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

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DIN-20211064SW000071287D

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : GAPPL/ADC/GSTD/24,25,26,27/2020-APPEAL & GAPPL/ADC/GSTD/2/2021-APPEAL /3944 TO 3948

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-001-APP-JC-51/2021-22**
दिनाँक Date : **26-10-2021** जारी करने की तारीख Date of Issue : **26-10-2021**

श्री मिहिर रायका संयुक्त आयुक्त (अपील) द्वारा पारित

Passed by Shri. Mihir Rayka, Joint.Commissioner (Appeals)

ग Arising out of Order-in-Original No. Nos
WS06/REF-175/IPL/MK/ 2019-2020 dt. 07-11-2019,
WS06/REF-165/IPL/MK/2019-2020 dt. 11.10.2019,
WS06/REF-164/IPL/MK/ 2019-2020 dt. 11.10.2019,
WS06/REF-173/IPL/MK/ 2019-2020 dt. 11.10.2019 &
WS06.REF-174/IPL/MK/ 2019-2020 dt. 07.11.2019
passed by Assistant Commissioner, GST Division VI, Ahmedabad South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
The Deputy Commissioner, Central GST, Division VI, Ahmedabad South,
3rd Floor, APM Mall, Anand Nagar Road, Ahmedabad-380015

(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 वेबसाईटwww.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

The Deputy Commissioner, Central GST, Division VI, Ahmedabad South (hereinafter referred to as `the appellant') has filed the following appeals on dated 5-8-2020 on the basis Review Order issued by the Pr. Commissioner, CGST, Ahmedabad South against Orders (hereinafter referred to as `the impugned orders) passed by the Assistant Commissioner, Central GST, Division VI, Ahmedabad (hereinafter referred to as `the adjudicating authority) sanctioning refund of ITC accumulated due to inverted tax structure under Section 54 of CGST Act, 2017 to M/s.Indian Potash Ltd., Ahmedabad (hereinafter referred to as `the respondent). The details are as under :

Sr No.	Appeal File Number	Impugned Order Number and date	Amount of refund sanctioned	Month	Review Order Number and date
1	GAPPL/ADC/GSTD /24/2020	WS06/REF-175/IPL/MK/ 20 9-2020 DATED 7-11-2019	293983475/-	Sept. 2018	14/2020-21 dated 24-7-2020
2	GAPPL/ADC/GSTD /25/2020	WS06/REF-165/IPL/MK/ 20 9-2020 DATED 11-10-2019	126224427/-	May 2018	11/2020-2021 dated 22-7-2020
3	GAPPL/ADC/GSTD /26/2020	WS06/REF-164/IPL/MK/ 2019-2020 DATED 11-10-2019	137522210/-	Feb 2018	10/2020-2021 dated 24-7-2020
4	GAPPL/ADC/GSTD /27/2020	WS06/REF-173/IPL/MK/ 2019-2020 DATED 11-10-2019	5888875/-	Jan 2018	12/2020-2021 dated 24-7-2020
5	GAPPL/ADC/GSTD /2/2021	WS06/REF-174/IPL/MK/ 2019-2020 DATED 7-11-2019	227628845/-	June 2018	13/2020-21 dated 24-7-2020

2. Briefly stated the facts of the case is that M/s.Indian Potash Ltd., 'Potash House' 45, Drive in road, Opp. Nirav Park, Navrangpura, Ahmedabad 380 009 (hereinafter referred to as `the respondent') is registered under GSTN Number 24AAACI0888H1ZM and filed refund claim on account of ITC accumulated due to inverted tax structure. The respondent has purchased inputs falling under HSN 3105, 3104 at 5% and 3923 at 18% and cleared mostly finished goods falling under HSN 3105 and 3104 at 5%. The respondent imported fertilizers at 5% GST for agriculture purpose and @ 18% GST for industrial purpose. The respondent has also declared that they have not claimed refund of input tax credit taken on capital goods and input services. In terms of Section 15 (2) of CGST Act, 2017, the respondent has supplied the goods after excluding the subsidies provided by the Central and State Governments. The respondent claimed refund of ITC accumulated due to inverted tax structure as per their turnover and ITC as per GSTR3B. The respondent has also submitted copy of Electronic Credit Ledger wherein the claim amount was debited and also all the declarations. The adjudicating authority vide impugned orders, referred in Table above has sanctioned refund to the respondents.

