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Service Tax

Digital signature not required till January end for invoices of online B2C services by overseas service provider

Notification No. 53/2016-ST Date : December 19, 2016

Finance Ministry amended Rule 4C of Service Tax rules, 1994 allowing to issue online invoices not authenticated by digital signature upto January 31, 2017 by a person located in non–taxable territory providing online information and database access or retrieval services to a non-assessee online recipient located in taxable territory .

Comments: This comes as result of demonetization. To ensure online transactions face less hassle

Past assessments shall not be reopened upon increased turnover from digital payments: CBEC

Instruction F.No. 137/155/2012-ST Date: December 9, 2016

CBEC clarified that past assessments shall not be reopened on account on account of increased turnover in the books of accounts, arising from use of digital means for payment. Further, it reiterates that Govt.’s initiative to curb black economy in the country, encourages people to shift towards digital mode of payment while making financial transactions.

Comments : This step is taken as a result of demonetization. It is a positive incentive to ensure people feel more assured about making digital and the industry does not suffer due to it .

CENVAT available on tour / rent-a-cab services availed for employee transportation

HC in case of Visteon Automotive Systems India (P) Limited allowed CENVAT credit on tour operator services availed by assessee for transportation of employees to and fro from factory as well as rent-a-cab services used for official purposes.

HC observed that the scope of definition to the word “includes” had to be given a wider meaning and not a restricted meaning. In this regard, HC observed that it is “in relation to manufacture or clearance of final products” or “in relation to providing an output service”.

HC also observed It was not Revenue's case that assessee had not made payment on the value of input services and the service tax payable thereon.

HC was of opinion that availment of such services was necessary for manufacture and for transporting the workers to and fro from the factory; hence, they could be included under "input services" definition under Rule 2(l). HC also stated that the extended services defined not only input services but also included picking up workmen and similarly rent a cab services were used for the official purpose of transporting the workers to the factory.

Based on above observations HC concluded that the services would be considered as "input services" as they were used in relation to manufacture of excisable goods.

Comments: HC has correctly held that these services are input services as the work force is one of the main component for production. These services availed by assessee for gather of workforce are well within the scope of services availed in provision of out put.

Distributors subscription towards representational & selling rights shall be considered as ' franchise service'

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SC in case of Amway India Enterprises Pvt Ltd dismissed the appeal of assessee due to lack of merits against confirmation of service tax on subscription received towards representational rights granted to various distributors to sell company products, under 'Franchise Service' category. Before , assessee approached SC , CESTAT after examining assessee company's Business Starter Guide and terms & Conditions, had noted that a distributor must inter alia be truthful and accurate in offering business opportunity or selling products, and must strictly adhere to guidelines, systems, procedures and policies mentioned therein.

Further, CESTAT also rejected assessee's reliance on decision of HC in case of State v. Gangamma and others [1964 SCC Online Kar 148] to elucidate the scope of words '' on behalf of", since these words nowhere appear in definition of franchise. As regards the dictionary meaning of the words "represent" and "representational", CESTAT noted that the same were far wider in scope than required to hold that distributors clearly had representational right to sell goods identified with Amway.

Comments: SC has affirmed the decision of CESTAT wherein it had gone by the facts of the agreement between the distributors and assessee. The main point which is to be considered is whether assessee had given representational rights to the distributor. If it is the case then it would be considered in nature of franchise service.

Refund available for the Scientific - research on goods in India for overseas recipient constitutes 'export'

Recently in a case of Advinus Therapeutics Ltd CESTAT allowed the refund of accumulated CENVAT credit on ' scientific and technical consultancy services' provided to recipient located outside India. Further, CESTAT also rejected Revenue's contention that since research on goods is performed within the taxable territory and confirmed that as per provisions of Rule 4 of Place of Provision of Service Rules, 2012 (POPS Rules), activity does not qualify as ' export' in terms of Rule 6A of Service Tax Rules, 1994.

Further , on noting that Noting that assessee was eligible to 'export' benefit under the pre-Negative List regime, CESTAT stated that corresponding provision in POPS Rules is Rule 3 which provides that place of provision of service shall be location of service recipient. It also Stated that Negative List regime was not intended to be either detrimental or beneficial to existing assessees except where such intent was specifically sanctioned by legislation. Further, CESTAT observed that even though Export of Service Rules 2005 are no longer valid for purpose of Rule 5 of CENVAT Credit Rules, their guidance value cannot be discountenanced .Further, CESTAT opined that customer satisfaction occurs upon an outcome which is possessed by recipient, hence, even if some activities are carried in India, by no stretch of imagination can it be asserted that fulfilment of same is in India. In this regard, CESTAT Remarked that , "…intent in Rule 4 to remedy out some specific situations that would, otherwise, would have enabled escapement from tax or leviability to tax where Rule 3 of Place of Provision of Service Rules, 2012 may not serve to confer jurisdiction becomes increasingly obvious".

