Indirect Tax News Update

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Service Tax

CBEC issues clarification on applicability of service tax on Online Information / Data Access or Retrieval services under reverse charge

Circular F. No. 202/12/016-ST Date : November 9, 2016

CBES clarifies that only cross-border B2C services provided in the taxable territory have been brought under the tax net w.e.f December 1, 2016 , however other cross border B2C services continue to be exempted. States that basis to determine whether a person is taking part in the provision of cross-border online database service through a telecommunications network, will depend on an electronic interface or a web portal, the facts and the nature of the contractual relations. Also Clarifies that in view of deletion of Rule 9(b) of Place of Provision of Service Rules, 2012 (PoPS Rules), default Rule 3 thereof will be applicable in such cases from December 1 onwards, whereby the place of provision of a service would be the location of service recipient . Further states that in the context of cross-border B2C OIDAR services provided to individual consumers, either the underlying supplier of services or the intermediary / digital platform operator, depending on who is seen to be providing the electronic services, would be required to collect service tax from consumers and remit the same to the Govt. However, such intermediary would neither be considered as service recipient nor as service provider where – (i) the invoice / customer's bill / receipt clearly identifies the service, its provider in non-taxable territory and service tax registration number of service provider in taxable territory, (ii) such intermediary neither collects / processes payment in any manner nor is responsible for payment between the non-assesse online recipient and service provider, (iii) intermediary involved in the provision does not authorise delivery, (iv) the general terms and conditions of the provision are not set by the intermediary involved in the provision but by service provider .

Comments: This is a positive step for revenue towards ensure that every taxable service is brought under its net . CBEC issued clarification to ensure that no issues are brought up in front of the courts for interpretation.

Portion on service tax liability reimbursed by agents of insurance service provider is not recoverable under section 73A of Finance Act

CESTAT in case of Standard life Insurance Co. Ltd. Vs. Commissioner of central Excise , Mumbai-II holds that portion of service tax liability reimbursed by insurance service provider is not recoverable agents under an agreement, is not recoverable u/s 73A of Finance Act . CESTAT noted that assessee was receiving 'insurance auxiliary services' from its agents in pursuit of its objective of rendering output 'life insurance service' and was discharging tax liability as provider of service as well as on 'reverse charge basis' on the value of input services. CESTAT also noted that assessee while paying commission to its agents, was withholding 60.3% of the tax so paid on 'reverse charge' basis and, thus, in effect recovering a portion of the tax liability from the agents . According to CESTAT, the tax system does not compel the person liable to pay tax to pass on the incidence of tax .

tax. Also, the burden of incidence is not compelled on the person liable to pay tax. CESTAT further went on to observe that the principles governing indirect taxation cannot substitute the interpretation of taxing provisions nor can they govern them, and tax can only be collected and recovered in accordance with the law. CESTAT observed that under service tax law, the person liable to pay the tax is required to deposit the amount irrespective of the quantum or stage of recovery from the person who bears the burden thereof. CESTAT thus stated that there is a distinct dichotomy in both Central Excise Act and Finance Act, of the obligation to credit the tax with Central Govt. and the recovery of the amount from other person. Further, CESTAT referred to Circular No. 870/8/2008-CX which clarified that Section 11D of Central Excise Act is not liable to be invoked even if the mandated payment for availing CENVAT credit on inputs used in exempt goods is recovered from the buyers of output goods. CESTAT thus concluded that this ratio applies to service tax levy and that recovery of amount already paid would tantamount to double deposit, which is enunciated by CESTAT in case of Sangam India Ltd vs. Commissioner of Central Excise, Jaipur [2008 (28) STR 627 (Tri-Del)] .

CESTAT also relied on Rashtriya Ispat Nigam Ltd. vs. Dewn Chand Ram Saran [2012-TIOL-37-SC-ST] wherein it was held that there was nothing in law to prevent the assessee from entering into an agreement with the contractor that the burden of any tax arising out of obligations of the contractor under the contract would be borne by the contractor. CESTAT thus held that the contractual obligation to reimburse the tax paid by the person designated to do so by law is not tax collected in any manner, that would warrant recourse to Section 73A. CESTAT further observed that since assessee had paid tax on the commission paid to agents on reverse charge basis, it was entitled to take credit of tax paid under CENVAT Credit Rules. CESTAT stated that in an agreement with the service provider, contribution, partial or entire to the liability of tax is not forbidden by law, and the assessee cannot be said to have contravened Section 73A of Finance Act so far as it has not deprived the service provider of any amount in excess of the tax deposited.

