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INDIRECT TAX REVIEW
FEBRUARY 2015

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SERVICE TAX

VALUE ADDED TAX

Inside this edition

INDEX

BUDGET 2015: INDIRECT TAXES

It is almost second-nature for India to expect something out of every budget. This budget is no different. However, one could certainly say that probably bets placed on this budget far exceed what is normally seen. It is almost as if the expectation is that it would be 'road-map' budget for the next 4 years of this present Government.

Budget 2015 has laid out a message of implementation by bringing in a slew of reforms to kickstart India's economic growth and move towards a non-adversarial tax system. Given the same, proposals in Budget 2015 may best be described as 'pro-growth'. Some of the noteworthy measures from an Indirect tax perspective are listed below.

Goods and Service tax ('GST') is expected to play a transformative role in the way the Indian economy functions. GST will add buoyancy to the economy by reducing the cascading effect on the cost of goods and services. The budget has re-affirmed the Government's intent in moving towards implementing a GST regime in India from April 1, 2016

In Budget 2014, the scheme of Advance Ruling was extended to Resident Private Limited Companies. The budget further extends this benefit to resident firms (i.e. partnership firms, sole proprietors and one person company). This would go a long way in reducing unnecessary litigation for businesses.

Although the effective rate of customs duty has been increased from 28.85% to 29.44%, proposals have been made for rationalization of the inverted duty structure in line with the agreement of the Government with the World Trade Organisation. For the Information Technology industry, the budget has brought in goods news with the abolition of Special Additional Duty in lieu of VAT on all goods (except populated printed circuit boards) for manufacture of ITA bound items.

Penalty provisions have been rationalized across the Customs, Excise and Service tax; thereby, reducing penalties on bonafide errors and making them more stringent in cases of tax evasion. The same may help in reducing litigation.

Cenvat credit of service tax paid under a partial reverse charge may now be taken on payment of service tax. This would reduce the time lag in availment of Cenvat credit as credit availment need not be delayed till payment of invoice value.

The increase in the time limit for availing Cenvat credit from 6 months to 1 year is a welcome step. This would ensure there is no credit leakage on account of delay in availing credit.

Although the Finance Minister managed to please the industry in certain sector, there were certain misses as well, such as:

The Union Budget 2014 (w.e.f October 1, 2014) has substantially increased the interest rates for delay in payment of service tax (for a delay for a period

beyond 6 months and up to 1 year) to 24% and to 30% (for a period beyond 1 year). Much was expected that Finance Minister in present Budget would consider lowering such penal interest rates so as to reduce the cost burden on an assessee. However, no announcements have been made in this regard by the Finance Minister.

Double taxation of certain transactions like taxation of intellectual property rights, supply of software, works contracts, etc. have been plaguing the industry for long. The Budget has failed to provide any clarity in this regard. Further, it was also expected to clarify the position regarding levy of service tax on amount recovered by employer from employee during the course of employment.

The industry was widely expecting that given the time consuming process for obtaining refunds, specific guidelines would be issued by the Government for procuring of refund claim within specific time frame. However, no guidelines have been issued in this regard in the budget.

Last but not the least, the media industry was hoping for a slew of reforms and the same may be a matter of discussion at the macro level within the corridors of power. However, not much was done. The industry is now hoping for measures at a micro-level for the common man to cherish with family.

Broadly the regulatory measures along-with issues of inverted duty structure, time limit of availing credit etc. are steps in the right direction. A favorable amendment in form of reduction in penalties to encourage compliance and early dispute resolution are measures and signals to facilitate ease of doing business in India.

CASE UPDATE: SERVICE TAX

Assessee not prohibited from paying tax on services exempted under a notification.

M/s Deloitte Haskins And Sells Vs. Commissioner of Central Excise, Thane [2015-TIOL-366-CESTAT-MUM]

M/s Deloitte Haskins and Sells (the Appellant) is a firm providing services of practising Chartered Accountant and Management Consultancy services to clients in India and abroad. The Appellants were operating from the different locations, each with a separate Service tax registration number and the accounting operations were carried out from Worli address (registered unit).

The Department alleged that the services rendered by the Appellant during the period under dispute were exempted under Notification No. 04/2004-ST dated March 31, 2004 (which provides exemption to services provided to SEZ units) [Notification 4/2004] and Notification No. 25/2006 dated July 13, 2006 (which provides exemption to services relating to representation before the statutory authorities) [Notification 25/2006].

Accordingly, the Appellant has wrongly availed Cenvat credit while providing exempted services as well as taxable services in violation of the Cenvat Credit Rules, 2004 (the Credit Rules) as the Appellant did not maintain separate

records for the exempted and taxable services in terms of Rule 6(1) of the Credit Rules. Therefore, as per Rule 6(3)(c) of the Credit Rules (as was prevalent during the period under dispute), the Appellant could utilize Cenvat credit only to the extent of 20% of the amount of Service tax payable on their output services. Hence, the Appellant was required to pay Rs. 2,78,23,485/- in terms of Rule 6(3)(c) of the Credit Rules.

It was further alleged that the Appellant has also irregularly availed Cenvat credit of Rs. 5,65,000/- and Rs. 31,25,737/-on the strength of invoices raised on the registered unit at Worli whereas the Cenvat credit was taken in another registered unit at Mafatlal House, Mumbai.

