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Indirect Tax Alert

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Dimensions – 69th Edition

Ruling under GST era

Penna Cement Industries Limited - Telangana[1]

Issue for Consideration

Does inter-state supply of goods on ex-factory / works terms attract IGST or CGST / SGST?

Discussion

- The Applicant is a manufacturer of cement and has cement plants in the state of Telangana. The Applicant occasionally undertakes inter-state supply of cement from these plants on ex-factory / works basis.
- The Applicant approached the Authority in order to determine the nature of tax that is leviable on such ex-factory sales. The Applicant contended as follows:
  - As per section 10(1)(a) of the IGST Act, 2017, the place of supply (POS) of the goods is where the movement of the goods terminates for delivery to the recipient. Since the delivery terminates at the factory gate, CGST and SGST should be charged.
  - However, the said section also states that the movement of goods can be by the supplier or the recipient. Accordingly, although the movement relating to the supply terminates at the factory gate, movement of such goods is carried further by the recipient / transporter up to the billing address, in a different state. Thus, as the delivery terminates in another state, IGST should be charged.
- After considering the submissions of the Applicant, the Authority observed as follows:
  - The usage of the words '*whether by the supplier or the recipient or by any other person*' in section 10(1)(a) of the IGST Act, 2017 indicates that the movement of goods can be undertaken by any person and therefore such movement does not end at the factory gate but at the place of final destination. This leads to the conclusion that as per the said section, ex-factory inter-state sales do not terminate at the factory gate but where the goods are finally destined as per the billing address.
  - Accordingly, as per section 10(1)(a) of the IGST Act, 2017 the POS has to be determined with

[1] 2020-VIL-129-AAR

reference to the location where the movement of goods ultimately terminates.

– The movement does not terminate at the factory gate since the recipient transports the goods to another state. Thus, termination takes place at the location (in a different state) where the goods are consigned / destined for, and such movement is made by the recipient or the transporter authorised by the recipient.

Ruling

Given that the location of supplier and the POS are in different states, the transaction should be regarded as an inter-state supply and accordingly, IGST should be charged.

Dhruva Comments:

It would be interesting to examine interpretation done by Courts under erstwhile CST laws while determining inter-state sale and whether the same would apply under the GST laws.

Judgments under Pre-GST era

M/s. Ascend Telecom Infrastructure Pvt. Ltd. v. *Assistant Commissioner (CT), CCE, Tamil Nadu*[2]

Issue for Consideration

Does the rendition of passive infrastructure service amount to transfer of the right to use goods to attract VAT under the Tamil Nadu Value Added Tax Act, 2006 (TNVAT Act)?

Discussion

- The Petitioner provides passive infrastructure (PI) service to the Mobile Telecom Operators (MTOs). The Petitioner has erected a temporary shelter on leased land, which is equipped with air conditioners and connected to power supply generators and antenna. Next to the temporary shelter, the transmission tower / mast is erected. The PI includes a temporary shelter and tower which can be used by two or more MTOs for provision of mobile service.
- The Petitioner has signed a Master Service Agreement (MSA) with the MTOs, under which the site-specific agreements were executed. The PI service provided by the Petitioner allows two or more MTOs to house their Base Transceiver Station (BTS), antenna and other accessories in the temporary shelter for receipt and transmission of cellular mobile signals. The BTS is connected to the antenna with the feeder cables, which run on the transmission towers of the Petitioner. The Petitioner is required to ensure a constant power supply and ambient temperature for efficient functioning of the mobile telecommunication equipment throughout, without any break. The Petitioner pays Service tax on the gross amount received from the MTOs.
- The Respondent raised a demand on the PI service provided by the Petitioner considering it to be a transfer of rights to use any goods liable to VAT by passing two separate orders (impugned orders) for the AY 2008-09 and 2009-10. Aggrieved, the Petitioner moved the Hon'ble High Court.
- The Hon'ble High Court observed as follows:
  – The nature of activity undertaken clearly indicates that the Petitioner provides a service as there is renting of space within the temporary shelter and on the transmission tower. Transfer of the right to use 'any goods' for a consideration is a sale as per section 2(33)(iv) of TNVAT Act. Furthermore, as per the decision of the Hon'ble Supreme Court in the case of *Bharat Sanchar Nigam Ltd.* v. *Union of India*[3], a transfer of right of use should be to the exclusion of the owner and others, and exclusively in favour of the person in whose favour such a transfer of the right to use is made.
  – In the present case, there is no exclusive transfer of the temporary shelter or the transmission tower to any one of the MTOs. The space in the shelter and the transmission tower,

[2] 2020 (6) TMI 57 - Madras High Court
[3] (2006) 3 SCC 1

provided on a shared basis, is charged separately, and would not come within the extended definition of sale as per section 2(33) of the TNVAT Act.

