IN THE HIGH COURT OF JUDICATURE AT MADRAS

D A T E D : 13.07.2020

C O R A M

The Hon'ble **Mr. A.P.SAHI, THE CHIEF JUSTICE**
and
The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

Writ Petition No.8890 of 2020
and
WMP.No.10803 of 2020

M/s.P.R.Mani Electronics
Rep. by its Proprietor,
P.Rajamani, S/o.Perumal Naidu,
No.32, Sannathi Street,
Thiruvannamalai District. ... Petitioner

Vs

1.Union of India
Rep. by Secretary,
Ministry of Finance,
No.136-A, North Block,
New Delhi.

2.The Goods and Service Tax Council,
Rep. through its Chairman,
Goods and Services Tax Secretariat,
5th Floor, Tower V,
Jeevan Bharathi Buildings,
Janpath Road, Cannaught Place,
New Delhi.

3.The Principal Chief Commissioner of GST & Central Excise,
26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai – 600 034.

4.The Assistant Commissioner of GST & Central Excise,
Tiruvannamalai- I Assessment circle,
Commercial Tax Buildings,
Collectorate Campus,
Tiruvannamalai. ... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, praying to issue a writ of declaration to declare that Rule 117 of Central Goods and Service Tax(CGST) Rules is ultra vires and unconstitutional in so far as petitioner consent and also to direct the Respondents authorities to permit the Petitioner to file Form GST Trans – 1 either electronically or manually to claim the transitional input tax credit of Rs.4,70,008/- accrued and vested with the Petitioner and grant such other relief.

For Petitioner : Mr.R.Rajarajan

For Respondents : Mr.R.Sankaranarayanan
Additional Solicitor General for R1 & R2
Assisted by Mr.K.Venkatasamy Babu

Mr.Mohammed Shaffiq
Spl.GP(T) for R3 and R4

O R D E R

SENTHILKUMAR RAMAMOORTHY.J.,

The validity of Rule 117 of the Central Goods and Service Tax Rules, 2017 (the CGST Rules) is under challenge in this writ petition on the grounds that it is *ultra vires* Section 140 of the Central Goods and Services Tax Act, 2017 (the CGST Act) and infringes Articles 14 and 300A of the Constitution, and the Petitioner further prays that the Respondents should be directed to permit the Petitioner to file Form GST TRANS – 1 either electronically or manually to claim the transitional input tax credit of Rs.4,70,008/-.

2. The Petitioner is a proprietary concern involved in the retail trade of mobile phones, electrical, electronic, and other items. Earlier, the Petitioner was registered as a dealer under the Tamil Nadu Value Added Tax Act, 2006 (the TNVAT Act) and, upon the coming into force of the CGST Act, the Integrated Goods and Services Tax Act, 2017 (the IGST Act) and the State Goods and Services Act, 2017 (the SGST Act) (two or more of which are referred to as the GST laws) on 01.07.2017, the Petitioner obtained registrations under the GST laws. When the CGST and SGST Acts

were introduced, as a transitional measure, the carry forward of credit for taxes paid on inputs under previously existing indirect tax laws, which may be referred to as transitional ITC (Transitional ITC), was enabled by making provision in respect thereof. In terms thereof, according to the Petitioner, he is entitled to avail Transitional ITC of Rs.4,62,496/- under the head of CGST and Rs.7,512/- under the head of SGST under the respective GST laws.

3. Section 140 of the CGST Act deals with Transitional ITC under the CGST Act. The said Section 140, *inter alia,* reads as under:

> *"**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 **within such time and in such manner as may be prescribed**(emphasis added):*
>
> *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.

(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. Thus, Section 140 stipulates that the registered person is required to submit a return, within such time, and in such manner as may be prescribed for purposes of availing Transitional ITC. The words "within such time" were not originally a part of Section 140(1) and were introduced by the Finance Act, 2020 under Notification No.43/2020 dated 16.05.2020 with retrospective effect from July 1, 2017. Section 164 of the CGST Act empowers the Government, on the recommendations of the GST Council, to frame rules for implementing the provisions of the Act. Section 164, in relevant part, is as under:

"*164. Power of Central Government to frame rules-(1) The Government may, on the recommendations of the Council, by*

notification, make rules for carrying out the provisions of this Act.