Consequently, held that location of performance of service in respect of goods is not an abstract, absolute expression for fastening tax liability on services that involve goods in some way, and for that, Rule 3 would suffice. Further, CESTAT observed, "It is , therefore, not by the specific word or phrase in rule 4(1) of Place of Provision of Service Rules, 2012 that the taxability is to be determined but from the mischief effect intended to be plugged".

Accordingly, Goods supplied, even though minor in proportion, are subject to alteration in course of research and nowhere is it asserted that in their altered or unaltered form, they are sent back to service recipient, and if they were, provisions of Customs Act would have been invoked; States that even if goods cease to exist in form supplied upon rendition of services thereon, it cannot be said that service has been provided in respect of goods and therefore, provisions of Rule 4(1) would not attract and services shall qualify as 'export' .

Comment: The basis on the which CESTAT has come to the above conclusion is that the service would be complete upon satisfaction of service recipient who is not with in the taxable territory and the fulfilment cannot be said to be with in India.

Sharing common storage would constitute a joint-venture between PSUs , Not a 'service'

SC in case of Gujarat State Fertilizers & Chemicals ltd held that sharing expenses between PSUs of State of Gujarat towards incineration and maintenance of storage / handling tank installed for receiving Hydro Cynic Acid (HCN) does not constitute ' service' .

SC first adverted on the aspect whether the arrangement between GSFL and GACL resulted into providing any services by GSFC to GACL and the 50% incineration expenses incurred would constitute for providing such services.

SC observed that, it was undisputed that HCN was received through pipeline from Reliance Industries Ltd. by GSFC and GACL and then shared in the ratio of 60:40, respectively. SC observed that, since HCN was received through pipeline, in order to save the expenditure, both the parties agreed for the common pipeline. SC further observed that, in order to enable GACL to receive the HCN through common pipeline, arrangement/agreement was entered into both the parties and thus handling facilities were installed in the premises of GSFC and handling expenditure were shared equally by both the parties and the same was mentioned in the agreement and reflected in the minutes of meeting.

In light of above arrangement, SC observed that, the handling portion and maintenance including incineration facilities were in the nature of joint venture between GSFC and GACL. The payment made by GACL to GSFC, pertained to the share of GACL which was payable to GSFC and the said cannot be treated as "service" provided by GSFC to GACL.

SC did not find it necessary to go into question as to whether receiving of HCN through the said common pipeline in the tank which was setup by the GFSC and GACL amount to 'storage' or not.

Comments: The sharing storage space is not a provison of service and it is only done to save expenses.

Central Excise

Credit reversal on exempted goods not similar to short duty payment recovery

CESTAT in case of Force Motors Ltd upheld deletion of penalty, Further CESTAT held that confirmation of credit reversal at 8% of exempted goods value upon non-maintenance of separate accounts for common inputs, is akin to short levied/ short paid.

CESTAT opined that the confirmation of the amount of 8% of value of exempted goods is not akin to any duty which is short levied or short paid. CESTAT stated that this amount being only in consideration for the utilization of common inputs, there were no provisions for recovery of the same during the relevant period, more so u/s 11A of the Central Excise Act. Hence, in the absence of any recovery mechanism u/s 11A, CESTAT found that the penalties imposed under Rule 12 of the CENVAT Credit Rules, 2002 r/w Section 11AC was incorrect. CESTAT thus, concluded that the Commissioner (Appeals) had correctly set aside the penalties imposed by the Adjudicating Authority and the impugned order was upheld.

Comments: There is no mechanism to recover such amount so the same is not chargeable

Manufacturing does not constitute packaging of pre-determined quantity of spares into plastic bags

CESTAT in case of Electropneumatic & Hydraulics (I) P Ltd observed that Packaging of 'O' rings and 'U' cap seals for supply with pneumatic cylinders & valves as 'spares', does not amount to "manufacture" u/s 2(f) of Central Excise Act .

CESTAT on noted that assessee purchased these products from various manufacturers who avail SSI exemption benefit and further sold them as 'seal kits' . Further, CESTAT stated that 'O' rings & 'U' cap seals are already marketable when supplier clears them to assessee, and subsequent packaging of pre-determined quantity in plastic bag would not make the same further marketable .

