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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

Service Tax on Director's Remuneration - Confusion prevails

The service provided by a director to the company is leviable to service tax under reverse charge mechanism vide Notification No. 30/2012- ST dated 20.06.2012 amended vide Notification No. 45/2012-ST dated 07.08.2012 read with rule **2(1)(d)(i)(EE)**. Accordingly, service tax is to be paid by the service receiver i.e. company to the extent of 100%. By the Finance Act, 2014 Service provided by a Director to a body corporate (earlier only company) is also now taxable under the reverse charge mechanism. The notifications relating to reverse charge merely state **'service provided or agreed to be provided by director to the said company'**. The provisions do not distinguish between whole time director or part time director or executive or non-executive director.

Section 65B(44) of Finance Act, 1994 as introduced w.e.f. 1-7-2012 excludes from the definition of service **"a provision of service by an employee to the employer in the course of or in relation to his employment"**. Thus, services provided by employee to employer have been excluded from the definition of 'service' itself. Now the issue arises what services are rendered by a director to the company which are liable to service tax and not considered as 'provision of service by an employee to the employer in the course of or in relation to the employment?

As per Section 2(94) of The Companies Act, 2013 "Whole Time Director" includes a director in the **whole time employment** of the company. Generally an executive director is understood as a whole time director. Executive directors are usually those who are involved in day to day affairs & they usually have deep knowledge of the company's business and are normally employed under service contracts providing for a salary and setting out specific executive duties. Hence, a whole time director/executive director, being an employee of the company, service tax is not applicable on it.

WHAT'S NEW

- The Central Government vide **Notification No. 34/2014-Cus**, dated 24.12.2014, increased custom duty on crude and refined edible oils.
- The Central Government vide **Notification Nos. 35, 37, 38/2014-Cus** dated 29.12.2014 has notified tariff concessions on various items as specified therein.
- CBEC vide **Circular No.17/2014-Cus** dated 18.12.2014, has clarified that Central Excise Authorities shall authenticate supply invoice/ ARE-3 for claiming Deemed export benefits by the assessees.
- CBEC vide **Circular No. 18/2014-Cus** dated 22.12.2014 has clarified the process of restoration of ACP status of the Accredited Clients Program Scheme clients.
- CBEC vide **Circular No. 19/2014-Cus** dated 31.12.2014 has announced several seaports & air cargo complexes to have 24x7 customs clearance facility.
- The Central Government vide **Notification No. 1/2015-C.E** dated 01.01.2015, has increased the Excise duty on branded and unbranded petrol, and branded and unbranded diesel by 2% for the 3rd time in 6 months.
- The last date of submitting VAT Audit Report/Statement in Form 88/88A for the F.Y. 2013-14 under WBVAT has been extended upto 31.03.2015.
- Concession in excise duty to cars, two-wheelers and SUVs introduced in interim budget for 2014-15 has ended w.e.f 31.12.2014.

Team Indirect Tax Express wishes all its readers a Very Happy New Years!
May this New Year all your dreams turn into reality and all your effort into great achievements.

Central Board of Excise and Customs also vide Circular No. 115/09/2009 – ST dated 31st July, 2009 had earlier clarified that remunerations paid to Managing Director/Directors of companies whether whole-time or independent when being compensated for their performance as Managing Director/Directors would not be liable to service tax. As per Section 2(54) of the Companies Act, 2013 "managing director" means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company. Both the Managing Director and a whole time Director may be termed as one and the same only. They both occupy two positions or possess two capacities, viz (i) one, that of director, and (ii) the other, that of a manager or officer of the company in the sense of whole time employee. The notice or letter of resignation too is required to be approved or accepted by the company and the officer concerned has to be relieved of his duties and responsibilities attached to the office which he has resigned from. However, in case of ordinary director, formal acceptance of resignation is not needed. Moreover, Records like Form 32, Terms of Agreement (responsibilities and remuneration payable), Resolution, and Article of Association of the company should establish that person is a Managing Director. Thus in our view service tax should not applicable on services of managing director too.

The Non-executive directors or independent directors are those who are not whole time directors or managing directors. They usually charge fees/sitting fees for attending meetings of the Board or Committees constituted by the Board, the commission as a percentage of net profits and reimbursements of expenses made towards travel expenses, conveyance charges, boarding, lodging in relation to attending of the board/audit committee meeting. They do not get a fixed remuneration form the company. Thus it appears that service tax under reverse charge is applicable for services received from these classes of directors.

The issue that now arises is that whether a person who is a director in more than one company and drawing remuneration from all those companies after TDS deduction u/s 192, can be said to be an employee of the company? This is a contentious issue. Mere deduction of TDS u/s 192 is not indicative of employer-employee relationship. Hence, it is arguable whether a person can be appointed as 'executive director' in more than one company. As already said, an executive director is understood as a whole time director. It is impractical that a person who is director in more than one company is an employee in all the companies. Therefore, it appears that service tax may be applicable on remuneration paid to these directors.

