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Indirect Tax Alert

Date: October 1, 2021

Dimensions – 127th Edition

Rulings under GST era

M/s. B. G. Shirke Construction Technology Private Limited - Authority for Advance Ruling, Maharashtra[1]

Issues for Consideration

- Whether the managerial and leadership services provided and lumpsum amount charged thereon by the Registered / Corporate Office to its Group Companies (distinct and related person) can be considered as a 'supply of service' in terms of section 7 of the CGST Act, 2017 ('Act')?
- If yes, then, whether the 'value' would be determined in accordance with the second proviso to rule 28 of the CGST Rules, 2017 ('CGST Rules') if the recipient is entitled to full input tax credit ('ITC')?
- If the valuation cannot be determined in accordance with rule 28, can it be done in terms of rule 30 / 31 of the CGST Rules?
- Whether the recipients be eligible to claim the ITC of the GST charged on the services?

Discussion

- B. G. Shirke Construction Technology Pvt. Ltd. is engaged in the business of construction activities and has construction sites in various states and holds separate GST registrations (distinct persons) in those states. The registered / corporate office is in Maharashtra ('the Applicant'). There are also various other Shirke group companies that are registered under GST.
- The Applicant supplies managerial and leadership services ('services') to its branch offices and group companies, which are distinct and related persons, respectively, and receives fixed monthly charges from each of the distinct and related persons.
- The charges received are at the discretion of the Applicant and are not supported by any specific valuation method under section 15 of the Act read with the valuation rules.
- The Applicant approached the Authority for Advance Ruling ('the Authority') and contended as follows:
  - The services provided to Group companies amounts to supply of services between distinct persons and related persons even without

[1] Advance Ruling No. GST- ARA - 42/2019-20/21-22/B-56 dated September 9, 2021

consideration as per clause 1 of schedule I of the Act. However, the said activity would not be treated as supply of services by virtue of specific relaxation provided in clause 1 of the schedule III of the Act due to existence of an employer employee relationship.

- The term 'employee' cannot be restricted to employment with the registered person merely on account of the location from where he renders his employment services. The relationship is for the whole legal entity. The services rendered to other distinct persons (as under GST) would still be regarded as a service by the employee to the employer. Reliance was also placed upon various judgments of various Courts.
- In respect of the valuation of the supplies, the transaction value should be determined in accordance with rule 28 of the CGST Rules. As there is no open market value available for such services and majority of the recipients are eligible for full ITC, the value declared on the invoices should be considered as open market value. For those who are not eligible for full ITC the mechanism as prescribed under rule 30 or 31 of the CGST Rules can be followed.

- The Authority after going through the facts of the case and considering the submissions made by the Applicant and Revenue observed as follows:
  - The term 'employee' as per Merriam Webster / Cambridge dictionary means a person employed by another, usually for wages or salary. In the present case, the site offices / group companies are independent offices separately registered under GST law. Therefore, the site offices / group companies cannot be treated as employees to avail the benefit of clause I of schedule III of the Act. Thus, the aforesaid supply of services will get covered under clause 2 of schedule I and therefore be liable for GST on the lumpsum amount.
  - With respect to valuation of the supplies, the transactions should be valued in accordance with rule 28 of the CGST Rules where the recipient is eligible for full ITC and the balance recipients can adopt the procedure under section 17 of the Act at their respective ends.

Ruling

- The services provided by the Registered / Corporate Office to its Group Companies (distinct and related persons) is a 'supply of service' and lumpsum amount charged thereon would be liable to GST.
- The value should be determined in accordance with the second proviso to rule 28 of the CGST Rules, if the recipient is entitled to full input tax credit.
- The determination of the eligibility of ITC being outside the purview of Advance ruling, the same is not answered.

Dhruva Comments:

The portion of the ruling in respect of the services rendered to the related group companies is in line with the GST provisions. However, the question remains open as to whether managerial / leadership support provided by employees stationed in head office to branches would tantamount to supply by the head office to branches being distinct person under GST. A similar ruling was delivered in the case of Columbia Asia Hospitals Pvt. Ltd., which is currently pending before the Karnataka High Court[2].

