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Contents

Service Tax

- FinMin notifies Rule 11 and Rule 12 of Service Tax Rules
- Renting of duty-free shop at airport not taxable as 'airport service' pre-July 2010
- Revenue's power to call record for general audit under Rule 5(A)(2) of Service Tax Rules 'ultra vires' the Finance Act
- Services received by Indian branch offices of airlines from foreign Computer Reservation System (CRS) companies not taxable as "Online Database Access or Retrieval service"
- Fees paid by Website domain registration company to International Corporation for Assigned Names and Number not taxable under reverse charge mechanism as 'franchise service'
- Volume discounts received by ad-agency from media not taxable as 'BAS'

Central Excise

- CENVAT Credit available against Indian Railways certificate for goods transportation : CBEC Notification
- Restrictions to prevent CENVAT credit misuse under Rule 12AAA imposed on 'provider of taxable service' : CBEC Notification
- Interest rate on delayed pre-deposit refunds fixed @ 6% p.a. : CBEC Notification
- Cellular Mobile Service provider not liable to avail CENVAT credit on towers / prefabricated buildings / parts thereof
- Place of removal, not factory gate where excise duty specific on final product
- Government undertaking cannot be called as 'institutional consumer' for excise valuation purposes
- Excise duty exemption available to sub-contractors setting up Power Projects under International Competitive Bidding

Customs

- Time and Place of delivery important for 'import valuation' purposes
- 'Bill of entry' sufficient to for import value determination

VAT

- Equipment supplied on BOOT basis not 'sale', VAT not applicable
- State Govt's power to impose restrictions on Input tax credit in respect of specified goods / certain class of dealers constitutionally valid
- Portable handheld e-ticketing machines not 'IT products'; Taxable only @ 12%, not 4%

Service Tax

FinMin notifies Rule 11 and Rule 12 of Service Tax Rules

Ministry of Finance vide. Notification No. 19/2014-ST dated August 25, 2014 has notified Service Tax (Second Amendment Rules) which will come into effect from October 1, 2014. Finance Ministry has inserted 2 Rules i.e. Rule 11 and Rule 12 to Service Tax Rules, 1994 .

Rule 11 prescribes that exchange rate for 'taxable service' value determination to be governed by ' generally accepted accounting principles', on the date when point of taxation arises as per Point of Taxation Rules, 2011.

Further, Rule 12 authorizes CBEC / Chief Commissioners of Central Excise to issue instructions for any incidental / supplemental matters for implementation of Finance Act .

Comments: The Notification has brought much needed clarity w.r.t. applicable exchange rate on value of taxable service.

Renting of duty-free shop at airport not taxable as 'airport service' pre-July 2010

In the case of Airport Retail Pvt. Ltd. vs. U.O.I., Delhi HC held that rent payable to Delhi International Airport Pvt. Ltd. (DIAL) w.r.t. duty free shops in airport premises would not be taxable as 'airport service' u/s 65(105)(zzm) of Finance Act, 1994 (Act) for the period prior to July 2010.

HC observed that such service would be taxable as mere renting of immovable property and not as 'airport service'. Further, it was held that Specific description ('airport service') would prevail over general description (renting of property) as per Section 65A governing classification of services. HC observed, *"clause (zzm) amended and proviso inserted w.e.f. July 2010 stating that an activity classifiable as 'airport service' and recourse to Section 65A not available where any service rendered within airport".*

Moreover, HC pointed out that even if transaction between DIAL and the assessee is considered as a simple letting out of immovable property, the same would not fall within taxable service prior to July 2010;

Comments: The aforementioned decision would be of great relevance as renting of duty free shops cannot be classified as 'airport service' pre-July 2010.

Revenue's power to call record for general audit under Rule 5(A)(2) of Service Tax Rules 'ultra vires' the Finance Act

In the case of Travelite (India) vs. U.O.I. & Ors., Delhi HC held that Rule 5A(2) of Service Tax Rules requiring production of records to audit party on demand and CBEC Circular dated January 1, 2008 pertaining to general audit, is 'ultra vires' the Finance Act .

