differently without a rationale, the provision cannot be declared as unconstitutional;

(v) The doctrine of reading down is employed to narrow down the scope of a proviso under challenge, when it may otherwise be unconstitutional. The doctrine cannot result in expansion of a statutory provision for refund which would amount to rewriting the legislation;

(vi) Accepting the submission of the assessees that goods and services must be treated at par can lead to drastic consequences in terms of:

(a) rates of taxes;

(b) concessions, benefits and exemptions;

(c) intervention in the areas of political, economic and legislative policies;

(vii) Refund of taxes is one form of granting exemption;

(viii) Once a refund is construed as a form of exemption from taxes, the provision has to attract

strict interpretation;

(ix) Exemptions, concessions and exceptions have to be treated at par and must be strictly construed;

(x) ITC is not a matter of right and the burden of proof is on the assessee to establish a claim for a concession or benefit;

(xi) The manner in which a proviso can be construed has been elucidated in the precedents of this Court. A proviso may not be only an exception but may constitute a restriction on the operation of the main statutory provision; and

(xii) A legislative amendment which reflects a policy choice is not subject to judicial review."

8. The Hon'ble Supreme Court crystalised and laid down the law in connection with refund under Taxation and some of the paragraphs of the judgement are quoted as under:

"87. We must be cognizant of the fact that no constitutional right is being asserted to claim a refund, as there cannot be. Refund is a matter of a statutory prescription. Parliament was within its legislative authority in determining whether refunds should be allowed of unutilised ITC tracing its origin both to input goods and input services or, as it has legislated, input goods alone. By its clear stipulation that a refund would be admissible only where the unutilised ITC has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies, Parliament has confined the refund in the manner which we have described above. While recognising an entitlement to refund, it is open to the legislature to define the circumstances in which a refund can be claimed. The proviso to Section 54(3) is not a condition of eligibility (as the assessees' Counsel submitted) but a restriction which must govern the grant of refund under Section 54(3). We therefore, accept the submission which has been urged by Mr. N Venkataraman, learned ASG.

93. Parliament engrafted a provision for refund Section 54(3). In enacting such a provision, Parliament is entitled to make policy choices and adopt appropriate classifications, given the latitude which our constitutional jurisprudence allows it in matters involving tax legislation and to provide for exemptions, concessions and benefits on terms, as it considers appropriate. The consistent line of precedent of this Court emphasises certain basic precepts which govern both judicial review and judicial interpretation of tax legislation. These precepts are……..

94. The principles governing a benefit, by way of a refund of tax paid, may well be construed on an analogous frame with an exemption from the payment of tax or a reduction in liability [Assistant Commissioner of Commercial Tax (Asst.) v. Dharmendra Trading Company reported in (1988) 3 SCC 570].

98. Parliament while enacting the provisions of Section 54(3), legislated within the fold of the GST regime to prescribe a refund. While doing so, it has confined the grant of refund in terms of the first proviso to Section 54(3) to the two categories which are governed by clauses (i) and (ii). A claim to refund is governed by statute. There is no constitutional entitlement to seek a refund. Parliament has in clause (i) of the first proviso allowed a refund of the unutilized ITC in the case of zero-rated supplies made without payment of tax. Under clause (ii) of the first proviso,

Parliament has envisaged a refund of unutilized ITC, where the credit has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies. When there is neither a constitutional guarantee nor a statutory entitlement to refund, the submission that goods and services must necessarily be treated at par on a matter of a refund of unutilized ITC cannot be accepted. Such an interpretation, if carried to its logical conclusion would involve unforeseen consequences, circumscribing the legislative discretion of Parliament to fashion the rate of tax, concessions and exemptions. If the judiciary were to do so, it would run the risk of encroaching upon legislative choices, and on policy decisions which are the prerogative of the executive. Many of the considerations which underlie these choices are based on complex balances drawn between political, economic and social needs and aspirations and are a result of careful analysis of the data and information regarding the levy of taxes and their collection. That is precisely the reason why courts are averse to entering the area of policy matters on fiscal issues. We are therefore unable to accept the challenge to the constitutional validity of Section 54(3)."

9. Though in the instant case we are not dealing with section 54 of CGST Act but are concerned with transitional provisions dealing with "refund" under section 142(3) of the CGST Act "in cash" under certain circumstances in connection with taxes suffered under the previous regime. However, the fundamental concepts and the interpretation of law relating to refund would still be the same and what is to be seen is whether the petitioner qualifies for entitlement of refund under section 142(3) of CGST Act in the light of the facts and circumstances of this case.

Legal proposition on the point of interpretation of transitional provisions, vested rights etc with reference to the judgements relied upon by the learned counsel of the petitioner.

10. The learned counsel for the petitioner has also referred to the judgment passed in the case of Union of India vs. Filip Tiago De Gama of Vedam De Gama (supra) on the point that the transitional provisions are to be purposefully construed and the paramount object in statutory interpretation is to discover what the legislature intended and this intention is primarily to be ascertained from the text of the enactment in question. This principle of statutory interpretation is well settled.

