

UPDATE

This Update has been prepared by Rajarshi Dasgupta and Vedika Agarwal

Can provision under the Customs Act, 1962 restrict Input Tax Credit under the Central Goods and Services Act, 2017?

Exports play a pivotal role in a country's economic growth and development, serving as a crucial driver of foreign exchange earnings and employment generation. They facilitate the integration of domestic industries into the global market, fostering technology transfer and innovation diffusion. Export-oriented activities stimulate productivity gains, enhance competitiveness, and attract foreign direct investment. Furthermore, exports contribute to a favorable balance of trade, bolstering macroeconomic stability and enabling nations to accumulate foreign reserves. Consequently, a robust export sector promotes industrial diversification, raises living standards, and enables countries to effectively participate in the global economy.

As a global economy, each country encourages exports of goods and services without export of taxes. This helps countries to compete on the global platform. It was with this thought that the "Duty Drawback Scheme" under the Customs Act, 1962 was first introduced in India in 1963. The scheme was initially implemented to provide a refund of customs and excise duties paid on inputs used in the manufacturing or processing of goods that are subsequently exported. The objective of the scheme is to neutralize the incidence of duties and taxes on exported products, thus enhancing the competitiveness of Indian goods in the international market. Over the years, the scheme has undergone several revisions and amendments to align with changing trade policies and market dynamics.

Higher drawback and normal drawback are two variations of the Duty Drawback Scheme that determine the refund rates for customs and other indirect taxes on inputs used in the manufacturing or processing of exported goods.

Normal drawback refers to the standard refund rates prescribed by the government for different categories of goods. These rates are predetermined and apply to a wide range of products. On the other hand, a higher drawback refers to an enhanced refund rate that is granted to specific industries or products to provide additional incentives for export promotion.

Section 75 of the Customs Act, 1962 deals with Drawback on imported materials used in the manufacture of goods that are exported. This section empowers the Central Government to provide a drawback of customs duties chargeable under the Customs Act, 1962 *"on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods..."*.

In exercise of the powers conferred under section 75 of the Customs Act and section 37 of the Central Excise Act, 1944 the Customs and Central Excise Duties Drawback Rules, 2017 was introduced vide Notification No. 88/2017-Cus. (N.T.) dated 21-09-2017.

The term “drawback” has been defined under Rule 2(a) of the Customs and Central Excise Duties Drawback Rules, 2017 as ‘drawback’ means the rebate of duty excluding integrated tax leviable under sub-section (7)¹ and compensation cess leviable under sub-section (9)² respectively of section 3 of the Customs Tariff Act, 1975 (51 of 1975) chargeable on any imported materials or excisable materials used in the manufacture of such goods. The Customs Law has prescribed provisions under which any assessee can claim a Drawback.

In 2017, the indirect tax regime in India went through a major shift. The Goods and Services Tax (hereinafter referred to as “GST”) was introduced with effect from 1st July 2017. Major indirect tax levies of Central Excise Duty, Service Tax, Value Added Tax, etc. were subsumed into GST. The GST Law in India was enacted through the Central Goods and Services Tax Act, 2017 (hereinafter referred to as “CGST Act, 2017”), Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as “IGST Act, 2017”), Union Territory Goods and Services Tax Act, 2017 (hereinafter referred to as “UTGST Act, 2017”) and State Goods and Services Tax Act, 2017 (hereinafter referred to as “SGST Act, 2017”). It was introduced with the promise of a seamless flow of Input Tax Credit (hereinafter referred to as “ITC”) and to avoid the cascading effect of tax.

Section 16 of the CGST Act, 2017 deals with the eligibility and conditions of availing ITC. Section 17 of the CGST Act, 2017 deals with apportionment of ITC and blocked credits. Thus, the CGST Act, 2017 does restrict the availment of ITC. It is a conditional right. Such bar on availment of ITC has to be accepted as valid and legal as they have not been struck down yet. Therefore, the CGST Act, 2017 has its own set of laws in terms of which any registered person can claim ITC.

