Indirect Tax News Update

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Service Tax

Service tax for overseas B2C online information and database access or retrieval (OIDAR) services shall be paid by March 6

Notification No. 5/2017-ST, 6/2017 Date : January 9, 2016

Ministry of Finance notified Service tax (Second Amendment) Rules, 2017 with effect from January 30, 2017. The Service tax for the months of December 2016 and January 2017 in respect of online information and database access or retrieval (OIDAR) services provided from non-taxable territory to non-assessee online recipients, shall be paid by March 6, 2017. The Finance Ministry also withdrew the tax exemption in case of OIDAR services received by an entity registered u/s 12AA of the Income Tax Act, 1961 for the purpose of providing charitable activities, from service provider located in non-taxable territory. In this regrd the Notification No. 25/2012-ST was amended .

Comments: This is a positive step for revenue towards ensure that every taxable service is brought under its net

Liability imposed on vessel in charge for transportation services from non– taxable territory

Notification Nos. 1/2017-ST, 2/2017-ST, 3/2017-ST and 4/2017 -ST dated January 12, 2017.

Ministry of Finance imposed service tax liability on person complying with Sections 29, 30 or 38 r/w Section 148 of Customs Act (viz. person in charge of vessel & his agent) 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 upto Customs clearance station in India. Accordingly, withdrew service tax exemption provided under Notification No. 25/2012-ST in this regard and amended Notification No. 30/2012-ST. Further the ministry exempted services provided by a business facilitator or a business correspondent to a banking company with respect to accounts in its rural area branch. Also amended Rule 2(1) of Services Tax Rules to exclude such persons from the definition of 'aggregator' who enable a potential customer to connect with persons providing services by way of renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes upon fulfillment of certain conditions. Further Ministry of Finance rationalizes the abatement for tour operator services w.e.f. January 22nd, grants 40% abatement without CENVAT credit on inputs and capital goods and the gross amount charged includes accommodation and transportation required for such tour .

Comment: This would be disadvantageous to the industry.

CBEC lays down procedure for registration & online tax payment for non– taxable OIDAR service providers

CBEC prescribed procedure for registration & online payment of service tax in respect of online information & database access or retrieval services rendered by non-taxable territory assessees. These assessees are required to fill and submit Form ST-1A, after this Registration Certificate in Form ST-2A will be generated automatically. Furteher for payment purposes, taxpayer / assessee must have internet banking account in one of 7 prescribed foreign banks which include BNP Paribas, HSBC, Standard Chartered and Bank of America. In this regard payment shall be routed through replica of EASIEST e-Payment portal, where assessee needs to select following Accounting Codes – 0153 for service tax on OIDAR, 0154 for interest and 1333 for penalties thereon, 1509 for payment of KKC, 1510 and 1512 for interest and penalties thereon respectively, and 1493 for SBC, 1494 for interest and 1496 for penalties thereon. Also using the EASIEST web portal, assessee can view / download GAR-7 challan evidencing payment of service taxes.

Comment:- The Circular bring about clarity in compliance with procedures and rules.

Renting of equipment constitutes ‘’deemed Sale’: CESTAT

CESTAT in Gimmco Ltd. vs. Commissioner of Central Excise & Service Tax, Nagpur case held that activity of renting of earthmoving equipment involves ‘transfer of right to use’ and thus, taxable as “deemed sale” under MVAT Act read with Article 366(29A) of Constitution. Further, CESTAT also observed that no service tax would be liable under “Supply of Tangible Goods for Use” category from May 16, 2008.

After Perusing the agreement, CESTAT noted that responsibilities casted upon hirer clearly show that right of possession and effective control of equipment vested with hirer, since it was liable for any misuse / abuse, safe custody / security and to settle disputes with third parties in relation to use.

Agreement also provided for charging of VAT at 12.5% on monthly invoice value to be paid by hirer, noted CESTAT while referring to CBEC Circular No. MF (DR) 334/1/2008-TRU dated February 29, 2008 wherein it was clarified that “supply of tangible goods for use” leviable to VAT / sales tax as ‘deemed sales’ will not be covered under the scope of “Supply of Tangible Goods for Use” service.

