

**IN THE HIGH COURT OF JUDICATURE
AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 3226 OF 2019
WITH
INTERIM APPLICATION NO. 423 OF 2021**

Godrej & Boyce Mfg. Co. Ltd. } Petitioner
Versus
Union of India and Ors. } Respondents

Mr. Arshad Hidayatullah, Senior Advocate with Mr. Anupam Dighe, Ms. Shailaja Kher, Mr. Makrand Joshi and Ms. Chandni Tanna, Advocates i/b. India Law Alliance for the petitioner.

Mr. Pradeep Jetly, Senior Advocate with Mr. J. B. Mishra and Ms. Maya Majumdar, Advocates for the respondents.

**CORAM :- DIPANKAR DATTA, CJ &
G. S. KULKARNI, J.**

RESERVED ON: - SEPTEMBER 22, 2021
PRONOUNCED ON: - OCTOBER 29, 2021

JUDGMENT :- (Per Dipankar Datta, CJ)

1. The petitioner is a company registered under the Companies Act, 1956 and is, *inter alia*, engaged in manufacture of sale of multiple products such as locks, furniture, industrial products, etc.

2. By presenting this writ petition dated November 14, 2019, the petitioner has mounted a challenge to a show cause notice dated August 27, 2019 issued by the Joint Commissioner, CGST & C.Ex, Navi Mumbai, respondent no.3. It has been alleged in such notice that the petitioner "availed inadmissible transitional credit amounting to Rs.3,83,43,693/- [Ed Cess: Rs.1,46,47,191/-, S.H. Ed Cess: Rs.71,77,464/- & PLA: Rs.1,65,19,038/-] in their Trans-1 filed on December 26, 2017". Consequently, the petitioner was required to show cause, within 30 days of receipt of the impugned notice, as to why-

"(i) the Trans-1 credit amounting to Rs.3,83,43,753/- comprising of Ed Cess: Rs.1,46,47,191/-, S.H. Ed Cess: Rs.71,77,464/- and PLA: Rs.1,65,19,038/- availed by them should not be rejected and recovered under sub-section (1) of Section 73 for the above discussed reasons.

(ii) the amount of Rs.3,83,43,753/- reversed by them in their Electronic Credit Ledger in February 2018 (shown in the GSTR-3B for the month of January 2018) should not be appropriated.

(iii) interest amounting to Rs.14,11,890/- calculated @24% per annum on Rs.3,83,43,753/- reversed by them should not be recovered under Section 50(3) of the CGST Act.

(iv) penalty under Section 122(2)(a) of the CTST Act should not be imposed."

3. According to the petitioner, the impugned notice proceeds on the footing that the transitional arrangement for taking Input Tax Credit in the cases of CESS such as Education Cess (E Cess), Secondary & Higher Education Cess (SHE Cess) and Krishi Kalyan Cess (KK Cess) has been taken away by a retrospective amendment. However, the petitioner claims that not only on the date of its issuance but even on the date this writ petition was presented, the amendment(s) referred to in the impugned notice had not come into force and, therefore, the impugned notice has been issued on an untenable legal premise; hence, it is without jurisdiction.

4. While articulating the point in support of the petitioner's claim that the impugned notice is non-est in the eye of law, Mr. Hidayatullah, learned senior counsel first pointed out that Explanation 3 has been inserted in Section 140 of the Central Goods and Services Act, 2017 (hereafter "the CGST Act", for short) with effect from July 1, 2017 by Section 28 of the Central Goods and Services (Amendment) Act, 2018 (hereafter "the Amending Act", for short). It is further pointed out that amendments have also been introduced in Explanations 1 and 2 to Section 140(1) by the said section (i.e., Section 28) with effect from the same date (July 1, 2017). However, in terms of sub-section (2) of Section 1 of the Amending Act, the provisions thereof would come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. Inviting our attention to Notification No.02/2019-Central Tax dated January 29, 2019, it has been contended that the Central Government had appointed February 1, 2019 as the date on

