December, 2014 VOL # 7, ISSUE # 1

INDIRECT TAX EXPRESS

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

PART-A: FROM THE EDITOR

Can a Service Receiver Deduct Service Tax from the Bill of Service Provider in Cases Where He Is Liable To Pay Service Tax under Reverse Charge Mechanism?

Service tax is now two decades old. However controversies have no end and it is getting multiplied from year to year. Service tax is an indirect tax and like other indirect taxes, incidence of this is also to be borne by the receiver of services or buyer of goods. Generally the service provider is required to charge and collect it from his clients and pay to the Government. However Section 68(2) of Finance Act, 1994 provides that a person other than service provider can be made liable to pay service tax. Central Government vide **Notification No. 30/2012-ST dated 20.06.2012** has made the receiver of services liable to make payment of service tax and related procedural compliances in case of some services for e.g. transportation of goods by road, insurance auxiliary services provided by an insurance agent, etc. In these cases, the receiver of service has to pay service tax and file half yearly returns and comply with other procedural formalities. A question arises here that whether the service receiver made so liable to pay service tax, can deduct the same from the amount payable by him to the service provider?

This practice is presently being followed by some insurance companies in respect of services received from its agents. For the services rendered, the agent is getting commission and bonus as per the fixed slab of insurance company based on the amount of premium. Generally insurance company sends fortnightly statement of commission payable to the agent on the basis of the premium received by it from various policy holders secured through the agent. From the amount of commission payable to the agent, the insurance company is deducting Service Tax @ 12.36% as well as TDS @ 10% and remitting the balance amount of commission to the agent.

As per **Rule 2(1)(d)(i)(A) of Service Tax Rules, 1994**, the person liable for paying tax in relation to service provided or agreed to be provided by an insurance agent to any person carrying on the insurance business is the recipient of service i.e. insurance company. However, he insurance company deducts the amount of service tax from the commission payable by it to the agents. But the spirit and intention of this provision is that in such cases, the service receiver has to comply with the procedural requirements, such as registration, payment of service tax periodically, filing of half yearly returns and other related compliances as if he is the service provider. However it does not mean that receiver of service can recover the service tax from the service provider in the same way a service provider recovers the service tax from his clients.

WHAT'S NEW

- The Central Government, vide **Notification No. 23/2014–ST** dated 05.12.2014, has amended rule 5A(2) of Service Tax Rules, 1994 to empower cost accountant or chartered accountant nominated under section 72A of the Finance Act, 1994 to conduct service tax audit.

- CBEC vide **Circular No. 181/7/2014-ST** dated 10.12.2014, has clarified that rule 5A (2) of the Service Tax Rules, 1994 empowering department & CERA audit team to conduct audit of service tax assessees has a clear statutory backing in section 94(2)(k) of the Finance Act, 1994.

- CBEC, vide **Notification no. 24/2014-CE** dated: 02.12.2014 has increased the rate of Excise duty on unbranded petrol, unbranded diesel, branded petrol and branded diesel.

- The Central Government, vide **Notification Nos. 46-48/2014-Customs (ADD)** has imposed anti-dumping duty on import of certain items into India.

- The Central Government, vide **Notification Nos. 25/2014-CE & 33/2014-Customs** dated 11.12.2014 exempted Excise duty on goods donated or purchased out of cash donation and Customs duty on goods imported for donation for the relief and rehabilitation of people affected by the floods in the State of Jammu and Kashmir.

We strongly condemn the horrific killing of innocent children in a school in Pakistan by the Taliban terrorists on 16.12.2014, and pray that their souls rest in peace.

Service tax should not be deducted from the amount of commission payable to the insurance agent. It is not like TDS that can be deducted from the amount payable to the agent. Service tax is an indirect tax, the incidence of which is to be borne by the user of goods or receiver of services. Generally the service provider is required to collect the same from the service receiver and pays it to the Government and the incidence is to be borne by the receiver of service. However in some cases for administrative convenience and ease of collection, the Government has made service user/receiver liable to pay it directly to the Government instead of paying it to the service provider. It does not mean that due to this shifting of compliance on insurance company, the value liable to service tax will get changed. It is still the gross amount of commission by whatever name called to be paid to the insurance agent which is liable to service tax. Upon this amount of commission, the insurance company has to pay service tax directly to the Government from its own pocket and not by way of deducting the same from the commission to be paid to the insurance agent. This will be clear from an example with hypothetical figures-

Practice Being Followed	**Amt (Rs)**	**Practice That Should Be Followed**	**Amt (Rs)**
Gross Commission payable to the agent	100000	Gross Commission payable to the agent	100000
Less: Service Tax @12.36%	12360	Less: TDS @ 10%	10000
Less: TDS @ 10%	10000	**Net Remittance to Agent**	**90000**
Net Remittance to Agent	**77640**	Service Tax @12.36%	12360
Total Outflow of the Insurance Co. (Rs 77640+12360+10000)	100000	Total Outflow of the Insurance Co. (Rs 90000+10000+12360)	112360

In the instant case, practically speaking the Government is getting service tax of Rs. 12360/- not on Rs 100000/- but on **Rs. 87640/-** which is the amount of commission received by the insurance agent (before deduction of TDS of Rs 10000/-). Therefore the effective rate of service tax comes out to be 14.10% instead of 12.36%. Similarly his commission amount after deduction of service tax is Rs 87640/- whereas TDS is being deducted on Rs 100000/-, which is also unjustified.

