NEUTRAL CITATION
2024:GUJHC:71361-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 11630 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 11635 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 11647 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 11649 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

and
HONOURABLE MR.JUSTICE D.N.RAY

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Approved for Reporting	Yes	No

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M/S TIRTH AGRO TECHNOLOGY PVT. LTD. & ANR.
Versus
UNION OF INDIA & ORS.

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Appearance:
MR ABHAY Y DESAI(12861) for the Petitioner(s) No. 1,2
MR D K TRIVEDI(5283) for the Petitioner(s) No. 1,2
MR SIDDHARTH H DAVE(5306) for the Respondent(s) No. 1,3,4
NOTICE SERVED for the Respondent(s) No. 2,5,6

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CORAM:**HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR.JUSTICE D.N.RAY

Date : 20/12/2024

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE D.N.RAY)

1. Heard learned Advocate Mr.D.K.Trivedi for

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the petitioners; learned Advocate Mr.Ankit Shah for the respondent No.1 and learned Advocate Mr.Hirak Shah appearing for learned Senior Standing Counsel Mr.Nikunt K.Raval for the respondent Nos.2 and 3.

2. Rule returnable forthwith. Mr.Ankit Shah, learned Advocate waives service of notice of rule for on behalf of the respondent No.1 and Mr.Hirak Shah, learned Advocate waives service of notice of rule for and on behalf of the respondent Nos.2 and 3. Since the controversy involved is short, the matter is finally heard and disposed of.

3. These petitions are filed under Article 226 of the Constitution of India where the common issue of rejection of refund applications based on Section 54(3) of the GST

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Act read with Rule 89(5) of the GST Rules is involved.

4. The petitioners therefore made applications under section 54(3) of the GST Act to get the refund of unutilized input tax credit as per the formula prescribed in Rule 89(5) of the Central/Gujarat Goods and Services Tax Rules, 2017 (for short 'the Rules').

5. The petitioners were granted partial refund computed as per the formula under the inverted duty structure for all the applications made prior to 05.07.2022 on the ground that prior to 05.07.2022, by unamended formula, the petitioners were not entitled to include the input services as part of the formula and as the petitioners have made the

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refund application prior to 05.07.2022, as per the Notification No. 14/2022 dated 05.07.2022 read with Circular dated 10.11.2022, the petitioners were not entitled to the refund as per the amended formula.

6. In the cases on hand, the refund applications filed by the petitioners have been rejected by the Department. A comprehensive chart showing the particulars of the respective applications, the quantum of refund and the particulars of rejection etc. is quoted hereinbelow. As the controversy pertaining to this group of petitions is similar, this common order will dispose of the same.

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01 Sr. No.	**02** SCA No.	**03** Period for which refund claimed	**04** Date of Refund Application [refund of entire accumulated credit in regard to inputs and input services]	**05** MAXIMUM REFUND AMOUNT – Amount of Refund claimed vide Refund Application **mentioned in column (04)**	**06** Date of RFD-06 (Refund Order) passed as per the old formulae under Notification 10/2017-CT dtd. 28/06/2017	**07** Refund Sanctioned considering old formulae vide RFD-06 **mentioned in column (06)** (in regard to input only)	**08** MAXIMUM REFUND AMOUNT if we consider the new formulae as per Notification 14/2022-CT dtd. 05/07/2020 (in regard to inputs and input services both)	**09** NOT ELIGIBLE REFUND AMOUNT if we consider the new formulae as per Notification 14/2022-CT dtd 05/07/2020 (in regard to input and input services both)	**10** Incremental Eligible Refund Amount **(Column 09 minus Column 07)**
				(Rs)		**(Rs)**	**(Rs)**	**(Rs)**	
01.	11630/2023	Aug – 2019	20/02/2020 **(Pg. 60-61)**	2,79,37,548	06/03/2020 **(Pg. 64-67)**	1,43,24,155	2,25,73,631	2,24,68,800	81,44,645
02.	11635/2023	Feb – 2020	14/04/2020 **(Pg. 60-61)**	3,49,03,128	27/10/2020 **(Pg. 66-69)**	2,25,62,970	3,00,19,500	2,95,58,763	69,95,794
03.	11647/2023	Apr – 2019	25/10/2019 **(Pg. 60-61)**	1,85,47,336	18/01/2020 **(Pg. 66-69)**	1,51,85,901	1,69,96,171	1,65,54,068	13,68,167
04.	11649/2023	July - 2019	19/03/2020 **(Pg. 60-63)**	5,80,97,383	06/03/2020 **(Pg. 64-67)**	4,83,00,532	5,23,07,866	5,21,71,741	38,71,209

7. **DISCUSSION & FINDINGS:**-

The formula for calculating the refund under Rule 89(5) of the GST Rules was challenged before different High Courts on the ground that it was ultra vires to section 54(3) of the GST Act and as the refund in

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respect of unutilized input tax credit attributable to input services was not being granted and, in the alternative, it was urged that the formula was defective as the entire input tax credit pertaining to inputs was first adjusted towards output tax liability for computing refund under Rule 89(5) of the GST Rules. Accordingly in many of these petitions, suitable amendments were moved to challenge the Notification No. 14/2022 dated 05.07.2022 read with Circular dated 10.11.2022.

