HIREGANGE & ASSOCIATES

Indirect Tax- Latest Judicial Precedents

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SUPREME COURT

1. No proceedings on legal representative of the deceased person *(Shabina Abraham and Ors 2015-TIOL-159-SC-CX)*

- The case pertains to period 1983 to 1985. It has been held by honourable Supreme Court that the assessment proceedings cannot continue against the legal representative/estate of a sole proprietor or manufacturer after he is dead in the absence of any machinery provision under the law.

- The taxation statute must be interpreted in light of what is clearly expressed. It cannot imply anything which is not expressed. It cannot import provisions in the statute so as to supply any assumed deficiencies.

Comment: *The decision is in respect of assessment proceedings and not appellate proceedings. Appellate proceedings would get abated unless legal heir impleads into the proceedings within the time limit provided for. Otherwise of which the order in appellate proceedings would sustain and implication of the said order would continue.*

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2. Serving of Notice on Kitchen boy is not proper (*Saral Wire Craft Pvt Ltd (2015-TIOL-154-SC-CX)*

- Adjudication Order served on kitchen boy of the assessee, is not proper service. As per section 37C of the Central Excise Act, notice must be served to the person for whom it is intended or his authorised agent under proof of acknowledgment.

- It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all.

Comment*: The judgment lays down the pre-requisite for issuance of notice. Any notice issued in violation of section 37C is not valid. It is worth mention that section 37C has been made applicable to service tax also by virtue of section 83 of the Finance Act, 1994. Hence, the principle laid down in the judgment shall mutatis mutandis apply to notice served in service tax cases also.*

HIGH COURT

3. Demand cannot be raised for the period beyond five years *(Shri Dharampal Lalchand Chug2015-TIOL-165-HC-MUM-CX)*

- Despite of the fact that the fraud is of great magnitude and involvement in the fraud is admitted, demand cannot be raised beyond a period of five years under section 11A

of Central Excise Act, 1944.

Comment: *Similar provisions exist under section 73 of Finance Act, 1994 where time limit of 18 months (normal cases)/ 5 years (fraud, suppression etc.) has been specified. If notice not issued by department within 5 years from relevant date, no remedy under service tax law to recover tax not paid. Time limit must always be checked in respect of all notices issued by department. Notice beyond specified time period is time barred and is invalid.*

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4. Time limit of one year under section 11B not applicable when payment of service tax made by mistake *(M/s Geojit BNP Paribas Financial Services Ltd 2015-TIOL-1602-HC-KERALA-ST)*

- When service tax is paid by mistake, the time limit of one year as provided under section 11B of the Central Excise Act, 1944 is not applicable.

- It has been held by Apex Court in case of Mafatlal Industries Ltd. that refund arising on account of unconstitutional levy, illegal levy and mistake of law can be processed under the section 11B and hence time limit is applicable. But in the instant case, payment was made on account of mistake of fact in understanding the law and hence not covered by Mafatlal case.

Comment: *Erroneous payment of service tax due to factual error may be claimed without time limit specified under section 11B of the Central Excise Act, 1944. However, if the wrong payment is on account of mistake of law, time limit of one year needs to be adhered to.*
It is to be noted that there are divergent views among various high courts on this issue. Some high courts of the view that all refund claim needs to be filed under section 11B only and hence time limit is applicable for all refund applications.

ADVANCE RULING

5. Cenvat Credit of tax charged by contractors on laying of pipe line is eligible for credit :*M/s GSPL India Transco Ltd and M/s GSPL India Gasnet Ltd (2015-TIOL-02-ARA-ST)*

- Services of laying of pipe line is different from construction of building or civil structure. Assessee is eligible to avail cenvat credit of taxcharged by EPC Contractor/ construction contractors and other service providers providing services of laying of pipe lines (except service tax paid vis a vis construction service for the civil work package for building the pipeline substations).

