

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.II

Excise Appeal No.70135 of 2022

(Arising out of Order-in-Appeal No.GZB-EXCUS-000-APPL-MRT-100-21-22 dated 27/01/2022 passed by Commissioner (Appeals) Central Goods & Services Tax, Meerut)

M/s Tirupati Structural Ltd.,
(A-6/5, Site IV Ind. Area, Sahibabad, Ghaziabad)
VERSUS

.....Appellant

Commissioner of Central Excise &

CGST, Ghaziabad

(CCE, Ghaziabad)

....Respondent

APPEARANCE:

Shri Rajesh Chhibber, Advocate for the Appellant

Shri A.K. Choudhary, Authorised Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70557/2025

DATE OF HEARING : 24 April, 2025
DATE OF PRONOUNCEMENT : 08 August, 2025

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.GZB-EXCUS-000-APPL-MRT-100-21-22 dated 27/01/2022 passed by Commissioner (Appeals) Central Goods & Services Tax, Meerut. By the impugned order, Commissioner (Appeals) has dismissed the appeal filed by the appellant against the rejection of refund claim.

2.1 Appellant is engaged in the manufacture of various HDPE/PVC goods. They filed a refund claim of Rs.8,39,730/- on 18.10.2019, stating that they had imported a machine under EPCG Scheme and accordingly, they did not pay the BCD, CVD, and additional Customs Duty on the same.

2.2 As per conditions prescribed in the said Scheme, they were required to fulfill the export obligation. As they failed to fulfill the export obligations, they had paid CVD of Rs.5,33,676/-, Education Cess on CVD of 10,674/-, S&H Education Cess of Rs.5,337/- and Additional duty of Customs of Rs.2,90,043/- (total amounting to Rs.8,39,730/-). As they were eligible to claim Cenvat credit of the above duties under the provisions of Cenvat Credit Rules, 2004 but due to implementation of GST w.e.f. 01.07.2017 they could not avail the said credit under GST.

2.3 The refund claim was rejected by the Adjudicating Authority vide Order-in-Original dated 15.06.2020 observing that appellant had failed to submit any evidence regarding receipt installation of the machine capital goods in the factory and the said machine was used in manufacture of finished goods as such Cenvat credit was not admissible. Reliance was placed by the Adjudicating Authority relying on the decision of Chennai Bench of this Tribunal in the case of M/s Servo Packaging Ltd. Vs Commissioner of GST Final Order No.40098 of 2020 dated 05.02.2020.

2.4 Aggrieved appellant filed appeal before Commissioner (Appeals) who vide his order dated 05.04.2021 remanded the matter back to the Original Authority for a decision after following the principals of natural justice.

2.5 In the remand proceedings, Original Authority as per the Order-in-Original dated 25.08.2021 again rejected the refund claim after following the principals of natural justice.

2.6 Aggrieved appellant have filed appeal before Commissioner (Appeals) which has been dismissed as per the impugned order.

2.7 Aggrieved appellant have filed this appeal.

3.1 I have heard Shri Rajesh Chhibber learned Counsel appearing for the appellants and Shri A.K. Choudhary learned Authorised Representative appearing for the revenue.

3.2 Arguing for the appellant learned Counsel submits that-

- The goods were used for the manufacture of goods cleared on payment of excise duty.

- The appellant imported capital goods under EPCG Scheme in 2009.
- The capital goods were very well installed in the factory.
- The appellant could not fulfill export obligation.
- No demand was raised by customs for almost 10 years.
- The custom duties including CVD were paid in 2019.
- The amount on account of CVD was paid much after the introduction of GST.
- The appellant was otherwise eligible to claim credit even if CVD was paid after non fulfilment of export obligation. Law stands settled in the case of German Remedies.
- The case law of Sarvottam Packaging is distinguishable.
- As regard the rejection of refund under Section 142 of CGST Act, it is submitted that once the credit is held to be admissible, it has to be refunded to the assessee as otherwise said decision would be of no value and cannot be given effect to.
- Identical issue came up before the Tribunal in the case of ITCO Industries vs. CCGST reported in 2023 (70) GSTL 76 (Tri.Chennai) wherein following earlier decisions (including the judgment of Hon'ble Madras High Court), the refund has been allowed. In any case, once the issue has been decided by Hon'ble High Court subsequent to the decision of this Tribunal in the case of Sarvottam, the same cannot be applied in the instant case.

