D ARVIND AND ASSOCIATES LLP

TAX ALERT.

COMPREHENSIVE UPDATE OF CASE LAWS ACROSS COURTS AND TRIBUNALS.

DECEMBER 2016

D Arvind & Associates
CHARTERED ACCOUNTANTS

Background

LD/64/105

CCE Vs. Dashion Ltd

The Appellant was manufacturing water treatment plant and other connected items and availed Cenvat Credit on inputs, input services and capital goods. Appellants had 5 manufacturing units with its registered office at Vatva, Ahmedabad.

Appellant also provided erection and commissioning, repairing and maintenance of water treatment plant services. Revenue made a case that Appellant was availing Cenvat credit of Service Tax paid for various services by one unit for purpose of clearance to another.

Show Cause Notice was issued alleging that Appellant did not register and also tax credit from unit was utilized for discharging tax liability of another unit instead of pro rata distribution amongst units. Adjudicating Authority passed the Order in Original against the Appellant which was also confirmed vide Order in Appeals.

The Appellant filed an appeal before the Tribunal which held that registered office and Vatva office were located at the same place and that credit was utilized at Vatva instead of distribution to various units. There was no restriction under law for utilization of such credit without proportional allocation to various units. Any failure to not register as an ISD was just a mere procedural infraction which could be condoned.

The Revenue went on an appeal before the Gujarat HC who dealt with Rule 2(m) explaining ISD and Rule 7 dealing with manner of distribution of credit. Rule 7 (d) regarding pro rata distribution did not exist during the Appellants disputed period and hence revenues stand was incorrect.

Denying Cenvat Credit to an ISD for non registration was incorrect and just a procedural infraction to be condoned of in the wake of Appellants maintaining full records. Demands on this count and also on grounds of limitation was dropped, consequently interest and penalty was set aside.

LD/64/108

M/s. Tata Technologies Ltd Vs. CCE

Appellant provided both taxable as well as exempted services and availed credit of Service Tax paid on input services. For the period April 2008 to September 2008 Appellant decided to reverse credit proportionate to exempted services under Rule 6(3A) of Cenvat Credit Rules, 2004. However Show Cause Notice was issued demanding 8% of value of exempted services on the grounds that Appellant did not file any declaration before opting for proportionate credit.

The Tribunal held that any condition regarding filing of declaration was directory in nature and not mandatory and since proportionate credit was reversed demand for 8% of value of exempted services does not sustain. Rule 6 could not be used to collect amount more than that authorised by the act and should stick to whatever remedial measures are offered to the Appellant.

LD/64/110

Mercedes Benz India Pvt Ltd vs. CCE Pune

Appellant a manufacturer of motor vehicles and parts under Chapter 87 of Central Excise Tariff Act, 1985 and sells the said vehicles through dealer network across India. The Appellant also imports completely built up units from Daimler AG, on payment of customs duty and are sold through the same dealer network.

Revenue contended that Service Tax paid on common input services attributed to import and sale of cars was not available but credit could be availed only on manufacture and sale of cars. Appellant however claimed that they hadn't availed credit of CVD paid on imported cars for sale in India and Cenvat Credit on input services related to import and sale of cars.

The issue was as to whether margin/value on trading of goods is to be considered and not the entire sale price/turnover of goods while calculating eligible credit.

Appellants stated that common input services were used for manufacture and sale of cars as well as for import and sale of cars. Their argument was that total common input services are to

be considered and multiplied by a suitable percentage and thereafter common input services related to manufacturing and trading activity could be arrived at.

Appellant also made a case for calculation of disallowance amount for credit attributable to trading activity as incorrect without following pro-rata formula. Appellant also further contended that any amendments to Rule 6(3A) should not be retrospective in nature.

Tribunal rejected the Appellants appeal however held that amendments though introduced in the form of an explanation they do cover certain cases prior to insertion or introduction. Appellant went on an appeal before the Mumbai High Court. The High Court held that explanation to the rule could not be given a retrospective effect. Hence for the period prior to amendment of the rule demanding 6% on trading turnover was incorrect.

With regards to apportionment of Input Credit matter was remanded back to tribunal and held that any amendments should not be concluded in the manner that suits the tribunal by taking a stand that amendment encouraged trading in goods rather than manufacturing the same.

