



Dimensions – 31st Edition

Rulings / Judgments under GST era:

1. Siemens Ltd. – West Bengal¹

Issue for Consideration	Whether the mobilization advance received during the pre-GST regime in respect of divisible works contract service and outstanding as on July 01, 2017 would be leviable to GST on the said date?
Discussion & Ruling	<p>Discussion:</p> <ul style="list-style-type: none"> The Applicant entered into a contract with Kolkata Metro Rail Corporation (KMRCL) for the design, supply, installation, testing and commissioning of power supply and distribution system of the Kolkata East-West Metro Rail Project. The contract also includes supply of equipment, training of personnel, etc. The Applicant had received mobilization advance of ₹ 16.33 crore in June 2011, being 10% of the contract value which was to be adjusted against the tax invoices raised by the Applicant. Out of the said amount ₹ 13.80 crore was outstanding as on June 30, 2017. The Applicant has approached the Authority to know to what extent GST is chargeable on such outstanding amount as on July 01, 2017. The Applicant contended that no GST was payable on the following grounds: <ul style="list-style-type: none"> - Lump sum advance has been received to the extent of 10% of the contract value and therefore, the same is not attributable to any goods or services. It is paid to meet the funding requirement of the contract; - The contract was a divisible contract under the erstwhile tax regime. No service tax was payable since the services were exempt vide sr. no. 14(a) of notification no. 25/2012 ST dated June 20, 2012.

¹ Order no. 18/WBAAR/2019-20 dated August 19, 2019



- No VAT was payable since the liability to pay the same arises upon transfer of property in goods. Accordingly, no West Bengal Value Added Tax (VAT) was payable at the time of receipt of advance as there was no transfer of property in goods;
- As per the erstwhile Point of Taxation Rules, 2011 (POT), service tax was payable upon the receipt of payment towards the provision of service or actual provisioning of service, whichever is earlier. The provision of service was exempt from service tax at the time of receipt;
- Further, the amount received was in the nature of earnest money deposit and not towards supply of any specific goods or services. Reliance was also placed upon the judgments of *Thermax Instrumentation Ltd.* [2016 (42) STR 19 (Tri-Mum)] and *GB Engineering Pvt. Ltd.* [2017 (52) STR 313 (Tri-Chennai)].
- The Authority observed as under:
 - As per section 13(2) of the CGST Act, the date of receipt of payment (i.e. advance) should be the time of supply since it precedes the date of issue of invoice and the date of provision of service;
 - The Applicant is deemed to have supplied the works contract service to KMRCL on July 01, 2017, to the extent of advance outstanding provided since no tax had paid on it under the erstwhile VAT and Service tax laws;
 - Being a divisible works contract, the value of service was not ascertainable until the invoice was raised by the Applicant. Accordingly, no advance received could be adjusted in the service bills. This principle was not followed in the case of *Thermax Instrumentation Ltd.* and *GB Engineering Pvt. Ltd.* (*supra*);
 - Works contract is no longer a divisible contract under GST and is a service contract.
 - The term 'consideration' under GST includes payment made for inducement of supply but does not include a deposit unless it is applied as consideration for the supply. In this context whether the mobilisation advance is earnest money or not is of little relevance;
 - The bank guarantee provided ensures that the amount is not diverted or misappropriated. The advance is, therefore, consideration, whether or not in the form of deposit.

Ruling:

- The Applicant has deemed to have supplied the works contract service to KMRCL on July 01, 2017 to the extent of the advance outstanding on that day;
- The value of the works contract service in the subsequent invoices when raised be reduced to the extent of such advances and GST should be charged on the net amount, so as to avoid double taxation.

**Dhruva
Comments /
Observations**

- Under the GST regime, a deposit is to be treated as a consideration only when such deposit is applied as consideration for the supply. In the present case, the Applicant had received 'mobilization advance' and not a deposit. An amount though received as an



advance cannot undertake the nature of deposit irrespective of both being shown as a liability in the balance sheet. Having said that, it is debatable whether the provisions of the GST laws, under a deeming fiction when none exists, can be said to be applicable to money received in pre-GST era.

- Taxability of EPC contracts initiated under pre-GST regime and continued under GST regime would be critical considering provisions on classification of such transactions and time of supply of such contracts.

