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INDIRECT TAX REVIEW
JULY 2015

EXCISE

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SERVICE TAX

VALUE ADDED TAX

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RECENT UPDATES:

Comparison of GST Bill 2014 and Recommendations of Select Committee of Rajya Sabha, 2015

The Constitution (122nd Amendment) Bill, 2014 was introduced in Lok Sabha on December 19, 2014 and was passed by it on May 6, 2015. The Bill was referred to a Select Committee of Rajya Sabha for examination which submitted its Report on July 22, 2015. The Report contained various recommendations along with three Notes of Dissent submitted by Congress, AIADMK and CPI.

The Table below compares the provisions of the 2014 Bill with the recommendations of the Select Committee and the Notes of Dissent.

Constitution (122nd Amendment) Bill, 2014	Select Committee recommendations, 2015	Notes of Dissent in Committee Report, 2015
Additional Tax (in Interstate trade) (Clause 18)		
An additional tax of up to 1% on the supply of goods will be levied by centre in the course of inter-state trade or commerce The tax will be assigned to the states from where the supply originates. This will be for two years, or longer, as recommended by GST Council.	The 1% additional tax in its present form is likely to lead to cascading of taxes Add an explanation to the clause to define "supply" to mean all forms of supply made for a consideration	The 1% additional tax is market distorting, especially since 100% compensation for five years to states has been proposed. Instead of the additional 1% tax, states should be permitted to retain 4% of centre's share of IGST on all inter-state supplies of goods.
Compensation to states (Clause 19)		
Parliament may provide for compensation to states for a maximum period of five years	100% Compensation to be for a five year period.	100% compensation to be provided for five years. Compensation must be deposited in a GST Compensation Fund, under the GST Council.
Coverage of GST (Clauses 12, 14 and 17)		
Alcoholic liquor for human consumption to be exempt from GST. GST is to be levied on petroleum crude, high speed diesel, motor spirit, natural gas,	No Changes Proposed	Tobacco and tobacco products, alcohol for human consumption, and electricity supply and consumption must be brought within the

aviation turbine fuel at a later date. GST to be imposed on tobacco. Centre to impose additional levy on tobacco.		purview of GST within five years. States must also be permitted to levy taxes on tobacco. Petroleum products to be kept out of GST
Dispute resolution (Clause 12)		
GST Council to decide upon the modalities to resolve disputes	No changes proposed	Separate GST Disputes Settlement Authority, as provided for in the 2011 Bill, must be included
GST Council (Clause 12)		
Functions to include: Model GST laws, principles of levy and place of supply, rates including floor rates with bands of GST, apportionment of IGST, etc. Voting: 3/4th weighted votes; 1/3 weightage to centre, 2/3 to states.	Define bands‟ (of GST) to include the range of GST rates (over the floor rate) within which CGST and SGST may be levied on specific goods or services or class of good or services. Voting: No changes proposed	A statutory GST Council is not required. A body like Empowered Committee of state Finance Ministers is adequate. A ceiling of 18% must be imposed on GST rates. Special consideration to be given to states or Union Territories whose population does
		not exceed 20 lakh, (ex. Goa or Puducherry). Voting: States must have 3/4 of the weighted votes, and the centre must have 1/4.

CASE UPDATES: SERVICE TAX

Penalty u/s 78 is leviable if tax recovered not paid & information of unpaid taxes not furnished in ST returns

Iwi Crogenic Vaporization System India vs. Commissioner of Central Excise, Customs & Service Tax- VADODARA (CESTAT Ahmedabad),

Brief of the case:

The CESTAT Ahmedabad in the case of Iwi Crogenic Vaporization System India held that The non-payment of recovered tax coupled with the fact of non-furnishing of the details in respect of unpaid part in periodical returns clearly establish the intention of assesse to evade the payment of service tax

recovered. Therefore, in such a case penalty levied u/s 78 is sustainable in law.

