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Indirect Tax Alert

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Judgments under Pre-GST era

Schlumberger Asia Services Ltd. v. Commissioner of CE & ST, Gurgaon-I[1]

Issues for Consideration

- Whether refund can be claimed of the CENVAT credit balances of Education Cess ("Ed. Cess"), Secondary and Higher Education Cess ("SHEC") and Krishi Kalyan Cess ("KKC") remaining unutilised as on June 30, 2017?
- Whether such refund claim can be barred by the period of limitation?

Discussion

- The Appellant is engaged in providing various services. On July 1, 2017 when the GST law came into force, the Appellant transferred the unutilised balance of the CENVAT credit on goods, services, Ed. Cess, SHEC and KKC into the GST account.
- Subsequently, section 140 of the CGST Act, 2017 was amended on August 30, 2018. As per the amendment, restriction was imposed on the carrying forward of credit lying unutilised in the CENVAT credit account of Ed. Cess, SHEC and KKC. Consequently, the Appellant immediately reversed the amount of CENVAT credit pertaining to Ed. Cess, SHEC and KKC and filed a refund claim on August 30, 2019 of such unutilised CENVAT balances.
- A show cause notice was issued to the Appellant rejecting the refund claim on the grounds that the refund claim filed on August 30, 2019 was barred by limitation since the amendment to section 140 of the CGST Act, 2017 stipulates that the carrying forward of CENVAT credit in the GST regime is restricted. Furthermore, Ed. Cess and SHEC had been abolished with effect from June 1, 2015.
- The refund was rejected by the adjudicating authority and hence the Appellant filed an appeal before the Tribunal. The Tribunal observed as follows:
  - When the new regime of GST came into force, there was no bar on carrying forward the credit of Ed. Cess, SHEC and KKC. Subsequently, section 140 of the CGST Act, 2017 was amended retrospectively and as per the amendment, any credit which was not admissible could not be considered a 'GST credit'. Therefore, the contention of the authorities that the CENVAT credit lying in the account is GST credit is "not acceptable" for the

[1] 2021-VIL-218-CESTAT-CHD-ST

reason that "the said credit cannot be transferred to GST Regime".

- The credit remaining unutilised in the Appellant's CENVAT credit account relating to cesses is as good as the same is remaining unutilised as on July 01, 2017. Since this credit cannot be transferred to the GST account as per the amended provision, it constitutes only a CENVAT credit of the cesses that lay unutilised as on July 01, 2017 in the CENVAT credit account. The same view has been taken by the Tribunal in the case of *Bharat Heavy Electricals Ltd.* v. *Commr. of CGST & Customs*[2].
- The refund claim filed is not barred by limitation since the relevant date of filing the refund claim shall be one year from date of amendment i.e. August 30, 2018.

Judgment

The Appellant is entitled to a refund of the Ed. Cess, SHEC and KKC ('Cesses') lying unutilized in CENVAT credit account as on July 01, 2017.

Dhruva Comments:

Vide notification no.43/2020-Central Tax dated May 16, 2020, CBIC notified retrospective amendment to section 140 of the CGST Act, 2017.

CESTAT Delhi in Bharat Heavy Electricals Ltd. (*supra*) accorded with the Appellant's submission that credits earned were a vested right in light of the Hon'ble Apex Court's judgment in the case of *Eicher Motors* v. *UOI*[3] case. This right will not extinguish with the change of law unless there is a specific provision that debars refund of such credit. Applying the ratio of the Eicher Motors case, CESTAT found the Appellant eligible for the cash refund of the cesses lying as CENVAT credit balance as on June 30, 2017 in their accounts.

Given contrary judgments on the transition of cesses, the moot question is whether such credits should be construed as a vested right or as a concession / facility subject to conditions.

Volvo Auto India Private Limited v. *Commissioner of Customs (Import & General)*[4]

Issue for Consideration

Whether true up payments received from a foreign holding company have to be included in the transaction value of imported goods, as per Customs law?

