

Critical issues in GST Refunds for Exporters, SEZ's

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Business Challenges faced by the exporters

- ✓ Containers Shortage
- ✓ International Freight Rates were gone up thrice/quadruple, but export contracts entered for 2-3 years-
- ✓ No regulatory authority for Monitoring the freight prices
- ✓ Non-availability of vessels
- ✓ Geo-political situations in Chania
- ✓ Substantial reduction in RoDTEP Rates
- ✓ Covid/Lock down situations

Business Challenges faced by the exporters

- ✓ Non-release of the necessary funds for MEIS 2019-20 and 2020-21 (up to Dec,2020)
- ✓ Delay in SEIS Rate Notification for the financial year 2019-20 and 2020-21
- ✓ Logistics cost is more in India
- ✓ Lack of proper investments on Exports related infrastructure including land customs, ICDs, Testing and Certification facility, Bazaar Haat on international land borders.



Introduction

Introduction-Exports

- ✓ No tax on export of goods or Services, Taxes cannot be exported
- ✓ Taxes paid if any will be refunded-Zero rated
- ✓ To maintain high competitive prices in the international market for Indian Products
- ✓ To create a level playing field for Indian exporters in in the international market
- ✓ To earn precious foreign currency,
- ✓ To promote the investments into India from foreign

Introduction-Exports

- ✓ 'Make in India' Vision
- ✓ To generate the huge employment opportunities for Indian youth in manufacturing and Service sector
- ✓ Development of domestic industry,
- ✓ Economic growth
- ✓ **GST is a destination-based consumption tax-** if the goods or services meant for consumption in foreign country-No Tax in India on such supply
- ✓ This is inherent character/feature of the GST Levy

Introduction-Exports

- ✓ Supply by a person in India will be subject to tax only when it has been consumed in India, and Tax must be levied in that taxable area where supply has been consumed; this is in conformity with
- ✓ Apex Court judgments in **All India Federation of Tax Practitioner [2007 (7) S.T.R. 625 (S.C.)]** and
- ✓ **Association of Leasing & Financial Service Companies [2010 (20) S.T.R. 417 (S.C.)]**.

What is 'Zero rating'?

- Not only the output is not liable for the payment of tax,
- Tax paid on inputs & input services at procurement stage will be refunded
- By giving the refund of ITC, the Govt. in true sense making the exports are zero rated.
- The major difference between the '*zero rated supply*' & '*exempt supply*' is in the case of exempt supply-supplier is not eligible for ITC.
- Along with the exports, supplies to SEZ's also is also a Zero Rated Supply
- The **legislative wisdom** should be applied in letter and spirit to make the exports really *Zero Rated*
- Unfortunately the way the IGST Law & GST Law is being implemented- the **intended objective is not being achieved fully**

What is 'Zero rating'?

- Article 265 of Constitution says '*No Tax shall be Levied or collected except without authority of Law*'
- Legislative wisdom Section 16 of IGST Act, 2017 says Exports are *Zero Rated*
- If the authority by whatever the reason rejects the refunds to exporters & retention of the same with the Govt. is unauthorized collection of Taxes
- Which is violation of Article 265 of the Constitution of India
- Refund of GST is subject to compliance of **procedure & safeguards**
- **Procedures are the handmaid of justice and not the mistress of law.** Sambhaji Vs Gangabha & Others (2008) 17 SCC 117.
- In the guise of procedures, the authorities are denying the refund claims partially, this is frustrating the very concept of Zero rating.



Latest Amendments

Removal of with payment of IGST option

- In case of zero rated supply, Section 16 (3) of the said Act allowed the option to claim refund of
 - Either of ITC of Inputs or input services **or**
 - IGST paid on zero rated supply
- The proposed amendment allows only one option for refund of unutilized credit of Inputs & Input Services.
- However, the option to pay tax and claim refund on zero rated supply will be available to only certain class of persons notified by way of notification issued by the Government.
- This amendment will be notified for implementation in a couple of days.

