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The Vires, Right & Retrospectivity –Transitional Credit

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Introduction:

Claim of credit accumulated in the returns of erstwhile regime under GST[1] regime by filing TRAN-01 return i.e. transitional credit is subject to vexatious litigation as many of the taxpayers failed to meet the due date prescribed in Rule 117[2]. The reasons for not meeting the due date are due to inefficiency of GST Portal[3], taxpayers are not vigilant of the time limit or due to confusion and chaos that was prevailing at the time when this new tax was introduced. A large number of writ petitions were filed between various High Courts expressing the inability to meet the due dates mainly due to inefficiency of GST Portal and accordingly requesting the courts to permit the filing of these returns.

Based on various courts directions, Central Government admitted the inefficiency of GST Portal and sub-rule (1A) has been introduced in Rule 117 through which the due date has been extended to those categories of taxpayers who could produce evidence of their attempt to file the TRAN-01 return within due date but were unsuccessful due to technical difficulties of GST Portal. But the plight of those taxpayers who could not gather evidence relating to their attempt to file the TRAN-01 return was not addressed.

In this backdrop, the vires of Rule 117 which imposed the time limit for filing TRAN-01 was challenged on the ground that no such power was conferred under Section 140[4] of CT Act[5] and is taking away the vested right over the accumulated transitional credit of previous regime. The High Courts have taken different stand on this issue and some of them ruled in favour of taxpayers while others were in favour of Revenue. The Finance Act, 2020 made retrospective amendment[6] to read timelines into Section 140 in order to nullify those judgements that were ruled in favour of the taxpayer.

Setting the tone – The Time Limit Row:

Before we delve into the themed aspects, it is imperative to understand the issue regarding applicability of time limit for claim of credit in GST regime, the credit which was accumulated in the returns under the previous regime by filing TRAN-01.

In terms of the provisions of Section 140(1), a registered person who has accumulated CENVAT Credit of eligible duties in the last return filed under erstwhile regime shall be entitled to carry forward such amount into electronic credit ledger maintained in the GST regime subject to certain conditions. Further, section 140(1) provides that such carry forward of credit of previous regime into GST regime shall be in the manner as prescribed by rules.

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[1] Goods and Services Tax
[2] Central Goods and Services Tax Rules, 2017
[3] www.gst.gov.in
[4] Section 140 deals with 'transitional arrangements for input tax credit'
[5] Central Goods and Services Tax Act, 2017
[6] The amendment is made effective vide Notification No. 43 dated 16.05.2020

Rule 117 of the CT Rules provided that every registered person to take credit under section 140(1) shall within 90 days from the appointed day submit a declaration in Form GST TRAN-01. In light of Rule 117, the credit of the previous regime shall be entitled to be taken into electronic credit ledger by filing TRAN-01 form within the time period prescribed.

As mentioned, many of the taxpayers missed the due date for reasons stated above. Many of the taxpayers approached the High Courts for relief by way of allowing them to file the TRAN-01 after the due date prescribed under Rule 117. It is in this context; questions were raised about the vires of Rule 117 on the reasoning that by prescribing the time limit for taking credit, it has traversed the originally enacted section 140 and also taken away the vested right of the taxpayer. Hence, the principal question before the courts is, whether Rule 117 has power to prescribe the time limit to transition the vested credit under the erstwhile regime to GST regime? Whether the credit which was already availed in the old returns can be stated to be a vested right and nothing can disturb, such credit?

As mentioned above, there were conflicting decisions on the above questions. In light of these legal developments, the provisions of section 140(1) were amended to insert the words 'within such time' with retrospective effect from 01.07.20177. With this understanding of the issue involved, we will now examine the following important decisions of various High Courts which dealt with this time limit row.

In the matter of Willowood Chemicals Private Limited[8] - Gujarat High Court:

In this matter, the Gujarat High Court held that Rule 117 in so far as the prescription of time limit is concerned is intra vires. Vide para 24, it was held that this plenary prescription of time limit is neither without authority nor unreasonable. The Court stated '*It is in exercise of this rule making power, the Government has framed the CGST Rules, 2017 in which; as noted, sub rule (1) of Rule 117 has prescribed, besides other things, the time limit for making declaration in the prescribed form for every dealer entitled to take credit of input tax under Section 140.* ***Sub rule [1] of Rule 117 thus applies to all cases of credits which may be claimed by a registered person under section 140 of the Act and is not confined to sub section [3]. This plenary prescription of time limit within which necessary declarations must be made is, in our opinion, neither without authority nor unreasonable.***

The High Court further denied the contention of the petitioners that the prescription of time limit under Rule 117(1) takes away an existing right. The Court vide Para 25 stated that '*Section 140 of the Act envisages certain benefits to be carried forward during the regime change. As is well settled, the reduced rate of duty or concession in payment of duty are in the nature of an exemption and is always open for the legislature to grant as well as to withdraw such exemption.* ***As noted in case of Jayam & Company [Supra], the Supreme Court had observed that input tax credit is a form of concession provided by the legislature and can be made available subject to conditions. Likewise, in the case of Reliance Industries Limited [Supra], it was held and observed that how much tax credit has to be given and under what circumstances is a domain of the legislature. In case of Godrej & Boyce Mfg. Co. Pvt. Limited [Supra], the Supreme Court had upheld a rule which restricts availment of MODVAT credit to six months from the date of issuance of the documents specified in the proviso. The contention that such amendment would take away an existing right was rejected.'***

The High court held that the rule making power conferred under section 164 of CT Act confers power on the sub-ordinate legislature to provide for time limit and accordingly held that Rule 117 is not ultra vires. The High Court reached such conclusion stating that '*While the entire tax structure within the country was thus being replaced by a new framework, it was necessary for the legislature to make transitional provisions. Section 140 of the CGST Act,*

[7] Inserted vide Finance Act, 2020 and notified retrospective vide Notification 43/2020-CGST dated 16.05.2020.
[8] 2018 (10) TMI 261 - Gujarat High Court

which is a transitional provision, essentially preserves all taxes paid or suffered by a dealer. ***Credit thereof is to be given in electronic credit register under the new statute, only subject to making necessary declarations in prescribed format within the prescribed time. As noted, sub section [1] of Section 164 of the CGST Act authorizes the Government to make rules for carrying out the provisions of the Act on recommendations of the Council. Sub section [2] of Section 164 further provides that without prejudice to the generality of the provisions of sub section [1], the Government could also make rules for all, or any of the matters, which by this Act are required to be or may be prescribed or in respect of which, provisions are to be or may be made by the rules. Combined effect of the powers conferred to subordinate legislature under sub sections [1] and [2] of Section 164 of the CGST Act would convince us that the prescription of time limit under subrule [1] of Rule 117 of the CGST Rules is not ultra vires the Act. Likewise, such prescription of time limit cannot be stated to be either unreasonable or arbitrary.*** *When the entire tax structure of the country is being shifted from earlier framework to a new one, there has to be a degree of finality on claims, credits, transfers of such credits and all issues related thereto. The petitioners cannot argue that without any reference to the time limit, such credits should be allowed to be transferred during the process of migration. Any such view would hamper the effective implementation of the new tax structure and would also lead to endless disputes and litigations. As noted in case of USA Agencies [Supra], the Supreme Court had upheld the vires of a statutory provision contained in the Tamil Nadu Value Added Tax Act which provided that the dealer would have to make a claim for input tax credit before the end of the financial year or before ninety days of purchase; whichever is later.* ***The vires was upheld observing that the legislature consciously wanted to set up the time frame for availment of the input tax credit. Such conditions therefore must be strictly complied with. Thus, merely because the rule in question prescribes a time frame for making a declaration, such provision cannot necessarily be held to be directory in nature and must depend on the context of the statutory scheme.'***

In the matter of Siddharth Enterprises[9] - Gujarat High Court:

The Gujarat High Court held that right to carry forward credit is a right or privilege acquired or accrued under the erstwhile laws which cannot be allowed to lapse. The Court stated that '***The right to carry forward credit is a right or privilege, acquired and accrued under the repealed Central Excise Act, 1944 (1 of 1944) and it has been saved under Section 174(2)(c) of the CGST Act, 2017 and, therefore, it cannot be allowed to lapse under Rule 117 of the CGST, 2017, for failure to file declaration form GST Tran-1 within the due date, i. e. 27. 12. 2017.'***

The High Court further held that if the right to carry forward CENVAT credit for not being able to file the Form GST TRAN-01 within the due date offends the policy of the Government to remove cascading effect of tax. Vide Para 28, the court held that '***The right to carry forward CENVAT credit for not being able to file the form GST Tran-1 within the due date offends the policy of the Government to remove the cascading effect of tax by allowing the input tax credit as mentioned in the Objects and Reasons of the Constitution 122nd Amendment Bill, 2014. The Objects and Reasons of the Constitution 122nd Amendment Bill, 2014 clearly set out that it is intended to remove the cascading effect of taxes and to bring out a nationwide taxation system.'***

The High Court held that Rule 117 which provides for time limit for transition credit is arbitrary and unreasonable. Vide Para 34, the Court held that '*Section 16 of the CGST Act allows the entitlement to take input tax credit in respect of the post-GST purchase of goods or services within return to be filed under Section 39 for the month of September following the end of financial year to such purchase or furnishing of the relevant annual return, whichever is earlier.* ***Whereas, Rule 117 allows time-limit only up to 27th December 2017 to claim transitional credit on pre-GST purchases. Therefore, it is arbitrary and unreasonable to discriminate in terms of the time-limit to allow the availment of the input tax credit with respect to the purchase of goods and services made in pre-GST regime and***

[9] 2019 (9) TMI 319 – Gujarat High Court

post-GST regime. This discrimination does not have any rationale and, therefore, it is violative of Article 14 of the Constitution.'

In the matter of Nelco Limited[10]- Bombay High Court:

The Bombay High Court relied on decision of the Gujarat High Court in Willowood Chemicals Private Limited (supra) on the issue whether transitional credit is a vested right or not. Further, held that the rule making power with respect to time limit under Rule 117 is traceable to general rule making power under section 164. The Court by referring to various decisions of Supreme Court and decisions of High Court till that date held as under:

41. The Petitioner has sought to distinguish the decisions in Willowood and JCB India Ltd. contending that the Division Bench was not considering Section 140(1) and the right under different subsections of section 140 are different and operate in different fields and what is relevant for one class cannot be made applicable to another class. It is submitted that the decisions in JCB India Ltd. and Willowood have considered section 140(3) of the Act. We do not think these decisions can be distinguished in this manner. The decisions in JCB India Ltd. and Willowood have laid down a general principle of law. The question of credit in a transitional provision being a concession or a right was argued and has been considered. We have not been shown any decision of this Court to the contrary. As a matter of judicial discipline, we will have to follow the dicta laid down by the Division Bench of this Court in JCB India Ltd.

