

INDIRECT TAX WEEKLY DIGEST

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GOODS & SERVICES TAX

JUDICIAL UPDATES

WRIT PETITION

MARKET RESEARCH SERVICES CANNOT BE CLASSIFIED AS 'INTERMEDIARY SERVICES' AND WOULD BE TREATED AS AN EXPORT OF SERVICES

Facts of the case

- M/s. OHMI Industries Asia Private Limited (Taxpayer) provides services to its group company viz., OHMI Industries Ltd., Japan (OHMI Japan). The Taxpayer had entered into 2 separate agreements with OHMI Japan viz., for rendering Business Support Services (BSS) and Market Research Services
- On supply of the aforesaid services, the Taxpayer had treated them as a zero-rated supply (i.e., export of services) on payment of IGST. Accordingly, the Taxpayer filed an application seeking a refund of IGST paid on such supplies
- Subsequently, a deficiency memo was issued to the Taxpayer seeking copies of the agreements entered into with OHMI Japan which was provided by the Taxpayer
- Accordingly, the Adjudicating Authority rejected the aforesaid application (without issuing a Show Cause Notice) and issued the adjudicating order stating that
 - The Taxpayer has provided support to customers of OHMI Japan directly, and hence, the same qualifies as an 'intermediary' service under section 2(13) of the Integrated Goods and Services Tax Act, 2017 (IGST Act)
 - Accordingly, the place of supply (POS) of such services would be the location of the supplier of service i.e., the place of business of the taxpayer
 - As a result, such supplies would not be classified as zero-rated supplies.

- As regards the aforesaid order seeking to disallow the benefit of zero-rated supply in respect of Market Research Services, the Taxpayer challenged the same before the Appellate Authority. However, no appeal was filed by the Company in respect of the denial of the IGST refund on BSS. The Appellate Authority upheld the adjudicating order
- Aggrieved by the above, the Taxpayer filed a writ petition before the Hon'ble Delhi High Court.

Contentions by the Taxpayer

- The Taxpayer contended that the impugned order passed by the Appellate Authority is without application of mind as the Appellate Authority failed to notice that the Taxpayer's appeal was confined only in respect of Market Research Services supplied to OHMI Japan and not in respect of BSS
- The Taxpayer submitted that the present case is squarely covered by the recent decision in **M/s Ernst and Young Ltd. Vs Additional Commissioner for CGST Appeals & Anr. [WP(C) No. 8600/2022]**
- The Taxpayer also contended that it had rendered Market Research Services on its account and had not acted as an intermediary between any service supplier and OHMI, Japan.

Contentions by the Tax Authorities

- The Tax Authorities filed a copy of the Market Research Services agreement with the Hon'ble High Court and stated that as per activities described in the said agreement, the taxpayer has supplied services to customers of OHMI Japan as an intermediary and hence the place of supply is in India.

Observations and Rulings by the Hon'ble High Court of Delhi

- The Hon'ble High Court observed that the impugned order passed by the Appellate Authority is without application of mind
- On perusal of the contractual arrangement with OHMI Japan, it was held that the contention of the Tax Authorities that the Taxpayer has facilitated services between OHMI Japan and its customers is unsustainable
- Referring to Section 2(13) of the IGST Act, the Hon'ble High Court observed that an 'intermediary' arranges or facilitates the supply of goods and services and that in the present case, it is undisputed that the Taxpayer has rendered Market Research Services on its account, and it has not arranged supply of such services from a third-party
- The Hon'ble High Court also referred to Circular no.159/15/2021-GST which clarifies that the concept of 'intermediary' contemplates a minimum of three parties
- In view of the above, the supply of Market Research Services by the Taxpayer cannot be held to be an 'intermediary' service
- It was also observed that the issue involved in the present case is squarely covered by Ernst and Young Ltd. (supra)
- In view of the above, the Hon'ble High Court allowed the Writ Petition filed by the Taxpayer and the order passed by the Appellate Authority was set aside. Further, the Tax Authorities were also directed to process the Taxpayer's refund claim along with interest.

