

GST TRACKER

ISSUE: MAY 2021

Riding the waves in

April 2021

14% (MOM)

1.23 - 1.41 Trillion (GST Collections)

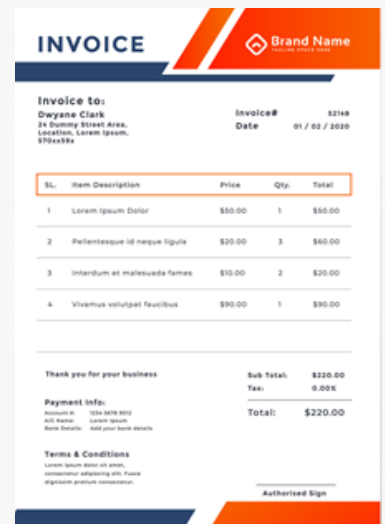
496% (Daily)

0.81 - 4.02 Lakhs (Daily Corona cases)



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EDITOR'S NOTE



Numbers does matter..

The GST revenue collection for April 2021 increased 14% MOM, thereby setting a new record, despite the second wave of COVID-19 Pandemic affecting several parts of the country. This can be attributed to improved compliance, opening up of the market, increased economic activities etc.

Though, we have a reason to celebrate the increase in economic activity, but at the same time, we need to be concerned about the second wave of the pandemic, as we witnessed an increase of nearly 500% in daily average case from 0.81 lakhs per day to 4.02 lakhs per day in the month of April 2021.

Partial lockdowns in several cities of the country has started hurting the economic activities. We all have a daunting task to bring economy back on track simultaneously keeping the pandemic under check. One needs to be resilient and not complacent to face the stressful time looming ahead.

Rather than waiting for numbers to reflect the debilitating impact of the pandemic on economy, let's all find innovative solutions to get things done while keeping the pandemic at bay.

It's time to change (for all of us).

Pankaj Kataria
(Founder Pakkabil)

Integrated GST Rebate denied To AA License Holders –The tale of tumult

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You don't pay taxes - they take taxes - Chris Rock

The tale of the issue, 'IGST rebate/refund to AA holder' started from the judgment in the case of Watson Pharma Private Limited vs The Union of India (2018) and ended (not completely ended) on Gujarat High Court Judgement in the case of Cosmo Films India Vs Union of India & OR's. (2020).

Now after the Gujarat HC judgment, DRI/DGGST/GST Audit Wing have sent many intimations/summons to various Export houses, wherein they have taken the benefit of the IGST Exemption then consequently taken the benefit of Rule 96 (Refund of IGST paid on exports). However, both authorities have not finalized the Notice but have sent only intimations for collecting the import/export data.

A. What is the issue?

- Notification no. 78/2017-Customs sought to provide exemption from IGST and Compensation Cess upon import of goods in case of Export Oriented Units ("EOUs"). On the other hand, a similar exemption had been provided for holders of Advance Authorization Licenses ("AA Licenses") in respect of inputs under Notification no. 79/2017-Customs.

- Further, the provisions concerning the export of goods or services are contained under the Integrated Goods and Services Tax Act, 2017 (“the IGST ACT”)
- Section 16 of the IGST Act deals with the export of goods and services and provides benefits against the export of goods or services which can be claimed through either,
 - a. Supply without payment of IGST and claim a refund of the unutilized input tax credit at the end of the period ("Refund") and
 - b. Supply on payment of IGST and claim refund of such IGST paid ("Rebate").
- For the procedure for granting refund of IGST on the goods and services exported out of India, Rule-96 of the Central Goods and Services Tax Rules, 2017 provides the mechanism, as per the procedure prescribed under section 54 of the CGST Act and CGST Act.
- Sub-rule (10) of Rule-96 of CGST Rules was inserted by the Central Goods and Service Tax (3rd Amendment) Rules, 2017 w.e.f. 1st July 2017.
- Rule 96(10) provides restriction of claiming the benefit of receiving the refund of export with payment of tax on goods or services in certain cases. Clause (b) of the said sub-rule specifically restricts such benefit upon availment of the benefit of Notification no. 78/2017-Customs and 79/2017-Customs dated 13th October 2017.
- The following is provided currently as per the extract of Rule 96(10) of the CGST Rules 2017:

(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have –

(a) or

(b) availed the benefit under notification No. 78/2017-Customs, dated the 13th October 2017, or notification No. 79/2017- Customs, dated the 13th October 2017 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme.

