IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P.(T) No. 3055 of 2022

M/s Usha Martin Limited, a Company registered under the Companies Act, 1956, having its office at Tatisilwai, Ranchi, Jharkhand- 835103 through its Authorized Signatory, namely Dhanraj Parihar, Aged about 42 years, Son of M.L. Parihar, Resident of A/6, Urmila Apartment, Road No.1, Sonari, Jamshedpur-831011 ..… Petitioner

Versus

1. Additional Commissioner, Central GST and Excise, Excise, Jamshedpur, Outer Circle Road, Bistupur, P.O. Jamshedpur, P.S. Jamshedpur, District East Singhbhum
2. Joint Commissioner, Central GST and Excise, Jamshedpur, Outer Circle Road, Bistupur, P.O. Jamshedpur, P.S. Jamshedpur, District East Singhbhum
3. Commissioner of CGST & CX, Jamshedpur, Outer Circle Road, Bistupur, P.O. Jamshedpur, P.S. Jamshedpur, District East Singhbhum
4. Union of India, through the Secretary, Department of Revenue, Ministry of Finance, having its office at No.137, North Block, New Delhi-110001

..... Respondents

CORAM: Hon'ble Mr. Justice Aparesh Kumar Singh
Hon'ble Mr. Justice Deepak Roshan

For the Petitioner : M/s Sujit Ghosh, Joybrata Misra,
Ashray Behura, Shubham Gautam, Advocates
For the Resp.-CGST : M/s Amit Kumar, Ashish Kr. Shekhar, Advocates
For the Resp.-UOI : Mr. Prabhat Kr. Sinha, CGC

10/ 10.11.2022 Heard learned counsel for the parties.

2. By the impugned adjudication proceedings initiated under Section 73 of the C.G.S.T. Act, 2017, the respondent No. 1- Additional Commissioner, C.G.S.T. & Excise, Jamshedpur has disallowed the CENVAT credit amounting to Rs.10,21,05,096/- carried forward by the petitioner by filing TRAN-1, in terms of Section 140 of the C.G.S.T. Act, 2017 by impugned order in original dated 30th March, 2022 (Annexure1).

3. Petitioner company operates in two divisions, Wire Rope Division and Steel Division. Steel Division is engaged in the manufacture of iron and steel products at its factory situated at Adityapur Industrial Area, Gamharia duly registered under the erstwhile Central Excise Act, 1944 (Hereinafter referred to as the C.E.A.) and Finance Act, 1994 (Hereinafter referred to as the Finance Act). The final products manufactured at the factory were dutiable under the Central Excise Act (C.E.A.) and are now taxable under Goods and Service Act. According to the petitioner, the iron ore required for manufacture of the final products were extracted from petitioner's captive iron ore mine situated at Bokna, Barajamda. Petitioner has got a site office at Bokna mines which receives the invoices issued under Rule 4 A of the Service Tax Rules, 1994 towards purchase of its input services received at the mines.

For distributing credit of service tax on the said services to the Gamharia factory in accordance with Rule 7 read with Rule 2(m) of the CENVAT Credit Rules, 2004 (hereinafter referred to as "C.C.R. 2004"), the petitioner duly filed an application on 25th April, 2008 for registration of its Bokna Mines as an Input Service Distributor under erstwhile Service Tax (Registration of Special Category of Persons) Rules, 2005. Petitioner was granted Registration on 27th May, 2008 in prescribed Form ST-2 to the said Bokna Mine Office as an input service Distributer. Petitioner thereafter started issuing invoices for distribution of the credit of the service tax paid on input services attributable to iron ore dispatched to the Gamharia factory. Petitioner was also allocated a Coal Block at Brinda-Sesai by the Ministry of Coal for captive mining and for utilizing it in the Gamharia factory for manufacturing Sponge iron. The coal mines at Brinda-Sasai were hundred percent captive mines of the petitioner's Gamharia factory and constituted one integrated unit with the factory in Gamharia. It is the case of petitioner that Bokna mines and Brinda-Sesai mines have maintained proper records and regularly filed the periodical returns in Form ST-3. On implementation of GST w.e.f 1st July, 2017 petitioner was allotted GST registration for all business places under Steel Division which included the Gamharia factory, the Bokna mines, the Brinda-Sesai mines etc. Gamharia factory was disclosed as principal place of business, whereas both the mines were disclosed as additional places of business. In terms of the provisions of Section 140 C.G.S.T. Act, 2017 (hereinafter referred to as the "C.G.S.T. Act") read with Rule 117 of the C.G.S.T. Rules, 2017 (hereinafter referred to as the "C.G.S.T. Rules"), petitioner filed TRAN-1 form to carry forward the amount of CENVAT credit amounting to Rs.13,43,86,752/- from the return relating to the period ending with the day immediately preceding the appointed date, i.e. 1st July, 2017 under the pre-GST regime. The aforesaid sum included CENVAT credit on account of input service invoices received at Bokna mines amounting to Rs.8,55,50,111/- and input service invoices received at Brinda-Sesai mines amounting to Rs.15,98,697/- and apart from the above, petitioner also transferred CENVAT credit of Rs. 15,19,17, 690/- by declaring the same in Column 7A(1) of TRAN-1 Form in terms of Section 140 (5) of the CGST Act read with Rule 117 of CGST Rules, which inter alia included CENVAT credit of service tax amounting to Rs.1,49,56,288/- on account of input services received at Bokna mines on or after 1st July, 2017 but the service in respect of which was paid by the petitioner under the Finance Act. The present issue relates to disallowance of the CENVAT credits amounting to Rs. 8,55,50,111/- pertaining to Bokna mines and credit

amounting to Rs.15,98,697/- pertaining to Brinda Sesai mines in respect of which proceedings were initiated by issuance of show cause notice dated 13th September, 2021 by the Joint Commissioner in Form GST-DRC-01 proposing recovery of transitioned CENVAT credit in terms of Section 73(1) of the C.G.S.T. Act along with interest and penalty. Prior to issuance of the notice, petitioner was served with a letter by Assistance Commissioner (Prevention) bearing No. 1720 dated 18th February, 2019 asking him to pay back the total amount of CENVAT credit of Rs. 15,19,17,690/- as per the break up indicated above pertaining to Bokna mines and Brinda Sesai mines. Petitioner had replied thereto on 2nd March, 2019. Thereafter, a notice in Form GST-DRC-01A dated 23rd July, 2021 was issued to which petitioner submitted its reply in Part B vide letter dated 26th August, 2021. Petitioner participated in the proceedings initiated under Section 73(1) and duly responded to the SCN vide letter dated 8th November, 2021 refuting all allegations. He was also granted a personal hearing on 16th March, 2022 in which his representative appeared in virtual mode. However, disregarding his submissions the impugned order dated 30th March, 2022 has been issued confirming recovery of CENVAT credit amounting to Rs. 10,21,05,096/- along with interest and penalty.

