IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 13491 of 2021
With
CIVIL APPLICATION (FOR ORDERS) NO. 1 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 13491 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 17703 of 2021
With
CIVIL APPLICATION (FOR DIRECTION) NO. 1 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 17703 of 2021

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MESSERS FILATEX INDIA LTD.
Versus
UNION OF INDIA

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Appearance:
MR AMAL PARESH DAVE(8961) for the Petitioner(s) No. 1,2
MR PARESH M DAVE(260) for the Petitioner(s) No. 1,2
MR DEVANG VYAS(2794) for the Respondent(s) No. 1
MR UTKARSH R SHARMA(6157) for the Respondent(s) No. 2,3,4

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

Date : 18/02/2022

COMMON ORAL ORDER

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

1 Since the issues raised in both the writ applications are the same and the parties are also the same, those were taken up for hearing analogously and are being disposed of by this common order.

2 For the sake of convenience, the Special Civil Application No.13491 of 2021 is treated as the lead matter.

3 By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

"(A) That Your Lordships may be pleased to issue a Writ of Mandamus, or any other appropriate writ, order or direction. striking down Sub Rule (48) of Rule 89 of the CGST Rules, 2017 as ultra vires Sections 54 and 164 of the CGST Act, 2017: ultra vires Section 16 of the IGST Act, 2017 and ultra vires Articles 14 and 19(1)(g) of the Constitution of India:

(B) That Your Lordships may be pleased to issue a Writ of Certiorari, or any other appropriate writ, order or direction, quashing and setting aside OIA No.VAD-CGST-02-APP-JC-OIO-2020-21 dated 13.7.2020 (Annexure-"O") passed by the Joint Commissioner, GST & Central Excise (Appeals) and also OIO No.5/Adj/Dem/JC/AK/2021-22 dated 19.7.2021 (Annexure-"U") passed by the Joint Commissioner, CGST & Central Excise, Vadodara-ll with all consequential reliefs and benefits to the Petitioner:

(C) That Your Lordships may be pleased to issue a Writ of Mandamus, or any other appropriate writ, order or direction holding and declaring that the refund claims for unutilized ITC of input transactions attributable to Zero rated supply in the nature of exports under LUT lodged by the Petitioner under Rule 89(4) of the CGST Rules were legal and valid, and that such refund claims in case of the Petitioner Company could be lodged under Rule 89(4) of the CGST Rules;

(D) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to restrain the Respondents, their servants and agents from taking any action against the Petitioner Company pursuant to OIA No.VAD-CGST-02-APP-JC OIO-2020-21 dated 13.7.2020 (Annexure-"O") and No.5/Adj/Dem/JC/AK/2021-22 dated 19.7.2021 (Annexure-"U"), thereby staying implementation and execution of this appellate order and the adjudication order on the conditions that may be deemed fit by this Hon'ble Court;

(E) An ex-parte ad-interim relief in terms of para 25(D) above may kindly be granted;

(F) Any other relief that may be deemed fit in the facts and circumstances of the case may also please be granted."

4 The facts giving rise to this writ application may be summarized as under:

5 The writ applicant is a company registered and incorporated under the Companies Act, 1956 (for short, "the Act, 1956"). The

company is engaged into the business of manufacturing of textile yarns.

6 It is the case of the writ applicant – company that under the old regime, the manufacturing activities of the writ applicant attracted levy of the Central Excise duty in the form of a tax on the manufacture of goods. The company was discharging its liability towards the payment of the Central Excise duty on the yarns manufactured in and cleared from the factory.

7 The company has been utilizing various inputs and input services in the manufacture of the final products namely the textile yarns and since such inputs and input services were delivered to the company by the suppliers on the payment of the appropriate amount of Excise duty, the company was availing credit of the duties so paid on the inputs and input services under the CENVAT Credit Scheme.

8 It is also the case of the writ applicant – company that it has been selling the goods manufactured by it in the domestic trade on the payment of Excise duty and the company has also been exporting such goods to foreign countries. On export also, the company was paying the Excise duty and the CENVAT credit was utilized for paying the Excise duty on the final products removed in the domestic trade as well as for the exports.

