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Service Tax

Repairing / rebuilding of motor vehicle parts not taxable as maintenance or repair service u/s 65(64) of Finance Act

SC in the case of CCE, CC & CST vs. Kuttukaran Trading Ventures, had dismissed the Special Leave Petition (SLP) filed by Revenue challenging the taxability of repairing / rebuilding of parts of motor vehicles under "maintenance or repair services" u/s 65(64) of Finance Act.

SC upheld the view of Kerala HC that definition of 'management, maintenance or repair' service excludes servicing of 'motor vehicles' and hence, no tax would be payable by assessee. Kerala HC had rejected Tribunal findings that exclusion would be available only if motor vehicle is brought to service centre and then dismounted for repair and not when motor vehicle dismounted at different place and engine / part thereof brought in knocked down condition to service centre for repairs.

Further, SC affirmed HC's view that motor vehicle includes all its parts as without such individual parts, it does not become 'motor vehicle'. HC had also observed that Statute clearly intends to exclude motor vehicle including its parts, and if such an interpretation is not given, very purpose of such exclusion would be rendered ineffective

Comments: The apex court has finally upheld the non-taxability of repairing of motor vehicle parts. This has definitely come as relief for the Industry.

BCCI liable to pay service tax for recording matches : SC

Recently, in the case of BCCI vs. CST, SC dismissed assesee's appeal against CESTAT order confirming huge demand under reverse charge basis towards audio-visual coverage of Indian Premier League (IPL) matches for and on behalf of BCCI by non-resident service providers, pre-March 2010.

In 2014, Tribunal, relying upon SC decision in Doypack Systems Pvt. Ltd. and Bombay HC ruling in ONGC, held that words 'in relation to' in Sec 65(105)(zzu) of Finance Act (programme producer services), are of wide amplitude and cover within their scope any activity in connection with main activity. Accordingly, Tribunal rejected assessee's argument that agreement with one of the suppliers for supply of software for recording events/matches would not fall within purview of 'programme production'.

Moreover, Tribunal also rejected assessee's argument that since definition of 'programme' refers to audio or visual matter, recording done for both audio and visual would fall outside said definition. As per the Principles of Statutory Interpretation, in order to give effect to manifest intention of legislature, expression "audio or visual matter" can be read as "audio and visual matter". Lastly, Tribunal rejected assessee's reasoning that production of programme cannot be said to be on 'its behalf' since no third party involved and held that transaction would be complete only when programme produced for assessee or on its behalf.

Comments: The aforementioned decision of SC as come as big shock to the Board of Cricket Control as the service tax demand of Rs 18 crore approx. has been confirmed.

Foreign currency conversion by Union Bank taxable as "Baking / Financial Service"

Recently, in the case of Palm Fibre India Private Limited vs CCE , Kerala HC held that conversion of entire foreign currency remittance from overseas, into Indian Rupees by Union Bank of India would be taxable as Banking or Financial Service.

HC rejected assessee's stand that tax would be applicable only on private 'money changers' under "Banking and Financial Services" category in terms of Sec 65(12) of Finance Act and that definition of 'service' u/s 65B(44) excludes transaction in money / actionable claim. In view of above, HC observed, *"Sub-clauses (i), (ii) and (iii) of Sec 67 are not in derogation of or exclusion to each other; but are mutually complementary, depending upon the manner in which consideration for provision of service is accepted by the service provider, from the recipient. In terms of money or in any other form and when it is not ascertainable; to be determined in terms of money"*.

Moreover, HC noted that Circular No. 163/14/2012-ST pertains to "remittance of foreign currency in India from overseas" and not "conversion of foreign currency into Indian Rupees", It was observed that remittance cannot be confused with conversion since both are distinct events, latter being the taxable event.

Comments: This decision of Kerala HC is important as it creates a distinction b/w 'foreign currency remittance' and 'foreign currency conversion', later being held as taxable.

