INDIRECT TAX EXPRESS

FORTNIGHTLY e-NEWS LETTER FROM M/s D A V A & ASSOCIATES
Chartered Accountants

PART-A: FROM THE EDITOR

IMPORTANT POINTS IN RELATION TO SHOW CAUSE NOTICE

Any letter or notice from the department is scary for the assessee, particularly when it is a show cause notice. A Show Cause Notice is a notice issued by a competent authority that requires a party to explain why a certain course of action should not be taken against it. If the party cannot convince the authority, that course of action is taken. It is also called Notice to Show Cause. In indirect taxes, generally a show cause notice is issued when there is alleged non-payment/short payment of tax/duty or erroneous refund. Through this section, we are trying to point out that although receipt of a show cause notice is a thing to be worried, but not to be panicked. This is because, frivolous show cause notices and corresponding confirmation of demand in adjudication is a routine matter in indirect taxes. There are some important points to be considered to prepare the reply properly. There are certain requirements/principles developed over the years through judicial precedents which a show cause notice should meet to sustain in the law. In essence, inter alia following points should be examined and kept in mind if a show cause notice is received : -

- SCN should generally be served by registered post to the assessee or his authorized agent and the date on which post has been delivered will be deemed as date of serving of SCN;
- Check for date, and signature of issuing authority;
- Go through it carefully to rule out any obvious mistake in calculations of demand, application of proper rate or presentation of correct facts;
- It should be checked whether SCN is issued within normal limitation period (One year in Central Excise and one & half year in service tax from the relevant date) or provisions of extended period (5 years) have been invoked. If invoked, whether grounds for invoking provisions of extended period are clearly mentioned or not?

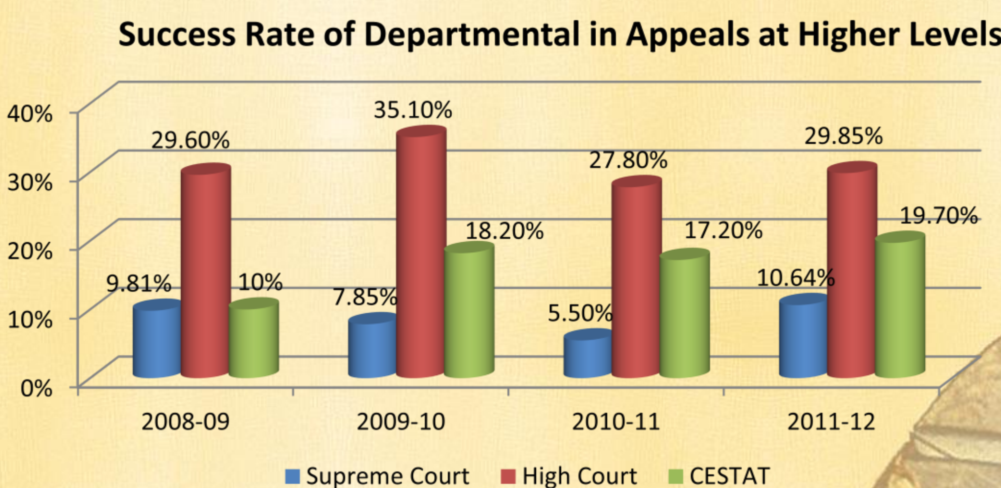
WHAT'S NEW

- As per the WBVAT order dated 13.06.2014, certain dealers have been selected for special audit u/s 43A due to mismatch of sales and purchases for the F.Y 2011-12 and/or non-compliance with the provisions of Rule 12(7) of the CST (R&T) Rules, 1957.
- Central Government, vide Notification No. 06/2014-Central Excise dt. 25.06.2014, has extended the period for excise duty cuts from 30.06.2014 to 31.12.2014.
- CBEC issues Notification No. 47/2014 - Customs (N.T.), dt. 19.06.2014, determining the rate of exchange of conversion of foreign currency into Indian currency or vice versa w.e.f 20th June, 2014 relating to import & export of goods.
- CBEC vide instructions No. 201/01/2014-CX.6 dated 26.06.2014 has instructed all chief commissioners in central excise, customs and service tax to follow judicial discipline in adjudication

Team of Indirect Tax Express E-News Letter wishes all CA's a very happy CA day (1st July). May the CA profession touches new heights in professionalism, excellence and independence in discharge of duty towards clients and other stake holders.

