

Information Technology Service – Rebate and Related Issues

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The introduction of Information Technology Services as a separate category liable to service tax with effect from 16.05.08 has introduced a new dimension to legal compliance by the IT sector which has been mainly due to the opening up of the opportunities with regard to either securing the refund of the Cenvat Credits or the rebate of service tax on exports of taxable service. The Cenvat Credits could be of excise duty on inputs or of service tax paid on input services used in providing output service which is exported while the rebate could be of the service tax paid on such taxable service exported or of service tax paid on input services and excise duty on inputs used in providing the output service exported. This benefit was not available earlier to a pure IT software service provider for the simple reason that the concerned service provided by him was an exempted service not subject to service tax at all while in order to claim the benefit of refund or rebate as stated above, the services exported was to be a taxable services finding a mention u/s 65(105) though such services may have been exported without payment of service tax u/r 4 of Export of Services Rules 2005.

Since the Information technology software services have been made taxable this year, an exporter of such services would henceforth be regarded as having exported taxable services and would be eligible to claim the benefit of either refund of Cenvat Credit under Cenvat Credit Rules 2004 or rebate of service tax under Rule 5 of Export of Service Rules 2005. The refund procedure as laid down by notification 5/2006 (CE) NT dated 14.03.06, in the opinion of the authors, could be a little cumbersome because of the restrictions imposed. Moreover, the credit is admissible in respect of inputs and input services used for providing an output service which would require correlation between the inputs and input services used and the output service exported, to be provided by the assessee besides the limitation period of 1 year applicable to refund claims. In addition to this, the assessee would also have to do with the inconvenience of credits on capital goods used for providing the taxable service exported, not being eligible for refund.

Rebate option

Rule 5 of Export of Service Rules 2005 talks about the rebate of service tax paid on such taxable service exported and service tax or duty paid on input services or inputs used in providing such taxable services exported and the granting of rebate through a notification. Two notifications had been issued in this regard by the Central Government and these are -

1. Notification 11/2005 ST dated 19.04.05 dealing with the rebate of service tax and cess paid on all taxable services exported in accordance with Rule 3 of Export of Service Rules 2005 to a country other than Nepal or Bhutan
2. Notification 12/2005 ST dated 19.04.05 dealing with the rebate of duty paid on excisable inputs and, service tax and cess paid on all taxable input services used in providing taxable services exported in accordance with Rule 3 of Export of Service Rules 2005 to any country other than Nepal or Bhutan

The assessee would have the option to go in for any one of the aforesaid two notifications once the taxable service has been exported by complying with the requirements of Rule 3 of Export of Service Rules 2005. The conditions to be satisfied for claiming the rebate have been given in the concerned notification itself. We would advise the professionals/ assesseees to go through these conditions carefully before deciding on the option to be selected as the two notifications adopt different procedures for granting of rebate to the assessee. While notification 11/2005 ST grants rebate of the service tax paid on taxable services exported, notification 12/2005 ST grants rebate of the service tax paid on input services and excise duty on inputs used in providing the taxable service which is exported. Between the two, notification 12/2005 ST in our opinion is more cumbersome as it requires the assessee to file a declaration with the jurisdictional Assistant Commissioner/Deputy Commissioner as to the taxable services to be exported along with the details of the inputs and input services actually required to be used in providing such taxable services with details as to values and duty/tax payable on such inputs or input services as the case may be which once again implies the need for correlation between the input/input services and the taxable service to be exported. Moreover, an exporter of taxable service cannot opt for rebate of excise duty paid on capital goods under this notification.

Rebate under Notification 11/2005 ST

Notification 11/2005 ST offers the assessee the advantage of utilising the Cenvat Credit lying unutilized in his books for the purpose of making payment of service tax on the taxable services exported. The export shall be in accordance with Rule 3 of Export of Service Rules 2005. The utility of this notification lies in the fact that even though the exporter of taxable services is not required to pay service tax on export of taxable services, he can encash his unutilized credits by utilising the same for the purpose of paying service tax on such exports of taxable services and then file a rebate claim for the amounts paid. The utilization of Cenvat Credits would be governed by the provisions of Cenvat Credit Rules 2004. Here, the assessee should note that if

he had been providing taxable services in the past, he would be entitled to bring forward the unutilized credits from the earlier periods. This could be useful where the credits accumulate over a period of time due to the service provider providing certain taxable services to his clients within the country while exporting mostly, non-taxable services (example IT software services which were exempted prior to 16.05.08). Thus such assessee would not only be entitled to credits in respect of inputs and input services used for providing the presently taxable IT software service which is exported, but would also be entitled to utilize the credits on inputs and input services used for providing a taxable service which had earlier been provided to customers/clients within the country. This utilization would however have to be done keeping in mind the restrictions imposed on the service provider by Rule 6 of Cenvat Credit Rules 2004.

