Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

Civil Appeal No 4810 of 2021

Union of India & Ors. **....Appellants**

Versus

VKC Footsteps India Pvt Ltd. **.... Respondents**

With

Civil Appeal No 4809 of 2021

With

Civil Appeal No 4811 of 2021

With

Civil Appeal No 4807 of 2021

With

Civil Appeal No 4767 of 2021

With

Civil Appeal No 4804 of 2021

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With

Civil Appeal No 4806 of 2021

With

Civil Appeal No 4802 of 2021

With

Civil Appeal No 4783 of 2021

With

Civil Appeal Nos 4775-4781 of 2021

With

Civil Appeal Nos 4769-4774 of 2021

With

Civil Appeal No 4805 of 2021

With

Civil Appeal No 4808 of 2021

With

Civil Appeal Nos 4764-4765 of 2021

And With

Writ Petition (C) 489 of 2021

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J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

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A Introduction

1 Parliament while enacting the Central Goods and Services Tax Act 2017,[1] has incorporated a provision for refund of tax in Section 54. Sub-Section (3) embodies a provision for refund of unutilised input tax credit[2] 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".

2 While envisaging a refund in the latter of the above two situations, Parliament was cognizant of the fact that ITC may accumulate due to a variety of reasons. However, Parliament envisaged a specific situation where the credit has accumulated due to an inverted duty structure, that is where the accumulation of ITC is because the rate of tax on inputs is higher than the rate of tax on output supplies. Taking legislative note of this situation, a provision for refund has been provided for in Section 54(3). The Central Goods and Service Tax Rules 2017[3] have been formulated in pursuance of the rule making power conferred by Section 164 of the CGST Act. Rule 89(5) provides a formula for the refund of ITC, in "a case of refund on account of inverted duty structure". The said formula uses the term "Net ITC". In defining the expression "Net ITC", Rule 89(5) speaks of "input tax credit availed on inputs".

[1] "**CGST Act**"
[2] "**ITC**"
[3] "**CGST Rules**"

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B Factual Backdrop

3 Writ petitions under Article 226 of the Constitution were instituted before the High Court of Gujarat and the High Court of Judicature at Madras. The petitioners before the High Court submitted *inter alia* that

(i) Section 54(3) allows for a refund of ITC where the accumulation is due to an inverted duty structure;

(ii) ITC includes the credit of input tax charged on the supply of goods as well as services;

(iii) Section 54(3) does not restrict the entitlement of refund *only* to unutilised ITC which is accumulated due to the rate of tax on inputs being higher than the rate of tax on output supplies. It also allows for refund of unutilised ITC when the rate of tax on input services is higher than the rate of tax on output supplies;

(iv) While Section 54(3) allows for a refund of ITC originating in inputs as well as input services, Rule 89(5) is *ultra vires* in so far as it excludes tax on input services from the purview of the formula; and

(v) In the event that Section 54(3) is interpreted as a restriction against a claim for refund of accumulated ITC by confining it only to tax on inputs, it would be unconstitutional as it would lead to discrimination between inputs and input services.

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4 By its judgment dated 24 July 2020 in **VKC Footsteps India Pvt. Ltd.** v. **Union of India**[4], the Division Bench of the Gujarat High Court, held that:

> "Explanation (a) to Rule 89(5) which denies the refund of "unutilised 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 High Court therefore directed the Union Government to allow the claim for refund made by the petitioners before it, considering unutilised ITC on input services as part of "Net ITC" for the purpose of calculating refund in terms of Rule 89(5), in furtherance of Section 54(3).

5 By its judgment dated 21 September 2020, in **Tvl. Transtonnelstroy Afcons Joint Venture** v. **Union of India**[5] and connected cases the Division Bench of the Madras High Court came to a contrary conclusion, after having noticed the view of the Gujarat High Court, which it has declined to follow. The Madras High Court has concluded that

> "63…
> (1) Section 54(3)(ii) does not infringe Article 14.
> (2) Refund is a statutory right and the extension of the benefit of refund only to the unutilised credit that accumulates on account of the rate of tax on input goods being higher than the rate of tax on output supplies by excluding unutilised input tax credit that accumulated on account of input services is a valid classification and a valid exercise of legislative power."

[4] R/ Special Civil Application No 2792 of 2019
[5] Writ Petition Nos 8596, 8597, 8602, 8603, 8605 and 8608 of 2019

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6 The writ petitions challenging the validity of Rule 89(5) on the ground that it is *ultra vires* Section 54(3)(ii) were dismissed. The divergence between the views of the Gujarat High Court on the one hand, and the Madras High Court on the other, forms the subject matter of this batch of appeals.

C Statutory Provisions

7 Section 54 of the CGST Act provides for a refund of tax. Under sub-Section (1) of Section 54, a person claiming a refund of "tax and interest, if any, paid on such tax or any other amount paid" has to make an application within two years of the relevant date. Section 54(3) provides for a claim of refund of unutilised ITC. Sub-sections (1) and (3) of Section 54 provide as follows:

> "Section 54. Refund of tax
> (1) Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed:
>
> Provided that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of Section 49, may claim such refund in the return furnished under section 39 in such manner as may be prescribed.
> […]
> (3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:
> Provided that no refund of unutilized input tax credit shall be allowed in cases other than-
>
> (i) zero rated supplies made without payment of tax;
> (ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods and services or both

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as may be notified by the Government on the recommendations of the Council:

Provided further that no refund of unutilized input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:

Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies."

8 Rule 89 was originally inserted in the CGST Rules through the Central Goods and Services Tax (Second Amendment) Rules 2017[6], which came into force on 1 July 2017. Rule 89(4) and Rule 89(5) were in the following terms:

"(4) […]

(B) "**Net ITC" means input tax credit availed on inputs and input services** during the relevant period;

[…]

(E) "Adjusted Total turnover" means the turnover in a State or a Union territory, as defined under sub-section (112) of section 2, excluding the value of exempt supplies other than zero-rated supplies, during the relevant period;

(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) x Net ITC ÷ Adjusted Total Turnover} – tax payable on such inverted rated supply of goods

[6] Notification No.10/2017- Central Tax by the Government of India, Ministry of Finance, Department of Revenue, Central Board Indirect tax and Customs

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> **Explanation:- For the purposes of this sub rule, the expressions "Net ITC" and "Adjusted Total turnover" shall have the same meanings as assigned to them in sub-rule (4)**."
>
> (**emphasis supplied**)

9 On 18 April 2018, the Central Goods and Services Tax (Fourth Amendment) Rules 2018[7] were notified. Rule 89(5) was amended in the following terms

> "(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-rules 4(A) or (4B) or both; and**
> (b) "Adjusted Total turnover" shall have the same meaning as assigned to it in sub-rule (4)."
>
> (**emphasis supplied**)

The amendment was with prospective effect. Rule 89(5), as it stands at present, was substituted on 13 June 2018 by the Central Goods and Services Tax (Fifth Amendment) Rules 2018[8]. By the amendment, Rule 89(5) was substituted with the retrospective effect from 1 July 2017 in the following terms:

> "(iii) **with effect from 01st July 2017, in rule 89, for sub-rule (5), the following shall be substituted namely**:-

[7] Notification No.21/2018- Central Tax by the Government of India, Ministry of Finance, Department of Revenue, Central Board Indirect tax and Customs
[8] Notification No.26/2018- Central Tax by the Government of India, Ministry of Finance, Department of Revenue of Central Board of Indirect Taxes and Customs

> "(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-rules 4(A) or (4B) or both; and**
> (b) Adjusted Total turnover shall have the same meaning as assigned to it in sub-rule (4).""
>
> (**emphasis supplied**)

The above sequence indicates that the definition of the expression 'Net ITC' in Rule 89(5) originally meant "input tax credit availed on input and inputs services". By the amendment of 18 April 2018, the definition of 'Net ITC' was substituted so as to mean ITC availed on inputs, with prospective effect. On 13 June 2018, this definition was made applicable with retrospective effect from 1 July 2017.

10 Before we proceed to analyse the submissions and formulate the points for consideration, it is necessary to emphasise at the outset that one of the core issues in the present batch of cases would turn upon the interpretation of the expression "inputs" in Section 54(3)(ii) of CGST Act and the definition of "Net ITC" in the amended Rule 89(5). During the course of the submissions, in the interest of maintaining clarity, Counsel on both sides used the expression 'input goods' while dealing with goods that are used as inputs and 'input services' while dealing with services that are used as inputs. We propose to use the same formulation to ensure

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conceptual clarity while distinguishing between goods which are used as inputs and services which are used as inputs. With this preface, we shall now proceed to deal with the submissions of the parties.

D Submissions

D.1 Union of India

D.1.1 Part I- Distinction between goods and services

11 Mr N Venkataraman, learned Additional Solicitor General[9] led the arguments on behalf of the Union Government in assailing the correctness of the decision of the Gujarat High Court (and supporting the decision of Madras High Court). Mr Venkataraman urged that:

(i) Goods and services are distinct at a constitutional level. Article 366(12) of the Constitution defines goods, while Section 366(26A) defines services. Under the CGST Act, the expression 'input' in Section 2(59) means tangible commodities other than capital goods, while on the other hand 'input service' in Section 2(60) means any service used or intended to be used by a supplier for business. Hence, 'goods' and 'services' and 'inputs' and 'input services' have distinct definitions;

(ii) Article 366(12A) defines 'goods and services tax' to mean any tax on the supply of goods or services or both except taxes on the supply of alcoholic liquor for human consumption;

[9] "**ASG**"

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(iii) Article 246A, which traces the source of power of taxation and identifies the fields of taxation, empowers the Parliament, the States and Union Territories to impose simultaneous tax both on goods and services. Consequently, though goods and services are brought to tax under a common code, both the Constitution and the statute have maintained a distinction between goods and services. They remain distinct for prescription, treatment and interpretation;

(iv) Section 2(62) and Section 2(63) define 'input tax' and 'input tax credit' which include taxes paid on goods (input goods) and services (input services) either under CGST, State Goods and Services Tax Act[10] and Integrated Goods and Services Tax Act 2017[11];

(v) Input tax means a tax charged both on goods and services. These are taxes paid by a supplier on their outward supplies as defined under Section 2(83) which become inward supply for the recipient under Section 2(67); and

(vi) The need to integrate both taxes on input goods and input services is to enable credit on a single pool for further cross utilisation on both goods and services.

D.1.2 Part II- Interpretation of Section 54(3)

(i) The structure of Section 54(3) is as follows:

[10] "**SGST Act**"
[11] "**IGST Act**"

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(a) The opening clause permits a registered person to claim refund of any unutilised ITC at the end of any tax period.

(b) The main clause permits:

i. a claim;

ii. in the nature of refund;

iii. of *any* unutilized ITC; and

iv. at the end of the tax period.

(ii) Section 54(3) contains three provisos, out of which the first proviso falls for interpretation in this case. The three provisos share common features which indicate that these provisos are in the nature of restrictions and not conditions (or qualifications);

(iii) 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

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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;

(iv) 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’;

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(v) 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

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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;

(vi) 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

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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;

(vii) 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;

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(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'.

D.1.3. Part III- Legal Propositions

(i) 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;

(ii) 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;

(iii) 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**

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of India[12] 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;

(iv) Though tax enactments are subject to Articles 14 and 19(1)(g) of the Constitution, this is subject to two well-settled principles:

(a) Discriminatory treatment under tax laws is not *per se* invalid. It is invalid only when equals are treated unequally or unequals are treated equally. Both under the Constitution and the CGST Act, goods, services, input (goods) and input services are not one and the same. These are distinct species, though covered by a common code; and

(b) The legislature is entitled to the widest latitude when it identifies categories of classification and unless things constituting the same class are treated differently without a rationale, the provision cannot be declared as unconstitutional;

(v) The doctrine of reading down is employed to narrow down the scope of a proviso under challenge, when it may otherwise be unconstitutional. The doctrine cannot result in expansion of a statutory provision for refund which would amount to rewriting the legislation;

(vi) Accepting the submission of the assessees that goods and services must be treated at par can lead to drastic consequences in terms of:

(a) rates of taxes;

[12] 1997 (5) SCC 536

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(b) concessions, benefits and exemptions;

(c) intervention in the areas of political, economic and legislative policies;

(vii) Refund of taxes is one form of granting exemption;

(viii) Once a refund is construed as a form of exemption from taxes, the provision has to attract strict interpretation;

(ix) Exemptions, concessions and exceptions have to be treated at par and must be strictly construed;

(x) 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;

(xi) 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

(xii) A legislative amendment which reflects a policy choice is not subject to judicial review.

12 Mr Balbir Singh, learned ASG has adopted the submissions of Mr N Venkataraman, learned ASG.

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D.2 Assessees

13 Mr V Sridharan, learned Senior Counsel appearing on behalf of the assessee[13] submitted:

(i) The assessee is, *inter alia*, engaged in the manufacture and supply of footwear which attracts output tax (goods and services tax[14]) at the rate of 5%;

(ii) The assessee, *inter alia*, procures input goods such as synthetic leather, PU Polyol and input services such as job work service, goods transport agency service on payment of applicable GST for use in the course of business and avails ITC on the GST paid thereon. A majority of the input goods and input services attract tax at the rate of 12% or 18%;

(iii) The rate of GST paid by the assessee on procurement of input goods and input services is higher than the rate of tax payable on their outward supply of footwear. Therefore, despite utilization of credit for payment of GST on outward supply, there is an accumulation of unutilized ITC in the electronic credit ledger of the assessee;

(iv) The assessee applied for refund of such unutilised accumulated ITC under Section 54(3) of the CGST Act read with Rule 89(5) of the CGST Rules;

(v) Rule 89(5) of the CGST Rules as originally enacted provided for refund of ITC availed on both inputs (that is input goods) and input services and was

[13] Appearing in SLP (Civil) No 14801 of 2020
[14] "**GST**"

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in line with Section 54(3) of the CGST Act. Accordingly, the assessee was granted refund of such unutilised ITC;

(vi) Rule 89(5) was substituted by Notification No. 21/2018-CT dated 18 April 2018 prescribing a revised formula for determining the refund on account of inverted duty structure. The above substitution was given retrospective effect from 1 July 2017 by Notification No. 26/2018-CT dated 13 June 2018;

(vii) The revised formula *inter alia* excludes 'input services' from the scope of 'Net ITC' for computation of the refund amount under the said Rule;

(viii) The substituted Rule 89(5) of the CGST Rules denies refund on the unutilised ITC availed on input services and allows relief of refund of ITC availed on input goods alone;

(ix) The Revenue is relying on amended Rule 89(5) to contend that refund will not be allowed on taxes paid on input services; and

(x) The Revenue is allowing refund of accumulated ITC of tax paid on input goods such as synthetic leather, and PU Polyol. Further, the Revenue is allowing accumulation of ITC paid on procurement of input services such as job work service and goods transport agency service. However, the refund of accumulated unutilised ITC paid on input services is being denied and refund already granted has been recovered from the assessee.

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PART D

14 Mr Sridharan urged that Rule 89(5) of the CGST Rules, to the extent to which it denies refund of ITC relatable to input services, is *ultra vires* Section 54. The submission has been premised on the following propositions:

(i) GST is a destination-based consumption tax. The fundamental principle of GST laws worldwide is that it is a multistage tax. Each point in a supply chain is potentially taxed. However, suppliers are entitled to avail credit of taxes paid at an anterior stage. This feature of GST leads to its description as being a tax on value addition, with the final consumer alone ultimately bearing the tax. The GST laws enacted in India are also based on this principle;

(ii) In **All India Federation of Tax Practitioners** v. **Union of India**[15], this Court held that excise duty, service tax and value added tax legislation provide for taxes on value addition and are destination based-consumption taxes. These are not charges on the business but on the consumer. Though the erstwhile tax legislation, prior to the enforcement of the Constitution (One Hundred and First Amendment) Act 2016, was based on the principle of value addition and consumption tax, there was no seamless flow of credit between Central and State levies. This anomaly was sought to be addressed by the constitutional amendment and by the legislation which has been enacted in pursuance of it;

[15] 2007 (7) SCC 527

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(iii) The purpose of the One Hundred and First Constitutional Amendment was:

(a) to replace a number of indirect taxes being levied by the Union Government and the State Governments;

(b) to obviate and remove the cascading effect of taxes; and

(c) to provide for a common national market for goods and services.

