आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

सत्यमेव जयते

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स्पीड पोस्ट / रजिस्टर्ड डाक ए.डी. द्वारा

(DIN-_20210664SW000000D594)

क फाइल संख्या : File No :GAPPL/ADC/GSTP/167,170,171/2020/1763 TO 1768

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-001-APP-ADC-11,12,13/2021-22**
दिनाँक Date : **18.06.2021** जारी करने की तारीख Date of Issue : 22.06.2021

श्री मोहित अग्रवाल, **अपर आयुक्त** (अपील) द्वारा पारित
Passed by Shri Mohit Agrawal, Additioanl Commissioner (Appeals).

ग Arising out of Order-in-Original No. ZO2406200041673, ZP2406200041739 & ZN2406200041717 दिनाँक: **03.06.2020** issued by Deputy Commissioner, Central GST, Division-VI (Vastrapur), Ahmedabad-South Commissionerate.

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/s. Indian Potash Limited, No.45, Potash House, Drive-in Road, Near Vijay Cross Road,Navrangpura, Ahmedabad-380009.

(A)	इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है। Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.
(i)	National Bench or Regional Bench of Appellate Tribunal framed under GST Act/CGST Act in the cases where one of the issues involved relates to place of supply as per Section 109(5) of CGST Act, 2017.
(ii)	State Bench or Area Bench of Appellate Tribunal framed under GST Act/CGST Act other than as mentioned in para- (A)(i) above in terms of Section 109(7) of CGST Act, 2017
(iii)	Appeal to the Appellate Tribunal shall be filed as prescribed under Rule 110 of CGST Rules, 2017 and shall be accompanied with a fee of Rs. One Thousand for every Rs. One Lakh of Tax or Input Tax Credit involved or the difference in Tax or Input Tax Credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to a maximum of Rs. Twenty-Five Thousand.
(B)	Appeal under Section 112(1) of CGST Act, 2017 to Appellate Tribunal shall be filed along with relevant documents either electronically or as may be notified by the Registrar, Appellate Tribunal in FORM GST APL-05, on common portal as prescribed under Rule 110 of CGST Rules, 2017, and shall be accompanied by a copy of the order appealed against within seven days of filing FORM GST APL-05 online.
(i)	Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying - (i) **Full amount of Tax, Interest, Fine, Fee and Penalty** arising from the impugned order, as is admitted/accepted by the appellant, and (ii) A sum equal to **twenty five per cent** of the remaining amount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order, in relation to which the appeal has been filed.
(ii)	The Central Goods & Service Tax (Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 has provided that the appeal to tribunal can be made within three months from the date of communication of Order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later.
(C)	उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइटwww.cbic.gov.in को देख सकते हैं। For elaborate, detailed and latest provisions relating to filing of appeal to the appellate authority, the appellant may refer to the website www.cbic.gov.in.

ORDER-IN-APPEAL

These orders arise on account of three (3) appeals filed byM/s. Indian Potash limited, No.45, Potash House,Drive-in Road, Near Vijay Cross Road,Navrangpura,Ahmedabad-380009(in short '*appellant*') against the following Orders-in-Original(in short '*impugned orders*') passed by the Deputy Commissioner, CGST, Division-VI (Vastrapur), Ahmedabad South (in short '*adjudicating authority*') in respect of three refund claims filed by the appellant under the provisions of Section 54(3)(ii) of the CGST Act, 2017 (in short '*the Act*') read with Rule 89(5) of the Central Goods & Services Tax Rules, 2017(in short '*the Rules*'):

Sr. No.	OIO No.& Date issued under Form GST-RFD-06	Period for which refund claimed	Amount of refund claimed (Rs.)	Appeal No.
1	ZO2406200041673 dated 03.06.2020	April, 2019	9,70,49,593/-	GAPPL/ADC/GSTP/167/2020
2	ZP2406200041739 dated 03.06.2020	November, 2018	8,47,39,446/-	GAPPL/ADC/GSTP/170/2020
3	ZN2406200041717 dated 03.06.2020	February, 2019	6,70,00,314/-	GAPPL/ADC/GSTP/171/2020

