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Service Tax

Service Tax leviable at 5.6 % for air-conditioned/centrally air-heated restaurant : CBEC Circular

With regard to services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, having the facility of air-conditioning or central air-heating in any part of the establishment, the Government of India has issued a circular No. 184/3/2015-ST dated June 03, 2015.

It has been clarified that w.e.f. June 1st, effective rate on such establishments has increased from 4.9% to 5.6% of total amount charged.

Further CBEC has clarified that in Budget 2015, no change has been made in abatement granted under Rule 2C of Service Tax (Determination of Value) Rules, 2006. Also stated that exemption still continues to services provided by restaurants, eating joints or mess, other than those having facility of air-conditioning / central air-heating in any part of establishment at any time during the year.

Comments: The CBEC clarification comes as a huge respite to all, as it has been clarified that 5.6% and not 14% Service Tax is to be charged.

Technical testing & analysis in India qualifies as 'export of services' where reports sent abroad for approval: Bangalore Tribunal

Bangalore CESTAT in Nektar Therapeutics Pvt. Ltd. vs. Commissioner of Customs, Central Excise and Service Tax, Hyderabad-IV has held that R&D activities provided by assessee are not taxable service under the category of technical testing and analysis, when testing was conducted entirely in India and the reports of such testing and analysis were sent abroad for approval, and the same qualify as export of services.

CESTAT noted that in present case, even though quality tests were conducted in India, service got completed only after the report was accepted by the clients abroad.

CESTAT observed that, "….even though quality tests were conducted in India, only after the report is accepted by the clients abroad, service gets completed..." Further, CESTAT held that issue wascovered by B.A. Research India Ltd decision, where coordinate bench took a view that this amounts to part performance abroad and part performance in India, and hence, has to be considered as 'export'.

Comments: The judgment is important to companies who export services.

No tax leviable under "construction of complex service", where 12 or more independent residential units / row houses with common amenities are constructed : Delhi Tribunal

In a recent case, Lalit Mohan Garg vs C.C. C.Ex. & S.Tax , Indore, the Delhi CESTAT granted service tax refund u/s 11B of Central Excise Act by holding that no tax is leviable under "construction of complex service", where 12 or more independent residential units / row houses with common amenities are constructed.

The Tribunal relied on Gauhati HC ruling in Magus Constructions Pvt. Ltd. and coordinate bench decision in Macro Marvel Projects Ltd. to set aside lower authorities' orders.

Comments: The judgment comes as a relief to all residential constructors.

Asst. Commissioner falls within meaning of "adjudication", order by him appealable u/s 85 of Finance Act: Madras HC

Recently, the Madras HC, in Narasimha Mills Pvt. Ltd. vs Commissioner of Central Excise (Appeals) & Anr., allowed assessee's writ and held that Asst. Commissioner would fall within the meaning of "adjudication" which is meant by settled law that "giving or pronouncing a decision or order judicially."

HC further held that, VCES is not a self contained code, but to be construed as a part and parcel of the Chapter V of Act, in view of contents of Sec 105 of Finance Act, 2013.

Comments: This decision is important as it concedes that the order passed by AC was appealable u/s 85 of Finance Act.l

CENVAT credit on outward GTA service availed beyond the place of removal allowed subject to conditions

In a recent case, Commissioners of Central Excise, Customs and Service Tax, Surat - II vs. Panoli Intermediates (India) Pvt Ltd, Ahmedabad CESTAT dismissed Revenue's appeal, and allowed CENVAT credit on outward GTA service.

Tribunal observed that as per CBEC Circular dated October 20, 2014, which clarified that payment of transport charges, inclusion of transport charges in value etc. were not relevant, but place where sale had taken place or when property in goods passes from seller to buyer would be relevant considerations to ascertain place of removal.

Comments: This decision is of note to everyone and comes as a huge relief to companies and firms availing CENVAT on GTA

Entitlement of CENVAT credit refund on export of "management, maintenance or repair service", in relation to ERP software implementation is to be decided by Third Member.

