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Contents

Service Tax

Central Excise

SEZ

Customs

VAT

Service Tax

CBEC clarifies on service tax levy on Joint Venture transactions and cash calls

Ministry of Finance vide. Circular No. 179/5/2014-ST dated September 24, 2014 has clarified on service tax levy on Joint Venture ("JV") transactions and cash calls.

CBEC has clarified that services provided by members of JV to JV and vice-versa and inter se between members of JV taxable under negative list regime, since it is an unincorporated association or body of persons and member treated as distinct persons.

It was further clarified that where cash calls are merely a transaction in money, same would be excludible from 'service' definition u/s 65B(44) of Finance Act, 1944. However, whether 'cash call' is merely 'transaction in money' and not a consideration for taxable service has to be determined on the basis of scrutiny of terms of JV agreement in each case.

CBEC stated that a comprehensive examination of various JV agreements holds key to understanding taxation of transactions, advises field formations to carefully examine leviability of service tax with reference to specific terms / clauses of such agreement .

Comments: The Circular has great relevance as it rings out clarity on service tax treatment w.r.t. JV agreements.

Security deposit not 'consideration' towards renting of immovable property

In the case of Magarpatta Township Developers & Construction Co. Ltd. & Ors. Vs. CCE, Mumbai Tribunal held that security deposit collected towards renting / leasing of immovable property would not attract service tax.

CESTAT observed that as per Sec 67 of the Act, the only consideration received in money for the service rendered is leviable to service tax. It was noted that consideration for renting of the immovable property is the amount agreed upon between the parties and on this amount the assessee was discharging service tax liability. Further, it was observed that security deposit is taken for different purpose altogether and it is to provide for security in case of default in rent by the lease or default in payment of utility charges or for damages, if any, caused to the leased property. Therefore, the security deposit services a different purpose altogether and it is not a consideration for leasing of the property.

Moreover, Tribunal stated that consideration for leasing out is rent and therefore, only rent charged is subject to service tax and not notional interest on security deposit. It was observed that there was no provision in service tax law for deeming notional interest on security deposit taken as a consideration for leasing of the immovable property. Reliance was placed on SC ruling in Moriruku UT India (P) Ltd. to hold that there is not scope of adding any notional interest to the value of taxable service rendered.

Lastly, CESTAT observed that in Excise law, under Rule 6 of Excise Valuation Rules, unless Revenue shows that the deposit taken has influenced the sale price, notional interest cannot be automatically included in the sale price for the purpose of levy. \

Comments: The aforementioned decision would be of great relevance for construction companies as no service tax is attracted on security deposit taken towards renting.

Bill discounting by banks does not amount to loan, hence interest income liable to service tax

In the case of UCO Bank vs. Comm. of ST, Kolkata Tribunal held that bill discounting facility provided by banks would not amount to loan and therefor, interest charged / collected thereby would attract service tax.

CESTAT held that Interest charged / collected would be included in value of taxable services u/s 67 of Finance Act upto April 18, 2006 & under Rule 6(2) of Service Tax (Determination of Service Tax) Rules, 2006 thereafter. It was observed such that facility considered as separate service as per clause (ix) of Sec 65(12).

However, CESTAT allowed exemption to the value equivalent to interest / discount received from customers in providing services of overdraft facility / cash credit facility / discounting of bills, bills of exchange / cheques from scope of service tax

Comments: The said decision is important for all banking organizations since CESTAT has ruled on the applicability of service tax on discounts facility extended to customers.

TV advertising from domestic & foreign advertisers taxable as 'broadcasting service'

Mumbai Tribunal in Star India Pvt. Ltd. held that TV advertising from domestic and foreign advertisers would be taxable as 'broadcasting service'.

CESTAT held that as per the Finance Act provisions, it is clear that as long as radio or television programme was received in India and intended for listening or viewing, the activity would be taxable even if the physical activity of broadcasting such as encryption of signals or beaming thereof takes place outside India.

It was observed that any branch office / subsidiary / representative / agent or any person who is appointed by broadcaster for selling of time slots for selling time slots / obtaining ads on behalf of the broadcaster would be liable to pay service tax. Reliance was placed upon CBEC Circulars dated July 2001 and July 2005.

Moreover, Tribunal stated that Sec 65(105)(zk) clearly provided that if any activity was undertaken in any manner in respect of sale of time slots or obtaining sponsorships on behalf of broadcaster, service tax would be payable at the hands of agent in India.

Comments : The aforesaid decision would be of great relevance as it holds that TV advertising from foreign advertisers taxable at the hands of their agents in India.

