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INDIRECT TAX REVIEW
MAY 2015

EXCISE

CUSTOMS

SERVICE TAX

VALUE ADDED TAX

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RECENT UPDATES: SERVICE TAX

TAXABILITY OF NEWLY TAXABLE SERVICES FROM 01.06.2015

The Ministry of Finance, Department of Revenue vide Notification No. 14/2015-ST dated May 19, 2015 has notified that the following changes in relation to the Negative List of services contained under Section 66D of the Finance Act, 1994 (**"the Finance Act"**) shall be effective from June 1, 2015:

- **Section 66D(f):** Services by way of carrying out any processes for production or manufacture of alcoholic liquor for human consumption brought under the Service tax net.
- **Section 66D(i):** Explanation inserted whereby the expression "betting, gambling or lottery" shall not include the activity as specified in substituted explanation 2 to Clause (44) of Section 65B of the Finance Act which reads as under:

"Explanation 2.—For the purposes of this clause, the expression "transaction in money or actionable claim" shall not include—

(i) any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination*, to another form, currency or denomination for which a separate consideration is charged;*

(ii) any activity carried out, for a consideration, in relation to, or for facilitation *of, a transaction in money or actionable claim, including the activity carried out—*

(a) by a lottery distributor or selling agent in relation to promotion, marketing, organising, selling of lottery or facilitating *in organising lottery of any kind, in any other manner;*

(b) by a foreman of chit fund for *conducting or organising a chit in any manner."*

- **Section 66D (j):** Omitted, which covers 'admission to entertainment event or access to amusement facilities'.

Consequently, Service tax to be levied on the services provided by way of access to amusement facility such as rides, bowling alleys, amusement arcades, water parks, theme parks, etc.

Service tax to be levied on services by way of admission to entertainment event of concerts, non-recognized sporting events, pageants, music concerts and award functions, if the amount charged for admission is more than Rs. 500.

Whereas services by way of admission to exhibition of the cinematographic film, circus, dance, or theatrical performances including drama, ballets or recognized sporting events shall continue to be exempt; [Read with Notification No. 16/2015-ST dated May 19, 2015 vide which changes has been made in the Mega Exemption List of Services effective from June 1, 2015]

However, as per **TRU Clarification vide** D.O.F.No.334/5/2015-TRU dated May 19, 2015, the effective dates to be notified later in respect of the changes proposed in **Section 66D(a)** of the Finance Act i.e. under clause (iv), the words 'support services' to be substituted by the words 'any service'.

Accordingly, after such amendment, 'Any services' provided by the Government or local authority to a Business Entity would be exigible to Service tax, except for the services that are specifically exempted, or covered by any another entry in the Negative List.

Hence, 'Support services' provided by Government or Local Authority to Business Entity will continue to be taxed under Reverse charge mechanism except (1) renting of immovable property, and (2) services specified in sub-clauses (i), (ii) and (iii) of clause (a) of Section 66D of the Finance Act.

Dilemma of change in taxability of new services effective from June 1, 2015: Rule 5 of the POT Rules Vs. Section 66B of the Finance Act:

With the new services becoming taxable w.e.f. June 1, 2015, the issue may crop up as to whether the services rendered prior to June 1, 2015 are exigible to Service tax when payments for such services are received later or invoices pertaining to such services are raised later.

Before taking insight into the uncertainties and ambiguities, it is pertinent here to understand the basic structure and concept of levy and collection of Service tax under the Finance Act governing taxability of a service.

Levy and Collection of Service tax under the Finance Act

In any taxing statute, the statutory provision containing the charging Section is of foremost importance. It is well settled law that levy of tax is one thing and collection thereof is quite different thing. Once the levy is attracted, the collection of tax may be at any different point/ stage/ event.

Under the Finance Act, Section 66B of the Finance Act is the charging Section which levy Service tax on taxable services. We are reproducing herewith Section 66B of the Finance Act for the ease of convenience:

*"***66B. Charge of service tax on and after Finance Act, 2012**.

