TATTVAM

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CONUNDRUM OF ITC REFUND ON BUSINESS CLOSURE: CRITICAL ANALYSIS OF SIKKIM HIGH COURT JUDGEMENT

Introduction:

- As the current GST law remains silent on the issue of refund of unutilised ITC on business closure, a significant yet controversial decision delivered by the Sikkim High Court in SICPA India Private Limited and Another v. Union of India[1] has resurfaced an important legal issue in GST. With far reaching implications the High Court allowed the refund of the unutilised Input Tax Credit ('ITC') upon closure of the business unit of the taxpayer. The ruling tends to have opened a new avenue for the businesses on the verge of closing by allowing refund of ITC in such cases.

Brief Facts of the Case

- The petitioner (SICPA) engaged in the business of manufacturing security inks closed its business unit in the state of Sikkim and after appropriately reversing the credit at the time of sale of its machineries it had accumulated ITC balance amounting to more than Rs 4.37 crores and accordingly it claimed refund under section 49(6) of the CGST Act, 2017.

- Section 49(6) entails refund of the balance amount in the electronic cash ledger after payment of all pending dues in accordance with the provision of section 54. However, section 54(3) carves out an exception and provides for refund only in two circumstances – firstly, in cases of zero-rated supplies and secondly, in cases of inverted duty structure.

- The refund claim of the petitioner was rejected by the tax authorities citing limited scope of refund as provided under section 54(3) and closure of business being none of them. Aggrieved by the decision, the petitioner filed a writ petition before the Sikkim High Court.

Analysis of the Judgement

- The main question of law before the High Court was whether the refund of ITC under the CGST Act, 2017 is limited to the two circumstances provided under section 54(3) or refund of ITC being a statutory right under the GST law can also be provided in cases of discontinuance of businesses.

  The High Court after analysing the provision, ruled in favour of the assessee. The main reasoning behind the Court decision was based on two main grounds. It observed that Section 54(3) is not a limiting provision but an enabling one. It ruled that there is no express bar explicitly provided in section 49(6) when read along with the section 54(3) for claiming refund in cases where the

[1] *SICPA India Private Limited and Another* v. *Union of India,* 2025 SCC Sikk 61.

business unit is getting closed. Secondly, the Court also noted that even though there exist only two circumstances for claiming refund under section 54(3) but at the same time the statute doesn't allow retention of tax without any authority of law.

- The High Court relied on the judgement delivered by the Karnataka High Court in the pre-GST era in the case of *Slovak India Trading Company Private*[2] wherein the refund of credit was allowed on account of closure of business unit (which was later upheld by the Supreme Court).

Positive Implications of the Judgement

- The Sikkim High Court decision has been widely welcomed and appreciated for its taxpayer-friendly stance. This ruling is first of-its-own kind by any High Court on this subject matter favouring the assessee and is likely to benefit taxpayers intending to surrender GST registration and seek refund of unutilized ITC.

- The judgment will particularly encourage those businesses which were earlier reluctant to close down their unviable business units because of the available ITC on their credit ledger. More importantly, the judgement instils a greater faith in the GST regime among the taxpayers by reinforcing the principle that the laws are to be interpreted in a manner which lessens the economic burden of the taxpayer rather than increasing it.

Consistent with previous rulings:

- Even though the ruling is first by any High Court in this subject matter favouring assessee, there have been previous cases in the erstwhile service tax regime where the courts have allowed refunds on closure of business unit on similar grounds.

- For instance, in **Union of India Vs Slovak India Trading Co Pvt Ltd**[3] the Hon'ble High Court of Karnataka allowed refund of CENVAT credit by stating that there is no express prohibition in Rule 5 [similar to section 54(3) of the CGST Act, 2017] and once the business unit is closed, Rule 5 is no longer available for the purpose of rejecting the refund claim.

- Similarly in **JU Pesticides & Chemicals Private Limited**[4] CESTAT observed that the Rule 5 of CENVAT Credit Rules, 2004 does not speak of refund in a situation where the manufacturing unit is closed, and the said rule does not also specifically prohibit refund when a unit closes down

[2] 2006 (7) TMI 9 - Karnataka HC.

