Indirect Tax News Update

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Service Tax

Service tax not applicable on transshipment goods transported to customs station from overseas

Circular No. 5/2017-ST, 6/2017 Date : February 16, 2017

Finance ministry TRU circular clarified that no service tax is applicable on transportation of goods by vessel which is intended for transshipment to any country outside India. As per Rule 10 of Place of Provision of Services Rules 2012, place of provision of services of transportation of goods by air / sea, other than by mail or courier will be the destination of goods. In case where goods are imported into customs station in India which are intended for transshipment to any other country and destination is not a place in taxable territory within India, if the same is mentioned in import manifest / import report and the goods are transshipped in accordance with provisions of Customs law .

Comments: This seams to be fair as the place of provision of service is clearly India in the above.

Service tax not leviable on turnkey contract undertaken for DMRC

Recently Siemens Ltd vs Commissioner of Service Tax, Mumbai CESTAT allowed assessee's appeal and held that service tax is not leviable on turnkey contract awarded for completing project of Delhi Metro Rail Corporation Ltd. (DMRC). In this regard assessee contended that since contract is a turnkey contract, it cannot be vivisected and therefore, claimed refund of service tax paid inadvertently.

Further, CESTAT referred to ruling in Afcons Infrastructure Ltd. where in respect of identical contract awarded by DMRC, service tax levy was set aside, in view of specific exclusion to 'Railways' from scope of 'commercial and industrial construction service', stating that there is no distinction between a monorail or metro rail or any kind of rail. In this regard, CESTAT Stated that, since issue involved in said case was in respect of very same DMRC, though a construction company for civil contract, contract in present case, as well, cannot be vivisected .

CESTAT also accepted assessee's contention that issue is now squarely settled in Larsen & Toubro Ltd., wherein SC has specifically laid down that, in works contract, there cannot be, vivisection and calculation of tax under various categories of services.

Comment: CESTAT rightly held that service component cannot be divided from the works contract and service tx cannot be levied separately.

Joint Venture with AAI for airport operation & maintenance, not taxable

Delhi HC in case of Delhi International Airport Pvt. Ltd. vs. UOI & Ors. held that upfront and annual fees payable by International Airports (assessees) to Airports Authority of India (AAI) under "Operations, Management and Development Agreements" (OMDAs) are not taxable as 'Franchise Services' u/s 65(47) r/w Section 65(105)(zze) of Finance Act, 1994 (Act). In this regard, HC noted that in terms of policy decision of Govt. of India and respective OMDAs executed between assessees & AAI, assessees have been granted exclusive right and authority to undertake some of the functions of AAI i.e. operation, maintenance, development, design, construction upgradation, modernization, finance and management of airport.

HC accepted assessees' contentions that they run their own operations using own processes, policies, methods, design, techniques etc., that OMDA is not Franchise Agreement but a statutory divestation of rights (other than reserved activities) in favour of assessee-co., which is a joint venture where AAI holds 26% shares and hence, there is no question of representing AAI in performance of those functions.

Referring to Section 65(47) of Act which defines "franchise", HC stated that merely because by an agreement, a right is conferred on a party to sell or manufacture goods or provide services or undertake a process, it would not ipso facto bring the same within ambit of a 'franchise', it is required to be established that the right conferred is a 'representational right' which should necessarily qualify all 3 possibilities - (i) sell or manufacture goods, (ii) provide service, and (iii) undertake any process identified with franchisor.

Further HC Remarked that , "A representational right would mean that a right is available with the franchisee to represent the franchisor. In the case of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor".

HC held that, from perusal of terms and conditions of OMDA, it is clear that no representational right has been granted by AAI to the assessees and a JV agreement (OMDA) has been entered into by AAI so that functions entrusted to it under AAI Act, can be effectively carried out by assessees.

HC found that Revenue's reliance upon decision in Home Solutions to contend that since transaction between parties leads to value addition to overall services being offered at airport premises, it is amenable to imposition of service tax, as misplaced.

