



Dimensions – 136th Edition

Rulings under GST era

M/s. Achampet Solar Private Limited, Authority for Advance Ruling, Telangana¹

Issue for Consideration

Whether GST is applicable on liquidated damages paid due to delay in commissioning of a project?

Discussion

- The Applicant is engaged in production and distribution of electricity obtained from solar energy.
- The Applicant has entered into an agreement with M/s. Belectric India (P) Ltd. for construction of solar power project which also provides for recovery of liquidated damages for delay of delivery of contract and for non-performance of plant.
- Accordingly, the Applicant was desirous to know whether GST was applicable on liquidated damages recoverable due to delay in commissioning of plant and overall postponement in completion of the project.
- Therefore, the Applicant approached the Authority for Advance Ruling, Telangana ('the Authority')
- The Authority observed as follows:

- As per the Indian Contract Act, 1872², a failure to perform the contract at agreed the time either renders it voidable at the option of the other party or the other party can recover compensation for loss due to non-performance.
- Referring to Paragraph 5(e) of Schedule II of the CGST Act, 2017, the Authority observed that in the instant case, the liquidated damages are a consideration for tolerating an act or a situation arising out of contractual obligation.
- Section 2(31)(b) of the CGST Act, 2017 provides that consideration for a supply includes the monetary value of an act of forbearance. Hence, toleration of an act or a situation is a supply of service, and the monetary value of such toleration is exigible to GST.
- The time of supply for GST liability on liquidated damages arises on the date on which damage is to be determined and paid as per the agreement.

¹ 2022 (2) TMI 715

² Section 55 of the Indian Contract Act, 1872



- Liquidated damages are liable to 18% GST under chapter heading 9997 of the GST rate notification³.

Ruling

The Authority held that recovery of liquidated damages is exigible to GST.

Dhruva Comments:

Applicability of tax to liquidated damages has been a contentious issue under both service tax and GST. While the Tribunal under the Service tax regime has consistently held that liquidated damages are not exigible to Service Tax, various advance rulings under GST have held that liquidated damages are exigible to GST.

It is relevant to deliberate as to whether recoveries made under the contract are for breach of condition or are consideration for an agreed supply under the contract. A distinction needs to be drawn between compensation / recovery of damages and consideration flowing against supplies effected as the parties have contracted for the latter activity and the former act is merely to safeguard the commercial interest.

M/s. Vishnu Chemicals Limited, Appellate Authority for Advance Ruling, Andhra Pradesh⁴

Issue for Consideration

Whether input tax credit (ITC) of invoices dated FY 2020-21 pertaining to services rendered during FY 2018-19 can be availed?

Discussion

- The Appellant is engaged in the manufacture of Basic Chromium Sulphate, Sodium Sulphate and Chromic Acid.

- The Appellant required space for storage of raw materials and finished goods and hence they had taken godowns on lease at Visakhapatnam from M/s Usha Tubes and Pipes Pvt. Ltd. (“the Supplier”).
- The supplier collected monthly rent from the Appellants upto March 2018 for such lease. However, for the rental period April 2018 to March 2019, the supplier issued a single tax invoice including GST dated April 2020.
- The Appellant was of the view that it was eligible to claim ITC of such invoice dated April 2020 if availed before filing the GST return for the month of September 2021 or filing of Annual return for FY 2020-21, whichever is earlier as per section 16(4)⁵ of the CGST Act, 2017.
- Accordingly, the Appellant approached the Authority for Advance Ruling, Andhra Pradesh (the Authority”). However, the Authority ruled that the Appellant was not eligible to avail ITC.
- Aggrieved, the Appellant approached the Appellate Authority for Advance Ruling, Andhra Pradesh (‘the Appellate Authority’) and raised the following contentions:
 - The Authority observed that the time limit to issue invoice is 30 days from the date of supply of service as per section 31(2) of the CGST Act, 2017 read with rule 47 of the CGST Rules, 2017. Thus, since the said time has elapsed, the Appellant is not eligible to avail ITC.
 - The Appellant submitted that there is no condition under section 16(4) of the CGST Act, 2017 that only invoices issued within the due date as per the GST law are eligible for ITC.
 - If there is a delay in issuance of invoice by the supplier, then action for such violation by way of collecting interest or imposing penalty should be on the supplier. However, delayed issuance

³ Sl. no. 35 of notification no. 11/2017-Central Tax (Rate) dated June 28, 2017

⁴ 2022-VIL-11-AAAR

⁵ Section 16(4) of the CGST Act, 2017: “(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.”



of invoice cannot be a ground to deny ITC to the Appellant.

