INDIRECT TAX EXPRESS

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

PART-A: FROM THE EDITOR

Service Tax on Commission in Relation to Inward Money Remittance From Outside India: One Step Forward, Two Steps Backward

The leviability of service tax on the commission paid to Indian agents in relation to remittance of foreign currency in India from overseas countries has been a disputed issue since long time. In case of money transfer service, the sender of money abroad approaches the foreign money transfer service operator (MTSO), office located outside India for transfer of money to a beneficiary in India. For the said Service, the overseas customer pays MTSO a service fee, in addition to the money to be transferred to India. The Indian beneficiary approaches the nearest office of agent of the MTSO in India. After checking the identity of the recipient and on confirmation of the identity proof, the amount sought to be transferred is paid to the beneficiary. MTSO pays the service charge/commission in convertible foreign exchange to Indian agent. It was in dispute whether the principal agents/sub-agents involved in providing such services in India would be chargeable to Service Tax in India or not.

POSITION BEFORE 30th JUNE, 2012:

The applicability of service tax on commission paid to Indian agents by the MTSO was subject matter of dispute in many cases and notices were issued. The CBEC came out with a Circular No.111/05/2009–ST dated 24.02.2009 clarifying that export of service may take place even when all the relevant activities take place in India so long as the benefits of these services accrue outside India" and further "the relevant factor is the location of the service receiver and not the place of performance."

The larger bench in case of Paul Merchant Ltd held that "The services provided by the Agents and sub-agents throughout during the period of dispute are classifiable as "Business Auxiliary Service" under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994 and the same have been exported in terms of the provisions of Rule 3(1)(iii) read with Rule 3(2) of the Export of Service Rules 2005 and hence no service tax is payable".

Accordingly, it was more or less settled that service tax is not applicable on the commission paid by the MTSO to Indian agents.

POSITION ON OR AFTER 01st July, 2012:

Concept of Negative List was introduced w.e.f. 01.07.2012 in Service Tax. Further

WHAT'S NEW

- CBEC, vide Order No. 02/2014-ST dated 24.10.2014, extended the date of submission of the Service Tax Return (Form ST-3) for the period from 1st April 2014 to 30th September 2014, from 25th October, 2014 to 14th November, 2014

- Due date of filing of returns under WBVAT, WBST, CST, ET Acts for quarter ended 30.09.2014 with or without Digital Signature Certificate has been extended upto 15.11.2014,

- CBEC vide Circular No. 988/12/2014–CX dated 20.10.2014, clarified issues relating to determination of 'place of removal' for the purpose of valuation under Central Excise.

- CBEC, vide Notification No. 30/2014-Custom dated 20-10-2014, extended the time period for furnishing the utilization certificate from the jurisdictional AC/DC of Central Excise from 6 months to 12 months.

"Man needs his difficulties because they are necessary to enjoy success."

-A. P. J. Abdul Kalam

Place of Provision of Service Rules, 2012 were notified to determine the place where a service has been performed. Rule 9 of the POPS Rules says that in case of specified services under rule 9, the place of provision will be the location of service provider. Specified services inter alia include services of 'Intermediary'. After introduction of POPS Rules, the CBEC again came out with a Circular **No. 163/14/2012–ST, dated 10th July, 2012**, clarifying that:-

"There is no service tax *per se* on the foreign exchange remitted to India from outside for the reason that money does not constitute a service and that conversion charges or fee levied for sending such money would also not be liable to service tax as the person sending money and the company conducting the remittance are both located outside India".

"It is further clarified that even the Indian counterpart bank or financial institution who charges the foreign bank or any other entity for the services provided at the receiving end, is not liable to service tax as the place of provision of such service shall be the location of the recipient of the service, i.e. outside India, in terms of Rule 3 of the Place of Provision of Services Rules, 2012".

Recently on October 14, 2014 surprisingly, the CBEC came out with a shocking Circular No. 180/06/2014 – ST clarifying inter alia that ***"Service provided by an intermediary is covered by rule 9 (c) of the Place of Provision of Service Rules, 2012. As per this rule, the place of provision of service is the location of service provider. Hence, service provided by an agent, located in India (in taxable territory), to MTSO is liable to service tax. The value of intermediary service provided by the agent to MTSO is the commission or fee or any similar amount, by whatever name called, received by it from MTSO and service tax is payable on such commission or fee".***

IS RULE 9 ULTRA-VIRES THE FINANCE ACT, 1994?

Under **Section 66B of Finance Act, 1994**, a service is taxable only when, inter alia, it is provided (or agreed to be provided) in the taxable territory. Further, "Taxable territory" has been defined in **sub-section 52 of section 65B** of the Act as 'whole of India excluding the state of Jammu and Kashmir'. **Section 66C of Finance Act, 1994** empowers the Central Government to determine by Rules, the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided. Accordingly, the Central government has **notified the Place of Provision of Service Rules, 2012** in exercise of the powers conferred by sub-section (1) of section 66C and clause (hhh) of sub-section (2) of section 94 of the Finance Act, 1994. Accordingly, if a service is performed in a non-taxable territory, whether by application of rule 9, can it be said to be liable to service tax in taxable territory. So far money transfer service rendered by the Indian agents have been considered by the CESTAT as well as earlier CBEC circulars as provided outside India and considered as 'Export'.

