IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P.(T) No. 2404 of 2020

M/s Subhash Singh Choudhary through its proprietor
..… Petitioner

Versus

1.The State of Jharkhand through the Secretary-cum-Commissioner, Department of State Tax, having its office at Porject Bhawan, HEC, P.O. Dhurwa, P.S. Jagannathpur, District-Ranchi.
2.Joint Commissioner of State Tax (Administration), Dhanbad Division, Dhanbad, having its office Opposite Civil Court Campus, P.O. and P.S. Bank More, Dhanbad, District-Dhanbad.
3.Deputy Commissioner of State Tax, Urban Circle, Dhanbad having its office Opposite Civil Court Campus, P.O. and P.S. Bank More, Dhanbad, District-Dhanbad.
4.State Tax Officer, Urban Circle, Dhanbad having its office Opposite Civil Court Campus, P.O. and P.S. Bank More, Dhanbad, District-Dhanbad. ..... Respondents

With

W.P.(T) No. 1429 of 2021

M/s. Bhilai Engineering Corporation Ltd., through its Authorized Signatory-cum-Manager, Finance & Accounts, namely, Satyajit Sarkar
..… Petitioner

Versus

1.The State of Jharkhand through the Secretary, State Tax Department, having its office at Project Building, P.O. Dhurwa, P.S. Jagnnathpur, District- Ranchi.
2.Joint Commissioner of State Tax (Administration), Dhanbad Division, Dhanbad, having its office at Luby Circle Road, P.O. and P.S. Dhanbad, District-Dhanbad.
3. Joint Commissioner of State Tax (Appeal), Dhanbad Division, Dhabad, having its office at Luby Circle Road, P.O. and P.S. Dhanbad, District-Dhanbad.
4.Deputy Commissioner of State Tax, Bokaro Circle, Bokaro, P.O. and P.s. Bokaro, District-Bokaro.
5.State Tax Officer, Bokaro Circle, Bokaro, P.O. and P.S. Bokaro, District-Bokaro. ..... Respondents

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CORAM: HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE DEEPAK ROSHAN

For the Petitioners : Mr. Sumeet Gadodia, Aakansha Mittal, Ranjeet Kushwaha, Surbhi Agarwal, Advocates. [WP(T) 1429/21]
Ms. Amrita Sinha, Adv. [WP (T) No. 2404/20]
For the Resp-State : Mr. A.K.Yadav, Sr. S.C.-I [WP(T) 1429/21]
Mr. P.A.S.Pati, G.A.-II [WP(T) 2404/20]

30/09.01.2023 Heard learned counsel for the parties.

2. The abovementioned writ petitions involved common issue for

adjudication and were tagged and heard together with the consent of the parties.

3. The sole issue for adjudication in the above Writ Petitions is *"Whether the amount deducted towards TDS u/s 44 of the Jharkhand Value Added Tax Act is a 'credit of the amount of value added tax' which a registered person is entitled to migrate in its electronic credit ledger"*?

4. Brief facts of the case (in W.P.(T) No. 1429 of 2021) is that the petitioner is primarily engaged in the business of supplying of machinery and providing engineering, commissioning and operational support services across the country and in the State of Jharkhand. Petitioner was duly registered under the provisions of Jharkhand Value Added Tax Act, 2005 [hereinafter referred to as 'JVAT Act, 2005' for short] and after implementation of the Goods & Services Tax Act, 2017 [hereinafter referred to as 'GST Act, 2017' for short] it was also registered under the said Act. Admittedly, Petitioner filed its returns for the quarter ending 30th June, 2017 i.e. immediately before appointed date and was having an excess input tax credit [hereinafter referred to as 'ITC' for short] of an amount of Rs. 1,73,69,826/-. The said amount comprised of Rs. 1,30,62,516/- pertaining to excess ITC and an amount of Rs. 43,07,310/- pertaining to unadjusted TDS deducted at source under Section 44 of the JVAT Act. The cumulative of the aforesaid amount in the return filed was carried forward as excess ITC to the next period as per Statutory Form JVAT-200 prescribed for filing quarterly returns.

GST Regime was implemented with effect from 1st July, 2017, and in terms of Section 140(1) of the JGST Act, Petitioner was entitled to carry forward 'credit of value added tax' reflecting in its return immediately preceding the appointed date and, accordingly, Petitioner claimed transition of the amount of credit of value added tax of Rs. 1,73,69,826/- by filing GST TRAN-1 online in GSTN Portal on 28th September, 2017. However, a Summary of Show Cause Notice in Form GST-DRC-1 contained in Reference No. 1879 dated 18th December, 2018 was issued by Respondent No. 5-State Tax Officer, Bokaro Circle, Bokaro, alleging, inter alia, that the Petitioner was not entitled for migration of the amount of credit of value added tax of an amount of Rs. 1,73,69,826/- and, accordingly, Petitioner was directed to show cause as to why entire claim of migration be not

disallowed and interest and penalty be not imposed upon Petitioner for wrongful availment of ITC. Petitioner submitted its reply dated 24th December, 2018, specifically, contending, inter alia, that Petitioner did not violate Section 140 of the JGST Act, but, Petitioner was communicated vide e-mail a Summary of Order in Form GST DRC-07 dated 19.01.2019, wherein the entire amount migrated by the Petitioner of Rs. 1,73,69,826/- was disallowed and interest and penalty was also imposed upon Petitioner. It is relevant to mention herein that in the Summary of Order in Form GST DRC-07 reference was given to the adjudication order being Order No. 1895 dated 19.01.2019, but, copy of such adjudication order was never supplied to the Petitioner and even after Petitioner applied for the certified copy for the said order, the same was not furnished to it.

