Reserved On : 24/12/2024
Pronounced On : 13/06/2025

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 22519 of 2019

With
R/SPECIAL CIVIL APPLICATION NO. 1550 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 1851 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 2031 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 3353 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 2187 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 3340 of 2022
With
R/SPECIAL CIVIL APPLICATION NO. 4217 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 6610 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 4002 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 5528 of 2022
With
R/SPECIAL CIVIL APPLICATION NO. 5128 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 5790 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 4938 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 6879 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6598 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 9844 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 5958 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 6594 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 6948 of 2024
With

R/SPECIAL CIVIL APPLICATION NO. 7359 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 7880 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 6158 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 7871 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 8393 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 7922 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 6346 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 7986 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 13588 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 7711 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 8847 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 8535 of 2023
With
CIVIL APPLICATION (FOR AMENDMENT) NO. 1 of 2023
In
R/SPECIAL CIVIL APPLICATION NO. 8535 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 8610 of 2023
With
CIVIL APPLICATION (FOR AMENDMENT) NO. 1 of 2023
In
R/SPECIAL CIVIL APPLICATION NO. 8610 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 8713 of 2023
With
CIVIL APPLICATION (FOR AMENDMENT) NO. 1 of 2023
In
R/SPECIAL CIVIL APPLICATION NO. 8713 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 7996 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 8383 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 7992 of 2023

With
R/SPECIAL CIVIL APPLICATION NO. 7414 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 8654 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 10011 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 9343 of 2023
With
CIVIL APPLICATION (FOR AMENDMENT) NO. 1 of 2023
In
R/SPECIAL CIVIL APPLICATION NO. 9343 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 8191 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 11440 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 10347 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 10324 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 10912 of 2023
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R/SPECIAL CIVIL APPLICATION NO. 11709 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 11595 of 2023
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R/SPECIAL CIVIL APPLICATION NO. 10889 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 11158 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 12674 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 15333 of 2022
With
R/SPECIAL CIVIL APPLICATION NO. 12299 of 2023
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2023
In
R/SPECIAL CIVIL APPLICATION NO. 12299 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 13036 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 13581 of 2023
With

R/SPECIAL CIVIL APPLICATION NO. 13375 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 12835 of 2021
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R/SPECIAL CIVIL APPLICATION NO. 13056 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 13384 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 13424 of 2021
With
CIVIL APPLICATION (FOR AMENDMENT) NO. 2 of 2023
In
R/SPECIAL CIVIL APPLICATION NO. 13424 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 15949 of 2023
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2024
In
R/SPECIAL CIVIL APPLICATION NO. 15949 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 14105 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 14263 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 13957 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 13931 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 14632 of 2021
With
CIVIL APPLICATION (FOR JOINING PARTY) NO. 1 of 2023
In
R/SPECIAL CIVIL APPLICATION NO. 14632 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 14738 of 2021
With
CIVIL APPLICATION (FOR JOINING PARTY) NO. 1 of 2023
In
R/SPECIAL CIVIL APPLICATION NO. 14738 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 12503 of 2024
With
R/SPECIAL CIVIL APPLICATION NO. 15546 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 16421 of 2021

With
R/SPECIAL CIVIL APPLICATION NO. 16892 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 16373 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 17514 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 17122 of 2023
With
CIVIL APPLICATION (FOR DIRECTION) NO. 1 of 2023
In
R/SPECIAL CIVIL APPLICATION NO. 17122 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 17572 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 18417 of 2021
With
CIVIL APPLICATION (FOR STAY) NO. 2 of 2023
In
R/SPECIAL CIVIL APPLICATION NO. 18417 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 18408 of 2021
With
CIVIL APPLICATION (FOR AMENDMENT) NO. 1 of 2023
In
R/SPECIAL CIVIL APPLICATION NO. 18408 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 18838 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 238 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 22929 of 2022
With
R/SPECIAL CIVIL APPLICATION NO. 18893 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 19435 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 20131 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 20398 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 22507 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 21040 of 2023
With

R/SPECIAL CIVIL APPLICATION NO. 22514 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 21015 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 21006 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 1210 of 2024

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

and
HONOURABLE MR.JUSTICE D.N.RAY

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Approved for Reporting	Yes	No

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MESSRS ADDWRAP PACKAGING PVT. LTD. & ANR.
Versus
UNION OF INDIA & ORS.

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Appearance:

Learned Senior Advocate Mr. V.Sridharan with learned advocates Mr. Anand Nainawati with Mr.Sahil Parghi with Mr. Ashish K.Vadodaria with Mr. Uchit Sheth with Mr. Paresh Dave with Mr. Amal Dave with Mr. Dhaval Shah with Mr. Parth Rachh with Mr. Aditya Tripathi with Mr. Abhishek Rastogi with Mr. Jatin Arora with Mr. Bharat Raichandani with Mr. Rashi Chopra with Mr. Love Sharma with Mr. Anshul Jain with Mr. Rithik Jain with Mr. Hiren J. Trivedi appearing for the respective petitioners

Learned ASG Mr. Devang Vyas with learned advocates Mr. Siddharth Dave with Mr. Utkarsh Sharma with Mr. C.B.Gupta with Mr. Chirayu Mehta with Mr. Parth Divyeshwar with Ms.Hetvi Sancheti with Mr.Deepak Khemchandani with Mr. Param Shah appearing for the respective respondents.

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CORAM:**HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR.JUSTICE D.N.RAY

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Draft amendment is allowed as per order dated 25.01.2023 passed in Special Civil Application No.238 of 2023.

2. This group of petitions are preferred challenging the vires of Rule 96(10) of the Central/State Goods and Services Tax Rules, 2017 (For short “the CGST Rules”) as substituted by the Central Goods and Services Tax(12th Amendment) Rules, 2018 with effect from 9.10.2018. Prior to its substitution, Sub-rule(10) was substituted by Central Goods and Services Tax 11th Amendment Rules, 2018 with retrospective effect from 23.10.2017 and Central Goods and Services Tax 8th Amendment Rules, 2018 with retrospective effect from 23.10.2017.

3. As the issue arising in this group of petitions is common, the same were heard analogously.

4. Brief facts of the case giving rise this group of petitions can be summarized by stating the facts of Special Civil Application No. 2187 of 2023 emerging from the record as under:

5. The petitioner of Special Civil Application No.2187 of 2023 is engaged in the business of manufacture, supply/export of conductors and Optical Fiber Ground Wires(OPGW) for several years and exports substantial quantity of finished goods manufactured to its customers spread across the world.

6. Prior to coming into the force of the Central Goods and Services Tax Act,2017 (For short “the GST Act”) with effect from 01.07.2017, the inputs and the capital goods used by the petitioner were chargeable to Central Excise duty under the Central Excise Act, 1944 and the input services used by the petitiones was chargeable to service tax under the Finance Act, 1994. The petitioner was eligible for availing the credit of the taxes paid by them on inputs, capital goods and input services under the Cenvat Credit Rules, 2004.

7. Cenvat Credit availed by the petitioner was in turn utilized for payment of the excise duty on the goods cleared by the petitioner in the domestic market as well as for payment of duties

applicable at the time of export of goods.

8. The petitioner was entitled to claim rebate i.e. refund of actual amount of excise duty so paid on the goods exported under Rule 18 of the Central Excise Rules, 2002.

9. The petitioner applied for Advance Authorisation (AA) License in the year 2017 under Chapter 4 of the Export-Import policy framed by the Central Government under the provisions of the Foreign Trade (Development and Regulations) Act, 1992 which was allowed by the Director General of Foreign Trade (DGFT). The petitioner thereafter obtained several AA licenses during the period between 04.07.2017 to 10.04.2019 and imported some of the raw materials required in manufacture of

finished products utilizing such AA licenses without payment of custom duty while procuring the other inputs, capital goods and input services from the domestic market by the petitioner.

10. As per the terms of the Advance Authorisation Scheme, the petitioner was not liable to pay any customs duty on raw materials imported on utilizing such licenses and therefore, no Cenvat credit of any customs duty in the nature of CVD, Education and other Cesses, Special Additional Duty (SAD) was availed by the petitioner. The petitioner however, availed Cenvat credit of excise duty and service tax paid on other inputs, capital goods and input services procured from the domestic market and utilized the same for payment of duty on exported goods and

rebate of such duties paid was also allowed to the petitioner prior to coming into force of GST regime with effect from 1.07.2017.

11. With effect from 01.07.2017, GST Act has been implemented by making necessary amendment in Customs Act, 1962 and Customs Tariff Act, 1975 as well.

12. With effect from 01.07.2017 instead of levying and collecting additional duty of customs equal to the duty of excise chargeable on similar goods produced or manufactured in India, Integrated Goods and Services Tax (IGST) came to be levied on imported goods, whereas the goods cleared for export were deemed to be transactions in the nature of inter-state supply of goods under the IGST Act and

therefore, IGST was levied and collected on the goods exported to the foreign countries.

13. The rebate i.e. refund of excise duties paid on the exported goods was allowed under Rule 18 of the Cenvat Excise Rules, 2002 prior to 01.07.2017. The IGST Act has also incorporated similar provisions for refund of tax in section 16 of the IGST Act,2017. The goods or services which are exported by the petitioner were not subjected to IGST and they are treated as “zero-rated supply” under section 16 of the IGST Act,2017.

14. Section 16 of the IGST Act,2017 provides that a registered person making zero rated supply shall be eligible to claim refund under either of the

conditions prescribed in sub-section(3) thereof i.e. (a) supply of goods or services under bond or Letter of Undertaking (LUT) without payment of integrated tax and claim refund of unutilised Integrated Tax Credit or (b) supply of goods or services on payment of Integrated Tax and claim refund of such tax paid. To claim the refund/rebate under section 16 of the IGST Act, provisions of section 54 of the GST Act were made applicable and the procedure prescribed in CGST Rules which are applicable for refund claim under section 54 of the GST Act are therefore, prescribed for availing refund/rebate under section 16 of the IGST Act.

15. Explanation 1 to section 54 of the GST Act provides that “refund” includes refund

of tax paid on zero-rated supply of goods or services or both or on inputs or input services used in making such zero-rated supply or refund of tax paid on the supply of goods regarded as deemed exports or refund of unutilized input tax credit as provided under section 54(3) of the GST Act.

16. Section 54(3) entitles a registered person to claim refund of unutilized input tax credit however, the proviso to the said sub-section provided that no refund of unutilized tax credit shall be allowed in cases other than (i) zero rated supplies made without payment of tax or (ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully

exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendation of the Council.

17. Rule 96 of the CGST Rules has been framed to deal with refund of IGST paid on goods and services exported out of India for entitlement of refund under section 54(3) of the CGST Act, whereas Rule 89 has been framed to deal with refund of unutilized input tax credit used in goods and services exported out of India without payment of tax.

18. In this group of petitions, the petitioners have made rebate/refund claim of IGST paid on goods and services exported out of India. Therefore, Rule 96 of the CGST Rules for entitlement of

refund of the petitioners under section 54(3) read with section 16 of the IGST Act shall be applicable. Relevant extract of Rule 96 of the CGST Rules reads as under:

> “96. Refund of integrated tax paid on goods [or services] 157 exported out of India.-
>
> (1) The shipping bill filed by [an exporter of goods] 158 shall be deemed to be an application for refund of integrated tax paid on the goods exported out of India and such application shall be deemed to have been filed only when:-
>
> (a) the person in charge of the conveyance carrying the export goods duly files [a departure manifest or] 159 an export manifest or an export report covering the number and the date of shipping bills or bills of export; and
>
> (b) the applicant has furnished a valid return in FORM GSTR-3or FORM GSTR-3B, as the case may be;
>
> XXX
>
> (10) The persons claiming refund of integrated tax paid on exports

of goods or services should not have -

(a) received supplies on which the benefit of the Government of India, Ministry of Finance notification No. 48/2017-Central Tax, dated the 18th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1305 (E), dated the 18th October, 2017 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme or notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1320 (E), dated the 23rd October, 2017 or notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1321 (E), dated the 23rd October, 2017 has been availed; or

(b) availed the benefit under notification No. 78/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R

> 1272(E), dated the 13th October, 2017 or notification No. 79/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1299 (E), dated the 13th October, 2017 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme."

19. Rule 96 of the CGST Rules falls under Chapter X of Refunds and deals with the refund of Integrated Tax "**paid**" on goods or services exported out of India. Sub-rule(1) to Sub-rule(9) prescribes the procedure for filing of the shipping bills, returns and other forms to avail the refund of IGST paid under section 16(3)(b) of the IGST Act.

20. Sub-rule (10) was inserted for the first time by Notification No.75/2017 dated 29.12.2017 with effect from

23.10.2017. By Notification No.3/2018 dated 23.01.2018 Sub-Rule(10) was amended with effect from 23.10.2017.

21. By Notification No.54/2018 sub-rule(10) of Rule 96 was substituted with effect from 9.10.2018 as under:

"Government of India
Ministry of Finance
(Department of Revenue)
Central Board of Indirect Taxes and Customs
Notification No. 54/2018 – Central Tax

New Delhi, the 9th October, 2018

G.S.R……(E). - In exercise of the powers conferred by section 164 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government hereby makes the following rules further to amend the Central Goods and Services Tax Rules, 2017, namely:-

1. (1) These rules may be called the Central Goods and Services Tax (Twelfth Amendment) Rules, 2018.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the said rules), in rule 89, for sub-rule (4B), the following sub-rule shall be substituted, namely:-

"(4B) Where the person claiming refund of unutilised input tax credit on account of zero rated supplies without payment of tax has –

(a) received supplies on which the supplier has availed the benefit of the Government of India, Ministry of Finance, notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1320 (E), dated the 23rd October, 2017 or notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1321(E), dated the 23rd October, 2017; or

(b) availed the benefit of notification No. 78/2017-Customs, dated the 13th October,2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Subsection (i), vide number G.S.R

1272(E), dated the 13th October, 2017 or notification No. 79/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1299(E), dated the 13th October, 2017,

the refund of input tax credit, availed in respect of inputs received under the said notifications for export of goods and the input tax credit availed in respect of other inputs or input services to the extent used in making such export of goods, shall be granted.".

3. In the said rules, in rule 96, for sub-rule (10), the following sub-rule shall be substituted,namely:-

"(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have -

(a) received supplies on which the benefit of the Government of India, Ministry of Finance notification No. 48/2017-Central Tax, dated the 18th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1305 (E), dated the 18th October, 2017 except so far it relates to

receipt of capital goods by such person against Export Promotion Capital Goods Scheme or notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1320 (E), dated the 23rd October, 2017 or notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1321 (E), dated the 23rd October, 2017 has been availed; or

(b) availed the benefit under notification No. 78/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1272(E), dated the 13th October, 2017 or notification No. 79/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1299 (E), dated the 13th October, 2017 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme."

22. It is the case of the petitioners that in view of substitution of Sub-rule(10) of Rule 96 of the CGST Rules, the right of the petitioners to claim refund of IGST paid on the entire goods exported by the petitioners was curtailed if the supplier of any of the inputs to the petitioners claiming refund has availed benefit of IGST exemption under Notification No.78/2017-Customs dated 13.10.2017 (EOU Scheme) or Notification No.79/2017-Customs dated 13.10.2017 (Advance Authorisation and EPCG scheme) as well as Notification No. 48/2017- Central Tax dated 18.10.2017 for claiming benefit of deemed export or merchant export Notification no. 40/2017 dated Central Tax (Rate) dated 23.10.2017 and Notification No. 41/2017 Integrated tax (Rate) dated 23.10.2017.

23. Notification No. 54/2018 has been made applicable prospectively providing that from 9.10.2018 onward, bar on claiming refund of IGST would apply in all cases where the registered person himself avails IGST exemption benefit under the scheme of Advance Authorisation, EPCG scheme and the same would not apply when supplier to the registered person avails the said benefit.

24. Though it is not in dispute nor any grievance is raised, in order to complete the chronology, Rule 96(10) was amended vide Notification no. 16/2020 dated 23.3.2020 whereby explanation was inserted with retrospective effect from 23.10.2017 which explains that bar provided under Rule 96(10)(b) shall not be attracted where the registered person has availed

the basic customs duty exemption under the scheme but discharged the IGST as part of the customs duty on imported inputs or capital goods.

25. In view of above amendment made in Rule 96(10) of the CGST Rules, though the petitioners have paid IGST on the exports made during the period after 01.07.2017 on bonafide belief that the petitioners are entitled to claim the refund in terms of section 54 of the GST Act read with section 16 of the IGST Act, refund claims were filed on the input tax credit on input of capital goods and input services procured from the domestic market by the petitioners to manufacture the exported goods or services. However, the respondent authorities on inquiry and investigation to the effect that petitioners were

exporting finished goods on payment of IGST and availing benefit of refund in terms of Rule 96(10) of the CGST Rules, in spite of availing the benefit of Notifications mentioned in the said Rule, were not eligible to claim such refund on the entire input tax credit availed by the petitioners on procurement of input, input services or capital goods from the domestic market as the petitioners have taken benefit of notifications for procurement of some of the material either under the Advance Authorisation license or under the merchant export or as per the notification stated in Rule 96(10). The respondent authorities therefore initiated the proceedings for recovery of the refund already paid to the petitioners for alleged violation of Rule 96(10) of the

CGST Rules on the ground that erroneous refund has been paid to the petitioners where raw materials were imported under Advance Authorisation scheme by the petitioners on some of the products which were procured under the said Scheme. The respondent authorities therefore, issued show cause notices and in some of the petitions, even orders-in-original are also passed raising the demand of recovery of refund already granted to the petitioners on the ground that sanction of such refund was erroneous refund.

26. The petitioners have therefore, filed these petitions to challenge the vires of Rule 96(10) of the CGST Rules being ultra vires to the provisions of section 16 of the IGST Act and section 54(3) of the GST Act. The petitioners have also challenged

the vires of Rule 96(10) of the CGST Rules on the ground of breach of fundamental rights under Articles 14, 19(1)(g) of the Constitution of India.

Submissions on behalf of the petitioners:

27. Learned Senior Advocate Mr. V. Sridharan with learned advocate Mr. Anand Nainawati made submissions on behalf of the petitioners and thereafter other learned advocates were also heard to make further submissions in support of the submissions made challenging the vires of Rule 96(10) of the CGST Rules.

28. Learned Senior Advocate Mr. V. Sridharan after brief introduction of the scheme of CGST Act and IGST Act and CGST Rules and object for inserting Rule 96(10)

submitted that there are two options available to the exporter of goods to pay IGST as provided under section 16(3) of the IGST Act prior to its amendment. As per the first option, it is permissible to supply the goods or services under bond or Letter of Undertaking (LUT) without payment of IGST and claim refund of unutilised input tax credit and second option is to pay the IGST and claim refund of such tax paid on goods or services or both.

29. It was submitted that the petitioners who are before this Court have availed the second option of payment of IGST on the goods exported which are zero rated supply and claimed the refund of such IGST paid by the petitioner on export of goods or

services or both. It was pointed out that refund is both on output tax and on capital goods also.

30. It was submitted that there is no time limit for utilization of input tax credit and there is no matching concept of input tax credit availed by the petitioners which was utilised for payment of IGST as there is no bifurcation in the electronic credit ledger vis-a-vis the input tax credited therein to bifurcate as to whether the same relates to inputs, input services or capital goods.

31. It was submitted that as per Rules 89(4) and 89(5) of the CGST Rules applicable to refund of unutilised input tax credit, the same do not relate to capital goods whereas input tax credit

utilised by the petitioners for payment of IGST on the export of goods and services utilises both the input tax credit on goods, services or capital goods. Distinction was tried to be made with regard to applicability of formula prescribed under Rule 89(4) of the CGST Rules to avail the refund of unutilised input tax credit because of timing mismatch between the period of taking credit and period of export and the amount of refund under Rule 96 of the CGST Rules for the tax paid on export of goods or services. Distinction was also made in applicability of Rule 89(4)(B) of the CGST Rules which provides for formula to avail the benefit of refund on basis of unutilised credit where the petitioners have availed the benefit of Advance

Authorisation Scheme but did not pay the IGST and exported the goods under bond or LUT.

32. It was therefore, submitted that if the petitioners import inputs without payment of customs duty and manufacture the goods therefrom along with other inputs for export and pay IGST on export of such goods, then the petitioners are not entitled to the refund of IGST paid. There is no co-relation between utilization of input tax credit on the goods which are imported without payment of custom duty used for manufacture of the goods exported by the petitioner. Reliance was placed on the minutes of 38th Meeting of GST Council meeting to submit that the council has considered the explanation given for insertion of Rule 96(10) into

CGST Rules on the ground that double benefit was being taken by the exporters in form of import of goods on advance license in addition to claiming IGST refund. It was submitted that under the guise of curbing the practice of having double benefit being taken by the exporters of importing goods on advance license and getting refund of IGST on payment of utilising the input tax credit of other material, it was submitted by learned Senior Advocate Mr. Sridharan that in case of the petitioners availing the benefit of advance license on certain goods has resulted into denial of the entire refund of IGST paid on goods exported to which the petitioner is otherwise being entitled to as per the provisions of section 16(3)(b) read with

section 54(3) of the GST Act.

33. It was submitted that apprehension on part of the respondent authorities of availing double benefit by the exporters of getting refund of IGST paid on export on one hand and importing the goods under the advance authorisation without payment of duty on other hand is misplaced as the petitioners are not importing the entire raw material by utilising the advance license and thereafter making payment of IGST utilising the other input credit to get the refund. It was therefore, submitted that Rule 96(10) of the CGST Rules as interpreted by the respondents to deny the refund even if one raw material is imported by the petitioners used for manufacture of goods exported on advance

license is not sustainable. It was further submitted that under the scheme of the Excise Act which was in existence prior to GST regime, the petitioners were entitled to have the option to pay the excise duty at the relevant time.

34. It was submitted that now in GST regime by utilising the input tax credit for payment of IGST from the Electronic Credit Ledger and thereafter get the refund of the same on the export of the goods which would ultimately accelerate the refund to the extent of GST on value addition is merely a cash flow advantage to the petitioners, but the same cannot be substantial relief in sense of reduced tax liability or the like. It was submitted that the policy of the Government is

always to encourage the export and the entire scheme of giving option to the petitioners to pay IGST by utilising input tax credit and get the refund of the same is to facilitate the cash flow which would not result into any benefit whatsoever to the petitioners except to reduce blockage of working capital.

35. Learned Senior Advocate Mr. Sridharan in support of his submissions placed reliance on the following decisions:

1) In support of his submission that this Court has quashed the notifications for being ultra vires the Articles 14 and 19(1)(g) of the Constitution of India, reliance was placed on the decision in case of **Gujarat Paraffins Pvt. Ltd. v. Union of India** reported in 2012(282) ELT

33(Guj.)

2) In the context of the input or output ratios to be considered for determining the quantum of refund of unutilized Input Tax Credit under Rule 89(4B), reliance was placed on the decision of this Court in case of **Filatex India Ltd. v. Union of India** reported in 2022 SCC OnLine Guj 2596.

