

# Indirect Tax- Latest Judicial Precedents

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September 2015

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### **SUPREME COURT**

#### **1. Service Tax cannot be levied on indivisible works contracts prior to 1.6.2007 (CCE, Kerala vs. M/s Larsen and Toubro Ltd 2015-TIOL-187-SC-ST)**

- Prior to 1.6.2007, service tax is applicable only to service contract simpliciter not to composite works contract. Section 67 of the Finance Act which provides for value of gross amount charged for charging service tax refer to value of service in case of contract of service simpliciter not for composite contracts.
- In case of works contract, tax cannot be levied on the material portion and there is no section which provides for removal of non-service elements from the composite works contracts prior to 1.6.2007.
- The judgment of Delhi High Court in case of GD Builders is incorrect in as much as arriving at conclusion that the Finance Act, 1994 contains both the charge and machinery for levy and assessment of service tax on indivisible works contracts.

**Comment:** This decision is going to bring to rest various disputes which are pending across the country before different levels as to taxability of works contract before 01.06.2007. Further also the decision specifically says that prior to introduction of works contract service with mechanism for segregation of material and labour by valuation rules, what was taxable under service tax was service simpliciter and not service portion in works contract. This may also raise question whether in case of works contracts which were not in the nature specified under the definition of works contract is not taxable until the change in the definition of works contract from 01.07.2012.

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### **HIGH COURT**

#### **2. Tribunal has power to extend stay beyond the period of 365 days (CCE, Meerut vs Vodafone Essar South Ltd 2015-TIOL-1974-HC-ALL-ST)**

- Section 35C(2A) of the Central Excise Act makes it apparently clear that the Tribunal is mandated to hear every appeal within a period of three years "where it is possible to do so". These words indicate that though a mandate was given to the Tribunal to decide the appeal within three years, it was not a mandatory provision, but only a directory provision.
- The proviso fixing the time limit of 365 days should be read in conjunction with above provision. Where main provision is not in the nature of mandatory, the proviso cannot be considered mandatory but is merely of directory nature.
- Usage of word "shall" though generally indicates mandatory nature of provision but it should be read in the context in which it has been used.
- The time limit of 365 days is in directory nature not mandatory.

**Comment:** The decision is likely to result in avoiding the recovery proceedings by department hitherto undertaken on the pretext that after expiry of 365 days, the stay order has vacated. It is relevant to note that the above provision may not be applicable for appeals filed on or after 6.8.2014 as now all appeals are required to be accompanied with pre-deposit of 7.5%/10% of duty amount or penalty imposed. No stay application is filed.

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**3. Cenvat credit of tax charged on mobiles phones services is eligible for credit**  
(Hindustan Coca Cola Beverages (P) Ltd. 2015 (39) S.T.R. 360(Bom.)

- As per definition of "input service" in rule 2(I) of the rule 2004, any expenditure incurred in manufacturing activity would be entitled for credit. Service tax charged on mobile phones used by employees/staff of manufacturer is eligible for credit.
- Though the case pertains to period prior to 1.4.2011 yet the High Court has analysed the definition post 1.4.2011 and concluded that the expenses of mobile phones are related to manufacturing process of assessee.

**Comment:** The departmental audit team generally questions the eligibility of credit on mobile phones citing that these are used by employees; hence, covered by exclusion clause of definition of input service and not eligible for credit. In our view credit can be availed by establishing that the mobiles have been used in connection with manufacturing/ provision of service. To be on safer side, small percentage of credit (say 10%) may voluntarily be given up treating as attributable to personal usage of employees.

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**4. Cenvat credit can be availed on outward freight paid on GTA service**(Haryana Sheet Glass Ltd. 2015-(39) S.T.R. 392 P & H)

- Assessee is eligible to avail Cenvat credit of service tax paid on outward freight paid by a manufacturer for delivery up to buyers premise.
- Ownership and property of goods transferred at customer's doorstep. Hence, the customer place shall be place of removal. As per the definition of input service, the credit is admissible for transportation expenditure incurred upto the place of removal.

**Comment:** It has been clarified vide Circular No. 988/12/2014-CX that credit admissible upto the place of removal where place of removal means place where sale has taken place or when the property in goods passes from the seller to the buyer. Payment of transport charges, inclusion of transport charges in value, payment of insurance or who bears the risk are not the relevant considerations to ascertain the place of removal. Hence, the place of removal must be clearly mentioned in agreement/purchase order.

**5. No statutory provision under Finance Act, 1994 for reimbursement of ST by service recipient to service provider** (*Multi Engg. & Scientific Corpn. 2015 (39) S.T.R. 414 (Pat.)*)

- The liability to pay service tax is on the service provider and being in the nature of Indirect Taxation, he has right to recover the same from service recipient though there is no provision under Finance Act, 1994 making statutory liability of service receiver to reimburse ST to service provider.
- If the contract between parties is all inclusive or there is no mention above tax clause, any increase or decrease of tax liability in future or levy of new tax with regard to contract would be entirely to the benefit or the liability of the service provider. Service receiver cannot be compelled to pay the same.

