

PRE-BUDGET MEMORANDUM 2017

Indirect Taxes



**THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA
NEW DELHI**

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I. INTRODUCTION

The Institute of Chartered Accountants of India (ICAI) considers it a privilege to submit the Pre-Budget Memorandum, 2017 on Indirect Taxes to the Government of India.

The Memorandum contains suggestions on issues relating to Service Tax, CENVAT Credit Rules, 2004, Excise Duty, Customs Duty and Central Sales Tax for the consideration of the Government while formulating the tax proposals for the year 2017-18. We believe that addressing the said issues would make tax laws simple, fair and transparent and avoid litigation.

In case any further clarifications or data is considered necessary, we shall be pleased to furnish the same.

The contact details are:

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ICAI's Contribution for Smooth Implementation of GST as Partner in Nation Building

- 1. Video lectures on Model GST Law:** Based on the request received from Revenue Secretary, Government of India, the ICAI has developed video lecture on all the topics of Model GST Law and link of which has been submitted on 31st October 2016. Further, it has been hosted on ICAI TV, which can be viewed by any of the stakeholders.
- 2. Background Material on Model GST Law:** The Committee has developed "*Background Material on Model GST Law*". The background material is very comprehensive and contains a clause by clause analysis of the Model GST Law along with comparisons to related provisions of existing law, FAQ's, MCQ's, Flowcharts and Illustrations etc. to make the reading and understanding easier. It is an all-inclusive material, which would provide an in-depth analysis to the proposed GST regime.
- 3. Suggestions on Model GST Law & draft Rules on Refund, Registration, Payment etc.:** The Institute has submitted two sets of its suggestions on Model GST Law to the Government. Members of the Council met the Sh. Najib Shah Chairman, CBEC on 10th August 2016 and gave inputs on various provisions contained in Memorandum on Model GST Law. Further, the Institute has submitted its suggestions on draft Rules on Refund, Registration, Payment etc. to the Government on 28th & 29th Sep, 2016.
- 4. Presentation before the Empowered Committee of State Finance Minister:** In response to the invitation received, the Institute presented its suggestions on Transitional Issues and IGST before the Empowered Committee of State Finance Minister on 30th August 2016.
- 5. Letter to State Government for utilizing expertise of the ICAI:** Letters have been sent to the State Finance Ministers and Commercial VAT Commissioner for nominating ICAI in the Group/Committee formed for implementation of GST in their State and utilizing the expertise of members of ICAI.
- 6. Formation of Study Group for helping State Government in smooth implementation of GST:** The Institute has already formed eighteen (18) state level Study Group extending its support to the State Government in smooth implementation of GST.
- 7. Support extended to Goods and Services Tax Network (GSTN):** Based on the request from GSTN, following supports have been provided:
 - (i) List of IT Firm collected from the members of ICAI and provided to GSTN for providing training so that IT Firm may make necessary changes compatible with GST.
 - (ii) Sharing data of ICAI's members for online validation by GSTN.

(iii) Nominating members for providing feedback on the software module of GST developed by GSTN.

8. Accreditation for training to Industry, Trade etc. in GST: ICAI has submitted an application for imparting quality Training on GST to industry, trade and other stake holders, as 'Approved Training Partners' (ATPs) under the 'GST Training Accreditation Programme' of NACEN.

9. Live Webcasts on GST: With a view to reach stakeholder at large, the Institute has been regularly organizing live webcast wherein any viewer can raise queries, which is replied by renowned speakers. Two webcasts on GST have been organized in the month of Oct & November, 2016.

10. GST Updates: With a view to update the members, summary of significant notifications, circulars and other important development in GST are regularly been circulated through e-mail and further uploaded on the website.

11. Identification and Training of new speakers on GST: 400 new speakers have been identified and trained in Model GST Law making an expert pool of over 500 faculties across India.

12. Workshops, Seminars and Conferences: More than 100 workshops, seminars and conferences on GST have been organized across the country

13. Suggestions on draft Business Processes of GST on Registration, Payment, Refund and Return: The ICAI submitted suggestions on draft Business Processes of GST issued by the Government on registration, payment, refund and return to the Ministry of Finance in December, 2015. Many of the suggestions have been incorporated in the Model GST Law released by the Government in June, 2016.

14. A Study Report to enable smooth Transition from Pre-GST to Post-GST Regime: With a view to facilitate the Government in smooth transition from Pre-GST to Post-GST Regime, the ICAI submitted a Study Report to Government, which envisages probable transitional issues and provides a solution thereof along-with draft Rules. Many of the suggestions have been incorporated in the Model GST Law released by the Government in June, 2016.

15. A Study Report on Impact of GST on Jammu & Kashmir Taxation System: With a view to facilitate the Government of Jammu & Kashmir in understanding the impact of GST on Jammu & Kashmir Taxation System, the ICAI submitted a Study Report to the Government of Jammu & Kashmir. The report entails the impact of GST implementation on Jammu & Kashmir economy, provides a comparative report on revenues under present and GST regime, analyses impact of GST for J&K based Traders, Industries, Consumers etc.

16. Suggestions on GST Constitutional Amendment Bill: ICAI submitted its suggestions in on GST Constitutional Amendment Bill, 2014. Many of the suggestions like defining the term services,

inclusion of petroleum product in GST, subsuming of entry tax into GST etc. have been incorporated in the Bill introduced by the Government in the Parliament.

17. Nomination at the Advisory Committee constituted by Goods and Services Tax Network (GSTN): Considering the expertise of members of ICAI, Goods and Services Tax Network requested ICAI to nominate its two members at the Advisory Committee constituted by Goods and Services Tax Network. Accordingly, ICAI has nominated two members at the said advisory Committee.

18. In addition to the above, ICAI is developing the following:

- ✓ Nationalized PPT on GST – by Nov 2016
- ✓ Revision of Background Material on Model GST Law - Dec 2016
- ✓ Handbook for Trading community; - Dec 2016
- ✓ Handbook for Manufacturing community; - Dec 2016
- ✓ Handbook for service providers; and - Dec 2016
- ✓ FAQ on Model GST Law.

Aforesaid ICAI's contribution for smooth implementation of GST like E-lectures, publication etc. are available for free at the website of the Indirect Taxes Committee www.idtc.icai.org



III. PRE-BUDGET SUGGESTIONS 2017

A. General Submissions

1. Amnesty Scheme / Dispute Resolution

A suitable amnesty scheme must be thought of for all Central Laws and State Laws which have been merged in GST in 'one go' to reduce existing litigation. The scheme must be well thought out since most schemes have failed for the following key reasons, among others:

- a. The procedure is cumbersome;
- b. There is no clarity on many issues at the drafting stage itself;
- c. The dealers are not certain that similar or same issues will be raked up for subsequent / past years;
- d. The payment terms are not addressed to the liking of a bonafide tax payer;
- e. The payment or taxes, interest and penalties fixed under the scheme are not worthwhile to consider and may be pursuing litigation is a better option.

Keeping the above factors in mind if a uniform amnesty scheme can be drawn up across laws and across all States and Union territories with a view to minimizing existing litigations. Other issues should be borne in mind while drafting such a scheme:

- a. It must be simple to understand;
- b. All types / classes of litigations must be covered;
- c. All types / classes of taxes under the Union / State Laws must be covered;
- d. All appeals filed by the State / Centre must be unilaterally withdrawn as a one-time measure of building trust;
- e. Any person who has opted to pay taxes under the scheme must not be subjected to any further revision, review, reference or any other proceedings in future, for the same year;
- f. Tax credits, if any, in the hands of the dealer (under the respective existing statutes) must be permitted to set off against the taxes, interest and penalties under the scheme;



- g. Taxes, interest, penalties paid under protest by an assessee in excess of what is payable under the scheme must be refunded within 30 days of filing the relevant applications together with appropriate orders;
- h. Penalties levied must be fully waived off if the disputed taxes are remitted within 3 months from the date of introduction of the scheme;
- i. Interest must not exceed 10% of the taxes payable;
- j. Litigations relating to input tax credits must be fully allowed and refunded within 30 days from the date of filing any such application;
- k. Withdrawal of applications / orders must not be insisted, upon filing of any such application under the scheme. However, such person must file the relevant withdrawal application within a period of 30 days from the date of filing such applications.
- l. An order accepting the application must be passed in every case not later than 30 days from the date of filing any such applications

2. Credit of eligible duties and taxes in respect of inputs held in stock

Section 145 of the Model GST Law does not cover the case of traders or those processing goods not amounting to manufacture who were not eligible to take CENVAT credit under the Central Excise law, but who become entitled to input tax credit under GST. The stocks lying with them on the appointed day might be containing excise duty/additional customs duties. When these stock items are taxable under GST, GST will be payable on their supply. Obviously, there has to be an enabling provision to set off the CENVAT elements contained in the stock lying with them on the appointed day. The absence of such a provision will result in a substantial cascading effect as well as denial of a rightful tax credit doubling the tax impact to such persons.

For example: A is a manufacturer having stock of finished goods worth Rs. 2 crores. Inputs in these finished goods have suffered Excise Duty of Rs. 15 lakhs and VAT Rs. 20 lakhs. Now if he makes supply of final goods under GST regime and tax payable by him is say Rs. 40 lakhs (assuming 20% rate) he would be eligible to claim credit of the duty paid on inputs in stock as per section 145 of the Model GST law (being eligible credit under the earlier law) and thus would be required to pay Rs. 5 lakhs as tax under GST.

On the other hand B is a trader having stock of finished goods worth Rs. 2 crores. Inputs in these finished goods have suffered Excise Duty of Rs. 15 lakhs and VAT Rs. 20 lakhs. Now if he



makes supply of final goods under GST regime and tax payable by him is say Rs. 40 lakhs (assuming 20% rate), he will be able to claim credit of VAT paid on stock held but will not be eligible to claim credit of the excise duty element contained in stock as per section 145 of the Model GST law (being ineligible credit under the earlier law) and thus would be required to pay Rs. 20 lakhs as tax under GST even though goods have already suffered excise duty under earlier law. This would be unfair to the traders and will lead to cascading of taxes. Further it is challengeable under Article 14 of the Constitution of India, 1949 which provides for the fundamental right of Equality before Law and that no state shall deny to any person equality before the law or the equal protection of the laws within the territory of India. Discrimination between manufacturers and traders might work against this principle.

Suggestion

- *It is suggested that there be made a provision to allow CENVAT Credit of inputs held in stock to traders under Central Excise Law.*
- *Alternatively, deemed credit of 75% value of the output duties paid on inputs be allowed to traders. This notional credit would ensure no disparity between the traders and manufacturers.*

3. Dispute Resolution - Pre-show cause notice consultation

Since May 2016 Penalty provisions in Customs, Central Excise and Service Tax have been rationalized to encourage compliance and early dispute resolution. Pre-show cause notice consultation mandatory at the level of Principal Commissioner / Commissioner in all the cases where duty involved is above Rs. 50 lakhs.

Issue

Though the scheme is very beneficial, assesseees are requested to appear for pre-consultation in a short period without intimating the issue for which the Show Cause Notice is desired to be issued against him. When assessee is not aware of the facts the consultation becomes fruitless thus only adding to the cost and time of the department as well as the assessee.

Suggestion

It is suggested that to make this Pre-show cause notice consultation a successful initiative a draft show because notice be issued to the assessee and a minimum period of 10 days be provided to prepare for the consultation scheduled.



4. Issues with VCES Scheme

Voluntary Compliance Encouragement Scheme (VCES) was an amnesty scheme introduced in May 2013 to self-motivate the defaulters to pay tax dues, file returns as required and not done in the past. The benefit of the scheme was available for all service tax including cess not paid from 1st October 2007 to 31st December 2012. Therein assessee making truthful declaration were provided immunity from interest, penalty and other proceeding.

Issue

- a) Even after submitting VCES challans by assessee(s), VCES 3 still not issued.
- b) For the VCES period Show Cause Notices are being issued to the assessee along with the request to make a pre-deposit which has been made applicable from 2014.

Suggestion

It is suggested to advise:

- a) *field formations to issue VCES-3 to the assessee at the earliest.*
- b) *the proper officers to not to issue show cause notices for assessee making declaration under VCES scheme and accordingly no retrospective pre-deposit demands be made from them.*

5. Number of benches at CESTAT level

As per recent media reports it appears that the pendency of cases in CESTAT has crossed 1 lakh cases. Further most of time is devoted to hear stay matters and due to huge pendency the Hon'ble Members despite their best efforts cannot take up regular matters. The Karnataka High Court in the case of Karnataka Industrial Areas Development Board Vs UOI, 2014 (299) ELT 197 (Kar.), held that the Central Government should constitute more Benches of CESTAT.



Following are the number of cases pending with CESTAT benches across the country:

**STATEMENT SHOWING YEARWISE BREAKUP OF
PENDING APPEALS IN CESTAT, AS ON 01.10.2016**

| Years | Delhi | Mumbai | Kolkatta | Chennai | Bangalore | Ahmedabad | Allahabad | Chandigarh | Hyderabad |
|--------------|--------------|--------------|-------------|--------------|--------------|--------------|-------------|-------------|-------------|
| Upto 2007 | 502 | 2638 | 10 | 1271 | 319 | 103 | 260 | 307 | 184 |
| 2008 | 124 | 927 | 565 | 332 | 294 | 223 | 163 | 405 | 283 |
| 2009 | 468 | 969 | 934 | 673 | 777 | 756 | 349 | 535 | 587 |
| 2010 | 1526 | 1213 | 806 | 933 | 767 | 1241 | 568 | 963 | 517 |
| 2011 | 1480 | 1150 | 1121 | 820 | 1012 | 1148 | 579 | 753 | 607 |
| 2012 | 1222 | 1635 | 997 | 848 | 1173 | 1106 | 724 | 588 | 955 |
| 2013 | 1826 | 2047 | 1023 | 1687 | 1585 | 2323 | 473 | 1027 | 879 |
| 2014 | 1851 | 1851 | 1164 | 1897 | 1477 | 2622 | 679 | 1670 | 1097 |
| 2015 | 1471 | 2185 | 1054 | 2033 | 1509 | 1933 | 767 | 897 | 754 |
| 2016 | 2474 | 2142 | 1550 | 1710 | 1452 | 1762 | 888 | 640 | 843 |
| TOTAL | 12944 | 16757 | 9224 | 12204 | 10365 | 13217 | 5450 | 7785 | 6706 |

Suggestions

- *It is suggested that the process of Constitution more Benches of the CESTAT be made speedy.*
- *Fill up vacancies of Judicial and Technical Members expeditiously.*
- *Transfer the administration and control of CESTAT to Ministry of Law like Income Tax Appellate Tribunal. This would ensure independence of CESTAT members.*
- *To allow attending of the hearing or representation of matters through video conferencing.*
- *To introduce a system of e-filing of appeal and make the filing process, paper-less.*
- *To reduce the minimum age limit for being Member of CESTAT.*

6. Jurisdiction of new CESTAT Benches be modified

CBEC has set up new CESTAT Benches at Allahabad, Chandigarh & Hyderabad to reduce the pendency of cases and enable their fast track disposal. Jurisdiction of these benches would be determined with reference to the Jurisdiction of respective High Courts which may pose problems to the assesseees. At present, CESTAT is having 5 benches at New Delhi with jurisdiction over



entire north India. The new benches of Allahabad & Chandigarh are proposed to have jurisdiction over entire states of Uttar Pradesh, Punjab, Haryana, Himachal Pradesh and Jammu & Kashmir. Thus jurisdiction of CESTAT, New Delhi would be confined to Delhi, Rajasthan, Madhya Pradesh & Chhattisgarh with comparatively fewer cases.

