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MONTHLY AUDIT BULLETIN – AUGUST, 2014

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New Delhi-110109**

INDEX

S.No.	Topic	Page No.
CENTRAL EXCISE		
1.	Short payment of duty due to under valuation on account of sales through the branch offices	01
2.	Short payment of Central Excise Duty in Coal Rejects	01
3.	Irregular availment of Cenvat Credit	02
4.	Under valuation in respect of goods cleared through marketing agency	03
SERVICE TAX		
5.	Non-payment of service tax by the service recipient for the service provided by a person located in a non-taxable territory and received by a person located in the taxable territory	04
6.	Non-payment of Service Tax on Cargo Handling Services CENVAT credit	05
7.	Short payment of service tax in view of the service tax payments made by the company on actual receipt/collection from its customer	06
8.	Service Tax not paid on the full value of imported Invoice for services resulting in short payment of Service Tax	07
9.	Excess or Wrong availment of Cenvat Credit	07
10.	Non-payment of service tax on flexes/ vinyls /printed materials used for hoarding/advertising	08
11.	Wrong availment of Cenvat Credit on transportation of final products	09
OSPCA		
12.	Short payment of Customs duty	11

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CENTRAL EXCISE

1)

GIST OF THE OBJECTION : - Short payment of duty due to under valuation on account of sales through the branch offices

COMMISSIONERATE : Central Excise Commissionerate, Bangalore - III

CONTRAVENTION OF PROVISION : Rule 7 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 read with section 4 of Central Excise Act, 1944

AUDIT CODE : VR010

During the course of audit, it is noticed that the assessee has cleared their finished goods on payment of duty to their branch offices at Bangalore for further sale. It was found during the audit that the assessee has not correctly arrived the assessable value of the said goods for payment of duties by not following the Rule 7 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 read with section 4 of Central Excise Act, 1944, which was applicable in the instant case. In the instant case, the assessee has cleared the finished goods from their factory at lesser rate and subsequently sold from their branches at higher price as seen from the sample branch invoices. Therefore, the assessee is liable to pay the differential duty of `53,44,980/- on account of difference in assessable value adopted at the factory and branches for the year-2010-11 to 2013-2014. On pointing out, the assessee has agreed to the objection and partly paid diff. duty of ` 1,97,976/- & `11,79,333/- for the year 2010-11 & 2011-12 respectively and has requested time for payment of remaining duty of `41,65,647/-.

(2)

GIST OF THE OBJECTION : - Short-payment of CE duty on coal rejects.

COMMISSIONERATE : Central Excise Commissionerate, Ranchi

CONTRAVENTION OF PROVISION : Rule 11 of Central Excise Valuation (Determination of Price of Goods) Rule, 2000

AUDIT CODE : VR010

In course of audit, it has been observed that the assessee had cleared Coal Rejects (CETSH-27011990) to different buyers including a major Construction Company. Coal rejects are being supplied to the above Company under the agreement/contract between the assessee and the Company. The said Company is supplying electricity to the assessee. The tariff of electricity supplied by the customer company is influenced by the cost of fuel i.e. Coal rejects supplied by

the assessee. Thus, both the units are having mutuality of interest in the business of each other and hence are “related persons” for the purpose of determination of duty of Central Excise. It has been found that the price of the said Coal rejects charged from the Company by the assessee is much lower (Rs. 90 PMT) than the price charged for the same from their other customers/buyers.

In view of the above facts the value of coal rejects taken for calculation of Central Excise duty payable by the assessee on its removal to the said Company is not correct. Section 4 (i) (b) of the Central Excise Act, 1944 provides that in a situation where price charged is not the sole consideration between the parties, valuation of goods is to be determined according to the provisions of Central Excise Valuation (Determination of Price of Goods) Rule, 2000. The provision of Rule 11 of Central Excise Valuation (Determination of Price of Goods) Rule, 2000, is applicable in the present situation. The situation prevailing in the instant case is not covered by any other rule of the said rules. As per Rule 11 of the Central Excise Valuation (Determination of Price of Goods) Rules, 2000, if the value of the excisable goods cannot be determined in accordance with its other rules, value is to be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section 4 (i) (a) of Central Excise Act,1944.