5. The Petitioner being aggrieved by the rejection of its claim of migration of credit of value added tax, preferred Appeal before the First Appellate Authority – Joint Commissioner of State Tax, Dhanbad Division, Dhanbad vide Appeal dated 04.03.2019 which was registered as Appeal Case No. BK/GST-03/2019-20. However, after Petitioner preferred the said Appeal, Rectification Order was passed by Respondent No. 5 in Form GST DRC-08, wherein earlier denial of migration of entire ITC of Rs. 1,73,69,826/- was reduced to denial of ITC only to a sum of Rs. 43,07,310/- i.e. an amount equivalent to excess TDS reflected in the quarterly return of the Petitioner.

Since subsequent rectification order was passed, wherein denial of transition of credit of value added tax was only confined to the amount of TDS, Petitioner preferred another Appeal online on 11th June, 2019, challenging the Rectification Order which was registered as Appeal Case No. BK/GST-02/2019-20. Since, Petitioner had already preferred the second appeal against the Rectification Order, its earlier Appeal against the original order became infructuous and, accordingly, Petitioner vide its e-mail dated 2nd March, 2020 prayed before the Appellate Authority for withdrawal of its first appeal. However, interestingly, despite the aforesaid fact, Appellate Authority proceeded to adjudicate the first appeal and was pleased to confirm the original Summary of Demand contained in Form GST DRC-07, wherein migration of the amount of credit of value added tax of Rs. 1,73,69,826/- was disallowed vide its order dated 02.03.2020 passed in

Appeal Case No. Appeal Case No. BK/GST-03/2019-20.

6. Interestingly, in the Appellate Order, reference of the e-mail dated 02.03.2020, wherein Petitioner has sought withdrawal of its Appeal was specifically noted and even submission of the Respondent-Department was duly noted regarding passing of the Rectification Order, but, despite the said fact the Appellate Authority proceeded to decide the said Appeal which was already rendered infructuous in view of the Rectification Order. Since the Appellate Authority passed order in Original Appeal confirming the original demand contained in Form GST DRC-07, Petitioner was compelled to file a rectification application before the Appellate Authority for recall of the Appellate Order dated 02.03.2020, but, no order was passed by the Appellate Authority on the said rectification petition. On the contrary, to the shock and surprise of the Petitioner, Petitioner vide e-mail dated 2nd November, 2020 was communicated an appellate order in respect of the second appeal filed by Petitioner being Appeal Case No. BK/GST-02/2019-20, wherein Petitioner was communicated order dated 10.06.2020 dismissing the second appeal of the Petitioner. The said second appeal of the Petitioner was not decided on merits by the Appellate Authority, but, was dismissed on the ground that the Petitioner filed two separate appeals which were not maintainable and, further, Petitioner has not filed any grounds of appeal and/or statement of fact pertaining to Rectification Order and also on the ground that Rectification Order was not annexed along with Memo of Appeal.

It is the specific case of the Petitioner that the Appellate Authority merely on alleged technicalities rejected the second appeal of the Petitioner. Further, it was the specific case of the Petitioner that neither the original adjudication order nor the rectification order was ever communicated to the Petitioner and only the summary of order was communicated in Form GST DRC-07 and Form GST DRC-08 and, under the said circumstances, rejection of the appeal of the Petitioner on the ground that it has not enclosed along with Memo of Appeal the adjudication order and/or rectification order was not tenable in the eye of law.

7. This Court vide order dated 13.04.2021 in the writ application filed by Petitioner directed Respondents to file their Counter Affidavit and, further, Respondents were directed to bring on record the rectification order

dated 13.03.2019, and to obtain instruction as to whether the last VAT assessment order ending the tax period 30th June, 2017 has been passed or not. Subsequent to the order passed by this Hon'ble Court, Counter Affidavit has been filed on behalf of Respondents and, admittedly, no rectification order dated 13.03.2019 has been enclosed along with said Counter Affidavit. In fact, in the Counter Affidavit, it has been clearly stated in paragraph 7(d) that no separate adjudication order was issued, rather, Form GST DRC-07 itself was an order/demand notice. Further, in the Counter Affidavit, assessment order pertaining to the period 2017-18 i.e. 01.04.2017 to 30.06.2017 has been annexed vide Annexure-A and a bare perusal of the said order dated 22nd March, 2021, it would be evident that at the time of VAT assessment, it was recorded that an amount of Rs. 1,73,69,826/- has been carried forward by the Petitioner in GST TRAN-1.

08. Brief facts of the case (in W.P.(T) No. 2404 of 2020) is that on 25.12.2017 return was filed by the petitioner for the period 01.04.2017 to 30.06.2017, showing excess amount of tax deducted at source amounting to Rs. 81,30,037/- which was auto populated at column 61 of the return being "excess input tax credit to be c/f to next period". Petitioner in terms of Section 140 (1) of the JGST Act, 2017, transmitted the said amount in its Electronic Credit Ledger within the stipulated period by filing declaration in TRAN-01. Thereafter, on 09.05.2018 petitioner received a notice in Form GST ASMT-10 stating, inter alia, that the petitioner has wrongly migrated the amount pertaining to excess TDS in TRAN-01. On 21.06.2018 Form GST DRC-01 & DRC-02 being summary of show cause notice was issued under Section 73 of the JGST Act, 2017. Thereafter, the petitioner submitted reply. On 12.07.2018 adjudication order was passed under Section 73 of the JGST Act, 2017 disallowing the transition of excess amount of TDS and the petitioner was directed to make payment of the amount of Input Tax Credit of Rs. 81,30,037.39/- and also imposed penalty and interest therein. Thus, the petitioner was directed to pay a total amount of Rs. 1,00,81,246.35 and DRC-07 was issued accordingly.

