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Indirect Tax Alert

Date: November 19, 2021

Dimensions – 132nd Edition

Ruling under GST era

The Tata Power Company Limited - Maharashtra Authority for Advance Ruling[1]

Issue for Consideration

Whether the amount of insurance premium recovered from employees towards top-up and parental insurance paid by the company amounts to 'supply of service' under the Central Goods and Services Tax Act, 2017 ('the Act')?

Discussion

- The Applicant is engaged in the business of generation, transmission, and distribution of electricity to its customers.
- The Applicant provides insurance cover to its employees under the group insurance policy. As part of its employee policy, an employee can opt for additional insurance ('top-up insurance') which is in addition to the group insurance policy provided to the employees. Also, an employee has the option to add the names of their parents to the group insurance policy for which a certain premium is recovered from the employees.
- The Applicant pays the insurance premium to the insurance company and thereafter recovers a certain portion from the employees salary. Further, the Applicant has not availed input tax credit of tax charged on the insurance premium that is paid to the insurance company.
- The Applicant has approached the Maharashtra Authority for an advance ruling ('the Authority') to determine the levy of GST on the amounts recovered from the employees and contended as follows:
  - Section 7(1) of the Act covers all supplies of goods / services made for a consideration and in the course or furtherance of business. Employer and employee are treated as related persons under GST and as per Schedule I of the Act, transactions between related persons qualify as 'supply' even without consideration provided that they are undertaken in the course or furtherance of business.
  - The Applicant is not primarily engaged in the business of providing health insurance and is merely arranging the same for the benefit of its employees and subsequently recovering a

[1] 2021-VIL-411-AAR

portion of the insurance paid from the employees.

- It is to be noted that arranging such insurance policies for employees is not mandated under any law and thus the Applicant is not obliged to provide such services. Not providing such services to its employees would not affect the primary business of the Applicant in any way and thus mere recovery of insurance premiums from its employees cannot be held to be a 'supply' of insurance services liable to GST under the Act.
- Reliance is placed on the advance rulings given by the Authority in the case of *POSCO India Pune Processing Center Pvt. Ltd.*[2] and *Jotun India Pvt. Ltd.*[3] wherein it was held that the recovery of insurance premium from the employees cannot be held to be in the course or furtherance of business and thus was not liable to tax.

- The jurisdictional officer submitted that the amounts recovered in the present case amounted to an activity in the course or furtherance of business and hence were liable to be classified as a 'supply' under section 7 of the Act.
- After considering the submissions and facts of the case, the Authority held as follows:
  - As per section 7 of the Act, an activity can be classified as a 'supply' under GST only if it is undertaken, inter alia, in the course or furtherance of business.
  - The service of insurance is provided by the insurance company and not by the Applicant. The Applicant is merely paying the insurance premium and subsequently recovering the same from its employees. The non-provision of such an insurance facility would not affect the business of the Applicant in any way. Therefore, the activity of recovery of medical insurance premium cannot be treated as an activity in the course or furtherance of its business.
  - The conditions laid out under section 7 of the Act are not fulfilled and the activity is not covered under the definition of 'business' and thus it cannot be held to be a supply of insurance service by the Applicant.
  - The rulings referred to *(supra)* by the Applicant pertain to similar sets of facts and hence the same ruling is confirmed in the present case also.

Ruling

The Authority held that the mere recovery of top-up and parental insurance premiums from employees does not classify as a 'supply' of service under the Act and is thus not liable to GST.

Dhruva Comments:

Similar advance rulings have been pronounced by the Authority in the case of *POSCO India (supra)* and *Jotun India Pvt. Ltd. (supra)* wherein it was held that the recovery of parental insurance premiums from employees is not in the course / furtherance of the business of the employer and hence cannot be treated as a supply under GST.

Judgement under Pre-GST era

M/s. IDP Education India Private Ltd. v. Additional Director General of Central Excise Intelligence, New Delhi[4]

Issue for Consideration

Whether Service Tax is payable on commission received for rendering 'student recruitment services' by a subsidiary company located in India to its Parent company located outside India, who, in turn, provides services to foreign universities?

