2022 (3) TMI 544 - MADRAS HIGH COURT

M/S. GANGES INTERNATIONAL PRIVATE LTD., M/S. SRC PROJECTS PRIVATE LIMITED, M/S. SUPREME PETROCHEMICALS LTD., VERSUS THE ASSISTANT COMMISSIONER OF GST & CENTRAL EXCISE, PUDUCHERRY, THE UNION OF INDIA, THE ASSISTANT COMMISSIONER OF CENTRAL TAXES & CENTRAL EXCISE, TIRUVOTTIYUR DIVISION

W.P.Nos.528, 1092 & 1160 of 2019

Dated: - 22-2-2022

Refund of CENVAT Credit by way of cash - transitional credit - Doctrine of Necessity - Payment of service tax on reverse charge on 30.12.2017 which was otherwise eligible for Cenvat Credit - HELD THAT:- When the GST regime has come into effect from 01.07.2017, under which, the erstwhile tax legislation governing the field hitherto since has been repealed or extinguished, necessarily the Legislature had to bring transitional provisions which they have done so. Accordingly, Sections 140 to 142 have been brought under GST Act wherein Section 140 has been provided as 'Transitional arrangements for input tax credit'. For the purpose of claiming the input tax credit under the GST regime also which otherwise accrued under the erstwhile regime on 30.06.2017 mainly this transitional provision under Section 140 has been made, where, as has been quoted herein above, the registered person is entitled to take Cenvat credit in his electronic credit ledger carried forward in the return relating to the period ending with the day immediately preceding the appointed day.

Though there was a balance in the credit insofar as the petitioners' case is concerned, as on 30.06.2017, for which the petitioners respectively made applications invoking Section 140(1) of the Act and such a credit has been carried forward under that Section. However, insofar the present claim made in these three cases are concerned, these credits were not available as on 30.06.2017, because, admittedly, these payments had been made only in the respective dates mentioned above in December 2017 and May 2018 - Once that payment has been made after the cut off date for making TRAN-1 application whether those amount/credit can be sought for to carry forward to the GST regime by making an application once again under Section 140(1) is the question.

Merely because, the transitional provision has come into effect from 01.07.2017 and under Section 140(1) of the Act, the persons like the petitioners can make a claim only in respect of the credit which is already accrued as on 30.06.2017 and these credit had come into the account of the petitioners only subsequently, for which, claim under Section 140(1) could not have been made, the chance of making such an application to seek the refund or otherwise of such a credit which has subsequently accrued in the account of the petitioners, cannot be denied - this Court feels that, in these kind of special situations, for which, the provision if not Section 142(3), no other eligible provision is available. Therefore, this Court feels that, since it is a dire necessity, as these kind of situation necessarily to be met with by the Legislation, for which, these transitional provision has been brought in in the Statute Book, there can be no impediment for invoking Section 142(3) of the Act by invoking the “Doctrine of Necessity”.

Since the language used in Section 142(3) of the Act is refund claim, the petitioner has made application for refund claim. However, under the erstwhile law, since the petitioners are not entitled to get any refund claim and their eligibility is confined only by taking the credit under Cenvat Credit Rules, beyond which, the relief cannot be

stretched upon.

The petitioners application atleast could have been considered by the respondents under Section 142(3) of the Act for the purpose of taking the credit and such credit could have been considered and allowed for carrying forward in the electronic credit ledger of the GST regime which is nothing but a different route than Section 140 and that is the only possibility for dealing with these kind of applications. Hence, this Court has no hesitation to hold that, the reasons stated by the respondents in these cases in passing the orders impugned to reject the claim made by the petitioners are not tenable or these reasons would not stand in the legal scrutiny.

The matters are remitted back to the respondents for reconsideration - Petition allowed by way of remand.

Judgment / Order

HONOURABLE MR. JUSTICE R. SURESH KUMAR

For Petitioner : Mr. G. Natarajan (in all WPs)

For Respondent : Mrs. Hema Muralikrishnan Senior Standing Counsel (In WP.No.528 of 2019)

For Respondent : Mr. A.P. Srinivas Senior Standing Counsel (in WP.No.1092 of 2019)

For Respondent : Mr. K. Umesh Rao Senior Standing Counsel (in WP.No.1160 of 2019)

COMMON ORDER

Since the issue raised in these writ petitions is common, with the consent of the learned counsel appearing for the parties, all these writ petitions were heard together and are being disposed of by this common order.