3) In support of his submission that motive is not relevant while judging the validity, reliance was placed on the decision of Hon'ble Supreme Court in case of **State of Bombay v. Bombay Education Society and other** reported in AIR 1954 SC 561.

4) In the context of doctrine of

proportionality and reasonableness, reliance was placed on the decision of Hon'ble Supreme Court in case of **M.C.V.S. Arunachala Nadar v. State of Madras and others** reported in AIR 1959 SC 300.

5) In support of his submission that the Court can mould relief which is best suited to the circumstances on hand, reliance was placed on the decision of Hon'ble Supreme Court in case of **Orissa Cement Ltd. v. State of Orissa and others** reported in 1991 Supp(1) Supreme Court Cases 430.

6) To canvas his submission that the Court is bound to take note of subsequent events, reliance was placed on the decisions of Hon'ble Supreme Court in case of **Pasupuleti Venkateswarlu v. The Motor &**

General Traders reported in (1975) 1 Supreme Court Cases 770 and in case of **Majati Subbarao v. P.V.K. Krishna Rao (Deceased) By Lrs** reported in (1989) 4 Supreme Court Cases 732.

7) In the context of direction to the Government to frame rule to avoid arbitrariness in assessment proceedings, reliance was placed on the decision of Hon'ble Supreme Court in case of **K. Damodarasamy Naidu and Bros. and others v. State of T.N. and another** reported in (2000) 1 Supreme Court Cases 521.

8) To highlight the settled principles of Article 14 of the Constitution of India, reliance was placed on the decisions of Hon'ble Supreme Court in case of **Budhan Choudhry v. State of Bihar** reported in AIR

1955 SC 191 and in case of **Shri Ram Krishna v. Shri Justice S.R. Tendolkar and others** reported in AIR 1958 SC 538.

9) In support of his submission that Article 14 is violated by failure to classify and treating unequal as equals, reliance was placed on the decisions of Hon'ble Supreme Court in case of **State of Maharashtra v. Mrs. Kamal Sukumar Durgule and others** reported in (1985) 1 Supreme Court Cases 234 and in case of **the State of Kerala v. Haji K Haji K. Kutty Naha and others** reported in (1969) 1 SCR 645.

10) In support of his submission that there must be a rational basis of discrimination, reliance was placed on decision of Hon'ble Supreme Court in case of **State of U.P.& Ors. v. Deepak**

Fertilizers & Petrochemical Corporation Ltd reported in (2007) 10 SCC 342.

11) In support of his submission that the lancet of the Court may remove the offending word and restore to constitutional health the rest of the provision, reliance was placed on the decision of Hon'ble Supreme Court in case of **State of Kerala v. T.M. Peter** reported in (1980) 3 SCC 554, decision of Kerala High Court in case of **Jayadevan v. State of Kerala** reported in 1980 SCC OnLine Ker 197 and decision of Hon'ble Supreme Court in case of **Lohara Steel Industries Ltd. v. State of A.P.** reported in (1997) 2 SCC 37.

12) In support of his submission that if part of a rule is ultra vires to Article 14 then the provisions need not be

struck down if State gives an undertaking to delete the offensive provision later, or accepts construction within constitutional limits, reliance was placed on the decision of Hon'ble Supreme Court in case of **P.N. Kaushal v. Union of India** reported in (1978) 3 SCC 558.

13) In support of his submission that if exercise of legislative or administrative power is manifestly erroneous or arbitrary, it is liable to be set aside, reliance was placed on the decisions of Hon'ble Supreme Court in case of **Shri Sitaram Sugar Company Limited and Anr. V. Union of India & ors.** reported in (1990) 3 SCC 223 and in case of **State of UP and others v. Renusagar Power Co. and others** reported in AIR 1988 SC 1737.

14) In support of his submission that in case conflict between the policy of the Government and notification issued by the Government under the relevant Act to implement the policy, policy of the Government will prevail, reliance was placed on decision of Hon'ble Supreme Court in case of **State of Bihar v. Suprabhat Steel Ltd** reported in (1999) 1 SCC 31.

15) In support of his submission that a mere laudable objective or well meaning provision would not confer validity to a law, reliance was placed on the decision of Hon'ble Supreme Court in case of **Shree Digvijay Cement Co. Ltd. v. Union of India** reported in (2003) 2 SCC 614.

16) In support of submission of the

doctrine of proportionality, reliance was placed on the decisions of Hon'ble Supreme Court in case of **Omkumar v. Union of India** reported in AIR 2000 SC 3689 and in case of **Kerala State Beverages(M&M) Corpn. Ltd v. P.P. Suresh** reported in (2019) 9 SCC 710.

17) In support of his submission that the exporter cannot be prevented to export goods under rebate claim after paying duty on export goods imply on ground of having procured inputs duty free, reliance was placed on the decision of this Court in case of **Zenith Spinners v. Union of India** reported in 2015(326) E.L.T. 97 (Guj.) and decision of Hon'ble Supreme Court in case of **Union of India v. Zenith Spinners** reported in 2015 (326) E.L.T. 23 (SC).

18) In support of his submission that once a person is eligible to claim refund in terms of the parent act, the Rule cannot impose a condition which would disentitle such person from claiming refund, reliance was placed on the decision of Hon'ble Supreme Court in case of **State of Mysore and ors. v. Mallick Hashim & Co.** reported in (1974) 3 SCC 251.

19) With respect to his submission of retrospective operation of rule, reliance was placed on the decision of Hon'ble Supreme Court in case of **CIT v. Essar Teleholdings Ltd.** reported in (2018) 3 SCC 253.

20) To highlight the legal principles that may be relevant in adjudicating cases where subordinate legislation is

challenged on the ground of being ultra vires the parent Act, reliance was placed on the decision of Hon'ble Supreme Court in case of **Naresh Chandra Agrawal v. ICAI** reported in 2024 SCC OnLine SC 114.

21) To highlight the view taken by this Court on validity of Rule 96(10), reliance was placed on the decision in case of **Cosmo Films Ltd. v,. Union of India** reported in (2021) 85 GSTR 79.

22) Reliance was also placed on decision of Hon'ble Supreme Court in case of **State of Kerala and others v. Unni and others** reported in (2007) 2 Supreme Court Cases 365.

36. Learned advocate Mr. Paresh Dave for the petitioner supplemented the

submissions made by the learned Senior Advocate Mr. Sridharan by again referring to the entire scheme and the provisions of law in detail and submitted that there is anomaly in applicability of Rule 96(10) of the CGST Rules resulting into it being ultra vires to the provisions of section 54(1) of the CGST Act as well as section 16(3)(b) of the IGST Act. It was submitted that Rule 96(10) is also contrary to the provisions of section 164 of the GST Act which provides for rule making power.

37. It was also submitted by learned advocate Mr. Paresh Dave that Rule 96(10) creates “class within class” of the exporters comprising of one class which do not import any goods using advance authorisation scheme and the exporters who

are importing goods utilising the advance authorisation scheme. It was submitted that exporters who are importing the goods on utilising the scheme are at disadvantage by Rule 96(10) for the entire refund is denied to such class of exporters and therefore, it results in violation of Article 14 of the Constitution of India.

38. It was further submitted that there is no alternative provided under the Rules and the petitioners cannot have the benefit of Rule 89(4B) of the CGST Rules which otherwise is applicable to the exporters who have not paid IGST but have exported the goods on submitting the bond or Letter of Undertaking and thereby claiming refund on unutilised amount of input tax credit as per the formula

prescribed under section 89(4B) whereas in case of the petitioners, the petitioners are entitled to amount of refund on the actual amount of tax paid and therefore, the aspect of granting proportionate refund also is not workable in case of the petitioners and the right which was prevailing prior to 1.07.2017 to get the refund under Rule 18 of the Cenvat Credit Rules, 2002 also cannot be jeopardised under the guise of double benefit being availed by the exporters.

39. Learned advocate Mr. Dave invited the attention of the Court to the facts of various petitions to point out that out of 100 items, only few items are being imported by the petitioners utilising the Advance Authorisation Scheme and the

entire refund of the petitioners on the IGST paid on export is denied on application of Rule 96(10) of the GST Act.

40. It was submitted by learned advocate Mr. Dave that by virtue of Clause (b) of Section 16(3) of the IGST Act, the petitioners have a right and option to pay integrated tax on the exported goods and claim refund of such tax paid on the goods actually exported. A right so conferred under a provision of the Act made by the Parliament cannot be taken away by a Rule; and therefore Rule 96(10) of the CGST Rules is ultra vires Section 16 of the IGST Act.

41. It was further submitted that Rule 96(10) forces or compels the petitioners

to avail only one option, about claiming refund under the scheme of Section 16(3)(a) of the IGST Act. The option (which is in the nature of a right) given by the Parliament cannot be denied by a rule made by the executive; and therefore, the rule is ultra vires Section 16 of the IGST Act. In support of such submission, reliance was placed on the following decisions:

(i) In case of **Union of India V/s. S. Srinivasan** reported in 2012 (281) ELT 3 (SC).

(ii) In case of **General Officer Commanding-In-Chief V/s. Dr. Subhashchandra Yadav** reported in AIR 1988 Supreme Court 876.

42. Learned advocate Mr. Dave submitted that the right to claim refund of integrated tax paid on exported goods under Section 16(3)(b) is to be exercised in accordance with the provisions of Section 54 of the CGST Act or the Rules made thereunder. Sub-section (1) of Section 54 of the CGST Act confers upon any person the right to claim refund of any tax; and it is this right under the provisions of Section 54(1) of the CGST Act, which is referred to in Sub-section (3) of Section 16 of the IGST Act. Section 54 of the CGST Act is an enabling provision for claiming refund, and a plain reading of this provision shows that the right to pay integrated tax and claim its refund on exported goods conferred on a registered person under Section 16(3) (b)

of the IGST Act is in no way affected or restricted under this provision of Section 54 of the CGST Act. Therefore, Rule 96(10) is ultra vires Section 54 of the CGST Act also.

43. It was submitted that the power to make rules is conferred upon the Government under Section 164 of the CGST Act. The Rules under Section 164 of the GST Act can be framed for carrying out the provisions of the Act. Section 16 of the IGST Act is a provision allowing a registered person to pay integrated tax and claim its refund in case of exports; and therefore Rule 96(10) of the CGST Rules is not a rule made for carrying out the provisions of the GST Act. This rule is therefore beyond the rule making power

of the Government, and hence ultra vires Section 164 of the CGST Act.

44. In support of his submissions, reliance was placed on the following decisions:

(i) In case of **SAL Steel Ltd. V/s. UOI** reported in 2020 (37) GSTL 3 (Guj.)

(ii) In case of **Mohit Minerals Pvt. Ltd. V/s. UOI** reported in 2020 (33) GSTL 321 (Guj.).

45. It was further submitted that under Section 164 of the GST Act, the Government can make rules for procedure regulating the refund claims. Sub Rules (1) to (9) of Rule 96 show that they are all provisions

for procedure for making a refund application and for documents and information to be submitted with the refund application. But by Sub rule (10), in guise of laying down the procedure for a refund claim, the entitlement of a registered person to claim refund is adversely affected, and the admissibility of a refund claim is denied. It was submitted that the impugned provision taking away the right and the entitlement of a registered person to claim refund is beyond the rule making power of the Government, and hence ultra vires Section 164 of the GST Act.

46. With regard to the Rule being Ultra vires Article 14 of the Constitution of India, it was submitted that a registered

person procuring only one or a few of the inputs duty free under Advance Authorisation, actually procures all other inputs, input services and capital goods on payment of appropriate GST. Input Tax Credit (ITC) of taxes so paid on all other inputs, input services and capital goods is allowed under Section 17 of the CGST Act and this right to avail ITC is not taken away or affected in any manner by any provision of the law. It was submitted that if such ITC is not allowed to be utilized for paying integrated tax on exported goods under claim of refund of such integrated tax, then ITC of all other inputs, input services and capital goods would keep on accumulating in the electronics credit ledger of the registered person, and such amount of

taxes paid on input transactions would add to the cost of the final products exported.

47. It was submitted that the provision is unreasonable because a genuine exporter like the petitioner is knocked off, and his right of refund is defeated, even if only one input was procured under exemption whereas a large quantum of other inputs and all input services were procured on payment of appropriate tax.

48. It was further submitted that the provision was based on incorrect basis inasmuch as the Government has made the impugned provision on the basis that the registered persons were en cashing ITC of other inputs, not used for export

transactions. It was pointed out that at para 7.1 of Circular No.45/19/2018-GST dated 30th May, 2018, at para 20 of Minutes of the 30th meeting of the GST Council and also in the Reply Affidavit filed by the Respondents, it is stated that some exporters started misusing the provision and started claiming refund of ITC in respect of inputs which were not used for exports, and that sub rule (10) of Rule 96 was made to ensure that the exporter did not utilise ITC availed on other domestic supplies received for making the payment of IGST on export of goods. It was submitted that this restriction is made on factually incorrect basis because the petitioners do not utilise ITC of “other” domestic supplies for paying IGST on the exported goods; nor

do the petitioners claim refund of ITC in respect of inputs which were not used for exports. The ITC utilised for paying IGST on exported goods is the tax paid on taxable inputs received without availing any exemption and that of tax paid on input services; and thus the ITC used for paying integrated tax on the exported goods is in respect of the tax paid on the inputs and input services (and also capital goods) actually used for exports.

49. It was submitted that the quantum of exports is much larger compared to the domestic supplies in case of the petitioners, and therefore the entire ITC could never be utilised for paying GST on local supplies. No registered person would come to the Court if it was possible to

utilise accumulated ITC in subsequent months. But the situation here is different because the accumulated ITC could never be utilised by the petitioners for the local supplies, which are very less.

50. It was further submitted that the impugned provision is made without considering these relevant facts, whereas incorrect and non-existent facts form basis of the impugned provision; and hence the provision has unreasonableness.

51. It was submitted that it has never been the objective of the Government (and also not of the Parliament) to not allow refund/rebate of local levies in respect of export transactions, because local

levies are not to be exported thereby rendering the exporter noncompetitive in the international trade, and also because exporting local levies is bad economics. Sub Rule (10) of Rule 96 does not serve this objective of the Law, but on the contrary defeats the objective for which Section 16(3)(b) of the IGST Act is enacted and also the objectives for which Section 54 of CGST Act is enacted and thus there is no nexus between Sub Rule (10) of Rule 96 and the objective of the Government in refunding local levies to the exporters for the export transactions. Therefore, the impugned provision is ultra vires Article 14 of the Constitution, because the provision is unreasonable and arbitrary.

52. Learned advocate Mr. Dave submitted that the case of the respondents is that refund would be allowed under the scheme of Section 16(3)(a) of the IGST Act, and unutilised ITC shall be in any case refunded to the exporters. But this proposition is based on incorrect and wrong facts because this option is not at all viable, and the genuine exporters may not get any refund if the procedure of Rule 89(4) and (4B) of the CGST Rules is followed for refund under Section 16(3)(a) of the Act.

53. It was submitted that the formula under Rule 89(4) for determining refund amount is based on “Net ITC”, which is the ITC availed during the relevant period; the “relevant period” being the period for

which the claim has been filed. In most of the cases, the manufacturer-exporter may not have availed ITC during the relevant period when the export is made, and therefore he may not get any refund under this scheme and therefore, Sub Rule (10) of Rule 96 is unreasonable in this view also.

54. It was submitted that prior to 01.07.2017 also, assessees like the petitioners were functioning under the Advance Authorization Scheme; and while importing one or a few inputs duty free under the Authorization, they were procuring all other inputs, input services and capital goods from local market on payment of Central Excise duties and service tax; and Cenvat credit of such

excise duty and service tax was allowed. Under Rule 18 of the Central Excise Rules, the goods were allowed to be exported on payment of excise duty and Cenvat credit was allowed to be utilised for paying excise duty on the exported goods, and rebate i.e. refund of such duties paid through Cenvat credit was also allowed. Alternatively, the entire Cenvat credit of inputs, input services and capital goods attributable to the exported goods was allowed by way of refund under Rule 5 of the Cenvat Credit Rules. The fact that one or a few of the inputs were imported customs duty free under the Authorization did not affect such right of rebate under Rule 18 of Central Excise Rules, nor refund under Rule 5 of Cenvat Credit Rules.

55. It was submitted that only because levies like central excise duty and service tax are subsumed in GST Laws with effect from 1.7.2017, the right of refund allowed prior to 1.7.2017 cannot be taken away altogether, when there is no other change in any of the relevant provisions including Advance Authorization Scheme under the Foreign Trade Policy. Rule 96(10) of the CGST Rules taking away the right of refund, which was a right allowed for decades prior to 1.7.2017, is ultra vires Article 14 of the Constitution because it is irrational and unreasonable. In support of his submissions, reliance was placed on the following decisions:

(i) In case of **Filco Trade Pvt. Ltd.**

reported in 2018 (17) GSTL 3 (Guj.)

(ii) In case of **Maxim Tubes Company Pvt. Ltd. V/s. UOI** reported in 2019 (368) ELT 337 (Guj.).

56. Learned advocate Mr. Dave thereafter referring to the amendment in Section 16 of the IGST Act submitted that with effect from 1st October, 2023, for the first time, a power is conferred upon the Government to specify a class of persons and a class of goods or services for exporting on payment of integrated tax and claiming refund of the tax so paid. No such power was vested in the Government prior to the amendment with effect from 1st October, 2023 and therefore Sub Rule (10) of Rule 96 excluding exports of goods

for which exemption of any of the Notifications specified under this provision was availed had been without any legal backing.

57. It was submitted that the Government has on the recommendations of the Council notified goods or services except a few products, which may be exported on payment of integrated tax with claim of refund of tax so paid. This Notification is effective from 1st October, 2023 i.e. the day on which the amended provision of Section 16 has been brought into force. This shows that the objective of the Government and also that of the Council has always been to allow export of all goods on payment of integrated tax and allow refund of tax so paid irrespective

of the class of the goods or class of the persons.

58. It was further submitted that the above change/amendment in the scheme of Section 16 made during the pendency of all these petitions shows that the restriction under Sub Rule (10) of Rule 96 of the CGST Rules had been without any legal backing, without any nexus with the objective sought to be achieved by the refund mechanism under Section 16 of the IGST Act, and unreasonable and based on incorrect facts.

59. Learned advocate Mr. Uchit Sheth for the petitioner in addition to adopting the arguments submitted by learned advocates for other petitioners submitted that the

amendment to Rule 96(10) of the Central Goods and Services Tax Rules, 2017 by Notification No. 54/2018-Central Tax dated 9.10.2018 is expressly made with prospective effect. It was consciously decided in the 30th GST Council meeting that the earlier retrospective amendment to Rule 96(10) by Notification No. 39/2018-Central Tax dated 4.9.2018 was resulting in withdrawal of refunds already granted and therefore, the amendment was required to be given prospective effect. This was also clarified by the Central Board of Indirect Taxes and Customs by circular dated 26.10.2018. It was submitted that it is a settled legal position that circular issued by the Board is binding on the authorities. Relying on the decision of Hon’ble Supreme Court in

the case of **Paper Products Ltd. v/s Commissioner of Central Excise** reported in (1999) 7 SCC 84, it was submitted that withdrawal of refund granted for the period prior to 9.10.2018 by giving retrospective effect to Notification No. 54/2018-Central Tax is wholly without jurisdiction and illegal.

60. It was further submitted that Section 16(3) of the Integrated Goods and Services Tax Act, 2017 at the relevant point of time only empowered the Government to provide "conditions, safeguards and procedure" subject to which refund of IGST paid on exports was to be granted. The Government cannot fully curtail right of refund in the garb of imposing condition. It was submitted that this is what has been sought to be done by the impugned

Rule which is ultra vires Section 16(3) of the IGST Act. Reliance is placed on the decision in the case of **Hides and Skin Owners Seva Mandal v/s State of Gujarat** [Special Civil Application No. 19824 of 2019 decided on 6.2.2020] wherein in the facts of the case while Section 15(b) of the Central Sales Tax Act, 1956 mandated the State Government to fully refund local tax paid on purchases of declared goods, such refund was sought to be curtailed by the State Government by issuing notification. The notification was sought to be defended by the Government by relying upon the language of the statutory provision which empowered the Government to stipulate conditions for grant of refund. Such contention of the State was negatived by observing as under:

"32. While sub-section (6) of section 11 of the GVAT Act permits the State Government to specify any goods or class of goods that shall not be entitled to whole or partial tax credit, the said provision cannot be read to mean that it empowers the State Government to override the provisions of section 15(b) of the CST Act and curtail the extent of reimbursement that has to be granted thereunder. When section 15(b) of the CST Act permits the State law to provide for the manner in which such reimbursement is to be granted, which may be subject to restrictions or conditions, it means that it is permissible for the State to decide the mode and manner in which such reimbursement is to be made. For example under the Sales Tax Act, reimbursement was granted by way of refund; whereas, under the GVAT Act it is granted by way of input tax credit. It may further be permissible for the State law to provide for restrictions or conditions, but, in the considered opinion of this court, the State law cannot provide for curtailing the extent of reimbursement which is provided in section 15(b) of the CST Act, namely the tax levied under the State law at the time of purchase of such goods. In the opinion of this court, section 15(b) of the CST Act does not permit the State law to reduce the amount of tax which is

> required to be reimbursed, but only permits the State law to provide for the manner in which such reimbursement is to be granted which may be subject to restrictions or conditions. However, from the language employed in section 15(b) of the CST Act, it is not possible to cull out an intention that the State law is permitted to tinker with the amount of reimbursement. The words of clause (b) of section 15 of the CST Act are clear and unambiguous, namely that the tax levied under the State law shall be reimbursed to the person making such sale in the course of inter-State trade or commerce."

61. Learned advocate Mr. Uchit Sheth submitted that in any case, the entire refund granted under Section 16 of the IGST Act cannot be taken back by the authorities on the basis of breach of Rule 96(10) of the CGST Rules. It is not in dispute that even if imports are made against advance authorization, refund of unutilized input tax credit as per Section 16(3)(a) is admissible. Therefore, even if

Rule 96(10) is held as valid, refund under Section 16(3)(a) is in any case admissible and therefore refund can be withdrawn only if and to the extent it is in excess of refund calculated as per Section 16(3)(a) of the IGST Act read with Rule 89(4) of the CGST Rules. It was therefore, submitted that impugned orders and notices withdrawing entire amount of refund with interest and penalty are in any case unsustainable. Reliance was placed on the decision of this Court in the case of **Real Prince Spintex Pvt. Ltd. v/s Union of India** [Special Civil Application No. 14974 of 2019 decided on 4.3.2020] wherein the exporter had claimed higher rate of duty drawback on the basis of which refund of IGST paid on exports was not granted by the authorities. This Court directed the

grant of refund of IGST paid on exports after adjusting the differential amount of excess drawback granted to the exporter from such IGST refund amount.

62. It was submitted that liability of interest under Section 50 of the GST Act can arise only in case where a person fails to pay tax to the Government within the prescribed period. There is no statutory provision requiring payment of interest if it is held that refund was erroneously granted. Demand of interest without the backing of any statutory provision is wholly without jurisdiction and illegal.

