SOFTEX for Non-STPI Units – A Mandatory Requirement

Introduction:

The typical model of majority of the IT companies which are engaged in provision of software services to parent/group companies is 'cost plus mark-up'. Under this model, the Indian companies would agree to provide a host of services to the parent/group companies and bill them on periodical basis on cost plus agreed mark-up. An agreed and transfer-pricing friendly margin/mark-up would ensure that Indian companies are always left with good enough reserves and not to worry of working capital requirements. This would ensure that Indian companies would never get into losses and concentrate on development of software and provision of other ancillary services.IT companies can start their operations in India either as SEZ or STPI or simple DTA unit[1]. Each of them have specific set of regulations and host of compliances to be adhered. The selection of the unit (SEZ/STPI/DTA) is purely the decision of promoter taking into the advantages and limitations which each set-up would provide.

The advent of MAT and phase out of Section 10A benefit under the Income Tax laws made choice of setting up a software company as SEZ unit, no longer a favorable option. The same is the case with STPI. Thereby all the companies now prefer starting the company as a DTA unit, since there are no specific pre-requisite conditions that are to be satisfied unlike SEZs and STPIs, which make the entire process of setup of DTA unit easy and hassle-free.

Problem:

However, one of the biggest procedural set-back in setting up a software company in DTA is the certification of proof of export of software. For a unit located in SEZ, it is granted by Development Commissioner and for a unit located in STPI, it is granted by Commissioner of STPI. However, for DTA unit, there is no exclusive/specific/nodal authority for monitoring/grant of certification as to whether export of services has actually and genuinely taken place.

This places a huge challenge on the software exporters to prove that there is an actual export of software which has taken place. This is also escalated by the fact that the software cannot be seen like goods and raises a serious doubt in the minds of the authorities regarding the genuineness of the exports. With money laundering activities and shell-companies is talked all over world on day-to-day basis, the governmental authorities, tend to look a closer look at the activities of certain software companies, which poses a significant threat to the genuine companies. This is majorly because there is no exclusive/specific/nodal authority which authenticates/certifies services provided by DTA units.

Amidst of the above suspicion, while these companies apply for refunds under indirect taxation, absence of certification of invoices by any of the nodal/specified agency, would present number of issues before the indirect taxation authorities. Further, the current FEMA laws would require software companies to file certain forms as declaration for proof of export of software services. The DTA units are not generally allowed to file said declaration unless they take a separate registration with STPI by paying an annual fee depending upon the turnover of the unit. If the said forms are not filed, then it would lead to a non-compliance under FEMA laws.

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[1] For the purposes of simplicity, let us assume that DTA unit does not include STPI unit.

Solution:

Keeping all of the above in view, we advise to each of the DTA unit, which is engaged in provision of software services, to obtain registration as Non-STPI unit with STPI authorities and obtain the authentication of invoice and also enable the DTA unit to file declarations under FEMA laws to avoid non-compliance thereof.

In the below write-up, we discuss in detail the law position under the FEMA regulations which make it necessary for the DTA units to register as Non-STPI units and also the procedure for obtaining registration as Non-STPI and other connected matters.

Obligation under FEMA:

Section 7 of FEMA deals with export of goods and services. Vide Section 7(3), every exporter of services shall furnish to RBI or to such authorities a declaration in such form and in such manner as may be specified, containing the true and correct material particulars in relation to payment for such services. Accordingly, to provide the manner and details to be contained the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 have been framed.

In terms of Regulation 3 *ibid*, the exporters of goods and services are required to declare the value of exports to the specified authority viz. Commissioner of Customs in case of goods and Director of STPI/Commissioner of SEZ in case of software. RBI requires the certification of the value of exports by the specified authority in order to monitor their realization and the specified authority is made responsible for this certification.

EDF is the prescribed form to declare the value of exported goods while SOFTEX is the prescribed form to declare the software exports. In case of export of goods, the declaration of the value of exported goods and its certification takes place during the time of export while in case of export of software, the declaration of the value of exported software and its certification is a post facto exercise which would be undertaken after export performance.