(iv) The Statement of Objects and Reasons accompanying the bill introducing the CGST Act also emphasised that there would be a seamless transfer of ITC from one stage to another in the chain of value addition;

(v) These principles reaffirmed the guidelines issued by the Organisation of Economic Co-operation and Development which emphasise that

(a) value added tax systems are designed to tax final consumption;

(b) only the consumers should bear the tax burden; and

(c) the main characteristic of a value added tax is of preserving neutrality in the value chain.

(vi) Compelling economic and fiscal realities necessitated the levy of value added tax like GST in place of traditional excise duties, service tax, sales tax and other legislation;

(vii) In a tax regime which was not based on value added tax, ensuring refund of tax paid at various stages of manufacturing would be cumbersome and complicated. It was to obviate the problems of the earlier regime that GST

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legislation was enacted by various countries including India to fully effectuate the principle underlying value-added destination-based consumption tax;

(viii) The situation in which the quantum of input taxes exceeds output tax is an anomaly, aberration and distortion resulting from various sources of taxes and conflicts with the fundamental principles of GST. The impact of these distortions can be revealed by practical examples involving situations such as

(a) Intermediate products attracting a lower rate of tax; and

(b) Intermediate products attracting a higher rate of tax.

(ix) As a result, varied situations of economic distortion resulting from a cascading effect of taxes in the form of unabsorbed ITC emerged due to variations in the rate of taxes. This is against the basic tenets of GST. GST being a consumption tax, postulates that the only tax in the entire chain should be the tax charged to the end customer without any 'sticking' or unabsorbed ITC;

(x) Government may in the public interest impose lower rates of tax on products such as fertilizers, tractors and lower-price footwear. The objective of taxing such goods at a lower rate is frustrated if inputs for making the final products are taxed at a higher rate and no refund of unutilized credit is granted. Refund of unutilised ITC seeks to achieve the objective of value-added consumption-based taxation in its true sense;

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(xi) Cognizant of the anomaly resulting from inverted duty structures, the erstwhile State Value Added Tax legislations provided for refund of unutilized ITC, even before the GST legislation saw the light of the day;

(xii) A near perfect GST legislation provides for refund of ITC in a situation involving an inverted duty structure. The provisions for refund ensure that anomalies in tax rates do not result in distortions to the fundamental features of GST which remains a true consumption tax. ITC may accumulate for a variety of reasons including (a) inverted duty structure, that is, GST on output supplies is less than the GST on the input supplies; (b) stock accumulation; (c) capital goods; and (d) partial reverse charge mechanism for certain services;

(xiii) The cascading effect or sticking credit may arise on account of higher taxes paid on input goods or input services. Refund of unutilized ITC will ensure the elimination of the cascading effect of taxes in a true sense;

(xiv) 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);

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(xv) 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;

(xvi) 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[16]. 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

[16] "**CBIC**"

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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;

(xvii) 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

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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

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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.

(xviii) 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;

(xix) Rule 89(5) by confining refund of unutilised ITC on input goods and denying refund of ITC on input services curtails the ambit of Section 54(3) and is hence *ultra vires*:

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(a) Rule 89(5) originally provided for refund of ITC paid both on input goods and input services but it was amended with retrospective effect to restrict refund only to ITC availed on input goods;

(b) After the amendment in terms of the formula, the ratio of proportionate turnover is applied only to ITC availed on input goods. However, after arriving at the proportionate value, the entire amount of tax paid on output supplies is deducted. The formula erroneously assumes that the entire output tax will be paid from ITC availed on input goods and the credit on input services will not be utilised for payment of output tax. If the rule took into computation ITC availed on both input goods and input services, both parts of the formula would be comparable and would result in a correct amount of unutilised ITC attributable to an inverted duty structure. The rule is *ultra vires* Section 54(3) since it restricts the computation of refund only by taking into account the credit availed on input goods. 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;

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(xx) 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):

(a) Accumulation of credit may occur due to various reasons such as absence of outward supplies in a tax period, supplies made at a loss, bulk purchase of inputs, excess opening balance of credit, and change in the rate of tax during the tax period;

(b) A rule which provides for the identification of unutilised ITC which is attributable to supplies having an inverted duty structure and bifurcating it from credit accumulating due to other causes would be for the purpose of carrying out the provisions of the CGST Act;

(c) A rule may provide a proportionate formula for determining the pro-rata amount of credit relatable to the inverted duty structure vis-a-vis total turnover. Such a formula may be needed where the assessee is making supplies involving an inverted duty structure as well as supplies not involving it;

(d) 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

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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);

(e) However, Rule 89(5) in the garb of fixing a formula for determining pro-rata the amount of credit relatable to the inverted duty structure vis-à-vis 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;

(xxi) 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

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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;

(xxii) The fact that the rules have been recommended by the Goods and Services Tax Council[17] 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*;

(xxiii) 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

[17] "**GST Council**"

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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); and

(xxiv) By virtue of the doctrine of severability that portion of Rule 89(5) which is *ultra* vires may be struck down. This would not constitute judicial legislation. The challenge to the *vires* of Rule 89(5) is only because of the definition of 'Net ITC' in the explanation to the rule. The explanation defines net ITC to mean ITC availed on inputs during relevant period. Section 54(3) allows refund of *any* unutilized ITC and not only credit on input goods. Consequently, only if the expression "on inputs" employed in Explanation (a) to Rule 89(5) is struck down, will Rule 89(5) be in line with Section 54(3).

15 Mr Sujit Ghosh, learned Counsel[18] submitted that

(i) The meaning of the expression "unutilised ITC" is credit on goods as well as services (which remains after paying output tax) in view of the definitions contained in Section 2(63) read with Section 2(62) of the CGST Act;

(ii) In Explanation-I to Section 54, the expression 'refund' qua zero rated supplies

[18] Appearing in SLP (Civil) Nos 1552-1557 of 2021

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(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.

(iii) The construction of Section 54(3) must be based on the following circumstances:

(a) The substantive part deals with the quantum of refund. The proviso is not a restriction but merely prescribes threshold conditions;

(b) Threshold conditions are evident from the use of the expression “in cases”;

(c) Each of the three provisos lays down (i) situations; and (ii) conditions, as evident from the following table:

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Situation	Condition	Proviso reference
Export of goods and services i.e. Zero rated supply	Supplies made without payment of tax	First Proviso, Clause (i)
Domestic supplies	(a) Accumulation of unutilized input tax credit has arisen due to rate of tax on input goods being higher than the rate of tax on outputs *(thus for example, accumulation due to sales made at discount/distress/non supply etc. are not to be allowed to be covered)*. (b) Should not be specifically excluded through notification. *For example, Unutilized ITC = 300 (for goods) and 200 (for services), rate of tax on goods = 10%, rate of tax on output =7%, then: - Threshold condition of inverted duty structure satisfied qua goods, then Entire basket of ITC i.e. 500 eligible for refund subject to adjustment of tax liability.*	First Proviso, clause (ii)
Export of goods	Supplies not liable to export duty	Second Proviso
Export of goods or services	Drawback in respect of (a) central tax not claimed or (b) refund of integrated tax not claimed.	Third Proviso

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(iv) The object and purpose of Section 54(3) must be borne in mind:

(a) The purpose of the provision is to give effect to the doctrine of equivalence or neutrality which is the basic objective of the GST and this is sought to be achieved by granting seamless credit through Section 16;

(b) The legislative background and preparatory material duly support the purpose of the legislation;

(c) The State does not want the taxpayers to suffer the ill effect of tax cascading solely because of its decision to offer a reduced rate of tax on outputs, relative to the tax rate on inputs;

(d) In the case of the petitioner which is engaged in providing services to Chennai Metro Rail, the original rate of output tax used to be 18 per cent while the input tax on goods and services was between 18 per cent to 28 per cent. As a result of Notification No. 1/2018 and a corresponding State notification, the rate of tax on output supplies, namely construction of mono rails and metro rails, was reduced to 12 per cent;

(e) Section 54(3) is not intended to cover a situation where the inverted duty structure is created by assessee due to its own actions such as discount/distress/non-supply as distinguished from the rate structure created by the State;

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(f) The object of achieving tax neutrality is sought to be implemented for the first time through the anti-profiteering measure embodied in Section 171;

(v) The international jurisprudence on GST and tax neutrality postulates that such taxes are not a permanent cost to the business and that businesses are pass through entities. The essential character is of an economically neutral tax through a seamless flow of credit;

(vi) 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

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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.

(vii) 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;

(viii) 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;

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

(x) 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;

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(xi) 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;

(xii) The convergence of credit takes place at the stage of availing and not at the stage of utilization;

(xiii) The CGST Act contemplates that conditions and restrictions are two distinct concepts;

(xiv) 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;

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

(xvi) 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

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claimed as a refund is not contrary to the statutory drill, but a refund through an appropriate construction of the statute;

(xvii) 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

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quantum of refund being prescribed by the main part of Section 54(3); or (iii) striking down/severing the offending portion;

(xviii) The doctrine of reading down the words of the statute to save its constitutional validity also includes reading up. If two interpretations are possible, the one which ensures that the provision is constitutionally valid must be adopted. Even otherwise, if the phrase "on inputs being higher than rate of tax on output supplies" is struck down, the impermissible classification between input goods and input services can be severed, thereby enlarging the class. Under such circumstances Section 54(3) as re-cast should read as follows:

> "(3) Subject to provisions of Sub-section 10, a registered person may claim refund of any unutilized input tax credit at the end of any tax period:-
>
> PROVIDED THAT no refund of unutilized input tax credit shall be allowed in cases other than-
>
> (i) Zero rated supplies made without payment of tax;
> (ii) Where the credit has accumulated on account of rate of tax (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council."

(xix) 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:

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(a) **Class legislation**

i. The class consists of all registered persons possessing unutilised ITC whether or not they are engaged in domestic supplies or exports;

ii. The species consists of (i) exporters and (ii) domestic suppliers where unutilised credit arises due to an inverted duty structure;

iii. Discrimination *inter se* the species or sub-species of the same class would be a class legislation which is hit by Article 14;

iv. To form a part of the same class, the claimant's position should be substantially similar or in like circumstances, and conditions need not be identical; and

v. In order to ascertain whether the persons are similarly placed one must look beyond classification and into the purpose of the law.

(xx) Goods and services, though defined separately, are treated substantially in a similar manner in several aspects both in the Constitution and in the CGST Act;

(xxi) In examining discriminatory treatment, it is the real effect of the provision which must be considered:

(a) The real effect of the provision is to create an economy which does not perpetuate a harmonized structure of GST or a harmonized national

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market for goods and services, which is contrary to the constitutional object of GST as provided in Article 279A(6); and

(b) The effect that goods are tangible while services are intangible does not bear any reasonable relation to the object of the legislation or to Article 279A(6). According to the submission, equal laws in respect of refunds of taxes in cases involving an inverted duty structure would have to be applied to everyone in the same situation whether dealing in input goods or input services. Since the purpose of GST is to achieve tax neutrality, equivalence and anti-profiteering, their position is substantially the same. The taxable event, person, measure of tax, machinery, penal and prosecution provisions are substantially the same. Hence the denial of the privilege of refund to input services is arbitrary. The classification which is found to be valid in a given frame of reference may be invalid in a different frame. From a revenue harvesting perspective, goods and services may be treated as different. However, from the perspective of neutrality and achieving a true consumption tax, goods and services cannot be treated differently;

(xxii) The limitation on the power of judicial review of tax legislation on grounds of 'wide latitude' is subject to exception. The submission is that after treating tax on input goods and input services in an identical fashion by granting credit (to achieve neutrality) and making the entire credit as a part of homogeneous basket, granting refund to input goods and not to input

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services (from that basket) is a colourable device to set at naught the doctrine of neutrality. The State having reduced the rate of tax on output supplies (leading to an inverted structure) the intent behind the refund was to reduce the tax burden on the consumer. Denying refund on input services would lead to an indirect impact on the very consumer that the State wanted to benefit in the first place. Moreover, the State has made no distinction between input goods and input services at the time of granting credit, thereby declaring an intent to achieve tax neutrality. The denial of refund on input services obliterates that intent and runs contrary to the purpose of the legislation; and

(xxiii) Denial of interest in the case of input services would be an unreasonable restriction and would not be saved by Article 19(6).

16 Mr Arvind Datar, learned Senior Counsel[19] urged the following submissions:

(i) 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

[19] Appearing in SLP (Civil) No 589 of 2020

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combined category. The concept of one nation one tax introduced by GST laws cannot be ignored only at the time of refund;

(ii) 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 sub-section (3); and

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(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.

(iii) 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;

(iv) 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;

(v) The word "inputs" in Section 54(3) first proviso (ii) cannot be restricted to goods because the CGST Act/ SGST Act treats goods as services. For instance, transfer of right in goods without transfer of title is deemed as "Supply of Services" as per Clause 1(b) of Schedule II, which reads as follows:

> "b. any transfer of right in goods or of undivided share in goods without the transfer of title thereof, is a supply of services;"

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(vi) Similarly, "Works Contract" as defined in Section 2(119) of the CGST Act is deemed as per Clause 6(a) of Schedule II as "Supply of Services" although it involves the supply of goods. Section 2(119) and the relevant portion of Schedule reads thus:

> **"Section. 2(119)** "works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract"

Clause 6(a) of Schedule II provides:

> **"6. Composite supply**
> The following composite supplies shall be treated as a supply of services, namely:—
> works contract as defined in clause (119) of section 2."

(vii) Further, Article 366(29A) of the Constitution, which provides for tax on sale or purchase of goods and which treats six kinds of supplies as deemed sales of goods, pertains to and is part of the erstwhile Entry 54 of List II which deals only with goods. Article 366(29A) reads as follows:

> "(29A) tax on the sale or purchase of goods includes
> (a) a tax on the transfer, otherwise than in pursuance of a contact, of property in any goods for cash, deferred payment or other valuable consideration;
> (b) a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;
> (c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;

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(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

(viii) Chapter V (Section 16 to 21) of the CGST Act does not make any distinction between credit of input tax on goods or services. Under Section 17 of the CGST Act, the input tax on both the goods and services used in exempt supplies or other classes of supplies specified therein, are not permitted to be availed as ITC. The remaining/ balance input tax is eligible to be availed as ITC, which remains in the electronic credit ledger of the taxpayer. After utilizing such ITC in terms of Section 49 of the CGST Act (*towards output GST on supply of goods or services or both*), which too makes no distinction between ITC accumulated on account of input goods or input services, the balance is to be refunded in accordance with Section 54(3) of the Act. The relevant portion of Section 49 reads thus:

"49. […]
(6) The balance in the electronic cash ledger or electronic credit ledger after payment of tax, interest, penalty, fee or any

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other amount payable under this Act or the rules made thereunder may be refunded in accordance with the provisions of section 54"

(ix) 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;

(x) 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

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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

(xi) The impugned notifications/delegated legislation, Notification No. 21/2018-CT (amending Rule 89(5)) dated 18 April 2018 and Notification No. 26/2018 (retrospectively amending Rule 89(5)) dated 13 June 2018, by disallowing the refund of ITC of tax on input services in an inverted duty structure scenario is not only *ultra vires* Section 54(3) proviso but also beyond the scope of powers of the delegate i.e. the Central Government, because such a restriction is a typical policy change which could not have been done through a delegated legislation.

