IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 16213 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 20626 of 2018
With
CIVIL APPLICATION (FOR ORDERS) NO. 1 of 2019
In
R/SPECIAL CIVIL APPLICATION NO. 20626 of 2018

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SHABNAM PETROFILS PVT. LTD.
Versus
UNION OF INDIA & 1 other(s)

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Appearance: SCA No.16213/2018 :
MR RC JANI WITH MR AVINASH PODDAR for
RC JANI AND ASSOCIATE(6436) for the Petitioner(s) No. 1
MR DEVANG VYAS(2794) for the Respondent(s) No. 1
MR VIRAL K SHAH(5210) for the Respondent(s) No. 2

Appearance : SCA No.20626/2018 :
MR PRAKASH SHAH WITH MR ARUN JAIN with
MR DHAVAL SHAH (2354) for the Petitioners
MR DEVANG VYAS, for the Respondent(s) No. 1
MR SOAHAM JOSHI, AGP for the Respondent No.2

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

Date : 17/07/2019
ORAL ORDER
(PER : HONOURABLE MR.JUSTICE A.C. RAO)

1.00. As common question of law arise in both these petition and as in both these petitions, the petitioners have challenged the provisions of Central Goods and Service Tax Act, 2017 and Notification and Circular issued thereunder, by which the inverted tax structure refund of excess duty is not granted, the same are heard, decided and disposed of by this

common order.

2.00. By way of Special Civil Application No.16213 of 2018, petitioner – Shabnam Petrofils Pvt. Ltd. has prayed for the following main reliefs:-

> *"16[B]. Your Lordships may be pleased to issue writ of mandamus or any other writ in the nature of mandamus or any other appropriate writ quashing and setting aside the Notification dated 26.07.2018 being No.20/2018 and Circular dated 24.08.2018 being Circular No.56/30/2018-GST as contrary to Section 54(3) of the Central Goods and Service Tax Act, 2017 as well as notification dated 28.06.2017 being Notification No.5/2017-Central Tax [Rate] and declare the said Notification and Circular as violative of Articles 14 and 19(1)(g) of the Constitution of India.*

2.01. By way of Special Civil Application No.20626 of 2018, petitioners – federation of Gujarat Weavers Welfare Association and others have prayed for the following main reliefs:-

> *"9(a). YOUR LORDSHIPS may be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioners case and after going into the validity and legality thereof to*

quash and set aside:

(i). proviso (ii) of the opening paragraph of the Notification No. 05/2017-C.T. (Rate) dated 28.06.2017 inserted vide Notification No. 20/2018-C.T. (Rate) dated 26.07.2018 issued by the Respondent No. 1;

(ii). proviso (ii) of the opening paragraph of the Notification No. 05/2017-S.T. (Rate) dated 30.06.2017 inserted vide Notification No. 20/2018-S.T. (Rate) dated 26.07.2018 issued by the Respondent No. 2; and

(iii). proviso (ii) of the opening paragraph of the Notification No. 05/2017-I.T. (Rate) dated 28.06.2017 inserted vide Notification No. 21/2018-I.T. (Rate) dated 26.07.2018 issued by the Respondent No. 1; and

(b). YOUR LORDSHIPS may be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioners case and after going into the validity and legality thereof to quash and set aside the Circular No. 56/30/2018-GST dated 24.08.2018 issued by the Respondent No. 4;

(c). YOUR LORDSHIPS may be pleased to issue writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, or order or direction under Article 226 of the Constitution of India, ordering and directing the Respondents, their subordinate servants and agents to forthwith withdraw and cancel:

(i). proviso (ii) of the opening paragraph of the Notification No. 05/2017-C.T. (Rate) dated 28.06.2017 inserted vide Notification No. 20/2018-C.T. (Rate) dated 26.07.2018 issued by the Respondent No. 1;

(ii). proviso (ii) of the opening paragraph of the Notification No. 05/2017-S.T. (Rate) dated 30.06.2017 inserted vide Notification No. 20/2018-S.T. (Rate) dated 26.07.2018 issued by the Respondent No. 2; and

(iii). proviso (ii) of the opening paragraph of the Notification No. 05/2017-I.T. (Rate) dated 28.06.2017 inserted vide Notification No. 21/2018-I.T. (Rate) dated 26.07.2018 issued by the Respondent No. 1; and

(d). YOUR LORDSHIPS may be pleased to issue writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of

India, ordering and directing the Respondents, their subordinate servants and agents to forthwith withdraw and cancel the Circular No. 56/30/2018-GST dated 24.08.2018 issued by the Respondent No. 4."

