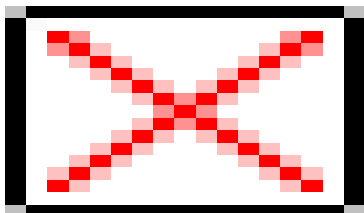


Refund of unutilised ITC in case of exports on CIF basis- A deep dive

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Golhas come a long way in transforming India into an export powerhouse. Amongst others, the Government has steadily promoted its ideology of 'Export goods, no taxes' and make the Indian products competitive in international market. The Goods and Services Tax ("GST")

Laws have also been drafted in line with the said principle such that, *interalia*, exports qualify as zero-rated supply ¹ and that tax incidence suffered at the procurement stage is being remitted and/or refunded to the exporter in accordance with Section 54 of the Central Goods and Services Tax [Act, 2017](#) ('CGST Act') read with the relevant rules framed thereunder.

However, in spite of several initiatives taken to allay the apprehensions that the exporters were facing under the GST laws, certain issues which are troubling the trade and industry at large and need the attention of the Government still persist. In this article, we shall deliberate on one such issue relating to refund of unutilized input tax credit in case of export of goods on CIF basis. The said issue has recently garnered a lot of interest owing to the amendment in Rule 89(4) of the Central Goods and Services Tax [Rules, 2017](#) ('CGST Rules') ² vide Notification No. [14/2022](#)-Central Tax dated July 5, 2022 ('[Notification No. 14/2022](#)').

As per the accepted industry practice, an exporter of goods may enter into different kinds of contracts with the overseas buyers viz. Free on Board ('FOB')

, or Cost, insurance & freight (CIF) basis, depending upon the business requirements. In case of FOB transaction, the exporter is relieved of all responsibility once the goods have been loaded on to the vessel at the loading port. However, in case of CIF transaction, the exporter is entrusted with the responsibility of delivering the goods at the location of the overseas buyers and bears the cost of transportation of goods along with insurance charges.

The current issue being examined pertains to a contract between the parties for export of goods on CIF basis. The amount negotiated and agreed with the overseas buyer for CIF contract is the total amount charged against the supply and received through normal banking channels. Such CIF value of goods received from the buyer becomes the transaction value in accordance with Section 15 of the CGST Act. Further, at the time of export, a tax invoice is issued by the exporter duly reflecting the CIF value of exports and the same is also disclosed in the statutory GST returns. A Shipping Bill is also filed by the exporter wherein it is compulsorily required to provide the details of the FOB value of the goods, freight, and insurance along with the incoterms of the transaction (i.e., CIF in the instant case).

Consequently, the exporter of the goods is granted refund of accumulated input tax credit of inward supplies which are used in effecting zero-rated supply (exports) without payment of tax under bond/letter of undertaking. Such refund is granted on the basis of formula prescribed under Rule 89(4) of the CGST Rules, which inter alia provides and considers the '**turnover of zero-rated supply of goods**' and reads as under:

"(C) "Turnover of zero-rated supply of goods" means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking or â€";"

For the purposes of arriving at the 'value of zero-rated supply of goods', the CIF value of the goods was being considered as the transaction value, which was also reflected in Tax Invoice and Shipping Bill for claiming refund. Since the values declared under the tax invoice and

Shipping Bill were identical (except for minor adjustment on account of foreign exchange fluctuation), the exporters claimed refund based on the CIF value of the goods exported.

The aforesaid position followed by the exporter was in sync with [Circular No. 37/11/2018-GST dated March 15, 2018](#), issued by the CBIC, wherein it had been clarified as under:

"9. Discrepancy between values of GST invoice and shipping bill/bill of export:

It has been brought to the notice of the Board that in certain cases, where the refund of unutilized input tax credit on account of export of goods is claimed and the value declared in the tax invoice is different from the export value declared in the corresponding shipping bill under the Customs Act, refund claims are not being processed. The matter has been examined and it is clarified that the zero rated supply of goods is effected under the provisions of the GST laws. An exporter, at the time of supply of goods declares that the goods are for export and the same is done under an invoice issued under rule 46 of the CGST Rules. The value recorded in the GST invoice should normally be the transaction value as determined under section 15 of the CGST Act read with the rules made thereunder. The same transaction value should normally be recorded in the corresponding shipping bill / bill of export.

9.1 During the processing of the refund claim, the value of the goods declared in the GST invoice and the value in the corresponding shipping bill / bill of export should be examined and the lower of the two values should be sanctioned as refund."

The said clarification was re-iterated in Para 47 of Circular No. 125/44/2019-GST dated November 18, 2019 issued by CBIC. Accordingly, where the CIF value in the shipping bill and tax invoice was the same, such value was considered for the purpose of sanction of refund.