Further, CESTAT Relied on AP HC ruling in case of G. S. Lamba which laid down essential requirements for transaction to constitute “transfer of right to use goods”, to hold that merely because restrictions were placed on lessee, it cannot be said that there was no right to use the equipment. As regards dropping of demand under “Business Auxiliary Service” category prior to May 16, 2008, CESTAT remanded matter to Adjudicating Authority for fresh consideration absent detailed findings as such and non-existence of main ground, i.e. classification as “Supply of Tangible Goods for Use” service

Comment: Renting of equipment in case where there is an effective control, would constitute to transfer of property and right use . In this regard, it can be termed as deemed sale.

Service tax payable only on service component in retreading of tyres and not on gross value.

SC recently in case of Safety Retreading Co. Pvt. Ltd. vs. Commissioner of Customs & Central Excise, Salem held that in a contract for retreading of tyres, service tax is payable only on service component and not on entire gross value.

Accordingly held that assessee is liable to pay on 30% of retreading charges as quantified under the State Act. Further referring to Section 67 of Finance Act which deals with valuation of taxable services for charging service tax, Notification No.12/2003-ST and CBEC Circular dated April 7, 2004, SC stated that costs of parts or other material, if any, sold (deemed to be sold) to the customer while providing maintenance or repair service is specifically excluded.

Rejected majority view of the CESTAT that in retreading of tyre, there is no sale or deemed sale of the parts or other materials used in the execution of the contract of repairs and maintenance and hence, entire gross value is liable to service tax. Also rejected Revenue contention that there is no evidence forthcoming from the side of the assessee that the value of the goods or the parts used in the contract and sold to the customer constitute 70% of the value of the service rendered.

Further SC Stated that no dispute has been raised with regard to the assessment of assessee on its turnover under the local/State Act, insofar as payment of VAT on that 70% component is concerned.

Comment: SC on considering the fact that most part of the tyre retreading services involves goods which are provided by the assessee, held that the same shall be considered as sale and tax was payable on them as per state vat act.

Central Excise

Master Circular proposed by CBEC on SCN, Adjudication & Recovery

CBEC proposes Master Circular on Show Cause Notice, Adjudication and Recovery, consolidating 85 Circulars of Central Excise. The Master Circular intends to compile relevant legal and statutory provisions on the subject. Further CBEC also invited comments / suggestions by February 15. the draft Master Circular is divided into 4 parts wherein Part I deals with Show Cause Notice related issues, Part II deals with issues related to Adjudication proceedings, Part III deals with closure of proceedings and recovery of duty, while Part IV deals with miscellaneous issues (such as service of decisions, orders, summons, de novo adjudication, and refund of pre-deposit). Further Master Circular lays down inter alia structure of Show Cause Notice – (a) introduction of the case, (b) legal frame work, (c) factual statement & appreciation of evidences, (d) discussion, facts and legal framework, (e) discussion on limitation, (f) calculation of duty and other amounts due, (g) statement of charges, and (h) authority to adjudicate, and reiterates that once the amount is paid, no coercive action shall be taken for recovery of balance amount during pendency of appeal proceedings before appellate authorities. Circular also states that refund of pre-deposit need not be subjected to process of duty refund u/s 11B of Central Excise Act, and same shall be paid with interest irrespective of whether the appellate order is proposed to be challenged by Dept. or not. Further it lists down the 82 Circulars which shall stand rescinded and 3 Circulars that would remain operative .

Comment: A compiled form of circular dealing with the above would be a good initiative provided it covers all the possible issues.

Input credit shall be reversed when product is cleared under purchaser's duty remission claim

HC recently in case of Atlas Automotive Components Private Limited and Anr. vs. Union of India and Ors. Directed reversal of input credit against clearance of aluminium castings under claim of duty remission by buyer for use in specific industrial process, in terms of Chapter X r/w Rule 57C of Central Excise Rules 1944. further HC Noted Adjudicating Authority's finding that assessee was reversing credit initially but resorted to jugglery subsequently, and since goods cleared under Chapter X procedure had not suffered any duty payment, MODVAT credit was reversible.

