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AUGUST 2015

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Inside this edition

- Managing IDT issues on procurement of goods and services.
- Case updates on Service tax
- Case updates on Central Excise

& more...

ARTICLES:

Relevance of Indirect Taxes in purchase function of an entity.

The successful material/ purchase officers know the production needs well in terms of quality, timeliness and quantity. He also understands the cost of products / services sought to be procured, where available at economical prices. Maybe nearer the source + have a few alternatives in case of urgent procurement. In this article, we look at few options/ situation in the procurement life cycle and understand the impact. The central excise duty (CED) & service tax rate is 12.5% and 14% respectively. VAT could be around 5% or 14% depending on the State and product. CST for interstate sale is 2% subject to Form 'C'. If there is no Form C, then the rate of VAT prevailing in the selling state would apply. In case of imports, total customs duty is normally around 27%. Therefore, the average impact of IDT in procurement of any product could range from 18% to 30% of the total purchases. The indirect tax aspects/ knowledge of such a person which could add value to his entity as well as the customers could be as under:

1. Understand the role taxes play vis a vis the concern which is procuring:

- The purchaser who is an intermediary manufacturer liable to pay the central excise duty would be able to avail the central excise duty and utilise the same for payment of duty on his final product. Therefore with such company, all purchases need to be quoted CED & VAT extra. The procurement department in such cases would only compare the basic price of various vendors while placing orders for purchase.
- Such a company may also be exporting the goods. In that case option to procurement without payment of excise duty can be examined. Maybe procurement with CT-1 certificate in case of goods procured for trading, procuring inputs duty free under Notification 43/ 2001-NT can be examined.
- Such a company maybe manufacturing exempted products [Defence, research sector, agricultural related use etc.]. They may be selling goods in retail trade. In that case, the credit of CED would not be available. Here, comparison of purchase price from various vendors should be all inclusive as credits are not available. Maybe the job work route to avoid loading the CED on the cost of product can be examined for supply to company.

  Alternatively getting the same sourced from a SSI manufactured where no duty would be added could be thought of. In such companies, the VAT however would be availed and set off/ refund claimed if accumulated also claiming duty drawback as available.
- The company maybe importing from outside India: In this case the option of reducing costs by importing raw materials without payment of duty, claiming the export benefits under Foreign Trade Policy like drawback, rebate, refund, Focus Market Scheme, Focus Product Scheme, Incremental Export scheme, Star exporter scrips etc maybe examined. Importing from countries having preferential tariff agreement could also save 2.5- 5% of the customs duty. For capital goods, procurement under EPCG license at zero customs / excise duty could be explored if finished goods are being exported.
- In general, buying from the source would ensure that intermediary margins are avoided + the CENVAT credit is available.
- Where one is buying from the registered dealer/ importer under central excise [Any 1st Stage/ 2nd Stage dealer /Importer/ Depot] can get registered for the passing on of the duty of excise (12.36%) or CVD(12.36%) or CVD + SAD(17%). Further the margin of the dealer

would also be transparent in these transactions. Margins maybe compared of different vendors to negotiate better.

- While going for contracts, the bifurcation of the supply and service could also be based on the availability of credit.
- In case of job worker (JW), the need to capture the job workers credit on capital goods/ consumables may also be an important criterion. Asking the JW to charge the service tax though not essential could be an option.
- The issue of the clear PO to the vendors disclosing value of material supplied Free of Cost would avoid later demands.
- The possibility of planning the logistics by sending material directly to the job worker and sending out the goods directly from the job workers premises could save some costs.
- The policy of having all vendors registered under VAT/ CST/ central excise & service tax maybe made mandatory.
- Policy to buy only from sources which pass on credit maybe put in place other than in exceptions.
- Material department needs to ensure that the duty paying documents are in order and accounts to pay only if credit is eligible.
- The reversal of credit on non receipt of job work material within 180 days and its subsequent re credit to be controlled.
- The credit on material purchased for captively used tools, dies , patterns and machinery could also be ensured.
- Avoiding CST procurement as the credit is not available and procuring locally only.
- Procuring on Just in Time to save on inventory carrying costs, reduction in cash flow.
- Payments for service providers in time to avoid reversal.
- Avoiding the joint charge or reverse charge applicability to the extent possible as it involves additional compliances from company.
- Ensure completeness of credits being availed and its regular reconciliation with the returns.
- Keeping the dept. updated on the changes in law especially the budget changes which may have a substantial impact.

2. Understand the role taxes play in our concern:

- Indirect tax can be upto 20+ % of the cost as customs duty [normally 10% of value of imported parts], CED of upto 6-7% of the cost, Input services upto 1-1.5% of cost, VAT amounting to 3-4 or 10-11% of the cost. The availment of the eligible credits could ensure that one is very competitive. The benefit of credits can be passed onto the customers by reducing the base price.
- Exports provide methods to get the refund/ recouping of these taxes and therefore these could be excluded when bidding.
- The sale mix as on date may be resulting in accumulation of credit [more of exports/ supply to 100% EOU]. Whether concern able to get refund if not then focus on local sale as the non receipt of refund becomes a cost.
- What is the material cost of the product. More the proportion, more is the credit and vice versa.

