Export of goods and non-realisation of consideration under GST

CA Roopa Nayak

Background

"Export of goods" as per Sec 2(5) of The IGST Act, 2017 with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India. The Allahabad HC in the case of Atin Krishna vs UOI [2019(25) G.S.T.L. 390] held that mere taking goods out of India is enough for a transaction to constitute an “export”[relying on Collector of Customs Calcutta vs Sun Industries (1988 (35) E.L.T. 241 (S.C.). When goods are moving from a place in India to a place outside India, the supplier could be said to be engaged in export of goods under GST.

As per Sec 16(1) of The IGST Act, 2017 export of goods/services is zero rated supplies. Thus, when a transaction qualifies as “export of goods”, it also amounts to a zero-rated supply in accordance with Sec 16(1)(a) of The IGST Act, 2017.

Under GST, exports can be made and refunds claimed through either of the following 2 ways:

a. Supply goods, without payment of IGST, under bond or Letter of Undertaking (LOU) and claim refund of the accumulated and unutilized ITC.
b. Supply the goods, with payment of IGST and claim refund of the IGST paid on such exported goods.

On a plain reading of the definition of export of goods it can be understood that mere movement of goods from a place in India to a place outside India would be sufficient for a transaction to result in export goods. The definition does not specify any condition about realisation of proceeds to be treated as export or to claim refund benefits pertaining thereto.

As per rule 96B(1) of The CGST Rules, 2017 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.

In summary, as per above rule, realisation of sale proceeds is required if unutilised input tax credit or integrated tax paid is to be obtained as refund upon export of goods.

It is significant that with effect from 1st October 2023, sub-section (3) of Sec 16 of The IGST Act, 2017 has been notified through Notification No. 27/2023-Central Tax.

Vide said notification, as per proviso to sub-section (3) of Sec 16 of The IGST Act, 2017 a registered person making zero rated supply of goods shall, **in case of non- realisation of sale proceeds**, be liable to **deposit the refund** so received under this sub-section **along with the applicable interest under section 50** of the Central Goods and Services Tax Act **within thirty days** after the expiry of the **time limit prescribed under the Foreign Exchange Management Act, 1999 (42 of 1999.)** for receipt of foreign exchange remittances, in such manner as may be prescribed.

Consequently, realisation of proceeds wef 1st October 2023 in case of export of goods becomes a necessity in case supplier wishes to get refund of utilised ITC or refund of IGST paid upon export.

In this article the paper writer has examined implications on refunds, when the sale proceeds for exported goods are not realized/realized after delay.

Whether realization of sale proceeds is mandatory as per GST law in the case of refund claims for export of goods till Oct 2023?

Sub-rule (1) of Rule 96B of IGST Rules had no backing under any section of the GST Act until 1st of October 2023. There was no provision under GST Act which mandated the realisation of sale proceeds in case of export of goods till such date[prior to Oct 23]. It is important to note that, the rule cannot override the statutory provisions under any act and this is a settled position of law.

Further, it was held by the Supreme Court in C.I.T. v. Taj Mahal Hotel reported in 82 ITR 44 that "*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*".

In the case of IFGL Refractories Ltd vs Joint Director General Of Foreign Trade [2001 (132) E.L.T. 545 (Cal.)], it was held that the provision of the procedural law and rule cannot

be overridden or whittle down the substantive law. Affirmed in 2022 (379) ELT 279 (Supreme Court)

Commissioner of Income-Tax, Madras Versus S. Chenniappa Mudaliar [1 969 (2)TMI 10 - SC] that if a rule clearly comes into conflict with the main enactment or if there is any repugnancy between the substantive provisions of the Act and the Rules made therein, it is the rule which must give way to the provisions of the Act.

Thus, a contention can validly be taken that Rule 96B(1) is ultra-vires and consequently not required to be followed until 1st October 2023.

Consequently, ONLY wef 1st October 2023 realisation of proceeds in case of export of goods becomes a necessity in case supplier wishes to get refund of utilised ITC or refund of IGST paid upon export and this condition is no longer ultra vires.

