HIREGANGE & ASSOCIATES

Indirect Tax- Latest Judicial Precedents

May 2016

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HIGH COURT

1. **Service provider can opt to pay service tax on works contract on gross amount and take credit on input/input service** *(CST.,Vapivs S.V. Jiwani 2016(42) S.T.R. 209 (Bom.)*

   - Background:Assessee engaged in rendering works contract service, paid service tax on gross amount without availing the option provided under Rule 2A of ST (Determination of Value) Rules, 2006 and taken credit on input/input service. Department alleged that tax needs to be paid under Rule 2A and assessee not entitled to credit of input/input service. Tribunal had held that credit may be taken.
   - Issue: Whether service tax on works contract may be paid on gross amount (with credit) instead of at abated rate as provided under Rule 2A of Valuation Rules?
   - Decision:The High Court did not go into substantive provision of law and held that revenue is not at loss when the credit has been availed after paying tax on gross amount. Revenue's appeal against Tribunal order allowing credit to assessee, not entertained.

   Comment:*Though High Court had not gone into substantive provision of law, yet in view of the author, the judgment of Tribunal holding that exercise of option under Rule 2A of Valuation Rules is not mandatory is correct position of law. Assessee may choose topay service tax on gross amount with credit on input/input service.*

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2. **Attachment and recovery of service tax demand from bank account of a company as against the dues recoverable from a proprietorship concern is illegal and impermissible***(Atchaya Engineering Pvt Ltd VsAddl Commissioner 2016-TIOL-662-HC-MAD-ST)*

   - Background:The director of the petitioner company is the proprietor of M/s Atchaya Enterprises. The department demanded service tax from M/s Atchaya Enterprises and attached the bank account of the petitioner company.
   - Issue:Can the bank account of another entity be attached for the dues of some other entity?
   - Decision:When the petitioner company is a separate and independent entity, the bank account of the petitioner company cannot be attached for the dues of the proprietorship concern, viz., M/s. Atchaya Enterprises. The attachment in respect of the petitioner company stands raised.

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3. **Penalty under section 76 and 78 are mutually exclusive.** *(Raval Trading Company vs CST- 2016 (42) STR 210 (Guj)*

   Background:Assesee did not pay service tax on business auxiliary service. Tribunal confirmed tax, interest and penalty u/s 76 and 78. Assessee contended that proviso inserted u/s 78 that no penalty shall be imposed u/s 76 when imposed u/s 78 is clarificatory in nature.

Issue:Whether penalty under section 76 and 78 can be imposed simultaneously?

Decision:Held that section 76 would cover cases other than arising on account of fraud, evasion etc. for which separate penalty has been provided u/s 78. Proviso to section 78 made it explicit which was till then implicit. Penalty cannot be imposed u/s 76 when confirmed u/s 78.

ADVANCE RULING

4. Only Expenditure/costs incurred by foreign C&F agent as a pure agent to be excluded from gross amount for charging ST (Berco Undercarriages India Pvt Ltd Vs CC, CE & ST 2016-TIOL-11-ARA-ST)

- Background:Foreign C&F Agent is located outside India and the applicant, who is recipient of service, is located in India. The service to be provided are freight, insurance, loading, unloading and handling charges of goods to be imported in India.C&F raises composite bills towards all such charges.
- Issue:In respect of bill raised by foreign C&F agent, which portion of invoice will attract Service Tax obligation under reverse charge mechanism?
- Decision:Ocean freight upto customs frontier in India is covered under Negative List. The expenditure or costs incurred by C & F Agent i.e. freight, insurance, loading, unloading, handling charges etc would be liable to service tax under reverse charge excluding the expenditures/costs recovered as pure agent satisfying the conditions enumerated under Valuation Rules.

TRIBUNAL

5. Credit of Service tax attributable to services used "exclusively" in a unit engaged in manufacture of exempted goods is not admissible*(Fosroc Chemicals India Pvt Ltd. Vs C.C. E. ,Cus. & S.T., Banglore-LTU 2016 (42) S.T.R. 28 Tri.- Bang.)*

- Background:Appellant is registered as Input service distributor (ISD) having various units. One of unit is enjoying the area based exemptions. Appellant distributed credit of service exclusively used in such unit. Department disallowed such credit.
- Issue: Whethertax paid on services exclusively used by exempted unitmay be availed and distributed by ISD?
- Decision:The word exclusively relates to unit and not to service tax and is not associated with word "Service Tax". Credit of service tax in respect of services used in exempted unit is not available to ISD and cannot be distributed to other units.