2. Brief facts of the case are that the appellant havingGSTIN 24AAACI0888H1ZMhad filed refund claims under form RFD-01A for the period as mentioned above seeking refund of unutilized Input Tax Credit (ITC) accumulated contending the accumulation of ITC in their case being on account of inverted tax structure viz. rate of tax on input being higher than the rate of tax on output supplies.The appellant is stated to be a leading importer and seller of inter alia Muriate of Potash, Di-ammonium Phosphate, Sulphate of Potash, Urea, Rock Phosphate, Gypsum. They are engaged in importing fertilizers from other countries and after converting the said fertilizers into retails packs sells the same at a subsidized price to dealers situated across India. It is their submission that one of the input i.e., packing materials, used for putting fertilizers in retail packet, is subjected to tax @ 18% and that since the retail pack of fertilizers is leviable @ 5% of GST, the difference in rate of taxes on input and output inter alia has resulted in further accumulation of credits. The refund claims referred above were filed by the appellant under the provisions of Section 54(3) of the Act read with Rule 89(5) of the Rules. After scrutiny of the refund claims filed by the appellant, they were issued with Show Cause Notices proposing rejection of their claim for refund on the ground that there is no such inverted duty structure in the case and according to Para 3.2 and Para 6 of Circular No.135/05/2020-GST dated 31.03.2020, the refund claim appears to be not admissible. Since there was no compliance/reply from the appellant's side for the SCN even after extension of time by two weeks for submission of reply to the SCN, the said refund claims were rejected by the adjudicating authority vide the impugned orders on the grounds in the Show Cause Notice.

3. Being aggrieved with the impugned order, the appellant has filed the present appealson following grounds:

- Impugned Order has been passed arbitrarily without taking into consideration the submissions/documentary proofs submitted and recorded at the time of reply to SCN. The order does not have a mention on reply to SCN submitted by them. Since the refund is denied without cogent/sound reasoning, the order is non-speaking in nature and is liable to set aside on this ground alone. They have relied on the case laws in the case of S.N.Mukherjee Vs. Union of India [1990 SCR Supl.(1) 44], Testeels Ltd. Vs. N.M. Desai and Anr. [AIR 1970 Guj.1], Excel India Pvt. Ltd. Vs. Commissioner of Service Tax, Bangalore [2007 (7) STR 542 (Tri.-Bang.)] and Asst. Commr. Commercial Taxes Vs. Shukla & Brothers [2010 (254) ELT 6 (SC)] and Circular No.1053/02/2017-CX dated 10.03.2017 and Instruction issued vide F.No.275/17/2015-CX.8A dated 11.03.2015 both issued by CBEC, in support of their contention;

- The impugned order has been passed without giving the appellant an opportunity of hearing, after the reply to the SCN was filed which is directly in contravention of the prescribed procedures. It is settled principle of law that any order passed without providing an opportunity of hearing is erroneous and in direct violation of principles of natural justice. They rely on the case laws in the case of Asst. Commr. Commercial Taxes Vs. Shukla & Brothers [2010 (254) ELT 6 (SC)], AutomotiveTyre Manufacturers Asson. Vs. Designated Authority [2011 (263) ELT 481 (SC)], Sri GayathriCahews Vs. Assistant Commissioner of GST &C.Ex., Cuddalore [2018 (19) GSTL 408 (Mad.)], Leo Prime Comp. Pvt. Ltd. Vs. Union of India [2020 (372) ELT 330 (Mad.)]; and Kerala Co-op. Dev. & Welfare Fund Board Vs. Union of India [2018 (13) GSTL 262 (Ker.)] in support of their contention;

- Para 3.2 of the Circular No.135/05/2020-GST dated 31.03.2020 is not applicable to the appellant as their case is completely different from the situation dealt therein. The said para is applicable where the input and output are the same but attracts different rates of taxes at different point of time;

