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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.06.2022

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THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

**W.P.No.4458 of 2019 &**
**W.M.P.No.5032 of 2019**

M/s.Interplex Electronics India Pvt. Ltd.,
Represented by its Company Secretary
Nandigama Aruna
E-16A, Sipcot Industrial Park,
Sriperumbudur, Tamil Nadu-602 105 ... Petitioner

Vs.

1.The Assistant Commissioner of State Taxex
Sriperumbudur Division,
Ground Floor, Bangalore High Road,
Nazarethper, Poonamallee, Chennai-603108

2.The Goods and Service Tax Network,
East Wing, 4th Floor, World Mark-1
Aerocity, New Delhi-110037 ... Respondent

**Prayer:** Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of mandamus directing the first respondent to do the needful to credit the ITC amount of Rs.16,21,227/- and Rs.4,24,136/- to the Electronic Credit Ledger of the petitioner.

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For Petitioner : Mr.G.Natarajan

For Respondents : Mr.Richardson Wilson [R1]
Additional Government Pleader
Mr.A.P.Srinivas [R2]
Senior Standing Counsel

**O R D E R**

The petitioner has sought a mandamus directing the respondents being the Assistant Commissioner of State Taxes/R1 and the Goods and Services Taxes Network/R2 to credit the amount relating to input tax credit (ITC) of Rs.16,21,227/- and Rs.4,24,136/- to the electronic credit ledger of the petitioner.

2. Mr.G.Natarajan, learned counsel for the petitioner, Mr.Richardson Wilson learned Additional Government Pleader for R1 and Mr.A.P.Srinivas, learned Standing Counsel for R2 have been heard in full.

3. The submissions made on behalf of the petitioner are as follows:

(i) The petitioner is registered to Central Excise which, with effect from 01.07.2007, stood subsumed into Goods and Service Tax (GST) law.

(ii) It is entitled to transition of various components of ITC in terms of Section 140 of the Central Goods and Service Tax Act, 2017 (in short 'CGST Act').

(iii) The petitioner claims entitlement of the amounts of Rs.16,21,227/- and Rs.4,24,136/- as per proviso to Section 140(1), the aforesaid components

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representing the closing balance of CENVAT credit as per their returns for the months of June 2017 and for service tax for the period April to June 2017.

(iv) A time limit was fixed in regard to the availment of transition under Rule 117 of the Central Goods and Services Tax Rules, 2017 (in short 'CGST Rules').

(v) The Rule provided that every GST registrant who claimed transition of credit in terms of Section 140 of the Act is to file a declaration in Form GSTR TRAN-1 in the common GST Portal within 90 days from 01.07.2017 i.e. 21.09.2017.

(vi) The time limit stood extended on several occasions to provide for the technical glitches plaguing the systems and in order to accommodate the difficulty faced by taxpayers adapt to as well as the officials of the Department to adopt to the new procedure.

(vii) The extension of time limits are from 29.09.2017 to 31.10.2017 vide order No. 2/2017 dated 18.09.2017, upto 30.11.2017 vide order No. 7/2017 dated 28.10.2017 and thereafter upto 27.12.2017 vide order No.10/2017 dated 15.11.2017.

(viii) Parallelly, Rule 120A provided for revision of the TRAN-1 already filed.

(ix) Rule 120A did not, in itself, provide for atime limit for revision but

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indicated that such limits may be inferred from the timelines as set out under Rule 117.

(x) Thus, the extension of timelines granted in respect of filing of TRAN-1 under Rule 117 applied equally in respect of the timelines for revision as well.

(xi) As a consequence, the time limit for revision of TRAN also ended on 27.12.2017 by implication, as under order No.10/2017 dated 15.11.2017.

(xii) The petitioner uploaded its TRAN-1 on 27.12.2017 claiming transition of the CENVAT credit balance. However, an error had been occasioned therein wherein instead of mentioning the amount as Rs.16,21,227/- as per ER 1 return filed for the month of June 2017, it had mistakenly referred to the amount as Rs.76,395/-.

(xiii) That apart, as regard the CENVST credit of Rs.4,24,136/-, the amount had erroneously omitted to be mentioned at all. Two errors, one of erroneous reduction of CENVAT credit and omission of another component of CENVAT credit, thus figured in the original TRAN-1 filed.

(xiv) Though an explanation is set forth in the affidavit as to the nature of the error, it may not be relevant to refer to the same, as there is no dispute on the factum of such error.

