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Indirect Tax Alert

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Judgments under GST era

Godway Furnicrafts v. *State of AP*[1]

Issue for Consideration

Whether a person can opt for composition scheme under GST when the turnover in the preceding financial year under VAT regime was higher than the prescribed limit?

Discussion

- The Petitioner was engaged in the furniture business and was registered under the erstwhile VAT regime and is also registered under GST.
- Under the GST law, the Petitioner opted to pay tax under the composition scheme as per section 10(1)[2] of the CGST Act, 2017 ('the Act') and has been complying regularly.
- The Revenue issued a show-cause notice alleging that the Petitioner is not eligible for the composition scheme as the turnover for the "preceding financial year" under the VAT regime exceeded ₹ 1 crore and accordingly demanded 28% GST at the regular rates along with interest and penalty.
- Aggrieved, the Petitioner filed the present Writ to the Hon'ble High Court of Andhra Pradesh on the following grounds:
  - The Respondent had accepted the option of the composition scheme exercised by the Petitioner on the web portal and permitted the Petitioner to pay GST under the composition scheme and cannot be now allowed to retract and demand GST at regular rates.
  - The provisions of the Act are not retrospective in operation and the words "preceding financial year" have no relevance for FY 2017-18. They are applicable from the financial year after the implementation of GST.
  - The turnover of the Petitioner from July 1, 2017 was below ₹ 1 crore.
- The Respondent on the other hand argued on the following grounds:

[1] Writ Petition No.10350 of 2020 dated November 11, 2020

[2] Section 10(1) of CGST Act, 2017: *"Notwithstanding anything to the contrary contained in this Act but subject to the provisions of sub-sections (3) and (4) of section 9, a registered person, whose aggregate turnover in the preceding financial year did not exceed fifty lakh rupees, may opt to pay, in lieu of the tax payable by him under sub-section (1) of section 9, an amount of tax calculated at such rate as may be prescribed, but not exceeding*
(a) one per cent of the turnover in State or turnover in Union territory in case of a manufacturer,
(b) ……"

- The option exercised by the Petitioner on the web portal cannot be accepted without due verification.
- The mere act of exercising an option and the payment of tax on a self-declaration basis would not by itself mean that the Revenue had accepted the scheme opted for by the Petitioner. It took time for Revenue to process all the options exercised, especially since GST is new levy.
- In absence of specific legal reference, it cannot be inferred that the words "preceding financial year" exclude VAT regime turnover.
- In the absence of filing of form GST-CMP 03 relating to stock details as on the date of the exercise of the composition scheme, the Petitioner cannot claim that turnover was less than the prescribed limit.

- The Hon'ble High Court has observed as follows:
  - The option to pay GST under the composition scheme exercised on the web portal is self-declaratory and requires verification.
  - Merely exercising an option by the Petitioner, and considering that it took time for the Revenue to verify the genuineness of the option exercised, cannot stop the Respondents from denying the option of composition scheme, if the option exercised was found to be incorrect.
  - If the reading of the words "preceding financial year" under section 10(1) of the Act is considered for the period after the commencement of GST only, all assessees filing false declaration for FY 2017-18 would not be liable to pay any tax as there would not be any preceding financial year for FY 2017-18. This cannot be the intention of the legislature.
  - If the intention was to exclude declarations made under the VAT regime, the same would have been specifically mentioned in section 10(1) of Act.
  - The objects and reasons of the Act makes it clear that it subsumes and replaces VAT into a single tax thereby simplifying the tax collection process.
  - If the business in the subsequent financial year decreases, a declaration can be made seeking a reduction of tax liability. However, the turnover of a previous year declared under a different tax collection process cannot be ignored for the purpose of determining the liability under new tax regime.
  - The words "preceding financial year" appears in more than one place under section 10 of the Act and hence it cannot be said that there was an error in usage of the words.
  - If the word "preceding" appearing before the words "financial year does not exceed ₹ 50 Lakhs" is ignored, it would lead to mockery of the said words.
  - To fix a parameter for extending the benefits of paying fewer taxes, the legislature thought it fit to consider the turnover for the preceding financial year.
  - For FY 2017-18, the preceding financial year would be FY 2016-17 under the VAT regime.
  - The collection of GST is not an addition to but rather a substitute for VAT.

