



INDIRECT TAX ALERT

08 May 2023

KEY JUDGEMENTS & RULINGS

Hon'ble Supreme Court held that no Service Tax will be levied on Corporate Guarantee by Parent Companies to their subsidiary as there is no consideration involved.¹

FACTS OF THE CASE

- The applicant had provided a corporate guarantee on behalf of its subsidiaries located within and outside India.
- The department filed a notice for non-recovery of tax as the above service was taxable under 'banking and other financial services'.
- The applicant claimed that the service was not taxable as no consideration was received for the said service.
- It was also contended that corporate guarantee is not similar to bank guarantee and hence it won't be taxable under 'banking and other financial services'.

¹ Commissioner of CGST and Central Excise vs. Edelweiss Financial Services Ltd [(2023) 5 Centax 58 (S.C.)]



JUDGEMENT

- Concurrent findings by adjudicating authority as well by CESTAT indicated that respondent-assessee had not received any consideration for providing a corporate guarantee to its group subsidiary company. Further, Revenue had failed to either assail this finding of fact or to demonstrate that issuance of corporate guarantee without consideration would be a taxable service.
- In view of the aforesaid, there was no reason to admit Revenue's appeal which was dismissed.

DHC COMMENTS

- This is a welcome judgement from the Supreme Court that corporate guarantee provided to group companies will not be eligible to Service Tax in the absence of consideration. It remains to be seen how taxpayers in the GST regime will be impacted by the outcome of this judgement.

Hon'ble Supreme Court held that Input Tax Credit was available to purchasing dealers only after discharge of burden to establish actual receipt of goods. Mere production of invoices and payment to the selling dealer by account payee cheque was not sufficient.²

FACTS OF THE CASE

- Assessing officer as well as the first Appellate Authority denied ITC under KVAT Act, 2003 as the genuineness of the purchase transaction was doubted. The reason for this was that selling dealers were either de-registered, had filed nil returns or had denied the sale.
- Tribunal allowed a second appeal on the ground that the purchasing dealer purchased certain goods under genuine tax invoices and consequently allowed the ITC to be claimed.

JUDGEMENT

- SC held that the burden of proof to claim input tax credit lies on the taxpayer claiming credit.
 - Section 70 of KVAT Act clearly stipulates that the burden of proof was on purchasing assessee to establish the genuineness of the transaction against which ITC had been claimed. Merely claiming to be a bona fide purchaser was not enough and sufficient to avail ITC.
- This burden of proof could not be shifted on Revenue by mere production of invoice or having made payments by account payee cheque to the seller.
- Purchase transactions are required to be proved beyond doubt by furnishing other details and documents viz. name and address of selling dealer, details of the vehicle which had delivered goods, payment of freight charges,

² State of Karnataka vs Ecom Gill Coffee Trading Private Limited [(2023) 148 taxmann.com 352 (SC)]



acknowledgement of taking delivery of goods in addition to tax invoices and payment particulars for establishing an

actual physical movement and receipt of goods.

DHC COMMENTS

- Supreme Court has ruled that under Karnataka VAT law one is required to prove all the aspects listed therein for availing ITC. It is the court's contention

that the recipient is required to prove the genuineness of the transaction before its claim of ITC is approved. It has only listed the means to do the same.

Hon'ble Karnataka High Court quashed the amendment to Rule 89(4)(c) vide Notification No. 16/2020-CT. This restricts the refund of unutilized credit on zero-rated supplies to a maximum of 1.5 times the value of like goods domestically supplied by the same or similarly placed supplier. Thus, it is held to be ultra-vires to the provisions of the GST law.³

FACTS OF THE CASE

- The petitioner is engaged in the business of various types of advanced imaging and sensor systems. It had applied for a refund of the unutilized ITC under Section 54(3)(i) of the CGST Act read with Rule 89 of the CGST Rules.
- However the refund application was rejected due to non-compliance with rule 89(4)(C) which restricts refund to 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier.

JUDGEMENT

- Karnataka High Court held the impugned Rule 89(4)(C) to be **illegal, arbitrary, unreasonable, irrational, unfair, unjust and ultra vires.**
- Karnataka HC held that the said rule is merely a machinery provision which cannot impose rigorous conditions to take away the right of refund all together.
- Hence, revenue was directed to accept the refund claims of the petitioner and grant a refund together with applicable interest

DHC COMMENTS

- Karnataka High Court has interpreted that Rule 89(4)(c) is unconstitutional on the ground that it restricts the exporters from claiming refund of ITC in case such exporter is making export via the LUT model. This favourable judgement will provide relief to genuine exporters as it is challenging to ascertain the value of similar supplies in the case of customized products or where the goods are only

³ Tonbo Imaging India Private Limited vs Union of India [TS-108-HC(KAR)-2023-GST]



manufactured for export and do not have a domestic market. In such cases, the genuine exporters were facing

inconvenience due to malpractices by others.

