D ARVIND AND ASSOCIATES LLP

TAX ALERT.

COMPREHENSIVE UPDATE OF CASE LAWS ACROSS COURTS AND TRIBUNALS.

MAY 2017

D Arvind & Associates
CHARTERED ACCOUNTANTS

Background

LD/65/95
N Bala Baskar Vs. Union of India

Service Tax on construction service under Joint Development Agreement

The Appellants filed a leave petition against levying Service Tax on construction service under a Joint Development Agreement.
The person to whom tax burden is passed challenges the levy of Service Tax and if the court accepts such plea would result in consequences and also a possible increase in incidence of sales tax affecting consumers.
Consumers could challenge levy of Service Tax on the ground that the manufacturer or dealer is passing on the burden to them.
Appellants contended that their services comes under exemption clause of Section 65B(44)(a)(i) and was a mere transfer of title in goods.
Department contended that the land owner engaged a contractor to construct a building upto a particular level and the undivided share of land was exchanged with the contractor and hence the developer had provided a service.
Thus it is very much clear that the Appellant constructed in a particular area and sold a part to third parties along with undivided share of land which is clearly a service. While provision of service the service provider could pass on the burden to service receipient.
Hence the Appellants appeal was dismissed by the Supreme Court however was allowed to apply and claim refund if permissible.

LD/65/96
3l Infotech

Services when rendered by foreign service providers to overseas branches, Indian entity is not recipient of service.

Appellant is a software developer and exported services to abroad. Overseas branches incurred expenses for consultancy and professional services rendered by foreign service providers. Appellant incurred marketing and promotional expenses. Appellant included the expenditure incurred by overseas branches as expenses spent by them and thus was asked to pay Service Tax under reverse charge under Section 66A of the Finance Act, 1994.
Department contended that services provided by foreign service provider to overseas branches are provided only to the Appellant and received in India.
Appellants contended that accounting standards necessitate the reflecting the said expenses in such manner in the Balance Sheet. The expenses are incurred by overseas branches only and Appellant and the overseas branches are distinct entities.
The matter came up for hearing before the Mumbai Tribunal which held that mere reliance on financial statements of Appellants cannot lead to a conclusion that Appellant receives services provided by foreign service providers to overseas branches.
The order did no dispute the fact that services were received by overseas branches towards business activities outside India.
Numerous case laws of Tribunals have held that funds transferred from India to entities outside India are not liable to Service Tax. Any transfer of funds which are gross outflows are in the nature of reimbursements not liable to Service Tax. Hence the orders passed by the Commissioner Appeals was set aside.

LD/65/98

M/s. Zapak Digital Entertainment Ltd. Vs. Commr of ST, Mumbai-II

Cenvat credit eligibility on broadcaster invoices.

Appellants promoted business by placing advertisement in various forms of media through an advertisement agency. The Add agency acted as a facilitator between broadcaster and appellant. Broadcaster raised invoices with names of Appellant and add agency. Broadcaster payment was made by the add agency subsequently reimbursed by the Appellant to the agency. On the invoices issued broadcaster for its activity the Appellants availed credit.
Cenvat credit was denied on the grounds that broadcaster had rendered input services for the add agency and raised invoice on the agency and not Appellant resulting in availment of credit by the Appellant based upon endorsement in invoice.
The matter came up for hearing before the tribunal who held on perusal of invoices that , the invoice has clearly mentioned Appellants name and add agency was an agent and hence clear that invoices are issued in Appellants name. Add agency is an agent for payment and transfer of money from Appellant to add agency hence credit was rightly availed on broadcasters invoices.

LD/65/101
CCE Vs. L&T Ltd

Service Tax demand with respect to services provided by SEZ to DTA units of same entity dropped

DTA units received certain services from its SEZ unit for which no consideration was charged. Department alleged that SEZ units provided business support service to DTA units. Appellants invoked the principle of mutuality to contend that services rendered by SEZ to DTA units are non taxable. The matter came up before the Tribunal who upheld Appellants contentions. Department went on an appeal before the High Court of Gujarat. Department challenged CESTAT order as one which is an error in law.
High court while pronouncing its judgment came down heavily on the department and held that SEZ enjoys tax concessions by way of tax exemptions with respect of goods exported out from a DTA unit or imported into a DTA unit and also goods procured from a SEZ unit by a DTA. Removal of goods from SEZ to a DTA unit is leviable only to customs duty.
The HC also looked into evidences which are very much clear that SEZ unit provided services to its own DTA unit without any consideration and hence dismissed the departments appeal.

