IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.1848 of 2023

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M/s Flipkart Internet Pvt. Ltd., a Company incorporated Under the Companies Act, 1956 having address at Gram Panchayat Amhara, Thana No. 44 and Mouza Amhara, Circle Office Danapur, Police Station-Bihta, District-patna, Bihar-801118, through its Authorized Representative namely Shri Sanjay Kuamr. V. Munoyat, Male aged about 48 Years, Son of Shri Vimal Chand. K. Munoyat, Resident of The Garden, ETA Star Apartment, K-304, Woodrose, Binay Mill Road, Magadi Road, Polioce Station-Kempapura Agrahara, District-Bengaluru-560023, Karnataka.

... ... Petitioner/s

Versus

1. The State of Bihar through the Secretary-Cum-Commissioner of State Tax, Bihar having its office at Vikas Bhawan, Bailey Road, Patna.
2. The Additional Commisioner of State Tax (Appeal), Central Division, Patna.
3. The Joint Commissioner of State Tax, Patliputra Circle, Central Division, Patna.
4. The Union of India through the Principal Secretary, Department of Revenue, Ministry of Finance, Government of India, Central Secretariat, North Block, New Delhi-110001.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 2291 of 2023

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M/s Sanyog Construction Private Limited, a Private Limited Company incorporated under the Companies Act, 1956 having its registered office at House No. 15 E, Rajendra Nagar, Road No. 12, Patna 800016, P.S.- Kadamkuan, District- Patna through its director Kunwar Singh, male aged about 48 years, S/o Triveni Singh, Resident of House no. 15 E, Road No.- 12, P.S.- Kadamkuan, District- Patna.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary cum Commissioner, Department of State Taxes, Government of Bihar, Patna.
2. The Principal Secretary cum Commissioner, Department of State Taxes, Government of Bihar, Patna.
3. The Deputy Commissioner of State Taxes, North Circle, Patna.
4. The Additional Commissioner of State Taxes, East Division Patna (Appeal).

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 2606 of 2023

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Summit Digital Infrastructure Limited having its Principal place of business at Plot No. 210 and 233, Dudheshwar Nath Complex, Bailey Road, Patna, Bihar - 800014, through its DGM- Taxation Shri Manish Khetan Male, aged about 41 Years, Son of Shri Omprakash Khetan, R/o E/404, Sonmarg CHS, Opp. St. Marys School, SV Road, Malad (West), Mumbai - 400064.

... ... Petitioner/s

Versus

1. The State of Bihar through the Secretary, Ministry of Finance, Department of Revenue, having its office at Vikash Bhawan, Baily Road, Patna - 800015.
2. The Deputy Commissioner, State Tax, Danapur Circle, Patna.
3. The Additional Commissioner State Tax (Appeals), Patna West Division, Patna.
4. The Joint Commissioner of State Tax, Danapur Circle, Danapur, Patna.
5. HDFC Bank Ltd., through its Branch Manager, Saguna More Branch, Danapur, Patna.
6. The Union of India through the Secretary, Department of Revenue, Ministry of Finance.

... ... Respondent/s

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Appearance :
(In Civil Writ Jurisdiction Case No. 1848 of 2023)
For the Petitioner : Mr. Tarun Gulati, Sr. Advocate
Mr. Kisore Kunal, Advocate
Mr. Manish Rastogi, Advocate
Mr. Parijat Saurav, Advocate
Ms. Runhun Pari, Advocate
For the State : Mr. P.K. Shahi, Advocate General
Mr. Vikash Kumar, SC-11
For the Union of India : Dr. K.N. Singh, ASG
Mr. Anshuman Singh, Sr. Standing Counsel, CGST
(In Civil Writ Jurisdiction Case No. 2291 of 2023)
For the Petitioner : Mr. Shashwat Pratyush, Advocate
For the State : Mr. P.K. Shahi, Advocate General
Mr. Vivek Prasad, GP-7
(In Civil Writ Jurisdiction Case No. 2606 of 2023)
For the Petitioner : Mr. Sanjay Singh, Sr. Advocate
Ms. Anveshika Singh, Advocate
Mr. Rudrank Shivam Singh, Advocate
For the State : Mr. P.K. Shahi, Advocate General
Mr. Vivek Prasad, GP-7
For the Union of India : Dr. K.N. Singh, ASG
Mr. Anshuman Singh, Sr.Standing Counsel, CGST

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE MADHURESH PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE MADHURESH PRASAD)

Date : 19-09-2023

1 These writ petitions have been considered together, as they involve common questions of law and identical issues and are accordingly being disposed of by the present common judgement and order.

2 The three writ petitioners, while availing the remedy of appeal under Section 107 of the Central Goods and Services Tax (CGST) Act/Bihar Goods and Services Tax (BGST) Act, have resorted to debiting of their respective electronic credit ledger (ECRL) for an amount equal to 10 percent of the remaining amount of tax in dispute arising from the assessment order in relation to which the appeal has been filed. Such sum is required to be deposited, failing which appeal would not be maintainable in terms of sub-Section 6 (b) of Section 107 of the CGST/BGST Act, which reads as follows:

> "***107(6).*** *No appeal shall be filed under sub-section (1), unless the appellant has paid—*
>
> *(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and*
>
> *(b) a sum equal to ten percent. of the remaining amount of tax in dispute*

arising from the said order, in relation to which the appeal has been filed."

3 The Appellate Authority has rejected the appeal as being defective for non-payment of the pre-deposit. According to the Appellate Authority, the 10 percent pre-deposit could only be paid by utilizing the cash ledger as per Section 49(3) of the CGST/BGST Act read with Rule 85(4) of the Central Goods and Services Tax Rules/Bihar Goods and Services Tax Rules (CGST/BGST Rules), 2017.

4 Since the petitioners have not paid the sum equal to 10 percent of the amount of tax in dispute under Section 107(6) of the CGST/BGST Act by utilizing cash ledger, the Appellate Authority has held that the mandatory requirement of pre-deposit was not complied with for maintaining the appeal under Section 107(6) of the CGST/BGST Act.

5 There is one additional fact in the case of M/s Sanyog Construction Pvt Ltd. (*CWJC No. 2291 of 2023*). In this case, the appeal has also been held to be barred by limitation specified under Section 107 of the CGST/BGST Act, which provides three months period for filing of appeal. As per Sub-Section (4) of Section 107 of the CGST/BGST Act, if the Appellate Authority is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within this

period, it may be allowed to present the appeal within a further period of one month.

6 The brief facts of the three cases are as follows:

CWJC No. 1848 of 2023

7 The petitioner is a registered taxpayer under the provisions of the CGST Act. Upon scrutiny of the returns filed by it for the financial year, 2017-18, it was observed that it had availed excess Input Tax Credit (ITC) in violation of Section 16(2) of the CGST Act.

8 The scrutiny resulted in initiation of proceedings under Section 73 of the CGST Act on 24-8-2022. The proceeding was initiated on the ground of mismatch of ITC claimed by the petitioner in its form GSTR-3B for the period July 2017 to March 2018; when compared with the ITC available in the auto-populated form GSTR-2A generated for the period.

9 After taking into consideration the submissions made by the petitioner, an order dated 24-09-2022 was passed under Section 73(9) of the CGST Act. The petitioner's liability was thus determined at Rs. 63,92,183/- (Tax Rs. 58,11,076/- + Penalty @ 10 percent, Rs. 5,81,107/-). A demand for this amount was raised in the prescribed form GST DRC-07 dated 24-9-2022. The tax liability comprised of CGST/BGST as also

Integrated Goods and Services Tax (IGST).

10 Aggrieved by such determination and demand made by the office of the Joint Commissioner of State Tax, the petitioner preferred an appeal before the Appellate Authority under Section 107 of the BGST Act in the prescribed form. The entire amount of tax determined by the Joint Commissioner was disputed by the petitioner.

11 The petitioner claims to have made the pre-deposit 10 percent for maintaining its appeal in respect of the remaining amount of BGST and IGST in dispute by debiting his ECRL. The requisite pre-deposit 10 percent of the remaining amount of tax in dispute under CGST, however, has been deposited by utilising Electronic Cash Ledger ("ECL" for short).

