

HIREGANGE & ASSOCIATES

Indirect Tax- Latest Judicial Precedents

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By CA Ashish Chaudhary

HIGH COURT

1. Input Tax credits can be claimed based on invoice value even though goods sold to consumer at discounted price by dealer (*Jyoti electronics 2016(336) E.L.T. 517 (Raj)*)

- **Background:** Assessee, dealer of electronic goods, received quantity discount from manufacturer. Goods so purchased were sold at discounted price to the consumer. Assessee took credit of tax charged by manufacturer on gross amount i.e. before discount. Department contended that credit cannot be taken on invoice amount but should be taken on net amount after deducting discount.
- **Issue:** Whether credit can be claimed on the gross amount (before discount) or net amount (after discount)?
- **Decision:** Nothing in law to prevent an assessee to sell goods below invoice value or even at loss. Assessee can pass discount to consumers and can avail the credit on the gross amount of invoice charged by vendor.

2. Activation of SIM card is a service and not sale and no VAT could be levied on the same (*Idea cellular Ltd. Vs. Union of India, 2016 (42) STR 823 (P&H)*)

- **Background:** Appellant charged VAT on activation of SIM cards and paid to state govt. Service tax department demanded ST on the same activity. Appellant filed writ to the High court contending that VAT paid to the state should be refunded as VAT is not leviable on aforesaid activity.
- **Issue:** Whether activation of SIM card is to be considered as Sale or service? If it is to be considered as service, then should vat collected by state be refunded?
- **Decision:** Activation of SIM card is service, not sale. No state has the right to retain taxes or money realized from citizens without authority of law. VAT collected by state govt to be refunded/transferred to Central Government, as the activity is subjected to levy of service tax.

Comment: *The judgment has upheld the Constitutional Principle that government cannot retain the amount in the name of tax unless it is due to them under relevant statute. Government cannot benefit itself at the cost of citizen.*

TRIBUNAL

3. Cost of Additional testing conducted on request of customer is not includible in assessable value for excise duty payment (*Bharat Bijlee Ltd. 2016(336) E.L.T. 78 (Tri-Mumbai)*)

- **Background:** Assessee conducted additional testing on request of customer. Department contended that the cost of additional testing needs to be included in the assessable value as the said test are required as per Indian Standard.
- **Issue:** Whether the cost of additional testing needs to be included in assessable value?
- **Decision:** Cost of the testing is not recovered by assessee from customer. Tribunal

relying upon the judgment of Shree Pipes Ltd. concluded that additional testing charges conducted by assessee for their own control quality test to market final product are not includible in assessable value.

4. Used Video cameras are considered as second –hand capital goods under FTP and freely importable (*Studio 24 Frames 2016(336) E.L.T. 532(Tri- Hyd.)*)

- **Background:** Assessee imported used video cameras as free importable second hand capital goods. Revenue contended that activity for which goods imported, not a service earning foreign exchange and hence said goods not capital goods.
 - **Issue:** Whether the video cameras are considered as second-hand capital goods and are freely importable?
 - **Decision:** Used second–hand video cameras imported by assessee is a basic infrastructure and machinery for revenue generation and for renting out to companies for making movies, television serial and documentary. Aforesaid goods, being capable of being sold as such, covered under category of second-hand capital goods under FTP and freely importable.
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5. No denial of credit if activity does not amounts to manufacture but final goods cleared along with excise duty (*Shree Rubber Plast Co. P. Ltd. 2016 (336) E.L.T. 313(Tri-Mumbai)*)

- **Background:** Assessee procured duty paid plastic bottles and after fitting with owned manufactured cap clearing on payment of duty and availed credit on bought out bottles. Department denied the credit on grounds that said activity does not amount to manufacture.
 - **Issue:** Whether credit is admissible on such bought out plastic bottles?
 - **Decision:** It was held that as per Rule 16 of Central Excise Rules, 2002, if the process does not amount to manufacture then the manufacturer is required to pay duty equivalent to cenvat Credit availed. As the payment of duty is not under dispute, credit is eligible.
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6. Erection and commissioning of equipment at customer's premises are not includible in assessable value (*Ultraseal (India) Pvt. Ltd. 2016 (336) E.L.T. 364 (Tri-Mumbai)*)