11. So far as the case of K. S. Paripoornan (supra) is concerned, the Hon'ble Supreme Court has considered the role of "Transitional Provision" and the learned counsel for the petitioner has referred to Para-71 of the said judgment, which is quoted as under: -

"71. Section 30 of the amending Act bears the heading "Transitional provisions". Explaining the role of transitional provisions in a statute, Bennion has stated:

"Where an Act contains substantive, amending or repealing enactments, it commonly also includes transitional provisions which regulate the coming into operation of those enactments and modify their effect during the period of transition. Where an Act fails to include such provisions expressly, the court is required to draw inferences as to the intended transitional arrangements as, in the light of the interpretative criteria, it considers Parliament to have intended."

(Francis Bennion : Statutory Interpretation, 2nd Edn., p. 213)

The learned author has further pointed out:

> *"Transitional provisions in an Act or other instrument are provisions which spell out precisely when and how the operative parts of the instrument are to take effect. It is important for the interpreter to realise, and bear constantly in mind, that what appears to be the plain meaning of a substantive enactment is often modified by transitional provisions located elsewhere in the Act." (p. 213)*

Similarly Thornton in his treatise on Legislative Drafting has stated:

> *"The function of a transitional provision is to make special provision for the application* of legislation to the circumstances which exist at the time when that legislation comes into force."

For the purpose of ascertaining whether and, if so, to what extent the provisions of sub-section (1-A) introduced in Section 23 by the amending Act are applicable to proceedings that were pending on the date of the commencement of the amending Act it is necessary to read Section 23(1- A) along with the transitional provisions contained in sub-section (1) of Section 30 of the amending Act."

12. There is no doubt about the aforesaid proposition that the transitional provisions are made to make special provision for the application of legislation to the circumstances which exist at the time when the legislation comes into force and are applicable to proceedings that were pending on the date of the commencement of the amending Act.

13. So far as the judgment in the case of J. K. Cotton Spinning and Weaving Mills Co. Ltd. (supra) is concerned, the petitioner has referred to paragraphs-10 of the said judgment, which is quoted as under: -

> *"10. Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the specific provision, we must hold that Cl. 5(a) has no application in a case where the special provisions of Cl. 23 are applicable."*

The aforesaid judgment does not help the petitioner in any manner in view of the fact that there is no conflict amongst the various provisions of CGST Act referred to by the learned counsel for the petitioner during the course of argument, particularly with reference to Sections 140, 142 and 174 of the CGST Act. The provisions have been interpreted in later portion of this judgement.

14. The learned counsel has further referred to the judgment in the case of CIT vs. J. H. Gotla reported in (1985) 4 SCC 343 to submit that even in taxation, if strict literal construction leads to absurdity, construction which results in equity rather than injustice, should be preferred. However, during the course of argument, the learned counsel has failed to demonstrate as to how any of the provisions of CGST Act which have been referred to by the petitioner has led to any absurdity. The interpretation of the provisions of CGST Act particularly with reference to refund as contemplated in the Act itself is required to be seen in the light of the principles as has been laid down by the Hon'ble Supreme Court in the case of Union of India vs. VKC Footsteps (supra), whose relevant portions have already been

quoted above. There can be no doubt that the right to refund in the matter of taxation is a statutory right which is neither a fundamental right nor a constitutional right and there is no equity in taxation. The right crystalizes only when the statute permits refund as per law and prescribed procedure.

15. It has been submitted that in the case of Gammon India Ltd. vs. Chief Secretary (supra), it has been held that the rights which are saved by saving provisions continues even after repeal. Further in the judgment passed by the Hon'ble Supreme Court in the case of Baraka Overseas Trader (supra), it has been held that the accrued rights under old law is to be continued under the new law. However, the moot question in the instant case is as to whether there was any existing right of availing CENVAT Credit or refund on the date of coming into force of the CGST Act in favour of the petitioner which can be said to have accrued or vested and consequently saved by the repealing provision of CGST Act. The finding in later part of this judgement holds that the petitioner did not have any existing right of availing CENVAT Credit or refund on the date of coming into force of the CGST Act which can be said to have accrued or vested and consequently saved by Section 174 (repeal and saving) read with Section 6 of General Clause Act.

16. The learned counsel has themselves relied upon a judgment passed by the Hon'ble Supreme Court in the case of State of Punjab and Ors. vs. Bhajan Kaur and Ors. (supra), wherein Section 6 of General Clauses Act has been interpretated by holding that the said provision inter-alia saves a right accrued, but it does not create a right. Paragraph-14 of the aforesaid judgment is quoted hereinbelow for ready reference: -

> *"14. ……Section 6 of the General Clauses Act, therefore, inter alia, saves a right accrued and/or a liability incurred. It does not create a right. When Section 6 applies, only an existing right is saved thereby. The existing right of a party has to be determined on the basis of the statute which was applicable and not under the new one. If a new Act confers a right, it does so with prospective effect when it comes into force, unless expressly stated otherwise."*

17. In the case of Glaxo Smith Kline PLC and Others (supra), the Hon'ble Supreme Court has upheld the view of the learned single judge of the High Court and held at Para-17 as under: -

> *"17. The learned Single Judge's view that the provisions of Section 78 of the Amendment Act have no application to the proceedings which stood concluded before the appointed day appears to be the correct view governing the issue. Since Chapter IV-A in question was merely repealed, the situation has to be dealt with in line with Section 6 of the General Clauses Act. The provisions of Section 78 are conditional provisions and are not intended to cover cases where the application for EMR had been rejected with reference to Section 21 of the amending enactment. As noted above, Chapter IV-A was repealed. The effect of the repeal has to be ascertained in the background of Section 6 of the General Clauses Act. That being so, the order of the Division Bench cannot be sustained and that of the learned Single Judge has to operate. The appeal is allowed but in the circumstances without any order as to costs."*