HC observed that that the only type of audit within the contemplation of the statute was that stipulated for in Sec 72A, i.e. a special audit when only certain circumstances are fulfilled. HC pointed out that Sec 72A prescribed the conditions meriting such special audit compelled the necessary inference that the Parliament did not intend to provide for a general audit that "every assessee" may be subjected to, "on demand" .

HC further observed that the "generality" of rule-making power conferred u/s 94

of the Act was thus only to the extent that rules made in exercise of that power were in conformity with the provisions of the statute. Therefore, HC observed that the rules may only give effect to the statute's provisions and intent and cannot be used to create substantive rights, obligations or liabilities that are not within the contemplation of the statute.

As regards CBEC Circular, HC observed that executive instructions without statutory force, could not possibly override the law; hence, any notice, circular, guideline etc. contrary to statutory laws could not be enforced.

Moreover, HC observed that Service Tax Audit Manual, was merely an instrument of instructions for service tax authorities and had no statutory force.

Comments: The said decision would provide respite to service providers as HC has struck down Revenue's power to ask for records in for general audit under Rule 5(A)(2).

Services received by Indian branch offices of airlines from foreign Computer Reservation System (CRS) companies not taxable as "Online Database Access or Retrieval service"

The Third Member Bench of Delhi Tribunal in Thai Airways International Public Company Ltd. & Anr., held that the services received by Indian branch offices from foreign-based Computer Reservation System (CRS) companies would not be taxable as "Online Database Access or Retrieval service" under reverse charge mechanism;

CESTAT observed that the services provided by CRS Companies are not meant for Indian branch & Head Office did not act as mere facilitator and there was no flow of consideration, direct or indirect from Indian branch to CRS Companies. It was held that the agreement b/w airline Indian branch offices & CRS companies did not provide anything from which it could be inferred that CRS Companies were required to provide location specific service to Thai Airways branches.

CESTAT placed reliance upon British Airways ruling , wherein it was held that service tax being destination and consumption based tax, cannot be created against non-consumer of services.

Comments: The said decision is of great importance for Airlines as Indian branch offices of airlines would not be liable to pay service tax on service received from CRS companies.

Fees paid by Website domain registration company to International Corporation for Assigned Names and Number not taxable under reverse charge mechanism as 'franchise service'

In Directi Internet Solutions Pvt. Ltd. vs. Commissioner of Service Tax, Mumbai CESTAT held that fees paid by website domain registration company to International Corporation for Assigned Names and Numbers (ICANN) & ICANN accredited registries would not be liable to service tax under reverse charge as "franchisee services". CESTAT observed that as per Sec 65(47) r/w Sec 65(48) and Sec 65(105)(zze) of Finance Act, 'franchisee' means an agreement by which franchisee granted representational rights to sell / manufacture goods or provide service or undertake any process identified with franchisor.

After pursuing ICANN Bye-laws and 'Registrar Accreditation Agreement', CESTAT pointed out that ICANN merely sets minimum standards for performance of registration function and accredits / recognizes assessee for meeting those standards. It was observed that 'accreditation' and 'representation' are two different things and absent representational rights from ICANN, no service tax would be payable under reverse charge.

As regards by amount received from resellers, CESTAT observed that agreement b/w assessee and resellers on principal to principal basis, use of ICANN name prohibited, hence resellers cannot be considered as franchisee or associate franchisor of ICANN.

Comments: The aforementioned decision is of great relevance to website domain registration companies.

Volume discounts received by ad-agency from media not taxable as 'BAS'

Mumbai CESTAT in Grey Worldwide (I) Ltd. vs. Commissioner of Service Tax, held that no service tax applicable on volume discounts received by advertising agency from media in absence of any contractual obligation to render service .

It was observed that the choice of the print / electronic media was with the advertiser and not with the advertising agency which merely coordinates between the media and the advertiser. Further, there was no contractual obligation between the assessee and the media for provision of any services. Therefore, these discounts were made only as a gratuitous gesture.

