D ARVIND AND ASSOCIATES LLP

TAX ALERT.

COMPREHENSIVE UPDATE OF CASE LAWS ACROSS COURTS AND TRIBUNALS.

NOVEMBER 2016

D Arvind & Associates
CHARTERED ACCOUNTANTS

Background

[2016] 95 VST 333 (Meghalaya)

NG Meghachandra Singh vs. Union of India

The honorable High Court of Gauhati held in 2009 that there should not be Tax Deduction at Source on the value of the contract but only on the taxable turnover after deductions under Section 5(2) of Meghalaya Value Added Tax Act, 2003.

Two methods provided for turnover of sales in relation to works contract are one in the principal provision whereby changes towards labour, services and other charges are to be deducted and second in the proviso whereby such percentages of value of works contract is to be deducted in cases where amount of charges towards labour services and other like charges are not ascertainable from the terms of the contract.

If there is a provision that a percentage shall be deducted as per Schedule IVA and there after taxable turnover would be worked out with deductions as per Section 5(2) inconsistency would occur in cases where amount of charges towards labour and services are ascertainable from terms of the contract. If deduction as per Schedule IVA has been already made further deduction under Section 5(2) was not permissible.

Thus the act is clear that deductions as to Section 5(2) would be either on the actual value of labour, services and other like charges or on the percentage provided under Schedule IVA. Deductions made by principal while making payment to works contractor is subject to final assessment and deduction at source by principal itself is not decisive of actual amount of VAT payable.

[2016] 94 VST 209 (CESTAT-Mum)

Prakash Sadashiv Karde vs. Commissioner of Central Excise, Customs & Service Tax Aurangabad.

Appellant was providing services of manpower recruitment and supply agency. The department alleged that the Appellant had not discharged Service Tax liability for the years 2007-08 and 2008-09 on receipt from the Service Recipient. The Appellant on being pointed out that Service Tax has to be paid discharged entire liability before issuance of Show Cause Notice.

Appellant contended that they had discharged entire liability even before issuance of Show Cause Notice and the said fact was ignored and interest cum penalty liability was fastened on the Appellant.

Appellant contended that they had neither charged Service Tax on its client nor collected amount towards the same. Since the disputed amount was paid before issuance of Show Cause Notice, Appellant had made a strong case for waiver of interest and penalty also as held by the tribunal.

[2016] 94 VST 232 (CESTAT-Chennai)

Schwing Steller (India) Pvt Ltd vs. CCE, LTU, Chennai

The Appellant is a service provider/receiver and hold centralized registration. They were issued a notice demanding Service Tax along with interest and penalty which was confirmed by the adjudicating authority.
Appellant contended that since they were centrally registered it took them nearly one month to recognize the fact that excess payment was made in May 2011 which was adjusted against the liabilities of July 2011.

Department made a case under Rule 6(4A) of Service Tax Rules, 1994 contending that Appellant made a wrong adjustment as Rules provided for adjustment of excess amount against Service Tax liability for succeeding month or quarter and not in subsequent month.

The Honorable Chennai tribunal held that intimation of adjustment should have been made to the department and declaration made in the returns. Even if the procedure was not adhered to it was just a mere procedural lapse and excess amount could not be retained by the government.

Adjustment by Appellant of excess amount of tax paid in May 2011, in the subsequent month's tax liability was in order. Hence invoking provisions of Section 73(1) was not sustainable as no case of short payment could be made.

[2016] 94 VST 236 (Guj)

State of Gujarat vs. GMM Co. Ltd

Entry 35 of notification issued under Section 5(2) of Gujarat Value Added Tax Act, 2003 pertains to machinery including parts and accessories used thereof in execution of works contract. Considering nature of construction material loader is machinery in execution of the contract.

When a question arises where certain equipment is machinery used in execution of works contract, the fact that whether it is a motor vehicle is insignificant. Therefore loader is machinery falling under entry 35 under Section 5(2) of Gujarat Value Added Tax Act, 2003.

[2016] 94 VST 251 (CESTAT-New Delhi)

Lake Palace Hotel and Motels Pvt. Ltd vs. CCE Jaipur

Appellant the owner of land and building rented the same to a hotel on profit sharing basis and also received security deposit. Department made a case for levy of Service Tax under rent of immovable property service on security deposit received and also on the notional interest on the deposit.

The Delhi Tribunal held that leasing out of property to hotel was not taxable under the deemed provision of Section 65(105) and also notional interest on security deposit cannot form part of rent agreed between the parties for levying Service Tax. Hence the orders confirming demand along with interest and penalty by the Adjudicating Authority was set aside.

[2016] 92 VST 1(AAR)

Go Daddy India Web Services Pvt Ltd

Appellant entered into a services agreement with a foreign firm located outside India engaged in the business of providing domain name registration, web hosting, designing and other web services to customers across the globe.

Appellant provides a host of services such as marketing, branding, offline marketing, oversight of quality of third party customer care center operated in India and payment processing on a principal to principal basis in terms of a draft service agreement to assist the foreign firm to develop the brand in India and serve its customers efficiently.

The Appellant receives a fee from the foreign firm equal to operating costs incurred plus mark up of 13% on such costs.

The question that arose for consideration was whether support services provided to firms located abroad were bundled services and accordingly a single service being business support service under Section 66F of Finance Act, 1994.

Another question that also arose was whether Business Support Service was exempted from Service Tax under Rule 3 of Place of Provision of Services Rules, 2012 and also an export of service under Rule 6A of Service Tax Rules, 1994.