ESTAT held that in absence of any Chapter Note that such packaging would amount to 'manufacture', view taken by lower authorities is unsustainable .

CESTAT also observed that issue dealing with the similar sets of facts was held in favor of asseessee by SC in case of Dalmia Industries Ltd and Neycer India Ltd.

Comments: The process of manufacturing would result in a new product even if it is dismantled and re-packed or cleared after branding. However, merely packing the products further into a plastic does not constitute manufacturing.

Goods manufactured at a work shop adjoining mining area are exempted

CESTAT in a recent case of wester coalfileds Ltd held that goods manufactured at a workshop adjacent to the mining area considering it as premises of mining area. CESTAT noted that the workshop is not within the mining area but situated adjacent to it. However, it belongs to the same company which is exclusively engaged in mining of coal. Moreover, the parts manufactured in the workshop are used for mining machines of assessee.

CESTAT also referred to SC decision in South Eastern Coalfields vs. Commissioner of Customs and Excise [2006 (200) ELT 357 (SC)] wherein Apex Court applied the purposive rule to interpret the term 'precincts' appearing in exemption Notification No. 63/1995-CE. In that case, SC observed that a workshop which is in an area in the environs of a mine and is existing solely for the purpose connected with the mine and under the same management, is obviously directly serving the mining operations.

Thus, the Notification was interpreted so as to include such a workshop within the definition of mine for the purpose of granting exemption, as that would encourage the mining industry.

Comments: CESTAT basically defined the adjacent work shop to be with in the premises of the mining area even though it is not with in the compound mining area. But the main point which was considered by CESTAT was that workshop even though adjacent to the mining area was existing only for the purpose of mining purpose.

Notional value not applicable where directors of group entities are relatives

CESTAT in its recent ruling in case of universal starch chem allied Ltd observed that 'raw material cost + job-work charges + profit' valuation where Directors of Group entities are relatives.

Further CESTAT, Rejected application of Rule 8 of Valuation Rules (115% of cost of manufactured goods) which was adopted by Revenue on the ground that job-worker (assessee) and raw material supplier being inter-connected undertakings, would fall within definition of "related persons" u/s 4(3)(b) of Central Excise Act .

CESTAT Stated that Rule 8 can be applied only where goods are captively consumed by manufacturer or used by other company on its behalf, which conditions are not met in present case. CESTAT also Noted co-ordinate bench decision in Handy Wires Pvt. Ltd. where it was held that transaction value can be rejected only when buyer is related in terms of Section 4(3)(b)(ii) / (iii) / (iv) or buyer is holding / subsidiary company of assessee. However CESTAT, Distinguished Ravishankar Industries Pvt Ltd decision, while upholding assessee's discharge of excise duty as per principle laid down by SC in Ujagar Prints.

Comments: The notional value can only applied where goods are consumed by manufacturer or used by other company.

VAT

Amendment to Levy tax on entry of goods on e-commerce operators post Constitutional amendment prima-facie beyond 'legislative competence'

HC recently in a case of Instakart Services Pvt Ltd grants interim relief to assessee. It held that Section 4A inserted by way of amendment to Uttar Pradesh Tax on Entry of Goods into Local Areas Act, 2007 to levy entry tax on goods brought into State through e-commerce / online purchases, particularly for personal use is prima facie 'unconstitutional' . HC considered assessee's contention that, by virtue of 101st amendment to Constitution, Entry 52 has been omitted from State List of Schedule VII and in terms of Clause 19 of Notification dated September 8, 2016 and only such laws which exists immediately before commencement of Constitutional Amendment Act have been saved for a period of 1 year.

According to assessee, no fresh charge or levy could have been introduced such as by way of Section 4A under the impugned amendment and since the same creates unlawful fiscal barriers that would result in unprecedented price hikes and the amendment is also against public interest. HC found that prima facie the amendment is completely beyond the authority and competence of State legislature as it ex-facie introduced levy of tax which was not existing under old Act, and consequently, observed that Clause 19 of 101st Constitutional Amendment Act does not in any way prima facie save the imposition of tax on online purchases / e-commerce, particularly for personal use.

Further, HC Followed SC ratio in Health for Millions while allowing assessee to trade through e-commerce, but to protect the interest of State, directs furnishing of Bank Guarantee, and lists the matter for hearing on January 20, 2017.

Comments: Post 101st Constitutional amendment for the implementation of GST. States cannot make amendments to insert any new levy of tax.