Drawbacks in claiming refund of ITC under LUT

- In this method if the vendor not file his GST return or not paid the taxes on your purchase invoice or not reflected in GSTR-2A, on such input refund will be rejected.
- Input Tax Credit on Plant & Machinery, Capital Goods will not be refunded under this route.
- Till now exporters are getting this refund on Capital Goods also under IGST route. This will become huge concern for Capital incentive Industries or those who wish to go for expansions now.
- So certain amount of GST hitherto refunded now it will become the cost
- If the costs is more, it will impact the profits
- It affects working capital of the exporters also.

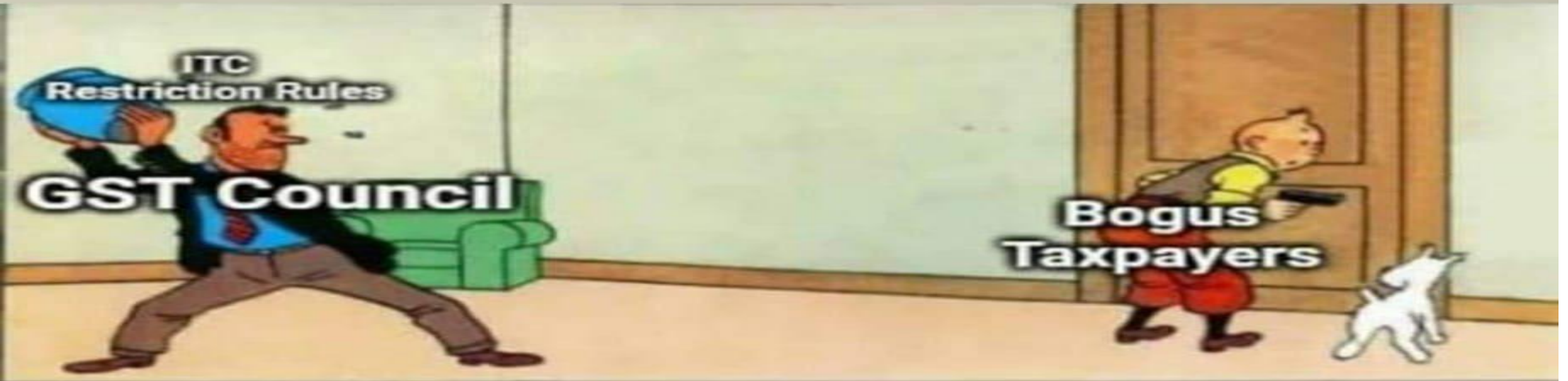
Drawbacks in claiming refund of ITC under LUT

- Exporter must apply for refund with GST Officer in the GSTN Portal.
- Jurisdictional AC is the sanctioning authority.
- If the exporter is allocated to Central Tax Authorities administration, there will be a pre-audit before sanctioning the refund.
- If the exporter is allocated to State Tax Authorities administration- if the refund claim is more than 1 Crore the file will go all the way to the Commissioner's for approval.
- There will be human intervention from the GST department at multiple levels.
- Each officer is having his own style in verification of invoices and documents.
- Officer will process the refund application; he is having discretion on certain issues so naturally he may expect the personal advantages.

Disadvantages of claiming refund of ITC

- If any exporter is planning to purchase the Plant & Machinery, Capital Goods in near future they have to purchase immediately to encash the IGST Refund.
- Newly established manufacturing plants who wish to export should take the GST on Plant & Machinery, Capital Goods as cost.
- Officer may reject some Input Tax Credit on invoices saying that this expenditure is not having the nexus with exports.
- There will be issue in documentation.
- For these processes it takes 3 to 6 months' time &
- For the exporters it consumes lot of time & loss of interest.

Amendments-troubling genuine exporters



Realization in CFE is *Sine Qua Non*

- If any exporter is unable to realize the bill/invoice amount in foreign exchange, to that extent proportionate ITC refund has to be forgone or to be paid back.
- Extensions can be applied from RBI
- This condition is draconian as the Refund of GST is neither incentive nor subsidy/grant from the Government.
- This condition is discriminatory
- The exceptions are yet to be notified: -
 - In case RBI Write it off
 - Post supply discounts
 - Amount paid by ECGC instead of buyer

Realization in CFE is Sine Qua Non

- If you are required to payback, exporter has to pay interest also.
- In future if the amount is realized- You can re-apply for refund?
- In the Rules-**Rule 96B**, this condition was introduced vide Notf no. 16/2020-CT dt.23.03.2020
- This Rule was ultra-virus to Statute
- Therefore, now introduced in the Act once this is notified for implementation, the Government may come-up with the revised rule