At times the material & procurement team, not being able to understand the indirect tax implications agrees to some conditions to quickly procure the materials but does not realise that the impact of tax may make the order a loss from the concerns perspective. The smart procurer can save the company anywhere between 10 -20% by ensuring seamless credit and adequate documentation. Option of procuring goods as high sea sales, transit sales against Form E1, E2 et., can save CST as cost. The team should also ensure that the taxes charged by the vendors are proper especially when the concern is not

able to claim CENVAT credit or claim input setoff. Otherwise, the same would result in extra cost.

CASE STUDY: EXCISE

A settled issue cannot be considered afresh by authority who settled the same

Commissioner of Central Excise V/s M/s. Seagull Threads (India) Ltd. (High Court of Bombay at Goa

Brief Facts

The Factory premises of the Respondent Company M/s. Seagull Threads (I) Ltd. was visited by the Central Excise (Preventive and Intelligence) Unit of the Appellants Office. Records and materials were seized under Panchanama somewhere around 13.08.1996 and 16.08.1996. After due investigation, the Respondent was issued a show cause notice alleging clandestine manufacture and clearances of excisable goods manufactured by the Respondent without payment of duty. The Commissioner of Central Excise Goa confirmed and communicated the demand. The Respondents preferred an Appeal before the CESTAT against the order which was allowed thereby the Order demanding duty, penalty and interest was set aside. Being aggrieved by the said Order, the Appellant has preferred the present appeal.

Contentions of the Revenue

The Revenue pointed out the facts of the case and stated that on being aggrieved by the order of the Commissioner, the Respondents filed an Appeal before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), which Appeal was allowed in part and, consequently, the demand of duty for Polyester Yarn was set aside and the demand of Viscose Yarn was confirmed; the penalty imposed under Section 11AC of the Central Excise Act was set aside; the penalty imposed under Rules 173Q was reduced to Rs. 2 lakhs.

The Respondents were called upon to pay the duty on Viscose Yarn as and when it was worked out. The Order passed by the CESTAT was duly accepted by the Commissioner and accordingly a demand was communicated to the Respondents by letter dated 13.05.2005. It is further the contention of the appellant that the Respondent called upon the Joint Commissioner to drop the demand for reasons stated in their letters. The Respondent also sought for a speaking order from the Joint Commissioner. A speaking Order was passed by the Commissioner after giving a personal hearing to the Respondent. But, however, the said duty was re-confirmed by the Appellant. Aggrieved by the Order, the Respondent preferred an Appeal before the CESTAT which was opposed by the Appellants and ultimately by impugned Order, the Appeal was allowed and the Order passed by the Commissioner, came to be set aside.

It has been further contended that the Tribunal has erroneously appreciated the evidence on record and has failed to consider that there was a shortfall which was established by the Appellants which made the Respondents liable to pay excise duty claimed along with penalty and interest.

It has been further submitted that as the original Order was accepted by the Respondent, the question of now disputing the correctness of the earlier findings by the Commissioner is totally erroneous.

Contentions of the Assesse

The assesse pointed out that on the basis of the material on record, it has been conclusively established that there was no shortfall at all during the relevant period. The allegations of the appellant that there was any manipulation or diversion of the inward records is totally perverse. It has been further contended by showing the balance sheet that the adjudicating authority has

considered only the production portion and has not considered the fact that there was a closing balance of the very same product indicated in the balance sheet.

Held By Hon'ble High Court of Bombay at Goa

The Hon'ble High Court stated that the Tribunal has found that there were two aspects to be considered on the basis of the contention of the Appellants and the Respondents. First is the scope of the remand Order of the Tribunal and the next is as to whether the claim of duty penalty and interest is justified. The Tribunal has rightly noted that on perusal of the Order of the remand, it clearly says that the demand thereof is to be re-visited on the basis of total Viscose Yarn manufactured by the Respondent during the year in question.

The dispute in the present case is with regard to the claim of duty in respect of two types of goods, one is the claim in respect of polyester and the other is Viscose Yarn. With regard to the claim of Polyester Yarn, the CESTAT by an Order dated 19.07.2004, has come to the conclusion that the demand of duty on polyester yard cannot be accepted as it does not amount to manufacture. Whilst remanding the matter with regard to Viscose Yarn, the Tribunal found that the Commissioner whilst making the demand of duty for both Polyester Yarn and Viscose Yarn had not indicated the duty separately on each of these products and, as such, as no duty was payable with regard to the Polyester Yarn, the demand with regard to the Viscose Yarn had to be re-visited on the basis of goods manufactured by the Respondent during the period in question. The said Order clearly shows that the claim of duty with regard to Viscose Yarn was ordered to be re-examined by the authorities. In such circumstances, the contention of the Appellants that there was no question of re-examining the said issue cannot be accepted on reading the said order.

