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Indirect Tax Alert

Date: June 12, 2021

Dimensions – 116th Edition

Judgments under Pre-GST era

Anjappar Chettinad A/c Restaurant and Others v. Joint Commissioner, GST and Central Excise and Others[1]

Issue for Consideration

Whether Service tax liability arises on sale of food, either from the restaurant's takeaway counters or by way of food parcels?

Discussion

- The Petitioners are engaged in the business of operating air-conditioned restaurants and are registered under Service tax law for providing restaurant services, outdoor catering services and mandap keeper services.
- An audit was undertaken on the Petitioners, wherein it was found that Service tax was not discharged on food sales made from the takeaway counter / parcel services for various periods up to June 2017 and accordingly, the orders were passed by the department.
- The Petitioners filed Writ Petitions before the Hon'ble Madras High Court against the impugned orders and contended that no Service tax was payable on take away / parcels, on the following grounds:
  - The definition of 'Service' given under Section 65B(44) of the Finance Act, 1994 ("the Act") excludes the transfer of title in goods by way of sale. The sale of packaged food from takeaway counters constitutes a pure trading activity and no component of service is involved therein.
  - There could be no artificial splitting of the transaction between 'service' and 'sale of goods' with an aim to tax it under Service tax. Reliance was placed upon letter issued by Ministry of Finance bearing no. 334/3/2011-TRU dated February 28, 2011 ("TRU") which clarifies that Service tax on restaurant services was not intended to cover sale of food that is collected or picked up for consumption elsewhere.
  - Restaurant services include service elements such as organised seating, air-conditioning, service at the table, live music, enhanced hospitality etc. which are absent in food takeaway transactions.
  - The Hon'ble Supreme Court in the case of *Federation of Hotel and Restaurant*

[1] 2021-VIL-442-MAD-ST

Associations of India v. *Union of India*[2] held that there could be no artificial division or distinction made between the sale and service elements when it comes to service of food in a restaurant.

- The Respondents put forth the following submissions:
  - Service element in a supply of food or any other article for human consumption is a declared service under section 66E of the Act and hence liable to Service tax.
  - The Hon'ble High court, in the case of *Indian Hotels and Restaurant Association* v. *Union of India*[3], held that restaurants primarily provide a service and the sale of food, undertaken in the provision of service, is only incidental. Thus, the provision of take away food and drinks involve rendition of service and the mode of sale, i.e. by parcels, has no bearing on the levy. The transaction should be bifurcated into one that involves both the components of sale and service and accordingly should be subjected to tax.
  - Furthermore, the writ petitions are not maintainable due to the availability of an alternate remedy in the form of appeal against the impugned orders.
- The Hon'ble High Court considered the arguments of both parties and observed as follows:
  - The Mega Exemption notification (25/2012-Service tax) exempted the services provided in relation to serving of food and beverages by a restaurant other than those having a facility of air-conditioning or central air-heating in any part of the establishment at any time during the year.
  - The CBEC had issued circular no. 173/8/2013-ST dated October 7, 2013 wherein various clarifications were provided in relation to the restaurant services.
  - As per the TRU, Service tax is not applicable on all services rendered by restaurants in the sale of food and drinks. The sale of food and drink simplicitor, services of selection and purchase of ingredients, preparation of ingredients for cooking and the actual preparation of the food and drink would not attract the levy of Service tax. Only those services commencing from the point where the food and drinks are collected for service at the table till the raising of the bill are covered. This would encompass a gamut of services including arrangements for seating, décor, music and dance, both live and otherwise, the services of hostesses, liveried waiters and the use of fine crockery and cutlery, among other things. The provision of the aforesaid niceties are critical to the determination as to whether the establishment in question would attract liability to service tax, and that too, only in an air-conditioned restaurant.
  - In case of food take away or food parcels, the above elements of service are absent. In most restaurants, food orders are collected through telephone, e-mail, online booking or through various food aggregators and the prepared food is brought to a separate food counter. Collection of food parcels are done through a separate counter which are mostly positioned away from the main dining area or may not be air-conditioned. In any event, the consumption of the food and drink is not in the premises of the restaurant. Accordingly, the Service tax liability should not arise on sale of food from the restaurant's takeaway counters or by way of food parcels.
  - Furthermore, the Petitioners have brought on record various orders passed by the Commissioners, Chennai wherein it was held that take away services would not attract service tax. The department has not filed any further appeal against such orders.
  - Furthermore, as in the present case the matter involved is a pure question of law, the argument of alternate remedy being available is rejected.

