A2Z TAXCORP LLP
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Indirect Tax and Other Laws Communique
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This bulletin brings to you the highlights of recent updates and important judgments in the field of indirect taxation along with key inputs from other fields to keep you abreast of all the latest happenings.

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SERVICE TAX

RECENT CASE LAWS

- **Notional interest on interest free security deposit cannot be added to the rent for levy of service tax on renting of immovable properties**

Murli Realtors Pvt. Ltd. and others Vs. Commissioner of Central Excise Pune-II [2014-TIOL-1728-CESTAT-MUM]

Murli Realtors Pvt. Ltd. and others (**“the Appellants”**) are lessors of immovable property who have leased out their premises on long time lease ranging from 5 to 10 years in consideration of lease rentals on a monthly basis. In addition to these rentals, they are also taking interest free security deposits from the lessees which vary from six months' rent to one year's rent (**“security deposits”**) to secure default in payment of rentals, default in payment of utility charges, if any, and damage caused to the property other than the usual wear and tear. These deposits are returned to the lessee at the end of the lease period.

The Department contended that the interest free security deposit has suppressed the lease rentals and, therefore, notional interest at the rate of 18% of the deposit should be added to the rent agreed upon between the parties for the purpose of levy of service tax on renting of immovable property.

The Hon’ble CESTAT, Mumbai relied upon the following judgments:

- ***Moriroku UT India (P) Ltd. Vs. State of UP [2008 (224) ELT 365 (SC)];***
- ***Commissioner of Income Tax Vs. J.K. Investors (Bombay) Ltd. [248 ITR 723 (Bom.)];***
- ***Central Excise, Mumbai -III Vs. ISPL Industries Ltd. [2003 (154) ELT 3 (SC)];***
- ***Intercontinental Consultants and Technocrafts Pvt. Ltd. Vs. Union of India &Anr. [2012-TIOL-966-HC-DEL-ST]***

and held that in the absence of specific provision in law and in the absence of any evidence led by Revenue to show that the security deposit taken has suppressed the rent, the impugned demands are not sustainable. Further, the Hon’ble Tribunal do not find any reason for adopting a rate of 18% per annum as rate of interest, which is neither the bank rate of interest for deposits or loans or the market rate of interest. Adoption of such an arbitrary rate militates against the concept of valuation. In view of the foregoing, notional interest on interest free security deposit cannot be added to the rent agreed upon between the parties for the purpose of levy of service tax on renting of immovable property.

- **Services provided for transportation of ‘waste’ through pipeline is not taxable as transportation of ‘goods’ through pipeline**

Gujarat State Fertilizers and Chemicals Ltd. Vs. Commissioner of Central Excise, Vadodara [2014-TIOL-1729-CESTAT-AHM]

Gujarat State Fertilizers and Chemicals Ltd. (**“the Appellant”**) has rendered services of transportation of effluent through pipeline or conduit to Heavy Water Project (**“HWP”**) for consideration. The Department contended that the Appellant is liable to pay Service tax on the services of transportation of effluent through pipeline or conduit to HWP under ‘Transportation of goods through pipeline or conduit’ taxable under erstwhile Section 65(105)(zzz) of the Finance Act, 1994 (**“the Finance Act”**).

It was held by the Hon’ble CESTAT, Ahmadabad that as per definition of 'goods' given under Section 2(7) of the Sales of Goods Act, 1930 (**“the Sale of Goods Act”**), the goods has to be a category of 'movable property'. Movable property in general trade parlance is considered as a property in goods which can fetch certain price.

However, effluent discharge facility is for disposal of a waste which is not being purchased by any person but is only being disposed of by utilizing the services of the Appellant. Hence, services of transportation provided by the Appellant are not for the 'goods' as defined in Section 2(7) of the Sales of Goods Act and the same cannot be considered as a service provided for transportation of goods as per Section 65(105)(zzz) of the Finance Act.