With regard to the claim of the Appellant that there was clandestine removal of Viscose Yarn, the Tribunal has noted that the amount claimed by the Appellant was in respect of 14.54 MTs. While determining the said figure, the Appellant had failed to note that closing balance was 24.16 MTs. Taking note of the said closing balance which has not at all been considered by the Adjudicating Authority whilst holding that there was clandestine removal of 14.54 MTs, the Hon'ble court found that the conclusion arrived at by the Tribunal cannot be faulted. The fact that the figures on the balance sheet have to be accepted has not been disputed by the Appellant. In fact the Tribunal has noted that there is no material on record produced by the Appellant to dispute the correctness of the figures shown on the balance sheet. These findings of fact by the authorities below cannot be re-appreciated by this Court in the present Appeal.

Mens Rea need not to be proven in case of mandatory penalty

Commissioner of Central Excise V/s Nazareth Alloys (High Court of Bombay at Goa) – EXCISE APPEAL NO. 25 OF 2008; Date of Decision: 07th January, 2015

Brief Facts

The only point for consideration was whether the reliance placed by the CESTAT in the judgment of the Larger Bench The in the case of Bhillai Conductors Pvt. Ltd. V/s. CCE, Raipur – 2000 (125) ELT 781 (Tribunal) was justified in the facts and the circumstances of the case.

The appellant pointed out that the observations that the said judgment no longer survived in view of the judgment passed by the Division Bench of this Court in the case reported in 2009 BCI 63 in the case of *"Commissioner of Central Excise & Customs Vs. Ram Aluminium P. Ltd."*. They further rely on the judgment of the Hon'ble Apex Court reported in 2008 (231) E.L.T. 3 (S.C.) in the

case of "Union of India Vs. Dharamendra Textile Processors", in case provisions of law provides for mandatory penalty, then revenue need not to establish mens rea.

Held By Hon'ble High Court of Bombay at Goa

The Hon'ble High Court found that in the impugned order passed by the Appellate Tribunal the main ground on which the confiscation was disallowed was because the appellants have failed to establish mens rea, which would entitle them to confiscate the goods. But, however, in the judgment of the Hon'ble Apex Court in the case of "*Dharmendra Textile Processors*" (supra), it has been observed that

"The stand of learned counsel for the assesse is that the absence of specific reference to mens rea is a case of casus omissus. If the contention of learned counsel for the assesse is accepted that the use of the expression "assesse shall be liable" proves the existence of discretion, it would lead to a very absurd result. In fact in the same provision there is an expression used i.e. "liability to pay duty". It can by no stretch of imagination be said that the adjudicating authority has even discretion to levy duty less than what is legally and statutorily leviable. Most of cases relied upon by learned counsel for the assesse had their foundation on Bharat Heavy Electrical's case (supra). As noted above, the same is based on concession and in any event did not indicate the correct position in law.

In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In Para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given."

In view of the said observations of the Hon'ble Apex Court, the ground on which the order was passed by CESTAT would not prima facie survive. As the respondents have failed to remain present and as the Tribunal has disposed of the appeal, only relying on the case of "*Bhillai Conductors Pvt. Ltd.*" (Supra), the Hon'ble Court found it appropriate in the interest of justice to quash and set aside the order passed by the CESTAT and to direct the CESTAT to decide the appeal afresh after hearing the parties in accordance with law. All the contentions of the parties are left open. The substantial questions of law are answered accordingly.

In absence of mutuality of interest two persons cannot be treated as related

Commissioner of Central Excise Aurangabad, vs. M/s Goodyear South Asia Tyres (Supreme Court), Civil Appeal No.-4370/2003

Facts of the case:

- The assesse is a joint venture of RPG SATL and Goodyear , known as M/s SATL. It was formed for manufacture OTR tyres and Radial tyres exclusively for CEAT and Goodyear under their brand names.
- The assesse received unsecured interest free loan of Rs.85.66 crores from CEAT and Goodyear. Some moulds and other equipments worth Rs. 10 crores free of cost, on loan basis, were also given by these two companies to the assesse.
- Such assistance by promoter companies to assesse was examined by the customs officer who issued show cause notice requiring to show cause as to why the assesse and promoter companies (buyers) are not to be treated as related persons as per Sec 4(4)(c) of the Act.

- After considering the reply of assesse, the adjudicating authority demanded differential duty by making valuation treating the assesse and buyers as related persons.
- The appeal of assesse was allowed by tribunal on the ground that there was no mutuality of interest in the present case.

Contention of the Revenue:

- The assesse and buyers have interest in the business of one another because the buyers are dependent on the manufacturing activity of the assesse and the assesse on the assistance from buyers for its smooth running of its business.
- Further, the interest is also natural because the assesse and buyers are under same management and to some extent common control.

Contention of the Assesse:

- Sale of goods by assesse to these two companies was on principal to principal basis and at arm's length.

- There is no mutuality of interest because the assesse has no interest in the business of buyers. It is the interest of the buyers in the business of assesse to whom the assesse company is supplying the goods manufactured by it.

