Indirect Tax News Update

VOLUME III, ISSUE IX

SEPTEMBER, 2016

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Service Tax

CBEC Draft Circular on accounting / documentary requirements for applying 'unjust enrichment' to refunds

Circular F. No. 137/29/2016-ST Date : August 09 2016

Recently CBEC issued draft Circular on applicability of "unjust enrichment" principle in case of service tax refunds, inviting feedback by September 6th indicated the accounting and documentation requirements to be adhered to in various refund scenarios, in order to bring uniformity in the application of the principle. Accordingly, Balance Sheet of the applicant for the FY in which duty / tax had been paid or credit note had been issued, should indicate refund amount as "Duty Receivable" under the heading 'Current Assets', and same should continue to show in Balance Sheet of subsequent FY(s) after the FY in which duty / tax was reflected as "Duty Receivable" till the FY in which refund is proposed to be sanctioned. Requisite certificates would be self-certified by applicants in all cases where duty refund is less than Rs. 25 lakhs, whereas CA / Cost & Management Accountant would be required for higher claims. In case of refund arising out of differential duty on inputs, CBEC stated that refund sanctioning authority had to satisfy himself that amount of duty / tax claimed as refund had neither been included in the cost nor CENVAT Credit thereof had been claimed by the recipient of goods. In case of capital goods, explains that issued relating to 'depreciation' also require examination, i.e. amount of duty should not be capitalized and same ought to be transferred to "Duty Receivable" Account.

Recognizing the business practice of expensing out the purchases in P&L Account of same FY as per accounting principles, CBEC stated that if recipient reverses CENVAT Credit in FY in which he claims refund, the test of unjust enrichment would stand satisfied. Also lays down the accounting & documentary requirements for refunds arising out of differential duty on final products, in cases of year ending / quantity discounts, finalization of provisional assessment under Rule 7 of Central Excise Rules and favourable order by Appellate Authority. Clarified that provisions of Sec 11B of Central Excise Act are not applicable in case of refund of pre-deposit amount and therefore, principle of unjust enrichment would not apply in such cases

Comments: It will fulfil dual purpose of uniformity and accountability thus, is good for the department and industry.

CBEC Circular on taxability of freight-forwarders as intermediary / principal when goods transported outside India

Circular No. 197/7/2016-ST Date : August 13 2016

Last month, CBEC issued clarification on applicability of service tax on freight forwarders for transportation of goods from India. Stated that where a freight forwarder deals with exporter as an agent of airline / carrier / ocean liner, he might be considered as an intermediary under Rule 2(f) r/w Rule 9 of Place of Provision Service Rules 2012 (POPS Rules) since he merely facilitates the provision of transportation service. In such case, service of freight forwarder would be subjected to tax while service of actual transportation of goods to a place outside India would not be taxable under Rule 10 of POPS Rules .

Further, where freight forwarder undertakes all the legal responsibility for transportation of goods and undertakes all the attendant risks, i.e. when he was acting as a principal, no service tax would be payable when destination of goods is outside India in terms of Rule 10. Accordingly, directs field formations to deal with cases purely on the basis of facts, terms of contract between the entities concerned, the provisions of Finance Act, POPS Rules and other Rules.

As per Rule 9 of POPS Rules, place of provision of intermediary services was the location of the service provider. Whereas, in terms of Rule 10, the place of provision of service of transportation of goods by air / sea, other than by mail or courier, was the destination of goods.

Comments: This is strange in the sense that service of freight forwarder is made taxable instead of service of actual transportation of goods to a place outside India. But, it clarified the position and clears all the confusion regarding taxability.

CBEC Circular on taxability of hiring / leasing without 'right to use' transfer. BSNL-criteria paramount

Circular No. 198/08/2016-ST **Date : August 18 2016**

CBEC issued clarification on service tax liability in case of hiring, leasing, licensing of goods without the transfer of right to use them, as provided u/s 66E(f) of Finance Act. Stated that in such cases, it was essential to determine whether in terms of the contract, there was transfer of right to use goods and the criteria laid down by SC in BSNL should invariably be followed and applied. Prior to this in BSNL case, SC had inter alia laid down that (i) there must be goods available for delivery, (ii) there must be consensus ad idem as to their identity, (iii) transferee should have legal right to use the goods, (iv) such right should be to the exclusion of the transferor i.e. it should not be merely license to use the goods, and (v) during the period of transfer, owner could not again transfer the same right to others.

Further, it was stated that cases decided under Sales Tax / VAT legislations could not be applied mechanically, they have to be considered against the background of those particular legislative provisions and terms of contract in that case. Some of these cases include Rashtriya Ispat Nigam Ltd, International Travel House Ltd, State Bank of India and G. S. Lamba & Sons. CBEC also cited examples of 'financial lease' & 'operating lease', as well as 'dry leases' & 'wet leases' for aircraft industry, to emphadize the diverse nature of transactions and clarified that in all these cases, no a priori generalizations or assumptions about service tax liability should be made. Reiterates, "The terms of the contract should be examined carefully, against the backdrop of the criteria laid down by the Supreme Court in the Bharat Sanchar Nigam Limited case as well as other judicial pronouncements"

Comments: This is a harsh decision on the renting business and it brings leasing / hiring with certain qualifications within the ambit of Service Tax.

