



ITC of Input Services Eligible for Refunds under Inverted Duty Structure.

VKC Footsteps India Pvt Ltd v. Union of India¹

The Hon'ble Gujarat High Court examined a batch of writ petitions challenging the vires of rule 89 of the Central Goods and Service Tax Rules, 2017 ("the Rules"), in so far as it excludes Input Tax Credit ("ITC") of "Input Services" from the definition of "Net Input Tax Credit" and consequently from claiming refund of ITC relating to Input Services in case of inverted duty structure.

In these petitions, the Petitioners have sought the following reliefs:

- (a) To hold that the amended rule 89 of the Rules is *ultra vires* section 54(5) of the Central Goods and Service Tax Act, 2017 ("the Act") in as much as section 54(3) of the 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.';
- (b) To hold that the amended rule 89 of the Rules is violative of Article 14 of the Constitution of India in as much as it treats dealers with accumulated credit of inputs and dealers with accumulated credit of input services differently;

- (c) To hold that section 164(3) of the Act is unconstitutional in as much as it suffers from the vice of excessive delegation; and
- (d) To hold that the amendment of rule 89 of the Rules cannot be given retrospective application.

In this regard, the Hon'ble Gujarat High Court held as follows:

The term "input tax credit" is defined under section 2(63) of the Act to mean the credit of input tax. While "input tax" is defined under section 2(62) of the Act to mean the tax charged on any supply of goods or services or both made to any registered person. Thus "inputs" and "input services" both constitute "input tax" and "input tax credit". Section 54(3) of the Act, states that a registered person may claim refund of "any unutilized input tax", but such a claim cannot be restricted by means of rule 89(5) of the Rules, only for "inputs" to exclude "input services" from the purview of "input tax credit". Moreover, clause (ii) of the proviso to sub-section 3 of section 54 of the Act also refers to both supply of goods or services and not only supply of goods as per the amended rule 89(5) of the Rules.

¹ TS-585-HC-2020(GUJ)-NT-VKC



In view of the various judgements and analysis of the provisions of the Act and Rules, and keeping in mind the object of the Act, the intention of the Government, in framing the Rules restricting the statutory provision cannot also be the intention of the law as interpreted in Circular No.79/53/2018 dated December 31, 2018, namely to deny a registered person refund of tax paid on "input services" as part of refund of unutilized ITC. The Court held that Explanation (a) to rule 89(5) of the Rules which denies any refund of "unutilised ITC" in relation to "input services" as part of "input tax credit" that has been accumulated on account of inverted duty structure is ultra vires the provisions of section 54(3) of the Act.

The Respondents were therefore, directed to allow the claim of refunds that were made by the Petitioners, by considering the unutilised input tax credit relating to "input services" as part of the "net input tax credit" for the purpose of calculating refund claim amount as per rule 89(5) of the Rules for claiming refund under section 54(3) of the Act.

Dhruva Comments:

The judgement in this case confirms the view that inverted duty structure refunds will also include refunds relating to input services, thereby resulting in substantial cash flow benefit in situations where input service credits have been accumulated but there is no immediate utilisation window. It remains to be seen how this judgement will evolve from here as the tax authorities are likely to challenge this order before the Hon'ble Supreme Court.

Given that the Rules are a subordinate legislation, there is also a possibility of a retrospective amendment being introduced in the Act itself, as well as the possibility that subsequent litigation may follow. The Hon'ble Gujarat High Court has refrained from commenting on whether rule 89 is violative of Article 14 of the Constitution in as much as it treats dealers with accumulated credits of inputs and dealers with accumulated credits of input services differently.

Another important aspect is that this is a judgement of the Hon'ble Gujarat High Court although applicable to the whole of India, it remains to be seen how the jurisprudence evolves when the issue is put forth for consideration before the High Courts of other states. The matter is currently under consideration before the Madras High Court² where an interim order has been issued, allowing refund of input services. Proceedings on the same issue are also pending before the Patna High Court³ and the Rajasthan High Court⁴.

From taxpayer's perspective, irrespective of the State's involvement, it is important that refund applications incorporate claim for refund of input services as well, considering the limitation period of two years for filing a refund claim. It could also be interesting to evaluate whether claims can be filed for previous periods. Filing a writ challenging rejected refund claims should be evaluated and reliance could be placed upon this judgement.

² Tanstonnelstory Afcons Joint Venture v. Union of India [2019-VIL-188-MAD]

³ Afconc-Sibmost Joint Venture v. Union of India and Other [2019-VIL-409- PAT].

⁴ Voylla Fashion Pvt. Ltd [Civil Writ Petition No. 24375/2018 dated October 31, 2018]





ADDRESSES

Mumbai

One World Center, 11th floor,
Tower 2B, 841, Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013
Tel: +91 22 6108 1000 / 1900

Ahmedabad

B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahlanagar, Corporate Road,
Ahmedabad 380 015
Tel: +91-79-6134 3434

Bengaluru

Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560 001
Tel: +91-80-4660 2500

Delhi / NCR

101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana 122 002
Tel: +91-124-668 7000

Pune

305, Pride Gateway, Near D-Mart, Baner,
Pune 411 045
Tel: +91-20-6730 1000

Kolkata

4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal 700016
Tel: +91-33-66371000

Singapore

Dhruva Advisors (Singapore) Pte. Ltd.
20 Collyer Quay, #11-05
Singapore 049319
Tel: +65 9105 3645

Dubai

WTS Dhruva Consultants
U-Bora Tower 2, 11th Floor, Office 1101
Business Bay P.O. Box 127165
Dubai, UAE
Tel: + 971 56 900 5849

KEY CONTACTS

Dinesh Kanabar

Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Ritesh Kanodia

ritesh.kanodia@dhruvaadvisors.com

Niraj Bagri

niraj.bagri@dhruvaadvisors.com

Ranjeet Mahtani

ranjeet.mahtani@dhruvaadvisors.com

WTS Dhruva Consultants recognised as **Best Newcomer Firm of the Year 2020 Europe** - International Tax Review

“India Tax Firm of the Year” 2017, 2018, and 2019 - International Tax Review’s Asia Tax Awards

“India Tax Disputes and Litigation Firm of the Year” 2018 - International Tax Review’s Asia Tax Awards

Dhruva Advisors has been consistently recognised as a **Tier 1 Firm in India for General Corporate Tax** by the International Tax Review’s in its World Tax Guide.

Dhruva Advisors has also been consistently recognised as a **Tier 1 Firm in India for its Transfer Pricing practice** in the International Tax Review’s Transfer Pricing Guide.

Dhruva Advisors in 2019 for the first time ranked as a **Tier 1 Firm in India for Indirect Taxes** in International Tax Review’s Indirect Tax Guide.

Best Newcomer of the Year 2016 - ASIA - International Tax Review’s Asia Tax Awards

Disclaimer:

The information contained herein is in summary form and is therefore intended for general guidance only. This publication is not intended to address the circumstances of any particular individual or entity. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. This publication is not a substitute for detailed research and professional opinions. Before acting on any matters contained herein, reference should be made to subject matter experts, and professional judgment needs to be exercised. Dhruva Advisors LLP cannot accept any responsibility for loss occasioned to any person acting or refraining from acting as a result of any material contained in this publication

