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Denial of Integrated GST refund to Advance Authorization License Holders

Topics Covered

- ✓What is Advance Authorization Scheme?
- ✓Eligibility for Advance Authorization
- ✓Validity of Advance Authorization
- ✓Section 16 of IGST Act
- ✓Rule 96(10) CGST Rules
- ✓Our View
- ✓DRI & DGCEI Notices ; How to Tackle ?
- ✓Important POVs of various authorities including important judgements

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What is Advance Authorization Scheme?

- Advance Authorization is issued to allow duty free import of input, which is physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, catalyst which is consumed / utilized in the process of production of export product, may also be allowed.
- Advance Authorization is issued for inputs in relation to resultant product, on the following basis:

  (i)As per Standard Input Output Norms (SION) notified (available in Hand Book of Procedures);

  OR

  (ii) On the basis of self declaration as per paragraph 4.07 of Handbook of Procedures.

  OR

  (iii)Applicant specific prior fixation of norm by the Norms Committee.

  OR

  (iv) On the basis of Self Ratification Scheme in terms of Para 4.07A of Foreign Trade Policy.

  (APPENDIX -4K)

Eligibility for Advance Authorization

The Advance Authorization Scheme is available to either a manufacturer exporter directly or a merchant exporter tied with a supporting manufacturer. The authorization is available for the following:

1. Physical exports
2. Intermediate supply
3. Supplies made to specified categories of deemed exports
4. Supply of 'stores' on board of a foreign going vessel/aircraft provided that there are specific Standard Input Output Norms (SION) in respect of items supplied.

Duties exempt under the Advance Authorization Scheme

- Proviso to Sec. 5(1) of the IGST Act, 2017 provides that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975. Accordingly, the IGST on the goods imported into India is leviable u/s 3(7) of the Customs Tariff Act, 1975.
- Now Notification No. 18/2015 – Customs dt. 01.04.2015 as amended by Notification No. 79/2017 dt. 13.10.2017 grants exemption w.e.f. 13.10.2017 from the payment of IGST on goods imported into India against a valid Advance Authorization issued by the Regional Authority in terms of paragraph 4.03 of the FTP.
- Said exemption as per the current status is available till 31.03.2021.

Section 16 of IGST Act

- Any supply of goods or services for export of goods or services or both means Zero Rated Supply.
- As per Section 16(3) of IGST Act, a registered person is eligible to take refund under either of the following options:
  - Under Bond or LUT without payment of integrated tax and claim refund of input tax credit or
  - Supply Goods on payment of integrated tax and claim refund of tax paid on goods or services or both in terms of section 54 of CGST Act.

Amended Section 16 of IGST Act

- Section 16 of the IGST Act is sought to be amended so as to restrict the zero-rated supply on payment of integrated tax only to a notified class of taxpayers or notified supplies of goods or services and link the foreign exchange remittance in case of export of goods with refund.

Amended Section 16 of IGST Act

Sec. 16(3) provides for two routes for claiming the refund.

- Now this has been proposed that the option of making the supply on payment of integrated tax shall only be granted to a notified class of taxpayers or notified supplies of goods or services.
- Now, wait for the amendment related to notified categories.
- Otherwise barring the situations covered under Rule 96(10) (May be restriction for Advance Authorization Holders), the exporters should be permitted to claim refunds under the with payment route.
- To recover the refunds in the context of export of goods if foreign exchange remittance is not received within thirty days after the expiry of the time limit prescribed under the Foreign Exchange Management Act, 1999

Rule 89 of CGST Rules

- Rule 89 of CGST Rules provides the manner and conditions involved for obtaining refund in different situations.
- As per the sub Rule 4 of Rule 89,

Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero-rated supply of services) × Net ITC ÷ Adjusted Total Turnover

Where Net ITC means input tax credit availed on inputs and input services during the relevant period.

Rule 89 of CGST Rules

- Accordingly, in case of Export without payment of Tax will lead to
  - Loss of Input on capital Goods
  - Loss of Transitional Credit
- Therefore , exporters prefer Export on payment of tax and exporters availing Advance Authorization License were entitled to import raw materials without payment of IGST under the Licenses and pay IGST on exports and claim (Refund) of the IGST so paid on exports.