[3] Union of India Vs Slovak India Trading Co Pvt Ltd [2006 (201) E.L.T. 559 (Kar.)]

[4] JU Pesticides & Chemicals Private Limited [2021 (378) E.L.T. 444 (Tri. - Chennai)

and accordingly the unit which is closed can apply refund especially when the tax suffered amount in form of CENVAT Credit is lying with the tax authorities.

- The judgement of the Sikkim High Court seems to be in line with the previous rulings wherein the courts have allowed refund of credit in similar circumstances and on similar grounds.

Critical analysis and Potential Concerns

- Even though the judgement seems to be taxpayer friendly and consistent with previous rulings but at the same time, it also raises concerns regarding its broad interpretation of statutory provisions.

Strict Interpretation of Taxing Statue

- One of the most settled principles in interpreting a taxing statute is that taxing statutes should be given a strict interpretation and if in case any doubt arises regarding the language of the act, the benefit of doubt must be given to the assessee. Section 54(3) explicitly states that *"no refund of unutilised input tax credit shall be allowed in cases other than"* zero-rated supplies and inverted duty structure. The intention of the legislature seems clear leaving no doubt behind for expanding the scope of the section.

Inconsistency with Previous Judicial Precedent

- The Sikkim High Court ruling appears to be in contrary compared to the decision given in Union of India vs VKC Footsteps India Pvt Ltd wherein the Supreme Court gave a narrow interpretation to section 54(3). The Supreme Court in this case stated that it is "impermissible for the Court to redraw the boundaries or to expand the provision for refund beyond what the Legislature has provided." This previous ruling from the Supreme Court cast a shadow over the expansive interpretation by the Sikkim High Court, potentially leading to inconsistencies in rulings across different High Courts in the country unless the Supreme Court itself clarifies the position regarding this interpretational conflict.

Redundancy of section 54(3)

- Another core concern regarding Sikkim High Court Judgement on ITC refund on business closure is regarding its ability to make section 54(3) redundant. If section 49(6) is to be taken as the independent source (ignoring its relation to section 54) and the argument regarding "*no express prohibition"* is to be considered, then the restrictive language and intent behind the section 54(3) is overlooked. Thereby, leaving the scope of allowing refund in any situation and not just zero-rated exports or inverted duty scenarios.

Way Forward

- While the Sikkim High Court decision stands out as a progressive step favouring the taxpayers and serving as a precedent for the businesses winding up their operations, its departure from the language of the statute makes it a possible contentious ruling which is likely to be challenged by the revenue before the higher courts.

- Since the issue is still in nascent stage, there are high chances that the revenue will challenge the decision. Further, possibility of conflicting decisions on the same issue from different High Courts can't be ruled out as we have seen earlier in **Gauri Plasticulture Pvt. Ltd. & Ors. v. Union of India & Ors**[5] where the Hon'ble Bombay High Court denied refund of unutilized Cenvat credit due to closure of manufacturing operations stating that tax statutes must be strictly construed.

- However, if the issue is finally settled in favour the assessee it could open new doors for the taxpayers but till then lack of clarity and conflicting judicial opinions may continue to hinder refund claim.

[5] *Gauri Plasticulture Pvt. Ltd. & Ors. v. Union of India & Ors [2019 (6) TMI 820 - Bombay HC]*

IMPLICATIONS OF PROPOSED RETROSPECTIVE AMENDMENT UNDER SECTION 17(5)(D) ON THE DECISION OF SUPREME COURT IN SAFARI RETREATS

Issue in Brief:

- In the case of ***Chief Commissioner of Central Goods and Services Tax & Ors v. M/s. Safari Retreats Private Limited & Ors***[6], the Hon'ble Supreme Court had read down **Section 17(5)(d) of the Central Goods & Services Tax Act, 2017** ("**CGST Act**"), which imposes a restriction on the availment of input tax credit ("**ITC**") on the goods or services used in construction of immovable property on his own account, even if such immovable property is utilized in the course or furtherance of business.

