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Indirect Tax Alert

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Dimensions – 60th Edition

Rulings / Judgments under GST era

M/s Sri Kanakadurga Rice and Flour Mill – Andhra Pradesh Appellate Authority[1]

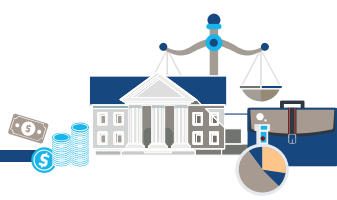
Issue

Whether GST is chargeable by adding the estimated value of the by-products which are retained by the miller, to the conversion charges receiving for carrying out milling activity?

Discussion

- The Appellant (miller), a private rice mill owner, has entered into an arrangement with the Civil Supplies Department (CSD) to mill and convert the paddy into rice and supply it to CSD.
- The terms of the arrangement are as under:
  - The paddy supplied by CSD shall be milled into rice;
  - Appellant shall return a set % (normally 65%) of the paddy milled into rice to CSD. In case of any shortfall, the miller shall procure the rice at his own cost;
  - The residues / by-products of 35% in the form of broken rice, husk and bran shall be retained by the rice miller to meet the CMR activity cost;
  - INR 15 per quintal to be paid as Custom Milling of Rice (CMR) charges.
- The Authority, upon scrutiny of returns for the period July 2017 to June 2018 and after obtaining certain information from CSD opined that that the residuary products retained by the Appellant are in lieu of additional monetary consideration. The Authority worked out the market value and estimated average yielding of these by-products and thereafter, passed an order determining the tax liability on the same.
- Aggrieved by the order, the Appellant appealed before the Appellate Authority disputing the levy of tax on the following grounds:
  - Authority has not invoked any specific provisions of the GST law and the orders passed are not in accordance with the legal position;
  - The Appellant is only an agent to collect and remit the tax to the Government. Therefore, if the Authority considers the value of other by-products as a part of service charge, then the Authority should take it up to the CSD for raising

[1] Order no. 5180 dated March 24, 2020 [2020-VIL-16-GSTAA]



an invoice on the total deemed value and pay necessary GST on services;

- The estimated value of by-products shall not be considered as consideration and therefore the value of supply adopted by the Authority is totally irrelevant to the facts of the case;
- The transaction of custom milling is between the assessee and CSD, which are not related parties and hence, the valuation provisions in this regard should not be invoked;
- In order to facilitate custom milling as reasonable, the CSD has allowed the miller to retain the by-products to compensate for various other costs incurred by the miller. Therefore, any levy of tax on such compensatory products shall be taken up with CSD and the miller should not be burdened.

- Appellate Authority observed as follows:
  - The Appellant converts the paddy into rice which is a 'service'. Thus, Appellant is a 'supplier of service' and CSD is 'recipient of service'. Since there is no specific exemption under GST, the aforesaid service is taxable at the rate of 5%;
  - Appellant has himself admitted that he has been compensated by retaining the by-products to meet the cost of milling activity, since INR 15 per quintal is not sufficient to meet the costs. This concludes that the goods retained are a part of the value of service;
  - The term 'consideration' as defined under the GST law could be in money or otherwise. Therefore, in the present case, 'consideration' is not only that portion which is received in cash but also what has been received by the Appellant in kind, i.e. the by-products left in the course of milling;
  - Section 15 of the CGST Act cannot be applied in the present case since price (INR 15 per quintal) is not the sole consideration for the supply. Accordingly, Rule 27(1)(b) of CGST Rules *(i.e. consideration in money and such further amount in money as is equivalent to the consideration not in money)* has been correctly applied by the Authority to determine the value of the supply;
  - Although broken rice and husk is exempt under GST, it would still be regarded as consideration for supply of milling service;
  - In respect of levy of tax on sale of rice bran, the Appellant has neither put forth any arguments nor pressed for any relief through hearings. The bran is not exempted under GST and the levy on the same is sustainable.