[M/s OHMI Industries Asia Private Limited Vs Assistant Commissioner, CGST [WP(C) No.6838/2022] dated 29 March 2023]

ORDERS BY APPELLATE AUTHORITY FOR ADVANCE RULING (AAAR)

SERVICES INEXTRICABLY LINKED TO CONSTRUCTION SERVICES COULD BE TAXED AS A COMPOSITE SUPPLY OF CONSTRUCTION SERVICES

Facts of the case

- M/s. Puranik Builders Limited (Taxpayer), engaged in the business of construction and sale of residential apartments, discharges GST @ 12% on the supply of construction services in respect of residential apartments sold before receipt of Occupancy/Completion Certificate. The said project does not fall under the affordable housing category
- As per the agreement between the Taxpayer and its customers, the Taxpayer provides the following class of services for which consideration is separately provided in the agreement
 - **Category I:** Such services include electric meter installation and deposit for meter, water connection charges, development charges and legal fees for the transaction of sale of residential apartments
 - **Category II:** Such services include a share of municipal taxes, advance maintenance, clubhouse maintenance, share money, application and entrance fee of the organisation, formation and registration of the organisation and legal charges in connection therewith.

- The Taxpayer had filed an application before the Authority for Advance Ruling (AAR) contending that the aforesaid charges recovered by the Taxpayer from its customers would be treated as consideration for the construction services supplied by the Taxpayer to its customers. In this regard, the AAR passed an order rejecting the aforesaid contention and held that the aforesaid charges would be treated as an independent supply of services and would be leviable to GST @ 18% without any abatement (i.e., 1/3rd reduction in value towards the sale of land)
- Aggrieved by the above, the taxpayer filed an appeal before the AAAR, Maharashtra.

Contentions of the Taxpayer

- The Taxpayer contended that the AAR has overlooked the submissions made by the Taxpayer and has mechanically ruled that the aforesaid charges are not naturally bundled
- The Taxpayer referred to Section 2(30) of the CGST Act (definition of 'composite supply') and CBIC Education Guide to Taxation of Services dated 20 June 2012 and submitted that the following principles (of services being naturally bundled) are applicable to the present case
 - Perception of the service receiver
 - Majority of service providers provide a similar bundle of services
 - Other charges are in the nature of incidental or ancillary service
 - They are advertised as a single package
 - The ancillary services are not available separately.
- Further, the Taxpayer also relied on the Hon'ble Supreme Court in **BSNL Vs. Union of India [2006 (145) STC 91 (SC)]** wherein the "dominant intention test" was laid down as follows:

"The test for composite contracts remains to be - did the parties have in mind or intend separate rights arising out of the sale of goods. The test for deciding whether a contract falls into one category or the other is as to what is 'the substance of the contract'."
- Applying the aforesaid principle, the taxpayer contended that the dominant intent of the customer is to purchase the residential apartment and all other facilities/services are incidental to the main supply of construction of the residential apartment
- The Taxpayer also relied upon the Maharashtra AAR in the case of **M/s Joyville Shapporji Housing Pvt. Ltd. [2020 (33) GSTL 306 (AAR-GST-Mah.)]** and submitted that the said ruling is squarely applicable to the present case as facts in the said case are identical to this case.

Observations and Ruling of the AAAR, Maharashtra

- In respect of charges mentioned in Category I above, the AAAR observed that
 - Such charges can reasonably be expected to be supplied by the builder/developer/promoter of a residential project
 - These charges are inextricably linked to a residential apartment or dwelling
 - Without these aspects, the property may not be used.