Construction of tube wells for water supply by Govt. not taxable, clarified CBEC

Circular No. 199/09/2016-ST **Date : August 24 2016**

Recently, CBEC clarified that service of constructing tube wells for the Govt. by contractors would be covered under exemption Notification No. 25/2012-ST. it was further, noted that exemption was available to following services provided to the Govt, a local authority or Govt. authority by way of – (a) construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of pipeline, conduit or plant for (i) water supply, (ii) water treatment, and (b) water supply. Stated that phrase "water supply" involves providing users access to source of water, which might be natural or artificial like tanks, wells, tube wells etc. Construction of artificial source would involve activities like drilling, lying of pipes, valves, gauges, fitting of motors, testing so as to eventually result in supply of water. Thus, exemption under entries at Sl. No. 12(e) and 25(a) of Notification No. 25/2012-ST would cover wide range of activities / services provided to a Govt, local authority or Govt. authority.

Comments: this is a welcome decision keeping an eye on social developmental responsibilities of the Government and its agencies.

Service Tax applicable on restaurants applying 'aspect doctrine', but grants relief to hotel accommodations

Delhi High Court in Federation of Hotels and Restaurants Association of India and Ors., upheld the constitutional validity of Sec. 65 (105)(zzzzv) and Sec. 66E(i) r/w Sec. 65(22) & Sec. 65(44) of Finance Act and Rule 2C of Service Tax (Determination of Value) Rules 2006, inasmuch as serving of food or beverage, including alcoholic beverages, to any person by a restaurant, having facility of air-conditioning in any part of its establishment, had been made amenable to service tax. Further, rejected assessee's contention that even after insertion of Article 366(29A)(f) vide 46th Constitutional Amendment, all aspects of transaction of supply of food & beverages to the customers fall within the meaning of 'sale of goods' amenable to sales tax / VAT levied by the Stated. Notes the constituent elements of Article 366(29A)(f) viz. (i) supply of goods being food or any other article for human consumption or any drink, fit for consumption whether or not intoxicated.

Moreover, HC referred the Apex Court ruling in Larsen & Toubro Limited vs. State of Karnataka and 'aspect doctrine', HC stated that even if some part of composite transaction involves rendition of service, there should be no difficulty in recognizing the power of Union to tax that portion. Observed that SC in case of K Damodarasamy Naidu vs. State of Tamil Nadu only dealt with exigibility of sales tax even where food and drink was in course of providing a service and hence, "was not an authority for proposition that in a catering contract, which is admittedly a composite contract, the service portion thereof could not be made exigible to service tax levied by a Union legislation.". Rejecting assessee's attempt to distinguish decision in Tamil Nadu Kalyana Mandapam Association vs. Union of India (relied on by Revenue) by pointing out the difference between outdoor catering & restaurant services, further, HC observed that same highlights the possibility of splitting up the composite transaction into the service element and supply of food.

Furthermore, HC rejected assessee's contention that Rule 2C arbitrarily attributes 40% of value of composite contract of supply of food & drinks to service component, observed, "What Rule 2C did is to enable the assessing authority to put a definite value to the service portion of the composite contract… Correspondingly there was abatement of that portion which pertains to the supply of goods in the form of food and drink" which had the approval of SC in Association of Leasing & Financial Service Companies v. Union of India.

However, HC struck down the levy of service tax on provision of short-term accommodation in hotel u/s 65(105)(zzzzw) of Finance Act, thereby accepting assessee's contention that levy of tax on luxuries as contemplated under Article 246 r/w Entry 62 of List II of Constitution entirely covers the field and therefore, Parliament lacks legislative competence to levy service tax thereon. Finding no discernible difference between the subject matter of levies under Delhi Tax Luxuries Act and Finance Act, HC observed that Sec. 65(105)(zzzzw) fails the foremost test of constitutionality of Union Tax as highlighted in International Tourist Corporation vs. State of Haryana that "before exclusive legislative competence can be claimed for Parliament by resort to the residuary power, the legislative incompetence of the State legislative must be clearly established.". Also observed that the Valuation Rules do not provide machinery for levy and collection of tax on accommodation, while refraining to discuss the decisions of Kerala HC in Union of India vs. Kerala Hotel Association, Bombay HC in Indian Hotels and Restaurant Association vs. Union of India and Karnataka HC in Ballal Auto Agency vs. Union of India as same are subject matter of appeal before SC.

Comments: This is a very important Judgment for Hotels / Restaurants operation in Delhi and around the country as it logically concluded the question of taxability of supply of food and ranting. Further, this decision has also clarified that the short term accommodation is liable to only state VAT and not to Service Tax. This clarification is of much relief to the common man.

CESTAT grants exemption on services consumed outside SEZ. Freight slot trading not 'BAS'

Previous month, CESTAT in DHL Lemuir Logistics Pvt Ltd., set aside the order which rejected service tax exemption under Notification 4/2004-ST to assessee for logistic services rendered to SEZ unit on the ground that services were not consumed within the Zone.

