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Bhasin Sethi & Associates
Advocates and Consultants

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Service Tax

Construction of flats equivalent to landowner's share under Joint Venture agreement, taxable as 'construction of residential complex service' u/s 65(105)(zzzh) of Finance Act: Madras HC

Madras HC in the case of Southern Properties & Promoters vs. CCE dismissed the appeal filed by assessee, and held that assessee cannot plead entitlement of Notification No. 29/2007-ST benefit relating to 'works contract', in view of the specific admission by assessee before the Adjudicating Authority that the services provided would fall u/s 65(105)(zzzh).

HC rejected the contention of assessee that there was no liability to pay tax in respect of 24 flats handed over to land owner after rendering service u/s 65(105)(zzzh) without any consideration, and observed that the land was transferred for the purpose of providing taxable service, and in case there was no monetary consideration, Sec 67, which provides for various methods of valuation, was to be utilized.

Further, HC expressed its non-inclination to accept Revenue plea in respect of valuation of taxable service u/s 65(105)(zzzh) , that it may fall under Rule 2 or 3 of Service Tax (Determination of Value) Rules, 2006 and the amendment made in 2012. HC stated that it would not make any observation that would influence the mind of Tribunal as to the applicability of such Rule on merits.

Comments: The judgment by Madras HC clears the air about landowner's share under JV agreements.

No ST payable under 'Management Consultancy Service' category for running, operating and managing under License Agreement: CESTAT, Mumbai

Recently, in the case of The Indian Hotels Co. Ltd vs. CST, Tribunal allowed appeal to hold that service can be said to be provided by one entity to another only when first entity undertakes an activity or performs a service for another for a consideration. Perusing the License Agreement clauses, Tribunal observed that the clauses made it clear that assessee did not run hotel as service, but in fact as part owner of assets along with institutional lenders.

Tribunal held that present case is different to Piem Hotels, and observed that the essence lies in the way assessee controls the running of hotel, which is different in both cases and mere holding of joint discussions, reporting of activities to Taj Lands End Ltd does not mean service is necessarily being provided, it only reflects mutual financial interest and involvement of both parties in running the hotel.

Further, Tribunal interpreted the term "service in connection with management of any organization" and held that it could only mean services in relation to consultancy, and observed "*If it is held otherwise then all cases of factories given on lease to be run by others under a license agreement will be termed as provision of management consultancy service etc. which is obviously not correct.*"

Comments: This decision comes as a huge relief to part owner of assets as well as institutional lenders.

Harvesting & transporting sugarcane a 'packaged deal', Engaging labour not man-power supply: Bombay HC

Recently, in CC, CCE and CST vs Godavari Khore Cane Transport Company (P) Ltd, Bombay HC dismissed Revenue appeal by holding that engaging labour for harvesting, loading / unloading and transportation of sugarcane pursuant to contract with sugar karkhana (factory) was not taxable as 'manpower recruitment or supply agency' service.

Further, HC also observed that services by assessee were a 'package deal' through which sugar karkhana got essential raw material supplied to factory site, and the manner of work done by assessee (by engaging labour) was not really Karkhana's concern.

Moreover, perusing the history of service tax legislations and the importance, HC observed that since recruitment service became taxable for the first time in 1997, and 'labour contract services' in 2005, assessee's packaged deal cannot be subjected to tax during disputed period. The HC conceded that provisions of Finance Act did not give sufficient leeway to Revenue at the disputed time to levy demand whilst also admitting that the situation has now changed with introduction of "Negative List" w.e.f. July 2012.

Comments: This decision of Bombay HC is important as creates a distinction b/w labour supply/transportation and Manpower Recruitment or Supply.

No law barring assessee to pay service tax on exempted service and subsequently claim refund: CESTAT, Mumbai

In the case of Deloitte Haskins and Sells vs CCE, Mumbai Tribunal relied on Crown Products Pvt. Ltd. vs CCE, Nashik - 2012 (28) STR 406 (Tri.-Mum) and MPS Ltd. Commissioner of Service Tax, Bangalore in appeal No. ST/763/2011, to hold that there was no law barring the assessee from paying tax on exempted services and claiming refund thereafter, as there is no provision akin to Section 5A(1A) of the Central Excise Act, 1944.

