

SERVICE TAX

BASIC CONCEPTS OF SERVICE TAX

- 1. Can the service tax liability created under law be shifted by virtue of a clause in the contract entered into between the service provider and the service recipient?**

RASHTRIYA ISPAT NIGAM LTD.

MAY 13, 14

SC DECISION

- With regard to submission of shifting of tax liability ,SC held that ST is an indirect tax which may be passed on
- Thus assessee can contract to shift their liability.
- Finance Act, 1994 is relevant only between assessee and tax authorities.
- It is irrelevant to determine to rights and liabilities between service provider and recipient as agreed in contract between them.
- There is nothing in law to prevent them from entering into agreement regarding burden of tax arising under contract between them.

- 2. Does preparation of ready mix concrete (RMC) along with pouring, pumping and laying of concrete amount to provision of service?**

GMK CONCRETE MIXING PVT LTD

SC DECISION

- SC held that there was no taxable service involved in supply of RMC.
- It was sales contract, and not a service contract.

- **The primary and dominant object of contract between parties was to supply RMC.**
- No tax could be levied under Finance Act, 1994 as it was not a law relating to commodity taxation.

3. In a case where rooms have been rented out by Municipality, can it pass the burden of service tax to the service receivers i.e. tenants?

KISHOR K.S VS CHERTHALA MUNICIPALITY

HC OBSERVATIONS AND DECISION

- HC held that it is a statutory right of the service provider to pass it on to the tenants.
- It is not open to the petitioner to challenge the validity of the demand for service tax **since it is an indirect tax and law provides that it can be passed on to the beneficiary.**
- **Based on above discussion HC held that Municipality can pass on the burden of service tax to the tenants.**

4. Whether the activity of running guest houses for the pilgrims is liable to service tax?

TIRUMALA TIRUPATI DEVASTHANAM, TIRUPATI

MAY 13

LAW- As per section 65(105)(zzzzw) of the FA 1994, service provided to any person by hotel, inn, guest house, club or camp site, by whatever name called for providing of accommodation for a continuous period of less than three month is a taxable service.

Facts of the case-

_Assessee was running guest houses for the pilgrims.

Discussion

- As stated above, service provided to any person by hotel, guest houses etc. for providing accommodation for continuous period of less than three month is a taxable service.
- Hence, in the present case, service provided by assessee by way of accommodation service to pilgrims is liable to service tax.

CASE LAW

- Facts given in this question are similar to the facts of a decided case law 'TIRUMALA TIRUPATI DEVASTHANAMS, TIRUPATI' in which the court have held in the same manner.

CONCLUSION

- As discussed above, assessee is liable to pay service tax.

5. Whether supply of food, edibles and beverages provided to the customers, employees and guests using canteen or guesthouse of other person, results in outdoor caterer services.

INDIAN COFFEE WORKERS CO-OPERATIVE SOCIETY LTD

FACTS

- Assessee entered into agreements with NTPC AND LANCO for running and maintenance of their canteen or the guest house or for catering.
- The assessee, sold eatables and beverages to the individual customers at the rates stipulated in the menu card, in the canteens of LANCO and NTPC.

LAW

- **As per section 66E(i) of the FA, 1994, service portion in supply of foods and drinks by an outdoor caterer is covered under declared list of service.**

DISCUSSION

- Catering services provided at a place other than his own is covered under 'outdoor catering'.
- As stated above, assessee is a person who supplies food, edibles for a purpose. The purpose is to cater to the persons who uses the facility of canteen.
- Hence, in the present case service provided by assessee is taxable catering service.

CASE LAW

- **Facts given in this question are similar to the facts of a decided case law 'Indian coffee workers co-op society ltd' in which the court have held in the same manner.**

CONCLUSION

- As discussed above, assessee is an outdoor caterer providing catering services, hence he is liable to pay service tax.

