MAHARASHTRA AUTHORITY FOR ADVANCE RULING

GST Bhavan, 8th floor, H-Wing, Mazgaon, Mumbai – 400010.

(Constituted under section 96 of the Maharashtra Goods and Services Tax Act, 2017)

BEFORE THE BENCH OF

(1) Shri B. Timothy, Addl. Commissioner of Central Tax, (Member)

(2) Shri B. V. Borhade, Joint Commissioner of State Tax, (Member)

GSTIN Number, if any/ User-id		27AADAD5976G1ZH
Legal Name of Applicant		DAEWOO-TPL JV
Registered Address/Address provided while obtaining user id		3rd Floor ,Transocean House,Lake Boulevard Road, Powai ,Maharashtra ,Mumbai 400076
Details of application		GST-ARA, Application No. 113 ,DATED 25.01.2019
Concerned officer		MUM-VAT-E-638, LTU-4,MUMBAI
Nature of activity(s) (proposed / present) in respect of which advance ruling sought		
A	Category	**Works Contract, Service Provision**
B	Description (in brief)	Daewoo-TPL JV, is a joint venture between M/s.Daewoo Engineering and Construction Company Limited and M/s. Tata Projects Limited. The said joint venture formed with the sole objective to bid and secure the contract for design, engineering and construction of Long Bridge - Mumbai Trans Harbour Link project ('MTHL Project').
Issue/s on which advance ruling required		i) Applicability of a notification issued under the provisions of this Act ii) Admissibility of input tax credit of tax paid or deemed to have been paid
Question(s) on which advance ruling is required		As reproduced in para 01 of the Proceedings below.

PROCEEDINGS

(Under section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

The present application has been filed under section 97 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act" respectively] by M/s. DAEWOO-TPLJV, seeking an advance ruling in respect of the following question.

1. The questions / issues before Hon'ble Bench for determination are as follows:

- *The Applicant though eligible to claim for refund of inverted duty structure under Section 54(3) of the CGST Act, wishes to understand the in-principle applicability*

of Notification 21 and 26 in as much whether the same allow for refund of ITC availed on input services (and remaining unutilized) in whole or part thereof.

- *Where the answer to above is negative, the Applicant wishes to understand how does the Notification 21 and 26 apply in a scenario where factually following financials may exist:*

A. Revenue streams

Works contract services liable to 12% GST	*INR 1,000*
Output GST @ 12%	*INR 120*
Total Revenues incl. GST	*INR 1,120*

B. Input Tax Credit Data

Particulars	***Amount (INR)***
ITC on inputs	*65*
ITC on input services	*90*
Sub-total	*155*
Less: Total tax on outward supplies	*120*
***Net balance remaining** unutilized*	*35*

The questions/ issues placed for determination before the Hon'ble Bench has to be appreciated in light of the following position of law and its applicability to the facts of the Applicant's business and activity as discussed above and detailed hereunder, as may be necessary.

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to any dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provision under the MGST Act. Further to the earlier, henceforth for the purposes of this Advance Ruling, the expression 'GST Act' would mean CGST Act and MGST Act.

02 FACTS AND CONTENTION – AS PER THE APPLICANT

The submissions, as reproduced verbatim, could be seen thus-

"STATEMENT OF FACTS:

(i) Daewoo-TPL JV, is a joint venture between M/s Daewoo Engineering and Construction Company Limited & M/s. Tata Projects Limited, formed with the sole objective to bid & secure the contract for design, engineering and construction of Long Bridge - Mumbai Trans Harbour Link project ('MTHL Project'). During the month of July 2017, Mumbai

Metropolitan Region Development Authority (MMRDA) has awarded Package 2 of MTHL project to Daewoo-TPLIV.

(ii) The supplies under the said contract qualify as works contract defined at Section 2(119) of the CGST Act & in turn have also been deemed as supply of services by virtue of Entry 6(a) of Sch. 1 as appended to the CGST Act.

