Indirect Tax News Update

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Service Tax

Non-taxability of AC restaurants / hotel services affirmed by Kerala HC division bench

Division bench of Keral HC in Kerala Bar Hotels Association & Others, had affirmed the non-taxability of AC restaurants / hotel services.

HC had upheld the single judge order and held that service tax levy on serving food & beverages in AC restaurant, hotel, inn, guest house, club or camp-site u/s 65(105)(zzzzv) & (zzzzw) of Finance Act is unconstitutional. HC observed that post 46th Constitutional amendment, supply of food & other articles for human consumption in restaurants is a 'deemed sale' under Art 366(29-A) and no service is involved therein. It was noted that the said activity is enumerated in Entry 54 of List II of Seventh Schedule and thus, only States have the legislative competence to impose tax on whole consideration received.

Further, HC distinguished from Bombay HC ratio in Indian Hotels and Restaurant Association & Anr., since whole consideration for supply of food (including service part of transaction) is exigible to State tax by virtue of constitutional definition. It observed that Union cannot characterise the same transaction as 'service' for levy of service tax .

Comments: The division bench ruling is important to conclude that service tax levy on restaurants is unconstitutional. However, earlier this year, division bench of Bombay HC upheld the service tax on restaurants. We hope to see some more clarity on this issue in future since it is crucial for hoteliers as well as end consumers.

Shipping charges towards transportation of imported goods not taxable under 'cargo service'

In the case of United Shippers Ltd., Mumbai Tribunal held that shipping / barging charges towards transportation of imported goods from mother vessel would not be taxable under 'cargo handling services' u/s 65(23) r/w Sec 65(105)(zr) of Finance Act .

CESTAT observed that when the goods are being transported by the barges from mother vessel, the activity is part of import transaction of bringing the goods into India from a place outside. It noted that question of rendering service would take place only after customs transaction is completed.

Moreover, CESTAT noted that Sec 14 of Customs Act and Customs Valuation Rules were specifically amended to include barge and handling charges in the imported goods value. Therefore, service tax on barge charges and handling charges together would not arise.

In order to support this, reliance was placed on SC ruling in Garden Silk Mills Ltd. and CBEC Circular dated Nov 30, 2009.

Comments: The aforementioned decision would be of great relevance as shipping / barges charges towards imported goods transportation would be chargeable to service tax.

Soft drink manufacturer not entitled to avail credit on services performed at bottler's premise

In the case of Coca Cola Pvt Ltd. vs CCE, Pune , Mumbai CESTAT held that input service credit on activities performed at botller's premise would not be available to soft drink manufacturer.

CESTAT held that CENVAT Credit prima-facie would be unavailable on quality control & testing services provided by third party at bottler's premises since such service is not in direct nexus with soft drink concentrate manufacture

CESTAT observed that the definition of 'input service' made it clear that the input service used by the manufacturer must be in relation to the manufacture of final products. CESTAT found that the assessee and the bottlers operated on a principal-to-principal basis and were separate business entities having independent registration with the Central Excise authorities. Therefore, even if the assessee could have quality control over bottlers unit to safeguard interests, that would not entitle them to avail CENVAT credit on the activities carried out in the bottlers' factory premises.

Comments: The said decision is crucial for all manufacturers and they must note that activities performed at independent third part premise on principal to principal basis would not be eligible for input credit against the final product.

Police services for private / public events prima facie not taxable as 'Security Agency Services'

In the case of Mumbai Police vs. Commissioner of Service Tax , Mumbai CESTAT held that Services provided by Mumbai Police to individuals / organisations for private and public events prima facie would not be taxable as 'Security Agency Services' u/s 65(94) r/w Sec 65(105)(w) of Finance Act;.

CESTAT observed that as per provisions of Mumbai Police Act, services provided by deployment of additional police force, either to individuals or for public events partake the nature of maintenance of peace and preservation of order. Moreover, it stated that costs received from service recipients gets credited to State Consolidated Fund, which also suggests statutory / sovereign nature of such function .

Reliance was placed on Delhi Tribunal ruling in Dy. Commissioner Police vs. Commissioner of Central Excise, Jaipur-II [2013 (31) STR 228 (Tri. Del.)] and Bombay HC ruling in Security Guards Board vs. Comm. of Central Excise, Thane II [2011 (24) STR 391].

Comments: It is important to note that services provided by police at events are not subject to service tax under security agency services.

Central Excise

CBEC clarifies on 6 months limitation on CENVAT credit availment

CBEC vide Circular No. 990 /14/2014-CX-8 dated November 19, 2014, has issued clarification on applicability of 6 months limitation on CENVAT credit availment, as amended vide Notification No. 21/2014-CE (NT).

CBEC clarified that said period of 6 months would not apply for taking re-credit of amount reversed in case of (i) non-payment of service value within 3 months from date of invoice, bill / challan, (ii) writing off of capital goods / inputs in Books of Account before use, and (iii) non-receipt of inputs from job-work within 180 days;

Hence, clarification has been issued to concluded that limitation applicable only when credit taken for first time on eligible document and not on re-credit under 3rd proviso to Rule 4(7), Rule 3(5B) and Rule 4(5)(a).

