The Malad Chamber of Tax Consultants

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42 Years MCTC Bulletin

"Every Passing Minute is Another Chance to Turn it Around"

E-mail: maladchamber@gmail.com Website : www.mctc.in

Regd. Office : B/6, Star Manor Apartment, 1st Floor, Anand Road Extn., Malad (W), Mumbai 400 064. **Mobile : 7039006655**
Admn. Office : C/o. Brijesh Cholerra : Shop No. 4, 2nd Floor, The Mall, Station Road, Malad (W), Mumbai-400 064

Vol. 1, No. 3 *For members & private circulation only* September, 2021

President's Communiqué

Dear Members

Festival season has begun and the income tax return due dates extension has given some time this year to enjoy the festivals with our loved ones. This will make us fresh and we will be full of energy to cater with our work once the site is streamlined most expectedly by the third week of September.

The 2nd study circle meeting held on 21st August on the subject of tax provisions of Restructuring of Partnership Firms was well attended and was a successful event.

In its endeavor to spread knowledge and in line with this year's theme of spreading awareness of allied laws, the chamber has tied up with AIFTP- West Zone, GSTPAM, Maharashtra Tax Practitioners Association, Confederation of GST Professionals and Industries, The Southern Gujarat Commercial Tax Bar Association – Surat, Central Gujarat Chamber of the Tax Consultants – Baroda and The Sales Tax Tribunal Bar Association – Mumbai in organizing a Lecture Series of Allied and General Law. Two sessions of the series are done so far – First on New Consumer Protection Act and the Second on Arrest and Prosecution in GST and Interplay with CRPC. The two lectures were well attended. A total of 11 lectures will be held in the series.

The chamber also formed three study groups this month – one each of Direct Taxes, Indirect taxes and Capital Markets. These study groups will provide an opportunity to the participating members in discussing various developments in the subject proper and interactive sessions will help the group members have clarity on the subject proper and will help them interact with the experts on the subject proper. Other details of the study groups are published elsewhere in this bulletin. I request you to kindly take advantage of this opportunity.

I also request you to kindly participate in the 'Gift a Membership' drive of the chamber and help spread the benefits of the chamber to as many tax professionals as possible.

"Education is the most powerful weapon which you can use to change the world" – Nelson Mandela

Last but not the least, please create awareness about eye donation – no one should miss the chance to see how beautiful the world is.

Wishing you a very happy Navratri, Dussehra and Eid.

Enjoy festivities, but with proper precautions of corona – the devil is still looming around.

Regards

CA Jignesh Savla
President, MCTC

Do you know? **Eye donation does not interfere with or delay final rites, as the corneal excision procedure takes less than 20 minutes**

Request: Members please send your Mobile No & Email ID to update list of life members.
Please send message on 7039006655 or email to maladchamber@gmail.com

For Queries & Submission of Forms for Membership/Seminar please contact any of the following Office Bearers:

Name	Designation	Contact Nos.	E-mail
Jignesh Savla	*President*	9820260070	cajigneshsavla@gmail.com
Ujwal Thakrar	*Vice President*	9819946379	ujwalthakrar@gmail.com
Khyati Vasani	*Hon. Treasurer*	9833288584	khyativasani@yahoo.com
Jitendra Fulia	*Hon. Secretary*	9820997205	jitendrafulia@rediffmail.com
Rajen Vora	*Hon. Secretary*	9819807824	vora.rajen@rediffmail.com

Life Membership Fees ₹ 2,500

The Malad Chamber of Tax Consultants

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Admin Office: C/o. Brijesh Cholera : Shop No. 4, 2nd Floor, The Mall, Station Road, Malad (W), Mumbai-400 064

MEMBERSHIP FORM

Date:..... /..... /.....

To,

The Hon. Joint Secretaries,
The Malad Chamber of Tax Consultants, Mumbai.

Dear Sirs,

Being eligible to practice under the Direct and/or Indirect Taxes Laws, I hereby apply for admission as a member of *The Malad Chamber of Tax Consultants with the following particulars:*

1. NAME OF MEMBER MR /MRS /MISS: .....
2. FATHER'S/HUSBAND'S NAME: .....
3. QUALIFICATIONS: .....
4. MEMBERSHIP NO., if any (with name of the association): .....
5. PERSONAL DATA:

   DATE OF BIRTH: ..... / ..... / ..... BLOOD GROUP: .....

   SPOUSE'S NAME: ..... SPOUSE'S DATE OF BIRTH ..... / ..... / .....

   MARRIAGE ANNIVERSARY: ..... / ..... / .....

   PROFESSION: ADVOCATE CA ITP ICWAI ICSI GSTP/STP
6. OFFICE NAME: .....

   OFFICE ADDRESS: .....

   PIN CODE: ..... STATE: ..... TEL. NO: ..... FAX NO: .....

   MOBILE NO: ..... EMAIL ID: .....
7. RESIDENTIAL ADDRESS: .....

   PIN CODE: ..... STATE: .....

   TEL. NO: ..... FAX NO: .....MOBILE NO: .....
8. COMMUNICATION TO BE SENT TO: OFFICE RESIDENCE

   The amount of ₹ 2500/- by Cheque/Draft No. ..... dated ..... / ..... / .....

   drawn on .....

   .....
9. Bank Detail for Online Payment
   Beneficiary Name: The Malad Chamber of Tax Consultants.
   Bank Name: HDFC Bank Ltd. Marve Road, Malad West Branch,
   Account No. 00471000136285; IFS Code: HDFC0000047.

UNDERTAKING

I, do hereby declare that whatever stated herein above is true to the best of my knowledge and belief. I also undertake to abide by the Rules, Regulation and Constitution of the Association, as amended from time to time.

.....
(Signature)

The Malad Chamber of Tax Consultants

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FOR OFFICE USE ONLY FOR MEMBERSHIP APPLICATION

Issued Acknowledgement Slip No. ..... Dated ..... / ..... / .....

Accepted by the Managing Committee in the Meeting held on ...../ ...../ .....

Cheque No. ..... Dated ..... / ..... / ..... for ₹ 2,500/- Bank

NOTES

1. Please attach educational qualification certificate for eligibility to practice tax laws.
2. Please write / type in CAPITAL LETTERS.
3. Cheques should be drawn in favour of *"The Malad Chamber of Tax Consultants".*
4. Outstation remittance should be by Demand Draft payable at Mumbai only.
5. Please tick (✓) wherever applicable.
6. The form should be completed in all aspects.
7. The membership application is subject to acceptance by the Managing Council.

For Query and Submission of forms for Membership please contact any of the following office bearers.

Name	Designation	Contact No.	E-mail
CA JIGNESH SAVLA	President	9820260070	cajigneshsavla@gmail.com
CA UJWAL THAKRAR	Vice President	9819946379	ujwalthakrar@gmail.com
CA KHYATI VASANI	Hon. Treasurer	9833288584	khyativasani@yahoo.com
SHRI JITENDRA FULIA	Hon. Secretary	9820997205	jitendradfulia@rediffmail.com
SHRI RAJEN VORA	Hon. Secretary	9819807824	vora.rajen@gmail.com

Please send the completed application form to the following address:

The Malad Chamber of Tax Consultants

C/o. Brijesh Cholera & Co.

Chartered Accountants Shop No. 4,
2nd Floor, The Mall,
Station Road, Malad (West), Mumbai 400097

Gift a membership

THE MALAD CHAMBER OF TAX CONSULTANTS

presents a wonderful opportunity to

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Benefits of MCTC Membership:

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- Access to knowledgeable and insightful Study Circle meetings on Direct Tax, Indirect Tax and Allied Laws
- Access to joint workshops on various topics held with WIRC, GSTPAM, CTC, and other associations.
- Access to RRC, IRRC, Sports tournaments and other social and cultural events.
- Access to monthly Bulletins having insights about various case laws and regular events of MCTC.
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Gift is the perfect way to mark a special event, milestone or achievement.

CA Kishor Thakrar | CA Pratik Satyuga
Convenors
Membership & Public Relation Committee

CA Jignesh Savla
President

Contact us: maladchamber@gmail.com

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DIRECT TAXES - Law Update

Haresh P. Kenia

1. Guidelines under section 9B and sub-section (4) of section 45 of the Income Tax Act, 1961

The CBDT, with the approval of the Central Government, issues guidelines within the power given under section 9B(4) , vide Circular no 14 dated 02.07.2021 , for the purposes of removing the difficulty with regard to giving effect to the provisions of Section 9B and Section 45(4) of the Act.

The section 9B being, newly inserted provision ,under Finance Act 2021 provides for deemed transfer in connection with the dissolution or reconstitution of specified entity whenever a specified person receives any capital asset or stock in trade or both from a specified entity.

- It provides for year of taxability of such capital asset or stock in trade in the hands of Specified Persons.
- It also provides for Any profits and gains arising from such deemed transfer is deemed to be the income of such specified entity of the previous year in which such capital asset or stock in trade or both were received by the specified person.
- Further it provides for chargeability of profits or gains under the head "Profits and gains of business or profession" or under the head "Capital gains", from such deemed transfer as deemed income of such specified entity in the previous year in which such capital asset or stock in trade or both were received by the specified person .
- It has also been provided that the fair market value of the capital asset or stock in trade or both, on the date of its receipt by the specified person, shall be deemed to be the full value of the consideration received or accruing as a result of such deemed transfer.
- The definitions of terms "'reconstitution of the specified entity", "specified entity" and "specified person" are provided in section 9B of the Act.

