Indirect Tax News Update

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Service Tax

Service tax not applicable only to services rendered to pre–school/ high school

Notification No. 10/2017-ST dated March 8, 2017

Finance ministry amended Notification 25/2012-ST w.e.f April 1, 2017. As per the notification Service tax is exempted on services to educational institution such as transportation of students, catering, security, housekeeping services, services relating to admission or conduct of examination, applicable only to pre-school educational institutions and higher secondary schools or equivalent institutions.

Comments: The educational institutions such as colleges would be affected by this .

Service tax not leviable on turnkey contract undertaken for DMRC

Recently Siemens Ltd vs Commissioner of Service Tax, Mumbai CESTAT allowed assessee's appeal and held that service tax is not leviable on turnkey contract awarded for completing project of Delhi Metro Rail Corporation Ltd. (DMRC). In this regard assessee contended that since contract is a turnkey contract, it cannot be vivisected and therefore, claimed refund of service tax paid inadvertently.

Further, CESTAT referred to ruling in Afcons Infrastructure Ltd. where in respect of identical contract awarded by DMRC, service tax levy was set aside, in view of specific exclusion to 'Railways' from scope of 'commercial and industrial construction service', stating that there is no distinction between a monorail or metro rail or any kind of rail. In this regard, CESTAT Stated that, since issue involved in said case was in respect of very same DMRC, though a construction company for civil contract, contract in present case, as well, cannot be vivisected .

CESTAT also accepted assessee's contention that issue is now squarely settled in Larsen & Toubro Ltd., wherein SC has specifically laid down that, in works contract, there cannot be, vivisection and calculation of tax under various categories of services.

Comment: CESTAT rightly held that service component cannot be divided from the works contract and service tx cannot be levied separately.

Spot billing of electricity meters for MSEDCL taxable is a "Business Auxiliary Service"

CESTAT recently in the case of S. S. Electricals vs. CCE Kolhapur held that activity of spot-billing of electricity meters for Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) is taxable as "business auxiliary service" under clause (vii) of Section 65(19) of Finance Act being service incidental / auxiliary to activity of sale of goods produced / provided by / belonging to client.

Further, CESTAT also Rejected assessee's contention that since entire data is captured in a CD after going to the customers' place for meter reading and thereafter handed over to MSEDCL, it will qualify as "information technology service". CESTAT stated that the main purpose of such activity is to generate bills and it is only incidental that electronic programmable devices are used for this purpose, thus the use of these devices cannot change the nature of services.

CESTAT also rejected assessee's claim of benefit under Notification 12/2003-ST and/or exclusion of cost of material used during the provision of service, stated that for the purpose of such claim, assessee is required to produce evidence of sale of material to clients during rendition of service and simply by consuming the material, assessee does not become eligible to benefit of Notification No. 12/2003-ST.

Moreover, CESTAT found no merit in assessee contention that since it has acted as pure agent, it is entitled to abatement of value of the goods and material consumed in terms of Rule 5(2) of the Service Tax (Determination of Value of Taxable Services) Rules, 2006, stated that the assessee is the service provider to MSDECL and service tax is payable on the value recovered by assessee from the service receiver and not entitled for any deduction.

Comment: CESTAT holds even though the material used for such service is of the nature of IT services, the main purpose of such activity is to generate which is incidental to business of providing electricity.

Taxing lottery promotion & marketing not unconstitutional, levy not possible due to absent computation mechanism

HC in case of Future Gaming & Hotel Services (P) Ltd. vs. Union of India held that service tax on promotion, marketing, organising, selling of lottery or facilitation in organising lottery of any kind undertaken by a lottery distributor or selling agent, however, same cannot be enforced due to absence of proper computation mechanism.

Further, HC Noted that earlier Division Bench judgment striking down Section 65(105)(zzzzn) of Finance Act, 1994 and further observes that similar challenge was accepted under negative list regime, as well as pursuant to amendment made by Finance Act, 2015.

HC while stating that instant case pertains to amendments made by Finance Act, 2016, remarked that, on gleaning through various amendments made from 2010 onwards, it is evident that service tax was intended on promotion, marketing, organizing, selling of lottery or facilitating in organizing lottery of any kind, in any other manner and by impugned amendment, a cosmetic change has been made in Amendment Act, 2010 which is not substantial and intention remains same in pith and substance.