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6. Belated filing of declaration under Rule 6 of Cenvat Credit Rules is condonable error and substantial benefit cannot be denied *(Tata Technologies Ltd vs CCE, Pune –I 2016 (42) STR 290 (Tri- Mumbai)*

- Background:Assessee providing taxable as well exempted service. They exercised

option provided under Rule 6 (3A) of the Cenvat Credit Rules but the intimation to exercise option was given belatedly. Department contended that delayed exercise of option tantamount to option not exercised at all. Reversal needs to be made @8% of exempted turnover.

- Issue:Delayed intimation of option whether take away substantial rights of assessee?
- Decision:majority of information required to be given in intimation letter is already available with department. Rule 6 cannot be used as tool of oppression to extract amount which is much beyond remedial measure and what cannot be collected directly cannot be collected indirectly. Mere delay in filing intimation cannot disentitle assessee to opt for the option.

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7. **Assessee has right to challenge tax, Interest, and penalty confirmed under adjudicating order even if same has been paid** *(C.C.E. Visakhapatnam Vs Apex communications 2016 (42) S.T.R. 153 (Tri. – Bang.)*

- Background:During investigation, department demandedpayment of additional service tax dues from the assessee. He paid additional liabilityalong with interest and penalty @ 25% within one month and pleaded before Commissioner (Appeal) to get the refund of penalty.
- Issue:Whether assessee can challenge the tax, interest and penalty once it has been paid?
- Decision:It has been held that there is nothing in the law which holds that once tax along with interest and reduced penalty is paid, the matter is settled and the assessee does not have any right to challenge same. Assessee can challenge the levy of tax, interest and penalty unless the matter is decided by settlement commission. Refund of penalty was allowed.

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8. **Credit of service tax paid onGTA service upto place of removal is admissible***(Cadbury India Ltd.Vs CCE, Mumbai-III 2016 (42) S.T.R. 155-Tri-Mumbai)*

- Background:Assesseecleared intermediate goods to job worker and to its other units and availed credit of ST paid on GTA services. Department disallowed the credit alleging that no credit admissible on freight expenses incurred beyond factory gate.
- Issue: Whether credit of service tax paid on GTA service may be availed?
- Decision:As per section 4(3)(c) of Central Excise Act, 1944, “place of removal” is place from where goods are sold. Though intermediate goods removed to job worker’s place and other unit, removal not amounting to sale of goods. The place of removal would be the place from where these goods are sold after removal of factory. As the factory is not place of removal, transportation expenses incurred beyond factory gate upto job worker premise/another unit is eligible for credit.

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9. Common excise registration can be grantedif two factories are connected through overhead conveyer *(TriveniEngg. & Industries Ltd. Vs CCE., Meerut-I2016 (42) S.T.R. 186 (Tri-Del.)*

- Background:Sugar mill and its co-generation power plant are separated by public road but connected through overhead conveyer. Bagasse generated in sugar mill transferred to co-generation power plant for generating electricity. Department contended that separate registration needs to be takenforco-generation power plant.
- Issue: Whether common registration can be taken for sugar mill and power plant?
- Decision:It was held that functioning of sugar mill and its co-generation plant located across public road to be treated as interlinked as one factory and hence common registration can be taken.

Comments:*The procedure of taking single registration has been amended vide circular no 1016/4/2016-CX, dated 29th Feb 2016 to provide that centralized registration would be permissible where process undertaken in different units are interconnected and they fall within single range.*

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10. Cenvat credit of input service for running canteen, maintenance of garden and cleanliness in residential colony is admissible *(Mukund Ltd. Vs CCE, Belapur 2016 (42) S.T.R. 88 (Tri-Mumbai)*

- Background:The issue pertains to period April 2007 to March 2012. Assessee availing credit on input services of manpower supply used forrunning of canteen, cleaning of residential colony, maintenance of garden etc. Department disallowed credit on such services.
- Issue: Whether assessee is eligible to avail Cenvat credit of these services?
- Decision:Following was held:

  (i) Manpower services to run canteen: canteen owned & managed by company and the manpower hired to run it could not be said to be in the nature of catering service. Credit is allowed.

  (ii) Gardening exp: Credit allowed as the services are required to maintain good atmosphere in manufacturing area and as per condition precedent laid down by State Pollution Control Board.