12 The Appeal has been rejected on 04.01.2023 by the Appellate Authority as being defective since payment of pre-deposit 10 percent of the disputed amount under the BGST and IGST was done by debiting its Electronic Credit Ledger (ECRL), instead of paying it from the Electronic Cash Ledger (ECL), which was in contravention of Section 49(3) of the BGST Act read with Rule 85(4) of the BGST Rules.

CWJC No. 2291 of 2023

13 The petitioner is a company engaged in civil construction activities. It purchased vehicle/s from two vendors

who were registered dealers in motor vehicle. The vehicles were purchased in the month of October 2017 and December 2017. Petitioner claimed ITC in respect of purchase of vehicles from the two vendors for the financial year 2017-18. The authorities held that the vehicles were to be used for the purposes which were not in furtherance of its business. By order dated 12.07.2022 passed by the Office of the Joint Commissioner of State Tax, the petitioner was thus held to be disqualified to avail the ITC on purchase of the vehicles in terms of Section 17(5) of the Act. Accordingly, a demand for Rs. 11,36,576/- was thus raised under Section 73 of the Act, requiring the petitioner to make payment within a month, of the amount of excess ITC claimed.

14 The petitioner preferred an appeal on 14.11.2022, under Section 107 of the Act, against the order dated 12.07.2022, beyond the maximum period of limitation specified in Section 107(1) and (4) of the Act.

15 The appeal has been rejected by the appellate authority by the impugned order dated 10-1-2023 on two grounds. The first ground is belated filing of the appeal and as such barred by limitation under Section 107(1) read with Section 107(4) of the Act. Another ground for rejecting the appeal is that the petitioner in this case also claimed to have

discharged the requisite payment of a sum equal to 10 percent of the remaining amount of tax in dispute by debiting his ECRL, which as per the Appellate Authority could not be done in view of the provisions contained in Section 49(3) of the BGST/CGST Act read with Rule 85(4) of the BGST/CGST Rules.

CWJC No. 2606 of 2023

16 This petitioner is also a registered entity, but engaged in construction and maintenance of telecommunication towers and leasing the same to telecommunication service providers. In respect of some purchase of capital goods and input tax services, he claimed ITC to the tune of Rs. 39,02,97,872/-. The petitioner was served with notice under Section 73(1) of the Act. The petitioner responded to the same. After the petitioner's response, the assessing authority passed a detailed order under Section 73(9) read with Section 50(3) of the Act whereby and whereunder the petitioner's tax liability was determined at Rs. 72,60,43,298/-, interest at Rs. 25,86,83,796/- and penalty at Rs. 7,26,04,328/-. The total liability of the petitioner was thus determined at Rs. 1,05,73,31,422/-. This petitioner also claims to have satisfied the requirement by paying a sum equal to 10 percent of the remaining amount of tax in dispute, for maintaining its appeal

under Section 107 of the BGST/CGST Act, by debiting its ECRL.

17 The appeal has been rejected by the Appellate Authority by the impugned order dated 4-2-2023, again by holding that the appeal is defective since the petitioner claimed to have satisfied the requirement of paying the pre-deposit of 10 percent for maintaining its appeal under Section 107 of the BGST/CGST Act by debiting of ECRL instead of utilising the ECL. Deposit has been found to be in contravention of Section 73(9) of the BGST Act read with Rule 85(4) of the BGST Rules, 2017.

SUBMISSIONS:-

18 Having noted the individual facts of the cases, this Court would proceed to consider the submissions advanced on behalf of the parties. Mr. Tarun Gulati, learned senior counsel for the petitioner in CWJC No. 1848 of 2023 has made his submissions. Mr Shashwat Pratyush, learned counsel has made submissions on behalf of petitioner in CWJC No. 2291 of 2023. Mr. Sanjay Singh, learned senior counsel has argued on behalf of petitioner in CWJC No. 2606 of 2023. Mr. P.K. Shahi, learned Advocate General, assisted by Mr. Vivek Prasad, learned GP-7 and Mr. Vikash Kumar, learned SC-11, has addressed the Court on behalf of State. Dr. K.N. Singh, learned Additional

Solicitor General has represented the Union of India, assisted by senior Standing Counsel, CGST, Mr. Anshuman Singh.

19 It is submitted by Mr. Tarun Gulati, learned senior counsel appearing on behalf of petitioner in CWJC No. 1848 of 2023, that the impugned order is contrary to and in violation of the binding Circulars as well as judgments of other Hon'ble High Courts.

20 The issue regarding utilisation of amount in the ECRL stands concluded with the issuance of the Circular bearing No. 172/04/2022-GST dated 06.07.2022 by the Central Board of Indirect Taxes & Customs (CBIT&C) under Section 168 of the Act. The same clarifies that payment towards output tax, whether self assessed in the returns and payable as a consequence of any proceedings instituted under the provisions of GST laws can be made by utilization of amount available in the ECRL of a registered person. The said Circular was adopted by the respondent-State of Bihar which issued a Circular dated 14.09.2022. The Circular dated 06.07.2022, therefore, issued in terms of the Section 168 of the GST Act is binding on the respondent authorities.

21 The requisite pre-deposit for maintaining appeal under Section 107 of the CGST/BGST is nothing but 10 percent of the remaining amount of tax in dispute payable as a

consequence of orders passed under Section 73 of the CGST/BGST Act. The petitioner has paid this 10 percent of the disputed amount of tax by debiting its ECRL for maintaining the appeal under Section 107(6) of the CGST/BGST Act, as per the two circulars (supra).

22 The learned senior counsel for the petitioner has also relied on decision of the Bombay High Court in the case of ***Oasis Realty vs. the Union of India & Ors*** reported in ***(2023) 3 Centax (Bombay)***, wherein it was held that a party can pay 10 percent of the disputed tax either using ECL or ECRL. Similar view was taken by the Allahabad High Court in the case of ***Tulsi Ram and Company vs. Commissioner,*** reported in ***(2022) 1 Centax 26 (All.)***, wherein it was held that the Appellate Authority can not insist on making payment of disputed tax through ECL only.

23 The learned senior counsel further submits that one of the grounds taken for sustaining rejection of the petitioner's appeal that ITC cannot be reversed towards payment of output liability is a new ground, which was not a ground taken in the order passed by the adjudicating authority nor in the impugned order of the appellate authority. The artificial distinction between payment of output tax and tax payable towards excess ITC claimed by the assessee is nothing more than a technical

plea relying on Section 49(3) of the CGST/BGST Act and is unsustainable. The CGST Act/Rules do not contain any prohibition on debiting of the ECRL for the payment in question. On the contrary, there are several provisions providing for reversal of such ITC such as Section 16(4), Section 17 read with Rules 42 and 43, Section 17(4), Section 17(5), Rule 44, etc. The reasoning that a reversal could not be made is thus contrary to the provisions of CGST Act/Rules, ignoring the fact that amount of excess ITC becomes part of output tax of the person.

24 This issue has also been settled by "INSTRUCTION" dated 28.10.2022 issued by the CBIT&C.

25 The Hon'ble Apex court in the case of ***Chandrapur Magnet Wires (P) Ltd. vs. CCE, Nagpur,*** reported in ***(1996) 2 SCC 159*** under similar circumstances has held that credit under the erstwhile MODVAT scheme was "*as good as tax paid*". Thus, where the deposit is made using credit from ECRL, it ought to be considered as payment of tax.

26 It is further submitted that recovery of any ITC wrongly availed or utilised can only be done by adding the amount of excess ITC to the output tax liability. In the instant case, the demand under Section 73(9) of the CGST/BGST Act is on account of alleged excess ITC claimed by the petitioner, which was sought to be reversed as tax being part of the output tax liability of the petitioner. Reversal of excess ITC is a statutorily permissible method of discharging liability under the

Act.

27 The stand of the respondent authority that ineligible ITC was being used by the petitioner for payment of 10 percent of the disputed tax amount, is also without any basis, apart from being contrary to the record of the present case. The ITC balance in the petitioner's ECRL on the date of filing of appeal was Rs. 1,01,68,205/- (One crore one lakh sixty-eight thousand two hundred and five rupees) whereas the disputed ITC determined under Section 73(9) of the CGST/BGST Act as tax payable, was only Rs. 58,11,076/- (Fifty-eight lakhs eleven thousand seventy-six rupees). Thus, there was sufficient balance available in the ECRL of the petitioner for making payment of 10 percent of the disputed tax amount of Rs. 5,81,107/- (Five lakhs eighty-one thousand one hundred and seven rupees).

