HIREGANGE & ASSOCIATES

Indirect Tax- Latest Judicial Precedents

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HIGH COURT

1. **Assembling of different parts of decorative lamp shades & chandeliers does not amount manufacture***(Kapoor lamp Shade Co. 2016(337) E.L.T. 14 (P& H)*

   - Background: Assessee procures various components of lamp shades & chandelier from different source and thereafter packs the same in cartons & put thereon its logo. Department considered that the assembling of different parts would amount to manufacture and hence liable to excise duty
   - Issue: Whether assembly of different parts of decorative lamps and chandeliers amounts to manufacturing?
   - Decision:Procuring the manufactured items & packing them with the logo of its own name does not amount to creation of new product and hence does not amount to manufacture as per Section 2(f) of the Central Excise Act, 1944. ('CEA')

   ***Linked to GST**: Tax is leviable on "supply" of goods and/or service. Whether process amounts to manufacture or not is not relevant.*

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2. **No service tax is leviable where SEZ unit had not charged for the services provided to its DTA unit** *(Larsen And Toubro Ltd 2016-TIOL-1337-Hc-Ahm-St.)*

   - Background: SEZ unit of assessee is providing services to its DTA unit and not collecting any charges for such service. Department contended that SEZ and DTA unit both are distinct entity and demanded service tax on said services.
   - Issue: Whether assessee is liable to pay tax on services provided by SEZ unit to DTA unit?
   - Decision: As per Section 66 of the FA, the tax is levied at the rate of prescribed percentage on the "value" of taxable services. In present case, SEZ unit of respondent assessee had not charged for the services provided to its DTA unit. Therefore, no service tax leviable.

   ***Comment**: Free services need to be distinguished from services where "value is not ascertainable". The former is not liable to service tax while in case of later, service tax is levied on value as determined under Service Tax (Determination of Value) Rules.*

   ***Linked to GST**: Schedule-I under Model GST Law specifies certain matters which would be treated as "supply" even if no consideration involved. Hence, implications on free services may need to be seen even if the transaction is between different entities of same person registered as separate taxable persons.*

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3. **No exemption from service tax on activity pertaining to runways in terms of section 97 of the Finance Act, 2012** *(M/S D P Jain And Company Infrastructure Pvt Ltd Commissioner Of Central Excise And Customs 2016-TIOL-1440-HC-MUM-ST*)

   - Background:Assessee is engaged in the business of Construction of runways for Airport Authority of India Ltd and not paying service tax by claiming exemption as per Section 97 of FA, 2012. Department denied the exemption and raised demand

for service tax.

- Issue:Whether assessee is liable to avail benefit of exemption provided in certain cases relating to management under Section 97 and 98.
- Decision: As per section 97, exemption is available in respect of activity of management, maintenance or repairs of roads and non- commercial government building respectively. Because on some portions and adjacent to a runway, motor vehicles ply or to tow or bring back stranded aircraft specialized recovery vehicles are brought on runway does not mean that runways are roads. Hence, runways are not road and no exemption benefit is available as per Section 97.

TRIBUNAL

4. Cenvat credit availed on input service used for output service and trading is required to be reversed proportionately on basis of turnover*(Delcam Software India Pvt. Ltd. 2016(43) S.T.R. 103(Tri-Mumbai)*

- Background: Assessee availed credit on input services used in common for providing output service and trading for the period Dec.2007 to Mar.2011. Department contended that trading is an exempted service and demanded for reversal of proportionate credit availed.
- Issue: Whether an assessee is required to reverse the credit of input service commonly used for output service and trading?
- Decision: Tribunal relied on the decision of Mercedes Benz India Pvt. Ltd. where it was held that Cenvat credit is not available on portion of service tax paid on 'input service' not attributable to 'output service'. Therefore, credit is required to be apportioned as per the assessee's turnover.

