IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 2792 of 2019

With
R/SPECIAL CIVIL APPLICATION NO. 14980 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 12483 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 13120 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 14148 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 14155 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 16269 of 2019
With
CIVIL APPLICATION (FOR DIRECTION) NO. 1 of 2019
In R/SPECIAL CIVIL APPLICATION NO. 16269 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 16276 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 653 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA
==

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

Downloaded on : Fri Aug 21 10:48:00 IST 2020

==

VKC FOOTSTEPS INDIA PVT. LTD.
Versus
UNION OF INDIA & 2 other(s)

==

Appearance:
MR MIHIR JOSHI, SENIOR COUNSEL WITH MS. AMRITA THAKORE, MR HARDIK MODHWITHY, MR AMIT LADDHA, MR AVINASH PODDAR, MR V SRIDHARAN SENIOR ADVOCATE WITH MR ANAND NAINAWATI, MR JIGAR SHAH AND MS PRIYANKA KALWANI , WADIAGHNADHY AND CO. for the Petitioner(s) No. 1
MR NIRZAR S DESAI, MR PARTH BHATT AND MR SOAHAM JOSHI FOR THE RESPONDENTS.

==

CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 24/07/2020

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Since these petitions are arising out of the common issue, the same were heard analogously and are being disposed of by this Common Judgment.

2. For the sake of convenience, the Special Civil Application No.2792 of 2019 is treated as the lead matter.

3. The petitioner has prayed for the following reliefs:

> *"20. The Petitioners, therefore, prays that this Hon'ble Court may be pleased to:*
> *(a) hold that the amended Rule 8 of the CGST Rules is ultra vires Section 54(5) inasmuch as Section 54(3) provides for refund of 'any*

Downloaded on : Fri Aug 21 10:48:00 IST 2020

unutilized input tax credit accumulated on account of inverted duty structure thereby covering credit of both 'inputs' and 'input services';

(b) hold that the amended Rule 89 of the CGST Rules is violative of Article 14 of Constitution of India inasmuch as it treats dealers with accumulated credit on inputs and dealers with accumulated credit on input services differently;

(c) hold that Section 164(3) is unconstitutional inasmuch as it suffers from the vice of excessive delegation;

(d) hold that the amendment of Rule 89 cannot be given retrospective application;

*(e) issue a Writ of Certiorari or any other appropriate Writ, Order or direction, in the nature of Writ, quashing the refund withholding orders dated 14.06.2018, and letter dated 11.06.2018 issued by Respondent No. 3 enclosed at **Exhibit-1 and Exhibit-2** respectively;*

(f) direct Respondents herein, pending the present petition, not to initiate any coercive action or recovery proceedings;"

4. The Petitioner is engaged in the business of manufacture and supply of footwear which attracts Goods and Service Tax (for short the "GST") at the rate of 5%. The Petitioner procures input services such as job work service, goods transport agency service etc. and inputs such as synthetic leather, PU Polyol, etc., on payment of applicable GST for use in the course of business and avails input tax credit of the GST paid thereon. Majority of the inputs and input services attract GST at the rate of 12% or 18%. Thus, GST rate paid by the Petitioner on

Downloaded on : Fri Aug 21 10:48:00 IST 2020

procurement of input is higher than the rate of tax payable on their outward supply of footwear. Therefore, in spite of utilization of credit for payment of GST on outward supply, there is accumulation of unutilized credit in electronic credit ledger of the Petitioners.

5. The fundamental feature of the GST is that effective taxation of the goods takes place at the stage of supply to the final consumer only and all taxes paid at the anterior stages should be fully absorbed in the tax on outward supply. Where it is not so, refund of accumulated unutilized credit can alone achieve the object of effective taxation only at the stage of supply to final consumer. Sub-section 3 of Section 54 of the Central Goods and Service Tax Act,2017 (for short "CGST Act") is inspired by this principle as it provides for refund of unutilized input tax credit where the credit is accumulated on the account of tax rate on inputs being higher than the tax rate on output supplies. Such situation has been referred as inverted duty structure. Section 54(3) (ii) of the CGST Act lays down the eligibility criteria for the grant of refund on account of inverted duty structure or condition precedent. The criterion being, that the 'rate of tax on inputs being higher than the rate of tax on output supplies'. Thus, as per these provisions, it provides the circumstance under

Downloaded on : Fri Aug 21 10:48:00 IST 2020

which the refund of unutilized credit will be granted. Section 54(3) of the CGST Act provides for refund of any unutilized input tax credit' and the said provision itself specifies the quantum of refund which will include credit availed on input services apart from inputs. This is so because the term “input tax” is defined in Section 2(62) of the CGST Act inter alia as tax charged on supply of goods or services or both. “Input tax credit” is defined in Section 2(63) of the CGST Act as the credit of input tax.

6. Rule 89(5) of the Central Goods and Service Tax Rules,2017 (for Short “CGST Rules, 2017”) is enacted to provide formula for determining the refund on account of inverted duty structure and an assessee is entitled to refund of the unutilized input tax credit availed during the relevant period proportionate to the turnover of inverted rated supply of goods vis-à-vis total turnover of the assessee for that period. Circular No. 79/53/2018-GST dated 31.12.2018 provides example at para 4(b) which is informative,(i) if, the rate of GST on some inputs is higher than the rate of GST applicable on the output supply, while rate of GST on some other inputs is lower than the rate of GST applicable on the said output supply, then that is a situation of inverted duty structure governed by Section 54(3) of the CGST Act,(ii)

Downloaded on : Fri Aug 21 10:48:00 IST 2020

if, assessee supplies goods and none of which involve inverted duty structure, it is not entitled for any refund of unutilized input tax credit,(iii) if, assessee supplies goods involving only inverted duty structure, then entire unutilized credit is refundable to it and (iv)if, an assessee is engaged in making two supplies, one involving inverted duty structure and other not involving inverted duty structure, then it is not entitled for refund for second category of supplies and eligible for refund only for first category of supplies.

7. The provision of Rule 89(5) of the CGST Rules, 2017 as originally introduced was substituted vide Notification No. 21 /2018-CT dated 18.4.2018 prescribing a revised formula for determining the refund on account of inverted duty structure which was given retrospective effect from 1.7.2017 vide Notification No. 26/2018-CT dated 13.6.2018. The revised formula inter alia excluded input services from the scope of 'net input tax credit' for computation of the refund amount under the Rule. Thus, the substituted Rule 89(5) of the CGST Rules,2017 denied refund on the input tax credit availed on input services and allow relief of refund of input tax credit availed on inputs alone.

8. Thus, in the present case, Respondents are

Downloaded on : Fri Aug 21 10:48:00 IST 2020

allowing refund of accumulated input tax credit of tax paid on inputs such as synthetic leather, PU Polyol, etc. However, refund of accumulated credit of tax paid on procurement of input services such as job work service, goods transport agency service, etc. is being denied.

9. The Petitioners have therefore challenged validity of amended Rule 89(5) of the CGST Rule,2017 to the extent it denies refund of input tax credit relatable to input services.

10. It is significant that it is not the case of the Respondents that credit for the tax paid on input services is not available to petitioner. Respondents are only denying refund in cash of unutilized amount of input service credit. Respondents are willing to grant refund in cash of unutilized amount to the extent relatable in inputs only.

I. SUBMISSIONS ON BEHALF OF THE PETITIONERS

11. The learned senior advocate Mr. Sridharan assisted by learned advocate Mr. Anand Nainawati for the petitioner in SCA No.2792 of 2019 submitted as under :

11.1 It was submitted that the fundamental principle of GST laws worldwide is that it is a multi-stage tax. Each point in a supply chain is potentially taxed. However, suppliers are

Downloaded on : Fri Aug 21 10:48:00 IST 2020

entitled to avail credit of taxes paid at anterior stage. This feature of GST leads to its description as being a tax on value addition, with final consumer alone ultimately bearing the tax. The GST law as enacted in India is also based on this principle.

11.2. It was submitted that the First discussion paper published on 10.11.2019 by the Empowered Committee of State Finance Ministers explained that the introduction of GST would achieve a continuous chain of set-off from the original manufacturer to the last retailer in the supply chain and eliminate the burden of all cascading effects. The relevant excerpts from the discussion paper have been reproduced hereunder:

> "1.14 In the GST***, both the cascading effects of CENVAT and service tax are removed with set-off, and a continuous chain of set-off from the original producer's point and service provider's point upto the retailer's level is established which reduces the burden of all cascading effects***. This is the essence of GST, and this is why GST is not simply VAT plus service tax but an improvement over the previous system of VAT and disjointed service tax.
>
> *1.15 The GST at the Central and at the State level will thus give more relief to industry, trade, agriculture and consumers through a more comprehensive and wider coverage of input tax set-off and service tax*

Downloaded on : Fri Aug 21 10:48:00 IST 2020

setoff, subsuming of several taxes in the GST and phasing out of CST.

...... emphasis supplied"

11.3. It was submitted that the Statement of Objects and Reasons appended to the Bill introducing the CGST Act also stated that GST will be levied at each stage of supply chain and the taxes paid at earlier stage will be available as input tax credit. The relevant extract of the same is as under:

> *"3. In view of the aforesaid difficulties, all the above mentioned taxes are proposed to be subsumed in a single tax called the goods and services tax which will be levied on sac o! of goods or services or both at each stage of supply chain starting from manufacture or import till the last retail level.*
>
> *4. … The proposed legislation will simplify and harmonise the indirect tax regime in the country. It is expected to reduce cost of production and inflation in the economy, thereby making the Indian trade and industry more competitive, domestically as well as internationally. Due to seamless transfer of input tax credit from one stage to another in the chain of value addition there is an in-built mechanism in the design of goods and services tax that would incentivise tax compliance by taxpayers.*
>
> *...... emphasis supplied"*

Downloaded on : Fri Aug 21 10:48:00 IST 2020

11.4. It was submitted that the Frequently Asked Questions (FAQs') on GST issued by the Central Board of Excise and Customs on 21.6.2016 updated from time to time, explains GST as under:

> *"Q 1. What is Goods and Services Tax (GST)?*
>
> *Ans. It is a destination based tax on consumption of goods and services. It is proposed to be levied at all stages right from manufacture up to final consumption with credit of taxes paid at previous stages available as setoff. In a nutshell, only value addition will be taxed and burden of tax is to be borne by the final consumer."*

11.5. It was submitted that the Government issued the GST flyers to create awareness amongst the trade and industry regarding the various provisions of GST also emphasized that uninterrupted and seamless flow of input tax credit is one of the key features of GST. Flyer No. 19 dated 1.1.2018 issued by the CBEC explaining the input tax credit mechanism in GST reads thus:

> *"**Uninterrupted and seamless chain of input tax credit hereinafter referred to as "ITC" is one of the key features of Goods and Services Tax.** ITC is a mechanism to avoid cascading of taxes. Cascading of taxes, in simple language, is 'tax on tax'. Under the present system of taxation, credit of taxes being levied by Central Government is*

Downloaded on : Fri Aug 21 10:48:00 IST 2020

not available as set-off for payment of taxes levied by State Governments, and vice versa. One of the most important features of the GST system is that the entire supply chain would be subject to GST to be levied by Central and State Government concurrently. As the tax charged by the Central or the State Governments would be part of the same tax regime, credit of tax paid at every stage would be available as set-off for payment of tax at every subsequent stage."

11.6. It was submitted that thus, GST is a consumption tax where tax burden is borne by the final consumer and business does not bear the burden of the tax since the business are allowed to take credit of the tax paid on anterior supplies received by them.

11.7. It was submitted that the Organisation of Economic Co-operation and Development (OECD) has issued international VAT/GST Guidelines which elucidate that VAT/GST are consumption tax and are borne ultimately by the final consumers and relevant portion relied on is as under:

"INTERNATIONAL VAT/GST GUIDELINES

PREFACE…

4. … In addition it should be borne in mind that value added tax systems are designed to tax final consumption and as such, in most cases it is only consumers who should actually bear the tax burden. Indeed, the tax is levied, ultimately,

Downloaded on : Fri Aug 21 10:48:00 IST 2020

on consumption and not on intermediate transactions between firms as tax charged on these purchases is, in principle, fully deductible. This feature gives the tax its main characteristic of neutrality in the value chain and towards international trade.

CHAPTER I
BASIC PRINCIPLES
I.A. INTRODUCTION

1. There are many differences in the way value added taxes are implemented around the world and across OECD countries. Nevertheless, there are some common core features that can be described as follows:

- ***Value added taxes are taxes on consumption, paid, ultimately, by final consumers.***
- *The tax is levied on a broad base (as opposed to e.g., excise duties that cover specific products);*
- ***In principle, business should not bear the burden of the tax itself** since there are mechanisms in place that allow for a refund of the tax levied on intermediate transactions between firms.*
- *The system is based on tax collection in a staged process, with successive tax payers entitled to deduct input tax on purchases and account for output tax on sales. Each business in the supply chain takes part in the process of controlling and collecting the tax, remitting the proportion of tax corresponding to its margin i.e. on the difference between the VAT paid out to suppliers and the VAT charged to customers. in general, OECD countries*

Downloaded on : Fri Aug 21 10:48:00 IST 2020

with value added taxes impose the tax at all stages and normally allow immediate deduction of taxes on purchases by all but the final consumer.