28 Learned senior counsel for the petitioner has also placed reliance on the decision of Gujarat High Court in the case of ***Cadila Health Care Pvt. Ltd. vs. UOI,*** reported in ***2018 (18) G.S.T.L. 30 (Guj.),*** decision of Hon'ble Jharkhand High Court in the case of ***Akshay Steel Works Pvt. Ltd vs. UOI,*** reported in ***2014 (304) ELT 518 (Jhar)*** and decision of Hon'ble Apex Court in the case of ***Eicher Motors Ltd. v. Union of India*** reported in ***1999 (106) ELT 3.***

29 Learned senior counsel further submits that pre-

deposit of 10 percent is nothing but 10 percent of tax. The disputed tax amount thus gets reduced to this extent of 10 percent, from the liability, and is to be indicated in the liability register mentioned in Rule 85 of the CGST/BGST Rules.

30 Perusal of Form GST ALP-01 (Appeal to Appellate Authority) and Rule 108 of the CGST/BGST Rules leaves no room for doubt that pre-deposit can be made either from the ECL or the ECRL. The form contains columns providing option and facilitating indication of payment to be made through each register separately. The respondent's contention that pre-deposit 10 percent cannot be made through ECRL was thus unsustainable and contrary to the statute/Rules, read with the statutory form.

31 The last submission of the learned senior counsel for the petitioner is that the impugned order is in violation of the principle of natural justice, since no notice or show-cause was issued with respect to the alleged defect based on which the appeal has been rejected. The impugned order is thus also liable to be set-aside for being violation of principle of natural justice.

32 Mr. Shashwat Pratyush, learned counsel appearing in *CWJC No. 2291 of 2023* has adopted the submissions advanced by Mr. Gulati with respect to the issue regarding the legitimacy of pre-deposit of 10 percent amount by debiting

ECRL for maintaining appeal as per Section 107(6) of the CGST/BGST Act.

33 There is another aspect in this case regarding appeal being barred by delay. The delayed filing of appeal is admitted by the petitioner in paragraph-8 of the writ petition. However, it is submitted that the same is occasioned due to the fault of Respondent No. 3, who did not provide the certified copy within time. It is submitted by learned counsel for the petitioner that delay in submission of the appeal is nothing but a technicality and based on such delay, the petitioner's right for consideration of its appeal cannot be defeated. Learned counsel has also placed reliance on notification No. 26/2022, issued by the CBIT&C on 26-12-2022, the same is a beneficial and curative circular apropos Rule 108(3) of the CGST Rules, in respect of the date to be considered as the date of filing of appeal under Section 107 of the CGST/BGST Act. Benefits of the curative and beneficial notification are required to be extended to the petitioner.

34 Mr. Sanjay Singh, learned senior advocate representing the petitioner in *CWJC No. 2606 of 2023*, having adopted the submissions advanced by learned Senior counsel, Mr. Gulati, has, in addition thereto, relied upon two other judgments to sustain pre-deposit 10 percent under Section 107

(6) of the CGST/BGST Act, by debit of ECRL. He has relied upon judgments of the Orissa High Court in ***Ranjan Naik [WP (C) 10203 of 2023]*** and ***Kiran Motors [WP (C) 22817 of 2023]***. He has also relied upon a judgement of the Madras High Court in the case of ***Larsen & Toubro Ltd. [WP Nos. 24577 and 24579 of 2023].*** He has also laid emphasis on circular dated 6-7-2022, noted above to submit that from the orders impugned, it is obvious that the respondents have relied upon serial No. 6 of the circular which is inapplicable to the issue. The provision relied upon only clarifies the taxes under GST Laws which are payable from ECRL. It only excludes tax payable on reverse charge basis. In the instant case, the pre-deposit of 10 percent sought to be paid by debiting ECRL is not in relation to any tax payable on "reverse charge mechanism". Therefore, the reliance on the circular dated 6-7-2022 (*supra*) by the respondents is untenable.

35 Learned Advocate General, on the other hand, has submitted that for filing appeal under Section 107 of the Act, pre-deposit of a sum equal to 10 percent of the remaining amount of tax in dispute was required to be done by utilising the ECL. The same was impermissible by debiting the ECRL. He has submitted that the demand in the instant case has arisen on account of excess claim of ITC by the petitioners in violation of Section 16(2) of the GST Act. Thus, demand was raised under

Section 73(9) of the GST Act. The amount to be paid is not in the nature of output tax as defined under Section 2(82) of the CGST/BGST Act.

36 Though output tax and input tax both fall under the purview of tax, these two provisions are mutually exclusive terms. As per Section 2(82) of the CGST/BGST Act, output tax is charged on taxable supply of goods or services made "***by the assessee***" or his agent. On the other hand, input tax, as per Section 2(62) of the CGST/BGST Act, is tax charged on any supply of goods or services "***to the assessee***" which is apparent from a bare reading of Section 2(62) and Section 2(82) of the CGST/BGST Act, which reads as follows:-

> "**2. Definitions.--**(62) "input tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes-
>
> (a) the integrated goods and services tax charged on import of goods;
>
> (b) the tax payable under the provisions of sub-sections (3) and (4) of section 9;
>
> (c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;
>
> (d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or
>
> (e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services

> Tax Act,
> but does not include the tax paid under the composition levy;
> **2. Definitions.--**(82) "***output tax***" in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis;"

37 Both the taxes thus apparently operate in different fields and are definitively mutually exclusive. The scheme of the Act also as apparent from plain reading of Section 49 of the CGST/BGST Act, maintains this distinction between input tax and output tax. It is only for payment of output tax that there is a provision for availing the amount lying in the ECRL. This distinction is also clear from bare perusal of Rule 85(4) and 86 of the BGST/CGST Rules, 2017.

38 The amount of pre-deposit 10 percent for availing appeal under Section 107(6) of the CGST/BGST Act can be paid only under Section 49(3) of the CGST/BGST Act. In view of the statutory prescriptions such as Sections 49, 49-A & 49-B of the CGST/BGST Act, governing utilisation of balance in ECRL, any other mode for utilisation of the balance in ECRL or ECL would stand prohibited.

39 The law in this regard is clear that where a statute provides the thing to be done in a particular manner, then it has to be done in that manner and in no other manner. He has placed

reliance on the decision of the Hon'ble Apex Court in the case of ***Gujarat Vikas Nigam Limited vs. Essar Power Ltd.*** reported in ***(2008) 4 SCC 755***. It is also submitted that the purpose of statutory appeal will be defeated, if the assesses are allowed to utilize credits lying in the ECRL, when the amounts claimed as ITC has already been held to be in excess of the entitlement of an assessee.

40 It is further submitted that the clarifications issued by the CBIT&C vide Circular No. 172/04/2022-GST dated 6th July 2022 contains no clarification to the effect that payment of pre-deposit for appeal in question, can be made by utilising claimed input tax credit lying in the ECRL. On the contrary, the clarifications merely reiterate the provisions of Section- 49 of the CGST/BGST Act and clearly states that payment towards output tax only can be made by utilizing ECRL.

41 It is submitted that the ratio of the judgement rendered by Hon'ble Bombay High court in ***Oasis Realty (CWJC 23507/12287/12457 of 2022)*** is not applicable in the instant case as the factual premise in the said decision is not applicable in the instant case. The disputed amount payable therein was towards output tax which is not the case in the present writ proceedings.

42 It is submitted further, that the ratio of the

judgement rendered by Hon'ble Allahabad High court in ***M/s Tulsi Ram and Company*** (*supra*) is not applicable in these cases as the factual matrix is different. In the said case, in fact the petitioner Firm had already made deposit through cash ledger. In fact none of the judgements relied upon by the petitioners is an authority to sustain their submission that pre-deposit 10 percent for filing an appeal before the Appellate Authority under Section 107 of the Act can be done by debiting ECRL.

43 It is submitted that order of the Appellate Authority in the present three cases insofar as it has held the appeal to be defective for non-deposit of a sum equal to 10 percent, of the remaining amount of tax in dispute arising from the order under appeal, from the ECL does not require any interference by this court. These applications are thus devoid of merit and fit to be rejected.