Being aggrieved, the Appellant filed an appeal before the Hon'ble CESTAT, Mumbai submitting as under:

- Notification 25/2006 provides exemption to services relating to representation before the statutory authorities, whereas the Appellant had charged consolidated amount for entire work i.e. drafting, compliance, appearance and sometimes their contract is for entire taxation related issues. Therefore, they chose to pay tax on the entire amount and not to avail exemption;
- Notification No. 4/2004 which grants conditional exemption to services provided to SEZ units was not availed because it is beyond control to ensure that the service receiver follows the conditions of the Notification such as maintenance of proper records;
- Unlike Section 5(A)(1A) of the Central Excise Act, 1944 (the Excise Act) there is no provision in the Finance Act, 1994 (the Finance Act) requiring that unconditional exemption has to be necessarily availed;
- Cenvat credit cannot be denied on procedural grounds.

The Hon'ble CESTAT, Mumbai held as under:

- Cenvat credit cannot be denied for the procedural infraction that the addressee in the invoices was another office of the Appellant and relied upon following judgments: Commissioner Vs. DNH Spinners [2009 (16) STR 418 (Tri.-Ahmd.)], Modern Petrofils Vs. CCE[2010 (20) STR 627 (Tri.Ahmd)].

Thus, the matter was remitted back to the Commissioner for verifying that the Inputs services in respect of such invoices were actually used in the Mafatlal House office and not in the Worli office.;

- Revenue has not examined the records in detail to see the nature of actual activities undertaken by the Appellant. Issue of Show Cause Notice without examining and analysing of all the documents does not serve any purpose;
- Unlike Section 5(A)(1A) of the Excise Act, there is no provision in the Finance Act requiring that unconditional exemption has to be necessarily availed and relied upon following judgments: – Crown Products Pvt. Ltd. Vs. CCE, Nashik [2012 (28) STR 406 (Tri.-Mum)] and MPS Ltd. Vs. Commissioner of Service Tax, Bangalore [Appeal No. ST/763/2011];

- Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy. Thus it is clear that under Service tax laws, the Assessee is not prohibited from paying tax on services exempted under a notification.

Thus, the Hon'ble Tribunal decided the matter in favour of the Appellant by holding that the Appellant had not provided exempted and taxable services in terms of Rule 6(2) of the Credit Rules and therefore the restriction of availment of Cenvat credit up to 20% of the value of taxable output services would not apply.

No extended period if demand arose out of correct figures shown in ST-3 Returns

Central Warehousing Corporation Vs. Commissioner of Service Tax, Ahmedabad [(2015)54 taxmann.com 209 (Ahmedabad – CESTAT)]

In the instant case, Central Warehousing Corporation (the Appellant) filed an appeal before the Hon'ble CESTAT, Ahmedabad against the Order of the Ld. Commissioner (Appeals) wherein demand of Rs. 6,18,946/- was confirmed against the Appellant by invoking extended period of limitation under Section 73 of the Finance Act, 1994 (the Finance Act).

The Appellant submitted that the aforesaid demand was raised as per CERA objection on the basis of short payment of Service tax shown in Service Tax Returns (ST-3 Returns) filed by the Appellant. Accordingly, when proper duty calculations were shown in the ST-3 Returns, extended period is not invokable. The Appellant relied upon the following cases in support of his contentions:

- Aneja Construction (India) Ltd.CST [Final Order No. A/1262/2012 – WZB, dated 9-8-2012]
- Commissioner Vs. Meghmani Dyes & Intermediates Ltd. [2013 (288) E.L.T 514 (Guj)] ("Meghmani Dyes case")
- Bhansali Engg. Polymers Ltd. Vs. CCE [2008 (232) ELT 561 (Tri. Delhi)]
- Johnson Mattey chemical India P. Ltd. Vs. CCE [Final Order No. 50323 of 2014, dated 22-1-2014]

However, the Revenue argued that the extended period is rightly applicable in the present case because the Appellant failed to give details/ information that short payment made in a particular month was made good in the next month's Service tax payment.

The Hon'ble CESTAT, Ahmedabad, relying on the decision in the Meghmani Dyes case, held that if prescribed Returns are filed by Assessee giving correct information, then extended period of limitation cannot be invoked. In the instant case also, prescribed ST-3 Returns were duly filed by the Appellant giving correct information and differential tax payable was apparent from the figures furnished by the Appellant.

Accordingly, the Appellant cannot be held to have suppressed any information with intention to evade payment of Service tax and thus,

extended period cannot be invoked. Therefore, the demand raised on the Appellant is time-barred.

Pre-deposit has to be waived off if Assessee's case is a good/ strong prima facie case covered by a binding precedent

Shukla & Brothers Vs. Customs, Excise & Service Tax Appellate Tribunal [(2015) 54 taxmann.com 182(Allahabad)]

Shukla & Brothers (the Appellant) is a proprietorship firm registered under Service tax under the category of 'Construction Work'. However, under some confusion and misguidance, the Appellant was issued registration under ST-2 in the category of 'Civil Structure Construction Work'. The Appellant claimed that the services provided are of maintenance/ sanitation services provided at factory premises of clients, which does not fall within tffvhe Service tax net.

Thereafter, the Show Cause Notice was issued to the Appellant demanding the alleged amount of Service tax along with interest and penalties, which was further confirmed by the Adjudicating Authority. Being aggrieved, the Appellant filed an appeal before the ld. Commissioner (Appeals) but the same was rejected.

Thereafter, the Appellant filed an appeal before the Hon'ble CESTAT, Delhi. The Hon'ble Tribunal vide a non-speaking Order dated February 26, 2013 (Impugned Order) ordered pre-deposit

of 40% of the demand under Section 35F of the Central Excise Act, 1944 made applicable to the Finance Act, 1994 (the Finance Act) vide Section 83 thereof.

