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Indirect Tax Alert

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Judgment under Pre-GST era

Toyota Kirloskar Motor Pvt. Ltd. v. *The Commissioner of Central Tax*[1]

Issue for Consideration

Can Cenvat credit be availed on outdoor catering services, post March 2011?

Discussion

- The Petitioner is engaged in manufacture of goods and is registered under the Central Excise Act, 1944. In terms of the Factories Act, 1948, it is mandatorily required to provide canteen facilities in the factory.
- The Petitioner had procured outdoor catering services in respect of the canteen and availed Cenvat credit on such services in terms of the definition of 'input service' under section 2(l) of the Cenvat Credit Rules, 2004 ('CCR'). The department disputed the said availment on the ground that w.e.f. April 1, 2011 the definition of input service specifically excluded outdoor catering services, when used primarily for personal use or consumption of any employee.
- The Petitioner primarily argued that the services were mandatorily required to be provided in terms of the Factories Act, 1948. Further, such expenses form part of the manufacturing cost and is included in assessable value of goods for discharging excise duty.
- The Tribunal by relying on the judgment of the larger bench in the case of *Wipro Ltd.* v. *CCEx., Bangalore*[2] upheld the demand.
- Thereafter, an appeal was filed before the Karnataka High Court, which also, vide its order[3], upheld the demand by observing that the definition of 'input service' has been amended w.e.f. April 1, 2011 whereby the credit is specifically disallowed on outdoor catering service. It also held that the taxing statue has to be strictly construed and one has to look at what is clearly stipulated by the statutory provision.
- Thereafter, the Petitioner filed a SLP before the Hon'ble Supreme Court, which was also dismissed, and the view of the High Court was upheld.

[1] 2021-VIL-89-SC-ST
[2] 2018 (4) TMI 149
[3] 2021 (5) TMI 880

Judgment

Cenvat credit is not eligible on outdoor catering services post March 2011.

Dhruva Comments:

The issue of eligibility of Cenvat credit on outdoor catering services has been a contentious issue post amendment in April 2011. There have been divergent Tribunal rulings on this issue. However, the Larger Bench judgment in case of Wipro Ltd *(supra)* denied the credit as the same is specifically excluded from the definition of input service and any other interpretation holding it as having direct / indirect nexus would defeat legislative intent. The High Court relying on Wipro Ltd *(supra)* noted that though the canteen is required in terms of Factories Act, 1948, it is established primarily for personal use or consumption of the employees. The said decision now stands affirmed by the Supreme Court and is the law of the land in terms of Article 141 of Constitution of India. The judgment would have far reaching implications as it would revive and raise demand for past period, wherever not hit by limitation. Additionally, the verdict could also have implications under GST and the tax position needs to be revisited.

Rulings under GST era

GSPC (JPDA) Limited - Authority for Advance Ruling, Gujarat[4]

Issue for Consideration

Whether settlement amount paid in lieu of an arbitration proceeding qualifies as a 'supply' under the Central Goods and Services Tax Act, 2017 ('the Act')?

Discussion

- The Applicant is engaged in the extraction of petroleum and had entered into a production sharing contract ('PSC') in November 2006 along with other concessionaries with *Autoridade Nacional do Petroleo E Minerals* ('ANP'), which is the oil and natural gas regulatory authority of Timor Leste.
- The PSC provides the right to the Applicant and other concessionaries to carry out petroleum operations jointly on a production sharing basis.
- At the request of the Applicant and other concessionaries due to certain factors, the ANP terminated the PSC in July 2015 and issued a notice demanding the cost of exploration, which was not conducted by the Applicant, along with damages for breach of its obligations in terms of the PSC.
- ANP initiated Arbitration proceedings against all the concessionaries in the International Chamber of Commerce ('ICC') in October 2018, as per the provisions of the PSC. As per the deed of settlement and release dated July 2020, a settlement sum was payable by the concessionaries to ANP.
- The Applicant approached the Gujarat Authority for Advance Ruling ('the Authority') to determine whether GST was leviable under reverse charge mechanism on the settlement amount paid by them to ANP. The Applicant contended as follows:
  - PSC is not a service contract since the concessionaires hold ownership in the resulting products along with a share in the resulting profit, unlike a service contract.
  - The exploration cost incurred is recoverable from ANP upon commencement of commercial production. Since the contract is not a service contract, the payment of exploration cost to ANP cannot be considered towards supply of services.
  - As per the CBIC circular[5], it has been clarified that under a Production Sharing Contract, the recovery of contract costs, called 'Cost Petroleum' is not a 'consideration' for service to Government, and thus it is not taxable under GST. The settlement amount paid by the