3. The impugned orders were examined by the Department and it was found that refund sanctioned is not proper and legal and accordingly on the basis of Review Orders mentioned in the Table above, the subject appeals were filed by the appellant on the following grounds :

i) The present issue relates to refund of unutilized input tax credit. Such refund is governed under the provisions of Section 54 (3) of CGST Act, 2017 and the corresponding State GST Act. The first proviso to said sub section read as under :

Provided that no refund of unutilized 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.

ii) The above proviso clearly stipulates that refund of unutilized input tax credit is admissible only in two situation viz. 1) cases where the accumulation is on account of zero rated supplies made without payment of tax and 2) the rate of tax on inputs is higher than the rate of tax on output supplies. Apart from the above two situations, no refund of unutilized input tax credit has been provided for.

iii) The adjudicating authority found that as per Section 15 (2) (e) of CGST Act, 2017, *the value of supply shall include subsidies directly linked to the price excluding subsidies provided by the Central and State Governments.* Accordingly, the respondent has supplied the goods after excluding the subsidies provided by the Central Government and State Governments.

iv) In the instant case, **the difference in purchase and sale price is due to Central/State Government subsidies available to the assessee**. 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 supplied. It is to mentioned here that the subsidy is available to the assessee but this may not be the reason for inverted duty structure. The amount of subsidy will be received by the respondent on later stages from the Central/State Government, but in this case the claimant has not included the amount of subsidies received in total taxable value.

v) In the instant case, the respondent has supplied the goods after excluding the subsidies provided by the Central Government and State Governments. This is due to the fact that inputs namely Muriate of Potash, Di Ammonium Phosphate, Sulphate of Potash, Urea, Rock Phosphate, Gypsum etc were imported by the respondent and the said imported goods were distributed/supplies at subsidies price by the claimant to dealers across India. **Thus, the sale**

price is lower compared to purchase price and such reduction in sale price is the main cause of accumulation of ITC.

vi) Further, the rate of tax on the inputs viz. Muriate of Potash, Di Ammonium Phosphate, Sulphate of Potash, Urea, Rock Phosphate, Gypsum etc is 5% IGST and the rate of tax on output supplies of the said goods is also 5% IGST or 2.5% CGST + 2.5% SGST. Thus, this is not a case where the rate of tax on inputs is higher than the rate of tax on output supplies. Further, in the instant case the output supplies have been made in India on payment of tax and no zero rate output supplies have been made without payment of tax. **Thus, the accumulation of ITC in the instant case is not owing to any of the situations specified under first proviso to Section 54 (3) of the CGST Act, 2017 and the corresponding State GST Act**. Accordingly, it appears that the respondent does not qualify for refund of unutilized ITC inasmuch as the provisions of Section 54 (3) ibid are not applicable to the facts of the case at hand. Therefore, as per sub section 3 (ii) of Section 54 of CGST Act, 2017 the said refund does not fall on account of ITC accumulated due to inverted tax structure. On going through the description 3104 and 3105 of goods that were imported and further sale in India, it is evident that both the products are same. There is no difference in imported product having HAN 3104 and 3105 and final product having HSN 3104 and 3105. That is another reason for which inverted duty structure cannot be applied to this case.

vii) In view of above facts and circumstances, it appeared that the adjudicating has erred in sanctioning refund under sub section (8) of Section 54 of CGST Act, 2017 to the respondent by considering that the respondent imported goods viz. Muriate of Potash, Di Ammonium Phosphate, Sulphate of Potash, Urea, Rock Phosphate, Gypsum etc on import value by paying IGST @ 5% the same imported goods were distributed at subsidies to their dealers across India on payment of IGST/CGST/SGST @ 5%. Therefore, as per sub section 3 (ii) of Section 54 of CGST Act, 2017, the said refund does not falls on account of ITC accumulated due to inverted tax structure. In view of above, the adjudicating authority has failed to consider the above facts at the time of sanctioning the refund.

viii) Therefore, on the basis of Review Orders issued by the Hon'ble Principal Commissioner, CGST, Ahmedabad South, the subject appeals were filed against the impugned orders to set aside the impugned orders wherein the adjudicating authority has erroneously allowed refund and to pass an order directing the original authority to recover the amount erroneously refunded to the respondent.