2. These features give value added takes their main economic characteristic, that of neutrality. The full right to deduction of input tax through the supply chain, with the exception of the final consumer, ensures the neutrality of the tax, whatever the nature of the product, the structure of the distribution chain and the technical means used for its delivery (stores, physical delivery, Internet).”

11.8. It was submitted that though India is not a signatory to OECD model, it adopts the same model of destination-based consumption tax rule as is clear from the discussion paper, statement of objects and reasons of the bill introducing the CGST Act and FAQ.

11.9. It was further submitted that the tax on each stage but effectively only on value addition also ensures that there is free flow of goods and services within the country and also across borders of countries. It was submitted that for instance, as if rate of GST on an article, say fan is 10%. Then fan will suffer the same tax of 10% whether it is imported from outside India or procured domestically. However, if the tax regime is not based on value addition, the imported fan will suffer tax at the rate of 10% on its value,

Downloaded on : Fri Aug 21 10:48:01 IST 2020

while the same article procured domestically will, in addition to the tax payable at the rate of 10% on value of fan will also suffer tax paid on inputs like motor etc. which will form part of the cost of fan which will seriously prejudice the domestic suppliers of fan. It was also submitted that governments want to encourage exports, by reliving domestic taxes levied on the goods which can be easily achieved under value added tax regime by simply refunding output tax of 10% on fan exported or by simply giving refund of total input tax credit to the exporter of fan. This will ensure that taxes paid at any stage of the supply chain do not get exported with the export of goods. In a tax regime which is not based on value added taxation, ensuring refund of the taxes paid at various stage of manufacture of fan will be cumbersome and complicated. Thus, to find out tax paid on steel, motor etc. used in a manufacture of fan will be extremely complicated. Thus, along with the goods, taxes will also get exported. It was submitted that keeping in mind the above economic necessities and realities, the GST law is enacted by various countries world over including India to achieve the principle of value added destination based consumption tax.

11.10. It was submitted that if, Steel supplied by ‘A’ is used to manufacture body of vehicle by ‘B’ which is in turn used to manufacture a car by

Downloaded on : Fri Aug 21 10:48:01 IST 2020

'C'. The GST rate applicable on steel is 18%, vehicle body is 28%,and car is 28%.

- 'A' Supplies the steel at Rs.150 (basic value of steel) + Rs.27 (amount of GST at 18% on Rs.150) to B, a manufacturer of vehicle body. 'A' will remit Rs. 27 as GST to the government.

- 'B' manufacturers the vehicle body and supplies the vehicle body at Rs.200 (value of supply) + Rs.56 (amount of GST at 28% on Rs.200) to 'C'. 'B' collects GST of Rs.56 from 'C', subtracts the GST paid on steel of Rs.27 and deposits the net amount of Rs.29 to the Government in cash.

- 'C' supplies the car at Rs.300 (value of supply) + Rs. 84 (amount of GST at 28% on Rs.300) to the ultimate consumer. 'C' collects from the customer Rs.84, subtracts the GST paid on vehicle body at Rs.56 and deposits the net amount of Rs.28 to the Government in cash.

- In this case, the output tax payable is higher than the input tax credit at all stages.

It was submitted that thus, ordinarily, each

Downloaded on : Fri Aug 21 10:48:01 IST 2020

assessee pays certain amount of tax in cash to the government at each stage due to value addition even after utilising input tax credit.

11.11 It was submitted that instead of the above example of car, if the example of a tractor is considered and if, tractor attracts GST rate of 12%. ‘D’, a supplier of tractors will supply the tractor at Rs.300 (value of supply) + Rs.36 (amount of GST at 12% on Rs.300) to the ultimate consumer, ‘D’, the supplier of tractor would have availed input tax credit of Rs.56 (tax paid to ‘B’, the supplier of vehicle body). This input tax credit would be used to pay GST on tractors of Rs.36. It was submitted that in such a case, there will be an accumulation of input tax credit of Rs.20 (Rs.56 -36) to C. as the rate of GST on inward supplies i.e. tractor body is higher (being 28%) then the rate of GST on outward supplies of tractors (being 12%). It was submitted that the direct consequence in such situation would be cascading effect of taxes in the form of unabsorbed excess tax on inputs with consequent increase in the cost of product which is against the very tenet of GST being consumption tax (namely, only tax in the entire chain is the tax charged to end customer and in the entire supply chain there should not be any sticking or unabsorbed input tax credit). It was therefore, submitted that in such odd situations

Downloaded on : Fri Aug 21 10:48:01 IST 2020

where rate of tax at final stage is less than the rate of tax on anterior stages is common feature when Government in public interest impose a lower rate of tax on products like fertiliser, tractors, low-priced footwear, etc.

11.12. It was submitted that in order to mitigate this anomaly, a mature GST law provides for refund of accumulated unutilised excess input tax credit. Such refund would ensure that anomalies in the tax rate which do not lead to distortions to the fundamental features of GST and GST remains a true consumption tax. It was submitted that the First Discussion Paper on GST in India by the Empowered Committee of State Finance Ministry published on 10.11.2009 had acknowledged the problem of accumulation of input tax credit on account of rate of input tax being higher than output tax and suggested that refund be provided of the accumulated input tax credit. The relevant portion of the paper which was relied upon, is reproduced as under:

THE HIGH COURT OF GUJARAT WEB COPY

> *“(vi) Ideally, the problem related to credit accumulation on account of refund of GST should be avoided by both the Centre and the States except in the cases such as exports, purchase of capital goods* ***Input tax at higher rate than output tax*** *etc where, again refund/adjustment should be completed in a time bound manner."*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

11.13 It was submitted that accordingly the legislature was alive to reality/ this aberration / anomaly (namely inverted duty structure) and hence provided for refund of unutilised input tax credit, by enacting Section 54(3)(ii) of the CGST Act, 2017. It was submitted that the Proviso (ii) to Section 54(3) enacts the condition precedent to be fulfilled for grant of refund, namely inverted duty structure. Thus, it sets out the only circumstance when refund can be granted. It was submitted that the main Section 54(3) itself stipulates what would be refunded. Main Section 54(3) refers 'any unutilised input tax credit'. It was submitted that the expression 'input tax credit' as defined under Section 2(63) means credit of input tax. The expression 'input tax' as specifically defined under Section 2(62) means the tax charged on any supply of "goods or services or both" made to a registered person. It was submitted that it is well settled that when an expression employed in the body of the Act is defined in the Act, that definition will apply whenever the expression is employed in the body of the Act, therefore, the expression 'input tax credit' appearing in main Section 54(3) would include both i.e., credit on inputs and input services as well. It was submitted that there is no reference/or provision in entire Section 54(3) enabling the Central Government/ Executive to

Downloaded on : Fri Aug 21 10:48:01 IST 2020

frame / enact Rule in this regard. It was submitted that this is unlike numerous other sections in the CGST Act, which expressly employ the word "prescribed”. For example, Section 9 provides that the manner in which tax is to be collected may be prescribed, Section 16(1) provides that conditions and restrictions for availing input tax credit may be prescribed, Section 31(2) provides that the time within which a person supplying taxable service shall issue invoice may be prescribed. It was submitted that in other words, in the context of Section 54(3), any exercise of any power by Rule making authority to frame Rule in this regard is entirely unnecessary and unwarranted. Hence, Rule 89(5) of the CGST Rules,2017 and Explanation (a) thereto, is ultra vires to that extent.

11.14 It was submitted that the policy of Government that goods are to be exported and not taxes. Consequently, no output tax is charged on goods exported (or if levied, same is refunded). It was submitted that non-levy of output taxes on goods exported alone does not relieve of full burden of local taxation on goods exported. Therefore, apart from not levying taxes on goods exported, refund of the taxes paid on input supplies used in export goods is also to be granted as per provision of section 54(3)of the

Downloaded on : Fri Aug 21 10:48:01 IST 2020

CGST Act.

11.15 It was submitted that therefore, if entire supplies made by an assessee are by way of export, entire input tax credit would be refunded to it but, ordinarily, assessee making domestic supplies is not eligible refund of input tax credit. However, if, an assessee is engaged in exporting goods as well making domestic supplies in such cases, the assessee would be eligible for claiming refund of input tax credit attributable to exports while simultaneously, not being entitled for cash refund of input tax credit relatable to domestic supplies. In such cases, where assessee makes both domestic supplies as well as export, one has to estimate input tax credit relatable to exports so that, such credit alone is refunded to the assessee. It was therefore, submitted that broadly speaking, Rule 89(4) provides for computation of the amount refundable as (export turnover divided by total turnover) multiplied by total input tax credit and hence the purpose of formula in Rule 89(4) is only to estimate the input tax credit relatable to export on proportionate basis, where assessee effects both export sales and domestic sales, while in law refund is due only for export.

11.16 It was therefore submitted that similarly need for providing formula in Rule 89(5) is that

Downloaded on : Fri Aug 21 10:48:01 IST 2020

if assessee has output supplies having inverted duty structure and also has output supplies not having inverted duty structure, refund is to be given only for the former supplies and refund is not to be given for latter supplies and proportionate formula is provided to confine refund to inverted duty structure Supplies only with no refund for other (i.e. non-inverted duty) outward supplies. It was submitted that if, GST paid on inward supplies is higher than the GST payable on output supplies i.e., supplies falling under inverted duty structure, then in principle, government decided to grant refund in such case by enacting Section 54(3) read with proviso (ii) thereto.

11.17 It was submitted that if an assessee is exclusively effecting outward supplies involving inverted duty structure, then the entire unutilised input tax credit will be eligible as refund to the assessee as ordinarily, in law, assessee is not eligible for input tax refund relatable to supplies not involving inverted duty structure. It was submitted that on the lines of rationale of Rule 89(4), Rule 89(5) estimates refund attributable / relatable to inverted duty structure supplies by adopting proportionate turn over basis which is the sole and only purpose of formula for enabling Rule 89(5).

Downloaded on : Fri Aug 21 10:48:01 IST 2020

11.18 It was therefore, submitted that the need and the rational for the formula contained in Rule 89(5) in considering turnover of inverted duty structure goods vis-a-vis total turnover is understandable and reasonable, however, Rule 89(5) in the garb of fixing formula for determining pro-rata amount of credit relatable to inverted duty structure turnover vis-a-vis total turnover, has restricted the refund to input tax credit on inputs and by denying input tax credit on input services by defining 'Net ITC' to mean input tax credit availed on inputs only which consequently ignores/overlooks input tax credit relatable to input services. The relevant extract of amended Rule 89(5) reads thus*:*

> *"(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula :*
>
> *Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover}- tax payable on such inverted rated supply of goods and services.*
>
> *Explanation : For the purposes of this sub-rule, the expressions-*
>
> *(a)* ***Net ITC shall mean input tax credit availed on inputs*** *during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both;*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

It was submitted that excluding refund on input services in the formula prescribed in Rule 89(5) is plainly contrary to main Section 54(3) and proviso (ii) thereto and therefore to this extent Rule 89(5) is ultra vires. It was submitted that main Section 54(3) categorically provides that a person may claim refund of any unutilised input tax credit and there are no words either in main section 54(3) or under proviso (ii) to Section 54(3) whatsoever that the refund in question would only be limited to credit of tax paid on inputs only. It was submitted that moreover, Explanation (a) to Section 54 defines refund' to include "refund of unutilised input tax as provided under sub-section (3) and as per Section 2(63) "input tax credit" means the credit of input tax, where as the term "input tax" is defined under Section 2(62) as under (relevant portion only):

> *"input tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes-*
>
> XXXX"

It was therefore, submitted that Explanation (a) to Rule 89(5) has narrowed down Section 54(3) by employing the expression "input tax credit availed on inputs" in Rule 89(5),thus, Rule 89(5)

Downloaded on : Fri Aug 21 10:48:01 IST 2020

has the effect of granting refund only on inputs and not on input services, hence, Explanation (a)to Rule 89(5) to the extent it confines refund of input tax credit only to 'inputs' & ignoring 'input services', is ultra vires Section 54(3).

11.19 It was submitted that it is well settled law that Rule made by executive cannot curtail or whittle down the provisions of the Act. It was therefore, submitted that explanation (a) to Rule 89(5) which confines refund to 'input credit' to the exclusion of 'input service credit' also whittles down the effect of word "any" in the phrase 'any unutilised input tax credit' employed in Section 54(3) as the word 'any' in the phrase 'any unutilised input tax credit' employed in Section 54(3) would obviously mean "all" input tax credit including input services.

THE HIGH COURT OF GUJARAT WEB COPY

11.20 Reliance was placed on the following decisions of the Hon'ble Supreme Court in support of above submissions:

> **(i) Shri Balaganesan Metals v. M.N. Shanmugham Chetty reported in (1987) 2 SCC 707** where in Para 18 & 19 word "any" in a statute is explained as under:
>
> > "18. *In construing* Section 10(3) (c) *it is pertinent to note that the words used are "any tenant" and not "a tenant" who can be called upon to vacate the portion*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

in his occupation. The word "any" has the following meaning:-

"Some; one out of many; an indefinite number. One indiscriminately of whatever kind or quantity."

Word "any" has a diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute depends upon the context and the subject matter of the statute.