Tale of Rule 96(10)

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Rationale behind Rule 96(10)

Circular No. 45/19/2018-GST dt. 30.05.2018 explains the rationale of the restriction under Rule 96(10) as follows:

"7.1. Sub-rule (10) of rule 96 of the CGST Rules seeks to prevent an exporter, who is receiving goods from suppliers availing the benefit of certain specified notifications under which they supply goods without payment of tax or at reduced rate of tax, from exporting goods under payment of integrated tax. This is to ensure that the exporter does not utilize the input tax credit availed on other domestic supplies received for making the payment of integrated tax on export of goods."

Bare Text of Rule 96(10)(At Present)

96(10)(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 receipt of capital goods by such person against Export 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

(b) 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, Sub-section (i), vide number G.S.R 1299 (E), dated the 13th October, 2017 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme.]]

12[Explanation.- For the purpose of this sub-rule, the benefit of the notifications mentioned therein shall not be considered to have been availed only where the registered person has paid Integrated Goods and Services Tax and Compensation Cess on inputs and has availed exemption of only Basic Customs Duty (BCD) under the said notifications.]

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

(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.";

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

1. 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
2. **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.**
3. There is not any domestic procurement of goods/services against Advance Authorization.
4. We only import 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.
5. 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 anyone. Hence, We are 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.

Ingredients after Amendment Vide NN 03/2018

- 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)

Vide Issuance of Notification No. 39/2018-CT dated 04.09.2018 The Government of India has substituted Rule 96(10) of CGST Rules, 2017. (Retrospective Effect)

"(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 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

(b)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, Sub-section (i),vide number G.S.R 1299 (E), dated the 13th October, 2017.".

Vide Issuance of Notification No. 53/2018-CT dated 09.10.2018 The Government of India has substituted Rule 96(10) of CGST Rules, 2017. (Both Clauses Merged)

In the Central Goods and Services Tax Rules, 2017, in rule 96, for sub-rule (10), the following sub-rule shall be substituted and shall be deemed to have been substituted with effect from the 23rd October, 2017, namely:-

"(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) 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 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, 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.".

Vide Issuance of Notification No. 54/2018-CT dated 09.10.2018 The Government of India has substituted Rule 96(10) of CGST Rules, 2017. (Words substituted with 'Supplies' & Clauses Demerged)

"(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 receipt of capital goods by such person against Export 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

(b) 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, Sub-section (i), vide number G.S.R 1299 (E), dated the 13th October, 2017 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme.".

Vide Issuance of Notification No. 54/2018-CT dated 09.10.2018 The Government of India has substituted Rule 96(10) of CGST Rules, 2017. (Words substituted with 'Supplies' & Clauses Demerged)

1. 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.
2. 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.

Ingredients after Amendment Vide NN 54/2018

- 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

Impact of Amendment

- 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**

Vide Issuance of Notification No. 16/2020-CT dated 23.03.2020 The Government of India has substituted Rule 96(10) of CGST Rules, 2017.

In the said rules, in rule 96, in sub-rule (10),in clause (b) with effect from the 23rd October, 2017, the following Explanation shall be inserted, namely,-

"Explanation.- For the purpose of this sub-rule, the benefit of the notifications mentioned therein shall not be considered to have been availed only where the registered person has paid Integrated Goods and Services Tax and Compensation Cess on inputs and has availed exemption of only Basic Customs Duty (BCD) under the said notifications.".

In other words if the person has paid IGST on imports under Advance Authorization the said person can claim the refund of IGST paid on exports.