IPL match coverage by non-resident service providers taxable in India under reverse-charge

In the case of BCCI vs. Comm. of ST, Mumbai Tribunal held that Audio-visual coverage of Indian Premier League (IPL) matches for and on behalf of BCCI by non-resident service providers would be taxable on reverse charge basis as 'programme producer services' pre-March 2010.

Tribunal held that Sec 65(105)(zzu) of Finance Act, provides that any service provided or to be provided to any person, by a programme producer, in relation to a programme would be taxable. Reliance was placed on SC decision in Doypack Systems Pvt. Ltd. and Bombay HC ruling in ONGC to hold that words 'in relation to' are expressions of width and amplitude and cover within their scope any activity in connection with main activity.

It was observed that as per Principles of Statutory Interpretation, in order to give effect to manifest intention of legislature, expression "audio or visual matter" can be read as "audio and visual matter". It was held that assessee's argument that production of programme cannot be said to be on 'its behalf' since no third party involved, is completely irrelevant since transaction would be complete only when programme produced for assessee or on its behalf.

However, Tribunal held that contract with supplier for booking accommodation and transport of personnel in connection with match recording would not be taxable, as same was availed by assessee by sub-contracting work to different service providers.

Comments : This ruling is import from Revenue's point of view as IPI coverage from non residents would attract service tax.

Central Excise

CBEC issues detailed guidelines for Audit Commissionerates

CBEC vide Circular No. 985 / 9/ 2014-St dated September 22, 2014, has issued detailed guidelines on structure / administrative set up and functions of Audit Commissionerates.

It was prescribed that one or more Audit Commissionerates per zone to be assigned for 23 Central Excise Zones and 4 Service Tax Zones, whereby Principal Chief Commissioner and Chief Commissioner will decide Audit Commissioner's jurisdiction in each zon.

Further, CBEC has created 2 LTU Audit Commissionerates, one in Delhi having jurisdiction over assessees in Delhi, Kolkata & Bangalore and other in Mumbai having jurisdiction over assessees in Mumbai & Chennai.

Further, CBEC has proposed 4 sections in Audit Commissionerate Headquarters viz. Panning & Coordination section, Administrative / Vigilance section, Technical section and Risk Management section, comprising of one Commissioner, 2 Additional / Joint Commissioners and 3 / 4 Deputy Commissioners.

Moreover, has assigned various functions to Audit Commissionerates including issuance of SCN, convening Monitoring Comm

ittee Meetings, difference of opinion consultations. Whereas, on the other hand, Executive Commissioner will handle litigation after adjudication proceedings, pre-audit / post audit of refunds, rebates & brand rate drawback fixation, and CERA audit.

On finalisation of audit, copy of Final Audit Report including 'NIL' report must be dispatched / provided to assessee under acknowledgement to be kept in Assessee Master File.

Lastly, for capacity building, CBEC has directed DG (Audit), in consultation with NACEN, to develop appropriate modules for officer's training as audit requires specialized skills in accountancy.

Comments: This is important Circular in terms of powers assigned to the Audit Commissionerate. In our opinion, on of the important functions of Audit Commissioner would be the power to issue Show Cause Notices.

CBEC instructs finalization of excise cases as per SC Super Synotex decision

CBEC vide. Excise Instruction No. 6/8/2014CX dated Sep 17, 2014 has instructed officers to apply SC decision in Super Synotex India Ltd. pertaining to transaction value computation post July, 2000, w.r.t. sales tax retained under State incentive scheme, in completing assessments.

SC in this case had decided on issue of abatement of sales tax where assessee was allowed to retain 75% of sales tax collected from buyer and was required to deposit only remaining 25% with State Government, under State Incentive scheme .

Comments : this is an important instruction from Department to apply transaction value in terms of Super Synotex ruling.

Input Credit available on direct supply of goods to job worker

Chennai CESTAT in the case of Hyundai Motors India Ltd, held that input credit would be available on direct supply of goods to jobworker.

Tribunal observed that assessee did not receive the inputs in its factory but same were supplied directly by the principal manufacturer to the job workers premises and after the job work was done, the goods were returned back to the assessee's factory. Tribunal further stated that assessee raised 57F4 challans to the job workers only after reversing the credit in the books of account and it finally availed the credit only on receipt of goods from the job workers, and all transactions of movement and receipt were maintained by the assessee. In such situation, it was held that credit cannot be denied.