Maintenance charges collected by Cooperative Housing Societies from members not taxable

In the case of Tahnee Heights Co-operative Housing Society Ltd & Others vs. CST, Mumbai CESTAT held that no service tax payable by Cooperative Housing Societies as "club or association" on maintenance charges collected from members towards repairs, beautification and security, u/s 65(25a) r/w Sec 65(105)(zzze) of Finance Act.

Tribunal has rejected revenue contention's that exclusion clause of Sec 65(25a) refers only to bodies which are established or constituted under a Statute and not bodies which are formed and registered under a Statute. Reliance was placed upon Gujarat HC ruling in Sports Club of Gujarat which held that so far Sec 65(25a), Sec 65(105)(zzze) and Sec 66 purport to levy service tax i.r.o. services purportedly provided by club to its members, are ultra vires.
Similarly, Jharkhand HC in Ranchi Club held that in view of mutuality, if club provides any service to its members in any form, then it's not a service by one to another as foundational facts of existence of two legal entities in such transaction is missing.

Comments: The said HC decision is of great relevance as it upholds the non-taxability of maintenance charges collected by members of Cooperative Society.

Central Excise

Guidelines of issuance on 'summons', emphasizes summons should be used as last resort : CBEC Instruction

Ministry of Finance vide. CBEC Instruction dated Jan 20, 2015, has issued guidelines on issuance of summons in Central Excise and Service Tax matters. It has been stated that summons need not always be issued when a simple letter can also serve the purpose of securing documents relevant to investigation. Therefore, it has been emphasised that use of summons should be made only as a last resort.

After being brought to notice, CBEC has issued the following guidelines: i) Superintendents should issue summons after obtaining prior written permission from an officer not below Assistant Commissioner with the reasons for issuance of summons to be recorded in writing. Further, where it is not possible to obtain such prior written permission, oral / telephonic permission from such officer must be obtained and same should be reduced to writing and intimated to the officer. ii) Also, officer issuing summons should submit a report / record a brief of the proceedings in the case file and submit the same to the officer who had authorised the issue of summons.
iii) Moreover, summons should not be issued at first instance to senior management officials such as CEO CFO / General Managers of a large company / a PSU. Such senior officials should be summoned only on the basis of their involvement in decision making process which led to loss of revenue.

CBEC has instructed to strictly follow the above guidelines.

Comments : The CBEC Instruction has come on a good note to emphasize that 'summons' should not be issued in first instance, but should be used as last resort.

Mandatory pre-deposit provisions applicable to Duty Drawback matters only at first stage of appeal : CBEC Circular

CBEC vide. Circular No. 993/17/2014-CX, has issued clarification on mandatory pre-deposit provisions introduced vide Finance Act (No. 2) 2014.

CBEC has reiterated that amended provisions regarding filing of appeal along with stipulated percentage of pre-deposit shall apply to all appeals filed on or after August 6, 2014. Also, clarified that mandatory pre-deposit would be payable while filing appeal to Commissioner (Appeals) in case of demand of duty drawback, in terms of amended Sec 129E of Customs Act.

However, as ambit of said Section in legislation not extendable to appeals u/s 129DD before Joint Secretary (Revision Application), pre-deposit in case of drawback, rebate and baggage applicable at first stage appeal only.

Comments: The clarification is important as it has be clearly stated that mandatory pre-deposit provisions in drawback matters would be applicable only at first stage of appeal.

Sec 11AB prospective; Interest inapplicable to clearances prior to September 1996

In the case of Commissioner of Central Excise, Mumbai-I vs Dev Ashish, Bombay HC observed that Sec 11AB is prospective and therefore, interest would not be applicable to clearances prior to September 1996 .

HC accepted assessee's plea that it was too late for Revenue to urge that refund application was not maintainable. HC observed that the application sought refund of sum erroneously recovered as interest and for the period prior to September 1996. Since the demand was for the period February 1995 to December 1999, no interest could have been levied on the unpaid duty amount. In these circumstances, application for refund could not have been rejected only on the ground that it was not maintainable, held HC. It observed, *"The Revenue's pleas before us are in the nature of afterthought."*

Further, HC concurred with Tribunal's reliance on the language of Sec 11AB and the coordinate bench decision in Markandy Prasad. Moreover, Revenue had accepted the fact that the provision and as interpreted in M/s. M.P. Tapes vs. Commissioner of Central Excise [CEGAT Order No. 1375 of 1997 dated April 22, 1997] lays down the correct law.

