

GST NEWSLETTER

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ARTICLE

INVERTED DUTY REFUND CLAIM ON ITC FROM INPUT SERVICES

Refund of taxes is a common feature of any tax law. Refund in direct tax cases may be due to excess payment or deduction of taxes while refund of indirect taxes may be due to excess input tax credit (ITC) or wrong payment of output taxes.

GST, as a tax law, was conceptualized in order to enable a smooth flow of tax in the form of ITC from the manufacturer to the end consumer such that it avoids a cascading effect of tax and results in only the end-consumer bearing the tax. But in instances of zero-rated supply (exports and SEZ supplies) and inverted duty structure, suppliers are not able to pass on the tax incidence to the next person and will not be able to utilize the ITC. Hence refund is provided under section 54 of CGST Act, 2017.

Refund under both concepts will be calculated as per the formula prescribed in Rule 89 of CGST Rules, 2017. Our discussion is restricted to explain the impact of recent High Court Judgement in the

case of VKC FOOTSTEPS INDIA PVT. LTD. VERSUS UNION OF INDIA & 2 OTHER (S) on refund of ITC due to inverted duty structure.

Inverted duty structure is the situation where inward supplies are taxed at higher rate than the tax rate applicable on outward supplies. For example, chemical used in agarbatti manufacturing is taxed at 18% whereas agarbattis are taxable at 5%. In this situation manufacturer will not be able to utilize full ITC since tax payable on sales will be lesser than ITC. Therefore, GST law provides for refund of such ITC as per the formula prescribed under Rule 89 of CGST Rules, 2017.

As per Rule 89(5) of the CGST Rules, 2017 amended by notification no. 26/2018 dated 13-06-2018 and applicable retrospectively from 01-07-2017:

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 –

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.

As per section 2(59) of the CGST Act, 2017 “input” means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business

As per the above said formula, the refund is restricted only to the extent of ITC accumulated on inward supply of goods other than capital goods only and ignores input services and capital goods even though section 54 allows on all inward supplies.

Due to this restriction, many were not able to claim full refund of ITC accumulated and they are facing difficulties in managing working capital.

Recently the Hon'ble High Court of Gujarat in case of VKC FOOTSTEPS INDIA PVT. LTD. VERSUS UNION OF INDIA & 2 OTHER (S) [2020 (7) TMI 726 - GUJARAT HIGH COURT] acknowledging the above anomaly held that Rule 89(5), ibid is ultra vires the provisions of section 54(3), ibid and read down the Rule 89(5), ibid to the extent it restricts the refund of ITC on input services. The honorable High Court examined the application and acts and made the following observations and rulings:

1. Section 54(3) of the CGST Act, 2017 provides for refund of Input Tax Credit without any restrictions under Zero-rated supplies or Inverted duty.

2. Rules are made 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.

3. No tax can be imposed by any byelaw or rule or regulation unless the statute under which the subordinate legislation is made specially authorizes 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.

4. 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.79/53/2018GST dated 31.12.2018 to deny the registered person refund of tax paid on “input services” as part of refund of unutilized input credit

5. Explanation (a) to Rule 89(5) which denies the refund of “unutilized 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.

6. 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.

From the above observations and ruling, the Gujrat High Court declared that ITC on both goods and services can be claimed as refund due to inverted duty supplies. Conclusion:

The Gujrat High Court rectified an error in the rule making by the authorities but it is expected that the Government may appeal to the Hon'ble Supreme court. Since the rule is not amended, it is suggested to follow the following course of action till the matter reaches finality,

1. Calculate eligible refund amount by considering ITC on Input and Input services
2. The refund application will be rejected and the ITC on both goods and services will be withheld.
3. The taxpayer has to opt for appeal with the relevant authority to obtain refund of ITC on services.
4. The appellate authority may either rule against the taxpayer or in favor citing the Gujrat HC ruling.

CASE LAWS

Facts of the case: M/S. SRI DMS HOSPITALITY PRIVATE LIMITED (AAAR, Karnataka)

The applicant is a private limited company which has taken a residential apartment for rent from the owner in order to rent out the entire property as staff residence to Sodexo Food Solutions in Bengaluru. The property is located in KIADB allocated land meant for industrial purposes. The agreement also provides for supplying other services such as wash rooms, bunkers, water purifiers, security service, television sets etc. The applicant raises a single invoice for monthly rent and another for the additional facilities. The applicant had approached the AAR in Karnataka to know whether the services provided are exempt under rental of residential dwelling or taxable under Real Estate services but on receiving an unfavorable ruling, has approached the Appellate AAR, Karnataka.

Provisions of the law:

As Per Sr. No. 17 of the Notification No. 11/2017 dated 28th June 2017 – ‘Real estate services’ are taxed at 18% GST and include rental of commercial properties.

