

INDIRECT TAX

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GOODS & SERVICES TAX

JUDICIAL UPDATES

WRIT PETITION

High Court refuses to intervene in the notice demanding reversal of ITC, availed through belated return in GSTR-3B

Facts of the case

- M/s. R K Modi and Sons ('Taxpayer'), a partnership firm, is engaged in the manufacture and wholesale of beedi;
- The taxpayer had filed a Writ petition under Article 226 of the Constitution of India being aggrieved by proposal to reverse Input Tax Credit (ITC) of INR 39.93 Mn through DRC-03 dated 28 January 2020 followed by demand notice dated 18 June 2021 passed by CGST authorities;
- The taxpayer had declared the ITC pertaining to the financial year 2017-18 and 2018-2019 by filing Form GSTR-3B beyond the time limit prescribed under section 16(4) of the CGST Act, 2017 (CGST Act);
- The ITC, so availed was eventually reversed on 28 January 2020 under protest.

Contention of the Taxpayer

- It was a genuine hardship and beyond the reasonable control of the taxpayer in filing GSTR-3B relating to the financial year 2018-19 within time limit;
- The taxpayer has filed the return after payment of applicable late fee under sections 47 & 50 of the CGST Act, which in fact allows the taxpayer to file the return beyond the due date; such a return should have been accepted without applying the provision of section 16(4) of the CGST Act;
- The learned counsel fairly admitted that the taxpayer is not challenging the constitutional validity of section 16(4) of the

CGST Act in this petition, but some other assesses have challenged the constitutional validity of the aforesaid provision;

- It was argued that the provision of section 16(4) is procedural in nature, and tax authorities should not take away the right of filing of return with a late fee;
- The provision of section 16(4) should not defeat a substantial claim of ITC which is otherwise allowable under the provisions CGST Act.

Contention of Tax authority

- The show-cause notice dated 17 February 2022 has been issued to the taxpayer and neither the validity of the said show-cause notice nor the constitutional validity of section 16(4) of the CGST Act has been challenged, therefore, the tax authorities are bound to act in accordance with law;
- Further, the present Writ petition is not maintainable under Article 226 of the Constitution of India as the taxpayer is having an alternative and efficacious remedy by filing an appeal before the appellate authority;
- The taxpayer is required to approach the competent authority along with a reply to the show-cause notice.

Ruling by the High Court

- Admittedly, the taxpayer has filed a return beyond the time limit prescribed in the statute, therefore, the entries have been reversed by virtue of section 16(4) of the CGST Act;
- In the said show-cause notice, the tax authorities have alleged that the taxpayer has willfully filed the return on a later date than the due date of filing of GSTR 3B for the financial year 2018-19 to accommodate ITC, therefore, it

is a matter of adjudication whether there was any wilful delay on the part of the taxpayer to submit the return or not;

- As the show-cause notice has been issued on the said matter, the taxpayer is required to file a response to the show-cause notice before the competent authority and the Court does not want to interference in the said matter and the Writ petition stands dismissed.

[High Court of Madhya Pradesh-M/s. R K Modi and sons & 2 others v/s Union of India & 2 others, Writ Petition no:21074 of 2021 dated 20 April 2022]

ORDERS BY AUTHORITY FOR ADVANCE RULING (AAR)

Marketing services provided under Marketing Services Agreement (MSA) will constitute supply of 'Intermediary Services'

Facts of the case

- M/s. Gulf Turbo Solutions LLP ('GTS LLP' or 'Taxpayer'), is in the business of service and repairs of various types of turbochargers and supplying spare parts required for turbochargers and ship spares;
- Gulf Turbo Repairs and Services FZC (GTRS) is a company incorporated/registered in Sharjah, UAE and is also in the business of service & repairs of various type of turbochargers;
- The majority of shares in both the companies are owned by Mr. Rehan Marzban Karanjia;
- Taxpayer has entered in the MSA and the scope includes:
 - conducting market surveys and providing GTRS with information on Indian and international market trends and features so to assist in determining the nature and scope of Indian and international market potential;
 - Assisting GTRS in conducting sales prospection through participation in industry events such as exhibitions, etc.;
 - Assisting GTRS in adaptation and implementation of its advertising policy;
 - Liaising with customers and collect their turbocharger and engine room machinery service and spare parts specifications and requirements, strategy and reporting the information obtained through such customer interactions to GTRS;
 - Facilitating GTRS in arrangement of discussions and provision of interpretation services and cross culture advise;
 - Connecting prospective customers with representatives of GTRS for the purpose of obtaining orders and establishing/maintaining close commercial relation between GTRS and customers;
 - Providing information on products and its functioning, etc., to GTRS's customers and notifying GTRS of any consumer complaints, monitoring regulatory developments (including establishing and maintaining contact with regulatory agencies.);
 - Any other assistance, regarding GTRS's marketing activities that may be reasonably requested by GTRS after the effective date in writing to GTSLLP.