17 Appearing on behalf of intervenor, Mr G Natarajan, in the course of his submissions urged (for the purpose of his submissions) that he does not dispute the position that under Section 54(3) read with rule 89(5), refund of ITC accumulating only on account of "input goods" is eligible for refund and the credit accumulated on input services is not entitled for refund. Based on this hypothesis, the submissions of the learned counsel are thus:

(i) The formula which has been prescribed in Rule 89(5) seeks to identify the quantum of ITC availed on inputs attributable to the outward supplies having an inverted rate structure. From the quantum of ITC on inputs, the

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tax payable by the supplier on the supplies having an inverted rated structure is reduced to arrive at the quantum of the credit accumulating on account of the inverted rate structure, which is available for refund;

(ii) 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;

(iii) 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

(iv) 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.

18 During the course of his oral submissions Mr Natarajan further elaborated on the above submissions by urging that

(i) 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;

(ii) ITC is available both on input goods and input services;

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(iii) 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;

(iv) In the above backdrop, the manufacturer should be allowed to utilise the ITC on input services first for the payment of taxes; and

(v) 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."

19 Appearing for another intervenor[20], Mr Shraff, learned Counsel submitted that-

(i) If the Explanation (a) to Rule 89(5) is *ultra vires* Section 54(3), unutilised ITC should include capital goods in addition to input goods and input services;

(ii) The electronic ledger makes no distinction between input goods and input services. The credit arises under integrated tax, central tax and state tax.

[20] IA 56717/2021

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The electronic ledger represents a collective credit of input goods, input services and capital goods;

(iii) The inequality arises because small and medium enterprises (SMEs) with one product, facing an inverted rate structure, would get a lesser amount while availing refund whereas large companies with multiple products would get refunds violating Article 19(1)(g); and

(iv) The retrospective amendment to Rule 89(5) takes away vested or accrued rights.

20 Mr Uchit Sheth, learned Counsel[21] has urged the following submissions:

(i) 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;

(ii) 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

[21] Appearing in SLP (Civil) Nos 2973 of 2021, 16003 of 2020, 677 of 2021 and 1340 of 2021

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because of an incorrect interpretation of Section 54(3) of the Act by the rule making authority;

(iii) 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;

(iv) If the rate of tax on inputs is higher than the rate of tax on output supplies, the entire unutilized ITC is "on account" of such circumstance and the entire balance of tax credit is required to be refunded. The expression 'on account of' cannot be read to mean 'to the extent of' particularly when it is not possible to compute the unutilized ITC attributable to input goods or services;

(v) There are two different connotations of the term 'input'. The first distinguishes it as goods vis-a-vis services while the second distinguishes it from output. The expression 'input tax' and 'input tax credit' have been defined to include tax in respect of both goods as well as services and there is no phrase called "input service tax credit". The expression 'inputs' in the proviso to Section 54(3) has been used in the second sense to distinguish it from output; and

(vi) GST is a destination-based consumption tax and the imposition of the tax is on supply. A supplier is liable to pay tax only to the extent it is payable

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on the output supply of goods or services and the refund of excess balance of input of ITC under inverted duty structure is a means to achieve this end. If the excess tax credit is not refunded, the tax liability of the supplier will be in excess of the liability fixed by the charging section and such interpretation should be avoided.

21 Dr Arvind Poddar, learned Counsel appearing on behalf of the respondents[22], urged that the respondents are in the business of providing dyeing and printing services for textile industries. For job work operations, they procure input goods (such as chemicals, stationeries and colours) and for providing outward supplies, they also avail of input services such as contract labour, consultancies, repairs of plants and machinery. The rate on outward supply of job work on textile fabrics is 5 per cent, while the rate on input goods and the rate on input services is 12 per cent /18 per cent. Thus, most of the input goods and input services attract a higher rate of GST compared to rate of GST applicable on the outward supply which is 5 per cent. The inverted duty structure results where the rate of GST on inverted supplies is higher than the outward supplies. As a result, over a period of time, credit gets accumulated in the electronic credit ledger. In this backdrop, the following submissions have been urged:

(i) Clause (ii) to the first proviso of Section 54(3) merely prescribes the eligibility conditions subject to which a refund of unutilised ITC could be made. The main part of Section 54(3) allows for a refund of any unutilised

[22] Appearing in SLP (Civil) No 1868/2021

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ITC subject to the satisfaction of two conditions – either that the assessee is making zero rated supplies without payment on taxes or where the credit is getting accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies. Clause (ii) of the first proviso merely prescribes a condition of eligibility subject to which refund of unutilised ITC could be made;

(ii) 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; and

(iii) It is paradoxical that while on the one hand the definition of net ITC has been amended to exclude ITC availed on input services, on the other hand, turnover of inverted supply of services and tax payable on such inverted rated supply of services has been included in the formula for calculating the maximum amount of refund.

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D.3 Rejoinder by Union of India

22 In response to the submissions of the assessees, Mr N Venkataraman, the learned ASG, has submitted the following propositions:

(i) The submission of the respondents that Article 279A(6) of the Constitution mandates a harmonised structure of GST and obligates parity of treatment amongst goods and services is misplaced for the following reasons:

(a) Article 279A(6) does not compel parity of treatment between goods and services. In fact, Article 366(12) deals with the definition of 'goods', Article 366(26A) deals with the definition of 'services' and Article 366(12A) defines 'goods and services'. Thus, goods and services are identified as two distinct aspects;

(b) Article 279A deals with the GST Council. The purpose of Article 279A(6) is to ensure that the GST Council, while discharging its function, is guided by the need for a harmonised structure. Thus, the term 'harmonised' or, harmony in this context would mean uniformity, consistency, shared values and responsibilities between the Union Government and State Governments. The essence of Article 279(A)(6) is promotion of cooperative federalism;

(c) If the interpretation of the respondents is accepted, it would render Article 279A(4) otiose as it allows the GST Council to make recommendations including rates and floor rates with bands of GST.

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(ii) Registered assessees having unutilised ITC do not form a distinct and separate class. Unutilised ITC can accumulate on account of huge discounts on output supplies of goods or services; as a business strategy to indulge in predatory pricing; loss of business resulting in undervaluation of goods; an Act of God; and inverted duty structure on account of inputs or input services, among other reasons . Thus, although registered assessees accumulating unutilised ITC constitute one category, it has numerous species. Parliament is entitled to choose the species out of the category and grant concessions or benefits. This would amount to treating equals equally, and unequals unequally;

(iii) The doctrines of equivalence, neutrality or secondary stage cascading effect are inapplicable and should not be used to read in grant of refund for unutilised ITC on input services. Although the stated goal of the doctrines may be convergence of a destination-based tax, policy issues as to how to achieve the stated goal must be left to the discretion of the Union Government and the State Governments. The level, type and time frame to achieve a complete convergence is a policy issue which cannot be subject to judicial review;

(iv) After the ITC on account of both inputs and input services is booked into an electronic ledger, it forms a homogenous nucleus and the source of the ITC (that is whether it arises from input or input services) cannot be determined. Thus, the formula provided in Rule 89(5) is necessary to make such a bifurcation; and

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(v) Prior to the enactment of GST, MODVAT/CENVAT Rules contained formulae to determine the quantum of eligibility of credit. Similarly, to legally dissect the homogenous unutilised ITC, a formula may be resorted to determine eligibility, restrictions, or refunds.

E Constitutional Scheme of GST

23 The idea which permeates GST legislation globally is to impose a multi stage tax under which each point in a supply chain is potentially taxed. Suppliers are entitled to avail credit of tax paid at an anterior stage. As a result, GST fulfils the description of a tax which is based on value addition. Value addition is intended to achieve fiscal neutrality and to obviate a cascading effect of taxation which traditional tax regimes were liable to perpetuate. In a sense therefore, the purpose of a tax on value addition is not dependent on the distribution or manufacturing model. The tax which is paid at an anterior stage of the supply chain is adjusted. The fundamental object is to achieve both neutrality and equivalence by the grant of seamless credit of the duties paid at an anterior stage of the supply chain.

24 The State VAT legislation in India represented a significant stage in the evaluation of fiscal legislation based on the principle of value addition. In **All India Federation of Tax Practitioners** v. **Union of India**[23], this Court, speaking through a two judge Bench, noted the principle that VAT is a consumption tax as it is borne by the consumer. The Court observed that with its increasing importance in the

[23] 2007 (7) SCC 527

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economy, the service sector is "occupying the centre stage of the Indian economy". As economists postulate, there is no distinction between consumption of goods and consumption of services both of which satisfy human wants and needs. The Court underscored that service tax is a destination-based consumption tax, not a charge on business but on the consumer of the service.

25 Though the erstwhile regime recognised the principle of value addition-based consumption taxes, there was an absence of a seamless flow of credit, particularly between Central and State levies. The background material antecedent to the adoption of the constitutional and legal structure underlying GST in the country indicates the importance which was ascribed to developing a tax regime which would achieve a continuous chain of set-off from the original producer and service provider's point up to the retailer's level in the supply chain and eliminate the burden of cascading tax effects. Thus, the first discussion paper on GST in India published by the Empowered Committee of State Finance Ministers on 10 November 2009 emphasised that :

> "1.14 … In the GST, both the cascading effects of CENVAT and service tax are removed with set-off, and a continuous chain of set-off from the original producer's point and service provider's point upto the retailer's level is established which reduces the burden of all cascading effects. This is the essence of GST, and this is why GST is not simply VAT plus service tax but an improvement over the previous system of VAT and disjointed service tax."

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26 The Statement of Objects and Reasons appended to the Constitution (One-Hundred and Twenty-Second Amendment) Bill 2014 which eventually became the Constitution (One Hundred and First Amendment) Act 2016 postulates that GST shall replace a number of indirect taxes levied by the Union Government and the State Governments. The object was to introduce a goods and service tax which would fulfil two fiscal priorities namely, (1) removing the cascading effect of taxes; and (2) providing for a common national market for goods and services. An extract from the Statement of Objects and Reasons is set out below:

> "The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments and is intended to remove cascading effect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and services, except those which are kept out of the purview of the goods and services tax."

27 Now, it is in this backdrop that it becomes necessary to advert to the constitutional amendment and the resulting legislation. The One Hundred and First Amendment to the Constitution is a watershed moment in the evolution of cooperative federalism. Since its origin, the Constitution contained a three-fold distribution of legislative power. Under Article 246, the subjects of legislation enumerated in the Union List of the Seventh Schedule were assigned to Parliament, those in the State List were assigned exclusively to the States and those in the

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Concurrent List were assigned both to Parliament and the States with precedence to Parliament under the provisions of Article 254.

28 To illustrate, Entry 84 of the Union List provided for duties of excise on tobacco and other goods manufactured or produced in India except – (a) alcoholic liquors for human consumption; and (b) opium, hemp and other narcotic drugs and narcotics. Entry 54 of the State List provided for taxes on sale or purchase of goods other than newspapers subject to Entry 92A of the Union List which provided for taxes on the sale or purchase of goods other than newspapers in the course of interstate trade or commerce. Entry 97, the residual entry of the Union List subsumed within it among other subjects, taxes not mentioned in the Union, State or Concurrent List, thereby bringing with its ambit the notion of 'rag-bag' legislation. The field contemplated by the erstwhile Entry 83 of the Union List (duties of customs including export duties) or Entry 97 did not travel into the area of trading. State legislation in the area of sales tax and VAT defined the ambit of the expression 'inputs', 'capital goods' and 'input tax credit'.

29 The One Hundred and First Constitutional Amendment brought about a significant merger by contemplating a fiscal umbrella comprehending GST. Article 246A was adopted in terms of which, notwithstanding anything contained in Article 246 and Article 254, Parliament and (subject to Clause (2)), the State Legislature of every State have the power to make laws with respect to GST imposed by the Union

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or by the State under clause (2) of Article 246A[24]. Parliament has the exclusive power to make laws with respect to goods and services tax where the supply of goods or of services, or both takes place in the course of inter-State trade or commerce. With the enactment of the One Hundred and First Constitutional Amendment, Entry 84 of the Union List has been restructured to incorporate duties of excise on the following goods **manufactured or produced** in India, namely –

(a) petroleum crude;

(b) high speed diesel;

(c) motor spirit (commonly known as petrol);

(d) natural gas;

(e) aviation turbine fuel; and

(f) tobacco and tobacco products.

30 Entry 54 of the State List has been restructured to provide for **taxes on the sale** of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, other than in the course of inter-State trade or commerce.

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[24] "Article 246A. (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.
(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods; or of services, or both takes place in the course of inter-State trade or commerce.
Explanation. – The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council."

31 Article 246A has brought about several changes in the constitutional scheme:

(i) *Firstly*, Article 246A defines the source of power as well as the field of legislation (with respect to goods and services tax) obviating the need to travel to the Seventh Schedule;

(ii) *Secondly*, the provisions of Article 246A are available both to Parliament and the State legislatures, save and except for the exclusive power of Parliament to enact GST legislation where the supply of goods or services takes place in the course of inter-State trade or commerce; and

(iii) *Thirdly*, Article 246A embodies the constitutional principle of simultaneous levy as distinct from the principle of concurrence. Concurrence, which operated within the fold of the Concurrent List, was regulated by Article 254.

32 The One Hundred and First Constitutional Amendment brought in amendments to the constitutional dictionary of definitions contained in Article 366. Clause 12 of Article 366 contained a definition of the expression "goods" to include all materials, commodities and articles. Clause 12A has been introduced by the amendment to define "goods and services tax":

> "Clause (12A) "goods and services tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption".

Clause 26A has been introduced to define "services":

> "Clause (26A) "Services" means anything other than goods"

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'Services', therefore, under the constitutional scheme means anything other than goods.

33 The constitutional scheme embodying GST is facilitated through the composition of the GST Council under Article 279A. The GST Council is to consist of the Union Finance Minister, the Union Minister of State in charge of Revenue of Finance; and the Minister In-charge of Finance or Taxation or any other Minister nominated by each State Government. Clause (4) of Article 279(A) empowers the GST Council to make recommendations to the Union and the States on the aspects comprehended in sub-clauses (a) to (h) of Clause (4), which are extracted below:

> "[…]
> (a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;
> (b) the goods and services that may be subjected to, or exempted from the goods and services tax;
> (c) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of inter-State trade or commerce under article 269A and the principles that govern the place of supply;
> (d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;
> (e) the rates including floor rates with bands of goods and services tax;
> (f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;
> (g) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and
> (h) any other matter relating to the goods and services tax, as the Council may decide."

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Clause (6) of Article 279A stipulates that:

> "(6) While discharging the functions conferred by this article, the Goods and Services Tax Council shall be guided by the need for a harmonised structure of goods and services tax and for the development of a harmonised national market for goods and services."

34 Article 279A(6) indicates that in the discharge of its functions, the GST Council is to be guided by the need for a harmonised structure of goods and services tax and the development of a harmonised national market for goods and services. This emphasis on harmony is crucial to co-operative federalism. It underscores that in a federal arrangement where the States and Union are converging together for the first time to adopt the same event for taxation, both sets of partners must be guided by the over-arching need to preserve harmony. Harmony postulates balance, an acceptance of mutual co-existence. Clauses (7) to (11) of Article 279A contain provisions for quorum, procedure and voting. Clause (9) is a clear indicator of the absence of supremacy either of the Union of the States. Under sub clause (a) of Clause 9, the vote of the Union Government is to have a weightage of one-third of the total votes cast, while the votes of all the State Governments together are to have a weightage of two-thirds of the total votes cast. Every decision of the Council is to be taken by a majority of not less than three-fourths of the weighted votes of the members present and voting. The principle of harmony does not postulate exact coincidence in all points of comparison or reference. Harmony is a postulate of cooperative federalism and is founded on the principle of mutual co-existence, deference and equality of the coexisting units.

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F CGST Act

F.1 Definitions

35 While understanding the provisions of Section 54(3), it becomes necessary to advert to some of the key definitions contained in the CGST Act.

Section 2 (52) defines the expression goods in the following terms:

> ""**goods"** means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply."