8. It would be germane to refer to the amended and unamended Rule 89(5).

> **Unamended rules prior to 05.07.2022 was as under**:
>
> "89(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:

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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

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

Amended Rule read as under:

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

[(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} - 21[{tax payable on such inverted rated supply of goods and services x (Net ITC ÷ ITC availed on inputs and input

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services)}].

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

(a) "Net ITC" shall mean input tax crdit 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" and "relevant period" shall have the same meaning as assigned to them in sub-rule (4).]"

9. The Hon'ble Apex Court, in its judgment in the case of **Union of India and others Vs. VKC Footsteps India Pvt. Ltd.** reported in **(2022) 2 SCC 603,** while upholding the validity of Rule 89(5) of the Rules, directed the GST Council to remove the anomalies in the formula stated therein as under:

> "132. In our view, the justification of the formula under Rule 89(5) given by the ASG to create a legal bifurcation is valid. In this context, it would be material to advert to the provisions of Rule 42. Rule 42(1) provides that the ITC in respect of

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input goods or input services which attract the provisions of sub-Section (1) or sub-Section (2) of Section 17 being partly used for the purpose of business and partly for other purposes or partly used for affecting taxable supplies including zero rated supplies and partly for effecting exempts supplies shall be attributed for the purposes of business or for effecting taxable supplies in the manner which is indicated in the Rule. Sub-Section (1) of Section 17 provides that where the goods and services or both are used by a registered person partly for the purposes of any business and partly for any other purpose, the amount of credit shall be restricted to so much of the input tax as is attributable to the purpose of its business. Sub-Section (2) of Section 17 provides that where the goods or services or both are used by a registered person partly for effecting taxable supplies including zero rated supplies under the CGST Act or under the IGST Act and partly for effecting exempt supplies the amount of credit shall be restricted to so much of the input tax as is attributable to the taxable supplies including zero rated supplies. Rule 42, in other words, provides for the manner in which the attributions of ITC in respect of the input or input services under sub-Sections (1) or (2) of Section 17 shall be carried out. Rule 43 similarly provides the manner in which ITC in respect of capital goods attracting the provisions of sub-Section (1) of Section 17, used partly

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for business and partly for other purposes or partly for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies would be attracted to the purpose of business or for effecting taxable supplies. Both Rules 42 and 43 provide for a formula for attribution. Rule 86 provides for the maintenance of an electronic credit ledger. Rule 89(5) provides for a refund. In both sets of rule clusters, Rules 42 and 43 on the one hand and Rule 89(5) on the other hand, a formula is used for the purpose of attribution in a post assimilated scenario. The use of such formulae is a familiar terrain in fiscal legislation including delegated legislation under parent norms and is neither untoward nor ultra vires.

133. We now turn to the submissions of the counsel for the assessees regarding the anomalies in the formula. In our view, the submission of Mr Sujit Ghosh, that the formula creates a distinction between suppliers having a higher component of input goods than those having a higher component of input services, and must be read down accordingly, must be rejected. The purpose of the formula in Rule 89(5) is to give effect to Section 54(3)(ii)which makes a distinction between input goods and input services for grant of refund. Once the principle behind Section 54(3)(ii)of the CGST Act is upheld, the formula cannot be struck down

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merely for giving effect to the same."

xxxxx

142. The above judicial precedents indicate that in the field of taxation, this Court has only intervened to read down or interpret a formula if the formula leads to absurd results or is unworkable. In the present case however, the formula is not ambiguous in nature or unworkable, nor is it opposed to the intent of the legislature in granting limited refund on accumulation of unutilised ITC. It is merely the case that the practical effect of the formula might result in certain inequities. The reading down of the formula as proposed by Mr Natarjan and Mr Sridharan by prescribing an order of utilisation would take this Court down the path of recrafting the formula and walk into the shoes of the executive or the legislature, which is impermissible. Accordingly, we shall refrain from replacing the wisdom of the legislature or its delegate with our own in such a case. However, given the anomalies pointed out by the assessees, we strongly urge the GST Council to reconsider the formula and take a policy decision regarding the same."