- **Input service distributor is not required to be a manufacturer or output service provider to avail Cenvat credit**

Moser Bear India Ltd. Vs. CCE, Noida [TS-368-Tribunal-2014(DEL)]

The head office of Moser Bear India Ltd. (**“the Appellant”**), located at Delhi is registered as an input service distributer (**“ISD”**) in terms of Rule 2(m) of the Cenvat Credit Rules, 2004 (**“the Credit Rules”**). The head office was discharging Service tax liability under Reverse Charge for the various services received by them from foreign country. The Service tax so paid by them on the various services, were actually being utilized by the Appellant in their factory located at Noida, which was distributed by the head office to the Appellant’s factory at Noida. The Appellant was utilizing the same for discharge of their Service tax liability.

The Department contended that in as much as the Service tax was being paid by the head office which was neither engaged in the manufacture of any excisable goods nor providing any output services, were not entitled to avail the said credit and in turn not entitled to pass on the said credit to the Appellant’s factory located at Noida.

The Hon'ble CESTAT, Delhi held that:

- In the light of Rule 7 of the Credit Rules which provides the manner of distribution of credit by ISD, the basic requisite condition for the distribution of the said credit is that the ISD receives the invoices towards purchase of input services and pays the Service tax. There is nothing in the said Rule to suggest that the head office or the office of the manufacturer should be himself in a position to provide any output service or to manufacture any excisable goods.
- Further, Cenvat Credit on the input services is not dependent upon the actual receipt of the services in the factory unlike the credit of the duty paid on the inputs, which is dependent upon the actual receipt of the inputs or the capital goods in their factory. As such, when the services were first received by the head office and then transferred to the factory for further utilization, it cannot be made a ground for denial of the credit.

➢ **Unjust Enrichment not applicable on refund of Service tax paid when no services are received under reverse charge and payment thereof had been adjusted between associated enterprises**

Wolters Kluwer India Ltd. Vs. Commissioner of Service Tax, Delhi [(2014) 48 taxmann.com 97 (New Delhi – CESTAT)]

Wolters Kluwer India Ltd. (**"the Appellant"**) entered into an agreement with Wolters Kluwer Amsterdam (**"foreign associated enterprise"**) for receiving services of 'Management or Business Consultant' from abroad in respect of management of their ongoing office in India and also to provide service related to Mergers and Acquisitions. Foreign associated enterprise provided services related to ongoing management of their India office and raised consolidated invoice thereafter. The Appellant paid the full value of the invoice and also deposited Service tax under reverse charge.

Later, the Appellant found that it had not received merger and acquisition services and accordingly, got back the payments from foreign associated enterprises and filed refund claim of Service tax paid on the stated service.

The Department denied refund on ground of unjust enrichment alleging that the Appellant's claim was an afterthought and a mere financial adjustment between associated enterprises was made just to suit their benefit.

The Hon'ble CESTAT, Delhi held that if services under reverse charge are not actually received, service recipient is entitled to refund of Service tax being paid by him, provided he has not taken Cenvat credit thereof. The Department cannot raise issue of unjust enrichment inasmuch as it is tax deposited by the service recipient himself which is being sought to be refunded. The Hon'ble Tribunal further held that if services have not been received and payment made for said services had been adjusted between Indian and foreign Company, said corresponding value of services would not be liable to Service tax. Thus, the matter was remanded back to verify factual position as to whether services were received by the Appellant and if not, to grant refund without raising issue of unjust enrichment.

CENTRAL EXCISE

RECENT CASE LAWS

- **No personal penalty can be imposed on employees when penalty on the Company is set aside**

Commissioner of Central Excise Vs. Chandresh C. Shah [(2014) 48 taxmann. com 236 (Gujarat)]

In the instant case, the Revenue issued a Show Cause Notice (**"SCN"**) against Doshion Ltd. (**"the Company"**) for recovery of wrongly availed Cenvat credit along with interest and penalty thereon. Further, personal penalty was also imposed against authorized signatory/ managers of the Company (**"the Respondents"**) under Rule 15(3) of Cenvat Credit Rules, 2004 (**"the Credit Rules"**) and Rule 26 of Central Excise Rules, 2002 (**"the Excise Rules"**) The Adjudicating Authority (**"the AA"**) confirmed the recovery of reduced amount of Cenvat credit, interest and penalty against the Company and imposition of penalty against the Respondents. However, on appeal the Hon'ble Ahmadabad Tribunal quashed and set aside the order of the AA.