(2) Without prejudice to the generality of the provisions of sub-section (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed, or in respect of which provisions are to or may be made by rules.

(3) The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act come into force...."

Pursuant to Section 164, the CGST Rules were framed and the procedure relating to availing of Transitional ITC was prescribed by Rule 117 thereof. Rule 117 reads as under:

"CGST Rule 117: Tax or Duty Credit Carried Forward under any Existing Law or on Goods Held in Stock on the Appointed Day (Chapter-XIV: Transitional Provisions)

(1) Every registered person entitled to take credit of input tax under section 140 shall, within ninety days of the appointed day, submit a declaration electronically in FORM GST TRAN-1, duly signed, on the common portal specifying therein, separately, the amount of

input tax credit to which he is entitled under the provisions of the said section:

Provided that the Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days.

Provided further that where the inputs have been received from an Export Oriented Unit or a unit located in Electronic Hardware Technology Park, the credit shall be allowed to the extent as provided in sub-rule (7) of rule 3 of the CENVAT Credit Rules, 2004.

(1A) Notwithstanding anything contained in sub-rule (1), the Commissioner may, on the recommendations of the Council, extend the date for submitting the declaration electronically in ***FORM GST TRAN-1*** *by a further period not beyond 31st March, 2020, in respect of registered persons who could not submit the said declaration by the due date on account of technical difficulties on the common portal and in respect of whom the Council has made a recommendation for such extension.*

(2) Every declaration under sub-rule (1) shall-

(a) in the case of a claim under sub-section (2) of section 140, specify separately the following particulars in respect of every item of capital goods as on the appointed day- (i) the amount of tax or duty availed or utilized by way of input tax credit under each of the existing laws till the appointed day; and (ii) the amount of tax or duty yet to be availed or utilized by way of input tax credit under each of the existing laws till the appointed day;

(b) in the case of a claim under sub-section (3) or clause (b) of sub-section (4) or sub-section (6) or sub-section (8) of section 140, specify separately the details of stock held on the appointed day;

(c) in the case of a claim under sub-section (5) of section 140, furnish the following details, namely:—

(i) the name of the supplier, serial number and date of issue of the invoice by the supplier or any document on the basis of which credit of input tax was admissible under the existing law;

(ii) the description and value of the goods or services;

(iii) the quantity in case of goods and the unit or unit quantity code thereof;

(iv) the amount of eligible taxes and duties or, as the case may be, the value added tax [or entry tax] charged by the supplier in respect of the goods or services; and

(v) the date on which the receipt of goods or services is entered in the books of account of the recipient.

(3) The amount of credit specified in the application in FORM GST TRAN-1 shall be credited to the electronic credit ledger of the applicant maintained in FORM GST PMT-2 on the common portal.

(4) (a) (i) A registered person who was not registered under the existing law shall, in accordance with the proviso to sub-section (3) of section 140, be allowed to avail of input tax credit on goods (on which the duty of central excise or, as the case may be, additional duties of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975, is leviable) held in stock on the appointed day in respect of which he is not in possession of any document evidencing payment of central excise duty.

(4) (a) (ii) The input tax credit referred to in sub-clause (i) shall be allowed at the rate of sixty per cent. on such goods which attract central tax at the rate of nine per cent. or more and forty per cent. for other goods of the central tax applicable on supply of such goods after the appointed date and shall be credited after the central tax payable on such supply has been paid:

Provided that where integrated tax is paid on such goods, the amount of credit shall be allowed at the rate of thirty per cent. and twenty per cent. respectively of the said tax;

(4) (a) (iii) The scheme shall be available for six tax periods from the appointed date.