CONSIDERATION:-

44 On consideration of the submissions advanced by the learned counsels representing the parties, the court would find that the main issue in the three writ proceedings is whether by debiting ECRL, an assessee can claim to have satisfied the requirement of pre-deposit of a sum equal to 10 percent of the remaining amount of tax in dispute as per the order under

appeal, for maintaining appeal as per Section 107 (6) of the CGST/BGST Act.

45 In this connection, one of the submissions made on behalf of the petitioners regarding payment of pre-deposit (10 percent) by debiting ECRL being valid in terms of the CBIT&C circular dated 06.07.2022 (*supra*), reiterated and adopted in totality by the State Government vide circular dated 14.09.2022 (*supra*), has to be considered with reference to the relevant extract of the clarifications issued. Relevant clarifications regarding “Utilisation of amounts available in electronic credit ledger and the electronic cash ledger for payment of tax and other liabilities”, as contained at issue No. 6, 7 and 8 of the circular dated 06.07.2022, reads as follows:-

6.	Whether the amount available in the electronic credit ledger can be used for making payment of any tax under the GST Laws?	1. In terms of sub-section (4) of section 49 of CGST Act, the amount available in the electronic credit ledger may be used for making any payment towards output tax under the CGST Act or the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "IGST Act"), subject to the provisions relating to the order of utilisation of input tax credit as laid down in section 49B of the CGST Act read with rule 88A of the CGST Rules. 2. Sub-rule (2) of rule 86 of the CGST Rules provides for debiting of the electronic credit ledger to the extent of discharge of any liability in accordance with the provisions of section 49 or section 49A or section 49B of the CGST Act. 3. Further, output tax in relation to a taxable person (i.e. a person who is registered or liable to be registered under section 22 or

		section 24 of the CGST Act) is defined in clause (82) of section 2 the CGST Act as the tax chargeable on taxable supply of goods or services or both but excludes tax payable on reverse charge mechanism. 4. **Accordingly, it is clarified that any payment towards output tax, whether self-assessed in the return or payable as a consequence of any proceeding instituted under the provisions of GST Laws, can be made by utilization of the amount available in the electronic credit ledger of a registered person.** 5. It is further reiterated that as output tax does not include tax payable under reverse charge mechanism, implying thereby that the electronic credit ledger cannot be used for making payment of any tax which is payable under reverse charge mechanism.
7.	Whether the amount available in the electronic credit ledger can be used for making payment of any liability other than tax under the GST Laws?	As per sub-section (4) of section 49, the electronic credit ledger can be used for making payment of output tax only under the CGST Act or the IGST Act. It cannot be used for making payment of any interest, penalty, fees or any other amount payable under the said acts. Similarly, electronic credit ledger cannot be used for payment of erroneous refund sanctioned to the taxpayer, where such refund was sanctioned in cash.
8.	Whether the amount available in the electronic cash ledger can be used for making payment of any liability under the GST Laws?	As per sub-section (3) of section 49 of the CGST Act, the amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of the GST Laws.

46 The circular dated 06.07.2022 issued by the CBIT&C provides some “clarifications” that are nothing more than a reiteration of the substantive statutory provision/s.

47 From reading of issue No. 6 and its clarifications, it is obvious that payment from the ECRL has been clarified to be

only for making any payments towards output tax under the GST or IGST Act under the statutory provisions contained under the CGST. It also specifies other liabilities with reference to the statutory provisions such as Section 49, 49-A and 49-B of the CGST. It also clarifies that payment of output tax, whether self-assessed in the return or payable as a consequence of any proceeding instituted under the GST can be made through ECRL of a registered person. It further specifies that ECRL cannot be used for making payment of any tax which is payable under reverse charge mechanism.

48 In Issue No. 7, the clarification of the statutory provision contained in Section 49 (4) of the CGST/BGST Act is to the effect that ECRL cannot be used for making a payment of interests, penalty, fee or "***any other amount payable under the said acts***" (*emphasis ours*). Section 49 (3) of the CGST/BGST Act provides that "any other amount" can be paid from ECL. Section 49 (4) of the CGST/BGST Act, however, limits the use of amounts available in the ECRL for making any payment "towards output tax" under the CGST/BGST or under the IGST, that also in the manner and subject to such conditions as may be prescribed. The distinction in the intention of the statute is clear. It contemplates use of credit in the ECRL under specified heads, in a specified manner

subject to specified conditions. Section 49(3) of the CGST/BGST Act, on the other hand, which deals with ECL, is not exhaustive in tenor, but illustrative. After specifying the nature of payments, such as towards "tax, interest, penalty, fee", it goes on to provide for payment of "***any other amount payable under the provisions of this act or rules made thereunder***". The limited purport of Section 49 (4) of the CGST/BGST Act has further been clarified in the clarification for issue No. 7 in circular dated 06.07.2022 (*supra*) issued by the CBIT&C in exerise of powers under Section 168(1) of the CGST/BGST Act, where it specifies that the ECRL cannot be used for making payment of interest, penalty, fee or any other amount payable under the statute.

49 The same intention is clear from Rule 85 (4) and Rule 86 of the CGST/BGST Rules. Rule 85(4) of the CGST/BGST Rules once again provides for payment of "any other amount" under the Act. From reading of Rule 86 of the CGST/BGST Rules, on the other hand, it is apparent that every claim of input tax credit is credited to the ECRL. These claims are, however, subject to assessment and determination whether the Input Tax Credit has been duly availed or wrongly availed for any reasons of fraud, willful misstatement, suppression of facts; or for any other reasons as per Chapter XV of the

CGST/BGST Act. The liabilities which are permitted to be discharged by debit of ECRL are specified in Rule 86(2) and Rule 86(3) of the CGST/BGST Rules. Rule 86 (3), (4) and (4-A) of the CGST/BGST Rules deal with refund of un-utilised amount lying in ECRL. Rule 86 (5), (6) and the explanation in Rule 86 of the CGST/BGST Rules relate to other issues, which are not relevant to the present proceedings. The submissions of learned Advocate General relying upon Rule 85 (4) and 86 of the CGST/BGST Rules finds favour with this court. The clarification dated 06.07.2022, in the opinion of this court, does not support submission made on behalf of the petitioners that the pre-deposit (10 percent) for filing appeal can be allowed by debiting the ECRL.

50 Mr. Tarun Gulati, learned senior counsel for the petitioner in *CWJC No. 1848 of 2023*, has also relied upon "Instructions" dated 28.10.2022, again issued by the CBIT&C. He has laid emphasis on paragraph 2 of the Instructions, relevant extract of which reads as follows:-

> *"2……Further, in GST regime, in connection with appeal mechanism under section 107 of the CGST Act, 2017, Rule 108 (1) of the CGST Rules, 2017 provides Form GST APL-01 for filing an appeal with option of payment of admitted amount and pre-deposit through electronic*

cash/credit ledger."

51 The Form GST APL-01 (hereinafter referred as "Appeal Form") referred to in this paragraph is part of Annexure-4 to *CWJC No. 1848 of 2023*. On construing this extract of paragraph-2 of the "Instructions" harmoniously with the Appeal Form relied upon, it is obvious that for filing an appeal under Section 107 of the Act, the Appeal Form contemplates payment of two components. One is "***payment of admitted amount of tax/interest/penalty/fee***" as per Section 107(6)(a) of the Act, and the other amount is "***pre-deposit***" under Section 107(6)(b) of the Act. It is not in dispute that payment of the first component can be done by debiting ECRL. Option available for payment from ECRL, therefore, can only be in respect of "***payment of admitted amount***" and not for "***pre-deposit***". For payment of the second component, being pre-deposit, paragraph-2 of the Appeal Form, in keeping with Section 49(3) of the CGST/BGST Act, read with Rule 85(4) of the CGST/BGST Rules, provides option of payment through cash (ECL). Thus, in the "Instructions" dated 28.10.2022 as well as the Appeal Form relied upon by the learned senior counsel for the petitioner, option is provided in the Appeal Form for payment through both ECL/ECRL. The two options are for the two distinct components under Section 49 (3) and 49(4) of

the CGST/BGST Act. Both options are not only with reference to Section 49(4) of the CGST/BGST Act.