Regulation 3(3) *ibid* has clarified that in situations where there are no prescribed declarations are specified to be made for any services, the exporter may export such services without furnishing any declaration, but shall be liable to realize the amount of foreign exchange which becomes due or accrues on account of such export and repatriate in accordance with FEMA regulations. The above is applicable only when the regulations do not prescribe any declaration for the services which are exported. However, as stated earlier, for export of software a declaration in the manner of SOFTEX has to be filed. Hence, every exporter of software is obliged to file a declaration in SOFTEX. Now, let us proceed to understand the expression 'software' for the purposes of FEMA regulations.

Meaning and Scope of 'Software':

Regulation 2(viii) of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 defines the term 'software' to mean any compute programme, database, drawing, design, audio/video signals, any information by whatever name called in or any medium other than in or on any physical medium.

The definition given is exhaustive and includes all kinds of software that may be shared in any medium other than in physical medium. The software in physical medium is treated as goods and declarations applicable for goods will equally applicable for software in physical medium. Apart from the above definition, Regulation 6(B) *ibid* specifies that SOFTEX form should also be filed for audio/video/television software.

Hence, on a combined reading of the definition of 'software' and Regulation 6(B), it is evident that SOFTEX form should be filed for computer software including audio/video/television software.

Declaration in SOFTEX:

Regulation 6 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 provides for declaration of software exports before the designated official of STPI or SEZs. The said official is under obligation to certify the value of the software exports.

The procedure related to filing of export declaration in SOFTEX form and its certification has been provided under Master Circular No. 14/2013-14 dated 01.07.2013 read with Master Direction on Export of Goods and Services[2].

Accordingly, the exporter of software is required to make a declaration in SOFTEX Form in duplicate not later than 30 days from the date of invoice or date of last invoice raised in a month. The data submitted through SOFTEX forms shall be transmitted electronically from STPI/SEZs to RBI. The data received by RBI will be made available in EDPMS portal through which the bankers can access the said information to match the inward remittance of export proceeds.

A unique number for each of the SOFTEX form submitted shall be generated electronically through the facility extended by RBI. One of the copies of the SOFTEX form shall be retained by STPI/SEZs for their records purpose and the other copy shall be handed over to the exporter after due certification from STPI/SEZ.

The certification of the value of exports by the designated authority of STPI/SEZ will be undertaken after examining the required documents in this regard. The documents sought by the said authority are required to be made available by the exporter within a period of 30 days. The certification process will be smooth and generally the values declared in the invoices issued towards software exports will be accepted and certified. Rejections are only in cases where there exists a doubt on genuineness of the export transaction undertaken.

The copy of SOFTEX form duly certified by the designated authority of STPI/SEZ shall be submitted to the banker for the purpose of realization of export proceeds.

Obligation on DTA Units:

As stated earlier, the units located in SEZs and undertaking software exports can declare their value of exports in SOFTEX forms before the designated authority of SEZs. The units registered under STPI scheme of Foreign Trade Policy can also declare the value of exports in SOFTEX forms before the designated authority of STPIs and accordingly obtain the required certification. The declarations and compliances prescribed under SEZ and STPI scheme are sufficient and they will take care of the requirements related to SOFTEX forms also.

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[2] Master Direction No. 16/2015-16 dated 01.01.2016
(https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=10395&fn=5&Mode=0)

With respect to units operating otherwise than as STPI or SEZ units that is DTA units, RBI has notified STPI as the authority to receive declarations in SOFTEX forms and to certify the value of exports. In order to accept SOFTEX forms and to certify the values from these units, STPI has required these units to register with them and undertake the necessary compliances as notified from time to time.

Consequences of Non-Filing of SOFTEX:

In case where the DTA units engaged in export of software services, has failed to declare their software exports and get them certified in SOFTEX forms, the same amounts to violation of Foreign Exchange Management (Export of Goods and Services) Regulations, 2015. This will attract penal proceedings under Section 13(1) FEMA and accordingly, penalty up to thrice the sum involved in the contravention can be imposed. Further, the DTA Unit may also be subjected to continuous penalty which may extend to INR 5,000 for every day after the first day during which the contravention continues.