Ruling

- By-products retained would be regarded as consideration for supply of milling service and GST would be leviable.
- GST is payable on the sale of rice bran.

Dhruva Comments

In the case of *General Engineering Works* v. *CCEx., Jaipur*[2], the Hon'ble Supreme Court had held that the value of scrap should be added to the conversion charges where such charges are depressed, and job worker is allowed to retain the scrap. The ruling has upheld the principle laid down by the Supreme Court and will be relevant in determining value of supply in job work transactions.

M/s Rajeev Bansal & Sudershan Mittal – Uttarakhand[3]

Issue

Whether transfer of an under-construction project as a going concern, is exempt under GST?

Discussion

- Applicant is a partnership firm engaged in business of constructing and selling residential / commercial complexes.
- The firm was constructing a residential property and had got the plan approved from the competent authority.

[2] 2007 (212) ELT 295 (SC)
[3] Order No 10/2019-20 dated January 09, 2020 [2020-VIL-83-AAR]

- The Applicant entered into a business transfer agreement with another firm for transfer of the said project on a going concern basis.
- The main assets of the business were land, incomplete constructed flats and the approved plan. A separate sale deed was executed for transfer of flats as required under the State laws.
- The Applicant approached the Authority to contend that the said supply was exempt in terms of sr. no. 12 of exemption notification[4] (i.e. *services by way of renting of residential dwelling for use as residence*).
- The Authority observed as follows:
  - The exemption should be available under sr. no. 2 of exemption notification (i.e. *services by way of transfer of a going concern, as a whole or independent thereof*) and not under sr. no. 12 as contended;
  - As per the sale deed,
    - Premises has been sold;
    - "Assets" include flats, residential floors, basement and ground floor;
    - Building is under construction;
    - Purchaser can use and sell the flats as per his will or construct other building / floor in the premises, but he cannot demolish the existing flats.
  - As per section 2(17) of the CGST Act, the word 'business' includes acquisition of goods or services for commencement or closure of business.
  - Transfer of business as a going concern is the sale of business including assets. 'Transfer of a going concern' can be described as transfer of a running business which is capable of being carried on by the purchaser as an independent business;
  - Internationally accepted guidelines issued by His Majesty's Revenue & Customs (HRMC) on transfer of business as going concern are:
    - assets must be sold as part of a 'business' as a 'going concern';
    - purchaser intends to use the assets to carry on same kind of business;
    - where only part of business is sold it must be capable of separate operation;
    - there must not be a series of immediately consecutive transfers.
  - The guidelines issued by HRMC are met in the present case. Hence, the said transfer will be treated as a transfer of business on a going concern basis.

Ruling

The transfer of project shall be treated as transfer of a business as a going concern and shall be exempted under sr. no. 2 of exemption notification.

Dhruva Comments

Transfer of business on a going concern basis has always been a contentious issue and subject matter of judicial interpretation. It is critical to analyse the construct of the transaction so as to test the going concern principle. Generally, transfer of business comprises of transfer of all assets and liabilities, employees, open orders, etc.

M/s Ultra Tech Nathdwara Cement Ltd v. Union of India & Ors.[5]

Issues

Whether demand raised by the authorities for period prior to the transfer date of a company taken over pursuant to insolvency resolution process is sustainable?

Discussion

- The Petitioner was an applicant of an insolvency resolution process instituted against M/s Binani Cements Ltd. The resolution plan submitted by the Petitioner was approved unanimously in the meeting of Committee of Creditors (COC).
- The resolution professional after collating the claims of all operational creditors, verified the claim of Respondent of INR 72.85 crore towards liability of Excise duty and Service tax. Further, resolution professional also determined that the liquidation value, being much less than outstanding debt,

[4] Notification no. 12/2017-Central Tax (Rate) dated June 28, 2017
[5] 2020-VIL-169-RAJ – the Hon'ble High Court of Rajasthan.

available to operational creditors including the Respondent would be zero.

