HIREGANGE & ASSOCIATES

Indirect Tax- Latest Judicial Precedents

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SUPREME COURT

1. **Word "include" in the definition of Inputs under Section 2(g) of CCR, 2002 gives a wide interpretation** *(RamalaSahkariChini Mills Ltd, UP Vs CCE 2016-TIOL-20-SC-CX-LB)*

   - Background: Assessee is availing Cenvat credit on welding electrodes used in maintenance of machine. Department disallowed the credit on ground that welding electrodes do not fall under the definition of input.Assessee contended that it is covered under inclusive part of definition and hence credit should be allowed.
   - Issue: Whether assessee can avail Cenvat credit on welding electrodes?
   - Decision: Definition of input is inclusive and includes items beyond the items which are specifically provided in the definition. The Larger Bench held the word "include" in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction. Hence, Credit is admissible.

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2. **Interest on delayed refund become payable from the date of receipt of refund application** *(M/s Hamdard Laboratories 2016-TIOL-21-SC-CX)*

   - Background: Refund application filed by assessee allowed belatedly. Department claimed interest payable from the date of refund order. Assessee contended that the interest to be allowed from the date of refund application.
   - Issue: Whether payment of interest from the date on which refund order is made is correct?
   - Decision: As per Section 11BB of Central Excise Act, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded, interest shall be payable. Thus, the only interpretation of Section 11BB then interest under the said Section becomes payable on the expiry of a period of three months. Such interest to be given beginning from the date of receipt of the application under Sub-section (1) of Section 11B of the Act.

HIGH COURT

3. **Payment of duty into wrong excise code could not be treated as non-payment of duty** *(Devang Papers Mills Pvt.Ltd.Vs. UOI 2016 (41) S.T.R. 418 (Guj.)*

   - Background: At the time of making payment of duty through challan assessee had mentioned wrong excise code on challan.
   - Issue: Whether payment under wrong excise code should be recognized as non-

payment of duty requiring payment of duty again?

- Decision: It was held that assessee duty was deposited and duly credited to government account. Payment of duty into wrong Excise codecouldnot be treated as non- payment of duty and assessee not to be asked again to make payment.

Advance Ruling

4. **Activities like inspection, testing, cleaning, lint brushing, Jewellery correction, folding and hanging, tagging etc.does not amountto manufactureor deemed manufacture** *(M/s Amazon Wholesale Pvt Ltd Vs CCE 2016-TIOL-05-ARA-ST)*

   - Background: Assessee engaged in B2B operations in India. Goods purchased from vendors brought to warehouse and sold from there to industrial users, wholesalers and retailers after performing above mentioned activities. Advance ruling sought whether process undertaken amount to deemed manufacture.
   - Issue: Whether such activities amount to manufacture or deemed manufacture?
   - Decision: No new product comes into existence having undergone these activities. Also, none of these activities could be said to be fixing or altering of MRP. The packing etc. undertaken is secondary process. The processes mentioned do not amount to manufacture.

Comment: *Though the judgment is binding on the assessee only (being judgment of advance ruling), yet it could give respite to similar e-commerce companies who may choose to take similar stand.*

TRIBUNAL

5. **Service tax is not applicable on fee collected by Chamber of Industry from its member to provide BAS** *(Maharashtra Chamber of housing Industry Vs. CCE, Mum-2016 (41) S.T.R. 441 (Tri- Mumbai)*

   - Background: Chamber of Industry had collected fees from its members and non-members. Department contended that service tax applicable on amount collected from members and non-members
   - Issue: Whether service tax is leviable on fees collected by club?
   - Decision:As regard to collection from members, Tribunal upheld the doctrine of mutuality by relying upon judgments of Karnavati Club Ltd and Ranchi club Ltd. Not liable to service tax. Collection made from non-members not to enjoy similar treatment and liable to service tax.

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6. **Assessee paid service tax on insistence of department though not liable to pay. Credit eligible to service receiver based on supplementary invoice** *(Auto Window-2016-(41)-S.T.R.-518-(Tri- Mumbai)*

   - Background: Job worker paying excise duty on manufacturing activity. On insistence of department, service tax also paid on job work charges. Manufacturer

availed credit of ST based on supplementary invoice of job worker. Department denied the credit by alleging that supplementary invoice raised covered under Rule 9(1)(bb) of cenvat Credit Rules (applicable in cases of fraud, suppression etc.).

- Issue:Tax not payable but paid on insistence of department and recovered from manufacturer. Could it be said to be case of fraud, suppression etc. and credit not eligible to manufacturer?
- Decision:Though service tax is not payable on manufacturing activity, yet job worker had paid on insistence of department. Intimation letter send to department under section 73(3) requesting for waiving issue of notice. Under these circumstances, it could not be said that there is fraud, suppression etc. by job worker. Credit allowed to manufacturer.

