



Dimensions – 123rd Edition

Judgment under GST era

Deem Distributors Pvt. Ltd. v. Union of India¹

Issue for Consideration

Whether tax can be demanded by the department pending investigation?

Discussion

- The Petitioner is a partnership firm registered under the GST law. The department had issued a letter dated April 25, 2019 ('first letter') asking the Petitioner to reverse the input tax credit ('ITC') availed on certain invoices, identified by them as fictitious suppliers, and the credit was availed without the goods actually being received in terms of departmental investigation.
- Subsequently, an intimation of tax payable dated January 22, 2021 ('second letter') was issued by the department *advising* the Petitioner to pay an amount of ₹ 1.17 crores failing which a show cause notice would be issued under section 74(1) of the CGST Act, 2017 ('the Act').
- Separate summons had also been issued to the concerned persons in the firm, however, the investigation of the matter was yet to be completed

and no notice under section 74 of the Act had been issued.

- The Petitioner had paid an amount of ₹ 35 lakhs to buy peace and to avoid coercion.
- The Petitioner filed a Writ Petition before the High Court against the intimation of tax payable and contended as follows:
 - The due procedure under section 74 of the Act was not followed;
 - No tax liability can be determined when the investigation is incomplete;
 - The Petitioner cannot be compelled coercively to pay the tax liability and this violates Article 14 and 300A of the Constitution of India.
- The Hon'ble High Court after considering the facts of the case and section 74 of the Act, observed as follows:
 - The counter affidavit filed by the department suggests that a conclusion has been drawn for reversal of ITC based on an *incomplete* investigation being undertaken by the department.
 - Without there being a determination of liability of the Petitioner in any enquiry under the Act, a

¹ 2021-VIL-572-TEL



demand cannot be sustained by the department.

- Section 74(5) of the Act provides a *choice* to a taxpayer to pay tax but does not give any power to the department to make a demand.
- The department could not have issued the first letter before the liability was ascertained. Furthermore, no advisory jurisdiction is conferred on the department to issue any 'advises' of the nature issued in the second letter.
- No demand can be raised when the investigation is in progress. The action of the department to collect the tax before determining the amount in an enquiry, is wholly arbitrary and without jurisdiction.

Judgment

- The High Court allowed the Writ Petition and directed as follows:
 - The department is restrained from coercing the Petitioner to make any payment without the issue of notice under section 74(1) of the Act.
 - Refund ₹ 35 lakhs already paid along with interest of 7% p.a. from the date of receipt till the date of payment.
 - The department can proceed with the investigation as well as enquiry under the provisions of the Act and act strictly in accordance with the Act.

Dhruva Comments:

Section 74(5) of the CGST Act allows discharge of tax as ascertained by an assessee or proper officer. An assessee cannot be fastened with a tax demand that has not been determined. The Hon'ble High Court has rightly held that tax demands raised by the department against which the investigation is pending is arbitrary.

In a similar issue, the Madras High Court in the case of *Shri Nandhi Dhall Mills India Pvt. Ltd. v. Senior Intelligence Officer and Others*² had directed the

department to refund the tax paid during the investigation proceedings.

Rulings under GST era

Goodwill Auto's – Authority for Advance Ruling, Karnataka³

Issue for Consideration

Whether reimbursement of cost of diesel incurred during provision of leasing of diesel generator set ('DG set') service, is chargeable to tax under the CGST Act, 2017 ('the Act')?