The Mumbai Tribunal, in a recent case, Infosys Technologies Ltd vs. Commissioner of Central Excise, Pune I, held that entitlement of CENVAT credit refund on export of "management, maintenance or repair service", being services of (i) maintenance of software, (ii) testing, (iii) re-engineering and (iv) consultation & management, in relation to ERP software implementation is to be decided by Third Member.

Member (Judicial) granted refund holding that software is required to be treated as 'goods' for purpose of levy of tax, as per law declared by Apex Court in TCS vs. State of Andhra Pradesh.

On the other hand, Member (Technical) remanded matter to Commissioner (Appeals) to re-examine nature of services rendered, since they involve development and designing of software as well, categorically falling within exclusion clause of Sec 65(105)(g)

According to Member (Technical), "*Merely because the maintenance or repair leads to some modified software does not necessarily imply that there is no 'maintenance or repair' of the software. Thus, it appears that the software in question could be categorized under the Maintenance or Repair service*"

Comments: This decision will be of note to companies availing CENVAT Credit on services w.r.t. ERP Software.

Only services rendered post April 1, 2012 relevant for calculating export turnover of services : Mumbai Tribunal

In a recent case, Commissioner of Central Excise, Pune vs. Computer Land UK Ltd, Mumbai Tribunal rejected Revenue's appeal and upheld Commissioner (Appeals) order excluding value of export services completed prior to March 31, 2012 for purpose of calculating 'export turnover' towards CENVAT Credit refund for quarter April – June 2012.

According to Commissioner (Appeals), under Rule 5 of CENVAT Credit Rules, receipt of payment immaterial and only actual export of service by way of provision & issuance of invoice relevant criteria w.e.f. April 1, 2012.

CESTAT found no infirmity or illegality in said order of Commissioner (Appeals), which set aside adjudication order. Further, it also held that Adjudicating Authority's objection to the filing of refund claim beyond limitation period was unsustainable since assessee had filed the claim on receipt of foreign exchange involved in export of services. The refund was filed within 1 year from receipt of FIRC, which view was settled by coordinate bench judgment in Bechtel India P. Ltd.

CESTAT held that absent DTA supply of services by assessee, 'export turnover' = 'total turnover', in terms of clause (E) of Rule 5(1) of CCR.

Comments : The decision is of importance as it clarifies exclusion of value of export services for calculation of export turnover.

Activity by 'stock photography agency' towards downloading of images a service

In a recent case, Photolibrary India P. Ltd. vs. Commissioner of Service Tax, Mumbai, Mumbai Tribunal upheld service tax demand on charges collected by 'stock photography agency' towards downloading of images by clients for limited use & period, u/s 65(75) r/w Sec 65(105)(zh) of Finance Act.

The Tribunal observed that,"*…the information or data contained in website may be having a copyright, but when this information is only available on the website for accessing and subsequent downloading, the copyright on the said images becomes incidental and the main activity so far as the appellant's client is concerned is making information available for retrieval."*

CESTAT distinguished the GE India Technology Centre P. Ltd ruling since the issue therein was of undertaking scientific research and technology analysis for the parent concern in USA and subsequent export of the same. CESTAT also held that Dewsoft Overseas P. Ltd. ruling was not applicable to the facts and circumstances of present case since the issue was classification of online computer teaching through interactive website. In that case, coordinate bench resolved the dispute by observing that access to computer was for the purpose of education and hence, would correctly be classified as 'commercial training and coaching classes' service; that activity of providing online license to student was not access or retrieval of data.

Comments: This decision is of note to the stock photography agencies.

Central Excise

Pre-deposit under amended Sec 35F of Central Excise Act mandatory before filing appeal: Mumbai Tribunal

Recently, Mumbai Tribunal in Maneesh Export (EOU) & others vs. Commissioner of Central Excise, Belapur, dismissed assessee's appeal on maintainability, and observed that pre-deposit under amended Sec 35F of Central Excise Act mandatory before filing appeal.