52 The submission of Mr. Tarun Gulati, learned senior counsel, that the Authorities have proceeded on a misconception and have unduly created an artificial distinction between input tax and output tax, appears to be unsustainable. In this connection, the court is inclined to accept the submissions of learned Advocate General that the two expressions are mutually exclusive. The submission in this regard with reference to definition of these two terms, as contained in Section 2(62) and 2(82) of the CGST/BGST Act, is correct in the opinion of this court. Both the expressions operate in different fields. Merely because the statutory provisions contemplates setting off or reconciliation of liability under one head with liability under the other head under certain conditions, the same would not obliterate the mutually exclusive nature of input tax and output tax.

53 The submission that reversal of excess ITC is statutorily permissible method of discharging liability under the CGST/BGST also does not help the petitioners' case. As per their own submissions, there are specific statutory provisions providing for reversal of such ITC such as Section 16 (4), Section 17 read with Rules 42 and 43, Section 17 (4), Section 17

(5), Rule 44, etc.. Reliance on these provisions, which are inapplicable in the instant case, in our opinion, is misplaced. The issue in the instant case is with reference to pre-deposit (10 percent) under a different statutory provision, namely Section 107 (6) of the CGST/BGST Act.

54 The court would thus proceed to consider the precedents relied upon by Mr. Tarun Gulati, learned senior counsel. Reliance placed on decision of the Hon'ble Apex Court in the case of ***Chandrapur Magnet Wires (P) Ltd.*** (*supra*), is clearly untenable. In the said case there was no dispute that the inputs which were utilised in the manufacture of copper wires were duty paid and had thus been entered by the appellants therein to their credit in the ledger. There is no such admission of the respondents in the instant cases. In fact, in the instant case the amount of ITC claimed by the petitioner in the ECRL, as per respondents, is in excess of petitioner's entitlement. The instant cases also arise out of a different statue namely the CGST and BGST. There are relevant provisions governing pre-deposit (10 percent) in the CGST and BGST Act. The provisions are under Section 49 (3) of the CGST/BGST Act and Rule 85 (4) of the CGST/BGST Rules. Unlike the provisions of the MODVAT Act falling for consideration in the case of ***Chandrapur Magnet Wires (P) Ltd.*** (*supra*), in the instant cases, these two provisions

of the CGST and BGST govern the payment of pre-deposit (10 percent) which would come under the expression "***any other amount***" occurring in Section 49 (3) of the CGST/BGST Act and Rule 85(4) of the CGST/BGST Rules. Relevant extract of these provisions are being quoted for the ease of reference:-

> "***49. Payment of tax, interest, penalty and other amounts.-***
>
> ***(1)*** *Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.*
>
> ***(2)*** *The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with [section 41 or section 43-A], to be maintained in such manner as may be prescribed.*
>
> ***(3)*** *The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fee or* ***any other amount*** *(emphasis mine) payable under the provisions of this Ac, or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.*
>
> ***(4)*** *The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and without such time as may be prescribed.*
>
> ……
>
> ……

> ***Rule 85.(4)*** *The amount deducted under Section 51, or the amount collected under Section 52, or the amount payable on reverse charge basis, or the amount payable under Section 10, any amount payable towards interest, penalty, fee or* ***any other amount*** *(emphasis mine) under the Act shall be paid by debiting the electronic cash ledger maintained as per Rule 87 and the electronic liability register shall be credited accordingly."*

55 It is these statutory provisions which are relevant to pre-deposit (10 percent) under Section 107 (6) of the CGST/BGST Act.

56 The decision in the case of ***Cadila Health Care Pvt. Ltd.*** (*supra*) and ***Akshay Steel Works Pvt. Ltd*** (*supra)* are decisions of different High Courts and that also with reference to a different provision, namely the CENVAT Credit Rules, 2004. It appears from bare perusal of the two judgments relied upon that the statutory provisions therein were completely different. In ***Akshay Steel Works Pvt. Ltd*** (*supra*), the court has found Rule 3 of the CENVAT Credit Rules to specifically allow an assessee to take benefit of his credit under "any of the category" as mentioned under Sub-Rule 1 of Rule 3 of the CENVAT Credit Rules. In the instant cases, petitioners have not relied upon any similar statutory provision specifying that ECRL can be utilised for pre-deposit 10 percent under Section

107(6)(b) of the Act. In the instant cases, the only provision/s which covers the pre-deposit 10 percent by using a similar expression “any other amount”, is occurring in Section 49 (3) of the CGST/BGST Act and Rule 85 (4) of the CGST/BGST Rules, both of which deal with utilisation of amount/s from ECL. These judgments, therefore, will not constitute a precedent in support of the petitioners’ case, in the instant proceedings.

57 Insofar as Mr. Tarun Gulati’s reliance placed on decision of the Hon’ble Apex Court in the case of ***Eicher Motors Ltd.*** (*supra*), this court would find that the Hon’ble Apex Court in the said case was considering the validity and application of modified scheme as a result of introduction of Rule 57-F [read as 57-F(4-A)] of the Central Excise Rules, 1944, under which credit which was lying unutilised with the manufacturers on the date of introduction of the provisions, would stand lapsed in the manner set out therein. The “credit” in issue in ***Eicher Motors Ltd.*** (*supra*) is credit to which the assessee had already become entitled. The credits were attributable to inputs already used in manufacture of the final products whereas in the instant case, the credit (ITC) is self-assessed and subject to scrutiny of returns and assessment as per Chapter XII of the CGST/BGST Act. In the instant cases, on the other hand, the admitted position is that the Authorities

found the credit (ITC) claim of the petitioners to be unsustainable. Decision of the Hon'ble Apex Court in the case of ***Eicher Motors Ltd.*** (*supra*), therefore, in the opinion of this court, would have no application to the facts and circumstances of the instant case.

58 Insofar as judgment of the Bombay High Court in the case of ***Oasis Realty*** (supra) relied upon by Mr. Tarun Gulati, this court would find that the same in paragraph No. 9 of the judgment has considered the 10 percent pre-deposit required under Clause (b) of Sub-Section (6) of Section 107 of the CGST/BGST Act to be 10 percent of tax. It has thus proceeded to hold that this amount may be deposited under Sub-Section (4) of Section 49 of the CGST/BGST Act. It is on this premise that the Bombay High Court has also relied upon the CBIT&C circular dated 06.07.2022 to sustain pre-deposit (10 percent) under Section 107 (6) of the CGST/BGST Act by debiting the ECRL. The judgment is of another High Court. The same though not binding on this court, we have considered the same. We, however, on a plain reading of Section 107 (6) of the CGST/BGST Act, extracted above, which uses the expression "***sum equal to***", are unable to agree with the view taken by the Bombay High Court. Use of this expression clarifies the nature of the amount (10 percent pre-deposit), for filing appeal. The

plain reading meaning is that pre-deposit is a sum equivalent to 10 percent of the remaining amount of tax, and not 10 percent of the remaining amount of tax, or disputed tax. The legislature could well have used the expression "10 percent of the remaining amount", which it has not used. It has used the expression "***sum equal to***". Thus from a plain reading of Section 107 (6) (b) of the CGST/BGST Act, it is obvious that the pre-deposit is not 10 percent of the dispute tax, but an amount equivalent to 10 percent. That being so, we are of the opinion that pre-deposit cannot be done through ECRL by relying upon Section 49 (4) of the CGST/BGST Act, but can be made through ECL as a "any other amount" under Section 49 (3) of the CGST/BGST Act.

59 Insofar as decision of the Allahabad High Court in the case of ***M/s Tulsi Ram and Company*** (*supra*), this court would find that a single judge bench of the Allahabad High Court while partly allowing the writ petition on 23.09.2022, has taken note of the fact that earlier on 25.06.2022, the petitioner-firm had already made deposit through cash ledger. In view thereof, this decision does not support the contention of Mr. Tarun Gulati that pre-deposit (10 percent) under Section 107 (6) of the CGST/BGST Act can be done by debiting ECRL.

