INDIRECT TAX EXPRESS

Fortnightly e-newsletter from m/s DAVA& Associates, Chartered Accountants

July, 2015
Volume 14, Issue 2

FROM THE EDITORIAL TEAM

Service tax on Sub-contractors when service is provided in the Non-taxable Territory

It is a common trade practice among the contractors to sub-contract a part or whole of the activity to one or more sub-contractor. However, so far service tax is concerned, the law is not much clear and results in undue hardship to the contractors as well as sub-contractors. Let's consider a case of a contractor of West Bengal who received a contract to provide repairs and maintenance of transit mixer in the Nepal i.e. non-taxable territory and sub-contract it to another contractor of West Bengal. Whether such service can be taxed in India as per the Place of Provision of Service Rule, 2012 even if the actual service was provided in a non-taxable territory?

Service Tax on main Contractor:

With the introduction of new scheme of tax, the determination of tax is dependent upon whether the services are provided within the taxable territory or not. In order to determine when a service will be deemed to be provided in the taxable territory, Central Government vide **Notification No. 28/2012-ST** dated **20.06.2012** has notified the Place of Provision of Service Rules, 2012, by exercising the powers as given under section 66C of Finance Act, 1994.

Rule 4 of the POPS Rules, 2012 deals with the performance based services and states that in cases where the physical presence of goods is essential for providing the services, the place of provision of service would be the place of actual performance of the service. Further, meaning of **"goods"** as given under section 2(7) of the Sale of Goods Act, 1930, will cover Transit Mixer also as it is a movable property and considered as goods liable to sales tax. Thus, place of provision of operation & maintenance service provided in respect of transit mixer should be determined by Rule 4 of the POPS Rules and as the actual performance of service is taking place in Nepal, said service can be said to have been rendered outside the taxable territory. Accordingly, service tax is not applicable on the main contractor as such service is provided in the non-taxable territory.

Moreover, even if the service by the main contractor does not get covered under Rule 4 of the POPS Rules, still service tax will not be applicable as the service will be covered by the default rule (Rule 3). As per default rule 3, if any other rule is not applicable to a particular service, then the location of the service recipient (i.e., Nepal) will be the place of provision of service.

Service Tax on Sub-contractor

Since the sub-contractor carries out operation and maintenance work of Transit Mixers on behalf of the main contractor in Nepal, the ultimate service would be deemed to have been performed in the non-taxable territory and thus service tax should not be applicable even in the hands of the sub-contractor as per rule 4 of the POPS Rules.

However, **Rule 8 of the POPS Rules** provide that where the location of the service provider as well as service recipient is in the taxable territory, place of provision of service shall be location of service recipient. Since both main contractor (service recipient) and subcontractor (service provider) is located in taxable territory, service shall be deemed to be performed in taxable territory.

Inside this issue:

From the Editorial Team	**1**
Notifications & Circulars	**2**
Quiz	**2**
Case Updates	**3**
FAQs	**4**

GST NEWS

- The Hindu Business Line reported that - The Union Cabinet, on 29.07.2015 (Wednesday), approved changes suggested by a Rajya Sabha Select Committee to the Goods & Services Tax (GST) Constitution Amendment Bill, including compensating the States for five years for loss of revenue. With this approval, the Government is all set to bring a revised Constitution Amendment Bill before the Rajya Sabha.

- CNN IBN reported that - The Rajya Sabha Select Committee has suggested that the GST rate should not go beyond 20% as higher rates could fuel inflation and erode the confidence of consumers in a new indirect tax regime proposed.

Further, CBEC vide **master Circular No. 96/7/2007-ST** dated **23.08.2007** has also clarified that a sub-contractor is also a taxable service provider. It states that the fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor. In addition, **Para 7.11.11 of the Service Tax Education Guide** also clarifies that the benefit of the specified entries in the mega-exemption would not be available to sub-contractors providing input service to the main contractor, unless the activities carried out by the sub-contractor independently and by itself falls in the ambit of the exemption.

Besides these, **Entry No. 29 of Mega Exemption Notification No. 25/2012-Service Tax** dated **20.06.2012** exempts services of *"sub-contractor providing services by way of works contract to another contractor providing* ***works contract services*** *which are exempt."* However, in the present case, as service provided appears to be in the nature of "Management, Repairs & Maintenance service", said service cannot be covered under the above entry and shall be taxable in the hands of the sub-contractor even if the same is exempted for the main contractor.

