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Service Tax

New Service Tax rate not yet in force: CBEC clarification

The Directorate General of Service Tax, Mumbai, vide Circular No. 183/02/2015-ST dated April 10, 2015 has clarified that the new Service Tax rate shall come into effect from a date to be notified by the Central Government after the enactment of the Finance Bill, 2015.

It has been further clarified that the date will be notified in due course after the enactment.

Also, with regard to abatement on value of services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, having the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year, CBEC has clarified that valuation of services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess is determined as provided in rule 2C of the Service Tax (Determination of Value) Rules, 2006.

Comments: The clarification is important as there was a wide spread confusion with regards to the new Service Tax rate.

Cement, tower parts, structural steel, etc. used in construction of telecom towers qualify as 'input' while rendering services of letting those towers on hire to telecom service providers : Mumbai Tribunal

Mumbai Tribunal in the case of Reliance Infratel Ltd v CST allowed the appeal filed by assessee, and held that inputs used for erection of Telecom Towers cleared as goods from the supplier & covered under "Capital Goods" and defined under Rule 2(a)(A) (i) of Cenvat Credit Rules, 2004 were admissible as credit under Rule 2(k) (ii) for providing output service i.e., Business Support Service.

Placing heavy reliance on Himachal Pradesh HC's decision in Gujarat Ambuja Cement, CESTAT held that merely as tower parts etc. were assembled together, credit cannot be denied, thereby reiterating that the excise duty paid on parts of components were admissible even though the parts were assembled into goods which are immovable or exempted.

Further, Tribunal noted that in Bharti Airtel Ltd., the towers and parts were held to be immovable, and hence were not goods, neither were they considered as input goods for providing telecom service.

Distinguishing the case at hand from Bharti Airtel, Tribunal observed that in the present case, the question of nexus between tower parts and output service of telecommunication was not under consideration.

Also, Tribunal observed that the HC rejected the admissibility of CENVAT Credit on the ground that towers and parts thereof were fastened and fixed to the earth and, therefore covered by the definition of capital goods and inputs which presuppose the existence of goods.

Tribunal held that the facts in the present case were essentially different and in the present case the output service is Business Support Service and not Telecommunication Service.

Comments: The judgment by Mumbai Tribunal clarifies the position with regards to 'Passive Telecom Infrastructure' and Business Support Service.

CESTAT rules out taxability of postage expenditure reimbursed by "Share Transfer Agent & Registrar to an Issue" from client companies

Recently, the Mumbai CESTAT in Link Intime India Pvt Ltd vs. Commissioner of Central Excise ruled out taxability of postage expenditure reimbursed by "Share Transfer Agent & Registrar to an Issue" from client companies by emphasizing that as per Sec 2(f) of the Indian Post Office Act, 'postage' is in the nature of duty / tax and therefore, cannot be considered as consideration for rendering any service.

Further, CESTAT also observed that, *" Postage is an amount received by the postal department for transmission by post and cannot be considered as a consideration received by the person who is the sender of the postal article."*

Also, CESTAT held that that since Share Transfer Agent services rendered under Securities and Exchange Board of India (Registrar to a Issue and Share Transfer Agents) Rules, 1993 are taxable only w.e.f. May 2006, demand prior thereto were unsustainable, even if wrongly paid under 'Business Auxiliary Service' category.

Applying the ratio laid down in Intercontinental & Technocrats Pvt Ltd by apex court, CESTAT observed that since Rule 5(1) of Service Tax (Determination of Value) Rules were declared ultra vires.

Comments: This decision of Mumbai Tribunal as it concedes that tax is not leviable on reimbursement of aforesaid expenses.

Notification No. 4/2014-ST dated February 17, 2014 can only be applicable prospectively: Madras HC

In Life Cell International (P) Ltd. vs. UOI and others, HC dismissed writ to hold that Notification No. 4/2014-ST dated February 17, 2014, which inserted Entry No. 2A in mega exemption Notification No. 25/2012-ST and extended exemption to "Services provided by cord blood banks by way of preservation of stem cells", was not clarificatory in nature and therefore, cannot be applicable retrospectively from June 20, 2012.

HC also observed that Entry No. 2 in mega exemption Notification dated June 20, 2012 exempts healthcare services provided by clinical establishment, authorized medical practitioner or paramedics and that services provided by cord blood banks do not form part of "health care services"

HC observed that if the amendment introduced by Notification No.4/2014-ST, dated February, 17 2014, was declaratory or clarificatory in nature, it will have retrospective effect and if the amendment was remedial in nature, it can have only a prospective effect unless specifically expressed to the contrary.