Comments: CESTAT has established that the assessee has paid service tax according to reverse mechanism which is any how available as CENVAT credit , thus service tax is not recoverable under section 73 of Finance Act.

Reverse-charge taxation inapplicable on financial assistance from Asian Development Bank /International Financial Corporation

CESTAT in case Coastal Gujarat Power Ltd vs. Commissioner of Service Tax, Mumbai-I set aside reverse charge demand u/s 65(105)(zm) r/w Section 65(12) of Finance Act i.e. 'banking & other financial services', with regard to commitment charges, up-front fee, arrangement fee, agency fee and out-of-pocket expenses paid to overseas lenders viz. International Financial Corporation (IFC) and Asian Development Bank (ADB) under the ECB Scheme. After Perusing the scheme of Section 66A of Finance Act r/w Taxation of Services (Provided from Outside India and Received in India) Rules 2006, CESTAT observed that unlike Section 65(105) which assigns equal importance to provider, recipient and activity, the recipient has been accorded overarching significance in said Rules reflecting the imperative for Section 66A viz. jurisdictional non-existence of service provider .

However CESTAT noted that assessee's claim in present case that service providers (i.e. ADB & IFC) are immune to taxation owing to statutes enacted by sovereign legislative organ in pursuance of international agreements entered into by Govt. of India, are intended to prevail over taxing provisions of any statute, even in absence of exemption thereunder. Also Rejected Revenue's stand that immunity granted by Section 5 of Asian Development Bank Act and Section 3 of International Finance Corporation (Status, Immunities and Privileges) Act is not applicable to every transaction in view of proviso attached thereto, which excludes excise duty/sales tax and service tax respectively from privilege of exemption. Further CESTAT Observed that ,on-obstante clause prefacing in exemption provisions in said two Acts articulates intent to allow these provisions to prevail over any other law including tax laws, further, preamble to both Acts makes it clear that immunity from tax is sufficiently broad to encompass all taxes and in that context, restrictions in proviso have to be interpreted literally and not liberally in Revenue's favour. CESTAT observed that accepting Adjudicating Authority's proposition that exemption would have been available in case service providers (i.e. ADB/IFC) had an establishment/ office in India, would create a new dimension to tax, viz. geographical location of provider, which is not envisaged in Finance Act; Moreover, CESTAT stated that "It cannot be lost sight of that it is the service that is taxable and, owing to its intangibility, the consummation of service is deemed to be complete when a receiver and provider exist".

Held that, ADB and IFC do have existence in India, even if not corporeally, by legislative acknowledgement and services rendered by them are not de hors provider so as to require recourse to Section 66A, states that "It is section 66 that is to be invoked". Observed that "With the provider being not only immune from taxation but also absolved of any obligation to collect and deposit any tax, there is no scope for subjecting the recipient to tax in the absence of inclusion in the definition of 'person liable to tax' in rule 2 of Service Tax Rules, 1994".

Comments: CESTAT established that geographical Location of provider is envisaged in Finance Act.

Arrangement with contracting-party a 'joint-venture'; Royalty towards port-exploitation rights not 'service' consideration

Recently, in the case Mormugao Port Trust & Anr. vs. Commissioner of Customs, Central Excise & Service Tax, Goa & Anr., CESTAT quashed service tax demand against Port Trust in respect of leasing of land & water front to South West Port Ltd (SWPL) towards construction of jetty for purpose of loading and unloading of cargo from ocean going vessels. After pursuing the Perusing the agreement between both parties, CESTAT noted that besides leasing, assessee also granted permission to SWPL to conduct port operations and received license fees / royalty towards the same. Further, CESTAT stated that arrangement between assessee & SWPL, being a public-private partnership, is in nature of joint venture whereby strategic, financial and operating decisions are to be unanimously agreed upon by both co-venturers.

