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CBIC GUIDELINES ON ISSUANCE OF REFUND ORDERS AND POST AUDIT REVIEW

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Recently, the Central Board of Indirect Taxes and Customs (CBIC) issued Instruction No. 03/2022 - GST dated 14 June 2022 (CBIC Instruction) prescribing guidelines and procedures to be followed in issuance of refund orders and post audit review, by the officers of the CBIC ('Tax Department'). Noting the provisions pertaining to review of orders under Goods and Services Tax ('GST'), the CBIC Instruction recognizes the divergent practises being followed by the Departmental Authorities across the country in sanctioning refund claims - where certain refund orders are speaking orders issued with detailed reasons, whereas others are non-speaking orders. To obviate this divergence and ensure consistency, the present CBIC Instruction seem to have been issued.

Need for and legislative backdrop to the CBIC Instruction

The issuance of the CBIC Instruction can be contextualised in the backdrop of law governing exercise of review jurisdiction by superior authorities. Here, we must also examine the legislative backdrop under GST *vis a vis* issuance of the CBIC Instruction.

The statutory pedigree behind issuance of the CBIC Instruction is drawn from Section 107 (2) of the Central Goods and Services Tax Act, 2017 ('CGST Act'). Section 107 (2) confers a power of review on the Commissioner to "*call for the record*" and examine the "*legality or propriety*" of any order passed by the Adjudicating Authority, within 6 months from its issuance. Therefore, in order to invoke review jurisdiction, the Revenue Department must show that the order suffers from illegality or impropriety.

The ambit of the words 'legality' or 'impropriety' has seen conflicting judicial discourse in the past, which was settled by a 5 Judge bench of the Supreme Court in *Dilbahar Singh*¹ case. The Supreme Court clarified that while exercising the power of review, a superior authority cannot act as an appellate authority. The role of the revisionary authority is limited to examining the process of consideration of the material evidence to form a view regarding the legality or propriety of the order. They cannot reappreciation/ re-examine the evidence recorded or pass an order on merits. A revisionary authority can interfere with the order of the lower authority in cases where a perverse finding has been recorded without consideration of the material evidence or relying upon wholly irrelevant material.

The CBIC Instruction

With an intent to clarify the requisite procedural safeguards failing which the orders are susceptible to review jurisdiction, the CBIC Instruction provides for a gamut of details to be furnished in the refund order. The CBIC Instruction can be compartmentalised into two

¹ [HPCL vs. Dilbahar Singh (2014) 9 SCC 78]

divisions – (1) Category-wise segregation of details to be captured in the refund order; (2) Guidelines to be followed for review of refund orders.

A brief summary of the same is provided in the points below:-

Category 1

- Details outlined in Para 2.1.1 (A) of the CBIC Instruction must be furnished for all categories of refund claim. These include substantive aspects that the refund order must deal with including - whether the refund claim is time barred; whether the taxpayer is not unjustly enriched including appropriate documentary evidence; whether applicant's submissions and case laws relied upon have been discussed, etc. That apart, other procedural aspects like details of deficiency memo, period of refund claim, issuance of show cause notice (SCN) and details of reply, details of documents filed along with the refund claim, filing of returns by the applicant, are other aspects which must also be mentioned in the refund sanction order.
- Specific to refunds arising out of export, supplies to special economic zone units and inverted duty refund, requirement of additional details has been spelt out. These include facets like computations pertaining to turnover, Net Input Tax Credit (ITC), verification of ITC admissibility as per law; compliance with other legal requirements set out in Section 54 of the CGST Act, etc.
- In case of refund claims for deemed export supplies, adherence to the necessary procedure while making procurements must *inter alia* be detailed.
- Separately where refund arises out of excess balance in cash ledger, details like debit of the amount from the electronic cash ledger and computation of the refund in accordance with Section 49 (6) of CGST Act are required to be provided.
- Where refund has arisen under the residuary category then the refund sanction order must mention the documents furnished along with the refund claim and their verification from GSTR1, GSTR3B returns and ICEGATE portal wherever required.

Category 2

- For post audit and review of refund orders, the CBIC Instruction provides that post-audit would be conducted for refund claims over the threshold limit of INR 100,000. All refund orders are required to be transmitted to the review module within 7 days of issuance of the refund order. A time bound procedure for completion of post-audit and consequent communication to the review branch, within three months has been contemplated. In all cases, the review of refund orders is required to be completed at least 30 days prior to the expiry of the six-month time period under section 107 (2) of the CGST Act.

Comments

As stated earlier, it is trite in law that review jurisdiction can only be exercised for testing the legality or propriety of the decision-making process and not the decision on merits *per se*. To the extent the CBIC Instruction provides additional procedural nuances and safeguards to be followed for issuance of refund orders, it appears to have been rightly guided by the existing jurisprudence.

Interestingly, the Courts have often sparred with the question of whether the reviewing authority has exceeded its jurisdiction by reviewing an order which was not illegal or

improper to begin with. For instance, where the assessing officer classified chillers under a particular entry, then re-classification under a separate entry by the Commissioner in an order for review was held to be bad in law.²² The Supreme Court affirmed the tribunal's³³ order that the Commissioner in review could not have relied upon new material and passed the order upon points not arising out of the order of the subordinate authority. Similarly, the Supreme Court held that in a review jurisdiction, the revisionary authority cannot assess the amount of escaped turnover relying upon new facts.⁴⁴ On the other hand, where exemption was granted to accessories and the assistant collector granted refund to spares by a cryptic order without relying upon any tangible material to ascertain whether such spares were accessories or not, the Court held it amenable to review jurisdiction.⁵⁵

Since lack of procedural regularity can taint the order as amenable to review, the present CBIC Instruction will assist the Tax Department in identifying orders which need to be reviewed. As such, the Tax Department may seek to review orders which have not been issued following the detailed instructions. Alternatively, where the refund order does not disclose the details specified in the CBIC Instruction, it furnishes an additional ground of challenge for Taxpayers to question the refund rejection orders.

All future refund/ sanction orders would necessarily be required to comply with this CBIC Instruction and taxpayers applying for refunds ought to be cognizant of the same while filing their refund claims.

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² [CCE v. Carrier Aircon Ltd., (2005) 11 SCC 421]

³ [Customs Excise Service Tax Appellate Tribunal]

⁴ [Dy. Commr. of Agricultural Income Tax v. Dhanalakshmi Vilas Cashew Co., (1970) 3 SCC 273]

⁵ [Commr. of Customs (Sea) v. Ballarpur Industries Ltd., (2001) 8 SCC 594]