Central Board of Excise & Customs

विधि - वार्ता

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In-house Monthly Newsletter

Editorspeak

Our fourth issue ushers us into the New Year 2013. We wish A VERY HAPPY & PROSPEROUS 2013 to all our patrons and readers.

We have been inundated with positive responses from our readers which encourages and motivates us to reach greater heights. It is our endeavour to ensure that VidhiVarta' is a news letter for our readers and by our readers. The contributions made by our readers in the form of articles, news, judgementsetc all are illuminating and enriching..

The topical issue "Impact of CCE, Mumbai Vs M/s FIAT India" emphasises the need for special audits to be undertaken under the provisions of Section 14A and 14AA of the Central Excise Act, 1944

Other features in the Newsletter are complete with recent developments impacting our decision making.

News

- Sh M S BadanMember CBEC has superannuated on 31st December 2012. He was holding the charge of Member (Customs). Ms SandhyaBaliga is looking after the charge of Customs in addition to her charge as Member (L & J).
- CESTAT, Mumbai has issued show cause notice to the Deputy Commissioner Service Tax division, Raigad for initiating contempt proceedings against him. The said Deputy Commissioner had failed to comply with the directions contained in CESTAT order dated 12th October 2012. **Abhijit Travels Vs CCE [2012-TIOL-1936-CESTAT-MUM].**
- In the case of Australian Cookies, Hon'ble Supreme Court has held that even the sale of the goods from the premises of the brand name owner is akin to branding the good. Benefit of small scale exemption shall not be available in respect of such goods being sold from the premises of brand name owner.
- A Workshop in the series of workshops being organized by Directorate of Legal Affairs to create the awareness about the procedures, processes and pitfalls in the litigation matters before the Apex Court was held in Cochin.
- A meeting was held between the Customs Administration of India and Hongkong on 14th Jaunary, 2013. To discuss various issues including enhenced cooperation to combat Customs officers, secure the global supply chain etc.

A meeting was held between the Custroms Administrations of India and Hong Kong on 14.01.2013 in New Delhi. The two sides held wide-ranging discussions on various issues inluding on enhancing cooperation to combat Customs offences, secure the global supply chain and facilitate legitimate trade.

Impact of CCE, Mumbai Vs M/s Fiat India Pvt Ltd & Anr [2012-TIOL-58-SC-CX]

Fiat India manufactured Uno cars using CKD/ SKD kits, which were sold to distributors below production cost. Excise duty was paid on the sale price charged from the distributors. During the period 1996-2000, excise duty was paid on the normal price and after the amendment of Section 4 and Valuation Rules it was paid on the transaction value.

The department contended that the price at which cars were sold to the distributors was not the normal price or the transaction value as it was not the sole consideration for sale and the intent to penetrate the market constituted 'extra-commercial consideration'. Thus a cost accountant was appointed by the department in terms of Section 14A of the Central Excise Act, 1944 to determine the assessable value of the cars cleared by the FIAT during the period under dispute. The cost accountant determined the assessable value on the basis of the cost of production plus profit.

Hon'ble Supreme Court has in the above mentioned decision upheld the contention of the department and has agreed with the manner of valuation adopted by the department in this case. Even the review petition filed by the FIAT in this case has been dismissed by the Apex Court.

The said judgement has opened a few very interesting issues regarding valuation and has given the department a chance to plug the loopholes which exist in the valuation scheme whereby someone could continuously clear the goods for nearly five years by undervaluing them in the name of penetrating the market. The issue is not only linked to the valuation but has much larger ramifications. To clarify the issue, we will have to go through the manner of valuation approved by the Apex Court in this case. As per the Apex Court in such cases the valuation should be done on the basis of manufacturing cost plus manufacturing profit, expressed mathematically-

Value = manufacturing cost + manufacturing profits; or

= Input Costs + Fixed Costs+ manufacturing profits;

Fixed Cost will comprise of the Cost of investment in capital goods, the overheads and other administrative and marketing expenses.

If the value of the goods i.e. normal value/ transaction value is less than the value determined on the basis of costing then it would mean that either of the three components have been suppressed while determining the assessable value.

In case the input costs or Fixed Costs that include the cost of capital goods has been suppressed, then it would imply an excessive built up of the CENVAT credit with the assessee.Thus the department looses on both counts viz on account of valuation and also on account of excessive CENVAT credit available with the assessee.

The manufacturing profits should normally be as reflected in the profit and loss account of the assessee and it is difficult to presume that any business entity would like to show losses constantly over a long period of time of five years. Thus the explanation that FIAT India was selling the cars below the cost price to penetrate the market for such a long period of time may not be an acceptable and plausible argument.

All cases of valuation, even those case where goods are being cleared on the basis of transaction value need to be investigated as has been done in case of FIAT. The most powerful tool available for such investigations under the provisions of Central Excise Act, 1944 to determine the correctness of value for the clearence of goods is through an special audit under section 14 A or 14AA.

JUDGEMENTS

HIGH COURT

M/s. Indorama Synthetics (India) Ltd. Vs UOI [2013-TIOL-02-HC-Mum]

The proceedings before the Settlement Commission are based on the admission made by the applicant before the settlement commission with regard to duty short paid or evaded by him. Once the applicant makes such an admission it is not open for him to contest the show cause notice on merits or demand a reasoned order to be issued for imposing the penalty on him. Full and complete disclosure is a sine qua non to invoke the jurisdiction of the Settlement Commission.

Once the case is settled by the process of Settlement Commission then it is not open for the applicant to challenge the part of order imposing penalty.