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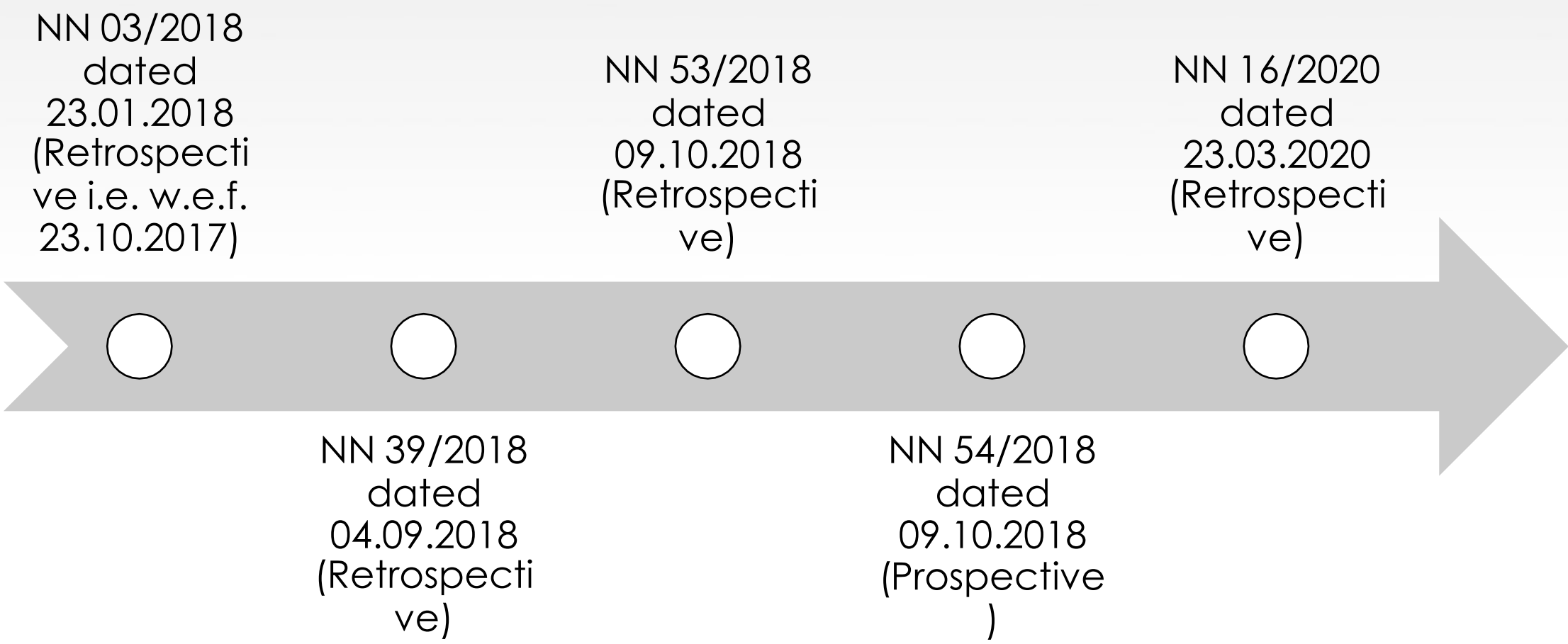

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Cosmo Films India Vs Union of India & Ors. (Gujarat High Court)

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The Court held that the restriction {Mentioned in the Rule 96(10)} shall apply from 23.10.2017, being NN 54/2018 is retrospective in nature.

Further the Court held that the exporters who have availed the refund are required to pay back the IGST claimed as exempt on imports along with interest.

Our View

1. **IGST paid refunds availed by exporters from 1.07.2017 to 8.10.2018 are good in law.**
2. It may be noted that the IGST exemption on imports against advance authorization is claimed by virtue of Notification No. 18/2015 – Customs dt. 01.04.2015 as amended by Notification No. 79/2017 dt. 13.10.2017. Said notification per se do not provide that the exemption shall not be available if the exports are done with payment of IGST and refund thereof is claimed.

3. **Petition is based on below mentioned ground**
   I. Declare rule 96 (10) ultra vires the CGST Act
   II. Declare that rule 96 (10) cannot be operated retrospectively.

Our View

- As discussed in above paragraphs, notification 54/2018-CT never intended to amend the rule 96(10) retrospectively, infect 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.**

DRI and DGCEI Notices ; What to do ?