However, the issue is still arguable and aforesaid interpretation is not free from doubts. As per the charging section 66B of the Finance Act 1994, a service is taxable only if it is ***"provided or agreed to be provided in the taxable territory"***. However, Rule 8 of POPS rules by an overriding provision says that if the service provider and service receiver both are located in the taxable territory, service will be deemed to be provided in the taxable territory even if the service is provided outside the taxable territory. Para **5.8.2 of the Service Tax Education Guide** takes a view that the presence of both the service provider and the service receiver in the taxable territory indicates that the place of consumption of the service is in the taxable territory and therefore, it is taxable in India. However, this may not be necessarily specifically in case of sub-contracting as in the present case the actual consumption of service is outside the taxable territory. POPS Rules have been notified under section 66C of the Finance Act to prescribe for guidance as to when a service shall be deemed to be provided in the taxable territory. However, the rules or said guidance have to be in consonance with the relevant section and in line with the spirit of the said section. Rules can not be framed in contradiction with the spirit of the said section. Rule 8 appears to be ultra vires the section 66B of the Finance Act, 1994. It is well settled that section prevails over rules. Thus, Rule 8 can be challenged to the extent that spirit of the Act is to impose service tax only on services being provided within the taxable territory. Otherwise rule 8 is going to create a lot of hardship to the assessees especially in case of sub-contracting where service of main contractor is not taxable by virtue of rule 4 of the POPS Rules, 2012.

NOTIFICATIONS & CIRCULARS

- Central Government, vide **Notification No. 34/2015-Customs (ADD)** dated **28.07.2015,** has re-imposed anti-dumping duty on imports of Compact Fluorescent Lamps [CFL], originating in or exported from the People's Republic of China, at rates as specified for a period of five years.

- CBEC, vide **Notification No.69/2015-Customs (N.T.)** dated **23.07.2015**, has amended Notification no. 36/2001-Customs (N.T.) dated 03.08.2001 to revise tariff values for import of certain items.

- CBEC, vide **Circular No.1004/11/2015-CX** dated **21.07.2015,** has laid down guidelines for carrying out detailed scrutiny of Central Excise returns.

- CBEC, vide **Circular No.1005/12/2015-CX** dated **21.07.2015** has clarified that the benefit of excise duty exemption on final products manufactured be available only to the domestic manufacturer, subject to non-availment of cenvat credit, and not the buyer/importer of such goods.

- Central Government, vide **Notification Nos. 34-36/2015-CE** dated **17.07.2015** and **Notification Nos. 37-39/2015-CE** dated **21.07.2015,** has made several amendments in Notification No. 30/2004-CE dated 09.07.2004, No. 1/2011-CE dated 01.03.2011 and No. 12/2012-CE dated 17.03.2012, clarified that benefit of excise duty exemption on final products manufactured [subject to the condition of non-availment of Cenvat credit of duty on inputs or capital goods used] is available only to the domestic manufacturer and not the buyer/importer of such goods.

QUIZ!!!

1.What is the maximum amount of penalty that can be imposed in case of non filling of the Audit report under the WBVAT Act, 2003?

2.For what amount of service tax paid, an assessee may fall under the scope of detailed manual scrutiny of service tax returns as per revised guidelines laid down by CBEC?

3. As per Finance Act 1994, what is the maximum amount of penalty that can be imposed in case of failure to pay service tax electronically through internet banking?

(Please mail your replies with your name and 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- **30th November of succeeding year**
Reply to Q2– **Rs. 10000/-**
Reply to Q3– **within five days excluding holidays**

Reply given by:

1. Manish Sachdeva, manish619sachdeva@yahoo.in
2. Bivas Nag, bivas28@gmail.com
3. Ajay Agarwal, ajayagarwal2306@gmail.com

CASE UPDATES

1. **Commissioner of C. Ex., Nashik vs. Mahindra & Mahindra Ltd. [2015 (39) S.T.R. 298 (Tri. – Mumbai)]**

Issue: - Whether service tax paid on catering service used in canteen and guest house services for employees are admissible as input service credit to manufacturer under Cenvat Credit Rules, 2004?

Decision- Relying on the decision in case of Ultratech Cement Ltd., Hon'ble Mumbai CESTAT held that the admissibility of input service tax credit on catering service is beyond doubt. However, the assessee will not be eligible for proportionate Service Tax credit on catering service, wherein the cost of service has been recovered from their employees. Subject to reversal of such credit along with interest thereon, allowing of Cenvat credit on catering service is sustainable in law.
As regards the guest house services, it was held that it cannot be said that there is a nexus between the service and the manufacturing activities. Therefore, guest house service is not an eligible input service.

2. **Saravana Ginning Factory vs. Commissioner of C. Ex., Madurai [2015 (318) E.L.T. 297 (Tri. – Chennai)]**

Issue: - What will be the transaction value of goods for the purpose of payment of excise duty by a job worker clearing finished goods directly to consignment agents instead of returning them to principal manufacturer?