- However, on the recommendation of the GST Council in it's 55th Council Meeting, a retrospective amendment[7] has been proposed to be introduced by the Finance Act, 2025 under **Section 17(5)(d)** to replace the phrase "plant or machinery" under **Section 17(5)(d)** with the phrase "plant and machinery" with effect from 01.07.2017 to align the restrictions laid down in **clause (c)** and **clause (d) of Section 17(5)**.

- In light of the above, a doubt may arise as to the applicability of the decision of Hon'ble Supreme Court in ***Safari Retreats (Supra)*** in light of the abovesaid retrospective amendment.

Implication of retrospective amendment:

- Before delving into the implications of the retrospective amendment, it is imperative to understand the key observations made by the Hon'ble Supreme Court in ***Safari Retreats (Supra)***.

Ratio of the decision:

- At the outset, it was observed that there are two exceptions to the restriction contemplated under **Section 17(5)(d)**, which are as under:
  - **(i.)** When the immovable property qualifies as "plant or machinery"; or
  - **(ii.)** When the construction of immovable property is not "on its own account".

- With respect to the first exception, it was held that the word "plant or machinery" used in **Section 17(5)(d)** cannot be interpreted in the same way as the expression "plant and machinery" defined

[6] 2024 (10) TMI 286 – Supreme Court.

[7] The said amendment shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

under **Explanation to Section 17(5)**. The Supreme Court referred to its decisions in Income Tax law to construe the meaning of the term "plant". It was held that a factual exercise is to be conducted to ascertain whether the immovable property falls under the purview of "plant" or not. In this regard, the Supreme Court laid down that the functionality test is to be applied to ascertain:

(i.) Whether the immovable property has been constructed to suit assessee's special technical needs; and

(ii.) Whether immovable property is essential to carry out the business activities of the assessee.

- Regarding the second exception, it was observed that the following would be covered under the scope of "on its own account":

  (i.) Where the immovable property will be used for personal purposes and not for providing any services; and

  (ii.) Where the immovable property will be used as a setting for carrying out its business activities.

- It was further observed that in case where the immovable property is constructed for the purpose of sale or lease/ licence, then the same cannot be said to be constructed "on its own account".

Above exceptions are not cumulative:

- At this juncture, it is to be noted that there is no specific observation as to whether the said conditions have to be satisfied cumulatively or independently.

- However, in our view, the decision of Supreme Court is quite clear in this regard. It has been categorically observed that there are two exceptions to the restriction envisaged under **Section 17(5)(d)**.

- In view of the above, the aforementioned conditions need not be seen cumulatively by the registered person. Rather, the same is a two-way process. That is, the registered person should first evaluate whether the immovable property has been constructed by a registered person on his own account, i.e., whether the registered person has constructed the building for his personal use or for to be used as a business premise and not for providing any service.

- If the immovable property has not been constructed by a registered person on his own account, in such a case, restriction under **Section 17(5)(d)** will not be attracted and the said person would be eligible to avail the credit pertaining to the same, irrespective of whether such immovable property qualifies as 'plant' or not.

- However, if the construction of immovable property by a registered person is on his own account, then the only way to pass through the restriction envisaged under **Section 17(5)(d)** is by way of qualifying as "plant or machinery", i.e., when the immovable property qualifies as a "plant or machinery in accordance with the functionality test laid down by the Supreme court. In such a case, the restriction under **Section 17(5)(d)** will not be applicable and consequent to the same, the registered person will be eligible to avail the credit pertaining to the same.

Impact of retrospective amendment:

- Pertinently, as already stated hereinabove, a retrospective amendment has been proposed to be implemented under **Section 17(5)(d)** to the effect that the phrase "plant or machinery" should be replaced with the phrase "plant and machinery" with effect from 01.07.2017.

- The intent of the above amendment is to make applicable the definition of the expression "plant and machinery" under **Explanation to Section 17(5)** to **Section 17(5)(d)**, as it is applicable in case of **Section 17(5)(c)**. Consequently, the following cannot fall under the purview of "plant and machinery" (even if, the same can qualify as "plant" in terms of functionality test propounded by Supreme Court):
  (i.) Land, building or any other civil structures;
  (ii.) Telecommunication towers; and
  (iii.) Pipelines laid outside the factory premises.

