IN THE GOODS AND SERVICES TAX APPELLATE TRIBUNAL
KOLKATA BENCH

COURT NO.1

Appeal No. APL/62/KLK/2026

The Commissioner
CGST & CX, Kolkata North Commissionerate
GST Bhawan, 180, Shantipally,
Rajdanga Main Road, Kolkata-700107

…… Appellant

VERSUS

M/s Power Tech Global Private Limited
6th Floor, 0, Hi-Tech Chamber, 84/1B
Topsia Road South, Kolkata-700046

…… Respondent

AND

Appeal No. APL/74/KLK/2026

The Commissioner
CGST & CX, Kolkata North Commissionerate
GST Bhawan, 180, Shantipally,
Rajdanga Main Road, Kolkata-700107

…… Appellant

VERSUS

M/s Power Tech Global Private Limited
6th Floor, 0, Hi-Tech Chamber, 84/1B,
Topsia Road South, Kolkata-700046

…… Respondent

AND

Appeal No. APL/75/KLK/2026

The Commissioner
CGST & CX, Kolkata North Commissionerate
GST Bhawan, 180, Shantipally,
Rajdanga Main Road, Kolkata-700107

…… Appellant

VERSUS

M/s Power Tech Global Private Limited
6th Floor, 0, Hi-Tech Chamber, 84/1B,
Topsia Road South, Kolkata-700046

…… Respondent

In appearance :

For the appellant: Mr. Shankha Majumdar, Superintendent, CGST
For the respondent : Mr. Subham Tulsian, Chartered Accountant

CORAM :

Hon'ble Shri S.G. Chattopadhyay : Judicial Member
Hon'ble Shri Bijoy Kumar Kar : Technical Member

Final Order

Date of Hearing : 21.07.2026
Date of Order : 05.08.2026

Per S.G. Chattopadhyay (JM):

[1]. Since all these 03 appeals arise from the same lis and resolve around substantially similar facts and questions of law, they are taken up together for disposal by a common order with the consent of the parties for the sake of convenience and to avoid multiplicity of proceedings.

[2]. The present appeals have been preferred before the GSTAT, Kolkata Bench under sub-section (1) of Section 112 of the Central Goods & Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act') against the common Order in Appeal dated 08.07.2025 passed by the Joint Commissioner, CGST & CX, Kolkata, Appeal-1 Commissionerate in Appeal Nos.563 of 2025, 564 of 2025 & 565 of 2025. The said appeals came to be filed before the Joint Commissioner by the present respondent (hereinafter called the 'taxpayer') under sub-section (1) of Section 107 of the CGST Act against the common Order in Original No.399 dated

02.02.2025 passed by the Assistant Commissioner of CGST & CX, Chowringhee Division, Kolkata North Commissionerate in case No.JD190225001830, No.JD1902250017988 and No.JD190225001785F.

[3]. The adjudicating authority by the said Order in Original (hereinafter called 'OIO') directed the taxpayer to reverse proportionate ITC to the tune of Rs.74,75,604/- (Rupees Seventy-four Lakhs Seventy-five Thousand Six Hundred Four only) for 03 financial years from 2017-2020 for availing the said sum of ITC on exempt supplies and to pay applicable interest thereon along with penalty of an equal sum of Rs.74,75,604/- (Rupees Seventy-four Lakhs Seventy-five Thousand Six Hundred Four only).

[4]. The aggrieved taxpayer assailed the said order of the adjudicating authority before the appellate authority under sub-section (1) of Section 107 of the CGST Act. As indicated, the appellate authority by the impugned order in appeal dated 08.07.2025 rejected the OIO passed by the adjudicating authority and thereby exonerated the tax payer from the liabilities.

[5]. Aggrieved by and dissatisfied with the impugned order passed by the Appellate Authority, the department (hereinafter called 'the revenue') has filed these 03 appeals before GSTAT Kolkata Bench for setting aside the said impugned order.

[6]. Brief facts of the case projected by the revenue are that the taxpayer is engaged in the business of manufacture of electrical apparatus

designed to distribute and control the flow of electricity which, *inter alia*, includes the manufacture of switchgears, voltage limiters, fuses and circuit breakers, surge protection devices, suppressors, junction boxes, boards, panels, consoles, cabinets, power capacitors etc. For carrying out his business, the taxpayer has set up his principal office at 6th Floor, O, Hi-tech Chamber, 84/1B, Topsia South Kolkata-46. He is registered under CGST Act with GSTIN:19AADCP2569B1ZH under the jurisdiction of R-V Chowringhee Division, Kolkata-North, CGST & CX Commissionerate.

[7]. The crux of the allegations against the taxpayer is that he availed ITC on inputs and services for outward supply of goods and services and wilfully suppressed it in the return submitted by him in GSTR Form 3B. A scrutiny undertaken by the revenue revealed that as per GSTR Form 3B submitted by the taxpayer, there was a total taxable supply of a sum of Rs.17,37,61,985/- during 03 financial years commencing from 2017-2020 and the taxpayer availed the benefit of exemption on a sum of Rs.10,93,43,077/- in respect of outward supply of MEIS Duty Scrips and availed ITC of Rs.1,95,15,412/-. But, as per determination made by the revenue in terms of Section 17 of the CGST Act, read with Rules 42 & 43 of CGST Rules, the taxpayer availed excess ITC of Rs.74,75,604/- for exempt goods and services and he wilfully suppressed the fact in GSTR Form 3-B.

[8]. Thus, for availing ITC by way of wilful suppression of fact, the revenue served a show-cause notice vide SCN

No.8/SC/GST/CHOW/KOL-N/24-25 dated 01.08.2024 on the taxpayer in terms of sub-section (1) of Section 74 of the CGST Act requiring him to show cause as to why he should not pay the amounts specified in the SCN along with applicable interest thereon and a penalty equivalent to the tax specified in the notice.

[9]. The show-cause notice in paragraph 2 contains a table which demonstrates as to how the revenue determined the amount of ITC to be reversed by the taxpayer in accordance with Section 17 of CGST Act read with Rules 42 & 43 of the CGST Rules and the corresponding provisions of the State GST Act and Rules. The table aforesaid is reproduced hereunder :-

F.Y	Total Taxable Turnover (INR)	Total Exempt Turnover (INR)	Total Turnover (Taxable+ Exempt) (INR)	Exempt Turnover to Total Turnover Ratio	ITC Available as per GSTR-3B (INR)		Total ITC Reversed (INR) in Table 4B(1) of GSTR-3B		ITC to be reversed as per Ratio Computed (INR)		Net ITC to be REVERSED	
2017-18	36730988	13536249	50267237	0.27	IGST=	80773	IGST=	0	IGST=	21751	IGST=	21751
					CGST=	1574848	CGST=	0	CGST=	424084	CGST=	424084
					SGST=	1574848	SGST=	0	SGST=	424084	SGST=	424084
2018-19	93991062	71622012	165613074	0.43	IGST=	944607	IGST=	36000	IGST=	408510	IGST=	408510
					CGST=	4664897	CGST=	0	CGST=	2017409	CGST=	2017409
					SGST=	4664897	SGST=	0	SGST=	2017409	SGST=	2017409
2019-20	43039935	24184816	67224751	0.36	IGST=	3550464	IGST=	0	IGST=	1277317	IGST=	1277317
					CGST=	1230039	CGST=	0	CGST=	442520	CGST=	442520
					SGST=	1230039	SGST=	0	SGST=	442520	SGST=	442520
					Total	**19515412**	**36000**		**7475604**		**7475604**	

[10]. Paragraphs 6, 7 & 8 of the show-cause notice is also considered relevant which is reproduced hereinbelow :-

6. The said taxpayer viz M/s POWER TECH GLOBAL PRIVATE LIMITED having GSTIN: 19AADCP2569B1ZH is, therefore called upon to Show Cause u/s 74 of the CGST/SGST Act, 2017 read with Section 20 of the IGST Act, 2017, before the Assistant Commissioner of CGST & CX, (Room No. 124), Chowringhee Division, Kolkata North Commissionerate, Kolkata, 180, Rajdanga Main Road, Shantipally, Kolkata-700107 within 30 (thirty) days from the date of receipt of this notice as to why:-

(i) Ineligible ITC of Rs. 74,75,604/-(Rupees Seventy Four Lakh Seventy Five Thousand Six Hundred Four Only) [Rs. 17,07,578 /-(IGST) + Rs. 28,84,013 /-(CGST) + Rs. 28,84,013 /-(SGST)] availed and utilized shall not be demanded and recovered under section 74 of CGST & SGST Act, 2017 read with Section -20 of IGST Act, 2017 from them.

