

[REFUND AND REBATE -]

[A service tax perspective]

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[CONSTITUTIONAL ASPECTS]

- Article 265 -No tax shall be levied or collected except by authority of law.
- Article 300A -No person shall be deprived of his property save by authority of law.

[STATUTORY PROVISIONS]

- Service Tax governed by Finance Act, 1994.
- No independent Section relating to refund.
- Section 83 of the Finance Act, 1994 makes section 11B of the Central Excise Act, 1944 applicable to refunds of service tax.

[Section 11B – Refund]

- Refund Vis-a-Vis Rebate
- Time limit
 - Cases where time period mentioned in the refund notifications
 - Cases where time limit not mentioned in the refund notification
 - Can a lesser amount of time limit be specified in the refund notifications

[Section 11B Contd...]

- Concept of Relevant Date
- Concept of Unjust Enrichment
- Presumption of Unjust Enrichment – against the assessee
 - Unjust Enrichment and CA certificate
 - Issues to be addressed/ verified by a CA to satisfy that duty has not been passed on/ borne by the assessee

[Section 11 B Contd...]

- Exceptions to concept of Unjust Enrichment
 - PUBLIC SECTOR UNDERTAKINGS - CCE Vs.Karnataka Agro Corn Products Ltd., 2008 (9) STR 597 (Kar).
 - Mafatlal Industries Ltd.– 1997 (89) ELT 247 (SC).

Refund vis-à-vis Time Limit

- Exceptions w.r.t filing refund within one year:
 - Payment Under Protest
 - Un – Constitutional Levy
 - Mistake of Law
 - Section 11B vis-à-vis Law of Limitation
 - Porcelain Electrical Mfg. Co. Vs. CCE, 1998 (98) ELT 583 (SC)
 - Collector Vs. Doaba Co. Operative Sugar Mill Ltd., 1988 (37) ELT 478 (SC)

Refund U/s 11B vis-à-vis Rule 5 of CCR, 2004

- Circumstance when refund is granted u/s 11B and when under rule 5 of the CCR, 2004.
- Time limit for refund – Section 11B vis-à-vis Rule 5
- Gillooram Gourishankar Vs CCE, 2007 (213) ELT 528 (T).

[Who should file the refund Application ?]

- Service Provider
- Service Receiver
- Chandigarh Vayu Bharti Co-op Society Vs.CCE, 2009 (14) STR 161 (T).
- McNally Bharat Engineering Co.Ltd Vs.CCE, 2006 (194) ELT 318 (T).

[Different provisions for Claiming Refund/rebate]

- Section 11B of the Central Excise Act, 1944 r/w section 83 of the Finance Act, 1994
- Rule 5 of the Cenvat Credit Rules, 2004
- Notification No.17/2009-ST dt.7.7.2009.
- Notification No.11/2005-ST dt.19.4.2005.
- Notification no.12/2005-ST dt.19.4.2005.

[Method I – Rule 5 of CCR, 2004]

- Who can claim Refund
 - Manufacturer
 - Provider of Output Service
- Refund of what can be claimed – Unutilised Cenvat Credit Balance
- Procedure for claiming refund – Notification No.5/2006-CE (NT) dt.14.3.06

[Method I Contd...]

- Department's direction to file certain additional documents though not specified in the notification no.5/2006-CE (NT) dt.14.3.2006. Whether valid ?
- Whether refund can be claimed on cenvat credit availed on input services prior to issue of notification 5/2006-CE (NT) dt. 14.3.2006, wherein the word input service was inserted.
 - a. Fibres and Fabrics International P Ltd 2009 (14) S.T.R. 809 (Tri. - Bang.)

Method II

Under Notification No.41/2007 dt.6.10.2007

- Who can claim refund –
 - manufacturer exporter
 - merchant exporter
 - service tax paid on specified services while using for export of goods.
- Refund can be claimed on what
 - Specified input service used in export of goods
- Jurisdictional Issue - Refund Application to be filed before whom
 - AC/ DC of Service Tax/ Central Excise
 - Merchant Exporter located in exclusive Service Commissionerate
- Rescinded by Notification No.17/2009 dt.7.7.2009

Method II Contd...

Under Notification No.17/2009 dt.7.7.2009

- Double Benefit – Duty Drawback and refund under present Notification can be availed but no Cenvat credit should be availed under Cenvat Rules.
- No refund claim shall be allowed if the amount is less than rupees five hundred.
- The invoice, bill or challan, or any other document issued in the name of the exporter, showing payment for such service availed and the service tax payable shall be submitted.
- The invoices has to self attested by the Assessee.

Method III Contd...