Further, CESTAT stated that the term 'consumption' in the Notification covers utilisation of services for authorised operations by SEZ units and did not restrict such exemption only to the extent perceived to be within the boundaries of SEZ.

CESTAT also examined the dispute in the context of the statutory provisions and noted that Sec 26 of the SEZ Act r/w Rule 31 of SEZ Rules provides for exemption from customs, central excise, service tax and other similar levies. CESTAT noted that unlike the terms and conditions relating to goods, there are no elaborate prescriptions for services which are intangible. CESTAT further found that in terms of Sec 51, the provisions of SEZ Act would have the effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than SEZ Act. It, thus, stated that in the event of dispute, the exemption in SEZ Act would prevail. In this regard, reliance was placed on the rulings in Commercial Tax Officer, Rajasthan vs Binani Cement Ltd & another [TS-40-SC-2014-VAT]. Reserve Bank of India vs. Peerless General Finance and Investment Co Ltd [1987 SCR (2)].

CESTAT also stated that in case of reasonable doubt, the construction most beneficial to the subject is to be adopted, i.e., provisions must be given the most beneficial interpretation. In this regard, it relied on CIT vs. Shahzada Nand & Sons [(1966) 3 SCR 379]. Cape Brandy Syndicate vs. IRC [(1921) 1 KB 64, 71] and a plethora of other cases. Thus, CESTAT held that the conflict between the exemption u/s 26 of SEZ Act and the Notification 4/2004 -ST was resolved in favour of assessee.

Comments: This decision comes as a great relief as now logistic service, provided in SEZ zone is not leviable to Service Tax, which would make Indian manufactured goods more competitive in world market.

Central Excise

Finmin notifies 'revised returns' provisions under Central Excise Rules w.e.f. August 17

Notification No 42-2016-CE(NT) dated August 11, 2016

Last month, Finance Ministry notified that sub-rule (8) of Rule 12 and sub-rule (7) of Rule 17 of Central Excise Rules introduced during Budget 2016 would come into force from August 17th. Accordingly, assessee can submit revised Excise Return by end of the calendar month in which original return had been filed, and in case of Annual Return, within one month from date of submission such Return, under Rule 12(8). In such case of revised return under clause (a), "relevant date" for purpose of recovery of excise duty u/s 11A of Central Excise Act would be date of submission of such revised return. Further, EOUs can submit revised returns by end of the calendar month in which the original return is filed, in terms of Rule 17 (7).

Comments: this is important Notification as it has revised the rules related to the filing of returns.

Disallows dual benefit of rebate and drawback on export

Recently, Madras HC in Raghav Industries Ltd vs. Union of India & others, disallowed the rebate of excise duty paid on exported goods under Rule 18 of Central Excise Rules since assessee had availed on duty drawback thereon in terms of Customs, Central Excise Duties and Service Tax Drawback Rules 1995. Stated that after clearing goods on payment of duty under claim for rebate, assessee should not have claimed drawback of central excise and service tax portions, and should have paid back the drawback amount availed before claiming rebate.

HC observed that while sanctioning rebate, the export goods, being one and the same, the benefits availed by assessee on said goods under different scheme, are required to be taken into account for ensuring that the sanction did not result in undue benefit to the claimant. Both, Rule 18 of Central Excise Rules and Customs, Central Excise Duties and Service Tax Drawback Rules 1995 are intended to give relief to the exporters by offsetting the duty paid. When assessee had availed duty drawback of customs duty, excise duty and service tax on the exported goods, it would not be entitled to the Rule 18 rebate by way of cash payment as it would result in double benefit.

HC observed that proviso to Rule 3 of Drawback Rules provides for reduction of drawback admissible, taking into account the lesser duty of tax paid or rebate, refund or credit obtained. In case of Spentex Industries Ltd, SC had dealt with provisions of Rule 18. while in present case the benefits claimed ware covered under different statutes – Drawback Rules and Central Excise Rules. Hence, the SC decision was not applicable to facts of present case. Hence, in view of

Allows accumulated credit refund on factory closure

Recently, CESTAT in Computer Graphics Ltd. vs. Commissioner of Central Excise, Tirunelveli, had allowed refund of accumulated CENVAT Credit under Rule 5 of CENVAT Credit Rules upon closure of factory. Notes that assessee, manufacturer of colour films & paper, had closed down factory owing to change in technology and consequently filed claim for refund of excess credit available in CENVAT Account. Further, rejected Revenue's reliance on CESTAT Larger Bench decision in Steel Strips wherein it was held that since there is no express provision for grant of refund except in case of exports under Rule 5, refund is not admissible on account of closure of unit. Stated that Larger Bench had not considered Karnataka HC decision in Slovak India Trading Co. Pvt. Ltd which allowed refund absent any express prohibition in Rule 5 and same was subsequently upheld by SC. Also refers to coordinate bench ruling in Srinivasa Hair Industries where refund of accumulated credit under Rule 5 was held admissible on account of closure of factory.

Comments: This is very important and a welcome decision and would reinstate faith in investors in doing business in India.