2. For the sake of convenience, the facts mentioned in W.P.No.1092 of 2019 is taken up and traversed.

3. The petitioner is engaged in providing various construction services to Government/Private parties and was registered with the erstwhile Service Tax Department. From 01.07.2017 as the GST regime has come into effect, the petitioner has shifted to GST regime from that date. The petitioner had filed last service tax return in the erstwhile regime for the quarter from April to June 2017 by 15.08.2017.

4. During the course of audit of accounts conducted by CERA Audit party for the erstwhile regime, it was pointed out that, the petitioner is liable to pay service tax under reverse charge on services rendered at two quarries, for which, royalty had been paid by the petitioner to the Government of Tamil Nadu for mining stones since such royalty payments are liable to service tax consequent to the issuance of Notification No.22/2016 ST dated 13.04.2016 with effect from

01.04.2016. In view of the amendment to Section 66 D(a) of the Finance Act, 1994, all services provided by Government or local authority to business entities have been made liable to service tax, subject to certain exemptions introduced by Notification 22/2016 dated 13.04.2016 and amending Notification 25/2012 dated 20.06.2012.

5. Since the petitioner had been prompted by the Department to pay the service tax, the petitioner had paid the appropriate service tax for an amount of ₹ 26,88,460/- for the royalty paid to the Government for mining the stones for the period from 01.04.2016 to 31.07.2017 along with applicable interest amount of ₹ 3,99,625/-.

6. Since it is an input service and the petitioner is a service recipient and has paid the service tax as stated above, therefore, he is entitled for credit of service tax paid under reverse charge since the service has been used by the petitioner for providing output service. While so, consequent upon the introduction of GST with effect from

01.07.2017, the relevant enactments pertaining to Central Excise and Service Tax have been repealed. The

Cenvat Credit Rules, 2004 also has been superseded by new Cenvat Credit Rules, 2017 vide Notification 20/2017 dated 30.06.2017. Various transitional provisions were enacted under the CGST Act, 2017 to avail Input Tax Credit on transitional basis vide Section 140 to 142 of the CGST Act and the Rules. It is to be noted that, for the purpose of claiming various transitional credits, a return in form GST TRAN-1 has to be filed by every tax payer, claiming transitional credit. Though the said period for claiming transitional credit was given 90 days from the date of introduction of GST, i.e., 01.07.2017, considering the technical glitches and other difficulties faced by the tax payer, it was further extended by various orders issued in this regard and ultimately the extension went upto 27.12.2017, before which, the TRAN1 claim should have been made.

7. When that being so, insofar as the case of the petitioner is concerned, for the payment of service tax for the period prior to 30.06.2017 since it was not immediately paid i.e., immediately after the availment of the service by the petitioner and it was paid only in December 2017 as the petitioner was prompted to pay the same by the Revenue, by the time since there has been change to GST regime and that has come into effect from 01.07.2017, whereby, the transitional provision has been made as stated, the petitioner could not make any application under GST TRAN-1 seeking for transfer of credit to the electronic credit ledger under the GST regime.

8. This is the peculiar situation faced by the petitioner as he paid the service tax only on 30.12.2017. In order to get the refund of the said amount, because, the said service tax paid is purely an input tax, for which, credit can be taken by the petitioner under erstwhile Cenvat Credit Rules, he had made an application, of course within the time limit to the respondent/Revenue. However, the said application seeking for refund filed by the petitioner, having been considered, was rejected through the Order-in-Original No.19/2018 dated 24.09.2018.

9. In the said order, though the respondent has found that, the assesee is eligible for taking Cenvat credit of the amount so paid under Service Tax Rules, since there was no provision in the new regime to allow as input tax credit in GST/credit in Electronic cash ledger/payment in cash and in the absence of any specific provision, such kind of plea made by the petitioner for refund of the input tax credit cannot be considered and refunded, therefore, the claim was untenable and accordingly, it was rejected. Aggrieved by the said order, the present writ petition has been filed.

