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Important News of the Week

- **SEZ - Service Tax - Refund - Board Clarifications Vides CIRCULAR NO. 142/11/2011 - ST., Dated: May 18, 2011** - Notification No. 17/2011-ST has been issued superseding notification 9/2009-ST dated 03.03.2009 vide which "A new scheme is also being introduced by which units in SEZs will be able to obtain tax-free receipt of services wholly consumed within the zone and get their refunds in a much easier manner", said the Finance Minister in his Budget 2011 Speech.

  The Government today said that SEZ unit and developers would require the sanction of Unit Approval Committee for availing benefits of service tax refund. Besides, developers and units would also have to furnish original invoices for claiming benefits, the Department of Revenue said in a circular. SEZ units and developers are exempted from service tax. However, in case of services taken from outside the zone they are levied the tax which can be later refunded.

  "Unit Approval Committee (UAC) of the SEZ determines goods and services required for the authorised operations of a unit/developer under the SEZ law. Hence, approval of the UAC is necessary for availing the notification benefit, on the taxable services," it said. The UAC is one of the three tiers of administrative setup governing SEZs. The UAC at the zonal level dealing with approval of units in the SEZs and other related issues.

  The circular further said: "Original invoices are needed for claiming refund. After receiving the refund, originals can be taken back on submission of copies certified by chartered accountant."

  It further added that consolidated refund can be claimed in case a single entity has multiple SEZ units with a centralised service tax registration. However, for such a benefit separate accounts have to be maintained for receipt and use of services for the authorised operations in SEZ unit. (Please read for details in the Digest column of this newsletter).

- **Software Exporters Not to be Denied Credit for Service Tax on Inputs In SEZs:** The IT industry stands to gain hundreds of crores as the finance ministry has decided not to deny software exporters credit for service tax on inputs because they had operations both inside and outside special economic zones. So far, the tax department has held that it could not determine if the input service was used in SEZ or not and denied them credit. The Central Board Excise and Customs had issued a circular clarifying the issue on March 1. The department has prescribed

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a new mechanism for claiming exemption on taxable services consumed in authorised operations within SEZs. Service wholly consumed in a SEZ will be totally exempt from tax. Experts say the clarification is consistent with the SEZ laws. In an ideal situation, service supplies to SEZ should be treated as export and the principles determining exports should apply in this case. The SEZ Act exempts from tax services that are used in producing services or goods that are exported. Service tax is levied at the rate of 10% on over 100 services. Services not wholly consumed within the SEZ will be segregated into two categories i. e. services shared between the SEZ and the regular operations, or technically domestic tariff area units, and services exclusively used by the SEZ. In these cases, there will not be any exemption but the units will be allowed to claim refund. If it is exclusively used for SEZ operation then full refund will be available. On some services, the units located outside SEZs are not eligible for refunds. In these cases, SEZ unit will only be allowed refund on a proportionate basis depending on turnover. The service tax refund rules were first notified in 2009 but have gone through many changes. After providing for a blanket exemption to input services, the finance ministry switched to a refund mechanism for tax paid on services consumed in SEZs. But subsequently it buckled under pressure from commerce department and spared units in SEZs from paying tax on services consumed inside the zones. However, IT units located outside SEZs still had to claim tax refunds on services exported from the units located outside the zone. Since most big software exporters have SEZ and non-SEZ operations, it created problem of identifying where an input service such as a software purchased by the company was being used.

- **DEPB scheme to end on June 30, 2011:**

Rejecting exporters' repeated pleas, the Finance Ministry today said the popular DEPB tax rebate scheme will come to an end from June 30, saving revenue for the government. "All exports will be zero-rated after Duty Entitlement Pass Book (DEPB) scheme ends. Two similar kind of schemes cannot go on. It will save some revenue for the government," Revenue Secretary Sunil Mitra told reporters here.

The government spends about Rs 8,000 crore on rebating exporters for levies under the 14-year old DEPB scheme. After repeated extensions, the scheme is to end next month, but exporters are lobbying hard for its continuation. Official sources said that exporters can avail a refund of local taxes through the alternative window of duty drawback.