[4] 2021 (10) TMI 367
[5] Circular No. 32/06/2018-GST dated February 12, 2018

Applicant to ANP is towards the exploration cost (i.e. Cost Petroleum) under the PSC.

- The settlement amount paid is not in relation to any independent supply either of 'agreeing to tolerate an act' or any other nature of supply, and thus the amount paid is not a 'consideration'. The termination of the PSC has arisen due to an unintended event and not due to any obligation of the parties to tolerate an act.
- Furthermore, the settlement amount payable pertains to the work undertaken during the Service tax regime and accordingly in terms of section 142(11)(b) of the Act, no GST is payable. Reliance was placed upon the ruling of *Woodkraft India Ltd*[6].
- Reliance was also placed upon various judgments of the Service tax regime, wherein it has been held that the amount paid as damages / compensation due to a breach / termination of the contract cannot be regarded as 'consideration' so as to levy service tax on such payment.
- Furthermore, reliance was also placed upon the Bombay High Court judgment in the case of *Bai Mamubai Trust* v. *Suchitra*[7], wherein it was held that GST is not payable on damages / compensation paid for a legal injury.

- The Authority observed as follows:
  - The settlement amount paid is not an exploration cost (i.e. Cost Petroleum) as contended by the Applicant. Cost Petroleum, as per the CBIC circular (*supra*), is the portion that is to be received as per the PSC, whereas in the present case, the amount is being paid by the Applicant.
  - The settlement amount paid is resulting from the deed of settlement, and not attributable to the breach of contract. As per the deed, ANP is receiving the payment for the following purposes:
    - **Agreeing to do an Act**
      Release the performance guarantee of the Applicant.
    - **Tolerate an Act**
      Toleration of non-payment of damages in pursuance of breach of PSC.
    - **Agreeing to refrain from**
      ANP not to pursue any arbitration proceedings against the Applicant subject to the settlement payment being made.
  - Accordingly, in terms of clause 5(e) of the Schedule II of the Act, the above activities being undertaken by ANP against the settlement amount should be regarded as a 'supply' under section 7 of the Act.
  - The payment is being made pursuant to the deed of settlement and the order of the ICC, both being dated post July 2017, this supply falls under the GST regime.
  - As per the GST law, the said supply is liable to be taxed under reverse charge mechanism in terms of sr. no. 1 of the notification[8]. The time of supply is the date of payment of the settlement amount under section 12(3)(b) of the Act.
  - The case laws relied upon by the Applicant pertain to the erstwhile service tax regime and are different from the subject matter in the present case, where supply of service has been identified and established under the provisions of the Act.

Ruling

The Authority held that the Applicant is liable to pay GST under reverse charge on the settlement amount paid, since it is a consideration for the services imported.

Dhruva Comments:

The Authority in the present case tries to draw a distinction between the damages payable under the contract and the amount settled through an arbitration award / settlement deed. It does not look into the fact

[6] 2020 (39) GSTL 110 (AAR-GST Mah.)
[7] 2019 (9) TMI 929
[8] Notification no. 10/2017-Integrated Tax (Rate) dated June 28, 2017

that the settlement amount paid is pursuant to the damages payable under the contract. It is imperative to determine whether the payment is a consideration under the contract or is pursuant to a breach of condition under the contract. There should be reciprocity for it to qualify as a 'supply'.

