HIREGANGE & ASSOCIATES

Indirect Tax- Latest Judicial Precedents

December 2015

By CA Ashish Chaudhary
vetted by: CA Rajesh Kumar T R

HIGH COURT

1. Credit of duty paid on installation of telecommunication towers is not eligible *(Vodafone India Ltd. vs CCE, Mumbai-II 2015 (40) STR 422 (Bom)*

- Background: Appellant engaged in business of providing telecom service availed credit on set up of telecommunication towers. Tribunal disallowed credit of duty paid on tower parts/ green shelter on the ground that these are 'immovable property', hence do not qualify as 'capital goods' or 'inputs'.
- Issue: Whether credit of duty paid installation of tower is eligible to telecommunication service provider?
- Decision: Tower parts are immovable properties and do not fall within the definition of capital goods as held in case of *Bharti Airtel* by same court. It is well settled principle that an interpretation of a statutory provision and equally, a misinterpretation, by one bench of High Court would be binding on coordinated bench of that very High Court. Hence, ratio of judgment in case of *Bharti Airtel* cannot be departed and credit not allowed.

***Comment**: Appeal has been filed before Supreme Court against the judgment in case of Bharti Airtel.*

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2. Exemption, as applicable to native artist and culture in theatre form under Notification No. 25/2012-ST, not available to film actors *(Siddharth Suryanarayan vs UOI 2015 (40) STR 436 (Mad)*

- Background: Appellant filed writ petition before HC seeking that there is no distinction between services provided by a film actor viz a viz artist/folk/classical art forms of music. The distinction between two for not granting exemption to film actors is artificial and in violation to Article 14 and 19 (1) (g) of Constitution of India.
- Issue: Whether film artists could be considered as "performing artists or folk or classical art" to claim benefit of exemption notification?
- Decision: Two categories are clearly different and distinguishable and cannot be treated at parity. The exemption has been granted to native art and culture to encourage them as they suffer from financial constraints which is not case with film actors. Hence, no disparity and writ petition dismissed. Film actors not entitled for exemption.

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3. Recovery proceeding cannot be initiated before determination of demand by adjudication order *(Exman Security Services Pvt. Ltd. 2015 (40) STR 463 (Jharkhand)*

- Background: Mistakes committed by assessee in computation of liability during investigation stage and department initiated recovery proceeding based on the computation provided by assessee even before adjudication of the case.

- Issue: Whether recovery proceeding can be initiated before determination of amount by way of adjudication order?
- Decision: Relying upon the judgment of Gujarat HC in case of *Technomaint Contractors Pvt Ltd.,* it has been held that recovery u/s 87 of Finance Act, 1994 cannot be initiated unless there is determination of amount by way of adjudication order after issuance of SCN u/s 73 (1) or 73A(1).

***Comment**: In a zeal to meet revenue target, department may sometimes initiate proceedings directly against third party. The judgment of HC has correctly laid down that first amount payable should be confirmed thereafter only recovery proceedings can be initiated.*

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4. When Finance Act 1994 is a special and complete code in itself then it override the provision of IPC *(Ajay Kumar Sandhu 2015-TIOL-2564-HC-P&H)*

- Background: Assessee paid the amount of service tax after registration FIR. Assessee filed for quashing FIR as well as consequential proceedings arising therefrom. Department disallowed for quashing of FIR that offence is committed under under Section 406 IPC.
- Issue: Whether FIR filed for non payment of service tax is required to be quashed?
- Decision: Finance Act of 1994 is a special and complete code in itself, wherein even the procedure for penalty has been provided, registration of FIR under the general provisions of IPC was nothing but abuse of process of Court and the same cannot be sustained.

TRIBUNAL

5. Credit of duty paid on installation of telecommunication towers is eligible *(Essar Telecom Infrastructure Pvt. Ltd. vs CST, Mumbai-I2015(40) STR 591 (Tri-Mumbai)*

- Background: Appellant providing telecom infrastructure services to telecom service providers and charging service tax under "Business Support Service". It availed credit of excise duty paid on capital goods and input services used for installation of telecom towers. Department disallowed credit of duty on the ground that these are 'immovable property', hence do not qualify as 'capital goods' or 'inputs'.
- Issue: Whether credit of duty paid installation of tower is eligible to service provider providing telecom infrastructure service to telecom service providers?
- Decision: Ratio of *Bharti Airtel* is not applicable in instant case as in that case the appellant was engaged in providing telecom services while in the instant case, the appellant has been providing telecom infrastructure service to telecom service provider. Credit is admissible.

***Comment**: The distinction has been made with Bharti Airtel case based on nature of services provided. Most of telecommunication service providers have adopted this model to safeguard against the likely disallowance of credit by department.*

6. Extended period of limitation cannot be invoked when records are audited by officer once and short payment not found *(Trans Engineers India Pvt. Ltd.2015 (40) S.T.R. 490 (Tri.-Mumbai)*

- Background: Assessee engaged in rendering services of 'installation and commissioning of plant equipment'. During second audit, department found short-payment of tax and issued notice invoking extended period
- Issue: Whether extended period can be invoked when the records have been audited earlier by department?
- Decision: Revenue authorities cannot invoke the extended period of limitation when the records of assessee were audited by the officers in earlier period but they did not find any short payment of tax from records.

