

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 15114 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA **Sd/-**
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE **Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

BHAGWATI CONSTRUCTION
Versus
UNION OF INDIA

Appearance:

MR UCHIT N SHETH, ADVOCATE for the Petitioner(s) No. 1,2
MR SIRAJ R GORI, ADVOCATE for the Respondent(s) No. 2
NOTICE SERVED for the Respondent(s) No. 1

CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 13/04/2022

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

1. By this writ-application under Article 226 of the Constitution of India, the writ-applicants have prayed for the following reliefs :

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- A. *This Hon'ble Court may be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ or order quashing and setting aside impugned communication dated 13.5.2019 (annexed at Annexure A) refusing to release refund/reimbursement of GST due to the Petitioners as per the Joint Procedure Order dated 21.1.2018 passed by the Western Railways in terms of order dated 27.10.2017 passed by the Railways Board;*
- B. *This Hon'ble Court may be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ or order directing the Respondents to grant reimbursement of Rs. 1,23,02,620 paid by the Petitioners under the GST Act towards contract dated 29.6.2017;*
- C. *Pending notice, admission and final hearing of this petition, this Hon'ble Court may be pleased to direct the Respondents to grant reimbursement of Rs. 1,23,02,620 paid by the Petitioners under the GST Act towards contract dated 29.6.2017;*
- D. *Ex parte ad interim relief in terms of prayer C may kindly be granted;”*

2. The facts giving rise to the present writ-application may be summarised as under :

3. The writ-applicant no.1 is a partnership firm having its place of business at Ahmedabad. The writ-applicant no.2 is the partner of the said firm.

4. The writ-applicants are the Government approved railway contractors since last 20 years. The writ-applicants had been awarded E-Tender No. Dy CE (C) P&D/ADI/ADI-HMT-16 by the Railways Board and an agreement was entered into on 29.6.2017.

5. The writ-applicants were registered under the Gujarat Value Added Tax Act, 2003 (for short, 'the VAT Act'). It appears that the writ-applicants had opted for a lump sum tax scheme and hence their tax liability under the VAT Act was 0.6%. Further, the service tax in respect of the construction contracts pertaining to the railways was exempt by virtue of the Mega Exemption Notification No.25/2012 issued under the Finance Act, 1994.

6. The GST regime was introduced in the country w.e.f. 1.7.2017. The VAT as well as the service tax was subsumed in the GST Act. It is not in dispute that the applicable rate of tax under the GST Act in case of the writ-applicants is 12%.

7. The contractors preferred a representation with the Railways for granting reimbursement of the additional tax liability under the GST Act in respect of the contracts which were entered into prior to the GST regime. This was particularly because the GST Act has conferred a right to the suppliers of

goods or services to collect tax from the recipients by way of issuance of tax invoice.

8. Having regard to the representations made by the contractors, the Railways Board issued an order dated 27.10.2017 giving instructions to all the Railway Divisions to issue a Joint Procedure Order for neutralizing the impact of the GST on the existing works allotted prior to the implementation of the GST regime.

9. Pursuant to such order, the Western Railways issued a Joint Procedure Order on 21.1.2018 and specified the procedure to claim the GST reimbursement. It is the case of the writ-applicants that the working for grant of the reimbursement of tax under the GST Act was contemplated contract-wise in such Joint Procedure Order.

10. A supplementary agreement was entered into by the writ-applicants with the Western Railways on 26.2.2018 for the contract pertaining to E-Tender No. Dy CE (C) P&D/ADI/ADI-HMT-16 based on the Joint Procedure Order.

11. The writ-applicants put up a claim on 26.2.2018 for reimbursement of the differential tax paid under the GST Act in accordance with the Joint Procedure Order and the supplementary agreement. The claim was supported by a Chartered Accountant certificate and also by taking into consideration the input tax credit admissible, if any, for the contract. The final claim in respect of the contract in question

was submitted by the writ-applicants through their Chartered Accountant on 30.11.2018.