63. It was submitted that there is no element of any fraud, willful misstatement, suppression or evasion. At

best an issue of legal interpretation is involved. It was submitted that imposition of penalty under Section 74 of the GST Acts in light of the dispute involved is wholly without jurisdiction and illegal.

64. Learned advocate Mr. Uchit Sheth thereafter made his submissions with regard to Special Civil Application No. 13957 of 2023. It was submitted that what was sought to be curbed by the impugned Rule 96(10) of the CGST Rules was a situation wherein the purchases were made without payment of tax while exports were made on payment of tax by utilizing other input tax credit which resulted in its encashment. It was submitted that insofar as imports against advance authorizations are concerned, the benefit of exemption is taken by the importer himself. However

Rule 96(10) of the CGST Rules, when incorporated, erroneously mentioned that exports on payment of tax would not be permitted when suppliers of the exporters had imported against advance authorizations. This anomaly was sought to be removed by Notification No. 39/2018-Central Tax dated 4.9.2018 with retrospective effect. Since this would result in reopening of refunds already granted to importers who had imported against advance authorizations and exported on payment of IGST, the retrospectivity was removed by simultaneously issuing Notification No. 53/2018-Central Tax and Notification No. 54/2018-Central Tax both dated 9.10.2018. Thus instead of providing that refunds already granted prior to 9.10.2018 were

not to be reopened, the anomalous provision was allowed to be retained for the prior period by virtue of impugned Notification No. 53/2018-Central Tax. It was submitted that such notification is completely contrary to the object sought to be achieved by the Rule inasmuch as even though the petitioners have purchased from suppliers on making full payment of tax under the GST Acts, even then refund of IGST paid by them on exports is sought to be withdrawn on the ground that supplier of the petitioners had imported against advance authorization. It was therefore, submitted that at least to this extent, Rule 96(10) as amended by Notification No. 53/2018-Central Tax is manifestly arbitrary and contrary to the object, purpose and scheme of the GST

Acts.

65. It was further submitted that the supplier of the petitioners has never claimed benefit of any exemption of GST while supplying goods to the petitioners. The benefit, if at all, claimed by the supplier, is on his imports which has nothing to do with the purchases of the petitioners. Thus, the suppliers having not taken benefit of any of the notifications as mentioned in Rule 96(10) of the CGST Rules on supplies made to the petitioners, proposed withdrawal of refund on exports made by the petitioners on the basis of impugned Rule 96(10) of the CGST Rules is wholly without jurisdiction, arbitrary and illegal.

66. Learned advocate Mr. Abhay Desai

adopted the submissions of other advocates for the petitioner and submitted that Rule 96(10) is ultra vires Section 16(3)(b) of the IGST Act, 2017.

67. It was submitted that Section 16(3)(b) of the IGST Act, 2017 as in existence prior to 01.10.2023 permits the registered person to supply the goods on payment of IGST and claim refund thereof subject to such conditions, safeguards and procedure.

68. It was further submitted that the expression "conditions, safeguards and procedure" does not permit the rule-making authority to prescribe "restriction" qua the class of persons by defeating their rights to claim the refunds in respect of entire exports including the exports made without availing any benefits on

corresponding procurement of inputs.

69. It was submitted that the legislature has consciously used the expression "conditions, safeguards and procedure" which is contradistinction from the expression "restrictions". By citing the example that Sec. 16(1) of the CGST Act, 2017 permits the rule-making authority to prescribe "conditions and restrictions", it was submitted that the expression "conditions, safeguards and procedure" used u/s 16(3)(b) does not permit the rule-making authority to prescribe restrictions.

70. It was further submitted that the expression "conditions, safeguards and procedure" implies that the rule-making authority can prescribe the circumstances

and factors which can affect the matter in which the registered person can claim the refunds by paying IGST on exports. In support of his submission, reliance was placed on the decision of the Hon'ble Supreme Court in the case of **Sankar Ram and Co vs Kasi Naicker** reported in (2003) 11 SCC 699 wherein it has been held as under :

> "It is a cardinal rule of construction that normally no word or provision should be considered redundant or superfluous in interpreting the provisions of a statute. In the field of interpretation of statutes, the courts always presume that the legislature inserted every part thereof with a purpose and the legislative intention is that every part of the statute should have effect. It may not be correct to say that a word or words used in a statute are either unnecessary or without any purpose to serve, unless there are compelling reasons to say so looking to the scheme of the statute and having regard to the object and purpose sought to be

achieved by it."

71. It was submitted that Section 16(3)(b) of the IGST Act, 2017 permits the rule- making authority to prescribe "conditions, safeguards and procedure" qua the transaction (exports) and not restrictions qua the "persons" who have availed the benefits of the given notifications and thereby restricting such persons from claiming refunds even on exports which are undertaken without availing the benefits of the given notifications. Rule 96(10) therefore by prescribing restrictions qua the persons is beyond the powers vested to the rule-making authority. The said Rule also contradicts the purpose for introducing such restriction which has been elucidated by CBIC vide Circular No. 45/19/2018-GST

dated 30/05/2018 wherein it has been stated that the purpose of Rule 96(10) is to ensure that the exporter does not utilise the input tax credit (ITC) availed on other domestic supplies received for making the payment of IGST on the export of goods and en cash such credit. It was therefore, submitted that such restriction is not in the nature of the condition for the reason that the exporter despite not availing of the benefits of the given notifications is still restricted from exercising the right of claiming the refund under section 16(3)(b). It was therefore, submitted that the rule-making authority is not vested with such powers u/s 16(3)(b) of the IGST Act, 2017 to prescribe such blanket prohibition qua the persons.

72. Learned advocate Mr. Desai further submitted that Section 16(4) of the IGST Act, 2017 as introduced vide Finance Act, 2021 w.e.f. 01/10/2023 permits the rule-making authority to prescribe a "class of persons" who are permitted to make zero-rated supply on payment of IGST. It was submitted that the said amendment further supports the submission that prior to 01/10/2023, Section 16(3)(b) of the IGST Act, 2017 does not permit the rule-making authority to prescribe restrictions for "persons" in the manner in which it has been done under Rule 96(10). It was therefore, submitted that Rule 96(10) is ultra vires to Section 16(3)(b) of the IGST Act, 2017.

73. Learned advocate Mr. Desai further submitted that Rule 96(10) is ultra vires

Article 14 and 19(1)(g) of the Constitution of India. It was submitted that even if the expression "conditions, safeguards and procedure" under section 16(3)(b) of the IGST Act, 2017 can be said to include the power to prescribe "restrictions", the prescribed restrictions cannot tantamount to prohibition. In support of such submission, reliance was placed on the decision of the nine-judge Bench of the Hon'ble Supreme Court in **K S Puttaswamy v. Union of India** reported in (2019) 1 SCC 1 which introduced the proportionality standard in determining violations of fundamental rights wherein the following test was laid down:

> "319.... This discussion brings out that following four sub-components of proportionality need to be satisfied:

> 319.1. A measure restricting a right must have a legitimate goal (legitimate goal stage).
>
> 319.2. It must be a suitable means of furthering this goal (suitability or rational connection stage).
>
> 319.3. There must not be any less restrictive but equally effective alternative (necessity stage).
>
> 319.4. The measure must not have a disproportionate impact on the right holder (balancing stage)."

74. It was submitted that Rule 96(10) provides for prohibition qua 'persons' and not qua the 'supplies' in respect of which the exporter has availed the benefits of the given notification and therefore, such blanket prohibition is disproportionate to the reasonable restrictions which the rule-making authority could have prescribed. It was therefore, submitted that Rule 96(10) is ultra vires Article 14 and 19(1)(g) of the Constitution of

India being disproportionate, excessive and unreasonable. In support of his submission reliance was placed on the decision of the Hon'ble Supreme Court in the case of **Union of India vs. VKC Footsteps India Pvt. Ltd.** reported in 2021 (52) G.S.T.L. 513 (S.C.) wherein rejection to the challenge to the validity of Rule 89(5) was based on the premise that the Explanation (1) to Section 54 of the CGST Act, 2017 defines 'refund' to mean the refund of the unutilized ITC as per Section 54(3) and hence when Legislature has specified as to what is eligible for refund, the power exercised by the rule-making authority to provide a formula under Rule 89(5) is not ultra vires the Act. It was submitted that in the present case, the legislature duly provides that

the exporter has the option to claim the refund of the IGST paid on exports. It was submitted that the rule-making by exercising the power to prescribe conditions, safeguards and procedure" have prescribed prohibition and therefore, the said Rule 96(10) is ultra vires Section 16(3)(b) of the IGST Act, 2017 as well as Articles 14 and 19(1)(g) of the Constitution of India.

75. Learned advocate Mr. Anandodaya Mishra for the petitioners contended that delegation by one enactment to the other enactment for specific purpose cannot change the framework of that original delegating enactment. It was submitted that as per the provisions of section 2(12) of the IGST Act “integrated tax” means the integrated goods and services

tax levied under the said Act. Reference was made to sections 16, 20 and 22 of the IGST to explain what is zero rated supply read with application of provisions of Central Goods and Services Tax Act to the IGST Act and power to make rules under the said Act. It was submitted that as per section 2(12) of the CGST Act the words and expression used and defined under the CGST Act were defined in the CGST Act shall have the same meaning as assigned to them in this Act. It was therefore, submitted that considering the provisions of section 54 read with section 164 of the CGST Act and section 22 of the IGST Act framing of Rule 96(10) form and manner in which it is framed is nothing but a colourable legislation or excessive legislation contrary to the basic

structure of the Constitution.

76. Reference was also made to Notification No.27/2023(CT) dated 31.07.2023 and Notification No.1/2023 (IT) dated 31.07.2023. Referring to and relying upon the various decisions for invoking Doctrine of Colourable Legislation and Doctrine of Excessive Legislation, learned advocate Mr. Mishra submitted that sub-rule(10) of Rule 96 of the Rules is a classic piece of Excessive Legislation by not allowing the refund of integrated tax paid on export of goods or services utilising the supply even though no benefit of any of the notification referred thereto is availed by the assessee but only one component used for manufacture of the goods exported and supply of the same is received on which

benefit of notification is availed then the assessee is not entitled to get any refund. It was submitted that it is a colourable exercise of power of legislation because the form and manner in which such legitimate refund claim of the petitioner is denied is contrary to the basic structure of the entire scheme of the IGST Act read with CGST Act and the Rules. In support of his submission, reliance was placed on the following decisions:

i) In case of **Ashok Kumar Alias Golu v. Union of India and Others** reported in (1991) 3 Supreme Court Cases 498, wherein it is held that it is only when a legislature which has no power to legislate frames a legislation so

camouflaging it as to appear to be within its competence when it knows it is not, it can be said that the legislation so enacted is colourable legislation.

ii) In case of **K.C. Gajapati Narayan Deo and Ors v. The State of Orissa** reported in AIR 1953 SC 375, wherein it is held as under:

> "9. It may be made clear at the outset that the doctrine of colourable legislation does not Involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power (Vide

Cooley's Constitutional Limitations Vol. 1, p. 379.). A distinction, however, exists between a legislature which is legally important like the British Parliament and the laws promulgated by which could not be challenged on the ground of Incompetency, and a legislature which enjoys only a limited or a qualified jurisdiction. If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, In respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The Idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act

within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretense or disguise. As was said by Duff J. In Attorney-General for Ontario v. Reciprocal Insurers and Others [1924] A.C. 328.),

> "Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing."

10. In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and If the subject-matter In substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the Constitutional prohibitions by employing an Indirect method. In cases like these, the enquiry must always be as to the true nature and character of the challenged legislation and it is the result

of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority (Vide Attorney-General for Ontario v. Reciprocal Insurers and Others, [1924] A.C. 328at 337.). For the purpose of this investigation the court could certainly examine the effect of the legislation and take Into consideration its object, purpose or design (Vide Attorney-General for Alberia v. Attorney-General for Canada, [1939] A.C. 117 at 130.). But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the legislature to exercise its powers. It is said by Lefroy In his well known work on Canadian Constitution that even If the legislature avow on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction, yet if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered ultra vires (See Lefroy on Canadian Constitution, page 75.).”

(iii) In case of **R.S. Joshi and ors. v. Ajit Mills Limited and ors.** reported in AIR 1977 SC 2279, wherein it is held as under:

> “16. Before scanning the decisions to discover the principle laid down therein, we may dispose of the contention which has appealed to the High Court based on 'colourable device'. Certainly, this a malignant expression and when flung with fatal effect at a representative instrumentality like the Legislature, deserves serious reflection. If, forgetting comity, the Legislative wing charges the Judicative wing with " colourable' judgments, it will be intolerably subversive of the rule of law. Therefore, we too must restrain ourselves from making this charge except in absolutely plain cases and pause to understand the import of the doctrine of colourable exercise of public power, especially legislative power. In this branch of law, 'colourable' is not tainted with bad faith or evil motive'; it is not pejorative or crooked. Conceptually, 'colorability' is bound up with

incompetency. 'Colour', according to Black's Legal Dictionary, is 'an appearance, semblance or simulation, as distinguished from that which is real... a deceptive appearance ... a lack of reality'. A thing is colourable which is, in appearance only and not in reality, what it purports to be. In Indian terms, it is may. In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law, although the label of competency is stuck on it, and then it is colourable legislation. It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. To put it more relevantly to the case on hand, if a legislation, apparently enacted under one Entry in the List, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable. In other words, the letter of the law notwithstanding, what is the pith and substance of the Act ? Does it

> fall within any entry assessed to that legislature in pith and substance, or as covered by the ancillary powers implied in that Entry? Can the legislation be read down reasonably to bring it within the legislature's constitutional powers ? If these questions can be answered affirmatively, the law is valid. Malice or motive is beside the point, and it is not permissible to suggest parliamentary incompetence on the score of mala fides."

(iv) In case of **Sonapur Tea Co. Ltd. v. Must. Mazirunnessa** reported in AIR 1962 SC 137, wherein it is held that the doctrine of colourable legislation really postulates that legislation attempts to do indirectly what it cannot do directly. In other words, though the letter of the law is within the limits of the powers of the Legislature, in substance the law has transgressed those powers and by doing so it has taken the precaution of concealing

its real purpose under the cover of apparently legitimate and reasonable provisions.

v) In case of **State of Kerala and another v. Peoples Union For Civil Liberties, Kerala State Unit and others** (judgment dated July 21, 2009 in Civil Appeal Nos. 104-105 of 2001), wherein it is held that the doctrine of `Colourable Legislation" is directly connected with the legislative competence of the State. It is one thing to say that an enactment suffers from vice of colourable legislation on the premise that it does not have legislative competence but it is another thing to say that only because the Act was amended purporting to nullify an earlier Act, the same by itself would attract the said doctrine. An act of mala fide on the part

of the legislature also is beyond the province of judicial review. In fact no motive can be attributed to the Legislature for enacting a particular statute. The question in regard to the constitutionality of the statute must be considered keeping in view only the provisions of the Constitution.

vi) In case of **Reliance Industries Ltd and others v. State of Gujarat and others** (CAV Judgment dated 16.04.2020 passed in SCA No.14206 of 2018), this Court has held as under:

> “114. It is well known that motive or intention for making an Act or issuing an ordinance is not justifiable before a court of law. Whenever the expressions colourable exercise of power or fraud on Constitution are used in connection with any enactment, it only means that the

particular legislature had no legislative competence although it purports to have exercised that power. Reference in this connection may be made to the cases of K.C.Gajapati Narayan Deo v. State of Orissa (AIR 1953 SC 375), Bhairabendra Narayan Bhup v. State of Assam (AIR 1956 SC 503), Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corpn. (AIR 1959 SC 308) and R.S. Joshi etc v. Ajit Mills Ltd. (AIR 1977 SC 2279). In the case of K.C.Gajapati Narayan Deo (AIR 1953 SC 375), it was observed (at p. 379): "It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of 'bona fides' or 'mala fides' on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all….. if the

> Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements."

77. It was submitted that byNotification No.1/2023(IT) dated 31.07.2023 section 123 of the Finance Act, 2021 has been made effective from 1st October, 2023 by

amending the provisions of section 16(3) of the IGST Act. It was therefore, submitted that sub-section(3) of section 16 as it was in operation prior to 1st October, 2023 would give option to the assessee to pay the integrated tax and claim refund paid on goods and services or both which is a zero rated supply. It was further contended that by applying Rule 96(10) of the CGST Rules, input tax credit and utilisation cannot be restricted or denied because eligibility and utilisation as provided under section 16 of the IGST Act read with relevant provision of the GST Act are absolute. It was submitted that explanation under the garb of classification cannot create a new condition with a retrospective effect when the rule itself is prospective in view of

provisions of section 164 of the Act.

78. Learned advocate Mr. Jatin Arora for the petitioners has adopted the submissions made by learned Senior Advocate Mr. Sridharan and learned advocate Mr. Paresh Dave. He also relied upon the decision of Hon'ble Apex Court in case of **Mathuram Agrawal v. State of Madhya Pradesh** reported in (1999) 8 Supreme Court Cases 667, wherein in relation to the municipal tax it was held that there is no tax liability in law if there is ambiguity in the provision as to any of the three components of tax law subject of tax, person who is liable to pay tax and rate at which tax is to be paid. It was submitted that in facts of the case applying rule 96(10) of the CGST Rules clearly shows the ambiguity with

regard to subject of tax and in such circumstances only legislature in amending the provisions of repeal and enact a new one. It was submitted that Rule 96(10) is required to be declared as ultra vires. The assessee cannot be deprived of legitimate refund on the supply for which no benefit is availed n notification of duty concession referred to in Rule 96(10) of the CGST Rules.

79. Reliance was also placed on decision of Kerala High Court in case of **Kerala State Electricity Board and others v. Thomas Joseph and others** reported in AIR 2023 SC 126, to highlight that Hon'ble Apex Court has explained in detail about the rule making powers of the delegated authority and held that if the rule goes beyond the rule making power conferred by

the statute the same has to be declared invalid and if the rule supplants any provision for which power has not been conferred it becomes invalid. It was pointed out that that Hon'ble Apex Court has held that basic test is to determine and consider the source of power which is relatable to the rule and similarly rule must be in accord with the parent statute as it cannot travel beyond it. Reliance was placed on the following observations of the Apex Court in support of his submission:

> "65. Delegated legislation has come to stay as a necessary component of the modern administrative process. Therefore, the question today is not whether there ought to be delegated legislation or not, but that it should operate under proper controls so that it may be ensured that the power given to the Administration is exercised properly; the benefits of the

institution may be utilised, but its disadvantages minimised. The doctrine of ultra vires envisages that a rule making body must function within the purview of the rule making authority conferred on it by the parent Act. As the body making rules or regulations has no inherent power of its own to make rules, but derives such power only from the statute, it has to necessarily function within the purview of the statute. Delegated legislation should not travel beyond the purview of the parent Act. If it does, it is ultra vires and cannot be given any effect. Ultra vires may arise in several ways; there may be simple excess of power over what is conferred by the parent Act; delegated legislation may be inconsistent with the provisions of the parent Act or statute law or the general law; there may be non- compliance with the procedural requirement as laid down in the parent Act. It is the function of the courts to keep all authorities within the confines of the law by supplying the doctrine of ultra vires.

66. In this context, we may refer with profit to the decision in General Officer Commanding-in-Chief and Another v. Dr. Subhash Chandra Yadav and Another reported in (1988) 2 SCC 351, wherein it has been held as follows:-

> "14. ….before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void….."

67. In Additional District Magistrate (Rev.) Delhi Admn. v. Siri Ram reported in (2000) 5 SCC 451, it has been ruled that it is a well recognised principle that the conferment of rule-making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

68. In Sukhdev Singh and Others v. Bhagatram Sardar Singh Raghuvanshi and Another reported in (1975) 1 SCC 421, the Constitution Bench has held that:

> "18. …. These statutory bodies cannot use the power to make rules and regulations to

> enlarge the powers beyond the scope intended by the Legislature. Rules and regulations made by reason of the specific power conferred by the statute to make rules and regulations establish the pattern of conduct to be followed. …"

69. In State of Karnataka and Another v. H. Ganesh Kamath and Others reported in (1983) 2 SCC 402, it has been stated that:

> "7. …..It is a well-settled principle of interpretation of statutes that the conferment of rule-making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto."

70. In Kunj Behari Lal Butail and Others v. State of H.P. and Others reported in (2000) 3 SCC 40, it has been ruled thus:-

> "13. It is very common for the legislature to provide for a general rule-making power to carry out the purpose of the Act. When such a power is given, it may be permissible to find out the object of the

> enactment and then see if the rules framed satisfy the test of having been so framed as to fall within the scope of such general power confirmed. If the rule-making power is not expressed in such a usual general form then it shall have to be seen if the rules made are protected by the limits prescribed by the parent act…….”

71. In St. Johns Teachers Training Institute v. Regional Director, National Council for Teacher Education and Another reported in (2003) 3 SCC 321, it has been observed that:

> “10. A regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and regulations are all comprised in delegated legislation. The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of

> ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details…..”

72. In Global Energy Limited and Another v. Central Electricity Regulatory Commission reported in (2009) 15 SCC 570, this Court was dealing with the validity of clauses (b) and (f) of Regulation 6-A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading Licence and other Related Matters) Regulations, 2004. In that context, this Court expressed as under:-

> “25. It is now a well-settled principle of law that the rule-making power “for carrying out the purpose of the Act” is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act.”

80. Referring to above dictum of law it

was submitted that Rule 96(10) of the CGST Rules goes beyond the rule making powers conferred by the statute and as such same is required to be declared as invalid and the respondent authority could not have exercised the power under section 164 of the GST Act to frame such rule to enlarge the power and scope intended by legislature for denial of refund to the assessee upon supply for which no benefit is availed from the notification referred to in Rule 96(10) of the CGST Rules. It was submitted that Rule 96(10) is therefore invalid as same could not have supplant the provisions of the enabling Act but it could be made only supplant it and what is permitted is delegation of ancillary or subordinate legislative functions or what is fictionally called

as power to fill up details and is given for carrying out purpose of the Act. Such delegation cannot be held to be laid down in guidelines and the regulation making power could not have been exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the Act.

