



Dimensions – 33rd Edition

Ruling / Judgments under GST era:

1. Maansmarine Cargo International LLP - Maharashtra¹

Issues for Consideration	<ul style="list-style-type: none"> Whether GST is leviable on the management fees charged to the overseas client for the work that is outsourced, in relation to managing of shipping operations? Whether GST is leviable on the reimbursement of expenses such as salaries, rent, office expenses, travelling cost, etc which are recovered on actuals from the overseas customer?
Discussion & Ruling	<p>Discussion:</p> <ul style="list-style-type: none"> The Applicant proposes to enter into an outsourcing agreement with an overseas customer ('customer') in order to manage their shipping operations. The scope of the work includes: <ul style="list-style-type: none"> - Handling all of the communications between vessel owners, shippers, consignees, various port agents and passing on information about vessel schedules and operations; - Drafting contracts of shipments and sending the same to ship owners and shippers or charter; - Preparing the report on time used per voyage and presenting to shipper reports on additional time per voyage; - Preparing invoices on behalf of clients as per contract and presenting them to charterers as per approvals from principals; - Reconciling the accounts; - Travelling to various countries at principal's cost to meet port agents, charterers, etc.

¹ Order no. GST/ARA/04/2019-20/B-97 dated April 15, 2019



- The Applicant would incur various expenses such as salary to employees, office rent, telephone, electricity, internet expenses, travel cost, etc. which would be reimbursed on actual basis by the customer. Further, the Applicant would also charge a separate management fee for the said service. Separate invoices would be raised for reimbursements and management fees. All the payments would be received in foreign convertible exchange.
- The Applicant contended that no GST is payable on the management fee and the reimbursements on the following grounds:

Management fee

- The nature of services provided are not in the nature of 'intermediary' as defined under section 2(13) of the IGST Act since the Applicant is not arranging or facilitating the supply of goods or services to the customer;
- Reliance was placed upon CBIC circular no. 107/26/2019-GST dated July 18, 2019 ('circular') to state that the nature of services being provided by the Applicant are in the nature of Information Technology enable services (ITeS) which are provided on Applicant's own account;
- Accordingly, as the Applicant is not an intermediary and the conditions of export of service specified under section 2(6) of IGST Act are satisfied, no GST should be payable on the same. The said supplies fall under the definition of 'zero rated supplies as per section 16 of the IGST Act.

Reimbursements

- The expenses are being reimbursed on actual basis by the customer and prior approval would also be taken from the customer;
 - The Applicant is acting as a pure agent of the customer and fulfils the conditions of a pure agent as specified under rule 33 of the CGST Rules.
- The Authority observed as follows:
 - The Applicant is arranging and facilitating the business of the overseas customer by liaising with their customers for commercial relations. They also fall within the definition of Agent under section 2(5) of the CGST Act. Thus, they are an intermediary under section 2(13) of the IGST Act. In this respect reliance was also placed upon Appellate Authority order in the case of *Asahi Kasei India Pvt. Ltd.* [MAH/AAAR/SS-RJ/01/2019-20 dated June 19, 2019];
 - In case of an intermediary services, the place of supply would be the location of supplier which in the present case is in the taxable territory. Accordingly, the said transaction shall not be treated as export of service;
 - The Applicant does not satisfy the conditions of a pure agent since the payment is for services that are rendered to the Applicant and not to a foreign company under the contract for supply;
 - Further, it is natural that the costs incurred for supply of services are borne by the supplier but are included in the cost of service. Thus, it represents an additional