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent. on the value of all services, **other than those services specified in the negative list***,* **provided or agreed to be provided** *in the taxable territory by one person to another and* **collected in such manner as may be prescribed**.*"*

[It may be noted here that the Ministry of Finance, Department of Revenue vide Notification No. 14/2015-ST dated May 19, 2015 has notified increase in the rate of Service tax from 12.36% to flat 14% (Subsuming Education Cess and Secondary & Higher Secondary Education Cess) to be effective from June 1, 2015.]

The literal interpretation of the charging Section 66B of the Finance Act means that the levy of Service tax is on those service 'other than the one specified in the Negative List', 'provided or agreed to be provided'. However, the collection of Service tax may be shifted to any point/ stage/event, in any manner, as prescribed by the Rules made in this behalf.

Further as already quoted in our earlier newsletter, the Hon'ble Supreme Court in the case of *All India Federation of Tax Practitioners Vs. Union of India [2007-TIOL-149-SC-ST]* has held that "*a tax on a thing or goods can only be with reference to a taxable event"* and the same contention was upheld again in the case of Association of Leasing & Financial Service Companies Vs. Union of India *[2010 (20) STR 417 (SC)]*, wherein the Hon'ble Supreme Court observed that the **taxable event under the Service tax law is the rendition of service.**

Now, in view of the above discussions, the levy of Service tax is on the provision of service and accordingly, the service must be taxable service at the time of its rendition in order to attract Service tax levy. In other words, if at the time of rendition of service, it is covered under the Negative List, then as per Section 66B of the Finance Act, no Service tax may be levied on the same irrespective of the date of its payment or raising of invoice.

However, in this regard, Rule 5 of the Point of Taxation Rules, 2011 (**"the POT Rules"**) governing Point of taxation for levy of Service tax in case of new services, provides contradictory provisions.

Key Concerns:

Whether Rule 5 of the POT Rules can override Section 66B of the Finance Act:

Rule 5 of the POT Rules provides that where a service is charged to tax for the first time, then:

"(a) no tax shall be payable to the extent the invoice has been issued and the payment received against such invoice before such service became taxable;"

As per this Rule 5(a) of the POT Rules, no Service tax is payable even if services are rendered after such service becomes taxable only when the invoice has been issued and the payment received against such invoice before such service became taxable.

"(b) no tax shall be payable if the payment has been received before the service becomes taxable and invoice has been issued within 14 days of the date when the service is taxed for the first time."

Manifestly, the stated Rule provides that in cases of levy on new services, irrespective of date of completion of service, Service tax shall be payable if the payment is received on or after the date of levy and/ or if the invoice is not issued within 14 days of the date of levy.

Now, the moot question here is that whether Rule 5 of the POT Rules can override Section 66B of the Finance Act in terms of which the levy of Service tax is on the provision of service and accordingly, the service must be taxable service at the time of its rendition in order to attract Service tax levy.In view of the above discussed provisions, the matter is subjected to debate as to whether Service tax would be leviable on a service which was not a 'taxable service' at the time of its rendition as being covered under the Negative List, merely because its payment is received on or after the date of levy and/ or the invoice is not issued within 14 days from the date service is taxed first time.

Here we would like to mention that the POT Rules were framed by the Central Government in exercise of the powers conferred under Section 94 of the Finance Act and such delegated legislation cannot be extended to go beyond the vires of the Finance Act.

Hence, an illustrative clarification to this effect is much warranted from the Board before the new services becoming taxable effective from June 1, 2015.

SERVICE TAX RATES CHART APPLICABLE FROM 01.06.2015

Normal Service tax rate with effect from 1st June 2015 is 14%. However applicable rate is different for many services which may be subject to fulfillment of some conditions. This is mainly due to material value or non-service element included in total value of these services.

This Chart will provide the effective rates on such services.