Goods cleared to license holder from customs bonded warehouse taxable, does not constitute "sale in course of import"

AAR in application of Moet held that sale of imported goods to license-holders from a customs bonded warehouse located in Maharashtra does not constitute 'sale in the course of import' u/s 5(2) of CST Act, the same would be considered as 'local sale' taxable under MVAT Act. Further AAR Observed that sale is deemed to take place in course of import, if same occasions the import or is effected by transfer of documents of title to goods before crossing the 'customs frontiers of India', which in terms of Section 2(ab), means crossing the limits of 'customs station' area in which imported / export goods are ordinarily kept before clearance.

Relying on SC decision in Davar & Co., AAR stated that 'customs area' is a wider term which covers all customs stations. However, assessee's warehouse declared as private bonded warehouse u/s 9 of Customs Act does not fall within customs station specified u/s 7 of said Act .

Remarked hat warehousing provisions are only meant for administration of Customs Act and not relevant to interpret the term 'customs station' for purpose of Section 2(ab) of CST Act, while holding that ex-bond sales to duty free shops are neither sale in course of import nor an export and thus, liable to tax as per Schedule Entry D-3 to MVAT Act .

Comments: The main point considered by AAR is that warehouse of the assessee is declared as private bonded warehouse u/s 9 of Customs Act and the same does not fall under with customs station specified u/s 7 of the Customs Act.

Pest control taxable as ' works contract' , involves transfer of property in pesticides

AAR in an application filed by Pestop held that pest control involves transfer of property in pesticide formulations (chemicals) and hence, liable to tax as 'works contract' under MVAT Act. AAR observed that the term "goods" as used in Article 366(12) of Constitution and as defined in MVAT Act is very wide and includes all types of movable properties and also that pesticides are goods within the meaning of sales tax statute,

Perusing the legal position of works contract after 46th Constitutional Amendment, AAR observed that in the process of implementing work order, property in goods is transferred to the consumer and therefore, applicant-dealer's contention that chemicals disappear or evaporate in the air after work, is not acceptable.

Applying SC ratios in L&T Ltd, Gannon Dunkerly & Pro Lab, AAR stated that the expression "in some other form" appearing in Article 366(29A) is of utmost significance as it includes goods which have ceased to be chattels or movables or merchandise and become attached or embedded to earth. AAR also Reiterated that dominant intention of parties is no longer significant as State legislature is empowered to separate goods which form part of works contract and imposed sales tax thereon, and accordingly, sought to apply Rule 58 of MVAT Rules to ascertain value of goods.

Comments: Pest control can be considered as transfer of property as the chemicals are transferred , even they cease to exist their effect can be seen in some or the other form and SC ratio L&T Ltd case would squarely apply to this.

Freight charges taxable to turnover of dealer, where obligation transport is essential for sale

HC in case of Pohar Saran Mishra upheld the inclusion of 'freight charges' in dealer's taxable turnover where obligation to transport goods to purchaser is an essential element of 'sale' transaction. Noted that supply of stone ballast was effected at railway siding, the ownership as well as responsibility remained with dealer till delivery since contract remained incomplete till transportation and measurement of goods by dealer at railway siding. Further, Referring to definition of 'turnover' under UP Trade Tax Act, 1948, HC noted that while first determinative factor is 'price' & any 'sums charged' in respect of goods, second factor is 'at the time of or before the delivery thereof', and latter part then excludes 'cost of freight' when separately charged. HC also Relied on SC judgment in India Meters Ltd., to observe that all expenses which dealer incurs for effecting and completing sale, are liable to be included in taxable turnover, and mere fact that freight charges are shown separately in an invoice, would not detract said position. ,Also Held that freight charges are excludible only in cases where obligation to transport goods to purchaser is not an essential facet of transaction, and in present case, freight was not a special condition imposed by purchaser but an integral component of 'sale' transaction.

Comments: This ratio established by HC depends on the facts of each case. The essential ingredient is obligation to transport good by the seller.

Customs

Owner of Import goods not liable to differentia duty, importer is liable

CESTAT in case of Inderjit nagpal held that differential customs duty u/s 28 of Customs Act in respect of imported MPEG cards can only be demanded from 'importer' who has filed the Bill of Entry (BoE), not from owner of such goods. Interpreting the expression "importer" defined u/s 2(26) as "owner or any person holding himself out to be the importer" in the context of the statute, CESTAT observed that while ownership in general parlance goes hand-in-hand with title to goods, Customs Act does not thrust statutory obligations upon 'owner' of such imported goods.

Setting aside confiscation u/s 111 r/w 113, CESTAT remarked that confiscation of goods that are untraceable after clearance for home consumption is nothing short of 'travesty', therefore, attaching fine to the act of confiscation without the wherewithal to complete the process is not only futile but detracts from credibility of Government.