CESTAT thus held, the amendment clearly indicates that amount of 7.5% or 10% as the case may be, is required to be deposited before filing of appeal.

Further, referring to the TRU letter issued at the time of introduction of Finance Bill and CBEC Circular No. 984/08/2014-CX dated September 16, 2014, CESTAT observed that the intention of legislature was to make the deposit mandatory for filing appeal.

CESTAT also relied on SC observation in Hossein Kasam Dada (India) Ltd. Also, concurring with Revenue, CESTAT noted that as per second proviso to Sec 35F, the stay applications and appeals filed after commencement of Finance Act 2014 would be governed by new provisions irrespective of the date when the order-in-original / order-in-appeal or the show cause notice was issued or the period of dispute.

Comments : The decision brings clarity that pre-deposit is a mandate, and only after it is made, can an appeal be filed.

Credit of service tax on common input services used for providing output service as well as for trading activity, in proportion of trading turnover - not allowed: Mumbai Tribunal

Recently, in Synise Technologies Ltd. vs. Commissioner of Central Excise, Pune, Mumbai CESTAT disallowed credit of service tax on common input services used for providing output service as well as for trading activity, in proportion of trading turnover.

Also, CESTAT held that trading was altogether outside the purview of Service Tax law, CENVAT Credit of services is permissible on input services in accordance with Rule 3 of the CENVAT Credit Rules.

CESTAT observed that input service is defined under Rule 2 (l) as a service used for providing output service and the inclusive part of the definition of input service under Rule 2 (l) only includes services used in the business of providing output service. CESTAT also stated that as trading is not an output service, credit cannot be allowed on the input services used for trading.

CESTAT relied on the Mercedes judgment to reiterate that trading was not a service and therefore, cannot be considered as an exempted service during the period prior to April, 2011 and the amended provision with effect from 1.4.2011 will not have retrospective effect.

Comments: This judgment is of note for providers of output service as well as trading service.

Re-credit of CENVAT credit reversed allowed, absent any dispute regarding assessee's entitlement : Mumbai Tribunal

In Shree Rubber Plast Co. Pvt Ltd. vs. Commissioner of Central Excise Thane II, Mumbai CESTAT set aside Commissioner (Appeals) order and allowed re-credit of CENVAT credit reversed, absent any dispute regarding assessee's entitlement thereof.

CESTAT observed that re-credit was not against any amount of duty payment and was admittedly a re-credit of an amount of CENVAT Credit debited at the instructions of the Revenue authorities. CESTAT observed that, the amount of debit made earlier was legally admissible as CENVAT credit to assessee. It was stated that, only because of the reversal at the instance of Revenue, on which Revenue has not raised any dispute on admissibility thereof, re-credit cannot be faulted with.

CESTAT placed reliance of the judgment of the Madras HC in ICMC Corporation Ltd., who had observed that suo-moto re-credit of amount reversed by the assessee cannot be objected and there is no need to file any refund claim under Section 11B. Taking note of the aforesaid ruling, CESTAT observed that it was clear that if suo motu re-credit of the amount is reversed by assessee, there is no need to file any refund claim under Section 11B. Accordingly, CESTAT held that the Madras HC judgment was squarely applicable and re-credit of the amount already reversed by assessee cannot be objected to.

Comments : The decision is of note to every assessee.

Differential duty demand beyond limitation period w.r.t. goods removed for captive consumption to another factory of assessee, absent mala fide intention attributable unsustainable : SC

Recently, the SC, in Nirlon Ltd vs Commissioner of Central Excise, Mumbai, sets aside differential duty demand beyond limitation period w.r.t. goods removed for captive consumption to another factory of assessee, absent mala fide intention attributable thereto.