However, recently, in certain cases involving CIF contracts, the departmental authorities started considering the FOB Value in the shipping bill for computing the turnover of zero-rated supply of goods while determining the refund of unutilized input tax credit in terms of Rule 89(4) of the CGST Rules. The said mechanism was adopted pursuant to an

Internal Circular bearing No. CBEC 20/16/34/2019-GST/1768 dated November 16, 2020 ('**Internal Circular**'), issued by Central Board of Indirect Taxes ('**CBIC**')

and addressed to the Principal Chief Commissioner/ Chief Commissioner of Central Tax. The relevant extract thereof is reproduced herein-below:

"2. The office of C&AG has made certain observations with respect to the above in its DAP No. 57/GST/2019-20 , wherein it has observed that there have been cases in field formations where sanctioned refund for zero-rated supplies (made without payment of tax) has been made considering invoice bill value of its supplies instead of the value (FOB) of their corresponding shipping bills even when shipping bill (FOB) value of the supplies was lower than the corresponding invoice value. Thus, this has resulted in excess payment of refund.

3. In this regard, it has been decided that the offices under your jurisdiction shell examine all such cases and take appropriate action in accordance with law in a time-bound manner. "

Correspondingly, it is only plausible to infer that the FOB value in the shipping bill was adopted for exports made on CIF basis in line with the observation made by the office of C&AG in its DAP No. 57/GST/2019-20, which seeks to disallow certain amount of refund by restricting the value of zero-rated supply to the FOB Value in a generic manner, without examining whether the nature of transaction is FOB or CIF.

The aforesaid position adopted by the C&AG appears to have gained legal sanctity vide the Notification No. [14/2022](#) -CT. Vide the said Notification, an explanation has been inserted in Rule 89(4) of the CGST Rules. The relevant extract of the said Notification is provided herein-below for ease of reference:

"Explanation. â€“ For the purposes of this sub-rule the value of goods exported out of India shall be taken as â€“

(i) the Free on Board (FOB) value declared in the Shipping Bill or Bill of Export form, as the case may be, as per the Shipping Bill and Bill of Export (Forms) Regulations, 2017; or

(ii) the value declared in tax invoice or bill of supply,

whichever is less."

Post amendment, the value of goods exported out of India would be taken as lower of Invoice or FOB value reflected in the shipping bill. Consequently, the refund under CIF contracts shall be restricted to the FOB value instead of the CIF value, which was earlier considered as the transaction value by the exporter. Thus, by adopting such value, the amendment seems to have ignored a crucial aspect dealing with the refund implications under the GST laws "whether the nature of the supply is on FOB or CIF basis.

In our view, to the extent the exporter is exporting goods under CIF Contracts, the aforesaid amendment restricting the value of refund without considering the nature of supply is far-fetched, as it overrides the provisions of GST laws relating to refund based on the value of zero-rated supply **3** of goods made during the relevant period, which is to be determined as per the transaction value **4** of such goods. Be that as it may, the amendment also seems to be discriminatory and violative of Article 14 of the Constitution inasmuch as it carves out an exception by providing lower refund to an exporter supplying goods on CIF basis vis-à-vis an exporter supplying goods on FOB basis, without any rationale. The amendment, therefore, restricts the refund whilst ignoring the fact that the exporters undertaking exports on CIF basis are earning more foreign exchange than those undertaken on FOB basis. It also dilutes the earlier correct legal position as laid down vide Para 9 of Circular No. 37/11/2018-GST, which restricts refund to lower of Invoice or Shipping Bill Value only and does not consider the word "**FOB**" as akin to "**Shipping Bill**" in case of CIF contracts.

Whilst on the issue, it may also be noted that another bone of contention in the aforesaid amendment made by "insertion" of the explanation would be whether the same is prospective or retrospective in nature. It is a settled position of law that where the explanation introduces a new provision and is not clarificatory in nature, it would have prospective effect. This view is also fortified by the fact that the position on the said issue had been clarified by CBIC itself vide the Circular No. 37/11/2018 earlier to consider the lower of Invoice or shipping bill value. Therefore, one may contend that the amendment to consider lower of FOB and invoice value is not retrospective and would be applicable with effect from July 5, 2022.

Having said that, the aforesaid legal position fails to address the difficulties faced by the exporters supplying goods on CIF basis inasmuch as it would essentially lead to substantial blockage of working capital. Such action of denial of refund would act as a deterrent to the entire export community and is evidently against the intent of the Government to stimulate exports.

One can only hope that the GST Council urgently intervenes in addressing the problems faced by the exporters by recommending a suitable amendment in the matter.

[The views expressed are strictly personal.]

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1 Section 16(1) of the Integrated Goods and Services Tax [Act, 2017](#) ('IGST Act').

2 Reference invited to provisions of CGST laws would invite similar reference to the respective State GST laws

3 Section 16(1) "zero rated supply" means any of the following supplies of goods or services or both, namely:-

- export of goods or services or both; or

4 Section 15 of the CGST Act

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