The Department preferred an appeal against the order of the Tribunal to the Hon'ble High Court of Gujarat. The High Court High Court did not admit appeal relating to penalty on ground that there was not even a prima facie case of fraud, collusion, evasion, etc., by company but the Department challenged deletion of penalty levied on managers, etc.

The Hon'ble High Court held that since there was no material even to suggest prima facie case of fraud, collusion, evasion, etc. against company and penalty levied on company had been finally set aside, no penalty could be levied on managers, etc. Hence, Tribunal order setting aside penalty on managers, etc. was upheld.

- **Deemed exports would be treated as physical exports for the purpose of claiming refund under the Cenvat Credit Rules, 2004.**

Commissioner of Central Excise and Customs Vs. Anita Synthetics Private Limited [2014 (9) TMI 368 – Gujarat High Court]

Anita Synthetics Private Limited (**“the Respondent”**) is a 100% EOU and made clearance of goods to another 100% EOU. Such clearance is treated as a deemed export as mentioned in the EXIM Policy. Therefore, the Respondent claimed the refund of Cenvat credit as per Rule 5 of the Cenvat Credit Rules, 2004 (**“the Credit Rules”**). The concerned Authority rejected the refund application.

The Commissioner (Appeals) and the Hon’ble CESTAT of Ahmadabad allowed the refund claims of the Respondent.

Being aggrieved the Department filed an appeal before the Hon’ble Gujarat High Court.

The Hon’ble High Court held that the facts and circumstances and the issues involved in the present case are squarely covered by the facts and circumstances and the issues involved in the case of ***Shilpa Copper Wire Industries [2011 (269) E.L.T. 17 (Guj.)].***

The Apex court in the case of Shilpa Copper Wire Industries (supra) had held that clearance made by one 100% EOU to another 100% EOU, which are deemed exports are to be treated as physical exports for the purpose of claiming refund of unutilized Cenvat credit under Rule 5 of the Credit Rules.

Accordingly the Hon’ble Court dismissed the appeal of the Department.

- **Cheque discounting charges is an interest and is not includible in the assessable value of the goods for levying Excise Duty**

Cadbury India Ltd. Vs. Commissioner of Central Excise-Indore [(2014) 48 taxmann.com 78 (New Delhi - CESTAT)]

Cadbury India Limited (**“the Appellant”**) filed an appeal against the order of the Commissioner (Appeals) wherein the learned Commissioner held that the cheque discounting charges would be includible in the assessable value of the goods.

Being aggrieved, the Appellant filed an appeal before the Hon’ble CESTAT.

The Appellant relied upon the finding of the Apex Court in the case of ***CCE Vs. Vikram Detergent Ltd. [2001 (127) ELT 641]*** wherein it had been held that bank charges in respect of clearance of outstation cheques weren’t includible in the assessable value of the goods. Further, the same view had been taken by the Hon’ble Tribunal in case of ***Hindustan Lever Ltd. Vs. CCE* [1997 (89) ELT 720 (Tri.)]**, that cheque discounting charges weren’t includible in the assessable value of goods.

The Hon’ble CESTAT held that cheque discounting charges is nothing but interest charged by the bank for delay in realization of payment. Further, the Hon’ble Tribunal relied upon the judicial pronouncement of the Apex Court in the case of ***Government of India Vs. Madras Rubber Factory Ltd.* [1995 (77) ELT 433]** wherein it was held that cheque discounting charges wouldn't be includable in the assessable value of goods. Accordingly, it was held that cheque discounting charges are not includible in the assessable value of goods.

CUSTOMS

RECENT CASE LAWS

- **The presumption of unjust enrichment is a rebuttable presumption**

Commissioner of Customs Vs. Apple India Pvt. Ltd. [2014-TIOL-1544-HC-KAR-CUS]

In the instant case, Apple India Pvt. Ltd. (**"the Respondent"**) filed a refund claim of Rs.5,22,27,424/- of Special Additional Duty (**"SAD"**) in terms of the Notification No.102/ 2007-Cus. (N.T.) dated September 14, 2007. The authorities rejected the said claim of refund on the grounds that the Respondent has failed to prove that they had not passed on the incidence of duty to the customers or any other person and also on the ground that they have not furnished required documents in relation to refund claims.

