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Service Tax

Conduits for lift irrigation systems, involving associated activities like trenching, masonry work, taxable as 'Commercial or Industrial Construction Service' (CICS) prior to June 2007

CESTAT LB, in Lanco Infratech Ltd & Others vs. CC, CCE & ST has held that laying of pipelines / conduits for lift irrigation systems and involving associated activities like trenching, masonry work, are taxable as 'Commercial or Industrial Construction Service' (CICS) prior to June 2007, and not 'Erection, Commissioning or Installation Service' (ECIS)

Additionally, CESTAT opined that construction of canals for water supply, laying of pipelines for a dam project, is to be classified as works contract "in respect of dam" and thus, excluded from scope of 'Works Contract Service' (WCS) u/s 65(105)(zzzza) of Finance Act

According to LB, turnkey / EPC contract enumerated in clause (e) of Explanation (ii) u/s 65(105)(zzzza) is a "descriptive and ex abundati cautela drafting methodology", and consequently, since essential character of such Turnkey / EPC contract is laying of pipelines / conduits, classifiable under clause (b) of said Explanation w.e.f. June 2007.

CESTAT also held that such contract "*would not be exigible to service tax if the rendition of service thereby is primarily for non-commercial, non industrial purpose.*"

CESTAT further observed that, "*This is the only possible and harmonious interpretation possible of the several clauses under Explanation (ii) of Section 65 (105)(zzzza), a distinct taxable service defined with constituent elements thereof substantially drawn from elements of pre-existing taxable services like ECIS, CICS or COCS; and other services when bundled to amount to turnkey/ EPC.*"

Comments: The decision is important as it has been clarified that services rendered to Govt (under turnkey / EPC contractual mode) is not taxable.

Service tax exemption on commission paid to overseas agents for procuring textile export orders: Chennai Tribunal

Chennai Tribunal in the case of Texyard International & Others vs. Commissioner of Central Excise, Trichy & Others granted service tax exemption under Notification No. 14/2004-ST on commission paid to overseas agents for procuring textile export orders, thereby rejecting Revenue's demand for service tax payment under reverse charge mechanism.

CESTAT observed that as per said Notification, Business Auxiliary Services (BAS) were exempt if they related to agriculture, printing, textile processing or education.

Further, CESTAT observed that the expression 'textile processing' must be understood in broader sense, commission paid to overseas agents is in respect of promotion of export sales, which is an activity incidental / auxiliary to processing of textile goods and therefore, constitutes BAS u/s 65(19) of Finance Act

Lastly, CESTAT observed that even if tax payable under reverse charge, input service credit available and may be refunded under Notification No. 41/2007, hence the situation revenue-neutral.

Comments: The judgment comes as a relief for most textile companies.

Input credit of cement & steel used in construction of jetty, to a port service provider allowed

Recently, the Gujarat HC in Mundra Ports and Special Economic Zone Limited vs. Commissioner of Central Excise and Customs allowed input credit of cement & steel used in construction of jetty, to a port service provider.

The HC rejected Revenue's contention that construction of jetty being exempt service, credit is unavailable under Rules 2(k) and 2 (l) of CENVAT Credit Rules. HC observed that since assessee had constructed jetty through a contractor in port premises by supplying the said material, input credit would be available thereon. HC further clarified that amendment to Rule 2(k) is w.e.f. July 7, 2009 and the same is not clarificatory in nature meaning it would operate prospectively.

Comments: This decision is important as it concedes that input can be availed for cement used in construction of jetty.

Sales marketing and promotion services received from foreign entity fall within the definition of 'Business Auxiliary Services'

In Tech Mahindra Ltd. vs. Commissioner of Central Excise , Pune - III, Mumbai CESTAT upheld partial service tax demand on IT Co. towards sales marketing and promotion services received from foreign entity. CESTAT held that such activities fell within the definition of 'Business Auxiliary Services', taxable from 2003 onwards.