10. Pursuant to the above directions issued by the Apex Court, the GST Council in its 47th Meeting held on 28/29.06.2022

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considered the agenda item 3(ii) with regard to amendment in formula prescribed in Rule 89(5) of the Rules for calculation of the refund of unutilized input tax credit on account of inverted duty structure as under:

> "7.2 The Principal Commissioner, GST Policy Wing informed that the Hon'ble Supreme Court of India in case of UOI vs. M/s. VKC Footsteps vide its order dated 13.09.2021 had upheld the vires of Rule 89(5) of the Central goods and Service Tax Rules, 2017 but had taken cognizance of the anomalies in the formula prescribed under Rule 89(5) of the CGST Rules, 2017. The Hon'ble Supreme Court had upheld the exclusion of ITC availed on input services from the computation of Net ITC. However, the Apex Court had noted that the formula prescribed in Rule 89(5) assumed that the tax payable on inverted rated supply of goods and services had been paid by utilizing input tax credit on inputs only and that there had been no utilization of the ITC on input services, such as assumption skewed the formula in favour of the revenue. The Apex Court had, therefore urged the GST Council to reconsider the formula.
>
> 7.3 The issue was deliberately by the Law Committee and in the absence of any empirical data, Law Committee had recommended to consider

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> utilisation of ITC on account of inputs and input services for pyament of output tax in the same ratio in which the ITC has been availed on inputs and input services during the said tax period and to use this deduction to revise the formula prescribed in rule 89(5) as suggested by the Hon'ble Supreme Court. Accordingly, Law Committee recommended the following amendment in formula prescribed in Rule 89(5):
>
> > 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 x(Net ITC ÷ ITC availed on inputs and input services)}.
>
> The Council agreed with the recommendation of the Law Committee."

11. The CBIC pursuant to the aforesaid decision of the GST Council issued the Notification No. 14/2022 dated 05.07.2022 being the Central Goods and Service Tax (Amendment) Rules, 2022. In Rule 8 of the aforesaid Rules, amendment is made in Rule 89 of the GST Rules as under:

> "8. In the said rules, in rule 89, -

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(a) in sub-rule (1), after the fourth proviso, the following Explanation shall be inserted, namely: - 'Explanation. — For the purposes of this sub-rule, "specified officer" means a "specified officer" or an "authorised officer" as defined under rule 2 of the Special Economic Zone Rules, 2006.';

(b) in sub-rule (2), -

(i) in clause (b), after the words "on account of export of goods", the words *, other than electricity" shall be inserted;

(ii) after clause (b), the following clause shall be inserted, namely: -

"(ba) a statement containing the number and date of the export invoices, details of energy exported, tariff per unit for export of electricity as per agreement, along with the copy of statement of scheduled energy for exported electricity by Generation Plants issued by the Regional Power Committee Secretariat as a part of the Regional Energy Account (REA) under clause (nnn) of sub-regulation 1 of Regulation 2 of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 and the copy of agreement detailing the tariff per unit, in case where refund is on account of export of electricity;";

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(c) in sub-rule (4), the following Explanation shall be inserted, namely: -

"Explanation. – For the purposes of this sub-rule, the value of goods exported out of India shall be taken as –

(i) the Free on Board (FOB) value declared in the Shipping Bill or Bill of Export form, as the case may be, as per the Shipping Bill and Bill of Export (Forms) Regulations, 2017; or

(ii) the value declared in tax invoice or bill of supply,whichever is less.";

(d) in sub-rule (5), for the words "tax payable on such inverted rated supply of goods and services", the brackets, words and letters "{tax payable on such inverted rated supply of goods and services x (Net ITC~ ITC availed on inputs and input services)}." shall be substituted;"

12. As per the aforesaid Rules, sub-rule (2) of the Rules provides as under:

"(2) Save as otherwise provided in these rules, they shall come into force on the date of their publication in the Official Gazette."

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13. Rule 8(d) of the Amended Rules, 2022 provides that in sub-rule (5) for the words “tax payable on such inverted rated supply of goods and services”, the brackets, words and letters “{tax payable on such inverted rated supply of goods and services, x (Net ITC ÷ ITC availed on inputs and input services)} has been substituted".