- They are supposed to incur tax only on value addition based on the cardinal principle of GST. However, due to higher GST rate on inputs, there is huge blockage in the form of accumulated credits. The appellant had paid input tax to the government in the form of Import IGST before the point of sale and this Input Tax locks up the working capital and government is providing relief only on sale of those inverted outward supplies. The appellant should be entitled for interest from the Government for the blockage of working capital due to inverted duty structure for their final products;

- It is well known principle of law that any provisions enacted has to be read and interpreted with its literal words and literal meaning unless there is any ambiguity in such literal interpretation. In the give case, the Circular clearly bring out a specified situation of refund of differential tax at different point. The situation is also

illustrated in clear terms to exclude refund of inverted duty only those specified situation. On plain reading of Para 3.2 of the said Circular along with facts of the appellant, the situation brought out in circular nowhere relates or applies to the given case of appellant. They rely on the case laws in the case of Tata Chemicals Ltd. Vs. Commissioner of Cus.(Preventive), Jamnagar [2015 (320) ELT 45 (SC)], State Vs. ParameshwaranSubramani [2009 (242) ELT 162 (SC)], Commissioner of Income Tax, Kerala Vs. Tara Agencies [2007 (214) ELT 491 (SC)] and Competition Commission of India Vs. Steel Authority of India [2010 (103) SCL 269 (SC)] in support of their contention in this regard;

- As per Circular No.79/53/2018-GST dated 31.12.2018, it is evident that if there is more than one input used towards a single output and rate of any input is higher than the rate of output, refund under IDS is applicable;

- Circular No.135/05/2020-GST dated 31.03.2020 was issued after filing of refund claim and hence cannot be made applicable. Para 6 of the mentioned circular brings out new requirement to include HSN/SAC code in ITC annexure submitted along with refund claim. When such requirement was not there at the time of application of refund claim, the doctrine of impossibility shall arise, where the appellant cannot be expected to comply with the new requirement which is not there at the time of filing the refund application and hence the department rejecting refund for such new requirement is completely wrong. Requirement of submission of HSN details in circular is not clarificatory in nature but an additional required to be followed with effect from the date of issuance of circular. Without prejudice to the above, the appellant have submitted Annexure-B in line with Para 6 of the Circular along with their reply to SCN; and

- Non-submission of HSN details in the Annexure-B is only a procedural lapse and the substantial benefit of refund available to the company should not be denied only on this ground. Procedure has been prescribed to facilitate verification of substantive requirement. As long as fundamental requirement is met, other procedural deviation can be condoned. They mainly rely on the case laws in the case of Mangalore Chemicals and Fertilizers Ltd. Vs. Deputy Commissioner [1991 (8) TMI 83 – Supreme Court of India] and LallubhaiAmaichand Ltd. [2011 (7) TMI 1094 – Government of India], among other six other case laws relied.

4. A hearing in the matter was held on 31.03.2021 through virtual mode. S/Shri/Smt.Harish Bindumadavan and AshwiniChandrasekaran, Advocates, L. Sayee Mohan and Rakesh R., Consultants and Rahul Kumar, Assistant Manager and Authorised Signatory attended the hearing on behalf of the appellant. They reiterated the submissionsmade in appeal memorandum and requested to consider their appeal.

5. I have carefully gone through the facts of the case, appeal memorandum, submissions made at the time of personal hearing and evidences available on records. The

issue to be decided in the case is whether in the facts and circumstances of the case, the appellant's claim for refund of accumulated input tax credit in the case is legally admissible or not as per provisions Section 54(3) of the Act on the ground of inverted tax structure contended by them.

6. Since the issue under dispute pertains to refund admissible under Section 54(3) of the Act, it would be relevant to see the provisions of the said section for better appreciation of the facts in the matter. The relevant extracts of the said Section reads as under:

" **Section 54(3)**

(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:

(emphasis applied)

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."

