# Service Tax Refund To Exporters : A Farce? – July 2, 2009

**SERVICE TAX REFUND TO EXPORTERS : A FARCE?**

**by S Sivakumar**

Despite all tall claims to the contrary, IT Exporters are being run from pillar to post by the Service Tax Department. The Government would seem to have made a complete mockery of the statutory provisions related to the refund of service tax on input services, to exporters in general and services exporters, in particular. Of course, 'software services' being an exempt service, software exporters were not allowed refund of service tax paid till May 16, 2008, when software services was made a taxable service under 'Information Technology Software Services'.

Realizing the need for a reasonable mechanism for handling the refund claims of exporters, the Government has issued a series of Notifications starting with the one bearing No. 40/2007 dated September 19, 2007. Despite that about seven notifications have been issued till date, there is hardly any improvement in terms of the ground reality, which is loaded strongly against the IT exporters in general and IT exporters in particular.

It is ironical that the seven Notifications are all aimed at 'exporters' of goods, as these Notifications repeatedly talk of the necessity for the exporter of goods for proving that the input service was used for manufacturing the goods which were exported, etc.

This article is an attempt to understand the stand that is taken/likely to be taken by the Department and the possible strategy that the IT exporter will have to adopt, vis-à-vis getting refund of service tax from the Department, in the form of FAQs.

**1. Since when is the software exporter entitled to refund of service tax paid on input services?**

Since software services was not a taxable service till May 15, 2008, refund applications can be filed in respect of service tax paid on input services received on and from May 16, 2008. In the case of input services which are invoiced on monthly basis (eg. Rents), the input services invoices for May 2008 can be split to arrive at the element attributable to the period May 16 to May 30, 2008.

**2. Is refund available on all input services?**

The refund is available in terms of Rule 5 of the Cenvat Credit Rules, 2004 and as such, refund is available in respect of all input services which have been directly or indirectly used by the exporter of goods/ services. The Department is taking a view that the IT exporter has to prove that the input service has been used to provide the output service (being software services, in the instant case). But, this stand will not stand judicial scrutiny and given the wide meaning that is given to 'input service', it is clear that the IT exporter can ultimately get a refund of service tax on practically all input services.

**3. The Department is insisting on the exporter proving that the input service has been directly/exclusively used for providing the output service (software, in the instant case)?**

The Department is able to take this stand, on the basis of the wording used in Rule 5, which is reproduced below:

Rule 5 : Where any input or input service is used in the manufacture of final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate product cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of,

- duty of excise on any final product cleared for home consumption or for export on payment of duty; or
- service tax on output service, and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification

Per se, it looks like that the concept of 'input service', as used in the specific context of granting refunds to exporters, in terms of Rules 2(1) and Rule 5, differ. While, Rule 2(1) defines 'input service' in an 'inclusive manner' by using the words " used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products, upto the place of removal", Rule 5 talks of the 'input service' in a restrictive manner, by using the words " being used in the manufacture of the final product which is exported".

The Department would seem to cling to Rule 5 while disposing off refund applications from exporters and in most cases, refunds are rejected on the ground that the input services are not used for providing the output service, which is exported. To my mind, this view is completely unjustified, given the fact that, Rule 5 is to be seen as subservient
to Rule 2(1), which defines 'input service' in much broader terms and so long as there is even an indirect connection, refund of the service tax paid on input services cannot be denied.

IT exporters can quote, with benefit, recent decision of the Larger Bench of the Bangalore CESTAT in the ABB case.

**4. Is many cases, the Department says it can refund service tax paid only on the input services specified in the Notifications issued?**

About 19 services have been specified as input services on which service tax refund is admissible, to goods exporters. Notwithstanding the fact that these Notifications are not applicable to services exporters, per se, the fact remains that these Notifications cannot limit the scope of the refund that is available to services exporters under Rule 5.

