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Indirect Tax Alert

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Judgment under Pre-GST era

Pujan Builders Engineers & Contractors v. *C.C.E. & S.T.-Vadodara-II*[1]

Issue for Consideration

Can an application for the refund of Service tax paid in excess, which was transitioned to and reversed under the GST regime, be tenable under section 11B of the Central Excise Act, 1944 ("CE Act")?

Discussion

- The Appellant filed their Service tax returns for the period from April to June 2017 in August 2017. The returns were revised in September 2017 due to the cancellation of some invoices. The Appellant transitioned the Service tax paid in excess, which had arisen out of the cancellation of invoices, into the GST regime by filing Form GST Tran-1.
- The GST authorities raised an objection on the transition of the amount and the Appellants reversed the amount so that it transitioned in February 2019 along with applicable interest. Thereafter, a refund claim was filed by the Appellant in April 2019. The claim was rejected by the authorities who treated it as time barred in accordance with section 11B of the CE Act.
- The Appellant filed the present appeal before the Hon'ble Tribunal after the dismissal of the appeal filed before the Commissioner (Appeals). The Appellant made the following submissions:
  - Upon the cancellation of invoices, no Service tax is payable, and the amount should be treated as a deposit.
  - Alternatively, upon the reversal of such a transitioned amount with interest, one must recognise that the refund had accrued to the Appellant and as such filing the refund application on April 5, 2019 is within the limitation period prescribed under section 11B of CE Act.
- The departmental authorities submitted that the refund claim was filed beyond the limitation period of one year and that the test of unjust enrichment must be examined.
- After perusing the facts and the legal provisions, the Hon'ble Tribunal observed as follows:
  - The Appellant had transferred the amount of Service tax paid in excess by filing Form GST Tran-1 and it was reversed in February 2019. The trigger event for the refund arose only after the amount was reversed by the Appellant.

[1] 2021-VIL-52-CESTAT-AHM-ST

- The refund claim application was filed within the time limit of one year i.e. April 2019 as prescribed under section 11B of the CE Act.
- The Tribunal observed that even though the refund claim was filed within the prescribed time limit, the issue of unjust enrichment i.e. whether the incidence of the refund amount has been passed on or otherwise must be examined by the authorities.

Judgment

The Hon'ble Tribunal remanded the matter back to the adjudicating authority to verify the aspect of unjust enrichment and to dispose of the refund claim.

Dhruva Comments:

Generally, upon the cancellation of invoices, the assessee should file a Service tax refund application within the limitation period. In the given case, the Hon'ble Tribunal has identified the date of the reversal of the transitioned amount as the relevant date for computing the limitation period rather than the original date of the payment of Service tax. The present judgment would certainly be useful in dealing with similar situations arising during the implementation of GST.

Ruling under GST era

M/s Meera Tubes Pvt Ltd – Authority for Advance Ruling, Uttar Pradesh[2]

Issue for Consideration

Whether the activity of fabrication of tanks from the steel plates which are supplied Free of Cost ("FOC") amounts to supply of services (i.e. job work) or supply of goods, if while undertaking the said activity various other self-procured materials and consumables are also used?

Discussion

- The Applicant is engaged in the business of fabricating tanks for Indian Oil Corporation Ltd. ("IOCL"). As per the contract, IOCL has supplied the steel plates from its depot on FOC basis to the Applicant. The Applicant also buys / manufactures certain other components at its own cost for fabricating tanks including consumables like welding electrodes, gas, etc which are used during the fabrication process.
- All these components / materials along with the labour charges constitute the value of work undertaken by the Applicant.
- The Applicant is presently charging GST at the rate of 18% on the final product, in the form of tanks, under HSN 7309 to IOCL without including the cost of steel plates.
- The Applicant received a communication from IOCL to charge 12% GST on the said supplies in terms of the amendment made in notification no. 11/2017-Central Tax (Rate) dated June 28, 2017 (as amended w.e.f. October 01, 2019) ("rate notification") whereby the rate for job work service was reduced to 12%. IOCL also referred to the CBIC circular no. 126/45/2019-GST dated November 22, 2019 ("the Circular") in this regard.
- Accordingly, the Applicant has approached the Authority for Advance Ruling ("the Authority") to determine whether the said supplies would amount to supply of goods or services (i.e. job work) and accordingly what would be the applicable HSN and the rate of tax. The Applicant made the following submissions:
  - As per entry 3 of Schedule II of the CGST Act, 2017, any treatment or process which is applied to another person's goods is a supply of service. Furthermore, job work under section 2(68) of the CGST Act, 2017 means any treatment or process undertaken by a person on goods belonging to another registered person.
  - The relevant extract of the amendment made w.e.f. October 1, 2019 under sl. no. 26 of the rate notification is as follows:

[2] 2021-VIL-135-AAR

S. No	Description	Rate
(id)	Services by way of **job work** other than (i), (ia), (ib) and (ic) above	12%
(iv)	Manufacturing services on physical inputs (goods) owned by others, other than (i), (ia), (ib), and (ic), **(id)**, (ii), and (iia) and (iii) above.	18%

