IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 22056 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and
HONOURABLE MR.JUSTICE B.N. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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RSPL LTD
Versus
UNION OF INDIA

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Appearance:
MR ANAND NAINAWATI(5970) for the PETITIONER(s) No. 1
MR NIRZAR S DESAI(2117) for the RESPONDENT(s) No. 1
MR SUDHIR M MEHTA(2058) for the RESPONDENT(s) No. 3
NOTICE SERVED(4) for the RESPONDENT(s) No. 2

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 16/10/2018

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Petitioner has prayed for a declaration that the action of the respondents in not allowing the credit

of excise duty paid on capital goods which were in transit as on 01.07.2017 is violative of Article 14 and 19(1)(g) of the Constitution of India. The petitioner's consequential prayer is that the respondents be directed to allow such credit to the petitioner.

2. This challenge of the petitioner arises in following background.

3. Petitioner is a company registered under the Companies Act and is engaged in manufacturing and selling of various consumer goods. The petitioner has a manufacturing unit of Soda Ash in Gujarat. For the purpose of such manufacturing activities, the petitioner procures raw materials as well as capital goods.

4. We would take note of the statutory provisions existing before 01.03.2017 when the GST statutes were brought into force and those introduced with effect from 01.07.2017 under GST statutes in relation to credit on excise duty paid on inputs on capital goods later. For the time being, we may record that prior to 01.07.2017, a manufacturer would be entitled to

take CENVAT credit of duty paid on inputs as well as on capital goods utilized in the manufacturing process, subject to conditions and restrictions provided in the CENVAT Credit Rules, 2004. With the introduction of Integrated Goods and Service Tax Act ('IGST Act' for short) and Gujarat Goods and Service Tax Act ('GGST Act' for short) with effect from 01.07.2017, such facility enabling the manufacturers to take credit of the duties paid on inputs as well as capital goods continued with certain modifications. CGST Act also contains transitional provisions as per which, unutilized CENVAT credit could be brought over to the GST regime. Such facility of migration would be available both in relation to inputs as well as capital goods. The statute also makes provisions to enable the assessee to avail the credit of duty paid on inputs which were in transit as on 01.07.2017. However, when it comes to the question of taking credit of the duty paid on the capital goods in transit and received on or after 01.07.2017, no facility is provided to enable the assessee to claim credit of the excise duty paid on such capital goods. This is where the grievance of

the petitioner arises.

5. Shri Nainawati appearing for the petitioner, drew our attention to the relevant statutory provisions. His main focus was on section 140 of the CGST Act and particularly sub-section (5) thereof which provides that a registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs, or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document was recorded in the books of account of such person within a period of thirty days from the appointed day. This provision thus excludes the capital goods which may have been purchased prior to 01.07.2017 but received by an assessee after said date, from the facility of availing benefit of excise duty paid on such capital goods. In this context, counsel for the petitioner raised following contentions:

I. Section 140 of the CGST Act is a transitional provision which covers the

situation of migration of unutilized CENVAT credit; both pertaining to input and capital goods. This provision also enables the assessee to take credit of the excise duty paid on inputs in transit. An artificial distinction is made only with respect to the capital goods in transit which is discriminatory and arbitrary.

II. It was contended that the classification between capital goods and inputs was an artificial demarcation. In order to be reasonable, such classification must have rational relation with the objects sought to be achieved.

III. Reference was made to the decision in case of ***Shayara Bano v. Union of India and others (MINISTRY OF WOMEN AND CHILD DEVELOPMENT SECRETARY AND OTHERS)*** reported in ***(2017) 9 SCC 1,*** in which the Supreme Court propounded that a statute can also be struck down on the ground that the same is manifestly arbitrary.

IV. Decision of Supreme Court in case of ***D.S. Nakara and Others v. Union of India*** reported in

(1983) 1 SCC 305 was cited to contend that if a provision is found to be discriminatory, it is not necessary that the Court must strike down the entire provision. Instead, the offending portion can be removed.

V. Counsel also contended that once the duty was paid by the assessee upon purchase of capital goods, the same could be utilized for discharging assessee's liability of tax. This right is a vested right and cannot be taken away by the legislation.

6. On the other hand, learned counsel for the department opposed the petition contending that the petitioner has not made out any ground for challenging the Statute. The parliament has framed the legislation after considering all aspects of the matter. As is well-settled, in economics sphere and tax legislation, the legislature has grater latitude. The Court cannot strike down a statutory provision merely on the opinion that the same is unreasonable or harsh.