The Substituted section 45(4) of the Act provides for chargeability under the head "Capital gains" in the hands of specified entity where a specified person receives any money or capital asset or both from a specified entity, during the previous year, in connection with the reconstitution of such specified entity, then any profits or gains arising from receipt of such receipt by the specified person shall be chargeable to income-tax as income of the specified entity under the head "Capital gains" .

- It has been further deemed that this income shall be the income of the specified entity of the previous year in which such money or capital asset or both were received by the specified person.
- A formula to calculate such profits and gains has also been provided in this sub-section. ……
- The terms "self-generated goodwill" and "self-generated asset" have been defined in this sub-section

It has been further clarified that when a capital asset is received by a specified person from a specified entity in connection with the reconstitution of such specified entity, the provisions of sub-section (4) of section 45 of the Act shall operate in addition to the provisions of section 9B of the Act and the taxation under the said provisions thereof shall be worked out independently. Both, the new section 9B and substituted sub-section (4) of section 45 are applicable for the assessment year 2021-22 and subsequent assessment years.

In accordance with the power given under section 9B (4) of the act, CBDT with the approval of the Central Government, hereby issues the guidelines.

The following guidelines have been laid down for removing difficulty :

- It is noticed that the amount taxed under section 45(4) of the Act is required to be attributed to the remaining capital assets of the specified entity, so that when such capital assets get transferred in the future, the amount attributed to such capital assets gets reduced from the full value of the consideration and to that extent the specified entity does not pay tax again on the same amount. It is further noticed that this attribution is given in the Act only for the purposes of section 48 of the Act which specifies mode of computation. It may be seen that section 48 of the Act only applies to capital assets which are not forming block of assets. For capital assets forming block of assets there is section 43(6)(c) of the Act to determine written down value of the block of asset and section 50 of the Act to determine the capital gains arising on transfer of such assets. However, the Act has not yet provided that amount taxed under sub-section (4)

of section 45 of the Act can also be attributed to capital assets forming part of block of assets and which are covered by these two provisions.

- To remove difficulty, it is clarified that rule 8AB of the Income Tax Rules, 1962 also applies to capital asses forming part of block of assets. Wherever the terms capital asset is appearing in the rule 8AB of the Rules, it refers to capital asset whose capital gains is computed under section 48 of the Act as well as capital asset forming part of block of assets. Further, wherever reference is made for the purposes of section 48 of the Act, such reference may be deemed to include reference for the purposes of sub-clause (c) of clause (6) of section 43 of the Act and section 50 of the Act.
- For the removal of doubt it is further clarified that in case the capital asset remaining with the specified entity is forming part of a block of asset, the amount attributed to such capital asset under rule 8AB of the Rules will be reduced from the full value of the consideration received or accruing as a result of subsequent transfer of such asset by the specified entity, and the net value of such consideration shall be considered for reduction from the written down value of such block under sub-clause (c) of clause (6) of section 43 of the Act or for calculation of capital gains, as the case may be, under section 50 of the Act.

The guidelines also contained detailed examples for understanding the matter. Readers may refer to the above circular for more details.

2. CBDT Extension of Time Lines for Electronic Filing of Various Forms-Section 119 of The Income-Tax Act, 1961

A. The Central Board of Direct Taxes (CBDT), in exercise of its powers under section 119 of the Act, **vide Circular no 15 dated 03.08.2021,** extends the due dates for electronic filing of the Forms, on consideration of difficulties reported by the taxpayers and other stakeholders in electronic filing of certain Forms under the provisions of the Income-tax Act.

- The Quarterly statement in Form No. 15CC to be furnished by authorized dealer in respect of remittances made for the quarter ending on 30th June, 2021, required to be furnished on or before 15th July, 2021 under Rule 37BB of the Rules, as extended to 31st July, 2021 vide Circular No. 12 of 2021 dated 25-6-2021, may be filed on or before 31st August, 2021;
- The Equalization Levy Statement in Form No. 1 for the Financial Year 2020-21, which was required to be filed on or before 30th June, 2021, as extended to 31st July, 2021 vide Circular No. 12 of 2021 dated 25-6-2021, may be filed on or before 31st August, 2021;
- The Statement of Income paid or credited by an investment fund to its unitholder in Form No. 64D for the Previous Year 2020-21, required to be furnished on or before 15th June, 2021 under rule 12CB of the Rules, as extended to 15th July,2021 vide Circular No. 12 of 2021 dated 25-6-2021, may be furnished on or before 15th September, 2021;
- The Statement of Income paid or credited by an investment fund to its unitholder in Form No. 64C for the Previous Year 2020-21, required to be furnished on or before 30th June, 2021 under rule 12CB of the Rules, as extended to 31st July, 2021 vide Circular No. 12 of 2021 dated 25-6-2021, may be furnished on or before 30th September, 2021.

B. Further, in view of non-availability of the utility for e-filing of certain Forms, the CBDT, extends the due dates for electronic filing of such Forms as under:

- Intimation to be made by a Pension Fund in respect of each investment made by it in India in Form No. 10BBB for the quarter ending on 30th June, 2021 required to be furnished on or before 31st July, 2021 under rule 2DB of the Rules, may be furnished on or before 30th September, 2021;
- Intimation to be made by Sovereign Wealth Fund in respect of investments made by it in India in Form II SWF for the quarter ending on 30th June, 2021, required to be furnished on or before 31st July, 2021 as per Circular No. 15 of 2020 dated 22-7-2020, may be furnished on or before 30th September, 2021.

C. It is also clarified that the above said forms, e-filed, after the expiry of time limits provided as per Circular No. 12 of 2021 dated 25-6-2021 or as per the relevant provisions, till date, will stand regularized accordingly.

3. Faceless Penalty Scheme, 2021

The CBDT vide letter F.NO. AA (NAFAC)-1/2021-22/439, dated 9-8-2021 gives SOP for Penalties under FACELESS PENALTY SCHEME, 2021.

- Faceless Penalty Scheme, 2021 has been notified vide CBDT Notification No. 2/2021 (S.0.117(E)) dated 12th January, 2021 on the strength of Section 274(2A) of the Income-tax Act. The Scheme mandates setting up of National Faceless Penalty Centre/Regional Faceless Penalty Centres (NFPC/RFPC) to conduct Faceless Penalty Proceedings and impose penalty in cases falling into its scope in a centralized manner similar to those of Faceless Assessment. National Faceless Assessment Centre (NaFAC)/Regional Faceless Assessment Centre (ReFAC) are to act as NFPC/RFPC respectively as per para 4(4) of the Scheme read with CBDT's order dated 20-1-2021. Therefore, National Faceless Penalty Centre (NFPC) may be read as National Faceless Assessment Centre (NaFAC); Faceless Penalty Unit or Penalty Unit may be read as Assessment Unit (AU) and Faceless Penalty Officer (FPO) may be read as Faceless Assessing Officer (FAO), wherever referred in this document.
- Further Notification No. 3/2021(S.O.118(E) dated 12th January,2021) notified on the strength of section 274(2B) of the Income-tax Act, 1961 issues directions for the purposes of giving effect to the Faceless Penalty Scheme, 2021.
- CBDT's order under para 3 of the Faceless Penalty Scheme, 2021 issued in F. No. 187/4/2021-1TA-I dated 20-1-2021 and dated 26-2-2021 defines the scope of FPS. Penalties leviable by officers above the rank of Addl. CIT or by designated Authorities are not within the scope of FPS. Further Penalties pertaining to Central Charge/International Taxation/TDS are also outside the scope of FAS.

The broad features of SOP for completing penalties covered under the scope of FPS-2021 is as under.

- Reference to NFPC
- Cleaning of Stack
- Immunity and Waiver of Penalties
- Penalties without base documents
- Access to records and data available on e-filing/Insight
- Show Cause Notice(SCN)
- Reference to Verification Unit (VU)
- Reference to Technical Unit (TU)
- Draft Penalty Order
- Review Unit (RU)
- Handling of non-responsive cases

Readers may refer to above CBDT Letter for further details.

4. Prescribed person for the purposes of Section 140 (c) and (cd) – Insertion of Rules 12AA and 51B

The Central Board of Direct Taxes, in exercise of the powers conferred by Section 140 (c) and (cd) and Section 288 (2) (viii) read with section 295 of the Income-tax Act, vide notification G.S.R. 578(E) [NO. 93/2021/F.NO. 370142/34/2021-TPL(PART III)], dated 18-8-2021, gives Income Tax (Twenty -Fourth Amendment) Rules, 2021 It Inserts Rule 12AA and 51B of income tax Rules.

Newly inserted Rule 12AA prescribes as under

"12AA. ***Prescribed person for the purposes of clause (c) and clause (cd) of section 140.***—For the purpose of clause (c) or clause (cd), as the case may be, of section 140, any other person shall be the person, appointed by the Adjudicating Authority for discharging the duties and functions of an interim resolution professional, a resolution professional, or a liquidator, as the case may be, under the Insolvency and Bankruptcy Code, 2016 (31 of 2016) and the rules and regulations made thereunder.

Explanation.—For the purposes of this rule, "Adjudicating Authority" shall have the same meaning as assigned to it in clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016).".

Newly inserted Rule 51B prescribes as under

"51B. ***Appearance by Authorised Representative in certain cases.***—For the purposes of clause (viii) of sub-section (2) of section 288, any other person, in respect of a company or a limited liability partnership, as the case may be, shall be the person appointed by the Adjudicating Authority for discharging the duties and functions of an interim resolution professional, a resolution professional, or a liquidator, as the case may be, under the Insolvency and Bankruptcy Code, 2016 (31 of 2016) and the rules and regulations made thereunder.

