HIREGANGE & ASSOCIATES

Indirect Tax- Latest Judicial Precedents

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By CA Ashish Chaudhary

HIGH COURT

1. **Service tax payable on construction service provided by developer to land owner** *(Southern Properties & Promoters 2015 (30) S.T.R. 892 (Mad.)*

   - Background: Service provider constructing flats under JV with land owner out of which few flats granted to land owner. No service tax paid on flats handed over to land owner citing that no consideration received from land owner. Tribunal ordered for pre-deposit.
   - Issue: Whether developer is liable to pay service tax on construction service provided to land owner?
   - Decision: Construction of flats for land owner is classifiable under the category of construction of complex service. In the absence of monetary consideration, section 67 read with Service Tax (determination of value) Rules, 2006 provides for various method of valuation. Value to be arrived at as per these methods by Tribunal during hearing.

   ***Comment**: There could be different options for charging service tax as follows:*
   - *Market or guideline value of land: at the time of entering into JV*
   - *Construction cost plus gross profit*
   - *First sale price of similar service: could be flat booked on Bhoomijooja day*
   - *Value of similar flats to buyer at the time of delivery of landowner flat*

Advance Ruling

2. **Consideration paid to employee of another company working under employment arrangement of assessee is not liable to service tax** *(M/s North American Coal Corporation India Pvt Ltd 2015-TIOL-08-ARA-ST)*

   - Background: Assessee employed one employee on permanent roll from his holding company. His salaries to be paid by assessee but social security interests taken care of by holding company as per tripartite agreement between assessee, holding company and employee. Assessee applied for advanced ruling.
   - Issue: Whether arrangement between employee and assessee is in the nature of employer-employee arrangement so as to be out of definition of service?
   - Decision: The agreement suggests that so long as employee is working in India, it shall be considered as employee of the assessee notwithstanding that the social security is taken care of by holding company. The nature of arrangement is employer-employee covered by exclusion clause of definition of service. No liability of service tax.

   ***Comment**: Though the judgment is binding on the assessee only (being judgment of advance ruling), yet it could give planning opportunities in case of group companies where deputation of employee is regular feature.*

TRIBUNAL

3. Assessee not liable to pay interest and penalty for fraud by consultant in tax and interest payment *(Hemangi Enterprises 2015 (40) S.T.R. 945 (Tri.- Mumbai)*

- Background: Assessee appointed consultant for discharging service tax liability. Paid cash towards service tax to consultant who instead of paying to department pocketed himself. Consultant admited fraud. Penalty demanded from assessee on ground that assessee was aware about the fraud of consultant.
- Issue: Whether assessee is responsible for payment of penalty for the fraudulent act on the part of consultant?
- Decision: There is clear evidence that assessee had withdrawn cash from bank and had been paying same for tax payment to consultant who instead of depositing same with exchequer, pocketed it. Assessee not aware of fraud of consultant and not liable for penalty.

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4. No service tax liability on services provided by association /club for welfare of its members *(Chiplun Nagari Sahakari Patsanstha Ltd. 2015 (40) S.T.R. 957 (Tri-Mumbai)*

- Background: Association/Club (assessee) providing service to its member by taking deposit from them and lending to needy member on interest with some clerical charges. Demand raised on allegation service provided by association comes under Banking and Financial service.
- Issue: Whether association/club is liable to pay service tax on service provided to its members?
- Decision: Association/Club is not accepting or lending money from public at large. It is working on the concept of mutuality where there is no difference between society and its members. Therefore, no service tax payable on services provided to its members for their welfare.