Comment: *The ruling has been given based on analysis of definition of input service as applicable since 1.7.2012. Though the decision rendered by advance authority is applicable to the case of applicant only, yet it gives an insight as to how the definition has been interpreted by authority. Another important aspect in this case has been where goods were directly supplied to service receiver on "billed to-ship to" basis by manufacturer. This could be a tax planning tool where service receiver can avail credit of excise duty on material*

which otherwise could not be available due to invoice received from VAT dealer.

TRIBUNAL

6. Department cannot insist for adopting a particular option for reversal of credit under Rule 6 of Cenvat Credit Rules *(M/s Mercedes Benz India (P) Limited 2015-TIOL-1550-CESTAT-MUM)*

- Assessee is free to choose any option provided under Rule 6 of Cenvat Credit Rules, 2004 for reversal of credit. The main objective of rule 6 is that the assessee should not avail the Cenvat credit in respect of input and input services which are used in or in relation to manufacture of exempted goods or for exempted service.

- There is no condition that if a particular option, out of three options, is not opted then only option is to pay 5% (now 7%) provided under Rule 6 (3) (i) shall be compulsorily made available

Comment: *It has been generally observed that where assessee fails to reverse the credit pertaining to exempted goods/services and the same is pointed out during audit, the department insists for reversal of credit at 5% (or the rate as applicable). However, in most of the cases, the beneficial option is reversal of credit under Rule 6 (3A) based on proportionate formula.*

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7. Input Service Distributor may distribute credit pertaining to services received prior to obtaining registration as ISD *(M/s Oil & Natural Gas Corporation Ltd 2015-TIOL-1571-CESTAT-MUM)*

- Provisions of Rule 9 of CCR does not provide any restriction clause that the credit is not allowed in respect of invoices issued by input service distributors in respect of service received by them prior to registration as input service distributor. Cenvat Credit cannot be denied on the ground that input service distributor have received services prior to obtaining registration as ISD.

Comment: *The judgment has again re-affirmed the view that non-registration cannot take away the rights of the assessee to take the credit. In many cases, it so happens that invoices are received at head office from where no services are rendered and thus credit cannot be adjusted in the absence of output liability. In such cases, the head office may obtain registration as ISD even belatedly also to distribute the credit pertaining to services received during the period prior to registration.*

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8. Late fee payable as prescribed for the period to which returns pertains instead of fee applicable at the time of filing of return*(Rughani Brothers 2015-TIOL-1484-CESTAT-MUM*

- Late fee for delayed filing of return is applicable as per the provision existed during

the time to which the return relates. For the return not been filed for the period April 2008 to March 2011, the late fee was prescribed Rs. 2,000 per return. Subsequent enhancement of late fee to Rs. 20,000/- w.e.f. 8.4.2011 is not applicable for the returns pertaining to earlier period. Hence, the penalty was confirmed at the rate of Rs. 2,000/- per return not Rs. 20,000/- per return.

Comment: *Practically it is felt that the returns are not filed pertaining to the period when the penalty/late fee is lower and subsequently the late fee/penalty is hiked and department insist for increased fee/penalty. This judgment holds that in such cases, fee would be applicable as existed during the time to which the return relates.*

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9. Input services need not be received within factory premise*(Vako Seals Pvt Ltd 2015-TIOL-1296-CESTAT-MUM)*

- Credit on input service is available even if these are received outside factory premises so long as it can be established that these have been used directly or indirectly in manufacturing activity. There is nothing in the law which requires that input service must be received within the factory.

- Credit on renting of immovable property may be availed even if premise is not included in the registration certificate. Service is not tangible like inputs or capital goods and scope of service is not limited within four corner of factory.