81. Learned advocate Mr. Abhay Rastogi has also adopted the submissions made learned Senior Advocate Mr. Sridharan and learned advocate Mr. Paresh Dave and has made further submission with regard to Doctrine of Impressibility for framing rule 96(10) of the CGST Rules and reference was placed on decision of Apex Court in case of **Association for Democratic Reforms & anr. v. Union of India and others** (judgment

dated 15.02.2024 in Writ Petition No. 880 of 2017) wherein it is held as under:

> “105. The next issue which falls for analysis is whether the violation of the right to information is justified. This Court has laid down the proportionality standard to determine if the violation of the fundamental right is justified. The proportionality standard is as follows:
>
> a. The measure restricting a right must have a legitimate goal (legitimate goal stage);
>
> b. The measure must be a suitable means for furthering the goal (suitability or rational connection stage);
>
> c. The measure must be least restrictive and equally effective (necessity stage); and
>
> d. The measure must not have a disproportionate impact on the right holder (balancing stage).
>
> xxx
>
> 119. The next stage of the proportionality standard is the least restrictive means stage. At this stage, this Court is required

to determine if the means adopted (that is, anonymity of the contributor) is the least restrictive means to give effect to the purpose based on the following standard:

a. Whether there are other possible means which could have been adopted by the State;

b. Whether the alternative means identified realise the objective in a 'real and substantial manner';

c. Whether the alternative identified and the means used by the State impact fundamental rights differently; and

d. Whether on an overall comparison (and balancing) of the measure and the alternative, the alternative is better suited considering the degree of realizing the government objective and the impact on fundamental rights.

xxxx

151. Finally, this Court in Justice KS Puttaswamy (5J) (supra) applied the structured proportionality standard to balance two fundamental rights. In this case, a Constitution Bench of this Court while testing the validity of the Aadhar Act 2016 had to resolve the conflict

between the right to informational privacy and the right to food. Justice Sikri writing for the majority held that the Aadhar Act fulfills all the four prongs of the proportionality standard. In the final prong of the proportionality stage, that is the balancing stage, this Court held that one of the considerations was to balance the right to privacy and the right to food. On balancing the fundamental rights, this Court held that the provisions furthering the right to food satisfy a larger public interest whereas the invasion of privacy rights was minimal.

152. However, the single proportionality standard which is used to test whether the fundamental right in question can be restricted for the State interest (that is, the legitimate purpose) and if it can, whether the measure used to restrict the right is proportional to the objective is insufficient for balancing the conflict between two fundamental rights. The proportionality standard is an effective standard to test whether the infringement of the fundamental right is justified. It would prove to be ineffective when the State interest in question is also a reflection of a fundamental

right.

153. The proportionality standard is by nature curated to give prominence to the fundamental right and minimize the restriction on it. If this Court were to employ the single proportionality standard to the considerations in this case, at the suitability prong, this Court would determine if non-disclosure is a suitable means for furthering the right to privacy. At the necessity stage, the Court would determine if non-disclosure is the least restrictive means to give effect to the right to privacy. At the balancing stage, the Court would determine if non-disclosure has a disproportionate effect on the right holder. In this analysis, the necessity and the suitability prongs will inevitably be satisfied because the purpose is substantial: it is a fundamental right. The balancing stage will only account for the disproportionate impact of the measure on the right to information (the right) and not the right to privacy (the purpose) since the Court is required to balance the impact on the right with the fulfillment of the purpose through the selected means. Thus, the Court while applying the proportionality

standard to resolve the conflict between two fundamental rights preferentially frames the standard to give prominence to the fundamental right which is alleged to be violated by the petitioners (in this case, the right to information). This could well be critiqued for its limitations.

156. Baroness Hale in Campbell (supra) employed a three step approach to balance fundamental rights. The first step is to analyse the comparative importance of the actual rights claimed. The second step is to lay down the justifications for the infringement of the rights. The third is to apply the proportionality standard to both the rights. The approach adopted by Baroness Hale must be slightly tempered to suit our jurisprudence on proportionality. The Indian Courts adopt a four prong structured proportionality standard to test the infringement of the fundamental rights. In the last stage of the analysis, the Court undertakes a balancing exercise to analyse if the cost of the interference with the right is proportional to the extent of fulfilment of the purpose. It is in this step that the Court undertakes an analysis of the comparative importance of the

considerations involved in the case, the justifications for the infringement of the rights, and if the effect of infringement of one right is proportional to achieve the goal. Thus, the first two steps laid down by Baroness Hale are subsumed within the balancing prong of the proportionality analysis."

82. Reference was also placed on concurrent judgment rendered by Hon'ble Mr. Justice Sanjiv Khanna in the aforesaid case giving a definite reasoning which are relied upon by learned advocate Mr. Rastogi as under :

"29. The test of proportionality is now widely recognised and employed by courts in various jurisdictions like Germany, Canada, South Africa, Australia and the United Kingdom. However, there isn't uniformity in how the test is applied or the method of using the last two prongs in these jurisdictions.

30. The first two prongs of

proportionality resemble a means-ends review of the traditional reasonableness analysis, and they are applied relatively consistently across jurisdictions. Courts first determine if the ends of the restriction serve a legitimate purpose, and then assess whether the proposed restriction is a suitable means for furthering the same ends, meaning it has a rational connection with the purpose.

31. In the third prong, courts examine whether the restriction is necessary to achieve the desired end. When assessing the necessity of the measure, the courts consider whether a less intrusive alternative is available to achieve the same ends, aiming for minimal impairment. As elaborated above, this Court Anuradha Bhasin (supra), relying on suggestions given by some jurists, emphasised the need to employ a moderate interpretation of the necessity prong. To conclude its findings on the necessity prong, this Court is inter alia required to undertake an overall comparison between the measure and its feasible alternatives.

32. We will now delve into the fourth prong, the balancing stage,

in some detail. This stage has been a matter of debate amongst jurists and courts. Some jurists believe that balancing is ambiguous and value-based. This stems from the premise of rule-based legal adjudication, where courts determine entitlements rather than balancing interests. However, proportionality is a standard-based review rather than a rule-based one. Given the diversity of factual scenarios, the balancing stage enables judges to consider various factors by analysing them against the standards proposed by the four prongs of proportionality. This ensures that all aspects of a case are carefully weighed in decision-making. This perspective finds support in the work of jurists who believe that constitutional rights and restrictions/measures are both principles, and thus they should be optimised/balanced to their fullest extent.

33. While balancing is integral to the standard of proportionality, such an exercise should be rooted in empirical data and evidence. In most countries that adopt the proportionality test, the State places on record empirical data as evidence supporting the enactment and justification for the encroachment of rights. This is

essential because the proportionality enquiry necessitates objective evaluation of conflicting values rather than relying on perceptions and biases. Empirical deference is given to the legislature owing to their institutional competence and expertise to determine complex factual legislation and policies. However, factors like lack of parliamentary deliberation and a failure to make relevant enquiries weigh in on the court's decision. In the absence of data and figures, there is a lack of standards by which proportionality stricto sensu can be determined. Nevertheless, many of the constitutional courts have employed the balancing stage 'normatively' by examining the weight of the seriousness of the right infringement against the urgency of the factors that justify it. Examination under the first three stages requires the court to first examine scientific evidence, and where such evidence is inconclusive or does not exist and cannot be developed, reason and logic apply. We shall subsequently be referring to the balancing prong during our application of the test of proportionality.

34. In Germany, the courts enjoy a

high judicial discretion. The parliament and the judiciary in Germany have the same goal, that is, to realise the values of the German Constitution. Canadian courts, some believe, in practice give wider discretion to the legislature when a restriction is backed by sufficient data and evidence. The constitutional court in South Africa, as per some jurists, collectively applies the four prongs of proportionality instead of a structured application. While proportionality is the predominant doctrine in Australia, an alternate calibrated scrutiny test is applied by a few judges. It is based on the premise that a contextual, instead of broad standard of review, is required to be adopted for constitutional adjudication.

35. Findings of empirical legal studies provide a more solid foundation for normative reasoning and enhance understanding of the relationship between means and ends. In our view, proportionality analyses would be more accurate when empirical inquiries on causal relations between a legislative measure under review and the ends of such a measure are considered. It also leads to better and more democratic governance. While one cannot jump from “is” to “ought”,

> to reach an “ought” conclusion, one has to rely on accurate knowledge of “is”, for “is” and “ought” to be united. While we emphasise the need of addressing the quantitative/empirical deficit for a contextual and holistic balancing analysis, the pitfalls of selective data sharing must be kept in mind. After all, if a measure becomes a target, it ceases to be a good measure.”

83. Learned advocate Mr. Avinash Poddar for the petitioner submitted that in Special Civil Application No.7711 of 2021, the petitioner has paid the IGST not only through electronic ledger but also through electronic cash ledger. It was submitted that approximately 70% of the IGST to be paid on exports was paid in cash and such a situation has not been considered in Rule 96(10) of the Rules and therefore, such rule is arbitrary and required to be struck down.

84. In support of his submissions, reliance was placed on the following decisions:

i) Decision of Jammu and Kashmir High Court in case of **Reckitt Benckiser v. Union of India** reported in (2011) 269 ELT 194 (J&K), wherein it was held that The issue of misuse cannot be generalized. It has to be case specific covering an individual or group of individuals. Every such misuse is required to be ascertained and verified before asserting that there has been misuse of exemption. By a general survey conducted, it cannot be said that the exemption benefit is being misused by the present petitioners. Taking recourse to the fact that exemption granted is being misused without identifying the individual cases would be an exercise

which can be termed to have been made by the respondents only to deny the exemption granted to the petitioners by way of original notification in pursuance to which they have altered their position. This action on the part of respondents can be termed to be arbitrary in nature.

ii) In case of **Shreya Singhal v. Union of India** reported in (2015) 5 Supreme Court Cases 1, wherein reliance was placed on the decision in case of **Kartar Singh v. State of Punjab**, (1994) 3 SCC 569 at para 130-131, as under:

> "130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should

give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.

131. Let us examine clause (i) of Section 2(1)(a). This section is shown to be blissfully and impermissibly vague and imprecise. As rightly pointed out by the learned counsel, even an innocent person who ingenuously and undefiledly communicates or associates without any knowledge or having no reason to believe or suspect that the person or class of persons with whom he has communicated or associated is engaged in assisting in any manner terrorists or

> disruptionists, can be arrested and prosecuted by abusing or misusing or misapplying this definition. In ultimate consummation of the proceedings, perhaps that guiltless and innoxious innocent person may also be convicted."

iii) In case of **Deputy Commissioner of Income Tax and another v. Pepsi Foods Ltd.** (now Pepsico India Holdings Pvt Ltd) reported in (2021) 7 Supreme Court Cases 413, wherein it is held as under:

> "27. We have already seen how unequals have been treated equally so far as assessees who are responsible for delaying appellate proceedings and those who are not so responsible, resulting in a violation of Article 14 of the Constitution of India. Also, the expression "permissible" policy of taxation would refer to a policy that is constitutionally permissible. If the policy is itself arbitrary and discriminatory, such policy will have to be struck down, as has been found

in paragraph 20 above."

85. Learned advocate Mr. Poddar in support of his submission that rule cannot impose tax unless the statute permits and rule cannot override statute, placed reliance on the following decisions:

i) In case of **Bimal Chandra Banaerji v. State of Madhya Pradesh and Etc.** reported in (1970) 2 Supreme Court Cases 467, wherein it is held as under:

> "13. No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule- making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it."

86. It was further submitted that the intention of the zero rated supply is to make the entire supply chain of exports as tax free i.e. no tax to be imposed both on inputs as well as outputs. Therefore, denying the refund in the present case would lead to imposing tax on the exporters which would be against the scheme of zero-rated supply. In support of such submission reliance was placed on the decision of Karnataka High Court in case of **M/s. Tonbo Imaging India Pvt. Ltd. v. Union of India and others** reported in 2023 SCC Online Kar 140, wherein it is held as under :

> "17. In my considered opinion, the impugned amendment to Rule 89(4)(C) of the CGST Rules is illegal, arbitrary, unreasonable, irrational,

> unfair, unjust and ultra vires Section 16 of the IGST Act and Section 54 of the CGST Act for the following reasons:-
>
> (a) Rule 89(4)(C) of the CGST Rules is ultra vires Section 54 of the CGST Act read with Section 16 of the IGST Act; the very intention of the zero-rating it to make entire supply chain of "exports" tax free, i.e., to fully 'zero-rate' the exports by exempting them from both input tax and output tax; accordingly, Section 16(3) of the IGST Act allows refund of input taxes paid in the course of making a zero-rated supply, i.e., supplies which covers exports as well as supplies to SEZs. The rule in whittling down such refund is ultra vires in view of the well settled principle of law that Rules cannot override the parent legislation."

87. Learned advocate Mr. Poddar with a view to point out the arbitrariness in

rule 96(10) submitted seven different situations as under:

Situation No.	Particulars
1	Where 100% Goods are imported under Advance Authorization
2	Where 100% Goods are Exported
3	Where import and export are on higher side than the domestic inward and outward supplies
4	Where import is higher and export is less than domestic outward supplies
5	Where import is lower and export is higher than domestic outward supplies
6	Where import and export- both are lower than domestic inward/outward supplies
7	Where local outward supplies are exempted

88. Referring to above situations, it was submitted that prime argument of the respondents in support of the impugned Rule 96(10) of the CGST Rules is that import is done without duty and the ITC on the domestic purchases is being utilised

against the payment of IGST on exports and refund is claimed, however, the six situations depicted above clearly show that due taxes reach the respondent treasury even if their argument is believed, the Revenue can be at loss only in the seventh situation where the goods being supplied is exempt from GST if supplied domestically.

89. It was submitted that refund of IGST paid during the export can cause loss only where the input tax credit being utilised for making the IGST payments is disputed but in none of the petitions, ITC is under dispute and therefore, even if the domestic credit is refunded back as per section 16(3)(b) of the IGST Act, the payment for domestic supply has to be made in cash.

90. With regard to interest, it was submitted that as per settled law, interest is compensatory in nature and therefore, existence of loss has to be proved by the respondents else the interest cannot be demanded.

SUBMISSIONS OF THE RESPONDENTS:

91. On the other hand learned Additional Solicitor General Mr. Devang Vyas for the Union of India defended the constitutional validity of fiscal law vires on various grounds. Learned Additional Solicitor General Mr. Vyas at the inception referred to the chronology of amendments made to Rule 96(10) of the CGST Rules as under:

> "a. Notification No. 75/2017 Central Tax dated 29.12.2017 inserted rule 96(9) in the CGST Rules with effect from 23rd October, 2017 which restricted the

person from claiming refund of IGST paid on export of goods or services, if he has received supplies on which the supplier has availed benefit of duty-free/concessional procurement under notification No. 48/2017-Central Tax dated 18th October, 2017 or notification No. 40/2017-Central Tax (Rate) dated 23rd October, 2017 or notification No. 41/2017- Integrated Tax (Rate) dated 23rd October, 2017. Notification No.75/2017-Central Tax dated 29.12.2017 was issued after obtaining approval of the GST Implementation Committee (GIC) and was ratified by the GST Council in the 25th meeting held on 18.01.2018.

b. Rule 96(9) was subsequently substituted by Rule 96(9) & Rule 96(10) by Notification No.3/2018 CT dated 23.01.2018 w.e.f. 23.10.2017 vide which the restriction on availing refund through IGST route was extended in cases where the exporter has received supplies on which the supplier has availed benefit of Notification No.78/2017- Customs dated 13.10.2017 and Notification No.79/2017- Customs dated 13.10.2017 which provided for duty free imports of inputs/Capital goods by AA, EOU and EPCG license holders. The said notification was

issued with the approval of GST Council obtained in 25th meeting held on 18.01.2018.

c. Rule 96 (10) was further amended by Notification No.39/2018-CT dated 04.09.2018 w.e.f. 23.10.2017 wherein the said restriction was made applicable to the cases where the exporter himself has availed benefit of duty- free procurement under Notification No.78/2017-Customs dated 13.10.2017 and Notification No.79/2017-Customs dated 13.10.2017 after obtaining approval of the GST Implementation Committee (GIC) and was ratified by the GST Council in the 30th meeting held on 28.09.2018.

d. However, during the 30th GST Council meeting, it was decided to restore the position of Rule 96 (10) prior to amendment vide Notification No.39/2018-CT dated 04.09.2018 by issuing Notification No. 53/2018-CT dated 09.10.2018 substituting Rule 96(10) w.e.f. 23.10.2017. Further, Notification No.54/2018-CT dated 09.10.2018 was issued with prospective effect to amend Rule 96(10) to inter alia provide for restriction on availing refund under IGST route when the exporter itself has availed benefit of duty-free procurement under Notification

No.78/2017-Customs dated 13.10.2017 and Notification No.79/2017-Customs dated 13.10.2017 and to create an exemption from the restriction placed vide 96(10) where the exporters have procured Raw Material duty free under Advance Authorisation scheme under Notification No.48/2017-CT dated 18.10.2017 or Notification No.79/2017-Customs dated 13.10.2017. While the said issue was discussed in the 30th meeting of GST Council, it was submitted by the Commissioner, GST Policy Wing that as the field formations have followed different practices during the past period and export refunds have been granted in many cases, it would be better not to re-open the earlier sanctioned refunds and the proposed amendment could be done only with prospective effect. Thereby, it was made clear that refund if sanctioned prior to 09.10.2018 i.e. the date of issuance of Notification No.54/2018-CT would not be re-opened. This was even clarified by Circular No. 70/44/2018 GST dated 26.10.2018 and Circular No. 125/44/2019-GST dated 18.11.2019 wherein it was clarified that:

> "Any exporter who himself/herself imported any

inputs/capital goods in terms of notification Nos. 78/2017-Customs and 79/2017-Customs both dated 13.10.2017, before the issuance of the notification No. 54/2018 Central Tax dated 09.10.2018, shall be eligible to claim refund of the Integrated tax paid on exports. Further, exporters who have imported inputs in terms of notification Nos. 78/2017-Customs dated 13.10.2017, after the issuance of notification No. 54/2018-Central Tax dated 09.10.2018, would not be eligible to claim refund of Integrated tax paid on exports.

However, exporters who are receiving capital goods under the EPCG scheme, either through import in terms of notification No. 79/2017-Customs dated 13.10.2017 or through domestic procurement in terms of notification No. 48/2017-Central Tax, dated 18.10.2017, shall continue to be eligible to claim refund of Integrated tax paid on exports and would not be hit by the restrictions provided in sub-rule (10) of rule 96 of the CGST Rules."

> e. Further, vide Notification No.16/2020-CT dated 23.03.2020, an Explanation has been inserted in rule 96(10) which provides that where IGST and Compensation Cess has been paid on procurement of inputs under Notification No.78/2017-Customs, dated the 13th October, 2017 or Notification No.79/2017-Customs, dated the 13th October, 2017 and exemption has been availed in respect of Basic Customs Duty (BCD) only, such procurement would not be considered to have been procured by availing the benefit of the said notifications. The said Notification was approved by GST Council in its 39th meeting held on 14.03.2020."

92. Learned Additional Solicitor General Mr. Devang Vyas thereafter negated the contention raised by the petitioner that Rule 96(10) of the CGST Rules is violative of provisions of section 16 of the IGST Act, 2017 read with section 54 of CGST Act, 2017 and hence liable to be declared as ultra vires by submitting that Rule 96(10) was inserted in order to prevent

exporters from availing double benefit of duty free/concessional procurement of inputs by availing benefit under the relevant notification and of refund of integrated tax paid on export as it was leading to monetisation of ITC which was attributable towards the non-export supplies. This was done in exercise of power given under section 164 of the GST Act (power to make rules), which includes the power to give retrospective effect to these rules.

93. It was submitted that the purpose of introducing the said provision was clarified in the GST Council meeting minutes and a Circular No.45/19/2018-GST dated 30-05-2018, was issued by the department. It was submitted that at point No. 7 of the said Circular, while

elaborating ambit of the scope of the provision of Rule 96(10) of the CGST Rules, it is stated that-

> "7.1 Sub-Rule (10) of Rule 96 of the CGST Rules seeks to prevent an exporter, who is receiving goods from suppliers availing the benefit of certain specified notifications under which they supply goods without payment of tax or at reduced rate of tax, from exporting goods under payment of integrated tax. This is to ensure that the exporter does not utilise the input tax credit availed on other domestic supplies received for making the payment of integrated tax on export of goods."

94. It was submitted that in order to address the concern of the exporters, explanation has been inserted w.e.f. 23.10.2017 under Rule 96(10) vide Notification No.16/2020-CT dated 23.03.2020 providing that if the exporter has not availed benefit of IGST and Compensation Cess exemption under the said

notifications, the exporter can avail the refund of tax paid on the exports. Thus, it can be stated that the intention of the legislature is very clear to provide refund of IGST only in those cases where tax paid inputs have been used in making zero- rated supplies and to restrict the same when the inputs are procured duty free.

95. It was further submitted that the fundamental principle governing the provisions of refund is that in the case of exports, taxes are not exported and accordingly, the tax suffered on the inputs used in the exported goods is refunded to the taxpayer. However, where duty has not been paid on the inputs used in the exported goods, refund of IGST would tantamount to encashment of ITC,

which is against the fundamental principle of taxation and also beyond the scope of Section 16(3)(b) of the IGST Act, 2017. Accordingly, provision of Rule 96(10) of the CGST Rules was formulated to avoid encashment of ITC. Thus, the legislative intent was to give refund of IGST only where tax paid inputs have been used in the making zero- rated supplies. In the cases where the taxpayer procures certain inputs in respect of which the benefit of Notifications as provided under clauses (a) and (b) of Rule 96(10) of the CGST Rules has been availed and procures certain inputs and input services against payment of appropriate tax, refund of unutilised ITC in such circumstances is available under the provisions of Rules 89(4A) and 89(4B) of the CGST Rules. It

was therefore, submitted that Rule 96(10) does not take away substantive right conferred under section 16(3)(b) of IGST Act, 2017 and the same is available under the provisions of Rules 89(4A) and 89(4B) of the CGST Rules and is also consistent with the genesis of providing benefit of advance authorisation.

96. Learned Additional Solicitor General Mr. Vyas further submitted that Section 54 of the GST Act provides for refund of tax paid and Input Tax Credit which have been accumulated in certain situations. It also lays down the conditions subject to which this refund can be claimed. Section 16 of the IGST Act gives the supplier making Zero- rated supplies two options under which refund on account of zero-rated supplies can be claimed. It was submitted

that these options have to be exercised in accordance with the provisions and conditions of section 54 of the GST Act and the rules prescribed thereunder.

97. It was further submitted that the second option, i.e. the option of making zero-rated supplies of goods or services on payment of IGST and claiming refund of the same (section 16(3)(b) of the IGST Act), has been explicitly subjected to such conditions, safeguards and procedure which may be prescribed in accordance with Section 54 of GST Act and rules made thereunder. It was submitted that these conditions and safeguards, as prescribed, are in relation to the option of claiming refund under this route and not in relation to the act of making zero-rated supplies under payment of IGST.

98. It was further submitted that detail rules have been prescribed in the CGST Rules to implement the provisions of section 54 of the GST Act and section 16 of the IGST Act. These rules have been notified using the power given under section 164 of the GST Act and under section 22 of the IGST Act. The said sections provide that the Central Government may, on the recommendations of the Council, make rules for carrying out the provisions of the Act. Sub-section (3) of Section 164 of the GST Act and sub-section (3) of section 22 of IGST Act explicitly provides for the power to give retrospective effect to the said rules.

99. It was submitted that the Central Government has, on the recommendations of

the GST Council, which is a constitutional body constituted under Article 279A of the Constitution of India, with the mandate of making recommendations to both Centre and State Governments on the matters pertaining to GST, notified various rules related to refund with the purpose of implementing the provisions contained in section 54 of the GST Act and section 16 of the IGST Act and to lay down the modalities/conditions for filing/ processing of the refund claims and one of these rules is Rule 96(10) of the CGST Rules.

