ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

INDIRECT TAX NEWSLETTER

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NOTIFICATION/CIRCULARS

<table>
<tr><th>S. No</th><th>Reference</th><th>Particulars</th></tr>
<tr><td colspan="3">GST</td></tr>
<tr><td>1</td><td>Notification No. 01/2023- Central Tax dated 28.02.2023</td><td>Vide this notification, the Explanation given under Notification No. 13/2017 dated 28.06.2017 in clause (h) has been expanded to include “Courts and Tribunals” as well.</td></tr>
<tr><td>2</td><td>Notification No. 02/2023- Central Tax dated 28.02.2023</td><td>▪ Vide this notification, clause (iva) is inserted under the Explanation to Notification No. 12/2017 dated 28.06.2017 which clarifies that “any authority, board or body set up by the Central Government or State Government including National Testing Agency for conduct of entrance examination for admission to educational institutions shall be treated as educational institution for the limited purpose of providing services by way of conduct of entrance examination for admission to educational institutions.”</td></tr>
<tr><td>3</td><td>Notification No. 03/2023- Central Tax dated 28.02.2023.

Notification No. 04/2023- Central Tax dated 28.02.2023</td><td>The following rate changes have been made with effect from 01.03.2023:
▪ Exemption has been granted to “Rab, other than pre-packaged and labelled”
▪ “Rab, pre-packaged and labelled” is classifiable under heading 1701/1702 and is liable to 5% GST under S. No. 91A in Schedule I of Notification No. 1/2017-CT(R) dated 28.06.2017.

“Pencil Sharpeners” is classifiable under heading 8214 and is liable to 12% GST under S. No. 186A in Schedule I of Notification No. 1/2017-CT(R) dated 28.06.2017.</td></tr>
<tr><td colspan="3">FOREIGN TRADE POLICY</td></tr>
<tr><td>4</td><td>Notification No. 59/2015-2020 dated 21.02.2023</td><td>The import policy condition of cashew kernels (broken/whole) has been amended as under:
<table>
<tr><th>Description and ITC (HS) Code</th><th>Existing Import Policy</th><th>Revised Import Policy</th></tr>
<tr><td>Cashew kernel, broken (08013210)</td><td>However, import is free if CIF value is above INR 680/- per Kg.</td><td>1. However, import is free if CIF value is above INR 680/- per Kg.
2. MIP conditions, however, shall not be applicable for imports by 100% Export Oriented Units (EOUs) and units in the SEZ.
3. SEZs and EoUs units shall not be allowed to sell the imported Cashew Kernels into Domestic Tariff Area (DTA).</td></tr>
<tr><td>Cashew kernel, whole (08013220)</td><td>However, import is free if CIF value is above INR 720/- per Kg.</td><td>1. However, import is free if CIF value is above INR 720/- per Kg.
2. MIP conditions, however, shall not be applicable for imports by 100% Export Oriented Units (EOUs) and units in the SEZ.
3. SEZs and EoUs units shall not be allowed to sell the imported Cashew Kernels into DTA.</td></tr>
</table></td></tr>
</table>

<table>
<tr><th>S. No</th><th>Reference</th><th>Particulars</th></tr>
<tr><td></td><td></td><td>Effect of this Notification: Minimum Import Price (MIP) on Cashew kernel (broken/whole) will not be applicable for imports by 100% Export Oriented Units (EOUs) and units in the SEZs subject to the condition that the imported Cashew Kernels are not sold into DTA.</td></tr>
<tr><td>5</td><td>Notification No. 56/2015-2020 dated 07.02.2023</td><td>Vide this notification, an entry has been inserted at serial no. (6) in para 4.42 of Foreign Trade Policy, 2015-20 in order to add Gemological Science International (GSI) Pvt. Ltd., Mumbai, Maharashtra, India as an agency permitted to import diamonds for certification/grading & re-export.</td></tr>
<tr><td>6</td><td>Public Notice No. 58/2015-2020 dated 24.02.2023</td><td>Directorate General of Foreign Trade (DGFT) gives relaxation in procedure in respect of acceptance of fee for excess duty utilization under the EPCG Scheme.