	<p>consideration for supply which shall be added to the value of the supply in terms of section 15 of the CGST Act.</p> <p>Ruling: GST is applicable on management fees and reimbursement of expenses.</p>
<p>Dhruva Comments / Observations</p>	<ul style="list-style-type: none"> • A similar order was passed by the Appellate Authority for Advance Ruling in the case of <i>Vservglobal Pvt. Ltd.</i> [Order no. MAH/AAAR/SS-RJ/22/2018-19 dated February 26, 2019]. • The Authority has not considered the circular issued for ITeS (<i>supra</i>) by stating that the same has been issued under the Income tax law. • Furthermore, while the said circular (<i>supra</i>) provides clarification on determining whether a person would be regarded as an intermediary or not in case of supply of ITeS services, the GST council in its meeting held on September 20, 2019 has recommended issuance of new Circular for ensuring uniformity across all jurisdictions on supply of ITeS services being made on own account or as an intermediary in supersession of current circular (<i>supra</i>). Thus, one would have to wait and watch till suitable clarifications are issued in this regard.

<p>2. M/s Tejas Constructions & Infrastructure Private Limited - Maharashtra²</p>	
<p>Issues for Consideration</p>	<ul style="list-style-type: none"> • Whether the contractor can charge GST on the value of material supplied by the contractee at agreed rates? • What should be the mechanism to calculate the taxable value under section 15 of the CGST Act, 2017?
<p>Discussion & Ruling</p>	<p>Discussion:</p> <ul style="list-style-type: none"> • The Applicant, a civil contractor, entered into an agreement with the contractee for constructing 25,000 spindle spinning mills building, wherein: <ul style="list-style-type: none"> - cement, mild steel, tor steel and structural steel required for the work would be supplied by the contractee at agreed rates, as per para 2(h) of the agreement and para 3 of the work order; - contract value is ₹ 600 lakhs, which is inclusive of materials and labour; - later, the value of such cement, mild steel, tor steel and structural steel provided by the contractee would be deducted. • The Authority observed / held the following: <p><i>Question No.1</i></p> <ul style="list-style-type: none"> - As the said materials are supplied by the contractee, the question raised as to whether the Applicant can charge GST on the same is irrelevant. <p><i>Question No.2</i></p> <ul style="list-style-type: none"> - GST will be paid on the total contract value, which is inclusive of material and labour;

² Order no. GST-ARA-03/2019-20/B-90 dated August 20, 2019



- From the terms of the contract, it was seen that the supply by the contractee to the applicant is not a free supply. The Authority placed reliance on the decision by the Supreme Court in the case of *M/s N.M. Goel & Co v. Sales Tax Officer, Rajnandgaon* [1989 AIR 285]. In this case, the appellant's tender was inclusive of the prices of materials to be used for construction. The PWD had agreed to supply from its stores iron, steel and cement for construction work and deduct the said prices from the final bill. It was held that by use or consumption of materials in the work of construction, the property in goods was passed to the appellant and thus, the sale was liable to tax;
- The materials supplied by the contractee are essential components for supply of construction service and in terms of section 15(2)(b) of the CGST Act, 2017, *any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both* shall be included in the value of taxable supply;
- In view of the above, the amount certified by the architect for the invoice to be issued, before deducting the value of cement, mild steel etc., shall be the value of supply under section 15 of the CGST Act.

Ruling:

- Question No.1 is not answered.
- Question No.2: GST is payable on the entire contract value as per the certificate issued by the Architect without deducting the value of cement, mild steel, tor steel and structural steel provided by the contractee.

**Dhruva
Comments /
Observations**

- There have been various rulings wherein goods provided by a contractee to a contractor on a free of cost basis were considered to be not includible in the value of taxable supply for the contractor. However, in the instant case, it can be noted that the aforesaid goods such as cement, mild steel etc. are to be supplied by the contractee at agreed prices.
- Hence, keeping in view the facts of the current case, the ruling seems to be in line with the valuation provisions of the GST law.
- Since the ruling does not comment upon the taxability of goods provided by the contractee at agreed rates, its GST implications need to be separately ascertained.