6.1 From the above provisions, it can be seen that refund of unutilized input tax credit is admissible only in **two situations** i.e. cases where the input tax credit remain unutilized for zero rated supply made without payment of tax and cases where the credit has accumulated on account of rate of tax on inputs is higher than the rate of tax on output supplies. Further, the specific proviso "*Provided that no refund on unutilized input tax credit shall be allowed in cases other than* ……", makes it clear that no refund of unutilized input tax credit can be granted in any situations other than above two.

7. In the instant case, the appellant has claimed the refund under clause (ii) of the above section viz. refund of unutilized input tax credit where the credit has accumulated on account of rate of tax on inputs is higher than the rate of tax on output supplies. The refund is

claimed on the ground that one of their inputs used viz. packing material is attracting higher rate of tax @ 18% whereas their output viz. retail packed fertilizer attracts tax at lower rate of 5% only, owing to which there was accumulation of ITC.

7.1 The adjudicating authority has rejected the subject refund claims on the grounds that there was no such inverted duty structure for refund in the case and as per Para 3.2 of Circular No.135/05/2020-GST, 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.

8. It is observed that in the present case, the appellants areimporting fertilizers from other countries and after converting the said fertilizers into retail packs sells the same at a subsidized price to dealers situated across India. The fertilizer imported attracts GST@5% and the fertilizer, after retail packing, sold attracts GST also @5%. Thus, the rate of tax on input is 5% IGST and rate of tax on output supplies is also 5% IGST or 2.5% CGST + 2.5% SGST. Therefore, prima facie, there does not seem to be a case of rate of tax on input being higher than the rate of tax on output supplies for the accumulation of ITC in the case. Further, it is an admitted fact that the output supplies of the appellant are at subsidized price because of whichthe taxable value of input supplies is more than the taxable value of output supplies and the difference in purchase and sale price is due to central / state government subsidies available to the appellant. It is clear that they have received a huge amount of subsidy over their final product upon which no tax has been collected. Therefore, the tax paid on input remains much higher than the tax collected on final product/output supplied. Evidently, the reduction in sale value compared to the purchase value in view of subsidies available, is the main reason for accumulation of ITC in the case of appellant. This fact is not disputed by the appellant. The criteria for refund under Section 54(3) of the Act is the difference in rate of tax and not the difference in value of supplies. In the case on hand, the rate of tax for inward and outward supplies is falling under the same slab of tax i.e., 5% slab and hence no refund is admissible in terms of Section 54(3) of the Act.

8.1 The appellant has claimed the refund on the contention that there is accumulation of ITC on account of their input viz. packing material attracting higher rate of tax @18%. But from the details submitted by them for claiming refund, it does not seem to be established that the accumulation of ITC is due to such higher rate of tax on packing material used or that there is accumulation of ITC for that reason. On the contrary, the accumulation of ITC quite obviously seems to be on account of lower sale price of output supplies owing to subsidies available. Since on the face of facts, the accumulation of ITC in the case appeared to on account of lower sale value of output supplies owing to subsidies, it was imperative on the part of the appellant to prove unequivocally that there was accumulation of ITC because of their packing material attracting higher rate of tax, apart from the accumulation of ITC due to lower sales value of output supplies and only in such a scenario, their claim of refund in the case would sustain legally. It is more so, as mere fact of some inputs attracting higher rate of

tax need not necessarily lead to accumulation of ITC always.In the case on hand, the appellant evidently could not prove this aspect unambiguously. By failing to prove convincingly that there is accumulation of ITC due to higher rate of tax on input, the appellant could not prove the admissibility of the refund claimed by them beyond any doubt. It is settled law that the onus to prove the admissibility of a refund claim purely and solely lies on the person who claims the refund.

8.2 Further, a perusal of the details of inward supplies received, submitted by the appellant in Statement 1A in terms of requirement under Rule 89(2)(h) of the CGST Rules, 2017 along with their refund application very clearly reveals that major part of the ITC available to the appellant is attributable to the input viz. fertilizers imported by them by paying IGST @5%, as is evident from the table give below which is based on the above referred details submitted by the appellant.

