Indirect Tax News Update

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Service Tax

Liability shifted upon 'importer' towards "transportation by vessel" services from non-taxable territory

Central Government shifted the liability to pay service tax on 'importer' defined u/s 2(26) of Customs Act in respect of services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from place outside India up to Customs clearance station in India w.e.f April 23rd.

Central Government amends Rule 6 of Service Tax Rules w.e.f. January 22nd by granting such person liable for paying service tax, an option to pay an amount calculated at 1.4% of sum of CIF value of imported goods.

Also amends Point of Taxation Rules w.e.f. January 22nd to prescribe point of taxation of services provided by a foreign shipping line to foreign charterer w.r.t. goods destined for India as the 'date of bill of lading' of such goods in the vessel at port of export.

Accordingly, Central government amended Explanation under Notification No. 30/2012/ST (imposing reverse charge liability) to state that person liable for paying service tax other than the service provider in respect of such services shall be importer defined u/s 2(26) of Customs Act w.e.f. April 23rd.

This clarification has been issued owing to many litigations and confusions. This has been a grey area till now. The clarification comes as a welcome change.

Comment: This comes as step ensure service tax is paid on the services accounted for .

Providing food to workers at subsidized rates is not service, but an industrial obligation

HC recently in the case of Bhimas Hotels Pvt. Ltd v. The Union of India and others held that food supplied by restaurant to employees at subsidized rate, would not qualify as 'service'; Notes that to come within the purview of definition of 'service', certain pre-requisites are to be fulfilled, viz. (i) there should be an activity, (ii) such activity should be carried out by a person for another, and (iii) it should be carried out for a consideration.

Further, HC rejected Revenue's argument that all the services come under the tax net except the ones which fall under exemption Notification No. 25/2012-ST, states that "unless an activity carried on by a person falls within the purview of the definition 'service', the question of analyzing whether such activity falls within the exemption under the Notification, dated 20.06.2012, does not arise".

Moreover, HC remarked that supply of subsidized food to employees / workers by the company management has to be seen as part of the pay package that workers have negotiated with the employer, and since the term 'wages' under Factories Act as well as Industrial Disputes Act includes anything supplied at subsidized rate, subsidized food would form part of 'wages'.

Further, on noting that Section 65B excludes any transfer, delivery or supply of any goods deemed to be a sale within the meaning of Article 366(29A) of the Constitution.

HC stated that Revenue has overlooked the fact that assessee has paid VAT on value of food supplied to its workers, and therefore, once the State Authorities have treated such supply as 'sale', it is not open to the Revenue to treat the same as 'service'.

Comments: As per Factories Act the company is required provide food to the workers if the work force is more than 250 people. Moreover, the subsidy provided by the company is part of their wages.

Amount deposited by mistake not 'tax' and refund will not be unjust enrichment

CESTAT in case of Monnet International Ltd & Anr. vs. CCE, New Delhi granted refund of amount deposited by mistake / good faith / pressure by assessees as service tax towards liaising services rendered to overseas client;

CESTAT Noted that soon after knowing the factual position, assessees filed refund claim but the same was rejected by lower authorities in a mechanical way by following the statutory provisions prescribed u/s 11B of Central Excise Act read with Section 83 of Finance Act.

Moreover, CESTAT held that as certified by the Chartered Accountant, assessees had not received any amount towards service tax from the overseas client, hence there was no case of unjust enrichment.

Further, CESTAT relied on Kerala HC ratio in KVR Constructions where it was held that if there is no authority to collect service tax by the Dept., it would not give them the authority to retain the amount paid which was initially not payable to them.

Further, CESTAT found that refund was filed within the period of 3 years after discovery of mistake as circumscribed by Delhi HC in Agro Industries Ltd, while holding that limitation under section 11B is not applicable to a case involving return of deposit, not refund of tax.

Comment: CESTAT held that as the amount was deposited by mistake, it would not amount to refund of tax

CENVAT credit on services exported from unregistered premises due to absent statutory bar

HC in case of Commissioner of Service Tax, Chennai vs. SCIOinspire Consulting Services (India) Pvt Ltd & Anr allows refund of unutilized CENVAT credit in respect of services exported from unregistered premises.

Further, HC rejected Revenue's reliance on Notification No. 5/2006 -CE (NT), Rule 5 of CENVAT Credit Rules and Rule 4 of Service Tax Rules to disentitle claim of assessee for refund of CENVAT credit.