Suggestion

Jurisdiction of new CESTAT Benches at Allahabad & Chandigarh be modified to exclude Delhi – NCR region i.e. Gurgaon, Faridabad, Noida, Ghaziabad etc. This will be reasonable as well as practical as trade and industry people from Noida, Ghaziabad, Faridabad and Gurgaon will not be made to travel to Allahabad or Chandigarh for getting their appeals decided by Tax Tribunals. This would also be in line with the jurisdiction of Delhi ITAT Benches which duly extends to Noida, Ghaziabad, Faridabad and Gurgaon.



B. SERVICE TAX

Substantive Law

7. Outbound transaction provided by Branch to overseas Head Office and vice-versa- Mismatch in Export and Import of Services Provisions

As per Explanation 3(b) to section 65B (44) of the Finance Act, 1994, an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

In a scenario where an offshore entity enters a contract for setting up an infrastructure project with a customer in India but the actual work is performed through the Branch office located in taxable territory, the transaction would lead to duplicity of taxes on the same turnover, without any credit eligibility i.e.,

- Branch office would be held liable to service tax on the money received from the Head Office for execution of the work.
- Branch office would also be held liable to service tax on the contract between Head Office and the India customer, since the Indian office (i.e. Branch Office) of the service provider (i.e. offshore entity) is directly concerned with provision of services.

Hence, on the same transaction the Branch Office would be held liable to pay service tax twice.

However, a different approach is adopted in case of services rendered by the Head Office/Branch to overseas Branch /Head Office whereby export status is denied vide rule 6A of the Service Tax Rules, 1994.

Suggestions

No service tax be levied on outbound transaction provided by an office located in taxable territory to another office located in non-taxable territory of the same legal entity.

Alternatively, export status be accorded to services rendered by Head Office/Branch to overseas Branch /Head Office so as to treat them at par with import of service.



Consequently, reversal of 7% amount as per Rule 6(3A) of CENVAT Credit Rules, 2004 may not be required.

8. Job work by SEZ units for exports- Need Review

The 'Negative List of Service' in Section 66D of the Finance Act, 1994 inter alia covers 'any process amounting to manufacture or production of goods'. The said expression has been defined in Section 65B (40) of the Act as to process on which duties of excise is leviable under Section 3 of the Central Excise Act, 1994 (CE Act).

Prior to introduction of Negative list, similar exclusion was contained under the taxable service category of 'Business Auxiliary Service' (BAS) which covered services relating to 'production or processing of goods', but excluded 'any activity that amounts to manufacture of excisable goods'. The Explanation to said definition of BAS provided that the term 'manufacture' has the meaning assigned to it in Section 2(f) of the CE Act.

While prior to introduction of 'negative list', the criteria to judge whether the activity amounts to 'manufacture' or not was with reference to definition of the said term as given in Section 2(f) of the CE Act, post introduction of Negative list, the reference is to Central Excise law provision, i.e. process on which duty of excise is payable under Section 3 of CE Act. Activities carried out in SEZ are outside the scope of Section 3 of CE Act and accordingly, do not fall in the exclusion list and, thus, do not get covered under the negative list.

Thus, a SEZ unit carrying out job-work activity would be liable to service tax, even though the process carried out by it amounts to 'manufacture', if seen from common parlance or in terms of definition as given in Section 2(f) of the CE Act.

Suggestion

The definition of 'process amounting to manufacture or production of goods', as presently given in Section 65B (40) of the Act, be modified to cover all processes that amount to manufacture as defined in Section 2(f) of the CE Act.

9. Trading of goods - Not a service still, it is in Negative list of Services

It is interesting to note that section 66D starts with the words, namely, 'The negative list 'shall comprise of the following **services...**'. Thus, negative list pre-supposes that all activities covered therein are services. However, the same are not charged to service tax by their specific exclusion in the charging section 66B.



The definition of service as provided under clause (44) of section 65B excludes *inter alia* ‘an activity which constitutes merely a transfer of title in goods or immovable property, by way of sale, gift or in any other manner’. Thus, by virtue of the said exclusion pure sale of goods and immovable property gets excluded from the very definition of service and cannot be termed as service.

However, trading of goods is covered under clause (e) of negative list of services though the same is not service at all. This could lead to interpretational issues in future.

Suggestion

Appropriate amendment be made to rectify the said anomaly.

10. Taxability of Right to use “Radio Frequency Spectrum”

Finance Act, 2016 amended Section 66E of Finance Act, 1994, enlisting Declared Services to include the right to use the radio-frequency spectrum and subsequent transfers thereof as Declared Services. The very same activity is being claimed by State Governments as liable under VAT and before High Courts. Entry would add to the disputes on count of double taxation.

Suggestions

- *Constitutional validity for levying tax on right to use the radio-frequency spectrum and subsequent transfers thereof be checked as it is covered under Article 366(29A)(d) of The Constitution of India 1949.*
- *Further when ST collected on whole amount in one shot, credit also should be allowed on the whole amount as it is a revenue expenditure. This would also be in line with uniformity and fairness.*

11. Conflict between Section 67A & Rule 5 of Point of Taxation Rules, 2011

Finance Act, 2016 amended Section 67A to provide that the time or point in time with respect to the rate of service tax will be as per Point of Taxation Rules, 2011.

Rule 5 of Point of Taxation Rules, 2011 has been amended vide *Notification No. 10/2016-ST dated 1st March 2016* to provide that the said rule applies also in cases of new levy.

The explanations added to Rule 5 of Point of Taxation Rules, 2011 raise a fundamental question as to whether a service which has already been provided prior to introduction of levy could be taxed on raising of invoice or receiving payment subsequently. One needs to distinguish between the taxable event (event deciding taxability) *vis-à-vis* a payment event (event deciding timing of



payment). Further, in the case of *Collector of C. Ex Hyderabad Vs Vazir Sultan Tobacco Co Ltd 1996 (83) E.L.T. 3 (SC)*, it was held that manufacturing is a taxable event whereas payment of excise duty is at the time of the removal of goods, therefore in a case where goods have been manufactured at the time when they were not excisable, there cannot be a duty liability at the time of removal of such goods.

Thus, the date of provision of service gets completely ignored which creates a conflict between Section 67A(1) and 67A(2).

Further, Explanation 2 read along with clarification implies that in case of services which are being taxed for the first time, tax would be payable even in case the payment is received after the date on which such service is being taxed despite the fact that services are rendered and invoice the same is issued when they were not liable to tax.

Suggestion

- *Suitable amendments be made in Rule 5 so as to ensure that no tax is required to be paid on that portion of services which is liable to tax for the first time and the services are rendered during the period they were not so liable for which invoice is also raised prior to notified date. Due weightage be given to date of rendering the service for the purpose of taxation of new services.*
- *Correspondingly, suitable amendments be made in Rule 7 also which provides for Point of Taxation in case of payment under Reverse Charge Mechanism.*
- *The new levies like SBC, KKC etc. be treated as change in effective rate of tax rather than being treated as services taxed for the first time.*

12. Applicability of service tax on employee secondment

Under employee secondment an employee is temporarily transferred to another job for a defined period for a specific purpose. A secondment job can be full-time, part-time or job share. Under Employee Secondment an Organisation may place its staff at the disposal of its associate/ subsidiary company.

It is important to note that definition of service as per Section 65(B) 44 of the Finance Act 1994 specifically excludes the provision of service by an employee to the employer in the course of or in relation to his employment.

The definition of term “Consideration” provides that



“(a) ‘consideration’ *inter alia* includes–

- (i) any amount that is payable for the taxable services provided or to be provided;
- (ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed.”

Issue

Under employee secondment there may arise a situation wherein an Indian company may be reimbursed by a Foreign Company with the salary entitled to an employee, temporarily working with the Foreign Company. Treatment of such reimbursements has created a confusion amongst the industries.

Suggestion

It is suggested that appropriate clarifications be issued with regards to such reimbursements relating to employee secondment purely based on employee-employer relationships.

13. Exemption of Production of alcoholic liquor for human consumption

Section 66D “Negative List” has been amended to make, services by way of carrying out any process amounting to manufacture or production of alcoholic liquor for human consumption, taxable.

Issue

Article 246 of Constitution of India empowers State Government under List II- State List vide Entry 51 to levy duties of excise on alcoholic liquor for human consumption manufactured or produced in a State.

Further, Article 246 of Constitution of India which empowers Central Government under List I- Union List vide Entry 97 to levy tax on “any other matter not enumerated in List II and List III including any tax not mentioned in either of those lists”. This may be deduced to mean that Central Government can levy tax on activities not enumerated in List II and List III.



Suggestion

It is suggested that constitutional validity for levying tax on manufacture or production of alcoholic liquor for human consumption be checked as it is covered under Entry 51 of List II- State List of Article 246 of Constitution of India.

14. Service tax on recoveries towards electricity supplies

Section 66D (k) of Finance Act, 1994 dealing with negative list of services lists transmission or distribution of electricity by an electricity transmission or distribution utility as one of the services under Negative List.

Further, Section 66B(23) defines ‘electricity transmission or distribution utility’ as ‘the Central Electricity Authority; a State Electricity Board; the Central Transmission Utility or a State Transmission Utility notified under the Electricity Act, 2003; or a distribution or transmission licensee under the said Act, or any other entity entrusted with such function by the Central Government or, as the case may be, the State Government and the definition of services excludes ‘transfer of property in goods’.

Also, Electricity constitutes “goods” under the VAT and Central Excise laws and judicial precedents have upheld this view.

Excisable goods are defined under Section 2(d) of the Central Excise Act, 1944 as “goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subjected to a duty of excise and includes salt”. Electricity is though specified in the CETA under Tariff Item 2716 00 00 but the same is presently not being subjected to any duty of excise and, therefore, it does not come under excisable goods.

Further, prior to 1.7.2012, activities relating to transmission or distribution were clearly exempt from service tax and there is no reason why State/Central Government utilities should be saddled with litigation on this count as by the statute governing them they cannot carry out any activity except in relation to transmission or distribution. Therefore, this exemption for activities relating to transmission or distribution should be restored.

Issue

Various developers of real estate parks supply electricity to their tenants (either generated through the DG sets or obtained from the state electricity board). However, only electricity transmitted or distributed by an electricity transmission or distribution utility is specifically exempted under



service tax. No specific exemption has been provided for electricity supplied by developers to its tenants.

Suggestion

It is suggested that to remove the ambiguity, it may be clarified that charges/ recoveries for supply of electricity by developers is not covered under the purview of service tax.

Alternatively, if the electricity supply needs to be taxed, it be suitably clarified and the valuation mechanism for the same be suggested accordingly.

15. Declared services- Need to clarify clause (e)

As per Section 66E, the following shall constitute declared services:

.....

“Agreeing to the obligation to refrain from an Act or to tolerate an Act or a situation or to do an Act.”

.....

If the clause is given its literal meaning, then it will cover very wide number of transactions [including many personal and social transactions] which may not be intention of the law-makers. The purpose of this clause is to tax non-compete fee.

Suggestion

It is suggested that this clause be suitably modified to exclude personal, social and religious activities.

16. Service Tax on Take Away Orders & Free Home Deliveries

The Service Tax Department of Chandigarh vide its letter C. No. ST-20/STD/Misc./Sevottam/62/12/4693 dated August 13, 2015 (“the Clarification”) has clarified that free Home delivery/ Pick-up of food is not liable to Service tax. The Department explained the matter further by stating that the dominant intention of such transaction is that of ‘Sale’ as food is not served at Restaurant and no other element of service such as ambience, live entertainment (if any), air conditioning or personalized hospitality is offered. It is further stated that Service tax can be levied if there’s an element of ‘Service’ involved which would typically be the case where food is served in Restaurant. Further, the Department has clarified that the



above transaction is not liable to Service tax, being sale in nature, if no amount is charged for such free delivery of food.

Issue

Service Tax levied in case of Take Away Orders even C. No. ST-20/STD/Misc./Sevottam/62/12/4693 dated August 13, 2015 (“the Clarification”) has clarified that free Home delivery/ Pick-up of food is not liable to Service tax.

Suggestion

It is suggested that appropriate explanation be provided in the law itself in respect of leviability of service tax on take away orders/ free home deliveries.

17. Levy of Service Tax on amount recovered towards penalty, fines, liquidated damages or any other recoveries from other person.

Section 66B of the Finance Act provides that service tax is leviable at the rate of 14% on the value of services, other than those specified in the Negative List, provided or agreed to be provided in the taxable territory by one person to another.

Section 65B(44) of the Act defines the term “service “ to mean any activity carried out by a person to another for a consideration, including declared services. The term “activity” has not been defined in the Act. The ministry of Finance, in the Guidance Note dated 20.06.2012 has observed that in the absence of any specific definition the term “activity” shall be given the meaning as it is understood commonly to include an act done, a work done, a deed done, an operation carried out, execution of an act, provision of a facility etc. It is further stated that activity could be active or passive and would also include forbearance to act.