18. In the case of Eicher Motors Ltd. Vs. Union of India (supra), it has been held that the rights of credit facilities accrued under existing law are not to be altered. Paragraphs-5 and 6 of the aforesaid judgment are quoted as under: -

> *"5. Rule 57-F(4-A) was introduced into the Rules pursuant to the Budget for 1995-96 providing*

for lapsing of credit lying unutilised on 16-3-1995 with a manufacturer of tractors falling under Heading No. 87.01 or motor vehicles falling under Headings Nos. 87.02 and 87.04 or chassis of such tractors or such motor vehicles under Heading No. 87.06. However, credit taken on inputs which were lying in the factory on 16-3-1995 either as parts or contained in finished products lying in stock on 16-3-1995 was allowed. Prior to the 1995-96 Budget, the Central excise/additional duty of customs paid on inputs was allowed as credit for payment of excise duty on the final products, in the manufacture of which such inputs were used. The condition required for the same was that the credit of duty paid on inputs could have been used for discharge of duty/liability only in respect of those final products in the manufacture of which such inputs were used. ……..

As pointed out by us that when on the strength of the Rules available, certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the Scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that the right, which had accrued to a party such as the availability of a scheme, is affected and, in particular, it loses sight of the fact that the provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessees concerned. Therefore, the Scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier Scheme was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the basis of the earlier Scheme necessarily that the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said Rule would result in affecting the rights of the assessees.

6. We may look at the matter from another angle. If on the inputs, the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus, a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the Rule cannot be applied to the goods manufactured prior to 16-3-1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods."

19. The learned counsel has also referred to the judgment passed in the case of CCE vs. Grasim Industries Ltd. (supra) to submit that excise duty/CENVAT is value added tax. There is no doubt about the aforesaid proposition, as it is not in dispute in the instant case that the petitioner was entitled to take credit of the service tax paid to the port authorities for the "port services" by way of CENVAT Credit as per the provisions of the rules.

20. However, in the instant case the petitioner has failed to follow the prescribed procedure to avail such a credit and consequently having lost such a right, he cannot claim revival of such a right and claim refund of the same by virtue of transitional provisions under Section 140(3) of the CGST Act. The

facts involved in the present case would demonstrate that the petitioner had no existing right on the date of coming into force of CGST Act to avail credit of the service tax paid on “port services” as CENVAT Credit and accordingly, the provision of Section 140(3) of the CGST Act cannot be construed to have conferred such a right which never existed on the date of coming into force of CGST Act.

21. So far as the judgment passed in the case of Kunal Kumar Tiwari vs. State of Bihar (supra) is concerned, the same has been relied upon by the petitioner to submit that an interpretation which advances the purpose of object underlying the Act should be preferred. But the learned counsel for the petitioner has failed to show as to how the entitlements to CENVAT Credit on service tax paid on “port services” which the petitioner did not claim as per procedure prescribed by law can be construed to confer such a right to claim such credit under transitional provisions followed by cash refund and how such a position in law would advance the purpose and object of CGST Act. Rather, the aforesaid interpretation sought to be given by the petitioner is contrary to the very object and purpose of section 142(3) of CGST Act which has been discussed at a later part of the Judgement.

22. So far as the judgment passed in the case of M/s. DMR Constructions (supra) by Hon’ble Madras High Court is concerned, the same related to transition of accumulated tax deducted at source which existed on the date of coming into force of CGST Act and relief was granted to the petitioner in terms of transitional credit under section 140(1) of CGST Act.

23. However, in the instant case, the petitioner failed to claim transitional credit in terms of section 140(1) of the CGST, Act and wrongly took credit of the impugned service tax in ST-3 return and thereafter claimed refund of the same by referring to section 142(3) of CGST, Act. Accordingly, the said judgement does not apply to the facts and circumstances of this case.

The sequence of facts; case of the parties and the contents of the impugned orders

24. The petitioner was having Central Excise Registration for manufacture of sponge iron, billet and TMT Bar. The petitioner was also registered under Service tax only as a person liable to pay service tax under Reverse Charge Mechanism. Admittedly, the “port services” involved in this case is not covered under Reverse Charge Mechanism and therefore the same was not includable in the service tax return filed by the petitioner under ST-3. Accordingly, the petitioner was not entitled to avail credit of the impugned service tax paid on the “port services” in its service tax ST-3 return.

25. It is not in dispute that the petitioner was entitled to claim CENVAT Credit on the service tax paid on “port services” if used in the manufacturing activity for which the petitioner was registered under the Central Excise Act, 1944.

26. The petitioner had imported coal through Bill of entry dated 27.04.2017 for using the same in or in relation to manufacture of dutiable final products. In course of the import, they received a bundle of services from M/s Kolkata Port Trust during 26.04.2017 to 29.04.2017 in the nature of “port services” who issued Bill dated 23.05.2017 for ₹ 89,36,836/- which included service tax of ₹ 10,88,328/-. The petitioner claims to have paid the entire bill including service tax on port services in the month of April itself. The petitioner was entitled to claim the service tax paid on “port services” as CENVAT Credit in their ER-1 return as per the provisions of existing law. The petitioner has submitted that the CENVAT Credit was not taken as the original bill/invoice was not received though generated on 23.05.2017. Admittedly, the petitioner did not claim the service tax paid on “port services” involved in this case as

CENVAT Credit in their relevant ER-1 return.