As to the ensuing question whether activity undertaken by a co-venturer could be said to be a service rendered to the Joint Venture, CESTAT answered the same in the negative, observing that whatever the partner does for the furtherance of business of the partnership, he does so only for advancing his own interest as he has a stake in the venture's success. It observed, "There is neither an intention to render a service to the other partners nor is there any consideration fixed as a quid pro quo for any particular service of a partner…A contractor-contractee or the principal-client relationship which is an essential element of any taxable service is absent in the relationship amongst the partners/co-venturers or between the co-venturers and joint venture."

CESTAT further stated that in order to render a transaction liable to service tax, the nexus between the consideration agreed and the activity to be undertaken should be direct and clear. Unless it could be established that a specific amount had been agreed upon as a quid pro quo for undertaking any particular activity by a partner, it could not be assumed that there was a consideration agreed upon for any specific activity so as to constitute a service. Referring to the ruling in Cricket Club of India vs. Commissioner of Service Tax [2015 (40) STR 973 = TS-611-CESTAT-2015-ST], CESTAT observed, "….activities undertaken by a partner/co-venturer for the mutual benefit of the partnership/ joint venture cannot be regarded as a service rendered by one person to another for consideration and therefore cannot be taxed." Citing an example where a partner chooses to grant partnership firm a right to use his office premises and regards this as his contribution to the hotch -potch of the firm, CESTAT stated, "The profits which the partner will earn in such circumstances is a reward due to an entrepreneur for the risk that he takes and cannot be regarded as a consideration for the renting of the office to the firm."

Further, referring to Explanation 3 in the definition of "service" in Section 65B(44) under the Negative List regime, CESTAT opined that this explanation, which treats unincorporated association or body of persons and members thereof as distinct persons, does not have the effect of rendering activities undertaken by partner / co-venturer (that are actually for his own benefit) as being a service rendered by it to the partnership (join venture). It remarked "The mere fact that the partnership (joint venture) may also benefit from the same is irrelevant as there is no contract of service agreed upon or performed by the partner (co-venturer) to the partnership (joint-venture)."

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Comments: CESTAT observed that since it could not be established that since there was no intention to render a service to the other partners or is there any consideration fixed for any particular service a joint venture it cannot be said as a service rendered for consideration.

Central Excise

VAT on 'pan masala containing tobacco' applicable, Constitutional 'revenue distribution' scheme, irrelevant

CESTAT in case of Godfrey Phillips India Pvt. Ltd. vs Commissioner of Central Excise, Mumbai - I ruled the appeal in favor of Revenue, stated that manufacturer of goods or output service provider who does not maintain separate accounts for common inputs & input services used in manufacture of dutiable and exempted goods / services, must choose "any one" of the options provided in Rule 6(3) of CENVAT Credit Rules 2004 (CCR). Further CESTAT Held that if assessee opts to pay 5% of value as per Rule 6(3)(i) in respect of cigarettes sold to Indian Navy that are exempt, then it cannot avail the option of reversing proportionate credit as per Rule 6(3)(ii) for traded goods. Further CESTAT stated that benefit of full credit under Rule 6(5) cannot be extended in respect of trading services and same needs to be reversed in proportion to the trading turnover and total turnover. After Analyzing Rule 6(3A), CESTAT observed that after April 2011, formula seeks to apportion total credit taken by manufacturer / service provider, whereas assessee has adopted only credit of common services used in trading at depot for which method is not prescribed in the Statute. Further held that 'value addition' has no relevance in apportioning the service tax credit of common services used between dutiable manufactured goods and traded goods, and accepts Revenue's use of sales value as "fair formula" .

Comments: Rule 6(3) broadly gives the assessee 2 options for reversing Cenvat credit of service tax paid on input services. First option is to pay 6% of the value of exempted goods or exempted services. Second option is to pay an amount determined as per the formula prescribed under Rule 6(3A) .

CENVAT credit not reversible on inputs / capital goods transferred to 100% EOU carved out in same factory premises in assessee's name

Recently in case of Behr India Ltd. vs. The Commissioner of Central Excise, Pune – II, CESTAT held that CENVAT credit will not be reversible on inputs / capital goods transferred to 100% EOU that are carved out in same factory premises in assessee's name . CESTAT noted that, inputs and capital goods were within the factory premises of the assessee even after carving out of the EOU by them. Further, the provisions of Rule 3(4) of CCR were applicable only when the MODVAT/ CENVAT credit availed on inputs or capital goods were removed from the factory premises. CESTAT observed that, the lower authorities erred in holding that, on transfer of capital goods to own EOU would attract duty liability.