Sr No.	Taxable service	Taxable Value	New Rate w.e.f. 01/06/2015	Condition
1	Financial leasing including hire purchase	10%	1.4%	NIL
2	Transport of goods by rail	30%	4.2%	NIL
3	Transport of passengers with or without accompanied belonging by rail	30%	4.2%	NIL
4	Supply of food or any other article of human consumption or any drink, in a premises (including hotel, convention center, club, pandal, shamiana or any place specially arranged for organizing a function) together with renting of such premises	70%	9.8%	Note(i)
5	Transport of passengers by air, with or without accompanied belongings	40%	5.6%	Note(ii)
6	Renting of hotels , inns, guest houses, clubs, campsites, or other commercial places	60%	8.4%	Note(ii)

	meant for residential or lodging purposes			
7	Services of goods transport agency	30%	4.2%	Note(iii)
8	Renting of any motor vehicle designed to carry passengers	40%	5.6%	Note(iii)
9	Transport of goods in vessel	30%	4.2%	Note(iii)
10	(i) Tour service –package tour	25%	3.5%	Note(iii)&(iv)
	(ii) Tour service –service solely of arranging or booking accommodation for any person in relation to a tour	10%	1.4%	Note(iii), (v)&(vi)
	(iii) Tour service – simple tour services	40%	5.6%	Note(iii)&(iv)
11	Construction of a complex , building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly			
	(i) for a residential unit having carpet area upto 2000 square feet and the amount charged is less than rupees one crore	25%	3.5%	Note (vii)&(viii)
	(ii) for other than (i) above	30%	4.2%	Note (vii)&(viii)

Note:

(i) CENVAT credit on any goods classifiable under chapters 1to22 of Central Excise Tariff Act,1985 used for providing the taxable service, has not been taken.

(ii) CENVAT credit on inputs and capital goods, used for providing the taxable service , has not been taken .

(iii) CENVAT credit on inputs, capital goods and input services , used for providing the taxable service, has not been taken .

(iv) The bill issued for this purpose indicates that it is inclusive of charges for such a tour.

(v) The invoice bill or challan issued indicates that it is towards the charges for such accommodation.

(vi) This exemption shall not apply in such cases where the invoice, bill or challan issued by the tour operator, in relation to a tour, only includes the service charges for arranging or booking accommodation for any person and does not include the cost of such accommodation.

(vii) CENVAT credits on inputs used for providing the taxable service has not been taken.

(viii) The value of land is included in the amount charged from the service receiver.

Sr no	Taxable service	Taxable Portion of Total Value	Effective Rate
12	Types of works contracts		
	(i) Execution of original works	40%	5.6%
	(ii) In cases not covered above including maintenance or repair or reconditioning or restoration or servicing or any goods	70%	9.8%
	(iii)Other works including maintenance, repair , completion and finishing services such as glazing , plastering, floor and wall tilling , installation of electrical fittings of an immovable property	70%	9.8%

Notes:

(i) "total amount" means the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract, after deducting (i)the amount charged for such goods or services , if any and (ii)the value added tax or sales tax ,if any , levied thereon.

(ii) The fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

(iii) CENVAT credit of duty of excise paid on any inputs , used in or in relation to the said works contract is not allowable.

Sr No	Taxable service	Taxable Portion of Total Value	Effective Rate
13	Supply of food and drinks in restaurant or outdoor catering		
	(i) Service provided by Restaurants	40%	5.6%
	(ii) Services provided by outdoor caterer	60%	8.4%

Notes:

(i) "Total amount" means the sum total of the gross amount charged and fair market value of all goods and services supplied in or in relation to the supply of food or any other article of human consumption or any other drink (whether or not in intoxicating), whether or not supplied under the same contract or any other contract, after deducting (i) the amount charged for such goods or services, if any and (ii) the value added tax or sales tax, if any, levied thereon.

(ii) The fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

(iii) CENVAT credit of duties or cess paid on any goods classifiable under chapter 1 to 22 of the central excise tariff act, 1985 is not allowable.