Discussion

- The Applicant is a partnership firm engaged in the business of leasing of DG sets. It has entered into a contract with Life Insurance Corporation of India ('LIC') to provide DG set on lease for ₹ 10,520/- per month along with reimbursement of diesel charges at ₹ 305/- per hour on actual usage basis.
- The Applicant is discharging GST at the rate of 18% on the gross amount collected, including the charges towards the cost of diesel.
- LIC has objected to the tax charged on reimbursements paid by them towards cost of diesel since diesel does not come within the purview of GST as per section 9 of the Act. Accordingly, it requested the Applicant to reimburse the tax wrongly collected.
- The Applicant has accordingly filed an application before the Authority for Advance Ruling, Karnataka ('the Authority') in order to determine the applicability of GST on recovery of the cost of diesel.
- The Applicant contended before the Authority that as per section 67 of the Finance Act, 1994, the term 'consideration' includes any reimbursement expenditure, received by the service provider, in the course of providing a taxable service which was always the intention. However, the Delhi High Court

² 2021-VIL-271-MAD

³ 2021-VIL-282-AAR



judgment in the case of *Intercontinental Consultants and Technocrats Pvt. Ltd. v. Union of India & Others*⁴ had taken a contrary view that reimbursement would not attract service tax in the absence of specific valuation provision.

- The Authority after considering the facts of the case observed as follows:
 - Reimbursement of diesel cost incurred for running DG Set by LIC are incidental expenses and is a part of consideration as defined under section 2(31) of the Act.
 - The contract entered into by the Applicant is a comprehensive contract, with the consideration consisting of a fixed component (monthly hire charges) and a variable component (diesel charges). Both the considerations are towards the same contract of supply of DG set on lease.
 - Though it may appear that the Applicant is receiving the reimbursement of diesel charges, the recipient is not paying for diesel but for services of DG set, which is an integral part of supply of DG set lease service.
 - There is no separate contract for supply of diesel and the invoice issued for reimbursement of diesel cost is nothing, but a supplementary invoice issued for the supply of rental service of DG set.

Ruling

The Authority held that GST was leviable at the rate of 18% on the diesel charges reimbursed by the recipient.

Dhruva Comments:

In the present ruling, the diesel charges were not being reimbursed *per se*. They were being charged to the recipient based on the *usage per hour* and this should not be regarded as a reimbursement. For a reimbursement to be not taxable, it should be incurred

as a pure agent subject to fulfilment of prescribed conditions.

M/s. Premier Sales Promotion Pvt. Ltd. – Authority for Advance Ruling, Karnataka⁵

Issue for Consideration

Whether the supply of vouchers itself is liable to GST? If yes, what will be the applicable rate of GST and the time of supply?

Discussion

- The Applicant is engaged in the business of providing marketing services.
- The Applicant receives orders for supply of vouchers such as gift vouchers, cash-back vouchers and vouchers with multiple options from its customers wherein the Applicant acts as an intermediary for buying and selling vouchers.
- The Applicant approached the Karnataka Authority for Advance Ruling ('the Authority') to contend that supply of such vouchers is not liable to GST on the following grounds:
 - The Applicant is the third-party issuer of vouchers, which are redeemable by the end users for goods or services from the specified merchants. The Applicant obtains the vouchers from the merchants. Issuance of vouchers is not taxable in the hands of the Applicant as he merely receives it for onward disbursement.
 - The holders of vouchers can redeem them at face value for purchase of goods and services, where there is a supply of goods and services against the production of vouchers. At this point, the voucher is used as full or partial consideration to settle an obligation and hence supply of vouchers by the Applicant should fall within the definition of money as per section 2(75)⁶ of the CGST Act, 2017. The vouchers

⁴ 2012-VIL-106-DEL-ST

⁵ Advance Ruling No. KAR ADRG 37/2021 dated July 30, 2021

⁶ Section 2(75) of the CGST Act, 2017: "money" means the Indian legal tender or any foreign currency, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveller cheque, money order, postal or electronic remittance or any other instrument recognised by the Reserve Bank of India when used as a consideration to settle an obligation or exchange with Indian legal tender of another denomination but shall not include any currency that is held for its numismatic value;"



