

GST Alert 08/2020-21

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Critical Analysis on Refund of IGST Paid on Export of Goods against Advance Authorization

Many cases have been rising across the country regarding the complications and confusion surrounding ITC and various refund mechanisms. Earlier this month, a manufacturer of flexible packaging films, Cosmos Films, filed a petition to Gujarat High Court, under Article 226 of the Constitution of India, for the denial of rebate claim for importing goods under Advance Authorisation (AA) License.

The petitioner was entitled to import raw materials without payment of IGST under AA Licenses and pay IGST on exports and claim Rebate (Refund) of the IGST so paid on exports. The petitioner has received benefits of refund of IGST at the relevant point of time.

The petitioner was unable to utilize the benefit of dutyfree imports under AA Licenses and take the benefit of rebate on exports, because the amendments made in Rule 96 (10) of CGST Rules state that the rebate on exports cannot be availed if the inputs procured have enjoyed AA benefits or Deemed Export Benefits under the said notification.

The petitioner had challenged the aforesaid notifications and amendments made in subrule 10 of Rule 96 of the CGST Rules, by Notification No. 54/2018, which denies the option to claim rebate to the petitioner for importing goods under AA Licenses.

The court ruled, on the conjoint readings of the provision of Section 16 of the IGST Act, Section 54 of CGST Act and Rule 96 (10) of CGST Rules, which is substituted by Notification No. 54/2018 dated 9th October 2018, that the person who has availed the benefits shall not have its claimed refund of integrated tax paid on exports of goods or services. The petitioner has availed benefits under the Advance Authorization License scheme as per the Notification No. 18/2015, which was amended by Notification No. 79/2017 dated 13th October 2017, and paid integrated tax on the goods procured by the petitioners for the export purpose.



However, we beg to differ. We believe that the refunds claimed till 23.01.2018 are legitimate, facts in the order of the honourable Gujarat High court in case of Cosmos Films have not been appreciated well, our reasons for the same are as under:

1. Insertion of Rule 96(10) in CGST Rules, 2017 vide Notification No. 03/2018-Central Tax dated 23.01.2018

The Government of India has inserted Rule 96(10) in CGST Rules, 2017 vide Notification No. 03/2018-Central Tax dated 23.01.2018. The extract of the newly inserted sub-rule is as under:

(d) for sub-rule (9), the following sub-rules shall be substituted, namely:-

*“(9) The application for refund of integrated tax paid on the services exported out of India shall be filed in **FORM GST RFD-01** and shall be dealt with in accordance with the provisions of rule 89”.*

(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have received supplies on which the supplier has availed the benefit of the Government of India, Ministry of Finance, notification No. 48/2017-Central Tax dated the 18th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1305 (E) dated the 18th October, 2017 or notification No. 40/2017-Central Tax (Rate) 23rd October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1320 (E) dated the 23rd October, 2017 or notification No. 41/2017-Integrated Tax (Rate) dated the 23rd October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1321 (E) dated the 23rd October, 2017 or notification No. 78/2017-Customs dated the 13th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1272(E) dated the 13th October, 2017 or Notification No. 79/2017-Customs Tax dated the 13th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1299 (E)

dated the 13th October 2017.”;

✚ Main ingredients of Rule 96(10) of CGST Rules, 2017:

- Supplier Supplies to the Exporter
- Exporter Exports the goods or Services



- ▶ The Supplier Claims benefit of the following Notification
 - Deemed Exports (Notification No. 48/2017-CT)
 - Merchant Export Scheme 0.1% (Notification No. 40/2017-CT(R) and Notification No. 41/2017-IGST(R))
 - EOU Scheme (Notification No. 78/2017-Custom)
 - AA/EPCG etc. (Notification No. 79/2017-Custom)

The above provision lays down that if **the supplier who has supplied goods/services to the exporter and claimed benefits** under any of the notifications as mentioned above, then exporter shall not be eligible to claim refund of IGST Paid on Export of Goods in other words Exporter shall be mandatorily required to export under Letter of Undertaking and claim refund of unutilized Input Tax Credit under Rule 89 of CGST Rules, 2017.