(Figures not in brackets are in Rs.)

Sr.No.		Tax period for which refund claimed		
		November 2018	February 2019	April 2019
1	Taxable value of input supplies	291,83,26,482/-	186,43,98,008/-	407,52,25,897/-
1(i)	Taxable value of input @5% rate of tax viz. fertilizer imported (Figure in bracket in percentage terms)	285,11,17,771/- (97.7%)	183,69,55,470/- (98.53%)	403,16,06,306/- (98.93%)
1(ii)	Taxable value of input other than having rate @5%, including those attract higher rate of tax of 18% (Figure in bracket in percentage terms)	6,72,08,711/- (2.3%)	2,74,42,538/- (1.47%)	4,36,19,590/- (1.07%)
2	Net Input Tax Credit	20,58,65,197/-	16,41,07,642/-	27,89,10,319/-
2(i)	ITC attributable to inputs attracting rate of tax @5% (Figure in bracket in percentage terms)	19,45,57,001/- (94.5%)	15,92,13,436/- (97.02%)	27,10,59,176/- (97.2%)
2(ii)	ITC attributable to inputs other than that attracting rate of tax @5%, including those attract higher rate of tax of 18% (Figure in bracket in percentage terms)	1,13,08,196/- (5.5%)	48,94,205/- (2.98%)	78,51,139/- (2.8%)
3	Refund claimed	8,47,39,446/-	6,70,00,314/-	9,70,49,593/-

As is evident from the above table, 94.5% to 97.2% of the Net Input Tax Credit is attributable to the tax paid on imported fertilizer @5% IGST and the share of the other inputs to the Net ITC is only ranging between 5.5% to 2.8%. While considering the taxable value of input supplies, it can be seen that the share of imported fertilizer towards taxable value of input supplies is ranging from 97.7% to 98.93% whereas that of other inputs ranges between 2.3% to 1.07%. Since the appellant is doing only retail packing in the present case, it is quite obvious that the cost of their output is almost contributed by the input fertilizer and the cost of packing material used therein is not that much significant in the final cost of the output both in value and quantity terms. The meager share of 2.3% to 1.07% of other inputs, viz. packing material, in the total taxable value of inward supplies discussed abovestrengthens this view. Further, it is an undisputed fact that the price of packing material is very less compared to the price of the other input viz. fertilizer.In such a situation, it is quite evident that the said input with such a meager share in the cost of output cannot normally cause an accumulation of ITC in the ordinary course, even if they attract a higher rate of tax. The tax paid on the input, packing material, is not sufficient enough to cause an accumulation of ITC in the instant caseas the rate of tax on 97.7% to 98.93% of the input supplies and the rate of tax on output supplies being same at 5% .No contra is proved by the appellant in this regard. In fact, there would have been no accumulation of ITC in the instant case, had there been no subsidies available to the output. Therefore, the appellant's contention that there is accumulation of credit due to higher rate of tax on their input viz. packing material does not hold water. Rather, it clearly stand established from the above data that the accumulation of ITC in the instant case was basically for the reason of lower value of output supplies of the appellant owing to Central/State Government subsidies available.

8.3 It is also pertinent to observe that the refund claimed by the appellant in the instant case is much higher than the actual input tax paid on the input attracting higher rate of tax @18%, as can be seen from Sr.No.6 of the above table, the rationale behind which is not understandable. The intention of the provisions of refund on account of inverted duty structure was never to allow refund higher than tax paid on input which attributes inverted tax structure.Therefore, the refund of unutilized ITC claimed by the appellant under inverted tax structure in excess to the ITC attributable on input is illogical and not in consonance with the intention and provisions of Section 54(3) of the Act and hence on that ground alone is not maintainable. Also, it cannot be contended that the refund is claimed as per the formula prescribed under Rule 89(5) of the Rules and hence is in order. In this context, I find that before applying the formula provided under Rule 89(5) which prescribes the method & manner of seeking such refund, the eligibility of the claim in term of Section 54(3) of the CGST Act, 2017 needs to be ascertained. It is settled legal principle that the Rules operate within the body of the Act and can never overrule the Act. Therefore, the said argument cannot succeed unless the claim qualifies in term of Section 54(3) of the Act.