It is often synonymous with "either", "every" or "all". Its generality may be restricted by context; (Black's Law Dictionary; Fifth Edition).

19. Unless the legislature had intended that both classes of tenants can be asked to vacate by the Rent Controller for providing the landlord additional accommodation be it for residential or non-residential purposes it would not have used the word "any" instead of using the letter "a" to denote a tenant."

(ii) Lucknow Development Authority v. M.K. Gupta (1994) 1 SCC 243. Para 4 of this judgment explains meaning of 'service' as under:

"*4. What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or flat? Can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of such property. The answer to all this shall depend on understanding of the word 'service". The term has variety of meanings. It may*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc. The concept of service thus is very wide. How it should be understood and what it means depends on the context in which it has been used in an enactment. Clause (o) of the definition section defines it as under:

> *" service' means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"*

It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to any service made available to potential users. The words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' dictionarily means 'one or some or all'. In Black's Law Dictionary it is explained thus, "word ,any' has a diversity of meaning and may be employed to indicate 'all' or ,every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject- matter of the statute". The use of the word 1 any' in the context it has been used in clause (o) indicates that it has been used in wider sense extending from one

Downloaded on : Fri Aug 21 10:48:01 IST 2020

to all. The other word 'potential' is again very wide. In Oxford Dictionary it is defined as 'capable of coming into being, possibility'. In Black's Law Dictionary it is defined as "existing in possibility but not in act. Naturally and probably expected to come into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the successive future instalments or payments on a contract or engagement already made." In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users. But the legislature did not stop there. It expanded the meaning of the word further in modem sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc. Each of these is wide-ranging activities in day to day life. They are discharged both by statutory and private bodies. In absence of any indication, express or implied there is no reason to hold that authorities created by the statute are beyond purview of the Act. When banks advance loan or accept deposit or provide facility of locker they undoubtedly render service. A State Bank or nationalised bank renders as much service as private bank. No distinction can be drawn in private and public transport or insurance companies. Even the supply of electricity or gas which throughout the country is being made, mainly, by statutory authorities is included in it. The legislative intention is thus clear to protect a consumer against services rendered even

Downloaded on : Fri Aug 21 10:48:01 IST 2020

> *by statutory bodies. The test, therefore, is not if a person against whom complaint is made is a statutory body but whether the nature of the duty and function performed by it is service or even facility."*

It was submitted that thus, what is to be refunded is "unutilised input tax credit and is so stated in main Section 54(3) itself. Therefore, Rule 89(5) is ultra vires to that extent.

11.21 It was submitted that Section 164(1) of the CGST Act confers a general rule making power on the Government as under:

> *"164. (1) The Government may, on the recommendation of the Council, by notification, make rules for carrying out the provisions of this Act."*

It was submitted that thus, the government can make rules only for the purpose of carrying out the provisions of the Act whereas Rule 89(5) provides a proportionate formula for determining the pro-rata amount of credit relatable to inverted duty structure vis-a-vis total turnover which is needed in case where the assessee is making supplies involving inverted duty structure as well as supplies not involving inverted duty structure as Section 54(3) provides for refund only in case of inverted duty structure and

Downloaded on : Fri Aug 21 10:48:01 IST 2020

hence, to this extent, Rule 89(5) can be said to be a rule made for carrying cut the provisions of the Act in terms of Section 164(1), however, Rule 89(5) further restricts the refund to input tax credit on inputs alone and denies in respect of input services, therefore, such a rule is not for the purpose of carrying out the provisions of the Act but for the purpose of restricting the provision of the Act namely Section 54(3) which provides credit of any unutilised input tax credit and as such explanation (a) to the Rule 89(5) cannot be sustained even under general rule making power conferred by Section 164(1).

11.22 It was submitted that it is well settled that if a provision is ultra vires, the court in an appropriate case can strike down the offending portion keeping intact the valid portions of the provision. Reliance was placed on para 10 in case of Lohara Steel Industries Ltd. v. State of AP. Reported in (1997) 2 SCC 37.

11.23 It was summarised that in the present case challenge to the vires of Rule 89(5) is only because of definition of Net ITC as per Explanation (a) to the said rule which defines "Net ITC" mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed

Downloaded on : Fri Aug 21 10:48:01 IST 2020

under sub-rules (4A) or (4B) or both where as Section 54(3) allows refund of any input tax credit and not credit on inputs only. Therefore if the above expression "on inputs" employed in Explanation (a) to Rule 8(5) is struck down, Explanation defining Net ITC will read as under:

> "Net ITC" shall mean input tax credit availed during two relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both"

It was submitted that the Explanation (a) to Rule 89(5) will then be entirely in line with the main provision viz. Section 54(3). Hence, the offending words in the Explanation i.e. "on inputs" are easily severable and liable to be stuck down to bring the Explanation (a) in accordance with main section 54(3) read with proviso (ii) thereto. It was submitted that granting refund of input tax credit on inputs and denying refund in respect of input service is also violative of Article 14 of the Constitution of India and hence bad in law.

12. Learned Senior advocate Mr. Mihir Joshi assisted by learned advocate Ms. Amrita M. Thakore appearing for the petitioner in SCA No.14155 of 2018 submitted as under:

12.1. It was submitted that GST was introduced with the intention of removing the cascading

Downloaded on : Fri Aug 21 10:48:01 IST 2020

effect of taxes by providing for input tax credit on all inputs and input services, which can be used for payment of output tax. [See Statement of Objects and Reasons of the Constitution (122nd Amendment) Act and Statement of Objects and Reasons of the CGST Act.

12.2 It was submitted that the scheme of the CGST Act makes this object very clear since Sections 16 and 49 clearly provide for input tax credit on any supply of goods or services used or intended to be used in the course of furtherance of business which can be used for payment of tax. Section 49(6) provides for refund of the balance in the electronic credit ledger after payment of tax, interest, penalty, fees, etc in accordance with Section 54 which pertains to refund of tax and Sub-section (3) of Section 54 stipulates that a registered person can claim refund of “ANY” unutilised input tax credit at the end of any tax period. Reference was made to “Notes on Clauses” of Section 54 to point out that it does not restrict refund of tax paid on inputs nor does it create a distinction between zero rated supplies and inverted tax structure for the purposes of refund of unutilised input tax credit as “input tax credit” as defined in Section 2(63) means credit of input tax and “input tax” as defined in Section 2(62) includes tax charged on any supply of goods or services or both. It was submitted

Downloaded on : Fri Aug 21 10:48:01 IST 2020

that the proviso to sub-section (3) of Section 54 provides the threshold eligibility criteria for claiming refund of unutilised input tax credit and Clause (ii) thereof allows claiming of refund of unutilised input tax credit where credit has accumulated on account of rate of tax on inputs being higher than rate of tax on output supplies which was explained as under:

> (i) If the rate of tax on inputs is higher than the rate of tax on output supplies, the registered person would meet the eligibility for claiming refund and is therefore entitled to all/ ANY unutilised input tax credit lying in the electronic credit ledger.
>
> (ii) Department seeks to rely upon the definition of "input" as contained in Section 2(59) which excludes "input services" separately defined in Section 2(60) to contend that the proviso to Section 54(3) excludes refund of tax paid on input services. It was submitted that this interpretation is not correct as:
>
> > (a) The words used in Clause (ii) of the proviso are "tax on inputs" and "tax on output supplies",considering that the intention of the legislature as evident from the object and scheme of the Act is to prevent cascading effect of tax and the Act specifically provides for availment of credit on inputs as well as input services, the words "tax on inputs" cannot be interpreted to mean tax on "inputs" as defined in Section 2(59) but have to be read as "input tax" as

Downloaded on : Fri Aug 21 10:48:01 IST 2020

defined in Section 2(62) which includes input services within its purview. This interpretation is fortified by the use of the phrase “tax on output supplies ” also in the same clause (ii) when considered in the context of the fact that the Act does not define “output” but defines “output tax” in Section 2(82) to include tax on both gods and services and defines “outward supply“ in Section 2(83) to include supply of goods as well as services and “supply” in Section 7 to include supply of both goods and services.

(b) Section 2 of the Act begins with the words “In this Act unless the context otherwise requires”, considering the object and scheme of the Act and the intention of the legislature, the context does require the aforementioned interpretation.

(iii) It was submitted that assuming that the interpretation of the department is applicable, then also once the rate of tax on inputs is higher than the rate of tax on output supplies, the registered person would meet the threshold eligibility for claiming refund and would thereafter be entitled to all/ANY unutilised input tax credit lying in the electronic credit ledger. No restriction can thereafter be placed by way of rules on refund of any part of the unutilised input tax credit lying in the electronic credit ledger.

12.3 It was submitted that amended Rule 89(5) results in perpetual retention / appropriation of unutilised input tax credit on services by the

Downloaded on : Fri Aug 21 10:48:01 IST 2020

Government contrary to the intention of the legislature as evidenced from the object and scheme of the Act which would therefore amount to indirect levy of tax without authority of law under Article 265 of the Constitution of India.

12.4 It was submitted that amended Rule 89(5) violates Article 14 of the Constitution of India as it is manifestly arbitrary and irrational because;

> (i) It denies a crystallised and vested right created by the statute by virtue of the statutory entitlement to credit which keeps accumulating but cannot be used.
>
> (ii) The retrospective operation of the amended Rule 89(5) deprives the petitioner even of the crystalised and vested right of refund.
>
> (iii) There is absolutely no rationale for allowing credit of tax paid on input services used or intended to be used in the course of furtherance of business which can be used for payment of tax but not allowing refund thereof if such credit cannot be utilised on account of inverted duty structure imposed by the Government itself.
>
> (iv) There is absolutely no rationale for allowing refund of unutilised input tax credit in respect of tax paid on inputs but not unutilised input tax credit in respect of tax paid on input services.

Downloaded on : Fri Aug 21 10:48:01 IST 2020

12.5 It was submitted that amended Rule 89(5) is also discriminatory since:

> (i) Refund of unutilised input tax credit in respect of tax paid on input services is permitted in the case of zero rated supplies (exports or supplies to SEZs). No intelligible differentia which has a rational nexus to the object sought to the achieved is perceptible.
>
> (ii) It is the Government which fixes rates of tax to be paid on different goods and services from time to time. It is only on account of prevalent rates that some industries would face an inverted duty structure while others do not. That may change if the rates are changed. Those industries which face an inverted duty structure and whose input services are taxed at a higher rate than the tax on their outward supplies, are not entitled to refund of unutilised input tax credit (which remains unutilised not on account of any action or inaction of the industry but on account of the rate structure set by the Government)while those industries which do not face an inverted duty structure are not faced with losing any part of their input tax credit. No intelligible differentia which has a rational nexus to the object sought to the achieved is perceptible.
>
> (iii) Those industries which are engaged in making outward supplies wholly using inputs would get full refund of unutilised input tax credit while putting at a disadvantage those industries which substantially use input services for making outward supplies.

Downloaded on : Fri Aug 21 10:48:01 IST 2020

(iv) If a manufacturer gets any part of his manufacturing done on job work basis, tax paid on job work charges would be treated a tax on input services which would not be refunded while other manufacturers of identical goods which do not use job work services would get refund of entire unutilised input tax credit.

12.6 It was further submitted that the statement of object and reasons of the CGST Bill 2017 are required to be considered for the purpose of analysis as to whether Rule 89(5) of the CGST rules is ultra vires or not. Statements of objects and reasons of the Act reads thus:

"STATEMENT OF OBJECTS AND REASONS

Presently, the Central Government levies tax on, manufacture of certain goods in the form of Central Excise duty, provision of certain services in the form of service tax, inter-State sale of goods in the form of Central Sales tax. Similarly, the State Governments levy tax on and on retail sales in the form of value added tax, entry of goods in the State in the form of entry tax, luxury tax and purchase tax, etc. Accordingly, there is multiplicity of taxes which are being levied on the same supply chain.

2. The present tax system on goods and services is facing certain difficulties as under—

(i) there is cascading of taxes as taxes levied by the Central Government are not available as set off against the

Downloaded on : Fri Aug 21 10:48:01 IST 2020

taxes being levied by the State Governments;

(ii) certain taxes levied by State Governments are not allowed as set off for payment of other taxes being levied by them;

(iii) the variety of Value Added Tax Laws in the country with disparate tax rates and dissimilar tax practices divides the country into separate economic spheres; and

(iv) the creation of tariff and non-tariff barriers such as octroi, entry tax, check posts, etc., hinder the free flow of trade throughout the country. Besides that, the large number of taxes create high compliance cost for the taxpayers in the form of number of returns, payments, etc.

3. In view of the aforesaid difficulties, all the above mentioned taxes are proposed to be subsumed in a single tax called the goods and services tax which will be levied on supply of goods or services or both at each stage of supply chain starting from manufacture or import and till the last retail level. So, any tax that is presently being levied by the Central Government or the State Governments on the supply of goods or services is going to be converged in goods and services tax which is proposed to be a dual levy where the Central Government will levy and collect tax in the form of central goods and services tax and the State Government will levy and collect tax in the form of state goods and services tax on intra-State supply of goods or services or both.