9 Under Rule 18 of the Central Excise Rules, the rebate i.e. refund of Excise duty paid on the exported goods was allowed by the Central Government and accordingly, the rebate of the Excise duty paid on the goods exported by the writ applicant – company was being regularly sanctioned and paid to the writ applicant – company by the department of the Central Excise.

10 From 1st July 2017, the new regime came into force i.e. the provisions of the CGST and IGST and CGST Rules for levy and recovery of the Goods and Services Tax came into force.

11 The writ applicant – company has been registered under the GST law and has been assigned a registration number. It is the case of the writ applicant – company that under Section 16 of the CGST Act, the Input Tax Credit (ITC) of the tax paid on input transaction is admissible to a registered person and in such circumstances, the writ applicant has been availing ITC of the GST paid on the inputs, capital goods and input services received under statutory documents like the tax invoice evidencing payment of the GST on such supplies.

12 According to the writ applicants, under the GST regime, the Government has provided a formula for arriving at the quantum of refund in respect of exports when a manufacturer exporter like the writ applicant herein is engaged in the local supplies as well as export supplies. According to the writ applicant – company, for the purpose of claiming refund, a procedure has been laid down under Rule 89(4) of the CGST Rules. The formula provided under Rule 89(4) has been made applicable by the Government from 1st July 2017 i.e. the date from which the GST laws were brought into force.

13 Later, the Sub Rules (4A) and (4B) respectively came to be inserted in the Rule 89 of the CGST Rules and these two Sub Rules have been substituted from time to time. According to the writ applicant – company, the two Sub Rules referred to above do not provide for any formula for calculating the refund of the unutilized credit.

14 It is the case of the writ applicants that for the exports made between January 2018 and October 2019, it was legally entitled to seek

refund of the accumulated ITC because substantial quantities of inputs, capital goods and input services were received and utilized for the manufacture and export of the goods and such credit was lying unutilized with the writ applicants.

15 In such circumstances referred to above, the writ applicants calculated the amount of refund in accordance with the formula provided by the Government under Rule 89(4) of the Rules for each of the months and accordingly, 22 refund claims were filed with all the necessary calculations supported with necessary documents. The writ applicants claimed refund of the unutlized credit aggregating to Rs.85,85,13,169/- (Rupees Eighty Five Crore Eighty Five Lakh Thirteen Thousand One Hundred Sixty Nine only).

16 According to the writ applicants, the aforesaid amount was cleared and paid.

17 A similar claim, as above, for the month of November, 2019 was put forward by the writ applicants, but the same came to be rejected. The same came to be rejected essentially on the ground that the writ applicant was supposed to file its claim for refund of the unutilized credit under Rule 89(4B) of the CGST Rules and not on the basis of the formula of Rule 89(4) of the Rules.

18 In the aforesaid context, we may refer to the operative part of the order passed by the Assistant Commissioner rejecting the refund claim. It reads thus:

> *"5.10 Their other contention is that "Rule 89 (4B) only lays down that refund of unutilized ITC availed on all inputs other than the inputs procured under Notification No. 40/2017, 41/2017, 78/2018 or 79/2017, would be available. As a matter of fact, formula remains same as laid down under sub rule (4) of Rule 89. Thus in any case refund is available in terms of the formula as mentioned in sub rule 4 of Rule 89. In view thereof, the noticee submits that they have filed refund claim*

correctly and legally under the provisions of Rule 89(4) and thereby it requires to be sanctioned." I find this contention to be incorrect as Rule 89 (4B)(b) is exclusively dealing with such situation i.e. Where the person claiming refund of unutilized input tax credit on account of zero rated supplies without payment of tax has availed the benefit of notification No. 78/2017-Customs, dated the 13th October, 2017 or notification No. 79/2017- Customs, dated the 13th October, 2017, and the refund of input tax credit, availed in respect of inputs received under the said notifications for export of goods and the input tax credit availed in respect of other inputs or input services to the extent used in making such export of goods, shall be granted.