8.3.1 The Hon'ble Supreme Court in the case of Union of India Vs. Intercontinental Consultants and Technocrafts Pvt. Ltd. [2018 (10) GSTL 401 (S.C.)], by relying on the judgment in the case Babaji Kondaji Garad Vs. Nasik Merchants Co-operative Bank Ltd. [(1984) 2 SCC 50], has held that:

> *"26. It is trite that rules cannot go beyond the statute. In Babaji Kondaji Garad, this rule was enunciated in the following manner :*
>
> > *"Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the byelaw, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with.""*

8.3.2 In the above decision, the Hon'ble Supreme Court also referred to their decision in the case of Commissioner of Income Tax, Madras Vs. S.Chenniappa Mudaliar [(1969) 74 ITR 41] wherein it was held that ***in the event of repugnancy between the substantive provisions of the act and a rule, it is the rule which must give way to the provisions of the Act.***

8.3.3 The Hon'ble Apex Court has further observed that it is also well established principle that Rules are framed for achieving the purpose behind the provisions of the Act, as held in *Taj Mahal Hotel* [1971 (82) ITR 44] :

> *"the Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect."*

8.3.4 Further, the Hon'ble Supreme Court in the case of ITW Signode India Ltd. Vs. Collector [2003 (158) E.L.T. 403 (S.C.)] has observed that:

> *"It is a well-settled principle of law that in case of a conflict between a substantive act and delegated legislation, the former shall prevail inasmuch as delegated legislation must be read in the context of the primary/legislative act and not the vice-versa."*

Apart from the above judgment, the aforesaid principle is also recognised by the Hon'ble Supreme Court in *Union of India* v. *Somasundram Viswanath,*[1989 (1) SCC 175] wherein the Court ruled that the Act will prevail over the Rules. The rule which travels beyond the scope of Act cannot be given effect to. [Also see *Bimal Chandra Banerjee* v. *State of Madhya Pradesh,* 81 ITR 105 (SC); *Lohia Machines Ltd.* v. *Union of India,* 152 ITR 308 (SC); *Chowgule & Co.* v. *C.I.T.,* 195 ITR 810 (Bom.)]

8.3.5 The Hon'ble Supreme Court in another judgment in the case of All Saints High School, Hyderabad & Others Vs. Government of Andhra Pradesh [1980 SCC (2) 478] has observed that:

> *"3. While interpreting a provision of law the Court will presume that the legislation was intended to be intra vires and also reasonable. The section ought to be interpreted consistent with the presumption which imputes to the legislature an intention of limiting the direct operation of its enactment to the extent that is permissible. A reading down of a provision of a statute puts into operation the principle that so far as it is reasonably possible to do so, the legislation should be construed as being within its power. It has the principle effect that* ***where an Act is expressed in language of generality, makes it capable, if read literally, of applying to matters beyond the relevant legislative powers, the Court will construe it in a more limited sense so as to keep it within power."***

8.3.6 A Constitution Bench of five Judges of the Hon'ble Supreme Court in the case of R.S. Nayak Vs. A.R. Antulay [AIR 1984 SC 684] has held that:

> *"The provisions of the Act must receive such construction at the hands of the court as would advance the object and purpose underlying the Act and at any rate not defeat it.* ***If the words of the statute are clear and unambiguous, it is the plainest duty of the court to give effect to the natural meaning of the words used in the provisions.*** *In the event of an ambiguity of the plain meaning of the words used in the statute being self-defeating, the court is entitled to ascertain the intention of the legislature to remove the ambiguity by construing the provision of the statute as a whole keeping in view what was the mischief when the statute was enacted and to remove which the legislature enacted the statute. Whenever a question arises upon ambiguity or where two views are possible of a Provision, it would be the duty of the court to adopt that construction which would advance the object underlying the Act."*