4) The respondent vide their letter dated 10-3-2021, has made following submissions :

i) The appellant in the appeal has stated that the ITC accumulation is owing to low sale price of fertilizers when compared to purchase price. This is due to the fact that fertilizer imported are distributed at subsidized price and not due to the change in rate of tax on inputs and out put. They had filed refund claims for the period January 2018, February 2018, May

2018, June 2018 and September 2018 for Rs.5888875/-, 137522210/- , 126224427/-, 227628845/- and 293983575/- respectively. Section 54 (3) (ii) which is the empowering as well as machinery provisions with respect of IDS refund, makes repeated emphasis on the phrase `unutilized input tax credit'. The refund under given provision is towards the unutilized portion of ITC, whereas, the notice has an assumption that since input and output rates are same (5% GST). It is also submitted that it has never been the case of the Department that the credit of other inputs which attract higher rate of duty was availed during the refund period does not qualify as ITC ; that the inputs which attract 18% GST is adding to the accumulation of unutilized credit. It is also not disputed that the said inputs are used towards the output supply and not eligible for ITC. The accumulation is also on account of inputs rate of tax being higher than the output rate of tax. To re-iterate the wordings of Section 54 (3) (ii) `the rate of tax on inputs being higher than the rate of tax on output supples'. In the instant case, the respondents has made its facts clear that there are other inputs that are chargeable to 18% GST which is higher than the GST rate of 5% on output supplies. Hence they are eligible for refund ; that they have complies with substantiate and procedural aspect for filing IDS refund as under :

Sr No.	Test for IDS refund	Remarks
1	Test of inputs definition	Imported fertilizers and packing materials are goods used towards its outward supply of fertilizers ie. Used towards furtherance of business
2	Test of outward supply definition	`Sale' is included in the exhaustive definition of outward supply. Hence, sale of fertilizers is covered under outward supply.
3	Test of eligible credit	ITC charged on inputs are eligible to be taken to electronic credit ledger since the test of inputs is satisfied ie used for further supplies
4	Whether tax rate on inputs are higher than tax rate on output supplies	GST rate of packing materials 18% (HSN 3923) ; GST rate of fertilizers 5% (HSN 3102)
5	Whether there is unutilized ITC	Yes. The workings and credit ledger clearly reflects the unutilized credit balance.
6	Test of formula prescribed under Law	The respondent had adopted the formula prescribed under Rule 89 (5) of CGST Rules, 2017 as it is without any deviation.

ii) The respondent has drawn attention to Circular No.79/53/2018-GST dated 31-12-2018 (subsumed with Circular No.125/44/2019 dated 18-11-2019, which brings out clarifications about refund related issues as under :

4a) Refund of unutilized ITC in case of inverted tax structure, as provided in section 54(3) of the CGST Act, is available where ITC remains unutilized even after setting off of available ITC for the payment of output tax liability. Where there are multiple inputs attracting different rates of tax, in the formula provided in rule 89(5) of the CGST Rules, the term "Net ITC" covers the ITC availed on all inputs in the relevant period, irrespective of their rate of tax.

4b) The calculation of refund of accumulated ITC on account of inverted tax structure, in cases where several inputs are used in supplying the final product/output, can be clearly understood with help of the following example:

iii) The business process flow of the respondent is as follows, the fertilizers shall be imported in bulk at 5% from abroad and such fertilizers are packed in retail units and shall be supplied across the country. The output shall be fertilizers which are taxed at 5%. However, there is more than one inputs involved in supply of such supply of fertilizer wherein one such inputs suffers 18% tax. As brought out in Section 54 (3) (ii) of CGST Act, 2017 read with 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, the respondent shall be eligible for IDS refund. Further Circular also clearly brings out that when there are multiple inputs attracting different rate of tax, the formula for IDS refund has to be strictly following to include ITC availed on all inputs availed during the period. The respondent accordingly have applied the formula as prescribed under Rule 89 (5) of CGS Rules, 2017. It is well settled principle under service tax regime that there is formula prescribed under law for availment or reversal of credit, it shall be followed accurately. The same is mandatory in nature and not directory. Hence there cannot be any deviation from prescribe formula. Hon'ble Supreme Court in the case of M/s.Tata Chemicals ltd. Vs Commissioner of Customs (Preventive) Jamnagar have held htat if the law required that something be done in a particular manner, it must be done in that matter and if not done in that manner has not existence in the eye of law at all. Moreover concept of GST is to tax on value addition, if the respondent has a lower selling value, the net tax amount that should accrue to Government shall be on end selling price. And consequently, excess taxes collected by Government on purchase price should be credited back to the Respondent. On the basis of above submissions, the respondents prayed to grant relief by passing further orders.