4. Learned counsel for the petitioner-Mr. Sujit Ghosh has raised the question of lack of jurisdiction of the adjudicating authority to decide upon the availment of CENVAT credit by the petitioner under the pre goods and service tax regime. He has referred to page no. 228, i.e. the reply/written submission to the show cause notice issued in Form GST DRC-01 dated 8th November, 2021 in which at para 6.1, details of pending litigations on the same issue have been provided. He has submitted that the proceedings for recovery of tax and penalty to the tune of Rs.5.46 crores and Rs. 3.06 crores relating to the period February, 2010 to March, 2011 and April, 2011 to September, 2011 is pending before the learned CESTAT, Kolkata. Service Tax Appeals in relation to other periods such as 2005-06, 2008-09, August, 2008 to January, 2010 and October, 2011 to March, 2012 are also pending before the learned CESTAT. Other proceedings relating to period April, 2012 to March, 2013 and April, 2016 to June, 2017 are also pending before the Commissioner (Appeals). Learned counsel for the petitioner has referred to Section 73 of the Finance Act, 1994 and Rule 14 of the CENVAT Credit Rules, 2004 to submit that any such proceeding for wrongful availment of CENVAT Credit could have been initiated under the said Act only. Respondent No.1 has wrongly assumed jurisdiction and adjudicated upon the issue of availment of regular CENVAT Credit brought forward from the previous years. He has also referred to the

repeal and saving provision under Section 174 of the CGST Act. According to the petitioner, these proceedings being inchoate, legal proceedings or recovery of arrears or any such tax, surcharge, penalty, interest etc. could be levied or imposed under the pre GST laws as if the repealed Acts, i.e. Finance Act, 1994 and Central Excise Act, 1944 are not being so amended or repealed. In support of the challenge, learned Counsel for the petitioner has, inter alia, made the following submissions**:**

It is submitted that Section 73 of the C.G.S.T. Act deals with cases where tax has been short paid or not paid or erroneously refunded or where input tax credit has been wrongly availed or utilized. The present dispute relates to alleged wrongful availment of CENVAT credit. It therefore becomes imperative to understand the ambit and scheme of input tax credit under the GST laws.

5. As per the scheme of the C.G.S.T. Act under Section 2 (62) input tax means Central Tax, State Tax, Integrated Tax or Union Territory Tax charged on supply of goods or services or both by registered persons. These expressions have been defined under Sections 2(21), 2(104) and 2(58) of the C.G.S.T. Act respectively to mean tax levied under the C.G.S.T. Act, State Goods and Service Tax Act and the Integrated Goods and Service Tax Act as the case may be. Similarly, Section 2(63) of the C.G.S.T. Act defines input tax credit to mean the credit of input tax. Therefore, input tax credit is not CENVAT credit, i.e. the credit that had accrued under the erstwhile regime. Section 16 of the C.G.S.T. Act provides that a registered person shall be entitled to take credit of input tax charged on supply of goods, services or on both, which are used by him in the course or furtherance of business. The amount taken as credit shall be credited to the Electronic Credit Ledger (E.C.L. for short). In other words, input tax shall be credited or be available to be utilized from the E.C.L by a registered person. Learned counsel for the petitioner has then drawn the attention of this Court to the transitional provisions under Section 140 of the C.G.S.T. Act, which deals with CENVAT Credit, availed and crystallized in pre GST regime and transitioned in the G.S.T. regime. He submitted that a registered person is entitled to take credit of eligible duties relating to period prior to the coming into force of the G.S.T. Act under Section 140 and such credit from the erstwhile regime shall be available in the E.C.L of the said person. Proviso to Section 140 specify the circumstances wherein transitional credit is barred namely a) where the amount of credit is not admissible as input tax credit under the present statute; b) Where a registered person/applicant has not furnished returns for a period of

six months under the previous regime**;** c) where the amount of credit relates to goods manufactured and cleared under exemption notification/schemes of the government. It is submitted that only in the above three situations a registered person is precluded from transitioning credit from the erstwhile regime to the present regime. The credit appearing in the E.C.L. both under the erstwhile and the present regime in terms of Section 140 and Section 16 respectively lose their distinction or birthmark once it is transferred to the E.C.L. and attain a homogenous nature. This is also obvious from reading of Section 49 Sub Section 4 of the C.G.S.T. Act which deals with utilization of amount available in the E.C.L. and merely states that the amount available in the E.C.L. may be used to discharge output tax liability incurred under this regime. In the aforesaid background of legal provisions under the C.G.S.T. Act, it is submitted that for the purposes of initiating proceedings under Section 73 of the C.G.S.T. Act, it is imperative that the credit in question is input tax credit that is credit of CGST or SGST or IGST. As such, unless and until there is wrongful availment of or utilization of input tax credit as defined under the G.S.T. law, the Proper officer is precluded from taking any action under Section 73. Anything to the contrary shall result in illegal assumption of jurisdiction. In this context reliance is placed upon the case of **Carona Ltd. vs. Parvathy Swaminathan & sons** reported in **(2007) 8 SCC 559 para 27 and 28** thereof. Petitioner has also relied upon **Raza Textiles Ltd. vs. Income Tax Officer, Rampur** reported in **(1973) 1 SCC 633 Para 3** and **Calcutta Discount Co. Ltd. vs. Income Tax Officer, Companies District I Calcutta & another** reported in **AIR 1961 SC 372 Para 26** to buttress his contention on lack of jurisdiction.