Section 16 of IGST Act

- Finance Act 2021 inserts the words '**for authorised operations**' after the words 'supply of goods or services or both.'
- Before this amendment any goods or services supplied to SEZ is a Zero Rated Supply.
- After this amendment, this section will now allow benefit only if, supply of goods or services to SEZ unit and such goods or services or both has to be used for **authorised operations**.
- What is **authorised operations**-prone to litigation.
- Section 2(C), Section 4(2) and Section 15(9) of SEZ Act, 2005 authorized operations includes domestic sales also.
- So what is not authorized operation?

List of authorised operations

- In my view all the **goods** supplied to SEZ is deemed to be used for authorized operations.
- Ministry of Commerce & Industry consequent to implementation of GST Act has approved the list of services which are consumed by the SEZ units/SEZ developer shall be treated as authorised operations.
- What about the services not included in list of authorised operations? Are they not Zero rated?
- Those are also Zero Rated. Harman Connected Services Corporation India Pvt. Ltd Vs CCE 2021 (49) G.S.T.L. 11 (Tri. - Bang.).
- **GMR Aerospace Engineering Ltd. Vs UOI [2019 (31) G.S.T.L. 596 – A.P.]**
- **Sections 7 and 26 of Special Economic Zone Act, 2005** exempted the goods & services from taxation
- SEZ Act have always overriding effect on provisions of other Acts if these are not in consistence with provisions of SEZ law-**Section 51 of SEZ Act, 2005**



**Export refund
related issues
under GST**

Rule 89(4) - Turnover of zero-rated supply of goods

Notification no. 16/2020- Central Tax dated 23rd March 2020

"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



Rule 89(4) - Turnover of zero-rated supply of goods

- This Rule is ultra-vires the GST Law. Going contrary to Law.
- Example export price is Rs. 1,00,000/-. Same consignment domestic price is 60,000/-.
- As per this Rule, export turnover is restricted to 1.5 times of domestic turnover $1.5 \times 60,000$ i.e 90,000/- balance turnover of Rs. 10,000/- is not a export turnover for refund calculation.
- So proportionate ITC refund is to be forgone.
- If the export product is new product or customized product or R & D products or not sold in domestic market, this Rule should not be applied.
- In Couple of above instances, authorities took the domestic turnover is Zero, as per the formula export turnover is which ever is less, accordingly rejected whole refund.
- Legality of this Rule is pending before Karnataka High Court. It will be struck down

Rule 96(10) contrary to the Law

- Those exporters who received the goods under Deemed export notification or Merchant Export Notification, Advance Authorization Holders and EOU's not allowed for **export with payment of IGST**.
- This Rule is contrary to Section 16 of IGST Act, 2017.
- Where the exporter availed Advance Authorization or an EOU unit, **the benefit of notifications mentioned therein shall not be considered to have been availed only where IGST and Compensation Cess on inputs has been paid and has availed exemption of only BCD**.
- This explanation is having retrospective application.
- DRI is investigating these cases.
- To avoid the dispute, EOU's AA holders can just pay back the IGST exemption availed & avail the ITC on the same

Restriction on refund of Compensation cess on "Exports made with payment of tax"

- In terms of Section 16 of the IGST Act, 2017 read with Section 11 of Compensation Cess Act, 2017 exporter is eligible for refund of Compensation Cess.
- Whether or not his output is subject to Compensation Cess.
- Circular No. 79/53/2018-GST dated 31.12.2018 clarified that the Compensation Cess would not be refundable in respect of consignments exported on payment of IGST.
- The same appears to be ultra-vires the CGST Act, IGST Act and the Cess Act as no such restriction is evident under the said Acts.
- Pitambra Books Private Ltd Vs UOI 2020 (34) G.S.T.L. 196 (Del.) held that **circulars cannot take away vested right of taxpayer granted by Statute**

Interest on delayed Refund

- In terms of Section 56 of the GST Act, if the refund amount is not released within 60 days from the date of receipt of application,
- Interest shall be sanctioned @ 6% for the delay.
- **Ranbaxy Laboratories Ltd vs Union of India 2011 (273) E.L.T. 3 (S.C.)** it is said that interest is automatic in case of delay
- Qualcomm India Private Limited Vs UOI [TS-205-HC-2021(BOM)] interest Section ***does not distinguish delay which is intentional and delay which is unintentional.***
- So wherever there is a delay, exporter should apply for refund of interest
- Interest amount may be small, this will bring the accountability & transference among the tax administration Officers.
- CAG is also directing the Ministry of Finance to sanction interest refund along with the main refund automatically.

