

GST impact on Duty Free Shops

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Introduction

After the 47th GST council meeting, amendments have been made in GST provisions to allow the refund of GST paid on procurement of goods and services treating supplies made by duty free shops (DFS) at airports as 'zero rated supply'. A welcome move which would address the issues of DFS supplying goods to outbound international passengers such as accumulation of ITC of GST paid on input services and capital goods. Efforts have been made in this article to understand the circumstances which could have led to these changes and possible course of action by DFS.

Pre-GST treatment of DFS supplies

Even prior to introduction of GST law, sale of goods from DFS were subject to disputes. Under the provisions of erstwhile CST Act 1956, there was a demand of sales tax by Karnataka sales tax office on M/s.Hotel Ashoka for the sale of goods such as liquor from DFS to international passengers. However, Supreme Court held that the sales made were constitutionally exempt from levy of tax under Article 286 of the Constitution of India as they were sales in the course of export out of India within the meaning of Section 5(1) of the CST Act.

The court also observed that DFSs are located outside the customs frontiers of India and when transaction is taking place outside the customs frontiers of India, the transaction would be considered to have taken place outside India. Subsequently, held that such sales would not be subject to sales tax.

GST on DFS supplies

Supplies by DFS may be categorized as A) Supplies to outbound international passengers and B) Supplies to inbound international passengers.

A. GST impact on supplies to outbound passengers

After the introduction of GST, there was no specific exemption given for transactions pertaining to supplies to or by DFS. Many were of the view that supplies made by DFS would continue to be exempt from GST, just the way it was exempt from levy of CST/ VAT before GST.

In GST regime, it was the Delhi advance ruling which created the confusion on the levy. The Delhi advance ruling authority in case of M/s.Rod Retail Private Limited held that supplies would be subject to GST and did not agree to the contention that the supplies are exports made beyond customs area and goods ultimately taken out of India by passengers. CBIC, to control the damage, vide letter dated 29.05.2018 clarified that the advance ruling is applicable only to applicant and not others. Still litigations did not stop.

After this, few changes were made in GST provisions to allow refund of GST paid on goods supplied to international outbound passengers. First was to exempt supply of goods from retail shops situated in departure area of international airport beyond immigration counters to outgoing international tourists with effect from 1.07.2019 vide notification no.11/2019-IGST (Rate). Then, Rule 95A was inserted from 1.07.2019 based on powers from Section 55 to allow refund of GST paid on indigenous goods procured and supplied to such tourists. For this purpose, 'outgoing international tourist' meant a person not normally resident in India, who enters India for a stay of not more than six months for legitimate non-immigrant purposes.

Issue with these changes was that it did not cover refund of GST on imported goods (mostly duty-free procurements) and GST paid on input services/capital goods. The circular clarified that no refund of input services will be granted which indicates that supplies were not treated as exports.

However, there are few high court rulings such as *Flemingo Travel Retail Ltd Vs. UOI [2019 (10) LCX0023]*, *Sandeep Patil Vs. UOI [2019 (010) LCX0179]*, *CIAL Duty Free and Retail Services Ltd Vs. UOI [2020 (09) LCX0077]* and *Atin Krishna Vs. UOI [2019 (05) LCX0024]* which came to the rescue of these DFS which may have led the GST council to make necessary changes in the GST provisions to give tax benefits for supplies made to outbound passengers.

Important points considered in Bombay High court decision in case of Flemingo

- a) In view of Section 5(2) read with Section 19(1) of the Sale of Goods Act, 1930, the condition of sale/declaration printed on the invoice of DFS, pursuant to signatures by the outbound passenger and cashier, acts as a contract agreeing that the property in the goods purchased from DFS passes to such outbound passenger only when such outbound passenger lands at the destination. There would be condition that those goods should be consumed only after reaching the destination. This would result in satisfaction of definition of term 'Export' as per Section 2 (5) of IGST Act which states that export mean taking goods out of India to a place outside India.
- b) Additional tax burden would prevent the duty-free shops in India from competing with DFSs at international airports elsewhere in the world. This would also hamper and prejudicially affect our foreign trade, and augmentation and conservation of foreign exchange.