5.11 I find that the claimant has partially agreed at para 7.3, page 6, of their defence submissions, (mentioned in the defence submissions above at Para 7.3) that "On perusal of sub rule (4) of 89……. Further, sub rule (4B) lays down that where the person claiming refund of unutilized ITC on account of Zero rated supplies without payment of tax and receives the supplies on which supplier has availed the benefit of Notification No. 40/2017-CT (Rate) dated 23.10.2017 or Notification No. 41/2017-Integrated tax (Rate) dated 23.10.2017 or availed the benefit of Notification No 78/2017-Customs dated 13.10.2017 or Notification No. 79/2017-Customs dated 13.10.2017, the refund of ITC availed in respect of inputs received under the said notifications or export of goods and the ITC availed in respect of other inputs or input services to the extent used in making such export of goods shall be granted."

Thus, when the category of filing of refund is incorrect i.e. claimant has filed in category "refund of unutilized ITC on account of exports without payment of tax" as per 89 (4), instead of the correct category "any other category" as per Rule 89 (4B), the provisions of Rule 89 (4B) comes to the fore wherein the claimant has to file their refund claim in the system under any other category, and consequently the eligibility and quantification of refund is subjected to the principles laid down in Rule 89 (4B).

5.12 The Claimant's contention at Para 8 of their defence submissions is that "even if the goods have been imported and later on exported under Advance Authorization, there is no restriction in sailing the benefit of refund claim of unutilized ITC on account of export of goods without payment of IGST. Even it is not the case of the department that sub rule (4B), in such situation, restrict the refund claim. Further, when the noticee imports the goods without payment of IGST, this itself shows that they do not cannot avail ITC on such goods as they import without payment of IGST. Since the noticed does not avail ITC on such imported inputs, the question of accumulation of credit in relation to such goods does not arise and if there is no accumulation of ITC on such imported goods, the question of availing of refund claim also does

not arise. In other words, the noticee claim refund of unutilized ITC united on inputs other than on the inputs which have been imported under Advance Authorization." I find that this contention is a matter of fact which is also not in dispute. However their concluding that "In view thereof, it is submitted that the notices has filed refund claim correctly in terms of the provisions of Rule 89(4) of the CGST Rules, 2017", is legally not tenable as they are required to file refund under Rule 89 (4B) and that too under any other category, hence the applicability of formula does not arise and the claimant is entitled for refund as per the provisions of Rule 89 (4B) which is devoid of any formula under Rule 89(4) and speaks of "the refund of input tax credit, availed in respect of inputs received under the said notifications for Export of goods and the input tax credit wailed in respect of other inputs or input services to the Extent used in making such Expert of goods shall be granted, but shall be accompanied by all supporting documents required for substantiating the refund claim under the category "refund of unutilized ITC on account of exports without payment of tax. Here it is pertinent to mention that the claimant is free to file refund under 89 (4B) under "any other category", for the relevant period of this refund claim.

6 In view of the above, I pass the following order.

ORDER

1. I hereby reject the refund claim amounting to Rs. 15,340/- of M/ s. Filatex India Limited, Plot No. D-2/6/A. Village- Jolva. Dahej-2, Industrial Estate, GIDC, Dahej. Tal. Vagin, Distt. Bharuch 392130 having GSTIN No. 24AAACF0027BIZM and re-credit the same to the electronic credit ledger of the claimant in Form GST PMT-03 online subject to the condition that the claimant gives an undertaking in writing that they shall not file an appeal in terms of Rule 93 of CGST Rules, 2017.

2. Thereby reject the refund claim amounting to Rs. 3,16,03,461/- of M/s. Filatex India Limited, Plot No. D-2/6/A, Village- Jolva, Dahej-2, Industrial Estate, GIDC, Dalej, Tel. Vagra, Distt. Bharuch-392130 having GSTIN No. 24AAACF0027B1ZM and re-credit the same to the electronic credit ledger of the claimant in Form GST PMT -03 online subject to the condition that the claimant gives an undertaking in writing that they shall not file an appeal in terms of Rule 93 of CGST Rules, 2017.

Date: 24.02.2020
Place : Bharuch

Signature (DSC): sd/-
Name : N. B. Nangas
Designation : Assistant Commissioner
Office address: Division -VII, CGST,
Vadodara – II Commissionerate."