- The Court distinguished the reliance placed by the Respondents on the judgment pronounced in the case of *Antrix Corporation Ltd.* v. *ACT, Bangalore*[4] because it involved a different issue and was not related to the present case.
- The dominant nature test enunciated by the Hon'ble Supreme Court in the case of *Bharat Sanchar Nigam Ltd. (supra)* for composite supplies other than those mentioned in Article 366(29A)[5] of the Constitution of India is *"did the parties have in mind or intend separate rights arising out of the sale of goods?"*. The transaction would not be regarded as a sale in the absence of any such intention, even if the contract could be disintegrated.
- The Court also observed that wherever the extended definition of sale in Article 366(29A) of the Constitution of India is attracted, a transaction can be taxed under provisions of both the TNVAT Act and the Finance Act, 1994. Furthermore, it is for the assessing officer, under the respective enactments, to determine the value of two transactions and collect tax accordingly.
- In the present case, there is no transfer of the right to use the goods as contemplated under Article 366(29A)(d) of the Constitution of India and section 2(33)(iv) of the TNVAT Act. Furthermore, although the temporary shelter and the mast are goods within the meaning of Article 366(12) of the Constitution of India and section 2(21) of the TNVAT Act, there is no exclusive transfer to exclusion of others to attract the levy of transfer of 'right to use'.
- The business model of the Petitioner is based on shared usage instead of exclusive usage of the PI and therefore, there is no deemed sale.
- Hence, tax is not payable by the Petitioner.

Judgment

- There is no transfer of the right to use in terms of section 2(33)(iv) of the TNVAT Act even though the PI of the Petitioner are goods within the meaning of Article 366(12) of the Constitution of India and section 2(21) of the TNVAT Act.
- The Hon'ble High Court quashed the impugned orders and held that no tax is payable by the Petitioner.

Dhruva Comments:

The judgment critically analyses the ambit of deemed sales comprising the 'transfer of the right to use any goods' and relies upon landmark judgment in the case of *Bharat Sanchar Nigam Ltd.* (*supra*) explaining the condition of exclusivity. The issue seems to be settled in view of favourable judgments pronounced by other High Courts.

It is also pertinent to note that, relying on the above decision, another judgment on similar facts has also been passed by the Hon'ble Madras High Court in the case of *Indus Towers Limited* v. *Union of India*[6].

***Commissioner of Service Tax* v. *Sobha Developers Ltd.*[7]**

Issue for Consideration

Do services provided by incorporated clubs to their members amount to rendition of service from one person to another, considering the doctrine of mutuality and therefore are they liable to Service tax during the pre-negative list regime?

Discussion

- The Respondent is engaged in the construction of complex and roads under the category *'construction of complex service and works contract service'* under the Finance Act, 1994.

[4] (2010) 29 VST 308 (Kar)
[5] Article 366(29A) of the Constitution of India defines the term tax on sale or purchase of goods. Sub-clause (d) of the said Article includes a tax on transfer of right to use any goods for any purpose for cash, deferred payment etc.
[6] 2020 (6) TMI 84 - Madras High Court
[7] 2020-VIL-233-KAR-ST

