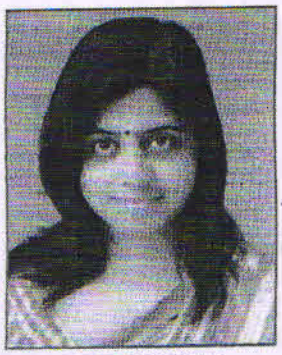
Story of service-tax refund and mysterious circular

CBEC switching sides to deny service tax refund

PRADEEP JAIN
CA



PREETI PARIHAR
CA

Introduction

1. Service tax refund, the concept first introduced in the year 2007, aims at providing the refund of service tax paid/suffered by the exporters in course of exporting their goods. Since last eight years it has been the most contentious 'benefit' allowable to the exporters in India. Government has been trying hard to simplify the concept of service tax refund. The more it tries, more it fails. This article is based on the journey of service tax refund during these 8 years and recent controversies attached to it.

The history of service tax in India

2. The first Notification through which the service tax refund was allowed was the Notification No. 40/2007-ST, dated 7-9-2007. It contained a list of four specified services on which the refund of service tax was allowed. This initial notification had a very small tenure of one month. It was superseded *vide* Notification No. 41/2007-ST, dated 6-10-2007. This notification, in turn, was superseded *vide* Notification No. 17/2009-ST, dated 7-7-2009. This new notification had list of 16 specified services on which service tax refund was allowed. This notification was amended for addition of new services in the list of specified services. Thereafter, this notification was replaced by Notification No. 52/2011-ST, dated 30-12-2011 which had list of 18 specified services including port services, THC charges, supply of tangible goods services in relation to export goods, CHA services, storage and warehousing, fumigation services, GTA services, etc. In this notification alternate facility of direct credit on the basis of % of FOB value of export goods was introduced. This facility was allowed as an option to the exporters if they did not intend to go in for refund on actual basis. Later on, with the introduction of service tax by way of negative list, this Notification No. 52/2011-ST was replaced by Notification No. 41/2012-ST, dated 29-6-2012.

2.1 ***Notification No. 41/2012-ST***: This Notification was issued to bring the service tax refund procedure at par with the negative list regime. In this new notification concept of specified services was

done away with. Since in the negative list era all the services except a few prescribed in mega exemption notification and negative list were taxable, same concept was imported in the Notification No. 41/2012-ST. Thus, instead of giving the list of specified services, it was mentioned that refund of service tax paid on 'specified services' would be allowed. It was explained as under:-

'(A) "specified services" means-

(i) *in the case of excisable goods, taxable services that have been used beyond the place of removal, for the export of said goods;*

(ii) *in the case of goods other than (i) above, taxable services used for the export of said goods;*

but shall not include any service mentioned in sub-clauses (A), (B), (BA) and (C) of clause (l) of rule 2 of the CENVAT Credit Rules, 2004;'

Thus, in the notification, it was stated that service tax refund shall be allowed of taxable services used beyond the place of removal. It was also clarified that definition of the place of removal shall be taken from section 4 of the Central Excise Act, 1944.

Place of removal – The root cause of dispute

3. It was stated in the Notification No. 41/2012-ST that the refund shall be allowed of the services that are used beyond the "place of removal" as defined in the Central Excise Act, 1944. This definition is given as follows:–

"Place of removal means -

(i) a factory or any other place or premises of production or manufacture of the excisable goods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;

from where such goods are removed;"

Therefore, the place of removal can be factory or depot of manufacturer, or warehouse or any other place where the manufactured goods are permitted to be deposited without payment of duty. Normally, it is the factory gate which is considered as place of removal in majority of cases. These days, in a No. of cases, department is taking a view that in case of export place of removal is the port; thus, the refund shall not be allowed on any service which is being availed from the factory gate to port of export. Resultantly, all the refund claims filed by the exporters are being rejected.

Circular No. 999/6/2015-CX, dated 28-2-2015

4. Circular No. 999/6/2015-CX, dated 28-2-2015 has been taken as support for denying the refund claims of the exporters. The relevant para dealing with the Cenvat admissibility to the manufacturer-exporter is produced as follows:-

"6. In the case of clearance of goods for export by manufacturer-exporter, shipping bill is filed by the manufacturer-exporter and goods are handed over to the shipping line. After Let Export Order is issued, it is the responsibility of the shipping line to ship the goods to the foreign buyer with the exporter having no control over the goods. ***In such a situation, transfer of property can be said to have taken place at the port where the shipping bill is filed by the manufacturer exporter and place of removal would be this Port/ICD/CFS.*** *Needless to say, eligibility to CENVAT Credit shall be determined accordingly."*

The refund claims are normally filed by the manufacturer-exporters. The department is

relying on the above para to hold that the port is the place of removal in case of export. Accordingly, the refund claims filed in respect of CHA services, port services, transportation of export goods from ICD to port, fumigation services, etc., are being denied.