Consequently, since Revenue categorically found transaction not taxable under "Renting of Immovable Property Services", HC quashed AAI's action of blocking assessees' Escrow accounts.

Comments: Any franchise agreement would that representational rights are transferred and the person or company receiving these would have to operate as per the rules and regulations of the franchise. In the present case AAI is providing the right t\for division of rights and assessee operates as per their rules and regulation and moreover AAI is a holder of certain shares. In this regard, ther agreement between assessee and AAI cannot termed as franchise agreement.

State welfare board providing security guards for industries is not a statutory function

CESTAT in case of Security Guards Board for Greater Bombay v. Commissioner of Central Excise, Thane II held that activity of 'Board' constituted for providing security guards to Industries is not a 'statutory function', hence, charges collected for same chargeable to service tax under 'Security Agency' services.

Further, referring to clause 40 of Maharashtra Private Security Guards (Regulation of Employment & Welfare) Scheme, 2002, and Section 6 of Maharashtra Private Security Guards (Regulation of Employment & Welfare) Act, 1981, CESTAT stated that, no Director is paid by Government of Maharashtra and levy is collected and determined by Board.

Further, CESTAT stated that, all expenses and salaries of Board are not charged to Consolidated Fund but charged to amount recovered under said Scheme, hence, Board cannot be said to be Public Authority or Statutory Authority, hence, charges collected not a 'statutory levy'.

However, perusing Clause 31 of Scheme, 2002, containing provisions for disbursement of wages to registered Security Guards of Board, states that, wages and allowances excludible from value of service tax as same collected by Board as an agency for payment to concerned persons/authorities.

Also, deletes penalty invoking Section 80, observing that, Board has been created for welfare of working class and purpose is to ensure that working people are treated well and not exploited

Comments: A security guards board working for the welfare of the security guards and not controlled by the government cannot be termed as a statutory authority.

Central Excise

Regassification and filling of gasses from tanker to cylinder not a manufacture

SC recently in case of Commissioner of Central Excise, Vadodra vs. Vadilal Gases Ltd. and Ors upheld CESTAT's order holding that activity of regassification and packing of pure argon and nitrogen in smaller cylinders and mixing inert gases (like argon, nitrogen, helium, etc) with other gases like oxygen, nitrogen, carbon dioxide and making available such combination to consumers in retail cylinders, not manufacture as per Central Excise Tariff Act, 1985 (Act).

Further, SC Observed that, deeming provision for 'manufacture' provided under Note 10 of Chapter 28 of the Act is in two parts i.e. (i) where labelling or re-labelling of containers and repacking from bulk packs to retail packs is undertaken and (ii) where adoption of any other treatment is undertaken to render product marketable to consumer.

As regards first limb, SC placed reliance upon CESTAT ruling in Ammonia Supply Company, wherein it was held that, ammonia coming in 'tankers' cannot be treated to have come in bulk packs.

Further, referring to Circular dated October 8, 1997, SC upheld CESTAT's findings that, no repacking from 'bulk' packs to 'retail' packs took place. As regards issue of mixing of gas, referring to SC ruling in Goyal Gases, SC stated that, notwithstanding mixing, gases retained their individual properties despite being filled up in same cylinder, demonstrating that, a new marketable product does not come into existence by said process.

Further, SC rejected Revenue's reliance upon SC ruling in Air Liquide North India Pvt. Ltd

Comment: SC observed that mere mixing of gases and filling them into cylinders does not amount to manufacture.

SSI exemption cannot be denied due mere affixation of brand name on sale documents

CESTAT recently in case of Tidland We Accessories Pvt Ltd. and others v. Commissioner of Central Excise, Belapur allows assessee's appeal, rejects denial of exemption to small-scale unit under various Notifications issued from time to time, where brand name affixed merely on 'sale documents' i.e. letter-heads, invoice and catalogues, not on 'goods'

Adjudicating Commissioner's findings that, mere printing of brand name on sale documents sufficient to deny eligibility under Notifications and use of part number on finished product establish origin of product, lacks rationale and appears to be philosophical musings on nature and purpose of restriction in exemption Notification, absent any forthright conclusion leading to exemption denial.