- Pursuant to the final approval of the resolution plan in November 2018, Petitioner took over the operations and management of M/s Binani Cements Ltd and changed the name of the company to Ultra Tech Nathdwara Cement Ltd. The resolution plan was fully implemented and payments as per the terms were duly made to all the creditors including the statutory creditors.
- Though the resolution plan was executed as per the final order, the Respondent raised numerous demands on the Petitioner.
- Aggrieved by the said demand raised by the Respondent, the Petitioner filed a Writ Petition before the Hon'ble High Court.
- The Petitioner contended as follows:
  - The resolution plan being approved by COC cannot be questioned in the court of law;
  - Further, the financial creditors are given precedence in the scheme and operational and statutory creditors have to make sacrifice;
  - Reliance was also placed on special leave petitions filed against the Petitioner for curtailment of government revenue due to the approved resolution plan and have been dismissed by the Hon'ble Supreme Court;
  - As per the amended provisions of section 31 of the Insolvency and Bankruptcy Code, 2016, an approved resolution plan is binding on all creditors including Central and State Government or any other person to whom any debt is payable under any law for time being in force;
  - While clarifying the Legislative intent of IBC in the Upper House of Parliament, the Hon'ble Finance Minister had informed that the Government will not make any further claim after the approval of a resolution plan.
- The Respondent contended that the Department was not heard by COC before finalising the resolution plan and hence it is not binding on them. Further, a mere summary rejection of SLP preferred by the Respondent would not curtail the right to raise a valid demand.
- The Hon'ble High Court observed as follows:
  - The purpose of IBC is to revive the distressed industry by virtue of a resolution plan and not to fade in oblivion. An approved resolution plan is binding on all stakeholders, even in the case of statutory dues;
  - The High Court also upheld the reliance placed by the Petitioner on the judgment pronounced by the Hon'ble Supreme Court in the case of *Essar Steel India Ltd.* v. *Satish Kumar Gupta & Ors.*[6];
  - The financial creditors have been given a precedence in the ratio of payments when the resolution plan is being finalized and have a right to vote in the COC. On the other hand, the operational creditors have no right of audience at the COC;
  - The statute clearly intends to revive a dying industry by providing an opportunity to a resolution applicant to take over the same and begin the operation on a clean slate;
  - The evaluation of all dues and liabilities have been left to the exclusivity of resolution professional with approval of COC while finalizing the resolution plan. The Courts have limited power of judicial review into the resolution plan approved by COC;
  - The amount assessed by the Resolution Professional has already been deposited in favour of Respondent by the Petitioner;
  - The High Court also observed that the Respondents would be acting in a totally illegal and arbitrary manner while pressing for demands raised in this Writ Petition and any other demands which they may contemplate for the period prior to the resolution plan being finalized;
  - The authorities should adopt a pragmatic approach and not indulge in frivolous litigation.

[6] 2019(16) SCALE 319

Judgment

The demand notice issued by the Respondent are ex-facie illegal, arbitrary and per-se not sustainable under law.

Dhruva Comments

The judgment decodes the intent of the legislation to provide a second opportunity for revival. The rejection of SLP filed by the department pursuant to NCLAT order and the current decision rejecting the demands of the departmental authorities for nothing beyond the resolution plan, confirms the immunity awarded under the resolution plan for prior period demands to the resolution Applicant. It will be interesting to see whether or not the current matter goes for another round of litigation.

M/s Vishnu Aroma Pouch Pvt. Ltd. v. Union of India[7]

Issues

Whether the Petitioner is liable to pay interest for delay in adjustment of tax liabilities due to technical glitches in the GST Portal?

