

PRE-BUDGET MEMORANDUM 2018

Indirect Taxes



**THE INSTITUTE OF CHARTERED
ACCOUNTANT OF INDIA
NEW DELHI**



I. INTRODUCTION

The Institute of Chartered Accountants of India (ICAI) considers it a privilege to submit the Pre-Budget Memorandum, 2018 on Indirect Taxes other than GST to the Government of India.

The Memorandum contains suggestions on issues relating to Service Tax, CENVAT Credit Rules, 2017, Excise Duty, Customs Duty and Central Sales Tax for the consideration of the Government while formulating the tax proposals for the year 2018-19. We believe that addressing the said issues would make tax laws simple, fair and transparent and avoid litigation.

In case any further clarifications or data is considered necessary, we shall be pleased to furnish the same.

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II. EXECUTIVE SUMMARY

S. No.	Topics	Suggestions
A. General Submissions		
1.	Amnesty Scheme / Dispute Resolution	A suitable amnesty scheme must be thought of for all Central Laws and State Laws which have been merged in GST in 'one go' to reduce existing litigation. - It must be simple to understand; - All types / classes of litigations must be covered; - All types / classes of taxes under the Union / State Laws must be covered; - All appeals filed by the State / Centre must be unilaterally withdrawn as a one-time measure of building trust; - Any person who has opted to pay taxes under the scheme must not be subjected to any further revision, review, reference or any other proceedings in future, for the same year; - Tax credits, if any, in the hands of the dealer (under the respective existing statutes) must be permitted to set off against the taxes, interest and penalties under the scheme; - Taxes, interest, penalties paid under protest by an assessee in excess of what is payable under the scheme must be refunded within 30 days of filing the relevant applications together with appropriate orders; - Penalties levied must be fully waived off if the disputed taxes are remitted within 3 months from the date of introduction of the scheme; - Interest must not exceed 10% of the taxes payable; - Litigations relating to input tax credits must be fully allowed and refunded within 30 days from the date of filing any such application; - Withdrawal of applications / orders must not be insisted, upon filing of any such application under the scheme. However, such person must file the relevant withdrawal



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		application within a period of 30 days from the date of filing such applications. 1) An order accepting the application must be passed in every case not later than 30 days from the date of filing any such applications
B. SERVICE TAX		
2.	Transition provision / Return filing provision for tax paid on receipt basis in erstwhile service tax regime	Rule 6 of Service Tax Rules, 1994 provides that in case of such individuals, partnership firms and one-person companies whose aggregate value of taxable services provided from one or more premises is Rs. 50 lakhs or less in the previous financial year, the service provider shall have the option to pay tax on taxable services provided or agreed to be provided by him up to a total of Rs. 50 lakhs in the current financial year, by the dates specified in this sub-rule with respect to the month or quarter, as the case may be, in which payment is received. It is suggested that suitable form of return be prescribed for intimation upon payment of service tax which was received in Post GST regime and levy was happened in erstwhile regime but payable on receipt basis.
3.	Search of premises- need change to incorporate reasons	It is suggested that to avoid vexatious searches, the reasons for conducting the search may be recorded in writing. This will also be in line with income-tax provisions. The suggestion seeks to bring about greater transparency in the processes and will enable the tax payer to effectively respond to the queries of the tax department. It will also bring about discipline within the department. Further, detailed & specific provisions for search be issued in lines with Section 153C on Income Tax Act, 1961. This would help in clarifying the issues like what would be the period for which search could extend, whether search may extend to sister concerns/ group of companies if the search is warranted for one company or what would amount to raid or survey in each situation etc.
4.	Prosecution- Need to incorporate mens rea	Prosecution provisions ought to apply only in exceptional cases and must include mens rea. Further, in the cases of



		interpretational issues such provisions should not be applied.
C. CENVAT CREDIT RULES, 2004		
5.	Balance Credit of Krishi Kalyan Cess	It is suggested that credit of KKC be allowed to be carried forward under GST regime to be set off against GST liability.
6.	Inputs/capital goods procured from EOU/EHTP/STP not paying duty in terms of Sl No. 2 of the Notification No.23/2003 CE dated 31.3.2003	It is suggested that rule 3(7) be amended to clarify that CENVAT credit will also be available in respect of clearances made by an EOU/EHTP/STP paying excise duty in terms of proviso to section 3(1) of the Central Excise Act, 1944. This will be in line with the overall objective of Foreign Trade Policy.
7.	Availment of CENVAT Credit on Input	(i) In order to safeguard the assessee from the huge loss of CENVAT Credit due to non-payment for the purchase of input due to business policies, the amended provision must be brought prospectively i.e. on the invoice or goods received after the effective date of amendment. There exist multiple cases wherein due to business policies and payment terms and condition, assessee are taking credit only after making payment to vendors i.e. on receipt/payment basis and due to which they have neither yet availed the credit nor account for such credit in the books of account to avoid inconvenience. In such cases, assessee would lose huge amount of CENVAT credit for nothing. (ii) It is suggested to clarify/notify that the amended proviso shall not apply in the following cases: (a) In case of retention money, time limit of one year may not apply. (b) In case of pending cases before adjudicating authorities, wherein as a consequence of judgement assessee becomes eligible for CENVAT Credit. (c) In case of cases with pending litigation/ under litigation, Credit be allowed for the period till the dispute under point of law is settled.
8.	Rule 13 of the CENVAT Credit Rules, 2017 provides for transfer of CENVAT credit in	It is suggested that there be made available a facility of allowing provisional credit upto 75% for adjustment immediately on receiving the request for the transfer. In cases where any excess claim of CENVAT Credit is observed, such



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	different cases.	excess claims be made to be remitted with applicable interest.
9.	Refund of CENVAT Credit – Rule 7 of CENVAT Credit Rules	(i) Refund claim may be filed on the basis of maintaining separate records for domestic & export transactions. In cases, where such records cannot be maintained, formula may be applied. (ii) Refund amount be related to quantum of inputs used to export goods/service and the proportionate credit involved in those exports irrespective of the period during which credit is taken. (iii) For the purpose of Export of Non-GST supply- credit provision be enabled.
10.	Penalty in respect of CENVAT credit wrongly taken or utilized- Rule 17	Rule 17 of CENVAT credit rules, 2017 provides where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly or in contravention of any provision of these rules, then all such goods shall be liable to confiscation and such person shall be liable to penalty not exceeding the duty or service tax on such goods or services, as the case may be or two thousand rupees whichever is greater. It is suggested that words given “taken or utilized” in Rule 17 be replaced with “taken and utilized”.
11.	Customs endorsement of bill of entry for availment of CENVAT credit	The procedure of Customs endorsement of the Bill of Entry (EDI copy) for availment of CENVAT credit by the end user unit be restored. Alternatively, a provision be made in the Bill of Entry format for indicating the details of the consignee (end user receiver) of the goods in addition to the details of the importer as is being done in the case of excise invoices where the invoice is made on the buyer with the consignee indicated as the end user.
D. CENTRAL EXCISE DUTY		
12.	Presumption That the Incidence of Duty Has Been Passed on To the	It is suggested to suitably amend Section 12B of Central Excise Act, 1944 to allow refund where credit notes are issued to dealers.