Hon'ble Delhi High Court held that the services provided by the petitioner to foreign EY Entities are the export of services and not intermediary services. This is because the intermediary merely “arranges or facilitates” the supply of goods or services between two or more persons. The person who supplies the goods or services is not an intermediary.⁴

FACTS OF THE CASE

- The petitioner is providing services to its UK-based head office.
- The petitioner applied for a refund of ITC in respect of the services exported by it in the relevant period.
- Revenue rejected the refund claim of the petitioner on the grounds that the services rendered were “intermediary service” and not “export of service”.

JUDGEMENT

- Delhi HC held that the last limb of Section 2(13) of the IGST Act reads as “but does not include a person who supplies such goods or services or both or securities on his own account” but that does not control the definition of the term ‘intermediary’. It merely restricts the main definition. The opening lines of Section 2(13) of the IGST Act expressly provide that an intermediary means a broker, agent or any other person who “arranges or facilitates the supply of goods or services or both or securities between two or more persons”.
- HC further held that the services rendered by the petitioner are not as an intermediary and therefore the place of supply of the services is to be determined on the basis of the location of the recipient of services. Since the recipient of services is outside India, the professional services rendered by the petitioner would fall within the scope of the definition of “export of services”.

DHC COMMENTS

- The Hon'ble High Court has clarified that a person supplying the goods/services is not an intermediary under GST. To qualify the meaning of intermediary an individual or entity has to arrange or facilitate the supply. Interpretation of the word intermediary is critical for the purpose of processing refunds for exports under GST. Various notices have been issued while processing refunds requiring the assessee to explain reasons for not qualifying as an intermediary under GST. This judgement will enable such access to favourably respond to such notice.

⁴ Ernst and Young Limited vs Additional Commissioner, CGST Appeals -II [TS-99-HC(DEL)-2023-GST]



Hon'ble Calcutta High Court held that detention of goods and imposition of penalty while being transported with an expired e-way bill is sustainable. The authority is not required to appreciate reasons for movement without a valid e-way bill.⁵

FACTS OF THE CASE

- The petitioner was transporting goods against an e-way bill which was generated but had expired before the goods reached the final destination.
- During the transportation, the same was intercepted. Since, there wasn't a valid e-way bill, a prima facie opinion was made that the consignment was not supported by any valid documents.
- A detention order was passed and a show cause notice was issued with a proposal for imposition of penalty.

JUDGEMENT

- The e-way bill, on the basis of which the goods were transported, expired prior to the vehicle reaching the final destination. There may or may not be valid reasons for not being able to transport the goods within the validity period of the e-way bill. The petitioner may not have any intention to evade tax but that cannot be a valid ground to transport goods without a valid e-way bill.
- Calcutta HC held that detention of goods and imposition of penalty, while goods are being transported with the expired e-way bill, is sustainable and authority is not required to appreciate reasons for movement without valid e-way bill.
- Detention of goods without valid documents is permissible in law. However, there is no scope to dilute the said provision of law for granting relief to an errant transporter.

DHC COMMENTS

- Transportation of goods with a proper e-way bill is one of the salient features of the GST law. There is no scope to dilute the said provision of law for granting relief to an errant transporter. GST law cannot and ought not to be interpreted in such a manner that the very essence of the same is lost. Section 129 of the Act opens with a non-obstante clause which lends a mandatory character to the same.

⁵ Abinash Kumar Singh vs State of West Bengal [(2023) 148 taxmann.com 393 (Calcutta)]



Hon'ble Patna High Court stayed the recovery proceeding of the balance amount of tax against Flipkart India on grounds of delay in the constitution of the appellate tribunal in terms of Section 112 (8) and (9) of Bihar Goods and Services Tax Act (BGST Act).⁶

FACTS OF THE CASE

- The department had initiated proceedings against the assessee for recovery of tax under dispute.
- Subsequent, to the commencement of proceedings assessee sought to avail the statutory remedy of appeal against the order of the additional commissioner before the Appellate Tribunal under section 112 of the Bihar Goods and Services Tax Act (BGST Act).
- However, due to non-constitution of the Tribunal assessee was deprived of this statutory remedy.

JUDGEMENT

- The HC ordered the assessee to deposit 20% of the remaining amount of tax in dispute, in addition to the amount deposited earlier under Section 107 (6) of the BGST Act.
- Further, it held that the assessee must be extended the statutory benefit of stay under Section 112(9) of the BGST Act as the assessee cannot be deprived of such statutory benefit due to non-constitution of the Tribunal by revenue.
- However, the HC also specified that the assessee would be required to file an appeal under Section 112 of the Act once the tribunal is constituted and made functional. The HC added that, in case the assessee chooses not to avail the remedy of appeal after the constitution of the Tribunal, the state authorities would be at liberty to proceed as per the law.

DHC COMMENTS

- This ruling upholds the right of appeal under Article 226 of the Constitution of India, available to the assessee. Further, the assessee cannot be deprived of such a right due to the non-constitution of the tribunal by the authorities.