With regard to different nature of goods, SC held that, lower authorities were right in holding that that the nature of goods was different as assessee had admitted some types of variations in both types of goods in its reply to Show Cause Notice.

However, SC held that, there could not have been any malafide intention on the part of assessee in filling declaration under Rule 6 (b)(i) in order to evade duty.

Thus, SC held that, the extended period of limitation under proviso to Section 11(A)(1) of the Act was not invokable as entire exercise was revenue neutral.

Comments: SC's take on limitation period is of note to all assessees.

Demand equal to 10% of sale value of exempted final product under Rule 6(3)(b) of CENVAT Credit Rules unsustainable : Delhi Tribunal

Recently, in IPCA Laboratories Ltd. vs. C.C.E Indore, Delhi CESTAT held that demand equal to 10% of sale value of exempted final product under Rule 6(3)(b) of CENVAT Credit Rules is unsustainable, when assessee reversed proportionate credit on common inputs attributable thereto.

Placing reliance on Gujarat HC's judgment in Sh. Rama Multitech, CESTAT observed that, HC held that, even if separate account was not maintained, a manufacturer using common inputs in or in relation to manufacture of dutiable as well as exempted final product was entitled to reverse proportionate CENVAT credit, in view of retrospective amendment by Finance Act, 2010.I

n view of the settled position by the HC, CESTAT held that the option of paying an amount equal to 10% of the sale value of the exempted goods cannot be forced upon assessee and assessee was entitled to reverse the Credit attributable to the inputs/ input services used in or in relation to the manufacture of the exempted final product.

Comments: This decision is important as it clarifies position w.r.t. demand of amount under Rule 6(3)(b).

Absent 'sale', CENVAT credit of furnace oil not reversible on wheeling out of electricity generated in captive power plant, to State Electricity Board power grid for synchronisation: Delhi Tribunal

Recently, the Delhi CESTAT (Chandigarh Circuit Bench), in Jindal Stainless Ltd. vs. Commissioner, Central Excise & Service Tax, Rohtak, held that absent 'sale', CENVAT credit of furnace oil not reversible on wheeling out of electricity generated in captive power plant, to State Electricity Board power grid for synchronization.

CESTAT held, it was settled law that there was no requirement of one to one co-relation between input and final product under the MODVAT/CENVAT Credit scheme and as per Rule 2(k) of CCR, 'input' meant all goods used in the factory by the manufacturer of the final product. CESTAT stated that as per Rule 4 (5)(a), CENVAT Credit was to be allowed even if any input or capital as such or after being partially processed were sent to a job worker for further processing, testing etc.

Also, CESTAT held that the input, viz., fuel used in the electricity sent to power grid for synchronization and received back and used in the manufacture of the final product, was within the purview of Rule 4(5)(a).

Comments: This decision is important w.r.t. job works.

VAT

Seismic survey carried for Oil Company to investigate earth's subterranean structure constitutes a 'service', not 'works contract' : Tripura HC

Recently, in Asian Oilfield Services & Others vs. The State of Tripura & Others, Tripura HC allowed allows writ, Seismic survey carried for Oil Company to investigate earth's subterranean structure constitutes a 'service', not 'works contract'.

HC further noted that while granting certificate of sales tax registration to the assessee, Superintendent of Taxes had described nature of business as works contract. Consequently, deductions were made by Jubilant from the amount payable to assessee in terms of the VAT Act. However, seeking clarity from Authority if the work of Geophysical Survey would qualify as works contract, assessee demanded refund of tax wrongly deducted, but the same was rejected.

HC held that such rejection had inherent fallacies since seismic survey work did not fall within the ambit of Sec 4(3). Assessee remained in exclusive possession and control of the equipment and all resources supplied by the contractor. Therefore, HC concluded that assessee was only rendering services amenable to tax by Union of India and not by State.

Comments: This ruling is of note to seismic surveyors.

