



“IGST – Customs v/s GST and other Refund issues”

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Agenda for discussion

- ▷ Analyzing the Concept of IGST – Customs v/s GST
- ▷ Likely issues in LUT based refunds
- ▷ Likely issues in IGST paid refunds
- ▷ Likely issues in Inverted duty structure refunds
- ▷ Time barred refunds

1.

IGST – Customs v/s GST

Is there really some difference??

Legal Meaning of Integrated tax

IGST Act, 2017

2(58) “integrated tax” means the integrated goods and services tax levied under the Integrated Goods and Services Tax Act.

Customs Act, 1962

Term ‘integrated tax’ is not defined.

Customs Tariff Act, 1975

Term ‘integrated tax’ is not defined.

Levy of IGST – IGST Act, 2017

*5(1) Subject to, there shall be **levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services** or both, except, on the **value determined under section 15** of the Central Goods and Services Tax Act and **at such rates, not exceeding forty per cent.**, as may be notified by the Government on the recommendations of the Council and **collected in such manner as may be prescribed** and shall be paid by the taxable person:*

*Provided 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 on the **value as determined under the said Act** at the **point when duties of customs are levied on the said goods under section 12** of the Customs Act, 1962.*

Levy of taxes on imported goods as per Customs law

- ▶ Section 12 of Customs Act, 1962 levies duties of customs at the rates specified under Customs Tariff Act.
- ▶ Section 2(15) of Customs Act - "duty" means a duty of customs leviable under this Act;
- ▶ Section 2 of Customs Tariff specifies the rates of duties of Customs. (1st and 2nd Schedule) - **BCD**
- ▶ Section 3 of Customs Tariff specifies additional duty equal to excise duty, sales tax, local taxes and other charges. – **CVD, SAD, IGST, Cess.**

Additional Duty under Customs – Section 3

3(1)/3(3)

Any article imported in India shall, **in addition, be liable to duty** equal to the excise duty for the time being leviable on a like article if produced or manufactured in India/excise duty on RM, components etc.

3(5)

Levy on imported article an Additional duty as would counter-balance the sales tax, VAT, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India.

3(7)

Any article imported into India shall, **in addition, be liable to integrated tax at such rate**, not exceeding forty per cent. as **is leviable under section 5** of the IGST Act, 2017.

Points to ponder...

- ▷ Imports prior to GST – Additional duty - CVD and SAD.
- ▷ Imports after GST – IGST and Cess, if applicable.

Q1. Whether, IGST u/s 3(7) paid on imports is an additional duty and covered in definition of “duty” given u/s 2(15) of Customs Act?

Q2. Whether IGST on imported goods is levied under IGST Act or Customs Tariff Act?

IGST = Additional Duty?

- ▶ Section 2(15) of Customs Act - "duty" means a duty of customs leviable under this Act.
- ▶ Section 12. Dutiable goods. - (1) Except as otherwise provided in this Act, or any other law for the time being in force, **duties of customs** shall be **levied** at such rates as may be specified under **the Customs Tariff Act, 1975**, or **any other law for the time** being in force, on goods imported into, or exported from, India.

IGST = Additional Duty?

Department's view

- ▷ As per 12(1), Duties of customs are levied not only under the provisions of the Customs Act and the Tariff Act but also under “any other law for the time being in force.”
- ▷ Thus, the integrated tax leviable on imported goods by the Integrated Tax Act would also be a duty of customs.

Correct position

- ▷ Section 12(1) provides that the duties of customs shall be levied **at such rates as may be specified in the Tariff Act or any other law for the time being in force.**
- ▷ **Only Section 2 of Tariff Act refers to duties of customs i.e BCD** and section 3 refers to additional duty.
- ▷ Section 3(7) and 3(9) **do not** uses word ‘**additional duty**’.
- ▷ **IGST is levied as per IGST Act but collected as per Tariff Act.**

Jurisprudence to support

- ▶ **Prestige Engineering (India) Limited vs. Collector of C., Excise, Meerut** 1994 (73) E.L.T. 497 (S.C)
- ▶ **Collector of Customs, Madras vs. Indian Organic Chemicals Limited** 2000 (118) ELT 3 (S.C)
- ▶ **Ceat Tyres of India Limited vs. Union of India** 1992 (57) ELT 221 (BOM.)
- ▶ **M/s Unicorn Industries vs. Union of India & Others** 2019 (12) TMI 286 –SC
- ▶ **Vedanta limited vs. Union of India** 2018 (19) GSTL 637 (Mad.)
- ▶ **Interglobe Aviation Limited v/s Commissioner of Customs** (Delhi CESTAT 51732/2019)

Implications if IGST = duty of customs

- ▶ ITC of IGST paid on import of goods would be challenged as IGST means IGST levied under IGST Act.
- ▶ Various exemption notifications for re-import of goods sent on repair abroad, consignment basis, EOUs, AA etc. would be challenged.
- ▶ Recovery of ITC on imports of goods taken till date.