Explanation.—For the purposes of this rule "Adjudicating Authority" shall have the same meaning as assigned to it in clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016).".

■■■

DIRECT TAX CASE LAWS

Compiled by CA Rupal Shah
(Partner at RHDB & Co LLP)

ACIT vs. Gujarat State Co-op Marketing Federation Ltd
Citation: [2021] 129 taxmann.com 53, ITAT Ahmedabad, 31 May 2021
Admissibility of contribution to gratuity trust u/s 36(1)(5) before the date of approval from Commissioner

Facts:

The assessee is a registered cooperative society and engaged in distribution of agricultural inputs, outputs, oil seeds, food grains etc. The assessee had formed an irrevocable trust for its Employees and applied for its approval u/s 36(1)(5) in the year 1985. However, there was no communication from department in this matter. In the year 2014, assessee again approached the department and was asked to make a fresh application. After hearing the new application, the Commissioner granted approval w.e.f 1 April 2012.

During the relevant assessment year, the assessee had made a contribution of ₹ 1.67 crores to the Employee Gratuity Trust and claimed deduction u/s 36(1)(5). The claim of the assessee was disallowed during the course of assessment on the grounds that approval to the Trust was accorded after the date of contribution and hence the deduction cannot be claimed as the condition of Section 36(1)(5) stipulates contribution to approved Gratuity Fund and at the time of contribution, the Trust was not approved under the Income Tax Act.

On first appeal, the assessee also contended before the CIT(A) that all the conditions required for approval were satisfied while making the original application. Hence for the non-receipt of approval cannot be penalised for non-action by the Department.

Held:

Though the approval was not received by the Gratuity Trust, the trust was an irrevocable trust, the employee did not have any control over the funds as the same were invested with LIC and that the subsequent approval by CIT was granted without any objections, which meant that the Trust was in compliance of the required conditions from the time of first application.

In light of the above contentions and judicial rulings in place, the contribution to the Grauity Trust before the date of approval was also allowed by the Hon'ble Tribunal.

Decisions relied upon:

CIT vs. Textool Co. Ltd. [2013] 35 taxmann.com 639/216 Taxman 327 (SC)

Shree Sajjan Mills Ltd. v. CIT [1985] 156 ITR 585/23 Taxman 37 (SC)

Prakash Software Solution Ltd v. ITO [2018] 89 taxmann.com 130 (ITAT AHD)

Eko India Financial Services Limited vs. ACIT
Citation: WP(C) 5819/2021, Delhi HC, 3 August 2021
Adjustment u/s 245 for demand in excess of 20% where appeal is pending

Facts:

For AY 2017-18 the assessee had an outstanding demand of ₹ 9.68 crores. Against this order the assessee is in appeal before the CIT(A) and the matter is not yet decided by the CIT(A). The client has paid an amount of ₹ 10,00,000 and a sum of ₹ 3.79 crores were adjusted against the refund of AY 2019-20.

The assessee had obtained a stay order from PCIT for stay on recovery of balance demand in view of the Office Memorandum issued by CBDT dated 29 February 2016 along with Office Memorandum dated 25 August 2017.

Held:

The office memorandum dated 29 February 2016 read with office memorandum dated 25 August 2017 stipulate that the Assessing officer shall normally grant stay of demand till disposal of first appeal on payment of 20% of the disputed demand. If the assessing officer believes that the payment of lump sum amounts higher than 20% is warranted, then the Assessing Officer will have to give reasons to show cause that the case falls under Para 4(B) of the office memorandum dated 29 February 2016.

Thus, the court held that department could recover only 20% of the demand outstanding against AY 2017-18 in accordance with Office memorandum stated in the above paragraph.

Thus, the assessee's plea was allowed and the department was directed to refund the amount adjusted in excess of 20% of the disputed demand.

Decisions relied upon:

Amrit Singh Ahluwalia vs. State of Punjab & Ors 1975 (3) SCR 82

Ramana Dayaram Shetty vs. International Airport authority of India & Ors 1979 SCR (3) 1014

■■■

ANALYSIS OF SUPREME COURT DECISION IN THE CASE OF VKC FOOTSTEPS INDIA PVT. LTD. & OTHERS [(2021) 130 taxmann.com 193 (SC) (13.09.2021)]

Compiled by CA Bhavin Mehta

ANALYSIS OF SUPREME COURT DECISION IN THE CASE OF VKC FOOTSTEPS INDIA PVT. LTD. & OTHERS [(2021) 130 taxmann.com 193 (SC) (13.09.2021)]

Section 54(3) of the CGST Act allows for a refund of unutilized input tax credit in cases involving (i) zero rated supplies made without payment of tax; and (ii) credit accumulation "on account of rate of tax on inputs being higher than rate of tax on output supplies". In pursuance of the rule making power conferred by section 164 of the CGST Act, rule 89(5) provides formula for the refund of ITC, in case of refund on account of inverted duty structure. The formula prescribed in rule 89(5) is reproduced below:

"(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} – 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-rule (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)"

The division bench of Gujarat High Court in **VKC Footsteps India Pvt. Ltd. vs. Union of India 2020 (43) G.S.T.L. 336 (Guj.)** held that "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".

The division bench of Madras High Court in **Tvl. Transtonnelstroy Afcons Joint Venture v. Union of India 2020 (43) G.S.T.L. 433 (Mad.)** declined to follow the Gujarat High Court view and held "Section 54(3)(ii) does not infringe Article 14. Refund is a statutory right and the extension of the benefit of refund only to the unutilized credit that accumulates on account of rate of tax on input goods being higher than the rate of tax on output supplies by excluding unutilized input tax credit that accumulated on account of input services is a valid classification and a valid exercise of legislative power."

The divergence views of the Gujarat High Court and Madras High Court is before the Supreme Court in the batch of appeals. The decision of Supreme Court is authored by Hon'ble Justice Dr. Dhananjaya Chandrachud disapproving the Gujarat High Court decision which allowed the refund of GST paid on input services in case of inverted duty structure. The decision runs into 140 pages.

The revenue was represented by Additional Solicitor General N. Venkataraman and assessees were represented by their respective advocates, namely, Senior Advocate V. Sridharan, Advocate Sujit Ghosh, Senior Advocate Arvind Datar, Advocate G. Natarajan, Advocate Shraff, Advocate Uchit Sheth and Advocate Dr. Arvind Poddar. The submission made by both revenue side and assessee side is exhaustive and educative. I am tempted to reproduce each of the arguments advanced by both the sides, however, due to constraint of space some of the relevant the arguments advanced by ASG and Advocates are reproduced below.

Arguments made by Revenue (ASG N. Venkataraman)

1. The provisos to Section 54(3) should be construed as restrictions for the following reasons:

   (a) The expression employed in the main clause of Section 54(3) is 'claim' whereas the provisos restrict this ambit by the use of the expression 'allowed'. The expression 'allowed' appears in all the three provisos;

(b) The main clause of Section 54(3) uses the expression "any unutilised ITC". On the other hand, the expression 'any' is conspicuous by its absence in all the provisos;

(c) The main clause of Section 54(3) uses the expression "a registered person may claim refund" while on the other hand, the three provisos have employed a restrictive expression or a negative expression, that is, "no refund of unutilized ITC shall be allowed";

(d) When the main clause used the expression 'any', this is expressly restricted by the use of the expression "no refund of unutilised ITC shall be allowed in cases other than". In other words, the expression 'any' has been restricted to "other than"; and

(e) In view of the above, the provisos under Section 54(3) have to be read and interpreted as restrictions and not as qualifications;

2. The first proviso restricts the refund of unutilized ITC only to two situations and the subsequent two provisos further restrict it to one of the categories out of the two in the first proviso. The two situations contemplated in the first proviso deal with contrasting situations with stark differences:

(a) Sub clause (i) of the first proviso deals with zero rated supplies which are exports. Exports of goods and services are not taxable. Hence, the taxes paid either on exported goods or services or on the input goods/input services or both used in the export of such goods and services need to be totally refunded;

(b) However, sub-clause (ii) of the first proviso deals with domestic supplies which are taxable outward supplies, in respect of which Parliament has chosen to allow refund of unutilised ITC only to the extent of the 'credit accumulated on account of rate of tax on inputs';

3. The first proviso cannot be read as a mere qualification or eligibility for the grant of refund on the entire unutilised ITC comprising input goods and input services by a specified registered person, for the following reasons:

(a) The expression used is 'the credit' and the accumulation is restricted only on account of 'inputs'. This cannot be read or interpreted to include input services and capital goods;

(b) The proviso limits the grant of refund only to two circumstances and hence the limitation has to be read as it is without extending it to input services and capital goods, specifically since the legislature has not included them;

(c) If the intention was to allow refund of unutilised ITC on account of input services and capital goods, in addition to input goods, such an intent would have been conveyed through statutory language, which is missing;

(d) The expression 'credit' has to be read along with 'inputs' and cannot be read as to extend a refund to input services and capital goods also, which are expressly not referred to in the proviso;

(e) 'The credit' in sub clause (ii) can go only with the expression 'inputs' and excludes accumulation of any credit on account of rate of tax on input services or capital goods;

(f) When there is an express inclusion limited only to the credit accumulation arising out of 'inputs', it would not be permissible to include input services and capital goods in the face of the statutory provision. What has not been included in the statute should not be included by way of judicial interpretation;

4. The reason why Parliament has adopted the expression 'unutilised ITC' in the main part of Section 54(3) and the first proviso, but has chosen to employ only the expression 'inputs' is as follows:

(a) There is a significant difference between the main provision and the first proviso even in the use of the expression 'unutilized ITC'. The expression 'any' in the main Section is absent in the first proviso with the further limitation that refund of 'unutilized ITC' is limited only to two circumstances specified in the proviso;

