HIREGANGE & ASSOCIATES

Indirect Tax- Latest Judicial Precedents

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Advance Ruling

1. **Subscription to share capital necessary to avail the service in future is consideration towards service and liable to service tax** *(M/S Avadh Infratech Ltd, Surat, Gujarat 2016-TIOL-27-ARA-ST*)

   - Background: Applicantcollected money from its shareholders for funding thesole object of company i.e. establishment of a luxurious club.Club membership granted only to shareholders of the company. Part of share subscription appropriated towards equity share capital and remaining towards development contribution fund and treated as a deposit in the company.
   - Issue:Advance ruling sought as to whether such money/contribution received by applicant against shares and deposits from the prospective members would be treated as consideration for a taxable service and thereby be liable to service tax ('ST').
   - Decision:Members of the club, in lieu of shares, would get services which include provision of a facility provided by the club such as restaurant, swimming pool and gymnasium as also all incidental activities necessary for the attainment of said objects of the club. Hence, the money/contribution received by company against the shares is taxable as service as per the provisions of the Finance Act, 1994. However, refundable security deposit not liable to tax.

   Linked to GST: *The definition of "supply" and "consideration" is wide enough to cover such nature of transactions and accordingly may be liable to GST also*

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2. **No benefit of exemption from ST to job-worker where principal manufacturer is availing central excise ('CE') exemption on manufacture (***M/S Sarkar & Sen Company, West Bengal 2016-TIOL-24-ARA-ST)*

   - Background:Applicant is availing benefit of ST exemption (as per notification 25/2012-ST) in respect of specific job work undertaken inside the factory of the manufacturer. Manufacturer already availing 100% CE duty exemption on the manufacture of specific goods involving job work vide Notification No. 12/2012-CE (NT).
   - Issue:Advance rulingsought as to whether applicant eligible for exemption from payment of ST on job work undertaken inside the factory of the manufacturer where CE exemption on the same claimed by manufacturer?
   - Decision: As the 'principal manufacturer' is availing benefit of 100% CE exemption on the manufacture of specific goods involving job work by the applicant, the benefit of ST exemption, in relation to the said job work, cannot be extended to the applicant.

   Linked to GST: *The job work charges levied by job worker are subjected to GST. Supply of goods by principal manufacturer to job worker and return thereof by job worker is not liable to GST if the conditions of section 43A are fulfilled.*

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3. Construction of pipe line or conduit cannot be considered a part of construction of building or civil structure and credit is admissible *(Rastriya Ispat Nigam Ltd. 2016(44) S.T.R. 136(Tri- Hyd.)*

- Background: Assessee had availed cenvat credit relating to the work contract service for laying of pipe works in the factory for supply of water to the raw material plant. Department denied the credit on ground that the laying of pipe or conduit is included in construction of building or civil structure and hence, falls outside the definition of input service under Rule 2(l) of CCR.
- Issue: Whether credit of ST paid on servicesof lying of pipe works in the factory is inadmissible to assessee?
- Decision: Definition of construction service under Sec.65 (25b) of the Act covers 2 services viz. "construction of building/civil structure/part thereof" and "construction of pipeline/conduit" under two different, independent sub-clauses which means that both cannot be said to be same. Similarly, the two services are distinct from works contract service defined under Sec. 65(105) (zzzza) (b) of FA.
- Hence, as not falling under the exclusion clause of definition of input service, credit of construction of pipeline/conduit services held admissible.

***Linked to GST**: Under Model GST law, construction services have not been defined. As per Section 2(107), "works contract" means an agreement for carrying out for cash, deferred payment or other valuable consideration, building, construction, fabrication, erection, installation, fitting out, improvement, modification, repair, renovation or commissioning of any moveable or immovable property;*

Further, sub-clause (c) of Section 16(9) disallows credit in respect ofgoods and/or services acquired by principal in execution of work contract when such contract results in construction of immovable property, other than plant and machinery. The eligibility of credit would depend upon interpretation of "construction of immovable property" and whether pipeline/conduit could be said falling within this limb.

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4. Only those rights which are recognized under any Indian law for the time being in force wouldget covered under the definition of Intellectual Property Right ('IPR') service liable to service tax*(Reliance Industries Ltd. 2016(44) S.T.R.82 (Tri-Mumbai)*

- Background:Assessee remitted the amount to various overseas entities towards the right to use/enjoy confidential/ technical know-how and patents held by such overseas entities. Department demanded service tax, under reverse charge mechanism, on such remittances under the head of IPR services.
- Issue: Whether an IPR, which is not recognised under Indian laws for the time being in force would constitute an IPR, the temporary transfer or the right to use or enjoyment of which is liable to service tax under the head of IPR services?
- Decision: Relying on case of TCS v. CST [2016(41) S.T.R. 121 (T)] as well as CBEC

Circular No. 80/10/2004-ST, Mumbai tribunal observed that "law for the time being in force" implies that only IPRs covered under Indian law in force would be chargeable to service tax. In present case, IPRs not recognized under the Indian law held not liable to service tax.