100. It was therefore submitted that the primary intent of Rule 96(10) is to restrict exporters who are availing duty free/concessional inputs, under certain notifications, for export, from encashing

their ITC availed on duty paid inputs, meant to be used in domestic supplies, by using it for IGST payments on export.

101. It was submitted that refund is not an unfettered right. The statutory authority that empowers a tax payer to claim for such refund also provides for imposition of checks and balances. Reference was made to Section 16(3)(b) of the IGST Act, 2017 which reads as under-

> “a registered person may supply goods or services or both, subject to such conditions, safeguards and procedures as may be prescribed on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied"

102. It was therefore, submitted that while the said Section extended authority for refund of tax paid on the goods and services, the same section also ensured

that such claims are not absolute and they would be subject to such conditions, safeguards and procedures as may be prescribed. Section 16 of the IGST Act, does not offer *carte blanche* for claim of refund. It provides for allowing such claims of legitimate refunds which are not contrary to or out of the ambit of the larger limitations of law created by imposition of restrictions.

103. Learned Additional Solicitor General Mr. Vyas further submitted that Rule 96(10) of CGST Rules is a result of the rule making power exercised by the Government under Section 164 of the GST Act, 2017 on the recommendation of the GST Council and is consistent with the provision of Section 16(3)(b) of the IGST Act, 2017. Therefore, undermining its

authority, which is derived from the same statute that provides for such claim of refund, is incomprehensible.

104. It was submitted that contention of the petitioners that the benefit of refund available under law have been denied by virtue of the provision of Rule 96(10), which is a delegated legislation is also baseless as the delegated legislation itself derived its authority from the same statute which gives the applicant the right to claim refund. It was submitted that the statute that made them entitled to refund also provides for putting in place proper checks and restrictions to prevent misuse of the same. It was submitted that provision of Rule 96(10) is not just another rule,but it was framed on recommendation of GST Council, a

constitutional body and in terms of the aforementioned statutory provision of Section 164 of the GST Act. Therefore, simply because it is framed under a delegated legislation, it does not lose its statutory power. It was submitted that if the Court were to declare such rules ultra vires, then the entire Rule framed under any Act would have to be declared ultra vires, the moment they provide any conditions as safeguards, whatsoever, for being a delegated legislation having encroached upon the power of the Parliament. It was submitted that the process of rule making would have no meaning and statute would not provide for the same either.

105. It was further submitted that so far as the provision of Rule 96(10) of the

CGST Rules, as amended by Notification No. 54/2018- Central Tax dated 09-10-2018, is concerned, it specifically provides for precondition of nonavailment of benefit of exemption extended by the Notification No.79/2017- Customs dated 13-10-2017, in case refund is availed of IGST paid on the goods exported. The use of the phrase "should not have availed" in the said Notification No.54/2018-Central Tax dated 09-10-2018, has clearly put a condition of nonavailment of benefit of the exemption notification if an exporter wants to avail benefit of IGST refund. Therefore, for claiming refund of IGST, benefit of exemption of IGST on imports under specified notifications stands barred by law, and the exporter would not be entitled to claim refund of IGST on

export of goods or services, if the exporter has availed benefit of exemption notifications and amount of IGST, so refunded, becomes recoverable for being availed in violation of the provision of Rule 96(10) of the CGST Rules.

106. It was therefore submitted that the said provision of Rule 96(10) of the CGST Rules, clearly establishes nexus between the refund claimed on exports in terms of the provisions of Section 16 of the IGST Act, 2017 read with the provisions of Section 54 of the GST Act and the exemption availed under the exemption notifications. Therefore, such provisions are complementary rather than mutually exclusive.

107. Relying on the judgment of this Court

in case of **M/s Cosmo Films Ltd Vs. UOI**, [Judgment dated 20.10.2020 rendered in Special Civil Application No. 15833 of 2018], it was submitted that this Court has delivered the judgment in favour of the department and has upheld the vires of the said Rule 96(10) of the CGST Rules wherein the Hon'ble High Court has held as under:

> "8.15 Recently, vide Notification No. 16/2020- CT dated 23.03.2020 an amendment has been made by inserting following explanation to Rule 96(10) of CGST Rules, 2017 as amended (with retrospective effect from 23.10.2017)
>
> "Explanation. For the purpose of this sub- rule, the benefit of the notifications mentioned therein shall not be considered to have been availed only where the registered person has paid Integrated Goods and Services Tax and Compensation Cess on inputs and has availed exemption of only Basic Customs Duty (BCD) under the said notifications."

By virtue of the above amendment, the option of claiming refund under option as per clause (b) is restricted to the Exporters who only avails BCD exemption and pays IGST on the raw materials thereby exporters who wants to claim refund under second option can switch over now. The amendment is made retrospectively thereby avoiding the anomaly during the intervention period and exporters who already claimed refund under second option need to payback IGST along with interest and avail ITC.

9. In view of above amendment, the grievance of the petitioner raised in this petition is therefore taken care of. However, it is also made clear that Notification No. 54/2018 is required to be made applicable w.e.f. 23rd October, 2017 and not prior thereto from the inception of the Rule 96(10) of the CGST Act. Therefore, in effect Notification No. 39/2018 dated 4th September, 2018 shall remain in force as amended by the Notification No.54/2018 by substituting sub-rule (10) of Rule 96 of CGST Rules, in consonance with subsection (3) of Section 54 of the CGST Act and Section 16 of the IGST Act. The Notification No. 54/2018 is therefore held to be effective w.e.f. 23rd October 2017. Rule is made absolute to the

aforesaid extent, with no order as to costs."

108. Referring to above judgment it was submitted that this Court has not found any of the provisions of Rule 96(10) being violative of provisions of Section 16 of IGST Act 2017 read with Section 54 of the GST Act. Further, at present no order by any higher court has been passed which is contrary to the said decision of the this Court.

109. Learned Additional Solicitor General Mr. Devang Vyas in order to assail the argument put forth by the petitioners that Rule 96(10) is violative of Article 14 and Article 19 (1)(g) and the freedom of trade and commerce provided in the Constitution of India, submitted that in the decisions of Hon'ble Apex Court in the cases of **E.P.**

Royappa Vs. State of Tamil Nadu, reported in AIR 1974 SC 555 and in case of **Maneka Gandhi Vs Union of India** reported in AIR 1978 SC 597 it has been highlighted that Article 14 strikes at arbitrariness in State action and ensures fairness and equality in treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant consideration, because that would be denial of equality. It was submitted that as such, the restrictions on refund of IGST under Rule 96(10) of the CGST Rules, 2017 cannot be termed as violative of Article 14 of the Constitution of India as the same is applicable to all the assessee

equally who are covered within its ambit. Further, freedom of trade, commerce and intercourse throughout the territory of India is also not restricted by the said provisions.

110. It was further submitted that in respect of violation of Article 19(1)(g) of the Constitution of India, question involved is whether the freedom of trade, commerce and intercourse is an absolute freedom. It was submitted that since an absolute freedom of trade, commerce and intercourse may lead to economic confusion and misuse of the same, therefore, the wide amplitude of the freedom granted by Article 19(1)(g) and Article 301 is limited by Articles 302 to 305 of the Constitution of India.

111. Learned Additional Solicitor General Mr. Vyas further submitted that Parliament is given power to regulate trade and commerce in public interest under Article 302 subject to Article 303 of the Constitution of India, hence, as enshrined in Article 301 of the Constitution of India, freedom of trade and commerce throughout the territory of India is also not restricted by the said restriction in Rule 96(10) of the CGST Rules.

112. It was submitted that contention raised in respect of violation of Article 265 of the Constitution of India, the question involved is whether the Notification No. 53/2018-CT and Notification No. 54/2018-CT dated 09.10.2018 which restrict the petitioner for claiming rebate of IGST are without

the authority of law or not. In this regard, it was submitted that section 16(3)(b) of the IGST Act, 2017 provides that "a registered person may supply goods or service or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or service or both supplied." Further, section 164(1) of the CGST Act provides that the Government may, on the recommendations of the Council, by notification, make rules for carrying out the provisions of this Act, accordingly, the restrictions on refund of IGST under certain conditions under Rule 96(10) have the authority of section 16(3)(b) of the IGST Act, 2017.

113. It was further submitted that the

rules governing the refund have been formulated after due deliberations by the GST Council, which is a constitutional body constituted under Article 279A of the Constitution of India. Moreover, refund is not an unfettered right and the government is well within its power to impose certain checks and restriction on the recommendation of the GST Council in order to allow only legitimate refund claims within the broader parameters of the law and principles of taxation. In view of the above, it was submitted that Rule 96(10) of the CGST Rules is not ultra vires the rule making power under section 164 of the GST Act, as the rule is consistent with the provisions of section 16(3)(b) of the IGST Act, 2017. It was therefore submitted that rule 96(10) cannot be considered to

be violative of provisions of section 54 of the GST Act or section 16 of the IGST Act or violative of Articles 14 and 19(1)(g) of the Constitution of India.

114. It was submitted that the respondents are justified in inserting Rule 96(10) with retrospective effect and thereby taking away vested right of petitioner to seek refund. In this regard, reference is invited to Section 164 of the CGST Act, 2017 which provides that:

> "164. Power of Government to make rules.- (1)The Government may, on the recommendations of the Council, by notification, make rules for carrying out the provisions of this Act.
>
> (2) Without prejudice to the generality of the provisions of sub-section (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which

> provisions are to be or may be made by rules.
>
> (3) The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act come into force.
>
> (4) Any rules made under sub-section (1) or sub-section (2) may provide that a contravention thereof shall be liable to a penalty not exceeding ten thousand rupees."

115. It was submitted that the statute itself has given absolute authority to the government to make Rules, including, making rules with retrospective effect, which would enable to carry out the provisions of the Act, hence, such Rules prescribing procedures and/or conditions and safeguards to ensure misuse of the provisions of the Act, are nothing but an extension of the Act itself when such

Rules are made for which the authority is derived from the Act, with intent and purpose as stated in the Act, they would obviously have the power and authority of the Act.

116. It was further submitted that it would be imperative to highlight that even Courts have agreed that Section 164 of GST Act provides unfettered powers to Government to make rules. Relying upon the judgment in case of **M/s P.R. Mani Electronics Vs UOI** [order dated 13.07.2020 rendered in W.P.No.8890 of 2020] it was submitted that Hon'ble Madras High Court has held that Section 164 of the CGST Act, 2017 imposes no fetters on rule making powers of the government for giving effect to the provisions of the GST Act wherein it is held as under:

"17. Section 140 of the CGST Act read with Rule 117 of the CGST Rules enables a registered person to carry forward the accumulated ITC under erstwhile tax legislations and claim the same under the CGST Act. In effect, it is a transitional provision as is evident both from Section 140 and Rule 117. In light of the judgment of the Supreme Court in Jayam, the contention of the learned counsel for the Petitioner to the effect that ITC is the property of the Petitioner cannot be countenanced and ITC has to be construed as a concession. In addition, it is evident that ITC cannot be availed of without complying with the conditions prescribed in relation thereto. Prior to the amendment to Section 140 of the CGST Act, the power to frame rules fixing a time limit was arguably not traceable to the un-amended Section 140 of the CGST Act, which contained the words "in such manner as may be prescribed", because such words have been construed by the Supreme Court in cases such as Sales Tax Officer Ponkuppam v. K.I. Abraham [(1967) 3 SCR 518] as not conferring the power to prescribe a time limit. Nevertheless, in our view, it was and continues to be traceable to Section 164, which is widely worded and imposes no fetters on rule making powers

> except that such rules should be for the purpose of giving effect to the provisions of the CGST Act. A fortiori, upon amendment of Section 140 by introducing the words "within such time", the power to frame rules fixing time limits to avail Transitional ITC is settled conclusively. In SKH Sheet Metals, the Delhi High Court concluded, in paragraph 26, that the statute had not fixed a time limit for transitioning credit by also referring to the repeated extensions of time. Given the fact that the power to prescribe a time limit is expressly incorporated in Section 140, which deals with Transitional ITC, and Rule 117 fixes such a time limit, we are unable to subscribe to this view. The fact that such time limit may be extended under circumstances specified in Rule 117, including Rule 117A, does not lead to the sequitur that there is no time limit for transitioning credit."

117. Learned Additional Solicitor General Mr. Devang Vyas submitted that while dealing with the challenge of constitutional validity of fiscal law vires, this court must be guided by

principles of statutory interpretation of a fiscal legislation and judicial self restraint.

118. Learned Additional Solicitor General Mr. Vyas pointed out the principle propounded by Hon'ble Apex Court while interpreting fiscal legislation in case of **ALD Automotive Pvt. Ltd. v. CTO** reported in [2018] 58 GSTR 468 (SC) as under :-

> "17. The challenge in this batch of appeals is challenge to a fiscal legislation. It is relevant to notice the principles of statutory interpretation of a fiscal legislation. The Constitution Bench of this Court in (1981) 4 SCC 675, R.K. Garg v. Union of India, has enumerated established principles for interpreting law dealing with economic activities. In paragraph 8 of the judgment following has been held:-
>
> > "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. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud where Frankfurter, J., said in his inimitable style:

> "In the utilities, tax and economic regulation cases, there are good reasons for judicial self- restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to

> reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events self- limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

119. Thereafter learned Additional Solicitor General Mr. Vyas pointed out the principles that govern the challenge to Constitutional validity of taxation law by relying upon the following judgments:

(i) In the case of **State of M.P. v. Rakesh Kohli**, (2012) 6 SCC 312, wherein the Hon'ble Apex Court has observed as under:-

> "32. While dealing with constitutional validity of a

taxation law enacted by Parliament or State Legislature, the court must have regard to the following principles:

(i) there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature,

(ii) no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found,

(iii) the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence,

(iv) hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law, and

(v) in the field of taxation, the legislature enjoys greater latitude for classification."

(ii) In the case of **Union of India v. VKC**

Footsteps (India) (P) Ltd., (2022) 2 SCC 603, wherein it is observed as under:-

> "88. The jurisprudential basis furnishes a depiction of an ideal state of existence of GST legislation within the purview of a modern economy, as a destination-based tax. But there can be no gainsaying the fact that fiscal legislation around the world, India being no exception, makes complex balances founded upon socio-economic complexities and diversities which permeate each society. The form which a GST legislation in a unitary State may take will vary considerably from its avatar in a nation such as India where a dual system of GST law operates within the context of a federal structure. The ideal of a GST framework which Article 279-A(6) embodies has to be progressively realised. The doctrines which have been emphasised by the counsel during the course of the arguments furnish the underlying rationale for the enactment of the law but cannot furnish either a valid basis for judicial review of the legislation or make out a ground for invalidating a validly enacted law unless it infringes constitutional parameters. While adopting the constitutional

framework of a GST regime, Parliament in the exercise of its constituent power has had to make and draw balances to accommodate the interests of the States. Taxes on alcohol for human consumption and stamp duties provide a significant part of the revenues of the States. Complex balances have had to be drawn so as to accommodate the concerns of the States before bringing them within the umbrella of GST. These aspects must be borne in mind while assessing the jurisprudential vision and the economic rationale for GST legislation. But abstract doctrine cannot be a ground for the Court to undertake the task of redrawing the text or context of a statutory provision. This is clearly an area of law where judicial interpretation cannot be ahead of policy-making. Fiscal policy ought not be dictated through the judgments of the High Courts or this Court. For it is not the function of the Court in the fiscal arena to compel Parliament to go further and to do more by, for instance, expanding the coverage of the legislation (to liquor, stamp duty and petroleum) or to bring in uniformity of rates. This would constitute an impermissible judicial encroachment on legislative power. Likewise, when the first proviso to Section 54(3) has provided for a restriction on the entitlement to

> refund it would be impermissible for the Court to redraw the boundaries or to expand the provision for refund beyond what the legislature has provided. If the legislature has intended that the equivalence between goods and services should be progressively realised and that for the purpose of determining whether refund should be provided, a restriction of the kind which has been imposed in clause (ii) of the proviso should be enacted, it lies within the realm of policy."

(iii) It was submitted that the Hon'ble Apex Court in the case of **Shri Ram Krishna Dalmia vs Shri Justice S. Tendulkar** reported in 1958 AIR 538, 1959 SCR 279, held that there is always presumption in favour of the constitutionality of the constitutionality of enactment and the burden is upon him who attacks it.

(iv) It was submitted that in case of **Kedar Nath Bajoria And Anr. vs The State Of West Bengal** reported in AIR 1954 SC

660, the Hon'ble Apex Court held that Article 14 does not insist the legislative classification should be scientifically perfect or logically complete.

(v) In the case of **Union of India v. Cosmo Films Ltd.** reported in (2023) 9 SCC 244 the Hon'ble Apex Court summed up as under :-

> "75. Therefore, there is no constitutional compulsion that whilst framing a new law, or policies under a new legislation - particularly when an entirely different set of fiscal norms are created, overhauling the taxation structure, concessions hitherto granted or given should necessarily be continued in the same fashion as they were in the past. When a new set of laws are enacted, the legislature's effort is to on the one hand, assimilate-as far as practicable, the past regime. On the other hand, the object of the new law is creation of new rights and obligations, with new attendant conditions. Inevitably, this process is bound to lead to some disruption. In this case, the disruption is in

the form of exporters needing to import inputs, pay the two duties, and claim refunds. Yet, this inconvenience is insufficient to trump the legislative choice of creating an altogether new fiscal legislation, and insisting that a section of assessees order their affairs, to be in accord with the new law. Therefore, the exclusion of benefit of imports in anticipation of AAs, and requiring payment of duties, under Sections 3(7) and (9) of the Customs Tariff Act, 1975, with the "pre-import condition", cannot be characterised as arbitrary or unreasonable.

73. This Court has held, on previous occasions, that when reform by way of new legislation is introduced, the doctrine of classification cannot be applied strictly, and that some allowance for experimentation, to observe the effect of the law, is available to the executive or legislature. This was emphasised in State of Gujarat v. Shri Ambica Mills Ltd. State of Gujarat v. Shri Ambica Mills Ltd., (1974) 4 SCC 656 : 1974 SCC (L&S) 381]: (SCC pp. 675-78, paras 55-56 & 64- 66)

> "55. A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include.

In other words, a classification is bad as under- inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring about his downfall employed such a classification.

56. The first question, therefore, is, whether the exclusion of establishments carrying on business or trade and employing less than 50 persons makes the classification under-inclusive, when it is seen that all factories employing 10 or 20 persons, as the case may be, have been included and that the purpose of the law is to get in unpaid accumulations for the welfare of the labour. Since the classification does not include all who are similarly

situated with respect to the purpose of the law, the classification might appear, at first blush, to be unreasonable. But the Court has recognised the very real difficulties under which legislatures operate difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to reshape and it has refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration. Mr Justice Holmes, in urging tolerance of under-inclusive classifications, stated that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched (Missouri, Kansas & Texas Railway Co. of Texas v. May, 1904 SCC OnLine US SC 118: 48 L Ed 971: 194 US 267, 269 (1904)].

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64. Laws regulating economic activity would be viewed differently from laws which touch and concern freedom of speech and religion, voting, procreation, rights with respect to criminal procedure, etc. The prominence given to the equal protection clause in many modern opinions and

decisions in America all show that the Court feels less constrained to give judicial deference to legislative judgment in the field of human and civil rights than in that of economic Regulation and that it is making a vigorous use of the equal protection clause to strike down legislative action in the area of fundamental human rights. / See "Developments Equal Protection", 32 Harv Law Rev 1065, 1127.]

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65. The question whether, under Article 14, a classification is reasonable or unreasonable must, in the ultimate analysis depend upon the judicial approach to the problem. The great divide in this area lies in the difference between emphasising the actualities or the abstractions of legislation. The more complicated society becomes, the greater the diversity of its problems and the more does legislation direct itself to the diversities.

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66. That the 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 adaption of remedies cannot be required, that judgment is largely a prophecy based on meagre and uninterpreted experience, should stand as reminder that in this area the Court does not take the equal protection requirement in a pedagogic manner". | See "General Theory of Law and State", p. 161.]

The same idea was echoed in Ajoy Kumar Banerjee v. Union of India (Ajoy Kumar Banerjee v. Union of India, (1984) 3 SCC 127: 1984 SCC (L&S) 355: (1984) 3 SCR 252]: (SCC pp. 160-61, para 54)

> "54.... Article 14 does not prevent legislature from introducing a reform i.e. by applying the legislation to some institutions or objects or areas only according to the exigency of the situation and further classification of selection can be sustained on historical reasons or reasons of administrative exigency or piecemeal method of introducing reforms. The law need not apply to all the persons in the sense of having a universal application to all persons. A law can be sustained if it deals equally with the people of well-defined class- employees of insurance companies as such and such a law is not open to the charge of denial of equal

> protection on the ground that it had no application to other persons."

74. Likewise, Javed v. State of Haryana (Javed v. State of Haryana, (2003) 8 SCC 369: 2004 SCC (L&S) 561 observed that there is no constitutional compulsion that a law or policy should be implemented all at once (SCC p. 383, para 16)

> "16. A uniform policy may be devised by the Centre or by a State. However, there is no constitutional requirement that any such policy must be implemented at one go. Policies are capable of being implemented in a phased manner. More so, when the policies have far-reaching implications and are dynamic in nature, their implementation in a phased manner is welcome for it receives gradual willing acceptance and invites lesser resistance."

76. This Court had also observed in State of M.P. v. Nandlal Jaiswal (State of M.P. v. Nandlal Jaiswal, (1986) 4 SCC 566: (1987) 1 SCR 1] that "in complex economic matters every decision is necessarily empiric, and it is based on experimentation" and that the Court, while considering the validity of executive action relating to economic matters grant a certain

measure of freedom or "play in the joints" to the executive". The Court crucially emphasised that: (SCC p. 606, para 34)

> "34. The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide."

77. In R.K. Garg (R.K. Garg v. Union of India, (1981) 4 SCC 675] this Court similarly spelt out the circumscribed role that the court has, in considering the validity or constitutionality of fiscal laws, or economic measures, stating that "the court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved". Likewise, in Aashirwad Films v. Union of India (Aashirwad Films v. Union of India, (2007) 6 SCC 624) this Court observed:

> "66.... The power of the legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways.