(xv) A representation was filed before R1 on 28.12.2018 explaining the errors and seeking permission for availment of the credit to which the petitioner is,

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admittedly, entitled but no response was received. Hence this writ petition.

4. The petitioners' questions the wisdom in the last dates for filing of TRAN-1 and revision of TRAN-1 being one and the same, leading to an absurdity in the practical application of the respective Rules.

5. Evidently, the intention of legislature cannot be such that an assessee, who has filed a TRAN-1 declaration on the last date, albeit one containing an error, can have no recourse or time to seek revision of the same.

6. In this regard, the petitioner would rely on a decision of a Division Bench of this Court in the case of *Commissioner of GST & C. Ex., Chennai South Vs. Bharat Electronics Ltd.*, [(2022) 58 GSTL 514]. The order , at the first instance, had been authored by me in the case of *Bharat Electronic Ltd. Vs. Commissioner of GST & C. Ex., Chennai South Commissionerate*, [(2021) 52 GSTL 261]. I have had occasion to deal with an identical factual situation as in the present case except in regard to the error that was occasioned, which is immaterial to decide the primordial issue that arises for resolution.

7. The crux of the decision was that, the timelines for uploading of TRAN 1 for seeking of credit as well as seeking revision of the credit cannot be one and the same as this leads to an unworkable position. In that view of the matter, the prayer of that petitioner had been accepted, directing the respondent to enable filing of revised TRAN 1 by opening of the portal within eight weeks from that order.

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8. A Division Bench of this Court has affirmed the aforesaid order on 18.11.2021, as against which the Union, I am given to understand, has not filed any appeal.

9. The submissions of the respondent revolve around a judgment of the First Bench of this Court in the case of *P.R.Mani Electronics Vs. Union of India*, [(2020) 39 GSTL 3]. Learned Standing Counsel would point out that in that case the Bench has categorically concluded that the time limit for availment of credit by transition is mandatory and not directory.

10. Reference is made to para 17 wherein the Bench states as follows:

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

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*fixing time limits to avail Transitional ITC is settled conclusively. In SKH Sheet Metals, the Delhi High Court concluded, in paragraph 26, that the statute had not fixed a time limit for transitioning credit by also referring to the repeated extensions of time. Given the fact that the power to prescribe a time limit is expressly incorporated in Section 140, which deals with Transitional ITC, and Rule 117 fixes such a time limit, we are unable to subscribe to this view. The fact that such time limit may be extended under circumstances specified in Rule 117, including Rule 117A, does not lead to the sequitur that there is no time limit for transitioning credit. In this context, reference may be made to Section 16(4) of the CGST Act which provides as follows:*

*"Section 16(4): A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under Section 39 for the month of September following the end of the financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier."*

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

*18. In judgments such as Union of India v. A.K. Pandey [(2009) 10 SCC 552] and Bachhan Devi v. Nagar Nigam [(2008) 12 SCC 372], the Supreme Court held that the use of words such*

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*as "shall" or "may" are not conclusive or determinative of the mandatory or permissive nature of a provision. In C. Bright v. The District Collector, [2019 SCC Online Mad 2460], after considering a number of judgments of the Supreme Court, a Division Bench of this Court captured the relevant factors to determine whether a provision is directory or mandatory, illustratively, in paragraph 20. In summary, those factors are: the use of peremptory or negative language, which raises a rebuttable presumption that the provision is mandatory; the object and purpose of the statute and the provision concerned; the stipulation or otherwise of the consequences of non- compliance; whether substantive rights are affected by non-compliance; whether the time limits are in relation to the exercise of rights or availing of concessions; or whether they relate to the performance of statutory duties. In this case, the peremptory word "shall" is used. The relevant rule deals with the time limit for availing Transitional ITC by carrying it forward from the credit balance under tax legislations which have been repealed and replaced by the CGST Act. Thus, the object and purpose of Section 140 clearly warrants the necessity to be finite. ITC has been held to be a concession and not a vested right. In effect, it is a time limit relating to the availing of a concession or benefit. If construed as mandatory, the substantive rights of the assessees would be impacted; equally, if construed as directory, it would adversely impact the Government's revenue interest, including the predictability thereof. On weighing all the relevant factors, which may be not be conclusive in isolation, in the balance, we conclude that the time limit is mandatory and not directory.*

11. Learned Standing Counsel thus argues that the only recourse available to an assessee is by challenging Rule 120A and in the absence of such challenge, relief as sought for by it, cannot be granted.