- issued by the Applicant are only a transaction in money and not classifiable as goods or services and hence are outside GST.
- As per the Reserve Bank of India master directions, money received from customers from supply of vouchers is to be kept in an escrow account and is used strictly for settlement of vouchers and is not accounted as an income by the Applicant.
 - If the vouchers are treated as actionable claims, then they would be treated as neither supply of goods nor services as per paragraph 6 of Schedule III of the CGST Act, 2017 and hence outside the purview of GST.
- The Authority after considering the facts of the case and the Applicant's submissions observed as under:
 - In the present case, there is an obligation for the acceptor to accept the payment instruments or vouchers as consideration or part consideration for a supply of goods and services or both and hence should be covered by the definition of "vouchers" as per section 2(118)⁷ of the CGST Act, 2017
 - Payment instruments would fall within the definition of money if they were used as a consideration to settle an obligation. In the present case, the end user (and not the Applicant) of the vouchers is using them to settle their obligation of payment of consideration. Hence the vouchers supplied by the Applicant to end users are not covered by the definition of "money" but would take the colour of money only when used for payment of a consideration for supply of goods and services procured by end user.
 - Furthermore, the Authority observed that supply of vouchers is not covered under the definition of "actionable claim" as per section 2(1) of the CGST Act, 2017 read with section 3⁸ of the Transfer of Property Act, 1882 as the vouchers are not debts which is defined as a liability or obligation in respect of a claim due from any person. In the present case, the entitlement of redemption is transferred into the possession of the end user at the time of supply of vouchers by the Applicant to its end user and hence the supply of vouchers is not an actionable claim.
 - The Applicant is involved in the trading of vouchers for a consideration in the course or furtherance of business and hence the activity is a supply as per GST law.
 - The vouchers that are printed on paper are tangible and are clearly goods. The e-vouchers which are intangible are also goods as per the judgments⁹ of the Hon'ble Supreme Court which state that goods can be tangible or intangible. Also, the supply of vouchers involves transfer of title and hence are goods as per para 1(a) of Schedule II of the CGST Act, 2017.
 - Vouchers are taxable at the rate of 18% GST under the residual entry no. 453 of the third schedule of notification no. 1/2017-Central Tax (Rate) dated June 28, 2017.
 - Further, as per rule 32(6) of the CGST Rules, 2017, the face value of vouchers shall be the value for GST purposes.
 - With regards to time of supply since the Applicant is not aware when the vouchers would be redeemed by the end users, the time of supply would be the date of filing a periodic

⁷ Section 2(118) of the CGST Act, 2017: "voucher" means an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services or both and where the goods or services or both to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument;"

⁸ Section 3 of Transfer of Property Act, 1882: "actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent"

⁹ *Tata Consultancy Services v. State of Andhra Pradesh* [2004 (11) TMI 11] and *Vikas Sales Corporation v. Commissioner of Commercial Taxes and Another* (and other Appeals and Writ Petitions) [1996 (5) TMI 363]



return as per section 12(5)(a) of the CGST Act, 2017.

Ruling

The Authority held that supply of vouchers is taxable under GST as goods at the rate of 18% on the face value of the voucher and the time of supply would be governed by section 12(5) of the CGST Act, 2017.

Dhruva Comments:

The Authority has held that supply or trading of vouchers is a supply of goods exigible to GST. Interestingly, under the pre-GST era, recharge coupon vouchers were held to be an actionable claim as money received in advance constitutes debt for the service provider. Also, the present ruling is in contradiction to the judgment of the Appellate Authority of Advance Ruling in the case of *M/s Kalyan Jewellers India Limited*¹⁰ wherein it was held that supply of vouchers is neither a supply of goods nor supply of services.

Taxability of supply of vouchers has been a matter of litigation both under the GST and Pre-GST era. There are various issues with regards to supply of vouchers such as taxability in case of third party or own supply of vouchers, rate of GST, time of supply, value of supply, place of supply etc. Hence, a clarification from the Government on the various issues with regards to supply of vouchers should bring much-needed clarity and would be useful in reducing litigation on the matter.

¹⁰ 2021 (4) TMI 885





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