CESTAT held that as assessee was 'deemed service provider' under Sec 66A, he is liable to service tax on reverse charge basis.

CESTAT further held that in terms of clear, unambiguous language used in Sec 66A, liability is attracted when taxable services is received from foreign service provider and service recipient is situated in India, hence, assessee is required to declare transactions in statutory returns filed u/s 70 of Finance Act. However, CESTAT clarified that demand prior to April 2006 was unsustainable in view of Bombay HC decision in Indian National Shipowners' Association.

Comments: This decision is of note to companies importing marketing and promotion services.

CESTAT allows refund of input service credit against export of services albeit receipt of consideration in Indian Rupees

In Sun-Area Real Estate Pvt. Ltd vs. Commissioner of Service Tax, Mumbai-I, Mumbai CESTAT observed that allowed refund of input service credit against export of services albeit receipt of consideration in Indian Rupees.

CESTAT observed, "…when a foreign bank is maintaining Indian rupees in their account, obviously, such Indian rupees was obtained in lieu of foreign exchange…"

Comments: This decision is important to importers receiving payment for services in Indian Rupees through FIRCs.

Central Excise

Amendment to Rule 11(2) of Central Excise Rules, 2002, only provides an additional facility for direct transport of goods : CBEC Clarifies

CBEC has issued clarification on scope and purpose of amendment to Rule 11(2) of Central Excise Rules, 2002, which allows consignee to avail CENVAT credit basis registered dealer's invoice in case of direct despatch from manufacturer or importer.

It has been clarified that the amendment only provides an additional facility for direct transport of goods from manufacturer or importer to consignee and obviates need for goods to be brought to registered dealer's premises for subsequent transport to consignee

The Clarification states that the provision stipulated under previous Circulars pertaining to credit availment on strength of original manufacturer's invoice would continue unless any amendment is made to Rule 9 of CENVAT Credit Rules or to registration requirement.

CBEC has stated that the amendments are meant to improve ease of doing business and should be harmoniously interpreted with existing rules and circulars in conformity with legal provisions, keeping the intention of the Government in mind.

Comments : The CBEC clarification is aimed to bring ease in doing business and by relaxing the provisions by way of amendment or otherwise is a step closer in that direction.

CENVAT Credit (Third Amendment) Rules 2015 applicable from June 1st: Finance Ministry notifies

The Finance Ministry has notified CENVAT Credit (Third Amendment) Rules 2015 w.e.f. June 1st whilst also amending Rule 6(3), whereby manufacturer of goods / provider of output service opting not to maintain separate accounts, shall be liable to pay an amount equal to 7% of value of exempted services.

The relevant Notifications through which the changes are brought about are Notification No 12_2014 - CE (NT) dated March 3, 2014, Notification No 14_2015 - CE (NT) dated May 19, 2015, Notification No 15_2015 - CE (NT) dated May 19, 2015.

Further, it has been notified that 7% would also be payable where any part of the value of taxable service has been exempted on condition that no CENVAT credit on inputs and input services shall be taken, in terms of second proviso to said sub-Rule.

Also, Notification No. 12/2014-CE (NT) has been amended thereby disallowing refund of unutilized input and input service credit claimed during half year, for providing 'supply of manpower for any purpose or security services' under Rule 5B (refund in respect of services taxed on reverse charge basis).

Comments: This Notification is of importance to everyone who avails CENVAT Credit.

Pre-deposit u/s 35F of Central Excise Act / Sec 129E of Customs Act of adjudged duty or penalty or both to be mandatorily made at the time of filing appeal itself

The Mumbai CESTAT in Shridhar Metal vs Commissioner of Central Excise, Customs & Service Tax, Aurangabad has held that pre-deposit u/s 35F of Central Excise Act / Sec 129E of Customs Act of adjudged duty or penalty or both, as the case may be, has to be mandatorily made at the time of filing appeal itself.