CESTAT also stated that, the lower authorities erred in holding that since there were two different legal entities and registrations, it would constitute as removal of capital goods and input .CESTAT observed that, EOU was also named as Behr India Ltd (100% EOU) and

Balance-Sheet of the assessee was one and the same, though the legal status of EOU was bit different from the DTA unit, it would not lead to conclusion that both were separate units. In this regard, CESTAT also referred to Sandvik Asia Ltd., wherein it was held that :

"Excise duty is fastened on goods and not on the status of the manufacturer; payment of duty and availment of credit of duty so paid is in relation to goods. As long as the goods on which CENVAT credit has been taken are used in production, revenue is not jeopardized".

Comments: Transfer of capital goods to own EUO would not attract duty liability.

Dismantling of defective fans and reassembly with new and workable parts does not amount to 'manufacture' u/s 2(f) of Central Excise Act

Madras high court in case of The Commissioner Central Excise, Meerut vs. Metro Appliances Ltd. & Ors held that holds that dismantling of defective fans and reassembly with new and workable parts does not amount to 'manufacture' u/s 2(f) of Central Excise Act .

As regards the question whether dismantled parts can be identified as 'fan', HC observed that when an item is dismantled and converted into separate parts and kept in heap, the dismantled parts independently cannot be identified as 'fan'. Further, w.r.t. re-assembly of dismantled parts of fan, HC stated that, when defective fans which had been dismantled, are reassembled, after removal of defective parts, repaired and replaced as new one by reusing remaining workable parts, it is a case of mere repairs and service. This cannot be said to be 'manufacture' u/s 2(f) of the Act. Accordingly, HC held, "… service or repair by replacement of new parts while using other parts for reassembling, will not amount to 'manufacture'..." .

Comments: HC affirmed the definition of manufacture u/s 2(f) interpreted by the courts and the judicial precedents set .

HC denies exemption under Notification No. 30/2004-CE to importer on account of non-compliance with condition of non-availment of CENVAT credit on inputs

Madras in case of The Commissioner of Customs (Exports), Chennai vs. Prashray Overseas Pvt. Ltd., Varanasi & Anr. Denied exemption under Notification No. 30/2004-CE to importer on account of non-compliance with condition of non-availment of CENVAT credit on inputs. Further , HC classified the Notifications that have come up before Apex Court in various judicial precedents into 4 types as under :

(i) In cases where exemption Notifications are absolute and they do not make the benefit available only upon the fulfillment of any condition, even the importer would be entitled to the benefit of exemption.

(ii) In cases where exemption Notifications stipulate only one condition that the inputs used in the manufacture of exempted goods should have suffered a duty, then the benefit of Notification will not be available to any of the importers, since he could have never paid any excise duty on the inputs used in the manufacture by foreign manufacturer.

(iii) In cases where exemption Notification stipulates only one condition namely that no CENVAT credit ought to have been availed on the inputs, the benefit of Notification will be available only to those, who satisfy two conditions i.e. that the inputs used by them suffered a duty and that they did not seek CENVAT credit.

iv) In cases where the exemption Notification stipulates two conditions i.e. the inputs should have suffered duty and that no CENVAT credit should have been availed, then the benefit of the Notification will be available only if both conditions are satisfied.

Accordingly, HC stated that interpretation of present Notification depends primarily on two important facts -

(i) inputs used in exempted goods suffered excise duty, and

(ii) whether manufacturer claimed CENVAT credit or not.

HC Noted that where Notifications have prescribed conditions merely procedural in nature, Courts have interpreted same in assessee's favour, but Notifications imposing conditions such as non-availment of CENVAT credit on duty suffered inputs, have gone in Revenue's favour.

Further HC Accepted Revenue's contention that exemption is available only if goods used as inputs in manufactured product have suffered duty of which credit has not been claimed, and said condition imposed upon domestic manufacturer cannot be satisfied by an importer. Accordingly HC Remarked that "interpretation to be given to a Notification stipulating a pre-condition that the inputs should have suffered a duty and no CENVAT credit should have been claimed, should be the same as the interpretation to be given to a Notification, which imposes a pre-condition that no CENVAT credit should have been claimed in relation to the duties leviable on the inputs" .