Later vide Order dated April 11, 2013, the Hon'ble Tribunal dismissed the appeal filed by the Appellant for non-compliance of condition of pre-deposit. Being aggrieved, the Appellant filed an appeal before the Hon'ble High Court of Allahabad.

The Hon'ble High Court of Allahabad held as follows:

- It has been a uniform view of various Courts that while considering provisions of pre-deposit of duty and penalty, the Authority concerned has to examine the question as to whether the Assessee has a good prima facie case so as to justify the dispensation of requirement of pre-deposit.
- Further, the Authority must exercise its discretion to dispense with such requirement particularly in a case where the Assessee satisfies the Appellate Authority that his case is squarely covered by the decision of a competent court binding on it and in such cases, asking the appellant to deposit the duty demanded and the penalty levied would cause undue hardship to the Appellant – Hindustan Ferro & Industries Ltd. Vs. CESTAT [2006 (205) ELT 153 (All)]; B.P.L. Sanyo Utilities & Appliances Ltd. Vs. Union of India [1999 (108) E.L.T. 621]; Andhra

Civil Construction Co. Vs. CEGAT [1992 (58) E.L.T. 184]; J.N. Chemical (P.) Ltd. Vs. CEGAT [1991 (53) E.L.T. 543].

- For a good or strong prima facie case, it is not necessary for the Assessee to satisfy the Tribunal that his case is full proof and is bound to succeed. Strong prima facie case would mean that the case is an

arguable one and fit for trial, or prima facie covered by a binding precedent. In such a situation, the Tribunal is under a legal obligation to consider the application of waiver taking into account the undue hardship which would require examination of prima facie case, on merits;

- The Impugned Order, running into six lines and directing the Appellant to deposit 40% of the demand is sans any reason and as such is cryptic.

Therefore, the Hon'ble High Court set aside the Impugned Order and the matter was remitted back to the Hon'ble CESTAT, Delhi for re-determine the issue and passing fresh orders on the applications for waiver of the condition of pre-deposit and the appeal itself thereafter.

Computerized invoices downloaded through internet are eligible documents for claiming Service tax Refund

Suncity Art* Exporters *Vs. Commissioner of Central Excise & Service Tax, Jaipur-II [(2015) 53 taxmann.com 207 (New Delhi – CESTAT)]

Suncity Art Exporters (**the Appellant**) were exporters of handicrafts and were entitled to Refund of Service tax paid on the various specified input services in terms of Notification No. 17/09-ST dated July 7, 2009. Accordingly, the Appellant filed Refund claims in respect of various input services like shipping and forwarding agent services, CHA services, terminal handling services, bill of loading services, documentary charges and transportation by rail etc.

The Refund claims of the Appellant were denied by the Department on various grounds:

- In some cases, Refund was rejected for non-submission of original invoices raised by the service providers. In this regard, the Appellant relying upon the decision in the case of *CCE Gokul* Refoils & Solvents Ltd. *[(2013) 42 GST 137/32 taxmann.com 245 (Ahd.)] and Creative Architects & Interiors in Order Appeal No. 213/2011 (M-ST), dated December 2, 2011*, submitted that the said invoices contained all the details like container number or shipping bill number, bill of loading number etc., and fully establishes the availment of input service used in the export of the goods;
- A part of the Refund claim was denied on the ground that the various services provided by the persons at the port like bill of loading charges, documentary charges, REPO charges etc., cannot called to be port services as also on the ground that the service providers are not registered under the port services category, but are registered under different categories;
- The Refund claim of Service tax paid on CHA services/ clearing and forwarding agent services was denied on the ground that the invoices issued do not mention the goods. The Appellant argued that the said invoices have cross reference to either invoice number or the

shipping bill number and/ or container number and from the said cross references the description of the goods can be found out;

- A part of the Refund was denied on the ground that CHA has charged other charges which do not fall under the CHA services and as such the Service tax paid by the CHA cannot be allowed as refund;
- In some cases, the Refund claim was denied on grounds such as describing the transportation of the goods by road in Refund application, whereas the actual transportation was rail, the claim was filed under the category of THC instead of CHA etc.

Being aggrieved, the Appellant preferred an appeal before the Hon'ble CESTAT, Delhi. The Hon'ble CESTAT, Delhi held the following:

- Denial of refund of Service tax on the ground of downloaded invoices is not in consonance with the precedent decisions as also in terms of the Board Circular No. 112/6/2009-ST dated March 12, 2009. Hence, the Department was directed to verify the Appellant's refund claim afresh;
- Any services provided on the port are 'port services'. Further, Refund cannot be denied on the ground that service providers are not registered for any particular service. Thus, the Department was directed to examine the Appellant's refund claim and verify the same from the documents and decide the Refund claim accordingly;
- Denial of Refund claim on ground of invoices not containing reference to goods was also set aside with directions to the Department to undertake the necessary exercises for cross reference of the invoices with the description of the goods;
- In as much as and as long as the CHA paid the Service tax on the entire consideration under the category of CHA services, the service recipient would be entitled to the benefit of the same. When no objection as to classification was raised by the Revenue at the time of collection of Service tax from the CHA, allowing them to raise such an objection at the time of grant of Refund would be against the principles of justice;
- Inadvertent mistakes like stating transport by road instead of by rail, filing refund claim as THC rather than as CHA, having occurred in the hands of the person preparing the Refund claim, cannot result in denial of Refund, if otherwise due to the assessee on merits.

Accordingly, the matter was remanded back to the Department for examining the Appellant's Refund claim afresh, in the light of the law declared by the Tribunal in various decisions and also after verification of the documents, without raising technical and procedural issues.