> Even so, large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the court will be reluctant and perhaps ill-equipped to investigate." (Ed.: As observed in Union of India v. Nitdip Textile Process, (2012) 1 SCC 226 at p. 254, para 66.1”

120. Learned Additional Solicitor General Mr. Vyas further submitted that the entire premise of the arguments of the petitioners seem to stem from a misconception that ITC is a matter of entitlement, a vested right and consequentially right to refund of ITC is also vested right, indefeasible or constitutional right. It was submitted that recently, the Hon'ble Apex Court in series of decisions has held otherwise holding that right to ITC is neither a vested right, in fact it is in nature of

benefit/concession. It was further submitted that the right to refund of ITC stems from the main right to ITC, hence is an ancillary right. It was submitted that in case of **ALD Automotive Pvt. Ltd. v. CTO** reported in [2018] 58 GSTR 468 (SC), Apex Court has observed as under :-

> "32. The input credit is in nature of benefit/concession extended to dealer under the statutory scheme. The concession can be received by the beneficiary only as per the scheme of the Statute. Reference is made to judgment of this Court in Godrej and Boyce Mfg. Co. Pvt. Ltd. and Others v. Commissioner of Sales Tax and Others, (1992) 3 SCC 624. Rules 41 and 42 of Bombay Sales Tax Rules, 1959 provided for the set off of the purchase tax. This Court held that Rule making authority can provide curtailment while extending the concession. In paragraph 9 of the judgment, following has been laid down: -
>
> > "9... In law (apart from Rules 41 and 41-A) the appellant has no legal right to claim set-off of the purchase tax paid by him on his purchases within

the State from out of the sales tax payable by him on the sale of the goods manufactured by him. It is only by virtue of the said Rules - which, as stated above, are conceived mainly in the interest of public - that he is entitled to such set-off. It is really a concession and an indulgence. More particularly, where the manufactured goods are not sold within the State of Maharashtra but are despatched to out-State branches and agents and sold there, no sales tax can be or is levied by the State of Maharashtra. The State of Maharashtra gets nothing in respect of such sales effected outside the State. In respect of such sales, the rule-making authority could well have denied the benefit of set-off. But it chose to be generous and has extended the said benefit to such out-State sales as well, subject, however to deduction of one per cent of the sale price of such goods sent out of the State and sold there. We fail to understand how a valid grievance can be made in respect of such deduction when the very extension of the

> benefit of set-off is itself a boon or a concession. It was open to the rule-making authority to provide for a small abridgement or curtailment while extending a concession. Viewed from this angle, the argument that providing for such deduction amounts to levy of tax either on purchases of raw material effected outside the State or on sale of manufactured goods effected outside the State of Maharashtra appears to be beside the point and is unacceptable. So is the argument about apportioning the sale-price with reference to the proportion in which raw material was purchased within and outside the State."

33. A Three-Judge Bench in (2005) 2 SCC 129, India Agencies (Regd.), Bangalore v. Additional Commissioner of Commercial Taxes, Bangalore had occasion to consider Rule 6(b)(ii) of Central Sales Tax (Karnataka) Rules, 1957, which requires furnishing original Form-C to claim concessional rate of tax under Section 8(1). This Court held that the requirement under the Rule is mandatory and without producing the specified documents, dealers cannot claim the benefits.

Following was laid down in paragraph 13: -

> "13.....Under Rule 6(b) (ii) of the Karnataka Rules, the State Government has prescribed the procedures to be followed and the documents to be produced for claiming concessional rate of tax under Section 8(4) of the Central Sales Tax Act. Thus, the dealer has to strictly follow the procedure and Rule 6(b) (ii) and produce the relevant materials required under the said Rule. Without producing the specified documents as prescribed thereunder a dealer cannot claim the benefits provided under Section 8 of the Act. Therefore, we are of the opinion that the requirements contained in Rule 6(b) (ii) of the Central Sales Tax (Karnataka) Rules, 1957 are mandatory.....

34. This court had occasion to consider the Karnataka Value Added Tax Act, 2013 in State of Karnataka v. M.K. Agro Tech.(P) Ltd., (2017) 16 SCC 210 = 2017 (6) G.S.T.L. 125 (S.C.). This Court held that it is a settled proposition of law that taxing statute are to be interpreted literally and further it is in the

domain of the legislature as to how much tax credit is to be given under what circumstances. Following was stated in paragraph 32: -

> "32. Fourthly, the entire scheme of the KVAT Act is to be kept in mind and Section 17 is to be applied in that context. Sunflower oil cake is subject to input tax. The legislature, however, has incorporated the provision, in the form of Section 10, to give tax credit in respect of such goods which are used as inputs/raw material for manufacturing other goods. Rationale behind the same is simple. When the finished product, after manufacture, is sold, VAT would be again payable thereon. This VAT is payable on the price at which such goods are sold, costing whereof is done keeping in view the expenses involved in the manufacture of such goods plus the profits which the manufacturer intends to earn. Insofar as costing is concerned, element of expenses incurred on raw material would be included. In this manner, when the final product is sold and the VAT paid, component of raw material would be included

> again. Keeping in view this objective, the legislature has intended to give tax credit to some extent. However, how much tax credit is to be given and under what circumstances, is the domain of the legislature and the courts are not to tinker with the same."

35. The judgment on which Learned Advocate General of Tamil Nadu had placed much reliance i.e. Jayam and Company v. Assistant Commissioner and Another, (2016) 15 SCC 125, is the judgment which is relevant for present case. In the above case, this Court had occasion to interpret provisions of Tamil Nadu Value Added Tax Act, [2006], Section 19(20), Section 3(2) and Section 3(3). Validity of Section 19(20) was under challenge in the said case. This Court after noticing the scheme under Section 19 noticed following aspects in paragraph 11:-

> "11. From the aforesaid scheme of Section 19 following significant aspects emerge:
>
> > (a) ITC is a form of concession provided by the legislature. It is not admissible to all kinds of sales and certain

> specified sales are specifically excluded.
>
> (b) Concession of ITC is available on certain conditions mentioned in this section.
>
> (c) One of the most important condition is that in order to enable the dealer to claim ITC it has to produce original tax invoice, completed in all respect, evidencing the amount of input tax."

36. This Court further held that it is a trite law that whenever concession is given by a statute the conditions thereof are to be strictly complied with in order to avail such concession. In paragraph 12, following has been laid down

> "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 such concession. Thus, it is not the right of the "dealers" to get the benefit of ITC but it is a concession granted by virtue of Section 19. As a fortiori, 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 dehors 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."

37. The Constitutional validity of Section 19(20) was upheld. The above decision is a clear authority with proposition that Input Tax Credit is admissible only as per conditions enumerated under Section 19 of the Tamil Nadu Value Added Tax Act, (2006). The interpretation put up by this

> Court on Section 3(2) and 3(3) and Section 19(2) is fully attracted while considering the same provisions of Section 3(2) and 3(3) and provision of Section 19(11) of the Act. The Statutory scheme delineated by Section 19(11) neither can be said to be arbitrary nor can be said to violate the right guaranteed to the dealer under Article 19(1)(g) of the Constitution. We thus do not find any infirmity in the judgment of the High Court upholding the validity of Section 19(11) of the Act. Both the issues are answered accordingly."

121. It was submitted that this view finds support in other decisions of the Hon'ble Apex Court as under:-

(i) **TVS Motor Co. v. State of Tamil Nadu** reported in [2018] 59 GSTR 1 (SC).

(ii) **State of Karnataka v. M.K. Agro Tech. (P) Ltd.**, reported in (2017) 16 SCC 210 (SC).

(iii) **Jayam & Co. v. Asstt. Commissioner** reported in [2016] 96 VST 1 (SC).

(iv) **Godrej & Boyce Mfg. Co. (P.) Ltd. v. CST**, reported in (1992) 3 SCC 624.

122. In support of submission that right to refund of input tax credit is not a constitutional right and it is only a matter of statutory prescription, reliance was placed on the decision in case of **Union of India v. VKC Footsteps (India) (P) Ltd.**, reported in (2022) 2 SCC 603, wherein Hon'ble Apex Court held as under:

> "99. We must be cognizant of the fact that no constitutional right is being asserted to claim a refund, as there cannot be. Refund is a matter of a statutory prescription. Parliament was within its legislative authority in determining whether refunds should be allowed of unutilised ITC tracing its origin

> both to input goods and input services or, as it has legislated, input goods alone. By its clear stipulation that a refund would be admissible only where the unutilised ITC has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies, Parliament has confined the refund in the manner which we have described above. While recognising an entitlement to refund, it is open to the legislature to define the circumstances in which a refund can be claimed. The proviso to Section 54(3) is not a condition of eligibility (as the assessees' the counsel submitted) but a restriction which must govern the grant of refund under Section 54(3). We, therefore, accept the submission which has been urged by Mr N. Venkataraman, learned ASG."

123. Learned Additional Solicitor General Mr. Vyas submitted that the argument of petitioners are mainly canvassed on a premise that ITC is matter of entitlement and that right to refund of ITC is vested right, therefore curtailment of such right under Rule 96(10) of CGST Rules is ultra

vires. It was submitted that as demonstrated herein above, the entire premise of the argument is faulty because when the foundational plinths of facts are faulty, entire structure is bound to fall.

124. Learned Additional Solicitor General thereafter submitted that contention of the petitioners that a classification has been created between the exporters who are claiming benefits under various schemes like AA, Merchant Exporters etc. and regular exporters under Rule 96(1)is concerned, such classification need not meet the test of scientific precision. It was submitted that the exporters are still able to utilise the ITC and in fact also claim refund of the same through another mode, hence, the benefit is also not as such curtailed. It was therefore submitted

that mode, manner and time period as to when such benefit/concession can be conferred is an exclusive domain under the rule making power of the Government on recommendation of GST Council.

125. It was submitted that in the case of **Union of India v. VKC Footsteps (India) (P) Ltd.**, reported in (2022) 2 SCC 603, issue at hand was Rule 89(5) of CGST Rules which prescribes a formula for computation of ITC to ascertain the maximum eligible refund amount. This rule was amended with a prospective effect in April 2018 which eliminated the component of input services from the formula, resultantly, this action bereaved several taxpayers who found themselves incapable of availing refund for unutilised ITC in case of input services. It was submitted

that the mainstay of this issue pertained to the distinction between input goods and input services in the first place. The case of the Revenue was that goods and services not only differ on the constitutional level itself but input goods and input services are also defined separately in the GST Act, thereby highlighting the inherent distinction and treating them at par is not conceivable owing to the difference in the tax rates, benefits, exemptions and other relevant policies since refund is a form of exemption, it must receive a literal interpretation and should not have its compass laxly widened. On the other hand, it was contended by the assessees that there must exist a reasonable nexus with the object sought to be achieved, in order

to lawfully discriminate between the two, such a differential treatment may be justified for the reason of revenue harvesting, however, that does not find a place as the bone of contention was that where on one hand, goods and services are conferred an equal treatment so far as levy is concerned, their prejudicial treatment for the purpose of refund is rather inequitable.

126. It was submitted that apropos this issue, the Court held that Parliament holds the power to exercise this latitude, which is not constricted to merely revenue harvesting purposes and expressed disapproval of the discriminatory treatment being unfair as unfairness and inequality arise in situations wherein equals are treated unequally and unequals

are treated equally. It was observed that the said case concerned with two different species altogether which were brought under the same pool only for the purpose of ITC utilisation with there being no constitutional or statutory guarantee of refund, it was held that such classifications can justifiably exist in tax legislation.

127. It was submitted that the same analogy applies in the case on hand. In the present case, the two different classes of exporters are in existence, one that claim benefits of procuring duty free raw material or at concessional rate under specified notifications and other exporters which cannot be said to give the treatment of equals being treated unequally.

128. It was submitted that after **VKC Footsteps**(supra), the Hon'ble Apex Court in case of **Union of India v. Cosmo Films Ltd.**, reported in (2023) 9 SCC 244 once again had the occasion to consider such issue on pre import exemption, where it was observed as under:

> 78. The object behind imposing the "pre-import condition" is discernible from Para 4.03 of FTP and Annexure 4-J of the HBP; that only few articles were enumerated when FTP was published, is no ground for the exporters to complain that other articles could not be included for the purpose of "pre-import condition"; as held earlier, that is the import of Para 4.03(i). The numerous schemes in FTP are to maintain an equilibrium between exporters' claims, on the one hand and on the other hand, to preserve the Revenue's interests. Here, what is involved is exemption and postponement of exemption of IGST, a new levy altogether, whose mechanism was being worked out and evolved, for the first time. The plea of

> impossibility to fulfil "pre-import conditions" under old AAs was made, suggesting that the notifications retrospectively mandated new conditions. The exporter respondents' argument that there is no rationale for differential treatment of BCD and IGST under AA scheme is without merit. BCD is a customs levy at the point of import. At that stage, there is no question of credit. On the other hand, IGST is levied at multiple points (including at the stage of import) and input credit gets into the stream, till the point of end user. As a result, there is justification for a separate treatment of the two levies. IGST is levied under the IGST Act, 2017 and is collected, for convenience, at the customs point through the machinery under the Customs Act, 1962. The impugned notifications, therefore, cannot be faulted for arbitrariness or under classification."

129. It was therefore submitted by learned Additional Solicitor General Mr. Vyas that Rule 96(10) of the CGST Rules may not be held as ultra vires to provision of section 54 of the GST Act read with

section 16 of the IGST Act.

OMISSION OF RULE 96(10) BY NOTIFICATION NO. 20/2024 DATED 8 TH OCTOBER,2024

130. Civil Application (For Orders)No.1 of 2024 in Special Civil Application No.22519 of 2019 was filed after this group of matters were reserved for judgment vide order dated 19.09.2024 in view of amendment made vide Notification No.20/2024- Cental Tax, dated 8.10.2024 issued by the Ministry of Finance (Department of Revenue) (Central Board of Indirect Taxes and Customs) omitting Rule 96(10) of the GST Rules, 2017. Relevant extract from the said Notification read as under:

"NOTIFICATION
No. 20/2024 – Central Tax

New Delhi, the 8th October, 2024

G.S.R... (E). –In exercise of the powers conferred by section 164 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, hereby makes the following rules further to amend the Central Goods and Services Tax Rules, 2017, namely:

1. (1) These rules may be called the Central Goods and Services Tax (Second Amendment) Rules, 2024.

(2) Save as otherwise provided in these rules, they shall come into force on the date of their publication in the Official Gazette.

2. In the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the said rules), in rule 36, in sub-rule (3), after the words "suppression of facts", the words and figures "under section 74" shall be inserted.

3. In the said rules, in rule 46, with effect from 1st day of November, 2024,–

(a) after clause (s), the second proviso shall be omitted;

(b) in the third proviso, for the words “Provided also that in the case of”, the words “Provided further that in the case of” shall be substituted;

4. In the said rules, after rule 47, the following rule shall be inserted with effect from the 1st day of November, 2024, namely:-

> “47A. Time limit for issuing tax invoice in cases where recipient is required to issue invoice.– Notwithstanding anything contained in rule 47, where an invoice referred to in rule 46 is required to be issued under clause (f) of sub-section (3) of section 31 by a registered person, who is liable to pay tax under sub-section (3) or sub-section (4) of section 9, he shall issue the said invoice within a period of thirty days from the date of receipt of the said supply of goods or services, or both, as the case may be.”.

5. In the said rules, , in rule 66, in sub-rule (1), after the word, letters and figure “FORM GSTR-7”, the words “, on or before the tenth day of the month succeeding the calendar month,” shall be inserted with effect from the 1 st day of November, 2024.

6. In the said rules, in rule 86, in sub-rule (4B), in clause (b), the words, brackets and figures “in contravention of sub-rule (10) of rule 96,” shall be omitted.

7. In the said rules, in rule 88B, in sub-rule (1), after the word and figures “or section 74”, the words, figures and letter “or section 74A” shall be inserted with effect from the 1st day of November, 2024.

8. In the said rules, in rule 88D, in sub-rule (3), after the words and figures “or section 74”, the words, figures and letter “or section 74A” shall be inserted with effect from the 1st day of November, 2024.

9. In the said rules, in rule 89,–

(a) in sub-rule (4),–

(i) in clause (B), the words, brackets, figures and letters “other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both” shall be omitted;

(ii) in clause (C), the words, brackets, figures and letters “, other than the turnover of supplies in respect of which refund is claimed under sub- rules (4A) or (4B) or both” shall be omitted;

(iii) in clause (E), for the long line beginning with the word “excluding” and ending with the words “during the relevant period”, the words “excluding the value of exempt supplies other than zero-rated supplies during the relevant period” shall be substituted;

(b) sub-rules (4A) and (4B) shall be omitted;

(c) in sub-rule (5), in the Explanation, in clause (a), the words, brackets, figures and letters “ other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both” shall be omitted.

10.In the said rules, in rule 96, sub-rule (10) shall be omitted.”

131. In Civil Application No.1 of 2024 in Special Civil Application No.22519 of 2019, following prayers were made:

“A) That this Hon'ble Court may be pleased to take on record the documents submitted at Annexures-2 and 3 in respect of the cases reserved for judgment vide order dated 19.9.2024 (Annexure-"1" to this application);

(B) That this Hon'ble Court may be pleased to consider whether the cases reserved for judgment vide order dated 19.9.2024 ought to be heard further for taking into consideration the developments that have taken place after reserving the case for judgment, and for passing order/s that may be deemed fit and appropriate in this regard by this Hon'ble Court;

(C) That this Hon'ble Court may be pleased to pass any further order and issue any further direction that may be deemed fit and proper in the facts of the present case."

132. After hearing both the sides, following order was passed on 22.11.2024 recalling order dated 19.09.2024 and this group of matters was ordered to be re-notified:

"1. Heard learned advocate Mr.Paresh Dave for the applicants-original petitioners, learned advocate Mr.Siddharth Dave and learned advocate Mr.C.B. Gupta for the respective respondents.

2. It was submitted by learned advocate Mr.Dave for the applicants that after the order passed by this Court on 19th September, 2024 reserving the matter for judgment, GST Council in its 54th Meeting recommended to prospectively omit Rule 96(10), Rule 89(4A) and Rule 89(4B) from the CGST Rules, 2017. It was further submitted and pointed out that by Notification No.20/2024-Central Tax dated 08th October, 2024, Central Board of Indirect Taxes & Customs framed Central Goods & Service Tax (Second Amendment) Rules, 2024 and as per Rule 10, Rule 96(10) is omitted.
2.1 It was, therefore, submitted that both Minutes and the Notification may be taken on record and appropriate order may be passed for re-notifying the matters which are reserved for judgment.

3. Considering the above submissions, both Minutes of the GST Council as well as Notification No.20/2024-Central Tax dated 08th October, 2024 are ordered to be taken on record of Special Civil Application No.22519 of 2019 and in view of the subsequent development after 19th September, 2024, the order dated 19th September, 2024 is ordered to

> be recalled and the matter is ordered to be re-notified for further consideration on 19th December, 2024 before the regular Bench.
>
> 4. The application is accordingly disposed of."

133. Pursuant to the above development, the matters were argued by learned advocates for both the sides to submit that Notification No.20/2024 dated 8th October, 2024 would be applicable to all the pending matters before the Court. The contention of the petitioners was that Rule 96(10) having been omitted by the said Notification with effect from the date of issuance of Notification i.e. 8th October, 2024, matters which are pending before the Court would be governed by the Notification or in alternative the said notification would apply retrospectively.

134. Learned Senior Advocate Mr.V. Sridharan with learned advocate Mr. Anand Nainawati submitted that the provisions of section 6 of the General Clauses Act, 1897 could not be made applicable to repeal of the Rules.

135. Reliance was placed on the decision of Hon'ble Apex Court in case of **Rayala Corporation (P) Ltd. and M.R. Pratap v. Director of Enforcement, New Delhi** reported in (1969) 2 Supreme Court Cases 412 wherein the Hon'ble Apex Court in facts of the said case while considering omission of Rule 132-A of the Defence of India Rules, 1962 held that section 6 of the General Clauses Act cannot apply on the omission of Rule 132-A of the Defence of India Rules and applies when the repeal

is of the Central Act and Regulations and not of the Rules as under:

> “17. Reference was next to a decision of the Madhya Pradesh High Court in State of Madhya Pradesh V/s. Hiralal Sutwala, AIR 1959 Madh Pra 93, but, there again, the accused was sought to be prosecuted for an offence punishable under an Act on the repeal of which sec. 6 of the General Clauses Act had been made applicable. In the case before us, sec. 6 of the General Clauses Act cannot obviously apply on the omission of Rule 132A of the D. I. Rs. for the two obvious reasons that sec. 6 only applies to repeals and not to omission, and applies when the repeal is of a Central Act or Regulation and not by a Rule. If sec. 6 of the General Clauses Act had been applied, no doubt, this complaint against the two accused for the offence punishable under R. 132A of the D. I. Rs. could have been instituted even after the repeal of that rule.
>
> 18. The last case relied upon is J. K. Gas Plant Manufacturing Co. (Rampur) Ltd. V/s. King Emperor, 1947 FCR 141 . In that case, the Federal Court had to deal with the effect of sub-sec. (4) of sec. 1

of the Defence of India Act, 1939 and the Ordinance No. XII of 1946 which were also considered by the Allahabad High Court in the case of Seth Jugmender Das (supra). After quoting the amended sub-sec. (4) of sec. 1 of the Defence of India Act, the Court held:-

> "The express insertion of these saving clauses was no doubt due to a belated realisation that the provisions of sec. 6 of the General Clauses Act (X of 1897) apply only to repealed statutes and not to expiring statutes, and that the general rule in regard to the expiration of the temporary statute is that "unless it contains some special provision to the contrary, after a temporary Act has expired, no proceedings can be taken upon it and it ceases to have any further effect. Therefore, offences committed against temporary Acts must be prosecuted and punished before the Act expires and as soon as the Act expires any proceedings which are being taken against a person will ipso facto terminate."

The Court cited with approval the

decision in the case of 1947 AC 362 (supra), and held that, in view of sec. 1 (4) of the Defence of India Act, 1939, as amended by Ordinance No. XII of 1946, the prosecution for a conviction for an offence committed when the Defence of India Act was in force, was valid even after the Defence of India Act had ceased to be in force. That case is, however, distinguishable from the case before us in two respects. In that case, the prosecution had been started before the Defence of India Act ceased to be in force and, secondly, the language introduced in the amended sub-sec. (4) of sec. 1 of the Act had the effect of making applicable the principles laid down in sec. 6 of the General Clauses Act, so that a legal proceeding could be instituted even after the repeal of the Act in respect of an offence committed during the time when the Act was in force. As we have indicated earlier, the notification of the Ministry of Home Affairs omitting Rule 132-A of the D. I. Rs. did not make any such provision similar to that contained in sec. 6 of the General Clauses Act. Consequently, it is clear that, after the omission of Rule 132A of the D. I. Rs., no prosecution could be instituted even in respect of an act which

was an offence when that Rule was in force.

19. In this connection, Mr. Desai pointed out to us that, simultaneously with the omission of R. 132-A of the D. I. Rs., sec. 4 (1) of the Act was amended so as to bring the prohibition contained in Rule 132A (2) u/s. 4 (1) of the Act. He urged that, from this simultaneous action taken, it should be presumed that there was no intention of the Legislature that acts, which were offences punishable under R. 132A of the D. I. Rs., should go unpunished after the omission of that rule. It, however, appears that when sec. 4 (1) of the Act was amended the Legislature did not make any provision that an offence previously committed under Rule 132A of the D. I. Rs., would continue to remain punishable as an offence of contravention of sec. 4 (1) of the Act, nor was any provision made permitting operation of Rule 132A itself so as to permit institution of prosecutions in respect of such offences. The consequence is that the present complaint is incompetent even in respect of the offence under Rule 132A (4). This is the reason why we hold that this was an appropriate case where the High Court should have allowed

> the applications u/s. 561-A of the Code of Criminal Procedure and should have quashed the proceedings on this complaint."