Discussion

- The Petitioner is engaged in manufacturing of Pan Masala sold under the brand name of 'Vimal'. The Petitioner discharged the tax liability for the month of August 2017 partly in cash through the electronic cash ledger and partly by utilisation of Input Tax Credit (ITC).The Petitioner had used the mode of internet banking while discharging the liability through cash for the month of August 2017. On successful credit of the amount to the concerned Government account, Challan Identification Numbers (CIN) was generated and the entire tax liability was discharged on September 19, 2017
- The Petitioner could not submit its Form GSTR-3B on September 20, 2017, due to heavy load on the GST portal. However, while filing the return on September 21, 2017, the portal crashed and information / details in all columns of the return were shown as "zero", even though the tax liability was fully paid by the Petitioner. A true and full disclosure stands reflected in the Form GSTR-1 for the said period.
- The Unique Identification Number (UIN) had also been generated for the corresponding entry in the electronic cash / credit ledger but due to system error in submission of returns, UIN was not indicated in the electronic liability register. Further, this system operates on its own and the Petitioner has no access to make such an entry in the system.
- Thereafter, the Petitioner immediately informed the jurisdictional GST authorities regarding the said occurrence and was advised to approach the Help Desk to sort out the issue. On approaching the Help Desk, the Petitioner's representative was informed that in accordance with circular dated September 1, 2017, any error in Form GSTR-3B would be rectified when Form GSTR-2 and GSTR-3 are filed.
- The Petitioner was waiting for Form GSTR-2 and GSTR-3 to be prescribed, however, in December 2017, the Government decided to keep the previous circular dated September 1, 2017 in abeyance till March 2018. In light of the events, the Petitioner was continuously approaching and filing letters / representations with GST authorities and was later informed that the Petitioner's case would fall under Common Error-I as per para 3 of circular dated December 29, 2017, and the Petitioner should pay the liability of tax along with interest, Aggrieved, the Petitioner filed a Writ Petition before the Hon'ble High Court.
- During the pendency of the present petition, the Petitioner prayed for manual filing of Form GSTR-3B for the impugned month. The court vide its order[8] allowed the Petitioner to manually file the return. However, the Respondents submitted that the true and correct details for the month of August 2017 with tax liability can be reflected in the return of the month of September 2019.
- The Petitioner thereafter filed Form GSTR-3B for September 2019 with taxes payable for August 2017. Also, the impugned tax amount was credited

[7] 2020-VIL-164-GUJ – The Hon'ble High Court of Gujarat.
[8] Order No 2019-VIL-221-GUJ dated May 07, 2019.

to the Government account and the tax payable reflected as nil.

- The Hon'ble High Court on the pending issue of applicability of interest observed as follows:
  - It is evident from the facts of the case that the Respondents were approached at the earliest point of time and grievance was not addressed for a considerable period of time. The errors in uploading the return were not on account of any fault on the part of the Petitioner but on account of error in the system;
  - The Petitioner had duly discharged the tax liability of August 2017 within the timelines; however, it was only on account of technical glitches in the system that the tax paid by the Petitioner for the said period had not been credited to the Government account;
  - The return submitted by the Petitioner for September 2019 along with the tax liability of August 2017 shall be treated discharged of its tax liability within the period stipulated under the GST laws.

Judgment

The Petitioner is not liable to pay interest on the impugned tax amount.

Dhruva Comments

The instant judgment reinforces the position that assessees would not be penalised for technological glitches arising on the GSTN portal. Needless to state that it would also be incumbent on the assessees to demonstrate the type of error faced and subsequent communication with the department to prove the bonafides.

GST, being the single largest tax reform in the country, faced many challenges during its implementation one of them being technological hiccups on the GSTN portal. Significant measures have been adopted by the GST Council and Infosys to resolve IT related discrepancies. Recently, the GST Council in its 39th Council Meeting also had discussed various issues to smoothen the return filing system.

