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 AC Restaurant Service - Tax on Service or Sale of Food?

Service tax was made applicable to restaurant having facility of air-conditioning in any part of the establishment and which has license to serve alcoholic beverages by The Finance Act, 2011. An abatement of 70% from the gross amount charged was available by Notification No. 34/2011-S.T., dated 25-4-2011. After introduction of Negative List regime w.e.f. 01.07.2012, it was covered as 'Declared Service' under section 66E. The condition of license to serve alcoholic beverages was removed w.e.f from 01.04.2013 and rate of abatement was further reduced from 70% to 60%. Thus Service Tax became leviable on all restaurants which are air conditioned. Ever since the introduction of service tax on restaurant service, it remained under dispute. The primary reason of dispute was whether service tax can be imposed on sale of food which is a deemed sale under sales tax laws and liable to VAT/Sales Tax at full rate.

Whether the Activity is Primarily of 'Sale of Food' or 'Provision of Service'?

As per Section 66E of the Finance Act, 1994 declared service includes "Service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicated) is supplied in any manner as a part of the activity.

As per Article 366)(29A)(f), supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicated), where such supply or service, is for cash, deferred payment or other valuable consideration, is 'deemed sale of goods'.

Thus even service portion has been specifically included as part of 'deemed sale of goods' and is entirely covered under power of State Government under List II i.e. State List. And again, as per section 66B(44)(a)(ii) of the Finance Act, an activity which merely constitute transfer, delivery, or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution has been excluded from the definition of service itself.

WHAT'S NEW

- CBEC, vide Circular No.: 989/13/2014-CX.3 Dated: 07.11.2014, clarified the excisability of odoriferous compound /agarbathi mix arising during the course of manufacture of agarbathi.

- 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 further extended upto 30.11.2014

- CBEC, vide notification no. 31/2014-Customs Dated: 11.11.2014, has exempted Custom Duty leviable on bunker fuels, namely IFO 180 CST and IFO 380 CST falling under Chapter 27 of the Customs Tariff for use in Indian Flag vessels for carrying export-import (EXIM) containers and empties.

- CBEC, vide notification no. 22/2014-CE dated: 12.11.2014 revised the rate of Excise duty on normal or unbranded petrol from Rs 1.20 per litre to Rs 2.70 per litre and on unbranded diesel from Rs 1.46 a litre to Rs 2.96.. The duty on branded petrol was raised from Rs 2.35 a litre to Rs 3.85 and on branded diesel from Rs 3.75 to Rs 5.25 per litre

"The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy."

-Martin Luther King, Jr.

Judicial Pronouncements:

The single bench of the Hon'ble Kerala High Court in the case of **M/s Kerala Classified Hotels and Resorts Association Vs Union of India** placing reliance on the Constitution Bench of the Supreme Court in the case of K. Damodarasamy Naidu held that service tax on the restaurant service is ultra-vires the constitution and the subject matter of taxation falls under the jurisdiction of States only. The Hon'ble High Court observed that the very purpose of incorporating the definition of tax on sale or purchase of goods in Article 366 was to empower the State Governments to impose tax on the supply, whether it is by way of or as a part of any service of goods either being food or any other article for human consumption or any drink either intoxicating or not intoxicating whether such supply or service is for cash, deferred payment or other valuable consideration.

The words "and such transfer delivery or supply of goods" is deemed to be a sale of those goods by the person making the transfer. Therefore the incidence of tax is on the supply of any goods by way of or as part of any service. When food is supplied or alcoholic beverages are supplied as part of any service, such transfer is deemed to be a sale. Apparently, the transfer is during the course of a service and when the deeming provision permits the State Government to impose a tax on such transfer, there cannot be a different component of service which could be imposed with any Service Tax in exercise of the residuary power of the Central Government under Entry 97 of List I of the Constitution of India.

Again, this view of the single bench was also upheld by the Hon'ble Division Bench in the writ appeal filed by revenue against the single bench order.

In the meantime, in the case of **M/s Indian Hotels And Restaurant Association Vs Union Of India [2014 (34) S.T.R. 522 (Bom.)], the** Hon'ble Bombay High Court took a different view and held that it cannot be said that Service Tax was component of tax on sale or purchase of goods envisaged by Entry 54 of List II (State List). Service Tax on restaurants under Section 65(105)(zzzzv) ibid is distinct tax, which cannot be equated with tax on sale or purchase of goods - Hence, Parliament is fully competent to impose a tax on service, under Article 248 of Constitution of India read with Entry 97 of List I of Seventh Schedule, and it cannot be said to have encroached on power of State Legislature to impose tax on sale or purchase of goods under Entry 54 of List II.

Conclusion

The decision of Kerala High Court appears to be in line with spirit of law and with due respect to the judiciary the decision of Bombay High Court needs a review. To the extent of service tax, there is double taxation on same activity as VAT is charged at full rate by the restaurants. The primary intention of the person going to a restaurant is having food and not buying incidental services. Hence, service tax on AC restaurants, needs to be withdrawn immediately by the Central Government.