(iii) Such Works Contract services is taxable @ 12% outward GST.

(iv) Execution of construction of large projects such as MTHL Project entails procurement of various inputs, input services & capital goods viz. cement, concrete, steel & steel structures, bridge accessories, formworks, plant & equipments, labour, etc. All such goods & services attract GST at varied rates, depending on the nature of such procurement.

(v) Based on the past experience and budgets prepared by Daewoo-TPL JV, following are critical procurements required for execution of MTHL Project:

No.	Description	Nature of procurement	Applicable Rate of GST
1	Cement	Input	28%
2	Concrete additives as micro silica, GGBFS, Admixture, etc	Input	18%
3	Reinforcement steel and structural steel	Input	18%
4	Bridge accessories as bearings, expansion joint and PT strands, etc	Capital goods	18%
5	Other material as bridge furniture such as crash barrier, view barrier, sound barrier, fence, fenders, etc	Capital goods	18%
6	Supply of labour from third party	Inputs services	18%
7	Geo technical investigation work	Inputs services	18%
8	Pile testing works	Inputs services	18%
9	Other works such as deck water-proofing, road works, steel span erection, plant and equipment installation	Inputs services	18%
10	Formworks	Inputs services	28%
11	Plant and equipment hire cost	Inputs services	18%
12	Spares and consumables, lubricants, etc	Inputs	18%
13	Design, insurance and finance charges	Inputs services	18%
14	Indirect cost such as site office, labour camp, IT infrastructure, land lease, vehicle rental, furniture, site running expense, etc	Inputs services	18%

**The rate mentioned is total of CGST and State GST rates, as may be applicable, to supply of attendant goods and services.*

(vi) *(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 unutilised 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 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.

(vii) Thus, a registered person can in-principle claim a refund of accumulated ITC in case the rate of GST on inputs is higher than rate of GST on its outward supplies provided that:

(a) in case of notified supplies, such benefit would not be allowed; and

(b) amount of refund that can be claimed as refund is to be determined basis specific formula prescribed under Central Goods and Services Tax Rules, 2017 ('CGST Rules').

(viii) In so far as condition (a) above is concerned, it is Applicant's position that its eligibility in the present instance is not restricted by any Notification and hence, such hurdle does not exist in its case.

(ix) Moving further, the condition (b) i.e. determination of eligible quantum of refund is based upon formula prescribed at Rule 89(5) of the CGST Rules (as amended).

(x) The said rule has been amended by Notification No 21/ 2018– C. T. (Rate) dated April 18, 2018 ('Notification 21'). Both amendments were made effective retrospectively from July 1, 2017 vide Notification No 26/ 2018 – C.T. (Rate) dt June 13, 2018 ('Notification 26'):

(xi) The formula for refund, amended by the Notifications above, stands as under:

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

(xii) The amendments made by the (2) notifications, essentially aimed at following changes in scheme of refund for inverted duty structure under GST regime:

(a) Extension of benefit to outward supplies of 'services' - Prior to amendment, formula for computing maximum refund amount only considered the turnover of supply of 'goods'. Acknowledging this error, the formula was rectified by retrospective amendment whereby turnover of supply of service was also included. This amendment underlined the intent of Government to extend benefit in all cases, whether supply of goods or services.

(b) Exclusion of 'input service from definition of 'Net ITC' – Prior to amendment, definition of 'Net ITC' was borrowed from sub-rule (4) of Rule 89 which included within its ambit 'inputs' as well as 'input services'. However, as per the amended definition, the definition of Net ITC only covers ITC availed on 'inputs'. Thus, the amendment has restricted the benefit of refund only to procurement of inputs which are used for inverted rated supply of goods or services.

(xiii) Given the above, the Notification 21 & 26 leads to several ambiguities in its applicability. The relevant issues for determination have thus been, listed herein below.