LD/64/112

CCE vs. TVS Motor Company Ltd

The issue that came up for consideration was whether pre delivery inspection charges and after sales service charges are to be included in assessable value. The matter came up before the Honorable Supreme Court which held that pre delivery inspection charges and free after sales charges would be not be included in assessable value under Section 4 of Central Excise Act, 1944.

PDI expenses and said services have no connection with servicing as mentioned in transaction value and can't be added to assessable value. Amount charged by manufacturer for sale of goods to dealer is only liable for Excise Duty. Since PDI expenses are not collected separately from dealers they are not part of transaction value.

LD/65/67

Duflon Industries Pvt. Ltd vs. CCE Raigad

The Appellant had an agreement with foreign entity whereby Appellant exported goods to the foreign entity for sale of such goods in Europe. As per the terms of agreement Appellant raised invoice on foreign entity and also provided an 8% deduction discount on invoice value which was mistakenly termed as commission on the invoice rose.

The department under this scenario alleged that foreign entity was appellant's commission agent and demanded Service Tax under Reverse Charge Mechanism. The demands were confirmed along with interest vide Order in Original and Appeals.

The Mumbai Tribunal finally herd the matter on appeals and held that for foreign entity to be termed as a commission agent there should be a purchaser, seller and the person who negotiates such transactions. None of such ingredients were prevalent in this foreign entity. Deduction of 8% in the invoice raised on foreign entity cannot be termed as commission.

Tribunal also came down heavily on the lower authority for wrongly construing the clauses of agreement between Appellant and Foreign Entity. Hence the impugned Order in Appeals was squashed and the Appellants appeals were allowed.

LD/65/68

Coastal Gujarat Power Ltd vs. Commissioner of Service Tax, Mumbai

Appellant borrowed funds for power project under ECB scheme and as per contract were to pay commitment charges, up front fees arrangement fees, agency fees and out of pocket expenses for the period April 2008 to March 2011.

On payments made to consortium of lenders Appellant discharge Service Tax on payments made under either one or two heads. Department made a case whereby sums paid to IFC and ADB is a consideration for rendering banking and financial services and hence slapped Service Tax demand along with interest and penalty under reverse charge.

Appellant disagreeing with the allegations made in the notice contended that ADB and IFC were established under an agreement between various countries and India was a signatory to such

agreements. As per the agreement member country should provide the organization with immunities, exemptions and privileges which is also enshrined in the Indian constitution.

The Government enacted Asian Development Bank Act, 1966 and International Financial Corporation Act, 1958 which were enacted post India becoming signatory to international agreements. These international agreements were enforced in India in the form of enactments hence they would prevail over the Finance Act, 1994.

Department however refuted the Appellant stating that exemptions and privileges do not extend to Service Tax, VAT and Excise Duty.

Hence the question that came up for consideration before the tribunal was whether Service Tax exemptions does exist outside the Finance Act, 1994 provisions and if exemptions exist could that result in the service recipient not liable to pay Service Tax under reverse charge.

The Tribunal held that Excise or VAT exemptions could not be denied to someone under the pretext that such exemptions aren't envisaged in the ADB and IFC agreement. The Tribunal further held that the two organizations are immune from taxation and are also absolved of obligation to collect and deposit tax, when that being the case recipient could not be subject to taxation in the absence of inclusion in definition of person liable to pay tax under Rule 2 of Service Tax Rules, 1994.
Thus when international organizations by virtue of agreements enjoy certain immunities law under Section 66A contrary to such immunities enjoyed will not prevail.

LD/65/69

Mormugao Port Trust vs. CCE & Service Tax, Goa

The Appellant rendered port services and was registered under Service Tax. Appellant entered into an agreement with South West Port Limited by virtue of which it had leased/rented out pieces or parcels of land situated in the operational area of the harbor where SWPL constructed a jetty.

Jetty was used for the purpose of loading and unloading of cargo from ocean going vessels. Appellants received license fees and royalties from SWPL. Appellants discharged Service Tax on license fees but not royalty. Appellant contended that royalty earned was a share of revenue for services jointly rendered by it and SWPL and no renting of immovable property was involved.