**Comment:** *There is conflicting judgment of different HC on this matter. While in case of Thermal Contractors Association, Allahabad HC has held that recovery of tax depends upon the terms of contract, in cases of Peary Lal Bhawan Association as well as Bhagwati Security Services, it has been held that service tax is statutory liability and needs to be collected from service receiver. In view of divergent decisions, it is advisable to always mention tax clause in the agreement explicitly. It would be very important especially in the light of upcoming GST where tax could substantially vary from existing taxes.*

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**6. Credit of sales commission ineligible to the extent relatable to the goods supplied as part of trading activity** (*F.L.Smith Pvt. Ltd. vs CCE, Tiruchirapalli 2015 (39) STR 373 (Mad.)*)

- The contract involved supply of goods manufactured as well as traded.
- Credit on input service is eligible which is used in or in relation to manufacture of final products. Sales commission paid for procurement of order pertaining to the goods supplied as being traded not eligible for credit even prior to 1.4.2011 also.

**Comment:** *The judgment has again reaffirmed view that the credit is not admissible on trading activity as the services used in the course of trading cannot be said to be used in relation to manufacture of final products.*

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**TRIBUNAL**

**7. Activities undertaken by distributors/ consignment stockists of the appellant are purely distribution/ sales and have no element of sales promotion, hence credit is not eligible** (*Gujarat State Fertilizers and Chemicals Ltd vs CCE, Surat-II 2015-TIOL-1747-CESTAT-AHM*)

- Activities undertaken by the distributors/ consignment stockists of the appellant are purely distribution/ sales and have no element of sales promotion and,

therefore, CENVAT credit taken with respect to commission paid to such distributors/ consignment stockists is not admissible.

- On argument by appellant that the activities are in the nature of sales promotion, it has been held that only mention in the agreement is provision of some samples, display photographs, brochures and sales promotion materials by the appellant but there is no whisper in the entire contract that any consideration is paid by the appellant to its distributors/ consignment stockists for undertaking such activity.
- Relied upon the judgment of jurisdictional HC in case of Cadila Healthcare Limited to disallow the credit.

**Comment:** *The eligibility of credit on all sales related activities is invariably questioned by audit officer. Therefore to avoid disputes in this regard the scope of the activities for which sales commission is paid is to be made clear in the agreements focusing on the fact that many activities are for long term – advertisement, road shows, business exhibitions, sponsorships ... as well as shorter term measures of identifying customers, negotiating with them, increasing sales by collecting orders etc. The nexus and pre removal activities now required to be explicit instead of implicit to avoid demands in this regard.*

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#### **8. No service tax under RCM on services from overseas commission agent** *(Suryalakshmi Cotton Mills Ltd. 2015 (39) S.T.R.460 (Tri.- Bang.)*

- Assessee is not required to pay service tax under reverse charge on services received from overseas commission agents as the concept of reverse charge came into effect from 18-4-2006 with the introduction of Section 66A. The period of dispute is from 1-1-2005 to 30-11-2006.

**Comment:** *Under present regime (w.e.f. 1.10.2014), commission agents in relation to goods could be considered as intermediary and the location of such intermediary shall be deemed to be place of provision of service under Rule 9 of Place of Provision of Service Rules, 2012. If commission agents are located outside India, place of provision is outside India and no liability to pay service tax under RCM on the service receiver located in India.*

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#### **9. Manufacturer or purchaser of final product can take credit of duty paid on input services used in other sister units** *(Expert Industries Pvt. Ltd. 2015 (39) S.T.R. 465 (Tri.-Bang.)*

- Assessee can avail the credit of input service, i.e. security service, manpower supply service, and telephone service in the main unit though service used in other unit of the assessee. The bills were raised by the service provider in the name of main unit from which goods are cleared from payment of duty.
- According to proviso to rule 3, a manufacturer or purchaser of final product can

take credit of duty paid on any output service received by him. Credit is admissible to the assessee so long as he is manufacturer or purchaser of final product and such final products are liable to duty and cleared on payment of duty.

- Unlike credit on inputs, there is no requirement that input service must be availed within four corner of factory.

**Comment:** The judgment has reaffirmed that the credit on input service is admissible so long as it can be established that these have been used in manufacture of final products or providing output service.

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**10. Service tax is applicable on long term lease as there is no distinction between short term and long term lease in the statutory provisions** (*New Okhla Industrial Development Authorities vs. CCE, Noida (2015 (39) STR 443 (Tri-Del)*)

- Definition of Renting of immovable property does not make any distinction between short term and long term leasing. Even lease for tenure of 99 years cannot be said to be equivalent to transfer of immovable property so as to keep the same outside levy of service tax.
- Renting of vacant land has become taxable w.e.f. 1.7.2010. Hence, there cannot be any service tax liability on leasing of vacant land prior to such date.