- During the course of the audit, the Adjudicating Authority (AA) came across agreements entered into by the Respondent with their customers for the sale of residential apartments and certain amounts collected as non-refundable deposit towards the *'Club House and Swimming Pool'*.
- The AA issued a notice to the Respondent demanding Service tax for the period 2006-2011 and April 2011-March 2012 stating that the Respondent is rendering service under the category of *'Club and Association Service'*. This demand was confirmed by the AA after considering the reply filed by the Respondent. Thereafter, an appeal was filed before the Hon'ble Tribunal and was allowed by placing reliance upon decisions rendered by the Hon'ble Gujarat and Jharkhand High Court. Aggrieved, the authorities filed an appeal before the Hon'ble High Court of Karnataka.
- The Appellant submitted that the clubs are either companies registered under the Companies Act or societies registered under the Societies Registration Act and constitutes a separate legal entity i.e. having a separate legal identity from its members. Therefore, the doctrine of mutuality has no significance in the context of taxable service provided by the clubs to its members.
- The Respondent placed reliance upon the judgment pronounced by the Hon'ble Supreme Court in the case of *State of West Bengal* v. *Calcutta Club Limited*[8] in support of the orders passed by the Tribunal.
- Perusing the facts and circumstances of the case as well as the judgment in the case of *Calcutta Club Limited* (*supra*), the Hon'ble High Court observed as follows:
  - The issue involved in the present case has been settled by the Supreme Court decision in the case of *Calcutta Club Limited* (*supra*).
  - The companies and the cooperative societies registered under the respective acts and incorporated prior to July 1, 2012 should not be covered under the Service tax net and thus, no Service tax liability arises.

Judgment

The Hon'ble High Court upheld the judgment given by Tribunal.

Dhruva Comments:

Taxability of transactions between clubs / associations and its members have always been a subject matter of litigation under the Service tax and the VAT regime. It would be interesting to analyse the applicability of the principles of mutuality under the GST law.

State Tax Officer v. *Abhishek Nagori – Liquidator for Asian Natural Resource (India) Ltd. (ANRIL) & Ors.*[9]

Issues for Consideration

- Is the Liquidator correct in treating the Appellant as a Statutory Creditor and not a Secured Creditor?
- Does statutory provision under section 53 of the Insolvency and Bankruptcy Code, 2016 (IBC) override the provision under section 48 of the Gujarat Value Added Tax Act, 2003 (GVAT Act).

Discussion

- ANRIL, previously known as Bhatia International Ltd. (BIL), was registered with the Commercial Tax department, Ahmedabad in Gujarat as a non-localised dealer since 2002. ANRIL cancelled their VAT and CST registration w.e.f. March 31, 2013. Thereafter, BIL registered itself at Surat in Gujarat under the name of ANRIL. Completion of assessments for the years 2006-07, 2010-11, 2011-12 and 2012-13 revealed outstanding dues to the tune of ₹151 Million along with applicable interest.
- Recovery proceedings were initiated by the Appellant against the Liquidator of ANRIL in 2018 under the category of a Financial Creditor. Placing reliance on section 53 of the IBC, the Liquidator

[8] 2019-VIL-34-SC-ST
[9] TS-344-Tribunal-2020-VAT

denied the Appellant's claim under the category of a Secured Creditor.

- Aggrieved by the decision of the Liquidator for treating the Appellant as a Statutory Creditor and not a Secured Creditor, the Appellant filed an appeal under section 42 of the IBC.
- The Appellant submitted as follows:
  - Section 48 of the GVAT Act states that any amount payable to the Government by a person from whom any amount of tax, interest or penalty is recoverable shall be recognised as a doctrine of the first charge over the property of such person. On a combined reading of section 48 of the GVAT Act with section 3(31)[10] of the IBC it can be said that the tax dues of the Appellant would be covered within the ambit of the Secured Creditor.
  - The Appellant shall have the first charge over the property of the corporate debtor in terms of section 3(30)[11] of the IBC being an obligation for payment of dues arising under the GVAT Act.
  - Reliance was placed on the following judgments to substantiate the ground that the State or the tax department has priority or first charge over the property of a debtor:
    - *Central Bank of India* v. *State of Kerala & Ors.*[12]; and
    - *Cosmos Co. Op. Bank Ltd.*[13] - Hon'ble High Court of Gujarat.
  - Reliance was also placed on an oral stay order passed by the Hon'ble High Court of Gujarat in the case of the *State of Gujarat* v. *Sanjay Kumar Agarwal*[14] against the order of the NCLT, Mumbai involving similar issues.
- The Respondent, while concluding that the Appellant falls under the category of a Statutory Creditor under section 53 of the IBC, submitted that he is duty bound to follow the provisions of the IBC and such provisions have an overriding effect over the statutory provisions contained in law made by the Parliament or the State.
- Perusing the provisions enshrined under the GVAT Act and the IBC, the Hon'ble Tribunal observed as follows:
  - Reliance placed upon the case of *Sanjay Kumar Agarwal* (*supra*) cannot be squarely applicable to the present litigation proceedings till the ratio *de condi* in the case is decided by the High Court. In such circumstances, no legal infirmity is noticed in the decision to treat the Appellant as a Statutory Creditor and not a Secured Creditor and the Liquidator has followed the provisions under section 53 of the IBC.
  - The Hon'ble Supreme Court while examining the constitutional validity of the IBC in the case of *Swiss Ribbons Pvt. Ltd.* v. *Union of India & Ors.*[15] and various other cases found the provisions of the IBC as *intra-virus* i.e. constitutionally valid. It was held that the dues of the Financial Creditor must prevail over other dues including the statutory dues or government dues.
  - Plain reading of section 53 of the IBC reveals that the government dues have not been awarded priority over the worker dues or the Financial Creditor dues but have been accorded due weightage and priority as per the "*Waterfall Mechanism*" enshrined under section 53 of the IBC. Furthermore, this Bench while considering the case of *Mr. Sundaresh Bhatt* v. *Central Board of Indirect Taxes and Customs*[16], has taken a view that the provisions of the IBC would have an overriding effect over the Central Excise Act, 1944, and the Customs Act, 1962, even though both the statutes have the status of a special law and contain non obstante clauses.