⁶ Flipkart India Pvt. Ltd. vs. the Additional Commissioner of State Tax & Ors. [TS-161-HC(PAT)-2023-GST]



Hon'ble Bombay High Court refuses to strike down provisions of Section 13(8)(b) and Section 8(2) of the IGST Act, governing 'Intermediary Services' as unconstitutional, however, observes that "the mechanism for Section 13(8)(b) to operate is confined only to the provisions of the IGST Act.⁷

FACTS OF THE CASE

- The Assessee is engaged in providing marketing and promotion services to its customers located outside India, making it an intermediary service provider as per section 2(13). As per section 13(8) of the IGST Act, the place of supply in the case of intermediary services will be the location of the supplier and hence will be taxable under GST.
- The Assessee contends that the services provided to its overseas customers should

be considered an export, and hence no tax should be levied. However, by the deeming fiction of law created by the above-mentioned provisions, the place of supply shall be India, and hence taxable under GST. Further, CGST and SGST would be applicable to the services, as the place of supply will be the state of the supplier, making it an intra-state supply. This would offend the Articles 245, 246A, 269A and 286(1)(b) of the Constitution of India.

JUDGEMENT

- The Hon'ble Bombay High Court observed that the fiction which is created by Section 13(8)(b) would be required to be confined only to the provisions of IGST and ruled that Section 13(8)(b) and

Section 8(2) of the IGST Act are legal, valid, and constitutional. However, the court has also held that these provisions can only be applied to the IGST Act and can't be used to levy tax on intermediary services under the CGST and SGST Acts.

DHC COMMENTS

- The taxpayers were eagerly waiting for clarity on the controversial issue of the taxability of intermediary services

provided to foreign recipients. Though this ruling was expected to provide clarity on this issue, has multiplied prevailing confusion.

Hon'ble Odisha AAR held that service received by the registered person by way of taking a residential dwelling on rent to be used as a guest house is taxable under Reverse Charge Mechanism.⁸

FACTS OF THE CASE

- The applicant sought an advance ruling on whether service received by a

registered person by way of renting residential premises used as the guest

⁷ Dharmendra M. Jani vs. UOI [TS-138-HC(BOM)-2023- GST)-2023-GST]

⁸ Indian Metals and Ferro Alloys Ltd. [TS-88-AAR(OD)-2023-GST] - AAR



house of the registered person is subject to GST under FCM or RCM.

- The guest houses were used to provide accommodation to employees of the

RULING

- Odisha AAR ruled that service received by the registered person (Applicant) by way of renting of residential premises used as a guest house for company employees is taxable under Reverse Charge Mechanism, notified vide Sr. No. 5AA of Notification No. 13/2017-CT (R) inserted vide the 'RCM' Notification No. 5/2022-CT(R).

DHC COMMENTS

- Renting a residential dwelling to a registered person would attract GST

company. Clause 4.13.1 of the CBIC Education Guide, cites that the guest house doesn't come within the ambit of 'residential dwelling'.

- AAR elucidates that the nature/purpose of use of residential dwelling i.e. for residence or otherwise by the recipient, has not been a condition in the said RCM notification. Hence, GST @ 18% under RCM will arise on the tenant if he is a registered person under GST with no other condition.

under RCM, irrespective of the nature of the use.

Hon'ble Tamil Nadu AAR held that services of the common employees of a person, provided by a branch office to the head office will attract GST Liability.⁹

FACTS OF THE CASE

- The applicant has a branch office at Chennai registered under the GST Act. The branch office of the applicant is providing support services to the head office in Bangalore.
- The employees are appointed and working for the company as a whole and not for the head office or branch specifically.

- Salary and other benefits to employees are not treated as supply under Para 1 of Schedule 3 of the CGST Act.
- The jurisdictional authority however, reported on the issues raised in the ARA application, stating that the service provided to the head office will attract GST liability as per Para 2 to Schedule-I.

RULING

- Tamil Nadu AAR ruled that the services provided by a branch office to the head office or vice versa are liable under GST.

This liability arises if each branch is separately registered under GST. The services must be provided by common employees of the person.

⁹ Profisolutions Private Limited [07/ARA/2023]



DHC COMMENTS

- This ruling is in line with the provisions of GST under which transfers to an entity under the same PAN are considered as supply and tax are levied on it.

Hon'ble Andhra Pradesh AAR held that liquidated damages paid are treated as supply under the GST Act and liable to GST.¹⁰

FACTS OF THE CASE

- The applicant, is a special-purpose vehicle which was set up to implement mega power projects in Andhra Pradesh. collect liquidated damages for an increase in moisture of raw coal over the loading end and other such conditions.
- The applicant entered an agreement with Chettinad Logistics Private Limited for the supply of certain services.
- In the event of a failure in performance of the job assigned to Chettinad Logistics (service provider), the applicant was to
- The applicant sought an advance ruling on whether liquidated damages collected by the applicant for non-performance of the act constitutes a supply under Section 7 of the GST act. Further, it sought the classification under GST of such damages and the rate of tax.

RULING

- AAR ruled that liquidated damages collected by the applicant from Chettinad Logistics Private Limited for non-performance of the act constitute a supply under Section 7 of the GST act and hence liable to tax @ 18%.

DHC COMMENTS

- This ruling is not correct as there is a favourable CBIC circular on liquidated damages.

¹⁰ M/s. AP Power Development Company Limited [04/AP/GST/2023]



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