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Service Tax

Written SCN may be waived at assessee's request, in case involving extended period of limitation, if assessee pays service tax / excise duty, interest and 15% penalty : CBEC Instruction

August 18, 2015 CBEC Instruction No. 137/46/2015-ST

CBEC has issued a clarification w.r.t. modus operandi of amended Sec 73, 76 & 78 of Finance Act as also Sec 11AC of Central Excise Act, in case of detections made during audit, investigation or scrutiny.

It has been stated that in case involving extended period of limitation, where an assessee pays service tax / excise duty, interest and 15% penalty, a written show cause notice (SCN) may be waived at assessee's request.

CBEC further clarified that on such written request by assessee for waiver of written SCN, 30 days period stipulated under clause (i) of second proviso to Sec 78 and Sec 11AC(1)(d) for reduced penalty, can be computed from date of receipt of such letter by Dept.

Also, CBEC clarified that provisions of Sec 73(3) & clause (i) of proviso to Sec 76 have to be read harmoniously so that in cases not involving fraud / suppression of facts, if assessee pays tax alongwith interest either within 30 days of issuance of SCN or before issuance of SCN, proceedings shall deem to be concluded

Comments: The instruction clarifies the modus operandi of amended sections, and allows for conclusion of proceedings by officers of DGCEI / Executive Commissionerate / Audit Commissionerate without issuance of an adjudication order.

Commission earned by way of settlement transactions between acquiring banks and merchant establishments not taxable as 'Service in relation to Credit Card services' prior May 2006 : CESTAT Larger Bench

Decision Date : August 14, 2015 Period of Dispute : Pre May 2006

The Larger Bench of CESTAT, in Standard Chartered Bank and Ors. vs. CST, Mumbai, has held that introduction of a comprehensive definition of "credit card, debit card, charge card or other payment service" in Section 65(33a) read with Section 65(105)(zzzw), by the Finance Act, 2006 is a substantive legislative exertion which enacts levy on the several transactions enumerated in sub-clauses (i) to (vii) specified in the definition set out in Section 65(33a); and all these transactions are neither impliedly covered nor inherently subsumed within the purview of credit card services defined in Section 65(10) or (12) as part of the BOFS.

Also, Larger Bench clarified that ME discount, by whatever name called, representing amounts retained by an acquiring bank from out of amounts recovered by such bank for settlement of payments to the ME does not amount to consideration received "in relation to" credit card services.

Additionally, CESTAT concluded that in the context of credit card services in BOFS, as the taxable service is defined and enumerated, acquiring bank and the ME could be considered to be a customer of the issuing bank and an acquiring bank.

With regards to Revenue's Preliminary objection on constituting Larger Bench, CESTAT observed that "mere filing or pendency of an appeal against the decision in ABN Amro Bank Limited, neither eclipses this decision nor operates as a fetter on another Division Bench, which would be free to either follow the ABN Amro Bank Limited decision or could doubt its correctness and seek interpretation, by a Larger Bench."

Comments: The decision is of note to all Acquiring Banks and Financial Institutions.

Indivisible composite works contracts not taxable under Finance Act prior to June 2007 : SC

Decision Date : Aug 20, 2015 **Period of Dispute :** June 1, 2007

In Commissioner of Central Excise & Customs, Kerala & Others vs. Larsen & Toubro Ltd & Others, SC has ruled in assessees' favour, and held that indivisible composite works contracts not taxable under Finance Act prior to June 2007.

Also, SC rejected Revenue's contention that statute need not do what 46th Constitutional Amendment has already done, viz. split indivisible works contract into separate contract of transfer of property in goods involved in execution thereof on one hand, and labour & service on the other.

Further, SC applied Gannon Dunkerley-II ratio, that unless such contract is split taking into account applicable deductions, charge to tax containing inter alia, entire cost of establishment, other expenses and contractor's profit, would transgress into forbidden territory attributable to transfer of property in goods in such contract.

Also noting the taxation scheme under Constitution, SC stated that it becomes very important to segregate the two elements completely for if some element of transfer of property in goods remains when service tax is levied, said levy would be found to be constitutionally infirm; Hence, rules that any charge to tax u/s Sec 65(105)(g), (zzd), (zzh), (zzq) and (zzh) would only be "of service contracts simpliciter and not composite indivisible works contracts"

Disregarding judgments which have dealt with exemption Notifications granted qua service tax "levied" under Finance Act, SC observed, *"Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise."*

Comments: This decision is of note to all work contractors.

