

To File or not to File Softex Forms and Legal Implications



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There are many Software exporting companies operating outside an export oriented scheme (STP, SEZ, EOU etc.) and they are always confused whether they need to comply with the erstwhile STPI guidelines and RBI regulations of filing Softex forms, sometimes they are also advised, that there is no need for them to file SOFTEX forms anymore as the STPI and IT benefits are over, due to the sun set clause in the Income Tax Act. Many young entrepreneurs feel that STPI should have been closed when the income tax exemption scheme expired half a decade ago and Verification of invoices serves absolutely no purpose, lately Even without STPI verification it is legal money coming in via legal banking channels for a legal purpose without any scope of tax evasion

Many Start-ups obviously get confused and, in some cases, companies stopped getting SOFTEX certification done, after complying with the STPI and RBI guidelines in past when they moved out of STP/SEZ schemes.

There are always two parts to deal with regulatory compliance. One, the policy aspect and second, the procedural aspect. Procedural are explained in plenty but no proper explanation on the policy is available, hence the confusion continues.

In general exports means sending 'goods and service' to clients in foreign country (outside territorial borders of India) for purpose of sale. The value of the goods declared is accepted & recorded and certified by the customs office called "valuation of export". Once the valuation of export is complete, the value is accepted both by RBI and its authorised dealer (the exporter's bank). RBI then monitors, the remittance of an equivalent value in exporter's bank account, the purpose of this process is that the person exporting the goods does not undervalue the goods or overvalue the goods thereby resulting in money laundering, this is the answer to the question of many entrepreneurs that Verification or valuation of invoices serves absolutely no purpose, and Even without verification it is legal money coming in via legal banking channels for a legal purpose without any scope of tax evasion, how can money be legal when the export value is X and the exporter receives foreign currency for X PLUS , thereby resulting in illegal money travelling into the country, not only that this may also result in tax evasion

Software as Goods - The Apex Court in the case of Tata Consultancy Services vs State of Andhra Pradesh on 5 November, 2004, held that Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners and are goods. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a goods. This how SOFTEX came into existence, therefore all software exports are classified as GOODS, Software (IT and ITeS) was given a special status in international trade equivalent to 'goods'.

Coming to the valuation of Software Invoices we first need to understand that the export process of Software can be physical on a media (CD/DVD, magnetic tapes etc.) OR exported through data communication links. There is a difference, when exported through data communication links, there are no physical goods, therefore government has

announced SOFTEX form as an alternative to the GR/PP forms (Physical exports), to suit the export of Software, through data communication links.

The RBI circulars on SOFTEX mentions exports of 'Software', there are multiple interpretations stating that software covers both Software services and Software products and Software services include a whole lot of things from consulting to design, development, implementation, maintenance, re-engineering of Software or a Software product and 'ITeS' covers all those services that are delivered to clients across borders of India using an IT driven system and process over a telecom/internet link (include BPO, KPOs, Digitization, Call centres, Data processing etc.) Seriously mistaken in its interpretation of software and the things Softex applies to, many entrepreneurs are confused as to what is included as software. The FEMA (export of goods and services) regulations 2000 - Notification No. FEMA 23 /2000-RB clearly defines Software as follows:

“includes transmission through any electronic media and 'software' means any computer programme, database, drawing, design, audio/video signals, any information by whatever name called in or on any medium other than in or on any physical medium ;

Therefore, we first need to determine whether services rendered by a company falls under Softex process or not, on proper interpretation a lot of consulting won't fall under Softex. As another proof point, the RBI incoming remittance classification includes a code category for "Computer, electronic, telecommunication ... consultancy services other than those covered in the SOFTEX form".

Had all software services fallen under Softex, why would that category exist?!! Therefore, proper interpretation is necessary, as Non filing of SOFTEX will result in the exports proceed realized and the remittance received treated as either 'general services' or not as an export proceed or illegal.

For general services such as management consulting, technical services there is no declaration form required to be filed.

For Software exporting companies not operating under STPI, it is possible to bypass and get remittances without filing SOFTEX , under the guise of a 'service' export. There is no immediate threat of non-compliance, However, not getting classified as 'software' can create problems in future. First problem created is your exports are not 'Software exports'. The other problems can erupt from regulations in other areas of taxation etc. Complex GST rules can create a lot of problem. Any situation, where an exporter will need to prove and protect itself can end up in to a nightmare of non-compliance.

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 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, 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 as the same is prescribed. Hence, every exporter of software is obliged to file a declaration in SOFTEX.

In case where the DTA (Domestic Tariff Area) 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 . 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 (Bank Reconciliation Statements) 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.

Therefore, for export of software a declaration in the manner of SOFTEX has to be filed as the law exists today, Coming to the view that STPI must be abolished & Softex Discontinued there are several opinion on this aspect stating that the STPI as a regulation/process are the worst form of red tape that should be scrapped.

When there are no benefits under the STPI scheme and with ever growing e governance & central government facilitating ease of doing business, should STPI exist?

