

Recent Rulings by Courts and Authorities

Supreme Court Rulings

Supreme Court ends extension of limitation period granted in wake of COVID-19

The Supreme Court¹ ended the extension of the limitation period granted on account of COVID-19. The Court has directed that the period from March 15, 2020, to October 2, 2021, will be excluded for computing the period of limitation for instituting proceedings. Further, in cases where limitation period would have expired during the period March 15, 2020, and October 2, 2021, the actual balance period of limitation remaining as on October 3, 2021, or 90 days from October 3, 2021, whichever is higher, will be available.

Refund of ITC² of GST³ paid on input services disallowed in case of inverted duty structure

The Supreme Court in the case of *VKC Footsteps India Pvt. Ltd.*⁴ dealt with the issue of availability of refund of ITC of input services for the purpose of inverted duty structure⁵. Rule 89(5) of CGST Rules⁶ was amended to restrict the refund of unutilised input tax of 'inputs' only. The High Court of Gujarat held that Explanation (a) to Rule 89(5) of CGST Rules was *ultra vires* the provisions of Section 54(3) of the CGST Act⁷, being the substantive provision for refunds under GST. In the appeal filed against the order of the High Court, the Supreme Court heard the arguments of both the parties and observed the following:

- The provisos to Section 54(3) of CGST Act are restrictive in nature and cannot be read to provide conditions of eligibility.
- There is a clear distinction between clause (i) and clause (ii) of the first proviso: (a) in the case of exports, the contingency is zero-rated supplies without any distinction between inputs or input services; (b) in contrast for domestic supplies, clause (ii) relates to the accumulation of credit on account of rate of tax on inputs being higher than the rate of tax on outward supplies.

¹ Miscellaneous Application No. 665 of 2021

² Input Tax Credit

³ Goods and Services Tax

⁴ Union of India & Ors. vs. VKC Footsteps India Pvt. Ltd., 2021 (9) TMI 626 – Supreme Court

⁵ Section 54(3)(ii) of the CGST Act

⁶ Central Goods and Services Tax Rules, 2017

⁷ Central Goods and Services Tax Act, 2017

- The argument on equivalent treatment for goods and services was answered by the Supreme Court by stating that the Court cannot redraw the boundaries of the legislation on the basis of an ideal, which the law intended to pursue, and the provision must be interpreted by giving effect to its plain terms. Further, under the Constitution and the CGST Act, goods and services and inputs and input services are not treated as one and the same and they are distinct species.
- The purpose of the formula in Rule 89(5) of CGST Rules is to give effect to Section 54(3)(ii) of the CGST Act which provides for 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.

The Supreme Court held that Rule 89(5) of CGST Rules is not *ultra vires* the provisions of Section 54(3) of CGST Act, thereby, clarifying that refund of ITC accumulated on account of input services is not available in case of inverted duty structure.

To the arguments of the anomalies in the formula for calculating the refund amount under Rule 89(5), the Supreme Court has urged the GST Council to reconsider the formula to prescribe proportion and/or order of utilisation of input service credit and take policy decision regarding the same.

JSA Comments: It appears that the Supreme Court has put to rest the controversy and diverse views adopted by the Gujarat High Court in the case of VKC Footsteps⁸ and Madras High Court in the case of Tvl. Transtonnelstroy Afcons Joint Venture⁹, thereby concluding that benefit of refund under inverted duty structure is available only for inputs and not for input services.

The Gauhati High Court in a recent ruling in the case of *BMG Informatics Pvt. Ltd.*¹⁰, decided a few days prior to the Supreme Court's decision in the case of VKC Footsteps (*Supra*), held that the benefit of refund under inverted duty structure would be available for the same inward and outward supplies, attracting different rates (on account of concessional rates). As per the facts of the case, the supplies under discussion pertained to inward and outward supply of services. The Gauhati High Court has interpreted the provisions of Section 54(3) of the CGST Act in a broad manner and has not distinguished between inputs and input services for being eligible for refunds under inverted duty structure. Therefore, the Supreme Court ruling in the case of VKC Footsteps (*Supra*) is likely to have a bearing on the ruling of the Gauhati High Court in allowing refund of input services.