Recently a lot of notices have been issued by the DRI/DGCEI to the exporters who have availed the scheme of Advance Authorization under the FTP asking the exporters to pay the IGST on the imports made on or after 23.10.2017, if they have availed the refund of IGST. (Paid on Exports)

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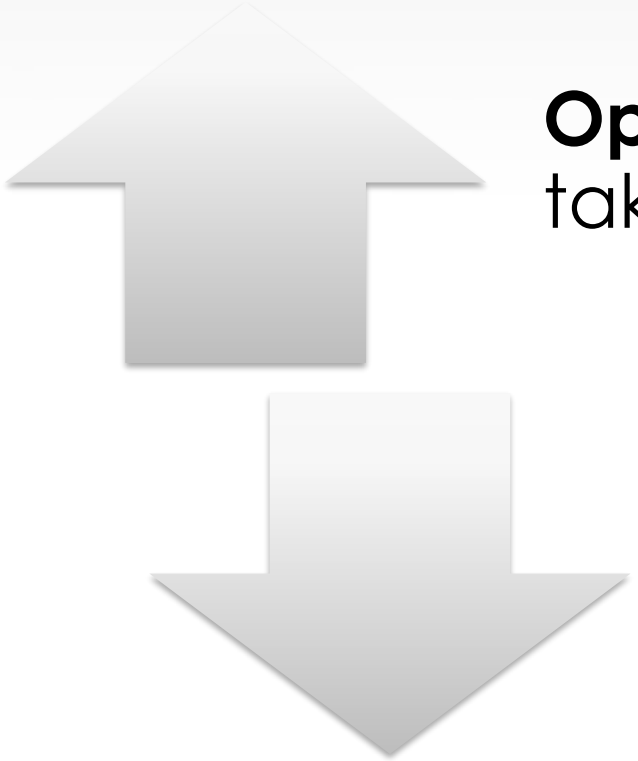
DRI and DGCEI Notices ; What to do ?



Option 1 :- Pay the amount and take credit!

Option 2 :- Challenge the Validity of Rule 96(10)!

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Pay the amount & Take the credit

Extract of Guj HC Judgement

"By virtue of the above amendment, the option of claiming refund under option as per clause (b) is not restricted to the Exporters who only avails BCD exemption and pays IGST on the raw materials thereby exporters who wants to claim refund under second option can switch over now. The amendment is made retrospectively thereby avoiding the anomaly during the intervention period and exporters who already claimed refund under second option need to ***payback IGST along with interest and avail ITC."***

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Pay the amount & Take the credit

- As per the cited para, Guj HC gave an option for availing the Credit.
- Now, as per Section 2(62), wherein it is stated that, "input tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes— (i) the integrated goods and services tax charged on import of goods;
- Now as per Rule 36(1)(d), the Bill of Entry is the document for assessing the IGST paid on Imports.
- Now, Amendment in the Bill of entry (As per Section 149 of the Customs Act, 1962) will be required, as the original Bill of entry was filed availing the benefit of Advance Authorization.
- Is it a easy task ? NO

Pay the amount & Take the credit

There is no clarity from CBIC on such adjustment, though DRI/DGCEI officers are asking AA Holders to pay back the amount and take credit!

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Challenge the Validity of Rule 96(10)
Subordinate Legislation cannot override main Statute

In COMMISSIONER OF INCOME-TAX, AP VERSUS TAJ MAHAL HOTEL [1971 (8) TMI 2 - SUPREME COURT] it was held by the Supreme Court that,

“the Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect.”

Challenge the Validity of Rule 96(10)

Bimal Chandra Banerjee v. State of M.P. and Ors., **1970 (8) TMI 30 - SUPREME COURT**, Hegde J. was examining the provisions of the M.P. Excise Act, 1915. The legislature levied excise duty only on those articles which came within the scope of Section 25 of that Act. it was observed as under: -

"*No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorizes the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule making authority. A rule making authority has no plenary power. It has to act within the limits of the power granted to it.*

Challenge the Validity DRI Notice/Intimations

- The recent judgement by Hon'ble SC in the case of **M/s Canon India Private Limited Vs Commissioner of Customs** has brought out an important ruling that the ADG of DRI is not the proper officer to issue SCN under Section 28(4) of the Customs Act, 1962. The Apex Court concluded the entire proceeding as invalid and without any authority of law.

- Now, this has thrown open plethora of challenges to the SCNs issued and the assessee's are bound to challenge through various writ petitions the validity of SCNs.

- The word "any officer" was distinguished with a "proper officer" in the ruling.

National Academy of Customs, Indirect Taxes and Narcotics (NACIN) View

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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 expressed above by us.