6. Whether the course completion certificate/training offered by approved Flying Training Institute and Aircraft Engineering Institutes is recognized by law (for being eligible for exemption from service tax) if the course completion certificate/ training/ is only for the purpose of eligibility for obtaining ultimate license/approval for certifying repair/maintenance/airworthiness of aircrafts?

GARG AVIATIONS LTD

HC OBSERVATIONS and DECISION

- The expression 'recognized by law' is a very wide one. Even if, certificate, diploma is not the product of statute but has approval of some kind in 'law' it would be exempt.
- The Aircraft act, the aircraft rules, and the Civil aviation requirements having provided grant of approval to such institutes and laid down conditions for grant of such approval and having further **provided for relaxation of one year** in the minimum practical training required **for taking the DGCA examination**, have recognized the course completion certificate and the qualification offered by such institutes.
- The certificate/training/qualification offered by Institutes which are **without approval of DGCA would** not entitled the benefit of such relaxation.
- Thus, the certificate/training offered by approved institutes has some values in eyes of law even if it be only for the purpose of eligibility for obtaining license for rendering service of repair/maintenance of aircrafts.
- An educational qualification recognized by law will not ceased to be recognized by law merely because for practicing in the field to which the qualification relates, a further examination held by a body regulating that field of practice is to be taken.
- The HC held that recognition accorded by court the act, the rules, and the CAR to the course completion certificate issued by the institutes cannot be ignored merely because the same does not automatically allow the holder of such qualification to certify the repair, maintenance of an aircraft and for which authorization a further examination to be conducted by DGCA has to be passed.
- **Thus, the inference can be that the education in regard to course completion certificate/training offered by such approved institutes would be considered as recognized by law.**

7. **Whether deputation of some staff to subsidiaries/group of companies for stipulated work or for limited period results in supply of manpower service liable to service tax, even though the direction/control/supervision remained continuously with the provider of the staff and the actual cost incurred was reimbursed by the subsidiaries/group companies?**

ARVIND MILLS LTD.

HC Observations

- The assessee was not in the business of providing recruitment or supply of manpower.
- Actual cost incurred by the assessee in terms of salary, remuneration and perquisites was only reimbursed by the group companies.
- There was no element of profit or finance benefit.
- The subsidiary companies could not be said to be their clients.
- Employee deputed did not exclusively work under the supervision or control of subsidiary company

HC DECISION

- **There is no relation of agency and client.**
- **The assessee company was not engaged in providing any services directly or indirectly in any manner for recruitment or supply of manpower to a client.**
- **Therefore, they were not liable to pay service tax.**

8. **Whether section 66E(i) of the Finance Act, 1994 which levies service tax on the service portion of activity wherein goods being food or any other article for human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of activity, is *ultra vires* the Article 366(29A)(f) of the Constitution?**

HOTEL EAST PARK

LAW

- **As per provision of FA 1994 and Rule 2C of ST Rules 1994**, the service portion in case of restaurant service is presumed to be 40% of the bill value and in case of outdoor catering 60% of the bill value and the same is subjected to tax.

DISCUSSION

- Thus, the value of food should be considered as 60% and 40% in case of restaurant services and outdoor caterer services respectively.
- It is generally observed that the hotel and restaurant owners charge VAT on the total bill amount.
- It is to be understood that the portion on which service tax is charged cannot be subject to VAT, as it results into double taxation.
- There is no provision in the VAT-ACT for the bifurcation of this amount.
- The state government should work for this and make rules in confirmation of the rules as provided in the Finance act 1994, so that the consumers are not double taxed over the same amount.

CASE LAW

- Facts given in this question are similar to the facts of a decided case law 'HOTEL EAST PARK' in which the court have held in the same manner.
- Court held that Section 66E(i) of the Finance Act 1994 is *intra vires* the Article 366(29A)(f) of the constitution of India.

CONCLUSION

- As discussed above, Section 66E(i) of the Finance Act 1994 is *intra vires* the article 366(29A)(f) of the constitution of India.