09. Mr. Sumeet Gadodia, learned counsel for the petitioner assisted by Mr. Ranjeet Kushwaha, learned counsel appearing in W.P.(T) No. 1429 of 2021 along with Ms. Amrita Sinha, leaned counsel appearing in W.P.(T) No. 2404 of 2020 have assailed the impugned action of Respondent-State Tax

Authorities in denying the migration of TDS amount in the electronic credit ledger by placing reliance upon Section 140(1) of the JGST Act. It has been contended that the said Section in unequivocal terms provides for transitional arrangement enabling the assesse to carry forward in its electronic credit ledger under GST Regime the credit of amount of Value Added Tax and Entry Tax carried forward in the return relating to the period ending with the day immediately preceding the appointed day. It has been submitted that the term 'credit of amount of Value Added Tax and Entry Tax' used in Section 140(1) of the JGST Act would include the amount of TDS deducted, as TDS is nothing but the amount of Value Added Tax deducted in advance from the Petitioners. It was contended that Section 44 of the JVAT Act contained special provisions relating to deduction of tax at source in certain cases and, undisputedly, TDS amount was deducted from the bills of the Petitioners which remained unadjusted and was carried forward in the returns of the Petitioners. It was vehemently submitted that the term 'credit of Value Added Tax' used under Section 140(1) of the JGST Act would clearly include in its purview the amount of TDS and the denial of migration of the said amount to the Petitioners by placing reliance upon Rule 117 of Jharkhand Goods and Service Rules, 2017 is not in accordance with law. It was further submitted that Rule 117 of the JGST Rules is per se contradictory to the main enactment i.e. Section 140(1) of the JGST Act. It was submitted that Section 140(1) of the JGST Act uses the term 'credit of Value Added Tax', whereas Rule 117 of the JGST Rules uses the term the 'amount of input tax credit' which is restrictive in nature and cannot be resorted to deny the benefit of migration of TDS in the electronic credit ledger. Reliance was placed upon the decision of 'Shree Bhagwati Steel Rolling Mills v. Commissioner of Central Excise & Anr.' reported in (2016) 3 SCC 643, and it was contended that the Hon'ble Apex Court in the said judgment held that rules and regulations which are in the nature of subordinate legislation and which are ultra vires are bound to be ignored by the Constitutional Courts when the question of their enforcement arises. It was submitted that in absence of any specific challenge to Rule 117, this Hon'ble Court at the time of enforcement of the said Rules being the Constitutional Court is bound to ignore Rule 117 to the extent, it is repugnant to Section 140, as it restricts migration only of the amount of

Input Tax Credit as against the migration of credit of Value Added Tax as specified in Section 140.

Elaborating the aforesaid arguments, it was submitted that under the VAT Regime, tax paid was of the following three components, namely:- (i) Input Tax; (ii) Tax deducted as TDS; and (iii) Entry Tax. It was contended that since tax paid under the VAT Act included all the aforesaid three components, the legislature in its wisdom deliberately used the term 'credit of amount of Value Added Tax and Entry Tax' in Section 140 of JGST Act which cannot be restricted by subordinate legislation i.e. Rule 117. In alternative, it was further contended that even if for the sake of arguments, it is presumed that Section 140 read with Rule 117 only provide for migration of the amount of ITC, then also unadjusted TDS deducted was all along treated as the amount equivalent to Input Tax Credit and, thus, the Petitioners are even otherwise entitled to migrate the amount of TDS in its electronic credit ledger under the GST Regime.

10. Mr. Sumeet Gadodia, learned counsel while inviting our attention to the statutory format of monthly return being Form JVAT 200 under the JVAT Rules have demonstrated before us that unadjusted TDS amount was only allowed to be carried forward in the subsequent period under Column 61 under the heading 'Excess Input Tax Credit'. It was contended that under the JVAT Act and its corresponding rules in the statutory form, there was no format of separately carrying forward unadjusted TDS amount, and, all along the unadjusted TDS amount was treated as Excess Input Tax Credit. Even for the period ending 30th June, 2017, the Petitioners-Assessess were having excess unadjusted TDS amount in the quarterly return filed by them. The said amount was allowed to be carried forward as Excess ITC. Thus, it was contended that on one hand, the Respondents all along treated unadjusted TDS amount as equivalent to Excess ITC amount in the statutory format of return, whereas on the other hand, Respondent-authorities are denying migration of unadjusted TDS amount by contending, inter alia, that only Excess ITC amount was allowed to be migrated which is self-contradictory. Reliance was also placed upon the provisions of Section 52 of the JVAT Act to contend, inter alia, that Petitioners were entitled to claim refund of excess tax paid including refund of Excess ITC. It was vehemently submitted that unadjusted TDS amount in the returns were

treated as Excess ITC and were allowed to be carried forward in the next succeeding months, whereas if the same was not allowed to be carried forward, the excess unadjusted TDS amount would have become refundable at the end of each quarter itself, on filing of the quarterly returns. It was submitted that Petitioners-assessess who were otherwise entitled for refund of the TDS amount on one hand were denied the benefit of refund by treating the unadjusted TDS amount as excess ITC amount to be carried forward in the next succeeding months and, on the other hand, the Respondents are not allowing the migration of the said excess ITC amount under the GST Regime as transitional credit.