Held by Hon'ble Supreme Court:

- The point of dispute is whether the assesse company and buyers ((Goodyear Indian Limited and CEAT Limited) are related persons as defined u/s 4(4)(c) of the Act.
- The revenue has based its valuation by considering them related person on the basis of "mutuality of interest in the business of one another". The expression clearly means that interest of the two persons have to be mutual, i.e., in each other to treat them as related persons.
- Two companies had given a loan of Rs. 85.66 crores to the assesse company, Further, some moulds and equipments were also supplied free of cost. It was done to smoothen the operations of assesse company from whom the lenders are purchasing goods.
- This clearly show that the buyers have interest in the business of assesse, but not vice-versa. Therefore, to brand them as related persons interest has to be from both sides in the business of one another which is missing in the present case.

- On the basis of above findings, the court disallowed the revenue's appeal to make valuation treating the assesse and buyers as related parties.

Ownership of Capital goods not required for availing CENVAT credit –

Commissioner of Central Excise Vs. M/s. Modernova Plastyles Pvt. Ltd. (High Court of Bombay

Brief Facts of the case

The assesse is engaged in manufacture of plastic articles/components and parts by using injection moulding machines. In the present matter the moulds, used to manufacture, in this case cabinets for television sets the finished product, were supplied to the Assesse by the Original Equipment Manufacturers. The dispute relates to the years 1997-98, 1998-99.

A show cause notice issued alleging that the assesse has availed and utilized inadmissible Modvat Credit on the moulds as capital goods in contravention of

Rules 57Q, 57R(3) and 57(T) of Central Excise Rule, 1944. The show cause notice has been issued for the reason that the Assesse is neither owner of the capital goods nor has it hired the same on lease, hire purchase or loan agreement from the financer.

The show cause notice was replied by the assesse, pointing out that as alleged in the show cause notice, it was not necessary that the moulds should be owned by the assesse since Rule 57Q and 57R underwent amendments after 1994.

The Commissioner passed an order in favour of the Revenue confirming the demand in the show cause notice with penalty and interest. Aggrieved by said order, assesse was in Appeal before CESTAT, Mumbai which has allowed the appeal by taking into account various decisions of the Hon'ble Supreme Court as well as this Court holding that the question which has been posed is no longer res integra, and also with reference to the decision in the case of German Remedies Ltd. V/s. Commissioner of Central Excise, Goa reported in 2002 (144) E.L.T. 606.

Held by Hon'ble High Court, Bombay

The Hon'ble high Court stated that in the present case undisputedly the assesse is engaged in manufacturer of plastic articles /components and parts by using injection moulding machines and manufactures finished goods as per the requirement of the original equipment manufacturers. It is not in dispute that the moulds supplied by the supplier are capital goods. The moulds used for injection moulding machine to manufacture the goods/finished products were supplied to the respondent assesse by original equipment manufacturer. These were duty paid moulds by the original manufacturer. Credit of the duties on moulds was being taken by the assesse. It is also not in dispute that the moulds supplied by the supplier are capital goods.

Though reliance is being placed by the revenue in the case of Terene Fibres India Pvt. Ltd. vs. Commissioner of Central Excise, Mumbai VI. In said case ultimate decision after difference of opinion between the members in the Division Bench of the Tribunal has been rendered in favour of the assesse holding that the demand is unsustainable. From the Judgment as has been rendered it is difficult to consider that there is a clear decision by the Tribunal that modvat credit would not be available to the assesse if the property in capital goods continued to vest in the supplier.

The Hon'ble Court stated that after 1994, sub rule 3 of Rule 57R having under gone amendment to it, removed such requirement of ownership/acquisition from financing agency. For taking credit of duty paid on said goods, it would not be necessary that capital goods shall either be owned by the assesse or those shall be acquired by finance from financing agency. Denial of credit based on such ground is unsustainable.

Issuance of Show cause notice mandatory for recovery of erroneous refund granted

The Commissioner of Central Excise Coimbatore Vs. M/s.Pricol Ltd. Perinaickenpalayam Coimbatore 641 103 (HIGH COURT OF MADRAS);

Brief Facts

The assesse is engaged in the manufacture of automobile parts and components. The assesse cleared waste and scrap and replacement of defective products without payment of duty. The period in question pertains to September, 1998. On the ground that the investigation revealed that the assesse cleared waste and scrap and replacement for defective products without payment of duty and also resorted to under-valuation of the goods,

adjudication proceedings were initiated and pending adjudication, the assesse deposited Rs.1.55 Crores under protest for the purpose of co-operating with the investigation of the Department. A show cause notice dated was issued on the assesse invoking the extended period of limitation as provided under proviso to Section 11A (1) of the Central Excise Act, demanding duty, interest and also penalty. After adjudication, the demand was confirmed by the Commissioner of Central Excise. Against the said order of the Commissioner, an appeal was filed to the Tribunal and the Tribunal set aside the impugned order of adjudication and allowed the appeal of the assesse.

Pursuant to the same, the assesse filed a claim for refund of deposit made under protest, including the deposit made at the time of filing the appeal to the Tribunal. The said refund application was sanctioned by the jurisdictional Assistant Commissioner. However, no appeal was filed against the order of the Assistant Commissioner of Central Excise, ordering refund.