42. The decision of the Supreme Court in the case of Collector of Central Excise, Pune v. Dai Ichi Karkaria Ltd. 1999 (112) ELT 353 (SC) cited by the Petitioner refers to MODVAT credit and in deciding a co-relation of the raw material and final product. ***The Apex Court held that it is not as if the credit can be taken only on the final product manufactured out of a particular raw material in which the credit is related. It was held that the credit may be taken on a final product on the very day it has become available. It is in this context, the nature of MODVAT credit was held to be indefeasible. The learned Additional Solicitor General has rightly distinguished this decision by pointing out that this decision does not consider the contingency of time limit on availment of credit, and also not in a transitionary provision. Under the impugned Rule, the input credit has been denied per se, but a time limit has been placed on its availment.***

43. The CENVAT Credit Rules prescribe conditions for availment of that credit. The rights and privileges accrued during the existing law have been saved under Section 174 of the Act. If what is saved from the earlier regime was conditional, then it cannot be converted to something without conditions in the new regime during the period of transition. ***If, before and after the GST regime, the availment of input credit is conditional, it cannot be that it is without any limit in the transitional period. With the advent of an entirely new tax regime, the earlier credit could have lapsed, but as and by way of concession it is permitted to be carried forward for a limited time.*** *Thus, going by the scheme of the Act, under Section 140(1), the reference to Input Tax Credit is not by way of a right, but as a concession….*

47. ***Thus the time limit in Rule 117(1) is traceable to the rule-making power conferred in Section 164(2). The credit envisaged under Section 140(1) being a concession, it can be regulated by placing a time limit. Therefore, the time limit under Rule 117(1) is not ultra-vires of the Act.'***

In the matter of Brand Equity Treaties Limited[11] - Delhi High Court:

[10] 2020 (3) TMI 1087 - Bombay High Court
[11] 2020(5)TMI171-Delhi High Court

The Delhi High Court considered this issue and held that transitional credit is a vested right and the same cannot be taken away through procedural law. The Court held as under:

21. Lastly, we also find merit in the submissions of the petitioners that Rule 117, whereby the mechanism for availing the credits has been prescribed, is procedural and directory, and cannot affect the substantive right of the registered taxpayer to avail of the existing /accrued and vested CENVAT credit. The procedure could not run contrary to the substantive right vested under sub Section (1) of Section 140……

There is no consequence provided in Rule 117 of GST Rules on account of failure to file GST TRAN-1. The argument of the respondents is that the consequence is provided in Sub-Section (1) of Section 140 by way of a pre-condition for being entitled to transit the CENVAT credit in his electronic credit register under the GST regime. We do not agree. Section 140 (1) is categorical. It states that the registered person "shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day….". Only the manner i.e. the procedure of carrying forward was left to be provided by use of the words "in such manner as may be prescribed". ***The limitation on the right to carry forward the CENVAT credit is substantively provided by the proviso to the said section. Those are the only limitations on the said statutory right. Under the garb of framing Rules – which are subordinate legislation, the width of those limitations could not have been expanded as is sought to be done by introduction of Rule (1A). In absence of any consequence being provided under Section 140, to the delayed filing of TRAN-1 Form, Rule 117 has to be read and understood as directory and not mandatory. Further, even in ALD Automotive Pvt. Ltd. V Commercial Tax Officer(2019) 13 SCC 225, while dealing with the question of whether the provision prescribing time limit for claim of Input Tax Credit is directory or mandatory in nature, it was observed that "whether particular provision is mandatory or directory has to be determined on the basis of object of particular provision and design of the statute" and "such interpretation should not be put which may promote the public mischief and cause public inconvenience and defeat the main object of the statute". Therefore, in the present cases, the purport of the transitory provisions is to allow a smooth migration from the erstwhile service tax regime to the new GST regime and the interpretation must be in consonance with the said purpose.***

22. ***We, therefore, have no hesitation in reading down the said provision [Rule 117] as being directory in nature, insofar as it prescribes the time-limit for transitioning of credit and therefore, the same would not result in the forfeiture of the rights, in case the credit is not availed within the period prescribed. This however, does not mean that the availing of CENVAT credit can be in perpetuity.*** *Transitory provisions, as the word indicates, have to be given its due meaning. Transition from pre-GST Regime to GST Regime has not been smooth and therefore, what was reasonable in ideal circumstances is not in the current situation.* ***In absence of any specific provisions under the Act, we would have to hold that in terms of the residuary provisions of the Limitation Act, the period of three years should be the guiding principle and thus a period of three years from the appointed date would be the maximum period for availing of such credit.***

In the matter of P.R. Mani Electronics[12] - Madras High Court:

The Madras High Court considered this issue after insertion of amendment to section 140(1) to provide for the time limit. It was argued on behalf of the petitioner that the transitional credit is a vested right and cannot be taken away by way of providing time limit under Rule 117. The Madras High Court considered the provisions of section 16(4) of CT Act which provides for time limit for availing credit and held that in the context of transitional credit, the case for a time limit is compelling and disregarding the time limit and permitting a party to avail transitional credit, in

[12] 2020 (7) TMI 443 – Madras High Court

perpetuity, would render the provision unworkable. Further, the Madras High Court relied on the decision of Bombay High Court in Nelco Limited (supra) to trace the rule making power to section 164. The observations of Court are as under:

17. Section 140 of the CGST Act read with Rule 117 of the CGST Rules enables a registered person to carry forward the accumulated ITC under erstwhile tax legislations and claim the same under the CGST Act. In effect, it is a transitional provision as is evident both from Section 140 and Rule 117. ***In light of the judgment of the Supreme Court in*** *Jayam,* ***the contention of the learned counsel for the Petitioner to the effect that ITC is the property of the Petitioner cannot be countenanced and ITC has to be construed as a concession. In addition, it is evident that ITC cannot be availed of without complying with the conditions prescribed in relation thereto. Prior to the amendment to Section 140 of the CGST Act, the power to frame rules fixing a time limit was arguably not traceable to the unamended Section 140 of the CGST Act, which contained the words "in such manner as may be prescribed", because such words have been construed by the Supreme Court in cases such as*** *Sales Tax Officer Ponkuppam v. K.I. Abraham* ***[****(1967) 3 SCR 518]*** **as not conferring the power to prescribe a time limit. Nevertheless, in our view, it was and continues to be traceable to Section 164, which is widely worded and imposes no fetters on rule making powers except that such rules should be for the purpose of giving effect to the provisions of the CGST Act. A fortiori, upon amendment of Section 140 by introducing the words "within such time", the power to frame rules fixing time limits to avail Transitional ITC is settled conclusively. In** *SKH Sheet Metals,* **the Delhi High Court concluded, in paragraph 26, that the statute had not fixed a time limit for transitioning credit by also referring to the repeated extensions of time.**

Given the fact that the power to prescribe a time limit is expressly incorporated in Section 140, which deals with Transitional ITC, and Rule 117 fixes such a time limit, we are unable to subscribe to this view. The fact that such time limit may be extended under circumstances specified in Rule 117, including Rule 117A, does not lead to the sequitur that there is no time limit for transitioning credit. In this context, reference may be made to Section 16(4) of the CGST Act which provides as follows: Section 16(4): A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under Section 39 for the month of September following the end of the financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.

The above provision is indicative of the legislative intent to impose time limits for availing ITC. Besides, Section 19(3)(d) of the TNVAT Act itself imposed a time limit for availing ITC and further provided that it would lapse upon expiry of such time limit. In our view, keeping the above statutory backdrop in mind, in the context of Transitional ITC, the case for a time limit is compelling and disregarding the time limit and permitting a party to avail Transitional ITC, in perpetuity, would render the provision unworkable. *In this regard, we concur with the conclusion of the Bombay High Court in Nelco that both ITC and Transitional ITC cannot be availed of except within the stipulated time limit. Such time limits may, however, be extended through statutory intervention. As stated earlier, in SKH Sheet Metals, the Delhi High Court observed that ITC is the heart and soul of GST legislations in as much as such legislations are designed to prevent the cascading of taxes. There can be no quarrel with this conceptual position; however, it is not a logical corollary thereof that time limits for availing ITC and, in particular, Transitional ITC, are inimical to the object and purpose of the statute'.*

In a Snapshot[1]:

S No	Ref	Judgement	Forum	Right	Rule 117	Rule 164	Period	J1	J2	J3	J4	J5
1	J1	Willowood Chemicals Private Ltd	Guj HC	N	Intra	Y	Prior	-	-	-	-	-

2	J2	Siddharth Enterprises	Guj HC[13]	Y	Ultra	-	Prior	NF	-	-	-	-
3	J3	Nelco Limited	Bom HC	N	Intra	Y	Prior	F	NF	-	-	-
4	J4	Brand Equity Treaties Limited	Del HC	Y	Ultra	N	Prior	NF	F	-	-	-
5	J5	P R Mani Electronics	Mad HC	N	Intra	Y	Post	-	-	-	D	-

Summarising the verdicts:

In the case of Willowood Chemicals Private Limited (supra), the Gujarat High Court considered this issue of time limit and held that the prescription of time limit within which the declarations must be made to avail credit is neither without authority nor unreasonable. The Court further held that the rule making power conferred under section 164 confers power on the sub-ordinate legislature to provide for time limit and accordingly held that Rule 117 is not ultra vires. Thus, the Gujarat High Court has held that the transitional credit is not a vested right and the rule making power to provide for time limit under Rule 117 is traceable to general rule making power conferred under section 164. The High Court relied on the decisions of Jayam & Co[14], Reliance Industries Limited[15] and Godrej & Boyce Manufacturing Co Private Limited[16] to stated that the credit is not a vested right.

However, the different bench of Gujarat High Court in a subsequent judgment of Siddharth Enterprises (supra) has taken a diametrically opposite view stating that transitional credit is a vested right and substantial rule making power like providing for time limit cannot be traceable to general rule making power. The Gujrat High Court relied upon the judgments of Eicher Motors Ltd[17] and Dai Ichi Karkaria Limited[18] to hold the credit is vested right and cannot be taken away.

The Gujarat High Court in the matter of Filco Trade Centre Private Limited[19], examined the validity of the provisions of section 140(3) which denies the claim of transitional credit related to closing stock of inputs, inputs contained in semi-finished or finished goods as on the appointed day that were procured under invoices and other prescribed documents that were issued earlier than twelve months from the appointed day. The High Court that the benefit of credit of eligible duties on the purchases made by the first stage dealer as per the then existing Cenvat credit rules was a vested right and it cannot be taken away by virtue of clause (iv) of sub-section (3) of Section 140 with retrospective effect in relation to the goods which were purchased prior to one year from the appointed day. The said decision was relied upon by Gujarat High Court in Siddhartha Enterprises (supra) to hold that CENVAT Credit availed under erstwhile regime is a vested right and cannot be taken away by prescribing additional conditions like time limit through rules.

