VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

Like always,
Like never before...

INDIRECT TAX REVIEW
APRIL 2015

EXCISE

CUSTOMS

SERVICE TAX

VALUE ADDED TAX

Inside this edition

- Service Tax: Changes in abatements and negative list w.e.f. 01.04.2015
- Clearance from DTA to SEZ is Export and eligible for rebate of Excise duty
- Case updates on Service tax
- Case updates on Excise.
- Case updates on VAT

& more...

RECENT UPDATES: SERVICE TAX

SERVICE TAX ABATEMENT RATE WITH EFFECT FROM 01.04.2015

Abatement in Service Tax was First Introduced Vide Principal Notification No. 26/2012-Service Tax, dated 20th June 2012 and subsequently been amended vide Notification No. 2/2013 – Service Tax, dated the 1st March, 2013, Notification No. 9/2013 – Service Tax, dated: May 8, 2013, Notification No. 08/2014 – Service Tax Dated-11th July, 2014 and Notification No. 8/2015-ST, dated March 01, 2015.

Union Budget 2015 and Notification No. 8/2015-ST, dated: March 01, 2015 following amendment has been made to abatement provisions wef 01.04.2015-

1. Transport of goods/ passengers by rail – Hitherto, service tax was payable on 30% of the value of services of rail transport of goods and passengers (with or without accompanied belongings) without any condition. Now, the abatement shall be available subject to the condition that Cenvat credit on inputs, capital goods and input services, used for providing the taxable services has not been taken under CCR, 2004.

2. Goods Transport Agency- Abatement on "Transportation of goods by Goods Transport Agency" was 75% which has now been reduced to 70%.

3. Services provided in relation to chit- Abatement on "Services provided in relation to chit" has been withdrawn.

4. Transport of goods in a vessel– Abatement on "Transportation of goods in a vessel" was 60% which has now been increased to 70%.

5. Transport of passengers by Air– Hitherto, an abatement of 60% was provided on taxable services of transport of passengers by air (with or without accompanied belongings). The said abatement continues for economy class travel and in case of other than economy class the abatement has been reduced to 40%.

Authentication of Invoice by digital signatures.

Vide Notification No. 5/2015-ST dated 1.3.2015, Rule 4C has been inserted in Service Tax Rules, 1994 whereby a provision for issuing digitally signed invoices has been introduced. New Rule 4C provides as under –

"4C. Authentication *by digital signature-*

(1) Any invoice, bill or challan issued under rule 4A or consignment note issued under rule 4B may be authenticated by means of a digital signature.

(2) The Board may, by notification, specify the conditions, safeguards and procedure to be followed by any person issuing digitally signed invoices."

Accordingly, following changes will take place –

(a) Any invoice, bill or challan issued under Rule 4A can be issued electronically.

(b) Consignment note under Rule 4B can be issued electronically.

(c) Such electronically issued invoices, consignment note etc shall have to be authenticated by means of a digital signature.

(d) CBEC shall specify the conditions, safeguards and procedure for compliance by any person issuing digitally signed invoices.

(e) CBEC shall specify the Conditions, safeguards and procedure for compliance by any person issuing digitally signed invoices.

(f) This may include procedure for verification of digitally signed invoices / documents.

CBEC will issue necessary Notification / Circular for prescribing Conditions, safeguards and procedure in due course.

Changes in the Negative List – Sec. 66D of the Act vide Budget 2015 with effect from 01.04.2015

Levy of service tax on any service received by a business entity from Government or local authority

- Presently, support services provided by Government or local authority to business entities are liable to service tax.
- It is proposed to extend the levy to all the services provided by Government or local authority to a business entity. Correspondingly to avoid any interpretational issues, the term 'Government has been defined under Sec. 65B(26A) of the Act to mean departments of Central Government, State Government and Union Territory.

Levy of service tax on processing of alcoholic liquor for human consumption

- Hitherto, any process amounting to manufacture or production of goods including processing of alcoholic liquor for human consumption was not leviable to service tax.
- The said definition alongwith entry 30 of Mega Exemption Notification is amended to exclude the processes for production or manufacture of alcoholic liquor for human consumption.
- With these amendments, such process (including intermediate production process) relating to alcoholic liquor undertaken either by principal or job worker will be taxable.

Levy of service tax on admission to an entertainment event or access to amusement facility

- Sec. 66D(j) of the Act excluded consideration charged for admission to entertainment event or access to amusement facility from the ambit of service tax. It is proposed to withdraw the said exemption.
- Accordingly, service tax shall be levied on fee charged for services provided by amusement parks, amusement arcades, water parks and theme parks.
- Further, fees for admission to an entertainment event of concerts, pageants, musical performances concerts, award functions and

sporting events will be liable to service tax. However by way of a specific entry in Mega Exemption notification, exemption has been provided to events where the fee does not exceed Rs. 500 per person. The recognized sporting events where the participants represent any district, state, zone or country shall however continue to be exempted.

- Levy of service tax on conducting a chit fund and distribution/selling of lottery
- Hitherto, the services of betting, gambling or lottery were not leviable to service tax. Considering the ensuing litigations on the taxability of services provided by the foreman of a chit fund, distributor/selling agent of lottery and money changer, a specific explanation has now been proposed to be introduced in Clause (i) of the Negative List to clarify that the terms 'betting, gambling or lottery' shall not include such services as specified above. Corresponding change has also been incorporated in the definition of service wherein the above services are now specifically included and hence taxable.

ST-Service Export from India Scheme (SEIS) under FTP

1. In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services provided or agreed to be provided against a scrip by a person located in the taxable territory from the whole of the service tax leviable thereon under section 66B of the said Act.