[2] 2017-VIL-56-SC
[3] 2014-VIL-94-BOM-ST

Judgment

The Hon'ble High Court allowed the writ petitions and quashed the impugned orders.

Dhruva Comments:

The subject decision is a welcome judgment and in unequivocal terms has characterised the transaction as sale of goods and there is no service element involved. A similar decision was also pronounced by Delhi High Court in case of *Indian Railways Catering & Tourism Corporation Ltd* v. *Govt of NCT of Delhi & Ors* wherein it was held that any transaction of supplying of food and beverages to the passengers during the train journey does not amount to rendition of an outdoor catering service but is a transaction of sale of food and beverages.

Judgments under GST era

Bangalore Turf Club Ltd. and Others v. The State of Karnataka and Others[4]

Issue for Consideration

Whether rule 31A(3) of the CGST Rules, 2017 ('the Rules'), levying GST on the entire bet amount received by the totalisator is *ultra vires* the CGST Act, 2017.

Discussion

- The Petitioners are public limited companies engaged in the business of a race club conducting horse races and facilitating betting by punters. The punters place their bets either with a totalisator run by the Petitioners or with a licensed bookmaker.
- Out of the total amount collected by the totalisator, the Petitioners retain their fixed commission and distribute the balance amount among the winners. In case of bets placed with the bookmaker, the bet amount and the odds of winning on individual horses are decided by the bookmaker, who could end up making a gain or loss depending upon the outcome of the race. In both the cases, irrespective of the result of the race, the Petitioners receive consideration in the form of commission.
- Up to June 30, 2017, the Petitioners discharged Service tax on the commission earned and betting tax under the Mysore Betting Tax Act, 1932. The CGST Act, 2017 ('the Act') came into force on July 1,2017 and repealed the above laws.
- Rule 31A[5] of the Rules ('impugned rule') was inserted in January 2018, levying GST on the total amount of bets collected by the totalisator. The Petitioners have challenged this amendment as ultra vires section 7 of the Act and liable to be quashed by filing a writ petition before the Hon'ble Karnataka High Court and submitted as follows:
  - The impugned rule violates Article 246A read with Article 366(12A) of the Constitution since it specifies levy of tax in the absence of supply of goods / services.
  - The impugned rule imposes tax on the entire bet amount whereas the Petitioners are not engaged in the supply of bets.
  - The supply of bets is not in the course or furtherance of business of the Petitioners and taxable value of supply exceeds the consideration received by the Petitioners.
- The Respondents submitted that the Act itself has mandated levy of tax on actionable claims from the beginning and betting is also an actionable claim. Hence the Petitioners cannot claim that tax was being levied on the value of the actionable claim by way of the amendment. The impugned rule has merely clarified the role of the Petitioners in the field of betting.
- The Hon'ble High Court considered the arguments of both parties and held as follows:
  - 'Totalisator' ordinarily means a system of betting on horse races in which the aggregate stake, less an administration charge and tax, is paid out to the winners in proportion to their stakes. The totalisator keeps a record of the

[4] 2021-VIL-445-KAR

[5] Rule 31(A) (3): The value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator

amount paid by the punter, automatically retains a certain percentage towards commission of the Petitioners and taxes thereon. It is thus evident that the Club is entitled only to commission from the total collections and from the total receipts of the bookmakers.