(xiv) In addition to above, it may be noted that the based on the nature of MTHL Project and its execution requirements & parameters, the Applicant envisages procurement mix of Daewoo-TPLIV shall tentatively comprise of 55% of materials (inputs) and 45% of services. This reflects that input services comprises of a considerable share of gross procurement made by Daewoo-TPL JV. Notably, the ratio of procurement mix is similar across all large scale projects undertaken by contractors with minor variance on a case to case basis.

(xv) In light of above, the Applicant has put forth various questions for determination by this Hon'ble bench of Authority for Advance Ruling duly constituted under the GST laws.

ADDITIONAL SUBMISSIONS:

Issue 1 - Benefit of refund, whether extendable to input services as well post amendments vide Notification 21 and 26 .

(i). As discussed in foregoing paragraphs, the formula prescribed (for determination of eligible refund amount) under Rule 89(5) of CGST Rules i.e. for "Net ITC" only considers ITC on 'inputs', for computing the amount of eligible refund. Thus, impliedly any portion of the ITC availed *inter alia* on 'input services' may *prima facie* not be available as refund under the said Rule.

(ii). Our below submissions, based on holistic analysis of provisions of GST law, however demonstrate that aforementioned restriction on refunding ITC corresponding to 'input services' is uncalled for and hence, may be ruled accordingly.

(iii). At the outset, Applicant would like to make reference to Section 54(3) of the CGST Act. Section 54(3) is the enabling Section which extends benefit of refund on account of inverted duty structure. The relevant extract thereof is reproduced again, for ease of reference:

(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 unutilised 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 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

.....

....

....

(10) Where any refund is due under sub-section (3) to a registered person who has defaulted in furnishing any return or who is required to pay any tax, interest or penalty,

which has not been stayed by any court, Tribunal or Appellate Authority by the specified date, the proper officer may --

(a) withhold payment of refund due until the said person has furnished the return or paid the tax, interest or penalty, as the case may be;

(b) deduct from the refund due, any tax, interest, penalty, fee or any other amount which the taxable person is liable to pay but which remains unpaid under this Act *or under the existing law.*

Explanation. For the purposes of this sub-section, the expression "specified date" shall mean the last date for filing an appeal under this Act.

(iv). As per said Section, refund of unutilized ITC can be claimed in (2) instances as stated above. As per the said Section, in case of inverted duty structure, benefit of refund is available on unutilized balance of ITC. Notably, the Section provides a sweeping benefit on entire balance of unutilized ITC without discrimination whether the same is on account of inputs, input services or capital goods. Alternatively said, the section does not restrict ITC on input services.

(v). It is a settled position of law that Rules, which are notified as a delegated legislation, cannot conflict (i.e. expand or restrict) the substantive provision empowering the issuance of such rules under the main enactment (i.e. CGST Act, in the present instance).

(vi). Further, the first proviso to Section 54(3) merely prescribes Instances wherein such benefit would be available. As per the verbatim of point (ii) of proviso to the said Section, refund is available in case where credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies.

(vii). Notably, the proviso merely specifies scenario or instances wherein such benefit would be available. As per the said proviso, the test required to be fulfilled is that ITC accumulation is on account of rate of tax on inputs being higher than rate of tax on outward supplies. The said provision, in no manner, prescribes the quantum of refund eligible or that refund would be restricted on input services.

(viii). In the Applicant's case, above test is duly fulfilled and thus, Applicant should in principle be eligible to claim refund on entire balance of unutilized ITC, including ITC on input services.

(ix). Thus reiteratively, the restriction to claim refund on 'input services' merely arises from specific formula prescribe under Rule 54(3). It needs to be analyzed whether substantive

benefit of refund on input services, which is allowed by CGST Act, 2017, can be curtailed or restricted by CGST Rules, which is a subordinate legislation.

