

Furnishing detail of shipping bill is not required to claim a refund of unutilised ITC in case of export of electricity - Andhra Pradesh HC

23 September 2022



Summary

The Andhra Pradesh High Court (HC) held the amendment to Rule 89 viz. refund of unutilised ITC on electricity export as 'retrospective'. The HC, with respect to the maintainability of writ petitions, ruled that the availability of an alternative remedy does not preclude the writ petitions from being maintained. The HC further observed that the submission of shipping bills as proof of export cannot be made applicable for the refund of electricity, as it is a customs document. Since the Custom Law does not refer to electricity, it is impossible to produce the shipping bills. Further, the amendment in the rule clarified that obtaining data from RPCS or REA regarding electrical energy generation and transmission across the border can be used as a base to show the number of electricity transmitted and supplied across the border. Thus, the HC stated that the rule, along with the amendment, cannot curtail the ITC benefit. Besides, the HC relied on 'CBIC's clarification on the procedure for filing and processing refund of unutilised ITC on electricity export and ruled that the amended rule is only clarificatory in nature.

Facts of the case

- The identical arguments were raised in seven writ petitions, of which three¹ were filed against the order-in-appeal and four² against the decision of the Deputy Commissioner of Central Tax.
- The writ petition filed against the order in appeal³ upholding the order rejecting refund was taken as a lead petition.
- A Memorandum of Understanding (MOU) existed between India and Bangladesh for electricity supply. After winning the BPDB procurement, the petitioner⁴ engaged in Power Purchase Agreements (PPAs) with the BPDB⁵ to supply electricity/electrical energy as per the provisions⁶.
- As per the regulations, the participating entity needs to obtain the approval of the designated authority appointed by the CEA⁷. Accordingly, the petitioner had obtained the necessary approvals. Further, the REA⁸ report⁹ indicates the electricity units transmitted by each electricity supplier to a particular recipient and the destination where the electricity is supplied.
- The petitioner had filed a refund of unutilised ITC¹⁰ on account of the export of electricity¹¹. The authorities requested the petitioner to submit documents,

¹ W.P.Nos.11194, 11206 & 11263 of 2021

² W.P.Nos.11198, 17275, 28836 & 30292 of 2021

³ No.GUN-GST-000-APP-001-20-21 GST

⁴ Sembcorp Energy India Ltd

⁵ Bangladesh Power Development Board

⁶ Indian Electricity Act, 2003 and the Rules and Regulations made thereunder

⁷ Central Electricity Authority

⁸ Regional Energy Account

⁹ monthly report issued by the Southern Regional Power Committee, which is a unit of Central Electricity Authority of Government of India,

¹⁰ Section 54 of CGST Act 2017

¹¹ Section 16 of IGST Act 2017

including a declaration that included the number and date of shipping bills/ bills of export. The petitioner provided all the required documents except for the shipping bill, for which it provided a letter stating that the shipping bill would not be available and that the Customs Law did not require the filing of a shipping bill or any other document showing the export of electrical energy.

- After that, the petitioner received a show cause notice wherein the refund was partially rejected because the delivery of electricity could not be deemed as an 'export of 'goods' since the petitioner had not included a shipping bill and an export general manifest with the refund application. Further, the petitioner filed an appeal. However, the refund was rejected on the grounds that there is no legal provision that exempts the submission of a shipping bill in connection with the export of electricity and that the adjudicating authority cannot be expected to overlook the lack of a shipping bill.
- Thus, the present writ petitions were filed by the aggrieved petitioners.
- The petitioner argued that the shipping bill is a custom document, and the same cannot be made applicable to show electricity supply. Further, the petitioner

submitted that the amendment¹² should take a retrospective effect as it is beneficial legislation.

- The respondent submitted that the current writ petitions were unmaintainable due to the direct approach before this court¹³, some of which were filed against the orders-in-original and others brought against orders-in-appeal. In this respect, the petitioner submitted that there was no effective alternative remedy in the absence of the GST Tribunal, and the direct filing of writ petitions before this court cannot be said as improper.