12. After scrutiny of the claim of the writ-applicants along with the supporting documents, the Deputy Chief Engineer of Railways generated a pay order on 10.2.2019 granting refund of the GST to the tune of Rs.1,23,02,620=00 after making statutory deductions.

13. The writ-applicants issued tax invoice on 11.2.2019 for collection of the amount under the GST Act. Thereafter, a letter was issued to the writ-applicants on 27.2.2019, *inter alia*, requiring them to give some clarifications, to which response was given by the writ-applicants on 1.3.2019.

14. The Deputy Chief Engineer, thereafter, wrote a letter to the writ-applicants on 5.4.2019 asking them to clarify as to why the input tax credit was shown to be 'Nil' in the working sheet for the refund of the GST even though the writ-applicants had discharged tax liability in the returns by utilizing the input tax credit.

15. The writ-applicants responded vide letter dated 10.4.2019 clarifying that the contract in question did not involve use of any goods in respect of which the input tax credit was admissible. The input tax credit which had been utilized for making the payment of tax in the GST returns was tax credit admissible in respect of other contracts.

16. The writ-applicants received a letter from the Deputy Engineer on 7.5.2019 again alleging that as against the tax refund/reimbursement of Rs.1,23,02,620=00 claimed by the writ- applicants, the tax of only Rs.33,92,980=00 was paid through the electronic cash ledger. The writ-applicants were asked to furnish the details of other contracts and input tax credit claimed qua such contracts.

17. Thereafter, it appears that the writ-applicants lodged a complaint dated 10.5.2019 with the Chief Engineer complaining that the refund/reimbursement was being withheld despite the fact that all the details as called for had been provided. The writ-applicants further pointed out that the details of the other contracts which were irrelevant were being called for.

18. The writ-applicants, thereafter, received the impugned letter dated 13.5.2019 from the Deputy Engineer informing them that they would not be granted reimbursement of the GST amount since only a part amount of the tax was paid through the electronic cash ledger.

19. Several correspondences were exchanged between the writ-applicants and the respondents and the writ-applicants gave their submission on 5.9.2019. It was pointed out that all the documents as required by the Joint Procedure Order and the supplementary agreement had already been submitted. Insofar as the requirement for contract-wise input tax credit for other contracts was concerned, it was pointed out that this was beyond the Joint Procedure Order and, in fact, not practically

possible. There was no requirement under the GST Act or any other law to maintain contract-wise details of the input tax credit claim. It was pointed out that insofar as the contract in question was concerned, the goods which were used did not entail the input tax credit and that such fact was not disputed. The writ-applicants, ultimately, requested for release of the GST refund/reimbursement.

20. A meeting of the writ- applicants, other similar contractors as well as the officers of the Railway Board was held on 13.1.2020 to resolve the issue. However, the issue could not be resolved.

21. The writ-applicants once again renewed their request on 26.5.2020. It was pointed out that the neutralizing of the GST impact and the input tax credit in respect of each contract would be taken care of separately. In fact, the price for contracts which were entered into after the implementation of the GST regime would be a relevant consideration for seeking the benefit of the input tax credit accruing to the writ-applicants. Thus, it appears that the cumulative calculation of all the contracts which was being demanded by the officers was impossible and also beyond the requirement of the Joint Procedure Order. Thereafter, it appears that the writ-applicants gave several reminders to the respondents.

22. As the respondents have declined to release the GST refund/reimbursement, the writ-applicants are here before this Court with the present writ-application.