Rejected assessee's contention that choice of buyer to either claim MODVAT credit of duty paid or claim remission doesn't make the goods exempt or chargeable to nil rate of duty. In this regard HC relied on Kirloskar Oil Engines Ltd. vs. Collector of Central Excise, Pune [1997(73) ELT 835] where in the larger bench of CESTAT has held that once there is an existing notification on the statute book at the time of receipt of inputs for use in the manufacture of such final products, it cannot be stated with any element of correctness that the manufacturer was not aware of availing of the said exemption notifices of the case of assessee.

HC stated that it for the reason of act jugglery by assesse the show cause notice was issued and explanation was sought by Revenue. Further, HC observed the concurrent findings in the orders of Revenue are not perverse or vitiated by error of law apparent on the face of the record. HC also observed that the arguments which were put forward by assessee were all considered by appellate authority. In this regard HC observed that order does not suffer any serious legal infirmity requiring interference in writ jurisdiction.

Comment: CENVAT credit is provided to avoid double taxation. Since the goods are cleared under remission CENVAT credit has to be reversed.

CESTAT calls for larger Bench to determine classification of tractors/ loaders

CESTAT recently in Action Construction Equipment Ltd. case asked Larger Bench to determine meaning of 'automobile' absent definition in Central Excise Law or any Notifications thereto. The main question for considering was whether spare parts of Wheeled Tractor Loader Backhoe (WTLB) and Hydra Cranes falling under Chapter Heading 8431, would be covered under Third Schedule to Central Excise Tariff Act as "parts, components and assemblies of automobiles" prior to April 2010.

CESTAT hled that co-ordinate bench in JCB India Ltd. overlooked law settled by Apex Court in MSCO Pvt. Ltd. and committed an error while adopting meaning as given in Air (Prevention and Control of Pollution) Act, 1981.

Observed that when expression 'automobiles' is not defined in Central Excise Act, it is not permissible to adopt the definition of very same expression appearing in different enactment and uniform Dictionary meaning can be usefully looked into, viz. "passenger car or goods carrier". Also observed that co-ordinate bench had not examined amendment in Third Schedule through Notification No. 11/2011 giving effect of demand of duty w.e.f. April 29, 2010 on parts, components and assemblies of goods as well Finance Ministry clarification dated February 28, 2011.

CESTAT accordingly, placed the matter before President for reference to Larger Bench on – (i) applicability of meanings assigned under Air (Prevention and Control of Pollution) Act / Motor Vehicles Act, and (ii) retrospective applicability of Notification No. 11/2011, for purpose of determining whether packing or repacking of said spare parts for retail sale would amount to "manufacture" u/s 2(f)(iii) of Central Excise Act .

Comment: the view taken by CESTAT was of view that automobiles means a car or goods carrier. However, the co-ordinate bench of CESTAT was of view that automobiles shall be assigned the meaning in Air (Prevention and Control of Pollution) Act / Motor Vehicles Act, due to different views of the co-ordinate benches the matter is

Interest recoverable under Rule 14 on wrongly availed CENVAT credit

CESTAT recently in the case Tata Toyo Radiators Ltd. vs. Commissioner of Central Excise, Pune-I upheld the interest liability on wrong availment of CENVAT credit, under Rule 14 of CENVAT Credit Rules r/w Sections 11A & 11AB of Central Excise Act. Further CESTAT rejected assessee's contention that such wrong availment merely entailed an entry in CENVAT Credit Account, not causing any loss to Revenue and since the same was reversed voluntarily, interest liability would not accrue. CESTAT also assessee's reliance on Karnataka HC decision in Bill Forge Pvt Ltd.

Taking note of Rule 14, CESTAT observed that where CENVAT credit is taken or utilized or erroneously refunded, the same along with interest should be recovered from the manufacturer or the provider of output service and the provisions of Section 11A and 11AB, which provide for recovery of duties, shall apply accordingly.