The Commissioner of Central Excise, however, took up the matter in exercise of powers conferred under Section 35E (2) of the Act and directed the authority to file an appeal to the Commissioner (Appeals) within the time limit prescribed thereunder. On the appeal filed by the Department, the Commissioner (Appeals) took up the same and allowed the appeal filed by the Department and directed the jurisdictional authority to verify the plea with regard to unjust enrichment.

The assesse went on appeal before the Tribunal against the said order of the Commissioner (Appeals). The Tribunal, in the said appeal, came to hold that there was no case of unjust enrichment on the facts of the said case, as the assesse had produced the Chartered Accountant's certificate to the effect that refund claim has not been passed on to the customers.

Aggrieved against the said order of the Tribunal, the Department was before this Court by filing the present appeal.

Contentions of the assesse

The assesse contended that even though the appeal was filed well within the time limit as specified under Section 35 (E) (3) of the Act, however, no notice, as contemplated under Section 11-A of the Act has been issued for making recovery of the erroneous refund. The Assesse placed reliance on the Board's circular No.423/56/98-CX dated 22.9.1998 and the decision of the Supreme Court in Commissioner of Central Excise Vs. Re-Rolling Mills (1997 (94) ELT 8 (SC)), which in turn relied upon the decision in Union of India Vs Jain Shudh Vanaspathi Ltd. & Anr. (1196 (86) ELT 460 (SC): 1996 (10) SCC 520). In the Circular No.423/56/98-CX dated 22.9.1998, the CBEC had issued the following clarification:-

"Certain doubts have been raised regarding whether the erroneous refunds granted could be recovered by recourse to review under Section 35-E of the Central Excise Act or demands under Section 11A within the statutory time limit as laid down.

The SC in the case of CCE Vs. Re-rolling Mills (reported in 1997 (94) ELT 8 (SC) has inter alia held as following.

"The learned Counsel for the parties do not dispute that this appeal is covered by the decision of this Court in Union of India & Ors. Vs. Jain Shudh Vanaspati Ltd. & Anr. 1996 (86) ELT 460 (SC) = (1996) 10 SCC 320. In that case the court was dealing with Section 28 of the Customs Act which is in parimateria with Section 11A of the Central Excise Act. The said decision is thus applicable to the present case also. For the reasons given in the said judgement, the appeal is dismissed".

In this context the point to be stressed is that the Order passed u/s 35-E (2) does not automatically result in the recovery of the refund. This has to be followed by SCN U/S 11A which should be issued within 6 months from the

date of actual refund. Since time limit for filling appeal u/s 35E (2) is longer than the time limit prescribed u/s 11A, the SCN, the SCN should precede the proceedings u/s 35-E (2).

This view has been supported by the opinion of the Law Ministry. The Law Ministry vide F.No. 387/78/98-JC has opined thus, "In view of the judgement of the Apex Court in CCE Vs. Re-rolling Mills [1997 (94) ELT 8] dismissing the appeal preferred by the Department against the CEGAT order, the order passed by the Tribunal on 27.1.98 in the present case of M/s Fag Precision Bearing Ltd. reflects the correct legal position. We, therefore, agree with the view of the referring Department that the demand for recovery of erroneous refund has to be made u/s 11A of the Central Excise Act, 1944 within the prescribed limitation period".

In view of above it is clarified that timely demands should invariably be raised (within six months normal period) under Section 11A the Act.""

Contentions of the Revenue

The Revenue contended that the appeal was filed well within time. Further, it was submitted on behalf of the appellant that the Supreme Court in Asian Paints (India) Ltd. Vs. Collector of Central Excise, Bombay (2002 (142) ELT 522 (SC)) has negatived the contention that recovery of excise duty cannot be made pursuant to an appeal filed after invoking the provisions of Section 35E if the time limit provided under Section 11A has expired, since such an invocation would, in effect, render Section 35E virtually ineffective and the same is impermissible.

Held by Hon'ble High Court of Madras

The Hon'ble High Court of Madras stated that the first question of law, which is raised, relates to the plea of unjust enrichment and much emphasis is laid on the decision of the Supreme Court in Mafatlal Industries case (1997 (89) ELT 247 (SC)).

In the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at the time of investigation, as has been recorded in the original proceedings itself. In this regard, it has to be noticed it has been the consistent view taken by the Courts that any amount, that is deposited during the pendency of adjudication proceedings or investigation is in the nature of deposit made under protest and, therefore, the principles of unjust enrichment does not apply. The abovesaid view has been reiterated by the High Court of Bombay in Suvidhe Ltd. Vs. Union of India (1996 (82) ELT 177 (Bom.)), and by the Gujarat High Court in Commissioner of Customs Vs. Mahalaxmi Exports (2010 (258) ELT 217 (Guj.)). There are also many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, the Hon'ble Court answers the first substantial question of law against the Revenue and in favour of the assesse.

The Hon'ble Court further stated that 2nd issue raised by the Department is whether the Tribunal was justified in holding that without a show cause notice issued under Section 11-A, there could be no recovery consequent to proceedings initiated under Section 35-E of the Act.