Discussion

- The Appellant has imported motor vehicles from its holding company in Sweden and paid Customs duty on the transaction value of the goods.
- The Appellant and its holding company are related persons under Customs law. Therefore, transaction value is accepted as the assessable value only if the invoice value is not affected by the relationship among the entities.
- Whenever the Appellant suffers any losses, its foreign holding company makes up for the losses which are called as true up payments.
- The Special Valuation Branch of Customs ('SVB') conducted a detailed investigation to ascertain the assessable value of the goods imported by the Appellant, and held that the relationship of the entities did not affect the value of goods and hence the invoice value should be considered as the transaction value for levy of Customs duty.
- The said order was valid for three years subject to an occasional review / final review after three years. The tax authorities did not file an appeal against the order.
- After three years, another order on the same issue was passed by the SVB ("OIO") wherein it was held that the holding-subsidiary relationship did not affect the invoice value of the goods. However, this time, the revenue filed an appeal against the said order before the Commissioner (Appeals) who

[2] 2020-VIL-402-CESTAT-DEL-CE
[3] 1999 (106) ELT 3 (SC)
[4] TS-217-CESTAT-2021-CUST

allowed the appeal and set aside the SVB order ("OIA / the impugned order"). The impugned order neither remanded the case back to the adjudicating authority nor did it give any directions on how the valuation had to be done.

- The Appellant filed an appeal against the impugned order before CESTAT, New Delhi on the following grounds:
  - The impugned order was passed after a delay of one year from the date of hearing and hence was liable to be set aside.
  - Principles of natural justice were violated as the submissions put forth before the authorities was not considered nor discussed in the order and hence it was pre-meditated and unilateral.
  - The true up payments were received as subvention payments to recoup losses and other expenses. These subvention payments are in nature of capital receipts and not revenue receipts.
  - The Appellants take responsibility of their own goods and the expenses are incurred to promote sales for their own business and not on behalf of the foreign supplier.
  - The first SVB order was not challenged by the authorities and hence the subsequent orders also should not be questioned to maintain consistency.
- The Respondent has put forth the following submissions:
  - The principle of promissory estoppel does not apply to taxation. If some issues were not considered in the first SVB order, nothing prevents them from being considered in the second SVB order.
  - The OIO failed to verify whether the true up payments were equal to the losses incurred by the importer or otherwise.
  - The Respondent relied upon the Delhi Tribunal judgment in the case of Reebok India[5] to submit that advertising and marketing costs incurred in relation to the imported goods are includible in the assessable value of goods.
  - True up payments in the present case are to be considered in the value irrespective of it being a capital receipt or revenue receipt.
  - The adjudicating authority has failed to examine the books of account to conclude whether or not the transaction value was influenced by the holding-subsidiary relationship of the Appellant and they have not properly verified the difference between the price of the imported cars with those sold to unrelated parties.
- The CESTAT has considered the arguments of both the parties and held as follows:
  - The impugned order is inconclusive as it found several mistakes in the OIO but has neither remanded it back to the adjudicating authority nor decided whether the relationship has affected the price or how the valuation is to be done. The impugned order should have either held that the relationship has affected the price and then should have decide on how the valuation should be done or the matter should have been remanded for re-decision.
  - The delay in passing the impugned order is undesirable but, in absence of legal provisions, the said order cannot be held invalid.
  - Under Customs, each bill of entry is a separate assessment and hence the Appellants contention that the second SVB order cannot be challenged as the first order was not questioned lacks merit. Further, both the SVB orders clearly indicate that they are subject to occasional / final review after three years.
  - What is relevant is whether any additional consideration is flowing from the Appellant importer to the foreign supplier to determine the correct assessable value. In the present case, the true up payments are flowing the other way round i.e., from the foreign supplier to the importer.
  - True up payment is an arrangement between the Appellant and the parent company. No law

[5] 2018 (364) ELT 581 (Tri-Delhi)

requires such payment nor can it influence the transaction value. The losses incurred by the Appellant have no bearing on the invoice value irrespective of whether it has been reimbursed in the form of true up payments or not.