(x). In this regard, reference is invited to Hon'ble Tribunal ruling in case of *Nahar Spinning Mills Ltd vs* ***Commissioner of Central*** *Excise, Bhopal (2000 (121) ELT 60] w*here in the context of determining due date for filing refund application, it was observed by the Hon'ble Tribunal that rules framed under subordinate legislation cannot over-ride statutory provisions contained in the section. Similar vie*w* has also been upheld in As*hok Granites Ltd vs CCE & ST, Salem (2016 (46) STR 875 (Tri - Chennai)].* Applying the said principle in the instant case, benefit available to Applicant by Section 54(3) of CGST Act should not be curtailed by Rule 89(5) of CGST Rules.

(xi). Additionally, Applicant would also like to submit that in the event CGST Act intended certain condition or restriction to be placed on quantum of refund to be granted, the CGST Act itself would expressly provide for same. Alternatively, CGST Act would provide specific stipulation to the effect that condition prescribed in CGST Rules should apply for determining the amount of refund. However, Section 54 in no manner, provides or stipulates that amount of refund would be granted subject to restriction specified in rules. Given this, Applicant humbly believes that amendment to refund formula, effected by way of issuance of Notfn No 21/ 2018, should not apply in the instant case.

(xii). Given this, it is prayed off the Hon'ble Bench that it may be ruled that the Applicant should be entitled to claim refund of unutilized balance of inputs as well as 'input services', on account of inverted duty structure and that the Notifications 21 and 26 should not be applicable to restrict the same.

Issue 2 – The applicability of the formula prescribed vide Notifications 21 and 26 on factual scenario indicated by the Applicant

(xiii). Whereas assuming for sake of argument & without admitting to such position, where benefit of refund (supra) is restricted to ITC on inputs alone, the Applicant has raised another issue for determination of the manner of applicability of the amendment notifications (supra).

(xiv). The case financial are restated below for ease of reference:

A. Revenue streams

Works contract services liable to 12% GST	INR 1,000
Output GST @ 12%_	INR 120
Total Revenues incl. GST	**INR 1,120**

B. Input Tax Credit Data

Particulars	**Amount (INR)**
ITC on inputs	65
ITC on input services	90
Sub-total	155
Less: Total tax on outward supplies	120
Net balance remaining unutilized	35

(xv) Interposing the case financials into the formula it finds that, no refund may be allowed in such scenario since the eligible figure, due to the formula, goes below NIL or zero.

Formulas as stipulated vide the amendment Notifications 21 and 26	case financials interposed in the 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	Max Refund = (1000 X 65] - 120 1000 = - 55 *(PS: effectively no refund since the figure is negative.]*

(xvi). The above seem to not grant the Applicant any benefit despite there being (a) an inverted duty structure; and (b) unutilized ITC remaining in its hands.

(xvii). Can the Applicant therefore, apply the amended formula as per Notification 21 and 26, in such manner whereby it:

(a) First utilized the ITC of input services towards payment of outward tax

Total Liability	120
Less: ITC on input services	90
Balance liability to be paid	30

(b) The balance liability if any is set off against the ITC of inputs

Total ITC on inputs	65
Balance to be utilized(see (i) above	30
Balance remaining unutilized	35

(c) And the refund formula is populated only with such utilization as it noted at (ii) above.

Formulas as stipulated vide the amendment Notifications 21 and 26	case financials interposed in the 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	Max Refund = (1000 X 65] - 30 1000 = 35

(xviii) The correct applicability of the Notifications may kindly be determined by the Hon'ble Bench.

PRAYER

I. The Hon'ble Bench may be pleased to take the aforesaid application on record and

pronounce a ruling in light of attendant facts as well as legal/ judicial position.

II. The ruling sought from the Hon'ble Bench is as follows:

"The refund of ITC on input services could also be claimed in case of an inverted duty structure scenario." And/ or

"In any case, the unutilized balance (so long it does not exceed) the gross ITC availed on inputs, could still be refunded in full."'

