Indirect Tax News Update

VOLUME II, ISSUE I

JANUARY, 2015

Bhasin Sethi & Associates
Advocates and Consultants

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Service Tax

Audit under Rule 5A(2) of Service Tax Rules has statutory backing - Delhi HC Travelite ruling Distinguishable : CBEC Notification and Circular

CBEC vide. Notification No. 23/2014-St dated December 5, 2014, has amended Rule 5A (2) of Service Tax Rules, 1994. It has been notified that Cost accountants or chartered accountants nominated under 72A of Finance Act, would now be authorized to demand production of cost audit reports, income tax audit report (if any) u/Sec 44AB of Income Tax Act, 1961 and other records maintained under sub-rule 2 of Rule 5, for scrutiny.

Pursuant to this notification, CBEC issued a clarification vide. Circular No. 181/7/2014 -ST dated December 10, 2014. It has been clarified that verification of records mandated by the statute is necessary to check the correctness of assessment and payment of tax by the assessee in the present era of self-assessment. Further, CBEC clarified that the term"verified" used in section 94(2)(k) of the Finance Act is of wide import and would include within its scope, audit by the departmental officers, as the procedure prescribed for audit is essentially a procedure for verification mandated in the statute.

In view of this, CBEC clarified that Delhi HC ruling in M/s Travelite (India) can be distinguished as clear statutory backing for new Rule 5A(2) of Service Tax Rules now exists in Finance Act .

Comments: CBEC notification and circular is of wide importance as it has distinguished the Delhi HC ruling by amending the provisions of Rule 5A(2) of Service Tax Rules.

Service Tax applicable on intra / inter bus operation service under 'rent-a-cab' service

In the case of S.K. Kareemun & Others vs. CCE, Bangalore Tribunal upheld the service tax demand on bus operators towards intra / inter-sate operation of buses for Andhra Pradesh State Road Transportation Corporation (APSRTC) as "rent-a-cab" service u/s 65(105)(o) r/w Sec 65(91) of Finance Act, post – 2007.

Tribunal observed that as per various agreements, APSRTC is free to run the vehicle wherever they want, whatever amounts collected as fare are to be paid to APSRTC only, operator or his family members cannot compete with APSRTC and operators cannot own contract carriages and cannot run travel agencies. In view this, Tribunal rejected bus operators' reliance on Uttarakhand HC ruling in case of Sachin Malhotra wherein it was held that unless control of vehicle is passed onto hirer under rent-a-cab scheme, i.e. he can operate wherever and whenever as per requirement, there cannot be a taxable transaction.

Moreover, Tribunal stated that post 2007, definition of 'rent a cab' amended to cover motor cab, maxi cab or any motor vehicle (omnibus) with capacity to carry 12 passengers (excluding driver) for hire or reward, which is outside the ambit of Sec 75 of Motor Vehicles Act. In view of this Tribunal observed that "*even if we take a view that because the word cab prefixed by motor and maxi is still a cab and therefore the definition of rent-a-cab scheme of Motor Vehicles Act can be applied even if specific exclusion or inclusion is not made, after 2007 it becomes very clear that the intention of the law makers for the purpose of levy of service tax was not to follow rent-a-cab*

scheme envisaged in the Motor Vehicles Act"

Thereafter, Tribunal noted that words 'rent' and 'hire' have been used by Legislature interchangeably, both under Motor Vehicles Act as well as Finance Act and therefore current transaction would be taxable u/s 65(105)(o) r/w Sec 65(91). Lastly, stated that CBEC Circular dated August 2007 which clarified that "w.e.f. June 2007, service tax would be applicable on renting of buses under the category of rent-a-cab service", as Contemporanea Expositio, having persuasive value.

Comments: The said decision is crucial for all State Transport Bus providers as service tax has been made applicable on inter / intra uses operation.