On a careful perusal of the definition of intermediary it is clear that the person who provided the main service was not an intermediary and hence the appellant does not come under the definition of intermediary under Rule 2(f) of Service Tax Rules, 2012.

Appellant purely provides services with the intention of promoting the brand of foreign firm in India and to develop the business in India and there existed no contract between the Appellant and the foreign entities. Appellant provides the service to foreign firm on a principal to principal basis and receives money in convertible foreign currency.

Appellant receives fees from foreign firms in respect of Indian customers who directly remitted service charges to foreign firms through international credit cards.
It is a clear case of the Appellant providing only services to the foreign entity and not to the foreign entities customers in India and not liable to Service Tax.

[2016] 96 VST 284 (Karn)
Gayathri Projects Ltd vs. Deputy Commissioner of Commercial Taxes

Section 45 of Karnataka VATR Act, 2003 and Section 9 of the Karnataka Entry Tax Act, 1979 clearly indicates that the Tax Recovery Authority may issue a notice to any person holding money on behalf of a dealer as long as the assessment order is in force. Such recoveries should also be authorised by law as lawful.

Rule 59 of Karnataka Value Added Tax Rules, 2005 prescribes the mode of recovery including attachment of movable and immovable Property.

The provisions of the 2003 Act or the 1979 acts envisages persons to be registered as dealers, submit returns online and pay taxes through E Payments.

Rule 79 of the 2005 VAT Rules prescribes the mode of recovery and attachment and sale of shares in a corporation. Rule 98 has provisions for mode of recovery in which share in a corporation can be sold by tax recovery officer.

Thus the 1979 Act and 2003 Act has given wider powers to recovery officers to demand money and also recover by attachment and sale of shares in companies.
The Appellants bank was a state and provided online services which was a state run bank and hence recovery proceedings initiated by the Deputy Commissioner was tenable and no immunity is available to the Appellant.

[2016] 96 VST 332(Guj)

Commissioner of Commercial Tax vs. Shakti Containers

Appellant was allowed exemption for Assessment Years 2003-04 and 2004-05 in terms of Section 5(3) of CST Act, 1956 in respect of sale to exporters being penultimate sale in connection with export. The Revisional authority had an opinion that Appellant had not produced necessary documents as required and issued notices to the Appellant to produce the documents. However the authority made a case of discrepancy in the document produced.
Additional tax demands along with interest and penalty of 40% was slapped on the Appellant under Section 45(6) of Gujarat Sales Tax Act, 1969.

The Appellant filed an appeal against revisional authority order before the Tribunal. The Honorable Tribunal opined that sales to exporters could not be identified bill to bill basis because process of supplying such materials was on going and continuous. The proof of documents asked for revisional authority was uncalled for and no further proof was necessary. Also penalty could not be imposed for the first time at revisional stage.

On Appeals by the Revisional Authority the Gujarat High Court held that Tribunal had committed an error in the face of law by treating the requirements of Section 5(4) of 1956 CST Act as procedural and denial of tax exemption was well within the powers of Revisional Authority and tribunal's interference was not justified.

However if benefit under Section 5(3) was denied to the Appellant the said sales should have been treated as local sales and not interstate sales as goods were sold to a local exporter. In the absence of further proof of export of goods having been exported authority ought to have taxed the Appellant on basis of local sales hence treating the said transaction as interstate sales was incorrect.

The Court also observed that the Appellant did not avoid payment of taxes and disclosed all particulars in their returns hence levy of penalties was set aside.

[2016] 96 VST 357 (SC)

Smt. B Narasamma vs. Deputy Commissioner Commercial Taxes Karnataka

Works Contracts that are liable to be taxed after the 46th constitutional amendment are subject to scrutiny under Article 268(3) of the Indian Constitution read with Section 15 of Central Sales Tax Act, 1956 namely that declared goods are chargeable at a single point and at a rate not exceeding 4%.

Once when the declared goods are incorporated into a particular work they are chargeable to 4% tax. However commercial goods are subject to further processing or finishing and remain commercially the same goods they could not be taxed again.

Madras High Court held that Iron and Steel Products used as a base and structure for buildings remained the same goods at the point of taxability. Even if the goods are cut into different shapes does not make the goods lose their identity as declared goods and therefore 4% tax is only leviable.

Iron and Steel goods where used in manufacture of doors, window frames , grills etc which in turn were used in execution of works contract was still liable to be taxed under Rule 6(4)(m) of Karnataka Sales Tax Rules, 1957.

[2016] 96 VST 339 (P&H)

Amit Filling Station Vs. State of Haryana

Appellant purchased petroleum products from HP for which they paid VAT. The tax authorities denied ITC benefit alleging that Appellants lost the tax invoices. Since the dealer could not get duplicate copies of the same on time the Appellate Authority and the Tribunal affirmed the denial of ITC. The Appellants had also failed to get Form VAT C-4 on time.

Subsequently Appellant obtained duplicate copies of tax invoices from the seller including Form VAT C-4 in original. The Appellant filed an RTI based on which the information officer clarified that Appellant had paid taxes on goods purchased from HP. Also appellant later produced duplicate copies of tax invoices from the seller and also VAT C-4 in original. Hence the case was remanded back to the Assessing Authority to be determined afresh based on the duplicate tax invoices and VAT C-4 submitted. Also if the Appellant had paid tax then benefit was to be granted to them.