(4) (b) The credit of central tax shall be availed subject to satisfying the following conditions, namely:-

(4) (b) (i) such goods were not unconditionally exempt from the whole of the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 or were not nil rated in the said Schedule;

(4) (b) (ii) the document for procurement of such goods is available with the registered person;

(4) (b) (iii) The registered person availing of this scheme and having furnished the details of stock held by him in accordance with the provisions of clause (b) of sub-rule (2), submits a statement in ***FORM GST TRAN 2*** *by 31st March 2018, or within such period as extended by the Commissioner, on the recommendations of the Council, for each of the six tax periods during which the scheme is in operation indicating therein, the details of supplies of such goods effected during the tax period;*

*Provided that the registered persons filing the declaration in **FORM GST TRAN-1** in accordance with sub-rule (1A), may submit the statement in **FORM GST TRAN-2** by 30th April, 2020.*

*(4) (b) (iv) the amount of credit allowed shall be credited to the electronic credit ledger of the applicant maintained in **FORM GST PMT-2** on the common portal; and*

(4) (b)(v) the stock of goods on which the credit is availed is so stored that it can be easily identified by the registered person."

5. As is evident on perusal of Rule 117(1), a registered person is required to submit a declaration, electronically, in Form GST TRAN-1 on the common portal within 90 days or, if applicable, the extended period not exceeding 180 days from the appointed date in order to make a claim for Transitional ITC. Upon recognizing that there were technical difficulties on the common portal, the last date for submitting Form GST TRAN-1 was extended and fixed as 27.12.2017. According to the Petitioner, on that date, the Petitioner's consultant could not enter the common portal and upload the form. No evidence of logging-into the common portal is provided and, therefore, the veracity of the above statement cannot be tested. However, the Petitioner approached the Sales Tax Collection Inspector, in person, on 29.12.2017, and submitted a hard copy of Form GST TRAN-1 and also received an acknowledgment. In spite of repeated follow up with the

Respondents, thereafter, the Petitioner states that there was no response with regard to the entitlement of the Petitioner to Transitional ITC. Meanwhile, Rule 117 was amended with effect from 10.09.2018 by inserting Sub-Rule 1-A, whereby the Commissioner was permitted, subject to the recommendation of the GST Council, to extend the date for submitting the declaration electronically by a further period up to 31.03.2020.

6. According to the Petitioner, ITC is in the nature of the Petitioner's property and, therefore, the Petitioner cannot be deprived of its property merely because the requisite form could not be submitted within the prescribed time limit. The prescription of such time limit in Rule 117 is *ultra vires* Section 140 and violates Article 14 and 300-A of the Constitution of India in as much as it deprives the Petitioner of its property by way of ITC. At a minimum, the said Rule 117 should be read as a directory or permissive provision and not as a mandatory or peremptory provision. The present writ petition was filed in these facts and circumstances.

7. We heard Mr.R.Rajaraman, the learned counsel for the Petitioner; Mr.R.Sankaranarayanan, the learned Additional Solicitor General for Respondents 1 and 2; and Mr.Mohamed Shaffiq, the learned Special

Government Pleader(Taxes) for Respondents 3 and 4.

8. The principal contention of the learned counsel for the Petitioner was that Rule 117 of the CGST Rules does not impose a mandatory obligation on registered persons, such as the Petitioner, to file Form GST TRAN-1 within the prescribed period. As a corollary, a person does not lose the right to ITC upon default in submitting the declaration in time. Although a constitutional challenge is made in the writ petition, the learned counsel conceded that such constitutional challenge was not being pressed. Nonetheless, the learned counsel submitted that Rule 117 is *ultra vires* Section 140 of the CGST Act and, at a minimum, is liable to be construed as a directory provision in so far as it specifies a time limit for the submission of the declaration in Form GST TRAN-1. In support of this contention, the learned counsel pointed out that the tax authorities were fully cognizant of the fact that registered persons were unable to submit the on line declaration within the prescribed period on account of technical glitches. This is evident from the fact that the time limit was subsequently extended by inserting Sub Rule 1-A in Rule 117 whereby the Commissioner was permitted, subject to the recommendation of the GST Council, to extend

