INDIRECT TAXES UPDATE - 57

SERVICE TAX

Procedure for electronic filing of Central Excise and Service Tax returns and for electronic payment of excise duty and service tax

Pursuant to issuance of *Notifications No. 21/2011-Central Excise (NT) & 22/2011-Central Excise (NT) both dated 14.09.2011* and *Notification No. 43/2011 ST dated 25.08.2011* prescribing mandatory electronic filing of Central Excise and Service Tax returns, the DG (Systems) has issued comprehensive instructions outlining the procedure for electronic filing of Central Excise duty and Service Tax returns and electronic payment of taxes under ACES. The said instructions outline the registration process for new assessees, existing assessees, non–assessees and for Large Taxpayers Units, steps for preparing and filing of return, use of XML Schema for filing dealer's return, procedure for obtaining acknowledgement of e-filed return, procedure for e-payment etc.

[Circular No. 956/17/2011 CX dated 28.09.2011]

Service provided by a non-resident or a person located outside India, to a recipient in India taxable w.e.f 18.04.2006 – Stand accepted by CBEC

CBEC has issued an instruction clarifying that service tax liability on any taxable service provided by a non-resident or a person located outside India, to a recipient in India, would arise w.e.f. 18.4.2006, i.e., the date of enactment of section 66A -'Charge of Service Tax on Services received from outside India' of the Finance Act, 1994.

Accordingly, instruction *F No. 275/7/2010-CX8A, dated 30.6.2010*, wherein the Board had communicated its view that service tax on a taxable service received in India, when provided by a non-resident/person located outside India, would be applicable on reverse charge basis with effect from 1.1.2005, stands rescinded. The instruction was issued by the Board even though the Mumbai High Court in the case of *M/s Indian National Shipowners Association (INSA)* held that service tax shall not be levied on the recipient of a service in India for the services provided by a non-resident or from a person located outside India for the period 1.03.2002 till 17.04.2006.

In response to the judgment of INSA, the Department had filed an appeal before the Hon'ble Supreme Court, for defending the levy of service tax on such services w.e.f. 1.1.2005. However, the departmental appeal has been dismissed by the Hon'ble Supreme Court in the following recent judgements:

(i) SLP (C) No . 29539 of 2010 in *CCE Vs Bhandari Hosiery Exports Ltd*.

(ii) SLP (C)No . 18160 of 2010 in *CST Vs Unitech Ltd*.

(iii) SLP (C) No. 34208/09 of 2010 in *UOI Vs S R Batliboi & Co.*

(iv) SLP (C)No. 328/332 of 2011 in *UOI Vs Ernst & Young*

(v) SLP (C) No. 25687-25688/2011 in *CCE Vs Needle Industries*

(vi) SLP (C) No. 25689-25690/2011 in *UOI Vs SKM Engg Products*

[CBEC Instruction F. No. 276/8/2009 CX8A dated 26.09.2011]

CUSTOMS

Section 28 of Customs Act amended retrospectively to validate Show Cause Notices

The Supreme Court in the case of *CCus. v. Sayed Ali 2011 (265) ELT 17* has held that Collector of Customs (Preventive) is not 'proper officer' and hence not competent to issue Show Cause Notice. The Apex Court held that only the customs officer assigned with specific functions of assessment and re-assessment in jurisdictional area where goods are imported are competent to issue show cause notice under Section 28 of Customs Act, 1962 as 'proper officer'. The Court further ruled that Notifications appointing Collector of Customs (Preventive) to be Collector of Customs for Bombay, Thane and Kolaba Districts do not ipso facto confer jurisdiction on him to exercise power entrusted to 'proper officers' under Section 28. The Court explained that the governing test to determine whether an 'officer of customs' is 'proper officer' is the specific entrustment of function by either CBEC or Commissioner of Customs under section 2(34) of Customs Act, 1962.