- **Andhra Pradesh High Court stays Service Tax On Lawyers:**

After Delhi and Guwahati High Court, Andhra Pradesh High Court also stayed the operation of a Central governments notification to levy service tax from practising advocates.

Pursuant to a Writ Petition challenging the imposition of service tax on lawyers and the prayer seeking interim relief by way of "restraining the Respondents from giving effect to directly or indirectly or acting upon the impugned provisions or collecting any service tax on the assistance provided as an officer of the Court by an advocate", the Andhra Pradesh High Court vide order dated 18.5.2011 has ordered "Since it is represented that the other High Courts have already granted stay in similar circumstances, there shall be interim stay, until further orders".

- **Participation by shareholders in general meetings under the Companies Act, 1956 through electronic mode – Pls Read General Circular No. 27/2011 dated. 20/5/2011.**

- **Participation by directors in meetings of Board / Committee of directors under the Companies Act, 1956 through electronic mode – Pls Read General Circular No. 28/2011 dated. 20/5/2011**

- **Registrar of Companies – Issue of Certificate by Digital Signature – Pls Read General Circular No. 29/2011 dated. 20/5/2011**

Important Judicial Pronouncement of the Week

- **CCE, Mumbai Vs Sunil Silk Mills (2011-TIOL-47-SC-CX)**

  - **Issue: Whether Penalty has to be equal to the duty**

  - **Held:** Excise - Rule ZQ - Penalty has to be equal to the duty - No discretion: if there is any failure to pay the amount of duty by the date specified in sub-rule (3), the assessee is liable to pay penalty equal to an amount of duty outstanding from him at the end of such month or Rs.5,000 /-, whichever is greater. The expression 'shall' used in the said provision also indicates that such a provision is mandatory. The same view is also taken in the decision of this Court in Union of India and others v. Dharamendra Textile Processors and others 2008-TIOL -192-SC-CX- LB.

- **M/s Anil Kumar Yadav Vs CCE, Pondicherry (2011-TIOL-605-CESTAT-MAD)**

  - **Issue:** Whether waiver of Penalty in varied manner at the discretion of Adjudicating authority permissible?

  - **Held:** Service Tax - Penalty - Once the lower adjudicating authority extended the benefit of Section 80 in respect of penalties under Section 76 and 77, he should have waived penalty under Section 78 also - Section 80 does not authorize the adjudicating authority to waive the penalties under some of the listed sections and to impose penalty under some of them - Penalty under Section 78 cannot be sustained.

- **M/s VPR Mining Infrastructure Pvt Ltd Vs CCE, Hyderabad (2011-TIOL-608-CESTAT-BANG)**

  - **Issue:** Whether Value of diesel and explosives supplied free of cost to service provider prima facie includible in taxable value for service Tax.

  - **Held:** Service Tax - Value of diesel and explosives supplied free of cost to service provider includible in taxable value for payment of service tax - 'Gross amount' referred to in Notification 1/2006-ST has to be the same as referred to in section 67 of Finance Act since a notification cannot grant exemption from tax on a value higher than the taxable value on which tax is otherwise due - Benefit of Notification No. 12/2003-ST also not available as there is no ingredient of sale of goods by service provider to service recipient - Pre-deposit of Rs. 10 crores ordered.

- **Petron Civil Engineering Pvt Ltd Vs CCE, Salem (2011-TIOL-598-CESTAT-MAD)**

  - **Issue:** Whether free supply materials such as cement and steel to be included in the assessable value of the commercial and industrial construction service?

  - **Held:** Stay/Dispensation of pre-deposit - Prima facie case has been made out for waiver of pre-deposit in view of the Tribunal's stay order in case of Gulf oil Corporation Ltd.

- **Sunil Hi-Tech Engineers Ltd Vs CCE, Nagpur (2011-TIOL-592-CESTAT-MUM)**

  - **Issue:** If main contractor pays Service Tax, should sub-contractor pay?