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	Buyer	
13.	Revision application for matters relating to baggage, drawback, rebate of duty on export of goods etc.	It is suggested to allow filing of appeals before CESTAT against the orders passed by the Commissioner (Appeals) in relation to the matters covered under proviso to section 35B(1) of the Central Excise Act, 1944 and proviso to section 129A of the Customs Act, 1962 as well i.e., orders relating to loss of goods where the loss occurs in transit from a factory to a warehouse, etc. or rebate of excise duty on export of goods or goods exported without payment of duty, baggage, drawback.
14.	Pre-deposit for Appeal	(i) It is suggested that a Bank Guarantee be provided as an alternative to pre-deposit to safeguard the working capital of the assessee. (ii) It is suggested that in order to prevent the frivolous demands, Tribunal be allowed to waive the pre-deposit in deserving cases. (iii) Without prejudice to the above, it is suggested that a Slab system may be introduced to safeguard the small-scale industries, small service providers or BIFR industries. (iv) It is also suggested that the relevant provisions be suitably clarified such that on payment of mandatory pre-deposit, the balance demand stands automatically stayed and no recovery proceeding thereof would be initiated by the department to meet the intention beyond the proposed provision. (v) It is suggested that in case pre-deposit is mandated and obligated then the interest on duty/tax demanded should not be charged for the period till the appeal is disposed off. (vi) It is suggested that said pre-deposit should only be in respect of duty/ tax demanded and not on the penalty amount as pre-deposit on penalty cannot be levied unless its cause is proved. (vii) Subject to above, appropriate clarification may be inserted to avoid the interpretation of TRU Letter. (viii) It is suggested that appropriate clarification be provided in respect of the cases remanded back to Commissioner for re-assessment and what would happened to deposition of pre deposited against original order and



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		whether again pre-deposit needs to be paid to appeal for re-assessed order. (ix) It is suggested that appropriate clarification be provided in respect of appeal to assessment order passed against duty paid under protest.
15.	Appeal to the Supreme Court	It is suggested that disposal of appeals pertaining to all cases be also routed through High Court as it is easily accessible from various parts of the Country.
16.	Penalty under Central Excise for Offences.	Rule 26(2) of Central Excise Rules, 2017 provides that any person, who issues any document other than excise duty invoice or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made there under like claiming of CENVAT credit under the CENVAT Credit Rules, 2017 or refund, shall be liable to a penalty not exceeding the amount of such benefit or ` 5,000, whichever is greater. It is suggested that the words “likely to take” be deleted from the said rule to avoid unnecessary penalization of dealers.
17.	Audit Issues	It is suggested that a copy of audit report even a clean one (having nil points) of the assessee under Excise Audit 2000 scheme be provided: • To facilitate the assessee to take corrective actions • To ensure/prove that audit is done up to a particular period. As in absence of the audit report with the assessee he is unable to prove that his accounts are audited till a particular period and is sometimes subjected to re-audit as there is no mechanism in the department to ensure the same.
E. CUSTOMS DUTY		
18.	Refund of Customs duty - Section 27 of Custom Act 1962	• It is suggested that suitable amendment be made prescribing proper time limit for granting of refund which should be obligatory in nature. Further, it is suggested to give mandatory interest on delayed refunds. • Concept of running account for payment of export duty and import duties and suo-moto adjusting the due refunds and collecting refunds may be implemented.



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		It is suggested that in case provisionally filed Shipping Bill is not finalized within a prescribed period, refund claim of excess duty paid be allowed and granted
19.	Interest on delayed refunds.	It is suggested that interest on refund be automatically computed from the end of 3 months from date of refund claim. If refund application is admitted and processed, applicant has no basis to issue waiver of claim of interest.
20.	Duties collected from the buyer to be deposited with the Central Government	It is suggested that provisions of charging interest be applied in these cases also as in the case of Excise/ Service Tax Law.
21.	Determination of Assessable Value for levy of Export Duty for Final Assessment of Provisionally filed Shipping Bill	It is suggested that suitable rules may be prescribed for the purpose of determination of assessable value, specifying the adjustment to be made with components like changes in the value of goods, freight components etc.
22.	Double taxation on Services and intangible rights related payments by importers of goods, to the foreign entities	Thus, there is an immediate need to issue appropriate clarification so that payments related to services and intangible rights are not doubly taxed to customs duty as well as service tax.
23.	Education Cess & Higher Education Cess on Imports	It is suggested that cesses payable as per custom law be removed by merging the cess into basic tax rate of custom so that the tax planning and cost planning of business will be easier and accurate. This will be in line with the rates of GST.
24.	Provisional release of goods, documents and things seized pending adjudication.	Section 110 A of Customs Act, 1962, provides that any goods, documents or things seized under section 110, may, pending the order of the adjudicating officer, be released to the owner on taking a bond from him in the proper form with such security and conditions as the Commissioner of Customs may require. It is thus suggested that the section be amended to include provisional release of goods, documents and things seized when the order is pending with appellate authority.
25.	Increase in Baggage Limits	Rule 3 of Baggage Rules provides that an Indian resident or a foreigner residing in India or a tourist of Indian origin, not being an infant, arriving from any country other than Nepal,



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		Bhutan or Myanmar, shall be allowed clearance free of duty articles in his bona fide baggage used personal effects, travel souvenirs and articles other than those specified, upto the value of 50 thousand rupees if these are carried on the person or in the accompanied baggage of the passenger. It is suggested that the baggage provisions be amended to enhance the baggage limit from Rs. 50,000/- to Rs.1,00,000/- for duty free allowance considering the effect of inflation on exchange rate
26.	Taxability of Transportation of Goods by a Vessel	The transportation of services by vessel from a place outside India up to the customs station of clearance in India will be liable to service tax. Rule 10(2) of Customs Valuation (Determination of value of imported goods) Rules, 2007 provides for inclusion of the cost of transport of the imported goods to the place of importation. In order to avoid dual taxation under Customs as well as Service Tax the omission proposed from Negative list be rescinded which would also be in line with GST structure.
27.	EOUs deemed to be delicensed from bonded warehouse	With the introduction of 44/2016 dated 29 July, 2016, EOUs have been deemed to be delicensed of the bonded warehouse established by them. This was introduced as a measure of ease-of-doing-business. - Amend 44/2016 to substitute 'deemed to be delicensed' with 'deemed to be bonded'. - Allow automatic renewal of bonding period subject to good and usable condition of all goods coterminous with EOU license validity
F. CENTRAL SALES TAX		
28.	Issue of "C", "H" Forms etc. under CST Law	Earlier Form required to be issued in the old VAT law be issued at the earliest.
G. OTHERS		
29.	Increase in limitation period for recovery of Central Excise & Customs to 2 years	Finance Act, 2016 has amended Section 28A of Customs Act 1962 & Section 11A of Central Excise Act 1944 to extend the period of limitation from 1 year to 2 years. The erstwhile time limit of 6 months for issuance of notice from the last date for filing of the annual returns be restored/