3.3 Learned Authorised Representative reiterates the findings recorded in the orders of the lower authorities.

4.1 I have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 Impugned order records as follows for rejecting the refund claim made by the appellant:-

"5.2 I find that the adjudicating authority in the impugned order has categorically mentioned that "he has examined the reply dated 30.05.2021 submitted by the appellant and the submissions made during personal hearing. To follow

the principle of natural justice the party has been given ample opportunity by way of personal hearings to support their case by adducing new facts/evidences. However, the party, although attended the hearing but could not succeed in bringing any new facts/grounds to corroborate/fortify their case. They have reiterated the same old submissions as given earlier." Accordingly, the adjudicating authority held that no new facts available with the party otherwise they would have submitted at the time of submission of their defense and at the time of personal hearing conducted after remand of the case.

5.3 Therefore, in the light of above narrated situation, I take up the issue to decide afresh as to whether the refund of CVD of Rs. 8,39,730/- is admissible to the appellant or not?

5.4 Here it is imperative to examine the Export Promotion Capital Goods (EPCG) scheme. The said scheme was introduced by the Directorate General of Foreign Trade (DGFT) under Chapter 5 of the Foreign Trade Policy (FTP) issued from time to time. The idea behind the launch of this scheme was the facilitation of capital product imports so as to Indian manufacturers can use them to produce quality goods. This scheme aims to improve India's manufacturing prowess in the global market. EPCG Scheme allows import of capital goods for pre-production, production and postproduction at zero customs duty. For this purpose, the concessions in Customs duties are being granted through Notification issued by the Central Board of Indirect Tax and Customs.

5.5 I find, that the appellant imported Capital Goods namely "Free Foamed Board Production Extruder Line with Standard Accessories" vide Bill of Entry No.793408 dated 20.05.2009 under Notification No.64/2008-Cus dated 09.05.2008 against EPCG License No. 0530148299 dated

29.01.2009. Notification No.64/2008-Cus dated 09.05.2008 issued under sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), exempts specified goods from so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as is in excess of the amount calculated at the rate of three percent ad-valorem, and the whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act, when specifically claimed by the importer.

5.6 The exemption under this notification was subject to the condition that the party was required to fulfil the Export obligation equivalent to eight times the duty saved on the goods imported as may be specified on the licence or authorization. The appellant did not fulfil the export obligation within the prescribed time period, as accepted by the appellant in their written submission and as per the condition of the Notification they paid all the customs duty including the CVD forgone at the time of import. After payment of the said customs duty, they filed the moot refund claim. In the refund claim they stated that as per Rule 3 of the Cenvat Credit Rules, 2004 they were eligible to claim the Cenvat credit of the above referred CVD duties. However, since old tax regime is not in existence and there is no provision under GST regime to avail cenvat credit of CVD paid under old regime, hence due to non availment of cenvat credit, the said claim has been filed by the appellant.