- Notification no. 78/2017-Customs which replaces the exemption from Basic Customs Duty with Basic Customs Duty and IGST within the Notification no. 52/2003-Customs dated 31st March 2003. Earlier, there was an ambiguity that was prevailing here was, whether not taking the benefit of Notification no. 78/2017-Customs meant payment of both BCD and IGST on imports or paying only IGST while availing exemption from BCD. There were some interpretational issues, which got clarified later on.
- Now, the assesses were entitled to import raw materials without payment of IGST under AA Licenses and pay IGST on exports and claim Rebate (Refund) of the IGST so paid on exports. But thereafter, the assessee was unable to utilize the benefit of duty-free imports under AA Licenses and take the benefit of rebate on exports, because of the amendments made in Rule-96(10) of CGST Rules.
- An exporter has therefore preferred a petition before Gujarat High Court challenging the aforesaid notifications and amendments made in sub-rule 10 of Rule-96 of the CGST Rules. Wherein court Held that: -

- HC to examine the validity of Notification no. 54/2018 substituting the sub-rule (10) of Rule 96 of the CGST Rules referred to the scheme of AA Licenses. HC noted that after enforcement of GST regime, Notification no. 79/2017-Customs dated October 13, 2017, was issued amending the Notification no. 18/2015 (which exempted materials imported into India, against a valid AA) whereby, it was provided that the exemption from IGST Cess leviable thereon under subsection (7) and subsection (9) of Section 3 of Customs Tariff Act shall be subject to preimport condition and available up to 31st March 2018.
- HC observed that Rule 96 (10) as it originally existed, when the Rules came into force provided that the persons claiming refund of Integrated Tax paid on export of goods or services should not have received supplies on which the supplier has availed the benefit from Government of India, Ministry of Finance, under Notification No. 48/2017 dated 18th October 2017 or Notification No. 40 of 2017 dated 23rd October 2017 or Notification No. 41 of 2017 Integrated Tax (Rate), dated 23rd October 2017 or Notification No. 78 of 2017 Customs dated 30th October 2017 or the Notification No. 79 of 2017 customs dated 13th October 2017.
- HC held that on a conjoint reading of the provision of Section 16 of the IGST Act, Section 54 of the CGST Act and Rule 96(10) which was substituted by Notification No. 54/2018 dated 9th October 2018, it was apparent that the person who has availed the benefits of Notification No. 48/2017 dated 18th October 2017 and other Notifications as stated in subrule 10 shall not have the benefit of claiming refund of integrated tax paid on exports of goods or services.

- HC observed that Assessee availed benefits under the AA License scheme as per Notification No. 18/2015 which was amended by Notification No. 79/2017 dated 13th October 2017 and paid integrated tax on the goods procured by the Assessee for the export purpose.
- HC on considering the effect of the Notification No. 54/2018, the contentions raised on behalf of the Revenue that there was no discrimination qua the Assessee, held it as tenable in law, as by the amendment made by Notification No. 54/2018 it denied the benefit which was granted to the Assessee by the Notification no. 39/2018 was withdrawn as same was not made applicable from October 23, 2017.
- HC enlightened that recently, vide Notification No. 16/2020 CT dated March 23, 2020, an amendment has been made by inserting an explanation to Rule 96(10) of the CGST Rules, under which the option of claiming refund is not restricted to the Exporters who only avails BCD exemption and pays IGST on the raw materials thereby exporters who want to claim a refund under the second option can switch over now.
- HC highlighted that the amendment was made retrospectively thereby avoiding the anomaly during the intervention period and exporters who already claimed a refund under the second option need to pay back IGST along with interest and avail ITC, because of which, the grievance of the Assessee was therefore taken care of.
- HC further mentioned Notification no. 54/2018 is required to be made applicable w.e.f.23rd October 2017 and not prior thereto from the inception of Rule 96(10) of the CGST Act, therefore, in effect Notification No.39/2018 dated 4th September 2018 shall remain in

force as amended by Notification No.54/2018 by substituting subrule (10) of Rule 96 of CGST Rules, in consonance with subsection (3) of Section 54 of the CGST Act and Section 16 of the IGST Act.

- HC, therefore, held Notification No. 54/2018 is held to be effective w.e.f. October 23, 2017

Now, this judgment created chaos among exporters!

B. Our View and Way Forward

- Let's go in the flashback once to understand the issue, it started with the Notification No. 03/2018 dated 23.01.2018, which had put a restriction on Refund of IGST paid on export of goods, the bare language of the notification: -

"If the supplier has claimed the benefit of certain Notifications as mentioned therein, in other words, the conditions are applicable vis-à-vis the Supplier of goods to the exporter and not to the exporter of goods directly."