It was contended that if the unadjusted TDS amount was not allowed to be carried forward as excess ITC, the Petitioners would have got refund of the said amount immediately in terms Section 52 of the JVAT Act but instead of claiming refund, the Petitioners in a bona fide manner have migrated the unadjusted TDS amount under GST Regime which is otherwise a revenue neutral situation. It was further contended that in the impugned orders, the claim of migration of TDS amount was rejected only by placing reliance upon Rule 117 of the JGST Rules but in the Counter Affidavit and/or during the oral submissions, Respondents have sought to substitute reasons for denial of migration of TDS amount by placing reliance upon the proviso to Section 140(1) of the JGST Act which is not tenable in law and is contrary to the ratio laid down by the Hon'ble Apex Court in the case of Mohinder Singh Gill & Anr. v. Chief Election Commissioner, New Delhi & Ors. reported in 1978 (1) SCC 405. Alternatively, it was argued that even the proviso to Section 140(1) is not applicable in the case of the Petitioners as the said proviso is to be understood in the context in which it has been used. It was contended that the proviso cannot be torn apart from the main enactment nor it can be used to nullify or set at naught the real object of the main enactment. Reference in his regard was made to the following decisions:-

(i) (1985) 1 S.C.C. 591 (S. Sundaram Pillai & Ors. v. P. Lakshminarayana Charya & Ors.), ….Para 27 & 30;

(ii) (2016) 6 S.C.C. 209 (Casio India Company Private Limited v. State of Haryana) ….Para 23;

(iii) (2022) SCC Online SC 607 (Prabha Tyagi v. Kamlesh Devi) ….Paras 25, 26, 58, 62 & 63.

It was submitted that a harmonious interpretation is to be given to the proviso and the term 'not admissible as input tax credit' used in the proviso would mean that if there is an express prohibition on certain amount being claimed as input tax credit under the GST Act, then the benefit of transition would not be available. While placing reliance upon Section 17(5) of the JGST Act which contains specific provision were ITC was not available it was contended that the proviso restricts migration of credit as stipulated under Section 140(1) of the JGST Act only under the circumstances specified under Section 17(5). Any other reading to the proviso would refer the main Section itself nugatory and would defeat the very statutory scheme of migration of transitional credit.

11. Per contra, Mr. Ashok Kumar Yadav and Mr. P. A. S. Pati learned counsel for the respondents have justified the impugned action of restricting migration of TDS amount under JGST Regime. Heavy reliance was placed upon Rule 117 of the JGST Rules and it was contended that the intent of the provisions of Section 140(1) of the JGST Act can be understood from Rule 117 of the JGST Rules which only provides migration of the amount of input tax credit and not the TDS amount. It was submitted that input tax credit is in the form of concession and, thus, had to comply its statutory requirement before availing its benefit and since Rule 117 of the JGST Rules prescribed the manner and procedure for availing the transitional benefit, the same is required to be adhered to. It was submitted that TDS and input tax credit both under the JVAT Act and the JGST Act have been recognized distinctively and under both the enactments, TDS is not equivalent to ITC as its basic nature is different and TDS partakes the character of 'output tax', whereas input tax credit as its name suggests is 'input tax'. Various provisions of JVAT Act and the JGST Act have been referred by the Respondents to buttress their aforesaid contention. Reliance was also placed upon Section 51(5) of the JGST Act to contend, inter alia, that the under the GST Regime, TDS deducted was required to be credited under the electronic cash ledger and not electronic credit ledger which by itself would demonstrate that TDS was in the nature of output tax and not in the nature of input tax. It was further submitted that the words 'credit of amount of value added tax' used under Section 140(1) is to be understood with the heading of Section 140 which uses the term 'transitional

arrangements for input tax credit' and the heading can be looked into to ascertain the true legislative intent. Reliance was placed upon the decision of the Hon'ble Apex Court in the case of Bhinka & Ors. v. Charan Singh reported in AIR 1959 SC 960 to contend, inter alia, that the heading prefixed to sections or set of sections in some modern statutes are regarded as preambles of those sections and any doubt in the interpretation of the words in the section, if there is the heading certainly helps to resolve that doubt. On the strength of the above, it was submitted that although the words 'credit of amount of value added tax' creates some ambiguity but its true meaning can be ascertained from the heading of Section 140 which provides for transitional arrangement of only input tax credit and not TDS. Further, extensive reliance was placed upon the proviso to Section 140(1) of the JGST Act and it was contended that proviso to Section 140(1) specifically restricts the migration of credit where the said amount of credit is not admissible as input tax credit under the GST Act. Reiterating the argument that TDS is in the nature of output tax, it was submitted that the proviso to Section 140(1) restricts migration of TDS amount and, thus, even otherwise, the Petitioners are not entitled for migration of the said amount. Reliance was placed upon the decision of the Hon'ble Apex Court in the case of Kedarnath Jute Manufacturing Co. v. CTO reported in AIR 1966 SC 12, to contended, inter alia, that the proviso prescribing exemption should be strictly construed and the effect of the proviso is to qualify/restrict migration of TDS amount.

12. We have heard the counsel for the parties and examined the relevant statutory provisions of JGST Act and the JVAT Act along with corresponding Rules.

For the sake of better appreciation, certain provisions are required to be quoted which are as under:-

Section 140(1) of the JGST Act is quoted herein-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, credit of the amount of Value Added Tax, and Entry Tax, if any, carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed:
>
> Provided that the registered person shall not be allowed to take credit in

the following circumstances, namely:-

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

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

(iii) where the said amount of credit relates to goods sold under notification, if any, claiming refund of value added tax paid thereon (where ever applicable)"

Provided further that so much of the said credit as is attributable to any claim related to Section 3, sub-section (3) of Section 5, Section 6, Section 6A or sub-section (8) of Section 8 of the Central Sales Tax Act, 1956 (74 of 1956) which is not substantiated in the manner, and within the period, prescribed in rule 12 of the Central Sales Tax (Registration and Turnover) Rules 1957 shall not be eligible to be credited to the electronic credit ledger:

Provided also that an amount equivalent to the credit specified in the second proviso shall be refunded under the existing law when the said claims are substantiated in the manner prescribed in rule 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957."