5.7 Before discussion on the admissibility of refund, it will not be out of context to examine as to whether the appellant was entitled to take cenvat credit under the erstwhile Cenvat Credit Rules, 2004 in case the duty was paid due to failure to fulfil the conditions of EPCG License. In view of para 2(7) of the Notification No.64/2008 *ibid*, the imported capital goods needed to be installed in the importer's factory or premises and a certificate from the

jurisdictional Deputy/Asstt. Commissioner of Central Excise, needed to be produced confirming installation and use of capital goods in the factory premises, within six months from the date of completion of imports. But the appellant did not produce any installation certificate from the jurisdictional Central Excise officer regarding receipt and installation of the said machine in their factory. Even when they were asked to submit the warehousing/installation certificate, they could not do so. Even they could not submit original copy of EPCG license. It is also fact on record that the appellant vide their letter dated 25.11.2019 has intimated to the department that the original license has been misplaced for which necessary FIR has been lodged but they failed to produce copy of FIR in support their. claim. Thus, in view of above, there is no evidence on record whether the said capital goods were received/installed in the factory and used in the manufacture of excisable goods and hence I am of the considered opinion that the appellant is not entitled to take Cenvat Credit on the capital goods imported by them as per Rule 3(1)(xi) (i) of the Cenvat Credit Rules, 2004, which provides that credit can be allowed to a manufacturer only if the capital goods are received in the factory.

5.8 Apart from the above, the capital goods have been imported duty free with export obligation and later on because of not fulfilling it, they are duty bound to refund the customs duty forgone to the Government. In this case the goods were imported in 2009, and no installation certificate were produced by them as per statutory requirement either at the time of filing claim or any later stage of the case and hence it is not feasible for the department to verify whether all or some of the goods had come into the appellant's factory and whether such goods had been used in the manufacture of specified products and that various conditions associated with the scheme

were fulfilled. Since the procedures were not followed for availment of credit on capital goods like declaration, intimation of receipt/ installation, maintenance of statutory records at the relevant time therefore, the appellant is not eligible for credit.

5.9 Further, Section 142 of the Central Goods and Services Tax Act, 2017 prescribes miscellaneous transition provisions. Section 142(3) provides 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. In this context, I find that the refund provisions under the erstwhile Rule 5 of the Cenvat Credit Rules, 2004 provides for refund of input Cenvat Credit when a manufacturer/service exports goods/services without payment of duty/tax. Admittedly, the present situation does not warrant refund under Rule 5 of the Cenvat Credit Rules, 2004 as the CVD and SAD has not been claimed as Cenvat in the first instance. Therefore, claim for refund of CVD is not admissible in terms of Section 142(3) read with the erstwhile provisions also. Admittedly, the capital goods imported have not gone into the manufacture of goods meant for export hence refund under the erstwhile Rule 5 of the Cenvat Credit Rules is not admissible to them. Thus, it is apparent that refund of the CVD was not admissible to them though available in erstwhile provisions; hence it is not admissible to the appellant in cash after introduction of GST. At best, the party could have availed the CENVAT Credit, but that would not ipso facto confer them any right to claim refund of such credit in cash with the onset of G.S.T. because

CENVAT is an option available to an assessee to be exercised and the same cannot be enforced.

5.10 I further find that it is the appellant who has unequivocally and unconditionally undertaken to pay the duty amount saved on the import of equipment together with interest at the agreed rate in the event of Its failure to discharge the export obligations. It is also not in dispute that the condition subject to which the appellant could have availed of a reduced rate of duty, namely, performance of the export obligation has not been complied with. The question then is whether a party who has availed of a benefit on a solemn assurance and a legal undertaking that it shall perform certain acts necessary for the enjoyment of the benefit being extended in its favour could continue enjoying those benefits while the conditions subject to which the benefit was extended are violated. The answer is in the negative. No party can avail of a benefit which was available subject to its performing conditions prescribed for the same, without performing such conditions. If the conditions fail, the party cannot retain the benefit. I, therefore, hold that the appellant is not entitled to credit of the Customs duty paid in violation of the conditions of the EPCG license.

