

**Amendment to Rule 89(4)(C) of CGST Rules, restricting refund by capping 'export turnover,'
not applicable retrospectively**

The Hon'ble Delhi High Court in the case of [M/s. Indian Herbal Store Pvt. Ltd. vs. Union of India \[W.P.\(C\) 9908/2021 and W.P.\(C\) 9912/2021 dated September 15, 2023\]](#) allowed the writ petition and held that the Rule 89(4)(C) of the Central Goods and Services Rules, 2017 ("**the CGST Rules**") would not have any retrospective application. The Hon'ble High Court while relying upon the judgment of the Hon'ble Karnataka High Court in *M/s. Tonbo Imaging India Pvt. Ltd. vs. Union of India and Others [W.P.(C) No. 13185/2020 dated February 16, 2023]*, noted that Hon'ble Karnataka High Court has already struck down the substitution made in Rule 89(4)(C), being arbitrary and ultra vires in nature and contrary to provisions of Section 54 of the Central Goods and Services Tax Act ("**the CGST Act**"). Therefore, the Hon'ble High Court set aside the Refund Rejection Order and Order-In-Appeal and directed the Revenue Department to process the claim for Refund of unutilized Input Tax Credit ("**ITC**").

Facts:

M/s. Indian Herbal Store Pvt. Ltd. ("**the Petitioner**") is an exporter of herbal goods through an e-commerce platform supplying goods through courier service.

The Petitioner filed three refund applications ("**the Application**") for claiming refund of unutilized ITC for the quarter of October, 2018 to December, 2018 of the Financial Year ("**the FY**") 2018-2019 ("**the Impugned Period 1**"). Thereafter, a Show Cause Notice ("**the SCN**") was issued for the Impugned Period 1. However, the aforesaid Application was rejected by the Revenue Department ("**the Respondent**") vide Refund Rejection Order ("**the Order**") dated September 15, 2020, for the Impugned Period 1 on the ground of non-fulfilment of conditions as laid out in Rule 89(4)(C) and Rule 96B of the CGST Rules.

The Petitioner had also filed three Applications for claiming refund of unutilized ITC for the quarter of January, 2019 to March, 2019, April, 2019 to June, 2019 and July, 2019 to

September, 2019 of the FY 2018-2019 and FY 2019-2020 ("**Impugned Period 2**"). Thereafter, a Show Cause Notice ("**the SCN**") was issued for the Impugned Period 2. However, the Application was rejected vide the Order dated September 24, 2020, October 22, 2020, and November 5, 2020, for not producing the relevant Foreign Inward Remittance Certificates ("**FIRC's**") and for non-fulfilment of terms and conditions required for computation of the eligible export turnover as laid out under Rule 89(4)(C) of the CGST Rules.

Aggrieved by the Orders, the Petitioner filed an appeal before the Respondent. However, the appeal filed by the Petitioner was rejected vide Order in Appeal both dated June 18, 2021 ("**the Appeal Orders**") on the ground that the conditions related to the export turnovers for the relevant tax period laid out under Rule 89(4)(C) of the CGST Rules have not been fulfilled.

Aggrieved by the Order and the Appeal Orders, ("**the Impugned Orders**"), the Petitioner filed a writ petition *W.P. (C) 9908/2021* for the Impugned Period 1 and *W.P.(C) 9912/2021* for the Impugned Period 2 praying for setting aside of the Impugned Orders and release of accumulated unutilized ITC on the export of goods before the Hon'ble High Court.

The Respondent contended that there is a possibility that the exporter might take undue benefit by inflating the value of zero-rated supply of goods. Therefore, a ceiling limit was introduced on the valuation of export of zero-rated supply of goods through the amendment in the CGST Rules vide *Notification No. 16/2020 dated March 23, 2020* substituting Rule 89(4)(C) of the CGST Rules. The Respondent further contended that the Rules being procedural in nature would have retrospective application.

Adv. Bimal Jain (**Advocate for the Petitioner**) argued that Rule 89(4)(C) can only have prospective application as the Notification itself clearly states that it would be applicable from the date of publication in the official gazette.

The Advocate for the Petitioner also argued that, the amendment in Rule 89(4)(C) of the CGST Rules, restricting the value of zero-rated supply of goods to 1.5 times the value of like goods supplied domestically, however, as per Section 54(1) of the CGST Act imposes a restriction on

introducing any new condition and only mandates for prescription of form and manner. The Advocate for the Petitioner further contended that the Rules have to be in consonance with the statutory provision and the purpose of the rule is to enforce the statutory provision, not to be in contravention with each other. Therefore, the amendment in Rule 89(4)(C) of the CGST Rules is ultra vires to Section 54(1) of the CGST Act and violates Article 14 of the Constitution of India.

Issue:

Whether the Rule 89(4)(C) of the CGST Rules violates the rights of the supplier for the denial of refund of unutilized ITC accrued on account of export of zero-rated supply of goods?

Held:

The Hon'ble Delhi High Court in ***W.P.(C) 9908/2021*** and ***W.P. (C) 9912/2021*** held as under:

- Observed that, the right to refund of unutilized ITC accrues when the goods are exported. Therefore, the Petitioner under Section 54(1) of the CGST Act, has the right to file an application for the refund of unutilized ITC within two years from the relevant date. As per Explanation clause 2(a) to Section 54 of the CGST Act, the relevant date of supply of goods for export would be the date on which the ship or aircraft on which goods are loaded leaves India.
- Noted that, the substitution of Rule 89(4)(C) of the CGST Rules would be applied prospectively from March 23, 2020 and the Respondent had erred in applying Rule 89(4)(C) of the CGST Rules for computing the export turnover for determining the refund claimed by the Petitioner for the Impugned Period 1 and 2, thereby, rejecting the contentions of the Respondent.
- Relying upon the judgment of the Hon'ble Karnataka High Court in ***M/s. Tonbo Imaging India Pvt. Ltd. vs. Union of India and Others [W.P.(C) No. 13185/2020 dated February 16, 2023]***, the Court further noted that, the Hon'ble Karnataka High Court has already struck down the substitution made in Rule 89(4)(C) of the CGST Act with respect to the ceiling

limit imposed on the valuation of export turnover, being arbitrary and ultra vires in nature and contrary to provisions of Section 54 of the CGST Act.

- Opined that, Rule 89(4)(C) of the CGST Rules would not be applicable for determining the amount of refund of unutilized ITC and the Petitioner has a rightful claim for refund of unutilized ITC.
- Held that, the Impugned Orders be set aside and directed the Respondent to process the refund of accumulated ITC along with the applicable interest.

Our Comments:

The judgement passed by the Hon'ble Delhi High Court is applaudable as it protects the rights of the exporters of zero-rated supply of goods from the unjust rules restricting the right of the Exporter to avail refund of the unutilized ITC.

Relevant Provisions:



Section 54 of the CGST Act:

Refund of tax.-

“(1) Any person claiming a refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed:

***Provided** that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in such form and manner as may be prescribed.*

.....

Explanation.- For the purposes of this section,-

(1).....

(2) "relevant date" means-

(a) in the case of goods exported out of India where a refund of tax paid is available in respect of goods themselves or, as the case may be, the inputs or input services used in such goods,

Rule 89(4)(C) of the CGST Rules:

89. Application for refund of tax, interest, penalty, fees or any other amount

4(C). "Turnover of zero-rated supply of goods" means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking 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, whichever is less, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both;"

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