- The expenses (such as marketing and advertisement) incurred by the Appellant are related to managing affairs of its own business in India and cannot be termed to be incurred on behalf of the foreign seller.
- The cars sold by the foreign seller to unrelated parties were different as they had additional features and were sold in retail. However, the Appellant had bought the cars in bulk being a distributor. The retail prices to individual buyers are higher than the bulk prices to distributors. There has been no such discussion in the OIA.
- The adjudicating authority has not verified the balance sheet and the Commissioner (Appeals) could not find any payments made on behalf of the seller even after one year of the hearing. Hence, the OIO cannot be set aside on mere suspicion without any evidence.
- If the Commissioner (Appeals) had found some reason to conclude that the relationship between parties has affected the price, then the same should have been pointed out in the OIA including which elements should be added to the invoice value to arrive at the transaction value. However, no such conclusion was mentioned in the OIA.

Judgment

The Tribunal allowed the appeal and set aside the impugned order. The expenses were not incurred on behalf of the seller and hence the true up payments have no relation to the invoice value of the imported goods. Thus, they are not required to be added to the assessable value.

Dhruva Comments:

The Hon'ble CESTAT in the present case has stated that true up payments are nothing but compensation for the losses incurred by the Appellant and they have no bearing on the invoice value of the imported goods. Furthermore, it is a settled position in Customs law that only costs incurred as a pre-condition to the import of goods on behalf of the seller are to be considered for Customs duty valuation. The activities undertaken by the buyer on his own account are not to be considered as an indirect payment to the seller even though it might result in a benefit to the seller. In the present case also, expenses incurred by the Appellant might indirectly benefit the seller but are not a pre-condition to the import of goods and hence, do not form part of the assessable value for Customs.

Notifications under GST

Relaxation in respect of GST compliances[6]

The Government has issued various notifications dated June 1, 2021 whereby it has provided various relaxations in respect of the GST compliances on account of the ongoing pandemic. The key highlights are as follows:

- The due date of furnishing GSTR-1 return for the month of May 2021 has been extended by 15 days i.e. from June 11, 2021 to June 26, 2021.
- The **interest payable** on late payment of tax through GSTR 3B return, beyond the due dates prescribed, has been relaxed based on the turnover of the assessee.
- The late fees payable on late filing of GSTR 3B for the period March 2021, April 2021 and May 2021 has been waived for various assessees basis their turnover and also for the quarter January-March 2021.
- The late fees for late filing of GSTR 3B / GSTR 1 of June 2021, (monthly / quarterly) in excess of certain

[6] Notification no. 17/2021 to 22/2021-Central Tax dated June 1, 2021

amounts have been waived depending upon the turnover of the assessee.

- In respect of the persons required to file GSTR 04 return for the FY 2021-22, if not filed by the due date, the late fee shall stand waived in excess of ₹500 (CGST + SGST) where tax payable is Nil and ₹2,000 (CGST + SGST) in any other case. Furthermore, the due date for furnishing the GSTR 04 return for the FY 2020-21 has been extended upto July 31, 2021 [*previously May 31, 2021*][7].
- In respect of the persons required to file GSTR 07 (TDS) return for the month of June 2021, fail to file the same by due date then the late fees in excess of ₹2,000 (CGST + SGST) shall stand waived.
- The due date for furnishing the Form ITC 04 (job worker) for the period January 1, 2021 to March 31, 2021 has been extended to June 30, 2021 [*previously May 31, 2021*][8].

Amendment in e invoicing provision

The Government has issued notification no. 23/2021-Central Tax dated June 1, 2021 whereby a government department and a local authority shall not be required to issue an e-invoice.

Amendment to section 50 of CGST Act[9]

The amendment made to section 50 of CGST Act, 2017 vide the Finance Act, 2021, has been made effective retrospectively w.e.f. July 1, 2017. As per the said amendment the interest shall be **payable** [*previously levied*] only on that portion of tax which is paid by debiting electronic cash ledger.

[7] Notification no. 25/2021-Central Tax dated June 1, 2021
[8] Notification no. 26/2021-Central Tax dated June 1, 2021
[9] Notification no. 16/2021-Central Tax dated June 1, 2021

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