*In 2018-19, CGST authorities registered over **1,600 cases** ... amount of **Rs.11,251 crore**, have booked 6,641 cases involving 7,164 entities till Novemberand recovered around **Rs. 1,057 crore**.....a fraud where issued fake invoices worth over Rs. 7,000 crore with GST of Rs. 700 crore through 90 firms.*

*...a fraud case, where **500 entities** were created comprising fake billers, intermediary dealers, distributors and bogus manufacturers of hawai chappals, in the case of inverted duty structure.... managed to create **fake credit amounting to Rs. 600 crore***

GST Frauds Type

- ▷ Purchase invoices are made for more than the actual goods received and in some cases where no goods are received at all but fake purchase invoices are made.
- ▷ Goods sold in cash to URD and later on issue bogus / fake output invoices on the same goods to registered buyer for a negotiable price.
- ▷ Creating bogus firms who sell their fake invoices on commission basis, without any actual movement of goods.

2.

Issues in LUT based refunds

Impact of Recent amendments

- ▷ **Annexure-B** for applying refund now to mandatorily mention **HSN/SAC Code of inward supplies.**
- ▷ **Refund shall be available only for invoices appearing in GSTR-2A.**
- ▷ Value of **“TO of zero-rated supply of goods”** means **lower** of following:
 - the value of actual zero-rated supply of goods made; 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.

Challenges due to change in Value of Zero Rated Supply

- ▷ Restriction in amount of refund.
- ▷ Un-liquidated ITC for exporters.
- ▷ No clarity as to meaning of like goods.
- ▷ No clarity as to meaning of similar supplier.
- ▷ Subjectivity of jurisdictional officer.

New Challenges by department

- ▷ DBK higher v/s Input GST refund.
- ▷ Re-demanding Input IGST refund also when higher DBK.
- ▷ Refund of capital goods.
- ▷ Refund of fraudulent claim of ITC based on improper tax invoice/GST not paid.
- ▷ Refund allowed to the extent of lower of value - FOB and Tax Invoice.

Review - Section 54(3)

(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

*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.*

Important points..Capital goods

- ▶ ITC as per 2(62) & 2(63) means CGST, SGST and IGST charged on any supply of **goods or services**.
- ▶ **Capital goods** means goods – 2(19).
- ▶ **Further**, there is no restriction present under section 16 of IGST Act for refunds.
- ▶ **Rule 89(4) in contravention with section 54.**
- ▶ **VKC Footsteps Vs. UOI [2020] 118 taxmann.com 81 (Guj.)**. is helpful.

Important points..Higher DBK

- ▶ Amit Cotton Ind. 2019 (29) G.S.T.L. 200 (Guj.) held refunds of IGST paid on exports allowed even in higher DBK. No restriction in Rule 96(4) to hold refund.
- ▶ Provision to section 54(3) restricts refund of ITC if DBK of **central taxes** availed.
- ▶ Central tax means **CGST** levied u/s 9.
- ▶ Integrated tax means **IGST** levied u/s 5. Separate levy.

Important points..Lower of FOB or taxable value

- ▶ As per Rule 89(4), “*Turnover of zero-rated supply of goods*” means the **value of zero-rated supply of goods** made during the relevant period..”
- ▶ Value of supply under IGST = provisions applicable under CGST - 20(iii) of IGST.
- ▶ Hence, valuation of zero rated supply is to be done as per section 15 of CGST.
- ▶ Circular 125/2019 asking to process refund on lower of FOB or taxable value ultra-vires the rules & section.
- ▶ Circulars cannot override and refund cannot be curtailed due to delegated legislation. Commissioner of Central Excise, Bolpur v. Ratan Melting and Wire Industries, 2008(12) S.T.R. 416 (S.C.)

2.

Issues in IGST refunds

Impact of Rule 96(10)

- ▶ Rule 96(10) restricts IGST refund if benefit of following availed:
 - 48/2017-CT: Deemed Exports (except capital goods under EPCG).
 - 40/2017-CT: Merchant Exports (0.1%)
 - 78/2017-Customs
 - 79/2017-Customs

Explanation: Benefit of the notifications mentioned therein **shall not be considered** to have been availed **only where the registered person has paid IGST and Compensation Cess on inputs and has availed exemption of only BCD** under the said notifications.

