Tax Talk

The Monthly Service Tax Bulletin

Vol : 2 - Issue 3 June 2014 ₹ 5/-

Editorial

Congratulations to our new Prime Minister, Mr. Narendra Modi and his team on taking charge after the Bharatiya Janata Party (BJP) and its allies have achieved astounding victory in Lok Sabha polls. We hope that the newly constituted government will meet the expectations of the country. According to the Election Commission of India, there is an increase in the number of voters by 100 million since the last general elections held in 2009, making it one of the largest elections held in the world. The average election turnout this time was 66.38%, the highest ever in the history of Indian general elections.

We would also like to congratulate our new Finance Minister, Mr. Arun Jaitley. In the current scenario, Mr. Jaitley will need to figure out innovative ways to raise revenues without further intensifying inflation and tax burden. He has committed himself to restoring public finances and investor confidence as a new administration promising better days for millions of discontented Indians.

Keen to put in motion the Goods and Services Tax (GST), our new Finance Minister has expressed his desire to hold an early meeting with the state finance ministers. He also asked revenue officials to appraise him of the developments on the GST front through a separate presentation on the issue. The ruling party BJP in its manifesto has committed to "bring on board all state governments in adopting GST, addressing all their concerns". Thus, we feel that one of the major reforms to be brought in by the new government will be the introduction of GST.

The CBEC has recently issued a circular seeking feedback and suggestions for further improvement of CESTAT appeal forms. It is pertinent to note that just about a year ago, the board had notified new forms of appeal to make the new forms simpler, user friendly and useful for creation of better database. The issue of circular inviting suggestions for improvement of forms introduced recently seems to convey the message that the Board itself is unhappy and dissatisfied with the newly notified forms.

Recently the High Court of Uttarakhand in case of *"M/s Valley Hotels & Resorts vs. The Commissioner, Commercial Tax, Dehradun"* held that in restaurants when the element of service has been brought under the Service Tax net (i.e. 40% of bill amount), no Value Added Tax can be imposed on such portion of the bill. This decision established that two taxes (VAT & Service Tax) cannot be imposed on the same value of a transaction. This landmark judgment has undoubtedly given solace to the assessees when applicability of Taxes in relation to the supply and services in the hotel industry which has always been a contentious issue both under VAT and Service tax. A similar view has been taken by the Chhattisgarh High Court in the case of *"M/s. Hotel East Park & Another vs Union of India & Others"*.

In our earlier issue, we had already discussed in detail about the "input services" as per Cenvat Credit Rules, 2004. In this issue we would like to discuss in detail about "inputs" which is another ambiguous point requiring discussion. The same is detailed in page 2 of the issue.

We hope this newsletter will add some value and prove to be beneficial to the readers. We highly solicit suggestions/opinions of the readers. Please feel free to convey your views at servicetaxgoyal@gmail.com.

CA Sushil Kr Goyal

27

DUE DATES

PAYMENT	Form	Due Date
Payment for month ending May 2014 (assessees other than individuals, proprietorship firm, partnerships firm and LLP	Cash/Cheque	5th June, 2014
	E-payment	6th June, 2014
Payment under VCES (Balance of Declared Tax Dues without interest)	Cash/Cheque/ E-payment	30th June, 2014

DUE DATES

REFUND	Form	Due Date
Filing of Refund claim of unutilised Cenvat Credit (for Service Provider under Reverse Charge Mechanism) for the period July 2012 to Sept. 2012*	A (Physical)	30th June, 2014

* Refer Rule 5B of Cenvat Credit Rules, 2004 read alongwith Notification No. 12/2014-CE (N.T.) dated 3rd March, 2014

Input

The term "input" has been defined under Rule 2(k) of Cenvat Credit Rules, 2004 which has two parts. First part defines the term "input" and second part excludes certain items from the definition of input.

The "means" part of the definition:

This part of the definition divides the term "input" into four sub-parts which have been discussed hereunder:

i. all goods used in the factory by the manufacturer of the final product

It defines the scope of inputs by including all the goods used in the factory of the manufacturer. It may be noted here that the use of goods for manufacture of final products is not emphasized here. It is relevant only for manufacturers and the emphasis is mainly on the place for use of goods (i.e. factory of the manufacturer). This part has a very wide and far reaching scope but has been cut short by the exclusion of the definition.

ii. any goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products

This sub-part further expands the coverage of the first point by including even accessories in the definition of inputs which are cleared along with final products and value of which is included in the value of such final products.

It also includes goods used for providing free warranty for final products. Through an explanation, the meaning of the term "free warranty" is explained as:

"Free warranty" means a warranty provided by the manufacturer, the value of which is included in the price of the final product and is not charged separately from the customer.

This sub-part of the definition stands out from the general contention that goods being "used for manufacture" are input.

iii. all goods used for generation of electricity or steam for captive use

This subpart is a specific clause and tends to clarify the stance that goods used for generation of electricity or steam for captive use shall be eligible for credit.

iv. all goods used for providing any output service

This sub-part of the definition is related to the service providers. It is quite compact yet much extensive. Here, the stress is on nature of usage of goods. It may be seen that unlike the definition relevant for manufacturers, the premises of service provider is irrelevant here and only usage of goods matters for categorizing the same as input.