- The restriction on availing ITC as per section 16(4) of the CGST Act, 2017 is applicable only on documents issued during a financial year and not on supplies made during a financial year.
- Reliance was placed on GST circular⁶ wherein it was clarified that in case a supply is made in FY 2019-20 and a debit note against such supply is raised in FY 2020-21, then the ITC of the debit note can be availed in FY 2021-22 (upto the time limit as per Section 16(4) of the CGST Act, 2017).
- After perusing the facts of the case and the contentions raised, the Appellate Authority observed as follows:
 - The period to which an invoice **pertains to** would be determined only on the basis of the period of supply. In the present case, irrespective of date of invoice, the said invoice pertains to the period of supply covered by the said invoice i.e. FY 2018-19.
 - The analogy drawn and GST circular relied upon by the Appellant are with reference to “debit note”, whereas the current issue pertains to an “invoice” and hence are out of context and irrelevant.
 - Section 16(4) of the CGST Act, 2017 contains the words “...following the end of the financial year to which such invoice or debit note **pertains**...” In the instant case, the invoice pertains to FY 2018-19 and hence the recipient is entitled to take ITC before furnishing of return for the month of September 2019 or before furnishing the annual return for FY 2018-19, whichever is earlier.
 - The proviso to section 16(4) of the CGST Act, 2017 contains the words “... in respect of any invoice or invoice relating to such debit note for supply of goods and services or both made during the financial year 2017-18....”. Hence,

the proviso necessitates and endorses that ITC of only invoices relating to supplies made during FY 2017-18 can be claimed in the subsequent financial year.

- The courts have time and again held that ITC is a concession that can be claimed subject to satisfying certain conditions prescribed in the statutes.
- Hence, the Appellant is not eligible to claim ITC of the invoice dated April 2020 that was issued for supply of services of FY 2018-19.

Ruling

The Appellate Authority upheld the ruling of the Authority wherein it was held that the Appellant is not eligible to claim ITC of the invoice dated April 2020 that is issued for supply of services of FY 2018-19.

Dhruva Comments:

The raising of a tax invoice for a supply as per GST law is an activity required to be carried out by the supplier and hence in case of any non-compliance, interest and other consequences are attracted on the supplier. However, interpreting section 16(4) of the CGST Act, 2017 to restrict the availability of ITC basis the period of supply rather than the period of invoice leads to an anomalous conclusion whereby the recipient of the service would be punished by way of denial of ITC for a non-compliance committed by the supplier.

Furthermore, reliance of the Appellate Authority on the proviso to section 16(4) of the CGST Act, 2017 may not be relevant, as the said proviso is applicable only for FY 2017-18 and not for any other financial year.

⁶ Circular No. 160/16/2021-GST dated September 20, 2021





ADDRESSES

Mumbai

1101, One World Center, 11th floor,
Tower 2B, 841 Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013
Tel: +91 22 6108 1000 / 1900

Ahmedabad

B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahladnagar, Corporate Road,
Ahmedabad 380 015
Tel: +91-79-6134 3434

Bengaluru

Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560 001
Tel: +91-80-4660 2500

Delhi / NCR

101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana 122 002
Tel: +91-124-668 7000

Pune

305, Pride Gateway, Near D-Mart, Baner,
Pune 411 045
Tel: +91-20-6730 1000

Kolkata

4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal 700016
Tel: +91-33-66371000

Singapore

Dhruva Advisors (Singapore) Pte. Ltd.
20 Collyer Quay, #11-05
Singapore 049319
Tel: +65 9105 3645

Dubai

WTS Dhruva Consultants
Emaar Square Building, 4
2nd Floor, Office 207,
Downtown, Dubai, UAE
Tel: + 971 56 900 5849

KEY CONTACTS

Dinesh Kanabar

Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Ritesh Kanodia

ritesh.kanodia@dhruvaadvisors.com

Niraj Bagri

niraj.bagri@dhruvaadvisors.com

Ranjeet Mahtani

ranjeet.mahtani@dhruvaadvisors.com

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