136. It was therefore, submitted that omission of Rule 96(10) by Notification No.20/2024 would be applicable to all pending cases as the same may not be applicable retrospectively to the cases which have already achieved finality.

137. Learned Senior Advocate Mr. Sridharan further submitted that effect of repealing the Rules without a saving clause would be applicable to all the pending cases. In support of his submission, reliance was placed on the decision of Hon'ble Apex Court in case of **Kolhapur Canesugar Works Ltd. and another v. Union of India and others** reported in (2000) 2 Supreme Court

Cases 536, wherein Hon'ble Apex Court considered the effect of repeal and deletion of any statute or a provision unless covered by section 6(1) of the General Clauses Act or a Saving provision and held that such repeal or deletion obliterates it from the statute book and the proceedings pending thereunder would stand discontinued. In the facts of the said case, the Apex Court considered the effect of applicability of Rule 10 and Rule 10A of the Central Excise Rules, 1944 which stood deleted and new Rule 10 was introduced by Notification dated 06.08.1977 and the effect of such deletion and introduction of new provision was that the old rules under which the show cause notice was issued ceased to exist and thereafter further proceedings were

without jurisdiction since Notification dated 06.08.1977 did not contain any Savings clause. It was therefore, held that the proceedings for recovery of erroneously granted rebate which had been initiated under Rules 10/10A prior to amendment but was pending on that date stood lapsed.

138. It was therefore, submitted that the proceedings initiated by the respondents under Rule 96(10) would lapse in view of the pendency of these petitions.

139. It was further submitted that an appeal is continuation of original proceedings as held by Hon'ble Supreme Court in case of **The State of Kerala v. K.M. Charia Abdulla and Co.** reported in

AIR 1965 Supreme Court 1585. The Hon'ble Apex Court in para no.5 of the said judgment held that

> "...An appeal is a continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitations prescribed."

140. It was therefore, submitted that these petitions wherein vires of Rule 96(10) of the CGST Rules are challenged along with adjudication orders under Articles 226 and 227 of the Constitution of India, have to be considered as a continuation of the original proceedings. It was further submitted that when a decree or order is passed by an inferior Court, Tribunal or authority was subjected to remedy available under the law before a superior forum then its finality is put in

jeopardy. Reliance was placed on the decision of Hon'ble Supreme Court in case of **Kunhayammed and others v. State of Kerala and another** reported in (2000) 6 Supreme Court Cases 359, wherein the Hon'ble Apex Court considered the Doctrine of Merger holding that it is merely a common law doctrine based on principles of propriety in the hierarchy of judicial system which postulates merger of the subordinate forum's decision in the decision of the appellate or revisional forum modifying, reversing or affirming such decision and thereafter only the latter decision exists in the eye of law. However, it was further held that doctrine of merger is not of universal or unlimited application but its applicability has to be determined keeping in view the nature

of jurisdiction exercised by the superior forum and the content or subject matter of challenge.

141. Reliance was placed on the decision of Hon'ble Apex Court in case of **Union of India and others v. West Coast Paper Mills Ltd. and another** reported in (2004) 2 Supreme Court Cases 747, wherein Hon'ble Apex Court while dealing with section 46-A of the Railways Act, 1890 and powers of the Supreme Court under Article 136 of the Constitution of India held that the judgment of the Tribunal becomes wide open once Special leave is granted and appeal is admitted by the Supreme Court so as to go into both the questions of facts as well as law and in such an event, the correctness of the judgment of the

Tribunal is in jeopardy. It was therefore, submitted that when the orders passed by the respondents are challenged before this Court, correctness of the same would be in jeopardy.

142. Referring to the Notification No.20/2024, learned Senior Advocate Mr. Sridharan submitted that clause 10 of the Notification only states that Rule 96(10) shall be omitted. It was therefore, submitted that an “omission” would amount to a “repeal” as “omission” and “repeal” are synonyms and therefore, not relevant to the present controversy. In support of his submission, reliance was placed on the decision in case of **Fibre Boards Private Limited, Bangalore v. Commissioner of Income Tax, Bangalore** reported in (2015)

10 Supreme Court Cases 333 to submit that omission of a provision would amount to repeal or implied repeal or not has to be determined by the Court as per the provisions of sections 6-A and 24 of the General Clauses Act. The Hon’ble Apex Court has held that repeal may take any form and so long as a statute or part of it is obliterated, such obliteration would be covered by the expression “repeal” and hence even an implied repeal of a statute would fall within the expression “repeal” in section 6-A of the General Clauses Act which would show that a repeal can be by way of an express omission and therefore, the word “repeal” in both sections 6 and 24 of the General Clauses Act would include repeals by express omission.

143. Learned Senior Advocate Mr. Sridharan therefore, submitted that effect of repeal and re-enactment of a statute would have to be considered for determination of the liability incurred under the repealed Act if continued and penalty proceedings in respect thereof if valid and mere absence of saving clause would not be decisive as held by Hon'ble Apex Court in case of **Gammon India Ltd v. Special Chief Secretary and others** reported in (2006) 3 Supreme Court Cases 354.

144. Learned Senior Advocate Mr. Sridharan submitted that the Notifications are also issued with a specific saving clause by the CBIC, reference was made to Goods and Service Tax Appellate Tribunal (Appointment and Conditions of Service of

President and Members), Rules 2023 and various notifications under the GST Act where specific saving clause was mentioned. It was further submitted that when the legislature intended for giving effect to the amendment etc. of Rules, Notifications, Orders then such specific provisions are incorporated. Reference was made to section 38A of the Central Excise Act, 1944 and section 159A of the Customs Act, 1962 which specifically provides that unless a different intention appears, amendment, repeal, supersession or rescinding shall not affect the previous operation of any rule. Reference was made to Notification No. 20/2017 dated 30.06.2017 for the Cenvat Credit Rules, 2004 which specifically shows that such rules were framed in supersession of the

Cenvat Credit Rules, 2004, except in respect of things done or omitted to be done before such supersession. It was therefore, submitted that in Notification No.20/2024, there is no exception to the things done or omitted to be done before omission of Rule 96(10) of the CGST Rules.

145. Learned Senior Advocate Mr. Sridharan submitted that during the pendency of these matters, Rule 96(10) has been omitted by Notification No.20/2024 and such omission would be applicable to the pending matters. In support of his submission reliance was placed on the following decisions:

1) **Mathew M. Thomas and others v. Commissioner of Income Tax** reported in

(1999) 2 Supreme Court Cases 543.

2) **Mohan Raj v. Dimbeswari Saikia and another** reported in (2007) 15 Supreme Court Cases 115.

3) **Keshavan Madhava Menon v. State of Bombay** reported in 1951 Supreme Court Cases 16.

146. It was therefore, submitted that pending these petitions being judicial proceedings when Rule 96(10) is omitted, it would be covered by such omission as proceedings have not reached finality.

147. Learned advocate Mr. Paresh M. Dave appearing for the petitioners submitted that GST Council recommended for omission

of Rule 96(10) prospectively along with Rule 89(4A) and Rule 89(4B) of the CGST Rules in its 54th meeting, but it was submitted that date of publication would not be relevant for applicability of the omission of Rule 96(10) as such omission is curative and remedial in nature and hence it would be applicable with retrospective effect as if it never existed.

148. Learned advocate Mr. Paresh Dave referred to the legislative history of enactment of Rule 96(10) to submit that CGST Rules have been brought in force on 1st July, 2017 and at that point of time Rule 96 had only 8 sub-rules and sub-rule (10) was not in existence. It was submitted that sub-rule(10) of Rule 96

came to be inserted on 9th October, 2018 which continued in force till 8th October, 2024 when Notification No.20/2024 was issued as per the recommendation of the GST Council in its 54th meeting to omit Rule 96(10) from the CGST Rules, 2017 prospectively. It was therefore, submitted that question is whether the restriction of sub-rule(10) stands removed only from 8th October, 2024 or such omission was from the date of enactment of this provision and no restriction would be in operation from 8th October, 2018 till 7th October, 2024.

149. It was submitted that recommendation of the GST Council or the date of publication of Notification No.20/2024 are not relevant for determining the date from which omission would be effective as

nature of amendment is clarificatory and curative. Reliance was placed on the decision in case of **CIT-I Ahmedabad v. Gold Coin Health Food Pvt. Ltd.** reported in (2008) 9 SCC 622 wherein the Hon'ble Apex Court has discussed the law as to the nature of amendment whether clarificatory or declaratory in absence of any expressed or implied declaration in statute and the date from which amendment is made operative would not conclusively decide the issue and the Court has to examine the scheme of the statute prior to amendment and subsequent to the amendment to determine whether the amendment is clarificatory or substantive. It was therefore, submitted that the circumstances under which the amendment was brought and consequences of the

amendment will have to be taken care of while deciding such a question.

150. It was submitted that Rule 96(10) of the CGST Rules was causing difficulty for the exporters in claiming export benefit of refund as the said rule referred to four exemption notifications which are still in operation and there is no amendment in the said notifications even after omission of Rule 96(10) and the situation remains the same as regards the procurement of inputs for export transactions and also about exporting the goods on payment of tax under claim of refund or export without tax under bond/LUT and claiming refund of unutilised ITC of input transactions attributable to the exports. It was submitted that the

contention raised on behalf of the Revenue justifying the restriction of sub-rule (10) of Rule 96 has been that the exporters were taking double benefit firstly, by procuring certain inputs under exemption without payment of tax and secondly, by claiming refund of tax paid on other inputs by utilizing credit of such tax for paying IGST on the exported goods by alleging that exporters were encashing Input Tax Credit of other inputs.

151. It was therefore, submitted that even if the contention of the Revenue is valid, then the same situation exists even after omission of Rule 96(10) by Notification No.20/2024 as four exemption notifications are still in operation without any amendment. It was submitted that GST

Council in its 54th meeting , has stated in the minutes that Rule 96(10) of the CGST Rules created difficulty in respect of refund on exports and therefore, its omission was recommended to remove such hardship and for simplifying and expediting the procedure for refunds.

152. It was therefore, submitted that existence of Rule 96(10) of the CGST Rules was a case of hardship and omission of such rule was for removing such hardship and hence amendment can not be prospective because its object is to remove the hardship and difficulties faced by the assessee, and hence it is curative and remedial.

153. It was submitted that a curative and

remedial amendment should be applied retrospectively i.e. from the date of insertion of main provision and not from the date of amendment or enforcement or omission. In support of such submission, reliance was placed on the following decisions:

1) **CIT, Kolkatta v. Calcutta Export Company** reported in (2018) 16 SCC 686.

2) **University of Kerala and others v. Merlin J.N. and another** reported in (2022) 9 SCC 389.

154. It was further submitted that deletion of a provision for removing ambiguity is curative in nature and impliedly would have retrospective effect as object of deletion of Rule 96(10) was to give benefit to the assessee and hence such

deletion was applicable from the date of enactment of the deleted provision. Reliance was placed on the decision of Uttarakhand High Court in case of **CIT v. Desh Rakshak Aushadhalaya Ltd.** reported in MANU/UC/0044/2008.

155. It was submitted that as the omission of Rule 96(10) of the CGST Rules is required to be held as curative in nature or remedial in nature, it should be read as forming part of the main provision from its inception as if it never existed. Reliance was placed on the following decisions:

1) **Allied Motors (P) Ltd. v. Commissioner of Income Tax, Delhi** reported in (1997) 3 SCC 472.

2) **Commissioner of Income Tax v. Alom Extrusions Ltd.** reported in (2010) 1 SCC 489.

3) **ITO v. Dhan Sai Srivas** reported in MANU/CG/0071/2009 of Chhatisgarh High Court.

156. Learned advocate Mr. Dave submitted that amendment made for removal of or remedying unintended or inadvertent error of withdrawing any benefit is held to be clarificatory or curative in nature and such amendment would cover the intervening period also. It was therefore, submitted that omission of Rule 96(10) is required to be considered for removal of hardship to the assessee being curative in nature. Reliance was placed on the following decisions:

1) **Shree Renuka Sugar Ltd. v. Union of India** reported in 2018 (360) ELT 483 (Guj.)of this Court.

2) **W.P.I.L. Ltd. Commissioner of Central Excise, Meerut, U.P.** reported in 2005(181) ELT 359(SC).

3) **Ralson (India) Ltd. v. Commissioner of Central Excise, Chandigarh** reported in 2015 (3419) ELT 234 (SC).

157. Learned advocate Mr. Dave further submitted that techniques are not unknown where an amendment or a statute is considered either clarificatory, declaratory or even curative. It was submitted that such interpretative techniques have developed over a period of

time to ensure that the intention of framing a legislation was given its full effect and curative statutes are by their very nature intended to operate upon and affect past transactions. Reliance was placed on the decision of Tripura High Court in case of **Biswajit Palit v. State of Tripura** reported in MANU/TR/0096/2020.

158. Learned advocate Mr. Dave submitted that Hon'ble Kerala High Court in case of **M/s. Sance Laboratories Private Limited and others v. Union of India and others** reported in 2024 (11) TMI 188 has held that Rule 96(10) of the CGST Rules is ultra vires the provisions of section 16 of the IGST Act as it is manifestly arbitrary as it produces absurd results not intended by the legislature.

159. Learned advocate Mr. Dave summarized his submissions that omission of sub-rule(10) of Rule 96 of the CGST Rules is curative in nature as it causes difficulty for exporters resulting in hardship for trade. It was submitted that such hardship cannot be allowed to operate for the intervening period from 9th October, 2018 to 7th October, 2024 and therefore, prayed that omission of Rule 96(10) may be considered to be remedial measure taken up the Central Government for curing anomaly and defect in refund sanctioning mechanism and therefore, such omission would be applicable from 9th October, 2018.

160. On the other hand, learned advocate Mr. Siddharth Dave appearing for the respondents on the issue of applicability

of Notification No.20/2024 to the pending matters regarding omission of Rule 96(10) of the CGST Rules, submitted that said omission would apply prospectively and not retrospectively as the said Notification has come into force with effect from the date of its publication in Official Gazette i.e. 8th October, 2024.

161. It was submitted that contention of the petitioners that omission of Sub-Rule (10) of Rule 96 of CGST Rules would have retrospective effect and all the pending proceedings would lapse, is contrary to the settled principle of law as the notification specifically prescribed the applicability or effect of the said amendment with specific date of publication in the Official Gazette.

162. It was submitted that as per the cardinal principle of construction, every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation and therefore, the Notification NO.20/2024 would have to be presumed to be prospective in absence of express terms or necessary implication for its retrospective applicability by the rule making authority.

163. It was submitted that GST Council, during its 54th meeting has recommended to omit Rule 96(10) of the CGST Rules prospectively along with other rules and accordingly, the Notification dated 8th October, 2024 was issued omitting Rule 96(10) in the CGST Rules.

164. It was further submitted that the GST Council is the expert apex body in the field of GST regime and therefore, there is no question of any presumption of legislative intention contrary to the said Notification which has been issued based on the recommendation of the GST Council with prospective effect.

165. It was further submitted that the petitioners have not challenged Notification No.20/2024 dated 8th October, 2024 by which Rule 96(10) stands omitted with prospective effect and therefore, in absence of any such challenge or in absence of any such specific pleadings, the petitioners cannot be allowed to contend contrary to the legal presumption

of prospective applicability of Notification dated 8th October, 2024.

166. It was submitted that unless there are words in a statute sufficient to show intention of legislature to affect existing rights or liabilities, it is deemed to be prospective only. It was submitted that where an issue arises whether a statute is prospective or retrospective, the Court has to keep in mind presumption of prospectivity articulated in legal maxim '*nova constitutio futuris formam imponere debet non praeteritis'* i.e. "a new law ought to regulate what is to follow, not the past". Reliance was placed on the decision of Hon'ble Apex Court in case of **Commissioner of Income Tax 5, Mumbai v. Essar Teleholdings Limited through its Manger**

reported in (2018)3 Supreme Court Cases 253.

167. It was submitted that as per the settled proposition, in absence of any such specific stipulation, the omission would apply prospectively to future transactions or events occurring after the omission and hence such omission of Rule 96(10) is presumed not to affect existing liabilities accrued before its omission and such omission would not impair or affect any action which has been taken in cognizance of or any rights / liabilities that were vested or accrued before the omission.

168. It was submitted that there is nothing on record to even remotely suggest the omission is in the nature of curative or

remedial and such contention of the petitioners is without any basis as also contrary to the recommendation of the GST Council.

169. It was therefore, submitted that while exercising writ jurisdiction, the Court may not mandate giving retrospective effect to a rule, which the rule making authority has not granted and hence, the submission of the petitioners to apply the Notification No. 20/2024 retrospectively is contrary to the settled legal position. In support of his submission, reliance was placed on the decision of Hon'ble Apex Court in case of **Zile Singh V. State of Haryana,** reported in (2004) 8 SCC 1 wherein the Hon'ble Apex Court while considering the retrospective action held that it is a cardinal principle of

construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. It was further held that rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations and the presumption against retrospective operation is not applicable to curative or declaratory statutes and four factors relevant in inferring necessary implication of retrospectivity of statute are stated i.e. i) general scope and purview of the statute; ii) the remedy sought to be applied; iii)the former state of the law; and iv) what it was the legislature contemplated. It was held that the rule against retrospectivity does not

extend to protect from the effect of a repeal, a privilege which did not amount to accrued right.

170. With respect to the contention of the petitioners of applicability of Section 6 of the General Clauses Act, it was submitted that such contention is also contrary to the settled principle of law as Section 6 of the General Clauses Act, would have no application in the facts of the present case where Rule 96(10) has been omitted as Section 6 of General Clauses Act, would apply to repeal and not to omission of a Central Act or Regulations and not of a Rule as has been held in case of **Rayala Corpon. (P) Ltd.** (supra).

171. It was submitted that in the facts of

the case, Revenue has already invoked its jurisdiction based on the Notification No.39/2018-CT dated 4th September, 2018 and has taken the cognizance based on the provision of Rule 96(10) as existed at the relevant point of time and hence, all the proceedings where the cognizance have been taken by the Revenue, would not be affected by the subsequent omission, which is specifically in prospective nature.

172. It was submitted that in this group of petitions, the petitioners have challenged the constitutional validity of insertion of the provision of Rule 96(10) of the CGST Rules which has been omitted by Notification No.20/2024 dated 8th October, 2024 and therefore, except the arguments on the aspect of constitutional validity of the insertion of Rule 96(10), in none

of the petitions, the Court has considered the merits of any of matter and the arguments are concluded only on the aspect of challenging constitutional validity of the Rule which can never be equated with the continuance of original proceedings as sought to be canvassed by the petitioners. It was therefore, submitted that in absence of any such specific pleadings, the petitioners are not entitled to any further relief as prayed for and the petitioners may be relegated to avail the efficacious alternative remedy, if at all the petitioners are aggrieved by the Show Cause Notice or order-in-original or any other action taken by the Revenue under Rule 96(10) of the CGST Rules.

173. It was further submitted that in absence of any challenge of the

prospectivity of the Notification No. 20/2024 and in absence of such pleadings, the petitioners are not entitled to contend contrary to the notification claiming its retrospective effect and hence such contention is not tenable in the eye of law.

REASONS AND ANALYSIS

174. Considering the submissions made by the learned advocates for both sides, the issues arising in this group of petitions, may be summarised as under:

1) Whether Notification No.20/2024 dated 8th October, 2024 whereby Rule 96(10) has been omitted with effect from the date of notification would be applicable retrospectively or not?

2) If answer to the above question is in the negative then whether the said notification would be applicable to all the pending litigation/proceedings or not?

3) If answer to the above question is in negative then

i) Whether Rule 96(10) as it existed, is ultra vires to Articles 14 and 19(1)(g) of the Constitution of India or not?

ii) Whether doctrine of proportionality and reasonableness is applicable while judging the validity of Rule 96(10) motive or not?

iii) Whether rational behind the applicability of Rule 96(10) is

arbitrary and discriminatory or not?

iv) Whether the exporters can be prevented to export goods under the rebate claim after paying duty on the ground of having double benefit under the Advance Authorisation License and refund of input tax credit or not?

v) Whether Rule 96(10) creates “class within class” of the exporters comprising of one class which do not import any goods using Advance Authorisation Scheme and the exporters who are importing goods utilising the said scheme?

vi) Whether refund of IGST can be denied even if only few items are being imported utilising Advance

Authorisation Scheme to manufacture the export goods?

vii) Whether Rule 96(10) is ultra vires to section 164 of the GST Act as the said Rule cannot be said to carry out the provisions of the Act and therefore, beyond the rule making power of the Government?

viii) Whether the condition imposed in Rule 96(10) to deny the refund of IGST paid on export goods for options exercised as per provisions of Section 16(3)(b) of the IGST Act is ultra vires to section 16(3) of the said Act or not?

ix) Whether expression “condition, safeguards and procedure” would permit

the rule making authority to prescribe "restriction" qua the class of persons to claim the refund in respect of entire export of goods which includes the goods manufactured without availing any benefit on the corresponding procurement of inputs?

175. Before considering the first issue of retrospective applicability of Notification No.20/2024 by which Rule 96(10) of CGST Rules is omitted with effect from 8th October,2024, it would be germane to refer to legislative history of Rule 96(10) of the CGST Rules.

i) The CGST Rules have come into existence with effect from 01.07.2017.

ii) Rule 96 falls within Chapter X for refund starting from Rule 89 to Rule 97A whereby the procedure is prescribed for claim of refund under the provisions of the GST Act.

iii) Rule 96 pertains to refund of integrated tax paid on goods or services exported out of India and provides the procedure for claim of refund of IGST.

iv) When Rule 96 was first made part of the Rules, it contained eight sub-rules.

v) Sub-rule (9) and sub-rule (10) of Rule 96 were inserted by the Central Goods and Services Tax (Amendment) Rules, 2018 (For short “the Rules, 2018”) with retrospective effect from 23.10.2017.

Thereafter, Sub-rule (10) was amended and substituted by Eighth Amendment and Eleventh Amendment of the Rules, 2018 with retrospective effect on 23.10.2017 and thereafter, Twelfth Amendment of Rules, 2018 was made with effect from 9.10.2018 and later on amended by the Central Goods and Services Tax (Third Amendment) Rules, 2020 with effect from 23.10.2017.

vi) After the aforesaid amendments, Rule 96(10) reads as under:

> “10) The persons claiming refund of integrated tax paid on exports of goods or services should not have-
>
> (a) received supplies on which the benefit of the Government of India, Ministry of Finance Notification No. 48/2017-Central Tax, dated the 18th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3,

Sub-section (1), vide number G.S.R. 1305(E), dated the 18th October, 2017 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme or Notification No. 40/2017-Central Tax (Rate), dated 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, section 3, sub-section (i), vide Number G.S.R. 1320(E), dated the 23rd October, 2017 or Notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, section 3, sub-section (1), vide Number G.S.R. 1321(E), dated the 23rd October, 2017 has been availed; or

(b) availed the benefit under Notification No. 78/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (1), vide number G.S.R. 1272(E), dated the 13th October, 2017 or Notification No. 79/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary. Part II, section 3, sub-section (t), vide Number G.S.R. 1299(E), dated the 13th October, 2017 except so far it relates to receipt of capital goods by such

person against Export Promotion Capital Goods Scheme."

