dhruva
advisors llp

Indirect Tax Alert

Date: April 8, 2022

Dimensions – 138th Edition

Judgment under GST era

Ganges International Pvt Ltd. & Ors. v. Asst. Commissioner of GST and Central Excise and Ors.[1]

Issue for Consideration

Whether Service tax paid on reverse charge after the last date of filing form GST TRAN-1 can be claimed as refund under the Central Goods and Services Tax Act, 2017 ('the Act').

Discussion

- The Petitioner is engaged in the business of providing various construction services to the Government and private entities and was registered under the erstwhile Service Tax Law. The Petitioner has migrated to GST with effect from July 1, 2017.
- During the course of the Central Excise Revenue Audit (CERA), it was found that the Petitioner was liable to pay service tax under reverse charge on royalty payments made to the State Government for the period from April 1, 2016 to July 31, 2017. Accordingly, the Petitioner discharged the applicable service tax in December 2017 along with the interest due.
- As per section 140(1) of the Act, a registered person has to file a return in form GST TRAN-1 for the purpose of claiming the transitional credits accrued under the previous tax regime. The last date for filing form TRAN-1 was December 27, 2017.
- Since service tax was paid beyond the due date of TRAN-1, the Petitioner filed an application under section 142(3) of the Act to claim refund of the service tax paid. However, the refund application was rejected by the Respondent on the ground that refund cannot be granted since there was no provision to allow refund of such tax paid or allow as input tax credit ('ITC') under the Act.
- The Petitioner filed a writ petition before the Hon'ble Madras High Court seeking refund / ITC of the service tax paid by them on the following grounds:
  - Section 140(1) of the Act allows registered persons to carry forward the eligible CENVAT credits accrued as on June 30, 2017, in the electronic credit ledger under GST. The last date for filing form TRAN-1 was December 27, 2017.
  - As the service tax payments in the present case were made beyond the last date for filing TRAN-1 form, the Petitioner could not claim the service

[1] 2022-VIL-176-MAD

tax paid as transitional credits in the TRAN-1 form.

- Accordingly, recourse was sought from section 142(3) of the Act which provides for refund of CENVAT credit accrued prior to July 1, 2017 as per the provisions of the erstwhile law.
- Therefore, the registered persons who are not able to carry forward the CENVAT credit as transitional credits under section 140(1) must be necessarily dealt with under section 142(3) of the Act to allow refund of the taxes paid by them under the erstwhile laws.
- The tax paid by the Petitioner is otherwise eligible as CENVAT credit under the Cenvat Credit Rules, 2004 (CCR) and hence, there is no dispute regarding its eligibility under the erstwhile laws.
- If the credit had accrued on June 30, 2017, the Petitioners could have made an application in form TRAN-1 under section 140(1). Since the payment of tax was itself made after the last date for filing form TRAN-1, the Petitioner could not carry forward the credits due to the peculiar circumstances.

- The Respondent disputed the claims of the Petitioner and submitted as follows:
  - The only transitional provision available for taxpayers under the Act is specified under section 140 and accordingly, the Petitioner could have made an application to claim the accrued CENVAT credit in their electronic credit ledger under GST via TRAN-1.
  - The Petitioner was not eligible to claim the tax paid as transitional credits as on June 30, 2017, by way of filing TRAN-1.
  - Section 142(3) prescribes only refund of accrued CENVAT credits and does not mention transfer of credits. While disposing a claim under section 142(3), the eligibility of the person availing the CENVAT credit should be fulfilled first. As per CCR, a manufacturer / service provider cannot avail CENVAT credit after one year of the date of the issuance of the prescribed documents.
  - The application filed by the Petitioner to avail the credit of tax paid and transfer to the same to GST cannot be treated as a refund application as envisaged under section 142(3).
  - Instead of filing form TRAN-1 within the prescribed time limit, the Petitioner has made a belated application, which under section 142(3) they claim to be a refund application.
  - CENVAT credit is a concession, to avail which all conditions need to be fulfilled such as credit to be claimed within one year of the date of issue of any of the documents specified in sub-rule (1) of Rule 9. Such date has already expired, as the petitioners admittedly availed the service prior to 30.06.2017.