- It should give all essential details including the amount demanded.
- It should state the nature of contravention and provision contravened clearly;
- It should not be vague, confusing or self-contradictory;
- Copies of all the relevant documents should be given. If this is not possible, substance of documents should be furnished. Opportunity should be afforded for inspection of documents and taking extracts therefrom;
- All the grounds should be clearly mentioned. If SCN is issued on one ground, demand cannot be confirmed on another ground;
- Adjudication cannot be in excess of the duty demanded in SCN.

As already said, issue of frivolous show cause notices and confirmation of demand is a routine exercise in Indirect Taxes. At times it is seen that judicial discipline is also not followed by the department in adjudication. The CBEC has recently issued instructions on **26th June, 2014** to all the adjudication authorities in indirect taxes to follow the judicial discipline in adjudication. Hence, receipt of show cause notice does not mean by itself that tax/duty demanded has to be paid. There is proper legal re-course and in most of the cases, noticee has to fight the case at least to the CESTAT level to get the relief as department's success rate at higher level like CESTAT, High Court or Supreme Court is alarmingly low. Following chart depicts the success rate of department in appeal at higher levels.



PART-B: QUERY OF THE FORTNIGHT

An educational institute is affiliated to a university recognised by UGC and conducts various university approved courses. However, the institute is not approved by AICTE. Whether the courses conducted by the institute will attract service tax under the category of 'Commercial Training or Coaching Centre'?

(Please mail your replies to the aforesaid query to ***davaidtexpress@gmail.com)***

The best answer as adjudged by our E-news Letter Team will be published in the next issue.)

➢ Did You Know? Ever since government raised customs duty on gold import from 2% to 10%, gold smuggling has seen exponential rise. In the last financial year (2013-14) authorities across the country seized gold worth over Rs 565 crore. This was a five-fold increase over figures of previous financial year.

PART-C: FREQUENTLY ASKED QUESTIONS

Query 1: A limited company is taking the service of individual lorry owners for transportation of goods. The lorry owner does not issue any consignment note for this. The payment to the lorry-owner is made on the basis of payment vouchers. Whether the limited company has to pay service tax on reverse charge basis on payments made to individual lorry owners?

Reply by E-News Letter Team: Hiring of small lorries/tempo from individuals doesn't come under the purview of GTA as they do not issue any Consignment Note. It was held by Hon'ble CESTAT in the case of Bellary Iron & Ores Pvt. Ltd. Versus Commr. Of C. Ex., Belgaum [2010(18) S.T.R. 406(CESTAT, DIVISION BENCH, BANGLORE)], that service of transportation by goods carriages not operated by GTA, is not liable to tax under the head 'Goods Transport Agency Service'. This service is actually covered under the category of 'service provided by any person in relation to supply of tangible goods', which is not covered under reverse charge mechanism. Hence, there is no liability of service tax under reverse charge on the limited company.

Query 2: A Tour operator's gross receipt in a financial year is Rs. 12 lacs. As per notification no 26/2012-ST, abatement available to Tour operator is 75%. It means Rs 3 lacs is taxable part. And as per basic exemption vide notification no 33/2012-ST, the service tax is not liable up to gross receipts of Rs 10.00 Lakh. Whether the tour operator can take the benefit of Notification No. 33/2012 after taking abatement of 75% under Notification No. 26/2012?

Reply by E-News Letter Team: Abatement is simply concession in payment of service tax (e.g. Abatement on Service tax on GTA is 75%). The value of taxable service is not reduced due to abatement. Thus, 'Taxable Value' means the full amount before abatement. Only the tax payable part is reduced by the given percentage. For the purpose of Notification No. 33/2012 –ST, the value of taxable service is to be considered. Hence, the full value of service before abatement is required to be considered.

In this case, the taxable part will not be value after abatement, i.e Rs. 3 lacs, but the full amount before abatement i.e. Rs 12 lacs/-. Hence the tour operator cannot take the benefit of notification no. 33/2012 after taking abatement of 75% under the notification no. 26/2012. He will enjoy the benefit of notification no.33/2012, till taxable value reaches Rs. 10 Lakhs. If the value of taxable service exceeds the exemption limit, he will have to make payment of service tax on the taxable value over and above Rs. 10 Lakhs, after availing the abatement under notification no. 26/2012-ST.

Union Health Minister Dr. Harsh Vardhan has urged finance minister Arun Jaitley to increase in tax on cigarettes of all lengths by Rs 2 to Rs 3.5 per stick (from 45per cent to over 60per cent) as well as removal of tax exemption granted to bidi makers, in the upcoming budget; measures that can deter people from smoking by making a puff dearer.