However revenue made a case for renting of immovable property as leasing land and water front area had taken place. The matter went upto Mumbai Tribunal which held in Appellants favour.

The tribunal held that the Appellant had leased the land and water front area and also permission was granted to SWPL to conduct port operations at Mormugao and such permissions was authorised by law. The arrangement between Appellant and SWPL was a public private partnership and was like a partnership agreement and revenue was shared jointly by the two ventures.

In this joint venture agreement there is an absence of consideration agreed and the activity to be undertaken. Hence it could not be assumed that a service was provided for consideration and thus royalty was not consideration for rendering services but Appellants share of revenue from the joint venture.

LD/64/71

M/s. Mohan Breweries & Distilleries Ltd CCE

The Appellants imported raw materials under a Bill of Entry and availed Credit of additional customs duties and also benefit of Notification No. 34/97-Cus. Appellant cleared goods by debiting the DEPB for Customs Duty and Additional Customs Duty.

Show Cause Notice was issued seeking to recover credit which was confirmed by the Order in Original, Appeal and by the Honorable Tribunal. Aggrieved by these orders the Appellant filed an appeal before the Madras High Court.

The HC held that Notification No. 31/97 exempted goods imported into India from additional customs duty and even customs duty subject to condition that DEPB is credited. Also Circular No. 05/2005-Cus was issued subsequently.

High Court drew the attention of the Appellant to para 4.3.5 of Exim Policy whereby the Appellant contended that Exim Policy dealt with exports and not a manufacturer making a DTA clearance.

As per Rule 5 of Cenvat Credit Rules, 2005 any inputs used in final products which was cleared for exports under a Letter of Undertaking and also are used in intermediate product cleared for

exports Cenvat Credit on Inputs can be utilized by the manufacturer for payment of Excise Duty on final products cleared for exports or home consumption on payment of duty.

The High Court held that Appellant could not claim benefits with respect to bill of entry of the year 2003 and any High Court Decision in Appellants favor on this subject was only prior to 2000 and appeals were dismissed.

LD/64/72

M/S RMG Polyvinyl Ltd vs. Union of India

Appellant is engaged in manufacture of PVC Sheeting, PVC flooring and coated cotton fabrics. Central Excise Department conducted a search at Appellants factory and certain records were obtained.

When doing a stock audit it was found that excess stock of finished goods i.e. laminated sheeting, flooring, tiles, met of certain varieties was found. Ledgers were also found in Executive Director Cabin which was scrutinized.

The ledgers contained entries of transactions relating to clandestine removal of finished goods and Show Cause Notices were issued for clandestine removal. Appellants filed an application before settlement commission under Section 32-E of the Act. Certain seized records were marked as R and Appellants admitted the same. However other seized invoices did not belong to Appellants Company.

Settlement Commission however held against the Appellant making a case for acceptance partly the allegations mentioned in the Show Cause Notice. Evidences provided by Appellant were not convincing. Aggrieved by the order Appellant filed an appeal before the Allahabad High Court who held the settlement commissions order to be squarely covered under Section 32F of the Act.

32 F has conferred powers on settlement commission to pass suitable orders and reject appellant's application. If non-cooperation with settlement commission application could be rejected. In the wake of these provisions the Honorable High Court dismissed the appeals.

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M/s Fortune Park Hotels Ltd vs. Commissioner of Service Tax, Delhi

Appellant operates hotels in their own brand name. An entrepreneur who wants to start a hotel under Appellants brand name sings an agreement with the Appellant to operate the hotel under the Appellants brand name. Service fee is charged under the operating agreement to operate and run the hotel which was not disputed in this case.

Department made a case for expenses reimbursed by the hotel to the appellant towards actual expenses incurred. Appellant sends a senior manager to work in the hotel that operate and run the hotel and are under the rolls of the Appellant. Salaries and Expenses are paid by the Appellant which are reimbursed by the hotel on actuals.

Question of reimbursable expenses chargeable to Service Tax under Section 67 of the Finance Act is settled by the intercontinental judgment in Appellants favor. Hence reimbursable expenses cannot form part of the gross value. The Tribunal also noted that demands were barred by limitation as the matter involved interpretation. Case for suppression or misstatement with intention to evade duty did not prevail. Hence Appellants appeals were allowed by the Tribunal.