6. Learned counsel for the petitioner has also urged that respondent no. 1 is only vested with the power of verification of transitional credit and not determine its eligibility or availability. While Rule 117 of the C.G.S.T. Rules deals with procedural aspects of transitional provisions specified in Section 140 of the C.G.S.T. Act, Sub Rule 3 of Rule 117 states that amount of credit specified in the relevant form shall be credited to the E.C.L. of the applicant. Similarly, Rule 121 states that the amount credited under Rule 117 (3) shall be verified and if found improper, proceedings may be initiated under Section 73 or 74 of the C.G.S.T. Act as the case may be. It is submitted that the verification under Rule 121 is of the amount specified in the relevant form under Rule 117(3) and not to the correctness or genuineness of the said amount. The verification is limited to the extent of the circumstances specified under proviso to Section 140 which bars transitioning of credit in specified

circumstances. It is submitted that unless and until the amount specified by the applicant falls under the specified circumstances mentioned under proviso to Section 140, such amount cannot be denied to be transitioned. Petitioner has also relied upon Section 142 (6) (b) of the C.G.S.T. Act, which provides that the every proceeding of appeal, review or reference relating to recovery of CENVAT Credit initiated whether before, on or after the appointed date under the existing law shall be disposed of in accordance with the provisions of existing law and if any amount of credit becomes recoverable as a result of such appeal, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act i.e. the C.G.S.T. Act. In this regard it is submitted that G.S.T. Law does not contemplate of initiation of proceedings under the erstwhile law. Rule 14 of the C.C.R., 2004 otherwise specifically contemplates recovery of CENVAT Credit wrongly taken or erroneously refunded. Learned counsel for the petitioner has then also drawn the attention of this court to the repeal and saving clause under Section 174 of the C.G.S.T. Act. It is submitted that under the saving clause inchoate rights continue to be proceeded under the erstwhile law. In the event a statute is repealed without a saving clause all rights (except for rights accruing under transaction past and closed) are extinguished along with the repeal. In this regard reliance has been placed on the case of ***Neena Aneja v. Jai Prakash Associates Ltd.*** reported in **2021 SCC Online Supreme Court 225 Para 77** and in the case of ***State of Rajasthan v. Mangilal Pindwal*** reported in **1996 5 SCC 60 para 9.**

7. According to the petitioner, Section 174 of the C.G.S.T. Act reserves the rights accruing under the erstwhile legislation, meaning thereby, any dispute arising out of the erstwhile legislation has to be dealt by the provisions of the said legislation and not under the present GST laws. Learned Counsel for the petitioner has in particular relied on the constitution Bench decision rendered in the case of ***Kedar Nath Singh v. State of Bihar*** reported in **AIR 1962 Supreme Court 955, Para 27** in which the Apex Court has held that if the impugned provisions of a law come within the constitutional powers of the legislature by adopting one view of the words of the impugned Section or Act, the Court will take that view of the matter and limit its application accordingly in preference to the view which would make it unconstitutional or another view of the interpretation of the words in question. It is submitted that the legislature could not have conferred parallel jurisdiction under both the existing law i.e. C.E.A. or Finance Act and the present G.S.T. Act to enable

the authorities to proceed on charges of irregular or improper availment of CENVAT Credit under the transitional provisions of Section 140. Learned counsel for the petitioner has provided a tabular chart of the total of nine show cause notices which were raised under the erstwhile laws which are *pari materia* to the impugned S.C.N. They are being furnished hereunder:

Sl. No.	SCN	Period	Demand	Pending at	Page No. of Writ Petition Compilation
1	V(72)(15) 39/APP/AD J/JSR/2009/1083, Dated 06.08.2009	2005-06 to 2008-09	6,80,17,830/-	CESTAT	250-254
2	V(72) (15) 66/APP/AD J/JSR/2009/12076 -77, dated 04.09.2009	Aug'08 to Mar'09	1,32,87,258/-	CESTAT	255-260
3	V(72) (15) 24/APP/AD J/JSR/2010/4777, dated 23.04.2010	Apr'09 to Jan'10	2,50,00,910/-	CESTAT	261-266
4	V(S.Tax)(15) 54/APP/AD J/JSR/2010/2218-19, dated 25.02.2011 & V(S.Tax)(15) 51/APP/AD J/JSR/2011/14911 dated 03.11.2011	Feb'10 to Mar'11	5,46,79,933/-	Full Stay Given by CESTAT, final hearing pending.	267-278 304-309
5	V(S.Tax)(15) 47/APP/AD J/JSR/2012/3168-3169, dated 27.04.2012	April'11 to Sep'11	3,06,37,739/-	Full Stay Given by CESTAT, final hearing pending.	279-284 310-311
6	V(S.Tax)(15) 69/APP/AD J/JSR/2012/7594, dated 09.10.2012	Oct'11 to March'12	1,83,97,282/-	CESTAT	285-291

7	V(S.Tax)(15) 13/APP/AD J/JSR/2013/3886, dated 08.05.2013	April'12 to March'13	36,53,597/-	Commissioner (A)	292-298
8	V(S.Tax)(15) 06/APP/AD J/JSR/2018/4103, dated 04.05.2018 (SOD)	April'16 to June'17	34,67,42,988/-	Commissioner (A)	299-303

8. From the tabular chart he has tried to demonstrate that the proceeding initiated under the pre GST SCN, which are pending before learned CESTAT or before the Commissioner (Appeals), are for the alleged contraventions relating to distribution of CENVAT Credit on input services received by Bokna captive iron ore mines of the petitioner and Kathotia captive coal mines of the petitioner. The present show cause notice which has led to passing of the order in original also alleges wrongful distribution of CENVAT Credit in terms of the rule 14 of the CENVAT Credit Rules, 2004. However, the proceedings for wrongful availment of CENVAT Credit has been initiated under Section 73 (1) of the C.G.S.T. Act instead of the relevant provisions of the C.E.A. and Finance Act read with Rule 14 of the C.C.R., 2004 and is without jurisdiction. Based on these submissions learned counsel for the petitioner has contended that the impugned proceeding being without jurisdiction and the order in original passed by the respondent no.1 being contrary to scheme of the C.G.S.T. Act are fit to be quashed in exercise of the powers under Article 226 of the Constitution of India by this Court as no determination on disputed questions of fact are required to be made to decide this legal issue. Learned counsel for the petitioner has relied upon the decision in **Magadh Sugar & Energy Ltd. vs. State of Bihar & others** reported in **(2021) SCC online SC 801 para 25 to 27.** Therefore, the impugned order in original may be quashed. Petitioner has no objection if such a proceeding can be initiated under the erstwhile C.E.A and the Finance Act for alleged contraventions.