36 The expression 'goods' is defined on the basis of a 'means and includes' formula. Following well-settled principles of statutory interpretation, the legislature uses the expression 'means' when it intends the definition to be exhaustive. The use of the expression 'includes' is intended to convey an expansive meaning. By using the expression "means and includes", the legislature intends to employ an extensive definition, incorporating subjects which may not ordinarily fall within the common understanding of the expression. Thus, the expression 'goods' is defined to mean every kind of movable property other than money and securities. It also includes certain other items incorporated in the inclusive part ("but includes") of the definition. The expression 'goods' is broadly defined. The expression 'services' is defined in Section 2(102) in the following terms:

> "Section 2(102) "services" means anything other than goods, money and securities but includes activities relating to the use

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> of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.
>
> Explanation: For the removal of doubts, it is hereby clarified that the expression "services" includes facilitating or arranging transactions in securities."

The expression 'services' is thus distinguished from goods since the expression means "anything other than goods".

37 The definition of the expression 'input' is contained in Section 2(59) which reads thus:

> "2(59) "input" means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business"

The expression 'input' is thus defined to mean goods other than capital goods. The definition however, incorporates a requirement of use, actual or intended, by a supplier or in the course or furtherance of business.

38 'Input service' is defined in Section 2(60) as follows:

> "input service" means any service used or intended to be used by a supplier in the course or furtherance of business;"

The definition of "input service" is parallel to that of "input", with the important distinction that while 'input' is defined with reference to "any goods", 'input service' is defined in relation to "any service". Both sets of definitions incorporate the further requirement of use or intended use by a supplier in the course or furtherance of business.

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39 The expression “input tax” is defined in Section 2(62) :

> “Input tax” in relation to a registered person, means the Central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes—
>
> (*a*) the integrated goods and services tax charged on import of goods;
>
> (*b*) the tax payable under the provisions of sub-sections (*3*) and (*4*) of section 9;
>
> (*c*) the tax payable under the provisions of sub-sections (*3*) and (*4*) of section 5 of the Integrated Goods and Services Tax Act;
>
> (*d*) the tax payable under the provisions of sub-sections (*3*) and (*4*) of section 9 of the respective State Goods and Services Tax Act; or
>
> (*e*) the tax payable under the provisions of sub-sections (*3*) and (*4*) of section 7 of the Union Territory Goods and Services Tax Act,
>
> but does not include the tax paid under the composition levy.”

The expression ‘input tax’ in relation to a registered person means (i) the Central, State, Integrated or Union Territory tax; (ii) charged on any supply of goods or services or both made to a registered person. This is followed by an inclusive definition.

40 The expression ‘input tax credit’ is defined in Section 2 (63):

> “2(63) “input tax credit” means the credit of input tax”

Evidently, since input tax credit means the credit on input tax, the definition of the expression ‘input tax’ has to be read into Section 2(63) in understanding the ambit of the expression ‘input tax credit’. Now, input tax is the tax charged on the supply of goods or services or both. Apart from the above definitions there are three other

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definitions which must be noted at this stage. The expression 'inward supply' is defined in Section 2 (67) in the following terms:

> "2(67) "inward supply" in relation to a person, shall mean receipt of goods or services or both whether by purchase, acquisition or any other means with or without consideration."

41 The expression 'output tax' is defined in the following terms:

> "2(82) "output tax" in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis"

The expression 'outward supply' is defined in Section 2(83) thus:

> "2(83) "outward supply" in relation to a taxable person, means supply of goods or services or both, whether by sale, transfer, barter, exchange, licence, rental, lease or disposal or any other mode, made or agreed to be made by such person in the course or furtherance of business."

42 Again, as in the case of inward supply, the expression "outward supply" incorporates the supply of goods or services or both. The expression "output tax" in other words means tax chargeable under the Act on the taxable supply of goods or services or both. The above definitions fall into three clusters: the first cluster relates to receipt – Section 2(62), Section 2(63) and Section 2(67); the second cluster consists of outward supply and output tax - Section 2(82) and Section 2(83); and the third cluster consists of goods, services, input and input services – Section 2(52), Section 2(102), Section 2(59) and Section 2(60).

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F.2 Section 16 & Section 49 of the CGST Act

43 Section 16 is comprised in Chapter V and is titled as 'input tax credit'. The marginal note to Section 16 indicates that the provision relates to eligibility and conditions for taking ITC. Sub-Section (1) of Section 16 is in the following terms:

> "16 Eligibility and conditions for taking input tax credit. – (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person."

44 Under sub-Section (1) Section 16:

(i) every registered person shall be entitled to take credit to input tax charged on any supply of goods and services or both to him;

(ii) which are used or intended to be used in the course or furtherance of his business;

(iii) subject to such conditions and restrictions as may be prescribed; and

(iv) in the manner specified in Section 49.

45 The amount of input tax credit is to be credited in the electronic credit ledger of the registered person. Sub-Section (2) spells out the conditions upon the fulfilment of which the entitlement to the credit of input tax in respect of any supply of goods or services can be availed. Sub- Section (2) of Section 16 is in the following terms:

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"16. […]

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under Section 37

(b)he has received the goods or services or both.

Explanation.—For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services-

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person.

(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient

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> shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:
>
> Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon"

46 Section 16(2) indicates that the credit of input tax charged on any supply of goods or services, or both, can be availed of by a registered person subject to the conditions which are set out in the provisos. Input tax, as we have already seen, has been defined in Section 2(62) as tax charged on any supply of goods or services or both. The credit of input tax is, therefore, relatable both to the supply of goods and services. Whether tax is paid on the supply of goods or services, the recipients receive ITC in a similar manner. Taxes on goods and services are identifiable, but upon credit to the electronic ledger they form a common pool for utilization. Section 16(1) indicates that the manner in which input tax credit can be utilized is spelt out in Section 49. Sub- Section (1) of Section 49 provides:

> "Section 49 (1) - Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed..."

47 Sub-Section (3) of Section 49 envisages that the amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of the Act or its rules in the manner and subject to conditions and within such time as is prescribed.

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Similarly, sub-Section (4) of Section 49 stipulates that the amount available in the electronic credit ledger can be used for making payment towards output tax under the CGST Act or under the IGST Act in such manner and subject to the conditions and within such time as is prescribed. Sub-Section (5) of Section 49 spells out the priorities according to which the amount of ITC available in the electronic credit ledger can be utilized. Sub Section (6) of Section 49 is significant and provides as follows:

> "(6) The balance in the electronic cash ledger or electronic credit ledger after payment of tax, interest, penalty, fee or any other amount payable under this Act or the rules made thereunder may be refunded in accordance with the provisions of Section 54."

48 The provisions of Section 16 and Section 49 indicate the following position:

(i) The ITC in the electronic credit ledger may be availed of for making any payment towards output tax under the CGST Act or under the IGST Act;

(ii) The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the CGST Act or its rules;

(iii) The balance in the electronic cash ledger or electronic credit ledger after the payment of tax, interest, penalty, fees or any other amount payable under the Act or rules may be refunded in accordance with the provisions of Section 54; and

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(iv) Sub Section (6) of Section 49, in other words contemplates a refund of the balance which remains in the electronic cash ledger or electronic credit ledger in the manner stipulated by the provisions of Section 54.

F.3 Interpretation of Section 54(3) of the CGST Act

49 The controversy in the present case turns upon the interpretation of Section 54, which is found in Chapter XI titled as 'Refunds'. The marginal note of Section 54 is titled "Refund of Tax". Section 54(1) provides thus:

> "54. (1) Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed:

Under sub-Section (1) of Section 54, an application has to be made within two years of the relevant date by a person claiming refund of tax and interest (if any, paid on the tax or any other amount paid), in such form and manner as prescribed. Explanation 1 to Section 54 is in the following terms:

> "Provided that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in the return furnished under section 39 in such manner as may be prescribed."

Sub-Section (3) of Section 54 is in the following terms:

> "Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:
>
> Provided that no refund of unutilised input tax credit shall be allowed in cases other than—

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> (i) zero rated supplies made without payment of tax;
> (ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:
>
> Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:
>
> Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies."

50 The submission which was urged by the assessees before the Gujarat and Madras High Courts, as well as this Court, is that under the substantive part of Section 54(3), Parliament has contemplated that the claim of refund may extend to any unutilized ITC. ITC means credit of input tax and since 'input tax' is defined with reference to the tax charged on the supply of goods or services or both, a refund may be claimed not only of the tax charged on input goods but also input services as a whole. According to the Revenue, the first proviso to Section 54(3) is a restriction. On the other hand, assessees have urged that the first proviso sets out only a condition or provision for eligibility and once it is fulfilled, the refund is available on the entirety of the unutilized ITC including the credit which is relatable to tax paid on input goods and input services.

51 The crux of the dispute in the present case pertains to how sub-Section (3) to Section 54 and Explanation 1 to sub-Section (1) of Section 54 are to be understood and interpreted. For convenience of analysis, the interpretation of sub-Section (3) of

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Section 54 can be distributed in its main tier and the three provisos. The main part of sub-Section (3) provides that a registered person may claim refund of any unutilized ITC at the end of any tax period. Tax period is defined in Section 2(106) as the period for which the return is required to be furnished. While enacting Section 54(3), Parliament has envisaged a claim for the refund of unutilized ITC by a registered person at the end of the tax period. The first tier is the main provision of Section 54(3) which lays down four conditions:

(i) A claim of refund;

(ii) By a registered tax person;

(iii) Of any unutilized ITC; and

(iv) At the end of any tax period, subject to the provisions of sub-Section (10).

52 The second tier is the first proviso. The first proviso begins with the expression "no refund of unutilized ITC shall be allowed in cases other than" which is followed by clauses (i) and (ii). The opening line of the first proviso contains two expressions of significance, namely, "no refund shall be allowed" and "in cases other than". The expression 'allowed' in the proviso must be contrasted with the expression 'claim' in the substantive part of sub-Section (3). A refund can be allowed only in the eventualities envisaged in clauses (i) and (ii). The expression 'other than' operates as a limitation or restriction.

53 The third tier of sub-Section 54(3) consist of the two clauses of the first proviso which deal with two distinct cases: Clause (i) deals with zero-rated supplies

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made without payment of tax, while Clause (ii) deals with credit which has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies. Proviso (ii) embodies the concept of an inverted duty structure. Proviso (ii) states that the refund of unutilized ITC shall be allowed only when the credit has accumulated because the rate of tax of inputs is higher than the rate of tax on output supplies. Input, as we have already noted, is defined in Section 2(59) to mean **goods other than the capital goods**. 'Output supplies' is not defined in the statute. As seen above, Section 16 stipulates the eligibility and conditions for availing ITC. ITC accumulates when the credit cannot be utilized either partly or in whole and this may occur for a variety of reasons. The credit of ITC may accumulate for several reasons. Without spelling out an exhaustive list of circumstances, the accumulation may be due to: (a) an inverted duty structure when the GST on output supplies is less than the GST on inputs; (b) stock accumulation; (c) capital goods; and (d) partial reverse mechanism for certain services. There could be other reasons as well, such as excessive discounts or predatory pricing.

54 The distortion caused by unutilized accumulated ITC was noticed before the advent of the GST regime, in the context of the State VAT legislation under the erstwhile regime. A White Paper on State-level Value Added Tax by the Empowered Committee of State Finance Ministers dated 17 January 2005 contemplated that if any credit remained unutilized in a month, it will be carried forward. If even at the end of second year there is an excess unadjusted ITC, the same will be refunded:

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> "**Carrying Over of Tax Credit**
> 2.4 If the tax credit exceeds the tax payable on sales in a month, the excess credit will be carried over to the end of next financial year. If there is any excess unadjusted input tax credit at the end of second year, then the same will be eligible for refund…."

Based on this, a provision for refund of unadjusted ITC was inserted in Section 11 of the Gujarat Value Added Tax Act read with Rule 15(6) of the Gujarat Value Added Tax Rules 2006[25]. When the GST regime was under discussion, the first discussion paper by the Empowered Committee of State Finance Ministers published on 10 November 2009 acknowledged the problem of the accumulation of ITC on account of the rate of input tax being higher than output tax and suggested that a refund be provided of accumulated ITC. The relevant extract from the discussion paper dealing with the 'Salient features of the GST model' reads thus:

> "3.2…(vi) Ideally, the problem related to credit accumulation on account of refund of GST should be avoided by both the Centre and the States except in the cases such as exports, purchase of capital goods, input tax at higher rate than output tax etc. where, again refund/adjustment should be completed in a time bound manner."

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[25] Rule 15:
"(6) Where the tax credit (other than tax credit on capital goods) admissible in the year remains unadjusted against the output tax as per section 11, such amount shall be refunded not later than expiry of two years from the end of the year in which such tax credit had become admissible:

Provided that the dealer claiming such refund shall have to prove to the satisfaction of the assessing authority that the purchases of the goods on which such tax credit had been calculated have been disposed off in the manner referred to in sub-section (3) of section 11 within the period by which refund under this sub-rule becomes admissible."

See also, Section 51 of the Maharashtra Value Added Tax Act 2002 read with Rule 60 of the Maharashtra Value Added Tax Rules 2005

55 The report of the Joint Committee, Empowered Committee of State Finance Ministers on Business Process for GST and on Refund Process published in August 2015 noted that under the proposed GST law, ITC will be allowed, so as to remove the cascading effect of taxes and it is the ultimate customer who should bear the burden of taxes. However, the report noticed that there can be cases where there is an accumulation of credit due to an inverted duty structure. The report envisaged that there would fewer rates of taxes and exemptions under GST and hence, the chances of an inverted duty structure would be "minimal". At the same time, it recommended a refund of carried forward ITC in the following terms:

> "(H) REFUND OF CARRY FORWARD INPUT TAX CREDIT:
> i) As stated earlier, ITC is allowed to remove cascading and under modern VAT laws, tax is charged on value addition only and tax is not charged on tax. It is for this reason that the ultimate consumer is liable to bear the tax burden.
> ii) It is noted that the ITC may accumulate on account of the following reasons :
>
> a) Inverted Duty Structure i.e. GST on output supplies is less than the GST on the input supplies;
> b) Stock accumulation;
> c) Capital goods; and
> d) Partial Reverse charge mechanism for certain services.
>
> iii) As regards the accumulated ITC attributed to accumulation of stock or capital goods, it is recommended that GST Law may provide that refund of carried forward ITC may not be allowed and such amount would be carried forward to the next tax period (s). The GST Law may provide for appropriate provisions in this regard.
> iv) **Under the proposed GST law, it is proposed to have fewer tax rates and fewer exemptions and therefore it is felt that chances of inverted duty structure would not be there or would be very minimal. But still there might be a**

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> **possibility that ITC may accumulate on account of inverted duty structure.**
> **v) It is recommended that in such case, cash refund may be granted after due audit and should be sanctioned only after the input tax credit has been matched from the purchase and sales statements filed along with monthly returns. The refund would be granted on submission of application. It may be mentioned, however, that presently the Centre does not grant refund in such cases.**…"
>
> (**emphasis supplied**)

While enacting Clause (ii) of the first proviso to Section 54(3) in the CGST Act, Parliament, took legislative notice of a specific eventuality namely "where the credit has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies". Parliament would be cognizant of the fact that ITC may accumulate for a variety of reasons, of which an inverted duty structure is one situation. Parliament was legislating to provide for a **refund** and therefore restricted it to the two situations spelt out in clauses (i) and (ii) of the first proviso. 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. But 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);

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(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";

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(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.