HC Observed that Notification No. 5/2006-CE (NT) which sets out the procedure for claiming refund of unutilized credit, does not bar grant of CENVAT credit even if premises are not registered, opined that correlating jurisdiction of concerned officer to whom application is to be made with location of registered premises would not obliterate the rights of exporter to claim refund.

Moreover, HC observed that neither Rule 5 of CENVAT Credit Rules nor Rule 4(2) & (3) of Service Tax Rules bring to the fore any limitation w.r.t. refund of unutilized CENVAT credit qua export services merely on ground of unregistered premises. HC relied inter alia on HC rulings in mPortal India Wireless Solutions (P) Ltd and Tavant Technologies and distinguished Sutham Nylocots decision on facts.

Comment: There is no statutory requirement or bar for availing CENVAT credit for unregistered premises.

Central Excise

SC upholds constitutional validity of 'mandatory pre-deposit' for appeals

SC in case of Satya Nand Jha vs Union of India & others dismissed SLP against Jharkhand HC order which upheld constitutional validity of amendment to Section 35F of Central Excise Act w.e.f August 6, 2014 mandating pre-deposit for preferring appeal. HC held that said Section was neither violative of Article 14 or Article 19 or any other provision of Constitution of India, thus rejecting assessee's argument that by virtue of amendment, taxpayers preferring an appeal were classified into two categories, i.e., those who have preferred an appeal before the amendment and those who preferred an appeal post amendment and according to HC, "whenever any cut-off date is prescribed, there are bound to be few persons who will fall on wrong side of the cut-off date, but, it does not mean that the cut-off date chosen by the legislature is arbitrary…what should be the cut-off date and how it should be fixed is the absolute prerogative power of the legislature...". Further, relying on SC ruling in Anant Mills Company Ltd, HC had held that the right to appeal is a statutory right and the legislature while granting the same, can always impose conditions for exercise thereof. HC also rejected assessee's contention that classification created by Section 35F had no reasonable nexus with the object sought to be achieved, while stating that "No legislation relating to tax can be declared to be illegal, much less unconstitutional, on the ground of being harsh, on the anvil of Article 14 of the Constitution of India otherwise, every taxpayer will feel every legislation relating to taxation to be a harsh one…".

HC observed that 2nd proviso to Section 35F which rules out applicability of 'mandatory pre-deposit' to stay applications and appeals pending prior to August 6, 2014, took away the effect of Section 6 of General Clauses Act with a "different intention" of Legislature. Finding no creation of 2 classes by this substituted Section 35F, HC remarked, "…the assessees, who do not want to deposit the tax..and want to prefer appeal, are themselves creating a class because of their own failure or mistake, otherwise the statute permits everyone to prefer an appeal.". Rejecting assessee's argument that such legislation is confiscatory in nature, HC remarked that in grossest extreme cases, assessee can take recourse to the writ jurisdiction under Article 226 of the Constitution of India. HC stated, "…statute relating to taxation cannot be struck down merely because the right to prefer an appeal is made conditional…" and since the amount so deposited can be easily recovered from Revenue with interest in case of favourable appeal decisions, said provision is more balanced and in favour of assessees.

Comment: This precondition to deposit certain percent of amount of demand duty was introduced to curtail the litigation and the process of stay in the appellant tribunals. SC held that legislature was with in rights to do so.

Technical know-how royalty taxable on inter-unit transfer

HC in case of Century Enka Ltd v. Commissioner of Central Excise, Pune royalty towards technical know-how includible in assessable

HC Rejected assessee's contention that royalty was not taxable since same was payable on net sales and there was no element of sale in inter-unit transfer,

CESTAT observes that the agreement was primarily for transfer of technologies and though the consideration thereto was termed as 'royalty', was actually technical know-how fee. HC opined that royalty charged on the basis of sale price is just a convenient mechanism to measure the amount payable on account of such transfer and in this regard, relies on coordinate bench decision in Otis Elevator Co. (I) Ltd. HC upheld penalty since CAS-1 clearly prescribed inclusion of such royalty in the assessable value, but sets aside demand in respect of chips manufactured by assessee as same were not covered as "products" under the agreement.

Moreover, CESTAT restricted the demand in respect of inclusion of bonus & gratuity in assessable value to normal limitation period and sets aside penalty u/s 11AC of Central Excise Act by relying on SC decision in Asarwa Mills.

Comments: HC held this on factual basis on observing that the agreement was primarily for transfer of technologies and though the consideration there to was termed as 'royalty'.