Whether this amendment is applicable for exports done during preceding years, when amounts not realized within time lines prescribed in FEMA? The aforementioned amendment is brought into effect from 1st October 2023. Thus, refund could be obtained on such transactions despite of not receiving any consideration for past periods exports[prior to Oct 2023].

This view is supported in numerous decisions including above rulings in Taj Mahal Hotel and Chennniappa Mudaliar supra, the time limit prescribed under the Rules for realization of consideration could be said to be a procedural condition. Based on the above, it could be understood that the time limit for realisation of proceeds from outside India is just a procedural requirement.

However, the department may not accept the above contention and could deny refund on the basis of ground that export proceeds have not been realised in accordance with Rule 96B of The CGST Rules, 2017 **despite of such provision being a mere procedural requirement under GST which was also ultra-vires the Act until 30th September 2023.**

We would like to throw light on circular 125/44/2019-GST which clarifies that export of goods have been zero rated under the IGST Act and as long as goods have actually been exported **even after a period of three months** [condition prescribed in Rule 96A], payment of IGST first and claiming refund at a subsequent date should not be insisted upon.

Rule 96A (1) of the CGST Rules provides that any registered person may export goods without payment of Integrated tax after furnishing a LUT / bond and that he would be liable to pay the tax due along with the interest as applicable within a period of 15 days after the

expiry of three months or such further period as may be allowed by the Commissioner from the date of issue of the invoice for export, if the goods are not exported out of India.
Based on the above circular a contention could be taken that substantial benefits under GST should not be denied due to procedural lapses and consequently exporter can claim refund of IGST paid on exports or utilised ITC.
There are several decisions of Tribunals in the past which lay down the principle that substantial benefits of export should not be denied for minor procedural lapses:

a. Convergys India Pvt. Ltd. - 2009 (16) STR 198 (Tri. – Del.)
b. Manubhai & Co. – 2011 (21) STR 65 (Tri. – Ahmd.)
c. Shrenik Pharma Ltd. – 2012 (281) ELT 477 (GOI)

Way ahead and conclusion

Non-realisation of export proceeds would restrict exporter of these goods from applying for refunds of unutilised ITC or IGST paid wef 1st October 2023, as the condition of realisation of sales proceeds in the proviso to Sec 16(3) of The IGST Act has been notified vide Notification No. 27/2023-Central Tax.
For periods prior to 1st October 2023, valid contention could be taken that there is no requirement to realise export proceeds to be eligible to claim refund although the department may quote Rule 96B to deny credit to exporter of goods. Dept may dispute that there is no realization of CFE against such exports, therefore deny refunds related to such exports. However, such stand by dept is not correct/backed by law and the exporter based on risk appetite can continue to still avail and utilise ITC on inputs and input services to claim refunds despite of not receiving export proceeds.
The suggested course of action: if payments of export proceeds are delayed but received within the extended period allowed by the RBI, then the benefits associated with such realisation cannot be denied.
However, it is suggested to take approval for record, from RBI citing reasons for delay in payment and the expected date on which payment would be received. In the case of Birender Kaur Bajra vs Dir. (Drawback), Department of Revenue [2010 (255) ELT 511 (Del.)], the applicant had failed to realise the sale proceeds within the stipulated time. Ex post facto extension for realizing sale proceeds was granted by Reserve Bank of India subsequently. It was held that recovery of drawback granted cannot be made if sale

proceeds were realised within extended period. It was immaterial that extension granted was ex post facto. This case was affirmed by the SC in 2017 (350) ELT A173 (SC).

Accordingly, if RBI extension (even if post facto) is taken by exporter, then the refund benefits of exports cannot be denied to such exporter.

Therefore, in paper writers considered view, where delay is anticipated to realise proceeds suggested course of action is to take a post-facto extension from RBI for receipt of consideration to avoid disputes in future.

For any queries mail roopa@hnaindia.com