56 The fulcrum of the argument of the assessees before the Gujarat and Madras High Courts and before this Court is that clause (ii) of the first proviso prescribes a condition of eligibility and not a restriction on the entitlement to refund. The entire basket of unutilized ITC, whether traceable to goods or services, is in the submission, eligible for refund. This submission has been made before the Court on three planes. The *first* plane on which the submission has been urged is that the purpose of enacting Section 54(3) was to ensure against a cascading effect or

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'sticking' inputs tax. According to the assesses, the GST regime is a result of a long-standing exercise of legislative preparation in the doctrine of equivalence and tax neutrality. According to the submission, the doctrine of equivalence postulated an equivalence between goods and services in the VAT regime, which must *a fortiori* be so under the auspices of a unified GST legislation which contemplates that businesses are only pass-through entities. The *second* plane of the submission is that the function of the GST Council, as specified in Article 279A(6), is that it is to be guided by the need for a harmonized structure of GST and a harmonized national market for goods and services. Clause (12A) of Article 366 provides for the levy of GST on both- goods and services. In this context, it was urged that in any fiscal regime, there are five essential components comprising of (a) taxable events; (b) taxable persons; (c) measure of tax; and (d) rate of tax; and (e) administrative machinery. In all these, it is urged that the CGST makes absolutely no distinction between goods and services. Section 16 which provides for the utilization of ITC makes no distinction between goods and services. The pale of the law, it was urged, applies substantive provisions similarly in the case of goods as well as services except as regard rates. But as regards rates, it was urged that even within the category of goods, the rates may or do vary. The legislature, for the first time, introduced anti-profiteering provisions based on the precept that a reduction in the rate of tax must be passed on to the consumer. When neutrality was not intended, as in the case of Section 17(5), a specific provision has been made by the legislature where the ITC cannot be availed of in those cases. Once the threshold of Section 17(5) is crossed, tax neutrality must, in their submission, be achieved.

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Finally, it was also urged that an inverted duty structure arises in many cases where the rate of tax on output supplies is reduced in order to fulfil certain objectives guided by public interest such as encouraging infrastructure development. In this backdrop, it was submitted that where the reduction of the rate of tax on outward supplies is in pursuance of the policy of the State, the ultimate object of achieving tax neutrality must be given full effect by fully effectuating a refund under Section 54(3) by allowing a refund of unutilized ITC, whether relatable to goods or services.

57 The submission based on the doctrine of equivalence places reliance on the decision of a three judge Bench of this Court in **Association of Leasing and Financial Service Companies** v. **Union of India**[26]. Chief Justice S H Kapadia, speaking for a three judge Bench, dealt with the validity of the provisions of Sections 65(12) and 65(105) (zm) of the Finance Act 1994, in so far as the said provisions sought to levy service tax on leasing and hire purchase. The levy of service tax on financial leasing services was challenged as being beyond the competence of Parliament by virtue of Article 366(29A) of the Constitution. While construing the issue, the Court adverted to the decision in **All India Federation of Tax Practitioners** (supra) and observed:

> "Service tax is an economic concept based on the principle of equivalence in a sense that consumption of goods and consumption of services are similar as they both satisfy human needs. Today with the technological advancement there is a very thin line which divides a "sale" from "service". That, applying the principle of equivalence, there is no

[26] 2011 (2) SCC 352

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> difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994. That service tax is, therefore, a tax on an activity. That, service tax is a value added tax. The value addition is on account of the activity which provides value addition, for example, an activity undertaken by a chartered accountant or a broker is an activity undertaken by him based on his performance and skill. This is from the point of view of the professional. However, from the point of view of his client, the chartered accountant/broker is his service provider. The value addition comes in on account of the activity undertaken by the professional like tax planning, advising, consultation, etc. It gives value addition to the goods manufactured or produced or sold. Thus, service tax is imposed every time service is rendered to the customer/client. This is clear from the provisions of Section 65(105)(*zm*) of the Finance Act, 1994."

58 The above formulation of the doctrine of equivalence dwelt on the economic rationale underlying the enactment of service tax. The economic rationale is based on the equivalence of goods and services, both of which are instruments for the satisfaction of human needs. The principle recognizes that there is, in economic terms, an equivalence between production or manufacture of saleable goods and production of marketable and saleable services. 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

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its plain terms. The Court cannot redraw legislative boundaries on the basis of an ideal which the law was intended to pursue.

59 Sub-Section (6) of Article 279A has provided that while discharging its functions the GST Council shall be guided by the need for (a) a harmonised structure of goods and service tax; and (b) the development of a harmonised national market for goods and services. In emphasizing the need, the constitutional provision reflects a goal, object and aspiration to be achieved. By emphasizing this, the provision underscores the vision that the GST Council should bear in mind in the discharge of its constitutional functions. The constitutional object is however to be realized under the auspices of legislation duly enacted under the provisions of Article 246A. The GST Council is intended to function towards the advancement of a harmonised structure for GST and market for goods and services. Contemporary doctrine would suggest that these objects of the fiscal regime may be furthered by bearing in mind (i) the doctrine of equivalence; (ii) the doctrine of neutrality; and (iii) the need of obviating secondary stage cascading effects. The realpolitik of tax policy and governance in the real world may not always match up to ideals. In an ideal tax regime, with a uniform rate of taxes on inputs goods, input services and outward supplies, the chance of accumulating unutilized ITC as a result of an inverted rate structure would be minimal. An inverted duty structure arises where the rate of tax on inputs exceeds the rate of tax on output supplies as a result of which the unutilized ITC may get accumulated. The jurisprudential material which has been relied upon by the assesses portrays an ideal state of GST legislation. In the well-

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known treatise on VAT, Alan Schenk and Oliver Oldman[27] explained the principled basis in VAT/GST legislation for the grant of refund of excess input tax credit. According to the authors:

> "II. Treatment of Excess Input Credits –Carry Forward, Offset, or Refund:
>
> As was discussed earlier and will be discussed in detail in Chapter 7, most countries define the jurisdictional reach of their VATs under the destination principle. **Applying the destination principle, exports are free of tax (zero rated). As a result, exporters commonly report excess input VAT in their periodic VAT returns. In addition, even registered persons making sales taxable at a positive rate may experience occasional excess input VATs, such as when they make capital purchases generating substantial input credits or when they increase their inventory as part of an expansion of their businesses.**
>
> There is an implicit assumption in VAT systems that registered persons will recover input VAT used in making taxable sales so that the input VAT does not enter into the pricing structure for those sales. To accomplish that goal, a normative or well-structured VAT must grant registered persons the right to recover excess input VATs within a reasonable period of time after incurring the input t(a)x (sic). …
>
> In the EU, the Sixth Directive provides that if there are excess input tax deductions, "Member States may either make a refund or carry the excess forward to the following period according to conditions which they shall determine. For Member States, excess credits must be refunded after being carried forward six months. However, Member States may refuse to refund or carry forward if the amount of the excess is insignificant…"
>
> (**emphasis supplied**)

[27] Alan Schenk and Oliver Oldman, VALUE ADDED TAX: A COMPARATIVE APPROACH (Cambridge Tax Law Series, 2007)

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60 The jurisprudential basis furnishes a depiction of an ideal state of existence of GST legislation within the purview of a modern economy, as a destination-based tax. But there can be no gain saying the fact that fiscal legislation around the world, India being no exception, makes complex balances founded upon socio-economic complexities and diversities which permeate each society. The form which a GST legislation in a unitary State may take will vary considerably from its avatar in a nation such as India where a dual system of GST law operates within the context of a federal structure. The ideal of a GST framework which Article 279A(6) embodies has to be progressively realized. The doctrines which have been emphasized by Counsel during the course of the arguments furnish the underlying rationale for the enactment of the law but cannot furnish either a valid basis for judicial review of the legislation or make out a ground for invalidating a validly enacted law unless it infringes constitutional parameters. While adopting the constitutional framework of a GST regime, Parliament in the exercise of its constituent power has had to make and draw balances to accommodate the interests of the States. Taxes on alcohol for human consumption and stamp duties provide a significant part of the revenues of the States. Complex balances have had to be drawn so as to accommodate the concerns of the states before bringing them within the umbrella of GST. These aspects must be borne in mind while assessing the jurisprudential vision and the economic rationale for GST legislation. But abstract doctrine cannot be a ground for the Court to undertake the task of redrawing the text or context of a statutory provision. This is clearly an area of law where judicial interpretation cannot be ahead of policy making. Fiscal policy ought not be dictated through the judgments of the

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High Courts or this Court. For it is not the function of the Court in the fiscal arena to compel Parliament to go further and to do more by, for instance, expanding the coverage of the legislation (to liquor, stamp duty and petroleum) or to bring in uniformity of rates. This would constitute an impermissible judicial encroachment on legislative power. Likewise, when the first proviso to Section 54(3) has provided for a restriction on the entitlement to refund it would be impermissible for the Court to redraw the boundaries or to expand the provision for refund beyond what the legislature has provided. If the legislature has intended that the equivalence between goods and services should be progressively realized and that for the purpose of determining whether refund should be provided, a restriction of the kind which has been imposed in clause (ii) of the proviso should be enacted, it lies within the realm of policy.

61 The submission which has been urged on behalf of the assessees is that registered persons constitute a class within the meaning of sub-Section (3) of Section 54 and each of them is entitled to claim a refund of unutilized ITC whether its origin lies in input goods or input services. In other words, it has been urged that Section 54(3) constitutes one homogenous class of registered persons who have unutilized ITC. The fallacy of the argument is in the hypothesis that unutilized ITC cannot be unbundled for the purpose of fiscal legislation. Accumulated ITC may result due to a variety of circumstances, some of which may while others may not lie within the volition of a registered person. We have referred to some of these factors earlier, including

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(i) High discount pricing;

(ii) Predatory pricing;

(iii) Shut down of business or industry;

(iv) Business loss;

(v) Economic compulsion to sell at below value prices; and

(vi) Stoppage of work.

62 These examples are indicators that the class, comprising of registered persons with unutilized ITC, covers a bundle of species as opposed to one unique or homogenous specie. Once we recognize this, it is necessary to allow the legislature the latitude to distinguish between credits arising out of the input goods stream and input service stream. GST legislation in India is the product of hard constitutional and legislative work which stretched over several decades. Our fiscal regime is yet to arrive at an ideological position of one bundle for goods and services based on a single rate structure. Broadly speaking, goods and services are taxed at 5 per cent, 12 per cent, 18 per cent and 40 per cent. As on date, there is an absence of uniformity in rates and it is the multiplicity of rates which has given rise to an inverted duty structure. Registered persons with unutilized ITC may conceivably form one class but it is not possible to ignore that this class consists of species of different hues. Given these intrinsic complexities, the legislature has to draw the balance when it decides upon granting a refund of accumulated ITC which has remained unutilized. In doing so, Parliament while enacting sub-Section (3) of Section 54 has stipulated that no refund of unutilized ITC shall be allowed other than in the two

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specific situations envisaged in clauses (i) and (ii) of the first proviso. Whereas clause (i) has dealt with zero rated supplies made without the payment of tax, clause (ii), which governs domestic supplies, has envisaged a more restricted ambit where the credit has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies. While the CGST Act defines the expression 'input' in Section 2(59) by bracketing it with goods other than capital goods, it is true that the plural expression 'inputs' has not been specifically defined. But there is no reason why the ordinary principle of construing the plural in the same plane as the singular should not be applied. To construe 'inputs' so as to include both input goods and input services would do violence to the provisions of Section 54(3) and would run contrary to the terms of Explanation-I which have been noted earlier. Consequently, it is not open to the Court to accept the argument of the assessee that in the process of construing Section 54(3) contextually, the Court should broaden the expression 'inputs' to cover both goods and services.

F.4 Construing the proviso

63 Provisos in a statute have multi-faceted personalities. As interpretational principles governing statutes have evolved, certain basic ideas have been recognized, while heeding to the text and context. Justice GP Singh, in his seminal text, *Principles of Statutory Interpretation*[28] formulates the governing principles of interpretation which have been adopted by courts while construing a statutory proviso. The first rule of interpretation is that:

[28] Justice GP Singh, PRINCIPLES OF STATUTORY INTERPRETATION 215-234, (14th Ed., Lexis Nexis)

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> "**The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment.** As stated by LUSH, J.: "When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject- matter of the proviso. In the words of LORD MACMILLAN: "The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case." The proviso may, as LORD MACNAGHTEN laid down, be "a qualification of the preceeding enactment which is expressed in terms too general to be quite accurate". The general rule has been stated by HIDAYATULLAH, J., in the following words: "As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule". And in the words of KAPUR, J.: "The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment."[29]
>
> (**emphasis supplied**)

64 But then these principles are subject to other principles of statutory interpretation which may supplement or even substitute the above formula. These other rules which have been categorized by Justice GP Singh are summarized as follows:

(i) A proviso is not construed as excluding or adding something by implication:

> "Except as to cases dealt with by it, a proviso has no repercussion on the interpretation of the enacting portion of

[29] Id

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> the section so as to exclude something by implication which is embraced by clear words in the enactment."[30]

(ii) A proviso is construed in relation to the subject matter of the statutory provision to which it is appended:

> "The language of a proviso even if general is normally to be construed in relation to the subject-matter covered by the section to which the proviso is appended. In other words normally a proviso does not travel beyond the provision to which it is a proviso. "It is a cardinal rule of interpretation", observed BHAGWATI, J., "that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other."[31]

(iii) Where the substantive provision of a statute lacks clarity, a proviso may shed light on its true meaning:

> "If the enacting portion of a section is not clear, a proviso appended to it may give an indication as its true meaning. As stated by LORD HERSCHELL: " Of course a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonably admit of doubt as to having this scope or that, which is the proper view to take of it."[32]

(iv) An effort should be made while construing a statute to give meaning both to the main enactment and its proviso bearing in mind that sometimes a proviso is inserted as a matter of abundant caution:

[30] Id at p. 218
[31] Id at p. 221
[32] Id at p. 223

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> "The general rule in construing an enactment containing a proviso is to construe them together without making either of them redundant or otiose. Even if the enacting part is clear effort is to be made to give some meaning to the proviso and to justify its necessity. But a clause or a section worded as a proviso, may not be a true proviso and may have been placed by way of abundant caution."[33]

(v) While ordinarily, it would be unusual to interpret the proviso as an independent enacting clause, as distinct from its main enactment, this is true only of a real proviso and the draftsperson of the statute may have intended for the proviso to be, in substance, a fresh enactment:

> "To read a proviso as providing something by way of an addendum or as dealing with a subject not covered by the main enactment or as stating a general rule as distinguished from an exception or qualification is ordinarily foreign to the proper function of a proviso. However, this is only true of a real proviso. The insertion of a proviso by the draftsman has not always strictly adhered to its legitimate use and at times a section worded as a proviso may wholly or partly be in substance a fresh enactment adding to and not merely excepting something out of or qualifying what goes before."[34]

65 Perhaps the most comprehensive and oft-cited precedent governing the interpretation of a proviso is the decision of this Court in **S Sundaram Pillai** v. **V R Pattabiraman**[35]. Justice S Murtaza Fazal Ali speaking for a three judge Bench of this Court held:

> "43. …To sum up, a proviso may serve four different purposes:

[33] Id at p. 226
[34] Id at p. 228
[35] (1958) 1 SCC 591

> (*1*) qualifying or excepting certain provisions from the main enactment:
> (*2*) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable:
> (*3*) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and
> (*4*) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

66 While enunciating the above principles, **S Sundaram Pillai** (supra) took note of the decision in **Hiralal Rattanlal** v. **State of UP**[36] where Justice KS Hegde, speaking for a four judge Bench of this Court observed that while ordinarily, a proviso is in the nature of an exception, the precedents indicate that sometimes a proviso is in the nature of a separate provision, with a life of its own. The Court held:

> "22… Ordinarily a proviso to a section is intended to take out a part of the main section for special treatment. It is not expected to enlarge the scope of the main section. But cases have arisen in which this Court has held that despite the fact that a provision is called a proviso, it is really a separate provision and the so-called proviso has substantially altered the main section. In *CIT* v. *Bipinchandra Maganlal & Co. Ltd., Bombay* [AIR 1961 SC 1040 : (1961) 2 SCR 493 : (1961) 41 ITR 290] this Court held that by the fiction in Section 10(2)(*vii*) second proviso read with Section 2(6-C) of the Indian Income Tax Act, 1922 what is really not income is, for the purpose of computation of assessable income, made taxable income."