Pursuant to the above judgement, an *Instruction F.No.437/143/2009- Cus. IV(pt) dated 15.04.2011* was issued by the Board directing the field formations to examine pending Show Cause Notices and wherever these are not hit by time limitation to get these issued afresh by the jurisdictional Commissionerates. Further, as a prospective remedial measure, the officers of Directorate General of Revenue Intelligence (DRI), Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates were assigned the functions of the 'proper officer' for the purposes of Sections 17 and 28 of the Customs Act by the Board vide *Notification No.44/2011-Customs (N.T.), dated 06.07.2011*.

With a view to validate the Show Cause Notices issued prior to 06.07.2011, the Board had proposed to retrospectively amend section 28 of the Act by the Customs (Amendment and Validation) Bill, 2011. The President has given assent to the said Bill and the amendment to Section 28 has come into force w.e.f. 16.09.2011. The said Act amends Section 28 of the Customs Act, 1962 by inserting clause (11), which reads as

follows:

"(11) Notwithstanding anything to the contrary contained in any judgement, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the sixth day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."

Accordingly, as per the amended Section 28 of the Customs Act, 1962 Show Cause Notices issued prior to 06.07.2011 by officers of Customs, which would include officers of Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence and similarly placed officers stand validated since these officers are retrospectively recognized as 'proper officers' for the purpose of Sections 17 and 28 of the said Act.

The Board has therefore, withdrawn *Instruction F.No.437/143/2009-Cus. IV (pt) dated 15.04.2011* as the matter pertaining to validity of Show Cause Notice has now been settled in terms of *Notification No.44/2011-Customs (N.T.) dated 06.07.2011* and amended Section 28 of the Customs Act, 1962.

It may be noted that though in terms of *Notification No.44/2011-Customs (N.T.) dated 06.07.2011* the officers of DRI and DGCEI are 'proper officers' for the purposes of Section 28, the Board has directed that these officers shall not exercise authority in terms of clause (8) of Section 28 of the said Act. In other words, there would be no change in the present practice and officers of DRI and DGCEI shall NOT adjudicate the Show Cause Notices issued under Section 28 of the Act.

[Circular No. 44/2011 Cus dated 23.09.2011]

Revised Duty Drawback rates notified

The Government has announced the revised All Industry Rates (AIR) of Duty Drawback 2011-12 vide *Notification No. 68 / 2011- Cus (N.T.) dated 22.09.2011*. The rates of duty drawback are effective from **01.10.2011**.

The drawback rates have been determined on the basis of certain broad parameters including, *inter alia*, the prevailing prices of inputs, Standard Input Output Norms (SION), share of imports in the total consumption of inputs, FOB value of export goods and the applied rates of duty. The incidence of duty on HSD/Furnace Oil has been factored in the drawback calculations. The incidence of service tax paid on taxable services which are used as input services in the manufacturing or processing of export goods has also been factored.

The drawback schedule this year incorporates items which were hitherto under the DEPB scheme. Thus, the total number of items in the drawback schedule now number approximately 4000. While incorporating these DEPB items in the Drawback schedule,

care has been taken to classify them at the appropriate four digit level.

For easy reference, a list of all the DEPB items falling under a particular product code and serial number with the corresponding drawback tariff item has also been separately hosted on the CBEC website.

Broadly most of the items which are already covered under the duty drawback schedule will suffer a minor reduction in the existing drawback rates mainly on account of the reduction in basic customs duty on crude petroleum as well as a reduction in central excise duty on diesel.

As a general policy, it has been decided that there will be no value cap on items in the drawback schedule, where the composite duty drawback rate is less than or equal to 3%. Further, there are certain goods especially in engineering and chemicals sectors where because of the wide variation in prices, no value cap has been assigned. You may like to exercise due diligence to prevent any misuse consequently. At the same time, it may also be ensured that the process of scrutiny of such items does not result in hardship to the exporters and the export consignments are not held up.

[Circular No. 42/2011 Cus. dated 22.09.2011]

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