SERVICE TAX CASE LAW SUMMARY (MAY 2016)

CH 1 - BASIC CONCEPTS OF SERVICE TAX

Sr.	Parties & Court	Matter	Decision	Answer
1	Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran 2012 (S.C.)	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?	**The Supreme Court** observed that on reading the agreement between the parties, it could be inferred that service provider (contractor) had accepted the liability to pay service tax, since it arose out of discharge of its obligations under the contract. With regard to the submission of shifting of service tax liability, the Supreme Court held that service tax is an indirect tax which may be passed on. **Thus, assessee can contract to shift its liability.** The Finance Act, 1994 is relevant only between assessee and the tax authorities and is irrelevant in determining rights and liabilities between service provider and service recipient as agreed in a contract between them. **There is nothing in law to prevent them from entering into agreement regarding burden of tax arising under the contract between them.**	YES
2	GMK Concrete Mixing Pvt. Ltd. 2015 (SC)	Does preparation of ready mix concrete (RMC) along with pouring, pumping and laying of concrete amount to provision of service ??	**The Supreme court** upheld the decision of the Tribunal wherein it was held that the contract b/w the parties was to supply RMC and not to provide any taxable services. Therefore, since the Finance Act 1994 is not a law relating to commodity taxation, the adjudication was made under mistakes of fact and law fails. **By this judgement, the SC dismissed the appeal filed by revenue.**	NO
3	Kishore K.S. v. Cherthala Municipality 2011 (Ker.)	In case where rooms have been rented out by Municipality, can it pass the burden of service tax to the service receivers i.e. tenants?	**<u>The High Court rejected the contentions of the assessee and observed as under :-</u>** (a) As regards the contention that there was no mention of the service tax liability in the contract, the Court held that this is a statutory right of the service provider/Municipality by virtue of the provisions under law to pass it on to the tenants. It is another matter that they may decide not to pass it on fully or partly. It is not open to the petitioners to challenge the validity of the demand for service tax, in view of the fact that service tax is an indirect tax and the law provides that it can be passed on to the beneficiary. Hence, the service tax can be passed on by the service provider i.e., Municipality. (b) The word "State" in Article 289 does not embrace within its scope the Municipalities. Hence, when service tax is levied on the Municipality there is no violation of Article 289. Moreover, Municipality has also not raised the contention that there was a violation of Article 289. **<u>The High Court held that Municipality can pass on the burden of service tax to the tenants.</u>**	YES

4	Tirumala Tirupati Devasthanams, Tirupati 2013 (A.P.)	Whether the activity of running guest houses for the pilgrims is liable to service tax?	**The High Court observed** that as per erstwhile section 65(105)(zzzzw) of the Finance Act, 1994, service provided to any person by a hotel, inn, guest house, club or camp-site, by whatever name called, for providing of accommodation for a continuous period of less than three months is a taxable service. **Therefore, the High Court held that since the petitioner was running guest houses by whatever name called, whether it was a shelter for pilgrims or any other name, it was providing the taxable services and was thus liable to pay service tax.**	YES
5	Indian Coffee Workers' Co-operative Society ltd. 2014 (All.)	Whether supply of food, edibles and beverages provided to the customers, employees and guests using canteen or guesthouse of the other person results in outdoor catering service ??	The High Court opined that the assessee is a caterer. NTPC and LANCO have engaged the services of the assessee as a caterer. Further, since the assessee provides the services as a caterer at a place other than his own, he is an outdoor caterer. HC clarified that taxable catering service could not be confused with who had actually consumed which is supplied by assessee. What is material is whether the service of an outdoor caterer is provided to another person and once it is, as in the present case, the charge of tax is attracted. HC elaborated that charge of tax in cases of VAT is distinct from charge of tax for service tax. Fact that assessee had paid VAT on sale of goods would not exclude the liability of the assessee for the payment of service tax in respect of taxable service provided by the assessee as an outdoor caterer. **HC held that assessee was liable for payment of service tax as an outdoor caterer**	YES
6	Garg Aviations Limited 2014 (All.)	Whether the course completion certificate / training offered by approved flying training institute and aircraft engineering institute is recognised by law (for being eligible for exemption of service tax) if the course completion certificate/training/ is only for the purpose of eligibility of obtaining ultimate license/approval for certifying repair / maintenance / air- -worthiness of aircrafts??	HC referred to the judgement of the Delhi HC in *Indian Institute of Aircraft Engineering* where in the Delhi HC has made the following observation: The Delhi HC held that the recognition accorded by the Act, Rules, Civil Aviation Requirements supra to the course completion certificate issued by the institutes as the petitioner cannot be withered away or ignored merely because the same does not automatically allow the holder of such qualification to certify the repair, maintenance or airworthiness of an aircraft and for which authorisation, a further examination to be conducted by the DGCA ha to be passed/cleared. HC upheld the decision of the Tribunal and held that revenue had not been able to persuade the court to take a contrary view as taken by the Delhi HC in the case. The appeal filed by the revenue would not give rise to any substantial question of law. **Hence, the appeal filed was dismissed and the assessee was held not to be liable to pay service tax**	YES

