2025:CGHC:37661

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

WPT No. 14 of 2021

Order reserved on: 01/07/2025

Order delivered on: 31/07/2025

Bharat Aluminium Company Limited, BALCO Plant, Balco Nagar, Korba, District Korba, Chhattisgarh – 495684.

--- **Petitioner**

Versus

1. State of Chhattisgarh, Through the Secretary, Department of Finance, Mahanadi Bhawan, Atal Nagar (Naya Raipur), District Raipur, Chhattisgarh.

2. Joint Commissioner (Appeals), State Tax, Bilaspur, Chhattisgarh.

3. Assistant Commissioner, State Tax, Korba, Circle-2, District Korba, Chhattisgarh.

--- **Respondents**

WPT No. 15 of 2021

Bharat Aluminium Company Limited, BALCO Plant, Balco Nagar, Korba, District Korba, Chhattisgarh – 495684.

---**Petitioner**

Versus

1. State of Chhattisgarh, Through the Secretary, Department of Finance, Mahanadi Bhawan, Atal Nagar (Naya Raipur), District Raipur, Chhattisgarh.

2. Joint Commissioner (Appeals), State Tax, Bilaspur, Chhattisgarh.

3. Assistant Commissioner, State Tax, Korba, Circle-2, Chhattisgarh.

--- Respondents

WPT No. 16 of 2021

Bharat Aluminium Company Limited, BALCO Plant, Balco Nagar, Korba, District Korba, Chhattisgarh – 495684.

---Petitioner

Versus

1. State of Chhattisgarh, Through the Secretary, Department of Finance, Mahanadi Bhawan, Atal Nagar (Naya Raipur), District Raipur, Chhattisgarh.

2. Joint Commissioner (Appeals), State Tax, Bilaspur, Chhattisgarh.

3. Assistant Commissioner, State Tax, Korba, Circle-2, Chhattisgarh.

--- Respondents

WPT No. 17 of 2021

Bharat Aluminium Company Limited, BALCO Plant, Balco Nagar, Korba, District Korba, Chhattisgarh – 495684.

---Petitioner

Versus

1. State of Chhattisgarh, Through the Secretary, Department of Finance, Mahanadi Bhawan, Atal Nagar (Naya Raipur), District Raipur, Chhattisgarh.

2. Joint Commissioner (Appeals), State Tax, Bilaspur, Chhattisgarh.

3. Assistant Commissioner, State Tax, Korba, Circle-2, Chhattisgarh.

--- Respondents

AND

WPT No. 18 of 2021

Bharat Aluminium Company Limited, BALCO Plant, Balco Nagar, Korba, District Korba, Chhattisgarh – 495684.

---**Petitioner**

Versus

1. State of Chhattisgarh, Through the Secretary, Department of Finance, Mahanadi Bhawan, Atal Nagar (Naya Raipur), District Raipur, Chhattisgarh.

2. Joint Commissioner (Appeals), State Tax, Bilaspur, Chhattisgarh.

3. Assistant Commissioner, State Tax, Korba, Circle-2, Chhattisgarh.

--- **Respondents**

For Petitioner	:	Mr. Bharat Raichandani, Mr. Arjyadeep Roy and Mr. K. Rohan, Advocates.
For Respondents/State	:	Mr. Rahul Tamaskar, Government Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

CAV Order

1. Feeling aggrieved and dissatisfied with the impugned order dated 17-9-2020 passed by the Joint Commissioner (Appeals), State Tax, Bilaspur, the petitioner herein namely, Bharat Aluminium Company Limited (BALCO) has filed these appeals calling in question legality, validity and correctness of the same by which its appeals preferred under Section 107 of the Chhattisgarh Goods and Services Tax Act, 2017 have been dismissed affirming the order dated 6-7-2019 passed by the

Assistant Commissioner, State Tax, Korba, Circle-2, directing recovery of ₹ 40,14,605/-.

(It is pertinent to mention here that W.P.(T)No.14/2021 relates to ITC claim for the month of February, 2019; W.P.(T)No.15/2021 relates to ITC claim for the month of August, 2019; W.P.(T)No.16/2021 relates to ITC claim for the month of January, 2019; W.P.(T)No.17/2021 relates to ITC claim for the month of December, 2018 and W.P.(T)No.18/2021 relates to ITC claim for the month of November, 2018.)

2. Since common question of law and fact is involved in these writ petitions, they are being disposed of by this common order.

