

INDIRECT TAX EXPRESS

*FORTNIGHTLY e-NEWS LETTER FROM M/s D A V A & ASSOCIATES
Chartered Accountants*

PART-A: FROM THE EDITOR

WHAT'S
NEW

Exports to Nepal- Whether Payment in Convertible Foreign Exchange Required for Getting Refund of Cenvat credit on Inputs?

Earlier upto 28.02.2012 export to Nepal and Bhutan did not qualify for export benefits under Central Excise as payment was not in convertible foreign exchange. Export to Nepal and Bhutan was specifically excluded from Notification No. 42/2001-CE (NT) dated 26.06.2001 which prescribed procedures, safeguards, conditions and limitations relating to export of excisable goods without payment of duty. However, w.e.f. 01.03.2012 duty free export to Nepal was allowed even if payment is not received in convertible foreign exchange. This was done by amending the notification No. 42/2001-CE (NT) dated 26.06.2001 vide an amending notification No. 26/2011-C.E. (N.T.) dated 5-12-2011, by removing the exclusion to Nepal. Consequently, exports to Nepal became at par with exports to other countries (except Bhutan). However, it was observed that department is rejecting refund claims filed by the exporters under rule 5 of the Cenvat Credit Rules, 2004 in relation to Cenvat credit on inputs used in manufacture of exported goods. Hence, the question is whether to claim refund of cenvat credit on inputs used in manufacture of goods exported to Nepal, payment in convertible foreign exchange is required?

Rule 19 of Central Excise Rules, 2002, prescribes that excisable goods may be exported or material may be removed for use in the manufacture or processing of goods which are exported, without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises. The procedures, safeguards, conditions and limitations relating to export of Excisable goods without payment of duty under aforesaid rule are prescribed in Notification No. 42/2001-CE (NT) dated 26.06.2001 as amended by Notification No. 26/2011-C.E. (N.T.), dated 5-12-2011. This notification nowhere requires payment in foreign currency to qualify as export under rule 19.

Rule 5 of CENVAT Credit Rules, 2004, prescribes that a manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit. The procedure, safeguards, conditions and limitations relating to Refund of CENVAT Credit under the aforesaid rules are prescribed in Notification No. 27/2012-C.E. (N.T.), dated 18-6-2012. There is no requirement that to avail the refund of cenvat credit on inputs, payment against export should have been received in foreign currency. On going through Rule 19 of the Central Excise Rules read with rule 5 of the Cenvat Credit Rules it is clear that an exporter

➤ CBEC, vide Notification No. 74/2014-Customs(NT) dated 02.09.2014 has amended notification No. 12/97-CUSTOMS (N.T.), dated the 2nd April, 1997, to appoint Village Mithirohar, Gandhidham at Gujrat as an inland Container Depot for Unloading of imported goods and loading of export goods.

➤ CBEC, issues Notification No. 75/2014-Customs (NT) dated 04.09.2014, determining the rate of exchange of conversion of foreign currency into Indian currency or vice versa w.e.f 5th September, 2014 relating to import & export of goods.

➤ West Bengal Commercial Tax Department vide Trade Circular No. 15/2014, dated 05.09.2014 has done away with manual filing of E-1, E-II and H forms. Dealers will now have facilities of online application, online disposal and online generation of forms.

"The reason why worry kills more people than work is that more people worry than work."

- Robert Frost

- If the exporter has not followed the conditions prescribed for export of excisable goods without payment of duty, or
- If the exporter has not followed the conditions prescribed for refund of Cenvat credit on inputs used in manufacture of exported goods.

Now, any manufacturer of goods, who has exported goods to Nepal without payment of duty under a bond by fulfilling all the conditions prescribed in this regard and who has filed a refund claim in accordance with the conditions prescribed in this regard, shall be eligible to get refund of Cenvat credit. It will be immaterial, whether export proceeds have been received in Indian currency or convertible foreign exchange.

The purpose of exempting export from duty is to make exports zero rated to enhance the competitiveness of Indian products in the global market. To make exports zero rated, no duty is charged on exports of final products and inputs are also allowed to be procured without payment of duty. If inputs have suffered duty, then such duty is refunded to make the exports zero rated. Hence, if an exporter is allowed to export excisable goods without payment of duty, it naturally follows that he will be eligible for claiming refund of Cenvat credit availed for manufacture of such excisable goods exported to make the exports zero rated.

Rule 19(2) of Central Excise Rules, provides that inputs to be used for manufacture of final product to be exported can be obtained without payment of excise duty. Alternatively, Rule 18 of Central Excise Rules makes provision for granting rebate of duty paid on inputs which are used in manufacture of final product which is exported. Intention of both the procedures is to make duty incidence Nil. Any of the methods may be followed by the exporter. An exporter cannot be denied the benefit of the same just because payment was received in Indian Rupees.

CBEC circular No. 961/04/2012-CX 6 dated 26.03.2012, it is clarified that exports to Nepal will be permissible irrespective of whether the payments are made in Indian currency or foreign convertible currency. Further, Circular No. 958/1/2012-CX, dated 13-1-2012 also reiterates the fact that Pursuant to Revised Treaty of Trade between Government of India and Government of Nepal, exports to Nepal have been put at par with exports to other countries (except Bhutan).

Rule 5 of the Cenvat Credit Rules, 2004 also allows refund of Cenvat on input/input services to exporters of services. As per explanation to rule 5, service should have been exported in accordance with Rule 6A of Service tax Rules, 1994. To treat a service as export of service, Rule 6A of Service tax Rules, 1994 inter alia requires payment in convertible foreign exchange. Thus for refund of Cenvat credit to exporter of service on inputs/input services, it is specifically provided that payment should be received in convertible foreign exchange. However, there is no such specific requirement in case of export of excisable goods as is done in the case of service tax.