Therefore, HC held that the provisions of Sec 11AB inserted w.e.f. September 28, 1996 are in the nature of penal interest and would apply only to those cases where clearances were effected after said date, irrespective of passing of adjudicating order.

Comments: The aforesaid decision has come as a relief as HA has upheld that interest provisions enunciated under Sec 11AB are prospective in nature and would not be applicable to period prior to Sep 1996.

Brand owner's nature of activities irrelevant to determine eligibility to claim SSI Exemption

In the case of Yash Krishni Food Services Ltd. vs. CCE Mumbai, Mumbai Tribunal has held that activities of brand owner would be irrelevant to determine the eligibility of SSI exemption benefit.

In instant case, Tribunal has disallowed SSI exemption benefit under Notification No. 8/2003-CE w.r.t. goods manufactured using brand name 'Ribbons & Balloons' belonging to another company. Tribunal has rejected assessee's contention that brand / trademark owner neither 'manufacturer' nor 'trader' nor 'seller' of goods, hence, brand name cannot be said to be belonging to Bharat Café.

In view of this, Tribunal observed that It is an undisputed fact that said company had applied for brand name registration with Trade Mark authorities and same was assigned to assesseee. Therefore, assessee would not be eligible for SSI exemption benefit as it had violated one of the conditions mentioned in the said Notification (i.e. use of brand name of another person).

Comments: It is important to note that benefit of SSI exemption would not be available w.r.t. goods using brand name of another company, even though brand owner company is not involved in trading / selling of manufactured goods.

VAT

Commissioner not empowered to defer 'assessment' proceedings under Andhra Pradesh VAT

AP HC in KMK Event Management Ltd vs. Commissioner of Commercial Taxes, held that Commissioner is not empowered to defer the assessment proceedings u/s 21(7) of Andhra Pradesh VAT Act (APVAT) which only provides for consequences of deferment of assessment proceedings.

HC applied the rule of construction 'noscitur a sociis' and stated that Deferment of assessment in Section 21(7), refers to power of Commissioner to defer revision proceedings u/s 32 (5) and power of Tribunal to defer hearing of appeal before it u/s 33(4), where proceedings pending before Tribunal, HC or SC, respectively. It was observed that term 'assessment', has a wide connotation and does not always mean determination of taxable turnover of a dealer under a taxing statute, levy of taxes is generally a legislative function, assessment a quasi-judicial function and collection an executive function.

HC observed, *"Extending the power of the Commissioner, under Section 32(5) of the VAT Act, to also defer assessment proceedings under Section 21, or the appellate proceedings under Section 31, of the VAT Act would require this Court to ignore the words under this section in Section 32(5) of the VAT Act. It would be wholly inappropriate for this Court, while interpreting a statutory provision, to delete or ignore some of the words used therein'."*

Comments : The aforesaid HC ruling is important as it has been defined the powers of Commissioner under AP VAT Act.

Physical notice to be served upon assessee where huge tax liability involved

Jharkhand HC in the case of Hindustan Construction Company Ltd vs. State of Jharkhand & Others, held that physical notice must be issued to the assessee where huge tax liabilities are involved.

HC observed that *"…..when the State is imposing such a hugeliability of tax of approximately Rs. 90 Lakhs, more care should have been taken by the State to serve the notice upon the petitioner or upon the assessee….."* . It was noted that over and above the orthodox methods of service of notice that should be followed, notice upon assessee ought to have been served by sending any employee of the State instead of passing ex-parte order. HC held that ex-parte orders are always have inbuilt difficulties because correct facts along with correct documents are not available with Assessing Officer

Moreover, HC observed, "…….*whenever order of remand and order of reassessment is passed by this Court, in a writ petition, provisions of Sub--section 2 of Section 42 of the Act, 2005 is applicable and whenever there is violation of fundamental right, we see no reason to relegate the petitioner to file an appeal or revision….."*

Comments: The aforesaid decision is crucial to note the violation of principles of natural justice. HC has insisted on service of physical notice to assessees where huge tax liabilities are involved.