- However, as regards the charges mentioned in Category II above, it was held that
 - Such charges are not expected by every customer and hence, the same is not inextricably linked to the construction services in respect of residential projects
 - All the aspects in respect of the aforesaid charges may or may not be advertised as a package
 - Further, different elements of transactions are available separately and the nature of the aforesaid charges is independent of the construction services
 - Even though any one or all of them is removed from the contract, the supply of services for the construction of residential apartments/dwellings goes unabated
 - The AAAR referred to the agreement with the customers and observed that the customer does not have any claim in respect of open spaces, roads, clubhouses, gardens, utility areas, common amenities, lobbies, staircases, terraces
 - As regards the Taxpayer's reliance on *M/s Joyville Shapporji Housing Pvt. Ltd. (supra)*, AAAR held that the same is not applicable to the present case because (a) the project, in that case, was an affordable housing project whereas the project in the present case does not qualify as an affordable housing project; and (b) In the case where the residential unit does not qualify as an affordable housing project, the AAR had directed to treat the other services as independent from the construction services
 - It was also observed that the services listed in Category II above would be considered to be supplied even in cases where the entire consideration was received after the issuance of the Completion/Occupation Certificate
 - In view of the above, it was concluded that the Taxpayer has attempted to subsume the aforesaid charges in the guise of construction services and that such charges are clearly distinguishable from the main services supplied by the Taxpayer.
- In view of the foregoing, the AAAR concluded that
 - The charges enlisted in Category I above would be treated as being inextricably linked to the construction service and hence, would be leviable to GST @ 12%
 - The charges enumerated in Category II above would be treated as independent supplies which would be leviable to GST at applicable rates (i.e., 18%).
- In respect of Category I charges, since the Taxpayer has collected excess tax from the customers, the AAAR also observed that such excess tax collected would be refunded to the customers.

[AAAR- Maharashtra, M/s. Puranik Builders Limited, TS-116-AAAR(MAH)-2023-GST, dated 30 March 2023]

ORDERS BY APPELLATE AUTHORITY FOR ADVANCE RULING (AAAR)

CIRCULAR NO.178/10/2022-GST IS NOT UNIVERSAL/ABSOLUTE AND HENCE, LIQUIDATED DAMAGES PAID FOR NON-PERFORMANCE OF THE CONTRACT IS LEVIABLE TO GST

Facts of the case

- M/s. AP Power Development Co. Ltd. (Taxpayer), set up to implement mega power projects in Andhra Pradesh had entered into an agreement with Chettinad Logistics Pvt. Ltd. (CLPL) for procuring certain services including coordination, supervision, loading and transportation of raw coal
- Clause 11 of the aforesaid agreement stipulates that the Taxpayer can recover liquidated damages from CLPL for failure to perform the following jobs assigned to CLPL
 - Increase in the moisture content over the loading end
 - Increase in the ash percentage
 - Penalties for late transportation and short supply of coal.

Questions before the AAR

- Whether the liquidated damages collected from the Taxpayer from CLPL for non-performing an act constitute a 'supply' under Section 7 of the CGST Act?
- What is the classification under GST for such liquidated damages?
- What is the applicable GST rate on such recoveries?

Contentions of the Taxpayer

- The Taxpayer referred to Section 73 of the Indian Contract Act, 1872 (Contract Act) and submitted that the compensation in the present case is not by way of consideration for an independent activity but is just an event in the course of the performance of the contract
- It was also submitted that Entry 5(e) of Schedule II to the CGST Act clarifies that to classify liquidated damages as a supply of service, there must be an agreement to tolerate a situation between the Taxpayer and CLPL
- In the present case, payment of liquidated damages arises due to the mutual acceptance of both parties on account of an unintentional occurrence which both parties intended to avoid. As a result, liquidated damages cannot be said to be a consideration received for tolerating the breach or non-performance of the contract
- It was also submitted that liquidated damages are merely a flow of money from CLPL to the Taxpayer for the breach of contract and the same cannot be constituted as a 'supply' of services
- Additionally, the Taxpayer also placed reliance on Circular no:178/10/2022 dated 3 August 2022 (Circular dated 3 August 2022) and submitted that the present case is covered by the aforesaid Circular, and hence, liquidated damages collected by the Taxpayer are not leviable to GST.