Andhra Pradesh HC observations and ruling¹⁴:

- **Writ petitions are maintainable:** The HC stated that the availability of an alternative remedy does not preclude the writ petitions from being maintained. Further, in the present case, the writ petitions can be entertained since the GST Tribunal has not yet been established by the GST Council, and the petitioner has no other effective option but to file a writ in this court.
- **Energy transmission across the border is verifiable:** The HC noted that out of seven writ petitions, three were ultimately dismissed due to the non-

¹² Rule 89(2) of CGST Rules,2017

¹³ under Article 226 of the Indian Constitution

¹⁴ Leading Writ Petition No.11194 of 2021 dated 26 August 2022 (all Writ Petition Nos.11194, 11198, 11206, 11263, 17275, 28836 & 30292 of 2021)

submission of the shipping bill and insufficient evidence to demonstrate that the petitioner has not exported power to Bangladesh. However, the other four writ petitions were rejected due to sole reason, i.e., the petitioner had failed to submit the shipping bills. It is evident from the rejection orders¹⁵ that the authorities have acknowledged their error in insisting on material production and energy export to Bangladesh. Thus, the respondent's claim that the petitioner never carried electricity across the border cannot be accepted as it can now be verified.

- **Provisions cannot curtail the ITC benefit:** The HC stated that rule 89 outlines a procedure for claiming a refund. However, as electricity is not included in the Customs Law and shipping bills are Customs documents, the need for shipping bills as proof of export cannot be applied to electricity. Further, the amendment in the rule clarified that the details can be used as the base to show the number of electricity transmitted and supplied across the border and that it is possible to obtain data from RPCS¹⁶ or REA regarding electrical energy generation and transmission across the border. Thus, the HC stated that the rule and the

amendment cannot curtail the ITC benefit.

- **Amendment in the rule is only clarificatory:** The HC noted that the circular¹⁷ clearly established that rule¹⁸ was amended to clarify the anomaly that existed with regard to the production of material evidencing export of electricity, because of which the taxpayers were facing difficulty in filing refunds. The amount of energy transmitted cannot be shown in the shipping bills. Therefore, the amendment cannot be said as declaratory; instead, it can only be described as correcting the flaw by clarifying how the transmission of electrical energy may be proved.
- **Clarification is retrospective in nature:** The HC stated that a proviso that is added to make the provision workable, a proviso that fills in a clear omission in the provision, or to be read into the provision to give the provision a reasonable interpretation, must be treated retrospectively to give a reasonable interpretation to the section as a whole. The HC relied on SC judgements¹⁹ and stated that any benefit conferred by law cannot be limited, especially when it is clarifying in nature and as a result, it must be implemented retrospectively. Even the department

¹⁵ Subsequent notices for the period June 2019 to September 2021

¹⁶ Regional Power Committee Secretariat

¹⁷ Circular No.175/07/2022-GST dated 6 July 2022

¹⁸ Rule 89 of the CGST (Amendment) Rules, 2022

¹⁹ JH Gotla, Vatika Township Private Limited

has implemented the notification for refund claims submitted for the time period prior to 4 July 2022, which made it clear that the amendment has retrospective effect.

Our comment

Earlier, Rule 89 of CGST Rules, 2017 stipulated furnishing details of shipping bill/ bill of export in respect of a refund of unutilised ITC in respect of export of goods. However, in the absence of the same, the power generating units were facing difficulty in refund claims.

As a result, the CBIC issued a notification dated 5 July 2022, revising Rule 89 to clarify that shipping bills are not necessary to be submitted while claiming the refund on account of the export of electricity. Rather, a statement containing the specific details such as the detail of export invoices, energy exported, statement of scheduled energy for exported electricity, etc. will be separately submitted in the case where a refund is on account of electricity. Further, the CBIC has also issued a circular to prescribe the manner of filing refund of ITC on account of export of electricity.

The HC, in the present ruling, has relied on the circular, notification, and relevant amendments in the rule, on the basis of which it has been held that the amendment in the rule is only clarificatory in nature and shall have a retrospective effect. This decision is welcome and in keeping with the recent clarifications provided by the CBIC. Further, it will establish precedent in similar cases since it will benefit taxpayers who are involved in transactions of a similar nature.

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