2.02. Thus, in both these petitions petitioners have challenged Notification No.20/2018-central Tax (Rate) dated 26.07.2018 issued by the Government of India, Ministry of Finance, Department of Revenue, by which it is resolved that, the accumulated input tax credit lying unutilised in balance in respect of the goods specified at Sr.Nos.1, 2, 3, 4, 5, 6, 6A, 6B, 6C, and 7 of the table below Notification dated 28/6/2017, after payment of tax for and upto the month of July, 2018, on the inward supplies received upto 31st day of July, 2018, shall lapse. In short, by way of the aforesaid Government Resolution, the inverted tax structure refund of excess duty is not granted.

3.00. The petitioner of Special Civil Application No.16213 of 2018, is a company registered under the Companies Act, 1956 and is engaged in manufacturing polyester texturized yarn (HSN Code : 5402) and also manufactures polyester woven fabrics and polyester knitted fabrics from polyester partially oriented yarn / polyester texturized yarn (HSN Code : 5402) while the petitioner No.1 of Special Civil Application No.20626 of 2018 is a duly registered under the Maharashtra Public Trust Act, 1950 and Societies Registration Act and representing its members who are mostly MMF fabric weavers. The said petitioner No.1 represents 25 associations consisting

of more than 35,000 registered power looms units employing ore than 4,00,000 workers. The petitioner No.2 of Special Civil Application No.20626 of 2018 is an Association of persons and representing its members who are mostly knitters engaged in the manufacture and sale of MMF knitted fabrics. The petitioner No.3 of Special Civil Application No.20626 of 2018 is the Secretary and authorized signatory of the petitioner No.1 while petitioner No.4 is the President and authorized signatory of the petitioner No.2.

3.01. According to the petitioners, the impugned Notification No.5/2017 (Central Tax (rate)] dated 28.6.2017 issued by the Government of India with regard to clause (ii) of the proviso to sub-section (3) of section 54 of the Central goods and Service Tax Act, 2017, no refund of unutilized input tax credit shall be allowed, where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on the output supplies of such goods (other than nil rated or fully exempt) supplies with regard to the goods described in Column No.(3) of the Table. The said notification came into force w.e.f. 1/7/2017.

3.02. Thereafter Government of India, Ministry of Finance (Department of Revenue issued Notification No.20/2018-central Tax (Rate) dated 26/7/2018 with regard to clause (2) of proviso to sub-section (3) of section 54 of the Central Goods and Service Tax Act, 2017 by which it has been resolved as under :-

> *"Provided that,*
>
> *[i] nothing contained in this notification shall apply to the input tax credit accumulated on*

supplies received on or after the 1M day of August, 2018, in respect of goods mentioned at serial numbers 1, 2, 3, 4, 5, 6, 6A, 6B, 6C and 7 of the Table below; and

[ii] In respect of the said goods, the accumulated input tax credit lying unutilized in balance after payment of tax for and upto the month of July, 2018, on the inward supplies received up to the 31st day of July, 2018 shall lapse."

3.03. According to the petitioners, Notification No.20/2018 dated 26/7/2018 issued extends the restriction on the utilization of unutilized input tax credit for and up to the month of July, 2018 and further states that on the inward supplies received upto 31.7.2018 shall lapse and further states that inward supplies received upto 31st day of July, 2018, shall lapse. It is contended by the learned counsel for the petitioners that the impugned notification is without application of mind inasmuch as the assessees are losing huge amount of money paid towards input tax credit. It is contended that a registered person's right to claim input tax credit arises from section 16 of the CGST Act. It is contended by the learned counsel for the petitioners that there is no statutory provision under the CGST Act empowering the respondents to issue notifications providing for lapsing of input tax credit. It is contended that rule can be made or notification can be issued under the guise of section 164 for lapsing input tax credit. It is also contended that power under section 54(3)(ii) of the CGST Act is limited to notify the supplies not entitled to refund of input tax credit accumulated on account of the inverted rate structure. It is

contended that the the impugned notifications have exceeded powers delegated under section 54(3)(ii) of the CGST Act. It is contended that the impugned notification to the extend providing for the lapsing of input tax credit are discriminatory. It is vehemently contended that the input tax credit is as good as tax paid by the assessee and a valid claim of input tax credit under the GST Act creates an indefeasible right in favour of the taxable person.