Sum paid as a pure agent of service recipient not includible in value of services

Union of India Vs. Raj Wines [(2015) 53 taxmann.com 445 (Chhattisgarh)]

Raj Wines was marketing and promoting various kinds of Indian Made Foreign Liquor/ Beer manufactured by Skol Beverages Limited (SBL), for which

the Assessee received total payment of Rs. 2,84,34,153/- in the name of Primary claim/ Retail Scheme, Commission claim, Merchandise expenses, Fixed office expenses, Other expenses (label Reg. & Brand Reg. Courier, NOC & Excise on breakages) for the period July 1, 2003 to August 31, 2006. However, no Service tax was deposited by the Assessee.

The Adjudicating Authority confirmed demand of Service tax on the total amount of Rs. 2,84,34,153/- under the taxable category of 'Business Auxiliary Services' along with interest and penalty. However, on appeal being filed to the Ld. Commissioner (Appeals), it was held that Service tax could only be levied on Commission claim and not on the other components of reimbursement received by the Assessee. The Ld. Commissioner (Appeals) also reduced the amount of penalty.

Being aggrieved, the Department preferred an appeal before the Hon'ble Tribunal. The Hon'ble Tribunal held that the Assessee was further liable to pay Service tax on Merchandise expenses, fixed office expenses as well as on miscellaneous expenses of registration and transportation. However, the Hon'ble Tribunal upheld the order of the Ld. Commissioner (Appeals) excluding Service tax on the amount received towards Primary claim/ Retailer scheme on the ground that it was paid over by the Assessee to retailers on behalf of SBL for achieving certain quota of sales and later on reimbursed by SBL as a pure agent.

Later on, the Department filed an appeal before the Hon'ble High Court of Chhattisgarh challenging the Hon'ble Tribunal's decision for exclusion of the amount received towards Primary claim/ Retailer scheme. The Hon'ble High Court of Chhattisgarh after discussing provisions under Section 67 of the Finance Act, 1994 (the Finance Act) read with Rule 5 of the Service Tax (Determination of Value) Rules, 2006 (the Valuation Rules), upheld the Order of the Hon'ble Tribunal holding that Primary claim/ Retailer scheme is the amount which the service provider (i.e. the Assessee) had given to the retailers on behalf of SBL for achieving certain quota of sales for which they were reimbursed by SBL as a pure agent. Accordingly, the said amount would be dealt in view of Rule 5(2) of the Valuation Rules which provides exclusion of expenditure or cost incurred by the service provider as the pure agent.

No Penalty when Service tax been paid before issue of SCN

CCE, Panchkula Vs. M/s. Krishna Cylinders [2015 (1) TMI 1197 – CESTAT NEW DELHI]

During the course of audit it was revealed that Krishna Cylinders (Assessee)has not paid Service tax during the period from April 1, 2006 to March 31, 2007 on outward Goods Transportation services. However, on being pointed out by the audit team, the Assessee paid the entire amount of Service tax along with applicable interest.

Thereafter, a Show Cause Notice (SCN) was issued to the Assessee to appropriate the amount already paid by the Assessee and for imposition of penalties under Sections 76, 77 and 78 of the Finance Act, 1994 (Finance Act).

Thereafter, in the Adjudication proceedings, the amount already paid by the Assessee was appropriated against the demand of Service tax and interest and various penalties under Sections 76, 77 and 78 of the Finance Act were confirmed.

On appeal being filed to the Ld. Commissioner (Appeals), the penalties under Sections 76, 77 and 78 of the Finance Act were set aside by invoking Section 80 of the Finance Act. Being aggrieved, the Revenue preferred an appeal before the Hon'ble CESTAT,Delhi.

The Revenue submitted that in the present case, the demand has been confirmed and admitted by the Assessee for the extended period of limitation. Therefore, the Assessee cannot escape the penalties. It was further submitted when extended period of limitation has been invoked and liability has been admitted by the Assessee, benefit of Section 80 of the Finance Act cannot be granted.

Furthermore, relying upon the decision in the case of Machino Montel (I) Ltd.[2006 (202) ELT 398 (P&H)], it was submitted that mere deposition of the duty demand before issuance of SCN cannot give the benefit to the Assessee for non-imposition of penalty.

The Hon'ble CESTAT,Delhi after discussing Section 73(3) of the Finance Act held that as per the provisions of Section 73(3) of the Finance Act, the SCN was not required to be issued when Service tax along with interest has been paid by the Assessee before issuance of SCN. Further, in SCN there were no specific allegations of non-payment by way of fraud, collusion, willful misstatement or suppression of material facts.

Accordingly, it was held that although the SCN was issued to the Assessee which was not required to be issued as per Section 73(3) of the Finance Act, no penalty could be imposed.

Cenvat credit on invoices received prior to Service tax registration

JP. Kenny Ltd. Vs. CCE. & CST. – Delhi[2015 (1) TMI 1199 – CESTAT NEW DELHI]

In the instant case, JP. Kenny Ltd. (the Appellant)availed Cenvat credit of Rs. 6,48,208/- on the invoices received prior to their Service tax registration and also availed Cenvat credit of Rs. 47,182/- on Housekeeping and Hotel services charges paid by them.

The Department denied the said Cenvat credit to the Appellant on the ground that the Appellant is not entitled to take Cenvat credit on services received prior to Service tax registration and that the Housekeeping and Hotel services charges are not related to Appellant's business of manufacturing as these services have been availed outside the factory premises. Thereafter, the matter was adjudicated and demand was confirmed against the Appellant along with interest and penalties.