Judgment

The Hon'ble High Court dismissed the Writ Petition holding that there is no illegality in taking into consideration the turnover of the VAT regime for the purpose of extending the benefit of the composition scheme under GST or for the collection of taxes and penalties.

Dhruva Comments:

GST has replaced various legislations like Central Excise, VAT etc. Since GST subsumes various erstwhile taxes, the GST law should be viewed as a replacement of earlier tax laws such as VAT, excise duty, service tax etc. and cannot be viewed as levy of tax that is different or in addition to levy of erstwhile taxes. If the previous year turnover would mean turnover under earlier legislations, then a question may arise as to which legislation needs to be considered?

ARS Steels & Alloy International Pvt. Ltd. v. *The State Tax Officer*[3]

Issue for Consideration

Whether input tax credit ('ITC') claimed on inputs lost during the manufacturing process is liable to be reversed under GST?

Discussion

- The Petitioners are engaged in the manufacture of MS Billets and Ingots. MS Scrap is used as an input for the manufacture of MS Billets which, in turn, are required to manufacture TMT / CTD bars. A small portion of the inputs are lost inherently during the manufacturing process.
- The department passed an order ('impugned order') seeking a reversal of the ITC pertaining to the portion of inputs lost during the manufacturing process under section 17(5)(h) of the CGST Act, 2017 ("the Act").
- The Petitioner has filed a writ petition before the Hon'ble Madras High Court against the impugned order. In this regard, the Hon'ble High Court observed as follows:
  - Section 17(5) of the Act provides that ITC shall not be available on inputs which are lost, stolen, destroyed, written off or disposed by way of gifts or free samples.
  - The Court observed that situations contemplated under section 17(5) of the Act are those in which the loss of inputs is quantifiable and involves external factors of compulsion. On the other hand, inputs lost in the instant case, is arising inherently out of the manufacturing process.
  - The Court relied upon its judgment in the case of *Rupa & Co. Ltd.* v. *CESTAT*[4] wherein it was observed that some amount of loss of input was inevitable during the manufacturing process. The Court held that Cenvat credit should be available on the original amount of inputs notwithstanding the fact that the entire amount of input would not be present in the manufactured product.

Judgment

The Hon'ble Madras High Court allowed the writ petitions and held that the department's claim for the reversal of ITC in the case of inputs lost inherently during the manufacturing process is neither contemplated nor covered under section 17(5) of the Act and hence the impugned order is liable to be set aside.

Dhruva Comments:

During the course of the manufacturing process, in various situations there are unavoidable / normal losses of certain inputs which are used to manufacture finished goods. The Court has rightly interpreted the provisions of the GST law and has upheld the ITC claim for such inputs lost during the manufacture of goods.

A similar ruling was pronounced in case of General Manager Ordnance Factory Bhandara[5] wherein the AAR observed that once inputs are used, they cease to exist. Thus, the question of they are being destroyed, lost or stolen does not arise.

Ruling under GST era

Teretex Trading Pvt. Ltd. – Authority for Advance Ruling, West Bengal[6]

Issue for Consideration

Whether the services of arranging / facilitating sale of goods for suppliers located outside India qualify as an 'export of service' under GST?

Discussion

- The Applicant intends to provide services related to the arranging of sales of goods for various overseas manufacturers / traders. The Applicant approached

[3] 2021-VIL-484-MAD
[4] 2015-VIL-373-MAD-CE
[5] 2019 (26) G.S.T.L. 423 (A.A.R. - GST)
[6] 2021-VIL-239-AAR

the West Bengal Authority for Advance Ruling ('the Authority') to seek a ruling on whether such services qualify as an 'export of service' under section 2(6)[7] of the IGST Act, 2017 ('the Act').