[2] 2019 (2) TMI 63
[3] 2019 (10) TMI 482
[4] TS-482-CESTAT-2021-ST

Discussion

- The Appellant is a subsidiary of IDP Australia and is registered under the Companies Act. IDP Australia has entered into an agreement with Australian universities / institutions treated as "Education Service Providers" under the Australian law to recruit students for which it receives certain percentage of tuition fee received from the students.
- For the aforesaid purpose, IDP Australia has entered into a 'Student Recruitment Services Agreement' with the Appellant to help recruit students from India. The Appellant receives consideration in the form of commission as specific percentage of processing fee received by IDP Australia from the foreign universities.
- The duties of the Appellant include:
  - Providing information and advice to students with respect to various programmes and on types of courses;
  - Helping in their application process;
  - Pre-departure student assistance with respect to visa, health insurance etc.
- A show cause notice was issued to the Appellant by the Commissionerate demanding service tax on the aforesaid commission received by the Appellant. However, the said demand was subsequently dropped on the grounds that the aforesaid services provided by the Appellant to IDP Australia qualify as 'export of service'.
- Subsequently, the issue was taken up by Director General of Central Excise Intelligence ('DGCEI') who initiated investigation and concluded that the 'Student Recruitment Service' is a misnomer and the Appellant is acting as an 'intermediary' between the foreign universities, IDP Australia and the students. Accordingly, the place of provision of service is India and such service do not qualify as 'export'.
- The Appellant referred to the contractual agreement, consideration flow and communications exchanged with IDP Australia to claim that it didn't qualify as an 'intermediary' under rule 2(l) of Place of Provision of Services Rules, 2012 since there is no privity of contract with the foreign universities and it is a sub-contractor of IDP Australia and receives consideration only from IDP Australia.
- The Appellant further submitted that the principle of *res judicata* is applicable to the present case, since an issue already settled by the department cannot be reopened merely on the ground that DGCEI holds a different view.
- The Tribunal observed as under:
  - As per the scheme of arrangement, IDP Australia is providing services to the foreign universities and in turn receiving consideration for the same. IDP Australia has incorporated the Appellant as a fully owned subsidiary and has subcontracted the work of recruitment of students in India.
  - The Revenue had failed to provide any evidence in the SCN or in the order, to show that the Appellant had a direct contract with the foreign universities. All that is evident from records is that Appellant is providing services which have been sub-contracted to it and is receiving commission as a sub-contractor from the main contractor i.e. IDP Australia. Thus, there is no evidence on record to establish that the Appellant is acting as an intermediary between IDP Australia and the foreign universities as alleged in the impugned order and SCN.
  - SCN issued earlier for the prior period was dropped holding that the services rendered by the Appellant to IDP Australia amounted to export of services. In the event, DGCEI had a different view, appeal should be filed with higher judicial forum. SCN issued on an issue already been settled is not sustainable.

Judgment

The Tribunal allowed the appeal and set aside the service tax demand on commission received by the

Appellant for 'Student Recruitment Services' rendered to its Parent Company located outside India.

Dhruva Comments:

This is a welcome judgment and provides much-needed clarity on the disputed subject of intermediary service. A similar view was adopted under the GST law vide circular no. 159/15/2021-GST dated September 20, 2021 wherein it was clarified that "sub-contracting for a service is not an intermediary service".

Circular

Guidelines for disallowing debit of electronic credit ledger as per rule 86A of CGST Rules, 2017[5]

Rule 86A of the CGST rules, 2017 empowers GST officers to disallow debit of electronic credit ledger ('ECL') in certain specified situations. The circular provides guidelines for invoking Rule 86A. The key points of the circular are as follows:

- The Commissioner (or an officer authorised by him) must form an opinion for disallowing debit of an amount from ECL after proper application of mind and considering all the facts of the case, including the nature of *prima facie* fraudulently availed or ineligible input tax credit ('ineligible ITC'), whether ineligible ITC availed is covered under the grounds prescribed under rule 86A of the CGST Rules, 2017, and whether disallowance is necessary to protect the interests of revenue.
- The power of disallowance must not be exercised in a mechanical manner; careful examination of all the facts is important.
- The remedy of disallowance is by its nature extraordinary and should be resorted to with maximum care and caution, not on the basis of mere suspicion.
- The power is exercised based on material evidence available or gathered in relation to ineligible ITC.
- The circular prescribes the monetary limit and relevant GST officer authorised for exercising the power of disallowance of debit from ECL.
- The relevant officers of DGGI are also empowered to exercise powers under rule 86A of CGST rules, 2017.
- If it is noticed, during audit by GST officers under section 65 or 66 of CGST Act, 2017 that ineligible ITC is availed which requires disallowance, then the concerned audit officer may refer the matter to the concerned jurisdictional officer for examination.
- The "Reasons to believe" should be duly recorded by the concerned officer **in writing** on file, before proceeding to disallow debit of amount from the ECL.
- The amount disallowed for debit from the ECL should not be more than the amount of ineligible ITC believed to have been availed.
- The action by the concerned officer to disallow debit from ECL along with the details of the that officer must be informed via the portal to the concerned registered person.
- The concerned officer may either on its own or based on submission made by registered person, on being satisfied that ITC initially considered to be fraudulently availed / ineligible is now eligible (fully / partially), may allow the use of such ITC to the extent of eligibility. Reasons for such allowance must be recorded on file in writing.
- The restriction imposed shall cease to have effect after expiry of one year. The registered person should be able to utilise the ITC considered ineligible, subject to any other action being taken against the registered person.
- As the disallowance has a bearing on the working capital of the registered person, it should be attempted that in all cases, the investigation and

[5] Circular no. CBEC-20/16/05/2021-GST dated November 2, 2021

adjudication are completed within the period of restriction so as to recover due liability.

Dhruva Comments:

The guidelines are a step in the right direction and would bring much needed clarity on the application of powers entrusted upon GST officers under rule 86A of the CGST rules, 2017.

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