10. Almost similar facts are projected in other two cases also and in order to have a quick reference, the relevant dates and the facts in respect of all those cases are provided under in the following table:

S.No.	***WP. No.***	***Petitioner***	***Status of Petitioner***	***Nature of Tax Paid***	***Pertaining to the***	***Date of payment***	***Amount paid***
1	*1092/ 2019*	*SRC Projects Pvt. Ltd.*	*Service Provider*	*Service Tax Services received from Govt. Reverse charge*	*April 16 to Jun 17*	*30.12.2017*	*26,88,460*
2	*528/ 2019*	*Ganges Internationale Pvt. Ltd.*	*Manufacturer*	*Service Tax. Services received from abroad.*	*April 16 to Jun 17*	*02.05.2018*	*24,20,684*

				Reverse Charge			
3	*1160/2019*	*Supreme Petrochemicals Ltd.*	*Manufacturer*	*Differential CVD & SAD paid on imported inputs*	*June 2016 to Mar 2017*	*14.12.2017*	*68,96,064*

11. Mr.G.Natarajan, learned counsel appearing for the petitioners has submitted that, since transitional provisions have been made under the GST Act, especially from Sections 140 to 142, where, Section 140(1) of the Act has enabled that any registered person, opting to pay tax, 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. Insofar as this transitional provision of Section 140(1) of the Act is concerned, the learned counsel would contend that, the petitioner could not make any application in GST TRAN-1 on or before 27.12.2017, because, the very service tax itself was paid by the petitioners in these cases on 14.12.2017, 30.12.2017 and 02.05.2018 respectively. Except in W.P.No.1160 of 2019, where, the CVD and SAD i.e., Countervailing Duty and Special Additional Duty had been paid by the said petitioner on 14.12.2017, in other two cases, the very payment itself made beyond 27.12.2017. Even in respect of W.P.No.1160 of 2019, those payments since had been made only on 14.12.2017 within the span of 10 to 15 days, the petitioner could not make an application in GST TRAN-1 under Section 140(1) of the Act.

12. In order to meet these kind of situation, according to the learned counsel for the petitioners, there is a provision available under Section 142 of the Act, which is also a transitional provision under the heading "Miscellaneous transitional provisions". Sub-section (3) of Section 142 enables any person to file a refund claim either before, on or after the appointed day i.e., 01.07.2017. For refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, such claim shall be disposed of in accordance with the provisions of existing law and any amount accruing to him shall be paid in cash.

13. The learned counsel appearing for the petitioners heavily relying upon sub-section (3) of Section 142 has further submitted that, if the refund claim is made either before the GST regime or on the date when the GST regime came into effect or after which, for refund of any amount of CENVAT credit, duty, tax etc., such refund claim application shall be disposed of only in accordance with the provisions of the existing law.

14. He would further state that, the existing law is nothing but the law which was prevailing prior to 01.07.2017. Here in the case in hand, under the Cenvat Credit Rules, 2004, if the petitioners are eligible to claim credit, the petitioners would also be eligible to make an application for refund under sub-section (3) of Section 142.

15. He would also submit that, if those opening is not made available to the persons like the petitioners who are placed in a peculiar situation, where, they could not make an application under Section 140(1) by way of GST TRAN-1, those assessees or applicants have to be necessarily dealt with only under Section 142(3) of the Act alone.

16. The learned counsel appearing for the petitioners would also submit that, insofar as the petitioners claim of refund is concerned, which is otherwise eligible under Cenvat Credit Rules, 2004 in the erstwhile regime as it was an input tax under the erstwhile regime i.e., the existing law, the petitioners application shall be considered and disposed of only under the provisions of the existing law.

17. However, the respondent, on considering the application submitted by the petitioners, has rejected the same

through the impugned orders by mainly stating the reason that, even though the petitioners are eligible for taking Cenvat credit, since there is no provision in the new regime to allow such refund, the claim was rejected. Pointing out this reason stated by the respondents, the learned counsel appearing for the petitioners would contend that, under the Cenvat Credit Rules since the petitioners become eligible to claim the credit and if the credit is accrued in the account of the petitioners on 30.06.2017, certainly, the petitioners could have made a claim under 140(1) of the Act by making a GST TRAN-1 application. However, since the service tax itself was paid only after 01.07.2017 and atleast in two cases, it was paid only after 27.12.2017, the chance of making an application in GST TRAN-1 under Section 140(1) of the GST Act could not have been possible for the petitioners in view of the peculiar circumstances.