3. The aforesaid challenge has been made on the following factual backdrop: -

4. The petitioner is engaged in manufacture, sale and export of aluminium products and it has its factory premises at Korba, Chhattisgarh. For the purposes of its business operations, the petitioner has established two power plants of 540 MW and 1200 MW at Korba. The petitioner imports coal on due payment of Goods and Services Tax (GST) Compensation Cess and uses the same for generation of electricity using the two power plants which is further used for manufacture of aluminium products. The petitioner also claims to maintain a residential township for its employees. It is the case of the petitioner that the electricity which is generated from the two power plants is used in three manners: (a) firstly, electricity from the power plants is used for manufacturing operations within the factory premises; (b) secondly, some portion of the

electricity is sold to State Electricity Boards; and (c) lastly, some portion of the electricity (540 MW) is supplied to the township for its employees, and the present dispute is confined to the portion of electricity which is supplied to the township of its company.

5. The petitioner herein filed an application for refund in terms of Section 54(1) of the Central Goods and Services Tax Act, 2017 (for short, 'the CGST Act') claiming refund of the Input Tax Credit (ITC) of the Compensation Cess paid on import of coal. The refund claimed by the petitioner was to the tune of ₹ 7,44,73,347/- for the month of February, 2019 on 1st April, 2019 on the premise that the petitioner being exporter of aluminium products is entitled for the ITC of the GST Compensation Cess paid on the inputs i.e. coal used for generation of electricity. On 6-5-2019, provisional refund of 90% of the total refund claimed was allowed to the tune of ₹ 6,70,26,012/- and show cause notice was issued to the petitioner on 7-6-2019 vide Annexure P-5 as to why the refund claimed to the extent of ₹ 51,48,531/- should not be rejected to which the petitioner filed its reply on 19-6-2019 vide Annexure P-6 clarifying the bifurcation in the usage of the two power plants by filing Form G, which is a statutory form, and stating that the electricity supplied to the township is for 'business' purposes, no reversal is warranted and the petitioner

also stated that GST Compensation Cess paid on import of coal is not attributable to the supply of Duty Credit Scrips (DCS) and no portion of the same is used for supply of DCS. In Form G – Electricity Duty, it has been mentioned that 1388641 KWH electrical energy i.e. total number of units, was consumed in the Township Colony for the month ending February, 2019. The competent authority by its order dated 22-6-2019 (Rectification order dated 6-7-2019) vide Annexure P-7 rejected the application assigning the following two reasons: -

1. Electricity generated by 540 MW Power Plant has been supplied for Township consumption by the taxpayer as evident from Form G provided by the taxpayer. Hence ITC of Compensation cess paid on coal attributable to 540 MW Power Plant is liable to be reversed under Rule 42 of CGST, SGST, IGST Act.

2. Sale of Duty Credit Scrips [Merchandise from India Export Scheme (MEIS) License sale] is an exempt supply under Notification No.36/2017 of IGST Act and 35/2017 of CGST Act and it should be included in Exempt Supplies as well as Total Turnover in the State for the purpose of Reversal of ITC under Rule 42 of CGST, SGST and IGST Act.

6. Questioning the order dated 6-7-2019 (Annexure P-7), the petitioner herein preferred appeal before the appellate authority under Section 107 of the Chhattisgarh Goods and Services Tax Act, 2017 before the Joint Commissioner (Appeals) and the Joint Commissioner (Appeals), State Tax, Bilaspur, by order dated 17-9-2020 (Annexure P-8), rejected the appeal of the petitioner holding firstly, that provision of electricity for consumption of residents of township is not intrinsically connected to the business activity of the petitioner; secondly, that sale of Duty Credit Scrips (DCS) is an exempt supply and quantum of ITC attributable to such exempt supplies warrants reversal; and lastly, that an amount of ₹ 40,14,605/- is recoverable from the petitioner leading to filing of the instant writ petitions questioning the order passed by the Joint Commissioner (Appeals) affirming the order dated 6-7-2019 (Annexure P-7) passed by the Assistant Commissioner, State Tax, Korba, Circle-2.