To facilitate the Ease of Doing Business, it has been decided to permit the RAs to allow the authorization holder to furnish additional fee to cover excess duty utilized for the EPCG authorizations issued under the FTP 2009-14 (extended up to 31.03.2015) also at the time of application of EODC subject to the condition that excess duty utilized was not more than 10% of duty saved value of the authorization.

Effect of this Public Notice: One time relaxation is granted in submission of additional fee to cover excess duty utilized in Export Promotion Capital Goods (EPCG) authorizations issued under Foreign Trade Policy (2009-14) (extended up to 31.03.2015).</td></tr>
<tr><td colspan="3">CENTRAL EXCISE</td></tr>
<tr><td>7</td><td>Notification No. 08/2023 - Central Excise dated 15.02.2023</td><td>There is a change in the special additional excise duty rate of petroleum crude and aviation turbine fuel.

The rate of duty is as below:

<table><tr><th>Product</th><th>Rate</th></tr><tr><td>Petroleum crude</td><td>INR 4,350/- per ton</td></tr><tr><td>Aviation Turbine Fuel</td><td>INR 1.5/- per liter</td></tr></table></td></tr>
<tr><td>8</td><td>Notification No. 09/2023 - Central Excise dated 16.02.2023</td><td>There is a change in the special additional excise duty rate of High speed diesel oil. The rate of duty is INR 1/- per liter.</td></tr>
</table>

RECENT CASE LAWS

Whether service tax paid on re-insurance premium on invoices issued by other insurance companies under a pooling arrangement should be allowed as input service credit?

Commissioner of Central Goods and Service Tax vs Shriram General Insurance Company Ltd.

[Special Leave Petition Civil Diary No. 4928-2023]

FACTS OF THE CASE

- The assessee is an insurance provider which has a pooling agreement with other insurance companies for re-insuring its policies after issuance of an insurance policy to the insured. The assessee had been depositing its service tax on the amount of insurance premium. In the process, the assessee had availed CENVAT Credit of input services, based on the invoices issued by other insurance companies with whom the assessee had a pooling agreement.
- In the process the assessee had availed amount of input service credit based on invoices issued by other insurance companies with whom the assessee had a pooling agreement. The Commissioner was of the opinion that the assesseee was not entitled to claim such credit as the term input service as contained in Rule 2(l) of the CENVAT Credit Rules, 2004 and came to the conclusion that the assessee was not entitled to claim such credit on input service.
- Thereafter, the assessee carried the matter in appeal. The Hon'ble Tribunal allowed the appeal relying upon the decision of Division Bench of the Karnataka High Court in case of ***Commissioner of Central Excise, Bangalore Vs. PNB Metlife India Insurance Co.Ltd. reported in (2015) 51 GST 504 (Karnataka)***. The Hon'ble Karnataka High Court had noted that the process of issuance of an Insurance Policy by the Insurer and subsequent procurement of re-insurance policy from another company (which is a statutory requirement u/s 101A of the Insurance Act, 1938) is an integral part of the total process of issuing the insurance policy. Therefore, such reinsurance being co-terminus with the insurance policy, the Karnataka High Court held that issuance of insurance policy by insurer, and then taking of re-insurance by it, is a continuous process. Therefore, the same same would not be an input service eligible for CENVAT credit within the meaning of Rule 2(1) of the CENVAT Credit Rules, 2004.
- Furthermore, the Hon'ble Tribunal clarified that creation of an insurance pool was as per the directions of the Insurance Regulatory Development Authority (IRDA), whereby all general insurers were directed to collectively participate in a pooling arrangement to share all motor third party insurance business underwritten by any of the registered general insurers. Aggrieved by the decision of Customs, Excise & Service Tax Appellate Tribunal ("**CESTAT**"), Revenue appealed before the Rajasthan High Court.
- The Hon'ble Rajasthan High Court in its judgment observed that in pursuance to the directions issued by the IRDA in exercise of powers conferred under Section 34 of the Insurance Act, all general insurance companies in India entered into an agreement for creating the insurance pool. These directives had statutory force and the act of the insurance companies to create such a pool was not a voluntary act.
- Furthermore, the Hon'ble Rajasthan High Court while noticing the definition of the term 'reinsurance' under Section 2(16B) of the Insurance Act, 1938 observed that the Tribunal was of the correct opinion that this pooling system is nothing but a form of re-insurance. Moreover, Section 101A of the Insurance Act, 1938 makes it compulsory for every insurer to re-insure such percentage of the sum insured on each policy as may be specified by the authority with previous approval of the Central Government. Therefore, the bench held that the tribunal correctly held that the entire situation is revenue neutral, and this pooling system is nothing but a form of re-insurance. Accordingly, the appeal was dismissed. Thereafter the department filed a Special Leave Petition before the Hon'ble Supreme Court