4. In view of the above, it has become necessary to have a Central legislation, namely the Central Goods and Services

Downloaded on : Fri Aug 21 10:48:01 IST 2020

Tax Bill, 2017. The proposed legislation will confer power upon the Central Government for levying goods and services tax on the supply of goods or services or both which takes place within a State. The proposed legislation will simplify and harmonise the indirect tax regime in the country. It is expected to reduce cost of production and inflation in the economy, thereby making the Indian trade and industry more competitive, domestically as well as internationally. Due to the seamless transfer of input tax credit from one stage to another in the chain of value addition, there is an in-built mechanism in the design of goods and services tax that would incentivise tax compliance by taxpayers. The proposed goods and services tax will broaden the tax base, and result in better tax compliance due to a robust information technology infrastructure.

5. The Central Goods and Services Tax Bill, 2017, inter alia, provides for the following, namely:—

(a) to levy tax on all intra-State supplies of goods or services or both except supply of alcoholic liquor for human consumption at a rate to be notified, not exceeding twenty per cent. as recommended by the Goods and Services Tax Council (the Council);

(b) to broad base the input tax credit by making it available in respect of taxes paid on any supply of goods or services or both used or intended to be used in the course or furtherance of business;

(c) to impose obligation on electronic commerce operators to collect tax at

Downloaded on : Fri Aug 21 10:48:01 IST 2020

source, at such rate not exceeding one per cent. of net value of taxable supplies, out of payments to suppliers supplying goods or services through their portals;

(d) to provide for self-assessment of the taxes payable by the registered person;

(e) to provide for conduct of audit of registered persons in order to verify compliance with the provisions of the Act;

(f) to provide for recovery of arrears of tax using various modes including detaining and sale of goods, movable and immovable property of defaulting taxable person;

(g) to provide for powers of inspection, search, seizure and arrest to the officers;

(h) to establish the Goods and Services Tax Appellate Tribunal by the Central Government for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority;

(i) to make provision for penalties for contravention of the provisions of the proposed Legislation;

(j) to provide for an anti-profiteering clause in order to ensure that business passes on the benefit of reduced tax incidence on goods or services or both to the consumers; and

(k) to provide for elaborate transitional provisions for smooth transition of existing taxpayers to

Downloaded on : Fri Aug 21 10:48:01 IST 2020

goods and services tax regime.

6. The Notes on clauses explain in detail the various provisions contained in the Central Goods and Services Tax Bill, 2017.

7. The Bill seeks to achieve the above objectives".

Referring to the above, it was submitted that basic object of the GST Act is to streamline indirect tax structure earlier prevailing in India so as to levy tax on intra-state supply of goods and interstate supply of goods and other objective stated herein above. It was therefore, submitted that Rule 89(5) prescribing the formula for calculation of refund on account of inverted duty structure is contrary to sub-section 3 of Section 54 of the GST Act rendering in contradictory to the basic scheme and object of the GST Act. Reliance was placed on the decision of the Supreme Court in the case of Printers (Mysore) Ltd. and another vs. Assistant Commercial Tax Officer and Others reported in [1994] 2 SCC 434, to submit that the object of the GST Act is not to create a burden, which was not there but to remove the burden, if any already existing in the prevailing tax structure. The Supreme Court has observed in the said decision as under :

"17. Reference must be made in this connection to the judgment in Indian

Downloaded on : Fri Aug 21 10:48:01 IST 2020

Express Newspapers v. Union of India *wherein not only the importance of freedom of press was emphasised, it was also held that a newspaper cannot survive and sell itself at a price within the reach of a common man unless it is allowed to take in advertisements. (See para 84). This decision is significant for the reason that it seeks to place freedom of press on a higher footing than other enterprises. E.S. Venkataramiah, J., as he then was, speaking for the Bench, said: (SCC p. 686, para 69)*

> *"In view of the intimate connection of newsprint with the freedom of the press, the tests for determining the vires of a statute taxing newsprint have, therefore, to be different from the tests usually adopted for testing the vires of other taxing statutes. In the case of ordinary taxing statutes, 8 (1 962) 3 SCR 842: AIR 1962 SC 305 9 (1972) 2 SCC 788 10 (1985) 1 SCC 641 :1985 SCC (Tax) 121 the laws may be questioned only if they are either openly confiscatory or a colourable device to confiscate. On the other hand, in the case of a tax on newsprint, it may be sufficient to show a distinct and noticeable burdensomeness, clearly and directly attributable to the tax."*

18. Now coming back to the amendment of the definition of "goods" in Section 2(d) *of the Central Sales Tax Act, the said amendment, brought in with a view to bring the said definition in accord with the amendments brought in by the Constitution Sixth (Amendment) Act (referred to hereinbefore) was actuated*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

by the very same concern, viz., to exempt the sale of newspapers from the levy of Central Sales Tax. The amendment was not intended to create a burden which was not there but to remove the burden, if any already existing on the newspapers a policy evidenced by the enactment of the Taxes on Newspapers (Sales and Advertisements) Repeal Act, 1951. This concern must have to be borne in mind while understanding and interpreting the expression "goods" occurring in the second half of Section 8(3)(b). *Now, the expression "goods" occurs on four occasions in* Section 8(3)(b). *On first three occasions, there is no doubt, it has to be understood in the sense it is defined in clause (d) of* Section 2. *Indeed, when* Section 8(1)(b) *speaks of goods, it is really referring to goods referred to in the first half of* Section 8(3)(b), *i.e., on first three occasions. It is only when* Section 8(3)(b) *uses the expression "goods" in the second half of the clause, i.e., on the fourth occasion that it does not and cannot be understood in the sense it is defined in* Section 2(d). *In other words, the "goods" referred in the first half of clause (b) in* Section 8(3) *refers to what may generally be referred to as raw material (in cases where they were purchased by a dealer for use in the manufacture of goods for sale) while the said word "goods" occurring for the fourth time (i.e., in the latter half) cannot obviously refer to raw material. It refers to manufactured "goods", i.e., goods manufactured by such purchasing dealer in this case, newspapers. If we attach the defined meaning to "goods" in the second half of* Section 8(3)(b), *it would place the newspapers in a more*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

unfavourable position than they were prior to the amendment of the definition in Section 2(d). *It should also be remembered that* Section 2 *which defines certain expressions occurring in the Act opens with the words: "In this Act, unless the context otherwise requires". This shows that wherever the word "goods" occurs in the enactment, it is not mandatory that one should mechanically attribute to the said expression the meaning assigned to it in clause (d). Ordinarily, that is so. But where the context does not permit or where the context requires otherwise, the meaning assigned to it in the said definition need not be applied. If we keep the above consideration in mind, it would be evident that the expression "goods" occurring in the second half of* Section 8(3)(b) *cannot be taken to exclude newspapers from its purview. The context does not permit it. It could never have been included by Parliament. Before the said amendment, the position was the State could not levy tax on intra-State sale of newspapers; the Parliament could but it did not and Entry 92-A of List I bars the Parliament from imposing tax on inter-State sale of newspapers; as a result of the above provisions, while the newspapers were not paying any tax on their sale, they were enjoying the benefit of* Section 8(3)(b) *read with* Section 8(1)(b) *and paying tax only @ 4% on non-declared goods which they required for printing and publishing newspapers. Their position could not be worse after the amendment which would be the case if we accept the contention of the Revenue. If the contention of the Revenue is accepted, the newspapers would now become liable to pay tax Co) 10% on non-*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

declared goods as prescribed in Section 8(2). *This would be the necessary consequence of the acceptance of Revenue's submission inasmuch as the newspapers would be deprived of the benefit of* Section 8(3)(b) *read with* Section 8(1)(b). *We do not think that such was the intention behind the amendment of definition of the expression "goods" by the 1958* (Amendment) Act. *Even apart from the opening words in* Section 2 *referred to above, it is well settled that where the context does not permit or where it would lead to absurd or unintended result, the definition of an expression need not be mechanically applied. [Vide T.M. Kanniyan v. ITO' Pushpa Devi v. Milkhi Ram 12 (para 14) and* CIT v. J. H. Gotla.*]"*

13. Mr. Uchit Sheth, the learned advocate for the petitioners appearing in Special Civil Application Nos.12483 of 2019, 16269 of 2019 and 16276 of 2019 referred to Section 2(60) of the GST Act which defines "input service" means any service used or intended to be used by a supplier in the course or furtherance of business. Thereafter, reference was made to the definition of "input tax" as per section 2(62) of the GST Act, to submit that "input tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him.

13.1 Learned advocate thereafter, referred to

Downloaded on : Fri Aug 21 10:48:01 IST 2020

provisions of Section 17 of the GST Act, which provides for "Apportionment of credit and blocked credits" and submitted that Section 17(1) provides that where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business. Section 18 of the GST Act was also referred to point out "Availability of credit in special circumstances" in relation to inputs and Section 20 was referred to point out the "Manner of distribution of credit by Input Service Distributer".

13.2 It was pointed out that Section 140(3) of the GST Act provides for "Transitional arrangements for input tax credit" available in the hands of the assessee on coming into force of the GST with effect from 1st July 2017. It was submitted that the aforesaid provisions of the GST Act clearly provides that the assessee is entitled to refund as per provision of Section 54(3) of the Act to claim refund of "any" unutilised input tax credit at the end of the tax period. In such circumstances, it was submitted that Rule 89(5) prescribing the formula to calculate the refund on account of inverted duty structure is therefore, contrary to the provision

Downloaded on : Fri Aug 21 10:48:01 IST 2020

of Section 54 (3) of CGST Act, 2017.

II. SUBMISSIONS ON BEHALF OF THE REVENUE

14. On the other hand, Mr. Nirzar S. Desai, the learned standing counsel for the respondent submitted that the petitions are not maintainable as Rule 89(5) of the CGST Rules only provides the mode of calculation of refund available to the assessee on account of inverted duty structure and the same is not contrary to the provisions of Sub-section 3 of Section 54 of the CGST Act in any manner because Sub-section 3 of Section 54 only provides that subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period and Proviso to Sub-section 3 of Section 54 of the CGST Act makes an embargo on the claim of the refund of unutilised input tax credit as it shall be allowed in cases other than- zero-rated supplies made without payment of tax and where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies, except supplies of goods or services or both as may be notified by the Government on the recommendations of the GST Council.

14.1 It was submitted that Section 164 of the GST empowered the Central Government to make rules on the recommendations of the Council, by

Downloaded on : Fri Aug 21 10:48:01 IST 2020

notification, for carrying out the provisions of this Act. It was submitted that this Rule making power is conferred upon the Government in the widest possible manner to make rules for carrying out the provisions of the GST Act.

14.2 It was further pointed out that Sub-section 2 of Section 164 also empowers the Government without prejudice to the generality of the provision of sub-section (1) to make rules for all or any of the matters which by CGST Act,2017 are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by the Rules and sub-Section 3 of Section 164 empowers the Government to have retrospective effect of such rules. It was therefore, submitted that the Government has framed the CGST Rules, 2017 in exercise of this rule making power conferred under Section 164 of the CGST Act. In such circumstances, it was submitted that the Rule 89(5) cannot be held to be ultra vires as it only provides the method of calculating the refund on account of inverted duty structure.

14.3 Learned advocate for the respondent relied upon the decision of this Court in case of ***Willowwood Chemicals Pvt. Ltd. vs. Union of India*** in SCA No.4252 of 2018 rendered on 12th / 19th September 2018 and more particularly on the

Downloaded on : Fri Aug 21 10:48:01 IST 2020

following observations of the Court made in paragraph Nos.22, 23, 25, 30, 31 and 32 as under :

> "22. We can however not be oblivious to Section 164 of the CGST Act, which is the rule making power and reads as under :
>
> > "164. **Power of Government to make rules :**
> >
> > (1) The Government may, on the recommendations of the Council, by notification, make rules for carrying out the provisions of this Act.
> >
> > (2) Without *prejudice* to the generality of the provisions of subsection (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules.
> >
> > (3) The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act comes into force.
> >
> > (4) Any rules made under sub-section (1) of subsection (2) may provide that a contravention

Downloaded on : Fri Aug 21 10:48:01 IST 2020

> thereof shall be liable to a penalty not exceeding ten thousand rupees.”

23. Under subsection [1] of Section 164 of the CGST Act, thus, the Government on recommendations of the Council, by notification, could make rules “*for carrying out the provisions of the Act”. This rule making power is thus couched in the widest possible manner empowering the Government to make the rules for carrying out the provisions of the Act*.” Subsection [2] to Section 164 is equally widely worded, when it provides that, “*without prejudice to the generality of the provisions of subsection (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be, or may be made by the rules*.” Sub-section [3] of Section 164, to which we are not directly concerned, nevertheless provides that the power to make rules conferred in the said section would include the power to give retrospective effect to such rules.

25. Section 140 of the Act envisages certain benefits to be carried forward during the regime change. As is well settled, the reduced rate of duty or concession in payment of duty are in the nature of an exemption and is always open for the legislature to grant as well as to withdraw such exemption. As noted in case of *Jayam & Company* [Supra], the Supreme Court had observed that input tax credit is a form of concession provided by the legislature and can be made available subject to conditions. Likewise, in the case of

Downloaded on : Fri Aug 21 10:48:01 IST 2020

Reliance Industries Limited [Supra], it was held and observed that how much tax credit has to be given and under what circumstances is a domain of the legislature. In case of *Godrej & Boyce Mfg. Co. Pvt. Limited* [Supra], the Supreme Court had upheld a rule which restricts availment of MODVAT credit to six months from the date of issuance of the documents specified in the proviso. The contention that such amendment would take away an existing right was rejected.

