

Refund of accumulated ITC in respect of services under inverted duty structure unavailable - SC

14 September 2021



Summary

The Supreme Court (SC) has affirmed the judgment of the Madras HC holding that the relevant provisions restricting the refund of accumulated input tax credit (ITC) of input services under the inverted duty structure are *intra vires* and does not need to be read down. The SC further stated that reading down of the formula 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. However, observing certain anomalies pointed out by the assesseees, the SC has directed the GST Council to reconsider the formula and take a policy decision regarding the same.

Facts of the case

- The Gujarat HC¹ had earlier allowed refund of ITC in respect of input services under the inverted duty structure under the GST law. It had held that the relevant provisions² under the GST law are contrary and *ultra vires* and need to be read down to the extent it denies refund of ITC on input services. The Revenue had filed a SLP against the Gujarat HC order before the Supreme Court.
- In another case³, the Madras HC had rejected the petitioner's contentions upholding the constitutional validity and

held that the relevant provisions are in conformity with the parent statute. The petitioner had filed an SLP challenging the said order of the Madras HC before the Supreme Court. The SC had accepted the SLP filed by the petitioner and issued notice to the revenue. Further directed that no coercive steps shall be taken.

SC's observation and ruling⁴

- **Use of formula not *ultra vires*:** Under the said rule, the formula is used for the purpose of attribution in a post assimilated scenario. The use of such

¹ in the case of M/s VKC Footsteps India Private Limited (Civil Appeal No 4810 of 2021)

² Section 54(3) of the CGST Act, 2017 read with Rule 89(5) of the CGST Rules, 2017

³ Tvl. Transtonnelstroy Afcons Joint Venture

⁴ Vide its order dated 13 September 2021

formulae is a familiar terrain in fiscal legislation including delegated legislation under parent norms and is neither untoward nor ultra vires.

- **Purpose of the formula:** The purpose of the formula in said rule is to give effect to Section 54(3)(ii) of the CGST Act 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 merely for giving effect to the same.
- **Court should not become a one-time arbiter:** We are affirmatively of the view that this Court should not in the exercise of the power of judicial review allow itself to become a one-time arbiter of any and every anomaly of a fiscal regime despite its meeting the jurisdictional framework for the validity of the legislation, including delegated legislation.
- **Formula not ambiguous or unworkable:** 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.

- **Reading down of formula impermissible:** The reading down of the formula 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.
- **Urge to GST council:** Accordingly, the SC refrained 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 assesseees, the SC urged that the GST Council shall reconsider the formula and take a policy decision regarding the same.
- **SLP filed by Revenue upheld:** The SC allowed the SLP filed by Revenue against the judgement of Gujarat HC and dismissed the SLP filed challenging the verdict of the Madras HC.

Our comments

There have been contradictory rulings on the availability of refund of accumulated ITC in respect of services under the inverted duty structure. The Gujarat HC had earlier held that the relevant provisions pertaining to refund in case of inverted duty structure under the GST law are ultra vires and need to be read down to the extent it denies refund of ITC on input services. Contrary to this, the Madras HC had held that the relevant provisions are intra vires and does not need to be read down.

The SC has now affirmed the judgment of the Madras HC and allowed the appeals filed by the Revenue against the judgment of the Gujarat HC. Thus, it seems that the intention of the Government is to not allow the benefit of refund of accumulated ITC on services. However, observing certain anomalies pointed out by the assesseees, the SC has directed the GST Council to reconsider the formula and take a policy decision regarding the same.

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