27. On account of non-inclusion of the service tax paid on port services in ER-1 Return, the petitioner could not have claimed the transition of the said CENVAT Credit as permissible transitional credit referrable to section 140 of CGST Act through TRAN-1 and could not utilise the same under CGST Regime. Admittedly, the time for filing TRAN-1 was extended till 31.10.2017 but still the impugned service tax on “port services” could not be included (although by this time the original bill/invoice was received on 20.09.2017) as this Service Tax as CENVAT Credit was not included in ER-1 return and the time for filing ER-1 return for the period in question had expired. Further the petitioner had claimed this amount in Service Tax return ST-3 filed on 22.09.2017.

28. Thus, the petitioner missed to exercise their rights to avail of transitional credit of the service tax paid on “port services” through the mechanism prescribed under the CGST Act (Section 140) read with the existing provisions of CENVAT Credit Rules, 2002. It is also important to note that the existing provision did not permit CENVAT Credit of service tax paid on “port services” without its inclusion in ER-1 Return and in absence of such inclusion within the prescribed time line the claim of credit stood completely lost and could not be claimed in TRAN – 1 as transitional credit under CGST Act. Admittedly, the petitioner was not entitled to claim the service tax paid on “port services” in their service tax return ST-3 as the petitioner was not an output service provider and was liable to file service tax return and pay service tax only under reverse charge mechanism. Admittedly, “port services” were not under reverse charge mechanism.

29. Further, Rule 5 of CENVAT Credit Rules, 2004 permits refund only when the services are used to export goods or services, which is not the case in the present case. It is not the case of the petitioner that the impugned services were used for export of goods or services. Thus, under the existing law the claim of refund of service tax paid by the petitioner on port services was not admissible.

30. The case of the petitioner is that since they received the original copy of the Bill dated 23.05.2017 as late as on 20.09.2017, they could not take CENVAT Credit in their last ER-1 return for June, 2017 filed on 30.07.2017. However, the petitioner took the credit of ₹ 10,88,328/- in their ST-3 return for April-June, 2017 filed on 22.09.2017 with a view to keep the said transaction above board so that their claim was not lost. It is also not in dispute that the last date for filing TRAN-1 was extended up to 31.10.2017.

31. From the entire records of the case this court does not find any explanation from the side of the petitioner as to under what circumstances the Bill dated 23.05.2017 was received by them as late as on 20.09.2017 (although as per the petitioner the port services were availed and the payment including service tax was made to the port authorities in the month of April 2017), except the statement that delayed receipt of the bill was beyond their control.

32. It is the case of the petitioner that they filed a refund claim for aforesaid amount of service tax paid to the port authority as they could not carry forward the aforesaid credit to their GST TRAN-1.

33. On 28.06.2018 the petitioner filed application for refund in Form – R for refund of service tax paid on “port services” to the port authorities by referring to provisions of Section 11B of Central Excise Act read with Section 142(3) of the C.G.S.T. Act, 2017.

34. Notice dated 24.07.2018 was issued to the petitioner asking them to show cause as to why the refund claim should not be rejected on following ground:

i. The petitioner had misled the Deptt By claiming refund since they had erred by not incorporating said CENVAT Credit in their ER-1 returns in time and claim the credit through TRAN-1 returns;

ii. The petitioner had erroneously taken CENVAT Credit of input service in their ST-3 return since the impugned service is not an input service for them as they are not engaged in provision of any output service;

iii. The petitioner had not submitted original copy of the service invoice and the refund application had not been pre-receipted with revenue stamp on the original copy.

35. In their reply to show -cause notice, the petitioner admitted that they had taken CENVAT Credit of input service in their ST-3 return filed under Service Tax. The petitioner tried to justify and explain their act as under: -

(i) The reason behind disclosure of CENVAT Credit claimed on input services in the ST-3 return was not for showing use of the said services for providing output services but there was no scope for them to disclose the same in ER-1 returns which was already filed before receipt of the duty paying document. The substantive benefit of CENVAT Credit should not be denied for technical breaches and that the legislation for granting input tax credit is beneficial piece of legislation and should be construed liberally;

(ii) The said services are used for procurement of inputs are amply covered in the definition of “input service” in terms of Rule 2(l) of CCR, 2004 and disclosure or non-disclosure of said credit in ST-3 and/or ER-1 are irrelevant.

(iii) Ultimate eligibility of the credit of the impugned services is not in dispute and the benefit of CENVAT Credit eventually accrues to them which is the heart and soul of Section 142(3) of the CGST Act, 2017 and under Section 142(3) there is no statutory precondition that in order to claim the transitional credit, the claim must be disclosed in the ER-1 return;

(iv) Section 142(3) of the CGST Act, 2017 provides for refund of CENVAT Credit in cash accruing to the assessee under CENVAT Credit Rules, 2004. Section 142 is a residuary provision which deals with cases/contingencies which are not specifically covered or contemplated under Section 140 or 141. Since, in the instant case the provision of Section 140(5) or any other sub-Section does not cover the contingencies as in the present case, it would be covered by the residuary provision of Section 142(3);

(v) Section 142(3) specifically saves Section 11B(2)(c) of Central Excise Act which deals with refund of CENVAT Credit which remained un-utilized for one or another reason;

(vi) Referring to the second proviso to Section 142(3) of the CGST Act, 2017 which provides that if carry forward of the transitional credit is claimed (under Section 140), then refund of such CENVAT Credit would not be admissible. Therefore, from a plain reading of section 142(3) it is crystal clear that CENVAT Credit lawfully admissible/earned under the CENVAT Credit Rules,

2004 shall be allowed to be carried forward in the Electronic Credit Ledger (as per ER-1) or shall be allowed to be refunded in cash where it is not possible to carry forward in Electronic Credit Ledger.