30. Both these judgments of the Supreme Court in the case of *Kanhaiya Lal Mukundlal Saraf* [Supra] and *Tilokchand Motichand v. H.B Munshi, CST* [Supra] came up for consideration before the 9Judge Bench in the case of *Mafatlal Industries Limited & Ors*., [Supra]. *Mr. Justice B.P Jeevan Reddy* speaking for the majority, summarized the conclusions in para 108 of the judgment. Portions relevant for our purpose, read as under:

> "108. [i] Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff – whether before the commencement of the Central Excise and Customs Laws [Amendment] Act, 1991 or thereafter – by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by

Downloaded on : Fri Aug 21 10:48:01 IST 2020

misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified there under and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 - and of this Court under Article 32 - cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11B of the Central Excises and Salt Act and Section 27 of the Customs Act do constitute “law” within the meaning of Article 265 of the

Downloaded on : Fri Aug 21 10:48:01 IST 2020

Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed there under. Section 11B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 [Amendment] Act are constitutionally valid and have to be followed and given effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. **All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excise and Sale Act or the Customs Act, as the case may be. It is necessary to emphasize in this behalf that Act provides a complete mechanism for correcting any errors whether or fact or law and that not only an appeal is provided to a Tribunal - which is not a departmental organ - but to this Court, which is a civil court.**

[ii] Where, however, a refund is claimed on the ground that the

Downloaded on : Fri Aug 21 10:48:01 IST 2020

provisions of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception. Where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be reopened on the basis of a decision on another person's case; **this is the ratio of the opinion of *Hidayatullah, CJ.*, in *Trilokchand Motichand* [Supra] and we respectfully agree with it.**

Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying clause (c) of subsection [1] of Section 17 of the Limitation Act, 1963. A refund claim in such a situation

Downloaded on : Fri Aug 21 10:48:01 IST 2020

cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

[iii] xx xx xx

[iv] It is not open to any person to make a refund claim on the basis of a decision of a court or tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. **A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without reopening such assessment/order on the ground of a decision in another**

Downloaded on : Fri Aug 21 10:48:01 IST 2020

person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17 [1](c) of the Limitation Act, 1963, has no application to such a claim for refund.

[v] Article 265 of the Constitution has to be construed in the light of the goal and the ideals set out in the Preamble to the Constitution and in Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes like Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the petitioner plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.

[vi] xx xx xx xx

[vii] **While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration.** Where

Downloaded on : Fri Aug 21 10:48:01 IST 2020

the petitioner-plaintiff has suffered no real loss or prejudice, having passed on the burden of tax or duty to another person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case of larger claims, it may well result in financial chaos in the administration of the affairs of the State.

[viii] **The decision of this Court in *STO v. Kanhaiya Lal Mukundlal Saraf* [Supra] must be held to have been wrongly decided in so far as it lays down or is understood to have laid down proportions contrary to the propositions enunciated in (i) and (vii) above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in *Kanhaiya Lal* [Supra] have also been wrongly decided to the above extent.** This declaration - or the law laid down in Propositions (i) to (vii) above - shall not however entitle the State to recover the taxes/duties already refunded and in respect whereof no proceedings are pending before any authority or Tribunal or Court as on this date. All pending matters shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings,

Downloaded on : Fri Aug 21 10:48:01 IST 2020

> whether under the orders of an authority, Tribunal or Court or otherwise.”

31. As per this decision, thus, the time limit provisions contained in the Central Excise and Customs laws for seeking refund of excess duty were held to be sacrosanct and were seen as constituting law within the meaning of *Article* 265 of the Constitution. Consequently, the tax collected, retained or not refunded in accordance with such provisions would be seen as collected, retained and not refunded under the authority of law. The view expressed by the Supreme Court in *Trilokchand Motichand* [Supra] was affirmed. It was emphatically stated that it was not open to any person to make refund claim on the basis of a decision of the Court or Tribunal rendered in case of another person. Such a person cannot claim that the decision of the Court or Tribunal in another person’s case has led him to discover a mistake of law under which he had paid the tax. In this context, it was observed that *any proposition to the contrary not only results in substantial prejudice to the public interest, but is offensive to several well established principles of law. It also leads to grave public mischief*. In this context, it was also observed that while examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims would not be an irrelevant consideration. In case of large claims, the same may result in financial chaos in the administration of the affairs of the State. The decision

Downloaded on : Fri Aug 21 10:48:01 IST 2020

in the case of *STO vs. Kanhaiya Lal Mukundlal Saraf* [Supra] to the extent "*it lays down or is understood to have laid down proposition contrary to these propositions*" was held to have been wrongly decided.

32. Thus, in the economic matters of such vast scale, the wider considerations of the State exchequer, while interpreting a statutory provisions cannot be kept out of purview. Quite apart from independently finding that the time limit provisions contained in sub-rule (1) of Rule 117 of the CGST Rules is not *ultra vires* the Act or the powers of the rule making authority, interpreting such powers as merely directory would give rise to unending claims of transfer of credit of tax on inputs and such other claims from old to the new regime. Under the new GST laws, the existing tax structure was being replaced by the new set of statutes, through an exercise which was unprecedented in the Indian context. The claims of carry forward of the existing duties and credits during the period of migration, therefore, had to be within the prescribed time. Doing away with the time limit for making declarations could give rise to multiple large scale claims trickling in for years together, after the new tax structure is put in place. This would besides making the task of matching of the credits impractical if not impossible, also impact the revenue collection estimates. It is in this context that the Supreme Court in the case of *Mafatlal Industries Limited* (Supra), after rejecting the contention that a person can move proceedings for recovery of tax paid upon success of

Downloaded on : Fri Aug 21 10:48:01 IST 2020

some other person before the Tribunal or Court in getting such tax collection declared illegal, was further influenced by the fact that any such situation could lead to utter chaos, if the claims are large. Under the circumstances, we do not find any substance in the petitioners' challenge to rule 117 (1) of the CGST Rules as well as GGST Rules."

III. ANALYSIS

15. Having heard the learned advocates for the respective parties and having gone through the materials on record in order to decide the controversy as to whether Rule 89(5) of the CGST Rules, 2017 is ultra vires or not, it would be relevant to refer to the following provisions of the CGST Act, IGST Act and CGST Rules, 2017 :

(i) Sections 2(62), 2(63), 54 and 164 of the CGST, Act 2017 read as under:

"2. Definitions.– In this Act, unless the context otherwise requires,-

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

Downloaded on : Fri Aug 21 10:48:01 IST 2020

payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or (e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act, but does not include the tax paid under the composition levy;

<u>(63) —input tax credit</u> means the credit of input tax;

***SECTION 54. Refund of tax.—(1)** Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed:*

***Provided** that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in the return furnished under section 39 in such manner as may be prescribed.*

(2) xxxxx

(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:

***Provided** that no refund of unutilised input tax credit shall be allowed in cases other than--*

(i) zero rated supplies made without payment of tax;

(ii) where the credit has accumulated on account of rate of tax on

Downloaded on : Fri Aug 21 10:48:01 IST 2020

inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

Provided *further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:*

Provided *also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.*

(4) The application shall be accompanied by—
(a) such documentary evidence as may be prescribed to establish that a refund is due to the applicant; and
(b) such documentary or other evidence (including the documents referred to in section 33) as the applicant may furnish to establish that the amount of tax and interest, if any, paid on such tax or any other amount paid in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such tax and interest had not been passed on to any other person:

Provided *that where the amount claimed as refund is less than two lakh rupees, it shall not be necessary for the applicant to furnish any documentary and other evidences but he may file a declaration, based on the documentary or other evidences available with him,*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

certifying that the incidence of such tax and interest had not been passed on to any other person.

SECTION 164. Power of Government to make rules.—*(1) The Government may, on the recommendations of the Council, by notification, make rules for carrying out the provisions of this Act.*

(2) Without prejudice to the generality of the provisions of sub-section (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules.

(3) The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act come into force.

(4) Any rules made under sub-section (1) or sub-section (2) may provide that a contravention thereof shall be liable to a penalty not exceeding ten thousand rupees."

THE HIGH COURT OF GUJARAT
WEB COPY

(ii) Section 16 of the Integrated Goods and Services Tax Act, 2017 reads as under:

*"**SECTION** 16. **Zero rated supply.-***

(1) "zero rated supply" means any of the following supplies of goods or services or both, namely:--

(a) export of goods or services or both; or

(b) supply of goods or services or both

Downloaded on : Fri Aug 21 10:48:01 IST 2020

to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:--

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied,

in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made there under.

(iii) Rule 89 of the CGST Rules, 2017 reads as under:

"CHAPTER X

REFUND

89. Application for refund of tax, interest, penalty, fees or any other amount.-

(1) Any person, except the persons covered under notification issued under section 55,claiming refund of any tax, interest, penalty, fees or any other

Downloaded on : Fri Aug 21 10:48:01 IST 2020

amount paid by him, other than refund of integrated tax paid on goods exported out of India, may file an application electronically in FORM GST RFD-01through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that any claim for refund relating to balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49 may be made through the return furnished for the relevant tax period in FORM GSTR-3 or FORM GSTR-4 or FORM GSTR-7, as the case may be:

Provided further that in respect of supplies to a Special Economic Zone unit or a Special Economic Zone developer, the application for refund shall be filed by the -

(a) supplier of goods after such goods have been admitted in full in the Special Economic Zone for authorised operations, as endorsed by the specified officer of the Zone;

(b) supplier of services along with such evidence regarding receipt of services for authorised operations as endorsed by the specified officer of the Zone:

Provided also that in respect of supplies regarded as deemed exports, the application may be filed by,

- (a) the recipient of deemed export supplies; or

(b) the supplier of deemed export supplies in cases where the recipient does not avail of input tax credit on such supplies and furnishes an undertaking to the effect that the supplier may claim the refund

Provided also that refund of any amount, after adjusting the tax payable

Downloaded on : Fri Aug 21 10:48:01 IST 2020

by the applicant out of the advance tax deposited by him under section 27 at the time of registration, shall be claimed in the last return required to be furnished by him.

(2) XXX

(3) XXX

(4) In the case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), refund of input tax credit shall be granted as per the following formula -

Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero rated supply of services) x Net ITC ÷Adjusted Total Turnover

Where, -

(A) "Refund amount" means the maximum refund that is admissible;

(B) "Net ITC" means input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both;

(C) "Turnover of zero-rated supply of goods" means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both;

(D) "Turnover of zero-rated supply of services" means the value of zero-rated supply of services made without payment of tax under bond or letter of undertaking, calculated in the following manner, namely:-

Downloaded on : Fri Aug 21 10:48:01 IST 2020

Zero-rated supply of services is the aggregate of the payments received during the relevant period for zero-rated supply of services and zero-rated supply of services where supply has been completed for which payment had been received in advance in any period prior to the relevant period reduced by advances received for zero-rated supply of services for which the supply of services has not been completed during the relevant period;

(E) ―Adjusted Total Turnover means the sum total of the value of- (a) the turnover in a State or a Union territory, as defined under clause (112) of section 2, excluding the turnover of services; and (b) the turnover of zero-rated supply of services determined in terms of clause (D) above and non-zero-rated supply of services, excluding- (i) the value of exempt supplies other than zero-rated supplies; and (ii) the turnover of supplies in respect of which refund is claimed under sub-rule (4A) or sub-rule (4B) or both, if any, during the relevant period.

(F) ―Relevant period means the period for which the claim has been filed.

(4A) XXXX

(4B) XXXX

(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.

Downloaded on : Fri Aug 21 10:48:01 IST 2020

Explanation:- For the purposes of this sub-rule, the expressions -

(a) ―Net ITC shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and

[“Adjusted Total turnover” and ”relevant period” shall have the same meaning as assigned to them in sub-rule (4).]

<u>(iv) Notification No.21/2018-CT dated 18.04.2018 read as under</u>:

“Central Goods and Services Tax Rules, 2017- Fourth Amendment of 2018

2. In the Central Goods and Services Tax Rules, 2017, -

(i) in rule 89, for sub-rule (5), the following shall be substituted, namely:-

“(5). In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.

Explanation:- For the purposes of this sub-rule, the expressions -

(a) “Net ITC” shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and

Downloaded on : Fri Aug 21 10:48:01 IST 2020

(b) "Adjusted Total turnover" shall have the same meaning as assigned to it in sub-rule (4).";

(v) Notification No.26/2018-C.T. dated 13.06.2018 read as under:

"Central Goods and Services Tax Rules, 2017-Fifth Amendment of 2018

2. In the Central Goods and Services Tax Rules, 2017, -
(i) in rule 37, in sub-rule (1), after the proviso, the following proviso shall be inserted, namely:-

"Provided further that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section (2) of section 15 shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16.";

(ii) in rule 83, in sub-rule (3), in the second proviso, for the words "one year", the words "eighteen months" shall be substituted;
(iii) with effect from 01st July, 2017, in rule 89, for sub-rule (5), the following shall be substituted, namely:-

"(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.