CESTAT rejected assessee's contention that pre-deposit cannot be insisted upon since it is at liberty to deposit the amount till appeal is 'entertained', i.e. taken up for hearing and consideration on merit.

CESTAT further elucidated that unlike HC / SC, there is no procedure in appellate Tribunal for motion hearing on appeal admission, such appeal stands admitted and becomes due for consideration on merit the moment it is filed before CESTAT.

Comments: This judgment is of note to everyone.

Interest recovery u/s 11AB of Central Excise Act on suo motu reversal of wrongly availed CENVAT credit barred by limitation

In the case, Kachchh Steels Pvt Ltd vs Commissioner of Central Excise, Rajkot, Ahmedabad CESTAT held that interest recovery u/s 11AB of Central Excise Act on suo motu reversal of wrongly availed CENVAT credit was barred by limitation.

CESTAT observed that on plain reading of Sec 11AB, it was clear that interest on delayed duty payment arises on determination of liability by Central Excise Officer u/s 11A(2) or on self ascertainment and intimation in terms of Sec 11A(2B).

Further, CESTAT observed that as per Sec 11A(2B), limitation of 1 year to be counted from the date of information of duty payment / credit reversal to Central Excise Officer, whereas show cause notice for interest recovery issued after more than 4 years.

Comments: This judgment is of note to every one.

Recovery proceedings cannot be initiated without issuance of show cause notice

In the case, Dharampal Satyapal Ltd. vs. Deputy Commissioner of Central Excise, Gauhati & Ors., SC held that recovery proceedings cannot be initiated without issuance of show cause notice u/s 11A of Central Excise Act, even if provision inapplicable.

SC held that it is fundamental to take any adverse action against a person, requirement of principles of natural justice must be fulfilled.

While under certain circumstances, natural justice principles may be excluded, nonetheless, "*It is not permissible f to jump over the compliance of the principles of natural justice on the ground that even if hearing had been provided it would have served no useful purpose*"

SC, at the same time, stated that it cannot be denied that as far as Courts are concerned, that they were empowered to consider as to whether any purpose would be served in remanding the case keeping in mind whether any prejudice would be caused to person against whom the action is taken. In this context, SC observed that since quantification of amount is undisputed, issuance of notice would be an empty formality, hence, the case stands covered by 'useless formality theory'.

SC thus held that, non-issuance of notice before sending communication has not resulted in any prejudice to assessee and it may not be feasible to direct Revenue to take fresh action after issuing notice as that would be a mere formality.

SC rejected assessee's contention that decision in R.C. Tobacco is in conflict with 3 Judge Bench's judgment in J.K. Cotton. SC observed that said argument was not even open to the assessee for the simple reason that the judgment in J.K. Cotton was specifically taken note of and discussed in R.C. Tobacco.

Comments: the decision is important as it validates Natural Justice principles in Central Excise law.

Affixing additional label on cartons received (availing area based exemption) and repacking/labeling imported coco butter, amounts to 'manufacture'

Third Member of CESTAT, in Jindal Drugs Ltd vs CCE Belapur, ruled in favor of assessee and concurred with Member (Judicial) that affixing additional label on cartons received at Taloja plant from Jammu unit (availing area based exemption) and repacking / labeling of imported coco butter, amounts to 'manufacture' in terms of Chapter Note 3 to Chapter 18 of Central Excise Tariff Act.

Third Member observed that, "*The argument of the Revenue that labeling or relabeling must enhance the marketability is contrary to the plain reading of note 3 to Chapter 18…..labeling per se will amount to manufacture…..There is no requirement in said note 3 that the labeling should enhance the marketability….*"

CESTAT observed that the word "and" appearing between the words "labeling or relabeling of containers" and "repacking from bulk packs to retail packs" substituted by Parliament with "or" to widen the scope of Note 3 and to overcome apex court judgments in Johnson & Johnson and BOC India Ltd, each of the activities covered thereunder are independent and deemed as manufacture.