7. The petitioner filed the instant writ petitions stating inter alia that it uses coal as a raw material for production of Aluminium Products and it produces electricity using the coal which is in turn used for production of Aluminium Products and supplied to their township. In the writ petitions filed by the petitioner, the petitioner has raised question, whether the maintenance of

township and supply of electricity thereof is in the course or furtherance of business in terms of Section 2(17) read with Section 16 of the CGST Act and it amounts to business activity to entitle the petitioner for Input Tax Credit (ITC) under Section 16(1) of the CGST Act and argued that during the pendency of the writ petitions, the insertion of Explanation 1(d) to Rule 43 of the Central Goods and Services Tax Rules, 2017 (for short, 'the CGST Rules') vide Notification No.14/2022 – Central Tax dated 5th July, 2022, would also be applicable to the pending proceedings, as it would have the retrospective effect. Therefore, the order impugned passed by the appellate authority i.e. the Joint Commissioner (Appeals), State Tax, Bilaspur, affirming the order of the Assistant Commissioner, State Tax, Korba, Circle-2, directing recovery of ₹ 40,14,605/- deserves to be set aside.

8. Return has been filed opposing the averments made in the writ petitions stating inter alia that proportion of Compensation Cess attributable to coal consumed for production of electricity used in the township is not eligible for refund of ITC and the appellate authority has rightly held that sale of Duty Credit Scrips is an exempted supply, it should be added to calculate the eligible Input Tax Credit. It has further been stated that turnover generated by selling Duty Credit Scrips should be

included in the turnover of exempt supplies as well as total turnover. Therefore, the writ petitions deserve to be dismissed.

9. Rejoinder has been filed on behalf of the petitioner.

10. It is appropriate to notice here that the appellate authority adjudicated the appeal preferred under Section 107 of the Chhattisgarh Goods and Services Tax Act, 2017 on 17-9-2020 and thereafter, the notification dated 5-7-2022 inserting Explanation 1(d) to Rule 43 of the CGST Rules came into force with effect from 5th July, 2022 on the recommendation made by the GST Council.

11. Mr. Bharat Raichandani, learned counsel appearing for the petitioner, would submit that maintenance of township is in the course or furtherance of business and hence ITC should be refunded to the petitioner. He would refer to the term 'business' as mentioned in Section 2(17) of the CGST Act and further refer to the definition 'input' as given in Section 2(59) of the CGST Act and also refer to the definition 'input service' as given in Section 2(60) of the CGST Act. He would further submit that Section 16(1) of the CGST Act grants a substantive right to the petitioner to claim ITC of any input goods or services, or both used in the course or furtherance of business and according to the petitioner, maintenance of township is very critical since the township houses employees who are important for continuity in

business operations, more so in light of the remote location of the petitioner's premises and maintenance of township being intrinsically connected with the petitioner's manufacturing operations is therefore 'business' in terms of Section 2(17) of the CGST Act and supply of electricity to the township is therefore business activity. He would also submit that availability of credit has to be judged on the basis of commercial expediency and the 'commercial expediency' of an expenditure has to be judged only from the view, whether the same is incurred 'for furtherance of business or not'. He would rely upon the decisions of High Courts and the Supreme Court in the matters of **Commissioner of Customs & Central Excise, Hyderabad-III v. ITC Limited**[1], **Commissioner of Central Excise, Nagpur v. Ultratech Cement Ltd.**[2], **Cinemax India Limited v. Union of India**[3] and **S.A. Builders Ltd. v. Commissioner of Income Tax (Appeals) Chandigarh and another**[4] to buttress his submissions. He would further submit that insertion of Explanation 1(d) to Rule 43 of the CGST Rules by Notification No.14/2022 – Central Tax dated 5th July, 2022 is applicable to the pending proceeding, as the same is clarificatory in nature and the same has been made pursuant to the recommendation made by the GST Council in its 47th GST Council Meeting dated 28-29 June, 2022.

1 2013 (32) STR 288 (AP)
2 2010 (260) ELT 369 (Bom.)
3 2011 (24) STR 3 (Guj.)
4 (2007) 1 SCC 781

He would further rely upon the decisions of the Gujarat High Court, Andhra Pradesh High Court and the Supreme Court in the matters of **Ascent Meditech Ltd. v. Union of India and others**[5], **M/s Tirth Agro Technology Pvt. Ltd. and another v. Union of India and others**[6], **Sembcorp Energy India Ltd. v. State of Andhra Pradesh**[7], **S. Sundaram Pillai and others v. V.R. Pattabiraman and others**[8], **Mysore Rolling Mills (P) Ltd. v. Collector of Central Excise, Belgaum**[9] and **Government of India and others v. Indian Tobacco Association**[10] in support of his contention and prayer has been made to grant the writ petitions and to set-aside the order passed by the appellate authority.