***Linked to GST**: As per Schedule II of Model GST Law, temporary transfer or permitting the use or enjoyment of any intellectual property right is to be considered as supply of service and thus, liable to GST. There is no reference to "law for the time being in force" and hence all IPR would be subjected to GST.*

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5. Overseas branches turnover will neither be included in export turnover nor in the total turnover of the assessee for refund purpose*(Nihilent Technologies Pvt Ltd 2016-TIOL-2262-CESTAT-MUM)*

- Background:Assessee filed refund claim in respect of service tax paid on the input service used for export of services including the turnover of services provided by the assessee's branches located in South Africa and UK to foreign based service recipients. Department rejected the refund claim contending that overseas branch turnover is not 'export turnover' while maintaining that it is addable in the 'total turnover' of assessee.
- Issue:Whether the value of service provided by the overseas branches of the assessee should be included in the 'total turnover' and 'export turnover' of the assessee?
- Decision:Under service tax laws, overseas branches of assessee are considered as distinct persons. Further, the overseas branches (viz. service providers) being located in non-taxable territory, the services provided by them are not 'export of service' in terms of Rule 6A(a) of STR, 1994.Thus, overseas branches turnover will neither be included in export turnover nor in the total turnover of the assessee.

***Linked to GST**: Under GST Law, "turnover" has been defined to include, inter-alia, exports of goods and / or services made within a State by a taxable person. Definition of "Total Turnover" as prescribed in the Draft Refund Rules covers the value of Turnover in State. Hence, the turnover of foreign branches shall not be included.*

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6. Conditions of beneficiary notification providing exemption by way of refund required to be fulfilled at the time of availing exemption *(Kolland Developers Pvt. Ltd. 2016(44) S.T.R. 65 (Tri- Mumbai.)*

- Background: Assessee, a developer of SEZ, filed refund claim in terms of Notification No. 12/2013-ST exemption of service tax on services availed by way of refund. Department rejected the refund claim on ground that receipt of specified services were not approved by Approval Committee at the time when the said serviceswere availed and thereby violating a condition under clause 3(I) of said exemption notification.
- Issue: Whether assessee is eligible for refund of service tax paid in respect of services availed in SEZ Unit?

- Decision: Notification No. 12/2013-ST providing exemption by way of refund, conditions thereof required to be fulfilled at the time of availing the services. Assessee having not fulfilled mandatory condition of getting services approved at time of availing exemption, refund of service tax held not grantable.

***Linked to GST**: Draft Refund Rules provide that the refund needs to be claimed by SEZ unit/developer. No mechanism has been proposed for ab-initio exemption on supplies made to SEZ unit.*

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7. Credit of tax paid on subscription to association/clubs/periodicals is not admissible *(Eid Parry India Ltd 2016(44)S.T.R 144 (Tri- Chennai)*

- Background: Assessee is an exporter/ domestic seller of sugar and availing credit of tax paid on subscription to Association/clubs/ Periodicals. Department disallowed the credit.
- Issue: Whether assessee is eligible to avail the credit of tax paid on subscription to Association/clubs/ Periodicals?
- Decision: Activity of Subscription to association/clubs/periodicals does not have any integral connection with the business of assessee. Therefore, as per Rule 2(l) of CCR, 2004, it is not an input service and credit is not admissible.

***Linked to GST**: The definition of input tax credit under GST is very wide to cover tax charged on any supply of goods/services used or intended to be used in the course or furtherance of business. Hence, all such expenses would be eligible for credit unless incurred for private/non-business purpose.*

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8. No requirement of credit reversal relating to input rejected during manufacturing process and sold at transaction value (TV)*(Castrol India Ltd. 2016(339) E.L.T. 265(Tri- Ahmd.)*

- Background:Certain inputs, related to which cenvat credit availed, sold as rejected /damaged goods at a TV much lower than their purchase price and excise duty paid on such lower TV. No corresponding reversal done of excise duty equal to cenvat credit availed. Department considered the sale as an "as such" removal of inputs and demanded to pay an amount equivalent to credit availed at the time of purchase as per Rule 3(5) of CCR, 2004.
- Issue: Whether assessee liable to pay excise duty equal to credit availed in respect of inputs rejected during manufacturing process and sold at TV?
- Decision: Where inputs are rejected during manufacturing process and sold at TV, excise duty is to be paid on TV. It is immaterial if the size, shape as well as classification remains the same after rejection. Reversal of credit to the extent of availment on said inputs is not required.