36. The Adjudicating Authority, after considering the submissions of the petitioner observed that the petitioner is a manufacturer of dutiable goods and is registered under Service tax only as a person liable to pay service tax under Reverse Charge Mechanism.

The petitioner is not an output service provider and, hence, the claim filed as refund is not maintainable.

The petitioner had erroneously taken credit in ST-3 return since the impugned service is not an output service.

The refund of CENVAT Credit is eligible only to export cases as per rule 5 of CENVAT Credit Rules, 2004 and the present case being not falling under rule 5, the petitioner is not entitled to refund under section 11B of Central Excise Act, 1944 read with Rule 5 of the CENVAT Credit Rules, 2004.

The Adjudicating Authority observed that the transitional provisions under the CGST Act specifically provide transition of credit through TRAN-1 and the petitioner had failed to declare its claim in proper return i.e. ER-1. Accordingly, the Adjudicating Authority, vide the Order-in-Original dated 25.01.2019, rejected the refund claim under the provisions of Section 11B of the Central Excise Act, 1944 made applicable to Service Tax vide Section 83 of the Finance act, 1994.

37. Aggrieved with the aforesaid Order in original the petitioner filed appeal reiterating the submissions made before the Adjudicating Authority. They made following main submissions before the appellate authority:

i. The services were received by them during 26.04.2017 to 29.04.2017 and payment, including service tax, was made in April, 2017. But they received the invoice on 20.09.2017 and they made provisional entry in their books of account. They could not take credit in their last ER-1 return for June, 2017 which they filed on 30.07.2017 for the reason beyond their control. They could not have filed any return thereafter when Central Excise Act, 1944 and the rules made thereunder was repealed;

ii. They could not avail the benefit of Section 140(5) of the CGST Act, 2017 for the same reason that the original copy of the invoice was received in September, 2017. They were left with no option than to file refund Application vide their letter dated 29.06.2018 under residuary provision of Section 142(3) read with Section 174(2)(c) of the CGST Act and Section 11B(2)(c) of the Central Excise Act, 1944;

iii. There is no requirement under Section 142(3) of the CGST Act of disclosure of the CENVAT Credit in the ER-1 return like Section 140(5) and unlike Section 140(1).

38. The appellate authority rejected the appeal with the following findings:

a. The transitional provisions contained in Section 140 of the CGST Act, 2017 provide for carrying forward of closing balance of the amount lying in CENVAT Credit account as reflected in the statutory returns for the period immediately preceding the appointed day i.e. 01.07.2017.

b. The Appellant could not carry forward the credit of ₹ 10,88,328/- of service tax, paid to Kolkata Port Trust for procurement of a raw material used in manufacture of excisable goods, is not under dispute nor is the eligibility of CENVAT Credit under “input service” under dispute.

c. The transitional provisions under the CGST Act, 2017 provides specifically transition of credit through TRAN-1. The appellant has failed to declare the same in time in ER-1 return and also in TRAN- 1 after enactment CGST Act. Section 140 of the CGST Act, 2017, which is a transitional provision, essentially preserves all taxes paid or suffered by a taxpayer. Credit thereof is to be given in electronic credit register under the provisions of CGST Act, 2017.

d. Further, the Board vide Circular No. 207/5/2017-ST clarified the issue related to payment of service tax after 30.06.2017, wherein it was clarified that the assessee can file TRAN-1 upto 30.10.2017 and same can also be revised. There could be parties who had billed on 30.06.2017 and not taken credit in electronic credit register and not transferred the same to GST regime.

e. In the present case the authority was considering a claim of refund of CENVAT Credit which was taken on ‘input services”. Section 11B (1) clearly says that a person claiming refund has to make an application for refund of such duty before the expiry of the period prescribed and, in such form, and manner. If the excisable goods are not used as inputs in accordance with the rules made, there is no question of any refund. The language of the Rule 5 of the CENVAT Credit Rules, 2004 indicates that where any input or input service is used in the final product, which is cleared for export etc. or used in the intermediate product cleared for export or used for providing output service which is exported, then, the CENVAT Credit in respect of the input or input service so used, shall be allowed to be utilised by the manufacturer or provider of output service towards payment of duty of excise on any final product cleared for home consumption or for export , on payment of duty or service tax on output service. When for any reason, such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitation as may be specified by the Central Government by a notification.

f. The appellate authority referred to a judgement passed by the North Zonal Bench of the CESTAT in the case of Purvi Fabrics & Texturise (P) Ltd. v. Commissioner of Central Excise, Jaipur-II - 2004 (172) E.L.T. 321 (Tri.- Del.), wherein it was held that there is no legal provision existing for refund either by cash or cheque. The only exception carved out is that the refund in cash is granted as an incentive measure to the exporter. The provisions and particularly Section 11B of the Central Excise Act provides for payment of amount of refund to the applicant only in situations specified in proviso to sub-section (2) of Section 11B of the Central Excise Act, 1944. The appellate authority held that the petitioner has attempted to claim something which the law does not permit at all.