1.1. Ingredients of the Notification

- a) Supplier Supplies to the Exporter
- b) Exporter Exports the goods or Services
- c) The Supplier Claims benefit of the following Notification
 - Deemed Exports (Notification No. 48/2017-CT)
 - Merchant Export Scheme 0.1% (Notification No. 40/2017-CT(R) and Notification No. 41/2017-IGST(R))
 - EOU Scheme (Notification No. 78/2017-Custom)
 - AA/EPCG etc. (Notification No. 79/2017-Custom)

1.2. Now, on a plain reading, it was observed that, said notification had an error i.e.:

- The above notification lays down that if the supplier has supplied goods/services to the exporter and claimed benefits under any of the notifications as mentioned above, the exporter shall not be eligible to claim a refund of IGST Paid on Export of Goods.
 - In other words, Exporter shall be mandatorily required to export under Letter of Undertaking and claim a refund of unutilized Input Tax Credit under Rule 89 of CGST Rules, 2017.
 - Now, a businessman imports goods from outside India against AA wherein the supplier is located outside India, so claiming of benefits given in the above notifications by the supplier is not at all applicable.
 - Therefore, Rule 96(10) of CGST Rules, 2017 as inserted by Notification No. 03/2018 dated 23.01.2018 does not apply to anyone.
- Thereafter, Notification No. 39/2018 dated 04.09.2018 (Retrospective) was issued, which rectified those wordings and replaced the word 'The Supplier' with 'The Supplies'.
 - But again, a new Notification No. 53/2018 dated 09.10.2018 (Retrospective) was issued and it again used the word 'The Supplier' instead of 'The Supplies'.
 - The aforementioned error/restrictions on the 'supply' got rectified only vide Notification No. 54/2018-CT dated 09.10.2018. (w.e.f. from the 09.10.2018 only)
 - Government-issued another notification No. 16 of 2020-Central Tax dated 23.03.2020 and under this notification sub-rule 10 of Rule 96, which was substituted by notification No. 54/2018 dated 09.10.2018 and an explanation was added w.e.f. 23.10.2017 namely

“Explanation- for the 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 service tax and compensation chess on inputs and has availed exemption of only Basic Custom Duty (BCD) under the said notifications”.

- The above explanation now makes it clear that under the aforesaid notifications, one could easily import without payment of BCD but by payment of IGST. In such a scenario, the restriction of Rule 96(10) of the CGST Rules 2017 would not be attracted and one can export with payment of IGST. Only where a person imports inputs without payment of BCD and IGST, one cannot export with payment of IGST.
- Furthermore, this explanation only provides for the situation where the registered person has paid IGST on inputs. It does not discuss about capital goods at all. The exception where the capital goods is allowed to be imported without payment of tax and export is allowed with payment of tax is only under EPCG scheme.
- Now, whether above explanation does applicable on the 'Capital Goods' as well? it is yet to be clarified. (Just like other matters in GST)
- Interestingly, in the case of ZAVERI AND CO PVT LTD VERSUS UNION OF INDIA 2019 (1) TMI 357 - GUJARAT HIGH COURT, wherein petitioner has challenged rule 96 (10)(b) of the Central Goods and Service Tax Rules, 2017 insofar as the same has been given retrospective effect. It was pointed out that subsequently vide Notification No. 53/2018-Central Tax dated 9.10.2018, sub-rule (10) of rule 96 has been substituted, and the retrospective effect given to it has been deleted. It was pointed out that, thereafter vide Notification No. 54/2018-Central Tax dated 9.10.2018, sub-rule (10) of rule 96 has been substituted making it applicable prospectively. It was submitted that, since the grievance of the petitioner was against the retrospective effect given to rule 96, such grievance no longer survives.
- By that, it means, the government had an intention to interpret Notification 54/2018 in 'Prospective Manner' only.
- In one of such GST updates prepared by the National Academy of Customs, Indirect Taxes and Narcotics (NACIN) dated 13.10.2018, which most importantly was issued after the amendment vide notification 54/2018-CT. View taken by NACIN can be seen on slide/Page No. 5,6 and 7 of this GST Weekly Update.

- Further, a reference should be made to the 30th GST Council's Minutes, wherein the Hon'ble Finance Minister of the Punjab raised the concerns for amendments in Rule 96(10): -

8.1. Shri Manpreet Singh Badal, Hon'ble Minister from Punjab stated that the role of GIC was to mostly issue clarifications on procedural issues and it should avoid approving amendment to Rules with retrospective effect. He stated that the notification regarding Rule 96 (10) and such other decisions involving retrospective amendments should have been brought before the Council and it was only about 10 days before the Council Meeting that the notifications were issued. He cautioned that GIC should not subsume the role of the Council.