[10] "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person
[11] "secured creditor" means a creditor in favour of whom security interest is created
[12] (2009) 4 SCC 94
[13] SCA/3372/2012 order dated July 23, 2012
[14] Civil Application No. 23256 of 2019
[15] 2019 (1) TMI 1508 - Supreme Court
[16] IA No. 474 of 2019 in CP(IB) No. 53/NCLT/AHM/2017

– The priority for distribution of proceeds including liquidation assets, was settled by the Hon'ble Supreme Court in the case of *Solidaire India Pvt. Ltd.* v. *Fairgrowth Financial Services Ltd. & Ors*[17] and *Maruti Udyog Ltd.* v. *Ram Lal & Ors.*[18]. The Court held that, when two special statutes contain a non obstante clause, the latter statute must prevail. Therefore, the IBC, being enacted subsequent to the GVAT Act, should have an overriding effect.
– Furthermore, the Hon'ble Supreme Court in the case of *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta & Ors.*[19] was held that even in resolution plan for the distribution of assets amongst the creditors, the Financial Creditors must be awarded a priority over the Operational Creditors and Government dues and the decision of the CoC in this regard would be conclusive and cannot be interfered with.

Judgment

The Hon'ble Tribunal upheld the decision of the Liquidator to treat the Appellant as a Statutory Creditor.

Dhruva Comments:

Whether tax dues could be regarded as an operational debt has been a subject matter of dispute in the IBC. Interestingly, the recent decision of the Hon'ble Jharkhand High Court in case of *Electrosteel Steel Limited* v. *The State of Jharkhand & Ors.*[20], categorised tax collected and not deposited as not a direct debt, so as to be construed as an operational debt.

MIOT Hospitals Ltd. v. *The State of Tamil Nadu*[21]

Issue for Consideration

Whether transfer of property in stents, valves, plates, pace makers (prosthetics), medicines, X-ray and other goods in the course of provision of medical services to inhouse patients amounts to 'works contract' and thereby a deemed sale to attract levy under the Tamil Nadu Value Added Tax Act, 2006 (TNVAT Act).

Discussion

- The Petitioners run hospitals and are providing medical / health services to inhouse patients. During the provision of such services, they surgically implant prosthetics in the bodies of patients and also provide ancillary services such as MRI scan films, X-rays etc. Packages were designed to provide such services and the consideration was received in accordance with the package. The Petitioners had not paid VAT on such packages and claimed the benefit of an exemption[22] whereby the sale of medicines by hospitals to their patients was exempted, irrespective of consultation fees being charged or not.
- The Respondents issued notices to the Petitioners proposing levy of tax under the TNVAT Act on such sales.
- However, the Petitioners instead of undertaking the adjudication procedure, filed the present Writ Petitions challenging the impugned notices on the following grounds:
  – The issue has been settled by the judgments[23] of four different High Courts which are squarely applicable in the present case.
  – Medical services cannot be regarded as 'works contract' as per section 2(43) of the TNVAT Act.
  – The Hon'ble Supreme Court in the case of *Bharat Sanchar Nigam Ltd.* v. *Union of India*[24] (para 44) has observed that when doctors hand