From the above, it would be correct to conclude that the Customs Act, 1962, and CGST Act, 2017 are independent of each other so far as the availment of ITC and drawback is concerned. There is no provision under the CGST/IGST/SGST/UTGST Acts, 2017 and the Rules made thereunder which restricts availment of ITC if drawback under the Customs Act, 2017 has been claimed.

Circular No. 22/2017-Customs dated 30.06.2017 deals with the changes introduced in Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 by Notification No. 58/2017-Cus (N.T.) & 59/2017-Cus (N.T.), both dated 29.06.2017 due to the introduction of GST. It states that to facilitate the transition to the GST regime in India, the government allowed the existing Duty Drawback scheme to continue from July 1, 2017, to September 30, 2017. Exporters during this period could claim the composite rates under specific conditions, while also having the option to claim higher drawback subject to the condition the refund of ITC (CGST and IGST) is not claimed under the CGST Act, 2017. Exporters had to provide prescribed declarations and certificates at the time of export. They also had

¹ S 3(7) of the Customs Tariff Act, 1975 states that “Any article which is imported into India shall, in addition, be liable to integrated tax at such rate, not exceeding forty per cent. as is leviable under section 5 of the Integrated Goods and Services Tax Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (8) 8[or sub-section (8A), as the case may be.”

² S 3(9) of the Customs Tariff Act, 1975 states that “Any article which is imported into India shall, in addition, be liable to the goods and services tax compensation cess at such rate, as is leviable under section 8 of the Goods and Services Tax (Compensation to States) Cess Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (10) 10[or sub-section (10A), as the case may be.”

the option to claim only the Customs portion of duty drawback rates while claiming a refund of ITC under the CGST Act, 2017.

The third proviso to Section 54(3) of the CGST Act, 2017 states that a refund of ITC shall not be allowed if any assessee avails higher drawback in respect of central tax or integrated tax. Various circulars³ issued under the GST regime have time and again stated that for a particular period, credit of inputs, input services, and capital goods simultaneous availment of higher drawback and refund of IGST and CGST would not be allowed. In this regard, it would be pertinent to note that the provisions of the Customs Act, 1962 are independent of the provisions of the CGST/IGST Act, 2017 and the rules made thereunder.

We find no provision and/or condition which restricts availment of ITC if a higher drawback is claimed simultaneously. The Customs & Central Excise Duties Drawback Rules, 2017 have been notified after the introduction of GST law, *i.e* 21.09.2017 and the said Rules nowhere refer to the provision of CGST and/ or IGST Act, 2017. Thus, it can be inferred that the condition imposed in the Circular dated 30.06.2017 is not supported by any statutory provisions and in the event, any such ITC is reversed for the same, the registered taxpayer can re-avail the ITC and there is no time limit prescribed under the law to re-avail the said ITC if reversed in the books and as well as returns.

On the other hand, there have been various judgments from the Hon'ble High Courts⁴ wherein the registered taxpayers have returned their differential amount of drawback along with interest and courts have refunds under the CGST Act, 2017. Thus, every registered taxpayer, depending upon the nature and quantum of transactions, risk factors, etc. may choose any of the options given hereinabove.

This Update has been prepared by Rajarshi Dasgupta and Vedika Agarwal who can be reached at rajarshi.dasgupta@aquilaw.com and vedika.agarwal@aquilaw.com. This Update is only for informational purposes and is not intended for solicitation of any work. Nothing in this Update constitutes legal advice and should not be acted upon in any circumstance.

³ Circular Nos. 17/17/2017-GST dated 15.11.2017, 24/24/2017-GST dated 21.12.2017, 37/11/2018-GST dated 15.03.2018

⁴ 2019 (7) TMI 472 - GUJARAT HIGH COURT, 2020 (1) TMI 90 - MADRAS HIGH COURT