Besides the decision in **CIT** v. **Bipinchandra Maganlal**[37], the Court in **Hiralal Rattanlal** (supra) adverted to the earlier decisions in **State of Rajasthan** v. **Leela**

[36] (1973) 1 SCC 216
[37] AIR 1961 SC 1040

Jain[38] and **Bihar Cooperative Development Cane Marketing Union Ltd.** v. **Bank of Bihar**[39].

67 In their effort to persuade this Court to accept the submission that the first proviso to Section 54(3) is in the nature of an eligibility condition as distinct from a restriction on the substantive part (contained in the opening words) of the provision, Counsel appearing on behalf of the assessees have sought to buttress their submissions with the following facets:

(i) Clause (ii) of the first proviso refers to "rate of tax" as distinct from the quantum of tax;

(ii) The expression "in cases other than where…" adverts to situations or circumstances;

(iii) The expression "on account of" would mean "due to";

(iv) The use of the expression 'inputs' (the singular being defined in Section 2(59) but not the plural) and the corresponding use of the expression "output supplies" (which is not defined, though "outward supply" is defined in Section 2(83));

(v) Section 54(8) and Section 49(6) provide that the balance in the electronic credit ledger is to be refunded and makes no distinction between a credit relatable to goods or to services;

[38] AIR 1965 SC 1296
[39] AIR 1967 SC 389

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(vi) The expression "on account of" has been used in Section 22(3) and Section 18(3) and is distinct from the use of the expression "to the extent of" in Section 23(1)(b) and the proviso to Section 12(2). "To the extent of" is a limiting expression and has a distinct connotation from "on account of";

(vii) The Ministry of Finance has issued a circular dated 31 December 2018[40] clarifying the following position:

> "4. Representations have been received stating that while processing the refund of unutilized ITC on account of inverted tax structure, the departmental officers are denying the refund of ITC of GST paid on those inputs which are procured at equal or lower rate of GST than the rate of GST on outward supply, by not including the amount of such ITC while calculating the maximum refund amount as specified in rule 89(5) of the CGST Rules. The matter has been examined and the following issues are clarified:
>
> a) Refund of unutilized ITC in case of inverted tax structure, as provided in section 54(3) of the CGST Act, is available where ITC remains unutilized even after setting off of available ITC for the payment of output tax liability. Where there are multiple inputs attracting different rates of tax, in the formula provided in rule 89(5) of the CGST Rules, the term "Net ITC" covers the ITC availed on all inputs in the relevant period, irrespective of their rate of tax.
> b) The calculation of refund of accumulated ITC on account of inverted tax structure, in cases where several inputs are used in supplying the final product/output, can be clearly understood with help of the following example:
> i. Suppose a manufacturing process involves the use of an input A (attracting 5 per cent GST) and input B (attracting 18 per cent GST) to manufacture output Y (attracting 12 per cent GST).

[40] Circular No 79/53/2018-GST available at <https://www.cbic.gov.in/resources//htdocs-cbec/gst/Circular-No-79.pdf;jsessionid=CFAC18978FCA5664090473EACD101561> (accessed on 12 September 2021)

ii. The refund of accumulated ITC in the situation at (i) above, will be available under section 54(3) of the CGST Act read with rule 89(5) of the CGST Rules, which prescribes the formula for the maximum refund amount permissible in such situations.

iii. Further assume that the claimant supplies the output Y having value of Rs. 3,000/- during the relevant period for which the refund is being claimed. Therefore, the turnover of inverted rated supply of goods and services will be Rs. 3,000/-. Since the claimant has no other outward supplies, his adjusted total turnover will also be Rs. 3,000/-.

iv. If we assume that Input A, having value of Rs. 500/- and Input B, having value of Rs. 2,000/-, have been purchased in the relevant period for the manufacture of Y, then Net ITC shall be equal to Rs. 385/- (Rs. 25/- and Rs. 360/- on Input A and Input B respectively).

v. Therefore, multiplying Net ITC by the ratio of turnover of inverted rated supply of goods and services to the adjusted total turnover will give the figure of Rs. 385/-.

vi. From this, if we deduct the tax payable on such inverted rated supply of goods or services, which is Rs. 360/-, we get the maximum refund amount, as per rule 89(5) of the CGST Rules which is Rs. 25/-."

68 Para 4(b) of the Circular thereafter proceeds to give certain illustrations. The above circular, it is urged, would demonstrate that the phrase "on account of" in the proviso is interpreted by the State qua goods as a threshold condition. Hence even if one input in the basket of inputs of a manufacturer results in an inverted duty structure, the whole of the accumulated ITC can be availed of. On the other hand, for services the same phrase is interpreted so as to mean 'to the extent of'. The expression "on account of" as understood for goods by the above circular must apply for services as well, meaning thereby that it is a threshold condition alone.

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69 The above submissions demonstrate the scholarship which has been brought to bear upon the controversy by Counsel appearing on behalf of the assessees. The above aspects of the statutory provision – Section 54(3) - must be juxtaposed together with all the features of the statutory provision including Explanation- I which have been adverted to earlier. The analysis earlier indicates why on a reading of the provision as a whole, clauses (i) and (ii) of the first proviso are restrictions and not mere conditions of eligibility. It is not possible for the Court to restrict the ambit of clause (ii) of the proviso, based on a circular which has been issued by the Ministry of Finance on 31 December 2018. In substance, the argument boils down to an effort to lead this Court to hold that in spite of the language which has been used in clause (ii) of the first proviso, (where the credit is accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies), input services must be read into the term "inputs". The assessees argue that the Departmental understanding, as reflected in the circular, should be the basis of interpreting a statutory provision. Such an exercise would be impermissible, when its effect is to expand the area of refund contemplated by the first proviso to cover input services in addition to input goods despite statutory language to the contrary. 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

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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

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services would lead to recognising an entitlement to refund, beyond what was contemplated by Parliament.

70 We must be cognizant of the fact that no constitutional right is being asserted to claim a refund, as there cannot be. Refund is a matter of a statutory prescription. Parliament was within its legislative authority in determining whether refunds should be allowed of unutilised ITC tracing its origin both to input goods and input services or, as it has legislated, input goods alone. By its clear stipulation that a refund would be admissible only where the unutilised ITC has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies, Parliament has confined the refund in the manner which we have described above. While recognising an entitlement to refund, it is open to the legislature to define the circumstances in which a refund can be claimed. 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.

F.5 Constitutional validity: The *ultra vires* doctrine

71 The submission which has been urged on behalf of the assessees is that if Section 54(3) is construed to confine a refund of unutilised ITC only to the extent that the accumulation arises on account of the rate of tax on inputs (meaning input goods) exceeding the rate of tax on outward supplies, the principles underlying Article 14 of the Constitution would be attracted and the statutory provision would

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suffer from the vice of arbitrariness. The submission is that this has become an incident of a class legislation: the class consists of registered persons having unutilised ITC. The class comprises of the following species (i) domestic suppliers; and (ii) exporters. The sub-species are (i) input goods; and (ii) input services. Opposing this submission, the learned ASG's submission is that this is a valid classification, denying one of the species namely input services the benefit of refund.

72 The principle which Counsel for the assesses espouse is sought to be buttressed by relying upon the decision in **State of Jammu & Kashmir** v. **Triloki Nath Khosa**[41] and in **Re The Special Courts Bill, 1978**[42]. The principles which are gleaned by Counsel from the above decisions, in their application to the present case, are that:

(i) Once the ITC comes within the fold of the electronic credit ledger and is comprised into a homogenous credit, a 'micro distinction' cannot be carried out; and

(ii) A similarity of features between species comprised in the class is sufficient: in the case of goods as well as services, the taxable event is the value addition tax and the administrative machinery treats goods as well as services similarly. The mere fact of goods being tangible is a matter of no consequence.

[41] (1974) 1 SCC 19
[42] (1979) 1 SCC 380

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73 Equality, it has been stressed in the above submission, cannot be cabined, cribbed and confined. Differentiating between goods and services, it has been urged, is not permissible and does not have a reasonable nexus to the object sought to be achieved. There is an evident difference in the rates at which goods and services are taxed but, according to the submission, this is not a provision for revenue harvesting. Finally, on this limb of submission, it has been urged that the wide latitude which is available with the legislature in the case of fiscal legislation is only where a revenue harvesting measure is involved. The twin test of reasonableness and the nexus with the object sought to be achieved must be demonstrated. The nexus (a) must be based on the object of the legislation alone; and (b) indicate a discernible principle which emanates from the classification. With the clarification on inputs by the Ministry of Finance, it is urged that no discernible principle emerges.

74 Counsel for the assesses also argued that before the High Courts of Gujarat and Madras, the Union Government did not urge that outflow of finance was the reason to exclude refunds on input services and it is not open to the Court to conjure up a reason. In support of the above submissions on constitutional validity, which have been urged by Mr Sujit Ghosh, learned Counsel, Mr Arvind Datar, learned Senior Counsel has urged that it would be paradoxical to posit on the one hand that goods and services are *pari materia* for the purpose of levy, collection and penalty but, that a distinction will be made between them for the purpose of refund.

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75 As a matter of first principle, it is not possible to accept the premise that the guiding principles which impart a measure of flexibility to the legislature in designing appropriate classifications for the purpose of a fiscal regime should be confined only to the revenue harvesting measures of a statute. The precedents of this Court provide abundant justification for the fundamental principle that a discriminatory provision under tax legislation is not *per se* invalid. A cause of invalidity arises where equals are treated as unequally and unequals are treated as equals. Both under the Constitution and the CGST Act, goods and services and input goods and input services are not treated as one and the same and they are distinct species.

76 Parliament engrafted a provision for refund Section 54(3). In enacting such a provision, Parliament is entitled to make policy choices and adopt appropriate classifications, given the latitude which our constitutional jurisprudence allows it in matters involving tax legislation and to provide for exemptions, concessions and benefits on terms, as it considers appropriate. The consistent line of precedent of this Court emphasises certain basic precepts which govern both judicial review and judicial interpretation of tax legislation. These precepts are:

(i) Selecting the objects to be taxed, determining the quantum of tax, legislating for the conditions for the levy and the socio-economic goals which a tax must achieve are matters of legislative policy. Chief Justice M. Hidayatullah, speaking for the Constitution Bench in **Assistant**

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Commissioner of Urban Land Tax v. **Buckingham and Carnatic Co. Ltd.**[43] held:

> "10…The objects to be taxed, the quantum of tax to be levied, the conditions subject to which it is levied and the social and economic policies which a tax is designed to subserve are all matters of political character and these matters have been entrusted to the Legislature and not to the Courts. In applying the test of reasonableness it is also essential to notice that the power of taxation is generally regarded as an essential attribute of sovereignty and constitutional provisions relating to the power of taxation are regarded not as grant of power but as limitation upon the power which would otherwise be practically without limit.

(ii) The same principle has been reiterated in **Federation of Hotel & Restaurant Association of India** v. **Union of India**[44], where Justice MN Venkatachaliah (as the learned Chief Justice then was), speaking for the Constitution Bench held:

> "46. It is now well settled that though taxing laws are not outside Article 14, however, having regard to the wide variety of diverse economic criteria that go into the formulation of a fiscal policy legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc., for taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the allegations of a hostile, discriminatory treatment what is looked into is not its phraseology, but the real effect of its provisions. A legislature does not, as an old saying goes, have to tax everything in order to be able to tax something. If there is equality and uniformity within each group, the law would not be discriminatory. Decisions of this Court on the matter have permitted the legislatures to exercise an extremely wide discretion in classifying items for tax purposes, so long as it

[43] (1969) 2 SCC 55
[44] (1989) 3 SCC 634

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> refrains from clear and hostile discrimination against particular persons or classes.
>
> 47. But, with all this latitude certain irreducible desiderata of equality shall govern classifications for differential treatment in taxation laws as well. The classification must be rational and based on some qualities and characteristics which are to be found in all the persons grouped together and absent in the others left out of the class. But this alone is not sufficient. Differentia must have a rational nexus with the object sought to be achieved by the law. The State, in the exercise of its governmental power, has, of necessity, to make laws operating differently in relation to different groups or classes of persons to attain certain ends and must, therefore, possess the power to distinguish and classify persons or things. It is also recognised that no precise or set formulae or doctrinaire tests or precise scientific principles of exclusion or inclusion are to be applied. The test could only be one of palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by experience."

(iii) In matters of classification, involving fiscal legislation, the legislature is permitted a larger discretion so long as there is no transgression of the fundamental principle underlying the doctrine of classification. In **Hiralal Rattanlal** (supra), Justice KS Hegde, speaking for a four judge Bench observed:

> "20. It must be noticed that generally speaking the primary purpose of the levy of all taxes is to raise funds for public good. Which person should be taxed, what transaction should be taxed or what goods should be taxed, depends upon social, economic and administrative considerations. In a democratic set up it is for the Legislature to decide what economic or social policy it should pursue or what administrative considerations it should bear in mind. The classification between the processed or split pulses and unprocessed or unsplit pulses is a reasonable classification. It is based on the use to which those goods can be put. Hence,

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> in our opinion, the impugned classification is not violative of Article 14."

(iv) More recently in **Union of India** v. **NITDIP Textile Processors Private Limited**[45], a two judge Bench observed:

> "67. It has been laid down in a large number of decisions of this Court that a taxation statute, for the reasons of functional expediency and even otherwise, can pick and choose to tax some. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the judicature cannot rush in where even the legislature warily treads. All these operational restraints on judicial power must weigh more emphatically where the subject is taxation. Discrimination resulting from fortuitous circumstances arising out of particular situations, in which some of the tax-payers find themselves, is not hit by Article 14 if the legislation, as such, is of general application and does not single them out for harsh treatment. Advantages or disadvantages to individual assessees are accidental and inevitable and are inherent in every taxing statute as it has to draw a line somewhere and some cases necessarily fall on the other side of the line."

77 The principles governing a benefit, by way of a refund of tax paid, may well be construed on an analogous frame with an exemption from the payment of tax or a reduction in liability (**Assistant Commissioner of Commercial Tax (Asst.)** v. **Dharmendra Trading Company**[46]).

78 In **Elel Hotels and Investments Limited and Others** v. **Union of India**[47]**,** Justice MN Venkatachaliah (as the learned Chief Justice then was) held that:

[45] (2012) 1 SCC 226
[46] (1988) 3 SCC 570
[47] (1989) 3 SCC 698

> "20…It is now well settled that a very wide latitude is available to the legislature in the matter of classification of objects, persons and things for purposes of taxation. It must need to be so, having regard to the complexities involved in the formulation of a taxation policy. Taxation is not now a mere source of raising money to defray expenses of Government. It is a recognised fiscal tool to achieve fiscal and social objectives. The differentia of classification presupposes and proceeds on the premise that it distinguishes and keeps apart as a distinct class hotels with higher economic status reflected in one of the indicia of such economic superiority. The presumption of constitutionality has not been dislodged by the petitioners by demonstrating how even hotels, not brought into the class, have also equal or higher chargeable receipts and how the assumption of economic superiority of hotels to which the Act is applied is erroneous or irrelevant."

79 In **Spences Hotel Pvt Ltd.** v. **State of West Bengal**[48]**,** a two judge Bench, speaking through Justice KN Saikia, revisited the precedents of this Court governing the principles of classification in tax legislation and held:

> "24…The history of taxation is one of evolution as is the case in all human affairs. Its progress is one of constant growth and development in keeping with the advancing economic and social conditions; and the fiscal intelligence of the State has been advancing concomitantly, subjecting by new means and methods hitherto untaxed property, income, service and provisions to taxation. With the change of scientific, commercial and economic conditions and ways of life new species of property, both tangible and intangible gaining enormous values have come into existence and new means of reaching and subjecting the same to contribute towards public finance are being developed, perfected and put into practical operation by the legislatures and courts of this country, of course within constitutional limitations."