Comments: This judgment is of note to assessee's receiving goods from different units and claiming area based exemption.

CENVAT credit reversal w.r.t. trading activity on turnover basis where assessee engaged in both manufacturing as well as trading upheld

CESTAT, in SKF India Ltd. & Another v. CCE, Pune, upheld CENVAT credit reversal w.r.t. trading activity on turnover basis where assessee is engaged in both manufacturing as well as trading.

CESTAT relied on Mercedes Benz ruling and rejected assessee's contention that demand should be recomputed on basis of Rule 6 (3D) of CENVAT Credit Rules w.e.f. April 2011.

Comments: This judgment is of note to companies involved in both trading and manufacturing.

Customs

Test reports based on samples (for determining ash content of coking coal) not reliable if samples drawn against procedure prescribed in law

SC, in the case Tata Chemicals Ltd & Another vs. Commissioner of Customs (P), set aside CESTAT's order, and held that test reports based on samples (for determining ash content of coking coal) is not reliable if samples were drawn against procedure prescribed in law.

SC held that the entire chemical analysis was ultra vires Sec 18(b) of Customs Act. Further, SC borrowed rationale from its own judgments in Bombay Oil Industries and Delhi Cloth & General Mills to hold that, if procedure for testing under Custom Acts not mentioned, Indian Standard Institution's method applicable.

SC observed that CESTAT ought to have realized that there can be no estoppel against law, and if law required something be done in particular manner, it must be done in that manner or it has no existence in eye of law at all.

SC further held that expressions such as "deems it necessary", "reason to believe" used in Statutes do not mean subjective satisfaction of concerned officer, such power not arbitrary and must be exercised in accordance with restraints imposed by law.

Comments: The decision is of note because it reiterates the important rule that there can be no estoppel against law.

LCDs imported for use in electricity supply meters classifiable under Chapter Heading 9013 as "Liquid Crystal Devices not constituting articles provided for more specifically in other headings"

In a recent case, Secure Meters Ltd vs Commissioner of Customs, SC set aside CESTAT order, and classified LCDs imported for use in electricity supply meters under Chapter Heading 9013 as "Liquid Crystal Devices not constituting articles provided for more specifically in other headings".

Further, SC rejected Revenue's application of Rule 3 of General Rules of Interpretation of First Schedule.

SC observed that a plain reading of Note 2(a) to Chapter 90 clarified that LCDs used as parts in final product, viz. electricity supply meters, are classifiable under respective specific heading, which is given under 9013.

SC further held that Note 2(b), as relied by Revenue, relates to 'other parts and accessories', i.e., it applies to those parts and accessories for which Note 2(a) is inapplicable.

SC also observed that as per Part-III of Chapter Notes to Chapter 90, general rule will not apply where parts and accessories which in themselves constitute 'article' fall in any particular heading of the Chapter, such view is fortified by Explanatory Notes issued by World Customs Organisation, as per which, LCD is covered by 'other devices' mentioned in 9013.80

Comments : This ruling is important for companies importing LCD for use in electricity supply meters.

1% Extra Duty Deposit demand on related party import of electronic automation parts quashed

In the case, Beckhoff Automation Pvt Ltd vs. Commissioner of Customs (Import), Mumbai, Mumbai Tribunal quashed 1% Extra Duty Deposit demand on related party import of electronic automation parts, absent finalisation of assessment under 'special valuation' within prescribed period.

The Tribunal relied on CBEC Circular No. 11/2011-Cus and Bombay HC decision in E.I. Dupont India Pvt Ltd and remanded the matter to Adjudicating Authority to re-determine if assessee-supplier relationship actually influenced the import price, in view of assessee's explanation that higher discount vis-à-vis independent buyer, was on account of after sales support provided to customers in India by assessee.

Tribunal also held that mere passing of discount by supplier to importer is a normal commercial practice, and does not necessarily conclude that discount has been passed on account of the relationship.