(ii) Appropriate interest shall not be imposed under Section 50 of CGST & SGST Act, 2017 read with Section -20 of IGST Act, 2017 and recovered from them.

(iii) Penalty under section 74 of CGST & SGST Act, 2017 read with Section -20 of IGST Act, 2017 shall not be imposed and recover from them.

7. If no cause is shown within the stipulated period of 30 (thirty) days from the date of receipt of this Notice or if he fails to appear before the Adjudicating Authority when the case shall be posted for hearing, the case will be adjudicated on the basis of available records with the department without any further reference.

8. This notice is issued without prejudice to any other action that may be taken against the Noticee under the provisions of the CGST Act, 2017/WBGST Act, 2017 and/or Rules made thereunder or under any other law for the time being in force.

[11]. The taxpayer submitted his reply dated 25.11.2024 to the show-cause notice served on him by the revenue. The relevant extract of taxpayer's reply is as under :-

2.0 REPLY TO THE SCN:-

"We Power Tech Global Private Limited registered with GSTIN: 19AAPFA2433C1ZP have not contravened the provisions of Section 17 of the CGST Act, 20173. The brief fact is that we purchased a

Drilling Machine (Hydra) from M/s Aqua Construction & Company registered with GSTIN: 19AAPFA2433C1ZP on 31.08.2017 having invoice number AQUA/HDD/09(17-18) only once but by mistake our Chartered Accountant has shown it twice while filing GSTR-1. Still, we have not taken ITC Input twice.

Sir, to claim our innocence we are enclosing the invoice of M/s Aqua Construction &Company so that you can verify it as Annexure-1.

Sir, we are enclosing the Independent Auditors Report for the period 2017-2018, 2018-2019 and 2019-2020 as Annexure 2.

Sir, we are enclosing the list of our suppliers for verification for 2017-2018, 2018-2019, 2019-2020. As Annexure 3.

Sir, we enclosing our Bank Statement as Annexure 4 for the disputed period along with our statement of License sales & purchases as Annexure 5 alongwith the invoices.

Sir, we will request you to verify all the documents and provide us an opportunity to clear any doubts."

[12]. The adjudicating authority considered the taxpayer's reply and each of the documents adduced on his behalf and by the OIO passed on 02.02.2025 came to the conclusion that in absence of any cogent evidence and plausible explanation, the taxpayer was liable to reversal of ITC to the tune of Rs.74,75,604/- as alleged in the SCN and passed the following order :-

"4.2.5 I find that the noticee has not submitted any details regarding amount of Input Tax attributable to inputs and input services Intended to be used exclusively for purposes other than business and exclusively for effecting exempt supplies respectively. The noticee did not submit any requisite justifiable documents/evidence in support of their aforesaid claim. Neither did they submit any cogent clarification whatsoever along with copies of supporting statutory documents/evidence wherein one to one correlation. between Input goods/services and Outward supply of goods/services could be established in relation to the taxable items/services & Exempted/Non GST items/services They submitted a reply mainly claiming of inadvertent double submission of one purchase in their GSTR-1. Therefore, in absence of any conclusive documents and plausible explanation, I find that the alleged ITC as alleged in the SCN is to be reversed for the Period from FY 2017-18 to FY 2019-20.

4.2.6. It is evidently clear that the said taxpayer have willfully suppressed the fact by declaring amount of ITC attributable to exempt supply and waited until the department unearthed the facts in the present case. If the scrutiny had not been initiated by the Department, such evasion of tax would never have come to light and the revenue involved would have been lost forever. Let me reiterate that due to indulgency in such activity of wrong declaration of amount and also remained reticent for such a long time it is clear that the said taxpayer have suppressed the relevant data from the department wilfully to avail the irregular ITC. In the current regime, so as in the earlier one, the Government has placed full trust on the taxpayer and accordingly measures like self-assessments, etc., based on mutual trust and confidence are in place. All these operate on the basis of honesty of taxpayer; therefore, the governing statutory provisions create a liability on taxpayer when any provision is contravened or there is a breach of trust placed on the taxpayer. It is pertinent to mention here that the system of self-assessment is specifically incorporated in respect of GST under the provisions of Section 59 of CGST Act, 2017 which reads and is quoted hereunder:

"Section 59. Every registered person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under section 39."

Since the said taxpayer were liable to self-assess the liability to pay tax and/or avail eligible ITC they had an obligation to furnish the correct and complete information, which I gravely note from the Show-Cause-cum-Demand Notice and the records, that the said taxpayer have miserably failed in pursuit of their statutory duty, more so by availing ITC which was procured by obtaining fake invoices when there is no supply of services.

Had the department not initiated the scrutiny against the said taxpayer the matter would have gone unearthed. Therefore, the amount of inadmissible ITC wrongly availed and utilized is liable to be reversed or paid under Section 74 of the CGST Act, 2017 read with corresponding Sections of SGST Act, 2017 and Section 20 of the IGST Act, 2017 along with interest under Section 50(3) of the CGST Act, 2017 and applicable penalty under Section 74 of the CGST Act, 2017 read with corresponding Sections of SGST Act, 2017 and IGST Act, 2017.

Accordingly, I find that the noticee is liable to reverse proportionate ITC to the tune of Rs. 74,75,604/- (Seventy Four Lakh Seventy Five Thousand Six Hundred Four Only) [Rs. 17,07,578/- (IGST) + Rs. 28,84,013/-(CGST) Rs.28,84,013/- (SGST)) for period from FY 2017-18 to FY 2019-20 attributable towards 'exempt supplies' in violation of Section 17(2) of the said Act and the said amount is recoverable under Section 74 of the said Act.

5.0 In view of the above observations, I pass the following order:

ORDER

i. I confirm the demand of Proportionate ITC attributable towards Exempted/Nil rated/Non-GST supply amounting to Rs. 74,75,604/-(Seventy Four Lakh Seventy Five Thousand Six Hundred Four Only) [Rs.17,07,578/- (IGST) + Rs. 28,84,013/-(CGST) Rs.28,84,013/-(SGST)) for the FY 2017-18 to 2019-20 in terms of Section 17(2) of the CGST Act 2017 read with Rule 42 of CGST Rules, 2017 and order for recovery of the same in terms of Section 74 of the CGST, Act, 2017 read with corresponding provisions of WBGST Act, 2017 & Section 20 of the IGST Act, 2017.;

ii I order for recovery of interest as applicable, on amount of ITC confirmed at SI No. (i) above, under Section 50 of the CGST Act, 2017 read with corresponding provisions of WBGST Act, 2017 & Section 20 of the IGST Act, 2017.

iii. I also impose a penalty of Rs.74,75,604/- (Seventy Four Lakh Seventy Five Thousand Six Hundred Four Only) under Section 74 of the CGST Act 2017 read with corresponding WBGST Act, 2017 & & Section 20 of the IGST Act, 2017,

6.0 This order is passed without prejudice to any other action which may be taken against the Noticee under any other law for the time being in force.

[13]. Aggrieved taxpayer challenged the OIO before the appellate authority mainly on the following grounds :-

(i) The revenue did not consider that the taxpayer was entitled to the financial incentive provided by the Government of India under the Mercandise Exports from India Scheme (MEIS) despite of his filing the invoices of the sale of duty credit scrips. As a beneficiary of MEIS, he used to sell duty credit scrips which should not have been treated as supply of goods for the purpose of determination of taxable liability. Moreover, in view of the amendment to Explanation 1 to Rule 43, CGST Rules, 2017, effected vide Notification No.14 of 2022 dated 05.07.2022, the taxpayer was entitled to the benefit of exempt supplies (sell of duty credit scrips) with retrospective effect.

(ii) In terms of Section 17(2) of the CGST Act, apportionment of ITC should have been restricted to taxable supplies including zero rated supplies only. It should not have included exempt supply duty credit scrips.

(iii) The demand for reversal of ITC for sale of duty credit scrips would go against the objective of the Government to incentivise the exporters for promotion of exports and amount to violation of the provisions of Rules 42 & 43 of the CGST Rules, 2017.

(iv) Invocation of the provision of Section 74(1) was not warranted in the proceedings because there was no wilful suppression or misstatement contemplated under Section 74(1) of the CGST Act. The taxpayer sought for the rejection of the OIO under the premises aforesaid.

