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Indirect Tax Alert

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Judgment under Pre-GST era

M/s. Sony India Pvt. Ltd. v. *Union of India and Another*[1]

Issue for Consideration

Can a Bill of entry ("BOE") be amended only after an order of Commissioner (Appeals) under section 128 of the Customs Act, 1962 ("the Act") or alternatively, under section 149 of the Act?

Discussion

- The Petitioner is engaged in the business of manufacturing and marketing different types of consumer electronics including mobile phones.
- During the period from August 2014 to January 2015, the Petitioner had imported mobile phones into India for trading purpose.
- At the time of filing the Bill of Entry ("BOE") on the import of mobile phones, the Petitioner was intending to claim the reduced rate of Countervailing duty ("CVD") of 1% as per sl. no. 263A(i) of the exemption notification[2].
- However, the Department did not allow the benefit of the reduced CVD to the Petitioner on the ground that the exemption is only available if Cenvat credit on goods and capital goods is not availed for the manufacture of mobile phones and in the present case, the Petitioner had procured and utilised the inputs and capital goods outside India. Also, at the relevant time, the electronic system of the Customs Department did not permit the availment of lower rate of tax as per the exemption notification.
- Accordingly, the Petitioner had to pay CVD at the rate of 6% at the time of import.
- However, relying on the judgment of the Hon'ble Supreme Court in the case of *SRF Limited and other* v. *Commissioner of Customs, Chennai and Other*[3], *as* pronounced in March 2015, the Petitioner was of the view that it was eligible for the benefit of the reduced rate of CVD.
- Accordingly, relying on the Supreme Court judgment in the case of *ITC Limited* v. *Commissioner of Central Excise, Kolkata-IV*[4], the Petitioner filed a letter in November 2019 to the Department to amend the BOEs under section 149

[1] 2021 (8) TMI 622
[2] Notification no. 12/2012-Central Excise dated March 17, 2012
[3] 2015 (4) TMI 561
[4] 2019 (9) TMI 802

of the Act to re-assess them and to allow the benefit of the reduced rate of CVD of 1% and to subsequently grant refund to the Petitioner for the CVD that it paid at a higher rate of 6%.

- However, the Department issued a letter dated February 2020 ("impugned order") rejecting the application of the Petitioner.
- The Petitioner filed a Writ Petition before the Hon'ble High Court at Telangana against the impugned order and contended as follows:
  - The judgment of the Hon'ble Supreme Court in case of *ITC Limited* (*supra*) is clearly applicable to the present case as it clarifies that before filing a refund claim under section 27 of the Act, a BOE should be modified by way of filing an appeal under section 128 or it can also be amended under section 149 or section 154 of the Act.
  - Section 149 of the Act provides for the amendment of a BOE on the basis of documentary evidence existing at the time of the clearance of goods which in the present case is the exemption notification. Hence, the Department has erroneously held that the refund benefit is not available as the decision of the Hon'ble Supreme Court in the case of *SRF Limited* (*supra*) was pronounced after the period of clearance of goods.
  - The judgment of *SRF Limited* (*supra*) merely clarifies the provision of the law that an importer would enjoy the same benefit as a manufacturer, if the importer is importing a like product for which beneficial rate of duty is available for a manufacturer.
  - The Department has erroneously held that a BOE can only be challenged by way of an appeal and if it is not challenged, assessment becomes final.
  - A BOE can be amended by filing an appeal under section 128 of the Act or by amending it under section 149 of the Act and it cannot be insisted that filing an appeal is the only proper remedy to amend a BOE ignoring section 149 of the Act.
- The Department on the other hand contended as follows:
  - The Petitioner has filed the BOE and not disputed the assessment, hence the assessment has reached finality, and hence the Petitioner should have sought a re-assessment under section 128 of the Act.
  - The proper officer has rejected the request to amend the BOE under section 149 of the Act as the Petitioner has bypassed the provisions of section 128 of the Act to re-assess the BOE.
  - If the re-assessment can be carried out under section 149 of the Act without any time limit, then the provisions of section 128 of the Act would be redundant.
- The Hon'ble High Court observed as follows:
  - The judgment of *ITC Limited* (*supra*) nowhere specifies that the amendment or modification of an assessment order can only be done in an appeal under section 128 of the Act. The judgment clearly indicates that the modification of the assessment order can either be under section 128 of the Act or any under other relevant provision i.e. section 149.
  - The only condition that is required to be fulfilled to seek the amendment of BOE under section 149 of the Act is that the amendment should be sought on the basis of documentary evidence existing at the time when the goods were cleared.
  - The Department has taken the judgment of *SRF Limited* (*supra*) as the documentary evidence, and it has rejected the claim of the Petitioner on the basis that the judgment was pronounced after the date of filing of the relevant BOEs. The law declared by the Supreme Court unless made prospective in operation is deemed to be the law of the land and it cannot be construed as being applicable

only after the date of the pronouncement of the judgment.

- The term "documentary evidence" under section 149 of the Act cannot include judgment of Courts.
- Amendment of the BOE was also rejected on the ground that for a different period, the Department had rejected a similar plea of the Petitioner and the same was confirmed by the Commissioner (Appeals). The said order is in appeal before CESTAT and has not yet attained finality. Furthermore, the said order was passed before the judgment of *ITC Limited* (*supra*) and the Department cannot refuse to follow the same. In fact, the Commissioner (Appeals) would also have followed it, if the judgment had been passed before the order of Commissioner (Appeals).
- The Assessing Officer has failed to correctly determine the duty leviable before the clearance of goods for home consumption and has further refused to amend the BOEs under section 149 of the Act which has caused great injustice to the Petitioner.
- Due to the initial incorrect determination of the duty by the Assessing Officer, the Petitioner was compelled to seek the amendment of BOE under section 149 of the Act and hence the Petitioner cannot be penalised for what the Authority ought to have done correctly by himself.