***Linked to GST**: Each supply of goods/service shall be independent to each other. There is no concept of "removal as such" under GST and supply of any nature shall be subjected to GST without requirement of reversal of credit.*

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9. Demand of excess 50% credit availed by wrongly availing 100% capital goods credit in same year of purchase held not sustainable as it is merely a procedural lapse*(M/s SUNDER ISPAT LTD2016-TIOL-2588-CESTAT-HYD)*

- Background: Assessee availed 100% credit on specified capital goods in the same year of purchase during the period 2005-06 to 2007-08. On show cause notice being issued, assessee paid the interest and penalty thereon but contested the demand of excess credit availed.
- Issue:Whether assessee is liable to pay the demand of irregularly availed excess credit?
- Decision:Relying on the case of Indian Oil Corporation Ltd Vs CCE, Delhi [2005 (187) ELT 241 (Tri.-Del)], the Hyderabad Tribunal observed that as assessee is eligible to avail 50% credit in the subsequent year, there is no revenue loss in such case. The availment of 100% credit in the same year of purchase is only a procedural lapse and thus payment of interest and penalty would suffice as compensation.

***Linked to GST**: Capital goods credit may be allowed to be taken fully in first year itself. Hence, such issues may not arise under GST regime.*

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10. Discounts allowed in the price contracted for sale from the depot would be allowable as deduction from such price *(M/s Havells India Ltd. 2016 TIOL-2527-CESTAT- DELHI)*

- Background: Assessee was claiming various types of discounts such as cash discount, quarterly and annual turnover discount etc. Though the fact of extending these discounts were known at the time of removal of the excisable goods but the actual quantification of these discounts were known only after achieving the sales target. Department contended that assessee will not be entitled to the deduction of discounts in respect of goods sold from their depot after their clearance from the factory.
- Issue: Whether assessee is eligible for claiming discounts in respect of goods sold from their depot after their clearance from the factory?
- Decision:The discounts are allowable on the normal TV (i.e. TV at which greatest aggregate quantity are sold) from the place of removal. In the present case, as per Section 4 of CEA, 1944 read with Rule 7 of Valuation Rules, 2000, the place of removal is not the factory gate but the depot of the assessee.Hence, discounts allowed in the price contracted for sale from the depot would be allowable as a deduction from such price.

***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. Hence, the deduction of discount from transaction value could be claimed subject to fulfillment of stringent requirement.*

11. Credit on services availed by job- worker having exemption benefit under Notifn. No. 214/16- CE is admissible to principal manufacturer *(Interface Microsystems 2016-TIOL-2457-CESTAT-CHD)*

- Background:Assessee had availed credit on manpower and recruitment supply agency service and security service used by the job worker who was exclusively manufacturing the goods on behalf of the assessee by availing exemption under Notification No.214/86-CEdated 25.3.1986. Department disallowed the credit on ground that the said services were not received by assessee.
- Issue: Whether assessee is eligible to avail the credit on services used by the job worker?
- Decision:Relying on the decision in the case of MRF Ltd. [2013 (31) STR 689], the Tribunal observed that as per Rule 3 of CCR, 2004,if job worker avails the exemption under Notification No.214/86-CE then principal manufacturer is entitled to avail credit of services availed by job worker. Hence, assessee is eligible to avail credit of services availed by job- worker.

***Linked to GST**: There is no concept similar to Notification No 214/86-CE under GST. Job worker shall have to charge GST on job work charges and may take ITC on input/input service used for such job work process.*

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12. Subsequently quantified quantity discount actually passed on to dealers allowable as deduction*(M/S Mercedes- Benz India Pvt. Ltd 2016-TIOL-2567-CESTAT-MUM)*

- Background: Assessee cleared final product viz motor vehicles to their dealers at fixed rate and allowed them performance-linked quantity discount based on turnover quantified at year end. Department contended that dealers had not sold the cars manufactured and cleared to them by the assessee of the same calendar year, thereby disallowing the deduction relating to quantity discount. Also, the deduction of discount extended to non-performing dealers was also disallowed.
- Issue: Whether assessee is allowed to take deduction of the quantity discount including the discount extended to non performing dealers?
- Decision: In present case, quantity discount was an advancely intimated discount without any qualification as to which cars are to be sold to be eligible for said discount. Only condition of selling specified number of cars in a calendar year had to be met to be eligiblefor the discount.
- Further, in relation to extending discount to non performing dealers, the discount had actually been passed on to the dealers and that by extending such discount, the dealers would be encouraged to work more efficiently and get orders for cars which would benefit the dealers as well as the assessee.Hence deduction claimed in relation to quantity discount held legitimate.

***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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