As per Sec 66E(e) of the Finance Act, 1994, “agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act” shall be a declared service and liable to service tax.

It is clear from above that in order to attract the levy of service tax, there should be an activity and the activity should be undertaken by one person to another person for another.

Issue

The Central Excise Department in some cases is demanding service tax on amount recovered towards penalty, fines, liquidated damages or any other recoveries from other person. It is



important to note that such recoveries done by the customer is not a consideration for any service provided by the customers to its vendors as there exists no reciprocity in such cases and the amount recovered from vendor is in the nature of compensation only.

In contract, compensation is being paid by one of the contracting parties to the other for any loss or injury caused to the latter by some conduct in breach of the terms of the contract.

CBEC vide *Circular No 96/7/2007/-ST dated 23.08.2007* has clarified that an amount collected for delayed payment of telephone bill is not to be treated as consideration charged for provision of telecom service and therefore, does not form part of the value of the taxable services under section 67 read with Service Tax (Determination of Value) Rules, 2006. It has further been if detention charges collected to hold a marine container beyond the holding period is determined by the shipping companies/steamer agent is not chargeable to service tax, the same being in the nature of a “penal rent” not a consideration for a service.

Suggestion

It is suggested that suitable amendment be made to provide that penal rates, charges, fines, liquidated damages etc. are not liable to Service tax.

18. Taxability of transfer of right to use goods

Long drawn litigation and confusion is prevailing on whether a transaction involves transfer of right to use goods or not. There has been tendency by State Government to tax it under VAT and Central Government to tax it under service tax. Huge litigations are going on this issue and tax payers and department is involved in unnecessarily litigation.

CBEC in its Circular no. 198/08/2016-ST dated 17.08.2016 provides that the criteria laid down by the Supreme Court in the case of *Bharat Sanchar Nigam Limited vs. Union of India* [2006 (2) STR 161 SC] and few other Supreme Court judgments to be followed. Even this circular is bit open as it instructs officers to check up the facts of the case and take the decision. Even after this circular, an apprehension is raised in the industry that the tendency of the officers will still be to take ultra-cautious views and drag assessee into unnecessary litigation.

Practically, this circular may not serve the purpose of reducing litigation on this issue

Suggestion

The Government should amend the law to provide as under:



- Where VAT is paid on the transactions by assessee, it should be excluded from the levy of the service tax.
- If assessee has discharged VAT or service tax and if Government is of the view that assessee has wrongly discharged tax, a provision should be made wherein the Government legally entitled to tax should recover it from other Government which has wrongly collected tax. The Government should put ratio of judgment of Honourable Punjab & Haryana High Court in case of *M/s. Idea Cellular Ltd vs. Union of India & others [2015-TIOL-896-HC-P&H-VAT]* in the law itself.

19. Order passed by Commissioner u/s 73A be made applicable in Tribunal by rectifying Section 86

As per section 73A of the Finance Act, 1994 where an amount had been collected in the name of Service Tax, which was collected in excess or was not required to be collected at all, the same has to be paid to the credit of Central Government. Under this section the Central Excise Officers had been provided power to issue Show Cause Notice and there upon determine the amount due after considering the representations made.

Section 86 of the Finance Act which deals with the appeal to the Tribunal covers only an order passed by the Commissioner under section 73 of the Finance Act or section 83A of the Finance Act and an order passed by the Commissioner (Appeals) under section 85 of the Finance Act . An order passed by the Commissioner under section 73A of the Finance Act is not covered by the section.

Normally, the order would be passed by Adjudicating Authority, who may be Commissioner or an authority below him depending upon the amount involved. In case where order is passed by a authority below Commissioner, the first appeal lies before Commissioner (Appeals) under the provision of Section 85 of the Finance Act 1994 and in case if the order is passed by the Commissioner as an Adjudicating Authority, an appeal cannot be made to CESTAT under section 86.

Issue

As per the existing provision of section 86, only order of Commissioner passed under Section 73 & 83A are appealable to Tribunal. An order passed by the Commissioner under section 73A of the Finance Act is not covered by the section meaning thereby that there is no appeal procedure if the order under section 73A is passed by the Commissioner but appeal can be filed if 73A order is passed by an authority subordinate to Commissioner. It appears the above



situation is only a drafting error as the only remedy left before aggrieved party is to file a Writ Petition before High Court.

Suggestion

It is suggested that the anomaly be rectified by amending section 86.

20. Amendment in time limit of filing application for the claim of Rebate under Service Tax

Section 93A of Finance Act provides that such rebate shall be filed within the period of one month from the date of commencement of the Finance Act.

Suggestion

Extend the time limit to 6 months from proposed 1 month.

Valuation of Taxable Service

21. Sharing of expenses between two companies/ sister concerns- Clarification required to adhere with Legal aspect

Suggestion

It is suggested that an appropriate clarification be issued with a view to provide clarity on service tax for 'sharing of expenses' between two associated companies/ sister concerns where there is no margin.

22. Manner of determination of Value in case where the whole consideration is not in money

Rule 3 of Service Tax (Determination of Value) Rules, 2006 reads as subject to the provisions of section 67, the value of taxable service, [where such value is not ascertainable], shall be determined by the service provider in the following manner :-

- (a) the value of such taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of trade and the gross amount charged is the sole consideration;
- (b) Where the value cannot be determined in accordance with clause (a), the service provider shall determine the equivalent money value of such consideration which shall, in no case be less than the cost of provision of such taxable service.



Issue

This method of valuation wherein a comparable price or price equivalent to similar service is taken as the value of the service may lead to different results under different situations. There is no fixed formula for determination of Value as in the case of Excise Valuation Rules. For Example: in cases where Corporate Guarantee is provided it is difficult to determine the value of services.

Suggestion

It is suggested that the provision be amended to provide a Deemed Consideration Mechanism wherein cost plus some deemed margin (may be 10%) be taken as value of Services on the similar lines as provided under Rule 8 of Excise Valuation Rules, wherein the Value of the Goods is taken as 110% of cost of the Goods.

23. Taxability of Aggregator Services

Central Government vide *Notification No. 7/2015-ST, Dated: March 01, 2015* provided that w.e.f 1st March 2015 service Tax for services provided or agreed to be provided by a person involving an aggregator in any manner shall be payable under reverse charge mechanism wherein 100 % of Service Tax will be required to be paid by the aggregator.

However, it has not been clarified as to whether the aggregator should pay service tax on the receipt or the margin earned by the aggregator.

Suggestion

It is suggested that there be prescribed a method of valuation for determining the value on which service tax is payable by an aggregator.

24. Service Tax payment on the tickets sold by lottery distributor

Rule 6(7C) of the Service Tax Rules, 1994 provides that the distributor or selling agent, liable to pay service tax for the taxable service of promotion, marketing, organizing or in any other manner assisting in organizing lottery may pay the service tax as per following instead of paying service tax @ 14%:



| Sl. No. | Rate | Condition |
|---------|--|---|
| 1. | Rs 8200 on every Rs 10 Lakh (or part of Rs 10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw | If the lottery or lottery scheme is one where the guaranteed prize pay-out is more than 80% |
| 2. | Rs 12800/- on every Rs 10 Lakh (or part of Rs 10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw | If the lottery or lottery scheme is one where the guaranteed prize pay-out is less than 80% |

Issue

When service tax levy is on Lottery Ticket Distributor/Agent, the Composition scheme should be based on the tickets sold by the Distributor/Agent rather than being based on face value of tickets printed.

Suggestion

It is suggested that Service Tax Rules relating to payment of service tax by Lottery distributor or selling agent be suitable amended to this effect since the distributor cannot ascertain the details of tickets printed by state government.

Exemptions/ Abatements/ Rebates

25. Taxability of Commission paid by Foreign Principal to Indian agent for Money Transfer

Circular No. 163/14/2012 - ST, Dated: July 10, 2012 provided that there is no service tax per se on the foreign exchange remitted to India from outside for the reason that money does not constitute a service and that conversion charges or fee levied for sending such money would also not be liable to service tax as the person sending money and the company conducting the remittance are both located outside India.



The aforesaid circular was amended by *Circular No. 180/06/2014-ST, Dated : October 14, 2014* and the NRI remittance fees earned by the Indian agents as well as the sub-agents from the foreign money transfer service operator for transferring the money to the beneficiary in India was made liable to service tax.

Issue

Based on the *Circular No. 180/06/2014-ST, Dated : October 14, 2014*, the service tax authorities have started issuing notices, demanding service tax retrospectively from agents/ sub-agents 01 July 2012 onwards.

Suggestion

It is suggested that Circular No. 180/06/2014-ST, Dated: October 14, 2014 be withdrawn to reinstate the old circular clarifying that no service tax is payable on money transfer service fee income in India.

26. Exemption to rehabilitation of existing slum dwellers

Notification No. 9/2016-Service Tax dated 01.03.2016

Suggestion

In order to ensure that exemption can be utilized for the benefit of all the slum-dwellers, the words “In-situ” be omitted from this exemption.

27. Exemption for transportation of Food Stuffs limited to Food grains

Central Government vide *Notification No. 6/2015-Service Tax, dated 6th March 2015*, has provided that services by way of transportation, by rail or a vessel or a goods transportation agency from one place in India to another, of only milk, salt and food grain including flours, pulses and rice; is exempt from Service Tax. Prior to this amendment transportation of tea, coffee, jaggery, sugar, milk products and edible oil, excluding alcoholic beverages were also exempt from Service Tax.

Issue

Withdrawal of exemption from tea, coffee, jaggery, sugar, milk products and edible oil will cause undue hardship to the poor and needy as the prices for procuring these items will go up.



Suggestion

It is suggested that exemption on transportation of tea, coffee, jaggery, sugar, milk products and edible oil be reinstated.

28. Exemption to Charitable Activities provided by an entity registered under section 12AA of Income Tax Act

Re-instatement of sub-clause (v) of clause (k) of mega exemption notification

The definition of “charitable activities” was amended by Finance Act 2013 by deleting the portion listed in sub-clause (v) of clause (k). Thus the benefit to charities providing services for advancement of “any other object of general public utility” up to ₹ 25 Lakh will not be available. The threshold exemption will continue to be available up to ₹ 10 lakh.

The expression “charitable purpose” has been defined under Section 2(15) of the Income Tax Act, 1961 to include:

- (a) Relief of the poor,
- (b) Education,
- (c) Medical relief, and
- (d) Advancement of any other object of general public utility.

Issue

The withdrawal of this exemption has made services for advancement of any other object of general public utility taxable subject to a threshold of ₹ 10 lakhs.

Suggestion

It is suggested that the exemption to charitable activities relating to “advancement of any other activity of public utility” be restored.

Further, the definition of Charitable Activities be amended to bring it in line with the one provided under the Income Tax Act, 1961

29. Services received by Educational Institutes

The exemption provided in respect of renting of immovable property services to educational



institutions has been withdrawn with effect from 11th July, 2014 *vide Notification No. 06/2014-ST dated July 11, 2014*. Further, exemption available for auxiliary services provided to the educational institutional has been restricted to specified services.

Issue

The levy of service tax on renting of immovable property provided to the educational institutions has substantial increase the cost of education.

Further to remove the ambiguity, the auxiliary services has been defined where in the services provided by Guest Faculty / teachers and IT lab services has not covered.

Suggestion

- (i) *It is suggested that Renting of Immovable property service provided to Education Institutions continue to be exempted.*
- (ii) *Keeping in view the Central Governments idea of Skilled India it is suggested that all the Education Services directly relating to the delivery of education or training to students be kept outside the purview of Service Tax.*

30. Clause 25 of Mega Exemption Notification - Services provided to Government, a local authority or a governmental authority

Clause 25 of *Notification No. 25/2012 dated 20.06.2012* exempts Services provided to Government, a local authority or a governmental authority by way of –

- (a) water supply, public health, sanitation conservancy, solid waste management or slum improvement and up-gradation; or
- (b) repair or maintenance of a vessel;

Suggestion

It is suggested that all functions entrusted to a municipality under Article 243W of the Constitution be covered in clause 25 of the mega exemption notification.

31. Manpower Supply Service- appropriate exemption/abatement be provided

Any person engaged in providing any service, directly or indirectly in any manner for recruitment or supply of manpower, temporarily or otherwise to any other person is liable to service tax.



Issue

While providing such manpower services, agency has to pay salary of its deputed employee and statutory dues such as ESI, EPF. Agency collects its fees for supplying manpower from the service recipients.

Further, no CENVAT credit is accrued on these services due to which cost of supply of manpower is very huge.

Suggestion

It is suggested that in respect of Manpower Supply Services, appropriate abatement be allowed in respect of Salary payable, ESI/EPF or the cost of Salary payable to its deputed employee by manpower or recruitment supply agency is allowed as deductions from the Gross Value Charged on the concept of pure agent.

Alternatively, it is suggested that only the Agency Charges be made liable to Service Tax. Where such charges cannot be disclosed separately, a Chartered Accountants certificate be obtained for such a purpose.

32. Abatement on Construction Services & Inclusion of Land Value in case of Construction of a complex, building, civil structure

Abatement Notification No. 26/2012 dated 20.06.2012 provides regarding abatement of Construction Services as follows:

| | | | |
|-----|---|----|---|
| 12. | Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly, except where entire consideration is received after issuance of completion certificate by the competent authority,- | | (i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004 |
| | (a) for a residential unit satisfying both the following conditions, namely :- (i) the carpet area of the unit is less than 2000 square feet; and (ii) the amount charged for the unit is less than rupees one crore; | 25 | (ii) The value of land is included in the amount charged from the service receiver.” |
| | (b) for other than the (a) above. | 30 | |



Issue

The abatement percentage for residential unit (satisfying a condition) and other units is different.

There may arise a situation where value of construction service is very less as compared to the value of land but the assessee is required to pay tax on an amount much higher than construction charge. For example: If the value of land is ₹ 20 Crores on which construction is done amounting to ₹ 2 crores, the assessee is required to pay tax on 25% of ₹ 22 crores which is much higher than ₹ 2 crores.

Suggestion

It is suggested that a uniform percentage of taxable value (75%) be given as the abatement. Also, notification be changed according to the value of land in the City/area (as per guideline value).

Further, it is suggested that appropriate mechanism be provided to exclude or reduce the value of Land in case of Construction of Complex, Building, Civil Structure etc. where the Circle rate value of land is more than 75% of the Total value of construction service including of land.

