HIREGANGE & ASSOCIATES

Indirect Tax- Latest Judicial Precedents

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HIGH COURT

1. Amount paid as "tax" by assessee under mistaken belief of fact or law or both, being erroneous and without authority of law, cannot be retained by Government *(G.B. Engineers Vs UOI 2016-43-S.T.R.-345-Jhar.)*

- Background: Assessee filed a refund claim for an amount erroneously deposited for the period during which service tax was not leviable on services provided. Department contended that refund claim is time bared as per section 11B of CEA, 1944 read with section 83 of FA, 1994.
- Issue: Whether refund claim is admissible to assessee?
- Decision: Service Tax paid by assessee under mistaken belief of fact or law or both, being erroneous and without authority of law, cannot be retained by Government. Therefore, refund claim is allowed to assessee.

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2. Cenvat credit availed on the strength of an advisory note issued by Head Office ('HO') taken on the basis of valid documents, held admissible *(Bharat Sanchar Nigam Ltd.2016 (43) S.T.R. 540 (Raj.)*

- Background: HO issued ATDs (Advise of Transfer) to assessee for transferring capital goods along with the eligible cenvat credit of the central excise duty paid thereon. Accordingly, assessee availed credit. Department denied credit on ground that documents for availing credit were improper and not in accordance with law.
- Issue: Whether document issued by HO is eligible document for taking credit?
- Decision: As assessee and HO were falling in same area circle, it was a case of transferring goods from one place to another unit. Hence credit availed on the basis of Bill of Entry endorsed by HO was a valid document under Rules 3 and 9 of CCR, 2004 especially when capital goods were duly utilized by assessee for rendering taxable output service.

TRIBUNAL

3. Advertisement expenditure incurred by dealer would not be included in assessable value ('AV') of manufacturer in the absence of any enforceable legal right against dealer *(Luminous Electronics Pvt. Ltd. 2016(338) E.L.T. 154 (Tri-Del.)*

- Background: Assessee cleared goods to wholesale dealers for further sale all over country. Advertisement expenses solely borne by the dealers. Department contended such advertisement costs would be included in AV of assessee and be made liable to central excise duty.
- Issue: Whether advertisement costs solely incurred by dealers to be included in AV of assessee?

- Decision: Benefits of higher sales and profit will be available to both (assessee as well as dealer) and not be restricted to the assessee only. Settled law that in absence of any enforceable legal right against dealers for incurring advertisement expenses, the same need not form part of AV of assessee.

***Linked to GST**: Section 15(2)(g) provides for any reimbursable expenditure/cost incurred by/behalf of supplier and charged in relation to the supply of goods and/or services to be included in Transaction Value ('TV'). Hence it implies that expenses, not linked to supply do not form part of TV.*

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4. No liability to reverse cenvat credit on sale of capital goods ('CG') when no credit was availed at the time of its purchase *(Shree Bhageshwari Papers Ltd. 2016(338) E.L.T. 132 (Tri-All.)*

- Background: Assessee had purchased second-hand CG in 1997 without payment of duty (as no excise duty levy existed on the said goods) and sold it after using for more than 10 years. Department contended that on disposal of CG, assessee liable to pay an amount i.e. higher of (a) proportionate cenvat credit taken on CG or (b) duty leviable on TV of CG sold.
- Issue: Whether assessee liable to pay an amount as per Rule 3(5A) read with Rule 3(5) of CCR on sale of the CG?
- Decision: Tribunal held that as assessee had categorically asserted that no cenvat credit was availed when second hand CG was purchased, which was further corroborated by memorandum of purchase of 1997, provisions of Rule 3(5A) read with Rule 3(5) of CCR, requiring reversal of CCR, would not be applicable.

***Linked to GST**: Section 16 (14) of the Model GST Law provides for payment of specified amount on supply of CGs on which input tax credit ('ITC') availed. The ratio laid down in above judgment may hold good in the GST regime too where CGs, related to which no ITC was availed on purchase, are subsequently supplied.*

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5. Any service provided by seller till execution of sale deed is service to self only and not liable to ST *(Bairathi Developers Pvt. Ltd. 2016 (43) S.T.R. 455 (Tri-Del.)*

- Background: Assessee entered into JDA with land owners for construction of complex. Assessee got share of 50% of total construction area in lieu of construction expense borne by assessee. Department demand service tax on the balance 50% of the constructed property assigned to land owners.
- Issue: Whether assessee liable to pay service tax in respect of land owners' share of 50% of total construction area on merely entering into JDA/Agreement to sale?
- Decision: Referring to CBEC circular dated 29.01.2009 and same Tribunal's decision in the case of R.F. Properties & Trading Ltd [2012 (31) S.T.R 578], Delhi Tribunal held that service tax would not be payable as any service provided by seller till execution of sale deed is service to self only. As 50% of constructed property to be transferred to landowners only on completion of construction, no service provider-receiver relation to exist before such transfer.