Multiple Exports Pvt Ltd VsUoI [2012-TIOL-1033-HX-AHM]

The original manufacturer is now not traceable, is not sufficient for reversal of CENVAT credit already taken by the appellants therein by virtue of original invoices. However, in order to get the credit of CENVAT, Rule 7(2) cast a further duty upon the appellants to take all reasonable steps to ensure that the inputs or the capital goods in respect of which the appellants had taken credit of CENVAT are the goods on which appropriate duty of excise as indicated in the documents accompanying the goods, has been paid.The petitioners have admittedly not taken the steps enumerated in the Explanation to Rule 7(2) of the Cenvat Credit Rules and, thus, the Revenue Authority rightly denied rebate of duty.

TRIBUNAL

M/S Amrapali Barter Pvt Ltd Vs. CST, Kolkata [2013-TIOL-32-CESTAT-KOL]

If the Service provider is registered with the Service Tax Authorities and has not provided any services during a particular return cycle and was not liable to pay any service tax during that return cycle, he is not required to file the Service Tax Return (even nil return) for that period as per the CBEC Circular No 97/8/07-ST dated 23/8/07. In case the Service Provider files the nil return after considerable delay no penalty under Section 77 of Finance Act, 1994 or fees under rule 7C of the Service Tax Rules imposable on him. Such case is fit for invocation of the proviso to rule 7C and grant waiver of late filing fees.

CCE VsShriAnandAgrawal [201-TIOL-26-CESTAT-DEL]

The invocation of penal provision of Rule 26 is dependent upon so many factors which are unconnected with the provisions of section 11A. No doubt a combined show cause notice under section 11A demanding short paid or non-paid dues along with proposal to imposition of penalties under Rule 26 is issued. The two proposals are independent of each other and mutually exclusive. Rule 26 which provides for imposition of penalty in certain circumstances cannot be said to be a part of the proviso to sub-section 2 of section 11A so as to conclude the proceedings in respect of all noticees on payment of duty, interest and part penalty by main manufacturer. The said proviso, only concludes the proceedings in respect of the persons against whom notice under section 11A is issued and who have deposited the duty in terms of provisions of sub-section 1A of section 11A,and would not result in conclusion of proceedings against all other persons on whom penalty stands proposed to be imposed in terms of Rule 26.

CCE Surat Vs. Sh M MSolanki [2013-TIOL-15-CESTAT-AHM]

The respondents had issued invoices by debiting the CENVAT Credit account and have facilitated M/s Ruby Silk Mills to get the rebate of the amount debited by him without actual supply of goods. As the goods were never supplied, the respondents had contended that since he had not dealt in any goods the conditions precedent for invoking the provisions of rule 26 are not satisfied and no penalty can be imposed on him under the said rule. Tribunal relying on the decision of Punjab and Haryana High Court in case of Vee Kay Enterprises [2011 (266) ELT 436 (P & H)] held that

the fact that invoices were issued in respect of the goods purported to be supplied, is sufficient to invoke the provisions of Rule 26 and penalty is rightly imposable in such cases.

Professional Couriers Vs CST [2013-TIOL-09-CESTAT-MUM]

Appellants were issued a show cause notice demanding the Service Tax in respect of the services provided by them and also for imposition of penalty in terms of Section 76, 77 & 78 of the Finance Act, 1994. The adjudicating authority imposed penalty under section 77 & 78. However Commissioner (Appeal) set aside the order imposing the penalty under section 77 & 78. Meanwhile when the matter was pending before the Commissioner (Appeal), the Commissioner of Service Tax (CST) as revisionary authority initiated the proceedings against the appellant as the adjudicating authority had failed to confirm the demand of service tax and interest thereon and had also not imposed penalty under section 76 of the Finance Act, 1994. The Commissioner confirmed the demand of service tax and interest thereon and also imposed minimum prescribed penalty on the applicant. In appeal against the order of the CST, tribunal held that penalty under section 76 was not an issue before the Commissioner (Appeal) and CST had rightly initiated the proceedings as revisionary authority and the said action shall not be hit by the bar under section 84(4).

M/s Rain Calcining Ltd Vs CC[2013-TIOL-07-CESTAT-MUM]

The issue under consideration was that whether the appellants have passed on the duty burden on their customers or will their claim hit by the principle of unjust enrichment. The appellants were only relying on the Chartered Accountant's certificate which was considered by the authorities below and it was held that the certificate did not indicate the basis on which the certification has been made and hence questioning the veracity of the certificate. Undisputedly, the burden to prove that the amount paid as cess (Customs duty) was not passed on to the consumers was on the appellants which they have failed to discharge satisfactorily.Hence the refund has been rightly rejected on the ground of unjust enrichment.

POT POURRI

- A mistake by a clerk or an accountant, which may be considered or allowed or overlooked as inadvertent error, cannot be overlooked lightly or casually if committed by a practicing Chartered Accountant, more so when it is committed in Annual report duly certified by him as correct and authentic report. Such errors committed by the CA needs to be looked with seriousness and appropriate punishment given to him.**[C A Rajesh Vs Disciplinary Committee 2013-TIOL-39-AHD-HC-MiSC].**

- CBEC has issued Circular No 967/1/2013-CX dated 1st January 2013, directing the field formations to initiate recovery proceedings in all cases of confirmed demands even if the stay application filed before the appropriate appellate authority is pending for over thirty days.

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मुद्रक : प्रचार एवं जन सम्पर्क निदेशालय, केंद्रीय उत्पाद एवं सीमा शुल्क, केन्द्रीय राजस्व भवन, इन्द्रप्रस्थ एस्टेट, नई दिल्ली–110 109