12. Mr. Rahul Tamaskar, learned Government Advocate appearing on behalf of the State/respondents, would submit that the supply of electricity to the township for consumption of residents is not integrally related to the business activity of the petitioner and according to him, the supply of electricity to the township by the petitioner does not affect the business, as the same could have also been done by the Power Distribution Company. Therefore, it has rightly been held that provision of electricity to the residents of township is not the integral part of the business and as such, the reversal of ITC is justified. He

5 2024:GUJHC:62022-DB
6 2024:GUJHC:71361:DB
7 2022 (65) GSTL 263 (AP)
8 (1985) 1 SCC 591
9 (1987) 1 SCC 695
10 (2005) 7 SCC 396

would rely upon the decisions of the Supreme Court in the matters of **Maruti Suzuki Limited v. Commissioner of Central Excise, Delhi III**[11] and **Commissioner of Central Excise v. Gujarat Narmada Fertilizers Company Limited**[12] to buttress his submission that reversal of credit is justified to the extent of input being used for production of electricity to the township. He would further submit that the input tax credit is in the form of concession or boon and the amendment dated 5-7-2022 adding Explanation 1(d) to Rule 43 of the CGST Rules has a prospective effect, whereas amendment in other Rules by the same notification for instance through clauses 7, 9 and 10 was expressly given retrospective effect. As such, the legislature clearly wanted to give amendment to Rule 43 of the CGST Rules a prospective effect. This ground has not been raised in the writ petitions. He would further rely upon the decision of the Supreme Court in the matter of **Sree Sankaracharya University of Sanskrit and others v. Dr. Manu and another**[13] in support of his contention.

13. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.

---

11 (2009) 9 SCC 193
12 (2009) 9 SCC 101
13 2023 SCC OnLine SC 640

14. After hearing learned counsel for the parties and going through the record, following two questions arise for consideration: -

1. Whether the maintenance of township and supply of electrical energy thereof is in the course or furtherance of business in terms of Section 2(17) read with Section 16(1) of the CGST Act entitles the petitioner for Input Tax Credit?

2. Whether the Input Tax Credit (ITC) will be available on effecting exempt supplies that is supply of DCS on or before 5-7-2022?

Answer to Question No.1

15. In order to consider the plea raised at the Bar, it would be appropriate to notice the relevant provisions contained in the CGST Act. The term 'business' has been defined in sub-section (17) of Section 2 of the CSGST Act. Sub-clause (b) of sub-section (17) of Section 2 of the CGST Act states as under: -

> "(17) "business" includes—
>
> (b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);"

16. Similarly, sub-section (59) of Section 2 of the CGST Act, which defines the term "input"; sub-section (60) of Section 2 of the CGST Act, which defines the term "input service"; and sub-

section (62), which defines the term "input tax", state as under:

-

> "(59) "input" means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business;
>
> (60) "input service" means any service used or intended to be used by a supplier in the course or furtherance of business;
>
> (62) "input tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes—
>
> (a) the integrated goods and services tax charged on import of goods;
>
> (b) the tax payable under the provisions of sub-sections (3) and (4) of section 9;
>
> (c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;
>
> (d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or
>
> (e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act,
>
> but does not include the tax paid under the composition levy;"

17. Sub-section (63) of Section 2 of the CGST Act defines, "input tax credit" means the credit of input tax. Chapter V of the CGST Act deals with Input Tax Credit. Section 16 of the CGST Act

provides for Eligibility and conditions for taking input tax credit. Sub-section (1) of Section 16 states as under: -

> "**16. Eligibility and conditions for taking input tax credit**. —(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person."

18. A careful perusal of Section 16(1) of the CGST Act would show that it provides for input tax credit to every registered person on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person subject to two conditions; (a) such conditions and restrictions as may be prescribed and (b) in the manner specified in Section 49.

19. The Input Tax Credit is a nature of benefit or concession extended to the dealer under the statutory scheme. The concession can be received by the beneficiary only as per the scheme of the statute.

20. In the matter of **Godrej & Boyce Mfg. Co. Pvt. Ltd. and others v. Commissioner of Sales Tax and others**[14], their Lordships of the Supreme Court dealing with Rules 41 & 41-A of the Bombay

14 (1992) 3 SCC 624

Sales Tax Rules, 1959 held that the rule-making authority can provide for a small abridgement or curtailment while extending a concession, and observed as under: -

> "9. … 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."