Explanation:- For the purposes of this

Downloaded on : Fri Aug 21 10:48:01 IST 2020

sub-rule, the expressions -
(a) Net ITC shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and
(b) Adjusted Total turnover shall have the same meaning as assigned to it in sub-rule (4).”

16. It would also be fruitful to refer to relevant part of the First Discussion Paper On Goods and Services Tax In India by the Empowered Committee of the State Finance Minister dated 10th November 2009, wherein it is observed for justification of GST as under:

“Justification of GST
1.13 Despite this success with VAT, there are still certain shortcomings in the structure of VAT both at the Central and at the State level. The shortcoming in CENVAT of the Government of India lies in non-inclusion of several Central taxes in the overall framework of CENVAT, such as additional customs duty, surcharges, etc., and thus keeping the benefits of comprehensive input tax and service tax set-off out of reach for manufacturers/ dealers. Moreover, no step has yet been taken to capture the value-added chain in the distribution trade below the manufacturing level in the existing scheme of CENVAT. The introduction of GST at the Central level will not only include comprehensively more indirect Central taxes and integrate goods and service taxes for the purpose of set-off relief, but may

Downloaded on : Fri Aug 21 10:48:01 IST 2020

also lead to revenue gain for the Centre through widening of the dealer base by capturing value addition in the distributive trade and increased compliance.

Salient features of the GST model

3.2 Keeping in view the report of the Joint Working Group on Goods and Services Tax, the views received from the States and Government of India, a dual GST structure with defined functions and responsibilities of the Centre and the States is recommended. An appropriate mechanism that will be binding on both the Centre and the States would be worked out whereby the harmonious rate structure along with the need for further modification could be upheld, if necessary with a collectively agreed Constitutional Amendment. Salient features of the proposed model are as follows:

(i) The GST shall have two components: one levied by the Centre (hereinafter referred to as Central GST), and the other levied by the States (hereinafter referred to as State GST). Rates for Central GST and State GST would be prescribed appropriately, reflecting revenue considerations and acceptability. This dual GST model would be implemented through multiple statutes (one for CGST and SGST statute for every State). However, the basic features of law such as chargeability, definition of taxable event and taxable person, measure of levy including valuation provisions, basis of classification etc. would be uniform across these statutes as far as practicable.

(ii) The Central GST and the State GST would be applicable to all transactions of goods and services made for a

Downloaded on : Fri Aug 21 10:48:01 IST 2020

consideration except the exempted goods and services, goods which are outside the purview of GST and the transactions which are below the prescribed threshold limits.

(iii) The Central GST and State GST are to be paid to the accounts of the Centre and the States separately. It would have to be ensured that account-heads for all services and goods would have indication whether it relates to Central GST or State GST (with identification of the State to whom the tax is to be credited).

(iv) Since the Central GST and State GST are to be treated separately, taxes paid against the Central GST shall be allowed to be taken as input tax credit (ITC) for the Central GST and could be utilized only against the payment of Central GST. The same principle will be applicable for the State GST. A taxpayer or exporter would have to maintain separate details in books of account for utilization or refund of credit. Further, the rules for taking and utilization of credit for the Central GST and the State GST would be aligned.

(v) Cross utilization of ITC between the Central GST and the State GST would not be allowed except in the case of inter-State supply of goods and services under the IGST model which is explained later.

vi) Ideally, the problem related to credit accumulation on account of refund of GST should be avoided by both the Centre and the States except in the cases such as exports, purchase of capital goods, input tax at higher rate than output tax etc. where, again refund/adjustment should be completed in a time bound manner.

(vii) To the extent feasible, uniform procedure for collection of both Central

Downloaded on : Fri Aug 21 10:48:01 IST 2020

GST and State GST would be prescribed in the respective legislation for Central GST and State GST.
(viii) The administration of the Central GST to the Centre and for State GST to the States would be given. This would imply that the Centre and the States would have concurrent jurisdiction for the entire value chain and for all taxpayers on the basis of thresholds for goods and services prescribed for the States and the Centre.
(ix) The present threshold prescribed in different State VAT Acts below which VAT is not applicable varies from State to State. A uniform State GST threshold across States is desirable and, therefore, it is considered that a threshold of gross annual turnover of Rs.10 lakh both for goods and services for all the States and Union Territories may be adopted with adequate compensation for the States (particularly, the States in North-Eastern Region and Special Category States) where lower threshold had prevailed in the VAT regime. Keeping in view the interest of small traders and small scale industries and to avoid dual control, the States also considered that the threshold for Central GST for goods may be kept at Rs.1.5 crore and the threshold for Central GST for services may also be appropriately high. It may be mentioned that even now there is a separate threshold of services (Rs. 10 lakh) and goods (Rs. 1.5 crore) in the Service Tax and CENVAT."

17. Reference is also required to be made to the International VAT/GST Guidelines, published on February 2006, which read as under:

Downloaded on : Fri Aug 21 10:48:01 IST 2020

"INTERNATIONAL VAT/GST GUIDELINES
PREFACE

1. The spread of Value Added Tax (also called Goods and Services Tax - GST) has been the most important development in taxation over the last half-century. Limited to less than ten countries in the late 1960s it has now been implemented by about 136 countries; and in these countries (including OECD member countries) it typically accounts for one-fifth of total tax revenue. The recognised capacity of VAT to raise revenue in a neutral and transparent manner drew all OECD member countries (except the United States) to adopt this broad based consumption tax. Its neutrality of principle towards international trade also made it the preferred alternative to customs duties in the context of trade liberalisation.

2. At the same time as VAT was spreading across the world, international trade in goods and services was expanding rapidly as part of globalisation developments, spurred on by deregulation, privatisation and the communications technology revolution. As a result, the interaction between value added tax systems operated by individual countries has come under greater scrutiny as potential for double taxation and unintentional non-taxation has increased.

3. When international trade was characterised largely by trade in goods, collection of taxes was generally undertaken by customs authorities, and when services were primarily traded within domestic markets, there was little need for global attention to be

Downloaded on : Fri Aug 21 10:48:01 IST 2020

paid to the interaction between national consumption tax rules. That situation has changed dramatically in recent years and the absence of internationally agreed approaches, which can be traced back to that lack of need, is now leading to significant difficulties for both business and governments, particularly for the international trade in services and intangibles, and increasingly for the trade in goods.

4. Even though the question remains difficult -and sometimes controversial- for interstate trade within federations or within economically integrated areas, the destination principle (i.e. taxation in the jurisdiction of consumption by zero rating of exports and taxation of imports) is the international norm. The issues therefore arise primarily from the practical difficulty of determining, for each transaction (i.e. the sale of a good, a right or a service), the jurisdiction where consumption is deemed to take place and therefore where it should be taxed. In addition, it should be borne in mind that value added tax systems are designed to tax final consumption and as such, in most cases it is only consumers who should actually bear the tax burden. Indeed, the tax is levied, ultimately, on consumption and not on intermediate transactions between firms as tax charged on these purchases is, in principle, fully deductible. This feature gives the tax its main characteristic of neutrality in the value chain and towards international trade.

5. Nevertheless, although most countries have adopted similar principles for the operation of their value added tax

Downloaded on : Fri Aug 21 10:48:01 IST 2020

system, there remain many differences in the way it is implemented, including between OECD member countries. These differences result not only from the continued existence of exemptions and special arrangements to meet specific policy objectives, but also from differences of approaches in the definition of the jurisdiction of consumption and therefore of taxation. In addition, there are a number of variations in the application of value added taxes, and other consumption taxes, including different interpretation of the same or similar concepts; different approaches to time of supply and its interaction with place of supply; different definitions of services and intangibles and inconsistent treatment of mixed supplies.

6. Since the late 1990s, work led by the OECD's Committee on Fiscal Affairs (CFA) in cooperation with business, revealed that the current international consumption taxes environment, especially with respect to trade in services and intangibles, is creating obstacles to business activity, hindering economic growth and distorting competition. The CFA recognised that these problems, particularly those of double taxation and unintentional non-taxation, were sufficiently significant to require remedies. This situation creates increasing issues for both businesses and tax administrations themselves since local rules cannot be viewed in isolation but must be addressed internationally.

7. Businesses are increasingly confronted by distortions of competition that sometimes favour imports over local

Downloaded on : Fri Aug 21 10:48:01 IST 2020

production or prevent them outsourcing activities as a means of improving their competitiveness. Multi-national businesses are confronted with laws and administrative requirements that may be contradictory from country to country. This generates undue burdens and uncertainties, in particular when they specialise or group certain functions in one particular jurisdiction, such as shared service centres, centralised sales and procurement functions, call centres, data processing and information technology support. Businesses can incur double taxation when two different jurisdictions both tax the same supply, the first one because it is the jurisdiction where the supplier is established and the second one because it is the jurisdiction where the recipient is established. In the case of leasing of goods, for example, a third jurisdiction, i.e. the jurisdiction where the goods are located, may also claim the tax. Uncertainties also arise in situations where, for example, the headquarters of a company established in one country provides supplies to customers in another country where it has a branch (force of attraction). Even if some countries implemented refund schemes of tax incurred by foreign business or registration procedures to achieve the same effect, which are intended in part to address some of the consequences of these different approaches, such schemes are, when they exist, often burdensome, especially for SMEs.

8. Tax administrations are often confronted with unintentional non-taxation that mirror the double taxation situations referred to above.

Downloaded on : Fri Aug 21 10:48:01 IST 2020

Consumption taxes are normally predicated on the basis that businesses are responsible for the proper collection and remittance of the revenue. Complex, unclear or inconsistent rules across jurisdictions are difficult to manage for tax administrations and create uncertainties and high administrative burdens for business, which can lead to reduced compliance levels. In addition, such an environment may also favour tax fraud and evasion.

9. The OECD has long held a lead position in dealing with the international aspects of direct taxes. The Organisation has developed internationally recognised instruments such as the Model Tax Convention on Income and on Capital and the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. Until now, no such instrument was available in the field of consumption taxes. Only the Ottawa Framework Conditions (1998), the Guidelines on Consumption Taxation of Cross-Border Services and Intangible Property in the Context of E-commerce (2001) and Consumption Tax Guidance Series (2003) have been published. The Committee on Fiscal Affairs therefore began work on a set of framework principles on the application of consumption taxes to the trade in international services and intangibles. These principles form the first part of the OECD VAT/GST Guidelines. These principles will be developed in order that countries (both OECD and non-OECD) can implement them in legislation. The table of contents will evolve in the light of experience and will be amended and completed over

Downloaded on : Fri Aug 21 10:48:01 IST 2020

time.”

The basic principles as described in Chapter I of International VAT/GST guidelines in the aforesaid report are as under:

“BASIC PRINCIPLES

I.A. INTRODUCTION

1. There are many differences in the way value added taxes are implemented around the world and across OECD countries. Nevertheless, there are some common core features that can be described as follows:

- *Value added taxes are taxes on consumption, paid, ultimately, by final consumers.*
- *The tax is levied on a broad base (as opposed to e.g., excise duties that cover specific products);*
- *In principle, business should not bear the burden of the tax itself since there are mechanisms in place that allow for a refund of the tax levied on intermediate transactions between firms.*
- *The system is based on tax collection in a staged process, with successive taxpayers entitled to deduct input tax on purchases and account for output tax on sales. Each business in the supply chain takes part in the process of controlling and collecting the tax, remitting the proportion of tax corresponding to its margin i.e. on the difference between the VAT paid out to suppliers and the VAT charged to customers. In general, OECD countries with value-added taxes impose the tax at all stages and normally allow immediate deduction of taxes on purchases by all*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

but the final consumer.

2. These features give value added taxes their main economic characteristic, that of neutrality. The full right to deduction of input tax through the supply chain, with the exception of the final consumer, ensures the neutrality of the tax, whatever the nature of the product, the structure of the distribution chain and the technical means used for its delivery (stores, physical delivery, Internet).

3. Value added taxes are also neutral towards international trade according to international norms since they are destination based (even if the rule might be different for transactions made within federations or economically integrated areas). This means that exports are zero rated and imports are taxed on the same basis and with the same rate as local production. Most of the rules currently in place aim therefore at taxing consumption of goods and services within the jurisdiction where consumption takes place. Practical means implemented to this end are nevertheless diverse across countries, which can, in some instances, lead to double or involuntary non-taxation, and uncertainties for both business and tax administrations. 1 Germany expressed its reservation on these principles. Luxembourg expressed its reservation on the first principle referred in paragraph 14 ("For consumption tax purposes internationally traded services and intangibles should be taxed according to the rules of the jurisdiction of consumption").