Comments: This Circular is of great relevance for Department as well as it clarifies that 6 month limitation for credit availment would be applicable for first time credit and not on re-credits.

CESTAT not empowered to dismiss appeal on appellant's non presence during hearing

In the case of Balaji Steel Re-Rolling Mills vs. Commissioner of Central Excise and Customs, SC observed that CESTAT is not empowered to dismiss appeal on the ground of non-presence of appellant during the hearing.

SC rejected revenue's stand that under Rule 20 of Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982, CESTAT has power to dismiss appeal for want of prosecution if appellant does not appear for hearing.

SC observed that Central Excise Act " does not give any power to the Tribunal to dismiss the appeal for default or for want of prosecution in case the appellant is not present when the appeal is taken up for hearing.. "

Moreover, SC noted that Sec 35C of Central Excise Act enjoins Tribunal to pass order on appeal confirming, modifying or annulling decision / order appealed against, hence it cannot dismiss appeal for default / want of prosecution. Reliance was placed on SC ruling in S. Chenniappa Mudaliar delivered in the context of Sec 33 of Income Tax Act, 1922 & Appellate Tribunal Rules, 1946. Therefore, SC directed to hear the appeal.

Comments: The aforesaid SC ruling is important to note that CESTAT has no power to dismiss appeal for default or for want of prosecution. SC has interpreted Sec 35C of Central Excise Act and came to the conclusion that CESTAT can only modify the order appeal against and cannot dismiss for default.

Input service credit admissible for services performed beyond 'place of removal'

Ahmedabad CESTAT in Radhe Renewable Energy Development Pvt. Ltd. vs CCE & ST, Rajkot, had held that CENVAT credit on services performed beyond palce of removal would be available.

CESTAT observed that Rule 2(l) of Cenvat Credit Rules does not require that service has to be rendered at the factory of the manufacturer for purpose of eligibility for service tax credit, and what needed to be examined was whether the service provided is in or in relation to manufacture.

CESTAT thus observed that "It is now a settled legal position that cenvat credit on input services is also admissible if the same was availed beyond place of removal provided such services are availed in relation to manufacture" . Reliance was placed upon Ahm. CESTAT ruling in Alidhara Textool Engineers Pvt. Ltd. and Gujarat HC ruling in Cadila Healthcare Ltd.

Comments: This decision is of great relevance for all the manufacturers as it once against clarifies that input credit on services availed after 'place of removal' would be available provided such services are in relation to manufacture.

Excise duty demand after 24 years clear 'abuse of law', Writ allowed at Show Cause stage

In the case of Kothari Petrochemicals Ltd. vs. U.O.I. & Ors., Madras HC allowed the writ challenging the Show Cause Notice and held that excise duty demand by Department on exempted petroleum
Products is a clear 'abuse of law' and completely outside jurisdiction.

HC took note of plethora of SC judgments and observed that abstinence from interference at show cause notice stage is a normal Rule. However, where notice is issued without jurisdiction; and where it is an abuse of process of law, writ jurisdiction can be invoked.

With regard to instant case, HC observed that Notifications issued in 1989, 2006 and 2012 clearly indicate that petroleum gases and other gaseous hydrocarbons received from refinery and returned after Polyisobutylene extraction are exempt. It noted that Indian Govt. was fully aware of the nature of assessee's manufacturing process and its entitlement to the benefit, while restoring the exemption in 1995 vide ad hoc Notification. Therefore, Commissioner, being an authority functioning under Indian Govt., is bound by exemption Notification as well as Govt.'s 1995 decision.

HC thus, observed that HC observed, *"exemption Notifications are always to be construed strictly. Just as nobody can be brought within the purview of an exemption Notification, by way of interpretation, it is also not permissible to deny the benefit of the Notification to someone whom, even according to the Government of India was entitled to the benefit."*

Comments: The aforesaid decision is very important as HC has exercised its writ jurisdiction at the Show Cause stage due to clear abuse of the process of law.

VAT

Andhra Pradesh HC elucidates CST law, rejects attempt to impose VAT on inter-state sale

AP HC in Sri Bhargavi Agro Tech, while discussing CST law had rejected Revenue's attempt to impose VAT on inter-state sale.

HC stated that supply of rice by Rice Millers to Food Corporation of India (FCI) outside State in terms of permit issued by Govt. of Pondicherry, in consultation with Civil Supplies authorities in Andhra Pradesh, an "inter-state sale" and therefore, would not be liable to VAT in AP. Further, HC pointed out that Rice Millers procured paddy stocks from agriculturists in Andhra Pradesh and transport it to Pondicherry under Andhra Pradesh Govt permit, which obligates them to supply / prescribed percentage of rice to FCI in Andhra Pradesh, therefore such obligation would occasion it as inter-state movement of goods.

HC noted that Articles 286 and 269(3) of Indian Constitution put restrictions on State legislature's power to make laws imposing tax on the sale of goods in the course of inter-state trade. Therefore, States have no powers to tax sale in the course of inter-state trade or commerce even if its situs is within the State.