12. Per contra, learned counsel for the petitioner would draw my attention to a subsequent decision in the case of *Amplexor India Pvt. Ltd. Vs. Union of India*, [(2021) 2 TMI 477], wherein the validity of the retrospective amendments

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to Section of CGST Act and Rule 117 of the CGST Rules have been assailed. The same Bench that had passed the order in the case of *P.R.Mani Electronics* (supra) has admitted the matter, framing the following questions for resolution.

> . . . . . .
>
> *6. Upon consideration of the submissions of the learned counsel for the appellant, we are of the opinion that the following questions arise for consideration in these writ petitions:*
>
> *(1)Whether Input Tax Credit is a vested right and therefore, whether the imposition of a time limit for transitioning or utilisation thereof is constitutionally impermissible?*
>
> *(2)Whether the time limit imposed in Rule 117 of the CGST Rules is mandatory or directory?*
>
> *(3)Whether Section 140 of the CGST Act read with Rule 117 of the CGST Rules divests the assessee of an alleged vested right or whether it prescribes conditions relating to the enforcement of such right?*
>
> *(4)Whether the assessee has a legitimate expectation that the Input Tax Credit availed under the erstwhile tax regime should be permitted to be transitioned to the new tax regime without imposing a time limit?*
>
> *(5)Whether the deprivation of the benefit of transitional Input Tax Credit would amount to double taxation of the assessee as alleged?*

13. Thus, the question of whether the time limit imposed under Rule 117 of the CGST Rule was mandatory or directory is at large before the Bench and is not a concluded issue as on date. In crystallizing the issue for resolution, the Bench at para 4 of the aforesaid order referred to various judgment of the Supreme Court and the High Court as follows:

> *4. In this connection, learned counsel for the petitioner further contends that Section 174(2)(c) of the CGST Act protects such vested right. In support of his submissions, he relied upon the*

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*CENVAT Rules, 2004 and in particular Rule 14, which provides that CENVAT credit can only be taken away when it has been wrongly availed as per the said Rule 14. Learned counsel for the petitioner has also relied upon the judgments of the Apex Court and other High Courts in the cases of Eicher Motors Limited v. Union of India, reported in 1999 (106) ELT 3 (SC); Collector of Central Excise, Pune v. Dai Ichi Karkaria Limited, reported in 1999 (112) ELT 353 (SC); Malladi Drugs and Pharmaceuticals Limited v. Union of India, reported in 2015 (323) ELT 489 (Mad.); Siddharth Enterprises v. Nodal Officer, reported in 2019 (29) GSTL 664 (Guj.); Adfert Technologies Private Limited v. Union of India, reported in 2020 (32) GSTL 726 (P&H) and Union of India and others v. Adfert Technologies Private Limited, S.L.P.(C) No.4408 of 2020, dated 28.02.2020, which arose out of the judgment of the Punjab and Haryana High Court in Adfert Technologies Private Limited (supra). He also referred to the judgment of the Apex Court in the case of Jayam and Company v. Assistant Commissioner, reported in 2018 (19) GSTL 3 (SC) and in particular, pointed out that paragraph 8 thereof was not brought to the attention of this Court on the earlier occasion. In addition, he adverted to the statement of objects and reasons of the CGST Act in order to contend that the primary object was to prevent the cascading of taxes and that the relevant provisions viz., Section 140 of the CGST Act and Rule 117 of the CGST Rules should be interpreted by keeping in mind the said object and purpose.*

14. The petitioner also relies on a decision passed by the Division Bench of the Delhi High Court in *Brand Equity Treaties Ltd. Vs. Union of India and Others*, [(2020 38 GSTL 10] particularly para 20 thereof. The Division Bench of the Delhi High Court was concerned with the prayer of mandamus seeking permission to transition accumulated CENVAT credit, seeking extension of the timelines for availment of credit.

15. The original prayer challenging the vires of the provisions of the Act

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and Rules were given up and the High Court was persuaded to accept the alternate prayer sought. The Bench notes that the GST regime was itself nascent, transition from pre to post GST regime had not, admittedly, been smooth and in recognition of these difficulties, directions were issued to the respondent to permit availment of credit within the extended timelines as granted by the Court.

16. Yet another observation made by the Bench relates to the fact that mere transition does not create any vested right upon the assessee as the eligibility to credit is an entirely different matter that would be tested by the Assessing Authority in their respective assessments. Thus, transition for itself does not create any benefit in favour of the petitioner except to carry forward accumulated credits, the eligibility to which will be tested at a later point in time.