4. Sales tax systems, although they work differently in practice, also set

Downloaded on : Fri Aug 21 10:48:01 IST 2020

> *out to tax consumption of goods, and to some extent services, within the jurisdiction of consumption. To this end, their implementation also aims at keeping it neutral towards international trade. However, in most sales tax systems, businesses do incur irrecoverable sales tax and, if they subsequently export goods, there will be an element of sales tax embedded in the price."*

Chapter Nineteen of the explanations given for Input Tax Credit Mechanism in GST as under:

"Chapter Nineteen

Input Tax Credit Mechanism in GST

> *Uninterrupted and seamless chain of input tax credit (hereinafter referred to as, "ITC") is one of the key features of Goods and Services Tax. ITC is a mechanism to avoid cascading of taxes. Cascading of taxes, in simple language, is 'tax on tax'. Under the present system of taxation, credit of taxes being levied by Central Government is not available as set-off for payment of taxes levied by State Governments, and vice versa. One of the most important features of the GST system is that the entire supply chain would be subject to GST to be levied by Central and State Government concurrently. As the tax charged by the Central or the State Governments would be part of the same tax regime, credit of tax paid at every stage would be available as set-off for payment of tax at every subsequent stage.*
>
> *Let us understand how 'cascading' of taxes takes place in the present regime.*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

Central excise duty charged on inputs used for manufacture of final product can be availed as credit for payment of Central Excise Duty on the final product. For example, to manufacture a pen, the manufacturer requires, plastic granules, refill tube, metal clip, etc. All Electronic Way Bill in GST 150 GST FLYERS these 'inputs' are chargeable to central excise duty. Once a 'pen' is manufactured by using these inputs, the pen is also chargeable to central excise duty. Let us assume that the cost of all the above mentioned inputs is say, Rs.10/- on which central excise duty @10% is paid, means Re.1. The cost of the manufactured pen is say Rs.20/-, the central excise duty payable on the pen @10% will be Rs.2/- . Now the manufacturer of the pen can use the duty paid on inputs, i.e. Re.1/- for payment of duty on the pen. So he will use Re.1 paid on inputs and he will pay Re.1/- through cash (1+1=2), the price of the pen becomes Rs. 22/-. In effect he actually pays duty on the 'value added' over and above the cost of the inputs. This mechanism eliminates cascading of taxes. However, when the pen is sold by the manufacturer to a trader he is required to levy VAT on such sale. But under the present system, the manufacturer cannot use the credit of central excise duty paid on the pen for payment of VAT, as the two levies are being levied by Central and State government respectively with no statutory linkage between the two. Hence he is required to pay VAT on the entire value of the pen, i.e. Rs.22/-, which actually includes the central excise duty to the tune of Rs.2/-. This is cascading of taxes or tax on tax as now VAT is not only paid on the value of pen

Downloaded on : Fri Aug 21 10:48:01 IST 2020

i.e. Rs.20/- but also on tax i.e. Rs.2/. Goods and Services Tax (GST) would mitigate such cascading of taxes. Under this new system most of the indirect taxes levied by Central and the State Governments on supply of goods or services or both would be combined together under a single levy. The major taxes/levies which are going to be clubbed together or subsumed in the GST"

18. Central Board of Excise & Customs, New Delhi issued frequently asked questions on Goods and Services Tax Act (GST)in 2nd Edition No. 31.03.2017 is as under:

"1. Overview of Goods and Services Tax (GST)

Q 1. What is Goods and Services Tax (GST)?

Ans. It is a destination based tax on consumption of goods and services. It is proposed to be levied at all stages right from manufacture up to final consumption with credit of taxes paid at previous stages available as setoff. In a nutshell, only value addition will be taxed and burden of tax is to be borne by the final consumer.

Q 2. What exactly is the concept of destination based tax on consumption?

Ans. The tax would accrue to the taxing authority which has jurisdiction over the place of consumption which is also termed as place of supply.

Q 3. Which of the existing taxes are proposed to be subsumed under GST?

Ans. The GST would replace the following taxes:

(i) taxes currently levied and collected by the Centre:

a. Central Excise duty

b. Duties of Excise (Medicinal and

Downloaded on : Fri Aug 21 10:48:01 IST 2020

Toilet Preparations)
c. Additional Duties of Excise (Goods of Special Importance)
d. Additional Duties of Excise (Textiles and Textile Products) e. Additional Duties of Customs (commonly known as CVD)"

19. The Circular no.79/53/2018-GST dated 31.12.2018 prescribes the calculation of refund amount for claims of refund of accumulated Input Tax Credit (ITC) on account of inverted duty structure as under:

> ***"Calculation of refund amount for claims of refund of accumulated Input Tax Credit (ITC) on account of inverted duty structure:***
> *4. Representations have been received stating that while processing the refund of unutilized ITC on account of inverted tax structure, the departmental officers are denying the refund of ITC of GST paid on those inputs which are procured at equal or lower rate of GST than the rate of GST on outward supply, by not including the amount of such ITC while calculating the maximum refund amount as specified in rule 89(5) of the CGST Rules. The matter has been examined and the following issues are clarified:*
> a) Refund of unutilized ITC in case of inverted tax structure, as provided in section 54(3) of the CGST Act, is available where ITC remains unutilized even after setting off of available ITC for the payment of output tax liability. Where there are multiple inputs attracting different rates of tax, in the formula provided in rule 89(5) of the CGST Rules, the term "Net ITC" covers the ITC availed on all inputs in

Downloaded on : Fri Aug 21 10:48:01 IST 2020

the relevant period, irrespective of their rate of tax.

b) The calculation of refund of accumulated ITC on account of inverted tax structure, in cases where several inputs are used in supplying the final product/output, can be clearly understood with help of the following example:

i. Suppose a manufacturing process involves the use of an input A (attracting 5 per cent GST) and input B (attracting 18 per cent GST) to manufacture output Y (attracting 12 per cent GST).

ii. The refund of accumulated ITC in the situation at (i) above, will be available under section 54(3) of the CGST Act read with rule 89(5) of the CGST Rules, which prescribes the formula for the maximum refund amount permissible in such situations.

iii. Further assume that the claimant supplies the output Y having value of Rs. 3,000/- during the relevant period for which the refund is being claimed. Therefore, the turnover of inverted rated supply of goods and services will be Rs. 3,000/-. Since the claimant has no other outward supplies, his adjusted total turnover will also be Rs. 3,000/-.

iv. If we assume that Input A, having value of Rs. 500/- and Input B, having value of Rs. 2,000/-, have been purchased in the relevant period for the manufacture of Y, then Net ITC shall be equal to Rs. 385/- (Rs. 25/- and Rs. 360/- on Input A and Input B respectively).

v. Therefore, multiplying Net ITC by the ratio of turnover of inverted rated supply of goods and services to the adjusted total turnover will give the figure of Rs. 385/-.

Downloaded on : Fri Aug 21 10:48:01 IST 2020

> *vi. From this, if we deduct the tax payable on such inverted rated supply of goods or services, which is Rs. 360/-, we get the maximum refund amount, as per rule 89(5) of the CGST Rules which is Rs. 25/-."*

The above Circular also provides for following explanation with regard to misinterpretation of the meaning of the term "inputs" with regard to the refund of accumulated ITC of input services and capital goods arising on account of inverted duty structure as under:

> ***"Misinterpretation of the meaning of the term "inputs":***
>
> *12. It has been represented that on certain occasions, departmental officers do not consider ITC on stores and spares, packing materials, materials purchased for machinery repairs, printing and stationery items, as part of Net ITC on the grounds that these are not directly consumed in the manufacturing process and therefore, do not qualify as input. There are also instances where stores and spares charged to revenue are considered as capital goods and therefore the ITC availed on them is not included in Net ITC, even though the value of these goods has not been capitalized in his books of account by the claimant.*
>
> *13. In relation to the above, it is clarified that the input tax credit of the GST paid on inputs shall be available to a registered person as long as he/she uses or intends to use such inputs for the purposes of his/her business and there is no specific restriction on the availment of such ITC anywhere else in the GST Act. The GST*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

paid on inward supplies of stores and spares, packing materials etc. shall be available as ITC as long as these inputs are used for the purpose of the business and/or for effecting taxable supplies, including zero-rated supplies, and the ITC for such inputs is not restricted under section 17(5) of the CGST Act. Further, capital goods have been clearly defined in section 2(19) of the CGST Act as goods whose value has been capitalized in the books of account and which are used or intended to be used in the course or furtherance of business. Stores and spares, the expenditure on which has been charged as a revenue expense in the books of account, cannot be held to be capital goods.

Refund of accumulated ITC of input services and capital goods arising on account of inverted duty structure:

14. Section 54(3) of the CGST Act provides that refund of any unutilized ITC may be claimed where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies). Further, section 2(59) of the CGST Act defines inputs as any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business. Thus, inputs do not include services or capital goods. Therefore, clearly, the intent of the law is not to allow refund of tax paid on input services or capital goods as part of refund of unutilized input tax credit. Accordingly, in order to align the CGST Rules with the CGST Act, notification No. 26/2018-Central Tax dated 13.06.2018 was issued wherein it was stated that the term Net ITC, as used in the formula for calculating the maximum refund

Downloaded on : Fri Aug 21 10:48:01 IST 2020

amount under rule 89(5) of the CGST Rules, shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both. In view of the above, it is clarified that both the law and the related rules clearly prevent the refund of tax paid on input services and capital goods as part of refund of input tax credit accumulated on account of inverted duty structure."

20. On perusal of the aforesaid provisions of the Act, Rules and various notifications, it appears that Rule 89(5) and more particularly explanation (a) thereof, provides that Net Input Tax Credit shall mean "input tax credit" availed on "inputs" during the relevant period other than the "input tax credit" availed for which refund is claimed under sub-rule (4A) or (4B) or both. Therefore, the grievance of the petitioner is that only the "inputs" is referred to in explanation (a) to sub-rule 5 of Rule 89 of CGST Rules 2017 and therefore, "input tax credit" on "input services" are not eligible for calculation of the amount of refund by applying Rule 89(5). Thus, it results into violation of provision of sub-section 3 of Section 54 of the CGST Act, 2017, which entitles any registered person to claim refund of "any" unutilised input tax credit. Sub-clause (ii) of the proviso to sub-section 3 of Section 54 negates the claim of refund of unutilized input

Downloaded on : Fri Aug 21 10:48:01 IST 2020

tax credit other than where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies, except supplies of goods or services or both as may be notified by the Government on the recommendations of the GST Council. Therefore, it would be germane to refer to and analyse what is the meaning of "supply" as per Section 7 of the *CGST Act*,2017 which defines the scope of supply and reads as under :

> " ***Scope of supply***
>
> **7** *(1) For the purposes of this Act, the expression "supply" includes--*
>
> *a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;*
>
> *(b) import of services for a consideration whether or not in the course or furtherance of business;1[and];*
>
> *(c) the activities specified in Schedule I, made or agreed to be made without a consideration. 2 ****
>
> *(d) * * ** **
>
> *[(1A) Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.]*
>
> *(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II."*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

The above provision of section 7 provides that "scope of supply" includes all forms of supply of goods or services. Therefore, for the purpose of calculation of refund of accumulated "input tax credit" of "input services" and "capital goods" arising on account of inverted duty structure is not included into "inputs" which is explained by the Circular No. 79/53/2018-GST dated 31.12.2018, wherein it is stated that the intent of law is not to allow refund of tax paid on "input services" as part of unutilised "input tax credit". Therefore, it is required to consider whether the refund of unutilised input tax credit arising due to inverted duty structure can be denied or not.

21. The Delhi High Court in case of **Intercontinental Consultants & Technocrats Pvt. Ltd. Vs. Union Bank of India** reported in **2013 (29) S.T.R. (Del.)** has held that the Rule which goes beyond the statute is ultra vires and thus liable to be struck down by referring to various decisions of the Supreme Court as under:

> *"12. There is ample authority for the proposition that the rules cannot override or overreach the provisions of the main enactment.* In Central Bank of India v. Their Workmen, *AIR 1960 SC 12, a Constitution Bench of the Supreme Court was concerned with the* Banking Companies Act, *1949.* Section 10 *of the*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

Act prohibit the grant of industrial bonus to bank employees in as much as such bonus is remuneration which takes the form of a share in the profits of the banking company. Rule 5 of the Banking Companies Rules, 1949, which were statutory rules, required a banking company to send periodically to the principle office of the Reserve Bank a statement in Form-I showing the remuneration paid during the previous calendar year to officers of the company. In a footnote to the Form, it was stated that remuneration includes salary, house allowance, dearness allowance, bonus, fees and allowances to Directors, etc. The contention was that Rule 5 enlarged the meaning and content of Section 10. *The contention was repelled but not on the ground that the rule can validly enlarge the content of the Section, but on the ground that the Section itself used the word "remuneration" in the widest sense. It was however acknowledged by the Court that the Rule cannot go beyond the statute. The relevant observations are: -*

> *"We do not say that a statutory rule can enlarge the meaning of S.10; if a rule goes beyond what the Section contemplates, the rule must yield to the statute. We have, however, pointed out earlier that S.10 itself uses the word "remuneration" in the widest sense, and R.5 and Form-I are to that extent in consonance with the Section."*

It has not been suggested in the present case that the words "consideration in money" or "the gross amount charged" themselves have been used in section 67 *in the widest sense of including the*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

amounts collected by the service provider for his travel, hotel stay, transportation and other out of pocket expenses. These words have been defined in the Explanation below the section and it is significant that the out of pocket expenses such as travel, hotel stay, transportation etc. have not been included in those expressions.