- **Held:** Service Tax – If main contractor pays Service Tax, should sub-contractor pay – Matter remanded - "oppressive" circular should be given only prospective effect: The learned Commissioner, without considering those circulars laid his hands on the circular dated 23.8.2007, which clarified that the sub-contractor was also liable to pay service tax irrespective of any payment of such tax by the main contractor. It appears, the learned Commissioner considered the circular dated 23.8.2007 to be of retrospective operation to cover the period of dispute in this case. One of the contentions which apparently escaped the attention of the learned Commissioner was that an "oppressive" circular should be given only prospective effect and that the benefit of a previous beneficial circular must be given to the assessee.

• **CST, Chennai Vs M/s E-Care India Pvt Ltd (2011-TIOL-590-CESTAT-MAD)**

- **Issue:** Is registration required for refund of unutilized credit?

- **Held:** Service Tax – Refund – Unutilized credit - Registration – No registration is required with the Service Tax authorities for claiming refund of unutilized credit.

• **M/s Xerox India Ltd (2011-TIOL-01-ARA-CUS)**

- **Issue:** Whether CVD to be levied under RSP valuation on Imported Goods for sale to Government Departments; meant for display?

- **Held:** In respect of the following activities however, imported products will be assessed to additional duty of customs on the basis of the retail sale price in terms of the proviso to sub-section (2) of Section 3 of CTA, 1975. (i) Products intended for sale to Government Departments, large customers etc.. (ii) Products intended for display and demonstration. Such goods would be exempt from the levy of Special Additional Duty in terms of Serial No.1 of the Table in the Notification No. 29/2010-Cus dated 27.2.2010 : ADVANCE RULINGS

• **Service tax applicable on maintenance, repair and overhauling (MRO) services to airlines by GMR Venture in SEZ – AAR Vides Ruling No. AAR /ST/06/201 1 in Application No. AAR/ ST /44/13/2010**

- A Tax tribunal has ruled that service tax will apply on the proposed GMR-led joint venture in Special Economic Zone to provide maintenance, repair and overhauling (MRO) facilities to domestic and foreign airlines. The ruling was given by the Authority of Advance Rulings (AAR) on an application filed by the MAS-GMR Aerospace Engineering Company, a joint venture of GMR, Hyderabad

International Airport Limited, Hyderabad and Malaysian Aerospace Engineering, SDN-BHD, Malaysia. The venture company, which proposed to set up MRO facility at an SEZ in Hyderabad, wanted to know whether the service tax would apply on services provided by the entity.

MAS-GMR Aerospace Engineering Company had argued that since the MRO services are provided in a SEZ, which technically is outside the country, no service tax should be levied.

Important Digests of the Week

- **GST progress after State Election results:**

ASIM Dasgupta, the chief of the Empowered Committee of State Finance Ministers, is no more the Finance Minister of West Bengal. Not only has his party lost the elections, but also he has lost the election to the Legislative Assembly. For the last four years, Dasgupta had been efficiently managing the committee and in association with Union Finance Minister Pranab Mukherjee has done tremendous work in taking the cause forward. Interestingly Asim was defeated by FICCI Secretary General Amit Mitra. Will Mamata Didi make him the Finance Minister and then will he be able to lead the GST team. As a business leader, Mitra should be able to effectively lead the GST team.

- **SEZ - Service Tax - Refund - Board Clarifications Vides CIRCULAR NO. 142/11/2011 - ST., Dated: May 18, 2011** TRU clarifies upon subsequent to the issuance of Notification 17/2011-ST dated 01. 03. 2011, of representations have been received seeking clarification on certain doubts. These doubts and clarifications are as follows:

	QUESTIONS	CLARIFICATIONS
1.	To claim the refund arising out of service tax paid under section 66A, no proforma is prescribed in the notification; how to claim it?	In the notification, there is no difference in treatment of service tax paid under section 66 and section 66A of Finance Act, 1994. Where refund arises, Table – A, in Form A-2 can be used for making a refund claim.
2.	(i) In the notification, what	All taxable services (under