SUBMISSIONS ON BEHALF OF THE WRIT-APPLICANT :

23. Mr.Uchit Sheth, the learned counsel appearing on behalf of the writ-applicants made the following submissions :

(a) The non-release of the refund by the respondents on the ground that while tax paid through the cash ledger is only Rs.33,92,980=00, the refund cannot be claimed of Rs.1,23,02,620=00, is absolutely misconceived and not tenable in law insofar as the input tax credit is concerned. It is well established that the input tax credit is as good as tax paid. The input tax credit is admissible under the GST Act of tax actually paid on the inward supply, which is legally admissible as credit for the purpose of payment of the output tax. There is no distinction between the tax paid through the electronic cash ledger and the tax paid through the electronic credit ledger. Therefore, the refusal to grant the refund on the basis that substantial amount is paid through the electronic credit ledger is not sustainable. The reliance is placed on the following judgements :

- (i) Eicher Motors Ltd. vs. Union of India and Another, (1999) 2 SCC 361.
- (ii) Jayaswal Neco Ltd. vs. Commissioner of Central Excise, (2015) 10 SCC 651.

(b) The insistence on the part of the respondents to produce the details of other contracts with a view to establish as to the input tax credit in respect of which the contract has been utilized for making the payment

of the output tax is absolutely unwarranted. At the outset, the Joint Procedure Order of the Western Railways clearly provides for contract-wise calculation of the refund/recovery. The supplementary agreement has also been entered into for the contract in question. A Chartered Accountant has certified that the GST-paid goods have not been used for this particular contract and hence there is no input tax credit qua this contract. In fact, the pay order had already been generated by the respondent no.2 after due consideration of all the relevant facts. Thus, the details of other contracts are absolutely irrelevant for the purpose of determining the refund/reimbursement of the contract in question. In any event, it is otherwise even not possible to ascertain as to the input tax credit of which contract was utilized for making the payment of the output tax. It is fundamental to the scheme of the GST Act that the input tax credit, once credited to the electronic credit ledger, forms a homogeneous pool and, therefore, it is impossible to determine which input tax credit is utilized for the payment of what liability. The correct approach ought to be to work out the differential tax liability of each contract which would also be in consonance with the formula prescribed in the Joint Procedure Order. The respondent no.2 authority is bound by the policy of the Ministry of Railways as well as by the Joint Procedure Order passed by the Western Railways and the non-compliance of the same is wholly without jurisdiction, arbitrary and illegal.

(c) The GST returns cannot be filed on the portal unless the tax liability as admitted in the returns is paid. The copies of the GST returns have been furnished to the respondents and, in fact, the impugned communication dated 13.5.2019 is clearly based on such returns. Thus, the evidence regarding the payment of tax has already been furnished. The respondents are, however, refusing to grant refund on the basis that a part liability has been paid through the electronic credit ledger. Such stance of the respondents is completely erroneous and illegal.

SUBMISSION ON BEHALF OF THE RESPONDENTS :

24. Mr.Siraj Gori, the learned counsel appearing on behalf of the respondents has relied upon the affidavit-in-reply filed by the respondents. He has made the following submissions:

(a) The respondents are not averse to granting the GST refund/reimbursement to the writ-applicants. However, the writ-applicants are not able to substantiate their refund claim by showing the actual payment of the GST through the cash ledger and, therefore, the respondents are not releasing the refund/reimbursement to the writ-applicants.

(b) The documents with respect to other contracts executed by the writ-applicants with the Railways are yet to be furnished and, therefore, the refund/reimbursement with respect to the present contract cannot be released.

(c) While the pay order for grant of refund/reimbursement was generated, the respondents wanted to further verify the refund claim and, therefore, the same has been withheld.

ANALYSIS :

25. The issue that arises for our consideration is, whether the respondents are justified in withholding the refund/reimbursement in favour of the writ-applicants.