Company's liquidator a 'dealer', sales tax applicable on sale of goods via auction

In the case of Assistant Commissioner, Ernakulam vs. Hindustan Urban Infrastructure Ltd and Ors., SC held that company's official liquidator is a 'dealer' and sales tax would be applicable in respect of sales effected by him pursuant to winding up proceedings of a company in liquidation.

SC observed that definition of "dealer" under various sales tax legislations given a broad and inclusive interpretation, in consonance with what legislature intended with regard to imposing sales tax liability on all transactions of sale of goods. Therefore as a necessary sequitur, the company in liquidation, whose assets are sold by way of auction, would be a "dealer" u/s 2(viii) of Kerala General Sales Tax Act and such transaction taxable u/s 5(1).

Moreover, SC discussed the roles of an Official Liquidator who (i) derives its authority from the provisions of Companies Act, 1956, (ii) acts on behalf of the company in liquidation for the purpose prescribed by the Act, (iii) is appointed by and is under the control and supervision of Court while discharging his duties. Thus, Official Liquidator steps into the shoes of company in liquidation and by inviting tenders, it is evident that he intends to conduct transfer of company assets in liquidation, taxable u/s 2(viii)(f) of Kerala General Sales Tax Act.

In order to conclude above, SC has relies inter alia on English Courts' views, including that in Re Mesco Properties case, that during winding up proceedings, if tax requires to be collected from company in liquidation, the liquidator would be the proper officer to pay the same.

Hence, liability to pay sales tax will be borne by Official Liquidator as a manager / receiver of property of company in liquidation. SC observed, *"The offer of the auction purchaser, as accepted by the Official Liquidator and confirmed by the High Court, was inclusive of all taxes. It would have been the bounden duty of the Official Liquidator to have separated an amount for the payment of taxes under the Act, 1963 to avoid any liability."*

Comments: This is a landmark ruling pronounced by SC. SC has given a detailed observation to conclude that "Company's Official Liquidator" acts as dealer w.r.t. goods sold during liquidation.

Customs

CBEC simplifies Customs procedures at ports for shipping, reduces physical documents submissions : CBEC Circular

Central Govt. vide. Circular No. 02/2015-Cus dated Jan 15, 2015, has simplified customs procedures at ports for shipping.

Following steps have been take in this regard:

i) The number of hard copes of Import General Maifest (IGM) required to be submitted by shipping lines / steamer agents at a Customs House has now been restricted to 2.

Ii) The steamer agent has now been permitted to give a continuity bond and to merge the guarantee with the continuity bond. It is to be noted that the port clearance, given on the strength of a bond, requires submission of numerous documents like the Lighthouse Dues Certificate, NOC for Immigration, Port Health Certificate etc., along with a guarantee were required to be submitted every time a vessel entered.

iii) In situations requiring the hard copy, such as when an amendment has to be made, Customs at ICD have been directed to not insist on more than 1 hard copy of SMTP.

iv) Lastly, a separate permission is no longer required from the jurisdictional Customs in case of change of mode of transshipment under the Goods Imported (Conditions of Transshipment) Regulations, 1995, although the jurisdictional Commissioner of Customs is to be intimated.

Comments: The Circular has definitely come as a 'good-news' for importers.

CBEC warns Customs Dept. to scrupulously follow RBI guidelines on Indian currency import / export : CBEC Circular

Central Govt. vide. Circular No. 02/2015-Cus dated Jan 15, 2015, has warned Customs Department to implement RBI guidelines on Indian currency import / export.

