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INDIRECT TAX EXPRESS

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

PART-A: FROM THE EDITOR

AUDIT IN SERVICE TAX- WHETHER ULTRA-VIRES THE FINANCE ACT, 1994?

Service tax audit is a tough time for the assessee. The audit party is always an unwelcomed guest. The assessees fear a visit by the audit party who usually come with a preconceived notion that the assessee must have wilfully evaded service tax. However, the validity of service tax audit itself is under challenge. There is no provision in the Finance Act, 1994 with respect to service tax audit except section 72A (Special Audit) which was inserted w.e.f. 28.05.2012, Section 72A empowers the Commissioner to direct an assessee to get his accounts audited by a chartered accountant or cost accountant nominated by him, to the extent and for the period as may be specified by him. However, service tax department and CERA audit team of Comptroller & Auditor General of India regularly conducts service tax audit of assessees. This audit is conducted by them under Rule 5A(2) of Service Tax Rules, 1994, an extract of which is reproduced below:

"Every assessee shall, on demand, make available to the officer authorised under sub-rule (1) or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India, within a reasonable time............"

The dispute is regarding the validity of Rule 5A(2) against the Finance Act, 1994 which empowers the department and CERA team to conduct service tax audit of the assessees.

In the case of **M/s. A.C.L. Education Centre (P) Ltd. vs. UOI & Ors.[2014 (33) S.T.R. 609 (All.)]**, the Hon'ble Allahabad Court upheld the validity of rule 5A(2), but held that audit is to be done by a practicing CA or Cost Accountant as per Section 72A. Furhter, in the latest case of **M/s Travelite (India) V. UOI [Writ Petition (C) No. 3774 of 2013]**, the Hon'ble Delhi High Court declared Rule 5A (2) as ultra vires the Finance Act, 1994 and accordingly as a result, department cannot conduct service tax audit of assessees. The Hon'ble Delhi High Court held that ***"Rules only give effect to statute's provisions and intent and cannot be used to create substantive rights, obligations or liabilities that are not within the contemplation of the statute. Rule 5A(2) must consequently be struck down."***

WHAT'S NEW

- Central Government, vide Notification No. 02 /2014-Customs (SG) dated 13.08.2014, has imposed safe-guard duty on import of certain tariff items into India.
- Central Government, vide Notification No. 24 / 2014 – CE (N.T.) dated 12.08.2014 has notified interest on delayed refund of pre-deposit under excise and service tax @ 6% p.a.
- Central Government, vide Notification No. 16/2014- Service Tax dated 06.08.2014 has notified that Chief commissioner will now be referred as Principal Chief Commissioner and Commissioner will be referred as principal commissioner.
- Central Government, vide Notification No. 37 /2014-Customs (ADD) dated 08.08.2014 imposed anti-dumping duty on imports of sodium nitrate from specified countries.
- Payment of all taxes under WBVAT electronically only through GRIPS Portal, w.e.f 01.10.2014, has been made mandatory vide Notification No. 1239-F.T dated 22.07.2014

"Freedom and power bring responsibility. That responsibility rests upon this assembly, a sovereign body representing the sovereign people of India." (Late Shri J.L. Nehru, the first PM on the eve of India's Independence, towards midnight on 14 August 1947 delivered to the Constituent Assembly of India in New Delhi.). ***Team 'Indirect Tax Express' Wishes You All A Very Happy Independence Day.***

So far audit by CERA team is concerned, the issue is whether CERA, the audit wing of Comptroller & Auditor General of India can conduct the audit of a private assessee. In the case of **SKP Securities Ltd & Infinity Infotech Pvt. Ltd. vs Deputy Director (RA-IDT) [2013 (29) S.T.R. 337 (Cal.)]**, the single bench of Hon'ble Kolkata High Court ruled that the notice issued by CERA for conducting Service tax audit of a private assessee cannot be sustained and was liable to set aside. However, the matter was referred to the division bench. Recently, in the case of **Association of the Unified Telecom Service Providers of India and others vs. UOI and others [2014-TIOL-31-HC-DEL-MISC]- (AUTSPI Case in short)**, the Hon'ble Delhi High Court upheld the powers of CAG to audit the receipts of Telecom companies, stressing on the fact that when the CAG has been given its powers by the Constitution itself, any contrary provisions in any of the statutes made by the parliament will not hold against it. Special Leave Petition Filed by the appellant in the Supreme Court was dismissed in favor of Central Government upholding decision of Delhi High Court. In this case the Central Government had agreement with the telecom service provider and a certain percentage of the receipts was payable to the Central Government. Although the Apex Court upheld the validity of CERA audit in this case, but it is still debatable whether ratio of the judgment is applicable in case of all private service tax assessees.