Taxability of excess baggage charges collected separately by Airliners—Referred to Third Member

In the case of Kingfisher Airlines vs. CST, CESTAT has referred the matter to Third Member w.r.t. taxability of excess baggage charges collected by Airline operators from passengers at the time of aircraft boarding.

Member (Judicial) held that main service provided by airliner is "transportation of passenger by air" u/s 65(105)(zzzo) of Finance Act and excess baggage charges are integral part of such service. Further, he held that as per Sec 65A, when taxable service comprises of more than one service, then such services shall be classifiable under the taxable head that gives essential characteristic. In vie of this, he observed that in instant case, essential characteristic is "transportation of passenger by air", hence assessees not required to pay any service tax on excess baggage charges.

On the contrary, Member (Technical) held assessees would be liable to service tax under "transportation of goods by air" service category in terms of Sec 65(105)(zzn) of Finance Act. He noted that activity of carriage of excess baggage is distinct and separately identifiable, therefore, no transportation of goods cannot be clubbed with transportation of passengers. He noted that only free baggage allowed with passenger can be called 'incidental' to service of transporting passengers by air and merely because two services are provided simultaneously but distinctly, it cannot lead to over-simplistic conclusion that a single service is provided. Moroever, Member (Technical) followed the classification principles enunciated u/s 65A, where service cannot be classified as per clause (a) or (b), then according to clause (c), it shall be classified under sub-clause which occurs first, which in present case is "transportation of goods".

Comments: The reference to Third Member of CESTAT is crucial so as the taxability of excess baggage charges are in question.

Service tax applicable on services provided by advocates w.r.t. advocacy/consultancy/assistance to business entities

In the case of P.C. Joshi & others vs. Union of India, Bombay HC upheld 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 .

HC noted that legislature by inserting such provision has neither interfered with role and function of advocate nor has it made any inroad in constitutional guarantee of justice to all. It was 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 which is sought to be achieved by Parliament.

Moreover, HC observed that activities of Advocates in legal field are expanding in the age of globalisation, liberalisation and privatization and 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 is definitely within the permissive sphere of legislation and cannot be faulted. Reliance was placed on SC decision in All India Federation of Tax Practitioners vs. Union of India, to observe that what holds good for chartered accountants and architects must equally apply to other professionals such as advocates, and who too are well conscious of their status.

HC observed that "*Merely because of the role of the advocate, it does not mean that his position as an officer of the Court and part and parcel of administration of justice is in any way undermined leave alone interfered with".* HC stated that differentiation maintained and made by Legislature by excluding individual to individual legal services, takes note 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 (g) of Constitution.

Comments: The said HC decision is of great relevance as it notes service tax applicability on advocates w.r.t. services provided to Business entities.

Central Excise

Excise exemption granted to goods meant for J&K flood relief till March 31, 2015

Central Govt. vide. Notification No. 25/2014-CE dated December 11, 2014, has granted excise duty exemption to goods meant for relief and rehabilitation of people affected by floods in the State of Jammu & Kashmir till March 31, 2015.

The said exemption subject to certification of manufacturer that goods are intended for said purpose and are cleared directly from factory / warehouse to Central Government. Further, it requires manufacturer to produce certificate to this affect within 6 months before Deputy / Assistant Commissioner.

Comptroller & Auditor General of India (CAG) releases report containing signification results of performance audit on Central Excise Administration in Automotive Sector

(CAG) releases report containing signification results of performance audit on Central Excise Administration in Automotive Sector for period 2010-11 to 2012-13.

Performance audit has been conducted in 40 Commissionerates comprising of 239 assessees to seek assurance that indirect tax administration is adequately placed to safeguard interests of revenue through inter alia annual analysis of tax payers and defaulters, monitoring of exemptions.

It has been recommended to include provision in Central Excise Rules, 2002 for payment of late fees in case of non-filing of periodical returns by a specified date and provision enabling filing of revised returns. Further, recommends review of Rule 10 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 imposing additional requirement of "holding and subsidiary relationship" not envisaged by Central Excise Act. It has been stated that clear provisions should be introduced indicating what constitutes "mutuality of interest in each other's business" for purposes of clause (iv) of Sec 4 (3)(b) of Act .

