[2024] 158 taxmann.com 562 (Article)

[2024] 158 taxmann.com 562 (Article)©
Date of Publishing: January 24, 2024

"Export of Goods & Services Under Fema"-II

MAHI YADAV
Founder and Managing Director, Majesty Legal, Standing Counsel for Enforcement Directorate

ABSTRACT

In the ever-expanding landscape of international trade, the Foreign Exchange Management Act (FEMA) stands as a cornerstone of India's regulatory framework, wielding significant influence over the export of goods and services. Enacted in 1999, FEMA replaced the more stringent Foreign Exchange Regulation Act, ushering in an era of economic liberalization and adaptability to the dynamic global market.

This Article examines the legalframework governing the export of goods and services from India under the Foreign Exchange Management Act (FEMA) and its 'Foreign Exchange (Export of Goods and Services) Regulations' of 2015. The Article elucidates key aspects, including the prior permission for specific exports, the procedural intricacies involved in the declaration of exports,the exemptions applicable to certain cases and penalties, appeals for contraventions. It also delves into the specific directives issued by the Reserve Bank of India in unique export scenarios, emphasizing conditions related to payment, declaration endorsement, and value verification. Various government incentives outlined in India's Foreign Trade Policy are discussed, aligning with the national imperatives of self-sufficiency and global competitiveness. This comprehensive analysis aims to facilitate a nuanced understanding of the regulatory and incentive landscape governing India's exports.

EXPORT REGULATIONS BY RBI

In case of ***Akshay N Patel* v. *Reserve bank of India***[1]**.**, the Hon'ble court held that Reserve bank of India (RBI) is a special, expert regulatory body that is insulated from the political arena. Its decisions are reflective of its expertise in guiding the economic policy and financial stability of the nation.RBI is empowered by FEMA to manage, regulate, and supervise the export and foreign exchange of India.

The Reserve Bank of India enacted the 'Foreign Exchange (Export of Goods and Services) Regulations' 2015 under the authority granted by Sections 7(3)(1)(a) and 47(2) of the FEMA Act, 1999.

A. Export With Prior Permission[2]

It specifies that certain exports require prior approval which are as follows: –

Export of goods under exclusive deal between the Central Government and Government of a foreign state; or

Export under rupee credits provided by the Central Government to Government of a foreign state shall be monitored by the terms and conditions laid out in the several public notices pointed by the Trade Control Authority in India and the information by the Trade Control Authority in India and the information issued from time to time by Reserve Bank of India.

An export under the line of credit provided to the bank or a financial institution performing in an offshore state by the Exim Bank for funding exports from India shall be ruled by the terms and conditions thought out by RBI to the approved dealers from time to time.

B. Declaration of Exports[3]

In the case of trade abroad by Customs manual harbors, every retailer of goods or software in tangible form or through any other manner, either directly or indirectly to any place outside India other than Nepal and Bhutan, shall provide to the defined authority an affirmation. The declaration shall be enclosed with such proofs which shall consist of true and correct material exacts including the amount.

C. Exemptions from Declarations[4]

It provides the list of cases which are immune from providing disclosure:

a. trade samples of goods and publicity material supplied free of payment;

b. personal effects of travellers, whether accompanied or unaccompanied;

c. ship's stores, trans-shipment cargo and goods supplied under the orders of Central Government or of such officers as may be appointed by the Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements;

d. by way of gift of goods accompanied by a declaration by the exporter that they are not more than five lakh rupees in value;

e. aircrafts or aircraft engines and spare parts for overhauling and/or repairs abroad subject to their reimport into India after overhauling /repairs, within a period of six months from the date of their export;

f. re-export of leased aircraft/helicopter and/or engines/auxiliary power units (APUs), either completely or in partially knocked down condition re-possessed by overseas lessor and duly de-registered by the Directorate General of Civil Aviation (DGCA) on the request of Irrevocable Deregistration and Export Request Authorization (IDERA) holder under 'Cape Town Convention' or any other termination or cancellation of the lease agreement between the lessor and lessee subject to permission by DGCA/Ministry of Civil Aviation for such exports[5];

g. goods imported free of cost on re-export basis;

h. the following goods which are permitted by the Development Commissioner of the Special Economic Zones, Electronic Hardware Technology Parks, Software Technology Parks or Free Trade Zones to be re-exported, namely:

(*a*) imported goods found defective, for the purpose of their replacement by the foreign suppliers/collaborators;

(*b*) goods imported from foreign suppliers/collaborators on loan basis;

(c) goods imported from foreign suppliers/collaborators free of cost, found surplus after production operations;

i. Replacement goods exported free of charge in accordance with the provisions of Foreign Trade Policy in force, for the time being.

j. goods sent outside India for testing subject to re-import into India;

k. defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.

l. exports permitted by the Reserve Bank, on application made to it, subject to the terms and conditions, if any, as stipulated in the permission.