Comments: This decision is of note to cord blood bank or others providing service in relation to such preservation.

Central Excise

No change of position on rebate of duty on goods cleared from DTA to SEZ post amendment to Rule 18 of Central Excise Rules and Rule 5 of CENVAT Credit Rules: CBEC Clarifies

CBEC has issued clarification on rebate of duty on goods cleared from DTA to SEZ post amendment to Rule 18 of Central Excise Rules and Rule 5 of CENVAT Credit Rules vide Notification Nos. 6/2015-CE(NT) and 8/2015-CE(NT) stating that said amendments do not change the current position, i.e. supply of goods to SEZ shall continue to be treated as 'exports', in terms of Sec. 51 & 53 of SEZ Act r/w Rule 30(1) of SEZ Rules

Perusing the provisions of SEZ Act, viz. Sec 2(m)(ii), Sec 26(1)(d), Sec 51(1) and Sec 53(1) r/w Rule 30(1) of SEZ Rules, CBEC has clarified such benefits would continue to be available on supply of goods to SEZ from DTAs. According to CBEC, the definition of 'export' as given in Rule 18, has only been made more explicit by incorporating the definition of export as given in the Customs Act.

Moreover, CBEC reiterated that position explained by DGEP vide Circular Nos. 29/2006-Cus dated December 27, 2006 and No. 6/2010 dated March 19, 2010 will not change after amendments made vide Notification Nos. 6/2015-CE (NT) and 8/2015-CE (NT).

Comments : The CBEC clarification rests the confusion relating to availability of rebate and accumulated CENVAT credit refund benefit on DTA to SEZ supplies.

Excise duty exigible on signages if item fixed in the earth can continue to be movable and excisable: Madras HC

In Virgo Industries (Engineers) Pvt. Ltd. vs. Commissioner of Central Excise, Chennai, HC upheld CESTAT's order and emphasized that excise duty exigible on signages erected at Indian Oil Corporation petrol stations.

Further, HC agreed with CESTAT and held that an item fixed in the earth can continue to be movable and excisable if same was capable of being shifted from one place to another without having to dismantle the same into constituent components.

Further, HC rejected assessee's reliance on CBEC Circular No. 58/1/02-CX dated January 15, 2002 which clarified that CKD and unassembled form of immovable final product would not be dutiable.

Also, HC distinguished case at hand from SC decision in Crafts Interiors Pvt. Ltd. that items ordinarily immovable or which cannot be removed without cannibalising are not excisable, since both Adjudicating Authority & CESTAT have specifically found that said signages are not immovable.

Comments: This decision is of note to all job workers working in manufacturing of signages for various petrol pumps, et al.

Sale of 10% of manufacturing capacity by assessee to its Holding Company does not attract proviso (iii) to Sec 4(1)(a) of Central Excise Act.

The SC, in Commissioner of Central Excise, Hyderabad vs. Detergents India Pvt Ltd & Anr.,dismissed Revenue appeals as devoid of merit, and held that sale of 10% of manufacturing capacity by assessee to its Holding Company did not attract proviso (iii) to Sec 4(1)(a) of Central Excise Act, as it stood prior to amendment in the year 2000.

Also, SC held that as price paid by Holding Co. to unrelated suppliers for sale of same / similar products lower than price paid to assessee, no "arrangement" was present between both entities to avoid / evade tax.

SC concluded that "*On a reading of the aforesaid judgment (Voltas), it becomes clear that the object of enacting Section 4 is that transactions at arm's length between manufacturer and wholesale purchaser which yield the price which is the sole consideration for the sale alone is contemplated."*

Comments: This judgment is of note to all companies, especially multinationals.

One year limitation period under Central Excise Act is inapplicable to rebate of export

In the case, The Deputy Commissioner of Central Excise, Chennai vs. Dorcas Market Makers Pvt. Ltd. & Anr., HC upheld Single Judge Bench order and held that one year limitation period prescribed u/s 11B of Central Excise Act was inapplicable to rebate of export duty under Rule 18 of Central Excise Rules.

Also, SC observed that even if one thinks that a rebate claim would have to be filed within one year from relevant date, by virtue of sub-section (1) r/w definition of "refund", which includes "rebate", under Explanation to sub-section (5), however, rebate is governed by Sec 12 and entitlement would arise only out of Notification issued u/s 12 (1); Notification No. 19/2004 governing rebate, does not contain any prescription regarding limitation, which is a conscious decision taken by Central Govt. with the advent of online application filing system.

Comments: This judgment is of note to every exporter.