**5. The IT exporter has not taken a registration certification? Can refund be denied on the basis of the fact that the IT exporter has not registered himself with the Service Tax Department?**

It is true that the Department is trying hard to deny refunds to IT exporters who have not taken registration or to deny the refund for the period there was no registration. This stand will not stand judicial scrutiny. Registration has nothing to do cenvat credit availment and utilization. Hence, cenvat credit cannot be denied even if the service provider had not obtained a registration or that he has not filed the periodical returns to the Department. In the case of CCE v. Thermax Ltd 1993 (74) ELT 891 (Bom-CEGAT), it was held that cenvat credit cannot be denied even when the entire manufacturing activity was carried on in unlicensed premises. In Sutham Nylocots v. CCE [2005 (188) ELT 26 (Trib. - Chennai), it was held that modvat credit under Rule 4 of the Cenvat Credit Rules cannot be denied if the registration was taken subsequently.

Notwithstanding this, the IT exporter / STP unit is strongly advised to obtain a registration certificate from the Department and also file the half yearly ST-3 returns.

**6. The Department seeks to reject refund applications which have not been filed within six months, as specified in the Notifications?**

Again, this view has no legal basis. The time limit for filing a refund claim in terms of Section 11B of the Central Excise Act, made applicable to service tax matters, is one year and no Notification can reduce this time frame.

**7. What are the basic procedures for filing refund claims?**

The exporter has to file Form R along with the following documents which are illustrative in nature (contributed largely by Ms Rebecca Andrews of Delhi)

- Copy of registration certificate and ST-3 returns filed, if any

- Copy of the cenvat credit register along with copies of all input services invoices, covering the refund claim period and copies of input service invoices matching with the entries in the cenvat credit register.
- Copies of output invoices, softex forms, Bank Realization Certificates and copies of bank statements
- Copies of orders with customers
- Note explaining how the input service has been directly or indirectly used for providing the output service
- Confirmation that no duty drawback or rebate has been claimed.
- Certification from a CA to the effect that, all input services invoices for which refund is being claimed, has been paid by the applicant
- General note on the nature of business carried on by the refund applicant.
- Declaration given in Notification 41/2007.

8. Can you provide copies of the Form R and the Declaration

The formats of Form R and the Declaration, are reproduced below Central Excise Series No. 2AA FORM - R Application for refund of excise duty (Rule 173-S) To The Assistant Commissioner, Central Excise, Division _____ Collectorate _____ 1. I/We claim refund of Rs. _____ (Rupees_____) on the grounds mentioned hereunder :- (a) (b) (c) 2. I/We enclose the following documents in support of the claim.. (i) (ii) (iii) (iv) (v) 3. The amount claimed was originally paid by AR1/AR5/AR6/AR7/AR8/AR9/ AR10/DD1/DD2 Treasury Challan No. _____ dated _____ deposited into _____ Treasury under the Head of Account IIIUnion Excise duties/Duty on _____ miscellaneous receipts/by adjustment in account current No. _____ dated _____. OR The amount claimed was debited to account current No. _____ on_____ against G.P. 1. No. _____ dated _____ vide entry at Serial No._____. OR 4. The amount claimed was paid vide G.P. 1. No. _____ dated _____and invoice No. ____ dated _____ of M/s. _____. 5. The payment of refund may please be made in my/our favour by a crossed cheque on _____ Treasury/by money order at Government cost. 6. I/We declare that no refund on this account has been claimed/received by me/us earlier. 7. I/We declare that the duty for which refund has been claimed has not been charged/realised from any other person and a copy of the price-list, relevant Gate Pass (Central Excise) like documents and invoices are enclosed. 8. I/We undertake to refund on demand being made within six months of the date of payment of any rebate erroneously paid to me/us. 9. I/We declare that the goods received by me/us after payment of Central Excise duty for which refund has been claimed has been consumed by me/us as industrial consumer/has been sold in wholesale/retail. Dated_____ Signature and full address of claimant Received payment Revenue Stamp (For amounts exceeding Rs. 20.00) _____ Signature of claimant Claim of Shri/Messrs _____ has been scrutinised and found correct. Refund of Rs. _____ (Rupees _____) is sanctioned. Certified that no refund order regarding the sum now in question has previously been passed. Head of Account Supdt./A.C. of C. Ex. _____ (SANCTIONING AUTHORITY) Rs. ____ credited towards consumer welfare fund established under Section 12C of the Central Excises and Salt Act, 1944. Cheque No. _____.dated _____ for Rs. _____ (Rupees_____) issued on _____ (RBI/SBI/Treasury) in settlement of this claim. A.C. of Central Excise. (For use in the C.A.O.'s office) Post audited certified that (i) the amount concerning which the refund is given has been credited into the Treasury/ (ii) order of refund has been verified with (a) DD1/DD2/AR1/AR5/AR6/AR7/AR8/AR9/AR10/T.C. No. _____dated _____ Gate Pass No. _____. OR (b) Debit entry in account current No. _____ dated _____ and (ii)Refund has been noted against the original credit under my signature. SEPARATE DECLARATION SPECIFIED UNDER NOTIFICATION 41/2008-ST : Form 1. Name of the exporter : 2. Address of the registered office or head office of the exporter : 3. Permanent Account Number (PAN) of the exporter : 4. Import Export Code (IEC) of the exporter : 5. Details of Bank Account of the exporter : (a) Name of the Bank : (b) Name of the Branch : (c) Account Number : 6. (a) Constitution of exporter [Proprietorship /Partnership /Registered Private Limited Company /Registered Public Limited Company /Others (specify)] (b) Name, address and telephone number of proprietor /partner /director 7. Description of export goods:

