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EXPORTERS' RIGHTS AND REFUND OF UNUTILIZED ITC SPREADING ACROSS FINANCIAL YEARS

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LEGAL FRAMEWORK UNDER GST LAWS RELATING TO EXPORT

The Constitution of India {Article 286(1)} mandates that no law passed by the State Government can impose, or authorise the imposition of a tax on export out of the territory of India. The export of goods and services is covered within the ambit of The Integrated Goods and Services Tax Act, 2017 ('IGST Act' for short). Section 2(5), Section 2(6), Section 7(5), Section 11(b), Section 16 of IGST Act, are the sections containing provisions relating to the export. In addition, the provisions of Section 54 of the Central Goods and Services Tax Act, 2017 (CGST Act' for short) and the rules made thereunder, viz, Rules 89 to 97A under Chapter – X, dealing with refund process, of the Central Goods and Services Tax Rules, 2017 (CGST Rules' for short) are also attracted. Besides these, time to time Circulars are also issued by CBIC in exercise of its power under Section 168(1) of CGST Act governing the legal framework for the refund to the exporters. For the sake of brevity, instead of reproducing/dealing with all the provisions relating to the export, only relevant extracts of applicable Sections, Rules or Circular having bearing on the refund relating to export are being dealt herein.

POSITION OF CIRCULARS VIS-À-VIS THE PROVISIONS OF THE ACT

This is appropriate to note that in taxation laws normally the parent act provides the substantial laws while the rules framed thereunder or the circulars issued thereunder provide for the procedural aspects. This is also important to note that it is the well settled proposition of law that no rule can override the provisions of the Act under which the rule is framed. The position of

the Circulars is no better. Indeed, the Circulars issued by authorities have been held merely to be the understanding of the statutory provisions by the authorities. **Hon'ble Supreme Court** in the case of **Commissioner of Central Excise, Bolpur Vs. Ratan Melting & Wire Industries (2008) 13 SCC 1** has held as under:

"7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.

8. ..... To lay content with the circular would mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme Court. That would be against the very concept of majesty of law declared by this Court and the binding effect in terms of Article 141 of the Constitution."

Therefore, legally the Circulars cannot impose the stricter conditions than postulated by the parent Act much less taking away or withdrawing the benefits provided by the parent Act, since doing so will amount to taking away the vested rights accrued to a person. At best the Circular can mitigate rigours of law by granting administrative relief beyond relevant provisions of the statute as has been observed by the **Hon'ble Delhi High Court** in **Pioneer India Electronics (P) Ltd. Vs. Union of India & Anr. ILR (2014) II DELHI 791**

"27..... Circulars might depart from the strict tenure of the statutory provision and might mitigate rigours of law thereby granting administrative relief beyond terms of the relevant provisions of the statute, but the Central Government is not empowered to withdraw benefits or impose harsher or stricter conditions than those postulated by the statute. In later cases, circulars can supplant the law but not supplement the law."

ANALYSIS OF REFUND PROVISIONS

As per Section 7(5) of IGST Act the export of goods and services or both are deemed to be interstate supplies and since Section 5 of the IGST Act levies IGST on all interstate supplies of goods or services or both, IGST is leviable on export. However, despite being leviable to IGST, exports are treated as zero rated supplies under Section 16 of the IGST ACT. Section 16 of the IGST ACT further deal with the credit of ITC and also entitles the supplier/exporter for the refund. Section 16 of the IGST Act is reproduced herein :-

*"**Section 16.** Zero rated supply-*

(1) "zero rated supply" means any of the following supplies of goods or services or both, namely: -

(a) Export of goods or services or both; or

(b) Supply of goods or services or both to a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely: -

(a) he may supply goods or services or both under bond or letter of undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and

claim refund of such tax paid on goods or services or both supplied,

in accordance with the provisions of Section 54 of the Central Goods and Services Tax Act or the rules made thereunder."