[48] (1991) 2 SCC 154

80 The Court held that the principle of equality does not preclude the classification of property, trade, profession and events for taxation – subjecting one kind to one rate of taxation and another to a different rate. The State may exempt certain classes of property from any taxation at all and impose different specific taxes upon different species which it seeks to regulate. The Court held:

> "27. "Perfect equality in taxation has been said time and again, to be impossible and unattainable. Approximation to it is all that can be had. Under any system of taxation, however, wisely and carefully framed, a disproportionate share of the public burdens would be thrown on certain kinds of property, because they are visible and tangible, while others are of a nature to elude vigilance. It is only where statutes are passed which impose taxes on false and unjust principle, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect on those who are to bear the public charges that courts can interpose and arrest the course of legislation by declaring such enactments void." "Perfectly equal taxation", it has been said, "will remain an unattainable good as long as laws and government and man are imperfect." 'Perfect uniformity and perfect equality of taxation', in all the aspects in which the human mind can view it, is a baseless dream."

81 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

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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).

G Rule 89(5)

82 Rule 89(5) of the CGST Rules provides for the computation of the refund of ITC on account of an inverted duty structure. The rule, as it was originally enacted, provided for a refund of ITC paid both on input goods and input services. Rules 89(5) was amended on 18 April 2018 with prospective effect. On 13 June 2018, Rule 89(5) as amended was substituted with retrospective effect from 1 July 2017. The

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effect of this amendment is that refund of unutilized ITC can only be availed on input goods.

83 Section 164 of the CGST Act empowers the 'government' (the expression 'government' being defined in Section 2(53) to mean the Central Government) to make rules for carrying out the provisions of the Act on the recommendations of the GST Council. Sub-Section (3) of Section 164 stipulates that that power to make rules shall include the power to make rules with retrospective effect not earlier than the date on which the provisions of the Act came into force. As a result of the amendment of Rule 89(5), the formula which has been specified for the refund of ITC is as follows:

> "Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} – tax payable on such inverted rated supply of goods and services.
>
> Explanation- For the purposes of this sub-rule, the expressions-
>
> (a) Net ITC shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and
>
> (b) Adjusted Total turnover shall have the same meaning as assigned to them in sub-rule (4)."

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G.1 The validity of Rule 89(5) of CGST Rules in exercise of the rule-making power under Section 164 of the CGST Act

84 A preliminary submission which has been urged by Mr V Sridharan, learned Senior Counsel is that the rule-making power under Section 164 of the CGST Act can only be used if specific authority for making the rule is granted by the particular section of the CGST Act. Elaborating on this submission, Mr V Sridharan has submitted that under the CGST Act, various sections expressly employ the word "prescribed" to indicate that rules may be formulated by way of delegated legislation for that particular section. As an instance, Mr Sridharan points out that Section 9 provides that the manner in which tax is to be collected may be 'prescribed'; Section 16(1) provides for conditions and restrictions for availing ITC which may be 'prescribed' and Section 31(2) provides that the time within which a person supplying a taxable service must issue an invoice may be 'prescribed'. These are examples where the statute has expressly contemplated that rules would have to be framed to give effect to a specific provision. It is the submission of Mr Sridharan that in the absence of such words in the text of the legislation, the government cannot exercise its authority under Section 164 of the CGST Act to frame rules for other sections. Thus, since Section 54(3) does not provide any words which indicate that specific authority has been granted for framing rules, Rule 89(5) is (according to the submission) invalid.

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85 We are unable to accept the above submission as it proceeds on a misconception. Under Section 164(1), confers an express power on the Central Government to make rules for carrying out the provisions of the CGST Act on the recommendations of the GST Council. It may be true that in certain specific statutory provisions, the Act recognizes, by using the expression 'prescribes', that rules may be framed for that purpose. But the converse cannot be assumed inferentially, by presuming that in other areas, recourse to the rule making power cannot be taken. By its very nature, a statutory provision may not visualize every eventuality which may arise in implementing the provisions of the Act. Hence it is open to the rule making authority to frame rules, so long as they are consistent with the provisions of the parent enactment. The rules may interstitially fill-up gaps which are unattended in the main legislation or introduce provisions for implementing the legislation. So long as the authority which frames the rules has not transgressed a provision of the statute, it cannot be deprived of its authority to exercise the rule making power. 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. If such a construction, as Mr Sridharan has hypothesised, were to be acceptable, it would render the provisions of Section 164 otiose. Thus, we find that 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.

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G.2 The vires of Rule 89(5) vis-à-vis Section 54(3) of the CGST Act

86 The next submission which has been urged by Mr V Sridharan, learned Senior Counsel is that Rule 89(5) is not in line with Section 54(3). The rule, as retrospectively amended, is asserted to be *ultra vires* Section 54(3) in as much as it restricts the computation of refund by taking into account only the credit availed on input goods. Moreover, under Section 54(1), the CGST Rules can provide only the form and manner in which an application for refund can be made and the substantive provisions of the CGST Act cannot, it is urged, be curtailed by making a contrary rule. The above submission which seeks to apply the doctrine of *ultra vires* is based on the hypothesis that the rule is not in line with Section 54(3). The submission, in other words, is based on the assumption that Section 54(3) allows for a refund of unutilized ITC as a result of an inverted duty structure due to input goods as well as input services.

87 The second limb of Mr Sridharan's submission is that any rules framed under Section 164 of the CGST Act must be for "carrying out the provisions of the Act". According to the submission, Section 54(3) provides for entitlement to refund of unutilized ITC, its quantum and for cases in which refund is to be granted. This is a complete code which does not require any rules for its operations and there is no reference in Section 54(3) enabling the Government to frame rules in this regard. Hence, the exercise of the rule making power is urged to be unnecessary and unwarranted.

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88 The rule-making power under Section 164(1) of the CGST Act may be exercised in numerous situations. As we have already noticed earlier in this judgment accumulation of credit may occur due to a variety of reasons including the absence of outwards supplies in a tax period, making supplies at a loss including by discount or predatory pricing, bulk purchase of inputs, large opening balance of credit or change in the rate of tax during the tax period. A rule providing for identifying unutilized ITC which is attributable to supplies having an inverted duty structure and bifurcating it from credit which has accumulated due to other causes would be a rule required for carrying out the provisions of the Act. A second instance to illustrate the same point is that a rule may provide a proportionate formula for determining the pro rata amount of ITC relatable to the inverted duty structure vis-à-vis the total turnover. Such a formula is necessary where the assessee is engaged in outward supplies involving an inverted duty structure as well as those not involving an inverted duty structure. In fact, Mr Sridharan in his submissions also accepts that such a formula would be a rule made for carrying out provisions of the Act. The third illustration in the link is with reference to exports. Under the CGST Act, ITC relatable to exports (which are zero-rated supplies) has to be refunded. The assessee may have both domestic sales as well as exports in which event there is a need for a proportionate formula. Rule 89(4) provides a formula for refund of ITC to cover a situation in which zero-rated supplies of goods or services or both has been done without payment of tax under bond or letter of undertaking in accordance with Section 16(3) of the IGST Act.

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89 Mr Sridharan, while arguing that Section 54(3) is a complete code in itself and does not warrant a rule to further the provisions of the Act, fairly concedes in his written note that a formula maybe required for bifurcating the accumulated ITC for the purpose of refund. According to the illustration which has been furnished by Mr Sridharan in his written note, where an assessee has supplies which fall under an inverted duty structure and supplies which do not, a refund of unutilized ITC can be availed of only related to the former but not the latter. A formula would be required to compute the ITC attributable to the two categories so that a refund is granted to the former and not the latter. Rule 89(5) estimates the refund attributable to the inverted duty structure by adopting a proportionate turnover basis, that is by dividing the turnover of inverted duty structure supplies by the adjusted total turnover and multiplying it with the 'Net ITC'. The submission proceeds to concede that the need and rationale for the formula contained in Rule 89(5) in considering the turnover of supplies relating to inverted duty structure vis-à-vis overall turnover is "understandable and reasonable".

90 The grievance however is that Rule 89(5) goes beyond the "provisions of the Act" when in the garb of fixing a formula, it restricts the refund of ITC to input goods by denying ITC of input services. This is done by defining 'Net ITC' to mean ITC availed of inputs. The gravamen of the challenge is that this consequently ignores ITC relatable to input services. In other words, the submission is that Rule 89(5) cannot be construed to be a rule for carrying out the "provisions of the Act".

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91 Mr V Sridharan has also submitted that in case a rule restricts the purpose of the legislation, it can be struck down if it is *ultra vires* the principal statute. This is because despite a provision for laying rules before a House of Parliament, subjecting them to the procedure for modification and annulment, a rule can never be equated with the process of legislation since in particular the rule lacks the assent of the President or the Governor as the case may be. In support of his submission, he has relied on the decision of a Constitution Bench in **Kerala State Electricity Board** v. **Indian Alluvium Co. Ltd.**[49] and the decision in **Bharat Hari Singhania** v. **Commissioner of Wealth Tax (Central)**[50] rendered by a three judge Bench.

92 The second limb of the line of challenge is that even though the rules are required to be recommended by the GST Council this will not elevate them to the status of a law enacted by the legislature. The submission which has been urged by Mr V Sridharan proceeds on an underlying assumption which is that Rule 89(5) by restricting the definition of Net ITC to mean ITC availed on input goods is an affront to Section 54(3). It is on this foundation, that it has been urged that a rule which is contrary to the statute cannot be saved merely on the ground that either (i) the rule has been laid before Parliament and is subject to its power of modification annulment or amendment; or (ii) the rule was made on the recommendations of the GST Council. The application of the second layer of the argument does not arise in

[49] (1976) 1 SCC 466
[50] (1994) Supp 3 SCC 46

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. 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.

93 For the sake of clarity, it is necessary to reproduce para 24.6 and para 24.7 of the written submissions of Mr V Sridharan:

> "24.5 Similarly, this… court has in several cases extended the benefit of exemption/ lower rate in case where such denial to a particular case was ultra vires or unconstitutional, thereby enlarging the scope of beneficial provision.
>
> 24.6 In the present case, challenge to the vires of Rule 89(5) is only because of definition of Net ITC in Explanation to the said rule which defines "Net ITC" as under:
>
> "Net ITC" shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both"

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94 Mr Sridharan urges that the words 'inputs' in Explanation (a) to Rule 89(5) be struck down as being severable to bring it "entirely in line with the main provision". We are unable to accept this submission. Explanation (a) to Rule 89(5) in defining 'Net ITC' to mean ITC availed on inputs (goods) is, as a matter of fact, entirely in line with the main provision, Section 54(3). On the contrary, to accept the submission of Mr Sridharan, would expand the ambit of Rule 89(5) beyond the terms governing the admissibility of a refund under Section 54(3) and would be hence impermissible.

G.3 The validity of the formula prescribed in Rule 89(5)

95 Mr G Natarajan, Mr Sujit Ghosh, learned Counsel, and Mr V Sridharan, learned Senior Counsel, have also urged an alternative submission for the challenge to Rule 89(5). It has been submitted that the formula prescribed in Rule 89(5) which seeks to grant refund of the ITC accumulated on account of input goods, is inherently flawed and will lead to anomalous results. The alternative submission is made on the assumption that Section 54(3)(ii) read with Rule 89(5) is restricted to refund of ITC accumulated on account of input goods only, and not input services.

96 Mr G Natarajan, learned Counsel appearing on behalf of the intervenor, has submitted that as it was originally framed, 'Net ITC' in Rule 89(5) allowed for a refund on account of an inverted duty structure both for input goods and input services. The position was amended initially on 18 April 2018 with prospective effect and thereafter on 13 June 2018 with retrospective effect on 1 July 2017. The formula prescribed in Rule 89(5) seeks to identify the quantum of ITC availed on input goods

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attributable to the outward supplies having an inverted rate structure. From such quantum of ITC on input goods, the tax payable by the supplier on such inverted rated supplies of goods and services is reduced to arrive at the quantum of credit accumulating on account of inverted rate structure, which is eligible for refund. The submission of Mr Natarajan is that in the formula prescribed under Rule 89(5), while reducing "tax payable on such inverted rated supplies of goods or services", the tax-payer should first be allowed to utilize the ITC availed on input services which is otherwise not eligible for refund. If the formula prescribed under Rule 89(5) is not construed in the above manner, it is alleged that it will lead to inequality between taxpayers dealing with outward supplies involving only an inverted rate structure (single line of goods) and taxpayers dealing with outward supplies having both an inverted rate structure and those not having inverted rate structure. Thus, it has been submitted that the Court should read down the formula prescribed in Rule 89(5) to the effect that while calculating the refund entitlement as the difference between Net ITC and tax payable on such supplies having inverted rate structure, it is presumed that the ITC accumulated on account of input services be allowed to be used for payment of tax payable on inverted goods and services, and the remaining balance of tax, which is paid out of accumulated ITC on account of input goods, is deducted from Net ITC in the formula.

97 Mr G Natarajan's submission indicates an aberration where a registered person with a single product with an inverted duty structure is neither able to use the unutilized ITC for the payment of tax on output supply nor is allowed a refund. On

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the other hand, a registered person with products involving an inverted duty structure and otherwise, is in a position to utilise the ITC availed on input services for payment of tax on turnover not having an inverted rate structure. Mr G Natarajan has given the following example:

S. No.	Description	Tax payer having only turnover of inverted rate structure	Tax payer having both turnover of inverted rate structure and other turnover
(i)	(ii)	(iii)	(iv)
1	Value of supply of goods, attracting 5% GST (Turnover having inverted rate structure)	Rs. 50,00,000	Rs. 50,00,000
2	Value of supply of goods, not having inverted rate structure	NIL	Rs. 50,00,000
3	Adjusted Total Turnover (1+2)	Rs. 50,00,000	Rs. 1,00,00,000
4	GST payable @ 5% on turnover having inverted rate structure 5% on (1)	Rs. 2,50,000	Rs. 2,50,000
5	GST payable @ 18% on turnover not having inverted rate structure	NA	Rs. 9,00,000
5	ITC on inputs availed during the tax period	Rs. 3,00,000	Rs. 6,00,000
6	ITC on input services availed during the tax period	Rs. 50,000	Rs. 1,00,000
7	Refund entitlement as per the formula	[Rs. 3,00,000 x Rs. 50,00,000/Rs. 50,00,000] – Rs. 2,50,000 = Rs. 50,000	[Rs. 6,00,000 x Rs. 50,00,000/ Rs. 1,00,00,000] – Rs. 2,50,000 = Rs. 50,000
8	Remarks	The ITC of Rs. 50,000 availed on input services is neither allowed as refund, nor used for payment of tax on output supply, but allowed to accumulate.	The Balance input credit of Rs. 3,00,000 and the entire credit of Rs. 1,00,000 availed on input services can be used for payment of tax on turnover not having inverted rate structure.

98 The submission of Mr Natarajan has also been supported by Mr V Sridharan in rebuttal. The formula in Rule 89(5) is reproduced below:

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> "Maximum Refund Amount=
> {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} – **tax payable on such inverted rated supply of goods and services**"
>
> (**emphasis supplied**)

99 Mr V Sridharan has urged that the second leg of the formula, that is, "tax payable on such inverted rated supply of goods and services" takes into account the entire tax payable on output supplies. In reality, the tax payable on output supplies would have been discharged by utilising the ITC on input goods and input services. However, the formula under Rule 89(5) presumes that nothing has been utilised from the ITC on input services and the entire tax on output supplies is discharged by utilising ITC on input goods. It was urged that although the stated objective of the formula is to grant refund of unutilised ITC accumulated on account of input goods, by deducting the entire sum of tax payable on output supplies, the quantum of such refund is reduced and the cascading effect of taxes is maximised. As a solution to the said anomaly, Mr Sridharan has proposed that for the purposes of Rule 89(5), an assumption must be made that ITC accumulated on account of input services, which is not refundable under Section 54(3), is used for discharging the output tax payable on inverted rate supply of goods and services. The remaining balance of output tax, must be then presumed to have been discharged from the ITC accumulated on account of input goods and it is only this remaining balance that should be deducted from the formula to calculate the refund. In other words, Mr Natarajan and Mr Sridharan propose an order of utilisation in the formula by which the ITC accumulated on account of input services is used first for discharging the tax liability

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and only then is the ITC accumulated on account of input goods used. During the course of his submissions, Mr Sridharan has relied on the decision of this Court in **Commissioner of Income Tax, Coimbatore** v. **Lakshmi Machine Works**[51] and has urged before us to adopt a purposeful and schematic interpretation to the formula which will make it comparable and workable.