Perusing relevant text of Notification, states, it is amply clear that, Notification denies exemption to 'goods' affixed with ineligible brand or trade name of another person, however, in the present case there is no allegation to that effect, therefore, exemption benefit cannot be restricted for use of ineligible brand name on any documentation .

Comment: CESTAT observed that mere fixinf of brand name on sale documents does not amount to branding.

Synthetic fibre waste garnetting is not a manufacture

CESTAT recently in case of Aapul Textile & Industries Pvt Ltd & Anr. vs. Commissioner of Central of Central Excise, Pune - II held that excise duty is not payable on process of garnetting / carding synthetic filament / fibre waste, as same does not amount to "manufacture".

CESTAT observed that waste after garnetting is not excisable as it does not involve emergence of different commercial commodity with characteristics different from the raw material. Coordinate bench in the case of Amritsar Swadeshi Woollen Mills, had clearly held that the process does not amount to manufacture. Despite the judgment, Revenue heavily relied on Chapter Note 3 of Chapter 55. Perusing the said Chapter Note, CESTAT noted that same is for the purpose of classification of waste of synthetic staple fibres; it does not declare that the process of garnetting / carding amounts to "manufacture". Comparing Chapter Note 3 with Chapter Note 4, it observed that wherever the legislature has intention to create deeming provisions about manufacture in respect of certain process, the Chapter Note such as Note 4, is created.

Hence, merely because Chapter Note 3 mentions about garneted / carded / combed or otherwise processed waste, it would not mean that the process thereof would amount to "manufacture". CESTAT also noted the judgments of Techno Associates Industries Pvt. Ltd. vs. Commissioner of Central Excise, Indore [1998 (99) ELT 389 (Tribunal)], Bombay Fibre Industries Ltd vs. Collector of Central Excise [1996 (83) ELT (SC)], Gulf Oil Corporation Ltd vs. Commissioner of Central Excise [2005 (183) ELT 40] cited by assessee, wherein it was held that garnetting process does not amount to manufacture.

Comment: It is clear that through garnetting there is no emergence of a new product. Hence same shall not be manufacture.

Welding electrodes under Heading 8311 are not capital goods

HC in case of Commissioner Central Excise, Lucknow v. Bajaj Hindustan Ltd. Khambarkhera, Lakhimpur Kheri allowed Revenue's appeal, held that 'welding electrodes' specified under Chapter Heading 8311 of Central Excise Tariff are not 'capital goods' under Cenvat Credit Rules (Rules), 2002/2004.Further HC observed that "definition of 'capital goods' under Rule 2(b) of Rules, 2002and Rule 2(a) of Rules, 2004 is exhaustive in the sense that it clearly specifies what 'capital goods' would mean. The items which fall under certain chapters of Central Excise Tariff Act are specifiably mentioned in Rule 2(b)(i) of Rules, 2002 and Rule 2(a)(A)(i) of Rules, 2004.

Further rejecting assessee's contention that, 'Welding Electrodes' would come within term 'components' so as to fall within category of 'capital goods', CESTAT remarked that, Rule 2(b)(iii) of Rules, 2002 and Rule 2(a)(A)(iii) of Rules, 2004 provide that, in respect of items mentioned in Rule 2(b)(i) and (ii) of Rules, 2002 and Rule 2(a)(A)(i) and (ii) of Rules, 2004, components, spares and accessories of goods specified thereunder would also fall within the category of 'capital goods'.

Held that, 'capital goods' as defined under said provisions of Rules 2002/2004, in substance, are pari materia with 'capital goods' specified in Rule 57¬Q of Central Excise Rules, 1944 (Rules 1944) and there is no substantial difference therein.