In our case, we have not done any domestic procurement of goods/services against Advance Authorization. We have only imported goods from outside India against Advance Authorization wherein the supplier is located outside India, so claiming of benefits given in the above notifications by the supplier is not at all applicable. Hence, in our view, Rule 96(10) of CGST Rules, 2017 as inserted by Notification No. 03/2018 dated 23.01.2018 is not applicable to us. We were eligible to claim a refund of IGST Paid on exports of goods against Advance Authorization during the period from 23.10.2017 to 08.10.2018.

2. Issuance of Notification No. 53/2018-CT dated 09.10.2018 with retrospective effect from 23.10.2017 and thereafter removal of effect thereof.

The Government of India has substituted Rule 96(10) of CGST Rules, 2017 vide Notification No. 53/2018 dated 09.10.2018 with retrospective effect from 23.10.2017 but immediately on the same day, they have issued Notification No. 54/2018 dated 09.10.2018, removing the retrospective effect from the amended provision.

Said Rule 96(10) and its retrospective amendment was challenged in the Gujarat High Court in the case of Zaveri and Co Pvt Ltd vs Union of India Civil Petition No. 15091 of 2018 wherein the Government of India confirmed that the rule is not retrospective in nature whereby the honorable High Court disposed off the petition saying that as the grievance of the petitioner has been resolved.



1. Mr. Uchit Sheth, learned advocate for the petitioner, has submitted that the petitioner has challenged rule 96 (10) (b) of the Central Goods and Service Tax Rules, 2017 insofar as the same has been given retrospective effect. It was pointed out that subsequently vide Notification No. 53/2018-Central Tax dated 9.10.2018, sub-rule (10) of rule 96 has been substituted, and the retrospective effect given to it, has been deleted. Thereafter, vide Notification No. 54/2018-Central Tax dated 9.10.2018, sub-rule (10) of rule 96 has been substituted, making it applicable prospectively. It was submitted that, since the petitioner's grievance was against the retrospective effect given to rule 96, such grievance no longer survives.

3. Issuance of Notification No. 54/2018-CT dated 09.10.2018

The Government of India has substituted Rule 96(10) of CGST Rules, 2017 vide Notification No. 54/2018 dated 09.10.2018. The extract of the same is reproduced below:

“(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have -

(a) received supplies on which the benefit of the Government of India, Ministry of Finance Notification No. 48/2017-Central Tax, dated the 18th October 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1305 (E), dated the 18th October 2017 except so far it relates to the receipt of capital goods by such person against Ex

(b) port Promotion Capital Goods Scheme or notification No. 40/2017-Central Tax (Rate), dated the 23rd October 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1320 (E), dated the 23rd October 2017 or notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1321 (E), dated the 23rd October 2017 has been availed; or

(c) availed the benefit under notification No. 78/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1272(E), dated the 13th October 2017 or Notification No. 79/2017-Customs, dated the 13th October 2017, published in the Gazette of India,



Extraordinary, Part II, Section 3, Subsection (i), vide number G.S.R 1299 (E), dated the 13th October 2017 except so far it relates to the receipt of capital goods by such person against Export Promotion Capital Goods Scheme."

- ✚ Main ingredients of Rule 96(10) of CGST Rules, 2017 as amended, w.e.f. 09.10.2018
 - ▶ If the exporter receives supplies on which following benefits availed:
 - Deemed Exports (Notification No. 48/2017-CT)
 - Merchant Export Scheme 0.1% (Notification No. 40/2017-CT(R) and Notification No. 41/2017-IGST(R))
 - ▶ If exporters avails following benefits:
 - EOU Scheme (Notification No. 78/2017-Custom)
 - AA/EPCG etc. (Notification No. 79/2017-Custom) **except for Capital Goods**

The substitution of new rules provides that if the exporter has **received any of the supplies** under Deemed Export Notification or Merchant Export Scheme OR **has availed any benefits** under EOU Scheme or Advance Authorization or EPCG Scheme THAN HE SHALL NOT BE ELIGIBLE FOR REFUND OF IGST PAID ON EXPORTS OF GOODS.