[17] (2001) 3 SCC 71
[18] (2005) 2 SCC 638
[19] 2019 (11) TMI 731 - Supreme Court
[20] 2020 (5) TMI 39 - Jharkhand High Court
[21] 2020-VIL-238-MAD
[22] G.O.Ms.No.976 Revenue dated March 28, 1959
[23] *Tata Main Hospital* v. *State of Jharkhand* [2007-VIL-11-JHR]; *International Hospital Pvt. Ltd.* v. *State of UP* [2014-VIL-48-ALH]; *Fortis Health Care Ltd.* v. *State of Punjab* [2015-VIL-73-P&H]; *Aswini Hospitals Pvt. Ltd.* v. *Intelligence officer, Thrissur* [2019-VIL-20-KER-LB]
[24] 2006-VIL-07-SC-LB

out prescriptions to patients there is no sale of paper (goods) to tax the transaction as a sale. The same logic should apply to medicines / prosthetics etc.

- Medical / health service is not recognized as a sale or purchase under Article 366(29A) of the Constitution of India and under TNVAT Act.
- Test to decide the substance of the contract is the 'dominant nature test' as enunciated by the Supreme Court in various judgments. The dominant intention was to provide health / medical services and not sale.
- The intention of legislature was not to include 'surgical procedures' into the Sales tax net, which is clear from the choice of words in the definition of 'works contract' under the TNVAT Act. The words 'implant' or 'transplant' have not been used in the definition of 'works contract'.
- There is a clear distinction in the legal treatment of 'property' and 'person'. The Law does not treat a person as property. The human body cannot be subject to works contract by going beyond the language used.
- Treating a human body as 'property' would validate suicide, foeticide, etc. Section 19 of the Transplantation of Human Organs and Tissues Act, 1994 makes commercial dealing in human organs a punishable offence. Thus, the legislative intent is not to tax.
- The term 'property' as used in section 2(43) of the TNVAT Act, cannot cover human beings or their live / un-detached parts and organs. Human beings are neither moveable nor immovable property for the purpose of said section. Thus, no tax should be levied by considering surgical procedures as 'works contract'.
- Under the Service tax regime, the levy on health care services was restricted and w.e.f. July 01, 2012, it was exempted. Also, under GST regime health care service is exempted.

- The Respondent contended as follows:
  - The benefit of the exemption claimed *(supra)* was not available as it was confined to the sale of medicines. Further, the said exemption was diluted by excluding the dispensaries of corporate hospitals as run by the Petitioners.
  - Prosthetics implanted into the body results into 'sale' as there is transfer of property. Prosthetics are property being bought and sold are taxable at the rate of 5% under the TNVAT Act. Consumables such as X-rays, MRI scans, etc. utilized for such services are liable to be taxed under the TNVAT Act.
  - By virtue of clause 29(1)(b) of Article 366 of the Constitution of India, there is a deemed transfer of property when implants are billed whether in a package or separately.
  - The four different High Court judgments *(supra)* relied upon are not relevant, as in the same the dealers were rendering only services without any transfer of property in goods.
  - Petitioners had received consideration under a package, which included charges for prosthetics, etc. and hence, the Petitioners had indirectly collected consideration for sale of prosthetics.
  - The term 'sale' as per TNVAT Act includes goods in any form.

- The Hon'ble High Court, after taking into account the judicial and legislative history surrounding the 46th constitutional amendment pertaining to the taxability of deemed sales and works contract transactions, observed as follows:
  - 'Works contract' is of infinite variety and it is not possible to exclude hospital services as outside the purview of Article 366(29A) of the Constitution of India even though the Supreme Court has made a contrary remark in the judgment of *Bharat Sanchar Nigam Ltd. (supra)*.
  - Works contract involves two fundamental elements, namely: transfer of material and rendering of service. The supplier transfers the ownership and possession of material to the recipient in the course of execution of works contract, which may result in a new identity of the material supplied or such material becomes part of an existing structure or goods.