CENVAT allowed on inputs indented by assessee, but used by different companies pursuant to strategic alliance agreement

In the case, Godrej & Boyce Mfg. Co. Ltd. vs. Commissioner of Central Excise, Karnataka HC allowed CENVAT credit on inputs indented by assessee, but used by different companies / units pursuant to strategic alliance agreement for production of steel through integrated steel plant.

HC rejected Revenue's contention that assessee ineligible to input credit w.r.t. portion of oxygen and nitrogen gas diverted and that such diversion is in violation of Central Excise Act.

Comments: the decision is important as it validates strategic alliance agreements.

VAT

Explanation (i) to Section 2(1)(zg) of the Haryana Value Added Tax Act constitutional

The HC of Punjab and Haryana, in CHD Developers Limited, Karnal and others vs. the State of Haryana and others, upheld the constitutional validity of Explanation (i) to Section 2(1)(zg) of the Haryana Value Added Tax Act constitutional, whilst reading down Rule 25(2) of Haryana VAT Rules.

The HC held that VAT was payable on value of goods at time of incorporation in works contract, and not on transfer of immovable property and other things done prior to date of entering sale agreement.

HC observed that Explanation (i) to Section 2(1)(zg) of the Act, which defined "sales price" provided for deduction on account of labour, material and services related charges from the gross turnover as defined under Section 2(1)(u) of the Act while arriving at the "sale price" in a works contract. HC held that as the same was not a charging provision which created any liability for assessing VAT in a "works contract", and was only in the definition clause of the Act, the provision did not embrace within its ambit something which was otherwise prohibited by law.

Comments : The aforesaid HC ruling is important as it reads down Rule 25(2) of the Haryana VAT Rules, thereby benefitting the sellers.

Replacement of defective motor vehicle parts by dealer during warranty period constitutes 'sale' : Gujarat HC

Recently, the Gujarat HC in Kataria Automobiles Pvt. Ltd. vs. State of Gujarat, has upheld the Tribunal order, and reiterated that replacement of defective motor vehicle parts by dealer during warranty period constitutes to 'sale' and thereby, exigible to tax under Gujarat VAT Act.

HC applied SC's ratio in Mohd. Ekram Khan and Sons and emphasized that since assessee received payment from manufacturer for parts supplied to customers, transactions were subject to levy of tax.

Further, HC rejected assessee's contention that while replacing defective parts in warranty period, there is no element of sale at all and as such, nothing is charged from car owners.

Also, HC noted that assessee purchased parts from open market and replaced them in place of defective parts during the warranty period, for which manufacturer issued credit notes.

Also, HC disagreed with Rajasthan HC's view in Marudhara Motors that credit notes received from manufacturer cannot be taxed as 'sale value' of spare parts replaced for defective parts under warranty by manufacturer to customer

Comments: The aforesaid decision is of note to every automobile dealer.

Port Trust liable to tax on sale transactions carried on by it besides statutory functions

The SC, in Cochin Port Trust vs. State of Kerala, held that Sec 2(viii) of Kerala General Sales Tax Act definition is very wide and specifically includes persons effecting sale / transfer of goods irrespective of same being in course of business or not meaning that Port Trust were dealer under the Act too.

Further, SC observed, *"The contradistinction between the definition of "dealer" under TN Act and the Act makes it abundantly clear that the observations of this Court in Madras Port Trust case, which refer to the definition of TN Act and interprets it to reach the conclusion of the Trust not being exigible to tax, cannot be accepted in the instant case"*

Comments: This is a landmark ruling pronounced by SC, laying down that Port Trusts are exigible to tax too.

Revisional Authority has no powers to pass reassessment after cancelling / setting aside assessment order

Recently, in the case Solidus Hi-Tech Products Pvt Ltd vs. State of Karnataka & Others, the HC allowed the writ appeals filed by assessee, and held that the Revisional Authority has no powers to pass reassessment after cancelling/ setting aside assessment order of Assessing Officer, u/s 63A of Karnataka VAT Act.

HC referred to the Division Bench's decision in Shankar Construction Co., where in the context of Sec 22A of Karnataka Sales Tax Act, it was held that passing of a fresh assessment order by Revisional Authority was wholly impermissible.

It further noted that with coming into force of amendment made w.e.f. April 1, 2013 in KVAT Act whereby 'or' has been substituted by 'and', Revisional Authority now can cancel the assessment order and direct fresh assessment. This clearly meant that the same has to be read in conjunction and not separately. HC observed, *"With this amendment, it is further fortified that after cancelling or setting aside the order of assessment, the Revisional Authority can only direct for a fresh assessment and not proceed to pass an order of reassessment."*

Comments: This ruling comes as a huge relief, protecting the intention of legislature and interest of assessee as right of appeal, revision etc., would be totally annihilated if fresh assessment was allowed.