The reliance placed by Department on the case of Asian Paints (India) Ltd. – Vs Commissioner of Central Excise, Bombay (2002 (142) ELT 522 (SC)). was distinguished by the Hon'ble Court on the ground that the said decision did not deal with the issue as to whether a notice under Section 11A of the Central Excise Act is mandatory for the purpose of proceeding for recovery.

The Hon'ble Court further stated that the circular as produced above relies upon the decision of the Supreme Court in Re-Rolling Mills case (supra) and the provisions of Section 11-A of the Act to state that timely demand should be raised, i.e., within six months as prescribed under Section 11-A of the Act. Section 11-A of the Central Excise Act, as it stood prior to amendment with effect from 12.5.2000, relates to recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded, within the period prescribed from the relevant date. The present case pertains to 1998 at which point of time the period of limitation fixed for issuance of show cause notice was six months. The said period of six months was amended to one year by Section 97 of the Finance Act 2000 (10 of 2000) with effect from 12.5.2000. Therefore, for all purposes, any period prior to 12.5.2000, for the purpose of recovery of duties not levied or not paid or short-levied or short-paid or erroneous refund, the time for issuance of show cause notice is only six months from the relevant date.

The Hon'ble Court further stated that it is clear that the said section mandates the issuance of a show cause notice, prior to passing an order, asking the person to show cause as to why duty, which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, shall not be paid. From a perusal of the documents available on record, as also the order of the Tribunal, it is clear that no such notice, as mandated under Section 11A, was issued for recovery of the duty on the ground of erroneous refund.

Further, the Board's Circular No.423/56/98-CX dated 22.9.1998 also stresses the need for the concerned Departments to issue timely demands through show cause notices within six months period as contemplated under Section 11A of the Act. This in itself shows that the show cause notice, as provided under Section 11A of the Act is mandatory in nature and the same has to be adhered to before proceeding further in the matter. Therefore, In the absence of any such show cause notice, which is mandatory, the Department cannot seek recovery of the amount. Accordingly, the 2nd substantial question of law is answered in favour of the assesse and against the Revenue.

In view of the above, the appeal has been dismissed.

CENVAT credit of outdoor catering & outward transportation upto place of removal allowed

Commissioner of Central Excise & Service Tax, Vs. M/s. Thiru Arooran Sugars Ltd. (Madras High Court)

Brief Facts of the Case

The assesse manufactures sugar, molasses, rectified spirit (non-excisable), extra neutral alcohol (exempted), ethanol, denatured ethyl alcohol and fuel oil (dutiable). The assesse was availing CENVAT credit of duty paid on the capital goods and inputs and the service tax paid in respect of input services as per the CENVAT Credit Rules, 2004. On verification of the records it was noticed that the assesse had availed credit of the service tax and education cess paid in respect of cell phone services, catering services and service tax paid on the Goods Transport Agency services in respect of freight charges paid for the outward movement of sugar. It appears that the above said services were not in relation to the manufacture and clearance of final products, as provided under CENVAT Credit Rules. Therefore, the assesse was issued with a show cause notice and after due process of law the adjudicating authority has ordered recovery of CENVAT credit under proviso to Section 73 and 75 of the Finance Act, 1944 read with Rule 14 of CENVAT Credit Rules and also imposed penalty under Rule 15 of CENVAT Credit Rules.

Aggrieved by the Order-in-Original, the assesse pursued the matter before the Commissioner (Appeals). The Commissioner (Appeals) passed order against the assesse.

As against the said order of the Commissioner (Appeals), the assesse went before the Tribunal. The Tribunal following the Larger Bench decision of the Tribunal in the case of Commissioner of Central Excise, Mumbai V. GTC Industries Ltd. reported in 2008 (12) STR 468 (Tri.-LB) and ABB Ltd., Vs. CCE Bangalore as reported in 2009 (15) STR 23 (Tri-LB) allowed the appeal by holding that CENVAT credit is admissible on 'outdoor catering service' as well as 'outward freight service' as the same are input service relating to business.

Being aggrieved by the orders of the Tribunal, the Revenue has filed the present appeal before this Court.

Held by Hon'ble Madras High Court

The Hon'ble High Court observed that in an identical circumstance, this Court dealt with the issue with regard to outdoor catering service, in a batch of appeals in C.M.A.Nos.2 of 2010 batch and vide judgment dated 13.02.2015 held in favour of the assesse by following the decision of the Bombay High Court in the case of CCE V. Ultratech Cement Ltd. reported in 2010 -TIOL – 745 – HC- MUM – ST, wherein all the contentions raised by the Revenue has been considered in extenso including the definition of 'input service' as defined in the case of Maruti Suzuki Ltd. V. CCE reported in 2009 (240) ELT 641 (SC). The Bombay High Court came to the conclusion that the decision of the Larger Bench of the CESTAT in the case of CCE V. GTC Industries Ltd. 2008 (12) STR 468 is a correct law, however, with a rider that where the cost of the food is borne by the worker, the manufacturer cannot take credit of that part of the service tax which is borne by the consumer.

