TAX ALERT.

COMPREHENSIVE UPDATE OF CASE LAWS ACROSS COURTS AND TRIBUNALS.

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CHARTERED ACCOUNTANTS

- *Background*

[2016] 95 VST 245 (Gauhati)

Mridul Properties Ltd vs. State of Assam

Entertainment Tax exemption and unjust enrichment

Appellants had established multiplexes in Assam for the period April 2007 to February 2008 and sought exemption from the liability to pay tax under Assam Amusements and Betting Tax Act, 1939 for a five years period.
Petitioners are also exhibitors who did not collect entertainment tax from movie goers and those who recovered the tax.
Appellants were issued a Show Cause Notice alleging that not charging entertainment tax was not believable as tickets issued for certain films charged entertainment tax. Appellants filed reply to the notice and assessment orders were passed along with interest and penalty.
The Appellate Authority also passed orders against the Appellants who filed a writ petition before the high court.
Appellants contended that exhibitors were exempted from entertainment tax liability; any form of retention could not be construed to mean unjust enrichment as it was an incentive for investment in multiplexes.
The department contended that retention of collected money was impermissible and had to be deposited with the government.
The court after going through the arguments of both sides held that tax was levied on admission to an entertainment which was different from persons entertained. Cine goers did not enjoy any entertainment benefits. Hence import of words to construe a notification as beneficial is erroneous.
Authority had levied tax on the ground that Appellant had charged and collected tax inspite of exemption and appropriated the same to itself. Even if exemption existed the Authority had no jurisdiction to levy tax during exemption period even in case where unauthorized collection was made.
The notification issued in 2008 clearly stated that when tax liability was exempted then benefit should accrue to the entity liable to pay tax. Exemption notification provides incentives and exemptions wherein benefit accrues to an entity made liable to pay tax. On a careful construction of entertainment tax provisions benefit accrued to an exhibiter and not the movie goer.
When the exhibitor retained collected tax even during exemption period it was not unjust enrichment and no refund of tax could be entertained as the said activity did not amount to illegal collections. Therefore Assessment orders were squashed as illegal and without jurisdiction.

[2016] 95 VST 275 (CESTAT-Chennai)

Source Hov India P. Ltd Vs.Commr of ST, Chennai-I

Cenvat Credit availed on Input Services in the form of Business Support Services

Appellants received patient's record data from abroad and processed the same in India for building a data base for retrieval thereof by the medical agencies abroad. Appellants while building data base provided various input services. Input Services were disallowed on the grounds that there was no nexus with manufacturing activity by the adjudicating authority.

The Services that was held to be ineligible was event management, maintenance or repair services relating to supply of foods and tangible goods, clearing and forwarding agency services and insurance on motor vehicles.

On Appeals before the tribunal the appeals were allowed partly. The Tribunal allowed credit on event management and photographic services considering the fact that disputed amount was small and for similar reasons credit on management, maintenance and repair services and tangible goods was allowed.

Clearing and forwarding services was necessary for the companies import/export operations. The Tribunal noticed the fact that adjudicating authority did not examine the nature of services thoroughly before denying credit and proper evidences were not looked into before denying credit on insurance auxiliary service and works contract services.

The Tribunal also allowed Cenvat credit on Customs House Agency service and even legal consultancy services being connected to business operations.

However issue regarding availment of credit on motor vehicles insurance, business auxiliary services was remanded back to adjudicating authority along with issues pertaining to availment of credit on parking charges, supply of foods and tangible goods and interior decoration service. The Adjudicating authority was asked to state the reason for his disallowance in the interest of justice.

[2016] 94 VST 1(SC)

Gujarat Ambuja Exports Ltd vs. State of Uttarakhand

Market Fees and Development Cess and legislative competency

Section 27(c) (iii) of Uttrarakhand Agricultural Produce Marketing Act, 2011 amended by the Uttrarakhand Agricultural Produce Marketing (Development and Regulation) (Amendment) Act, 2012 sort to levy market fee and development cess on agricultural produce not brought into the market for sale purpose but for manufacturing or further processing is against the act which regulates buying and selling of agricultural produce within the notified market area. Manufacture and Production is in list 1 of 7th schedule to the constitution and Entry 52. Since Central Government has competence over levying cess on this product state government cannot levy market fee and development cess on such produces.
Preamble to a statute cannot control an enacting part. Preamble gives legislature a clear meaning and also helps to determine the true meaning of enacting provision. Enacting provision should be given its effect without defeating the act in totality.