the date for submitting the declaration electronically by a further period up to 31.03.2020. The learned counsel contended that the said provision itself states that it is introduced so as to enable the submission of the declaration by persons who could not submit the same within the previously prescribed time limit on account of technical difficulties in the common portal. As per the learned counsel, this clearly indicates that the provision is intended to be directory and not mandatory notwithstanding the use of the word "shall" in Rule 117(1). In order to further buttress his submissions, the learned counsel relied upon a judgment of the Division Bench of the Delhi High Court in **Micromax Informatics Ltd. v. Union of India, WP(C) No.196 of 2019 (Micromax Informatics),** wherein Rule 117 was construed as directory and not mandatory.

9. On the contrary, the learned Additional Solicitor General submitted that ITC is in the nature of a concession granted to registered persons and, therefore any conditions, including time limits, subject to which such concessions are granted should be enforced strictly. In other words, concessions cannot be availed of unless the conditions relating thereto are fully complied with.

10. The learned Special Government Pleader(T) also contended that ITC is a concession and not a vested right. In support of this proposition, he referred to and relied upon the judgment of the Hon'ble Supreme Court in **Jayam and Company v. Assistant Commissioner and another, (2016) 15 SCC 125 (Jayam),** wherein it was held categorically, in the context of the TNVAT Act, that ITC is a concession. In **Jayam,** he pointed out that the Supreme Court further held that the conditions subject to which such concession is granted should be strictly complied with in order to avail such concession. He also pointed out that this principle was reaffirmed in the recent judgment of the Hon'ble Supreme Court in **ALD Automotive Private Limited v. Commercial Tax Officer, now upgraded as Assistant Commissioner(ct) and others, (2019) 13 SCC 225 (ALD Automotive).** In this judgment, the Hon'ble Supreme Court reiterated that ITC is a concession, which can only be availed of by the beneficiary as per the terms and conditions specified in the statute. More importantly, he pointed that the Supreme Court held in **ALD Automotive** that the time limit for filing the tax return under Section 19(11) of the TNVAT Act was mandatory because it used the word "shall". By analogy, he contended that

the time limit in Rule 117 should also be construed as mandatory. With regard to the judgment of the Division Bench of the Delhi High Court, he pointed out that the operation of the said judgment was stayed by the Supreme Court and that there was a judgment of the Division Bench of the Bombay High Court to the contrary.

11. We considered the submissions of the learned counsel for the respective parties and examined the records.

12. The statutory and constitutional challenge, in this case, is on the basis that Rule 117 of the CGST Rules is *ultra vires* Section 140 of the CGST Act and Article 14 and 300-A of the Constitution. At the time of arguments, the learned counsel for the Petitioner did not pursue the constitutional challenge. As regards the contention that Rule 117 is *ultra vires* Section 140 of the CGST Act, on examining Rule 117 of the CGST Rules and Section 140 of the CGST Act, we find that Section 140 stipulates that a registered person making a claim for input tax credit should furnish a return, within such time, and in such manner as may be prescribed. As stated earlier, the rule making power is contained in Section 164, which is couched in wide terms, and enables the Government to frame rules to give effect to the provisions of the Act and, in particular, to make rules for

matters that are required to be prescribed by the CGST Act. Interestingly, the power to frame rules with retrospective effect is also conferred subject to the limitation that it should not pre-date the date of entry into force of the CGST Act. Pursuant thereto, Rule 117 was framed whereby a time limit was fixed for submitting the on line Form GST TRAN -1. By the Finance Act of 2020, the words "within such time" were introduced in Section 140, with retrospective effect from 01.07.2020, thereby conferring expressly the power to prescribe time limits in Section 140 even without relying entirely on the generic Section 164. In this statutory context, we find ample reason to conclude that Rule 117 of the CGST Rules is *intra vires* Section 140 of the CGST Act but none to conclude otherwise.