[14]. The appellate authority was of the view that sale of MEIS licences falls within the category of exempt supplies and in view of the amendment to Explanation 1 to Rule 43 of CGST Rules by inserting clause (d) after clause (c) in Explanation 1 effected vide Notification No.14 of 2022 dated 05.07.2022, whereby the value of supply of duty credit scrips was excluded from the aggregate value of exempt supplies, the taxpayer was entitled to ITC on the aggregate value of exempt supplies of duty credit scrips. The first appellate authority viewed that in view of the said amendment to Explanation 1 to Rule 43 of CGST Rules, the order of the adjudicating authority for reversal of the credit availed by the taxpayer for sale of duty credit scrips was illegal. To arrive at the conclusion, the appellate authority relied on the decision of the Hon’ble Apex Court in the cases of (i) **Sedco Forex International Drill Inc. Vs Commissioner of**

Income-tax, Dehradun, reported in AIR 2006 Supreme Court 428 (ii) **Hitendra Vishnu Thakur And others Vs. State of Maharashtra And Others, reported in (1994) 4 SCC 602** (iii) **Suchitra Components Ltd. Vs. Commissioner of Central Excise, Guntur, reported in (2006) 12 SCC 452** and (iv) **Allied Motors (P.) Ltd. Vs. Commissioner of Income-tax, reported in (1997) 224 ITR (SC) 677** and held that the said amendment of Rule 43 of CGST Rules which was effected by the Notification dated 05.07.2022 should have been applied retrospectively by the adjudicating authority because the said amendment was beneficial to the taxpayer. In this regard, the appellate authority also relied on Advance Ruling vide Order No.12 of 2023 dated 24.05.2023 passed by the Telengana State Authority for Advance Ruling, wherein it was ruled that after insertion of clause (d) to Explanation 1 of Rule 43 of CGST Rules, 2017, the value of duty credit scrips would not form part of the value of exempt supplies for the purpose of computation of reversal of input tax credit under Rule 42 of CGST Rules, 2017. On the basis of such findings, the appellate authority allowed the appeal and rejected the order in original passed by the Assistant Commissioner, Chowringhee Division, Kolkata North Commissionerate. It would be appropriate to reproduce the relevant extract of the impugned order of the appellate authority which is as under :-

> *5.4. The appellant is engaged in purchase sale of MEIS license and is also engaged in its regular operations of electrical supplies which is taxable in nature. I find that the adjudicating authority in*

Para 4.2.3 of the impugned order had considered the sale and purchase of MEIS license as 'Exempted Supply' and accordingly ordered to reverse the proportionate ITC to the tune of Rs. Rs.74,75,604/- alongwith interest and penalty alleging that common ITC had been used for exempted supply as well as taxable supply.

5.5. I find that vide notification no. 14/2022 dt: 05.07.2022 a new clause (d) was inserted in the Explanation-1 to Rule 43 wherein the scope of the said explanation was expanded to exclude the value of duty credit scrips from the aggregate value of exempt supplies for the purpose of the Rule 42 as follows:

"[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)…

(b)…

(c)…

(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, Subsection (i), vide number GSR 1284(E), dated the 13th October, 2017."

5.6. I find, the notification is clarificatory in nature. So, it is clear that, the intension of the I find the legislature is clarificatory rather than to enact a new rule. In this context, Apex Court judgement in the case of Sedco Forex International Drill Inc. Vs. Commissioner of Income Tax, Dehradoon reported in [AIR 2006 SUPREME COURT 4281/ (2005) 279 ITR 310[SC] is relevant and applicable.

5.7. Rule 43 of the CGST/SGST Rules, 2017 governs the manner of apportionment and reversal of ITC and these are procedural in character. In this respect, wish to mention the Apex Court judgement in the case of Hitendra Vishnu Thakur Vs. State of Maharashtra reported in 1994 SCC (4) 602. It was expressly opined that, procedural amendments shall have retrospective effect.

5.8. I find an Advance Ruling of TSAAR Order No.12/2023 dtd. 24.05.2023 passed by TELANGANA STATE AUTHORITY FOR ADVANCE RULING, wherein it has been clarified that: "After the insertion of this Rule, the value of duty credit scrips will not form part of value of exempt supplies for the purpose of computation of reversal of input tax credit under Rule 42 of the CGST Rules."

5.9. I find cluse (d) to Explanation 1 of Rule 43 was inserted vide the notification no. 14/2022 dt: 05.07.2022. Explanation 1 pertains to clarification for computation of exempted supplies. As per legal understanding, any clarification always bears a retrospective effect. In this context, I wish to mention the Case of Suchitra Components Ltd. Vs. CCE, Guntur [(2008)12 STT 25 (SC)] wherein at Para 2 of the order the Hon'ble Apex Court held that a beneficial circular has to be applied retrospectively while oppressive circular has to be prospectively. I fird similar findings in the order given by the Apex Court in the case of M/s Allied Motors Pvt. Ltd. Vs. Commissioner of Income Tax Delhi reported in (1997) 224 ITR 677. I find it as a beneficial provision and must be given retro effect to avoid hardship and promote equity.

Hence, the MEIS transaction made by the appellant during 2017-18 to 2019-20 and Its non-reversal of proportionate ITC must be construed retrospectively being procedural, clarificatory and beneficiary which is consistent with binding on the basis of findings given by the Apex Court and established principles of statutory interpretations.

Now, in view of the findings as discussed hereinbefore and in terms of Sec 107 of the CGST Act 2017, I proceed to pass the following order.

ORDER

- *I allow the appeal and reject the orders vide DRC 07 no. ZD1902250018130, ZD1902250017988 & ZD190225001785F dated 03.02.2025 (Order -in-Original No. 399/CHOW/AC/Kol-N/2024-25 dated 02.02.2025) passed by the Assistant Commissioner, Chowringhee Division, Kolkata North Commissionerate. So, the instant case is herewith disposed off accordingly.*

[15]. The said order of the appellate authority is under challenge before us.

[16]. We have heard Mr. Shankha Majumdar, Superintendent, CGST appearing on behalf of the revenue before us. We have also heard Mr. Subham Tulsian, Chartered Accountant, who is representing the respondent in this appeal.

[17]. The grounds of the appeal before us are mainly as follows :-

i) The sale of duty credit scrips was an exempt supply during the period of assessment from 2017-2020. In terms of the statute, the taxpayer is not entitled to ITC for exempt supplies, therefore, the adjudicating authority lawfully directed the him to reverse the ITC availed by him for sale of duty credit scrips.

ii) The Notification No.14 of 2022 dated 05.07.2022 amending Explanation 1 to Rule 43 of CGST Rules by insertion of clause (d) in Explanation 1 was given prospective effect under its commencement clause and the appellate authority committed error by giving the benefit of such amendment to the respondent with retrospective effect.

iii) The Advance Ruling of the Telengana State Authority was applicable only to the jurisdictional officers.

iv) The amendment of Rule 43 of CGST Rules, 2017, whereby the value of duty credit scrips was excluded from the aggregate value of exempt supply to the taxpayer would apply prospectively as contemplated under the amended rule.

[18]. With regard to the judgments of the Hon'ble Apex Court relied upon by the appellate authority, the revenue has contended that the facts of those cases being distinguishable, the decisions are not applicable to the present case. On the grounds aforesaid, the appellant has sought for dismissal of the impugned order of the appellate authority.

[19]. In response, the taxpayer uploaded his cross objection and documents he considered relevant in support of his case. The grounds of his objections have been summarized as follows :-

i) *The appellate authority has decided the appeal on merit with due application of mind and after due appreciation of the factual matrix, applicable statutes and available materials which does not call for any interference. The present appeal before the GSTAT, is therefore, devoid of merit.*

ii) *The revenue was preferred this appeal in violation of the monetary limit prescribed by the CBIC vide Circular No.207/1/2024-GST, dated 26.06.2024, whereby the CBIC, in exercise of power conferred under Section 120(1) of the CGST Act, 2017, has fixed a monetary limit of Rs.20,00,000/- for the purpose of filing appeal before the GST Appellate Tribunal. The amount involved in this appeal is less than this monetary threshold of Rs.20,00,000/- and as such in view of the said circular of CBIC, all the three appeals of the revenue are liable to be dismissed at the outset.*

iii) *The taxpayer is engaged in regular business of electrical supplies which has been duly disclosed by the taxpayer under taxable supplies and taxable liability arising from such supplies has also duly been discharged by him. But, insofar as the question of sale of duty credit scrips is concerned, the said scrips are received as rewards in order to encourage exports. Once issued by the Government, such scrips can be sold as such and does not require any taxable input. Therefore, the duty credit scrips cannot be treated at par with other exempt goods and services and as such the appellate authority has rightly held that ITC availed by the taxpayer on the sale of* *duty credit scrips is not reversable. The taxpayer has, therefore, sought for dismissal of the appeal.*

[20]. In the course of his arguments, Mr. Shankha Majumdar, Superintendent, vehemently contended that the appellate authority committed serious error in holding that amendment of Rule 43 of CGST Rules effected by Notification No.14/2022 dated 05.07.2022 would be given retrospective effect since it conferred a benefit to the taxpayer. It was argued by Mr. Majumdar that the sale of duty credit scrips falls in the category of exempt supplies and since the taxpayer availed ITC on such exempt supplies during the assessment period before the Notification came into force, he was legally bound to reverse the ITC availed by him on such exempt supplies.