Accordingly, vide this notification rule 96 (10) was made applicable prospectively from 09.10.2018

4. NACIN view

National Academy of Customs, Indirect Taxes and Narcotics (NACIN), formerly known as National Academy of Customs Excise and Narcotics (NACEN), is the apex institute of the Government of India for capacity building of civil servants in the field of indirect taxation, particularly the areas of customs, GST, central excise, service tax, and narcotics control administration

This premier body is responsible for training GST cadres across India. It issues important educational updates regularly, in one of such GST updates, dated 13.10.2018, which most importantly was issued after the amendment vide notification 54/2018-CT. View taken by NACIN can be seen on slide/Page No. 5,6 and 7 of this GST Weekly Update. As can be witnessed, the view taken by NACIN is identical to the views espoused above by us.



5. Reasoning why Facts in Cosmos Films case are not appreciated well

Prayer of the petitioner before the High court was as under:

- a. Declare rule 96 (10) ultra vires the CGST Act
- b. Declare that rule 96 (10) cannot be operated retrospectively.

Second prayer was silent on the fact whether they were challenging the retrospectivity from 1.07.2017 or from 23.10.2017 onwards. In our view, this was the crucial error that was made which confused the court.

In Para 4.6 of the judgement, this confusion comes out clearly.

4.6. It appears that, thereafter, by Notification No. 53/2018-Central Tax dated 9th October 2018, sub-clause (a) and (b) of sub-rule 10 of Rule 96 of the CGST Rules were merged. Thereafter, vide Notification No. 54/2018-Central Tax dated 9th October 2018, the sub-rule 10 of Rule 96 of the CGST Rules was again de-merged and “with effect from 23rd October, 2017” thereby indicating that Notification No. 54/2018-Central Tax do not intend to apply the amendment to Rule-96(10) of the CGST Rules retrospectively. The petitioner has therefore preferred this petition challenging the aforesaid notifications and amendments made in sub-rule 10 of Rule-96 of the CGST Rules, by Notification No. 54/2018 denying the option to claim rebate to the petitioner for importing goods under AA Licenses being ultra-vires the provisions of the CGST Act and the CGST Rules made there under and Article 14 of the Constitution of India.

As discussed in above paragraphs, notification 54/2018-CT never intended to amend the rule 96(10) retrospectively, infact said 54/2018 replaced amendments brought in by 39/2018 and notification 53/2018-CT precisely to remove retrospectivity, there is no other change whatsoever other than de-merging a paragraph into two parts where the language and conditions remain same. Notification 54/2018 while amending rule 96(10) categorically states that this amendment will be effective from the date of its publication in official gazette which is 9.10.2018. Another fact which was overlooked was that notification 53 and 54 both were issued on same date.

Further, order in the case of Zaveri and sons where the government has themselves said that the subject amendment was prospective in nature effective from 9.10.2018 only was not even discussed least cited.

6. Conclusion



From the above mentioned Facts, legal provisions, interpretation and review of the judicial pronouncements, it is crystal clear that Notification No. 03/2018 dated 23.01.2018, which has put a restriction on Refund of IGST paid on export of goods **ONLY if the supplier has claimed the benefit of certain Notifications as mentioned therein**, in other words, the conditions are applicable vis-à-vis the Supplier of goods to the exporter and not to the exporter of goods directly.

Restrictions have been put directly on the exporters of goods/services only vide Notification No. 54/2018-CT dated 09.10.2018 and not before that. Accordingly, IGST paid refunds availed by exporters from 1.07.2017 to 8.10.2018 are good in law.

We hope Judgement of Cosmos Films is reviewed sooner than later to avoid unnecessary hassle to exporters.

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