Preservation and tinning of fresh fruits & green vegetables does not amount to manufacture : SC

Recently, in Commissioner of Trade Tax, UP vs. S.R. Cannery, SC upheld Revenue's appeal as devoid of merit, and upheld Allahabad HC order that preservation and tinning of fresh fruits & green vegetables not 'manufacture' and 'sale' thereof non-taxable under UP Trade Tax Act, in terms of Notification No. 7038 dated January 31, 1985.

SC further held that HC was right to reject Revenue's contention that, process of preservation of fresh fruits and green vegetables packed in tinned containers brought out a new commercial commodity, amounting to 'manufacture' u/s 2(e-1) of the Act .

Comments: This Notification is of importance to seismic surveyors.

DPE bags/packing material not integrated, but distinct and separate sales : AP & Telangana HC

Recently, AP & Telangana HC in Andhra Cements Company Limited vs. The Commissioner of Commercial Taxes, Hyderabad, held that sale of cement and HDPE bags/packing material not integrated, but distinct and separate sales liable to be taxed at rates applicable as per relevant entries under First Schedule to Andhra Pradesh General Sales Tax Act.

HC held that since period of dispute prior to 1995, a reading of unamended Sec 6-C (dealing with levy of tax on packing material) would reveal that it was permissible to have an agreement for separate sale of packing material and goods packed / filled.

Comments: The decision is of note to the Cement industry.

Customs

Courier Imports and Exports (Clearance) Regulations 1998 amended: Finance Ministry Notification

Finance Ministry via Notification No. 62/2015-Cus (NT) dated June 17, 2015 amended Courier Imports and Exports (Clearance) Regulations 1998, extending the applicability to goods sought to be exported through e-commerce platform under 'Merchandise Exports from India Scheme' (MEIS) from Chennai, Delhi and Mumbai airports, in consignments upto Rs 25,000/- involving transaction in foreign exchange.

The amendment also stated that for such exports, Authorised courier shall make entry in the form prescribed in Shipping Bill and Bill of Export (Form) Regulations, 1991.

Further, amendment has been made to Form Courier Shipping Bill - II (CSB-II) and Form Courier Bill of Export - II (CBEx-II) to allow export of bonafide commercial samples and prototypes of goods of value not exceeding Rs 50,000/- per consignment, instead of earlier limit of Rs 25,000/- in financial year.

Comments: The Notification is of note to e-commerce players.

License fee not includible in assessable value of imported capital goods : SC

SC in Commissioner of Customs (Import), Mumbai vs. Hindalco Industries Ltd, ruled in favour of assessee, by holding that licence fee and fees paid for basic engineering, training and technical services not includible in assessable value of imported capital goods, under Rule 9 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.

Further, SC observed that assessee purchased various capital components from many other parties and the goods for which the agreement was signed with OEC constituted only 16% of total value. In light of this, SC held that the matter was squarely covered by the recent judgment of SC in Commissioner of Customs, Ahmedabad vs. Essar Steel Ltd

SC observed that it was clear that CESTAT had gone into various provisions of three agreements to conclude that, neither the fees paid under the Licence Agreement nor under the Basic Engineering, Training and Technical Services Agreement related to the import of the capital goods nor was it a condition of sale.

Comments : The decision is of note to companies entering into License Agreements with MNCs.

Application filed for extension of warehousing period, after expiry of stipulated period of 1 year, entertainable

In the case, Vardhman Life Sciences Pvt. Ltd. v. Commissioner of Customs (Import), Chennai, CESTAT allowed assessee's appeal and held that assessee's application for extension of goods in bonded warehouse is entertainable, even though such application is made after expiry of one year prescribed for storage of goods, under Customs Act, 1962 (Act).