CESTAT noted SC observation in Ind-Swift Laboratories Ltd. that even if credit had been availed wrongly, the liability to pay interest would accrue since the Rule covers both the situations i.e. CENVAT credit taken or utilized wrongly, and the word 'or' is disjunctive in nature. Further, CESTAT noted the decision of Bombay HC in GL & V India Pvt. Ltd wherein it was held that interpretation of Rule 14 by SC in Ind-Swift Laboratories Ltd would prevail over all the other Courts.

Accordingly, CESTAT held that assessee was not entitled to refund of interest already deposited and dismissed assessee's appeal.

Comment: The interest is recoverable under Rule 14 , irrespective of the fact the CENVAT credit wrongly availed in been refunded voluntarily.

VAT

VAT not leviable on inter-state goods supply for works contract execution within State

Authority for Clarification, Kerala Commercial Tax Dept. in Hitech Elastomers Ltd clarified that VAT is not leviable on supply of goods inter-state for execution of works contract within the State. According to applicant, pursuant to contract awarded by Cochin Port Trust for replacement of old and damaged rubber fenders at Cochin Port, same were sourced from Gujarat on payment of Central Sales Tax (CST), hence, said work being an inter-state work contract is not taxable under Kerala VAT Act.

Further authority relied on SC ruling in K.G. Khosla and Co. Ltd., observes that inter-state movement of goods is in pursuance of and incidental to works contract agreement executed between applicant and Cochin Port Trust; Referring to SC rulings in Bharat Heavy Electricals and Builders Association of India and Larsen &Toubro Ltd., holds that said transaction amounts to 'inter-State sale' and in terms of Section 9 of CST Act, the State from which such movement of goods commences, is alone authorized to levy tax or make law to deduct tax thereon. Since movement of goods takes place from outside State of Kerala, no tax under Kerala VAT Act is leviable.

Comment: The state cannot levy tax on the movement of goods which takes from out side the state.

SC Allows post-sale 'trade discount' deduction

SC in case of Southern Motors vs. State of Karnataka & Ors. HC order which rejected deduction of trade discount extended through credit notes post completion of sale on ground that such discount was not reflected in sale invoice in terms of Rule 3(2) of Karnataka VAT Rules; Reads down first proviso to Rule 3(2)(c) which stipulates that such discount shall be allowed if "the tax invoice or bill of sale issued in respect of the sales relating to such discount shows the amount allowed as discount".

Accepted assessee's contention that since trade discounts are not comprehensible at time of sale, being contingent on variable factors to be computed only upon happening of a future event, such discounts actualize through credit notes at end of prescribed period, and therefore, literal interpretation sought to be given to contents of said proviso is expressly illogical, rendering Section 30 of Karnataka VAT Act and Rule 31, redundant and unworkable .

Further SC remarked, depending on eventualities comprehended u/s 30, credit and debit notes are issued which result in corresponding reduction / enhancement of tax liability on the basis of declarations in the returns, thus, there is an in-severable co-relation between taxable turnover and tax payable

Section 30 axiomatically thus deals only with incidence of tax and not spectrum of situations / eventualities bearing on the tax liability, which particularly are dealt with by Rule 3(2). Further SC observed that, "It is too trite to state that neither an assessee is liable to pay tax in excess of what is due in law nor is the revenue authorized to exact the same. Any interpretation of Rule 3(2)(c) though an integrant of a fiscal statute has to be in accord, in our estimate unite this fundamental mandatory postulation" .

Relying on host of judicial precedents, SC stated that, "though words in a statute must, be extended their ordinary meanings, but if the literal construction thereof results in anomaly or absurdity, the courts must seek to find out the underlying intention of the legislature and in the said pursuit, can within permissible limits strain the language so as to avoid such unintended mischief".

According to SC, the intention of legislature could not have been to deny benefit of deduction of trade discount, which is an accepted item of deduction, hence, the interpretation to be extended to said proviso has to be essentially in accord with legislative intent to sustain realistic benefit of trade discount; However, while devious manipulations in trade discount to avoid tax in a given fact situation is not an impossibility, such avoidance can be effectively prevented by insisting on proof of such discount.