17. Paragraphs 20 and 26 are relevant and are extracted below:

> *20. The above decision would also cover the case of the Petitioners, and there can be no two views about this proposition and we would like to extend similar benefit to them. Nevertheless, let's delve into the more fundamental question - Whether the Government could curtail the accrued and vested right, and restrict it to 90 days by a subordinate legislation? To answer this vexed query, let's first examine the legal provisions. Sub-section (1) of Section 140 which deals with the transitory provision, permits carry forward of the CENVAT credit. This presupposes that the amount of CENVAT credit of eligible duties has therefore accrued and is existing and reflected in the CENVAT credit register. Sub-Section (1) of Section 140 enables a registered person to carry forward such credit in the return relating to the period ending with the day (30th June, 2017) immediately preceding the appointed date which is 1st July, 2017 furnished by him under the existing law. The provisions of the Service Tax under Chapter V of the Finance Act stood repealed by virtue of the*

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*GST legislation as provided under Section 174 of the CGST Act. Thus, on the appointed date, the credits which existed under the previous regime were required to be transitioned to the new regime. This credit in every sense stood accumulated, acquired and vested on the appointed date as it was reflected in the said CENVAT credit register in the previous regime. On enactment of the CGST Act, no mechanism was provided for the refund of the credit that existed on the said date. The only mechanism was for utilization of such credit by migrating the same to the GST regime by way of filing declarationForm TRAN-1. The manner and procedure to carry forward the said CENVAT credit under SubSection (1) of Section 140 was to be 'prescribed'. The word 'prescribed' has also been defined under Section 2(87) to mean "prescribed by Rules made under this act on the recommendation of the council". This brings us to Rule 117 of CGST Rules, the relevant provision prescribing the manner in which the CENVAT credit has to be transitioned. Initially, the time limit prescribed under Rule 117 for transitioning was 90 days, as explained above, was extended from time to time. Evidently, there is no other provision in the Act prescribing time limit for the transition of the CENVAT credit, and the same has been introduced only by way of Rule 117. This provision also contains a proviso, which vests power with the Commissioner to extend the period on the recommendations of the Council. Indeed, the Commissioner has exercised such power and time period which was initially to expire after 90 days, has been, as a matter of fact, extended till 29th December, 2017. In fact, as noticed above, under Sub-Rule (1A) of Rule 117, for a specific class of persons, the time limit has gone way beyond the period originally envisaged, and has still not expired. Thus, there is nothing sacrosanct about the time limit so provided. It is not as if the Act completely restricts the transition of CENVAT credit in the GST regime by a particular date, and there is no rationale for curtailing the said period, except under the law of limitations. The period of 90 days has no rationale and as noted above, extensions have been granted by the Government from time to time, largely on account of its inefficient network.*

.....

*26. We, therefore, have no hesitation in reading down the said provision [ Rule 117] as being directory in nature, insofar as it prescribes the time-limit for transitioning of credit and therefore, the same would not result in the forfeiture of the rights, in case the*

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*credit is not availed within the period prescribed. This however, does not mean that the availing of CENVAT credit can be in perpetuity. Transitory provisions, as the word indicates, have to be given its due meaning. Transition from pre-GST Regime to GST Regime has not been smooth and therefore, what was reasonable in ideal circumstances is not in the current situation. In absence of any specific provisions under the Act, we would have to hold that in terms of the residuary provisions of the Limitation Act, the period of three years should be the guiding principle and thus a period of three years from the appointed date would be the maximum period for availing of such credit.*

18. The respondents, for their part, rely upon the judgment of the Hon'ble Supreme Court in the case of *Union of India Vs. Bharti Airtel Ltd. and* Others, [(2022) 4 SCC 328] reversing the decision of the Delhi High Court in *Bharti Airtel Ltd. Vs Union of India* [38 GSTL 145]. This judgment is distinguishable on the ground that in that case, the Delhi High Court had been concerned with the amendment of a 3B return.