Section 140(1) of the Central Goods and Services Tax Act, 2017, is quoted herein-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 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 17(5) of the JGST Act is quoted herein-under:-

"17. Apportionment of credit and blocked credits.—(1) xxx

(5) Notwithstanding anything contained in sub-section (1) of Section 16 and sub-section (1) of Section 18, input tax credit shall not be available in respect of the following, namely.—

(a) motor vehicles and other conveyances except when they are used—

(i) for making the following taxable supplies, namely.—

(A) further supply of such vehicles or conveyances; or

(B) transportation of passengers; or

(C) imparting training on driving, flying, navigating such vehicles or

conveyances;

(ii) for transportation of goods;

(b) the following supply of goods or services or both:-

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre;

(iii) rent-a-cab, life insurance and health insurance except where—

(A) the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force; or

(B) such inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as part of a taxable composite or mixed supply; and

(iv) travel benefits extended to employees on vacation such as leave or home travel concession.

(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course of furtherance of business.

Explanation.—For the purposes of clause (c) and (d), the expression "construction" includes re-construction, renovation, additions, or alterations or repairs, to the extent of capitalization, to the said immovable property;

(e) goods or services or both on which tax has been paid under Section 10;

(f) goods or services or both received by a non-resident taxable person except on goods imported by him;

(g) goods or services or both used for personal consumption;

(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and

(i) any tax paid in accordance with the provisions of Sections 74, 129 and 130."

Section 51(1) and Section 51(5) of the JGST Act are quoted herein-under:-

"51.Tax deduction at source.—(1) Notwithstanding anything to the contrary contained in this Act, the Government may mandate,--

(a) a department or establishment of the Central Government or State Government, or

(b) local authority; or

(c) Government agencies; or

(d) such persons or category of persons as may be notified by the

Government on the recommendations of the Council,
(hereafter in this section referred to as "the deductor"), to deduct tax at the rate of one per cent from the payment made or credited to the supplier (hereafter in this section referred to as "the deductee") of taxable goods or services or both, where the total value of such supply, under a contract, exceeds two lakh and fifty thousand rupees:

Provided that no deduction shall be made if the location of the supplier and the place of supply is in a State or Union territory which is different from the State or, as the case may be, Union territory of registration of the recipient.

Explanation .-- For the purpose of deduction of tax specified above, the value of supply shall be taken as the amount excluding the central tax, State tax, integrated tax and cess indicated in the invoice.

Xxx xxx xxx

(5) The deductee shall claim credit, in his electronic cash ledger, of the tax deducted and reflected in the return of the deductor furnished under sub-section (3) of Section 39, in such manner as may be prescribed."

Rule 117 of JGST Rules is quoted herein-under:-

"117. Tax or duty carried forward under any existing law or on goods held in stock on the appointed day.—

(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 of eligible duties and taxes as defined in explanation 2 to Section 140 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.

(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.
(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'
(iii) The scheme shall be available for six tax periods from the appointed date.
(b) The credit of central tax shall be availed subject to satisfying the following conditions, namely:-
(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;
(ii) The document for procurement of such goods is available with the registered person;
(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 at the end of 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;
(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

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

Section 44 of the JVAT Act, reads as under:-

"**44.** Special provisions relating to Deduction of Tax at Source in certain cases.—(1) The State Government may, having regard to the effective recovery of tax, require in respect of contractors or any other class or classes of dealers that any person making payment of any valuable consideration to them for the execution of a works contract in the State involving transfer of property in goods, whether as goods or in some other form or for sale of goods in the State, as the case may be, shall, at the time of making payment, whether by cash, adjustment, credit to the account, recovery of dues or in any other manner, deduct tax in advance therefrom which shall be calculated by multiplying the amount paid in any manner with such rate not exceeding ten per cent, as the State Government may, by notification in Official Gazette, specify and different rates may be specified for different works contracts or class or classes of dealers, and that such person shall keep record, of the payments made and, of the tax deducted in advance therefrom, for a period of five years from the close of the year when the payments were made and shall produce such record before the prescribed authority when so required for carrying out the purposes of this Act.

Provided that, no deduction shall be admissible, in the circumstances, where a works contractor opts for Composition Scheme of Tax under Section 58 of the Act.

(2) The provisions of sub-section (1) shall not apply where the amount or the aggregate of the amounts paid or likely to be paid during a year by any person to a dealer does not or is not likely to exceed one lakh rupees or such other amount as may be prescribed.

(3) Every person who is required to deduct tax in advance under sub-section (1) shall furnish such returns at such intervals by such dates in such manner to such authority as may be prescribed and shall pay the tax deducted according to such returns to the State Government in such manner as may be prescribed.

(4) Every person referred to in sub-section (3) shall issue to the payee a certificate of tax deduction and payment in such form in such manner as may be prescribed.

(5) Any tax paid to the State Government in accordance with sub-section (3) shall be adjustable by the payee, on the authority of the certificate issued to him under sub-section (4), with the tax payable by him under this Act and the assessing authority shall, on furnishing of such certificate to it, allow the benefit of such adjustment after due verification of the payment.

(6) If any person fails to deduct the whole or any part of the tax as required by or under the provisions of sub-section (1), or fails to pay the whole or any part of the tax as required by or under sub-section (3), then, the authority referred to in sub-section (3) may, at any time within five

years of the close of the year when he failed to do so, by order in writing, direct him, after giving him a reasonable opportunity of being heard, to pay, by way of penalty, a sum equal to the amount of tax which he failed to deduct or pay as aforesaid.

Section 11(1) of the Value Added Tax Act, reads as under:-

"**11.** Charge on Tax on Entry of Goods.—(1) Notwithstanding anything contained in Sections 8, 12, 13 and 14 of this Act or any notification issued thereunder, there shall be levied and collected a tax on Import price(s), on entry of such goods mentioned in Schedule III of this Act, into the State or into a local Area for consumption, use or sale therein, subject to such condition as may be prescribed.

Provided that the tax levied on import price(s) of such goods mentioned in Schedule III, shall be levied at the rate of 4 percentum.