Accordingly, on an overall review of scheme of Act / Rules, requirement of reference of discount in tax invoice/ bill of sale to qualify it for deduction has to be construed in relation to transaction resulting in final sale/purchase price and not limited to original sale sans trade discount.

Comment: SC came to the above conclusion based on the intent of the legislature.

VAT on SIM replacement & lease line charge are ultra vires Constitution holds HC

HC recently in case of idea Cellular Ltd. & Anr. vs. The Assistant Commissioner of Commercial tax, LTU, Indore & Others quashed imposition of VAT on SIM replacement charges and lease line charges collected by telecom service providers. Further HC struck down Section 2(u) and 2(v) of Madhya Pradesh VAT Act, 2002 which define 'sale' and 'sale price' respectively, by finding them ultra vires the Constitution to the extent they levy VAT on SIM replacement and lease line charges which are merely services. HC rejected Revenue contention that when the customer comes to telecom service providers for issuance of new SIM / replacement of damaged SIM, the consideration charged therefor should be construed as 'sale' .

Stated that SIM is merely a key to enter service providers' facility and use their services, SIM card is not sold to the subscriber but merely forms part of the services rendered thus cannot be charged separately to sales tax . HC held that only if the parties intend that SIM card should be a separate object of sale, sales tax can be levied thereon, applying the same analogy for the SIM replacement charges which are in the form of service charges and do not represent sale price.

HC relied on Bharat Sanchar Nigam Ltd, M.P. Reliance Telecom Ltd, Idea Mobile Communication Ltd wherein it was held that no sales tax can be charged for providing SIM cards since they are considered to be part and parcel of telecom services and dominant intention of transaction is to provide services, not to sell SIM cards which on their own, would hardly have any value.

As regards to the issue of imposing VAT on lease line charges, HC stated that issue is squarely covered by the decision of Bharti Infratel Ltd., remarks that subscriber of a lease line does not become the owner thereof either by control or by possession and hence, such charges are only for services rendered and there is no element of sale therein .

Comment: SIM replacement shall be considered as service rather than sale , because the company is merely replacing the SIM which was sold to the customer already.

No CST on inter-state transfer of missiles for warhead integration, would constitute 'Stock transfer'

HC in case of BrahMos Aerospace Pvt. Ltd. vs. The State of Maharashtra & Others ruled on situs of inter-State sale and appropriate State for purpose of levy & collection of CST, where semi-finished goods, viz. missiles, are transferred from one State to another for job-work (warhead integration) and thereafter, dispatched outside the State pursuant to agreement of sale with President of India.

HC Noted that assessee, a joint venture company between Defence Research & Development Organisation and State Enterprise incorporated under Russian Federation's legislation, received an order for missiles from Ministry of Defence, and for purpose of execution thereof, components imported from Russia were stored at Nagpur and thereafter stock transferred to Hyderabad for assembly and fixing on SKD article.

Taking note of Section 9(1) of CST Act, HC stated that, it is clear that establishment in Andhra Pradesh, where components are assembled, makes missiles and is the State from where movement of goods in course of inter-state sale commences, and since it is impossible to fit the warhead at facility located in civilian area at Hyderabad, the missile is brought to Nagpur in Maharashtra for same purpose. Rejected Assessing Officer's (AO) contention that, movement of semi-finished goods from Hyderabad to Nagpur cannot be construed as a 'mere stop-over' in inter-State movement as claimed by assessee, and since final product (missile) is appropriated and dispatched from Nagpur in the form of a missile, movement is occasioned from State of Maharashtra:

Observed, there is a fundamental error in understanding of AO that said transaction is an inter-state sale from Maharashtra and not Andhra Pradesh, held that findings of AO that it is movement of finished goods, which would be determining and conclusive factor, is legally flawed. Further Criticising AO's approach, HC observed that non-application of mind to the very crucial and relevant factors governing applicability of CST Act to inter-State sales, since in all cases relied upon by AO, movement was of 'finished goods' and not of 'semi-finished goods'.

Comment: since the missiles were semi finished goods and considering the difficulty in accommodating them in said unit HC has come such conclusion.