Comment: *Rule 9(1)(bb) of CCR provides that service receiver cannot take credit based on supplementary invoice where SP has paid tax in cases of fraud, suppression etc. All cases may not be said to be hit by above rule. However, service receiver should always be cautious where tax is claimed by SP through supplementary invoice as it could be possible that department deny the credit based on above allegation.*

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7. **Service tax leviable on gross amount (payment made to labourers + commission @ 5%) charged by manpower supply agency** *(Neelkanth Associates Vs CCE 2016 (41) S.T.R. 569 (Tri. – Del.)*

- Background:Assesseepaid service tax only on commission of 5% on supply of manpowerservicenot on gross amount. Department demanded service tax on gross amount (which included amount paid to labourers also)
- Issue:Whether service tax needs to be paid on commission income or on the gross amount?
- Decision:Section 67 provides thatservice tax to be levied on gross amount charged by the service provider. Gross amount charged for the service is inclusive of the amount of payment made to the labourers and therefore ST is leviable on such gross amount, not merely on commission.

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8. **Giving taxi to a driver for plying the passenger under radio taxi service is not "supply of tangible goods service"***(Meru Cab Co. Pvt. Ltd. 2016 (41) S.T.R. 444 (Tri-Mumbai)*

- Background: Radio tax scheme is operated by assessee by giving taxies to driver for plying the passenger. Booking is made by passengers with appellant who directs nearest driver to ply the passenger. Fare collected by driver from passengers and handed over to appellant at the end of day. Department demanding service tax on this collection arguing that giving taxi to an individual driver for use fall under the service of "Supply of Tangible Goods for use.
- Issue: Whether the radio taxi service provided by the assessee is covered under "Supply of Tangible Goods Service?
- Decision: Agreement between the assessee and driver to "use" the taxies

forferrying passenger. Driver of taxi is not a permit holder and does not have independent authorization for plying vehicles. Agreement does not indicate that drivers are having possession of vehicle for their use but it is to be used for plying the passengers. The privity of contract is between appellant and passengers. Hence appellant is not covered under entry "supply of tangible goods".

***Comment**:The judgment has analysed the relationship of service provider and service receiver and has held that privity of contract is between appellant and ultimate passengers. Collection made by driver and paid to appellant is in the capacity of agent of appellant. The ratio could be applicable in case of transactions where multiple parties are involved.*

As per present law, service provided by cab operator to passengers is taxable under renting of motorcab while services availed from driver is taxable under reverse charge in hand of company as aggregator service.

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9. Credit admissible on excise duty paid on tables and chairs *(ICICI Lombard General Insurance Company Ltd 2016-TIOL-367-Cestat-Mum)*

- Background: Assessee is engaged in business of general insurance and availing credit of excise duty paid on furniture and fittings. Department disallowing the credit on ground that these are not capital goods.
- Issue: Whether assessee is eligible to avail Cenvat credit of excise duty paid on chairs and tables?
- Decision: It is a common knowledge that company is required to have chairs and tables to render services to their clients as the employees need to sit and work on the same. Therefore, assessee is admissible.

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10. Distribution of Cenvat credit cannot be denied when head office is not registeredas Input service distributer *(M/S Shukra Beedies (P) Ltd Vs CCE 2016-TIOL-318-Cestat-Mad)*

- Background: Credit of service tax paid on certain services availed by appellant at different places for the purpose of manufacture of excisable goods. Department disallowed the credit on ground that Head Office of assessee is not registered as ISD.
- Issue: Whether assessee is eligible to avail Cenvat credit distributed by Head office?
- Decision: It was held that registration is a regulatory measure to bring the assessee to the fold of the law. Even if unregistered, the liability under law remains unchanged. ISD registration is only a procedural requirement of law and hence credit cannot be denied.

***Comment**: Department objects to credit availment on technical and procedural grounds during audit. Courts have consistently held that credit cannot be denied on such grounds.*

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11. Refund of service tax erroneous paid cannot be denied merelybecause refund filed with wrong jurisdiction *(Fujitsu Consulting Pvt. Ltd.2016 (41) S.T.R. 728 (Tri-Mumbai)*

- Background: Assessee filed refund claim of service tax deposited at Pune jurisdiction and the invoice was addressed to Delhi office.Department disallowed the refund on ground that invoice is addressed at Delhi office and Delhi office is not included in centralized registration.
- Issue: Whether assessee is eligible for refund of service tax wrongly paid?
- Decision: It was held that Section 11B of CE Act, 1944 neither proposes restricting the refund on account of jurisdiction nor it stipulates filling the refund claim in particular jurisdiction. Therefore, jurisdiction cannot be the reason for denial of refund claim.