(b) The first situation deals with refund on account of zero-rated supplies which are exports where refund is granted on all the taxes paid on input goods, input services including taxes paid on export supplies. This is evident from Explanation-I to Section 54(3) where the expression refund permits the above;

(c) However, when it comes to an inverted duty tax structure, the refund is limited to only one category namely, 'credit accumulated on account of rate of tax on inputs';

(d) The expression 'unutilized ITC' could comprise of taxes paid both on input goods and input services, and the first proviso and the main Section necessarily have to employ the expression 'unutilized ITC' to take care of zero-rated supplies which are exports under the first category;

(e) When it comes to an inverted tax structure, it is limited only to 'inputs'. It is a common fact that unutilized credit arising out of input services also partakes the character of unutilized ITC;

(f) Parliament has rightly used the expression 'unutilised ITC' both in the main clause and in the first proviso to deal with zero rated supplies and restricted refund to those arising out of 'inputs' when it comes to an inverted structure;

(g) Parliament could not have used the expression 'inputs' in the main clause and first proviso as this would act as a disability to zero rated supplies where Parliament intended to grant a refund arising out of both input goods and input services;

(h) Parliament has therefore appropriately employed the expression 'unutilized ITC' in the main clause and the first proviso and has used the limited expression 'inputs' in sub-clause (ii) to the first proviso in the inverted structure;

5. Explanation-I to Section 54(3) defines refund in three parts:

(a) When it comes to zero rated supplies on exports, it extends the refund to 'inputs', 'input services' and also taxes paid on zero rated supplies of goods or services or both;

(b) When it comes to deemed exports, it restricts the refund of tax only on the supply of goods;

(c) When it comes to inverted structure, it limits it as provided in the proviso to Section 54(3). This is one more reason to read the proviso to Section 54(3), as a restriction and not as a qualification. If the intent of Parliament was to grant a refund arising both out of input goods and input services even in the case of inverted tax structure, it would have defined refund in Explanation-I at par with zero rated supplies and there was no need to limit it only to one situation of the credit accumulation arising on account of 'inputs'.

6. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. There being no challenge either to the levy or collection of taxes in these cases, taxes paid into the coffers of the Union Government or the States become the property of the Union/States;

7. The refund of taxes is neither a fundamental right nor a constitutional right. The Constitution only guarantees that the levy should be legal and that the collection should be in accordance with law. There is no constitutional right to refund. Refund is always a matter of a statutory prescription and can be regulated by the statute subject to conditions and limitations;

8. Even in the case of an illegal levy or a levy which is unconstitutional, the decision of the nine judges Bench in Mafatlal Industries Limited v. Union of India held that the right of refund is not automatic. The burden of proof lies on the claimant to establish that it would not cause unjust enrichment;

9. Refund of taxes is one form of granting exemption; Once a refund is construed as a form of exemption from taxes, the provision has to attract strict interpretation; Exemptions, concessions and exceptions have to be treated at par and must be strictly construed;

10. ITC is not a matter of right and the burden of proof is on the assessee to establish a claim for a concession or benefit;

11. The manner in which a proviso can be construed has been elucidated in the precedents of this Court. A proviso may not be only an exception but may constitute a restriction on the operation of the main statutory provision; and

12. A legislative amendment which reflects a policy choice is not subject to judicial review.

Arguments advanced by Assessee Advocates

I. (Senior Counsel V. Sridharan)

1. Section 54(3) has been enacted to achieve the objective of removing the cascading effect of unutilized ITC. Section 54(3) provides for refund of "any unutilised input tax credit" but the refund is available in only two situations namely, (a) zero rated supplies; and (b) inverted duty structure. The quantum of refund is provided by the main part of Section 54(3) which stipulates the refund of ***any unutilised*** ITC. This includes credit availed on input goods as well as on input services having regard to the definitions contained in Sections 2(62) and 2(63);

2. The proviso only provides for cases in which the refund under the main provisions of Section 54(3) will be available. Once the requirement of inverted duty structure in proviso (ii) is fulfilled, the entire unutilised ITC has to be refunded. The reason why proviso (ii) defines the inverted duty structure with reference to only input (goods) vis-a-vis output supplies may be that while services (barring a few) were leviable to tax at 18 per cent, goods were subject to various categories of rates. If input services were also considered for determining inverted duty structure, refund may be required to be granted practically to all the assessees. Hence, the legislature defined inverted duty structure only with reference to 'inputs' (input goods). However, once a case fulfils the condition of an inverted duty structure, refund of the entire unutilised ITC which is attributable to inverted duty structure supplies is allowed, including the credit availed on input goods and input services;

3. A circular has been issued on 31 December 2018, being Circular No. 79/53/2018-GST by the Central Board of Indirect Taxes and Customs. In a situation where GST on some inputs is higher than the rate of GST applicable on the output supply, while the rate of GST on other inputs is lower than the GST on the output supply, the circular provides that refund will be granted by taking the ITC availed on all inputs, including input services, which attract a lower rate of tax than on output supply. The "CBIC" circular, in other words, does not treat Section 54(3) read with the proviso (ii) as qualifying the extent of refund but only as a pre-condition to qualify for the grant of refund;

4. Proviso (ii) to Section 54(3) only lays down 'cases' where refund is eligible but it does not define the quantum of refund. This will be evident from the following:

   (a) The quantum of refund is provided in the main segment to Section 54(3). The expression "any" unutilised ITC means all unutilised ITC;

   (b) The definitions of 'input tax credit' under Section 2(63) and 'input tax' in Section 2(62) would indicate that both input goods and input services are included;

   (c) The proviso indicates the 'cases' in which refund will be eligible. The expression 'cases' means situations or circumstances;

   (d) Clause (ii) of the first proviso commences with the expression "where" which signifies that what follows will be a situation or aspect of something;

   (e) The statutory provision must be read as a whole and in the context of other provisions. All the three provisos refer to cases in which refund is allowed or, as the case may be, not allowed and do not refer to the quantum of refund;

   (f) Clause (ii) of the proviso refers to "the credit". The use of the definitive article clearly indicates that the reference is to unutilised ITC already mentioned in the main part of Section 54(3). The expression 'the' signifies one particular sum or credit and any attempt to bifurcate it into credit on input goods and input services will produce anomalous results;

   (g) The expression 'accumulated' signifies the credit balance which is unutilized after credit has been availed and utilised for making payments on output tax on outward supplies;

   (h) Clause (ii) of the proviso uses the words "on account of" which means by reason of or because of. By stipulating that the proviso provides for the quantum of refunds, the Revenue is attempting to substitute the words "on account of" with "to the extent of";

   (i) The submission of the Revenue cannot be accepted because clause (ii) of the proviso refers to the rate of tax. To accept the interpretation of the Revenue, the words "and only to the extent" will have to be added to the proviso;

   (j) Though the CGST Act makes a distinction between 'inputs' and 'input services', this is only relevant at the stage prior to the availment of credit, namely to determine the eligibility of credits under Sections 16 and 17 of the CGST Act. After the credit has been availed, it goes in a common pool from which the credit is utilised for making payment for output tax. Utilization happens from the entire credit available for the tax period in this common pool and it cannot be co-related to ITC availed on particular input goods or input services. The balance is the unutilised ITC at the end of the tax period. At this stage, it is not possible to determine whether the balance pertains to ITC availed on input goods or on input services; and

   (k) Alternatively, the words, "rate of tax on inputs" must be read to include whatever goes in the making of output supplies namely, both input goods and input services.

5. Explanation (1) to Section 54 covers four cases of refund:

   (a) refund of tax paid on zero-rated supplies of goods or services;

   (b) refund of tax paid on input goods or input services used in making zero rated supplies (where no output tax is paid);

   (c) refund of tax on the supply of goods regarded as deemed exports;

   (d) refund of unutilised ITC under sub-Section (3).

   In the case of (a) above, the legislature has used the expression "goods or services"; in the case of (b), "inputs or input services"; in the case of (c), "goods or services". However, in respect of refund of unutilised ITC, it has only been provided that the refund will be granted as provided under sub-section (3). The explanation does not restrict the refund only to credit availed on input goods in the case of an inverted rated structure;

6. Section 54(3) provides for entitlement to refund, its quantum and the cases in which the refund is to be granted. Section 54(3) being a code in itself, there is no reference to a provision enabling the Government to frame rules in this regard. Hence, with reference to Section 54(3), any exercise of the rule making power is unwarranted; The general rule making power conferred by Section 164(1) is to carry out the provisions of the CGST Act and cannot save the offending provisions of the Explanation to Rule 89(5).

7. Where the entire supplies made by assessee are by way of export, the entire ITC is refundable under proviso (i). However, where an assessee is engaged in exporting goods and in domestic supplies, the assessee should be eligible for claiming refund from ITC attributable to exports while not being entitled to cash refund on ITC relatable to domestic supplies. In such cases where an assessee makes both domestic supplies as well as exports, a formula may be required to estimate the ITC relatable to exports which alone can be refunded to the assessee in a similar

manner if an assessee has output supplies. Where an assessee has output supplies having an inverted duty structure and output supplies not having an inverted duty structure, refund is to be given only for the former and not for the latter. The formula would be required for that purpose. Rule 89(4) relating to export adopts pro-rata of export turnover to total turnover as the basis. Rule 89(5) is similarly enacted to deal with an assessee having inverted duty structure supplies and other supplies not having an inverted duty structure. This should be the sole purpose of the formula for Rule 89(5).

