

Kerala High Court holds Rule 96(10) of CGST Rules as *ultra vires* the provisions of the GST Law



Legislative Provisions

- Section 16 of Integrated Goods and Services Tax Act, 2017 (IGST Act) *inter alia* provides that in respect of zero-rated supply (including export) of goods/ services, the supplier shall have the following options:
 - **Option I:** Undertake zero-rated supply without payment of IGST under Bond/ Letter of Undertaking (LUT) and claim refund of unutilised input tax credit (ITC) on inputs/ input services (as per Section 54 of the Central Goods and Services Tax Act, 2017 (CGST Act) read with Rule 89 of the CGST Rules); or
 - **Option II:** Undertake zero-rated supply on payment of IGST and claim refund of IGST paid on such supplies (as per Section 54 of the CGST Act read with Rule 96 of the CGST Rules)
- Rule 96(10) of the CGST Rules (dealing with refund of IGST paid on exports) specifically barred an exporter to claim refund of goods/ services exported ‘on payment of IGST’ (and consequently claim refund) in case the benefit of prescribed notifications (such as under EPCG, as an EOU / STPI, Merchant Exports, etc.) is claimed on its procurements¹. However, Rule 89 of the CGST Rules (dealing with the refund of accumulated ITC by an exporter) does not impose a similar restriction.
- Considering the above, various Petitioners (Taxpayers) had challenged the validity of Rule 96(10) of the CGST Rules *inter alia* on the ground that the said sub-rule unjustly restricts the eligibility to export goods/ services on payment of IGST.

Legislative Provisions

- Rule 96(10) of the CGST Rules takes away the right of an exporter to claim refund of IGST which is a right granted by the substantive provision of the IGST Act viz., Section 16 of the IGST Act.
- Unlike Rule 96(10) of the CGST Rules, Rule 89 of the CGST Rules does not restrict the right of an exporter to claim refund even if certain inputs are procured after availing the benefit of prescribed notifications (such as under EPCG, as an EOU/ STPI, Merchant Exports, etc.). This leads to an anomalous situation where an exporter who is otherwise on the same footing, will get the benefit of refund of taxes paid if he opts for Option I above but will not get benefit when he opts for Option II above.
- It is well settled that a subordinate legislation has to be subservient to the plenary legislation and the introduction of restrictions as provided in Rule 96(10) of the CGST Rules is contrary to the express provisions of Section 16 of the IGST Act (See *Shayara Bano Vs. Union of India [(2017) 9 SCC 1]* and *Union of India Vs. Intercontinental Consultants and Technocrats Pvt. Ltd. [(2018) 4 SCC 669]*).
- Relying on the Supreme Court ruling in *Union of India Vs. VKC Footsteps Ltd. [(2022) 2 SCC 603]*, it was contended that a restriction on the right to claim a refund of IGST paid can only be justified if it is explicitly contemplated by the plenary law (i.e., the GST law in this case).
- It is also well settled that where a statutory provision produces a manifestly absurd and unjust result, which could never have been intended by the Legislature, the Court may modify the language used by the Legislature or even ‘do some violence’ so as to achieve the obvious intention of the Legislature or produce a rational construction (See *K.P. Varghese Vs. Income Tax Officer [(1981) 4 SCC 173]*).
- A comparison of Rules 89 and 96 of the CGST Rules show that there has been an unreasonable classification among the exporters who may opt to seek refund of unutilised ITC by filing a Bond / LUT vis-à-vis the exporters opting to pay IGST on exports. Such distinction was never authorised by the statute and hence, Rule 96(10) of the CGST Rules is liable to be struck down as *ultra vires* Section 16 of the IGST Act as also being manifestly arbitrary and unreasonable.
- The phrase ‘*subject to such conditions, safeguards and procedures as may be prescribed*’ in Section 16 of the IGST Act does not refer to condition, safeguards and procure regulating the right to refund and only provides that sufficient condition, safeguards and procedure may be prescribed by the rule-making authority to ensure that there is no leakage of revenue.
- Further, Sections 54(3) and 54(4) of the CGST Act do not authorise imposition of a restriction contemplated by Rule 96(10) of the CGST Rules.
- Relying on *Zenith Spinners Vs. Union of India [2005 SCC OnLine Guj 601]* (affirmed by Supreme Court in *[2020 (14) SCC 520]*), it was contended that the phrase ‘*conditions, safeguards and procedures*’ mentioned in Section 16(3)(b) of the IGST Act read with the phrase ‘*conditions, limitations and safeguards*’ in Section 54(6) of the CGST Act cannot be interpreted to empower the Government to impose a complete restriction so as to take away the right provided under the GST law.

¹ Vide Notification No. 20/2024-Central Tax dated 8 October 2024, Rule 96(10) has been omitted prospectively i.e., with effect from 8 October 2024. Our alert on the notification can be accessed by clicking here.