Thus, from the perusal of Section 16 of IGST Act, it is seen that exports are zero rated supplies under Section 16(1) of the IGST ACT and further Section 16(2) specifically allows ITC for making zero rated supplies, even if such supplies may be exempt supplies. It is also seen that Section 16(3) of the IGST ACT entitles the supplier/exporter to claim refund of unutilized ITC. Thus, Section 16(3) of the IGST ACT grants a vested right to an exporter for refund of 'unutilised input tax credit'. Further, two options are provided by Section 16(3) either of which can be exercised by the exporter for claiming the refund. Section 16(3) of the IGST ACT further says that refund is to be claimed in accordance with the provisions of Section 54 of the Central Goods and Services Tax Act (CGST Act) or the rules made thereunder.

Section 54 of CGST Act provides the substantial law relating to the refund while the Rules 89 to 97A under Chapter – X of CGST Rules provide for the procedure for the refund process. Relevant extracts of Section 54 of CGST Act are reproduced here:

Section 54. Refund of tax.

(1) *Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed:*

Provided that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in the return furnished under section 39 in such manner as may be prescribed.

(2) .....

(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:

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."

.....

***Explanation**.—For the purposes of this section,—*

(1) "refund" includes refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, or refund of tax on the supply of goods regarded as deemed exports, or refund of unutilised input tax credit as provided under subsection (3).

(2) "relevant date" means—

(a) in the case of goods exported out of India where a refund of tax paid is available in respect of goods themselves or, as the case may be, the inputs or input services used in such goods,—

(i) if the goods are exported by sea or air, the dateon which the ship or the aircraft in which such goods are loaded, leaves India; or

(ii) if the goods are exported by land, the date on which such goods pass the frontier; or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office

concerned to a place outside India;

(b) in the case of supply of goods regarded as deemed exports where a refund of tax paid is available in respect of the goods, the date on which the return relating to such deemed exports is furnished;

(c) in the case of services exported out of India where a refund of tax paid is available in respect of services themselves or, as the case may be, the inputs or input services used in such services, the date of -

(i) receipt of payment in convertible foreign exchange, or in Indian rupees wherever permitted by the Reserve Bank of India where the supply of services had been completed prior to the receipt of such payment; or

(ii) issue of invoice, where payment for the services had been received in advance prior to the date of issue of the invoice;

(d) in case where the tax becomes refundable as a consequence of judgment, decree, order or direction of the Appellate Authority, Appellate Tribunal or any court, the date of communication of such judgment, decree, order or direction;

(e) in the case of refund of unutilised input tax credit under clause (ii) of the first proviso to sub-section (3), the due date for furnishing of return under section 39 for the period in which such claim for refund arises;

(f) in the case where tax is paid provisionally underthis Act or the rules made thereunder, the date of adjustment of tax after the final assessment thereof;

(g) in the case of a person, other than the supplier,the date of receipt of goods or services or both by such person; and

(h) in any other case, the date of payment of tax.

Perusal of Section 54(1) clearly shows that a limitation period of two years is provided for an assesse/claimant to make an application for refund. The said limitation period of two years is to be calculated from the "relevant date" the meaning of which is provided in Explanation (2)

appended to Section 54 which envisages various situations. The explanation (1) assigns an inclusive meaning to the term "refund" which inter alia includes the refund of tax paid on export of goods and services or both, and refund of unutilised input tax credit relating to export. Apart from this limitation period of two years, no other restriction as to the clubbing or bunching of the refund claims across two financial years has been imposed by any relevant provision of the Section 54. Therefore, it follows that an applicant making application for refund will be well within his right to make his refund claim for the tax periods spreading across the financial years subject to the condition that all such tax periods must be falling within the limitation period of two years from the relevant date. As noted above Section 54 of the CGST Act, provides the substantial law relating to the refund therefore, all the rules framed providing for procedural aspects of refund procedure and the relevant circulars issued by the tax authorities must be in conformity with Section 54 of the CGST Act.

RELEVANT CIRCULARS ISSUED BY CBIC

With a view to ensure uniformity in the implementation of the provisions of law across field formations, the CBIC time to time issues Circulars providing for the procedural aspects of the refund process. As is known that till September, 2019 applications for refunds were being processed manually by the tax authorities whereby the applicants claiming refunds were required to file the refund application in FORM GST RFD-01A on the common portal, take a print out of the same and submit it physically to the jurisdictional tax office along with all supporting documents. Further processing of these refund applications, i.e. issuance of acknowledgement of the refund application, issuance of deficiency memo, passing of provisional/final order, payment advice etc. was also being done manually.