Export commodity is subject to export duty

- As per first Proviso to Section 54(3) of the GST Act, 2017 refund of ITC would not be given in cases where the goods exported out of India are **subjected to export duty**.
- In the Second Schedule to Customs Tariff Act, 1975 number of commodities mentioned in Schedule with Export Duty.
- But the Notification under the Customs exempted most of the commodities export duty.
- Only one or two commodities liable for export duty.
- If the authorities interprets though subsequently exempted, all the commodities mentioned Second Schedule are subject to export duty hence may deny the refund for such commodities.
- IN RE : CHOWGULE & CO. PVT. LTD 2019 (27) G.S.T.L. 405 (A.A.R. - GST)

Other issues

- In the case of Service Exports-Payment advises given by the Bank also is a proof for receipt of foreign currency.
- Payment received through PAY PAL- Refund can be applied
- Amendment of shipping bill is possible in Customs-Section 149
- Wherever there is delay in sanctioning 90% provisional refund within 7 days-Exporter should claim the interest.
- Delay in getting the endorsement of invoices by SEZ authorities, leading to delay in refunds.
- The GST department should process the refunds based on data entered in SEZ-NSDL-Online.
- CIF value of exports shall be considered as export turnover for the GST purposes not the FOB value as considered for Duty Drawback.

Other issues

- The goods exempted from GST like food products, flowers, feeds, vegetables, medicines e.t.c are also eligible for refund if they are exported.
- If the fresh refund application is filed after removing the defects, the date of filing the original application shall be considered for time limits.
- The decisions under the Excise Law will help to this extent.
- What will happen there is delay in obtaining the LUT?
- What will happen if the Goods exported after three months from the date of invoice?
- Service exporter if the amount is not realized, output Tax cannot be imposed.
- Many service exporters like software companies they are not applying for refunds.

SEZ Units

- SEZ Units are also eligible for refund of unutilized ITC if any vendor charges the GST to the SEZ Units.
- Initially there was an ambiguity regarding the eligibility of refunds for SEZ Units.
- Now new table is also inserted in the GST Refund Rules for SEZ Units.
- SEZ Units cannot be put in disadvantageous position than that of DTA Units.
- Still some of State GST Officers not sanctioning the GST Refunds to the SEZ Units.
- SEZ Units should contest this matter & in our view Courts will take a favourable view.
- We have filed one WRIT Petition on this issue before hon'ble AP High Court.

SEZ Units eligible for GST Refunds

- **BRITANNIA INDUSTRIES LIMITED Vs UOI 2020 (42) G.S.T.L. 3 (Guj.)**
- SEZ Unit making zero rated supplies, unable to utilize the credit of Input Tax Credit of IGST from its Input Service Distributor (ISD).
- Input Tax Credit being distributed by ISD, there is no specific supplier of goods and services to file a refund application to claim the refund of Input Tax Credit distributed by ISD.
- Therefore, petitioner is entitled to claim refund of IGST lying in Electronic Credit Ledger



Recent Judgments

Important Judgments

- **Amit Cotton Industries Vs UOI 2019 (29) G.S.T.L. 200 (Guj.) & Saraf Natural Stone Vs UOI 2019 (28) G.S.T.L. 385 (Guj.)**
- Exporter is eligible for interest on delay in sanctioning the IGST Refunds.
- In terms of Section 75A of the Customs Act, 1962 Interest for delay beyond 30 days in sanctioning the Duty Drawback also to be paid @ 6% p.a.
- **Jian International vs CCGST 2020 (39) G.S.T.L. 385 (Del.)**
- GST Officer cannot issue the deficiency memo in refund application after 15 days.
- Acknowledgment in FORM GST RFD-02 or any deficiency memo not being issued in RFD-03 within timeline of fifteen days, refund application presumed to be complete in all respects in accordance with sub-rules (2), (3) and (4) of Rule 89 of Central Goods and Services Tax Rules, 2017.