13. In Babaji Kondaji Garad v. Nasik Merchants Co-operative Bank Ltd., *(1984) 2 SCC 50, the Supreme Court (Three-Judge Bench) observed as under: -*

> *"Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the bye- law, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with."*

14. A learned single Judge of this Court in Devi Datt v. Union of India, *AIR 1985 Delhi 195 held that though the language of Rule 102 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955 was wider in its ambit and covered the properties comprised in the compensation bill and entrusted to a managing officer for management, "but obviously the said rule has to be construed in the light of the parent Section and it cannot be construed as enlarging the scope of* Section 19 *itself. It is a well settled canon of construction that the Rules made under a statute must be treated exactly as if*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

they were in the Act and are of the same effect as if contained in the Act. There is another principle equally fundamental to the rules of construction, namely, that the Rules shall be consistent with the provisions of the Act. Hence, Rule 102 has to be construed in conformity with the scope and ambit of Section 19 *and it must be ignored to the extent it appears to be inconsistent with provisions of* Section 19". *In making these observations, the learned single Judge referred to and followed the judgment of the Supreme Court in* State of Uttar Pradesh v. Babu Ram Upadhyay, *AIR 1961 SC 751.*

15. In the tax jurisprudence the position is no different and it has been held in CIT v. S.Chenniappa Mudaliar, *(1969) 74 ITR 41 that if a rule clearly comes into conflict with the main enactment or if there is any repugnancy between the substantive provisions of the Act and the Rules made therein, it is the rule which must give way to the provisions of the Act.* In Bimal Chandra Banerjee v. State of M.P. and Ors., *(1971) 81 ITR 105, Hegde J. was examining the provisions of the M.P. Excise Act, 1915. The legislature levied excise duty only on those articles which came within the scope of* Section 25 *of that Act. The rule-making authority, which was the State Government, purported to levy duty on articles which did not fall within the scope of the Section. Holding this act of the State Government to be ultra vires the Section, it was observed as under: -*

> *"No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

> *authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule making authority. A rule making authority has no plenary power. It has to act within the limits of the power granted to it.*

16. In CIT, Andhra Pradesh v. Taj Mahal Hotel, *(1971) 82 ITR 44 it was held by the Supreme Court that*

> *"the Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect."*

17. In Commissioners of Customs and Excise v. Cure and Deeley Ltd., *(1961) 3 WLR 788 (QB) the facts were these.* Section 33(1) *of the Finance Act, 1940 of the United Kingdom enacted that the Commissioners might make regulations providing for any method for which provision appeared to them to be necessary for the purpose of giving effect to the provisions of the Act and of enabling them to discharge the functions. The Commissioners framed Regulation 12 of the Purchase Tax Regulations, 1945. It stated that if any person failed to furnish a return as required by the regulation or furnished an incomplete return, then the Commissioners could determine the amount of tax appearing to them to be due from such person, and demand payment thereof. Such amount determined by the Commissioners was to be deemed to be the proper tax due from such person and the tax had to be paid within 7 days of the*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

demand. The regulations did not provide for any appeal or for taking up the decision of the Commissioners to any Court of law. The validity of the regulation came up for consideration before the Court. Sachs J., observed as follows: -

> *"To my mind a Court is bound before reaching a decision on the question whether a regulation is intra vires to examine the nature, objects, and scheme of the piece of legislation as a whole, and in the light of that examination to consider exactly what is the area over which powers are given by the section under which the competent authority is purporting to act."*

It was ultimately held by the Court that Regulation 12 was ultra vires on three grounds. One of the grounds, which is relevant for our purpose, was that the regulation rendered the subject liable to pay such tax as the Commissioner believed to be due whereas the charging Section imposed a liability to pay such tax as in law was due.

18. Section 66 *levies service tax at a particular rate on the value of taxable services.* Section 67 *(1) makes the provisions of the section subject to the provisions of Chapter V, which includes* Section 66. *This is a clear mandate that the value of taxable services for charging service tax has to be in consonance with* Section 66 *which levies a tax only on the taxable service and nothing else. There is thus in built mechanism to ensure that only the taxable service shall be evaluated under the provisions of 67. Clause (i) of sub-section (1) of* Section 67 *provides that*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

the value of the taxable service shall be the gross amount charged by the service provider "for such service". Reading Section 66 *and* Section 67 *(1) (i) together and harmoniously, it seems clear to us that in the valuation of the taxable service, nothing more and nothing less than the consideration paid as quid pro quo for the service can be brought to charge. Sub-section (4) of* Section 67 *which enables the determination of the value of the taxable service "in such manner as may be prescribed" is expressly made subject to the provisions of sub-section (1). The thread which runs through* Sections 66, 67 *and* Section 94, *which empowers the Central Government to make rules for carrying out the provisions of Chapter V of the Act is manifest, in the sense that only the service actually provided by the service provider can be valued and assessed to service tax. We are, therefore, undoubtedly of the opinion that Rule 5 (1) of the Rules runs counter and is repugnant to* Sections 66 *and* 67 *of the Act and to that extent it is ultra vires. It purports to tax not what is due from the service provider under the charging Section, but it seeks to extract something more from him by including in the valuation of the taxable service the other expenditure and costs which are incurred by the service provider "in the course of providing taxable service". What is brought to charge under the relevant Sections is only the consideration for the taxable service. By including the expenditure and costs, Rule 5(1) goes far beyond the charging provisions and cannot be upheld. It is no answer to say that under sub-section (4) of* Section 94 *of the Act, every rule framed by the*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

> *Central Government shall be laid before each House of Parliament and that the House has the power to modify the rule. As pointed out by the Supreme Court in* Hukam Chand v. Union of India, *AIR 1972 SC 2427: -*
>
> *"The fact that the rules framed under the Act have to be laid before each House of Parliament would not confer validity on a rule if it is made not in conformity with* Section 40 *of the Act."*
>
> *Thus* Section 94 *(4) does not add any greater force to the Rules than what they ordinarily have as species of subordinate legislation.*
>
> *19. For the above reasons we quash the impugned show-cause notice and allow the writ petition with no order as to costs."*

The above decision is also affirmed by the Supreme Court vide 2018(10)GSTL 401 (SC), which read as under :

> *"24) In this hue, the expression 'such' occurring in* Section 67 *of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what the gross amount is charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to* Section 67 *(unamended i.e., prior to May 01, 2006) or after its amendment, with effect from, May 01,*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

2006. Once this interpretation is to be given to Section 67, *it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of* Section 67. *We, therefore, find that High Court was right in interpreting* Sections 66 *and* 67 *to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.*

25) This position did not change even in the amended Section 67 *which was inserted on May 01, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However,* Section 67(4) *is expressly made subject to the provisions of sub-section (1). Mandate of sub-section (1) of* Section 67 *is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider.*

26) It is trite that rules cannot go beyond the statute. In Babaji Kondaji Garad, this rule was enunciated in the following manner:

> *"Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the bye-law, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

> *provision ahs precedence and must be complied with."*

27) The aforesaid principle is reiterated in Chenniappa Mudaliar holding that a rule which comes in conflict with the main enactment has to give way to the provisions of the Act.

28) It is also well established principle that Rules are framed for achieving the purpose behind the provisions of the Act, as held in Taj Mahal Hotel:

> *"the Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect."*

29) In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, *dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by* Finance Act, *2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of* Section 67 *itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the learned counsel for the Department that* Section 67 *is a declaratory provision, nor could it be argued so, as we find that this is*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

a substantive change brought about with the amendment to Section 67 *and, therefore, has to be prospective in nature. On this aspect of the matter, we may usefully refer to the Constitution Bench judgment in the case of* Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Private Limited8 *wherein it was observed as under:*

> *"27. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-à-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.*
>
> *28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule*

Downloaded on : Fri Aug 21 10:48:01 IST 2020

is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Phillips v. Eyre [(1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the

Downloaded on : Fri Aug 21 10:48:01 IST 2020

legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

22. Further, in the case of ***Lohara Steel Industries Ltd. v. State of A.P.*** reported in **(1997) 2 SCC 37**,the Supreme Court has held that the offending portion which is severable can be struck down. Para 10 of the said order read as under :

"10. It was, however, contended before us by the department that the exemption notification must be read as a whole and, therefore, if we find the exemption notification to be violative of Article 304(a) the entire exemption notification will have to be struck down and not just a portion of it which is discriminatory as contended by the appellants. This question in relation to a taking statute has been considered by this Court as far back as in 1953 in the case of The State of Bombay and Anr. v. The United Motors (India) Ltd. and Ors. ([1953] SCR 1069 at 1097). If the taxing statute imposes tax on subjects which are divisible in their nature and if the covered subjects which are exempted by the Constitution are wrongly taxed, the entire taxing statute need not be declared as ultra

Downloaded on : Fri Aug 21 10:48:01 IST 2020

vires because it is feasible to separate taxes levied on authorised subjects from those levied on exempt subjects and to exclude the latter in the assessment to tax. In such cases this Court has said the statute itself should be allowed to stand. The taxing authority can be prevented by injunction from imposing the tax on subject exempted by the Constitution. In the present case the exemption notification as it originally stood exempted all re-rolled finished products sold in the State of Andhra Pradesh from tax provided tax had been paid in the State of Andhra Pradesh on the raw material. This exemption is still available to rerolled products which are manufactured within the State. No exception can be taken to this part of the notification. Only the portion of exemption notification which discriminates against goods manufactured outside the State violates the provisions of Article 304(a). In fact the words denying this exemption to goods manufactured outside the State were expressly and specifically added to the original http://JUDIS.NIC.IN SUPREME COURT OF INDIA Page 4 of 4 exemption notification by the amending G.O.Ms.No.1373 of 28.8.1981. It is this amendment alone, which is clearly severable, that offends Article 304(a). It can, therefore, be struck down. The subsequent notification of 20.3.1984 proceeds on the same basis. There is no need, therefore. to strike down the entire tax exemption which is granted to all re-rolled steel products sold in there State of Andhra Pradesh and manufactured out of tax paid raw material purchased in the state of Andhra Pradesh. The discriminatory provision is clearly severably and can

Downloaded on : Fri Aug 21 10:48:01 IST 2020

be struck down.”

23. From the conjoint reading of the provisions of Act and Rules, it appears that by prescribing the formula in Sub-rule 5 of Rule 89 of the CGGST Rules,2017 to exclude refund of tax paid on “input service” as part of the refund of unutilised input tax credit is contrary to the provisions of Sub-section 3 of Section 54 of the CGST Act,2017 which provides for claim of refund of “any unutilised input tax credit”. The word “Input tax credit” is defined in Section 2(63) means the credit of input tax. The word “input tax” is defined in Section 2(62), whereas the word “input” is defined in Section 2(59) means any goods other than capital goods and “input service” as per Section 2(60) means any service used or intended to be used by a supplier. Whereas “input tax” as defined in section 2(62) means the tax charged on any supply of goods or services or both made to any registered person. Thus “input” and “input service” are both part of the “input tax” and “input tax credit”. Therefore, as per provision of sub-section 3 of Section 54 of the CGST Act,2017, the legislature has provided that registered person may claim refund of “any unutilised input tax”, therefore, by way of Rule 89(5)of the CGST Rules,2017, such claim of the refund cannot be restricted only to “input” excluding the “input services” from the

Downloaded on : Fri Aug 21 10:48:01 IST 2020

purview of “Input tax credit”. Moreover, clause (ii) of proviso to Sub-section 3 of Section 54 also refers to both supply of goods or services and not only supply of goods as per amended Rule 89(5) of the CGST, Rules 2017.

24. In view of the above analysis of the provisions of the Act and Rules keeping in mind scheme and object of the CGST Act, the intent of the Government by framing the Rule restricting the statutory provision cannot be the intent of law as interpreted in the Circular No.79/53/2018-GST dated 31.12.2018 to deny the registered person refund of tax paid on “input services’ as part of refund of unutilised input tax credit.

25. We are of the opinion that Explanation (a) to Rule 89(5) which denies the refund of “unutilised input tax” paid on “input services” as part of “input tax credit” accumulated on account of inverted duty structure is ultra vires the provision of Section 54(3) of the CGST Act, 2017.

26. In view of the above, Explanation (a) to the Rule 89(5) is read down to the extent that Explanation (a) which defines “Net Input Tax Credit’ means “input tax credit” only. The said explanation (a)of Rule 89(5) of the CGST Rules is held to be contrary to the provisions of Section

Downloaded on : Fri Aug 21 10:48:01 IST 2020

54(3) of the CGST Act. In fact the Net ITC should mean “input tax credit” availed on “inputs” and “input services” as defined under the Act.

27. The respondents are therefore, directed to allow the claim of the refund made by the petitioners considering the unutilised input tax credit of “input services” as part of the “net input tax credit”(Net ITC) for the purpose of calculation of the refund of the claim as per Rule 89(5) of the CGST Rules,2017 for claiming refund under Sub-section 3 of Section 54 CGST Act,2017.

28. In the result, for the forgoing reasons, the petitions are accordingly allowed. Rule is made absolute to the aforesaid extent. No order as to costs.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

FURTHER ORDER :

After the judgment is pronounced, Mr. Nirzar Desai learned Standing Counsel for the respondent made a request to stay the operation, implementation and execution of the judgment.

Having regard to what has been stated in the judgment and more, particularly, when Explanation(a) to Rule 89(5) of the CGST Rules, 2017 is held to be ultra vires the provisions of sub-section(3) of section 54 of the CGST Act, 2017, request of the learned advocate is rejected.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

ALOK

Downloaded on : Fri Aug 21 10:48:01 IST 2020