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	is the treatment for service tax paid on taxable services which do not fall in the category of "wholly consumed services", and also are not 'shared services' ? Is refund available? (ii) Whether in the case of category (iii) services referred in paragraph 2(a) of the notification, 'proportionate refund' applies to only 'shared services' i.e. services that are used both for SEZ (Special Economic Zone) authorised operations as well as DTA (Domestic Tariff Area) operations?	section 66 or section 66A) received by a SEZ Unit/Developer for the authorised operations, have been exempted in the first paragraph of notification 17/2011-ST, subject to conditions. In Paragraph 2, conditions attached to this exemption are prescribed. In terms of paragraph 2(a), refund route is the default option for all who intend to claim the exemption granted by the notification in its first paragraph. However, an exception is provided in the form of ab initio (upfront) exemption, to the 'wholly consumed' services. Services which fall outside the definition of 'wholly consumed' services can be categorized as those which are used exclusively by the SEZ Unit/Developer, for the authorised operations in SEZ or shared with DTA operations. Para 2(d) of the notification is applicable to refund arising from 'shared services' only. Thus exemption to services exclusively used for the authorised operations of SEZ Unit/Developer, will continue to be available by way of refund, as specified in paragraph 2(a) itself, subject to other conditions. To claim this refund, Table-A, provided in Form A-2 may be used. It is clarified that only such services shall be considered as exclusively used by SEZ Unit/Developer, for the authorised operations, as they satisfy the following criteria:

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		(i) Invoice is raised in the name of the SEZ Unit/Developer or in the invoice, it is mentioned that the taxable services are supplied to the SEZ Unit/Developer for the authorised operations; (ii) Such services are approved by the 'Unit Approval Committee(UAC)', as required for the authorised operations; (iii) Receipt and use of such services in the authorised operations are accounted for in the books of accounts of the SEZ Unit/Developer.
3.	Meaning of the expression 'who does not own or carry on any business other than the operations in the SEZ' appearing in paragraph 2(a)(iii) of the notification, which creates a difference between 'standalone' and 'non-standalone' SEZ Unit/Developer, may be clarified.	The expression refers to an entity which is carrying out business operations in SEZ and also DTA. Merely having an office in the DTA for purpose of liaison/business promotion, does not restrict a SEZ Unit from availing benefit extended to a standalone unit.
4.	Whether Approval by UAC is necessary, to claim benefit under the notification?	Yes. Unit Approval Committee (UAC) of the SEZ determines goods and services required for the authorised operations of a Unit/Developer, under the SEZ law. Hence approval of the UAC is necessary for availing the notification benefit, on the taxable services.
5.	(i) Does condition (c) prescribed in paragraph 2 of the notification, restrict the non-standalone Units/Developers, from availing upfront exemption for wholly consumed services, which fall under category (i) and (ii) of para	In respect of category (i) and (ii) services listed in paragraph 2(a), upfront exemption is made available to all SEZ Units/Developers, who fulfill the conditions of notification; only in the case of category (iii), difference is created between standalone and non-

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	2(a) of the notification? (ii) For whom and for what purpose, Declaration in A-1 is required?	standalone SEZ Units/Developers. Declaration in Form A-1 is required to be produced, to a service provider, to claim upfront exemption (after striking out the inapplicable portion). This is a one-time Declaration. Original Declaration can be retained with the SEZ Unit/Developer for business record or for production to the jurisdictional Central Excise/Service Tax authorities, if need be, for any verification; a copy has to be retained by SEZ Specified Officer; self-attested photocopies of the Declaration can be submitted to service provider to avail upfront exemption, subject to fulfillment of other conditions mentioned in the notification.
6.	Meaning of the expression "total turnover" found in paragraph 2(d) of the notification is not clear: whether it refers to turnover of SEZ Unit or the entity (including DTA and SEZ Unit). This may be clarified.	Total turnover includes turnover of DTA Unit and also export turnover of SEZ Unit. This is the way to calculate proportionate refund. Table-C in Form A-2, illustrates this aspect.
7.	A Developer may not have export turnover; therefore, he cannot get refund of service tax based on the formula provided for shared services in paragraph 2(d) of the notification: therefore, it may be explained how a Developer can claim exemption under the notification?	Generally, SEZ Developers will be using category (i) services listed in paragraph 2(a), relating to immovable property located within SEZ; upfront exemption is available for these services, and category (ii) services, irrespective of whether the Developer is standalone or not. As another option, refund route is also available. In the case of category (iii) services if Developer is standalone, upfront exemption is available.