The Hon'ble Karnataka High Court has held that presumption under Section 28 of the Customs Act, 1962 (**"the Customs Act"**) that incidence of the duty has been passed on to the customers is a rebuttable presumption. It is relevant to note that Section 28D of the Customs Act provides that there arises a presumption that the incidence of duty has been passed on to the customers. It also states that every person who has paid the duty on any goods under the Customs 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.

However, in the instant case, the Respondent has rebutted such presumption of passing the duty to the buyers by producing an auditor report wherein it is stated that burden of duty has not been passed by the Appellant to its customers either directly or indirectly.

- **The Department cannot take a stand contrary to the instructions of the CBEC**

Commissioner of Customs, Tuticorin Vs. Sterlite Industries India Ltd. & Others [2014-TIOL-1411-HC-MAD-CUS]

In the instant case, the issue was whether demurrage charges and despatch money is required to be included in the assessable value of goods. The Hon'ble Tribunal relied upon a Larger Bench decision in ***Indian Oil Corporation Vs. CC, Calcutta [2000 (122) ELT 615]***, wherein it was held that demurrage charges incurred by oil companies is not required to be included in the assessable value of the crude petroleum oil and other petroleum products. The Hon'ble Tribunal referred two Circulars issued by the Central Board of Excise & Customs (**"the CBEC"**):

- Circular F.No.467/21/89-Cus.V, dated August 14, 1991 (**"Circular No. 467"**), which states that demurrage charges and despatch money may not form a part of the assessable value.

- Circular No.14/2001-Cus, dated March 2, 2001 (**“Circular No. 14”**), which states that demurrage charges and despatch money are required to be added to the assessable value.

  In the instant case, since the transactions related to period prior to March 2, 2001, the Hon’ble Tribunal placing reliance on the Circular No. 467, which was applicable during the relevant period, rejected the order of the Commissioner (Appeals) wherein it was held that demurrage charges and despatch money are required to be added to the assessable value for the period prior to March 2, 2001.

  On appeal by the Revenue, the Hon’ble Madras High Court held that since the transactions in the instant case related to a period prior to March 2, 2001, the demurrage charges and despatch money were not includible in the assessable value as Circular No. 467 was prevalent during that time. Accordingly, the Department was not permitted to take a stand contrary to the instructions issued by the CBEC during the relevant period.

➢ **Additional duty of Excise is leviable on an imported article only if Excise duty is levied on a like article manufactured in India**

Shivam Engineering Company Vs. Union of India [2014-TIOL-1563-HC-AHM-CUS]

In the instant case, Shivam Engineering Company (**“the Petitioners”**) have filed a writ petition before the Hon’ble Ahmadabad High Court requesting to prohibit the Revenue from levying Additional Duty of Excise (**“CVD”**) under Section 3(1) of the Customs Tariff Act, 1975 (**“the Customs Tariff”**) as per the rates prescribed under Heading No. 89.08 of the Central Excise Tariff Act, 1985 (**“the Excise Tariff”**). Heading 89.08 of the Excise Tariff covers vessels and other floating structures for breaking up.

The Hon’ble High Court has placed reliance on the judgment of ***Hyderabad Industries Ltd. Vs. Union of India [2002-TIOL-369-SC-CUS-CB]***, wherein the Hon’ble Supreme Court had held that when articles which are not produced or manufactured cannot be subjected to levy of Excise duty, then on the import of like article, no CVD can be levied under the Customs Tariff. The Hon’ble High Court further observed that import of vessels and other floating structures for breaking up does not constitute manufacture in India, so no Excise duty is leviable in India. Accordingly, it has been held that no additional duty is leviable on the vessels and other floating structures imported into India for breaking up, under section 3(1) of the Customs Tariff, as per the rate prescribed under Heading No.89.08 of the Excise Tariff.