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		fixed.
30.	Refund of duty/tax not passed on to the immediate buyer	Section 27 of the Customs Act 1962 & Section 11B of Central Excise Act 1944 provide that Any person claiming refund of any duty or interest- paid by him; or borne by him, may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs/ Excise or Deputy Commissioner of Customs/ Excise, before the expiry of one year, from the date of payment of such duty or interest Recently Hon'ble Supreme Court in the case of CCE, Madras v Addison & Co Ltd - 2016 TIOL 146 SC CX LB provided that assessee is entitled for filing refund claim on basis of credit notes raised towards turnover discount. In the light of aforesaid Supreme Court decision, it is suggested that section 27/ 11B be amended to give effect to the decision
31.	Concessions to Special Economic Zones (SEZ)	Section 50 of SEZ Act, 2005 provides that the State Government may, for the purposes of giving effect to the provisions of this Act, notify policies for Developers and Units and take suitable steps for enactment of any law:- (a) granting exemption from the State taxes, levies and duties to the Developer or the entrepreneur; (b) delegating the powers conferred upon any person or authority under any State Act to the Development Commissioner in relation to the Developer or the entrepreneur. It is suggested that the above provisions be made mandatory by amending Section: 51 of the SEZ Act to provide that the provisions of this Act shall have effect notwithstanding anything contained in any state tax laws.
32.	Powers of the Commissioner (Appeals) under the Central Excise Act and the Customs Act to condone the delay in	• It is, therefore, suggested that the power to condone appeals be vested with the Commissioner Appeals upto a period of 90 days instead of 30 days with a further appeal to CESTAT in case of delays beyond such period. • Further, in genuine cases Commissioner Appeals be vested



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	filing the appeal	with condonation powers for unlimited period.
33.	Waiver from penalty if duty and interest paid before service / issue/ receipt of Show cause notice under different statute	The provisions under the three statute be harmonized so as to provide complete waiver from penal provisions where tax/ duty and interest is paid within 30 days of the 'receipt' of the notice rather than 'issue' of notice
34.	Personal Penalty	It is observed that Central Excise Department sometimes issues notices for personal penalty to junior and middle level officers of the Corporates under Rule 26 (earlier rule 209A). These types of notices are mostly issued wherever allegation or suppressions are leveled. The employees in large Corporates are salaried employees and are professionals. Their jobs are transferable. However, issuance of personal penalty notices creates unnecessary obstacles. The work is done for and on behalf of Corporates (assesseees). Excise Department should deal with the Corporates and not with individual employees. Therefore, it is suggested that the provisions relating to personal penalty be removed from the statute.
35.	Exemption from payment of duty by way of refund mechanism	It is suggested that the present system of granting exemption through refund route be reviewed and be made simple to comply.
36.	Suggestions for Reduction of Litigation	
a.	Accountability of tax collectors	In order to project a sense of even-handedness in dealing with tax payers, provisions relating to accountability be introduced and not formulated independently. The Tribunal or Commissionerate (Appeal) may impose reasonable cost for the same. If there are rewards awarded to the departmental officers for anti-evasion cases then there ought to be penalty also for frivolous litigations.
b.	Timely information and guidance	It is suggested that all the orders passed by CESTAT and Adjudicating Authority/ Commissioner (Appeals) be made available on websites for ready reference of the industry. The CBEC may play a proactive role and issue



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		clarifications on problems / issues of industry which are similar in nature to avoid such problems resulting in litigation at a later stage.
c.	Vacancies in Tribunal	The vacancies in Tribunal be filled and additional benches in metro and new benches in non-metro cities be constituted to expedite the disposal of long pending cases. A fast track system of disposal of cases be introduced to deal with high revenue cases and settled issues.
d.	Members of CESTAT	Practicing Chartered Accountants be made eligible for being appointed as Members of the CESTAT as in case of ITAT.
37.	Focus on Assessee outside the Tax Net	• Sufficient officers say -15% of the total be allocated to unearth these assessees. • The efforts be made in controlled environment where the small duty/ tax payer is not hassled while those who need to pay the duty/ tax be brought to mainstream. • The systems to be transparent and have built in accountability. To include checks to avoid connivance and graft.



III. DETAILED SUGGESTIONS 2018

A. General Submissions

1. Amnesty Scheme / Dispute Resolution

A suitable amnesty scheme must be thought of for all Central Laws and State Laws which have been merged in GST in 'one go' to reduce existing litigation. The scheme must be well thought out since most schemes have failed for the following key reasons, among others:

- a. The procedure is cumbersome;
- b. There is no clarity on many issues at the drafting stage itself;
- c. The dealers are not certain that similar or same issues will be raked up for subsequent / past years;
- d. The payment terms are not addressed to the liking of a bonafide tax payer;
- e. The payment or taxes, interest and penalties fixed under the scheme are not worthwhile to consider and may be pursuing litigation is a better option.

Keeping the above factors in mind if a uniform amnesty scheme can be drawn up across laws and across all States and Union territories with a view to minimizing existing litigations. Other issues should be borne in mind while drafting such a scheme:

- m) It must be simple to understand;
- n) All types / classes of litigations must be covered;
- o) All types / classes of taxes under the Union / State Laws must be covered;
- p) All appeals filed by the State / Centre must be unilaterally withdrawn as a one-time measure of building trust;
- q) Any person who has opted to pay taxes under the scheme must not be subjected to any further revision, review, reference or any other proceedings in future, for the same year;
- r) Tax credits, if any, in the hands of the dealer (under the respective existing statutes) must be permitted to set off against the taxes, interest and penalties under the scheme;
- s) Taxes, interest, penalties paid under protest by an assessee in excess of what is payable under the scheme must be refunded within 30 days of filing the relevant applications together with appropriate orders;



- t) Penalties levied must be fully waived off if the disputed taxes are remitted within 3 months from the date of introduction of the scheme;
- u) Interest must not exceed 10% of the taxes payable;
- v) Litigations relating to input tax credits must be fully allowed and refunded within 30 days from the date of filing any such application;
- w) Withdrawal of applications / orders must not be insisted, upon filing of any such application under the scheme. However, such person must file the relevant withdrawal application within a period of 30 days from the date of filing such applications.
- x) An order accepting the application must be passed in every case not later than 30 days from the date of filing any such applications

B. SERVICE TAX

2. Transition provision for tax paid on receipt basis

Rule 6 of Service Tax Rules, 1994 provides that in case of such individuals, partnership firms and one-person companies whose aggregate value of taxable services provided from one or more premises is Rs. 50 lakhs or less in the previous financial year, the service provider shall have the option to pay tax on taxable services provided or agreed to be provided by him up to a total of rupees fifty lakhs in the current financial year, by the dates specified in this sub-rule with respect to the month or quarter, as the case may be, in which payment is received.

Section 140(5) of CGST Act, 2017 provides that a registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day.

Section 142(11)(b) of CGST Act, 2017 provides that notwithstanding anything contained in section 13, no tax shall be payable on services under this Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994.

Section 174(2) of CGST Act 2017 provides that the repeal of the Finance Act, 1994 as amended to the extent mentioned in the sub-section (1) or section 173 shall not affect



any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts.

Issue

In cases where services were provided in the earlier law and option of payment of service tax was exercised on receipt basis. Now if invoice for a service was raised and service was provided on or before 31.10.2016 but payment is expected to be received after July 2017, then owing to aforesaid provisions assessee is required to pay tax on receipt basis i.e. service tax.

Suggestion

It is suggested that suitable clarification be provided in the law for such transition situations.

Further, suitable form of return be prescribed for intimation upon payment of applicable service tax.