Taxability of director remuneration in service tax is an arguable matter. There are divergent practices being followed by different companies with respect to payment of service tax under reverse charge on director's remuneration. Due to lack of clarity, companies are facing litigations on this issue. Hence, CBEC should clarify the scope and coverage of the provisions of reverse charge in case of director's remuneration under various scenarios.

PART-B: QUIZ TIME!!

1. From which date service tax became applicable on 'Renting of Immovable Property Services'?

2. What is the rate of abatement from maximum sale price for payment of excise duty on MRP based valuation under section 4(A) on 'Footwear'?

3. Which is the prescribed form under Central Sales Tax Act, 1956 for claiming exemption from CST against sale prior to export?

(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 Oct, 2014.**

Reply to Q2– **False.**

Reply to Q3– **Rs. Ten Crore.**

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SOME COMMON LEGAL MAXIMS AND THEIR USE

- ***Ultra Vires*** - Beyond one's legal power or authority. E.g. The bank had issued judicial review proceedings to quash the notice as being *ultra vires*.
- ***Nexus*** – Connection. E.g. The facts pleaded in the writ petition must have some *nexus* in relation to the prayer to be granted.

PART-C: CASE UPDATES

1. **Advocates Association of Western India vs. Union of India, [Bombay [2014] 52 taxmann.com 311]**

Issue: Whether Levy of service tax on services provided by advocates and arbitral tribunal has constitutional validity and not violative of Article 19(1)(g) of the Constitution?

Decision: The Hon'ble Bombay High Court held that levy of service tax on a limited category and class of professionals, namely Advocates, the burden of which does not fall on them but on the receiver of the service, cannot be said to be violative of the guarantee or right under Article 19(1)(g) of the Constitution of India. The legislature by inserting such provision has neither interfered with the role and function of an advocate nor has it made any inroad and interference in the constitutional guarantee of justice to all. The Hon'ble High Court did not find any substance in the complaint that the profession of advocates and legal profession itself has been treated on par with commercial or trading activities or dealings in goods and other services. Merely because of the role of the advocate, it does not mean that his position as an officer of the Court and part and parcel of administration of justice is in any way undermined leave alone interfered with. The Advocates and legal practitioners are known to pay professional taxes and taxes on their income. They are also brought within the purview of service tax because their activities in legal field are expanding in the age of globalization, liberalization and privatization. They are not only catering to individuals but business entities. If it is found that the advocates are catering to affluent and rich class of litigants and recipients of legal services, then, the tax on the services rendered to them is definitely within the permissive sphere of legislation. That cannot be faulted.

2. **Indian Hotels Co. Ltd. vs. Commissioner of Central Excise[2014 (36) S.T.R. 1268(Tri. – Bang)]**

Issue: Whether the Hotel allowing Customers to use photocopier, printer etc. available in business centre, amounts to Business Support Service?

Decision: The Hon'ble Tribunal at Bangalore held that it is not known to whom the service is provided since the customers of the hotel used the facility. It is not known for what purpose the business centre was used. In the absence of any knowledge as to what are the purposes for which the service was used, how one can reach a conclusion that the service received by the customers of the appellant could be one of the various services listed under support service of business or commerce is difficult to imagine. Basically the responsibility to show that a taxable event has occurred and service is leviable to tax is required to be proved by the revenue. In this case obviously it is an assumption on the part of the revenue that taking print out, photocopying and use of computer fall under the category of BSS. In view of the above observations, the impugned order is set aside and the appeal is allowed with consequential relief, if any, to the appellant.

The Union Cabinet on 17th December, 2014, Wednesday, approved the Constitutional Amendment Bill on Goods & Services Tax (GST), inching closer to the rollout of an ambitious indirect tax reform expected to raise revenues and boost growth.

PART-D: FREQUENTLY ASKED QUESTIONS

Query 1: M/s XYZ Pvt Ltd had organized a sports event. It has obtained service of police for security and made payment for the same. Whether the company is liable to pay service tax on these services availed from government under reverse charge?

Reply by E-News Letter Team: According to **Sl. No. 6 of Notification No. 30/2012-ST dated 20.06.2013,** in case of service provided by Government or local authority by way of support services excluding Renting of Immovable property and those mentioned in clauses (a)(i – iii) of Section 66D of Finance Act, 1994; service recipient has to pay service tax on 100% value. Support service has been defined in Section 65B (49) as *"infrastructural, operational, administrative, logistic marketing or any other support of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of movable or immovable property,* ***security****, testing and analysis".* Hence, in our opinion service tax shall be payable by XYZ Pvt. Ltd. under reverse charge on 100% value of the service.

Query 2: M/s ABC Pvt Ltd provides services to its clients on credit term of 3 months. It collects interest at the rate of 18% p.m. from its client for payments received after due date. Whether such interests received on delayed payments is includable in taxable value?

Reply by E-News Letter Team: In terms of clause (iv) of Sub-rule 2 of Rule 6 of Service Tax (Determination Of Value) Rules, 2006, the value of any taxable service does not include interest on delayed payment of any consideration for the provision of services or sale of property. Therefore, Service tax shall not be applicable on such interest received on delayed payments.

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

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