***Linked to GST**: Construction services deemed as "supply of service" except where entire consideration received after issuance of completion certificate or before 1st possession, whichever earlier. Further, Section 13 of the Model GST Law, relating to time of supply of services, has not considered the agreement date for triggering the payment of GST.*

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6. Credit of input service availed for transfer of goods from factory to depot is admissible *(Alkem Laboratories Ltd. 2016 (43) S.T.R. 457 (Tri- Kolkata)*

- Background: Assessee availing area based exemption ('ABE').Availed cenvat credit of GTA services for transferring goods from factory gate (located within ABE area) to depot (located outside ABE area). Department contended that the credit in relation to service received upto place of removal ('POR') is admissible and place of removal being factory gate, denied credit from factory to depot.
- Issue: Whether Credit of GTA services availed from the factory gate to their depots will be admissible?
- Decision: 'Point of clearance ('POC')' distinct from 'POR'. POC is factory gate for which ABE available. On combined reading of 'input service' definition as per CCR with POR definition u/s 4(3)(c), input service credit of services availed up to the POR (viz. factory/warehouse/depot) admissible. Here, POR being depot, credit of GTA services availed from the factory gate to depot is admissible.

***Linked to GST**: The definition of input service under Model GST law has been kept wide enough to cover any service used or intended to be used by a supplier for making an outward supply in the course or furtherance of business. Hence, unless specifically provided/restricted, credit of GST paid on expenses incurred at place of business in relation to business would be available.*

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7. Credit on input service used in construction of dormitory for stay of technician/ engineers within factory located in remote area is admissible*(Bajaj Hindusthan Ltd. 2016(43) S.T.R. 461 (Tri-Del)*

- Background: Technicians/engineers required for maintenance of plants and machinery at factory of assessee. Factory being located in remote area, dormitory constructed within the factory for stay of the technicians/engineers. Input tax credit of construction service availed. Department denied the credit on ground that the same does not quantify as input service as per CCR.
- Issue: Whether assessee is eligible to avail Cenvat credit of service tax on the above construction services availed?
- Decision: Relying on Andhra Pradesh High Court's decision in the case of ITC Ltd [2013 (32) S.T.R 288], Delhi Tribunal observed that since stay of technicians /engineers required in factory located in remote area for maintenance of plant and machinery, construction of dormitory connected with business activities of assessee. Hence credit admissible.

***Linked to GST**: Tax charged on supply of goods and services to taxable person which are used in course or furtherance of his business is admissible as input tax credit. However, goods/services acquired by principal in execution of works contract which*

results in construction of immovable property, other than plant & machinery is not eligible for credit u/s 16 (9)(c) of the Model GST Law.

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8. Credit cannot be denied on account of excess service tax payment *(JCT Ltd. 2016(43) S.T.R.467 (Tri- Chan.)*

- Background: Construction Company paid service tax on 67% of the value of service instead on 33%. Assessee, being service recipient, took credit of actual service tax paid. Department denied credit to assessee to the extent of the excess service tax paid by construction company is not in the nature of service tax.
- Issue: Whether assessee is eligible to credit of excess service tax paid?
- Decision: Excess payment of service tax not disputed by department. Once the tax has been accepted by department, there is no justification for disallowing the credit.

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9. Credit is admissible on health insurance services for welfare of workers *(Fiem Industries ltd. 2016(43) S.T.R. 470 (Tri-Chennai.)*

- Background: Assessee availed Cenvat credit on health insurance service for welfare of employees. Department denied the credit on ground of exclusion of insurance service from Rule 2(l) of CCR, 2004w.e.f 1.4.2011.
- Issue: Whether credit could be taken on health insurance service?
- Decision: Exclusion in definition of input service is in respect of insurance services only with regard to coverage of employees during journey on leave travel and not for welfare of workers mandated in Factories Act.

Comment: *Credit is disallowed by department during the audit. The assessee could contemplate to avail the credit under protest so that the right to avail it within statutory time limit of one year is not lost. On subsequently having judicial clarity, it could be utilized for payment of output liability.*

Linked to GST*: Similar restrictions are placed in the Model GST Law on availment of credit. The judgment could be of equal relevance in the GST regime also. Also, the assessee may carry forward the credits presently taken under protest so that these are not lost in GST regime wanting disclosure in the return.*

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10. Credit of Health and Fitness service provided to BPO's Employees is admissible (*Sitel India ltd. 2016 (43) S.T.R. 424 (Tri-Mumbai)*

- Background: Assessee, a BPO service provider, considered health and fitness service availed for their employees as input service and availed related credit. Department denied the credit on ground that the said services were not falling under definition of input service and were not used for providing output service.
- Issue: Whether credit is admissible to assessee in respect of health and fitness service?
- Decision: Credit cannot be denied on basis of nomenclature of service. It is

necessary to ascertain nature and requirements for providing output service. BPO employees required to work 24X7. Health and fitness service not for entertainment of employees but a necessity for providing better quality of output service. Hence credit held admissible.