60 This court would also find that merely because the

petitioner claims to be having surplus ITC balance in his ECRL on the date of filing of appeal, the Authorities cannot allow him to comply with the requirement of pre-deposit (10 percent) by debiting ECRL, contrary to the statutory procedure for payment prescribed in Section 49 (3) of the CGST/BGST Act read with Rule 85 (4) of the CGST/BGST Rules. It is a time honoured principle founded on decision in the case ***Taylor vs. Taylor*** [***(1875) 1 Ch D 426 (CA)***], which has been followed by the Hon'ble Apex Court time and again, that when the statute provides for doing of a thing in a particular manner, all other methods are expressly excluded. In this connection, the learned Advocate General has rightly relied on decision in the case of ***Gujarat Vikas Nigam Limited*** (*supra*). This court would consider it appropriate also to rely upon paragraph-40 of decision of the Hon'ble Apex Court in the case of ***Chief Information Commissioner and Anr. vs. State of Manipur and Anr.*** reported in ***(2011) 15 SCC 1***, which reads as follows:-

> "*40. It is well known that when a procedure is laid down statutorily and there is no challenge to the said statutory procedure the Court should not, in the name of interpretation, lay down a procedure which is contrary to the express statutory provision. It is a time-honoured principle as early as from the decision in Taylor v. Taylor [(1875) 1 Ch D 426 (CA)] that where a statute provides for something to be done in a particular manner it can be done in that manner alone and all other modes of performance are necessarily*

> *forbidden. This principle has been followed by the Judicial Committee of the Privy Council in Nazir Ahmad v. Emperor [(1935-36) 63 IA 372 : AIR 1936 PC 253 (2)] and also by this Court in Deep Chand v. State of Rajasthan [AIR 1961 SC 1527 : (1961) 2 Cri LJ 705] , AIR at para 9 and also in State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)] reported in AIR at para 8.*"

61 In view of the express specific statutory provisions contained in Section 49(3) of the CGST/BGST Act and Rule 85(4) of the CGST/BGST Rules, and there being no challenge to these provisions, the last submission of Mr. Tarun Gulati, learned senior counsel, regarding the impugned order being in violation of principles of natural justice, is also, in the opinion of this court, found to be unsustainable.

62 Insofar as the submissions made by Mr. Shashwat Pratyush, learned counsel for the petitioner in *CWJC No. 2291 of 2023*, regarding the delay in submission of appeal being nothing but a technicality, the court would consider it useful to reproduce relevant extract of Section 107 of the CGST/BGST Act under which the limitation for filing appeal has been prescribed, which reads as follows:-

> "***Section 107. Appeals to Appellate Authority.-***
> ***(1)*** *Any person aggrieved by any decision or order passed under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within*

> *three months from the date on which the said decision or order is communicated to such person.*
>
> ....
>
> ***(4)*** *The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months, as the case may be, allow it to be presented within a further period of one month.* ”

63 Plain reading of the statutory provision reveals that the option of filing appeal before the Appellate Authority is only within three months from the date on which the order is communicated to the person. Under Sub-Section 4 of Section 107 of the CGST/BGST Act, the Appellate Authority, subject to satisfaction that the appellant was prevented by sufficient cause from presenting appeal within three month period, is left with discretion to allow presentation of the same within a further period of one month. The statute thus circumscribes the maximum time frame within which, the person may avail remedy of appeal before the Appellate Authority.

64 In *CWJC No. 2291 of 2023*, the admitted position is that the appeal before the Appellate Authority was presented against the order dated 12.07.2022 on 14.11.2022, i.e. not within maximum period of four months as per statutory prescription. The court would find that the petitioner has failed to adhere to the time prescribed in the statute for filing appeal before the

Appellate Authority. The appeal was required to be filed within a specified time, which ordinarily would be mandatory. This court cannot enlarge the intention and scope of Section 107 (1) and (4) of the CGST/BGST Act. The language of the provision is unambiguous. In absence of any provision in the Act conferring discretion to further enlarge the time or condone the delay, the writ court would refrain from issuing directions contrary to the statute. Our view to this effect finds support from decision of the Hon'ble Apex Court in the case of ***Bijay Kumar Singh and Ors. versus Amit Kumar Chamariya and Anr.*** ***r***eported in ***(2019) 10 SCC 660***. In paragraph-16 of the said judgment, the Hon'ble Apex Court has observed as follows:-

> "***16.*** *While examining as to when the provision of a statute is to be treated as directory or mandatory, this Court held in Nasiruddin case [Nasiruddin v. Sita Ram Agarwal, (2003) 2 SCC 577] that if an act is required to be performed by a private person within a specified time, the same would ordinarily be mandatory but when a public functionary is required to perform a public function within a time-frame, the same will be held to be directory unless the consequences thereof are specified. It was held as under : (SCC p. 589, para 37)*
>
> > *"37. The court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is*

not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used. It may be true that use of the expression "shall or may" is not decisive for arriving at a finding as to whether the statute is directory or mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions are mandatory in character.

38. Yet there is another aspect of the matter which cannot be lost sight of. It is a well-settled principle that if an act is required to be performed by a private person within a specified time, the same would ordinarily be mandatory but when a public functionary is required to perform a public function within a time-frame, the same will be held to be directory unless the consequences therefor are specified. In Sutherland's Statutory Construction, 3rd Edn., Vol. 3, at p. 107 it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory or directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow non-compliance with the provision.

***

40. Thus, on analysis of the aforesaid two decisions we find that wherever the special Act provides for extension of time or condonation of default, the court possesses the power therefor, but where the statute does not provide either for extension of time or to condone the default in depositing the rent within the stipulated period, the court does not have the power to do so.

41. In that view of the matter it must be held that in absence of such provisions in the present Act the court did not have the power to either

extend the period to deposit the rent or to condone the default in depositing the rent." "

65 Notification dated 26.12.2022 is concerned with Rule 108(3) of the CGST/BGST Rules regarding time limit for submission of certified copy of the decision or order appealed against, which is not the basis for holding the petitioner's appeal being barred by delay. This court would thus find that submissions based on notification dated 26.12.2022 (*supra*) is not relevant to the instant case which involves period of limitation for filing the appeal.

66 In the instant case the issue is of filing of appeal being barred in view of limitation, specified and provided in Section 107 of the CGST/BGST Act, which provides for filing of appeal within three months. Section 107 (4) of the CGST/BGST Act also places a limit to the condonation of limitation. It specifically provides for allowing the appeal to be presented within a further period of one month only. In the instant case, it is not in dispute that even after allowing additional period of 30 days as per section 107 (4) of the CGST/BGST Act, the appeal has been filed belatedly. The appeals, therefore, were barred by limitation also.

67 Insofar as the additional submission advanced by Mr. Sanjay Singh, learned senior counsel for petitioner in *CWJC*

No. 2606 of 2023, regarding respondent's misplaced reliance on Serial No. 6 of the circular/s dated 06.07.2022 (*supra*) and 14.09.2022 (*supra*), this court is of the view that clarification regarding utilisation of amounts in ECRL in Serial No. 6, 7 and 8 are with reference to specific statutory provisions contained therein; other than Section 49 (3) of the CGST/BGST Act and Rule 85 (4) of the CGST/BGST Rules which are applicable in the instant cases. The issue has already been considered above, while dealing with the submissions advanced by learned senior counsel Mr. Tarun Gulati.