5. Personal hearing was held on 11-10-2021. No one appeared on behalf of the appellant. Shri Harish Bindumadhavan, Advocate, Shri Sivakumar Ramjee and Shri Rakesh Ramachandran appeared on behalf of the respondents on virtual mode. They stated that they want to add to their written submission dated 10-3-2021. They were given 3 working days to submit it.

6. Accordingly, the respondent vide letter dated 12-10-2021 made following additional submissions :

i) That it was contended in their submissions dated 10-3-2021 that paragraph 3.2 of Circular No.135/05/2020-GST dated 31-3-2020 is not applicable to the present case of the respondent. Even if that had to be made applicable, the said paragraph is quashed by Gauhati HC in the recent judgment which is brought out as under:

ii) In the case of BMC Informatics Pvt Ltd. v. Union of India - [2021] 130 taxmann.com 182 (Gauhati HC), paragraph 3.2 of Circular No.135/05/2020-GST dated 31-3-2020 is held to be invalid and void. In the said case, the assessee was a company dealing with IT system integrator and is a service provider primarily engaged in sales and service of information and technology products. It submitted a claim for a refund but the same was rejected by Assistant Commissioner. The claim was rejected on ground that input and output supplies made by assessee were of same material and goods. Therefore, although rate of tax on input supply may be higher than rate of tax in output supply, but by referring to provisions of paragraph 3.2 of Circular No.135/05/2020 -GST dated 31-3-2020, it was held that assessee was not entitled to refund being engaged in trading of technology related products not manufacturers. The appeal was against it and the Joint Commissioner (Appeals) held that the assessee was entitled to the benefit of refund of duty. The department filed writ petition against it. The Honorable High Court observed that there was a conflict between provisions of paragraph 3.2 of Circular No.135/05/2020-GST dated 31-3-2020 with provisions of section 54(3)(ii) of CGST Act. The Section 54(3)(ii) provides that a refund of unutilized input tax credit would be available in event, rate of tax on input supplies is higher than rate of tax on output supplies. However, paragraph 3.2 of Circular No.135/05/2020-GST dated 31-3-2020 provides that even though different tax rate may be attracted at different point of time, but refund of accumulated unutilized tax credit will not be available under section 54(3)(ii) in cases where input and output supplies are same. The honorable High Court held that whenever there is a conflict between provisions of a statutory Act and a notification or circular issued by an administrative authority, provisions of statutory Act would prevail over such conflicting provisions of a notification or a circular of an administrative authority. Thus, assessee was entitled to the benefit of refund of duty and provisions of paragraph 3.2 of Circular No.135/05/2020-GST dated 31 -3-2020 would not be sustainable in law.

iii) Firstly, paragraph 3.2 of Circular No.135/05/2020-GST dated 31-3-2020 does not apply to the given case of Appellant and secondly, the same is held to be unsustainable in law. Based on the above submissions, the Respondent prayed to grant relief by passing such further or other orders as may deem fit in the facts and circumstances of this case.

7. I have carefully gone through the facts of the case, appeal memorandum, submissions made by the respondent and evidences available on records. The issue to be decided in the case is whether in the facts and circumstances of the case, the order passed by the adjudicating authority sanctioning claim for refund of accumulated input tax credit filed by the respondents is legally sustainable or not as per provisions Section 54(3) of the Act on the ground of inverted tax structure and consequently whether the refund sanctioned to the respondent is liable for recovery or otherwise.

8. The issue under dispute pertains to grant of refund governed under Section 54(3) of the Act, therefore I find it relevant to record 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."

9. 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 creditremainunutilized 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.