In view of the aforesaid provisions and their interpretation rejection of refund claim by department seems to be illegal and untenable in law.



PART-B: QUIZ TIME !!

1. From which date was Education Cess introduced on Central Excise Duty?

2. MODVAT was introduced in India in which year?

3. What was the service tax collection in 1994-95, when it was introduced for the first time in India?

(Please mail your replies with your name and mail id to davidtexpress@gmail.com)

(The first 3 correct answers will be published in the next issue with name & mail id of the sender.)

ANSWER TO LAST FORTNIGHT'S QUIZ:

Reply to Q1 - The Tax Reform Committee headed by Dr. Raja Chelliah

Reply to Q2 - Sri Abdul Rahim Rather

Reply to Q3 - Rs. 150 lakhs

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SOME COMMON LEGAL MAXIMS AND THEIR USE

- ***Ex parte*** – From [for] one party. E.g. It was decided that it was absolutely appropriate, fair and proper to proceed *ex parte*.
- ***Mutatis mutandis*** – Having changed [the things that] needed to be changed. E.g. The points that the author makes about the town's roads and bridges also apply, *mutatis mutandis*, to its schools and municipal buildings.



PART-C: CASE UPDATES

1. Lafarge India Ltd. vs. Commissioner Of CE, Raipur [2014(35) STR 645 (Chhattisgarh)(HC)]

Issue: Whether the appellant is entitled to claim Cenvat Credit of the service tax paid on Goods Transport Agency service for delivering the goods to the customers' premises on a true and proper construction of Cenvat Credit Rules, 2004?

Decision: The Hon'ble High Court held that the assessee has not included the amount paid for the GTA service in the price of the goods. It has not chosen it to be a part of the price and as such the assessee was not entitled to claim Cenvat credit for the same. Further, relying on the conditions given in the circular No. 97/8/2007-ST dated 23.08.2007, the Hon'ble High Court held that in case of sale at the place of destination (FOR Basis), an assessee is entitled to claim cenvat credit on service tax paid for goods transportation agency service provided the amount paid was integral part of the price of the goods. In this case, the amount paid for GTA service was not integral part of the price of the goods. And hence the assessee was not entitled to claim Cenvat credit of the service tax paid.

2. Bengal Shrachi Housing Development Ltd. & ors. vs. Union of India & ors. [W. P. No. 4085 (W) of 2014]

Issue: The petitioner had given some space to the respondent on rent and invoices were issued to them inclusive of service tax component. However, the respondent did not pay the service tax element on some pretext or other and continued this practice for a long period of time. Aggrieved by the act of the respondent, the petitioner filed this writ petition wherein the main issue involved is - Who between the first petitioner and the respondents, in terms of the agreement between the parties, is liable to bear the service tax?

Decision: The Hon'ble High Court of Kolkata relied on the decision of the Hon'ble Allahabad High Court in the case of M/s. Bhagwati Security Services (Regd.) v. Union of India & ors, where it was held that, "Having gone through the agreement and the provisions of the relevant statute, we find that service tax is statutory liability. It is a tax which is required to be collected by the service provider from the person to whom service is provided, and thereafter to be deposited with government treasury within the prescribed time. Thus, essentially the statute is being imposing the tax upon the person to whom service is being provided, and the service provider is merely a collecting agency." Accordingly, it held that liability to bear service tax being that of the person receiving service, there can be no escape from the conclusion that the respondents, i.e. lessee are liable to bear service tax.

Indirect tax collections grew at 9% in August this year to Rs. 40,644 crore from a year ago, indicating a promising growth trend in central excise and customs duties after muted performance in the initial months of the fiscal.



PART-D: FREQUENTLY ASKED QUESTIONS

Query 1: A service provider is providing services both in India and outside India. As per the Place of Provision of service Rules, the service provided outside India is treated as provided outside the taxable territory. However, payment against service is not received in convertible foreign exchange. Common input services are availed in relation to providing service in India as well as outside India. Whether full Cenvat credit can be availed in respect of common input services?

Reply by E-News Letter Team: Since the service provided outside the taxable territory, is exempt as per Place of Provision of Service Rules, and cannot be treated as export under Rule 6A of Service tax Rules, 1994; full Cenvat credit cannot be availed in respect of common input services. As per Rule 6(2) of Cenvat Credit Rules, 2004, where a service provider avails of CENVAT credit of any inputs or input services, and provides such both taxable as well as exempted services, then, he shall maintain separate accounts for receipt and consumption of inputs and input services for the provision of exempted and taxable services. However, if he is opting not to maintain separate accounts, he may follow any of the options given in Rule 6(3) of Cenvat Credit Rules. Thus in this case, Cenvat credit against service rendered outside India, which is an exempt service, shall not be allowable.

Query 2: A restaurant is charging service tax on 40 % of Bill amount in accordance with Rule 2C of Service Tax (Determination of Value) Rules, 2006 and is also taking 100% Cenvat Credit of service tax on input Services like maintenance, security, rent etc. Whether it is justified in doing so?

Reply by E-News Letter Team: According to the explanation 2 to Rule 2C of Service Tax (Determination of Value) Rules, 2006, the provider of taxable service shall not take CENVAT credit of duties or Cess paid on any goods classifiable under Chapters 1 to 22 of the Central Excise Tariff Act, 1985 (5 of 1986). However, there is no restriction in respect of availment of cenvat credit of input services and Capital goods. Thus the restaurant is justified in claiming 100% cenvat credit of the input services availed. The restaurant may also claim cenvat credit of capital goods used in providing the service.

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