g. The appellate authority also held that the claim of refund is not a matter of right unless vested by law. The plea of injustice or hardship cannot be raised to claim refund in the absence of statutory mandate. In this regard, a reference was made to the judgment of the Hon’ble Supreme Court setting out the fundamental legal principles that in a fiscal statute, nothing can be read into its provisions and rather should not be read, which is expressly not there. In other words, an implied meaning cannot be given. Para 20 of the judgement passed by the Hon’ble Supreme Court, Union of India and Ors. v. Ind-Swift Laboratories Limited – (2011) 4 SSC 635 was referred

as under: -

> *"20. A taxing statute must be interpreted in the light of what is clearly expressed. It is not permissible to import provisions in a taxing statute so as to supply any assumed deficiency. In support of the same we may refer to the decision of this Court in CST v. Modi Sugar Mills Ltd. wherein this Court at AIR para 11 has observed as follows:*
>
> > *"11. …..In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: It cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency."*

h. The appellate authority recorded that the petitioner had received the invoice from the service provider on 20.09.2017 and by that time, they had already filed their last ER-1 return for the month of June, 2017. The appellate authority found nothing in Rule 5 permitting refund of unutilised credit. The appellate authority held that the present situation is not a case of a manufacturer or producer of final products seeking to claim CENVAT Credit of the duty paid on inputs lying in stock or in process when the manufactured or produced goods ceases to be exempted goods or any goods become excisable. The appellate authority also held that refund of CENVAT Credit is permissible where any input is used for final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export. Therefore, in the scheme of the rules, what is sought by the petitioner is not permissible. Thus, the attempt by the petitioner to claim refund of CENVAT Credit was held to be not allowable and the appeal was rejected.

Interpretation of section 142(3) read with section 140(1), 140(5) and section 174 of CGST Act vis-a vis the facts of this case.

39. The relevant portions of the aforesaid sections as relied upon by the learned counsel for the petitioner during the course of arguments are as under.

Section 140 (1) and (5) of the CGST, Act reads as under:-

> *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 within such time and 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.

140 (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, within such time and in such manner as may be prescribed, 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."

Section 142(3) of the CGST Act reads as under:-

"142(3) Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT Credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 (1 of 1944):

PROVIDED that where any claim for refund of CENVAT Credit is fully or partially rejected, the amount so rejected shall lapse:

PROVIDED FURTHER that no refund shall be allowed of any amount of CENVAT Credit where the balance of the said amount as on the appointed day has been carried forward under this Act"

The Sections 173 and 174 of CGST Act are quoted as under :-

"173. Amendment of Act 32 of 1994

Save as otherwise provided in this Act, Chapter V of the Finance Act, 1994 shall be omitted.

174. Repeal and saving

(1) Save as otherwise provided in this Act, on and from the date of commencement of this Act, the Central Excise Act, 1944 (1 of 1944) (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955), the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), and the Central Excise Tariff Act, 1985 (5 of 1986) (hereafter referred to as the repealed Acts) are hereby repealed.

(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (32 of 1994) (hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not-

(a) revive anything not in force or existing at the time of such amendment or repeal; or

(b) affect the previous operation of the amended Act or repealed Acts and orders or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts:

PROVIDED that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or

(d) affect any duty, tax, surcharge, fine, penalty, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Act or repealed Acts; or

(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed;

(f) affect any proceedings including that relating to an appeal, review or reference, instituted before on, or after the appointed day under the said amended Act or repealed Acts and such proceedings shall be continued under the said amended Act or repealed Acts as if this Act had not come into force and the said Acts had not been amended or repealed.

(3) The mention of the particular matters referred to in sub- sections (1) and (2) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal."

40. Section 142 of the CGST Act, 2017 provide for Miscellaneous Transitional Provisions. The following are the pre-conditions of refund in cash under section 142(3) : -

a. Sub Section-(3) deals with claim for refund filed before, on or after the appointed day. Thus it, interalia, deals with applications for refund filed before the appointed date and pending on the appointed date apart from the refund applications filed on or after the appointed date.

b. Further the refund application should be for refund of any amount of CENVAT Credit, duty, tax, interest or any other amount paid under the existing law.

c. Such application filed before, on or after the appointed day is to be disposed of in accordance with the provisions of existing law.

d. If any amount eventually accrues the same is to be refunded in cash, notwithstanding anything

to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11-B of the Central Excise Act, 1944.

e. It also provides that where any claim for refund of CENVAT Credit is fully or even partially rejected, the amount so rejected shall lapse.

f. The second proviso provides that no refund shall be allowed of any amount of CENVAT Credit where the balance of the said amount as on the appointed day has been carried forward under the CGST Act.

41. Thus, section 142(3) of CGST, Act clearly provides that refund application with respect of any amount relating to CENVAT Credit, duty, tax, interest or any other amount paid under the existing law is to be disposed of in accordance with the provisions of existing law and if any such amount accrues the same shall be paid in cash. Such right to refund in cash has been conferred notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11-B of the Central Excise Act, 1944.

