Indirect Tax News Update

VOLUME I, ISSUE V

NOVEMBER 2014

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Foreign Currency remission in India from overseas not a 'service' : CBEC Clarification

Ministry of Finance vide. Circular No. 180/6/2014-ST dated October 14, 2014 has clarified on service tax levy on foreign currency transfer in India from overseas.

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FinMin issued detailed clarification on service tax applicability on money remittances received in India from abroad through Money Transfer Service Operator (MTSO). It has been noted that no service tax would be payable on foreign currency remitted to India from overseas since it does not constitute any service u/s 65B (44) of Finance Act, 1944.

However, it clarified that any Indian Bank or other entity acting as MTSO agent w.r.t. money transfer would be liable to pay tax as "Intermediary service". FinMin stated that such agent facilitates money transfer by MTSO to beneficiaries in India and hence, falls under 'intermediary' category as per Rule 2(f) of Place of Provision of Service Rules, 2012.

Moreover, sub-agent of bank would also fall within the scope of 'intermediary' and would be liable to pay tax. Also, amount charged separately from Indian Bank / entity / agent / sub-agent would be subject to service tax; Lastly, Ministry elucidated that any currency conversion activity is an 'independent taxable' activity, therefore, subject to applicable service tax rate

Comments: The Circular has great relevance as it keeps money transfer from abroad outside the scope of service tax levy. However, it is important to note that agents / sub-agents for facilitation of such money transfer would be subject to service tax levy.

Promotion / Marketing of foreign principal by its Indian subsidiary amounts to 'export of service'

In the case of Microsoft Corporation (I)(P) Ltd. v. C.S.T., New Delhi, Third Member of Delhi Tribunal held that promotion / marketing of foreign principal by its Indian subsidiary amounts to 'export of service' and would not be subject to service tax in India.

CESTAT observed that the disputed service is the service provided by the assessee to his Principal located in Singapore and therefore, marketing operations done by the assessee in India cannot be said to be at the behest of any Indian customer. It was pointed out that the service being provided may or may not result in any sales of the product in Indian soil. Third Member placed reliance on its own ruling in Paul Merchants Ltd. vs. CCE Chandigarh .

Tribunal concluded that, the services being provided by the assessee to Singapore Recipient company to be used by them at Singapore, may be for the purpose of the sale of their product in India, however, same would qualify as 'export of services'.

Comments: The aforementioned decision would be of great relevance for all multinational companies having offices in India since no service tax would be payable on their promotion activities done through Indian subsidiaries.

Sub-contractor not liable to service tax when main contractor discharges tax on same transaction

In the case of CCE, Pune vs. Akruti projects , Mumbai Tribunal held that sub-contractor would not be liable to service tax when main contractor has already discharged tax on the same transaction.

CESTAT held that Notification No. 1/2006-ST was in confrontation with the charging Sec 66, and accordingly, would not be applicable to the facts and circumstances of the case so far as condition relating to not taking of CENVAT Credit was concerned of service tax paid by sub-contractor.

CESTAT relied heavily on SC ruling in L&T Ltd. which held that work executed by sub-contractor are not multiple transactions, and acceptance of Revenue argument would result in plurality of deemed sales contrary to Art. 366(29A)(b) of Constitution. Moreover, in view of the SC ruling, CESTAT held that the Third Member opinion in Sunil Hi-Tech Engineers Ltd was per incuriam and not binding. It observed that the decision was directly in the teeth of Apex Court ruling, being passed without taking notice of the same.

Comments: The said decision is important to uphold the SC view that work executed by sub-contractor are not multiple transactions and hence, sub-contractor is not liable to pay service tax once main contractor discharges the liability.

Pending enquiry / investigation sufficient to reject VCES amnesty

Uttarakhand HC in Uttarakhand Van Vikas Nigam vs. Union of India & Ors. , held that VCES amnesty to Public Sector Undertaking would not be available in view of pending inquiry / investigation on 'Goods Transport Agency' services availed .

HC observed that in addition to barring persons against whom notice / determination order been passed u/s 72, 73 or 73A of Finance Act, Scheme would be unavailable where inquiry / investigation pending is based on summons issued u/s 14 of Central Excise Act.

Further, HC rejected assessee's reference to the words 'in respect of service tax not levied or not paid or short-levied or short-paid' u/s 73 to contend that unless proceedings initiated under said provision, mere issuance of summons cannot deprive assessee from taking scheme benefit. With this regard, HC relied on CBEC clarifications issued post implementation of VCES and observed that since summons not of 'roving nature' & specifically dealt with transport services availed by assessee, de novo re-consideration of application would prove futile.