Customs

Demand u/s 125(2) of Customs Act not maintainable if SCN limited to confiscation and imposition of penalty

The SC, in the case Fortis Hospital Ltd. vs. Commissioner of Customs, Import reversed Bombay HC order and set aside duty demand u/s 125(2) of Customs Act as show cause notice u/s 124 was limited to confiscation of goods and imposition of penalty for breach of Notification No. 64/88-Cus which exempted medical equipment import.

Also, SC observed that, Sec 124 deals with confiscation of goods and penalty and does not deal with payment of import duty. SC further stated that no doubt, such payment of import duty would become payable by virtue of Sec 125(2), but only when condition stipulated in the said provision is fulfilled, namely, fine is paid in lieu of confiscation of goods.

SC observed, *"When the Department chose to take action under Section 124 of the Act, it should have been alive of the situation that the Noticee may not exercise the option and in such case, duty would not be payable automatically."*

Comments: The decision is of note because it reiterates the most important rule with regards to issuance and role of SCN.

Fees for technical services from foreign consultant towards setting up & commissioning of manufacturing unit in India, not includible in import value of steel plant

In a recent case, Commissioner of Customs, Ahmedabad vs. Essar Steel Ltd., SC dismissed Revenue appeal, and held that fees for technical services from foreign consultant towards setting up & commissioning of manufacturing unit in India, was not includible in import value of steel plant.

SC further held that rendition of such services was not a pre-condition for sale, and that Rule 9(1)(e) of Customs Valuation (Determination of Price of Imported Goods) Rules of 1988 was inapplicable.

SC further observed that a conjoint reading of Rule 4 and Rule 9 of Valuation Rules makes it clear that only those costs & services actually paid or payable pre-import are to be added for determining value of imported goods.

Comments : This ruling is important to all steel manufacturers importing technical services from foreign consultants.

Exemption to imported parts/components of 'hot mix plant'

In the case, IVRCL Infrastructure & Projects Ltd. v Commissioner of Customs, SC held that exemption cannot be given to imported parts/components of 'hot mix plant', intended for construction of road for National Highways Authority of India (NHA), under exemption Notification dated March 1, 2001, as complete plant in unassembled form and was not imported.

SC observed that Rule 2(a) of Interpretative Notes will have no application to an exemption notification, issued u/s 25 of Customs Act. Therefore, SC rejected assessee's contention that an unassembled plant which is incomplete but has essential character of a complete plant is not the test to be applied.

Further, SC stated that the test to be applied is whether plant in its entirety is being imported albeit in an unassembled form.

Comments : The judgment is of note to importers, as to how special care is to be taken to import the same in assembled form if one wants to take benefit of the Notification.

Foreign Trade Policy

FTP 2015-2020: Key takeaways

Commerce & Industry Minister Smt. Nirmala Sitharaman unveiled the much awaited Foreign Trade Policy 2015-2020 at Vigyan Bhawan, New Delhi. She stated that the new policy focused on promotion of manufacture and service exports and employment generation, in line with Central Govt's "*Make in India", "Digital India"* and *"Skills India*" initiatives / campaigns.

Some of the key takeaways from the new Policy are as follows :

- Policy merges 5 schemes, viz. Focus Product Scheme, Market Linked Focus Product Scheme, Focus Market Scheme, Agri. Infrastructure Incentive Scrip, VKGUY into a single, transferable, MEIS;
- Rewards for export of notified goods to notified markets under MEIS payable at 2% to 5% of realised FOB value (in free foreign exchange);
- Duty credit scrip under said scheme no longer with actual user condition or restricted to usage for specified types of goods but be freely transferable and usable for all types of goods and service tax debits on procurement of services / goods;
- Grants reward rates of 3% and 5% based on net foreign exchange earned and debits would be eligible for CENVAT credit or drawback;
- Both MEIS & SEIS incentives under Chapter 3 shall be available to SEZ units;
- Criteria of export performance for recognition as "Status Holder" changed from Rupees to US dollar earnings;
- e-Commerce exports of handloom products, books/ periodicals, leather footwear, toys and customized fashion garments through courier or foreign post office would also be able to get benefit of MEIS (for values upto 25,000 INR).
- 'Service Exports from India Scheme' (SEIS) replaces 'Served From India Scheme' (SFIS), applies to all "service providers in India" instead of "Indian service providers" of notified services.
- **Comments:** The said framework gives India an unusual opportunity in producing financial services, on a global scale.

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