HC stated that, while previous Division Benches have come to conclusion that no service tax is leviable on lottery, present case pertains to service tax on related activities in distribution and sale of lottery tickets. Further,referring to various SC rulings such as Delhi Cloth & General Mills Co. Ltd., T. N. Kalyana Mandapam Assn. and All India Federation of Tax Practitioners, HC stated that Parliament is competent to impose service tax for services rendered for consideration by a person.

In this regard, HC observed, "Taxation is a distinct matter for the purpose of legislative competence and it must flow from the specific entry provided for levy and imposition of taxes". Therefore, held that Parliament is conferred with power and competence to impose service tax on other related activities under Entry 97, and resultantly, amendment brought in by Finance Act, 2016 is not unconstitutional.

However, accepting assessee's contention that, there is no payment of consideration for incidental activities, HC held that when consideration is unascertainable for services rendered by distributor or selling agent,service tax is not imposable, relied on SC ratio in National Mineral Development Corporation Ltd.Martin Lottery Agencies and own decisions in Future Gaming Solutions Pvt. Ltd.. Accordingly, allowed assessee's writ partly, holding that amendments carried out by Finance Act, 2016 are not capable of being implemented for imposition and levy of service tax, and quashes Notification No. 18/2016-ST and Circular dated February 29, 2016.

Comment: HC held even though it is not unconstitutional to impose service tax on other related activities under entry 97, since

Central Excise

Master Circular on Show cause Notice , Adjudication and Recovery

CBEC issued Master Circular on Show Cause Notice, Adjudication and Recovery, rescinding 89 Circulars on the subject and is divided into 4 parts wherein Part I deals with Show Cause Notice related issues, Part II deals with issues related to Adjudication proceedings, Part III deals with closure of proceedings and recovery of duty, while Part IV deals with miscellaneous issues such as service of decisions, orders, summons, de novo adjudication, and refund of pre-deposit.

Master Circular inter alia lays down structure of show cause notice, – (a) introduction of the case, (b) legal frame work, (c) factual statement & appreciation of evidences, (d) discussion, facts and legal framework, (e) discussion on limitation, (f) calculation of duty and other amounts due, (g) statement of charges, and (h) authority to adjudicate, and reiterates that once the amount is paid, no coercive action shall be taken for recovery of balance amount during pendency of appeal proceedings before appellate authorities.

Clarified that notices for recovery of interest alone should be adjudicated based on monetary limit fixed for duty amount involved and not on basis of interest amount. Further states that adjudicating order must be a speaking order, generally contain brief facts of case, written and oral submissions by the party, observation of Adjudicating Authority on evidences on record and facts of omission and commission during personal hearing and finally the operating order. Refund of pre-deposit shall not be subjected to process u/s 11B of Central Excise Act, hence, refund with interest shall be paid to appellant within 15 days of application thereto, irrespective of whether appellate order is proposed to be challenged by Dept. or not.

Comment: As we could see there have been many discrepancies regarding such procedure, this clarification comes as welcome change.

SSI exemption cannot be denied for mere use of third party brand name

CESTAT in case of Poonam Perfect and others v. Commissioner of Central Excise, Mumbai-IV held that exemption accorded to small scale industries under Notification No. 8/2001-CE cannot be denied because brand name used by assessee is registered with another person.

Further referring to SC decision in Bhalla Enterprises, CESTAT observed that such denial would constrain the exemption Notification and would be perilous for any small unit to use a brand unless registered in own name, and “A small unit that balances on the edge of

Further. CESTAT was of the opinion that logic adopted by Revenue would handicap any small scale unit with adverse presumption of ineligibility to exemption unless it has registered the brand itself, and that exception accorded in Notification to certain branded goods has a different objective, no uniform rule can be prolonged for admitting / denying the benefit.

HC remarked that, it is impossible for Govt. to devise sentences that would describe precisely what is enabled and what is disincentivized by exclusion, the intent to take advantage of recognition enjoyed by another brand is critical for invoking the exception provision and such intent has not been established by Revenue. Accordingly, holds that in the absence of any attempt to even portray any advantage that assessee derives from using particular brands, same cannot be considered to have intended to communicate a connection in course of trade with person who purportedly owns the brand name.

Comment: HC held that since there was intention to take advantage from using such third party brand, the exemption cannot be denied.

Credit cannot be denied without notice/order, also suo moto restoration credit not erroneous

CESTAT in case of Jayaswals Neco Ltd vs. Commissioner of Central Excise, Nagpur held that mere observations in assessment of returns without challenge to MODVAT credit entitlement, insufficient to debar assessee from availing credit, however, suo moto re-credit of reversed entry amounts to breach of proper procedure. CESTAT accepts assessee’s contention that credit cannot be disallowed absent notice or formal order denying its claim as ‘capital goods’, while relying on SC ruling in Kosan Metal Products Ltd..