18. Therefore, this kind of applications submitted by the petitioners or persons like the petitioners seeking for the refund under Section 142(3) should have been dealt with and disposed of in the manner provided in that sub-section and if the respondent decided the application in that manner, certainly, the present reason given in the impugned order might not have been given and the claim of the petitioners if not for refund atleast for transfer in the credit or taking the credit in the present GST account could have been acceded to.

19. Therefore, the learned counsel appearing for the petitioners makes a request that, the impugned order, since has given the only reason that, for want of provisions, the refund claim made by the petitioners is rejected and such a provision is available in the Act and it would be possible for the respondent to take the route of Section 142(3), the order impugned can be interfered with and set aside and it can be remanded back to the respondents for reconsideration to take up the application submitted by the petitioners for refund and decide the same if not for refund atleast for credit. Therefore, the learned counsel seeks indulgence of this Court in this regard.

20. However, on the other hand Mr. A.P. Srinivas and Mrs. Hema Muralikrishnan, learned Senior Standing Counsels appearing for the respondents in these cases would make the following submissions:

(i) The only transitional provision for these kind of assessees available under the GST Act is Section 140. If Section 140 is invoked, the petitioner could have made an application under Section 140(1) of the Act, 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. Which means, according to them, if at all the petitioners are eligible to claim any CENVAT credit, that too, for the period prior to 30.06.2017 and if the said claim of credit of eligible duties is furnished in the return relating to the said period, then only such a claim could have been made by the petitioners.

(ii) Such a claim should have been made by way of application in GST TRAN-1 on or before the extended period i.e., 27.12.2017. In the case in hand, there is no such application submitted and there was no such eligibility for the petitioners even to make such an application, as, on 30.06.2017 no such amount accrued in the account of the petitioners to take the claim for credit in the electronic credit ledger under the GST.

(iii) They also submitted that, insofar as Section 142(3) of the Act, the said provision is not related to transfer of credit. The said provision is only related to seek for any refund of the duty paid already and those refund application if it is filed either before, on or after the appointed day, no doubt, that should be disposed of under the existing law i.e., the erstwhile law prior to 01.07.2017. However, while disposing the same, the eligibility of the person, who made such a claim to get the refund in cash, first should be satisfied.

(iv) Here in the case in hand, according to the learned Standing Counsels for respondents, the petitioners should have filed the return six months prior to the appointed day without any default and the claim for refund is not relates to the mere Cenvat credit, but it is based on the duty paid by the applicant or claimant like the petitioners and that is related to Central Excise Act, 1944. Therefore, what was the eligibility of a person under Central Excise Act, 1944 to seek for a refund claim, such kind of refund claim alone should

be made under sub-section (3) of Section 142 and therefore, the application submitted by the petitioners to take a credit and to transfer the same, cannot be treated as a refund application within the meaning of Section 142(3) of the Act, they contended.

(v) They also made submission that, insofar as the eligibility of the petitioners to seek CENVAT credit under Rule 3 of the Cenvat Credit Rules, the conditions imposed under Rule 4 of the Cenvat Credit Rules should have been fulfilled.

(vi) One such condition is, as per third proviso to Rule 4(1) of the Cenvat Credit Rules, that the manufacturer or the provider of output service shall not take CENVAT credit after one year of the date of issue of any of the documents specified in sub-rule (1) of Rule 9.

(vii) Quoting this provision of the Cenvat Credit Rules, the learned Standing Counsel for the respondents would further contend that, the one year limitation which starts from the documents pertaining to the petitioners provided under sub-rule (1) of Rule 9 since already expired, as the petitioners admittedly availed the service prior to 30.06.2017, such a claim cannot be made even under the erstwhile Cenvat Credit Rules, therefore, on that account also, the petitioner is not entitled to, they contended.

(viii) Further, the learned Standing Counsel would also submit that, the petitioners, instead of making an application within the time under Section 140(1) of the Act by making an application in GST TRAN-1 availing the opportunity to make such an application within the time i.e., on or before 27.12.2017, now had made a belated application, where, they claimed that, such application should have been dealt with under Section 142(3) of the Act, as if that, it is a refund claim of CENVAT credit.