9. Counter affidavit has been filed by the respondents inter alia taking the following stand:

According to the respondents the appellant has an efficacious and alternative remedy against the order-in-original before the appellate authority under Section 107 of the CGST Act, 2017. On the question of jurisdiction it has been stated that the circular dated 9th February, 2018 permits the proper

officer to adjudge disputes under Section 73/74 of the CGST Act in respect of central tax not paid or short paid or input tax credit or central tax wrongly availed or utilized. Therefore, he has not exceeded his jurisdiction. The plea of the petitioner that the instant show cause notice should have been kept in call book till final decision of the appeal by the learned CESTAT is not tenable as the adjudication proceedings are to be time bound in terms of Section 73 (10) the C.G.S.T. Act, 2017, i.e. the orders under Subsection 9 have to be passed within three years from the due date of furnishing of annual return for the financial year to which the tax not paid or short paid or irregularly or wrongly availed input tax credit relates to or within 3 years from the date of erroneous refund. The impugned proceeding has been initiated for wrongful availment of ITC through TRAN 1 for contravention of Section 140 of the C.G.S.T. Act, 2017 and thus proceedings under Section 73 of the CGST Act is legal and proper. It is submitted that Bokna mines was engaged in excavation and handling of iron ores and their subsequent transportation from mines to the railhead for the delivery to the petitioner's Gamharia plant. For such transportation, bills were raised in the name of Bokna mines by the transporters and Bokna mines paid the same along with service tax leviable on such transportation charge. Mining of iron ore is not subject to levy of duty of excise. The activity of Bokna mines cannot be treated as either provider of output service or a manufacturer. Further the both mines as well as the petitioner are separate entities and are independent profit centers of Usha Martin Group of companies. Therefore, Bokna mines cannot be equated with the office of the manufacturer or provider of output service or an office of the petitioner. The impugned order in original has been passed after due opportunity of personal hearing and on consideration of the defence reply submitted by the noticee. Learned counsel for the petitioner has also referred to Rule 2 (m) of the CENVAT Credit Rules, 2004 which defines input service distributor. The definition lays down the criteria that input service distributor is an office of the manufacturer or producer of the final product or provider of output service which receives invoices for the purchase of input services. Therefore, iron ores excavated in Bokna mines and subsequently transported to the rail head for delivery to the petitioner's Gamharia plant would not amount to Bokna mines being treated as provider of output service or a manufacturer. In view of Rule 7 of the C.C.R., Bokna mines cannot distribute CENVAT Credit or service tax paid by them for such services. Learned counsel for the respondents has relied upon the provisions of Rule 142 (1) of the C.G.S.T. Rules, 2017, which provides that a proper officer shall serve, along with the

notice issued under the relevant Sections indicated therein a summary thereof electronically in form GST DRC 01. Such notice was properly served on the petitioner on 22nd September, 2021 with an acknowledgement. Section 169 of the C.G.S.T. Act, 2017 relating to service of notice has also been referred to. According to the respondents, as per provisions of Rule 3 (1) of the CCR, 2004, a manufacturer can avail credit of any input service received by manufacturer or provider of output services. A manufacturer can take credit of input services received by them but the invoices having not been issued in the name of the petitioner noticee and the services having been rendered by another independent entity it did not qualify input service for the petitioner noticee unit. Therefore, the credit availed by them was irregular and has rightly been held so by the impugned order-in-original. It is submitted that provision for transition of pre GST era credit of Central Excise and Service Tax are contained in Section 140 of the C.G.S.T. Act. The tax payer base of both Central and State has undergone change and got subsumed under G.S.T. Two fundamental principles were kept in sight while transitioned credit was verified. Firstly, only such CENVAT Credit can be taken as credit of C.G.S.T. in Electronic Credit Ledger by filing TRAN 1 for which strict legal authority exists in Section 140 of the C.G.S.T. Act, 2017. Secondly, same CENVAT Credit cannot be availed as transitional credit twice. In form TRAN 1 there are only six entries which decide all C.G.S.T. credit which is posted in the E.C.L. Therefore, a show cause notice was issued in Form G.S.T.-D.R.C.-01 on 13th September, 2021 for irregular availment of I.T.C. to the tune of Rs. 10,21,05,096/- transitioned through table 5 (A) and table 7(a)/7A of TRAN 1 under Section 73 (1) of the C.G.S.T. Act, 2017 by the competent authority in view of circular dated 9th February, 2018. The same has been adjudicated upon after providing proper opportunity of personal hearing and considering defence reply submitted by the petitioner.

10. Learned counsel for the respondent has, in particular, referred to the guidance note on C.G.S.T. transitional credit Annexure A to his written notes which provides for transition of pre GST era credit of Central Excise and Service Tax under section 140 of the CGST Act. It lays down two fundamental principles which should be kept in sight when the transitioned credit is verified. Firstly, only such CENVAT Credit can be taken as credit of CGST in the Electronic Credit Ledger by filing TRAN 1 for which explicit legal authority exists in Section 140 of the C.G.S.T. Act. Secondly, same CENVAT Credit cannot be availed as transitional credit twice. This can happen in situations such as availing CENVAT Credit as Transitional Credit through

TRAN 1 and also through return in form GSTR 3B or availing same credit twice through two different tables of Form TRAN 1. The other circular also enclosed to the written note relied upon by the learned counsel for the respondent issued by C.B.E.C. is dated 23th February, 2018 bearing no. 33/07/2018-GST (Annexure C). Learned counsel for the respondent has referred to the directions issued by the C.B.E.C. under Section 168 of the C.G.S.T. Act regarding non-transition of CENVAT Credit under section 140 of the C.G.S.T. Act or non utilization thereof in certain cases. Para 2 of the instant circular provides that where in relation to a certain CENVAT Credit pertaining to which a show cause notice was issued under Rule 14 of the CENVAT Credit rules, 2004, which has been adjudicated and where in the last adjudication order or the last order in appeal as it existed on 1st July, 2017, it was held that such CENVAT Credit is not admissible, then such CENVAT Credit or "disputed Credit" credited to ECL in terms of Section 140 of the Act shall not be utilized by a registered taxable person to discharge his tax liability till the order in original or the order in appeal is in existence.