Further Relied upon own ruling in Upper Ganges Sugar & Industries Ltd. Vs. Commissioner Customs & Central Excise wherein similar issue was considered in context of Rules 1994.

Comment: HC observed that only the components of the of the goods specified in Rule 2(b)(i) and (ii) of Rules, 2002 and Rule 2(a)(A)(i) and (ii) of Rules, 2004 can only considered as capital goods.

VAT

No sales tax deferral to PSI units on sale of DEPB license

Bombay HC in case of Graphite India Ltd. and Anr. vs. The State of Maharashtra denied deferral of sale tax liability in respect of sale of DEPB by the assessee, holding eligibility certificate under Package Scheme of Incentives.

HC Noted that eligible industrial units holding certificates have an option to either claim exemption from payment of sales tax or defer tax collected, which the assessee had opted for under Rule 31B of Bombay Sales Tax Rules. Further, HC Rejected assessee's contention that since Rule 31AA which provides for calculation of the cumulative quantum of benefit, was amended to the effect that assessees holding eligibility certificate can claim exemption on sale of DEPB license also, but no such amendment was incorporated under Rule 31B, same is discriminatory and violative of Article 14 of the Constitution.

Stating that the two Rules cannot be compared, HC observed that the amendment so incorporated was restricted in its application to the beneficiaries of exemption mode and there was no compulsion to incorporate any such amendment under Rule 31B.

According to the HC, even if Rule 31B was not touched and was not amended, it does not mean that assessee can seek a writ of mandamus directing the State to either amend or modify it

Comment: HC rightly observed that industrial units holding certificates have an option to either claim exemption from payment of sales tax or defer tax collected.

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no transfer of property in consumable chemicals / solvents used for cleaning

HC in VPSSR Facilities vs. Commissioner of Value Added Tax and Anr. held that use of consumable chemicals / solvents in the process of cleaning does not amount to transfer of property in goods from assessee to Northern Railways (contractee) exigible to tax.

Consequently, contractee is not liable to deduct tax at source and Revenue is liable to grant a certificate for Nil TDS. Further, HC Stated that use of certain chemicals and solvents by assessee is integral part of execution of cleaning contract but property therein does not pass on to the contractee, such chemicals and solvents are not required by contractee for any purpose other than for cleaning, washing and housekeeping.

Further, HC stated that there is a distinction between consumables required for running an equipment and consumables required for servicing or maintaining an equipment, like in case of motor cars, petrol and oil are required for running them but chemicals and solvents are required for servicing in garage.

Further Hc held that mere fact that soaps, detergent, chemicals and solvents are deposited in the store of the contractee would not make any difference to the exigibility. HC rejected Revenue's reliance on Enviro Chemicals and Xerox Modicorp Ltd rulings since the Courts were not dealing with goods integral to service contract and completely consumed during the execution thereof.

Comment: Since the goods were integral to the service and are consumables in the course of provisions of service, HC held that there is no transfer of property.

VAT not leviable on building contracts before May 17, 2010

HC in case of Dhingra Jardine Infrastructure Pvt Ltd quashes levy of VAT on builders prior to May 17, 2010, absent machinery provisions under Haryana VAT Act or Rules framed thereunder, for calculation of 'taxable turnover'. In this regard, HC Held that, SC verdict in K. Raheja Development Corporation in May 2005 is a binding precedent, declaring law at that time on the subject, to be followed by all Courts and authorities below and action could have been taken by authorities basis thereof.

Further, HC remarked that, instructions issued by Dept. stating that said Apex Court ruling was law of land to be meticulously followed w.r.t. civil works contracts / builders and developers, are binding upon authorities. As regards Revenue contention that issue was finally decided in case of L&T in 2013, HC stated that final determination of a controversy cannot be kept pending only on ground that same was pending adjudication by Larger Bench, and value of binding precedent cannot be taken away till the time matter is decided by LB.

