

Instruction No.115

No. K-43014(16)/9/2021-SEZ
Government of India
Ministry of Commerce & Industry
Department of Commerce
SEZ Division

Vanijya Bhawan, New Delhi,
Dated the 9th April, 2024

To,
The Development Commissioners,
All Special Economic Zones.

Subject: Concerns / queries / clarifications regarding the newly inserted SEZ Rule 11B notified vide DoC Notification dated 6.12.2023

Sir,

I am directed to refer to Department of Commerce Notification no. G.S.R 881(E) dated 06th December, 2023 amending SEZ Rules, 2006 to insert Rule 11B to allow set up of non-SEZ IT/ITES units in IT/ITES SEZs and to state that this Department has received several queries from stakeholders in this regard.

2. Accordingly, Department of Commerce in consultation with Department of Revenue has duly examined all such queries received from stakeholders and the responses thereon are provided in the enclosed Annexure.

3. This issues with the approval of competent authority.

Encl: as above

(Sumit Kumar Sachan)
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Copy for information to:

1. DG, DGEP, Department of Revenue
2. JS (Customs), CBIC
3. DG, EPCES



Clarification in respect of Rule 11B of SEZ Rules, 2006

Issue 1: While paying back the tax benefits attributable to the built-up space to be demarcated as NPA under 11B(5) (i) or paying back tax benefits availed for creation of social or commercial infrastructure and other facilities under 11B(5)(ii) to be used by both SEZ processing and non-processing area, clarity is required on whether the duties are to be paid on the (i) depreciated value, (ii) prevailing value as certified by Chartered Engineer Or (iii) to repaying the tax benefits that were originally availed.

Further, whether tax paid as per the certificate issued by Chartered Engineer would be sufficient for SO to issue NOC.

Response: In terms of Rule 11B of the SEZ Rules, 2006, demarcation of a Non-Processing Area (NPA) can be permitted only after **repayment of the tax benefits that were originally availed** viz. option (iii) above. Tax paid for tax benefits attributable or availed as per 11B(5)(i) and 11B(5)(ii) shall be sufficient to issue NOC.

Issue 2. At what rate the tax is to be paid on the value certified by the Chartered Engineer for the built-up area proposed to be demarcated as Non-Processing Area?

Response: The originally availed tax benefits at the time of setting up of SEZ has to be considered for repayment of tax benefits.

Issue 3. Whether the CE valuation & certification for built up area shall be based on Cost of construction as booked in the financial books of the Developer or based on CPWD/PWD rates?

Response: Demarcated built up area shall be certified by the Chartered Engineer. Further, no valuation would be needed as **tax benefits shall be certified based on financial books.**

Issue 4. The clarification is required to know the maximum eligible NPA, considering that the SEZ is located at Category 'A' cities:

For Example:

Say the built-up area of the building with its basements in Processing area= 200000 sqm

Say the basements area of the building included in above is = 40,000 sqm

Say the other utilities, cafeteria, and amenities area in Processing area = 10,000 sqm

Clarification required:

Whether 50% of NPA in above scenario is = 100000 sqms (200000/2) or else

It will be 75,000 sqm (200000-40000+10000=150000/2)?

Response: This will be governed as per the provisions of Rule 11B(7) of SEZ Rules, 2006 read with Rule 5(b) of the SEZ Rules, 2006. There is minimum built-up processing area requirement of 50,000 sq metres in Category 'A' cities for IT/ITES SEZ. **Further, such minimum built up processing area cannot be less than fifty percent of the total area.** In above example 1,00,000 square maximum eligible NPA.

Issue 5. No tax benefit for operation and maintenance of common infrastructure and facilities shall be applicable to particular floor(s)/area to be demarcated as non-processing area or shall be applicable to all common infrastructure and facilities of the entire SEZ? Ideally it should apply to particular floor(s)/area to be demarcated as non-processing area.

Response: This will be governed by Rule 11B(9) of the SEZ Rules, 2006 which provides that **no tax benefits shall be available on operation and maintenance of common infrastructure and facilities** of an IT or ITES SEZ. The reference therefore is to **all common infrastructure** and liability of the entire SEZ and **not just a partial floor/ area** to be demarcated as non-processing area.

Issues 6. Whether the Cost of construction of Basement(s) of the building is also required to be included for repayment of proportionate tax benefits on the NPA floor of the said building?