7	Arvind Mills Limited 2014 (Guj.)	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 ???	The HC rejected the contention of the Revenue and held that deputation of the employees by the respondent to its group companies was only for and in the interest of the assessee. 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 temporarily or otherwise to a client. **Therefore, they were not liable pay service tax.**	NO
8	Hotel East Park 2014 (Chhatisgarh)	Whether Sec 66E(i) of the Finance Act 1994 which levies ST 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 *ultravires* the Article 366(29A)(f) of the Constitution ???	The HC held that Sec 66E(i) of the Finance Act 1994 is ***Intravires*** the Article 366(29A)(f) of the Constitution. Further the HC held that no VAT can be charged over the amount meant for service and that the amount over which service tax has been charged should not be subject to VAT. The HC directed the state government to frame such rules and issue clarifications to this effect to ensure that the customers are not doubly taxed over the same amount. The rules may be in conformity with the bifurcation as provided under the Finance Act, 1994 or ensure that the commercial tax authorities do not charge VAT on that part of the value of the food and drink on which service tax is being assessed.	NO
9	Infotech Software Dealers Association (ISODA) 2010 (Mad.)	Can a software be treated as goods and if so, whether its supply to a customer as per an "End User Licence Agreement" (EULA) would be treated as sale or service?	The High Court reiterated that software is goods as per Article 366(12) of the Constitution. A software whether customised or not would become goods provided it has the attributes thereof having regard to (a) utility (b) capable of being bought and sold (c) capable of transmitted, transferred, delivered, stored and possessed. **<u>The High Court held that though software is goods, the transaction may not amount to sale in all cases and it may vary depending upon the terms of EULA.</u>**	CASE TO CASE BASIS
10	CCE v. Nahar Industrial Enterprises Ltd. 2010 (P & H)	Whether service tax is chargeable on the buffer subsidy provided by the Government for storage of free sale sugar by the assessee?	**The High Court noted** that apparently, service tax could be levied only if service of storage and warehousing was provided. Nobody can provide service to himself. In the instant case, the assessee stored the goods owned by him. After the expiry of storage period, he was free to sell them to the buyers of its own choice. He had stored goods in compliance with the directions of the Government of India issued under the Sugar Development Fund Act, 1982. He had received subsidy not on account of services rendered to Government of India, but had received compensation on account of loss of interest, cost of insurance etc. incurred on account of maintenance of stock. **<u>Hence, the High Court held the act of assessee could not be called as rendering of services.</u>**	NO

11	Mayo College General Council 2012 (Raj)	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?	**The High Court held** that when the petitioner permitted other schools to use their name, logo as also motto, it clearly tantamounted to providing 'franchise service' to the said schools and if the petitioner realized the 'franchise' or 'collaboration fees' from the franchise schools, the **petitioner was duty bound to pay service tax to the department.**	YES

CH 2 - PLACE OF PROVISION OF SERVICE

Sr.	Parties & Court	Matter	Decision	Answer
1	Wipro Ltd. 2013 (Del.)	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? **Final Answer read over here**: The High Court, therefore, allowed the rebate claims filed by the appellants and held that the condition of the notification must be capable of being complied with as if it could not be complied with, there would be no purpose behind it.	The High Court noted that the appellant was also required to describe, value and specify the amount of service tax payable on input services actually required to be used in providing taxable service to be exported. The High Court opined that except the description of the input services, the appellant could not provide the value and amount of service tax payable as any estimation was ruled out by the use of the word **"actually required"** and the bill/invoice for the input services were received by the appellant only after the calls were attended to. Further, the High Court also observed that **one-to-one matching of input services with exported services was impossible.** **Thus, the High Court was of the view that in the very nature of things, and considering the peculiar features of the appellant's business, it was difficult to comply with the requirement "prior" to the date of the export.** Furthermore, the High Court elaborated that **if particulars in declaration were furnished to service tax authorities within a reasonable time after export, along with necessary documentary evidence,** and were found to be correct and authenticated, object/purpose of filing of declaration would be satisfied.	NO