03. CONTENTION – AS PER THE CONCERNED OFFICER

The questions / issues before Hon'ble Bench for determination are as follows:

(i). The Applicant though eligible to claim for refund of inverted duty structure under Section 54(3) of the CGST Act, wishes to understand the in-principle applicability of Notification 21 and 26 in as much whether the same allow for refund of ITC availed on input services (and remaining unutilized) in whole or part thereof.

(ii) Where the answer to above is negative, the Applicant wishes to understand how the Notification 21 and 26 applies in a scenario where factually following financials may exist:

A. Revenue streams

Works contract services liable to 12% GST	INR 1,000
Output GST @ 12%_	INR 120
Total Revenues incl. GST	INR 1,120

B. Input Tax Credit Data

Particulars	**Amount (INR)**
ITC on inputs	65
ITC on input services	90
Sub-total	155
Less: Total tax on outward supplies	120
Net balance remaining unutilized	35

The issues placed for determination before the Hon'ble Bench has to be appreciated in light of the following position of law and its applicability of the facts of the Applicant's business and activity as discussed above and detailed hereunder, as may be necessary.

- **FACTS:**

(i) Mumbai Metropolitan Region Development Authority (MMRDA) has awarded Package 2 of MTII project to Daewoo-TPL JV.

(ii) The supplies under the said contract qualify as works contract defined at Section 2(119) of the Central Goods and Services Tax Act, 2017 ("CGST Act) and in turn have also

been deemed as supply of services by virtue of Entry 6(a) of Schedule II as appended to the CGST Act.

(iii) Such Works Contract services is taxable @ 12% outward GST.

(iv) execution of construction of large projects such as MTHL Project entails procurement of various inputs, input services and capital goods such as cement, concrete, steel and steel structures, bridge accessories, formworks, plant and equipment's, labour, etc. All such goods and services attract GST at varied rates, depending on the nature of such procurement.

(v) The critical procurements (goods and services both) required for execution of MTHL Project viz. : cement, Concrete additives as micro silica, GGBFS, Admixture, etc, Reinforcement steel and structural steel, Bridge accessories as bearings, expansion joint and PT strands, etc, Other material as bridge furniture such as crash barrier, view barrier, sound barrier, fence, fenders, etc, labour, geo technical investigation work, pile testing works, Other works such as deck water-proofing, road works, steel span erection, plant and equipment installation, formworks, Plant and equipment hire cost, Spares and consumables, lubricants, etc, Design, insurance and finance charges, and Indirect cost such as site office, labour camp, IT infrastructure, land lease, vehicle rental, furniture, site running expense, etc are procured by them on paying GST ranging from 18% to 28%.

(vi) The legal provisions are as follows

- **Section 54(3) of GST Act reads as follows.**

"Subject to the 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 -zero rated supplies made without payment of tax:*

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 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.

- **Rule 89(5) of GST Rule reads as follows :-**
- *In case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per following formula*
- *Maximum refund amount= {(Turnover of inverted rated supply of goods)* Net ITC/Adjusted Total Turnover}- tax payable on such inverted rated supply of goods*
- As discussed in foregoing paragraphs, the formula prescribed (for determination of eligible refund amount) under Rule 89(5) of CGST Rules i.e. for "Net ITC" only considers ITC on 'inputs', for computing the amount of eligible refund. Thus, impliedly any portion of the ITC availed inter alia on 'input services' may prima facie not be available as refund under the said rule
- **Section 1 (59)** input definition of GST Act reads as follows :-
- *Input means any goods other than capital goods used or intended to be used by a supplier in the course of furtherance of business*
- **Section 1(63)** ITC definition of GST Act reads as follows :-

"Input tax Credit" *means the credit of input tax;*

The AAR being vires and creature of GST Act and the interpretation of notification and enhancement of scope of notification to services is beyond jurisdiction of AAR authority, The definition of Section-2(59) input clearly mentions the inputs with regards to goods only.