Loading business software onto imported cashless currency transmitting device didn't constitute 'manufacture'

Recently, AAR in Nucleus Software Exports Ltd. vs. Commissioner of Central Excise, Noida, held that activity of loading business software onto imported hardware / device called 'Nucleus Device' which would serve as a cashless currency transmitting apparatus, did not constitute 'manufacture' under Central Excise Law. Further, AAR noted that the CESTAT decision relied upon by Revenue was an interim order and related to pre-deposit of dues ordered by Adjudicating Authority. It also found Revenue's submission regarding the functioning of device upon loading of software as factually incorrect. Applicant had clearly mentioned that the Nucleus Device, prior to import, would be embedded with basic input output system, enabling it to perform primary functions such as processing of input commands and display of data. Thus, AAR agreed with the applicant that the Nucleus Devices, as imported, are not incomplete or unfinished articles.

AAR perused the definition of 'manufacture' u/s 2(f) of Central Excise Act and observed that loading of software only enhances the utility of Nucleus Device. Hence, loading of software could not be said to be incidental or ancillary to completion of manufactured product as envisaged u/s 2(f)(i) .

Further, AAR found that no Section or Chapter Notes of the First Schedule to the Central Excise Tariff Act treat process of recording of sound or data or other phenomena of product of Heading 8517 as amounting to manufacture u/s 2(f)(ii). Furthermore, it stated that Sec 2 (f)(iii) is applicable only in respect of goods which fall under Third Schedule and Nucleus Device, classifiable under Heading 8517, did not fall thereunder.

Agreeing with applicant's submissions, AAR stated that the uploading of software into the Nucleus Device, which is already embedded with the basic input output system to perform primary functions, would not result in new and different article having a distinct name, character or use. It also agreed with the applicant that Chapter Note 10 or any other Note to Chapter 85 is not applicable in the present case to consider the activity of uploading of business software in the Nucleus Device as 'deemed manufacture'. AAR remarked, "If the intention of the legislature was to treat up-loading of software into devices like Nucleus Device, as manufacture, Note(s) to Chapter 85 would have included goods of heading 8517, deeming such activity to be manufacture." Accordingly, AAR held that the activity of loading of business software in the Nucleus Device by the applicant would not constitute manufacture under the Central Excise Law.

Comments: This is yet another important decision. It will give boast to the Information Technology Industry and also reduce the cost of installation of software.

Activity of crushing coal before supply not 'manufacture' absent new product therefrom

Last month, AAR in Dhunseri Petrochem Ltd. vs. Commissioner of Central Excise, Kolkata, had noted the definition of 'manufacture' u/s 2(f) of the Act and observed that the activity of crushing coal would not be covered therein. All that the applicants were doing was crushing the coal of different sizes. However, even after crushing the coal, it would not lose its character nor would it be a new product. Therefore, AAR opined that the activity could not be covered as a 'manufacturing activity' nor the crushed coal could be manufactured product. AAR further observed that the Revenue also did not seriously claim that this would be covered under the Act. As regards the contention that process of crushing coal would amount to 'service', AAR stated that it was a different issue which did not fall for consideration here.

Comments: AAR has rightly clarified that for an activity to be called 'manufacturing activity' a new and distinguished product must come up, if not then it would be mere servce.

VAT

Allows notional ITC on second-hand vehicles purchased. VAT discharge on first-sale mandatory

Recently, Andhra Pradesh and Telangana HC in Prathul Automobiles Pvt Ltd. & Anr. vs. The Asst. Commissioner of Commercial Tax, Hyderabad, ruled that dealer would be entitled to adjust notional Input Tax Credit (ITC) claimed on purchased price of second-hand motor vehicles, when ultimately sold to his customers. HC, further stated that while the notional ITC, which could be claimed by the dealer under Rule 20(3)(a) of the Rules, was only on the purchased price actually paid by him to his vendor, the dealer must also submit documentary evidence to show that the said vehicle had been subjected to levy of VAT under the Act. HC stated that new vehicles, registered outside the State of Telangana under the Motor Vehicles Act, 1988 at the time of their first sale by an automobile dealer, do not fall within the ambit of Rule 20(3)(a) of the Rules. It is only because new vehicles, registered within the State of Telangana, are subject to VAT when they are sold within the State, have the dealers of used/second-hand cars been extended the benefit of notional ITC. HC stated that the used/second hand car dealers could not avoid the obligation of producing documentary evidence to show that the subject vehicle had suffered VAT under the Act nor is it sufficient compliance of the Rule if they were to merely submit documentary evidence of the purchased price paid to their immediate vendor from whom they had purchased the used/second-hand cars.