7. Meditation and yoga classes covered under Health and Fitness Services and liable to tax *(Malabar Hill Citizens Forum 2015 (40) S.T.R.493 (Tri-Mumbai)*

- Background: Assessee engaged in providing services of aerobics and yoga claimed exemption of the same. Department alleged that the services falls within the definition of "Health and Fitness Services" and hence liable to tax.
- Issue: Whether meditation and yoga services covered under "Health and Fitness Services"?
- Decision: As held in case of *Osha International Foundation Neo Sanyas Foundation* that these services are covered by "Health and Fitness Service" and hence liable to tax. Extended period also invoked as assessee did not cooperate with the department.

***Comment**: Yoga services have been exempted from service tax vide Notification No. 20/2015-ST dated 21.10.2015 and hence not liable to service tax.*

8. No tax liability on support services under reverse charge where tax charged by government. *(Kakinada Seaports Ltd 2015 (40) STR 509 (Tri.-Bang.)*

- Background: Assessee entered into contract with Government of Andhra Pradesh (GOAP) to build and operate existing births as well as develop and operate additional berths to provide port service. The revenue was to be shared between assessee and GOAP. GOAP charged service tax on their share of revenue. Demand raised alleging that the tax needs to be paid by appellant under reverse charge on sharing of revenue with government under support service by government.
- Issue: Whether there would be liability to pay service tax under reverse charge where tax has already been charged by GOAP?
- Decision: Support services provided by government is taxable in the hand of service receiver under reverse charge under Notification No. 30/2012-ST. But when the tax has already been charged by service provider, it cannot be again demanded from service receiver under reverse charge.

***Comment**: Courts generally take lenient view that in case of reverse charge where tax already stands paid by service provider, it cannot again be demanded from service receiver. However, it is to be noted that this should not be made regular practice where judiciary may deny extending similar benefit.*

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9. Electricity, water and data communication charges recovered based on area occupied cannot be called as sale of goods or pure agent collection:*(Sea View Support System Pvt. Ltd. 2015 (40) STR 573 (Tri-Bang.)*

- Background: Assessee on behalf of owner collecting charges from tenants for using electricity, water and data communication. These charges being collected based on area occupied rather than actual consumption. Department raised demand for service tax on the ground that electricity and water charges collected on basis of area occupied is neither sale of goods nor pure agent collection.
- Issue: Whether electricity and water charges collected on the basis of area occupied could be treated as sale of goods or collection as pure agent?
- Decision: It was held that collection of charge towards water/electricity based on area occupied cannot *prima facie* be called sale of good as in case of sale, the quantum of goods supplied is always known which is not in instant case as collection has been made based on area occupied. Also payment made to owner includes charges towards maintenance and back-up power supply which *prima facie* indicates services are in the nature of "Business Support Service".

***Comment**: The judgment, though stay order, has disturbed settled view that charges recovered towards supply of water and electricity is not liable to service tax as it amounts to sale of goods. One may refer earlier judgments in favor of assessee in case of Plaza Maintenance & Services Ltd 2011-TIOL-47-CESTAT-MAD, Chitrali Properties Pvt Ltd Vs CCE, Pune – III (2013-TIOL-236-CESTAT-Mum) and Econ Hinjewadi Infrastructure Pvt Ltd Vs. CCE, Pune – III (2012-TIOL-1688-CESTAT-Mum)*

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10. Education cess should also be refunded in case of export of goods *(Tumkar Minerals Pvt. Ltd. 2015-TIOL- 2444 –CESTAT-MUM)*

- Background: Assessee claimed refund of education cess along with service tax paid on input service. Department denied the refund on the ground that only service tax is refundable not education cess.
- Issue: Whether assessee is eligible for refund of education cess paid on service tax?
- Decision: Decision of tribunal in case of Balasore Alloys Ltd. *has, vide Circular No.134/3/2011-ST dated 08.04.2011* (supra) is that education cess paid on service tax refunded to the exporter cannot be recovered. Therefore, assessee is eligible for refund of education cess..

***Comment**: Similar ratio could be applied for Swachh Bharat Cess (SBC) also.*

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11. Supply of taxi to drivers plying the same on behalf of appellant cannot be considered as 'supply of tangible goods' service. *(M/s Meru Cab Company Pvt.*

Ltd. 2015-TIOL-2408-CESTAT-MUM)

- Background: Appellant having fleet of taxies registered as radio taxi operator with state government. Booking is received from ultimate passengers based on which taxi is assigned for taking journey. Payment is made by passengers to driver who deposits the same with appellant. Department alleged that the supply of taxies to driver by appellant is supply of tangible goods service liable to service tax.
- Issue: Whether assessee is covered under supply of tangible goods for use and to pay service tax on amount collected from collection fare from passengers?
- Decision: It has been held that no services have been provided to drivers as they have been acting merely based on instruction of the appellant for plying the taxies. Also, payment is received by them from passengers on behalf of the appellant. As the taxies are used by ultimate passengers only, it cannot be said that the service are provider to drivers liable to service tax under category of "supply of tangle goods for use" service.