11. However, we may observe at this stage that in the first place the CENVAT Credit sought to be transitioned under Section 140 of the C.G.S.T. Act was never subjected to any adjudication order under the existing law that is the C.E.A. or the Finance Act. Secondly, the guidance note or the circular dated 23rd February, 2018 does not throw light on whether a proceeding under Section 73 of the C.G.S.T. Act can be initiated for transition of CENVAT Credit which is alleged to be inadmissible under the pre existing laws.

12. However, learned counsel for the respondent submits that since the petitioner has an alternative remedy of appeal under Section 107 of the C.G.S.T. Act he may be relegated to raise all these issues before the appellate authority.

13. We have considered the submission of learned counsel for the parties. We have also taken note of the relevant materials relied upon from the pleadings on record. We have also gone through the decisions cited on behalf of the petitioner and the guidance note or circular issued by the C.B.E.C. as referred by learned counsel for the respondent. We have also examined the relevant provisions of the C.G.S.T. Act and the provisions of the C.E.A. and Finance Act and the C.C.R. From the chronology of facts borne from the pleadings on the record, it is not in dispute that the impugned order in original dated 30th March, 2022 passed under Section 73 (9) of the C.G.S.T. Act, 2017 relates to availment of CENVAT Credit which was allegedly inadmissible under the C.E.A. and Finance Act read with C.C.R. It is also not in dispute that

no SCN or order in original has been passed under the existing law, i.e. the C.E.A. and Finance Act read with C.C.R. either at the time of filing of TRAN 1 or thereafter in respect thereof. The writ petition has been preferred purely on the question of legality and jurisdiction of Respondent No.1 to initiate a proceeding under Section 73 (1) of the C.G.S.T. Act for transition of CENVAT Credit which was allegedly inadmissible under C.E.A. and Finance Act read with C.C.R. The issue raised herein does not require entering into any question of disputed facts. The primary issue relates to the jurisdiction of Respondent No.1 to initiate proceedings under the C.G.S.T. Act for alleged contravention of C.E.A. and Finance Act, 1994 read with C.C.R., 2004. In this regard it is profitable to refer to the case of **Magadh Sugar & Energy Ltd. vs. State of Bihar & others** reported in **2021 SCC Online Supreme Court 801, para 25 to 27, 31 and 32.** The Apex Court has after dealing with the precedents on the question of maintainability of the writ petition under Article 226 of the Constitution of India in the presence of an alternative statutory remedy held as under:

> ***"25.*** *While a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution if an effective and efficacious alternate remedy is available, the existence of an alternate remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallized by this Court in Whirpool Corporation v. Registrar of Trademarks, Mumbai and Harbanslal Sahni v. Indian Oil Corporation Ltd. Recently, in Radha Krishan Industries v. State of Himachal Pradesh a two judge Bench of this Court of which one of us was a part of (Justice DY Chandrachud) has summarized the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternate remedy. This Court has observed:*
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> *"28. The principles of law which emerge are that:*
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> *(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;*
>
> *(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;*
>
> *(iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c)* ***the order or proceedings are wholly without jurisdiction****; or (d) the vires of a legislation is challenged;*
>
> *(iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;*

(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

(emphasis supplied)

26. *The principle of alternate remedies and its exceptions was also reiterated recently in the decision in Assistant Commissioner of State Tax v. Commercial Steel Limited. In State of HP v. Gujarat Ambuja Cement Ltd. this Court has held that a writ petition is maintainable before the High Court if the taxing authorities have acted beyond the scope of their jurisdiction. This Court observed:*

"23. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in L. Hirday Narain v. ITO [(1970) 2 SCC 355: AIR 1971 SC 33] that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies; unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition."

27. *The above principle was reiterated by a three-judge Bench of this Court in Executive Engineer v. Seetaram Rice Mill. In that case, a show cause notice/provisional assessment order was issued to the assessee on the ground of an unauthorized use of electricity under Section 126(1) of the Electricity Act 2003 and a demand for payment of electricity charges was raised. The assessee contended that Section 126 was not applicable to it and challenged the jurisdiction of the taxing authorities to issue such a notice, before the High Court in its writ jurisdiction. The High Court entertained the writ petition. When the judgment of the High Court was appealed before this Court, it held that the High Court did not commit any error in exercising its jurisdiction in respect of the challenge raised on the jurisdiction of the revenue authorities. This Court made the following observations:*

"81. Should the courts determine on merits of the case or should they preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent authority? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. ***We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the***