5.11 Finally on the issue of the instant refund claim, I place reliance here on a similar matter of refund filed due to advent of GST law. The Hon'ble CESTAT, Chennai in Excise Appeal No. 41700 OF 2019, in the case of M/s Servo Packaging Ltd, Pudiucheery Vs Commissioner of GST Final Order NO. 40098/2020 dated 05.02.2020 has held that:- "The import which would have normally suffered duty having escaped due to the Advance Licence, but such import being a conditional one which ultimately stood unsatisfied, naturally loses the privileges and the only way is to tax the import....in case of non-fulfilment of export obligation payment of duty has been prescribed in case of bona fide default in export obligation, which also takes

care of voluntary payment of duty with interest as well. There is no question of refund."

4.3 Basically, the claim of the appellant by stating that they would have been eligible for the Cenvat credit of CVD, Education Cess & S &H Education Cess and additional duty of Customs paid by them in respect of the capital goods imported by them under EPCG Scheme for the reason that they had failed to fulfill the export obligations as prescribed. I note that the payment of these amounts was made in the year 2019 when there was no scheme. Appellant is claiming himself to be eligible for the credit in terms of a scheme to the time of making the payment of the above amounts, he claims that he could not avail this credit as per the constant scheme. This amount should be refunded to him as he has relied upon the decision of the Chennai Bench of this Tribunal in the case of M/s ITCO Industries Ltd. 2023 (70) GSTL 76 (Tri.-Chennai) wherein following has been held:-

"7. Having considered the rival contentions, I find that the payment of CVD and SAD subsequently during GST regime, for the imports made prior to 30-6-2017 is not disputed under the advance authorisation scheme. It is also not disputed that the appellant have paid the CVD and SAD in August, 2018 by way of regularisation on being so pointed out by the Revenue Authority. Further, I find that the Court below have erred in observing in the impugned order, that without producing proper records of duty paid invoices etc. in manufacture of dutiable final product, refund cannot be given. I further find that refund of CVD and SAD in question is allowable, as credit is no longer available under the GST regime, which was however available under the erstwhile regime of Central Excise prior to 30-6-2017. Accordingly, I hold that the appellant is entitled to refund under the provisions of Section 142(3) and (6) of the CGST Act.

Accordingly, I direct the jurisdictional 8. Assistant Commissioner to grant refunds to the appellant of the

amount of SAD & CVD as reflected in the show cause notices and also in the orders-in-appeal. Such refund shall be granted within a period of 45 days from the date of receipt of order along with interest under section 11BB of the Central Excise Act. The impugned orders are set aside."

4.4 It is noted that the above judgment has been rendered without taking note of the earlier decision rendered by the same Bench in the case of M/s Servo Packaging Ltd. 2020 (373) ELT 550 (Tri.-Chennai) wherein this issue has been considered and following was observed:-

"2. *Brief facts leading to the present controversy are, the assessee made a request for refund of the Customs Duty paid, due to unfulfilled export obligation against Advance Authorization, under Section 142(3) of the CGST Act, 2017. The assessee-appellant could not fulfil its export obligation in some cases, as per annexure to its request for refund dated 16-5-2019, owing to lack of export orders, which prompted the appellant to pay off the Customs Duties on account of short export and thereby close the export obligation under the above Advance Licences. It is also an admitted fact that the above Customs Duty was paid along with appropriate interest. It is the case of the appellant that since the inputs imported by it were used in the manufacture of final products on which Central Excise Duty/GST, as the case may be, was paid/to be paid, they were eligible for refund of CVD and SAD paid. Further, post the introduction of GST, the appellant having left with no option to claim the above credit under the CENVAT Credit Rules with also no scope to report the same under Transitional Credit while migrating to GST, the refund in cash was claimed under Section 142(3) *ibid*.*

3. *The Adjudicating Authority vide communication dated 6-6-2019 after considering the contentions of the appellant*

insofar as refund was concerned, intimated that the refund claim of the assessee of Customs Duty (i.e., CVD and SAD) which were legitimately payable, having been paid for non-fulfilment of the conditions of import under Advance Licence, was not covered under Section 142 ibid and consequently, the refund was rejected. Aggrieved, the assessee preferred an appeal before the Commissioner of GST and Central Excise (Appeals-I), Chennai, who vide impugned Order-in-Appeal No. 326/2019 (CTA-I), dated 17-10-2019 upheld the rejection. Consequently, the present appeal is filed before this forum.