Alternatively, Rule 2(a) of Service Tax (Determination of Value) Rules, 2006 be suitably amended to provide an option to reduce the value of land where the Circle rate value of land is more than 75% of the Total value of construction service including of land.

33. Service Tax on Advertisement Agency Commission

The value of taxable services in relation to service provided by an advertising agency to a client is the gross amount charged by such agency from the client for services in relation to advertisements. However, the amount paid by the advertising agency, excluding their own commission, for space in getting the advertisements published in the print media (i.e. newspapers, periodicals, etc.) are not includible in the value of taxable service.

For example a publication house charges ₹ 10,000/- to Advertising agency A with 15% discount i.e. ₹ 8,500/-. Advertising agency A charges the ultimate client a similar bill of ₹ 10,000/- with a lesser discount of 10% i.e. ₹ 9,000. As per current industry practice agencies charge service tax @ 1.854% (15% commission * 12.36% ST rate). So Agency A will charge service tax @ 1.854% * ₹ 9,000/- and the commission is not shown separately.



Issue

There is no business process/ mechanism available for determining the actual value liable to Service Tax in case of Services like Advertisement, Expenses, sharing between group companies, services of sub-brokers and other intermediary services.

Suggestion

It is suggested that existing practice be amended to compulsorily declare a proportion as service charge for advertisement agencies in order to curb the existing practice of hiding the commission portion of the bills.

Alternatively, it is suggested that a mechanism on the basis cost plus 10% or actual margin, whichever is lower be introduced to help in determining the value of such intermediary services.

Procedural Law

34. Issue of Show Cause Notice for fraud etc. to Non-fraud assesseees

Section 73(1) of the Finance Act 1994 provides that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within 30 months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

Provided where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of -

- (a) fraud; or
- (b) collusion; or
- (c) wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax, by the person chargeable with the service tax or his



agent, the provisions of this sub-section shall have effect, as if, for the words 30 months the words "5 years" had been substituted.

Further section 73(3) provides that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid.

Provided no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service tax under this sub-section and interest thereon.

Issue

It has been observed that the most of the notices are being issued under proviso to section 73(1) of the Finance Act 1994 as a case of fraud etc. by applying limitation period of 5 years.

In addition to the above, it may also be observed that assessee are not informed as to whether notice is issued by the specific reason of fraud **OR** collusion **OR** wilful misstatement **OR** suppression of facts **OR** contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

This makes the NON-FRAUDULENT assessee liable to penal provision u/s 78 in place of section 76 and rips them off the no penalty payment provision u/s 73(3) of the act. This causes undue hardship to those assessee and depicts misuse of power by the proper officers.

Suggestion

- *It is therefore suggested that non-fraudulent assessee be issued show cause notices u/s 73(1) wherever applicable and a guideline be issued in this regard to all the officials.*
- *Further if an assessee is issued a notice under proviso to section 73(1), the reason for such notice be clearly specified as to whether it relates to fraud **OR** collusion **OR** wilful misstatement **OR** suppression of facts **OR** contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.*



35. Increase in limitation period for recovery of service tax to 30 months

Finance Act, 2016 amended Section 73 to provide that the limitation period for recovery of service tax not levied or paid or short-levied or short paid or erroneously refunded, for cases not involving fraud, collusion, suppression etc. is to be enhanced by 1 year, that is, from present limit of 18 months to 30 months. The limit of 18 months was earlier revised from 12 months on 28.05.2012.

Further, w.e.f 1st April 2016, a new Rule 7(3A) has been inserted in the Service Tax Rules, 1994 to provide for filing of annual return by 30th November of the succeeding financial year.

Presently, Rule 7(1) of the Service Tax Rules, 1994 provides for submission of half yearly Service Tax return by 25th of the month following particular half year.

Therefore, the maximum period of 43 months demand can be made even for bona fide actions, which is not reasonable. It would also breed further inefficiencies and hardship on the service providers.

Suggestion

- *The erstwhile time limit of 6 months for issuance of notice be restored where tax is not collected due to the inherent fact that the taxes cannot be collected after the year is over.*
- *Further, the time limit for taking CENVAT credit as well as refunds be increased to 6 months from the last date of filing annual returns*

36. Penalty for late filing of Return

Where the return prescribed under rule 7 of the Service Tax Rules 1994 is furnished after the date prescribed for submission of such return, the following amount is payable by the assessee:

| Delay in filing of return after due date | Late fees |
|--|---------------------------------------|
| First 15 days | ₹ 500/- |
| More than 15 days but less than 30 days | ₹ 1000/- |
| More than 30 days | ₹ 1000/- + 100 per day beyond 30 days |

The maximum amount of late fee is restricted to the amount specified in Section 70(1) of the Finance Act, 1994 which is ₹ 20,000/-.



Issue

The assessee is bound to file a return under service tax even if it is a nil return to prevent himself from litigation. At times the penalty imposed on the assessee exceeds the amount of tax payable by him which puts an additional burden on the assessee.

Suggestions

- *It is suggested that late fees of filing service tax return be subjected to the maximum amount of tax payable by the assessee.*
- *Additionally, it is also suggested that the assessee having nil returns be not imposed with the late fees for filing delayed returns.*

37. Penalty for offences by director etc. of company

Section 78A of Finance Act, 1994 provides that where a company has committed any of the listed contraventions, then any director, manager, secretary or other officer of such company, who at the time of such contravention was in charge of, and was responsible to, the company for the conduct of business of such company and was knowingly concerned with such contravention, shall be liable to a penalty which may extend to one lakh rupees.

Issue

In case any contravention is taking place in the company, the director etc. of the company is liable to pay penalty even if the same is not proved in their name.

Also, Section 89 of the Finance Act, 1994 provides for the prosecution provisions in case of offences specified under section 78A

Suggestion

It is suggested that the penal provisions be amended wherein penalty leviable thereon may be waived if the concerned person is able to prove reasonable cause of such failure.

Further, as the prosecution provisions are taken care of by Section 89, the provisions of section 78A be subsumed accordingly.



38. Search of premises- *need change to incorporate reasons*

Section 82 provides that the Joint Commissioner or Additional Commissioner of Central Excise may, if he has reason to believe that any documents or books or things which in his opinion shall be useful for or relevant to any proceeding under the Act, are secreted in any place, may authorize any Central Excise Officer to search for and seize or himself search for and seize such documents or books or things.

Suggestion

It is suggested that in order to avoid vexatious searches, the reasons for conducting the search may be recorded in writing. This will also be in line with income-tax provisions. The suggestion seeks to bring about greater transparency in the processes and will enable the tax payer to effectively respond to the queries of the tax department. It will also bring about discipline within the department.

Further, detailed & specific provisions for search be issued in lines with Section 153C on Income Tax Act, 1961. This would help in clarifying the issues like what would be the period for which search could extend, whether search may extend to sister concerns/ group of companies if the search is warranted for one company or what would amount to raid or survey in a given situation etc.

39. Prosecution- *Need to incorporate mens rea*

Joint Commissioner and Additional Commissioner are empowered to issue search warrant under section 82 and the same is executed by the Superintendent. Provisions relating to prosecution contained in section 89 have been re-introduced by the Finance Act, 2011 and further amended by Finance Act, 2012 to apply in the following situations:

- (i) Knowingly evades the payment of service tax;
- (ii) Availment and utilization of CENVAT credit without actual receipt of inputs or input services;
- (iii) Maintaining false books of accounts or failure to supply any information or submitting false information;
- (iv) Non-payment of amount collected as service tax for a period of more than six months.



Further, section 89(1) inter alia provides that whoever avails and utilizes credit of taxes or duty without actual receipt of taxable service either fully or partially in, shall be liable for punishment as provided therein.

This implies that assessee cannot avail and utilize CENVAT credit till the time, services are actually received. However, rule 4(7) of the CENVAT Credit Rules allows “CENVAT credit in respect of input service on or after the day on which the invoice, bill or, as the case may be, Challan referred to in rule 9 is received.

Suggestion

Prosecution provisions ought to apply only in exceptional cases and must include mens rea. Further, in the cases of interpretational issues such provisions should not be applied.

40. Amendment in time limit of Filing application for the claim of Rebate under Service Tax

Notification No. 41/2012-ST dated 29.06.2012 has granted rebate of service tax paid on the taxable services which are received by an exporter of goods and used for export of goods, subject to the extent and manner specified.

Section 93A with retrospective effect vide Finance Act 2016. Further an application for the claim of rebate of service tax would be made within the period of one month from the date of commencement of the Finance Act, 2016.

Suggestion

Time limit for making an application for the claim of rebate of service tax be extended to 3 months from proposed 1 month.

41. Penalty for delay in filing service tax returns

Notification No. 19/2016-Service Tax dated 01.03.2016 has amended Rule 7C of Service Tax Rules to provide the following:

- (i) For delay in filing ST-3 returns, late fee of Rs.500 upto 15 days and Rs.1000 beyond 15 days but not later than 30 days. Delay beyond 30 days Rs.1000 plus Rs.100 per day maximum of 20,000.



- (ii) Where the annual return is filed by the assessee after the due date, the assessee shall pay to the credit of the Central Government, an amount calculated at the rate of Rs. 100 for the period of delay in filing of such return, subject to a maximum of Rs. 20,000.

Suggestions

- *The provisions be modified to grant relief when delay is due to justifiable reasons/ nil returns.*
- *The maximum penalty/late fee be reduced to Rs 5,000/- for delay in filing of returns.*

42. Provision for Bad Debts

W.e.f 01.04.2011, payment of service tax has been shifted from receipt basis to accrual basis in case receipts of the service provider exceed 50 Lakh in the preceding financial year vide Point of Taxation Rules, 2011. In this system, there are no provisions for bad debt adjustments and the service providers are forced to pay service tax out of their own pockets if they fail to realize the consideration from the clients.

Suggestion

Rule 6(3) of the Service Tax Rules, 1994 be suitably amended to allow suo-moto credit of service tax paid in the event of bad debts.

43. Applicability of Advance Rulings- *Problem of non-availability of clarification on interpretational issues by large number of assessee*

(a) Multiple inquiries / Audits / investigations- *Need to streamline the system*

Due to lack of coordination and clarity available, there is large number of instances when the assessee financial statements are being scrutinized by different wings of departments. The present structure or authorities available for this scrutiny are:

- Director General of Investigation
- Audit wings in Commissionerate
- Anti Evasion Wing of Commissionerate
- Range Official of Commissionerate



It is usually seen that one wing has already conducted the investigation/ audit and other wing also issue notice. Even simultaneous inquiries are being made from the assessee by different wing. All these leads to inconvenient situation to the assessee in conducting their usual business.

Suggestion

- *It is suggested that a Certificate be issued by the wing who has conducted investigation/audit to the assessee and/ or necessary provision be made to avoid duplication of audit so that assessee can be saved from unnecessarily harassment.*
- *Further, a common database be maintained by the department to record the investigations/ audits conducted for an assessee so that the information is readily available and duplication of audits be avoided.*
- *We understand that the purpose of constitution of each such wing is different, however all the wings are following the procedure of detailed guidelines and seeking similar details from assessee for last five years, which is not the objective of the creation of such wings.*

Place of Provision of Services Rules, 2012

44. Place of provision of performance based services like testing of software or hardware products

Rule 4 of Place of Provision of Service Rules, 2012 states that Place of provision of performance based services shall be the location where the services are actually performed even though the actual use and enjoyment of service is happening at a different location.

Issue

Many overseas clients outsource testing services to service providers in India. Testing is usually performed on software or hardware carried out in labs in India and the test reports are made available to the overseas clients for consideration in convertible foreign exchange. Accordingly, such services are construed as provided in India and hence, are made liable to Service tax.

Suggestion

Thus, to comply with the destination based principle, it is suggested that a proviso be inserted in sub rule 4(a) of Place of Provision of Service Rules, 2012 to provide an exception that in respect of



testing service performed on goods, the place of provision of service would be the location of the service recipient i.e. to whom the test report or exception report, if any, is required to be delivered.

45. Amendment in Rule 4(a) in case of Software services

Software services from India have made a difference. The technical support (call centre, trouble shooting, updates, resolution) of intangibles should be based on the customer. However it could be interpreted to be “goods” and therefore based on location of the goods. Read with Rule 7 these services would also be disputed unnecessarily.

Suggestion

Following the best practices, the place of provision of goods related services [rule 4(a)] should be the location of goods only for tangible goods.

46. Amendment to Rule 7 in case of export and domestic services

Many Indian Companies provide global services and a part of the same may be provided in India also. Rule 7 sets out that the entire service shall be deemed to be provided in India. For Example, An Indian firm provides a ‘technical inspection and certification service’ for a newly developed product of an overseas firm (say, for a newly launched motorbike which has to meet emission standards in different states or countries). Say, the testing is carried out in Maharashtra (20%), Kerala (25%), and an international location (say, London 55%). Notwithstanding the fact that the greatest proportion of service is outside the taxable territory, the place of provision will be the place in the taxable territory where the greatest proportion of service is provided, in this case Kerala.

Anywhere else in the world this would be an export and not liable as the major proportion is exports. Any exporter who can read between the lines would then be forced to break up his contract into for India and others unnecessarily to avoid this unreasonable imposition.

Suggestion

Appropriate amendment be made to rectify this anomaly.

47. Amendment in Rule 9 in case of intermediary services

The rules provide clarity on where the service is deemed to be provided- whether in India or Outside India. However, majority of export of services are not treated as exports under these rules. The areas where there is ambiguity and lack of fairness are as under:



Intermediaries for goods and services earning revenues in convertible foreign exchange are liable based on the place of provider. The best practice (earlier for goods available upto September, 2014) was that it should be based on recipient. This is especially so as most developed nations (European Union) provide exemption as long as the customer is outside the nation or European Union (as a destination based tax).

Moreover as the Rule 9 provides if the services are not provided as main services i.e. rendered as broker/agent etc. in that case place of provision will be location of service provider. This phrase gives rise to lot of interpretation. To explain, whether services of a commission agent arranging order, will fall under services on his account or not? To add further there are service providers in country who not only procure order but also offer certain ancillary services which are supposed to be performed by service receiver say testing, review of quality. Now the confusion which need clarity is which one will fall under “Main Services”.