7. Under the erstwhile Central Excise Rules, 1944,

rule 57Q was inserted vide notification dated 01.03.1994. Sub-rule (1) of rule 57Q essentially provided the benefit of duty paid on capital goods used by the manufacturer in his factory for payment of duty of excise leviable on its final product subject to conditions contained therein. Term capital goods defined in the definition below sub-rule (1). Sub-rule (2) of rule 57Q provided that notwithstanding anything contained in sub-rule (1), no credit of the specified duty paid on capital goods shall be allowed if such duty has been paid on such capital goods before first day of March 1994. Thus, this rule for the first time granted the facility of utilizing the specified duty paid on capital goods used by the manufacturer in the factory discharging its duty liability but restricted the application thereof to the duty which was paid on such capital goods after 01.03.1994.

8. CENVAT credit Rules, 2004, also granted similar benefits. Term “capital goods” was defined in rule 2A. Rule 3 of the CENVAT credit Rules, 2004, pertains to CENVAT credit. Sub-rule (1) of rule 3 provided that a manufacturer or producer of final

products or a provider of output service shall be allowed to take credit to be called CENVAT credit of the various duties specified in clauses (i) to (xi) contained therein paid on any input or capital goods received in the factory of manufacture of final product or by the provider of output services on or after the 10th day of September, 2004 and any input service received by the manufacturer of the final product or by the provider of output service on or after the said date. Rule 4 of CENVAT credit Rules, 2004, prescribed conditions for allowing CENVAT Credit and essentially provided that the CENVAT credit in respect of capital goods received by the provider of output services or the manufacturer of final products can claim the credit of duty paid on such capital goods for an amount not exceeding 50% of such duty in the same financial year and the balance credit may be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer or the premises of the goods of output services.

9. Section 2(19) of the CGST Act defines the term “capital goods” as to mean the goods, the value of

which is capitalized in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business. Term 'input' is defined in section 2(59) as to mean any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of a business. Section 2(62) defines the term 'input tax' in relation to a registered person as to mean the Central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and would include several taxes specified in clauses (a) to (e) contained therein. Term 'input tax credit' is defined under section 2(63) as to mean the credit of input tax.

10. Section 16 of the CGST Act pertains to eligibility and conditions for taking input tax credit. Sub-section (1) of section 16 provides that every registered person shall subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or

intended to be used in the course of furtherance of his business and said amount shall be credited to the electronic credit ledger of such person. Sub-section (3) of section 16 provides that where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income Tax Act, 1961, the input tax credit on the said tax component shall not be allowed.

11. Section 17 of CGST Act pertains to apportionment of credit and blocked credits. Sub-section (1) of section 17 provides that where the goods or services or both are utilized by the registered person partially for the purpose of any business and partially for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business. Likewise, sub-section (2) of section 17 provides that where the goods or services or both are used by the registered person partially for affecting taxable supplies including zero rated supplies and partially for exempt supplies, the amount of credit shall be restricted to so much of the input tax as is

attributable to the said taxable supplies including zero rated supplies.

12. Rule 43 of the Central Goods and Service Tax Rules, 2017 ('CGST Rules' for short) provides the manner of determination of input tax credit in respect of capital goods and reversal thereof in certain cases. This rule provides a formula restricting the input tax credit in respect of capital goods which attracts sub-section (1) and sub-section (2) of section 17 being partially used for the purpose of business and partially for other purposes or partially used for affecting taxable supplies and partially for taxing exempt supplies.

13. Chapter XX of the CGST Act contains transitional provisions. Section 140 contained therein pertains to transitional arrangements for input tax credit. Relevant portion of section 140 reads as under:

> "140. (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit 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 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.

(2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

PROVIDED that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law and is also admissible as input tax credit under this Act.

Explanation: For the purposes of this sub-section, the expression "unavailed CENVAT credit" means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of CENVAT credit to which the said person was entitled in respect of the said capital goods under the existing law.

(5) A registered person shall be entitled to take, in his electronic credit ledger, credit

of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, 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."

14. These statutory provisions make a few things clear. Facility to avail credit on excise duty paid on capital goods used by the manufacturer in his factory for discharging duty liability on the finished products was made available under rule 57Q of the Central Excise Rules, 1945 with effect from 01.03.1994. This continued even under the CENVAT credit Rules, 2004, subject to conditions. As per clause, sub-rule (2) of rule 4 of the CENVAT credit Rules, 2004, would be restricted to a maximum of 50% of the duty paid on such capital goods in the financial year in which the capital goods were received in the factory of the manufacturer.

Remaining 50% could be availed in any financial year subsequent to such year.

