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**VALIDITY OF RESTRICTION IMPOSED TOWARDS AVAILMENT  
OF ITC ON INPUT SERVICES BY RULE 89(5) CGST RULES,  
2017**

Vinay Kothari & Anushka Jain

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# Overview

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## INTRODUCTION

- ❖ Section 54(3) of the CGST Act, 2017 empowers the assessee to claim refund of unutilized input tax credit at the end of any tax period which has accrued on account of inverted duty structure. The said section does not differentiate between input accrued on account of goods and input accrued on account of services.
  - ❖ The manner in which the said refund is to be calculated is prescribed under Rule 89(5) of the CGST Rules, 2017. However, Rule 89(5) was amended vide Notification no. 21/2018 dated 18.4.2018 and vide Notification no. 26/2018 dated 13.6.2018, and was given retrospective applicability from 1.7.2017.
  - ❖ By way of the amendment an assessee who could earlier claim refund of ITC on account of inverted duty structure, for both inputs as well as input services, could not claim it only on goods as services were kept out of the purview of same.
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## IMPLICATION OF THE AMENDMENTS

- ❖ By way of the amendment vide Notification no. 21/2018 dated 18.4.2018 and vide Notification no. 26/2018 dated 13.6.2018, the definition of “Net ITC” given under Rule 89(5) was amended and the refund of ITC was made limited only to the extent of ITC which had accrued on account of inputs whereas, ITC which had accrued on account of Input services was excluded from the definition, thereby, clearly going beyond the scope of section 54(3) which allows refund of any unutilized ITC.
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## CHALLENGE TO VALIDITY OF AMENDMENTS

- ❖ In regard to the said controversy which arose, the said amendment was challenged before various High Courts of India.
  - ❖ One petition was filed before the Division bench of Gujarat High Court in the case ***“VKC Footsteps India Pvt. Ltd. v. Union of India”*** wherein, the Hon’ble Court had adjudicated upon the validity of the Rule 89(5) which excludes ITC accrued on account of input services from the definition of Net ITC and held the same to be *ultra vires* to Section 54(3) of the CGST Act, 2017, thereby, including ITC accrued on account of input services in the definition of Net ITC as provided in the Explanation (a) of the Rule 89(5) and eventually, allowing the refund of ITC which accrues on account of input services.
  - ❖ A similar controversy was challenged before the Madras High Court in the case of ***“TVL Transtonnelstroy Afcons Joint Venture vs. UOI, 2020-VIL-459-MAD”***, wherein it was held that the recent amendment in question is in consonance with the parent act.
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## Applicability of Judgments on other States

- ❖ Observing the said judgments, it can be said that once a provision or rule of a Central Act has been struck down or declared ultra vires by any High Court of the country then the rule or provision which has been declared ultra vires, would be considered as ultra vires across the nation, unless the judgment or order of the High Court is either stayed or overruled by the Hon'ble Supreme Court of India.
  - ❖ In this regard, the reliance is placed on the case of **Kusum Ingots and Alloys v. Union of India**, Hon'ble Supreme Court held that, *"An order passed on a writ petition questioning the constitutionality of a parliamentary Act, whether interim or final keeping in view the provisions contained in clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act"*.
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## **Order of Single Bench of Rajasthan High Court staying recovery pursuant to the amended law.**

Recently, a petition, on the abovementioned principle that a provision of a Parliamentary Act once declared invalid or ultra vires by any High Court would have applicability all over the nation, was filed before the Single Judge Bench of the Rajasthan High Court which came to be registered as S.B.C.W.P. No. 9900/2021, M/s Blue Phosphate Ltd. v. UOI & Anr., wherein, the Single Judge while taking into consideration the arguments advanced by the petitioner counsel, vide its order dtd. 12.8.2021 stayed the impugned actions of the department vide which it had sought recovery of the refund of ITC accrued on account of input services. The relevant portion of the order is reiterated herein below:

*“1. Mr. Kothari, learned counsel for the petitioner submits that though the provisions of Rule 89(5) of the Central Goods and Service Tax Rules 2017 have been declared ultra vires by Gujarat High Court vide judgment dated 24.07.2020, yet the respondentNo.2 is seeking to recover the amount of input tax credit, which has already been paid/allowed to the petitioner company (vide order dated 09.04.2020 Annex.6).*

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*2. Learned counsel contends that once the provision in question has been declared illegal by the Gujarat High Court, respondent No.2 cannot resort to such provision to initiate/continue the proceedings for recovery of the amount.*

*3. It is also informed that Division Bench of this Court at Jaipur in the case of M/s Venus Footarts Limited & Anr. Vs. Assistant Commissioner & Ors. (D.B. Civil Writ Petition No.14332/2020) so also in the case of Kriti Creation Vs. Union of India (D.B. Civil Writ Petition No.9116/2020) has stayed further proceedings pursuant to the show cause notices.*

*4. In view of the aforesaid, issue notice. Issue notice of stay application also, returnable within six weeks.*

*5. Meanwhile, no coercive measures shall be taken against the petitioner for recovery of the amount mentioned in the notices dated 22.01.2021 and 09.03.2021.”*

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# OUR ORGANIZATION

EMAIL-ID - [kotharivinay@gmail.com](mailto:kotharivinay@gmail.com)

CONTACT - 0291-2433947/+91 9462050200

## LAW DIVISION

### KOTHARI & ASSOCIATES

Meena Kothari  
Anjay Kothari  
Vinay Kothari  
Richa Kothari  
Devendra Singh Chouhan  
Mehul Kothari  
Pradeep Khichi  
Mukesh Gurjar  
Anushree Srisrimal  
Kritika Kothari  
Anushka Jain  
Vrinda Bhardwaj

## CA DIVISION

### B.M.KOTHARI & COMPANY

A.M.Kothari  
Amit Kothari  
Parasmani Kothari  
Shalini Kothari  
Abhinav Kothari  
Kailash Purohit  
Sumit Rathi  
Shubham Vaid  
Neeraj Gandhi