3.04. In support of the above contention, learned counsel for the petitioners have relied on the decision of the Apex Court in the case of **Dipak Vegetable Oil Industries Ltd. Vs. Union of India** reported in **1991 (52) ELT 222 (Gujarat),** wherein the Apex Court has held as under :-

> *“13. The learned counsel Shri Trivedi also relied upon the following observations made by the supreme court in Shri Vijayalakshmi Rice Mills v. State of M.P. - AIR 1976 SC 1471 :*
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> *"5. ...It is a well recognized rule of interpretation that in the absence of express words or appropriate language from which retrospectivity may be inferred, a notification takes effect from the date it is issued and not from any prior date. The principle is also well settled that statutes should not be construed so as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the Amending Act came into force....*"

14. He also relied upon similar observations made by the Supreme Court in Govinddas v. Income-tax Officer, AIR 1977 SC 552 :

> *"10. Now it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure....."*

15. These observations of the Supreme Court also support the view that a right which is acquired as a result of operation of a statutory provision cannot be taken away retrospectively unless the statutory provision so provides or by necessary implication it has the same effect. As pointed out, here in this case, what has been done is to rescind the notifications and not the Rules. Though the right of the manufacturers like petitioners to credit of money had crystalized only after issuance of the notifications and the extent of it was governed by the terms of the notifications, once the said right got crystallized in terms of money, in our opinion, it was not intended to be taken away or could not be taken away merely by rescinding the notifications. The effect of the rescinded notifications is, in our opinion, that from the date on which the said

notifications came to be rescinded, the manufacturers of Vanaspati and soap ceased to earn the benefit of credit of money while manufacturing their final products - Vanaspati or soap - with the help of notified inputs, but they were not deprived of their right to utilise the credit of money which they had already earned validly so long as the same was or intended to be used for payment of excise duty in the manufacture of Vanaspati or soap, as the case may be, merely because the notifications have been rescinded, it cannot be said that Rule 57N has ceased to operate. For these reasons the contention raised on behalf of the respondents will have to be rejected."

3.05. The learned counsel for the petitioners has also And the decision of the Apex Court in the case of **Eicher Motors Ltd. Vs. Union of India,** reported in **1999 (106) ELT 3 (S.C.)**. The Apex Court in the case of Eicher Motors Ltd. (supra) has observed and held as under :-

"5. Rule 57F (4A) was introduced into the Rules pursuant to Budget for 1995-96 providing for lapsing of credit lying unutilised on 16-3-1995 with a manufacturer of tractors falling under Heading No. 87.01 or motor vehicles falling under Heading No. 87.02 and 87.04 or chassis of such tractors or such motor vehicles under Heading No. 87.06. However, credit taken on inputs which were lying in the factory on 16-3-1995 either as

parts or contained in finished products lying in stock on 16-3-1995 was allowed. Prior to 1995-96 Budget, central excise/additional duty of customs paid on inputs was allowed as credit for payment of excise duty on the final products, in the manufacture of which such inputs were used. The condition required for the same was that the credit of duty paid on inputs could have been used for discharge of duty/liability only in respect of those final products in the manufacture of which such Inputs were used. Thus it was claimed that there was a nexus between the inputs and the final products. .in 1995-96 Budget Modvat scheme was liberalised/simplified and the credit earned on any input was allowed to be utilised for payment of duty on any final product manufactured within the same factory irrespective of whether such inputs were used in its manufacture or not. The experience showed that credit accrued on inputs is less than the duty liable to be paid on the final products and thus the credit of duty earned on inputs gets fully utilised and some amount has to be paid by the manufacturer by way of cash. Prior to 1995-96 Budget. the excise duty on inputs used in the manufacture of tractors. commercial vehicles varied from 15% to 25%. whereas the final products were attracted excise duty of 10% or 15% only. The value addition was also not of such a magnitude