2. M/s Siddharth Enterprises v. The Nodal Officer²

Issue for Consideration

Whether the due date for filing Forms GST TRAN-1 and GST TRAN-2, prescribed under rule 117 of the CGST Rules to avail the transitional credit of eligible duties is merely a directory provision and not a mandatory one?

Discussion & Judgment

Discussion:

- The Petitioner is a partnership firm engaged in the business of import-export and distribution of branded housewares. The Petitioner was unable to file the Form GST TRAN-1 before the due date on account of technical glitches on the GST portal.
- The Petitioner physically submitted its claim of transitional credit on stock to the Authorities. However, without being given any opportunity of hearing, the Petitioner was denied permission to file Form GST TRAN-1 on the ground that the taxpayer had neither tried to save / submit, nor file the Form GST TRAN-1, as per the GST System Logs.
- The Petitioner filed a Writ Petition seeking approval to file Forms GST TRAN-1 and GST TRAN-2 enabling them to claim transitional credit in respect of inputs held in stock, as per the provisions of section 140(3) of the CGST Act and rule 117 of the CGST Rules.
- The Hon'ble High Court observed the following:
 - Section 140(3) of the CGST Act allows carry forward of the eligible duties in respect of the inputs held in stock subject to certain conditions. Further, the said is a complete code in itself and the substantive right to carry forward the transitional credit cannot be curtailed by the application of rules;
 - Reliance was placed on the decision of the Hon'ble Supreme Court in the case of *Union of India v. Suksha International & Nutan Gems & Anr.* [1989 (39) ELT 503 (SC)] wherein it was held that an interpretation unduly restricting the scope of beneficial provision should be avoided so that it may not take away with one hand what the policy provides with the other;
 - The entitlement of credit on purchases in the pre-GST regime being a vested right cannot be taken away by virtue of rule 117 of the CGST Rules i.e. failure to file the forms on time. Such rights were acquired or accrued under the erstwhile laws and the rights have been saved by virtue of section 174(2)(c) of the CGST Act. Such

² 2019-VIL-442-GUJ – The High Court of Gujarat at Ahmedabad



credit cannot be allowed to lapse upon failure to file the Forms GST TRAN-1 before the due date prescribed;

- Restrictions on the carry forward of such credits offend the Government's policy to eliminate the cascading effect of taxes by permitting the input tax credit as mentioned in the Objects and Reasons of the Constitution 122nd Amendment Bill, 2014. Further, restrictions such as limiting time allowed to avail input tax credit results in discrimination with respect to purchases made in the pre-GST regime and thereby violates Article 14 of the Constitution of India;
- Unavailability of such transitional credits shall dent the working capital of the Petitioner, diminishes their ability to continue with their business and is violative of the mandate of Article 19(1)(g) of the Constitution of India;
- Article 300A of the Constitution of India provides that no person shall be deprived of the property saved by authority of law. It was also observed that the right to property is a constitutional right and not a fundamental one. Further, since the Cenvat credit earned under the erstwhile law is the property of the Petitioner, its appropriation on account of sheer procedural failure would violate Article 300A of the Constitution of India.

Judgment:

- The Hon'ble High Court directed the authorities to allow the filing of Form GST TRAN-1 and GST TRAN-2 enabling the Petitioner to claim the transitional credit.
- The Hon'ble High Court also held that the due date contemplated under rule 117 of the CGST Rules for the purposes of claiming transitional credit is procedural in nature and thus should not be construed as a mandatory provision.

**Dhruva
Comments /
Observations**

- Placing reliance on several Supreme Court / High Court judgments, this judgment reaffirms the principle of law that right to claim credit is a substantive right and cannot be curtailed as a result of procedural lapses. Being a vested right under the pre-GST era, such credit becomes indefeasible and cannot be taken away.
- The procedures are formulated to operationalise the rights conferred under the Statute and the same cannot narrow down on or run in conflict with the objective of the substantive right.
- While the judgment provides relief to the taxpayers who could not claim the transitional credits due to technical glitches, it will be interesting to see how the verdict is implemented and whether the matter travels to the Supreme Court for finality...!



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