



## Dimensions – 93<sup>rd</sup> Edition

### Judgment under Pre-GST era

#### **Manisha Pharmo Plast Pvt. Ltd. v. Union of India<sup>1</sup>**

##### Issue for Consideration

Can interest on a refund application claim be denied on the grounds that the claim attained finality at a later date?

##### Discussion

- The Appellant had filed a refund application on December 12, 1999 but the refund was only paid on June 26, 2005 and without any interest.
- The Hon'ble High Court of Gujarat<sup>2</sup> denied the interest on the refund claim under section 11BB of the Central Excise Act, 1944 ("CEA, 1944") read with circular no. 670/61/2002-CX dated October 1, 2002 noting that the adjudication of the refund claim had attained finality only after dismissal of proceedings before the High Court on July 18, 2005.
- Aggrieved, the Appellant filed the present appeal before the Hon'ble Supreme Court.

- The Hon'ble Supreme Court observed that their judgment in the case of *Ranbaxy Laboratories Ltd. v. Union of India*<sup>3</sup> approving the dictum of the Hon'ble High Court of Rajasthan<sup>4</sup> was applicable to the present matter. Interest on refund claims should commence if a refund is not paid within three months of the date of refund application. This is also the starting point for calculation of interest on refunds as envisaged under section 11BB of the CEA, 1944.

##### Judgment

The Hon'ble Supreme Court allowed the Appellant's interest on refund claim with a direction to calculate and pay the interest amount within three months.

##### **Dhruva Comments:**

The judgment clarifies that interest, if any due, on refund claims should be calculated on expiry of three months from the date of refund application, irrespective of the fact the matter is sub-judice and has attained finality at a later date.

<sup>1</sup> 2020 (11) TMI 726

<sup>2</sup> 2010 (262) E.L.T. 165 (Guj.)

<sup>3</sup> 2011 (273) E.L.T. 3 (S.C.)

<sup>4</sup> 2004 (170) E.L.T. 4 (Raj.)



## Ruling under GST era

### ***The Principal Commissioner of Central Tax, Bangalore West Commissionerate v. M/s NCS Pearson Inc – Appellate Authority for Advance Ruling, Karnataka<sup>5</sup>***

#### Issue for Consideration

Can a test which is conducted online for which the score is given by both a computer program and a human scorer, be said to fall within the realm of “minimal human intervention” in order to classify the service as Online Information Database Access and Retrieval (“OIDAR”)?

#### Discussion

- The Respondent is an entity based in United States of America (“USA”) and is engaged in the provision of computer-based test administration solutions for educational institutes, professional licensing organizations etc. It is registered under GST as an OIDAR service provider.
- The Respondent provides 3 types of tests to candidates in India and it had approached the Authority for Advance Ruling (“the Authority”) to determine whether such tests would qualify as OIDAR services or not. The Authority vide its ruling<sup>6</sup> held that Type-1 and Type-2 test qualify as OIDAR, while Type-3 does not qualify as OIDAR. As the Type-3 test did not qualify as OIDAR service, the same was also not liable to reverse charge in lieu of the exemption provided under sl. no. 10 of notification no. 9/2017-IGST dated June 28, 2017 and accordingly no tax was payable on the same either by the service provider or by the service recipient under reverse charge mechanism. Aggrieved by the said ruling in respect of Type-3 test, the Appellant approached the Appellate Authority for Advance Ruling (“the Appellate Authority”).
- The Appellate Authority after taking into account the facts of the case observed as follows:
  - As per the definition of OIDAR service in section 2(17) of the IGST Act, 2017, the following four

ingredients are essential for a service to qualify as OIDAR:

- Service is delivered over the internet or an electronic network;
  - Supply of service is essentially automated;
  - Delivery of service is impossible in absence of information;
  - Service involves minimal human intervention.
- The nature of the Type-3 test is as follows:
- There are Multiple Choice Questions (“MCQ”) and essay-based questions. On completion of the test, the results / score for MCQs are provided immediately based on a computer algorithm. The essay-based answers are sent by the Respondent to an entity in USA, which then evaluates it independently by a professional human scorer and by a computer-based program known as Automated Essay Scoring system (“AES”).
  - If the difference between the scores given by the human scorer and the AES is less than one point, then the final score is the average of both of the scores, and if the difference is greater than one point, then the essay is routed to an expert human scorer whose decision becomes the final score. The final score is communicated electronically to the candidate within three weeks of the test date.
  - Furthermore, in cases where the essay cannot be evaluated by AES, then, it is routed to a second human scorer.
- The Type-3 test is conducted over the internet using a computer system. The process of test registration, conduct of exam and communication of result are automated and cannot be done in the absence of information technology. Thus, the first three requirements

<sup>5</sup> 2020-VIL-71-AAAR

<sup>6</sup> 2020-VIL-131-AAR



for qualifying as an OIDAR service (*supra*) are fulfilled.