***Comment**: The judgment has highlighted the concept of mutuality and held that no service tax applicable for services rendered by club to members.*

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5. Prior to 1.4.2011 trading activity was not considered service at all, therefore no requirement to maintain separate account for trading activity *(Krishna Auto Sales 2015 (40) S.T.R. 1121 (Tri.-Del.)*

- Background: Assessee engaged in sale of vehicles and providing repair/maintaining of vehicles service. Cenvat credit availed on common input services (mobile phone) used in both trading and repairing activity. Department disallowed entire credit on failure to maintain separate account for trading activity.
- Issue: Whether entire credit not allowed for failure to maintain separate account for trading activities?
- Decision: Trading activity was not *"service"* prior to 1.4.2011. Therefore as per Rule 6(2) of Cenvat credit Rules, 2004 assessee not required to maintain separate accounts for trading activity and entire credit not to be disallowed. Credit is

available pertaining to repair income which needs to be quantified on some reasonable basis.

***Comment**: Now the issue is well settled that credit not eligible on trading prior to 1.4.2011 also. The ratio of judgments may be relevant under negative list regime also where certain activities which are excluded from the definition of 'service' may not fall within definition of output service and hence credit of expenditure incurred for the same may not be eligible. To be noted that as these are not covered within definition of exempted service, hence Rule 6 of Cenvat Credit Rules, 2004 may not be applicable and reversal may needs to be carried out on some reasonable basis.*

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6. Failure to take ISD registration is procedural mistake which cannot deny availment of entire credit *(Rohan Motors Ltd.2015 (40) S.T.R. 1153 (tri. Del.)*

- Background: Assessee engaged in services of repair & maintenance of vehicles. Availed cenvat credit on advertisement service common to multiple units without obtaining ISD registration. Ob being pointed out, proportionate credit pertaining to other units reversed. Department contending reversal of credit as ISD registration not undertaken.
- Issue: Whether credit availed on advertisement service without obtaining ISD registration is correct?
- Decision: Admittedly there was need to take ISD registration where services availed pertain to more than one units. But failure to take is only procedural non compliance. When assessee had reversed the credit pertaining to other units, there is no justification in denying full credit.

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7. Small scale exemption available to each of co-owners separately in case of renting of immovable property service *(Deoram Vishrambhai Patel 2015 (40) S.T.R. 1146 (Tri.- Mumbai)*

- Background: Service providers let out property jointly owned and claimed small scale exemption for each of co-owners independently. Demand raised on the ground that exemption limit needs to be considered for all co-owners jointly.
- Issue: Whether small scale exemption limit needs to be considered for all co-owners taken together or for each of the co-owner separately?
- Decision: Small scale exemption is available *qua* service provider not *qua* service. Exemption limit needs to be seen independently for each of the individual not collectively. Hence, exemption is eligible.

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8. Deploying of employees to service receiver factory for job work on per piece basis not liable under manpower supply service *(Shivshakti Enterprises 2015 TIOL 2589 CESTAT MUM)*

- Background: Job work done by deploying employees to factory premises of service receiver. Consideration received based on number of pieces manufactured by

employees. Demand raised under manpower supply service.

- Issue: Whether services classifiable under manpower supply where consideration received on per piece basis?
- Decision: The nature of work performed is deliverable based lump sum agreement and not for supply of manpower. No service tax liability under manpower supply service.

***Comment**: The ratio of judgment is valid under negative list regime also where distinction could be made between manpower supply services or otherwise for the purpose of determining liability under reverse charge. Clear scope should be outlined in the agreement so as to avoid different interpretation by department.*

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9. Cenvat credit of service tax paid on input services used in relation to renting of immovable property is allowed prior to 1.4.2011 *(M/s Vamona Developers Pvt. Ltd 2015-TIOL-2705-CESTAT-Mum)*

- Background: Assessee availed credit on services used for construction of mall which has been rented out charging service tax under the category of "renting of immovable property". Department disallowed credit on ground that mall is immovable property, hence credit is not admissible.
- Issue: Whether credit of input service is allowed used for construction of mall which has been let out?
- Decision: The word "setting up" was deleted only from 1.4.2011. Prior to that, definition had specifically included "set up" of premise of output service provider. In view of the precedent decisions, credit is eligible