15. In a different format in the GST regime also this facility is continued. As correctly pointed out by the counsel for the petitioner, the CGST Act does not make a distinction between duty paid on capital goods or inputs for the purpose of granting credits thereof. Sub-section (1) of section 16 as noted allows every registered person, subject to conditions and restrictions as may be prescribed to take credit of input tax charged on any supply of goods or services or both to him. We may recall, the term 'input tax' is defined as to mean various taxes charged on any supply of goods or services or both to a registered person. Sub-section (3) of section 16 further clarifies this position when it provides that if the registered person has claimed depreciation of tax component of the cost of capital goods or plant and machinery under the Income Tax Act, 1961, the input tax credit on the such tax component would not be allowed. Similarly, sub-sections (1) and (2) of section 17 which pertain to restriction of the tax credit when the goods or services are utilized

partially for business purpose and partially for other purposes or partially for affecting taxable supplies and partially for non-taxable supplies, also makes no distinction between capital goods and inputs. Rule 43 of the CGST Rules makes detailed provision for working out such restriction on eligibility of input tax credit on capital goods to which sub-sections (1) or (2) of section 17 would apply.

16. However, when it comes to the transition from the central excise to GST regime, the legislature has made slightly different provisions for credit on inputs and capital goods. In this context, section 140 of the CGST Act assumes significance. Sub-section (1) of section 140 enables a registered person other than a person who has opted for payment of tax on composition basis to carry forward CENVAT credit of eligible duties in relation to the period ending with the day immediately preceding the appointed day under the existing law in such manner as may be prescribed. Sub-section (2) of section 140 provides that the registered person other than one opting to pay tax on composition basis shall be

entitled to take in his electronic credit ledger credit of unavailed CENVAT credit in respect of capital goods not carried forward in return furnished under the existing law as may be prescribed. These provisions thus, enable an assessee to carry forward and take credit of unutilized CENVAT credit paid on inputs as well as on capital goods, of course in the manner as may be prescribed and subject to conditions contained in the said provision. Sub-section (5) of section 140 however makes a distinction between the capital goods and inputs. It provides that a registered person shall be entitled to take credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty on tax in respect of which has been paid by the supplier under the existing law, 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. As per the proviso to sub-section (5) such period could be extended by the Commissioner for a further period not exceeding thirty days on sufficient cause being

shown.

17. Very clearly thus sub-section (5) of section 140 allows a registered person, credit of eligible duties and tax in respect of inputs or input services which were received on or after the appointed day but on which the tax was paid earlier. In absence of any matching provisions pertaining to capital goods, in a situation where the duty had been paid on purchase of goods prior to the appointed day but the goods were received on or after the appointed day, there would be no possibility of availing credit on such tax under the GST regime.

18. It can thus be seen that to this limited extent, the CGST Act has made a distinction between the capital goods and inputs. The question is, is this demarcation unlawful? As noted, the fulcrum of the petitioner's argument was that this makes an artificial distinction between capital goods and inputs which has no rational relation to the purpose sought to be achieved. The subsidiary contention of the petitioner was that there is no reason why such distinction should have been made. On the other

hand, the respondents had argued that granting of credit on the duty paid is in the nature of concession. For valid reason, law can always be framed not granting such concession in certain cases.

19. The legislature, as we have noted, made a clear and conscious demarcation between capital goods and inputs when it comes to availing credit of the duties paid on the goods which are in transit. When the entire tax structure was being replaced by the GST provisions, there would arise a need for making transitional arrangements. Chapter XX of the CGST Act, as noted, contains transition provisions. Section 140 contained in the said chapter makes detailed provisions for transitional arrangements for input tax credit. Subject to contentions and in the manner as may be prescribed, the unused tax credit would be migrated to the GST regime. This section also would enable a registered person to claim credit of the duty paid prior to the appointed day on the inputs even though the inputs may be received after the appointed day. This section consciously does not provide any such facility in relation to the capital goods in transit. This demarcation itself would not

be artificial, arbitrary or in any manner, discriminatory. The capital goods and inputs used in manufacturing process have always been treated differently and distinct treatment have been given under the earlier statutes. If the legislature therefore was of the opinion that in relation to capital goods in transit, duty paid before the appointed date cannot be claimed as a credit in the GST regime, we do not find that the distinction is in any manner artificial or arbitrary.