that the excise duty required to be paid on final products could have exceeded the total input credit allowed. Since the excess credit could not have been utilised for payment of the excise duty on any other product, the unutilised credit was getting accumulated. The stand of the assessees is that they have utilised the facility of paying excise duty on the inputs and canted the credit towards excise duty payable on the finished products. For the purpose at utilisation of the credit all vestitive facts or necessary incidents thereto have taken place prior to 16-3-1995 or utilisation of the finished products prior to 16-3-1995. Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory on the basis of the existing scheme. Now by application of Rule 57F(4A) credit attributable to inputs already used in the manufacture of the final products and the final products which have already been cleared from the factory alone is sought to be lapsed, that is, the amount that is sought to be lapsed relates to the inputs already used in the manufacture of the final products but the final products have already been cleared from the factory before 16-3-1995. Thus the right to the credit has become absolute at any rate when the input is used in the manufacture of the final product. The basic postulate, that the scheme is

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

6. We may look at the matter from another

angle. If on the inputs the assessee had already paid the taxes on the basis at 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.

7. There are several decisions referred to by the learned Counsel on either side but we do not think that those decisions have any relevance to the point under discussion.

8. We allow the petitions filed by the assessees and declare that the said rule cannot be applied except in the manner indicated by us above. No orders as to costs."

3.06. Learned counsel for the petitioners contended that the aforesaid ratio has been followed in the following cases :-

[1] Samtel India Ltd. V/s. Commissioner of Central Excise, Jaipur [2003 (155) ELT 14 SC]

[2] Jayam and Co. V/s. Assistant Commissioner (2016) 96 VST 1(SC)

[3] Collector of Central Excise V/s. Dai Ichi Karkaria Ltd. 1999 (112) ELT 353 (SC)

[4] Jayaswal Neco Ltd. V/s. Commissioner of Central Excise 2015 (322) ELT 587(SC)

[5] Commissioner of Central Excise Vs/ New Swadeshi Sugar Mills (2016) 1 SCC 614,

[6] TATA Engineering & Locomotive Co. Ltd. V/s. Union of India [2003 (159) ELT 129 (Bom.)]

[7] Grasim Industries Ltd. V/s. CBEC [2004 (163) ELT 10] &

[8] Shree Rajastban Texchem Ltd. V/s. Union of India [2005 (182) ELT 311.

3.07. It is further contended by the learned counsel appearing for the petitioners that from the above, it is clear that the impugned notification and circular are required to be struck down as unconstitutional on the ground that it took away the vested right of the assessee without there being any justifiable reason.

4.00. Both these appeals are vehemently opposed by the learned counsel for the respondents - revenue. It is contended that to reduce the accumulation of ITC with fabrics weavers, the GST council, in its meeting held on 6th October 2017

recommended reduction in GST rate on man-made fiber yarns from 18% to 12% which was notified vide notification No. 35/2017-Central Tax (Rate) dated 13th October 2017. This gave significant relief to the sector and accumulation of ITC got reduced. Subsequently, requests were received from textile industry to relax the said condition to allow refund of accumulated credit. While in the 28th meeting the request to remove restriction on refund of accumulated input tax credit was agreed to by the GST Council. this change was made with prospective effect and a conscious decision was taken by the Council that the input tax credit lying in balance on the date of the notification implementing the new provision, shall lapse. This lapsing of accumulated input tax credit was in the spirit of earlier rate structure which envisaged that refund of accumulated credit was not to be allowed.

4.01. The learned counsel appearing for the respondents - revenue further contended that in terms of the GST Council decision, Notification No. 5/2017-Central Tax (Rate) dated 28th June, 2017 was amended vide Notification No. 20/2018-Central Tax (Rate) dated 26th July. 2018 to allow refund or no on purchases made alter 1st August. 2018 and to lapse the input tax credit on account of inverted duty structure lying in balance after payment of GST for the month of July. 2018 (on purchases made on or before the 31' July, 2018). The power to lapse the input tax credit flows inherently from the power deny refund of accumulated input tax credit on account of inverted duty structure. It is contended that the petitioners even prior to the date of coming into force of the notification were not able to take the benefit of this credit as refund on account of inverted duty structure was blocked. It is contended that

allowing the utilization of the credit would have led to allowance of the blocked credit and thus in a way would negate the earlier position of blockage of input tax credit refund. Attention of this Court is invited to circular No. 56/30/2018-GST dated 24.08.2018, wherein all the issues raised by the textile industry were clarified after due consultation with the trade. It is contended that, in fact, on the whole issue, there was extensive discussion and deliberations with trade and industry and other stakeholders including at the level of Union Finance Minister. It is further contended that the inputs from all the State Governments were also taken before issuance of the impugned circular.