Comments: HC Classified the Notifications that have come up before Apex Court in various judicial precedents into 4 types, HC stated that interpretation of present Notification depends primarily on two important facts - (i) inputs used in exempted goods suffered excise duty, and (ii) whether manufacturer claimed CENVAT credit or not .

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VAT

HC quashes reassessment proceedings instituted u/s 29 of UP VAT Act on the basis of 'change of opinion' consequent to SC judgment in Nokia India Pvt. Ltd

Recently in case of Samsung India Electronics Pvt Ltd vs. State of UP & Others Allahabad HC quashed reassessment proceedings instituted u/s 29 of UP VAT Act on the basis of 'change of opinion' consequent to SC judgment in Nokia India Pvt. Ltd. HC opined that the Nokia judgment could not have been followed so as to invoke jurisdiction u/s 29 because in that case, phone charger was sold as a separate accessory and therefore, Apex Court held that it is not part of mobile phone. The battery was supplied with mobile phone and, therefore, battery charger was earlier classified as 'cell phone and its part', and that battery charger was sold as a separate entity and not as accessory .

HC observed that assessee in present case never argued that cell phone & battery charger are composite goods, instead it maintained that goods are put in sets for retail sale and there was no finding of Apex Court in this regard stating that they cannot be classified according to 'essential character' test.

Rule 3(b) of General Rules of Interpretation of First Schedule to Customs Tariff Act applies an assumption that component which gives essential character is only relevant, and all goods put up in a set have to be classified by component which gives the same its essential character. HC Also found no mechanism in the Legal Metrology Act or Rules (which mandate MRP on package) to split value of different products and subject them to classification and assessment separately, while according importance to 'intention' of parties who wanted to sell mobile phone alone and not with charger which was supplied along therewith in composite pack.

HC accepted assessee's stand that the proceedings were premeditated and awarded cost of Rs. 50,000/- to assessee observing that notices & orders have been passed in colourable exercise of powers and without jurisdiction .

Comments: HC established the product is to be taxed is a matter of intent of the parties. In a composite contract, it depends on what the parties intend to buy or sell. Further ,In the facts of present case, parties intended to sell the mobile phone alone, and not the mobile charger which was supplied along therewith in a composite pack

HC upholds jurisdiction of State Taxing Authorities to demand VAT from assessee towards royalty received from franchisee for right to use trademark in India

Allahabad HC in case Dominos Pizza Overseas Franchising B.V. vs. State of U.P. and others upheld the jurisdiction of State Taxing Authorities to demand VAT from assessee towards royalty received from franchisee for right to use 'Dominos Pizza' trademark in India. Further HC after pursuing the licensing agreement observed that IP Holder situated in USA and the assessee who is registered in Netherlands have executed a franchise agreement with Jubilant Foodworks Ltd (erstwhile Dominos Pizza India Pvt Ltd) whose HO is located in State of UP.

Further noting SC Constitution Bench conclusion in 20th Century Finance Corpn. Ltd. that situs of deemed sale arising from 'transfer of right to use goods' would be the place where contract in respect thereof is executed, HC observed that provision read down by Apex Court viz. Section 2(h)(iv) Explanation I, clause (ii) of UP Trade Tax Act, has not been inserted in UP VAT Act and instead, "place of business" u/s 2(x)(iv) has been defined as place where right to use goods is exercised.

In terms of Section 2 r/w Section 4 of Indian Contract Act as well as SC decision in Bhagwandas Goverdhandas Kedia, acceptance and intimation of acceptance of offer are both necessary to result in binding contract, method of communication will depend upon nature of offer and circumstances in which it is made.

HC observed that in the present case, there was no averment regarding mode of communication adopted by assessee communicating its acceptance. There was not even a whisper as to how and in what manner communication of acceptance was made. In the absence of any specific pleading so as to attract exceptions with regard to communication, HC held that acceptance would be completed only when it is communicated to offeror and that communication obviously would be at a place wherefrom offer was made. That be so, the agreement could be said to become a concluded contract and executed when it is communicated to proposer / offeror in UP. As a result, the very foundation of argument that taxing authorities in UP had no jurisdiction, disappeared.