4. *When the matter was taken up for hearing, Shri V. Ravindran, Ld. Advocate, appeared for the assessee-appellant and Ms. Sridevi Taritla, Ld. Joint Commissioner (Authorized Representative), appeared for the Revenue-respondent.*

5. *Ld. Advocate for the appellant reiterated the grounds and contentions urged before the lower authorities. He also submitted that when the import was made and the applicable duty was paid, the same would tantamount to a normal import and hence, the Cenvat credit would remain available. He also relied on the following decisions of various Benches of the Tribunal :*

(i) T2S Software Solutions Pvt. Ltd. v. Commr. of G.S.T. & Central Excise [2019 (7) T.M.I. 1299 - CESTAT, Chennai];

(ii) Rawalwasia Ispat Udyog Pvt. Ltd. v. C.C.E., Panchkula [2019 (7) T.M.I. 1242 - CESTAT, Chandigarh = 2019 (26) G.S.T.L. 196 (Tri.-Chan.)];

(iii) JMT Consultant Detailing Pvt. Ltd. v. Commr. of Central Tax, Bengaluru East [2019 (12) T.M.I. 648 - CESTAT, Bangalore];

(iv) *German Remedies Ltd. v. C.C.E., Goa [2004 (177) E.L.T. 539 (Tri. - Del.)]*

6.1 *Per contra, Ld. Authorized Representative for the Revenue supported the findings of the lower authorities. Ld. Authorized Representative also pointed out that by Advance Authorization, the appellant was permitted to import without payment of duty which the assessee has done, but the same was subject to the condition of fulfilling export obligation of the final product; that the appellant having not fulfilled the said obligation, the same has rightly suffered Customs duty because of the duty free import.*

6.2 *With regard to the cases relied on by the assessee, she would submit that the decisions are on refund per se under Rule 5 of the CENVAT Credit Rules, 2004 and hence, the same ratio is not applicable to a refund of duty arising on account of non-fulfillment of export obligation under Advance Authorization.*

7. *In rejoinder, Ld. Advocate would submit that the Advance Licence was always renewed and there is no finding by the lower authorities as regards the lapse of the period prescribed for export. Moreover, he would submit, that the appellant had voluntarily paid the Customs Duty because the appellant did not get export order and the voluntariness has never been questioned by the lower authorities.*

8.1 *Heard both sides. The only issue to be decided is, "whether the appellant has made out a case for refund under Section 142(3) *ibid*, of the Customs Duty paid in view of non-fulfilment of its export obligations?"*

8.2 *None of the decisions relied on by the assessee are dealing with the refund arising on account of failure to comply with export obligation vis-à-vis Advance Authorization and therefore, as pointed out by the Ld.*

Authorized Representative for the Revenue, the same are not applicable to the facts of this case.

9.1 *Advance Authorization is issued in terms of paragraph 4.03 of the Foreign Trade Policy [F.T.P. (2015-20)] and the relevant Notification is Notification No. 18/2015-Cus., dated 1st April, 2015. The said Notification exempts materials imported into India against a valid Advance Authorization issued by the Regional Authority in terms of paragraph 4.03 of the FTP subject to the conditions laid down thereunder. One of the conditions, as per clause (iv), is that it requires execution of a bond in case of non-compliance with the conditions specified in that Notification. Further, paragraph 2.35 of the FTP also requires execution of Legal Undertaking (LUT)/Bank Guarantee (BG) : (a) Wherever any duty free import is allowed or where otherwise specifically stated, importer shall execute, Legal Undertaking (LUT)/Bank Guarantee (BG)/Bond with the Customs Authority, as prescribed, before clearance of goods.*