M/s. Eastern Coalfields Ltd. – Authority for Advance Ruling, West Bengal[3]

Issue for Consideration

Whether the Applicant is required to reverse Input Tax Credit (ITC) availed in excess of the entitlement

[2] WP 20034/2019
[3] 2021-VIL-345-AAR

prescribed under rule 36(4) of the Central Goods and Services Tax (CGST) Rules, 2017?

Discussion

- The Applicant is a producer and supplier of coal and has received input services from M/s. Gayatri Projects Ltd ('Supplier'). The Applicant made the payment for these supplies and availed ITC during the period January 2020 – March 2020 on the basis of GST invoices issued by the Supplier.
- However, the Supplier furnished their GST returns for the stated period in the month of November 2020. This appeared in the auto-drafted Form GSTR 2B of the Applicant for the month of November 2020 with the remark 'Return Filed Post Annual Cut-off'.
- The Applicant approached the West Bengal Authority for Advance Ruling ('the Authority') and contended as follows:
  - Rule 59 and Rule 60 of the CGST Rules, 2017 do not prohibit, in any manner, the availment of ITC. Notification no. 82/2020 – Central Tax dated November 10, 2020 implemented the provision of Form GSTR-2B with effect from January 1, 2021 by substituting the said rules. Form GSTR-2B generated prior to January 1, 2021 (on a trial run basis) for the month of November 2020 does not have any statutory force. Therefore, the said notification could not restrict the ITC availment for the Applicant in the months of January to March 2020.
  - The intent of the GST law is to provide seamless availment of ITC to every registered person. Further, section 16(2) of the CGST Act, 2017 stipulates conditions for availment of ITC. In the instant case, the ITC has been availed on the basis of tax invoices and receipt of service from the Supplier. Further, the Supplier also paid the tax along with interest for the period January 2020 – March 2020. Thus, all the conditions stipulated under section 16(2) are complied with for entitlement of ITC.
- The Revenue contended as follows:
  - The Revenue admitted that Form GSTR-2B was made effective from January 1, 2021.
  - The Supplier filed their GST returns and paid the tax liability beyond the due date of furnishing the return under Section 39 and in contravention of section 42(7) of the CGST Act, 2017. The details of such input invoices should have been furnished by the Supplier on or before the due date of furnishing the GST return for the month of September 2020.
- The Authority after considering the submissions made by the Applicant and Revenue observed as follows:
  - The Supplier furnished Form GSTR-1 and Form GSTR-3B pertaining to the period January 2020 - March 2020 in the month of November 2020 which restricted ITC in the auto-drafted Form GSTR-2B of the Applicant for the month of November 2020 with the remark 'Return Filed Post Annual Cut-off'. Further, section 16 of the CGST Act, 2017 read with rule 36 of CGST Rules specifies requirements for claiming ITC. In the instant case, the details of the invoices in respect of such supplies have not been uploaded by the Supplier during the said tax periods and therefore, the ITC has been availed by the Applicant in violation of restrictions as prescribed in rule 36(4).
  - The proviso inserted to rule 36(4) vide Notification No. 30/2020 - Central Tax dated April 03, 2020 states that the return in Form GSTR-3B for the tax period September, 2020 shall be furnished with the cumulative adjustment of ITC for February to August, 2020 in accordance with sub-rule (4). Further, CBIC Circular No. 142/12/2020-GST dated October 09, 2020 clarifies the applicability of rule 36(4) as regards cumulative application, i.e. "all the taxpayers are advised to ascertain the details of invoices uploaded by their suppliers under subsection (1) of section 37 of the CGST Act for the periods of February, March, April, May, June, July and August, 2020, till the due date of

furnishing of the statement in Form GSTR1 for the month of September, 2020 as reflected in GSTR-2As".