Being aggrieved, the Appellant preferred an appeal before the Hon'ble CESTAT, Delhi. The Appellant relying upon the decision in the case of MPortal

India Wireless Solutions Pvt. Ltd Vs.CST [2011 (9) TMI 450 – KARNATAKA HIGH COURT] (MPortal India case)which was followed bythe Hon'ble Tribunal in the case of Reliance Ports & Terminals Ltd. Vs. C.C.E. [2013-TIOL-388-CESTAT-Mum], submitted that Cenvat credit cannot be denied for the invoices received prior to Service tax registration. Further in respect of Cenvat credit availed on the Housekeeping charges, the Appellant submitted that the same is governed by the decision in the case of LO real India Pvt. Ltd Vs. C.C.E. [Pune 2011 (22) STR 89]. However, for Hotel charges, the Appellant fairly conceded that they are not entitled to take Cenvat credit for the same but submitted that the demand is time barred as the facts of availment of Cenvat credit came to the knowledge of the Department at the time of audit.

On the other hand, the Department placed reliance on the decision in the case of Showa India (P) Ltd. Vs. C.C.E. Faridabad[2012 (25) S.T.R. 152 (Tri-Del)]and submitted that prior to Service tax registration, the Appellant is not entitled to take Cenvat credit. Whereas in respect of services of Housekeeping and Hotel charges, it was submitted that these services are availed by individual in residential colony. Therefore, the Appellant is not entitled to take Cenvat credit of the same.

On ground of limitation, the Department submitted that as the fact of availment of Cenvat credit came to the knowledge of the Department during the course of the audit and the Appellant has not taken any positive steps to pay inadmissible Cenvat credit within time, therefore, extended period of limitation is rightly invoked.

The Hon'ble CESTAT, Delhi relying upon the decision in the MPortal India case, held that the matter is squarely covered in aforesaid decision and therefore, the Appellant is entitled to take Cenvat credit on the invoices received prior to Service tax registration. As regards the issue of inadmissible Cenvat credit, the allegations of the Department were upheld and the corresponding demand was confirmed along with interest.

CASE UPDATE: CENTRAL EXCISE

Cenvat credit cannot be denied at the end of the recipients of the goods, on the premise that higher duty has been paid by the manufacturer

CCE Pune I Vs. Pefco Foundry And Other [2015 (2) TMI 556 - CESTAT MUMBAI]

In the instant case, Bajaj Auto Ltd. Pune/Aurangabad and Telco, Pimpri ("the manufacturers"), sold scraps ("impugned goods") to the first stage dealers who, in turn, sold the impugned goods to Pefco Foundry ("the Assessee"). The Revenue denied Cenvat credit amounting to Rs. 49,89,412/- to the Assessee on the following grounds:

- Cenvat credit has been availed by the Assessee against the invoices indicating supply of MS Off cuts, whereas the material which was actually supplied under the cover of invoices was CRCA scrap;
- The price at which the impugned goods were sold by the manufacturers to the first stage dealers was excessively higher than

the price at which the dealer sold such impugned goods to the Assessee.

The Assessee submitted that the impugned goods sold by the manufacturers at a certain price to the first stage dealers are segregated wherein the scrap which can be used for manufacturing of components directly is sold at higher price and the scrap which either cannot be used or sold for use of melting are sold under the cover of invoices at a lower price. It was further submitted that till 1997, the manufacturers were describing the impugned goods as M.S. Scrap but after the decision of the Hon'ble Supreme Court in the case of LML, they revised the classification list and classifying the same material as MS Off cuts. Therefore, the contentions of the Revenue are not sustainable.

Thereafter, the Adjudicating Authority decided the matter in favour of the Assessee, allowing the Impugned Cenvat credit. Being aggrieved, the Revenue preferred an appeal before the Hon'ble CESTAT, Mumbai.

The Hon'ble CESTAT, Mumbai held as under:

- From the various statements of dealers and the manufacturers, recorded by the Revenue, it is clear that till 1997, the impugned goods were described as M.S. scrap and thereafter in terms of the decision of Hon'ble Supreme Court in the case of LML, the impugned goods were classified into various types of M.S. Offcuts. These M.S. Offcuts either can be used for manufacture of components or can be used as melting scrap;
- Further, from the statements of first stage dealers, it is clarified that after procuring the impugned goods from the manufacturer, they used to segregate them and the goods which can be used for manufacture of components or can be re-used were sold at higher price and the remaining were sold at lower price as CRCA melting scrap;
- During the period 1996-97, Bajaj Auto Ltd. was clearing the MS scrap by reversing the Cenvat credit availed on MS Sheets (inputs). In that case, the Revenue cannot dispute reversal of Cenvat credit by Bajaj Auto Ltd., at the end of the recipients of the said goods as Cenvat credit is taken on the duty paid by Bajaj Auto Ltd., on the said goods;
- The Hon'ble Supreme Court in the case of MDS Switchgear Pvt. Ltd. [2008 (229) ELT 485 (S.C.)], has held that Cenvat credit cannot be denied at the end of the recipients of the goods on the premise that higher duty has been paid by the manufacturer.

Thus, the Hon'ble Tribunal upheld the Order of the Adjudicating Authority allowing Cenvat credit to the Appellant and decided the case in favour of the Assessee.

In case of composite Show cause Notice in respect of two Assessees, there is no rule or principle that authorizes the apportionment of liability based upon the past figures.