8.3.7 Further, the Hon'ble CESTAT in the case of Jhunjhunwala Rolling Mills and Engg. Works Vs. Collector of Central Excise, Nagpur [1987 (28) ELT 534 (Tri.)], while deciding the refund claim of the party held that:

> ***"4.*** *We have examined the submissions made on both the sides. The main plunke of the appellants for claiming refund is the Appellate Collector's decision containing in his order dated 22.9.1979 upholding the classification of the steel produced under Item 26AA and holding that the products were eligible to exemption from Central Excise duty under that item. The appellants contended that this decision should apply to the earlier classifications and that as a result of this decision they are automatically entitled to refund of duty as the Appellate Collector granted consequential relief to them. At the outset we may observe that this is a fallacious contention. The Appellate Collector's decision in his order dated 22.9.1979 was with reference to the classification list of the product which was required to be filed in terms of Rule 173B. A decision of the appellate authority in this behalf cannot over-ride the other statutory provisions of claiming refund as enjoined under Section 11B. When the Appellate Collector*

allowed the appeal with consequential relief if any he could not have implied that the relief should be granted suo motu without any application from the assessee. The particular appeal of M/s. Jhunjhunwalla Rolling Mills did not involve any claim for refund of duty. If it had been so, the contention of the learned Advocate would have been correct and this type of relief would have been covered by Section 11B(93) which did not require any claim to be filed for the refund. But this was an order in respect of the classification of the products manufactured by the appellants. To get the benefit of this order, the law required that the appellants should make claim for refund in terms of Section 11B. Indeed the appellants have made such claims and these were not in accordance with the prevalent practice of the Department and were not made with a view to expediting the payment of refunds as claimed by the appellants but they were filed under the provisions of law for claiming refund. The appellants seem to have mixed up two issues to urge that the relief should have been automatic. This is not so as observed above. In view of these circumstances, the various judicial pronouncements cited by the learned Advocate of the appellants are not applicable to the present appeal. It may further be added that there are no provisions in Section 11B that would authorise suo motu refund to the assessee as contended by the appellants except in case of an order passed in appeal or revision. The Appellate Collector's order was not one which concerned the claim for not but it only determined a question of classification under Rule 173B. The provisions of Rule 173B cannot over-ride the legal requirements of Section 11B. Hence we do not find any merit in the contention of the learned Advocate. In these circumstances, we find that the orders of the Asst. Collector and the Collector (Appeals) are quite legal and correct. The same are confirmed and the appeal of M/s. Jhunjhunwalla Rolling Mills is rejected."

By applying the ratio of the above judgment in the facts of the present case, no refund would be admissible merely relying Rule 89(5) of the Rules as Section 54(3) of the Act is specific about granting of refund on account of difference in rate of tax and it nowhere speaks about valuation difference on account of subsidy as in the present case. Rule 89 only provides the formula for calculation of refund on account of inverted duty structure and it cannot over ride the basic legal requirement of Section 54(3) of the Act. Therefore, the appellant's reliance on Rule 89(5) of the Rules and the clarification issued vide CBIC Circular No.79/53/2018-GST dated 31.12.2018 would not help their cause for refund as they would come into play only upon complying with requirements of the relevant statutory provision viz. Section 54(3) of the Act that the ITC must have accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies, which is not the case here.

8.4 Thus, on the facts of the case, it is obvious that the accumulation of input tax credit in the instant case is not owing to the situation specified under clause (ii) of first proviso to Section 54(3) of the CGST Act and the corresponding state GST Act but is apparently on account of lower taxable value of output supplies owing to subsidies available. Provisions of Section 54(3) of the Act does not provide for refund of unutilized input tax credit in such cases and hence appellant's claim for refund of unutilized input tax credit in the case does not qualify for refund of unutilized input tax credit in as much as the provisions of Section 54(3)

ibid are not applicable to the facts of their case for there being no apparent accumulation of ITC due to inverted tax structure as contended by them.