Further, rule 9 specifies that the services of telecommunication, online access and retrieval and banking are based on the location of service provider. This is leading to many such service providers shifting the business outside India.

Suggestion

For intermediaries and other specified services given under rule 9, the place of provision of service should be location of service recipient.

Point of Taxation Rules, 2011

48. Determination of point of taxation in case of copyrights, etc.

Rule 8 of Point of Taxation Rules, 2011 provides that in respect of royalties and payments pertaining to copyrights, trademarks, designs or patents, where the whole amount of the consideration for the provision of service is not ascertainable at the time when service was performed, and subsequently the use or the benefit of these services by a person other than the provider gives rise to any payment of consideration, the service shall be treated as having been provided each time when a payment in respect of such use or the benefit is received by the provider in respect thereof, or an invoice is issued by the provider, whichever is earlier.



Suggestion

It is suggested that an explanation be inserted in Rule 8 of Point of Taxation Rules, 2011 to the effect that this rule is not applicable where whole amount of the consideration is ascertainable at the time when service was performed and in such cases where Rule 3 or Rule 7 is applicable, as the case may be.



C. CENVAT CREDIT RULES, 2004

49. Credit of Krishi Kalyan Cess (KKC) to manufacturers

Krishi Kalyan Cess (KKC) @ 0.5% has been introduced w.e.f 01.06.2016 on the value of all or any of the taxable services for the purposes of financing and promoting initiatives to improve agriculture or for any other purpose relating thereto.

Further, it has been provided that CENVAT credit of Krishi Kalyan Cess paid on input services shall be allowed to be used for payment of the KKC on the service provided by a service provider.

Issue

KCC is required to be paid on taxable services. Further, the credit of KKC is allowed to be set off only against payment of KKC and no other. Thus, a manufacturer making payment of Central Excise Duty will not be able to utilise the same. As a result, it will increase the cost of the product.

Suggestion

CENVAT Credit Rules, 2004 be suitably amended to provide for credit availability of KKC seamlessly for payment of Excise or Service Tax dues

50. Definition of exempted service

Rule 2(e) defines exempted service to mean a

- (1) taxable service which is exempt from the whole of service tax leviable thereon; or
- (2) service, on which no service tax is leviable under section 66B of the Finance Act; or
- (3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken;

but shall not include a service which is exported in terms of rule 6A of the Service Tax Rules, 1994.

By the said definition, exempted service unintentionally includes 'any process amounting to manufacture or production of goods', which results in reversal of CENVAT credit on exempted service as per Rule 6. Similarly, services by way of interest or discount on deposits, loan or advances also get covered under the definition of exempted service resulting in reversal of credit under rule 6.



Above activities inadvertently get covered under the definition of exempted service, which may not be the intention of the law maker.

Suggestion

It is suggested that this anomaly be corrected beforehand by making an appropriate amendment to avoid litigation.

51. Definition of exempted goods

Goods manufactured by a job worker are exempt from payment of whole of the duty of excise under *Notification No. 214/86 CE* subject to the condition that the Principal Manufacturer (supplier of raw materials or semi-finished goods) uses the job worked goods in or in relation to the manufacture of the final products in his factory or removes from his factory without payment of duty in specified cases. Under these circumstances, it is obvious that the appropriate duty of excise on such job worked goods gets discharged at the end of the principal manufacturer. Accordingly, the job worker should not be liable to pay any amount under Rule 6(3) of CENVAT Credit Rules, 2004. However, because such job worked can be treated as exempted goods under the definition of ‘exempted goods’ as given in rule 2(d) of CENVAT Credit Rules, 2004 (CCR), there are instances of department demanding payment of duty or amount under rule 6(3) of CCR which is unwarranted.

There are series of Tribunal and High Court decisions namely *CCE v. Bharat Fritz Werner 2007 (218) ELT 177 (Kar.)* and *CCE v. Sterlite Industries Ltd. 2009 (244) ELT A89 (BBY HC)* holding that such goods are not to be treated as ‘exempted goods’ in the hands of a job worker as the duty liability, if any, ultimately gets discharged by the principal manufacturer including the value of job worked goods.

Suggestions

- *It is suggested that the definition of “exempted goods” in rule 2(d) be amended to clarify that goods produced or manufactured on job work basis where the principal manufacturer is under the obligation to pay duty on such goods will not be construed as ‘exempted goods’. This would avoid multiple incidence of duty on the same goods and avoid unnecessary litigation. Recently, the Karnataka High Court in the case of *CCE v. Bharat Fritz Werner Limited, 2007 (218) ELT 177 (Kar.)* upheld the above contention.*
- *On the same lines, definition of “exempted service” be amended to provide for exclusion of job-work provided to principal manufacturer exempted vide Sl. No. 30(c) of Notification*



No. 25/2012 ST dated 20.6.2012 which would be in line with job-work manufactured goods supra.

52. Utilization of old unutilized/ accumulated credit of E Cess and SHE Cess

The basic rate of Excise Duty is 12.5% and the rate of Service Tax to 14% with effect from 1st March 2015 and 1st June 2015 respectively. Few issues regarding utilisation of credit of EC and SHEC for payments of basic excise duty have been addressed vide *Notification No. 12/2015 Central Excise (N.T.), Dated: April 30, 2015* & *Notification No. 22/2015-Central Excise (N.T.), Dated: October 29, 2015* as under:

Credit of EC & SHEC may be utilized for:

- (a) Education Cess and Secondary & Higher Education Cess on inputs or capital goods received in the factory of manufacture of final product on or after the 1st March, 2015
- (b) Balance 50% Education Cess and Secondary & Higher Education Cess on capital goods received in the factory of manufacture of final product or the premises of the provider of output service in the financial year 2014-15; and
- (c) Education Cess and Secondary & Higher Education Cess on input services received by the manufacturer of final product on or after the 1st March, 2015.
- (d) Paid on inputs or capital goods received in the premises of the provider of output service on or after the 1st day of June, 2015
- (e) Paid on input service in respect of which the invoice, bill, challan etc. as referred to in rule 9, is received by the provider of output service on or after the 1st day of June, 2015

Issue:

However, the following issues still need to be addressed:

- (a) Treatment of old unutilized/ accumulated credit of EC & SHEC of Excise duty with the assessee as on 28th February 2015.
- (b) Treatment of old unutilized/ accumulated credit of EC & SHEC of Service Tax with the assessee as on 31st May 2015.



Suggestion

It is suggested that appropriate amendment be made to enable utilization of old unutilized/accumulated credit of EC & SHEC of Excise duty/ Service tax.

53. Services consumed by an employee during employment

Definition of input services provided under Rule 2(1) of CENVAT Credit Rules excludes the services provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee from the definition of input services thus disallowing credit on such services. However, presently even if these services are consumed for business purposes during the course of employment the credit is being disallowed.

Suggestion

It is suggested that if the aforesaid services are consumed by an employee in relation to business during his employment the credit of tax paid on such services be made available to employer.

54. Taxability of Transportation of Passengers by a Stage Carriage (w.e.f. 01.06.2016)

Notification No. 08/2016-ST dated 1st March 2016 provides for abatement @ 60% to service of transportation of passengers, with or without accompanied belongings, by a stage carriage w.e.f. 01.06.2016 with a condition of non-availment of CENVAT Credit thereon.

Suggestion

Input Service as well as Capital goods credit should be extended as a measure of uniformity and fairness. Capital goods credit on Motor Vehicle and other capital goods also to be allowed just like credit on “wagons”.

55. Taxability of transport of passengers by ropeway, cable car or aerial tramway (01.04.2016)

Notification No. 9/2016-Service Tax dated 01.03.2016 has withdrawn the exemption provided to services relating to Transport of passengers, with or without accompanied belongings, by ropeway, cable car or aerial tramway.



Suggestion

Full credit of Capital goods, input and input services to be available as a measure of uniformity and fairness.

56. Trading and non-services are considered as exempted services

Notification no 13/2016 CE provides that exempted services as defined in clause (e) of rule 2 shall include an activity, which is not a service as defined in section 65B(44) of the Finance Act, 1994.

Suggestion

Remove the explanation 3 to Rule 6(1) of CENVAT Credit Rules, which provides trading or Non-Service being considered as exempted service for Rule 6 computation.

57. Eligibility of Output Service Provider to take credit of the Special Additional Duty leviable under section 3(5) of the Customs Tariff Act

Rule 3 (1) (viiia) of the CENVAT Credit Rules, 2004 provides that a manufacturer or producer of final products or a provider of output service shall be allowed to take credit of the special additional duty (SAD) leviable under of section 3(5) of the Customs Tariff Act provided a provider of output service shall not be eligible to take credit of such additional duty.

Issue

On import of goods made by service providers the component of SAD is a cost to the service provider whereas the same is available as credit for the manufacturer. Thus, for assesseees involved in Research & Development and engaged in other health services related activities, which utilise such inputs in providing output services, the said duty becomes a cost.

Suggestion

It is therefore suggested that the provisions of availing CENVAT credit of SAD paid on imported equipment and other items may be extended to service providers also

58. Inputs/capital goods procured from EOU/EHTP/STP not paying duty in terms of Sl No. 2 of the Notification No.23/2003 CE dated 31.3.2003

In terms of rule 3(7)(a), the manufacturer or service provider is allowed the benefit of taking CENVAT credit of duty paid on inputs or capital goods if the same are manufactured by an EOU/EHTP/STP in case the said unit pays excise duty under section 3 of the Central Excise



Act, 1944 read with Sl.No.2 of the *Notification No. 23/2003 CE dated 31.3.2003*. This credit is given on the basis of aggregation as specified in 2nd proviso to rule 3(7)(a) which is effective from 7.9.2009.

An EOU/EHTP/STP is liable to pay duty of excise in terms of proviso to section 3(1) of the Central Excise Act, 1944. However, the said unit is entitled to claim concessional duty or exemption from payment of duty in terms of *Notification No. 23/2003-CE dated 31.3.2003* issued under section 5A of the Act. The said concession/exemption is conditional and is available on fulfillment of certain prescribed conditions. Therefore, if a unit does not satisfy or fulfill the conditions, it is not entitled to pay concessional duty under the above notification. Alternatively, since the above notification is conditional, there is an option to EOU units not to avail the benefit of above notification.

In both the above situations, an EOU pays duty of excise in accordance with proviso to section 3(1). In such a case, the procurer of inputs or capital goods which are in-turn manufactured by EOU/EHTP/STP, which do not pay duty as per *Notification No. 23/03* but in terms of proviso to section 3(1), face difficulties in availment of credit.

This is a serious lacuna in the CENVAT Credit Rules, 2004 and there is a possibility of the department denying the CENVAT credit since the provisions of rule 3(7)(a) of the CENVAT Credit Rules, 2004 may not be applicable in this case.

Suggestion

It is suggested that rule 3(7) be amended to clarify that CENVAT credit will also be available in respect of clearances made by an EOU/EHTP/STP paying excise duty in terms of proviso to section 3(1) of the Central Excise Act, 1944. This will be in line with the overall objective of Foreign Trade Policy.

59. Availment of CENVAT Credit on Input and Input Service

Rule 4 of CENVAT Credit Rules, 2004 has been amended vide *Notification No. 6/2015-Central Excise (N.T.), Dated: March 1, 2015*.

Rule 4(1) provides that the CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service or in the premises of the job worker, in case goods are sent directly to the job worker on the direction of the manufacturer or the provider of output service, as the case may be. The proviso now



provides that the manufacturer or the provider of output service shall not take CENVAT credit after one year from the date of issue of any of the documents specified in Rule 9(1).

Similarly, Rule 4(7) provides that the CENVAT credit in respect of input service shall be allowed, on or after the day on which the invoice, bill or, as the case may be, challan referred to in rule 9 is received. Amended proviso to Rule 4(7) of the CENVAT Credit Rules, 2004 provides that in respect of input service where whole or part of the service tax is liable to be paid by the recipient of service, credit of service tax payable by the service recipient shall be allowed after such service tax is paid:

The amended Proviso now provides that the manufacturer or the provider of output service shall not take CENVAT credit after one year from the **date of issue** of any of the documents specified in Rule 9(1).

Issue

The circular has not clarified in the respect of following circumstances:

- Whether the amended proviso is applicable on the invoices issued prior or post to the effective date of amendment.
- The case of interpretational issues and consequently extended period is invoked, then there will be demand of 5 years whereas credit of the same period will not be allowed which is against the spirit of law and will cause hardship to assessee. To illustrate, an assessee is rendering services for ₹ 100 and outsourcing the same for ₹ 80. Now, in case of old period investigation on some interpretational issue or based on some judgment from apex court, he is obliged to pay tax on ₹ 100 but will not be allowed to claim credit on ₹ 80. We may have live examples where different judgment suggests to pay tax after a substantial period pass over.

Suggestions

- (i) *In order to safeguard the assessee from the huge loss of CENVAT Credit due to non-payment for the purchase of input and availment of services due to business policies, the amended provision must be brought prospectively i.e. on the invoice or goods received after the effective date of amendment. There exist multiple cases wherein due to business policies and payment terms and condition, assessee are taking credit only after making payment to vendors i.e. on receipt/payment basis and due to which they have neither yet availed the credit nor account for such credit in the books of account to avoid inconvenience. In such cases, assessee would lose huge amount of CENVAT credit for nothing.*



- (ii) It is suggested to clarify/notify that the amended proviso shall not apply in the following cases:
- (a) In case of retention money, time limit of one year may not apply.
 - (b) In case of pending cases before adjudicating authorities, wherein as a consequence of judgement assessee becomes eligible for CENVAT Credit.
 - (c) In case of cases with pending litigation/ under litigation, Credit be allowed for the period till the dispute under point of law is settled.

60. Certification of refund by statutory auditor or any other auditor

Notification No. 27/ 2012 CE (NT) provides that refund of CENVAT credit will be allowed subject to the procedure, safeguards, conditions and limitations as provided in the said notification. As per Para 3(e) of the said Notification, the refund claim has to be accompanied by a certificate in Annexure A-I, duly signed by the auditor (statutory or any other) certifying the correctness of refund claimed in respect of export of services.

Suggestion

It is suggested that the refund be allowed to be certified by a practicing Chartered Accountant (not only Statutory Auditor or any other auditor).