Observations and Ruling of the AAR, Andhra Pradesh

- The AAR referred to sections 55(1) and 55(3) of the Contract Act and observed that failure to perform the contract at the agreed time renders the contract voidable at the option of the aggrieved party, and alternatively, such aggrieved party can recover compensation as per sections 73 and 74 of the Contract Act
- The AAR held that in the present case, the Taxpayer recovers liquidated damages from CLPL for violating the terms of the agreement
- Referring to section 2(31) of the CGST Act the AAR observed that the meaning of the word 'consideration' is very broad and would include any payment made or to be made, whether in money or otherwise, in respect of, in response to or for inducement of supply of goods or services
- In the present case, CLPL is paying an amount to the Taxpayer which is neither ad-hoc/ unconditional nor as per the whims of CLPL/Taxpayer. Such an amount is based on the specified formula/contingencies as stipulated in the agreement. Hence, the payment made by CLPL is in response to something done by the Taxpayer
- On perusal of the Circular dated 3 August 2022, it was observed that the said Circular is not universal/absolute, and the same can be applied reasonably having regard to the facts of the case. Further, referring to Para 7.1.6 of the aforesaid Circular it was observed that the payments made towards damages are incidental to the main supply and if the main supply is taxable, such incidental recoveries would also be taxable
- In view of the foregoing, it was concluded that liquidated damages paid by the defaulting party for tolerating the act of non-performance/breach of contract have to be treated as 'consideration' for tolerating an act or a situation under the agreement. Hence, the same would be treated as a supply of services leviable to GST @ 18% under HSN code 9997.
[AAR- Andhra Pradesh, M/s. AP Power Development Co. Ltd., [TS-117-AAR(AP)-2023-GST, dated 17 March 2023]

CUSTOMS

NOTIFICATION

EXEMPTION FROM LEVY OF BASIC CUSTOMS DUTY (BCD) ON THE EXPORT OF RICE IN THE HUSK OF SEED QUALITY

Notification no:55/2022 dated 31 October 2022 has been amended to exempt rice in the husk (paddy or rough), of seed quality falling under the HSN 1006 10 10 from BCD under Second Schedule to Customs Act, 1962, even without complying with any conditions specified in the notification. The notification comes into force on 11 April 2023.

[Notification no:30/2023-Customs dated 10 April 2023]

CIRCULARS

NOTIFICATION

LAUNCH OF NEW WEB APP FOR ONLINE FILING OF AUTHORISED ECONOMIC OPERATOR FOR LOGISTICS OPERATOR (AEO-LO) APPLICATIONS

The CBIC has launched a new version (v3.0) of the monitoring application physically filed AEO-LO applications for timely intervention and expedience from 11 April 2023. To ensure a smooth roll-out, AEO-LO applicants are not mandatorily required to register on the AEO portal while physically filing their application till 30 April 2023, post which this would become mandatory. Circular no:33/2016 dated 22 July 2016 stands suitably modified to this extent.

[Circular no:10/2023-Customs dated 11 April 2023]

FOREIGN TRADE POLICY (FTP)

NOTIFICATION

STREAMLINING OF HALAL CERTIFICATION PROCESS FOR MEAT AND MEAT PRODUCTS

Policy conditions for Halal Certification Process for meat and meat products are notified.

[Notification no:03/2023 dated 6 April 2023]

PUBLIC NOTICE

PROCEDURE FOR OBTAINING REGISTRATION CERTIFICATE FOR IMPORT OF ISOPROPYL ALCOHOL (IPA)

Procedure for filing the application/issuance of a Registration Certificate (RC) for import of IPA HSN 2905 1220, subject to country-wise Quantitative Restrictions (QR) for FY 2023-24 has been specified.