Important Judgments

- **Asiatic Clinical Research Pvt. Ltd Vs UOI 2021 (49) G.S.T.L. 3 (Kar.)**
- If at all, the Officer wants to reject the refund claim, follow the principles of natural justice.
- **Sutherland Global Services Pvt. Ltd Vs CCE 2021 (47) G.S.T.L. 454 (Mad.).**
- Exempted Services also eligible for refund of Input Taxes, if services are exported.
- **Linde Engineering India Private Ltd VS UOI 2020-TIOL-1285-HC-AHM-ST**
- Holding & Subsidiary Company are not merely establishments of a distinct person in accordance with Item (b) of explanation 3 of clause (44) of Section 65B of the Finance Act. They are separate legal entities. Refund is eligible to subsidiary company.



Risky Exporter Alert

Risky Exporter Alert

- ✓ IGST refunds - mechanism to verify the IGST payments for goods exported out of India in certain cases
- ✓ Instances of availment of IGST refund using fraudulent ITC claims by some exporters have been observed by the Government
- ✓ Some exporters have availed ITC on the basis of ineligible documents / fake invoices or fraudulently and utilized that credit for payment of IGST on goods exported out of India
- ✓ In several cases that there is huge variation between the FOB value declared in the Shipping Bill and the Taxable value declared in GST Return

Risky Exporter Alert

- ✓ Exporters were found to be non-existent in several cases
- ✓ Identification of Suspicious cases like huge variation between GSTR-2A & 3B, not regular in filing the Returns, excessive claims of ITC, mismatches in GSTR-1 & 3B etc.
- ✓ DG Systems/DGARM will identify such exporters as risky exporters
- ✓ RMCC will insert alert in the system for all such risky exporters and make 100% examination mandatory for export consignments relating to those risky exporters.
- ✓ Also, alert shall be placed to suspend IGST refunds & Duty Drawbacks in such cases.

Risky Exporter Alert

- ✓ Chief Commissioner of Central Tax shall get the verification of the IGST refund claims and other related aspects done in accordance with the Standard Operating procedure.
- ✓ Cases where no malpractices have been reported on verification- Refunds will be released.
- ✓ Cases where malpractices have been reported on verification - No refund will be granted.
- ✓ Board said the percentage of such exporters selected for verification is a small fraction of the total number of exporters claiming refunds. Statement appears not true.

Risky Exporter Alert

- ✓ Exporter should furnish information in the format attached as Annexure 'A' to Circular No. 131/1/2020-GST, dated 23-1-2020
- ✓ Verification shall be completed by jurisdictional CGST office within 14 working days of furnishing of information
- ✓ If the verification does not get completed within 14 days, exporter should bring it to notice of nodal cell constituted in CC Office.
- ✓ Chief Commissioner of Central Tax should take appropriate action to get verification completed within 7 days
- ✓ If the refund is not sanctioned within a month, exporter can escalate the issue to Board by raising the query in www.cbic.gov.in/issue

Risky Exporter Alert

- ✓ Annexure 'A' contains details of Directors/owners, Details of year wise ITC, output tax, Bank Account details, FIRC details, Fixed Asset details as per Income Tax Returns, KYC Documents, Power bills, Rental agreement
- ✓ The purpose of examination is to ascertain whether exporter is genuine, whether he is having running factory, Capital goods are installed in the factory, whether ITC availed from major vendors are genuine claims.
- ✓ However the GST Authorities are doing the in-depth Audit & verification thereby verification is getting delayed for months together

Risky Exporter Alert

- ✓ GST Authorities are doing this exercise beyond their scope and also doing the GST compliance of vendors of exporters (Level I & II)
- ✓ They are not recognising the fact that during the verification, refunds are on hold which is huge burden to exporters.
- ✓ It is causing lot of working capital pressure for the exporters.
- ✓ In the report given to DGARM, the verification authority AC/DC & Jurisdictional GST Commissioner should give the recommendations on bona fides of the exporter. The Customs Officer also should give favourable report to RMCC upon physical verification of consignment.
- ✓ Upon these two positive reports, refunds will be sanctioned.



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