Provided further that where a dealer has paid tax on entry of such goods, on which he is not liable to pay Tax u/s 17 of the Act, but is liable to pay tax by virtue of sale of such goods, under sub section 3 of section 9, his liability to pay tax on such goods as specified in Part-E of Schedule-II under Section 13, shall stand reduced to the extent of tax paid on the entry of such goods subject to such condition as may be prescribed."

Section 18(6) of the JVAT Act is quoted herein-under:-

"**18.** Input Tax Credit.—(1) xxx xxx xxx

(6) Input Tax Credit shall not be claimed by the dealer until the tax period in which the dealer receives the tax invoice in original containing the prescribed particulars of the sale evidencing the amount of input tax paid.

Provided that input tax credit shall be claimed by a registered dealer on the tax paid, on the entry of goods mentioned in Schedule III evidencing the amount of tax paid, as prescribed.

Provided further that for good and sufficient reasons, to be recorded in writing, where a registered dealer is prevented from producing the Tax Invoice in original or evidence of payment of tax paid on entry of goods, in original, the prescribed authority may allow, such input tax credit as prescribed."

Section 17(1) of the JVAT Act is quoted herein-under:-

"**17.** Tax Payable — (1) The tax payable by a registered dealer for any tax period shall be the difference between the output tax payable plus purchase tax, if any, and the input tax paid, which can be determined, from the following formula:

Tax payable = (O+P)-I

Where 'O' denotes the output tax payable for any tax period as determined under Section 15, 'P' denotes the purchase tax paid by a registered dealer for any tax period as determined under Section 10 and 'I' denotes the input tax paid or payable and includes tax paid on Entry of Goods, for the said tax period as determined under Section 15."

A holistic reading of the aforesaid provisions would reveal that TDS was deducted under Section 44 of the JVAT Act which is an amount of value added tax deducted in advance from a registered dealer. Further, under the JVAT Act, provisions were incorporated under Section 11 for levy of entry tax. Although, entry tax was levied under the JVAT Act itself but the said levy was imposed in view of the enabling provisions contained under 7 Schedule, List II, Entry 52 of the Constitution of India. Further, under Section 18(6) of the JVAT Act, a registered dealer was entitled to claim input tax credit even in respect of tax paid on entry of goods and, thus, entry tax was available as input tax credit. Thus, under the provisions of JVAT Act, tax paid was of the following three components, namely:- (i) Input Tax; (ii) Tax deducted as TDS; and (iii) Entry Tax.

13. The role of 'Transitional Provision' has been considered by the Hon'ble Apex Court in the case of ***K. S. Paripoornan v. State of Kerala and Others*** reported in ***(1994) 5 SCC 593***, and paragraph 71 of the said judgment is quoted as under:-

"71. Section 30 of the amending Act bears the heading "Transitional provisions". Explaining the role of transitional provisions in a statute, Bennion has stated:

"Where an Act contains substantive, amending or repealing enactments, it commonly also includes transitional provisions which regulate the coming into operation of those enactments and modify their effect during the period of transition. Where an Act fails to include such provisions expressly, the court is required to draw inferences as to the intended transitional arrangements as, in the light of the interpretative criteria, it considers Parliament to have intended."

(Francis Bennion : Statutory Interpretation, 2nd Edn., p. 213)

The learned author has further pointed out:

"Transitional provisions in an Act or other instrument are provisions which spell out precisely when and how the operative parts of the instrument are to take effect. It is important for the interpreter to realize, and bear constantly in mind, that what appears to be the plain meaning of a substantive enactment is often modified by transitional provisions located elsewhere in the Act." (p.213)

Similarly Thornton in his treatise on Legislative Drafting has stated:

"The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force."

For the purpose of ascertaining whether and, if so, to what extent the provisions of sub-section (1-A) introduced in Section 23 by the amending Act are applicable to proceedings that were pending on the

date of the commencement of the amending Act it is necessary to read Section 23(1-A) along with the transitional provisions contained in sub-section (1) of Section 30 of the amending Act."

The transitional provisions are made to make special provisions for the application of legislation to the circumstances which exist at the time when the legislation comes into force. In the case of Union of India v. Filip Tiago De Gama of Vedam De Gama reported in 1991 (1) SCC 277, it has been held that transitional provisions are to be purposefully construed and the paramount object in statutory interpretation is to discover what the legislature intended and this intention is primarily to be ascertained from the text of the enactment in question.

14. It is in the aforesaid background that the provisions of Section 140(1) of the JGST Act are required to be construed. The said provision unambiguously provides for migration of credit i.e. tax paid under the erstwhile tax regime and the words used in Section 140(1) of the JGST Act, namely, 'credit of amount of value added tax and entry tax' is to be understood in the context in which it has been used. Admittedly, under the JVAT Act even entry tax was levied vide Section 11 and the said levy of entry tax was available as input tax credit for adjustment against output tax liability. TDS amount was also available for adjustment against output tax liability apart from the input tax credit which was available for adjustment against output tax liability.

The intention of the legislature while enacting the transitional provision was to ensure that migration of unadjusted tax paid under repealed enactments are allowed to be carried forward for adjustment against the output tax liability in the GST Regime. There cannot be any dispute with respect of the aforesaid purpose for which transitional provisions under GST Act was enacted. The use of the words 'credit of amount of value added tax and entry tax' had a definite purpose to be achieved. As already stated above, entry tax was levied under Section 11 of the JVAT Act and was available as input tax credit for adjustment against output tax liability.