9.2 *Further, there is no dispute that the above is guided by the Handbook of Procedures ('HBP' for short) and paragraph 4.50 of the HBP prescribes the payment of Customs Duty and interest in case of bona fide default in Export Obligation (EO), as under :*

"(a) Customs duty with interest as notified by DoR to be recovered from Authorisation holder on account of regularisation or enforcement of BG/LUT, shall be deposited by Authorisation holder in relevant Head of Account of Customs Revenue i.e., "Major Head 0037 - Customs and minor head 001-Import Duties" in prescribed T.R. Challan within 30 days of demand raised by Regional/Customs Authority and documentary evidence shall be produced to this effect to Regional Authority/Customs Authority immediately. Exporter can

also make suo motu payment of Customs duty and interest based on self/own calculation as per procedure laid down by DoR.”

10. *Thus, the availability of CENVAT paid on inputs despite failure to meet with the export obligation may not hold good here since, firstly, it was a conditional import and secondly, such import was to be exclusively used as per FTP. Moreover, such imported inputs cannot be used anywhere else but for export and hence, claiming input credit upon failure would defeat the very purpose/mandate of the Advance Licence. Hence, claim as to the benefit of CENVAT just as a normal import which is suffering duty is also unavailable for the very same reasons, also since the rules/procedures/conditions governing normal import compared to the one under Advance Authorization may vary because of the nature of import.*

11. *The import which would have normally suffered duty having escaped due to the Advance Licence, but such import being a conditional one which ultimately stood unsatisfied, naturally loses the privileges and the only way is to tax the import. The governing Notification No. 18/2015 (supra), paragraph 2.35 of the FTP which requires execution of bond, etc., in case of non-fulfilment of export obligation and paragraph 4.50 of the HBP read together would mean that the Legislature has visualized the case of non-fulfilment of export obligation, which drives an assessee to paragraph 4.50 of the HBP whereby the payment of duty has been prescribed in case of bona fide default in export obligation, which also takes care of voluntary payment of duty with interest as well. Admittedly, the inputs imported have gone into the manufacture of goods meant for export, but the export did not take place. At best, the appellant could have availed the Cenvat credit, but that would not ipso facto give them any right to claim refund of such credit in cash with the*

onset of GST because CENVAT is an option available to an assessee to be exercised and the same cannot be enforced by the CESTAT at this stage.

12. *There is no question of refund and therefore, I do not see any impediment in the impugned order."*

4.5 I also find that the issue in dispute is squarely covered by the decision of Hon'ble Jharkhand High Court in the case of M/s Rungta Mines Ltd. 2022 (67) GSTL 180 (Jharkhand) wherein following has been held:-

"Legal proposition on the point of interpretation of transitional provisions, vested rights etc. with reference to the judgments 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 v. 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 :-*

Section 30 of the amending Act bears the "71. 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 (1A) 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(1A) 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 :-*

Applying this rule of construction that in "10. 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 judgment.

14. *The Learned Counsel has further referred to the judgment in the case of CIT v. 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 v. 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. v. 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 judgment 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. v. Bhajan Kaur and Ors. (supra), wherein Section 6 of General Clauses Act has*

been interpreted 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 :-

... .. Section 6 of the "14. 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 :-*

The Learned Single Judge's view that the "17. 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. v. 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 :-*

Rule 57F(4A) was introduced into the Rules "5. 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 Heading 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.

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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 assesseees 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 assesseees 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 assesseees.

We may look at the matter from another 6. 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 v. 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 v. 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 Judgment.

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 judgment 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 27-4-2017 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 26-4-2017 to 29-4-2017 in the nature of "port services" who issued Bill dated 23-5-2017*

for Rs. 89,36,836/- which included service tax of Rs. 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 23-5-2017. 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 referable 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 20-9-2017) 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 22-9-2017.