Moreover, noting that second proviso to Section 34 was amended whereby time limit for revision of assessment orders by Commissioner was extended from 3 to 6 years, HC accepted assessee's contention that suo-moto revision u/s 34 by Commissioner cannot be exercised since 3 years were already expired in instant case.

Further, HC Stated that, "Right to revise the order had extinguished, which could not be revived. Further life could be injected only in the cases where limitation for revising an assessment order was still existing… the amendment cannot put life to a dead claim".

Rejected revenue's attempt to invoke exception clause carved u/s 34 providing extended period of limitation, stating that even if amendment, Tribunal order or HC / SC order is subsequent to passing of assessment order, in normal circumstance, exercise of revisional jurisdiction has to be during the period of limitation except when amendment / order came into existence just before limitation was to expire.

Further, HC Observed, that "Exception clause is to be invoked only in exceptional circumstances. It is always required to be strictly interpreted even if there is hardship to any of the parties". Further, HC refused to dwell into vires of Explanation (i) to Section 2(1)(zg) of Haryana VAT Act, since same already upheld by Division Bench in CHD Developers Ltd., wherein State was directed to bring necessary changes in Rules in consonance with observations made in judgment, and accordingly, Rule 25(2) to (5) were substituted vide Notification dated July 23, 2015 with retrospective effect from May 17, 2010; However, upholds levy from May 17, 2010, stating that, Rules were in existence pursuant to judgment in CHD Developers' case, and sets aside assessment against company which stood dissolved after merger.

Comment: HC observed that vat is not liveable building material since inclusion of works contracts.

Customs

CBEC directs submission of CAS- 4 certificate for captive consumption

CBEC Instruction F. NO. 206/01/2017-CX 6 dated February 16, 2017.

CBEC ordered for submission of CAS-4 Certificate of Financial Year ending March 31st, by December 31st of next FY for purpose of calculating cost of captively consumed goods; For eg., for FY 2016-17, CAS-4 Certificate should be issued by December 31, 2017. Assessing Officer shall thereafter finalise the provisional assessment expeditiously.

Comment: Assessee's should comply with these instructions.

Remedy of appeal is a compulsive jurisdiction

HC in case of Manali Petrochemicals Ltd. vs. Union of India & Ors. set aside CESTAT's order which dismissed assessee's appeal against findings of Designated Authority and issue of Notification No. 9/2015-Cus (ADD) imposing anti-dumping duty on the ground that writ petitions challenging the same were pending before HC.

Noting that assessee had not filed any writ petition before HC, accepted the contention that pendency of a writ petition cannot ever be a ground to deny appellate remedy, which is created specifically by statute and exists as of right. Perusing Section 9C of Customs Tariff Act, HC stated "Parliamentary intent in creation of an appellate forum in respect of findings by DA was to provide meaningful redress by a competent appellate body and that the order impugned is not only cryptic but mistaken in its assumption that pending WPs (of others) can provide adequate redress to the assessee which is an entirely erroneous assumption, because those WPs are merely pending and depend upon exercise of discretion". Further, HC Remarked that, every order of a judicial or quasi-judicial authority should indicate reasons to hold what it did, bereft of which, it might have momentous consequences to those affected by it.

Stated that, "The availability of an appellate remedy in this case, is conferment of a right to approach the higher forum for correction, on facts and law, whereas exercise of judicial review is within a restricted canvas.". Accordingly, HC allowed assessee's writ holding that CESTAT had in essence, treated an appellate remedy (otherwise a compulsive jurisdiction) to be alternative and discretionary, robbing it of substantial content.

Comment: HC observed that pendency of writ petition cannot ever be a ground deny appellant remedy.

High contract price determines the assessable value, inclusion of notional commission inappropriate.

