

ANUP SINHA & ASSOCIATES, CHARTERED ACCOUNTANTS

TAX ALERT FOR SEPTEMBER, 2021 (GST)



Transtonnestroy Afcons Joint Venture vs. Union of India¹

Whether a claim of refund made by an assessee under an inverted duty structure covers the input tax credit accumulated on input goods and/or input tax credit accumulated on input services under the relevant provisions of the CGST Act read with the CGST Rules

Executive Summary

- The Petitioner used both input goods and input services in its output supplies. The case of the Petitioner was that it was entitled to a refund of the entire unutilised input tax credit, irrespective of whether such credit accumulated on account of procurement of input goods and/or input services by paying tax at a higher rate than that paid on output supplies.
- The Hon'ble High Court has held that the section 54(3)(ii) of the CGST Act, 2017 curtails a refund claim to the unutilised credit that accumulates only on account of the rate of tax on input goods being higher than the rate of tax on output supplies. As a corollary, the rule 89(5) of the CGST Rules, 2017 as amended, is in conformity with Section 54(3)(ii) of the CGST Act. Consequently, it is not necessary to interpret Rule 89(5) and, in particular, the definition of net input tax credit ('Net ITC') herein so as to include the words 'input services'.
- In a contrary decision rendered by the Hon'ble Gujarat High Court in the matter of VKC Footsteps India Pvt Ltd vs. Union of India², the Hon'ble High Court has directed the respondents to allow the claim of refund made by the Petitioner considering the unutilised input tax credit of input services as part of the 'Net ITC' for the purpose of calculation of the refund of the claim as per rule 89(5) of the CGST Rules for claiming refund under the section 54(3) of the CGST Act.

¹ (2021) 91 GSTR 130 (Mad)

² (2020) 81 GSTR 66 (Guj)

Facts

- The Petitioner was a contractor providing services to the Chennai Metro Rail Ltd. In the course of business, the Petitioner used both input goods and input services in its output supplies. Both the input goods and, particularly, the input services were subjected to a higher rate of tax than the rate of tax on output supplies of the Petitioner. Consequently, there was substantial accumulation of unutilized input tax credit resulting from the inverted duty structure.
- The case of the Petitioner was that they were entitled to a refund of the entire unutilized input tax credit, irrespective of whether such credit accumulated on account of procurement of input goods and/or input services by paying tax at a higher rate than that paid on output supplies. On the contrary, the case of the Tax Department was that the refund of unutilised input tax credit was permissible only in respect of the quantum of credit that accumulated due to the procurement of input goods at a higher rate than that paid on output supplies, and that credit accumulation on account of procuring input services at a rate of tax higher than that paid on output supplies was liable to be disregarded for refund purposes.

Ruling of the Hon'ble Madras High Court

- The Hon'ble High Court has held that the provision of section 54(3)(ii) of the CGST Act does not infringe Article 14 of the Constitution of India. The Hon'ble High Court has further held that refund is a statutory right and the extension of the benefit of refund only to the unutilised credit that accumulates on account of the rate of tax on input goods being higher than the rate of tax on output supplies by excluding unutilised input tax credit that accumulates on account of input services is a valid classification and a valid exercise of legislative power. Thus, the section 54(3)(ii) of the CGST Act curtails a refund claim to the unutilised credit that accumulates only on account of the rate of tax on input goods being higher than the rate of tax on output supplies. As a corollary, the rule 89(5) of the CGST Rules, as amended, is in conformity with Section 54(3)(ii) of the CGST Act. Consequently, it is not necessary to interpret rule 89(5) and, in particular, the definition of 'Net ITC' therein so as to include the words 'input services'.
- Incidentally, it may be mentioned that the Hon'ble Madras High Court, while rendering this decision, has considered the decision of the Hon'ble Gujarat High Court in the matter of VKC Footsteps India Pvt Ltd vs. Union of India (supra).

Contrary Decision: Ruling of the Hon'ble Gujarat High Court in the matter of VKC Footsteps India Pvt Ltd vs. Union of India (supra)

- The Petitioner was engaged in the business of manufacture and supply of footwear. The GST rates paid by the Petitioner on procurement of input and input services were higher than the rate of tax payable on their outward supply of footwear. Therefore, there was accumulation of unutilized credit in electronic credit ledger of the Petitioner resulting from the inverted duty structure. The Petitioner prayed to the Hon'ble High Court to hold that the amended rule 89(5) of the CGST Rules is ultra vires Section 54(3) of the CGST Act inasmuch as the section 54(3) of the CGST Act provides for refund of any unutilized input tax credit accumulated on account of inverted duty structure thereby covering credit of both inputs and input services and further, to hold that the amended rule 89 of the CGST Rules is violative of Article 14 of the Constitution of India inasmuch as it treats dealers with accumulated credit on inputs and dealers with accumulated credit on input services differently.
- The Hon'ble High Court has, *inter alia*, held that Explanation (a) to rule 89(5) of the CGST Rules, which denies the refund of unutilized input tax credit paid on input services as part of input tax credit accumulated on account of the inverted duty structure, is ultra vires the provision of the section 54(3) of the CGST Act. The respondents are therefore directed by the Hon'ble Court to allow the claim of refund made by the Petitioner considering the unutilised input tax credit of input services as part of the 'Net ITC' for the purpose of calculation of refund of the claim as per rule 89(5) of the CGST Rules for claiming refund under the section 54(3) of the CGST Act.

Conclusion

- When two High Courts of India have expressed two opposite views on the similar facts, then, as per the accepted legal principle of jurisprudence, the view favourable to an assessee (other than the assessee located in the respective jurisdictions of the High Courts upon which the decisions are binding) may be followed till the Hon'ble Supreme Court settles the matter at rest.

Contact Details:

Rituparna Sinha

E-mail id:

rituparna.sinha@asinha.co.in

Pampi Singh

E-mail id:

pampi.singh@asinha.co.in

Anup Sinha & Associates

**Direct Tax | International Tax | Transfer Pricing |
Expatriate Tax | Indirect Taxes | Regulatory**

Anup Sinha & Associates, founded in the year 2012 as a partnership firm (registered with the Institute of Chartered Accountants of India), has set up its offices in **Kolkata and New Delhi**. The firm offers a wide range of services in the areas of Direct Tax, International Tax, Transfer Pricing, Expatriate Tax, Indirect Taxes and Regulatory. The firm is headed by Anup Sinha, Chartered Accountant, who has work experience of seventeen years in Big Four Professional Services Firms in the areas of tax and regulatory.

The Partners of the firm have established a company in **Dhaka** (Bangladesh) namely, Anup Sinha Consulting (P) Ltd, which offers a wide range of services in the areas of Direct Tax, International Tax, Transfer Pricing, Expatriate Tax, Indirect Taxes and Regulatory. The company assists potential foreign investors in exploring business opportunities in Bangladesh and resolves their issues by coordinating with the Bangladesh Investment Development Authority, Ministries of Bangladesh, Bangladesh Bank, National Board of Revenue and Registrar of Joint Stock Companies & Firms.