The Hon'ble Court noted that various High Courts have concurred with the above-said principle of the Bombay High Court and followed the above-said decision. Therefore, the issue as decided by the Tribunal and the various Courts clearly settled the issue that the CENVAT Credit has been properly availed in respect of outdoor catering services.

With regard to the outward freight charges, the Karnataka High Court in the case of CCE V. ABB Ltd., Bangalore reported in [2011] 44 VST 1, which was rendered on the appeal filed by the Department as against the decision of the full Bench of the Tribunal, while answering the issue whether the services availed by a manufacturer for outward transportation of final products from the place of removal should be treated as an input service in terms of Rule 2 (1) (ii) of the CENVAT Credit Rules, 2004 and thereby enabling the manufacturer to take credit of the service tax on the value of such services.

In view of the above, the Hon'ble Madras High Court dismissed this appeal by affirming the order of the Tribunal.

No denial of CENVAT credit availed on invoices issued in the name of unregistered premises

M/s. Allspheres Entertainment Pvt. Ltd. Vs. CCE, Meerut [2015 (8) TMI 953 – (CESTAT DELHI)] on the following issue:

Issue:

Whether the Department is justified in denying CENVAT credit availed by the Assesse on sole ground that the invoices were issued to the Branch office of the Assesse, which was unregistered?

Facts & Background:

Allspheres Entertainment Pvt. Ltd. ("the Appellant") is registered with the Service Tax Department in the category of 'Event Management Services' ("EMS Services") with it's premise at Nainital ("Nanital Office") registered with the Service Tax Department. During 2011-12, the Appellant was, inter alia, engaged in rendering the EMS Services in Delhi – NCR, for which the Company maintains

a temporary "Field office" at Delhi ("Delhi Office") to facilitate rendering of the EMS Services.

The Appellant received various Input Services ("the Impugned Services") in Delhi, which were used by them for rendering taxable Output Services. Accordingly, the Appellant availed CENVAT credit of the Service tax paid on the Impugned Services used for rendering taxable Output Services at Delhi.

The Department raised the Show Cause Notice dated April 16, 2014 alleging that the Appellant had availed inadmissible CENVAT credit without having proper documents as prescribed under Rule 9 of the CENVAT Credit Rules, 2004 ("the Credit Rules") read with Rule 4A of the Service Tax Rules, 1994 ("the Service Tax Rules"), since the invoices were containing address of Delhi Office instead of Nainital Office.

Later on, the Ld. Adjudicating Authority as well as the Ld. Commissioner (Appeals) upheld disallowance of CENVAT credit to the tune of Rs. 1,87,391/- along with imposition of interest and penalty. In addition, penalty of Rs. 20,000/- was imposed for late filing of ST-3 Returns under Section 70 of Finance Act, 1994 ("the Finance Act") read with Rule 7 of the Service Tax Rules. Further, penalty of Rs. 10,000/- under Section 77 of the Finance Act was also imposed. Being aggrieved, the Appellant preferred an appeal before the Hon'ble CESTAT, Delhi.

We pleaded the matter on behalf of the Appellant and put forth the following submissions:

Eligibility of CENVAT credit availed on the Impugned Services under Rule 2(l) of the Credit Rules is not in dispute;

All the particulars as required under Rule 4A of the Service Tax Rules are contained in the invoices issued by the Input Service Provider to the Appellant except that the invoices were containing address of Delhi field office instead of Nainital Office;

The Credit Rules per se nowhere restricts that the invoices for Input Services should be addressed in the name of registered premises only;

Even, if the allegation is accepted then in such a scenario, Service tax paid by the Appellant on account of the EMS Services rendered from Delhi office should also have been objected by the Department;

CENVAT credit cannot be denied on basis of minor procedural irregularities;

In the case of Manipal Advertising Services Pvt. Ltd. Vs. C.C.E., Mangalore [2010 (19) S.T.R. 506 (Tri. – Bang.)], the Hon'ble CESTAT, Bangalore held that if a person is discharging Service tax liability from his registered premises, the benefit of CENVAT credit on the Service tax paid by the service providers cannot be denied to the assesse only on the ground that the said invoices are in the name of branch offices.

The Hon'ble High Court of Karnataka in the case of mPortal India Wireless Solutions P. Ltd. Vs. C.S.T., Bangalore [2012 (27) S.T.R. 134 (Kar.)], has held that the Credit Rules does not mandate registration with Department for availing CENVAT credit and denial of benefit on the ground non-existent in law is unjustified.

Held:

The Hon'ble CESTAT, Delhi accepted the contentions of the Appellant and held that in the absence of any such dispute regarding availment of Impugned Services and their utilization for payment of Service tax or proper accounting of the same, the denial of CENVAT Credit of Service tax paid on Impugned Services by Nainital office of the Appellant on the sole ground that the invoices

issued are in the name of the Appellant's unregistered Delhi office is unjustified since the head office which is registered with the Department has discharged the Service tax liability of Delhi office. The defect in the invoices is only procedural lapse or rather a curable defect.