which the provisions of the Amending Act shall come into force except clause (b) of Section 8, Section 17, Section 18, clause (a) of Section 20, sub-clause (i) of clause (b) and sub-clause (i) of clause (c) of Section 28. It has, thus, been urged that without the amendments introduced in Explanations 1 and 2 to Section 140 being brought into force, the respondent no.3 merely on the basis of Explanation 3, as introduced and brought into force, could not have issued the impugned show cause notice and since the same suffers from a gross jurisdictional error, the petitioner is under no obligation to respond thereto. Referring to ground (C) of the writ petition, he has also urged that the petitioner has set up a categorical case of the amendments to Explanations 1 and 2 of Section 140 of the CGST Act not having been notified in terms of Section 1(2) and, hence, sub-clauses (i) each of clauses (b) and (c), Section 28 of the Amending Act are still inoperative in law. It has, accordingly, been prayed that the impugned show-cause notice be set aside.

5. Mr. Jetly, learned senior counsel appearing for the respondents opposed the writ petition by contending that the impugned show-cause notice has been issued by an officer who does have the jurisdiction to issue such notice; hence, the petitioner ought to be directed to raise all points that are available to it in defence for consideration of the said officer. It was further contended by him that the point urged by the petitioner that the impugned show cause notice is not founded on any legal premises, is a jurisdictional issue; and such issue can even be urged by it for an adjudication by the respondent no.3. In view of the impugned show-cause notice not suffering

from absolute want of jurisdiction to even investigate facts, and the respondent no.3 having issued the notice without pre-judging any issue, he contended that this is not an appropriate stage for this Court to pronounce on the merits of the petitioner's claim and set aside the impugned notice. If at all the petitioner is successful in persuading the respondent no.3 not to proceed further, the notice would obviously have to be revoked. In such circumstances, he prayed for disposal of the writ petition without any interference.

6. We have heard learned senior counsel for the parties and perused the materials on record.

7. Since the validity of the show-cause notice dated August 27, 2019 is under challenge on the ground that it has been issued on an erroneous legal premise, it would be absolutely necessary for us to notice the ground on which such notice rests. For facility of convenience, we reproduce the ground in its entirety hereinbelow: -

"Inadmissible credit availed by the assessee in Tran-1 amounting to Rs.3,83,43,693/- [Ed Cess: Rs.1,46,47,191/-, S.H. Ed Cess: Rs.71,77,464/- & PLA: Rs.1,65,19,038/-] in contravention of provisions of Section 140 of CGST Act, 2017 read with explanation 1 & 2 of Section 140 of CGST Act, 2017 and Non Payment of Interest under the provisions of Section 50(3) of CGST Act, 2017 amounting to Rs.14,11,890/- on the reversal of Rs.3,83,43,693/- made under Protest on 20.02.2018.

The explanation 3 to Section 140 of CGST Act, 2018 mentioned under the sub-section (a) of Section 28 of The Central Goods And Services Tax (Amendment) Act, 2018 (No.31 of 2018) dated 29th August 2018 amended with retrospective effect from 1st July 2017 provides specifically that the expression 'eligible duties and taxes' excludes any CESS which has not been included in Explanation-1 and Explanation-2 of Section 140 of the CGST Act, 2017.

Explanation-1 and Explanation-2 of Section 140 of the CGST Act, 2017 do not include Education Cess, Higher Secondary Education Cess & Personal Account Amounts the ambit of the 'eligible duties and taxes'."

8. It would not be incorrect to infer that but for the introduction of Explanation 3 to Section 140 of the CGST Act by Section 28 of the Amending Act, the impugned show-cause notice may not have seen the light of the day. A pointed reference is made to Explanation 3 wherein it has been expressed that 'eligible duties and taxes' excludes any CESS which has not been included in Explanations 1 and 2 of Section 140 of the CGST Act; also a reference is made to Explanations 1 and 2 that the same do not include Education Cess, Higher Secondary Education Cess and Personal Account Amounts within the ambit of the 'eligible duties and taxes'.