Recently, there have been various judgments delivered under the service tax regime, wherein it has been held that no service tax is payable on the amount received under a contract as compensation or liquidated damages. The ratio of these judgments should also apply under the GST regime as the law remains the same. However, the Authority under GST have been taking a divergent view.

M/s Jayshankar Gramin Va Adivasi Vikas Sanstha – Authority for Advance Ruling, Maharashtra[9]

Issues for Consideration

- Whether the Applicant is liable to be registered under GST?
- Whether GST is applicable on amount received as donations / grants from various entities including Central Government and State Government - if yes, then what is the applicable rate of GST?

Discussion

- The Applicant is a charitable trust registered under the Maharashtra Public Charitable Trust Act, 1950, Societies Act and also under section 12AA and section 80G(5)of the Income-tax Act, 1961.
- The Applicant provides shelter, education, guidance, clothing, food and health to orphans and homeless children.
- The Applicant also provides shelter, food, medical facilities, clothing etc. to destitute women who are victims of domestic violence, divorcees, homeless and rape victims. The Applicant represents the women before legal forums, helps in lodging FIRs against the culprits at the police station, arranges for expert counsellors to bring the women out of trauma and help them lead normal lives.
- The Applicant receives monthly payments per child from the Government of Maharashtra's Women and Child Welfare department and from Central Government through the Ministry of Women and Child Welfare. The Applicant also receives donations from the public.
- The present application for Advance ruling was filed, contending as follows:
  - Reliance was placed on circular[10] issued under service tax and on the judgment of the Hon'ble CESTAT in the case of *Apitco Limited* v. *Commissioner of Service Tax, Hyderabad*[11] (upheld by the Hon'ble Supreme Court[12]) under the service tax regime to contend that donations/grants received are not consideration for any supply.
  - The activity of the Applicant falls within sl. no. 1 of exemption notification[13] as the Applicant is registered under section 12AA of the Income Tax Act, 1961 and hence is exempt from GST.
  - Hence, the Applicant should not be liable to register under GST nor should they be liable to pay GST on grants / donations received from Central / State Government and other parties for carrying out charitable activities.
- The Department, on the other hand, contended as follows:
  - The exemption notification is applicable only if an entity is registered under section 12AA of the Income Tax Act, 1961 by way of **charitable activities**. The term "Charitable Activities" are defined under the exemption notification.

[9] TS-604-AAR(MAH)-2021-GST
[10] Circular no. 127/9/2010-ST dated August 16, 2010
[11] 2010 (20) S.T.R. 475 (Tri. - Bang.)
[12] 2011 (23) S.T.R. J94 (S.C.)]
[13] Notification no. 12/2017-Central Tax (Rate) dated June 28, 2017 : Sl. No. 1 - Services by an entity registered under section 12AA or 12AB of the Income-tax Act, 1961 (43 of 1961) by way of charitable activities.

- The services / activities performed by the Applicant to orphans, homeless women, destitute women etc. are not specifically covered as "Charitable Activities" as per the exemption notification.
- Hence, it cannot be concluded that the Applicant is not liable to be registered under GST.

- The Authority observed as follows:
  - The exemption from GST as per the exemption notification is available to specific charitable activities only. Hence, there could be many activities which are not considered as charitable activities and fall under the GST net.
  - The Applicant has not specified how the services provided by them fall within the term "charitable activities" as per the exemption notification.
  - On perusal of the activities performed by the Applicant and the definition of the term 'charitable activities', the Applicant cannot be said to be performing any activity falling within the term "charitable activities" as strictly defined under the exemption notification.
  - Hence, the activities of the Applicant are not exempt from GST. Accordingly, the Applicant is liable to obtain registration under GST.
  - The definition of 'supply' as per GST law covers all the activities of the Applicant. Furthermore, the term "consideration" includes "grants" but excludes only "subsidy". Furthermore, profit motive is not important criteria to fall within the definition of "business".
  - In the present case, all the ingredients of supply, i.e. supply of goods or services made for a consideration in furtherance of business, are fulfilled.
  - The Applicant has not submitted donations receipts or the details of what sort of donations are received. Furthermore, reference was made to GST circular[14]. Hence, in case of donations, if the gift or donation is made to a charitable organization and the purpose of such gift / donation is philanthropic (i.e. it leads to no commercial gain) and is not an advertisement, then GST is not leviable. However, in all other cases, GST would be leviable.
  - The services provided by the Applicant falls within SAC 9993 covering human health and social care services along with accommodation as this SAC includes residential social assistance services including round the clock care services for children and youth.
  - Hence, services provided by the Applicant are covered under SAC 9993 and should attract GST at 18%.