Facts of the case:

During the course of investigation by the central excise officers it was found that the assessee company was not paying service tax on certain services as payable under Reverse charge mechanism. Accordingly a demand of Rs 34,06,598/- along with interest under sec 75 and also equivalent penalty u/s 78.

The entire service tax along with interest was paid before the issue of show cause notice (SCN). Therefore, the assessee contested the penalty levied that the non-payment was accepted and paid before issue of SCN. The assesse approached to the CESTAT against the order of Commissioner imposing penalty.

Contention of the Assessee:

The service tax demanded was payable under reverse charge mechanism (RCM) of which the assessee is eligible to claim credit on actual payment in cash. This being the case the situation is revenue neutral, therefore, the intention to evade the payment of the service tax could not be established.

Since the intention was not to evade the payment of tax, the penalty levied under sec 78 is not tenable.

The reliance was placed on the decision of CESTAT Ahmedabad in the case of Bhagwati Caterers P. Ltd.

Contention of the Revenue:

The case of Bhagwati Caterers Pvt Ltd is not applicable because in the present case no financial hardships has been shown by the assessee resulting in delay of payment. Further, the service tax payable under RCM (remaining unpaid) has not been reported in the periodical returns filed by the assessee.

As a result of not reporting of such unpaid tax, the department has no track of amount of tax it deserve and by investigation only the department tracked the non-payment. Such failure coupled with the fact that assessee was also recovering same from the customers clearly establish that there was intention to evade the payment of tax.

Decision of the CESTAT:

It is clear that the assessee was duly aware of its liability to pay tax whether as a service provider or under RCM as it has been registered with the department for the same in the manner so required. Thus, it is not the case that assessee can claim ignorance of law.

The assessee has also not furnished the details of unpaid tax and value of taxable services in the quarterly returns. Department could detect non-payment of as a result of special investigation. Further, the assessee was

shifting the burden of its tax liability by recovering the same from counter party.

Assessee has also not claimed any financial hardship for non-payment. Thus, the benefit of case relied by the assessee of Bhagwati Caterers P. Ltd could not be claimed.

In view of the above findings, there is no good reason to interfere with the findings of Commissioner. Accordingly, the penalty as imposed is upheld by concluding the intention of assessee was to evade the tax collected.

Pre-deposit prejudicial to assessee's interest cannot be ordered on a debatable issue

P.K.Shefi vs. The Customs, Excise & Service Tax Appellate Tribunal (Madras High Court), Civil Miscellaneous Appeal No.- 537 to 540 of 2015, Date of Pronouncement-June 12,2015

Brief of the case:

The Hon'ble Madras HC in the case of PK Shefi vs. CESTAT held that the tribunal is not right to order pre-deposit prejudicial to the interest of the assessee when the issue was debatable and the assessee has reasonably shown the likely financial hardship to be suffered.

Facts of the case:

- The assessee is was awarded a contract by M/s. IRCTC for supply of food to the passengers on board the trains run by the Indian Railways.
- The revenue alleged that the service provided by the assessee is covered within the definition of outdoor catering services as defined u/s 65(105)(zzt) which become taxable w.e.f 01.03.2006.
- The department raise a demand for the services provided on trains other than (Rajdhani/Shatabadi), as the assessee made the payment of tax for services provided on other Rajdhani/Shatabadi.
- The tribunal in response to stay application filed by the assessee passed a non-speaking order asking to pre-deposit Rs. 3.75 crores as against the demand of 5.91 crores relying on the decision of Imagic Creativity Pvt. Ltd.
- The assessee is now in appeal before the High Court against the order of tribunal.

Contention of the Assessee:

- The appellant pleaded financial hardship and submitted that it is required more than Rs.one crore to provide the services and therefore, the demand in this case may affect the 30 year contract.
- The assessee relied on the decision of Hon'ble Delhi HC in the case of IRTC vs. Govt. of NCT of Delhi wherein the court held that the outdoor catering services provided by the contractors on board the train

amounts to transfer of goods (food etc.), by the service provider (assessee)to Indian Railways, for consideration and the property in the goods also passes to Indian Railways.

