

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 11061 of 2019**

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GRASIM INDUSTRIES LIMITED

Versus

UNION OF INDIA

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Appearance:

MR NARESH THACKER, SENIOR ADVOCATE WITH MR HARDIK P
MODH(5344) for the Petitioner(s) No. 1,2
for the Respondent(s) No. 1,2

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CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA

and

HONOURABLE MR.JUSTICE A.C. RAO

Date : 10/07/2019

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1 The subject matter of challenge in this writ application is to the constitutional validity of the amendment brought about in Section 140 of the Central Goods and Services Tax Act, 2017 by way of the Central Goods and Services Tax (Amendment) Act, 2018 with effect from the 1st day of July, 2017. The unamended Section 140 of the Act reads as under:

“Section 140 : Transitional Arrangements for Input Tax Credit. (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed:

Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:—

(i) where the said amount of credit is not admissible as input tax credit under this Act; or

(ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or

(iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.

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

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

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

(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No.26/2012—Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:—

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iii) the said registered person is in possession of invoice or other

prescribed documents evidencing payment of duty under the existing law in respect of such inputs;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and

(v) the supplier of services is not eligible for any abatement under this Act:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

(4) A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994, but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger,—

(a) the amount of CENVAT credit carried forward in a return furnished under the existing law by him in accordance with the provisions of sub-section (1); and

(b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods or services, in accordance with the provisions of sub-section (3).

(5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day:

Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:

Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken

under this sub-section.

(6) A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:—

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is not paying tax under section 10;

(iii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs; and

(v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

(7) Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall be eligible for distribution as credit under this Act even if the invoices relating to such services are received on or after the appointed day.

(8) Where a registered person having centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier:

Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act:

Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account Number for which the centralised registration was obtained under the existing law.

(9) Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such credit can be reclaimed subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.

(10) The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may be prescribed.

Explanation 1.—For the purposes of sub-sections (3), (4) and (6), the expression “eligible duties” means—

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957;

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975;

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975;

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978;

(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985;

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985; and

(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001, in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day.

Explanation 2.—For the purposes of sub-section (5), the expression “eligible duties and taxes” means—

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act,

1957;

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975;

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975;

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise Textile and Textile Articles) Act, 1978;

(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985;

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985;

(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001; and

(viii) the service tax leviable under section 66B of the Finance Act, 1994 (32 of 1994), in respect of inputs and input services received on or after the appointed day.”

2 The amended Section 140 of the principal Act reads as follows:

“In Section 140 of the principal Act, with effect from the 1st day of July, 2017.-

(a) in sub-section (1) after the letters and word “CENVAT” credit”, the words of “eligible duties” shall be inserted and shall always be deemed to have been inserted.

(b) in the Explanation 1-

(i) for the word, brackets and figures “sub-section (3), (4)”, the word, brackets and figures “sub-sections (1), (3), (4)” shall be substituted and shall always be deemed to have been substituted.

(ii) clause (iv) shall be omitted and shall always be deemed to have been omitted.

(c) In the Explanation 2-

(i) for the word, brackets and figure “sub-section (5)”, the words, brackets and figures “sub-sections (1) and (5)” shall be substituted and shall always be deemed to have been substituted.

(ii) clause (iv) shall be omitted and shall always be deemed to have been omitted.

(d) After Explanation 2 as so amended, the following Explanation shall be inserted and shall always be deemed to have been inserted namely -

Explanation 3 – For removal of doubts, it is hereby clarified that the expression “eligible duties and taxes” excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under sub0section (1) of Section 3 of the Customs Tariff Act, 1975.”

3 The challenge to the constitutional validity of the Amendment Act has something to do with the credit of Education Cess (for short, “EC”), and the Secondary and Higher Secondary Education Cess (for short, “SHEC”). The challenge is substantially on the ground that the amendment seeks to retrospectively disallow the transition and carry forward of the EC and SHEC in the GST regime, which was levied on the inputs, capital goods and inputs services used in the manufacture of excisable products, which were cleared on the payment of the Central Excise duty under the CGST Act.

4 Mr. Thacker, the learned senior counsel appearing for the writ applicants gave us more than a fair idea about the entire scheme of the Act, more particularly, the availability of the CENVAT credit. Mr. Thacker pointed out that prior to the impugned amendment, the transitional mechanism under Section 140(1) of the CGST Act, *inter alia*, allowed transition of the CENVAT credit of taxes, duties and cesses levied on the inputs, capital goods and inputs services, which were duly reflected and carried forward in the last return pertaining to the pre-GST regime. Mr. Thacker pointed out something very relevant and important by showing that the EC and SHEC qualified as CENVAT credit under the credit rules. He further pointed out that since Section 140(1) (pre-

amended) referred to “CENVAT credit” in accordance with the credit rules, the writ applicants were eligible to transition of such credit into the GST regime. Section 140(1), as it stood prior to its amendment, allowed unhindered operation to avail the CENVAT credit until the amendment came into force on 29th August 2018. Mr. Thacker, the learned senior counsel argued that the impugned amendment seeks to deny and take away the vested and accrued rights and benefit hitherto, which were allowed to be transitioned under Section 140(1) of the CGST Act.

5 The challenge to the constitutional validity of the impugned amendment is substantially on the ground that it is violative of Article 19(1)(g) of the Constitution being absolutely arbitrary and unreasonable. Mr. Thacker submitted that no reasons have been assigned for bringing around such an amendment.

6 Mr. Thacker tried to fortify his submissions by placing reliance on the following two decisions of the Supreme Court:

(1) **Eicher Motors Limited vs. Union of India** [(1999) 2 SCC 361]

(2) **Tata Motors vs. State of Maharashtra** [(2004) 5 SCC 783]

7 Mr. Thacker submitted that the relevant files may be called for and the same may be perused for the purpose of knowing or understanding the reasons for the amendment. Mr. Thakkar submitted that, as on date, no reasons whatsoever are forthcoming as to why the Government sought to amend the Section 140(1) retrospectively. According to him, in the absence of any valid reasons, this Court should hold that giving retrospectivity to the impugned amendment would certainly be inequitable and arbitrary.

8 Having heard Mr. Thacker, the learned senior counsel appearing for the writ applicants and having gone through the materials on record, we are of the view that we should call upon the respondents to explain as regards the impugned amendment, more particularly, considering the submissions, which have been canvassed before us.

9 Let **Notice** be issued to the learned Attorney General of India. Let **Notice** be also issued to the respondents herein, returnable on **31st July 2019**. Let **Notice** be also issued as regards interim relief, which has been prayed for, in this petition, returnable on **31st July 2019**. Direct service is permitted.

10 By the next returnable date, we expect the Union of India to file an appropriate reply and also keep necessary files ready to indicate the reasons for bringing around such amendment with retrospective effect.

11 In the meantime, Mr. Modh, the learned counsel appearing for the writ applicants shall furnish one copy of the entire paper book to Mr. Devang Vyas, the Assistant Solicitor General of India.

12 Notify this matter on 31st July 2019 on top of the Board.

(J. B. PARDIWALA, J)

(A. C. RAO, J)

CHANDRESH