68 Insofar as the decisions in the cases of ***Ranjan Naik*** (*supra*) and ***Kiran Motors*** (*supra*) relied upon by Mr. Sanjay Singh, learned senior counsel, with due deference, this court would observe that the same being decisions of a Division Bench by another High Court, would not constitute a binding precedent on this Division Bench. Having said so, this court would hasten to add that from both these decisions, it is apparent that the various statutory provisions and the clarifications contained in the circular dated 06.07.2022 (supra) which have been placed in these proceedings, were not brought to the notice of the Division Bench in the Orissa High Court. In the instant case, however, learned counsels for the petitioners and learned counsels for the respondents also have made

elaborate submissions with reference to the various statutory provisions and the provisions contained in the circulars dated 06.07.2022 and 28.10.2022. After due consideration of these various provisions and elaborate arguments, we have found above that pre-deposit (10 percent) for maintaining appeal under Section 107 (6)(b) of the CGST/BGST Act is possible only by utilising amounts lying in the ECL and not ECRL. Since our decision is based on such consideration, we respectfully take a contra-view to the view taken by Division Bench of the Orissa High Court in the cases of ***Ranjan Naik*** (*supra*) and ***Kiran Motors*** (*supra*). While doing so, we have given the judgment of the Division Bench of the Orissa High Court, and Bombay High Court in the case of ***Oasis Realty*** (supra), due consideration and have recorded our dissent with reasons. Having done so, we consider it apposite to quote paragraph 23 of the decision of the Hon'ble Apex Court in the case of ***Pradip J. Mehta versus Commissioner of Income Tax, Ahmedabad*** reported in ***(2008) 14 SCC 283***, which reads as follows:-

> *"**23.** Although, the judgments referred to above were cited at the Bar in the High Court, which were taken note of by the learned Judges of the Bench of the High Court, but without either recording its agreement or dissent, it answered the two questions referred to it in favour of the Revenue. Judicial decorum, propriety and discipline required that the High Court should, especially in the event of its contra view or dissent, have discussed the aforesaid judgments of the different High Courts and recorded its own reasons for its contra view. We quite see the fact that the*

> *judgments given by a High Court are not binding on the other High Court(s), but all the same, they have persuasive value. Another High Court would be within its right to differ with the view taken by the other High Courts but, in all fairness, the High Court should record its dissent with reasons therefor. The judgment of the other High Courts, though not binding, have persuasive value which should be taken note of and dissented from by recording its own reasons. "*

69 Decision in the case of ***Larsen & Toubro Ltd.*** (*supra*) relied upon by the petitioners, also does not help the case of the petitioners. Again the court would find that the various statutory provisions as well as the circulars and elaborate arguments considered by us which we have had the benefit of considering, were not brought to the notice of the Madras High Court in the case of ***Larsen & Toubro Ltd.*** (*supra*) decided by an Hon'ble Single Judge Bench. Having regard to the decision of the Hon'ble Apex Court in the case of ***Pradip J. Mehta*** (*supra*), extracted above, we are unable to agree with decision of the Madras High Court, apart from the fact that it being a judgment passed by an Hon'ble Single Judge.

70 Upon consideration of the issue on merits, as above, this court finds that the appeal filed by the petitioner in C.W.J.C. No. 2291 of 2023 was barred by limitation prescribed in Section 107(1) & (4) of the CGST/BGST Act.

71 This court is also of the unambiguous conclusion that the pre-deposit (10 percent) for maintaining appeal under Section 107 (6)(b) of the CGST/BGST Act can be done by

utilizing amounts in the ECL only. The conclusions are based on the provisions contained in Section 49(3) of the CGST/BGST Act read with Rule 85 (4) of the CGST/BGST Rules. The circular dated 06.07.2022 also has been discussed above. Plain reading of these provisions make it clear that the pre-deposit (10 percent) is not covered by Section 49(4) of the CGST/BGST Act. Section 49 (4) of the CGST/BGST Act is exhaustive, as noticed above, and only permits for making payments towards output tax under the CGST/BGST Act or under the Integrated Goods and Services Tax Act, in such manner and subject to conditions as may be prescribed. The court, therefore, in exercise of jurisdiction under Article 226 of the Constitution of India, would not add to the legislation so as to enlarge the scope of utilization of amounts in ECRL, for any other purpose.

72 Insofar as Section 49(3) of the CGST/BGST Act regarding amount available in ECL, as discussed above, this court finds that the provision itself permits utilization of the same for payments towards tax, interest, penalty, fee or ***any other amount*** (*emphasis ours*) payable under the provisions of the Act or Rules made thereunder. The heads specified in Section 49 (3) of the Act are merely illustrative. The pre-deposit (10 percent) as per Section 107 (6)(b) of the CGST/BGST Act is "***a sum equal to 10 percent of the remaining amount of tax in***

dispute" arising from the order under appeal. The statute has used the expression "a sum equal to" with specific purpose. Use of such expression cannot be overlooked by the court. The court, therefore, has not accepted the submission that the pre-deposit (10 percent) is part of the tax liability. If there was such intention of the legislature, surely, the provision would have incorporated such an expression. The fact, however, is otherwise. The pre-deposit is not 10 percent of the remaining amount of tax. In such circumstances, pre-deposit, in the opinion of this court, can only be covered by the expression "any other amount" occurring in Section 49(3) of the CGST/BGST Act, as also Rule 85(4) of the CGST/BGST Rules.

73 The irresistible conclusions from simple reading of Section 49 of the Act, therefore, is that amount in ECRL cannot be utilized for the purposes of paying the pre-deposit (10 percent) under Section 107 (6) of the CGST/BGST Act as this amount is neither an output tax under the BGST/SGST Act, nor is this amount due under the Integrated Goods and Services Tax Act. This is further clarified from perusal of Sub-Sections (1) and (2) of Section 49 of the CGST/BGST Act. From plain reading of these two provisions, it is clear that actual deposits are made in the ECL through internet banking, credit or debit cards or any FD or RTGS settlement or by such other mode. The

balance in ECRL, however, is a self-assessed input tax credit of the registered person. The amounts are credited on a provisional basis in the Electronic Credit Ledger, which is apparent from Section 41 of the BGST/SGST Act and are subject to an assessment proceedings to determine the amount of credit eligible for being utilized by the registered person.

74 This court would also rely upon and take into consideration recent decision of the Hon'ble Apex Court in the case of ***Union of India v. VKC Footsteps (India) (P) Ltd.*** reported in ***(2022) 2 SCC 603***. In paragraph 72 and 73 of the said judgment, the Hon'ble Apex Court has dealt with utilization of amounts available in ECL as well as ECRL,thus:-

> *"**72.** Sub-section (3) of Section 49 envisages that the amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of the Act or its Rules in the manner and subject to conditions and within such time as is prescribed. Similarly, sub-section (4) of Section 49 stipulates that the amount available in the electronic credit ledger can be used for making payment towards output tax under the CGST Act or under the IGST Act in such manner and subject to the conditions and within such time as is prescribed. Sub-section (5) of Section 49 spells out the priorities according to which the amount of ITC available in the electronic credit ledger can be utilised. Sub-*

section (6) of Section 49 is significant and provides as follows:

> *"**49. (6)** The balance in the electronic cash ledger or electronic credit ledger after payment of tax, interest, penalty, fee or any other amount payable under this Act or the rules made thereunder may be refunded in accordance with the provisions of Section 54."*

73. *The provisions of Section 16 and Section 49 indicate the following position:*

> ***73.1.*** *The ITC in the electronic credit ledger may be availed of for making any payment towards output tax under the CGST Act or under the IGST Act.*
>
> ***73.2.*** *The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the CGST Act or its Rules.*
>
> ***73.3.*** *The balance in the electronic cash ledger or electronic credit ledger after the payment of tax, interest, penalty, fees or any other amount payable under the Act or Rules may be refunded in accordance with the provisions of Section 54.*
>
> ***73.4.*** *Sub-section (6) of Section 49, in other words contemplates a refund of the balance which remains in the electronic cash ledger or electronic credit ledger in the manner stipulated by the provisions of Section 54."*

75 In view of paragraph 72 of this decision of the Hon'ble Apex Court in the case of ***VKC Footsteps (India) (P)***

Ltd. (*supra*), extracted above, we find that the Hon'ble Apex Court has considered the use of expression "any other amount" under Sub-Section (3) of Section 49 of the CGST/BGST Act. Thus, use of amounts in the ECL, for payment of pre-deposit (10 percent) for maintaining an appeal under Section 107 of the CGST/BGST Act, as an "any other amount" is obvious from this decision of the Hon'ble Apex Court. Such a conclusion is inevitable also from paragraph 73.2 of this decision, extracted above.