3. Revenue Bar Association v. The Union of India³

**Issues for
Consideration**

- Whether exclusion of advocates from being considered for appointment as a judicial member is violative of Article 14 of the Constitution of India?
- Whether the appointment of member of Indian Legal Service ('ILS') as a Judicial member of the Appellate Tribunal contrary to the law laid down by the Hon'ble Supreme Court in the case of *Union of India v. R. Gandhi* [2010-VIL-38-SC]?

³ 2019-VIL-466-MAD – The High Court of Judicature at Madras



	<ul style="list-style-type: none">• Whether the composition of National, Regional, State and Area benches of the GST Appellate Tribunal ('GSTAT') is violative of Articles 14 and 50 of the Constitution of India and the law laid down by the Hon'ble Supreme Court?
Discussion & Judgment	<p>Discussion:</p> <ul style="list-style-type: none">• Writ Petitions were filed before the Hon'ble Madras High Court ('the High Court') seeking declaration of section 109 and 110 of the CGST Act and TNGST Act, relating to the constitution of the GSTAT and composition of the members, as void, defective and unconstitutional being in violation of Articles 14, 21 and 50 of the Constitution of India.• The High Court observed as follows: <i>Question no. 1:</i><ul style="list-style-type: none">- The Court also observed that the advocates do not have a constitutional / legal right to be appointed as Judges/ judicial members of the GSTAT. The right to be considered emanates from being eligible by virtue of any Act or Rules conferring such right and in absence of any right, one cannot contend that a person's right to be considered as taken away. Hence, such exclusion cannot be regarded as violative of Article 14 of the Constitution of India;- Advocates are eligible to be appointed as Judicial Members in the Income Tax Appellate Tribunal which is the oldest Tribunal in the country. Further, lawyers are eligible for appointment as Judicial Member in the CESTAT. The High Court observed that even though constitutional validity of Section 110 (1) (b) cannot be struck down on the ground of non-inclusion of advocates as Judicial Members, the Union of India must evaluate as to why it is making a departure from the existing practice;- The High Court recommended that the Parliament should reconsider the issue regarding the eligibility of lawyers to be appointed as Judicial Members in the GSTAT.<i>Question no. 2:</i><ul style="list-style-type: none">- The challenge to appointment of a person, who is or has been a member of ILS and has held a post not less than Additional Secretary for a period of three years is a settled issue;- Reliance was placed on the judgment pronounced by Hon'ble Supreme Court in the case of <i>Union of India v. R. Gandhi (supra)</i> wherein it was held that a person who has held a position under the ILS cannot be considered for appointment as a judicial member. This dictum of the Hon'ble Supreme Court would also apply to the Appellate Tribunal constituted under the CGST and TNGST.<i>Question no. 3:</i><ul style="list-style-type: none">- All the Tribunal, regardless of the fact that they are Tribunal constituted under Article 323-A or 323-B of the Constitution of India or under any statute, are a part of justice delivery system and for effective justice delivery system, there is a need of an independent impartial Tribunal. The cases to be presented for adjudication before



the GSTAT shall deal with cases/ issues against the State and the Expert Members outnumbering the Judicial Members would raise a reasonable apprehension in the minds of the assessee that the outcome might not be fair and is more inclined towards the State. Reliance was placed on the judgments pronounced by Hon'ble Supreme Court in the cases of *R.K. Jain v. Union of India* [1993 (4) SCC 119], *Union of India v. R. Gandhi (supra)* and *Madras Bar Association v. Union of India* [2014 (10) SCC 1];