In December, 2017 CBIC issued **Circular No. 24/24/2017-GST dated 21.12.2017** whereby stipulating that the refund claims shall be filed only on monthly basis. The said circular apparently created practical difficulties for the exporters in the situations where the exporters may have exported goods/services in a month other than a month in which input/services has been received. Accordingly, representations were made to CBIC and considering these difficulties of the exporters, the CBIC issued another **Circular no. 37/11/2018-GST dated 15.03.2018** thereby allowing the filing of the refund claim by clubbing successive months. However, this clubbing of successive months was allowed subject to the condition that the successive months can not spread across financial years. **Para 11.2 of Circular no. 37/11/2018-GST dated 15.03.2018** is reproduced below:

"11.2. In this regard, it is hereby clarified that the exporter, at his option, may file refund claim for one calendar month/quarter or by clubbing successive calendar months/quarters. The Calendar month(s)/quarter(s) for which refund claim has been filed, however, cannot spread across different financial years."

Thus the Circular no. 37/11/2018-GST dated 15.03.2018 created complexities for the exporters who made purchases of inputs in one financial year but made exports in another financial year.

Subsequently, (Master) Circular No. 125/44/2019-GST dated 18.11.2019 was issued by CBIC whereby earlier Circulars No. 17/17/2017-GST dated 15.11.2017, 24/24/2017-GST dated 21.12.2017, impugned circular no. 37/11/2018-GST dated 15.03.2018, 45/19/2018-GST dated 30.05.2018 (including corrigendum dated 18.07.2019), 59/33/2018-GST dated 04.09.2018, 70/44/2018-GST dated 26.10.2018, 79/53/2018-GST dated 31.12.2018 and 94/13/2019-

GST dated 28.03.2019 were rescinded/subsumed and Fully electronic refund process through FORM GST RFD-01 and single disbursement was introduced. Further, the restriction imposed by earlier 37/11/2018-GST dated 15.03.2018 for not allowing the spread of refund period *across* different financial years was retained in para 8. Para 8 of Circular No. 125/44/2019-GST dated 18.11.2019 is reproduced below:

"8. The applicant, at his option, may file a refund claim for a tax period or by clubbing successive tax periods. The period for which refund claim has been filed, however, cannot spread across different financial years. Registered persons having aggregate turnover of up to Rs. 1.5 crore in the preceding financial year or the current financial year opting to file FORM GSTR - 1 on quarterly basis, can only apply for refund on a quarterly basis or clubbing successive quarters as aforesaid. However, refund claims under categories listed at (a), (c) and (e) in para 3 above must be filed by the applicant chronologically. This means that an applicant, after submitting a refund application under any of these categories for a certain period, shall not be subsequently allowed to file a refund claim under the same category for any previous period. This principle / limitation, however, shall not apply in cases where a fresh application is being filed pursuant to a deficiency memo having been issued earlier."

Thus, it is seen that para 8 of (Master) Circular No. 125/44/2019-GST dated 18.11.2019 created great hardships to the exporters at least on two counts. One, it imposed undue restriction on the exporters to the effect that the period for which refund claim is filed, cannot spread across different financial years which effectively means that in case purchases for inputs were made in one financial year, refund of unutilized ITC on such purchases can not be claimed, if the export was made in next financial year even if the input purchases were made in March (last month of one financial years) and export was made in April (first month of next financial year). Another hardship created by the

said Circular is that the refund application can only be filed by the exporter chronologically that is to say, the exporter, after submitting a refund application for a certain period, shall not be subsequently allowed to file a refund claim under the same category for any previous period, which means if an exporter, for example, files refund application for August 2019, he will not be able to file the application for June/July 2019 subsequently. Indeed the instances have also come across wherein the applicants are not even allowed to file the refund application for the later months, in case the refund application is first not filed for previous months.

