

Landmark Decisions in Erstwhile Tax Regime Relevant in GST

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1. General Propositions

Whether decisions of erstwhile tax regime relevant?

- ▶ **Comm. of C. Ex. v. Jawahar Mills Ltd. - 2001 (132) E.L.T. 3 (S.C.)**
 - ▶ Decisions of sales tax and income tax are applicable to Central Excise.
 - ▶ The principle laid down by a decision is binding.
- ▶ **General decisions on Tax Planning continues to be relevant -**
 - ▶ CIT v. Motor & General Stores - 1967 SCR (3) 876
 - ▶ CIT v. B.M. Kharwar – [1969] 72 ITR 603 (SC)
- ▶ However, if language of the Statute is different, decisions rendered under earlier law may not apply. [Associated Cement Co. v. Commissioner of Customs – 2001 (128) ELT 21 (SC)]

Binding Nature of Judgements

- ▶ Article 141 of the Constitution
 - ▶ Supreme Court decisions are binding on all courts in India
- ▶ Article 225 of the Constitution
 - ▶ Decision of Privy Council and Federal Court are binding on High Court until Supreme Court rules to the contrary.
- ▶ East India Commercial v. Collector of Customs – 1962 AIR 1893
 - ▶ No provision in Constitution expressly providing for binding nature of High Court decisions.
 - ▶ High Court has superintendence over all inferior Courts and Tribunals under Article 226 and 227 of the Constitution.
 - ▶ Therefore, the decisions of High Court are binding on all inferior Courts and Tribunals within its jurisdiction.

Whether CESTAT decisions are relevant in GST?

- ▶ Union of India v. Kamalakshi Finance Corporation -1991 (55) ELT 433 (SC)
 - ▶ Decisions of Appellate Authorities are binding on revenue officers.
- ▶ CESTAT is an Appellate Authority under Customs, Central Excise and Service Tax Laws.
- ▶ CESTAT is not an Appellate Authority under GST. Hence, decisions of CESTAT are not binding under GST.
- ▶ Curious Question: For classification or rate of tax purpose for imported goods, CESTAT is an appellate authority. The decision of CESTAT is binding on custom authorities for imported goods. Whether the same will be binding in case of classification in domestic transactions?

2. Value of Supply – Free of Cost Supplies

Value of Supply – Free of Cost Supplies

- ▶ **Moriroku UT India (P) Ltd. v. State of U.P. - 2008 (224) E.L.T. 365 (S.C.)**
 - ▶ Toolings and Moulds supplied free of cost by the customer for manufacturing automobile components.
 - ▶ Sales tax department argued that amortisation cost of toolings and moulds should be included in the value for the purpose of Sales Tax. Department relied on the provisions of Central Excise Act where amortised cost is included in the value for the purpose of levy of excise duty.
 - ▶ The Court held that fiction created for the purpose of levy of excise duty cannot be borrowed for the purpose of sales tax. Excise is levied on the event of manufacture whereas sales tax is a tax on each commercial transaction. Tax can only be levied on actual price received or receivable.

Value of Supply – Free of Cost Supplies

- ▶ **Inox Air Products Ltd. v. Commissioner of C. Ex. - 2012 (28) S.T.R. 570 (Bom.)**
 - ▶ Cost of electricity supplied free of cost cannot be included in the value of taxable service.
 - ▶ The fact that the same is includible under the Central Excise Act is irrelevant. Excise duty is levied on manufacture whereas service tax is levied on consideration received for services rendered.
 - ▶ Unless cost of electricity supplied free of cost constitutes the consideration received by the assessee, it would not be includible in the value of taxable service.
- ▶ GST is also a transaction based tax. Therefore, tax is payable only on actual price paid or payable. This is specifically provided under Section 15(1) of the CGST Act.

Value of Supply – Free of Cost Supplies

- ▶ Commissioner of Service Tax v. Bhayana Builders (P) Ltd. - 2018 (10) G.S.T.L. 118 (S.C.)
 - ▶ Value of Goods/material supplied free of cost by service recipient is not to be included in 'gross amount' under Section 67 of the Finance Act, 1994 because no price is charged for them by service provider.
- ▶ Section 15(2) of CGST Act – Value of supply shall include
 - ▶ (b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both.
- ▶ As per contract, if free of cost supplies is not the liability of service provider, then such amount will not be included in value of supply.