2. Application**.** – This notification shall be applicable to the Service Exports from India Scheme duty credit scrip issued by the Regional Authority in accordance with paragraph 3.10 read with paragraph 3.08 of the Foreign Trade Policy.

3. The exemption shall be subject to the following conditions, namely:-

(1) that the conditions (1) and (2) specified in paragraph 2 of the Notification No. 25/2015-Customs, dated the 8th April, 2015 are complied and the said scrip has been registered with the Customs Authority at the port of registration specified on the said scrip (hereinafter referred as the said Customs Authority);

(2) that the holder of the scrip, to whom taxable services are provided or agreed to be provided shall be located in the taxable territory;

(3) that the holder of the scrip who may either be the person to whom the scrip was originally issued or a transferee-holder, presents the scrip to the said Customs Authority along with a letter and an invoice or challan or bill, as the case may be, issued under rule 4A of the Service Tax Rules, 1994 by the service provider indicating details of his jurisdictional Central Excise Officer (hereinafter referred to as the said Officer) and the description, value of the

taxable service provided or agreed to be provided and service tax leviable thereon;

(4) that the said Customs Authority, taking into account the debits already made under Notification No. 25/2015-Customs, dated the 8th April, 2015, notification No. 21/2015-Central Excise, dated the 8th April, 2015 and this exemption, shall debit the service tax leviable, but for this exemption in or on the reverse of the scrip and also mention the necessary details thereon, updates its own records and sends written advice of these actions to the said Officer;

(5) that the date of debit of service tax leviable, in the scrip, by the said Customs Authority shall be taken as the date of payment of service tax;

(6) that in case the service tax leviable as per the point of taxation determined in terms of the Point of Taxation Rules, 2011 is prior to date of debit or that the rate of tax determined in terms of rule 4 of the Point of Taxation of Rules, 2011, is in excess of the rate of service tax mentioned in the invoice, bill or challan, as the case may be, the holder of the scrip shall pay such interest or short-paid service tax along with interest, as the case may be;

(7) that the holder of the scrip presents the scrip debited by the said Customs Authority within thirty days to the said Officer, along with an undertaking addressed to the said Officer, that in case of any service tax short debited in the scrip, he shall pay such service tax along with applicable interest;

(8) that based on the said written advice and undertaking, the said Officer shall verify and validate, on the reverse of the scrip, the details of the service tax leviable, which were debited by the said Customs Authority, and keep a record of payment of such service tax and interest, if any;

(9) that the service provider retains a copy of the scrip, debited by the said Customs Authority and verified by the said Officer and duly attested by the holder of the scrip, in support of the provision of taxable services under this notification; and

(10) that the said holder of the scrip, to whom the taxable services were provided or agreed to be provided shall be entitled to avail drawback or CENVAT credit of the service tax leviable under section 66B of the said Act, against the service tax debited in the scrip and validated by the said Officer.

4. Any amount due to the Central Government under this notification shall be recoverable under the provisions of the said Act and the rules made there under.

CASE UPDATE: SERVICE TAX

CENVAT credit on civil construction services for factory shed

Cenvat credit allowed on civil construction services for construction of factory shed, which is falling under setting up of factory premises

Commissioner of Central Excise, Delhi III, Gurgaon Vs. KML Molding [2015-VIL-171-CESTAT-DEL-CE]

KML Molding (the Respondent) is a manufacturer of motor vehicle parts. The Respondent constructed factory shed in their factory premises and availed Cenvat credit of Service tax paid on civil construction services (impugned service). The Revenue alleged that the Respondent is not entitled to avail the Cenvat credit on impugned service as the same has been taken for immovable property and thus have no nexus with the manufacturing activity of the Respondent.

Therefore, the Revenue issued a SCN alleging denial of the Cenvat credit availed on the impugned service, which was further upheld by the Adjudication

Authority along with imposition of interest and penalty. However, on appeal being filed to the Ld. Commissioner (Appeals), Cenvat credit on impugned service was allowed to the Respondent.

Being aggrieved, the Revenue preferred an appeal before the Hon'ble CESTAT, Delhi.

The Hon'ble CESTAT, New Delhi held that in terms of the definition of Input service under Rule 2(l) of the Credit Rules as was prevalent during the period of dispute, setting up, modernization, renovation or repair of the factory falls under the inclusive part of the definition and thus Cenvat credit is allowed to the Appellant on the impugned service availed for construction of factory shed which is not other than setting up of factory premises.

No interest and/ or penalty can be levied just because the Assessee had paid Service tax, which was actually not payable.

Commissioner of Central Excise, Tirunelveli Vs. Sundaram Textiles Ltd. [(2015) 55 taxmann.com 242 (Madras)]

Sundaram Textiles Ltd. ("the Respondent" or "the Company") was running a Textile Industry in Nanguneri and used to receive Intellectual Property Service ("Impugned Service") from Japanese Company. The Commissioner of Central Excise, Tirunelveli directed the Respondent to pay Service tax on the Impugned Service availed for the period 1999 to August 15, 2002 which was duly paid by the Respondent. Subsequently, a SCN was issued raising demand of interest as well as imposing penalty under Section 76 of the Finance Act, 1994 ("the Finance Act") which was confirmed vide Order-in-Original dated April 25, 2005.

Being aggrieved, the Respondent preferred an appeal before the Learned Commissioner (Appeals), wherein it was held that the amendment made in the Service Tax Rules providing for liability of service recipient under Reverse Charge mechanism came into effect only from August 16, 2002, hence, during relevant period, there was no liability to pay Service tax even though the Respondent was made to pay Service tax by the Department. Since the Respondent was not liable to pay Service tax, the question of interest and penalty does not arise.