JUDGMENT

- Upon considering the judgment of Hon'ble Rajasthan High Court, the Hon'ble Supreme Court dismissed the departments petition by holding that *"This Court is of the opinion that the order impugned does not call for interference. The Special Leave Petition is, accordingly, dismissed."*

No illegality in credit availed by insurance company on payment made to auto-dealers towards infrastructure-support

ICICI Lombard General Insurance Company Ltd. v. Commissioner of CGST and Central Excise, Mumbai Central

[Service Tax Appeal No. 89570 of 2018 – CESTAT, Mumbai]

FACTS OF THE CASE

- The Appellant is a general insurance company, *inter alia*, engaged in the business of providing insurance services in respect of automobiles. In furtherance of its business of providing motor vehicle insurance, the Appellant followed the practice of availing CENVAT credit of the Service Tax paid as against the facilitation fees charged by the motor vehicle dealers for providing the infrastructure and support services to the Company.
- The said Service Tax paid was being denied and sought to be recovered along with interest and penalty amounting to Rs.135,72,98,778/- *vide* the Show Cause Notice No. 106/2015 dated 17.10.2015 ("**SCN**") issued to the Appellant. Thereafter, the ***Order in Original No. 15/COMMR/(Dr.KNR)/CGST&CEX/MC/2018*** dated 15.02.2018 was issued in the matter denying the claim for CENVAT credit of the Service Tax paid by the Appellant and confirmed the demand of Service Tax, interest and penalty.
- Accordingly, the Appellant filed an appeal against the impugned order before the Customs, Excise & Service Tax Appellate Tribunal ("**CESTAT**"), Mumbai *vide* Service Tax Appeal No. 89570 of 2018 so as to take the CENVAT credit of the Service Tax paid.

JUDGMENT

- The Hon'ble tribunal while setting aside the impugned order observed that it is an undisputed fact that the automotive dealers had paid service tax on the nature of services described in the invoices issued to the Appellant; that payment of service tax by such dealers have been accepted by the service tax authorities having jurisdiction over their business premises. Since, the service tax paid by such dealers was availed as Cenvat credit by the appellant, availment of such credit is in conformity with the Cenvat statute.
- Furthermore, the Hon'ble Tribunal relied upon the judgement passed on similar facts by a co-ordinate Bench of the Tribunal in the case of ***M/s. Cholamandalam General Insurance Co. Ltd. v. The Commissioner of G.S.T. & Central Excise, Chennai [2021 (47) G.S.T.L. 263 (Tri.-Chennai)]*** where it was held that since the service tax was paid by the auto dealer, under the taxable head of "Business Auxiliary Service" and the assessment of auto dealer has not been re-opened or questioned, the credit availed cannot be denied to the insurance company.
- Reliance was also placed on ***CCE&C v. MDS Switchgear Ltd. [2008 (229) E.L.T. 485 (S.C.)]***, wherein it was held that once the tax liability has been discharged and accepted by the Department, the consequential Cenvat credit cannot be denied at the recipient's end.
- On the question of violation of Section 40 of the Insurance Act, 1938, the Hon'ble Tribunal placed reliance on the Letter dated 12.08.2015 issued by the Insurance Regulatory Development Authority (IRDA), clarifying the position that outsourcing of the non-core activities by insurance companies is permissible. Hence, in this context, the law is well settled that when a competent authority has issued an opinion on a particular matter, the same shall be binding and cannot be questioned by the other agencies.