Matter Discussed in

Goods and Services Tax Council

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Extract of the Minute book of 30th GST Council Meeting held as on 28th September 2018

8.1. Shri Manpreet Singh Badal, Hon'ble Minister from Punjab stated that the role of GIC was to mostly issue clarifications on procedural issues and it should avoid approving amendment to Rules with retrospective effect. He stated that the notification regarding Rule 96 (10) and such other decisions involving retrospective amendments should have been brought before the Council and it was only about 10 days before the Council Meeting that the notifications were issued. He cautioned that GIC should not subsume the role of the Council.

8.2. The Secretary explained that amendment to Rule 96(10) of the CGST Rules was brought before the GIC, as double benefit was being taken by the exporters in the form of import of goods on advance license in addition to claiming IGST refund. Hence, it was an urgent matter on which decision had to be taken quickly by the GIC in order to plug the revenue leakage. He also pointed out that once the Hon'ble Minister from Punjab highlighted certain concerns regarding amendment to Rule 96 of the CGST Rules, an Agenda note was now placed before the Council to rectify the inadvertent mistake and to permit refund of IGST paid on export goods made from capital goods imported under the EPCG scheme. He added that the GIC decisions were circulated to all the States before it is implemented and the mistakes could be pointed out by any of the States. The Hon'ble Minister from Punjab stated that they would send a written communication on this matter.

Important Judgements

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Pre GST Regime Judgment

Zenith Spinners v. UOI 2015 (326) E.L.T. 97 (Guj.)

Facts

- The petitioner is a proprietary concern of M/s. Zenith Exports Limited. The petitioner is inter alia engaged in the business of manufacture of Viscose Yarn (Viscose content 100%).
- It is an admitted position that the petitioner has been procuring duty free inputs i.e. 100% Viscose Staple Fibre under Notification No. 43/2001-Central Excise (NT) dated 26th June, 2001 after following the procedure prescribed under the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001.
- There is no dispute that the petitioner manufactures final product known as Viscose Yarn for the purposes of exports only. Similarly, there is no dispute that the final product is actually exported.

Issue

- However, by virtue of Amendment Notification issued by the Central Board of Excise & Customs (CBEC) being Notification No. 10 of 2004-C.E. (N.T.) dated 3rd June, 2004 sub-paragraph (vi) to Paragraph No. 2 came to be substituted by the said Notification and Explanation-II came to be inserted.
- It is the stand of the petitioner that by virtue of this Notification, though termed to be clarificatory in nature, the entire scheme laid down in Rules 18 and 19 of the Central Excise Rules, 2002 (the Rules) has been given a go-by and hence, the said Notification be treated as bad in law.
- It is an accepted position that the impugned show cause notices have been issued on the basis of the aforesaid Amendment Notification.

Law

- Rule 19(1) of the Rules an exporter is entitled to export final products without payment of duty after executing the necessary bond in this regard and under Sub-rule (2) of Rule 19 of the Rules any material which is used in the manufacturing or processing of goods i.e. final products which are exported can also be removed without payment of duty.
- Sub-rule (1) and Sub-rule (2) of Rule 19 of the Rules an exporter has the option to seek exportation of final products or removal of inputs without payment of duty, but in the event an exporter exercises option only qua one or the other sub-rule and claims rebate under Rule 18 qua the final products.
- But by virtue of the Amendment Notification dated 3rd June, 2005 the option available with an exporter is taken away and the exporter who opts to remove the inputs without payment of duty is forced to export the final products also without payment of duty, even though the exporter is entitled to claim rebate under Rule 18 in relation to the duty paid on such final products. He, therefore, urged that the said Amendment Notification be struck down as going beyond the provisions of Rule 19 of the Rules.

Rules 18 and 19 of the Rules read as under:

- **Rule 18. Rebate of duty. –**

  Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification.

  Explanation. - Export includes goods shipped as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft.

- **Rule 19. Export without payment of duty.**

  (1) Any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, as may be approved by the Commissioner.

  (2) Any material may be removed without payment of duty from a factory of the producer nor the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the Commissioner.

  (3) The export under Sub-rule (1) or Sub-rule (2) shall be subject to such conditions, safeguards and procedure as may be specified by notification by the Board.