26. The Government of India, through the Ministry of Railways, had issued an order on 27.10.2017 for the GST neutralization of the contracts. The order reads as under :

*“Government Of India
Ministry Of Railways
(Railway Board)
New Delhi*

No. 2017/CE-I/CT/7/GST, dated 27.10.2017

To,

As per list attached

Sub: Impact of GST on Existing Works Contracts

1. *Ministry of Railways have received a number of representations from Zonal Railways, railway contractors and contractors' associations with a request that the increased tax liability due to implementation of GST should*

be borne by railways in works contracts awarded before implementation of GST. The issue was under consideration of Board for some time. It is seen that the impact of GST varies, depending upon the type of work, business model adopted by contractor and also on the state in which these works are being carried out. The impact is much more in labour intensive works like P. Way linking, Earthwork etc.

2. *Considering the above, it has been decided to make existing works contracts awarded before implementation of GST, as GST neutral after carefully taking into account the input tax credit available to the contractor, on a case to case basis, on production of documentary evidence. This exercise may involve reimbursement to contractors or recovery from contractors depending upon the tax liability of the contractor before GST and after GST including input tax credit available to the contractor after GST.*

3. *Zonal Railways/Production Units may therefore work out modalities through a procedure order with the approval of General Manager in consultation with Principal Financial Advisor & legal cell. Following should be kept in view while framing the procedure order:*

3.1 *For dealing with impact of GST in individual contracts, a supplementary agreement is to be entered into with the contractor in consultation with financial advisor in terms of Para 1265 of the Engineering Code.*

3.2 *A clause is to be added in the supplementary agreement*

to state that in case there is any further change in the GST tax structure till the date of completion of work or any error is noticed in the calculation of amount payable/ recoverable till the release of Final Bill amount to contractor, the same shall be paid by the Railways or recovered from the contractor's bills/security deposit or any other dues of contractor with the Govt. of India.

3.3 In case while awarding the contracts, the reasonability of rates was justified by Tender committee considering the impact of GST, such compensation would not apply.

3.4 For neutralizing GST impact on the works contracts awarded before implementation of GST; along with documentary evidence, the contractor should submit work sheet of tax liability before GST and after GST duly certified by chartered accountant engaged by him.

The tax liability of the contractor before implementation of GST should be worked out taking into account all stipulated taxes in force before GST implementation i.e., Excise duty, VAT including VAT on Excise duty, Entry tax, Octroi duty, prevalent Service tax etc., irrespective of whether the same were actually paid by agency or not.

3.5 The rate reasonability and quantities of input materials for which ITC shall be available to the contractor, should be ensured by the executive with due care in consultation with associate finance.

3.6 Sample post checks of the compensation made to the

contractor may be got undertaken by the GST consultant engaged by the Zonal Railways/ Production Units.

3.7 Recovery, if any, which is required to be done from the contractors, may be regulated as per Section 171(1) of CGST Act, 2017.

4. This is issued with the approval of Board (ME, FC, CRB).

(Prem Sagar Gupta)

Executive Director/ Civil Engineering(G)/ Railway Board”

27. Pursuant to such order, the Western Railways issued a Joint Procedure Order dated 21.1.2018 laying down the procedure for the GST neutralization based upon the policy of the Government of India. The relevant portion of the order reads thus :

“4. The review for GST neutrality is to be done on a case to case basis on the production of various detailed out in the following paragraphs of the JPO.

xxxx xxxxx

8. Procedure to be followed for GST neutralization:

8.1. In accordance with the Railway Board’s letter dated 27.10.2017 all contracts awarded prior to 01.07.2017 and all such contracts for which tenders were opened prior to 01.07.2017 but finalized after the implementation of GST are to be considered for GST neutralization. However, if any of the tender has been finalized duly considering the impact

of GST, then such contract will not be eligible for the proposed GST neutralization.