Customs

Rules for bilateral safeguard measures under India-Japan Trade Agreement notified by FM

Finance Ministry notified India-Japan Comprehensive Economic Partnership Agreement (Bilateral Safeguard Measures) Rules, 2017. As per Rule 3 thereof, Director General shall inter alia investigate whether increased imports of an originating good from Japan into India, have caused or threatening to cause serious injury to domestic industry as a result of elimination / reduction of customs duty under the Trade Agreement; Director General shall recommend bilateral safeguard measure for a particular duration which if adopted, would be adequate to prevent or remedy the serious injury. On receipt of recommendations of Director General, the Central Govt. may suspend further reduction of customs duty rate on originating good provided for in the Trade Agreement / increase the customs duty rate to a level not to exceed the lesser of – (i) the Most Favoured Nation applied customs duty rate on originating good in effect on the day when bilateral safeguard measure is taken; or (ii) the Most Favoured Nation applied duty rate on the day immediately preceding date of entry into force of Trade Agreement; Bilateral safeguard measure shall not exceed a period of 3 years from date of its imposition, provided that in highly exceptional circumstances, Central Govt. may extend said period on recommendation of Director General

Comment: These rules have been notified to ensure strict compliances of the trade agreement .

FM amended AIR duty drawback w.e.f. Jan 15

FM has amended All Industry Rates of Duty Drawback w.e.f. January 15, 2017. Inter alia reduced drawback rates for Gold jewellery, Silver jewellery and articles, while caps / rates have been changed for man-made fibre floor coverings and baby garments. Also aligned tariff items and description of goods in AIR Drawback Schedule with the amended First Schedule to Customs Tariff Act (commensurate with HSN 2017 edition). Condition No. 3(ii) of AIR Notification No. 131/2016-Cus (NT) has been amended so that parts or components of agriculture equipment remain classifiable under respective tariff items only

Comment: This would be a disadvantageous to the Jewellery industry.

Exemption conditions for import of Telematic Infrastructural Equipments amended by FM

Finance Ministry amended conditions for availment of customs duty exemption on import of Telematic Infrastructural Equipment under STP Scheme. As per the amendment, the importer, viz. Infrastructure Service Provider ('ISP') must produce a certificate to Asst. / Dy. Commissioner of Customs from concerned Director of STP Society to the effect that imported goods are to be installed or used in premises of ISP, and that importer is authorised by Inter-Ministerial Standing Committee for 100% EOUs in the EHTPs and STPs. Further, Goods must be used only for purpose of export of software by STP units located in premises of ISP, who shall execute a bond before Asst. / Dy. Commissioner to inter alia pay on demand, an amount equal to duty leviable on goods where they are used for other purposes. Asst. / Dy. Commissioner may allow ISP to re-export imported goods subject to permission granted by STP Director and to clear specified goods on payment of duty on the depreciated value as per straight line method at rates specified on quarterly basis. Accordingly, Notification No. 153/1993-Cus was also amended.

Comment: These amendments are made to ensure the benefits are procured by the eligible person.

Bill of Entry reassessment cannot be appealed, unless order is passed by proper officer

HC ruled on appealability against reassessment of bill of entry, held that unless an order is passed in terms of Section 17(5) of Customs Act, such reassessment does not become an appealable order / decision u/s 128 thereof. Further, HC observed that Section 128 provides for appeal by any person aggrieved by an order passed under the Customs Act to Commissioner (Appeals) within a specified period from date of communication to him; Section 17(5) stipulates that reassessment order in writing shall be given by proper officer within a specified time. However, in present case, no order was passed but additional duty imposed against bill of entry was paid by assessee under protes. Accordingly, HC directed Revenue to pass reassessment order in terms of Section 17(5) and grants liberty to assessee to appeal against same thereafter

Comment: It is a common factor the appeal can only be made against an order passed by a Proper officer. The reassessment of bill of entry

Denial of AIR drawback to EOU against exports inapplicable

Delhi CESTAT in Fancy Images & Others vs. Commissioner of Customs, New Delhi case set aside Rs. 2.92 Cr demand and equivalent penalty against EOU-assessee towards recovery of All Industry Rate duty drawback sanctioned upon export of readymade garments, apparels and clothing. Rejected Revenue's stand that Notification No. 26/2003-Cus (NT) denies All Industry Rate of drawback against export of commodity / product manufactured by EOU in terms of relevant EXIM Policy / FTP.