Comments : The judgment is of note to importers of electronic automation parts.

Services using helicopter to oil companies for transportation of person, materials to/from various oil rigs qualifies as 'non-scheduled passenger services'

CESTAT, in Global Vectra Helicorp Ltd. vs. Commissioner of Customs (Import), Mumbai, observed that on reading the definition of Air Transport Service under Rule 3(9) with the definition of Scheduled Air Transport Service under Rule 3(49), it was evident that in order to classify as the 'non-scheduled passenger service', the service must be for transportation of persons or things for remuneration, operating to a single flight or a series of flight which must be opened to the members of the public and must not operate as per the published scheduled or time table and / or with regular and systematic flight.

Comments : The judgment is of note to transport companies.

VAT

No case of understatement of tax liability in revised return where entire tax along with interest paid

HC, in Indus Towers Ltd. vs. State of Karnataka, allowed assessee's petition and held that there is no case of understatement of tax liability in revised return where entire tax is paid along with interest.

Further, HC set aside penalty u/s 72(2) of Karnataka VAT Act and observed that being unable to ascertain turnover due to software issues at Head Office, assessee initially filed a 'nil' return so as to comply with return filing requirement by due date and later filed revised return when correct facts and figures were available. HC held that Sec 72 provides that a dealer who furnishes a return which understates his liability to tax by more than 5% of his actual liability to tax, shall be liable to penalty equal to 10% of amount of such understated tax

HC also observed, *"Once a revised return has been filed and accepted by the Department, the original return gets obliterated and the only return which remains for consideration would be the revised return, as there cannot be two live returns pending consideration of the Department"*

Comments: The said judgment is of importance, on a pan India scale.

Correct to allow Input Tax Credit (ITC) if goods sold at price lower than that shown in VAT invoice : Rajasthan HC

Rajasthan HC, in Commercial Taxes Officer, Ajmer vs. Sharda Agencies, dismissed Revenue's petition and held that there was no perversity or illegality in Tax Board's order allowing Input Tax Credit (ITC) where goods sold at price lower than that shown in VAT invoice.

HC held that discount / incentives received from wholesaler / manufacturer on account of turnover by way of credit notes, which was separately shown by assessee, and same is not in conflict with Rajasthan VAT Act.

Comments: The said judgment is of importance to dealers claiming input tax credit (ITC) on the basis of VAT invoice.

Agreement with DTC to give bus on hire for plying on specified routes, as per specified schedule, not a 'transfer of right to use of goods'

Delhi HC, in Hari Durga Travels vs Commissioner of Trade & Taxes, Delhi, granted relief to Delhi Transport Corporation (DTC) bus operator by holding that agreement with DTC to give bus on hire for plying on specified routes, as per specified schedule, not a 'transfer of right to use of goods', and hence not liable to VAT.

HC observed that bus owner bears responsibility for any mishappening or accident, commits to be bus owner at all times, holds registration and licenses in its favour, in which case, it cannot be said that effective control and possession of vehicles transferred to DTC.

Comments: The said judgment is of importance to transport corporations.

Deduction of quarterly 'turnover discount' given to dealers by way of credit notes from "sale price" u/s 2(m) of Delhi Sales Tax Act upheld

Delhi HC, in MRF Ltd vs Commissioner of Trade and Taxes, upheld deduction of quarterly 'turnover discount' given to dealers by way of credit notes from "sale price" u/s 2(m) of Delhi Sales Tax Act, thereby rejecting Tribunal findings that deduction allowable only in respect of 'cash discounts', not any other 'trade discount'.

HC disallowed assessee's claim for inter-state sale to third party, since goods were transferred from its office in one State to another pursuant to declaration in Form F and duly entered in stock register, and no material furnished to show that such movement was for purposes of / pursuant to eventual sale of goods.

Comments: The judgment is of note as deduction of quarterly 'turnover discount' has been upheld.

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