

TAX INFO

Dated 29/11/2021

Latest update on GST Law: Information regarding **Refund in case of inverted tax structure where input and output are same is allowed under Section 54(3)(ii)** as given in **Judgement by Gauhati High Court.**

We expressly disclaim liability to any person in respect of anything done in reliance of the contents of this publication

Name of Petitioner	BMG Informatics Pvt Ltd
Name of Respondent	Asst. Commissioner
Court	The Gauhati High Court
Date of Judgement	02/09/2021
Appeal No.	Writ Petition No.WP(C)/3878/2021

Facts of the Case:

BMG Informatics Pvt. Ltd is dealing with IT system integrator and is a service provider primarily engaged in sales and service of information and technology products to Government Departments, PSU and to other Research and Educational Institutes. **A refund claim was rejected** for the period from 01.10.2018 to 31.12.2018 as the amount of ITC claimed for refund was accumulated out of the trading activity **where the input and output were the same, referring to the clarificatory circular No.135/05/2020-GST dated 31.03.2020.**

As per the circular No.135/05/2020-GST dated 31.03.2020, the input supplies and the output supplies may attract different tax rates at different point of time, such differences in the tax rates are not covered under Section 54(3)(ii) of the CGST Act of 2017. Therefore, the refund of accumulated ITC on account of reduction in GST rate under Section 54(3)(ii) of the CGST Act 2017 would not be applicable in cases where the input and output supplies are same.

But, Section 54(3)(ii) of the CGST Act of 2017 provides that no refund of unutilized input tax credit shall be allowed in cases other than where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. The provisions of Section 54(3)(ii) of the CGST Act of 2017 makes it explicitly clear that if the input tax credit has accumulated as because the rate of tax on input supply is higher than the rate of tax on output supply, in such event, the assessee would be entitled to a refund of the unutilized input tax credit. Of course, there is a further exception that in the event the output supplies are subjected to a nil rate or are fully exempted supplies, in such event, the refund of the unutilized input tax credit will not be available under Section 54(3)(ii) of the CGST Act 2017.

In the instant case, the assessee obtains its input supplies either from the manufacturer, or from some other authorized dealer and makes the output supplies to a Government Department or PSU or a Research and Educational Institute within the NE Region. It is stated that the tax rate applicable in respect of a supply made to a Government Department, PSU or a Research and Educational Institutes within the NE Region is subjected to a partial

exemption of the GST under Notification 45/2017-GST (Rate) dated 14.11.2017 and are taxable at 2.5%. There is a partial exemption and it is neither a case of nil rate nor it is a case of full exemption.

Therefore, Circular No.135/05/2020-GST dated 31.03.2020 appears to be in conflict with the provisions of Section 54(3)(ii) of the CGST Act of 2017.

The law in this respect is well settled that whenever there is a conflict between the provisions of a statutory Act and that of a notification or circular issued by an administrative authority, the provisions of the statutory Act would prevail over such conflicting provisions of a notification or a circular of an administrative authority.

Decision of the Court:

The input supplies and the output supplies made by the petitioner assessee are not governed either by a nil rate of tax nor it is governed by fully exempted rate of tax and, therefore, the refund provided under Section 54(3)(ii) would be applicable in respect of the difference between the rate of tax of input supplies and the rate of tax on output supplies. In other words, the provisions for refund of the unutilized input tax credit under Section 54(3)(ii) of the CGST Act of 2017 would be applicable in case of the petitioner assessee.

In the instant case, when the provisions of Section 54(3)(ii) of the CGST Act of 2017 are unambiguous and explicitly clear in nature, there is no requirement of bringing in any uniformity in the implementation of the Act and the provisions of Section 54(3)(ii) would have to be applied in the manner it is provided in the Act itself.

Consequently, in view of the clear unambiguous provisions of Section 54(3) (ii) providing that a refund of the unutilized input tax credit would be available and the provisions of paragraph 3.2 of the circular No.135/05/2020-GST dated 31.03.2020 providing that even though different tax rate may be attracted at different point of time, but the refund of the accumulated unutilized tax credit will not be available under Section 54(3)(ii) in cases where the input and output supplies are same, would have to be ignored.

The matter stands remanded back to the Assistant Commissioner to pass a reasoned order on the claim of the petitioner assessee for refund under Section 54(3)(ii) of the CGST Act of 2017.

Suresh Aggarwal, Advocate

Compliance & Litigation under GST

Address: House No. 54, Pocket A-3, Sector-5, Rohini- 110085

Phone: 91-9810032846; 011 - 45131427

Email: sureshagg@gmail.com

Website: <http://www.sureshtaxation.com>