Subsequently, when the matter involving similar question was heard before the Bombay High Court in the case of Nelco Limited (supra), the Bombay High Court placing reliance on Willowood Chemicals Private Limited (supra) held that credit is conditional and cannot be a vested right. The Bombay High Court has not distinguished the judgment in matter of Siddharth Enterprises (supra) stating that the said judgment has not referred to the judgement of Willowood Chemicals Private Limited (supra). The Bombay High Court would have distinguished the judgment of Siddharth Enterprises (supra) despite of the fact that the said judgment does not make reference to Willowood Chemicals Private Limited (supra).

On the contrary the Delhi High Court in the case of Brand Equity Treaties Limited (supra) refused to consider the judgement in Willowood Chemicals Private Limited (supra) on the reason that the Gujarat High Court itself in the

[13] Different bench from the bench which has heard the matter of Willowood Chemicals Private Limited
[14] (2016) 15 Supreme Court Cases 125
[15] 2017 (9) TMI 1307 – Supreme Court
[16] 1992 (7) TMI 292 – Supreme Court
[17] 1999 (106) ELT 3 (SC)
[18] (1999) 7 Supreme Court Cases 448
[19] 2018 (17) GSTL 3 (Gujarat)

subsequent Siddharth Enterprises (supra) taken a contrary view. Further, the Delhi High Court held that the limitation to carry forward the CENVAT Credit was substantively provided by the proviso to the said section. The Court stated that these are the only limitations on the said statutory right and under the grab of framing rules, the width of the limitations cannot be expended. Further, the Court also went on to hold that though the time limit is said to be arbitrary and unreasonable, the availment of credit cannot be just left to be a right in perpetuity. The Court stated that the time limit prescribed under the Limitation Act should act as a guiding principle as against time limit under Rule 117 and accordingly concluded that the credit can be availed within three years from the date of GST coming into effect.

The Madras High Court in the case of P.R. Mani (supra) refused to place reliance on the decision of Brand Equity Treaties Limited (supra) on the reasoning that it decided prior to retrospective amendment to section 140 to read time limit into section 140. The High Court relied upon the decisions of Willowood Chemicals Private Limited (supra) and Nelco Limited (supra) and held that the time limit is reasonable.

In light of these developments on this issue, an attempt is made in this article to refer to the views expressed by Honourable Supreme Court and various High Courts and the surrounding legal position to understand the vires of Rule 117, the vested right of the credit and the validity of retrospectivity to the said section. Accordingly, the article is themed over the following aspects:

- Role of Delegated Legislation vis-à-vis Rule 117 (Vires)
- Vested Right on Credits (Rights)
- Validity of Retrospective Amendment to Section 140 (Retrospectivity)

Though each of the above aspects on its own is capable for debate at extensive lengths, we try to cover them in this single article as each of them are interlinked and capable of influencing the other one. Hence, we request the reader to proceed further with the above disclaimer. With the understanding of the issues involved, we will now proceed to examine each of these aspects by considering the evolved jurisprudence.

Role of Delegated Legislation vis-à-vis rule 117- The Vires:

It is an accepted position that legislature in India have been held to possess wide powers to delegate subject to condition that such delegation cannot be of essential legislative functions which consists determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. Learned Justice GP Singh in his book on 'Interpretation of Statutes' has stated as under:

The Legislature cannot delegate 'uncanalised and uncontrolled power' the power delegated must not be 'unconfined and vagrant, but must be 'canalised within banks that keep it from overflowing'. The 'banks', that set the limits of the power delegated, are to be constructed by the Legislature by declaring the policy of the law and by laying down standards for guidance of those on whom the power to execute the law is conferred. So, the delegation is valid only when the legislative policy and guidelines to implement it are adequately laid down and the delegate is only empowered to carry out the policy within the guidelines laid down by the Legislature.

What is permitted, therefore, is the delegation of ancillary or subordinate legislative functions, or what is fictionally called, a power to fill up the details. The Legislature may, after laying down the legislative policy, confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of the policy. The Legislature's ability to delegate these functions is derived from an implied conferral of that authority for the effective exercise of the legislative power granted by the Constitution on the principle that everything necessary to the exercise of a power is implicit in the grant of power. The limits of this ability to delegate i.e., the inhibition against delegation of essential legislative functions, is also impliedly derived from the provisions of the Constitution which

confer the power to make laws on the Legislature. It is reasoned that the Constitution entrusts the duty of law-making to Parliament and the Legislature of States, and thereby impliedly prohibits them to throw away that responsibility on the shoulders of some other authority. Thus, the area of compromise between these two implications determines the permissible limits of delegation. ***The question, whether any particular legislation suffers from excessive delegation, has to be decided by the courts having regard to the subject matter, the scheme, the provisions of the statute including its preamble, and the facts and circumstances in the background of which the statute is enacted.*** The courts in this task have been quite generous and liberal, for it is now accepted that having regarding to the complexity of problems which a modern State has to face, delegated legislation is a necessity and has its own advantages. ***If, on a liberal construction of a given statute, a legislative policy and guidance for its execution are brought out, the statute, even if skeletal, will be upheld and it will not be a valid argument that the Legislature should have made more detailed provisions. But this rule of liberal construction should not be carried by the court to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on the executive. It is the duty of the court to strike down without hesitation any arbitrary power conferred on the executive by the Legislature. Conferral of unguided discretion which can lead to discrimination is abdication of legislative function.***

With the above in mind, we have to proceed to examine, whether prescription of time limit under Rule 117 in order to claim the credit accumulated in previous regime to be transitioned to GST regime suffers from excessive delegation has to be decided based on the scheme, the provisions of the statute and the facts and circumstances in the background of which the statute is enacted. Basis our examination, if it is found that the time limit under Rule 117 is in accordance with the scheme, provisions of the statute and the facts and circumstances, then such rule cannot be said to be suffering from excessive delegation, even if the statute is skeletal and it would not be a valid argument that the legislature should have made more detailed provisions. At the same time, it has to be seen such a liberal construction should not lead to an arbitrary power conferred on executive to be struck down.

In simple words, if the rules framed are in accordance with the scheme, the provisions of the statute, facts and circumstances in the background which the statute is enacted, the courts are bound to take liberal interpretation. On the other hand, if the rules are intended to confer any arbitrary power and achieve what the legislature itself do not wish to achieve/regulate, would be liable to struck down. Before examining, whether Rule 117 is in accordance with the scheme, provisions of the statute, facts and circumstances or confers an arbitrary power on the executive, let us proceed to examine certain judgments, wherein the said issue is dealt.

In the matter of KI Abraham[20] - Supreme Court:

The facts involved therein is the dealer was engaged in trading of coconut oil. During the year in consideration, the dealer has made inter-state sales. For certain portion of inter-state sales, the dealer has submitted C-Forms. For the balance sales, the dealer failed to submit the said forms within the time stipulated in the Rule 6 of Central Sales Tax (Kerala) Rules read with Section 13(4)(e) and Section 8(4) of Central Sales Tax Act, 1956. In absence of such forms, the Revenue has assessed the dealer at higher rate rather than the concessional rate applicable when C-Forms were submitted. The dealer has submitted the said forms and asked the Revenue to consider and revise the assessment. The Sales Tax Officer and the Appellate Assistant Commissioner rejected the stand of dealer requesting assessment at lower rate stating that the dealer has failed to submit the forms within the stipulated time period. The dealer after exhausting all the legal remedies has approached the High Court, wherein the High Court has quashed the assessment proceedings and directed the Sales Tax Officer to assess at lower rates after taking the forms into consideration. The Revenue has preferred an appeal against such a judgment of High Court before the Honourable Supreme Court. The Honourable Supreme Court after referring to the provisions of Section 8(4) read with Section 13(4)(e) stated that the phrase 'in the prescribed manner' occurring in Section 8(4) of the act only ***confers power on rule making authority to prescribe a rule stating what particulars are to be mentioned in the prescribed form, the nature and value of the goods sold, the***

[20] AIR 1967 SC 1823

parties to whom they are sold, and to which authority the form is to be furnished. But the phrase 'in the prescribed manner' in Section 8(4) does not take time-element. In other words, the section does not authorise the rule-making authority to prescribe time limit within which the declaration is to be filed by the registered dealer. The view that we have taken is supported by the language of Section 13(4)(g) of the Act which states that State Government may make rules for 'the time within which, the manner in which and the authorities to whom any change in ownership of any business or in the name, place or nature of any business carried on by any dealer shall be furnished'. This makes it clear that the legislature was conscious of the fact that the expression 'in the manner' would denote only the mode in which an act was to be done, and if any time limit was to be prescribed for the doing the act, specific words such as 'the time within which' were also necessary to be put in the statue'.

Thus, the Supreme Court considered the phrase 'in the prescribed manner' and held that it only indicates the procedural aspects namely the name of the form, the fields that the forms should contain and other similar aspects. Accordingly, the Honourable Supreme Court has held that Rule 6(1) to the extent which it deals with time-limit is ultra-vires and accepted the plea of the dealer on submitting the declarations in the reasonable time.

In the matter of Maharashtra State Board of Secondary and Higher Education and Another[21] - Supreme Court:

In this matter, the Honourable Supreme Court was seized with a question canvassed is whether, under law, a candidate has a right to demand inspection, verification and revaluation of answer books and whether the statutory regulations framed by the Maharashtra State Board of Secondary and Higher Secondary Education governing the subject insofar as they categorically state that there shall be no such right can be said to be ultra vires, unreasonable and void. The question that is relevant for the current context is whether the provision contained in Regulation 104(1) that no revaluation of the answer books or supplement is ultra-vires the regulation making power conferred by Section 36 and also illegal and void on the ground of its being manifestly unreasonable. The Honourable Supreme Court after considering the submissions by both parties stated in Para 14 as ***'In our opinion, this approach made by High Court was not correct or proper because the question whether a particular piece of delegated legislation – whether a rule or regulation or other type of statutory instrument – is in excess of power of subordinate legislation conferred on the delegate has to be determined with reference only to the specific provisions contained in the statute conferring the power to make rule, regulation, etc and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the Court to substitute its own opinion for that of the Legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation-making body and declare a regulation to be ultra vires merely on the ground that, in view of the Court, the impugned provisions will not help to serve the object and purpose of the Act. So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provisions of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the effacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the statute. Though this legal position is well established by long series of decisions of this Court, we have considered it necessary to reiterate it in view of the manifestly erroneous approach made by High Court to the consideration of the question as to whether the impugned clause (3) of Regulation 104 is ultra vires.*** Accordingly, the Honourable Supreme Court has held that Regulation 104 is intra-vires the Act and upheld said delegated legislation.