Examination of para 8 of (Master) Circular No. 125/44/2019-GST dated 18.11.2019 vis-à-vis Section 54 of CGST Act, Section 16 of IGST Act and Rule 89 of CGST Rules clearly shows that neither of the aforesaid restrictions is in consonance with the provisions of said sections and rule. Therefore, the said restrictions imposed by para 8 of Circular No. 125/44/2019-GST dated 18.11.2019 are not only beyond the scope of the parent provision but also practically takes away the substantial rights provided to the exporters by the parent provisions thus, creates great hardships to exporters. Therefore, the said para 8 became susceptible to challenges before the Courts.

CHALLENGE TO CIRCULAR NO. 125/44/2019-GST DATED 18.11.2019 IN COURTS

Finding the aforesaid restriction imposed by para 8 of of (Master) Circular No. 125/44/2019-GST dated 18.11.2019 pertaining to the spread of refund claim across different financial years as prima facie arbitrary the Hon'ble Delhi High Court vide an Interim Order dated 21.01.2020 passed in case bearing W.P.(C) No. 627/2020 stayed the rigour of para 8 of (Master) Circular No. 125/44/2019-GST dated 18.11.2019 while observing as below:-

"12. The matter certainly requires our consideration and we have already called upon the respondents to file a detailed counter affidavit to meet the contentions of the petitioner. However, at this stage, we are of the prima facie view that by way of the impugned circulars, though the respondents recognise the difficulties faced by the exporters and have permitted them to file refund claim for one calendar month/quarter or by clubbing successive calendar months/quarters, yet the restriction pertaining to the spread of refund claim across different financial years is arbitrary. There is no rationale or justification for such a constraint. In the instant case, where exports are not made in the same financial year, question arises as to whether Respondents can restrict the filing of the refund for tax periods spread across two financial years and deprive the petitioner of its valuable right accrued in his favour.....

.....The entire concept of refund of ITC relating to zero rated supply would be obliterated in case the respondents are permitted to put any limitation and condition that takes away petitioner's right to claim refund of all the taxes paid on the domestic purchases used for the purpose of zero rated supplies. The incentive given to the exporters would lose its meaning and this would cause grave hardship to the exporters who are earning valuable foreign exchange for the country. The Respondents cannot, artificially by acting contrary to the fundamental spirit and object of the law, contrive ways to deny the benefit, which the substantive provisions of the law confer on the tax payers. Thus, in our considered opinion, the petitioner has a strong prima facie case, and we cannot deny the petitioner of its right to claim refund which is visible from the mechanism provided under the Act. The impugned circulars take away the vested right of the taxpayer that has accrued in the relevant period.....

13. Having regard to the aforenoted circumstances, till the next date of hearing, we stay the rigour of paragraph 8 of Circular No. 125/44/2019-GST dated 18.11.2019 and also direct the Respondents to either open the online portal so as to enable the petitioner to file the tax refund electronically, or to accept the same manually within 4 weeks from today."

(underlining supplied)

AMENDMENTS IN CIRCULAR NO. 125/44/2019-GST DATED 18.11.2019 BY CBIC

Pursuance to the aforesaid Order dated 21.01.2020 of the Hon'ble Delhi High Court, CBIC has issued the recent **Circular No.135/05/2020 dated 31.03.2020** whereby, inter alia, allowing the clubbing/ Bunching of refund claims across Financial Years in following terms-

"2.5 The issue has been examined and it has been decided to remove the restriction on clubbing of tax periods across Financial Years. Accordingly, circular No. 125/44/2019-GST dated 18.11.2019 stands modified to that extent i.e. the restriction on bunching of refund claims across financial years shall not apply."

Besides the aforesaid relaxation, the Circular No.135/05/2020 dated 31.03.2020 inter alia also restricts the refund of accumulated ITC to those invoices the details of which are uploaded by the supplier in FORM GSTR-1 and are reflected in the FORM GSTR-2A of the applicant.

However, from the above, it is to be seen that only one restriction imposed by para 8 Circular No. 125/44/2019-GST dated 18.11.2019 is mitigated, the other restriction related to filing of the refund application chronologically is still present. Challenge to the said restriction as well as challenge to the introduction of fully electronic filling and processing of the refund application vide Circular No. 125/44/2019-GST dated 18.11.2019, which is perceived to be contrary to Rule 97A of CGST Rules, is still pending before the Hon'ble Delhi High Court, the result of which is keenly awaited.