21. Similarly, in the matter of **State of Karnataka v. M.K. Agro Tech. Private Limited**[15], the Supreme Court has held that taxing statutes are to be interpreted literally and further it is the domain of the legislature as to how the tax credit is to be given and under what circumstances, and pertinently observed as under: -

> "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

15 (2017) 16 SCC 210

> 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."

22. In the matter of **Jayam & Co. v. Commr.**[16], while interpreting the provisions of Sections 19(20), 3(2) & 3(3) of the Tamil Nadu Value Added Tax Act, 2006, it has been held by the Supreme Court that 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; and concession of ITC is available on certain conditions, and observed as under: -

> "11. From the aforesaid scheme of Section 19 the 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."

Their Lordships further held that it is a trite law that whenever concession is given by a statute the conditions thereof are to be

16 (2016) 15 SCC 125

strictly complied with in order to avail such concession, and observed as under: -

> "12. It is 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."

23. As such, ITC is a nature of benefit or concession extended to the dealer and it can be availed by the beneficiary as per the scheme of the statute subject to fulfillment of the conditions laid down in Section 16(4) of the CGST Act. It is not the substantive right of the dealer to claim ITC, it is a kind of concession provided by the legislature on fulfillment of certain conditions mentioned in the provision.

24. The petitioner in Form G submitted Electricity Duty under the Electricity Duty Rules mentioning therein that 1388641 KWH

units have been consumed in the township colony for the month ending February, 2019. The competent authority by its order dated 22-6-2019 (rectification order dated 6-7-2019) held that the electricity generated by the petitioner to the extent of 1388641 KWH units has been supplied for township consumption by the taxpayer as evident from Form G provided by the taxpayer, as such, ITC of Compensation cess paid on coal attributable to 540 MW Power Plant is liable to be reversed under Rule 42 of the CGST Rules. The expression "in the course or furtherance of his business" employed in Section 16(1) of the CGST Act, has not been defined in the CGST Act and it may be referred to the activities which are integrally related to the business activity and not welfare activity. The appellate authority has held that the provision of electricity for the consumption of the residents of township is nothing but a prerequisite relying upon the decision of the Supreme Court in **Maruti Suzuki Limited** (supra).

25. Before this Court, the respondents have placed reliance upon the decision of the Supreme Court in **Gujarat Narmada Fertilizers Company Limited's** case (supra). In the connected appeal i.e. Civil Appeal No.1862 of 2006 (**CCE and Customs v. Gujarat Narmada Valley**), the question for consideration was, whether the Department was right in reversing proportionate

CENVAT credit to the extent of electricity wheeled out/cleared to the grid and to the township. Their Lordships held that the decision rendered in **Maruti Suzuki Limited** (supra) would apply and in **Maruti Suzuki Limited** (supra), their Lordships observed as under: -

> "45. To sum up, we hold that the definition of "input" brings within its fold, inputs used for generation of electricity or steam, provided such electricity or steam is used within the factory of production for manufacture of final products or for any other purpose. The important point to be noted is that, in the present case, excess electricity has been cleared by the assessee at the agreed rate from time to time in favour of its joint ventures, vendors, etc. for a price and has also cleared such electricity in favour of the grid for distribution. To that extent, in our view, the assessee was not entitled to CENVAT credit.
>
> 46. In short, the assessee is entitled to credit on the eligible inputs utilised in the generation of electricity to the extent to which they are using the produced electricity within their factory (for captive consumption). They are not entitled to Cenvat credit to the extent of the excess electricity cleared at the contractual rates in favour of joint ventures, vendors, etc., which is sold at a price."

26. In **Maruti Suzuki Limited** (supra), their Lordships have clearly held that the assessee would be entitled to credit on the eligible inputs utilised in the generation of electricity to the extent to which they are using the produced electricity within their factory (for captive consumption) and they would not be entitled to CENVAT credit to the extent of the excess electricity cleared

at the contractual rates in favour of joint ventures, vendors, etc., which is sold at a price.

27. In that view of the matter, as it is admitted case of the petitioner that the electricity generated in 540 MW Power Plant is used in the course of or furtherance of his business, which is evident from Form G provided by the taxpayer i.e. the petitioner herein, the petitioner would not be entitled for ITC to electrical energy consumed for maintenance of its township in light of the decisions rendered by their Lordships of the Supreme Court in **Gujarat Narmada Fertilizers Company Limited's** case (supra) and **Maruti Suzuki Limited** (supra). Accordingly, the first question formulated is answered against the petitioner and in favour of the respondents.