If this practice of deducting service tax from the commission of the agents is followed, then this leads to denial of basic exemption of Rs 10 Lacs to such agents. Suppose an agent's total commission during a particular F.Y is Rs 9 Lacs, on which the insurance company has deducted and paid service tax to the Government which comes out to be Rs 11124/-. In this case, although his gross commission is below Rs 10 lacs, still he has paid the service tax on the whole amount of commission to the insurance company. This is a strange situation, where these agents have to pay service tax from their own pocket, which was otherwise not payable by them, had the insurance company was not made liable to pay service tax.

In view of the above statutory provisions and their interpretation, it appears that insurance company cannot deduct service tax from the amount of commission payable to the insurance agent. Service tax is an indirect tax and it is to be borne by the receiver of service from its own pocket. It can not be deducted like TDS. Therefore, the existing practice being followed by the insurance company is not in accordance with law. The value liable to service tax is the gross amount of commission received by the agent and on such value service tax is to be paid by the insurance company from its own pocket and not by deducting the same from the commission of the agent as this results in the payment of lower commission to the agent and consequently payment of service tax at a higher rate.

PART-B: QUIZ TIME!!

1. E-filing of Service tax Return was made mandatory from which date?

2. State whether true or false – "Education cess paid on input or input service can be utilised for payment of Secondary & Higher Education Cess on output services or excisable final products."

3. What is the maximum limit of pre-deposit required to be made for filing an appeal under Section 35F of Central Excise Act, 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- **1st July, 2012**

Reply to Q2– **Cigarettes**

Reply to Q3– **60%**

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SOME COMMON LEGAL MAXIMS AND THEIR USE

- ***Ex ante*** – Of before. E.g. The rule itself is secondary, but it must be determined *ex ante* and be reported.
- ***Pro Rata*** – from the rate. E.g. the bonus may also be reduced *pro rata* according to the length of the leave taken during the year.

PART-C: CASE UPDATES

1. **Prathyusha Associates Shipping Pvt. Ltd. vs C.C.E., C. & S.T., Vishakhapatnam-I [2014(36) S.T.R. 1145 (Tri.-Bang)]**

Issue: Whether exempt service & service which is not taxable at all are one and the same for the purpose of availment of Cenvat Credit on common services where both exempt and taxable services are provided?

Decision: The Hon'ble Bangalore Tribunal held that from the definition of Exempted service in Rule 2(e) of Cenvat Credit Rules, 2004; it becomes clear that so long as the activity is a service and even if it is not taxable, it has to be considered as an exempted service. it is not necessary that a service should be taxable and an exemption notification exempting levy of service tax should have been issued.In view of this position, the non-taxable service rendered by the appellant has to be considered as an exempt service and therefore the appellant could not have utilised cenvat credit beyond the limits prescribed under the rules. The Hon'ble Tribunal went on to say that when the statute is clear and there is no ambiguity, no citizen has the liberty or luxury of assuming and acting on his assumptions without looking into the law and without any verification whatsoever. More so, in matters like service tax where the responsibility of assessment is on the assessee and not on the department.

2. **Central Excise vs. Inductotherm India Pvt. Ltd. [2014(36) S.T.R. 994 (Guj.)]**

Issue: Whether the credit of Service Tax paid by the assessee on 'Cargo handling service' in relation to export would be admissible as 'input service tax credit' and whether the same would fall under the purview of definition of "input service"?

Decision: The Hon'ble Gujrat High Court has held that 'cargo handling services' are utilized for the purpose of export of final product where the place of removal for the purpose of export shall necessarily have to be the port of shipment and not factory gate, and therefore, any service availed by the exporters until the goods left India from the port are the service used in relation to clearance of final product upto the place of removal. If the definition of input service is recollected, it includes services used by the manufacturer directly or indirectly in or in relation to manufacture of the final product and in relation to clearance of final product from the place of removal. Thus, tax paid by the service providers under this category of cargo handling service would be inclusive in the definition of 'input service'.

Indirect Tax Revenue (Provisional) collections have increased from Rs 306814 crores in April-November 2013 to Rs 328662 crore in April-November 2014, while recording an increase of 7.1% over the corresponding period in the previous year. Service Tax collections have increased from Rs 91982 crore in April-November 2013 to Rs 102592 crore in April-November 2014, registering an increase of 11.5%.

PART-D: FREQUENTLY ASKED QUESTIONS

Query 1: M/s XYZ inn has a declared tariff of Rs. 1100 per room day. However during off season, tariff is reduced to Rs. 700 per room day. Whether service tax is applicable on accommodation charges collected during off season?

Reply by E-News Letter Team: As per Sl. No. 18 of Mega Exemption notification 25/2012 - ST dated 20.06.2012 as amended, services by a hotel, inn, guest house, club or campsite, by whatever name called, for residential or lodging purposes, having declared tariff of a unit of accommodation below rupees one thousand per day or equivalent are exempt. Thus the 'declared tariff' shall determine the taxability and not the taxable value. However, the tax will be liable to be paid on the amount actually charged i.e. declared tariff minus any discount offered. Thus, in our opinion, when the tariff is reduced in the off-season, tax will still be required to be paid as the declared tariff is still Rs. 1100 per room day but the taxable value shall be Rs 700/- only.

Query 2: M/s ABC Pvt Ltd is manufacturer of excisable goods and have taken insurance for providing workmen's compensation in case of accidents in the course of their employment.Whether this service can be considered as input service used in manufacture of final product for the purpose of availing cenvat credit?

Reply by E-News Letter Team: As per Rule 2(l) of the Cenvat Credit Rules, 2004, in case of manufacturer "input service" includes "activities relating to business". According to Workmen's Compensation Act, it is obligatory for the company to pay compensation to the workmen in case of an accident within the factory. To fulfill this legal obligation, the assessee has taken insurance. Therefore in this case, in our opinion, the insurance premium is definitely relatable to business activity and accordingly Cenvat credit is allowable.

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