[21] (1984) 4 Supreme Court Cases 27

In the matter of Dr Haniraj L Chulani[22] - Supreme Court:

In this matter, the Honourable Supreme Court had an occasion to determine as to whether State Bar Council of Maharashtra & Goa was justified in refusing enrolment of Dr Haniraj L Chulani as an advocate under the Advocates Act, 1961 as he is a medical practitioner who does not want to give up his medical practice but want simultaneously to practice law. Dr Haniraj L Chulani (Doctor) is a medical practitioner since 1970 and during the continuance of his said profession as a medical practitioner, the appellant joined LLB Degree Course and obtained Degree of Bachelor of Laws. Thereafter Dr Haniraj L Chulani has applied to the State Bar Council of Maharashtra & Goa (State Bar Council) for being enrolled as an advocate under Advocates Act, 1961. The Doctor insisted that even though he is a medical practitioner he is entitled to simultaneously carry on the profession as an advocate. The Enrolment Committee rejected his request for being enrolled as an advocate simultaneously with his carrying on his medial practice as a surgeon. The Doctor contended that Rule 1 framed by State Bar Council under Section 28(2) and Section 24(1)(e) of the Advocates Act was ultra vires and illegal. It was submitted that insofar as the said rule prohibits a person who is otherwise qualified to be admitted as an advocate from being enrolled as an advocate if he is carrying on any other profession like medical profession in the present case, it suffers from vice of excessive delegation of legislative power. The Honourable Supreme Court has stated vide Para 16 ***'So far as the question of excessive delegation of legislative power is concerned, we must note at the outset that the Act has been enacted, as seen earlier, with a view to regulate the right of advocates to practice law. The rules framed by the Bar Council of India especially relating to standards of professional conduct and etiquette clearly aim at securing high standards of competence in legal services and seek to strengthen the professional relationships among its members and promote the welfare of the society as whole.. The attack on the impugned rule on the ground of excessive delegation of legislative power will have to be examined in the light of scheme of the Act which has entrusted the power and the duty to elected representatives of the profession constituting the State Bar Councils to lay down the high standards of professional etiquette as expected of the advocates enrolled by it. It is pertinent to note that the Act has entrusted to the Bar Council of India, amongst others, the functions to promote legal education and to lay down standards of such education in consultation with the Universities in India imparting such education and the State Bar Councils.. The Act also deals with the topic of regulation of professional conduct of advocates from the entry point itself.*** Vide Para 17 it states that '***…Thus, from the pre-entry point to legal profession till the exit point from the legal profession, the Bar Council of India and State Bar Councils monitor the career of legal practitioner. It is the entire scheme of the Act when considered in the light of the nature of the legal profession to which such entry is given which has to be kept in view while considering the submission of the learned Senior Counsel for the appellant that the power given to the State Bar Councils to regulate such entries by framing rules is a piece of excessive delegation of legislative power. It cannot be gainsaid that law is universally described as an honorable profession.*** Vide Para 18, the Supreme Court states '***The aforesaid well established connotations and contours of the requirements of the legal profession themselves supply the necessary guideline from the Bar Councils concerned to frame rules for regulating the entries of persons to profession. As noted earlier, the impugned rule has been framed by Maharashtra State Bar Council in exercise of its rule-making power under Section 24(1)(e) read with Section 28(2) of the Act.. Such rule-making power flows from Section 28(2)(d). Even though the aforesaid rule-making power is couched in wide terms the said power entrusted to the State Bar Council cannot be said to be unfettered or unhedged. The said rule-making power draws its sustenance from the guidelines laid down by the Act itself which entrusts the duty to the State Bar Council concerned to regulate entry to the legal profession which has the aforesaid well established connotations and attributes. The Bar Councils concerned are entrusted by the legislature itself with the aforesaid rule-making power enabling them to determine the requirements of the State Courts concerned where the new entrants have to practice and to lay down appropriate conditions regulation such entries. As the power to make rules is entrusted by legislature to the chosen representatives of the State concerned where the Bar Councils functions and the needs of the litigating public residing in the State in light of the set-up of courts in the States***

[22] (1996) 3 Supreme Court Cases 342

concerned, it cannot be said that the power is in any way unfettered or uncanalised so as to amount to the total effacement of legislative controls.

Thus, in the facts of the present case, the rule involved prohibited the enrollment of a person who is otherwise qualified as an advocate for the reason that he is engaged in practicing other profession namely doctor. The said rule making power can be traceable to the Act itself considering the fact that the Bar Councils are entrusted by the legislature itself to regulate entry to legal profession. It is in this context, the vires of said rule has been upheld by tracing the same to the overall objects and intents of the legislation.

In the matter of Kunj Behari Lal Butail & Others[23] - Supreme Court:

To consolidate and amend the laws relating to ceiling on landholdings in the State of Himachal Pradesh, the Himachal Pradesh Ceiling on Land Holdings Act, 1972 was enacted. Section 26(1) of the Act provides that the state government may, by notification, makes rules for carrying out the purposes of this Act. Vide such powers, Himachal Pradesh Ceiling on Land Holdings Rules, 1973 were framed. Rule 3 of said rules deals with 'areas to be treated as subservient to tea plantations'. The said rule has a proviso which states that no land, treated as subservient to tea planation under the sub-rule and exempted from the operation of the Act under Section 5(g) thereof, shall be transferred by the landowner in any manner, without the permission of the state government. The said proviso was not there in the text of Rules as originally framed and has been inserted by amendment through notification. It was this notification and rule was challenged by the appellants because their effort at alienating a piece of land subservient to a tea planation was sought to be put into jeopardy. The Supreme Court after hearing both the parties, stated vide Para 13 as ***'It is very common for the legislature to provide for a general rule-making power to carry out the purpose of the Act. When such a power is given, it may be permissible to find out the object of the enactment and then see if the rules framed satisfy the test of having been so framed as to fall within the scope of such general power confirmed. If the rule-making power is not expressed in such a usual general form then it shall have to be seen it the rules made are protected by the limits prescribed by parent act. (See: Sant Saran Lal v. Parsuram Sahu, AIR Para 19). From the provisions of the Act we cannot spell out any legislative intent delegating expressly, or by necessary implication, the power to enact any prohibition on transfer of land. We are also in agreement with the submission of Shri Anil Divan that by placing complete prohibition on transfer of land subservient to tea estates no purpose sought to be achieved by the Act is advanced so also such prohibition cannot be sustained. Land forming part of a tea estate including land subservient to a tea planation have been placed beyond the ken of the Act. Such land is not to be taken into account either for calculating the area of surplus land or for calculating the area of land which a person may retain as falling within the ceiling limit. We fail to understand how a restriction on transfer of such land is going to carry out any purpose of the Act, We are fortified in taking such view by the Constitution Bench decision of this Court in Bhim Singhji v. Union of India whereby sub-section (1) of Section 27..***

We are also of the opinion that a delegated power to legislate by making rules 'for carrying out the purposes of the Act' is a general delegation without laying down any guidelines; ***it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.*** Accordingly, the said rule was struck down.

In this said case, the Honourable Supreme held that it is very common for the legislature to provide for a general rule making power to carry out the purpose of the Act. When such a power is given, it is required to examine whether the rules framed satisfy the test of having been so framed as to fall within the scope of such general power confirmed. If the rule making power has not been expressed in such a general form, then it shall be protected by the limits of parent Act. The Honourable Supreme Court further held that such general ruling making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.

[23] (2000) 3 SCC 40

In the matter of Global Energy Limited and Another[24] - Supreme Court:

The Parliament has enacted Electricity Act, 2003. In exercise of its jurisdiction conferred by Section 178 of the said Act, the Central Electricity Regulatory Commission (CERC) made the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading License and Other Related Matters), Regulations 2004. In terms of provisions of the said Act as also the regulations, inter alia, license is required to be taken by a person who is desirous of dealing in inter-state trading. Appellant (Global Energy Limited) is a public limited company incorporated and registered under the Companies Act, 1956. Appellant has applied for license to deal in inter-state trading and requested for grant of interim permission since it was engaged in dealing inter-state prior to commencement of the Act. CERC has granted the said interim permission. By reason of an order, the said application was allowed and CERC granted the license and directed the Appellant to publish a notice as per the terms of Section 15. Meanwhile, the regulations are amended and inserted a new regulation 6A which dealt with disqualifications. CERC has rejected the application stating that the said regulations will come into effect retrospectively and thus appellant was disqualified. The Honourable Supreme Court making reference to Regulation 6A stated that the said provision is imperative in character and couched in negative language. It provides for disqualifications. In Para 24, the Supreme Court states ***'Indisputably, a subordinate legislation should be read in context of the Act. Thus read, Regulation 6-A should be construed in terms of the requirements contained in Section 52 of the Act, namely, technical requirement, capital adequacy, requirement and creditworthiness for being an electricity trader. It affects the credit of the applicant. It also affects the credit-effectiveness, namely (1) financial integrity of the applicant, (2) his competence, (3) his reputation and character; and (4) his efficiency and honesty. It affects a pending proceeding. Because of the said amendment, an interim license granted in favour of the appellant stood revoked. This however, would not mean an amendment made in a regulation would under no circumstance, affect pending proceeding.*** In Para 25, it states, ***'It is now well-settled principle of law that the rule-making power 'for carrying out the purposes of the Act' is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such provision alone, the regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of provisions of the said Act.*** In Para 27, it states '***The power of regulation-making authority, thus, must be interpreted keeping in view the provisions of the Act. The Act is silent as regards conditions for grant of license. It does not lay down any pre-qualification therefor. Provisions for imposition of general conditions of license or condition laying down the pre-qualifications therefore and/or the conditions/qualifications for grant of revocation of license, in absence of such a clear provision may be held to be laying down guidelines by necessary implication providing for conditions/qualifications for grant of license also.*** Accordingly, struck down Rule 6-A.

The Honourable Supreme Court in this case also held that it is a well-settled principle of law the rule making power 'for carrying out the purposes of the Act' is a general delegation and the same cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of said Act.