[21]. With regard to the threshold limit of Rs.20,00,000/- for filing appeal before GSTAT, contended by the taxpayer, Mr. Majumdar argued that CBIC Circular No. No.207/1/2024-GST, dated 26.06.2024 in paragraph 3 has laid down some principles which are to be considered while determining as to whether a case falls within the said monetary threshold or not. Mr. Majumdar has referred to para 3.viii of the Notification which reads as under :-

> 3. *While determining whether a case falls within the above monetary limits or not, the following principles are to be considered:*
> *i.xxxxxxxx*
> *ii.xxxxxxx*
> *iii.xxxxxxx*
> *iv.xxxxxxx*
> *v.xxxxxxx*
> *vi.xxxxxxx*

vii.xxxxxx

viii. In a composite order which disposes more than one appeal/demand notice, the monetary limits shall be applicable on the total amount of tax/interest/penalty/late fee, as the case may be, and not on the amount involved in individual appeal or demand notice.

[22]. It is contended by Mr. Majumdar, Superintendent that the three appeals taken together, the amount involved in these appeals exceeds the monetary limit of Rs.20,00,000/- and as such the contention of the taxpayer does not gain ground. This apart, Mr. Majumdar has also invited our attention to the exclusions provided in the said circular which, in paragraph 4.iv, provides that when the matter is related to an issue which is recurring in nature and/or involves interpretation of the provisions of the Act/the Rules/Notification/Circular/Order/Instruction etc., the threshold limit provided under the Circular shall not apply. According to Mr. Majumdar, Superintendent, the said circular would have no bearing on this case. Mr. Majumdar, the authorised representative of the appellant, concluded his arguments by submitting that the appellate authority rejected the OIO without application of mind and the law laid down in this regard and, therefore, the order of the appellate authority is liable to be dismissed.

[23]. Appearing on behalf of the taxpayer Mr. Subham Tulsian, Chartered Accountant, vehemently contended that the present appeal preferred by the revenue is not maintainable in view of Circular No.207/1/2024-GST dated 26.06.2024, which was issued by the Government of India, Ministry

of Finance, Department of Revenue to reduce the Government litigation. The Circular fixed monetary limits for filing of appeals or application by the revenue before the GST Appellate Tribunal, High Courts and Supreme Court which clearly indicates that for filing appeals before the GSTAT, such monetary limit would be Rs.20,00,000/-. It is submitted by Mr. Tulsian that the Circular has statutory force since it has been issued by the competent authority in exercise of powers conferred under Section 120 (1) read with Section 168 of CGST Act pursuant to the recommendation of GST Council. Mr. Tulsian has further contended that unless the policy framed by the Government of India for the purpose of reducing litigation by fixing a monetary limit is adhered to by the departmental officer, the goal to be achieved by such policy will be frustrated. Mr. Tulsian concludes his submission on this issue by contending that the present appeal does not fall within the ambit of any of the exclusions provided under paragraph 4 of the Circular and, therefore, the appeal is required to be dismissed *in limine.*

[24]. In continuation of his arguments Mr. Tulsian contends that the order impugned is passed on a sound reasoning. According to him the appellate authority has, by correct interpretation of law, rightly held that the amendment of Rule 43 of CGST Rules effected by the Notification of 2022 would apply to this case retrospectively. He argues that looking to the curative nature of the said amendment by way of insertion of clause (d) under Explanation 1 to Rule 43 of CGST Rules and taking into

consideration the intention of the framer of this rule, it must be applied retrospectively for the benefit of the taxpayers including the present respondent.

[25]. With regard to the allegation of the revenue in the SCN that the taxpayer has suppressed the ITC availed by him on the sale of exempt goods (duty credit scrips), Mr. Tulsian has contended that the taxpayer did not suppress any information. With regard to purchase of inputs for outward taxable supplies of electrical apparatus, a complete statement of his turnover, tax liability and ITC availed by him has been furnished in GSTR Form-3B in time. The revenue did not dispute it. Mr. Tulsian has contended that insofar as the duty credit scrips is concerned, the same is only received as reward. Once it is issued by the Government of India, the same can be sold by the beneficiary which does not require the purchase of any input for this purpose and, therefore, the value of the supply of duty credit scrips was excluded from the aggregate value of exempt supplies for the purpose of Rule 42 of CGST Rules, which along with Rule 43 provides the manner of determination of input tax credit in respect of inputs or input service reversal thereof.

[26]. Mr.Tulsian has further contended that this is not a fit case for invoking Section 74 of the CGST Act, 2017 as there is no proof of any wilful misstatement or suppression of facts to evade tax as contemplated under Section 74(1) of the CGST Act, 2017.

Under the premises, aforesaid, Mr. Tulsian, CA urges this Tribunal to dismiss the appeal.

[27]. In view of the above, the questions which arise for determination in this appeal are as follows :-

i) *Whether we can accept the contention of the taxpayer that in view of Circular No.207/1/2024-GST dated 26.06.2024 fixing the monetary limit of Rs.20 lakhs for filing appeal before GSTAT, this appeal is not entertainable?*

ii) *Whether the Appellate Authority was correct in exonerating the taxpayer from all tax liabilities by applying Notification dated 05.07.2022 retrospectively whereby the value of duty credit scrips was excluded from the aggregate value of exempt supplies by insertion of clause (d) after clause (c) in Explanation 1 to Rule 43 of CGST Rules, 2017 by way of amendment?*

iii) *Whether in the given facts and circumstances of the case, the Revenue was legally correct in invoking Section 74(1) of the CGST Act, 2017 against the taxpayer?*

F I N D I N G S

[28]. As regards the question as to whether this appeal is entertainable in view of the monetary limit for filing appeal before the GSTAT fixed by Circular No.207/1/2024-GST dated 26.06.2024 issued by the Government of India, Ministry of Finance, Department of Revenue, the argument of the revenue is that the Circular is not applicable to this appeal because

clause-viii of paragraph 3 of the said circular has provided in unambiguous terms that whenever more than one appeals have been decided by a composite order, the amount involved in individual appeal or individual demand notice shall not be considered for determining as to whether it falls within the threshold of such monetary limit. Rather the total amount of tax/interest/penalty/late fee, as the case may be, shall be taken into account to determine the applicability of the circular. It has also been argued on behalf of the Revenue that under paragraph 4 of the circular, the exclusions have been provided and under one of such exclusions provided under clause iv of paragraph 4, whenever the appeal involves an issue which is recurring in nature and/or involves interpretation of the provisions of the Act/the Rules/Notification/Circular/Order/Instruction etc., the said circular will not apply. The revenue contends that apart from the question of monetary limit fixed by the circular, the overall objective of the circular for reducing unnecessary litigation has been considered by the revenue and after giving a careful consideration to the merit of the appeal, the revenue has preferred this appeal before this Tribunal.

[29]. The contention of Mr. Tulsian appearing on behalf of the taxpayer is that paragraph 3 of the circular has only laid down the principles to be considered by the revenue while determining as to whether the appeal falls within the monetary limit fixed by the circular. Paragraph 3 does not provide any exclusion. Therefore, paragraph 3 will not be applicable to exclude the present appeal from the purview of this circular. Further

contention of Mr. Tulsian is that the exclusions are provided under paragraph 4 of the circular and the instant appeal does not fall within the ambit of any those exclusions and as such the present appeal is squarely covered by the circular and the revenue is debarred from filing the appeal before the Tribunal in view of the monetary limit fixed by the circular.