Later the Hon'ble CESTAT, Chennai also upheld the Order of the Commissioner (Appeals). Being aggrieved the Department preferred an appeal before the Hon'ble High Court of Madras contending that since the Respondent has received services from a Foreign Company and paid Service tax also, therefore the Respondent is also liable for interest and penalty.

The Hon'ble High Court of Madras upheld the Order of the Hon'ble Tribunal and held that since amendment to the Service Tax Rules have come into effect on August 16, 2002 and it is only by way of amendment the liability of service recipient to pay Service tax on the Impugned Service arises otherwise there was no liability on the Respondent to pay Service tax during the period under dispute.

Since the Respondent was not liable to pay Service tax, the Respondent is also not liable to pay Interest as well as penalty.

Period of limitation not apply in case of refund of Service tax paid inadvertently

Period of limitation under Section 11B of the Excise Act will not apply in case of refund of Service tax paid inadvertently where no such Service tax liability exist

Shravan Banarasilal Jejani Vs.* Commissioner of *Central Excise, Nagpur [(2015) 55 taxmann.com 363 (Mumbai – CESTAT)]

Shravan Banarasilal Jejani (**the Appellant**) is the owner of the residential flats sold to them by the builder who paid Service tax on the residential flats. However, in terms of the Circular No. 108/2/2009-ST dated January 29, 2009 (**the Circular**), there was no Service tax liability on sale of the residential flats on the Appellant. Accordingly, refund claim was filed by the Appellant in respect of Service tax so deposited.

The Adjudicating Authority sanctioned the refund claim but on appeal by the Revenue, the claim for refund was rejected on the ground of being time barred in terms of provisions of Section 11B of the Excise Act. Being aggrieved, the Appellant preferred an appeal before the Hon'ble CESTAT, Mumbai contending that as they were not required to pay the Service tax therefore, the provisions of Section 11B of the Excise Act are not applicable.

The Hon'ble CESTAT, Mumbai relying upon the decision in case of *CCE Vs. KVR Construction [(2012) 36 STT 33/22 taxmann.com 408]* held that period of limitation under Section 11B of the Excise Act will not apply in case of refund of Service tax paid inadvertently, where no such Service tax liability exist.

It was further held that in terms of the Circular, the Department is not legally allowed to ask for the Service tax and if they do so, the same is unconstitutional. Accordingly, the Appellant is rightly entitled for refund of the amount of Service tax paid erroneously.

No Service tax liability arise on loans & advances, if it is revealed in audited balance sheet

Reliance Infratel Ltd. Vs. Commissioner of Service tax, Mumbai – II [2015 (4) TMI 129 – CESTAT MUMBAI]

Reliance Infratel Ltd. (the Appellant or the Company) is a subsidiary of Reliance Communications Limited (RCM) (collectively referred to as parties) providing taxable service falling under Business Support Services. The Company was formed when RCM demerged the business of Telecom infrastructures and Telecom operating services into different entities and the business of Telecom infrastructure was demerged into the Appellant. Rs. 283/- crore were given by RCM to the Appellant towards the expenditure incurred by RCM even before the Appellant came into existence by way of expenses towards the initial setting up and also by way of payments made to vendors for supply of materials. Further, since the Telecom towers require huge investments the Appellant borrowed Rs. 1210/- crore from RCM during June, 2007 and September, 2007 as interest-free loan which was repaid/ returned by December 31, 2007.

Investigation of the Appellant was initiated on November 26, 2007 by the officers of DGCEI and it was alleged that the financial support given to Appellant by RCM in terms of the Master Service Agreement dated April 10, 2007 (the Agreement) was in the nature of advance for the taxable services rendered or to be rendered by the Appellant to RCM and is required to be set off against the bills that would be raised later by the Appellant on RCM.

Therefore, DGCEI issued a SCN demanding Service tax liability along with interest and penalty for the period from April 10, 2007 to March 31, 2008 which was confirmed by the Adjudicating Authority.

Being aggrieved the Appellant preferred an appeal before the Hon'ble Tribunal, Mumbai contending that the sum of Rs. 1, 493/- crores ("impugned amount") received by the Appellant from RCM is a loan by way of Inter Corporate Deposits given to the Appellant.

The Hon'ble CESTAT, Mumbai held as under:

- The Agreement and the audited balance sheets of the parties does not lead to a conclusion that the impugned amount received by the Appellant was in nature of advances for the services to be rendered;
- Further, repayment of impugned amount is not afterthought as even prior to the investigations, on September 20, 2007 the Appellant had recorded and treated the amount as Inter Corporate Deposits in the half Yearly balance sheet;

- Audited Balance Sheet for the year ending March 31, 2008 of both the parties which are in the public domain show Rs. 1,210/- crore as a loan and not as consideration for any services rendered. Further, there is no dispute that the Appellant had repaid Rs. 1,210/- crore received from RCM during the same financial year;
- Amount of Rs. 283/- crore was given before the Appellant came into existence and the same was repaid during the same financial year, hence Rs. 283/- cannot be treated as a consideration received for the services to be rendered by the Appellant but it is a financial support given by RCM to the Appellant by way of loans. Further, both the parties being Public Limited Companies, have clearly indicated in their balance sheets that the amounts have been shown as received and loans repaid.
- Scrutiny of the balance sheets produced revealed that accounts of the parties do not indicate any co-relation in the repayment of the loan and receipt of the service charges by the Appellant.
- Invoices raised by the Appellant on RCM do not reflect adjustment of impugned amounts and the Appellant has discharged Service tax liability for the consideration received in respect of the invoices raised;
- In terms of Section 67 of the Finance Act, 1994, only payment made towards services provided can be brought under the ambit of consideration received and not any other amount.