PART-D: CASE UPDATES

1. **NITCO Ltd. vs. Commissioner of Central Excise, Raigad [2014 (34) S.T.R. 835(Tri.-Mumbai)]**

Issue: The head-office of the appellant had distributed Cenvat credit of service tax paid on input services without being registered as an input service distributor. Also the appellant had availed Cenvat credit of service tax paid on services which were used for trading activity of imported goods and real estate business and without being in possession of requisite documents.

Decision: The tribunal held that ISD scheme is a special Scheme and if anybody wants to avail the benefit thereof, the terms and conditions have to be complied with completely. The distribution of credit by the head office of appellant was without being registered as ISD, and without ascertaining receipt of services at its factory, thus, same held to be against the provisions of Cenvat Credit Rules, 2004. The tribunal also held that availment of Cenvat credit is not permissible when construction was for storage of imported goods and was in respect of trading activity. Moreover, prior to 2011, trading was not considered as service at all, so appellant could not have taken credit pertaining to the trading activities *ab initio.* Similarly, for insurance services, bulk of it being in connection with traded goods, the appellant could not have taken credit in respect of this service.

2. **KONE Elevators India Pvt. Ltd. V/s State of Tamil Nadu [2014 (34) S.T.R. 641 (S.C.)]**

Issue: Whether Composite contract for manufacture, supply and installation of lifts in a building is "contract for sale of goods" or a "works contract"?

Decision: The 5 Judges bench of Supreme Court by a majority view (4-1) held that:

- Nature of these contracts exposits supply of goods/materials and installation of lift on certain norms parameters, various technical and other aspects which require considerable skill and experience. Individually manufactured goods such as lift car, motors, ropes, rails, etc. are components of lift which are eventually installed at site for lift to operate in building. In constitutional terms, it was transfer either in goods or some other form. After goods were assembled and installed with skill and labour at site, it became permanent fixture of building. Hence fundamental characteristics of works contract were satisfied.
- The Works contract is an indivisible contract but, by legal fiction, is divided into two parts, one for sale of goods, and the other for supply of labour and services;
- The concept of "Dominant nature test" or for that matter, the "Degree of intention test" or "Overwhelming component test" for treating a contract as a Works contract is not applicable;
- The term "Works contract" as used in Clause (29A) of Article 366 of the Constitution takes in its sweep all genre of Works contract and is not to be narrowly construed to cover one species of contract to provide for labour and service alone;
- Once the characteristics of Works contract are met with in a contract entered into between the parties, any additional obligation incorporated in the contract would not change the nature of the contract.

"Do not pray for tasks equal to your powers. Pray for powers equal to your tasks" – Philips Brooks

ANSWER TO LAST FORTNIGHT'S QUERY:

Query: A person is a director in more than one company, and is getting remuneration from all such companies in which he is a director. Whether all the companies who are paying remuneration to the director are liable to pay service tax under reverse charge?

Best Reply: As per the amended Notification No. 30/2012- ST dated 20.06.2012, the service provided by a director to the company is leviable to service tax under reverse charge mechanism. Accordingly, service tax is to be paid by the service receiver i.e. company. Section 65B(44) of Finance Act, 1994 as introduced w.e.f. 1-7-2012 excludes services provided by employee to employer from the definition of service. Now the question arises whether a person who is a director in more than one company and getting remuneration from all the companies can be called an employee in all the companies where he is a director in view of the fact that TDS is deducted from the remuneration paid to him under section 192?

As per explanation given in Sec 269 of The Companies Act, 1956 "Whole Time Director" includes a director in whole time employment of the company and has active participation in the affairs of the Company. Whereas the term 'Executive Director' is not defined in Companies Act 1956. Executive director are usually those who are involved in day to day affairs & they usually have deep knowledge of the company's business. Executive directors are normally employed under service contracts providing for a salary and setting out specific executive duties.

Records like Form 32 (option for executive director is taken), Terms of Agreement (responsibilities and remuneration payable), Resolution, and Article of Association of the company should establish that person is executive director. Besides deducting TDS U/s 192 there must be a stamped agreement in writing between the Company and the concerned Director showing the relationship of Employee and Employer. Mere deduction of TDS u/s 192 is not indicative of employer-employee relationship. Generally an executive director is understood as a whole time director. Accordingly, it is arguable whether a person can be executive director in more than one company. Therefore, it is impractical that a person who is director in more than one company is employee in all the company. Accordingly, safer side will be to pay the service tax on the remuneration paid to the director under reverse charge.

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