Under Notification No.18/2009 dt.7.7.2009

- Manufacturer/Merchant Exporters who avail the taxable service of GTA for transport of their goods to the port of export and services provided by a commission agent located outside India to act on behalf of the exporter to cause sale of goods exported by him. – The exporter availing the two services is not required to discharge service tax if the said service are used in relation to export.

Method IV

Notification No.11/2005 dt.19.4.2005

- Not many claimants avail the benefit of said notification.
- Refund application to be accompanied by documentary evidence of receipt of payment against taxable service exported and for which rebate is claimed.
- A declaration that such taxable service in respect of which rebate of service tax and cess paid on such service is claimed, has been exported, in terms of Rule 3 of the Export of Service Rules, 2005 along with the documents evidencing the export of such taxable service.

Method V Notification No.12/2005 dt.19.4.2005

- No cenvat credit should be availed on inputs and input service of which rebate has been claimed.
- Declaration has to be filed by the provider of taxable service to be exported prior to date of export of taxable service, with the jurisdictional Assistant/Deputy Commissioner of Service Tax as the case may be describing the taxable service intended to be exported with.
- The claimant has to indicate what is the classification of the export service as per section 65 (105) of the Finance Act 1994.
- Delay in filing the declaration after export is condonable – CST Vs.Keane Worldzen India Pvt Ltd 2008 (10) S.T.R. 471 (Tri. - Del.).

Refund Vis-à-vis Export of Service Rules, 2005.

- Rule 3 of the Export Rules, classifies all the services under section 65(105) into three broad categories and then provides for different set of conditions to be met by each class of services to merit becoming an export service.
- For example providing of Information Technology Service, falls under the residual category of sub-clause (iii) of Rule 3(1) of the Export Rules. The conditions to be fulfilled under the said sub-clause are as follows:

[Rule 3 of Export of Service Rules - Provisions]

- *a. The service should be provided in relation to business or commerce, such service must be provided to a recipient located outside India.*
- *b. If the service is provided other than in relation to business or commerce, the recipient must be located outside India at the time of receipt of service.*

[Rule 3 Contd...]

- A second set of conditions are prescribed under Rule 3(2), which are common to all the services. The said conditions are as follows:
- *(i) Such service must be provided in India and used outside India.*
- *(ii) The service provider receives payment for such service in convertible foreign exchange.*

Rule 3 – Board Clarification

- Board Circular No.III/5/2009-S.T. dt.24.2.2009, has clarified the services provided by an assessee are to be treated as 'export'.
- *For the services that fall under Rule 3(1)(iii), the relevant factor is the location of the service receiver and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. Thus for rule 3(1)(iii), it is possible that export of service may take place even when all the relevant activities take place in India so long as the benefit of these services accrue outside India.*

Procedural Aspects relating to Refunds

- Refund before whom to be filed?
- Refund period from which date to be computed – date of rendering of services or date of receipt of consideration?
- Refund – what documents to be filed?

Certain contentious issues relating to refund now settled

- Whether one to one co-relation required between input service and output service – Dai Ichi Karkari Supreme Court.
Capiq Engineering Pvt Ltd Vs.CCE, 2008 – TIOL- 1967 (T)
- Refund on closure of business of the service provider
- Jurisdictional Issue – Customs Vis-à-Vis Service Tax
 - Board Circular 828/5/2006-CX dt.20.4.2006.
 - Pahwa Chemicals

Refund – Miscellaneous Issues

- Whether refund can be claimed for a period prior to registration?
 - Nylocots Vs Commissioner of Central Excise, 2005 (188) ELT 26 (T)
 - Om Prakash Jayaprakash & Co Vs CC, 2004 (178) ELT 429 (T)
- Concept of Nexus b/w input and output service for claiming refund. – Scenarios:
 - Whether service tax paid on terrace area, parking area, park maintenance, bridge area can be claimed as refund.
 - Whether service tax paid on premises of provider of output service could be claimed as refund.

[GTO/GTA]

- If Services of Goods Transport Operator/Owner is engaged no service tax is payable.
- Para 149 of the Budget Speech of the Finance Minister in 2004, it was clearly stated that there was no intent to tax the owner or operator of trucks and that the levy was attracted only on services provided by booking agents.
- Kanaka Durga Agro Oil Products Pvt Ltd, 2009 (15) STR 399 (T-Bang)

[Other Connected Issues.....I]

- CBEC has issued a circular No.828/5/2006 – CX dt.20.4.2006 – 80% refund within 15 days from the date of filing.
- Practically the Department do not follow.
- Department cannot raise issue relating to eligibility of cenvat credit in claimant's refund application.
- Interest on delayed payment of interest.

[Other Connected Issues.....II]

- Export of Service are not exempted service – Board Circular No. Circular No. 868/6/2008-CX., dated 9-5-2008 – para 7
- Refund cannot be denied on the ground that export of service are exempt services.

[Open House..]

Thank You.