As per Sr. no. 12 of Notification No. 12/2017 dated 28th June 2017, Services by way of renting of residential dwelling for use as residence is exempt from tax.

Ruling:

The AAAR up-held the AAR’s ruling which stated that: The agreement between the applicant and Sodexo only provides for the lease of the property as a whole without any details of the flats that are let out. Further, the property is allocated by Karnataka Industrial Area Development Board (KIADB) for industrial and commercial purposes. Hence, the building built on the land cannot be construed as a residential building. Hence, the rental received by the applicant is chargeable to GST.

Facts of the case: BHARAT OMAN REFINERIES LTD. VERSUS UOI, Gujarat HC

The applicant is a limited company which has paid GST on Ocean Freight through Reverse Charge Mechanism (RCM) as per entry no. 10 of IGST rate Notification No. 10/2017 dated 28.06.2017. But subsequently based on various Civil Petitions filed against the payment of GST on Ocean freight, the Gujarat High Court held the entry for payment of GST on Ocean Freight as ultra vires the IGST Act, 2017. Hence, the applicant has approached the HC to direct the Union of India to refund the GST amount paid by the applicant.

Provisions of the law:

As per entry no. 10 of notification no. 10/2017 dated 28th June 2017 ‘Services supplied by a person located in non- taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India’ shall be subject to GST by RCM where the supplier of service is ‘A person located in non-taxable territory’ and the recipient of service is an ‘Importer, as defined in clause (26) of section 2 of the Customs Act, 1962(52 of 1962), located in the taxable territory’.

As per the Special Civil Petition ‘Mohit Mineral Pvt. Ltd. v/s UOI’ it was held that the supply of services provided by the foreign transporter to the foreign supplier by way of transportation of goods in a vessel from a place outside India to the place of customs station of clearance in India is not an inter-state supply as per the provisions of Section 7 of the IGST Act

Ruling:

The Gujarat HC, based on the provisions of the IGST Act, 2017 and the ruling held in Mohit Minerals case, directed the GST authorities to refund the IGST amount paid by the applicant by RCM for ocean freight charges.

NOTIFICATIONS AND CIRCULARS FOR THE MONTH OF JULY 2020

■ Four Central Tax Notification.

Sl. No	Subject	Notifications/Circulars No. Date of Issue
1.	Seeks to amend Notification no. 13/2020-Central Tax in order to amend the class of registered persons for the purpose of e-invoice	61/2020-Central Tax dated 30.07.2020
2.	Seeks to make Ninth amendment (2020) to CGST Rules	60/2020-Central Tax dated 30.07.2020
3.	Seeks to extend the due date for filing FORM GSTR-4 for financial year 2019-2020	59/2020-Central Tax dated 13.07.2020
4.	Seeks to make eighth amendment (2020) to CGST Rules	58/2020-Central Tax dated 01.07.2020

DUE DATES OF GST FOR THE MONTH OF AUGUST 2020

AUGUST 2020

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
2	3	4	5	6	7	8
9	10 *GSTR-7 & GSTR-8	11 *GSTR-1	12	13	14	15
16	17	18	19	20 *GSTR-3B/5/5A	21	22
23	24	25	26	27	28	29
30	31					

* For taxpayers with Annual Turnover more than Rs. 1.50 Crores or who has opted for monthly return.

* For taxpayers with Annual Turnover less than Rs. 1.50 Crores and who have opted for quarterly return.

RELAXATION IN LATE FILING OF RETURNS AND LATE PAYMENT OF TAX:

Turnover > 5 Crores	Turnover > 1.5 Crores and < 5 Crores	Turnover < 1.5 Crores
No relaxation for GSTR 3B, it's to be filed by 20th August 2020 . Maximum Rs. 500 if filed before 30th September 2020	No late fees on GSTR 3B if filed within 27th September 2020 and maximum Rs. 500 if filed after 30th September 2020	No late fees on GSTR 3B if filed within 27th September 2020 and maximum Rs. 500 if filed after 30th September 2020
No interest on GSTR 3B if filed within 20th August 2020	No interest on GSTR 3B if filed within 27th September 2020	No interest on GSTR 3B if filed within 27th September 2020
Interest of 18% p.a. if filed after 20th August 2020	Interest of 9% p.a. between 27th September & 30th September 2020 and 18% p.a. thereafter.	Interest of 9% p.a. between 27th September & 30th September 2020 and 18% p.a. thereafter.
No late fee on GSTR 1 if filed within 11th August 2020	No late fee on GSTR 1 if filed within 11th August 2020	No late fee on GSTR 1 if filed within 11th August 2020

Disclaimer:

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