[2016] 95 VST 391 (Mad)

Sri Nataraja Medical Agencies vs. Commissioner of Commercial Taxes, Chepauk

Purchasing dealer not liable for default of selling dealer

Appellants challenged impugned orders on the ground that order was passed on the basis that selling dealer defaulted in payment of tax dues. The Appellant submitted documents and proof that he was an active dealer and had paid 25% of the tax amount.
The department contended non submission of documents by the purchasing dealer. The matter went till the high court which held that if the selling dealer had not paid tax dues then he was the liable person and not the purchasing dealer who had shown proof of payment of tax on his purchases.
Any registered dealer under Section 19(1) could claim ITC if he had paid tax due on purchases. Thus the current case falls under Section 19(1) of Tamil Nadu VAT Act, 2005. It is also important to note that the purchasing dealer had paid tax to selling dealer and claimed ITC which was accepted during self-assessments.
Invoking Section 19(16) of TN VAT Act, 2005 to revoke ITC availed was incorrect and contrary to the act and rules hence the orders were set aside and remanded matter back to the Appellate Authority to decide the case on merits.

[2016 93 VST 358 (CESTAT-Mum)

Percept D'Mark (India) Pvt. Ltd vs. Commr of Service Tax, Mumbai

Service Tax on Advertising Services

Appellants were issued a show cause notice based on a tripartite agreement with cricket players and Hero Honda a manufacturer for endorsing products and brands of the Appellant through print and television media and also displayed product on cricket bats. The Notice alleges that the Appellant failed to pay Service Tax on advertisement services provided by them. The Original Authority confirmed the demand through Order in Original and also confirmed on appeals.

Against the Order in Appeal the Appellant appealed before the tribunal. The tribunal held that H appointed the Appellant for sales promotion and publicity of products and Appellants involved the cricket players in brand promotion and advertisement of Hero Honda's Products.

Cricket players created and produced add campaigns for promotion of products for which H provided for accommodation and travel. Hero Honda/Appellant had to indemnify the cricketers for loss or damages arising out of any act related to advertisement and sales promotion. Commissioner dismissed the Appeal on the ground that Appellants services were not connected to any liasoning work relating to cricketer's endorsement rights and that the activity involved preparation, exhibition and display of advertisements. The Authority thus sort to levy Service Tax on advertisement services for payments received from cricketers.

The Authority also had made a case for suppression of facts with intent to evade duty for non disclosure of material facts. In some clauses of agreement service tax liability was mentioned. Hence limitation period was invoked and the order of Adjudicating Authority on merits was also upheld.

[2016] 93 VST 258 (T&AP)

GVPR Engineers Ltd vs. State of Telangana

Writs under constitution and constitutionality of Works Contract Tax payment under Telangana and AP VAT Act.

Assessing Authority has a statutory obligation to pass an order in accordance with the relevant legal provisions and if that is the case writ petition challenging the findings of the Assessing Authority would be squashed. Thus validity of an Assessment Order has certain restrictions within that framework only it would be examined.

Section 76 of Telangana VAT Act, 2005 has powers to remove any difficulties that may arise in giving effect to provisions of the act.

Government issued instructions under Section 76(2) of the Act regarding execution of works contract stipulating collection of Tax at Source on 4%. This pertains to all engineering works irrespective of the nature of work and category of registration.

Once the bills are paid 4% Tax at Source would be collected in Telangana. Under Section 22 of AP VAT Rules, 2005 tax has to be paid before 20th of the month succeeding the one month tax period. In 2015 the government issued an order for tax collected at source under Section 22(3) to mean that when bills are paid 5% tax at source would be collected.

An individual cannot construe that VAT liability arises only when contractee makes payment on the bills sub mitted by the contractor would mean that government is nullifying the statutory provisions vide a government order which is legally not tenable. In the wake of 2015 clarifications dealers liability is determined only based on such clarification.

Returns shall be filed on the value of goods at the stage of incorporation into works contract and VAT liability has no relation to receipt of consideration for goods sold. Irrespective of receipt of sale consideration the liability to pay does persist. Any submissions for postponing the time of payment would render the provisions fruitless hence tax declared in the returns for a particular month should be paid along with the returns by the 20th of succeeding month.