Thus, the Hon'ble Tribunal allowed the appeal in favour of the Appellant and held that no Service tax liability arises on loans and advances if it is revealed in the audited balance sheet.

No Recovery of Service tax under Section 87 of the Finance Act without issuance of SCN under Section 73 thereof

Exman Security Services Pvt. Ltd. Vs. The Union of India and Others [2015 (4) TMI 396 – JHARKHAND HIGH COURT]

A raid under Section 82 of the Finance Act was carried out in the premises of the Exman Security Services Pvt. Ltd. (the Petitioner) on March 25, 2014. Statement under Section 14 of the Excise Act was recorded of the Managing Director of the Petitioner wherein it was submitted that Service tax liability of the Petitioner exist but amount calculation will be provided later. Thereafter, Petitioner vide letter dated April 23, 2014 provided calculation for Service tax liability of Rs. 4,45,97,399/- (Impugned amount), which was further disputed vide letter dated November 13, 2014 admitting the liability of Rs. 3.05 crores approximately, upon exact calculation.

Based on the letter dated April 23, 2014, the Revenue issued Recovery Notice under Section 87 of the Finance Act for Impugned amount and confirm the demand vide order dated August 11, 2014 ("Recovery Order"). Later, pursuant to Section 73(1) of the Finance Act, the Revenue issued demand-cum-SCN dated

October 17, 2014 of Rs. 6,58,90,037/-, for the period 2009-10 to 2013-14. Albeit, the Petitioner submitted the reply but the Revenue has not decided the matter raised in the SCN.

Therefore, the Petitioner filed a writ Petition before the Hon'ble Jharkhand High Court challenging the Recovery Order dated August 11, 2014.

The Hon'ble Jharkhand High Court allowed the writ petition in favour of the Petitioner and held that no recovery of Service tax under Section 87 of the Finance Act without issuance of SCN under Section 73 thereof with the following observations:

- Small error committed by the Petitioner in writing cannot be encashed by the Revenue, specially when the Petitioner is handicapped as several registers having details of the accounts were seized during the raid;
- Calculation mistake may occur in the absence of documents. Further, mistake was corrected by the Petitioner and the Revenue was informed. Hence, burden of proof cannot be shifted and the Revenue cannot issue SCN under Section 87 of the Finance Act;
- Burden of proof that liability exist is on Revenue;
- Both SCN under Section 87 of the Finance Act and Section 73(1) cannot be issued together;
- SCN dated October 17, 2014 raised demand amounting to Rs. 6,58,90,037/- which includes Impugned amount;
- 3.21 crore was deposited by the Petitioner towards the liability reveals that he is bonafide;
- Reliance was placed in case of Technomaint Contractors Pvt. Ltd Vs. Union of India [(2014) 69 VST 247 (Guj)], wherein the Hon'ble Gujarat High Court held that Notice under Section 87 of the Finance Act cannot be given by the Revenue, unless, there is determination of the amount, after issuance of the notice under Section 73 (1) or under Section 73A(1) thereof;
- Reliance was placed in case of V. Man Power Solution Vs. Commr. of Cus. and Central Excise [(2014) 69 VST 528 (Uttarakhand)], wherein the Hon'ble High Court of Uttarakhand held that "any amount payable" in Section 87 of the Finance Act means that amount adjudged after hearing the SCN and Section 87 thereof is one of the methods of recovery of the amount due and payable after adjudication is done;

- Directed to adjudicated the SCN as early as possible and practicable;

RECENT UPDATES: CENTRAL EXCISE

Clearance from DTA to SEZ is Export and eligible for rebate of duty-CBEC

Background: In the Union Budget, 2015 *vide* Notification No. 06/2015-C.E. (N.T.) dated March 1, 2015 (Effective from March 1, 2015), Export goods have been defined by inserting a Clause (1A) in Explanation 1 to Rule 5 of the Cenvat Credit Rules, 2004 (**"the Credit Rules"**), which is reproduced as under:

- *"(1A) "export goods" means any goods which are to be taken out of India to a place outside India".*
- Similarly, Notification No. 8/2015–C.E. (N.T.) dated March 1, 2015 has substituted the existing explanation to Rule 18 of the Central Excise Rules, 2002 (**"the Excise Rules"**) to narrow down the meaning of the term 'Export' in the following manner:
- *"Explanation. – For the purposes of this rule, "export", with its* grammatical *variations and cognate expressions, means taking goods out of India to a place outside India and includes shipment of goods as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft.".*
- Accordingly, with the insertion of the words *"taking goods out of India to a place outside India"*, fate of refunds/ rebate in case of Deemed exports [which is defined under Para 7.01 of Chapter 7 of the Foreign Trade Policy 2015-2020 (Para 8.1 of Chapter 8 of the erstwhile Foreign Trade Policy 2009-14) as *"Deemed Exports refer to those transactions in which goods supplied do not leave country, and* payment for *such supplies is received either in* Indian rupees *or in free foreign exchange"*] raised concerns among the Trade.