- Accordingly, in view of the above retrospective amendment, it can be said that the observations made by the Supreme Court with regards to the scope of the expression "plant or machinery", stands negated to a large extent.

- As discussed hereinabove, the two exceptions as contemplated under **Section 17(5)(d)** are not required to be satisfied cumulatively, but the same can be satisfied independently to avail ITC of goods and services used in construction of immovable property. Consequently, it can be said that a registered person can still avail ITC on the basis of the satisfaction of second exception related to "on his own account", even if the proposed retrospective recommendation has effectively negated the decision of Supreme Court with regards to exception relating to "plant or machinery".

- Therefore, in view of the above discussion, it can be said that the above retrospective amendment has not affected the applicability of the exception related to "on his own account" and as such, in case where the construction of immovable property is for the purposes of leasing, renting or other

services, then the restriction under **Section 17(5)(d)** cannot be said to be applicable on the availment of ITC by a registered person.

Binding nature of obiter dicta of Supreme Court's decision:

- However, at this juncture, it is to be noted that the Supreme Court's observations with regards to second exception pertaining to "on his own account", cannot be said to form part of its *ratio decidendi*. As such, it can merely qualify as its *obiter dicta*. In light of the same, a doubt may arise as to the precedential value of these observations by the Supreme Court.

- In this respect, reference can be made to various judicial pronouncements wherein it has been categorically held that the obiter dicta of the Supreme Court's decision shall also be binding on the subordinate courts.

- In the case of ***Lyka Labs Ltd v. State of Maharashtra***[8], it was held as under:

> *"**44.** It is true that on considerations of judicial uniformity and judicial discipline, the High Courts must accept as binding not only the ratio decidendi in the decisions of the Supreme Court but also the obiter dicta. In determining the binding nature of the expression of opinion, the Courts should consider — Whether the expression of opinion was casual or considered. Whether it was connected with any point arising in the case. It is true that under Article 141 of the Constitution, the law declared by the Supreme Court is binding on all the Courts and therefore, even the principles enunciated by the Supreme Court, including its obiter dicta, when they are stated in clear terms, have a binding force. But when a question is neither raised nor discussed in a judgment rendered by the Supreme Court, it is difficult to deduce any principles of a binding nature from it by implication."*

- Similarly, there are various other decisions wherein it has been well-settled that the obiter dicta of the Supreme Court's decisions are also binding, provided that the same must have been expressly stated in unequivocal terms and must be connected with any points arising in the case.[9]

- In view of the foregoing discussion, it can be said that the observations made by the Supreme Court with respect to the second exception pertaining to "on his own account" will also hold

[8] 2023 SCC Online Bom 560

[9] *Maghraj Patodia v R K Birla* 1968 SCC OnLine Raj 47; *Bimla Devi v Chaturvedi & Ors* AIR 1953 All 613; and *Sarwan Singh Lamba and Ors v Union of India & Ors* (1995) 4 SCC 546.

precedential value on the subordinate courts.

- Accordingly, if the construction of immovable property by a registered person is not on its own account, such registered person can take commercial call to avail ITC of goods or services used in construction of immovable property.

Possibility of dispute

- Considering the proposed amendment in section 17(5) of the CGST Act, there is high probability that the department would dispute the eligibility of ITC in all the cases where the taxpayers have claimed ITC of goods or services used in construction of immovable property for renting/leasing purposes.

- In such a case, the dispute will have to be litigated at an appropriate forum. However, in our view, a taxpayer will have a good case to argue based on the exception pertaining to "on his own account".

GST ON DEVELOPMENT RIGHTS UNDER SCRUTINY: BOMBAY HIGH COURT'S SHRINIVASA REALCOM RULING

Introduction:

- In the real estate sector, it is a common commercial practice for developers or builders to refrain from purchasing land outright. Instead, they often enter into Joint Development Agreements **("JDA")** with landowners to acquire development rights over the land. Under such arrangements, the developer is granted the right to develop the land without acquiring its ownership. Typically, these arrangements are formalized through a tripartite agreement involving the developer, the landowner, and occasionally a confirming party such as a prospective buyer or financier. Pursuant to this agreement, the developer undertakes the responsibility of carrying out development activities—such as plotting or constructing residential or commercial units—on the land. In return, the landowner transfers development rights to the developer, usually as consideration in kind for a portion of the constructed area and/or a share in the revenue generated from the project.
- The key question that arises is whether the transfer of development rights over land constitutes a transfer of ownership in its entirety, or merely a limited right granted for development purposes—an issue that holds significant relevance in determining the taxability of such transactions.