Decision- The job worker, instead of returning the finished goods to the principal manufacturer, directly cleared the goods to the consignment agents on payment of excise duty and has already collected the excise duty from the customers as per the price at which it was cleared from the consignment agents. In this respect, the Hon'ble Chennai CESTAT held that the excise duty is payable on the goods manufactured and cleared from the job worker directly to the consignment agent on the price at which consignment agents have sold to the buyers. The judgment in the cases of *Loharu Steel Industries Ltd*. and *I.P.F. Vikram India Ltd*. are rightly applicable to the present case. Accordingly, the balance demand was confirmed for payment of duty as per the price at which consignment agents sold the goods to customers.

TRIBUTE TO THE MISSILE MAN OF INDIA

Known as the Missile Man of India, respected **Dr. APJ Abdul Kalam**'s contribution to science went beyond all the material recognition bestowed upon by the society. He had a way with words - from his memorable speeches while addressing students all over India to his inspirational books and essays including his autobiography 'Wings of Fire'. Kalam's words motivated generations of Indians to dream big and work hard towards achieving them. Following are some inspirational quotes by the scientist, author and former president of India:

- *"You have to dream before your dreams can come true."*
- *"It is very easy to defeat someone, but it is very hard to win someone."*
- *"Man needs difficulties in life because they are necessary to enjoy the success."*
- *"All Birds find shelter during a rain. But Eagle avoids rain by flying above the Clouds. Problems are common, but attitude makes the difference."*
- *"Dream is not what you see in sleep, dream is something which doesn't let you sleep."*
- *"Be active! Take on responsibility! Work for the things you believe in. If you do not, you are surrendering your fate to others.*
- *"Failure will never overtake me if my determination to succeed is strong enough."*
- *"If you want to shine like a sun. First burn like a sun."*
- *"Difficulties in your life do not come to destroy you, but to help you realize your hidden potential and power, let difficulties know that you too are difficult."*

Team Indirect Tax Express expresses grief towards the loss of our beloved Former President Dr. APJ Abdul Kalam, who died on 27.07.2015 after a cardiac arrest during a lecture at the Indian Institute of Management in Shillong.

FREQUENTLY ASKED QUESTIONS

IDT NEWS

The Economic Times reported that - Traders and processors of wheat products from pasta to bread are concerned over a likely move by the government to impose a 10 per cent duty on the cereal grain to discourage imports. Analysts said that the step is aimed at helping the Food Corporation of India offload wheat of poor quality on account of unseasonal rains. "The 10 per cent import duty on wheat is aimed at protecting farmers from cheap overseas grain", a Government official clarified.

Query 1: Mr. X. is a selling Agent of State Lottery in West Bengal. He purchases lottery tickets at a discounted price and sales it in retail. Whether service rendered by Mr. X. in assisting the state in sale of lottery tickets is taxable under service tax?

Reply by e-newsletter team: As per Entry 62 of List II (State List) of the 7th Schedule of the Indian Constitution, tax on lottery is a State subject. Accordingly, it has been covered in the negative list of services and service tax is not payable on lottery. However, as per explanation to clause (i) of the negative list, betting, gambling or lottery does not include activities of lottery distributor or selling agent. Thus, service tax is leviable on the services provided by distributor or selling agents of lottery, as appointed or authorized by the organizing state for promoting, marketing, distributing, selling, or assisting the state in any other way for organizing and conducting a lottery.

Query 2: M/s. ABC Pvt. Ltd. is in the business of online web designing, rendering service both in India and outside India. Whether service tax will be applicable on services rendered to clients located outside India?

Reply by e-newsletter team: Under Negative List regime of service tax, online web designing shall be considered as an activity for consideration and shall be taxable @14% if provided in taxable territory. Place of Provision of Service Rules, 2012 have been notified to determine when a service will be deemed to have been provided in the taxable territory. Online web designing is not covered under any specific rule of Place of Provision of Services Rules. Therefore, it should be governed by Rule 3 (Default Rule) of POPS Rules and such service shall be taxable at the location of service receiver. Hence, if service is rendered to a client located outside India, service shall be deemed to have been provided in the non-taxable territory and service tax will not be applicable. Services provided to a client located in the taxable territory shall be taxable in India.

M/s D A V A & ASSOCIATES
(Chartered Accountants)

'Mercantile Building';
Block-B, Room No.-8; 1st Floor,
9, Lal Bazar Street, Kolkata-700001
Office Ph: (033) 22313940/ 40046893
Mobile: +91 9874355518/9433135518
E-mail id: davakolkata@gmail.com
Web: davaassociates.com
Other offices at: Chandrapur, Delhi & Kolkata

Editor

CA Narayan Kr. Agarwal

Editorial Team

Ms Richa Keshari
Ms Nikita Sultania
Mr. Vikash Sultania

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