Interim stay granted on Bombay HC judgement which upheld levy of service tax on Advocates : SC

Decision Date : Aug 10, 2015

In Bombay Bar Association vs. Union of India & Ors., SC granted interim stay on operation and implementation of Bombay HC judgement which upheld levy of service tax on Advocates u/s 65(105)(zzzzm) of Finance Act w.r.t. services such as advice, consultancy, appearing before Court / Tribunals rendered to business entities as an individual or a firm of advocates.

Bombay HC had, inter alia, held that Legislature by inserting such provision had neither interfered with role and function of advocate nor had it made any inroad in constitutional guarantee of justice to all.

Also, HC had observed that classification / distinction by Legislature w.r.t. legal services by individual advocate to individuals vis-à-vis services to business entities, has reasonable nexus with socio-economic object sought to be achieved by Parliament.

As per principles laid down by SC in several rulings, greater latitude and discretion has been given to Govt. under taxing legislations & Statutes, hence there was no substance to challenge based on violation of doctrine of equality enshrined by Art. 14 of Constitution, ruled had HC.

Also, HC had remarked that activities of Advocates in legal field are expanding in the age of globalisation, liberalisation and privatisation, if it is found that they are catering to affluent and rich class of litigants and recipients of legal services, then tax on such services was definitely within the permissive sphere of legislation and could not be faulted.

HC had also observed that differentiation maintained and made by Legislature by excluding individual to individual legal services justified on basis of commercialisation of law practice in today's world and therefore, cannot be termed as arbitrary, discriminatory, unfair, unreasonable and unjust or violative of Article 19(1)(g) of Constitution.

Comments: This decision of SC brings a temporary sigh of relief to lawyers in India.

No one year time limit applicable to refund of unutilised input services credit : Mumbai CESTAT

Decision Date : July 21, 2015

In a recent decision, Affinity Express India Pvt Ltd vs CCE Pune-I, CESTAT clarified that no one year time limit as envisaged u/s 11B of Central Excise Act applicable to refund of unutilised input services credit under Rule 5 of CENVAT Credit Rules.

W.r.t. eligibility of certain input services, CESTAT found that the same were essential and in fact, were used for provision of output services. When assessee claimed credit thereon, the same was not challenged.

Further, CESTAT Further, upheld assessee's refund claim relating to input services viz. transport, xerox, meal vouchers noting no objection of Revenue at the stage of credit availment, observes, "It is settled principle, that there cannot be different yardsticks in allowing the credit and granting the refund."

Comments: This decision is important to all manufacturers.

One-time maintenance charges' collected by builder-assessee from flat purchasers not exigible to service tax : CESTAT

In a recent decision, The Mumbai CESTAT, in Goel Ganga Promoters & Others vs. Commissioner of Central Excise, Pune-III, held that one-time maintenance charges' collected by builder-assessee from flat purchasers not exigible to service tax.

The CESTAT relied on earlier ruling in case of Kumar Beheray Rathi & others, where co-ordinate bench observed that builders / developers act only as trustees / pure agents of flat owners' funds and cannot be held as providers of maintenance or repair service.

CESTAT noted that the Co-ordinate bench had ruled that builders pay on behalf of customers / flat owners, to various authorities like Municipal Corporation and service providers such as security agency & cleaners and do not charge anything of their own.

Moreover, CESTAT observed that deposit account shifted to flat owner's Co-operative Society upon formation as per statutory obligation under Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963.

Comments: This decision is important to builders.

Central Excise

Cash discount' to be taken into consideration for arriving at "price" in terms of Sec. 4 of Central Excise Act, as amended in 2000 : SC

Decision Date : Aug 25, 2015

Recently, SC in Purolator India Ltd. vs. Commissioner of Central Excise, Delhi-III, partially allowed assessee's appeal by holding that 'cash discount' to be taken into consideration for arriving at "price" in terms of Sec. 4 of Central Excise Act, as amended in 2000.

SC relied on on Bombay Tyre International and Madras Rubber Factory Ltd. rulings rendered in context of erstwhile Sec 4, and observed that amended provision makes no change in said position.

Also, SC held that common thread running through Sec 4 is that excisable goods have to have a determination of 'price' only "at the time of removal" and this basic feature never changed even after several amendments, whether prior to or after 1973 or after 2000.

Further, SC noted that assessee's contention that since 'cash discount' known at or prior to clearance of goods and contained in sale agreement, is deductible from "sale price" to arrive at value of excisable goods "at the time of removal."