(ix) The learned Standing Counsel would also submit that, the Cenvat credit itself is a concession. This has been clearly held in number of cases by the highest Court of the land. When that being the concession, as per the conditions imposed therein or subject to the conditions imposed therein, such concession could be availed by the eligible person. Therefore, it is not the payment or duty paid by the person like the petitioners to make a claim as has been done in this case by making an application as a refund claim and further taking the stand that, such a claim should have been dealt with under Section 142(3) of the Act.

(x) If such a concession, which was made available to persons like the petitioners, have not been availed in time, under the erstwhile Rule i.e., before the GST regime and admittedly, since the petitioners have failed to make availment of the Cenvat Credit Rules by taking the credit as the petitioners have not paid the service tax or the duty in all these three cases prior to 30.06.2017 and they paid after six months or more, the question of making any claim under Section 142(3) in this case does not arise.

(xi) In order to avoid the time limit prescribed for invoking Section 140(1) i.e., upto 27.12.2017, where, the petitioners admittedly failed to make it, the petitioners have chosen to take the present route now wants to change their stand that, the application shall be treated as an application for taking the credit and therefore, whatever the eligible credit available in the account of the petitioners shall be transferred in the electronic credit ledger of the petitioners under the GST regime. Such a stand taken by the petitioners at this juncture cannot be countenanced, therefore, on that ground also, the petitioners are not entitled to seek any quashment of the impugned order and a consequential relief of remand or otherwise, therefore, the learned Standing Counsels would contend that, all these writ petitions are liable to be rejected.

21. I have considered the detailed submissions made by the learned counsel for both sides and have perused the materials placed before this Court.

22. Insofar as the dates with regard to the payment of service tax or the duty in the three cases are concerned, there is no dispute. In all the three cases, before 30.06.2017 i.e., during the erstwhile Central Excise, Service Tax and Cenvat Credit regime, the amounts had not been paid. In W.P.No.1092 of 2019, service tax was paid on

30.12.2017 for a sum of ₹ 26,88,460/-, in W.P.No.528 of 2019 service tax had been paid by this petitioner on 02.05.2018 for a sum of ₹ 24,20,684/-, in the third case i.e., W.P.No.1160 of 2019, the petitioner had paid the Countervailing Duty as well as Special Additional Duty on 14.12.2017 to the extent of ₹ 68,96,064/-. In the first two cases, admittedly, the said payment itself was made beyond 27.12.2017 and in that third case, it was just 13 days prior to 27.12.2017.

23. When the GST regime has come into effect from 01.07.2017, under which, the erstwhile tax legislation governing the field hitherto since has been repealed or extinguished, necessarily the Legislature had to bring transitional provisions which they have done so. Accordingly, Sections 140 to 142 have been brought under GST Act wherein Section 140 has been provided as 'Transitional arrangements for input tax credit'. For the purpose of claiming the input tax credit under the GST regime also which otherwise accrued under the erstwhile regime on 30.06.2017 mainly this transitional provision under Section 140 has been made, where, as has been quoted herein above, the registered person is entitled to take Cenvat credit in his electronic credit ledger carried forward in the return relating to the period ending with the day immediately preceding the appointed day. Which means, before 01.07.2017 whatever the eligibility of a person to carry the Cenvat credit in the return filed relates to the period prior to the appointed day i.e., before 01.07.2017, that could be carried to the GST regime. How this credit has to be carried forward to the GST regime has been also stated in the said Section, under which, an application for GST TRAN-1 has to be made stating the accrued Cenvat credit in the account to be carried forward under the new GST regime to the electronic credit ledger. In order to make such a claim under Section 140(1), time limit has been prescribed, which was originally for a shorter period of 90 days, subsequently, which has been extended upto 27.12.2017, therefore, beyond 27.12.2017 no such application under Section 140(1) of the Act by making a GST TRAN-1 can be made.

24. Though there was a balance in the credit insofar as the petitioners' case is concerned, as on 30.06.2017, for which the petitioners respectively made applications invoking Section 140(1) of the Act and such a credit has been carried forward under that Section. However, insofar the present claim made in these three cases are concerned, these credits were not available as on 30.06.2017, because, admittedly, these payments had been made only in the respective dates mentioned above in December 2017 and May 2018.