HC, thus, stated that the submission of assessee that only documentary proof of the purchased price actually paid by the dealer of the used/second-hand car is required to be produced, and not of the vehicle having earlier been subject to VAT under the Act, did not merit acceptance as that would require Rule 20(3)(a) to be so construed as to extend the benefit to a dealer even in cases where VAT had not been paid on the vehicle under the Act. According to HC, such construction would result in travelling even beyond what the Act provides.
Hence, if the words "already registered in the State under the Motor Vehicles Act, 1988" in Rule 20(3)(a) were construed to include vehicles initially registered in another State and thereafter, on they being brought within the State of Telangana, were again registered within the State, then that would render Rule 20(3)(a) ultra vires the provisions of the Act. HC stated that Rule 20(3)(a) of the Rules must be construed harmoniously with the provision of the VAT Act and the object for which the Act was made.
In view thereof, HC concluded that while the eligibility to claim ITC is no doubt notional, the said benefit is available only on VAT dealer producing documentary evidence not only regarding the purchased price actually paid by him, but must also establish that the used/second-hand vehicle so purchased, was subjected to VAT at the time of its initial registration within the State of Telangana. Accordingly, HC set aside the assessment order to the limited extent assessee was denied notional ITC on purchased of used/second-hand vehicles for failure to produce tax invoice. It directed Revenue to afford assessee an opportunity of a personal hearing to produce documentary evidence and thereafter, pass orders afresh in accordance with law. It clarified that the assessment order would remain valid in all other aspects.

Comments: This is very important decision and now purchaser can take credit on the purchase of second-hand vehicles, if the seller has already paid the VAT at the time of purchase. Thus, it would make encourage proper accounting of the details at the time of purchase of new vehicles and made them more attracted.

Anti-dumping duty on imports includible in finished goods' sale price upon SEZ-DTA clearance

Madras HC in Flextronics Technologies (India) Private Limited vs The State of Tamil Nadu, held that Anti-Dumping Duty (ADD) leviable on components imported by SEZ unit (assessee) from China would form part of 'sale price' of goods manufactured and sold to DTA purchaser, for the purpose of Tamil Nadu VAT Act & Central Sales Tax Act. Further, HC rejected assessee's contention that act of importation of manufactured goods into India happened after sale of goods at SEZ gate and since the purchaser, who was deemed to be the importer, paid ADD u/s 9A of Customs Tariff Act, same could not be included in sale price. Perusing the provisions of Section 30 of SEZ Act and Section 15 of Tamil Nadu SEZ Act, HC observed that chargeability of customs duty, including ADD / countervailing and safeguard duties, arises upon removal of goods from SEZ to DTA, i.e. upon 'import' into India. Stated, "It is the appellant who enjoys the exemption by virtue of the statutory scheme and it is the very same appellant who suffers the automatic withdrawal of exemption, the moment the goods are removed from the Special Economic Zone to the Domestic Tariff Area". HC, thus, observed that statutory liability for payment of ADD actually falls upon assessee but by virtue of contract, liability shifted upon the purchaser of manufactured goods. Holds, "The fact that the purchaser paid the same or the fact that the sale had taken place prior to the clearance of the goods, is of no consequence, since the point of first import was when the goods came to India from China.... Antidumping duty was leviable on the first incidence of import… but was not actually collected due to the protective cover given by the Special Economic Zones Act".

IMoreover, understanding the purpose of levy of ADD, HC observed that once such duty was actually levied, same becomes part of the sale price as otherwise the sale price of product imported into India would be different from sale price of product domestically manufactured. Further, rejected assessee's claim for refund of countervailing duty discharged on finished goods upon clearance from SEZ gate on similar grounds, but sets aside imposition of penalty at 150% u/s 27(3)(c) of TNVAT Act absent wilful duty evasion intention. Further, rejected assessee's attempt to distinguish SC judgments in McDowell, Mohan Breweries and Madras Rubber Factory, while on the other hand, held that neither Bombay HC ruling in Gujarat Export Corporation nor SC decision in Kiran Spinning Mills Ltd. nor Division Bench judgment in State Trading Corporation would apply to present case.

Comments: once again HC has segregated between the DTA and SEZ territory, and observed that goods emanating from SEZ would be considered the foreign manufactured.

CDMA service-provider's subsidy towards service charges not includible in handsets 'sale price'

Delhi HC in Communication World vs. Commissioner, Trade & Taxes and Anr., observed that the subsidy granted by Tata Teleservices Limited to CDMA handsets distributor (assessee) towards connections sold to customers, not includible in sale price of handsets as 'other valuable consideration'. Expression 'sale' in Sec 2(l)(zc) of DVAT Act is widely defined but did not include 'grant or subvention payment' made by one Govt. to another, notes HC. In present case, subsidy did not reduce the output tax liability of selling dealer from whom assessee. Further, HC noted that the expression 'sale' in Sec 2(l)(zc) of DVAT Act had been widely defined to mean "any transaction of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one government agency or department, whether of the Central Government or of any State Government, to another) and includes…" therefore, according to HC, the words in brackets point to the fact that a 'grant or subvention payment' made by one Govt. to another was not intended to be included in the sale price. Therefore, it was not considered part of the 'other valuable consideration' for which there could be transfer of property in goods from one person to another.

In this regard, HC noted plethora of cases including the decisions in Neyveli Lignite Corporation Limited vs. Commercial Tax Officer, Cuddalore [(2001) 124 STC 586a (SC), wherein, SC had held that the payment made by the Govt. to a manufacturer "could not be regarded as a discharge of any liability or obligation by the Government towards the purchade of the fertiliser." The amount given by Govt. under the administrative scheme of furnishing subsidy was not part of the sale price or consideration for the sale of fertilizers by the manufacturer and did not form part of the 'turnover' for the purposes of the Tamil Nadu General Sales Tax Act.