DELHI VALUE ADDED TAX

NOTIFICATIONS/CIRCULARS

- **Adjustment of Input Tax credit in respect of issuance of Debit Note or Credit Note related to discounts**

The Delhi Value Added Tax Department has issued Circular No. 11 of 2014-15 dated September 8, 2014 (**"the Circular"**) to clarify reversal of Input Tax Credit in respect of Credit Note (**"CN"**) or Debit Note (**"DN"**) issued in relation to discounts.

In terms of Section 10(1) of the DVAT Act, 2004 (**"the DVAT Act"**) where a purchaser of goods has been issued CN or DN, he is required to adjust his ITC in the tax period when such CN or DN is issued. However, such adjustment would be possible only in the context of sales and purchases made in Delhi.

Instances where CN can be issued by the Selling Dealer

The Circular has enumerated the following instances where CN can be issued by the selling dealer:

(i) Trade Discount**,**

(a) Discounts given at the time of sale

(b) Post sale discounts

(ii) Relating to goods returned or rejected by the purchaser.

(iii) Due to variation in rate or quantity in individual sale invoice;

(iv) Consideration for other facilities offered to the purchaser, such as, rent for window display, sign-boards, lease rental of premises, other establishment expenses, etc.

(v) Reimbursement of expenses incurred by purchaser on behalf of seller.

(vi) Cash Discount.

The seller may adjust the ITC by revising the return or by making the adjustment in current tax period returns in terms of Section 8 of the DVAT Act. The reduction in ITC by the buyer is independent of reduction in output tax liability by the seller.

Issuance of CN against cash discount

The CN issued in respect of cash discount, reimbursement of expenses and consideration for other facilities offered to purchaser wouldn't be adjustable against the output tax liability.

Since the above instances doesn't affect the output tax liability, they are not required to be reported in Annexure 2C and Annexure 2D of the Vat Return.

Adjustment of ITC by the buying Dealer

ITC would be adjusted by the buying dealer in the circumstances where the CN or DN issued to him is in respect of trade discount, goods returned or rejected by the dealer and due to rate or quantity variation.

- **No waiver of penalty under Amnesty Scheme for false maintenance of Books and Accounts if there is no tax deficiency**

It is relevant to note that penalty under Section 86(15) of the DVAT Act, 2004 (**"the DVAT Act"**) is leviable for preparation of false, misleading and deceptive books and accounts.

A clarification has been issued vide Circular 12/2014-15 dated September 11, 2014 that if tax deficiency arose due to false, maintenance of books and accounts then the penalty leviable under Section 86(15) would be waived off on payment of tax and interest under the DVAT Amnesty Scheme.

However, such penalty cannot be waived off under DVAT Amnesty Scheme where such maintenance of books and accounts does not result in any tax deficiency.

NEWS FLASH

Goods and services tax: Jayalalitha seeks concessions for states

J Jayalalitha, Chief Minister of Tamil Nadu asked centre for more concessions on Goods and Service tax. The government of Tamil Nadu proposed that the goods of local importance should be exempted from goods and service tax. The state government also suggest that to avoid dual control, states should be vested with the control of dealers having a turnover up to Rs 1.5 crore both for intra-state and inter-state supply of goods and services, whereby the Centre can avoid expanding its administrative machinery while collecting CGST (central goods and services tax) from such dealers.

The Tamil Nadu government also urged that before the Constitutional Amendment Bill on GST is enacted, the Government of India should strive for a broad consensus on the important issues relating to the GST like compensation period and methodology, revenue neutral rates, floor rates, etc. so that the states fear of loss of fiscal autonomy and permanent revenue loss can be eliminate.

GST: Centre considers Gujarat model to win states' support

On the meet with the states, the Centre considers Gujarat model to win states' support over GST implementation. The Gujarat model concerns the loss of revenue in the new tax regime and bridge trust deficit. However the states opposed the proposal and it might be diluted if the Centre was to accept it. The finance ministry is trying to win a consensus on the Constitution amendment Bill for the rollout of GST. The states' strongly demand a provision in the Constitution to compensate them for any losses they made under the proposed indirect tax regime. The ministry is now considering another legal framework that will ensure the Constitution does not have to be amended for this purpose, and at the same time, even states' trust does not erode.