Comment:*W.e.f. 1.4.2011, Rule 2(e) of CCR, "exempted services" was amended to include "trading". Consequently, input service credit pertaining to trading activities would automatically get reversed.*
Linked to GST*: Supply includes sale also. There would be no need to reverse the credit when GST charged on trading. However, input tax credit reversal (whether or not proportionately) would be required in cases where goods and/or services are used by registered taxable person for effecting non-taxable supplies or supplies made for non-business purposes.*

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5. *Credit of capital goods installed by a taxable person in the State of Jammu & Kashmir (J&K) for providing taxable services from the state, held ineligible* *(Vodafone Essar Space Tel Ltd. 2016(43) S.T.R. 124 (Tri-Kolkata)*

- Background: Assessee obtained centralized registration at Bhubaneswar and availed Cenvat credit on capital goods installed in J&K considering that these capital goods are used for providing taxable roaming services from J&K. Department contended that service tax provisions not being applicable in the State of J&K, hence the credit is ineligible.
- Issue: Whether assessee is admissible to avail credit with respect to capital goods installed in the State of J&K?

- Decision: As per section 64(1) of Finance Act, 1994, service tax provisions are not applicable to J&K. In spite of obtaining centralized registration for discharging service tax liability, all branch offices of the service provider remain separate. Branch at J&K cannot be considered to be providing services from Bhubaneswar.
- Therefore, when service provider in J&K was not required to discharge service tax, then no credit capital goods installed in J&K.

***Linked to GST**: GST Act would be applicable to the State of J&K also, hence the need of reversal of credit does not arise.*

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6. Service providing in respect of transportation of goods along with loading and unloading considered as GTA service *(DroliaElectrosteels (P) Ltd. 2016 (43) S.T.R. 261 (Tri-Del.)*

- Background: Assessee availed credit of service tax paid as receiver of GTA service on basis of consolidated bill issued by service provider in respect of transportation, loading and unloading charges paid. Department contended that the service provided was to be covered under cargo handling service and therefore, the amount paid by assessee cannot be treated as payment of service tax.
- Issue: Whether the service received by assessee would be considered as GTA service or cargo handling service?
- Decision:Board Circular No. 104/7/2008 – ST dated 6-8-2008 states that service provider registered as a GTA and issuing consignment note for transportation of goods by road in goods carriage, will be treated as GTA service and not cargo handling service even if he undertakes packing, loading, unloading services as integral to his main service.

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7. When sufficient material evidence of receipt of goods on record, burden shift on revenue to prove credit wrongly availed without actual receipt of goods *(Anj Metal Recycling Pvt. Ltd. 2016(337) E.L.T. 453(Tri- Chan.)*

- Background: Assessee availed cenvat credit on basis of invoice issued by supplier. Department denied the credit on the ground that the credit was taken merely on the basis of invoices withoutphysically receiving the goods.
- Issue: Whether the stand taken by the department is correct?
- Decision: As per Rule 9(3) of CCR, 2004, credit is taken on document indicating the duty paid on inputs and identity of supplier. When assessee has sufficient material evidence of receipt of goods on goods on record (viz. duty paid invoices, weighment slips, payment by cheque, entry in RG-23 register), the burden of proof shifts on revenue. Credit held admissible.

***Linked to GST:** With all the transactions being electronically captured, one could hope that such issue does not arise.*

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8. Discount declared before selling of goods from depot is allowable deduction from assessable value *(Biochem Pharmaceuticals Industries 2016(337) E.L.T. 276*

(Tri-Mumbai)

- Background:Assessee stock-transferred excisable goods to depot. The goods were then sold from the depot by offering quantity discount which was reflected on sale invoice. Department disallowed the discount on ground that it should be known prior to the clearance of goods from factory and demanded excise duty on amount of discount.
- Issue: Whether discount passed on to the buyers should be added to the transaction value for discharging excise duty?
- Decision:Section 4 of CEA defines transaction value to be the price actually paid/payable by the buyer for the goods when sold.
- Assessee declared the quantity discount before sale of goods from the "place of removal"viz. depot and discount was shown in the sale invoice. No duty to be charged on discount amount which was neither paid nor payable in case of goods sold.