- Works contract can be divisible or indivisible. The definition of 'works contract' as per TNVAT Act is expansive and not restricted to a specific genre of work.
- The dominant intention to transfer the property in goods is not relevant for works contract after the 46th constitutional amendment.
- The observation of the Supreme Court in the case of *Larsen and Toubro Ltd.* v. *State of Karnataka*[25] that 'works contract' takes within its fold all genres and is not restricted to one specie of contract dilutes the illustration in para 44 of the Supreme Court judgment in the case of *Bharat Sanchar (supra)*. Further, treatment with a medicine cannot be equated with the complicated medical procedures undertaken by the Petitioners.
- To argue that medical service involves all elements of works contract and yet is not a 'works contract' is an argument and a point of view too farfetched. Like building contracts, a transaction of a medical service can also amount to a works contract as the definition of 'works contract' is not confined to a particular genre of contract.
- Even if the dominant intention was to not to transfer the property in goods and rather render services, it is open to states to levy Sales tax on materials used in such contract, if such contract otherwise has elements of a 'works contract'.
- The Petitioners wrongly availed the benefit of exemption *(supra)* even after it was diluted.
- The decision of the Supreme Court in the case of *Commissioner, Central Excise and Customs, Kerala* v. *Larsen and Toubro Ltd.*[26] dealing with service tax, held that a works contract is a different specie distinct from a contract of services. This makes it clear that Sales tax is payable on the supply portion.
- Works contract under GST has been restricted to any work undertaken for an **immovable property** only.
- The intent of the legislature under the Service tax law and the GST law is to exempt healthcare services from tax. However, in the absence of any specific notification under the TNVAT Act, it cannot be said that health services involving prosthetics etc. are not liable to VAT.
- The four different High Court judgments relied upon by the Petitioners *(supra)* are distinguishable on the following basis:
    - Tata Main Hospital: The dominant nature test invoked in the case does not survive after the 46th constitutional amendment. In this case the Court did not answer as to whether in the course of provision of medical / health services any clause of 'sale' under the Bihar Finance Act, 1981 was attracted or not. Only after ruling out the same and the definition of works contract (under the Bihar Finance Act, 1981) could Court proceed to determine the taxability or non-taxability of the transaction.
    - International Hospital Pvt. Ltd.: There was no discussion in the judgment as to how the Court has arrived at its conclusion when the very purpose of expanding the scope of tax on purchase and sale as per 46th constitutional amendment was to include transactions involving not only sale but also deemed sale.
    - Fortis Health Care Ltd. and Ashwini Hospitals Pvt. Ltd.: The reasoning provided runs contrary to the express language in Article 366(29A) of the Constitution of India and also to the ratio of Supreme Court in the case of *Bharat Sanchar Nigam Ltd. (supra)*.
- The reason for bringing the 46th constitutional amendment was to bring indivisible contracts within the purview of Sales tax and hence after the amendment, the view of the Hon'ble Supreme Court in the case of *State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.*[27] has no precedential value.

[25] 2013-VIL-03-SC-LB
[26] 2015-VIL-88-SC-ST
[27] AIR 1958 SC 560

- The Supreme Court in the case of *Bharat Sanchar Nigam Ltd (supra)* has held that sub-clauses of Article 366(29A) of the Constitution of India does not cover hospital services. However, there is no legal basis to follow this conclusion any longer in light of the subsequent decisions of the Supreme Court.
- The decision of the Supreme Court in *Bharat Sanchar Nigam Ltd (supra)* which was relied upon in the four different High Court decisions *(supra)* should have been applied with caution and circumspection as the *Bharat Sanchar Nigam Ltd.* case was concerned with 'transfer of right to use' which is another specie of sale different from 'works contract'. The different High Courts in these four rulings have examined the issue from a common perspective and not from the point of view of 'works contract' and hence the ratio of these judgments is not binding.
- The definition of works contract as per TNVAT Act is of very wide import and is not limited or confined to any specific genre of contract involving service and supply of goods or to an immovable property. Any agreement for fitting or installation of any movable property such as prosthetics would qualify as works contract.
- Fitting out or implanting prosthetics alleviates pain and improves the life of the patient and can be construed as 'works contract'.
- Dispensing of medicine to patients while they undergo treatment cannot come within the purview of 'works contract' and cannot be liable to tax.
- The term 'works contract' cannot be given a restricted meaning merely because 'works contract' as a concept was originally confined to contracts relating to immovable properties.
- The definition of works contract can include hospital / health / medical services involving composite contracts of provision of service along with supply of goods.
- The decision of the four different High Court rulings (discussed supra) would be acceptable in the era prior to the 46th constitutional amendment.
- There is not only transfer of possession of prosthetics into the physiology of the patient but also the ownership of such prosthetics for consideration in the course of provision of medical / health services. Also, the cost of X-ray, CT scans, etc. gets included in the package is taxable, as such activity can be termed as the processing of movable property.