Tribunal observed that the substantial conditions for availing MODVAT credit on inputs under the provisions of 57A or 57Q are- (1) evidence of duty payment of inputs; (2) receipt of the inputs; and (3) usage of the inputs in the excisable goods. Thus, instant case, all the three conditions had been satisfied. It was observed that though the goods had been directly supplied from the principal supplier to the job workers premises, the invoices raised thereby were in assessee's name.

Further, Tribunal distinguished SC ruling relied upon by Revenue on the ground that it related to the denial of exemption notification benefit where the assessee had not followed the statutory requirements for manufacture of intermediate excisable goods. On the other hand, it accepted assessee's reliance on co-ordinate bench ruling in Otis Elevator Co. (I) Ltd. [2009 248 ELT 225] wherein it was observed, "Mere physical delivery of the goods at the instance of the appellants at a place of job worker cannot be sufficient to treat that the goods were not supplied to the appellants directly".

Comments : The aforesaid decision is important for all manufacturers as input credit has been allowed where goods were supplied directly to job worker by principal manufacturer.

SEZ

Commerce Ministry exempts vessels used for oil spill response / emergencies from SEZ rules

Commerce Ministry vide. Instruction No. 81/2014 dated September, has exempted vessels used for oil spill response / emergencies under Rule 34 of SEZ rules.

Ministry has extended exemption to vessels required to respond for oil spill emergencies / participate in scheduled oil spill response exercise under directions of Coast Guard as per National Oil Spill Disaster Contingency Plan (NOSDC);.

Rule 34 provides that duty shall be charged on goods admitted in an SEZ if used for purpose other than authorized operations:

Comments: The said instruction has great relevance for all SEZ units.

Credit reversal exemption available to SEZ developers retrospective, applicable pre-2008

Karnataka HC in the case of Commissioner of Central Excise & Service Tax vs. Fosroc Chemicals (India) Pvt. Ltd. , has ruled on applicability of exception to Rule 6(6) of CENVAT Credit Rules in respect of supply of goods to both SEZ unit and developer prior to December 2008.

HC held that amendment to Rule 6(6) vide Notification No. 50/2008-CE (NT) including 'SEZ developers' therein is clarificatory, therefore said amendment was retrospective in nature; HC stated that prior to 2008, Rule 6(6)(i) provided exemption from reversal of CENVAT credit in case of supply of excisable goods without payment of duty to SEZ units only.

In order to support the above, reliance was placed on SC rulings in Shamarao V. Parulekar, Shyam Sundar & Ors, and Indian Tobacco Association to understand the effect of the term "substitution of provision".

Further, HC noted that as per Sec 2(m) of SEZ Act, 'export' means supplying goods or providing services from DTA to SEZ unit / developer and such exports would be exempted from excise duty u/s 26 of SEZ Act and consequently from application of CENVAT Credit Rules. Moreover, it was observed that though 'export' as defined under SEZ Act included supply of goods to Unit and Developer, the word 'Developer' was conspicuously missing in Rule 6(6)(i) of CENVAT Credit Rules before 2008 amendment.

HC concluded that *"effect of substitution is that CENVAT Credit Rules must be read and construed as if altered words had been written with pen and ink and the words "to developer of SEZ for their authorized operation" were present from inception".* Reliance was palced on CBEC Circular No. 29/2009-Cus which clarified that supplies from DTA to SEZ unit or developers for authorised operations inside SEZ may be treated as exports w.e.f. March 14, 2006.

Comments : The aforesaid decision is important as HC has made it clear that credit reversal exemption would be available to SEZ units prior to 2008 also. This has come as a relief to SEZ units / developers.

Customs

Bars domestic sales of imports under Advance Authorisation before Export fulfillment

Mumbai Tribunal in Unimark Remedies Ltd. and Ors. vs. Commissioner of Customs (Export Promotion), Mumbai, has barred domestic sale of inputs imported duty free under Advance Authorisation for manufacture of final products but cleared before fulfillment of export obligation (EO).

It was held that Foreign Trade Policy provisions were clearly violated as inputs imported under authorisations is subject to actual user condition and is non-transferable, however option to dispose final product available only once EO is completed.

Tribunal observed that Foreign Trade Policy nowhere states that authorisation-holder can use surplus imported duty free raw material for own use. Moreover, it was noted that Advance Authorisation Scheme cannot be compared with All Industry Duty Drawback, absent correlation under drawback with actual consumption of material / duty incident;

Proceedings for CHA License revocation must initiate within 90 days from offense report

Madras HC in the case of A.M. Ahamed & Co. vs. Commissioner of Customs, Chennai & Ors., has held that notice for revocation of Customs House Agent's (CHA) license must be given within 90 days from receipt of 'offence report' in terms of Regulation 22(1) of Customs House Agent License Regulations 2004.