- Since the CESTAT, Sales Tax / VAT Tribunals are being replaced by GSTAT, the constitution of the new Tribunal should also be on the same lines as the earlier ones. Further, Article 50 of the Constitution of India provides for separation of judiciary from the executives. The said Article should be interpreted in a way that the dominance of Technical Members does not outnumber the Judicial Members;
- The Tribunals now are adjudicating subjects which were initially dealt with by the Courts. These subjects being judicial in nature, the Tribunals cannot be run by a majority of non-Judicial Members while deciding disputes between the State and its citizens;
- Placing reliance on several Supreme Court judgments, the High Court observed that the creation of alternate institutions to exercise the judicial functions should not be less effective than that of the High Courts. The Parliament, therefore, only has the power to set up an alternative institutional mechanism, insofar as such institution offers an effective mechanism which is no less effective than that of a High Court. The High Court stated that *"To be as effective as a High Court, would not be limited to having powers akin to High Court, it would also include the ability to exercise judicial function akin to a High Court, in the sense of being impartial and independent."*;
- The High Court also observed that the number of Expert / Technical Members cannot exceed the number of Judicial Members on the bench since a properly trained judicial mind is necessary for deciding on issues relating to the decision-making process or interpretations of notifications and sections under the CGST Act.

Judgment:

- The argument that exclusion of lawyers from scope and view for consideration as members of Tribunal is ultra vires is rejected by the High Court. However, the High Court has recommended the Parliament must consider amending section for inclusion of lawyers to be appointed as Judicial Members in view of issues likely to arise for adjudication and to maintain uniformity with the various statutes.
- Section 110 of the CGST Act which prescribes that a Member of ILS, who has held a post of Additional Secretary for three years, can be appointed as a Judicial Member is struck down.
- Section 109 of the CGST Act which prescribes that the Tribunal shall consist of one Judicial Member, one Technical Member (Centre) and one Technical Member (State) is struck down.



**Dhruva
Comments /
Observations**

The GST Council recently gave its nod for the formation of GSTAT, which shall bring consistency to the interpretation and application of the GST law. It will be interesting to see how the matter unfolds with consequential amendments or being appealed to the Supreme Court for finality.

Judgment under Pre-GST era:

4. Tecnimont Private Limited v. State of Punjab⁴

**Issues for
Consideration**

- Whether the condition of pre-deposit of 25% of total additional demand of tax, interest and penalty under Section 62(5) of the Punjab Value Added Tax Act, 2005 for hearing first appeal is onerous, harsh, unreasonable and therefore violative of Article 14 of the Constitution of India?
- Whether the first appellate authority in its right to hear appeal has inherent powers to grant interim protection from such a condition for hearing of appeals on merits?

**Discussion &
Judgment**

Discussion:

- Section 62(5) of the Punjab Value Added Tax Act, 2005 (“the Act”) stipulates that no appeal against any original order passed under the Act shall be entertained unless the appeal is accompanied by satisfactory proof of minimum payment of twenty-five per cent of the total amount of additional demand created, penalty and interest, if any.
- Several Writ petitions were filed before the High Court challenging the validity of section 62(5) of the Act. The High Court finally concluded that the State is empowered to enact Section 62(5) of the Act and the said provision is legal and valid on the basis of following observations:
 - Various rulings of the Supreme Court were considered which can broadly be classified under two categories: (i) Cases where the statutory provision while insisting on pre-deposit itself gives discretion to the appellate authority to grant relief against the requirement of pre-deposit where the appellate authority is satisfied that insistence of pre-deposit would cause undue hardship (ii) Cases where challenge to the statutory provision were rejected despite the Statute not conferring any such discretion on the appellate authority;
 - In *Seth Nand Lal and another v. State of Haryana and Others* [1980 (Supp) SCC 574] the Constitution Bench of the Supreme Court held that the fetter (pre-deposit) imposed on the right of appeal / revision even in the absence of a provision conferring discretion on the appellate / revisional authority to relax or waive the condition cannot be regarded as onerous or unreasonable. Hence, the challenge to the provision must fail;
 - In *Government of Andhra Pradesh and Others v. P. Laxmi Devi (Smt.)* [2008 (4) SCC 720] the Hon’ble Supreme Court noted that in the event of any exorbitant demand raised by the authority, the assessee may always file a writ petition challenging the demand alleging that determination is arbitrary and / or based on

⁴ Civil Appeal No. 7358 of 2019 – The Supreme Court



extraneous considerations and in that case it is always open to the High Court, if it is satisfied that the allegation is correct, to set aside the demand by declaring the demand as arbitrary.