The RBI vide A.P. (DIR series) No. 146, dated June 19, 2014 had enhanced the limit to Rs 25000/- per person from Rs 10,000/- per person. Thus, any person resident in India: i) can take outside India (other than to Nepal and Bhutan) currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25,000; and ii) who had gone out of India on a temporary visit, may bring into India at the time of his return from any place outside India (other than from Nepal and Bhutan), currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25,000

It has been provided that any person resident outside India, not being a citizen of Pakistan and Bangladesh and also not a traveller coming from and going to Pakistan and Bangladesh, and visiting India: i) can take outside India currency of amount not exceeding Rs. 25,000 while exiting only through an airport ; ii) can bring into India currency of amount not exceeding Rs. 25,000.

In view of the above guidelines, CBEC has requested all Chief Commissioners of Customs / Customs and Central Excise to ensure that the said guidelines are scrupulously followed by the officers under their charge. Further, wants Commissioners to ensure wide publicity to these guidelines by displaying them at prominent places at the airports etc. so as to avoid harassment for genuine passengers. Lastly, it has been stated that in case of any non compliance on the part of the officers, serous action would be taken.

Comments : This Circular was necessary to remind the Customs Authorities.

Allows retroactive extension of anti-dumping enquiry

In the case of Hyundai Motors India Pvt. Ltd. , Madras HC has allowed retroactive extension of time limit for completion of anti-dumping enquiry, though notification issued by Central Govt. was after expiry of the statutorily prescribed period (notification dated April 30, 2014 having retroactive application from March 9, 2014).

HC has rejected assessee's contention that any order extending the period should also be passed before the expiry of the period. In line of this, HC has accepted Additional Solicitor General's argument that period of limitation indicated for mere procedural purposes, cannot take away the substantial right of the Central Govt.. Further, HC notes that the Parent Act (Customs Tariff Act) doesn't prescribe any time limit for enquiry completion though the Rules, which are a subordinate legislation, do stipulate the same. Therefore, time limit of one year prescribed under Rule 17(1) id not intended to confer any benefit upon importer or exporter, hence "*no right which is vested in the importer is taken away by theextension of the period for conclusion of investigation.. "*

HC ruled that *"If an order of extension does not either take away any vested right or extinguish any right sought to be created by efflux of time, such an extension cannot be assailed, on the sole ground that it was not granted, during the life of the thing itself"* . It has been observed that time limits prescribed by subordinate legislations must be generally taken as directory, not mandatory. Also, observed that the action of the Designated Authority in granting less than 24 hours notice to the parties to appear for a personal hearing sre not violative of natural justice principles.

HC further observed that investigation by Designated Authority under the Rules not akin to criminal charge/quasi judicial proceedings where individual stake involved; Rule 6 does not contemplate oral/personal hearing where 'two adversaries' pitted against each other, observes that Rule stipulates more of an investigation than enquiry, hence " normal rules that cumulatively constitute the principles of natural justice, do not apply to an investigation under these Rules".

Comment: The aforementioned decisions is very crucial as it allows retrospective extension of anti-dumping enquiry.

Valuation of goods sold to dealers / consumers at price higher than MRP declared / affixed at the time of import— Third Member to decide

In the case of Nitco Tiles Ltd vs. CC (Import), matter w.r.t. valuation of tiles sold at higher price than MRP declared during import, has been referred to the third member.

Third Member of CESTAT to determine applicability of Sec 4A of Central Excise Act to tiles sold to dealers / consumers at price higher than MRP declared / affixed at the time of import.

Member (Judicial) held that reference to "retail sale valuation" in Sec 3(2) of Customs Tariff Act is limited to like articles manufactured in India, hence provisions of Sec 4A(4) (contemplating confiscation and re-determination of MRP) and Explanation 1 & 2 thereto are irrelevant and inapplicable to Sec 3(2). Further, provisions of Sec 4A(4) for redetermination of MRP not applicable to imports prior to May 2003, as Sec 3(2) merely provided for confiscation of offending imported excisable goods at relevant time.

Member (Judicial) has applied Bangalore Tribunal ratio in ABB Ltd. and stated that Central Excise (Determination of Retails Sale Price of Excisable Goods) Rules which came into force from 2008 for RSP ascertainment not relevant / applicable to Customs Tariff Act / Customs law. Therefore, Higher MRP can be determined only when more than 1 MRP is fixed on same package and not other situation, hence, differential duty cannot be demanded on the basis of price at which goods have subsequently been sold since assessee paid CVD on MRP declared at time of import.