- The Petitioners hold that money is in its fiduciary capacity for a certain period between input of money by the punters and the output of money to the winners of stake for which the Petitioners receive consideration in the form of commission.
- It is the bookmakers who indulge in betting and receive consideration depending on the outcome of the race. In contrast, the Petitioner provides a totalisator service for which it receives a certain commission. The Court held that betting is neither in the course of business nor in furtherance of business of a race club for the purposes of the Act. Therefore, a totalisator does not indulge in betting and as a result, there is no supply of goods / bets by the Petitioner.
- The impugned rule completely wipes out the distinction between the bookmakers and a totalisator by making the Petitioners liable to pay tax on the entire bet value and not merely on the commission earned by it.
- The commission so received by the petitioners is not in respect of nor in response to an inducement of supply of a betting transaction. Thus, the totalisator holds money in trust on behalf of the punters before redistribution to the winners of stake which cannot be construed to be a consideration in terms of section 2(31) of the Act.
- In the present case, the Petitioners do not supply bets to the punters. However, the impugned rule makes the Petitioners suppliers of bets. Therefore, the Petitioners cannot be held liable to pay tax under the Act on the entire amount, as the service that the Petitioners provide is only of a totalisator.
- Making the entire bet amount that is received by the totalisator liable for payment of GST would take away the principle that a tax can be levied only on the basis of consideration under the Act. The consideration that the petitioners receive is by way of commission for planting a totalisator. This is similar to a share broker or a travel agent, both of whom are liable to pay GST only on their income i.e., commission earned and not on all the monies that pass through them.
- Therefore, the impugned rule, in so far as it declares that the value of actionable claim in the form of chance to win in a horse race of a race club to be 100% of the face value of the bet is beyond the scope of the Act.
- The Court referred to the judgment in the case of *K.R. Lakshmanan*[2] given by the Hon'ble Supreme Court that the activity of the petitioners was a game of skill and not a game of chance.
- The Court further relied upon the judgment of Hon'ble Supreme Court in *P.Krishnamurthy*[3] wherein it was held that while considering the validity of a subordinate legislation, the Courts will have to consider the nature, object and scheme of the enabling Act and then decide whether the subordinate legislation conforms to the parent statute.
- As per charging section 9 of the Act, tax is to be levied only on the supply of goods and services, on the value determined under section 15 of the Act which deals with value of taxable supply, at a tax rate not exceeding 20% and to be paid by a taxable person who is the person obliged to pay tax.
- The impugned rule in question travels beyond the authority conferred upon section 9 which is the charging section, since it brings a totalisator under a taxable event without it being so

[2] 1996 (1) TMI 336
[3] 2006 (3) TMI 741

defined under the Act nor such power being conferred in terms of the charging section.

- The nexus between the measure of tax and the taxable event under rule 31A(3) can at best be supply of a totalisator service. Rule 31A(3) tampers the nexus between the measure of tax and the taxable event as the amount fully paid into the totalisator is directed to be assessed for payment of GST under the Act.

Judgment

- In view of the above discussion, the Hon'ble High Court allowed the writ petitions and quashed rule 31A(3) being ultra vires the CGST Act, 2017.
- It held that the Petitioners were liable to pay GST only on the commission earned by them and not on the entire amount.

Dhruva Comments:

The Hon'ble Supreme Court in *Skill Lotto Solutions Private Limited.*[4] has upheld the inclusion of actionable claims under 'goods' defined in the CGST Act, 2017. Furthermore, it dismissed the Petitioners contention that prize money should be excluded for computing the value of taxable supply in case of lotteries. It will be interesting to see how this matter unfolds and whether tax is applicable merely on the commission element and would exclude the bet amount.

Super India Paper Products Benlon India Ltd and Others v. Union of India & ORS. Commissioner, Delhi Goods & Service tax & ANR.[6]

Issue for Consideration

- Whether Petitioners would be permitted to file / revise / rectify Form GST TRAN-1 in the following / scenarios:
  - Where taxpayers have evidence of an attempt to file a TRAN-1 form?
  - Where taxpayers do not have any proof of an attempt to file TRAN-1 form?
  - Where Petitioners have submitted the TRAN-1 form within the prescribed time period but their grievance stems from their inability to revise / rectify the TRAN-1 form which they had filed?

Discussion

- The Hon'ble High Court had clubbed various Writ Petitions based on commonality of issues regarding filing of Form GST TRAN-1 into four batches. However, the first three batches were covered under the present judgment and the balance being decided by separate judgments.
- A brief background in relation to the present case is as under:
  - The CGST Act, 2017 allows for transition of unutilised Cenvat credit available under the previous regime to GST regime by furnishing the necessary details in Form GST TRAN-1 by a specific deadline.
  - The transitionary mechanism was not smooth and several factors including technical glitches, low internet bandwidth, technological hindrances while accessing the portal etc. prevented or obstructed the taxpayers from filing Form GST TRAN-1.
  - Several petitions were received from taxpayers seeking directions to re-open the portal. The Government took cognizance of the same and deadline for filing Form GST TRAN-1 was extended for certain class of cases.
  - All the taxpayers could not avail the benefit of the said relaxation and therefore, the writ petition is filed for claiming the unutilised input tax credit.
- The Hon'ble High Court has discussed the views taken by this Court and other High Courts and has observed as under:
  - Shortcomings faced in the online system during the trial-and-error phase of GST are not the sole grounds for allowing the petitions in favour of

