

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

D.B. Civil Writ Petition No. 5714/2021

Baker Hughes Asia Pacific Limited, Having Its Project Office At Unit No. 203, Reliable Tech Park, MIDC, Airoli, Navi Mumbai 400708, Maharashtra and *Project Execution Office* at Survey No. 2301/818 and 2408/819, Ahmedabad Highway Near Petrol Pump, Barmer, Rajasthan 344001 through its Authorised Signatory Ranveer Milkhi Singh Rana Son Of Shri Milkhi Ram Rana, Age-47 Years, Resident Of Village & PO Tatehal, Tehsil Palampur, District Kangra, Himachal Pradesh 176103.

----Petitioner

Versus

1. Union Of India, Through Its Secretary, Ministry Of Finance, 3rd Floor, Jeevan Deep Building, Sansad Marg, New Delhi.
2. The State Of Rajasthan, Through Its Principal Secretary, Department Of Finance, Secretariat, Jaipur.
3. The Deputy Commissioner, State Tax, Circle Barmer, Rajasthan.
4. Central Board Of Indirect Taxes And Customs, Through Its Chairman, North Block, New Delhi 110001.

----Respondents

For Petitioner(s)	:	Mr. Tushar Jarwal, Sr. Advocate with Mr. Sheetal Kumbhat.
For Respondent(s)	:	Mr. Mukesh Rajpurohit, ASG. Mr. Sandeep Shah, Sr. Advocate-cum-AAG with Mr. Nishant Bafna. Mr. Hemant Dutt. Mr. Rajvendra Saraswat.

**HON'BLE MR. JUSTICE SANDEEP MEHTA
HON'BLE MR. JUSTICE VINOD KUMAR BHARWANI**

J U D G M E N T

Judgment pronounced on ::: **30/06/2022**
Judgment reserved on ::: **24/05/2022**

BY THE COURT : (PER HON'BLE MEHTA, J.)

1. The petitioner herein has approached this Court through this writ petition under Article 226 of the Constitution of India with the following prayers:

"a. issue an appropriate writ, order, or direction in the nature of Certiorari or any other writ, order or direction of like nature, calling for record of the Petitioner's case leading to passing of the Impugned Refund rejection Order in Form RFD 06 dated 05.01.2021 (Annexure-1) and after examining its legality and propriety, quash the Impugned Refund rejection Order in FORM RFD 06 dated 05.01.2021 (Annexure-2) as being arbitrary, illegal and constitutionally invalid;

b. issue an appropriate writ, order, or direction in nature of Certiorari or any other writ, order or direction of like nature, to call for, examine the record in relation to the Impugned Circular bearing No. 135/05/2020-GSTF.No.CBEC-20/01/06/2019-GST dated 31.03.2020 (Annexure-2) and quash Para 3 of it to the extent it seeks to deny refund in cases where input and output supplies are same as being arbitrary, violative of Article 14, and Article 300A of the Constitution of India and ultra vires Section 54 of the Central Goods and Services Tax Act, 2017;

c. Writ of Mandamus or any other appropriate writ, order or direction in the nature of mandamus directing the Respondent No.2 and 3 [Deputy Commissioner, State Tax] to grant refund of accumulated Input Tax Credit amounting to Rs. 27,02,26,876 as claimed by the Petitioner under FORM-GST-RFD-01 dated 29.09.2020;"

2. Brief facts relevant and essential for disposal of the writ petition are noted herein below:

The petitioner operating in the State of Rajasthan through its project Office at Unit No.203, Reliable Tech Park, MIDC, Airoli, Navi Mumbai, entered into a development contract with the

company Vedanta Limited which has been granted exclusive rights to carry out petroleum operations in Rajasthan Block RJ-ON-90/1 by the Government of India. For this purpose, a Production Sharing Contract was executed between Vedanta and the Central Government. In order to procure essential goods, materials and/or equipment required for carrying out the petroleum exploration and production operations as prescribed in the Production Sharing Contract, Vedanta entered into a sub contract dated 11.12.2018 with the petitioner for supply of these articles. As per terms of contract, the petitioner was required to procure the specified goods, material and/or equipment from India and abroad for onward dispatch to its Customer i.e. Vedanta. For executing the aforementioned supply of goods, the petitioner obtained registration under the CGST/RGST Acts and claims to have been regularly filing returns and paying tax to the Central/ State Government. For the purpose of execution of the contract, the petitioner procured goods from authorised vendors at GST rates varying between 5% to 28%.

