Cloud of Ambiguity around the new restriction of 1.5 times of domestic value to be considered for export value!!

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April 29, 2020

The Central Board of Indirect Taxes and Customs (CBIC) has issued Notification No. 16/2020 dated 23 March, 2020 to make certain amendments to the Central Goods and Services Tax (CGST) Rules, 2017 with respect to the refund mechanism under GST for zero-rated supply of goods and/or services with or without payment of IGST.

Amongst others, one surprising amendment is the change made to the definition of 'Turnover of zero-rated supply of goods' as given under Rule 89(4)(c) of the CGST Rules, 2017. Rule 89 of the CGST Rules 2017 broadly covers the mechanism and procedures pertaining to refund of GST. Sub Rule 4 of Rule 89 of the CGST Rules, 2017 particularly covers the method to compute refund of unutilised Input Tax Credit (ITC) in case of export of goods and/or services without payment of tax under bond or under Letter of Undertaking (LUT).

The formula for computing such refund as given under Rule 89(4) of the CGST Rules, 2017 is as below:

Refund = [(Turnover of zero-rated supply of goods) x Net ITC]/ Adjusted Total Turnover

Further, clause (c) of Rule 89(4) of the CGST Rules, 2017 defines *"Turnover of zero-rated supply of goods".* It is this definition that has been amended by the said Notification which has led to considerable amount of uncertainty and ambiguity for the exporters. The amendment under discussion is highlighted below:

"Turnover of zero-rated supply of goods" means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking ***or the value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed, supplier, as declared by the supplier, whichever is less,*** *other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both;*

Some significant points to be noted about the amendment are:

1. The amendment only applies to export of goods and not of services.
2. The said amendment is only applicable to exports made without payment of duty.
3. The amendment is a prospective one. Therefore, it shall apply to all the refund application filed post 23 March 2020. However, the industries may take a view that the rule should be

applied to exports done after the amendment date and not the applications filed after 23rd March 2020.

4. The rule is not clear about value of export or per unit value. While the intent should be per unit, this remains ambiguous.

The above amendment is an indication of the fact that the Government intends to keep a tight rein on refund claimed by exporters. But the momentous question is why? The first thought that comes to mind is that this may have been done in order to check the frivolous claims of overstated export value invoiced to overseas group companies by Indian exporters intending to take undue advantage of the MEIS and refund benefits. While this amendment may address the issue, it is not farfetched to say that this could pose significant challenge in computing refund claims and could also open doors for prolonged litigations and ambiguity.

Owing to the Covid-19 scenario, this amendment is yet to be tested on floors as there is no amendment in Valuation mechanism provided under Section 15 of CGST Act and Rules cannot override provisions as per Act.

However, some prominent implications of this amendment are listed below:

1. While the target of the Government is to bring in line the overstated export claims due to inflated invoicing made to overseas group companies in order to claim undue advantage of refund benefits, this amendment may prove to be strenuous to genuine exporters curbing their legitimate refund claims. This anti-abusive provision will impact a greater audience. In a distress marketing condition due to COVID, such a move will have a negative impact.

2. The amendment is not free from ambiguity. It lays down the scenario where an exporter has domestic sales also, but in a situation where the entity is a 100% export entity, the exporter is forced to rely on like goods sold domestically by another supplier. On one hand this could become a challenge for a supplier to look for a similarly placed supplier having domestic sales (especially in a scenario where the products under question are novel items), it also will put an additional burden on the assessing officer to examine if the details of another supplier are authentic and comparable to the exporter.

   This issue will be the basis of a lot of disputes and litigations considering it calls for a best judgment from both the exporter and the assessing officer which maybe subjective in each case. In a nutshell, it can be said that this amendment is reminiscent of the disputes under the Central Excise regime where valuation was always an on-going issue.

   Another issue woven with the same point is the disclosure on the part of the domestic supplier supplying like goods; not all suppliers would want to disclose their sales and strategy to their competitors and revenue authorities.

3. Lastlu, an issue which is likely to crop up is the method used to compare the export turnover vis-à-vis the domestic sales. While the formula looks simple in theory, it may get complicated when applied practically. A few questions which could arise are whether the comparison will have to be made unit wise or in aggregate, whether the assessing officer

would consider the product portfolio of a company which is engaged in various products supplied both in domestic market and exported. While, these issues are just illustrative, the list may go on.

As the provision seems prejudicial to genuine exporters who may have to bear the brunt of this amendment, the CBIC has received multiple representations from trade bodies and export giants seeking a grievance redressal.

To summarize, the amendment is wrapped with the following ambiguous questions for the taxpayers

1. If there are no domestic supplies and value of export per unit is more than the price of similar goods in domestic market, then will the restriction still be applied or there can be waiver to such export units?
2. If there are no goods supplied in the domestic market and value of similar goods provided by other suppliers is not available, then how will the value be ascertained?
3. If the value of goods in domestic market is fluctuating or there is wide range of price per unit, then which value to be considered?
4. If there are additional features provided in the goods as compared to domestic supplies, then can adjustments be made to ensure apple to apple comparison?
5. Where the value is impacted because of the quantity involved, will there be an adjustment allowed?
6. Will there be valuation mechanism introduced for this provision?
7. The value at the time of export will be considered or the value at the time of assessing the claim will be considered?
8. Will it be applicable to all the goods or there will be a selected list of goods for which the amended provisions will apply?
9. The amendment will be applied to claims filed after the effective date of amendment or goods removed after such effective date?
10. Can such an amendment vide rules tenable in law without amendment in the valuation mechanism as per CGST Act?

On a closing note, the Government should consider the fact that the introduction of the provision may plug a few illegitimate export claims but will certainly demotivate genuine exporters who would face hardships on account of this amendment. Another fact which cannot be ignored is that the Governments objective has always been to boost exports; however, amendments like these may take us in the opposite direction.

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