Judgment

The Hon'ble High Court held that the Respondents were justified in proposing a demand to tax the Petitioners. Further, the demand shall be confirmed to the value of prosthetics and charges incurred for X-ray, CT scan etc. and exclude the value of medicines and other consultation charges.

Dhruva Comments:

The concept of works contract, whether in the Sales tax / VAT regime, Service tax or even GST, has been a subject matter of litigation post the 46th constitutional amendment.

The Maharashtra VAT department had issued a circular[28] wherein it was clarified that the dominant intention in administering medicines or consumables or implants is treatment of disease and not supply of the same. It did not amount to deemed sale. Reliance was placed upon the Supreme Court judgment in the case of *Bharat Sanchar Nigam Ltd (supra)*. The Special Leave Petition filed in the case of *Tata Main Hospital (supra)* stands dismissed by the Supreme Court and the judgments in the case of *International Hospital Pvt Ltd.* and *Fortis Health Care Ltd. (supra)* are pending for admission before the Supreme Court.

The judgment states that the dominant nature test propounded in *Bharat Sanchar Nigam Ltd. (supra)* needs reconsideration. Considering the divergent rulings, it will be interesting to see how the judiciary unfolds on this subject.

[28] Circular no. 7A of 2008 dated March 13, 2008

Circular under GST era

Clarification on refund related issues[29]

- CBIC had issued a circular[30] (said circular) wherein it was clarified that the refund of accumulated input tax credit (ITC) would be restricted to only those invoices which are uploaded by the supplier in Form GSTR-1 and are reflected in Form GSTR-2A of the applicant.
- Representations were received that the authorities have rejected the refund claims in respect of the ITC availed on Imports, ISD invoices, RCM supplies, etc. citing the said circular, since the said invoices / documents were not reflected in Form GSTR-2A of the applicant.
- It has now been clarified that prior to the issuance of the said circular, the refund was being granted even in respect of those invoices which were not reflected in Form GSTR-2A and which were uploaded by the applicant along with the refund application. The said circular in any way does not impact the refund of ITC availed on invoices / documents relating to imports, ISD invoices, RCM supplies, etc. The treatment of refund on the same will continue as it was before the issuance of the said circular.

Dhruva Comments:

Circular was very much the need of the hour considering the cash flow impact being faced by the trade at large due to the lockdown. The department should now expedite the processing of refund applications being rejected on the said basis.

[29] Circular no. 139/09/2020-GST dated June 10, 2020
[30] Circular no. 135/05/2020-GST dated March 31, 2020

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WTS Dhruva Consultants recognised as **Best Newcomer Firm of the Year 2020 Europe** - International Tax Review

"India Tax Firm of the Year" 2017, 2018, and 2019 - International Tax Review's Asia Tax Awards

"India Tax Disputes and Litigation Firm of the Year" 2018 - International Tax Review's Asia Tax Awards

Dhruva Advisors has been consistently recognised as a **Tier 1 Firm in India for General Corporate Tax** by the International Tax Review's in its World Tax Guide.

Dhruva Advisors has also been consistently recognised as a **Tier 1 Firm in India for its Transfer Pricing practice** in the International Tax Review's Transfer Pricing Guide.

Dhruva Advisors in 2019 for the first time ranked as a **Tier 1 Firm in India for Indirect Taxes** in International Tax Review's Indirect Tax Guide.

Best Newcomer of the Year 2016 - ASIA - International Tax Review's Asia Tax Awards