Moreover, noting that there has been blanket enhancement of assessable value without reference to specific BoE, CESTAT stated that Section 28 can only be invoked in relation to specific consignments and corresponding BOE, hence, recovery of duty absent enumeration of BoE is without authority of law.

Further, sets aside penalty imposed on importer stating that since ground raised by him was not considered, it can impinge upon proceedings for mis-declaration of goods and accordingly, remands matter to Adjudicating Authority to ascertain actual factual status.

Comments: This seems logical as ownership of the goods changes at different stages of Import. The person wjo files the bill of entry for the goods imported would considered as the person chargeable to differential duty.

Refusal to entertain application covering separate notices where matter interconnected by Settlement Commission is unsustainable

Recently HC in case of Door Deco Industries quashed Settlement Commission's order rejecting assessee's application filed u/s 32E of Central Excise Act, with respect to two show cause notices (SCNs) and requiring separate applications with respect to each SCN.

Assessee, relied upon Special Bench ruling in Yousufff Kasim Sait and Gujarat HC ruling in Mahendra Petrochemical to contend that, both SCNs were inter-connected as first SCN quantified duty liability and action in respect of seized material, and second SCN sought to quantify further liability based on very same notice after investigation.

Referring to definition of 'Case' u/s 32E(1) of Central Excise Act, to mean a proceeding in the Act or any other Act for levy, assessment and collection of excise duty, HC stated that, investigation was a seamless one in relation to same trigger and issuance of separate SCNs was a matter of convenience of Department.

Rejecting Revenue's reliance upon Madras HC decision in Optigrab International, HC stated that, what persuaded Madras HC was that adjudicating authorities fall in different Commissionaires, while in present case, Commissionaire concerned with adjudicating authority is 'common'. HC Held that if assessee unit were not to approach Settlement Commissioner, there is every likelihood of multifarious conflicting decision, further states that, "The Court in such circumstance should lean to a progressive interpretation that furthers the petition rather than based on purely procedural views".

Comments: The department shall not ignore the law in place to the benefit of its convenience.

Project import benefit shall be available even after it is disposed off after use

CESTAT in case of NOCIL held that 'Project Import' benefit under Notification No. 132/85 r/w Project Import Regulations cannot be denied upon disposal of imported plant & machinery after 2 years of installation and use thereof. CESTAT observes that CTH 98.01 is an extension of facility and not grant of concession, same has been introduced to classify entire plant (which may consist of several components) under single heading and to charge single rate of duty. CESTAT observed that In present case, the installed plant & machinery was disposed only due to economic unviability and absent any restriction on sale under the Notification or Regulations, thus the benefit of final assessment under CTH 98.01 cannot be denied. Distinguished Larger Bench decision in Bharat Bijlee on facts and also noted that imported goods were not used at all in that case. Further, CESTAT observed that SC ruling in Toyo Engineering India Ltd works in assessee's favor, since it lays down that subsequent use of imported equipment that was used for initial setting up of plant, for any other project, cannot debar assessee from availing project import facility.

Comments: There was no restriction on sale of the plant and it is not case where plant and machinery was not used at all. Thus CESTAT rightly concluded to the above ratio upon considering these facts.

FTP

TED refund withdrawal to achieve parity between domestic supplier and importer is not arbitrary

HC recently in case of Malana power held that Withdrawal of Terminal Excise Duty (TED) refund on supply of goods to power sector by amendment to Para 10.11 of Handbook of Procedures 1999-2000 (HBP), neither violative of Foreign Trade (Development & Regulations) Act nor an infringement of promissory estoppel doctrine. HC Noted that Notification dated April 22, 1999 for the first time amended HBP to include eligibility of domestic suppliers to deemed export benefits with further stipulation that TED refund would be restricted to amount that would have been payable as excise @ 3%.

Referring to Committee Report which stipulated corresponding duty benefits to domestic suppliers consequent to exemption on imports for particular sector, HC noted that Countervailing duty in case of power sector had been increased from 0% to 16% and therefore, TED refund could not be given to domestic suppliers. Since duty refund eligibility has been linked to payment of excise duty to offset competitive additions that imported goods would have over domestically manufactured ones, achievement of parity compelled Govt. to amend HBP in the manner it did. Therefore, HC finds no arbitrariness or violation of promissory estoppel doctrine, while distinguishing SC ruling in case of Kanak Exports.

Comments: promissory estoppel bars the State or Government agencies from setting up imperative and necessity as defense, nevertheless if on facts it can be shown that whole promissory to its word would inevitably having regard to the larger public interest, such estoppel cannot be ground for claim .

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