Sr. No.	Taxable service	Revised rates of service tax
14	Booking of air tickets by air travel agent	Domestic booking 0.7%International booking -1.4%
15	Life insurance service	First year - 3.5%Subsequent year – 1.75%
16	Money changing service	
	(i) Gross amount of currency exchanged for an amount upto Rs. 100,000	0.14% or Minimum Rs. 35/-
	(ii) Gross amount of currency exchanged for an amount of rupees exceeding Rs. 100,000 and up to Rs. 10,00,000	Rs. 140 and 0.07%
	(iii) Gross amount of currency exchanged for an amount of rupees exceeding Rs. 10,00,000	Rs. 770 and 0.014% or maximum of Rs. 7,000/-
17	Service provided by Lottery distributor and selling agenta) If the lottery or lottery scheme is one where the guaranteed prize payout is more than 80% b) If the lottery or lottery scheme is one where the guaranteed prize payout is less than 80%	Rs. 8,200 on every Rs. 10 Lakh or part of Rs. 10 Lakh of aggregate face value of lottery tickets printed by the organizing State for a draw.Rs. 12,800 on every Rs. 10 Lakh or part of Rs. 10 Lakh of aggregate face value of lottery tickets printed by the organizing State for a draw

SIGNIFICANT CHANGES UNDER CENTRAL EXCISE WEF 14.05.2015

The Hon'ble President has given assent to the Finance Bill, 2015 on Thursday, May 14, 2015. Accordingly, the Finance Bill, 2015 has now become Finance Act (No.20), 2015. We have already provided the changes in Service tax that are effective from May 14, 2015 and the changes that will become effective only from the date to be notified and Significant changes under Customs wef 14.05.2015 in our earlier newsletters.

Now, we are summarizing herewith changes under the Central Excise effective from May 14, 2015 for easy digest:

PART I: CHANGES UNDER THE CENTRAL EXCISE EFFECTIVE FROM MAY 14, 2015:

Changes under various Sections under the Central Excise Act, 1944 ("the Excise Act")

Section 11A: Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded

- Section 11A(5), 11A(6) and 11A(7) of the Excise Act contains the provisions relating to the category of cases where fraud, collusion,

wilful mis-statement, etc., is involved but the details relating to the transactions are available in the specified record like reduced penalty of 50%, maximum penalty of 25% in cases where the duty amount, interest and reduced penalty is paid before issuance of SCN etc.

- Effective from May 14, 2015, Section 11A(5), 11A(6) and 11A(7) of the Excise Act are omitted so as to bring uniformity in treatment of cases involving fraud, collusion, wilful mis-statement, etc. irrespective of whether the details of the transaction is so recorded or not;
- New sub-section 16 inserted after Section 11A(15) of the Excise Act to provide that the provisions of Section 11A shall not apply to cases where the non-payment or short payment of duty is self-assessed and declared as duty payable by the assessee in the periodic returns filed and that in such cases recovery of duty shall be made in such manner as may be prescribed;
- Sub-clause (vi) inserted in Explanation 1 to Section 11A of the Excise Act (containing provision relating to 'relevant date') to provide that in cases where only interest is required to be recovered, the relevant date would be the date of payment of duty.
- Transition provisions – Explanation 2 has been substituted to provide that if Show Cause Notice was not issued prior to enactment of the Finance Bill, 2015, recovery of duty will be governed by the provisions as amended.

Section 11AC: Rationalization of penal provisions:

Non-fraud cases: In cases not involving fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Excise Act or Rules with the intent to evade payment of duty, in the following manner:

- Ceiling of 10% of the duty determined under Section 11A(10) of the Excise Act or Rs. 5,000/-, whichever is higher has been incorporated;
- No penalty leviable if duty amount and interest is paid within 30 days of issuance of SCN and proceedings in respect of such duty amount and interest shall be deemed to have been concluded;
- Reduced penalty equal to 25% (i.e. 2.5% of Duty) of the penalty if the duty amount, interest and reduced penalty is paid within 30 days of communication of the Adjudication Order.
- If the duty amount or penalty is increased in any Appellate proceedings, then the benefit of reduced penalty (i.e. 25%) shall be admissible if duty, interest and reduced penalty on such increased amount is paid within 30 days of such Appellate Order.