Response: The tax benefits on the construction of the building including basement should be taken into account for repayment of tax benefits attributable to the demarcated NPA floor in terms of Rule 11B (5) (i).

Issues 7. Whether repayment of tax benefits on Plant & Machinery (capital goods) in the stock will be at the depreciated value in terms of Rule 49 of the SEZ Rules?

Response: Rule 49 would be applicable for clearance of plant and machinery pertaining to 11B(5)(i) and not 11B(5)(ii). However, it is clarified that if benefit under 11B(5)(ii) has been taken then **all benefits** are to be repaid.

Issue 8: A floor may have some SEZ units. These units may also like to serve only DTA and hence the whole floor may be demarcated as Non-Processing Area. How can this be enabled?

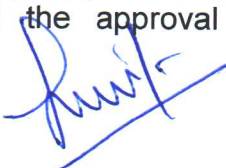
Response: This situation is not envisaged as of now.

However, SEZ units may opt out of SEZ under Rule 74 of SEZ Rules, 2006 and complete built up floor is available for demarcation as NPA in terms of Rule 11B(3), BoA, thereafter, may permit demarcation in terms of Rule 11B which may be used for setting up of IT/ITES units.

Issue 9: Presently under Rule 11(1), Development Commissioner has the power to demarcate the non-processing area. This NPA can be bifurcated into dual use (11A (1)) and single use (11A (2)). Even under Rule 11B as well, Development Commissioner rather than Board of Approval should issue appropriate permissions and to demarcate the processing and non-processing areas. This will save time for both the Developers and IT Companies.

Response: The BoA is empowered under the Rules.

Issue 10: Instruction No. 114 dated 28/12/2023 has led to an apprehension; because it states that, non-SEZ IT/ITES units (occupants of non-processing area carved within processing area) shall not need the approval of Jurisdictional Development



Commissioner. However, we opine that, validation of operations of units identified to occupy and operate from Non-Processing Area of SEZ, need to be performed by the office of Jurisdictional Development Commissioner through appropriate documents sought from the concerned unit. This is because of the following reasons:

- i. Despite PA & NPA being the components of same SEZ, it would have multiple controlling agencies and lose its status of single governing authority, leading to procedural complications and project execution complexities. This would initiate the involvement of State Govt. in such enclaves for multiple aspects.
- ii. Appreciating that, units of NPA would not undergo the rigmarole of Approval Committee scrutiny, it would still be prudent for validation of its operations by DC through submission of concerned certificates. (IT/ITES Certificate for business entity issued by Industries Commissioner / Directorate of Industries by State Govt., STPI Director, HTPI Director, IT & ITC Ministry of GOI, etc.). Such NPA-LOA (signifying NIL benefits) issued by DC would also help the occupants during verification by Tax Authorities & Customs
- iii. Possibility of instances / violations such as - (a) occupation by non-compliant units (i.e. bereft of IT/ITES certification for their operations), (b) non-IT units (commercial entities) may be observed causing escalation in disputes, which may culminate in revoking this facility by GOI.

Response: No additional / differential treatment envisaged to such units vis-à-vis any other DTA units.

In terms of Rule 11(B)(10), the businesses engaged in Information Technology or Information technology enabled Services Special Economic Zone in a NPA shall be subject to provisions of all Central Acts and Rules and orders made thereunder as are applicable to any other entity operating in Domestic Tariff Area (DTA).

Issue 11. It is time consuming in computing the taxes and duties availed of by both the unit as well as the establishment providing services in the newly converted non-processing areas in proportion of the built up area over the past several years due to the time involved in retrieving the books of accounts in consultation with a Chartered Engineer which could typically go up to 3-6 months.

Hence, it is requested to permit the Developers to convert to Non-Processing Area based on a undertaking that the Developer will refund all the concessions availed after the final computations have been assessed correctly and accepted by the concerned AO/ SO.

This will allow the process to be initiated quickly instead of waiting till the final computations are completed. During this period the developer could start marketing the space and simultaneously raise the required funds in the form of advances from potential IT companies willing to occupy the space.

Response: Rule 11B (5) reads as follows:

"

...