Furthermore, in case of Tisco General Office Recreation Club, SC had held that "the lump sum subsidies made ex gratia could not be regarded as valuable consideration in respect of the sale or supply of goods and were not part of the sale price and consequently did not form part of the gross turnover of the Appellant for the purposes of sales tax under the Bihar Finance Act, 1981." Thus, HC observed that in present case, the grant of subsidy by TTL to assessee did not go to reduce the output tax liability of the seller, i.e. Drive India. The subsidy was for the purpose of generating revenue from call charges etc. paid by the consumer. It was not towards sale of handsets. It, therefore, did not affect the sale price of handsets. In light of the law explained in aforesaid decisions, HC held that the subsidy offered by TTL could not be included in sale price for the purposes of VAT.

Therefore, HC upheld the order of OHA sustaining the objections filed by assessee against the notices of default assessments of tax and penalty

for Might & July 2007, and August 2008. Further, HC held that assessee was right in contending that notice u/s 74A(1) was unsustainable in law. Therefore, HC observed that the notice merely reproduced the words of said provision without indicating the specific grounds on which Commissioner proposed to revise the OHA order. In this regard, HC referred to decisions in Commissioner of C. Ex, Bangalore vs. Brindavan Beverages (P) Limited [2007 (213) ELT 487 (SC)] and Amrit Foods vs. Commissioner of Central Excise, U.P. [2005 (190) ELT 433 (SC)]. Accordingly, HC allowed the writ petitions by upholding OHA order, handing over the deposit of Rs. 1.24 Cr (approx.) to assessee and by quashing the notice issued u/s 74A(2).

Comments: It is an important and good decision. The domain of both the Service and goods are separate and distinguishable and encroaching upon it is a bad practice and must be discouraged.

Customs

CBEC dispenses with mandatory warehousing for EOU / STP / EHTP units w.e.f August 13th

Circular No 35/2016-Cus and Notification No. 44/2016-Cus dated July 29, 2016.

Recently, CBEC dispenses with mandatory warehousing requirements for Export Oriented Units (EOUs), Electronics Hardware Technology Park Units (EHTPs), Software Technology Park Units (STPIs) and Biotechnology Park Units in line with Government's objective of 'ease of doing business'. Stated that warehouses are facilities set up to avail benefit of customs duty deferment but in case of these units, such need is obviated in view of exemption available under Notification No. 52/2003-Cus and hence, application of warehousing provisions adds to their compliance requirements without adding to either improved monitoring by Dept. or providing any additional facilitation to them. Issued Notification No. 44/2016-Cus amending Notification No. 52/2003-Cus and resultantly, these units would stand De-licensed as warehouses under Customs Act and there would be no requirement of maintaining warehoused goods register w.e.f August 13, 2016. However, in order to maintain records of receipts, storage, processing and removal of goods imported by the units in terms of Notification No. 52/2003-Cus, CBEC prescribes maintenance of records in digital format with audit trail feature. Also dispenses with system of sending re-warehousing certificates to Customs Station of import and in place of bond to bond movement for inter-unit transfer of capital goods and manufactured goods, CBEC prescribes procurement certificate / pre-authenticated procurement certificates along with usual commercial documents such as invoice & delivery challan.

Comments: it is a welcome decision and would definitely add to ease of doing businesses.

FM introduces Taxations Laws Amendment Bill. Proposes 40% tariff rates for marble & granite

Taxation Laws (Amendment) Bill 2016 Dated August 10 2016

Lok Sabha introduces The Taxation Laws (Amendment) Bill 2016 to amend inter alia the First Schedule of Customs Tariff Act. Accordingly, proposes to increase tariff rate of customs duty from 10% to WTO bound rate of 40% on all goods falling under specified tariff items under Chapters 25 & 68 including rough marble, travertine blocks / slabs and granite blocks / slabs. As per statement of objects & reasons, proposed amendment would enable Govt. to fix appropriate effective rate of customs duty on such goods

Comments: it is done in pursuance of the WTO commitment, but, it is very harsh on the marble industry and on the common man, who wants to construct new house.

CBEC rescinds Provisional Assessment Regulations. Issued guidelines for 'security / bonds' deposit u/s 18

Circular No. 38/2016-Cus and Notification 113/2016-Cus (NT) both dated August 22, 2016

In CBEC issued guidelines for provisional assessment u/s 18 of Customs Act, while rescinding The Customs (Provisional Duty Assessment) Regulations, 2011 vide Notification No. 113/2016–Cus (NT). Stated that whenever duty is to be assessed provisionally, the importer would (i) for the purpose of undertaking to pay on demand the deficiency, if any, between the duty finally assessed and duty provisionally assessed, execute a bond in the prescribed form, and (ii) also furnish security. Such security would be in the form of bank guarantee or cash deposit, as convenient to the importer. In this regard, CBEC lays down the amount / percentage of security to be obtained based on class of importer, while reiterating that amount of security would be determined on the basis of differential duty and not CIF value of goods. Further clarified that provisional assessments u/s 18 are to be carried out with respect to cases where duty is in dispute, cases relating to execution of bond or undertaking specified as a condition to Notification or those requiring compliance of conditions under allied Acts are not to be provisionally assessed.