S. No.Description of goods Classification in case of excisable goods
(1) (2) (3)
8. Description of taxable services received by the exporter for use in export goods
S. No.Description of taxable serviceClassification under the Finance Act, 1994
(1) (2) (3)

9. Name, designation and address of the authorized signatory / signatories: 10. I / We hereby declare that- (i) the information given in this application form is true, correct and complete in every respect and that I am authorized to sign on behalf of the exporter; (ii) no CENVAT credit of service tax paid on the specified services used for export of said goods shall be taken under the CENVAT Credit Rules, 2004; (iii) the said goods shall be exported without availing drawback of service tax paid on the specified services under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995; (iv) I / we shall maintain records pertaining to export goods and the taxable services used for export of the said goods and shall make available, at the declared premises, at all reasonable time, such records for inspection and examination by the Central Excise Officer authorised in writing by the jurisdictional Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be. (Signature of the applicant / authorized person with stamp) Date: Place: 9. What are normally the issues that are raised by the Department and how should the IT exporter handle these? The Show Cause Notices issued by the Department would normally cover the following issues, viz.

- Issues concerning non/delayed obtaining of the registration
- Issues concerning invoices, Bank Realization Certificates, Softex Forms, etc.
- Requirement of documentary proof that the input services have been used to provide the output services.
- Other procedural issues

The IT exporter would be advised to file a detailed reply to the SCN, citing case laws and furnishing documentary evidence to counter the objections raised by the Department.

**10. What are the steps that are involved in the refund process?**

- The IT exporter is required to File Form R along with the Declaration and the other supporting documents, as discussed above.
- The Department would normally issue a Show Cause Notice ('SCN') asking why the refund claim should not be rejected, specifying the grounds on which the refund claim is proposed to be rejected, specifying the time within which the reply has to be filed.
- When the time given for the SCN is less than 30 days (which is normally the case), the exporter should file a letter asking for a minimum of 30 days time for replying to the SCN.
- The exporter should file a detailed reply providing additional information and documents substantiating his refund claim and providing case laws and should also attend the Personal Hearing. The exporter can engage the services of a CA or a Lawyer, where required.
- The refund claim could either get completely rejected or could get partially rejected. The exporter is entitled to file an appeal with the Commissioner (Appeals) which the order is issued by an authority lesser than that of the Commissioner
- Depending on the orders of the Commissioner (Appeals), the exporter can decide on going on appeal to the Tribunal.