61. Refund of CENVAT Credit – Rule 5 of CENVAT Credit Rules

Rule 5 of CENVAT Credit Rules, 2004 provides that a manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette :

$$\text{Refund amount} = \frac{(\text{Export turnover of goods} + \text{Export turnover of services})}{\text{Total turnover}} \times \text{Net CENVAT credit}$$

Notification No. 05/2006 - CX (NT), Dated: March 14, 2006 provides that prescribed application for refund along with the prescribed enclosures and the relevant extracts of the records maintained are to be filed before the expiry of the period specified in section 11B of the Central Excise Act, 1944.



Issue:

- (a) There is no option available to the assessee to claim refund on account of maintaining separate books of accounts for export and domestic transactions as in Rule 6(2) of CENVAT Credit Rules, 2004 for exempted & taxable services. The refund is granted only on the basis of Formula prescribed in the Rule.
- (b) The Refund is to be claimed within the prescribed time limit as specified under section 11B of the Central Excise Act, 1944.

Suggestions

- *It is suggested that facility of maintaining separate records be extended to Rule 5 so that separate records be maintained for domestic & export transactions on the basis of which refund claim may be filed. In cases where such records cannot be maintained, formula may be applied.*
- *It is further suggested that no time limit be prescribed for filing the refund claim and refund be allowed based on available credit balance*
- *It is suggested that the refund amount be related to quantum of inputs and input services used to export goods/service and the proportionate credit involved in those exports irrespective of the period during which credit is taken. It may not be necessary for an exporter to buy the goods and receive the input services in the same quarter to claim refund.*

62. Refund claim under Rule 5 / Export Incentives

The major trouble brewing up for the IT sector is 'service tax refunds'. The Government of India needs to refund large amount to the Information Technology/Business Process Outsourcing (IT/BPO) sector. The amount is attributed to the service tax refunds for the past several years. To make matters worse, there are no specific guidelines for service tax refunds provided by the department with regards to exports of services. There is vast distinction between benefits available to exporter of Goods and exporter of services in respect of refund of CENVAT credit.

The Rule 5 of CENVAT Credit Rules, 2004 for refund for export of services is not very effective as compare to refund in the case of export of Goods.



Suggestions

It is suggested that:

- *The application of refund be made on-line with certificate from chartered accountant regarding validity of the refund claimed. The refund application can only be filed after receipt of money in convertible foreign exchange. Export Incentive schemes in line with goods to be put in place.*
- *After filing of return, 50% of the refund be credited on-line in the bank account of the exporter within 30 days of filing the application and the balance amount be refunded within 6 months after verification of the documents submitted.*
- *Alternatively, Duty Drawback Scheme may be introduced in case of Export of Services too in lines with exports of goods.*
- *All pending refund applications as on date should be disposed of within 6 month time. Refund of 80% to be disbursed once identity and turnover confirmed. Balance within reasonable period of 6 months.*

63. Service Exporters - computation of time limit for filing refund claims

Rule 5 of the CCR provides for refund of CENVAT Credit. *Notification No 27/2012 CE (NT) dated 18.06.2012* has been issued to give effect to provisions of Rule 5 of CCR. The said notification provides for time limit for filing refund claim as provided under Section 11B of the Central Excise Act, 1944.

Section 11B of Central Excise Act considers 'relevant date' for the purpose of determining the time limit for filing of refund claim. 'Relevant date' in case of export of goods has been defined under Section 11B of the Central Excise Act, 1944. However relevant date in case of export of services is not specifically defined and the same is generally construed as date of export of service. There is no clear provision for defining relevant date for export of service under Section 11B of the Central Excise Act, 1944.

In terms of Rule 3 of Point of Taxation of Service Rules, 2011, the date of invoice is the 'point of taxation' for services rendered provided the invoice is raised within 30 days from the date of completion of provision of service. However, if any advance is received prior to completion of service then the 'point of taxation' for such service would be the date of receipt of advance. Further, in terms of second proviso to Rule 3 of Point of Taxation Rules, 2011 for continuous



supply of service the point of taxation is on completion of an event as per terms of contract. Accordingly, in cases of continuous supply of service, the service provider generally raises a periodic invoice which becomes the point of taxation.

However, in terms of Rule 5 (1)(D) of the CENVAT Credit Rules, 2004, export turnover is determined as an aggregate of export realization for the services completed either during the same quarter or in the preceding quarters and any proceed towards a service which is yet to be completed i.e. proceed received in advance is excluded from the export turnover.

From the above, it can be seen that there is disparity in the 'date of export' as considered under Rule 3 of Point of Taxation Rules, 2011 viz –a - viz in Rule 5 of the CCR. While Rule 3 of Point of Taxation Rules, 2011 considers invoice date or receipt date whichever is earlier as date of export, whereas the, Rule 5 of CCR considers export realization of completed services as 'date of export'.

Suggestion

Exporter of Service is required to claim refund of service tax within the time limit prescribed under the law. However, the term, 'relevant date' for exporter of service is not defined (though, it is defined for the exporter of goods). This causes difficulties to the service exporters. Further, with the introduction of 'Point of Taxation of Service Rules', disparities between dates have arisen. Hence, it is suggested that Notification 27/2012 CE (NT) dated 18.06.2012 be amended to prescribe the time limit for claiming refund:

- *For goods – as prescribed under 11B of the Central Excise Act, 1994*
- *For Service - as one year from the date of receipt of export proceeds or completion of service whichever is later in alignment with the definition of 'export turnover of service' as provided under Rule 5 of the CCR.*

64. Amendment in Rule 6(3) of CCR

As per Section 65A (2) goods” means every kind of movable property other than actionable claim and money; and includes securities, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. As per Section 66D (e) of Finance Act, 1994, trading of goods has been specified as service in negative list.



Issue

Investment activities in securities are considered as Trading of Goods and Proportionate Input Credit is reversed as per Rule 6(3) of CENVAT Credit Rules. Moreover, value of trading is taken as the total turnover and not only the profit earned thereon.

Also as per VAT, the goods are defined as every kind of moveable property other than newspapers, actionable claims, stocks, shares and securities. Securities are not treated as goods under VAT.

Suggestion

It is suggested that appropriate clarification be issued regarding the Investment in Securities. If the same is kept outside the purview of services the requirement of credit reversal be done away with.

65. Rule 7 of CENVAT Credit Rules 2004 - CENVAT Credit distribution by Input Service Distributor (ISD) to Job-worker/Outsourced manufacturing unit-Ambiguity in the coverage of Outsourced unit - Explanation 4 of the substituted Rule 7:

The explanation appears to limit coverage to assessee liable to pay excise duty on advalorem basis only i.e.

- (i) A job worker, who is liable to pay excise duty on the value determined under Rule 10A of the Central Excise Valuation Rules
- (ii) A contract manufacturer, who manufactures goods for ISD bearing the brand name of ISD and is liable to pay excise duty on value determined under Section 4A of the Central Excise Act.

Suggestion

A suitable amendment may be made in Explanation 4 to cover the outsourced manufacturing units liable to pay excise duty other than at nil rate. An amendment may be made in Rule 2(m) of the Credit Rules to include an office of an assessee having outsourced manufacturing units.

66. Penalty in respect of CENVAT credit wrongly taken or utilized- Rule 15

Rule 15 provides where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly or in contravention of any provision of these rules, then all such goods shall be liable to confiscation and such person shall be liable to penalty not exceeding the duty or service tax on such goods or services, as the case may be or two thousand rupees whichever is greater.



Suggestion

It is suggested that words given “taken or utilized” in Rule 15 be replaced with “taken and utilized”.

67. CENVAT credit on self certified bill of entry in case of import of goods through courier agency

At present there is no specific provision for availing CENVAT credit based on courier receipts or package receipts though countervailing duty is paid on such imports through a common Bill of Entry prepared for all imports by Courier Agency. The courier agent forwards a photocopy of such Bill of Entry to each importer. However, CENVAT is not allowed to be taken on such copy.

Suggestion

As duty has been paid, an appropriate provision be inserted in the CENVAT Credit Rules to avail the CENVAT credit based on certified copies of such Bill of Entry.

Alternatively, a mechanism of casual registration be introduced in the excise law so that the courier agent may register as first stage dealer and get entitled to pass on the credit.

This will address the difficulty of obtaining registrations and surrendering it time and again/filing Nil returns and face penal consequences even though there is no liability to tax. This will also reduce cost of doing business and will not lead to leakage of credit due to non-availability of the appropriate procedure for the same.

68. Customs endorsement of bill of entry for availment of CENVAT credit

The erstwhile procedure of customs endorsement of Bill of Entry for availment of CENVAT credit by the end user unit has been dispensed with vide *Customs Public Notice No. 16/2006 dated 22-03-2006*. This is causing hardships to the manufacturers since they are unable to avail CENVAT credit on the imported [free issue] material received by them from their customers.

Suggestion

The procedure of Customs endorsement of the Bill of Entry (EDI copy) for availment of CENVAT credit by the end user unit be restored.

Alternatively, a provision be made in the Bill of Entry format for indicating the details of the consignee (end user receiver) of the goods in addition to the details of the importer as is being done in the case of excise invoices where the invoice is made on the buyer with the consignee indicated as the end user.



69. Parity between CENVAT Credit procedures and Central Sales Tax procedures

Section 3(b) of the Central Sales Tax Act provides for the circumstances under which a sale or purchase of goods is said to take place in the course of inter-state trade or commerce. According to Section 3(b), a sale or purchase of goods shall be deemed to take place in the course of inter-state trade or commerce if the sale or purchase is effected by a transfer of documents of title to the goods during their movement from one state to another. Where the property in the goods has passed before the movement of goods has commences, the sale will not evidently fall within Section 3 (b) or when the property in the goods passes after the movement from one State to another, such sale will not also fall within the section. Accordingly, the section provides for endorsement in the documents during the journey or movement of goods and not earlier to that.

Under Central Excise, where a registered person places an order on a manufacturer for supply and delivery of goods directly to customer/ assessee and the goods are also accordingly transported/ dispatched from the manufacturers' premises to the users' premises without being brought to the Registered persons' premises, the manufacturer has to issue an invoice under Central Excise Rules, 2002. The prescribed invoice under Central Excise should also contain (in addition to specified details), the consignee's name and address for the purpose of availing CENVAT credit. Thus, before the goods move from one State to another or one place to another, the consignee's name (second buyer) also should be incorporated in the documents of title of goods to make him eligible to avail CENVAT. If this condition is satisfied in order to avail the CENVAT credit, then the transaction will not qualify as an E1 sale under the Central Sales Tax Act.

A close comparison of mandatory requirement under the Central Sales Tax Act, 1956 and Central Excise Act, 1944/Rules, 2002 will lead us to find a contradiction between these two Acts as far as sale in transit is concerned. Both the Acts are Central legislations and as such there should not be any anomaly or contradiction on the same issue. When sale in transit is recognized or accepted under Central Excise Act, 1944/Rules, 2002, the same should have been allowed under Central Sales Tax Act also as per Central Excise requirement. At present, the industry faces hardship in cases of sale in transit under Central Sales Tax Act as documents of title to goods are to be endorsed during the course of transit whereas the Central Excise Act requires such endorsement for such sale in transit to be done before commencement of such movement.

Suggestion

It is suggested that appropriate amendment be made to claim the CENVAT Credit on E-I & E-II sales made under Central Sales Tax.



D. CENTRAL EXCISE DUTY

70. No Excise duty on packing/ re-packing without alteration of MRP

Sec. 2(f) of the Central Excise Act, 1944 defines the word ‘manufacture’ which includes any process in relation to the goods specified in the III Schedule, which includes packing or re-packing of such goods in a unit container. Excise authorities levy excise duty on reduction in price because of removal or change in packaging.

Issue

Owing to business dynamics, companies need to make few changes in the product packaging even after removal wherein the label or packaging is changed to provide more information about the product. In such a situation, though there is no alteration in the MRP value of the product, however, excise authorities tend to levy Excise duty again on such activity.

Suggestion

It is suggested that the activity of change in label on the product without altering its MRP and giving only additional information about the product may not be considered as amounting to manufacturing activity liable to Excise duty.

71. Exemption to goods used for setting up of Sewerage Projects

Section 5A of the Central Excise Act, 1944 provides that if the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon.

Issue

There is no specific notification providing exemption to goods used for setting up of Sewerage Projects as is available for water supply projects.

Suggestion

It is suggested that the goods/ Services required for setting up of Sewerage Projects be exempted from payment of Excise duty to reduce the cost of setting up of sewerage project. “Swachh Bharat” being major govt. initiative and sewerage and Sewerage Projects are important aspect in Public Health and Sanitation



72. Interest under Section 11AB of the CE Act

When a supplementary invoice is issued then the payment of differential duty later is clearly a case of short-payment of duty at the time of clearance and, therefore, interest is payable under Section 11AB of the Central Excise Act, 1944.

Issue

Assessee is liable to pay interest when he pays the duty because of subsequent re-fixation of prices through supplementary invoices, from the date of clearance of the goods which industry cannot justify. And the demand even though when sufficient balance is available in PLA or CENVAT for such short payment.

In present market conditions the prices are fixed based on some indicators like steel price indicators exchange rate trends of RBI consumer price index. Accordingly, the price will get revised for upward /downward. Now as per excise law on supplementary invoice duty is payable to Govt. It is also now demanded to pay interest for delayed payment from original dispatch date to supplementary invoice date which industry cannot justify to the stake holder

Also SC ruling of *SKF India Limited [2009 (239) ELT 385]* requires the assessee to pay interest on the duty liability.

Suggestion

Thus a clarification is required to set aside the SC ruling of SKF India Limited [2009 (239) ELT 385].

It may be noted that in the case of M/S STEEL AUTHORITY OF INDIA LTD. 2015 Versus COMMISSIONER OF C. EX., RAIPUR (326) E.L.T. 450 (S.C.) the matter has been referred to the larger bench in the favour of the assessee.

73. Presumption That the Incidence Of Duty Has Been Passed On To The Buyer

Section 12B of Central Excise Act, 1944 provides that every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

Issue

Presently, department denies refund where credit notes are issued to dealers because the burden was passed on to ultimate buyers, despite the precedent decision by Judiciary.



Suggestion

It is suggested to suitably amend Section 12B of Central Excise Act, 1944 to allow refund where credit notes are issued to dealers.