In the matter of Travelite (India)[25] – Delhi High Court:

In this matter under Service Tax law, the Honourable Delhi High Court was dealing with the vires of Rule 5A(2) of the Service Tax Rules, 1994 which provided for audit by department that are not contemplated by the Finance Act, 1994. The High Court has held that ***'The mere fact that a rule-making power is phrased in terms that indicates a general delegation of power, cannot lead to the inference that such power may be exercised to make rules that exceed the bounds of the statute. Rules may only give effect to the statute's provisions and intent and cannot be used to create substantive rights, obligations or liabilities that are not within the contemplation of the statute. It is apparent that the only type of audit within the contemplation of the statute is that stipulated for in Section 74A, i.e. a special***

[24] (2009) 15 Supreme Court Cases 570

[25] 2014 (35) STR 653 (Del.)

audit when only certain circumstances are fulfilled. The Parliament thus had a clear intention to provide for only a special audit. The fact that Section 74A prescribes the conditions meriting such special audit compels the necessary inference that the Parliament did not intend to provide for a general audit that "every assessee" may be subjected to, "on demand". This Court is thus of the opinion that any attempt to include provision for such a general audit through the back-door, such as through the impugned rule, is ultra vires the rule making power conferred under Section 94(1). Rule 5A(2) must consequently be struck down'.

In light of the above decisions, one can figure out the scope the scope and ambit of general rule making power as under:

- Whether a particular piece of delegated legislation is traceable to general rule making power or not is required to be determined considering the overall purpose and object of the parent act. If the rule in question is in line with the overall objects of parent act, then same can be upheld and does not suffer from the vires of excessive legislation.

- It is common for legislature to provide for general rule making power. If the rules made by exercising such general rule making power, then it is required to examine whether the rules so framed fall within the scope of general power so confirmed. Such general ruling making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.

Extrapolating the above Principles to Rule 117:

Now, the question is whether by virtue of general power making rule under Section 164(2), can the time limit under Rule 117 can be prescribed to regularise or transition the erstwhile credit into the GST regime or whether the said time limit should be prescribed specifically in the provisions of Section 140(1)? Let us proceed to answer this keeping the above jurisprudence in perspective.

Judgement	Reasoning	Applying to Rule 117
KI Abraham	• The SC in this matter was concerned with the validity of prescription of time limit for submission of forms. The assessee took the plea that Section 13(4) which deals with rule-making power for various issues laid down therein, does not make a mention of time limit as one of the items for which rules can be made. • The SC stated that the power of Section 13(4)(e) was only to prescribe the particulars that should be made available in the form but does not state that the rule can be made for providing time limit for submission. • Accordingly, the SC held that in absence of such power of prescription of time limit in the said rule-making sub-section, the rules cannot provide the time limit. The SC also made reference to Section 13(4)(g), another rule making sub-section, which has specific reference to	• SC was considering the provisions of Section 13(4) of Central Sales Tax Act, 1956. • The said section unlike Section 164 of CT Act, lays down various items for which rules can be made. • Among such various items, one item has a mention about the time limit and the other does not have mention of time limit. • It was under such a situation, the SC referring to the other items which prescribe time limit, stated that the item under consideration does not have the mention of time limit and accordingly rule made in light of such power mentioning time limit is ultra vires. • We are of the view that the ratio of this judgment cannot be applied to position under CT Act for two reasons.

	the time limit for the issue mentioned therein. By reference, SC stated that since the sub-section which was under consideration does not have any specific mention of time limit, the plea of Revenue stands failed.	• One, that the SC was considering the vires of rule-making power, where there were multiple items under the rule-making section. Whereas, in Section 164, there were no multiple items and it is a pure case of general rule -making power. Since there would not be an occasion under Section 164 to find time limit mentioned in one item and not being mentioned in another item, in absence of items, the judgment cannot be straight away applied. If Section 13(4) was also similar to Section 164, the conclusion of SC may have been different favouring the Revenue. • Two, the SC was not dealing with the transition credit, but credit for the first time. We believe that there would be lot of difference between the transition credit and first time credit. In the later case, substance has to be given importance than the procedure, where as in the former, the procedure is important than substance, since the substance was dealt at time of grant of credit in the first instance. • Hence, we are of the view that the decision of SC cannot be applied directly to the position under CT Act and even if applied, it would be favourable to Revenue rather than assessee.
Maharashtra State Board of Secondary and Higher Education	• The SC was considering the vires of Regulation 104 which stated there cannot be any right to revaluation of answer books. • The SC reversed the judgement of HC by stating whether a rule is in excess of power of subordinate legislation has to be determined with reference only to specific provision contained in the statute conferring the power to make rules and also object and purpose of the Act. • The SC further held that it is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provisions of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the effacious achievement of the objects and purposes of the Act. It is not	• From the rationale delivered by SC, it is evident that to determine whether Rule 117 is ultra vires or intra vires, what has to be seen is whether the rules are within the scope of the Act, then the rules should be held valid and courts cannot substitute whether a particular aspect has to be dealt by the act or rules. • Hence, applying this to Rule 117, as long as the said rule is within the boundaries set by the Act and comes from valid rule making authority, the same has to be held valid. The Courts should not decide upon whether the time limit should be specified in the Act or rules. • Hence, we are of the view, that since Rule 117 is within the boundaries of the parent act and stems from valid rule making authority, the prescription of time limit under Rule 117 should be considered to be intra vires.

	for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the statute.	
Dr Haniraj L Chulani	• The SC in this case was considering the vires of Rule 1 framed by State Bar Council under Section 28 and Section 24 of Advocates Act. • The petitioner challenged the said rule by stating it suffers from vice of excessive delegation of legislative power. • The SC stated whether there is an excessive delegation of power or not has to be examined keeping the objects of Act and rules framed in this connection.	• Applying the said rationale to the current position under CT Act, the time limit prescription under Rule 117 cannot be said to be excessive if the objective of GST laws is kept in perspective. • The GST laws were promogulated to get all possible indirect taxes under one umbrella and ensure that there is no cascading effect of taxes. If seen under this light, it would be evident that the time limit fixed under Rule 117 to get the erstwhile credit into GST regime is reasonable and does not suffer with excessive delegation. • If the Rule 117 provides that such credit cannot be availed, then such prescription would have been said to be ultra-vires, but just because a sun set clause is mentioned in Rule 117 to debar the taking credit after the said period cannot make such rule ultra vires.
Kunj Behari Lal Butail & Others	• The SC in this matter held that the rule which was made going beyond the parent act is ultra vires and liable to be struck down. • In the facts of this case, the rule was dealing with an aspect which the parent act did not provide for and such rule was also not advancing the object of the act and in such circumstances the said rule was struck down.	• Applying the said rationale to the position under CT Act, it is evident that what is prescribed under Rule 117 is not beyond the scope of the parent act. • Further, the said rule does not bring into existence substantive rights or obligations or disabilities which are not contemplated vide the provisions of CT Act. • Mere prescription of time limit by which the assessee has to file the return to get the past credit into GST regime cannot be said to be dealing with substantive rights or obligations or disabilities. Failure to comply with the said rule would result into certain disabilities, and such a position by itself cannot be stated to be taking away the substantive rights.
Global Energy Limited	• The SC in this matter held that the rule which was made going beyond the parent act is ultra vires and liable to be struck down. • In the facts of this case, the rule was dealing with an aspect which the parent act did not provide for and such rule was	• Applying the said rationale to the position under CT Act, it is evident that what is prescribed under Rule 117 is not beyond the scope of the parent act. • Further, the said rule does not bring into existence substantive rights or obligations

	also not advancing the object of the act and in such circumstances the said rule was struck down	or disabilities which are not contemplated vide the provisions of CT Act. • Mere prescription of time limit by which the assessee has to file the return to get the past credit into GST regime cannot be said to be dealing with substantive rights or obligations or disabilities. Failure to comply with the said rule would result into certain disabilities, and such a position by itself cannot be stated to be taking away the substantive rights.
Travelite (India)	• The Delhi HC in this matter stated that the rule which was providing for audits for which the parent act has not provided is ultra vires.	• Applying the same to position under CT Act, since Rule 117 is dealing with the items or aspects which are laid down in Section 140, the same can be said to be intra-vires.

From the above, it can be argued that the prescription of time limit under Rule 117 is within the competence of Section 164 and accordingly the said rule is intra-vires. The act of amending the provisions of Section 140(1) inserting the time limit is only out of abundant caution and that by itself cannot be leading to the conclusion that Rule 117 is ultra-vires. However, there is nothing certain in the tax law, there also may exist an alternat view, which we detail hereunder.

Possible Alternate View:

The Gujarat High Court in Willowood Chemicals Private Limited (supra) opined that the prescription of time limit under Rule 117(1) is not ultra vires the Act and is very much required to attain a degree of finality on claims, credits, transfers of such credits and all issues related thereto. The Gujarat High Court relied upon the Honourable Supreme Court decision in the case of USA Agencies[26] under Tamil Nadu Value Added Tax Act which upheld a time limit provision to claim input tax before the end of financial year or before ninety days of purchase whichever is later by stating that the legislature consciously set up time frame for availment of input tax credit and these conditions are to be strictly complied with.

However, the Gujarat High Court has not examined the fact whether such rule making power under said Act is traceable to general rule making power. Further, they relied on the Honourable Supreme Court Judgement under said Act, wherein the substantial provision of time limit was brought into the Statue itself.

Whereas in the facts of the present case, the time limit condition was not expressly provided for in section 140(1) as prevailing prior to amendment. Hence, a view may be taken that the decision of Gujarat High Court in Willowood Chemicals Private Limited (supra) is short sighted to the extent it does not examine the fact that bringing time limit by a delegated legislation to affect the availment of credit can be traceable to general rule making power in view of the above discussed legal position on general rule making power.

On the contrary, the Gujarat High Court in the case of Siddharth Enterprises (supra) has taken a view that the right to carry forward credit is a right or privilege, acquired and accrued under the repealed Central Excise Act, 1944 (1 of 1944) and it has been saved under Section 174(2)(c) of the CT Act and, therefore, it cannot be allowed to lapse under Rule 117, for failure to file declaration form TRAN-1 within the due date. The Court also observed under para 34 that Section 16 of the CT Act allows the entitlement to take input tax credit in respect of the post-GST purchase of goods or services within return to be filed under Section 39 for the month of September following the end of financial year to such purchase or furnishing of the relevant annual return, whichever is earlier. Whereas, Rule 117 allows time-limit only up

[26] [2013] 5 CST 63

to 27th December 17 to claim transitional credit on pre-GST purchases. Therefore, the Court held that it is arbitrary and unreasonable to discriminate in terms of the time-limit to allow the availment of the input tax credit with respect to the purchase of goods and services made in pre-GST regime and post-GST regime. This discrimination does not have any rationale and, therefore, it is violative of Article 14 of the Constitution was the conclusion arrived by the Court. Thus the Gujarat High Court taken a view that transitional credit is a vested right which cannot be taken away by delegated legislation by providing for time limit under delegated legislation i.e. Rule 117.

