

Clarification on operational and procedural aspects concerning Rule 11B of the SEZ Rules (Non-Processing Area for IT/ ITES SEZ units)

Vide Notification No. GSR 881(E) dated 6 December 2023, Rule 11B of the Special Economic Zone Rules, 2006 (SEZ Rules) was introduced *inter alia* laying down the process, conditions, compliances, etc. for conversion of Processing Areas (PA) (in IT/ITES SEZ) into Non-Processing Areas (NPA). However, considering the various operational and procedural difficulties faced by the industry, the Ministry of Commerce, in consultation with the relevant stakeholders, has issued Instruction No. 115 dated 9 April 2024 to clarify the operational/ procedural aspects.

The gist of the clarification provided by the aforesaid Instruction is as under:

ISSUES	CLARIFICATION
<p>What is the manner for computing the tax benefits attributable to -</p> <ol style="list-style-type: none"> The built-up space to be demarcated as NPA under Rule 11B(5)(i) of the SEZ Rules; Creation of social or commercial infrastructure and other facilities under Rule 11B(5)(ii) of the SEZ Rules to be used by both SEZ PA and NPA. <p>which needs to be paid back and what would be the rate of tax.</p>	<p>Under Rule 11B of the SEZ Rules, demarcation of NPA is permitted after repayment of the tax benefits that were originally availed (and not on depreciated value or prevailing value as certified by a Chartered Engineer).</p>
<p>Whether the CE valuation and certification for the built-up area shall be based on the cost of construction as accounted by the Developer or whether the same shall be based on Central Public Works Department/ Public Works Department rates.</p>	<p>Demarcated built-up area shall be certified by CE. Further, no valuation would be required as the tax benefits shall be certified as based on the financial books.</p>
<p>Whether the tax benefits for operation and maintenance of common infrastructure and facilities shall not be applicable for a particular floor(s)/ area to be demarcated as NPA or whether the same would not be available to all common infrastructure and facilities of the entire SEZ.</p>	<p>As per Rule 11B(9) of the SEZ Rules, no tax benefits shall be available on the operation and maintenance of common infrastructure and facilities of an IT/ ITES SEZ. The reference is to all common infrastructure and not to only the area to be demarcated as NPA.</p>
<p>Whether repayment of tax benefits on Plant & Machinery (capital goods) in stock will be at depreciated value as provided under Rule 49 of the SEZ Rules.</p>	<p>Rule 49 would apply only in respect of clearance of Plant & Machinery pertaining to Rule 11B(5)(i) of the SEZ Rules. However, if the benefit is availed under Rule 11B(5)(ii) of the SEZ Rules, all the tax benefits are required to be repaid.</p>

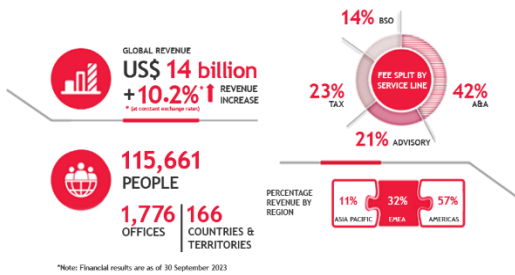
ISSUES	CLARIFICATION
<p>Whether the Developers can be permitted to convert an area into NPA based on an undertaking that the Developer will refund all the concessions availed after undertaking final computations which are assessed correctly and accepted by the SO.</p>	<p>No. Under Rule 11B(5) of the SEZ Rules, demarcation of NPA can be permitted only after the repayment of benefits.</p>
<p>In cases where it is possible to segregate the basement(s) and other utilities for exclusive use by the SEZ units, can the Developer adopt a position that repayment of tax on such part of the built-up area is not required?</p>	<p>Yes. Repayment of benefits is not required in such cases, provided that such segregation is possible and permissible as per the SEZ Rules.</p>
<p>Whether repayment of tax benefits already availed on goods and services used/ consumed for Operation and Maintenance of SEZ are required.</p>	<p>As per Rule 11B(9) of the SEZ Rules, no repayment of tax benefits on Operation & Maintenance is envisaged for demarcated NPA for the setting-up and operation of businesses engaged in IT/ITES.</p>
<p>After repayment and surrender of tax benefits on the common built-up infrastructure and amenities (like cafeteria, hubs), whether such amenities can be used by the Domestic Tariff Area (DTA).</p>	<p>On repayment of benefits under Rule 11B(5)(ii) of the SEZ Rules, the common infrastructure shall attain similar usages as dual-use NPA under Rule 11A(1) of the SEZ Rules, subject to compliance with the other provisions of the SEZ Rules.</p>
<p>Whether a Developer would be required to repay the taxes on social and commercial infrastructure (without interest) while the industrial infrastructure would remain duty-free.</p>	<p>As per Rule 11B(5)(ii) of the SEZ Rules, common infrastructure would include all infrastructure and other facilities for common usage between the SEZ units and non-SEZ IT/ ITES units in the SEZ.</p>
<p>Whether a Developer/ Co-Developer can demarcate a portion of the 'land' as NPA that can be used for developing office space and infrastructure to be used/ leased for IT/ ITES units for domestic business.</p>	<p>Rule 11B of the SEZ Rules only provides for demarcation of built-up space in IT/ ITES SEZ. However, it is not applicable for a vacant land.</p>
<p>Whether Board of Approval/ Unit Approval Committee will monitor the units coming into the demarcated NPA as per Rule 11B of the SEZ Rules.</p>	<p>No.</p>
<p>Whether the social or commercial infrastructure and other facilities (under Rule 11B(5)(ii) of the SEZ Rules) and common infrastructure and facilities (under Rule 11B(9) of the SEZ Rules) would include internal roads, common parking facilities, sewage, drainage, food courts/ hubs, utilities like generation and distribution of power including power back-up, HVAC facilities.</p>	<p>Yes. Common infrastructure would cover all infrastructure attributable for common usage between the SEZ and non-SEZ units in the IT/ ITES SEZ.</p>
<p>In case of SEZ developed by the Government where the land was allotted to Co-Developers for creating infrastructure and built-up space for IT/ ITES -</p> <ol style="list-style-type: none"> Whether any of the Co-Developers can go for demarcation of NPA out of their own space (within limits), without having any bearing/ dependency on the Developer/ other Co-Developers in the same SEZ. Whether the Developer who has created roads/ water/ drainage, etc. is also required to pay back the benefits availed (if any). 	<p>Ideally, consent of the Co-Developers is required. However, the Board of Approval may relax this condition on the merits of the case.</p>