25. Once that payment has been made after the cut off date for making TRAN-1 application whether those amount/credit can be sought for to carry forward to the GST regime by making an application once again under Section 140(1) is the question.

26. Insofar as the said option is concerned, as has been rightly pointed out by the learned counsel appearing for the petitioners, that kind of application under Section 140(1) cannot be made in these cases, because, the condition imposed under Section 140(1) is that, the registered person opting to pay tax shall be entitled to eligible duties carried forward in the return relating to the period ending with the day immediately preceding the appointed day.

27. So, what was the eligible credit available in the account as on 30.06.2017 alone should be carried forward under Section 140(1) transitional provision.

28. Here these amounts since have been paid as stated supra, sometime after the time limit for making the application under Section 140(1), these amounts whether can be sought for by way of credit transfer or refund in cash, is the next question.

29. In this context, it is the case of the petitioners, as projected by the learned counsel for the petitioners that, the application, therefore, was submitted by the petitioners only for refund as the word 'refund' alone has been mentioned in the other transitional provision under Section 142 in the head, 'Miscellaneous transitional provisions'.

30. If an application is submitted for refund claim under Section 142(3), the same shall be disposed of in accordance with the provisions of the existing law. Therefore, there can be no quarrel that, such application submitted under Section 142(3) shall be disposed of only in accordance with the erstwhile law prior to the GST regime. Here, the controversy arise is, the Revenue has taken a stand that, the application submitted by the petitioners if at all to be an application, it shall be only treated as application for credit transfer, for which, the petitioners have to take a route of Section 140(1) of the Act not under Section 142(3). The reason being, according to the Revenue, the application submitted under Section 142(3) is an application to make a claim for refund and therefore, such a refund claim could not have been made by the petitioners even during the erstwhile regime before 01.07.2017, as, if at all the petitioners were eligible to claim any Cenvat credit, it is only a credit, which should be transferred, for which, the route is Section 140(1) and not under Section 142(3).

31. However, if we look at the facts of the present cases, we can see that, the service availed by the petitioners in the first two cases were prior to 30.06.2017, the import made by the petitioners in respect of the third case was also prior to 30.06.2017. For these transactions, service tax as well as CVD and SAD should have been paid or made immediately, however, till 30.06.2017, no such payment has been admittedly made in any of these cases.

32. However, since these petitioners were triggered by the Revenue, subsequently these payments were made in December 2017 as well as May 2018 as stated supra.

33. By the time, the time to make application under Section 140(1) was already over by 27.12.2017. Therefore, it is the claim of the petitioners side that, the only way out for the petitioners to make a claim is an application under Section 142(3), therefore, such a refund claim was made instead of claiming credit transfer to the electronic credit ledger under the GST regime.

34. In this context, a further objection was raised by the Revenue side that, even according to sub-section (3) of Section 142, the petitioners would be eligible to be considered for the refund claim, provided, if they are eligible to seek such refund under erstwhile regime. Here in the case in hand, it is only a Cenvat credit, even for the Cenvat credit, whether they are eligible to seek for such a credit prior to 30.06.2017 is also a question, where, factually such Cenvat credit for these amounts could not have been claimed, as admittedly these amounts have been paid subsequent to 30.06.2017. Even if the application submitted by the petitioners is considered under Section 142(3), even then the petitioners would not be eligible to claim such Cenvat credit much less the refund claim.

35. In support of this objection, the learned Standing Counsel appearing for the Revenue drew the attention of this Court to third proviso to Rule 4(1) of Cenvat Credit Rules which says that, the manufacturer or provider of output service shall not take Cenvat credit after one year of the date of issue of any of the documents specified in sub-rule (1) of Rule 9.

36. Elaborating further, it was the contention of the Revenue's counsel that, the documents pertaining to Rule 9(1) is nothing but payment of Service tax or duty as service tax as well as the duty which should have been paid immediately after taking the input service and also the import in respect of the respective cases. Conveniently, in these cases, since the petitioners have chosen to pay the service tax as well as the additional duty long after from that date, they have not satisfied the one year limitation provided under third proviso to Rule 4(1) of the Cenvat Credit Rules.