Clarification by the CBEC:

- The CBEC vide **Circular No. 1001/8/2015-CX dated April 28, 2015** (**"the Circular"**) has clarified that since Special Economic Zone (**"SEZ"**) is deemed to be outside the Customs territory of India in terms of the provisions under the SEZ Act, 2005, any licit clearances of goods to SEZ from Domestic Tariff Area (**"DTA"**) will continue to be Export and therefore be entitled to the benefit of rebate under Rule 18 of the Excise Rules and of refund of accumulated Cenvat credit under Rule 5 of the Credit Rules, as the case may be. The relevant text of the Circular is reproduced herein below:
- *".....3. It can thus be seen that* **according to the SEZ Act, supply of** goods from **DTA to the SEZ constitutes export. Further, as per section 51 of the SEZ Act, the provisions of the SEZ Act shall have over riding effect over provisions of any other law in case of any inconsistency. Section 53 of the SEZ Act makes an SEZ a territory outside the customs territory of India.** *It is in line of these provisions that rule 30 (1) of the SEZ rules, 2006 provides that the DTA supplier supplying goods to the SEZ shall clear the goods either under bond or as duty paid goods under claim of rebate on the cover of ARE-1.*
- *4. It was in view of these provisions that the DGEP vide* circulars No. 29/2006-customs dated 27/12/2006 *and* No. 6/2010 dated

19/03/2010 *clarified that rebate under rule 18 of the Central Excise Rules,* 2002 is *admissible for supply of goods made from DTA to SEZ. The position as explained in there circulars does not change after amendments made vide* Notification No. 6/2015-CE (NT) *and* 8/2015-CE (NT) *both dated 01.03.2015, since the definition of export, already given in rule 18 of Central Excise Rules, 2002 has only been made more explicit* by incorporating the definition of export as given in the Customs Act, 1962. Since SEZ is deemed to be outside the Customs territory of India, any licit clearances of goods to an SEZ from the DTA will continue to be export and therefore be entitled to the benefit of rebate under rule 18 of CER, 2002 and of refund of accumulated CENVAT credit under rule 5 of CCR, 2004, as the case may be…..”

The clarification issued by the Board will provide much needed relief to the Trade as well as ‘Make in India’ mission of the Hon’ble Prime Minister.

*However, it would not be out of place here to mention that the Circular specifically talks about the clearance made from DTA to SEZ. Accordingly, it is made clear that the benefit under the Excise Rules and the Credit Rules will not cover the clearances made from DTA to Export Oriented Units (**“EOUs”**).*

CENVAT credit can now be claimed within one year

Change w.e.f. 1st March, 2015

W.e.f. 1st March 2015, time limit for availment of Cenvat Credit has been extended to one year from the date of invoice. This implies that Cenvat credit on inputs and input services which could be earlier (as provided for w.e.f. 01.09.2014) availed within the period of six months from the date of invoice can now (w.e.f. 1.3.2015) be availed within a period of one year from the date of invoice .

The amendment has been made vide Notification No. 6/2015-CE(NT) dated 1.3.2015 w.e.f. 1.3.2015 wherein the words ‘six months’ have been substituted by words ‘one year’ in third proviso of Rule 4(1) of Cenvat Credit Rules, 2004.

Impact of Change

The amendment w.e.f. 1.3.2015 of allowing time limit of one year instead of six months shall make the amendment made w.e.f. 1.9.2014 redundant because it would cover period of March to September 2014 also. Further, those who could not claim Cenvat credit of invoices issued prior to September, 2014 can now do so as the time limit has been raised from one month to one year. Thus, on all eligible invoices of last one year cenvat credit be availed.

There are many instances where assessees receive input services but do not taken any registration as they are not engaged in providing any taxable service during that period. In such cases, it may be advisable that the assessee must take registration and file periodical returns wherein credit must be duly availed.

Quantum of Pre-deposit for an appeal u/s. 35F of CEA, 1944

The era of appeals have changed from 06.08.2014 when mandatory pre-deposit was introduced via Section 35F of CEA,1944 .Similar provisions exist for customs and service tax as well .

In order to understand the implication of such a change, Section 35F is produced herein below and it is broken in parts for better understanding ;

Deposit of certain percentage of duty demanded or penalty imposed before filing appeal. — The Tribunal or the Commissioner (Appeals), as the case may be, shall SECTION 35F. not entertain any appeal —

(i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the [Principal Commissioner of Central Excise or Commissioner of Central Excise];

Case 1

1. It talks about mandatory pre-deposit in First Appeal

2. Quantum of 7.5% of the duty or penalty has to be deposited as mandatory predeposit

3. First stage appeal may arise out of an order passed by an officer below the rank of Principal Commissioner or Commissioner of Central Excise

4. Order passed by such officers as stated in para 3 shall be appealable to Commissioner(Appeals) as First Appeal under Section 35 of the act.

(ii) against the decision or order referred to in clause (a) of sub-section (1) of section 35B, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

Case 2

1. It talks about mandatory pre-deposit in First Appeal

2. Quantum of 7.5% of the duty or penalty has to be deposited as mandatory pre-deposit

3. Orders or Decisions passed by Commissioner shall be appealable to Tribunal as First Appeal under clause (a) of sub-section (1) of section 35B. The said clause is produced herein below

"Section 35B(1)(a) a decision or order passed by the [Principal Commissioner of Central Excise or Commissioner of Central Excise] as an adjudicating authority;"

(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has deposited ten per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against :

Case 3

1. It talks about mandatory pre-deposit in Second Appeal

2. Quantum of 10% of the duty or penalty has to be deposited as mandatory pre-deposit

3. Orders passed by Commissioner(Appeals) shall be appealable to Tribunal as Second Appeal under clause (b) of sub-section (1) of section 35B. The said clause is produced herein below

"Section 35B(1)(b)an order passed by the Commissioner (Appeals) under section 35A;"

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores :

Case 4

1. A ceiling limit of 10 Crores has been fixed irrespective clauses of mandatory pre deposit of 7.5% or 10% of duty or penalty , as applicable

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014.