74. Revision application for matters relating to baggage, drawback, rebate of duty on export of goods etc.

As per proviso to section 35B(1) of the Central Excise Act, 1944 no appeal shall lie to the Appellate Tribunal if the order passed by the Commissioner (Appeals) relates to loss of goods where the loss occurs in transit from a factory to a warehouse, etc. or rebate of duty on export of goods or goods exported without payment of duty. In such cases, there is a provision to file revision application under section 35EE of the Central Excise Act, 1944 before the Central Government. Similarly, as per section 129A of the Customs Act, 1962 appeal shall not lie to the CESTAT if the order passed by the Commissioner (Appeals) relates to baggage etc and revision application will have to be filed. This causes undue hardship to the assessee as approaching Revisionary Authority at New Delhi results in substantial increase in the litigation cost of the assessee.

Suggestion

It is suggested to allow filing of appeals before CESTAT against the orders passed by the Commissioner (Appeals) in relation to the matters covered under proviso to section 35B(1) of the Central Excise Act, 1944 and proviso to section 129A of the Customs Act, 1962 as well i.e., orders relating to loss of goods where the loss occurs in transit from a factory to a warehouse, etc. or rebate of excise duty on export of goods or goods exported without payment of duty, baggage, drawback.

75. Pre-deposit for Appeal

Section 35F has been substituted with earlier provision by Finance Act, 2014 which prescribe a mandatory pre-deposit of 7.5% of the duty demanded or penalty imposed or both for filing the appeal before the Commissioner (Appeals) or the Tribunal at the first stage, and 10% of the duty demanded or penalty imposed or both for filing second stage appeal before the Tribunal. However, the amount of pre-deposit payable shall be subject to a ceiling of ₹ 10 Crore. It is also pertinent to add here that all pending appeals or stay applications shall be governed by the statutory provisions prevailing at the time of filing such applications or appeals.



Issue

The Revised Section 35F is highly detrimental to the interest of genuine assesses who might get wrongly implicated by the Revenue Authorities for evasion of taxes/duty. Further, such substitution has led to empower Revenue Authorities, since initiation of any proceedings against an assessee, ultimately lead to depositing of a certain percentage of amount, by an assessee, with the treasury even if it not a legitimate due to the Government. To say it simply, amendment has adversely affected genuine assesses' Right to appeal before the higher authorities.

Furthermore, taking away the right of dispensing of Pre-deposit and making it mandatory to deposit a certain percentage of duty demanded before filing an appeal, has caused undue-hardship to small entrepreneurs/ manufacturers/ service providers. It is noteworthy that a small entrepreneur, as per the revised section, first has to make a pre-deposit of 7.5% of the duty demanded or penalty imposed or both for filing an appeal before Commissioner (Appeals) and if, the assessee doesn't get a favorable order, then again he will have to make a mandatory pre-deposit of 10% of the duty demanded or penalty imposed or both, if he approaches the Hon'ble Tribunal. Therefore in totality, the assessee have to pay a total of 17.5% of pre-deposit of duty demanded and equivalent percentage of penalty [which works out to be 35% of duty demanded] which will only lead to causing undue hardship and harassment to small entrepreneurs at the hands of the Revenue.

Further, if the assessee succeeds in its appeal, then the prescribed percentage of amount deposited with the Government will have to be obtained by way of refund, which itself is a daunting task for an assessee to obtain from the Department.

On the other hand, such proposed substitution is likely to benefit tax evaders, as by depositing a prescribed percentage at the time of appeal, the matter could be prolonged till the appeal comes up for regular hearing before the Hon'ble Courts.

Additionally, in the Finance Minister Speech he said that "to expedite the process of disposal of appeals, amendment have been proposed in Custom and Central Excise Act with a view to freeing appellate authorities from hearing Stay application and to take up regular appeals for final disposal" It is not clear as to whether after the mandatory pre deposit Stay application would still need to be filed by assessee to avoid the proceedings of recovery of demand / penalty raised.

In addition, TRU Letter further states that another 10% of Pre-deposit in case of second stage of appeal in addition to the 7.5% of the demand and / or Penalty totaling to 17.5%, however language of the section 35F is different.



Further, it is submitted that in most of the cases unconditional stay has been granted by the tribunal to the assessee.

Suggestions

- *It is suggested that a Bank Guarantee be provided as an alternative to pre-deposit to safeguard the working capital of the assessee.*
- *It is suggested that in order to prevent the **frivolous** demands, Tribunal be allowed to waive the pre-deposit in deserving cases.*
- *Without prejudice to the above, it is suggested that a Slab system may be introduced to safeguard the small-scale industries, small service providers or BIFR industries.*
- *It is also suggested that the relevant provisions be suitably clarified such that on payment of mandatory pre-deposit, the balance demand stands automatically stayed and no recovery proceeding thereof would be initiated by the department to meet the intention beyond the proposed provision.*
- *It is suggested that in case pre-deposit is mandated and obligated then the interest on duty/tax demanded should not be charged for the period till the appeal is disposed off.*
- *It is suggested that said pre-deposit should only be in respect of duty/ tax demanded and not on the penalty amount as pre-deposit on penalty cannot be levied unless its cause is proved.*
- *Subject to above, appropriate clarification may be inserted to avoid the interpretation of TRU Letter.*
- *It is suggested that appropriate clarification be provided in respect of the cases remanded back to Commissioner for re-assessment and what would happened to deposition of pre deposited against original order and whether again pre-deposit needs to be paid to appeal for re-assessed order.*
- *It is suggested that appropriate clarification be provided in respect of appeal to assessment order passed against duty paid under protest.*
- *Subject to above, we further suggest that specially in case of Ex-parte order the condition for Pre -deposit be withdrawn with immediate effect as in some of the cases no physical notice is being served to the party and an ex-party order be made with frivolous demand and no principal of natural justice being followed.*



76. Appeal to the Supreme Court

Under section 35L (1) of Central Excise Act, 1994 (b) an appeal lies to the Supreme Court from any order passed by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

Finance Act (No. 2), 2014 has inserted sub-section(2) in section 35L to provide that the determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment

Issue

The above amendment has practically lead to a situation where a major chunk of the cases will be appealable to the Supreme Court by-passing the jurisdictional High Court. As is well known that Supreme Court is already flooded with pending matters, centralization of appeals to the Supreme Court will lead to delay in disposal of appeals.

Further, the cost of litigation goes up considerably for most assesseees who are located far from New Delhi.

Suggestions

It is suggested that disposal of appeals pertaining to all cases be also routed through High Court as it is easily accessible from various parts of the Country.

77. Penalty under Central Excise for Offences

Rule 26(2) of Central Excise Rules, 2002 provides that any person, who issues any document other than excise duty invoice or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made there under like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or ₹ 5,000, whichever is greater.

Issue

The words “likely to take” penalizes the dealer of importer unreasonably as the government has a mechanism in place to verify whether the recipient of goods or service has taken credit or not.



Suggestion

It is suggested that the words “likely to take” be deleted from the said rule to avoid unnecessary penalization of dealers.

78. Audit Issues

EA 2000 is a modern, transparent and interactive method of audit wherein the auditor proceeds with audit fully conversant with the business of the assessee. At the end of the process of verification, the auditor prepares Audit Report which incorporates all the audit objections/audit paras. An audit report provides (issue or para wise) the issue in brief, the reply or the explanation of the assessee, the reason for the auditor not being satisfied with the reply, the amount of short payment (if tabulated) and the recoveries of the same.

Suggestion

It is suggested that a copy of audit report even a clean one (having nil points) of the assessee under Excise Audit 2000 scheme be provided:

- *To facilitate the assessee to take corrective actions*
- *To ensure/prove that audit is done up to a particular period.*

As in absence of the audit report with the assessee he is unable to prove that his accounts are audited till a particular period and is sometimes subjected to re-audit as there is no mechanism in the department to ensure the same.



E. CUSTOMS DUTY

79. Setting up of Export Warehouse at any place in India

The Finance Act 2016 omitted section 9 of the Customs Act, 1962, to do away with the prior-condition of declaring a place as Warehousing Station for setting up private warehouse and to enable exporters to set up warehouse anywhere in India.

Suggestion

It be made possible to set up export warehouse at any place in India. CBEC may instead prescribe certain pre-conditions, as it may deem fit, regarding the place / location where such export warehouse can be set up by limiting this facility to only notified places in India is only acting as bottleneck in the smooth flow of exports.

80. Refund of Customs duty - Section 27 of Custom Act 1962

It has been observed that specified time limit is not followed by the officers in granting the refund even after submission of all relevant documents. The prolonged delay in refunds is causing undue financial hardship.

Suggestion

- *It is suggested that suitable amendment be made prescribing proper time limit for granting of refund which should be obligatory in nature. Further, it is suggested to give mandatory interest on delayed refunds.*
- *Concept of running account for payment of export duty and import duties and suo-moto adjusting the due refunds and collecting refunds may be implemented.*
- *It is suggested that in case provisionally filed Shipping Bill is not finalized within a prescribed period, refund claim of excess duty paid be allowed and granted.*

81. Power to Grant exemption of duty: Section 25 of Customs Act 1962

At present, every notification issued under section 25(1) or section 25(2A) shall, -

- unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette;



- also be published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi

Finance Act, 2016 amended section 25(4) to provide that Every notification issued under sub-section (1) or sub-section (2A) shall, unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette.

Further, section 25(5) is also sought to be omitted which states that 'Notwithstanding anything contained in sub-section (4), where a notification comes into force on a date later than the date of its issue, the same shall be published and offered for sale by the said Directorate of Publicity and Public Relations on a date on or before the date on which the said notification comes into force.

Suggestion

The amendment be made in such a manner whereby the notification comes into effect from the date next to the date of its publication in official Gazette.

82. Interest on delayed refunds

If any duty ordered to be refunded under sub-section (2) of section 27 to an applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below 5% and not exceeding 30% per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty.

Issue

Sometimes assessee waives their claim for interest and take up only the refund amount net of interest to expedite the refund process. Procedure of seeking waiver of claim for interest by the department from applicants is deterrent and needs to be discontinued.

Suggestion

It is suggested that interest on refund be automatically computed from the end of 3 months from date of refund claim. If refund application is admitted and processed, applicant has no basis to issue waiver of claim of interest.



83. Duties collected from the buyer to be deposited with the Central Government

Section 28B of Customs Act 1962 provides that every person who is liable to pay duty under this Act and has collected any amount in excess of the duty assessed or determined or paid on any goods under this Act from the buyer of such goods] in any manner as representing duty of customs, shall forthwith pay the amount so collected to the credit of the Central Government.

Correspondingly, Section 11DD of Central Excise Act & Section 73B of Finance Act provide that where such excess amount is collected the person liable to pay the amount to Central Government shall, in addition to the amount, be liable to pay interest at such rate not below 10%, and not exceeding 36% per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first day of the month succeeding the month in which the amount ought to have been paid under this Act, but for the provisions contained in sub-section (3) of section 11D/ 73A, till the date of payment of such amount

Issue

The provision for charging interest provided in Excise/ Service Tax is not provided for Customs.

Suggestion

It is suggested that provisions of charging interest be applied in these cases also as in the case of Excise/ Service Tax Law.

84. Determination of Assessable Value for levy of Export Duty for Final Assessment of Provisionally filed Shipping Bill

There is no set mechanism or rules prescribed specifying the methodology for computing assessable value for the purpose of levy of Export duties as defined for valuation of imported goods.

In this regard, it has been observed that custom authorities are taking their own different stands for finalizing the value for the purpose of computing Export duties. The same is also not uniform at different ports.

Custom Valuation (Determination of value of Export Goods) Rules, 2007 brought vide *Notification No. 95/2007-Cus (NT) Dated 13/9/2007* also not describe the methodology for determining the assessable values.

There has been no time line defined to do final assessment of provisionally assessed shipping bills, departmental officers are taking their own time to make the final assessments.



Suggestion

It is suggested that suitable rules may be prescribed for the purpose of determination of assessable value, specifying the adjustment to be made with components like changes in the value of goods, freight components etc.

85. Double taxation on Services and intangible rights related payments by importers of goods, to the foreign entities

As per Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 the Value of Services and intangible rights is required to be added to the transaction value of imported goods for the purpose of levy of Customs duty at the same time such payments (consideration) for Services and intangible rights are also liable to Service Tax. Thus, there is an issue of double taxation.

As per Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the following is required to be added to the price actually paid or payable for the imported goods while determining the transaction value:

- (a)
- (c) Royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable.
.....
- (e) All other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

Explanation:- Where the royalty, licence fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e) of Rule 10, such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.

The issue pertains to Indian Companies entering into business arrangement with foreign entities. Such arrangements are mainly done to use brand/reputation, Intellectual Property Rights, product & business expertise etc. of foreign entities and sell products supplied/approved by



them in Indian market. Such arrangements are made in different legal forms like Joint Venture, Franchise, License, Distributor etc.

Under the above arrangements, Indian Companies are obliged to maintain prescribed standards of business, pay for value of goods being imported and are also required to make payments to foreign partner for services and intangible rights which are identified by various names like Franchise/License Fee, Marketing/Advertising Fee, Agents Fee/Commission, Renewal Fee, Reimbursements of Travel etc.

While Custom Authorities relates all above direct or indirect payments related to Services & intangible rights like royalty, license fee etc. to supply of goods and hold them liable to Customs duty, Service Tax Authorities treat such payments as consideration for services and hold Indian Companies liable to pay Service Tax under reverse charge mechanism.

Thus, Indian Companies are exposed to the burden of double taxation of customs duty as well as service tax.

When Transfer of Right to use imported/locally procured packaged software or canned software is passed on to the buyer, Government has exempted CVD/Central Excise duty on consideration for such transfer of right to use, provided Service Tax is paid on the same (Ref: *Notification No. 25/2011-Cus., dated 01.03.2011 and 14/2011-CE., dated 24.03.2011*). Conversely, Service Tax was exempted when CVD/Excise duty was paid (Ref: *Notification No. 34/2012 – ST., dated 20.06.2012*).

Government had exempted IPR service providers from service tax equivalent to amount of cess payable on the transfer of technology under the provisions of the R & D Cess Act, 1986 so as to avoid double taxation of both Service Tax & R & D Cess (Ref *Notification No. 17/ 2004-ST., dated 10.09.2004*).