Taxability during the Service Tax regime

- In the erstwhile Service Tax regime, prior to 1st July 2012 (before the Negative List Regime), service tax was levied only on specified services and transfer of development rights was not explicitly covered. Its closest possible classification was under "Renting of Immovable Property," but upon legal analysis of lease and license concepts, it was evident that permanent and irrevocable transfer of development rights neither constituted a lease (which implies temporary, revocable enjoyment) nor a license (which does not create interest in the property). Consequently, such transfer of development rights was seen as a sale of a right in immovable property—falling outside service tax ambit. However, from 1st July 2012 (Negative List Regime), all services became taxable except those specifically excluded. Though CBEC's Education Guide clarified that only a transfer of title in immovable property was not a service, the department argued that since transfer of development rights does not result in complete ownership transfer, it remained taxable. However, courts have construed "title" to encompass not only ownership but also any right or interest in property. Notably, in the case of ***DLF Commercial Projects Corporation v. Commissioner of Service Tax, Gurugram, 2019 (27) G.S.T.L. 712 (Tri. - Chan.),*** the CESTAT held that in such transactions, what is transferred is notmerely title in the narrow sense of ownership, but a bundle of rights, including the undivided right, title, and interest in land—these being conveyed under registered deeds upon completion of development.

- As a result, there is a compelling argument that, even under the Negative List Regime, the permanent sale of development rights is not subject to service tax since it represents a transfer of title to the property.

The Development Rights Dilemma: A Contentious GST Conundrum

- The contentious and debatable issue regarding the taxability of transfer of development rights also got inherited in the GST regime (i.e. whether or not GST is applicable on the transfer of the development rights). This issue primarily pertains to the interplay between title, ownership, possession, and economic interest in the immovable property. This complexity is furthered by the transfer of such rights without transferring the ownership/title of the said land particularly in JDAs to the developer by the landowners. The Telangana High Court recently ruled in the case of ***Prahitha Constructions (Writ Petition No. 5493 of 2020)*** that a mere transfer of development rights made in accordance with a JDA does not automatically transfer ownership or title rights; as a result, the transfer of development rights is subject to GST and is not covered by Entry 5 of Schedule III of the GST. The developer has filed a SLP in the Supreme Court for special leave against the said decision, and for the time being, no stay has been granted by the court. Similar challenges are currently pending before other High Courts as well.

Recent decision of the Bombay High Court

- However, the Hon'ble Bombay High Court at the Nagpur bench, on 08.04.2025 in the case of ***M/s Shrinivasa Realcon Private Ltd. Vs. Deputy Commissioner Anti- Evasion Branch, CGST & Central Excise Nagpur & Ors. (Writ Petition No. 7135 OF 2024)*** quashed a show cause notice and tax demand issued under Entry 5B of Notification No. 13/2017-Central Tax (Rate) dated 28.06.2017 as amended which states as "Services supplied by any person by way of transfer of development rights or Floor Space Index (FSI) (including additional FSI) for construction of a project by a promoter".

- In this case the petitioner, a developer, had entered into a development agreement dated 07.04.2022 with a landowner for constructing a multi-storied complex. The Department sought to levy GST on the alleged transfer of development rights under Entry 5B. However, the Court clarified that the transaction did not involve any independent or marketable Transferrable Development Right **("TDR")** or FSI as contemplated under Clause 11.2 of the Unified Development Control and Promotion Regulations ('UDCPR'). The developer was merely granted permission to utilize the land's inherent FSI for the purpose of construction, without any purchase or transfer of development rights from a third party.

