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Indirect Tax Alert

Date: November 12, 2021

Dimensions – 131st Edition

Rulings under GST era

CRB Dairy Foods Pvt. Ltd. - Authority for Advance Ruling, Tamil Nadu[1]

Issue for Consideration

Whether input tax credit ('ITC') can be availed on goods / services which are procured to implement a sales promotion scheme?

Discussion

- The Applicant is engaged in the manufacture and supply of ghee and other products. In order to expand its market, the Applicant had launched a promotional scheme for its retailers whereby the rewards would be paid on the basis of the quantity and value of goods procured by the retailers from the sub-stockists. The scheme was launched for the period April 2019 to July 2019.
- The rewards were in the nature of foreign trips, gold vouchers, televisions, air-coolers, etc. The vendors have charged GST on such goods / services procured by the Applicant.
- The Applicant approached the Authority for Advance Ruling ('the Authority') to contend that they are eligible to claim the credit on such goods and services based on the following grounds:
  - The goods / services are procured in the course of business and have direct nexus with the business being carried out. Marketing and business expansion is an indispensable part of the business, and the scheme was launched to promote sales.
  - The conditions prescribed under section 16 of the CGST Act, 2017 ('the Act') have been fulfilled.
  - The restriction under section 17(5)(h) of the Act is not applicable since the rewards cannot be equated as goods 'disposed of by way of gift'. Gift means something which is provided voluntarily without any conditions attached, whereas reward is provided with an expectation of some benefit to be received.
  - As per the scheme, **only if** the targets are achieved, the retailers would be eligible for the rewards. Therefore, the object of scheme is to promote sales and not give gifts voluntarily.
  - The sales had increased during the scheme period and the expenses incurred form part of the cost of the goods.

[1] Advance Ruling Order No. 36/ARA/2021 dated September 30, 2021

- The Authority observed as follows:
  - The impugned goods / services are distributed to the retailers for their personal consumption, which is restricted under section 17(5)(g) of the Act. The expenses being included in the price to arrive at the value of goods supplied is immaterial due to the explicit restriction.
  - The rewards were extended by the Applicant at their own will, voluntarily without any consideration in money or money's worth. The rewards are not in the nature of discounts to the products but are in the nature of personal consumables and qualifies to be termed as gifts. Section 17(5)(h) restricts the credit on gifts, even if procured in the course or furtherance of business
  - The rewards are given based on the goods stocked and not based on the sales made.
  - The promotional goods are distributed on fulfilment of conditions with no separate consideration. Therefore, such distribution is not a supply as per section 7 of the Act.

Ruling

ITC is not eligible on promotional goods / services procured in terms of section 17(5)(g) and (h) of the Act.

Dhruva Comments:

Section 17(5)(h) restricts ITC on goods which are distributed as gifts. The sales promotion benefits are extended only upon fulfilment of stipulated targets and conditions of the scheme. In a way, these are benefits either given as rewards or discounts on achieving scheme milestones. It will have to be seen as to whether the judiciary interprets such rewards as 'gifts' so as to deny ITC.

Further, in a similar case of *Sanofi India Ltd.*[2], the members of the Appellate Authority had divergent views and accordingly, it was deemed that no ruling can be issued on the disputed subject in terms of section 101(3) of the Act.

M/s Amneal Pharmaceuticals Private Limited. – Appellate Authority for Advance Ruling, Gujarat[3]

Issue for Consideration

Whether GST is applicable on the amount recovered by the employer from employees in respect of canteen services provided through a third-party service provider?

Discussion

- The Appellant is mandatorily required to provide a canteen facility to its employees as per the Factories Act, 1948. The canteen is run by a third party (i.e. Canteen service provider).
- The food is provided at subsidized rates and a certain portion is recovered from the employees by deducting it from their salary.
- The Appellant had approached the Gujarat Authority for Advance Ruling ('the Authority') to contend that no GST was payable on such amount recovered from employees. However, the Authority vide its order[4] confirmed the levy of GST.
- Aggrieved by the said order, the Appellant filed the present appeal before the Gujarat Appellate Authority for Advance Ruling ('The Appellate Authority') and contended as follows:
  - It is only providing a facility to the employees without making any profit and is only acting as a mediator between the employees and canteen service provider.
  - No input tax credit ('ITC') is being claimed on the GST charged by the canteen service provider.