9. Since it is not proved that there is accumulation of ITC due torate of tax on inputs being higher than the rate of tax on output supplies in the case, the allegation in the SCN dated 08.05.2020 issued that there is no such inverted duty structure in the case which caused accumulation of credit for being eligible for refund under Section 54(3) of the Act stands justified. The appellant has not submitted any reply or explanation to the above basic allegation in the SCN either in their reply to the SCN or in the present appeal. They have only submitted reply to the reasons shown in the "Remarks' column in the SCN which in fact were other grounds in addition to the basic ground referred above.

9.1 The appellant has contended that Para 3.2 of the Circular No.135/05/2020-GST dated 31.03.2020 relied by the adjudicating authority in the SCN is not applicable to them as their case is completely different from the situation dealt therein. I find that though Para 3.2 of the circular is with reference to a specific issue, the clarification 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, is general in the context of the provisions of the Act under reference and is therefore squarely applicable in appellant's case also. In the present case, on going through the description (HSN : 3104 & 3105) of goods that were imported and further sold in India, it is evident that both the products are same. There is no difference in imported product having HSN 3104 & 3105 and final output product having HSN 3104 & 3105. The other contention of the appellant that the Circular is even otherwise not applicable as it was issued after the date of filing of their refund claims is also not tenable as the clarification under reference being clarificatory in nature applies to all pending refund cases also.

9.2 With regard to the plea of the appellant on violation of principles of natural justice in the impugned order, I find that the appellant was initially granted 15 days time to submit their reply to the SCN and was granted a hearing on 20.05.2020. But the appellant sought an extension of 15 more days time and the adjudicating authority has granted the same as is evidenced from the remarks column in the impugned order. The appellant has contended that the reply to the SCN dated 08.05.2020 was filed by them on 03.06.2020 around 18.00 Hrs., i.e. in the last minute of the last day of compliance to be made. However, no evidence in this regard is submitted by them. The impugned orders in the case were issued after 18.15 Hrs on the same day which clearly indicates that the reply to the SCN submitted by the appellant in the last minute was not received by the adjudicating authority before deciding the issue. The adjudicating authority, therefore, did not have any opportunity to consider the said reply in his decision. It is undeniable that the appellant could have filed their reply to the SCN well in advance especially in a context where the additional time to file reply was granted as per their request. From the said facts, it is clear that the appellant was given ample time to represent their case which they could not avail rightly. Therefore, the appellant's

stand that the impugned order is non-speaking and in violation of principles of natural justice, does not carry any merit.

10. In view of the above discussions, I do not find any reason to interfere with the decision taken by the adjudicating authority in the matter. Accordingly, the appeals of the appellant are rejected being devoid of merits and the impugned orders are upheld as legal and proper but are modified to extent discussed hereinabove.

11. अपीलकर्ताद्वारादर्जकीगईअपीलोकानिपटाराउपरोक्तरीकेसेकियाजाताहै।
The appeals filed by the appellant stand disposed off in above terms.

(Mohit Agrawal)
Additional Commissioner(Appeals)
Date: 18.06.2021.

Attested:

(Anilkumar P.)
Superintendent(Appeals),
CGST, Ahmedabad.

BY SPEED POST TO:

M/s. Indian Potash limited,
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Copy to:-

1. TheChief Commissioner, Central Tax, Ahmedabad Zone..
2. The Principal Commissioner, CGST, Ahmedabad South.
3. The Commissioner, CGST (Appeals), Ahmedabad.
4. The Deputy Commissioner, CGST Division-VI, Ahmedabad South.
5. The Asstt. Commissioner, CGST (System), HQ, Ahmedabad South. (for uploading OIA on website)
6. Guard file.
7. P.A. File