Explanation. — For the purposes of this section "duty demanded" shall include, —

(i) amount determined under section 11D;

(ii) amount of erroneous Cenvat credit taken;

(iii) amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the Cenvat Credit Rules, 2004.]

Further,

1. All stay applications and appeals pending before 06.08.2014 i.e enactment of the Finance (No.2) Act,2014

2. Duty will include amount determined under Section 11D,amount of erroneous cenvat credit and amount payable under Rule 6 of the CCR,2001 or the CCR,2002 or the CCR,2004.

Transit Sale – Dealer Registration is not mandatory

The Central Government has issued Notification No. 08/2015-CE(NT) dated 01-03-2015, which is effective from the date of issue, has inter alia, inserted the following 3rd proviso in Rule 11(2) of Central Excise Rules, 2002 (CER, 2002)

"Provided also that if the goods are directly sent to any person on the direction of the registered dealer, the invoice shall also contain the details of the registered dealer as the buyer and the person as the consignee, and that person shall take CENVAT credit on the basis of the registered dealer's invoice"

It has created a lot of confusion and worry in the minds of those manufacturers and dealers who receive goods directly, as consignee, from manufacturer through unregistered dealer (as buyer) and avail cenvat credit on the strength of invoice of supplier manufacturer. The proviso has also perplexed a large number of unregistered dealers who are being advised! instructed by their customers and others to obtain central excise dealer Registration if they wish to validly pass on the cenvat credit to customers. They are wondering why they are being forced to take mandatory registration when the same would become redundant very soon after the implementation of GST, which the Government has committed to bring from 01-04-2016.

In my view, the amendment has been made to facilitate trade and industry in view of the new policy of 'Ease of doing Business' as announced by our Prime Minister Shri Narendra Modi. Earlier, many registered dealers used to bring the goods in their registered premises simply for issuing Cenvatable invoice in case of transit sale. The amendment has facilitated such registered dealers, who need not physically bring the goods at their godown/depot and can directly dispatch the same from the factory/depot of the supplier manufacturer. This facility, which seems to be given to the registered dealers to reduce unnecessary transportation cost, cannot be interpreted to mean that purchase through unregistered dealer is not permitted. Also, the manufacturer or provider of output service receiving goods directly as consignee from supplier manufacturer though unregistered dealer can continue to avail cenvat credit on inputs as earlier. The reasons for my said view are as below:

1. The amendment is a beneficial provision given to First Stage dealer and Second Stage dealer. Rule 9(1) of Cenvat Credit Rules, 2004 (CCR) prescribes the eligible documents on the basis of which cenvat credit can be availed by manufacturer or provider of output service. One of the many eligible documents the invoice issued by manufacturer. Rule 9(2) ibid provides that the document (i.e. invoice in our case) should contain all the particulars as per CER, 2002.

2. Rule 11(1) of CER, 2002 provides that no excisable goods shall be removed from a factory or a warehouse except under an invoice signed by the owner of the factory or his authorized agent. Rule 11(2) ibid specifies the particulars that must be contained in any cenvatable invoice. The relevant portion is extracted below:

" (2) The invoice shall be serially numbered and shall contain the registration number, address of the concerned Central Excise, name ofthe consignee, description, classification, time and date of removal, mode of transport and vehicle registration number, rate of duty, quantity and value, of goods andthe duty payable thereon….

Provided also that if the goods are directly sent to any person on the direction of the registered dealer, the invoice shall also contain the details of the registered dealer as the buyer and the person as the consignee, and that person shall take CENVAT credit on the basis of the registered dealer's invoice '…

3. It is clear from plain reading that the name of the consignee must be mentioned in the cenvatable invoice and so the consignee is the person entitled to avail cenvat credit and not the 'buyer of goods'. To provide an exemption to this rule, the 3rd proviso has been inserted to provide that in case of transit sale, the details of 'registered dealer' as 'buyer' should also be mentioned in the cenvatable invoice.

4. The proviso is very specific and has limited application only for 'registered dealers'. If an unregistered dealer is doing transit sale, he can continue to issue commercial invoice as earlier, as the proviso is applicable only when the goods are sent to any person on the direction of the registered dealer, which he is not.

5. In case of transit sale/E1 sale where the buyer is an unregistered dealer, the customer/end user can continue to avail cenvat credit on the basis of supplier manufacturer's invoice, as earlier, if the invoice contains it's name as consignee as provided in the sub rule 2. The manufacturers invoice showing recipient name as consignee is also a valid document for Cenvat as has been clarified in Circular No 96/7/95-CX dated 13-02-1995. The earlier procedure and law is still valid.

6. In addition to the 'consignee', the Central Government intended to allow 'buyer' to take credit by sending materials directly to consignee. Hence the newly inserted 3rd proviso to Rule 11(2) of CER, 2002 has provided an additional method for availing cenvat credit to BUYER, who should be a REGISTERED DEALER. The Hon'ble Rajasthan High Court had ruled that merely providing an alternative method or additional method for availing Cenvat Credit does not take away the entitlement to avail Cenvat credit on the basis of original document and the judgement has also been recently followed by Hon'ble Gujarat High Court.