[2016] 93 VST 165 (Karn)

Pratham Motors Pvt Ltd vs. State of Karnataka

Eligibility of deduction of discounts in sale of price of cars sold under KVAT Rules, 2005.

Appellant is a car dealer and offered discounts on the sale price of cars to its customers. They claimed deduction of discounts by issuing credit notes siting Rule 31 of Karnataka Value Added Tax Rules, 2005.

The Appellant relied on judgment delivered by Karnataka High Court allowing deductions claimed on discounts offered to customers in the sale price as per Rule 31 of KVAT Rules, 2005. The Karnataka High dismissed the appeals filed Karnataka Government against tribunal order allowing the deductions claimed.

Departments and Governments have constantly relied on Rule 3(2) (c) which states that unless the discounts are shown on the invoices, bills etc. the amounts shown as discount are not eligible for deduction. The courts have consistently held that not always Rule 3(2) (c) prevails over Rule 31 or if Rule 3(2) (c) is invoked dealers could still avail benefit under Rule 31.

The judgment delivered in the case of Reliance Industries squarely applies to the Appellants case and also the relevant provisions are in their favour hence the petition of Appellant was allowed.

[2016] 93 VST 206 (CESTAT-Mumbai)

Pharmalinks Agency (I) Pvt. Ltd vs. CCE Pune

Clearing and Forwarding Agency Service and Warehousing Service

Appellant entered into a clearing and forwarding agency agreement for handling, carrying, forwarding agency agreement for the purpose of handling, carrying, forwarding and shipping of products and warehouse storage agreement for storage of goods with a company.

In addition to tax on warehousing rent and clearing forwarding agency charges appellants made certain payments on behalf of service recipient in the form of freight charges, octroi, sales tax, ,licensing fees, courier charges telephone charges, electricity charges statutory charges, packing material charges, unloading charges etc. All these incurred expenses were reimbursed from A.

Department took a stand that reimbursements are liable to Service Tax under clearing forwarding agency services and issued a notice to the Appellant. Post adjudication Orders were confirmed against the Appellant upheld by the Commissioner Appeals.

On Appeals to the tribunal the Appellant got a partial order in his favour. Service recipient entered into a separate agreement with transporter for transporting goods to various places and service recipient discharged freight expenses. Appellant paid these expenses and claimed reimbursements as a pure agent. Appellants acted independently and not as part of clearing and forwarding agency function and freight expenses incurred were not included in reimbursements.

Courier, fax, telephone charges, electricity charges etc. were incurred as part of clearing and forwarding function and towards running the office and issue of documents pertaining to that function. Over and above permissible limits appellant bear the cost of reimbursement of electricity charges. Hence only those charges were to be added to taxable value along with interest.

However on the main issue of reimbursements it is clear that Appellant acted as pure agent and hence with regards to that the Appeals were allowed in their favour.

[2016] 93 VST 202 (Mad)

Sri Lakshmi Textiles vs. Commissioner of Commercial Taxes Chepauk Chennai

Returns filed and tax dues adjusted from available Input Tax Credit.

The Appellants filed returns and adjusted tax dues from ITC credit available on the tax paid on purchases. Assessment orders were passed accepting returns filed under Section 22(2) of TN VAT Act, 2006.

However later notices were issued alleging that many selling dealers did not pay tax and ITC had to be reversed along with imposing penalty under Section 27(3) under TN VAT Act, 2006. Appellants filed a reply along with annexures such as purchase bills, tax invoices showing collection of taxes and monthly returns filed which was rejected and orders passed against them.

Appellant filed appeal before the High Court and the court held that Appellants paid taxes at the time of purchasing goods to the seller. Reversal of ITC was uncalled for as Appellant had paid taxes and could not be held liable for mistakes done by seller. Hence ITC credit adjusted against Tax dues was held to be correct and assessment orders setting aside the same was set aside.

LD/65/80

Mandahana Exports vs. CCE Kolhapur

Reimbursements not taxable

Appellants used factory premises which were vacant for renting to various parties. Appellant recovered rent and paid Service Tax on the same under an agreement with the Lessee.

Appellant also provided services such as security guard, emergency electricity generator, and common sanitary block for workers, repairs and maintenance of factory building, vehicle expenses and collected actual expenses on the same.