3. Interest on wrongly availed ITC

Interest on wrongly availed ITC but not utilised

- ▶ Union of India v. Ind-Swift Laboratories Ltd. – 2011 (265) ELT 3 (SC)
 - ▶ Rule 14 of Cenvat Credit Rules, 2004 specifically providing for interest when Cenvat credit taken or utilized wrongly or erroneously refunded hence interest on irregular credit arises from date of taking such credit. No reason to read the word 'or' as 'and'.
- ▶ Commissioner of C. Ex. v. Bill Forge Pvt. Ltd - 2012 (279) E.L.T. 209 (Kar.)
 - ▶ Distinguished between 'taking' and 'availment'. Taking of credit means actually taking credit in account books while clearing finished products. It is not merely entry in account books showing entitlement to credit. No interest liability arises on availment of credit.
- ▶ Subsequently, Rule 14 of CCR, 2004 was also amended to provide that no interest payable unless wrongly availed/taken credit has been utilized.

Interest on wrongly availed ITC but not utilised

▶ Section 73(1) of the CGST Act

- ▶ Where it appears to the proper officer that ... input tax credit has been wrongly availed or utilised ... he shall serve notice on the person ... who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

▶ Commercial Steel Engineering Corporation v. State of Bihar - 2019 (28) G.S.T.L. 579 (Pat.)

- ▶ Availment of credit requires a positive act and unless carried out for reducing any tax liability it cannot be case of either availment or utilization.
- ▶ Mere reflection of transitional credit in electronic credit ledger cannot be treated as an act of availment.
- ▶ No interest leviable if credit reversed before utilizing it for reducing tax liability.

Interest on wrongly availed ITC

- ▶ J.K. Synthetics Ltd. v. Commercial Tax Officer - 1994 SCC (4) 276
 - ▶ Express provision is needed under the statute to levy interest as it is a part of substantive law.
- ▶ Section 50 of the CGST Act provides for payment of interest where a person fails to pay tax.
 - ▶ (1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council
- ▶ There is no express provision for levy of interest on wrong availment or utilisation of input tax credit. However, when such wrongly availed ITC is utilised for payment or output tax, to that extent, there will be short payment of tax and interest may apply thereafter.

4. Denial of ITC if tax not paid by Supplier

Denial of ITC if Tax not paid by Supplier

- ▶ **Mahalaxmi Cotton Ginning v. State of Maharashtra (Bom.)**
 - ▶ ITC is a concession provided by Legislature
 - ▶ There is nothing unconstitutional in not providing the benefit if tax not paid by the supplier.

- ▶ **Arise India Limited v. Commissioner of Trade & Taxes (Del.)**
 - ▶ Read down the provision to not apply to bona fide purchasing dealer who has with a registered selling dealer who has issued a tax invoice reflecting the TIN number.
 - ▶ However, if purchasing dealer and selling dealer have acted in collusion, department can deny credit.

Denial of ITC if Tax not paid by Supplier

▶ Section 16 of the CGST Act-

- ▶ (2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless –
 - ▶ ...
 - ▶ (c) subject to the provisions of section 41 or section 43A, the tax charged in respect of such supply has been **actually paid** to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply.

5. Extended Period of Limitation

Extended Period of Limitation

- ▶ **Cosmic Dye Chemical v. Collector of C. Ex. - 1995 (75) E.L.T. 721 (S.C.)**
 - ▶ The words “mis-statement or suppression of facts” clearly qualified by the word “wilful” which means with intent to evade duty.
 - ▶ The words “contravention of any of the provisions of this Act or Rules” are again qualified by the immediately following words “with intent to evade payment of duty”.
 - ▶ It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for invocation of extended period of limitation.

Extended Period of Limitation

▶ Section 74 of the CGST Act –

- ▶ (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax, he shall serve notice

▶ Explanation 2 below Section 74 –

- ▶ For the purposes of this Act, the expression “suppression” shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.

Extended Period of Limitation

- ▶ Section 74 does not specifically require 'intent' to evade payment of tax unlike under Central Excise Act and Service Tax.
- ▶ However, as held by Supreme Court in Cosmic Dye, the word 'wilful' means intent to evade tax.
- ▶ Further, the word 'wilful' will qualify both misstatement and suppression.