Board of Approval shall permit demarcation of a non-processing area for a business engaged in Information Technology or Information Technology enabled Services Special Economic Zone, only after repayment, without interest by the Developer,-

1. Tax benefits attributable to non-processing areaas specified by Central Government. [Rule 11B 5 (i)]

ii. Tax benefit already availed for information technology enabled services in non-processing area shall be applicable. [Rule 11B 5 (ii)]."

Thus, it may be noted that in terms of Rule 11B(5), demarcation of a non-processing area can be permitted only after repayment of benefits.

Issues 12. Confirmation is requested that -- wherever it is possible to segregate the basement(s) and other utilities for exclusive use by the SEZ units-----on such part of the built-up area, the repayment of tax is not required.

Response: Yes, repayment of benefits is not required in such cases provided such a segregation is possible and permissible as per SEZ Rules.

Issues 13. Clarity that repayment of tax benefits already availed on goods & services used/ consumed for Operation & Maintenance (O&M) of the SEZ are not required to payback.

Response: The matter is guided by the Rule 11B(9) which applies prospectively. **No repayment of benefits availed on O&M is envisaged** for demarcated NPA under Rule 11B for setting up and operation of businesses engaged in IT/ITES.

Issue 14. Please confirm that post repayment and surrender of tax benefits on common built-up infrastructure and amenities like cafeteria, hubs, under sub-rule 5(ii) & (9) of the amended Rule 11B, the said amenities can be used by the Domestic Tariff Area.?

Response. Rule 11B envisages demarcation of portion of the built up area as a NPA for setting up and operation of businesses engaged in IT/ITES. Further, Rule 11B (5) (ii) requires repayment of tax benefits already availed for creation of social or commercial infrastructure and other facilities to be used by both SEZ units and businesses engaged in IT/ITES in non-processing area. Such common facilities envisaged are facilities (including common build up infrastructure and amenities like cafeteria, hubs) set up under Rule 11A(2). On the repayment of benefits under sub-Rule 5(ii) of Rule 11B, the common infrastructure shall attain similar usages as dual use NPA as under 11A(1) subject to compliance of other provisions under SEZ Rules.

Issue 15. Is this understanding correct? A Developer would only be required to repay the taxes on social and commercial infrastructure (without interest) while industrial infrastructure would continue to be duty free.

Response. In terms of Rule 11B (5) (ii), common infrastructure would include **all infrastructure and other facilities** for common usage between SEZ units and non-SEZ IT/ITES units in the SEZ.



Issue 16. As per Sub Rule 1, the Developer can request for demarcation of built-up space as Non- Processing area. Need clarity on whether Developer / Co-Developer can demarcate a portion of the 'Land' as Non-Processing Area that can be used for developing office space & infrastructure to be used / leased for IT/ITES units for domestic business.

Response. Rule 11B only provides for demarcation of built up space in IT/ITES SEZ. It is **not applicable for vacant land.**

Issue 17. Will the BOA/UAC monitor the units coming into non-processing area?

Response. BOA/UAC will not monitor the unit set up in the demarcated NPA as per Rule 11B of the SEZ Rules, 2006.

Issue 18. There is a need for clarification regarding the meaning of social or commercial infrastructure and other facilities under Rule 11B(5)(ii) and common infrastructure and facilities under Rule 11B(9). Does it include internal roads, common parking facilities, sewage, drainage, food courts/hubs, utilities like generation and distribution of power including power back up, HVAC facilities.

Response. Yes, in terms of Rule 11B(5) & Rule 11B(9) of the SEZ Rules, 2006, common infrastructure would cover **all** infrastructure attributable for common usage between SEZ units and non-SEZ units in the IT/ ITES Special Economic Zone.

Issue 19. In the case of SEZ's developed by the Government wherein land was allotted to the Co-Developers for creating infrastructure and built-up space for IT/ITES-

i. whether any of the Co-Developer can go for demarcation of the Non- processing area, out of their own space (within the limits), without having any bearing/dependency on the Developer OR other Co-Developers of the same SEZ and

ii. whether the Developer who created Roads/water/drainage etc., in such SEZ layout also need to pay back any benefits in case they availed any. (The Co- Developer will pay back the tax benefits that are availed in his area, as applicable).

iii. The restriction on availment of tax benefits for operational maintenance of common infrastructure would be limited to such common infrastructure in the building in which floor space is to be demarcated as NPA.