4.02. The learned counsel appearing for the respondents - revenue has contended that in the case of **Kapil Mohan Vs. Commissioner of Income Tax** reported in **1999 (1) SCC 430**, the Apex Court has held that it is now well settled in the field of taxation, hardship or equity has no role to play in determining eligibility to tax and it is for the legislature to determine the same.

5.00. Heard the learned counsel for the respective parties and considered the material on record.

5.01. Having heard the rival submissions and considering the provisions of section 54(3(ii), which empowers the respondents – revenue to frame the rules, does not empower the respondents – Central Government to frame rule providing for lapsing of the input tax credit.

5.02. The decision of the Apex Court in the case of Dal

Ichi Karkaria Ltd. (supra) as well as decision of the Apex Court in the case of Eicher Motors Ltd. (supra) are squarely applicable to the facts of the case on hand.

5.03. In the case of Dal Ichi Karkaria Ltd. (supra), the Apex Court in the context of rule 57A to 57J of the Central Excise Rules, 1944 has held that a manufacturer obtains credit for central excise duty on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. Therefore, it is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. The Court held that the credit is indefeasible.

5.04. In the case of Eicher Motors Ltd. (supra), the Apex Court has observed and held as under :-

> *"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 15 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."

6.00. In view of the above, both these petitions succeed. The impugned Notification dated 26.07.2018 bearing No.20/2018 and Circular dated 24.08.2018 bearing Circular No.56/30/2018-GST to the extent it provides that the input tax credit lying unutilized in balance, after payment of tax for and upto the month of July, 2018, on the inward supplies received upto the 31st day of July, 2018, shall lapse, are hereby quashed and set aside and are hereby declared as untra vires and beyond the scope of section 54(3)(ii) of the CGST Act, as section 54(3)(ii) of the CGST Act does not empower to issue such notifications and consequently, it is held that the petitioners and members of the petitioners are entitled for the credit and it be granted to them.

In view of the disposal of the main Special Civil Application, Civil Application No.1 of 2019 in Special Civil Application No.20626 of 2019 also stands disposed of. No costs.

Sd/-
(J. B. PARDIWALA, J.)
Sd/-
(A. C. RAO, J.)

PER : J.B. PARDIWALA, J. :-

7.00. I am in complete agreement with the final conclusion arrived at by my esteemed brother Justice Rao.

However, I would like to add few words of my own:

8.00. The writ applicant No.1 is a society representing its members who are mostly MMF fabric weavers. The writ applicant No.2 is an Association of Person representing its members who are mostly knitters engaged in the manufacture and sale of MMF knitted fabrics.

9.00. The members of the writ applicants are engaged in the supply of textiles and textile articles of Chapters 52 to 63 of the First Schedule to the Customs Tariff Act, 1975.

10.00. With the introduction of the Goods and Services Tax (hereinafter referred to as "GST') in India w.e.f. 01.07.2017, the Central Goods and Service Tax Act, 2017 ("CGST Act"), Integrated Goods and Service Tax Act, 2017 ("IGST Act"), and Gujarat Goods and Service Tax Act, 2017 ("SGST Act"), has come into force.

11.00. The CGST Act and SGST Act provides for the levy and collection of the GST on the supply of goods and services within the State of Gujarat. The IGST Act levies and collects GST on the inter-state supply of goods and services.

12.00. The Scheme of levy of GST is to tax supply of goods and services on value addition.

13.00. Section 16 of the CGST Act allows the registered person to take input tax credit ("ITC") of tax charged on the inputs and input services or both used or intended to be used

in the course or furtherance of his business.

14.00. Section 140 of the CGST Act allows a registered person to take credit in his electronic credit ledger of the amount of CENVAT Credit carried forward in the return relating to the period ending with the date immediately preceding the appointed day i.e. 01.07.2017.