[4] 2020 (12) TMI 140
[6] 2021 (6) TMI 108 – Delhi High Court

the taxpayers. Courts also delved into the rationality / validity of the statutory provisions;

- Recently, in *Brand Equity Treaties Limited v. Union of India & Ors*[7], the Court had the occasion to deal with the legal effect of the time period prescribed under rule 117 of the CGST Rules, 2017 for filing the TRAN-1 Form i.e., whether the said provision was directory or mandatory, and concluded that the period was merely directory;
- In the said decision, the Court also delved into the irrationality of rule 117(1A), since it applied to only one class of persons who faced technical difficulties on the common portal, without defining the said concept anywhere in the Act or the Rules framed thereunder;
- Revenue has filed an appeal before the Supreme Court against the Brand Equity judgment for which stay has been granted by the Supreme Court.

- The Hon'ble High Court has given its observations by classifying the taxpayers into three baskets as detailed below.
- **Where taxpayers have evidence of attempts to file TRAN-1 form:**
  - The Petitioners have genuinely attempted to file TRAN-1 form within time and have also taken care to preserve some evidence which is now being relied upon in support of their contention;
  - In the case of *SRC Aviation (P) Ltd. v. Union of India and Ors*[8], this Court, after recording the fact that the Petitioner had placed a copy of the screenshot evidencing that they were unable to file the TRAN-1 form on the GST Portal allowed the assessee to file TRAN-1 form electronically or manually.
- **Where taxpayers do not have any proof of attempts to file TRAN-1 form:**
  - Even though the Petitioners do not have any document to support their attempt in filing the TRAN-1 form, we find that the benefit has been given by this Court to similarly placed taxpayers in other matters such as *Triveni Needles Pvt. Ltd. v. Union of India and Ors.*[9] despite the absence of any screenshots to support the claim of the Petitioners therein.
  - Further, there is another judgment in the case of *National Internet Exchange of India v. Union of India & Ors*[10] whereby the Petitioner had missed out on certain invoices pertaining to inputs and input services on which service tax was paid, while filing the TRAN-1 form. The Court allowed the writ petition stating that it was a genuine human error and since the Petitioner is holding documents evidencing their payment of tax and is thus eligible to carry forward the credit from erstwhile tax regime to the GST regime under Section 140 of the CGST Act read with rule 117 of the CGST Rules, 2017.
- **Where Petitioners have submitted the TRAN-1 form within the prescribed time period but their grievance stems from their inability to revise / rectify the TRAN-1 form which they filed:**
  - It is seen that since there is no effective mechanism provided for the revision / rectification of TRAN-1 form, the Petitioners were forced to approach this Court under Article 226 of the Constitution of India;
  - A genuine mistake should not result in the Petitioners losing out on their accumulated credit which is protected by Article 300A of the Constitution of India;
  - The lack of an effective revisional mechanism would leave the taxpayers remediless, which, to our minds, could not be the intention of the law, and moreover, no provision was brought to our notice which extinguishes the said right of the

[7] 2020 (5) TMI 171
[8] MANU/DE/4345/2019
[9] (2020) 77 GST 550 (Delhi)
[10] MANU/DE/0242/2021

taxpayer. For such reasons, the benefit cannot be denied;

- Similar relief has been granted by this court in several other decisions.

Judgment

The Hon'ble High Court allowed the Writ Petition and directed the Revenue to either re-open the online portal to enable the Petitioners to file TRAN-1 form electronically, or to accept the same manually on or before June 30, 2021 for Petitioners falling in any of the three batches.

Furthermore, instructions have been given to the Revenue to process the Petitioners claims in accordance with law once the TRAN-1 Form is filed.

Dhruva Comments:

There have been divergent High Court rulings in relation to re-opening TRAN-1 form for claiming transitional credit. The jury is out as to whether such transitional credit is a vested right under Article 300A of the Constitution of India and whether or not the same is an absolute right or a creation of statute and can be availed within the boundaries of the statute. It would be interesting to see how the Supreme Court interprets the transitional provisions for claiming credit of pre-GST regime through Form GST TRAN-1.

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