[2017] 97 VST 506 (Guj)

State of Gujarat Vs. ONGC Ltd

Transportation charges part of sale price

ONGC, Reliance and British Gas formed a joint venture for development of two Oil and Gas fields at Mumbai High. The joint venture signed a production sharing agreement with government. On behalf of the joint venture British Gas undertook exploration, drilling, production and selling facilities. Natural gas in sour form was taken to ONGC from the gas field for further transmission upto to sweetening plant of ONGC at Hazira where Hyrdocarbons from the sour gas was separated to produce natural gas.

Joint venture paid processing and transportation charges to ONGC , whereby natural gas got converted into a deliverable state at the time of sale to GAIL. ONGC also has crude oil which was refined for further sale of petroleum products and part of crude oil was sold to oil marketing companies for refining and sale. ONGC sold kerosene and liquefied petroleum gas in bulk and

oil marketing companies converted part of kerosene in distinguishable form to be sold through PDS system.

State government provided exemption from tax on sale of kerosene sold through PDS system and also on sale of liquefied gas for domestic usage.
ONGC had a view that sale of liquefied petroleum gas sold to oil companies fell under the scope of sale of liquefied petroleum for domestic use. They further opined that intra state sales of liquefied petroleum from Gujarat to other states are exempted on the ground that intra state sales was for domestic usage of consumers.

Department rejected Appellants contentions and slapped demand along with interest and penalty which was set aside by the Tribunal. On Appeals by the department before Gujarat High Court the issue it was held that because ONGC did not receive transportation charges from GAIL but received them from joint ventures such charges cannot be excluded from sale price before delivery of goods.

[2017] 98 VST 164 CESTAT
Shree Rajasthan Syntex Vs. CCE

Construction of exemption notifications

Appellant filed appeals against the order of Appellate Authority rejecting the refund claim filed on the ground that Appellant availed drawback in respect of goods exported under customs , excise and service tax drawback rules, 1995. Also another allegation was that certain services received where not covered under scope of specified services as per Notification No. 41/2007.
Appellant quoted CBEC circular 19/2006 and contended that drawback rates considered only incidence of service tax paid on taxable services used as input services in manufacturing of exported goods.
Notification No. 41/2007 introduced omitted a specific condition e of Rule 3(2) with an intention to grant refund of services even when exports were made under draw back claims. Even Section 93A gave powers to government to grant rebate on services used as input services in manufacturing of goods exported.
Refund of tax in relation to terminal handling charges and transportation of empty containers from port to factory was allowed. CHA was a specified service and hence refund claims of the Appellant of service tax on agency charges was also allowed.
If proviso e was omitted from Notification No. 41/2007 which did not affect exporters eligibility for refund then there was no requirement to delete the provision from 33/2008 which was retrospective.
Hence if goods are exported under claim for drawback of Service Tax paid on specific services refund claims not admissible under Notification No. 41/2007 and strict construction needed for interpreting exemption notifications which ought to be held in departments favour.

[2017] 98 VST 207 (SC)
Southern Motors Vs. State of Karnataka

Post sale discount eligible for deduction

Appellants are a dealer in motor vehicles and they raised invoices on purchasers and as per policy had to maintain uniformity in pricing. After sales were completed customers were issued credit notes which offered them discount.

Appellant thus retained net amount after deducting sum of discounts disclosed in the credit note based on which even IT returns where filed.

Such deductions towards discounts based on credit notes were allowed by assessing authority who whoever subsequently disallowed post sale discount deductions awarded before. Even the high court of Karnataka upheld the order of the Assessing Authority.

The Appellants filed appeal before the Supreme Court which interpreted Rule 3(2)(c) of Karnataka Value Added Tax, Rules, 2005 to hold that amounts allowed as discount could be deducted from total turnover to ascertain the turnover that is taxable.
Any such discounts to be allowed as deduction from total turnover could be allowed based upon the practice followed by the dealer based upon the contract or agreement and also invoice or bills issued.