What about Social Welfare Surcharge (SWS) or if IGST not paid in past??

Rule 96(10) – Department understanding

- ▶ Duty structure when goods are imported:
 - BCD >> SWS >> IGST
- ▶ Whether SWS is covered under BCD? – **NO** as per department based on **M/s Unicorn Industries vs. Union of India & Others** 2019 (12) TMI 286 –SC
- ▶ **Hence, rule 96(10) violated and entire IGST refund taken need to be re-deposited????**

“Risky Profile” solution

- ▶ Non-adherence of 14 days timelines by department.
- ▶ IGST refund suspended and 100% examination.
- ▶ Follow escalation process given in Circular 131/1/2020-GST.
- ▶ Register grievance on CBIC portal, if refund suspended for more than 1 month.

3.

Issues in Inverted Duty refunds

Availability of refund of Input services?

- ▶ **VKC Footsteps Vs. UOI [2020] 118 taxmann.com 81 (Guj.).**
 - Section 54(3) refers to refund of **any ITC** but in rule 89(5) refund restricted to **ITC of inputs** only.

- ▶ **Tvl. Transtonnelstroy Afcons Joint venture Vs Uoi [2020] (9) TMI – Madras HC**
 - Section 54(3)(ii) enables to claim refund of **ITC only to the extent** that such credit has accumulated on account of **rate of tax on inputs goods being higher than rate of tax on output** supplies.

Review - Section 54(3)

(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

.....

What about traders?

- ▶ GST rate at the time of purchase is higher than GST rate at the time of sale of such goods
 - Circular 135/5/20 clarified no refund allowed.
 - Restrictions only for: Goods exported on export duty, DBK of central taxes claimed, IGST paid exports and NIL rated or fully exempt supplies.
- ▶ **No such restriction present under section 54(3).** Circulars cannot override and refund cannot be curtailed due to delegated legislation. *Commissioner of Central Excise, Bolpur v. Ratan Melting and Wire Industries*, 2008(12) S.T.R. 416 (S.C.)
- ▶ It is not open for CBIC to give any hypothetical construction to the provision when it is very clear and unambiguous. *Kanai Lal Sur v. Paramnidhi Sadhukhan*, AIR 1957 SC 907

4.

Time Barred Refunds

Time barred refunds

- ▶ When refund vouchers are issued after the expiry of 2 years specified in section 54
- ▶ When credit notes are issued after the maximum period specified in section 34
- ▶ When services have not been rendered and agreement has been cancelled as a result thereof
- ▶ If excess tax has been paid which was not liable to be paid, such tax shall be considered as deposit and time limit do not applies.
- ▶ Tax Invoice issued but Supply not made. GST Law do not provides solution but Article 265 violated.



***"No tax shall be levied or collected
except by the authority of law"***

Three situations of refund - *Mafatlal Industries Ltd. v. Union of India (SC)*

▷ **Unconstitutional levy –**

Where a provision of the Act under which tax is levied is struck down as unconstitutional.

-File Writ/Suit

▷ **Illegal levy-**

Where the tax is collected by the authorities under the Act by mis-construction or wrong interpretation of the provisions of the Act, Rules and Notifications or by an erroneous determination of the relevant facts

-Provision of specific act applies, if Rejected then writ

▷ **Mistake of law-**

Where levy held unconstitutional in another person's case

-No option to re-open

Judicial Viewpoint

- ▶ Hon'ble Supreme Court in case of *Union Of India And Others v. I.T.C. Limited* [1993] 67 ELT 3(SC)

*"Normally in a case where tax or money has been realised without the authority of law, the same should be refunded and in an application under Article 226 of the Constitution the Court has power to direct the refund unless there has been avoidable laches on the part of the petitioner. **It is true that in some cases the period of three years is normally taken as a period beyond which the Court should not grant relief but that is not an inflexible rule.**"*

- ▶ *Ahmedabad Tribunal in CCE&ST v. Madhvi Procon Pvt Ltd* [2015] 38 STR 74.
- ▶ *Commissioner of Central Excise (Appeals), Bangalore v. KVR Construction* (2012) 22 taxmann.com 408 (Kar)
- ▶ *Radico Khaitan Ltd. v. Commissioner of Service Tax* (2014) 48 taxmann.com340 (New Delhi CESTAT).

Thanks!

Any questions?

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