> ***courts only where they involve primary questions of jurisdiction or the matters which go to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act.***
>
> *82. It is argued and to some extent correctly that the High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the above stated class of cases. It is a settled principle that the courts/tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain, lex nil frustra facit, nor to enforce one which would be frivolous-lex neminem cogit ad vana seu inutilia-the law will not force anyone to do a thing vain and fruitless.* ***In other words, if exercise of jurisdiction by the tribunal ex facie appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction****. This issue is no longer res integra and has been settled by a catena of judgments of this Court, which we find entirely unnecessary to refer to in detail…"*
>
> ***(emphasis supplied)***
>
> ***31.*** *The test that is to be applied for the determination of a question of law is whether the rights of the parties before the court can be determined without reference to the factual scenario. In this case, the High Court was entrusted with the determination of the meaning of the phrases used in Section 3 of the Act to determine if the supply of electricity by the appellant would fall within its ambit. Unlike a dispute on the execution of a promissory note or a plea of adverse possession, there is no adjudication on facts required here. There is also no dispute on the nature of the transaction involved.*
>
> ***32.*** *The issues raised by the appellant are questions of law which require, upon a comprehensive reading of the Bihar Electricity Act, a determination of whether tax can be levied on the supply of electricity by a power generator (which also manufactures sugar) supplying electricity to a distributor; and whether the first respondent has the legislative competence to levy duty on the sale of electricity to an intermediary distributor in view of the decision of this Court in State of AP (supra). The question of whether the appellant is liable to file returns under Sections 6B(1) and 5A of the Act is directly related to the issue of whether the sale of electricity by the appellant to BSEB falls under the charging provisions of Section 3(1). The questions raised by the appellant can be adjudicated without delving into any factual dispute. Thus, the present matter is amenable to the writ jurisdiction of the High Court."*

14. The Apex Court has laid down that the test that is to be applied for the determination of a question of law is whether the rights of the parties before the court can be determined without reference to the factual scenario. If there is no dispute on facts whether the action of the respondent was without jurisdiction or not can be examined in exercise of Article 226 of the Constitution of India. As such the presence of alternative remedy of appeal under Section 107 of the C.G.S.T. Act does not operate as a restriction to delve upon and decide the question of jurisdiction of respondent no.1 raised in the

writ petition. If the order or proceedings are wholly without jurisdiction, the writ court can determine the question of law raised before it.

15. From the conspectus of facts borne from record two questions emerge for answer in the present writ petition. (i), whether the initiation of proceedings under Section 73 (1) of the C.G.S.T. Act in the facts and circumstances of the case was within jurisdiction of the Respondent No.1 or not; (ii) whether in view of Section 174 of the C.G.S.T. Act, such a proceeding for availment of alleged inadmissible CENVAT Credit could have been initiated under C.E.A. and Finance Act read with C.C.R. or not. For proper appreciation the provision of Section 140 (1) and Section 174 of the C.G.S.T. Act are quoted hereunder.

> **140 (1)** and **Section 174** of the C.G.S.T. Act are quoted hereunder:
>
> **"140. Transitional arrangements for input tax credit**
>
> ***"Section 140 (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 [of eligible duties] 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:*
>
> *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."*
>
> ***Section 174. Repeal and saving.***
>
> *(1) Save as otherwise provided in this Act, on and from the date of commencement of this Act, the Central Excise Act, 1944 (1 of 1944) (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1995), the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), and the Central Excise Tariff Act, 1985 (5 of 1986) (hereafter referred to as the repealed Acts) are hereby repealed."*
>
> *(2) The repeal of the said Act and the amendment of the Finance Act 1994 (32 of 1994) (hereinafter referred to as "such amendment" or amended Act" as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not-*
>
> *(a) revive anything not in force or existing at the time of such amendment or repeal; or*

(b) affect the previous operation of the amended Act or repealed Acts and orders or anything duly done or suffered thereunder; or
(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts:
PROVIDED that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or
(d) affect any duty, tax, surcharge, fine, penalty, interest as are due or may become due or any forfeiture or punishment incurred or inflected in respect of any offence or violation committed against the provisions of the amended Act or repealed Acts; or
(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed;
(f) affect any proceedings including that relating to an appeal, review or reference, instituted before on, or after the appointed day under the said amended Act or repealed Acts and such proceedings shall be continued under the said amended Act or repealed Acts as if this Act had not come into force and the said Acts had not been amended or repealed.
(3) The mention of the particular matters referred to in sub-sections (1) and (2) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal."

16. Section 140 relates to transitional arrangements for input tax credit and is provided under Chapter XX which relates to transitional provisions. Section 139 provides for migration of existing tax payers i.e. every person registered under any of the existing laws. Section 140 provides that a registered person other than a person opting to pay tax under Section 10, shall be entitled to take in his E.C.L., the amount of CENVAT Credit of eligible duties carried forward in the return relating to the period ending with the day immediately preceding the appointed date, i.e. 1st July, 2017, furnished by him under the existing law in such manner as may be prescribed. Transitional provisions have a purpose. When one legislative system ends and another begins it is considered necessary by the legislature to enact special provisions for the circumstance which exists when that legislation came into force. As the learned author Craies has observed in his treaties 'On Legislation' legislation does not necessarily have effect as law immediately after being passed or made. It may take effect under these circumstances: (1) Immediately upon being passed or made; (2) At a point in the future that is specified upon the

legislation being passed or made, or that can be determined under criteria specified upon the legislation being passed or made; (3) Only if some future event occurs (which may be a real-world event or an event such as making an order-designed to commence the legislation); (4) with retrospective effect from a past time; or (5) not at a particular point in time, but in relation to things done or events occurring during a period specified upon the legislation being passed or made, with it being possible to specify either a single period for all purposes or different period for different purposes.

17. Transitional provisions, as the learned author has observed may be relatively unimportant in that by definition they effect few cases but they are extremely complicated and they can be important to the cases affected. The necessity for saving and transitional provisions is a consequence of the change in law, whether the change is caused by the new statute law or by the repeal, repeal and substitution, or modification, of the existing statute law. It is in this light that the transitional provisions incorporated under Chapter XX have to be understood. The C.E.A., 1944 and the Finance Act, 1994 ceased to exist with effect from 1st July, 2017 upon coming into force of the C.G.S.T. Act and the G.S.T. regime. Under the existing law, CENVAT Credit admissible to any registered Tax payer could have been utilized as input tax credit for discharge of tax liability. The same would have remained idle or unutilized if such transitional provisions were not provided for under the G.S.T. regime. Therefore, the legislature provided for transitional arrangement for input tax credit under the C.G.S.T. Act i.e. CENVAT Credit or under the State G.S.T. Acts i.e. input tax credit as are admissible at the time of transition under the existing Vat laws or Entry Tax Act etc. The circumstances under which it is permissible to transition such credit are provided under Section 140 proviso itself which have been quoted herein above. Clause (i) to the Proviso indicates that the said amount of credit if it is not admissible as input tax credit under this Act meaning thereby the C.G.S.T. Act, the registered person shall not be allowed to take credit of those CENVAT Credit. The circumstances in which no registered person shall be entitled to take credit of any input tax in respect of any supply of good or services or both are provided under Section 16 (2) of the C.G.S.T. Act under Chapter V “Input Tax Credit”, which is quoted hereunder.