Commissioner of Central Excise Vs. Modern Industrial Enterprises [2015 (2) TMI 609 - DELHI HIGH COURT]

Modern Industrial Enterprises ("MIE") and Florida Electrical Industries Ltd. ("FIEL") (collectively referred to as "the Assessees") were subject to independent search operations by the Central Excise Authorities on September 22, 2001, wherein Clandestine removal of excisable goods was ascertained and some material was seized. Therefore, the Revenue vide Show Cause Notice ("the SCN") dated March 25, 2003 sought duty on such clandestine removal and also imposed penalty.

The Assessees contended that the SCN issued by the Ld. Commissioner lacked the jurisdiction. Further, without attributing the extent of clandestine removal alleged in respect of each unit specifically, duty liability could not be imposed. However, the Ld. Commissioner vide Order dated June 30, 2004 confirmed the demand raised in the SCN.

Being aggrieved, the Assessees preferred an appeal before the Hon'ble Tribunal. The Hon'ble Tribunal upheld the contentions of the Assessees and set aside the demand raised in the Order of the Ld. Commissioner. It was held by the Hon'ble Tribunal that the Commissioner of Central Excise, Delhi-I could not issue the SCN against FEIL as FEIL falls within the jurisdiction of the Central Excise Commissioner, Delhi-II. Further, without attributing the actual removals and working out the duty liability on the basis of the past production of goods is untenable. In other words, since it was not possible to arrive at the value of clearances separately between MIE and FEIL, duty demanded could not be confirmed.

Being aggrieved, the Revenue preferred an appeal before Hon'ble High Court of Delhi. The Hon'ble High Court allowed the appeal in favour of the Respondents in regard to the duty demanded on clandestine removal by remanding the same on merits and decided the jurisdiction issue involved in favour of the Revenue along with the following observations:

- Issuing of the SCN in a composite manner to two parties ipso facto did not vitiate the proceedings. However, if at the stage of determination of liability or at the final stage, it was open to the Commissioner to ascribe one figure or the other, to each of the parties, that course ought to have been adopted;
- There is no rule or principle that authorizes the apportionment of liability based upon the past figures;
- As regards the issue of jurisdiction, the Assessees' submission that upon the issuance of Notification No. 14/2002-CE(NT) dated March 8, 2002, legality of investigations stood protected but upon the ceasing of such proceedings, the appropriate Commissioner necessarily had to exercise jurisdiction is textual and narrow. In tax proceedings, such as the present one, there is certain seamlessness to the entire process, and splitting up that into different stages, i.e., investigation, adjudication, etc., and the spelling up of the process would defeat the

underlying object of Section 38A of the Central Excise Act, 1944 ("Where any rule, notification or order made or issued under this Act or any notification or order issued under such rule, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not—(a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect, and lead to startling as well as anomalous results…") and would lead to startling as well as anomalous results.

Accordingly, the Hon'ble High Court held that the matter requires to be re-examined on the merits of the clandestine removal and directed that the Tribunal may, depending upon the submissions made and the extent of materials available with it, take such course, as is available in law, for this purpose, after giving due opportunity to both the parties.

Subsequent reversal of Cenvat credit initially availed but not utilized, tantamount to non-availment of Cenvat credit

JCT Limited Vs. CCE, Jallandhar and Ludhiana and vice-versa [2015 (2) TMI 600 - CESTAT NEW DELHI]

JCT Limited ("the Assessee"), in their composite mill, manufactured cotton yarn from cotton and used the same within the factory for weaving of fabrics. In respect of captive clearances of cotton yarn, the Assessee was availing full duty exemption under Notification No. 30/04-CE dated July 9, 2004 ("the Exemption Notification"). The goods covered by the Exemption Notification are fully exempt from Excise duty, if no Cenvat credit in respect of Inputs has been taken. In the instant case, the Assessee took Cenvat credit in respect of packing material during November, 2005 and December 2005 of Rs. 1,622/- and during January to March 2006 of Rs. 2,753/-. However subsequently on being pointed out by the Department, the Assessee reversed the said Cenvat credit. Further, there was no dispute that aforesaid Cenvat Credit of Rs. 4375/- was utilized by the Assessee for payment of duty on any of their final product.

But, the Department contended that the Assessee is not eligible for availing the benefit of the Exemption Notification even if the availed Cenvat credit is subsequently reversed. Therefore, the Adjudicating Authority confirmed the demand along with interest and penalty, by denying the exemption under the Exemption Notification and also allowed the cum duty benefit i.e., treating the sale price of the yarn as including the Excise duty. Thereafter, the Order of the Adjudicating Authority was upheld by the Ld. Commissioner (Appeals). Being aggrieved both the Assessee and the Department preferred an appeal before the Hon'ble CESTAT, Delhi in respect of duty demanded and allowing of the cum duty benefit respectively.

The Hon'ble CESTAT, Delhi relying upon the judgment of Hon'ble Allahabad High Court in the case Hello Minerals Water (P) Ltd. Vs. Union of India [(2004 (7) TMI 98] which was based on the Hon'ble Apex Court judgment in the case

of Chandrapur Magnet Wire (P) Ltd. Vs. CC, Nagpur [1996 (81) E.L.T. 3 (S.C.)], held that since the Cenvat credit initially taken was reversed without being utilised by the Assessee, it is to be treated as if the Assessee has not taken the Cenvat credit and hence, would be eligible for the exemption benefit under the Exemption Notification.

It was further held by the Hon'ble Tribunal that since the duty demand itself has been set aside, the Revenue's appeal would not survive and is accordingly dismissed.