6. Arrest before Adjudication

Arrest before Adjudication

- ▶ **Makemytrip v. Union of India - 2016 (44) S.T.R. 481 (Del.)**
 - ▶ The arrest made merely on the basis of presumption that the assessee has not paid tax is not justified especially when the assessee has been filing Service Tax returns regularly with the Service Tax Department, which was not verified by the officers.
 - ▶ Arrest without following the adjudication process can be made only in cases of habitual offenders of not filing Service Tax returns or of non-payment of Service Tax.
 - ▶ In any other case, such arrests without following safeguards violate the fundamental rights of the arrested under Article 21 of Constitution of India.
- ▶ **Supreme Court dismissed the appeal of the revenue and affirmed the above decision - 2019 (22) G.S.T.L. J59 (S.C.)**
- ▶ **The decision will equally apply in GST -**
 - ▶ **Jayachandran Alloys (P) Ltd. v. Commissioner of GST – 25 GSTL 321 (Mad.)**

7. Binding Nature of Circulars

Binding nature of Circulars

- ▶ Section 168 of the CGST Act provides that Board may issue orders, instructions or directions to Central Tax officers for the purpose of uniformity in the implementation of the act and such officers shall observe and follow such orders, instructions and directions.
- ▶ Commissioner of C. Ex. v. Ratan Melting & Wire Industries - 2008 (231) E.L.T. 22 (S.C.)
 - ▶ Circulars binding on the department officers.
 - ▶ However, circulars are not binding on assessee and courts.
 - ▶ Any circular contrary to the decision of Supreme Court/High Court is not binding.

Binding nature of Circulars

- ▶ Other general propositions relevant in GST –
 - ▶ Benevolent circulars will be treated as clarificatory and will apply retrospectively;
 - ▶ Withdrawal of Benevolent circular will apply only prospectively;
 - ▶ Different circulars for different period – Respective circular will cover respective period;
 - ▶ Circular cannot be issued in derogation of statutory provisions, however circular can tone down the rigours of the act – *Navnitlal Javeri v. Appellate Assistant Commissioner*, 1965 (1) SCR 909.

8. Exemption Notification – Strict Construction

Exemption Notification – Strict Construction

- ▶ Commissioner of Customs v. Dilip Kumar & Co. - 2018 (361) E.L.T. 577 (S.C.)
 - ▶ In case of any ambiguity in charging section, the benefit must go to assessee as there is no a priori liability to pay tax.
 - ▶ However, in case of exemption notification, any ambiguity must be construed in favour of revenue. The burden of proof is on assessee as it increases the burden of tax on other taxpayers
- ▶ This general principles continue to be relevant in GST.

9. General Rules of Interpretation

Notification vis-à-vis Section/Chapter Notes

- ▶ Commissioner of C. Ex., Jaipur v. Mewar Bartan Nirman Udyog -2008 (231) ELT 27 (SC)
 - ▶ “While interpreting the exemption notification, one cannot go by rules of interpretation applicable to cases of classification under tariff.”
 - ▶ The proposition is too broadly stated.
 - ▶ The Section Notes and Chapter Notes will apply for interpretation of Notification if –
 - ▶ The text of the Heading in the Customs Tariff and Notification is identical,
 - ▶ If the Section Notes or Chapter Notes are definition of a term.
- Gujarat State Fertilizers Co. v. Collector of Central Excise – 1997 (91) ELT 3 (SC)

Notification vis-à-vis Section/Chapter Notes

- ▶ Jain Engg. Co. v. Collector of Customs, Bombay – 1987 (32) ELT 3 (SC)

Exemption Notification –

- ▶ Description specifically mentioned internal combustion piston engines and part thereof.
- ▶ Heading 84.06 does not mentioned parts.

Held: Exemption will be available to parts, any other interpretation will amount to amendment of notification.

Specific over General – Not Applicable to Exemption Notifications

- ▶ H.C.L. Limited v. Collector of Customs, New Delhi – 2001 (130) ELT 405 (SC)
 - ▶ Two exemption notifications covering the goods in question
 - ▶ Benefit of exemption notification which gives greater relief can be availed
 - ▶ Regardless of the fact that that notification is general in its terms and the other notification is more specific to the goods



THANK YOU!