In the light of above, audit is of the view that the average price charged from the independent buyers on clearance of such coal rejects is to be taken as price for determination of Central Excise Duty liability in respect of clearance made by the assessee to the said Company. The total short payment of Central Excise Duty (Including Cess) made by the assessee on account of incorrect assessable value comes to Rs. **1,08,20,985/-** (Including Cess) which is required to be paid along with interest. On persuasion, the assessee agreed with the objection made by audit. They have paid an amount of **Rs. 9189458/-** (including cess) for the period February-2013 to January-2014 out of Rs. **1,08,20,985/-** raised by the audit for the period from February-2013 to January-2014.

(3)

GIST OF THE OBJECTION : - Irregular availment of Cenvat credit .

COMMISSIONERATE : Central Excise Commissionerate, Raigad

CONTRAVENTION OF

PROVISION : Cenvat Credit Rules, 2004

AUDIT CODE : IR031

The assessee did not properly maintain quantity of inputs on which cenvat credit was availed by them. The assessee informed that they did not prepare batch card and destroyed batch calculation sheet after completion of batch. The assessee was not filing ER5 /ER6 returns which

provides the input-output ratio and consumption of principal raw material and finished goods. The assessee manufactured different products falling under Ch 27, 28, 29, 32, 38& 39 used as construction chemicals and no separate item wise production and clearance records were maintained in daily production report. In ER1 returns all the goods were shown as construction chemicals and consolidated entries were made. The verification of Tax Audit Report (Form 3CD) for the F.Y 2012-13 revealed that in para 28bA, the assessee provided details regarding the consumption of raw material and in para 28bB, the assessee provided details regarding the finished goods manufactured during the F.Y. During the course of audit, the assessee informed that they cleared samples without preparing Central Excise invoices and without payment of duty and they did not have records of the said samples. The input output ratio were analysed in relation to the consumption of raw material and production of finished goods on the basis of data provided in Tax audit report for the F.Y 2012-13. On such analysis, it was found that the production and clearance of finished goods worth Rs. 6.59 Crores were suppressed by the assessee on which the duty liability of Rs. 81,47,000/- arises.

The assessee did not agree with the para. The Divisional Assistant Commissioner has been directed to initiate necessary action to safe guard the revenue.

(4)

GIST OF THE OBJECTION : - Under valuation in respect of goods cleared through marketing agency

COMMISSIONERATE : Central Excise Commissionerate, Ahmedabad – I

CONTRAVENTION OF

PROVISION : Rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000

AUDIT CODE : VR010

During the course of verification of the unit, it is observed that, the assessee is clearing their finished goods, viz. submersible pumps to different branches of a party located at different location of the country. As stated by the assessee in their letter dated 13/8/2013 (filed on 21/8/2013) and from the records, it is observed that the party is the marketing agency and the goods manufactured by the assessee are sold through them. The partners are brothers and relatives and some of them are common in both the firms. Thus, they are related concerns also.

It is observed from the sale invoices of the assessee that, they are paying Central Excise duty on the amount of 110% of the transaction cost of the submersible pumps taking a stand that both are related persons. From the invoices issued by both the firms for a particular submersible pump having specific serial number; it is observed that, the price at which M/s Sabar Enterprises sell the pumps to their dealers are higher than the 110% value plus excise duty.

As per Rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000,

“When the assessee so arranges that the excisable goods are not sold by an assessee except to or through a person who is related in the manner specified in either of sub-clauses (ii), (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act, the value of the goods shall be the normal transaction value at which these are sold by the related person at the time not sold to such buyers (being related person), who sells such goods in retail.”

In the case of the assessee, their 99.9% of the sales are through their related concerns. Therefore, Rule 9 of the Central Excise Valuation Rules, 2000 is very much applicable in their case and they have to pay central excise duty on the price at which their marketing agency sells the goods to unrelated buyers.

On comparison of the data relating to sales of submersible pumps by the party and that of the assessee the differential duty payable on account of undervaluation is worked out to Rs. 35,20,569/- (Rs. 34,18,028/- + Ed. Cess Rs. 68,361/- + H. Ed. Cess 34,180/-).

SERVICE TAX

(5)

GIST OF THE OBJECTION : Non payment of service tax by the service recipient for the service provided by a person located in a non-taxable territory and received by a person located in the taxable territory.

COMMISSIONERATE : Service Tax Commissionerate, Coimbatore

CONTRAVENTION OF

PROVISION : Rule 2(1)(d)(i)(G) of Service Tax Rules-1994

AUDIT CODE : CSR04

The assessee undertakes preparation of Formula cars which includes striping, checking, changing clutches and paintings at his work shop. He pays service tax for the preparation charges received. While doing so, the assessee also engages other professionals / consultants from overseas for consultation and fine tuning the Formula cars. The assessee pays them consultation fee in foreign currency, apart from meeting their expenses for travelling and accommodation (service value Rs.2908051).