HC held that in case of absence of statutory definition in the Regulations, 'offence report' must be construed as a report indicating any one of the ingredients for revocation or suspension of CHA license. It was noted that date of knowledge of Commissioner, by means of any communication such as show cause notice or order-in-original, can be construed as date of receipt of offence report.

Further, HC stated that no penalty would be leviable since importer has got clean chit from Settlement Commission in underlying dispute. In view of this, HC observed that it would be unfair to impose extreme penalty on CHA once importer has escaped with nominal fine on ground of true and full disclosure.

Comments: The aforesaid decision is important for all CHA License holders.

VAT

Maharashtra Govt. introduces 'Retailer Composition Scheme' w.e.f. Oct 1, 2014

Maharashtra Govt. vide. Notification No. VAT.1514/C.R. 58/ Taxation-1 dated August 21, 2014 , has amended Notification dated June 1, 2005, pertaining to composition scheme applicable to retailers on fulfilment of specified conditions.

It has been notified that total sales turnover for the purpose of composition tax shall exclude High Speed Diesel Oil (HSD Oil), any kind of motor spirits, fabrics and sugar notified under Schedule C. Further, composition tax payable @ 1% on total turnover of goods including tax free goods or @ 1.5% on total Turnover of taxable goods.

Further, it has been notified that six monthly dealers who have opted for earlier scheme for FY 2014-15, can choose the new scheme by filing an application in Form-4A upto October 31, 2014. However, monthly/quarterly return filers ineligible for this scheme for FY 2014--15.

It has been provided that retailers opting out / ceasing to be eligible for Retailer Composition Scheme must intimate in Form-4B by April 30th of each year .

VAT inapplicable on sole transaction of car absent profit motive

Karnataka HC in case of State of Karnataka vs. Vasavi Wood Industries, has held that no VAT would be payable on sale transaction of car wherein no profit motive is involved.

HC has referred to SC decision in Orissa Road Transport Company Ltd., in which definition of "casual dealer" was scrutinized. In that case, SC had held that even if a person did not have systematic business involving regular transactions of purchase / sale, he would still be regarded as a casual dealer if he entered into occasional transactions of a business nature involving purchase / sale of goods.

In view of above, HC observed, *"…what follows from the aforesaid judgment is, the volume, frequency, continuity and regularity of transactions of purchase and sales being an important element in determining whether the business was carried out apart from the elements of profit making being there, occasional sales of a business nature would make the respondent, a casual dealer."*

HC noted that in the instant case assessee was a registered dealer in wood and wood products and was not engaged in selling cars occasionally every year. It was observed that the car sold was a solitary transaction, while also lacking profit motive, and had nothing to do with the primary business carried on by assessee.

Hence, HC was of the opinion that Tribunal was justified in holding that assessee was not a dealer or a casual dealer.

Comments: The aforesaid ruling is important as it has been held that profit motive is necessary for VAT purposes.

Accountants can prima facie appear before VAT authorities

Allahabad HC in the case of Tax Lawyers Association, Lucknow vs. State of U.P. , has allowed Chartered Accountants, Company Secretaries and Cost & Works Accountants from filing returns and appearing before VAT authorities.

It was observed that as per Sec 33 of Advocates Act, 1961, no person unless enrolled under Advocates Act is entitled to practice, however, subject to a provision contrary being made in the Act itself or in any other law. HC thus noted that persons who are not advocates practicing in any court or before any authority or person is clearly subject to a provision to the contrary in the Act or in any other law for the time being in force.

Therefore, where a provision is contained in any other law for the time being in force, entitling persons who are not advocates to practice in any court or before any authority or person, its effect would be to lift the embargo which is imposed by Section 33 of Advocates Act. With this regard, reliance was placed upon SC ruling in aLL.M. Mahurkar vs. Bar Council of Maharashtra [1996 9 SCC 192] wherein it was held that large number of persons have been permitted to appear before sales tax authorities on behalf of dealers including an employee, a relative, a sales tax practitioner and also professionally qualified people like lawyers andaccountants. Thus, right to appear before a sales tax authority was therefore, it was held, not confined only to lawyers.

Further, HC noted that the expression 'any other law for the time being in force' cannot be restricted to a law which was in force on the date of the enactment of the Act of 1961. It was observed that expression 'any other law for the time being in force' must receive its plain and natural connotation, which means a law which was in force when the Act of 1961 was enacted as well as a law which may be enacted by the competent legislature from time to time.

Comments: This is an important decision for all accountants as their right to practice before VAT authorities was challenged.

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