The "excludes" part of the definition:

This part curbs the ambit of the definition to a certain extent. It contains six clauses mentioning about those goods which are excluded from the definition of input, which have been discussed hereunder:

A. light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol;

It excludes goods such as light diesel oil, high speed diesel oil, or motor spirit (commonly used as petrol) from the coverage of the definition. It may be noted that other fuels like Air Turbine Fuel are considered as input.

B. any goods used for –

a) construction or execution of works contract of a building or a civil structure or a part thereof; or

b) laying of foundation or making of structures for support of capital goods, except for the provision of service portion in the execution of a works contract or construction service as listed under clause (b) of section 66E of the Act;

This clause excludes goods used for construction or execution of works contract as well as goods used for laying of foundation or making of structures for support of capital goods from the definition of inputs until and unless the same is used by a service provider for providing works contract service or construction service including services of builders or developers

C. capital goods except when used as parts or components in the manufacture of a final product;

In cases where any goods defined as capital goods has been used as parts or components in the manufacture of final products, credit of the same would be available. Though it is an excluding clause to the definition, it brings in certain items within the scope of inputs. Needless to say, capital goods would have been considered as an exclusion from the definition of inputs but vide this clause certain capital goods based on its usage are covered under the definition of input.

D. motor vehicles;

This clause of the definition states that motor vehicles are also excluded from the definition of input. Previously, only motor vehicles used for providing output services were excluded. But after amendment, this exclusion has been extended for manufacturer of final products as well.

E. any goods, such as food items, goods used in a guesthouse, residential colony, club or a recreation facility and clinical establishment, when such goods are used primarily for personal use or consumption of any employee;

This clause also prescribes a usage based exclusion of goods from the scope of input. This exclusion primarily targets hospitality related services. It specifies that any goods used by the employees for their personal use or consumption are not to be considered as input.

F. any goods which have no relationship whatsoever with the manufacture of a final product.

Goods which have no relation with the manufacture of final products are excluded and classified that it cannot be considered as input. This clause curbs the scope of first part of the definition and requires use of goods to be related to manufacture of final product.

GST Updates

Hopes on Introduction of GST :

GST was supposed to be introduced from April 1, 2010 but stiff opposition from several state governments forced the Centre to defer it. Now, with the new government, there is hope for its implementation. The previous Government had brought a Constitutional Amendment Bill to introduce the GST, but failed to get it through because of lack of consensus.

Mr P Chidambaram at the end of his tenure as the Finance Minister had expressed his disappointment for not being able to introduce GST; however he did not acknowledge the reasons causing the delay in its introduction. He also appealed to all political parties to resolve to pass the GST law in 2014-15.

GST is one of most sought after topics upfront. Our new Finance Minister has expressed his desire to hold an early meeting with State finance ministers on GST. His move is significant as the previous Government had held the opposition responsible for stalling the bill's passage.

During his tenure as the leader of the Opposition in Rajya Sabha, Mr Arun Jaitley had shown serious concerns regarding introduction of GST and had proclaimed that if the NDA government comes into power, the proposal of introducing GST would be high on their agenda. It seems that the time has come for the NDA government to unleash their promises in the form of introducing GST which would be its most precious and appreciated gift to the business community.

Likely Advantages of GST in India:

- It will boost up economic growth in India
- In GST system, both Central and state taxes will be collected at the point of sale. Both the components will be charged on manufacturing cost and thus may, reduce the tax burden for consumers.
- It will result in a simple, transparent and easy tax structure; merging all levies on goods and services into one GST.
- It may broaden the tax base.
- It will increase tax collections due to wide coverage of goods and services.
- It will result in cost competitiveness of goods and services in Global market and catalyze the globalization movement of India.

Case Decisions

No VAT When Service Tax Charged

One of the most talked about topics of recent times that has been circling around is the conflict with regard to charging of Service Tax and VAT on the supply of food and beverages as a part of services provided in restaurants. The order passed by the Uttarakhand and the Chhattisgarh High Court recently seems to be quite relieving for the concerned industry and the stakeholders as a whole. Hence, discussing the aforesaid judgements becomes indispensible at the moment for clarity in the subject matter.

Service Tax (Determination of Value) Rules, 2006 were amended w.e.f. 01.07.2012 by inserting a new Rule 2C, which provided that Service portion [in an activity wherein goods,

being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity, at a restaurant] would be 40% of the total amount and service tax has to be paid on the said amount. However the question arises whether VAT can also be charged on 40% of the billing amount on which service tax has already been charged.

There is a practice of charging Service Tax and VAT on the overlapping value by restaurants or hotels within the Hotel Industry. For instance, a customer is billed for an amount of Rs. 100, then as per the applicable service tax provisions, service tax shall be chargeable on 40% of the bill value i.e on Rs.40. On the other hand, VAT is charged on the full value of the bill i.e 100%. Therefore, with respect to 40% of the bill value, it suffers both Service Tax and VAT. Such a treatment leads to double taxation of the same amount, once as sale of goods and then again as provision of services.