Accepting assessee's claim that Notification no. 04//2004 dated March 31, 2004 under which assessee provided services to SEZ units is a conditional notification, Tribunal observed that one of the conditions of the Notification was that the developers or units of SEZ shall maintain proper account of receipt and utilization of the said taxable service. Tribunal held that as the maintenance of proper accounts was outside the control of the assessee, they had every right to pay the taxes in full.

Comments: The ruling is important as it concedes that there is no provision akin to Section 5A of the Central Excise Act..

Central Excise

Determination of place of removal: CBEC Clarification

CBEC has issued a clarification vide Circular No. 988/12/2014-CX dated October 20, 2014 on the 'place of removal' for the purpose of availing CENVAT Credit on input services in case of exports.

As per the clarification, CBEC has intimidated that the place where the sale takes place or when property in goods passes from seller to buyer is the relevant consideration to determine the place of removal

Thus, CBEC clarifies that where goods are cleared for export by manufacturer-exporter, transfer of property can be said to have taken place at the port where the shipping bill is filed by the manufacturer-exporter and place of removal would be this port/ICD/CFS.

Additionally, it has been clarified that In case of export through merchant exporters, place of removal shall be the place where property in goods passes from manufacturer to merchant exporter, which in most cases would be factory gate, as goods are unconditionally appropriated to contract in case where goods are sealed in factory; However, in isolated cases, it has been clarified that place of removal may extend further depending on facts of the case, but not beyond the Port / ICD / CFS where shipping bill is filed by merchant exporter.

Comments : The CBEC clarification is of note to all manufacturers.

Central Excise and Service Tax Audit norms to be followed by the Audit Commissionerates: CBEC Circular

Ministry of Finance vide. Circular No. 995/2/2015-CX dated February 27, 2015, has issued audit norms that are to be followed by Audit Commissionerates w.e.f. July 1, 2015 in Central Excise and Service Tax matters.

Additionally, for adequate reportage, the Ministry has asked the Commissionerates to classify taxpayers into 3 categories namely – i) Large Units ii) Medium Units and iii) Small units on the basis of - a) annual value of clearances and total duty paid w.r.t. Excise and/ or (b) value of services rendered and services received (dutiable on reverse charge basis) and total duty paid w.r.t. Service Tax.

Moreover, outlining clear guidelines, the Ministry clarifies that the threshold limit for categorising units would depend on available manpower in Audit Commissionerate and assessee's base turnover and duty paid by each assessee in jurisdiction of Audit Commissionerate.

Comments : The CBEC Instruction has come on a good note to emphasize that effective audit plays a key role in improving.

Whether affixing additional label on cartons imported/received from assessee's other unit availing area based exemption under Notification No. 56/2002 amounts to 'manufacture'

In a recent case, Jindal Drugs vs. CCE, Technical Member held that intention behind affixing labels at Jammu and then at Taloja unit was to avail CENVAT credit of duty paid at Jammu and, finally encash whole duty in rebate form, by exporting goods, and get over hurdle of Notification No. 19/2004 which disallows rebate on 'exports' where area based exemption was availed.

The Technical Member further observed that simply by putting labels revealing same information i.e., product name, ingredients, name of manufacturer, and terming it as 'manufacture' in terms of Chapter Note 3 to Chapter 18 of Central Excise Tariff Act (CETA) amounts to making a mockery of legal language.

On the other hand, Member (Judicial) relied upon Tribunal ruling in United Distributors and held that labeling at Taloja Unit amounted to manufacture as per Note 3 to Chapter 18 of CETA and did not require that labeling to enhance marketability.

Comments: . To resolve the difference of opinion, the matter has now been placed before the Third Member.

Banding single pack of soaps into combo packs constitutes manufacture.