On the other hand, Member (Technical) confirmed the duty demand relying on Planet Sports Pvt Ltd and Media Industries Ltd rulings and stated that retail price which assessee is required to declare on packages is the 'maximum' price at which goods may be sold to ultimate consumer and which is termed as 'MRP'. It was observed that once there exists a de facto situation whereby goods are sold at prices higher than MRP declared during customs clearance, such higher prices will under law, become true retail selling price on which CVD is to be paid.

Member (Technical) stated that accepting assessee's claim would nullify the whole scheme of MRP based levy, which was introduced to counter the problem of undervaluation as well as administrative problem of having large number of prices at which goods are sold. Also, stated that absence of Rules / machinery provisions cannot make law inoperative as the Standards of Weight and Measures Act & Customs Tariff Act clearly define MRP on which CVD is required to be paid. Hence, Revenue has precisely demanded duty on correct MRP .

Comments: The aforementioned ruling is very important as issue pertaining to valuation of goods sold at higher price than declared has been referred to the Third Member. The issue is important for both Department and assessee. Let us all wait what Third Member has to say on this!

Foreign Trade Policy

Indian subsidiaries of foreign companies eligible for duty credit scrips

In the case of Yum Restaurants (I) Pvt Ltd & Others vs. Union of India & Others, Delhi HC has held that Indian subsidiaries of foreign companies would be eligible for duty credit scrips under Served from India scheme (SFIS).

HC has interpreted both Foreign Trade Policy 2004-09 and 2009-14 and set aside Policy Interpretation Committee (PIC) / DGFT decision dated December 27, 2011 denying benefit to non-Indian companies with an aim to promote 'Indian' brand. HC observed that expression "Indian Service Providers" would plainly include all Indian entities including individual nationals, hence, DGFT has misinterpreted the expression "Served from India brand" to be brands of Indian companies, which are recognised asIndian. It was noted that "Served from India brand" used in context of accelerating growth of services does not refer / allude to any trade name / trade mark of any individual service provider.

HC observed, *"….DGFT / PIC has introduced a completely new concept in the eligibility criteria as specified under the FTP 2009-14, that is, to limit the incentives only to companies with trade names which, reflect their association with India".* The objective of granting incentive to Indian Service Providers is to establish 'India' as a brand, a recognised destination for outsourcing of services.

HC also stated that there is no scope to read into the words "Indian Service Providers" the condition that for service providers to be Indian, its shareholders must also be Indian, observes, "*The conclusion of DGFT that Indian companies having foreign equity cannot be considered as Indian, militates against well established canons of company law".*

Comments: This is a very important ruling as it has interpreted the scheme "Serve from India" and allowed the duty scrip benefit to Indian subsidiaries of foreign companies.

Duty Credit Scrip under FTP can be transferred to 'group company'

In GMR Hotels and Resorts Ltd , Andhra Pradesh HC held has allowed transfer of Duty Credit Scrip under 'Served From India Scheme' of Foreign Trade Policy (FTP) to holding / group company.

HC has quashes DGFT decision that assessee not entitled to transfer the scrip absent 26% or more shares / voting rights in transferee company. It was observed that definition of 'Group Company' under Para 9.28 of FTP does not envisage that transferor company alone should hold 26% or more voting rights / has power to appoint more than 50% of Board of Directors in other company, nor Para 3.12.7 restricts transfer of scrip from a group company to another company based on holding capacity.

Therefore, HC concluded that incentive scheme for export of services under Chapter 3 must receive liberal construction, DGFT cannot introduce something which is not envisaged and impose additional restriction and DGFT is only empowered to interpret existing clauses and cannot seek to amend / alter FTP provisions, decision disallowing transfer in excess of vested powers and jurisdiction .

Comments: The said decision has great relevance in terms as HC has approved the transfer of duty scrip benefit to group company.

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