Duty payment on higher of annual capacity / actual production not 'ultra viers' under Section 3A Central Excise Act

SC in case of Bhuwalka Steel Industries Ltd v Union of India held that Rule 5 of Hot Re-Rolling Steel Mills Annual Capacity Determination Rules, 1997 ('Rules of 1997') is neither ultra vires the authority conferred u/s 3A of Central Excise Act, 1944 ('Act') nor violative of Article 14 of the Constitution of India. Further, rejected assessee's contention that Rule 5 creates a fiction by stipulating that determined annual capacity shall be deemed to be equal to actual production of mill during FY 1996-97, SC states that true and proper construction of the words "shall be deemed to be" occurring in both Section 3A(2) and Rule 5 would reveal that no legal fiction is sought to be created, and in this regard, refered to decision in Consolidated Coffee Ltd. & Anr. which held that "…the word "deemed" is used a great deal in modern legislation in different senses and it is not that a deeming provision is every time made for the purpose of creating a fiction". Moreover, opined that Section 3A(2) only embodies a rule of evidence which commands the Revenue to presume certain facts, akin to presumption by the Court u/s 114 of Indian Evidence Act. Further, HC noted that Rule 96ZP(3) of Central Excise Rules, 1944 provides an option to the assessee to pay the duty at concessional rate vis-a-vis other assessees, SC rejects Revenue contention that in view of judgments in Venus Castings (P) Ltd. and Supreme Steels and General Mills & Others, the question regarding vires of Rule 96ZP(3) is no more res-integra and once the assessee makes a choice to avail the scheme, the same cannot be changed. HC Observed that in the aforesaid two judgments SC was dealing with Rule 96ZO(3) and

Further, HC noted that Rule 96ZP(3) of Central Excise Rules, 1944 provides an option to the assessee to pay the duty at concessional rate vis-a-vis other assessees, SC rejects Revenue contention that in view of judgments in Venus Castings (P) Ltd. and Supreme Steels and General Mills & Others, the question regarding vires of Rule 96ZP(3) is no more res-integra and once the assessee makes a choice to avail the scheme, the same cannot be changed.

HC Observed that in the aforesaid two judgments SC was dealing with Rule 96ZO(3) and neither the vires of Rule 96ZP(3) nor its interpretation actually fell for consideration, hence refers the matter to larger bench for further examination of two judgments

Comment: SC held that true and proper construction of the words "shall be deemed to be" occurring in both Section 3A(2) and Rule 5 of Hot Re-Rolling Steel Mills Annual Capacity Determination Rules, 1997 would reveal that no legal fiction is sought to be created,

'unjust-enrichment' principle not applicable to refunds pursuant to discounts

SC in case of Addison & Co. Ltd. vs. Commissioner of Central Excise, Madras dismissed review petitions against 3-Judge Bench order which ruled on entitlement of excise duty refund pursuant to year end turnover discounts and additional discounts offered by manufacturer to dealers by way of credit notes.

Bench had rejected Revenue's stand that any credit note that is raised post clearance will not be taken into account for purpose of refund by referring to decision in Bombay Tyre International

HC Noted assessee's submission that turnover discount is known to the dealer even at the of clearance, SC held that assessee would be entitled to file refund claim on the basis of credit notes raised by him towards such discount.

However, as regards applicability of unjust enrichment principle, SC rejected Madras HC's interpretation of Section 11-B of Central Excise Act while observing that, "The sine qua non for a claim for refund as contemplated in Section 11-B of the Act is that the claimant has to establish that the amount of duty of excise in relation to which such refund is claimed was paid by him and that the incidence of such duty has not been passed on by him to any other person."

Comment: Since the dealer is aware of the credit discounts at time of clearance, assessee can file the refund on the basis of credit notes

VAT

HC prescribes directory time limit for reclaiming ITC reversed during job-work as not ultra vires VAT Act.

HC prescribed a time limit, vide Rule 20 of Punjab VAT Rules, of 90 days for claiming Input Tax Credit (ITC) reversed for goods sent for job work and held that the Rule is not ultra vires of Section 13 of Punjab VAT Act. HC prescribed the limit in order to ensure that goods which are returned by job workers after processing are the same goods that were sent for further processing. Further HC explained that identity of goods is an important factor for claiming ITC and stated that if the goods returned by the job workers after processing are different and less in value, then the taxable person would be availing the ITC of a higher value than what he was entitled to. Nevertheless, HC opined that the claim of assessee for ITC cannot be rejected simply on the ground that the goods sent to job worker were not received back within a period of 90 days and that time limit prescribed is not mandatory but only directory and thus, Revenue authorities must not consider themselves bound by the rigid time -frame as there is no necessity that the goods sent must be returned by the job workers during the same assessment year. However, HC stated that goods must be returned within 'reasonable time' which is assessed by keeping in view the scheme and purpose of the VAT Act. Consequently,

HC remanded back the matter to Tribunal to decide afresh whether goods were returned in reasonable time in the case M/s Reliance Retail Ltd. vs. State of Punjab and Anr.