13. The learned counsel for the Petitioner contended that ITC is the property of the registered person, such as the Petitioner, and that consequently Rule 117 should not be construed in such manner as to divest a person of property. The question as to the nature of ITC was considered by the Hon'ble Supreme Court in **Jayam** (cited supra), albeit in the context of the TNVAT Act, wherein the Hon'ble Supreme Court categorically concluded that ITC is a form of concession provided by the legislature and

that it can only be availed of by satisfying prescribed conditions. Paragraphs 11 and 12 of the said judgment are significant and read as follows:

> "***11.*** *From the aforesaid scheme of Section 19 following significant aspects emerge:*
>
> *(a) ITC is a form of concession provided by the legislature. It is not admissible to all kinds of sales and certain specified sales are specifically excluded.*
>
> *(b) Concession of ITC is available on certain conditions mentioned in this section.*
>
> *(c) One of the most important condition is that in order to enable the dealer to claim ITC it has to produce original tax invoice, completed in all respect, evidencing the amount of input tax.*
>
> ***12.*** *It is a trite law that whenever concession is given by statute or notification, etc. the conditions thereof are to be strictly complied with in order to avail such concession. Thus, it is not the right of the "dealers" to get the benefit of ITC but it is a concession granted by virtue of Section 19. As a fortiori, conditions specified in Section 10 must be fulfilled. In that hue, we find that Section 10 makes original tax invoice relevant for the purpose of claiming tax. Therefore, under the scheme of the VAT Act, it is not permissible for the dealers to argue that the price as indicated in the tax invoice should not have been taken into consideration but the net purchase price after discount is to be the basis. If we were dealing with any other aspect dehors the issue of ITC as per Section 19 of the VAT Act, possibly the arguments of Mr Bagaria would have assumed some relevance. But, keeping in view the scope of the issue, such a plea is not admissible having*

regard to the plain language of sections of the VAT Act, read along with other provisions of the said Act as referred to above."

14. The judgment in **ALD Automotive** (cited supra) dealt with the question whether the time limit in Section 19(11) of TNVAT is mandatory or directory. Paragraph 45 thereof is as under:

> **"45.** This Court in the above case clearly laid down that whether particular provision is mandatory or directory has to be determined on the basis of the object of the particular provision and design of the statute. The period of 10 days in submitting the report of the public analyst was held to be directory for the reason that on the negligence of those to whom public duties are entrusted no one should suffer. Such interpretation should not be put which may promote the public mischief and cause public inconvenience and defeat the main object of the statute. The interpretation of Rule 9(*j*) in the above case was on its own statutory scheme and has no bearing in the present case. We, thus, are of the view that time period as provided in Section 19(11) is mandatory."

The said Section 19(11) also pertains to the time limit for claiming ITC and uses the word "shall". After examining the language of Section 19(11) and the context, including the object and design of the statute, the Hon'ble

Supreme Court concluded that the time limit specified in Section 19(11) is mandatory.

15. The validity and the mandatory or directory nature of Section 140 of the CGST Act and Rule 117 of the CGST Rules were considered in several High Court judgments and we propose to discuss them briefly before drawing definitive conclusions. In **Blue Bird Pune Pvt. Ltd. v. Union of India [2019 SC Online Del 9250](Blue Bird),** a Division Bench of the Delhi High Court directed the tax authorities to open the on line portal so as to enable the electronic filing of Form GST TRAN-1 or accept the manually filed form. The said decision was based on earlier judgments of the Delhi High Court wherein it was observed that the GST system is in a "trial and error phase". A subsequent judgment of the Division Bench of the Delhi High Court in **SKH Sheet Metals Components v. Union of India [2020 SCC online Del 650] (SKH Sheet Metals)** examined the concept of ITC and observed that an uninterrupted and seamless chain of ITC is the heart and soul of GST so as to avoid cascading of taxes. In the said judgment, the mandatory or directory nature of Rule 117 was considered and the Court concluded that it is directory both on the basis that the CGST Act does not specify the consequences of not complying with the time limit and because

