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Does Rule 96A of CGST Rules Override the Act? - Analysing the Validity

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India's tax law reforms, particularly the implementation of the GST, have played a significant role in promoting exports and supporting export-oriented industries. Under the GST framework, exports are considered "zero-rated supplies," eliminating the GST on exported goods or services. This reduces the tax burden on exporters and improves their competitiveness globally. Exporters can also claim input tax credits, resulting in enhancing cost efficiency.

By aligning tax laws with export promotion objectives, India has created a favorable environment for businesses to excel in the global market. These reforms, combined with other supportive measures, are expected to boost India's exports, generate employment, attract foreign investment, and strengthen its position in the global economy.

First let us understand the definition of export of service:

As per **section 2(6)** of the IGST Act, 2017 ” 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; and
(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explantation 1 in section 8;

From the above definition it is clear that all the above conditions have to be cumulatively fulfilled in order to consider an activity to be export of service.

One of the benefits in GST provided to the exporters is Exports under LUT:

Export of goods or services can be made without payment of integrated tax under the provisions of rule 96A of the Central Goods and Services Tax Rules, 2017 (the CGST Rules). Under the said provisions, an exporter is required to furnish a bond or Letter of Undertaking (LUT) to the jurisdictional Commissioner before effecting zero rated supplies.

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Rule 96A. Export of goods or services under bond or Letter of Undertaking.-

(1) Any registered person availing the option to supply goods or services for export without payment of integrated tax shall furnish, prior to export, a bond or a Letter of Undertaking in FORM GST RFD-11 to the jurisdictional Commissioner, binding himself to pay the tax due along with the interest specified under sub-section (1) of section 50 within a period of -

(a) fifteen days after the expiry of three months 3[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; or

(b) fifteen days after the expiry of one year, or such further period as may be allowed by the Commissioner, from the date of issue of the invoice for export,**if the payment of such services is not received by the exporter in convertible foreign exchange** or in Indian rupees, wherever permitted by the Reserve Bank of India.

Based on the above definition, Rule 96A (1)(b) for “export” of services, if the payment in convertible foreign exchange is not received then the supply cannot be export of service as the condition specified as per section 2(6) of the IGST Act, 2017 is not fulfilled.

This gives rise to the burning question:

- **Can Rule 96A(1)(b) in the first instance be made applicable where the conditions for export of service as per section 2(6) is not fulfilled ?**

To answer the above question, we need to understand levy of GST:

As per Section 1 of IGST Act, 2017, extends to the whole of India. In the cases where Section 13(2) of the IGST Act, 2017 is applicable, Place of supply for export of services (say export of software service) shall be the location of recipient. In such case, if the location of the recipient is outside India, levy of IGST has been extended beyond the jurisdiction of India. This gives rise to another question, when GST is applicable only to the whole of India, can provisions of GST apply when place of supply is outside India?

Hon’ble Supreme court in case of GVK Industries Ltd Vs ITO 2017 (48) STR 177 (SC) has held that It is constitutionally restricted from enacting legislation with extra-territorial jurisdiction, parliament does not have powers to make laws beyond the territory of India.

There were series of decision during service tax regime, wherein it was held that when services was provided and used outside India, the same could not be taxed in India.

1. Infosys Ltd Vs CST 2015 (37) STR 862 (Tri-Bang),
2. KPIT Cummins Infosystems Ltd Vs CCE 2014(33) STR 105 (Tri Mumbai)
3. Intas Pharmaceuticals Ltd Vs CST 2009 (16) STR 748 (Tri-Ahmd)

A combined reading of the said provisions makes it clear that what is taxable is only the supplies made in India and not otherwise. It is immaterial as to who provides services, whether an Indian concern or otherwise, but the services must be rendered in India or performed in India and the law cannot have extra territorial operation beyond the territory of India. When the charge fails, the levy fails. When the levy fails, the machinery fails and when the machinery fails the valuation fails, and so would the collection and recovery of tax. Therefore, the basis to collect tax in terms of**96A(1)(b) Rules, could be set to travel beyond the Act.**

It is relevant to note that what is taxable is services provided within the country and not services provided outside the country.

Conclusion:

Contrary to the intention of the law and public interest to promote exports, Rule 96A(1)(b) of the CGST Rules, 2017 provides for payment of tax along with interest on exports of service where payments are

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unrealized within the specified timelines.

When the exporter has failed to realize the payment, it would be penalizing the exporter asking him to remit the tax along with interest, for not having received the payment from customer outside India, as per Rule 96A(1)(b) of CGST Rules. At best the exporter could be asked to reverse the proportionate input tax credit attributable to export of service turnover for which the consideration was not realized.

Export of service is defined in sec 2(6) of the IGST Act. Rule 96A(1)(b) of CGST Rules provides for payment of tax and interest in case of non-realization of export proceeds. Whereas non-realization of export proceeds fails to fulfil the conditions to be export of service as per the Act, consequently, can Rule 96A(1)(b) of CGST Rules override the act, demanding tax on non-realization of export proceeds.

Consideration is a must for levying GST, on supplies made when the levy fails due to non-realization of consideration on export of services, can rule 96A(1)(b) of CGST Rules override the Act.

The issues which could arise in this issue case is.

Can the judiciary uphold Rule 96A of CGST Rules on the ground that when the invoice was raised it amounted to supply for consideration, later the realization could not be materialized. Hence rule 96A of CGST Rules can rightly be invoked or could the judiciary read down Rule 96A of CGST Rules with the definition of Export of Service and interpret that realization failed hence condition for export of service fail. Consequently no recovery of GST could be made on non realization of export proceeds.

Author is of the view that instead of demanding GST along with interest under Rule**96A(1)(b) of CGST Rules**, the appropriate approach could have been to reversal of proportionate ITC for having not realized consideration on export of services, which was the position of law during service tax regime, along with denying the export benefits under GST/ FTP law.

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