Comment: HC held that the time limit of 90 days for claiming ITC reversed for goods sent for job work is merely directory and that goods must be returned within reasonable time.

Charter-hiring rigs for drilling not taxable, no 'right to use' transfer

HC recently held that charter hire of 'jack-up rigs' used exclusively in the Arabian Sea for drilling operations would not amount to "transfer of right to use", and consequently removed the jurisdiction of State VAT authorities to assess such transactions under the provisions of APVAT Act absent execution of contracts within the State. HC observed in the case M/s. Transocean Offshore vs. UOI that when the assessee, entrusted with drilling operations under a sub-contract where the contracting parties did not have a registered office and also the Articles of Agreement had nothing to with the State, set up a temporary base in the State for maintenance of rigs, Revenue sought to levy VAT at 14.5% u/s 4(8) of APVAT Act on operator hire charges on ground that there was transfer of 'right to use'. HC held that merely because a person was registered as a 'dealer' in State of AP, Revenue could not assume jurisdiction to tax all events that happen beyond territorial limits of that State. Further, HC noted that responsibility of contractor was only to network between assessee and operator to enable assessee to carry out the work, hence HC viewed that there was never any transfer of 'right to use' in favor of contractor or

HC observed, relying on SC rulings in Rashtriya Ispat Nigam Ltd. and BSNL and Delhi HC rulings in International Travel House Ltd. and Hari Durga Travels, that the entire control with regard to manning, operating and navigating was retained with assessee and thus, there was no transfer of right to use.

Comment: HC noted that responsibility of contractor was only to network between assessee and operator to enable assessee to carry out the work, hence HC viewed that there was never any transfer of 'right to use' in favor of contractor or operator.

SC: Batteries integral to Radio Receivers taxable at 4%.

SC recently dismissing SLP affirmed Rajasthan HC decision that 'batteries' supplied to the Army for Radio Communication Receivers are taxable at 4% under Rajasthan VAT Act, instead of 12.5% as claimed by Revenue. .

HC, considering the certificates issued by Office of Directorate General Assam Rifles, viewed that the batteries supplied were accessories of Radio Sets, and the Radio Communication Receiver was incomplete and non-functional without the batteries being placed

HC further noted that since Entry No. 28 of Schedule IV mentions that parts of commodities in Entries 1 to 27, which include Radio Communication Receivers and Radio Pagers, to be taxable at 4%, then batteries would be covered in Entry No. 28. Furthermore, HC went on to view that battery is fitted for RCRs or used in Cars and for other diverse purposes and unless a battery is fitted into a RCR or a Car, such RCRs or/and Cars will not start and will be non-functional.

HC, while placing reliance on SC's decision in Nokia India Pvt. Ltd. and Kores (India) Ltd., held that payment of tax at 4% was just & proper.

Comment: Batteries supplied to the Army for the purpose of Radio Communication Receivers would be taxed at 4% under Rajasthan VAT Act, rather than at 12.5%.

Customs

Deemed export does not benefits refund upon EOU / SEZ - DTA clearance of indigenous procurements

Circular No. 13/2017-Cus **dated April 10, 2017**

CBEC issued clarification vide Circular No. 74/2001-Cus on treating indigenous goods, supplied to the EOUs/EPZ/SEZ/EHTP/STP units after availing deemed export benefits, as 'imported goods' and thus, duty as applicable is liable to be paid accordingly. Further, CBEC went on to view that there is no constraint of refund of deemed export benefits on the goods or for production of certificate from Development Commissioner concerning refund or non-availment of deemed export benefits at the time of clearance if the goods have been treated as 'imported goods' and applicable customs duty has been paid at the time of their transfer/sale back into DTA or exit. On the other hand, the units, after payment of excise duty as per Notification No. 22/2003-CE and on producing certificate from Development Commissioner in the regard that deemed export benefits have been paid back or not availed as envisaged in the Circular.