In view of this, CESTAT concluded that incentives received by the ad agency from media without any contractual obligation to render any service were not liable to service tax under BAS category. Therefore, demands in the instant case would not be sustainable.

Comments: The said decision would be of relief to ad-agencies as no service tax would be applicable on volume discounts received from media.

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Central Excise

CENVAT Credit available against Indian Railways certificate for goods transportation : CBEC Notification

Ministry of Finance vide. Notification No. 26/2014-CE dated August 27, 2014 has notified CENVAT Credit (Eighth Amendment) Rules, 2014 .

FinMin has allowed CENVAT credit against the 'Service Tax Certificate for Transportation of goods by Rail issued by Indian Railways. Accordingly, Rule 9 of CCR was amended.

Comments: CBEC notifies on credit availability in respect of goods transportation by rail.

Restrictions to prevent CENVAT credit misuse under Rule 12AAA imposed on 'provider of taxable service' : CBEC Notification

Ministry of Finance vide. Notification No. 25/2014-CE dated August 25, 2014 has amended rule 12AAA of CCR, pertaining imposing restrictions on CENVAT credit utilisation or suspension of registration to prevent misuse of provisions.

FinMin has included 'taxable service provider' against whom Chief Commissioner of Excise can impose restrictions, in addition to manufacturers, first stage & second stage dealers and exporters.

Comments: CBEC has expanded the scope of restrictions preventing CENVAT credit provisions by including "taxable service provider".

Interest rate on delayed pre-deposit refunds fixed @ 6% p.a. : CBEC Notification

CBEC vide. Notification No. 24/2014 - CE(NT) dated August 12, 2014 has notified interest rate (in terms of Sec 35FF of CE Act) @ 6% p.a. on pre-deposit refund pursuant to favourable Commissioner (Appeals) / CESTAT order.

Sec 35FF prescribes interest on delay in refund beyond 3 months from date of communicating appellate order to Adjudicating Authority, till date of actual refund.

Comments: CBEC has notified interest rate in case of default in making pre-deposit refunds.

Cellular Mobile Service provider not liable to avail CENVAT credit on towers / prefabricated buildings / parts thereof

In the case of Bharti Airtel Ltd., Bombay HC held that credit on towers / prefabricated building would not be available against output mobile service provided by Bharti Airtel.

HC held that Mobile towers / prefabricated building structure (PFB) are neither 'capital goods' under Rule 2(a) nor 'inputs' under Rule 2(k) of CENVAT Credit Rules, 2004 (CCR). It was observed that Towers and parts are fastened and fixed to earth and becomes immovable after erection, hence non-marketable / non-excisable and cannot be treated as 'goods'.

Further, HC rejected assessee's contention that Base Transreceiver Station (BTS) a single integrated system consisting of tower, antennas, PFB etc. classifiable under CH 85.25 of CETA and should be treated as 'capital goods'. It was held that only goods specified in Rule 2(a)(A)(i) and Rule 2(a)(A)(iii) of CCR used for providing output service can qualify as 'capital goods' for credit purposes. In view of this, Towers / PFB cannot be treated as 'capital goods' as not qualifiable as components / spares / accessories of goods falling under Chapters / headings of CET Schedule as specified under Rule 2(a).

As regards assessee's contention that towers to be treated as inputs, HC observed that assessee's reference to input definition as contained under clause (i) of Rule 2(k) irrelevant as same pertains to goods used in relation to final product manufacturing or any other purpose within factory of production.

Further, HC observed that Towers are structures fastened to earth on which antennas are installed, hence cannot be considered as antenna's accessory / part .

Comments: The said decision was the mosit awaited decision and it has ruled in Revenue's favour. This ruling is of great importance of various cellular mobile service providers across the country.

Place of removal, not factory gate where excise duty specific on final product

In the case of Ultra Tech Cement, Chhattisgarh HC held that place of removal in case where excise duty is specific would not be factory gate.