- The Hon'ble High Court observed as follows:
  - The Petitioner has rightly stated that TRAN-1 applications could not be filed for such tax paid beyond the last date for filing TRAN-1, due to technical difficulty.
  - The Respondent had objected that the credits were not available under CCR as the Petitioner had claimed the credit after the time limit of one year from the prescribed document date. However, in the present case, the applicable document is the service tax challan evidencing payment of tax and it is within the limitation period specified under the CCR.
  - The court observed that, had there been no GST regime from July 1, 2017, then the Petitioner would have been eligible to claim CENVAT credit of the tax paid as its eligibility under CCR is not in dispute.
  - The refund / ITC cannot be denied merely because an application under section 140(1) could not be made by the Petitioner due to the circumstances. Except for section 142(3), no other provisions are available in the present facts and such cases have to be necessarily met by the legislation. Thus, section 142(3),

which permits refund applications, can be invoked by applying the "doctrine of necessity"

- Usually, the doctrine of necessity is applied only for want of forum. However, in the present case, if section 142(3) is not invoked, the Petitioner would be left without any remedy and hence the doctrine of necessity has to be invoked.
- CCR provides only for the availing of CENVAT credits and not for the granting of refund of available credits, thus refund applications cannot be made by the Petitioner in this case. However, a claim to avail the ITC of the accrued credits under section 142(3) could have been considered allowing such ITC to be carried forward in the electronic credit ledger of the Petitioner as such an approach is the only possible way to deal with such cases.
- The orders passed by the Respondent disallowing the claim made by the Petitioner are not tenable and are liable to be set aside.

Judgment

The Hon'ble High Court set aside the order passed by the Respondent and remanded the matter to reconsider the application under section 142(3) of the Act and providing a direction that the accrued credits can be carried forward to the electronic credit ledger of the Petitioner under GST.

Dhruva Comments:

It is a welcome judgment in favour of the taxpayer on transitional credit. Basis the intent of law, it invokes the doctrine of necessity to allow carry forward of credits through section 142(3) being the only option left to allow transitioning of such credits in electronic credit ledger as refund of said amount was not permitted under earlier law. In a similar case, the CESTAT, Chennai in case of *Terex India Pvt. Ltd.* v. *The Commissioner of GST & CE, Salem*[2] had also held in favour of the taxpayer, that section 142(3) of the Act is the relevant provision to claim refund of transitional credits paid under the erstwhile laws.

Rulings under GST era

Harish Chand Modi – Rajasthan Authority for Advance ruling[3]

Issue for Consideration

Whether reimbursement of electricity expenses on an actual basis by the tenant would form part of the value of taxable supply of renting of immovable property under the Central Goods and Services Tax Act, 2017 ('the Act').

Discussion

- The Applicant has entered into an agreement with the tenant for rental of his immovable property. As per the agreement, the tenant pays electricity charges and DG electricity charges, *inter alia*, to the Applicant.
- The Applicant has installed sub-meters for every tenant, which record their respective electricity consumption in units. The electricity charges are recovered from every tenant on actual cost basis and is paid to the electricity company by the Applicant.
- Furthermore, the Applicant has also installed a DG set for supply of electricity for which they charge a fixed amount of Rs. 10,000 per month and a variable cost of Rs. 18 per unit consumed.
- The Applicant has approached the Rajasthan Authority for Advance Ruling ('the Authority') to determine whether such electricity charges recovered would be liable to tax and contended as below:
  - The amounts collected by the Applicant are purely a reimbursable expense which is collected on actual usage of electricity as per the sub-meters installed.

[2] 2021 (10) TMI 531
[3] 2022-VIL-59-AAR

- The amounts collected are not on an ad-hoc basis which clarifies the intent of both the parties to collect electricity charges on an actual basis.
- The tenant cannot make payment of electricity charges directly to the electricity company and hence, there is a silent agreement between the parties to collect such charges as per the sub-meter reading which shall be paid by the Applicant to the electricity company.
- All the conditions for qualifying as a 'pure agent' laid down under rule 33 of the CGST Rules, 2017 are fulfilled by the Applicant as the amounts are recovered on the basis of the rent agreement, whereby each tenant has authorised the Applicant to pay electricity charges on their behalf.
- Since the amounts are collected on actuals as a pure agent, they will neither form part of the value of taxable supply of the immovable property nor be taxable under GST.