Further, in my view, the last line in the 3rd proviso, which says "and that person shall take CENVAT credit on the basis of the registered dealer's invoice" seems to be ultra vires the Central Excise Act, 1944 or the rules thereunder and if challenged, may be struck down by the judiciary. In my view, if any trader, whether registered dealer or not, instruct his supplier to directly dispatch the excisable goods to the consignee, without first physically bringing the goods in his godown/depot, then such trader cannot issue valid cenvatable invoice even when he is a registered dealer. In view of the various issues involved, the Central Government should immediately issue necessary amendment or clarification to bring certainty and peace of mind to the trade and industry

CASE UPDATE: CENTRAL EXCISE

Limitation period under Excise Act not applicable to rebate claim filed

Limitation period prescribed under Section 11B of the Excise Act is not applicable for the rebate claim filed under Rule 18 of the Excise Rules

Deputy Commissioner of Central Excise, Chennai Vs. Dorcas Market Makers Pvt. Ltd and Commissioner of Central Excise (Appeals), Chennai [2015-TIOL-820-HC-MAD-CX]

Dorcas Market Makers Pvt. Ltd. (the Respondent) is engaged in the export of 'Medimix' brand of Ayurvedic Toilet Soap, falling under CSH 3401.11.10 of the Central Excise Tariff Act. The Respondent filed a rebate claim on June 17, 2008 under Rule 18 of Excise Rules for refund of the duty paid for goods exported during the period July 1, 2006 to January 31, 2007 (rebate claim". The Deputy Commissioner of Central Excise, Chennai rejected the rebate claim as time barred in terms of Section 11B of the Excise Act.

Later on, the denial of rebate claim was upheld by the Commissioner of Central Excise (Appeals), Chennai. Being aggrieved the Respondent filed a Writ Petition before the Hon'ble Madras High Court, wherein the matter was decided in favour of the Respondent and it was held that rebate claim filed is not time barred as Rule 18 of the Excise Rules is self-contained and has to be construed independently. Being aggrieved, the Department preferred an appeal before the Hon'ble Supreme Court.

The Hon'ble Supreme Court held as under:

- No dispute exist that the Respondent actually exported the goods in the instant case as the same is evident from ARE-1 forms;
- Even, the facts that whether the exports have taken place and duty had been paid or not, can be ascertained from facility of online filing of applications;
- Rule 18 of the Excise Rules itself does not stipulate a period of limitation;
- Rebate Claim under Rule 18 of the Excise Rules should be as per notification issued by the Central Government and in this regard

Notification No. 19/2004-CE (NT) dated September 6, 2004 (Notification 19/2004) was issued;

- Further, Notification 19/2004 has superseded the previous Notification No. 41/94-CE (NT) dated September 12,1994 which prescribed the time limit for filing claim. But, Notification 19/2004 does not contain the stipulation regarding limitation. This was a conscious decision taken by the Central Government and hence, the view taken by the learned Judge of the Hon'ble High Court that Rule 18 of the Excise Rules is to be construed independently is fair and reasonable;

Thus, the Hon'ble Supreme Court allowed the appeal in favour of the Respondent holding that period of limitation prescribed under Section 11B of the Excise Act is not applicable to rebate claim filed as both Rule 18 of the Excise Rules and Notification 19/2004 does not prescribe the time limit for filing rebate claim.

Suppression of facts cannot be alleged when all relevant facts were in knowledge of Department

Suppression of facts cannot be alleged while issuing subsequent SCN on same and similar facts, when all relevant facts were in knowledge of the Department at the issuance of first SCN

Commissioner of Central Excise & Customs Vs. Rivaa Textiles Industries Limited [(2015) 54 taxmann.com 239 (High Court of Gujarat)]

Rivaa Textiles Industries Limited ("the Respondent") is the processor of man-made fabrics. On September 16, 1996 inspection was carried out at the godown-cum-business premises of the Respondent by the Central Excise Officers. On the basis of information gathered in the inspection dated September 16, 1996, the Department issued various SCNs dated March 14, 1997, April 20, 1998 and March 27, 2001.

The SCN dated April 20, 1998 was issued alleging clandestine removal of manmade fabric and Excise duty demand of Rs. 1,60,77,219/- for the period 1995-96 and 1996-97 was made. Further, the Department issued third SCN dated March 27, 2001 for the period relating to June 24, 1996 to September 13, 1996 ("third SCN") asking the Respondent to pay Excise duty amounting to Rs. 25,76,598/- on account of illicit removal and invoked extended period of limitation on the premise of suppression of facts and willful mis-statements.

Later, the Ld. Commissioner vide Order dated January 11, 2002 confirmed the duty demand made in the third SCN and also imposed penalty after holding that the third SCN was issued within a period of five years from September 16, 1996 in terms of Proviso to Section 11A of the Excise Act. However, in the matter of Second SCN, the demand was dropped after observing that the

issue has been settled by CEGAT and there is no point in proceeding with this aspect.

Being aggrieved by the Order of the Ld. Commissioner, the Respondent preferred an appeal before the Hon'ble CESTAT, Mumbai. The Hon'ble CESTAT, Mumbai vide Order dated December 20, 2005 quashed and set aside the order of the Ld. Commissioner. Thereafter, the Department preferred an appeal before the Hon'ble High Court of Gujarat.

The Hon'ble High Court of Gujarat relying upon the decision in case of Nizam Sugar Factory Vs. Collector of Central Excise [2006 (197) ELT 465 (SC)], allowed the appeal in favour of the Respondent and held that where all the relevant facts were in the knowledge of authorities when first SCN was issued, while issuing second and third SCN's on same and similar facts and on the basis of same inspection made on September 16, 1996, Department cannot allege suppression of facts by Respondent.