Since the quantum of assessment was not under challenge, HC left it open to assessee to dispute the same by filing appeal under the statute .

Comments: HC obsereved that the taxing authority has jurisdiction as the agreement could be said to become a concluded contractand executed when it is communicated to offeror in UP.

Sale of goods under brand name by fully owned subsidiary / group company of holding entity with unusually high margin is taxable as 'first sale' u/s 5(2) of Kerala General Sales Tax Act 1963 (KGST Act)

SC in case of KAIL Ltd. vs. State of Kerala held that the sale of goods under brand name by fully owned subsidiary / group company of holding entity with unusually high margin is taxable as 'first sale' u/s 5(2) of Kerala General Sales Tax Act 1963 (KGST Act). SC observed that assessee and its 100% holding company are part of same group, and the former was allowed to use brand name and infact even the letter head used by assessee was printed with brand name with logo & trademark. Further SC Rejected assessee's claim of 'second sale' exemption on premise that brand name does not belong to it. Accordingly, SC remarks that brand name has no relevance when products are manufactured and sold in bulk by holding company to its subsidiary, but assumes significance when goods are marketed with publicity in the market. Also observes that if the sale between holding and subsidiary company, both having right to use same brand name is at realistic price and marketing company charged only usual margins in trade, then there is no scope for ignoring first sale, particularly when first seller was also holder of brand name and was free to market such branded products.

However, since in present case, margin charged by assessee while making further sale was unusually high. SC held that, "inter se sale between the groups of companies under the control of the same family was only to reduce tax liability and was rightly ignored by the assessing officer by levying tax under section 5(2) of the KGST Act" .

Comments: SC remarked that brand name has no relevance when products are manufactured and sold in bulk by holding company to its subsidiary.

Additional tax in the form of Surcharge u/s 7A of Haryana VAT Act cannot be levied on taxable turnover of works contractor who opts for compounded rate of tax u/s 9

HC in case of Mahashiv Promoters Pvt. Ltd. & Ors. vs. The State of Haryana and Anr. Held that additional tax in the form of Surcharge u/s 7A of Haryana VAT Act cannot be levied on taxable turnover of works contractor who opts for compounded rate of tax u/s 9. Further HC Remarked that the taxable event for levy of additional tax is taxable turnover. Thus, said provision will have no application unless dealer's taxable turnover is determined and stated that calculation of tax is at subsequent stage. Further HC Noted that in case of specified dealers which includes works contractors, lump sum tax in lieu of regular tax is payable under the VAT Act and in that process, taxable turnover is not to be determined except in the cases of retailers opting for payment of tax on lump sum basis. Further HC Noted that Madras HC in the case of South provisions of Tamil Nadu General Sales Tax Act. Distinguishes Bhima Jewellery & Systematic Conscom Ltd relied by assessee as well as Hoshiarpur Large and Medium Industries Association's decision referred by Revenue on facts.

Comments: Established that the said provisions will not have application unless dealer's taxable turnover is calculated at subsequent stage.

Customs

CBEC explains the scheme for deferred payment of customs duty extended to importers certified under Authorized Economic Operator programme as AEO (Tier Two) and AEO (Tier Three)

Circular No. 52/2016-Cus dated November 15, 2016

CBEC explained the scheme for deferred payment of customs duty extended to importers certified under Authorized Economic Operator programme as AEO (Tier Two) and AEO (Tier Three), w.e.f. November 16th. Stated that every such importer shall obtain ICEGATE login to avail benefits envisaged under the AEO programme and advises to nominate a nodal person who would be responsible for authenticating all the customs related transactions on behalf of AEO. An eligible importer shall intimate to the AEO Programme Manager with a copy to the Principal Commissioner of Customs or the Commissioner of Customs having jurisdiction over the port of clearance his intention to avail the said benefit. Importer intending to make deferred payment shall indicate the same using flag "D" in the payment method column of Bill of Entry filed, and only upon authentication by such AEO importer through nodal person, customs clearance would be provided for the consignment under said Rules. Further CBEC Stated that importer also has an option to select challans belonging to deferred period and pay at any time, even before the due date provided under Rule 6.

Comments: This is a welcome step for the industry.