Comment: This seems logical as the duty is not payable for the supply to EOUs as they are deemed to be exported from thereon.

Clarification on operationalisation of functions of Customs / Excise authorities for SEZ matters

Notification No. GSR 772(E) **dated August 5, 2016,**

CBEC clarified that all new cases of refund, demand, adjudication, review and appeal would be made by the concerned jurisdictional authorities of Customs, Central Excise and Service Tax under the provisions of the respective Acts, as also GST Commissionerates upon implementation, in terms of Notification No. GSR 772(E). Further, CBEC laid down standard operating procedures with respect to every functional operation, while explaining that all pending demands would be adjudicated by the appropriate authority as prescribed under Customs, Central Excise, Service Tax or GST laws and rules thereunder including demands issued prior to August 5, 2016 because the act of adjudication is prospective in nature. CBEC also made clear that refund cases of past, which are otherwise in order on account of limitation and merit, should be issued by Customs officers (even though filed in the office of Development Commissioner), whereas for the purposes of interest on delayed refunds, viewed that the date on which said claims are received by jurisdictional Customs,

Central Excise or Service Tax or Central GST field formations would be relevant. CBEC furthermore stated that Development Commissioner may impose penalty on SEZ unit for not achieving positive NFE , though, in respect of duty benefits already taken on unutilized capital goods/raw materials for carrying out authorized operations, demand, adjudication and appeal would be made in terms of Notification dated August 5, 2016.

Comments: Rule 47 of SEZ Rules was amended to empower Customs & Central Excise Authorities to deal with refund, demand, adjudication, review and appeal in the SEZ authorization.

CBEC issues clarification to Amendments made to Sections 46 & 47 of Customs Act.

Notifcation No.24-28/2017-Cus (NT) dated : March 31, 2017

Amendments made to Sections 46 & 47 of Customs Act, affected vide enactment of Finance Bill 2017 were explained by CBEC. CBEC clarified that as per amended Section 46, importer must present bill of entry before end of next day following the day on which aircraft, vessel or vehicle carrying goods arrives at customs station. Bill of Entry (Electronic Integrated Declaration) Regulations 2011 and Bill of Entry (Forms) Regulations 1976 were been amended to prescribe late charges for delayed filing, except where goods have arrived before enactment of Finance Bill 2017. CBEC further amended Handling of Cargo in Customs Areas Regulations 2009 to make it mandatory for Customs Cargo Service Providers to provide information about arrival of cargo to the Customs. Moreover, CBEC amended Notification No. 40/2012-Cus appointing Addl. / Jt. Commissioner rank officer as the proper officer for considering requests for waiver of late charges under proviso to Section 46(3). Furthermore, as per amended Section 47, importer would have to pay duty on the same day in case of self-assessed bill of entry and within 1 day after return of bill of entry in case of reassessment/provisional assessment. Nevertheless, CBEC clarified that all bills of entry filed before enactment of the Finance Bill 2017 would be governed by erstwhile provisions of Section 47 except where same is reassessed or provisionally assessed on or after said enactment, importer would have 1 day instead of 2 days for payment of duty.

Comments – in case of self-assessed bill of entry, importers will have to pay duty on the same day, and within 1 day after return of bill of entry in case of reassessment/provisional assessment.

Peremptory Circular imposing penalty for errors in import manifest, contrary to law

CESTAT upholding adjudication order allowed amendment to bill of lading for adding consignee name in spite of no mention of consignee in import manifest. CESTAT observed that Section 30 of Customs Act empowered proper officer to amend / supplement the incorrect manifest absent fraudulent intent.

CESTATE rejected Revenue contention that goods were offloaded in India without being manifested and in terms of Circular No. 13/2005-Cus, liable to be adjudicated for imposition of penalty and observed that that even though the Circular did direct penalty, it was silent on the statutory provision to be invoked.

CESTAT also went on to view that these instructions are not binding on it and stated that the peremptoriness in the Circular was contrary to law and to that extent, rendered the same unenforceable. In the case of Commissioner of Customs, Mumbai vs. Ace Shipping and Offshore Co. Pvt. Ltd,

CESTAT opined that although the goods were unloaded, whether inadvertently or otherwise, there was no allegation that same were not inventorized in the records of the duly appointed custodian and in the absence of such evidence, invocation of Section 111(g) of Customs Act for confiscation was not in accordance with law.

Comment: The peremptoriness in the Circular is contrary to law and to that extent, renders same unenforceable

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