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Varying concept of Export of Service under ST law & FTP

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FOREIGN Trade Policy 2015-20 (FTP) introduced the 'Service Exports from India Scheme (SEIS) from April 2015. The SEIS is to encourage export of notified services from India. The motto of the scheme is to provide rewards to exporters to offset infrastructural inefficiencies and associated costs involved and to provide exporters a level playing field.

It is pertinent to note here that FTP does not define "export of services". So, the question may arise as to how to determine whether the services are export or not. There is no reference of any kind in FTP to refer to service tax law to determine the export qualification. FTP merely states that benefit would be given to service exporter of specified services. Relevant provisions in this regard may be noted:

Para 3.08(a)

Service Providers of notified services, located in India, shall be rewarded under SEIS, subject to conditions as may be notified. Only Services rendered in the manner as per Para 9.51(i) and Para 9.51(ii) of this policy shall be eligible. The notified services and rates of rewards are listed in Appendix 3D.

Thus, services have to be rendered in a manner as given in following para-

Para 9.51

"Service Provider" means a person providing:

(i) Supply of a 'service' from India to any other country; (Mode1- Cross border trade)

(ii) Supply of a 'service' from India to service consumer(s) of any other country; (Mode 2- Consumption abroad)

The benefits under FTP are given to boost exports from India so as to gain foreign exchange for the country. As long as the services are provided from India (Para 9.51(i) and (ii) above) and foreign exchange is being earned as a consideration, the services should be eligible for benefit if they are specified.

Drawing reference to service tax law for determining the export of service does not seem to be the intention of the government. Had there been such an intention, FTP could have specifically referred to service tax law ("Law by Reference") and there was no need for Para 9.51 (i) and (ii) as given above. In fact, if reference is drawn to service tax law for determining exports, Para 9.51 (i) and (ii) become redundant.

Further, the concept of service provider under FTP is borrowed from the General Agreement on Trade in Services (GATS) which governs the international trade in services. GATS is a treaty of World Trade Organisation (WTO) that entered into force in January 1995. The treaty was created to extend the multilateral trading system to service sector. As indicated in Chapter XX of GATS, the definition of trade in services covers four different modes of supply.

(Mode 1) Cross border trade - which is defined as delivery of a service from the territory of one country into the territory of other country;

(Mode 2) Consumption abroad - this mode covers supply of a service of one country to the service consumer of any other country;

(Mode 3) Commercial presence - which covers services provided by a service supplier of one country in the territory of any other country, and

(Mode 4) Presence of natural persons - which covers services provided by a service supplier of one country through the presence of natural persons in the territory of any other country.

FTP intends to cover only Mode 1 and Mode 2 only. Mode 3 and Mode 4 are not not sought to be covered by FTP.

Also, Mode 1 and Mode 2 are not in tandem with the service tax law since service tax prescribes altogether different conditions of export. Hence, the concept of export of service under FTP and service tax law are not not aligned to each other. Accordingly, there could be a situation that a service does not qualify as export under service tax law but may still be eligible for SEIS benefit.

This kind of situation creates difficulties for the companies exporting services in determining whether they are eligible for the benefit of SEIS or not. Moreover, it creates a room for the department authorities to reject the benefit to the exporter and thus defeating the entire purpose of export promotion.

The government should look into this issue and come out with a clarification.

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