  (iii) Cleaning service: Incurred in maintenance of residential colony forming part of factory premise as per factory plan approved by excise authorities.

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11. Cost of free supply items by recipient of service not to be added in the assessable value of service *(AMR India Ltd. Vs CCE, Hyderabad-II 2016 (42) S.T.R. 329 Tri.- Bang.)*

- Background:Appellant is engaged in activity of site formation.Assessee has not included cost of material supplied free of cost by service receiver in assessable value. Department contended that cost of material will be included in assessable value and service tax is leviable on the same.

- Issue:Whether the cost of free supply material is to be added in value of services?
- Decision:Relying upon the decision of Larger Bench in case of Bhayana Builders (P) Ltd. v. CST, it has been held that cost of free supply items by service recipient is not to added in assessable value of services.

Comment: *The ratio of judgment holds good under Valuation Rule 2A post Negative List also as the free issue of material by servicereceiver cannot be said to be consideration for providing service and hence cannot be subjected to tax.*

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12. Penalty waived if service tax along with interest under reverse charge paid before issue of show cause notice *(Bharat Forge Ltd. Vs CCE, Pune-III 2016(42) S.T.R. 312 Tri.- Mumbai)*

- Background:Assessee availed external commercial borrowing in the form of convertible foreign currency bonds. No service tax was paid under RCM.On being pointed out, service tax was paid along with interest.
- Issue:Whether penalty can be waived where tax paid along with interest under reverse charge which is eligible as credit?
- Decision:It was held that ST payable under reverse charge was available for credit and hence revenue neutral transaction.There would not be any financial benefit from delay payment to the assessee.As assessee has paid the full amount of interest before issue of show cause notice and the same is available as credit, waiver of penalty u/s 80 is granted.

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13. Credit cannot be denied for period pertaining prior to registration even if availed after five years *(Vamona Developer Pvt. Ltd. Vs CCE.,& S.T., Pune-III 2016 (42) S.T.R. 277 Tri.-Mum)*

- Background:Appellant is engaged in business of construction and sale of commercial properties and providing taxable service renting of immovable property. They were uncertain as to whether constructed mall would be sold as immovable property or leased as renting of immovable property. After apprx five years, credit of 80% pertaining to the area rented was availed. Department rejected credit on ground that it cannot be availed after five years and for the period pertaining prior to registration.
- Issue:Whether Input service credit is eligible under thse circumstances?
- Decision:It was held that Assessee had taken credit only when mall was completed and prior to that they were not sure whether property had to be sold or rented. Cenvat Credit was taken when remaining property was ready to be rented out. Delay can be ignored when there was no violation of legal provisions. So credit can be taken.

Comment:*W.e.f. 1.3.2015, time limit of one year has been fixed for availment of credit. Credit cannot be availed for the period prior to that.*

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14. In respect of services availed beyond the territory of India and outside the

place of removal, there can be no doubt regarding its inadmissibility*(Khanna International Pipes Pvt Ltd Vs CCE 2016-TIOL-961-CESTAT-MUM)*

- Background:The appellant,, a manufacturer exporter had taken credit on business support services under the head terminal handling charges,documentationcharges,destinationterminal handling charges, destination documentation charges &destination haulage and shutout charges.
- Issue: Whether credit of expenditure incurred outside India is eligible?
- Decision:Theappellant has availed credit in respect of services received upto the Port of clearance and beyond that as well. So far as the services received up to the Port clearance, the credit of Service Tax cannot be denied. However, in respect of services availed at the destination, which is not only beyond the place of removal but also outside India, the same is not admissible.

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15. Cenvat credit of input services availed at retail outlets of manufacturer is admissible *(M/s Sports and Leisure Apparel Ltd Vs. CCE, Noida2016-TIOL-887-Cestat-All)*

- Background:Assessee is a manufacturer and claimed credit of service tax paid on input services availed at its own retail outlets from where goods are actually sold. Department questioned the credit as same is availed after removal of goods from the factory.
- Issue:Whether assessee would be eligible to credit of services at retail outlets from where goods are sold?
- Decision:It was held that since goods are not sold at factory gate but are sold at retail outlets, therefore, place of removal in this case would be the retail outlets from where goods are sold and hence credit is admissible.