HC has reversed the Tribunal ruling which held that where "excise duty rate" on final product specific, 'place of removal' would be factory gate and CENVAT credit of Goods Transport Agency (GTA) services for outward transportation up to customer premises would not be available.

HC held that no provision in Central Excise Act or CENVAT Credit Rules or any CBEC Circular which states that in case of specific duty rate, 'place of removal' is manufacturer's factory gate. It was observed that by not expressly defining in statute, Legislature / Board have clarified their intention that in such a case, factory gate cannot be treated as 'place of removal' as a presumption of law;

In order to support, HC placed reliance on Division Bench ruling in Lafarge India Ltd, wherein it was held that 'place of removal' would be customers' premises if sale occurs at destination and GTA service credit up to destination would be available.

Comments: The ruling has reversed CESTAT stand that "place of removal" + "Factory Gate" where duty rate is specified (not advolrem).

Government undertaking cannot be called as 'institutional consumer' for excise valuation purposes

In case of PG Electroplast, Delhi CESTAT has held that Government undertaking cannot be consider as 'intuitional consumer' for excise valuation purposes.

CESTAT upheld the Valuation of valuation of Colour Television Sets (CTVs) cleared to TN State Govt undertaking for free distribution to poor on MRP basis u/s 4A of Central Excise Act, 1944.

In order to conclude above, Tribunal rejected Revenue's contention provisions of Sec 4A would be inapplicable since Govt undertaking an Institutional Consumer, and therefore excluded from requirement of affixing MRP under Rule 2A(b) of Standard Weights & Measures (Packaged Commodities) Rules, 1977 (Standard Weights Rules).

It was observed that the definition of Institutional Consumer consists of service industry like airlines, railways and other similar services and as such the activity of free distribution of CTVs among poorer section of the population of Tamil Nadu on behalf of the Govt. of Tamil Nadu, could not be called as service industry since it was not a commercial activity.

Comments: The ruling would be of great relevance to various TV manufacturers like assessee who supplied Colour TVs to TN State Govt. on MRP basis.

Excise duty exemption available to sub-contractors setting up Power Projects under International Competitive Bidding

Mumbai CESTAT in case of H.D. Fire Protect Pvt. Ltd., has allowed excise duty exemption to sub-contractors under Notification No. 6/2006-CE on supply of goods to contractors undertaking setting-up of Ultra Mega Power Projects under International Competitive Bidding (ICB) process.

CESTAT rejected Revenue's contention that exemption benefit would not be available since assessee a sub-contractor and not party to ICB process. It was observed that Notification No. 6/2006 nowhere stipulates that sub-contractors must participate in bidding process. CESTAT stated that mere mention of their name in awarded contract and certification from Chief Electrical Engineer and undertaking of Chief Executive Officer of project would be sufficient to avail benefit.

Comments: The decision is important as it extended excise duty exemption to subcontractors in setting up Power Projects under bidding.

Customs

Time and Place of delivery important for 'import valuation' purposes

In the case of V.K. Industrial Corp. Ltd., Mumbai CESTAT held that time of delivery and place of importation are necessary ingredients for 'import valuation' purposes under the Customs Act.

In this case, CESTAT accepted transaction value declared by assessee based on invoice value as per prevalent international market rates + demurrage charges, though goods imported earlier by another consignee was at higher rate.

Further, CESTAT noted that no prudent business man in the circumstances where goods are available at lower price, would buy goods and be ready to pay duty on higher value, therefore, it was observed that assessee would have no extra benefit/gain in importing goods on the declared value.

CESTAT observed, "….it is very much clear that the value is to be the transaction value which is paid or payable for import of goods in India when sold for delivery at the time and place of importation. Therefore, sale, time of delivery and place of importation are necessary ingredients to determine the value of the goods. All the three ingredients must be read in conjunction. There must be a sale for delivery at the time and place of importation and contemporaneous prices at the time cannot be ignored."

Comments: The said decision is of great relevance for the importers as it accepted the assessee's lower transaction value.

