

## **LEGAL POSITION QUA VALIDITY OF RULE 96(10) OF THE CGST RULES AND ITS DATE OF APPLICABILITY**

### **➤ What is Rule 96(10)?**

Rule 96(10) of the CGST Rules places restriction on the exporters from availing dual benefits by simultaneously claiming IGST exemption on imports made under Notification Nos. 78/2017 and 79/2017-Cus both dated 13.10.2017 (“Notification No. 78/79”) and paying IGST on exports through Input Tax Credit with the intention of claiming a refund of the said IGST amount under Section 54 of the CGST Act read with Rule 89 of the CGST Rules.

Vide Notification No. 20/2024-Central Tax dated 08.10.2024, Rule 96(10) has been omitted with effect from 08.10.2024.

### **➤ Challenge regarding the vires & legality of the restriction under Rule 96(10)**

The validity and legality of the restriction under Rule 96(10) has been challenged before various High Courts on the basis that:

- (i) Rule 96(10) violates the provisions in the parent statute because the only prescription in Section 16 of IGST Act and Section 54 of CGST Act was to the extent of outlining the form and manner for claiming refund, but not for restricting refund.
- (ii) Rule 96(10) creates fetter on an exporter’s right to claim refund of IGST paid on exports & does not stand the test of legality because the Statute empowers rules to be made for enabling the refund mechanism, but not to restrict refund claims for legitimate exporters.
- (iii) Rule 96(10) is also violative of Article 14 of Constitution of India as an arbitrary and unreasonable differential treatment is meted out to EOUs, Advance Authorization license holders and similar assesseees.

The Hon’ble Kerala High Court vide its Order dated 10.10.2024 in *Sance Laboratories Ltd.* has held Rule 96(10) of the CGST Rules to be ultra vires Section 16 of the IGST Act and violative of Article 14 of the Constitution of India. The observations made by the Court, in brief, are as follows:

- (a) Rule 96(10) puts a restriction on exporters which completely take away the right under the parent provision of Section 16(3)(b) of IGST Act. The words “subject to such conditions, safeguards procedure as may be prescribed” in Section 16(3) (a) & (b) of the IGST Act and Section 20 of the IGST Act and Section 54 of the CGST Act do not authorise the imposition of such blanket restrictions; and
- (b) Literal interpretation of Rule 96(10) leads to a manifestly absurd result which leads to hostile discrimination against those who apply for refund under Section 16(3)(b) [Rule 96], unlike in case of exporters who seek refund under Rule 89. Such unjust result is violative of Article 14 of the Constitution of India and could never have been intended by the legislature.

In writ petitions contending similar grounds, the Hon’ble Punjab & Haryana High Court vide its Order dated 08.04.2024 in *Arjan Impex Pvt. Ltd.* and Order dated 24.02.2023 in *Glassco Laboratory*

*Equipments* has granted an interim stay qua recovery proceedings in the Writ Petition challenging the restriction under Rule 96(10) of CGST Rules. Further, the Court has also granted stay vide a series of orders dated 28.04.2023, 28.07.2023 and 07.08.2024 in ***Electronic Instrumentation, Punjab Chemicals and Crop Protection Ltd.***, and ***Avanti Overseas Pvt Ltd.*** respectively.

The Hon'ble Bombay High Court vide its Order dated 27.01.2021 in ***Prashi Pharma Private Limited***, where the vires of the restriction under Rule 96(10) have been challenged, has granted interim relief qua recovery of IGST refund till the next date of hearing. The Writ Petition challenging legality of Rule 96(10) as being violative of Article 14, is also pending consideration before the Hon'ble Bombay High Court in ***Watson Pharma Private Limited***.

Similarly, the Hon'ble Gujarat High Court vide its Order dated 08.09.2021 in ***Mayur Woven Pvt. Ltd.*** and Order dated 15.09.2021 in ***Parikh Enterprises*** has stayed the recovery and coercive actions in the Writ Petitions challenging the vires of Rule 96(10).

The Hon'ble Madras High Court in ***Comstar Automotive Technologies Pvt. Ltd.*** has also admitted the Writ challenging the arbitrary restriction as ultra vires Section 16 of the IGST Act.

#### ➤ **Dispute regarding the date of applicability of restriction under Rule 96(10)**

While various notifications were issued / rescinded in respect of Rule 96(10), the last Notification No. 54/2018-Central Tax dated 09.10.2018 finally imposed the restriction, which is applicable as on date. It is pertinent to note that this amendment was not given retrospective effect, rather the said Notification was made effective from the date of its publication in the Official Gazette i.e. 09.10.2018. This position was further clarified vide Circular No. 125/44/2019-GST dated 18.11.2019 ("Circular No. 125") issued by the Central Board of Indirect Taxes and Customs ("CBIC") wherein it was stated that restriction under Rule 96(10) would be applicable prospectively w.e.f. 09.10.2018.

There has been a continuous dispute with respect to the date from which the restriction under Rule 96(10) is applicable. The GST Department has issued slew of demand notices seeking to enforce Rule 96(10) from 23.10.2017, i.e. the date on which first amendment notification was issued. These demand notices are chiefly premised on the Hon'ble Gujarat High Court's order dated 20.10.2020 in ***Cosmo Films Pvt. Ltd.*** wherein it was observed that Notification No. 54 would become applicable retrospectively from 23.10.2017.

The order in ***Cosmo Films Pvt. Ltd.*** has now been reviewed by the Gujarat High Court vide its order dated 19.09.2024, wherein the mistake apparent on record has been rectified and it has been correctly held that Notification No. 54/2018 is not applicable retrospectively from 23.10.2017 but instead from 09.10.2018. Further, the Writ Petition in ***Zaveri and Co. Pvt. Ltd.*** had previously been disposed by the same High Court as being infructuous on the basis that Notification No. 54 has been made applicable prospectively, and therefore, the grievance qua retrospective application of the said provision does not survive. Therefore, it is clear that the restriction prescribed under Rule 96(10) of the CGST Rules is applicable prospectively from 09.10.2018 to 08.10.2024.

## W&B Comments

The GST authorities have launched investigations in respect of the refunds received by the exporters upon payment of IGST. Upon summons / search / seizure, the said proceedings have been culminated into show cause cum demand notices thereby seeking recovery of the allegedly erroneous refunds. Thereafter adverse orders have been passed by the Adjudication Authority and the First Appellate Authority. Filing of second appeal before the GST Appellate Tribunal will require additional 10% pre-deposit through cash. However, the Tribunal is not yet functional.

The demand orders are chiefly based on the order of the Gujarat High Court dated 20.10.2020. However, the said order has now been reviewed vide another order dated 19.09.2024 of the same High Court, holding that Notification 54/2018 is applicable prospectively from 08.10.2018. Now, that the Hon'ble Kerala High Court has held Rule 96(10) to be invalid, a Writ Petition may be preferred before the jurisdictional High Court, challenging the said demand as being legally untenable on the basis that Rule 96(10) [as was applicable during the relevant period] was ultra vires the CGST Act and the Constitution of India. In the event, the demand pertains to the period prior to 09.10.2018, an additional plea may be taken to challenge the said demand as being without jurisdiction.

We hope you have found this information useful. For any queries/clarifications please write to:

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