***Linked to GST**: Similar restrictions are placed in the Model GST Law on availment of credit. Section 16(9) (b) disallows ITC related to goods and/services used primarily by employees for personal use/consumption. The judgment could be of equal relevance in the GST regime also. Also, the assessee may carry forward the credits presently taken under protest so that these are not lost in GST regime wanting disclosure in the return.*

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11. Samples sold by manufacturer to distributor for further free distribution assessable at transaction value ('TV') unless price not the sole consideration*(Bausch & Lomb Eye care (India) P. Ltd. 2016(338) E.L.T. 297 (Tri-Del.)*

- Background: Assessee were selling sample packs of 60ml bottles at Re. 1/- to distributor meant for further free distribution by the distributors as sales promotion. Department contended that the sample bottles were required to be valued based on price of comparable goods (viz. half of price of 120ml bottles meant for retail sale) and demanded extra excise duty.
- Issue: Whether duty has been correctly paid by adopting the TV of the samples sold?
- Decision: Relying on the Mumbai Tribunal's decision on identical facts in the case of Sun Pharmaceutical Industries [2005 (183) ELT 42], as upheld by Apex Court, Delhi Tribunal held that, unless price is not sole consideration, small sample packs required to be assessed at TV between the manufacturer and distributor. Subsequent manner of distribution by distributor (as free samples or otherwise) irrelevant.

***Linked to GST**: As per Section 15 of the Model GST Law, where price is sole consideration, supplier and recipient are unrelated and there is no reason to doubt the truth/accuracy of the TV declared by supplier, the TV shall be the value of the supply made and valuation rules cannot be resorted to.*

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12. Penalty collected from dealers for violating terms of agreement is not includible in AV*(Skoda Auto India Pvt Ltd 2016-Tiol-2050-Cestat-Mum)*

- Background: Penalty paid by assessee's dealers to assessee if cars sold by dealers in territory different from territory allotted to the dealers. Department contended that such penalty amount received by assessee would be included in AV.
- Issue: Whether assessee is liable to pay duty on amount of penalty received from its dealers?
- Decision: Penalty collected from dealers for violating terms of agreement and selling motor vehicles in other dealers' jurisdiction is not in connection with sale but related to post sale breach of contract and is, therefore, not includible in AV.

13. **Limitation period of one year for refund filing to be computed from last date of quarter in which FIRCs issued** *(SG Analytics Pvt Ltd 2016-TIOL-2028-Cestat-Mum)*

- Background: Assessee filed refund claim under Rule 5 of CCR, 2004. Department denied the refund claim on ground that the computation of one year from the date of FIRCs would render it beyond the period of one year as specified in Notification No. 27/2012 – CE (NT).
- Issue: Whether the period of one year, specified in Section 11B of CEA, read with the above notification, to be computed from the date of issue of FIRC?
- Decision: Procedure laid down in the notification restricts filing of claims to only once in every quarter. Settled law that limitation will become operative only with reference to date of FIRC. Hence, on harmonious reading, relevant date to be the last date of the quarter in which the FIRCs were issued and not from date of issue of FIRC.

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-CEregarding 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.*

14. **Expenditure related to delegated service procured to provide an output service held as an eligible input service***(M/S My Car (Pune) Pvt Ltd 2016-Tiol-1962-Cestat-Mum)*

- Background: Assessee rendering 'authorized service station service' on behalf of M/s. Maruti Udyog Ltd. Output service of “free servicing” delegated to another authorized dealer. Related labour costs along with service tax paid by assessee to the servicing dealer and input credit thereof claimed. Department denied the credit on ground that it is not an input service and that the activity not being undertaken in assessee’s premises implies a disconnect with output service.
- Issue: Whether tax paid to the servicing dealer is admissible as input tax credit to the assessee?
- Decision: Relying on the Bombay HC decision in the case of Coca Cola India Pvt Ltd. [2009-TIOL-449-HC-MUM-ST], the Tribunal held that labour costs incurred by assessee are expenditure towards service procured to provide an output service. Fact that service not performed in assessee’s premises held immaterial. Hence, credit admissible.

15. **Credit of excise on demo car is not admissible** *(M/S Aras Motors Pvt Ltd 2016-TIOL-2158-Cestat-Mad.)*

- Background: Assessee is availing credit of excise duty on demo car purchased for the purpose of displaying to attract customers. Department denied the credit on

ground that demo car is neither a capital goods nor an input.

- Issue: Whether credit of excise duty on purchase of demo car is admissible?
- Decision: Credit of excise duty on demo cars held inadmissible as they were neither classifiable under any of the chapters dealing with capital goods nor were they used in providing output services to be eligible as inputs.

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