Grievances of exporters

5. Couple of years back when the concept of service tax refund claim was not there, exporters were availing of the Cenvat credit of the services after factory gate till port of export. The department was denying the Cenvat credit on the grounds that the factory gate was the place of removal even in case of exports; thus, Cenvat credit was not allowed on the services availed beyond this place. Accordingly, Cenvat credit was disallowed and the exporters were trapped in the judicial proceedings. In order to keep the exporters away from the hassels of litigations on account of Cenvat credit, the mechanism of service tax refund claim was introduced. Since inception of this concept till the negative list era, there was list of specified services on which the refund of service was allowed. This list included port services, CHA services, GTA services from factory to port, fumigation services, etc. It is worth noting here that all of these services were availed after the goods were cleared from the factory gate. During that time also department denied the refund claim on one ground or other. In 99% cases it was mere technical lapse. A number of Tribunal judgments were passed holding that technical lapses should not be a ground to deny the refund claim where the factum of export, utilization of services in course of export and payment to service provider was not disputed. The situation was bit settled with the introduction of % based refund claim *vide* Notification No. 52/2011-ST. However, with the Notification No. 41/2012-ST when the list of specified services was removed, the stand of department also changed with regard to the "place of removal". Since the notification now states that the services availed beyond the place of removal will be eligible for service tax refund, department has accepted that port is place of removal, thus, the services availed prior to departure of goods from port shall not come in the definition of specified services. Moreover, the above discussed circular dated 28-2-2015 has added fuel to fire. Thus, again, the department is rejecting the refund claim resulting into harassment of exporters.

Are the department's contentions justified?

6. It is being contended that the port is the place of removal in case of export, thus, the services like GTA services from factory to port, CHA services, Terminal handling charges, fumigation services, port services, etc., are not specified services for the purpose of availing of service tax refund claim. This contention does not appear to be fair and just in view of following facts:—

- Notification No. 41/2012-ST has been issued after supersession of Notification No. 52/2011-ST. In legal terms the word "supersede" means to take the place of, as by reason of superior worth or right. A recently enacted statute that repeals an older law is said to supersede the prior legislation. It is a settled law that the new notification issued in supersession of any notification is to be read/interpreted in view of old notification. The Notification No. 41/2012-ST has been issued on exactly same lines when compared to earlier Notification No. 52/2011-ST. The only difference being the list of specified services which is being deleted in the new notification. This shows that the new notification has been issued merely to align the service tax refund procedure with the negative list regime. Thus, since there is no change in the basic theme of the notification and procedure of allowing the refund claim, due effect should be

given to all the provisions that were settled and not contradicted in the new notification. Since the old notification specifically allowed the refund of service tax on the CHA services, storage and warehousing, technical testing and analysis, transportation of goods from ICD to port of export, etc., it shows that the place of removal was considered as the factory gate earlier. Since there is no change in the facts, circumstances and legal provisions, the same should be considered as factory gate now also.