9. For the purpose of a decision on the petitioner's claim as regards validity and/or legality of the impugned show-cause notice, may read Section 28 of the Amending Act. It reads as follows: -

"28. In section 140 of the principal Act, with effect from the 1st day of July, 2017,-

- (a) In sub-section (1), after the letters and word "CENVAT credit", the words "of eligible duties" shall be inserted and shall always be deemed to have been inserted;
- (b) In the *Explanation 1*-
 - (i) for the word, brackets and figures "sub-sections (3), (4)", the word, brackets and figures "sub-sections (1), (3), (4)" shall be substituted and shall always be deemed to have been substituted;
 - (ii) clause (iv) shall be omitted and shall always be deemed to have been omitted;
- (c) in the *Explanation 2*-
 - (i) for the word, brackets and figure 'sub-section (5)', the words, brackets and figures "sub-sections (1) and (5)" shall be substituted and shall always be deemed to have been substituted;
 - (ii) clause (iv) shall be omitted and shall always be deemed to have been omitted;
- (d) after *Explanation 2* as so amended, the following Explanation shall be inserted and shall always be deemed to have been inserted, namely:-

"*Explanation 3.*- For removal of doubts, it is hereby clarified that the expression "eligible duties and taxes" excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975."

10. It would, at this stage be profitable to contrast pre-amended and amended Section 140 of the CGST Act and Explanations 1 and 2, and read the same with newly introduced Explanation 3. We consider it appropriate to reproduce the same in a tabular form hereinbelow: -

Prior to Amendments by Section 28 of the CGST (Amendment) Act, 2018	Post Amendments by Section 28 of the CGST (Amendment) Act, 2018
CHAPTER XX	CHAPTER XX
TRANSITIONAL PROVISIONS	TRANSITIONAL PROVISIONS
SECTION 140. Transitional arrangements for input tax credit.- (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed:	SECTION 140. transitional arrangements for input tax credit.- (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit of <u>eligible duties</u>* carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed:
Provided that the registered person shall not be allowed to take credit in the following circumstances, namely: - (i) where the said amount of credit is not admissible as input tax credit under this Act; or (ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or	Provided that the registered person shall not be allowed to take credit in the following circumstances, namely: - (i) where the said amount of credit is not admissible as input tax credit under this Act; or (ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or

(iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government. (2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed: Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law and is also admissible as input tax credit under this Act. Explanation.- For the purposes of this sub-section, the expression "unavailed CENVAT credit" means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of CENVAT credit to which the said person was entitled in respect of the said capital goods under the existing law.	(iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government. (2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed: Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law and is also admissible as input tax credit under this Act. Explanation.- For the purposes of this sub-section, the expression "unavailed CENVAT credit" means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of CENVAT credit to which the said person was entitled in respect of the said capital goods under the existing law.
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(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No.26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, subject to the following conditions, namely :- (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act; (ii) the said registered person is eligible for input tax credit on such inputs under this Act; (iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs; (iv) such invoices or other prescribed documents were issued not earlier than twelve	(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No.26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, subject to the following conditions, namely:- (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act; (ii) the said registered person is eligible for input tax credit on such inputs under this Act; (iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs; (iv) such invoices or other prescribed documents were issued not earlier than twelve
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months immediately preceding the appointed day; and (v) the supplier of services is not eligible for any abatement under this Act: Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed. (4) A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 (1 of 1944) or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994 (32 of 1994), but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger,- (a) the amount of CENVAT credit carried forward in a return furnished under the existing law by him in accordance with the provisions of sub-section (1); and	months immediately preceding the appointed day; and (v) the supplier of services is not eligible for any abatement under this Act: Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed. (4) A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 (1 of 1944) or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994 (32 of 1994), but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger,- (a) the amount of CENVAT credit carried forward in a return furnished under the existing law by him in accordance with the provisions of sub-section (1); and
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(b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods or services, in accordance with the provisions of sub-section (3). (5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day : Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days: Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section. (6) A registered person, who was either paying tax at a fixed	(b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods or services, in accordance with the provisions of sub-section (3). (5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day : Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days: Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section. (6) A registered person, who was either paying tax at a fixed
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rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, subject to the following conditions, namely: - (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act; (ii) the said registered person is not paying tax under section 10; (iii) the said registered person is eligible for input tax credit on such inputs under this Act; (iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs; and (v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day. (7) Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall	rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, subject to the following conditions, namely: - (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act; (ii) the said registered person is not paying tax under section 10; (iii) the said registered person is eligible for input tax credit on such inputs under this Act; (iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs; and (v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day. (7) Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall
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be eligible for distribution as credit under this Act, even if the invoices relating to such services are received on or after the appointed day. (8) Where a registered person having centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day in such manner as may be prescribed: Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier: Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act: Provided also that such credit may be transferred to any of the registered persons having the	be eligible for distribution as credit under this Act, even if the invoices relating to such services are received on or after the appointed day. (8) Where a registered person having centralised registration under existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day in such manner as may be prescribed: Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier: Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act: Provided also that such credit may be transferred to any of the registered persons having the
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same Permanent Account Number for which the centralised registration was obtained under the existing law. (9) Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such credit can be reclaimed subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day. (10) The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may be prescribed. Explanation 1. – For the purposes of sub-sections (3), (4) and (6), the expression “eligible duties” means – (i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957); (ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975); (iii) the additional duty leviable under sub-section (5) of section	same Permanent Account Number for which the centralised registration was obtained under the existing law. (9) Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such credit can be reclaimed subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day. (10) The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may be prescribed. Explanation 1.- For the purposes of <u>sub-sections (1), (3), (4)*</u> and (6), the expression “eligible duties” means – (i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957); (ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975); (iii) the additional duty leviable under sub-section (5) of section
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3 of the Customs Tariff Act, 1975 (51 of 1975); (iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978); (v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); (vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); and (vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day. Explanation 2.—For the purposes of sub-section (5), the expression “eligible duties and taxes” means— (i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);	3 of the Customs Tariff Act, 1975 (51 of 1975); (iv) * * * † (v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); (vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); and (vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day. Explanation 2.— For the purposes of sub-sections <u>(1)</u> and <u>(5)</u>,* the expression “eligible duties and taxes” means – (i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);
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(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975); (iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975); (iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978); (v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); (vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); (vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001); and (viii) the service tax leviable under section 66B of the Finance Act, 1994 (32 of 1994), in respect of inputs and input services received on or after the appointed day.	(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975); (iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975); (iv) * * * † (v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); (vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); (vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001); and (viii) the service tax leviable under section 66B of the Finance Act, 1994 (32 of 1994), In respect of inputs and input services received on or after the appointed day.
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	Explanation 3. – For removal of doubts, it is hereby clarified that the expression “eligible duties and taxes” excludes any cess which has not been specified in <i>Explanation 1 or Explanation 2</i> and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975).*
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* added

† omitted

11. Importantly, Mr. Jetly has not produced any document or material to show that the amendments in Explanations 1 and 2 to Section 140 brought about by Section 28 of the Amending Act have been brought into force. Pertinently, amendment in sub-section (1) of Section 140 has been brought into force by the said notification and the expression ‘of eligible duties’ now finds place therein. However, Explanation 3 seeks to clarify that the expression ‘eligible duties and taxes’, as distinguished from ‘eligible duties’, excludes any cess not specified in Explanations 1 and 2 and any cess collected as additional duty of customs. The expression ‘eligible duties and taxes’ appears in sub-section (5) of Section 140, whereas the expression used in sub-section (1) thereof is ‘of eligible duties’. Mr. Hidayatullah seems to be right in his contention that mere introduction of Explanation 3 to Section 140 of the CGST Act, and making it operational with effect from February 1, 2019, would not clothe the respondent no.3 with the power to issue a show-cause notice on the premise that Education Cess, Higher