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		If Developer is not standalone, on service tax paid on category (iii) services, which are exclusively used for the authorised operations in SEZ, he can avail exemption through refund route. 'Exclusive use' explained in clarification for question No.2. may also be referred in this connection.
8.	Whether proportionate amount of service tax paid on shared services that have not been refunded after applying the formula in paragraph 2(d), shall be available to the DTA Units of the entity as cenvat credit?	Yes. Available.
9.	Whether consolidated refund claim under 17/2011-ST can be filed by an entity having more than one SEZ unit and a centralized service tax registration.	If an entity is having multiple SEZ Units with a centralized service tax registration, consolidated refund claim can be filed, provided separate accounts are maintained for receipt and use of services for the authorised operations in SEZ Unit.
10.	Whether certified copies of invoices can be used for claiming refund, if originals are needed for other statutory purpose; Whether on the basis of single invoice, one can claim proportionate refund for SEZ Unit and balance as cenvat credit	In terms of the notification, original invoices are needed for claiming refund; after receiving the refund, originals can be taken back on submission of copies certified by Chartered Accountant. On a single invoice, if proportionate refund (by SEZ Unit) and cenvat credit (by DTA Unit) needs to be obtained, then also similar system shall be followed.

- **Service Tax – Liability on value of SIM card - DGST wants Show Cause Notices to be issued** Vides DGST Letter F.No.V/DGST/21-30/Legal/10/2010/2698; Dated : May 12, 2011:

A Show Cause Notice was issued to Idea Mobile demanding service tax on the value of SIM card issued by them to the subscribers. The demand was confirmed by the original adjudicating authority and upheld by the 1st Appellate Authority. However, the CESTAT set aside the demand holding that service tax is not liable to be paid since the petitioner has paid sales tax on the SIM card, reported in 2006-TIOL-857-CESTAT-BANG.

The department filed Central Excise Appeal No.20/2006 before the Hon'ble High Court of Kerala and the same was allowed in 2009-TIOL-318-HC-KERALA-ST. The High Court held that the State Sales Tax Authorities, consequent to remand in terms of the Supreme Court judgment in BSNL & Anr. Vs Union of India & Ors., reported in 2006-TIOL-15-SC-CT-LB had dropped proceedings to levy Sales Tax on SIM card in respect of other mobile phone operators who had challenged the levy of Sales Tax and a different stand cannot be taken in the case of the petitioner despite that they have remitted Sales Tax and consequently Service Tax is chargeable on the value of the SIM card.

Against the High Court order, the party had gone in SLP before the Supreme Court and the case is slated for hearing in the Supreme Court in July 2011.

Now the DGST has information that while in most of the States/Zones, Service tax is being paid on the value of SIM cards, there are certain Zones/States where service tax is not being paid and the State authorities are collecting Sates Tax/VAT on these SIM cards.

In view of the practice followed in majority of the field formations on the issue and the matter being sub-judice , DGST wants field formations to raise protective demands on this issue to safeguard Government revenue.

- **Service Tax - Export of Services - 'Used Outside India' - Clarification worse than Confusion**

ONE of the Common conditions for export under the Export of Services Rules was that the service is provided from India and “used outside India”. Board Circular No.111/05/2009-ST, dated 24.02.2009 had clarified on the expression “used outside India” in Rule 3(2)(a) of the Export of Service Rules 2005 as prevalent at that time. The condition specified in Rule 3(2)(a) has since been omitted vide Notification 06/2010-ST dated 27 Feb 2010.

It seems an issue had been raised as to whether for the period prior to 28.2.2010 the requirement that the service should be "used outside India" invariably means the location of the recipient?

Board says, "In the stated Circular it was inter-alia, clarified that the words, "used outside India" should be interpreted to mean that "the benefit of the service should accrue outside India". It is well known that services, being largely intangibles, are capable of being paid (maybe what they meant was provided) from one place and actually used at another place."

But, CBEC Circular No. 141/10/2011 – TRU, Dated: May 13, 2011 created more confusion on concept of Used outside India.

Note: Please do write to us for any clarifications/ suggestion.

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