20. Article 14 as is well-known, prohibits class legislation but not reasonable classification. To bring in the element of discrimination in terms of Article 14 of the Constitution, the onus would be on the petitioner to establish that the persons or things treated differently form a homogeneous class. In the present case, the source of the petitioner's grievance or dissatisfaction is that the inputs and capital goods are treated differently. When we find that the inputs and capital goods form different and distinct classes, the question of sub-classification or artificial demarcation would not arise. One of the grounds cited in the affidavit in reply filed by

the respondents for treating the capital goods in transit differently is that the capital goods are typically slow moving items. This term is not explained in detail in such affidavit. However, to us it appears that the suggestion of the respondents is that unlike inputs, the capital goods which can be in the nature of plant and machinery including highly sophisticated specially designed and manufactured machines, may take much longer time for delivery and installation after the orders are placed by the manufacturers and the legislature was not inclined to keep the issues of migration of tax credits and pending claims open for indefinite period of time.

21. In case of ***R.K.Garg v. Union of India and others*** reported in ***(1981) 4 SCC 675*** the constitution bench of the Supreme Court held that every legislation particularly in economic matters is essentially empiric and it is based on experimentation. It was further held and observed as under:

> *"7. Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well established principles which have been evolved by the courts as rules of guidance in discharge of its constitutional function of judicial review. The first rule is that there is*

always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. ...

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10. The court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry" that exact wisdom and nice adoption of remedy are not always possible and that "judgment is largely a prophecy based on meagre and un-interpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There, may be crudities and inequities in complicated

experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Reig Refining Company 94 Lawyers Edition 381 be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

22. ***In case of Jayam & Company v. Assistant Commissioner & Anr.***, reported in ***[2016] 15 SCC 125,*** the Supreme Court while upholding the validity of section 19(20) of the Tamilnadu Value Added Tax Act, 2006, made following observations:

"12. It is a trite law that whenever

concession is given by statute or notification, etc., the conditions thereof are to be strictly complied with in order to avail of such concession. Thus, it is not the right of the "dealers" to get the benefit of ITC but its a concession granted by virtue of section 19. As a fortiorari, conditions specified in section 10 must be fulfilled. In that hue, we find that section 10 makes original tax invoice relevant for the purpose of claiming tax. Therefore, under the scheme of the VAT Act, it is not permissible for the dealers to argue that the price as indicated in the tax invoice should not have been taken into consideration but the net purchase price after discount is to be the basis. If we were dealing with any other aspect de hors the issue of ITC as per section 19 of the VAT Act, possibly the arguments of Mr. Bagaria would have assumed some relevance. But, keeping in view the scope of the issue, such a plea is not admissible having regard to the *plain language of sections of the VAT Act, read along with other provisions of the said Act, as referred to above.*"

23. In case of ***Godrej & Boyce Mfg. Company Prvt. Limited vs. Commissioner of Sales Tax & Ors.,*** reported in ***[1992] 3 SCC 624,*** the Supreme Court had upheld a rule which restricted availment of MODVAT Credit to six months from the date of the documents specified in the proviso. The contention that such amendment would take away an existing right was rejected. In case of ***State of Gujarat v. Reliance Industries Limited,*** reported in ***[2017] 16 SCC 28*** it was held and observed that how much tax credit should

be given and under what circumstances, is a domain of a legislature.

24. In a recent judgment dated 12.10.2018, in case of ***ALD Automative Pvt. Ltd. v. The Commercial Tax Officer,*** the Supreme Court confirmed the judgment of the Madras High Court upholding validity of section 19(20) of Tamilnadu Value Added Tax Act, 2006, the special provision provides that in case of any registered dealer fails to claim input tax credit in respect of any transaction of taxable purchase in any month, he shall make the claim before the end of the financial year or before 90 days from the date of purchase whichever is later. This provision thus provided time limit for a dealer to claim tax credit in respect of transaction of taxable purchase. This provision was attacked on the ground that it laid down restrictions on enjoyment of input tax credit which the main provision granting such facility does not envisage. It was also argued that in any case the time limit provision should be seen as directory and not mandatory. The Supreme Court repelled the challenge observing *inter alia* that the conditions under which the concessions and the benefits is given

is always to be strictly construed. If it is accepted that there is no time period for claiming input tax credit as contained in section 19(11), the provision would become too flexible and would give rise to large number of disputes including of verification of claim of input credit. Taxing statutes contained self contains scheme of levying computation and calculation of tax. The time under which a return is to be filed for the purpose of assessment of tax cannot be dependent on the will of a dealer.

25. Under the circumstances, we do not find that the statute in any manner violates Article 14 or 19(1)(g) of the constitution. It can also not be seen as taking away an existing right to claim CENVAT Credit of the duty paid on capital goods. Even in the earlier statute right to claim credit of duty paid would arise or accrue only upon receipt of such capital goods at the place of manufacturer.

26. In the result, petition is dismissed.

(AKIL KURESHI, J)

(B.N. KARIA, J)

ANKIT SHAH