Response:

(i) &(ii) Ideally, consent of co-developers should be there. Moreover, BoA may relax this condition on merits of the case.

(iii) Rule 11B(9) clearly states that no tax benefits shall be available on operation and maintenance of common infrastructure and facilities of such an Information Technology or Information Technology Enabled Services Special Economic Zone and **not just the common infrastructure in the Building.**

Issue 20. The insertion of Rule 11B of SEZ, Rules, 2006 contemplates demarcating a portion of the built up area of an IT/IT enabled services SEZ as a 'non processing area'. This 'non-processing area' may be used for setting up and operations of IT/IT enabled services. Now, the processing and non processing area have been outlined



in Section 6 of SEZ Act. The Non-processing areas defined therein is meant inter alia for activities other than rendering services which invariably includes IT/IT enabled services. Therefore, it appears that the new insertion of Rule 11B of SEZ Rules, 2006 goes beyond the statutory provisions contained in the Act. If so, it should not happen that the unit provides IT/IT enabled services in the demarcated non-processing area of SEZ and there is a serious challenge of recognizing such services, which may create uncertainty or ambiguity in the operations of IT/IT enabled service provider.

Response. The issue has been duly examined and it is noted that Rule 11B is in consonance with the provisions of the Act.

Issue 21. As per Rule 11 B(9) of SEZ, Rules, 2006, it has been made clear that there shall be no tax benefits available on operation and maintenance of common infrastructure and facilities of such IT/IT enabled services SEZ. In this connection, we would like to know if the SEZ unit is able to clearly allocate the portion of costs/ expenses separately for both processing and non-processing floors, based on sqft calculation, then in that case whether tax concession i.e., GST/ Customs duty benefits would be made available for 'Processing area' of SEZ unit.

Response. No benefits on Operation & Maintenance of common infrastructure and facilities shall be available if the same is used by units in NPA.

Issue 22. Can the demarcated area be opened for non-IT and ITES companies?

Response. No, since as per Rule 11B(2), it can only be used for IT & ITES business.

Issue 23. Can we entertain outsiders to this non-processing area like in dual use case?

Response. There has to be access control mechanism for IT/ITES NPA units in terms of Rule 11B(4).

Issue 24. What is the impact of this circular on the ongoing and future projects? Can we demarcate it at the time of construction?

Response. Rule 11B is applicable for demarcation of space in the existing built up complete floor area in IT/ITES SEZ.

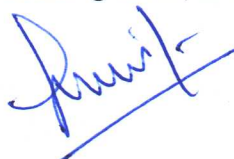
Issue 25. Once demarcated, can we lease out this space for other commercial activities like restaurant, hotel etc?

Response. Only IT/ITES units are permitted to be set up under Rule 11B.

Issue 26. Being a World Trade Center, we would like to have Consulate offices and Trade Support Agencies operating out from our buildings. Do we need to do a demarcation to help them start their offices inside WTCs?

Response. Only IT/ITES units are permitted to be set up under Rule 11B.

Issue 27. Trust this is clear that even if an SEZ Co-Developer IT/ITES building is situated in the middle of the SEZ processing area, it is still possible for that said SEZ



Co-Developer to apply to get the premises notified as non-processing area and that this rule is not only for those area or buildings that lie next to public roads or non-processing area.

Response. Rule 11B envisages demarcation of floor space in an existing built up complete floor area in IT/ITES SEZs as NPA for setting up of non SEZ IT/ITES units, irrespective of location of building in SEZ.

Issue 28. Sub Rule 4 requires that there shall be appropriate access control mechanism for SEZ unit and business engaged in IT or ITES in non-processing area to ensure adequate screening of movement of persons as well as goods in and out of their premises. Could you suggest the best methods for achieving this. Will this be sufficient to have different access cards and security guards etc. for those in non-processing area.

Further, there would be common employees (HR, finance, legal etc.) for units in SEZ and non-processing area. Will there be any restrictions on movement of employees?

Further, Will there be any additional requirement or specific requirements for scrutiny/verification for good being procured by units in non-processing area?

Response. Jurisdictional UAC shall specify the mechanism for access control as well as movement of common employees based on specific requirements of the SEZ after considering the risk profile of each SEZ on a case-to-case basis.