14. Thereafter, the CBIC has issued circular dated 10.11.2022 for clarification as under:

> “Clarification:
>
> Vide Notification No. 14/2022-Central Tax dated 05.07.2022, amendment has been made in sub-rule(5) of rule 89 of CGST Rules,2017 modifying the formula prescribed therein. The said amendment is not clarificatory in nature and is applicable prospectively with effect from 05.07.2022. Accordingly, it is clarified that the said amended formula under sub-rule (5) of rule

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> 89 of the CGST Rules,2017 for calculation of refund of input tax credit on account of inverted duty structure would be applicable in respect of refund applications filed on or after 05.07.2022. The refund applications filed before 05.07.2022 will be dealt as per the formula as it existed before the amendment made vide Notification No. 14/2022-Central Tax dated 05.07.2022."

15. After the amendment to the formula in Rule 89(5) was notified, the petitioners filed a rectification application for differential refund as per the new amended formula. Show-cause notices were issued proposing to reject the refund on the ground that the refund was not admissible since the refund as per the old formula was already granted to the petitioners.

16. Learned advocate Mr.D.K.Tivedi for the petitioners submitted that the question of prospective applicability of Notification No.

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14/2022 dated 05.07.2022 is no longer res integra as has been held by several High Courts including this Court in Special Civil Application No.18317 of 2023 decided on 17.10.2024 in the case of **Ascent Meditech Ltd. Vs. Union of India and ors.**

17. It was therefore submitted that the petitioners are entitled to refund as claimed.

18. Learned advocates Mr.Ankit Shah and Mr.Hirak Shah appearing on behalf of the respective respondents the respondents are not in a position to counter the aforesaid submissions or the applicability of the decision of this Court in Ascent Meditech Ltd. (Supra) wherein, this Court has held as under:-

> *45. In case of **Collector of Central Excise, Shilong vs. Wood Craft Products Ltd** reported in (1995) 3 SCC 454, the Hon'ble Apex Court has held that a*

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clarificatory notification would take effect retrospectively and such a notification merely clarifies the position. Clarificatory notifications have been issued to end the disputes between the parties. Therefore, Notification No. 14/2022 dated 05.07.2022 cannot be applied prospectively for the refund claim which were made within two years as prescribed under section 54(1) of the GST Act. It is not in dispute that the petitioner has filed refund claims within two years as stipulated in section 54(1) of the Act.

. *46. It is also not disputed by the respondent that the petitioner is entitled to the refund as per sub-section 3(ii) of section 54 of the Act being difference in the GST rates due to inverted rated structure and accordingly, the petitioner was granted refund though petitioner has filed refund applications pursuant to the deficiency memo issued repeatedly.*

. *47. Considering the above provisions of the GST Act, the same would be applicable in the facts of the case irrespective of the notification issued by the CBIC pursuant to the decision taken by the GST council as per the direction issued by the Hon'ble Supreme Court. The petitioner cannot be denied the refund as per the provision of 54(3) of the Act only because the petitioner has been granted the refund prior to 05.07.2022 as it would create a discrimination resulting into inequality*

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between the assesses who have been granted refund prior to 05.07.2022 and the assesses who have applied for refund after 05.07.2022. The impugned circular is therefore contrary to the provisions of the Act as it cannot be said that the refund applications filed after 05.07.2022 would only be entitled to the benefit of the amended Rule 89(5) of the Act. As per the provisions of section 54(1) read with section 54(3) of the Act if the assessee has made refund application within the prescribed period of two years, then the assessee would be entitled to the refund as per the amended formula which has been notified w.e.f. 05.07.2022. In the facts of the case the petitioner has made rectification applications for refund as per new amended formula within two years. Moreover, as held by this Court in the decisions in case of Shree Renuka Sugars Ltd (supra) and in case of Pee Gee Fabrics Ltd (supra), there is no embargo on preferring second refund application if the petitioner is entitled to the same within the period of two years.

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. *48. In view of the foregoing reasons, the impugned order dated 24.08.2023 is hereby quashed and set aside. The Circular No. 181/22 dated 10.11.2022 so far as it clarifies that the amendment is not clarificatory in nature is quashed and set aside and it is held that the Notification No. 14/2022 is applicable retrospectively as the amendment brought in Rule 89(5) of the Rules is curative and clarificatory in nature and the same would be applicable*

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retrospectively to the refund or rectification applications filed within two years as per the time period prescribed under section 54(1) of the Act. Rule is made absolute to the aforesaid extent."

19. The aforesaid decision of this Court is squarely applicable to the facts of the present group of petitions and nothing could be pointed out by the respondents to persuade this Court from taking a different view. In that view of the matter, these petitions succeed and the respondents are directed to release the respective amounts mentioned in column No.10 of the chart to the petitioners within a period of three months from the date of receipt of copy of this order. Rule is made absolute to the aforesaid extent. No order as to costs.

(BHARGAV D. KARIA, J)

(D.N.RAY,J)

SALIM/