9. Can a software be treated as goods and if so, whether its supply to a customer as per an "End User License Agreement" (EULA) would be treated as sale or service?

INFOTECH SOFTWARE DEALERS ASSOCIATION

NOV 2013

LAW

- Services of adaptation, customization, design, development, enhancement, implementation, programming, upgradation of information technology software are one of the declared services provided under section 66E.
- **Facts of the case are similar to the decided case law 'Infotech Software Dealers Association' wherein HC noted the following observation**
 - If software is goods, then, if there is sale or deemed sale, then there cannot be any service tax.
 - In any other case, it would be liable to ST.
 - Depending upon terms of End user license agreement transaction may not amount to sell in all cases.
 - On the issue as to whether the transaction would amount to sale or service, the HC was of the view that, it would depend upon the nature of individual transaction.

CONCLUSION

- As discussed above, transaction may not amount to sell in all cases and it may vary depending upon the terms of EULA.

10. Whether service tax is chargeable on the buffer subsidy provided by the Government for storage of free sale sugar by the assessee?

NAHAR INDUSTRIAL ENTERPRISES LTD

MAY 2011

HC DECISION

- HC noted that, service tax could be levied only if service of storage and warehousing was provided.
- Subsidy received not on account of services rendered to Govt of India but had received compensation on account of loss of interest, cost of insurance etc.
- Further, subsidy not taxable under rule 6(2)(ii)

11. A society, running renowned schools, allows other schools to use a specific name, its logo and motto and receives a non-refundable amount and annual fee as a consideration. Whether this amounts to a taxable service. ?

MAYO COLLEGE GENERAL COUNCIL

MAY 2014

LAW

- Unless the following four aspects are present ,an activity cannot be charged with ST
- I) the person who provides the service
- II) the person who receives the service
- III) the actual rendering the service
- IV) the consideration for the service.

- Further, it cannot be charged to ST, if service is covered in negative list or exempted by way of notification.

FACTS

Assessee allows other schools to use a specific name, its logo and motto for a consideration.

DISCUSSION

- As stated above, it can be seen that assessee was providing franchise service to other schools which were neither covered in negative list nor exempted and therefore, such service is taxable.

CASE LAW

- The facts of the case are similar to the decided case lay ' MAYO COLLEGE GENERAL COUNCIL' in which court have held in the same manner.

CONCLUSION

- **As discussed above, assessee is liable to pay ST.**

PLACE OF PROVISION OF SERVICE

1. Whether filing of declaration of description, value etc. of input services used in providing IT enabled services (call centre/BPO services) exported outside India, after the date of export of services will disentitle an exporter from rebate of service tax paid on such input services?

WIPRO LTD

Interpretation of statute

Condition imposed by statute must be capable of being complied with if it is not possible of compliance, then there is no purpose behind it.

CASE LAW

Facts of the case are similar to the decided case law 'WIPRO LTD' in which the court observed the following and decided the case in favor of the assessee.

- The court observed that **nature of service** was such that they were rendered seamlessly, **on continuous basis, without any commencement and terminal points.**
- It was **impossible** for the appellant to not only determine the **date of export but also anticipate the call** so that declaration could be filed 'prior' to date of export.
- As per Notification 12/2005, declaration of description, value and amount of service tax on **input services actually required to be used in providing export service** had to be filed prior to date of export.
- HC held that **except** the description of input service, the appellant could not provide the value of service and service tax **as the invoices in respect of the input-services were received only at regular intervals.**

- Further the HC elaborated that if particulars in declaration were furnished to STAX Authorities **within a reasonable time after export,** along with necessary documentary evidence, and were found to be correct and authenticated object of filing of declaration would be satisfied.
- The, HC therefore allowed the rebate claims filed by the appellant.

EXEMPTIONS AND ABATEMENTS

1. Is exemption in relation to service provided to the developer of SEZ or units in SEZ available for a period prior to actual manufacture (which is the authorized operation) of final products considering these services as the services used in authorised operations of SEZ?