- The Circular further states that excess ITC availed arising out of reconciliation during this period, if any, shall be required to be reversed in Table 4(B)(2) of Form GSTR-3B, for the month of September 2020 and failure to reverse such excess availed ITC on account of cumulative application of rule 36(4) of the CGST Rules would be treated as availment of ineligible ITC during the month of September 2020. Thus, the Applicant has availed ITC in excess of his entitlement prescribed under rule 36(4) of the CGST Rules, 2017.

Ruling

The Applicant is not entitled to ITC claimed by it on the invoices raised by the Supplier pertaining to the period January 2020 – March 2020 for which the returns in Form GSTR-1 and Form GSTR-3B had been furnished by the Supplier in the month of November 2020. Therefore, the Applicant is required to reverse the said ITC.

Dhruva Comments:

The ruling gives the interpretation for rule 36(4) in the light of claiming of ITC. However, it is relevant to note that section 16 merely requires payment of tax to the government (which would include belated payments). Also, it is relevant to note that payment of tax and appropriate disclosure in Form GSTR-1 is beyond the control of the buyer. There have been judgments from the High Court directing the Revenue department to initiate recovery proceedings against defaulting sellers. Thus, it needs to be seen whether ITC should be denied to a bonafide buyer merely due to such belated tax payment by a seller.

Thiru Neelakanta Realtors Limited Liability – Authority for Advance Ruling, Tamil Nadu[4]

Issue for Consideration

Whether the valuation of a construction service on notional basis as per paragraph 2A of rate notification[5] would be applicable where the agreement was entered on or before September 29, 2019 an with unregistered owner.

Discussion

- The Applicant is engaged in the business of providing works contract and construction services.
- The Applicant has entered into a Joint Development Agreement ("JDA") on April 17, 2019 with K. Alamelu and N. Rama who are owners of the land at Chennai ("owners"), for developing the land.
- As per the terms of the JDA:
  - The Applicant would construct property on the land comprising of three flats, wherein two of the flats would be allotted to the owners and one flat to the Applicant.
  - The Applicant would be required to pay a prescribed amount to the owners.
  - The owners would convey / transfer a certain portion of the undivided share of land to the Applicant.
  - All costs of construction shall be borne by the Applicant.
- Further, Paragraph 2A of the rate notification provides for the valuation of construction services on a notional basis, where a person transfers development rights or FSI to a promoter against consideration in the form of construction of apartments. Accordingly, the value shall be deemed to be equal to the total amount charged for similar apartments in the project from the independent buyers. Here, it is important to note that:

[4] Order no. 33/ARA/2021 dated August 17, 2021
[5] Notification no. 11/2017-Central Tax (Rate) dated June 28, 2017

- Paragraph 2A was inserted w.e.f. April 1, 2019[6] and was applicable when a "registered person" was transferring development rights or FSI.
- Paragraph 2A was amended w.e.f. October 1, 2019[7] whereby the word "registered" was removed before the word "person" and hence the paragraph 2A was applicable when a "person" (whether registered or not) was transferring development rights or FSI.