Comments: CAG report on automotive sector is of great relevance as it recommends review of few central excise provisions.

Rule 8(3A) of CER refraining manufacturers to utilize credit for duty payment beyond due date declared 'ultra vires'

In the case of Indsur Global Ltd. vs. U.O.I., Gujarat HC struck down Rule 8(3A) of Central Excise Rules, to the extent it required defaulter to make duty payment without utilizing CENVAT credit till payment of outstanding amount, including interest.

HC observed that reasons for default manifold i.e. economic reasons, slowness in business, temporary financial crunch and all reasons cannot be given same treatment by imposing such stringent condition. In view of this, accepted assessee's contention that Rule 8(3A) does not distinguish between 'wilful defaulter' and others, hence condition pertaining to credit non-utilization is unreasonable and invalid.

After taking note of the object of CENVAT credit, HC observed that *"If such facility is withdrawn, it could be appreciated, his ability to continue the business under such adverse financial climate would further diminish…. This rule thus imposes a wholly unreasonable restriction which is not commensurate with the wrong sought to be remedied".*

HC thus concluded that by no stretch of imagination, restriction of duty payment without credit utilization under Rule 8(3A) is a reasonable restriction, hence violative of Art 14 of Indian Constitution. Also, such restriction is a serious affront to manufacturer's right to carry on trade / business as guaranteed under Art 19(1)(g) of Indian Constitution.

Thereafter, HC stated that Rule 8(3A) is a recovery mechanism creating no new liability, therefore, legitimate measure would be to insist assessee in default to clear all consignments on duty payment. However, HC has rejected assessee's contention that Rule 8(3A) is beyond rule making power of subordinate legislation and creates a hostile discrimination treating equals as unequals.

Comments: The aforesaid decision has come as a relief to manufactures as now manufacturers can utilize credit where dty has been discharged beyond the prescribed date.

Credit allowed on dutiable final goods despite few products being exempt

In the case of Shree Baba Exports vs. CCE, Meerut-II, Delhi Tribunal has allowed input credit utilisation for excise duty payment on dutiable final products, despite some products being exempt by way of CBEC Notification.

It was observed that credit required to be reversed in terms of Rule 11(3) of CENVAT Credit Rules is only against stock inputs / final products on the date of exemption. Therefore, ,anufacturer's right to utilize CENVAT credit for duty payment on dutiable final products cannot be taken away just because out of several products, one / few have been exempt.

As regards Rule 6 applicability, Tribunal noted that credit would be inadmissible where exempt final products have been cleared for home consumption and not against export under Bond / Letter of Undertaking. Absent evidence in this regard, Tribunal remanded the matter to Adjudicating Authority for de novo consideration of Rule 6 applicability.

Comments: The said decision is important as it allows credit on dutiable final products despite few products are exempt.

VAT

Goods supplied after filing BoE/assessment not sale in course of import but "inter-state" sale

AP HC in Vellanki Frame Works v. the Commercial Tax Officer, held that transfer of goods after filing bill of entry (BoE) / assessment would not be treated as a sale in course of import but an 'interstate sale', be it under principal-agent relationship or sale.

HC noted that assessee is an 'importer' as BoE filed in its name and once goods cleared for home consumption, they cease to be 'imported goods' as contemplated u/s 2(25) of Customs Act. It was observed that fact that name of Principal does not reflect in ex-bond BoE belies assessee's contention that goods sold by it on high seas by transfer of document to title

HC observed that *"It is evident, therefore, that the contention of high seas sales has been raised by the petitioner only to avoid the goods being subjected to tax as inter-state sales under the CST Act".*

Comments : The aforesaid HC ruling is important as it has been held that goods transfer after filing BoE is an inter-state sale and notr high seas sale.