> “*SECTION 16. Eligibility and conditions for taking input tax credit.- (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input*

tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,-

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

[(aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under Section 37;]

(b) he has received the goods or services or both."

[Explanation.— For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services—

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person.]

(c) subject to the provisions of [section 41 or Section 43A], the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

PROVIDED that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

PROVIDED FURTHER that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

PROVIDED ALSO that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income tax Act, 1961 (43 of 1961), the input tax credit on the said tax component shall not be allowed.

(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 financial year to which such invoice or [xxx] debit note pertains or furnishing of the relevant annual return, whichever is earlier:

[PROVIDED that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019.]

18. The enumerated conditions under which the registered person shall not be entitled to avail of the credit of input tax are not one which are applicable to the case of the present petitioner. The show cause notice under which the instant adjudication proceedings were initiated is worded allege similar contraventions under the CEA, Finance Act, 1994 and the CCR as the previous show cause notices issued under the existing law against the petitioner relating to contravention of the C.E.A., Finance Act and C.C.R.. The adjudicating authority does not hold that the transition of CENVAT Credit under Section 140 of the C.G.S.T. Act by the petitioner and relating to the period just before the appointed date i.e. 1st July, 2017 are not one which are inadmissible to be credited in terms of section 16 (2) of the C.G.S.T. Act. The Show cause notice itself alleges contravention of the C.E.A., Finance Act, 1994, read with C.C.R., 2004. As such, sub clause (i) of proviso to section 140 does not apply to the case of the petitioner at hand. It is neither the allegation against the petitioner that he had not furnished his returns required under the existing law for the period of six months immediately preceding the appointed date as per clause (ii) to the proviso to Section 140. In substance, the contraventions which have been alleged and the proceedings which have been initiated under Section 73 (1) of the C.G.S.T. Act are in relation to violation of the C.E.A. and Finance Act read with C.C.R. The gist of the imputation is that the petitioner could not claim the CENVAT credit in lieu of invoices raised by its Bokna mines as both of them were independent entities. Similar was the imputation in respect of the previous show cause notices issued under the existing law which are pending adjudication before the learned CESTAT or the Commissioner (Appeals) for different periods and in some of which the petitioner has already got a stay by the learned CESTAT. Whether the CENVAT credit under the existing law were admissible to be availed and transitioned by the petitioner was not an issue lying within the jurisdiction of the C.G.S.T authorities to be proceeded against and determined under the relevant provisions of Section 73 of the C.G.S.T. Act which provides as under:

> "Under Section 73 of the C.G.S.T. Act a proper Officer may require a registered person to show cause in case it is found that he has not paid any tax or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized for any reason, other than the reason of fraud or any willful misstatement or suppression of fact to evade tax (such contraventions are covered by Section 74 of the C.G.S.T. Act) asking him to explain as to why he should not pay the amount specified in the notice along with interest and under Section 50 and penalty thereupon".

A perusal of the provisions of Section 73 of the CGST Act makes it clear that such a proceeding can be initiated for non-payment of any tax or short payment of such tax or for erroneous refund of such tax or for wrongly availing or utilizing the input tax credit which are available under the C.G.S.T. Act. Section 73 does not speak of CENVAT Credit as C.G.S.T. Act does not provide for CENVAT Credit rather the term has been subsumed in the expression input tax credit both relating to the supply of good or services. The assumption of jurisdiction by Respondent No. 1 to determine whether the CENVAT Credit was admissible under the existing law by invoking provisions of Section 73 of the C.G.S.T. Act was therefore not proper in the eye of law.

19. This leads us to the next question whether a registered person could transition inadmissible CENVAT Credit of the existing regime to the G.S.T. regime under Section 140 of the C.G.S.T. Act without any check or proceeding against him. We have to then advert to Section 174 of the C.G.S.T. Act to find the answer. Section 174 relates to repeal and saving and has been engrafted under the chapter XXI relating to Miscellaneous Provisions. Pursuant to the 101 Constitutional amendment, Articles 246 A, 269 A and 279 A were inserted and certain Articles like section 268 A were repealed. The amendment act brought drastic changes in the taxing powers of the Centre and the State. Certain other articles such as Article 248, 249, 250, 268, 269, 270, 271, 286 and 366 and 368 were amended. Besides that the 6th and the 7th schedules were also amended. Article 246 A provided for a federal fiscal mechanism. By this article the State legislatures are empowered to make laws regarding G.S.T. Tax imposed by the Union or by that State and to implement them in intra State trade. The Centre continues to have exclusive power to make G.S.T. laws regarding inter State trade. Both the union and states in India came to have simultaneous powers to make laws on the goods and services. Article 269 A deals with levy and collection of goods and service tax in the course of inter-State trade or commerce. In case of inter-State trade the amount collected by the Centre is to

be apportioned between the Centre and the States as per the G.S.T. council's recommendation. Under the G.S.T. regime, if the Centre collects the tax it assigns State share to the State concerned. On the other hand, if the State collects the tax it assigns the Centre's share to the Centre. Article 279 A provided for the Constitution of a G.S.T. council besides prescribing its powers and positions. Earlier Article 268 A dealt with the service tax levied by the Union and collected and appropriated by the Union and the States. The said Article stood repealed. As to the amended constitution provisions, Article 248 confers residuary legislative powers on the Parliament. Now this provision is subject to Article 246 A of the Constitution.