3. Search of premises- need change to incorporate reasons

Section 82 provides that the Joint Commissioner or Additional Commissioner of Central Excise may, if he has reason to believe that any documents or books or things which in his opinion shall be useful for or relevant to any proceeding under the Act, are secreted in any place, may authorize any Central Excise Officer to search for and seize or himself search for and seize such documents or books or things.

Suggestion

It is suggested that in order to avoid vexatious searches, the reasons for conducting the search may be recorded in writing. This will also be in line with income-tax provisions. The suggestion seeks to bring about greater transparency in the processes and will enable the tax payer to effectively respond to the queries of the tax department. It will also bring about discipline within the department.

Further, detailed & specific provisions for search be issued in lines with Section 153C on Income Tax Act, 1961. This would help in clarifying the issues like what would be the period for which search could extend, whether search may extend to sister concerns/ group of companies if the search is warranted for one company or what would amount to raid or survey in a given situation etc.



4. Prosecution- Need to incorporate mens rea

Joint Commissioner and Additional Commissioner are empowered to issue search warrant under section 82 and the same is executed by the Superintendent. Provisions relating to prosecution contained in section 89 have been re-introduced by the Finance Act, 2011 and further amended by Finance Act, 2012 to apply in the following situations:

- (i) Knowingly evades the payment of service tax;
- (ii) Availment and utilization of CENVAT credit without actual receipt of inputs or input services;
- (iii) Maintaining false books of accounts or failure to supply any information or submitting false information;
- (iv) Non-payment of amount collected as service tax for a period of more than six months.

Further, section 89(1) inter alia provides that whoever avails and utilizes credit of taxes or duty without actual receipt of taxable service either fully or partially in, shall be liable for punishment as provided therein.

This implies that assessee cannot avail and utilize CENVAT credit till the time, services are actually received. However, rule 6 of the CENVAT Credit Rules allows "CENVAT credit in respect of input service on or after the day on which the invoice, bill or, as the case may be, Challan referred to in rule 11 is received.

Suggestion

Prosecution provisions ought to apply only in exceptional cases and must include mens rea. Further, in the cases of interpretational issues such provisions should not be applied.



B. CENVAT CREDIT RULES, 2004

5. Balance Credit of Krishi Kalyan Cess (KKC)

Krishi Kalyan Cess (KKC) @ 0.5% has been introduced w.e.f 01.06.2016 on the value of all or any of the taxable services for the purposes of financing and promoting initiatives to improve agriculture or for any other purpose relating thereto.

Further, it has been provided that CENVAT credit of Krishi Kalyan Cess paid on input services shall be allowed to be used for payment of the KKC on the service provided by a service provider.

Issue

Balance credit of KKC as on appointed date is not allowed to set off against GST liability.

Suggestion

It is suggested that credit of KKC be allowed to be carried forward under GST regime to be set off against GST liability.

6. Inputs/capital goods procured from EOU/EHTP/STP not paying duty in terms of Sl No. 2 of the Notification No.23/2003 CE dated 31.3.2003

In terms of rule 3(7)(a), the manufacturer or service provider is allowed the benefit of taking CENVAT credit of duty paid on inputs or capital goods if the same are manufactured by an EOU/EHTP/STP in case the said unit pays excise duty under section 3 of the Central Excise Act, 1944 read with Sl.No.2 of the *Notification No. 23/2003 CE dated 31.3.2003*. This credit is given on the basis of aggregation as specified in 2nd proviso to rule 3(7)(a) which is effective from 7.9.2009.

An EOU/EHTP/STP is liable to pay duty of excise in terms of proviso to section 3(1) of the Central Excise Act, 1944. However, the said unit is entitled to claim concessional duty or exemption from payment of duty in terms of *Notification No. 23/2003-CE dated 31.3.2003* issued under section 5A of the Act. The said concession/exemption is conditional and is available on fulfillment of certain prescribed conditions. Therefore, if a unit does not satisfy or fulfill the conditions, it is not entitled to pay concessional duty under the above notification. Alternatively, since the above notification is conditional, there is an option to EOU units not to avail the benefit of above notification.



In both the above situations, an EOU pays duty of excise in accordance with proviso to section 3(1). In such a case, the procurer of inputs or capital goods which are in-turn manufactured by EOU/EHTP/STP, which do not pay duty as per *Notification No. 23/03* but in terms of proviso to section 3(1), face difficulties in availment of credit.

This is a serious lacuna in the CENVAT Credit Rules, 2004 and there is a possibility of the department denying the CENVAT credit since the provisions of rule 3(7)(a) of the CENVAT Credit Rules, 2004 may not be applicable in this case.

Suggestion

It is suggested that rule 3(7) be amended to clarify that CENVAT credit will also be available in respect of clearances made by an EOU/EHTP/STP paying excise duty in terms of proviso to section 3(1) of the Central Excise Act, 1944. This will be in line with the overall objective of Foreign Trade Policy.

7. Availment of CENVAT Credit on Input

Rule 6 of CENVAT credit rules, 2017 provides that the CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service or in the premises of the job worker, in case goods are sent directly to the job worker on the direction of the manufacturer or the provider of output service, as the case may be. The proviso now provides that the manufacturer or the provider of output service shall not take CENVAT credit after one year from the date of issue of any of the documents specified in Rule 11(1).

Issue

The circular has not clarified in the respect of following circumstances:

- Whether the amended proviso is applicable on the invoices issued prior or post to the effective date of amendment.
- The case of interpretational issues and consequently extended period is invoked, then there will be demand of 5 years whereas credit of the same period will not be allowed which is against the spirit of law and will cause hardship to assessee. To illustrate, an assessee is rendering services for ` 100 and outsourcing the same for ` 80. Now, in case of old period investigation on some interpretational issue or based on some judgment from apex court, he is obliged to pay tax on ` 100 but will not be allowed to claim credit on ` 80. We may have live examples where different judgment suggests to pay tax after a substantial period pass over.



Suggestions

- (i) *In order to safeguard the assessee from the huge loss of CENVAT Credit due to non-payment for the purchase of input due to business policies, the amended provision must be brought prospectively i.e. on the invoice or goods received after the effective date of amendment. There exist multiple cases wherein due to business policies and payment terms and condition, assessee are taking credit only after making payment to vendors i.e. on receipt/payment basis and due to which they have neither yet availed the credit nor account for such credit in the books of account to avoid inconvenience. In such cases, assessee would lose huge amount of CENVAT credit for nothing.*
- (ii) *It is suggested to clarify/notify that the amended proviso shall not apply in the following cases:*
 - (a) *In case of retention money, time limit of one year may not apply.*
 - (b) *In case of pending cases before adjudicating authorities, wherein as a consequence of judgement assessee becomes eligible for CENVAT Credit.*
 - (c) *In case of cases with pending litigation/ under litigation, Credit be allowed for the period till the dispute under point of law is settled.*

8. Rule 13 of the CENVAT Credit Rules, 2017 provides for transfer of CENVAT credit in different cases.

Rule 13 of the CENVAT Credit Rules, 2017 provides for transfer of CENVAT credit in different cases. It provides that transfer of CENVAT Credit by the jurisdictional Dy./Assistant Commissioner of Central Excise, will be allowed within 3 months [further extendable by 6 months] from the date of receipt of application from the manufacturer or service provider in this regard, subject to the fulfillment of the conditions prescribed under Rule 10 (3).