19 Being dissatisfied with the aforesaid order passed by the Assistant Commissioner, the writ applicants went in appeal before the Joint Commissioner, CGST and Central Excise, Appeals, Vadodara.

20 The appellate authority thought fit to remit the matter to the Assistant Commissioner. While remitting the matter, the appellate authority recorded a finding that the appellant i.e. writ applicant herein is eligible for refund of the accumulated credit, not under Rule 89(4) of the CGST Rules, 2017 as claimed, but under Rule 89(4B) of the Rules. We quote the relevant observations made by the appellate authority while disposing of the appeal as under:

> *"5.5 Again, the appellant had pleaded that even if Rule 89(4B) is applied to the present case, the amount of ITC attributable to Zero rated supplies would have to be determined only based on the formula given under Rule 89(4), as under the GST Laws no one to one co-relation of inputs/inputs services with the finished goods is envisaged. In this regard, I find that the same is not correct in the present case, refund has to be arrived at based on Rule 89(4B) which says "the refund of input credit availed in respect of inputs received under the said notifications for export of goods and the input tax credit availed in respect of other inputs or input services to the extent used in making such export of goods, shall be granted." The refund is applicable on the accumulated ITC that have gone into the making of export of goods. Thus,it can be seen that under Rule 89(4B) no formula is applicable for calculating the refund of accumulated ITC.*
>
> *5.6 From, the above discussion it can be seen that the appellant is eligible for refund of accumulated credit, not under Rule 89(4) of CGST Rules, 2017 as claimed but under Rule 89(4B) of CGST Rules, 2017. The appellant had filed the present refund claim under Rule 89(4), which has been rejected by the adjudicating authority as they have failed to file the refund claim under the correct Rule i.e. Rule 89(4B) and the claim requires to be amended and Refund has to filed under Rule 89(4B) as suggested in the impugned Order Para 5.12. Since this Office is not in possession of all the records and details of ITC credit availed and related matters the case is remanded back to the adjudicating authority with the mandate of considering the claim of refund of the ITC by the appellant afresh under Rule 89(4B) of the CGST Rules, 2017 and pass a Speaking Order based on merit of the*

subject claim. The refund claim shall be accompanied by all supporting documents/working/calculation required for substantiating their refund claim.

6. In view of the above, the adjudicating authority has to give specific findings on the matter based on the discussions made supra. Needless to say abiding by the principle of natural justice, due opportunity, to the appellant be given to put forth their submissions on the above issues before arriving at the final conclusion. Further, I also direct the appellant to resubmit all documents/records, and comply with the details/information called for by the adjudicating authority and co-operate with the adjudicating authority in the matter.

7. Since, the matter is being remanded, no opinion is expressed on the legal and factual maintainability of the case whether in favour of appellant or Department. For remanding the matter, I rely on Hon'ble Gujarat High Court's judgment in the case of Medico Labs-2004 (273) ELT 0117 (Guj.), wherein it has been held that even after amendment of Section 35A or the Central Excise Act, the appellate authority has the power to set aside the decision, which is under appeal before it and it has power to remand the matter to the authority below for its fresh consideration. The same view has also been considered by the Hon'ble CESTAT, Ahmedabad in case of Bacha Motors (P) Ltd Vs. CST, Ahmedabad-2010(20)STRO575. Accordingly, I hereby remand the matter to the adjudicating authority for fresh consideration, after setting aside the impugned order.

8. Appeal No.APL01/02/20-21 is disposed off in the above terms.

Sd/-
(Reena Ashis Dash)
Joint Commissioner,
CGST & Central Excise,
Appeals, Vadodara."

21 Being dissatisfied with the aforesaid order passed by the appellate authority, the writ applicant is here before this Court with the present writ applications.

22 There is one further challenge in the present writ application and that is to the order passed by the Joint Commissioner, CGST and Central Excise, Vadodara – II dated 19th July 2021 seeking to recover the entire

amount which was sanctioned in favour of the writ applicants on the premise that since the Joint Commissioner (Appeals) has said that the refund could not have been sanctioned under Rule 89(4) of the Rules, the entire amount needs to be recovered from the writ applicants.