Judgment

The High Court set aside the impugned order and directed the Department to amend the BOEs under section 149 of the Act to enable the Petitioner to claim refund.

Dhruva Comments:

After the judgment of *ITC Limited* (*Supra*), the Customs Authorities have been insisting on re-assessment under section 128 of the Act for granting refund of excess Customs duty.

The present judgment should bring about much needed relief to assessees as BOE could be amended under section 149 and subsequently, refund could be filed without obtaining an order from the Commissioner (Appeals).

Ruling under GST era

M/s. Tata Motors Ltd. – Authority for Advance Ruling, Gujarat[5]

Issues for Consideration

- Whether GST is applicable on nominal amount recovered by the employer from its employees for usage of canteen facility?
- Whether input tax credit ('ITC') can be claimed by the employer on the canteen services? If yes, would the ITC be restricted to the extent of the payment made by the employer to the canteen service provider?

Discussion

- The Applicant maintains a canteen facility (through a contractor) for its employees at factory premises in accordance with the mandatory requirement of the Factories Act, 1948. The canteen facility can be used only by the authorized personnel.
- The Applicant recovers a nominal amount on a monthly basis from the salary of the personnel for such facility and pays it to the contractor. The balance amount is paid by the Applicant to the contractor, which becomes its cost.
- The Applicant approached the Gujarat Authority for Advance Ruling ('the Authority') and contended as follows:
  - As per the CBIC press release dated July 10, 2017, supply by an employer to an employee in terms of a contractual agreement of employment (part of salary / CTC) is not subject

[5] Advance Ruling No. GUJ/GAAR/R/39/2021 dated July 30, 2021

to GST. In order to avail the canteen facility, the employer employee relationship is must.

- It is not in the business of providing canteen service and therefore the recovery of a nominal amount should not be subject to GST. In this regard, reliance was placed upon the ruling of *Jotun India Pvt. Ltd.*[6]
- In terms of section 17(5)(b) of the CGST Act, 2017 ('the Act'), the ITC shall be eligible on goods / services which are obligatory for an employer to provide to its employees, under any law for the time being in force. Thus, the credit should be eligible on canteen facility services provided by the contractor.

- The Authority after considering the facts of the case observed as follows:
  - The Applicant collects the canteen charges from the employee and pays it to the contractor. There is no profit margin in this activity. This activity carried out by the Applicant is without consideration.
  - As per section 17(5)(b)(i) of the Act, the ITC is not eligible on food and beverages and outdoor catering services.
  - However, on perusal of section 17(5)(b)(i),(ii) and (iii) of the Act, it should be noted that:
    - Section 17(5)(b)(i) of the Act ends with a colon (':') and the proviso pertaining to the said clause ends with semicolon (';'). Colons are used in sentences to show that something is following, like a quotation or example. Semicolons are used to join two independent clauses / subclauses, or two complete thoughts that could stand alone as complete sentences. Thus, they are to be used to deal with two complete thoughts that can stand alone as a sentence.
    - A semicolon creates a wall for conveying mutual exclusivity between the sub-clauses. In the present case, the legislature intended the said subclauses to be distinct and separate alternatives with distinctively different qualifying factors and conditionalities.
    - Thus, the section 17(5)(b)(i) is independent of section 17(5)(b)(iii). Thereby, the proviso to section 17(5)(b)(iii)[7] is not connected to section 17(5)(b)(i) and cannot be read into it. In this regard, reliance was placed upon various judgments of the Supreme Court and High Courts.
  - Furthermore, as the ITC is itself not eligible on canteen services, the case law referred to *CCEx., Nagpur* v. *Ultratech Cements Ltd.*[8] is not relevant.

Ruling

- GST paid on canteen facility is blocked credit under section 17(5)(b)(i) of the Act and inadmissible.
- No GST is leviable on the amount collected from the employees and paid to the contractor.

Dhruva Comments:

Adopting a view that the benefit of proviso to section 17(5)(b)(iii) is applicable only to the said section may be detrimental to the assessees, since the intent of the law cannot be to allow only the ITC for travel benefits or home travel and deny for food / catering / health services, which are otherwise mandatory under the applicable laws.

Furthermore, the Gujarat Authority recently in the case of *Dishman Carbogen Amics Ltd.*[9] has held that no GST is payable on the amount collected by the employer from employees in respect of the canteen charges. However, a contrary ruling has been given by Gujarat Authority in the case of *Amneal Pharmaceuticals Pvt. Ltd.*[10]

[6] 2019-TIOL-312-AAR-GST
[7] Proviso to section 17(5)(b)(iii) - Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force
[8] 2010 (260) ELT 369 (Bom.)
[9] Advance Ruling No. GUJ/GAAR/R/22/2021 dated July 9, 2021
[10] Advance Ruling No. GUJ/GAAR/R/50/2020 dated July 30, 2020

Notification

Extension of timeline for filing of GST returns through electronic verification code (EVC)[11]

The CBIC had issued notification no. 07/2021-Central Tax dated April 27, 2021 (*as amended*) whereby the facility for filing of GSTR 1 and GSTR 3B returns during the period April 27, 2021 to August 31, 2021 was allowed through the EVC mode in respect of person registered under the provisions of the Companies Act, 2013. The said facility has now been extended upto October 31, 2021.

[11] Notification no. 32/2021-Central Tax dated August 29, 2021

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