HC observed that "If sale of goods falls within ambit of Sec 3(a) of Central Sales Tax Act, it would be an inter-state sale notwithstanding that in terms of Sec 4(2)(b), unascertained goods appropriated to contract of sale within territorial limits of State where goods delivered".

Comments : The aforesaid HC ruling in our opinion is one of the important rulings under CST and VAT law.

Notification issued by Commissioner requiring dealers to produce documents / additional information not 'excessive delegated legislation'

Karnataka HC in the case of Harsha Enterprises & Sri Rameshwara Modern Rice Mills Vs. State of Karnataka & Anr. , had held that notification issued by Commissioner requiring additional information from dealers cannot be treated as 'excessive delegation of power' and is therefore not unconstitutional.

It was observed that Notification requiring specified dealers to furnish additional details electronically alongwith returns is not violative of Articles 265, 14 & 19(1) of Indian Constitution. It was noted that as per Sec 35(1) of KVAT Act, State Legislature has left to Commissioner's wisdom to specify class of dealers and nature of information

/ particulars to be furnished while furnishing their returns along-with the format.

HC observed that *"Merely because a direction on notification is issued pursuant to a statutory power, it would not become a piece of delegated legislation or a rule"* .

Moreover, HC rejected assessees' contention that disclosure of such information would amount to leakage of trade secrets and would adversely affect the prospects of their business. With this regards HC observed that divulgence of trade secrets which would adversely affect business, if any, cannot affect constitutional validity of the Notification, which seeks to enhance transparency in tax payment under the Act

Comments : This said decision is important for Revenue as notifications issued by Commissioner under its administrative power cannot be treated as delegated legislation.

Customs

Central Govt. revises 'All Industry Drawback Rates' w.e.f. Nov 22, 2014 : CBEC notifications & Circular

Central Govt vide Notification Nos. 109/2014-Cus & 110/2014-Cus alongwith Circular No. 13/2014-Cus, has notified revised "All Industry Drawback Rates" (AIR) w.e.f. November 22, 2014.

Central Govt. has rationalized several entries by merging them at respective four digit level / under respective residuary sub-heading 'others'. Further, where drawback claim filed with reference to AIR Schedule, application for Brand Rate fixation under Rule 7 of Customs, Central Excise Duties and Service Tax Drawback Rules shall not be inadmissible,

In case of Project Exports, where export product is accompanied with ARE-1 and no cap has been prescribed in Schedule, maximum drawback shall not exceed the amount calculated applying ad valorem drawback rate to 1.5 times the ARE-1 value.

Moreover, Central Govt has extended tenure of Drawback Committee temporarily with a view to facilitate trade Proceedings for CHA License revocation must initiate within 90 days from offense report.

Software imported for exclusive use not 'packaged software'

Delhi CESTAT in Commissioner of Customs, New Delhi vs. Himachal Futuristic Communication Ltd., had held that Software imported for BSNL's exclusive use not "packaged software" and hence, exemption benefit would be available.

CESTAT rejected revenue's stand that software on CD is meant for multiple users and therefore, would qualify as "packaged / canned software" and hence, no exemption would be available .

CESTAT held it was a subject interactive software, specially developed for use by manufacturers and operators for programming of wireless phone before delivery to customers.

Thus, Tribunal inferred that it was BSNL using the software for specific purposes and this was loaded to BSNL centres, from where value added services were provided to subscribers after programming their phones. Further, tit noted that he subscribers' phones were programmed to be compatible with the software used by BSNL.

Comments: The aforesaid decision is important as it holds that software exclusively developed for BSNL though installed on CD is 'customized software' subject to exemption notification benefit.

Customs Authorities cannot rectify classification errors in Bill of Entry

Madras HC in the case of Neoteric Informatique Ltd. vs. Assistant Commissioner of Customs, Chennai , had held that Customs Authorities cannot rectify classification errors in Bill of Entry.

HC observed that Customs Authorities are not competent to rectify such errors committed by assessee u/s 154 of Customs Act since Sec 154 only empowers authorities to correct clerical / arithmetic errors in any decision or order passed by Central Govt. / CBEC / Customs Officer and not error committed by importer or his authorised agent.

In view of this, HC directed assessee to file appeal when Revenue accepts correct classification.

Comments : The aforesaid decision is of great relevance for all importers as it clearly lays down that Revenue cannot rectify any error, if any, in the Bill of Entry filed by importer.

Foreign Trade Policy

Physical filing of Importer Exporter Code (IEC) not required w.e.f. Jan 1, 2015

DGFT vide. Public Notice No. 76(RE-2013)/2009-2014 dated November 27, 2014, had revoked the physical filing of Importer Exporter Code (IEC) not required w.e.f. Jan 1, 2015.

It has been notified that application for new IEC will need to be filed in online mode only, along with requisite documents. Further, decision regarding grant / refusal of IEC to be conveyed within 2 working days by concerned jurisdictional Regional Authorities.

Also, DGFT has notified that Online facility to be also available on e-biz portal of DIPP, after integration with DGFT's system .

Comments : In order to focus on e-filing, DGFT has done away with physical filing of IEC w.e.f. Jan 1, 2015

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