According to **Rule 2(1)(d)(i)(G) of Service Tax Rules-1994**, from 1.7.2012 onwards, if any taxable service is provided by a person located in a non-taxable territory and received by a person located in the taxable territory, the service tax liability rests with the recipient of such service. Prior to 1.7.2012, similar situation was governed by **Section 66A of Finance Act-1994 read with Taxation of Services (provided from outside India) Rules-2006**.

As per the above provisions, such activity falls within the ambit of service and whatever expenses incurred towards this would attract service tax. However, in view of the fact that the service providers do not have permanent address or usual place of residence in India, the service tax liability rests with the service recipient in terms of Section 66A of Finance Act-1994 read with Rule 3 (iii) of Taxation of Services (provided from outside India) Rules-2006 for the period prior to 1.7.2012 and under **Rule 2(1)(d)(i)(G) of Service Tax Rules-1994**, from 1.7.2012 onwards.

On being pointed out, the assessee has paid the dues with interest.

(6)

**GIST OF THE OBJECTION : Non-payment of Service Tax on Cargo Handling Services
CENVAT credit.**

COMMISSIONERATE : Service Tax Commissionerate, Visakhapatnam - II

CONTRAVENTION OF

**PROVISION : Department of Revenue's Order No.1/2002-S.Tax dated
01.08.2002 ,
Section 65(B)(5) of the Finance Act, 1994. W.e.f 30.06.2012
Notification No.10/2012-ST dated 01.08.2002**

AUDIT CODE : CSR04

The tax payers are providers of steamer Agency Services, Cargo Handling services etc. The service providers were appointed as a handling agent of 'Broken White rice' being exported through Kakinada Anchorage Port to West African Base on warehouse delivery basis. During the period from 02/2012 to 12/2013 the service providers handled various consignments of Broken Rice involving activities like warehousing, loading/unloading, stitching, fumigation, hiring/towing of Barge, payment of port dues and other miscellaneous works. The service providers claimed exemption from payment of service tax on the above services on the ground that the goods are meant for export and the service recipient is located abroad and the services utilized for the said export are also exempt from payment of duty as it amounts to export of service.

The audit observed that the service providers only dealt with the goods from warehouses to vessels and are not involved in procurement or export of the goods and no part of the service in question is rendered outside India. The audit pointed out that the services rendered by the service provider in the present case cannot be treated as 'Export of Service'.

The audit further pointed out that 'Rice' is an 'agricultural produce' w.e.f 16.08.2002 as per the Department of Revenue's Order No.1/2002-S.Tax dated 01.08.2002 (Service Tax (Removal of Difficulty) Order, 2002), till 30.06.2012. Definition of 'Agricultural produce' was inserted under Section 65(B)(5) of the Finance Act, 1994, w.e.f.30.06.2012 and 'Rice' is not covered under the aid definition.

As per Notification No. 10/2012-ST dated 01.08.2002, the services provided by a Cargo Handling Agency in relation to 'agricultural produce' are exempted from payment of service tax. Thus handling of rice by the service providers was exempted till 30.06.2012. The exemption from payment of service tax on handling, loading, unloading, packing, storage and warehousing of Rice was again allowed vide Notification No. 4/2014-ST dated 17.02.2014. The audit pointed out that services of handling of Rice were taxable during the period from 01.07.2012 to 16.02.2014 and the service providers are liable to pay service tax of Rs.47.49 lakhs on services rendered during the aforesaid period. The service providers agreed to the objection and paid the amount. Interest and Penalty are to be recovered.