construing it as mandatory would prejudice the assessee. In drawing this conclusion, the Court relied on the judgment of the Delhi High Court in **Brand Equity Treaties Ltd. v. Union of India [(2020) Taxmann.com 415] (Brand Equity Treaties)** and **Micromax Informatics** (cited supra)**,** wherein the Court held that CENVAT credit had accrued and vested in the assessee and is, consequently, the property of the assessee. By order dated 19.06.2020 in SLP Nos 7425-7428 of 2020, the Hon'ble Supreme Court granted a stay of the operation of the judgment in **Brand Equity Treaties.** At this juncture, it is pertinent to point out that **Brand Treaty Equities** was decided prior to the amendment to Section 140 of the CGST Act whereby the words "within such time" were introduced. On the other hand, **SKH Sheet Metals Components** was decided after the amendment; nonetheless, the Delhi High Court concluded that the amendment settles the question as to the power to frame rules fixing the time limit for filing the declaration but does not fix a time limit for transitioning credit.

16. By contrast, a Division Bench of the Bombay High Court interpreted Rule 117 of the CGST Rules in **Nelco Limited v. Union of India [2020 SCC Online Bom 437] (Nelco)** as *intra vires* Section 140 and as imposing a reasonable time limit for availing of ITC. **Nelco** was decided

before Section 140 was amended. Even so, the Court concluded that Section 164 of the CGST Act is wide enough to enable the framing of rules fixing a time limit to claim Transitional ITC. In addition, the Court concluded that ITC is a concession which is required to be availed of within the prescribed time, failing which it would lapse. The Gujarat High Court also considered this question in **Willowood Chemicals Ltd. v. Union of India [2014 (306) ELT 551](Willowood).** In **Willowood,** the Gujarat High Court concluded that Transitional ITC is a concession and that Rule 117 is *intra vires* Section 140 of the CGST Act.

17. Section 140 of the CGST Act read with Rule 117 of the CGST Rules enables a registered person to carry forward the accumulated ITC under erstwhile tax legislations and claim the same under the CGST Act. In effect, it is a transitional provision as is evident both from Section 140 and Rule 117. In light of the judgment of the Supreme Court in **Jayam,** the contention of the learned counsel for the Petitioner to the effect that ITC is the property of the Petitioner cannot be countenanced and ITC has to be construed as a concession. In addition, it is evident that ITC cannot be availed of without complying with the conditions prescribed in relation thereto. Prior to the amendment to Section 140 of the CGST Act, the power

to frame rules fixing a time limit was arguably not traceable to the unamended Section 140 of the CGST Act, which contained the words "in such manner as may be prescribed", because such words have been construed by the Supreme Court in cases such as **Sales Tax Officer Ponkuppam v. K.I. Abraham [(1967) 3 SCR 518]** as not conferring the power to prescribe a time limit. Nevertheless, in our view, it was and continues to be traceable to Section 164, which is widely worded and imposes no fetters on rule making powers except that such rules should be for the purpose of giving effect to the provisions of the CGST Act. *A fortiori,* upon amendment of Section 140 by introducing the words "within such time", the power to frame rules fixing time limits to avail Transitional ITC is settled conclusively. In **SKH Sheet Metals,** the Delhi High Court concluded, in paragraph 26, that the statute had not fixed a time limit for transitioning credit by also referring to the repeated extensions of time. Given the fact that the power to prescribe a time limit is expressly incorporated in Section 140, which deals with Transitional ITC, and Rule 117 fixes such a time limit, we are unable to subscribe to this view. The fact that such time limit may be extended under circumstances specified in Rule 117, including Rule 117A, does not lead to the sequitur that there is no time

limit for transitioning credit. In this context, reference may be made to Section 16(4) of the CGST Act which provides as follows:

> *"Section 16(4): A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under Section 39 for the month of September following the end of the financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier."*