But opined that, “an erroneous process adopted by assessing officer will not endow the assessee with the liberty to right any wrong” and same should have been subjected to rectification through procedure established by law, which obligation devolves on the assessee. Held, since assessee patently failed in this, such lacunae in procedure cannot obtain seal of approval in these proceedings and hence, restoration of credit is not in order.

Further noting that Larger Bench ruling in BDH Industries, CESTAT finds no justification in imposition of penalty, states that such constitution of Larger Bench to determine procedure for restoration of reversed credit amply illustrates lack of clarity and absence of clear provisions in Central Excise laws.

Comment: The assessee should be allowed to challenge and present his case .

Cutting , drilling, bending of aluminum bought from market not manufacture

CESTAT in case of R.D. Plast and others v. CCE, Delhi I allowed assessee's appeal, observed that mere process of cutting, drilling and bending aluminium channels, brought from market would not amount to 'manufacture', and remands the matter. Further, CESTAT rejected Revenue's findings that aluminium sections so prepared for use in structures are not same goods as aluminium sections brought in from market and process undertaken by assessee resulted in bringing in a new and different article having distinct, name, character or use. Stating that lower authority did not appreciate factual and legal issue involved and it is unclear as to how an aluminium section cut to size and drilled/bent wherever required will become a distinct marketable product from the input, CESTAT observed that, it is necessary to have clear recording on facts as to what type of new identifiable product emerges from aluminium sections brought in by assessee.

Relied on CESTAT LB ruling in Mahindra & Mahindra misplaced, as in said case, CESTAT was examining dutiability of various structural items before they are used in construction process, while in present case there is no clear finding regarding type of structure.

Comment: Based on the facts and process undertaken CESTAT observed that the process undertaken doesn't result in a new product.

Consolidated refund claim to EOU, upto 1 year from filing allowed

CESTAT in case STI Phoenix Wear Pvt. Ltd. Vs. Commissioner of Central Excise, Indore allowed consolidated refund claim to 100% EOU assessee for period falling within one year from date of filing refund claim, in terms Notification No. 5/2006 r/w 11B. Rejected assessee's contention that refund claims can be filed without any time limit as refund is to be filed in accordance with procedure laid down in said Notification which is a self contained code and that, no relevant date has been given u/s 11B to cover present case. CESTAT Stated that clause 2 of Notification specifies that, refund claims are to be submitted not more than once per quarter, further, in respect of EOUs such claims are to be filed for each calendar month, remarks, this cannot be interpreted to mean that any claim not filed on monthly basis shall stand rejected; As regards to the issue of time bar, refers to ratio in GTN Engineering (I) Ltd., wherein HC has observed that, wherein mention of specific date prescribed is absent , relevant date must be the date on which final products are cleared for export. Accordingly, allows refund claim for period falling within time period of one year from date of filing refund claim and holds, balance claim pertaining to prior period as hit by time bar, remands matter to adjudicating authority

Comment: The appeal was partly allowed.

VAT

ITC cannot be recovered upon purchasing & selling dealers' data mismatch

HC in JKC Gpraphics solution private limited case held that Input Tax Credit not reversible by purchasing dealer under TNVAT Act where there is a mismatch of returns filed by such dealer with that of selling dealer.

In this regard, HC noted that since statute is silent on procedure to be adopted while matching the transactions, Circular No. 10 of 2015 has been issued stipulating guidelines. According to the HC, procedure adopted by the Assessing Officers in present case are half-baked attempts which have not yielded results, the show cause notices and orders reversing ITC have no appreciable impact on the revenue collection and thus, Principal Secretary and Commissioner of Commercial Taxes in consultation with his officers should lay out a detailed procedure as to how to take forward cases of mismatch.

Assessing Officer is bound to act honestly without giving room for any arbitrariness and must exercise judgment in the matter, stated HC while directing a thorough enquiry with due opportunity to the dealers at both ends. HC Stated that change of opinion / change of officer is no ground to reopen an assessment and the reasons therefor should not only be explicitly recorded, but should be duly supported with adequate information

Comment: HC observed that statute is silent on the procedure to be followed in such cases and also directed Commissioner of Commercial Taxes in consultation with his officers to lay out a detailed procedure as to how to take forward cases of mismatch.