37. However, this point has been met by the learned counsel appearing for the petitioners, who would submit that, no doubt within one year from the date of issue of any of the documents specified under sub-rule (1) of Rule 9 alone such kind of claim by the provider of the output service shall be made to take the Cenvat credit, whereas, in the present case, insofar as the petitioners are concerned, the payment has been made, i.e., service tax have been paid, in the referred dates and the challan evidencing payment of service tax by the petitioner who is the service recipient, is the relevant document mentioned is Rule 9(1)(e).

The said challan evidencing the payment of service tax by the service recipient as the person liable to pay service tax is the document which has been mentioned as one of the document under Rule 9(1) as contemplated in the third proviso to Rule 4(1) of the Cenvat Credit Rules. Here in the case in hand, within one year period from the date of payment of the service tax as per the challan, which is evidencing the payment, the claim now has been made and application has been submitted by the respective petitioners. Therefore, it is within the limitation and also it is the definite case of the petitioners that, insofar as the eligibility of the petitioner to claim Cenvat credit cannot be disputed and this has been specifically averred in the order impugned itself, where, it has been specifically stated that, the petitioner assessee is eligible for taking cenvat credit of the amount so paid under Service Tax regime, however since there is no provision in the new regime to allow the refund claim it is not tenable.

38. In support of this factual matrix, the learned counsel relied upon para 12 of the impugned order in W.P.No.1092 of 2019 which reads thus:

> *"12. In the self assessment era, it is for the assessee to assess the liability correctly and pay appropriate service tax, which the claimant has not properly done. Had the claimant paid the applicable service tax at the appropriate time they could have very well taken the credit and carried over the same, when GST came into force. I find that though the assessee is eligible for taking cenvat credit of the amount so paid under Service Tax Rules, there is no provision in the new regime to allow such refund as input tax credit in GST/credit in Electronic cash ledger/payment in cash. In the absence of such provisions, I am inclined to reject the refund claim as not tenable."*
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> *(Emphasis supplied)*

39. Thus, the eligibility of the petitioners otherwise to claim the Cenvat Credit under normal circumstances under the erstwhile law prior to 30.06.2017 is not in much dispute. However, it is the vehement contention on the part of the Revenue that, what are all the eligible credit for which, credit can be taken by the petitioners during the transitional period was taken by the petitioners as on 30.06.2017, thereafter the subsequent payment made shall not form part of the credit accrued on 30.06.2017. Therefore, the subsequent amount paid anything cannot be treated as a input tax credit for the purpose of making the claim in the transitional period even for carrying forward the same to the electronic credit ledger under GST regime.

40. Insofar as the said objection of the Revenue is concerned, this Court feels that, insofar as these three cases are concerned, since the facts are very peculiar, where, the petitioners availed service prior to 01.04.2017, for which, the amount payable to them have been paid to the service provider, but the tax alone has not been paid i.e., service tax as well as the duty referred to above and this has been paid only after triggering the petitioners by the Revenue, but this payment has been made within the reasonable / permissible period. But, before making these payments since the transitional period has come into effect, the peculiar situation has arisen. Otherwise, had there been no GST regime from 01.07.2017, the petitioners otherwise would have been eligible to claim Cenvat credit of all these amounts paid, for which, the eligibility of the petitioners to claim the credit is not in much dispute.

41. Merely because, the transitional provision has come into effect from 01.07.2017 and under Section 140(1) of the Act, the persons like the petitioners can make a claim only in respect of the credit which is already accrued as on 30.06.2017 and these credit had come into the account of the petitioners only subsequently, for which, claim under Section 140(1) could not have been made, the chance of making such an application to seek the refund or otherwise of such a credit which has subsequently accrued in the account of the petitioners, cannot be denied.

42. In that view of the matter, this Court feels that, in these kind of special situations, for which, the provision if not Section 142(3), no other eligible provision is available. Therefore, this Court feels that, since it is a dire

necessity, as these kind of situation necessarily to be met with by the Legislation, for which, these transitional provision has been brought in in the Statute Book, there can be no impediment for invoking Section 142(3) of the Act by invoking the "Doctrine of Necessity".