23 We take notice of the fact that the writ applicants have challenged the constitutional validity of Sub Rule (4B) of Rule 89 of the Rules, 2017 on the ground that the said Sub Rule is *ultra vires* Sections 54 and 164 respectively of the CGST Act; *ultra vires* Section 16 of the IGST Act, 2017 and *ultra vires* Articles 14 and 19(1)(g) of the Constitution of India. The second part of the relief as prayed for by the writ applicants is to quash and set aside both the orders passed by the authorities i.e. the order passed by the Assistant Commissioner and the order passed by the Joint Commissioner (Appeals) and the grant of refund accordingly.

24 We have heard Mr. Paresh M. Dave, the learned counsel appearing for the writ applicants and Mr. Utkarsh Sharma, the learned A.G.P. appearing for the respondents.

25 We first inquired with Mr. Dave as to why his clients want to challenge the constitutional validity of Sub Rule (4B) of Rule 89 of the Rules. We heard Mr. Dave on this issue and tried to understand his line of arguments. Manifold contentions were raised by Mr. Dave in this regard. However, we are of the view that at this point of time, we should not touch the issue as regards the constitutional validity of the Sub Rule (4B) of Rule 89 as we are in a position to dispose of this writ application on a short legal ground. At the same time, we would also like to clarify that it may not be construed that the issue of constitutional validity has been given up. The issue as regards the constitutional validity of Rule (4B) of Rule 89 may be agitated in any other appropriate litigation.

26 The short point for our consideration as on date is whether the assertion on the part of the writ applicant that it is entitled to claim the refund in accordance with the formula as provided under Sub Rule (4) of Rule 89 of the Rules is correct? To put it in other words, whether it is Sub Rule (4B) of Rule 89 which should be made applicable for the purpose of determining the claim so far as the refund is concerned?

27 Mr. Dave vehemently submitted that in fact, if there is any formula which could be said to have been provided for the purpose of adjudicating the claim, the same is to be found in Sub Rule (4) of Rule 89, as Sub Rule (4B) of Rule 89 does not provide for any formula. However, Mr. Dave invited the attention of this Court to the stance of the Commissioner, as reflected in the affidavit-in-reply filed on behalf of the respondents. We take notice of the fact that Shri Manoj Kumar Srivastava, Principal Commissioner of Central Goods and Service Tax and Central Excise, Vadodara – II has affirmed the reply stating as under:

> *"7.2 Para 15, 15 (a) to (c):-*
>
> *The petitioner's contentions that, they are unable to establish the quantum of ITC availed in respect of inputs or input services to the extent used in making export of goods (being an impossible exercise), is absolutely non-tenable, illogical and far from factual position.*
>
> *Every manufacturing process have clearly specified ratios of inputs/raw materials to be used which are to be strictly adhered to for production of finished goods. Therefore each and every manufacturer / exporter must be aware of input-output ratio of the inputs/raw materials used in such manufacturing of the exported goods and the ITC availed against such input supplies received, otherwise they cannot arrive at the costing of the finished goods. Accordingly, contrary to petitioner's contention the required information can be easily bifurcated along with quantity.*
>
> *Further, the claimant must be aware of the turnover of the exported goods, the input output ratio i.e. exact quantities of raw materials / input supplies used in such export of goods and ought have*

the capacity to bifurcate the ITC availed on such input supplies used in such export of goods and hence the claimant's contention that they can't identify the input supplies used in exports exclusively as input supplies are common in both exports and DTA supply is not tenable and also not sustainable. Thus, emphasizing that they are unable to follow the procedure as prescribed under Rule 89(4B) is not possible to them, is totally baseless and not acceptable."

28 The stance of the Principal Commissioner is that it is not correct on the part of the writ applicants to say that if Sub Rule (4B) of Rule 89 is to be applied, then it is difficult for the writ applicants to establish the quantum of ITC availed in respect of inputs or input services to the extent used in exporting the goods. According to Mr. Dave, the Principal Commissioner, in its reply, has himself provided a workable formula. In such circumstances, according to Mr. Dave, there need not be any debate now whether the Sub Rule (4) or Sub Rule (4B) of Rule 89 would apply. In the reply, the Principal Commissioner has stated that each and every manufacturer / exporter is believed to be aware of the input / output ratio of the inputs / raw materials used in such manufacturing of the exported goods and the ITC availed against such input supplies received. According to the Principal Commissioner, it is difficult to believe that the manufacturer would not be aware, otherwise the manufacturer would not be in a position to arrive at the costing of the finished goods.