Issue

The time limit of 3 months [further extendable by 6 months] may be required for administrative reasons etc. by jurisdictional Dy./Assistant Commissioner of Central Excise. However, denial of credit during this period might lead to working capital issues, blocking of credit etc. which needs to be provided for.

Suggestion:

It is suggested that there be made available a facility of allowing provisional credit upto 75% for adjustment immediately on receiving the request for the transfer. In cases where any excess



claim of CENVAT Credit is observed, such excess claims be made to be remitted with applicable interest.

9. Refund of CENVAT Credit – Rule 7 of CENVAT Credit Rules

Rule 7 of CENVAT Credit Rules, 2017 provides that a manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette :

$$\text{Refund amount} = \frac{\text{(Export turnover of goods)}}{\text{Total turnover}} \times \text{Net CENVAT credit}$$

Notification No. 05/2006 - CX (NT), Dated: March 14, 2006 provides that prescribed application for refund along with the prescribed enclosures and the relevant extracts of the records maintained are to be filed before the expiry of the period specified in section 11B of the Central Excise Act, 1944.

Issue:

- (a) There is no option available to the assessee to claim refund on account of maintaining separate books of accounts for export and domestic transactions as in Rule 6(2) of CENVAT Credit Rules, 2004 for exempted & taxable services. The refund is granted only on the basis of Formula prescribed in the Rule.
- (b) The Refund is to be claimed within the prescribed time limit as specified under section 11B of the Central Excise Act, 1944.

Suggestions

It is suggested that-

- *Refund claim may be filed on the basis of maintaining separate records for domestic & export transactions. In cases, where such records cannot be maintained, formula may be applied.*
- *Refund amount be related to quantum of inputs used to export goods/service and the proportionate credit involved in those exports irrespective of the period during which credit is taken.*



- *For the purpose of Export of Non-GST supply- credit provision be enabled.*

10. Penalty in respect of CENVAT credit wrongly taken or utilized- Rule 17

Rule 17 of CENVAT credit rules, 2017 provides where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly or in contravention of any provision of these rules, then all such goods shall be liable to confiscation and such person shall be liable to penalty not exceeding the duty or service tax on such goods or services, as the case may be or two thousand rupees whichever is greater.

Suggestion

It is suggested that words given “taken or utilized” in Rule 17 be replaced with “taken and utilized”.

11. Customs endorsement of bill of entry for availment of CENVAT credit

The erstwhile procedure of customs endorsement of Bill of Entry for availment of CENVAT credit by the end user unit has been dispensed with vide *Customs Public Notice No. 16/2006 dated 22-03-2006*. This is causing hardships to the manufacturers since they are unable to avail CENVAT credit on the imported [free issue] material received by them from their customers.

Suggestion

The procedure of Customs endorsement of the Bill of Entry (EDI copy) for availment of CENVAT credit by the end user unit be restored.

Alternatively, a provision be made in the Bill of Entry format for indicating the details of the consignee (end user receiver) of the goods in addition to the details of the importer as is being done in the case of excise invoices where the invoice is made on the buyer with the consignee indicated as the end user.



D.CENTRAL EXCISE DUTY

12. Presumption That the Incidence Of Duty Has Been Passed On To The Buyer

Section 12B of Central Excise Act, 1944 provides that every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

Issue

Presently, department denies refund where credit notes are issued to dealers because the burden was passed on to ultimate buyers, despite the precedent decision by Judiciary.

Suggestion

It is suggested to suitably amend Section 12B of Central Excise Act, 1944 to allow refund where credit notes are issued to dealers.

13. Revision application for matters relating to baggage, drawback, rebate of duty on export of goods etc.

As per proviso to section 35B(1) of the Central Excise Act, 1944 no appeal shall lie to the Appellate Tribunal if the order passed by the Commissioner (Appeals) relates to loss of goods where the loss occurs in transit from a factory to a warehouse, etc. or rebate of duty on export of goods or goods exported without payment of duty. In such cases, there is a provision to file revision application under section 35EE of the Central Excise Act, 1944 before the Central Government. Similarly, as per section 129A of the Customs Act, 1962 appeal shall not lie to the CESTAT if the order passed by the Commissioner (Appeals) relates to baggage etc and revision application will have to be filed. This causes undue hardship to the assessee as approaching Revisionary Authority at New Delhi results in substantial increase in the litigation cost of the assessee.

Suggestion

It is suggested to allow filing of appeals before CESTAT against the orders passed by the Commissioner (Appeals) in relation to the matters covered under proviso to section 35B (1) of the Central Excise Act, 1944 and proviso to section 129A of the Customs Act, 1962 as well i.e., orders relating to loss of goods where the loss occurs in transit from a factory to a warehouse, etc. or rebate of excise duty on export of goods or goods exported without payment of duty, baggage, drawback.



14. Pre-deposit for Appeal

Section 35F has been substituted with earlier provision by Finance Act, 2014 which prescribe a mandatory pre-deposit of 7.5% of the duty demanded or penalty imposed or both for filing the appeal before the Commissioner (Appeals) or the Tribunal at the first stage, and 10% of the duty demanded or penalty imposed or both for filing second stage appeal before the Tribunal. However, the amount of pre-deposit payable shall be subject to a ceiling of ` 10 Crore. It is also pertinent to add here that all pending appeals or stay applications shall be governed by the statutory provisions prevailing at the time of filing such applications or appeals.

Issue

The Revised Section 35F is highly detrimental to the interest of genuine assesses who might get wrongly implicated by the Revenue Authorities for evasion of taxes/duty. Further, such substitution has lead to empower Revenue Authorities, since initiation of any proceedings against an assessee, ultimately lead to depositing of a certain percentage of amount, by an assessee, with the treasury even if it not a legitimate due to the Government. To say it simply, amendment has adversely affected genuine assesses' Right to appeal before the higher authorities.

Furthermore, taking away the right of dispensing of Pre-deposit and making it mandatory to deposit a certain percentage of duty demanded before filing an appeal, has caused undue hardship to small entrepreneurs/ manufacturers/ service providers. It is noteworthy that a small entrepreneur, as per the revised section, first has to make a pre-deposit of 7.5% of the duty demanded or penalty imposed or both for filing an appeal before Commissioner (Appeals) and if, the assessee doesn't get a favourable order, then again, he will have to make a mandatory pre-deposit of 10% of the duty demanded or penalty imposed or both, if he approaches the Hon'ble Tribunal. Therefore, in totality, the assessee have to pay a total of 17.5% of pre-deposit of duty demanded and equivalent percentage of penalty [which works out to be 35% of duty demanded] which will only lead to causing undue hardship and harassment to small entrepreneurs at the hands of the Revenue.

Further, if the assessee succeeds in its appeal, then the prescribed percentage of amount deposited with the Government will have to be obtained by way of refund, which itself is a daunting task for an assessee to obtain from the Department.

On the other hand, such proposed substitution is likely to benefit tax evaders, as by depositing a prescribed percentage at the time of appeal, the matter could be prolonged till the appeal comes up for regular hearing before the Hon'ble Courts.

Additionally, in the Finance Minister Speech he said that " to expedite the process of disposal of



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appeals, amendment have been proposed in Custom and Central Excise Act with a view to freeing appellate authorities from hearing Stay application and to take up regular appeals for final disposal” It is not clear as to whether after the mandatory pre deposit Stay application would still need to be filed by assessee to avoid the proceedings of recovery of demand / penalty raised.