100 Mr Sujit Ghosh has urged before us that the formula in Rule 89(5) creates a distinction between suppliers of services having a higher component of input goods than input services as against suppliers of services having a higher component of input services than input goods. In his submissions, Rule 89(5) would favour the former as they would be entitled to a larger quantum of refund on account of more use of input goods.

101 In response to these submissions, Mr N Venkataraman, learned ASG, has conceded that certain inadequacies might exist in the formula. However, he has sought to justify the need for a formula in Rule 89(5). The ASG has submitted that under the scheme of the CGST Act, the accumulated ITC arising out of input goods and input services is booked into the electronic credit ledger and is to be utilised thereafter for payment of tax on outward supplies on goods and services in accordance with Section 49 of the CGST Act. Once payments are made from the electronic ledger, the remaining quantum of unutilised ITC becomes one homogenous nucleus and it is impossible to attribute the unutilised ITC to its source,

[51] (2007) 11 SCC 126

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that is, it cannot be identified whether the balance unutilised ITC is arising from input goods or input services. In order to bifurcate the unutilised ITC into input goods and input services for the purpose of granting refund in accordance with Section 54(3)(ii) on ITC on inputs, Rule 89(5)3 has resorted to prescribing a formula to legally dissect the unutilised ITC. The learned ASG has urged that the prescription of formulae to artificially determine refund or utilisation is a common practice in the field of taxation and was used prior to the enactment of the CGST Act in MODVAT/CENVAT Rules for determining quantum of eligibility of credit. Another instance is Rule 42 and 43 of the CGST Rules 2017 which provide specific formulae in restricting the ITC when a registered supplier uses input goods, input services and capital goods for purpose of business and other than business purposes.

102 The ASG, having justified the need for a formula, has then argued that a formula prescribed by delegated legislation may not be perfect and may have certain aberrations. However, a wide discretion is given to the policy makers in this regard and only if the formula is arbitrary and violative of Article 14 of the Constitution, can it be struck down. For this, the ASG has relied on the decision of a Constitution Bench of this Court in **RK Garg** v. **Union of India**[52], where it was observed that economic legislation ought not to be measured by abstract symmetry, since it is essentially empirical in nature and is based on experimentation. We note however, that the ASG has not refuted the anomalies point out by the Counsel for the assessees.

[52] (1981) 4 SCC 675

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103 In our view, the justification of the formula under Rule 89(5) given by the ASG to create a legal bifurcation is valid. In this context, it would be material to advert to the provisions of Rule 42. Rule 42(1) provides that the ITC in respect of input goods or input services which attract the provisions of sub-Section (1) or sub-Section (2) of Section 17 being partly used for the purpose of business and partly for other purposes or partly used for affecting taxable supplies including zero rated supplies and partly for effecting exempts supplies shall be attributed for the purposes of business or for effecting taxable supplies in the manner which is indicated in the Rule. Sub-Section (1) of Section 17 provides that where the goods and services or both are used by a registered person partly for the purposes of any business and partly for any other purpose, the amount of credit shall be restricted to so much of the input tax as is attributable to the purpose of its business. Sub-Section (2) of Section 17 provides that where the goods or services or both are used by a registered person partly for effecting taxable supplies including zero rated supplies under the CGST Act or under the IGST Act and partly for effecting exempt supplies the amount of credit shall be restricted to so much of the input tax as is attributable to the taxable supplies including zero rated supplies. Rule 42, in other words, provides for the manner in which the attributions of ITC in respect of the input or input services under sub-Sections (1) or (2) of Section 17 shall be carried out. Rule 43 similarly provides the manner in which ITC in respect of capital goods attracting the provisions of sub-Section (1) of Section 17, used partly for business and partly for other purposes or partly for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies would be attracted to the purpose

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

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

105 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

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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.

106 While we are alive to the anomalies of the formula, an anomaly per se cannot result in the invalidation of a fiscal rule which has been framed in exercise of the power of delegated legislation. In **RK Garg** (supra), Justice P N Bhagwati (as the learned Chief Justice then was) speaking for the Constitution Bench underscored the importance of the rationale for viewing laws relating to economic activities with greater latitude than laws touching civil rights. The Court held:

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"8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey* v. *Doud* [351 US 457 : 1 L Ed 2d 1485 (1957)] where Frankfurter, J., said in his inimitable style:

> "In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaption of remedy are not always possible" and that "judgment is largely a prophecy based on meagre and uninterpreted experience". **Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all**

> **possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in *Secretary of Agriculture* v. *Central Roig Refining Company* [94 L Ed 381 : 338 US 604 (1950)] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity.** The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."
>
> (**emphasis supplied**)

107 The dictum in **RK Garg** (supra) 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.

108 Mr Sridharan had also urged that the formula may be read down as was done by this Court in **Lakshmi Machine Works** (supra). In this case, the Court was faced with a question of whether excise duty and sales tax were to be included in the 'total turnover', which was a denominator in the formula prescribed under Section 80-HHC(3) of the Income Tax Act 1961 for the purpose of arriving at the deduction from profits retained for export business. In order to arrive at the deduction, the formula apportioned business profits by the ratio of export turnover to total turnover. Various amendments had been made by the legislature to the formula in Section 80-HHC(3) to make the formula workable. The Court, speaking through Justice SH Kapadia (as the learned Chief Justice then was), observed that

> "21. According to *The Law and Practice of Income Tax* by Kanga and Palkhivala, the word "profits" in Section 28 should be understood in normal and proper sense. However, subject to special requirements of the income tax, profits have got to be assessed provided they are real profits. Such profits have got to be ascertained on ordinary principles of commercial trading and accounting. However, the Income Tax Act has laid down certain rules to be applied in deciding how the tax should be assessed and even if the result is to tax as profits what cannot be construed as profits, still the requirements of the Income Tax Act must be complied with. Where a deduction is necessary in order to ascertain the profits and gains, such deductions should be allowed. Profits should be computed after deducting the expenses incurred for business though such expenses may not be admissible expressly under the Act, unless such expenses are expressly disallowed by the Act (see p. 455 of *The Law and Practice of Income Tax* by Kanga and Palkhivala). Therefore, schematic interpretation for making the formula in Section 80-HHC workable cannot be ruled out. Similarly, purposeful interpretation of Section 80-HHC which has undergone so many changes cannot be ruled out, particularly, when those legislative changes indicate that the legislature intended to

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> exclude items like commission and interest from deduction on the ground that they did not possess any element of "turnover" even though commission and interest emanated from exports. We have to read the words "total turnover" in Section 80-HHC as part of the formula which sought to segregate the "export profits" from the "business profits". Therefore, we have to read the formula in entirety. In that formula the entire business profit is not given deduction. It is the business profit which is proportionately reduced by the above fraction/ratio of export turnover ÷ total turnover which constitutes Section 80-HHC concession (deduction). Income in the nature of "business profits" was, therefore, apportioned. The above formula fixed a ratio in which "business profits" under Section 28 of the Act had to be apportioned. Therefore, one has to give weightage not only to the words "total turnover" but also to the words "export turnover", "total export turnover" and "business profits". That is the reason why we have quoted hereinabove extensively the illustration from the *Direct Taxes (Income Tax) Ready Reckoner* of the relevant word."

109 The Court in **Lakshmi Machine Works** (supra) was dealing with a question of interpretation, where the formula was silent on inclusion of sales tax or excise duty, in the definition of total turnover. Thus, a schematic interpretation was adopted to give effect to the intent of the legislature.

110 In **Commissioner of Income Tax** v. **HCL Technologies Limited**[53], a two judge Bench of this Court considered whether, while calculating 'export profit' for the deduction under Section 10-A of the Income Tax Act 1961, software development charges are to be excluded from the definition of 'total turnover'. For calculating the export profit, the total profits of the business were apportioned by the ratio of export turnover to total turnover. The issue was complicated as these charges were

[53] (2018) 16 SCC 709

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allowed to be deducted from export turnover, which was a component of the total turnover and the numerator in the formula. However, the Revenue had denied the deduction from the total turnover, the denominator. The Court interpreted and revised the formula as otherwise it would lead to undesirable results. In doing so, Justice RK Agrawal observed that

> "16. The respondent Company has claimed deduction under Section 10-A as per certificates filed on Form 56-F. The respondent, while computing the deduction, has taken the same figure of export turnover as of total turnover. […]
>
> 17. In the above backdrop, we are of the opinion that the definition of total turnover given under Sections 80-HHC and 80-HHE cannot be adopted for the purpose of Section 10-A as the technical meaning of total turnover, which does not envisage the reduction of any expenses from the total amount, is to be taken into consideration for computing the deduction under Section 10-A. When the meaning is clear, there is no necessity of importing the meaning of total turnover from the other provisions. If a term is defined under Section 2 of the IT Act, then the definition would be applicable to all the provisions wherein the same term appears. As the term "total turnover" has been defined in the Explanation to Sections 80-HHC and 80-HHE, wherein it has been clearly stated that "for the purposes of this section only", it would be applicable only for the purposes of those sections and not for the purpose of Section 10-A. **If denominator includes certain amount of certain type which numerator does not include, the formula would render undesirable results**.
>
> […]
>
> 22. **In the instant case, if the deductions on freight, telecommunication and insurance attributable to the delivery of computer software under Section 10-A of the IT Act are allowed only in export turnover but not from the total turnover then, it would give rise to inadvertent, unlawful, meaningless and illogical result which would**

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> **cause grave injustice to the respondent which could have never been the intention of the legislature**.
>
> 23. Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well. (**emphasis supplied**)

In **Arun Kumar and Others** v. **Union of India**[54], a challenge was raised to the validity of the Rule 3 of the Income Tax Rules 1962 which amended the method of computing valuation of a 'perquisite' (which includes rent free accommodation provided to an assessee by their employer) under Section 17(2) of the Income Tax Act 1961. The appellants argued that the amended Rule did not provide the assessee with the right to claim before the assessing officer that there was no "concession" in the matter of rent with respect to the accommodation provided and thus, Section 17(2) and Rule 3 were not applicable. An argument was raised to "read down" the Rule by introducing the principle of *audi alteram partem*. Rejecting this argument, the Court, speaking through Justice CK Thakker, noted that

> "55. The doctrine of "reading down" is well known in the field of constitutional law. Colin Howard in his well-known work *Australian Federal Constitutional Law* states:
>
> Reading down puts into operation the principle that so far as it is reasonably possible to do so, legislation should be construed as being within power. It has the practical effect that where an Act is expressed in language of a generality which makes it capable, if read literally, of applying to matters

[54] (2007) 1 SCC 732

beyond the relevant legislative power, the Court will construe it in a more limited sense so as to keep it within power."

The Court after reviewing the judicial precedents on this point observed:

"61. **But it is equally well settled that if the provision of law is explicitly clear, language unambiguous and interpretation leaves no room for more than one construction, it has to be read as it is. In that case, the provision of law has to be tested on the touchstone of the relevant provisions of law or of the Constitution and it is not open to a court to invoke the doctrine of "reading down" with a view to save the statute from declaring it *ultra vires* by carrying it to the point of "perverting the purposes of the statute**.

[…]

65. As we have already indicated earlier, Rule 3 prior to its amendment in 2001 was totally different. It dealt with the method of calculation of concession keeping in view the concept of "fair rental value". In the light of the principle and phraseology in Rule 3, the rule-making authority provided an opportunity to the assessee to satisfy the assessing officer that the rent sought to be recovered from the employee could not be said to be "concession" as it was "fair rent", "reasonable rent", "market rent" or "standard rent'. When the rule is amended and the concept of "fair rental value" has been done away with and the only method which has been adopted is to calculate the rent on the basis of population of the city in question, it cannot be successfully contended that the intention of the rule-making authority was to afford an opportunity to the assessee to convince the assessing officer that the rent recovered by the employer from his employee was not in the nature of concession. Nor a court of law would, by interpretative process, grant such opportunity to the assessee so as to enable him to convince the assessing officer that the rent fixed was not covered by Section 17(2)(*ii*) of the Act and therefore was not a "perquisite". We are, therefore, unable to accept the argument of Mr Salve and allow import of the principles of natural justice in Rule 3."

(**emphasis supplied**)

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

H Conclusion

112 Having devoted our attention to the submissions at the Bar, we have come to the conclusion that the judgment of the Madras High Court needs to be affirmed by dismissing the appeals challenging that verdict while the appeals against the judgment of the Gujarat High Court by the Union of India should be allowed.

113 The Division Bench of the Gujarat High Court having examined the provisions of Section 54(3) and Rule 89(5) held that the latter was *ultra vires.* In its decision in

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VKC Footsteps India Pvt. Ltd. (supra)**,** the Gujarat High Court held that by prescribing a formula in sub-Rule (5) of Rule 89 of the CGST Rules to execute refund of unutilized ITC accumulated on account of input services, the delegate of the legislature had acted contrary to the provisions of sub-Section (3) of Section 54 of the CGST Act which provides for a claim of refund of *any* unutilized ITC. The Gujarat High Court noted the definition of ITC in Section 2(62) and held that Rule 89(5) by restricting the refund only to input goods had acted *ultra vires* Section 54(3). The Division Bench of the Madras High Court on the other hand while delivering its judgment in **Tvl. Transtonnelstory Afcons Joint Venture** (supra) declined to follow the view of the Gujarat High Court noting that the proviso to Section 54(3) and, more significantly, its implications do not appear to have been taken into consideration in **VKC Footsteps India Pvt. Ltd.** (supra) except for a brief reference. Having considered this batch of appeals, and for the reasons which have been adduced in this judgment, we affirm the view of the Madras High Court and disapprove of the view of the Gujarat High Court. We accordingly order and direct that:

(i) The appeals[55] filed by the Union of India against the judgment of the Gujarat High Court dated 4 July 2020 in **VKC Footsteps India Pvt. Ltd.** (supra) and connected cases are allowed and the judgment shall be set aside;

[55] SLP (Civil) No 14801 of 2020; SLP (Civil) No 16003 of 2020; SLP (Civil) No 1340 of 2021; SLP (Civil) No 16032 of 2020; SLP (Civil) No 677 of 2021; SLP (Civil) No 1868 of 2021; SLP (Civil) No 2951 of 2021; SLP (Civil) No 2456 of 2021; SLP (Civil) No 2973 of 2021

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(ii) The appeals[56] filed by the assessees against the judgment of the Madras High Court in **Tvl. Transtonnelstroy Afcons Joint Venture** (supra) and connected cases dated 21 September 2020 shall stand dismissed. As a consequence, the writ petition filed by the assessees shall also stand dismissed. There shall no order as to costs; and

(iii) The observations in paragraphs 104 to 111 shall be considered by the GST Council to enable it to take a considered view in accordance with law.

114 Pending application(s), if any, stand disposed of.

…….....J.
[Dr Dhananjaya Y Chandrachud]

…….....J.
[MR Shah]

New Delhi;
September 13, 2021.

[56] SLP (Civil) No 589 of 2021; SLP (Civil) No 1418 of 2021; SLP (Civil) Nos 1742-1748 of 2021; SLP (Civil) Nos 1552-1557 of 2021; SLP (Civil) Nos 8008-8009 of 2021

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