Comments: it is a procedural clarification and is significant one, as now security deposit and execution of bond are to be done.

Grants CVD refund on imported mobile-phones. Reminds Revenue of 'binding' Court decisions

Delhi HC in Yu Televentures Pvt Ltd vs. Union of India & Ors., granted the refund of excess countervailing duty (CVD) paid by assessee on import of mobile phones, in terms of Sec 27 of Customs Act r/w Notification No. 12/2012-CE. Further, HC opined, the mere fact that Dept. was contemplating or in fact filed a review petition or an appeal against HC / SC order that was 'unacceptable' to the Dept. could not be valid justification for not complying with or implementing the order. Unless the operation of the orders was stayed in subsequent proceedings by a Court of competent jurisdiction, the binding effect of said orders on the Dept. would continue. In this regard, HC referred to SC decision in Union of India vs. Kamlakshi Finance Corporation Ltd. [1991 (55) ELT 433 (SC)], and Gujarat HC ruling in E.I. Dupont India Pvt. Ltd. vs. Union of India [2014 (305) ELT 282 (Guj.)].

Moreover, HC noted that Revenue had been unable to defend the impugned order which was clearly passed in defiance of the binding decisions of SC and HC. HC found that the review petition in case of SRF Ltd stood dismissed by SC, while in case of Micromax Informatics Ltd., no order in SLP staying the order had been produced. Therefore, there was absolutely no justification for Revenue to reject assessee's refund claim, held HC.

Accordingly, it set aside the rejection order finding no reason why Revenue should be permitted to deny the refund as all relevant documents were on record. It directed Revenue to pay the refund together with interest and cost of Rs. 10,000/- and further directed Commissioner of Customs to call for an explanation from concerned officer and to take further action as appropriate in accordance with law.

Comments: this is a reminder for the department that they operate within the corridor of law and they must abide by law of the land and must not misuse the power / authority.

FTP

State/Central taxes paid not eligible for SFIS/SEIS incentives, clarified DGFT

Trade Notice No. 11/2015-20, dated July 21, 2016

In Previous month, DGFT issued clarification for calculating the 'foreign exchange earnings' for duty credit entitlement under Served From India Scheme (SFIS) / Service Exports from India Scheme (SEIS). Clarified that State / Central taxes collected on charges such as accommodation, services, food etc from the customers needs to be deducted while calculating the foreign earnings based on which SFIS / SEIS incentives are determined. DGFT stated that such taxes are paid by the customers to Government through the service provider. Directs authorities to strictly comply and calculate the entitlement only on the basis of receipt of foreign exchange earned by exporters:

Comments: It is done in consonance with practices in other countries.

Commerce Ministry notifies Special Advance Authorisation Scheme for Apparels / Clothing Articles w.e.f. September 1st

Notification No. 21/2015-2020 dated August 11, 2016

Ministry of Commerce notifies Special Advance Authorization Scheme for export of Articles of Apparel and Clothing Accessories of Chapters 61 & 62 of ITC(HS) Classification, w.e.f. September 1, 2016. Exporters would be entitled to an authorization for fabrics including inter lining on pre-import basis, as well as All Industry Rate of Duty Drawback for non-fabric inputs on exports. Authorization and fabric imported, would be subject to actual user condition and would be non-transferable even after completion of export obligation. However, imported fabric might be transferred for job-work excluding to units located in areas eligible for area based exemption, while invalidation of authorization would not be permitted. Only physical exports would fulfill export obligation.

Comments: It has been done to improve the export and better management of various incentivised schemes. Although, it would discourage new and small entrants in the cloths exporting Industry.

Disallows Terminal Excise Duty refund on intermediate goods. DTA - EOU supplies exempt ab-initio

Recently, Bombay HC in Sandoz Pvt. Ltd. & Anr. vs. Union of India & Others, upheld rejection of Terminal Excise Duty (TED) refund claims filed by EOU-assessee against supplies of intermediate goods from sister DTA unit.

Perusing the provisions of Foreign Trade (Development & Regulations) Act, HC observed that it is the prerogative of the Central Govt. to formulate and announce the FTP and it might also, in like manner, amend that Policy. The proviso to Section 5 clarified that the Central Govt. might direct that, in respect of SEZs, the FTP would apply to the goods, services and technology with such exceptions, modifications and adaptations, as might be specified by Notification in the Official Gazette. HC observed that the Director General and others are responsible for carrying out the Policy. the DG can interpret the Policy or any such stipulations in the nature thereof, during the course of its implementation.

HC also noted the provisions of Chapters VI and VIII of FTP 2009-14. As per Para 6.2(b), an EOU might import and/or procure from DTA or bonded warehouse in DTA / international exhibition held in India without payment of duty, all types of goods including capital goods required for its activities, provided they are not prohibited items of import in the ITC (HS). In terms of Para 6.11(a), supplies from DTA to EOU would be regarded as deemed exports and DTA supplier would be eligible for relevant entitlements under Chapter 8 (deemed exports), besides discharge of export obligation, if any, on the supplier. Notwithstanding the above, the EOU / EHTP / STP / BTP units can, on production of disclaimer certificate from DTA supplier, obtain entitlements specified in Chapter 8. Deemed export duty drawback is also referred to in this Para / clause, noted HC.