Comment: *Again, this is very often raised question in the departmental audit where observation is made for reversal of credit on input service received at unregistered premise. The judgment reaffirms the view that it is not mandatory to receive the service within factory for availment of credit. Similar analogy applies for services received by service provider outside their registered premise.*

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10. Exemption under Notification 14/2004-ST is available for processing of "textile" not "textile materials"*(Global Alloys Pvt Ltd: 2015 – 39 S.T.R. 257 Tri-Del)*

- "Textile" and "textile article" are different. Exemption of business auxiliary service in relation to textile granted under Notification No. 14/2004-ST is not applicable on the supervision of making tents, mosquito net, trousers and shorts ad these products are in the nature of "textile article" not the "textile".

- Section XI of the Central Excise Tariff Act, 1985 reads as "textile and textile article". It indicates that both are distinct from each other. When the exemption granted in the Notification No. 14/2004 speaks only about "textile", its scope cannot be extended by granting exemption for textile article as both are separate identifiable products.

Comment: *Exemption of similar nature is granted in mega exemption notification where intermediate production process as job work in relation to textile processing is exempted. The ratio laid down in above judgment shall be equally applicable on current exemption entry also. This may have lot of impact on textile sector.*

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11. Cenvat credit of civil construction service is allowed*(Mark Exhaust Systems Limited 2015 (39) S.T.R. 351 (Tri. - Del.)*

- Cenvat credit to be allowed on various civil construction activities in the factory as the definition of input service is inclusive definition which specifically includes services used in relation to setting up, modernization, renovation or repair of factory premises.

- Hence, services availed for construction of gas bank plate, construction of drive way, construction of paint shop, land/earth filling with compaction, fabrication work, digging of gutter and laying rainwater pipes, sound proofing of rooms, construction of ETP, underground tanks and sludge pits, excavation, RCC work, construction of gas godown, construction of store, flooring work, fencing MS railing, construction of foundation of machines, fixing of doors, windows, dismantling of RCC and PCC road is eligible for credit.

Comment: *The definition of input service has been amended w.e.f. 1.4.2011 and subsequently w.e.f. 1.7.2012. In the amended definition, the word "set up" has been specifically omitted. Further, works contract and construction service undertaken for civil structure or part thereof has been specifically included in the exclusion clause of the definition of input service. Hence, credit of above services may not be admissible. However, if services are availed in the nature of modernisation, renovation or repair of factory (other than of civil work) or premise of output service provider, credit could be eligible as per present definition also.*

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12. Credit of outdoor catering service not eligible*(Bajaj Motors Ltd. 2015 (39) S.T.R. 85 (Tri.-Del.)*

- Cenvat Credit of service tax paid on outdoor catering service not available. Outdoor catering service excluded from the definition of input service. Denial of credit on outdoor catering service w.e.f. 01.04.2011.

Comment: *Contrary decision in case of Hindustan Coca Cola Beverages Pvt. Ltd.2015 (38) S.T.R. 129 where it has been held that outdoor catering services received by all the employees in relation to business activity is eligible for credit as the definition of input service excludes only those cases where service is meant for personal use or consumption by an employee or the cost of which is included as part of salary of the employee as a cost to company.*

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13. No time limit for availment of credit(*H & R Johnson (India) 2015 (39) S.T.R. 319 Tri. - Mumbai)*

- There is no time limit in availing credit of input service. Where credit availment was missed out in earlier period, it may be taken subsequently without any time limit.

Comment: *Above judgment does not hold goods under current law where time limit of six month w.e.f. 1.10.2014 has been specified for availing the credit on input and input service.*

The limit has now been extended to one year w.e.f. 1.3.2015.

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14. Components of capital goods need not to be in the possession of manufacturer for availing balance 50% credit in subsequent year*(Owens Corning (India) Pvt. Ltd: 2015 (39) S.T.R. 158 (Tri.-Mumbai)*

- The condition that the capital goods should be in possession of the manufacturer in the subsequent financial year is not applicable to components. Assessee entitled to 50% cenvat credit in subsequent financial year for component used in manufacture of final product.

Comment: *Rule 4 of Cenvat Credit Rules provides that possession of components is not necessary in the subsequent years. The judgment is relevant under present law also.*

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