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 23-5-2017 as late as on 20-9-2017, they could not take Cenvat credit in their last ER-1 return for June, 2017 filed on 30-7-2017. However, the petitioner took the credit of Rs. 10,88,328/- in their ST-3 return for April-June, 2017 filed on 22-9-2017 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 23-5-2017 was received by them as late as on 20-9-2017 (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 28-6-2018 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 CGST Act, 2017.*

34.*Notice dated 24-7-2018 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 25-1-2019, 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 26-4-2017 to 29-4-2017 and payment, including service tax, was made in April, 2017. But they received the invoice on 20-9-2017 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 30-7-2017 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 29-6-2018 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. 1-7-2017.

(b) The Appellant could not carry forward the credit of Rs. 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 of 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-S.T. clarified the issue related to payment of service tax after 30-6-2017, 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 30-6-2017 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 judgment 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 judgment passed by the Hon'ble Supreme Court, Union of India and Ors. v. Ind-Swift Laboratories Limited - (2011) 4 SSC 635 = [2011 \(265\) E.L.T. 3](#) (S.C.) was referred as under :-

A taxing statute must be interpreted in the "20. 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 :

..... "11In 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 20-9-2017 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 :-

A registered person, other than a person 140(1) 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.

A registered person shall be entitled to 140(5) 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 :-

Every claim for refund filed by any "142(3) 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 :-

Amendment of Act 32 "173. of 1994

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

Repeal and saving. - 174. *Save as otherwise provided in this Act, on and (1) 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.*

The repeal of the said Acts and the amendment of the Finance Act, (2) 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.

The mention of the particular matters (3) 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, inter alia, 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 11B 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 11B 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 sub-section (2) of Section 11B also refers to application for refund made under Section 11B(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 judgment, 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 words "such application" which is clearly referable 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 judgments 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 judgment 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 1-7-2017 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 22-9-2017, 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 30-6-2017 under reverse charge basis to cover instances of bills raised on 30-6-2017 since credit is available only if the payment is made and the payment in such cases could be made only after*

30-6-2017. However, in the instant case the bill was admittedly generated on 23-5-2017, 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(I) 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 23-5-2017 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 20-9-2017 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 28-6-2018 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 Sections 142(3) and 174 of CGST Act. The impugned orders are well reasoned orders calling for no interference. Accordingly, this writ petition is dismissed."*

4.6 This decision was relied upon by the Hyderabad Bench of this Tribunal in the case of M/s C.A.D. Vision Engineers Pvt. Ltd. 2024 (19) Centax 289 (Tri.-Hyd) by holding as follows:-

"13. *Therefore, essentially when there is no provision in the law either under the Cenvat Credit Rules 2004 or in the Finance Act 1994 to allow cash refund, for such accumulated credit, Section 142(3), per se, cannot make it an eligible refund merely because the appellant have not been able to utilize on the ground of not having filed the revised return or were not able to take the TRAN-1 route etc., within specified time. I also observe that in the case of Banswara Syntex v. CCE [2018 (91) TMI 1064] = 2019 (363) E.L.T. 773 (Raj.), the Hon'ble Division Bench of Rajasthan High Court held that refund of accumulated unutilized credit on account of education cess and secondary and higher secondary education cess was not entitled for cash refund in view of their having no provision under the Act of 1944.*

14. *Further, I also find that the issue of the scope of Section 142(3) of the Act came up before Hon'ble Jharkhand High Court in the case of M/s Rungta Mines v. CCE, Jamshedpur [2022-TIOL-252-HC-Jharkhand-GST] = 2022 (67) G.S.T.L. 180 (Jhar.) = (2022) 1 Centax 151 (Jhar.) = (2022) 145 taxmann.com 456 (Jhar.). In this case Hon'ble High Court, inter alia, held that the provision of Section 142(3) does not entitle a person to seek refund*

where no such rights occur under the existing law or new CGST regime in terms of provision of CGST Act and the rules framed and notification issued thereunder. Meaning thereby, Section 142(3) does not confer a new right which never existed under the old regime to the manner of giving relief if the person is not entitled under the existing law. The relevant paras of the judgment are reproduced below for ease of reference:

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 1-7-2017 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.