15.00. Similarly, Section 140 of the SGST Act enables a registered person to take credit in his electronic credit ledger of the amount of Value Added Tax and Entry Tax carried forward in the return relating to the period ending with the date immediately preceding the appointed day i.e. 01.07.2017.

16.00. Section 54(3) of the CGST Act provides for the refund of the unutilised ITC in two circumstances viz. (i) zero rated supplies made without payment of tax (export of goods and services); and (ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (popularly known as inverted rate of tax).

17.00. Section 54(3)(ii) of the CGST Act further provides that the Central Government, on the recommendation of the GST Council, may notify the goods or services or both to which the refund of {TC accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies shall not be available. Section 54(3) of the CGST Act reads thus:

> *"(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised*

input tax credit at the end of any tax period:

Provided that no refund of unutilised input tax credit shall be allowed in cases other than -

(i) zero rated supplies made without payment of tax;

(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:

Provided also that no refund of input tax credit shall be allowed. If the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies."

18.00. In terms of Section 20 of the IGST Act, Section 54(3) of the CGST Act shall *mutatis mutandis* apply to the IGST Act.

19.00. Section 54(3) of the SGST Act reads thus:

"(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised

input tax credit at the end of any tax period:

Provided that no refund of unutilised input tax credit shall be allowed in cases other than (I) zero-rated supplies made without payment of tax, (ii) where the credit has accumulated an account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council :

Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty :

Provided also that no refund of input tax credit shall be allowed, If the supplier of goods or services or both claims refund of the integrated tax paid on such supplies."

20.00. Vide Notification No.05/2017-Central Tax (Rate) dated 28.06.2017, as amended by Notification No. 29/2017-Central Tax (Rate) dated 22.09.2017 and Notification No. 44/2017-Central Tax (Rate) dated 14.11.2017, the Central Government, on recommendation of the GST Council (Respondent No. 3 herein), in exercise of powers conferred upon it under section 54(3) of the CGST Act, *inter alia,* notified following textile and textile goods (listed at Sr. Nos. 1 to 7 of the Table thereto) under Section 54(3) of the Act in respect of

which refund of ITC accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies.

S. No.	***Tariff item, heading, sub-heading or chapter***	***Description of Goods***
1	*5007*	*Woven fabrics of silk or of silk waste*
2	*5111 to 5113*	*Woven fabrics of wool or of animal hair*
3	*5208 to 5212*	*Woven fabrics of cotton*
4	*5309 to 5311*	*Woven fabrics of other vegetable textile fibres, paper yarn.*
5	*5407, 5408*	*Woven fabrics of manmade textile materials*
6	*5512 to 5516*	*Woven fabrics of manmade staple fibres*
6A	*5608*	*Knotted netting of twine, cordage or rope; made up fishing nets and other made up nets, of textile materials*
6B	*5801*	*Corduroy fabrics*
6C	*5806*	*Narrow woven fabrics, other than goods of heading 5807; narrow fabrics consisting of warp without weft assembled by means of an adhesive (bolducs)"*
7	*60*	*Knitted or crocheted fabrics [All goods].*

21.00. The effect of the Notification No. 05/2017-Centra1 Tax (Rate) dated 28.06.2017, as amended by the Notification No. 29/2017-Central Tax (Rate) dated 22.09.2017 and Notification No. 44/2017-Centra1 Tax (Rate) dated 14.1

1.2017, was that the aforesaid goods were not entitled to refund of the ITC accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies.

22.00. Vide Notification No.20/2018-Centra1 Tax (Rate) dated 26.07.2018, issued in exercise of powers conferred upon Central Government under section 54(3) of the Act, the above Notification No. 05/2017-Centra1 Tax (Rate) dated 28.06.2017 was amended with effect from 01.08.2018.

23.00. The effect of the amending notification is to de-notify the goods mentioned at Sr. Nos.1 to 7 to the table to the Notification No. 05/2017-Central Tax (Rate) dated 28.06.2017 thereby paving way for the refund of the ITC accumulated on account of the inverted rate structure in respect of the said goods w.e.f. 01.08.2018.

24.00. The amending notification further provided that the accumulated ITC lying unutilized in balance, after payment of tax for and up to the month of July, 2018, on the inward supplies received up to the 31.07.2018, shall lapse.