8. However, Rule 89(5) in the garb of fixing a formula for determining prorata the amount of credit relatable to the inverted duty structure vis-àvis total turnover has restricted the refund to ITC on input goods by denying it on input services. This has been done by defining 'Net ITC' to mean ITC availed on all 'inputs', thus overlooking ITC relatable to input services. Such a rule cannot be treated as one for carrying out the purpose of the CGST Act;

9. A delegated legislation can be struck down as ultra vires of a principal statute. The laying of delegated legislation before Parliament does not confer any validity on such ultra vires rules. The process of laying rules before Parliament and making them subject to modification or annulment cannot be equated with legislation which has the assent of the President, or the Governor, as the case may be. The doctrine of ultra vires will apply even if a resolution is passed by Parliament approving or modifying the rules. Though, the CGST Rules have been laid before Parliament, any part which is ultra vires the CGST Act is liable to be struck down;

10. The fact that the rules have been recommended by the Goods and Services Tax Council does not elevate them to the status of a statute enacted by the legislature. The recommendations made by the GST Council under Article 279A (4) of the Constitution take effect only after they have been incorporated in the legislation passed by the Parliament or the State legislature. The CGST Act and SGST Act have been enacted on the recommendations of the GST Council, in exercise of the power under Article 279A, while the CGST Rules have been framed on the recommendations of the GST Council in exercise of the powers conferred by Section 2(87) and Section 164 of the CGST Act. There is a clear distinction between laws enacted by the legislature and delegated legislation. A rule made on the recommendation of the GST Council must be in consonance with the relevant legislation, failing which it would be ultra vires;

11. Section 54(3) grants a refund of the entire unutilised ITC in the case of an inverted duty structure irrespective of whether the credit pertains to input "GST Council" goods or input services. The amendment made in Rule 89(5) which restricts the refund of unutilised ITC availed only on 'inputs' is ultra vires Section 54(3).

II. Advocate Sujit Ghosh

1. In Explanation-I to Section 54, the expression 'refund' qua zero rated supplies

   (a) is an inclusive definition which refers to unutilized ITC qua Section 54 (3);

   (b) covers a refund on both input goods and input services for the purpose of Section 54(3);

   (c) in relation to zero rated supplies, the expression refund in Explanation-I to Section 54 is clarificatory though it uses the words "inputs" and "input services";

   (d) The right to refund in the case of zero-rated supplies arises in Section 16(3)(a);

   (e) The provision uses the phrase "refund of unutilised ITC in accordance with Section 54"; and

   (f) The meaning of the term 'refund' for both export and domestic supplies is one and the same.

2. A contextual interpretation of Section 54(3) must look at the overall scheme of the statute. The substantive part of Section 54(3) deals with the quantum of credit which is amplified by three attributes:

   (a) it connotes a finite sum and thus a quantum, since a time period is prescribed for identifying such quantum by the use of the phrase "at the end of any period";

   (b) Section 54(3) needs to be read contextually with sub-Sections (4), (5) and (6) of Section 49 and Rule 86(3) and Rule 89(3); and

   (c) Both the GST Council and the Union Government also understood that the quantum of refund was the entire unutilised ITC and not only ITC accumulated on account of input goods. This is evident from Notification No. 5/2017 dated 28 June 2017. If the exception contemplated in clause (ii) of the first proviso to Section 54(3) contemplates denial of the entire basket of unutilised ITC (as argued by the State) a fortiori the first part of clause (ii) should be presumed to include refund of the entire basket of unutilised credit. This is because unless the first part of clause (ii) did not entitle refund of the entire basket of ITC, carving out an exception for denial of the entire basket of ITC in the latter part would be absurd.

3. The expression 'claim' means a demand made of right, calling upon another to pay something which is due. Accordingly, a claim in the context of Section 54(3) is a demand for enforcement of a right of refund which becomes due. The entitlement to the right is not through the process of allowance of the claim but instead, the enforcement of the right is through the process of allowance. The entitlement to the right of the entire basket of credit accrues from the substantive provision and its enforcement happens through the proviso;

4. The expression 'allowed' should be interpreted to mean verification of the claim and its sanction. Allowed cannot mean the 'creation of an entitlement' or else the main provision of Section 54(3) would become redundant;

5. The phrase "wholly on account of" is conspicuous by its absence in proviso to Section 54(3);

6. The absence of the word 'any' in the proviso is not fatal. Despite the absence of 'any', the words "unutilised ITC" refer to credit on goods and services both;

7. The proviso to Section 54(3) merely prescribes the condition and does not deal with the quantum of refund since the quantum is prescribed by the substantive provision. The proviso is not an exception to the substantive part since it makes a reference to the substantive condition to be satisfied. Both must be construed harmoniously. Thus, the main provision of Section 54(3) confers an entitlement to the refund of the entire unutilised ITC and the proviso only seeks to provide the condition and not to obliterate the main provision. The better view is that the entitlement is created of the quantum of refund by the main provision while the proviso only indicates the conditions to be satisfied;

8. The convergence of credit takes place at the stage of availing and not at the stage of utilization;

9. The CGST Act contemplates that conditions and restrictions are two distinct concepts;

10. If the proviso was meant to deal with the quantum of refund, Parliament would have separately carved out a substantive provision for zero rated supplies and a separate provision for domestic supplies. Since that has not been done, both cases derive their entitlement to refund of unutilised ITC through the substantive provision;

11. Section 54(3) is not akin to an exemption but is aimed at achieving tax neutrality;

12. Reliance on the decision of the nine judge Bench in ***Mafatlal Industries Limited v. Union of India (supra)*** is out of context since what is being claimed as a refund is not contrary to the statutory drill, but a refund through an appropriate construction of the statute;

13. The main submissions, in summation, are that:

    (a) The expression 'input' in the proviso if read contextually, and not by the strict statutory definition, would cover both input goods and input services;

    (b) Grammatically 'input' covers labour and material and is opposite to 'output';

    (c) Use of the word "output supplies" as opposed to the defined expression "outward supplies" (Section 2(83)) emphasises the legislative intent to use common parlance words;

    (d) The substantive part of Section 54(3) should be construed to provide for the quantum of refund of the entire basket of credit and the proviso should be construed merely as a threshold condition that an "inverted duty structure" should exist qua goods;

    (e) If the above propositions are not acceptable, there would be an invidious discrimination between input goods and input services violating Articles 14 and 19; and

    (f) The only way to save the provision in such a case is by (i) reading down the word "input" in the proviso to include both goods and services or (ii) interpreting the proviso as laying down conditions and the quantum of refund being prescribed by the main part of Section 54(3); or (iii) striking down/severing the offending portion;

14. All registered persons demanding refund on account of inverted duty structure for input goods and input services form a part of the same class and seek equality of privileges in terms of Article 14:

III. Senior Advocate Arvind Datar

1. An interpretation of Section 54(3) first proviso (ii) which leads to disallowance of credit on input services is impermissible as, firstly, Articles 269A and 279A introduced by the One Hundred and First Constitutional Amendment seek to harmonise goods and services and remove the cascading effect of taxes. Secondly, the Statement of objects and reasons associated with the constitutional amendment and the Bill introducing the CGST Act emphasised the need to treat goods and services as one combined category. The concept of one nation one tax introduced by GST laws cannot be ignored only at the time of refund;

2. The proviso to Section 54(3) speaks only of categories of cases where refund would be available. It does not speak of a restriction on the quantum of refund. This is for the following reasons:

    (a) The quantum is determined by the main sub-section (3), which speaks of "refund of any unutilised input tax credit";

    (b) The first proviso employs the word "cases" ["no refund of unutilised input tax credit shall be allowed in cases other than"] thus making it clear that it only lists categories of cases, and does not deal with quantum of credit;

    (c) The first proviso does not mention "credit to the extent of" or "credit of an amount equal to" or any other such wording indicative of quantum;

(d) Where the legislature intended to advert to the quantum, it has used the words "amount claimed as refund" in the 4th proviso – such is not the phrase employed in the first proviso;

(e) The second and third provisos too refer only to 'cases' – it is thus clear that first, second and third provisos are intended to deal with cases and are in nature of conditions, while it is only the fourth proviso which adverts to the quantum and there again not to restrict the quantum but only to refer to the amount claimed as refund under the main subsection (3); and

(f) It has been the Union Government's case that every word has been carefully chosen in Section 54(3) first proviso (ii). It follows that where the provision speaks the language of categories (i.e. 'cases') and not the language of quantum (i.e. 'amount'), it cannot be read as any restriction of quantum.

3. The word 'inputs' in the first proviso (ii) of Section 54(3) refers to the aggregate of goods and services that are used in output supplies. In the context of the first proviso (ii), the word 'inputs' has not been used to refer only to input goods. The word employed in the proviso is "input(s)" whereas definition of 'input' under Section 2(59) refers to goods alone;

4. The accumulation (of ITC) is because the total GST on all the inputs (goods or services or both) is more than the GST payable on the output supplies. The reference is to all the inputs used to produce the output supplies;

5. There is no distinction between ITC on goods or services either at the time of availing or taking of the credit or at the time of utilization of credit. Therefore, it could not have been the intention of the Parliament to differentiate between the two only at the time of refund in the case of an inverted duty structure envisaged under clause (ii) to the first proviso to section 54;

6. Without prejudice to the above submissions and assuming that the words "inputs" means only input goods and not input services, it is stated that even proceeding on the basis that the use of the words "on account of" suggests the requirement of a causal relationship between the higher rate of input goods and the accumulation of credit, once such a relationship is present, then the entire accumulation is available as refund, rather than just the portion relatable to input goods. To elaborate:

(a) Parliament did not state "the credit has accumulated solely/only/entirely on account of rate of tax on inputs being higher than the rate of tax on output supplies.";

(b) Thus, all that is required is that there is accumulation and that the tax on input goods is higher than the output supplies. If these two criteria are met, it follows logically that at least some portion of the accumulation would be on account of the higher rate of input services; and

(c) Thereupon, the entire accumulation would be available as refund in line with the main sub-section (3); and

IV. Advocate G. Natarajan

1. In the formula which is prescribed under Rule 89(5), while reducing the "tax payable on such inverted rated supply of goods or services" the tax payer should be allowed to first utilise the ITC accumulated on account of input services, which is otherwise not eligible for refund;

2. If the formula prescribed under Rule 89(5) is not read down in this manner, it will lead to gross inequality between taxpayers having only inverted rated supplies and taxpayers who also have other supplies; and

3. The formula in Rule 89(5) should hence be read down by stipulating that while calculating the refund entitlement as the difference between Net ITC and tax payable on such supplies having inverted rated structure, the tax payable after utilising the ITC availed on input services attributable to inverted rate supplies for payment of the tax should be reckoned.