28. In view of the decisions rendered by the Supreme Court in **Gujarat Narmada Fertilizers Company Limited's** case (supra) and **Maruti Suzuki Limited** (supra), the decisions relied upon by the petitioner in **ITC Limited's** case (supra), **Ultratech Cement Ltd.'s** case (supra), **Cinemax India Limited** (supra) and **S.A. Builders Ltd.** (supra) are not applicable to the facts of the present case and are clearly distinguishable.

Answer to Question No.2

29. The petitioner uses coal for generating electricity which is in turn used for production of Aluminium products. Such products

are exported and as an incentive, the petitioner gets Duty Credit Scrips. Duty Credit Scrips are incentive given to the exporters for promoting export and can be used for setting off Customs Duty. It cannot be used for setting off GST. It is considered as 'goods' with HSN 4907 and its supply is exempted from GST. The exemption has been granted by Notification No.35/2017 issued in exercise of power conferred under Section 11 of the CGST Act.

30. The term 'exempt supply' has been defined in sub-section (47) of Section 2 of the CGST Act, which states as under: -

> "(47) "exempt supply" means supply of any goods or services or both which attracts *nil* rate of tax or which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply;"

31. In this regard, Section 17 of the CGST Act, which deals with Apportionment of credit and blocked credits, may be noticed herein. Sub-section (2) of Section 17 provides as under: -

> "(2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies."

32. A careful perusal of Section 17(2) of the CGST Act would show that as a general rule, credit is restricted to input tax

attributable to the taxable supplies including zero rated only and is not available for input tax attributable for affecting exempt supplies and the formulae for determination of ITC on inputs, input services and reversal thereof has been provided under Rule 42 of the CGST Rules, whereas, Rule 43 of the CGST Rules provides for the formulae of determination of ITC on capital goods and reversal thereof. Explanation 1 after Rule 43(5) carved out exception to the general rule that ITC will not be available on 'exempt supplies'. Admittedly and undisputedly, sale of DCS is an exempt supply as notified by Notification No.35/2017 issued in exercise of power conferred under Section 11 of the CGST Act. Therefore, the petitioner was not eligible for Input Tax Credit before the amendment in the CGST Rules. However, by amendment dated 5-7-2022, sale of DCS was excluded from 'aggregate value of exempt supply' for the purpose of Rule 42. Therefore, after the amendment dated 5-7-2022, ITC is available to the petitioner even on supply of DCS, despite being an 'exempt supply', which the petitioner is claiming that the amendment dated 5-7-2022 be declared clarificatory and be given retrospective effect so that the petitioner can enjoy the benefit of ITC on sale of DCS from the date of enactment of the CGST Act.

33. In this regard, it would be apposite to notice the relevant provision contained in Rule 43 of the CGST Rules which was amended and Explanation 1(d) was added with effect from 5-7-2022. Clause (d) of Explanation 1 to Rule 43 of the CGST Rules states as under: -

> "(d) the value of supply of Duty Credit Scrips specified in the notification of the Government of India, Ministry of Finance, Department of Revenue No. 35/2017-Central Tax (Rate), dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R. 1284(E), dated the 13th October, 2017."

34. Mr. Bharat Raichandani, learned counsel for the petitioner, vehemently submits that the rule-making authority of the CGST Rules has the power to make the rule with retrospective effect, therefore, this rule adding Explanation 1(d) to Rule 43 of the CGST Rules has the retrospective effect and at least, it would apply to the pending cases, as the petitioner's appeal was pending since 19-9-2019. However, it has been argued by Mr. Rahul Tamaskar, learned State counsel, that though it is an explanation, but it would have the prospective effect. However, it is not in dispute that by virtue of Section 164(3) of the CGST Act, the rule making authority – Central Government, has power and jurisdiction to promulgate the rule with retrospective effect.

35. The amendment to Explanation 1 to Rule 43 of the CGST Rules adding clause (d) was made pursuant to the recommendation made by the GSL Council in its 47th GST Council Meeting held on 28-29 June, 2022, which states as under: -