[30]. We have considered their submissions in the light of the circular which has been brought on record and the parties to the appeal have advanced argument and counter argument on the issue. Under this circular issued on 26.06.2024 the Government of India has fixed monetary limits for filing appeals before the GSTAT, High Court and the Supreme Court. Under paragraph 2 of the circular no appeal can be filed by the revenue before GSTAT where the amount involved in the appeal is less than Rs.20,00,000/- and in respect of Hon'ble High Court it would be Rs.1,00,00,000/- and in respect of Supreme Court it would be Rs.2,00,00,000/-, respectively. The object of the circular is stated in the preamble which reads as under :-

> *Reference is invited to the National Litigation Policy which was conceived with the aim of optimizing the utilization of judicial resources and expediting the resolution of pending cases. It underscores the importance of prudent litigation practices by establishing thresholds for filing appeals in Revenue matters. Specifically, the Policy mandates that appeals should not be pursued when the amount involved is below a specified monetary limit set by Revenue authorities. Furthermore, it discourages filing appeals in cases where established precedents from Tribunals and High Courts have settled the matter and have not been contested in the Supreme Court.*

[31]. Undoubtedly the said circular has statutory force because the Central Board of Indirect Taxes and Customs (hereinafter called 'CBIC') has been empowered under Section 120(1) read with Section 168(1) of CGST Act, 2017 to issue such orders or instructions or directions fixing the monetary limit to regulate the filing of the appeal. It would be appropriate to reproduce Section 120 and Section 168(1) of the CGST Act, 2017 for the sake of clarity. The said Sections read as under :-

> ***"120. Appeal not to be filed in certain case****s. —1) The Board may, on the recommendations of the Council, from time to time, issue orders or instructions or directions fixing such monetary limits, as it may deem fit, for the purposes of regulating the filing of appeal or application by the officer of the central tax under the provisions of this Chapter.*
>
> *(2) Where, in pursuance of the orders or instructions or directions issued under subsection (1), the officer of the central tax has not filed an appeal or application against any decision or order passed under the provisions of this Act, it shall not preclude such officer of the central tax from filing appeal or application in any other case involving the same or similar issues or questions of law.*
>
> *(3) Notwithstanding the fact that no appeal or application has been filed by the officer of the central tax pursuant to the orders or instructions or directions issued under sub-section (1), no person, being a party in appeal or application shall contend that the officer of the central tax has acquiesced in the decision on the disputed issue by not filing an appeal or application.*
>
> *(4) The Appellate Tribunal or court hearing such appeal or application shall have regard to the circumstances under which appeal or application was not filed by the officer of the central tax in pursuance of the orders or instructions or directions issued under sub-section (1).*
>
> x x x x x
>
> ***"168. Power to issue instructions or directions.*** *- (1) The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this Act, issue such orders, instructions or directions to the central tax officers as it may deem fit, and thereupon all such officers and all other persons employed in*

the implementation of this Act shall observe and follow such orders, instructions or directions.

[32]. From the language of Sections 120 and 168(1) of the CGST Act, 2017, it is clear that such circulars contain instructions/directions to the officers of the central tax, who are legally bound to follow such instructions/directions. But insofar as the Tribunal is concerned, a CBIC Circular does not have a binding effect on the Tribunal. In this regard, the Principal Bench of the GST Appellate Tribunal in its final order dated 04.06.2026 in the case of M/s Dow Chemical International Private Limited, Appellant Vs. Commissioner of State Tax, Mazgaon, Mumbai in paragraph 17 has succinctly held as under :-

17. The circular issued by the CBDT and CBIC are having binding character as far as its officers are concerned not as far as judicial authorities like High Court exercising jurisdiction under Article 226 or 227 of the Constitution of India. We are also of the opinion that since the Tribunal is not department under CBIC any circular issued by the CBIC does not have a binding effect on Tribunal. However, it can be looked into for the purpose of interpretation, having persuasive role. In this connection, we rely upon two judgments.

1. K.P. Varghese v. ITO [1981] 7 Taxman 13/131 ITR 597 (SC),

2. Ellerman Lines Ltd. v. CIT [1971] 82 ITR 913 (SC)

[italics supplied by us]

[33]. Since the matter has been raised before us by the parties, we have given due consideration to the said Circular in order to ascertain the bearing of the said circular on this appeal. Paragraph 1.1 of the circular contains the entire provision of Section120 of CGST Act, 2017. Paragraph 2 of the circular fixes the monetary limits in the tabular form for fling the appeal before the GSTAT, High Court and Supreme Court. Paragraph 3

lays down the principles to be considered to ascertain whether a case falls within the said monetary limits and paragraph 4 provides the exclusions which excludes the cases where the monetary ceiling shall not apply. Paragraph 5, 6, 6.1, 6.2 & 6.3 have been reproduced for the purpose of an understanding of the circular from the right perspective. The said paragraphs read as under :-

> *5. It is pertinent to mention that an appeal should not be filed merely because the disputed tax amount involved in a case exceeds the monetary limits fixed above. Filing of appeal in such cases is to be decided on merits of the case. The officers concerned shall keep in mind the overall objective of reducing unnecessary litigation and providing certainty to taxpayers on their tax assessment while taking a decision regarding filing an appeal.*
>
> *6. Attention is drawn to sub-sections (2), (3) & (4) of section 120 of the CGST Act, which provide that in cases where it is decided not to file appeal in pursuance of these instructions, such cases shall not have any precedent value. In such cases, the Reviewing Authorities shall specifically record that "even though the decision is not acceptable, appeal is not being filed as the amount involved is less than the monetary limit fixed by the Board."*
>
> *6.1 Non-filing of appeal based on the above monetary limits, shall not preclude the tax officer from filing appeal or application in any other case involving the same or similar issues in which the tax in dispute exceeds the monetary limit or case involving the questions of law.*
>
> *6.2 Further, it is re-iterated that in such cases where appeal is not filed solely on the basis of the above monetary limits, there will be no presumption that the Department has acquiesced in the decision on the disputed issues in the case of same taxpayers or in case of any other taxpayers. Accordingly, in case any prior order is being cited or relied upon by the taxpayer, claiming that the same has been accepted by the Department, it must be checked as to whether such order was accepted only on account of the monetary limit before following them in the name of judicial discipline.*
>
> *6.3 Also, in respect of such cases where no appeal is filed based on the monetary limit, the Departmental representatives/counsels must make every effort to bring to the notice of the GSTAT or the*

> *Court, as the case may be, that the appeal in such cases was not filed only for the reason of the amount of the tax in dispute being less than the specified monetary limit and, therefore, no inference shall be drawn that the decisions rendered therein were acceptable to the Department. Accordingly, they should draw the attention of the GSTAT or the Court towards the provisions of sub-section (4) of section 120 of the CGST Act, 2017 as reproduced in para 1.1 above.*

[34]. From a careful reading of the contents of the circular, it has appeared to us that under the directions contained in the circular, the revenue has to carefully consider the various principles laid down under this circular before filing such appeal. It is contended by the revenue that they have strictly followed the instructions contained in the circular. Clause viii of paragraph 3 of the circular and the exclusion clause provided in clause iv of paragraph 3 of the circular have been specifically referred to which support the contention of the Revenue that filing of the present appeal is not affected under this circular. We find force in the submission of the Revenue. There is, therefore, no merit in the contention of the taxpayer with regard to this issue.

[35]. The next issue which arises for our determination is whether the Appellate Authority was correct in applying Notification No.14 of 2022 dated 05.07.2022 retrospectively in favour of the taxpayer whereby the value of duty credit scrips was excluded from the aggregate value of exempt supplies by insertion of clause (d) after clause (c) in Explanation 1 to Rule 43 of the CGST Rules, 2017.

[36]. The main ground of appeal of the taxpayer before the appellate authority was that in view of the insertion of clause (d) after clause (c) in

Explanation 1 to Rule 43 of CGST Rules effected by Notification No.14 of 2022 dated 05.07.2022, the value of duty credit scrips would be excluded from the aggregate value of exempt supply in order to make apportionment of ITC reversal and as such the taxpayer would be entitled to avail ITC on the value of the sale of duty credit scrips. The first appellate authority accepted the contention of the taxpayer and by giving retrospective effect to the said amendment to Rule 43 of CGST Rules, 2017 for the transactions made in 2017-2020 provided relief to the taxpayer which is under challenge before us.