- Appointment of taxpayer for marketing support services will be on P2P basis. Relationship between the parties will be that of independent contractors which do not intend to create relationship of principal and agent between both the parties.

Questions before the AAR

- Whether provision of these services constitute 'intermediary' as defined under section 2(13) of the IGST Act, 2017?
- Whether services supplied by taxpayer constitute composite supply and categorize as 'support services'?

Contention of the taxpayer

- The impugned MSA clearly defines the relationship between the parties is that of independent contractors meaning thereby that agreement does not intend to create relationship of principal and agent;
- Taxpayer is not authorized and in no way carries-out activities such as negotiation, conclusion of contracts, acceptance of orders, determination of pricing, invoicing, rebate/discounts, resolution of customer complaints or settlement of disputes with customers. On the contrary it is clearly mentioned in the agreement that taxpayer will provide services on his own account. All the costs and expenses incurred for giving these services will be borne by the taxpayer. Hence, the proposed marketing services as per agreement will not fall under 'intermediary services' as envisaged under section 2(13) of IGST Act, 2017;
- Taxpayer's role in respect of adoption and implementation of GTRS's advertising policy, sales promotion through exhibition/trade shows, liaising with customers etc. is in the nature of assistance in conducting the said activities and not actual provision of services on its own account conducting the market survey and information on market trends are the main activities that determine the nature and scope of Indian and international market potential for GTRS;
- Further as per the agreement taxpayer has no authority to conclude or negotiate any contract or secure any orders on behalf of GTRS. On the contrary taxpayer would provide service on his own account to GTRS to further augment its business of turbo charger repairing services and supply of ship spare parts in India and globally. All the costs and expenses to provide these services to GTRS will be incurred and borne by GTSLLP.

Contention by the tax authority

From the description of services mentioned in the agreement, it is evident that taxpayer indulges in provision of services which could be treated as 'intermediary' services. Hence, though all other criterion of export of services is fulfilled, the nature of services of GSTLLP is of 'intermediary' nature.

Observations & Ruling by the AAR

- In the draft agreement submitted by the taxpayer, there is a clause that there is a separate transfer pricing agreement between the taxpayer and GTRS for supply of services as well as supply of goods. In general practice, transfer pricing is an accounting practice that represents the price that one division in a company charges another

division for goods and services provided and further, transfer pricing allows for the establishment of prices for the goods and services exchanged between subsidiaries, affiliates, or commonly controlled companies that are part of the same larger enterprise. The taxpayer has submitted that they are dealing with GTRS on a P2P basis, and it is also seen that there is a transfer pricing agreement between the taxpayer and GTRS which implies that they are not dealing on a P2P basis being 'related' parties;

- As per the definition, an intermediary:
 - Means a broker, an agent or any other person, by whatever name called;
 - Who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons;
 - but does not include a person who supplies such goods or services or both or securities on his own account.
- The taxpayer has not categorically mentioned whether they are arranging or facilitating supply of goods or services or both but has definitely stated that they connect GTRS with the customers and prospective customers in India. By connecting the customers/prospective customers with GTRS, the taxpayer is actually arranging or facilitating the supply of goods or services or both, between two or more persons;
- Further, the taxpayer will be liaising with the customers of GTRS and collect their turbocharger and engine room machinery service and spare parts specifications and requirements, strategy and reporting the information obtained through such customer interactions to GTRS. Also, the taxpayer will be providing information on products and its functioning, etc., to GTRS's customers and notifying GTRS of any consumer complaints and monitor regulatory developments (including establishing and maintaining contact with regulatory agencies, etc.) satisfies condition number (ii) mentioned above;
- Further, from the taxpayer's submissions it is clear that, they are not providing services on their own account. They are providing the service of connecting the business of GTRS with customers with an intention of promoting such business of GTRS in India. Taxpayer will be connecting customers with representatives of GTRS for the purpose of business and other commercial discussions between customer and GTRS. Hence it clearly appears that, the taxpayer is not acting on its own account rather acting on behalf of GTRS and therefore satisfies condition number (iii) mentioned above;
- Marketing services agreed to be provided by the taxpayer under MSA will constitute supply of 'intermediary services' classifiable under HSN code 9961/9962 and not as 'support' services or an export of services as defined under section 2(6) of the IGST Act, 2017.