4. Rule 89(5) suffers from the vice of treating unequals equally. This happens because a discrimination results between assessees who have only inverted rated supplies and those who have other supplies;

5. At the end of every tax period, it is possible to note how much ITC has arisen from input goods or input services. However, once a credit in the electronic ledger is utilised, it is not possible to bifurcate what remains between input goods and input services;

6. The formula, as it stands, presumes that the outward tax liability is paid out of the ITC accumulated only on account of input goods. Thus, what is granted by the statute in Section 16 is indirectly taken away by the formula prescribed in the rule. Thus, an order of utilization of credit should be provided for payment of taxes to avail of credit on input services. In other words, in the formula in Rule 89(5) the following words should be read in at the end: "after utilising the input tax credit on input services pertaining to such inverted rate supply of goods and services.

V. Advocate Uchit Sheth

1. Once tax credit is claimed and credited into the electronic credit ledger, it forms a consolidated pool of credit, making it impossible to segregate into credit for input goods and credit for input services. Hence, it is not

possible to ascertain the source of unutilized ITC. The proviso to Section 54(3) only lays down a condition precedent for claiming ITC and once the condition is fulfilled, then refund is admissible on the entire amount of unutilized input ITC.

2. The amended formula in Rule 89(5) stipulates maximum refund permissible by deducting output tax from the Net ITC qua inputs goods. In other words, it is presumed that output tax is first adjusted against ITC pertaining to input goods and thereafter qua input services. There is no basis for such hierarchy in utilization of tax credit and the anomaly arises because of an incorrect interpretation of Section 54(3) of the Act by the rule making authority.

3. Section 49(6) of the Act provides that the balance in the electronic cash ledger or electronic credit ledger after payment of tax, interest, penalty, fee or any other amount payable is to be refunded in accordance with Section 54. The legal obligation is to refund the balance in the ledger if the conditions specified in Section 54 are fulfilled. There is no legal basis for the artificial dissection of such a balance.

VI. Advocate Dr. Arvind Podar

1. Rule 89(5) while providing a procedure for computing refund under Section 54(3) imposes an artificial restriction which has not been prescribed in the main statute and is patently arbitrary and illegal. Section 49 allows credit utilization irrespective of whether it is out of input goods or input services. On the other hand, Rule 89(5) artificially restricts the credit by initiating the formula under which duty can be paid out of credit on input goods and input services only and hence the credit of input services will keep on accumulating. Rule 89(5) must allow the taxpayers to utilise and make payment through input services first and then the balance through credit on inputs;

Observation by Supreme Court

1. The opening words of the substantive part of Section 54(3) contemplate a claim of refund of "any unutilized input tax credit". Undoubtedly, any unutilized ITC would include credit on account of tax charged on any supply of goods or services or both. The opening sentence of Section 54(3) provides for (i) a claim of refund by a registered person; (ii) of any unutilized input tax credit; (iii) at the end of any tax period. The impact of the first proviso, as its opening words indicate, is that:

   (i) "No refund" of unutilized ITC "shall be allowed" "in cases other than" (i) and (ii);

   (ii) The expression "claim" in the substantive part must be distinguished from the phrase "shall be allowed" in the opening sentence of the first proviso. Likewise, the expression "may claim refund" in the opening part must be distinguished from "no refund" in the opening part of the first proviso;

   (iii) The impact of the first proviso is that a refund of unutilized ITC shall be allowed only in cases falling under (i) and (ii). The expression 'only' in the previous sentence is not a judicial addition to statutory language but follows plainly from the expressions "no refund" of unutilized ITC shall be allowed "in cases other than";

   (iv) The expression "in cases other than" is a clear indicator that clauses (i) and (ii) are restrictive and not conditions of eligibility. A refund, in other words, can be allowed in the two contingencies spelt out in clauses (i) and (ii) of the first proviso;

   (v) 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 input goods 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 output supplies;

   (vi) The legislative draftsperson has made a clear distinction between clause (i) and clause (ii) of the first proviso and it was in this context that the opening words of Section 54(3) have used the expression "may claim refund of any unutilized ITC";

   (vii) Explanation 1 to Section 54, while defining the expression "refund" for the purposes of the section adopts an inclusive definition covering (a) refund of tax paid on zero rated supplies of goods or services or both; (b) refund of tax paid on input goods or inputs services used in making such zero rated supplies; (c) refund of tax on supply of goods regarded as deemed exports; and (d) refund of unutilized ITC as provided under sub-section (3) of Section 54; and

   (viii) Explanation 1 indicates that with reference to exports, the legislature has brought within its fold ITC on input goods and input services. In contrast, in the case of domestic supplies it has contemplated refund of unutilized ITC "as provided under sub-section (3)". The Explanation is a clear indicator that in respect of domestic supplies, it is only unutilized credit which has accumulated on the rate of tax on input goods being higher than the rate of output supplies of which a refund can be allowed. Clause (ii) of the first proviso in other words is a restriction and not a mere condition of eligibility.

2. The issue before this Court, however, is whether an a priori equivalence between goods and services for the purpose of bringing both within a composite tax regime must result in the conclusion that a refund of unutilized

ITC must be made available to both - input goods as well as input services, disregarding the provision which has been inserted by the legislature in the present case in the form of Section 54(3). The answer to this is clear. The Court while interpreting the provisions of Section 54(3) must give effect to its plain terms. The Court cannot redraw legislative boundaries on the basis of an ideal which the law was intended to pursue.

3. Sub-Section (3) of Section 54 begins, in its main part, with the stipulation that a registered person may claim refund of any 'unutilised ITC at the end of any tax period'. Whether we construe the first proviso as an exception or in the nature of a fresh enactment, the clear intent of Parliament was to confine the grant of refund to the two categories spelt out in clauses (i) and (ii) of the first proviso. That clauses (i) and (ii) are the only two situations in which a refund can be granted is evident from the opening words of the first proviso which stipulates that "no refund of unutilised input tax credit shall be allowed in cases other than". What follows is clauses (i) and (ii). The intent of Parliament is evident by the use of a double – negative format by employing the expression "no refund" as well as the expression "in cases other than". In other words, a refund is contemplated in the situations provided in clauses (i) and (ii) and no other. To put it differently, the first proviso can be recast, without altering its meaning to read that a refund of unutilised ITC shall be allowed only in the cases governed by clauses (i) and (ii). Clause (i) deals with zero rated supplies without payment of tax. Explanation-1 to Section 54 clarifies that the expression 'refund' includes refund of tax paid on zero rated supplies on goods or services or both, or on inputs or input services used in making such zero-rated supplies. On the other hand, in the case of deemed exports, Explanation-1 refers to a refund of tax on the supply of goods. Likewise in regard to domestic supplies, governed by clause (ii) of the first proviso, the expression 'refund' means refund of unutilised ITC as provided under sub-Section (3). With the clear language which has been adopted by Parliament while enacting the provisions of Section 54(3), the acceptance of the submission which has been urged on behalf of the assessee would involve a judicial re-writing of the provision which is impermissible in law. Clause (ii) of the proviso, when it refers to "on account of" clearly intends the meaning which can ordinarily be said to imply 'because of or due to'. When proviso (ii) refers to "rate of tax", it indicates a clear intent that a refund would be allowed where and only if the inverted duty structure has arisen due to the rate of tax on input being higher than the rate of tax on output supplies. Reading the expression 'input' to cover input goods and input services would lead to recognising an entitlement to refund, beyond what was contemplated by Parliament. The proviso to Section 54(3) is not a condition of eligibility (as the assessees' Counsel submitted) but a restriction which must govern the grant of refund under Section 54(3). We therefore, accept the submission which has been urged by Mr N Venkataraman, learned ASG.

4. Parliament while enacting the provisions of Section 54(3), legislated within the fold of the GST regime to prescribe a refund. While doing so, it has confined the grant of refund in terms of the first proviso to Section 54(3) to the two categories which are governed by clauses (i) and (ii). A claim to refund is governed by statute. There is no constitutional entitlement to seek a refund. Parliament has in clause (i) of the first proviso allowed a refund of the unutilized ITC in the case of zero-rated supplies made without payment of tax. Under clause (ii) of the first proviso, Parliament has envisaged a refund of unutilized ITC, where the credit has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies. When there is neither a constitutional guarantee nor a statutory entitlement to refund, the submission that goods and services must necessarily be treated at par on a matter of a refund of unutilized ITC cannot be accepted. Such an interpretation, if carried to its logical conclusion would involve unforeseen consequences, circumscribing the legislative discretion of Parliament to fashion the rate of tax, concessions and exemptions. If the judiciary were to do so, it would run the risk of encroaching upon legislative choices, and on policy decisions which are the prerogative of the executive. Many of the considerations which underlie these choices are based on complex balances drawn between political, economic and social needs and aspirations and are a result of careful analysis of the data and information regarding the levy of taxes and their collection. That is precisely the reason why courts are averse to entering the area of policy matters on fiscal issues. We are therefore unable to accept the challenge to the constitutional validity of Section 54(3).