Law

- Rule 5 of the CENVAT Credit Rules, 2004 (CENVAT Rules) to contend that in a case where an input is used in the final product which is cleared for export under bond CENVAT Credit in respect of the input so used is to be allowed to be utilized by the manufacturer towards payment of excise duty on any final product cleared for export or home consumption.
- Thus, the submission was that by virtue of the Amendment Notification even this provision was being rendered nugatory or redundant. He, therefore, urged that the impugned Notification should not be permitted to operate.

Court Held

- As can be seen from reading of Sub-rule (1) and Rule (2) of Rule 19 of the Rules the opening portion grants an option to the exporter by virtue of the language used. In Sub-rule (1) it is stated Any excisable goods may be exported, and in Sub-rule (2) it is stated Any material may be removed. Therefore, the exporter has an option to export the final products without payment of duty or use inputs which are procured without payment of duty in the manufacture or processing of goods which are to be exported.
- At the other end, the later portion of Sub-rules (1) and (2) of Rule 19 of the Rules grants discretion to the Commissioner to approve the option that is exercised by an exporter by use of the phrase as may be approved. If the interpretation which is placed on the provision by the respondent authorities by issuance of impugned Notification is accepted, it would not only take away the option granted to the exporter but also take away the discretion granted to the Commissioner by the Rule.
- It is settled position that by virtue of exercise of powers of issuing a notification which is for the purposes of imposing conditions, safeguards and procedure the authority cannot exceed the jurisdiction by providing for a situation which either restricts the rights granted under the Rule itself or make the Rule itself redundant.

Court Held

- In the circumstances, the impugned Notification being Notification No. 10/2004-CE(NT) dated 3rd June, 2004 is bad in law for the aforestated reasons, namely, it is not in consonance with the principal provisions, namely, Rules 18 and 19 of the Rules, and it is, even otherwise, **Revenue neutral.**
- The CBEC cannot exercise power under Rule 19 of the Rules to negate a notification issued by the Central Government under Rule 18 of the Rules. The same is, therefore, declared to be bad in law and is quashed and set aside. As a consequence the impugned show cause notices (Annexure-C Collectively) are also quashed and set aside.

GUJARAT HIGH COURT
ZAVERI AND CO. PVT. LTD. VERSUS UNION OF INDIA
dated 18th December 2020

The Notification 54/2018 itself makes it clear that the same shall come into force from the date of its publication in the official gazette.
According to petitioner, what has been observed in para-9 of the order passed in the Special Civil Application No. 15833 of 2018 needs to be re-looked, as the Department has started issuing notices indiscriminately on the premise that the Notification would apply with effect from 23.10.2017.

Court Held:-

*7. Let **notice** be issued to the respondents returnable on 24.02.2020. Till the next date of hearing, the proceedings pursuant to the notice dated 24.11.2020 Annexure – B shall remain stayed.*

GUJARAT HIGH COURT
Zaveri and Co Pvt. Ltd. Vs Union of India (Gujarat High Court) dated 12.12.2018

- 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.
- It was pointed out that, 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 grievance of the petitioner was against the retrospective effect given to rule 96, such grievance no longer survives.

Watson Pharma Private Limited vs The Union of India, [TS-989-HC-2018(BOM)-NT]

Writ petition has been filed before Bombay HC challenging the provisions of Rule 96(10) of CGST Rules, 2017 restricting EOUs, Advance Authorization (AA) holders and other assessees who have procured inputs at concessional rate of tax or under deemed export benefits from claiming rebate benefits.

Petitioner has submitted that Rule 96(10) is violative of Article 14 of Constitution to the extent that an arbitrary and unreasonable differential treatment is meted out to EOUs, AA holders and similar assessees vis-?-vis regular exporters. The petitioner is aggrieved for not being able to monetize excess ITC balance carried forward each month.
Similar writs have also been filed in case of other petitioner before Delhi and Gujarat HC.

Government has not submitted their response till date.

“How this issue might affect your business ?”
Please feel free to contact us

FCA. Archana Jain
E:- Archana.jain@taxtru.in
M:- +91 99990 09508

CA. Navjot Singh
E: navjot.singh@taxtru.in
M: +91 99533 57999

TAXTRU BUSINESS
ADVISORS LLP

#F-13 Kirti Nagar, Nearby Derawal Bhawan, Delhi – 110015