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TIOL has recently reported the decision of the single member CESTAT Bench at Bangalore on the case involving **ANZ International** (2008-TIOL-346-CESTAT-BANG). This welcome judgment deals with the case of an 100% EOU exporter of goods being allowed to claim a refund of the cenvat credit availed in respect of inputs used for the goods exported.

Will this important judgment pave the way for the refund of cenvat credit for Software Technology Parks ('STPs') as well, considering the decision of the Government to levy service tax on the software sector?

The facts of the case, briefly, are as under :

The appellants are 100% EOU and received dutiable inputs from certain dealers for the manufacture of the finished products which were exported. They availed Cenvat credit on the duty paid inputs. Being a 100% EOU, they were not in a position to utilize the credit and consequently they applied for refund of the Cenvat credit availed by them. The Department rejected the refund claims on the ground that in terms of Rule 6(1) of the Cenvat Credit Rules ('CCR') the appellants could not have taken credit of duty paid on the inputs because the final products are subjected to NIL rate of duty and on appeal, the Commissioner (Appeals) confirmed the Departmental view holding that exported goods are 'exempted goods'. Hence, as per the Department, once the 100% EOU was not entitled for the cenvat credit, the question of refunding the same did not arise.

The Bangalore CESTAT has categorically held that, on a careful reading of Rule 6(6) of the CENVAT Credit Rules, it is very clear that the provisions of sub-rule (1), (2), (3) and (4) are not applicable to goods removed without payment of duty, which are actually cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002. The CESTAT has further held that any exported good does not suffer the incidence of Central Excise duty, which is why, there is a provision for exporting the goods under bond. In the case of 100% EOUs, the input can be imported free of duty. They can be obtained indigenously also free of duty. However, in certain circumstances, when duty is paid on the inputs, then the appellants are entitled for the Cenvat credit. There is nothing in the Rules provides which prohibits 100% EOUs from availing Cenvat credit. Rule 5 of the CENVAT Credit Rules provides for refund of Cenvat credit where the appellants are not able to utilize the same. The CESTAT, depending on the case of ***Sterlite Optical Technologies Ltd. Vs. CCE, Aurangabad (***2005-TIOL-565-CESTAT-MUM***)*** and certain other judgments, has held that in the case of 100% EOUs, *prima facie*, there is no bar on the availment of Cenvat credit. This welcome decision reiterates the view that 100% EOUs exporting goods cannot be denied the benefit of refund of unutilized cenvat credit.

Let's now discuss this judgment, vis-a- vis Software Technology Park Units ('STPs') and especially to the STPs who operate in the software services field, on whom, service tax is being levied. Many of my friends in the software industry as well from my professional circle have started believing that the FM has given a big bonanza for the beleaguered software industry by imposing service tax on the software sector and that the Government has been rather naïve, in this regard. One of my esteemed friends had gone to the extent of saying that the levy of service tax is the biggest and the largest bonanza that the IT industry has ever received from the Government and that the IT lobby had 'bargained hard' to have the Government levy service tax on them. Their reasoning is based on the simple logic that, the software industry being highly export centric would in any case not pay service tax and instead get significant amounts of refunds from the Government on account of unutilized cenvat credit.

I, for one, is not that naïve to believe that the Government would introduce the levy service tax on the software industry, only to end up refunding significant amounts on account of refund of unutilized cenvat credit to the STPs.

The catch then lies, in the way the Government has defined 'exempted services' in Rule 2(e) and the way it has amended the Rule 6(3) of the CCR, in the 2008-09 Budget. (Writing on TIOL earlier, I had elaborately discussed in two separate articles, the havoc that Rules 2(e) and 6(3) as amended would create on service providers).

As per Rule 5 of the CCR, an exporter of taxable services is entitled to utilize the cenvat credit in respect of the inputs and input service for payment of output service tax and where for any reason such adjustment is not possible, a refund is allowed so long as the services exporter has not claimed rebate of service tax under the Export of Services Rules, 2005. The Government has also issued Notification No. 5/2006-C.E. (N.T.) dated March 14, 2006, in this regard. The problem however is that, the services exporter is actually claiming exemption in respect of the exempted services consideration in respect of which is received in convertible foreign exchange, under Notification 21/2003-ST dated June 20, 2003. The Department would indeed claim that the services exporter is claiming benefit under an exemption notification and consequently, is providing an 'exempted service' though the service is actually exported and has been paid for in convertible foreign exchange. Moreover, in terms of Rule 2(e), as aforesaid, 'exempted services' would include services in respect of no service tax is paid and viewed in this angle, 'exempted services' would include taxable services which are exported, as well. After all, if the Department can argue, as they did in the ANZ International case, that exported goods are to be treated as exempted goods as they are subject to Nil rate of duty, why wouldn't they argue that 'exported taxable services' will also fall under the definition of 'exempted services'.

In most cases, the Department could argue that the services exporter is either providing 100% exempted services or is providing both taxable and exempted services and consequently, most of the cenvat credit availed by services exporter would need to get reversed or paid back to the Department @ 8% of the value of the exempted services. In which case, the services provider will have hardly anything in this cenvat credit, to claim as a refund, making a mockery of the refund provisions.

In my opinion, under the current dispensation, the only option that a services exporter has is in terms of the Export of Services Rules 2005. Under these Rules, the services exporter can opt to pay service tax on the exported service and claim rebate of the service tax so paid. The Government has issued Notifications 11/2005-ST and 12/2005-ST, both dated April 19, 2005, laying down the rebate procedure. The big problem here is that, the services exporter will have to pay up in cash, the service tax on the services exported after adjusting the accumulated cenvat credit on input services, in terms of Notification 11/2005 and then prefer a rebate claim, in respect of each export. Going by my experience, unlike goods exporters, the rebate procedure would be highly cumbersome and impractical procedure for services/software exporters.

I may add here that the Commissioner (Appeals), Bangalore has held in Re. I. Seva Systems Pvt Ltd reported in 2007 (7) S.T.R. 242 (Commr. Appl.) that, in the case of a 100% EOU exporting call center services in the nature of business auxiliary services, which is taxable under Section 65(105) of the Finance Act, 1994 but exempted under Notification No. 8/2003-ST, there is no bar in allowing rebate (even when the output service is exempted) as the rebate is granted under the Export of Service Rules, 2005 under a separate procedure prescribed in the notification which is independent of Cenvat Credit Rules 2004. In the same appeal, the Commissioner (Appeals) had further held that as no goods are exported under bond and the output service exported is exempted, the exclusion clause under Rule 6(6) of Cenvat Credit Rules, 2004 is not attracted and consequently no refund of credit of input/input services is available under the Export of Services Rules.

The fact, however, remains that the benefit of refund of cenvat credit under the CCR is a very simple and practical procedure and it would be very unfortunate if this important benefit is denied to the STPs on any pretext. The Commerce Ministry and the Industry Associations leave no stone unturned in proclaiming India's emergence as a global services provider. But the fact remains that the software exporters have indeed been exporting taxes, over the last few years with the refusal of the Department to allow refunds of input credit and the introduction of service tax on the software industry is unlikely to result in enabling the refund of input credit. I hope that this issue is taken up by the Commerce Ministry and NASSCOM with the Finance Ministry immediately to bring in the desired changes in the refund provisions and especially in Rule 2(e) of the CCR to exclude exported services from the purview of 'exempted services'.