CESTAT in case of Jharsanya Logistics Pvt Ltd and others vs. Commissioner of Customs, Mumbai that for the purpose of determining assessable value of goods imported on High Sea Sale basis, actual High Sea Sales commission is to be included in CIF value of imported goods and inclusion of notional commission is not appropriate.

Rejected revenue contention that in each and every case of High Sea Sale, CIF value + 2% notional commission should be taken for assessment of Bill of Entry. Further, CESTAT Observed that as per Circular No. 32/2004-Cus, such method shall be adopted only in case where actual contract value is not available, In this regard, CESTAT noted that in present case, tax invoice raised by High Sea seller clearly disclosed that value charged is over and above CIF value + 2% and therefore, such method of valuation will not be applicable. Further, CESTAT opined that since Letter of Credit charges are borne during the course of import, prior to clearance, shall be includible in assessable value. As regards administrative charges, CESTAT held that absent evidence regarding their nature, they are nothing but sales profit of High Sea seller, clearly includible in assessable value of imported goods.

Comment: CESTAT observed that the commission shall not included in the assessable value.

Despite not fulfilling export obligations and notification conditions, EOU is entitled for proportionate benefits

CESTAT in case of Moonlight Exim (P) Ltd v. CCE, Jaipur allowed proportionate benefit to assessee EOU for exports made against which foreign exchange realized and in case of failure to fulfill, export obligation (EO) and conditions of Notification No. 53/1997-Cus., remanded the matter.

CESTAT Referred to Circular No. 29/2003-Cus., Notification No. 52/2003-Cus., and CESTAT decisions in Natural Stone Exports Ltd. and Nikhil Industries. CESTAT remarked that liability of duty against assessee would be limited to gap between foreign exchange outgo for imports and foreign exchange earned on account of exports made. Accordingly, CESTAT stated that holding assessee liable for duty foregone in case of all imports is illogical, which is clear from contents of Notification 52/2003-Cus. (issued in rescindment of Notification NO. 53/1997) and it naturally flows that assessee is entitled to proportionate benefit of exports made and foreign exchange realised, despite fact that, Net Foreign Exchange earnings are not positive and documentary evidence of receipt/realization of foreign exchange/export proceeds is not produced before adjudicating authority.

Observed that confiscation is not required if assessee used said goods in manufacturing export goods, however, for remaining goods which were not used for manufacturing export goods, assessee is liable to payment of customs duty foregone, further, sets aside penalty.

Comment: Cestat rightly observed that assessee is entitled to benefits to extent of what he has fulfilled.

SEZ

Duty payable on inter-unit transfer of goods by STP

CESTAT in case of Commissioner of Customs, Bangalore vs. M/s Velankani Information Systems upholds levy of duty along with interest, where premises leased along with goods procured/imported duty-free, by a STP unit under 100% EOU scheme, to other STP unit on inter-unit transfer (IUT) basis.

Further, HC Noted assessee's contention that, transfer of goods to other STP unit on IUT basis was permissible under provisions of Foreign Trade Policy (FTP) as well under relevant Notifications, and that second unit will assume Export Obligation (EO) upon transfer of capital goods, hence, there is no loss to Revenue.

Remarked that, Notifications 52/2003-Cus and 22/2003-CE allows various equipments such as DG sets, AC equipments, UPS, etc., imported by a STP unit to be utilised by other STP units belonging to owner of importing unit and located in same compound or nearby premises for purposes of development of software and export, subject to approval of Commissioner of Customs / Central Excise.

Observing that, leasing of STP premises along with equipment has been done without obtaining any permission of proper authorities in instant case, holds, transferring duty-free goods out of their own possession amounts to de facto de-bonding of such goods, accordingly duty demand of duty foregone on imported as well as indigenous goods, is in order.

However, HC observed that since, diversion not made outside EOU/STP scheme, Commissioner correct in taking a lenient view in refraining to impose redemption fine and penalty.

Comment: HC observed that transfer of goods to other STP unit on IUT basis is permissible.

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