No. There is no additional requirement or specific requirements for scrutiny/verification for goods being procured by units in non-processing area.

Issue 29. Can the non-processing area also comprise of living area or housing for employees/guests of-course without tax benefits. Can you guide the provisions in this regard.

Response. No.

Issue 30. What additional set of compliance requirements may be introduced for these demarcated non-processing areas in light of the new rule 11B?

Response. Compliance requirements for IT/ITES NPA units will be at par with DTA units for administration of Central / State / local government laws.

Issue 31. Permission for demarcation of a non-processing area will be granted by the BOA only after repayment of tax benefits by the Developer. Are any income tax benefits availed by the developers also required to be reversed?

Response. The tax benefits to be repaid includes customs duties, central excise duty, CGST, IGST and SGST and such other central levies and tax benefits already availed by the developer.

This is in line with the already existing Rule 11A(1).



Issue 32. Standard Application Form may be prescribed.

Response. Format for a Standard Application Form is annexed as **Appendix**.

Issue 33. Businesses engaged in IT or ITeS SEZs in a non-processing area shall not avail any rights or facilities available to SEZ units. How this will be managed on a practical level, considering such units will be operating in the same campus.

Response. IT/ITES units to be set up under Rule 11B in the NPA of IT/ITES SEZ are not entitled for any right / privileges under SEZ law. There is provision of repayment of tax benefits and access control in Rule 11B.

Issue 34. How does the new SEZ rule affect the determination of the place of supply for goods and services within the SEZ, from a GST standpoint?

Response. IT/ITES units to be set up under Rule 11B in the NPA of IT/ITES SEZ would be subject to GST or any other law, as are applicable.

Issue 35. As per the notification, Business operating in non-processing area would be subject to provisions of all Central Acts, Rules and Orders as applicable to DTA. Would the business also be subject to other state legislations?

Response. These units are not 'SEZ units' set up in processing area and are not envisaged to get benefits extended by the State Government under section 50 of the SEZ Act, 2005 or otherwise to SEZ units.



**COMMON APPLICATION FORM FOR DEMARCATION OF NON-PROCESSING
AREA IN IT/ITES SEZs FOR SETTING UP OF NON SEZ IT/ITES UNITS
[Refer rule 11 (B)]**

1. Name and address of the Developer:
2. Letter of Approval No. and date:
3. Date of Notification:
4. Name of the sector of SEZ for which approval has been given:
5. Total Notified Area of Special Economic Zone (in hectare):
6. Total area of –
 - (i) Processing Area - _____ hectare
 - (ii) Non Processing Area - _____ hectare
7. Details of Built up area :
 - (i) No. of towers with built-up area of each tower (in square meter)
 - (ii) Total Built-up area - _____ Square meter.
8. Total Built up area in –
 - (i) Processing Area - _____ Square meter.
 - (ii) Non - Processing Area - _____ Square meter.
9. Total numbers of floors in the building wherein demarcation of NPA is proposed.
10. Total Built up area proposed for demarcation of NPA for setting up of Non SEZ IT/ITES units.
11. How many floors are proposed for demarcation of NPA for setting up of Non SEZ IT/ITES units.
12. Total Duty benefits and tax exemption availed on the built up area proposed to be demarcated as NPA, as per Chartered Engineers certificate (in Rupees Crore)
13. Whether duty benefits and tax exemptions availed has been refunded and NOC from specified officer has been obtained (please enclose NOC from specified officer)
14. Reasons for demarcation of NPA:
15. Total remaining built up area..... (in sq mt)
16. Whether remaining built up area fulfils the minimum built up area requirement as per Rule 5 of SEZ Rules, 2006.



17. Purpose and usage of such demarcation of NPA :

18. I/We hereby declare that the above statements are true and correct to the best of my/our knowledge and belief. I/We will abide by any other condition, which may be stipulated by the Government of India. I/We fully understand that any Letter of Approval granted to me/us on the basis of the statement furnished is liable to cancellation or any other action that may be taken having regard to the circumstances of the case if it is found that any of the statements or facts therein are incorrect or false.

Place:

Signature of the Applicant

Date:

Name in Block Letters

Designation

Official Seal/Stamp

Tel. No

E-mail

Full Residential Address

Recommendation of Development Commissioner

The proposal has been examined and my recommendation is as follows:

Signature of Development Commissioner