Hence in view of above the ARA-1 is not maintainable before ARA.

04. <u>HEARING</u>

Preliminary hearing in the matter was held on 26.02.2019. Sh. Gopal Mundra appeared and requested for admission of their application. During the hearing, applicant was asked to clarify whether the questions raised in the ARA was covered under the Section 97(2) of CGST ACT .Jurisdictional Officer was not present.

Applicant was called for hearing on 26.03.2019. Sh. Gopal Mundra appeared, made oral & written submissions. Jurisdictional Officer Sh. Jadhav, Dy. Commr., State Tax, MUM-VAT-E-638, LTU-4 , Mumbai, also appeared & made written submissions. We heard both the sides.

05. OBSERVATIONS

5.1 We have gone through the facts of the case, documents on record and written submission made by both, the applicant as well as the jurisdictional office. The issue raised before us is in respect of the applicant's eligibility for refund of unutilized input tax credit.

5.2 We find that M/s Daewoo-TPL JV, a joint venture between M/s Daewoo Engineering and Construction Company Limited and M/s. Tata Projects Limited is registered under the GST Act and have been awarded the contract from MTHL in the form of works contract. The contract in the nature of services. Execution of construction of large projects such as MTHL Project entails procurement of various inputs, input services and capital goods such as cement, concrete, steel and steel structures, bridge accessories, formworks, plant and equipment, labour, etc. All such goods and services attract GST at varied rates, depending on the nature of such procurement. The ITC paid on the inputs and services are higher than output supply. Therefore, the transaction is covered under Inverted duty structure. In such cases as in the subject case, to avoid the cascading effect, Govt. has allowed relief in the form of Refund of unutilized Input tax Credit as provided in Section 54 of the CGST Act, and the relevant provision (3)(ii) of the said section is reproduced as under:-

Section 54. Refund of Tax.

54(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 unutilised input tax credit shall be allowed in cases other than

i) .....;

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.

The procedure for filing such application for refund and for process of the same is also

mentioned in the said Section 54.

5.3 The CGST Rules, 2017 was notified vide Notification No. 3/2017- Central Tax, dated 19.06.2017. Rule 89 (1) (2) and (3) of the CGST Rules deals with such application and enumerates the procedure and the documents required to be filed for claiming such refunds.

Clause No. (5) of Rule 89 mentioned above was substituted vide Notification No. 21/2018 dated 18.04.2018 and the said clause (5) prescribes the formula for the maximum refund amount that may be granted which is reproduced as under :-

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

The said formula considers "input tax credit". As per Section 2(63) of the CGST Act, 'input tax credit' means the credit of input tax. And as per Section 2(62) of the CGST Act, "*input tax" means ....., the Central Tax, State Tax, Integrated Tax or Union Territory tax charged on any supply of goods or services or both.....& includes ....."*

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

Thus input would mean goods and tax on inputs would mean tax on goods.

Section 54 (3)(ii) talks of '*where **the credit has accumulated on accoun**t of rate of tax on inputs being higher than the rate of tax on output supplies'* It is clear that the said clause (ii) speaks only in respect of credit availed on inputs being higher i.e. credit availed on tax paid on goods being higher.

A reading of the provisions of Section 54 (3) (ii) and Notification No 21 of 2018 implies that the formula prescribed (for determination of eligible refund amount) under Rule 89(5) of CGST Rules i.e. for "Net ITC" only considers ITC on 'inputs', for computing the amount of eligible refund. Therefore any portion of the ITC availed on 'input services' is not available as refund under the said Rules.

5.4 The said refund formula was made retrospectively effective from 01.07.2017, vide Notification No. 26/2018-Central Tax dated 13.06.2018. Thus the effect of both the above Notifications i.e. Notfn Nos. 21 & 26 of 2018, taken together, has the effect of having introduced the above said refund formula with effect from 01.07.2017.