CONCLUSION:

The constitutional validity of Rule 9 is doubtful to the extent it covers services provided to a person located in the non-taxable territory. The new CBEC circular has opened up a new set of debates on applicability of service tax on commission received from MTSO. The circular is clearly against the stand taken by the CESTAT as well as CBEC's own clarifications earlier. Service providers in the present case are back to square one now.

PART-B: QUIZ TIME!!

1. What is the turnover limit in service tax to claim 3% concession on the applicable rate of interest for late payment of service tax?

2. What is the time limit for filing of appeal to Commissioner (Appeals) in service tax?

3. What is the normal period of limitation for issuing show cause notice under service tax?

(Please mail your replies with your name, location and e-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.)

ANSWER TO LAST FORTNIGHT'S QUIZ

Reply to Q1- **Taxable turnover of Rs. 50 Lakh or less in the previous financial year.**

Reply to **Q2 – 100%**

Reply to Q3–**Rs. 5 crores**

Reply given by:

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SOME COMMON LEGAL MAXIMS AND THEIR USE

- ***Quid pro quo***- This for that. E.g. Relation between assessee and bank proved that there was ***quid pro quo*** between them to meet requirement of funding.
- ***De facto***- Concerning fact. E.g. If payment or actual collection of tax could be spoken of as a ***de facto***, it was only provisional.

PART-C: CASE UPDATES

1. Microsoft Corpn. (I) (P) Ltd. vs Commr. Of Service Tax, New Delhi [2014-TIOL-1964-CESTAT-DEL]

Issue: Whether Service provided to Principal situated in non-taxable territory to market products in India is an Export of Service and not liable to Service Tax?

Decision: The third member of CESTAT, agreeing with the findings of the Member (Technical) of the referral Bench, held that Service provided to Principal situated in non-taxable territory to market products in India is an Export of Service and not liable to Service Tax and majority decision in the case of *Paul Merchants* is required to be followed. The disputed service is the service being provided by the appellant to his principal located in Singapore. The marketing operations done by the appellant in India cannot be said to be at the behest of any Indian customer. The service being provided may or may not result in any sales of the product on Indian soil. The transactions and activities between the appellant and Singapore principal company are the disputed activities. As such, the services are being provided by the appellant to Singapore recipient company and to be used by them at Singapore, may be for the purpose of the sale of their product in India, have to be held as export of services.

2. Calderys India refractories ltd Vs C.C.E, Aurangabad [2014 (36) S.T.R. 102 (Tri. Mumbai)]

Issue: Whether penalty under section 77 and 78 of finance act, 1994 imposed when transactions are reflected in balance sheet of the relevant year and liability is discharged immediately on pointing out of short payment?

Decision: The Hon'ble CESTAT, Mumbai held that penalty is not imposable on the appellant under the provisions of section 77 and 78 of the finance act, 1994 relying on the decision of the tribunal in case of Essar Ltd. If transaction were reflected in the balance sheet of the appellant for the relevant year and evidences are available on records; it indicates that the appellant had no intension to suppress any information or withhold any information from the department with an intension to evade payment of service tax. The appellant has not disputed service tax and interest liability and therefore, the appropriation of the same by the adjudicating authority is upheld.

Finance minister Arun Jaitley on 21st Oct 2014,, said the revised Constitution Amendment Bill to roll out Goods and Services Tax (GST) would be introduced in the forthcoming winter session of parliament. He also said the first "tranche" of compensation to states for their revenue loss arising due to phasing out of central sales tax (CST) may also be taken up in the winter session

PART-D: FREQUENTLY ASKED QUESTIONS

Query 1: M/s XYZ constructed an immovable property which was later on leased to M/s ABC. Whether M/s XYZ is eligible to take CENVAT credit on inputs with respect to services used for such construction of immovable property in view of the fact that service tax is charged on renting of such immovable property?

Reply by E-News Letter Team: Upto 31.03.2011, the definition of input service included services used in relation to setting up, renovation or repairs of the premises of provider of output service or an office relating to such factory or premises. However, w.e.f 01.04.2011 the word 'setting up' has been removed from the definition. Accordingly, Cenvat credit of inputs used in construction of immovable property to be let out after construction could be availed upto the date of amendment in the definition of 'input service'. Thereafter, the credit is likely to be denied by the department.

Query 2: Is it mandatory to file service tax return if there is no turnover?

Reply by E-News Letter Team: Every person liable to pay service tax has to submit half yearly return in form ST-3 within 25 days of the end of the half year as per rule 7 of service tax rules, 1994. Therefore, nil returns are not essential. However, as per Para 4.8 of FAQ released by CBEC in November 2007, even if there was no business during the period, assessee will have to file 'Nil' return as long as registration certificate is valid. On the other hand, CBEC vide para 6.1 of Master Circular 97/8/2007 dated 23rd August, 2007 clarified that "*Persons who are not liable to pay service tax (because of an exemption including turnover based exemption), are not required to file ST-3 return*". Further, the Hon'ble CESTAT in the case of **Amrapali Barter Pvt. Ltd. vs. Commissioner Of Service Tax, Kolkata [2013 (32) S.T.R. 456 (Tri. - Kolkata)]** had held that if there was no liability of service tax, penalty cannot be imposed for non-filing of NIL returns. However, still it is advisable to file NIL returns to avoid unnecessary litigations.

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

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