- It is reiterated that the service tax refund procedure was being introduced because department was not allowing the Cenvat credit in respect of services availed after the goods were cleared from factory. However, on litigation some decisions came in favour of assessees that allowed the Cenvat credit in respect of some post-removal services. Accordingly, some exporters started taking the Cenvat credit on the strength of those judgments. Interestingly, a No. of such decisions pertain to year 2008-09 - like *CCE* v. *ADF Foods Ltd.* [Order Nos. A/1409-1410/WZB/Ahd./2009, dated 26-6-2009], *Rawmin Mining & Industries Ltd.* v. *CCE* [2009] 18 STT 329 (Ahd. - CESTAT), *CCE* v. *Rolex Rings (P.) Ltd.* [2008] 16 STT 193 (Ahd. - CESTAT). In all of these decisions it was held that port is the place of removal and services availed upto the port are eligible for Cenvat credit. But the department was not accepting these decisions and was continuously denying the Cenvat credit by quoting the definition of place of removal by relying on some decisions passed against the assessee. It was only when the negative list era came into effect and service tax refund procedure was aligned to it the abovesaid circular dated 28-2-2015 was issued, then the department started relying on the decisions that were earlier quoted by the assessees. Taking differential stands under similar facts and circumstances is not legally acceptable.
- It is important to note that the Notification No. 41/2012-ST prescribes the condition that refund of service tax shall be allowed only if the Cenvat credit is not taken. This condition has been kept to deny the possibilities of dual advantages by the assessees. It is worth noting here that the accumulated Cenvat credit is allowed as refund under rule 5 of the Cenvat Credit Rules, 2004 to the exporters. Thus, even if the credit is taken, it is allowed as refund under separate mechanism. However, earlier department was not allowing the benefit of Cenvat credit to the exporters by saying that the place of removal in case of export is factory gate. Now, it is denying the refund claim under Notification No. 41/2012-ST by saying that the factory gate is not place of removal, rather it is the port of export. If the contention of the department is accepted, it would mean that port is the place of removal in case of export. Thus, Cenvat credit shall be allowed undoubtedly on all the services availed till the goods leave the port of export. Thus, the refund of accumulated credit will be filed under rule 5 of the Cenvat Credit Rules, 2004 and the issuance of this notification shall become redundant. It is worthwhile to note the decision of the Hon'ble Supreme Court in the case of ***British Airways Plc.* v. *Union of India*** **2001 taxmann.com 90** wherein it was held that while interpreting a legal provision, the court should try to sustain its validity and purpose behind which the same is enacted. If any interpretation leads to redundancy, it should be avoided.
- As per department's contention, services availed up to the port of export are not specified services and refund of service tax is not allowed on these services. It is contended that only the services

availed beyond the port of export are eligible. It is worthwhile to note here that after the goods leave the port of export, it goes beyond the territorial waters of India. Thus, any services availed of afterwards are not chargeable to service tax. In other words, practically neither any service is availed of by the exporter, nor any service tax is levied. Thus, if this contention is accepted the issuance of this notification will become *null* and *void*.

- Two types of mechanisms are prescribed under Notification No. 41/2012-ST through which the service tax refund can be claimed. One is on the basis of percentage of FOB value and other is on actual basis. The different percentage has been prescribed for different products based upon the estimated service tax suffered by them till the removal of goods till the same reach port of export. This percentage itself indicates the fact that the estimated services availed from clearance of goods from factory till the port of export have been considered. Since there are practically no services availed after the port of export, the percentage would have been *NIL* in such a case. Accordingly, there was no need of issuing this notification. Interestingly, no show cause notice is being issued by the department in the cases where the exporter opts for refund on percentage basis. All the allegations are raised only when the exporter goes for refund on actual basis.
- It is also a fact that the department takes differential stands under same facts and circumstances as per its convenience. For allowing Cenvat credit, the revenue department accepts place of removal as the port of export, whereas for granting rebate in cash the place of removal is treated as factory gate. It is the practice to deduct the expenses like insurance, freight, etc., incurred after the removal of goods from factory till the port while granting the rebate in cash. Such dual-sided approach puts a question mark on departmental proceedings.
- The Circular dated 28-2-2015 which is being taken as yardstick to deny the refund claims of exporters looses its validity simply on the grounds that it is silent on several issues discussed categorily in the forgoing paras. Going further, the para 7 of the same circular prescribes that the place of removal in case of export through merchant exporter is the factory gate itself, because it is the factory gate where the goods are unconditionally appropriated. Thus, the same circular specifies two places of removal in different situations of export. Also, the circular pertains to availment of Cenvat credit and cannot be made applicable for grant of service tax refund under Notification No. 41/2012-ST. It is also worthwhile to mention here that this circular nowhere states that it has been issued in context of Notification No. 41/2012-ST.

Conclusion

7. The past and present of service tax refund is ambiguous and full of litigations. Whatever is the language of erstwhile notification, the department takes the stand as per its own convenience. The journey of eight years of service tax refund claim shows that the fate of service tax refund claim, of course, does not meet the expectation of Government. The department has only one aim - "how to deny the refund claim", whatever be the intention of Government while issuing the notification. Of course, departmental officers can write a novel on the ways to deny the refund claims. The language of notifications does not seem sufficient. That is the reason the mysterious circulars are issued to add fuel to fire. Whatever be the past and present of a beneficial notification, the future is always only one – litigation, litigation and only litigation.

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