Hence, as far as special audit by a chartered accountant or cost accountant, under Section 72A is concerned, there is no dispute regarding the legality. Audit by department officers is now declared ultravires. The assessee may deny the audit by the department based on the Delhi High Court judgment in **Travelite (India)** case. However, it does not appear that department will forgo audit powers and hence amendment is expected in the Finance Act, 1994. So far audit by CERA team is concerned, the picture becomes hedgy in view of the Apex Court judgment in AUTSPI case and only time will decide the final outcome.

ANSWER TO LAST FORTNIGHT'S QUERY:

Query: An assessee is engaged in the manufacture and sale of goods and is registered under West Bengal VAT. The goods are sold ex-factory, i.e. sale is completed on the factory-gate. The risk and responsibility of the assessee ceases to exist as soon as the goods are loaded on the buyer's truck or his transport agent's truck. Sometimes, for the sake of convenience of the buyer, the assessee arranges transportation and Insurance. All these costs are extra and payable by the buyer and are shown in the invoice separately. Whether West Bengal VAT is payable on freight charges against transportation arranged on buyer's behalf by the assessee?

Best Reply: Freight charges should not form part of sale price for calculation of West Bengal VAT as sale is completed at the factory gate itself. If the property in goods are transferred to the buyer at the premises of the seller i.e sale is made at factory gate of the seller, transportation charges incurred are not included in assessable value. This view was taken by the Hon'ble Supreme Court in the landmark judgement in the case of **Escorts JCB Ltd. vs. Commissioner Of Central Excise, Delhi-II [2002 (146) E.L.T. 31 (S.C.)]**. Although the case is related to Central Excise, still the ratio should be applicable in VAT. **[Reply given by: Our E-News Letter Team]**

PART-B: QUIZ TIME !!

1. When service tax was first introduced in India in 1994, 3 services were covered. Name those 3 services.

2. What was the total amount of tax collected by the Central Government under the Service Tax Voluntary Compliance Encouragement Scheme introduced in 2013?

3. Which is the first State to implement Value Added Tax in India and with effect from which date?

(Please mail your replies with your name and mail id to ***davaidtexpress@gmail.com)***

(The first 3 correct answers will be published in the next issue with name & mail id of the sender.)

Relying on a recovery seen in customs and excise duty receipts in the month of June, Finance minister Shri Arun Jaitley on Monday at the annual conference of chief commissioners and directors general of customs, central excise and service tax, said "Revenue targets in the case of indirect taxes for the current financial year 2014-15 are challenging but are very much achievable."

PART-C: CASE UPDATES

1. **Travelite (India) V/s Union of India & Ors [W.P (c) 3774/2013, C.M.No. 7065/2013, Delhi High Court]**

Issue: Whether Rule 5A(2) of the Service Tax Rules, 1994 is ultra vires the provisions of the Finance Act, 1994? Whether CBEC Instruction No: F.No.137/26/2007-CX.4 dated January 1, 2008 regarding Audit by Department is contrary to the Finance Act?

Decision: The Hon'ble Delhi High Court held that Rules only give effect to statute's provisions and intent and cannot be used to create substantive rights, obligations or liabilities that are not within the contemplation of the statute. The only type of audit within the contemplation of the Statute is that stipulated for in Section 72A of the Finance Act, i.e. a Special Audit, when only certain circumstances are fulfilled. The Parliament thus had a clear intention to provide for only a special audit. Parliament did not intend to provide for a general audit that *"every assessee"* may be subjected to, "*on demand*". Any attempt to include provision for such a general audit through the back-door, such as through the impugned rule, is ultra-vires the rule making power conferred under Section 94(1). Rule 5A(2) must consequently be struck down. The impugned CBEC instruction, being in furtherance of Rule 5A(2), which rule is *ultra-vires* the Finance Act, 1994, is void for the same reasons. Executive instructions without statutory force, cannot possibly override the law; consequently, any notice, circular, guideline etc. contrary to statutory laws cannot be enforced. Further, the Hon'ble Delhi High Court also held that the Service Tax Audit Manual is merely an instrument of instructions for the service tax authorities; it is but obvious that it is not a statutory instrument and has no statutory force. Thus, Rule 5A(2) cannot be sought to be justified as against it.