5. The wide powers given under Section 164 of the CGST Act are only limited by the provisions of the Act itself, in furtherance of which a rule maybe framed. It is for this reason that the powers under Section 164 are not restricted to only those sections which grant specific authority to frame rules. The absence of the words "as may be prescribed" in Section 54(3) does not deprive the rule making authority to make rules for carrying out the provisions of the Act.

6. In the present case for the simple reason that Rule 89(5) in defining Net ITC to mean "input tax credit availed on inputs" does not transgress the statutory restriction which is contained in proviso (ii) of Section 54(3). The challenge to Rule 89(5) as a piece of delegated legislation on the ground that it is ultra vires Clause (ii) of the first proviso to Section 54(3) is therefore lacking in substance. As reasoned in the earlier part of this judgment, Clause (ii) of the first proviso is not merely a condition of eligibility for availing of a refund but a substantive restriction under which a refund of unutilized ITC can be availed of only when the accumulation is relatable to an inverted duty structure, namely the tax on input goods being higher than the rate of tax on output supplies. As reasoned in the earlier part of this judgment, Clause (ii) of the first proviso is not merely a condition of eligibility for availing of a refund but a substantive restriction under which a refund of unutilized ITC can be availed of only

when the accumulation is relatable to an inverted duty structure, namely the tax on input goods being higher than the rate of tax on output supplies. There is therefore no disharmony between Rule 89(5) on the one hand and Section 54(3) particularly Clause (ii) of its first proviso on the other hand.

7. The aberrations which have been pointed out by the Mr Sridharan and Mr G Natarajan certainly indicate that the formula is not perfect. The formula makes a presumption that the output tax payable on supplies has been entirely discharged from the ITC accumulated on account of input goods and there has been no utilisation of the ITC on input services. While a similar formula is provided in Rule 89(4) with regard to zero rated supplies, in that case, the 'Net ITC' includes input goods and input services and thus, there is no imbalance between the different components of the formula. The formula prescribed in Rule 89(5) however, seeks to deduct the total output tax from only one component of the ITC, namely ITC on input goods. This in our view is at odds with reality, where the ITC on both input goods and input services is accumulated in the electronic ledger and is then utilised for the payment of output tax. In making such an assumption, the formula tilts the balance in favour of the Revenue by reducing the refund granted. We are equally cognizant of the fact that the proposed solution, that is prescribing an order of utilisation of the ITC accumulated on input services and input goods, may tilt the balance entirely in favour of the assessee as that would make a contrary assumption that the output tax is discharged by the ITC accumulated on account of input services entirely. Another possible solution could be that the Rule itself provides for a statutory assumption or a deeming fiction of utilisation of a certain percentage of ITC on input services towards the payment of output tax for the purpose of calculation of refund.

8. The dictum in RK Garg v. Union of India (1981) 4 SCC 675 squarely applies to the present case in which the Government has exercised its powers of delegated legislation to frame a formula, which has certain inequities. However, these inequities are to be ironed out by the Government in the course of the application of the formula. 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. 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.

9. 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. **Conclusion**: The judgment of the Madras High Court in ***Tvl. Transtonnelstroy Afcons Joint Venture v. Union of India 2020 (43) G.S.T.L. 433 (Mad.)*** is affirmed and disapprove of the view of the Gujarat High Court decision in ***VKC Footsteps India Pvt. Ltd. vs. Union of India 2020 (43) G.S.T.L. 336 (Guj.).***

My Comments

1. The Hon'ble Apex Court has held that clause (ii) of first proviso to sub-section (3) of section 54 is restriction and not condition of eligibility. The whole judgment revolves around the conclusion arrived by the Court that clause (ii) of the first proviso to section 54(3) is restriction and not condition. It appears the Apex Court arrived to such conclusion on the basis that the first proviso to sub-section (3) provides for "no refund of unutilized input tax credit shall be allowed". It appears the Court is therefore of the view that the first proviso gets detached from the main provision contained in sub-section (3), and has to read independently. With due respect, if that the case, may be, there was no need for the main provision of sub-section (3), namely, "subject to the provision of sub-section (10), a registered person may claim refund of any unutilized input tax credit at the end of any tax period". The sub-section (3) could have started with wordings "No refund of unutilized input tax credit shall be allowed in cases other than …." The quantum of refund is provided in main segment of sub-section (3) of section 54, namely, "any unutilized ITC". The proviso to Section 54(3) merely prescribes the condition and does not deal with the quantum of refund since the quantum is prescribed by the substantive provision. The statutory provision must be read as a whole and in the context of other provisions. The conclusion arrived by the Hon'ble Court is not too appealing.

2. The taxpayer having inverted duty structure, will never be in position to claim refund of the accumulated ITC with respect to input services, which means that unadjusted accumulated input tax credit of input services shall be ineligible perpetually. As per the accounting norms if the probability of adjusting or obtaining a refund of such unutilised input tax credit is low, it would have to be shown as an expense in the profit and loss account. Thereby, the objective to avoid cascading effect of taxes will not be achieved as businesses will have no other option but to pass on the burden to the consumer. This will ultimately lead to dual taxation and burden of cascading effect of tax on the ultimate consumer, Thereby the denial of claim of refund of accumulated unadjusted input tax credit pertaining to input services results in trespassing the rights of the registered dealer to claim the input tax credit resulting in infringement of benefit provided in section 16 of the CGST Act, 2017.

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GST PE CHARCHA

Applicability of Limitation Period under Indirect Taxes

Compiled by Monarch Bhatt, Advocate

(Partner at FairLaw Consultancy)

As we all are aware that nationwide lockdown was announced in the month of March 2020 on account of COVID-19. Consequently, the due dates for various compliances related to GST and other taxes were extended. However, in some of the cases the situations were beyond someone's imagination and many of the assessee have missed several dates. The assessee has not only missed the compliance dates but also missed the due dates for filing of appeals before the commissioner or before the tribunal or before the High Courts; many of the cases due dates for filing of refund has also been missed and so on there are several different issues related to the limitation under various central and state acts.

The Hon'ble Supreme Court took the cognizance of the situation arising out of COVID-19 under the "Suo Moto Writ Petition (Civil) No. 3/ 2020" and exercised their powers under Article 142 read with Article 141 of the Constitution of India and declared that their order dated 23rd March, 2020 is binding order within the meaning of Article 141 on all Courts / Tribunals and authorities. The order specifically mentioned that this order is applicable to all the litigants and/ or lawyers across the country facing difficulties on account of COVID-19 in filing their petitions / applications / suits / appeals / all other proceedings within the period of limitation prescribed under the general law of limitation or under special laws (both of central and / or state). Further, the Hon'ble Supreme Court in their order dated 23rd March, 2020 ordered that *"a period of limitation in all such proceedings, irrespective of the limitation prescribed under general law or special laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this court in the present proceedings".* Thereafter in continuation of the same, since situations seemed to get improved in respect of the pandemic, Hon'ble Supreme Court on 08th March, 2021 ordered for exclusion of period from 15.03.2020 to 14.03.2021 while computing the limitation period. However, in continuation of this, Hon'ble Supreme Court on 27th April, 2021 re-considered this as there was steep rise in COVID-19 cases and therefore ordered for restoration of their order dated 23rd March, 2020 and in continuation of order dated 8th March, 2021 directed that *"the period of limitation as prescribed under general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended till further orders."*

In the backdrop of these some of the common queries, which has come up before us on regular basis has been shared along with our views and our way forward approach towards it.

Query: The assessee has received order under GST rejecting the refund claim filed by them on zero rated supply. Now, time period of three months for filing an appeal has been expired during 22.03.2020 to 30.07.2021. Since assessee is having strong case on merits want to file an appeal against this order. Is there any possibility where assessee can get a shelter over the limitation period of three months as provided under the GST provisions?

Reply: The assessee can file an appeal and period of limitation is not yet over in the present case of assessee as Hon'ble Supreme Court order is squarely applicable to GST provisions as well. Therefore, whatever is the issue involved in your case, be it refund or be it demand of taxes or denial of ITC under GST, in all the cases against any of the order, period of limitation shall be calculated considering the decision of Hon'ble Supreme Court in it's "Suo Moto Writ Petition (Civil) No. 3/ 2020" read with their order dated 27.04.2021. The same has also been accepted by the CBIC while issuing the circular No. 157/ 13/ 2021 – GST dated 20.07.2021 wherein, para. 5 it has been specifically mentioned that order of the Hon'ble Supreme Court is applicable in respect of any appeal which is required to be filed before Joint/ Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal and various courts against any quasi-judicial order or where proceeding for revision or rectification of any order is required to be undertaken. Therefore, limitation period does not apply for filing of any appeal before any of the authorities as per the GST provisions and assessee can still file the appeal as per the order of the Hon'ble Supreme Court.

Query: The assessee has received an order from the Commissioner (Appeals) rejecting their claim of CENVAT credit availed and utilised for providing taxable services. The order has been passed under Chapter V of Finance Act, 1994 (Service tax provisions) and appeal against such order is to be filed before the CESTAT, where time limit for filling of an appeal is three months. However, three months from the date of the receipt of order has been expired during 22.03.2020 to 31.08.2021. The assessee wants to know is there any extension of limitation period available for filing an appeal before the CESTAT?