Linked to GST: *Discounts allowed before or at the time of supply as a normal trade practice would be allowed as deduction from "value of taxable supply" provided reflected in sale invoice. Discount/incentive allowed post supply would not be allowed as a deduction. Post supply discount deduction will be allowed only if it is established as per agreement, known at or about the time of supply and specifically linked to relevant invoices.*

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9. **In case of "as such" removal of inputs, assessee required to pay duty at the rate applicable on date of such removal***(Corrosion Engineers (P) Ltd. 2016(337) E.L.T. 304 (Tri- All)*

- Background: Assessee cleared inputs "as such" on which credit has been availed on payment of duty at a rate applicable at the time of clearance. Department considered that assessee have paid lessor amount and credit of duty taken on such goods should be reversed when goods are cleared as such.
- Issue: Whether duty to be paid by way of payment/reversal of credit availed on inputs cleared as such?
- Decision: As per Rule 3(4) of CCR, 2002, assessee required to pay duty on the value and at the rate applicable on date of such removal and not required to pay/reverse an amount equal to Cenvat credit availed thereon.

Linked to GST: *Removal of input as such would be considered separate/independent supply and liable to GST as per the rate prevalent at the "time of supply" i.e. as such removal.*

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10. **Credit is admissible on input services used for laying the pipeline** *(Reliance Gas Transportation Infrastructure Ltd 2016-TIOL-1593-Cestat-Mum)*

- Background: Assessee had availed credit on input services for laying pipeline, which was used for rendering its output service. Department denied credit on ground that said input services used for "setting up" resulted in the creation of an

immoveable property.

- Issue: Whether Credit could be taken on input services used for laying the pipeline?
- Decision:There is direct nexus between availing the input service for providing output services. It was also held that as per definition of input services any service used in relation to "setting up" premises of output service provider is eligible for credit. The concept of movability or immovability is irrelevant for determining eligibility to input service credit**.** Hence, credit is admissible to assessee.

Comment:*W.e.f 1.4.2011, the activity "setting up of factory/premises" has been omitted from input services definition. However, one could argue that it would get covered under "in relation to manufacture" clause in case it pertains to manufacturer.*

Linked to GST: *Section 16 of the Model GST Law disallows input tax credit of goods and/or services acquired by the principal in the execution of works contract when such contract results in construction of immovable property, other than plant and machinery*

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11. No extra costs to be added where physician samples valued on pro-rata basis of comparable goods sold *(Nicholas Piramal Ltd 2016-TIOL-1614-Cestat-Mum)*

- Background: Assessee is a manufacturer of pharmaceutical goods clearing physician samples. For discharging central excise duty on such physician samples, the valuation is done on the *pro rata* basis of the sale pack cleared by them. Department contended that value of extra packing charges would be included in assessable value and made liable to excise duty.
- Issue: Whether extra packing charges required to be added in assessable value?
- Decision:The cost of extra packing already included in the pro rata price of the regular sales pack. Hence need not separately be added in assessable value.

Linked to GST: *As per Section 15 under Model GST Law incidental expense i.e. packing shall be included in transaction value. There may not be transaction value of physician samples hence the value of goods of like kind and quality needs to be taken.*

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12. Where supplier of goods have committed fraud,the buyer of goods cannot be penalized*(M/S Vinayak Exim 2016-TIOL-1643-Cestat-Mum)*

- Background:Issue relates to period 2003-04. Certain merchant exporters ('MEs') made bonafide purchases from a merchant manufacturer ('MM') under invoice showing duty payment and ARE-I. Said purchases were exported and rebate claim filed. On investigation, MM found to have fraudulently availed Cenvat credit on bogus invoices without receipt of the inputs. Rebate claim forgone by MEs.Department imposed penalty on assessee on ground of collusion.
- Issue: Whether MEs are liable to pay penalty in respect of wrong utilization of credit by MM on ground of collusion?
- Decision:Where supplier of the goods committed fraud, the bonafide buyer of the goods cannot be penalized. To levy penalty, need to establish beyond doubt that

the buyer is knowingly involved in the fraud committed by the supplier which in the present case could not be established. Hence, no penalty on MEs.

Linked to GST:*As per Section 66 (1) (i) under Model GST Law, where a taxable person supplies any goods and/or services without issue of any invoice or issues an incorrect or false invoice with regard to any such supply, such person shall be penalized. Also, Section 66 (1) (vi) states that where a taxable person takes or utilize credit without actual receipt of goods and/or services either fully or partially, he shall be liable to penalty under this Act. The burden of proof shall be on the assessee claiming that he is not liable to pay GST or eligible to claim credit.*

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