CH 5 - EXEMPTIONS AND ABATEMENTS

Sr.	Parties & Court	Matter	Decision	Answer
1	Zydus Technologies Limited 2014 (Guj)	Is exemption in relation to a service provided to the developer of SEZ or units in SEZ available for a period prior to actual manufacture (which is the authorised operation) of final products considering these services as the services used in the authorised operations of SEZ ??	HC relied on its decision passed in the case of *Cadila Healthcare Ltd 2013 (Guj.)* and held that no error has been committed by CESTAT in holding that assessee is entitled to refund; as though the operations of the assessee did not reach to the commercial production stage, the input services of scientific and technical consultancy procured by them were in relation to the manufacture which would take place at a later date. In instant case, HC referring to above case decision, **held that services rendered for a period prior to actual manufacture of final product is commercial activity / production and assessee is entitled to exemption by way of refund claimed.**	YES

2	Sachin Malhotra 2015 (Uttarakhand)	Is "hiring of cab" different from "renting of cab" for service tax purpose ??	**HC opined** that under "rent a cab" scheme, hirer is endowed with the freedom to take the vehicle wherever he wishes, and he is only obliged to keep the holder of the license informed of his movements. In case of hire, which is offered on strength of permit issued by M.V. Department then the owner of the vehicle who may/may not be a driver will offer his service while retaining the control and possession of vehicle with himself. **HC upheld** the decision of the Tribunal wherein it was held that unless the control of the vehicle is made over to the hirer and he is given possession for howsoever short a period, which the contract contemplates, to deal with the vehicle, no doubt subject to the other terms of the contract; there would be no renting.	YES

CH 6 - SERVICE TAX PROCEDURES

Sr.	Parties & Court	Matter	Decision	Answer
1	Rajasthan Urban Infrastructure 2013 (Raj.)	Whether 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?	**The High Court held** that if as per the **terms of the agreement** between the payer and the payee, the amount of **service tax** is to be **paid separately** and is not included in the fees for professional services or technical services, the **service tax component would not be subject to TDS** under section 194J of the Income-tax Act, 1961.	DEPENDS ON TERMS

CH 7 - DEMAND, ADJUDICATION AND OFFENCES

Sr.	Parties & Court	Matter	Decision	Answer
1	Chitra Builders Private Ltd. 2013 (Mad.)	Is it justified to recover service tax during search without passing appropriate assessment order?	The **High Court observed** that 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 by following the procedures established by law. However, in the present case, no such procedures had been followed. Further, although Department had stated that the said amount had been paid voluntarily by the petitioner in respect of its service tax liability; it had failed to show that the petitioner was actually liable to pay service tax. Thus, the **High Court elucidated** that the **amount collected by Department**, from the petitioner, during the search conducted, **could not be held to be valid** in the eye of law, and **directed the Department to return** to the petitioner the sum of Rs. 2 crores, collected from it, during the search conducted.	NO
2	Infinity Infotech Parks Ltd. 2013 (Cal.)	Can extended period of limitation be invoked for mere contravention of statutory provisions without the intent to evade service tax being proved?	The **High Court held** that 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.	NO

3	Kandra Rameshbabu Naidu 2014 (Bom.)	Would service tax collected but not deposited prior to 10.05.2013 be taken into consideration while calculating the amount of Rs. 50 lakh as contemplated by clause (ii) of section 89(1) of the Finance Act, 1994?	The **High Court held** that since the said **offence is a continuing offence**, **entire amount** of service tax **outstanding** [which is required to be deposited with the Central Government] **as on 10.05.2013**, would be **taken into consideration** while calculating the amount of Rs. 50 lakh as contemplated by section 89(1)(ii) of the Finance Act, 1994.	YES
4	N.B.C. Corporation Ltd. 2014 (Del.)	Whether best judgment assessment under section 72 of the Finance Act, 1994 is an ex-parte assessment procedure?	The **High Court held** that section 72 **could *per se* not be considered** as an ex parte assessment procedure as ordinarily understood under the Income-tax Act, 1961. **Section 72 mandates** that the **assessee must appear and must furnish books** of account, documents and material **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 an 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.**	NO
5	Adecco Flexione Workforce Solutions Ltd. 2012 (Kar)	Whether penalty is payable even if service tax and interest has been paid before issue of the show cause notice?	The **Karnataka High Court held** that the authorities had no authority to initiate proceedings for recovery of penalty under section 76 when the tax payer paid service tax along with interest for delayed payments promptly. As per section 73(3), no notice shall be served against persons who had paid tax with interest; the authorities can initiate proceedings against defaulters who had not paid tax and not to harass persons who had paid tax with interest on their own. **If the notices were issued contrary to this section, the person who had issued notice should be punishable and not the person to whom it was issued.**	NO
6	KVR Construction 2012 (Kar.)	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?	The **High Court of Karnataka**, distinguishing the landmark judgment by Supreme Court in the case of Mafatlal Industries 1997 (S.C.) relating to refund of duty/tax, **held that** 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. The High Court opined that once there was lack of authority to collect such service tax from the assessee, it would not give authority to the Department to retain such amount and validate it. Further, **provisions of section 11B** of the Central Excise Act, 1944 **apply to a claim of refund of excise duty/service tax only**, and could not be extended to any other amounts collected without authority of law. **In view of the above, the High Court held that refund of an amount mistakenly paid as service tax could not be rejected on ground of limitation under section 11B of the Central Excise Act, 1944.**	NO
7	Ankleshwar Taluka ONGC Land Loosers Travellers Co. OP. 2013 (Guj.)	In a case where the assessee has acted bonafide, 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?	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.** Moreover, when the entire issue for levying of the tax was debatable, that also would surely provide legitimate ground not to impose the penalty.	NO