- The Jurisdictional officer submitted his views as under:
  - As mentioned in the rent agreement, the electricity charges and other charges are collected by the Applicant by issuing invoices using a prepaid meter.
  - The word 'reimbursement' has not been mentioned anywhere in the agreement.
  - Renting of immovable property is the principal supply in this case and electricity, maintenance, and other charges are towards ancillary services related to the principal supply of renting. Thus, it is a composite supply and shall form part of the taxable value of supply under section 15 of the Act.
- The Authority perused the contentions of both the parties and ruled as follows:
  - The Applicant collects the rent amount and various other charges from the tenants. The Applicant collects these amounts in advance and subsequently adjusts it in the upcoming periods.
  - The charges are recovered by the Applicant by issuing invoices and hence, it is established that services are supplied by the Applicant to the tenants.
  - The electricity charges as well as the DG set charges are ancillary services to the principal supply of rental of immovable property and forms part of composite supply.
  - There is no clear authorisation from the tenant to the Applicant to make the payment of electricity charges on their behalf to the electricity company. The word 'reimbursement' also has not been mentioned in the agreement.
  - There is no contractual agreement with the tenant to act as a pure agent to incur expenses on their behalf.
  - Further, the amounts collected are not on an actual basis as it is collected in advance from the tenants and adjusted subsequently based on the sub-meter readings.
  - Therefore, the amounts collected as electricity charges would form part of the value of supply under GST and be liable to tax.

Ruling

The Authority held that the electricity charges collected would be included in the value of supply and would be taxable at 18% as a composite part of the principal supply of rental of immovable property.

Dhruva Comments:

Despite there being several favourable decisions, which held for non-inclusion of electricity charges recovered as reimbursement, the authorities have distinguished them on the basis of the factual matrix and related documentation. While the legislation excludes reimbursements claimed from transaction value, it necessitates appropriate documentation to qualify for such deductions. Thus, extreme care needs to be taken on how the transaction is structured, agreements are drafted and documentation is done.

Amogh R Bhatwadekar – Appellate Authority for Advance Ruling, Maharashtra[4]

Issue for Consideration

- Whether the Appellant is liable to discharge GST liability under reverse charge mechanism on purchase of e-goods from foreign suppliers where such goods are stored on cloud servers located outside India and not downloaded by the Appellant?
- Whether supply of e-goods by the Appellant to the Indian / foreign buyers from whom the payments are received in Indian / foreign currency would attract GST under the place of supply provisions for OIDAR services?

Discussion

- The Appellant is a proprietor supplying digital goods i.e. 'online gaming' ("e-goods / digital goods").
- These digital goods are received by the Appellant from the suppliers located outside India through email or messages that are accessed and stored on a cloud server for dispatching to its customers.
- The customers visit the website of the Appellant and make online payment, after which the goods are delivered by the cloud server to the customers by e-mail or a link is provided via which it can be downloaded.
- Based on the application filed by the Appellant, the Maharashtra advance ruling authority[5] had ruled that:
  - Supply of digital goods would be considered as supply of 'service' in terms of the definition of the OIDAR services as per section 2(17) of the IGST Act, 2017 and such service is classifiable under HSN 998439 and would attract 18% GST.
  - The Appellant would be liable to pay IGST under reverse charge mechanism for procurement of e-goods from the foreign supplier as the place of supply in case of OIDAR services is the location of the recipient of the service.
  - Further, if the services are provided to a customer in India, then they should be subject to GST as the place of supply would be in the taxable territory.
  - Where the customer is located outside India and payment is received in convertible foreign exchange, the Authority refrained from answering the said question due to non-availability of sufficient details / documents.
- Being aggrieved, the Appellant approached the Appellate Authority for Advance Ruling, Maharashtra ('the Appellate Authority') and raised the following contentions:
  - The e-goods are procured from the overseas suppliers and are stored on a cloud server located outside India. These e-goods are never downloaded on any systems in India and are subsequently delivered to the customers located outside India through access via email.
  - Therefore, the said supply of e-goods would qualify as an 'export of service' since the supplier as well as the customers of e-goods are both located outside India and the consideration is also received in convertible foreign exchange.
- The Respondents submitted as follows:
  - Where the customer is located outside India and the payment is received in convertible foreign exchange, the supply of digital goods will qualify as an 'export of service' since all the five conditions prescribed under section 2(6) of the IGST Act, 2017 are satisfied.
  - In all other cases pertaining to the instant matter, the transactions will be subject to GST.
- The Appellate Authority observed as follows:
  - The Appellant has not disputed the classification of the impugned e-goods.