The matter has throughout been in dispute and a number of cases are pending before the authorities at all levels for resolving the same. A landmark judgement was delivered by the Hon'ble Kerala High Court, wherein it was held that levying Service Tax on the supply of foods is unconstitutional. This was followed by the judgement of the Bombay High Court reinstating that Service Tax should be levied on restaurant services. Now a new dimension has come up in the matter with the recent judgement of the Chhattisgarh High Court in which it differed from the earlier decision of the Kerala High Court and held that levy of Service Tax on restaurants was intra vires the constitution.

The Chhattisgarh High Court held that Section 66E(i) of the Finance Act, 1994 which is titled as Declared Services includes the service portion in an activity wherein goods, being food or any article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity. Further Section 65B(44) of the Finance Act, 1994 includes a declared service but excludes such transfer, delivery or supply of goods which is deemed to be sale within the meaning of clause (29A) of Article 366 of the Constitution.

Section 65B (44) as well Section 66E(i) only charges service tax on the service part and not on the sale part. It indicates that the sale of the food has been taken out from the service part as was interpreted by the Supreme Court in the past.

Since levy of Service Tax on Service portion is Valid, charging VAT on same value of Service portion on which service tax has already been charged, would lead to double taxation and therefore is not a proper procedure which is being followed.

The decision of the Chhattisgarh High Court has also been affirmed in one of the recent judgements passed by the Uttarakhand High Court in the case of M/s. Valley Hotel & Resorts Vs the Commissioner of Commercial Tax, Dehradun wherein it was held that the element of service provided by the restaurants, on which service tax has been charged as per applicable Service Tax laws should not be subject to VAT.

The two judgements passed by the Chhattisgarh and the Uttarakhand High Courts are in similar lines, stressing on the fact that where on an amount, service tax has already been charged, VAT should not be levied. These decisions seem to be carving out on all new area of doubts and apprehensions. The effects of such decision may be extended onto other fields of similar tax subjection such as Software industry or Works Contract Executors. As such the litigations in these matters are large in number, we hope clarifications would soon be issued in the matter.

Regular Column

FAQ

Q We are a service provider of both taxable and non-taxable services. When it comes to Cenvat Credit, we are not able to maintain separate accounts for input services used for providing such service. What is the procedure required to be followed by us for taking credit of input services used for providing taxable service?

A In case where a service provider provides both taxable and non-taxable services and maintains separate accounts for input services used, then the service provider can take the cenvat credit of the total amount of the input services used for providing the taxable services. However, if separate accounts are not maintained by such service provider, cenvat credit should be taken as per Rule 6 (3) of Cenvat Credit Rules, 2004.

Cenvat Credit used for providing exempted services should be reversed as per Rule 6(3) of Cenvat Credit Rules, 2004. The said rules provide two options:

"(i) pay an amount equal to six per cent of value of the exempted goods and exempted services;"

This is a fixed percentage based computation where the service provider need to pay service tax amount equivalent to 6% of the value of exempted goods or exempted services.

"(ii) pay an amount as determined under sub-rule (3A);"

Rule 6(3A) is an attribution based computation and as per the said rule, amount of Cenvat Credit to be reversed (i.e. A) to be calculated as per the formula:

A = B/C*D

where B denotes total value of exempted services provided, C denotes total value of exempted as well as taxable services provided and D denotes total Cenvat Credit taken during the month.

Further the Rule also requires the assessee to intimate in writing to the Superintendent of Central Excise/Service Tax having jurisdiction over the premises of the service provider. The intimation letter should contain the name, address, registration no., description of taxable and exempted goods and date from which the option is exercised or proposed to be exercised. The option once opted will remain valid for the financial year.

Also the reversal of Cenvat Credit is to be made proportionally every month on the basis of quantum of services provided in the preceeding Financial Year.

After the year end, within 30th June on final computations, differences with provisional payments shall be refunded or paid as the case may be and the same shall be intimated to the Jurisdictional Superintendent of Central Excise within fifteen days from the date of such payment or adjustment.

Accordingly, the service provider can opt for either of the above mentioned options to reverse the Cenvat Credit attributable towards provision of exempted services.

BOOK POST

Published from :

Tax Talk

Stephen House
Room No. 64, 4th Floor
4, B.B.D. Bag (East) Kolkata - 700 001

Owner: M/s Goyal Tax Services Pvt. Ltd., Printer & Publisher: Mrs. Reena Goyal Published from Stephen House, Room No. 64, 4 B. B. D. Bag (East), 4th Floor, Kolkata - 700 001 And Printed from M/s CDC Printers Pvt. Ltd., Tangra Industrial Estate-II (Bengal Pottery), 45, Radhanath Chowdhury Road, Kolkata - 700 015. Editor: CA Sushil Kumar Goyal.