In the case of Nelco Limited (supra), the Bombay High Court refused to place reliance on the Honourable Supreme Court decision of Dai Ichi Karkaria Limited (supra) for the reason that in that matter, the issue involved was not of transitional credit and did not consider the contingency of time limit on availment of credit. Accordingly, the Bombay High Court held that time limit in Rule 117(1) is traceable to rule-making power conferred in section 164(2). The Bombay High Court held that the transitional credit is not a vested right and cannot be considered as indefeasible. Since the said decision have not taken the spirit behind Dai Ichi Karkaria Limited (supra), the judgment may require reconsideration.

The Delhi High in the case of Brand Equity Treaties Limited (supra) wherein it was held that the procedure under Rule 117 could not run contrary to section 140. The Delhi High Court held that transitional credit is a substantial right in itself and it cannot be restricted by providing for time limit under rule 117. However, the Court set a higher period of 3 years taking clue from the provisions of Limitation Act.

Hence, it can be argued by taking clue from Siddharth Enterprises (supra) and Brand Equity Treaties Limited (supra), that credit being a vested right, the same cannot be regulated by rules like Rule 117 and accordingly the credit once availed should be made available in GST regime, if such claim is made within a period of 3 years from the appointed day.

Concluding on the vires, we are of the view that there is a great possibility for the courts to hold that Rule 117 is intra vires because the prescription of time limit for getting the past credits into the GST regime cannot be said to be excessive delegation or create substantive rights which are not provided by the parent act. However, as stated above, there is an alternate view possible and only the Supreme Court should put a rest to this. Let us wait and see how the story ends.

Now, that we have finished dealing with vires, let us proceed to examine, whether the transitional credit is a vested right or not. This is also helpful to decide the vires as stated above.

Vested Rights on Credits – The Rights:

We will now look into the aspect whether transitional credit that got accumulated to the taxpayer in the previous law is a vested right. Before we delve upon this issue, we will look into the evolved jurisprudence on the concept of vested right. The legal definition of the term 'vested right' under Merriam Webster's dictionary is 'a right belonging completely and unconditionally to a person as a property interest which cannot be impaired or taken away (as through retroactive legislation) without the consent of the owner'.

In simple words, if credit is held to be vested right, no subsequent legislation can take away such benefit from the tax payer. If such credit is held not to be vested right, then the legislation can take away such benefit by way of legal sanction. We shall understand more about the concept of 'vested right' by looking at the jurisprudence under the earlier indirect taxation laws. Basis above, then we shall try to understand whether transition credit is a vested right or not.

In the matter of Eicher Motors Ltd[27] - Supreme Court:

The petition before the Honourable Supreme Court in this matter is the validity and application of modvat scheme, as modified by introduction to Rule 57F of Central Excise Rules, 1944, under which the credit, which was lying unutilised with manufacturers, stood lapsed in the manner is questioned. The petitioners prayed to quash the said rule mainly on four grounds – (1) Modvat credit lying in balance with the assessee as on 16.03.95 represents a vested right accrued or acquired by the assessee under the existing law and such right is sought to be taken away by the impugned rule and the Central Government has no powers under Section 37 of Central Excise Act, 1944 to frame such rule, (2) the impugned rule is arbitrary and unreasonable as the same has been framed without due application of mind to relevant facts, (3) Section 37 of the Act does not enable the Central Government to frame a rule enabling the lapsing of the balance in modvat account and is therefore ultra vires the rule-making power, (4) the rule is vitiated on the ground of promissory estoppel and/or the doctrine of legitimate expectation.

The Honourable Supreme Court after hearing to the revenue, held vide Para 5 as '….*Thus, the assessee became entitled to take the credit of the input instantaneously once the input is received in the factory on the basis of the existing scheme. Now by application of Rule 57F(4A) credit attributable to inputs already used in the manufacture of the final products and the final products which have already been cleared from the factory alone is sought to be lapsed, that is, the amount that is sought to be lapsed relates to the inputs already used in the manufacture of the final products but the final products have already been cleared from the factory before 16-3-1995.*

Thus, the right to the credit has become absolute at any rate when the input is used in the manufacture of the final product. The basic postulate, that the scheme is merely being altered and, therefore, does not have any retrospective or retro-active effect, submitted on behalf of the State, does not appeal to us. *As pointed out by us that when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that right, which had accrued to a party such as availability of a scheme, is affected and, in particular, it loses sight of the fact that provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessees concerned.*

Therefore, the scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier scheme was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the earlier scheme necessarily the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said rule would result in affecting the rights of the assessees. *6. We may look at the matter from another angle.* ***If on the inputs the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus, a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed.***

Therefore, it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the rule cannot be applied to the goods manufactured prior to 16-3-1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods.

Key Take – Aways:

[27] (1999) 2 Supreme Court Cases 361

The Honourable Supreme Court in this matter have set a standard to state that once the tax is paid on inputs and the same was eligible at the time of payment of such taxes, the same shall stands to be eligible and admissible until such inputs were utilised. The Court stated that once a right accrued to the assessee on the date which they paid the tax on raw materials or inputs and that right would continue until the facility available thereto gets worked out or until those goods existed.

In the matter of Dai Ichi Karkaria Limited[28] - Supreme Court:

The question that the Honourable Supreme Court is seized in the above matter is, whether for the purpose of arriving the cost of intermediate product to be subjected to excise duty, the excise duty paid on the raw material has to be taken into consideration or not. The Revenue was of the view that for the purpose of arriving the cost of intermediate product, the excise duty paid on the raw material is to be taken into account, whereas the manufacturers contend that such excise duty paid on raw material is not required to be taken. The Revenue took a stand that if the credit of excise duty is not been granted, then for the purposes of ascertaining the cost of intermediate product, the excise duty paid on raw material would have been taken for sure and the modvat scheme did not alter the fundamental position. By virtue of it, the Revenue contended that the cost of raw material was not reduced. The modvat scheme resulted in reducing the excise duty on the excisable product. The Revenue contended that the ***credit of excise duty on the raw material in the register maintained for MODVAT purposes was only a book entry which might be utilised later for payment of excise duty on the excisable product. In other words, it matured when the excisable product was removed from the factory and the stage for payment of excise duty thereon was reached. Actually, credit was taken, that is availed of or utilised, at the time of the removal of the excisable product. Consequently, the cost of production of the excisable product was not reduced by the amount of MODVAT credit on the raw material. The credit was contingent credit. It might be disallowed under certain circumstances. It could not be withdrawn like a credit amount in a bank account. The manufacturer did not have any indefeasible right or title to it. The rules pertaining to MODVAT scheme made it clear that the MODVAT credit was in the nature of a set-off or an adjustment.***

The Honourable Supreme Court then stated that there is no doubt that were it not for MODVAT scheme and the credit available on the excise duty paid on the raw material thereunder, the excise duty paid on the raw material would be a factor in determining the cost of the excisable product. The question that Supreme Court framed is does the MODVAT Scheme make a difference? Accordingly, the Honourable Court vide Para 17 and 18 held as under:

It is clear from these Rules, as we read them, that ***a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product.*** *There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for.* ***We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.***

Key Take – Aways:

[28] For citation, please refer supra.

The Honourable Supreme Court in this matter was considering the inclusion of excise duty paid on raw material for calculation of cost of intermediate product. The assessee was of the view that since the credit is available of such taxes, the same cannot be included in the cost of intermediate product. The Revenue was of the view that the credit availed on the raw material will mature only at the time when the final product is removed from the factory, until then the credit is contingent. The Honourable Court found no logic behind the submission of Revenue and held that once credit is available to the assessee, it becomes indefeasible and the credit becomes available on the very first day the raw material is purchased. The Court made general observations pertaining to the credit and made such a statement.

In the matter of Samtel India Limited[29] - Supreme Court:

In the said case, Rule 57F(17) of Central Excise Rules provided for lapse of credit accumulated on manufacture of tractors, motor vehicles and shall not be utilised for payment of duty on any excisable goods whether cleared for home consumption or for export. The said provision has been brought into effect from 16.03.1995. Appellant exported goods and claimed refund of CENVAT Credit accumulated upto Feb 1995. These claims of refund was rejected on the ground that under sub-rule 17, stating that the credit has been lapsed and the same cannot be refunded. In the context, the Honourable Supreme Court vide para 7 and 8 held as under:

7. *Thus, the then sub-rule 4A is identical to sub-rule 17 which is under consideration. In Eicher Motors case (supra),* ***it has been held that the assessee became entitled to take the credit on the input having been received in the factory on the basis of the existing Scheme. It is held that the right to credit became absolute when the input was used in the manufacture of the final product. It is held that the incident following thereto must take place in accordance with the Scheme under which the duty had been paid on the manufactured product. It is held that if such a situation is sought to be altered necessarily it follows that right which accrued to a party gets affected. It is held that the Scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier Scheme was applicable and under which the assessee had availed of the credit facility for payment of taxes. It is held that the right which accrued to the assessee on the date when they paid the taxes would continue until the facility available thereto gets worked out or until those goods existed. It is held that the amended sub-rule could not be applied to the goods manufactured prior to 16th March, 1995*** *(date on which sub-rule 4A came into existence).*

8. *The principles laid down in Eicher Motors case (supra) are fully applicable, here. It is however submitted that is no challenge to the validity of sub-rule 17. It is submitted that this Court cannot, therefore, strike down nor read down sub-rule 17. It is submitted that in the absence of such a challenge full effect has to be given to the wording of sub-rule 17. It is submitted that sub-rule 17 specifically provides that the credit would lapse and that credit shall not be allowed. We are unable to accept this submission. What was then sub-rule 4A is now sub-rule 17(a). Sub-rule 17(b) is identical to sub-rule 17(a) except that it is in respect of a different final product. Once a validity of a provision is challenged and the validity is upheld by reading down that provision, then it is not necessary that in all subsequent proceedings the validity must again be challenged. It is sufficient if a party claims that the provision has to be read in the manner laid down by a judgment of this Court. In the light of the judgment of this Court in Eicher Motors case (supra), sub-rule 17 cannot apply to vested rights. Therefore to the extent that the goods have already been exported, prior to March, 1997, the assessee would be entitled to a refund.*

[29] (2003) 11 Supreme Court Cases 324

Key Take – Aways:

The Honourable Supreme Court in this matter by following its earlier decision in Eicher Motors Ltd (supra) has held that credit once eligible, the same cannot be subsequently taken away in the form of amendment. The Court after observing the fact pattern is similar to the Eicher Motors Ltd (supra) has followed the same.