8.2 For dealing with the impact of GST in individual contract, a Supplementary (Subsidiary) agreement is to be entered into by the Executive, with the contractor , duly vetted by Finance, in terms of Para 1265 of the Indian Railway Engineering Code. A Supplementary agreement is to be signed by the Original Agreement Signing Authority or by the Authority delegated such powers. (Proforma for the agreement is given in Annexure-A)

xxxx xxxxx

8.5 The contractor shall submit a work sheet for On Account/FCC bills for assessing the tax liability before and after GST including the input tax credit available to the contractor. This shall be duly certified by the Statutory/Tax Auditor auditing the books of the contractor. The tax liability of the Contractor before implementation of GST should be worked out taking into account all stipulated taxes in force prior to the implementation of GST i.e. excise duty, VAT, including VAT on excise duty, entry tax, octroi duty, prevalent service tax etc. irrespective of whether the same were paid by the agency or not for the On Account/FCC Bills

8.6 On receipt of the Account/Final contract certificate from the executive, the contractor shall submit the following documents (for the on Account/FCC to the Executive for the GST neutralization:

a) *The invoice (Bill) duly segregating the GST component from the gross amount of the work executed. This should contain details of GSTIN, TIN & STRN numbers- state-wise (if he is working in more than one State) along with the worksheet.*

b) *A work sheet for the tax liabilities before GST and after GST, including the list of items for which the Input Tax Credit (ITC) is available for the work. A sample copy of the work sheet is given in the Annexure-B for general guidance. The details given in this worksheet and calculations should be duly certified by Statutory/Tax Auditor auditing books of the contractor. This worksheet shall be submitted for each of the bills, which may have already been passed as per provision of para 15 of this JPO and also for all other bills being processed after the notification of the GST for the contracts falling in the categories in para 1(i) and (iii) GST rates as applicable at the time of actual passing of bills will be adopted.*

The worksheet shall contain details of the quantities of all input materials/services procured for the particular work/works. The contractor shall also certify that the invoices submitted for the work have not been/ will not be used for any other work to claim Input Tax Credit (ITC)/refund. The contractor shall also give a certificate that no refund claims of GST are pending settlement with the GST authorities.

At the Railway end, the component of input materials/

services for SOR/USSOR items will be checked with reference to the rate analysis available in the SOR/USSOR, For NS items, the executive officer will carry out a detained rate analysis considering the input materials/services required for executing the NS item which will be approved by JAG / Senior Scale (independent charge)

c) The contractor shall, for the On Account/FCC bills, shall submit all the original Tax Invoices for all the input material/services procured for the particular work, enfaced with agreement number, in support of the ITC and the same shall be duly certified by the Statutory/Tax Auditor auditing the books of the contractor.

d) The tax liability of the Contractor, before implementation of GST, shall be worked out for On Account/FCC bills taking into account all stipulated taxes in force before the GST implementation i.e. excise duty, VAT, including VAT on Excise duty, entry tax, octroi duty, prevalent service tax etc., irrespective of whether the same were paid by the agency or not.

e) In case the contractor has procured material from unregistered vendors/suppliers the details of such procurement should be included in worksheet.

f) The contractor shall submit copies of GST returns GSTR1, GSTR2, GSTR3, GSTR3, etc., as available on GST Network from time to time.

xxxx xxxxx

10. The difference of bill amount arrived at as per the old taxes (before GST) and GST, duly considering the ITC, certified by the Statutory/Tax Auditor auditing the books of the contractor, shall be checked by the Executive. The tax liability of the contractor before and after implementation of the GST, submitted by the contractor, shall be recorded in the Measurement Book clearly showing---

- Tax liability before GST = rs _____
- Tax liability after GST =rs _____
- Difference =(+)/(-) rs _____

The bill containing these details shall then be prepared as per the format given in Annexure 'B' and forwarded to the Finance for security and prior vetting. The contractors claim will then be submitted to the associate finance for passing of the Bill. The difference in the tax liability before the GST and after the GST shall be reimbursed to the contractor or recovered from the contractor as the case may be.