HC disallows post-sale discount deduction

HC in case of Vettathil Agencies disallows deduction of discount received from supplier under various schemes, by way of credit notes subsequent to sale of goods.

Further HC rejected assessee-dealer's contention that such discount on sale price is a normal practice, and same is excluded from definition of "sale price" / "purchase price", as also forbidden u/s 11(3) of Kerala VAT Act.

Observed that Finance Act 2008 amending 5th proviso to Section 11(3) did not change the situation to pay tax but only clarified that amount covered under credit note issued by supplier that does not affect input tax credit already availed and the shall not be reckoned for assessment purpose.

Therefore, HC stated that same cannot be extended to assessment of turnover for payment of tax while accepting Revenue's reliance on HC rulings in Cement House and Syed Muhammed to contend that assessee sold goods at price lower than purchase price attracting Explanation VII to Section 2(lii). Accordingly, relegated assessee to appellate remedy stating that time during which writ petition was pending would be excluded for preferring appeal.

Comment: The credit notes have always been includible in the taxable value.

Watches with precious stones/metal/diamonds are jewellery

HC in case of Titan Industries Ltd has concurred with VAT Tribunal, classified Titan's 'Nebula' watch with precious stones / metals / diamonds as "Jewellery" taxable at 1% under Entry 13(ii) of Schedule-II to the Gujarat VAT Act, instead of 12.5% under residuary Entry 87 of Schedule-II + 2.5% additional tax.

Further HC Noted that said watch is made of 18 Karat gold where value of gold & precious stones remains 90% to 95% vis-à-vis 2% to 5% of watch, and same is sold by and large at jewellery stores instead of ordinary watch stores. HC also Stated that though the 'jewellery watch' is not defined under the Act, "Articles or Jewellery made of gold or silver or both or of other precious metals" are covered under Entry 13(ii) of Schedule II.

Referring to the meaning of 'Jewel / Jewellery' under Law Lexicon Dictionary, HC remarked that mainly because Nebula watch carries the mechanism of a watch, it will not lose the characteristic of jewellery.

Stated that the word "Article or Jewellery" used in Entry 13(ii) of Schedule II is required to be given the widest meaning and is not required to be read in a narrow or restricted sense, while relying on SC decision in Ele-IHOTEL and Investments Ltd. ruling .

Comment: HC held even though the product has mechanism of a watch , since it contains gold and other precious stones which most of the part of the watch. It should termed as jewellery.

Customs

'Related-party' imports assessable on MRP, but on greatest aggregate sale-price to institutional buyer

CESTAT in case of Encyclopaedia Britannica India Pvt Ltd rejected valuation adopted by Deputy Commissioner, Special Valuation Branch by way of backward calculation of related party imports, viz. making deductions from the 'retail sale price' (RSP / MRP) of CVDs / DVDs so imported.

Noting assessee's contention that said MRP pertains to negligible retail sales made to individual buyers whereas institutional sales are made at substantially reduced price, CESTAT held that valuation mechanism adopted by Revenue is strictly not in accordance with Rule 7 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Perusing provisions of Rule 7(1) and Interpretive Note thereto which stipulates that valuation can be based on unit price at which imported goods are sold in greatest aggregate quantity to unrelated persons in India, CESTAT remarked that in instant case, assessable value should be arrived at by considering unit price of goods sold to institutional buyers as these sales satisfy provisions of Rule 7. However, CESTAT stated hat royalty of 5% of net sales revenue has to be included in assessable value since underlying agreement clearly provides for payment of said royalty on Net Sales Revenue of all products. Further, CESTAT refused to comment on royalty paid for goods downloaded through link since downloads via internet were not subject matter of present proceedings, and accordingly remands matters for de novo consideration.

Comment: CESTAT has come such conclusion based on Rule 7 of Customs Valuation Rules.

Purchaser liable for 'demurrage' on goods imported before title acquisition

SC in case of Rasiklal Kantilal & Co has partly allowed assessee's appeal, set aside decision of Bombay Port declining the remission of demurrage charges claimed by assessee while directing appropriate decision on the application duly recording the reasons thereto. Remarked, the fact that assessee was not permitted to clear goods due to pendency of some proceedings initiated by Customs Authorities by itself does not create a right of remission in favour of the assesse, though it may constitute a relevant circumstance for considering granting remission if the Port so chooses as a matter of policy. However, stated that the authority of the Port to grant or decline remission of any amount due towards any rate payable under the Major Port Trusts Act must be based on rational consideration and a sound policy, also observes that Port could not bring anything on record nor any policy which demonstrated the reasons for declining remission.

