

## Amended Rule 89(4)(C) capping export turnover cannot be applied retrospectively for computing refund of accumulated ITC – Delhi HC

11 October 2023



## Summary

The Delhi High Court (HC) has held that the amended Rule 89(4)(C) of the Central Goods and Services Tax Rules, 2017 (CGST Rules), which restrict refunds by capping export turnover, will not be applicable prior to 23 March 2020, i.e., the date from which it came into effect. The HC rejected the department's contention that provisions are procedural in nature and have a retrospective application. It was held that the right for a refund of accumulated ITC arises on the date when the goods are exported, and the 'turnover' refers to the period during which the supplies are made. In view of the above, the HC set aside the refund rejection order of the appellate authority.

## Facts of the case

- M/s. Indian Herbal Store Pvt. Limited (the petitioner) had filed refund applications for the period from 1 October 2018 to 30 September 2019. The department rejected the same on two grounds, i.e., non-submission of the Foreign Inwards Remittance Certificates (FIRC) and the computation of the eligible export turnover not complying with Rule 89(4)(C) of the CGST Rules.
- The appellate authority upheld the refund rejection orders because the export turnover was not in accordance with Rule 89(4)(C) of the CGST Rules.
- The petitioner was aggrieved by the impugned orders and preferred the present petition. The petitioner also challenged the constitutional vires of Rule 89(4)(C) of the CGST Rules.
- The department contended that Rule 89(4)(C) of the CGST Rules is a procedural provision to calculate the refund, and therefore, the amended clause is applicable retroactively.

## Delhi HC's observations and judgement [W.P.(C) 9908/2021; Order dated 15 September 2023]

- **Amended rule restricts the value of export turnover for calculating refund:**

The HC analysed the rule amended w.e.f. 23 March 2020 and stated that after the amendment, the turnover of the zero-rated supplies would mean the value of the zero-rated supplies actually made during the relevant period without tax payment, or 1.5 times the value of similarly placed domestic supplies, whichever is less. Accordingly, even if the value of zero-rated supplies exceeds 1.5 times the value of similarly placed domestic supplies, for the purpose of computation of refund, the export turnover shall necessarily be the value that is 1.5 times the value of similar goods domestically supplied. Accordingly, the refund of ITC is restricted by capping the value of the export turnover.

- **Amended rule applicable prospectively:** The HC rejected the department's contention that the rule is retroactive. The HC found that the appellate authority erred in applying the amended rule for computing the assessee's export turnover. The HC referred to the refund provisions and held that the right to refund the accumulated ITC is crystallised on the date the subject goods are exported. Further, the HC clarified that the term 'turnover' has to be interpreted in relation to the period it

relates to. Therefore, the ITC relating to the turnover of a period must be calculated in accordance with the rules in effect at the time.

- **Amended rule struck down:** The HC stated that the Karnataka HC, in the case of M/s. Tonbo Imaging India Pvt. Ltd.

struck down the amended rule. The HC ruled that if a statute or a statutory position is declared *ultra vires* the Constitution of India, it is retroactive to the date it was issued. Accordingly, at present, the amended provisions are not in existence.

### Our comments

Pertinently, Rule 89(4)(C) restricts the refund quantum where the exports are made without the payment of IGST under a LUT/bond. This leads to discrimination between the exporters who export goods under the LUT and claim a refund of accumulated ITC vis-a-vis exporting goods with tax payment. Therefore, on this account, the Karnataka HC, in the case of Tonbo Imaging India Private Limited, had invalidated the amended Rule 89(4)(C) of the CGST Rules and declared it to be in violation of Article 14 and Article 19(1)(g) of the Constitution.

The Delhi HC relied upon the above ruling and concluded that the amended provisions are non-existent as of date. This is a favourable judgement for the exporters seeking a refund of accumulated ITC on account of exports and may set precedence in mitigating similar scenarios.

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