Whether the assessee providing the service of marketing and market research to overseas recipient would qualify as an intermediary?

Whether the appellants are eligible for the refund of unutilised credit under Rule 5 ibid read with Notification No. 27/2012-CE(NT) dated 18.06.2012?

Idex India Private Limited vs Commissioner of CGST, Mumbai East

[Service Tax Appeal No. 86812 of 2019 – CESTAT, Mumbai]

FACTS OF THE CASE

- The assessee is into the business of providing services related to software development and IT enabled services. They are providing Business Support Services to its overseas holding company, M/s. Idex Corporation, USA and its subsidiaries such as Idex, Japan etc.
- The holding company carries out the activity of manufacturing and selling precision engineered products through its various business units worldwide and the assessee these units by rendering the services viz. Marketing and Promotion Services, Engineering Support Services to the distributors/customers and Accounting & Management Reporting Services.
- In order to avail the unutilized accumulated CENVAT credit the assessee filed refund claims under Notification No. 27/2012-CE(NT) dated June 18, 2012, read with Rule 5 for the period in dispute (April, 2015 to June, 2016). Thereafter, the Adjudicating Authority vide Order-in-Original dated 31.05.2017 rejected the refund claims filed by the appellant on the ground that the services provided by the appellants to their clients cannot be treated as export of service as provided under Rule 6A of the Service Tax Rules and therefore they are not eligible for refund of the CENVAT Credit lying in balance under the provisions of Rule 5.

JUDGMENT

- On the first issue, the Hon'ble Tribunal observed that an "intermediary" is someone who arranges or facilitates the supplies of goods or services or securities between two or more persons. It is thus necessary that the arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (main supply) and one arranging or facilitating the said main supply. Therefore, an activity between only two parties cannot be considered as an intermediary service.
- The Hon'ble Tribunal relying upon the guidance note dated 20.06.2012 issued by CBIC and a similar clarification issued by the CBIC on 21.09.2021 under GST regime observed that there is no doubt that in cases wherein the person supplies the main supply either fully or partly, on principal-to-principal basis, the said supply cannot come with the ambit of "intermediary".
- Furthermore, the Hon'ble Tribunal observed that sub-contracting for a service is also not an intermediary service. The supplier of main service may decide to outsource the supply of main service, either fully or partly, to one or more subcontractors. Such sub-contractor provides the main supply, either fully or a part thereof and does not merely arrange or facilitate the main supply between the principal supplier and his customers and therefore clearly not an intermediary.
- Coming on to the second issue, the Hon'ble Tribunal observed that Rule 5 lays down how to determine the quantum of admissible refund from the accumulated CENVAT credit. It cannot be considered to be a proceeding for denial of CENVAT credit available in the account of the claimant and therefore even if the refund is denied, then also the amount continues to remain in the CENVAT account of the claimant.
- Furthermore, the Hon'ble Tribunal observed that if the Revenue is not in agreement with the claims of the assessee and if, according to Revenue, the services in issue do not fall within the ambit of 'export of service' then the Revenue ought to have initiated the proceedings against the assessee for demanding the Service Tax in respect of taxable service provided by the assessee. Since, no such proceedings have been initiated by the Revenue as borne out from the records of the case, therefore in a way Revenue itself has allowed this taxable service provided by assessee as 'export of service.' If that is so then in the proceeding under Rule 5 ibid Revenue cannot deny refund by treating the service provided not to be export of service.

RECENT ADVANCE RULINGS

Whether the supply of goods or services for 'setting up of network' would qualify as 'works contract'?

What is the rate of tax applicable to the supplies made under the contract?