- Thus, the transaction between them was a case purely of sale of goods under the provisions of Sale of Goods Act as well as Delhi Value Added Tax Act and the element of service by way of heating the food, heating/freezing the beverages and then serving them to the passengers is purely incidental required for sale of food and beverage in a transaction of this nature.

Thus, there is no service portion for levy of service tax.

Contention of the Revenue:

- The outdoor catering service provided on trains which was exempted earlier became liable to service tax levy with effect from 1.3.2006.
- The assessee even have paid service tax on catering services provided to passengers on board the Rajdhani/Shatabdi Express but have not paid service tax on catering services in respect of of the other trains (i.e. other than Rajdhani/Shatabdi Express trains). This fact by itself makes but clear that even when the activities are similar, M/s P.K.Shefi have paid service tax in some cases and have not done so in other cases.
- The reliance was placed on the decision of the Hon'ble Kerela High Court in the case of SAJ Flight Services Pvt. Ltd. wherein the court held that the activity of supplying food on trains by the contractor under contract with IRCTC was not an outright sale activity but an outdoor catering plus sale on which service tax is also chargeable

Decision of the Hon'ble High Court:

- The issue as to taxability of the food supplied on board the train by the contractors engaged by IRTC is a debatable issue because there are contrary judgements of two High courts-Delhi and Kerala, the former favoring the assessee and the latter favoring the department.
- The assessee has also shown the financial hardship caused due to huge pre-deposit pending appeal.
- Thus, considering the uncertainty of levy of service tax and likely financial hardship to the assessee , the court modify the order of tribunal to direct the pre-deposit of 50% of 2.5 crores within 4 weeks of the receipt of the court's order and balance 50% of 2.5 crores 4 weeks after first deposit. On compliance of the above the balance amount demanded shall stand waived and its collection shall remain pending till the appeal decided.
- Assessee's appeal is partly allowed.

No Service Tax on Services Provided in India on behalf of Recipient Located Outside India

M/s. Tarsem Mittal & Sons Vs. Commissioner of Central Excise (CESTAT Delhi), S. T. A. No. 363 of 2009, Date of Decision: 19.12.2014

The appellant is an agent of Western Union on whose behalf appellant is disbursing money to the persons directed by Western Union who is located outside India. Revenue is of the view that as the service has been performed in India therefore, the service is received by Western Union in India. Therefore appellant is liable to pay service tax under the category of Business Auxiliary services for the commission received by the appellant for disbursing money to a person directed by Western Union.

Hon'ble Tribunal relied upon its decision given in the case of Paul Merchant in which it held that in such a cases since services although performed in India but the respondent is located outside India and services has been provided on behalf of the recipient located outside India. Therefore, it falls under the export of services. In these circumstances, this Tribunal has held that no service tax is payable by the assessee under the category of Business Auxiliary services.

CASE UPDATES: CENTRAL EXCISE

Input credit not reversible in case of remission of duty on destroyed goods

M/s. Joy Foam Pvt. Ltd. vs. Commissioner of Central Excise (Madras High Court) , Civil Miscellaneous Appeal No. 2940 of 2007, Date of Pronouncement- June 11,2015

Brief of the case:

The Hon'ble Madras High Court in the case of M/s Joy Foam P. Ltd held that the input credit of inputs need not to be reversed even in case the payment of duty has been ordered to be remitted under Rule 49 of Central Excise Rules, 2002. It is why because neither such reversal is a pre-condition for remission nor the remission can be considered as exemption.

Facts of the case:

- A fire broke out it in the factory of assessee as a result of which the stock of manufactured goods, raw materials, work-in-progress and the returned goods were destroyed. The assessee reversed the credit availed on stock of raw materials, returned goods and inputs contained in semi-finished goods, which destroyed in the fire accident.
- Assessee applied for remission of the duty , which was accepted conditionally by Commissioner on the direction to pay/reverse Cenvat

credit of inputs contained in stock of finished goods got destroyed by fire.