19. Paragraphs 47 and 48 are relevant and are extracted below:

*47. Significantly, the registered person is not denied of the opportunity to rectify omission or incorrect particulars, which he could do in the return to be furnished for the month or quarter in which such omission or incorrect particulars are noticed. Thus, it is not a case of denial of availment of ITC as such. If at all, it is only a postponement of availment of ITC. The ITC amount remains intact in the electronic credit ledger, which can be availed in the subsequent returns including the next financial year. It is a different matter that despite the availability of funds in the electronic credit ledger, the registered person opts to discharge OTL by paying cash. That is a matter of option exercised by the registered person on which the tax authorities have no control, whatsoever, nor they have any role to play in that regard. Further, there is no express*

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> *provision permitting swapping of entries effected in the electronic cash ledger vis-a-vis the electronic credit ledger or vice versa.*
>
> *48. A priori, despite such an express mechanism provided by Section 39(9) read with Rule 61, it was not open to the High Court to proceed on the assumption that the only remedy that can enable the assessee to enjoy the benefit of the seamless utilization of the input tax credit is by way of rectification of its return submitted in Form GSTR-3B for the relevant period in which the error had occurred. Any unilateral change in such return as per the present dispensation, would have cascading effect on the recipients and suppliers associated with the concerned transactions. There would be complete uncertainty and no finality could ever be attached to the self-assessment return filed electronically. We agree with the submission of the appellant that any indulgence shown contrary to the statutory mandate would not only be an illegality but in reality, would simply lead to chaotic situation and collapse of tax administration of Union, States and Union Territories. Resultantly, assessee cannot be permitted to unilaterally carry out rectification of his returns submitted electronically in Form GSTR-3B, which inevitably would affect the obligations and liabilities of other stakeholders, because of the cascading effect in their electronic records.*

20. Learned Standing Counsel would thus reiterate that the timelines under the CGST Act and Rules are sacrosanct and cannot be breached under any circumstances. The ratio of the aforesaid decision, in his submission, would apply to the present issue as well and as a consequence there could be no tampering with the timelines mentioned under Rule 120A.

21. I have considered the detailed submissions made as well as devoted anxious study to the judgments referred.

22. I am of the considered view that the issue that arises before me stands on a different footing from that that arose in the decisions that have been cited and

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relied upon by the revenue. No doubt, the timelines for seeking transition of credit have been held to be mandatory. (See *P.R.Mani Electronics* (supra)). However, in the subsequent decision in *Amplexor* (supra), the Bench has, considering a slew of judgments cited by both sides, been persuaded to formulate certain issues for resolution. This includes the issue as to whether the timelines seeking transition under 140 and 117 are mandatory or directory and the same is pending declaration.

23. The timelines for filing of GSTR returns have also been clarified by the Hon'ble Supreme Court. However, the observations of the Hon'ble Court in that case may not, in my respectful view, lead to a conclusion adverse to the assessee in the present case.

24. The point of distinction is the fact that in the present matter, we are concerned as to whether the end-date/cut-off date in two sets of timelines, one seeking transition and the other seeking revision of error in the return seeking transition, can be one and the same.

25. In *Bharat Electronics Ltd.* (supra) I have taken the view that it does not stand to reason that the time limit for revision of a TRAN 1 return be identical to the timeline for filing of a return seeking transition. The purpose of revision is to enable correction/modification of a return of transition. In such an event, it would stand to reason that some additional time, over and above the timeline granted for a TRAN-1 return be provided by the respondent, in the later instance.

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26. As regard the defence of the respondent to the effect that Rule 120A should be challenged, I do not agree. As pointed out, Rule 120A does not, by itself, stipulate any time limit, though undoubtedly, the timeline stated under Rule 117 has to be read into Rule 120 as well. This would not, in my view, lead to a conclusion that the application of Rules 117 and 120A cannot be harmonized, to make them workable, viable and practical.

27. In light of the discussion as above and being of the categoric view that the timelines under Rule 120A must be of a period over and above the timelines stipulated in Rule 117, mandamus as sought for by the petitioner is issued. Since the credits filed by the petitioner relate to Central Excise and Service both coming under Central jurisdiction, R1 may will enable opening of the portal such that revision may be sought.

28. Let this exercise be done within a period of eight weeks from date of uploading of this order in the official website of this Court. This writ petition is allowed in the above terms. Connected miscellaneous petition is closed. No costs.

**15.06.2022**

Index : Yes
Speaking Order
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To

1.The Assistant Commissioner of State Taxex
Sriperumbudur Division,
Ground Floor, Bangalore High Road,
Nazarethper, Poonamallee, Chennai-603108

2.The Goods and Service Tax Network,
East Wing, 4th Floor, World Mark-1
Aerocity, New Delhi-110037

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**DR.ANITA SUMANTH, J.**

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**W.P.No.4458 of 2019 and**
**W.M.P.No.5032 of 2019**

**15.06.2022**