***Comment**: FA 2015-16 has introduced the concept of "aggregator" where liability to pay service tax on the services provided by driver would be on the aggregator under reverse charge. Hence, the taxi operator would be liable to service tax on the services provided to ultimate passengers as output service providers while on services received from drivers, would be liable as aggregator under reverse charge.*

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12. No service tax on sale proceeds of auction of abandoned imported goods *(M/S Balmer Lawrie And Co Ltd 2015-TIOL-2414-CESTAT-MUM)*

- Background: Assessee realized sale proceeds towards auction of abandoned imported goods on which VAT has been charged. Departments demands service tax alleging it as service charges towards storage or warehouse
- Issue: Whether sale proceeds from auction of abandoned cargo is covered by storage and warehousing services?
- Decision: For the purpose of service tax it is foremost requirement that there should be service provider and service recipient. In case of auction, money is realised from auction of cargo and is not received from any service recipient. Hence, same cannot be classified under "Storage & Warehousing" service.

***Comment**: The matter had attained finality as many decisions have been rendered in favor of assessee. However, post negative list, the department has again raised the same issue as now there is no need to classify the activity under any particular category of service for charging service tax.*

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13. Cenvat credit is allowed on input services like construction, repairs etc. received in residential township constructed for their employees *(Reliance Industries Ltd 2015-TIOL-2343-CESTAT-MUM)*

- Background: Assessee receiving construction, repair & maintenance, manpower recruitment and supply, works contract service etc. in relation to residential township constructed in remote areas near factory for their employees. Cost of

these services debited in books of account and their cost form part of the value of finished goods. Department disallowed the credit on the same.

- Issue: Whether assessee is eligible to avail credit of input services?
- Decision: It has been established based on certificate of cost accountant that cost of these services forms part of the value of finished goods on which excise duty is charged. Credit is eligible based on judgment of Bombay HC in case of Coca Cola India Pvt Ltd.

***Comment**: The judgment has touched basic scheme and purpose of introduction of Cenvat Credit Rules that credit should be allowed on all expenditure so as to avoid cascading of taxes. Though the judgment may not hold good post amendment in the definition of input service w.e.f. 1.4.2011 whereby many of these expenditures have been specifically made ineligible for credit.*

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14. Credit of construction service allowed to service provider engaged in providing renting of immovable property service *(Maharashtra Cricket Association 2015-TIOL-2418-CESTAT-MUM)*

- Background: Appellant availed input credit on construction service used for construction of sports stadium. Tax charged on renting of stadium under the category of "Renting of Immovable Property" service. Department disallowed credit relying on Board Circular No. 98/01/2008-ST.
- Issue: Whether construction is eligible input service where tax charged on output service under "Renting of immovable property"?
- Decision: Input service is not limited to the services for providing output service, but it also includes the service for setting up the premises of provider of output service. The Board Circular appears to have travelled absolutely contrary to the clear and plain language of the definition of the input service. Hence, credit is eligible.

***Comment**: Post amendment in definition w.e.f. 1.4.2011, credit on construction service may not be eligible though one may claim credit of architect/interior decorator service.*

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15. Refund of service tax paid to SEZ unit is eligible even if there is no specific notification to that effect under service tax law during the relevant period *(Reliance Industries Limited vs CCE, Mumbai-I,2015-TIOL-2453-CESTAT-MUM)*

- Background: Appellant filed claim in accordance with provision of Special Economic Zone Act in May 2007 for refund of service tax paid on services used in SEZ area. There was no notification under service tax law during that period providing for refund. Department declined the refund application.
- Issue: Whether refund can be claimed based on SEZ Act when no notification was in force during the relevant period?
- Decision: It has been held that provisions of section 26 of Special Economic Zones Act, 2005 are conferred with a primacy that cannot be denied, diluted or denigrated

owing to delay in issuance of notification under service tax law. Notification issued in 2009 shows that it was intention of government to allow refund. For whatever reason the notification was not issued during period 2006 to 2009, refund cannot be denied when there were specific provisions under the SEZ Act.

NCR Office: 509, Vipul Trade Centre, Sohna Road, Sector 48, Gurgaon
Tel: 8510950400; ashish@hiregange.com

Head Office:
1010, II Floor, 26th Main, 4th T Block, Jayanagar, Bangalore - 560041. Tel: 080-26536405

Branch Office:
Basheer Villa", House No.8-2-268/1/16/B, II Floor, Sriniketan Colony, Road No.3, Banjara Hills, Hyderabad – 500034
Tel: 040-40062934

Branch office:
Flat No. 101, D.No. 9-19-18, Sai Sri Kesav Vihar, Behind Gothi Sons Show room, CBM Compound, Visakhapatnam-530 003 Tel:8916009235

www.hiregange.com