Suggestion

Thus, there is an immediate need to issue appropriate clarification so that payments related to services and intangible rights are not doubly taxed to customs duty as well as service tax.

86. Education Cess & Higher Education Cess on Imports

An education cess @ 2% & a secondary and higher education cess @ 1% is leviable on aggregate value of duties of customs imposed on the items imported into India. These Cesses are in addition to any other duties of customs chargeable on such goods.



Suggestion

It is suggested that cesses payable as per custom law be removed by merging the cess into basic tax rate of custom so that the tax planning and cost planning of business will be easier and accurate. This will be in line with the rates of Excise duty & Service Tax.

87. Provisional release of goods, documents and things seized pending adjudication

Section 110 A of Customs Act, 1962, provides that any goods, documents or things seized under section 110, may, pending the order of the adjudicating officer, be released to the owner on taking a bond from him in the proper form with such security and conditions as the Commissioner of Customs may require.

Issue

Presently the Act provides for provisional release of goods only when the order is pending before adjudicating authority but doesn't cover provisional release of goods when order is pending with appellate authority.

Suggestion

It is thus suggested that the section be amended to include provisional release of goods, documents and things seized when the order is pending with appellate authority

88. Increase in Baggage Limits

Rule 3 of Baggage Rules provides that an Indian resident or a foreigner residing in India or a tourist of Indian origin, not being an infant, arriving from any country other than Nepal, Bhutan or Myanmar, shall be allowed clearance free of duty articles in his bona fide baggage used personal effects, travel souvenirs and articles other than those specified, upto the value of **50 thousand rupees** if these are carried on the person or in the accompanied baggage of the passenger.

Suggestion

It is suggested that the baggage provisions be amended to enhance the baggage limit from Rs. 50,000/- to 75,000/- for duty free allowance considering the effect of inflation on exchange rate.

89. Taxability of Transportation of Goods by a Vessel

The transportation of services by vessel from a place outside India up to the customs station of clearance in India will be liable to service tax.



Rule 10(2) of Customs Valuation (Determination of value of imported goods) Rules, 2007 provides for inclusion of the cost of transport of the imported goods to the place of importation;

- (b) And the cost of transport is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods. Thus, freight paid in case of transportation by vessel is already included in the cost of imported goods and as a reason, custom duty gets paid on the same. Now Customs Duty as well as Service tax would be paid on the same transaction leading to double taxation.

Suggestion

- *In order to avoid dual taxation under Customs as well as Service Tax the omission proposed from Negative list be rescinded which would also be in line with proposed GST structure.*
- *Alternatively, entry 20 of Mega Exemption notification be suitably amended to include the transportation of goods by a vessel therein.*



F. CENTRAL SALES TAX

90. Facility to submit Form C, E etc. online

Section 6 is charging Section. As per Section 6(2) subsequent inter-state sale transaction taking place by transfer of documents of title to goods, when the goods are in course of movement, are exempt. For this purpose the claimant dealer has to obtain Form E-1 from his vendor (if such vendor is first seller otherwise, E-II) and Form 'C' from the buyer. One 'C' form can be issued for one quarter of a financial year. Similarly EI/EII can also be issued on quarterly basis. Under Section 6A, branch/consignment transfer is allowed only if Form 'F' is produced, else it will be deemed to be a sale. Form 'F' is required to be obtained from transferee branch/agent. One Form 'F' can cover transfers affected in one calendar month.

Central Government has also substituted sub rule (7) to rule 12 with effect from 1st October, 2005. Form C or certificate in Form E-I or E-II will have to be submitted to sales tax department within three months from the end of the quarter in which sale is affected. In case of Form F, it is to be obtained on monthly basis and it is to be submitted to the sales tax department within three months from the end of the month in which goods are transferred to the interstate branch or agent.

Suggestion

- *With a considerable development in technology, all the relevant forms under Central Sales Tax Act like Form C, E, F etc. be allowed to be filed online. This will not only expedite the process of submitting the forms but also will save the time and streamline the process.*
- *Form E-1 is issued by the seller of goods in case of first sales made. At the time of subsequent sale form E-II is required to be issued by the seller. It is suggested that Form E-I be allowed to be used as self declaration form by intermediate sellers in order to avoid exchange of various forms in the process.*



G. OTHERS

91. Increase in limitation period for recovery of Central Excise & Customs to 2 years

Finance Act, 2016 has amended Section 28A of Customs Act 1962 & Section 11A of Central Excise Act 1944 to extend the period of limitation from 1 year to 2 years.

Suggestion

The erstwhile time limit of 6 months for issuance of notice from the last date for filing of the annual returns be restored/ fixed.

92. Refund of duty/tax not passed on to the immediate buyer

Section 27 of the Customs Act 1962 & Section 11B of Central Excise Act 1944 provide that Any person claiming refund of any duty or interest- paid by him; or borne by him, may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs/ Excise or Deputy Commissioner of Customs/ Excise, before the expiry of one year, from the date of payment of such duty or interest

Recently Hon'ble Supreme Court in the case of *CCE, Madras v Addison & Co Ltd - 2016 TIOL 146 SC CX LB* provided that assessee is entitled for filing refund claim on basis of credit notes raised towards turnover discount.

Suggestion

In the light of aforesaid Supreme Court decision, it is suggested that section 27/ 11B be amended to give effect to the decision.

93. Concessions to Special Economic Zones (SEZ)

Section 50 of SEZ Act, 2005 provides that the State Government may, for the purposes of giving effect to the provisions of this Act, notify policies for Developers and Units and take suitable steps for enactment of any law:-

- (a) granting exemption from the State taxes, levies and duties to the Developer or the entrepreneur;
- (b) delegating the powers conferred upon any person or authority under any State Act to the Development Commissioner in relation to the Developer or the entrepreneur.



Issue

Presently, as the above provisions are discretionary, there is no mechanism to regulate the state governments in extending concessions to SEZ as envisaged in SEZ Act and Rules. Due to lack of co-ordination between central and state governments the concessions like supply of goods without payment of CST is being denied by many state governments resulting in added cost to such units.

Suggestions

It is suggested that the above provisions be made mandatory by amending Section: 51 of the SEZ Act to provide that the provisions of this Act shall have effect notwithstanding anything contained in any state tax laws.

94. Powers of the Commissioner (Appeals) under the Central Excise Act and the Customs Act to condone the delay in filing the appeal

Under section 35 of the Central Excise Act, 1944 or section 128 of the Customs Act, 1962, an appeal before the Commissioner (Appeals) is required to be filed within 60 days from the date of receipt of the order of the lower authorities. The Commissioner (Appeals) is empowered to condone the delay upto 30 days beyond 60 days provided sufficient cause is shown. It has been observed that the said condonable period of 30 days is very short and requires to be increased to either 60 days or 90 days. Further, there are many instances where meritorious cases cannot be pursued because of the above technicality. The Courts have held that an appeal filed beyond the condonable period cannot be admitted contrary to the statutory provisions, since the Commissioner (Appeals) has no power to condone beyond 30 days.

Further, Appellate Tribunal has unlimited condonation powers.

Suggestion

- *It is, therefore, suggested that the power to condone appeals be vested with the Commissioner Appeals upto a period of 90 days instead of 30 days with a further appeal to CESTAT in case of delays beyond such period.*
- *Further, in genuine cases Commissioner Appeals be vested with condonation powers for unlimited period.*



95. Consistent Time Limits for Filing appeals to Commissioner of Central Excise (Appeals) under Excise & Service Tax

Section 85(3A) of the Finance Act 1994 provides that an appeal shall be presented within **two months** from the date of receipt of the decision or order of such adjudicating authority, made on and after 28.05.2012, relating to service tax, interest or penalty. Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of **one month**

Section 35(1) of the Central Excise Act 1944 provides that any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise, may appeal to the Commissioner (Appeals) within **60 days** from the date of the communication to him of such decision or order. Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, allow it to be presented within a further period of **30 days**.

Suggestion

It is suggested that time limits for filing appeals to Commissioner of Central Excise (Appeals) under Central Excise & Service Tax be made consistent.

96. Waiver from penalty if duty and interest paid before service / issue/ receipt of Show cause notice under different statute

A complete waiver from penal provisions has been granted in cases not involving fraud, collusion, willful misstatement, suppression and contraventions of provisions with the intention to evade duty in the following manner:

Section 76 of the Finance Act now provides where service tax has not been levied or paid, or has been short levied or short paid, or erroneously refunded, for any reason, other than the reason of fraud or collusion or willful misstatement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty not exceeding ten per cent. of the amount of such service tax:

Provided that where such service tax and interest is paid within a period of thirty days of–

(i) the date of **service** of notice under sub-section (1) of section 73, no penalty shall be payable;”



Section 11AC(1) of Central Excise Act, 1944 as amended provide that(a) where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, for any reason other than the reason of fraud or collusion or any willful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under subsection (10) of section 11A shall also be liable to pay a penalty not exceeding ten per cent. of the duty so determined or rupees five thousand, whichever is higher:

Provided that where such duty and interest payable under section 11AA is paid either before the issue of show cause notice or within thirty days of **issue** of show cause notice, no penalty shall be payable....”

Section 28(2) of Customs Act, 1962 as amended provides that where notice under clause (a) of subsection (1) has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of **receipt** of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said **notice is served** under clause (a) of subsection (1) shall be deemed to be concluded.”;

Issue

With regards to show cause notice the usage of the word ‘service’ in Service tax, ‘issue’ in Central Excise and ‘receipt’ in Customs, will lead to interpretational disputes and frivolous litigation which does not seem to be the intention of the Government. This is evident from the TRU Letter II annexed to the Budget documents, wherein these words have been used interchangeably.

The difference between the meaning of the terms ‘issue’ and ‘service’ of notice cannot be ignored. In legal parlance distinction exists and its significance is high. ‘Issue’ of notice cannot be same as the ‘service’ of notice. The ‘service’ of notice ideally means the time when the delivery of notice is complete in the hands of the Noticee. On the other hand, ‘issue’ of notice would happen when its delivery is merely initiated. There may be a situation that a notice may be issued today, but may be served 2-3 years later.

Suggestion

*The provisions under the three statute be harmonized so as to provide complete waiver from penal provisions where tax/ duty and interest is paid within 30 days of the ‘**receipt**’ of the notice rather than ‘issue’ of notice.*



97. Personal Penalty

It is observed that Central Excise Department sometimes issues notices for personal penalty to junior and middle level officers of the Corporates under Rule 26 (earlier rule 209A). These type of notices are mostly issued wherever allegation or suppressions are leveled. Though sales tax is also an indirect tax like excise duty, there is no practice of levying personal penalty under Sales Tax Law.

The employees in large Corporates are salaried employees and are professionals. Their jobs are transferable. However, issuance of personal penalty notices create unnecessary obstacles. The work is done for and on behalf of Corporates (assesseees). Excise Department should deal with the Corporates and not with individual employees.

Suggestion

Therefore, it is suggested that the provisions relating to personal penalty be removed from the statute.

98. Exemption from payment of duty by way of refund mechanism

Section 5A of the Central Excise Act, 1944 or section 25 of the Customs Act, 1962 or section 93 of the Finance Act, 1994 empowers the Central Government to exempt from payment of excise duty/customs duty/service tax. However, off late, few exemption notifications have been issued under the above statutory provisions which are in effect a refund mechanism subject to fulfillment of conditions. For instance, *Notification No.102/2007 Cus dated 14.9.07* as amended which provides for refund of special additional duty of 4% leviable under section 3(5) of the Customs Tariff Act, 1975 or *Notification No. 40/2012 ST dated 20.06.12* which provides refund of service tax to SEZ developer/unit.

The above notifications have lot of conditions and procedures. Many a times the assesseees face great difficulties in claiming the said exemption. The administration of these notifications is resulting in harassment of the assessee besides breeding heavy litigations.

Suggestion

It is suggested that the present system of granting exemption through refund route be reviewed and be made simple to comply.



99. Suggestions for Reduction of Litigation

(a) Accountability of tax collectors

In the present tax laws, there is no accountability on the part of tax collectors. This leads to the misuse of powers vested in them vide the respective legislations. For proper discharge of responsibilities, accountability is a necessary counter-balance and is very essential for effective discharge of the authority vested in a person

Suggestion

In order to project a sense of even-handedness in dealing with tax payers, provisions relating to accountability be introduced and not formulated independently. The Tribunal or Commissionerate (Appeal) may impose reasonable cost for the same.

If there are rewards awarded to the departmental officers for anti-evasion cases then there ought to be penalty also for frivolous litigations.

(b) Timely information and guidance

It has been observed that the order passed by CESTAT and Adjudicating Authority/ Commissioner (Appeals) does not reach to the industry timely, resulting non compliance or non timely compliance.

Further, it is felt that the time lag for the issuance of the clarifications on common problems/ issues of pertaining to industry.

Suggestion

It is suggested that all the orders passed by CESTAT and Adjudicating Authority/ Commissioner (Appeals) be made available on websites for ready reference of the industry. The CBEC may play a proactive role and issue clarifications on problems / issues of industry which are similar in nature to avoid such problems resulting in litigation at a later stage.

(c) Vacancies in Tribunal

Suggestion

The vacancies in Tribunal be filled and additional benches in metro and new benches in non-metro cities be constituted to expedite the disposal of long pending cases. A fast track system of disposal of cases be introduced to deal with high revenue cases and settled issues.



(d) Members of CESTAT

Suggestion

Practicing Chartered Accountants be made eligible for being appointed as Members of the CESTAT as in case of ITAT.

100. Focus on Assessee outside the Tax Net

The tax payer who is registered is subjected to periodic returns, visits, multiple audits and extended scrutiny. Many assessee in the unorganized sectors like the iron and steel articles, plastic household goods, works contractors, interior decorators among others are able to operate with impunity due to sufficient controlled, continuous focus on them not in place. This erodes the competitiveness of the compliant while such persons work totally in the black money / parallel sector. This would also be an important move to smoothly graduate into the GST regime.

Suggestion

- *Sufficient officers say -15% of the total be allocated to unearth these assesseees.*
- *The efforts be made in controlled environment where the small duty/ tax payer is not hassled while those who need to pay the duty/ tax be brought to mainstream.*
- *The systems to be transparent and have built in accountability. To include checks to avoid connivance and graft.*