Further, entities engaged in exports are entitled to claim refund of the input GST paid on inputs and input services received for undertaking exports. In order to process these refund claims, the concerned tax authorities insist the business entities engaged in software exports to submit SOFTEX forms for the purpose of processing of such refund claims. Non-submission of said forms may lead to rejection of the refund claims.

Further, in the absence of certified SOFTEX forms, the banks will process the inward foreign exchange remittances as proceeds realized towards exports of services and accordingly BRCs[3] will be issued certifying that the proceeds are received against export of services but not towards export of software. This will act as deterrent to the business entities in claiming that they have previous export performance for participation in tenders related to software projects.

Way Forward for DTA Units – Register as Non-STPI Units:

As stated above, for DTA units, the STPI is notified for certifying the invoices and declarations thereon. Hence, it is advisable for any DTA unit engaged in export of software to obtain registration with STPI as 'Non-STPI' unit and accordingly submit declarations to STPI and get them certified.

Fee for Non-STPI Units:

STPI will collect service charges from Non-STPI units for certifying the SOFTEX forms. The service charges are collected in advance prior to registering of contracts and immediately after obtaining the registration. The amount of service charges payable are slab wise which shall be determined based on the value of contracts registered. In the event of non-certification of SOFTEX forms due to any reason (non-submission of required documents or cancellation of contract etc.,.), STPI will retain 20% of the service charges paid and the balance amount shall be refunded.

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[3] BRCs are to be issued by Bank for realization of export proceeds as required under para 1.12 of FTP 2015-20

The service charges payable[4] are mentioned as under:

S No	Export Turnover for the Year	Annual Services Charges (INR)
1	Upto 12.5 lakhs	INR 4,000
2	Above 12.5 lakhs to 25 lakhs	INR 8,000
3	Above 25 lakhs to 50 lakhs	INR 16,000
4	Above 50 lakhs to 3 Cr	INR 55,000
5	Above 3 Cr to 10 Cr	INR 1,10,000
6	Above 10 Cr to 25 Cr	INR 2,25,000
7	Above 25 Cr to 50 Cr	INR 2,50,000
8	Above 50 Cr to 100 Cr	INR 3,50,000
9	Above 100 Cr to 500 Cr	INR 5,75,000
10	Above 500 Cr to 1000 Cr	INR 6,00,000
11	Above 1000 Cr	INR 6,50,000

Compliances & Other Aspects as Non-STPI Units:

The DTA units are required to obtain a registration before STPI. This is called registration as Non-STPI unit. The unit seeking to obtain the said registration is required to file an application in prescribed form[5] with required supporting documents before the Director, STPI. The application shall be accompanied by a prescribed fee of Rs. 1,000 plus GST. The Director, STPI will verify the application along with supporting documents and grant the registration[6] as a Non-STPI unit. The registration granted is valid for a period of three years. It is required to be renewed before its expiry by approaching the Director, STPI during the last three months prior to the expiry of registration.

All the contracts entered by the Non-STPI unit to undertake software exports are required to be registered with STPI by making necessary application[7] in this regard. Further, a copy of said contracts are also required to be enclosed. The registration of contracts shall be undertaken prior to declaration of software exports under the said contracts.

The Non-STPI unit registered with STPI is required to submit quarterly and annual performance reports in the prescribed forms[8].

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[4] Amounts mentioned are excluding GST amount. GST will be charged at 18% on the mentioned charge.
[5] Prescribed form to apply for Non-STPI Registration by Hyderabad STPI is Annexure-I
[6] Registration Certificate will be given in the form Annexure-II by Hyderabad STPI. This is also called as LoP (Letter of Permission)
[7] Application for Registration of Contracts shall be made in form Annexure-V by Hyderabad STPI
[8] QPR shall be filed in Form Annexure-III while APR shall be filed in Form Annexure-IV

Glossary

Acronym	Detailed Description
STPI	Software Technology Park of India
SEZ	Special Economic Zone
DTA	Domestic Tariff Unit
RBI	Reserve Bank of India
EDF	Export Declaration Forms
SOFTEX	Software Exports
FEMA	Foreign Exchange Management Act, 1999
GST	Goods & Services Tax
BRC	Bank Realisation Certificate
QPR	Quarterly Performance Report
APR	Annual Performance Report