



MONTHLY NEWSLETTER

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1

THE CONUNDRUM ON REFUND OF UNUTILIZED INPUT TAX CREDIT PUT TO REST – SUPREME COURT

The journey of the conundrum inceptioned with the two divergent judgments pronounced by the Hon'ble Madras High Court¹ and Hon'ble Gujarat High Court². As such, both the Courts interpreted differently on the validity of Rule 89(5) of the Central Goods and Service Tax Rules, 2017, thereby felicitating to the hoopla as and in form of two different fiscal formulas for claiming refund on unutilized input tax credit. For the sake of brevity, Rule 89(5) provides a formula for the refund of ITC, in "a case of refund on account of inverted duty structure".

Recently, the dust has been cleared by the Hon'ble Supreme Court whilst confirming the Madras High Court judgment therein planting the fiscal formula included in the Central Goods and Service Tax Rules with regards to claim of unutilized input tax credit accumulated on input services.

The Gujarat High Court, in its judgment in the **VKC Footsteps India Pvt. Ltd. vs Union of India** case, had 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.



¹ Tvl. Transtonnelstroy Afcons Joint Venture vs Union of India MANU/TN/5105/2020

² VKC Footsteps India Pvt. Ltd. Vs. Union of India MANU/GJ0998/2020

It would be of no less importance to mention herein that Section 54 embodies a provision for refund of unutilised input tax credit in cases involving zero rated supplies made without payment of tax and credit accumulation “on account of rate of tax on inputs being higher than rate of tax on output supplies”.

The Madras High Court, while delivering its judgment in ***Tvl. Transtunnelstory Afcons Joint Venture*** case declined to follow the view of the Gujarat High Court. It noted that the proviso to Section 54(3) and, more significantly, its implications do not appear to have been taken into consideration in VKC Footsteps case except for a brief reference.

“Section 54(3)(ii) does not infringe Article 14 (right to equality). 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,” the Madras High Court had noted.

However, the Bench said though the formula suffers from “inequities”, it did not deserve to be struck down. Further, the Apex Court has urged GST Council to reconsider the fiscal formula and

to come up with a policy decision in this regard.



2

**SECTION 9 APPLICATION -
COURTS EMPOWER TO
ADJUDICATE POST
CONSTITUTION OF
ARBITRAL TRIBUNAL**

The courts must not entertain an application filed under Section 9 of **The Arbitration Act, 1996** unless remedy under Section 17 is seen to be ineffective. However, to the contrary, recently The Hon'ble Supreme Court of India, in **Arcelor Mittal Nippon Steel (India) Ltd. V. Essar Bulk Terminal Ltd.**³, allowed an application moved before commercial court under Section 9 of the Act.

For the sake of brevity the factual matrix of the case is as such, that the parties entered into **Cargo Handling Agreement ("CHA")** consisting of an arbitration clause, according to which if any dispute arose between the parties, the same shall be resolved through arbitral tribunal. As such, the disputes arose between the parties, subsequently, Arcelor Mittol Nippon Steel (India) Ltd., appellant, filed an application under Section 11 of Arbitration Act for appointment of arbitrator, whereas the Essar Bulk Terminal Ltd, respondent, filed an application under Section 9 of the Act. Aggrieved from the order passed by the Commercial Court appellant preferred a petition before the High Court thereby

challenging the order passed by the Commercial Court.

It would be relevant to specify that the Hon'ble Gujarat High Court whilst dismissing the petition held that the Commercial Court have the powers u/s 17 of the act that an appropriate order can be passed under Section of the Act if the remedy is evident to be ineffective.

It is apposite to mention herein that Arcelor Mittol Nippon Steel (India) Ltd., appellant upon aggrieved with the order passed by the Hon'ble High Court order, moved to the Hon'ble Apex Court thereby raising issues (i) Does the court have power to entertain an application filed under Section 9 of the Act, once the tribunal has been constituted, along-with the meaning of term "entertain" purports. (ii) Is it an obligation upon the court to examine remedy provided under Section 17 before passing an order under S.9(1) of the Act.

While dealing with first issue, it was argued by the appellant that the legislative intent behind insertion of Section 9(3) of the Act i.e. to reduce the role of court in the arbitration process therein a reference was made to 246th Report of the Law Commission. It was further contended that the report of High Level Committee chaired by Justice B.N. Srikrishna asserting the intent

³ Civil Appeal No. 5700 of 2021

behind Section 9(3) of Arbitration Act was to minimize the judicial interference in arbitration proceedings. The term “entertain” was emphasized whilst quoting ***State Bank of India and Ors. v. S.N. Goyal***⁴ and ***Deep Chand & Ors. v. Land Acquisition Officer & Ors.***⁵ to explain the meaning of the term. Further the appellant submitted that the term “entertain” was used with reference to “adjudicate” and “passing of interim order” under Section 9(1) of Act.