Comment:*Ifdeliveries are on FOR destination basis then point of sale will be treated as 'place of removal' and Cenvat credit upto such place of sale will be admissible. The situations where goods are sent to depot for ultimate sale and services are availed totransport such goods are also covered here.*

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16. Cenvat credit can be availed on outdoor catering service for providing canteen facilities to employees *(FiammMinda Automotive Ltd Vs CCE, Delhi 2016-TIOL-930-CESTAT-DEL)*

- Background:Assessee availed credit of outdoor catering service received to facilitate to its employees which is statutorily requirement of Factories Act. Said expenses incurred by assessee are considered while fixing the price of the final product. Further, Cenvat credit has been availed of ST charged by job workers although exempted.
- Issue:Whether credit can be taken of service tax paid on outdoor catering service and exempted job work activity?
- Decision:On outdoor catering service, honorable tribunal relied upon Karnataka High-court judgment in case of StanzenToyotetsu India (P) Ltd and held that since the same is statutory requirement and cost is also being added while fixing the price and hence credit is admissible on outdoor catering service. W.r.t. credit on job work charges it was held that service providers are registered with department and ST

paid by them were accepted and retained as statutory dues, the same cannot be denied on the recipient's end on the ground that the said service is not liable for service tax.

Comment: *There are few judgments pertaining to period post 1.4.2011 in favor as well as against the eligibility of credit on catering service. One could claim credit and reverse under protest till judicial clarity emerge so that credit is not lost on time limitation.*

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17. Cenvat credit can be taken on services availed at job work premises of the manufacturer *(Hardik Founders and Engineers Pvt. Ltd. Vs. CCE, Pune 2016-TIOL-925-CESTAT-MUM)*

- Background:Manufacturer has three units; out of them only one is registered under Central Excise and other are job-workers of the main unit. Assesssee claimed credit of ST paid on input services availed on such premises. Department disallowed. Department disallowed the credit alleging that other units are not registered.
- Issue: Whether credit of input service can be taken at units which are not registered under Central excise?
- Decision:It was held that credit cannot be denied merely for the reason that the services were received and used outside the registered premises. Job-work units are carrying out the activities on product which is subsequently cleared as final product on payment of duty by registered unit and services received and used by such units are part of the manufacturing process and hence credit is admissible.

Comment:*This decision is important to assessees who are engaged in manufacturing and operating through multi units. Some of them may not have been registered. Cenvat credit of ST paid from those units could be claimed.*

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18. Cenvat credit on hotel and conference used for the purpose of auction and marketing conference allowed*(Maharashtra Seamless Ltd. Vs CCE, Raigad 2016-TIOL-974-CESTAT-MUM)*

- Background: Appellant had availed credit of ST paid on hotel services in connection with auction of scrap (generated during the manufacturing process) and in marketing conferences. Department argued that there is no nexus with the manufacturing process, hence credit is not admissible.
- Issue: Whether Credit can be availed on ST paid on hotel services?
- Decision: It was held that input service definition clearly includes sales promotion and market research. The activities undertaken by the appellant clearly falls under the head of sales promotion and therefore, credit on the same cannot be denied.

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19. Subsidiesreceived from government do not form part of gross value *(VaradFertilisersPvt LTD 2016-TIOL-1031-CESTAT-MUM)*

- Background: Assessee had received transportation subsidy from the government of India. Department contends that amount of subsidy should be part of gross value of service and same is liable to service tax.

- Issue: Whether subsidy amount should be added to the gross value of service?
- Decision:The ratio of Hon'ble Supreme Court judgment in case of *Mazagon Dock Ltd*. is applicable and held that subsidy of 20% from Govt. cannot be said to be additional consideration as it is not received from buyer either directly or indirectly and not liable to service tax.

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20. Period of 1 year for refund under Rule 5 of CCR, 2004 is to be considered from the end of quarter *(M/s IndagoVs CCE, Pune 2016-TIOL-1020-CESTAT-MUM)*

- Background: Assessee filled a refund on 8.5.2013 claim under Rule 5 of Cenvat Credit Rules, 2004 for the period April 2012 to June 2012. Department rejected the refund on time bar for the reason that FIRC was received on 13.4.2012 and from that date refund claim was filed after 1 year on 8.5.2013.
- Issue:What would be the date from when the period of 1 year is to be counted?
- Decision:It was held that since the refund has to be filed on quarterly basis, the period of 1 year should be computed from the end of the quarter and hence assessee is entitled for refund and same is not time bar.