176. On coming into force of the Rule 96(10), the refund claims of the petitioners for IGST paid on export of goods or services were denied even if the petitioners had utilised only a small portion of the inputs imported without payment of custom duty under Advance Authorisation License. Being aggrieved, the petitioners have challenged vires of Rule 96(10) in this group of petitions.

177. The GST Council in its 54th meeting recommended to omit Rule 96(10), Rule 89(4A) and Rule 89(4B) of the CGST Rules, 2017 prospectively to simplify and expedite the procedure for refund in respect of exports considering the

difficulties being faced by the exporters due to the restrictions in respect of refund on exports in cases where benefits of specified concessional/exemption notification is availed on the inputs.

178. Considering the recommendation of the GST Council, CBIC issued Notification No.20/2024-Central Tax dated 8th October, 2024 called as Central Goods and Services Tax (Second Amendment) Rules, 2024 (here-in-after referred to as “the Rules, 2024”)

179. Sub-rule (2) of Rule 1 of the said Notification provides that “save as otherwise provided in these rules, the Rules shall come into force on the date of their publication in the Official Gazette”.

180. Rule 10 of the said Notification reads as “In the said rules, in rule 96, sub-rule(10) shall be omitted.”

181. On perusal of the Central Goods and Services Tax (Second Amendment) Rules, 2024, it appears that whenever amendment in various rules prescribed therein is to come into effect from a particular date, such date is mentioned in rules. For example, Rule 5 of the said Rules prescribes as under:

> “In the said rules, in rule 66, in sub-rule (1), after the word, letters and figure “Form GSTR-7”, the words “,on or before the tenth day of the month succeeding the calendar month.” shall be inserted with effect from the 1st day of November, 2024.”

182. Similarly, in Rules 3, 4, 6, 7, 8, 11 and 12 of the said Rules,2024, it is stipulated that the said rules shall be

inserted with effect from 1st day of November, 2024. Therefore, except Rules 2, 9 and 10, effective date of applicability of amendment in various Rules of CGST Rules is provided whereas amendment in Rule 36(3), Rule 89 and Rule 96(10), no such effective date is provided. Therefore, as per Rule 1(2) of the Rules, 2024, such Rules comes into force on the date of publication in the Official Gazette i.e. 8th October, 2024 meaning thereby Rules 2, 9 and 10 of the Rules, 2024 would come into effect from 8th October, 2024.

183. In order to consider the contention raised on behalf of the petitioners that Rule 10 of Rules, 2024 whereby Rule 96(10) of the CGST Rules has been omitted, would

be applicable retrospectively as if such rule has never been in existence,it is required to be examined as to whether omission of Rule 96(10) was curative, and remedial or not and whether the date from which the amendment has been operative would decide the issue of applicability of Rule 96(10) from the said date or not.

184. The fact remains that Rule 96(10) of the CGST Rules has been recommended to be omitted by GST Council prospectively to remove the difficulties of the exporters in claiming refund of the IGST paid on export of goods on account of four exemption notifications from payment of duty for importation of the inputs utilised for manufacture of goods to be exported.

185. Sub-rule(2) of Rule 1 of the Rules, 2024 clearly stipulates that the rules save as otherwise provided in the said rules, shall come into effect on the date of the publication in the Official Gazette i.e 8th October, 2024.

186. Reliance placed by the petitioners on decision of Hon'ble Apex Court in case of **CIT-I Ahmedabad v. Gold Coin Health Food Pvt. Ltd.**(supra) to examine the circumstances under which the amendment was brought in existence and the consequences of the amendment will have to be taken care of while deciding the issue as to whether the amendment was clarificatory or substantive in nature and whether it will have retrospective effect

or it was not so.

187. In the book “Principles Of Statutory Interpretation” 14th Edition, 2015, Justice G. P. Singh , the learned author has stated about the position regarding retrospective operation of the statute as under:

> “The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES and approved by the Supreme Court: "For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word 'declared' as well as the word 'enacted'." But the

use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' or 'shall be deemed never to have included' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous." An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have

> retrospective effect and, therefore, if the principal Act was existing law when the constitution came into force, the amending Act also will be part of the existing law."

188. In his book "Maxwell on the Interpretation of Statutes", Twelfth Edition, with regard to retrospective applicability of the amendment, P.St. J. Langan has stated that;

> "Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

189. It is further observed with regard to rights of the parties to pending cases

that

> “But if the necessary intendment of a statute is to affect the rights of parties to pending actions, the Court must give effect to the intention of the legislature and apply the law as it stands at the time of the judgment even though there is no express reference to pending actions.”

190. This principle was applied to the Landlord and Tenant (Rent Control) Act 1949 in Hutchinson v. Jauncey,(1950) 1KB 574, the Court of Appeal taking the view that Sir George Jessel M.R. had gone too far when he said that express terms alone could alter the rights of parties by taking away or conferring any pending right of action.

191. The effect of a change in the law between a decision at first instance and the hearing of an appeal from that

decision was discussed by the House of Lords in Att.-Gen. v. Vernazza.98 Lord Denning said (at p. 978) that

> "it was clear that in the ordinary way the Court of Appeal cannot take into account a statute which has been passed in the interval since the case was decided at first instance, because the rights of the litigants are generally to be determined according to the law in force at the date of the earlier proceedings. But it is different when the statute is retrospective either because it contains clear words to that effect or because it deals with matters of procedure only, for then Parliament has shown an intention that the Act should operate on pending proceedings, and the Court of Appeal are entitled to give effect to this retrospective intent as well as a Court of first instance."

For this purpose, however, a statute which actually takes away the right of appeal is not to be regarded as affecting mere matters of procedure.

192. The Hon'ble Apex Court in case of **Zile**

Singh V. State of Haryana (supra) has observed as under:

> “13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only "nova constitution futuris formam imponere debet non praeteritis" a new law ought to regulate what is to follow, not the past. It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole.
>
> 14. The presumption against retrospective operation is not applicable to declaratory

> statutes.... In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is "to explain" an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect."

193. Reliance placed on behalf of the petitioners in case of **CIT, Kolkatta v. Calcutta Export Company**(supra) as to whether omission of Rule 96(10) by Rules, 2024 is curative in nature and therefore, should be applied retrospectively i.e. from the date of insertion of the said

rule from 9th October, 2018 is also required to be applied to the facts of the case because the Rules, 2024 clearly stipulates for applicability from the date of publication in Official Gazette in consonance with the recommendation of the GST Council to omit Rule 96(10) of the CGST Rules, 2017 prospectively. It cannot be said that omission of Rule 96(10) is curative or remedial because, by omission it affects substantive rights of the assessee to claim refund of IGST paid on export of goods when duty free inputs are utilised. If the omission of Rule 96(10) is to be applied with retrospective effect, the Rules,2024 would have stipulated but even the GST Council has recommended omission of Rule 96(10) with prospective effect. Such recommendation is

binding upon the Government. Therefore, reliance placed on behalf of the petitioners on various case laws to canvass the proposition that omission of Rule 96(10) is curative and remedial and therefore, has to be applied retrospectively cannot be accepted.

194. In view of above finding, the next question arises is whether Notification No.20/2024 whereby Rule 96(10) of the CGST Rules has been omitted with effect from 8th October, 2024 would be applicable to the proceedings including this group of petitions which are pending before the Court or any other proceedings which are pending before the respondents or not.

195. Sections 6, 6A and 24 of the General

Clauses Act are required to be considered for deciding the issue as to whether Notification No.20/2024 would be applicable to the pending proceedings or not. Sections 6, 6A and 24 of the General Clauses Act read as under:

> "**6. Effect of repeal**.-Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect;or
>
> (b)affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d)affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

6-A. Repeal of Act making textual amendment in Act or Regulation.- Where any [Central Act] or Regulation made after the commencement of this Act repeals any enactment by which the text of any [Central Act] or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal.

24. Continuation of orders, etc., issued under enactments repealed and re-enacted.-Where any Central Act or Regulation, is, after the commencement of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided any [appointment, notification], order, scheme, rule, form or bye-law, [made or] issued under the repealed Act or Regulation, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been [made or] issued under the provisions so re-enacted, unless and until it is superseded by any [appointment, notification], order, scheme, rule, form or bye-law [made or] issued under the provisions so re-enacted [and when any [Central Act] or Regulation, which, by a notification under section 5 or 5-A of the [Scheduled Districts Act, 1874 (14 of 1874)] or any like law, has been extended to any local area, has, by a subsequent notification, been withdrawn from and re-extended to such area or any part thereof, the provisions of such Act or Regulation shall be deemed to have been repealed and re-enacted in such area or part within the meaning of this

section."

196. The Hon'ble Apex Court in case of **Fibre Boards Private Limited, Bangalore v. Commissioner of Income Tax, Bangalore** (supra) while considering the applicability of the aforesaid provisions of the General Clauses Act vis-a-vis the repeal or omission or implied repeal regarding conditions laid down in section 54G of the Income Tax Act, 1961 has held as under:

> "34. Thirdly, an earlier Constitution Bench judgment referred to earlier in this judgment, namely, State of Orissa v. M.A. Tulloch & Co., (1964) 4 SCR 461 has also been missed. The Court there stated:
>
> > "..Now, if the legislative intent to supersede the earlier law is the basis upon which the doctrine of implied repeal is founded could there be any incongruity in attributing to the later

legislation the same intent which Section 6 presumes where the word 'repeal' is expressly used. So far as statutory construction is concerned, it is one of the cardinal principles of the law that there is no distinction or difference between an express provision and a provision which is necessarily implied, for it is only the form that differs in the two cases and there is no difference in intention or in substance. A repeal may be brought about by repugnant legislation, without even any reference to the Act intended to be repealed, for once legislative competence to effect a repeal is posited, it matters little whether this is done expressly or inferentially or by the enactment of repugnant legislation. If such is the basis upon which repeals and implied repeals are brought about it appears to us to be both logical as well as in accordance with the principles upon which the rule as to implied repeal rests to attribute to that legislature which effects a repeal by necessary implication the same intention as that which would attend the case of an express

> repeal. Where an intention to effect a repeal is attributed to a legislature then the same would, in our opinion, attract the incident of the saving found in Section 6 for the rules of construction embodied in the General Clauses Act are, so to speak, the basic assumptions on which statutes are drafted..." (At page 484)

35. The two later Constitution Bench judgments also did not have the benefit of the aforesaid exposition of the law. It is clear that even an implied repeal of a statute would fall within the expression "repeal" in Section 6 of the General Clauses Act. This is for the reason given by the Constitution Bench in M.A. Tulloch & Co. that only the form of repeal differs but there is no difference in intent or substance. If even an implied repeal is covered by the expression "repeal", it is clear that repeals may take any form and so long as a statute or part of it is obliterated, such obliteration would be covered by the expression "repeal" in Section 6 of the General Clauses Act.

36. In fact in Halsbury's Laws of England Fourth Edition, it is stated that:

> "So far as express repeal is concerned, it is not necessary that any particular form of words should be used. (R v. Longmead, (1795) 2 Leach 694 at 696). All that is required is that an intention to abrogate the enactment or portion in question should be clearly shown. (Thus, whilst the formula "is hereby repealed" is frequently used, it is equally common for it to be provided that an enactment "shall cease to have effect" (or, If not yet in operation, "shall not have effect") or that a particular portion of an enactment "shall be omitted)."

37. At this stage, it is important to note that a temporary statute does not attract the provision of Section 6 of the General Clauses Act only for the reason that the said statute expires by itself after the period for which it has been promulgated ends. In such cases, there is no repeal for the reason that the legislature has not applied its mind to a live statute and obliterated it. In all cases where a temporary statute expires, the statute expires of its own force without being

> obliterated by a subsequent legislative enactment. But even in this area, if a temporary statute is in fact repealed at a point of time earlier than its expiry, it has been held that Section 6 of the General Clauses Act would apply. - See: State of Punjab v. Mohar Singh, (1955) 1 SCR 893 at page 898."

197. The Hon'ble Apex Court has also considered the decision in case of **Rayala Corporation (P) Ltd. and M.R. Pratap v. Director of Enforcement, New Delhi**(supra) as under:

> "28. An attempt was made in General Finance Company & Anr. v. Assistant Commissioner of Income Tax, Punjab, (2002) 7 SCC 1 to refer these two judgments to a larger bench on the point that an omission would not amount to a repeal for the purpose of Section 6 of the General Clauses Act. Though the Court found substance in the argument favouring the reference to a larger bench, ultimately it decided that the prosecution in cases of non-compliance of the provision therein contained was only

transitional and cases covered by it were few and far between, and hence found on facts that it was not an appropriate case for reference to a larger bench.

29. We may also point out that in G.P. Singh's Principles of Statutory Interpretation, 12th Edition, the learned author has criticized the aforesaid judgments in the following terms:

> "Section 6 of the General Clauses Act applies to all types of repeals. The section applies whether the repeal be express or implied, entire or partial or whether it be repeal simpliciter or repeal accompanied by fresh legislation. The section also applies when a temporary statute is repealed before its expiry, but it has no application when such a statute is not repealed but comes to an end by expiry. The section on its own terms is limited to a repeal brought about by a Central Act or Regulation. A rule made under an Act is not a Central Act or regulation and if a rule be repealed by another rule, section 6 of the General Clauses Act will not be

> attracted. It has been so held in two Constitution Bench decisions. The passing observation in these cases that "section 6 only applies to repeals and not to omissions" needs reconsideration for omission of a provision results in abrogation or obliteration of that provision in the same way as it happens in repeal. The stress in these cases was on the question that a 'rule' not being a Central Act or Regulation, as defined in the General Clauses Act, omission or repeal of a 'rule' by another 'rule' does not attract section 6 of the Act and proceedings initiated under the omitted rule cannot continue unless the new rule contains a saving clause to that effect.."(At pages 697 and 698)

30. In view of what has been stated hereinabove, perhaps the appropriate course in the present case would have been to refer the aforesaid judgment to a larger bench. But we do not find the need to do so in view of what is stated by us hereinbelow.

31. First and foremost, it will be

noticed that two reasons were given in Rayala Corporation (P) Ltd. for distinguishing the Madhya Pradesh High Court judgment. Ordinarily, both reasons would form the ratio decidendi for the said decision and both reasons would be binding upon us. But we find that once it is held that Section 6 of the General Clauses Act would itself not apply to a rule which is subordinate legislation as it applies only to a Central Act or Regulation, it would be wholly unnecessary to state that on a construction of the word "repeal" in Section 6 of the General Clauses Act, "omissions" made by the legislature would not be included. Assume, on the other hand, that the Constitution Bench had given two reasons for the non-applicability of Section 6 of the General Clauses Act. In such a situation, obviously both reasons would be ratio decidendi and would be binding upon a subsequent bench. However, once it is found that Section 6 itself would not apply, it would be wholly superfluous to further state that on an interpretation of the word "repeal", an "omission" would not be included. We are, therefore, of the view that the second so-called ratio of the Constitution Bench in Rayala Corporation (P)

> Ltd. cannot be said to be a ratio decidendi at all and is really in the nature of obiter dicta."

198. In view of the above decision rendered by the Apex Court, "omission" would be included in the interpretation of word "repeal" and hence omission of Rule 96(10) with effect from 8th October, 2024, would amount to repeal without any saving clause. General Clauses Act, 1897 is largely based on the English Interpretation Act, 1889 and according to such law, the effect of repealing a statute was to obliterate it completely from the records of Parliament as if it had never been passed, except for the purpose of those actions, which were commenced, prosecuted and concluded while it was an existing law. Therefore, repeal without any saving clause would destroy

any proceeding whether or not yet begun or whether pending at the time of enactment of the repealing Act and not already prosecuted to a final judgment so as to create a vested right. However by incorporation of Section 38(2) in the English Interpretation Act, 1889 which deals with effect of repeal in future Acts which is equivalent to section 6 of the General Clauses Act has been analysed by the Hon'ble Apex Court in case of **Gammon India Ltd v. Special Chief Secretary and others** (supra) as under:

> "50. The next question is whether the application of that principle could or ought to be limited to cases where a particular form of words is used to indicate that the earlier law has been repealed. The entire theory underlying implied repeals is that there is no need for the later enactment to state in express terms that an earlier enactment has been repealed by

using any particular set of words or form of drawing but that if the legislative intent to supersede the earlier law is manifested by the enactment of provisions as to effect such supersession, then there is in law a repeal notwithstanding the absence of the word 'repeal' in the later statute. Now, if the legislative intent to supersede the earlier law is the basis upon which the doctrine of implied repeal is founded, could there be any incongruity in attributing to the later legislation the same intent which Sec. 6 presumes where the word 'repeal' is expressly used. So far as statutory construction is concerned, it is one of the cardinal principles of the law that there is no distinction or difference between an express provision and a provision which is necessarily implied, for it is only the form that differs in the two cases and there is no difference in intention or in substance. A repeal may be brought about by repugnant legislation, without even any reference to the Act intended to be repealed, for once legislative competence to effect a repeal is posited, it matters little whether this is done expressly or inferentially or by the enactment of repugnant legislation. If such is the basis

> upon which repeals and implied repeals are brought about it appears to us to be both logical as well as in accordance with the principles upon which the rule as to implied repeal rests to attribute to that legislature which effects a repeal by necessary implication the same intention as that which would attend the case of an express repeal. Where an intention to effect a repeal is attributed to legislature then the same would, in our opinion, attract the incident of the saving found in Sec. 6 for the rules of construction embodied in the General Clauses Act which are, so to speak, the basic assumptions on which statutes are drafted."

199. Decision of the Hon'ble Apex Court in case of **Mathew M. Thomas and others v. Commissioner of Income Tax** (supra) would be applicable to the facts of the present case wherein it is held as under:

> "4. The Full Bench opined that the Circular was not applicable to the case on hand as the acquisition proceedings were over by the order

of the Competent Authority passed on 31.3.1981. The Full Bench observed that the pendency of the proceeding before the Competent Authority was necessary for the applicability of the Circular and as no such proceedings were pending in this case, the Circular had no application. Consequently, the Full Bench declined to answer the question referred and directed the matter to be posted before the Division Bench for hearing.

xxx

8. It is well settled that the word "Proceedings" shall include the proceedings at the appellate stage. It is sufficient to refer to the Judgement of this Court in Garikapati Veeraya V/s. N. Subiah Choudhry, AIR 1957 SC 540, wherein the Court said at page 553 :-

> "(i) That the legal pursuit of a remedy, suit appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceedings."

Hence we are unable to persuade ourselves to agree with the view expressed by the Full Bench of the

> High Court in the Judgement under appeal that the circular would apply only to proceedings pending before the Competent Authority."

200. Crawford on "Statutory Construction" dealing with the general effect of the repeal of an Act states the law in America to be as follows:

> "A repeal will generally, therefore, divest all inchoate rights which have arisen under the repealed statute, and destroy all accrued causes of action based thereon. As a result, such a repeal, without a saving clause, will destroy any proceedings whether not yet begun, or whether pending at the time of the enactment of the repealing Act, and not already prosecuted to a final judgment so as to create a vested right."

201. In a footnote relating to the cases which the learned author cites in support of the above proposition, he adds:--

> "See Cleveland, etc., R. Co. v. Mumford (Ind.)(2) where the repeal of a statute during the trial prevented a judgment from being rendered. Similarly, there can be no legal conviction for an offence, unless the act be contrary to law at the time it is committed; nor can there be a judgment, unless the law is in force at the time of the indictment and judgment. If the law ceases to operate, by its own limitation or by a repeal, at any time before judgment, no judgment can be given. Hence, it is usual in every repealing law to make it operate prospectively only, and to insert a a saving clause, preventing the retroactive operation of the repeal and continuing the repealed law in force as to all pending prosecutions, and often as to all violations of the existing law already committed."

202. The author then proceeds to quote the following passage from Wall v. Chesapeake & Ohio Ry., Company reported in 1919 (125) 120 III:

> "It is well settled that if a

statute giving a special remedy is repealed without a saving clause in favour of pending suits all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after. If a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision was rendered. The effect of the repeal is to obliterate the statute repealed as completely as if it bad never been passed, and it must be considered as a law which never existed, except for the purposes of those actions or suits which were commenced, prosecuted and concluded while it was an existing law. Pending judicial proceedings based upon a statute cannot proceed after its repeal. This rule holds true until the proceedings have reached a final judgment in the court of last resort, for that court, when it comes to announce its decision, conforms it to the law then existing, and may therefore reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court has been withdrawn by an absolute repeal."

203. In view of above conspectus of law, it appears that the recommendations of the GST Council to omit Rule 96(10) prospectively would apply to all the pending proceedings and cases. However, the contention on behalf of the Revenue that the petitioners have filed these petitions challenging the validity of Rule 96(10) cannot be said to be pending proceedings is without any basis because the petitioners have also challenged the show cause notices as well as orders-in-original passed by the respondents by invoking Rule 96(10) for rejecting the refund claims of the petitioners and therefore, it can be said that these petitions are nothing but pending proceedings before the Court which has not achieved finality when the Notification

No.20/2024 came into force with effect from 8th October, 2024.

204. By Notification No.20/2024 Rules, 2024 have been notified and as per Rule 10 of the said Rules, Rule 96(10) of the CGST Rules has been omitted with prospective effect. This would give rise to three situations, firstly, whether the same would be applicable retrospectively, or secondly, prospectively or thirdly, same would be applicable prospectively but also to "pending proceedings". As discussed here-in-above, Rule 10 of Rules, 2024 is applicable prospectively and the same also would be applicable to pending proceedings.

205. Therefore, we are of the opinion that Notification No.20/2024 dated 8th October,

2024 would be applicable to all the pending proceedings/cases meaning thereby that Rule 96(10) would stand omitted prospectively but applicable to pending proceedings/cases where final adjudication has not taken place.

206. Therefore, in view of foregoing reasons, the omission of Rule 96(10) would apply to all the proceedings/cases/ petitions which are pending for adjudication either before this Court or before the respondent adjudicating authority and no further proceedings are required to be carried forward and petitioners would be entitled to maintain refund claims of IGST paid on export of goods.

207. In view of above findings, as Rule

96(10) would not be applicable to the pending proceedings, in view of omission of Rule 96(10) by Notification No.20/2024 with effect from 8th October, 2024, the question of challenge to the vires and validity of rule 96(10) is not required to be considered at this stage.

208. The petitions therefore succeed in view of applicability of Notification No.20/2024 whereby Rule 96(10) is omitted and the said Notification would be applicable to all the pending proceedings/cases as on 8th October, 2024. The impugned show cause notices and the orders-in-original are therefore, quashed and set aside. The petitioners are therefore, entitled to maintain refund claims for IGST paid for the export of goods as per Rule 96 of the CGST Rules,

2017 in accordance with law.

209. Civil Applications also stand disposed off.

210. Rule is made absolute to the aforesaid extent. No order as to costs.

(BHARGAV D. KARIA, J)

(D.N.RAY,J)

RAGHUNATH R NAIR