Battery charger an 'accessory', taxable at general rate and not concessional rate

SC in the case of Nokia Ltd., held that mobile batter charge is an accessory and therefore, would be not be taxable at concessional rate but at general rate.

SC quashed P&H HC order which granted concessional tax rate to Nokia India (assessee) towards battery chargers sold alongwith cell phones, under Schedule 'B' to Punjab VAT Act .

HC has rejected assessee's contention that since battery chargers is not sold independently but in a composite package, tax rate as applicable to "cell phones & parts thereof" i.e. 4% would be leviable and not 12.5%.

SC stated that battery charger is not an integral part of cell phone making it a composite good, infact, it is only an 'accessory' capable of being sold separately.

SC observed that "*Merely, making a composite package of cell phone charger will not make it composite good for the purpose of interpretation of the provisions".* Moreover, Schedule 'B' does not indicate that cellular phone includes accessories like chargers.

Comments: This SC ruling is crucial as it has noted that mobile phone chargers as an accessory and taxable at 12.5%, not at 4%.

Movement of goods to another State by buyer for job-work does not constitute "inter-State sale"

In the case of ITC Bhadrachalam Paperboards Ltd, AP HC held that shifting of goods to another State by buyer for job-work does not constitute an "inter-state sale" .

HC observed that as per the law laid down by apex court, nature of transaction must be determined by reference to Sec 3 of CST Act alone, which inter alia states that sale / purchase must occasion the movement of goods from one State to another to qualify as "inter-State sale".

Reference was made to Sec 23 of Sales of Goods Act to hold that sale is deemed to be completed when goods are delivered to buyer / carrier / bailee, without reserving right of disposal by seller. HC stated that in instant case, assessee sold paperboards ex-factory by delivering to carrier and thereby passed risk in goods to buyer, who transferred them to anotherState for conversion into cigarette packets / cartons, hence liable to local tax.

Moreover, HC held hat payment of concessional tax under CST Act cannot relieve assessee from its liability to pay local tax under Andhra Pradesh General Sales Tax Act, however, it can claim refund.

Comments: The aforesaid decision is important for dealers as goods shifted to another state for job-work cannot be treated as an inter-state sale.

Customs

Customs exemption granted to goods meant for J&K flood relief till March 31, 2015

Central Govt. vide. Notification No. 332014-Cus dated December 11, 2014, has granted customs duty exemption to goods meant for relief and rehabilitation of people affected by floods in the State of Jammu & Kashmir till March 31, 2015.

The said exemption subject to certification of importer that goods are intended for said purpose and are cleared directly from factory / warehouse to Central Government. Further, it requires importer to produce certificate to this affect within 6 months before Deputy / Assistant Commissioner.

Manufacture under customs bond is imports, excise concession prima facie ineligible

In the case of Dempo Shipbuilding & Engineering Pvt. Ltd., Mumbai Tribunal observed that barge vessels manufactured by Shipbuilding Company under customs bond is at par with imports and would be ineligible for concessional excise duty rates / exemption on clearance.

Tribunal rejected assessee's claim of 2% Countervailing Duty (CVD) under Notification No. 1/2011-CE as amended vide Notification No. 16/2012-CE, subject to non-availment of input credit. It was observed that said notification is applicable only to domestically manufactured goods and not imports, as foreign manufacturer unable to satisfy given condition.

Reliance was placed on Larger Bench ruling in Priyesh Chemicals & Metals wherein it was held that benefit of conditional exemption Notification cannot be extended to imported goods.

Comments: The aforesaid decision is important so as to note that manufacture under customs bond is not eleigible for excise duty concessions.

Royalty payable on manufactured goods sale not includible in inputs' import value

In the case of Atlas Copco India Ltd. vs Commissioner of Customs (Import), Mumbai Tribunal observed that royalty in respect of technical know-how paid on sale of manufactured goods, viz. compressed air & gas / construction & mining equipment would not be includible in assessable value of imported inputs.