CESTAT found no dispute regarding use of duty paid raw materials in manufacture of final products without availment of CENVAT credit thereon and as such, entitlement of assessee to drawback in terms of Drawback Rules r/w Section 75 of Customs Act. Further CESTAT noted that Karnataka HC in Karle International, had held an identically worded Notification No. 67/98-Cus (NT) to be inapplicable inasmuch as the same ran counter to Section 75 of Customs Act, observing that benefit given under the Statute could not be taken away by way of Notification. The said decision of Karnataka HC was upheld by SC while noting that another decision rendered by Madras HC was not challenged by Revenue, observes CESTAT and accordingly, allows appeal without adverting to issues of revenue neutrality and limitation .

Comment: Assessee is entitled to drawback as per Drawback Rules read with Section 75 of Customs Act.

FTP

Penalty for non-furnishing of 'BRC' upheld by HC

HC dismissed writ in case of Shri Arvind Wadialal Mohtasha & Anr. V. Addl. Director General of Foreign Trade & ors case . HC found no fault in imposition of penalty where assessee failed to produce bank certificate evidencing credit of sales proceeds in its account, to prove export obligation (EO) fulfillment under value based Advance License Scheme.

HC Rejected assessee's contention that a strict view for non-furnishing of bank realization certificate (BRC) was unwarranted since all requirements to obtain EO discharge certificate were complied, and necessary proof of goods leaving Indian shores and reaching port of destination in Vietnam were submitted.

Further HC Observed that fact of assessee being a supporting manufacturer and exporter was never brought on records in proceedings before authorities, and because of contradictory claim, authorities eventually insisted on production of certificate from banker to demonstrate credit of sale proceeds.

Furtehr, HC Remarked that absent furnishing of such supporting evidence, Court cannot allow altogether different factual scenario to be introduced and presented in writ jurisdiction, while refusing to invoke doctrine of 'substantial compliance'. Stated that, "…The order passed is based on non-compliance and that has been established and proved. It is not for the authorities to go on waiting for the petitioners to produce the relevant proof…"

Comment: HC found fault in assessee since the assessee failed to produce bank certificate evidencing credit of sales proceeds in its account, to prove export obligation (EO) fulfillment under value based Advance License Scheme.

SEZ

'Fly-Ash' won't constitute "waste" / "scrap" , non-excisability upheld by HC

HC in case of CBEC and Anr. vs. Mettur Thermal Power Station upled the single Judge Bench decision which ruled that 'fly ash' generated during generation of electricity by burning of pulverized coal does not involve any manufacturing activity and therefore, does not fall within purview of "excisable goods" u/s 2(d) of Central Excise Act.

Further HC referred to SC decisions in Laljee Godhoo & Co. and Moti Laminates (P) Ltd. which laid down satisfaction of twin tests for any goods to be excisable – 'manufacture' and 'marketability' and failure of even one test would render the product not liable to excise duty. HC also Remarked that since 'fly ash' is not manufactured and gets formed as a by-product, merely because it satisfies the test of marketability, it can be held liable to excise duty. However, observed that Single Judge Bench had erred in holding that 'fly ash' is a waste / scrap arising in course of manufacture of 'electricity' which is an exempted good, hence, no duty is leviable thereon by virtue of Notification No. 89/95-CE.

Further HC stated that general synonymous meaning that is attributable to the term "waste" / "scrap" as mentioned in Notification No. 89/95-CE, would effectively mean that any remains during the course of production / manufacture of a product would be worthless or not usable in any form and would be fit for destruction, however, 'fly ash' is marketable and used for production of asbestos, cement, and fly ash bricks, and so, cannot be termed as "waste / scrap".

Comment: As generated during generation of electricity, it cannot be said that there is a manufacturing process involved. However, since it satisfies the marketability test , it cannot be termed as waste generated in the course of manufacturing.

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