Restrictions imposed by Rule 6 – a summary

Under Rule 6 of CCR 2004, the service provider cannot avail credits of excise duty on inputs and service tax paid on input services used for providing exempted services. In this regard the service provider is generally required to maintain a separate record of the receipt and usage of the input services and the receipt, issue and consumption of inputs for use in providing taxable services and those used for providing exempted services. Credits are to be availed only on inputs/input services used for providing taxable services. Prior to 01.04.08, where separate records were not maintained, the service provider could utilize credits only to the extent of 20% of the service tax payable on taxable services provided. This restriction was with regard to utilization alone and not for availing the credits (recording the credits in the books). The balance unutilized credits in our opinion maybe carried forward. Thus, we can have a scenario where a service provider provides both taxable and exempted services and utilizes credits to the extent of 20% of the service tax payable on taxable services and carries forward balance credits left out, to the subsequent period. This credit carried forward, may in our opinion, be utilized for making payment of service tax under claim for rebate provided the same was eligible earlier subject to possible limitation on time.

Note: Where separate records are not maintained with effect from 01.04.08, the service provider has the option of either paying an amount of 8% on the value of exempted services or calculating the credits to be availed on a proportionate basis using the formula set out in Rule 6(3A) (b) of CCR 2004. The scheme calls for intimating the authorities about the option to use the formula and availing the credits on a provisional basis every month by taking the previous financial year's figures in respect of taxable services and exempted services as the basis for segregating the credits. The actual credits that one is entitled to be known at the end of the

current financial year at which point of time, the actual credits could either be less or more than the credits provisionally availed. Where more, the excess is reversed/paid off on or before 30th June of succeeding financial year and where less, the balance can be availed.

What about the credits on capital goods?

As far as capital goods are concerned, the question of denying credits of excise duty on such goods would arise where the said capital goods are used exclusively for providing exempted services. In other cases full credits can be claimed on such capital goods subject to other conditions of Cenvat Credit Rules 2004 being satisfied. These credits too can be used for payment of service tax on services exported under claim for rebate u/n 11/2005 ST.

In respect of 16 specified services given below, full cenvat credits of service tax paid on such services received by the service provider can be availed unless the services are used exclusively for providing exempted services.

1. Consulting engineer's services (Sec. 65(105)(g))
2. Services received from an architect (Sec. 65(105)(p))
3. Interior decorator's services (Sec. 65(105)(q))
4. Management consultant's services (sec. 65(105)(r))
5. Real estate agent's services (Sec. 65(105)(v))
6. Security agency's services (Sec. 65(105)(w))
7. Services provided by a scientist or a technocrat in relation to scientific or technical consultancy (Sec. 65(105)(za))
8. Banking and financial services (Sec. 65(105)(zm))
9. Insurance auxiliary services concerning life insurance business (Sec. 65 (105)(zy))
10. Erection, commissioning and installation services (Sec. 65(105)(zsd))
11. Management or maintenance or repair service (Sec. 65(105)(zsg))
12. Technical testing and analysis agency's services (Sec. 65(105)(zsh))
13. Technical inspection and certification services (Sec. 65(105)(zsi))
14. Banking or other financial services by a foreign exchange broker (Sec. 65(105)(zsk))
15. Commercial or industrial construction services (Sec. 65(105)(zsq))
16. Intellectual property services (Sec. 65(105)(zsr))

It is interesting to note that while commercial or industrial construction services find a mention, there is silence regarding works contract service. This is something which should logically be included as per the authors and should be addressed by the law makers.

Claim for rebate

The claim for rebate would be filed in accordance with the notification 11/2005 ST in Form ASTR 1 given in the notification itself. The claim could be made once the service has been exported and the amounts received in convertible foreign exchange and the invoice/bill of the service provider should indicate or highlight the fact that the export of service is under claim for rebate u/n 11/2005 ST. The claim should be made within a reasonable time limit with the restriction as to 1 year applicable to refunds not being applicable in this case. The service provider should also take due care to ensure that all the necessary details specified in the said notification are furnished with the claim for rebate to avoid a scenario where the claim is rejected by the rebate sanctioning authority (jurisdictional ACCE/DCCE). The documents generally required are the statement of credits availed and utilized (Cenvat Credit Register), input service bills and Cenvat invoices for inputs, details of payment made on the export of service, details of payment made to input service providers, details of receipt of proceeds in convertible foreign exchange from the client and export service bills.

Caution – The service provider is advised to be careful here as the definition of “input service” as laid down in the Cenvat Credit Rules 2004 would have to be satisfied in order to avail the credits and utilize the same for the purpose of payment. Here, there could be a difference of opinion in some cases between the department and the assessee as to what would constitute “input service” and what would not. This can result in the rebate claim getting stuck. To overcome this situation, the service providers are advised to ensure that the credits are broken up category wise (as per the categories taxed u/s 65(105) of Chapter V of Finance Act 1994 as amended) so that even if some of the credits were to be questioned, the rest of the credits would be allowed and the rebate claim can be proceeded with.

Conclusion

Generally the claim is supposed to be processed within 15 days from the date of submission. Where there is a delay, the authority is required to furnish reasons for the delay. There is also a circular which requires interest to be paid on delayed refunds/ rebates. In reality, even in this day of e filing, the claims are being delayed inordinately as Government litigates on issues and facts as a matter of routine. In spite of the provisions coming in 2005 itself, large number of claims are pending all across the country. In recent times the refund allowed in the past is being sought to be recovered!!! In developed countries refund is sanctioned in a few hours to a few

days for normal standard claims. It is hoped that India too will adopt such international best practices and the process of rebate/ refund would be automatic and hassle free.