Ruling

The Authority held as follows:

- Applicant is liable to be registered under GST.
- Applicant is liable to pay GST on grants received. However, GST would not be leviable on donations, if the purpose of such donations is philanthropic and is not an advertisement.
- GST on grants / donations is leviable at 18%.

Dhruva Comments:

Activities which are specifically included within the term "charitable activities" as per the exemption notification are exempt from GST. However, there may be various charitable activities undertaken by organisations which may not strictly fall within the definition of the term "charitable activities". Nevertheless, such receipts may still not attract GST being in the nature of grant / donation. For a transaction to attract tax, there should be a 'supply' by the supplier to a recipient for an agreed consideration. This would certainly be absent in case of gratuitous receipts where there would be no obligation to provide anything in return on the recipient.

Furthermore, it is important to note that section 2(15) of the Income Tax Act, 1961 defines "charitable purpose" to include "any other object of general public utility". Hence, unlike the definition of the term "charitable

[14] Circular no. 66/40/2018-GST dated September 26, 2018

activities" under the GST exemption notification, the definition under the Income Tax Act, 1961 is wide to cover any activity with the object of general public utility.

Instruction

Issuance of Show Cause Notice ('SCN') and adjudication process[15]

As per audit report no. 1 of 2021 issued by Comptroller and Auditor General of India, various observations were made in respect of the issuance of SCNs and their adjudication. The audit pointed out the following:

- Draft SCNs are pending for issuance;
- Inordinate delay in adjudication;
- Adjudication orders not issued within stipulated period after completion of personal hearing;
- Periodical review of call book cases not done;
- Records/ files pertaining to adjudication were not been submitted to audit party

Accordingly, CBIC has issued instructions for expeditious disposal of the legal cases under Central Excise and Service Tax law. The same is summarized below:

Issue of SCN and adjudication order

- SCNs should be issued without any delay once the investigation is over/ analysis is done and draft is prepared. SCNs should be adjudicated within the time period prescribed under the Central Excise and Service tax laws[16].
- Adjudication orders should be passed within a period of one month after the personal hearing has been concluded, except in certain circumstances. The timelines have been prescribed through the Master Circular no. 1053/02/2017-CX dated March 10, 2017 ('Master Circular').

Review of call book cases

- Cases should be transferred to the call book only after the approval of the Commissioner and should be reviewed on a monthly basis. CBIC has previously issued letter / Circulars[17] prescribing the categories of cases which should be transferred to the call book. Non-adherence to these instructions shall be viewed seriously.
- The assessee should be formally intimated about the transfer of the cases to the call book. This has also been specified under para 9.4 of the Master Circular.

Case files / records not submitted to audit party

- The decisions taken by the judicial or quasi-judicial authority cannot be questioned by the audit parties. However, the sharing of records does not interfere with the judicial or quasi-judicial proceedings. Therefore, the request of the audit party for production of records must be acceded to.
- Further, the Pr. Chief Commissioner / Chief Commissioner & Pr. Commissioner / Commissioner must undertake a periodic review of pending adjudication cases.

[15] CBIC-90206/1/2021-CX-IV Section-CBEC dated November 18, 2021
[16] Section 11A(11) of Central Excise Act, 1944 and Section 73(4B) of Finance Act, 1994
[17] D.O. letter F No. 101/2/92-CX dated March 4, 1992; Circular no. 385/18/98-CX dated March 30, 1998; Circular no. 719/35/2003-CX dated May 28, 2003

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