The legislature in its wisdom even provided for migration of the unadjusted entry tax amount under the GST Regime as otherwise the said amount would have become refundable to the assesse in terms of Section 52

of the JVAT Act. Similarly, amount deducted towards TDS was adjustable against output tax under the JVAT Act and the legislature in its wisdom by using the words 'credit of amount of value added tax' intended to allow migration of TDS amount under the GST Regime as otherwise the said unadjusted TDS amount would have been become refundable to the assesse immediately after repeal of the aforesaid JVAT Act. Thus, the legislature instead of providing refund of unadjusted TDS and entry tax to the assesee's, provided mechanism to enable the assesee's to migrate the aforesaid credits under the GST Regime for its adjustment against its output tax liability. This was to avoid the cumbersome process of asking the assesse to claim refund of the amount of unadjusted TDS, Entry Tax and Input Tax Credit instead providing, inter alia, to allow the assessee to migrate the said amount under the GST Regime as facilitation for adjustment against output tax liability.

15. It is in the aforesaid context that the proviso to Section 140(1) of the JGST Act is required to be interpreted. Proviso to Section 140(1) of the JGST Act provides that a registered person shall not be allowed to tax credit where the said amount of credit is not admissible as input take credit under the GST Act. It was contended by the Respondents that since TDS was in the nature of output tax, it was not admissible as input tax credit under the GST Act and, hence, cannot be allowed to be migrated.

In our opinion, the aforesaid restrictive interpretation sought to be given to the proviso is beyond the scheme of transitional provision. On the contrary, a harmonious interpretation is to be given to the proviso and the term used in the proviso, namely, 'not admissible as input tax credit' could only mean that if there is an express prohibition under the GST Act for claiming input tax credit, then the benefit of transitional would not be available. Section 17(5) of the JGST Act contains provisions prohibiting availment of input tax credit under the GST Act and, in our opinion, the interpretation of the proviso would be to restrict the migration of credit, if the credit pertains to the transactions which are prohibited under Section 17(5) of the JGST Act in which no input tax credit is available. Any contrary interpretation given to the proviso would have an effect of nullifying and/or setting at naught the real object of the transitional provision.

The Hon'ble Apex Court in the case of S. ***Sundaram Pillai & Ors. v. P. Lakshminarayana Charya & Ors***. (Supra) has held as under:-

> *"27. The next question that arises for consideration is as to what is the scope of a proviso and what is the ambit of an Explanation either to a proviso or to any other statutory provision. We shall first take up the question of the nature, scope and extent of a proviso. The well established rule of interpretation of a proviso is that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment."*
>
> (Emphasis Supplied)

Similarly, the Hon'ble Apex Court in the case of ***Prabha Tyagi v. Kamlesh Devi*** (Supra) has held that:-

> *"62. In this context, it would be useful to adumbrate on the principles that govern the interpretation to be given to proviso in the context of main provision.*
>
> *(a) The normal function of a proviso is to except something out of the provision or to qualify something enacted therein which, but for the proviso, would be within the purview of the provision. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. In other words, a proviso qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main provision. Further, a proviso cannot be construed as nullifying the provision or as taking away completely a right conferred by the enactment.*
>
> *(b) In this regard, learned Author, Justice G.P. Singh, in "Principles of Statutory Interpretation", 15th Edition, has enunciated certain rules collated from judicial precedents. Firstly, a proviso is not to be construed as excluding or adding something by implication i.e., when on a fair construction, the principal provision is clear, a proviso cannot expand or limit it. Secondly, a proviso has to be construed in relation to which it is appended i.e., normally, a proviso does not travel beyond the provision to which it is a proviso. A proviso carves out an exception to the main provision to which it has been enacted as a proviso and to no other. However, if a proviso in a statute does not form part of a section but is itself enacted as a separate section, then it becomes necessary to determine as to which section the proviso is enacted as an exception or qualification. Sometimes, a proviso is used*

as a guide to construction of the main section. Thirdly, when there are two possible construction of words to be found in the section, the proviso could be looked into to interpret the main section. However, when the main provision is clear, it cannot be watered down by the proviso. Thus, where the main section is not clear, the proviso can be looked into to ascertain the meaning and scope of the main provision.

(c) According to Justice G.P. Singh, the learned author, the proviso should not be so construed as to make it redundant. In certain cases, "the legislative device of the exclusion is adopted only to exclude a part from the whole, which, but for the exclusion, continues to be a part of it", and words of exclusion are presumed to have some meaning and are not readily recognized as mere surplusage. As a corollary, it is stated that a proviso must be so construed that the main enactment and the proviso should not become redundant or otiose. This is particularly so, where the object of a proviso sometimes is only by way of abundant caution, particularly when the operative words of the enactment are abundantly clear. In other words, the purpose of a proviso in such a case is to remove any doubt. There are also instances where a proviso is in the nature of an independent enactment and not merely, an exception or qualifying what has been stated before. In other words, if the substantive enactment is worded in the form of a proviso, it would be an independent legislative provision concerning different set of circumstances than what is worded before or what is stated before. Sometimes, a proviso is to make a distinction of special cases from the general enactment and to provide it specially.

(d) At this stage, the construction or interpretation of a proviso could be discussed as gathered from various judgments of this Court.

(i) In Ishverlal Thakorelal Almaula vs. Motibhai Nagjibhai – [AIR 1966 SC 459], while dealing with the Bombay Tenancy and Agricultural Lands Act, 1948, this Court held, that a proper function of a proviso is to except or qualify something enacted in the substantive clause, which but for the proviso, would be within that clause.

(ii) In Kaviraj Pandit Durga Dutt Sharma vs. Navaratna Pharmaceutical Laboratories – [AIR 1965 SC 980], while considering the proviso to Section 6 of Trade Marks Act, 1940, it was observed that it would not be a reasonable construction for any statute, if a proviso which in terms purports to create an exception and seeks to confer certain special rights on a particular class of cases included in it should be held to be otiose and to have achieved nothing.

(iii) In Kedarnath Jute Manufacturing Co. Ltd. vs. The Commercial Tax Officer and Others, [AIR 1966 SC 12], it was observed that "the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment or to qualify something enacted therein, which, but for the proviso, would be within it". [See "Craies" on Statute Law - 6th

Edition - P. 217]. In this case, the Court was considering Section 5(2) (a) (ii) of Bengal Finance Sales Tax Act, 1941 and Rule 27-A of Bengal Sales Tax Rules.