In addition, TRU Letter further states that another 10% of Pre-deposit in case of second stage of appeal in addition to the 7.5% of the demand and / or Penalty totaling to 17.5%, however language of the section 35F is different.

Further, it is submitted that in most of the cases unconditional stay has been granted by the tribunal to the assessee.

Suggestions

- *It is suggested that a Bank Guarantee be provided as an alternative to pre-deposit to safeguard the working capital of the assessee.*
- *It is suggested that in order to prevent the **frivolous** demands, Tribunal be allowed to waive the pre-deposit in deserving cases.*
- *Without prejudice to the above, it is suggested that a Slab system may be introduced to safeguard the small-scale industries, small service providers or BIFR industries.*
- *It is also suggested that the relevant provisions be suitably clarified such that on payment of mandatory pre-deposit, the balance demand stands automatically stayed and no recovery proceeding thereof would be initiated by the department to meet the intention beyond the proposed provision.*
- *It is suggested that in case pre-deposit is mandated and obligated then the interest on duty/tax demanded should not be charged for the period till the appeal is disposed off.*
- *It is suggested that said pre-deposit should only be in respect of duty/ tax demanded and not on the penalty amount as pre-deposit on penalty cannot be levied unless its cause is proved.*
- *Subject to above, appropriate clarification may be inserted to avoid the interpretation of TRU Letter.*
- *It is suggested that appropriate clarification be provided in respect of the cases remanded back to Commissioner for re-assessment and what would happened to deposition of pre deposited against original order and whether again pre-deposit needs to be paid to appeal for re-assessed order.*
- *It is suggested that appropriate clarification be provided in respect of appeal to assessment order passed against duty paid under protest.*



15. Appeal to the Supreme Court

Under section 35L (1) of Central Excise Act, 1994 (b) an appeal lies to the Supreme Court from any order passed by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

Finance Act (No. 2), 2014 has inserted sub-section (2) in section 35L to provide that the determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment

Issue

The above amendment has practically lead to a situation where a major chunk of the cases will be appealable to the Supreme Court by-passing the jurisdictional High Court. As is well known that Supreme Court is already flooded with pending matters, centralization of appeals to the Supreme Court will lead to delay in disposal of appeals.

Further, the cost of litigation goes up considerably for most assesseees who are located far from New Delhi.

Suggestion

It is suggested that disposal of appeals pertaining to all cases be also routed through High Court as it is easily accessible from various parts of the Country.

16. Penalty under Central Excise for Offences.

Rule 26(2) of Central Excise Rules, 2017 provides that any person, who issues any document other than excise duty invoice or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made there under like claiming of CENVAT credit under the CENVAT Credit Rules, 2017 or refund, shall be liable to a penalty not exceeding the amount of such benefit or ` 5,000, whichever is greater.

Issue

The words “likely to take” penalizes the dealer of importer unreasonably as the government has a mechanism in place to verify whether the recipient of goods or service has taken credit or not.



Suggestion

It is suggested that the words “likely to take” be deleted from the said rule to avoid unnecessary penalization of dealers.

17. Audit Issues

EA 2000 is a modern, transparent and interactive method of audit wherein the auditor proceeds with audit fully conversant with the business of the assessee. At the end of the process of verification, the auditor prepares Audit Report which incorporates all the audit objections/audit paras. An audit report provides (issue or para wise) the issue in brief, the reply or the explanation of the assessee, the reason for the auditor not being satisfied with the reply, the amount of short payment (if tabulated) and the recoveries of the same.

Suggestion

It is suggested that a copy of audit report even a clean one (having nil points) of the assessee under Excise Audit 2000 scheme be provided:

- *To facilitate the assessee to take corrective actions*
- *To ensure/prove that audit is done up to a particular period.*

As in absence of the audit report with the assessee he is unable to prove that his accounts are audited till a particular period and is sometimes subjected to re-audit as there is no mechanism in the department to ensure the same.



E. CUSTOMS DUTY

18. Refund of Customs duty - Section 27 of Custom Act 1962

It has been observed that specified time limit is not followed by the officers in granting the refund even after submission of all relevant documents. The prolonged delay in refunds is causing undue financial hardship.

Suggestion

- *It is suggested that suitable amendment be made prescribing proper time limit for granting of refund which should be obligatory in nature. Further, it is suggested to give mandatory interest on delayed refunds.*
- *Concept of running account for payment of export duty and import duties and suo-moto adjusting the due refunds and collecting refunds may be implemented.*
- *It is suggested that in case provisionally filed Shipping Bill is not finalized within a prescribed period, refund claim of excess duty paid be allowed and granted.*

19. Interest on delayed refunds.

If any duty ordered to be refunded under sub-section (2) of section 27 to an applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below 5% and not exceeding 30% per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty.

Issue

Sometimes assessee waives their claim for interest and take up only the refund amount net of interest to expedite the refund process. Procedure of seeking waiver of claim for interest by the department from applicants is deterrent and needs to be discontinued.

Suggestion

It is suggested that interest on refund be automatically computed from the end of 3 months from date of refund claim. If refund application is admitted and processed, applicant has no basis to issue waiver of claim of interest.

20. Duties collected from the buyer to be deposited with the Central Government

Section 28B of Customs Act 1962 provides that every person who is liable to pay duty under this Act and has collected any amount in excess of the duty assessed or determined or paid on



any goods under this Act from the buyer of such goods] in any manner as representing duty of customs, shall forthwith pay the amount so collected to the credit of the Central Government.

Correspondingly, Section 11DD of Central Excise Act & Section 73B of Finance Act provide that where such excess amount is collected the person liable to pay the amount to Central Government shall, in addition to the amount, be liable to pay interest at such rate not below 10%, and not exceeding 36% per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first day of the month succeeding the month in which the amount ought to have been paid under this Act, but for the provisions contained in sub-section (3) of section 11D/ 73A, till the date of payment of such amount

Issue

The provision for charging interest provided in Excise/ Service Tax is not provided for Customs.

Suggestion

It is suggested that provisions of charging interest be applied in these cases also as in the case of Excise/ Service Tax Law.

21. Determination of Assessable Value for levy of Export Duty for Final Assessment of Provisionally filed Shipping Bill

There is no set mechanism or rules prescribed specifying the methodology for computing assessable value for the purpose of levy of Export duties as defined for valuation of imported goods.

In this regard, it has been observed that custom authorities are taking their own different stands for finalizing the value for the purpose of computing Export duties. The same is also not uniform at different ports.

Custom Valuation (Determination of value of Export Goods) Rules, 2007 brought vide Notification No. 95/2007-Cus (NT) Dated 13/9/2007 also not describe the methodology for determining the assessable values.

There has been no time line defined to do final assessment of provisionally assessed shipping bills, departmental officers are taking their own time to make the final assessments.

Suggestion

It is suggested that suitable rules may be prescribed for the purpose of determination of assessable value, specifying the adjustment to be made with components like changes in the value of goods, freight components etc.