'Bill of entry' sufficient to for import value determination

Division Bench of Mumbai Tribunal in a recent ruling Swiber Offshore Construction Pvt. Ltd. vs. CC, held that value declared in Bill of Entry would be sufficient for determination of assessable value of imported vessel.

It was observed that invoice / insurance cover value would not be relevant for exemption entitlement under Notification No. 21/2002-Cus.

CESTAT thus concluded that documents, namely, invoice and insurance cover were not the evidences for determining assessable value of a vessel.

Comments: The said ruling is important as it allowed duty exemption on basis of value declared in the 'Bill of Entry'.

VAT

Equipment supplied on BOOT basis not 'sale', VAT not applicable

In the case of Tata Consultancy Services vs. State of Meghalaya, HC held that equipment used in providing network services to Meghalaya State Govt. departments and PSUs on "Build, Own, Operate & Transfer (BOOT)" basis would not amount sale, hence no VAT would be applicable.

HC observed that assessee was still not only in control and possession of equipment imported, but also was the owner of the same,. Therefore, there was neither any sale nor supply of material nor transfer of right to goods have taken place and hence could not be said to be 'tax on sale or purchase of goods' as defined in Art. 366 (29-A) of Indian Constitution.

In order to support the above observation, HC placed reliance on SC rulings in Rastriya Ispat Nigam Ltd, Imagic Creative (P) Ltd, BSNL and Builders Association of India .

Comments: It is important to note that supply of goods on BOOT basis would not amount to sale, hence no Vat applicable.

State Govt's power to impose restrictions on Input tax credit in respect of specified goods / certain class of dealers constitutionally valid

In the case of Kadwani Forge Ltd., Gujarat HC upheld the constitutional validity of Sec 11(6) of Gujarat VAT Act enabling State Govt to curtail input tax credit (ITC) in respect of specified goods / class of dealers, by way of Notification in Official Gazette;

HC further rejected assessee's contention that input tax credit once validly availed by dealers u/s 11 becomes a statutory right and cannot be wished away as being merely a concession at the whims of the executive.

It was observed that when the Act itself confers power on State Govt to curtail credit and especially when tax credit u/s 11(1)(a) is subjected to provisions of sub-sections (2) to (12), it cannot be said that Sec 11(6) is unconstitutional / violative of Art 14 of Indian Constitution. Further, HC upheld the constitutional validity of Notification dated June 29, 2010 (as amended on September 7, 2010) reducing tax credit to 2% in case of sale of goods outside the State.

HC noted that sale from State to outside destination is governed by Central Sales Tax Act and State Govt. has not touched the same, hence, Notification not violative of Art 286 (3), 301 & 303 of Constitution. HC stated that Notification issued in larger public interest to save revenue, in view of reduction in central sales tax by Central Govt and failure to compensate the State for losses thereof .

Comments: The ruling is important from State authorities point of view as HC has upheld their power to curtail ITC on interstate sale.

Portable handheld e-ticketing machines not 'IT products'; Taxable only @ 12% , not 4%

In the case of MicroFx vs. State of Karnataka, Karnataka HC held that that portable handheld e-ticketing machine would not amount to an 'IT product'. In view of this HC held that same would taxable @ 12% and not 4% (as prescribed for IT product).

HC stated that how the goods are understood in the commercial sense has to be taken into consideration for the purpose of classification of the goods and the scientific and technical meaning has no place. HC stated that in the present case, Karnataka State Road Transportation Corporation (KSRTC) had invited tender for supply of ticketing machines with technical specifications detailing the hardware and software components, which they called as portable handheld ticketing machine. Therefore, when the goods involved are portable handheld ticketing machines, and that is how the assessee has described them and that is how the customers have also understood, and in the Central Excise Tariff Act, ticket issuing machines have been expressly included in Entry 8470, HC stated that by no stretch of imagination, could it hold that the machines fell under 8471, especially when the entry specifically stated "not elsewhere specified or included.

Comments: The Court has clarified on classification on portable e-ticketing machines, stating that commercial meaning is relevant for classification and not technical meaning.

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