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Amendment prescribing comparison between tax invoice and shipping bill for computation of refund has a prospective effect – Jharkhand HC

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Summary

The Jharkhand High Court (HC) has held that a change in policy can only be brought by an amendment in the parent Act and shall have a prospective application. The HC adverted to explanation to Rule 89(4) of the Central Goods and Services Tax Rules, 2017 (CGST Rules), and clarified that the stipulation of comparing value of export with FOB for determining refund, shall have a prospective application. The HC affirmed that the amendment inserted is a substantive change and not clarificatory or declaratory. Further, the amendment is not in line with the comparison of value of export and the shipping bill, which can either be CIF or FOB values for computing refund, as stipulated by Circular No. 125/44/2019-GST dated 18.11.2019 (impugned circular).

Facts of the case

- Tata Steel (the petitioner) procures coal from vendors for manufacturing iron and steel, upon payment of requisite GST and Compensation Cess.
- The petitioner undertakes export of goods under a bond/ Letter of Undertaking (LUT), i.e., without payment of outward tax, which results in accumulation of the ITC of the compensation cess charged on supply of coal.
- For the period from January to February 2019 (disputed period), the petitioner could not determine the price of exported goods with certainty. As a uniform practice, the petitioner furnished the 'cost price' of such goods as 'taxable value' as well the 'invoice value' and declared the same in the GSTR-1 return of the said months.
- Pertinently, the details of shipping bills were also required to be furnished in GSTR-1. However, in the event of non-availability of such details, it was permitted to update the same by amending Table 9 of the subsequent GSTR-1 return.
- The petitioner, on becoming aware of the final price of goods as reflected in shipping bills at the time of actual export, updated the details in Table 9A of the GSTR-1 return in September 2019.
- Subsequently, the petitioner applied for refund of the unutilised ITC in respect of the disputed period as per the prescribed formula basis the updated actual value of exports.
- Subsequently, a show cause notice was issued, indicating that the value of the 'turnover of zero rated supply of goods' could not be ascertained with certainty.
- However, on the basis of the impugned circular, which stipulates considering the lower of the values indicated in the tax invoice and the shipping bill, the department refunded the partial amount and denied refund of the balance amount considering the lower value.
- The subsequent appeal of the petitioner was denied. Therefore, the present writ petition was preferred by the petitioner.

Jharkhand HC observations and judgement [WP(T) No. 1719/2022; Order dated 21 August 2023]

- **Substantive change in law operates propectively:** The HC observed that initially Rule 89(4) of the CGST Rules contemplated actual transaction value for the purpose of calculation of the refund amount. Subsequently, Rule 89(4) was amended by Notification No. 14/2022

dated 5 July 2022 (amendment notification) and an explanation was inserted. The HC opined that since a substantive change was brought in the law, it should have a prospective effect. The HC specifically pointed out that the same can also be inferred from the indication of date of application provided in the amendment notification.

- **Change in policy cannot be be effected by a circular:** The HC opined that merely because the term 'explanation' has been used, it does not indicate that the amendment is clarificatory or declaratory. While the impugned circular comtemplated comparison between the value of export in the tax invoice and in the shipping bill, which can either be FOB or CIF value, the amended explanation required the comparison of value in the tax invoice with only the FOB value. Accordingly, the explanation was not on similar lines with the circular. Additionally, the HC adverted that the policy can be changed only by introducing an amendment in the parent Act, and not by a circular.

Our comments

This is a welcome ruling for the exporters claiming refund prior to insertion of the said explanation. This judgement prominently addresses and clarifies the pertinent issue of jurisdiction. By clarifying that policy changes can only be made by way of amendment in the parent Act, the HC has restricted the jurisdiction of the department.

It has been affirmed that the department cannot extend its jurisdiction by bringing a policy change by means of a circular. It is trite that a circular must be within the four corners of the parent Act. In the present case, the Act or Rules nowhere contemplated the comparison of values of a tax invoice and a shipping bill and consideration of lower of the two for the purpose of computation of refund. Accordingly, the amendment that was brought by the explanation inserted in the Act shall have a prospective effect.

Further, placing reliance on the celebrated judgement of the Supreme Court in the case of ***Union of India v. Martin Lottery Agencies Ltd.***, the HC elucidated that merely the usage of an explanation is not indicative of the amendment being clarificatory or declaratory in nature.

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