76 The court is also required to consider that the provisions which arise for consideration in the present proceedings are in relation to the statutory procedure for availing the right to appeal in a taxing statute. The above conclusions are based on a plain reading of the statutory provisions in the taxing statute. The provisions being clear, the court would not venture to interpret the various provisions to somehow include within Section 49(4) of the CGST/BGST Act an option to utilise the amount lying in ECRL, for purposes other than what is specified therein. It is trite law that the right to appeal is a statutory right and not an absolute right. Such statutory right is capable of being circumscribed by statutory conditions. The court would consider it useful to extract paragraph-4 from the decision of the Hon'ble Apex Court in the

case of ***Nokia India Private Limited versus State of Chhattisgarh and Anr***. reported in ***(2021) 12 SCC 471***, which reads as follows:-

> *"**4.** In terms of the said proviso, no reference can be maintained unless an amount of 50% of deficit duty was deposited by the party concerned. While considering the provision which is completely pari materia, this Court observed as under : (P. Laxmi Devi case [State of A.P. v. P. Laxmi Devi, (2008) 4 SCC 720] , SCC pp. 734-37, paras 16-29)*
>
> > *"16. A perusal of the said provision shows that when a document is produced (or comes in the performance of his functions) before a person who is authorised to receive evidence and a person who is in charge of a public office (except a police officer) before whom any instrument chargeable with duty is produced or comes in the performance of his functions, it is the duty of such person before whom the said instrument is produced to impound the document if it is not duly stamped. The use of the word "shall" in Section 33(1) shows that there is no discretion in the authority mentioned in Section 33(1) to impound a document or not to do so. In our opinion, the word "shall" in Section 33(1) does not mean "may" but means "shall". In other words, it is mandatory to impound a document produced before him or which comes before him in the performance of his functions. Hence the view taken by the High Court [P. Laxmi Devi v. State of A.P., 2001 SCC OnLine AP 448 : AIR 2001 AP 446] that the document can be returned if the party does not want to get it stamped is not correct.*
> >
> > *17. In our opinion, a registering officer under the Registration Act (in this case the Sub-Registrar) is certainly a person who is in charge of a public office. Section 33(3) applies only when there is some doubt whether a person holds a public office or not. In our opinion, there can be no doubt that a Sub-Registrar*

holds a public office. Hence, he cannot return such a document to the party once he finds that it is not properly stamped, and he must impound it.

18. In our opinion, there is no violation of Articles 14, 19 or any other provision of the Constitution by the enactment of Section 47-A as amended by the A.P. Amendment Act 8 of 1998. This amendment was only for plugging the loopholes and for quick realisation of the stamp duty. Hence it is well within the power of the State Legislature vide Entry 63 of List II read with Schedule VII List III Entry 44 to the Constitution.

19. It is well settled that stamp duty is a tax, and hardship is not relevant in construing taxing statutes which are to be construed strictly. As often said, there is no equity in a tax vide CIT v. V. MR. P. Firm Muar [CIT v. V. MR. P. Firm Muar, AIR 1965 SC 1216] . If the words used in a taxing statute are clear, one cannot try to find out the intention and the object of the statute. Hence the High Court fell in error in trying to go by the supposed object and intendment of the Stamp Act, and by seeking to find out the hardship which will be caused to a party by the impugned amendment of 1998.

20. In Partington v. Attorney General [Partington v. Attorney General, (1869) LR 4 HL 100] , Lord Cairns observed as under : (HL p. 122)

> *'... If the person sought to be taxed comes within the letter of the law he must be taxed, however, great the hardship may appear to the judicial mind. On the other hand if the court seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be.'*

The above observation has often been quoted with approval by this Court, and we endorse it

again. In Bengal Immunity Co. Ltd. v. State of Bihar [Bengal Immunity Co. Ltd. v. State of Bihar, AIR 1955 SC 661] , AIR at p. 685 this Court held that if there is hardship in a statute it is for the legislature to amend the law, but the court cannot be called upon to discard the cardinal rule of interpretation for mitigating a hardship.

21. It has been held by a Constitution Bench of this Court in CIT v. T.S. Devinatha Nadar [CIT v. T.S. Devinatha Nadar, AIR 1968 SC 623] (vide AIR paras 23 to 28) that where the language of a taxing provision is plain, the court cannot concern itself with the intention of the legislature. Hence, in our opinion the High Court erred in its approach of trying to find out the intention of the legislature in enacting the impugned amendment to the Stamp Act.

22. In this connection we may also mention that just as the reference under Section 47-A has been made subject to deposit of 50% of the deficit duty, similarly there are provisions in various statutes in which the right to appeal has been given subject to some conditions. The constitutional validity of these provisions has been upheld by this Court in various decisions which are noted below.

23. In Gujarat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad [Gujarat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad, (1999) 4 SCC 468] , this Court referred to its earlier decision in Vijay Prakash D. Mehta v. Collector of Customs [Vijay Prakash D. Mehta v. Collector of Customs, (1988) 4 SCC 402] wherein this Court observed : (Vijay Prakash case [Vijay Prakash D. Mehta v. Collector of Customs, (1988) 4 SCC 402] , SCC p. 406, para 9)

> *'9. The right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to*

appeal is a statutory right and it can be circumscribed by the conditions in the grant.'

24. In Anant Mills Co. Ltd. v. State of Gujarat [Anant Mills Co. Ltd. v. State of Gujarat, (1975) 2 SCC 175] this Court held that the right of appeal is a creature of the statute and it is for the legislature to decide whether the right of appeal should be unconditionally given to an aggrieved party or it should be conditionally given. The right to appeal which is a statutory right can be conditional or qualified.

25. In Elora Construction Co. v. Municipal Corpn. of Greater Bombay [Elora Construction Co. v. Municipal Corpn. of Greater Bombay, 1979 SCC OnLine Bom 38 : AIR 1980 Bom 162] , the question before the Bombay High Court was as to the validity of Section 217 of the Bombay Municipal Act which required pre-deposit of the disputed tax for the entertainment of the appeal. The Bombay High Court upheld the said provision and its judgment has been referred to with approval in the decision of this Court in Gujarat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad [Gujarat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad, (1999) 4 SCC 468] . This Court has also referred to its decision in Shyam Kishore v. MCD [Shyam Kishore v. MCD, (1993) 1 SCC 22] in which a similar provision was upheld.

26. It may be noted that in Gujarat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad [Gujarat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad, (1999) 4 SCC 468] the appellant had challenged the constitutional validity of Section 406(e) of the Bombay Municipal Corporation Act which required the deposit of the tax as a precondition for entertaining the appeal. The proviso to that provision permitted waiver of only 25% of the tax. In other words a minimum of 75% of the tax had to be deposited

before the appeal could be entertained. The Supreme Court held that the provision did not violate Article 14 of the Constitution.

27. In view of the above, we are clearly of the opinion that Section 47-A of the Stamp Act as amended by A.P. Act 8 of 1998 is constitutionally valid and the judgment of the High Court declaring it unconstitutional is not correct.

28. We may, however, consider a hypothetical case. Supposing the correct value of a property is Rs 10 lakhs and that is the value stated in the sale deed, but the registering officer erroneously determines it to be, say, Rs 2 crores. In that case while making a reference to the Collector under Section 47-A, the registering officer will demand duty on 50% of Rs 2 crores i.e. duty on Rs 1 crore instead of demanding duty on Rs 10 lakhs. A party may not be able to pay this exorbitant duty demanded under the proviso to Section 47-A by the registering officer in such a case. What can be done in this situation?

29. In our opinion in this situation it is always open to a party to file a writ petition challenging the exorbitant demand made by the registering officer under the proviso to Section 47-A alleging that the determination made is arbitrary and/or based on extraneous considerations, and in that case it is always open to the High Court, if it is satisfied that the allegation is correct, to set aside such exorbitant demand under the proviso to Section 47-A of the Stamp Act by declaring the demand arbitrary. It is well settled that arbitrariness violates Article 14 of the Constitution vide Maneka Gandh v. Union of India [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] . Hence, the party is not remediless in this situation." "

77 In view of the consideration above, this court is of the opinion that the appeals filed by the instant petitioners under

Section 107 of the CGST/BGST Act were not maintainable as the pre-deposit (10 percent) as per Section 107 (6)(b) of the Act, was not complied with by the petitioners.

78 The conclusion of the Appellate Authority that payment of pre-deposit (10 percent) can only be made through ECL, requires no interference by this court exercising jurisdiction under Article 226 of the Constitution of India.

79 Writ petitions are dismissed.

(Madhuresh Prasad, J)

I agree.
(Chakradhari Sharan Singh, J):

(Chakradhari Sharan Singh, J)

sumit/shashank-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	31.10.2023
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