22. Double taxation on Services and intangible rights related payments by importers of goods, to the foreign entities

As per Customs Valuation (Determination of Value of Imported Goods) Rules, 2017 the Value of Services and intangible rights is required to be added to the transaction value of imported goods for the purpose of levy of Customs duty at the same time such payments (consideration) for Services and intangible rights are also liable to Service Tax. Thus, there is an issue of double taxation.

As per Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the following is required to be added to the price actually paid or payable for the imported goods while determining the transaction value:

- (a)
- (c) Royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable.
.....
- (e) All other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

Explanation:- Where the royalty, licence fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e) of Rule 10, such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.

The issue pertains to Indian Companies entering into business arrangement with foreign entities. Such arrangements are mainly done to use brand/reputation, Intellectual Property Rights, product & business expertise etc. of foreign entities and sell products supplied/approved by them in Indian market. Such arrangements are made in different legal forms like Joint Venture, Franchise, License, Distributor etc.

Under the above arrangements, Indian Companies are obliged to maintain prescribed standards of business, pay for value of goods being imported and are also required to make payments to foreign partner for services and intangible rights which are identified by various names like Franchise/License Fee, Marketing/Advertising Fee, Agents Fee/Commission, Renewal Fee, Reimbursements of Travel etc.

While Custom Authorities relates all above direct or indirect payments related to Services & intangible rights like royalty, license fee etc. to supply of goods and hold them liable to



Customs duty, Service Tax Authorities treat such payments as consideration for services and hold Indian Companies liable to pay Service Tax under reverse charge mechanism.

Thus, Indian Companies are exposed to the burden of double taxation of customs duty as well as service tax.

When Transfer of Right to use imported/locally procured packaged software or canned software is passed on to the buyer, Government has exempted CVD/Central Excise duty on consideration for such transfer of right to use, provided Service Tax is paid on the same (Ref: Notification No. 25/2011-Cus., dated 01.03.2011 and 14/2011-CE., dated 24.03.2011). Conversely, Service Tax was exempted when CVD/Excise duty was paid (Ref: Notification No. 34/2012 – ST., dated 20.06.2012).

Government had exempted IPR service providers from service tax equivalent to amount of cess payable on the transfer of technology under the provisions of the R & D Cess Act, 1986 so as to avoid double taxation of both Service Tax & R & D Cess (Ref Notification No. 17/2004-ST., dated 10.09.2004).

Suggestion

Thus, there is an immediate need to issue appropriate clarification so that payments related to services and intangible rights are not doubly taxed to customs duty as well as service tax.

23. Education Cess & Higher Education Cess on Imports

An education cess @ 2% & a secondary and higher education cess @ 1% is leviable on aggregate value of duties of customs imposed on the items imported into India. These Cesses are in addition to any other duties of customs chargeable on such goods.

Suggestion

It is suggested that cesses payable as per custom law be removed by merging the cess into basic tax rate of custom so that the tax planning and cost planning of business will be easier and accurate. This will be in line with ease of doing business and levy of single rate, similar to GST Levy.

24. Provisional release of goods, documents and things seized pending adjudication

Section 110 A of Customs Act, 1962, provides that any goods, documents or things seized under section 110, may, pending the order of the adjudicating officer, be released to the owner on taking a bond from him in the proper form with such security and conditions as the Commissioner of Customs may require.

Issue



Presently the Act provides for provisional release of goods only when the order is pending before adjudicating authority but doesn't cover provisional release of goods when order is pending with appellate authority.

Suggestion

It is thus suggested that the section be amended to include provisional release of goods, documents and things seized when the order is pending with appellate authority

25. Increase in Baggage Limits

Rule 3 of Baggage Rules provides that an Indian resident or a foreigner residing in India or a tourist of Indian origin, not being an infant, arriving from any country other than Nepal, Bhutan or Myanmar, shall be allowed clearance free of duty articles in his bona fide baggage used personal effects, travel souvenirs and articles other than those specified, upto the value of **50 thousand rupees** if these are carried on the person or in the accompanied baggage of the passenger.

Suggestion

It is suggested that the baggage provisions be amended to enhance the baggage limit from Rs. 50,000/- to Rs.1,00,000/- for duty free allowance considering the effect of inflation on exchange rate.

26. Taxability of Transportation of Goods by a Vessel

The transportation of services by vessel from a place outside India up to the customs station of clearance in India will be liable to service tax.

Rule 10(2) of Customs Valuation (Determination of value of imported goods) Rules, 2007 provides for inclusion of the cost of transport of the imported goods to the place of importation;

(b) And the cost of transport is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods. Thus, freight paid in case of transportation by vessel is already included in the cost of imported goods and as a reason, custom duty gets paid on the same. Now Customs Duty as well as Service tax would be paid on the same transaction leading to double taxation.

Suggestion

- *In order to avoid dual taxation under Customs as well as Service Tax the omission proposed from Negative list be rescinded which would also be in line with GST structure.*

27. EOUs deemed to be delicensed from bonded warehouse



With the introduction of 44/2016 dated 29 July, 2016, EOUs have been deemed to be delicensed of the bonded warehouse established by them. This was introduced as a measure of ease-of-doing-business.

Issue

- With bonded warehouse being delicensed, goods brought into bonded warehouse already attracts the relevant date under section 15 of Customs Act
- Duties as applicable on the date of actual import into EOU will only be applicable
- Duties (including IGST) cannot be imposed on debonding of goods from EOU after some interval of time

Suggestion

- *No IGST be imposed on debonding of goods from EOU*
- *Amend 44/2016 to substitute 'deemed to be delicensed' with 'deemed to be bonded'*
- *Allow automatic renewal of bonding period subject to good and usable condition of all goods coterminous with EOU license validity*

F. CENTRAL SALES TAX

28. Issue of "C", "H" Forms etc. under CST Law

Earlier Form required to be issued in the old VAT law be issued at the earliest.

G. OTHERS

29. Increase in limitation period for recovery of Central Excise & Customs to 2 years

Finance Act, 2016 has amended Section 28A of Customs Act 1962 & Section 11A of Central Excise Act 1944 to extend the period of limitation from 1 year to 2 years.

Suggestion

The erstwhile time limit of 6 months for issuance of notice from the last date for filing of the annual returns be restored/ fixed.

30. Refund of duty/tax not passed on to the immediate buyer

Section 27 of the Customs Act 1962 & Section 11B of Central Excise Act 1944 provide that Any person claiming refund of any duty or interest- paid by him; or borne by him, may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs/ Excise or Deputy Commissioner of Customs/ Excise, before the expiry of one year, from the date of payment of such duty or interest



Recently Hon'ble Supreme Court in the case of *CCE, Madras v Addison & Co Ltd - 2016 TIOL 146 SC CX LB* provided that assessee is entitled for filing refund claim on basis of credit notes raised towards turnover discount.

Suggestion

In the light of aforesaid Supreme Court decision, it is suggested that section 27/ 11B be amended to give effect to the decision.

31. Concessions to Special Economic Zones (SEZ)

Section 50 of SEZ Act, 2005 provides that the State Government may, for the purposes of giving effect to the provisions of this Act, notify policies for Developers and Units and take suitable steps for enactment of any law:-

- (a) granting exemption from the State taxes, levies and duties to the Developer or the entrepreneur;
- (b) delegating the powers conferred upon any person or authority under any State Act to the Development Commissioner in relation to the Developer or the entrepreneur.