[AAR-Maharashtra, M/s. Gulf Turbo Solutions LLP, Ruling no:GST-ARA-101/2019-20/B-53, dated 27 April 2022]

EXCISE/SERVICE TAX

Royalty reported in the financial statement but not paid to supplier would not be included in the value of imported goods

Facts of the case

- M/s. Doosan Bobcat India Pvt Ltd., formerly known as M/s. Doosan Infracore India Pvt Ltd., ("Taxpayer") is a registered company under the Companies Act;
- The taxpayer imported excavator, machine tools and parts and accessories from M/s. Doosan Infracore Co. Ltd. South Korea. The taxpayer and the supplier are 'related' parties and hence, the case has been referred to Special Valuation Branch (SVB) for examination;
- Accordingly, the Assistant Commissioner as per Order-in-Original(O-i-O) no:7731/2008 dated 4 June 2008 held that the price declared was on par with contemporaneous imports made by unrelated buyers and therefore accepted the declared price as the transaction value in terms of rule 3(3)(a) of Customs Valuation Rules, 2007. The imports made from 4 June 2008 to 3 June 2011 were finalized accordingly;
- The taxpayer made some more imports from China, the supplier being M/s. Doosan Infracore Co. Ltd. China, a 'related' company. The SVB examined the correctness of the declared value and after considering the imports, passed the OIO no:11272/2010 dated 5 March 2010 holding that the declared invoice price of the imports made can be accepted as the transaction value up to 4 March 2013. It was therein held that no royalty was made to the foreign supplier and was not included in the transaction value. For the imports made by the taxpayer from M/s. Doosan Infracore Co. Ltd., Korea, it was held that the OIO no:7731/2008 dated 4 June 2008 and 11272/2010 dated 5 March 2010 should continue and the order was held to be valid till 3 June 2014;
- The company by name M/s. Doosan International India Pvt Ltd., imported skid steer loads compressor, parts and accessories from 'related' supplier viz M/s. Doosan Trading Ltd. Ireland. The SVB examined the value declared and the Deputy Commissioner (SVB) as per OIO no:8046/2008 dated 19 August 2008 accepted the declared price as the transaction value. The issue was again examined and the Commissioner of Customs (SVB) as per OIO no:16063/2011 dated 26 May 2011 held that the pricing pattern has not undergone any change and the transaction value as declared in the invoice was accepted;
- The company M/s. Doosan International India Pvt Ltd. subsequently got amalgamated with M/s. Doosan Infracore India Pvt Ltd. Consequently, the SVB vide order no:11272/2010 dated 5 March 2010 issued to M/s. Doosan Infracore India Pvt Ltd. which was valid up to 3 June 2014 was taken up for review;
- The Deputy Commissioner of Customs (SVB) passed the review order no:26120/2014 dated 4 June 2014 wherein it

was observed that the royalty amount of INR 2.80 Mn shown in the balance sheet for the year 2012-13 was net of taxes and not includible in the declared value;

- The Commissioner of Customs, aggrieved by the order filed appeal before the Commissioner of Customs (Appeals) and vide Order in Appeal no:124/2015 dated 30 January 2015 the impugned OIO no:26120/2014 dated 4 June 2014 was set-aside and directed the adjudicating authority to reconsider the matter on various issues. It was also ordered to collect Extra Duty Deposit ('EDD') @ 5% of the value of goods;
- Against the order, the taxpayer filed appeal before the CESTAT. The CESTAT passed the final order vide order no:42209/2017 dated 20 September (2017=2018-TIOL-679-CESTAT-MAD);
- While remanding the matter to the adjudicating authority, CESTAT directed that the only issue to be examined by the adjudicating authority is with reference to the payment of royalty and no other payments made to the foreign suppliers can be considered in the re-adjudication. The CESTAT also ordered that the EDD should be 1% and not 5% as ordered by the Commissioner of Customs (Appeals);
- The Deputy Commissioner of Customs (SVB) passed OIO(Denovo) no:64397/2018 dated 12 July 2018. It was held that the royalty amount shown to have been paid in the financial statements during 2012-13 should be added to the invoice value. Appeal filed before the Commissioner of Customs (Appeals) was rejected upholding the order passed by the adjudicating authority. Aggrieved by such order, the taxpayer approached the CESTAT.