As such, the respondent arguments were crafted towards the maintainability of the petition under Article 227 of the Indian Constitution it was submitted that the Hon'ble Apex Court has the jurisdiction but the same shall be exercised before the arbitral tribunal is constituted.

It would be of no less importance to mention herein that the Hon'ble Apex Court, on a comprehensive perusal of the submissions of both the parties, held that the respondent has failed to prove any delay and laches with regards to constitution of arbitral tribunal and therefore application under section 9 of the Act subsists well on all the fronts. Moreover, the respondent stated that the Arbitration Act did not confer any power on the court to relegate or transfer pending applications under Section 9(1) to an arbitral tribunal the moment it was

constituted. Whilst allowing the appeal, the court concluded that once the application u/s 9 is heard, relief(s) are to be declined pursuant to Section 17 of the Act.



⁴ AIR 2008 SC 2594

⁵ AIR 1994 SC 1901

3 SUPREME COURT RECALLS ITS SUO MOTO ORDER ON LIMITATION

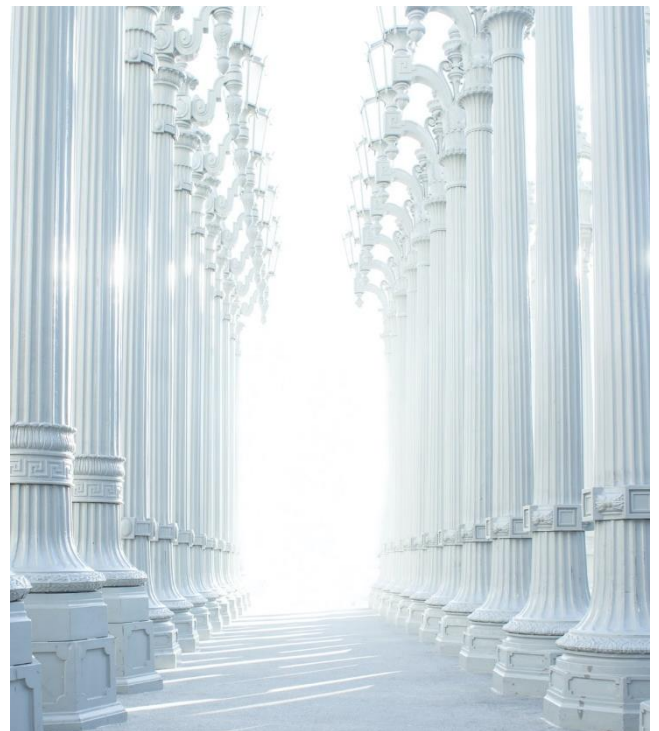
The Hon'ble Supreme Court vide its order dated 23.09.2021 has withdrawn its earlier order for extension of limitations after observing that number of positive cases of Covid-19 are under control and the normalcy is restored.

On 23.03.2021⁶, the Hon'ble Supreme Court after taking in account the plight of the litigants and their inability to approach courts as a result of the prevalence of Covid-19 took *suo moto* cognizance of the same and extended the period of Limitation provided under all General and Special Laws while using its inherent powers under Article 141 & 142 of the Constitution. The said order of the Hon'ble Court is applicable to all the Courts and Tribunal.

The Order has the following consequences –

I. "In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.

II. In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.



III. The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section

⁶ *In Re: Cognizance for Extension of Limitation, Miscellaneous Application No. 665 of 2021.*

12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”

At the time when the economy was almost shut, it was necessity to pass the order for extending limitation as the legal services were at a halt and the general public was unable to approach the Courts for enforcing their rights. Moreover, there was a significant increase in defaults in repayment of loans since the arrival of Covid-19 and it was practically impossible for people to approach the Court even after knowing that limitation is in force. Moreover, since the last year, indubitably, the Covid-19 wave had hit in different parts of the country at different times; therefore, instead of various High Courts passing different decision for extending the limitation, a uniform order applicable throughout the India is more reasonable.

As the overall situation in the economy is getting back to normal, there is no further extension is required. Moreover, the Hon'ble Court has already ruled that in case the situation gets worse, then the Court would not hesitate in restoring the order for extension of the limitation period.



4

CAN A LITIGANT/ PARTY-IN-PERSON CLAIM TO ARGUE HIS OR HER MATTER AS A MATTER OF RIGHT?

Recently, an interesting issue has been examined by the Hon'ble Uttarakhand High Court in ***Sanjiv Chaturvedi versus Union of India***,⁷ wherein a Litigant/ Party-in-person insisted upon arguing his/her matter before the Hon'ble Court.