[2] 2019 (10) TMI 1388
[3] TS-569-AAAR(GUJ)-2021-GST
[4] TS-1167-AAR-2020-NT

- The said activity does not fall within the scope of 'supply' as it is not in the course or furtherance of business.

- After observing the facts of the case, the Authority observed as follows:
  - As per the agreed arrangements between the Appellant and its employees, a portion of the canteen charges is to be borne by Appellant and balance by the employees. The consolidated amount is paid by the Appellant to the canteen service provider.
  - The Appellant does not supply any goods or services against the amount collected. The Appellant neither keeps any margin in the said activity nor charges any separate consideration for the said activity.
  - The food is being supplied by the canteen service provider and not the Appellant.
  - The Authority had levied GST on the premise that 'food is being supplied by the Appellant'. However, as confirmed by the Appellant, it is only collecting the employee's share, without making any profit and only acts as a mediator.

Ruling

The Appellate Authority allowed the appeal filed by the Appellant and held that no GST is leviable on the amount recovered from the employees.

Dhruva Comments:

This is a beneficial ruling for the industry. It is a quite common to provide a canteen facility, whereby the employer and employee share the cost and administratively consideration is paid by employer to canteen service provider. There is no rendition of service by employer to employee.

A similar view was also taken in the case of *Dishman Carbogen Amics Ltd*.[5]

Judgement under GST era

M/s. Bundl Technologies Private Limited v. *Union of India and Another*[6]

Issues for Consideration

- Whether payments made under protest during investigation amount to payment of self-ascertained tax under section 74(5) of the CGST Act, 2017 ('the Act')?
- Whether the taxpayer would be entitled to claim refund of tax paid under protest pending investigation and issuance of a show cause notice ('SCN')?

Discussion

- The Petitioner operates an e-commerce platform under the name *'Swiggy'*, wherein delivery of food is done through delivery partners (including electronic pick-up) engaged by the Petitioners.
- Owing to spikes in food orders during holidays and festive seasons, the third-party service provider 'Greenfinch' has been engaged for delivery and supply of food. The Petitioner claimed Input Tax Credit ('ITC') on the GST charged by 'Greenfinch' on such supply.
- The matter was taken up for investigation by the Directorate General of Goods and Services Tax Intelligence, Hyderabad Zonal Unit ("DGGI") on the basis that "Greenfinch" was a non-existent entity and accordingly the ITC availed of by the Petitioner was fraudulent.
- The Petitioner submitted that, during the investigation by DGGI, an amount of ₹ 27.51 crores were illegally collected by DGGI under coercion and threat of arrest by detaining the Directors for investigation late in the night and in the early hours of morning.
- Since no show-cause notice was issued even after 10 months after the initiation of the investigation, the Petitioner filed a formal refund application before

[5] 2021 (8) TMI 836
[6] TS-546-HC (KAR)-2021-GST

the jurisdictional GST office in respect of the amount collected illegally by the DGGI.