"Transaction value" as defined u/s 4(3)(d) to be read along with expression "for delivery at the time and place of removal", and expression "actually paid or payable for the goods, when sold" only means that whatever is agreed to as price for goods forms basis of value, whether paid or not.

Hence, SC held that basis of "transaction value" is agreed 'contractual price', and the expression "when sold" is not meant to indicate time at which such goods sold, but to indicate that goods are subject matter of an 'agreement of sale.'

Referring to CBEC Bulletin for period January-March, 1975 which allowed deduction towards cash discount, SC stated that said understanding of Board would necessarily continue even after Sec 4 amendment in year 2000.

Comments : The decision is of note as it brings respite to every assessee who arrived at value without considering cash discounts.

Invalidation of advance license in favour of intermediate-manufacturer (assessee) constitutes indirect 'additional consideration' for sale of goods to license-holder : SC

Decision Date : Aug 21, 2015

Recently, SC in Commissioner of Central Excise, Nagpur vs. Indorama Synthetics (I) Ltd., allowed Revenue's appeal, and held that invalidation of advance license in favour of intermediate-manufacturer (assessee) constitutes indirect 'additional consideration' for sale of goods to license-holder.

SC observed that Commissioner rightly concluded that transfer of advance import license by buyer in favour of seller enabling duty-free import of raw materials and consequently bringing down cost of production / procurement is 'consideration'.

SC further relied on on IFGL Refractories Ltd ruling where on identical facts, SC concluded that benefit of duty drawback accruing to seller as a result of surrender of advance license by buyers constitutes 'additional consideration.'

Rejecting assessee's plea to refer matter to larger Bench, SC stated that the argument that benefit in the form of duty-free imports flows to assessee only pursuant to and based on licence issued by DGFT and does not flow from invalidation letter, is too ingenuous to be accepted.

Comments : This ruling is of note as it widens the scope of 'related persons' in terms of Sec 4(3)(b)(iv) of Act.

Proportionate input service credit payment / reversal attributable to traded goods under Rule 6(3A) of CENVAT Credit Rules, 2004 (CCR), along with interest, a substantial compliance of Rule 6(3)(ii)

Decision Date : July 16, 2015

In Mercedes Benz India (P) Ltd vs Commissioner of Central Excise Pune-I, CESTAT allowed assessee's appeal, and held that proportionate input service credit payment / reversal attributable to traded goods under Rule 6(3A) of CENVAT Credit Rules, 2004 (CCR), along with interest, a substantial compliance of Rule 6(3)(ii), thereby setting aside demand equal to 5% sale value of traded goods under Rule 6(3)(i).

Also, CESTAT held that monthly payment per Rule 6(3A) is 'provisional basis', not mandatory, observes, "Legislature has not enacted any provision by which Cenvat credit, which is other than the credit attributed to input services used in exempted goods or services, can be recovered from the assessee"

Comments : The decision is of note as it throws light on compliance of procedure and condition in Rule 6(3A) of CCR, 2004

Assessee entitled to CENVAT Credit in respect of fitment used in the final product by job worker, where finished goods were cleared from premises of job worker for export 'on behalf of' assessee

Recently, the CESTAT, in Jayaswals Neco Ltd vs Commissioner of Central Excise, Nagpur, allowed CENVAT credit to principal-manufacturer (assessee) despite use of imported goods in manufacture of finished goods on job-work basis and export thereof from job-worker's premises.

CESTAT rejected Revenue's contention that job-worker is actual manufacturer, not assessee and hence, CVD credit ineligible. CESTAT added that even though part manufacturing carried out by job-worker on its own, since entire final product is completed & exported 'on behalf of' assessee, CENVAT credit legally available.

Comments: It is of note as CESTAT has held that premises from where goods have been exported is not of much relevance is not the most crucial determinative factor.

Customs

Blast furnace industry not exempt from ADD payment on import of Metcoke pre 2000: SC

Decision Date : Aug 4, 2015 **Period of Dispute : Pre May 19, 2000**

Recently, In Jayaswal Neco Ltd vs. Commissioner of Customs, Vishakhapatnam, SC quashed CESTAT order enhancing anti-dumping duty (ADD) payable under Notification dated October 1998 upon default of export obligation (EO) under advance licenses, by pig iron manufacturer (assessee).

However, SC rejected assessee's stand that in terms of Notification No. 69/2000, blast furnace industry exempt from ADD payment on import of Metcoke, states that said exemption applicable only prospectively w.e.f. May 19, 2000 and cannot have reference to earlier proceedings.