> **II. <u>Amendment to Explanation 1 after rule 43:</u>**
>
> 2.1 Duty Credit Scrip (DCS) is an incentive scheme which is an export promotion benefit offered by the Government of India under the Foreign Trade Policy (FTP) 2015. Such DCSs are transferable and GST was required to be paid on its sale / supply. However, w.e.f. October, 2017 [vide notification No. 35/2017-Central Tax (Rate), dated 13-10-2017 (entry No. 122A)], the said supply was exempted from GST.
>
> 2.2 Various representations have been received from field formations and trade and industry seeking clarification as to whether the registered persons, who make such exempted supply of DCSs, are required to reverse ITC under rule 42 on common inputs and input services used for both taxable (including zero-rated) supply as well as the said exempted supply of DCSs.
>
> 2.3 The issue was deliberated by the Law Committee. The Law Committee opined that though supply of MEIS/Duty Credit Scrip by the exporters is an exempt supply under GST, the credit availed on inputs and input services by the exporters for making taxable supplies including zero rated supplies should not be considered as common credit on such taxable supplies and the exempted supply of DCS. Therefore, there should be no requirement of reversal of input tax credit for such exempted supply of DCS by the exporters. Accordingly, the Law Committee recommended that clause (d) may be inserted in Explanation 1 after rule 43 of CGST Rules, 2017 (shown in red color below) to clarify the aforesaid stand.

Explanation 1 after rule 43
Explanation 1:- For the purposes of rule 42 and this rule, it is hereby clarified that the aggregate value of exempt

supplies shall exclude:-

(a) [omitted]

(b) the value of services by way of accepting deposits, extending loans or advances in so far as the consideration is represented by way of interest or discount, except in case of a banking company or a financial institution including a non-banking financial company, engaged in supplying services by way of accepting deposits, extending loans or advances; and

(c) the value of supply of services by way of transportation of goods by a vessel from the customs station of clearance in India to a place outside India.

(d) the value of supply of Duty Credit Scrips specified in the notification of the Government of India in the Ministry of Finance, Department of Revenue No. 35/2017-Central Tax (Rate), dated the 13th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number GSR 1284(E) dated the 13th October, 2017.

Thereafter, it has been brought into force with effect from 5-7-2022.

36. The effect of amendment excludes value of DCS from the aggregate value of exempt supplies. By virtue of Section 164(3) of the CGST Act, the Central Government is conferred power to give retrospective effect to the rules. It states as under: -

"**164. Power of Government to make rules.**—xxx xxx xxx

(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."

37. However, it has not been expressly mentioned in Notification No.14/2022 dated 5-7-2022 that Rule 43 of the CGST Rules adding Explanation 1(d) would have the retrospective effect which has been given to the other rules for instance through clauses 7, 9 and 10. Now, the question would be, whether such an amendment adding Explanation 1(d) to Rule 43 of the CGST Rules would have the prospective effect or it would have the retrospective effect?

38. According to Justice G.P. Singh's **Principles of Statutory Interpretation**, 15th Edition (page 166-168), an Explanation once added it becomes a part and parcel of the enactment. It states as under: -

> "**3.10 Explanation**
>
> An *Explanation* is at times appended to a section to explain the meaning of words contained in the section. It becomes a part and parcel of the enactment. The meaning to be given to an *Explanation* must depend upon its terms, and "no theory of its purpose can be entertained unless it is to be inferred from the language used". An explanation does not ordinarily enlarge the scope of the section appended to it, but if it does, effect must be given to legislative intent, even though legislature has named a provision as an explanation.
>
> xxx xxx xxx
>
> xxx xxx xxx
>
> An *Explanation* may be added to include something within or to exclude something from the ambit of the main

enactment or the connotation of some words occurring in it. Even a negative *Explanation* which excludes certain types of a category from the ambit of the enactment may have the effect of showing that the category leaving aside the excepted types is included within it. An *Explanation*, normally, should be so read as to harmonise with and clear up any ambiguity in the main section and should not be so construed as to widen the ambit of the section. It is also possible that an *Explanation* may have been added in a declaratory form to retrospectively clarify a doubtful point in law and to serve as a proviso to the main section or *ex abundanti cautela* to allay groundless apprehensions.

In *Sundaram Pillai v. Pattabiraman*[17], Fazal Ali J culled out from earlier cases, the following as objects of an *Explanation* to a statutory provision:

> (a) to explain the meaning and intendment of the Act itself,
>
> (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve.
>
> (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,
>
> (d) an *Explanation* cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the *Explanation*, in order to suppress the mischief and advance the object of the Act it can help or assist the court in interpreting the true purport and intendment of the enactment, and
>
> (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

17 *Sundaram Pillai v. VR Pattabiraman*, AIR 1985 SC 582 : (1985) 1 SCC 591, p 613