[37]. The question is whether in the given facts and circumstances of the case the benefit of the amendment made in 2022 w.e.f.05.07.2022 would be available to the taxpayer for availing ITC for the transactions made by him in 2017-2020.

[38]. In order to settle the question, we need to have a look into the status of Rule 43 of CGST Rules, 2017 as it was, prior to the amendment in 2022. Before we go to Rule 43 of CGST Rules, 2017, let us have a look at Section 11 of CGST Act, 2017.

[39]. Sub-section (1) of Section 11 of CGST Rules, 2017 empowers the Central Government to exempt by notification, goods or services or both of any specified description from the whole or any part of the tax leviable thereon on the recommendations of the GST Council. The said sub-section (1) of Section 11 of CGST Act, 2017 is being quoted for the sake of clarity of understanding which reads as follows :-

Section 11. Power to grant Exemption.-

(1) Where the Government is satisfied that it is necessary in the public interest so to do, it may, on the recommendations of the Council, by notification, exempt generally, either absolutely or subject to such conditions as may be specified therein, goods or services or both of any specified description from the whole or any part of the tax leviable thereon with effect from such date as may be specified in such notification.

[40]. Therefore, the goods or services or both notified under sub-section (1) of Section 11 of the CGST Act, 2017 shall be treated as exempt supply as defined under clause (47) of Section 2 of the CGST Act, 2017. The Central Government, in exercise of its power, conferred under the said sub-section (1) of Section 11 of CGST Act, 2017 came out with Notification No.2 of 2017 from the Ministry of Finance, Department of Revenue with effect from 28.06.2017, whereby the supply of some goods and services specified in the schedule appended to the said notification were exempted from the central tax leviable thereon under Section 9 of the CGST Act, 2017. There were as many as 148 items in the said schedule. The duty credit scrips were not then included in the said list of the exempt supplies.

[41]. 03 months later, the Government of India by similar statutory notification No.35 of 2017 dated 13.10.2017 amended its earlier Notification No.2 of 2017 dated 28.06.2017 referred to in the preceding paragraph and included therein Duty credit scrips by incorporating item No.122A in the schedule as an exempt supply with prospective effect. Thus, the duty credit scrips, an export promotion incentive granted by the

Government of India, came to be recognized as an exempt supply under the CGST Act, 2017 with effect from 13.10.2017.

[42]. Subsequently 04 years later, the Government of India, Ministry of Finance, Department of Revenue in exercise of its rule making power provided under Section 164(1) of CGST Rules, 2017 amended Rule 43 of CGST Rules, 2017 by inserting clause (d) after clause (c) in Explanation 1 to Rule 43 of the CGST Rules, 2017. After such amendment, the Explanation 1 to Rule 43 stands as under :-

> [Explanation 1: -For the purposes of rule 42 and this rule, it is hereby clarified that the aggregate value of exempt supplies shall exclude: -
>
> [* * *]
>
> (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, 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.]*
>
> (italics supplied by us)

[43]. The commencement clause of the said Notification No.14 of 2022 provides in specific terms that save and otherwise provided under the

Rules, the amendment shall come into force on the date of its publication in the official gazette. There is no dispute that the said notification was published in the Gazette of India in its extraordinary issue on 05.07.2022. Therefore, as per the commencement clause of the said amendment clause (d) after clause (c) in Explanation 1 to Rule 43 is said to have come into force with effect from 05.07.2022.

[44]. Section 164(3) of the CGST Act empowers the Central Government i.e. the Rule Making Authority to give retrospective effect to the rules or any of them from a date not earlier than the date of which the provisions of CGST Act, 2017 came into force. In the wisdom of the Rule Making Authority, they brought the amendment in force with a prospective effect from 05.07.2022 despite having power under the enabling provision of Section 164(3) of the Act to effect it retrospectively.

[45]. But the appellate authority having ignored the specific provision provided under the amended Rules of 2022 applied the said amendment retrospectively in favour of the taxpayer for the assessment made for transactions made by him 04 years back in 2017-2020 and allowed his appeal on the analogy that the amended rule being beneficial to the taxpayer, its benefit cannot be denied to him by applying the rule prospectively.

[46]. The appellate authority, however, relied on various decisions of the Hon'ble Apex Court to arrive at such conclusion. As we have gathered

from the impugned order passed by the first appellate authority, it relied on the following judgments of the Hon'ble Supreme Court :-

- ***i) Sedco Forex International Drill Inc. Vs Commissioner of Income-tax, Dehradun, reported in AIR 2006 SCC;***
- ***ii) Hitendra Vishnu Thakur And Ors. Vs. State of Maharashtra And Ors, reported in (1994) 4 SCC 602;***
- ***iii) Suchitra Components Ltd. Vs. Commissioner of Central Excise, Guntur, reported in (2006) 12 SCC 452; and***
- ***iv) Allied Motors (P.) Ltd. Vs. Commissioner of Income-tax, reported in (1997) 224 ITR (SC) 677.***

[47]. In the case of **Sedco Forex International Drill Inc.** (supra), the issue before the Hon'ble Apex Court was whether the salary of the employee of the appellant company payable for "field break" outside India would be subjected to tax under Section 9(1)(ii) read with the Explanation thereto in the Income Tax Act, 1961 for the assessment years 1992-1993 and 1993-1994 retrospectively after the said Explanation to Section 9(1)(ii) was substituted by the amendment with effect from 01.04.2000. In paragraph 20 of the said judgment, the Hon'ble Apex Court held that as was affirmed by the Apex Court in the case of **Goslino Mario, reported in (2000) 241 ITR 313**, *a cardinal principle of the tax law is that the law to be applied for such assessment is that the law which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication* [italics supplied by us]. It would be appropriate for us to refer the paragraph 20 of the judgment which reads as follows :-

> *20. As was affirmed by this Court in Goslino Mario (supra), a cardinal principle of the tax law is that the law to be applied is that*

which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. [See also: Reliance Jute and Industries vs. CIT (1980) 1 SCC 139]. An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force. But if it changes the law it is not presumed to be retrospective irrespective of the fact that the phrase used are 'it is declared' or 'for the removal of doubts'.

[italics supplied by us]

[48]. In the case of **Hitendra Vishnu Thakur** (supra), which was also relied upon by the first appellate authority, the Hon'ble Apex Court decided a batch of criminal appeals and Special Leave Petitions where the following 03 questions arose before the Hon'ble Apex Court :-

i) When can the provisions of Section 3(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as the 'TADA') be attracted ?

ii) Is the 1993 amendment amending Section 167(2) of the Code of Criminal Procedure by modifying Section 20(4)(b) and adding a new provision of Section 20(4)(bb) applicable to the pending cases i.e. is it retrospective in operation ?

iii) What is the true ambit and scope of Section 20(4) and Section 20(8) of TADA in the matter of grant of bail to an accused brought before the designated court and the factors which the designated court has to keep in view while dealing with the application for grant of bail u/s.20(4) of the Act and for grant of extension of time to the prosecution for further investigation under clause (bb) of Section 20(4) of the Act and incidentally whether the conditions contained in Section 20(8) of TADA Control, grant of bail under Section 20(4) of the Act also?

[49]. The Hon'ble Apex Court dealt with the issue No.2 with regard to retrospective operation of the amendment in paragraphs 24 to 29 . In para 26 of the Judgement, the Hon'ble Apex Court laid down the principles with

regard to the ambit and scope of an amended Act and its retrospective operation which reads as under :

> *26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:*
>
> *(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.*
>
> *(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.*
>
> *(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.*
>
> *(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.*
>
> *(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.*
>
> *[italics supplied by us]*

[50]. In the case of **Suchitra Components Ltd.** (supra), which has been relied upon by the first appellate authority, the Hon'ble Apex Court held that the issue is covered by a previous judgment of the Hon'ble Apex Court rendered in the case of **CCE v. Mysore Electricals Industries Ltd.,**

reported in (2006) 12 SCC 448, wherein it was held by the Hon'ble Supreme Court that a beneficial circular has to be applied retrospectively while oppressive circular has to be applied prospectively. Thus, when the circular is against the assessee, they have right to claim enforcement of the same prospectively. Paragraphs 2 and 3 of the judgment reads as under :-