Contentions of the Tax Authority

- The right to claim refund under Section 16 of the IGST Act is always subject to Section 54(6) of the CGST Act. Further, relying on the phrase ‘*subject to such conditions, safeguards and procedures as may be prescribed*’ in Section 16 of the IGST Act (both prior to 1 October 2023 and with effect from 1 October 2023) and also on Section 54(6) of the CGST Act, it was contended that refund of IGST where zero-rated supply of goods/ services is made will always be subject to such conditions, limitations and safeguards as may be prescribed. Thus, Rule 96(10) of the CGST Rules is not *ultra vires* Section 16 of the IGST Act.
- The Parliament has consciously given the right to impose such conditions, limitations and safeguards, as may be necessary in light of the fiscal objectives, to the rule-making authority. Hence, the Courts must not lightly tinker with the working of a rule in the nature of Rule 96(10) of the CGST Rules.
- The Supreme Court, in *VKC Footsteps (supra)*, has held that the right to claim refund is not absolute. Thus, Rule 96(10) of the CGST Act conforms to the vires of Section 16 of the IGST Act. Further, Rule 96(10) of the CGST Rules must be interpreted in the manner in which an exemption notification is interpreted. It is well settled that in case of any doubt, the interpretation of an exemption notification must be in favour of the Revenue.
- Reliance was also placed on *Union of India and Ors. Vs. Willowood Chemicals Pvt. Ltd. and another [2022 (9) SCC 341]* to contend that a refund can be granted only in accordance with the rules and not dehors the Rules.
- An exporter has an option to adopt either of the options (Option I or Option II) as contemplated by Section 16 of the IGST Act and it is for the exporter to opt for a more beneficial method.

Observations and Ruling of the High Court

- Although the issue arising in the writ petitions relate to the period prior to the amendment of Section 16 of the IGST Act i.e., prior to 1 October 2023, in substance the said provision (both before and after the amendment) does not restrict the right of an exporter to claim refund of IGST paid on exports or claim refund of unutilised ITC on inputs and input services.
- Rule 96 of the CGST Rules has undergone various amendments from time to time. However, the history of the amendments and the reasons for these amendments are not relevant to examine the validity of Rule 96(10) of the CGST Rules.
- The Supreme Court ruling in *VKC Footsteps (supra)* was dealing with a restriction imposed by the plenary legislation (in form of the CGST Act) whereas in the present case, it is evident that the subordinate legislation (i.e., the CGST Rules) has travelled beyond the scope of the plenary legislation (i.e. GST Law).
- The phrase ‘subject to such conditions, safeguards and procedures as may be prescribed’ in Sections 16(3)(a) and 16(3)(b) of the IGST Act and the provisions of Section 54 of the CGST Act do not authorise the imposition of restrictions in such a manner that it would completely take away the right granted under Section 16 of the IGST Act.
- Rule 96(10) of the CGST Rules creates a restriction on the right to claim refund that is not contemplated by Section 16 of the IGST Act. Hence, Rule 96(10) of the CGST Rules is *ultra vires* Section 16 of the IGST Act and is manifestly arbitrary (as per the law laid down in *Shayara Bano (supra)*) and the said provision produces absurd results, not intended by the Legislature.
- It was also noted that Rule 96(10) of the CGST Rules was deleted with effect from 8 October 2024. However, as the deletion is prospective, it does not impact the ongoing cases where the refund of IGST has either already been denied or is proposed to be denied. Hence, notwithstanding the said deletion, the Court ruled on the validity of Rule 96(10) of the CGST Rules for the prior period.
- In view of the above, Rule 96(10) of the CGST Rules was held to be *ultra vires* the provisions of Section 16 of the IGST Act and is therefore, unenforceable on account of being manifestly arbitrary.

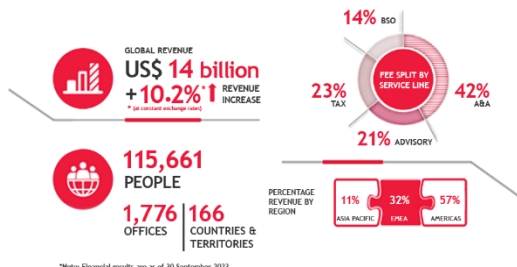
BDO India Comments

The restriction to claim refund of IGST paid on exports under Rule 96(10) of the CGST Rules had been a significant area of dispute between the Taxpayers and the Revenue Authorities, with the Taxpayers approaching various High Courts, challenging the validity of Rule 96(10) of the CGST Rules. This judgment, deciding the issue on the basis of a cardinal principle of law, i.e. Rules cannot travel beyond the provisions in the Act and holding the restriction under Rule 96(10) as *ultra vires* Section 16 of the IGST Act, would be welcomed by the Taxpayers at large. Since the Government has already removed this restriction under Rule 96(10), with effect from 8 October 2024, it would be interesting to see whether the Government challenges this ruling or allows the issue to be settled based on this judgment for the past period as well. The Taxpayers who have ongoing disputes or have already repaid the amount of refund claimed (along with interest demanded by the tax authorities), would need to closely assess the way forward to avail remedies available to them.

[Sance Laboratories Pvt. Ltd. Vs. Union of India and Ors. [TS-700-HC(KER)-2024-GST]]

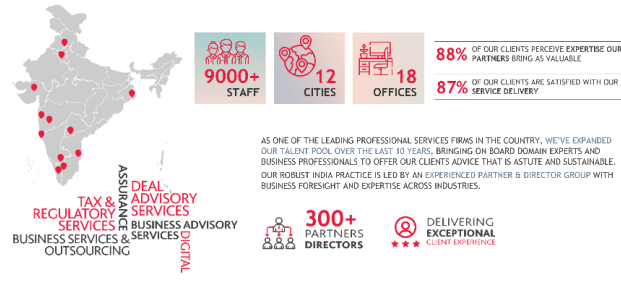
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