CASE UPDATE: CUSTOMS

Time limit prescribed for filing refund under Section 27 of the Customs Act, 1962 cannot be made applicable to the amount of duty paid by mistake

Parimal Ray & Another Vs. the Commissioner of Customs (Port), Customs House & Others [2015 (2) TMI 826 - CALCUTTA HIGH COURT]

In the present case, a Thailand based Company, Italian Thai Development Public Company Limited and an Indian Public Company, ITD Cementation India Limited having its place of business in Salt Lake City, Kolkata decided to establish a Joint Venture Organisation - ITD-ITD CEM JV. This Joint Venture was unincorporated, represented by Parimal Ray and Another ("collectively along with Joint Venture Company referred to as "the Petitioner").

The Kolkata Municipal Corporation invited tenders, in or about 2008 for its Drinking Water Supply Project. The Petitioner was successful in tendering and the Contract for the same was awarded to them. For the Contract awarded, the Petitioner imported the tunnel boring machines ("impugned goods") vide Bills of Entry were dated December 15, 2009, December 21, 2009, May 31, 2010 and paid Custom duty of Rs. 3,60,45,561/-. Later on during September, 2012, the Petitioner came to know that they made their classification erroneously and as per the correct classification the impugned goods enjoyed 100% duty exemption as per the Exemption Notification issued under Section 25 of the Customs Act, 1962 ("the Customs Act").

Accordingly, the Petitioner vide Application dated June 4, 2013 applied for refund of the entire amount of Rs. 3,60,45,561/- mistakenly paid by them. However, the Revenue denied refund to the Petitioner on the ground that refund had to be made within time limit prescribed under Section 27 of the Customs Act. Further, the Application made by the Petitioner cannot be taken as a proper Application for refund under Section 27 of the Customs Act. Being aggrieved, the Petitioner filed Writ Petition before the Hon'ble High Court of Calcutta contending that the time limit prescribed under Section 27 of the Customs Act cannot be made applicable to the amount of duty paid by mistake.

The Hon'ble High Court of Calcutta held as under:

- Section 27 of the Customs Act only applies when there is over payment of duty or interest under the Customs Act. Therefore, the duty or interest must be leviable under the Customs Act and paid under it. However, in the instant case, the impugned goods were not exigible to any duty, hence any sum paid into the exchequer by the

Petitioner was not duty or excess duty but simply money paid into the Government account;

- The money received by the Government, could more appropriately called money paid by mistake by one person to another which the other person has an obligation to repay under Section 72 of the Contract Act, 1962;
- A person to whom money has been paid by mistake by another person, becomes at common law a trustee for that other person with an obligation to repay the sum received - Shiv Shankar Dal Mills Vs. State of Haryana [AIR 1980 Supreme Court 1037];
- As per Section 17 of the Limitation Act, 1963, money paid by mistake can be recovered up to three years from the time the plaintiff discovers the mistake or could have discovered the same with reasonable diligence.
- Therefore, the Hon'ble High Court directed the Department to refund the said sum of Rs. 3,60,45,561/- to the Petitioner within 12 weeks of the communication of this Order.

CASE UPDATE: VAT

Works contract executed for SEZ units cannot have the benefit of zero rating since goods transferred by a contractor are neither exported as such or used in the manufacture of other goods which are exported.

Tulsyan Nec Limited Vs. The Assistant Commissioner (CT) [2015 (2) TMI 564 - MADRAS HIGH COURT]

Tulsyan Nec Limited ("the Petitioner") was engaged in the manufacture of High Tensile Fasteners, Gear Shifters etc., and its factory was located in Special Economic Zone ("SEZ"). The Petitioner was awarded contracts for construction of their factory building and related infrastructure in SEZ. The Petitioner inter alia contended that in terms of Section 18(1)(ii) of the Tamil Nadu Value Added Tax Act, 2006 ("TNVAT Act"), sale of goods to any registered dealer located in SEZ is zero rated sale, if such registered dealer has been authorised to establish such unit by the authority specified by the Central Government in this behalf and shall be entitled for Input tax credit or refund of the amount of tax paid on the purchase of goods specified in the First schedule including Capital Goods.

While on the other hand, the Revenue contended reversal of Input tax credit on the basis of the Circular No. 9 of 2013, dated July 24, 2013 ("the Circular") issued by Commissioner of Commercial Taxes, Chepauk, Chennai stating that sale of goods, involved in the execution of Works contract, to any other registered dealer located in SEZ in the State is not zero rated sale, as the goods are not exported as such or consumed or used in the manufacture of other goods that are exported, as required under Section 18(2) of the TNVAT Act. Consequently relying upon the Circular, the Assessing Officer issued an Assessment Order to reverse the Input tax credit availed as the transaction involved is not a zero rated sale and imposed penalty. Being aggrieved, the

Petitioner challenged the Circular and the Assessment Order by filing Writ Petition before the Hon'ble High Court of Madras.