Issue

Presently, as the above provisions are discretionary, there is no mechanism to regulate the state governments in extending concessions to SEZ as envisaged in SEZ Act and Rules. Due to lack of co-ordination between central and state governments the concessions like supply of goods without payment of CST is being denied by many state governments resulting in added cost to such units.

Suggestions

It is suggested that the above provisions be made mandatory by amending Section: 51 of the SEZ Act to provide that the provisions of this Act shall have effect notwithstanding anything contained in any state tax laws.

32. Powers of the Commissioner (Appeals) under the Central Excise Act and the Customs Act to condone the delay in filing the appeal

Under section 35 of the Central Excise Act, 1944 or section 128 of the Customs Act, 1962, an appeal before the Commissioner (Appeals) is required to be filed within 60 days from the date of receipt of the order of the lower authorities. The Commissioner (Appeals) is empowered to condone the delay upto 30 days beyond 60 days provided sufficient cause is shown. It has been observed that the said condonable period of 30 days is very short and requires to be increased to either 60 days or 90 days. Further, there are many instances where meritorious cases cannot be pursued because of the above



technicality. The Courts have held that an appeal filed beyond the condonable period cannot be admitted contrary to the statutory provisions, since the Commissioner (Appeals) has no power to condone beyond 30 days.

Further, Appellate Tribunal has unlimited condonation powers.

Suggestion

- *It is, therefore, suggested that the power to condone appeals be vested with the Commissioner Appeals upto a period of 90 days instead of 30 days with a further appeal to CESTAT in case of delays beyond such period.*
- *Further, in genuine cases Commissioner Appeals be vested with condonation powers for unlimited period.*

33. Waiver from penalty if duty and interest paid before service / issue/ receipt of Show cause notice under different statute

A complete waiver from penal provisions has been granted in cases not involving fraud, collusion, willful misstatement, suppression and contraventions of provisions with the intention to evade duty in the following manner:

Section 11AC(1) of Central Excise Act, 1944 as amended provide that(a) where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, for any reason other than the reason of fraud or collusion or any willful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty not exceeding ten per cent. of the duty so determined or rupees five thousand, whichever is higher:

Provided that where such duty and interest payable under section 11AA is paid either before the issue of show cause notice or within thirty days of **issue** of show cause notice, no penalty shall be payable...."

Section 28(2) of Customs Act, 1962 as amended provides that where notice under clause (a) of subsection (1) has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of **receipt** of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said **notice is served** under clause (a) of subsection (1) shall be deemed to be concluded.";

Issue



With regards to show cause notice the usage of the word 'service' in Service tax, 'issue' in Central Excise and 'receipt' in Customs, will lead to interpretational disputes and frivolous litigation which does not seem to be the intention of the Government. This is evident from the TRU Letter II annexed to the Budget documents, wherein these words have been used interchangeably.

The difference between the meaning of the terms 'issue' and 'service' of notice cannot be ignored. In legal parlance distinction exists and its significance is high. 'Issue' of notice cannot be same as the 'service' of notice. The 'service' of notice ideally means the time when the delivery of notice is complete in the hands of the Noticee. On the other hand, 'issue' of notice would happen when its delivery is merely initiated. There may be a situation that a notice may be issued today, but may be served 2-3 years later.

Suggestion

The provisions under the three statute be harmonized so as to provide complete waiver from penal provisions where tax/ duty and interest is paid within 30 days of the 'receipt' of the notice rather than 'issue' of notice.

34. Personal Penalty

It is observed that Central Excise Department sometimes issues notices for personal penalty to junior and middle level officers of the Corporates under Rule 26 (earlier rule 209A). These type of notices are mostly issued wherever allegation or suppressions are leveled.

The employees in large Corporates are salaried employees and are professionals. Their jobs are transferable. However, issuance of personal penalty notices create unnecessary obstacles. The work is done for and on behalf of Corporates (assesseees). Excise Department should deal with the Corporates and not with individual employees.

Suggestion

Therefore, it is suggested that the provisions relating to personal penalty be removed from the statute.

35. Exemption from payment of duty by way of refund mechanism

Section 5A of the Central Excise Act, 1944 or section 25 of the Customs Act, 1962 empowers the Central Government to exempt from payment of excise duty/customs duty/However, off late, few exemption notifications have been issued under the above statutory provisions which are in effect a refund mechanism subject to fulfillment of conditions. For instance, *Notification No.102/2007 Cus dated 14.9.07* as amended which provides for refund of special additional duty of 4% leviable under section 3(5) of the



Customs Tariff Act, 1975 or *Notification No. 40/2012 ST dated 20.06.12* which provides refund of service tax to SEZ developer/unit.

The above notifications have lot of conditions and procedures. Many a times the assessee face great difficulties in claiming the said exemption. The administration of these notifications is resulting in harassment of the assessee besides breeding heavy litigations.

Suggestion

It is suggested that the present system of granting exemption through refund route be reviewed and be made simple to comply.

36. Suggestions for Reduction of Litigation

(a) Accountability of tax collectors

In the present tax laws, there is no accountability on the part of tax collectors. This leads to the misuse of powers vested in them vide the respective legislations. For proper discharge of responsibilities, accountability is a necessary counter-balance and is very essential for effective discharge of the authority vested in a person

Suggestion

In order to project a sense of even-handedness in dealing with tax payers, provisions relating to accountability be introduced and not formulated independently. The Tribunal or Commissionerate (Appeal) may impose reasonable cost for the same.

If there are rewards awarded to the departmental officers for anti-evasion cases then there ought to be penalty also for frivolous litigations.

(b) Timely information and guidance

It has been observed that the order passed by CESTAT and Adjudicating Authority/Commissioner (Appeals) does not reach to the industry timely, resulting non compliance or non timely compliance.

Further, it is felt that the time lag for the issuance of the clarifications on common problems/ issues of pertaining to industry.

Suggestion

It is suggested that all the orders passed by CESTAT and Adjudicating Authority/Commissioner (Appeals) be made available on websites for ready reference of the industry. The CBEC may play a proactive role and issue clarifications on problems / issues of industry which are similar in nature to avoid such problems resulting in litigation at a later stage.

(c) Vacancies in Tribunal



Suggestion

The vacancies in Tribunal be filled and additional benches in metro and new benches in non-metro cities be constituted to expedite the disposal of long pending cases. A fast track system of disposal of cases be introduced to deal with high revenue cases and settled issues.

(d)Members of CESTAT

Suggestion

Practicing Chartered Accountants be made eligible for being appointed as Members of the CESTAT as in case of ITAT.

37. Focus on Assessee outside the Tax Net

The tax payer who is registered is subjected to periodic returns, visits, multiple audits and extended scrutiny. Many assessee in the unorganized sectors like the iron and steel articles, plastic household goods, works contractors, interior decorators among others are able to operate with impunity due to sufficient controlled, continuous focus on them not in place. This erodes the competitiveness of the compliant while such persons work totally in the black money / parallel sector. This would also be an important move to smoothly graduate into the GST regime.

Suggestion

- *Sufficient officers say -15% of the total be allocated to unearth these assessees.*
- *The efforts be made in controlled environment where the small duty/ tax payer is not hassled while those who need to pay the duty/ tax be brought to mainstream.*
- *The systems to be transparent and have built in accountability. To include checks to avoid connivance and graft.*