D. Directions by RBI in Specific Cases[6]

Despite everything is followed the exporter shall, before trade, shall agree to the conditions as may be indicated in the order of RBI, namely –

That the payment of the merchandise or software is secured by an irrevocable letter of credit or by such other course of action or report as may be mentioned in the order;

That any declaration to be furnished to the predetermined authority shall be submitted to the approved merchant for its prior endorsement, which may, having regard to the conditions, be given or withheld or might be offered subject to such circumstances as might be indicated by the RBI by directions issued now and then;

That a duplicate copy of the declaration to be outfitted to the predetermined authority shall be submitted to such expert or association as may be demonstrated for ensuring that the value of products specified in the declaration represents the proper worth.

RBI shall give no direction, and no endorsement shall be withheld by the Authorized merchant unless the exporter has been given a reasonable chance to make a representation in that matter.

E. Acknowledgement of Export Value

It specifies that the sum representing the full worth of value of merchandise/software/services traded shall be acknowledged and repatriated to India inside 9 months from the date of trade, gave that where the products are exported to a distribution centre established outside India with the consent of RBI, the full worth shall be paid to the approved merchant as it is acknowledged and in any case inside 15 months.The RBI, for sufficient reasons, may amplify the time of 9 months to 15 months[7].

F. Payment Methods

The Full export price of the goods or articles shall be received through a certified or an authorized dealer in the form of:

Bank Draft, Demand Draft, Pay Order, Banker's or Personal Cheques,

Foreign Currency Notes/ Foreign Currency Traveller's Cheques,

Payment out of cash reserves held in the Foreign Currency Non-Repatriable Account deposits and NRE account,

International Credit/Cash Cards,

Precious alloys, i.e. Gold/ Silver/ Platinum by the Gem & Jewellery Units in Special Economic Zones and Export Oriented Unit in equal to the value of the jewellery exported.

CONTRAVENTIONS, PENALTIES AND APPEALS

Penalties for contraventions under FEMA are per se monetary in nature. If any exporter contravenes any provisions, rules, regulations, etc. the penalty imposed can be up to 3 times of the sum involved in contravention; and if the sum of contravention is not ascertainable, penalty can be up to Rs. 200,000. If the contravention is a continuing one, a further penalty up to Rs. 5,000 per day may be imposed for every day after the 1st day during which the contravention continues[8].

If any exporter is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed u/s. 37A (at present the limit prescribed is Rs. one crore), then such person is liable to:

1. Penalty up to 3 times the sum involved.
2. Confiscation of the value equivalent situated in India.
3. Imprisonment for a term which may extend to 5 year + fine.

The adjudicating officer / competent authorities may also confiscate any currency, security or property in addition to imposing penalty. If a person does not pay up the penalty within 90 days, he is liable for civil imprisonment.

There is a right to appeal given at every stage and an appeal against an order of the Adjudicating Authority can be made to the Special Director (Appeals). An appeal against the order of the Special Director (Appeals) can be made to the Appellate Tribunal. An appeal, on questions of law, against the order of the Appellate Tribunal can be made to the High Court.

The case of ***Riddhisiddhi Bullions Ltd.*** **v.** ***Union of India***[9]focuses on the significance of the powers of the RBI by which penalties can be imposed by it under the FEMA, 1999. It deals with violation of the impugned circulars of the RBI which were issued under Section 11 of the FEMA, 1999 for regulating import-export of gold. It could result in imposing fiscal penalty by the RBI under the FEMA.

EXPORT INCENTIVES BY GOVERNMENT

The government provides export incentives to not only motivate exporters, who bring in foreign exchangebut also to compensate them for costs incurred while exporting. These incentives are in line with the government's 'Aatmanirbhar' and 'Make in India' initiatives to attain self-sufficiency and ensure higher reach of local products. India's Foreign Trade Policy (FTP) advocates various export incentives that are offered by the government through the Directorate General of Foreign Trade (DGFT). A list of key incentives provided by the government to achieve its goal are as follows:

1. Merchandise Exports from India Scheme (MEIS)

   The MEIS rewards exporters by offsetting the infrastructural inefficiencies and associated costs. This scheme provides incentives to exporters in the form of duty credit scrips to refund losses on paid duties. Under the MEIS, an incentive of 2-5% of the 'Free on Board' (FOB) value of exports is provided to all exporters, irrespective of their annual turnover. However, MEIS will be soon replaced with the new Rebate of Duties & Taxes on Exported Products (RoDTEP scheme), as MEIS is not WTO-compliant.
2. Rebate of Duties & Taxes on Exported Products (RoDTEP Scheme)

   The RoDTEP scheme has replaced the old MEIS in a phased manner in December 2020. The RoDTEP scheme aims to refund all hidden taxes, which were earlier not refunded under any export incentive scheme, such as the central and state taxes on the fuel used for transportation of export products, duties levied on electricity used for manufacturing, mandi tax levied by APMCs, toll tax & stamp duty on the import-export documentation and others.

3. Service Exports from India Scheme (SEIS)

   The objective of 'Service Exports from India Scheme' (SEIS) is to motivate traders who export notified services. Service Exports also bring in foreign exchange to the country and is hence encouraged. Under SEIS, an incentive of 3-7% of the net foreign exchange earnings is provided to the service exporters. It requires the service providers to have an active Import–Export Code (IEC Code) with a minimum net foreign exchange earnings worth US$ 15,000 to be eligible for a claim under the scheme.

4. Advance Authorisation Scheme (AAS)

   Advance Authorisation Scheme allows duty-free imports of raw materials, which are required to produce export goods. It allows traders to import raw materials at 0% import duty if those raw materials will be used to manufacture export products.

5. Duty Free Import Authorisation (DFIA Scheme)

   The purpose of this scheme is the same as the Advance Authorisation Scheme, i.e., to allow duty-free imports of raw materials. However, this scheme is applicable post exports; this means that duty-free imports will only be allowed once exports are completed.

6. Duty Drawback Scheme (DBK Scheme)

   Under Duty Drawback Scheme (DBK), exporters are given compensation on customs and central excise duties incurred on materials used in the manufacture of exported goods.

7. The Rebate on State & Central Taxes and Levies Scheme (RoSCTL Scheme)

   RoSCTL scheme is only applicable to the apparel and made-up industry, covering Chapters 61-63 of the ITC (HS). It grants refund on taxes such as VAT on transportation fuel, captive power, 'mandi' tax and electricity duty. This scheme will be soon merged with the RoDTEP scheme in all sectors.

8. Export Promotion Capital Goods Scheme (EPCG Scheme)

   EPCG scheme facilitates the imports of capital goods to produce goods and services by manufacturers. Under this scheme, exporters can partner with a manufacturer and import the required capital goods to produce export goods at 0% duty. This scheme also helps reduce the service exporter's capital costs. Service exporters such as hotels, travel & tour operators, taxi operators, logistics companies and construction companies are some beneficiaries under this scheme.

CONCLUSION

In conclusion, India's regulatory framework, led by FEMA and its Regulations, significantly influences the global trade of goods and services. Navigating the approvals, detailed declarations, and specific exemptions requires a nuanced understanding of these legal guidelines. The Reserve Bank of India provides crucial guidance, ensuring exporters comply with rigorous conditions. Timely acknowledgment and repatriation of export values, along with diverse payment methods, enhance the sophistication of the export process. Government incentives, aligned with national goals, serve as crucial pillars for self-sufficiency and global competitiveness. As India aims for a prominent role in global trade, mastering these regulatory and incentive dynamics becomes imperative for exporters seeking success on the international stage.

© Copyright Taxmann. No part can be copied or circulated without the permission of Taxmann.

1. [2021] 133 taxmann.com 53 (SC)/Civil Appeal No. 6522 of 2021
2. Regulation 13 of Foreign Exchange (Export of Goods and Services) Regulations' 2015
3. Regulation 3 of Foreign Exchange (Export of Goods and Services) Regulations, 2015
4. Regulation 4 of Foreign Exchange (Export of Goods and Services) Regulations' 2015
5. Substituted vide Notification No. FEMA 23(R)(4)/2021-RB dated January 08, 2021 published in the Official Gazette of India, Extra Ordinary, Part III, Section 4 dated January 11, 2021.
6. Regulation 16 of Foreign Exchange (Export of Goods and Services) Regulations, 2015
7. Regulation 9 of Foreign Exchange (Export of Goods and Services) Regulations' 2015.
8. Section 13(1) of FEMA Act, 1999
9. Writ Petition No. 10001 of 2014/[2016] 66 taxmann.com 153 (Bom.)