(iv) In Dattatraya Govind Mahajan and Others Vs. The State of Maharashtra and another – [AIR 1977 SC 915], a Constitution Bench of the Apex Court, while considering the amendment made to Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, in the context of Article 31B of the Constitution and the second proviso thereto, reiterated what was stated in Ishverlal's case, (supra).

(v) In S. Sundaram Pillai, etc, vs. V.R. Pattabiraman – [AIR 1985 SC 582], while dealing with the scope of a proviso and explanation to sub - section (2) of Section 10 of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, this Court held that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or qualifying something enacted therein which, but for the proviso, would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment, nor can it be used to nullify or set at naught the real object of the main enactment. Sometimes, a proviso may exceptionally have the effect of a substantive enactment.

(e) After referring to several legal treatises and judgments, this Court held in the above judgment as under:-

"43. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:

(1) qualifying or excepting certain provisions from the main enactment;

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and (4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

(f) The approach to the construction and interpretation of a proviso is enunciated in the following cases.

(i) In M. Pentiah vs. Muddala Veeramallappa – [AIR 1961 SC 1107], it was observed that while interpreting a section or a proviso, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, one should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

(ii) In Superintendent & Remembrancer of Legal Affairs to Govt. of West Bengal vs. Abani Maity - [AIR 1979 SC 1029], this Court

observed that the statute is not to be interpreted merely from the lexicographer's angle. The Court must give effect to the will and in-built policy of the Legislature as discernible from the object and scheme of the enactment and the language employed therein. The words in a statute often take their meaning in the context of a statute as a whole. They are, therefore, not to be construed in isolation."

(Emphasis Supplied)

16. It is also a well settled principal of law that one provision under a statute cannot be used to defeat another and it should not be lightly assumed that what legislature has given with one hand has taken away the same with other. If we give a wider interpretation to the proviso as suggested by the Respondent, the use of the words 'entry tax' under Section 140(1) of the JGST Act would be rendered nugatory as admittedly by virtue of 101st Constitutional Amendment, Entry 52 of List II has been deleted and, under no circumstances, entry tax would have been available as input tax credit under the GST Regime. Thus, we are of the opinion that proviso Clause (i) to Section 140(1) of the JGST Act only restricts migration of such amount of credit where there is an express prohibition in respect of such transaction of claiming input tax credit under Section 17(5) of the GST Act.

17. We have also carefully examined Rule 117 of the JGST Rules which restricts the transitional provision of Section 140(1) of the JGST Act and permits only, migration of 'input tax credit' as against credit of value added tax and entry tax stipulated under Section 140(1) of the JGST Act. Admittedly, Rule 117 of the JGST Rules, is a subordinate legislation and is restricts the scope of Section 140(1) of the JGST Act. As a Constitutional Court, we are bound to ignore Rule 117 of the JGST Rules when the question of its enforcement arises and mere fact that there was no specific relief sought for to strike down or to declare the said Rules as ultra vires would not stand in our way of not enforcing them. [See Shree Bhagwati Steel Rolling Mills v. Commissioner of Central Excise & Anr. (Supra)]. The aforesaid view has also been expressed by the Hon'ble Apex Court in the case of ***Bharthidasan University v. All-India Council for Technical Education*** reported in ***(2001) 8 SCC 676,*** wherein it was held as under:-

*"**14.** The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make*

Regulations is confined to certain limits and made to flow in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for strike down or declare them ultra vires, particularly when the party in sufferance is a respondent to the lis or proceedings cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack. It would therefore, be a myth to state that the Regulations made under Section 23 of the Act have 'constitutional' and legal status, even unmindful of the fact that any one or more of them are found to be not consistent with specific provisions of the Act itself. Thus, the Regulations in question, which AICTE could not have made so as to bind universities/UGC within the confines of the powers conferred upon it, cannot be enforced against or blind a university in the matter of any necessity to seek prior approval to commence a new department or course and programme in technical education in any university or any of its departments and constituent institutions."

18. Apart from the above, we cannot ignore the fact that unadjusted TDS amount would have been otherwise refundable to the Petitioners if the same were not allowed to be carried forward as excess input tax credit in the statutory format of quarterly return being Form JVAT 200. We have examined the format of quarterly return, wherein vide column 61, unadjusted TDS amount has been treated as input tax credit amount and was required to be carried forward in the next succeeding months. The Petitioners at the time of filing of their returns were left with no option but to forward the unadjusted TDS amount as excess input tax credit in the succeeding months and were not required or compelled to claim refund of unadjusted TDS amount. Thus, at this stage, the Respondents cannot contend that unadjusted TDS amount cannot be allowed to be migrated in terms of Section 140(1) of the JGST Act. Even otherwise, the stand of the Respondents is self-destructive, as if the Petitioners are not allowed to migrate the unadjusted TDS amount under the GST Regime, they would have become entitled for refund of the same with effect from 1st July, 2017 and would have certainly been entitled to statutory interest @ 9% on the said amount in terms of Section 52/53 of the JVAT Act.

19. Under the cumulative facts and circumstances mentioned hereinabove, we are of the considered opinion that the action of the

Respondent-authorities in passing the impugned orders denying migration of TDS amount and, consequently, levying interest and penalty thereupon is not sustainable in the eye of law and are liable to be quashed, and accordingly the impugned orders including Demand Notices in the respective writ applications are hereby quashed and set aside. It is declared that the Petitioners are entitled for migration of the TDS amount in terms of Section 140(1) of the JGST Act.

20. In the result, both writ petitions are allowed. However, there would be no order as to cost.

(Aparesh Kumar Singh, A.C.J.)

(Deepak Roshan, J.)

Amardeep/