It further noted Para 8.3 of FTP, which deals with benefits for deemed exports. HC observed that Para 8.3(c) grants exemption from TED where supplies are made against ICB. In other cases, refund of TED would be given. Exemption from TED is also available for supplies made by an advance authorisation holder to a manufacturer holding another advance authorisation if such manufacturer, in turn, supplies the product(s) to an ultimate exporter. Para 8.4.2 stated that the supplier would be entitled to benefits of Para 8.3(a), (b) and (c) whichever is applicable in respect of supply of goods to EOU. Para 8.5 deals with eligibility for refund of TED / drawback.

Further, HC noted that Circular dated March 15 / April 18, 2013 laid down the amendment to Para 8.3(c) which said that refund of TED would be given if exemption is not available. Exemption from TED is available to various categories of supplies, such as supplies of goods by DTA unit to EOU and therefore, such categories of supplies which are exempt ab initio would not be eligible to receive refund.

HC thus remarked that whether this was a merely clarificatory provision or it purported to amend and substantively Para 8.3 and therefore, it would not govern the period during which the refund was claimed by assessee, was the essential controversy.

HC further noted the Delhi HC judgment in Kandoi Metal Powders Mfg. Co. Pvt. Ltd. vs. Union of India [TS-34-HC-2014(DEL)-FTP] which was heavily relied on by assessee. HC noted that in that case, the refund claims had not been processed and thus, the petitioners therein were directed to approach the DGFT for appropriate relief or clarification. It did not deal with the contentions put forth in the present case. Hence, HC proceeded to deal with the issue independent of Delhi HC verdict.

HC was of the view that once the export and import of goods and particularly by EOU is dealt with by Para 6.2, then it was to be determined whether DGFT was right in relying upon the Policy Circular by terming it as merely clarificatory. According to HC, the refunds had been rightly rejected since Para 6.2(b) and 6.11(c)(ii) of FTP state that no refund of TED should be provided by regional authorities of DGFT or the office of DC because such supplies are ab-initio exempted from excise duty. The harmonious reading of FTP and particularly said Paras enabled DGFT to arrive at the conclusion that refund was not admissible.

HC observed, “Once there was a clear stipulation in the policy itself, then, all that the circular did is to clarify this obvious position. If there was no obligation to pay duty, then, there is no question of claiming a refund in the manner done. If that is what had been held and appears to be essential finding, then, that is not in any manner contrary to the mandate of the provisions and particularly of section 5 of the FTDR Act.”

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SEZ

Commerce Ministry modifies SEZ law. Mandates RCMC, introduces 'Audit' & notifies offences

Notification Nos. GSR. 771(E), 772(E), dated August 5, 2016

Recently, Ministry of Commerce amends SEZ Rules 2006 thereby mandating obtainment of 'Registration-cum-Membership Certificate' from the Export Promotion Council for Export Oriented Units and SEZs by unit or developer / co-developer to avail exemptions, drawbacks and concessions under Rule 22. Further amends Rule 47 to empower Customs & Central Excise Authorities to deal with refund, demand, adjudication, review and appeal with regard to matters relating to authorized operations under SEZ Act, transactions, and goods & services related thereto. Also introduces 'audit' provision under Rule 79 whereby all authorized operations and transactions relating thereto would be audited by Customs officers from a panel drawn by jurisdictional Development Commissioner in consultation with jurisdictional Chief Commissioner of Customs & Central Excise. Ministry of Commerce notifies offences under Sections 28, 28AA & 28AAA, 74 & 75, 111, 113, 115, 124, 135 and 104 of Customs Act, Sections 9, 9AA, 11, 11A & 11AA of Central Excise Act and Sections 73, 73A, 73B & 75, 76, 89 and 91 of Finance Act as offences under SEZ Act. Authorizes Addl. Director General, DRI for offences under Customs Act, and Addl. Director General, DGCEI for offences under Central Excise Act and Finance Act to be enforcement officer(s) in respect of notified offence(s) committed in SEZ, while jurisdictional Commissioners of Customs & Central Excise can carry out investigation, inspection, search or seizure in SEZ with prior intimation to Development.

Comments: Mandating Registration-Member Certificate from Export Promotion Council for EOUs / SEZs by unit is a good move by Ministry of Commerce.

Commerce Dept. prescribes guidelines for 'work from home' by employees of IT/ITeS SEZ units

SEZ Instruction No. 85 dated August 2, 2016

Dept. of Commerce lays down guidelines towards work from home by employees of IT/ITeS units in SEZ as well as units registered as Other Service Providers (OSPs) with Dept. of Telecommunications (DoT). Accordingly, stated that person should be regular employee of SEZ unit and should be authorized to undertake work pertaining to that unit. Work performed should be as per services approved for SEZ unit and must be attributable to project of SEZ unit. Export revenue of resultant products / services should be accounted by SEZ unit to which the employee is tagged and at no point should work from home involve export from outside SEZ unit. In addition, SEZ units registered as OSPs and availing benefit of Work from Home would strictly adhere to OSP Guidelines issued by DoT.

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