It was observed that such royalty is not 'a condition of sale of goods being valued' as stipulated under Rule 10(1)(c) of Customs Valuation (Determination of Price of Imported Goods) Rules, 2007. Tribunal noted that cost of standard bought out components and landed cost of imported components would be deductible for 'royalty' computation.

Therefore, Tribunal concluded that "the royalty has nothing to do with thevalue of the imported raw materials".

Comments : The aforesaid decision is of great relevance for all importers as royalty payment towards manufactured goods is not includible in inputs import value.

Foreign Trade Policy

Commerce Ministry to determine duty credit scrip entitlement under "Served From India Scheme"

In the case of UHDE India Pvt. Ltd. , Bombay HC directed Secretary of Commerce to consider entitlement of duty credit scrip under "Served From India Scheme" (SFIS) to Indian company with majority foreign shareholding as well as application of Policy Interpretation Committee decision w.r.t. promotion of Indian brand to instant case.

HC observed that manner in which foreign trade needs to be developed and regulated is essentially to be decided by authorities under Parliamentary statute. It was noted that if such authorities can evolve any policy, it is equally open for them to consider the present issue of assessee, and Court must not examine the issues as they are not only intricate, but essentially of a policy decision needed to be taken by Executive.

HC stated that in larger public interest and of promoting foreign trade, State / Central Govt. must take such decisions and Ministry must reach decision uninfluenced by Revenue pleadings / DGFT view and in case of any adverse decision.

Comments : The aforesaid decision is of great relevance in the field of India's foreign policy.

SEZ

No CVD leviable on Domestic Tariff Area sale by SEZ unit, where like goods exempt from excise duty

In the case of Roxul Rockwool Insulation India Pvt Ltd , Gujarat HC held that no additional customs duty / countervailing duty (CVD) would be leviable on DTA sale by SEZ unit, where like goods are exempt from excise duty.

HC stated that Sec 30 of SEZ Act envisages clearance of goods from SEZ to DTA, subject to fulfilment of condition, which is payment of customs duty (including CVD, anti-dumping & safeguard duties) as payable on like articles at time of import into India; In order to determine applicable CVD rate on subject goods at time of import, Sec 3(1) of Customs Tariff Act must be referred to, which provides for CVD equivalent to central excise duty payable on like articles if manufactured in India; Since in instant case, "stone-wool insulation products" exempt when locally manufactured, no CVD would be payable on their import u/s 3(1) of Customs Tariff Act.

HC observed that Sec 5A of Central Excise Act is not relevant in deciding applicability of duty on DTA clearances from SEZ after enactment of SEZ Act.

HC observed, *"Whether such liability would continue on SEZ units when local manufacturers were exempt has seen to be gathered from the language used in Section 30 of SEZ Act and not from proviso of sub- section (1) of Section 5A of Central Excise Act"; Charging Sec 3 of Central Excise Act amended to exclude goods / manufactured in SEZ from payment excise duty, therefore, continued reference to SEZ in proviso to Sec 5A(1) clearly a legislative oversight; Concludes by stating, "…entire legislative scheme has undergone a change by introduction of SEZ Act and the changes made in the Central Excise Act in this regard…..legislative intention emerging is that a SEZ unit will have no liability to pay countervailingduty, if the local manufacturer of like goods is exempt from payment of whole of such duty"*

Comments: The said decision is important so as no CVD would be leviable on sale in DTA where similar goods are exempt.

401, Satyam Cineplexes, Ranjit Nagar,
New Delhi - 110008
Phone No. : 011-25895998, 25894899
Email: delhi@bsalaw.in

C-20/1 (Lower Ground Floor),
Ardee City, Near Gate-3,
Sector-52, Gurgaon - 122011
Phone No. : 0124-4275494, +91-9910044272
Email: gurgaon@bsalaw.in

Website : www.bsalaw.in