(7)

GIST OF THE OBJECTION : Short payment of service tax in view of the service tax payments made by the company on actual receipt/ collection from its customer

COMMISSIONERATE : Service Tax Commissionerate, Mangalore

CONTRAVENTION OF

PROVISION : Point of Taxation Rules, 2011

AUDIT CODE : OSR99

During the course of audit, it is observed that the details of amounts shown as Revenue from operations are not tallied with the gross receipts shown in ST-3 returns towards various services such as Advertising Agency, Event Management and Photography Service. On enquiry, the assessee stated that they are paying service tax on actual receipt/collection from its customers. But, as per Point of Taxation, brought into effect from 01.04.2011, the assessee is required to discharge service tax on accrual basis. As per point of taxation, w.e.f. 01.04.2011, the remittance of service tax to the Govt. account by the person liable to pay the service tax need not depend on actual receipts (either part or in full) but depend on the date of completion of the provision of service or the date of issue of invoice/bill/challan. In view of the above, the assessee is liable for payment of service tax on accrual basis. Thus, the total service tax short paid for the period 2012-13 works to `49,21,305/- with interest of `16,28,658/- and penalty of `9,99,373/-. On being pointed out the assessee agreed and requested for time for making payment of service tax.

(8)

**GIST OF THE OBJECTION : Service Tax not paid on the full value of imported Invoice
for services resulting in short payment of Service Tax**

COMMISSIONERATE : LTU, Bangalore

CONTRAVENTION OF

PROVISION : Valuation Rules, 1997

AUDIT CODE : VSN99

During the verification of the 15CB certificates produced by the assessee for the period 2010-11 to 30.09.2013 it was observed that the assessee in several cases has paid service tax not on the full value of import of services. He has paid on lesser value than the import invoice value resulting in short payment of service tax. This would not have been detected, if auditors had not verified each and every 15CB Certificates submitted to income tax individually. The short paid amount came to `50,20,147/- for the period 2010-11 to 2013-14 (upto September 2013). On pointing out the assessee agreed to the audit observation and has paid service tax of `50,20,147/- along with interest of `15,28,257/-. The GLT has been instructed by the Monitoring Committee to recover the penalty also.

(9)

GIST OF THE OBJECTION : Excess or Wrong availment of Cenvat Credit

COMMISSIONERATE : Service Tax Commissionerate, Mumbai - I

PROVISION : Rule 4(7) of Cenvat Credit Rules, 2004

Notification No.13/2011 dated 31.03.2011

AUDIT CODE : SSR01

It was noticed from the Trial Balances of the assessee and invoices of the vendors that they were receiving volume discount and discount from their vendors in lieu of making prompt / early payment. In such cases, the assessee got credit notes from their vendors for the discounted amount and did not make payment for the total amount as mentioned in the invoice but for the discounted amount only. While availing Cenvat credit, they have availed total Cenvat credit as applicable on the total taxable value mentioned in the invoice. As the assessee have not paid their vendors the full amount as mentioned on the invoice, because of the credit note received by them, the credit availed by them on the entire taxable value mentioned in the invoice is not correct as per the provision of rule 4(7) of Cenvat Credit Rules, 2004 as amended by Notf. No. 13/2011 dated 31/03/2011. The relevant portion of the rule is reproduced below :

‘if any payment or part thereof, made towards an input service is refunded or a credit note is received by the manufacturer or the service provider who has taken credit on such input service, he shall pay an amount equal to the CENVAT credit availed in respect of the amount so refunded or credited.’

In view of the above, credit on the taxable value equivalent to the discount received by them is not eligible to them, and hence the credit so availed by them is not proper and is required to be reversed / recovered along with applicable interest.

Decision taken in MCM: The para is accepted. As the assessee has paid the wrongly availed Cenvat Credit and has paid the interest, the para is treated as closed. The amount involved was Rs. 57.38 Lakhs

10)

GIST OF THE OBJECTION : Non-payment of service tax on flexes / Vinyls /printed materials used for hoarding / advertising_:

COMMISSIONERATE : Service Tax Commissionerate, Mumbai - I

PROVISION : Notification No.12/2003(ST)

TRU’s instruction F.No.341/43/96-TRU dated 31.10.1996

AUDIT CODE : CSR99

The assessee is engaged in providing hoarding which actually falls under the category ‘Sale of space or time for advertisement services’. For providing these services, they get flexes / vinyls printed from their job workers. Though they are getting a comprehensive contract for providing of the service which includes the cost of the printed material, they are paying service tax only on the value excluding that of the printed material claiming that the printed material is chargeable to VAT and therefore, the benefit of Notfn. No. 12/2003(ST) is applicable in the case.

However, CBEC vide instruction F.No. 341/43/96-TRU dated 31/10/1996 clarified that *“in relation to advertising agency, the service tax is to be computed on the gross amount charged by the advertising agency from the client for service in relation to advertisements. This would, no doubt, include the gross amount charged by the agency from the client for making or preparing*

the advertisement material, irrespective of the fact that the advertising agency directly undertakes the making or preparation of advertisement or gets it done through another person”.