Circulars under GST era

GST refunds related issues[9]

The CBIC has provided clarifications on the various issues being faced by the assessees / field formations in respect of the GST refund claims. The same is summarized below

- Clubbing of refund claims across financial years
  - Restriction was imposed on clubbing of refund applications for tax periods spread across different financial years, by Master Circular on refunds[10] (Master circular);
  - The said restriction has now been removed in lieu of the Delhi High Court order in the case of *M/s Pitambra Books Pvt. Ltd.* v. *UOI* [11].

- Refund of accumulated ITC on account of reduction in GST rate
  - Section 54(3)(ii) of CGST Act, allows refund of accumulated ITC on account of inverted duty structure i.e. where the rate of tax of inputs is more than the rate of tax on output supplies;
  - However, the refund would not be eligible where the GST rate of the goods is subsequently reduced. e.g. trader purchases the goods at the rate of 18%, but the rate is subsequently reduced to 12%;
  - The refund would not be eligible under section 54(3)(ii) of CGST Act in such cases, since the input and output supplies are the same even though attracting different rates of tax at different point of time.

Dhruva Comments

The clarification would cause a lot of hardship to such traders as this would lead to accumulation of ITC for them. Section 54(3)(ii) nowhere states that the inputs and output supplies need to be different to claim the refund. It merely states that rate of tax on inputs should be higher than the rate of tax on output supplies.

[9] Circular no. 135/05/2020 GST dated March 31, 2020
[10] Circular no. 125/44/2019 GST dated November 18, 2019
[11] 2020-VIL-45-DEL

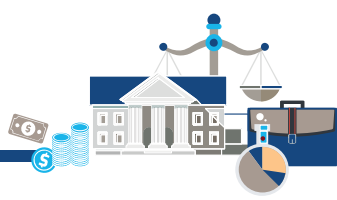
- Manner of grant of refund in cases other than zero rated supplies
  - In certain cases, mentioned below, the refund is paid in cash even if the tax is paid through ITC:
    - Excess payment of tax;
    - Tax paid on intra-state supply subsequently held to be inter-state supply and vice-versa;
    - Assessment / provisional assessment / appeal / any other order;
    - 'Any other' ground or reason.
  - In order to avoid unintended encashment of credit balances, the refund of the above-mentioned cases, would be paid in the same proportion in which the tax has been paid originally i.e. by debiting electronic cash and credit ledger;
  - In this regard, suitable amendments[12] have also been made in CGST Rules, whereby two new sub rules have been inserted viz. Rule 86(4A) and Rule 92(1A);
  - The refund amount payable in cash should be paid by issuance of order in FORM GST RFD-06 and the ITC in FORM GST PMT-03.
- Refund of ITC not reflected in GSTR-2A
  - As per para 36 of the Master Circular *(supra)* the refund can be taken even if the invoices were not reflected in GSTR-2A. However, due to insertion of sub rule (4) in Rule 36 of CGST Rules[13], the field formations faced difficulties with respect to the admissibility of the refunds for those invoices which were not reflected in GSTR-2A;
  - Accordingly, the refund of ITC would be restricted to only those invoices which are uploaded by the supplier in GSTR-1 and reflected in GSTR-2A of the applicant. Para 36 *(supra)* is modified to such extent.

Dhruva Comments

For unmatched transactions, the authorities would now not rely only on the Tax invoice produced by the assessee during refund proceedings.

- Mention HSN code of the invoices for which refund is claimed
  - As per the master Circular *(supra)*, a statement in prescribed format was required to be submitted while filing the refund claim mentioning the details of the invoices for which refund was being claimed. However, the said format did not contain a column to mention HSN code of the goods / services;
  - As GSTR-2A does not contain the HSN wise details, it becomes difficult for the field formations to distinguish the ITC on capital goods / services out of the total ITC. Accordingly, a new HSN column is being added in the prescribed statement format.
  - Further, if a supplier is not mandated to mention the HSN code, then the applicant is not required to mention the HSN code in respect of such inward supply.

[12] Notification no. 16/2020-Central Tax dated March 23, 2020
[13] Notification no. 49/2019-Central Tax dated October 09, 2019



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