- The High Court also relied on the judgment in *Income Tax Officer v. M. K. Mohammed Kunhi* [1969 (2) SCR 65] where in context of the Income Tax Act, 1961 it was held that the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction and held that the power to grant stay is therefore conferred on the Appellate Tribunal under the Punjab Value Added Tax Act, 2005. It was further noted that when appellate jurisdiction is conferred, it impliedly grants the powers of doing all such acts or employing such means, as are essentially necessary to its execution and that the statutory powers carries with it the duty in proper cases to make such orders for staying proceedings as will prevent the appeal if successful from being rendered nugatory.

Judgment:

- The Supreme Court held that it has rightly been held by the High Court that Section 62(5) of the Act is legal and valid and the condition of 25% of pre-deposit is not onerous, harsh, unreasonable and is not violative of Article 14 of the Constitution of India.
- It was noted by the Supreme Court that in cases of genuine hardship, recourse is open to the concerned person by way of challenging the Order before the High Court in a Writ petition. However, it would be completely a different thing to say that the Appellate Authority can grant such relief. It was held that such interpretation would make the provision itself unworkable and render the statutory intentment nugatory.

**Dhruva
Comments /
observations**

The Hon'ble Supreme Court relied on various judicial pronouncements to reiterate the position which was settled by way of various judicial pronouncements. Hence, the only recourse which is available to the assessee is to seek relief before the High Court in genuine cases and appellate authority cannot waive the requirement of mandatory pre-deposit unless the statute provides otherwise. Thus, the yardstick of what constitutes extreme hardship is a subject matter of judicial examination and would be examined on a case to case basis.



ADDRESSES

Mumbai

11th Floor,
One IndiaBulls Centre, Tower 2B,
841, Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013
Tel: +91 22 6108 1000 / 1900

Ahmedabad

B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahlanagar, Corporate Road,
Ahmedabad - 380 015
Tel: +91-79-6134 3434

Bengaluru

Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560 001
Tel: +91-80-4660 2500

Delhi / NCR

101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana - 122 002
Tel: +91-124-668 7000

Pune

305, Pride Gateway, Near D-Mart, Baner,
Pune - 411 045
Tel: +91-20-6730 1000

Kolkata

4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal – 700016
Tel: +91-33-66371000

Singapore

Dhruva Advisors (Singapore) Pte. Ltd.
20 Collyer Quay, #11-05
Singapore 049319
Tel: +65 9105 3645

Dubai

WTS Dhruva Consultants
U-Bora Tower 2, 11th Floor, Office 1101
Business Bay P.O. Box 127165
Dubai, UAE
Tel: + 971 56 900 5849

Bahrain

WTS Dhruva Consultants
2301, Level 23, P.O. Box No. 60570,
Harbour Tower (East), Bahrain Financial Harbour,
Kingdom of Bahrain
Tel: +973 1663 1921

New York

Dhruva Advisors USA, Inc.
340 Madison Avenue, 19th Floor, New York,
New York 10173 USA
Tel: +1-212-220-9494

Silicon Valley, USA

Dhruva Advisors USA, Inc.
5201 Great America Parkway,
Santa Clara, California 95054
Tel: +1 408 930 5063

KEY CONTACTS

Dinesh Kanabar (Mumbai)

Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Ritesh Kanodia (Mumbai)

ritesh.kanodia@dhruvaadvisors.com

Niraj Bagri (Mumbai)

niraj.bagri@dhruvaadvisors.com

Ranjeet Mahtani (Mumbai)

ranjeet.mahtani@dhruvaadvisors.com

Amit Bhagat (Delhi / NCR)

amit.bhagat@dhruvaadvisors.com



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