Contention of the Taxpayer

- The taxpayer submitted that merely because the amount of royalty to the tune of INR 2.81Mn was stated in the financial statements for the year 2012-13, the tax authorities directed to include the said amount as royalty in the invoice value;
- The tax authorities failed to see that no such payment towards royalty was actually paid to the foreign supplier and that the amount had been reversed as shown in statements in the financial years 2014-15. Though evidence was produced before the tax authorities, they failed to appreciate the same;
- The taxpayer had produced the Chartered Accountant's certificate to establish that the royalty amount of INR 2.81Mn shown in the balance sheet for the year 2012-13 was never paid to the foreign supplier and the book entries made was also reversed later in the financial year 2014-15. However, the said evidence was not at all considered by the authorities;
- It was further argued that the adjudicating authority has stated in the order that it is not convincible that there was no agreement for payment of royalty. It was explained that it is true that the taxpayer and foreign supplier did not have any agreement. It cannot be construed that the taxpayer who made payment of royalty, was later reversed and not effectuated at all. The royalty proposed to be included in the transaction value has no nexus to the goods imported. He relied upon the decision in the case of Commissioner of Customs Vs. Ferodo India Pvt Ltd. - 2008 (314) ELT 23 (SC)= 2008-TIOL-28-SC-CUS and Syngenta India Ltd. Vs. Commissioner of Customs - 2014 (314) ELT 473 (Tri.) = 2013-TIOL-2317-CESTAT-MUM.

Contention by the tax authority

- The tax authorities submitted that though the Show-Cause-Notice (SCN) was issued by DRI, the taxpayer is not contesting the issue in this regard as to whether DRI is 'the proper officer' for issuing the SCN;
- It was argued that taxpayer have made entries in the books of accounts for the year 2012-13 as to the payment of INR 2.81 Mn to the foreign supplier under the heading 'Royalty'. They have not furnished any strong evidence to prove that the said amount has not been paid to the foreign supplier. In any case, the matter requires to be remanded to the adjudicating authority to look into the documents produced by the taxpayer as to whether they have actually paid the royalty to the foreign supplier or not.

Observations & Ruling by the CESTAT

- The issue is whether the amount of INR 2.81 Mn in the nature of payment of royalty can be included in the transaction value and whether it is a condition of sale. It is seen from the facts narrated above that there is no agreement between the taxpayer and the foreign supplier;
- It is then difficult to understand whether the royalty is a condition for the sale of the imported goods. In the present case, the taxpayer contended that they have made provision for royalty, but they have not actually paid any amount and that the amount was reversed in the year 2014-15;
- They have furnished the Chartered Accountant's certificate and produced the financial statements for the respective years;
- Besides these, the entries in the ledger/books of accounts have to be examined. In such circumstances, we deem it fit that the matter requires to be remanded to the adjudicating authority who shall look into the aspect of whether the taxpayer has paid royalty to the foreign supplier or not. In case, the taxpayer has not paid such an amount, there is no question of including the same in the transaction value;
- In the light of the above, the impugned order is set aside to this effect and the matter is remanded to the adjudicating authority who shall reconsider the issue as per the above directions. The appeal is disposed of in the above terms.

[CESTAT-Chennai-M/s. Doosan Bobcat India Pvt Ltd - Appeal case no:41133- 2019(2022-TIOL-362-CESTAT-MAD) dated 20 April 2022]

FOREIGN TRADE POLICY (FTP)

NOTIFICATION

Amendment in export policy of Guar Gum

The export of Guar Gum to European Union and UK will now be allowed subject to issuance of official certificate in place of Health Certificate with immediate effect.

[Notification no:03/2015-20 dated 09 May 2022]

Alignment of Appendix 4R with the Finance Act, 2021

A new RoDTEP schedule (Appendix 4R) has been notified for implementation with effect from 01 January 2022 after aligning the earlier schedule with the Customs tariff Schedule as per Finance Act, 2021.

[Notification no:04/2015-20 dated 11 May 2022]

NEWS FLASH

1. “GST Council mulling 28% tax on Bitcoin, other cryptocurrencies”
<https://economictimes.indiatimes.com/news/economy/policy/gst-council-mulling-28-tax-on-bitcoin-other-cryptocurrencies/articleshow/91447695.cms>
[Source: Economic Times, 10 May 2022]
2. “Record GST collection a sign of U.T. being on growth path, says L-G”
<https://www.thehindu.com/news/cities/puducherry/record-gst-collection-a-sign-that-ut-was-on-growth-path-says-lg/article65401473.ece>
[Source: The Hindu, 11 May 2022]
3. “Visiting wellness resort? Don’t expect GST relief”
<https://timesofindia.indiatimes.com/business/india-business/visiting-wellness-resort-dont-expect-gst-relief/articleshow/91478317.cms>
[Source: Times of India, 11 May 2022]
4. “GSTN provides Interim Solution for Incomplete GSTR-2B in Some Cases in GST Portal”
<https://www.taxscan.in/gstn-provides-interim-solution-for-incomplete-gstr-2b-in-some-cases-in-gst-portal/175071/>
[Source: Taxscan, 15 May 2022]
5. “Increase cess on tobacco items, GST council urged”
<https://timesofindia.indiatimes.com/city/goa/increase-cess-on-tobacco-items-gst-council-urged/articleshow/91526579.cms>
[Source: Times of India, 13 May 2022]



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