The ratio of the aforesaid judgment is squarely applicable to the facts of the case in so far as the interpretation of Section 142(3) of the Act is concerned. It must also be noted that a plain reading of provisions under the Act clearly supports this interpretation. There is no ambiguity in so far as wordings under section 142(3) are concerned."

4.7 I find that appellant was well aware long back even prior to introduction of GST w.e.f. 1st July, 2017 that they had and were not in position to fulfill the export obligation. In fact

appellant have not even produced the installation certificate as require under the EPCG scheme evidencing the installation of the said capital goods in their premises at any time during the entire proceedings. Both the authorities have found that these capital goods imported under EPCG scheme were never installed in the premises of the appellant and were diverted elsewhere. Even in this appeal before CESTAT the installation certificate has not been produced.

4.8 They claimed that Customs Authorities for 10 years never have issued any notice demanding the said dues for non fulfillment of conditions of EPCG Scheme. Thus they paid these duties in the year 2019 and have claimed the refund. I do not find any merits in such submission when appellant was well aware that he is not in position to fulfill the export obligation and he had diverted the capital goods elsewhere he was required to deposit the duty in terms of the conditions of the bond executed by him for claiming the benefit of EPCG Scheme. The deposit of custom duty has been made against the capital goods which were never installed in the factory of appellant and installation certificate produced. The misdemeanor committed by the appellant cannot be a ground for claiming this amount as refund by taking shelter of the fact that GST has been introduced w.e.f. 01.01.2017. Appellant has in my view no case for claiming the refund of various duties paid, either on merit or on equity. The appellant do not have clean hands to make this claim even on the ground of equity.

4.9 It is settled law that no one should be allowed to claim benefit of his own wrongs. In the case of Municipal Committee Katra [Order dated 09.05.2024 in CIVIL APPEAL NO(S). 14970-71 OF 2017] Hon'ble Supreme Court observed as follows:

"18. The situation at hand is squarely covered by the latin maxim 'nullus commodum capere potest de injuria sua propria', which means that no man can take advantage of his own wrong. This principle was applied by this Court in

the case of *Union of India v. Maj. Gen. Madan Lal Yadav* [(1996) 4 SCC 127] observing as below: -

"28. ...In this behalf, the maxim *nullus commodum capere potest de injuria sua propria* — meaning no man can take advantage of his own wrong — squarely stands in the way of avoidance by the respondent and he is estopped to plead bar of limitation contained in Section 123(2). In *Broom's Legal Maxim* (10th Edn.) at p. 191 it is stated:

"... it is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure."

The reasonableness of the rule being manifest, we proceed at once to show its application by reference to decided cases. It was noted therein that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law. In support thereof, the author has placed reliance on another maxim *frustra legis auxilium invocat quaerit qui in legem committit*. He relies on *Perry v. Fitzhowe* [(1846) 8 QB 757 : 15 LJ QB 239] . At p. 192, it is stated that if a man be bound to appear on a certain day, and before that day the obligee puts him in prison, the bond is void. At p. 193, it is stated that "it is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned". At p. 195, it is further stated that "a wrong doer ought not to be permitted to make a profit out of his own wrong". At p. 199 it is observed that "the rule applies to the extent of undoing the advantage

gained where that can be done and not to the extent of taking away a right previously possessed”.

19. It is beyond cavil of doubt that no one can be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is a sound principle that he who prevents a thing from being done shall not avail himself of the nonperformance he has occasioned. To put it differently, 'a wrong doer ought not to be permitted to make profit out of his own wrong'. The conduct of the respondent-writ petitioner is fully covered by the aforesaid proposition.”

4.10 Thus, I do not find any merits in the appeal filed by the appellant.

5.1 Appeal is dismissed.

(Order pronounced in open court on-08 August, 2025)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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