5.5 Section 54 (3) mentions that "*Provided that no refund of unutilised 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 or services*** *or both as may be notified by the Government on the recommendations of the Council:*

Thus it is clear that refund of unutilized input tax credit (comprising of both goods and services) shall be allowed only in cases mentioned in (i) and (ii) i.e the allowance of such refund of credit is only when credit availed on goods is higher that the tax rate on output supplies.

5.6 In their first query the applicant wishes to understand the in principle applicability of Notification 21 & 26 in as much whether the same allow for refund of ITC availed on input services (and remaining unutilized) in whole or part thereof. We are of the view that the said Notifications are prescribing the formula for maximum refund to be given to the applicant. We find that the said Notifications have prescribed the formula effective retrospectively, on refund claims to be made on account of inverted duty structure.

5.7 While we agree with the Applicant's argument that rules framed under subordinate legislation cannot override statutory provisions contained in the section, we do not agree with their contention: '*Section 54 in no manner provides or stipulates that amount of refund would be granted subject to restriction specified in rules'* because the Section 164 in subsection (1) of the CGST Act, 2017 empowers the Government to make rules for carrying out the provisions of the CGST Act. How the provisions of Section 54 of the CGST Act are to be carried out is laid down in the Rule 89 of CGST Rules, 2017. Therefore whenever the Section 54 is to be applied, it has to be applied only in accordance with the Rule 89 of CGST Rules, 2017 as amended from time to time. The significance and the necessity of subordinate legislation and how it has become a component of legislation has been summed up by the Hon'ble Supreme Court, quoting John Salmond, in the *Gwalior Rayon Mills Mfg. (Wing.) Co. Ltd. V. Asstt. Commissioner of Sales Tax and Others [All India Reporter* 1974 SC 1660 (1667)] thus:

"Most of the modern socio-economic legislations passed by the legislature lay down the guiding principles and the legislative policy. The legislatures because of limitation imposed upon by the time factor hardly go into matters of detail. Provision is, therefore, made for delegated legislation to obtain flexibility, elasticity, expedition and opportunity for experimentation. The practice of empowering the executive to make subordinate legislation within a prescribed sphere has evolved out of practical necessity and pragmatic needs of a modern welfare State.

In modern times, it is not always possible for the legislatures to make laws providing every detail. In view of newer areas emerging, law-making today has become not only time consuming but also an increasingly complicated and technical affair. What a legislature can possibly do and actually does is that it lays down the policy and purpose of the legislation and leaves it to the executive, experts and technocrats to provide for working details within the framework of the enactment by way of rules, regulations, bye-laws or other statutory instruments. That is why, delegated legislation is increasingly assuming an important role in the process of law-making, ***comprising an important component of legislation****. Powers have also been conferred under various provisions of the Constitution of India on the different functionaries to frame rules, regulations or schemes dealing with various aspects."*

Therefore, we do not see anything in the Rule 89 of the CGST Rules, 2017, as amended by the Notifications 21 and 26 of 2018, that overrides the Section 54 of the CGST Act, 2017 and they have to be read together harmoniously while granting refunds.

5.7 Their second query is "Where the answer to above is negative, the Applicant wishes to understand how does the Notification 21 and 26 apply in a scenario where factually following financials may exist..... and they have gone on to list five actual financials.

5.8 This authority can give rulings only as per the provisions mentioned in Sections 95 and 97 of the Act.

Section 95 says that, the term 'advance ruling' means a decision provided by this authority to the applicant on matters or questions specified in subsection 2 of Section 97, in relation to the supply of goods or services or both being undertaken or proposed to be undertaken by the applicant. For the sake of better understanding, Section 97 is reproduced as below:

Section 97 reads as below:

"(1) an applicant desirous of obtaining an advance ruling under this Chapter may make an application .....