Once a discount is eligible for deduction as per rule any interpretation contrary to the rule would be improper and absurd. Revenue refuted the courts view stating that discount to be entitled for deduction should be shown in the invoice and the same should be reflected by the purchaser in his accounts that price has been paid minus the discount.

Section 29 and 30 of Karnataka VAT Act deals with issuance of tax invoice and bill of sale which is not in any conflict with Rule 3(2)(c). Hence it is very much clear that if taxable turnover consists of sale price, then trade discount should not be disallowed.

Any discount to qualify as deduction is in relation to the final sale and not limited only to original sale. High court contrary interpretation of Rule 3(2)(c) is illogical and hence dealers appeals were allowed.

[2017] 98 VST 153 (All)
Flipkart India Pvt. Ltd Vs. Chandra Prakash Mishra

Jurisdiction under CST Act

Appellants were an ecommerce operator and were involved in trading of goods and provided warehousing and other sellers registered on the portal. The Appellant also managed inventory, invoicing and packaging for sellers.

Appellant submitted an application online for amendment of CST registration. However the department did not take any action on the application and instead initiated assessments against the Appellant and passed an ex parte order. Also recovery proceedings were initiated against the Appellant.

Additional Commissioner of Commercial Taxes set aside the ex parte orders and reverted the matter back to the department who passed ex parte order along with refund request of the Appellant. The respondent passed yet another ex parte order and recovered further money.

The matter came up for hearing before the Allahabad High Court which had set aside an earlier order passed by the department and directions were issued to the department by the commissioner to follow strictures issued by the court and also directions of Additional Commissioner.

The department had acted in contrary to directions of the court and passed his assessment orders in the garb of litigations. Hence Appellants appeals were allowed.

[2017] 98 VST 407 (Patna)
Indchemie Health Specialities Vs. State of Bihar

Quantity Discount given to customers not included in Taxable Turnover

Appellants manufactured and sold medicines and made a trade discount offer to retailers and stockists according to which certain quantity of products were offered to them free on purchase of specified quantity of products.

Under the Bihar Sales Tax Act trade discounts were not included in total turnover however for the period 2000-01 such discounts formed part of taxable turnover.

Appellants contended that sale price has not be charged on products given to customers on purchase of specified quantity of the product and hence do not form part of taxable turnover.

For sale to occur there should be a transfer of property in goods for cash, or deferred payment or a valuable consideration. Hence in the wake of this legal provision the Appellant was right in not including such discounts in total turnover, hence Appellants appeals were allowed.

[2017] 77 taxmann.com 155 (SC)
CCE & ST Vs. Ultra tech Cement Ltd.

Appellant availed credit of Service Tax paid on GTA services for outward transportation of goods from factory to customer premises. Appellants delivered goods on FOR basis who delivered the goods in good condition which was Appellants responsibility as per Circular No. 97/08/2007-ST and hence credit was allowable.

The case came up before the Supreme Court aggrieved on appeals by revenue against tribunal and high court order. Revenue contended that even if circular was in Appellants favour then the Tribunal instead of dismissing appeals should have remanded the matter.

Any facts that was found by the Appellate Authority which was not challenged before any tribunal should not form part of proceedings before any court. Merely because a matter that was held in Appellants favour by High Court was appealed by revenue before the tribunal the same would not be a case for consideration before Supreme court. Hence revenue appeals before Supreme Court was dismissed as no question arose for consideration.

[2017] 77 taxmann.com 231 (Kerala)
Gulf Oil Lubricants India Ltd. Vs. Commr. Of CT Trivandrum

Assessment orders were passed against the Appellant by rejecting their contentions and including quantity discount given to dealers as part of the sales turnover for the financial year 2011-12, 2012-13 and 2013-14.
Appeals against assessment orders for the previous years the deputy commissioner(appeals) remitted the matter back to the assessing officer with directions that quantity discount should not be part of sales turnover. The deputy commissioners remand order was upheld by the assessing officer for the prior period.
Appellants also quoted Section 7 of the Kerala Value Added Tax Act, 2003 which states that trade discount is deemed to be a sale only in certain cases and in their case such discounts do not form part of the sales turnover.
The commissioner of Commercial Taxes has also given an example which goes to show that unless and until quantity discount is allowed on sale of particular product the said product sales shall be accounted in the turnover for levy of VAT.
The commissioner also has clarified that statute is very clear in stating that quantity discount is excluded from turnover which is taxable.