20. It is consequent to such a novel legislation that both the Centre and the States enacted their G.S.T. laws. However, as is obvious, the new regime had to make provisions for the transactions which remained inchoate under the existing law. It is also a well settled legal position that on account of the new legislation the implementation of the G.S.T. regime could not be left to a realm of uncertainty. For a violation under the existing law, parallel proceedings could not be conducted under the existing law at the behest of jurisdictional officer and at the same time under the new law at the instance of another jurisdictional officer of the G.S.T. Act. It is in this conceptual background that the purport and construction of the repeal and saving provisions under Section 174 of the C.G.S.T. Act is to be understood. The existing Act, such as the Central Excise Act, 1944, the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Additional Duties of Excise (Goods of Special Importance Act, 1957), The Additional Duties of Excise (Textile and Textile Articles Act, 1978 and the Central Excise Tariff Act, 1985 were repealed under Subsection (1) of Section 174. However, the legislature provided that the repeal of the said Acts and the amendment of the Finance Act, 1994 to the extent as mentioned in sub section (1) or section 173 shall not (a) revive anything not in force or existing at the time of such amendment or repeal; or (b) affect the previous operation of amended Act or repealed Acts or and orders or anything duly done or suffered thereunder; or **(c)** affect any right, privilege, obligation or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts. Sub clause (e) of subsection 2 of Section 174 is relevant for purposes of the present case which are again reproduced hereunder:

> *"(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest,*

> *right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed;"*

21. It provides that the repeal of the existing laws shall not affect any investigation, inquiry, verification (including Scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine , interest, right, privilege, obligation, liability, forfeiture or punishment as aforesaid and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication **and other legal proceedings** or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed. In substance, investigations, inquiry, verification, assessment proceedings, adjudication proceedings, legal proceedings which were for recovery of arrears or remedy in respect of any such duty or tax etc., which were pending or such other legal proceedings or inchoate rights which were in existence on the appointed day, for them legal proceedings may be instituted, continued or enforced as if these Acts had not been so amended or repealed. To decide whether any particular transaction is affected by the repeal of an Act, it is necessary to ascertain whether the transaction in question was completed when the Act was repealed. The present repeal and saving clause expressly engrafts that notwithstanding the repealing Act the repeal shall not affect any right or liability acquired accrued or incurred. In this regard it is appropriate to rely upon the opinion of the Apex Court as rendered in the case of **State of Rajasthan vs. Mangilal Pindwal** reported in **(1996) 5 SCC 60 para 9 to 11** as under:

> *"**9.** As pointed out by this Court, the process of a substitution of statutory provision consists of two steps; first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place. (See: Koteswar Vittal Kamath v. K. Rangappa Baliga & Co. [(1969) 1 SCC 255 : (1969) 3 SCR 40] , SCR at p. 48.) In other words, the substitution of a provision results in repeal of the earlier provision and its replacement by the new provision. As regards repeal of a statute the law is thus stated in Sutherland on Statutory Construction:*
>
> *"The effect of the repeal of a statute where neither a saving clause nor a general saving statute exists to prescribe the governing rule for the effect of the repeal, is to destroy the effectiveness of the repealed act in futuro and to divest the right to proceed under the statute, which, except as to proceedings*

> *past and closed, is considered as if it had never existed." (Vol. I, para 2042, pp. 522-523)*
>
> ***10.*** *Similarly in Crawford's Interpretation of Laws it has been said:*
>
> *"Effect of Repeal, Generally.— In the first place, an outright repeal will destroy the effectiveness of the repealed act in futuro and operate to destroy inchoate rights dependent on it, as a general rule. In many cases, however, where statutes are repealed, they continue to be the law of the period during which they were in force with reference to numerous matters." (pp. 640-641)*
>
> ***11.*** *The observations of Lord Tenterden and Tindal, C.J. referred in the above-mentioned passages in Craies on Statute Law also indicate that the principle that on repeal a statute is obliterated is subject to the exception that it exists in respect of transactions past and closed. To the same effect is the law laid down by this Court. (See: Qudrat Ullah v. Municipal Board [(1974) 1 SCC 202 : (1974) 2 SCR 530] , SCR at p. 539)"*

22. Therefore, it is clear that the repeal of the existing laws upon coming of the G.S.T. law regime did not leave a vacuum as to past transactions which were not closed. The repeal and saving clause (e) under Section 174(1) of the C.G.S.T. Act allowed such legal proceedings to be instituted in respect of inchoate rights except rights under transactions which were past and closed. Petitioners also admit that proceedings for availing CENVAT Credit which were allegedly inadmissible under the C.E.A., Finance Act, read with C.C.R., 2004 could have been initiated under the existing laws. It is also not in dispute that in respect of previous proceedings for such contravention the cases have been kept in call book and in some of them the learned CESTAT has stayed the recovery of the tax. The duty of the constitutional courts is to interpret the law and also to ensure that there is certainty about the law not only in the minds of the law enforcement agencies but also in the common person as to where he stands in the eye of law. If proceedings for transition of CENVAT Credit alleged to be inadmissible is permitted to be carried under the C.G.S.T. Act, it may lead to uncertainty not only in the minds of the ordinary citizen but also in the minds of the Tax authorities. In some cases a jurisdictional proper officer under the C.G.S.T. Act may initiate proceedings under the provisions of the C.G.S.T Act for such contravention. In other cases the competent jurisdictional officer may initiate proceedings under the existing law that is the C.E.A. and Finance Act for the same contravention in view of the repeal and saving provisions under Section 174 of the C.G.S.T. Act. Such a course cannot be countenanced in law. As such, we are of the considered view that the initiation of proceedings by respondent no. 1 under section 73 (1) of the

C.G.S.T. Act, 2017 for alleged contravention of the C.E.A. and Finance Act, read with C.C.R. against the petitioner by filing TRAN 1 in terms of Section 140 of the C.G.S.T. Act for transition of CENVET Credit as being inadmissible under the existing law was beyond his jurisdiction. Consequently the Order in Original dated 30th March, 2022 passed by the respondent no. 1 being without jurisdiction cannot be sustained in the eye of law. The impugned adjudication proceedings and the order in original dated 30th March, 2022 are accordingly quashed.

23. However, respondent authorities are at liberty to initiate proceedings under the provisions of the existing law, i.e. C.E.A, 1944, Finance Act, 1994 read with C.C.R, 2004 against the petitioner for the relevant tax period in accordance with law.

(Aparesh Kumar Singh, J.)

(Deepak Roshan, J.)

sm/pramanik