In the matter of Osram Surya (P) Limited[30] - Supreme Court:

The facts involved are that Rule 57G of the erstwhile Central Excise Rules, 1944 are amended to provide additional condition that the credit should be availed within 6 months from the date of issue of duty paying documents. This amendment was also challenged on the ground that it is taking away the vested right with respect to the invoices received prior to the amendment and credit was not yet availed. In this context, the Honourable Supreme Court upheld the amendment by stating that the amendment is not taking away any vested right and is merely introducing limitation for availment of credit. Vide Para 9, the court held as under:

Without such a challenge, the appellants want us to interpret the rule to mean that the rule in question is not applicable in regard to credits acquired by a manufacturer prior to the coming into force of the rule. This we find it difficult because in our opinion the language of the proviso concerned is unambiguous. It specifically states that a manufacturer cannot take credit after six months from the date of issue of any of the documents specified in the first proviso to the said sub-rule. ***A plain reading of this sub-rule clearly shows that it applies to those cases where a manufacturer is seeking to take the credit after the introduction of the rule and to cases where the manufacturer is seeking to do so after a period of six months from the date when the manufacturer received the inputs. This sub-rule does not operate retrospectively in the sense it does not cancel the credits nor does it in any manner affect the rights of those persons who have already taken the credit before coming into force of the rule in question. It operates prospectively in regard to those manufacturers who seek to take credit after the coming into force of this rule. Therefore, in our opinion, the Tribunal was justified in holding that the rule in question only restricts a right of a manufacturer to take the credit beyond the stipulated period of six months under the rule. Therefore, this appeal will have to fail.***

Key Take – Aways:

The Honourable Supreme Court in this matter dealt may be for the first time a situation which places restriction on the credits prospectively. The Honourable Court found that a prospective rule which states the credit will be lost if the assessee does not avail the same within a prescribed time period cannot be said to disturb or cancel the credits in any manner rights of those persons who have already taken the credit before the said rule coming into effect. In other words, the Honourable Court laid down a precedent stating that if any subsequent amendment is not disturbing the earlier granted rights, the same cannot be said to be disturbing the vested rights.

In the matter of Cellular Operators Association of India[31] - Delhi High Court:

In the facts of the said case, Education Cess (EC) and Secondary Higher Education Cess (SHEC) were not payable on excisable goods with effect from 01.03.2015 vide Notification Nos. 14/2015-C.E. and 15/2015-C.E. both dated 1st March 2015. EC and SHE were also abolished and ceased to be payable on taxable services when Section 95 of Finance Act (No. 2) 2004 and Section 140 of Finance Act, 2007 were omitted by Finance Act, 2015. The omission was to take effect from 1st June 2015 vide Notification No. 14/2015-S.T., dated 19th May 2015.

[30] (2002) 9 Supreme Court Cases 20
[31] 2018(14) GSTL 522 (Del)

As a result, levy of EC and SHEC on excisable goods was withdrawn with effect from 1st March 2015 and in respect of taxable services with effect from 1st June 2015. The petitioners do not have any grievance against the withdrawal or abolition of levy of EC and SHE. The grievance of the petitioners is, and they claim a vested right to avail benefit of the unutilized amount of EC or SHE credit, which was available and had not been set off as on 1st March 2015 and 1st June 2015 for payment of tax on excisable goods and taxable services respectively. The contention of the assessee is that EC and SHE were subsumed in the central excise duty and accordingly the general rate of which was increased from 12% to 12.5%, and service tax, which was increased from 12.36% to 14%. In this case, it was held as under:

The decision in the case of Eicher Motors Limited and Another (supra) is distinguishable, for in the said case, what was subject matter of challenge was Rule 57F(4A), which had stipulated that unutilized credit as on 16th March, 1995 lying with the manufacturers of tractors under Heading 87.01 or motor vehicles 87.02 and 87.04 or chassis of tractors or motor vehicles under Heading 87.06 shall lapse and shall not be allowed to be utilized for payment of duty on excisable goods. The proviso, however, had stipulated that nothing shall apply to the credit of duty, if any, in respect of inputs lying in stock or contained in finished products lying in stock as on 16th March, 1995, thereby creating an anomalous situation. Credit of tax paid on inputs and even finished products was available, but not in respect of the sold products. This was clearly taking away a vested right in the form of an amendment to the Rule. There was lapse of credit, which could not be utilized, though the tax/duty had not been withdrawn. The Supreme Court noticed that the credit attributable to inputs had already been used in manufacture of final products that had been cleared, and this alone was sought to be lapsed, notwithstanding the fact that the right had become absolute. On a holistic reading of the entire scheme, it was observed that when acts have been done by the parties concerned on the strength of the Rules, incidence following thereto must take place in accordance with the scheme or the Rules, otherwise it would affect the rights of the assessees. Further, right had accrued on the date when the assessee had paid tax on the raw materials or inputs and the same would continue till the facility available thereto got worked out or until the goods existed. As noticed above, tax/duty had not been withdrawn. Lastly and more importantly, Section 37 of the Central Excise Tariff Act, 1985 (sic) did not enable the authorities to make the Rule impugned therein. The legal ratio in Eicher Motors Limited and Another (supra) was followed in Samtel India Limited (supra) wherein amended Rule 57F(17) of the Central Excise Rules, 1944 was challenged. ***The Rules had postulated lapsing of credit in case of manufactured goods falling under sub-heading 8540.12, though the proviso had provided for credit of duty in respect of inputs lying in stock or contained in finished goods lying in stocks. It was held that the said scheme of credit of input tax, in view of amended provision, could not be made applicable to goods which had already come into existence and under which the assessee had claimed credit facility. As noticed above, in the present case, credit of EC and SHE could be only allowed against EC and SHE and could not be cross-utilized against the excise duty or Service Tax. In fact, what the petitioners seek is an amendment of the scheme to allow them to take cross-utilization of the unutilized EC and SHE upon the two cesses being withdrawn against excise duty and Service Tax, though this was not the position even earlier. Both EC and SHE were withdrawn and abolished. They ceased to be payable. In these circumstances, it is not possible to accept the contention that a vested right or claim existed and legal issue is covered against the respondents by the decision in Eicher Motors Limited and Another (supra) and Samtel India Limited (supra). The said decisions are distinguishable and inapplicable.'***

Key Take – Aways:

The Delhi High Court while rejecting the plea of vested right qua EC and SHEC stated that since the such cesses were abolished and no such cesses were required to be paid on output, the credit of such cesses cannot be allowed as a matter of right. The High Court stated that what the assessee was asking to permit is something which the law itself has not provided. The utilisation of credit of cesses against payable of service tax and excise duty was never contemplated in the scheme of CENVAT credit rules and the credit cannot be allowed to be set off despite of the fact that the increase of rate of output tax/duty was due to subsuming of such cesses. The Honourable Court distinguished the Eicher Motors Ltd (supra) and Samtel India Limited (supra) and stated they are inapplicable.

In the matter of Jayam & Co[32] - Supreme Court:

The facts involved are that the Appellant is a dealer in television (TVs) sets. The Appellant purchased TVs from LG Electronics Private Limited by paying the applicable tax (say purchase price Rs. 100 and VAT Rs 10). The Appellant obtained discount for the TVs purchased from LG Electronics Private Limited (discount of Rs. 20 making the effective purchase cost excluding tax as Rs. 80). The Appellant sold the TVs to his customer at a price higher than the discounted purchase price and lower than the original price at which purchase was made. (Sale price Rs. 95 and tax charged Rs. 9.5). This resulted into a higher value added tax (VAT) input claim (Rs 10) than the VAT output (Rs 9.5). Under these kind of price arrangements, there is a possibility of moving higher amount of input VAT from one entity to the other entity as compared to the commensurate value of goods by artificially increasing the sale price of goods to charge higher VAT amount at the time of sale and later on reducing the price by way of discount. Noticing this possibility, amendment was made to TN VAT Act[33] by inserting sub-section (20) in section 19.

In light of the above sub-section, the excess input VAT claimed (i.e. Rs 0.5) over the output VAT is required to be reversed by the taxpayer. This amendment was given retrospectively with effect from 01st January 2007. In light of the amendment introduced, the same was challenged for its retrospective operation because the amendment is of such nature that it is taking away there vested right over the input VAT accumulated. On the issue of retrospective operation, it was held by the Honourable Supreme Court vide para 18 as under:

When we keep in mind the aforesaid parameters laid down by this Court in testing validity of retrospective operation of fiscal laws, we find that the amendment in-question fails to meet these tests. The High Court has primarily gone by the fact that there was no unforseen or unforeseeable financial burden imposed for the past period. That is not correct. Moreover, as can be seen, sub-section (20) of Section 19 is altogether new provision introduced for determining the input tax in specified situation, i.e., where goods are sold at a lesser price than the purchase price of goods. ***The manner of calculation of the ITC was entirely different before this amendment. In the example, which has been given by us in the earlier part of the judgment, 'dealer' was entitled to ITC of Rs. 10/- on re-sale, which was paid by the dealer as VAT while purchasing the goods from the vendors. However, in view of Section 19(20) inserted by way of amendment, he would now be entitled to ITC of Rs. 9.50. This is clearly a provision which is made for the first time to the detriment of the dealers. Such a provision, therefore, cannot have retrospective effect, more so, when vested right had accrued in favour of these dealers in respect of purchases and sales made between January 1, 2007 to August 19, 2010. Thus, while upholding the vires of sub-section (20) of Section 19, we set aside and strike down Amendment Act 22 of 2010 whereby this amendment was given retrospective effect from January 1, 2007.***

On the aspect of validity of the amendment, the Honourable Court upheld the amendment, though prospectively, which is evident from these paras '*It is a trite law that whenever concession is given by statute or notification etc. the conditions thereof are to be strictly complied with in order to avail such concession. Thus, it is not the right of the 'dealers' to get the benefit of ITC but it's a concession granted by virtue of Section 19. As a fortiorari, conditions specified in Section 10 must be fulfilled. In that hue, we find that Section 10 makes original tax invoice relevant for the purpose of claiming tax.* ***Therefore, under the scheme of the VAT Act, it is not permissible for the dealers to argue that the price as indicated in the tax invoice should not have been taken into consideration but the net purchase price after discount is to be the basis. If we were dealing with any other aspect do hors the issue of ITC as per the Section 19 of the VAT Act, possibly the arguments of Mr. Bagaria would have assumed some relevance****. But, keeping in view the scope of the issue, such a plea is not admissible having regard to the plain language of sections of the VAT Act, read along with other provisions of the said Act as referred to above.*

[32] For citation, please refer supra.

[33] Tamil Nadu Value Added Tax Act, 2006.