**Comment:** Post Negative list, the declared service entry covers renting of immovable property. The scope of levy has been enlarged by including renting of immovable property for any purpose within ambit of service tax as against earlier definition where renting for use in the course of or for furtherance of business or commerce was only included. Also, such renting cannot be considered as transfer of title in immovable property in any other form so as to keep the same out of the definition of the term "service" as defined under section 65B (44).

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**11. Refund of Cenvat Credit not deniable on the ground that export of service carried out from unregistered premises** (*Embitel Technologies (India) Pvt. Ltd. 2015(39) S.T.R. 612 (Tri.-Bang)*)

- Refund of Cenvat Credit cannot be denied on the ground that exports of services are carried out from the unregistered premise.
- No bar or prohibition in law for making exports from unregistered premises. Once admissible Cenvat credit accumulates and Rules provide for refund, such refund cannot be rejected. Subsequent registration of premise is sufficient.

**Comment:** Again, this is very often raised question in the departmental audit where observation is made for reversal of credit/rejection of refund 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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**12. Service Tax on GTA required to be paid by consignee when mentioned in consignment note that liability is of consignee though freight paid by consignor** (*Bhagyalaxmi Electroplast P. Ltd. 2015 (39) STR 622 -Tri-Bang.*)

- Consignor paid freight to transporter and recovered the same from consignee by indicating separately on the invoice. Price quoted is not 'FOR' delivery.
- It has been mentioned on the consignment note that the liability to pay service tax is on the consignee.
- Liability on GTA is on the person who is liable to pay freight either by himself or through his agent irrespective of the person who is actually paying freight to transporters. Merely fact that freight has been paid by consignor does not preclude the consignee from paying ST when clearly mentioned on the consignment note that liability is of consignee.

**Comment:** The judgment lay down correct position of law. In commercial transaction, it must be clearly mentioned in the documents i.e. PO, agreement, consignment note etc. as to person who is liable to pay freight and liability to be discharged accordingly. Once freight expenses are recorded in profit & Loss Account, this is going to be examined by department whether tax has been paid under RCM on such expenses. The supporting documents would assist in ascertaining the person who is liable.

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**13. Service receiver is not liable to examine the correctness of service tax paid by service provider** (*India Vision Satellite Communication Ltd. 2105(39) S.T.R. 684 (Tri.-Bang.)*)

- If the service tax has been paid by the service provider and service receiver is eligible for the credit, it is not the responsibility of service receiver to examine the correctness of tax paid and department cannot deny credit of service tax on this ground.
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**14. The term "office" as indicated in the definition of input service distributor not confined to head office only. Credit distributed by regional offices are also eligible** (*The India Cements Limited vs CCE Tirunelveli 2015-TIOL-1620-CESTAT-MAD*)

- The term "an office" cannot be limited to a physical boundary but shall be interpreted as different boundaries which are offices and distribute the credit
  - The term "an office" used in Rule 2 (m) of Cenvat Credit Rules, 2004 is to be read in plurality in the context in which that is used and any narrow meaning given to the term "an office" would defeat the spirit of the provisions.
  - Credit may be distributed by multiple units. Not confined to distribution by head office only.
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**15. Cenvat credit on service tax paid on input service in case where assessee is 100% EOU is allowed** (*Lavin Kapur Cottons Pvt. Ltd. 2015(39)S.T.R. 514 (Tri.-Mumbai)*)

- Assessee can avail the Cenvat credit on service tax paid on input service on ground that assessee exported the goods while claiming the benefit of Notification No. 30/2004.
  - In view of principles that only the goods are exported and taxes are not exported including the taxes on final product or taxes on inputs used in manufacture of final product. The intention of litigation is to ensure that the duty is not levied on the export goods or on inputs used in the manufacture of goods.
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**16. Services of procuring purchase orders/marketing provided to holding company situated outside India for sale of their goods in India is export of service** (*Ishida India Pvt. Ltd. 2015 – TIOL – 1719 – CESTAT – DEL*)

- Order received from Indian customers on behalf of holding company located outside India. Commission is received from foreign company based on goods supplied to Indian customers pursuant to obtaining purchase orders.
- If no purchase orders are canvassed, there would be no supply or use of goods in India at all. Merely because the goods supplied were ultimately used in India, cannot be a reason to hold that there was no export of the output service
- The effective use and enjoyment of the service of procuring purchase order is by the Company in Japan and therefore the only conclusion possible is that the services were exported.

**Comment:** The judgment has been delivered in the context of earlier provisions of Export of Service Rules, 2005. Presently, the service is in the nature of intermediary service and is liable to be taxed in India as the location of service provider i.e. intermediary is in India as per Place of Provision of Service Rules, 2012.

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