Show Cause Notices was issued which confirmed the demand along with interest and penalty on adjudication vide Order in Original and Order in Appeals under rent of immovable property services. Appellant filed an appeal before the tribunal against the unfavorable orders.

Tribunal held that only rent is paid for purpose of renting premises and other amounts are paid as reimbursements which is not rent of immovable property services and hence demands were set aside.

LD/65/82

Advinus Theraputics Ltd. vs. Commissioner of Central Excise.

Scope of Rule 4 of POP Rules, 2012.

Appellant is an EOU rendering technical and scientific consultancy service. They entered into an agreement with a Japanese company for generating candidate compounds for pharma products and research and drug development with an American based company.

Appellant filed refund claim under Rule 5 of Cenvat credit rules on inputs and input services which was rejected by adjudicating authority but later allowed by Appellate Authority.

Revenue went on appeal before the tribunal contending that the Appellants performed services in India and hence liable to be taxed under Rule 4(1) of POP Rules, 2012 as play of supply is in India.

In the case of Sai Life Sciences the Mumbai Tribunal held that exports are not taxable. Tribunal took a stand that if consideration is received in convertible foreign currency for exports then it limit Rule 5 of Cenvat Credit Rules, 2004 and put export privileges under jeopardy and bring them under ambit of taxation.

If POP rules is interpreted in a way that tax is leviable whether that could prevail over the principal that exports are not taxable would become a big concern. Tribunal however would not decide upon the question as to manner and mode in which tax on export services could be waived.

Prior to 2012 Appellant was coming under export of services with recipients located outside India. Tribunal also made a case whereby revenue did not question legislative intent of erstwhile export of service rules just because there was a change in regime post 2012.

Tribunal has clearly made a case for receipt of consideration in foreign currency and recipient is outside India but revenue disregard of those is insisting on taxing the same.
Even under the new regime of 2012 as per Rule 4 of POP Rules, 2012 performance of service is outside India and it is an export not leviable to Service Tax.

Appellants also goods in connection with research which is very minor in proportion and subject to alterations in the course of research. If goods cease to exist in the supplied form then one can't say that services have been provided in respect of goods even if it cannot be denied that services have been rendered on goods, hence Rule 4(1) not applicable.

Thus the tribunal on applying its earlier decision in the case of Sai Life Sciences held that Appellants are entitled to refund and an expression in a law could not be seen in isolation so as to deny exporters substantive benefit they would be getting.

LD/65/82

M/s. Bhoruka Aluminium Ltd vs. CCE & ST, Bangalore

Demand along with interest paid before issuance of Show Cause Notice

Appellant availed services of foreign company for repairs and maintenance of capital goods installed in his factory and no tax was paid under reverse charge. Department on investigation issued letter to pay the amount and appellant availed credit of the amount paid which was not disputed.

Show Cause Notice was issued under Section 76, 77 & 78 of Finance Act along with interest and penalties which was confirmed by Order in Original and Appeals. The mater went till the tribunal who held in Appellants favour. Under Section 73(3) if tax is paid along with interest before issuance of SCN then an SCN shall not be issued. When the audit department issued a letter Appellant paid the Service Tax amount along with interest and department did not dispute the fact and also make a case for suppression and concealment. Accordingly Section 78 for levy of penalty was set aside.

When disputed amounts were paid before issuance of Show Cause Notice then the SCN should not be issued and adjudication proceedings commenced against the Appellant which is contrary to law and principles of justice.

LD/65/78

Commissioner of Service Tax vs. Jet Airways (I) Ltd

Excess charges collected by airlines not liable to Service Tax separately

Difference of opinion arose between technical and judicial member on the issue of whether Service Tax is liable to be paid on excess baggage charges collected by airlines. Judicial member contended that excess baggage charges are integral part of transportation of passenger by air hence Service Tax on excess baggage charges not liable to tax.

Technical Member held that Appellant are liable to tax under transportation of goods by air under Section 65(105(zzn). The said activity was separate and identifiable and only free baggage is incidental to transportation services.

The third member however opined that carriage of baggage is incidental to the main service and classifiable under Section 65(105) (zzn) and no separate contract existed for transport of goods.

Even agreement for transport of passengers no element of transporting unaccompanied goods existed.