In the matter of Sterlite Technologies Ltd.

[TS-45-AAAR(MAH)-2023-GST]

FACTS OF THE CASE

- Applicant is engaged in manufacturing of telecom products (such as optic fiber, optic fiber cable. etc.) and services in relation to laying of these optic fiber cables (either underground or hung overhead) to create a network, setting up of control centres, installation of equipment, commissioning of network and other ancillary activities that may be necessary for creation of network infrastructure for its customers in the telecom industry.
- The applicant had filed the application to seek advance ruling on (a) Whether the supply of goods or services for 'setting up of network' would qualify as 'works contract' as defined in Section 2(119) of the CGST Act? and (b) If supplies contemplated as per the contract with BSNL are not treated as works contract can these continue to qualify as composite supply? If yes what is the principal supply?
- The Appellant claimed that creation of said network fulfils all other ancillary parameters necessary for an activity to qualify as works contract. The Appellant also referred to Notification No. 11/2017-Central Tax (rate) dated June 28. 2017 (as amended from time to time) and submitted that the works contract to be undertaken by it is covered under Entry No. 3(vi)(a) of the rate Notification to attract GST at the rate of 12%.
- However, the view of Authority for Advance Ruling (**AAR**) was different as in Order No. March GST-ARA-106/2018-19/B-34 dated 28, 2019 it was ruled that the supply of goods or services for 'setting up of network' would qualify as a composite supply of works contract' as defined under Section 2(119) of the CGST Act and Activities of the Appellant are covered by sub-clause Notification (ii) of Entry No. 3 of the Rate and attract GST at the rate of 18%.

AAAR RULING

- The Authority observed that the network is intended to be used for war fighting operations of the Indian Navy and therefore, the required works contract is set up with the predominant purpose of defence. In such a case, the said works contract is undertaken for a predominant purpose other than commerce, industry, business or profession.
- Therefore, Maharashtra Appellate Authority for Advance Ruling (**AAAR**) modified AAR and observed that supply as a sub-contractor for 'setting up of network' on behalf of Bharat Sanchar Nigam Limited (**BSNL**) for the Indian Navy is taxable at 12% (for period April 2019 to December 31, 2021) under entry at serial number 3(vi)(a) of Notification No.11/2017-CT (Rate) dated June 28, 2017.

Whether GST is applicable on advances received towards sale of site

In the matter of Rabia Khanum

[TS-55-AAAR(KAR)-2023-GST]

FACTS OF THE CASE

- The applicant owns three acres of land and intends to convert the said land for residential usage and form small plots and sell them to individuals after obtaining necessary permission from the concerned authorities. In order to obtain a sanction, the applicant will develop the land with basic amenities which are required for human inhabitation.

- The applicant sought a ruling on whether GST is applicable on (a) consideration received on sale of sites; (b) advances received towards sale of site; (c) sale of plots after completion of works related to basic necessities.
- The AAR in ruling no. KAR ADRG 31/2022 held the answer to all the above question in the negative. Aggrieved by this ruling, the jurisdictional CGST officer has filed the appeal on the ground that the GST is payable on entire consideration received by the developer even after completion, if the agreement is entered into before completion. GST is also payable on the advance received towards sale of site in terms of Section 12(b) of CGST Act at 18% on the gross value.

AAR RULING

- The AAAR rejected the appeal filed by the Assistant Commissioner of Central Tax and upheld the ruling of AAR.
- Further, the AAAR observed that the owner of the land is developing the land not at the behest of the buyer and not because the purchaser has requested for any service from him but because it is required by law for the seller to develop the land in order to sell plots.
- Further, it was observed that the title of plot will only be transferred after the completion certificate is granted by the concerned authority. Also, the developed area such as drainage, developed roads etc. are not transferred to the buyers which means the consideration received by the seller before or after the completion of development is only for the sale of plot as no service is provided to the buyer.

We hope you have enjoyed reading this update. For further information please write to us at insights@elp-in.com or connect with our authors:

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