11. Recovery, if any, from the contractors may be regulated as per section 171 (1) of CGST Act, 2017, i.e., any reduction in the rate of tax on any supply of goods or services or the benefit of the Input Tax Credit shall be passed on to the recipient (Railways) by way of a commensurate reduction in the prices. The executive will review all the agreements to ensure that recovery is done, wherever due. The recovery shall be effected from the on account bills on hand and if no account bills are pending, the recovery shall be effected from the final bill/security deposit or any other dues.”

28. It is germane to note that paragraph 4 of the JPO as above provides that the review for the GST neutrality is to be done on case-to-case basis. Further, it is provided in paragraph 8.2 as above of the JPO that a supplementary agreement is to be entered into by the executive with the contractor for dealing with the impact of the GST in individual contracts. Paragraph 8.6(b) of the JPO provides that the contractor will have to provide a worksheet for the tax liabilities before the GST and after the GST including the list of items for which the input tax credit is available for the work. It is further provided that the worksheet should contain the details of the quantities of the input materials/services procured for the particular works. Paragraph 8.6(c) of the JPO further provides that the contractor shall submit the original tax invoices for all the input material/services procured for the particular work in support of the input tax credit. Paragraph 8.6(f) of the JPO requires furnishing the copies of the GST returns. Paragraph 10 of the JPO provides for calculating differential tax liability for the contract considering the input tax credit for the contract. A draft of the supplementary agreement is annexed along with the JPO.

29. From the reading of the terms of the JPO as aforesaid, the following factual position emerges :

- (a) The calculation of the GST neutralization is envisaged separately for each contract.
- (b) A supplementary agreement is to be entered into by the Railways with the contractor for each contract for the purpose of GST neutralization.

(c) The details of the input tax credit are to be provided by the contractor in respect of the input materials used for a particular work.

(d) Reimbursement/refund is to be granted for differential tax liability taking into account the pre-GST tax liability and the post-GST tax liability. If at all the post-GST liability for a particular contract is lower than the pre-GST liability, then the amount can also be recovered from the contractor.

30. In the case of the writ-applicants, it is not in dispute that the supplementary agreement has been entered into only with respect to the agreement dated 29.6.2017 executed in connection with the work of E-Tender No. Dy.CE(C)/P&D/ADI/HMT-16. The parties to the agreement have clearly agreed to the GST neutralization in respect of such contract. Moreover, the writ-applicants have produced a certificate of the Chartered Accountant certifying that no GST-paid inputs have been used in the execution of the contract and, therefore, there was no input tax credit pertaining to this contract. Such facts are not in dispute. If that be so, then the writ-applicants are entitled to refund in terms of the order for the GST neutralization issued by the Ministry of Railways read with the JPO and the supplementary agreement. In fact, it appears that this was also determined by the respondents themselves by generating a pay order in favour of the writ-applicants.

31. The tenor of the impugned communication dated 13.5.2019 issued by the respondent no.2 would reveal that even after the generation of the pay order, the same has not been disbursed primarily on the basis that the writ-applicants have paid a much lower amount of tax through the electronic cash ledger.

32. It is unfortunate to note that the respondents have not been able to understand the basic scheme of the GST Act. The input tax credit is admissible under Section 16(1) of the GST Act of the tax paid on goods and services used in the course of the business. The input tax credit claimed by a taxable person gets credited into his electronic credit ledger. Such amount is the actual tax that such taxable person has paid to his supplier, which is further paid to the Government treasury. Thereafter, while making the payment of the output tax, Section 49 of the GST Act entitles a taxable person to utilize the balance available in the electronic credit ledger. Thus, the tax which was already paid by a taxable person is effectively allowed to be set off against the output tax liability.

33. Therefore, the tax payment through the electronic credit ledger is a legally recognized mode of payment under the GST Act. In fact, it is settled legal position that the input tax credit is 'as good as tax paid' by the assessee. A reference may be made to a judgement of the Supreme Court in the case of Jayaswal Neco Ltd. (*supra*), wherein the following was observed after relying upon the earlier decisions :

“17. In clause (b) of Rule 173-G, a duty has been cast on the manufacturer to maintain an account current with the Commissioner for the purpose of discharging his duty liability by debiting such account current. This clause also provides that duty can be discharged by utilising CenVAT credit in the manner mentioned in the said clause. Thus, insofar as mode of payment is concerned, it can be through account current or by utilising CenVAT credit. Both the methods are permissible. The mode of payment of duty through CenVAT credit is as good as making payment through account current.