[4] 2022-VIL-21-AAAR
[5] 2020-VIL-325-AAR

- The Appellant is receiving OIDAR services from foreign vendors, wherein the place of supply is the location of the recipient of the service. Therefore, the said transaction would qualify as an import of service even though the said e-goods are stored on cloud servers located outside India and are not downloaded by the Appellant in India.
- The Appellant has made payment to foreign vendors and receives the right to supply the e-goods to its customers.
- The Appellant is liable to pay IGST under reverse charge mechanism in terms of section 5(3) of the IGST Act, 2017 read with notification[6] on the purchase of e-goods from the foreign suppliers.
- The provision related to the place of supply of OIDAR services as prescribed under section 13(12) of the IGST Act, 2017 does not specify how and where the services related to OIDAR are received by the recipient but only mentions the location of the recipient.
- In the instant case, the Appellant imports digital goods from the foreign supplier by which he gets the right to transfer the e-goods to his customers located in India, and hence there is no out and out sale and the said transaction will attract GST.
- In relation to the supply of goods to foreign customers, the Appellate Authority held that it is not possible to determine the place of supply of OIDAR services without testing all the conditions prescribed under the explanation to section 13(12) of the IGST Act, 2017 and hence, the said question cannot be answered, and it shall be decided by the jurisdictional officer based on the facts of the transaction.

Ruling

The Appellate Authority did not interfere with the ruling pronounced by the Authority for Advance Ruling and upheld the same.

Dhruva Comments:

The classification of digital / e-goods has been a subject matter of dispute in the pre-GST regime also. The Appellate Authority has given the instant ruling considering the fact that the Appellant has received OIDAR service as the classification of e-goods was not under dispute. The Apex Court in the case of Tata Consultancy Services Limited[7] has held that software when put on physical media such as CD, disk etc. should be construed as goods. The aforementioned classification of digital goods could have an impact on other digital assets, and it needs to be seen whether the same gets covered under OIDAR services.

[6] Notification no.10/2017-I.T (Rate) dated June 28, 2017
[7] 2004 (178) E.L.T. 22 (S.C.)

www.dhruvaadvisors.com

Follow us on:

ADDRESSES

Mumbai
1101, One World Centre, 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

Dhruva Advisors has been consistently recognised as the **"India Tax Firm of the Year"** at the ITR Asia Tax Awards in 2017, 2018, 2019, 2020 and 2021.

Dhruva Advisors has also been recognised as the **"India Disputes and Litigation Firm of the Year"** at the ITR Asia Tax Awards 2018 and 2020.

WTS Dhruva Consultants has been recognised as the **"Best Newcomer Firm of the Year"** at the ITR European Tax Awards 2020.

Dhruva Advisors has been recognised as the **"Best Newcomer Firm of the Year"** at the ITR Asia Tax Awards 2016.

Dhruva Advisors has been consistently recognised as a **Tier 1 Firm in India for General Corporate Tax** by the International Tax Review's in its World Tax Guide.

Dhruva Advisors has also been consistently recognised as a **Tier 1 Firm in India for its Transfer Pricing** practice ranking table in ITR's World Transfer Pricing guide

Dhruva Advisors has been consistently recognised as a **Tier 1 Firm in India for Indirect Taxes** in International Tax Review's Indirect Tax Guide.