(2) The question on which the advance ruling is sought under this Act, shall be in respect of,—

(a) classification of any goods or services or both;
(b) applicability of a notification issued under the provisions of this Act;
(c) determination of time and value of supply of goods or services or both;
(d) admissibility of input tax credit of tax paid or deemed to have been paid;
(e) determination of the liability to pay tax on any goods or services or both;
(f) whether applicant is required to be registered;

(g) whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both, within the meaning of that term".

5.9 We find from the above subsection 2 of Section 97, that the method of calculation of refund is not covered therein. The provisions of Section 95 state that the applicant shall ask the question in relation to the supply of goods or services or both being undertaken or proposed to be undertaken by them on matters or questions specified in, and to that extent only, the authority shall answer/give a ruling to those category of issues.

5.10 From the perusal of the question it is seen that the query no. 2 above is with respect to the formula involved in calculation of refund. Such queries do not fall under Section 97 of the CGST Act.

5.11 We find that in the present case, applicant has posed the question no 2 that is not covered under the category mentioned from (a) to (g) of subsection (2) of section 97 of CGST ACT. Hence we refrain from taking up the question for any discussion.

06. In view of the extensive deliberations as held hereinabove, we pass an order as follows:

ORDER

(Under section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

NO.GST-ARA- 113/2018-19/B- 41 **Mumbai, dt.** 24/4/2019

MEMBER, ADVANCE RULING AUTHORITY MAHARASHTRA STATE, MUMBAI

Q. No. 1): The Applicant though eligible to claim for refund of inverted duty structure under Section 54(3) of the CGST Act, wishes to understand in-principle applicability of Notification No 21 and 26 in as much whether the same allow for refund of ITC availed on input services (and remaining unutilized) in whole or part thereof.

Answer: **Both the Notifications Notification No 21/ 2018 - Central Tax (Rate) dated April 18, 2018 and Notification No. 26/2018-Central Tax dated 13.06.2018 21 do apply to the Applicant which prescribe the method for carrying out provisions of Section 54 (3) of the CGST Act, 2017 and therefore do not allow refund of ITC availed on input services (and remaining unutilized) in whole or part thereof, in view of the definition of 'input' contained in the sub-section (59) of Section 2 of the GST Act, 2017 and the definition of 'Net ITC' contained in the Notification No. 26/2018-Central Tax dated 13.06.2018.**

Q.No.2) :Where the answer to above is negative, the Applicant wishes to understand how does the Notification 21 and 26 apply in a scenario where factually following financials may exist:

A. Revenue streams

Works contract services liable to 12% GST	INR 1,000
Output GST @ 12%_	INR 120
Total Revenues incl. GST	INR 1,120

B. Input Tax Credit Data

Particulars	**Amount (INR)**
ITC on inputs	65
ITC on input services	90
Sub-total	155
Less: Total tax on outward supplies	120
Net balance remaining unutilized	35

Answer : **This question pertains to formulae for calculation of refund and hence does not fall within the purview of Section 97 of the CGST Act and is therefore not answered.**

MEMBER, ADVANCE RULING AUTHORITY MAHARASHTRA STATE, MUMBAI

PLACE - Mumbai

DATE : 24/04/2019

sd

B. TIMOTHY
(MEMBER)

sd

B. V. BORHADE
(MEMBER)

Copy to:-
1. The applicant
2. The concerned Central / State officer
3. The Commissioner of State Tax, Maharashtra State, Mumbai
4. The Chief Commissioner of Central Tax, Churchgate, Mumbai
5. Joint commissioner of State Tax, Mahavikas for Website.

CERTIFIED TRUE COPY

MEMBER
ADVANCE RULING AUTHORITY
MAHARASHTRA STATE, MUMBAI

Note :- An Appeal against this advance ruling order shall be made before The Maharashtra Appellate Authority for Advance Ruling for Goods and Services Tax, 15th floor, Air India building, Nariman Point, Mumbai - 400021.