43. Normally, the theory of "Doctrine of Necessity" could be invoked when there is a dire necessity with regard to the forum, before whom, the issue has to be referred to and disposed and decided by such forum. Earlier the view was that, it would apply only to judicial matters but in ***Mohapatra and Company and another Vs. State of Orissa and another [1985] 1 SCR 322,*** it was held that "the doctrine of necessity applies not only to judicial matters but also to quasi-judicial and administrative matters".

44. The "Doctrine of Necessity" though would be applied only with regard to the forum or the authority by whom it shall be decided, here, since it is a transitional period from the erstwhile tax regime to the present GST regime, where, the available provisions are to be best utilised by the taxpayers, it become imperative in order to meet the special situation as the one discussed above, to have a forum, for which, the available legal provision of the Act viz., GST Act, 2017 can very well be invoked. The "Doctrine of Necessity" has been best explained in (***1996) 4 SCC 104, Election Commission of India and another Vs. Dr.Subramaniam Swamy and another*** and also in ***(2006) 3 SCC 276 in State of U.P. Vs. Sheo Shanker Lal Srivastava and others.*** In a Division Bench judgment of High Court of Delhi in the matter of ***Duncan Agro Industries Limited Vs. Union of India reported in 1988 (18) ECC 358, the [1985] 1 SCR 322,*** Mohapatra Company case has been followed.

45. Therefore, though normally the "Doctrine of Necessity" would only be invoked for want of forum, here in the case, it also can be construed that, if Section 142(3) is not permitted to be invoked in meeting situations like this, that situation would render that taxpayer remediless, hence, here also the "Doctrine of Necessity" can be invoked, in the considered opinion of this Court.

46. Since the language used in Section 142(3) of the Act is refund claim, the petitioner has made application for refund claim. However, under the erstwhile law, since the petitioners are not entitled to get any refund claim and their eligibility is confined only by taking the credit under Cenvat Credit Rules, beyond which, the relief cannot be stretched upon. Moreover, the Cenvat credit facilities which is a concession and if at all that concession has to be availed by the petitioners, that concession can be availed only in the manner known to law, for which, only credit facility can be adopted and therefore, the question of making any refund by way of cash as provided under Section 142(3) does not arise in this case, as, for which, the petitioners since have not been eligible or entitled to, that kind of claim cannot be made by the petitioners.

47. But at the same time, the petitioners application atleast could have been considered by the respondents under Section 142(3) of the Act for the purpose of taking the credit and such credit could have been considered and allowed for carrying forward in the electronic credit ledger of the GST regime which is nothing but a different route than Section 140 and that is the only possibility for dealing with these kind of applications. Hence, this Court has no hesitation to hold that, the reasons stated by the respondents in these cases in passing the orders impugned to reject the claim made by the petitioners are not tenable or these reasons would not stand in the legal scrutiny, in view of the legal position which have been discussed herein above.

48. For all these reasons, this Court, having considered the peculiar facts and circumstances of the case, is inclined to dispose of these writ petitions with the following orders:

> *"(i) That the impugned orders in these writ petitions are liable to be set aside, accordingly are set aside. As a sequel, the matters are remitted back to the respondents for reconsideration. While reconsidering the same, the authority concerned, who has to deal with the applications of the petitioners, shall consider and dispose of these applications under Section 142(3) of the CGST Act, 2017.*
>
> *(ii) While reconsidering the said applications, the claim made by the petitioners need not be considered for*

the purpose of refund of the claim made by them. However, the said claim made by the petitioners can very well be considered for the purpose of permitting the petitioners to carry forward the accrued credit to the electronic credit ledger of the GST regime.

(iii) After considering the said applications, as indicated above, the necessary order shall be passed by the respondents within a period of six weeks from the date of receipt of a copy of this order. It is made clear that, before passing the orders as indicated above, an opportunity of being heard shall be given to the petitioners, so that the petitioners can put forth their case by providing all necessary inputs to the satisfaction of the authorities to take a decision thereon.

49. With these directions, all these Writ Petitions are ordered accordingly. However, there shall be no order as to costs.

Citations: in 2022 (3) TMI 544 - MADRAS HIGH COURT

1. 2006 (2) TMI 594 - Supreme Court
2. 1996 (4) TMI 497 - Supreme Court
3. 1984 (8) TMI 350 - Supreme Court
4. 1988 (8) TMI 110 - HIGH COURT OF DELHI