- The Petitioner has a legitimate right to seek refund of tax, which would not in any way lessen their obligation to honour the demand made after adjudication.
- The Respondents filed a detailed statement of objection and contended that 'Greenfinch' is a fictitious entity, and the ITC was availed of without actual receipt of services. It further stated that the refund claim made by the Petitioner was premature.
- The Respondents further submitted that the power of investigation was exercised by them legitimately and denied the allegations of coercion and threat of arrest. Additionally, they claimed that the payments were made by the Petitioners as a goodwill gesture and accordingly, such payments should be construed as payment of tax voluntarily by generation of DRC 03, under self-ascertainment under section 74(5) of the Act.
- Respondents further asserted that since the Petitioners had exercised the statutory right of refund, the Petitioner is bound to follow the procedure to its logical end by invoking the remedies under the statute.
- The Petitioner filed a writ petition before the Hon'ble Karnataka High Court for issuance of the writ of Mandamus, under article 226 of the Constitution of India seeking to direct the Respondents to refund the amount of ₹ 27.51 crores illegally collected. The High Court held as follows:
  - Regarding the objection made by the Respondent in respect of the non-maintainability of the refund claim made by the Petitioner, the Court observed that there is a difference between the existence of power and the exercise of jurisdiction, which depends on the facts of each case. Furthermore, if any amount is collected without the authority of law, in such a case, the Court possesses the power to issue appropriate directions to determine the validity of collection of the amount/tax as being illegal.
  - Furthermore, mere fact that the application has been made for refund does not take away the right of the Petitioner to seek appropriate direction when the eventual direction is only for consideration of the refund application. Accordingly, the question of alternate remedy is of no significance.
  - Mere payment of tax cannot be construed to be a payment towards self-ascertainment as per section 74(5) of the Act since the procedure of self-ascertainment under section 74(5) begins after the procedures under sub-section (6), (7) and (8) of section 74 of the Act have been concluded.
  - The contention of the Respondent that the investigation is pending even after payment of tax by the Petitioner on a self-ascertainment basis is clearly an afterthought. The stand taken by the Respondent regarding payment of tax by the Petitioner on the self-ascertainment basis is ambiguous and is only used as a defence against the assertion of the Petitioner that the payment of the amount has been made involuntarily. Accordingly, the contention of payment being made by way of self-ascertainment is liable to be rejected.
  - Further, the sequence of the events occurred during the investigation and the source of payment establishes a nexus between the investigation and simultaneous payments. Hence, the apprehension expressed by the Petitioner with regard to locking of main doors during the investigation is clearly understood.
  - Also, the Petitioners seek the remedy of refund claim for the amount deposited during the investigation due to lack of time and conclusion of the investigation.
  - The observations of the Hon'ble Supreme Court in the case of *Dabur India Limited and Another* v. *State of Uttar Pradesh and Others*[7] are

[7] 1990 4 SCC 113

squarely applicable to the present case wherein it observed that "filing of return and payment of substantial taxes by the petitioner would clearly warrant for treating such taxpayers with certain element of dignity" which taxpayers can only be construed to be "bona fide taxpayers". A bona fide taxpayer is required to be treated better than a 'detenu and arrestee'. The Court cannot direct the manner in which an investigation should be conducted but is subject to maintaining appropriate dignity of taxpayer as enshrined under Article 21 of the Constitution of India.

- The Court refused to embark on the validity of section 16(2)(c) of the Act stating that the grievance of the Petitioner can be redressed otherwise.
- The right of refund would be independent of the process of investigation and the two cannot be linked together. The Court directed the Respondents to consider the refund application filed by the Petitioner and pass suitable orders accordingly.

Judgment

The Hon'ble Karnataka High Court allowed the writ petition and directed the Respondents to consider the refund application and pass suitable orders accordingly.

Dhruva Comments:

The judgment clearly states that any payment made during the investigation under duress and under protest shall **not** be treated as payment made either voluntarily or under self-ascertainment in spite of furnishing DRC-03. The taxpayer may claim a refund of this amount pending the conclusion of the investigation, both being independent of each other.

Notification

Change in GST goods rate schedule[8]

- The Government has amended the notification no. 1/2017-Central Tax (Rate) dated June 28, 2017 (goods rate notification) as follows:
  - Sr. no. 243 in Schedule II has been omitted (entry read as 'permanent transfer of Intellectual Property (IP) right in respect of goods other than Information Technology software');
  - In sr. no. 452P of the Schedule III, the words 'in respect of Information Technology software' have been omitted (previously the entry read as 'permanent transfer of IP right in respect of Information Technology software').

Dhruva Comments:

By making the above amendments, the Government has levied a single rate of tax (18%) on transfer of IP irrespective of whether it is related to information technology software or any other goods.

Further, similar amendments were also made in respect of rate of services for transfer of IP w.e.f. October 1, 2020[9]. Thus, now there exists only one rate of 18% on transfer of IP, temporary or otherwise.

[8] Notification no. 13/2021-Central Tax (Rate) dated October 27, 2021
[9] Notification no. 6/2021-Central Tax (Rate) dated September 30, 2021

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