> *2. We have heard Mr. A.R.Madhav Rao, learned counsel for the appellant and Mr K. Radhakrishna, learned Senior Counsel for the respondent. We have perused the orders passed by the lower Authorities and also of the Tribunal. The point raised by the learned counsel for the appellant is covered by the recent judgment of this Court in Civil Appeal No.4488 of 2005, Commissioner of Central Excise, Bangalore versus M/s. Mysore Electricals Industries Ltd., reported in 2007 (204) E.L.T. 517. In the said Judgment, this Court held that a beneficial circular has to be applied retrospectively while oppressive circular has to be applied prospectively. Thus, when the circular is against the assessee, they have right to claim enforcement of the same prospectively.*
>
> *3. In view of the submission made by the learned counsel for the appellant and also of the judgment of this Court in Mysore Electricals, the appellant is liable to pay the duty from 29-8-1990 i.e. from the date of issue of the show-cause notice and not from 1-3-1990 as ordered by the Tribunal.*
>
> *[italics supplied by us]*

[51]. We have also gone through the judgment passed by the Hon'ble Apex Court in the case of **CCE v. Mysore Electricals Industries Ltd**. (supra) which was relied upon by the Hon'ble Apex Court for rendering the judgment in the case of **Suchitra Components Ltd**. (supra). The decision of the Hon'ble Apex Court in the case of **CCE v. Mysore Electricals Industries Ltd**. (supra) is contained in paragraphs 14 to 17 which read as under :

14. We have perused the order impugned in this appeal, other connected records, and considered the rival submissions.

15. In the instant case, the assessee had filed a classification list effective from 1-3-1993, classifying the single panel circuit-breakers un-der Heading 85.35 and claiming concessional rate of duty at 5% under Notification No. 52/93 dated 28-2-1993. The said classification list was approved by the jurisdictional Assistant Commissioner on 10-6-1993. Thereafter, the assessee cleared the said goods in accordance with the approved classification list. When this approved classification was proposed to be revised to reclassify the single panel circuit-breakers under Heading 85.37 of the Tariff Act, such reclassification can take effect only prospectively from the date of communication of the show-cause notice proposing reclassification. In the instant case, the show-cause notice was communicated to the assessee only on 31-12-1993. Therefore, as rightly urged by the learned counsel for the respondent, the reclassification can take effect only from 27-4-1994 and accordingly the differential duty can be demanded only from that date.

16. In view of the above, we see no reason to interfere with the order passed by the Commissioner (Appeals) and as confirmed by the Tribunal. The appeal is accordingly dismissed.

17. However, there shall be no order as to costs.

[italics supplied by us]

[52]. In the case of **Allied Motors (P.) Ltd. V. Commissioner of Income-Tax** (supra), the issue before the Hon'ble Apex Court was that the first proviso was added to Section 43B of the Income Tax Act, 1961 which was not on the statute when the assessments were made in respect of the assesses. The assesses, therefore, contended that the proviso brought by way of amendment should be given effect to retrospective date when Section 43B became a part of income Tax Act, 1961. As it is intended to obviate unexpected hardships in the application of Section 43B, the Hon'ble Apex Court in paragraph 15.2 on this issue has held as under :-

15.2. Certain courts have interpreted the provisions of section 43B in a manner which may negate the very operation of this section. The *interpretation given by these courts revolves around the use of the words any sum payable. The interpretation given to these words is that the amount payable in a particular year should also be statutorily payable under the relevant statute in the same year. Thus, the sales tax in respect of sales made in the last quarter was held to be totally outside the purview of section 43B since the same is not statutorily payable in the financial year to which it relates. This is against the legislative intent and, there fore, by way of inserting an Explanation, it has been clarified that the words 'any sum payable', shall mean any sum, liability for which has been incurred by the taxpayer during the previous year irrespective of the date by which such sum is statutorily payable..."*

[italics supplied by us]

[53]. For a better perspective, the backdrop of the circumstances in which the Hon'ble Apex Court gave above judgment in the case of **Allied Motors (P.) Ltd**. (supra) need to be brought on record. For this purpose, a portion of paragraph 60 of the judgment may be quoted which runs as under :-

"The Budget Speech of the Finance Minister for the year 1983-84, reproduced in [1983] 140 ITR (St.) 31, is to the same effect.

Section 43B was, therefore, clearly aimed at curbing the activities of those taxpayers, who did not discharge their statutory liability of payment of excise duty, employer's contribution to provident fund, etc., for long periods of time but claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incurred by them in the relevant previous year. It was to stop this mischief that section 43B was inserted. It was clearly not realised that the language in which section 43B was worded, would cause hardship to those taxpayers who had paid sales tax within the statutory period prescribed for this payment, although the payment so made by them did not fall in the relevant previous year. This was because the sales tax collected pertained B to the last quarter of the relevant accounting year. It could be paid only in the next quarter which fell in the next accounting year. Therefore, even when the sales tax had in fact been paid by the assessee within the statutory period prescribed for its payment and prior to the filing of the income-tax return, these assessees were unwittingly prevented from claiming a legitimate deduction in respect of the tax paid by them. This was not intended by section 43B. Hence, the first proviso was inserted in section 43B. The amendment which was made by the Finance Act of 1987 in section 43B by inserting, inter alia, the first proviso, was remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the *assessee and which made the provision unworkable or unjust in a specific situation.*

Looking to the curative nature of the amendment made by the Finance Act of 1987, it has been submitted before us that the proviso which is inserted by the amending Finance Act of 1987, should be given retrospective effect and be read as forming a part of section 43B from its inception. This submission has taken support from decisions of a number of High Courts before whom this question came up for consideration. The High Courts of Calcutta, Gujarat, Karnataka, Orissa, Gauhati, Rajasthan, Andhra Pradesh, Patna and Kerala appear to have taken the view that the proviso F must be given retrospective effect. Some of these High Courts have held that "sum payable under section 43B(a) refers only to the sum payable in the same accounting year, thus excluding sales tax payable in the next accounting year from the ambit of section 43B(a). The Delhi High Court has taken a contrary view holding that the first proviso to section 43B G operates only prospectively. We will refer only to some of these judgments."

[italics supplied by us]

[54] The issue we are dealing with in the case in hand is that whether Explanation 1(d) inserted in Rule 43 of GST Rules, 2017 which excludes the value of supply of duty credit scrips from the aggregate value of exempt supplies with effect from 05.07.2022 for the purpose of calculating proportionate ITC reversal of the taxpayer could be applied retrospectively to allow the taxpayer for availing ITC on such exempt goods in the transactions made way back in 2017-20.

[55]. As we have already discussed, the first appellate authority gave relief to the taxpayer by allowing retrospective effect to the aforesaid amendment made in Rule 43 relying on the judgments of the Hon'ble Apex Court which have been referred to in the preceding paragraphs. From a reading of those judgments, it goes without saying that the first appellate authority relied on the said judgments without appreciating the fact that

the legal and factual issues involve ed in those cases are entirely different from the instant case.

[56]. As we have discussed, the duty credit scrip was not an exempt supply in terms of clause (47) of Section 2 of CGST Act, 2017 before 13.10.2017. It was incorporated in the law as an exempt supply by way of issuing Notification No.35 of 2017 dated 13.10.2017. At that time, the benefit of exclusion of the value of supply of duty credit scrips from the aggregate value of exempt supply for the purpose of calculating proportionate ITC reversal was not made available to the taxpayers. 04 years later, in 2022, the Central Government in the Ministry of Finance, Department of Revenue came out with a notification whereby clause (d) was inserted after clause (c) in Explanation 1 to Rule 43 of CGST Rules which excluded the value of supply of duty credit scrips from the aggregate value of exempt supplies with prospective effect from 05.07.2022. Looking to the language of Explanation 1 and clause (d), it cannot be presumed that the provision was inserted in the Rule to clarify doubts or any kind of ambiguities in the provision. It is apparent that the provision was inserted to provide the benefit of exclusion of the value of the duty credit scrips from the aggregate value of exempt supplies for the purpose of calculating proportionate ITC reversal from a prospective date. Obviously, the rule framers had power under Section 164(1) of CGST Act, 2017 to give retrospective effect to the amendment. Despite having such power they intended to give the provision of prospective effect. Input Tax

Credit being concessional in nature, the taxpayer cannot be allowed to claim its enforcement from retrospective effect as a vested right. In the case of **Sree Sankaracharya University of Sanskrit Vs. Dr. Manu and another, reported in (2023) 19 SCC 30**, the Hon'ble Apex Court was of the view that where the statute is curative or merely clarificatory of previous law, retrospective operation thereof may be permitted. In the case in hand, apparently the amendment to Rule 43 was not brought to cure or clarify any doubts or ambiguity.