3. It is asserted by the petitioner that in order to reduce the burden of tax and the cascading effect and to give a boost to the oil and gas industry, the Central Government issued a Notification No.3/2017- CGST dated 28.06.2017 providing for an effective GST Rate of 5% on all supplies made for specified operations subject to certain conditions. To avail 5% concessional rate of GST under the said notification, a pre-requisite condition was stipulated i.e. to provide a certificate from the Directorate General of Hydrocarbons, Ministry of Petroleum and Natural Gas which clears the transfer of said goods. The essentiality certificate was issued

bearing the name of the petitioner as the supplier and Vedanta as recipient. The petitioner, procured the goods by paying GST from 5% to 28% (Input Tax) and supplied the same to the Vedanta at the fixed GST rate of 5% (Output Tax) under the notification No.3/2017-Central Tax (Rate), dated 28.06.2017. It is claimed that Input Tax Credit available to the petitioner is much higher than its Output Tax Liability and as a consequence, after complete utilization of the credit towards the Output Tax Liability, a significant percentage of Input Tax Credit accumulated in favour of the petitioner on account of difference in rate of tax (GST) which was much higher than the rate of output tax. The petitioner has thus claimed that it is entitled to refund under the inverted duty structure as provided by the CGST and RGST Acts. For this purpose, the petitioner has relied upon Section 54 of the CGST Act which reads as below:

***"(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 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)

(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:"

(Emphasis supplied)

4. The petitioner claims to have filed a legitimate refund claim quantified at Rs.27,02,26,876/- in FORM No.GST-RFD-01 bearing Application Reference Number (ARN) AA080920066706Y to the respondent No.3 Deputy Commissioner, State Tax, Circle Barmer for the period between September, 2018 to September, 2019 as per the inverted duty structure in terms of Section 54(3)(ii) of the CGST Act. Pursuant to receiving the Refund Form, the petitioner's representative was summoned by the respondent No.3 Deputy Commissioner, State Tax, Circle Barmer and acting under his directions, all relevant details were provided in support of the I.T.C. refund claim. The petitioner alleges that to its utter surprise, a notice under FORM-GST-RFD-08 dated 19.12.2020 was received requiring the petitioner to show cause as to why the refund claim to the tune of Rs.27,02,26,876/- be not rejected in light of the Circular dated 31.03.2020 issued by the Central Board of Indirect Taxes and Customs (CBITC) which stipulates that refund under the inverted duty structure in terms of Section 54(3)(ii) of the CGST/SGST Act would not be available where the input and output supplies are the same. Clause 3.2 of the Circular dated 31.03.2020, is the bone of contention between the parties and is reproduced hereinbelow for the sake of ready reference:

*"3.2- It may be noted that refund of accumulated ITC in terms clause (ii) of sub-section (3) of section 54 of the CGST Act is available where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. **It is noteworthy that, the input and output being the same in such cases, though***

attracting different tax rates at different points in time, do not get covered under the provisions of clause (ii) of sub-section (3) of section 54 of the CGST Act. It is hereby clarified that refund of accumulated ITC under clause (ii) of sub-section (3) of section 54 of the CGST Act would not be applicable in cases where the input and the output supplies are the same.

(Emphasis supplied).

5. The petitioner relies upon Para 59 of the Circular No.125/44/2019-GST - CBEC-20/16/04/18-GST wherein, it has been clarified that refund under Section 54(3)(ii) of the CGST Act i.e. inverted duty structure, is to be allowed when the inputs are being procured at the normal GST rate and the output supplies are being made at a lower GST rate because of the lower rate notification in place. The said para of the circular is reproduced herein below for the sake of ready reference:

*"59. Notification No. 40/2017 - Central Tax (Rate) and notification No. 41/2017 - Integrated Tax (Rate) both dated 23.10.2017 provide for supplies for exports at a concessional rate of 0.05% and 0.1% respectively, subject to certain conditions specified in the said notifications. **It is clarified that the benefit of supplies at concessional rate is subject to certain conditions and the said benefit is optional. The option may or may not be availed by the supplier and/or the recipient and the goods may be procured at the normal applicable tax rate.** It is also clarified that the exporter will be eligible to take credit of the tax @ 0.05%/0.1% paid by him. **The supplier who supplies goods at the concessional rate is also eligible for refund on account of inverted tax structure as per the provisions of clause (ii) of the first proviso to sub-section (3) of section 54 of the CGST Act.**"*