39. In **Sree Sankaracharya University of Sanskrit** (supra), it has been held by the Supreme Court that merely describing a provision as an "Explanation" or a "clarification" is not decisive of its true meaning and import and it has been further held that a prerequisite for describing a provision as explanation or clarification, the pre-amended law should be vague or ambiguous. Their Lordships observed as under: -

> "50. An explanation/clarification may not expand or alter the scope of the original provision, vide *Bihta Cooperative Development Cane Marketing Union Ltd.* v. *Bank of Bihar,* AIR 1967 SC 389. Merely describing a provision as an "Explanation" or a "clarification" is not decisive of its true meaning and import. On this aspect, this Court in *Virtual Soft Systems Ltd.* v. *Commissioner of Income Tax, Delhi*, (2007) 289 ITR 83 (SC) observed as under :
>
> > "Even if the statute does contain a statement to the effect that the amendment is declaratory or clarificatory, that is not the end of the matter. The Court will not regard itself as being bound by the said statement in the statute itself, but will proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is an amendment which is intended to change the law and which applies to future periods."
>
> 51. This position of the law has also been subscribed to in *Union of India* v. *Martin Lottery Agencies Ltd.,* (2009) 12 SCC 209 wherein it was stated that when a new concept of tax is introduced so as to widen the net, the same cannot be said to be only clarificatory or declaratory and therefore be made applicable retrospectively, even though such a tax was introduced by way of an explanation to an existing provision. It was further held that even though an explanation begins with the expression "for removal of doubts," so long as there was no vagueness or ambiguity in the law prior to introduction of

the explanation, the explanation could not be applied retrospectively by stating that it was only clarificatory.

52. From the aforesaid authorities, the following principles could be culled out:

i) If a statute is curative or merely clarificatory of the previous law, retrospective operation thereof may be permitted.

ii) In order for a subsequent order/provision/amendment to be considered as clarificatory of the previous law, the pre-amended law ought to have been vague or ambiguous. It is only when it would be impossible to reasonably interpret a provision unless an amendment is read into it, that the amendment is considered to be a clarification or a declaration of the previous law and therefore applied retrospectively.

iii) An explanation/clarification may not expand or alter the scope of the original provision.

iv) Merely because a provision is described as a clarification/ explanation, the Court is not bound by the said statement in the statute itself, but must proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is a substantive amendment which is intended to change the law and which would apply prospectively."

40. Reverting to the facts of the present case, it is quite vivid that clause (d) was enacted and inserted in Explanation 1 to Rule 43 of the CGST Rules based on the representations and recommendation made by the GST Council. Insertion of clause (d) has only expanded the scope of supplies which have to be excluded from the aggregate value of exempt supplies. Therefore, the amendment made in the explanation in shape of

Rule 43, Explanation (1)(d), of the CGST Rules, is not clarificatory in nature. Though express power in Section 164(3) of the CGST Act has been conferred upon the rule-making authority, yet the rule-making authority did not choose to promulgate it with retrospective effect. ITC, as held earlier, is not the substantive right of the dealer, it is only a nature of benefit or concession extended to the dealer under the statutory scheme and it cannot be claimed as a matter of right as held by their Lordships of the Supreme Court in **Jayam & Co.** (supra). As such, it cannot be held that it was retrospective in nature and would not apply to the present pending cases. Accordingly, the learned appellate authority has rightly dismissed the appeals of the petitioner. The second question is also answered against the petitioner and in favour of the State/ respondents.

41. The judgment relied upon by the petitioner in **Ascent Meditech Ltd.** (supra) delivered by the High Court of Gujarat is completely distinguishable as in that case amendment to Rule 89(5) of the Central/Gujarat Goods and Services Tax Rules, 2017 was brought after direction of the Supreme Court in the matter of **Union of India and others v. VKC Footsteps India Private Limited**[18] wherein after noticing the anomalies in the formula it was specifically directed by their Lordships of the Supreme Court to remove the anomalies and to take decision in

18 (2022) 2 SCC 603

accordance with law. Similarly, the decision relied upon in **Mysore Rolling Mills (P) Ltd.** (supra) and other decisions, are clearly not applicable to the facts of the present case and are distinguishable.

42. In that view of the matter, the benefit of amendment in shape of Explanation 1(d) to Rule 43 of the CGST Rules would be available for the period after 5-7-2022 and no case for interference in the order impugned passed by the Joint Commissioner (Appeals) deciding both the issues against the petitioner, would be made out.

43. Consequently, I do not find any merit in the petitions and all the writ petitions stand dismissed leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
JUDGE

Soma