18. This Court in CCE v. Dai Ichi Karkaria Ltd. [(1999) 7 SCC 448 : (1999) 112 ELT 353] described credit under the ModVAT scheme to be “as good as tax paid”. The reasons for the aforesaid view taken by the Court are contained in paras 18 and 19 of the judgment which may be recapitulated as under : (SCC pp. 458-59)

“18. 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 acknowledgment 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.

19. *It is, therefore, that in Eicher Motors Ltd. v. Union of India [(1999) 2 SCC 361 : (1999) 106 ELT 3] this Court said that a credit under the ModVAT Scheme was 'as good as tax paid'.*"

34. Thus, the payment of tax by utilization of the tax credit is a valid mode of payment. The denial to release refund/reimbursement on the ground that only part amount has been paid by the writ-applicants through the electronic cash ledger is not legally tenable. The entire amount of the output tax paid under the GST Act in relation to the contract in respect of which the supplementary agreement has been entered into with the writ-applicants needs to be forthwith released irrespective of the fact, whether such amount has been paid through electronic cash ledger or through electronic credit ledger.

35. Insofar as the passing of the benefit of the input tax credit to the respondents is concerned, if no input tax credit is attributable to this particular contract since no GST-paid inputs have been used for the execution of the contract, then the question of passing of the benefit of the tax credit also does not arise. The certificate of the Chartered Accountant certifying that no GST-paid goods have been used for executing this particular contract is not refuted by the respondents. The terms of the JPO clearly envisage refund or recovery separately for each contract for which supplementary agreement is to be entered into. Admittedly, in the present case, the supplementary agreement is entered into with the writ-applicants only for one contract and, therefore, only input tax credit which is directly attributable to such contract is to be considered while deciding refund/recovery.

36. It may not be out of place to state that the fact that the output tax even in respect of this contract has been paid through the electronic credit ledger does not mean that the input tax credit is claimed in respect of this contract. There is a difference between availment of the input tax credit and the utilization of the input tax credit. Insofar as the passing of the benefit of the input tax credit is concerned, the input tax credit factually availed qua the contract is to be calculated. This is clear from the terms of the order of the Ministry of Railways as well as the JPO. However, insofar as the utilization of the input tax credit from the electronic credit ledger is concerned, the same is only a mode of payment of the output tax. For the purpose of payment of tax, the electronic credit ledger is a homogeneous pool of

credit which cannot be vivisected. It appears that the respondents have not been able to understand this distinction between the availment and the utilization of the input tax credit which has led to the present controversy. The non-payment of refund to the writ-applicants is contrary to the order of the Ministry of Railways read with the JPO and the supplementary agreement and the same ought to be forthwith released.

37. If at all, for other contracts with the writ-applicants subsisting as on date of the implementation of the GST regime, the refund or recovery is to be worked out in terms of the JPO, then it is open for the respondents to enter into supplementary agreements in terms of the JPO for such contracts and, thereafter, the refund or recovery, as the case may be, can suitably be worked out.

38. In the result, the writ-application succeeds and is hereby allowed. The impugned communication dated 13.5.2019 refusing to release the refund/reimbursement of the GST is hereby quashed and set-aside. The respondents are directed to forthwith release the refund of Rs.1,23,02,620=00 in respect of which the pay order has already been generated. The refund may be paid to the writ-applicants within a period of four weeks from the date of receipt of copy of this order.

(J. B. PARDIWALA, J.)

(NISHA M. THAKORE, J.)

/MOINUDDIN