[Public Notice no:4/2023 dated 11 April 2023]

EXTENSION OF VALIDITY OF ANFS AND APPENDICES ISSUED UNDER FOREIGN TRADE POLICY (FTP) (2015-20)

Validity of ANFs and Appendices issued under FTP (2015-20) has been extended till 31 May 2023 or the date when new ANFs and Appendices are notified under the FTP (2023), whichever is earlier, in so far as they are not inconsistent with the provisions of FTP 2023 and HBP 2023.

[Public Notice no:5/2023 dated 11 April 2023]

TRADE NOTICE

ISSUANCE OF EXPORT OBLIGATION DISCHARGE CERTIFICATES (EODC) FOR ADVANCE AUTHORISATION (AA) AND EXPORT PROMOTION CAPITAL GOODS (EPCG) PROCESS FROM DGFT PORTAL

In continuation to the earlier Trade Notice no:24/2022-23 dated 12 January 2023 concerning online functionality to AA/EPCG authorisation holders for updating closure/redemption status on the DGFT Website, a detailed process for closure/redemption of license or closure of AA/EPCG has been issued. Additionally, certain clarifications regarding the online process and submission of physical documents to the Regional Authorities (RA) have been provided.

[Trade Notice no:01/2023-24 dated 6 April 2023]

GSTN ADVISORY

TIME LIMIT FOR REPORTING INVOICES ON THE IRP PORTAL

- The Government will impose a time limit on reporting old invoices on the e-invoice IRP portals for taxpayers with Aggregate Annual Turnover (AATO) greater than or equal to INR 1bn
- Taxpayers covered in the aforesaid category will not be allowed to report invoices older than 7 days from the date of reporting
- The restriction on reporting e-invoices to the IRP portal within 7 days will now apply to all document types for which IRN is to be generated (as against the earlier advisory clearly stating that the restriction applies only to invoices). Thus, even the credit/debit notes have to be reported within 7 days of issue
- For example, if an invoice has a date of 1 April 2023, it cannot be reported after 8 April 2023. The validation system will disallow the user from reporting the invoice after the 7-day window
- The reporting restriction will not apply to Taxpayers having AATO less than INR 1bn, as of now
- The aforesaid changes are proposed to be implemented from 1 May 2023.

[Source - GSTN Advisory dated 13 April 2023]

NEWS FLASH

“Constitution of GST tribunal goes against several rulings of Supreme Court”

<https://indianexpress.com/article/opinion/columns/constitution-of-gst-tribunal-goes-against-several-rulings-of-supreme-court-8549359/>

[Source: *The Indian Express*, 11 April 2023]

“Centre gets post-GST tax buoyancy boost but states yet to improve: NIPFP”

<https://www.moneycontrol.com/news/business/economy/centre-gets-post-gst-tax-buoyancy-boost-but-states-yet-to-improve-nipfp-10401131.html>

[Source: *Moneycontrol*, 12 April 2023]

“Group of ministers likely to propose 18% GST for games of skill, 28% for chance”

<https://economictimes.indiatimes.com/tech/technology/group-of-ministers-likely-to-propose-18-gst-for-games-of-skill-28-for-chance/articleshow/99369204.cms>

[Source: *Economic Times*, 10 April 2023]

“MSMEs selling online need simpler GST rules”

<https://www.thehindubusinessline.com/opinion/msmes-selling-online-need-simpler-gst-rules/article66721675.ece>

[Source: *Hindu Business Line*, 10 April 2023]

“Plugging leaks: Anti-evasion steps in focus to boost Delhi govt's GST revenues”

<https://timesofindia.indiatimes.com/city/delhi/plugging-leaks-anti-evasion-steps-in-focus-to-boost-delhi-govts-gst-revenues/articleshow/99418471.cms>

[Source: *Times of India*, 12 April 2023]

“Raj govt to appoint 2,000 tax mitras to facilitate GST collection”

<https://theprint.in/india/raj-govt-to-appoint-2000-tax-mitras-to-facilitate-gst-collection/1509935/>

[Source: *The Print*, 10 April 2023]

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