Secondary Education Cess and Personal Account Amounts are not included in Explanations 1 and 2. For sustaining the validity and/or legality of the impugned show-cause notice, the respondent no.3 could not have relied upon Explanation 3 exclusively to contend that cess is not included in 'eligible duties and taxes'. As the law now stands, Explanation 3 does not have any application to sub-section (1) of Section 140. The respondent no.3 while issuing the impugned show cause notice perhaps overlooked this aspect and also that, parts of the amendments in Explanations 1 and 2 to Section 140 of the CGST Act sought to be introduced by sub-clauses (1) each of clauses (b) and (c) of Section 28 of the Amending Act are yet to be brought into force. In such view of the matter, a reference to Explanations 1 and 2, as it stands now, may be held to be mindless which, in law, would amount to issuance of a notice without due regard to the provisions of law as well as facts requiring existence or non-existence of a material fact for assumption of jurisdiction.

12. We are conscious of the settled law that the High Court in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India ought not to interfere with a show-cause notice as a matter of routine or for the mere asking. However, it is only in a case where a show-cause notice is found to be totally non-est in the eyes of law for absolute want of jurisdiction of the authority issuing the notice to even investigate into the facts that the writ court may, instead of relegating the noticee to respond to the show-cause notice, itself examine the point of lack/want of jurisdiction. If any authority is required, one may profitably refer to the decision

of the Supreme Court in **Special Director and Anr. V. Mohd. Ghulam Ghouse & Anr.**, reported in (2004) 3 SCC 440.

13. Although it is true, as contended by Mr. Jetly, that the respondent no.3 does not lack the jurisdiction to issue a notice of the nature impugned herein provided the circumstances therefor do exist, the question that has arisen for our consideration is whether issuance of the show-cause notice is vitiated for an approach which is based on an erroneous legal premise. An error in assumption of jurisdiction might also render a notice/an order *ultra vires* and bad. Perusal of the impugned show-cause notice would reveal assumption of jurisdiction by the respondent no.3 based on introduction of Explanation 3 to Section 140 of the CGST Act read with Explanations 1 and 2 thereof without showing application of mind as to whether the amended Explanations 1 and 2 have been made operational or not as well as whether Explanation 3 would at all apply to sub-section (1) of Section 140 of the CGST Act. There could have been little reason for us to interfere if assumption of jurisdiction by the respondent no.3 on the ground appearing from the impugned show-cause notice were shown to be defensible with reference those provisions of law, which have become operational by due exercise of power in terms of sub-section (2) of Section 1 of the Amending Act. Even otherwise, it has not been shown to us that upon introduction of Explanation 3 of Section 140 of the CGST Act read with partly un-amended Explanations 1 and 2 thereof, the respondent no.3 did have the jurisdiction to issue the impugned show-cause notice.

14. For the reasons as aforesaid, we hold that the present case is one where the impugned show-cause notice suffers from an error going to the root of the jurisdiction of the respondent no.3 in assuming jurisdiction and is, accordingly, indefensible and liable to be set aside. We order accordingly.

15. It is, however, made clear that if the respondent no.3 has reason to believe that the action proposed in the show-cause notice could be saved even without the amendments in Explanations 1 and 2 to Section 140 of the CGST Act having been brought into force or on grounds other than the one assigned therein, it shall be at liberty to issue a fresh show-cause notice to the petitioner and if such notice is issued, the petitioner will be free to respond to the same and take all possible defences available to it in law.

16. Accordingly, the writ petition stands disposed of leaving the parties to bear their own costs.

17. In view of the disposal of the writ petition, nothing survives for decision in the interim application. The same stands disposed of accordingly.

SALUNKE
J V

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by SALUNKE J V
Date: 2021.10.30
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(G. S. KULKARNI, J.)

(CHIEF JUSTICE)