- The Applicant contended that the services qualify as an export of service and submitted as follows:
  - The role of the Applicant is to locate the prospective buyers, understand their requirements, and arrange the sale of desired goods to the buyers located outside / within India.
  - No prior agreement is entered into by the Applicant with the overseas seller for undertaking such sales. Furthermore, the goods are delivered directly by the sellers to the respective buyers.
  - The Applicant receives certain commission in foreign exchange, as a percentage of the value of goods, for arranging the sale of goods.
  - The services will be supplied at the Applicant's own risk and costs and the Applicant will not be appointed as an agent by the supplier / recipient of goods.
  - The Applicant neither represents the suppliers at the time of procuring the order nor does it have the authority to negotiate on the seller's behalf. Furthermore, it does not assume any obligation on behalf of the seller / buyer.
  - Selling goods through an independent service provider without appointing it as an agent is a common practice in some industries such as textile and chemical industries. The service provider arranges such sale at their own risk and costs in exchange for commission which is negotiated as per the market norms.
  - The Applicant denies its role as an agent of the seller but agrees that it is involved in arranging and facilitating the sale of goods. Furthermore, the Applicant does not have any establishment outside India and hence the service provider and recipient are not merely establishments of distinct persons under GST.
- The Authority considered the facts of the case and the Applicant's submissions and held as follows:
  - Section 2(13) of the Act defines "intermediary" as *a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account*.
  - In the present case, the Applicant procures purchase orders from the buyers located in India and then connects such buyers with the overseas suppliers of goods.
  - The Applicant admits that the consideration in the form of commission is received which is a percentage of the value of goods. Therefore, it is established that the supply of services provided by the Applicant is inextricably linked with the sale of goods.
  - The Applicant does not hold the title of the goods at any point of time and cannot change the nature or value of the goods. Furthermore, the goods are not supplied on their own account since the Applicant does not assume any obligation in respect of the goods.
  - The Authority observed that the services provided by the Applicant satisfies all the conditions to qualify as an 'intermediary' and hence, the place of supply, as per section 13(8) of the Act, shall be the location of the supplier of services i.e. West Bengal and the transaction should be treated as an intra-state supply under GST.

Ruling

The Authority held that the place of supply of services in the present case is in India. Therefore, all the conditions that must be satisfied for a supply to qualify as an 'export of service' are not fulfilled in the present case. Accordingly, the supply cannot be termed as an 'export of service'.

[7] Section 2(6): "Export of services" means the supply of any service when, (iii) the place of supply of service is outside India;

Dhruva Comments:

The scope, taxability and constitutional validity of intermediary services has been a subject matter of litigation under GST before various High Courts. A careful study of the agreed contractual terms between the parties and the scope of services is necessary to determine whether the services are supplied as an 'intermediary'.

Recently, a two-member bench of the Hon'ble Bombay High Court in the case of *Dharmendra M. Jani* v. *Union of India*[8] had a difference of opinion on the constitutional validity of section 13(8)(b) and the matter now lies with the Chief Justice to decide and put the issue to rest.

Trade Notice issued by DGFT

Issuance of scrips put on hold

- DGFT has issued trade notice no. 08/2021-22 dated July 8, 2021, whereby it has been stated that the benefits / scrips issued under the various schemes namely MEIS, SEIS, ROSL and ROSCTL would be put on hold for a temporary period due to changes in allocation procedure.
- Further, no new applications would be allowed to be submitted online and all the submitted applications pending for issuance of scrips would also be put on hold. Once the issuance of scrips is opened again the trade would be suitably informed.

Dhruva Comments:

The Government is yet to notify the SEIS rates for 2019-20. Further, putting on hold the issuance of new scrips and those already submitted would certainly lead to cash flow challenges for the industry considering the present pandemic situation.

[8] Writ Petition no. 2031 of 2018 dated June 09, 2021

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