- Assessee aggrieved by the order of Commissioner approached to CESTAT which held that the credit in respect of inputs contained in destroyed finished goods need not to be reversed by relying on the decision of Larger Bench of CESTAT New Delhi in the case of Inalsa Ltd.
- Aggrieved by the said decision of the CESTAT , the department is before High Court.

Contention of the Revenue:

- The Department relied upon the decision of CESTAT, Ahmedabad in the case of Mafatlal Industries Ltd. wherein it was held that input credit as attributable to finished goods destroyed should be reversed in case remission of duty is claimed under Rule 49 of the Central Excise Rules.
- The department also pleaded that on remission of duty on finished goods, the same partake the character of exempted/nil rated goods and the input credit is not allowable in respect of inputs used in manufacture of such exempted or nil rated goods.

Contention of the Assessee:

- The assessee relied upon the decision of the CESTAT, New Delhi in the case of Inalsa Ltd. wherein the tribunal decided the case in favour of assessee that goods destroyed due to natural cause cannot be considered at par with exempted goods.
- Inputs one used for manufacture of finished goods qualify for claiming cenvat credit and subsequent damage to finished goods won't make the claim of already claimed Cenvat credit reversible in the absence of any specific restriction provided on the law.

Decision of the Hon'ble High Court:

Rule 49 of Central Excise Rules, 1944 and Rule 21 of Central Excise Rules, 2002 which provides for remission of duty in respect of goods lost or destroyed by natural cause or by unavoidable accidents or in case goods become unfit for consumption does not provide reversal of credit in respect of inputs used in the manufacture of such goods.

Further, the destroyed finished goods on which duty has been remitted cannot be equated with exempted or nil rated goods because the exemption is a benefit allowed which is general is nature whereas the goods being waived off from duty in case of remission is because of damage caused to them and fulfilling certain conditions as to nature of damage.

On the basis of above findings, the court concluded that the input credit in respect of destroyed goods is not reversible.

Refund of pre-deposit is permissible through a simple letter and no need to file refund claim u/s 11B of the CEA

Bestonso Vs. Commissioner of Customs (Import), Nhava Sheva, [(2015) 59 taxmann.com 158 (Mumbai – CESTAT)]

Issue:

Whether the Assessee is required to file refund claim under Section 11B of the Central Excise Act, 1944 for refund of the amount deposited during investigation despite of the fact of appeal allowed in Assessee's favour with consequential relief?

Facts & Background:

In the instant case, Shri Lorenzo Bestonso ("the Assessee") deposited an amount of Rs. 64,03,603/- on January 2, 2010 during the course of investigation proceedings. Later on the matter was decided in favour of the Assessee by the Hon'ble CESTAT, Mumbai vide its Order dated March 5, 2013 wherein the Assessee's appeal was allowed with consequential relief by setting aside the Order-in-Original passed by the Commissioner of Customs (Import), Nhava Sheva.

Thereafter, the Assessee wrote a letter to the Department for refund of the amount so deposited by them during the course of investigation proceedings. However, the Department refused to refund the same on the ground that the Assessee has not filed the refund claim.

Being aggrieved, the Assessee filed a Miscellaneous Application before the Hon'ble Tribunal for implementation of the Order passed on March 5, 2013 and for issuing suitable directions to the Customs Authorities for refund of the amount along with interest immediately.

Held:

The Hon'ble CESTAT, Mumbai after affirming that fact that the Assessee has written letter to the Department for granting refund of the amount, held that where Assessee's appeal has been allowed with consequential relief, it is incumbent upon the Revenue to refund the amount deposited during investigation. It was further held by the Hon'ble Tribunal that as per CBEC Circular in this regard, if refund is due to assessee of a pre-deposit made, there is no need to file any refund claim and only a simple letter would suffice.

Accordingly, the Hon'ble Tribunal directed the Revenue to refund the said amount along with interest to the Assessee within fifteen days from the date of this Order.