Amendments made after 47th council meeting

Vide notification no.14/2022-Central Tax dated 5.07.2022, Rule 95A of CGST Rules 2017 has been omitted effective form 1.07.2019 (from date of introduction). This indicates that government has accepted the fact that the supplies are exports and refund cannot be restricted only to goods. As

understood, the government has not filed special leave petitions against the high court rulings discussed above wherein supplies held as exports. Intention also appears to treat the supplies as export and allow refund of taxes at par with normal exports.

Refund claim for past period

Based on circular no.106/25/2019, many DFSs would have reversed the credit on input services and even on inputs where co-relation was not possible with outward supplies. The circular stated that the supplies being exempted, requires ITC reversals and claim of refund through manual application.

Refund from July 2018 onwards

Amendment has been made retrospective with effect from 1.07.2019. In principal impact of such amendment would be to treat the DFS at par with any other exporter and permit them to claim the refund of inputs (under Rule 89) and all type of ITC (under Rule 96) subject to the satisfaction of time limit. The period between 1.03.2020 to 28.02.2022 would be excluded for the purpose of computing the limitation based on recent amendments made in Section 54 for making refund applications. This has created the possibility of claiming refund for the earlier period as well. The refund would be eligible for claim from July 2018 onwards by making application under Rule 89 of CGST Rules 2017.

Refund for July 17 to June 2018

Though time barred, an attempt can be made for refund of taxes paid for the period as there was clear ambiguity in the law which has forced the government to make retrospective changes by removing rule 95A. However, the easier way to encash the accumulated credits would be to for exports with payment of GST utilising accumulated credits and then claim refund.

Refund possible even if definition of 'Outgoing international tourist' not met

DFSs would have failed to apply for refund even on goods supplied when condition of passengers stay in India was not more than six months for legitimate non-immigrant purposes. Even in these cases, refund should be allowed as the definition of 'export' gets satisfied.

Refund where ITC already reversed for the past period

DFSs would have reversed the ITC on input services based on Rule 95A for the past period. As the rule has been omitted retrospectively, it is safe to contest that refund for past period should also be allowed. ITC reversed earlier can be taken to GSTR-3B and refund application can be made. It may be noted that reconciliations issues are going to crop up which needs clear explanation.

B. GST impact on supplies to inbound international passengers

The goods stored in DFS being in customs area would be subject to customs duties only on removal of goods for home consumption. When goods are

supplied by such DFS to inbound international passenger, IGST would not be payable as supply is made before crossing the customs frontiers.

The Central Government vide order dated 31st August 2018 in *Aarish Altaf Tinwala (F.No. 371/142/B/2018-RA/ 1391)*, held that supply of goods from the arrival DFSs is treated as an export by DFSs, and the passenger who buys from DFS and thereafter crosses the customs barrier, files import declaration and becomes importer. This position has been affirmed by the Supreme Court by rejecting the writ petition filed against this central government order, vide an order dated 10th May 2019 passed in Writ Petition (C) No. 564 of 2019 titled as *Aarish Altaf Tinwala vs. Union of India*. This would have effect till 31st January 2019 and therefore, ITC should be eligible for refund.

With effect from 1.02.2019, Schedule III to CGST Act 2017 also amended to include entry stating 'supply of warehoused goods to any person before clearance for home consumption' to consider it neither as a supply of goods nor as a supply of services. With this amendment, the question of levy of IGST does not arise.

ITC in relation to inputs or input services would also be eligible as such supplies would not be treated as 'exempt supply' in terms of explanation to Section 17(3) of CGST Act. However, such credits may get accumulated unless DFS has supplies subject to GST wherein such credits can be utilised. Refund may not be eligible. However, it would be interesting to see if the Government continue to hold the similar view for inbound passengers in future.

Note: The supplies made to DFS by registered persons would not be exempted and it would not be considered as exports. The Madhya Pradesh high court in case of *Vasu Clothing Pvt. Ltd. Vs. Union of India [2018(12) LCX0001]* has also held that such supplies are not exports since the exporter would be DFS.

Conclusion

It may be noted that nowhere including press release of GST council meeting, the objective of removal of Rule 95A has been provided. The exemption notification no.11/2019-IGST exempting supplies to outbound passengers is yet to be withdrawn. However, author is of the view that based on the rulings of high courts and fact that exempt goods are also eligible for refund benefit when exported, DFS can go ahead and start applying for refunds.

Views are expressed based on information and provisions applicable till 11.07.2022. Any feedback, suggestion can be provided to mahadev@hiregange.com