The Delhi Tribunal, in Vasantham Enterprises vs CCE, held that branding single pack of soaps into combo is covered under the meaning of manufacture u/s 2(f) of Central Excise Act r/w Note 6 to Chapter 34 of Central Excise Tariff Act, and area based exemption is therefore available under Notification 50/2003-CE.

Tribunal also noted that CBEC vide its Circular No.908/28/2009 -CX, had clarified that the benefit of Notification No.49/2003-CE and No.50/2003-CE, as amended are to be available, only to such goods where both the activities of manufacture of the main product and the principal activities are undertaken in the specified areas in the States of Uttarakhand or Himachal Pradesh even if peripheral activity alone is undertaken by job workers in the specified areas.

Further, Tribunal observed that assessee had a bonafide belief that it wasn't a manufacturer and the declaration being not filed wasn't a suppression of fact, and accordingly remanded the matter for re-examination of exemption entitlement.

Comments: This judgment is of note to all manufacturers and job workers.

No 'interest' payable on refundable interest amount from Department

In the case, Hindalco Industries Ltd. v. CCE, CST and CC, CESTAT Bangalore dismissed an appeal on the grounds that no 'interest' was payable on refundable interest amount from Department as the statute does not provide for payment of interest while sanctioning the refund of interest on duty.

The Tribunal conceded that the word 'interest' was added to Sec 11B of Central Excise Act in relation to refund of duty, it emphasized that Parliament did not consider appropriate to add the same to 11BB.

Comments: It is important to note that Department is under no obligation to pay 'interest' payable on the refundable interest.

MODVAT credit allowed on inputs / partially processed inputs sent for job-work but not received in factory within 180 days

In the case, Godrej & Boyce Mfg. Co. Ltd. vs. Commissioner of Central Excise, Bombay HC upheld the Tribunal order and allowed MODVAT credit on inputs / partially processed inputs sent for job-work but not received in factory within 180 days, under Rule 57 of erstwhile Central Excise Rules, 1944 (Rules).

HC observed that the harmonious reading of provisions of Rule 57F indicated that there was no mandate of disallowing MODVAT credit where inputs were not received back within the prescribed period, and on the other hand, the Rules envisaged the denial of proportionate credit, and provided for situations where credit could be adjusted when goods were not received within 180 days.

Comments: It is important to note that the erstwhile Rules do not disallow MODVAT credit, if input not received within 180 days.

VAT

VAT not applicable on drugs, etc., during medical procedure

The HC of Punjab and Haryana, in Fortis case, applied the dominant intention test to hold that that a medical procedure that as an integral part requires administration of drugs, etc could only attract VAT if it fulfilled the ingredients of sale, as defined under the Punjab and Haryana VAT Acts and Article 366 (29A). Thus, intention of parties, nature of goods, delivery etc., were important determinative factors of whether a medical procedure involved 'sale of goods.'

Further, the HC rejected Revenue's contention that ratio of Jharkhand HC in Tata Main Hospital and Allahabad HC in International Hospitals Pvt. Ltd. was inapplicable as the definition of 'sale' under Punjab VAT and Haryana VAT Acts differed from respective definitions under Bihar and UP Acts, and held that the ingredients of 'sale' remained unchanged, in view of the fact that State was not empowered under Constitution to severe contract and construe supply of drugs, medicines as a 'sale'.

Additionally, the HC observed that Article 366(29-A) of the Constitution did not raise a presumption that every transaction is a sale and, thereafter allowed the State to search for what could be the element of sale, in a transaction and that the SC in BSNL case, affirming the dominant nature test with respect to such contracts, specifically stated that sub-clauses of Article 366(29-A) of Constitution did not cover hospital services.

Comments : The aforesaid HC ruling is important as it limits the power of the State, and reestablishes the need to follow dominant test in certain circumstances.

Transfer of right to use goods of incorporeal or intangible character such as trademarks & patents also exigible to tax

Recently, the Bombay HC dismissed Tata Sons' writ petition in TATA SONS Limited and another vs. The State of Maharashtra and another, thereby upholding sales tax levy for AY 1998-99 to 2001-02 on 'TATA' brand equity and business promotion agreements entered with various TATA Companies, under Maharashtra Sales Tax on the Transfer of Right to use any Goods for any Purpose Act, 1985 (Act).