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12. Cenvat credit allowed of service tax paid on GTA service from factory to port. (*Pearl engineering Polymers Ltd. Vs CCE (2016-41-S.T.R.-773-Tri- Mumbai*)

- Background: Assessee had availed Cenvat credit of service tax paid on freight charges for outward transportation of goods from factory to port for export. Department disallowed the credit alleging that place of removal is factory gate not port and credit off GTA cannot be taken beyond place of removal.
- Issue: Whether assessee is eligible to take credit of service tax paid on transportation charges beyond factory?
- Decision: It was held that transportation service incurred for clearances of goods from factory to the port is within the term of "clearances of goods up to the place of removal" as the port is place of removal in case of export of goods. Credit allowed.

Comment: *An exporter (merchant/manufacturer) may claim exemption from payment of ST on GTA service under Notification No. 31/2012-ST. Alternatively refund may be claimed for all expenditure incurred beyond factory gate under Notification No. 41/2012-ST as amended by Notification No. 1/2016-ST dated 3.2.16.*

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13. Service tax cannot be levied on transfer of Immovable property *(Sumeet CT holle and Pratima Vs CCE, 2016-TIOL-528-CESTAT-MUM)*

- Background: Agreement between appellant and buyer is transfer of immovable property by way of sale. Appellant paid service tax on immovable property considering as construction of flats services. Assessee filed refund u/s 11B of CEA.
- Issue: Whether Service tax paid on immovable property can be refunded u/s 11B?
- Decision: It was held that transfer of immovable property is outside the ambit of service tax. Tax collected by the vendor is without authority of law and hence liable to be refunded u/s 11B of CEA,1944.

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14. Credit credit on sales commission is eligible retrospectively (*M/s Essar Steel India Ltd Vs. CCE, Surat2016-TIOL-520-CESTAT-AHM)*

- Background:Assessee availed credit on sales promotion activity. Department denied the credit alleging that the service is not in the nature of sales promotion but is sales commission. Assessee contended that definition of input service amended vide Notification no 2/2016-CE (NT) by adding an explanation that sales promotions includes sale of dutiable goods on commission basis is retrospective.
- Issue: Whether credit on sales commission is eligible retrospectively?
- Decision: It was held that explanation inserted in Rule 2(l) of CCR that sales promotion includes services provided by commission agent also is declaratory in nature and effective retrospectively. Hence, credit is admissible for earlier period also.

***Comment**: There were conflicts as to whether credit of service tax charged by commission agent is admissible. The definition of Input Services has been amended by adding an explanation that sales promotion includes services provided by commission agent. The judgment is expected to put rest frivolous litigation by department.*

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15. Inputs used for job work are entitled to Cenvat Credit (*M/s MPI PAPER PVT LTD Vs. CCE, Surat-2016-TIOL-477-CESTAT-MUM)*

- Background:The Appellants is undertaking manufacturing and job work activity for another manufacture. The Job work activity is exempted under NT-214/86. Department contended for reversal in under rule 6 of CCR
- Issue: Whether reversal of credit is required under rule 6 CCR?
- Decision:Court had relied uponLarger bench decision of MumbaiTribunal in case of Sterlite Industries Ltd where it was held MODVAT credit of duty paid on the inputs used in the manufacture of final product cleared without payment of duty for further utilisation in the manufacture of final product and which are cleared on payment of duty by the principal manufacturer, credit would be eligible. Based on this case held that Inputs used for job work are entitled to CENVAT credit.

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16. Location of client cannot be uncoupled with performance of service for considering a service as export service *(HSBC Software Development (India) Pvt Ltd 2016-TIOL-415-Cestat-Mum)*

- Background: Assessee is providing “technical testing and analysis” or “maintenance or repair” of software service. Employees of assessee sitting in India have to access the server/computer network abroad. Department demanding service tax on ground that performance of service, even partly even partly, out of India is a necessary condition for treating the rendition of these services as export.
- Issue: Whether assessee is liable to pay service tax on technical testing and or maintenance or repair service.

- Decision: Service tax is a value added tax on commercial activities and is not a charge on the business, but on the consumer, then, it is leviable only on services provided within the country. Therefore,location of client cannot be uncoupled with performance of service. Though the benefit of the services accrued to the foreign clients outside India, it is termed as 'export of service'.

Comment:*Post Negative List, export of service needs to be determined in terms of Place of Provision of Services Rules, 2012. Where services are provided from a remote location by way of electronic means the place of provision shall be the location where goods are situated at the time of provision of service. As software is also goods and is located outside India, place of provision is outside India.*

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