Further the Hon'ble Tribunal also reduced the late fees under Section 70 of the Finance Act to Rs. 5,000/-, and set aside the penalty under Section 77 of the Finance Act.

CASE STUDY: SERVICE TAX

Supreme Court stays imposition of Service Tax on lawyers –

Bombay Bar Association vs. UOI (Supreme Court), Petition(s) for Special Leave to Appeal (C)

Supreme Court bench comprising Chief Justice H.L. Dattu, Justice A.K. Mishra and Justice Amitava Roy has stayed the Bombay High Court's order, dated 15.12.2014 in the case of P.C. Joshi Vs. Union of India of dismissing the petition challenging levy of service tax on lawyers.

The Bombay Bar Association has challenged aforesaid order as well as the provision of Sub-clause (zzzzm) of clause (105) to Section 65 of the Finance Act, 1994, which was inserted by the Finance Act, 2011.

Few of the prominent questions of law, amongst others, as framed before SC are as below:

Whether the relationship between an advocate and a litigant is that of a provider and a service recipient or whether the relationship is that of a representative and a litigant ?

Whether the impugned judgment *is correct and legal in as much as levy of service tax on the provision of assistance to the court would hit the provision of justice either by the individual or a business entity as both are indisputably guaranteed under right to justice in terms of Article 21 read with Article 39A of the Constitution ?*

Bombay High Court

It is pertinent to note that Bombay High Court while dismissing the petition held that

"the taxable service means any service provided or to be provided to any person, by a business entity, in relation to advice, consultancy and assistance in any branch of law, in any manner."

"legislature by inserting such provision has neither interfered with the role and function of an advocate nor has it made any inroad and interference in the constitutional guarantee of justice to all. The services provided to an individual client by an individual advocate continues to be exempted from the purview of the Finance Act and consequently Service Tax but when an individual advocate provides service or agrees to provide services to any business entity located in the taxable territory, then, he is included and liable to pay Service Tax.' The judgment also notes*, 'The Advocates and legal practitioners are known to pay professional*
taxes and taxes on their income. They are also brought within the purview of service tax because their activities in legal field are expanding in the age of globalization, liberalization and privatization. They are not only catering to individuals but business entities."

Realization of export sale proceeds within a definite time frame is not a pre-condition to claim refund under Rule 5

M/s P&P Overseas vs. CCE, Delhi (CESTAT Delhi) , Excise Appeal No. 1307-1308 of 2011 (SM),

[Arising out of the Order-in-Appeal No. 58-59/BK/GGN/2011 dated 21/02/2011 passed by The Commissioner of Central Excise & Customs (Appeals), Delhi III, Gurgaon.]

Facts of the case:

The assesse claimed refund of unutilized CENVAT credit u/Rule 5 of CENVAT Credit Rules, 2004 in respect of input services availed in relation to manufacturer of the finished goods exported out of India. The input services in respect of which refund claimed were courier and Custom House Agent services (CHA).

The Assistant Commissioner disallowed the claim on two grounds:

i) The services of courier and CHA are not input services as defined u/Rule 2(l) of CENVAT credit Rules, 2004

ii) The export proceeds have not been received by the assesse.

The order of Asst. Commissioner was upheld by the CCE (Appeals). Aggrieved by the same assesse is in appeal before the tribunal.

Contention of the Assesse:

CHA service is input service because as per the definition of input service as per Rule 2(l) of CENVAT Credit Rules, 2004 input service includes outward transportation up to the place of removal. In case of export sale port from where the goods are exported is place of removal as the sale take place only on the handing over the title documents to port authorities

Courier service is input service because it is used in relation of manufacture of goods exported out of India and it has indirect nexus with the manufacturing operations.

As regards, the second ground of rejection that export sale proceeds note received it was argued by the assesse's learned counsel that such condition is nowhere mentioned Rule 5 nor in the Notification No. 5/2006-CE issued by the Government under Rule 5 of the CENVAT Credit Rules, 2004.

Contention of the Revenue:

The learned counsel for the department reiterated the findings of CCE(Appeals) and contended that the claim is not allowable as the services in respect of which refund claimed are not input services and also on the ground that export sale proceeds not received at the time of filling quarterly refund claim.

Decision of the Tribunal:

The issue relating to eligibility of courier as input service have been dealt in many judicial pronouncements and the crux of them is that CHA service availed for export of goods is specifically included in the definition of input service because input service specifically include outward transportation upto the place of removal.

As per the CBEC circular 137/85 of 2007 In case of export goods, ownership of such goods remained with the manufacturer-exporter till port area and it gets transferred at the Port upon hand over of documents of title to export goods.

Therefore, based on the said circular CENVAT credit of service tax paid on CHA service for export of goods is admissible.

As regards, the eligibility of courier service the same is input service because of its indirect nexus with the business operations (which include manufacturing also).

Further, the tribunal agreed with the assesse's argument that realization of sale proceeds within a definite time frame was not at all any condition for claiming refund claim it was not at all any condition for claiming refund claim

Appeal filed by the assesse was allowed fully.

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 assesse under the category of Business Auxiliary services.

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