42. It is not in dispute that the refunds under the existing law of Service Tax as well as Central Excise Act, 1944 are governed by section 11B of the Central Excise Act, 1944 and subsection 2 of section 11 B also refers to application for refund made under section 11 B(1) of Central Excise Act, 1944. Further section 11B(3) of Central Excise Act, 1944 clearly provides that all kinds of refunds including those arising out of judgement , decree or orders of court or tribunal are to be dealt with in accordance with the provisions of section 11B (2) of Central Excise Act, 1944 . It is also important to note that section 11B(2) of Central Excise Act, 1944 deals with the manner in which applications for refund under section 11B (1) are to be dealt with as it uses the word “such application” which is clearly referrable to section 11B (1) of Central Excise Act, 1944. Further, the proviso to section 11B(2) deals with situations of rebate of duty; unspent advance deposits; principles of unjust enrichment in cases where duty of excise is paid by manufacturer or borne by buyer and who have not passed on the incidence of such duty to any other person; and also where duty of excise is borne by any other class of applicant as the central government may notify in official gazette with a further proviso regarding unjust enrichment.

43. The entire section 11B of Central Excise Act, 1944, as it stood immediately before the appointed date, does not sanction any refund where the assessee has failed to claim CENVAT Credit as per CENVAT Credit Rules, 2004 and has lost its right to claim such credit by not claiming it within the time prescribed. Further section 11B also has its own strict time lines for claiming refund. Rule 5 of the CENVAT Credit Rules provides for refund only when the inputs are used in relation to export, which is not the case here. These aspects of the matter have been rightly considered and decided against the petitioner while passing the impugned orders whose details have already been stated above.

44. Under the provisions of section 11B the right to claim refund was conferred not only to the assessee but also to such classes of applicants as notified by the central government and also covers situations arising out of judgements of courts and tribunals. On the appointed date there could be claims of refund of any amount of CENVAT Credit, duty, tax, interest or any other amount paid under the existing law in connection with which the applications for refunds were pending or time limit for claiming refund was yet to expire or may crystalize on account of any judgement of courts or tribunals in relation to pending litigations. These are some of the situations which would be covered by the

miscellaneous transitional provisions as contained in section 142(3) of CGST, Act which would continue to be governed by section 11B(2) of Central Excise Act, 1944.

45. The provision of section 142(3) does not entitle a person to seek refund who has no such right under the existing law or where the right under the existing law has extinguished or where right under the new CGST regime with respect to such claim has not been exercised in terms of the provision of CGST, Act and the rules framed and notifications issued. Meaning thereby, section 142(3) does not confer a new right which never existed under the old regime except to the manner of giving relief by refund in cash if the person is found entitled under the existing law in terms of the existing law. Section 142(3) does not create any new right on any person but it saves the existing right which existed on the appointed day and provides the modalities for refund in cash if found entitled under the existing law as the entire claim is mandated to be dealt with as per the existing law. It neither revive any right which stood extinguished in terms of the existing law nor does it create a new right by virtue of coming into force of CGST, Act.

46. Section 174 of the CGST Act read with section 6 of the General Clauses Act saves the right acquired, accrued or vested under the existing law and does not create any new right which never existed on the appointed day i.e on 01.07.2017 under the existing law.

47. The argument of the petitioner by referring to second proviso to section 142(3) of CGST Act that it indicates that section 142(3) would apply to the situations where the assessee has failed to take transitional credit under section 140(1), is also devoid of any merits. The second proviso only indicates that if the assessee has taken transitional credit he will not be entitled to refund. Certainly, an assessee cannot simultaneously claim transitional credit as well as refund of the same amount. The second proviso to section 143(2) cannot be said to be an eligibility condition to claim refund but is only a condition which governs refund as an assessee cannot be permitted to have transitional credit as well as refund of the same tax amount.

48. Section 140(5) applies under the circumstances where input services are received after the appointed day but the tax has been paid by the supplier under the existing law within the time and in the manner prescribed with a further condition that the invoice etc are recorded in the books of account of the such person within a period of 30 days from the appointed day. Section 140(5) also does not help the petitioner. Section 140 (5) has no applicability to the facts and circumstances of this case. In the instant case, admittedly the services in the nature of “port services” were received by the petitioner in the month of April 2017 and invoice was also generated in the month of May 2017.

49. In the peculiar facts of this case, the petitioner did not claim transitional credit but claimed the impugned amount of service tax on “port services” as credit in their ST-3 return which they were admittedly not entitled as they were assessee under service tax only on reverse charge mechanism and admittedly the “port services” availed by the petitioner was not covered under reverse charge mechanism. Thus, the petitioner on the one hand illegally took credit of service tax on “port services” as credit in their ST-3 return and on the other hand filed application for refund of the same amount under section 142(3) of the CGST, Act which is certainly not permissible in law. The authorities have rightly considered these aspects of the matter also while rejecting the application for refund filed by the petitioner.

50. It is not in dispute that the petitioner has claimed the credit of service tax involved in the present case paid on “port services” as “input service” in ST-3 return filed on 22.09.2017, though they were not entitled to claim such a credit. It is further not in dispute that the petitioner did not include the impugned service tax paid on “port services” in its ER-1 return and accordingly was neither entitled to include nor included the same as transitional credit in TRAN-1 under CGST Act. As per the notification (Annexure-5) extending the date of filing TRAN-1 to 31.10.2017, the same was in relation to certain service tax issues which were paid after 30.06.2017 under reverse charge basis to cover instances of bills raised on 30.06.2017 since credit is available only if the payment is made and the payment in such cases could be made only after 30.06.2017. However, in the instant case the bill was admittedly generated on 23.05.2017, services availed and bill amount including service tax was paid in April 2017 but the original bill did not reach the petitioner for unknown/undisclosed reasons.