ISSUES	CLARIFICATION
In case of an SEZ developed by the Government where the land was allotted to Co-Developers for creating infrastructure and built-up space in IT/ ITES, whether the restriction on availment of tax benefits for operational and maintenance of common infrastructure would be limited to such common infrastructure in the building in which the floor space is to be demarcated.	Rule 11B(9) of the SEZ Rules provides that no tax benefits shall be available on the operation and maintenance of common infrastructure and facilities of such an IT/ ITES SEZ and not just the common infrastructure in the building.
Whether insertion of Rule 11B of the SEZ Rules is beyond the statutory provisions of the Special Economic Zones Act, 2005 (SEZ Act).	No.
Whether the benefits on Operation & Maintenance of common infrastructure facilities shall be available for the PA, if the unit is clearly able to allocate costs separately for PA and NPA, based on per square feet calculation.	No.
Whether a demarcated area can be opened for non-IT and ITES companies?	No.
Whether outsiders can be entertained in the NPA like in dual-use case.	There must be access control mechanism for IT/ ITES NPA units as per Rule 11B(4) of the SEZ Rules.
Whether demarcation of area can be made at the time of construction.	Rule 11B of the SEZ Rules is applicable only for demarcation of space in the existing built-up complete floor area in IT/ ITES SEZ as NPA for setting up of non-SEZ IT/ ITES units. This can be done, irrespective of the location of the building in the SEZ.
Once demarcated, whether the space can be leased out for other commercial activities like restaurants, hotels, etc.?	Only IT/ ITES units are permitted to be set up under Rule 11B of the SEZ Rules.
What shall be the mechanism for access control and movement of common employees?	Jurisdictional Unit Approval Committee to specify the mechanism for access control and movement of common employees based on specific requirements of the SEZ after considering the risk profile of each SEZ on a case-to-case basis.
Does there exist an additional requirement/s for scrutiny/ verification of goods being procured by units in NPA?	No.
Can NPA comprise of living area or housing for employees/ guests without tax benefits?	No.
What are the compliance requirements for units in NPA created by demarcation?	Compliance requirements for IT/ ITES NPA units will be at par with DTA units for administration of Central/ State/ local government laws.
What is the nature of tax benefits to be repaid at the time of demarcation of NPA?	In line with Rule 11A(1) of the SEZ Rules, the tax benefits to be repaid include customs duties, central excise duty, CGST, SGST, IGST and such other central levies and tax benefits already availed by the Developer.
How would the rule affect the determination of place of supply for goods and services within SEZ, from a GST perspective?	IT/ ITES units set up under Rule 11B in the NPA of IT/ ITES SEZ would be subject to GST or any other law, as applicable.
Whether the businesses operating in NPA would also be subject to other State legislations.	Such units are not 'SEZ units' set up in PA and hence, are not envisaged to get the benefits extended by the State Government under Section 50 of the SEZ Act or otherwise to the SEZ units.

[Source: Instruction No. 115 dated 9 April 2024]

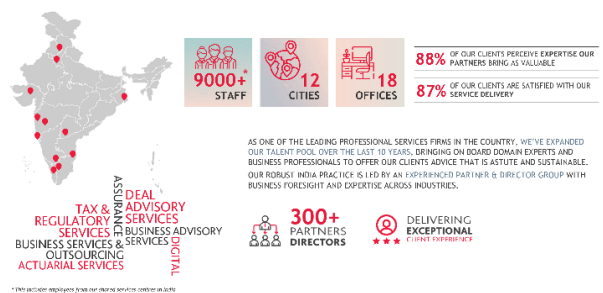
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