OR

Whether the developer or units of SEZ would be entitled to the refund of ST paid in respect of services received prior to the actual manufacturing of final products by it?

PROVISION

- If taxable service are utilized by developer or units of SEZ for carrying out authorized operations in SEZ, SEZ units can claim refund of ST paid on such input services.

DISCUSSION

- In case SEZ Unit **receives some services** (e.g Scientific & Technical consultancy services) **prior to the actual manufacturer of final products**, the same shall be **treated as in relation to commercial activity** if such services are must for the manufacture of the final products and the developer or units of SEZ will be entitled to refund of such input services also.
- Therefore, in case of pharmaceutical industries where it would not be possible to produce the final product unless testing and analysis and approval is obtained,
- the services availed in respect of technical testing and analysis services are directly related to the manufacture of the final product.
- And shall be treated as input services eligible for refund claim.

CASE LAW

Facts of the case are similar to the decided case law 'Zydus Technologies Ltd' in which court have held in the same manner.

CONCLUSION

As discussed above, services rendered for a period prior to actual manufacture of final product is commercial activity and assessee is entitled to exemption by way of refund claimed.

2. Is „hiring of cab“ different from „renting of cab“ for service tax purposes?

SACHIN MALHOTRA

HC OBSERVATIONS

- The HC observed that **under rent - a - cab scheme**, the hirer is endowed (capable/able) with the freedom to take the vehicle wherever he wishes, and he is only obliged to keep the holder of license informed of his movements from time to time.
- However, when a person chooses to **hire a car** then the owner of the vehicle who may or may not be the driver, will offer his service while retaining the control and possession of the vehicle with himself
- The HC observed that though **rent and hire** may, in a different context, have the same connotation (meaning) ; in the context of **rent - a - cab scheme and hiring**, they signify two different transactions.

NOTE- THE SC has admitted SLP against this judgment.

SERVICE TAX PROCEDURES

1. Where tax is to be deducted at source under section 194J of the Income-tax Act, 1961 on the amount of service tax if it is paid separately and is not included in the fees for professional services/technical services?

RAJASTHAN URBAN INFRASTRUCTURE

HC DECISION

The HC held that if as per the terms of the agreement between the payer and payee, the amount of ST is to be paid separately and is not included in the fees for professional/technical services, the service tax component would not be subject to TDS u/s 194J of IT act.

NOTE- The view taken in the said judgment has been incorporated by CBDT in circular no 1/2014.

DEMAND, ADJUDICATION AND OFFENCES

1. Is it justified to recover service tax during search without passing appropriate assessment order?

CHITRA BUILDERS PRIVATE LIMITED.

LAW

- It is a well settled position in law that no tax can be collected from the assessee, without an appropriate assessment order being passed by the authority concerned and without following the procedures established by law.

FACTS

- During search conducted at the branch office, service tax was collected from the assessee without passing an appropriate order.

DISCUSSION

- As stated above, as appropriate order was not passed for recovery of service tax, amount collected during the search conducted could not be held to be valid in the eye of law.

CASE LAW

- Facts of the case are similar to the decided case law 'Chitra Builders Private Limited' in which court have held in the same manner.

CONCLUSION – As discussed above, amount collected is not valid in the eye of law.

2. Can extended period of limitation be invoked for mere contravention of statutory provisions without the intent to evade service tax being proved?

INFINITY INFOTECH PARKS LTD

LAW

As per Section 73(1), extended period of limitation can be invoked if **the service tax has *not been levied or paid* or has been *short levied* or *short-paid* or *erroneously refunded* **by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provision of CHAPTER V** or rules made thereunder **with intent to evade payment of service tax.****

DISCUSSION

Mere contravention of provision of chapter V or rules framed thereunder does not enable the service tax authorities to invoke the extended period of limitation.