Fraud cases: In cases involving fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Excise Act or Rules with the intent to evade payment of duty, in the following manner:

- Penalty shall be of 100% of the duty determined under Section 11A(10) of the Excise Act. However, in respect of the cases where the details relating to such transactions are recorded in the specified

record for the period beginning with the April 8, 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President [i.e. May 14, 2015] (both days inclusive), the penalty shall be 50% of the duty so determined;

- Reduced penalty equal to 15% of the duty amount alleged in the SCN shall be levied if duty, interest and reduced penalty is paid within 30 days of issuance of SCN. Further proceedings in respect of such duty amount, interest and penalty shall be deemed to be concluded;
- Reduced penalty equal to 25% of the duty amount, determined by the Central Excise officer by an Adjudication Order, shall be levied if the duty, interest and reduced penalty is paid within 30 days of communication of Order of the Central Excise Officer; and
- If the duty amount gets modified in any Appellate proceedings, then the amount of penalty and the interest payable thereon shall stand modified accordingly, and after taking into account the amount of duty so modified, the person who is liable to pay such amount of duty, shall also be liable to pay the amount of penalty and interest so modified;
- If the duty amount or penalty is increased in any Appellate proceedings, then the benefit of reduced penalty (i.e. 25%) shall be admissible if duty, interest and reduced penalty on such increased amount is paid within 30 days of such Appellate Order.

Transition provisions: Explanation I prescribes transition provision in the following manner:

- Amended provisions of Section 11AC of the Excise Act shall apply to cases where no SCN is issued, before the date of enactment of the Finance Bill, 2015 (i.e. May 14, 2015); and
- In cases where SCN has been issued but no Adjudication Order has been issued before the date of enactment of the Finance Bill, 2015 (i.e. May 14, 2015),assesse shall be eligible to closure of proceedings on payment of duty and interest in non-fraud cases or on payment of duty, interest and 15% penalty in fraud cases, within 30 days from the date on which the Finance Bill, 2015 receives the assent of the President (i.e. May 14, 2015);
- In cases where Adjudication Order is passed after the date of enactment of the Finance Bill, 2015 (i.e. May 14, 2015), assesse shall be eligible to benefit of reduced penalty of 25% of penalty amount in non-fraud cases or 25% of duty amount in fraud cases, subject to the condition that the payment of duty, interest and penalty is made within 30 days of the communication of the Order.

Provisions relating to Settlement Commission has been amended to, inter alia, include amendment in the proviso to Section 31(c) to delete the reference to *"in appeal or* revision*, as the case may be"* so as to provide that when any proceeding is referred back, whether in appeal or revision or otherwise, by any Court, Appellate Tribunal or any other Authority to the

Adjudicating Authority for a fresh adjudication or decision, then such case shall not be entitled for settlement.

Penalty provided under sub-sections (4) and (5) of Section 37 of the Excise Act (Power of Central Government to make Rules) increased to Rs. 5000/-. Earlier it was Rs. 2000/-.

No. 205A of Notification No. 12/2012-Central Excise dated March 17, 2012 exempts railway or tramway track construction material of iron and steel from payment of Excise duty on the value of rails, subject to conditions specified therein. This exemption is being made applicable retrospectively for the period from March 17, 2012 to February 2, 2014.

CASE UPDATES: SERVICE TAX

Export condition fulfilled even if payment is received in Indian Rupees

Sun-Area Real Estate Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai-I [2015-TIOL-956-CESTAT-MUM]

Issue:

Whether the conditions of export of services under the erstwhile Export of Service Rules, 2005 is satisfied when the payment was received in Indian Rupees through a Foreign Bank, who have issuedForeign Inward Remittance Certificate?

Facts:

Sun-Area Real Estate Pvt. Ltd. ("the Appellant") received payment against export of services in Indian Rupees through Deutsche Bank, who have issued Foreign Inward Remittance Certificate ("FIRC") as statutorily provided under Exchange Control Manual of Reserve Bank of India ("RBI"). Further, it was also certified in the FIRC that the payment thereof has not been received in non-convertible rupees or under any special trade or payments agreements. Accordingly, the Appellant filed refund claim amounting to Rs. 10,89,279/- in respect of Service tax paid on export of services under the erstwhile Export of Service Rules, 2005 ("the Export of Service Rules").

The Department denied refund to the Appellant on the ground that since in the present case, the payment was received in Indian Rupees, therefore, the condition of Rule 3(ii) of the Export of Service Rules is not complied with. Thereafter, the refund claim was rejected by the Ld. Commissioner (Appeals).