- There is no dispute that there is an element of human intervention in the Type-3 test but whether such involvement is “minimal” or not needs to be decided. As there are no guidelines under the Indian laws in this respect, reference is made to European Commission VAT Committee Guidelines which had agreed that for the assessment of notion “minimal human intervention” it is the involvement on the side of the supplier which is relevant and not that on the side of customer.
- An AES would be considered valid if it measures the trait that it purports to measure and it would be considered reliable if its outcome is repeatable. If the AES scores agree with the score of the human scorer, then the AES is reliable. A human score evaluation serves as a good indicator that the AES is giving a stable consensus score. Thus, the role of human scorer is in effect a means to ensure the reliability of AES program.
- There is importance of human scorer, but the focus here is on a computer-based test where the intent is to also assess the performance using an automated system. The reliability of the AES is validated by the near agreement to the score given by the human scorer. Thereby, the involvement of human element in essay writing is within the realm of “minimal human intervention”. When the Type-3 test is viewed as a whole, the scoring done by the human scorer is to be regarded as being within the realm of ‘minimal human intervention’.
- Furthermore, even from the candidate’s perspective, the human involvement is minimum in the entire process starting from the manner of registering for the test, the actual test-process and the outcome of the test, as all of the stages are automated.

## Ruling

Type-3 test is classifiable as an OIDAR service.

### **Dhruva Comments:**

With the increasing share of supply of digital content / e-learning offerings (live or recorded modules) etc, it needs to be analysed whether such transactions results in provision of OIDAR services. In this process, in the absence of definition of the term “minimal human intervention”, under the GST law, it would remain a contentious issue and a subject matter of judicial interpretation.

## **Other important judgment**

### ***Tamil Nadu State Marketing Corporation Ltd. v. Union of India***<sup>7</sup>

#### Issue for Consideration

Is the High Court an appropriate forum for challenging the vires of a section / provision when the matter is sub-judice before the Income tax assessing officer (“AO”)?

#### Discussion

- The AO issued a Show Cause Notice (“SCN”) on the Appellant disallowing deduction of VAT expense incurred by the Appellant as being squarely covered by section 40(a)(iib) (“impugned section”) of the Income-tax Act, 1961. Thereafter, the AO finalised the assessment considering the above disallowance and passed an assessment order for the assessment year 2017-18.
- The Appellant approached the Hon’ble High Court against the order. The order was set aside on the ground of violation of principles of natural justice and the matter was pending before the AO.
- Thereafter, the Appellant again filed the Writ Petition before the Hon’ble High Court challenging the vires of the impugned section as being ultra-vires to Article 14, 19 and 265 of the Constitution of India. The Hon’ble High Court passed its

<sup>7</sup> [2020] 121 taxmann.com 325 (SC)



judgement<sup>8</sup> dismissing the Writ Petition observing that the vires of the section could not be entertained at this stage as the matter was still sub-judice before the Income tax authorities.

- Aggrieved, the Appellant filed the present appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court observed as follows:
  - The vires of the impugned section could only be decided by the High Court in exercise of powers under Article 226 of the Constitution of India and should have been decided on merits irrespective of the fact that the matter was sub-judice before the AO.
  - The cause of action for challenging the vires of the impugned section arose for the Appellant on the issuance of the SCN and the Appellant should not wait until the finalisation of assessment proceedings by the AO.
  - The Supreme Court observed that the stage at which the Appellant approached the High Court was an appropriate moment to challenge the vires of the impugned section and the High Court failed to exercise its powers vested under Article 226 of the Constitution of India by not pronouncing a judgment on the merits of the case.
  - Furthermore, the Supreme Court clarified that they had not expressed any opinion on merits with respect to legality and validity of the impugned section.

### Judgment

The Hon'ble Supreme Court allowed the appeal and remanded the matter back to the Hon'ble High Court to decide the issue with respect to the challenge to the vires of the impugned section on its merits.

### **Dhruva Comments:**

The Larger Bench judgment has categorically ruled on the jurisdiction and powers vested upon the High Court

under Article 226 of Constitution of India. The judgment also commented on determining the cause of action and appropriate moment for approaching the High Court. The vires of a section can be challenged at the stage of the SCN itself and the assessee is not required to wait until the finalisation of proceedings.

## Notifications

### ***Waiver of penalty for e-invoicing in the case of B2C transaction***

- The Government has issued notification no. 89/2020-Central Tax dated November 29, 2020 to waive the penalty payable by any registered person under section 125 of the CGST Act, 2017 (general penalty section), in respect of non-compliance for the generation of e-invoice in case of B2C transactions.
- The penalty has been waived for the period from December 1, 2020 to March 31, 2021 subject to the condition that the compliances are made from April 1, 2021.

### ***Mandatory issue of HSN on invoices***

- The Government has issued notification no. 90/2020-Central Tax dated December 1, 2020 to state that w.e.f. December 1, 2020, a registered person supplying specified class of goods<sup>9</sup> shall be mandatorily required to mention the 8-digit HSN code.

## GSTN update

### ***Unblocking of e-way bill generation facility<sup>10</sup>***

- An e-way bill generation facility is blocked if the taxpayer fails to file GSTR-3B for two or more consecutive tax periods. In order to unblock it, the taxpayer was hitherto required to make an

<sup>8</sup> [2020] 121 taxmann.com 324

<sup>9</sup> [Click here](#) for the link for the class of goods

<sup>10</sup> Dated November 28, 2020



application, manually, to the jurisdictional authority in Form GST EWB 05.

- A facility has now been made available, w.e.f. November 28, 2020, to file such application online through the GST login portal of the taxpayer. The path to be followed in the portal is Services > User Services > My Applications > Application for unblocking of E-way bill and click New Application and thereafter submit application in Form EWB 05 against which the tax officer shall issue an order in Form EWB-06, post conducting a personal hearing.







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