The above provision is indicative of the legislative intent to impose time limits for availing ITC. Besides, Section 19(3)(d) of the TNVAT Act itself imposed a time limit for availing ITC and further provided that it would lapse upon expiry of such time limit. In our view, keeping the above statutory backdrop in mind, in the context of Transitional ITC, the case for a time limit is compelling and disregarding the time limit and permitting a party to avail Transitional ITC, in perpetuity, would render the provision unworkable. In this regard, we concur with the conclusion of the Bombay High Court in **Nelco** that both ITC and Transitional ITC cannot be availed of except within the stipulated time limit. Such time limits may, however,

be extended through statutory intervention. As stated earlier, in **SKH Sheet Metals,** the Delhi High Court observed that ITC is the heart and soul of GST legislations in as much as such legislations are designed to prevent the cascading of taxes. There can be no quarrel with this conceptual position; however, it is not a logical corollary thereof that time limits for availing ITC and, in particular, Transitional ITC, are inimical to the object and purpose of the statute.

18. In judgments such as **Union of India v. A.K. Pandey [(2009) 10 SCC 552]** and **Bachhan Devi v. Nagar Nigam [(2008) 12 SCC 372],** the Supreme Court held that the use of words such as "shall" or "may" are not conclusive or determinative of the mandatory or permissive nature of a provision. In **C. Bright v. The District Collector, [2019 SCC Online Mad 2460],** after considering a number of judgments of the Supreme Court, a Division Bench of this Court captured the relevant factors to determine whether a provision is directory or mandatory, illustratively, in paragraph 20. In summary, those factors are: the use of peremptory or negative language, which raises a rebuttable presumption that the provision is mandatory; the object and purpose of the statute and the provision concerned; the stipulation or otherwise of the consequences of non-

compliance; whether substantive rights are affected by non-compliance; whether the time limits are in relation to the exercise of rights or availing of concessions; or whether they relate to the performance of statutory duties. In this case, the peremptory word "shall" is used. The relevant rule deals with the time limit for availing Transitional ITC by carrying it forward from the credit balance under tax legislations which have been repealed and replaced by the CGST Act. Thus, the object and purpose of Section 140 clearly warrants the necessity to be finite. ITC has been held to be a concession and not a vested right. In effect, it is a time limit relating to the availing of a concession or benefit. If construed as mandatory, the substantive rights of the assessees would be impacted; equally, if construed as directory, it would adversely impact the Government's revenue interest, including the predictability thereof. On weighing all the relevant factors, which may be not be conclusive in isolation, in the balance, we conclude that the time limit is mandatory and not directory.

19.We also note that Rule 117 specifies that the return in Form GST TRAN – 1 is required to be filed electronically on the common portal. This requirement is not satisfied by handing over the form in person to the Sales Tax Collection Inspector, Tiruvannamalai. Consequently, in our view,

the Petitioner has completely failed to make out a case to direct the Respondents to permit the Petitioner to file Form GST TRAN -1 and claim the Transitional ITC of Rs.4,70,008/-. Needless to say, if any dispensations are granted by the tax authorities with regard to availing of Transitional ITC, whether by filing Form GST TRAN-1 or otherwise, and to which the Petitioner may be entitled, this order will not preclude the Petitioner from making a claim for Transitional ITC.

15. In the result, the writ petition is dismissed. Consequently, the connected miscellaneous petition is closed. No costs.

(A.P.S.,CJ,) **(S.K.R.,J,)**
13.07.2020

Index :Yes
Internet :Yes
rrg
To
1.The Secretary,
Union of India
Ministry of Finance,
No.136-A, North Block,
New Delhi.

2.The Chairman,
The Goods and Service Tax Council,
Goods and Services Tax Secretariat,
5th Floor, Tower V,
Jeevan Bharathi Buildings,
Janpath Road, Cannaught Place,
New Delhi.

3.The Principal Chief Commissioner of GST & Central Excise,
26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai – 600 034.

4.The Assistant Commissioner of GST & Central Excise,
Tiruvannamalai- I Assessment circle,
Commercial Tax Buildings,
Collectorate Campus,
Tiruvannamalai.

THE CHIEF JUSTICE

and

SENTHILKUMAR RAMAMOORTHY.J.,

rrg

Pre-Delivery Order in

W.P.No.8890 of 2020

13.07.2020