In addition, HC observed that the bare perusal of sections of the Act indicated that tax is leviable on turnover of sales i.r.o. transfer of right

to use any goods and as per Entry No. 7 in the Schedule, transfer of right to use goods of incorporeal or intangible character such as trademarks & patents, is also exigible to tax.

Further, HC further observed that, "…The Act does not give any indication as is rightly urged before us that the right to use the incorporeal / intangible goods should be exclusively transferred in favour of the transferee. The nature of the transfer or the nomenclature assigned to the act will therefore not necessarily be decisive…"

Comments: The aforesaid decision is crucial to note that the tax is leviable on turnover of sales in respect of transfer of right to use any goods.

Work Stations are not furniture

The Karnataka HC, in State of Karnataka vs. Infosys Technologies Ltd., upheld the Tribunal findings and 'work stations' were not 'furniture', and hence, did not fall under the list of restricted items for input tax credit (ITC) availment under Schedule-V of Karnataka VAT Act, 2003 (KVAT Act).

Further, HC observed that Section 11 of KVAT Act disallowed ITC on goods specified in Schedule V used for purpose other than re-sale or manufacture or any other process of other goods for sale. Lastly, HC observed that Work stations or a cubicle used to sit and operate a computer is an accessory of computer, computer peripherals, which in common parlance is not understood as 'furniture' for a convenience or decoration.

Comments: This is a landmark ruling pronounced by HC, laying down the ground work for interpreting goods covered under furniture.

Entry 25 of Schedule VI to KST Act - Constitutional

Recently, in the case State of Karnataka vs. Pro Lab & Others, the SC upheld the constitutional validity of Entry 25 of Schedule VI to Karnataka Sales Tax Act, which deals with levying sales tax on processing and supply of photographs, photo prints and negatives.

Whilst delving into the legislative history of works contract amendments & host of judicial pronouncements on the issue, SC observed that after insertion of clause 29-A in Article 366 of Constitution, the indivisible works contract can be bifurcated in two – one for "sale of goods" and other for "services", thereby making goods component of contract exigible to tax.

Further, SC observed that" *... In M/s Larsen and Toubro, the Court, after extensive and elaborate discussion, once again specifically negated the argument predicated on dominant intention test having regard to the statement of law delineated in ACC Ltd. and Bharat Sanchar Nigam Ltd.*" ;

In addition, SC held that " *.. while going into this exercise of divisibility, dominant intention behind such a contract, namely, whether it was for sale of goods or for services, is rendered otiose or immaterial.*" Further, SC held that, "*as a sequitur, by virtue of Article 366(29-A), State Legislature is empowered to segregate the goods part of works contract and impose sales tax thereupon, observes "Sales tax, being subject-matter of the State List, the State Legislature has the competency to legislate over the subject."*

Comments: This judgment is of note to professional photographers.

Customs

Redemption Fine applicable in event where goods are available and are to be redeemed

The Bombay HC, in the case CC, Export vs National Leather Cloth Manufacturing dismissed Revenue's appeal and upheld the order of the Tribunal, by holding that redemption fine is a concept which arises in event where goods are available and are to be redeemed, and as in the case at hand, the goods were not available, there was no question of redemption of the goods. HC observed the aforesaid by relying on the Division Bench ruling in Finesse Creation Inc.

Additionally, HC observed that Sec 125(1) of Customs Act prescribed option to pay fine in lieu of confiscation, and hence, Tribunal order did not suffer from any serious legal infirmity / perversity that warranted Court's interference.

Comments: The decision is of note because it reiterates and important rule with regards to Redemption fine.

Refund claim of duty paid under self-assessment available without challenging bill of entry

In a recent case, SuryaLakshmi Cotton Mills Ltd. Vs. CCE, Pune, CESTAT Mumabai allowed the assessee's appeal by allowing the refund of excess customs duty paid under a self-assessment of Bill of Entry (BoE), u/s 27 of Customs Act.