The contravention necessarily has to be with the intent to evade payment of service tax.

3. **Would service tax collected but not deposited prior to 10.05.2013 be taken into consideration while calculating the amount of `50 lakh as contemplated by clause ii of section 89(1) of the F.A 1994?**

KANDRA RAMESHBABU NAIDU

MAY 2015

LAW

Non-payment of service tax despite collection from customers is a continuing offence.

HC DECISION

The HC held that, since the said offence is a continuing offence, entire amount of service tax outstanding as on 10.05.2013 would be taken into consideration while calculating the amount of Rs. 50 lakhs as contemplated by section 89(1)(i) of the F.A 1994.

4. Whether best judgment assessment under section 72 of the Finance Act, 1994 is an ex-parte* assessment procedure?

N.B.C. CORPORATION LTD

- Best judgment assessment u/s 72 could **per se** not be considered as an ex-parte assessment order.
- **Section 72** mandates that the assessee **must appear and must furnish** books of accounts, documents to the central excise officer **before, he passes the best judgment assessment order.**
- Thus said order is not akin to an ex-parte order.
- Such order **will be akin** to an ex-parte order, **when the assessee fails to produce records and the central excise officer has to proceed on other information or data which may be available.**

NOTE – The term ex-part is applied in a law to proceeding by one party in the absence of, and without notice to , the other.

5. Whether penalty is payable even if service tax and interest has been paid before issue of the show cause notice?

ADECCO FLEXIONE WORKFORCE SOLUTIONS LTD

MAY 13

LAW

- **Authorities had not authority to initiate proceedings for recovery of penalty u/s 76,**
when the tax payer paid service tax along with interest for delayed payment promptly.
- **As per section 73(3),no notice shall be served against persons who had paid tax with interest.**

6. Can an amount paid under the mistaken belief that the service is liable to service tax when the same is actually exempt, be considered as service tax paid?

KVR CONSTRUCTION

MAY 13, NOV 15

HC OBSERVATIONS AND DECISION

- Service tax paid mistakenly under construction service although actually exempt is payment made without authority of law.
- Therefore, mere payment of amount would not make it, service tax payable by the assessee.
- Once there was lack of authority to collect such service tax from the assessee, it would not give the authority to the department to retain such amount and validate it.
- Time limit of Section 11B not applies to refund of service tax paid by mistake.

CONTRARY VIEWS in case of 'Andrew Telecom India Ltd' and in case of 'MCI Leasing Pvt Ltdheld that limitation u/s 11B would be applicable. **ASKED IN NOV 2015**

7. In a case where the assessee has acted *bona fide*, can penalty be imposed for the delay in payment of service tax arising on account of confusion regarding tax liability and divergent views due to conflicting court decisions?

ANKLESHWAR TALUKA ONGC LAND LOOSERS TRAVELLERS CO.

MAY 2014

HC OBSERVATIONS

- The levy was comparatively new and therefore, both unawareness and confusion were quite possible.
- They were essentially agriculturist, who lost their lands when plant of ONGC was set up, and therefore, had created society and for many years they were providing rent-a-cab service to the ONGC.
- There were divergent views of different benches of Tribunal, which may have added to such confusion.

HC DECISION

- The High Court held that even if the appellants were aware of the levy of service tax and were not paying the amount on the ground of dispute with the ONGC, there could be **no justification in levying the penalty in absence of any fraud, misrepresentation, collusion or wilful mis-statement or suppression.**

8. Whether the recipient of taxable service having borne the incidence of service tax is entitled to claim refund of excess service tax paid consequent upon the downward revision of charges already paid, and whether the question of unjust enrichment arises in such situation?

OR

Whether the service recipient could file claim for refund of Stax borne by him?

INDIAN FARMERS FERTILIZERS COOP.LTD.