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10. No separate service tax liability arise on advance received from customer on basis of mutual commitment *(Thermax Instrumentation Ltd 2015-TIOL-2736-CESTAT-MUM)*

- Background: Assessee engaged in erection, commissioning and installation service. Received mobilization advances from customer and booked it under current liability. Periodically adjusted against invoice on services being rendered. Service tax paid at the time of raising of invoice.
- Issue: Whether assessee liable to pay service tax on advance received?
- Decision: Service tax paid at the time of adjustment of advances on periodical completion of work and raising of bill. When amount received from customer, it cannot be said to be towards services in view of the fact that same disclosed under current liability. Service tax cannot be demanded again when tax already paid on periodical adjustment.

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11. Refund claim cannot be rejected merely on ground that it has been filed in wrong jurisdiction *(M/s Fujitsu Consulting Pvt Ltd 2015-TIOL-2646-CESTAT-MUM)*

- Background: Assessee acquired business under business transfer agreement.

Transferor company charged transfer fee on which service tax was paid and invoice raised at Delhi address. On realising that no service tax is payable, refund claim was filed by their Pune office. Claim disallowed on ground that Pune office is not entitled for refund as invoice was raised at Delhi address.

- Issue: Whether refund is eligible when claim filed in different jurisdiction?
- Decision: Refund claim lodged in different jurisdiction cannot be rejected merely for want of right Jurisdiction**.** Only aspect that is to be ensured is that refund should not be claimed by more than one person**.** Refund claim allowed.

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12. CESTAT not empowered to allow the benefit of reduced penalty of 25% from the date of its order *(TOPS SECURITY LTD 2015-TIOL-2751-HC-DEL-ST)*

- Background: Assessee did not pay service tax on security services and demand was confirmed along with penalty equal to duty u/s 78. CESTAT reduced penalty to 25% provided assessee pay reduced penalty within 30 days of the order of CESTAT
- Issue: Whether CESTAT empowered to extend benefit of reduced penalty under Sec.78(1) counting from the date of CESTAT order?
- Decision: The language of section is clear that reduced penalty of 25% to be paid within 30 days of the order of **adjudicating authority**. The objective of provision is to provide incentive to assessee who does not wish to contest service tax liability. Even in cases where option to pay reduced penalty has not been spelt out in order in original, CESTAT is not allowed to extend the benefit at appellate stage.

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13. No service tax liability on service of providing buses on hire to schools for conducting educational trip*(M/S MAHARASHTRA STATE ROAD TRANSPORT CORPORATION 2015-TIOL-2808-CESTAT-MUM)*

- Background: Assessee providing buses on hire to school for conducting educational trip. Department raised demand considering it Rent -a -cab/Tour Operator service.
- Issue: Whether service tax applicable on hiring of busses to school for conducting educational trips?
- Decision: Tour does not include journey organized or arranged for use by an educational body, other than a commercial training or caching centre etc. Services have been performed in respect of educational trips of schools which are excluded from the purview of the tour operator service. Therefore, assessee is not liable to pay service tax.

Comment*: Services provided to educational institute for transportation of student, faculty and staff is covered by mega exemption notification.*

NCR Office: 509, Vipul Trade Centre, Sohna Road, Sector 48, Gurgaon
Tel: 8510950400; ashish@hiregange.com

Head Office:
1010, II Floor, 26th Main, 4th T Block, Jayanagar, Bangalore - 560041. Tel: 080-26536405

Branch Office:
Basheer Villa", House No.8-2-268/1/16/B, II Floor, Sriniketan Colony, Road No.3, Banjara Hills, Hyderabad – 500034
Tel: 040-40062934

Branch office:
Flat No. 101, D.No. 9-19-18, Sai Sri Kesav Vihar, Behind Gothi Sons Show room, CBM Compound, Visakhapatnam-530 003 Tel:8916009235

www.hiregange.com