10. In the instant case, the respondent 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.

11. The adjudicating authority has sanctioned the subject refund claims against which the Department has filed the subject appeals mainly on the ground that (i) the difference in purchase and sale price is due to Central/State Government subsidies available to the assessee but this may not be the reason for inverted tax structure (ii) the sale price is lower compared to purchase price and such reduction in sale price is the main cause of accumulation of ITC ; and (iii) the accumulation of ITC in not owing to any of the situations specified under first proviso to Section 54 (3) of the CGST Act, 2017 and corresponding State GST Act.

12. The first contention raised by the appellant is that the difference in purchase and sale price is due to Central/State Government subsidies available but this may not be the reason for inverted tax structure. It is observed that in the present case, the respondents are importing 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. Further, the output supplies of the respondent are at subsidized price because of which the 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 respondent. It is clear that the respondent receives 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, there is reduction in sale value compared to the purchase value is in view of subsidies available. This fact is also not disputed by the respondent. The term 'Inverted Tax Structure' refers to a situation where the rate of tax on inputs purchased is more than the rate of tax on outward supplies. This means Inverted Duty Structure arises when tax paid on Inward Supplies is higher than tax payable on outward supplies. In the subject case it is evident that due to subsidies the sale price of output supply is lower than the sale price of inputs. Therefore, such a situation may not lead to inverted tax structure.

13. The second contention of the appellant that the sale price is lower compared to purchase price and such reduction in sale price is the main cause of accumulation of ITC. The respondent in their counter submission submitted that the accumulation is also on account of input rate of tax being higher than the output rate of tax and that in the instant case there are other inputs that are chargeable to 18% GST which is higher than the GST rate of 5% on output supplies. I find that the activity of the respondent involves conversion from bulk pack to retail pack of inputs. Therefore, it is obvious that substantial percentage of cost of output would be the cost of inputs and cost of packing materials may not have significant percentage in the cost of output. Since, the packing materials which attracts higher rate of GST, is having

meager share in the cost of output supply, this cannot normally cause an accumulation of ITC in the ordinary course. Therefore, it does not seem that the accumulation of ITC is due to such higher rate of tax on packing material used. On the contrary, from the fact of the case, the accumulation of ITC quite obviously seems to be on account of lower sale price of output supplies owing to subsidies available. Since, it is also admitted by the respondent that due to subsidies, the sale price is lower than the purchase price, it was imperative on the part of the respondent 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. Therefore, the respondents' 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 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. In the case on hand, the respondent 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 respondent 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. Therefore, I find force in appellant's contention that lower sale price as compared to purchase price is the main cause of accumulation of ITC.

14. Regarding the third contention of the appellant that the accumulation of ITC in the instant case is not owing to any situations specified under first proviso to Section 54 (3) of the CGST Act, 2017 and the corresponding State GST Act, 2017, the respondent made counter submission that they had complied with substantiate and procedural aspect for filing refund and that they had adhered to the refund formula prescribed under Law ie prov sions of Section 54 (3) of CGST Act, 2017 read with Circular No.79/53/2018-GST dated 31-12-2018 and formula prescribed under Rule 89 (5) of CGST Rules, 2017. I find that in the subject case the inputs are supplied after undertaking packing of the same from bulk pack to retail packs for agriculture purpose which attracts tax of 5% and for industrial purpose which attracts 18% tax. Thus, both the principal input and output are one and same, falling under same HSN and attracting same rate of tax. As per sales summary given in the appeal memorandum, I find that major portion of supply was made for agriculture purpose. The other input which is packing material attracts higher rate of tax than the tax on output viz. Fertilizers. Since the activity involves conversion of inputs from bulk packs to retail packs, it is quite obvious that the cost of their output is almost contributed by the input of 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. In such a situation, it is quite evident that packing materials having a meager