Goods and Services Tax implementation likely by mid-2015

The government priority over GST was seen when centre revenue officials announced that the GST may be implemented by mid-2015. The efforts by the centre may keep the implementation of the goods and service tax on track. Whereas the government is also ensuring that infrastructural framework does not pose any challenge when GST is launched. GST will help to create a pan-Indian market for movement of goods and delivery of services and in return add about 1-2 per cent to GDP. All eyes are on the winter session of parliament, when major framework on GST comes into existence.

Finance Ministry conducts study on tax exemptions for goods and services

The Finance Ministry has started a comprehensive study of tax exemptions granted to various goods and services under indirect tax regime in order to streamline the tax structure under Goods and Service (GST) for a pilot run of GST in 2015. Moreover there is a possibility that the government may introduce two types of GST i.e. Central GST and State GST.

Same goods and services are exempted as well as taxable under different taxation policies of centre and state respectively. In such variation, firstly the consumer gets the exemption on central sales tax and then input credit on the value added tax paid on the item. However states have opposed to the two tier structure of – central GST and state GST over and above constitutional amendment to effect transfer of taxation rights from state to centre under a uniform structure.

Telangana State for Centre to bear loss on GST account

The newly formed state "Telengana" government is supporting the implementation of (Goods and service tax) and put forward the suggestion that the centre has to bear the losses on account such implementation. State finance minister Etela Rajender, who left for New Delhi to attend the meeting of the Empowered Committee of State Finance ministers, told that the Centre's ambitious proposal of integrated Goods and Services Tax (GST) is welcomed.

Steel Ministry asks Finance Ministry to roll back duty of coking coal imports

The Steel and Mines Ministry has sought rollback of 2.5 per cent duty on coking coal imports, imposed in the last Budget, to unburden domestic steel makers. Finance Minister Arun Jaitley in Budget 2014-15 had

imposed 2.5 per cent duty on coking coal imports, which the steel industry had said could lead to an increase in cost of steel production by Rs. 200 a tonne.

Indian steel makers mostly used imported coking coal for use in the blast furnace and the annual volume goes up beyond 35 million tonnes. This is due to subdued and stagnant supply from state-run Coal India Ltd. Production of one tonne of steel requires 0.8 tonnes of coking coal. Against this, the finance ministry has not yet commented on this issue.

Registrations drop sharply after new Companies Act comes into force

As per the data provided by the Ministry of Corporate Affairs (MCA), the registration of companies drop by halved after the new Companies Act comes into existence. As during the first five months of the financial year, only 21780 companies were registered as compared with 43148 in the last financial year. The officials said that the reason of decline is the privileges and exemption which were conferred by old Companies Act to the private companies, such privileges and exemption are now withdrawn by the new Companies Act.

And also it takes long time to incorporate in India as compared to the other developed countries, political uncertainty, economic environment may be the other reason.

Excise, customs receipts lift indirect tax collection growth to 9% in August

The central excise and customs duties collection shows the promising growth trend of 9% in August this year to Rs 40,644 crore from a year ago, indicating a robust growth trend in central excise and customs duties after the lethargic performance in the initial months. Customs duty collections grew at 9.9% while excise duty receipts retained the healthy growth of the previous month at 8%. However the service tax receipts were declined to 9% in August, which was earlier at double digit.

Due to the poor collections in the initial months of the year, customs and excise collections growth in the April-August period still remained moderate at Rs 71,207 crore and Rs 61,415 crore, showing a 0.3% and 0.5% growth respectively. Service tax collection in the period showed a 15% growth at Rs 61,870 crore.

ABOUT US

A2Z TAXCORP LLP having professionals from Multi disciplines which provides services under the Indirect & Direct Tax Laws, DGFT, Foreign Trade Policy, SEZ, EOU, Export – Import Laws, Free Trade Policy, Accounting, Auditing, Law, Company Laws, etc.

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