Being aggrieved, the Appellant preferred an appeal before the Hon'ble CESTAT, Mumbai relying upon Notification No. FEMA 9/2000-RB and FEMA 14/2000-RB dated May 3, 2000 issued by RBI under Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000 ("FEMA Notifications") to provide that as per Foreign Exchange Management Act, 1999 ("FEMA") provisions, when the payment against any export is received even in Indian Rupees, but through authorised dealer, the payment/ remittance should be considered as foreign exchange.

Held:

The Hon'ble CESTAT, Mumbai held as under:

- As per Clause 3A. 6(i) of the Exchange Control Manual, it is clear that FIRC is issued only in respect of foreign exchange;
- In the present case, FIRCs were issued and there is a specific certification that the payment has not been received in non-convertible rupees, which establishes that the payment received and mentioned in the FIRCs are payment in convertible foreign exchange;
- In terms of FEMA Notifications, it is very clear that, when a person receives payment in Indian Rupees from the account of a bank situated in any country outside India maintained with an authorised dealer, the payment in rupees shall be deemed to have repatriated the realized foreign exchange to India;
- In terms of Regulation 3 made under Section 47 of the FEMA, in the present case the foreign remittance in Indian Rupees through Deutsche Bank is the receipt of payment in convertible foreign exchange;
- In the case of B. Boda and Company Private Ltd. Vs. Central Board of Direct Taxes [AIR 1997 SC 1543] the payment towards insurance brokerage retained by the Indian agent from the total payment of premium to be paid to the foreign insurance company in foreign exchange, was held to be retained in foreign exchange;

Accordingly, it was held that even though the Appellant received the payment in Indian Rupees but the same is deemed to be convertible foreign exchange and accordingly the condition as provided under Rule 3(ii) of the Export of Service Rules stand complied with.

Effective from July 1, 2012, the erstwhile Export of Service Rules, 2005 has been replaced with the conditions contained under Rule 6A of the Service Tax Rules, 1994 ("the Service Tax Rules") read with Rule 6(8) of the Cenvat Credit Rules, 2004. In terms of Rule 6A (1) of the Service Tax Rules, the six essential requisite conditions to be fulfilled for a service to be considered as export of service are mentioned here under:

(a) the provider of service is located in the taxable territory;
(b) the recipient of service is located outside India;
(c) the service is not a service specified in Section 66D of the Finance Act, 1994;

(d) the place of provision of the service is outside India (determined as per the Place of Provisions of Services Rules, 2012);
(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and

(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Finance Act, 1994.

Since, the condition of receiving payment under convertible foreign exchange still prevails even after July 1, 2012, the relevance of afore stated judgment still holds good.

Department cannot reassess refund claim sanctioned vide Appellate Order without challenging the same

TT Ltd. Vs. CST, Delhi [2015 (5) TMI 109 – CESTAT NEW DELHI]

Issues:

- Whether the Adjudicating Authority is allowed to reassess/ re-quantify the amount of refund claim sanctioned vide the Appellate Order without challenging the same?
- Whether the Adjudicating Authority is allowed to re-examine the refund claim on new and afresh ground which was neither alleged in SCN, original Adjudicating Order and the Appellate Order?
- Whether the Appellant is entitled for refund claim of the services availed prior to amendment in the notified services in the Notification No. 41/2007-ST dated October 6, 2007?

Facts & Background:

TT Ltd. (**"the Appellant"** or **"the assessee"**) filed six refund claims for Rs. 47,77,492/- for Service tax paid on Input services used for export of goods under Notification No. 41/2007-ST dated October 6, 2007 (**"the Notification"**). 5 Show Cause Notices were issued in respect of refund claims on various grounds. Thereafter, an Adjudication Order (**"OIO 1"**) was passed rejecting the refund claims on grounds namely:

- Refund claims pertaining to quarter ending June, September and December, 2007 are filed beyond the period of limitation.
- Some invoices do not contain requisite details as prescribed in Rule 4A of the Service Tax Rules, 1994
- No evidence of payment made against the invoices on which refund was sought.