share in the cost of output cannot normally cause an accumulation of ITC in the ordinary course, even if they at ract a higher rate of tax. 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. Further, 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. Further, vide Circular No.79/53/2018-GST dated 31-12-2018 Board has clarified that where there are multiple inputs attracting different rates of tax, in the formula provided in Rule 89 (5) of CGST Rules, the term Net ITC covers the ITC availed on all inputs in the relevant period, irrespective of their rate of tax. However, the said clarification apply to cases of refund, where there is accumulation of ITC on account of same rate and higher rate of tax on inputs than the tax on output under Section 54 (3) of CGST Act, 2017. In other words, the clarification is given for cases which fall under the category of cases specified under Section 54 (3) of the Act and not to cases of refund outside the purview of Section 54 (3). In the subject case, the factor which leads to accumulation is lower sale price and higher purchase price and not the same/higher rate of tax on input than the output supplies. Therefore, unless the claim qualifies under Section 54 (3) of the Act, the argument based on Board's Circular does not succeed. As discussed above, the claim does not fall under the category of cases mentioned at proviso (ii) to Section 54 (3) of the Act and hence clarification issued by the Board cannot be applied in this case. In view of above, since, the provisions of Section 54 (3) of ACGST Act, 2017 in clear and unambiguous terms restricts refund of accumulated ITC on account of reasons other than the situations specified under proviso (i) and (ii), mentioned above, I find that the ground put forth by the appellant that the accumulation of ITC in the instant case is not owing to any situations specified under first proviso to Section 54 (3) of the CGST Act, 2017 and the corresponding State GST Act, 2017 is legally tenable.

15. In their counter submissions, the respondent relied on Hon'ble Supreme Court's decision in the case of M/s.Tata Chemicals Ltd., Vs Commissioner of Customs (Preventive) Jamnagar, in support of their contention that the formula prescribed under Law should be followed accurately and that the same is mandatory and not directly and that there cannot be any deviation from the prescribed formula. In the said case the Apex Court has held that *if the law requires that something to be done in a particular manner, it must be done in that manner and if not done in that manner has no existence in the dye of law at all.* On closer reading, it is noticed that the decision was rendered in the context wherein the Department Officer's has not drawn samples in accordance with the Law. In the subject case, the requirement for importing the formula prescribed under Rule 89 (5) of CGST Rules, 2017, necessitates only in

respect of refund cases which are covered under Section 54 of CGST Act, 2017. 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. As discussed in preceding paras, Rules framed under Act cannot override the provisions of Act. In this regard, I rely upon decision of Hon'ble Supreme Court in the case of ITW Signode India Ltd. Vs. Collector wherein it was 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."* There is plethora of decisions of Court's and higher appellate forums holding the similar view. Therefore, I find that the decision rendered in the case laws cited by the respondent is not aptly applicable to the present case. Similarly, the respondent's reliance on 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.

16. The respondent vide their letter dated 12-10-2021 further contended that Para 3.2 of the Circular No.135/05/2020-GST dated 31.03.2020 is not applicable to them which was held to void and invalid by Hon'ble High Court of Gauhati In the case of BMG Informatics Pvt Ltd. v. Union of India. However, I find that no averment is made by the appellant in the appeal memorandum, regarding applicability of above Circular to the subject issue. Therefore, I do not find it relevant to discuss the same in this proceeding.

17 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 respondent'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. Since it is not proved that there is accumulation of ITC due to rate of tax on inputs being higher than the rate of tax on output supplies in the case, I find that the impugned orders passed by the adjudicating authority sanctioning refund is erroneous and not maintainable under the Law in force. Accordingly, I find that there is merit in the appeal by the appellant to set aside the impugned order passed by the adjudicating authority sanctioning refund to the respondents.

18. In view of the above discussions, I hold that the adjudicating authority has erroneously sanctioned refund to the respondents and hence refund so sanctioned is liable for recovery

Therefore, I set aside the impugned orders passed by the adjudicating authority sanctioning refund to the respondents and allow the appeal filed by the appellant. Consequently, I order recovery refund erroneously sanctioned to the respondent's along with interest under the provisions of CGST Act, 2017 and Rules made there under and corresponding SGST Act, 2017.

19. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।
The appeals filed by the appellant stand disposed off in above terms.

26/12/21

(MihirRayka)
Joint Commissioner (Appeals)

Date :

Attested

(Sankara Raman B.P.)
Superintendent
Central Tax (Appeals),
Ahmedabad

By RPAD

To,

M/s. Indian Potash limited,
No.45, Potash House,
Drive-in Road,
Near Vijay Cross Road,
Navrangpura,
Ahmedabad-380009.

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.