Refund related amendments through CGST (Third Amendment) Rules, 2020
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1.0 Vide Notification 16/2020 CT Dt. 23.03.2020 certain important amendments have been made in connection with refunds, in the CGST Rules, 2017, which are explained in this article.

2.0 A new sub rule (4A) has been introduced in Rule 86 which reads as below.

> *(4A) Where a registered person has claimed refund of any amount paid as tax wrongly paid or paid in excess for which debit has been made from the electronic credit ledger, the said amount, if found admissible, shall be re-credited to the electronic credit ledger by the proper officer by an order made in* ***FORM GST PMT-03.***

2.1 As per the above, any refund of wrongly paid tax or excess paid tax is claimed, the same shall be given as credit in Electronic Credit Leger, if such wrong / excess tax paid through Electronic Credit Leger. This provision would curb the practice of voluntarily paying more tax or wrong tax from out of ITC, to encash such accumulated ITC by way of claiming refund in cash.

2.2 But the question is as to how to find out whether any particular tax liability was paid out of Electronic Credit Ledger or through Electronic Cash ledger and payments are made on a consolidated manner on the due date. For example, if out of 100 invoices issued in a month, in 10 invoices tax was charged wrongly or in excess, how to determine whether the tax on such 10 invoices was paid through ITC or Cash?

2.3 Answer to this lies in the new sub rule (1A) introduced in Rule 92 which reads as below.

(1A)Where, upon examination of the application of refund of any amount paid a2s tax other than the refund of tax paid on zero-rated supplies or deemed export, the proper officer is satisfied that a refund under subsection (5) of section 54 of the Act is due and payable to the applicant, he shall make an order in ***FORM RFD-06*** *sanctioning the amount of refund to be paid, in cash, proportionate to the amount debited in cash against the total amount paid for discharging tax liability for the relevant period, mentioning therein the amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable and for the remaining amount which has been debited from the electronic credit ledger for making payment of such tax, the proper officer shall issue* ***FORM GST PMT-03*** *re-crediting the said amount as Input Tax Credit in electronic credit ledger.*

2.4 As per the above, if the refund for wrongly paid tax or excess paid tax is claimed for the month of April 2020 and in that month, 60 % of the total tax liability was paid through ITC and the balance 40 % was paid in cash, the refund also would be given by way of credit in Electronic Credit ledger to an extent of 60 % and the balance 40 % in cash.

2.5 It may be noted that the above restriction would not apply to refund of ITC on account of zero rated supplies and deemed exports.

3.0 Clause (C) of3 sub rule (4) of Rule 89 has been substituted as below.

(C) "Turnover of zero-rated supply of goods" means the value of zerorated 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 subrules (4A) or (4B) or both.

3.1 As per the above, the value of exports (zero rated supply) shall be limited to 1.5 times of the domestic price of such goods supplied either by the same supplier (refund claimant) or similarly placed supplier.

3.2 This provision is intended to act as a check on over invoice of export to claim more refund. But, when the refund claimant is not at all having domestic sale of same goods, the price of "similarly placed suppliers" have to be compared for this purpose, which is likely to lead to litigation on "similarity".

4.0 In clause (b) of sub rule (10) of Rule 96, the following Explanation has been inserted with retrospective effect from 23.10.2017.

> *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.*

4.1 As per sub rule (10) of Rule 96, if the inputs are procured duty free under certain notifications, the benefit of refund of IGST paid on export cannot be claimed. In this context, the above Explanation clarifies that if the benefit of these notifications are claimed only in respect of BCD, and not in respect of IGST or Compensation Cess, refund would be entitled.

5.0 A new Rule 96 B has been introduced which reads as,

> ***96B. Recovery of refund of unutilised input tax credit or integrated tax paid on export of goods where export proceeds not realised****. –(1) Where any refund of unutilised input tax credit on account of export of goods or of integrated tax paid on export of goods has been paid to an applicant but the sale proceeds in respect of such export goods have not been realised, in full or in part, in India within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), including any extension of such period, the person to whom the refund has been made shall deposit the amount so refunded, to the extent of non-realisation of sale proceeds, along with applicable interest within thirty days of the expiry of the said period or, as the case may be, the extended period, failing which the amount refunded shall be recovered in accordance with the provisions of section 73 or 74 of the Act, as the case may be, as is applicable for recovery of erroneous refund, along with interest under section 50:*
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> *Provided that where sale proceeds, or any part thereof, in respect of such export goods are not realised by the applicant within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), but the Reserve Bank of India writes off the requirement of realisation of sale proceeds on merits, the refund paid to the applicant shall not be recovered.*

(2) Where the sale proceeds are realised by the applicant, in full or part, after the amount of refund has been recovered from him under sub-rule (1) and the applicant produces evidence about such realisation within a period of three months from the date of realisation of sale proceeds, the amount so recovered shall be refunded by the proper officer, to the applicant to the extent5 of realisation of sale proceeds, provided the sale proceeds have been realised within such extended period as permitted by the Reserve Bank of India.

5.1 As per the above, for refund of unutilised ITC on account of exports and refund of IGST paid on export of goods, realisation of export proceeds has been mandatory, failing which the refund sanctioned can be recovered back.

5.2 But the moot question is whether the rule would stand judicial scrutiny? Unlike the definition of export of service, where receipt of consideration in foreign exchange is mandatory to qualify as export, the definition of export of goods does not mandate so. The said definitions as per the IGST Act are reproduced below.

Sec. 2 (5) "export of goods" with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India;

Sec. 2 (6) "export of services" means the supply of any service when, -

(i) the supplier of service is located in India;

(ii) the recipient of service is located outside India;

(iii) the place of supply of service is outside India;

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange [or in Indian rupees wherever permitted by the Reserve Bank of India]; and

(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;

5.3 Once the definition of "export of goods" does not contemplate realisation of export proceeds (in foreign exchange or otherwise),

imposing it as a condition for claiming refund of unutilised ITC and refund of IGST paid on exports, does not seem to be legal. Further, Section 16 (3) of the IGST Act, which grants these benefits for export, does not make realisation of export proceeds as a condition precedent, though it mentions "in accordance with the provisions of Section 54 or the rules made thereunder".

5.4 Though the intention of the Government in making this amendment is justified (to link export benefits to actual realisation of export proceeds and to prevent many frauds), the manner in which it has been done casts serious doubts as to whether the amendment would survive judicial scrutiny in the face of lack of legislative sanction.

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