CESTAT sets aside confiscation of parts of secondhand machinery, where parts of single machine were imported at two different ports , at different dates, due to logistical difficulty

CESTAT in case Hightemp Furnaces Ltd. vs. Commissioner of Customs (Imports), Mumbai set aside confiscation of parts of secondhand machinery, where parts of single machine were imported at two different ports (i.e. JNPT Nhava Sheva and New Customs House, Mumbai Port), at different dates, due to logistical difficulty.

CESTAT compared the purchase order with invoices of both the consignments and stated that it was one consignment of the second hand machine which was ordered and was imported accordingly. CESTAT further added that just because both the consignments were delivered at different ports does not make them independent of each other. CESTAT interpreted Rule 2(a) of General Rules of Interpretation which said "if complete machine is presented unassembled or disassembled, it has to be classified under classification of particular machine and not as parts" and stated that even though the machine was imported and cleared from two different ports, both consignments together comprise of one machine which is covered under said Rule 2(a) and thus, no license was required for clearance of such goods.

CESTAT further observed that it is undisputed that both consignments put together comprise of one machine and it is indifferent that they were imported at different ports at different times. CESTAT also noted that, the purchase order value tallies with the two invoices. CESTAT concluded that irrespective of fact that both the consignments were imported on different port at different time it will not change the classification of a whole machine.

.**Comments:** CESTAT established that the second consignment is a part and parcel of the machine as a whole and thus, could not be classified as an independent part and therefore, no license was needed for its clearance.

Royalty payable by OEMs / Distribution Service Providers (DSPs) to Microsoft towards right to use software purchased from assessee, would be includible in the value of CDs so imported

CESTAT recently in Repro India Ltd. vs. Commissioner of Customs (Import), Mumbai rejected import value of software CDs declared by assessee, holds that royalty payable by OEMs / Distribution Service Providers (DSPs) to Microsoft towards right to use software purchased from assessee, would be includible in the value of CDs so imported. As per assessee's Authorized Replication Service agreement with Microsoft, goods (software packages) could be sold only to those OEMs / DSPs who have valid licensing agreement with Microsoft, which clearly implies restriction.

on sale of goods. Further CESTAT observed that "Software package is of no use without royalty and it is the royalty payment or an undertaking/agreement to pay royalty which is prerequisite of working of package.". Also Rejected assessee's resort to Deductive Value Method under Rule 7 of Customs Valuation Rules to arrive at assessable value, stated that since identical goods of greatest aggregate quantity are not imported, recourse to such method cannot be taken and instead, Rule 8 (Residuary Method) must be resorted to. However, CESTAT directed appropriate adjustments towards expenses, taxes and profit margins, while rejecting assessee's claim for CVD exemption under Notification No. 6/2006-Cus absent emergence of specific new software product .

Comments: Precedent set by CESTAT would be loss to the industry as the software would be more costly.

FTP

HC quashes DGFT Trade Notice No. 11/2015 which withdraws export incentives under Focus Product Scheme (FPS) under FTP 2009-14 to items other than bicycle parts under Entry No 269 (earlier Entry No 242) of Appendix 37-D

Gujarat HC in case of Intolcast Private Limited vs. Union of India quashed DGFT Trade Notice No. 11/2015 which withdraws export incentives under Focus Product Scheme (FPS) under FTP 2009-14 to items other than bicycle parts under Entry No 269 (earlier Entry No 242) of Appendix 37-D. Further HC Stated that Trade Notice does not simply provide for a clarification but goes much further and essentially seeks to amend the Entry itself. Also Stated that if the intention of the Policy makers was to confine the benefits of export incentives to parts that can be used in bicycles, the description of various items which can never be used in bicycles, ought not to find place there. Observing that Entry 242 was flanked by several entries which referred to bicycles and parts thereof, HC stated that when the contents of the Entry itself are sufficiently clear, have a wide import and apply to range of products and parts which have no relation to bicycles, interpretation sought to be given by DGFT in the clarificatory Trade Notice cannot be accepted. HC Observed that power to amend an Entry would be with Govt. of India, and in this regard, relies on rulings in case of Malik Tanning Industries, Pushpanjali Floriculture Pvt. Ltd. & Baidyanath Ayurved Bhawan (Pvt.) Ltd .

Comments: HC set precedent regarding interpretation of above mention notice .

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