Appellants had duly disclosed receipts from passengers towards excess baggage in the books of accounts and hence no concealment and suppression of information occurred. Hence penalties were also set aside. On Appeals against tribunal order before Mumbai High Court the case was dismissed for no grounds on merits.

LD/65/79

Gujarat State Fertilizers and Chemicals Ltd vs. CCE

Sharing of expenses towards incineration and maintenance of storage tank not service

Appellant is a public sector undertaking and collected incineration charges from GACL. Department took a view that amount charged by GSFC to GACL amounted to providing storage and warehousing services.

Appellant contended that GSFC and GACL received HCN from Reliance Industries through a pipeline partially used in manufacturing shared in a particular ratio. Incineration charges were divided equally. Appellant entered into agreement with GACL and thus there existed no provision of service.

The demand under Section 78 was confirmed upto tribunal level and matter came up before the Supreme Court. Appellants contend that ingredients of storage were not prevalent in their operations and that no warehousing services were also provided. Expenses incurred on maintenance of storage tank were shared between the parties equally which is not provision of service by GSFC and GAPL.

HCN was received through a pipeline from Reliance by GSFC and GAC through a common pipeline to save expenditure. Handling facilities were installed at GSFC and both GSFC and GAC shared the expenses which formed part of an agreement. GACL made payment GSFC which is the share payable to GSFC. Hence it is not service provided by GACL to GSFC. Receiving HCN through a common pipeline setup by GFSC and GACL is not storage.

Hence the lower authority orders were set aside.

2017-TIOL-52-CESTAT-ALL

M/s. JRK Auto Parts Pvt Ltd vs. CCE & ST Noida

Cenvat credit availment on non submission of original copies of bills of entry.

During the period 2007-08 and 2008-09 Appellant availed Cenvat credit on the basis of 7 bills of entries. Original copies could not be produced during audit. Show Cause Notice was issued denying credit availed on photocopies of bills of entries under Rule 9 of Cenvat Credit Rules, 2004.

Appellants contended that credit was availed based on original bill of entries which later was sent to statutory auditors who misplaced the same. However not agreeing with the submissions Order in Original was passed against the Appellant and even order in Appeals was against the Appellant. The case was appealed before the tribunal. The Notice did not allege as to whether appellants had original bill of entries when they availed credit plus inputs were used in the factory of manufacturing which was also not disputed. Hence appeals were allowed in Appellants favour.

2017-TIOL-50-CESTAT-Del

M/s. Prism Cement Ltd vs. CCE and ST

Cenvat credit eligibility on GTA services for outward movement of cement to buyers premises

Appellants manufactured cement and clinker, paid Excise Duty on the same at the time of clearance. Appellants cleared cement to customers like industrial customers or dealers from the factory o depots and later to the ultimate buyers.

Department made a case for place of removal as factory gate and hence transportation from factory gate to customers premises not eligible for credit. The credit was disallowed vide Order in Original for period 2005-2011 also confirmed vide Order in Appeals. The Appellant appealed before the tribunal against the order disallowing credit.

Appellants submitted purchase orders which indicated that cement sale is on FOR basis along with dealership agreement. However during dispatch invoice issued to customers indicated FOB instead of FOR. Commercial invoices showed segregation of value of goods for VAT as excise duty is discharged on MRP basis. Appellants arrange transportation and pays charges on RCM. Credit notes were issued in case of transit loss recovered later from transporter. Excise Invoice had indicated FOB instead of FOR due to some issues in SAP software.

Dealership agreement is on ex works/FOR basis. Company shall not be liable for any loss/damage to goods after the same is collected for and forwarded from the company dump/works. If the freight is on to pay basis value of damages would be deducted. The Original Authority failed to establish ownership of goods by Appellant during transit till delivery to buyer and also place of delivery cannot be place of removal merely on the basis of delivery. According to adjudication authority factory gate was only place of removal.

Appellants submitted evidences to prove that place of removal was customer's premises which were rejected by the adjudicating authority. When the matter came up before the tribunal, they emphasized on circular number 97/8/2007-ST and Ambuja Cements judgment on place of removal.
Dealership agreement mentions FOR basis transaction and Appellants admitted to not availing credit on ex works transactions. The tribunal did not accept such a contention as they were contrary to documents submitted hence matter was remanded back to original authority for reverification. Hence appellant's appeals were allowed by way of a remand.