- The Court held that the nature of rights conferred under such development agreements— where a developer constructs on the owner's land and retains saleable units as consideration—cannot be equated with the kind of TDR or FSI transfer envisaged under Entry 5B. It observed that the scope of Entry 5B is limited to those situations where there is an identifiable and compensatory transfer of development rights or FSI, typically involving an external or regulatory grant. Therefore, contractual rights granted by a landowner to a developer to construct and appropriate built-up units do not amount to a taxable supply of TDR under GST law. Consequently, the show cause notice and related proceedings were quashed, reinforcing that not all development arrangements fall within the ambit of Entry 5B.

Transferable Development Rights vs. Transfer of Development Rights

- At this juncture it becomes pertinent to draw the line of difference between transfer of development rights and transferable development rights as laid down by the court in this ruling.

- **TDR** refers to rights granted by a competent authority—typically the Central or State Government or a local municipal body—to a landowner as compensation for surrendering land for public purposes, such as roads, parks, or civic amenities, without monetary consideration. These rights are conferred through Development Rights Certificates (DRCs), which authorize the holder to construct over and above the base permissible Floor Space Index (FSI) in another location, within the limits prescribed under the Development Control Regulations. TDRs are thus regulatory instruments that are freely transferable, either wholly or in part, and may be used by the landowner or sold to a third party.

- **Transfer of Development Rights**, on the other hand, involves a private contractual arrangement between a landowner and a developer. In such transactions, the landowner permits the developer to undertake construction on the landowner's property—typically under a JDA—in return for a consideration that may consist of cash, a share of the constructed area, or a mix of both. Herein, the developer does not receive any independent or tradable right from the government, but rather a development right derived contractually from the landowner.

- Unlike TDR, which originates from statutory compensation and is transferrable in the open market, a development right inherently stems from mutual agreements and is non-transferable except as per the stipulated contractual terms. Thus, while both terms refer to development potential, they are distinct in origin, nature, and legal implications—TDR being a compensatory regulatory right, and DR being a contractual entitlement to develop a specific land parcel and unlike TDR cannot be severed from that land.

Implications of the said decision

- In this regard, it is pertinent to note at the outset that the said decision did not adjudicate on the taxability of development rights per se under GST law. Rather, the ruling was strictly limited to determining who is liable to pay GST on the transfer of development rights under the reverse charge mechanism ("RCM"). The judgment cannot be interpreted to mean that there is no levy of GST on development rights. Notably, the Court viewed TDR in a narrow or inverted sense, whereas under GST notifications, development rights and "TDR" have been used interchangeably, without any specific reference to "TDR certificates." The distinction lies not in the nature of rights transferred, but in the method—whether conferred through an agreement or a certificate. Post-2019, the transfer of development rights have either been exempted or subjected to RCM, with the developer being made liable to discharge tax.

- Secondly, while the said ruling may appear beneficial to the real estate sector at first glance, it is important to note that the RCM notification closely mirrors the language of the related GST exemption notification. Thus, if the said decision of the High Court is interpreted to exclude development rights from the purview of GST liability entirely, it may have inadvertent consequences. Specifically, it could jeopardize the exemption notifications issued post-2019 that allow developers to claim exemption or discharge GST under RCM on development rights. Such a view could imply that the underlying development rights transaction itself is non-taxable, rendering the RCM exemption inapplicable, and creating potential tax liability exposures for developers who have relied on such exemptions in good faith. Hence, this approach if followed haphazardly, poses a risk on the unsettling, settled positions and adds to the legal uncertainty surrounding the GST treatment of development rights.

Conclusion

- Conclusively, this ruling by the Bombay High Court may offer some relief—particularly to the developers in Maharashtra. However, it raises significant concerns for taxpayers across the country. The judgment confines itself to the question of tax liability without addressing the broader issue of taxability of development rights under GST. Consequently, if adopted as a precedent, it could prompt tax authorities to challenge the applicability of exemptions currently being claimed by developers. It can also be noted that the Hon'ble High Court while arriving at the said conclusion has not considered GST Council discussions in 2019 when exhaustive changes were made in the real estate sector including introduction of the RCM entry on development rights.

- Given this ambiguity, there is a pressing need for clear and authoritative clarification from the government, especially since a conclusive ruling from the Supreme Court may not be forthcoming

in the near future to avoid any further litigation on this matter.

- In our view, it is advisable to wait for a final word from the Supreme Court before a position is adopted basis the said decision.

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