High Court Rulings

Amendment of bill of entry permitted even after clearance of goods

In the case of *Sinochem India Company Pvt. Ltd.*¹¹, the petitioner applied for amendment of GSTIN¹² and address in the bill of entry. However, the same was rejected on the grounds that GSTIN cannot be amended after 'out of charge' order is issued by the customs authorities. The Bombay High Court noted that the spirit and intent of Section 149 of the Customs Act, 1962 is to facilitate rectification of error in cases where the importer can establish with the help of contemporaneous import documents that the error was inadvertent and

⁸ VKC Footsteps India Pvt. Ltd. vs. Union of India and 2 others, TS- 585-HC-2020(Guj)-NT

⁹ Tvl. Transtonnelstroy Afcons Joint venture and others vs. Union of India and 2 others, TS-800-HC-2020(Mad)-NT

¹⁰ BMG Informatics Pvt. Ltd vs. Union of India & Ors., 2021 (9) TMI 472 – Gauhati High Court

¹¹ Sinochem India Company Pvt. Ltd. Vs. Union of India & Ors. and Hindustan Unilever Ltd. vs. Union of India & Ors., TS-409-HC-2021(BOM)-CUST

¹² Goods and Services Tax Identification Number

bona fide. Relying on precedents issued by other High Courts, the Bombay High Court held that amendment to the bill of entry is clearly permissible even in a situation where the goods are cleared for home consumption.

JSA Comment: This ruling reaffirms that the customs authorities cannot deny amendment of GSTIN or any other fields in the bill of entry if the assessee can establish the *bona fide* behind the error requiring rectification, even if the goods have been cleared for home consumption. This is yet another ruling which brings relief to assessee(s) having accumulated ITC under incorrect GSTIN(s) on account of inadvertent errors at the time of filing the bills of entry.

Notifications

Central Goods and Services Tax (Eighth Amendment) Rules, 2021

Notification Nos. 35 & 36/2021-Central Tax dated September 24, 2021

The following amendments have been made to the CGST Rules:

- Various rules amended for the purpose of aadhar authentication and linking bank accounts having permanent account number of the concerned taxpayer.
- Time limit for filing Form GST ITC-04¹³ amended - half yearly for taxpayers with aggregate turnover exceeding INR 5 crores, and annual for taxpayers with aggregate turnover upto INR 5 crores.
- Form GSTR-1 for a registered person will be restricted, if FORM GSTR-3B for the preceding month has not been furnished (instead of two months prescribed earlier).
- Rule 89 amended to include filing of refund claims in Form GST RFD-01 for the purpose of Section 77 of CGST Act i.e., refund of tax paid on inter-state/ intra-state supply, subsequently, held to be intra-state/ inter-state supply.

Electronic Duty Credit Ledger Regulations, 2021

Notification No. 75/2021-Customs (N.T.) dated September 23, 2021

CBIC¹⁴ has notified the Electronic Duty Credit Ledger Regulations, 2021 with effect from September 23, 2021. A shipping bill or a bill of export presented on or after January 1, 2021 and having a claim of duty credit under RoDTEP¹⁵ or RoSCTL¹⁶ scheme will be processed in customs automated system. The exporter will have the option to combine the duty credits under a particular scheme, allowed to him in one or more shipping bill/ bill of export, and to carry forward the said duty credits to create an e-scrip for that scheme in the ledger, valid for a period of one year.