Hence in the wake of Appellants contentions and commissioners example and legal provisions the Appellants writ petition was allowed and assessing authority has to consider the matter in accordance with commissioners example and Circular No. 05/2005.

[2017] 78 taxmann.com 106(Madhya Pradesh)
Idea Cellular Ltd Vs. Assistant Commissioner Commercial Taxes, LTU Indore

Levy of VAT on SIM Card replacement charges

Appellants provided telecom services within Madhya Pradesh in the form of cellular, fixed lines and broadband services including STD and ISD facilities. Service Tax was paid on the above said services.
Assessing Authority sort to levy VAT on sim card replacement charges and lease line charges received by the Appellants from their subscribers on the ground that the said charges came under Section 2(u) and 2(v) of MP Vat Act, 2002.
The matter came up for hearing before the Madhya Pradesh High Court which held that SIM card contains a computer chip with pre recorded instructions based upon which service provider identifies its subscribers. Information is fed into a computer for activation. SIM card is part of services rendered by the service provider. If SIM card was a separate object intended to be sold then VAT is leviable.
Various high courts and even supreme court has held that amount received from subscribers towards SIM card forms part of taxable value and is liable to Service Tax. With respect to replacement charges they form part of activation charges and hence VAT cannot be levied.
Lease Line charges are in the form of service charges and control possession of mobile towers remain with the Appellant and hence liable only to Service Tax and not VAT.

[2017] 78 taxmann.com 18 (Mumbai CESTAT)
Multi Screen Media (P.) Ltd vs. CCE Thane

Determining whether Selling time slots to advertisers was sale of space or time for advertising

Appellants with respect to programs broadcast from outside India received amount for allocating time slots to music companies. Appellants produce programs that are broadcasted by overseas agency for which slots are booked with the agency. Appellants also engaged commercially with clients of overseas broadcasting agency wherein Appellants paid Service Tax as provider of broadcast agency service. Adjudicating Authority sought to levy Service Tax on the Appellants on the ground that they provided broadcasting services.
Matter came up before the Mumbai Tribunal who emphasized on the need to go through the nature of contract between the Appellant and the overseas broadcast agency.
Appellants issue invoice to overseas broadcast agency specifying the duration of advertisement and the program duration in which the music companies add would be incorporated.
Appellants also produce programs and serials though broadcasted by the entity in Singapore , still are prepared and designed at the discretion of the Appellant. Appellants only select the advertisers and also the content of the filler.
Appellants also insert non program material in the program so produced, sell time slots to producers of music and the producers use the fillers to provide a preview of the program.
If the contract reveals that the agreement between the Appellant and the music company is that of a cliental relation and not of a fee remission agency, then Appellants contention of being an independent service provider sustains.
There is a need to look into the invoices in detail and take note of the fact whether the Appellant is a representative of overseas broadcast agency or a commercial production house selling slots in programs produced by themselves through the overseas broadcast agency. Tax liability should be ascertained based on this fact. Hence Appeals were remanded back to the original authority for fresh consideration of the issue.

[2017] 78 taxmann.com 209 (P&H)
CCE , Chandigarh Vs. Ind.Swift Lands Ltd.

Refund claims under Section 11B of Central Excise Act, 1944

Appellants paid Service Tax under protest and claimed refund of Service Tax. Adjudicating Authority issued notices to the Appellant rejecting refund claims filed by them on the grounds that they were time barred under Section 11B(1). Tribunal however held the matter in Appellants favour which was appealed by the department before the High Court.
The question that arose for consideration as to whether refund claims were time barred or not. Second Proviso to Section 11B(1) states that if duty is paid under protest refund application is not barred by limitation and hence application for refund was filed correctly and not hit by limitation.