The factual matrix of the case were that a Writ Petition was filed before the Hon'ble Court through a counsel along with which an attached note requesting the Hon'ble Court that let the same shall be argued by the learned Senior Counsel on behalf of the Petitioner. However, astonishingly, whilst appearing before the Hon'ble Court, party in-person insisted upon arguing the matter. It would be relevant to mention here that the Hon'ble Court queried the Petitioner on the same, the floor was kept open with regards to appointment of counsel by the Hon'ble Court however, the Petitioner heavily insisted to argue the matter as party-in-person.

In this regard, the Hon'ble Division Bench of Uttarakhand High Court, comprising of the **Hon'ble Chief Justice Sri Raghvendra Singh Chauhan & the Hon'ble Justice Alok Kumar Verma** held that the party/litigant cannot claim to argue the matter as party-in-person, as a matter of his right however, the same shall be left to the discretion of the concerned court whether to allow the matter to be argued as party-in-person or not.

The Court categorically observed that the Indian Parliament enacted the Advocates Act, 1961 "Act" to consolidate the law relating to legal practitioners with an aim to reform the judicial administration post Independent India. As such, the Act defines the term "Advocate"⁸ as an

⁷ Writ Petition (S/B)
No. 407/2020.

⁸ Section 2(a), Advocates Act, 1961

advocate entered in any roll under the Act. It also defines “legal practitioner”⁹ as an Advocate (or Vakil) of any High Court, a pleader, mukhtar or revenue agent.

The admission and enrolment of an advocate is dealt with by the Chapter III of the Act whereas the Chapter IV of the Act deals with “Right to Practice”. The Act recognizes advocates to be the only class of persons, entitled to practice

law¹⁰ and every Advocate entitled as of right to practice throughout the territories to which the act extends¹¹. Thus, that it is only an advocate who can claim as a right to argue a matter before any court or tribunal.

Moreover, the Act provides discretionary power to the any court, authority, or person to permit any person, other than an advocate to appear before it or him in any particular case.¹²



⁹ Section 2(i), Advocates Act, 1961

¹⁰ Section 29, Advocates Act, 1961

¹¹ Section 30, Advocates Act, 1961

¹² Section 32, Advocates Act, 1961

5

LEGAL NEWS AND
UPDATES

- NEET-UG Aspirants have moved the Apex Court seeking cancellation of entrance exam conducted by National Test Agency on 12.09.2021 and thereby sought directions for re-exam alleging paper leak under criminal conspiracy.
- Apex Court observed the inherent power vested with the High Court under Section 482 Cr.P.C., power to annul the proceedings of 'non-compoundable' offences irrespective of the fact that trial has been concluded or appeal stands dismissed against conviction, keeping in mind facts and circumstance of the case, as the same shall not paralyze the object of criminal justice system.
- In *Husna Banu v. State of Karnataka* decided on 29.09.2021, Karnataka High Court while hearing matter of child custody held that breastfeeding shall be recognized as fundamental right u/A 21 of the Constitution of India, right of lactating mother and suckling infant shall be put under the umbrella of fundamental Right.
- Apex Court held that to avail seniority benefit, period of service shall be considered from the joining date and not retrospectively.
- Shootout at Delhi's Rohini Court end on death of three people including under-trial gangster Jitender Gogi. Incident popped questions on court's security norms. Plea filed in Delhi High Court for security upgrade. While another filed before apex court to minimize the production of under-trials.
- Apex Court ruled that the company officials including manager, directors, chairman etc. cannot be held vicariously liable for the offence committed by company without stating individual role.
- CCI imposed penalty of Rs. 873 Crore on three beer companies – UBL, AIBA, Carlsberg India and 11 individuals for price coordination in various Indian States and UT's, infringing norms of Competition Law.
- Apex Court ruled that compromise between accused and complainant cannot be sole basis for reduction in accused punishment.
- Supreme Court observed that if signature on cheque is admitted then presumption shall be raised u/s 139 of Negotiable Instrument Act that same was issued in discharge of debt or liability.

- Apex Court frowned upon 10 adjournments order granted by MP court in the matter of eviction suit. Bench of apex court barred the grant of repeated adjournment.
- Moratorium under IBC applicable only on corporate debtor not on promoters.
- Apex Court directed the states to ensure internet facility with adequate speed in every jail in order to implement 'Fast and Secured Transmission of Electronic Records' (FASTER).
- Apex Court refused to accept Centre request to postpone 2021 exam for women's entry into NDA and INA by
- Apex Court held that NCLT cannot permit modifications and withdrawals of approved resolution plan by Committee of Creditors.





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