CESTAT observed that, the capital goods still under bond were of high value and those have become duty-free in terms of EPCG licence issued to assessee. CESTAT thus stated that, before exercise of power u/s 61, goods were duty free. I

n this context, CESTAT observed that, *"Law is well settled that the dutiability of the goods shall be decided on the date of clearance. When there was no duty leviable even on the date of passing order under proviso to section 61 of the Act, it was not desirable for the Commissioner to deny clearance of the goods .....levying interest thereon after four months of the application filed for extension".*

Comments : The judgment is of note as public confidence is instilled as authorities are not allowed to keep the goods in bonded warehouse years together without order for clearance on judicious consideration of investment made and value of time.

Differential customs duty demand on import of RBD Palmolein consequent to increase in tariff value, unsustainable : SC

In Union of India & Ors. vs Param Industries Ltd & Ors., SC concurred with Karnataka HC and held that differential customs duty demand on import of RBD Palmolein consequent to increase in tariff value is unsustainable.

SC noted HC's observation that for bringing the Notification into force and make it effective, two conditions are mandatory, viz., (1) Notification should be duly published in the official gazette, (2) it should be offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi. In the present case, the second condition had not been satisfied inasmuch as impugned Notification was offered for sale only on August 6, 2001. SC concurred with HC's view, which was in conformity with the law laid down by SC in Harla vs. The State of Rajasthan [1952 (1) SCR 110]. In that case, SC by referring to an English judicial pronouncement in Johnson vs Sargant, observed, "….There must therefore be promulgation and publication in their cases. The mode of publication can vary; what is a good method in our country may not necessarily be the best in another. But reasonable publication of some sort there must be."

Comments : The judgment is of note to importers and exporters of various goods.

FTP

DGFT amends provisions in relation to deemed exports, AA & EPCG Schemes of Handbook of Procedures of FTP 2015-2020 : Public Notice

Vide Public Notice No. 16/2015-20 dated June 4, 2015, DGFT has amended several provisions of the Handbook of Procedures of FTP 2015-2020, , including those relating to Advance Authorisation & EPCG Schemes, as also Deemed Exports w.e.f. April 1, 2015.

Amendment has been made to Para 4.38 relating to 'Clubbing of Advance Authorisations', thereby (i) disallowing clubbing in respect of authorisations issued on or before March 31, 2009, (ii) allowing clubbing of only such authorisations which have been issued within 36 months from date of issue of earliest authorisation, in case of issuance before June 5, 2012, and (iii) in case of issuance after June 5, 2012, authorisations issued within 18 months.

Further, Para 4.42 which relates to 'Export Obligation Period and its extension', has been amended, thereby restricting period of extension to 12 months (6 + 6) subject to payment of composition fee, from date of expiry of EO period of advance authorization.

Para 7.02(c) (Criteria for claiming deemed export benefits), DGFT has been amended too, states that since supply of goods to EPCG authorisation holder is not exempted from TED payment, claim for TED refund may be made to concerned RA, as per invalidation letter.

Further, 3 working days time limit has been set for disposal of applications towards acceptance of BG / LUT & Schemes of Chapter 3.

Comments: The said Public Notice is of note to all status holders.

Supply of service by DTA units to SEZ ineligible for rewards : Public Circular

DGFT, vide Policy Circular No. 01/2015-16 dated June 11, 2015, has clarified that supply of service by DTA units to SEZ ineligible for rewards under 'Service Exports from India Scheme' (SEIS).

The Circular also stated that reading of Para 3.08(a) with Para 9.51(i) of FTP 2015-2020 makes it abundantly clear that 'supply' of service to any other country only is eligible for SEIS benefits.

The Policy Circular further clarified that since SEZ is 'Indian Territory', supply of service to SEZ unit(s) was and shall continue to remain ineligible for SIES rewards.

Lastly, DGFT vide the Circular has also helped settle unrest by clarifying that amendment notified vide Notification No. 08/2015-2020 dated June 4, 2015 through which export turnover relating to services of SEZ units was deleted from list of ineligible categories under SEIS, shall have no effect on such DTA supplies to SEZ.

Comments: The said Public Circular is of note to SEZ and suppliers.

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