It was further held that since the entire proceedings are time barred, Excise duty cannot be levied against the Respondent and, accordingly no penalty can be imposed.

CASE UPDATE: VAT

Publication of prospectus and making it available to students is ancillary activity to the main and predominant object to impart education and thus Institutions are not 'dealer' under VAT

Commercial Taxes Officer Vs. Banasthali Vidyapith [2015 (4) TMI 393 – RAJASTHAN HIGH COURT]

Banasthali Vidyapith (the Petitioner) is a institution imparting education primarily to female students and has claimed that they are not carrying on any trade, commerce or business but only carrying on the activity of imparting education. The Petitioner is registered under Section 12AA of the Income Tax Act, 1961 and it is a public society formed and registered on March 16, 1951 under the provisions of Indian Societies Act, 1860 and also under Rajasthan Societies Act, 1958.

The Departmental survey of the Petitioner premises on December 12, 2012 revealed that for the Assessment Years 2007-08 to 2012-13, the Petitioner provided material namely cement, iron and steel to the contractors for constructing its premises or/and maintenance of the properties being owned by it ("Supply of Material"). The Petitioner also sold prospectus to the prospective students who wanted to seek admission in the institution ("Sale of Prospectus"). The Revenue contended that Supply of Material to the Contractors and reducing the value of the same from the Contract amount and Sale of prospectus is 'Sale' liable to the Rajasthan Value Added Tax

("RVAT") under Entry 104 and the Petitioner being a dealer is liable to get registered under the Rajasthan Value Added Tax Act, 2003 ("RVAT Act").

Thereafter, the Assessing officer held that the Petitioner is liable to be registered under the category of 'Obligatory Registration' under Section 11 of the RVAT and also imposed penalty on account of non-registration, which was further upheld by the first Appellate Authority.

Being aggrieved, the Petitioner preferred an appeal before Rajasthan Tax Board, who held that the Petitioner does not fall in the purview of 'dealer' under Section 2(11) of the RVAT as it does not carry on any business. Further, the Petitioner is not carrying on any business as the primary and dominant activity is of imparting education which cannot be said to be business.

Being aggrieved, the Revenue preferred a revision Petition before the Hon'ble High

Court of Rajasthan.

The Hon'ble High Court of Rajasthan relying upon the judgments in case of N.M. Goel & Co. Vs. STO, Rajnandgaon and Anr. [1989 (1) SSC 335] allowed the appeal in favour of the Petitioner and held that imparting of education which is the main activity of the Petitioner cannot be said to be in the nature of business activity, a trade, commerce or manufacture, therefore the Petitioner is not a 'dealer' liable to 'Obligatory Registration' under Section 11 of the RVAT.

The Hon'ble High Court further held that it is well settled that if the main activity is not business, then the connected, incidental or ancillary activities would not normally amount to business unless an independent intention to conduct business in these connected, incidental or ancillary activities is established by the Revenue. Moreover, in the instant case, the Petitioner is a deemed University and publication of 'prospectus' and making it available to students is ancillary, incidental and essential to its main and predominant object to impart education. Hence, it is not a dealer liable to be registered under the Rajasthan VAT Act.

Further, while dealing with aspect of Supply of material, the Hon'ble High Court held that the Petitioner has purchased the material after payment of VAT. Tax having been suffered at the time of purchase by the Petitioner the same material cannot be subjected to another levy on such transfer to the contractor for consumption as levy under RVAT Act is a single point tax.

VAT unconstitutionally paid eligible for refund: P&H HC

M/s Idea Cellular Ltd. Vs. Union of India and others (Punjab & Haryana High Court), Civil Writ Petition No. 28512 of 2013, Date of Order: 23rd March,2015

The taxability on activation of SIM has been a long disputed issue, which attained finality post verdict of Hon'ble Supreme Court of India in case of BSNL v Union of India, in 2006.

However, the issue arose as to what would be the consequence of the amount paid as VAT prior to the said judgment

Recently, similar issue came up before Hon'ble High Court of Punjab & Haryana in the matter of Idea Cellular Limited v. Union of India

The Petitioner, M/s Idea Cellular Ltd., paid the VAT on the transactions of activation of SIM cards, since earlier in case of State of UP v. Union of India, Supreme Court held the activity of activation of SIM cards as exigible to VAT. However, post verdict in case of BSNL, the same was outside the purview of VAT. Therefore, petitioner demanded the refund of VAT so paid, as the same was outside the authority of law under article 265 of Constitution of India.

The respondent contended that the BSNL judgment is prospective in nature. Moreover, the state is not empowered to grant refund u/s 20 of Haryana VAT Act in such a case. And the direction for refund shall be the case of unjust enrichment, which is prohibited by law.

Hon'ble High Court held that BSNL judgment is applicable since inception & can't be construed as prospective in nature.

Further, when the tax has been collected in the absence of authority of law, the High Court is empowered to issue writ for directing refund to the petitioners.

Accordingly, the amount of VAT paid shall be transferred to the Service Tax Department of Union.

Comments: The said judgment has acted as a breather for the industry and it is expected that other cases on the same ground are disposed of in favor of the assesses, in order to avoid unnecessary hardship

***

VERENDRA KALRA & CO

CHARTERED ACCOUNTANTS

CONTACT DETAILS:

Head Office
75/7 Rajpur Road, Dehradun
T +91.135.2743283, 2747084, 2742026
F +91.135.2740186
E info@vkalra.com
W www.vkalra.com

Branch Office
80/28 Malviya Nagar, New Delhi
E info@vkalra.com
W www.vkalra.com

For any further assistance contact our team at
kmt@vkalra.com