For the same reasons given above, ***challenge to constitutional validity of sub-section (20) of Section 19 of VAT Act has to fail. When a concession is given by a statute, the Legislature has power to make the provision stating the form and manner in which such concession is to be allowed. Sub-section (20) seeks to achieve that. There was no right, inherent or otherwise, vested with dealers to claim the benefit of ITC but for Section 19 of the VAT Act. That apart, we find that there were valid and cogent reasons for inserting Section 19(20). Main purport was to protect the Revenue against clandestine transactions resulting in evasion of tax.****'*

Key Take – Aways:

The Honourable Supreme Court has categorically held that with respect to the input VAT that was already accumulated to the dealers prior to the amendment, the same was accrued unconditionally or all the conditions that were in force prior to the amendment were satisfied and right to claim the input VAT was accumulated to the dealer. In view of this reason, the apex court held that the input VAT accumulated prior to amendment was a vested right. With respect to validity of the amendment, the apex court taken a view that input VAT is a benefit or concession to be conferred by a statue and it is the prerogative of the legislature to prescribe the conditions that may be relevant to claim such benefit or concession. Accordingly, the apex court upheld the validity of amendment for prospective operation.

Summarising the verdicts:

The above are some of the important judgments which elucidate the concept of vested right. The decision of Eicher Motors Ltd (supra) is the earliest one from the Honourable Supreme Court, wherein it was held that once the credit was available to the assessee, the same cannot be taken away by way of subsequent amendments. Though, the decision of Dai Ichi Karkaria Limited (supra) does not deal exclusively on the issue of vested right, the Court made an important observation stating that credit is indefeasible and the same is not contingent. Post to that, the decision of Eicher Motors Ltd (supra) is followed in the matter of Samtel India Limited (supra). It is also important to note that Eicher Motors Ltd (supra) and Samtel India Limited (supra) were rendered in situations where the credit was newly introduced and the restrictions that a credit suffers today were not there then.

When the issue came before the Supreme Court in the matter of Osram Surya (P) Limited (supra), we can see that there is some sort of maturity in the cenvat credit system both at the implementation level and adjudication level. The Supreme Court rightly observed that by way of introduction of a new rule barring the availment of credit post certain period does not in any way effect the rights already created.

The Delhi High Court in the matter of Cellular Operators Association of India (supra) stated that in situations where cesses where were abolished on output, there cannot be said a vested right created in favour of the assessees in respect of the cesses already availed. The Delhi High Court rejected the plea of allowing of such credit of cesses to be set off against the output tax/duty payable, since the cesses can not be equated to output taxes/duties. The Delhi High Court stated that such cesses were allowed only for the reason that the similar cesses were payable on output. When the cesses on output were abolished prospectively, the said action cannot be stated to be taking away the vested rights. The Supreme Court in Jayam & Co (supra) again by following the decision of Eicher Motors Ltd (supra) and Samtel India Limited (supra) held that action of insertion of rule disturbing the past credit position was invalidated.

With this understanding of the above jurisprudence on the issue of vested right, in the opinion of the paper writers, the following principles emanate in understanding the meaning of a 'vested right':

- A right gets vested when the credit is availed
- Such right cannot be taken away by way of subsequent amendments to the statute
- Prospective conditions imposing availment/restriction cannot be said to be taking the vested rights away
- No vested right in case where credit was given on condition that such credit can be used against similar output

With this understanding on vested rights, we will examine whether the CENVAT Credit accumulated under the erstwhile regime by way of availment in the prescribed returns[34] is of the nature of vested right or not. As mentioned above, the High Courts have taken a different view:

Extrapolating the above Principles to TRAN Credit:

Now, let's take the leading judgments on this matter and apply the above principles.

Judgement	Reasoning by Courts	Comments
Willowood Chemicals Private Limited	• The HC held that the prescription of time limit for transitioning credit from earlier to GST regime will not take away the vested right since the credit is a concession or benefit provided by the legislature and the same can be regulated. • The said conclusion was arrived by following the decisions of Supreme Court in Jayam & Co (supra), Reliance Industries Limited (supra) and Godrej & Boyce Mfg Co. Pvt Limited (supra). • The Court stated that the credit is given in electronic credit register only subject to making necessary declarations in prescribed format within the prescribed time. • The Court distinguished judgments of Eicher Motors Ltd (supra) and Dai Ichi Karkaria Limited (supra) by stating that conclusions arrived therein was that the MODVAT credit in account of manufacturer is in nature of duty already paid and which cannot be taken away by retrospective rules.	• In the facts of the matter, since the State VAT laws were allowing the refund of the tax that was not being taken forward to GST regime, there is a possibility that the HC would have come to the conclusion that there is no disturbance to vested rights. To this extent, a distinction can be made on the facts. • However, seen in a different perspective, the Gujarat HC also dealt all the judgments which were given in the context of 'vested right', a view can also be taken that irrespective of whether the tax is refunded or not, the judgment lays down a valid prescription regarding vested rights. • In our view, if the CT Act states that the credit availed during earlier regime cannot be carried forward in any manner, then the principles enunciated by SC in Eicher Motors Ltd (supra) and others can be followed. • However, when the CT Act allows the said credit to flow from the earlier laws, subject to filling of the forms and within the prescribed time limit and failure to do so by the assessee, the assessee cannot plead for disturbance of vested rights.
Siddharth Enterprises	• The HC held that the right to carry forward the credit from earlier regime is saved in terms of Section 174 and therefore cannot be allowed to lapse under Rule 117 for failure to declaration in the prescribed form within the due date. • The HC followed the judgments of Eicher Motors Ltd (supra) and Dai Ichi	• The HC has proceeded on the reasoning that since the objective of the GST laws is to remove cascading effect and failure to allow the transition credit would result in cascading effect rejected the time limit prescribed under Rule 117. • In our view, judgment of HC may requires reconsideration because, as stated earlier, the CT Act does not restrict the earlier

[34] Section 140 of CT Act provides for availment of various kinds of transitional credit. We restrict analysis credit qua Section 140(1) alone.

	Karkaria Limited (supra) and accordingly held that the TRAN Credit is a vested right.	credit but allows the credit subject to declaration in forms and filing within the due date. In absence of such declaration in such forms and time limit, the claims would continue in infinitum and the tax authorities would be clueless to verify the credit. Hence, such conditions cannot be said to be taking away the vested rights but only to regularise the vested rights.

Therefore, in light of the above discussion, we understand that all the judgements of various High Courts have failed to determine the following questions by referring to the available jurisprudence in an exhaustive manner:

- Whether CENVAT Credit that was already carried forward in the returns filed under existing law by satisfying all the conditions amounts to 'vested right' and is required to be claimed as transitional credit under GST regime despite not meeting the procedural conditions?

- Whether section 164 of the CT Act which provides for general rule making power can affect the existing rights and liabilities of a taxpayer?

- Whether retrospective amendment to Section 140 to validate Rule 117 by reading time limits into Section 140 can operative retrospectively by statutory force when it has the implications of taking away the already accrued 'vested rights'?

With this, we now proceed to understand whether retrospective amendment can be brought into statute to take away the already accrued vested rights.

Validity of Retrospective Amendment to Section 140 – The Retrospectivity:

As mentioned in the introduction, the Finance Act, 2020 made retrospective amendment to Section 140 to read timelines to avail various types of transition credit in order to validate the time limit prescribed under Rule 117. As stated earlier, such amendment to Section 140 to prescribe time lines may be viewed as abundant caution and to remove any possible interpretation that the Rule 117 does not have power to do so. The view that the amendment of Section 140 itself validates that Rule 117 does not have power to prescribe so, in our view, may not stand to legal scrutiny.

The real question is that, whether the CENVAT Credit, which is undoubtedly, assumes the character of 'vested right' can be disturbed by asking the assessee to fill a specified form and in time limit, when moving to the GST regime. In our view, just because a time limit is attached to regularise the transition credit, by itself, should not be taken as disturbing the 'vested right'. For example, look at one of the conditions in proviso to Section 140(1) which states that the registered person is not allowed to take credit where the said amount of credit is not admissible as input tax credit under CT Act.

In our view, this condition has to be challenged on the ground that it is disturbing the earlier vested credits. For example, if a credit was allowed under the earlier CENVAT Credit Rules but not allowed under Section 17(5) of CT Act, the proviso states that such credit cannot be carried forward to GST regime. This would be disturbing the earlier vested right because the condition which was not available at the time of availment cannot be enforced when moving to the GST regime. Conditions like these have to be struck down by following the decisions of Eicher Motors Ltd (supra), Samtel India Limited (supra), Osram Surya Private Limited (supra) and Jayam & Co (supra).

However, conditions like filing the prescribed forms within the time limit does not disturb the 'vested right', in our view, they have to be seen as conditions facilitating the transition credit. However, if a tax payer for ingenuine reasons cannot file the forms within the time limit, then he cannot raise the plea that such credit should be allowed based on the reasoning of 'vested right'. The decision of Brand Equity Treaties Limited (supra) prescribing the time limit under Limitation Act should be applied for transition credit, in our view, went a bit overboard. If such time limit under Limitation Act is available for transition credit, why the same should not be applied for Section 16(4) of CT Act. In similar way, all time limits prescribed vide the act or rules can be replaced with time lines specified under Limitation Act. Hence, in our view, the condition of filing relevant forms and within time limit, be it, vide act or rules, should be held to be intra-vires and the courts in India have consistently held that retrospectivity of tax law is legal.

Conclusion:

The three questions that were dealt in this article are highly debatable and concluding with a single view is a sin. It is for the Honourable Supreme Court to put rest to the above issues. However, we try to conclude in the subsequent paras, our views/conclusions on the questions raised.

The first, on the vires, we are of the view that the going based on the objective of the GST laws and the jurisprudence, there are bright chances for stating that the Rule 117 prescribing the time limit is intra-vires. However, the time limit may also be viewed as substantial condition since it has potential of disturbing the old credits if not acted within the time limit, an alternate view is also possible, such time limit should have been prescribed by CT Act and should not be left to rules.

The second, on the vested right, undoubtedly, the CENVAT credit is vested right and the same cannot be taken away by subsequent amendments. However, since the CENVAT credit is vested right, it does not follow, that the credit can be availed at the whims and fancies of assessee. Hence, the credit though vested right, the same has to be made good by following the time lines prescribed.

The third, on the retrospectivity, there is no bar to retrospectively amend the tax law and it is not a strange thing. The only issue is that whether the amendment to insert time limit in Section 140 would by itself make Rule 117 ultra-vires. As stated earlier, this itself may not be reason to struck down Rule 117.

As stated earlier, we do not certain answers for the questions raised. However, the answers would affect the credits involved. The Honourable Supreme Court has to put rest to all of this and no idea how much time it would take for the same. Till then, Fingers crossed!

[1] Check for Legends at the end of this article.

Legends:

Acronym	Detailed
SC	Supreme Court
HC	High Court
Y	Yes
N	No
Right	Vested Right
Rule 117	Vires of Rule 117
Rule 164	Power to prescribe time limit
Prior	Prior to amendment to Section 140

Post	Post to amendment to Section 140
F	Followed
NF	Not Followed
D	Distinguished