¹³ Details of challans in respect of goods dispatched to a job worker or received from a job worker to be filed in GST ITC-04

¹⁴ Central Board of Indirect Taxes and Customs

¹⁵ Remission of Duties and Taxes on Exported Products

¹⁶ Rebate of State and Central Taxes and Levies

Manner of issuance of duty credit for goods exported under RoDTEP and RoSCTL

Notification No. 76 & 77/2021-Customs (N.T.) dated September 23, 2021

The notification prescribes the manner of issuance of duty credit under the RoDTEP and RoSCTL scheme, with specified conditions and restrictions, in the Foreign Trade Policy. The key features of the schemes are:

- Duty credit under RoDTEP will be issued in lieu of remission of any duty or tax or levy, chargeable on any material used in the manufacture or processing of goods or for carrying out any operation on such goods in India that are exported, where such duty or tax or levy is not exempted, remitted, or credited under any other Scheme. Whereas duty credit under RoSCTL will be issued against exports of garments and made-ups, with respective rates and caps.
- The value of goods for calculation of duty credit to be the declared export FOB¹⁷ value of the said goods or up to 1.5 times the market price of the said goods, whichever is less.

Extension of applicability of Foreign Trade Policy 2015-20

Notification No. 33/2015-20 read with Public Notice no. 25/2015-20 dated September 28, 2021

The applicability of the Foreign Trade Policy, 2015-20 and Handbook of Procedures, 2015-20 has been extended from September 30, 2021, to March 31, 2022.

Extension in EO¹⁸ period of specified advance authorization and EPCG¹⁹

Notification No. 28/2015-20 dated September 23, 2021

EO period extended till December 31, 2021, for advance authorization and EPCG where EO period expired between August 1, 2020, to July 31, 2021. However, such extension is subject to 5% additional EO on the date of expiry of original/ extended EO period. This is an alternate option to payment of composition fee of 0.5% per month of unfulfilled FOB value in case exports effected are more than 50% within initial EO period and at 1% per month where less than 50% exports have been effected within initial EO period.

Entitlement under SEIS²⁰ for service exports capped at INR 5 crores

Notification No. 29/2015-20 dated September 23, 2021

The notification notifies the services and rates for claim under SEIS for services rendered for FY²¹ 2019-20. Further, service providers for FY 2019-20 will be entitled to duty credit scrip with total entitlement capped at INR 5 crores. Services covered under Appendix 3E which were earlier entitled for SEIS benefits even in cases where service charges were earned in Indian Rupees (treated as receipt in deemed foreign exchange as per

¹⁷ Free on Board

¹⁸ Export Obligation

¹⁹ Export Promotion Capital Goods

²⁰ Service Exports from India Scheme

²¹ Financial Year

guidelines of Reserve Bank of India) are not eligible for the benefit for FY 2019-20. The Appendix prescribing the service categories and rates has also undergone changes.

JSA Comments: The capping of the value of entitlement comes as a surprise for the industry as, such capping was not envisaged in the SEIS scheme and therefore, we could expect it to be challenged by the industry.

Circulars

Pursuant to the 45th GST Council Meeting held in Lucknow on September 17, 2021, the CBIC has issued circulars clarifying issues pertaining to intermediary services, conditions regarding export of services and other miscellaneous issues discussed in the meeting.

Clarification on scope and primary requirements for intermediary services

Circular No. 159/15/2021- GST dated September 20, 2021

The circular provides clarifications in relation to the scope of intermediary and the primary requirements for a service to qualify as intermediary services. The basic pre-requisites to qualify as an intermediary, laid down in the circular are:

- Minimum of three parties should be involved;
- Two distinct supplies – main supply between the principals for supply of goods/ services and ancillary supply which is facilitating or arranging the main supply;
- Intermediary service provider to have the character of an agent, broker, or any other similar person;
- Does not include a person who supplies such goods or services or both or securities on his own account;
- Sub-contracting for a service is not an intermediary service.