- As per the amendment, the supply should first qualify as 'job work' and then it can be considered as a 'service' to be taxable at the rate of 12%. The Applicant falls under sl. no. (iv) (*supra*) up to September 30, 2019.
- The entry under sl. no. 26(id) dealing with 'job work' is to be read in exclusion of the 'job work' dealing with 'manufacture'. Such exclusion from the entry concerning 'manufacturing' is also apparent from the use of words 'other than (id)' which specifically refers to 'job work'.
- The dilemma of classification of 'service' under sl. no. 26(iv) or (id) has been clarified under para 4 of the circular.
- The term 'manufacture' has been defined under the CGST Act, 2017 and the Central Excise Act, 1944. The 'supply of goods' or a 'supply of service' are absolutely mutually exclusive concepts with no overlapping under the GST law except for 'Composite Supply', 'Mixed Supply' or 'Principal Supply'.
- In preparation of the tanks, the Applicant uses various other inputs / materials without which the tanks cannot be brought into existence. Throughout the tender documents, invoice etc. emphasis has been placed on the word 'Fabrication'. Also, the actual activity of bringing the tanks in its desired commercial form can more closely be covered under 'Fabrication'.
- The key difference between 'fabrication' and 'manufacturing' is that 'manufacturing' involves building a product from the bottom-up whereas 'fabrication' involves assembling of standardized parts.
- The concept of 'job work' as explained by the Hon'ble Supreme Court in the case of *Prestige Engineering (India) Ltd. and Ors.* v. *Collector of Central Excise, Meerut and Ors.*[3] is not applicable to the present case since substantial supplies are employed by the Applicant at his own cost which are all necessary for rendition of the supply of the tank.
- CBIC circular no. 38/12/2018 dated March 26, 2018 has clarified that a job worker can use his own goods in addition to the goods received from the principal. Hence, the present activity is squarely covered under the ambit of 'job work' as per the GST law.
- The activity of converting the steel plates using the Applicant's own material would amount to 'manufacture' of tanks as per the GST law. In this regard, reliance was placed upon various pre-GST judgments wherein it had been held that fabrication of tanks from steel plates provided on FOC basis amounts to manufacture and leviable to excise duty.
- The activity of 'fabrication' amounts to 'manufacturing' was established under the pre-GST regime, but the analysis is yet to be made under the GST jurisprudence considering the facts of the case and the relevant law.
- It is significant to consider what actually is supplied, whether it is a 'job work service' under the scope of 'supply of service' and / or such 'job work service' is amounting to 'manufacture' or a 'supply of goods' in the form of 'fabricated tank'.

- After considering the submissions of the Applicant, the Authority observed the following:
  - The Applicant has made contrary submissions as they are classifying the tank as supply of goods under HSN 7309 and simultaneously they have submitted that tanks merit classification as supply of service under HSN 9988.

[3] 1994-VIL-03-SC-CE

- Even after the amendment, the Applicant is supplying the same goods and charging GST at the rate of 18% under HSN code 7309 and there is no change in the composition of the final product and process of fabrication of steel tanks.
- The weight and value of the components and materials used in the fabrication of the tanks is quite substantial as compared to the steel plates provided on FOC basis. It is not a case that entire inputs required for fabrication of tanks are provided by IOCL, but substantial items are used by the Applicant during the process. Hence, the nature of supply in the present case is supply of goods.
- The activity of the Applicant is not covered in the services by way of job work or in manufacturing service.
- The legislature has defined job work and manufacture separately. As such, the legislature does not intend to cover a treatment or process that results in a distinct commodity under the scope of job work. The steel plates and tank are different commodities and after processing on steel plates, a new product i.e. tank has been manufactured which is distinct in name, character and use.
- The fabrication of tanks from steel plates supplied by IOCL is manufacture as per CGST Act, 2017. Reliance was also placed upon the pre-GST case laws as referred to by the Applicant. Accordingly, supply of tanks by the Applicant is supply of goods.

Judgment

The Authority held that the activity undertaken by the Applicant is supply of goods falling under HSN 7309 and attracts 18% GST.

Dhruva Comments:

The concept of job work has been a subject matter of litigation under the GST as well as the Pre-GST regime. The circular no. 38/12/2018 dated March 26, 2018 issued by the CBIC though states that a job worker can use his own goods in providing the service but does not state to what extent the own materials can be used. The Hon'ble Supreme Court in the case of Prestige Engineering (*supra*) has held that even if minor additions are made by a person on the goods supplied by the Principal, it can still qualify as a job work transaction. However, the same would not be true if the additions made are of substantial nature and value. Thus, in each transaction it would be imperative to determine as to whether the activity amounts to job work or whether it results in manufacture basis the goods supplied by the Principal and / or activities or process undertaken. Accordingly, the nature of supply whether as supply of goods or job work service would get determined.

Circular

IGST refund on exports in relation to SB005 error (invoice mismatch errors in GSTR 1 and Shipping bill)

- The CBIC has issued various circulars in the past in respect of SB005 error which provided the facility for resolving invoice mis-match errors (between GSTR 1 and shipping bills) with an officer interface as a measure to rectify the error and thus, enable refund of IGST paid against exports. This facility was being extended on a time-to-time basis depending upon the date of filing of the shipping bills.
- The CBIC has now issued circular no. 5/2021-Customs dated February 17, 2021 to state that the quantum of shipping bills pending on account of SB005 error has reduced but the error is still occurring in some cases thereby resulting in delay of release of IGST refunds. Accordingly, the facility of the officer interface has been made available on a permanent basis to resolve such error irrespective of the date of filing of the shipping bill.
- Furthermore, such facility shall be available on payment of ₹ 1,000/- as a fee towards such rendering of service by the Customs Officers for correlation and verification of the claim. In this

regard, necessary amendment has been made in the Levy of Fees (Customs Documents) Regulations, 1970 vide notification no. 17/2021-Customs (N.T.) dated February 17, 2021.

Dhruva Comments:

The said measure is a welcome step as it would enable the assessees to resolve the errors at the earliest and help them get IGST refunds expeditiously.

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