- **Background:** Assessee had undertaken erection and commissioning of machines at their customers premises and charged separately for such work. Department contended that the said charges included in assessable value.
 - **Issue:** Whether the erection and commissioning charges will include in assessable value?
 - **Decision:** It was held that Expense on erection and commissioning are post clearance expense at the behest of the customers, hence not includible in assessable value for charging excise duty.
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7. Unutilized Cenvat credit of EOU at the time of de-bonding can be transferred to DTA Unit (*Tecumseh Products India P. Ltd. 2016 (636) E.L.T. 685 (Tri-Bang)*)

- **Background:** Assessee has transferred the unutilized Cenvat credit in account of EOU at the time of its de-bonding to DTA unit, Department contented that this transfer of credit is not covered by the provision of Rule 10 and denied the credit.
- **Issue:** Whether the unutilized Cenvat credit lying in account of EOU at the time of its de-bonding can be transferred to its successor DTA at the time of its de-bonding?
- **Decision:** Rule 10 of CCR does not prohibit the availment of such credit at the time of conversion of DTA to EOU. Hence, a successor DTA can get the unutilized credit lying with its predecessor unit, i.e. from EOU.

8. Adjudicating authority need to follow the pronouncements made by higher judicial forums (*Ahclon Builders & developments P. Ltd. vs. CCE & ST, Surat-I, 2016(42) S.T.R. 845 (Ahmd.)*)

- **Background:** Assessee received free supply of goods for providing service of construction. Assessee relied on the Bhayana Builder judgment and didn't include the cost of free supply material to the gross value. Adjudicating authority disregarded the Larger Bench judgment of Tribunal in Bhayana Builders Pvt. Ltd. by observing that said judgment has not yet attained finality.
- **Issue:** Whether department contention is correct?
- **Decision:** It was held that the Adjudicating Authority cannot disregard this applicability on the grounds that the case has not yet attained finality. Judicial discipline demands that adjudicating authority should follow the pronouncements made by higher judicial forums without reservations.

9. Contribution towards PF to be included in the gross amount charged by the manpower supply agency (*Maurya Brothers vs. CCE -Ahmd, 2016 (42) STR 859 (Tri-Del)*)

- **Background:** Assessee providing manpower recruitment and supply agency services and was responsible to remit the Provident Fund amount to Provision Fund Authorities.
- **Issue:** Is this amount to be included in the gross amount charged for taxable service rendered?
- **Decision:** It was held that since statutory liability to remit the provident fund amount to PF authorities is on assessee. Thus, this amount shall be included in gross amount charged. Court relied upon in the case of M/s Neelav Jaiswal & Brothers (2014 (34) STR 225 (Tri.-Del))

10. Credit distribution as ISD not deniable merely because office registered as ISD not providing any output service. (*Qualcomm India Pvt. Ltd. vs. CST, Mumbai-I, 2016 (42) STR 886 (Tri-Mum)*)

- **Background:** Appellant is providing services from Delhi and Mumbai. Delhi office is registered as ISD and accounts and billing are centralized at Mumbai office. No output service is provided from Delhi office. Department contended that ST attributed to services used in Delhi office are not eligible for distribution to the Bombay office.
 - **Issue:** Can distribution of Cenvat Credit be allowed from Delhi office?
 - **Decision:** It was held that the Delhi office has correctly distributed Cenvat credit to its Mumbai office in terms of Rule 7 of CCR, 2004. Billing has been done by Mumbai office and payments have been received in foreign currency, disallowance of credit set aside.
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11. Credit admissible of services utilized up to the place of removal (Ashoka Industries vs. CCE- Jaipur-I, 2016(42) STR1009-Tri-Del.)

- **Background:** As per P.O., sale price is fixed as FOR at buyer's premise. The appellant availed insurance and GTA service for such delivery. Department denied the credit on outward transportation.
 - **Issue:** Whether credit of such services can be availed as Input service?
 - **Decision:** It was held that appellant is eligible for credit on freight & insurance charges incurred upto place of removal. The ownership and responsibility of goods hasn't passed by way of sale until it is delivered at the destination. Hence, credit is admissible.
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12. Value of goods supplied by the principal manufacturer need not be added in the AV while discharging CE duty (VAKO SEALS PVT LTD 2016-TIOL-1364-CESTAT-MUM)