The Hon'ble Madras High Court interalia held as under:

- Zero rated sale as defined under Section 2(44) of the TNVAT Act means sale of any goods on which no tax is payable, but credit for the Input tax related to that sale is admissible;
- To be considered as a zero rated sale and to be eligible for Input tax credit or refund, the sale transaction should fall within any of the three clauses of Section 18(1) of the TNVAT Act;
- Section 18(2) the TNVAT Act has to be read along with Section 18(1) thereof. Hence, the Petitioners contention that Section 18(2) of the TNVAT Act will not apply to Section 18(1)(ii) thereof is not sustainable as it amounts to inserting a new provision to the statute when the statute does not contemplate of such situation/ contingency;
- In terms of Rule 22 of the Central Special Economic Zones Rules 2006, grant of exemption, drawbacks and concession to the entrepreneur or Developer shall be subject to conditions contained therein. Therefore, the scheme of the Central Special Economic Zones Act, 2005; Tamil Nadu Special Economic Zones Act, 2005 and the Rules made thereunder makes it clear that benefit is intended to the SEZ unit for the authorised operations which essentially is the export activity for which approval has been granted;
- In the case of Kerala State Cooperative Marketing Federation Vs. CIT, reported in [1998 (5) TMI 6 - SUPREME COURT], wherein the Hon'ble Supreme Court pointed out that while interpreting statutory provision, attention should be given to the setting in which the provision occurs and regard must be had to the language of an entire group of connected provisions which may form an integral whole;
- It is a settled rule of interpretation that in a taxing statue one has to look merely what is clearly stated, there is no room for any intendment, there is no equity about tax, there is no presumption as to tax, nothing is to be read in, nothing is to be implied and one can only look fairly to the language used.

Thus, the Hon'ble High Court upheld the validity of the Circular stating that Works contract executed for SEZ units cannot have the benefit of zero rating since goods transferred by a contractor are neither exported as such or used in the manufacture of other goods which are exported, as not being ultra vires to the provisions of the TNVAT Act and not violative of Article 14 of the Constitution of India.

The fact that the contractor could seek refund of the tax paid did not absolve the contractee of their statutory obligation to deduct and pay TDS on Works contract

Krishnapatnam Port Company Ltd. Vs. The Govt. of AP., rep. by its Principal Secretary (Revenue) (CT), Hyderabad & Ors.[2015 (2) TMI 472 - Andhra Pradesh High Court]

Krishnapatnam Port Company Ltd.("the Petitioner" or "KPCL") was engaged in the business of construction and development of the Krishnapatnam Deep Water Port in Nellore District, and in providing necessary infrastructural facilities for handling port operations thereat. By virtue of State concession contract dated September 17, 2004 ("the Agreement"), the Petitioner was granted construction and infrastructure activities of the Port for, and on behalf of, the State of Andhra Pradesh. In terms of the Agreement, the relationship between the State of

Andhra Pradesh and KPCL was that of a principal and an agent. Further, Clause 3.16 of the Agreement specifically provided exemption from Sales Tax (VAT from 2005 onwards) on all Inputs and sales, if any, deemed. Further, Sales tax was totally exempt on all Inputs, required for construction of the Port, for the purpose of the project construction throughout.

KPCL entrusted the work of the Port construction to its holding company Navayuga Engineering Company Limited ("NECL") on engineering, procurement and construction (EPC) basis for an agreed amount. The Department alleged that KPCL had deducted tax at source ("TDS") from the bills of NECL but has not paid the same to the Government and accordingly confirmed demand of TDS of Rs. 92,98,03,154/- along with interest in terms of Section 22(2) read with Section 22(4) of the Andhra Pradesh Value Added Tax Act, 2005 ("AP VAT Act").

Being aggrieved, the Petitioner filed a Writ Petition before the Hon'ble High Court of Andhra Pradesh submitting that by virtue of the conditions in the Agreement, the Government of Andhra Pradesh undertook to forego revenue streams from the project, such as exemption from Sales tax on all the Inputs required for project construction and that the KPCL had not recovered any tax from the Contractor which can be verified from the records and the running account bills.

The Hon'ble High Court of Andhra Pradesh held as under:

- NECL was liable to pay tax under the AP VAT Act for execution of the Works contract of construction of the Port. Further, KPCL was statutorily obligated, under Section 22(3) of the AP VAT Act, to deduct TDS from the running account bills of NECL, and remit the deducted tax amount to the Government;

- The fact that NECL could seek refund of the tax paid as per the State Government Order G.O.Ms. No. 609 dated May 29, 2006, issued in terms of Section 15(1) of the AP VAT Act, will not absolve KPCL of their statutory obligation to deduct TDS;

- Section 15(1) of the AP VAT Act merely enables the State Government, if it is necessary to do so in the public interest, to provide by way of Notification, for grant of refund of the tax paid to any person on the purchases effected by him and specified in the said Notification. Even on a notification being issued under Section 15(1) of the AP VAT Act, the contractee is statutorily obligated, under Section 22(3) thereof, to deduct TDS from the running account bills of the contractor, and the contractor is entitled, thereafter, to claim refund;

- Hence, if a statute has conferred a power to do an act, and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any manner other than the one prescribed;

- The AP VAT Act does not empower the Government to grant exemption but only enables it to grant refund, the doctrine of promissory estoppel cannot be invoked to compel the Government of Andhra Pradesh to carry out a promise contrary to the provisions of the AP VAT Act;

- The Petitioner suppressed the fact that KPCL having deducted tax at source from the running account bills of NECL, have made false statements on oath before the Court that there is no deduction of TDS from NECL. Further, KPCL by resorting to such dishonest means, secured interim stay of all further proceedings and have thereby avoided remitting the TDS deducted from the running account bills of NECL, to the Government. The undeserved benefit and advantage obtained by KPCL, by abusing the judicial process, must be neutralized;

- The Petitioner abused the process of the Court by making a false statements on oath, hence is liable to pay exemplary costs of Rs. 75,000/- to the Commissioner, Commercial Taxes within three weeks from the date of receipt of a copy of the Order of the Court, failing which the Commissioner can recover the same in accordance with law.

The Hon'ble High Court dismissed the appeal in favour of the Department and held that the fact NECL could seek refund of the tax paid did not absolve KPCL of their statutory obligation to deduct TDS on Works contract.

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