8.2. The Secretary explained that amendment to Rule 96(10) of the CGST Rules was brought before the GIC, as double benefit was being taken by the exporters in the form of import of goods on advance license in addition to claiming IGST refund. Hence, it was an urgent matter on which decision had to be taken quickly by the GIC in order to plug the revenue leakage. He also pointed out that once the Hon'ble Minister from Punjab highlighted certain concerns regarding amendment to Rule 96 of the CGST Rules, an Agenda note was now placed before the Council to rectify the inadvertent mistake and to permit refund of IGST paid on export goods made from capital goods imported under the EPCG scheme. He added that the GIC decisions were circulated to all the States before it is implemented and the mistakes could be pointed out by any of the States. The Hon'ble Minister from Punjab stated that they would send a written communication on this matter.

Link for the minutes: -

<http://www.gstcouncil.gov.in/sites/default/files/Minutes/Signed%20Minutes%20-%2030th%20GST%20Council%20Meeting.pdf>

- Now, after the Judgement of Gujarat High Court (Cosmo Films), Directorate of Revenue Intelligence (DRI) and Directorate General of Central Excise Intelligence (DGCEI)/ Directorate General of GST Intelligence (DGGI) has started sending notices to them asking for the amount of IGST exemption/IGST refund with interest and penalty. Few of them are facing the heat from Audit Commissionerate's, which have conducted the audit as per Section 65 of the CGST/SGST Act. In our view the judgment of Gujarat High Court is bad in law and should be challenged before Supreme Court.
- Now after the Cosmo Judgement, in another judgment filed before GUJARAT HIGH COURT In the case of ZAVERI AND CO. PVT. LTD. VERSUS UNION OF INDIA dated 18th December 2020 (No. 16212 of 2020), it was stated that The Notification 54/2018 itself makes it clear that the same shall come into force from the date of its publication in the official gazette. According to the petitioner, what has been observed in para-9 of the order passed in the Special Civil Application No. 15833 of 2018 needs to be re-looked, as the Department has started issuing notices indiscriminately on the premise that the Notification would apply

with effect from 23.10.2017, thereafter the Court Held: -

7. Let notice be issued to the respondents returnable on 24.02.2020. Till the next date of hearing, the proceedings according to the notice dated 24.11.2020 Annexure – B shall remain stayed.

- Because the action of the government authorities suffers from the vices of excessive delegation by the impugned notifications denying the benefit of 'Zero rated' exports conferred upon the petitioner through Section 16(3)(b) of the CGST Act by imposing arbitrary restrictions upon the petitioner so that they are unable to claim rebate benefits from the Government.
- Because neither Section 16 of the IGST Act nor Section 54 of the CGST Act prescribes any power to issue impugned notifications, to deny the impact of zero-rating exports for granting benefits of rebate under Section 16 of the IGST Act, to nullify the benefits under the AA Scheme availed by the exporters.
- Because, the Rule travels beyond the mandate of the Statute and seeks to take away the benefits which were generated, accrued, and vested by the Statute. Impugned Rule arbitrarily seeks to retrospectively interfere with accrued and vested right and is liable to be struck down.
- In this regard, reliance is also made to the decisions of the Hon'ble Supreme Court Union of India Vs. NS Ratnam, 2015 (322) ELT 353 (SC) and Vikram Cement and Amr. Vs. The State of M.P., 2015(11) SCC 708, wherein it is held that

“Where a fair procedure has not been laid down, the validity thereof cannot be upheld. A statute that provides for civil or evil consequences must conform to the test of reasonableness, fairness, and non-arbitrariness. Therefore, the Impugned Notification being contrary to the principles of fairness and reasonableness, is liable to be struck down.”

- Because the object of an Explanation to a statutory provision is to explain the meaning and intendment of the Act itself, where there is any

obscurity or vagueness in the main enactment, to clarify the same to make it consistent with the dominant object which it seems to subserve, to provide additional support to the dominant object of the Act to make it meaningful and purposeful. An Explanation cannot have the purpose of legislating when the main provision is clear and unambiguous.

- Because an explanation appended by an amendment to a statutory provision cannot in any way interfere with or change the enactment of any part thereof or take away a statutory right with which any person under a statute has been clothed or set at naught the working of the Act by becoming a hindrance in the interpretation of the same.