- **Background:** Assessee carried out the process of bonding of rubber by using bodies of valve supplied by principle manufacturer and discharging the excise duty on the valve of rubber product used by them plus job work charges. Department is demanding duty on bodies of valve also.
 - **Issue:** Whether assessee is eligible to discharge duty on bodies of value supplied by principal manufacturer?
 - **Decision:** It was held that No duty is required to be paid on the job work activity in terms of Notification No. 214/86-CE. Accordingly, value of machine bodies supplied by the principal manufacturer need not be added in the AV while discharging CE duty on rubber product used for job work.
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13. Excise duty need not to be charged on the freight amount in case freight amount is not shown in excise invoice (M/s CYLIN VALVE INDUSTRIES 2016-TIOL-1399-CESTAT-MUM)

- **Background:** Assessee mentioned the amount of freight charges in commercial invoice instead of Excise invoice. Department demanded Duty on grounds that the freight amount was not shown in the invoice which is in contravention of the Rule 5 of Central Excise Valuation Rules and duty is payable on such freight charges.

- **Issue:** Whether assessee is liable to pay duty on value of freight?
 - **Decision:** The adjudicating authority in its order has accepted that place of removal of such goods is factory. It was held that merely because in excise invoice the amount of freight is not shown, the excise duty cannot be charged on the freight amount.
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14. Playing cards which is supplied along with final product is eligible for input credit (M/s MANIK MACHINERY MANUFACTURERS PVT LTD 2016-TIOL-1497-CESTAT-MUM)

- **Background:** Assessee supplied 'playing cards' as a free gift along with their final product. Department contended that playing card is neither input nor used in or in relation to the manufacture of final product therefore it does not fall under the category of input or input services and Cenvat credit is not admissible
 - **Issue:** Whether credit is admissible on playing cards?
 - **Decision:** It was held that playing cards are purchased by the assessee and expenditure of the same stands absorbed in the cost of the final product which ultimately suffered the duty as a whole, therefore eligible for input credit.
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15. No reversal of credit is required in case of receivable amount is written off as bad debts and tax has been paid on such amount (M/s JAKG COMMUNICATIONS PVT LTD 2016-TIOL-1507-CESTAT-MAD)

- **Background:** In the course of provision of service certain amount receivable from the recipient of service could not be realized. Department is of the view that to the extent amount not realized, Cenvat credit is to be reversed.
 - **Issue:** Whether Credit is required to be reversed on the amount not realized?
 - **Decision:** It was held that when there is no such provision is specified in the law which requires the reversal of credit in respect of the Output Service provided and the consideration thereof not realized for which such receivable amount is written off as bad debt. Hence, no need to reverse the credit.
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16. Service rendered to J & K are not exempted service hence reversal of credit on common input service under Rule 6(3) not required (M/s RAMBOLL IMISOFT PVT LTD 2016-TIOL-1536-CESTAT-HYD)

- **Background:** Assessee availed credit on the input services for providing service to state of Jammu and Kashmir. Department contended that when the Finance Act, 1994 itself is not applicable to Jammu and Kashmir, the services rendered in that State are exempted services and denied the credit.
- **Issue:** Whether credit on common input services is required to be reverse?
- **Decision:** Services rendered in J & K are not chargeable to tax does not make them exempted services and Sub clause 2 of Rule 6 covers output service which are leviable to tax but exempted. Hence, no reversal of credit is required.

17. Amount of freight which is collected in excess of actual freight is not includible in the assessable value (M/s BHARAT PETROLEUM CORPORATION LTD 2016-TIOL-1520-CESTAT-MUM)

- **Background:** At the time of clearance the assessee was collecting extra amount per KL over and above the assessable value declared as Free Deliver Zone (FDZ) charges. Department contended that the said amount was includible in assessable value and leviable to tax.
- **Issue:** Whether the amount of freight collected in excess is included in assessable value?
- **Decision:** Court relied upon the case of *IOCL 2013 (291) ELT 449* where it was held that any amount of freight which is collected in excess of actual freight is not includible in the assessable value.

18. Credit of tax paid on insurance services for employees in factory is admissible (M/s FIEM Industries Ltd 2016-TIOL-1451-CESTAT-MAD)

- **Background:** Input services credit availed on insurance premium for health insurance of factory employees, credit denied on the ground that such services are specifically excluded from the definition of input service.
- **Issue:** Whether credit of tax paid on insurance premium for health insurance of factory employees is admissible?
- **Decision:** It has been held that exclusion of insurance service in certain events is only in respect of the insurance coverage given to employees during journey availing leave travel concession. The insurance service is availed to overcome difficulties under Workmen Compensation Act and hence credit could not be denied.

Comment: *The judgment pertains to period post 1.4.2011 wherein restriction was placed on availment of credit of insurance service primarily used for personal consumption of employees.*

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