As regards challenge to assessment to Bills of Entry, Tribunal observed that there was no dispute regarding eligibility of exemption notification, and hence, there was no lis b/w assessee and Revenue. Further, Tribunal took note of SC ruling in Priya Blue and stated that same would not be applicable in instant case as it pertained to previous period under refund provisions of old Sec 27 of Customs Act. After comparing the old and new Sec 27, Tribunal observed that in the old provision, refund was to be filed in pursuance of assessment order as against the new provision where refund could be claimed without appeal where duty was paid under self-assessment.

As regards unjust enrichment, Tribunal noted that assessee had filed all relevant documents showing that amount of refund was shown as 'receivable', and therefore remanded the matter for the factual aspect to be verified by adjudicating authority.

Comments : This ruling is important as it gives rights against unjust enrichment.

Second refund claim not to be disallowed only because Circular No. 06/2008-Cus. allows one filing per month

In the case, Devki Nandan J. Gupta vs CC, Mumbai Tribunal allowed assessee's appeal and held that the second refund claim filed in same month cannot be rejected on sole ground that CBEC Circular No. 06/2008-Cus permitted one claim per month, irrespective of number of the Bills of Entry (BoE).

Accepting assessee's plea that since statutory time of 1 year in respect of both BoEs was to expire, it had no option but to file both refund claims in same month, Tribunal held that it was not the intention of the Circular to restrict the number of claims to one in a month, even when the period for filing refund was about to expire.

Comments : The judgment is of note as being a landmark one as to how statutes are to be interpreted.

Special Economic Zone

Ministry of Home Affairs can direct the State Government to cancel the entire agreement with the strategic partner if selection process not satisfactory

In the case of Om Infra Projects Ltd. and another vs UOI and others, the Madras HC dismissed the appeals filed by the assessee, whilst also disallowing the SEZ's Developer selection process (adopted by Government of Pondicherry) as the Govt. had failed to draft a Detailed Project Report (DPR) and Technical advisor's appointment before selection.

Further, HC rejected the inclusion of Om Metal (assessee) as strategic partner of Special Purpose Vehicle (SPV), and observed that Om Metal & Developer was not a 'consortium company', and as the original application was filed as 'single company', the selection process wasn't satisfactory.

Additionally, HC observed that the Selection Committee 'must' avoid the backdoor entry method and instead follow the established procedures so that the most competent / qualified / experienced company can be selected to complete the job.

Moreover, HC called the 'natural justice' argument an empty formality since Courts are not permitted to interfere in Economic Policy Decisions with regards to SEZs.

Comments: This is a very important ruling with regards to the selection of the Developer and the conditions that must be fulfilled before one is chosen.

Policy Framework for Finance SEZs

The finance ministry has issued a policy framework to set up finance special economic zones (SEZs) in the country. The same has been done with a view to make India a global hub of financial services. The concept note of National Institute of Public Finance and Policy (NIPFP) clarifies that India requires sophisticated financial services to fuel growth in the future and establishment of finance SEZs will help bring the trade on rupee and NIFT, which has shifted to countries like Singapore, Dubai and London.

"*To establish financial hubs such as London and Singapore, India should set up special economic zones (SEZ) for financial services companies that would have full capital convertibility and receive tax breaks*", the National Institute of Public Finance and Policy has said in the report to the finance ministry.

The framework suggests the implementation of tax pass-through for pooling vehicles to encourage foreign investors using Indian financial service providers for private equity, venture capital and mutual funds has also been suggested. In relation to this.

Besides exemption from excise duties, it has also sought exemption from securities transaction tax, commodities transaction tax and service tax.

Comments: The said framework gives India an unusual opportunity in producing financial services, on a global scale.

401, Satyam Cineplexes, Ranjit Nagar,
New Delhi - 110008
Phone No. : 011-25895998, 25894899
Email: delhi@bsalaw.in

C-20/1 (Lower Ground Floor),
Ardee City, Near Gate-3,
Sector-52, Gurgaon - 122011
Phone No. : 0124-4275494, +91-9910044272
Email: gurgaon@bsalaw.in

Website : www.bsalaw.in