HC DECISION

- The assessee was the recipient of the taxable service and had borne the incidence of service tax.
- Since the burden of tax has been borne by the assessee as a recipient of service, question of unjust enrichment will not arise as per section 11B of Central Excise Act,1944
- Assessee was manufacturing final product which was exempt from payment of excise duty.
- Hence, it has been held that the burden of duty had been borne by the assessee as a service recipient only and the question of unjust enrichment did not arise.
- Thus, the assessee would be entitled to claim a refund of excess service tax paid by him.

9. Can the expression „suppression of facts“ be interpreted to include in its ambit, mere failure to disclose certain facts unintentionally?

NARESH KUMAR AND CO.PVT LTD.

HC DECISION

- Wilful suppression cannot be assumed merely on failure to declare certain facts **unless it is preceded by deliberate non-disclosure to evade the payment of service tax.**

OTHER PROVISIONS

1. Can the committee of commissioner review its decision taken earlier under section 86(2A) of the Finance Act, 1994, at the instance of Chief Commissioner?

DELL INTL.SERVICES INDIA PVT LTD.

HC DECISION

- HC held that once committee of commissioners, on careful examination of the order of the commissioner (appeals) did not differ in their opinion against the said order of the commissioner (appeals)
- And **decided to accept the said order, the matter ends there.**
- The said decision is final & binding on the chief commissioner also.
- The chief commissioner is not vested with any power to call upon the committee of commissioners to review its orders.
- Such procedure is not contemplated under law & is without jurisdiction.

2. Can the Commissioner (Appeals) remand back a case to the adjudicating authority under section 85 of the Finance Act, 1994?

ASSOCIATED HOTELS LTD

HC OBSERVATIONS AND DECISION

- The HC observed that Section 85(4) of the Finance Act 1994 is worded widely and gives ample powers to commissioner **while hearing and disposing of the appeals to pass such orders as he thinks fit** including an order enhancing tax, interest or penalty.
- Such powers would, therefore, inherently contain the power to remand a proceeding for proper reasons to the adjudicating authority.

Similar view – The HC in case of 'World Vision' has also held that u/s 85(4) of Finance Act, 1994, the commissioner (Appeals) has the power to remand back the case to the adjudicating authority for fresh consideration.

3. Whether the period of limitation or the period within which delay in filing an appeal can be condoned, specified in terms of months in a statute, means a calendar month or number of days?

ASHOK KUMAR TIWARI

DECISION

It was held that

- A liberal view must be taken while considering an application for condonation of delay and that even where no wholly satisfactory cause was pleaded but on the terms as to cost.
- The HC opined that where the legislature intends to define the period of limitation with regard to the number of days, it does so specifically.
- **Section 85** of the FA 1994 has defined the period of limitation as well as the power to condone the delay with regard to stipulation **in terms of months** and such a stipulation can only mean a calendar month.

- Once the legislature has used the expression 'three months' both in substantive part of section 85(3) as well as in its proviso, it would not be open for the HC to substitute the words '3 months' by the words '90 days' and if it does so, it would amount to rewriting the legislative provision, which is impermissible.
- Commissioner of Central Excise (Appeals) had the jurisdiction to condone the delay in filing of appeal by the assessee .

NOTE – SC in case of M/s Econ antri Ltd vs. M/s Rom Industries Ltd has held that while computing the period of limitation, the day on which the offence was committed has to be excluded.

4. Can an appeal filed in time but to the wrong authority be rejected by the appellate authority for being time barred? CHAKIAT AGENCIES

HC OBSERVATIONS

- The HC noted that appeal had been preferred in time, but reached different wing of the same building.
- Since the appeal was received by the adjudicating officer who has passed the original order, **he ought to have sent it to the other wing of the same building, but he had not done the same.**
- Therefore the order passed by the appellate authority cancelling the appeal on the ground that it was not received in time, could not be accepted.

HC DECISION

- In light of the above discussion, the HC directed the appellate authority to entertain the appeal of the assessee to pass appropriate orders on merits and in accordance with law, after affording him an opportunity of being heard.