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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

Amendment in Rule 14 of the Cenvat Credit Rules w.e.f. 01.03.2015- A Lot to Worry About

Rule 14 of the CCR, 2004 has been amended w.e.f. 01.03.2015 vide Notification No. 06/2015-CE(NT) dated 01.03.2015 the mechanism for determination of utilization of Cenvat Credit. In the aforesaid rule, it has been provided that all credits taken during a month shall be deemed to have been taken on the last day of the month and the utilization thereof shall be deemed to have occurred in the following manner, namely: - (i) the opening balance of the month has been utilized first; (ii) credit admissible in terms of these rules taken during the month has been utilized next; (iii) credit inadmissible in terms of these rules taken during the month has been utilized thereafter.

Whether Interest and penalty is payable or not on cenvat credit availed but not utilized has always remained a matter of debate. The issue has been a subject matter of wide-spread litigation before various judicial forums.

Position upto 31.03.2012:

Till 31.03.2012 Rule 14 of Cenvat Credit Rules, 2004 provided that if Cenvat credit has been **availed or utilized** wrongly, the same shall be payable along with interest and provisions of Sections 11A and 11AB of Central Excise Act (in respect of excisable goods) and Sections 73 and 75 of Finance Act, 1994 (in respect of services chargeable to Service Tax) shall apply mutatis mutandis for effecting the recovery. Further, Rule 15 provided for penalty for irregular availment or utilisation of cenvat credit. Accordingly, upto 31.03.2012, as per Rule 14 & 15, even availing irregular credit would attract interest and penalty liability even if not utilized. The Hon'ble Supreme Court has also reiterated the aforesaid provisions in case of **Union of India & Ors. vs. M/s Ind-Swift Laboratories Ltd.** held on 21 February, 2011.

Position from 01.04.2012 to 28.02.2015:

The magnanimity of the Central government was evident from the fact that they amended Rule 14 vide Notification 18/2012-CE (N.T) by **replacing the word 'or' with 'and' w.e.f. 01.04.2012.** Accordingly, to attract interest and penalty, both the conditions i.e., availment and utilization need to be satisfied.

WHAT'S NEW

- The Central Government vide **Notification No. 06/2015-Customs (ADD) dated 03.03.2015** have extended the anti-dumping duty on "Tyre Curing Presses, except Six Day Light Curing Press for curing bi-cycle tyres" for a further period of one year.

- The Central Government vide **Notification No. 07/2015-Customs (ADD) dated 13.03.2015,** has imposed Anti-dumping duty on import of Sheet glass into India from originating countries as specified in the Notification.

- CBEC vide **Circular No. 1000/7/2015-CX dated 03.03.2015** has issued instructions regarding adjudication of Central Excise and Service Tax Cases booked by DGCEI.

- The Central Government vide **Notification No. 29/2015 - Customs (N.T.) dated 10.03.2015** has notified the Customs Tariff (Determination of Origin of Products under the Duty Free Tariff Preference Scheme for Least Developed Countries) Rules, 2015.

- The Central Government vide **Notification No. 30/2015 - Customs (N.T.) dated 13.03.2015** has amended the tariff rates of Palm oil, Palmolein, poppy seeds etc.

"Enjoy your game and chase your dreams, because dreams do come true...!"
-Sachin Tendulkar

However, the change was made effective prospectively from the relevant date.

Further, in the case of Commissioner Of C. EX. & S.T., Bangalore vs. Bill Forge Pvt. Ltd [2012(26) S.T.R.204 (Kar)], the Hon'ble Karnataka High Court distinguished the case of Ind-Swift Laboratories Ltd and held that if before utilization of credit, entry has been reversed, it amounts to not taking credit on inputs. So, interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is taken or utilized wrongly. Thus Penalty cannot be imposed if Cenvat Credit has been taken but not utilized.

Position on & after 01.03.2015:

Rule 14 is being amended to provide that the opening balance of Cenvat credit shall be automatically deemed to be utilized first. As a result of this, in cases where the Cenvat has been taken but not utilized due to interpretational issues, the assessee shall not be able to plead that such Cenvat was only availed and not utilized. He will be liable to interest and penalty considering such availment of credit as irregular availment and utilization. Interest for wrong utilisation is understandable, but can there be liability of interest only because assessee has 'taken' i.e. made entry in Cenvat credit records, without actually utilising it?

Further, a similar line of difficulty also arises where the tax payer is not sure about the eligibility of Cenvat credit. The credit on input services is to be availed within a period of 6 months (upto 28.02.2015) and one year on & after 01.03.2015 due to the prescribed time limit for availing credit under Rule 4(1). Also, in case of reversal at a later date, the service provider will have to pay the amount of credit along with interest even if he has not utilized the wrongly availed Cenvat credit. Consequently, this will lead to the assessee being at a loss in either situation. He can neither avail Cenvat Credit and neither keep it in his records as it will be considered utilized nor he can leave that credit as the prescribed time limit for availing Cenvat Credit is 6 months or 1 year as the case may be.

Availment of Credit Now amounts to Utilisation of Credit:

The new amendment is basically a deeming provision where by credit availed is actually deemed to be utilised. It is a general practice to avail the credit but not to utilize in case of doubts or interpretational issues. Since there was no revenue loss to the government on the credit availed but not utilised by the assessee and as such there seems to be no logic behind this provision. The government itself had amended the provisions of in favour of the assessee even after the Supreme Court Judgement contrary to that keeping in view the spirit of law. Now it is doing away with it which is detrimental to the trade and industry.

Conclusion:

This provision is going to cause great hardships to the assessee. It is requested from the government to roll back the changes and maintain the status quo in this matter.

PART-B: QUIZ TIME!!