Reply: The assessee can file an appeal before the CESTAT as ratio laid down by the Hon'ble Supreme Court is applicable even for filling of an appeal before the CESTAT against any order passed under the erstwhile indirect tax regime of Service tax, Excise or customs. Further, as per circular F. No. 01(05)/ circular/ CESTAT/ 2021 dated 26.07.2021 issued by the registrar of CESTAT, it has been directed that all benches of the tribunal while computing the period of limitation shall strictly adhere to the direction of the Hon'ble Supreme Court's order dated 27.04.2021. Further, it has also been instructed that there is no requirement of any miscellaneous application to be filed for condonation of delay. The applicant is only required to mention that they desire to take the benefit of the Supreme Court's order dated 27.04.2021 in verification clause and appeal form in date of receipt shall contain the reference of Supreme Court order dated 27.04.2021. Hence, even application for condonation of delay is not required to be submitted along with the appeal and appeal can be filed before the CESTAT.

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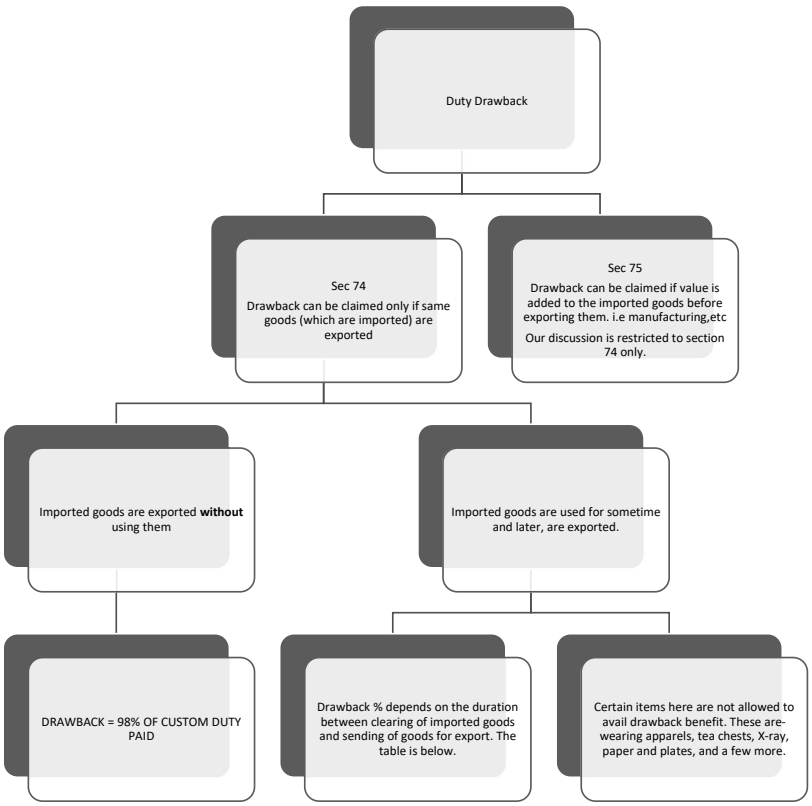
STUDENTS' CORNER

SECTION 74 – DUTY DRAWBACK

Compiled by Neel Randeria

Not just within India but across the world, a legal framework which requires in-depth consulting due to the sheer nature of complexities involved in it, is- International Trade Law. To govern it, India has an act in place called- CUSTOMS ACT, 1962. The basic idea of this act is to levy custom duty on import of goods. Generally, government encourages export of goods as it benefits the economy in various ways. In order to do this, it not only relieves exports from custom duty but also offers incentives. One of the most important incentive is Duty Drawback. Considering the vastness of Customs Act, this article will focus only on the term Duty Drawback, *that too pertaining to only section 74.*

In lucid language, duty drawback is a fundamental principle stating-duty paid on impo rted goods will be refunded back, if the imported goods are exported. But the precise meaning of it as per the act as well as its salient characteristics are mentioned in the diagram below.



S. No	Length of period between the date of clearance for home consumption and the date when the goods are placed under Customs control for export	Percentage of import duty to be paid as Drawback
1	Not more than three months	95%
2	More than three months but not more than six months	85%
3	More than six months but not more than nine months	75%
4	More than nine months but not more than twelve months	70%
5	More than twelve months but not more than fifteen months	65%
6	More than fifteen months but not more than eighteen months	60%
7	More than eighteen months	Nil
{Even if imported goods are merely tested though not used, it will be treated as “Used” after importation}		

Question 1: Pre-condition for drawback-

- The goods should be exported within 2 years from the date of payment of custom duty on imported goods.

Question 2: Documents required for filing application for drawback-

- The documents are-
  a. Triplicate copy of the Shipping Bill bearing examination report recorded by the proper officer of the customs at the time of export.
  b. Copy of the Bill of entry or any other prescribed documents against which goods were cleared for importation.
  c. Import invoice.
  d. Evidence of payment of duty paid at the time of importation of goods.
  e. Permission from the Reserve Bank of India for re-exports of goods, wherever necessary.
  f. Export invoice and packing list.
  g. Copy of the Bill of Lading or Airway bill.
  h. Any other documents as may be specified in the deficiency Memo

Question 3: Time Limit for filing application for drawback-

- Three months from the let export date. Further delay beyond three months from let export date can be condone with the late fees-
- Delay of three months i.e. six months from let export date can be condone by the Assistant Commissioner of Custom of drawback on payment of 1% of the FOB value of exports or one thousand rupees whichever is less.
- Delay of six months i.e. twelve months from let export date can be condone by Principal Commissioner of Customs or Commissioner of Customs, on payment of 2% of the FOB value or two thousand rupees whichever is less.

This a sincere effort where the concept of duty drawback is simplified at its maximum. It is my sincere hope that you may find this article resourceful.

Dear Members

In line with its objective of spreading knowledge and creating awareness, the chamber is pleased to announce the formation of 3 virtual study groups for its members. The three study groups will be of Direct Tax, Indirect Tax and Capital market respectively. Members of the study group will have the opportunity of discussing virtually various developments in their respective subject and will have the liberty to decide on the subject, group leader / speaker of each of their sessions. These interactive sessions will help the group members to have clarity on the subject proper, develop his/her personality, leadership and will help them to interact with the experts on the subject.

I hereby request the members to kindly grab this opportunity and enrol for the study groups of their interest. Members at their option can opt for either or all groups.

Convenors of the respective study groups are as follows :

Direct Tax Study Group	CA Khyati Vasani	9833288584
Indirect Tax Study Group	Shri Bhavin Mehta	9224208781
Capital Market Study Group	CA Pratik Satyuga	9819512962

Interested members may please contact the above convenors for details and clarifications, if any. They may also feel free to contact the chamber on 7039006655.

Charges for the membership of study groups are fixed at ₹ 500 per group per year for members of the chamber and ₹ 750 per year for others. The same may be transferred to the bank account of the chamber at:

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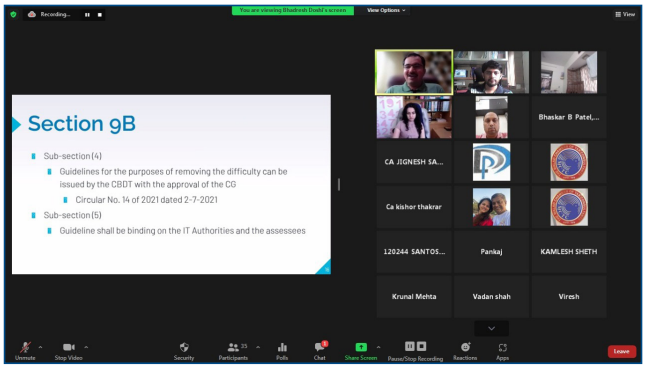
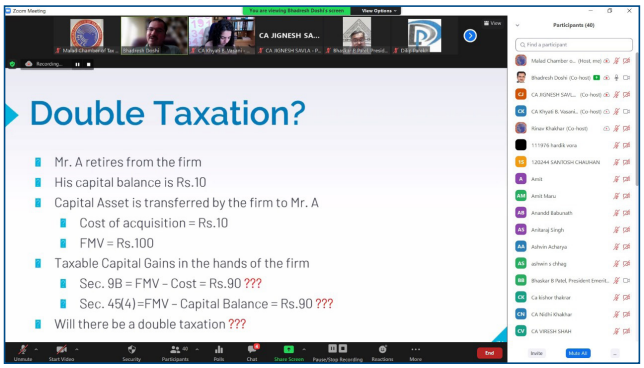
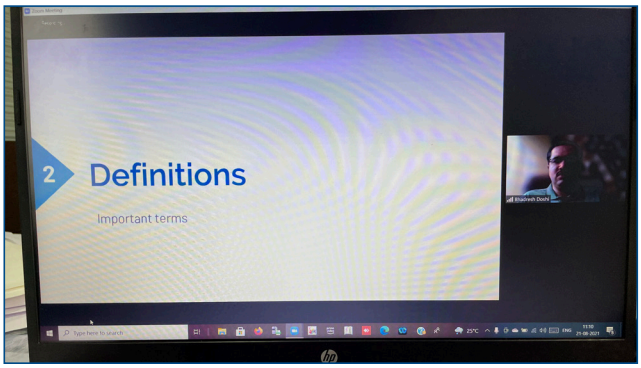
Regards

CA Jignesh Savla
President, MCTC

GLIMPSES OF 2ND STUDY CIRCLE







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