C. Practical Aspects and Possible Solutions

- Pay the amount and take credit: As suggested by the Gujarat HC judgment, wherein it has been suggested that, one can make payment and take the credit of the amount.

a) Now, as per Section 2(62), wherein it is stated that “input tax” concerning a registered person, means the central tax, State tax, integrated tax, or Union territory tax charged on any supply of goods or services or both made to him and includes— (I) the integrated goods and services tax charged on import of goods;

b) Now as per Rule 36(1)(d), the Bill of Entry is the document for assessing the IGST paid on Imports.

c) Now, an Amendment in the Bill of entry (As per Section 149 of the Customs Act, 1962) will be required, as the original Bill of entry was filed availing the benefit of AA.

d) Is it an easy task? NO

- Challenge the Validity of Rule 96(10)
 - a) That it is a settled principle of law, inter alia, laid down in the decisions of the Hon’ble Supreme Court in Gupta Modern Breweries vs. State of J & K, (2007) 6 SCC 317 at page 327 that a tax cannot be imposed by way of Rule or bye-laws. In the said decision after referring to various judgments, it is held that:

"32. In-State of Punjab v. Devans Modem Breweries Ltd. [(2004) 11 SCC 26], SCC at Para 25, K. T Moepel Nair vs. the State of Kerala [AIR 1961 SC 552: (1961) 3 SCR 77], SCR at paras 89 & 91, Ahmedabad Urban Development Authority v. Sharad Kumar Jayanti Kumar Pisasale [(1992) 3 SCC 285] SCC at paras 6-7, Hindustan Times, State of U.P. [(2003) 1 SCC 591], SCC at para 30 and & Bimal Chandra Banerjee vs. State of M. P., [(1970) 2SCC 467], SCC at para 14, it has been held that a tax under Article 265 can only be imposed by way of legislation and it is impermissible to be imposed by way of bye-laws or rules."

- In this regard, in Balaji Kondwani Garaad vs. Nasik Merchants Co-operative Bank Ltd., (1984) 2SCC 50, the Hon'ble Supreme Court observed as under:

"Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the bye-law, if not in conformity with the statute to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with."

Further, in this regard, reliance is also placed on the following decisions, wherein, it is categorically held that in the exercise of Rule-making power, a new levy cannot be imposed on the taxpayers.

- In COMMISSIONER OF INCOME-TAX, AP VERSUS TAJ MAHAL HOTEL [1971 (8) TMI 2 - SUPREME COURT] it was held by the Supreme Court that,

"The Rules were meant only to carry out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect."

- Bimal Chandra Banerjee v. State of M.P. and OR's., 1970 (8) TMI 30 - SUPREME COURT, Hegde J. was examining the provisions of the M.P. Excise Act, 1915. The legislature levied excise duty only on those articles which came within the scope of Section 25 of that Act. it was observed as under: -

“No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorizes the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it.

- Challenging the ‘Jurisdictional validity’ of DRI/DGGST

a)The recent judgment by Hon’ble SC in the case of M/s Canon India Private Limited Vs Commissioner of Customs has brought out an important ruling that the ADG of DRI is not the proper officer to issue SCN under Section 28(4) of the Customs Act, 1962. The Apex Court concluded the entire proceeding as invalid and without any authority of law.

a)Now, this has thrown an open plethora of challenges to the SCNs issued and the assessee are bound to challenge through various writ petitions the validity of SCNs.

b)The word “any officer” was distinguished with a “proper officer” in the ruling.

Conclusion

Worthwhile to mention that, AA holders availing IGST refund are here for a long battle now.

GSTN updates April 2021

Date of Issue	Subject
06/04/2021	Auto-population of e-invoice details into GSTR-1
06/04/2021	Module wise new functionalities deployed on the GST Portal for taxpayers
08/04/2021	Payment of Tax by Taxpayers under QRMP Scheme, for the month of March, 2021
12/04/2021	Clarification on reporting 4-digit/6-digit HSNs
13/04/2021	New features of Form GSTR-2B & GSTR-3B made available to taxpayers under QRMP Scheme
13/04/2021	Updates in Forms GSTR-1, GSTR-3B and Matching Offline Tool for taxpayers in QRMP Scheme
16/04/2021	Due dates for filing of Form GSTR-3B from the Tax Period of January, 2021

Source: www.gst.gov.in

Notifications/Circulars/Orders issued in the month of April 2021

Ø Central Tax Notifications April 2021

Notification Nos.	Date of Issue	Subject
07/2021	27/04/2021	Seeks to make second amendment (2021) to CGST Rules..

Ø Central Tax (Rate) Notifications April 2021

No Central Tax (Rate) Notification was issued in the month of April 2021

Ø Integrated Tax Notifications April 2021

No Integrated Tax Notification was issued in the month of April 2021

Ø Integrated Tax (Rate) Notifications April 2021

No Integrated Tax (Rate) Notification was issued in the month of April 2021

Source: www.cbic.gov.in

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