29 Mr. Dave would submit that if the input / output ratio of the inputs / raw materials is to be looked into, then it is feasible for the writ applicants to determine its claim and seek appropriate refund.

30 As noted above, the Joint Commissioner (Appeals), although took the view that Sub Rule (4B) of Rule 89 of the Rules would apply, yet it thought fit to remit the matter so that the claim can be determined accordingly. Mr. Dave would submit that now since the principle of input / output ratio is to be applied for the purpose of determining the amount to be refunded, a fresh exercise will have to be undertaken by

the Assistant Commissioner.

31 In view of the aforesaid, it is not even necessary for us to now quash and set aside the order passed by the Joint Commissioner (Appeals), as, in fact, the matter should go back to the Assistant Commissioner for the purpose of determination of the refund claim in accordance with the principle / formula, as provided and explained in the reply. But, at the same time, it would be necessary for us to quash and set aside the order passed by the Joint Commissioner dated 19th July 2021. It reads thus:

"ORDER

(i) I confirm the demand of Rs.85,37,07,928/- (Rupees Eighty Five Croes Thirty Seven Lakhs Seven Thousand Nine Hundred and Twenty Eight only) (sum Total of IGST – Rs.7,97,05,689/- + CGST – Rs.23,36,22,217/- + SGST – Rs.53,52,21,375/- + CESS – Rs.51,58,647/-) and order to recover the same from the claimant M/s Filatex Indian Ltd. (GSTIN – 24AAACF0027B1ZM) under Section 74(1) of CGST Act, 2017 as amended, being total refund claim erroneously sanctioned during the periods from JAN-18 to OCT-19 , but not due under Rule 89(4) of CGST Rules, 2017.

(ii) I confirm interest at the appropriate rate on the amount as mentioned at (i) above, and order to recover the same from the claimant M/s. Filatex India Ltd. (GSTIN – 24AAACF0027B1ZM) under Section 74(1) of CGST Act, 2017 read with Section 50 of CGST Act, 2017 as amended.

(iii) I impose penalty of Rs.85,37,07,928/- (Rupees Eighty Five Croes Thirty Seven Lakhs Seven Thousand Nine Hundred and Twenty Eight only) equal to the amount mentioned at (i) upon the claimant M/s. Filatex India Ltd. (GSTIN – 24AAACF0027B1ZM) and order to recover the same under Section 74(9) of CGST Act, 2017 as amended."

32 This writ application succeeds in part. The impugned order dated 19th July 2019 passed by the Joint Commissioner, CGST and Central Excise, Vadodara – II referred to above is hereby quashed and set aside. The Assistant Commissioner shall now proceed further in accordance with the directions issued by the Joint Commissioner (Appeals) vide the

order dated 13th July 2020 and adjudicate the claim of the writ applicants in accordance with Sub Rule (4B) of Rule 89 of the CGST Rules, but keeping in mind the formula of input / output ratio of the inputs / raw materials used in the manufacturing of the exported goods. In other words, keeping in mind what has been stated by the Principal Commissioner in his affidavit-in-reply filed in the present litigation, more particularly, in accordance with the averments made in para 7.2, which is at page 288 of the paper book. Let this entire exercise be undertaken at the earliest and the claim shall be determined and paid accordingly to the writ applicants within a period of eight weeks from the date of receipt of the writ of this order.

33 The connected writ application being the Special Civil Application No.17703 of 2021 succeeds on the same line of reasoning. We need to clarify one thing so far as this connected writ application is concerned. In the connected writ application, the writ applicant has already furnished the necessary refund claim, but in view of the fact that the refund adjudication is to be undertaken a fresh, it should not be said that the earlier claims are now time barred. It is needless to clarify that the fresh adjudication shall be subject to the clearance of the deficiency memo.

34 Consequently, the connected Civil Applications also stand disposed of.

(J. B. PARDIWALA, J)

(NISHA M. THAKORE,J)

CHANDRESH