In view of the above circular, the value of flexes / vinyls/ printed materials is required to be included in the value for the purpose of service tax. Amount involved is Rs. 128.21 Lakhs + interest

Decision taken in MCM: The para is accepted. The group is directed to get SCN issued to the assessee.

(11)

GIST OF THE OBJECTION : Wrong availment of Cenvat Credit on transportation of final products.

COMMISSIONERATE : Ahmedabad - III

CONTRAVENTION OF

**PROVISION : 4(3) (c) of the Central Excise Act, 1944
Rule 2(1)(ii) of Cenvat Credit Rules, 2004**

AUDIT CODE : SSR04

The assessee is engaged in manufacturing of Vitrified Tiles classifying the same under Chapter Sub Heading No. 69079010 of the CETA, 1985.

During the course of audit, it was noticed that the said assessee is clearing their finished goods on MRP base by valuing their goods under Section 4A of the Central Excise Act 1944 and cleared the goods from factory gate to the depot/branches and also availing Cenvat Credit on the transportation of the goods on Road from factory gate to depot/branches.

As per CESTAT's judgment in the case of M/s. Ultratech Cement Ltd. V/s. Commissioner of Central Excise, it was held that where duty is chargeable at specific rates or at the value determined under Section 4-A, and not at ad-valorem rates under Section 4 of the Central Excise Act, 1944, the definition of "place of removal" as given in Section 4(3) (c) would not be applicable and as such the "place of removal" will be the factory gate. Therefore, in such cases, Cenvat credit cannot be availed with respect to service tax paid on transportation of final products beyond the factory gate.

Also, as per Section 4(3) (c) of the Central Excise Act, 1944, the definition of "place of removal" is :

“place of removal” means –

- (i) a factory or any other place or premises of production or manufacture of the excisable goods;*
- (ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;*
- (iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory; from where such goods are removed;*

Also, as per Rule 2(1)(ii) of Cenvat Credit Rules, 2004 “input service” means any Service-

- (i) used by a provider of taxable service for providing an output service; or*
- (ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal,*

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

From above, it is clear that the service utilized after the factory gate do not fall under the purview of definition of the Input Service. Therefore, the said assessee is not entitled to take credit on services utilized beyond the place of removal and so credit availed on Transportation of the Goods on Road from the factor gate to depot/branches to the tune of Rs. 47,73,660/- needs to be reversed along with applicable interest.

OSPCA

(12)

**GIST OF THE OBJECTION : Short payment of customs duty on a total value of
Rs.2,33,56,690/- during the period from April 2009 to
June 2012**

COMMISSIONERATE : Chennai - III

CONTRAVENTION OF

PROVISION : Rule 10(1) (C) of the Customs Valuation Rules, 2007

AUDIT CODE : VSR02

During the course of OSPCA Audit, it was noticed that the assessee has entered into a Technology license Agreement with their related foreign suppliers and as per the terms of agreements, the assessee has to pay 3.75% of Royalty on the "Net Sale Value" of the product which is inclusive of the value of imported raw materials. Whereas, the assessee deducted the value of Imported Raw materials and wrongly arrived at the Net Sale Value and thereby short paid the Royalty amount to their related foreign suppliers. As per Rule 10(1) (C) of the Customs Valuation Rules 2007, such royalty and license fee payment should also be included in order to arrive at the transaction value of the imported goods. The amount of Royalty short paid by the assessee to their foreign suppliers works out to Rs.45,11,461/- for the year 2009-10 Rs. 68,31,397/- for the year 2010-11 Rs.1,14,28,500/- for the year 2011-12 and Rs.5,85,332/- for the year 2012-13 up to June-12. (From July 2012 onwards the assessee has rightly calculated the royalty amount and paid.) Hence, it is pointed out that the above amount of Royalty short paid by the assessee has to be included into the assessable value of imported goods, Imported during the period from April 2009 to June 2012 and appropriate duty of Customs for the above amount shown year wise, along with appropriate interest under Section 28 AA to be recovered from the assessee. In this connection, a detailed OSPCA Audit report is prepared for submission to Custom House, Chennai.

Disclaimer

The compilation is based upon the audit reports approved in the monthly Monitoring Committee Meetings (MCM) sent through the zonal Additional Directors General (Audit). In case of any doubts about the Audit Objections reported herein, the concerned Commissionerate may be contacted.