51. It is apparent from the impugned orders that the specific case of the respondent is that the petitioner had claimed CENVAT Credit under ST-3 return thereby treating the services involved in the present case as their input services used for providing output service, whereas they are not output service provider and the same cannot be used for providing output services. Therefore, it cannot be their input services under Rule 2 (l) of CENVAT Credit Rules, 2004. I am also of the considered view that the petitioner could not have claimed the impugned service tax on port services in ST-3 return as they were registered for discharging their liability under the service tax only on reverse charge mechanism. Rather it is the case of the petitioner that they had included the impugned service tax in ST-3 Return under compelling circumstances of non-receipt of original invoice dated 23.05.2017 and this was done only attempting to save their credit which they had failed to claim through ER-1 return and then as transitional credit through TRAN-1 under section 140(1) of the CGST Act. Thus, the authority has rightly held that petitioner had wrongly claimed Credit of the impugned service tax under ST-3 return and omitted to claim the impugned service tax as CENVAT Credit in ER-1 Return.

52. Further case of the respondent is that the petitioner as a manufacturer was eligible to claim CENVAT Credit on impugned service i.e “port services” and should have claimed the credit in their ER-1 Return within the prescribed time and accordingly could have claimed transitional credit through TRAN-1 under section 140 of CGST, Act. Thus, late receipt of the original invoice which has been cited as the reason for failure to claim CENVAT Credit under the existing law and transitional credit under section 140(1) of the CGST, Act was wholly attributable to acts and omissions of the petitioner and its service provider of the “port services” and the respondent authorities had no role to play. The petitioner had failed to avail the opportunity to claim CENVAT Credit of service tax on port services in terms of the existing law read with section 140 of CGST, Act and had no existing right of refund on the date of coming into force of CGST, Act. The petitioner having not used the port services for export was not entitled to claim refund under the existing law. The petitioner was also not entitled to refund on account of the fact that the petitioner had already taken credit of the service tax paid on port services in ST-3 Return of service tax although admittedly the petitioner was not entitled to take such credit in ST-3 Return. On account of aforesaid three distinct reasons the petitioner was rightly held to be not entitled to refund under section 142(3) of CGST, Act by the impugned orders.

53. All the aforesaid provisions referred to and relied upon by the learned counsel of the petitioner do not entitle a person like the petitioner to any relief in the circumstances of acts and omissions of the service provider (port authority) or the service recipient (the petitioner) who have failed to comply the

provision of law, both under the existing law and also under the CGST Act. The relied upon provisions of CGST Act do not cover any such situation relating to any consequences due to inter parte acts and omissions. In the instant case, as per the case of the petitioner, the entire problem has cropped up due to non-receipt of the invoice in original from the port authorities although the port services were availed and payments for the same to the port authorities were made by the petitioner in the month of April 2017, the invoice was generated by the port authorities in the month of May 2017 but the original invoice was received by the petitioner only on 20.09.2017 i.e after coming into force of CGST Act. The late receipt of the invoice is essentially between the petitioner and the port authorities and the tax collecting authorities had nothing to do in the matter. Certainly, the delay in receipt of original invoice is not attributable to the respondent authorities under the existing law or under the new law.

54. The authorities have held in the impugned orders that in the instance case, the timeline for claiming CENVAT Credit qua the service tax paid on port services was not followed by the petitioner, although the services were availed, the entire payment was made and the bill was also generated in the month of April/May, 2017. Further, it has also been held in the impugned orders that the petitioner not only failed to claim the CENVAT Credit as per law, but illegally claimed the credit of the same while filing service tax return although the petitioner was not entitled to do so as the petitioner was not registered as a service provider. The authorities have also held that the service tax paid on port service was not eligible for refund under the existing law as the said services were not utilised for export. Thus, the petitioner on the one hand did not claim CENVAT Credit as per the procedure established by law under the existing law and on the other hand violated the provisions of law while filing his service tax returns and claimed the amount as input service and thereafter filed his petition for refund on 28.06.2018 referring to Section 142(3) of the CGST Act. The petitioner never had a right to claim refund under the existing law and had failed to exercise their right to claim CENVAT Credit as per law and wrongly claimed the impugned amount as credit in Service Tax Return (S.T. 3 return).

55. In view of the aforesaid findings, I do not find any reason to interfere with the findings and reasons assigned by the adjudicating authority as well as the appellate authority rejecting the application for refund filed by the petitioner under section 11B of Central Excise Act read with Section 142(3) and 174 of CGST Act. The impugned orders are well reasoned orders calling for no interference. Accordingly, this writ petition is dismissed.

56. Pending interlocutory applications are closed.

(Aparesh Kumar Singh, J.)

I Agree.

(Aparesh Kumar Singh, J.)

(Anubha Rawat Choudhary,)

Citations: in 2022 (2) TMI 934 - JHARKHAND HIGH COURT

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2. 2018 (5) TMI 915 - Supreme Court
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