However, HC directed Revenue to consider penalty & interest issue in terms of Circular dated November 25, 2013, in view of the fact that assessee had deposited entire tax amount in anticipation of Scheme .

Comments : The aforesaid decision is important for all assessee who had opted for VCES in 2013, since VCES benefit had been denied to assessee due to pending investigation u/s 14 of Central Excise Act.

Central Excise

CBEC clarifies on "Place of Removal" under CENVAT Credit Rules

CBEC vide Circular No. 988 /12/ 2014-ST dated October 20, 2014, has issued detailed clarification on "Place of Removal" definition under CENVAT Credit Rules.

CBEC has clarified the principles to determine 'place of removal' for purpose of CENVAT credit availment under amended CENVAT Credit Rules (CCR). The said clarification has been issued to settle various interpretations adopted deviating from CBEC Circular No. 97/8/2007 and Order No. 59/1/2003.

CBEC stated that "Place of removal" has to be determined in terms of Central Excise Act, 1944 r/w Sale of Goods Act, 1930. It was noted that place where sale takes place or where transfer of property in goods takes place from seller to buyer would be the relevant consideration to determine place of removal and not insurance or freight;

Further, it has been clarified that wherever CENVAT credit is available upto place of removal, definition of 'place of removal' would apply irrespective of its nature of assessment.

Comments: This is one of the most important Circulars issued by CBEC since it clarifies on the concept of "Place of Removal". We hope that this Circular settles the haphazard interpretation of 'place of removal' definition.

Excise Audit has 'statutory backing' ; Delhii HC ruling in Travelite India not applicable to excise

CBEC vide Circular No. 986 /10/ 2014-ST dated October 9, 2014, has clarified that Central Excise Officers can conduct audit and Delhi HC ruling in Travelite is not applicable to excise.

CBEC clarified that Delhi HC judgement does not deal with issue of audit in Central Excise and there is adequate statutory backing for conducting audit by Excise officers. It was noted that Rule 22 of Central Excise Rules, 2002 empowers Commissioner to depute audit party for carrying out scrutiny / verification of assessee's records.

CBEC stated that statutory backing for said Rule flows from Sec 37(2)(x) & general rule making powers u/s 37(1) of Central Excise Act. Further, provided that Central Government empowered to make rules to check correctness of levy and collection of duty, which in present regime of self-assessment, means verification of correctness of self-assessment and payment of duty by the assessee.

CBEC noted that expression 'verification' used in Sec 37 is of wide import and includes within its scope, audit by Departmental officers, as procedure prescribed for audit is essentially a procedure for verification mandated in the statute. Therefore, Central Excise Officers can continue conduct of audit, as provided in statute .

Comments: This Circular is very important since it clarifies that service tax ruling in Travelite (India) will not be applicable to Central Excise. Delhi HC in Travelite (India) held that "requiring production of records to audit party on demand under Rule 5A (2) of Service Tax rules is ultra vires the Finance Act."

CESTAT Larger Bench grants stay beyond 365 days

Delhi CESTAT LB in Chhattisgarh Distelleries & Others vs. CCE Raipur & Others , rules on extension of stay beyond 365 days (180+185) u/s 35C(2A) of Central Excise Act.

LB observed that where appeal cannot be disposed of for reasons not attributable to assessee, and Tribunal is satisfied that assessee did not indulge in any protractive strategies, stay extension can be granted.

It was observed that in such cases Tribunal can pass speaking order disclosing satisfaction as to absence of any delay / protractive stratagems by assessee / non-disposal of appeal on account of pendency of several appeals / other appropriate reasons. Reliance was placed on Gujarat HC ruling in Small Industries Development Bank of India,

It was observed that Tribunal's power to extend stay cannot circumscribed. Moreover, CESTAT refused to adjudicate upon applicability of third proviso to Sec 35C(2A) to appeals / stay orders / applications where cause of action arose before its enactment w.e.f May 10, 2013 or Finance Act 2014 w.e.f. Aug- Such issue to be considered when application for stay extension presented and where such contention pressed into service, in appropriate cases before appropriate bench.

Comments : The aforesaid decision is important since it clarifies on CESTAT power to grant stay extension beyond 365 days. This definitely must have come as a relief for assessees.

Credit available on capital goods used for dutiable and exempted goods at different time

Delhi Tribunal in Brindavan Beverages Pvt. Ltd held that credit would be available on capital goods used for used for manufacture of exempt goods but subsequently used for manufacture of dutiable goods.

CESTAT observed that In terms of CENVAT Credit Rules, it is not required that capital goods must simultaneously be used for manufacture of exempted and dutiable final product. Reliance was placed upon Gujarat HC judgment in Gujarat Prepack.