Continuance of Assessment Proceeding Under Central Excises and Salt Act, 1944 on Death of Assessee

Supreme Court in Shabina Abraham & Ors. vs. Collector Of Central Excise & Customs [Civil Appeal no.5802 of 2005, decided on 29, July, 2015],

Hon'ble Supreme Court in Shabina Abraham & Ors. vs. Collector Of Central Excise & Customs [Civil Appeal no.5802 of 2005, decided on 29, July, 2015], has observed the speak of Benjamin Franklin in his letter of November 13, 1789 to Jean Baptiste Leroy that "Nothing is certain except death and taxes." The Apex Court has further observed in this Appeal that to tax the dead is a contradiction in terms. Tax laws are made by the living to tax the living. What survives the dead person is what is left behind in the form of such person's property. This appeal raises questions as to whether the dead person's property, in the form of his or her estate, can be taxed without the necessary machinery provisions in a tax statute. The precise question that arises in the present case is whether an assessment proceeding under the Central Excises and Salt Act, 1944, can continue against the legal representatives/estate of a sole proprietor/manufacturer after he is dead.

Facts In Brief Of The Shabina Abraham Case (supra):

The facts of the case were that one Shri George Varghese was the sole proprietor of Kerala Tyre and Rubber Company Limited. By October 1985, this proprietary concern had stopped manufacture and production of tread rubber. By a show cause notice dated 12.6.1987, for the period January 1983 to December 1985, it was alleged that the assessee had manufactured and cleared tread rubber from the factory premises by suppressing the fact of such production and removal with an intent to evade payment of excise duty. The provisions of Section 11A, as they then stood, of the Central Excises and Salt Act were invoked and duty amounting to Rs.74,35,242/- was sought to be recovered from the assessee together with imposition of penalty for clandestine removal. On 14.3.1989, the said Shri George Varghese died. As a result of his death, a second show cause notice was issued on 18.10.1989 to his wife and four daughters asking them to make submissions with regard to the demand of duty made in the show cause notice dated 12.6.1987. By their reply dated 25.10.1989, the said legal heirs of the deceased stated that none of them had any personal association with the deceased in his proprietary business and were not in a position to locate any business records. They submitted that the proceedings initiated against the deceased abated on his death in the absence of any provision in the Central Excises and Salt Act to continue assessment proceedings against a dead person in the hands of the legal representatives. The said show cause notice was, therefore, challenged as being without jurisdiction.

The Apex Court Decision In Brief:

The Supreme Court observed in the case that the position under the Income Tax Act, 1922 was also the same until Section 24B was introduced by the Income Tax (Second Amendment) Act of 1933. Prior to the introduction of the aforesaid Section, the Bombay High Court had occasion to deal with a similar question in Commissioner of Income Tax, Bombay vs. Ellis C. Reid, A.I.R. 1931 Bombay 333.

Pursuant to the 12th Law Commission Report, a new Income Tax Act was passed in 1961 which contained elaborate provisions for assessment of deceased persons after they die. The anomalies left by Section 24B of the 1922 Act were sought to be rectified in the new provisions contained in the 1961 Act.

The Apex Court after taking into account the statutory provisions contained in the Central Excises and Salt Act at the relevant time, the Central Excises Rules, 1944, the decision in the case of Commissioner of Income Tax, Bombay vs. James Anderson, [1964] 51 I.T.R. 345, Commissioner of Central Excise, Bangalore –III vs. Dhiren Gandhi, 2012 (281) E.L.T. 64 (Karnataka) as well as other judicial rulings, the relevant provisions of the Bombay Sales Tax Act, 1953, the definition of a "person" under the General Clauses Act, 1897, the rival submissions of the Counsels of the case, allowed the appeal and the judgment of the Kerala High Court was set aside.

While concluding, the Supreme Court observed a portion of its earlier decision in the case of Commissioner of Sales Tax Commissioner, Uttar Pradesh vs. Modi Sugar Mills, 1961 (2) SCR 189 at 198:-

"In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency."

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