



Dimensions – 101st Edition

Judgment under pre-GST era

M/s Ajay Kumar through partner Smt. Mala Sinha v. The Union of India through The Commissioner Service Tax-cum-Central Excise, Patna and Others¹

Issue for Consideration

Whether Service tax should be paid even though the tax amount has not been received due to a dispute and pending for arbitration?

Discussion

- The Petitioner is engaged in the business of washing and cleaning bedrolls and linen and had rendered the said services to East Central Railway during FY 2011-12 and 2012-13. The Petitioner was not registered under the Service tax law.
- An investigation was carried out by the department, followed by show cause notice and order passed confirming the demand in April 2018. The Petitioner filed a Writ Petition before the Hon'ble High Court and made the following submissions:
 - The demand order suffers from perversity;
 - No amount has been received from the recipient;

- The dispute is pending for arbitration;
 - The service recipient is obliged to comply with the statutory provisions;
 - The obligation of the service provider is only on actual receipt of the tax amount and not otherwise.
- The High Court after considering the various provisions of the Service tax law, observed as follows:
 - The Hon'ble Supreme Court in the case of *Laghu Udyog Bharati and another v. Union of India and Others*² had held that an indirect tax may be passed on to the customer, but in respect of levy and assessment it is the person rendering the service who can alone be regarded as an assessee and not the customer. Furthermore, reference was made to various case laws which state that it was the obligation of the service provider to comply with the statutory provisions.
 - The language of the Service tax law is clear and unambiguous, and the service provider is required to register and make payment of tax. The law does not stipulate payment of tax only on receipt thereof.

¹ 2021-VIL-38-PAT-ST

² (1999) 6 SCC 418



- Arbitral proceedings would only determine obligations *inter se* the parties to the agreement and not the liability or factum of compliance of statutory provisions.
- The law requires timely payment of tax. There is no provision for deferment, either till the time of its receipt or payment only subject to its receipt.

Judgment

The Hon'ble High Court held that the Petitioner is liable to pay the tax amount even if the service recipient had failed to pay the said amount and the matter was pending for arbitration.

Dhruva Comments:

The judgment unequivocally lays down a clear point that Service tax is liable to be paid by the service provider irrespective of whether such tax has been paid or not by the recipient. Arbitration proceedings cannot be a factor for deferment of the tax liability. The judgment would equally be applicable under the GST regime.

Judgment under GST era

Nipun A. Bhagat, Proprietor of Steel Kraft Industries v. State of Gujarat³

Issue for Consideration

Can input tax credit (“ITC”) be blocked under rule 86A of the CGST Rules, 2017 for the recovery of dues under the Gujarat Value Added Tax Act, 2003 (“GVAT Act”)?

Discussion

- The Petitioner is engaged in the manufacturing of kitchenware and home appliances and is also a director in Bhagat Marketing Private Limited (“BMPL”). The Petitioner was also a director in Dolphin Metals (India) Ltd. (“DMIL”) from 2009 to 2018.

- The Respondents sent a notice under section 44 of the GVAT Act to the Union Bank of India for attaching the bank accounts maintained by BMPL to recover outstanding tax and interest pertaining to DMIL. However, the bank declined to act because the name and PAN of account holder i.e. BMPL was different from the person to whom the notices were addressed i.e. DMIL.
- Accordingly, the Respondents blocked the ITC of the Petitioner available in the electronic credit ledger with an intention to recover the amount of tax and interest payable by DMIL under the GVAT Act.
- The Petitioner filed the present Writ Petition before the Hon'ble High Court of Gujarat after their request for the release of the blocked ITC was denied by the Respondents. After perusing the facts of the case, the Court observed as follows:
 - The reliance placed by the Respondents on section 18 of the Central Sales Tax Act, 1956 – *Liability of directors of private company in liquidation* – is misplaced as the said section is only applicable to a private limited company and therefore it should not be applicable to DMIL which is a public limited company.
 - Powers enshrined under rule 86A of the CGST Rules, 2017 can be invoked only on satisfaction of the conditions stipulated therein. The authority can exercise its powers under rule 86A of the CGST Rules, 2017 only if the Commissioner or an officer authorised by him / her has **reasons to believe** that the ITC available in the electronic credit ledger has been fraudulently availed or is ineligible for reasons stated in rule 86A(1)(a) to (d) of the CGST Rules, 2017.
 - Furthermore, the issue is squarely covered by the judgments pronounced by the Hon'ble High Court in the cases of *Mr. Choksi v. State of Gujarat*⁴, *Different Solution Marketing Private*

³ 2021-VIL-40-GUJ

⁴ SCA No.243 of 1991



*Ltd. v. State of Gujarat*⁵ and *Paras Shantilal Savla v. State of Gujarat*⁶.

Judgment

The Hon'ble High Court allowed the Writ Petition and directed the Respondents to unblock the ITC. Furthermore, the High Court clarified that the Respondents are not precluded from recovering the dues of DMIL by any other mode of recovery permissible under the law.

Dhruva Comments:

Recently, the Hon'ble High of Gujarat in the case of *M/s S.S. Industries v. Union of India*⁷ issued directions to the Government for creating a framework on the applicability and the situations in which the powers enshrined under rule 86A of the CGST Rules, 2017 can be invoked by the authorities. It is crucial that the Government issues the framework at the earliest opportunity in order to provide clarity on the discretionary aspect followed by the authorities in related cases; the framework would prove to be a useful guide in settling such matters.

⁵ SCA No.19949 of 2015

⁶ SCA No.7801 of 2019

⁷ 2020 (12) TMI 1120





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