1. What is the revised rate of abatement in service tax w.e.f. 01.04.2015 for service of Goods Transportation Agency?

2. Fill in the blank - A service tax assessee has to preserve its records for a minimum period of _______.

3. State True or False – ***'SSI units can avail entire 100% Cenvat credit of capital goods in the first year itself as per Cenvat Credit Rules, 2004'***

(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 - **6 months**
Reply to Q2 - **1 year from the relevant date**
Reply to Q3 - **5 years**

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SOME COMMON LEGAL MAXIMS AND THEIR USE

- ***In pari materia***- In the same matter. **E.g.** The Court relied on the view of the apex court *in pari materia* and gave its judgment.
- ***Ex parte***- From [for] one party. **E.g.** In absence of cooperation from the appellant, the adjudicating authority recorded the fact and decided ex parte on merit.

PART-C: CASE UPDATES

1. New Allenberry Works vs C.C.E, New Delhi [2015 (37) S.T.R. 303 (Tri.-Del.)]

Issue: Whether Cenvat credit of service tax can be taken for the outward freight for excisable goods delivered by the appellant at the premises of their buyer?

Decision: The Hon'ble CESTAT, Delhi relied on the views of High Court in the case of M/s Gujarat Ambuja Cement Ltd. wherein it was held that where the place of delivery of goods is customer premises and the freight is borne by the manufacturer, the place of removal has to be held as the customer's gate. The CESTAT found that the board has also clarified the issue vide Circular No. F/137/85/2007-CX-IV, dated 23.8.2007. Even after the amendment of the definition of Input services w.e.f 1.4.2008, replacing the words from the place of removal to up to the removal, the place of removal gets extended upto the buyers premises in the case of FOR sales and as such the said amendment would not made any such difference, where the sales are on FOR basis. Also it has been rightly contended that even in terms of Sale of Goods Act, 1932, goods are sold with the ownership and risk and transfer takes place on the point of delivery of goods to the buyers. Therefore, in the case of FOR destination sales, the ownership and risk are transferred when the seller manufactures delivers the goods to the buyer at his premises and thus Cenvat credit of service tax can be taken for the outward freight for excisable goods delivered by the seller at the premises of their buyer.

2. Kingfisher Airlines P. Ltd Vs Commisioner of Service Tax, Mumbai [2015(37) S.T.R. 358 (Tri. -Mumbai)]

Issue: The appellants had an agreement for lending the money by BNP Paribas for purchase of aircraft. BNP Paribas secured their loans through COFACE in France for lending the money to appellant and paid insurance guarantee as consideration. Revenue was of the view that the service given to BNP Paribas is a service received by the appellant; therefore same was covered under Banking and Financial Institution service. The issue is who is the service provider and who is the service receiver and whether appellant is liable to pay service tax under Reverse Charge Mechanism.

Decision: The Hon'ble Mumbai Tribunal held that the money lender BNP Paribas has secured the loan amount lended to appellant from COFACE France and to secure their money they have paid insurance Guarantee to COFACE France. The service receiver is BNP Paribas and service provider is COFACE, France. The service receiver is BNP Paribas and service provider is COFACE, France. The appellant is only the beneficiary of the transaction held between BNP Paribas and COFACE, France. As the appellant is neither service provider nor service recipient, it is not liable to pay service tax at all under Reverse Charge Mechanism.

The government will have to collect Rs 63,000 crore from indirect tax collections in March to meet the revised tax projections for FY15. Till February, the government has collected Rs 4.78 lakh crore against projections of Rs 5.41 lakh crore in the revised estimates (RE) for FY15.Indirect tax collections in February stood at Rs 50,464 crore, a 15.9 per cent increase over Rs 43,453 crore in the same month of 2014.

PART-D: FREQUENTLY ASKED QUESTIONS

Query 1: Mr. X is running a snacks corner where there is no sitting arrangement and it is operated on "self-service" principle. There is one AC installed in the premises. Whether Mr. X is liable to pay service tax under the "Restaurant Service" category?

Reply by E-News Letter Team: Service Tax on facility of take away /sale of food at counter by AC- Restaurants is a matter of dispute. Service tax has been levied on activity of supply of food etc. In terms of Clause (i) of section 66E, "service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity" is declared service. Therefore, it is considered that service tax would remain leviable on the food etc. supplied by a restaurant, eating joint or a mess if they have the facility of air-conditioning or central air heating in any part of their establishment, irrespective of the fact whether the food is served in their premises, outside the premises, delivered or taken away and same practice is being followed in the industry. However, in our opinion sale of food at counter/ take away is completely a sale transaction and is entirely covered under power of State Government under List II i.e. State List. The restaurant is not providing any sort of service. The customers are not enjoying any facilities of the restaurant except the food. Therefore service tax may not be imposable.

Query 2: An NGO is celebrating its golden jubilee in the current year and on this occasion it is publishing a souvenir wherein space is provided for best wishes of member firms and giving other advertisements. Total revenue from such advertisements is about Rs.21 lakhs. Whether service tax is payable on such advertisements in souvenirs?

Reply by E-News Letter Team: "Selling of space for advertisements in Print Media" is covered under the Negative List of services and therefore not leviable to service tax. Print media inter alia includes books as defined in Press and Registration of Books Act, 1867 but does not include business directories, yellow pages and trade catalogues which are primarily meant for commercial purpose. As per section 1(1) of the Press and Registration of Books Act, 1867, "Book" includes every volume, part or division of a volume, and pamphlet, in any language, and every sheet of music, map, chart or plan separately printed. As per the aforesaid definition, a souvenir appears to be covered by the definition of 'book', and hence, advertisement in such souvenirs should not be subject to service tax.

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