PART-B: QUIZ TIME!!

1. What is the maximum penalty for late filing of ST-3 Return under Rule 7C of Service Tax Rules, 1994?

2. What is the gross annual turnover limit for compulsory registration under WBVAT?

3. What is the time limit for filing Revised Service Tax Return (ST-3) as per Rule 7B of the Service Tax Rules 1994?

(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- **Turnover of Rs. 60 Lakh or less in the previous financial year.**

Reply to **Q2 – 60 days**

Reply to Q3–**18 months**

Reply given by:

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SOME COMMON LEGAL MAXIMS AND THEIR USE

- ***Consensus ad idem***- Agreement to the same. E.g. The tribunal held that there was no consensus ad idem to the original contract, and that it was, therefore not enforceable.
- ***Inter alia***- Among others. E.g. In our company the success of product-development is measured in, inter alia , the number of weeks taken to finalize a design.

PART-C: CASE UPDATES

1. **Kerala Classified Hotels and Resorts Association Versus Union Of India [2014-TIOL-1913-HC-KERALA-ST]**

Issue: Whether levy of Service Tax on Restaurants and hotels is beyond legislative competence of Parliament?

Decision: Upholding a single judge order, the Hon'ble Division Bench of Kerela High Court held that it cannot be said that it is an activity of service. When the said activity is deemed to be a sale of the food and other articles of human consumption by a constitutional definition, tax on the said activity can be imposed only by the state in view of Entry 54 in List II of the Seventh Schedule. In the case of K. Damodarasamy Naidu, the Constitution Bench of the Apex Court had also in view of the words used in article 366(29A) (f), the bill raised on the customer cannot be split as charged for the service part and as charged for the food part and that the supply of food by the restaurant owner to the customer, though it may be a part of the service that he renders by providing good furniture, furnishings and fixtures, linen, crockery and cutlery, music etc., tax is leviable for the whole amount of the consideration received by the restaurant owner. It is thus evident that the matter covered by sub-clause (zzzzv) of Clause 105 of Section 65 of the Finance Act, 1994, as amended by Finance Act, 2011 is a matter enumerated in Entry 54 of List II of Seventh Schedule and the States alone have the legislative competence to enact any law imposing tax on the said matter.

2. **Gurmeher construction Vs commissioner of central excise, Raipur [2014(36) S.T.R 545 (Tri- Del.)**

Issue: Whether interest is chargeable when CENVAT Credit wrongly taken is reversed before utilization?

Decision: The Hon'ble CESTAT relying on the decision of Hon'ble Karnataka High Court in the case of M/s Bill Forge Pvt. Ltd. held that interest is compensatory in character & is imposed on an assessee who has withheld any payment of any Tax, as an when it is due & payable. If there is no tax liability, no interest is payable. Section 11AB of the Act is attracted only on delayed payment of duty i.e., where only duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person liable to pay duty, shall in addition to the duty is liable to pay interest. It is not stipulated that interest is payable from the date of book entry, showing entitlement of CENVAT Credit. Therefore interest cannot be claimed from the date of wrong availment of CENVAT Credit but from the date CENVAT Credit is taken or utilized wrongly.

In view of recent circular of CBEC clarifying the applicability of service tax on commission paid to Indian agents by foreign institutions in relation to inward money transfer services, the Kerala government has expressed concerns saying it would hit families who depend on their kin working in the Gulf and other nations. Minister for Non-Resident Keralites Affairs KC Joseph, have written to Union Finance Minister Arun Jaitley, urging withdrawal of the decision.

PART-D: FREQUENTLY ASKED QUESTIONS

Query 1: Whether reverse charge would apply on service provided by an advocate in connection with Income Tax Return filing?

Reply by E-News Letter Team: As per Notification no. 30/2012-ST dated 26-6-2012, for services provided or agreed to be provided by individual advocate or a firm of advocates by way of legal services, 100% of service tax is payable by the person receiving the service and as per Service Tax Rules, 1994, the term “legal service” means any service provided in relation to advice, consultancy or assistance in any branch of law, in any manner and includes representational services before any court, tribunal or authority. Since, income tax return filing is a service in relation to Income Tax Act, 1961, reverse charge should be applicable.

Query 2: M/s X & Co, providing security agency services, has an excess CENVAT Credit which is not utilizable. Can he claim refund of such CENVAT Credit?

Reply by E-News Letter Team: As per notification no.12/2014 – Central Excise (N.T) service providers providing output service of (i) renting of a motor vehicle designed to carry passengers on non-abated value, to any person who is not engaged in similar business; (ii) supply of manpower for any purpose or security services; or (iii) service portion in the execution of a works contract provided can claim refund of excess Cenvat credit, which is not utilizable in the proportion of turnover of output service under reverse charge to that of total turnover during the half year. The refund claim should be filed within one year from the due date of filing the half yearly return. . Therefore, M/s X & Co. in this case being a provider of security service is eligible for refund of CENVAT Credit.

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

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