[57]. With a view to the discussion made above, we are of the considered view that the first appellate authority was not correct in applying the said amendment in Rule 43 retrospectively in favour of the taxpayer. In our view, the rule framers intended to enforce the amendment prospectively and there is no reason to alter it in favour of the taxpayer. The issue is accordingly decided.

[58]. Now, the issue which we are going to decide is whether Section 74(1) of the CGST Act, 2017 under which the SCN No.8/SC/GST/Chow/Kol-N/2024-25 dated 01.089.2024 was issued against the taxpayer could be invoked in the given facts and circumstances of the case. In order to decide this question, we need to have a look at the provision of law at the outset. Section 74(1) of the CGST Act, 2017 reads as under :

> ***Section 74. Determination of tax [, pertaining to the period up to Financial Year 2023-24,] not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by***

reason of fraud or any wilful- misstatement or suppression of facts.-*(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.*

[italics supplied by us]

[59]. From a plain reading of Section 74(1) it would appear that the circumstances in which Section 74(1) can be invoked are fraud and wilful-misstatement or suppression of facts which requires an intention to evade tax by unfair or illegal means. After Section 74, Section 74-A has been inserted in the CGST Act, 2017 by Notification No.15 of 2024 and the Explanation 2 to sub-section (12) of Section 74-A defines "suppression" which reads as under :

"Explanation 2.*—For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.]"*

[60]. This definition of "suppression" in Explanation 2 to sub-section (12) of Section 74-A, thus provides that "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in his return, statement, report or any other document furnished under this Act. There is no dispute that the taxpayer duly filed his monthly return in GSTR Form-3B as well as in his annual returns. We have

gathered from the documents uploaded on behalf of the taxpayer that he filed his monthly GSTR returns in Form No.3B almost regularly for the assessment period. Even there is no allegations against the taxpayer that he did not submit his annual returns. The taxpayer has also uploaded his annual returns on the portal. There is, therefore, no act of non-submission or non-declaration of facts or information on the part of the taxpayer. He also produced the invoices to bring to light the fact that he used to sell duty credit scrips. Therefore, no malafide intention could be attributed to the taxpayer.

[61]. Pursuant to the direction of the Hon'ble Supreme Court in the case of **Northern Operating Systems Private Limited (NOS) in Civil Appeal No.2289-2293 of 2021**, an instruction bearing No.05/2023-GST was issued by CBIC vide F.No.CBIC-20004/3/2023-GST, dated 13th December, 2023 stating therein that Section 74(1) can be invoked only in cases where there is a fraud or wilful mis-statement or suppression of facts to evade tax on the part of the said taxpayer. The said instruction contains that Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful mis-statement or suppression of facts to evade tax. It also provides that only in the cases where the investigation indicates that there is material evidence or fraud or wilful mis-statement or suppression of fact to evade tax on the part of the taxpayer, provisions of Section 74(1) of CGST Act may be invoked for issuance of show cause notice, and such evidence should also be made

a part of the show cause notice. It would be appropriate to reproduce paragraph 3.1, 3.2 & 3.3 of the said Instruction reads as under :-

> *3.1 It has also been represented by the industry that in many cases involving secondment, the field formations are mechanically invoking extended period of limitation under section 74(1) of the CGST Act.*
>
> *3.2 In this regard, section 74 (1) of CGST Act reads as follows:*
>
> *"(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized <u>by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax</u>."*
>
> *3.3 From the perusal of wording of section 74(1) of CGST Act, it is evident that section 74(1) can be invoked only in cases where there is a fraud or wilful mis- statement or suppression of facts to evade tax on the part of the said taxpayer. Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful mis-statement or suppression of facts to evade tax. Therefore, only in the cases where the investigation indicates that there is material evidence of fraud or wilful mis statement or suppression of fact to evade tax on the part of the taxpayer, provisions of section 74(1) of CGST Act may be invoked for issuance of show cause notice, and such evidence should also be made a part of the show cause notice.*

[62]. In the case in hand no investigation was carried out and no evidence has been brought on record on the part of the revenue to establish fraud, wilful mis-statement or suppression of facts within the meaning of Section 74(1) read with Explanation 2 to sub-section (12) of Section 74 of the CGST Act, 2017. If we go further, suppression of facts cannot be equated with ordinary non-declaration. The wordings of Section 74(1) clearly indicates that there must be a deliberate intention on the part of the taxpayer to evade tax.

[63]. In the present case before us, stand of the taxpayer right from the beginning is that he is entitled to the benefit of clause (d) in Explanation 1 to Rule 43 of CGST Rules, 2017 retrospectively. Under this impression, he made his self-assessment in Form GSTR-3B. He never concealed that he availed ITC on the value of supply of duty credit scrips. The department was not also unaware of the fact that he supplied duty credit scrips during the financial years 2017-20. When both sides were aware of the fact, the taxpayer cannot be accused of fraud or wilful suppression. In the case of **Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut, reported in (2005) 7 SCC 749**, the Hon'ble Supreme Court in paragraph 26 of the judgment succinctly held that the "suppression of facts" must be construed strictly, it does not mean any omission and the act must be deliberate and wilful to evade payment of duty. The relevant observations of the Hon'ble Supreme Court in para 26 are as under :-

> *26. In Tata Iron & Steel Co. Ltd. vs. Union of India & Ors [1988 (35) ELT 605 (SC)], this Court held that when the classification list continued to have been approved regularly by the department, it could not be said that the manufacturer was guilty of "suppression of facts". As noted herein earlier, we have also concluded that the classification lists supplied by the appellant were duly approved from time to time regularly by the excise authorities and only in the year 1995, the department found that there was "suppression of facts" in the matter of post forming manufacturing process of the products in question. Furthermore, in view of our discussion made herein earlier, that the department has had the opportunities to inspect the products of the appellant from time to time and, in fact, had inspected the products of the appellant. Classification lists supplied by the appellant were duly approved and in view of the admitted fact that the flow-chart of manufacturing process submitted to the Superintendent of Central Excise on 17.5.1990 clearly mentioned the fact of post-forming process on the rubber, the finding on "suppression of facts" of the CEGAT cannot be approved by us. This*

Court in the case of Pushpam Pharmaceutical Company vs. Collector of Central Excise, Bombay [1995 Supp (3) SCC 462], while dealing with the meaning of the expression "suppression of facts" in proviso to section 11A of the Act held that the term must be construed strictly, it does not mean any omission and the act must be deliberate and wilful to evade payment of duty. The Court, further, held : -

> *"In taxation, it ("suppression of facts") can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."*

[64]. We have examined the case in the light of the judgment of the Hon'ble Apex Court in the case of **Anand Nishikawa Co. Ltd**. (supra) and keeping in view the relevant provisions of CGST Act quoted hereinabove and the Circular dated 13.12.2023 issued by the CBIC as well as in the given facts and circumstances of the case. In our considered view the Revenue could not bring on record any material to prove a deliberate intention on the part of the taxpayer to evade tax and as a result the Revenue was not correct in invoking Section 74(1) of the CGST Act against the taxpayer in this case. Therefore, the SCN issued under Section 74(1) of the CGST Act, is not sustainable in this case.

[65]. In view of what has been held above, Section 75(2) of CGST Act, 2017 will be applicable which reads as under :-

Section 75. General provisions relating to determination of tax.-

(1) Where the service of notice or issuance of order is stayed by an order of a court or Appellate Tribunal, the period of such stay shall be excluded in computing the period specified in sub-sections (2) and (10) of section 73 or sub-sections (2) and (10) of section 74 [2][or sub-sections (2) and (7) of section 74A], as the case may be.

(2) Where any Appellate Authority or Appellate Tribunal or court concludes that the notice issued under sub-section (1) of section 74 is not sustainable for the reason that the charges of fraud or any wilful-misstatement or suppression of facts to evade tax has not been established against the person to whom the notice was issued, the proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of section 73.

[66]. Consequently, we direct the proper officer of the Revenue contemplated under sub-section (2) of Section 75 of the CGST Act, 2017 to determine the tax liability of the taxpayer herein within the statutory period after providing an opportunity of hearing to the taxpayer.

[67]. With the direction aforesaid to the Revenue, the present appeals of the Revenue are decided and disposed off.

[68]. Order pronounced in open Court in presence of the authorised representatives of the parties.

[69]. The Registry is directed to upload the Final Order on GSTAT Portal immediately.

S.G.Chattopadhyay

Bijoy Kumar Kar