Comment: *Refund claims are routinely rejected by department alleging time bar in the absence of specific provision in the Rule 5 read with notification No 27/2012-CE regarding the date from which time limit should be computed. Notification No. 14/2016-CE (NT) has inserted time limit of one year beginning from the date of invoice or receipt of payment, whichever is later. Now the disputes are expected to come down.*

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21. Whether the buyer is the contractor of SEZ units or developer, Rule 6 of CCR, 2004 is not applicable *(M/s Manikgarh Cement vs CCE, Nagpur 2016-TIOL-1016-CESTAT-MUM)*

- Background: Department demanded the amount at the rate of 10% under Rule 6 of CCR, 2004 on the ground that supplies made by appellant to to the contractor of SEZ developer not to developer.
- Issue:Whethersupply to contractor of SEZ requires reversal of credit under Rule 6?
- Decision: Tribunal relied on the decision made in the case of Ultratech Cement Ltd. and held that even if the buyer is contractor of SEZ unit or developer, Rule 6 of CCR cannot be made applicable. No need of reversal of credit under Rule 6.

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22. Cenvat credit is admissible on strength on Debit Notes issued by service provider *(M/s EmmesMetalsPvt LTD Vs. CCE, Mumbai 2016-TIOL-999-CESTAT-MUM)*

- Background: Assessee is availing credit on the strength of debit note issued by the service provider. Department denied the credit as debit note does not contain the address of service provider, not in form of challan and in form of correspondence letter.
- Issue:Whether Cenvat credit can be claimed on the strength of debit notes?

- Decision:As per Rule 9 of the CCR, 2004, the documents prescribed for taking Cenvat credit in respect of input services are invoice, bill or challan issued by provider of input service. Cenvat credit can be allowed on the strength of debit note if it contains the information as required under Rule 4A of STR, 1994

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23. When duty is paid under protest, there is no case for invoking limitation *(M/s Sudarshan Chemical Industries Ltd 2016-TIOL-987-CESTAT-MUM)*

- Background: Assessee had reversed credit under protest and filed a refund claim for the said reversal. Department rejected the claim on grounds that assessee has voluntary paid the amount and claim is time barred.
- Issue: Whether time limitation is applicable for refund of duty paid under protest?
- Decision:It was held that duty paid under protest cannot be considered as voluntary payment of duty and the limitation does not apply to such claims there is no case for invoking limitation.

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24. Clearance of goods from DTA to SEZ is to be treated as export and entitled to refund of accumulated Cenvatcredit *(Parth Trading Co 2016-TIOL-982-CESTAT-AHM)*

- Background: Assessee filled a refund claim of un-utilized Cenvat credit lying in balance in respect of duty paid inputs used in manufacture of final products and exported to SEZ unit. Department contended that clearance of the goods from DTA to SEZ would not amount to export.
- Issue:Whether assessee is entitled to refund under Rule 5 of CCR, 2004 for goods cleared from DTA to SEZ?
- Decision:It is clearly mentioned in the Board Circular dated 28/04/2015that the supply of goods from DTA to SEZ has to be treated as export, hence entitled to refund of accumulated Cenvat Credit under Rule 5 of Rules, 2004.

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25. Employee cost reimbursement within group companies without any mark up/margin does notpartake the character of consideration for any service *(Franco Indian pharmaceutical Pvt. Ltd. Vs Comm. Of Service Tax , Mumbai 2016-TIOL-885-Cestat Mum)*

- Background:Appellant is manufacturer of pharmaceutical products and also had a good network of marketing his own product; the said marketing network is being utilized by the group companies for marketing of pharmaceutical products. The three companies whose products are marketed by the appellant's employees are sent on deputation to group companies. Appellant recovers the expenses incurred by them in form of percentage of sale made.Department contends these expenses as BAS.
- Issue:Whether these activities are to be treated as BAS and liable to service tax?

- Decision: By legislative design, services rendered in the course of employment have been kept outside the purview of service tax. Whether such services are rendered by an employee to one employer or many, as in the case of joint employment, cannot make any difference to the tax treatment of the emoluments earned by the employee.
- In the absence of any markup/ margin, the payments received against debit notes by one employer company upon the other employer companies, will not partake the character of consideration for any service, but will merely represent reimbursement of shared costs and not liable to service tax.

Comment: *The decision holds correct position of law even for the period post Negative List also.*

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