However, CESTAT observed that intention to use goods for manufacturing both exempt and taxable products must clearly exist at time of receipt of capital goods.

Comment: The ruling is of great importance for all the manufacturers dealing in both exempt and dutiable goods.

No input service credit available for manufacturing "soft drinks concentrate" since final products is exempt

Ahmedabad CESTAT in Parle Agro Pvt. Ltd. held that no credit would be available in respect of advertising services availed for exempt final products, towards manufacture of soft drink concentrate (intermediate product).

CESTAT observed that simply including cost of advertisement in assessable value of Non-alcoholic beverage base (NABB) / soft drink concentrate would not make entire credit admissible, if end products for which services availed are fully exempt. CESTAT relied on Bangalore Tribunal ruling in ECOF Industries Ltd. and stated that procedural irregularities can be ignored while allowing CENVAT credit, but such credit should not pertain to inputs / input services used in manufacture of exempted goods.

Comment: The aforesaid decision is of great relevance and assessees must take note of this before availing the credit.

VAT

Dy. Commissioner cannot invoke revisionary powers under Kerala Sales Tax Act only to modify orders passed consequent to Appellate Authority's directions

Kerala HC in Indo Scottish Brand Pvt. Ltd. held that Deputy Commissioner can invoke revisionary powers u/s 35 of Kerala General Sales Tax Act (KGST Act) only to modify original assessment orders and not orders passed consequent to Appellate Authority's directions.

HC observed that assessment orders can suo-motu be proceeded against by Dy Commissioner to the extent they concern those issues which have not been carried in appeal.

CESTAT stated that permitting invocation of powers u/s 35 would tantamount to ignoring the modification order of Appellate Authority which has attained finality and has merged with original assessment order.

Comments: The aforementioned decision is of great relevance since HC has restricted Dy. Commissioner's power to modify orders only to the extent of orders passed by adjudicating authority and not appellate authority's order.

Assessee can set off excess payment of State sales tax against deficit in Central Sales Tax deposit of equivalent amount

Calcutta HC in Hindustan Unilever Limited held that assessee can set off excess payment of State sales tax against deficit in Central Sales Tax deposit of equivalent amount .

HC rejected Revenue's stand that albeit direct credit of both taxes into Consolidated Fund of the State, they fall under different Constitutional / legislative fields and therefore, such adjustment would not possible.

HC observed that separate levy and collection of both taxes does not matter and if they are credited to same fund, it would create a gross credit in the fund. It was pointed out that short payment of Central Sales Tax with corresponding increased payment of State sales tax does not reduce gross credit in the fund, hence if dealer wants adjustment / set-off, it must be readily granted without insisting on formalities.

Moreover, HC called Revenue's approach in disallowing adjustment as very technical and pedantic. Also, no penalty/ interst would be leveid in absence of monetary loss to Govt. However, HC clarified that such adjustment can be made only when taxes paid in excess / short paid credited into known account / fund can be easily adjusted and would not apply in case of inter-departmental adjustment / completely different types of taxes.

Comments : The aforesaid decision is important as HC has made it clear that assessee can set off state sales tax against Central Sales Tax deficit. This has come as a relief for assessees.

Customs

Cost reimbursement of Customs officers at Cargo Terminal not 'ultra vires' Constitution / Customs Act

Bombay HC in Mumbai International Airport Pvt Ltd, upheld the constitutional validity of Regulation 5(2) of Handling of Cargo in Customs Areas Regulations 2009.

HC observed that since custodianship was transferred from Airport Authority of India and Air India Ltd to assessee, it was obligated to bear charges of Customs staff posted at Cargo Terminal, on cost recovery basis, absent grant of specific exemption.

It was observed that none of the functions under Customs Act can be discharged / carried out, nor the power exercised in that behalf except by Customs officers, thus charges / expenses in relation thereto have to be paid and that is how Circulars, Guidelines and Regulations must be read and interpreted.

Comments: The decision is important as constitutional validity of Regulation 5(2) of Handling of Cargo in Customs Areas Regulations 2009 has been upheld.

Design / Engineering charges for erection / installation of equipment imported liable to customs duty

Bangalore Tribunal in Jai Balaji Industries held that Charges for design, engineering and technical supervision of equipment imported for erection, commissioning and installation of plant includible in assessable value, hence liable to customs duty.

CESTAT noted that such charges is a condition of sale of imported equipment as there was no indication that assessee was at liberty to get erection, commissioning and installation done by someone else. CESTAT rejected assessee's contention that design and engineering exclusively related to post importation activity of erection, commissioning and installation of plant.

It was observed that Turnkey contract was entered for design and engineering work related to equipment as well as erection, commissioning and installation of plant and no separate contracts were entered as such for both activities.

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