8	Indian Farmers Fertilisers Coop Limited 2014 (All.)	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 ???	The **HC upheld** the decision of the CESTAT that **since** the **burden of tax** has been **borne by the respondent as a service recipient,** question of **unjust enrichment will not arise** as per Sec 11B of CEA 1944 (u/s 83 of FA 1994). Further the **HC held** that **once** the **finding of the adjudicating authority** that the **claim for refund** was **filed within the period of limitation was not challenged** by the Revenue before the first appellate authority and CESTAT, **Revenue could not assert to contrary and first time urge a point in an appeal before this court** which was **not raised** in grounds of appeal **before authorities below**.	YES & NO
9	Naresh Kumar & Co. Pvt. Ltd. 2014 (Cal.)	Can the expression "suppression of facts" be interpreted to include in its ambit, mere failure to disclose certain facts unintentionally ???	HC held that **willful suppression cannot be assumed and / or presumed merely on failure to declare certain facts** unless it is preceded by deliberate non-disclosure to evade the payment of tax. The **extended period of limitation can be invoked** on clear exposition that there has been a conscious act on the part of the assessee to evade the tax by non-disclosing the fact which, if disclosed, would attract service tax u/s 66 (now Sec 66B) & 67 of the Finance Act, 1994. The **non-disclosure** of the fact, **which, even if, disclosed would not have attracted the charging section cannot be brought within the ambit of suppression of fact** for the purpose of extension of limitation period.	DEPENDS

CH 8 - OTHER PROVISIONS

Sr.	Parties & Court	Matter	Decision	Answer
1	Dell Intl. Services India P. Ltd. 2014 (Kar.)	Can the Committee of Commissioners review its decision taken earlier under section 86(2A) of the Finance Act, 1994, at the instance of Chief Commissioner?	The **Karnataka High Court held** that once the Committee of Commissioners, on a careful examination of the order of the Commissioner (Appeals), did not differ in their opinion against the said order of the Commissioner (Appeals) and decide to accept the said order, the matter ends there. The said decision is final and 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 order** so that he could take decision to prefer an appeal. Such a procedure is not contemplated under law and is without jurisdiction.	NO
2	Associated Hotels Ltd. 2015 (Guj.)	Can the Commissioner (Appeals) remand back a case to the adjudicating authority u/s 85 of Finance Act 1994 ???	The **HC held that Sec 85(4) of the Finance Act, 1994 gives ample powers** to the Commissioner (Appeals) while hearing and disposing of the appeals and **such powers inherently contain the power to remand a proceeding** for proper reasons to the adjudicating authority.	YES

3	Ashok Kumar Tiwari 2015 (All.)	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 ???	HC opined that **where the legislature intends to define the period of limitation with regard to the number of days, it does so specifically.** Sec 85 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" **it would not be open for the high court to substitute the words by "90 days" and if it does, it would amount to rewriting the legislative provision, which is impermissible.** The **day on which order is received is to be excluded** while calculating period of limitation and if the period **expires on a public holiday** then assessee can **file an appeal on next working day.** In given case, Commissioner of CEx. (Appeals) had the jurisdiction to condone the delay in filing of appeal by an assessee as the same had been filed within stipulated time prescribed for the same	CALENDAR MONTH
4	Chakiat Agencies 2015 (Mad.)	Can an appeal filed in time but to the wrong authority be rejected by the appellate authority for being time barred ???	HC noted that appeal has been preferred in time, but reached a different wing of the same building. Since the appeal was received by the adjudicating officer who passed the original order, ought to have sent it to other wing 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 referred Andhra Pr HC Judgement in *Radha Vinyl Pvt. Ltd. and Similar case.* Either the department should have returned the appeal papers to assessee to enable him to file appeal before appropriate authority or should have handed over the papers itself. **HC directed the appellate authority to entertain the appeal of the assessee and to pass appropriate orders on merits and in accordance with law after affording him an opportunity of being heard.**	NO