Clarification in respect of certain GST related issues

Circular No. 160/16/2021- GST dated September 20, 2021

- For computing the time limit prescribed for availing ITC [as per Section 16(4) of CGST Act], the date of issuance of debit note (not the date of underlying invoice) will be considered for determining the relevant financial year (effective January 1, 2021). This clarification is brought in subsequent to delinking of the debit note and the invoice for the purpose of availing ITC.
- There is no requirement for the transporter to carry physical copy of tax invoice in cases where e-invoice has been generated by the supplier, as the proper officer can verify the quick response code embedded in the invoice reference number.
- In case of export of goods from India, Section 54(3) of CGST Act restricts refund of unutilised ITC in cases where such goods are subject to export duty. It is now clarified that this restriction is applicable only for those goods where export duty is actually paid i.e., excludes goods subject to nil export duty or exempted from export duty.

Clarification on the condition 'mere establishment of distinct person' for export of services

Circular No. 161/17/2021- GST dated September 20, 2021

The circular clarifies a key issue faced by the exporters while claiming refund(s) for export of services, provided to group companies located outside India. The GST authorities were rejecting claims of refund on the grounds that subsidiaries/ related companies incorporated in India of overseas entities qualified as 'mere establishment of distinct person' [by invoking condition (v) of Section 2(6) of the IGST Act²²]. The circular has clarified this issue and expressly stated that a subsidiary/ sister concern/ group concern, etc. (incorporated in India) providing services to its foreign group company will not be barred by condition (v) of Section 2(6) of IGST Act, thereby qualifying the service(s) as export. The said condition will only restrict a branch or an agency or representational office of a foreign company.

Clarification in respect to refund of tax wrongly paid as per Section 77 of CGST Act

Circular No. 162/18/2021- GST dated September 20, 2021

Section 77 of CGST Act and Section 19 of IGST Act permits refund of tax erroneously paid on inter-state supplies, "subsequently held" to be intra-state supply and *vice-versa*. In this regard, it is clarified that the term "subsequently held" in the said provision covers the following situations:

- where the correct treatment of the transaction to be inter-state/ intra-state supply is suo moto identified by taxpayer; and
- where the inter-state/ intra-state supply made by a taxpayer is subsequently found/ held as intra-state/ inter-state by the tax officer in any proceeding.

Accordingly, refund claim under the said provisions can be claimed by the taxpayer in the abovementioned situations, provided that the taxpayer pays the required amount of tax under the correct category of tax.

Key decisions of 45th GST Council meeting on September 17, 2021

- Levy of compensation cess to be extended till April 2026.
- Deferment of inclusion of specified petroleum products under the ambit of GST.
- GST rate changes for correcting inverted duty structure in footwear and textiles sector, to be evaluated and implemented with effect from January 1, 2022.
- GoMs²³ to be set up to examine the issue of inverted duty structure, rationalize the rates and review exemptions from the point of view of revenue augmentation and to discuss ways and means of using technology.
- Proposal to reduce the rate of interest from 24% to 18% on ineligible ITC availed and utilized (effective from July 1, 2017).

²² Integrated Goods and Services Tax Act, 2017

²³ Group of Ministers

- To remove the anomaly of dual levy of IGST²⁴ on import of goods under lease, it is proposed that IGST on the import value will be exempt, where GST is paid on the lease amount.
- E-commerce operators to be made liable to pay GST (effective from January 1, 2022) on services of:
 - a) transportation of passengers by any type of motor vehicle;
 - b) restaurant services provided through them.
- It has also been decided that services by cloud kitchens/ central kitchens will attract GST at 5% (without input tax credit) from a date to be notified.
- External batteries sold along with UPS systems/ inverter attract GST rate applicable to batteries (28% for batteries other than lithium-ion battery) while UPS/inverter would attract 18%.
- The services by way of grant of mineral exploration and mining rights to attract GST at the rate of 18% w.e.f. July 1, 2017.
- GST on specified renewable energy projects can be paid in terms of the 70:30 ratio for goods and services, respectively, during the period from July 1, 2017, to December 31, 2018, in the same manner as has been prescribed for the period on or after January 1, 2019.

For more details, please contact km@jsalaw.com



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²⁴ Integrated Goods and Services Tax