

GST UPDATE - Circular issued to clarify aspects relating to Inverted Duty Refund

Circular No 181 dated November 10, 2022

Introduction

Since the inception of GST, provisions relating to inverted duty (ID) refund (i.e. in cases where the taxes charged on inputs are higher than that payable on the output) have been contentious & subject matter of challenge in various fora.

The constitutional validity, of the original scheme of ID refund under GST, has been examined by the Hon'ble Supreme Court in **UOI vs VKC Footsteps**¹. The Apex Court observed anomalies in ID refund formula and urged the GST Council to reconsider and take a policy decision regarding the same. Basis such observation, the CBIC presumptuously corrected the refund formula *vide* Notification No 14/ 2022 dated July 5, 2022. Although such correction was widespread expected to have a retrospective effect, the Notification did not contain any stipulation to that effect; resultant the operation of the amendment is purportedly prospective.

Separately, w.e.f. July 18, 2022, the benefit of ID refund was also curtailed on products falling under Chapter 15 to Chapter 27 *vide* Notification No. 9/2022.

Pursuant to these amendments, an uncertainty existed in the industry with respect to the tax period to which above amendments shall apply with following possibilities in vogue:

S.No	Actual Period of Transactions	Date of Filing ID Refund Claim	Applicable Provisions
1	Pre-Amendment	Pre-Amendment	Likely the pre-amendment position of law should apply; unless the amendment to formula is considered mere clarificatory or corrective since implemented pursuant to direction of Hon'ble Supreme Court in VKC (supra)
2	Pre-Amendment	Post-Amendment	Uncertainty
3	Post-Amendment	Post-Amendment	Post-amendment position of law should apply

To address the said issues & uncertainty, the GST Policy Wing of the CBIC issued clarifications through Circular No. 181 dated November 10, 2022.

Clarifications provided in the Circular



Issue: Whether the new formula, prescribed in Rule 89(5) of the CGST Rules, 2017, should apply only to refund applications filed on/ after July 5, 2022 (i.e. date of amendment), or should also apply to refund applications filed before said date.



Clarification: The amendment is not clarificatory in nature and the new formula should apply only to refund applications filed on/ after July 5, 2022. Refund applications filed prior to such date should be dealt with as per erstwhile formula.

¹ [Civil Appeal No 4810 of 2021]

ELP comments

The clarification provided in the Circular has, thus, provoked a new round of interpretation dispute.

Foremost, the Circular does not lend any clarification on tax period to which such amendment applies. Rather it merely implies that legal provisions, to adjudicate the claim, must be read with reference to those in force on the date of filing of the claim. Illustratively, in a scenario wherein refund is filed post July 5, 2022 for tax period prior to such date (say April 2022), a question arises as to whether old formula should apply or revised formula. The circular bats for application of the revised formula in such cases. Although this, such interpretation would violate principles of equity, insofar as it purports to treat refund application for same period differently, merely on basis date of filing.

Without prejudice to above, it must be noted that the instant amendment was introduced to rectify an anomaly in law pursuant to court direction. It is a well-established legal principle that beneficial amendments to rectify an anomaly should have retrospective application. However, practically at ground level, the GST authorities have rejected refund claims as per new formula, even if filed after July 5, 2022. Such action in the hindsight is now appearing contrary to the views expressed in the Circular.

Given that clarifications issued are binding on the departmental authorities, the taxpayers should adopt a strategic approach to maximize the refund & simultaneously, strategize regarding litigation risk.



Issue: Whether ID refund restriction on certain goods, effective from July 18, 2022, should apply to (a) claims pending on July 18, 2022; or (b) only to claims filed on/ or after July 18, 2022; or (c) refunds pertaining to prospective tax periods?



Clarification: The restriction should apply prospectively and accordingly be applicable to claims filed on/ or after July 18, 2022 and should not apply to refund claims filed prior to such date.

ELP comments

Similar to the first clarification, in this case as well the date of filing has been given credence over any other substantive event/ aspect. It is, however, an established position of law that provisions as in force on date/ in period of transaction should alone apply. Date of lodgement of claims, like in present scenario, should precisely be of no avail.

The Circular although implies that stated restriction should apply to all claims filed on or after July 18, 2022, notwithstanding that refund pertains to period prior to such date. Such retrospective applicability is not only against the intent of the Notification but also tantamount to legislating an *ex-post facto* law through a circular, which fiscal statutes do not permit for. Further, the retro-applicability of restriction (at least to the extent of refund claims pending for filing as on date of issuance of amending notification) runs contrary to settled legal position that the taxpayer cannot be subjected to a condition/ restriction on a *post facto* basis.

We trust you will find this an interesting read. For any queries or comments on this update, please feel free to contact us at insights@elp-in.com or write to our authors:

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