SC further held that ADD not includible in calculation of special customs duty and special additional duty payable on imports by assessee, states that "additional duty" & "special additional duty" refer only to surcharge provision and not to provision levying independent duty.

SC also quashed levy of interest on customs duties payable absent such condition in bond executed in terms of Notification No. 30/1997, moreover, accepts assessee's contention that Sec 18(3) of Customs Act inserted w.e.f. July 2006 inapplicable as provisional assessment made in 1998 and final assessment only in 2004.

SC further noted that that assessee did not divert goods meant for export into DTA but it were only market considerations that made export obligation difficult, hence no penalty imposable thereon.

Comments: This ruling is of note to pig iron manufacturers.

Import of second-hand non-computerised embroidery machines alongwith reading devices not "computerised embroidery machines" when imported in unassembled condition : SC

Decision Date : July 22, 2015

Recently, in Pioneer Embroideries Ltd. vs. CC, Mumbai, SC upheld CESTAT order denying concessional duty benefit on import of second-hand non-computerised embroidery machines alongwith reading devices, same cannot be treated as "computerised embroidery machines" imported in unassembled condition.

SC accepted CESTAT's reliance on Australian Tribunal's decision to hold that classification has to be done w.r.t. state / condition of goods at time of importation and not by reference to purpose / intention of importer.

Also, SC noted that CESTAT was conscious of a situation where a particular machine is brought in an unassembled form, however it found that at no point of time before importation were the reading devices installed on old machines sought to be imported by assessee.

Noting second part of Rule 2(a) of General Interpretative Rules and related Explanatory Notes, CESTAT observed that when a complete / finished article is presented unassembled, same has to be classified in heading applicable to assembled article.

It was further observed that said Rule further indicates that article must be presented in unassembled condition only for convenience of packing, handling or transport, and that components are to be assembled either by means of fixing devices / by riveting / welding, not subjected to any further working operation for completion into finished state.

Comments: This judgment of the SC is important as it clarifies the law relating to unassembled/dis-assembled import of goods.

Amazon's 'Kindle Device' is totally exempt from payment of customs duty : AAR

Decision Date : May 15, 2015

Recently, the AAR in Amazon Seller Services Private Limited vs. The Commissioner of Customs (Import & Gen.), IGI Airport and Ors. has held that Amazon's 'Kindle Device' is totally exempt from payment of customs duty in terms of Notification No. 25/2005-Cus.

AAR held that the Kindle is classifiable under Tariff Item 8543 70 99 viz., electrical machines with translation / dictionary functions as same an educational device with *"function of allowing the user to read various books and while reading, if the user comes across any difficult word incomprehensible to the user, he can access the dictionary meaning of the word."*

Also, AAR rejected Revenue's contention that Notification would be applicable only to Kindle devices having translation / dictionary functions as main function, observes that Notification nowhere states that function of translation / dictionary needs to be a main feature of electrical machine like Kindle device.

Also, AAR ruled that Kindle not covered under 8528 59 00 as main Entry 8528 pertains to 'monitors' and 'projectors', states that said device not a monitor / a projector.

Further, AAR clarified that Kindle apparatus is not a game, and is not covered under Entry 9504 as it pertains to video game consoles / machines or other games.

Comments: The decision is of note as AAR elucidated that when an entry is to be read, the plain meaning has to be given to those entries.

VAT

Stay on recovery of tax assessed on Dominos Pizza as "dealer" u/s 2(h) of U.P. Trade Tax Act towards royalty received from franchisee for right to use trademark

Decision Date : Aug 20, 2015

Allahabad HC, in Domino's Pizza Overseas Franchising B.V. vs. State of U.P. and others, admitted assessee's writ petition, and stayed recovery of tax assessed on Dominos Pizza Overseas Franchising B.V. as "dealer" u/s 2(h) of U.P. Trade Tax Act towards royalty received from franchisee for right to use trademark in India.

HC found that assessment order prima facie without jurisdiction, and noting assessee's contention that provisions of Sec 2(h) no longer in existence as U.P. Trade Tax Act replaced by U.P. VAT Act, which does not have similar provision.

Also, HC referred to SC's judgment in 20th Century Finance Corporation Ltd wherein clause (ii) of Explanation-1 to Sec 2(h) read down to the effect that it would not apply to transaction of transfer of right to use goods, if such 'deemed sale' an outside sale or sale in course of import / export of goods out of India or inter-state sale

Comments: The decision, when given, would be of note as it deals with as it deals with taxable event on 'transfer of right to use goods' and situs of sale on "deemed sale".