- In the present case, the owners were not registered before September 29, 2019.
- The Applicant was of the view that the notional valuation as per paragraph 2A of the rate notification is not applicable. Hence, the Applicant filed the present advance ruling before the Authority for Advance Ruling at Tamil Nadu ("the Authority") contending as follows:
  - For the period from March 29, 2019 to September 29, 2019, paragraph 2A of the rate notification was applicable only when a registered person was transferring development rights.
  - Paragraph 2A of rate notification prescribing a notional value is not applicable to the Applicant since the actual cost of construction is available.
  - Paragraph 2A of the rate notification providing for valuation of construction service is *ultra vires* to section 15(5) of the CGST Act, 2017 as the section provides that value of supply can only be prescribed via rules.
  - Since paragraph 2A of rate notification is not applicable, the value of supply shall be determined in terms of rule 30 (cost of construction + 10%) or rule 31 (residual rule) of CGST Rules, 2017.
  - The construction service is against the undivided share of land and not against the development rights or FSI, and hence paragraph 2A of rate notification is not applicable. As per the JDA, if the owners agree to convey a proportionate share of the undivided share of land, then a specified number of flats would be handed over by the Applicant to the owners. Hence, the construction service is provided by the Applicant to the owners in lieu of transfer of the undivided share of land by the owners.
  - Merely because the owners are permitting the developers to enter the land, it cannot be construed that owners have transferred development rights against consideration in the form of constructed apartments.
  - The substance and object for which parties enter into a contract is relevant for determining the nature of service provided by either party.
  - The development rights have been transferred before September 29, 2019 (i.e. before omission of the words "registered" from paragraph 2A of rate notification) when the owners were not registered and hence paragraph 2A of rate notification should not be applicable.
- After considering the JDA and the contention of the Applicant, the Authority observed as follows:
  - The term "development right" is not defined under GST nor in the rate notification. However, the term "development" is defined under section 2(s) of the Real Estate (Regulation and Development) Act, 2016 to mean carrying out development of immovable property, engineering etc. over or under the land and making any material change to the land.
  - The development rights refer to rights that permit promoters to modify / improve their property as per law. These rights add value to a property and represent the development potential of the property.
  - In case of JDA, the owner transfers proportionate land coupled with development rights for construction. Generally, these two rights cannot be separated, and the intention of

[6] Notification no. 03/2019- Central Tax (Rate) dated March 29, 2019
[7] Notification no. 20/2019- Central Tax (Rate) dated September 30, 2019

the owner is to transfer proportionate FSI for a consideration in the form of constructed flats / units. The same has been done in the present case.

- In the present case, the owners have transferred the undivided share of land along with development rights as consideration for the construction service.
- As per the JDA, there is transfer of development rights from the owners to the Applicant as the owners approached the Applicant to develop the property and the Applicant agreed to it. The entire work of developing the residential complex has been vested with the developer by the owners.
- Paragraph 2A of the rate notification provides the value to be taxed when a person transfers development rights or FSI to a promoter and does not limit itself to transfer of development rights alone. In the present case, the owners have vested the rights to develop the immovable property owned by them to the Applicant and hence paragraph 2A of the rate notification should be applicable.
- Payment of taxes encompasses valuation of supply and time of supply.
- Paragraph 2A of the rate notification provides the value of supply for construction service in respect of an apartment handed over to the owner against development rights.
- The time of supply is notified[8] as the date of issuance of completion certificate or its first occupation, *whichever is earlier*.
- The basis of charge of tax in a taxing statute is the taxable event i.e. the point in time when the tax is imposed. The tax becomes payable when liability to pay tax arises and the liability to pay tax arises by the occurrence of the taxable event.
- In the present case, the taxable event is the completion of construction of the buildings, and not the date on which such right to develop is transferred or the date on which the agreement to develop is entered into.
- In the present case, although the Applicant has entered into a JDA with the owners who were unregistered before September 29, 2019, the time of supply falls after the amendment of paragraph 2A of rate notification (to be applicable to "person" rather than a "registered person").
- The date of completion is yet to arrive and hence the developer, being the taxable person is liable to pay tax on such date of completion.
- Paragraph 2A of the rate notification prescribes the value to be adopted and there is no choice of adoption of any other value. Hence, since the law provides for the value to be adopted, the same will be applicable even if actual cost of construction is available.

Ruling

The Authority held that valuation of construction service is to be determined as per paragraph 2A of the rate notification as the levy is imposable on the date of completion of construction i.e. after amendment of paragraph 2A, even if the actual cost of construction is available.

Dhruva Comments:

Applicability or otherwise of any provision needs to be assessed on the date when the taxable event arises. Time of supply provisions determine the point of time when tax is to be discharged by the supplier, but do not determine the taxability or otherwise of any transaction. Similarly, it could be argued that applicability or otherwise of the subject notification is to be seen on the date of entering into the contract and not thereafter.

[8] Notification no. 6/2019-Central Tax (Rate) dated March 29, 2019

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