The OIO 1 was challenged before the Ld. Commissioner (Appeals), wherein it was held that refund filed for the period June and September, 2007 are barred by limitation and the Appellant is entitled for rest of the refund claims subject to verification of certain documents by the Adjudicating Authority (**"OIA 1"**). Later on, OIA 1 was accepted by the Committee of Commissioners. However on approaching the Adjudicating Authority for sanctioning of refund claims as per OIA 1, the Adjudicating Authority sanctioned the refund claim of Rs. 8,48,422/- only out of the total refund claim sanctioned and rejected the refund claim of Rs. 34,95,654/- on new and afresh ground that specified services were received by the assessee prior to the date when these services were notified under the Notification (**"OIO 2"**). On appeal before the Ld. Commissioner (Appeals), OIO 2 was upheld (**"OIA 2"**). Being aggrieved, the Appellant preferred an appeal before the Hon'ble CESTAT, Delhi.

Learned counsel for the Appellant submitted as under:

- In earlier round of litigation, the order of sanctioning refund claim has been accepted by the Department. Therefore, without challenging the said Order, the Adjudicating Authority has no right to raise new and afresh issue to reject the refund claims – as held by the Hon'ble Apex Court in the case of *Commissioner of C. Ex., Chennai-I Vs I.T.C Ltd. [2006(204) ELT 363 (S.C)]*;
- The Adjudicating Authority cannot re-assess and re-quantify the amount of refund as per Appellate Order without challenging the same – as held by the Hon'ble High Court of Allahabad in the case of *Commissioner of Customs & Central Excise Vs. Samtel Color Ltd. [(2014) 49 taxmann.com 238 (Allahabad)]*;
- The refund claims were rejected on new and afresh ground, which was neither alleged specifically in the SCN nor there was specific finding in the Adjudication Order as well as in the Appellate Order. Hence the same is not sustainable – as held by the Hon'ble Tribunal, Delhi in the case of *Dhampur Sugar Mills Ltd. Vs. Commissioner of C. EX., Meerut-II [2010 (260) E.L.T. 271 (Tri. – Del.)]*;
- Refund claims cannot be denied merely on the ground the services availed by the Appellant prior to the date of the Notification as there is no condition as such in this regard in the Notification – as held by the Hon'ble CESTAT, Mumbai in the case of *WNS Global Services (P) Ltd. Vs. Commissioner Of C. Ex., Mumbai [2008 (10) S.T.R. 273 (Tri. – Mumbai)]* which has been affirmed by *Hon'ble Bombay High Court in [2011 (22) STR 609 (Bom)]*.

On the other hand, the Department argued that OIA 1 has not simply sanctioned the refund claim but has directed the Appellant to produce certain documents and thereafter the Adjudicating Authority has every right to examine those documents and deny the refund claim. It was also submitted that the conditions of the Notification are required to be fulfilled as held by Hon'ble High Court of Allahabad in the case of *Addi Industries Ltd. [2014 46 GST 204]* (**"Addi case"**).

Held:

The Hon'ble CESTAT, Delhi upheld all the contentions of the Appellant and held as under:

- As the Commissioner (Appeals) has directed to verify certain documents, in that case, if those documents were not produced by the Appellant or found deficient then the refund claim can be rejected to that extent. But the refund claim cannot be examined afresh;
- The Adjudicating Authority has taken the new ground to adjudicate the refund at the time of verification of certain documents which is also not permissible in law. OIA 1 has attained finality against which Revenue has not preferred any appeal, thus the Adjudicating Authority has no right to re-examine the refund claim but only can verify the documents as directed by the Commissioner (Appeals);

- In the Notification, there is no condition that if the services availed prior to the date of Notification, the Appellant are not entitled to refund claim;
- In Addi case, the condition of the Notification was that refund claim is to be filed within the prescribed time but there is no condition in the Notification that if the services availed prior to its insertion, refund is not admissible. Therefore reliance on Addi case is not acceptable.

Accordingly, the Hon'ble Tribunal decided the matter in favour of the Appellant and directed the Adjudicating Authority to sanction the refund claim on verification of the documents as directed by the Commissioner (Appeals) vide OIA 1 within a period 90 days.

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;

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