The petitioner filed a detailed reply to the show cause notice dated 09.12.2020 claiming that there was no restriction on claiming refund in such cases where the inputs and output supplies are same as outward supplies were made at concessional

GST rates under the CGST notification dated 18.11.2019 which approves refund in cases where input and output supplies are same and where GST on output supply is fixed at a lower rate. Pursuant to receiving the aforesaid reply, the respondent No.3 rejected the refund claim submitted by the petitioner with reference to para 3 of the Circular dated 31.03.2020, vide impugned order dated 05.01.2021 (Annexure-1). The petitioner has thus, approached this Court through this writ petition preferred under Article 226 of the Constitution of India for assailing para 3 of the impugned circular dated 31.03.2020 and so also the rejection order dated 05.01.2021.

6. Separate replies to the writ petition have been filed by the respondents wherein, it has primarily been asserted that input and output supplies made by the petitioner are same thereby, leading to no value addition on the goods supplied by it and hence, the petitioner's claim for refund is not compliant with the criteria of inverted duty structure prescribed under Section 54(3) of CGST Act, 2017 and therefore, the tax credit would not be available to the petitioner. In this reference, reliance has been placed on Para No.3.2 of the Circular dated 31.03.2020. The respondents have emphatically disputed application of the circular dated 18.11.2019 (*supra*) to the petitioner's claim.

7. Shri Tushar Jarwal, Sr. Advocate assisted by Shri Sheetal Kumbhat, Advocate representing the petitioner, relied upon the Judgments rendered by the Guwahati High Court in the case of ***B.M.G. Informatics Pvt. Ltd. Vs. Union of India & Ors,*** reported in ***2021-VIL-650-GAU*** and the Calcutta High Court in

the case of **M/s. Shivaco Associates & Anr. vs. Joint Commissioner of State Tax, Directorate of Commercial Taxes & Ors**, reported in **2022-VIL-209-CAL** and urged that in the case of **B.M.G. Informatics Pvt. Ltd. (supra)**, Hon'ble Guwahati High Court categorically disapproved the stipulation made in the circular dated 31.03.2020 providing that even though different tax rates may be attracted at different points of time but the refund of accumulated unutilised tax credit will not be available under Section 54(3)(ii) of the CGST Act where the input and output supplies are same. It has been directed by the Guwahati High Court that this Circular would have to be ignored in situations akin to the case at hand.

While accepting the writ petition in the case of **M/s. Shivaco Associates (supra)**, Hon'ble Calcutta High Court went on to hold that the respondent authority, ought not to have rejected the claim of the petitioners by relying on the circular dated 31.03.2020 as the same was contrary to the provisions of the Act.

Shri Jarwal further urged that subordinate legislation in form of a statutory circular cannot supersede or override the parent statute and as such, the impugned circular, to the extent it disallows Input Tax Credit under the Inverted Duty Structure where input and output supplies are same, and so also the impugned order dated 05.01.2021, are per se illegal and hence deserve to be struck down while accepting the writ petition.

8. Per contra, Shri Mukesh Rajpurohit, learned ASG representing the Union of India and CBIT, learned Senior Counsel Shri Sandeep Shah, AAG representing the Department of Finance,

State of Rajasthan and, Shri Rajvendra Saraswat, Advocate representing the GST Department, vehemently and fervently opposed the submissions advanced by the petitioner's counsel. They contended that the petitioner is not entitled to the refund claim for ITC in face of the Circular dated 31.03.2020 and implored the Court to affirm the impugned order and sought dismissal of the writ petition.

9. We have heard and considered the submissions advanced by learned counsel representing the parties and have gone through the pleadings and the documents placed on record as well as the circulars and statutory provisions referred by the parties.

10. At the outset, we may note here that Section 54(3)(ii) of the CGST Act is absolutely unambiguous and does not carve out any exception that Input Tax Credit under the Inverted Tax Structure would not be applicable where the input and the output goods are the same. For the purpose of clarification, the Government of India, Ministry of Finance, Central Board of Indirect Taxes and Customs issued a notification dated 18.11.2019 para No.59 whereof reproduced infra, which makes it clear that the supplier who supplies goods at a concessional rate to companies involved in specified projects is entitled to refund under the inverted tax structure as per Clause (ii) of first proviso to Sub-section (3) of Section 54 of the CGST Act. The circular dated 31.03.2020 (Annexure-2) on the strength whereof the petitioner's claim for ITC refund has been rejected, clarifies that refund of accumulated ITC under Clause (ii) of Sub-section (3) of Section 54 of the CGST

Act would not be applicable in cases where the input and output supplies are the same.