25.00. The relevant extracts of the Notification No.20/2018-Central Tax (Rate) dated 26.07.2018 are reproduced as follows:

> *"**Refund of unutilized/accumulated credit on specified fabrics - Amendment to Notification No.***

5/2017-C. T. (Rate)

In exercise of the powers conferred by clause (ii) of the proviso to sub-section (3) of section 54 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 5/2017-Central Tax (Rate), dated the 28th June, 2017, published in the Gazette of India, Extraordinary, Part 1], Section 3, Sub-section (i). vide number G.S.R. 677(E), dated the 28th June, 2017, namely :

In the said notification. In the opening paragraph the following proviso shall be inserted. Namely :

"Provided that,

(i) nothing contained in this notification shall apply to the input tax credit accumulated on supplies received on or after the 1st day of August, 2018, in respect of goods mentioned at serial numbers 1, 2, 3, 4, 5, 6, 6A, 6B, 6C and 7 of the Table below; and

(ii) in respect of said goods, the accumulated input tax credit lying unutilised in balance, after payment of tax for and upto the month of July, 2018, on the inward supplies received up to the 31st day of July 2018, shall lapse."

26.00. In the case on hand, the writ applicants have challenged the proviso (ii) of the opening paragraph of the Notification No.05/2017-C.T. (Rate) dated 28.06.2017 inserted

vide Notification No. 20/2018-C.T. (Rate) dated 26.07.2018.

27.00. The challenge is essentially on the following grounds:

(i) The Respondents have no power under Section 54(3) of the CGS'T Act to lapse the accumulated ITC lying unutilised in balance on 31.07.2018.

(ii) The only power conferred upon the Respondents under Section 54(3) of the CGST Act is to notify the goods and services not entitled for refund of ITC accumulated on account of inverted rate structure.

(iii) The Central Board of Indirect Taxes and Customs (Respondent No. 4 herein), vide Circular No.56/30/2018-GST dated 24.08.2018 has clarified that the legislative power of providing for lapsing of ITC flows inherently from the power to deny refund of ITC accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies.

(iv) It is the case of the writ applicants that the ITC once validly taken is indefeasible and vested right is accrued in favour of the registered person to utilize the same without any limitation.

(v) Strong reliance has been placed upon the decision of the Supreme Court in the case of ***Collector of Central Excise, Pune v. Dai Ichi Karnataka Ltd, 1999 (112)***

E.L.T. 353 (S.C.)**,** wherein it is held that when credit has been validly taken, its benefit is available to the manufacturer without any limitation in time. The credit is indefeasible.

(vi) Reliance is also placed upon the decision of the Supreme Court in the case of ***Eicher Motors Ltd. v. Union of India, 1999 (106) E.L.T. 3(S.C.)****,* for the proposition that 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 thereto gets worked out or until those goods existed.

(vii) Further reliance is placed on the decision of this Court in the case of ***Baroda Rayon Corporation Limited – 2014 (306) E.L.T. 551 (Guj.).***

ANALYSIS:

(viii) The CGST Act itself provides for the lapsing of the ITC at Sections 17(4) and 18(4) respectively of the CGST Act. Thus, where the legislature wanted the ITC to lapse, it has been expressly provided for in the Act itself. No such express provision has been made in Section 54(3) of the CGST Act.

(ix) No inherent power can be inferred from the provision of Section 54(3) of the CGST Act empowering the Central Government to provide for the lapsing of the unutilised ITC accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies

(inverted rate structure).

(x) The members of the writ applicants have a vested right to unutilised ITC accumulated on account of rate of tax on inputs being higher than the rate of tax on the output supplies.

(xi) It is a well settled principle that the delegated legislation has to be in conformity with the provisions of the parent statute. By prescribing for lapsing of ITC, the Notification No.05/2017-C.T. (Rate) dated 28.06.2017, as amended by Notification No.20/2018-C.T. (Rate) dated 26.07.2018, has exceeded the power delegated under Section 54(3)(ii) of the CGST Act.

(xii) In view of the above, proviso (ii) of the opening paragraph of the Notification No.05/2017-C.T. (Rate) dated 28.06.2017, inserted vide Notification No.20/2018-C.T. (Rate) dated 26.07.2018, is *ex-facie* invalid and liable to be strike down as being without any authority of law.

Sd/-

(J. B. PARDIWALA, J.)

RAFIK.....