2. **M/S Heidelberg Cement (India) Ltd & M/S Ultra Tech Cement Ltd v. Commissioner Of Central Excise, Nagpur, Raigad [2014-TIOL-1433-CESTAT-MUM]**

Issue: Whether sale of Cement in 50 kg bags to builders/developers/ manufacture of RMC would qualify as sale to institutional consumers? Whether such sale is eligible for Concessional Excise Duty under Sr. No. 52 of Notification No. 12/2012-CE dated 17.9.2012. ?

Decision: The Hon'ble CESTAT, Mumbai, held that 'institutional consumer' is defined to mean consumers like transportation, Airways, Railways, Hotels, Hospitals or any other service institutions who buy packaged commodity directly from the manufacturer and 'industrial consumer' means those who purchase the packaged commodity for use by that industry. The sale of cement for manufacture of RMC would definitely come within the category of sale to industrial consumers. As regards builders/developers etc., construction activity is a service activity as is well understood and there is also a Service Tax levy on construction activity. Only certain service providers have been specifically mentioned in the explanation of Package Commodity Rule 1977; others are covered by the expression 'like' and 'any other service institution' similar to those specifically mentioned Therefore, sale to such builders/developers would certainly qualify as sale to institutional consumers. and cement bags of 50 kg cleared to industrial or institutional consumers, which is not subject to fixation of MRP, is eligible for concessional rate of duty as per Notifications No. 12/2012-CE dated 17.9.2012.

'GST will be a reality soon as consultation process with the state governments is now in final stages. GST will result in simple and unified tax structure which will bring transparency and efficiency in tax administration," Minister of State for Finance Ms Nirmala Sitharaman said.

PART-D: FREQUENTLY ASKED QUESTIONS

Query 1: If a company purchases a new AC & seller installs the same in company's premises. Will this installation charge come under the purview of works contract service under reverse charge?

Reply by E-News Letter Team: - Works contract has been defined in Section 65B of the Finance Act, 1994 as a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any moveable or immoveable property or for carrying out any other similar activity or a part thereof in relation to such property. In this case, the contract is predominantly for sale of ACs, i.e. transfer of property and not provision of service. Therefore, installation of AC is not covered under purview of works contract.

Query 2: A Goods Transport Agency (Ltd. Co.) has hired individual laborers for loading and unloading of goods in vehicles. These labourers are paid either on basis of units loaded and unloaded or number of days worked. Whether GTA is liable to pay Service Tax on Reverse Charge Mechanism on such payments made to laborers?

Reply by E-News Letter Team: - According to Rule 2(g) of Service Tax Rules, 1994, Supply of manpower means supply of manpower temporarily or otherwise, to another person to work under his superintendence or control. If different individual laborers are hired by any organization or business directly, without engaging the service of any other person in any manner, in such case, the laborers are said to be contractually employed by the company. There is no intermediary and no consideration is paid to any intermediary. In those cases, provisions of reverse charge are not applicable.

Editor

CA Narayan Kr. Agarwal

Editorial Team:

CA Keshav Poddar
Ms Stuti Tibrewal
Mr. Abishek Gupta

In case of any queries/feedback/suggestions, mail to us on davaidtexpress@gmail.com

Prepared By:

M/s D A V A & ASSOCIATES
(Chartered Accountants)

'Mercantile Building';
Block-B, Room No.-8; 1st Floor,
9, Lal Bazar Street, Kolkata-700001
Office Ph: (033) 22313940/ 40046893
Mobile: +91 9874355518/9433135518
E-mail id: davakolkata@gmail.com
Web: davaassociates.com
Other offices at: Chandrapur, Delhi, Kolkata &Thane