11. We may state here that this circular is in the nature of an explanation and was issued on 31.03.2020 whereas the petitioner's claim for refund was a prior period between September, 2018 to September, 2019 on which date, the clarification dated 18.11.2019 was in force which clearly stipulates that a registered dealer who supplies goods at concessional rate is eligible for refund under the Inverted Tax Structure. Clause (ii) of Sub-Section (3) of Section 54 of the CGST Act does not indicate that ITC would be admissible only if the goods supplied had been subjected to some process. The provision allows refund of credit accumulated on account of supplies and does not mention that the credit could be claimed only if the supplier has made any value addition/ enhancement to the goods supplied. The very purpose of fixing the rate of GST at 2.5% each towards CGST/RGST on goods supplied for execution of petroleum projects was introduced with the object of promoting the oil and gas exploration activities. The Central Government Notification dated 28.06.2017, in unambiguous terms stipulates that upon being satisfied that it is necessary in the public interest to do so, on the recommendations of the council, intra State supply of goods, was being exempted/taxed at lower tax rates.

12. The impugned circular dated 31.03.2020 issued by CBITC was challenged before Hon'ble Guwahati High Court in the case of ***B.M.G. Informatics Pvt. Ltd. (supra)***. The learned Single bench of Guwahati High Court, vide judgment dated 02.09.2021, held

that the supplying dealer would be entitled to claim refund of accumulated unutilised tax credit under Section 54(3)(ii) of the CGST Act irrespective of the fact the input and output supplies are the same by ignoring the circular dated 31.03.2020. Similar view was taken by Hon'ble Calcutta High Court in the case of **M/s. Shivaco Associates (supra)**.

13. During the course of arguments, this Court made a pertinent query from learned counsel Shri Saraswat as to whether the judgment of the Guwahati High Court in the case of **B.M.G. Informatics Pvt. Ltd. (supra)** had been challenged any further to which, he fairly conceded that to his information, the judgment has not been challenged so far.

14. In wake of the discussion made herein above, we are of the firm opinion that the circular dated 31.03.2020, being a subordinate legislation, is repugnant and conflicting to the parent legislation i.e. Section 54(3)(ii) of the CGST Act and hence, the same cannot be applied to oust the legitimate claim for accumulated ITC refund filed by the petitioner. Otherwise also, the claim for refund of ITC filed by the petitioner was for a period prior to issuance of the circular dated 31.03.2020. Consequently, rejection of the petitioner's claim for accumulated input tax credit by the respondent No.3 Deputy Commissioner, State Tax, Circle Barmer with reference to para 3 of the Circular dated 31.03.2020, is invalid on the face of the record and cannot be sustained.

15. Thus, the order dated 05.01.2021 is hereby quashed and set aside. The respondents are directed to forthwith, refund the

accumulated input tax credit to the petitioner as per its entitlement.

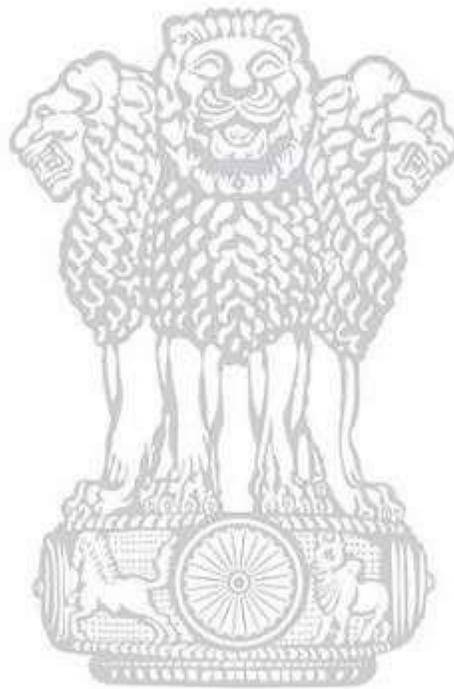
16. The writ petition is allowed in these terms.

17. No order as to costs.

(VINOD KUMAR BHARWANI),J

(SANDEEP MEHTA),J

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