Rejected assessee's argument that the amounts due towards various services in respect of imported goods until the title thereto was passed onto it ought to be collected from steamer agent, states that denying the right of Port to demand and recover the dues from consignee when he seeks delivery of goods under bailment would be illogical and inconsistent with the scheme of the Act. Stated that denying such a right on the ground that the person claiming delivery of the goods acquired title to the goods only towards the end of the period of bailment would result in driving the Port to recover the dues from the bailor / his agent, who may or may not be within the jurisdiction of the municipal courts of this country.

Comment: SC observed that assessee was not permitted to clear goods due to pendency of some proceedings initiated by Customs Authorities by itself does not create a right of remission in favour of the assesse, though it may constitute a relevant circumstance for considering granting remission if the Port so chooses as a matter of policy.

SAD refund cannot be denied due to packing list mismatch

CESTAT in case of Hanuman Timber Co granted refund of 4% SAD on timber logs sold after paying sales tax/VAT, absent dispute that entire quantity so imported had been sold subsequently.

CESTAT Found that Adjudication Authority did not disclose the basis for arriving at quantity ineligible for refund, it was simply stated that some logs did not tally with packing list without even mentioning as to whether such mismatch was with respect to variety, shape, dimension, color or any markings or numbering.

Also Found force in assessee's contention that all pieces of same logs may not be transported in one truck, pieces of convenient sizes of different logs may normally be transported as per space

available in the truck. Moreover, CESTAT stated that non-issuance of show cause notice deprived assessee the opportunity to defend its case in correct perspective, therefore, its contention that logs were cut to facilitate transportation, as put forward at appellate stage, is acceptable.

Relied on CESTAT ruling in Gayatri Timber Pvt. Ltd. which in turn relied upon Gujarat HC ruling in Variety Lumbers Pvt. Ltd.

Comment: CESTAT rightly observed that the mere fact that some logs did not tally with packing list , cannot be a ground to deny SAD refund.

'Rebate of State Levies' Scheme extended to export of 'made-up' articles from March 21st

CBEC Circular No. 8/2017-Cus dated March 20, 2017

CBEC extended the scheme of Rebate of State Levies (ROSL) to export of made-up articles covered under Chapter 63 of AIR Drawback Schedule, excluding tariff items 6308, 6309 and 6310 and goods in tariff item 9404 that are excluded from drawback tariff item 6304. Said scheme is applicable to exports with Let Export Orders dated from March 23, 2017, but not available to exports made under the general Advance Authorization Scheme with claim of duty drawback under Rule 6 of Drawback Rules. CBEC also clarified that the definition of 'export' in ROSL Scheme does not cover movement of goods from DTA to SEZ units and that claim cum declaration of eligibility has to be made by exporter on drawback exports at item-level.

Amount of rebate shall be calculated using FOB value exports and rates and caps of rebate specified in ROSL Scheme; All the guidelines for ROSL for garments as enumerated in CBEC Circular No. 43/2016-Cus and arrangements made by Directorate of Systems and Pr. CCA CBEC in respect of ROSL for garments shall apply mutatis mutandis to ROSL for made-ups.

Comment : This is a great initiative to encourage exports.

FTP

EO can be discharged in Indian Rupees under Advance Licence

HC in case of Bishwanath Industries Ltd allowed assessee's writ, quashed cancellation of advance license where Export Obligation (EO) discharged in Indian Rupees (INR), rejecting Revenue's plea that said license could be issued only for General Currency Area (i.e. USD).

Noted that Deputy Director General of Foreign Trade (DGFT), had already found that, assessee indicated FOB value both in Indian currency and USD, all relevant information was duly disclosed before issuance of license and not suppressed and assessee had sought for correction/ amendment in EO terms mandated in USD in license. Referring to Appendix XIII of Handbook of Procedures of EXIM Policy 1992-97, states that EXIM Policy itself makes ample provision for discharge of EO in non-convertible INR exports from India against liquidation of Rupee balance to credit of erstwhile rupee payment area (RPA) countries. Noting that agreement between assessee and importer, specified only Indian Rupee Value and not its US dollar equivalent, states, "If the Indian Rupee was the agreed currency of exports, and the exports were made accordingly then the DGFT cannot override or rewrite the terms of the agreement and impose another currency of trade on the parties". Consequently, held that, assessee is eligible to relief of amendment to advance licence showing EO to be in Indian Rupees instead of USD.

Comment: The decision was taken based on the facts of the case.

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