Explanation 2 to Sec 2(1)(zd) of Delhi VAT (DVAT) Act as ultra vires : Delhi HC

Recently, the HC in Delhi Petrol Dealers Association & Others vs. GNCT of Delhi & Others struck down Explanation 2 to Sec 2(1)(zd) of Delhi VAT (DVAT) Act as ultra vires Constitution of India insofar it permits levy of VAT on 'deemed' sale price of petrol / diesel, instead of actual sale price charged to ultimate consumers by dealers.

Consequently, the declared omission in Form DVAT-16 of relevant column to enable petroleum dealers to claim input credit as unsustainable in law.

Consequently, HC held that the expression 'sale' within the meaning of Sec 3 of DVAT Act is confined to actual sale that has taken place and it is only the price of that sale that can legitimately constitute the measure for levy of tax.

Comments : The decision is of note to everyone as levy of VAT on 'deemed' sale price of petrol / diesel has been struck down.

No central sales tax (CST) exemption on sale of packing material, sale not in course of export : Kerala HC

In Super Packaging Industries vs. The Sales Tax Officer & Anr., HC upheld Single Judge order denying central sales tax (CST) exemption on sale of packing material viz. paper cartons to exporter of goods, finds such sale not 'in course of export' u/s 5(3) of CST Act.

HC applied SC Constitution Bench's interpretation of said section in Azad Coach Builders' case, there must exist an inextricable link between local sales / purchase with export of goods to claim exemption.

Further, HC observed that, *"Each link should be inextricably connected with the one immediately preceding it. Without it, a transaction sale cannot be called a sale in the course of export of goods out of the territory of India."*

Moreover, HC held that the intention on part of both buyer and seller to export was absent which would take assessee's case out from purview of Sec 5(3), hence, writ petitions and writ appeal liable to be dismissed

Comments: The judgment is of note as CST exemption was common on paper cartons etc., in course of export

Provision of passive infrastructure to various telecommunication operators not liable to VAT

Recently, in VAT Bharti Infratel Ltd. vs. State of MP & others, Madhya Pradesh HC allowed assessee's writ, and held that provision of passive infrastructure to various telecommunication operators not 'transfer of right to use' goods u/s 2 of Madhya Pradesh VAT Act, not liable to VAT.

Further, HC quashed Additional Commissioner's order, holding that possession of such passive infrastructure always remained with assessee and limited access provided to sharing telecom operators can only be regarded as 'permissive use' for very limited purpose with strictly regulated access; Relies on Karnataka HC and Delhi HC rulings in case of Indus Towers Ltd.

HC noted that Master Service Agreement (MSA) with sharing telecom operators contains several restrictions, curtailment of access to passive infrastructure and prescribes several penalties for failure on assessee's part to ensure uninterrupted, high quality service, hence it is difficult to imagine how assessee can part with possession of part infrastructure.

Comments: This is of note as it has been held that activity of providing passive infrastructure and related operations and maintenance services to various telecommunication operators is a 'service', hence not liable to VAT

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FTP

Delhi HC directs DGFT to consider assessee's refund claim for Terminal Excise Duty (TED) paid through CENVAT Credit Account, towards supplies made against International Competitive Bidding

Decision Date : July 28, 2015

In Union of India & Ors vs. Alstom India Limited, HC set aside Single Judge orders, and directed DGFT to consider assessee's refund claim for Terminal Excise Duty (TED) paid through CENVAT Credit Account, towards supplies made against International Competitive Bidding (ICB).

HC noted that supplies made by assessee to NTPC were under ICB and therefore, were exempt from TED payment. However, assessee had paid the duty and claimed refund thereof under Para 8.3(c). Based on certain file notings that application was not maintainable, assessee approached the HC but since no order of rejection had been passed, Single Judge refused to interfere at that stage. However, certain observations were made interpreting the purport of Para 8.3(c) and DGFT was directed to examine the case in light thereof.

HC noted that u/s 6 of FTDR Act, DGFT is made responsible for carrying out the policy, i.e., any dispute w.r.t. implementation of policy has to be resolved / clarified by DGFT. In light of such power, the question whether TED paid for supplies made against ICB, i.e., an exempted item, can be refunded or not, required consideration by DGFT in accordance with law on proper interpretation of the provisions of FTP, held HC. It observed, *"No doubt, the decision taken by the DGFT is amenable to judicial review, however, even before a decision is taken by the DGFT, in our considered opinion, the learned Single Judge ought not to have directed the statutory authority that the decision be taken in a particular manner."*

Comments: The judgment is of note as it interprets S. 6 of the FTDR Act..

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